IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
March 5, 2024 Session

**LARRY MCKAY v. STATE OF TENNESSEE**

**Appeal from the Criminal Court for Shelby County**
**Nos. B87597, B87598 Paula L. Skahan, Judge**

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**No. W2023-01207-CCA-R9-CO**

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This is an interlocutory appeal from the trial court's order granting the motions of Defendant, Larry McKay, ("Defendant") and Shelby County District Attorney General, Steven J. Mulroy, ("DA Mulroy") to disqualify the Office of Attorney General and Reporter ("Attorney General") from representing the State during Defendant's capital error coram nobis proceeding. The trial court concluded that a recently enacted statute, which gave the Attorney General "exclusive control over the [S]tate's defense of the request for collateral review" in capital cases, *see* 2023 Tenn. Pub. Acts ch. 182 ("Public Chapter 182"), violated Article VI, § 5 of the Tennessee Constitution. The Attorney General obtained permission from the trial court and this court to file an interlocutory appeal on behalf of the State to address this constitutional issue of first impression. After thoroughly considering the briefs and arguments of the parties and amici curiae, this court concludes that the trial court erred in finding that Public Chapter 182 was unconstitutional. Accordingly, the order of the trial court is reversed, and this case is remanded for further proceedings.

**Tenn. R. App. P. 9 Interlocutory Appeal; Judgment of the Criminal Court Reversed and Remanded**

ROBERT L. HOLLOWAY, JR., J., delivered the opinion of the court, in which ROBERT H. MONTGOMERY, JR., and JILL BARTEE AYERS, JJ., joined.

Jonathan Skrmetti, Attorney General and Reporter; Andrée Sophia Blumstein, Solicitor General; Nicholas W. Spangler, Associate Solicitor General, for the appellant, State of Tennessee.

Robert L. Hutton and Eliza Jones, Memphis, Tennessee, for the appellee, Larry McKay.

Steven J. Mulroy, Memphis, Tennessee for the amicus curiae, Shelby County District Attorney General's Office.[1]

Kevin H. Sharp, Nashville, Tennessee for the amici curiae, 64 Current and Former Prosecutors and Attorneys General, and Former Judges, United States Attorneys, and Federal Officials.

Mark A. Fulks, Johnson City, Tennessee, for the amicus curiae, Association of Prosecuting Attorneys.

## OPINION

### Factual and Procedural Background

Defendant, Larry McKay, and his co-defendant, Michael Eugene Sample, were convicted of two counts of felony murder and sentenced to death in 1982. *See State v. McKay*, 680 S.W.2d 447 (Tenn. 1984), *cert. denied*, 470 U.S. 1034 (1985). After Defendant's convictions and sentence were upheld by the Tennessee Supreme Court, he filed multiple petitions for post-conviction and habeas corpus relief, all of which were denied. *See, e.g.*, *McKay v. State*, No. W2008-02274-CCA-R3-PD, 2010 WL 2384831 (Tenn. Crim. App. June 15, 2010) *perm app. denied* (Tenn. Jan. 13, 2011); *McKay v. State*, No. M2005-02141-CCA-R3-CO, 2006 WL 288107 (Tenn. Crim. App. Feb. 7, 2006); *State v. McKay & Sample*, No. 02C01-9506-CR-00175, 1996 WL 417664 (Tenn. Crim. App. July 26, 1996) *perm. app. denied* (Tenn. Dec. 2, 1996); *Sample & McKay v. State*, No. 02C01-9104-CR-00062, 1995 WL 66563 (Tenn. Crim. App. Feb. 15, 1995) *perm. app. denied* (Tenn. Jan. 27, 1997); *McKay & Sample v. State*, No. 25, 1989 WL 17507 (Tenn. Crim. App. Mar. 1, 1989). On March 30, 2023, Defendant filed the petition for writ of error coram nobis from which this appeal stems.

