

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

STATE OF TENNESSEE,)
)
 Appellant,)
)
v.)
)
PERVIS TYRONE PAYNE,)
)
 Appellee.)

)
)
 SHELBY COUNTY
 No. W2022-00210-SC-R11-CD

**ON APPEAL BY PERMISSION FROM THE JUDGMENT
OF THE COURT OF CRIMINAL APPEALS**

REPLY BRIEF OF THE STATE OF TENNESSEE

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INTRODUCTION

Everyone agrees that Tenn. Code Ann. § 39-13-203(g) is silent about resentencing after a finding of intellectual disability. The only real question, then, is what conclusion to draw from that silence. This Court’s precedents provide the answer: Trial courts may exercise authority over a final judgment only when—and to the extent—authorized by statute or rule. Here, that means the trial court had no authority to engage in plenary resentencing and, therefore, no authority to realign Payne’s murder sentences.

Payne flips the baseline. Rather than look to what the legislature authorized, Payne assumes the existence of plenary resentencing authority. But he never explains the source of that authority. It is not in Section 203(g), which merely authorizes “a determination of whether [Payne] is intellectually disabled.” And any inherent authority extends only to fixing the unconstitutional death-penalty component of the judgments—not plenary resentencing.

This Court encouraged the legislature to create an “appropriate procedure . . . to enable defendants condemned to death prior to the enactment of the intellectual disability statute to seek a determination of their eligibility to be executed.” *Payne v. State*, 493 S.W.3d 478, 492 (Tenn. 2016). It did just that by resolving the constitutional problem without authorizing plenary resentencing.

Nearly 36 years ago, the trial court determined that Payne’s murder sentences should be served consecutively. That sentencing determination cannot be reconsidered absent statutory authorization. The Court should reverse.

ARGUMENT

I. **Tenn. Code Ann. § 39-13-203(g) Does Not Authorize Sentence Realignment.**

Payne strawmans the State’s position. He repeatedly asserts that “Appellant has conceded that the trial court was required to take action not expressly delineated by § 203(g).” (Def. Br. at 21-22, 33, 39.) Not so. Payne conflates the State’s primary argument—that Section 203(g) “does not authorize *any* form of resentencing”—with the State’s alternative argument—that “[a]t most” the trial court could enter amended judgments reducing the death sentences to life imprisonment. (State Br. at 40, 42.) There is nothing “internally inconsistent” about making an alternative argument. (Def. Br. at 33.) And both arguments lead to an outcome that precludes any unconstitutional execution of Payne’s death sentences.

A. **The statute only allowed the trial court to make an intellectual disability determination.**

Section 203(g) gave Payne the opportunity to 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). This plain text, read in context and in light of the statute’s limited purpose, only allowed the trial court to make an intellectual disability determination. (State Br. at 15-16, 27-39.) It did not give the trial court plenary resentencing authority. (State Br. at 27-30.)

1. Payne ignores the statutory text. Indeed, the section of his brief purportedly addressing the “plain language” of the statute does not quote a single word from it. (Def. Br. at 39-43.) Instead, Payne recites a

boilerplate acknowledgement of the “primary importance” of statutory text before downplaying the statute’s exclusive focus on intellectual disability and death-penalty eligibility. (Def. Br. at 24 (citing *Yebuah v. Ctr. for Urological Treatment, PLC*, 624 S.W.3d 481, 487 (Tenn. 2021)).)

Payne admits that Section 203(g) is silent about sentence alignment.¹ (Def. Br. at 35, 40.) But he argues the Court should not “presume from silence” that the legislature intended to “divest” the trial court of jurisdiction. (Def. Br. at 54 (quoting *Fletcher v. State*, 951 S.W.2d 378, 381-82 Tenn. 1997).) That gets things exactly backwards. The trial court undoubtedly *lost* jurisdiction over Payne’s judgments after they became final. See *Tenn. Code Ann. § 40-35-319(b)*; *State v. Pendergrass*, 937 S.W.2d 834, 837 (Tenn. 1996). “[O]nce the judgment[s] bec[a]me[] final in the trial court, the court [had] no jurisdiction or authority to change the sentence in any manner . . . except under certain limited circumstances authorized by statute or rule.” *Nichols v. State*, No. E2018-00626-CCA-R3-PD, 2019 WL 5079357, at *12 (Tenn. Crim. App. Oct. 10, 2019), *perm. app. denied* (Tenn. Jan. 15, 2020). And when “the Court is exercising special statutory powers the measure of its authority is the statute itself.” *Brown v. Brown*, 281 S.W.2d 492, 501 (Tenn. 1955). Thus, the trial court could modify the final judgments only to the extent

