No. S20G0192

In the Supreme Court of Georgia

MARK GRAY,
Appellant,
v.
THE STATE,
Appellee.

On Petition for a Writ of Certiorari to the Court of Appeals of Georgia in A18A0077

♦

Brief of the Georgia Association of Criminal Defense Lawyers and the Georgia Public Defender Council as Amici Curiae in support of Appellant

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QUESTION PRESENTED

This Court has granted certiorari on this question, arising from *Gray v. State*, 351 Ga. App. 703 (2019):

> Where the petitioner sought modification of his sentence within one year of his original sentencing, did the Court of Appeals err in ruling that the trial court lacked jurisdiction to enter its order modifying the petitioner's sentence, because the order was entered outside the one-year period authorized under § 17-10-1(f)?

AMICI AND THEIR INTERESTS

The Georgia Association of Criminal Defense Lawyers and the Georgia Public Defender Council offer their views on the question as amici curiae.[1]

1. The Georgia Association of Criminal Defense Lawyers.

A frequent friend of this Court, the Georgia Association of Criminal Defense Lawyers (GACDL) is a professional association of Georgia's lawyers who rise at the Constitution's clarion call to defend those accused of crime and to secure the processes of law the accused are due. It includes both public defenders and private counsel, united in aspiration to improve the administration of criminal justice and to sustain the rule of law. GACDL hopes that its views might aid the Court.

[1] Appellant filed his principal brief on 26 April, so under Rule 23(1), amici could only file of right through 6 May. Amici could not accomplish that task because the current Covid-19 pandemic prevented them from timely conferring. On 15 May, however, this Court granted amici leave to file under Rule 23(3). Amici's brief in support of appellant is timely under that order, a copy of which is attached.

2. The Georgia Public Defender Council.

The Georgia Public Defender Council (GPDC), represented here by its Office of the Appellate Defender, is the independent executive-branch agency responsible for administering Georgia's public-defender system. OCGA § 17-12-1(b) and (c). The Indigent Defense Act of 2003 charges GPDC with "assuring that adequate and effective legal representation is provided to indigent persons" (*id.* at (c)) and with "assist[ing] public defenders to provide adequate legal defense" (OCGA § 17-12-6(a)). Consistent with its mission, GPDC has particular interests in the proper interpretation of § 17-10-1(f), which widely affects its clientele.

STATEMENT OF THE CASE

On 9 January 2017, the DeKalb Superior Court imposed a 20-serve-10 sentence upon Mark Gray for his guilty plea to several counts of child sexual exploitation. He did not appeal. On 6 December 2017—well within the one year prescribed by § 17-10-1(f)—he moved the court to modify the sentence. The court did not hear the motion, however, until 3 October 2018—well after the judgment's one-year anniversary. On that date, a substitute judge entered a consent order reducing the sentence to 15-serve-5. Shortly thereafter, the original judge, having returned to the bench, purported to revoke the modified sentence and reinstate the original, claiming an inherent power to do so during the still-running term in which the reduction was entered.

Gray appealed on the basis that the judge had no power to disturb or vacate the modified sentence. The District Attorney filed a brief concurring, but for the procedural reason that she had not been given notice and an opportunity to be heard on the reinstatement. *Ex mero motu*, the Court of Appeals ruled that the modification itself was void, having occurred outside of the one-year period authorized under § 17-10-1(f), albeit sought within that period: "the trial court ... lacked jurisdiction to enter the order more than one year after the original sentencing …." *Gray*, 351 Ga. App. at 704.

The statutory language from which the Court drew its reasoning was: "Within one year of the date [of sentencing] the court imposing the sentence has *the jurisdiction*, power, and authority to … reduce the sentence …." *Id.* (quoting OCGA § 17-10-1(f) (emphasis original)). It read this plain language to "dictat[e] that the trial court lost jurisdiction to … reduce Gray's sentence months before it entered the Modification Order." *Id.* at 705. "That Gray filed a motion to modify his sentence within the one-year period … does not alter the result under the plain meaning of that statute." *Id.*

The Court affirmed the reinstated original judgment as having been right for that reason, and Gray has successfully sought certiorari on the issue framed above.

