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Clerk of the
Appellate Courts

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

GARY W. SUTTON v. STATE OF TENNESSEE

Circuit Court for Blount County
No. C-28405

No. E2026-00107-CCA-R10-PD

ORDER

The State of Tennessee has filed an application for extraordinary appeal, *see* Tenn. R. App. P. 10, seeking review of the trial court’s January 16, 2026 order. That order denied the State’s motion to dismiss the Petitioner’s petition to determine his ineligibility for execution due to intellectual disability, on the ground that the petition is procedurally barred. The State argues that extraordinary appeal is required for two reasons. First, it argues that the trial court’s order constitutes a “plain and palpable abuse of discretion.” Second, it argues that a hearing on the procedurally barred petition reflects a “fundamental illegality.” *Gilbert v. Wessels*, 458 S.W.3d 895, 898 (Tenn. 2014).

The Petitioner has filed an answer in opposition. He argues that the State has failed to establish that the trial court’s order reflects a “plain and palpable abuse of discretion” or a “fundamental illegality.” Absent such a showing, the Petitioner contends, extraordinary appeal is not warranted.

Upon full consideration of the State’s application, the Petitioner’s response, and the attachments thereto, we agree with the Petitioner and respectfully deny the State’s application for extraordinary appeal.

FACTUAL BACKGROUND

A. PROCEDURAL HISTORY

The Petitioner and his codefendant, James Henderson Dellinger, were convicted of the 1992 first degree premeditated murder of Tommy Mayford Griffin and sentenced to death. On direct appeal, the Tennessee Supreme Court affirmed the Petitioner's conviction and sentence. *State v. Dellinger*, 79 S.W.3d 458, 462 (Tenn. 2002).

The Petitioner filed a petition in May 2022 to determine his ineligibility for execution due to intellectual disability. Tenn. Code Ann. § 39-13-203(g)(1).¹ The Attorney General thereafter appeared to represent the State in the proceeding, *see* 2023 Tenn. Pub. Acts, ch. 182,² and the proceedings were stayed pending resolution of a constitutional challenge to that legislation in a separate case. *See McKay v. State*, No. W2023-01207-CCA-R9-CO, 2024 WL 4404318 (Tenn. Crim. App. Oct. 4, 2024); *McKay v. State*, 706 S.W.3d 338 (Tenn. 2025).

On December 3, 2025, the Attorney General filed a motion to dismiss the petition, arguing that the Petitioner's intellectual disability claim had been litigated "numerous times" at trial. *Id.* § 39-13-203(g)(2).³ The Petitioner filed a response in opposition, arguing that the intellectual disability claim was not adjudicated "on the merits" in any prior proceeding and, therefore, was not procedurally barred. The trial court held a hearing on the State's motion on January 8, 2026, at which the parties presented argument and the Petitioner offered the testimony of his trial counsel, John Goergen.

¹ Tennessee Code Annotated section 39-13-203(g)(1) provides that "[a] defendant who has been sentenced to the death penalty prior to April 28, 2023, and whose conviction is final on direct review may petition the trial court for a determination of whether the defendant is intellectually disabled."

² The Act designates the Attorney General to represent the State in the trial court in all capital proceedings brought via the Post-Conviction Procedure Act, *see* Tenn. Code Ann. § 40-30-114(c); intellectual disability proceedings, *see* Tenn. Code Ann. § 39-13-203(g)(1); and the writ of error coram nobis statute, *see* Tenn. Code Ann. § 40-26-105.

³ Tennessee Code Annotated section 39-13-203(g)(2) provides that "[a] defendant shall not file a motion under subdivision (g)(1) if the issue of whether the defendant has an intellectual disability has been previously adjudicated on the merits."

B. HEARING ON STATE'S MOTION TO DISMISS

At the hearing, Mr. Goergen testified that he and F.D. Gibson represented the Petitioner at trial. He recalled that the Petitioner had undergone intelligence quotient ("I.Q.") testing prior to his appointment to the case, the results of which showed a full-scale I.Q. of 76.⁴ Based upon that result, he explained, counsel determined that the Petitioner "was an alcoholic, drug abuser, and already had diminished capacity." Counsel accordingly "wanted to have his capacity measured as he was at the time of the murder." To that end, counsel moved the trial court to permit additional I.Q. testing while the Petitioner was intoxicated. Mr. Goergen testified that counsel had hoped to establish that the Petitioner, while under the influence of alcohol, was unable to form the requisite *mens rea* at the time the offense was committed.

