

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
March 7, 2023 Session

FILED

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Clerk of the
Appellate Courts

STATE OF TENNESSEE v. PERVIS TYRONE PAYNE

Appeal from the Criminal Court for Shelby County
Nos. 87-04408, 87-04409, 87-04410 Paula L. Skahan, Judge

No. W2022-00210-CCA-R3-CD

In this case of first impression, the State appeals the trial court's sentencing hearing order that the Defendant's two life sentences be served concurrently after he was determined to be ineligible for the death penalty due to intellectual disability pursuant to Tennessee Code Annotated section 39-13-203(g) (Supp. 2021) (subsequently amended). The State argues that the consecutive alignment of the Defendant's original sentences remained final and that the trial court lacked jurisdiction to consider manner of service. The Defendant responds that the trial court had jurisdiction to sentence him, including determining the manner of service of his sentences, and did not abuse its discretion in imposing concurrent life sentences. After considering the arguments of the parties, the rules of statutory construction, and other applicable legal authority, we conclude that the trial court properly acted within its discretion in conducting a hearing to determine the manner of service of the Defendant's life sentences. Accordingly, the judgments of the trial court are affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed

ROBERT H. MONTGOMERY, JR., J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER, J., and CAMILLE R. MCMULLEN, P.J., joined.

Jonathan Skrmetti, Attorney General and Reporter; Andrée Sophia Blumstein, Solicitor General; Andrew C. Coulam, Senior Assistant Attorney General; Amy P. Weirich, District Attorney General; and Steve Jones, Assistant District Attorney General, for the appellant, State of Tennessee.

Kelley J. Henry, Amy D. Harwell, and Ashley W. Thompson, Federal Public Defenders, Nashville, Tennessee, for the appellee, Pervis Tyrone Payne.

OPINION

Background

In 1988, the Defendant, Pervis Tyrone Payne, was convicted of two counts of first degree murder and one count of assault with intent to commit murder for the stabbing of Charisse Christopher and her two young children. *See State v. Payne*, 791 S.W.2d 10 (Tenn. 1990), *aff'd sub nom Payne v. Tennessee*, 501 U.S. 808 (1991). The Defendant testified at trial that he discovered the victims after the attack; however, the jury rejected this theory, and the Tennessee Supreme Court stated on appeal that the evidence at trial “virtually foreclose[d] the possibility that an unidentified intruder committed these murders and disappeared out the front door before Defendant entered the apartment.” *Id.* at 15. The jury sentenced the Defendant to death for each of the murder convictions, and the trial court held a separate sentencing hearing for the assault conviction.

During the sentencing hearing, the Defendant’s trial counsel stated with regard to the State’s motion for consecutive sentences: “We’ll leave it up to the Court. I think, in light of the death penalty sentence, the motion for consecutive sentencing is irrelevant.” The prosecutor responded:

As far as the motion for consecutive sentencing goes, I sincerely hope that it is totally irrelevant, but, being a realist, I cannot say that it is. The defendant has been sentenced to death by electrocution on two separate charges of murder in the first degree. Should our Courts, our Appellate Courts, at least, lose touch with reality once again and declare the statute unconstitutional or somehow commute these two offenses to life in the Penitentiary, it would be important as to whether or not they are consecutive or concurrent. And that’s why we have filed the motion.

The State argued that consecutive sentences were justified under *Gray v. State*, 538 S.W.2d 391 (Tenn. 1976), because the Defendant was a dangerous offender who had little or no regard for human life. At the conclusion of the hearing, the trial court imposed a sentence of thirty years for the assault conviction “based on particularly the magnitude of this offense and how horrible this was[.]” The trial court ordered the thirty-year sentence to be served consecutively to the death sentences, explaining “that becomes only relevant, I think, because of – I think we have to anticipate what might occur in the future and what may be taking place in felony procedures, whether there could be impossibilities. So I think consecutive sentencings would be appropriate in this situation.” The Defendant’s trial counsel asked, “Are all three sentences consecutive?” To which the trial court responded, “All to run consecutive, yes.” The Defendant did not challenge the consecutive

alignment of his sentences in the appeal of his convictions and death sentences.¹ See generally *State v. Payne*, 791 S.W.2d 10 (Tenn. 1990).