¹ Despite past characterizations, see Def. Br. at 35, sentence alignment is different than the “manner of service,” which generally refers to whether the sentence is served on probation or confinement. See *Tenn. Code Ann. §§ 40-35-401(a), -402(a)* (distinguishing between “the manner of service of the sentence” and “the imposition of consecutive sentences” or “concurrent sentences”); see also *State v. Pollard*, 432 S.W.3d 851, 859 (Tenn. 2013).

expressly authorized by the statute, and Payne’s extensive discussion of the trial court’s jurisdiction over *original* sentencing proceedings is entirely misplaced. (Def. Br. at 28-39, 48-55.)

Payne summarily asserts that the trial court had jurisdiction over both the “intellectual disability proceedings *and* the attendant proceedings necessary to impose constitutional sentences once his death sentences were vacated as unconstitutional.” (Def. Br. at 30.) But Section 203(g) has no language authorizing the trial court to “vacate[]” the original judgments or conduct “attendant proceedings.” (Def. Br. at 16-17, 22, 30, 69.) The legislature could have authorized as much. Indeed, the Post-Conviction Procedure Act specifically instructs trial courts to “vacate and set aside the judgment” after finding a constitutional violation. [Tenn. Code Ann. § 40-30-111\(a\)](#). But Section 203(g) contains no such authorization.

Moreover, the trial court did not need “attendant proceedings” to accomplish the statute’s purpose. (Def. Br. at 30.) Contrary to Payne’s suggestion, strict adherence to the statutory text would not render the statute “useless” or “absurd,” *see* Def. Br. at 21, because it prevents unconstitutional executions. As Payne notes, this Court presumes the legislature knows existing law. (Def. Br. at 25.) So the legislature is presumed to know that this Court would not—and could not—order the execution of a death sentence after a trial court’s finding of intellectual disability, because “legal reason exists against the execution of the sentence.” [Tenn. Code Ann. § 40-23-119](#); *cf.* [Tenn. Sup. Ct. R. 12.4\(A\)](#). Payne does not even acknowledge these provisions or the State’s argument based on them. (State Br. at 28, 40.)

Contrary to Payne’s assertion, the purpose of Section 203(g) is not to “correct and prevent unconstitutional death *sentences*.” (Def. Br. at 41 (emphasis added).) The purpose is to prevent unlawful *executions*. This purpose is clearly reflected by the statute’s text and is further underscored by the legislative history. (State Br. at 18, 30-32, 37-39.) In fact, the very decision of this Court that prompted the legislature to enact Section 203(g) recognized that a “claim of ineligibility” to be executed “is completely independent of the validity of [the] original sentencing.” *Payne*, 493 S.W.3d at 487 (“Petitioner’s claim that he is ineligible to be executed because of his intellectual disability is analogous to a claim that he is not competent to be executed.”). Because an intellectual disability determination alone prevents unlawful executions, there is no reason to depart from the plain statutory text.

2. Regarding the statutory context, Payne admits that Section 203(g)’s appellate right—that “[e]ither party may appeal the trial court’s decision”—refers solely to the trial court’s intellectual disability determination. (Def. Br. at 48.) As the State has argued, that shows the legislature only contemplated the trial court making an intellectual disability determination and a limited right of appeal from that discrete issue. (State Br. at 33.)