Mr. Goergen further explained that any reference in counsel's pleadings to an intellectual disability determination related to this *mens rea* theory. It was not directed at establishing that the Petitioner's intellectual disability barred imposition of the death penalty. For this reason, Mr. Goergen testified, counsel did not present evidence concerning deficits in adaptive behavior that manifested before the age of eighteen at the hearing on additional testing.

The Petitioner argued that when the evaluation from Middle Tennessee Mental Health Institute ("MTMHI") reported an I.Q. score of 76, counsel "were operating under the assumption that [the Petitioner] wasn't eligible to raise that claim under the [intellectual disability] statute." Counsel instead sought to establish the Petitioner's "intellectual functioning at the time of the crime" to raise a diminished capacity defense. The Petitioner asserted that the trial court's comments regarding deficits in adaptive behavior and manifestation before age eighteen were "inappropriate" given this change in defense

⁴ At the time of the Petitioner's offense, the Code defined intellectual disability (then referred to as "mental retardation") as follows:

- (a) As used in this section, "mental retardation" means:
 - (1) Significantly subaverage general intellectual functioning as evidence by a functional intelligence quotient (I.Q.) of seventy (70) or below;
 - (2) Deficits in adaptive behavior; and
 - (3) The mental retardation must have manifested during the developmental period, or by eighteen (18) years of age.

Tenn. Code Ann. § 39-13-203(a) (1991).

theory. The Petitioner further argued that the notation on the trial court's Rule 12 Report should not be construed as a previous adjudication on the merits of the intellectual disability claim.

The State argued that the Petitioner presented the intellectual disability claim in multiple pretrial motions, even after the MTMHI evaluation reported an I.Q. score of 76. These included a motion for continuance to determine whether the Petitioner's intellectual disability barred imposition of the death penalty, and a notice of affirmative defense addressing, separately, intoxication and intellectual disability.

The State further argued that at the hearing on the motion for additional I.Q. testing while intoxicated, the trial court denied the motion because the Petitioner failed to establish whether intoxication would affect the I.Q. score. The trial court also concluded, the State noted, that the Petitioner had failed to present evidence of deficits in adaptive behavior manifesting before age eighteen. The State also argued that the trial court's Rule 12 Report constituted proof of a ruling on the intellectual disability issue, since it answered "yes" to whether the issue of mental retardation had been raised under section 39-13-203. Together, the State argued, these findings established an adjudication of the intellectual disability claim on the merits.

C. TRIAL COURT'S ORDER

On January 16, 2026, the trial court entered an order denying the State's motion to dismiss. The trial court found that after testing revealed an I.Q. score of 76, Petitioner's counsel abandoned attempts to establish the Petitioner's ineligibility for the death penalty. Counsel instead pursued a defense theory that the Petitioner lacked the requisite *mens rea* at the time of the offense.

The trial court further addressed the Rule 12 Report. It found that, although the Petitioner had filed a Notice of Affirmative Defense referencing intellectual disability, and although the Rule 12 Report noted that the issue of mental retardation had been raised, the Petitioner never actually pursued a mental retardation defense at trial. The trial court accordingly concluded that the Rule 12 Report is "a procedural aid and not a substantive adjudication."

The trial court accordingly held that “whether [the Petitioner] is intellectually disabled has not been previously adjudicated on the merits and that [the Petitioner] is entitled to an evidentiary hearing on that issue.”

ANALYSIS

Tennessee Code Annotated section 39-13-203 governs whether a defendant under sentence of death may be executed notwithstanding a claim of intellectual disability. The General Assembly enacted this procedure after the Tennessee Supreme Court held that the execution of persons with intellectual disabilities violates the federal and state constitutions. *See Van Tran v. State*, 66 S.W.3d 790, 812 (Tenn. 2001); Tenn. Code Ann. § 39-13-203(g) (2025). The statute defines intellectual disability to require proof of three elements: (1) significantly subaverage general intellectual functioning, as reflected by a functional intelligence quotient of seventy or below; (2) deficits in adaptive behavior; and (3) manifestation of the disability during the developmental period, or by eighteen years of age. *Id.* § 39-13-203(a).