THE VIEWS OF AMICI

Because temporal limitations on the power to modify sentences are jurisdictional, the General Assembly's inclusion of "jurisdiction" in § 17-10-7(f) did not alter the common-law rule that a timely motion extends jurisdiction to modify until exercised.

The Court of Appeals erred in *Gray* when it held that § 17-10-7(f)'s constraint on a court's "jurisdiction" to modify a sentence terminated at one year, regardless of when invoked. The history of § 17-10-1(f) and its predecessors affirms the common-law principle that a seasonable motion to alter a sentence extends a court's ability to do so beyond normal temporal limitations, which the word "jurisdiction" alone does not abrogate. What is more, *Gray* is incongruous with the Court of Appeals' earlier opinion in *Tyson v. State*, which held that timely invocation extended a court's power to modify a sentence beyond its normal limitations. 301 Ga. App. 295, 296 (2009).

Section 17-10-1(f)'s historical context, including the courts' constructions of its predecessors, is critical to understanding the error below. The Court of Appeals accurately reconstructed the statute's history. *Gray*, 351 Ga. App. at 705–07. But it incorrectly applied that history and drew the wrong lessons from it.

A. Section 17-10-1(f) and its predecessor statutes derogated from the common-law rule that courts could only alter sentences in the term when originally imposed.

Under the common law as it existed on 14 May 1776, which to this day remains "the backstop law of Georgia," (*State v. Chulpayev*, 296 Ga.

764, 780 (2015); accord OCGA § 1-1-10(c)(1)), a court's power to modify its judgments ended with the term of court. *United States v. Mayer*, 235 U. S. 55, 67–69 (1914) (explaining the within-term limits of courts' power and the exceptions thereto and collecting citations). That rule applied to sentences imposed upon convictions. *Jobe v. State*, 28 Ga. 235, 236 (1859).

In the 20th century, Georgia derogated from the common law of sentencing. From 1919 until 1974, in felony cases tried to a jury in this State, the jury fixed the sentence. See *Harris v. State*, 166 Ga. App. 202, 204(3) (1983). And the judge was required to "commit the convicted person to the penitentiary in accordance with the verdict of the jury." Ga. Code of 1933, § 27-2502. In 1950, the General Assembly amended § 27-2502 to confer on judges the "power and authority to suspend or probate … sentence[s]" fixed by the jury, though they could not do so "[a]fter the … prisoners … entered upon their services in the penal institutions of Georgia …." Ga. L. 1950, p. 352, § 3A. Important to note is that the statute dealt specifically with the power to "probate or suspend" only jury-imposed sentences. It did not concern or restrain a court's common-law power to modify within the term of court a sentence that itself had fixed—misdemeanor sentences and felony sentences pronounced upon guilty pleas or after bench trials—where the judge had always retained a plenary power during the term of court. *Phillips v. State*, 95 Ga. App. 277, 278–79 (1957).

Later, in 1964 (by Ga. L. 1964, p. 352, § 1), the General Assembly abandoned this mixed treatment of jury-fixed and judge-fixed sentences and brought any restriction upon judges' "power and authority to suspend or probate" a jury-fixed sentence back into the common-law tradition: "[a]fter the term of court at which the sentence is imposed …, [the judge] shall have no authority to suspend, probate, modify, or change the sentence …." Entry into state prison ceased to curb a court's power, and its common-law power to modify its own sentences continued.

