DEATH PENALTY CASE
Case No. W2022-00210-SC-R11-CD

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

STATE OF TENNESSEE,
Appellant,

v.

PERVIS TYRONE PAYNE,
Appellee.

APPELLEE'S RESPONSE BRIEF
(Oral Argument Requested)

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STATEMENT OF THE ISSUES PRESENTED

Tennessee Code Annotated § 39-13-203 was amended in 2020 to provide relief from unconstitutional death sentences for a narrow group of capital defendants. The question presented is whether the Tennessee legislature intended, via statutory silence, to divest the trial court of its ordinary sentencing jurisdiction, statutory authority, and/or inherent power over criminal sentencing matters—including the non-jurisdictional question of manner of service?

STATEMENT OF THE CASE

In 2020, the Tennessee legislature amended Tennessee Code Annotated § 39-13-203 to provide that a defendant sentenced to death "prior to the effective date of this act and whose conviction is final on direct review may petition the trial court for a determination of whether [he] is intellectually disabled," and therefore ineligible for the death penalty. Tenn. Code Ann. § 39-13-203(g)(1). Pervis Payne was the first person to seek relief under this new law. Ultimately, Appellant conceded Mr. Payne's intellectual disability and agreed his two death sentences were unconstitutional. III 329–30.

The trial court convened a hearing on November 23, 2021. It declared Mr. Payne intellectually disabled and ineligible for the death penalty and vacated the judgment on his two death sentences. III 331–32. Counsel for Mr. Payne argued that, in resentencing Mr. Payne, the court must consider the manner of service for Mr. Payne's two life sentences—that is, whether the sentences should run consecutively or concurrently.[1] Appellant's original arguments against the trial court's assessment of manner of service were based on res judicata and law of the case.

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[1] The parties have consistently agreed Mr. Payne must receive a life sentence for each murder conviction, as there was no provision for a sentence of life without the possibility of parole ("LWOP") at the time of his conviction.

On December 8, 2021, the trial court entered an order granting a sentencing hearing on manner of service. III 333–44, 396–411, 414–29. The trial court based its decision "on fundamental fairness (including allowing [Mr. Payne] to present evidence that the legal and factual posture of this case has changed between Mr. Payne's trial and present) and case law" refuting application of the law of the case doctrine.[2] III 415.

It noted that the trial court that originally determined manner of service for the death sentences over 30 years earlier failed to make required on-the-record findings of facts or demonstrate compliance with applicable statutes and rules. III 420–22 (discussing *Gray v. State*, 538 S.W.2d 391 (Tenn. 1976)). It explained that this failure constituted reversible error that would have entitled Mr. Payne to a new sentencing hearing and rejected Appellant's argument that Mr. Payne waived any current argument regarding manner of service by failing to raise this claim on direct appeal in 1988:

> [F]undamental fairness issues and the changed factual and legal nature of the case between Mr. Payne's trial and present are such that this issue should not be considered waived. That

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[2] The trial court rejected several of Mr. Payne's arguments—specifically, that the record was silent on manner of service for the two murder sentences and that the trial court could reassess manner of service for the corresponding assault sentence. III 419–20; IV 465 n.14, 474. It also rejected Appellant's res judicata and law of the case arguments, which Appellant abandoned on appeal. III 423–26.

> the record of Mr. Payne's sentencing hearing is devoid of clear findings of fact and conclusions of law justifying the imposition of consecutive sentences, standing alone, would justify this Court's granting of a sentencing hearing to address the concurrent/consecutive sentencing issue.

III 422–23.[3]

Nonetheless, the trial court found alternate reasons justifying a new sentencing hearing. Echoing concerns regarding fairness, the trial court concluded that evidence offered at a new sentencing hearing on manner of service would "differ substantially from the evidence offered at Mr. Payne's capital sentencing hearing," in part because "the record now contains evidence that Mr. Payne is intellectually disabled." III 424. It reasoned Mr. Payne should have an opportunity to present evidence "at a new sentencing hearing to show a change in the factual and legal landscape of the case[.]" III 424.

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[3] In its CCA briefing, Appellant made only a passing reference to waiver in its argument that the trial court effectively granted relief under the Post-Conviction Procedure Act ("PCPA"). The CCA questioned "whether the manner of service of the Defendant's sentences was ripe for judicial decision before the death sentences were vacated." *State v. Payne*, No. W2022-00210-CCA-R3-CD, 2023 WL 5599723, at *10 (Tenn. Crim. App. Aug. 30, 2023) (citing *West v. Schofield*, 468 S.W.3d 482, 491 (Tenn. 2015)) Appellant continues to rely on PCPA cases before this Court, but has not renewed its waiver argument.

As to Appellant's sparse argument regarding statutory authority to convene a sentencing hearing,

> [T]he Court acknowledges the first-degree murder statutes do not explicitly provide for a new sentencing hearing as to the manner of an inmate's sentence should the inmate be declared intellectually disabled on post-conviction. However, while the statute does not explicitly provide for a new sentencing hearing as to the manner of a petitioner's sentence, the statute does not exclude such a hearing, either. In this Court's view, the decision on whether to conduct a hearing on the manner of a petitioner's sentence in such instances falls within the trial court's discretion, and in this particular case this Court concludes such a hearing is appropriate.

III 426–27.

On December 13, 2021, the trial court convened a two-day evidentiary hearing. IV 443–44. On January 31, 2022, it entered an order that Mr. Payne's life sentences run concurrently. IV 445–74. In a 29-page order, the trial court thoroughly detailed the evidence presented by both parties, finding all witnesses who testified credible. IV 446–62. The court noted that, although Mr. Payne's release eligibility must be determined by the 1982 Sentencing Act, other sentencing issues must "be resolved under the current sentencing act." IV 462. After detailing the relevant standards and provisions of the Tennessee Criminal Sentencing Reform Act of 1989—i.e., purpose and intent of sentencing, general sentencing provisions applicable to all defendants, etc.—it confirmed it had considered all requisite factors in reaching its decision. IV 463–64

(quoting Tenn. Code Ann. §§ 40-35-210(b), 40-30-103). The trial court concluded that, based on the relevant authorities and sentencing principles from the 1989 Act, Appellant failed to meet its burden of proof on consecutive sentencing.[4] IV 473–74. That same day, the court entered a final judgment, memorializing concurrent life sentences, running consecutive to the assault sentence. IV 475.

Appellant appealed to the Court of Criminal Appeals ("CCA") solely on the issue of whether the trial court had jurisdiction to determine manner of service. After briefing and argument, the CCA affirmed the trial court. *State v. Payne*, No. W2022-00210-CCA-R3-CD, 2023 WL 5599723 (Tenn. Crim. App. Aug. 30, 2023).

It concluded that "subsection 203(g) is silent" as to sentencing procedures for a trial court to follow after a defendant is found retroactively ineligible for the death penalty due to intellectual disability. *Id.* at *6. Finding plain language interpretation unavailable, the CCA "examine[d] the broader statutory scheme, the legislative history, and

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[4] Appellant has never disputed the propriety of the trial court's recitation of legal principles, findings of fact, or application of law to those findings. Finding no abuse of discretion in the court's January 31, 2022, order and judgment, Appellant has abandoned such arguments in favor of the erroneous jurisdictional challenge to the court's December 8, 2021, order to convene the hearing in the first place.

other sources." *Id.* It found no aid in legislative history, as there was no legislative discussion on sentencing procedures or the statute's effect on defendants with multiple murder sentences. *Id.* at *7.

The CCA did find significant interpretive guidance in the broader statutory scheme—that is, in other provisions related to first-degree murder sentencing. *Id.* It concluded that "the legislature intended subsections 203(d) and 206(e) to fill the procedural gap after a defendant has been determined to be intellectually disabled" under § 203(g). *Id.* at *7 (citing *Young v. City of LaFollette*, 479 S.W.3d 785, 792 (Tenn. 2015) (statutory construction "presume[s] that the Legislature knows the law and makes new laws accordingly")). Although subsections 203(d) and 206(e) provide for a jury sentencing hearing regarding LWOP, "Mr. Payne was not eligible for a sentence of life without parole because it was not an available sentencing option at the time of the offense." *Id.* (citing Tenn. Code Ann. § 39-13-202(b) (Supp. 1987)); *State v. Cauthern*, 967 S.W.2d 726, 735 (Tenn. 1998)). The CCA concluded that, for a defendant like Mr. Payne, the criminal code provides only that the defendant "shall be sentenced to imprisonment for life." *Id.* (quoting Tenn. Code Ann. § 39-13-208(c)).

The CCA firmly rejected Appellant's argument that statutory silence on manner of service for multiple murder sentences left the trial court without jurisdiction. *Id.* at *7–8. Applying *expressio unius est exclusio alterius*, it noted that manner of service and multiple sentences "are not mentioned anywhere in the first-degree murder section of the Code," and concluded that a court cannot "presume from silence that the

legislature intended to divest a trial court of jurisdiction it would otherwise have." *Id*. at *8 (citing *Fletcher v. State*, 951 S.W.2d 378, 382 (Tenn. 1997)). It found Appellant's argument, "taken to its logical extension," would "lead to the absurd result that *all previously imposed consecutive first-degree murder sentences are invalid*." *Id*. (emphasis added). The CCA noted that, to the contrary, prior precedent makes "clear that no statutory conflict exists between the first-degree murder sentencing statutes and the general sentencing statutes . . . with regard to manner of service of multiple sentences for first-degree murder." *Id* (collecting cases).

Applying these principles to the question on appeal, the CCA opined that, because subsection 206(e) requires a full jury sentencing hearing for LWOP-eligible defendants, the "logical conclusion is that when the trial court determines that a defendant is ineligible for the death penalty due to intellectual disability, the trial court must vacate, rather than amend, the judgments, allowing the court to sentence the defendant anew."[5] *Id*. at *9. It highlighted precedent demonstrating that, when a

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[5] In its CCA brief, Appellant conceded that the trial court "vacated" Mr. Payne's death sentences. Now, seemingly based upon this singular sentence in the CCA's opinion, Appellant argues for the first time that the court merely "modified" the final judgment, rather than vacating it and imposing a new one. Appellant misstates the CCA's decision, assertingthat the CCA "erroneously concluded that the trial court had

death sentence is vacated, "the parties may litigate the manner of service of the resulting life sentences"—even if the issue that led to vacation did not directly call into question the prior decision regarding manner of service. *Id.* (citing *State v. Gdongalay P. Berry*, No. M2017-00867-CCA-R3-CD, 2018 WL 3912302, at *4 (Tenn. Crim. App. Aug. 15, 2018)).