The Defendant subsequently sought post-conviction relief but did not raise trial counsel's failure to challenge the consecutive alignment of his sentences as a basis for ineffective assistance of counsel. See *Pervis Tyrone Payne v. State*, No. 02C01-9703-CR-00131, 1998 WL 12670 (Tenn. Crim. App. Jan. 15, 1998), *perm. app. denied* (Tenn. June 8, 1998). Over the years, the Defendant unsuccessfully sought various forms of collateral relief but never raised the consecutive alignment of his sentences as an issue. See, e.g., *Payne v. Bell*, 418 F.3d 644, 646 (6th Cir. 2005) (federal habeas corpus petition); *Payne v. State*, 493 S.W.3d 478, 480 (Tenn. 2016) (petition for writ of error coram nobis), *cert. denied* 137 S. Ct. 1327 (Mar. 20, 2017); *Pervis Tyrone Payne v. State*, No. W2018-01048-CCA-R28-PD (Tenn. Crim. App. Jan. 4, 2019) (order) (motion to reopen post-conviction proceedings); *Pervis Payne v. State*, No. W2016-02326-CCA-R28-PD (Tenn. Crim. App. Aug. 1, 2017) (order) (motion to reopen post-conviction proceedings), *perm. app. denied* (Tenn. Nov. 21, 2017); *Pervis Tyrone Payne v. Wayne Carpenter, et al.*, No. M2014-00688-COA-R3-CV, 2016 WL 4142485 (Tenn. Ct. App. Aug. 2, 2016) (declaratory judgment action seeking to enjoin his execution), *perm. app. denied* (Tenn. Nov. 16, 2016); *Pervis Tyrone Payne v. State*, No. W2013-01215-CCA-R28-PD (Tenn. Crim. App. July 29, 2013) (order) (motion to reopen post-conviction proceedings), *perm. app. denied* (Tenn. Nov. 14, 2013); *Pervis Payne v. State*, No. W2007-01096-CCA-CCA-R3-PD, 2007 WL 4258178 (Tenn. Crim. App. Dec. 5, 2007) (petition for post-conviction DNA analysis), *perm. app. denied* (Tenn. Apr. 14, 2008).

On May 11, 2021, the General Assembly amended Tennessee Code Annotated section 39-13-203, the statute addressing intellectual disability in the context of capital sentencing. See 2021 Tenn. Pub. Acts, ch. 399, § 2. As relevant to this appeal, the legislature added the following subsection:

(g)(1) A defendant who has been sentenced to the death penalty 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 the defendant is intellectually disabled. The motion must set forth a colorable claim that the defendant is ineligible for the death penalty due to intellectual disability. Either party may appeal the trial court's decision in accordance with Rule 3 of the Tennessee Rules of Appellate Procedure.

¹ During the present proceedings, the Defendant argued in the trial court that due to the lack of judgment forms and inadequate findings by the original trial judge, the record was "ambiguous" with regard to whether the death sentences were ordered to be served consecutively. He does not raise this argument on appeal.

- (2) 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.

T.C.A. § 39-13-203(g). On May 12, 2021, the Defendant filed a petition asserting that he was ineligible for the death penalty because he was intellectually disabled. With his petition, the Defendant included reports from Dr. Daniel Martell and Dr. Daniel Reschly, both of whom concluded that the Defendant met the clinical and statutory definitions for intellectual disability. *See* T.C.A. § 39-13-203(a).² The State conceded that the Defendant's petition set forth a colorable claim and requested the opportunity to have the Defendant evaluated by its own expert, Dr. Tucker Johnson, prior to an evidentiary hearing on the petition.

On November 18, 2021, the State filed a notice that it was withdrawing its request for an evidentiary hearing. Based upon its review of Dr. Johnson's report and other evidence, the State stipulated that the Defendant "would be found intellectually disabled" and should receive two life sentences for the murder convictions. Both parties agreed that the Defendant was not eligible for a sentence of life without the possibility of parole because it was not an available sentence for first degree murder at the time of the offenses in this case. *See* T.C.A. § 39-13-202(b) (Supp. 1987); *State v. Cauthern*, 967 S.W.2d 726, 735 (Tenn. 1998).

The trial court held a hearing on November 23, 2021, during which defense counsel presented their position that the trial court should not only vacate the death sentences but also should consider the manner of service of the sentences based upon new evidence that the Defendant was not a dangerous offender. The State responded that the intellectual disability finding did not affect the consecutive alignment of the sentences and that the trial court lacked discretion to consider the matter under *res judicata* and the law of the case doctrine. The trial court entered an order that same day vacating the Defendant's capital sentences but taking under advisement the issue of whether it could consider the manner of service of the life sentences.