But it was widely apparent that the common-law term-of-court rule could operate arbitrarily. Terms varied from as long as six months for some courts to as few as two months for others. See OCGA § 15-6-3. Furthermore, one defendant could be sentenced on the first day of the term and enjoy an ample opportunity to seek modification, another on the very last day of the term and have no opportunity at all. Accordingly, in 1986, the General Assembly tinkered with the scheme again and provided that "[a]fter the term of court, *or 60 days* from the date on which the sentence was imposed …, whichever time is greater, [the judge] shall have no authority to suspend, probate, modify, or change the sentence …." Ga. L. 1986, p. 842 (emphasis added).

The legislature dropped the "term of court or 60 days" provision entirely in 1993. Ga. L. 1993, p. 1654. This amounted to a full reversion to the common-law term-of-court rule. *Levell v. State*, 247 Ga. App. 615, 616 (2001); *Latham v. State*, 225 Ga. App. 147, 148–49 (1997),

superseded by statute, OCGA § 17-10-1(f), as recognized in *Gray v. State*, 351 Ga. App. 703, 706 n.5 (2019).

The specific language that this case concerns was enacted in 2001 when the general Assembly added § 17-10-1(f):

> Within one year of the date on which the sentence is imposed, or within 120 days after receipt … of the remittitur upon affirmance of the judgment after direct appeal, whichever is later, the court imposing the sentence has the jurisdiction, power, and authority to correct or reduce the sentence and to suspend or probate all or any part of the sentence imposed. Prior to entering any [such] order …, the court shall afford notice and an opportunity for a hearing to the prosecuting attorney. Any order modifying a sentence which is entered without notice and an opportunity for a hearing … shall be void ….
>
> Ga. L. 2001, p. 1043, § 1.

B. Whether under common-law or statute, temporal limitations on courts' power and authority to alter sentences were jurisdictional.

In *Gray*, the Court of Appeals concluded that the inclusion of the word "jurisdiction" in § 17-10-1(f) set a hard limit on a trial court's power to modify an imposed sentence—no matter when a defendant had invoked that power. But "jurisdiction" adds no meaning that "power and authority" do not already convey. Indeed, "power and authority" constitute the very definition of the former term. *Mar-Pak Michigan v. Pointer*, 226 Ga. 189, 191 (1970); *Kennedy v. Durham*, 219 Ga. 859, 862 (1964). And under the common law (as well as under every Georgia statutory iteration of a court's power to modify its sentences), the temporal limitations—whether the term of court, entry to a state

prison, or a fixed period—had always been regarded as jurisdictional (meaning necessary to invoke the court's power and authority). See, *e.g.*, *Porter v. Garmony*, 148 Ga. 261 (96 S. E. 426, 427) (1918) (holding that "[w]hen the term at which the sentence imposed expired, the judge was without *authority* to change it" (emphasis added)); *Barthell v. State*, 286 Ga. App. 160, 161 (2007) (holding that where "[n]o motion to vacate that sentence [was] made during [the] term of court [when it was imposed], the trial court was without *authority* to vacate it" (emphasis added)); *Shaw v. State*, 233 Ga. App. 232, 232 (1998) (holding that "[a] trial court is without *jurisdiction* to modify a sentence after the expiration of the term of court during which the sentence was entered" (emphasis added)); *Mauldin v. State*, 139 Ga. App. 13, 13 (1976) (holding that "since the revocation of probation and the modification or change in the sentence occurred at a different term of court, the superior court lost *jurisdiction* to change or modify the original sentence" (emphasis added)); *Phillips*, 95 Ga. App. at 278–79 (holding "that the trial court has *power* to amend and modify its sentences only at the term during which they are imposed" and that "the trial court was … without *jurisdiction*, at a subsequent term of court, to modify his sentence" (emphasis added)).