'inherent power' to enter amended judgments modifying the original sentence alignment." Appellant Br. at 39; *id.* at 15, 26, 37, 45–47, 50. But the CCA did *not* conclude that the trial court had inherent authority to "amend" or "modify" the judgment; it *expressly held* that "when the trial court determines that a defendant is ineligible for the death penalty due to intellectual disability, *the trial court must vacate, rather than amend, the judgments,* allowing the court to sentence the defendant anew." *Payne*, 2023 WL 5599723, at *9 (emphasis added).

The only reference to "modification" arose in a footnote to that holding, in which the CCA highlighted appellate decisions from other states supporting its conclusion that, when a death sentence must be vacated as unconstitutional, the matter before the trial court is resentencing and entry of a new judgment, not modification of the previous—now unconstitutional—judgment. *Id.* at *9 n.5. Appellant's reliance on rules and cases regarding sentence modification are thus irrelevant. Mr. Payne nonetheless notes that these cases are factually, legally, and/or procedurally inapposite.

Based upon statutory silence, the broader statutory scheme, and the legislative history, the CCA concluded § 203(g) is ambiguous, and ambiguity must be resolved in Mr. Payne's favor. *Id*. at *10. It reached that conclusion by applying either the rule of lenity or this Court's ruling that trial courts have inherent power to adopt appropriate rules of procedure where no procedure is specifically prescribed. *Id*. (citing *State v. Reid*, 981 S.W.2d 166, 170 (Tenn. 1998)). The CCA held that silence weighed in favor of the trial court's inherent authority: "no statutory provision requires a sentencing hearing to determine the manner of service of multiple first-degree murder convictions, . . . but no statutory provision expressly forbids such a hearing[.]" *Id*. The court ultimately concluded that the decision whether to conduct a sentencing hearing to determine "manner of service of first-degree murder sentences after the death penalty has been vacated pursuant to subsection 203(g) lies within the discretion of the trial court," and here, the trial court was not prohibited from exercising such discretion.[6] *Id*.

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[6] Appellant appears to have abandoned its argument that the trial court "effectively granted postconviction relief"—and its related argument that Mr. Payne "waived" any right to challenge manner of service for two life sentences in 2021 by failing to challenge manner of service in 1988—as it is not raised in Appellant's brief. Mr. Payne nonetheless notes that the CCA disagreed with Appellant's characterization of the proceeding below as "postconviction review," taking "judicial notice of the fact that

Appellant requested permission to appeal, which this Court granted on February 12, 2024.

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proceedings under § 203(g) have been colloquially, though perhaps inartfully, referred to as 'post-conviction intellectual disability' proceedings,"—a reference to "proceedings after a conviction," rather than "exclusively to proceedings under the [PCPA]." *Payne*, 2023 WL 5599723 at *10.

SUMMARY OF THE ARGUMENT

A trial court's decision regarding manner of service of sentences for multiple offenses is reviewed under a highly deferential abuse of discretion standard. There is no dispute that the trial court that imposed two concurrent life sentences upon Pervis Payne after his death sentences were vacated as unconstitutional did not abuse its discretion. Appellant had no grounds upon which to challenge the trial court's exercise of discretion but was displeased that it was unsuccessful in obtaining consecutive life sentences. Undeterred, Appellant shifted gears, mounting an attack on the trial court's very jurisdiction to impose new lawful sentences upon Mr. Payne.

Appellant has argued, in various ways and conclusory manner, that in amending the statute, the Tennessee legislature was required to affirmatively grant the trial court jurisdiction or authority to affect new constitutional sentences and a lawful final judgment. Under Appellant's theory, because the amendment to Tennessee Code Annotated § 39-13-203 did not include any sentencing procedure for defendants who are ineligible for life without parole or any reference to manner of service, the trial court lacked jurisdiction to do anything other than declare Mr. Payne constitutionally ineligible for execution.

But this Court has repeatedly declined to construe statutory silence as limiting the jurisdiction or authority that a court would ordinarily have. Thus, if a trial court would ordinarily have jurisdiction or statutory authority over a particular matter, the Tennessee legislature must

expressly evince an intent to divest a court of jurisdiction it would otherwise have.

There is no question that the trial court had original and subject matter jurisdiction to impose lawful sentences in Mr. Payne's criminal proceedings pursuant to § 39-13-203(g). And it is firmly established that manner of service decisions—including consecutive versus concurrent sentencing—are non-jurisdictional matters made by the trial court within the exercise of its jurisdiction.

If the court were, as Appellant argues, truly without jurisdiction to impose constitutional sentences and a lawful final judgment upon Mr. Payne, absurdity would result in Mr. Payne's case. For Mr. Payne would stand convicted of two murders but the court tasked by law with imposition of criminal sentences would be powerless to enter a valid final judgment. That absurdity has ripple effects: in ruling against Appellant, the CCA noted that, taken to its logical extension, Appellant's position would result in all previously imposed consecutive sentences for first-degree murder being declared void. Because the legislature is presumed not to enact useless or absurd statutes, Appellant's interpretation must fail.

Even Appellant does not seem to buy the most extreme version of its argument, for it concedes that § 203(g) is not self-executing for a defendant like Mr. Payne, who is ineligible for a sentence of life without the possibility of parole. Seemingly recognizing the need for Mr. Payne to have lawful sentences, Appellant makes various arguments about the trial court's ability to "cure" or "modify" the sentences and judgment that

it agreed were unconstitutional—despite the fact that the text of § 203(g) provides no specific language empowering "cure" or "modification."

Appellant implicitly concedes that the trial court had an obligation to take remedial action but fails to acknowledge the valid source necessary for the court to fulfill its duty: the relevant sentencing statutes and the remainder of the criminal code. A harmonious reading of the criminal code leads to only one conclusion: that the legislature intended new sentencing proceedings to commence after an eligible defendant's death sentences are vacated as unconstitutional under § 203(g), and that the legislature intended trial courts to have broad discretion and authority over manner of service decisions. The trial court acted within the bounds of its authority and discretion in this case, imposing sentences authorized by the relevant sentencing statutes and applying all relevant sentencing principles, statutes, and rules to its manner of service decision.

The trial court's action is further justified by virtue of its inherent authority to adopt appropriate rules of procedure to address issues for which no procedure is otherwise prescribed. No specific procedure for sentencing was prescribed in § 203 for defendants in the same procedural position as Mr. Payne, yet everyone—including Appellant—agrees the trial court was required to do *something* to affect a lawful final judgment. The trial court adopted a rule of procedure consistent with the existing rules of criminal procedure and the statutory scheme governing criminal and sentencing matters. While no statutory provision required the trial court to convene a sentencing hearing, no statutory provision expressly forbade it, leaving the matter solely within the trial court's discretion.

Appellant's remaining arguments about the presumption against retroactivity, principles of finality, and the inapplicability of the rule of lenity to the § 203(g) amendments are wholly meritless. The presumption against retroactivity does not apply to a statute designed to be retroactive. Principles of finality are not relevant—let alone dispositive—when the legislature enacts legislation designed to upend the finality of judgments. And the rule of lenity, though not necessary to decide this matter, may be properly applied to any ambiguous criminal statute, including those relevant to jurisdiction and manner of service, as a "tiebreaker" in favor of the defendant.

The Court of Criminal Appeals noted that a conclusion that the courts can "presume from silence that the legislature intended to divest a trial court of jurisdiction it would otherwise have" will have broad and potentially catastrophic consequences in criminal law. Appellant seems to have no reservations about these consequences so long as it achieves its desired outcome in this case—that Mr. Payne be given consecutive sentences. But the people of Tennessee, trial courts, and the justice system as a whole deserve more stability than Appellant's myopic view provides. This Court should affirm the CCA's decision, not only to reinforce the longstanding principle that trial courts have broad discretion over sentencing decisions unless the legislature expressly states its intent to divest them of that jurisdiction, but also to repudiate Appellant's continued efforts to use "jurisdiction" as an outcome determinative litigation tool.

ARGUMENT

I. Standard of Review

Statutory construction is a question of law subject to *de novo* review. *State v. Welch*, 595 S.W.3d 615, 621 (Tenn. 2020).

II. Relevant Principles of Statutory Construction

The singular question in this appeal turns upon statutory interpretation. In construing statutes, this Court must "give effect to the legislative intent without unduly restricting or expanding a statute's coverage beyond its intended scope." *State v. McGouey*, 229 S.W.3d 668, 672 (Tenn. 2007) (quotation marks omitted). The text "is of primary importance, and the words must be given their natural and ordinary meaning in the context in which they appear and in light of the statute's general purpose." *Yebuah v. Ctr. for Urological Treatment, PLC*, 624 S.W.3d 481, 487 (Tenn. 2021); *State v. Edmondson*, 231 S.W.3d 925, 927 (Tenn. 2007). When the text is "clear and unambiguous, the courts need not look beyond the statute itself to ascertain its meaning." *Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 527 (Tenn. 2010); *Green v. Green*, 293 S.W.3d 493, 507 (Tenn. 2009) (when text is clear and unambiguous, courts "must simply enforce it as written").

Sometimes, however, it is necessary to employ additional interpretive principles for ambiguous statutory text. Provisions of the "criminal code are to 'be construed according to the fair import of their terms, including reference to judicial decisions and common law interpretations, to promote justice, and effect the objectives of the

criminal code.'" *State v. Legg*, 9 S.W.3d 111, 116 (Tenn. 1999) (quoting Tenn. Code Ann. § 39–11–104 (1997)). Crucially, this Court may not incorporate "magic words" into criminal statutes. *State v. Nelson*, 23 S.W.3d 270, 271 (Tenn. 2000). At the same time, "there is no canon against using common sense in reading a criminal law, so that strained and technical constructions do not defeat its purpose[.]" *Kordel v. United States*, 335 U.S. 345, 349 (1948); *Lovvorn v. State*, 389 S.W.2d 252, 256 (1965) ("[C]riminal statutes should be read with the saving grace of common sense.") (cleaned up).

"In ascertaining the intent of the legislature, this Court may look to the language of the statute, its subject matter, the object and reach of the statute, the wrong or evil which it seeks to remedy or prevent, and the purpose sought to be accomplished in its enactment." *State v. Collins*, 166 S.W.3d 721, 726 (Tenn. 2005). It is for this Court "to alter or amend a statute, question the statute's reasonableness, or substitut[e] [its] own policy judgments for those of the legislature." *Falls v. Goins*, 673 S.W.3d 173, 184 n.8 (Tenn. 2023) (citation, quotation marks omitted). This Court must always presume that the legislature is knowledgeable about prior enactments and knows the state of the law at the time it passes legislation. *Edmondson*, 231 S.W.3d at 927. As such, the *expressio unius est exclusio alterius* canon presumes that, when the legislature includes specific language in one section of a statute but omits it in distinct section of the same act, the legislature acted purposefully in the subject included or excluded. *Welch*, 595 S.W.3d at 623.