Subsection (g)(1) permits a defendant under sentence of death to move the trial court for a determination of intellectual disability. *Id.* § 39-13-203(g)(1). Subsection (g)(2), however, bars such a motion where “the issue of whether the defendant has an intellectual disability has been previously adjudicated on the merits.” *Id.* § 39-13-203(g)(2); *see also Black v. State*, No. M2022-00423-CCA-R3-PD, 2023 WL 3843397, at *4-5 (Tenn. Crim. App. June 6, 2023) (addressing whether subsection (g)(2)’s bar applied to a defendant whose intellectual disability claim had been adjudicated under the statutory definition of intellectual disability in effect before the legislature’s adoption of the current standard). Thus, whether a defendant’s claim was previously adjudicated on the merits is a threshold question: if it was, the trial court has no occasion to reach the substantive elements of intellectual disability at all.

In this appeal, the State raises two related but distinct arguments in support of extraordinary review. First, the State contends that the trial court’s conclusion—that Petitioner’s intellectual disability claim was not previously adjudicated on the merits—reflects a plain and palpable abuse of discretion and a fundamental illegality. Second, the State contends that this same conclusion means the trial court lacked jurisdiction to conduct a hearing on Petitioner’s claim in the first place, an independent basis for finding a fundamental illegality.

We begin with the standard governing both arguments before addressing each in turn.

A. RULE 10 EXTRAORDINARY APPEALS

Tennessee Rule of Appellate Procedure 10 permits an extraordinary appeal from an interlocutory order “on application and in the discretion of the appellate court alone.” Tenn. R. App. P. 10(a). The rule authorizes such review only in two circumstances: (1) when “the lower court has so far departed from the accepted and usual course of judicial proceedings as to require immediate review,” or (2) when review is “necessary for complete determination of the action on appeal as otherwise provided in these rules.” *Id.* The application must be accompanied by “copies of any order or opinion relevant to the questions presented in the application and any other parts of the record necessary for determination of the application.” Tenn. R. App. P. 10(c). It may also be supported by affidavits or other relevant documents. *Id.*

In exercising the discretion to grant extraordinary review, our supreme court has made clear that Rule 10 relief is reserved for the most exceptional cases. As the court has explained previously,

An appellate court should grant a Rule 10 extraordinary appeal only when the challenged ruling represents a fundamental illegality, fails to proceed according to the essential requirements of the law, is tantamount to the denial of a party’s day in court, is without legal authority, is a plain and palpable abuse of discretion, or results in either party losing a right or interest that may never be recaptured.

....

Unlike Rule 9 appeals, Rule 10 appeals are reserved only for *extraordinary* departures from the accepted and usual course of judicial proceedings.

Gilbert, 458 S.W.3d at 898 (citations omitted) (emphasis in original). This high threshold reflects the extraordinary nature of the remedy and the need to preserve the orderly progression of proceedings in the absence of truly exceptional circumstances. With this standard in mind, we turn to the State’s two arguments.

B. PRIOR ADJUDICATION OF AN INTELLECTUAL DISABILITY CLAIM

Identifying the standard of review to be applied to the trial court's ruling is helpful to our determination of whether the trial court's order represents an extraordinary departure from the accepted and usual course of proceedings so as to require extraordinary review. *See State v. Enix*, 653 S.W.3d 692, 698 (Tenn. 2022). Because the trial court's ruling rests in part on findings of fact, "we will uphold the trial court's findings of fact unless the evidence preponderates against those findings." *See State v. Stanfield*, 554 S.W.3d 1, 8 (Tenn. 2018). That said, "[i]n weighing the preponderance of the evidence, we give great deference to findings based on the trial court's assessment of the weight and credibility of live testimony." *Jones v. State*, No. M2017-02198-COA-R3-CV, 2019 WL 3318338, at *2 (Tenn. Ct. App. July 24, 2019) (citing *Allstate Ins. v. Tarrant*, 363 S.W.3d 508, 515 (Tenn. 2012)), *perm. app. denied* (Tenn. Dec. 5, 2019).