On April 28, 2023, Public Chapter 182 became effective, amending several statutes and designating the Attorney General as the representative of the State in capital collateral

[1] In its order granting the Attorney General's motion for an interlocutory appeal, the trial court stated that DA Mulroy "is a proper party and appellee in this cause." After the Attorney General filed his application for an interlocutory appeal in this court, DA Mulroy filed a notice of appearance, stating that "he represents himself in his official capacity as the elected District Attorney General for the Thirtieth [] Judicial District as an Appellee in this matter." The Attorney General filed a motion to strike the notice of appearance filed by DA Mulroy. This court, citing Tennessee Code Annotated section 8-6-109 and *State v. Simmons*, 610 S.W.2d 141 (Tenn. Crim. App. 1980), granted the motion to strike, noting that DA Mulroy had not "cited any authority to support the proposition that a district attorney general may appear in the appellate courts in his official capacity to represent an interest separate and distinct from that of the State, as represented by the State Attorney General." However, this court allowed DA Mulroy to both file a brief and participate in oral argument as an amicus curiae.

review proceedings in the trial court. *See* 2023 Tenn. Pub. Acts ch. 182. Specifically, Public Chapter 182 added the following subsection to Tennessee Code Annotated section 40-30-114 of the Post-Conviction Procedure Act:

> (c)(1) In cases where a defendant has been sentenced to death and is seeking collateral review of a conviction or sentence, the attorney general and reporter has exclusive control over the [S]tate's defense of the request for collateral review and has all of the authority and discretion that the district attorney general would have in non-capital cases as well as any additional authority provided by law. The attorney general and reporter is not bound by any stipulations, concessions, or other agreements made by the district attorney general related to a request for collateral review.
>
> (2) The trial court lacks jurisdiction to enter a final order granting relief on a request for collateral review outlined in subdivision (c)(1) until the attorney general and reporter files a response to the request.
>
> (3) It is the duty and function of the district attorney general, and the district attorney general's staff, to lend whatever assistance may be necessary to the attorney general and reporter in the trial and disposition of requests for collateral review outlined in subdivision (c)(1), including, but not limited to, providing the attorney general and reporter with the district attorney general's case file and any other case-related material.
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> (4) As used in this subsection (c), "collateral review":
>
> (A) Means any proceeding under this chapter, including a petition requesting analysis of evidence, a proceeding under § 39-13-203(g) [intellectual disability], a proceeding under § 40-26-105 [error coram nobis], a proceeding involving a challenge to a capital inmate's competency to be executed, and any other judicial reexamination of a judgment or claim in a proceeding outside of the direct review process; and
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> (B) When a defendant has been sentenced to death after March 1, 2023, does not mean the trial of an original petition for post-conviction relief as authorized by § 40-30-104. All other proceedings involving a defendant who has been sentenced to death after March 1, 2023, including reopened post-conviction proceedings granted under § 40-30-117 must be conducted in conformity with subdivision (c)(1).

2023 Tenn. Pub. Acts ch. 182, § 1. The error coram nobis statute was likewise amended by adding the following provision: "Notice of the suing out of the writ shall be served on the district attorney general except in cases where a defendant has been sentenced to death, where notice shall be served on the attorney general and reporter." 2023 Tenn. Pub. Acts ch. 182, § 5; *see* Tenn. Code Ann. § 40-26-105(a). The amended statutes "applie[d] to all currently pending, reopened, and future requests for collateral review." 2023 Tenn. Pub. Acts ch. 182, § 6.

On May 1, 2023, Defendant filed a motion to disqualify the Attorney General's Office from representing the State. As relevant to this appeal, Defendant argued that Public Chapter 182 violated Article VI, § 5 of the Tennessee Constitution,[2] which provides, in relevant part, as follows:

> An Attorney for the State for any circuit or district, for which a Judge having criminal jurisdiction shall be provided by law, shall be elected by the qualified voters of such circuit or district . . . In all cases where the Attorney for any district fails or refuses to attend and prosecute according to law, the Court shall have power to appoint an Attorney pro tempore.