"[C]ourts ordinarily will not infer an intention to change longstanding and fundamental legislative policies without a clear indication or expression of such an intention, which must appear either by express declaration or by necessary implication." 82 C.J.S. *Statutes* § 360 (2024); *Johnson v. Hopkins*, 432 S.W.3d 840, 848 (Tenn. 2013) (citing *State v. Dodd*, 871 S.W.2d 496, 497 (Tenn. Crim. App. 1993), for principle that "new statutes change pre-existing law only to the extent expressly declared"); *Winter v. Smith*, 914 S.W.2d 527, 538 (Tenn. Ct. App. 1995) (courts "will not construe statutes to change existing law more than a statute itself declares or necessarily implies"); *Cronin v. Howe*, 906 S.W.2d 910, 912 (Tenn. 1995) (repeals by implication are disfavored); *see also Tenneco Oil Co. v. Clevenger*, 363 So. 2d 316 (Ala. Civ. App. 1978) (where statute is silent as to scope of application, courts presume legislature does not intend to make alterations of law beyond that declared "expressly or by unmistakable implication"). Instead, statutes must be construed harmoniously, so that they do not conflict. *State v. Turner*, 193 S.W.3d 522, 526 (Tenn. 2006); 3 Sutherland Statutory Construction § 59:9, Statutes relating to criminal procedure (8th ed.) ("[I]t is a cardinal principle of statutory construction that repeals by implication are not favored and will not be indulged in if there is any other reasonable construction.").

This Court is not only required to interpret statutes in a manner that makes "practical sense," but also in a manner that avoids undermining the statute's constitutionality. *Powell v. Cmty. Health Sys., Inc.*, 312 S.W.3d 496, 508 (Tenn. 2010); *State v. Burkhart*, 58 S.W.3d 694,

697–98 (Tenn. 2001); *Davis–Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 529–30 (Tenn. 1993); *cf.* *Waters v. Farr*, 291 S.W.3d 873, 882 (Tenn. 2009) (quoting *State v. Pickett*, 211 S.W.3d 696, 700 (Tenn. 2007), for proposition that courts must "begin with the presumption that an act of the [legislature] is constitutional"). To that end, the canon of constitutional avoidance posits that, in "choosing between competing plausible interpretations of a statutory text," there is a presumption that the legislature did not intend the interpretation that implicates constitutional questions. *Clark v. Martinez*, 543 U.S. 371, 381–82 (2005) (Scalia, J.). The avoidance canon comes into play only when, after the application of ordinary textual analysis, the statute is susceptible to more than one construction—at which time it favors statutory constructions that "allow[] courts to *avoid* the decision of constitutional questions." *Id.* at 381, 385; *Davis-Kidd*, 866 S.W.2d at 529 (court have "duty to adopt a construction which will sustain a statute and avoid constitutional conflict if any reasonable construction exists that satisfies the requirements of the Constitution").

Finally, "Tennessee law provides that courts are to avoid a construction that leads to absurd results." *See, e.g.*, *State v. Howard*, 504 S.W.3d 260, 269 (Tenn. 2016). This Court may accordingly "presume that the [legislature] did not intend to enact a useless statute[.]" *Lee Med.*, 312 S.W.3d at 527 (citing *State v. Jackson*, 60 S.W.3d 738, 742 (Tenn. 2001)).

III. The trial court possessed jurisdiction to impose a lawful sentence and judgment upon Mr. Payne after the parties agreed that he was intellectually disabled.

Appellant's core argument is that the trial court lacked jurisdiction to resentence Mr. Payne after he was declared intellectually disabled pursuant to § 203(g). There are many types of "jurisdiction" implicated in a given case. Here, the trial court clearly possessed original and subject matter jurisdiction to enter a judgment resentencing Mr. Payne to two life sentences after his prior sentences were vacated as unlawful.

A. The trial court had original and subject matter jurisdiction to conduct proceedings necessary to impose a lawful sentence and judgment.

In Tennessee, criminal courts "have original jurisdiction of all criminal matters not exclusively conferred by law on some other tribunal." Tenn. Code Ann. § 40-1-108. Linked to original jurisdiction is subject matter jurisdiction, which "involves the court's lawful authority to adjudicate a controversy brought before it." *Johnson*, 432 S.W.3d at 843; *State v. Ferrell*, No. M201601157CCAR3CD, 2017 WL 111305, at *1 (Tenn. Crim. App. Jan. 11, 2017) (equating circuit court subject matter jurisdiction over criminal matters with original jurisdiction under § 40-1-108). Lack of subject matter jurisdiction renders any court ruling

void.[7] *See* *State v. Prewitt*, No. W201601516CCAR3CD, 2017 WL 1103047, at *3 (Tenn. Crim. App. Mar. 24, 2017) (without "evidence that the [criminal court] lacked subject matter jurisdiction over his case, the trial court's judgments are not facially void"); *cf.* *In re Baby*, 447 S.W.3d 807, 837 (Tenn. 2014) ("[I]f the juvenile court lacked jurisdiction as to a particular subject matter, its ruling as to that issue is a nullity."); *In re Estate of Trigg*, 368 S.W.3d 483, 489 (Tenn. 2012) ("[T]he orders and judgments entered by courts without jurisdiction over the subject matter of a dispute are void[.]").

Both the amendments to § 203(g) and the various relevant sentencing provisions are codified in the criminal code and are therefore "criminal matters." The trial court thus had original and subject matter

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[7] Neither Mr. Payne nor the lower courts that have ruled in his favor have suggested that "the original case is automatically void from its inception," as Appellant suggests in its brief. *See* Appellant Br. at 43 (quoting *Sills v. State*, 884 S.W.2d 139, 142 (Tenn. Crim. App. 1994)). However, as Appellant acknowledges, when a judgment is vacated for constitutional error, "the original case may be returned to the particular stage needed to remedy the constitutional wrong found to have occurred." *Id.* (quoting *Sills*, 884 S.W.2d at 142). So it was here: Mr. Payne's death sentences were vacated pursuant to a newly-enacted criminal statute—returning his case to the stage *prior* to the unlawful sentencing. The "remedy" is a sentencing proceeding, for imposition of constitutional sentences and a lawful final judgment.

jurisdiction over both Mr. Payne's intellectual disability proceedings *and* the attendant proceedings necessary to impose constitutional sentences once his death sentences were vacated as unconstitutional.

To hold otherwise would have staggering consequences for Tennessee criminal law. If the trial court in Mr. Payne's case lacked original or subject matter jurisdiction to enter a judgment against him following the undisputedly required vacation of his death sentences, *any* judgment issued by the trial court would be facially void. Mr. Payne would thus stand convicted of two murders,[8] but the court tasked by Tennessee law with imposition of criminal sentences would be powerless to issue a valid judgment. This Court may "presume that the [legislature] did not intend to enact a useless statute," and useless the ID amendments would indeed be if a trial court could declare an individual categorically ineligible for the death penalty but could take no further action to correct the constitutional error. *See Lee Med*, 312 S.W.3d at 527. Reading § 203(g) with "the saving grace of common sense" should lead this Court to the same conclusion as every other court to have considered the issue.

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[8] Mr. Payne's innocence was not at issue in the proceedings below and are not at issue in this appeal. Nonetheless, Mr. Payne reiterates—as he has since his arrest more than 30 years ago—that he is innocent of the crimes for which he stands convicted. No legal argument set forth herein should be construed as an admission of guilt. Additionally, since the crime facts and proof at trial are not relevant to the singular issue in this appeal, this Court should disregard pages 19–22 of Appellant's brief.

See Kordel, 335 U.S. at 349; *Lovvorn*, 389 S.W.2d at 256; *Powell*, 312 S.W.3d at 508.

Moreover, if this Court determines that the trial court lacked jurisdiction to impose a lawful sentence and final judgment, Mr. Payne would have grounds for an as-applied constitutional challenge to the amendment. That is, if as Appellant urges, the trial court had "jurisdiction" only declare Mr. Payne intellectually disabled, but the legislature clearly indicated that a death sentence for a person with intellectual disability is unconstitutional, Mr. Payne could challenge the statute as unconstitutional on any numbers of grounds, including vagueness.[9] This result makes little sense, given the required

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[9] The due process doctrine of vagueness requires "legislatures [to] set reasonably clear guidelines for . . . triers of fact to prevent arbitrary and discriminatory enforcement." *State v. Lyons*, 802 S.W.2d 590, 591 (Tenn. 1990); *Burkhart*, 58 S.W.3d at 699 (statute may be vague where it provides "no legally fixed standards," "delegat[ing] basic policy matters to . . . judges, and juries for resolution on an ad hoc and subjective basis"); *cf. Johnson v. United States*, 576 U.S. 591 (2015) (Scalia, J.) (statutes related to sentencing are subject to void-for-vagueness challenges); *accord* *Sessions v. Dimaya*, 584 U.S. 148, 188 (2018) (Gorsuch, J., concurring) (opining that sentencing statute that asks a court to guess about its contours "while offering so little by way of guidance is unconstitutionally vague"). "[A]n 'as-applied' challenge only requires the

presumption that the legislature does not intend to adopt statutes raising constitutional questions. *Pickett*, 211 S.W.3d at 700; *Clark*, 543 U.S. at 381–82. To the extent this Court determines that statutory silence here gives rise to two plausible interpretations, this Court has a "duty to adopt [the] construction which will sustain [§ 203(g)] and avoid constitutional conflict"—namely, Mr. Payne's interpretation that leaves him with a valid final judgment. *See Davis-Kidd*, 866 S.W.2d at 529.

Appellant surely would not endorse an interpretation of § 203(g) that renders it unconstitutional or the absurd consequences that would stem from a ruling that the trial court lacked "jurisdiction" to resentence Mr. Payne and enter a final judgment on his murder convictions. Such arguments could be seized upon by criminal defendants and petitioners whose sentences are vacated for numerous reasons, leading to an avalanche of litigation and a disruption of criminal sentences being imposed and executed in a timely and just manner. As the CCA pointed

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challenger to demonstrate that the statute operates unconstitutionally when applied to the challenger's particular circumstances." *Waters*, 291 S.W.3d at 923 (Koch, J., concurring) (noting as-applied challenge requires analysis of case specific facts to "determine whether the application of the challenged statute deprived the challenger of a constitutionally protected right"); *State v. Burkhart*, No. 01C01-9804-CC-00174, 1999 WL 1096051 (Tenn. Crim. App. Dec. 6, 1999) (citing *Springfield Armory, Inc. v. City of Columbus*, 29 F.3d 250 (6th Cir. 1994), for proposition that, in assessing vagueness, "criminal statutes are held to a stricter standard of clarity").

out, because the first-degree murder statutes also do not expressly mention manner of service, a ruling that such silence leaves a trial court without jurisdiction over manner of service would "lead to the absurd result that all previously imposed consecutive first-degree murder sentences are invalid." *Payne*, 2023 WL 5599723, at *8.