Whether those facts satisfy the statutory requirement that the intellectual disability issue have been "previously adjudicated on the merits," Tenn. Code Ann. § 39-13-203(g)(2), is ordinarily a question of law reviewed de novo. *See Black v. State*, No. M2022-00423-CCA-R3-PD, 2023 WL 3843397, at *4 (Tenn. Crim. App. June 6, 2023) (citing *State v. Jones*, 589 S.W.3d 747, 756 (Tenn. 2019)), *no perm. app. filed*. But the question before us on this application is narrower still. It is not whether we would reach the same legal conclusion on de novo review, but whether the trial court's resolution of that question departs so far from the accepted and usual course of proceedings as to constitute a plain and palpable abuse of discretion or a fundamental illegality. *See Gilbert*, 458 S.W.3d at 898.

The record before the trial court on this question was genuinely mixed, in two respects. First, Mr. Goergen testified that trial counsel's references to Petitioner's I.Q. were directed at an entirely different theory—whether intoxication prevented Petitioner from forming the requisite *mens rea*—and that counsel neither presented nor argued any evidence of adaptive-behavior deficits or age-eighteen manifestation. The record also reflects, however, that in ruling on counsel's 1996 motion for additional intoxicated I.Q. testing, the trial court of that era made findings touching each of the three statutory elements of intellectual disability: that Petitioner's I.Q. was not 70 or below, that he did not have deficits in adaptive behavior, and that no proof showed manifestation by age eighteen. *See* Tenn. Code Ann. § 39-13-203(a). The 2026 trial court considered this tension directly, crediting Mr. Goergen's testimony and concluding that Petitioner "never actually put forth at trial a defense of intellectual disability," such that the 1996 findings did not amount to an adjudication of the intellectual disability issue on the merits.

Second, the record's mixed character extends to the Rule 12 Report. The trial court's Rule 12 Report noted that the issue of mental retardation had been raised, which the State argued was itself proof of a ruling on the merits. The trial court found otherwise, concluding that the Rule 12 Report is "a procedural aid and not a substantive adjudication"—a characterization consistent with the limited, assistive function Tennessee courts have long ascribed to Rule 12 reports. *See Alley v. State*, 958 S.W.2d 138, 148 (Tenn. Crim. App. 1997); *Malone v. State*, 707 S.W.2d 541, 544 (Tenn. Crim. App. 1985).

Whether either of these conclusions is the only permissible reading of the record, or the most persuasive one, is not the question Rule 10 asks us to answer. The trial court reached both conclusions only after full briefing from both parties and an evidentiary hearing at which it had the opportunity to assess Mr. Goergen's credibility firsthand—a hearing the State does not contend was procedurally deficient in any respect.

Given the deference owed to the trial court's assessment of live testimony, *see Stanfield*, 554 S.W.3d at 8, and given that the record is reasonably susceptible to more than one characterization on both points without either reading being plainly wrong, we cannot say that the trial court's resolution of this mixed question presents a plain and palpable abuse of discretion or a fundamental illegality. Rule 10 does not authorize this Court to resolve, in the first instance and on an interlocutory record, a close statutory-application question that the trial court considered and decided through the ordinary course of proceedings; it is limited to correcting the rare ruling that plainly and palpably departs from that course. *See id.*

Our holding is confined to the question Rule 10 presents: whether the trial court's resolution of this issue was so clearly incorrect as to constitute a plain and palpable abuse of discretion or a fundamental illegality warranting immediate interlocutory correction. It is not. We express no opinion on whether the trial court's characterization of the 1996 findings or the Rule 12 Report is correct as a matter of law, and nothing in this order shall be construed as resolving, for purposes of the law of the case or otherwise, whether Petitioner's intellectual disability claim was in fact previously adjudicated on the merits within the meaning of section 39-13-203(g)(2). That question remains open for full de novo consideration on any appeal as of right following the trial court's evidentiary hearing on Petitioner's intellectual disability claim.