C. *Under both common law and statutes, timely invocation extended courts' jurisdiction, power, and authority beyond normal temporal limitations.*

Despite the general rule that the temporal limitations on a court's power to modify were jurisdictional, the common law, as well as every Georgia statutory iteration of the power to modify a sentence, recognized an exception to those limitations: if invoked seasonably, while the court had jurisdiction, that power endured beyond the term and until the court ruled.[2] *Mayer*, 235 U. S. at 67 (explaining that "a court cannot set aside or alter its final judgment after the expiration of the term … unless the proceeding for that purpose was begun during that term"); accord *Doby v. Evans*, 258 Ga. 777, 777 (1988); *Kaiser v. State*, 285 Ga. App. 63, 65 (2007); *Reed v. State*, 246 Ga. App. 373, 375 (2000); *State v. Bradbury*, 167 Ga. App. 390, 392 (1983); *Porterfield v. State*, 139 Ga. App. 553, 554 (1976); see also *United States v. Krohn*, 700 F. 2d 1033, 1036 (5th Cir. 1983) (explaining that "under the common law, the term-of-court rule limited only the filing—not the *decisional*—period applicable to motion for reduction of sentence" (emphasis original)).

[2] An identical exception to the same-term-of-court rule existed for civil judgments. *Hume v. Bowie*, 148 U. S. 245, 253 (1893); *Phillips v. Negley*, 117 U. S. 665, 673 (1886).

D. Because "jurisdiction" added no meaning to "power and authority," the Court of Appeals erred in concluding that the present version of § 17-10-1(f) altered the common law in a way that its predecessors did not.

The Court of Appeals invoked the plain-language canon to revoke *sub silentio* the venerable invocation rule, which had always moderated the temporal limitations upon a court's power to modify the sentence. *Gray*, 351 Ga. App. at 704. To start, it presumed that the General Assembly had acted "with full knowledge of the existing condition of the law." *Id.* at 705. Then, it found significant that the 2001 legislation employed "the word 'jurisdiction' for the first time in connection with the trial court's authority" (*id.* at 707) and that it "could have included the common law exception [by] allowing a court to rule on any motion *filed* within one year of sentencing, but it chose not to" (*id.* at 706 (emphasis original)). This was enough to signal to the Court that the General Assembly intended to do away with a procedural principle that had stood unquestioned for 225 years. And so it declared.

The Court's reasoning stumbles at every step. First, the plain-language canon is not the exclusive compass through to the meaning of statutory text. History and context are critical. See, *e.g.*, *United States v. Smith*, 331 U. S. 469, 473 (1947) (rejecting an argument "that because the literal language of [then Federal Rule of Criminal Procedure 33] places the five-day limit only on the making of the motion [for a new trial], it does not limit the power of the court later to grant the motion, and the power survives affirmance of the judgment ...."). Second,

the presumption that the legislature acts "with full knowledge" of the law cuts both ways. If similar statutory language in the past versions of the statute were not regarded as curtailing the common-law power to extend the term when a sentence modification was seasonably invoked, the addition of the synonymous, redundant word "jurisdiction" to the "power and authority" used in the past hardly reflects an intention to so radically change the law. It just as well might reflect an intention let the law alone. "Jurisdiction" adds nothing. See *Mar-Pak Michigan*, 226 Ga. at 191; *Kennedy*, 219 Ga. at 862. For a word most naturally read as part of a "triplet [or] synonym string," (Bryan A. Garner, *Garner's Dictionary of Legal Usage*, 294 (3rd ed. 2011)), the Court of Appeals gave "jurisdiction" a lot of weight to carry.

The surplusage canon, which dictates that every word be given meaning, if possible, animated the Court of Appeals when it construed "jurisdiction" to reach out to and strangle the venerable invocation rule. But,

> like all other canons, this one must be applied with judgment and discretion, and with careful regard to context. It cannot always be dispositive because (as with most canons) the underlying proposition is not invariably true. Sometimes drafters do repeat themselves and do include words that add nothing of substance, either out of a flawed sense of style or to engage in the ill-conceived but lamentably common belt-and-suspenders approach. Doublets and triplets abound in legalese …."
>
> Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 176–77 (2012).