Appellant's brief is internally inconsistent as to whether it actually believes the trial court lacked "jurisdiction" to impose a lawful sentence upon Mr. Payne. *Compare* Appellant Br. at 41 ("the court's authority over the case ended when Payne's judgments became final" 30 years ago), *with id.* at 40 ("True, § 203(g) gave the trial court jurisdiction to determine" ineligibility for the death penalty). It argues that "Section 203(g) only authorizes the trial court to make a determination of whether the defendant is intellectually disabled," and "does not authorize *any* form of resentencing[.]" Appellant Br. at 28, 42; *id.* at 32–33 ("The trial court simply makes an intellectual-disability determination to decide whether a capital defendant is ineligible for the death penalty. And for defendants, like Payne, who are ineligible for life without parole, that ends the endeavor."); *id.* at 36 (arguing that legislature "did not even hint—let alone provide a 'clear indication'—that it intended to open the door to anything beyond a determination of intellectual disability"); *id.* at 40. But Appellant also appears to concede that the trial court did, in fact, need to take additional action beyond mere declaration of intellectually disabled for a lawful sentence to take effect. Appellant Br. at 40 ("At most, the trial court should have simply cured the unconstitutional component of Payne's death sentence by reducing the

death sentences to life imprisonment by operation of law."); *id.* at 42 (asserting "no need" for legislature to provide procedural mechanism for sentencing defendants not eligible for LWOP because "the only available sentence for these defendants is 'imprisonment for life'").

There is inherent conflict in Appellant's position: it maintains that the trial court had "jurisdiction" over Mr. Payne's criminal proceeding—but only to the extent necessary to make a declaration of intellectual disability. And it agrees that there was a need to "cure" Mr. Payne's unconstitutional sentences by imposing lawful life sentences *and* that the trial court was empowered to "cure" the constitutional error—despite the fact that the text of § 203(g) provides no specific language empowering it to affect such a "cure." So, Appellant has indeed read into the text § 203(g) *some* amount of authority not specifically delegated by the statutory text. *See Legg*, 9 S.W.3d at 116 (criminal statutes should be interpreted in a manner that "promote[s] justice, and effect[s] the objectives of the criminal code"). Appellant's concession that the trial court was required to take action to ensure that lawful sentences were imposed is proof that Appellant's quibble is not an issue of "jurisdiction." *See Payne*, 2023 WL 5599723, at *9 ("The parties do not dispute that the trial court possessed subject matter jurisdiction to impose a sentence.").

In Appellant's view, it is Appellant that gets to determine the extent of authority and action available to the trial court beyond the express text of §203(g). This selective textual reading is based upon the result that Appellant desires in this case, rather than on the language of the amendment. To state the obvious, Appellant's preferred result in a case is not an applicable principle of statutory construction.

B. Manner of service decisions, such as consecutive versus concurrent sentencing, are non-jurisdictional matters a trial court makes in exercise of its jurisdiction.

The sentencing decision in question—consecutive versus concurrent sentences for multiple crimes—is a decision regarding manner of service. *State v. Pollard*, 432 S.W.3d 851, 858–59 (Tenn. 2013); *State v. Allen*, 259 S.W.3d 671, 689–90 (Tenn. 2008)). This classification refutes Appellant's interpretation because manner of service is undoubtedly a *non-jurisdictional* matter—a factual or legal determination made by a trial court *in exercise of its jurisdiction*.[10] *See Edwards v. State*, 269 S.W.3d 915, 924 (Tenn. 2008).

Stacking sentences for multiple crimes is "akin to a trial court's decision as to how and where a defendant serves his sentences: on probation, on community corrections, in split confinement, or in the penitentiary." *Allen*, 259 S.W.3d at 689–90. Other non-jurisdictional sentencing matters include offender classification and release eligibility. *Edwards*, 269 S.W.3d at 923. Such matters *can* be expressly restricted by

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[10] Curiously, Appellant referred to the core sentencing issue as "manner of service" in its CCA brief, but since Mr. Payne has correctly argued that manner of service is inherently non-jurisdictional, Appellant has rebranded the issue before this Court as a matter of "sentence alignment."

statute; however, absent clear statutory limitations, trial courts retain authority and discretion with respect to non-jurisdictional sentencing decisions. *See* *Smith v. Lewis*, 202 S.W.3d 124, 127–28 (Tenn. 2006); *Hogan v. Mills*, 168 S.W.3d 753, 756 (Tenn. 2005); *State v. Burkhart*, 566 S.W.2d 871, 873 (Tenn. 1978). Thus, when it comes to manner of service, statutory silence is indeed dispositive—in favor of the trial court's authority.

Challenges to a trial court's decision regarding manner of service are accordingly reviewed only for "abuse of discretion with a presumption of reasonableness." *State v. Bonds*, 502 S.W.3d 118, 166 (Tenn. Crim. App. 2016) (abuse-of-discretion standard applies so long as sentence is within statutory range); *Pollard*, 432 S.W.3d at 859 (same); Tenn. Code Ann. § 40-35-402(d). "This deferential standard does not permit an appellate court to substitute its judgment for that of the trial court." *Bonds*, 502 S.W.3d at 166 (citing *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 927 (Tenn. 1998)).

Appellant has attempted to avoid this highly deferential standard of review by concocting a "jurisdictional" void that does not exist. Appellant has not identified a single statute expressly limiting trial court authority over non-jurisdictional sentencing matters for an individual whose death sentences have been retroactively vacated under § 39-13-203(g). Manner of service decisions—including consecutive versus concurrent sentencing—are undoubtedly within the trial court's proper exercise of authority.

Appellant's entire appeal is a red herring, as its true quarrel is not with the *fact* of the trial court's authority over manner of service, but

rather with its *exercise* of that authority. But that exercise of authority is subject to review only for abuse of discretion—and Appellant has declined to set forth any argument at any stage that the trial court's manner of sentence determination amounted to an abuse of discretion. It was not.

IV. The trial court did not lack authority to determine the manner of service of Mr. Payne's life sentences.

Appellant uses the terms "jurisdiction" and "authority" synonymously. In the criminal sentencing context, Tennessee courts frequently use the terms interchangeably, even though sentencing authority is a distinct concept from original and subject matter jurisdiction. Regardless, Appellant has misconstrued the contours of and limitations on a trial court's sentencing authority—and what legislative action is necessary to divest a court of such authority.

A. The trial court did not lack statutory authority to determine the manner of service of Mr. Payne's life sentences.

Because "the setting of punishment for criminal offenses is a legislative function," trial courts lack authority to impose sentences (1) "in direct contravention of a governing sentencing statute," or (2) that are "not available under the sentencing statutes governing the case." *Williams v. State*, No. E2013-02025-CCA-R3HC, 2014 WL 1833305, at *3 (Tenn. Crim. App. May 7, 2014). If a trial court imposes a sentence that is not available under or is in direct contravention of the relevant

sentencing statutes, such sentence is void. *Id*. If, however, the sentence imposed is not outside the bounds of the relevant sentencing statutes, the sentence cannot be void or illegal. *Id*. (court did not exceed sentencing authority where petitioner's sentence was within appropriate statutory range and violated no relevant sentencing statute); *Taylor v. State*, 995 S.W.2d 78, 85 (Tenn. 1999) (where trial courts had personal and subject matter jurisdiction, and the sentences imposed were not in excess of punishments authorized by relevant sentencing statute, sentences could not be void or illegal).

Stated another way, limitations on a trial court's authority to impose sentences for criminal offenses must originate in the "[s]tatutes prescribing and defining available punishments[.]" *Williams*, 2014 WL 1833305, at *3 (citing *Smith,* 202 S.W.3d at 127–28); *McConnell v. State*, 12 S.W.3d 795, 798 (Tenn. 2000)). "Indeed, it is a general principle that where a court has jurisdiction over the person and the subject matter, and the judgment rendered is not in excess of the jurisdiction or power of the court, no error or irregularity can make the judgment void." *Taylor*, 995 S.W.2d at 85. Instead, a sentencing decision made within the scope of authority prescribed by the statutes defining available punishments is subject to review only for abuse of discretion with a presumption of reasonableness. *State v. Bise*, 380 S.W.3d 682, 707 (Tenn. 2012) (clarifying standard of review for sentencing decisions made within scope of statutory authority and noting that 2005 amendments to 1989 Sentencing Act "served to *increase* the discretionary authority of trial courts in sentencing") (emphasis added).

Here, the sentences imposed upon Mr. Payne after his death sentences were vacated as unconstitutional were available under and did not contravene the relevant sentencing statutes. In fact, there is no dispute between the parties that, under the relevant sentencing statutes, the trial court was *required* to impose a life sentence for each murder conviction.

This alone should defeat Appellant's appeal because Appellant has conceded that the trial court was required to take action *not expressly delineated by § 203(g)*. In admitting that imposition of a lawful sentence under § 203(g) is *not* self-executing, Appellant acknowledges that (1) the trial court has an obligation to take remedial action after finding a defendant retroactively intellectually disabled, and (2) to fulfill that obligation, the trial court must look to other relevant sentencing statutes and provisions for defendants statutorily ineligible for LWOP. A thorough review of relevant statutory provisions makes clear that the trial court's decision to consider the manner of service of the two life sentences was not in direct contravention of any statute and that concurrent life sentences are a statutorily available punishment for multiple murders.

1. The plain language of the § 203(g) amendment demonstrates that the legislature did not restrict the trial court's ordinary sentencing authority.

Appellant's primary argument is that the trial court's decision to impose concurrent life sentences was unlawful because the amendments

to § 39-13-203 did not authorize trial courts to revisit the manner of service of Mr. Payne's sentences. Appellant Br. at 27–30. Appellant concedes that § 39-13-203 does not mention manner of service or resentencing proceedings. This concession should ultimately end this Court's inquiry.

The legislature undisputedly did not mention manner of service generally, or consecutive or concurrent sentencing specifically, in amending the intellectual disability statute. As such, the legislature did not evince any intent to restrict, modify, or alter the broad discretionary authority over sentencing granted to the trial courts by other statutes and rules. Because the amendments to § 203(g) neither expressly limited the trial court's authority nor expressly delineated a specific punishment to be imposed in a new final judgment, the trial court's sentencing decision was not rendered without authority.