The parties filed supplemental briefs on the issue of the trial court's sentencing authority after vacating a death sentence under Tennessee Code Annotated § 39-13-203(g). The Defendant argued that the law of the case doctrine applied only to prior appellate decisions rather than trial court orders and, thus, did not prevent the trial court from

² The statutory definition of intellectual disability under Tennessee Code Annotated section 39-13-203(a) was also amended as part of the same legislation that created subsection 203(g). *See* 2021 Tenn. Pub. Acts, ch. 399, § 1. However, this amendment was not raised as an issue in the trial court and is not relevant to this appeal.

considering the manner of service of the sentences. The Defendant further argued that even if the doctrine applied, it is a discretionary rule rather than a constitutional mandate or a jurisdictional limitation and that the changed factual and legal landscape justified the trial court's consideration of the issue. *See State v. Hall*, 461 S.W.3d 469, 500-01 (Tenn. 2015) (exercising discretion to review the sufficiency of the evidence in a delayed appeal even though none of the exceptions to the law of the case doctrine applied). The Defendant similarly argued that *res judicata* and collateral estoppel did not apply. The State argued that the trial court's order vacating the Defendant's death sentences did not impact the consecutive alignment of the sentences, which remained final. The State argued that subsection 203(g) "does not authorize revisiting the manner of serving any sentence" and that the only remedy provided by statute was a jury trial to decide between a sentence of life or life without parole. *See* T.C.A. §§ 39-13-203(d); -206(e). The State also argued that the consecutive alignment was the law of the case and pointed to several appellate court opinions in which the consecutive alignment of sentences remained undisturbed on remand despite resentencing being required for other issues. The Defendant filed a response arguing, as relevant here, that the silence of subsection 203(g) and the other first degree murder sentencing statutes with regard to the manner of service of multiple sentences "signifies only that other sentencing provisions of the criminal code apply — namely Tennessee Code Annotated § 40-35-115."

On December 8, 2021, the trial court entered an order granting a new sentencing hearing on the issue of whether the life sentences would be served concurrently or consecutively. The trial court concluded that the Defendant was "entitled to a sentencing hearing based on issues of fundamental fairness" in order to "present evidence that the legal and factual posture of this case has changed between Mr. Payne's trial and [the] present." The trial court noted that the original trial judge "made exhaustive findings of fact regarding Mr. Payne's sentence for assault to commit first degree murder" as was "required under the applicable sentencing statutes in effect at the time." However, the trial court found that "the record does not appear to contain findings of fact which comport with the requirements of *Gray* and the applicable statutes and court rules" with regard to consecutive sentencing. The trial court opined that if the Defendant had raised the issue on direct appeal – or argued during post-conviction that appellate counsel was ineffective for failing to raise the issue on direct appeal – his case would have been remanded for a new sentencing hearing. However, the trial court rejected the State's waiver argument, finding that "fundamental 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." The trial court noted that "no court of record has ever concluded [the original trial judge's] imposition of consecutive sentences was proper." Further, the trial court concluded that it was not bound by the law of the case doctrine, *res judicata*, or collateral estoppel.

With regard to the State's statutory argument, the trial court stated as follows:

[T]he Court acknowledges the first degree murder statutes do not explicitly provide for a new sentencing hearing as to the manner [of service] 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 service] 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 service] of a petitioner's[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.

In a footnote, the trial court cited *State v. Reid*, 981 S.W.2d 166, 170 (Tenn. 1998), for the proposition 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.”

After a two-day sentencing hearing in December 2021, during which multiple witnesses testified on behalf of the Defendant, the trial court issued a sentencing order on January 31, 2022. The trial court found that the State failed to carry its burden of showing by a preponderance of the evidence that the Defendant is a dangerous offender based upon the current need to protect the public.³ Accordingly, the trial court ordered the Defendant's life sentences to be served concurrently to each other but consecutively to the sentence for the assault conviction, the latter of which had not been affected by the intellectual disability finding. The State filed a timely notice of appeal. See T.C.A. § 40-35-402(a) (stating the State may appeal the “manner of the service of the sentence imposed by the sentencing court,” including “the imposition of concurrent sentences”).

Analysis

On appeal, the State argues that the trial court lacked jurisdiction under Tennessee Code Annotated section 39-13-203(g) to consider the manner of service of the Defendant's sentences. The State asserts that “[t]he plain language of the statute solely concerns determining whether a defendant is categorically ineligible for capital punishment due to intellectual disability and, if so, what eligible sentence may be instituted in its place.” Because the consecutive alignment of the Defendant's sentences “was not constitutionally forbidden by the finding of intellectual disability,” the State contends that portion of the Defendant's sentence remained final and could not be amended. Further, the State argues that by basing its decision upon “fundamental fairness [due to] perceived faults in the

³ The State does not challenge the merits of this ruling on appeal.

original sentencing hearing and the supposed ineffective assistance of Payne’s original counsel for not raising them on direct appeal,” the trial court “effectively grant[ed] post-conviction relief to broaden its resentencing authority,” despite the fact that subsection 203(g) does not provide a means of reopening post-conviction proceedings.