Payne resists that conclusion, stating that the legislature “did not deem it necessary to specify a right of appeal” for the concomitant resentencing that (in Payne’s view) occurs after any intellectual disability determination. Statutory context suggests otherwise. Section 203(f) states that an intellectual disability determination in the context of the original trial “shall not be appealable by interlocutory appeal, but

may be a basis of appeal by either [party] *following the sentencing stage of the trial.*” [Tenn. Code Ann. § 39-13-203\(f\)](#) (emphasis added). This neighboring appellate provision clearly contemplates a sentencing hearing only after an intellectual disability determination at the time of trial. That Section 203(g) contains no similar language indicates that the legislature did not contemplate or authorize plenary resentencing for post-trial intellectual disability determinations.

Payne also wrongly suggests that the State’s reliance on [Tenn. Code Ann. § 40-35-402\(a\), \(b\)\(3\)](#) to appeal the concurrent sentencing order somehow shows that the trial court retained plenary resentencing authority. (Def. Br. at 48.) Nonsense. The State can appeal under those provisions because the trial court *wrongfully* exercised resentencing authority. This Court has repeatedly recognized that the State can appeal a sentencing decision by contesting the trial court’s jurisdiction to make that decision. *See, e.g., State v. Tolle*, 591 S.W.3d 539, 541, 544 (Tenn. 2019) (holding that the State had a right to appeal a sentencing decision when the trial court “exceeded its authority” under [Tenn. R. Crim. P. 35](#)). The statutory basis for this Court’s jurisdiction over this appeal has nothing to do with the scope of the trial court’s limited authority under Section 203(g).

Finally, Payne quizzically claims that by pointing out the language he reads into the statute, the State is guilty of “rewriting” the statute. (Def. Br. at 52.) But that is the exact opposite of rewriting the statute. (State Br. at 29.) The State is perfectly happy with the text as it stands. That text authorizes “a determination of whether [Payne] is intellectually disabled” and therefore “ineligible for the death penalty.” [Tenn. Code](#)

Ann. § 39-13-203(g). It does not authorize the trial court to “vacate” the original judgments or “impose a lawful sentence.” (Def. Br. at 22, 28, 69.) That ends this case.

B. At most, the trial court could amend the judgments to reflect consecutive life sentences.

Even if the trial court had authority beyond the statutory text, it would be limited to entering amended judgments reducing Payne’s death sentences to life imprisonment. This Court has repeatedly made clear that courts should limit collateral remedies to the problem at hand—here, the death sentence. There is simply no jurisdictional basis to revisit the original sentence alignment—a distinct and severable component of otherwise final judgments. (State Br. at 46-47.)

1. Payne pushes an expansive view of inherent authority—one that would intrude into legislative prerogatives. According to Payne, if the trial court had power to modify any portion of his sentences after making an intellectual disability determination, then it necessarily had broad plenary resentencing authority. (Def. Br. at 56-58.) But that is not the law.

“Across remedial contexts, the nature of the violation determines the scope of the remedy.” *Off. of United States Tr. v. John Q. Hammons Fall 2006, LLC*, 144 S. Ct. 1588, 1594 (2024) (cleaned up). The court’s role “is to remedy the constitutional wrong consistent with [legislative] intent, not to provide the complaining parties’ preferred form of relief.” *Id.* at 1596. In other words, a court must fashion a remedy that “cures the constitutional violation.” *Id.* at 1600.

That means that any change to a judgment must be limited to the defect. As discussed, *see* State Br. at 34-36, a judgment consists of “distinct and severable components” and “relief will differ . . . depending upon which aspect of the judgment is invalid.” *Cantrell v. Easterling*, 346 S.W.3d 445, 455-56 (Tenn. 2011). “[E]rrors in sentencing are inevitable, but the avenue of relief and remedy is determined by the type of error that infects the sentence.” *State v. Brown*, 479 S.W.3d 200, 208 (Tenn. 2015).

In *Cantrell*, the Court held that four aggravated rape sentences were illegal, because the judgments indicated, contrary to statute, that the petitioner was eligible for early release on parole. 346 S.W.3d at 447, 459. The Court explained, however, that the “underlying convictions [were] not tainted by the illegality and therefore remain intact.” *Id.* at 459. Nor did the discrete sentencing error void the entire sentence. *Id.* The Court simply remanded for the entry of amended judgments that omitted the reference to release eligibility, providing that “the judgments are in no other way modified.” *Id.* Thus, the trial court had no authority to revisit the consecutive alignment of the original sentences. *Id.* at 448, 459.