Appellant argues that Mr. Payne and the lower courts have violated basic principles of statutory construction by adding extra clauses or broadening the scope of the statute. But it is Appellant that has attempted to add to or broaden the 2021 amendments. As discussed above, jurisdiction and authority over sentencing matters are *already granted* to trial courts. Changes to existing law must be expressly declared; otherwise, the courts would routinely be repealing existing law by implication, which violates the separation of powers. *See, e.g.*, *Johnson*, 432 S.W.3d at 848; *Dodd*, 871 S.W.2d at 497; *Winter*, 914 S.W.2d at 538; *Cronin*, 906 S.W.2d at 912. By attempting to strip Tennessee's trial courts of their sentencing authority, Appellant has inferred an intention to change longstanding law, policy, and practice

without unmistakable legislative intent. Appellant notes that "what a text chooses not to do are as much a part of its purpose as its affirmative purpose." Appellant Br. at 32 (cleaned up). This is true: and what this text chooses *not* to do is limit the longstanding general grant of authority to trial courts over criminal sentencing matters.

Recall Appellant's concession that the trial court was required to take corrective action to "cure" the unconstitutional sentences after a finding of intellectual disability. This interpretation requires inserting words into the amendment to reach a specific result without defining a procedure as to how to reach that result. The interpretation adopted by Mr. Payne and the lower courts, however, requires no such addition to the text; rather, it requires only that the usual procedure, found in the remainder of the criminal code, be utilized.

Appellant argues that the sole purpose of the amendment is ineligibility for the death penalty due to intellectual disability. Appellant Br. at 27–28. But the statute's general purpose is to correct and prevent unconstitutional death sentences. Where ineligibility is established and declared by the trial court pursuant to § 203(g), *a constitutional sentence still must be imposed* for this general purpose to be fulfilled. *See Yebuah*, 624 S.W.3d at 487 (statutory language construed in light of its general purpose); *Edmondson*, 231 S.W.3d at 927 (same). Given that § 39-13-203(g) did not include language specifying a sentence to impose or—most critically—restricting a trial court's authority under such circumstances, other sentencing statutes and procedures are necessarily triggered for the statute to fulfill its general purpose—that is, imposing lawful sentences and judgments that avoid unconstitutional executions.

At the time the trial court decided to hold a sentencing hearing to determine manner of service of Mr. Payne's life sentences, *there was no valid final judgment* in Mr. Payne's case. *See* Cantrell v. Easterling, 346 S.W.3d 445, 456 (Tenn. 2011) ("valid" final judgment requires both a conviction *and* a sentence). Appellant ultimately offers no relevant citation or support for its argument that a trial court is bound by prior factual and legal determinations ancillary to a judgment that has been vacated as unconstitutional; no such authority exists.[11] And notably,

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[11] The closest Appellant comes is its citation of *Sills*, 884 S.W.2d at 142–44, for the proposition that if prejudice from a constitutional violation as to one portion of a sentence "did not spread," the court on resentencing "is authorized to reaffirm or to refuse to vacate those portions of the original sentence." Appellant Br. at 43. *Sills* is factually distinguishable, as it arose under the PCPA and involved a dispute over whether the 1982 or 1989 Sentencing Act applied to the remaining charge after other convictions were vacated. Nonetheless, to the extent this case is relevant, it supports Mr. Payne's position. The trial court was "authorized"—but not *required*—to reaffirm or refuse to vacate other portions of the sentence, reinforcing the fact that trial courts retain both discretion and authority over sentencing issues that remain after some portion of a judgment is vacated. In fact, the trial court in *Sills* found that defendant's range did not change, but nonetheless conducted a limited sentencing hearing, reassessing enhancement and mitigation factors for the

Appellant's brief fails to respond to the CCA's reliance on precedent *contrary* to its position. The CCA noted that *Berry*, 2018 WL 3912302, at *4, "recognized that when death sentences are vacated, even though the issue did not directly call into question the manner of service, the parties may litigate the manner of service of the resulting life sentences during the subsequent sentencing proceeding." *Payne*, 2023 WL 5599723, at *9. This is precisely what transpired in Mr. Payne's case.

2. A harmonious reading of the criminal code shows that the trial court's statutory and inherent authority to resentence Mr. Payne was not restricted by the amendments to § 39-13-203(g).

Appellant maintains that "nothing in the broader statutory scheme" defeats its interpretation. Appellant cites several provisions from the same chapter as the statutory amendment in question—namely, §§ 39-13-203(d), 208(c), and 206(e)— to support its contention that there is "no need for resentencing" because the amendment "only contemplates a sentence reduction from death to either life imprisonment or life without parole." Appellant Br. at 32–33, 42. But none of these provisions support Appellant's interpretation of §203(g).

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remaining portions of the original sentence for the purpose of imposing an appropriate sentence within the existing range.

Section 203(d) does not provide for a specific sentence, and indeed, cannot even be read as applying to individuals seeking *retroactive* relief pursuant to § 39-13-203(g). Instead, the plain language shows it applies only to *prospective* capital cases:

> (d) *If* the court determines that the defendant was a person with intellectual disability at the time of the offense, *and if* the trier of fact finds the defendant guilty of first degree murder, *and if* the district attorney general has filed notice of intention to ask for the sentence of imprisonment for life without possibility of parole as provided in § 39-13-208(b), *the jury shall* fix the punishment in a separate sentencing proceeding to determine whether the defendant shall be sentenced to imprisonment for life without possibility of parole or imprisonment for life. Section 39-13-207 shall govern the sentencing proceeding.

Tenn. Code Ann. § 39-13-203(d) (emphases added). A series of joined "if" clauses create a condition precedent to a mandatory jury proceeding. Appellant does not argue that a new jury proceeding would be appropriate for *retroactive* cases arising under § 39-13-203(g). And, in cases like Mr. Payne's, where LWOP did not exist at the time of conviction, the third "if" clause would never be satisfied, with the jury provision rendered superfluous. Thus, this subsection, that Appellant relies on as stripping the trial court of authority during a *resentencing* proceeding, was clearly intended to apply only to *future* cases where the

intellectual disability determination is—rightly and properly—conducted *prior* to trial.

Section 208(c) provides that a defendant "shall be sentenced to imprisonment for life by the court" for first-degree murders in which Appellant has not filed notice of intent to seek the death penalty. Tenn. Code Ann. § 208(c). This provision inapplicable, as this is not a case where Mr. Payne was convicted of murder after Appellant declined to file a notice of intent to seek a capital sentence. Further, § 208(c) requires only that the sentencing court impose a sentence of "imprisonment for life"; it does *not* require that a court impose *consecutive* sentences of imprisonment for life in the event of multiple convictions. Thus, even if § 208(c) were applicable to Mr. Payne's case, it does not support Appellant's argument that the trial court lacked authority to impose concurrent sentences.

Section 206(e) similarly provides no support for Appellant's position. Section 206 deals with direct appeal and review of capital sentences by this Court after the entry of a final judgment. Subsection (e) specifically provides:

> In the event that any provision of §§ 39-13-202—39-13-205 or this section, or the application of the sections, to any individual or circumstance is held to be invalid or unconstitutional so as to permanently preclude a sentence of death as to that individual, the court having jurisdiction over the individual previously sentenced to death shall cause the individual to be brought before the proper court, which shall, following a sentencing hearing conducted in accordance with

> § 39-13-207, sentence the person to imprisonment for life without possibility of parole or, if applicable, imprisonment for life.

Tenn. Code Ann. § 39-13-206(e).

Mr. Payne's case is not one where resentencing was required because any statutory provision was deemed invalid or unconstitutional on direct appeal. Rather, Mr. Payne's resentencing was necessitated by the passage of a *new* statutory provision which provided a *new* direct action under the criminal code and vested the trial court with authority over that new criminal proceeding. Furthermore, the cross-referenced § 207 primarily delineates the procedures for jury sentencing proceedings to decide whether a sentence of life imprisonment or LWOP should be imposed in non-capital first-degree murder cases. It does not specify any procedures relevant to resentencing, or to judicial authority and discretion in sentencing in cases—such as Mr. Payne's—where LWOP is not available.

Nonetheless, even if § 39-13-206(e) did apply to Mr. Payne's resentencing, the trial court's decision regarding concurrent sentencing is not prohibited, as neither § 206(e) nor § 207 mention manner of service. Simply put, Sections 208(c) and 206(e) require imposition of a sentence of life imprisonment. That is precisely the sentence the trial court imposed upon Mr. Payne for each conviction.

In its opinion, the CCA reached the same conclusion about these provisions as Mr. Payne. It noted that §§ 39-13-202 through 208 "relate to sentencing in first-degree murder cases," but "none of these statutes specifically address the manner of service of multiple sentences"—a point

Appellant conceded below. *Payne*, 2023 WL 5599723, *8. Instead, manner of service determinations for multiple first-degree murders are at the discretion of the trial court pursuant to § 40-35-115. *Id*. And the CCA relied upon prior precedent making clear that "statutory requirements for imposing a sentence of life without parole are not 'the equivalent of a ban on the imposition of consecutive [life] sentences that result in effectively eliminating the possibility of parole.'" *Id*. (quoting *State v. Jawaune Massey*, No. E2013-01047-CCA-R3-CD, 2014 WL 3661490, at *40 (Tenn. Crim. App. July 23, 2014)). The CCA further opined that:

> [S]ubsection 206(e) requires a full jury sentencing hearing pursuant to section 207 for those defendants who are eligible for a sentence of life without parole. *Compare* [Tenn. Code Ann.] § 39-13-206(e) *with* Tenn. R. Crim. P. 36.1(c)(2) [providing for mere correction of an illegal sentence]. The logical conclusion is that when the trial court determines that a defendant is ineligible for the death penalty due to intellectual disability, the trial court must vacate, rather than amend, the judgments, allowing the court to sentence the defendant anew.

The CCA correctly concluded that the legislature has demonstrated an intent to provide new sentencing proceedings after a finding that a defendant's death sentence is unconstitutional.