The Defendant argues that after vacating his death sentences under subsection 203(g), the trial court had subject matter jurisdiction to impose new sentences, which included determining whether they should be served consecutively or concurrently. The Defendant argues that manner of service is a non-jurisdictional aspect of his sentence and that concurrent sentences do not directly contravene any statute. The Defendant argues that the silence of subsection 203(g) – as well as the other first degree murder sentencing statutes – with regard to the manner of service of multiple first degree murder sentences does not indicate that the legislature intended to restrict or modify the trial court’s sentencing authority under the general sentencing statutes and Rules of Criminal Procedure. The Defendant agrees that subsection 203(g) does not fall under the Post-Conviction Procedure Act but disagrees with the State’s characterization of the trial court’s statements in its order regarding “post-conviction” and ineffective assistance of counsel.

This is a case of first impression regarding the construction of Tennessee Code Annotated section 39-13-203(g) as it relates to the extent of the trial court’s sentencing authority following a finding that a death-sentenced defendant is intellectually disabled and, thus, ineligible for the death penalty. *Cf. Byron Black v. State*, No. M2022-00423-CCA-R3-PD, 2023 WL 3843397 (Tenn. Crim. App. June 6, 2023) (interpreting T.C.A. § 39-13-203(g)(2)). Issues of statutory construction are questions of law and, as such, are reviewed de novo with no presumption of correctness. *State v. Welch*, 595 S.W.3d 615, 621 (Tenn. 2020). The legislature has provided that criminal statutes 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.” T.C.A. § 39-11-104. “The most basic principle of statutory construction is to ascertain and give effect to the legislative intent without unduly restricting or expanding a statute’s coverage beyond its intended scope.” *Welch*, 595 S.W.3d at 621 (quoting *State v. Howard*, 504 S.W.3d 260, 269 (Tenn. 2016)). “We endeavor to construe statutes in a reasonable manner that avoids statutory conflict and provides for harmonious operation of the laws.” *Brown v. Jordan*, 563 S.W.3d 196, 198 (Tenn. 2018) (internal quotation omitted). Courts must “avoid a construction that leads to absurd results.” *Welch*, 595 S.W.3d at 621.

Generally, this court will “begin with the statute’s plain language. When the statutory language is clear and unambiguous, we must apply its plain meaning in its normal and accepted use.” *State v. Frazier*, 558 S.W.3d 145, 152 (Tenn. 2018) (internal citation omitted). This court will “also consider ‘[t]he overall statutory framework’” and “well-established canons of statutory construction” to determine the meaning of a statute. *State*

v. Deberry, 651 S.W.3d 918, 924-25 (Tenn. 2022) (citations omitted). “[S]tatutes ‘in pari materia’—those relating to the same subject or having a common purpose—are to be construed together[.]” *Id.* at 925 (quotation omitted). “When a statute’s meaning is clear and unambiguous after consideration of the statutory text, the broader statutory framework, and any relevant canons of statutory construction, we enforce the statute as written.” *Id.* However, “[w]hen the statutory language is silent as to the issue at hand, the ‘objective and spirit behind the legislation’ may be determinative.” *State v. McNack*, 356 S.W.3d 906, 909 (Tenn. 2011) (quoting *Lipscomb v. Doe*, 32 S.W.3d 840, 845 (Tenn. 2000)). Additionally, “[w]hen the statutory language is ambiguous, the legislative history often offers guidance in discerning the General Assembly’s purpose and intent.” *Powers v. State*, 343 S.W.3d 36, 50 (Tenn. 2011). An ambiguity exists when the parties derive different, but both reasonable, interpretations of a statute. *Frazier*, 558 S.W.3d at 152. If, after the application of all of these rules and canons of statutory construction, the “statute remains grievously ambiguous or uncertain, the rule of lenity operates as a ‘tie-breaker’ and requires us to resolve the ambiguity in the defendant’s favor.” *Deberry*, 651 S.W.3d at 925 (internal citation omitted).

When the legislature amended Tennessee Code Annotated section 39-13-203 in May 2021, it created a procedural mechanism for defendants who had previously been sentenced to death to litigate whether they were ineligible for the death penalty due to intellectual disability. Tennessee Code Annotated section 39-13-203(g) provides as follows:

- (g)(1) A defendant who has been sentenced to the death penalty 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 the defendant is intellectually disabled. The motion must set forth a colorable claim that the defendant is ineligible for the death penalty due to intellectual disability. Either party may appeal the trial court’s decision in accordance with Rule 3 of the Tennessee Rules of Appellate Procedure.
- (2) 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.