In *Brown*, the Court held that Tenn. R. Crim. P. 36.1 does not authorize correction of *expired* illegal sentences. 479 S.W.3d at 202. As originally enacted, the rule was “silent” on this issue. *Id.* at 210. The Court declined to interpret that silence as permissive because that was “not reasonable in light of the expressed purpose of Rule 36.1, its language, and the jurisprudential background from which it developed.”

Id. If the legislature had intended to expand the scope of relief beyond that which is available in habeas cases, “Rule 36.1 would have almost certainly included language clearly expressing that intent.” *Id.* at 211. These cases, and others, confirm that judgments contain distinct and severable components—the conviction and sentence—and the sentence itself contains components that may or may not be infected by various sentencing errors. (State Br. at 35.)

Here, the legislature gave the trial court jurisdiction to make an intellectual disability determination, which only implicated Payne’s eligibility for the death penalty. So even assuming some change to the judgments was appropriate, the only thing necessary to effectuate the trial court’s intellectual disability determination was the reduction of Payne’s death sentences to life imprisonment. That alone would have “cure[d] the constitutional violation.” *Hammons*, 144 S. Ct. at 1600.

The intellectual disability determination in no way implicated or undermined the validity and rationale of the original sentence alignment. Payne’s attorneys told the original sentencing judge that, “in light of the death penalty sentence, the motion for consecutive sentencing is somewhat irrelevant.” (IX, Ex. H, Sent. Hr’g at 2.) But the judge clearly disagreed and imposed consecutive sentences for the explicit purpose of ensuring that Payne remained imprisoned even if his death sentences were reduced to life. (IX, Ex. H, Sent. Hr’g at 5, 11.) The judge recognized the severability of those two sentence components and insisted that the consecutive-sentence determination would endure even if the death penalty could not be lawfully imposed. (IX, Ex. H, Sent. Hr’g at 5, 11.)

At bottom, Payne’s expansive view of the trial court’s inherent power ignores finality principles. Trial courts may invoke their “inherent power” to adopt new procedural rules only when such rules are “consistent with constitutional principles, statutory laws, and generally applicable rules of procedure.” (State Br. at 46 (quoting *State v. Reid*, 981 S.W.2d 166, 170 (Tenn. 1998).) Courts cannot just claim the “inherent power” to “increase [their] jurisdiction” beyond statutory and constitutional limits. *Anderson Cnty. Q. Ct. v. Judges of 28th Jud. Cir.*, 579 S.W.2d 875, 879 (Tenn. Ct. App. 1978); *see also Partee v. State*, No. 02C01-9311-CC-00267, 1995 WL 381649, at *4 (Tenn. Crim. App. June 28, 1995) (same) (no perm. app. filed). Even accepting some measure of inherent power, this Court should not presume from silence that the legislature provided plenary resentencing authority in every statute or rule authorizing collateral review of final judgments. It should adhere to the well-established practice of limiting any remedy to the constitutionally problematic aspect of the judgment—here, reducing Payne’s sentences from death to life imprisonment. *See, e.g., Brown*, 479 S.W.3d 200; *Cantrell*, 346 S.W.3d 445.

2. The remainder of Payne’s scattershot arguments likewise lack merit. To begin, Payne mischaracterizes the State’s limited reliance on the broader statutory scheme. (Def. Br. at 43-46.) To be sure, Sections 203(d), 206(e), and 208(c) do not *directly* apply to defendants, like Payne, seeking retroactive application of the intellectual disability statute; but they illustrate that life imprisonment is the only available sentence for

convicted first-degree murderers, like Payne, who are ineligible for death or life without parole.²

Payne disputes the State's take on the legislative history. (Def. Br. at 58-61.) But he points to nothing in the legislative record that evinces an intent to release death-row inmates with multiple murder convictions into the community through judicial tinkering with the original sentence alignment decades after conviction. Indeed, there is no support for his preferred remedy of plenary resentencing. And his reliance on the legislature's presumed awareness of trial courts' jurisdiction over *original* sentencing proceedings, *see* Def. Br. at 59, misses the point. Again, the trial court lost jurisdiction when the judgments became final, and the scope of the trial court's collateral jurisdiction under the intellectual disability statute must be measured by the statute itself. *See Brown*, 281 S.W.2d at 501.