In another last-ditch attempt to save its losing interpretive battle, Appellant argues for the first time that the appeals provision of § 203(g) "confirms that the trial court's role is limited to making an intellectual-disability determination[.]" Appellant Br. at 33. That is,

because § 203(g)(1) specifies that either party may appeal the trial court's "decision," and the only "decision" referenced is the ID determination, this must mean that the legislature did not intend for the trial court to make any sentencing "decision." *Id.*

To see the flawed logic of this argument one need only look at Appellant's own jurisdictional statement in its appeal to the CCA. Appellant claimed appellate jurisdiction to challenge Mr. Payne's sentence under § 40-35-402(a), (b)(3)—the provisions of the criminal code that provide the district attorney with a right to appeal "the length, range, or manner of service of the sentence imposed by the sentencing court." Because the legislature is presumed to know the state of the law at the time it passes legislation, the logical conclusion is that it expressly provided a right of appeal for the *new* procedure enacted in § 203(g) but did not deem it necessary to specify a right of appeal that exists elsewhere in the criminal code. *See Edmondson*, 231 S.W.3d at 927. That is to say, when reading the provisions harmoniously and with the saving grace of common sense, *both* the trial court's sentencing authority *and* the right of appeal of its sentencing decision are derived from pre-existing criminal statutes.

Appellant has cherry-picked select subsections of the criminal code, declared that those provisions do not mention manner of service or specifically authorize trial courts to take any action with respect to imposing constitutional sentences, and thus proclaimed the trial court's judgment in this case statutorily unauthorized. What Appellant has *not* done is acknowledge the numerous statutory provisions and criminal rules that expressly *require* trial courts to determine whether sentences

should be served consecutively versus concurrently and place the requisite restrictions and boundaries on this exercise of the court's discretion.

A trial court's authority and limitations with respect to sentencing are derived from Chapter 20, Judgment and Sentence, and Chapter 35, the 1989 Sentencing Act. Appellant's brief wholly ignores the relevance of these chapters of the criminal code—specifically, the provisions that speak directly to concurrent versus consecutive sentencing. In this case, the trial court correctly summarized and applied the statutory principles applicable to its decision regarding Mr. Payne's sentences. In the absence of express statutory limitation on the trial court's authority, it is these sentencing statutes that place the required constraints and obligations on the trial court's sentencing decision.

As the CCA properly noted, the Tennessee legislature has, in fact, codified judicial discretion with respect to consecutive versus concurrent sentencing in several provisions of the criminal code. Section 40-35-115—the statute the trial court relied on to reach its decision regarding Mr. Payne's sentences—expressly vests authority and discretion in the trial court over consecutive versus concurrent sentences. Indeed, it provides that, where a defendant is convicted of multiple offenses, the trial court "*shall* order sentences to run consecutively or concurrently" subject to the provision's internal criteria. Tenn. Code Ann. § 40-30-115(a) (emphasis added). The statute carries a presumption that sentences run concurrently, unless the remaining criteria are satisfied or "unless consecutive sentences *are specifically required by statute or the Tennessee*

Rules of Criminal Procedure." Tenn. Code Ann. § 40-30-115(d) (emphasis added).

These principles are echoed in other statutes and rules. Section 40-20-111 provides:

> When any person has been convicted of two (2) or more offenses, judgment shall be rendered on each conviction after the first conviction; provided, that the terms of imprisonment to which the convicted person is sentenced shall run concurrently or cumulatively in the discretion of the trial judge. The exercise of the discretion of the trial judge shall be reviewable by the supreme court on appeal.

Tenn. Code Ann. § 40-20-111(a). Such discretion is expressly limited only when the defendant has committed a felony while on bail. Tenn. Code Ann. § 40-20-111(b) (in such circumstances, a "trial judge shall not have discretion as to whether the sentences shall run concurrently or cumulatively but shall order that the sentences be served cumulatively"). Tennessee Rule of Criminal Procedure 32(c) provides that, where the defendant is convicted of multiple offenses, "the trial judge shall determine whether the sentences will be served concurrently or consecutively," and "shall specify the reasons" for its decision. Tenn. R. Crim. P. 32(c)(1). The rule specifies circumstances when consecutive sentences are mandatory. Tenn. R. Crim. P. 32(c)(2)–(3) (consecutive sentences required for felonies committed on parole, bail, or in the course of escape, and "for any other ground provided by law").

These statutes and rules demonstrate that the legislature intended for trial courts to have broad discretion over the consecutive versus

concurrent sentencing decision.[12] More importantly, these provisions demonstrate that the legislature knew how to expressly limit the scope of that discretion. *See* *Kilgore v. NHC Healthcare*, 134 S.W.3d 153, 158 (Tenn. 2004) (where statutory provision "could have but does not" express an exclusive means of relief, "the plain and ordinary meaning of the section does not replace or limit judicial review," as the legislature would have stated "in plain and ordinary language" its intent to "divest[] the trial court of jurisdiction"); *cf.* *Robertson v. R.R. Lab. Bd.*, 268 U.S. 619, 627 (1925) ("It is not lightly to be assumed that [the legislature] intended to depart from a long-established policy.").

In contrast, § 203(g) *contains no such limitation*. Appellant repeatedly states, without citation to authority, that the legislature was required to affirmatively grant sentencing authority to trial courts in the

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[12] Appellant does not acknowledge § 40-35-115 or Rule 32 in its brief. It instead discusses Rules 35, 36, and 36.1, none of which are relevant here. Rule 35, "Correcting or Reducing a Sentence," deals with clerical errors discovered within 14 days of sentencing and reductions for substantial assistance. Rule 36, "Clerical Error," allows for correction of clerical errors "at any time." Rule 36.1, "Correction of Illegal Sentence," applies when a defendant seeks to amend his judgment because sentence "is one that is not authorized by the applicable statutes or that directly contravenes an applicable statute." As acknowledged by the CCA, Rule 36.1 is not applicable to Mr. Payne's case and sets forth distinct procedures from § 203 upon a determination that a sentence is unlawful.

intellectual disability amendment. Appellant Br. at 14, 16, 19, 38, 39. This flips the jurisdictional question on its head.[13] Instead of reading the criminal code in a manner that gives effect to legislative intent, Appellant has read a closed universe of subsections in isolation so as to eliminate authority and discretion vested by other statutory provisions. Nothing in the text or legislative history for the § 203(g) amendment indicates that the legislature intended to modify or restrict any other provision of the criminal code.

"Sentencing is jurisdictional and must be executed in compliance with the [applicable Sentencing] Act." *Davis v. State*, 313 S.W.3d 751, 759 (Tenn. 2010) (quoting *McConnell,* 12 S.W.3d at 798). This means a trial court lacks jurisdiction or authority to impose a sentence only when it (1) is not *authorized* by the applicable statutes, or (2) *directly*

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[13] Appellant goes so far as redrafting the text of the amendment, adding words it believes necessary for a trial court to have any sentencing authority following an ID finding. In doing so, Appellant has committed the cardinal error of "rewriting the law under the pretense of interpreting it." *King v. Burwell*, 576 U.S. 473, 516 (Scalia, J., dissenting). It is not the job of this Court—let alone the Attorney General's Office—to "alter or amend a statute, question the statute's reasonableness, or substitut[e] [its] own policy judgments for those of the legislature." *Falls*, 673 S.W.3d at 184 n.8. As Appellant itself notes, this Court obligation is to "focus on what legislative bodies *did say*, not on what they *could have said*." Appellant Br. at 45.

contravenes an applicable statute. *Id.* Examples of sentences imposed outside the scope of the trial court's jurisdiction or authority include: imposing sentence pursuant to an inapplicable statutory scheme, *McConnell*, 12 S.W.3d at 799–800; declaring a felon infamous for a crime not listed as infamous by statute, *May v. Carlton*, 245 S.W.3d 340, 348–49 (Tenn. 2008); sentencing defendant to LWOP where such sentence was not statutorily authorized for that offense, *Stephenson v. Carlton*, 28 S.W.3d 910, 912 (Tenn. 2000); including early-release provision in defendant's sentence where applicable statute expressly prohibited early release, *Smith,* 202 S.W.3d at 127–28; and ordering sentences to be served concurrently despite statutory requirement for consecutive service, *Burkhart,* 566 S.W.2d at 871; *but cf. Hogan*, 168 S.W.3d at 756; (trial court did not exceed authority in imposing concurrent sentences where there was no "basis for requiring consecutive sentences for these offenses").

The sentences imposed here were authorized by, and not in direct contravention of, the relevant sentencing statutes. There were certainly sentences that the trial court could have imposed upon Mr. Payne that would been outside the scope of its lawful authority and not in compliance with the applicable sentencing acts. For example, the trial court lacked authority to impose harsher sentences of LWOP, or lighter sentences of 25 years' imprisonment, as neither sentence was authorized by statute for Mr. Payne's offenses. But the trial court imposed the only sentences authorized for Mr. Payne—life for each murder conviction. And no statute ordered that, in the event of multiple life sentences for murder,

the sentences *must* be served consecutively. In the absence of an express statutory basis for requiring consecutive sentences, the trial court appropriately exercised its authority and discretion in imposing concurrent life sentences.

This Court has repeatedly declined to construe statutory silence as limiting jurisdiction that a court would otherwise have. *See, e.g.*, *Kilgore*, 134 S.W.3d at 158–159 (where statutory provision did not expressly limit trial court jurisdiction, maintaining judicial authority is consistent with a "harmonious[]" reading of the relevant provisions and with "the remedial purpose" of the entire Act); *State v. Peele*, 58 S.W.3d 701, 704–05 (Tenn. 2001) (using statutory construction principles to construe silence in criminal procedure rule as retaining trial court jurisdiction because "divest[ing] the trial court of jurisdiction . . . would limit the effectiveness" of the rule); *Fletcher*, 951 S.W.2d at 381–82 ("To conclude that the Legislature, by its silence intended to divest this Court of jurisdiction . . . is not reasonable. Had the [legislature] intended to enact a statute aimed at divesting this Court of jurisdiction . . . , it could have drafted a provision explicitly stating that purpose and intent. *We will not presume from silence that such a purpose was intended*.") (emphasis added).[14] In fact, Appellant has not identified a single case in which

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[14] Appellant argues at length that *Fletcher*'s holding was "narrow" and that "[h]ere, of course, the situation is reversed." Appellant Br. at 41. But its argument that this case is the inverse of *Fletcher* is premised upon

statutory silence was construed as an intent to strip a court of jurisdiction it would otherwise have.

Had the legislature intended LWOP sentences for all individuals whose death sentences are retroactively vacated under § 39-13-203(g), it could have expressly said so. Similarly, if the legislature intended to tie a trial court's hands with respecting to manner of service in the event of *multiple* death sentences being vacated, it could have so stated. That it did not do so evinces an intent that the normal rules and procedures of sentencing apply. And it means that the trial court did not act outside the bounds of its jurisdiction and authority in considering—and imposing—concurrent sentences in the instant case.