Significantly, subsection 203(g) is silent with regard to the procedure to be followed between the filing of a motion or petition that sets forth a colorable claim of intellectual disability that has not been previously adjudicated on the merits and an appeal of the trial court’s decision. Subsection 203(g) also does not address the trial court’s sentencing authority after concluding that a defendant is ineligible for the death penalty due to intellectual disability. As a result, this is not a situation where this court may interpret and

apply the plain language of this statute alone. Thus, we will examine the broader statutory scheme, the legislative history, and other sources to determine the statute’s meaning.

The State argues that the legislative history behind subsection 203(g) “confirms the narrow scope” of the statute. According to the State, “the legislation merely addresses the categorical ineligibility for the death penalty for those who have not had their intellectual-disability claims adjudicated on the merits.” On the Senate floor, the sponsor of the bill that would become subsection 203(g) explained as follows:

To uphold our constitutional responsibilities, as well as Tennessee’s commitment since 1990 to prohibit the execution of individuals with intellectual disability, this legislation also provides a procedural path for the very limited number of individuals with an intellectual disability who are already under the death sentence and who have not had their intellectual-disability claims fully adjudicated by the courts on the merits.

Hearing on S.B. 1349 Before the S. Floor Sess., 112th General Assembly (Tenn. Apr. 26, 2021) (Sen. Gardenhire). The Senate sponsor further addressed the procedural bar contained in subsection 203(g)(2), stating, “[T]his bill will not provide another bite of the apple because those few individuals never got a first bite at the apple.” *Id.* Similarly, the House sponsor stated that the proposed legislation “would not create a second or subsequent appeal hearing on the issue of intellectual disability to someone who has been given the sentence of capital punishment.” *Hearing on H.B. 1062 Before the H. Floor Sess.*, 112th General Assembly (Tenn. Apr. 26, 2021) (Rep. Hawk).

We have reviewed the legislative history of the statute and conclude that the discussion and debate focused on updating the statutory definition of intellectual disability and preventing relitigation of the issue if it had been previously decided on the merits. *See Hearing on S.B. 1349 Before the S. J. Comm.*, 112th General Assembly (Tenn. Apr. 13, 2021); *Hearing on H.B. 1062 Before the H. Crim. Just. Comm.*, 112th General Assembly (Tenn. Apr. 14, 2021); *Hearing on H.B. 1062 Before the H. Crim. Just. Subcomm.*, 112th General Assembly (Tenn. Apr. 7, 2021). No legislative discussion addressed sentencing procedures after a successful intellectual disability petition, nor was any mention made regarding the statute’s effect on a defendant with multiple first degree murder sentences. Thus, the “narrow scope” of the statute identified by the State pertained to the number of defendants to whom subsection 203(g) applied rather than to a trial court’s jurisdiction to sentence a defendant once intellectual disability has been determined. The legislative history is silent on the issue.

Looking to the broader statutory scheme, other provisions related to sentencing in first degree murder cases provide significant guidance. When a defendant is determined to be intellectually disabled, Tennessee Code Annotated section 39-13-203(d) provides that

after a guilty verdict and with proper notice from the State, “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” pursuant to the procedures set out in Tennessee Code Annotated section 39-13-207. Similarly, Tennessee Code Annotated § 39-13-206(e) provides that when a previously imposed death sentence is held to be “invalid or unconstitutional so as to permanently preclude a sentence of death as to that individual,” the trial court shall conduct a jury sentencing hearing pursuant to section 207 to decide between a sentence of life or life without parole. Because a finding of intellectual disability renders the death penalty unconstitutional as to that individual defendant, *see Atkins v. Virginia*, 536 U.S. 304, 321 (2002); *Van Tran v. State*, 66 S.W.3d 790, 812 (Tenn. 2001), we presume 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 pursuant to subsection 203(g). *Young v. City of LaFollette*, 479 S.W.3d 785, 792 (Tenn. 2015) (“It is a fundamental tenet of statutory construction that this Court must presume that the Legislature knows the law and makes new laws accordingly.”) (citing *Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 527 (Tenn. 2010)). Although both subsections 203(d) and 206(e) provide for a jury sentencing hearing pursuant to Tennessee Code Annotated section 39-13-207, the Defendant in this case was not eligible for a sentence of life without parole because it was not an available sentencing option at the time of the offense. *See* T.C.A. § 39-13-202(b) (Supp. 1987); *State v. Cauthern*, 967 S.W.2d 726, 735 (Tenn. 1998). In such a situation, Tennessee Code Annotated section 39-13-208(c) provides, “[T]he defendant shall be sentenced to imprisonment for life by the court.”