Accordingly, the trial court's order does not present either a plain and palpable abuse of discretion or a fundamental illegality, and it does not depart from the usual course of proceedings so as to require immediate review. Moreover, the State will not lose a right

that may never be recaptured because either party may appeal as of right from the trial court's decision at the conclusion of the intellectual disability proceedings. Tenn. Code Ann. § 39-13-203(g)(1).⁵

C. JURISDICTION

The State separately argues that the trial court's order reflects a fundamental illegality because the trial court lacked jurisdiction to grant Petitioner a hearing at all. The State advances two theories. First, it contends that because section 39-13-203(g)(2) barred Petitioner from filing a motion under subsection (g)(1) in the first instance, the trial court lacked subject-matter jurisdiction to entertain the petition. *See Osborn v. Marr*, 127 S.W.3d 737, 740 (Tenn. 2004) (concluding that where a statute creates a cause of action and designates who may bring it, standing is a jurisdictional prerequisite). Second, the State contends that the trial court's order impermissibly modified a final criminal judgment without statutory authority to do so. *See State v. Payne*, 721 S.W.3d 204, 211 (Tenn. 2025) (recognizing that a trial court has no jurisdiction to modify a final criminal judgment absent a statute or rule granting such authority).

Both theories depend entirely on the premise that Petitioner's intellectual disability claim was previously adjudicated on the merits—the same mixed question addressed above. As discussed, the record on that question is genuinely contested, and the trial court's resolution of it, reached after full briefing and an evidentiary hearing, was not plainly and palpably incorrect. That is enough to defeat the State's jurisdictional theories at the Rule 10 stage, for the same reason and to the same limited extent as set out above.

Osborn is distinguishable because the jurisdictional defect there could be identified without resolving any contested question—the class of persons entitled to petition under the statute at issue was fixed and undisputed. 127 S.W.3d at 741. *Payne* is likewise distinguishable: it confirms that section 39-13-203(g) is itself the source of a trial court's jurisdiction to conduct an intellectual-disability hearing once the statutory prerequisites are

⁵ We note that the State filed a notice of supplemental authority asserting that the trial court “acted beyond its authority in permitting the Post-Conviction Defender's Office to file an unverified and unauthorized petition on behalf of a prisoner.” *See Holton v. State*, 201 S.W.3d 626, 635 (Tenn. 2006) (holding that the trial court lacked authority to consider post-conviction petitions filed on behalf of capital defendants that were neither signed nor verified by the defendants). In light of our denial of the application and because the State raises this challenge for the first time in this court, we pretermitt that issue. *See State v. Hardison*, 680 S.W.3d 282, 309 (Tenn. Crim. App. 2023).

satisfied, but it does not hold—nor did it involve—a trial court’s resolution of a disputed threshold question after an evidentiary hearing. 721 S.W.3d at 211. Because the trial court’s exercise of jurisdiction represents a resolution of a close question, rather than a clear disregard of an undisputed jurisdictional bar, we cannot say that the trial court so clearly acted without jurisdiction or authority as to constitute a fundamental illegality.⁶

CONCLUSION

In summary, and upon review of the State’s application and supporting materials, we conclude that the trial court’s ruling does not represent a fundamental illegality, a plain and palpable abuse of discretion, or the loss of a right or interest that may never be recaptured. Nor did the trial court act without legal authority in conducting a hearing on Petitioner’s claim.

Because the State has not demonstrated an extraordinary departure from the ordinary course of judicial proceedings, the application for extraordinary appeal is respectfully DENIED.

The STAY of the trial court proceedings is VACATED. The costs of this proceeding are taxed to the State of Tennessee.

JUDGE TOM GREENHOLTZ
JUDGE STEVEN W. SWORD
JUDGE STACY L. STREET

⁶ A challenge to subject-matter jurisdiction may be raised at any stage and cannot be waived. *See Osborn*, 127 S.W.3d at 739. We accordingly address the State’s jurisdictional theory on its merits rather than treating it as forfeited. As with the discussion above, we express no view on the ultimate correctness of the trial court’s characterization of the 1996 findings or the Rule 12 Report.