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this Court accepting the core argument in this appeal: that "[t]he trial court had *no* jurisdiction." *Id.* But Appellant was also the party in *Fletcher* urging this Court to conclude that the legislature intended to divest a court of jurisdiction it would otherwise have "by mere silence." *Fletcher*, 951 S.W.2d at 381–82. This Court should follow the *Fletcher* rule—that it is not reasonable to conclude that the legislature intends to divest a court of jurisdiction via silence—and reject Appellant's continued efforts to use "jurisdiction" as an outcome-determinative litigation tool.

B. The trial court had inherent authority to hold a sentencing hearing in Mr. Payne's case where no specific rules and procedures were prescribed for the imposition of constitutional sentences.

Appellant further argues that the CCA erred in concluding that the trial court retained inherent authority over Mr. Payne's resentencing. However, Appellant once again misstates the contours of the CCA's decision. It did not, for example, conclude that the trial court had "inherent power to extend the scope of [its] own jurisdiction," Appellant Br. at 46; it *did* conclude that, where no procedure is specifically prescribed, trial courts retain inherent power "to adopt appropriate rules of procedure" *within the scope of their jurisdiction*, *Payne*, 2023 WL 5599723, at *9.

The lower courts relied upon *Reid*, 981 S.W.2d 166, as support for this proposition. Appellant contends that this reliance was erroneous based upon an incredibly narrow reading of *Reid*. But *Reid* was not confined to its facts.

Instead, this Court broadly affirmed the inherent power of trial courts as derived from both legislative and precedential sources:

> It is well settled that Tennessee courts have inherent power to make and enforce reasonable rules of procedure. [collecting cases; citations omitted]. Indeed, the [legislature] has explicitly recognized this inherent power. For example, Tenn. Code Ann. § 16–3–407 (1994 Repl.), provides that "[e]ach of the other courts of this state may adopt additional or

> supplementary rules of practice and procedure not inconsistent with or in conflict with the rules prescribed by the supreme court." . . .
>
> Accordingly, we hold that when issues arise for which no procedure is otherwise specifically prescribed, trial courts in Tennessee have inherent power to adopt appropriate rules of procedure to address the issues.

Reid, 981 S.W.2d at 170. In fact, in *Reid*, it was *Appellant* urging this Court to affirm a trial court's inherent power "to adopt a procedure which is consistent in principle and spirit with existing rules of criminal procedure" and the governing statutory scheme. *Id*. at 169. To that end, this Court concluded only that the trial court's exercise of inherent power "must be consistent with constitutional principles, statutory laws, and generally applicable rules of procedure," using "analogous generally applicable rules of procedure" where possible. *Id*. at 170.

This is precisely the type of circumstances for which the *Reid* rule exists. No specific procedure for sentencing was prescribed in § 203 for defendants in the same procedural position as Mr. Payne, yet everyone—including Appellant—agrees the trial court was required to do *something* in order to affect a lawful final judgment. The trial court adopted a rule of procedure consistent with the existing rules of criminal procedure and the statutory scheme governing criminal and sentencing matters. As the CCA noted, "no statutory provision requires a sentencing hearing to determine the manner of service of multiple first-degree murder convictions, . . . but no statutory provision expressly forbids such a

hearing[.]" *Payne*, 2023 WL 5599723, at *10. The CCA thus correctly determined based upon the *Reid* decision that, where no statutory provision requires or forbids a particular course of action, the determination of the appropriate procedure "lies within the discretion of the trial court" by virtue of its inherent authority. *Id*.

V. The legislative history of the § 203(g) amendments undermine Appellant's position.

Because § 39-13-203(g) is unambiguous—in that it does nothing to curtail the trial court's jurisdiction or authority with respect to resentencing an individual whose judgment is vacated as unconstitutional under its terms—there is no need to look to the legislative history or any other external source to discern the legislature's intent. *Lee Med*, 312 S.W.3d at 527; *Green*, 293 S.W.3d at 507. However, if this Court agrees with the CCA that the statute is ambiguous, Appellant's arguments regarding the legislative history for the amendments are unconvincing.

Appellant argues the legislative history "confirms the narrow purpose and scope" of § 203(g).[15] Appellant Br. at 38. Appellant finds it

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[15] Although Appellant cites *Black v. State*, No. M2022-00423-CCA-R3-PD, 2023 WL 3843397, at *8 (Tenn. Crim. App. June 6, 2023), for the general proposition that the Court may consider legislative history to confirm its interpretation of a statute, it quotes a portion of that opinion

compelling that (1) the sponsors of the legislation never "suggest[ed] that the legislation would grant trial courts plenary resentencing authority after a determination of intellectual disability," and (2) the fiscal note accompanying the bill "merely states" that the sentence to be imposed after finding a defendant intellectually disabled is a life sentence. *Id*. at 38–39.

However, the fact that the legislature did not raise the issue of trial court jurisdiction or authority to impose lawful sentences and judgments weighs *against* Appellant's position. Tennessee has vested its trial courts with broad discretion as to sentencing determinations, including as to decisions regarding manner of service. That the legislature is presumed to be aware of the statutory jurisdiction and authority trial courts hold over sentencing decisions but declined to include any specific language in § 203(g) curtailing such authority indicates that no such intent can be divined.[16]

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in which the CCA stated that it "agree[s] with Appellant that the legislative history confirms [the court's] interpretation of subsection [203](g)(2)." Appellant Br. at 37. Not only does the instant case involve *only* § 203(g)(1), and not § 203(g)(2), the CCA is the same court that has expressly rejected Appellant's proposed interpretation of § 203(g)(1) and concluded that the legislative history is silent as to the question in this case.

[16] The fiscal note is similarly unpersuasive: it does not mention

Critically, the CCA—after reviewing the full legislative history—concluded that the "narrow scope" of the statute refers to the number of defendants potentially entitled to relief thereunder. *Payne*, 2023 WL 5599723, at *7. Indeed, sponsor Senator Gardenhire stated that the amendments would "not provide another bite of the apple because those *few individuals* [who are entitled to seek retroactive relief under the statute] never got a first bite at the apple"—i.e., "full[] adjudicate[ion] by the courts on the merits" of intellectual disability claims. *Hearing on S.B. 1349 Before the S. Floor Sess.*, 112th General Assembly (Tenn. Apr. 26, 2021) (Sen. Gardenhire).

A holding that a trial court retains its ordinary jurisdiction and authority over criminal sentencing matters does not unlawfully expand the scope of § 203(g). It does not change the statutory burden or standards relevant to the trial court's decision that an individual is or is not a person with intellectual disability ineligible for execution. It does not allow a trial court to impose only life sentences for those individuals who are statutorily able to receive only sentences of LWOP. It does not render

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resentencing costs or anything about procedures for imposing lawful sentences. It merely compares the cost associated with executing a defendant with the cost of imprisoning him for a life sentence in concluding that there is no significant financial impact from the amendment. And, once again, the sentences the trial court imposed *are* "life sentences."

a new or wider group of individuals eligible for relief, thereby providing a second bite at the intellectual-disability apple.

A trial court's assessment of manner of service of multiple life sentences does not provide "a second bite." An individual like Mr. Payne, who was sentenced to death by a judge and jury with no knowledge of his intellectual disability, has never had a *first* bite at having his sentencing decisions fairly rendered. He has finally—after waiting decades—tasted his first full and fair bite, with the trial court only now able to consider Mr. Payne's manner of service *in light of* his intellectual disability.

The legislature certainly evidenced no intent to curb the authority and discretion over sentencing decisions vested to trial courts by other sections of the criminal code.[17] Thus, to the extent this Court deems it appropriate to consider legislative history, such consideration weighs in Mr. Payne's favor. At a minimum, the legislative history is, as the CCA found, neutral as to the present question.

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[17] Perplexingly, Appellant argues *both* that the legislature "did not . . . even contemplate" resentencing in drafting the amendment *and* that the legislature's silence on the issue of resentencing was an intentional "choice not to say more." Appellant Br. at 39. Clearly, both of these positions cannot be simultaneously true. In discerning the legislature's intent, however, this Court should recall the presumptions that the legislature is aware of its prior enactments, that the legislature does not intend to pass useless legislation, and that repeals by implication are disfavored.

VI. The presumption against retroactivity and "finality of judgment" are irrelevant when the legislature enacts new provisions of the criminal code declaring a judgment retroactively unconstitutional.

Another argument Appellant raises for the first time before this Court is that the presumption against retroactivity supports its construction of § 203(g). But Appellant concedes that the legislature "*indisputably intended for there to be some retroactive application of the intellectual disability statute*." Appellant Br. at 36 (emphasis added). Appellant is correct: the amendment was expressly tailored to apply retroactively. The entire reason the amendment was necessary was to retroactively correct unconstitutional death sentences imposed prior to *Atkins*.[18] Simply put, there can be no "presumption against retroactivity" for a statute enacted for the singular purpose of being applied retroactively.

Appellant's quibble is not actually with retroactivity, but with the trial court's assessment of manner of service for Mr. Payne's new life sentences. That is not an issue of "retroactive" application of a statute, making this argument wholly without merit.

Furthermore, despite the fact that this case involves a pure question of statutory interpretation, Appellant begins the argument section of its brief by waxing poetic about principles of finality. It argues

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[18] *Atkins v. Virginia*, 536 U.S. 304 (2002).

that the trial court and the CCA "sidestepped" statutory interpretation principles "upset[ting] the finality of 33-year old judgments."[19] Appellant Br. at 26.

But here, the precipitating body that "upset the finality" of Mr. Payne's sentences was *not* the trial court or the CCA. Rather, Mr. Payne's death sentences were vacated after the Tennessee legislature enacted new legislation which left him categorically ineligible for the sentences that stood for over 30 years. Appellant conceded that Mr. Payne satisfied the requirements of the new law, thereby "upsetting" the decades-old final (unconstitutional) judgment. If the legislature intended to let lie sentencing decisions that had remained undisturbed for 33 years, it would not have enacted § 203(g). That the legislature passed this amendment—*the sole purpose of which is to allow proceedings to disturb death sentences that had remained undisturbed*—is reason enough to reject this flawed argument.

Appellant creates a red herring with cherry-picked quotes from case law regarding Appellant's need for finality to "execute its moral

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[19] Appellant's arguments about finality center around its new position that the trial court "modified" the judgment. The trial court did not "modify" a final judgment; it vacated a final judgment due to its unconstitutional sentences, then imposed a new lawful final judgment. Appellant's reliance on precedent regarding trial court rights and restrictions when modifying a sentence is misplaced; further, these cases are factually and legally inapposite.

judgment" and the "profound injury" inflicted upon Appellant and victims when finality is "unsettle[d]."[20] *Id.* at 26, 34–35,43. But neither Appellant nor the victims suffers injury—moral or otherwise—when finality is disturbed by the legislature's decision to prevent an unconstitutional judgment from being executed. Quite the opposite. The citizens of Tennessee and the justice system itself suffers injury when unconstitutional judgments are allowed to stand.