The State argues that because the first degree murder sentencing statutes are silent with regard to the manner of service of multiple first degree murder sentences, the trial court lacked jurisdiction to consider the issue. The State points to a familiar canon of statutory construction: *Expressio unius est exclusio alterius*, the expression of one thing is the exclusion of another. *See* BLACK’S LAW DICTIONARY 581 (6th ed. 1990). The State disagrees with the Defendant’s contention that the trial court may look to the general sentencing provisions under Title 40, particularly Tennessee Code Annotated section 40-35-115, which addresses the manner of service of multiple sentences.

As our supreme court has explained, “The canon of statutory construction *expressio unius est exclusio alterius* provides that ‘where the legislature includes particular language in one section of a statute but omits it in another section of the same act, it is generally presumed that the legislature acted purposefully in the subject included or excluded.’” *Welch*, 595 S.W.3d at 623 (quoting *State v. Loden*, 920 S.W.2d 261, 265 (Tenn. Crim. App. 1995)); *see also Frazier*, 558 S.W.3d at 153 (quoting *State v. Lewis*, 958 S.W.2d 736, 739 (Tenn. 1997) (“When one statute contains a given provision, the omission of the same provision from a similar statute is significant to show that a different intention existed”)). However, this is not a situation in which manner of service was included in one provision

of the first degree murder sentencing statutes but specifically excluded from another. Instead, multiple sentences and manner of service are not mentioned anywhere in the first degree murder section of the Code. *See* T.C.A. §§ 39-13-202 through -208. The State argues that the silence of these statutes with regard to manner of service indicates a trial court's lack of jurisdiction to consider the issue. However, if this argument were taken to its logical extension, it would lead to the absurd result that all previously imposed consecutive first degree murder sentences are invalid.⁴ We will not presume from silence that the legislature intended to divest a trial court of jurisdiction it would otherwise have. *Cf. Fletcher v. State*, 951 S.W.2d 378, 382 (Tenn. 1997) (holding that the silence of T.C.A. § 40-30-117 regarding second-tier appeals from the denial of a motion to reopen post-conviction proceedings did not divest the Tennessee Supreme Court of jurisdiction).

Moreover, “[w]hen two statutes seemingly address the matter in question,” – in this case, sentencing – “and one is special and particular and the other is general, then the general statute will be construed so as to operate on all the subjects introduced therein except the particular one which is the subject of the special provision.” *State v. Davis*, 173 S.W.3d 411, 415 (Tenn. 2005). While the general sentencing statutes under Title 40, Chapter 35, apply to convictions for most offenses, Tennessee Code Annotated sections 39-13-202 through 208 relate specifically to sentencing in first degree murder cases, addressing the length or type of sentence that may be imposed (death, life without parole, or life) and the procedures by which such sentences are imposed. Although none of these statutes specifically address the manner of service of multiple sentences, this court has previously held the 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.” *State v. Jawaune Massey*, No. E2013-01047-CCA-R3-CD, 2014 WL 3661490, at *40 (Tenn. Crim. App. July 23, 2014). Instead, “the trial court retains the statutory discretion to order the consecutive service of multiple sentences pursuant to Tennessee Code Annotated section 40-35-115.” *Id.* Although no statutory provision requires the trial court to conduct a separate sentencing hearing to determine the manner of service of multiple first degree murder convictions, *see State v. Dellinger*, 79 S.W.3d 458, 503 (Tenn. 2002) (appendix), a trial court cannot impose consecutive sentences for first degree murder without such a hearing. *State v. Jones*, 15 S.W.3d 880, 896 (Tenn. Crim. App. 1999). Indeed, numerous opinions from this court have upheld consecutive life and life without parole sentences by examining the trial court's findings under Tennessee Code Annotated section 40-35-115. *See, e.g., State v. Robinson*, 930 S.W.2d 78, 85 (Tenn. Crim. App. 1995) (rejecting defendant's argument that consecutive life without parole sentences are “excessive” and “illogical”); *State v.*

⁴ In Tennessee, sentences for multiple convictions are deemed to be concurrent unless ordered or statutorily required to be served consecutively. *See* T.C.A. § 40-35-115(d); Tenn. R. Crim P. 32(c); *State v. Allen*, 259 S.W.3d 671, 683 (Tenn. 2008).