Payne also parrots the Court of Criminal Appeals' mistaken belief that the State's position, "taken to its logical extension . . . would result in all previously imposed consecutive sentences for first-degree murder being declared void." (Def. Br. 16, 21, 70.) Not true. The procedural

² Section 203(d) provides that in the context of an original sentencing proceeding, "the defendant shall be sentenced to imprisonment for life without possibility of parole or imprisonment for life." But if the State did not give notice of its intent to seek life without parole, Section 208(c) provides that "the defendant shall be sentenced to imprisonment for life." And Section 206(e), which applies if the application of the first-degree murder statute "is held to be invalid or unconstitutional so as to permanently preclude a sentence of death," likewise only allows for sentence reduction from death "to imprisonment for life without possibility of parole or, if applicable, imprisonment for life."

posture of the case makes all the difference. For *original prosecutions*, trial courts obviously have plenary sentencing authority under [Tenn. Code Ann. §§ 40-35-101 et seq.](#) In that context, whenever a defendant is convicted of more than one offense, [Tenn. Code Ann. § 40-35-115\(a\)](#) and [Tenn. R. Crim. P. 32\(c\)\(1\)](#) clearly require the trial court to determine whether the sentences will be served concurrently or consecutively. For these cases, it is irrelevant that sentence alignment is “not mentioned anywhere in the first degree murder section of the Code.” *Payne*, 2023 WL 5599723, at 8. But after the judgments become final, trial courts lose jurisdiction. [Tenn. Code Ann. § 40-35-319\(b\)](#); *Pendergrass*, 937 S.W.2d at 837. Statutes authorizing *collateral review* grant jurisdiction where none exists; they do not “divest” jurisdiction by silence or otherwise. For this reason, *Payne*’s reliance on *Fletcher v. State*, 951 S.W.2d 378, 382 (Tenn. 1997), is misplaced. (State Br. at 41-42.)

Lastly, *Payne* fails to understand the State’s reliance on the finality concerns animating the presumption against retroactivity. (Def. Br. at 62.) The State agrees that the legislature “intended for there to be *some* retroactive application of the intellectual disability statute.” (State Br. at 36.) It clearly expressed its intent for the statute to apply retroactively to enable capital defendants to seek a determination of whether they are intellectually disabled. (State Br. at 36.) But the statute is silent about other remedial measures—such as sentence realignment—and the presumption against retroactivity precludes courts from interpreting that silence as permission to go beyond retroactive intellectual-disability determinations. *See Patel v. Gonzales*, 432 F.3d 685, 690 (6th Cir. 2005)

(noting that “where a statute is silent as to the scope of its application, the statute should not be applied retroactively”).

The upshot: If the trial court had any resentencing authority beyond the plain text of the intellectual disability statute, it was constrained to grant only the relief necessary to effectuate its intellectual disability determination—a sentence reduction from death to life. Nothing more.

II. The Rule of Lenity Does Not Apply.

The Court of Criminal Appeals wrongly invoked the rule of lenity as an independent basis for affirming the trial court’s unauthorized sentencing relief. *Payne*, 2023 WL 5599723, at *10. The intellectual disability statute is not ambiguous, and more fundamentally, it is not a penal statute. Therefore, the rule of lenity does not apply. (State Br. 27-39, 47-51.)