Defendant argued that Article VI, § 5 requires a locally elected district attorney to represent the State in all proceedings before a trial court exercising criminal jurisdiction and that the legislature could not interfere with that constitutionally granted authority. That same day, DA Mulroy filed a response in support of Defendant's motion to disqualify the Attorney General, adopting Defendant's "reasoning and legal arguments . . . *in toto*."[3] On May 31, 2023, the Attorney General filed a response in opposition to the motion to disqualify, arguing that Article VI, § 5 does not vest the district attorney with exclusive control over the State's defense in collateral review proceedings. The Attorney General argued that no court has ever held that the district attorney's constitutionally protected discretion to prosecute criminal offenses extends beyond the entry of a final judgment of conviction. Additionally, the Attorney General argued that Defendant lacked standing to move for disqualification as he could not show a distinct and palpable injury.[4] The parties filed multiple replies, responses, and supplements.

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[2] Defendant also alleged that the statute violated Article II, § 17 regarding the subject and caption of the bill. Although that issue was certified by the trial court for this interlocutory appeal, neither party raised it in their briefs before this court. Therefore, we will not address this issue.

[3] DA Mulroy also argued that the statute violated the voting rights of the citizens of the judicial district who elect the district attorney. However, that issue was not certified by the trial court for this interlocutory appeal, nor was it raised by the parties in their briefs before this court.

[4] The Attorney General did not argue that DA Mulroy lacked standing, instead arguing that he failed to properly notify and consult with the Attorney General regarding the constitutional challenge to the statute pursuant to *State v. Chastain*, 871 S.W.2d 661 (Tenn. 1994).

The trial court heard arguments on June 2, 2023. Defendant argued that the legislature could not "impede the inherent discretion and authority of the elected district attorney general without violating Article VI, § 5 of the Tennessee Constitution," which ties the locally elected district attorney to the locally elected trial court with criminal jurisdiction. Defendant asserted that since the ratification of the current constitution in 1870, the district attorney has represented the State in all criminal matters at the trial court level while the Attorney General has represented the State at the appellate level. Defendant argued that the district attorney's constitutional duty to "attend and prosecute" criminal cases does not simply refer to the period between indictment and verdict but instead has a broader meaning. Defendant argued that while the legislature may create criminal laws and procedures, it may not divest the district attorney of authority to represent the State in those proceedings. Defendant distinguished habeas corpus proceedings, in which the Attorney General represents the State at the trial court level, from other forms of collateral review by arguing that habeas corpus is not an exclusively criminal remedy and that it can only be used to challenge void judgments rather than the underlying criminal conviction. Defendant cited the case of *State v. Ray*, 973 S.W.2d 246 (Tenn. Crim. App. 1997), as an example of constitutionally protected prosecutorial discretion extending to collateral review proceedings long after a conviction was final.

Echoing many of the arguments made by Defendant, DA Mulroy asserted that the essential disagreement in this case was over the extent to which locally elected district attorneys have a "zone of inherent discretion . . . that can't be abrogated or divested or transferred by another branch of government." DA Mulroy argued that certain discretionary decisions that have been recognized as protected within the trial context – such as determining what evidence to present, engaging in plea bargaining, or withdrawing a death notice – are equally relevant in the post-conviction context. He argued that district attorneys have "virtually unqualified unrivaled discretion" that is kept in check by both local elections and the heightened ethical duty to seek justice. DA Mulroy argued that both the plain language and the history of Article VI, § 5 support the idea that the State must be represented by a locally elected district attorney in all cases falling within the criminal jurisdiction of the circuit or district court. DA Mulroy argued that by enacting Public Chapter 182, "the legislature is in effect making a permanent *pro tem* appointment, transferring an entire class of cases away from the locally elected district attorney," in violation of the plain language of Article VI, § 5.