Andrew Mann, No. E2010-00601-CCA-R3-CD, 2012 WL 184157, at *19 (Tenn. Crim. App. Jan. 23, 2012); *State v. Robert A. Guerrero*, No. M2008-02839-CCA-R3-CD, 2011 WL 2306078 (Tenn. Crim. App. June 8, 2011); *State v. Robert Austin*, No. W2005-01963-CCA-R3-CD, 2007 WL 2624399 (Tenn. Crim. App. Sept. 10, 2007). Thus, prior case law makes it clear that no statutory conflict exists between the first degree murder sentencing statutes and the general sentencing statutes under Title 40 with regard to manner of service of multiple sentences for first degree murder.

However, even if trial courts have jurisdiction to consider the manner of service of multiple first degree murder sentences during an original sentencing hearing, the question remains whether a trial court has the jurisdiction to consider the issue after concluding that a defendant is ineligible for the death penalty pursuant to subsection 203(g). The State argues that because the consecutive alignment of the Defendant's original sentences "was not constitutionally forbidden by the finding of intellectual disability," then this portion of his sentences remained final, and the trial court lacked jurisdiction to amend it. *See* T.C.A. § 40-35-319(b) (providing that "once the judgment becomes final in the trial court, the court shall have no jurisdiction or authority to change the sentence in any manner" except under certain limited circumstances not applicable here); *State v. Moore*, 814 S.W.2d 381, 382-83 (Tenn. Crim. App. 1991). The State argues, "There is no provision in § 39-13-206(e) or § 39-13-207 for revisiting manner-of-service of multiple sentences."

When a defendant has been determined to be intellectually disabled under subsection 203(g), he is constitutionally ineligible for the death penalty. *See Atkins*, 536 U.S. at 321; *Van Tran*, 66 S.W.3d at 812. Thereafter, a constitutionally permissible sentence must be imposed in its place. *See Cantrell v. Easterling*, 346 S.W.3d 445, 456 (Tenn. 2011) (stating that a valid judgment requires both a conviction and a sentence). The parties do not dispute that the trial court possessed subject matter jurisdiction to impose a sentence. *See State v. Stephenson*, 195 S.W.3d 574, 593 (Tenn. 2006) ("[A]s the court with exclusive subject matter jurisdiction of the defendant's conviction for first degree murder, the [trial court] also possessed the inherent authority to impose a sentence for that conviction" after the original sentence was vacated during habeas corpus proceedings.), *abrogated on other grounds by State v. Watkins*, 362 S.W.3d 530 (Tenn. 2012). Unlike correcting an illegal sentence under Tennessee Rule of Criminal Procedure 36.1, which provides for the trial court to enter an amended judgment when the illegal sentence was not part of a guilty plea, subsection 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* T.C.A. § 39-13-206(e) *with* Tenn. R. Crim. P. 36.1(c)(2). 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 This court has previously 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. *See State v. Gdongalay P. Berry*, No. M2017-00867-CCA-R3-CD, 2018 WL 3912302, at *4 (Tenn. Crim. App. Aug. 15, 2018) (noting that after the post-conviction court vacated the death sentences due to the jury’s consideration of a subsequently vacated prior murder conviction and the State withdrew its death notice, the only issue before the court was the manner of service of the two life sentences).

On the other hand, subsection 206(e) does not specifically address the sentencing procedures for a defendant who is not eligible for a sentence of life without parole.⁶ As stated above, such a defendant “shall be sentenced to imprisonment for life by the court.” T.C.A. § 39-13-208(c). However, the statute does not address whether the trial court is to enter an amended judgment or to vacate the death sentence and sentence the defendant anew. In light of the silence of the statutory text, the broader statutory scheme, and the legislative history, the rule of lenity requires that this court resolve the ambiguity regarding the trial court’s sentencing authority under subsections 203(g) and 206(e) in the Defendant’s favor. *See Deberry*, 651 S.W.3d at 925. Additionally, the Tennessee Supreme Court has held 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” so long as such rules are “consistent with constitutional principles, statutory laws, and generally applicable rules of procedure.” *State v. Reid*, 981 S.W.2d 166, 170 (Tenn. 1998). As stated above, no statutory provision requires a sentencing hearing to determine the manner of service of multiple first degree murder convictions, *Dellinger*, 79 S.W.3d at 503, but no statutory provision expressly forbids such a hearing, *see Gdongalay P. Berry*, 2018 WL 3912302, at *4. Thus, we hold that the decision whether to conduct a sentencing hearing to determine the 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.