Throughout this litigation, Appellant has suggested that, if its position does not prevail, Mr. Payne will not be punished at all. But Mr. Payne remains convicted of first-degree murder. He has served more than 34 years in prison, despite maintaining his innocence. He has endured the psychological and spiritual turmoil of living under the specter of multiple execution warrants. Even with concurrent sentences, he will not be immediately eligible for parole, and there is no guarantee that parole will *ever* be granted.

Appellant has no grounds upon which to argue about the morality of finality here. If Appellant had its way, *Mr. Payne would have been*

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[20] Appellant cites *Schlup v. Delo*, 513 U.S. 298 (1995), for the proposition that society has a legitimate systemic interest in preserving finality of judgments—without acknowledging that the crux of *Schlup* was to *create exceptions to the finality principle*. Specifically, the Supreme Court held that "in appropriate cases, the principles of comity and finality . . . must yield to the imperative of correcting a fundamentally unjust incarceration." *Id.* at 320–21.

executed prior to the passage of the statute that Appellant now agrees renders him constitutionally ineligible for execution.[21] The Tennessee legislature has changed course regarding punishments for intellectually disabled persons, as the U.S. Supreme Court did before it. Appellant too has changed its opinion of this case with passage of time and new laws. This is a case study on when principles of finality must bow to other factors and changed circumstances.

These same factors—passage of time, new legislation, changed factual circumstances—led the trial court to use its abundant discretion to determine whether Mr. Payne's life sentences should run concurrently or consecutively. As the CCA correctly concluded, a trial court is not *required* to conduct a sentencing hearing regarding manner of service in these circumstances but is not *prohibited* from so doing. The trial court's broad jurisdiction over criminal and sentencing matters leaves the matter to the trial court's discretion.

Despite Appellant's accusation that the trial court used a sledgehammer by "assum[ing] *plenary* resentencing authority," Appellant Br. at 14, 19, 27, 32–33, 38, the trial court in reality used a scalpel in imposing a lawful judgment upon Mr. Payne. The trial court declined to consider any issue related to the assault charge, finding it unaffected by the amendments. It exercised care in determining what evidence and testimony would be permitted and making clear what

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[21] Mr. Payne was 26 days from execution when Governor Lee granted a reprieve on November 6. 2020.

standards applied to the narrow issue at hand. The trial court was so precise and careful in its findings of facts and conclusions of law that Appellant declined to raise any argument that it abused its discretion in reaching its sentencing decision.

Instead, Appellant concocted this meritless jurisdictional argument. This appeal was not brought because Appellant believes that the trial court lacked jurisdiction to vacate Mr. Payne's sentences and impose new sentences pursuant to the rules and statutes governing sentencing. Rather, it was brought because Appellant is displeased with the result of the proceeding but was fully aware that it had no basis to argue that the trial court abused its discretion in determining manner of service. Appellant surely would not have filed this appeal challenging the trial court's jurisdiction and authority if the trial court had determined after the resentencing hearing that Mr. Payne should serve his two life sentences consecutively—even though, under Appellant's current argument, such a decision would have been void. This Court, like the CCA, should reject Appellant's thinly-veiled attempt to sidestep an unfavorable standard of review by raising jurisdictional claims with wide sweeping and dangerous implications for criminal cases.

VII. Though a "tiebreaker" is not needed here, the rule of lenity may properly be applied to any ambiguous criminal statute to break an interpretive tie in favor of the criminal defendant.

Appellant finally argues that the CCA erred in invoking the rule of lenity because (1) § 203(g) is not so ambiguous as to require a "tiebreaker", and (2) the rule of lenity does not apply to the intellectual disability statute.

In a 15-page opinion, the CCA referenced the rule of lenity only twice. *Payne*, 2023 WL 5599723, at *6 (citing *State v. Deberry*, 651 S.W.3d 918, 925 (Tenn. 2022), in legal standards section, noting that if statute remains ambiguous after application of other rules and canons of construction, "the rule of lenity operates as a 'tie-breaker'" in defendant's favor), *10 (stating, as one basis for decision, that "the rule of lenity requires that . . . ambiguity regarding the trial court's sentencing authority" be resolved in Mr. Payne's favor). The rule of lenity was not the only basis for the CCA's decision: it also based its decision on the statute's language that does not "expressly forbid" resentencing hearings and on this Court's precedent that trial courts maintain inherent power to adopt rules of procedure when issues arise for which no procedure is specifically prescribed. *Id*. at *10.

Given the limited references to the rule of lenity, and the fact that it was only one of several bases for the CCA's conclusion, Appellant's arguments about unlawful expansion and an avalanche of inconsistent and unfair rulings are misplaced, if not exaggerated. Mr. Payne agrees

with Appellant's first point: there is simply no need for a "tiebreaker" in this case. This Court can easily resolve the statutory construction issues in this case by using ordinary principles of statutory construction and common sense, without application of the rule of lenity. *See, e.g.*, *United States v. Gonzalez*, 250 F.3d 923, 929 n.8 (5th Cir. 2001) (rejecting application of rule of lenity for lack of ambiguity, noting that silence regarding consecutive sentencing "leaves intact the [trial] court's statutory discretion" in selecting consecutive or concurrent sentences).

Nonetheless, Appellant's substantive arguments regarding the rule of lenity are unpersuasive. The "rule of lenity [is] rooted in the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should[.]" *United States v. R.L.C.*, 503 U.S. 291, 305 (1992) (citing *United States v. Bass*, 404 U.S. 336, 347–348 (1971)) (cleaned up). The U.S. Supreme Court has held that the rule applies to *both* substantive criminal statutes, *and* "to answer questions about the severity of sentencing[.]" *Id.* (citing *Bifulco v. United States*, 447 U.S. 381, 387 (1980)). "The rule of lenity requires *ambiguous criminal laws* to be interpreted in favor of the defendants subjected to them." *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality op.) (emphasis added); *see, e.g.*, *Wallace W. v. Commonwealth*, 128 N.E.3d 581, 590 (Mass. 2019) (applying rule of lenity to statute to determine juvenile court's jurisdiction over defendant); *Gov't of V.I. v. Douglas*, 812 F.2d 822, 833 (3d Cir. 1987) (applying rule of lenity in favor of consecutive sentences where legislative intent regarding mandatory consecutive sentences versus judicial discretion over manner of service was unclear).

The intellectual disability statute is part of the criminal code. It gives the trial court authority to vacate unconstitutional criminal sentences and places upon it an obligation to impose new ones. Because it is in the criminal code and places criminal/penal obligations upon the trial court, the rule of lenity applies. The inverse also refutes Appellant's position: if this is *not* a penal statute, trial courts must look at remainder of the criminal code for guidance on resentencing and final judgment, defeating Appellant's statutory construction argument.

Appellant argues that "[e]ven if the intellectual disability statute could be characterized as a resentencing statute, the rule of lenity should not apply to acts of 'legislative grace.'" Appellant Br. at 49–50. In doing so, Appellant compares the amendments to post-conviction review proceedings and the First Step Act of 2018. As discussed above, the ID Act is a *criminal* statute—it is *not* PCPA matter, which do not arise under the criminal code and are subject to their own specific and onerous set of rules and procedures. And the First Step Act was not passed to correct any constitutional error with federal sentences; rather, it included a broad range of sentencing reforms, including, *inter alia*, reduced mandatory minimum sentences, increased jail credits, and an expanded safety valve with the goal of reducing recidivism and reducing prison populations by lowering excessive federal sentences.[22] *See, e.g.*, Ashley Nellis & Liz Komar, *The First Step Act: Ending Mass Incarceration in*

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[22] Ironically for Appellant, the First Step Act *increased* judicial discretion over sentencing matters.

Federal Prisons, The Sentencing Project, Aug. 22, 2023, *available at* https://www.sentencingproject.org/policy-brief/the-first-step-act-ending-mass-incarceration-in-federal-prisons/. In short, the First Step Act was a matter of sentencing *policy*, not of sentencing *constitutionality*.

These two examples may indeed be matters of "legislative grace," as "grace," by its traditional and Biblical definition, is a mercy or pardon, a free and unmerited favor bestowed upon a sinner. But Mr. Payne takes issue with characterizing legislation aimed at preventing unconstitutional executions as "an act of legislative grace." It is wildly inappropriate to consider it a "favor" from the legislature to not execute a person who is constitutionally ineligible for execution. Instead, such acts are necessary for the people of Tennessee to continue to have faith in their criminal justice system.

Appellant maintains that this Court must correct the CCA's mention of the rule of lenity to avoid inconsistency, unpredictability, and unfairness. Appellant Br. at 50. But the true risk of inconsistency and unpredictability from this case arises if Appellant's interpretation is adopted. As the CCA adeptly noted, a conclusion that the courts can "presume from silence that the legislature intended to divest a trial court of jurisdiction it would otherwise have" will have broad and potentially catastrophic consequences in the area of criminal law. Indeed, it found that Appellant's argument, "taken to its logical extension," would "lead to the absurd result that all previously imposed consecutive first-degree murder sentences are invalid" due to lack of jurisdiction over manner of service. *Payne*, 2023 WL 5599723 at *8.

Appellant seems to have no reservations about these consequences so long as Mr. Payne is given consecutive sentences. But the people of Tennessee, trial courts, and the justice system as a whole deserve more stability than Appellant's myopic view can provide. This Court should reaffirm the longstanding principle that trial courts have broad discretion over sentencing decisions—including manner of service—unless and until the legislature states "in plain and ordinary language" its intent to "divest[] the trial court of jurisdiction." *See Kilgore*, 134 S.W.3d at 158; *Fletcher*, 951 S.W.2d at 382.

CONCLUSION

Wherefore this Court should affirm the well-reasoned opinion of the Court of Criminal Appeals.

Respectfully submitted this the 12th day of June, 2024.

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CERTIFICATE OF COMPLIANCE

I certify that this Brief contains 14,998 words as determined by the word processing program used to prepare this document. This is under the 15,000-word limit set forth in Tennessee Supreme Court Rule 46, § 3.02

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CERTIFICATE OF SERVICE

I, Kelley J. Henry, certify that on June 12, 2024, a true and correct copy of the foregoing was served via electronic filing to opposing counsel, Edwin Alan Groves, Jr., Asst. Attorney General, P.O. Box 20207, Nashville, Tennessee 37202.

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