Although the Attorney General argued that Defendant lacked standing because he could not show a specific injury stemming from the choice of the attorney who represents the State in his coram nobis proceeding, the Attorney General stated he was "not asserting [a] standing argument with respect to DA Mulroy." With regard to the constitutionality of Public Chapter 182, the Attorney General argued that the language of Article VI, § 5 does not prohibit the "delegation of trial court collateral defense authority to the [Attorney General]." The Attorney General argued that Defendant failed to cite any case supporting

the proposition that "constitutionally recognized prosecutorial discretion extends beyond a final judgment in a criminal case," disagreeing with Defendant's reading of *State v. Ray*. The Attorney General noted that his office had long represented the State at the trial court level in habeas corpus proceedings in which a criminal defendant collaterally attacks criminal judgments. The Attorney General asserted that habeas corpus was the only form of collateral review of a criminal judgment available at the time the 1870 Constitution was adopted.

In response, Defendant argued that the right to a locally elected prosecutor is a structural constitutional safeguard. Defendant argued that common law writs of error coram nobis were used in criminal cases at the time of the 1870 Constitution and, thus, would have been intended by the framers as being part of the district attorney's constitutional duty to "attend and prosecute" criminal cases. DA Mulroy responded that the division between pre-conviction and post-conviction exercises of prosecutorial discretion, where only the former is constitutionally protected, does not find support in the text of Article VI, § 5.

On July 17, 2023, the trial court issued an order granting Defendant's and DA Mulroy's joint motion to disqualify the Attorney General's Office from representing the State. After concluding that both Defendant and DA Mulroy had standing to challenge the constitutionality of Public Chapter 182, the trial court concluded that the act violated Article VI, § 5 of the Tennessee Constitution. The trial court recognized that it must start with the "strong presumption that acts passed by the legislature are constitutional." *Lynch v. City of Jellico*, 205 S.W.3d 384, 390 (Tenn. 2006). The trial court found that the plain language of Article VI, § 5 "tethered" a locally elected district attorney to the circuit or district court exercising criminal jurisdiction. The trial court noted that unlike other constitutional provisions, Article VI, § 5 "does not say that the district attorney shall have such powers and duties as provided by law"; thus, the legislature could not enact statutes abrogating those duties. The trial court disagreed with the Attorney General's argument that the duty to "attend and prosecute" criminal cases ends upon the entry of a final judgment of conviction, noting that the term "prosecute" was understood by the framers of the 1870 Constitution as having "a broader meaning than referring only to pre-judgment stages of a criminal case." The trial court found that case law supported the proposition that the legislature could not "enact laws which impede the inherent discretion and responsibilities of the office of district attorney general without violating Article VI, § 5 of the Tennessee Constitution." *State v. Superior Oil, Inc.*, 875 S.W.2d 658, 661 (Tenn. 1994). The trial court also found that the Attorney General is not subject to the court's ability to appoint an attorney pro tempore under Article VI, § 5; thus, Public Chapter 182 "removes the judicial check on abusive prosecutions in certain capital collateral review proceedings." The trial court found that because the circuit and district courts have

criminal jurisdiction over petitions for collateral relief, Article VI, § 5 requires the State to be represented by a locally elected district attorney in those proceedings.[5]

On August 10, 2023, the Attorney General filed a motion for permission to file an interlocutory appeal pursuant to Tennessee Rule of Appellate Procedure 9 and to stay the coram nobis proceedings pending the disposition of said appeal. The Attorney General asked the trial court to certify questions as to whether Public Chapter 182 violated Article VI, § 5 of the Tennessee Constitution and whether Defendant had standing to challenge the constitutionality of the act. The Attorney General asserted that interlocutory review would "prevent needless relitigation of [Defendant's] petition after a final judgment, [would] provide critical direction to the trial court's presiding over other capital cases in which these issues are being litigated, and [would] ensure efficient and consistent resolution of an important constitutional question of statewide significance." Both DA Mulroy and Defendant filed responses agreeing to the certification of the Article VI, § 5 issue but opposing certification of the issue regarding Defendant's standing, arguing that it was moot in light of the Attorney General's concession that DA Mulroy had standing.[6]

On August 15, 2023, the trial court entered an order granting an interlocutory appeal and staying the coram nobis proceeding. The trial court found that interlocutory review would prevent needless and protracted litigation, would prevent irreparable injury to the interests of all parties involved, and would develop a uniform body of law for multiple capital cases across the state regarding an issue of first impression. The trial court certified the following issue for interlocutory appeal: "whether Article VI, § 5 and/or Article II, § 17 of the Tennessee Constitution justified the disqualification of the [Attorney General] from representing the State in this case." However, the trial court agreed that the issue of Defendant's standing was moot because the Attorney General had "affirmatively waived and knowingly forfeited any challenge to DA Mulroy's right to move for disqualification." On September 11, 2023, this court granted the Attorney General's application for interlocutory review pursuant to Rule 9.