Payne minimizes the Court of Criminal Appeals’ unfounded reliance on the rule of lenity, noting that the court referenced the rule of lenity “only twice.” (Def. Br. at 67.) But this is not a matter of arithmetic. As *Payne* acknowledges, the intermediate court clearly invoked the rule of lenity as a basis for its decision. (Def. Br. at 67); *Payne*, 2023 WL 5599723, at *10 (“[T]he rule of lenity requires that this court resolve the ambiguity . . . in the Defendant’s favor.”). The State’s argument pointing out this novel—and unprecedented—application of the rule of lenity is therefore not an “exaggerat[ion].” (Def. Br. at 67.) If the intermediate court’s decision stands, it will send the wrong message to lower courts tasked with interpreting countless other criminal laws.

On the merits, Payne wrongly claims that the rule of lenity applies simply because the intellectual disability statute “is in the criminal code.” (Def. Br. at 69.) He also asserts, without explanation, that the statute “places criminal/penal obligations upon the trial court.” (Def. Br. at 69.) (Def. Br. at 69.) Payne points to no binding precedent to support these sweeping and baseless assertions.

First, Payne notes that the rule of lenity applies to both “the substantive scope of criminal statutes” and “questions about the severity of sentencing.” (Def. Br. at 68 (quoting *United States v. R.L.C.*, 503 U.S. 291 (1992)).) That is true, but the juvenile sentencing statute at issue in *R.L.C.*—which limited punishment to “the maximum term of imprisonment that would be authorized if the juvenile had been tried and convicted as an adult”—is nothing like Tennessee’s intellectual disability statute. 503 U.S. at 294. The intellectual disability statute does not prescribe the maximum penalty for a criminal offense; it does not impose a penalty at all. (State Br. at 49.)

Payne’s reliance on *Government of Virgin Islands v. Douglas*, 812 F.2d 822 (3d Cir. 1992), is similarly misplaced. In *Douglas*, the federal appeals court applied the rule of lenity when interpreting a federal sentencing statute that did not clearly indicate whether consecutive sentencing was mandatory under the circumstances. 812 F.2d at 833. Importantly, the language at issue was part of the statute imposing a penalty for the criminal offense. *Id.* at 827. It was not a remedial statute, like Tenn. Code Ann. § 39-13-203(g), which, again, prescribes no criminal penalties at all.

Next, Payne argues that “[t]he rule of lenity requires ambiguous *criminal laws* to be interpreted in favor of the defendants subjected to them.” (Def. Br. at 68 (quoting *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality)).) On closer inspection, however, *Santos* involved the federal statute defining the offense of money laundering—clearly penal in nature—not some generic “criminal law.” 553 U.S. at 509-10. The intellectual disability statute, by contrast, does not define a criminal offense. (State Br. at 49.)

Payne identifies one state court decision applying the rule of lenity to determine whether a juvenile court had jurisdiction over a child. (Def. Br. at 69 (citing *Wallace W. v. Commonwealth*, 128 N.E.3d 581, 590 (Mass. 2019)).) The Massachusetts court did not address whether the statute at issue was penal in nature, but there is at least an argument that the existence of juvenile court jurisdiction would necessarily affect the severity of any resulting punishment. In any event, this isolated instance of a single state court broadly applying the rule of lenity to a jurisdictional statute does not outweigh the mountain of precedent cabining the rule of lenity to its traditional function as a tiebreaker for interpreting grievously ambiguous penal statutes. (State Br. at 47-49.)

Finally, Payne quibbles with the State’s reference to the intellectual disability statute as an act of “legislative grace.” (Def. Br. at 69-70.) Though the intellectual disability statute, unlike some resentencing statutes, is a constitutional imperative, the basic point remains the same: Section 203(g) is a remedial statute that can only benefit a criminal defendant. Because the statute neither defines a criminal offense nor imposes a criminal penalty, there is no issue of “fair

notice” to the accused. Joshua S. Ha, *Limiting the Rule of Lenity*, 12 Wake Forest L. Rev. Online 46, 63 (2022). Thus, the justification for the rule of lenity is not present.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Tenn. Sup. Ct. R. 46 § 3.02, the total number of words in this brief, exclusive of the Title/Cover page, Table of Contents, Table of Authorities, Certificate of Compliance, and Attorney Signature Block, is 3,833. This word count is based upon the word processing system used to prepare this brief.

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