⁵ Other states have also recognized this distinction between vacating sentences, which allows the trial court to sentence the defendant anew, and amending or modifying previously imposed sentences. *See State v. Lambright*, 404 P.3d 646, 652-53 (Ariz. Ct. App. 2017) (“Once the death sentence was vacated, the trial court was sentencing [the defendant] anew . . . constrained only by statute, case law, and constitutional principles when choosing between a concurrent or consecutive term.”) (internal citation and quotation omitted); *State v. Goode*, 710 S.E.2d 301, 303 (N.C. Ct. App. 2011) (holding that after death sentences were vacated by the federal court, “the matter before the court at the resentencing hearing was the entry of new judgments” rather than the modification of the original judgments; thus, the trial court had “judicial discretion as to whether the sentences were to be concurrent or consecutive”).

⁶ Our research reflects that subsection 206(e) has never been cited in an appellate opinion.

The State points out that in this case, the trial court based its decision to hold a sentencing hearing, in part, upon alleged flaws in the original sentencing proceeding. The State argues that “[d]irect appeal is the avenue by which any freestanding complaints about the original imposition of consecutive sentences should have been raised or otherwise be waived.” Given the nature of the death penalty, we question whether the manner of service of the Defendant’s sentences was ripe for judicial decision before the death sentences were vacated. *See West v. Schofield*, 468 S.W.3d 482, 491 (Tenn. 2015) (“The central concern of the ripeness doctrine is whether the case involves uncertain or contingent future events that may or may not occur as anticipated or, indeed, may not occur at all.”). As acknowledged by the parties during the original sentencing hearing, the consecutive alignment of the Defendant’s sentences was contingent upon the possibility of the sentences being reduced to life imprisonment sometime in the future. More directly to the State’s contention, however, is the fact that the Defendant did not argue, either in the trial court or in this court, that the original consecutive alignment of his sentences was improper.⁷ Instead, the Defendant argued that the trial court had the discretion to consider the manner of service of his sentences given the changed factual and legal circumstances of his case. While a trial court may take into account a defendant’s previous failure to challenge the consecutive alignment of his sentences, that fact does not prevent the trial court from exercising its discretion to consider the manner of service of multiple first degree murder sentences after vacating the death penalty.

Finally, because we have determined that the trial court had jurisdiction under subsection 203(g) to vacate the Defendant’s death sentences and, in its discretion, conduct a sentencing hearing to determine manner of service, we need not address the State’s argument that the trial court improperly expanded its sentencing jurisdiction by “effectively grant[ing] post-conviction relief.” That said, we agree with the State that if the legislature had intended to create an intellectual disability proceeding under the auspices of the Post-Conviction Procedure Act, it certainly could have done so, given the fact that the same legislative session also passed the Post-Conviction Fingerprint Analysis Act, Tennessee Code Annotated sections 40-30-401 through -413. *See* 2021 Tenn. Pub. Acts, ch. 355. However, we disagree with the State’s characterization of certain statements in the trial court’s order as evidence that the trial court “was engaging in post-conviction review.” Although the trial court noted a potential basis for a claim of ineffective assistance of appellate counsel, the court never determined that a constitutional violation occurred, a prerequisite for post-conviction relief pursuant to Tennessee Code Annotated section 40-30-111(a). *See Abdur’Rahman v. State*, 648 S.W.3d 178, 197 (Tenn. Crim. App. 2020). Moreover, we take judicial notice of the fact that proceedings under subsection 203(g) have been colloquially, though perhaps inartfully, referred to as “post-conviction intellectual

⁷ Indeed, as noted above, the Defendant argued in the trial court that his death sentences were actually concurrent due to the lack of judgment forms ordering consecutive service.

disability” proceedings. In this context, “post-conviction” is being used to refer to proceedings after a conviction, rather than as a term of art referring exclusively to proceedings under the Post-Conviction Procedure Act. See T.C.A. § 39-13-203(g)(1) (stating that a petition may be filed after the defendant’s “conviction is final on direct review”); cf. *Nunley v. State*, 552 S.W.3d 800, 829 n.23 (Tenn. 2018) (referring to “post-conviction motions . . . impacting the finality of the judgment of conviction” in the context of the statute of limitations period for a coram nobis claim).

Conclusion

In conclusion, we hold that the trial court has the discretion to conduct a sentencing hearing to determine the manner of service of multiple sentences for first degree murder after a death sentence has been vacated pursuant to subsection 203(g). Because the State raised only a jurisdictional argument, we have not considered any argument that the trial court abused its discretion by granting such a hearing or by subsequently imposing concurrent sentences based upon the facts in this case. See *State v. Bristol*, 654 S.W.3d 917, 923 (Tenn. 2022) (explaining that appellate review should generally be limited to those issues that have been briefed by the parties). Based on the foregoing, we affirm the judgments of the trial court.

ROBERT H. MONTGOMERY, JR., JUDGE