Section 17-10-1(f) and all of its statutory predecessors are in derogation of the common law as it existed on May 14, 1776. See OCGA § 1-1-10(c)(1). Under the common law, if invoked during the term of court, a court's otherwise-limited jurisdiction to modify a sentence endured beyond the term and until the court ruled. "Statutes which invade the common law … are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." *Isbrandtsen Co. v. Johnson*, 343 U. S. 779, 783 (1952). "In order to abrogate a common law principle, the statute must 'speak directly' to the question addressed by the common law." *United States v. Texas*, 507 U. S. 529, 534 (1993) (citation omitted).

These common-law canons prevail in Georgia. The common law "must remain of force until changed by legislation." *McPhaul v. McPhaul*, 15 Ga. 486 (104 S. E. 241, 243) (1920). Statutes in derogation of it must be strictly construed (*Heard v. Neighbor Newspapers*, 259 Ga. 458, 458(5)(b) (1989); *Ball v. Lastinger*, 71 Ga. 678, 680 (1883)) "and not extended beyond [their] plain and explicit terms" (*Pickens v. City of Waco*, 352 Ga. App. 37, 40 (2019)). See generally Scalia & Garner, *Reading Law* at 318–19 (2012) (discussing the presumption against a change in the common law). To be sure, if the General Assembly intended to set an absolute limit on a court's timely invoked power to render a decision, it knows how to do so. See OCGA § 15-6-21 (setting

absolute limits on the time in which superior courts must decide motions once submitted for decision); cf. Ga. Const. Art. 6, § 9, ¶ II (obliging the Supreme Court and Court of Appeals to "dispose of every case at the term for which it is entered on the court's docket for hearing or at the next term").

E. Gray *conflicts with earlier Court of Appeals precedent that acknowledged a timely invocation will extend the power to modify a sentence.*

A decade before it decided *Gray*, the Court of Appeals considered its inverse in *Tyson v. State*, 301 Ga. App. 295 (2009). There, the Court of Appeals held that the State's within-term motion extended the superior court's power to modify appellant's sentence beyond the term when imposed.[3] *Id.* at 296. *Gray*'s holding does not square with *Tyson*'s: The State's timely invocation extends the court's power to modify but the defendant's does not?

Amici do not go so far as to suggest that the panel in *Gray* ought to have been bound by the holding in *Tyson*:

[3] That the State's timely invocation extended the court's power to modify was one of two bases on which the Court of Appeals rejected the appellant's claims in *Tyson*. The other was that the superior court had authority to modify the appellant's probation for the duration of its term under § 42-8-34(g). *Tyson*, 301 Ga. App. at 297. Both bases count as holdings. "[W]here there are two grounds, upon either of which the judgment of the trial court can be rested, and the appellate court sustains both, the ruling on neither is obiter, but each is the judgment of the court, and of equal validity with the other." *Dooly v. Gates*, 194 Ga. 787, 793 (1942) (quoting *Union Pacific R. Co. v. Mason City Co.*, 199 U. S. 160, 166 (1905)). See generally Bryan A. Garner, et al., *The Law of Judicial Precedent* 122–25 (2016) (explaining that both of two or more explicitly alternative holdings are both precedential, not dicta).

For one thing, *Tyson* was a physical precedent, one judge having concurred only in the judgment. 301 Ga. App. at 298. So it was just persuasive authority. Ct. App. R. 33.2(a)(2); *Chaparral Boats, Inc. v. Heath*, 269 Ga. App. 339, 349–50 (2004) (Barnes, J., concurring specially); see also Stephen Louis A. Dillard, *Open Chambers Revisited: Demystifying the Inner Workings and Culture of the Georgia Court of Appeals*, 68 Mercer L. Rev. 1, 8–10 (2016) (discussing the Court of Appeals' physical precedent rule). And (under Georgia Court of Appeals practice at least) it was not a horizontal precedent that would have constrained the panel in *Gray*. See *White v. State*, 305 Ga. 111, 121–22 (2019) (holding that the Court of Appeals erred by abandoning its own precedents); see also Garner, et al., *The Law of Judicial Precedent* at 37–38 (explaining that federal circuit court panels must abide by prior panel decisions from the same court).

For another, *Tyson* interpreted the common-law limitations on a sentencing court's power to modify, whereas *Gray* interpreted § 17-10-1(f). Section 17-10-1(f) is a vehicle for defendants to seek relief, not the State. It contemplates the correction, reduction, suspension, or probation of a sentence, as well as notice and an opportunity to respond for the prosecutor. And had the General Assembly spoken clearly, it could have derogated completely from the common law, as the panel in *Gray* presumed. *United States v. Texas*, 507 U. S. at 534; see also Scalia & Garner, *Reading Law* at 318 (explaining that "statutes will not be

interpreted as changing the common law unless they effect the change with clarity").

Still, a warped reflection between a sentencing court's mirrored statutory and common-law powers ought at least to have given the *Gray* panel pause. Instead, it got no mention.

F. The Court of Appeals' wrongful abandonment of the common law in Gray *disrupts both state and federal practice.*

As this Court's grant of certiorari suggests, the question on petition is of "great concern, gravity, [and] importance" to far more litigants than just Gray. Sup. Ct. R. 40. Undersigned counsel practice regularly in the postconviction space. They can attest to the significant impact the opinion below will have on their clientele, who frequently seek relief under § 17-10-1(f) after affirmance on appeal. *Gray* has given busy courts a pocket veto with which to deny those clients relief, either without consideration or for the inability to provide the State notice and an opportunity for a hearing within 60 days.

Of particular concern, however, are prisoners under state sentence seeking relief under the AEDPA. Before *Gray*, the pendency of motion to modify sentence would toll the limitations period under the AEDPA until the sentencing court ruled. *Wall v. Kholi*, 562 U. S. 545, 553–56 (2011). But the Court of Appeals blurred that black-and-white rule. Now it is unclear whether a pending motion to modify would toll the limitations period until the sentencing court entered an order or until

the motion became moot by mechanical operation of the statute. That morass is avoided, however, through the persistence of the common-law invocation rule, which the General Assembly did not abrogate.

CONCLUSION

If the General Assembly intended to change the invocation rule when it added "jurisdiction" to the terms "power and authority" in § 17-10-1(f), it did not do so with the clarity of purpose necessary to abrogate a procedure that had been imbedded in the prevailing common law for centuries. To abrogate a common-law principle, a statute must speak directly to the question. The common-law principle that timely invocation extends jurisdiction to enter an otherwise-untimely decision long applied to statutes governing courts' "power and authority" to modify sentences. And it does still.

Amici urge this Court to vacate the judgment of the Court of Appeals.[4]

[signature page follows]

[4] Vacatur, not reversal, is the proper remedy, contrary to the prayer in the petition-stage brief from amici. By deciding the case on the § 17-10-1(f) issue, the Court of Appeals elided whether the original sentencing judge had jurisdiction to vacate the successor judge's modification order. See *Gray*. 351 Ga. App. at 703. Amici offer no views on that issue other than to note it could still be dispositive of Gray's appeal.

Respectfully submitted on 15 May 2020 by

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CERTIFICATE OF SERVICE

I certify that before filing this brief on 15 May 2020, I served a copy of it via United States mail counsel for the appellant and appellee:

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SUPREME COURT OF GEORGIA
Case No. S20G0192

May 15, 2020

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

MARK GRAY v. THE STATE

Upon consideration of the "Application for Leave to File under Rule 23 (3)" an amicus curiae brief in support of the appellant filed by amici curiae the Georgia Association of Criminal Defense Lawyers and the Georgia Public Defender Counsel, it is hereby ordered that the application be granted.

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.
Witness my signature and the seal of said court hereto affixed the day and year last above written.

, Clerk