## Analysis

### I. Standing

As an initial matter, this court has serious reservations regarding whether either Defendant or DA Mulroy had standing to challenge the constitutionality of Public Chapter 182 in the manner in which they did. *See City of Chattanooga v. Davis*, 54 S.W.3d 248,

[5] The trial court also concluded that the arguments regarding the violation of Article II, § 17 were without merit and that the arguments regarding the violation of voting rights were pretermitted.

[6] Both DA Mulroy and Defendant argued that the trial court should also certify the Article II, § 17 issue. However, as noted above, none of the parties raised that issue on appeal.

278-81 (Tenn. 2001); *State v. Chastain*, 871 S.W.2d 661, 665 (Tenn. 1994). "Constitutional standing, the issue in this case, is one of the 'irreducible . . . minimum' requirements that a party must meet in order to present a justiciable controversy." *City of Memphis v. Hargett*, 414 S.W.3d 88, 97 (Tenn. 2013). However, the standing issue is not before this court. The issue of DA Mulroy's standing was not preserved by the parties in either the trial court or this court. Although the issue of Defendant's standing was briefed by the parties, the trial court specifically declined to certify that issue for interlocutory appeal, and the Attorney General did not ask this court to certify the standing issue pursuant to either Rule 9 or Rule 10.[7] In an interlocutory appeal, unlike a direct appeal, this court's "review is . . . limited to those questions clearly within the scope of the issues certified for interlocutory appeal." *Metro. Gov't of Nashville & Davidson Cnty. v. Tennessee Dep't of Educ.*, 645 S.W.3d 141, 147 (Tenn. 2022). This court has "limited discretionary authority to review unpreserved and unpresented issues." *State v. Bristol*, 654 S.W.3d 917, 923 (Tenn. 2022). Because the issue of Defendant's standing was not properly preserved for this interlocutory appeal, and the issue of DA Mulroy's standing was not presented by the parties at all, we decline to address standing and will proceed to consider the merits of the constitutional challenge.

## II. Standard of Review

The issue in this case, as certified by the trial court and presented by the parties, is whether Public Chapter 182 violates Article VI, § 5 of the Tennessee Constitution by transferring representation of the State in capital collateral review proceedings from the locally elected district attorney to the Attorney General. The constitutionality of a statute is a question of law, which this court reviews de novo with no deference to the legal conclusions of the trial court. *State v. Decosimo*, 555 S.W.3d 494, 506 (Tenn. 2018). As the Tennessee Supreme Court recently explained: "Ruling on a constitutional challenge to a statute is often an exercise in judicial restraint. We must be careful not to impose our own policy views on the matter or overstep into the General Assembly's realm of making reasoned policy judgments." *State v. Booker*, 656 S.W.3d 49, 56 (Tenn. 2022) (citing *Stein v. Davidson Hotel Co.*, 945 S.W.2d 714, 717 (Tenn. 1997)). Accordingly, this court must "start with a strong presumption that acts passed by the legislature are constitutional," particularly where "the facial constitutional validity of a statute is challenged." *Decosimo*, 555 S.W.3d at 506 (citing *Lynch*, 205 S.W.3d at 390; *Gallaher v. Elam*, 104 S.W.3d 455, 459 (Tenn. 2003)). A party challenging the constitutionality of a statute bears a "heavy burden of overcoming that presumption." *Helms v. Tenn. Dep't of Safety*, 987 S.W.2d 545, 550 (Tenn. 1999).

[7] During oral argument, the Attorney General stated that they would abandon the standing issue in order to have this case resolved on the merits. This court would not be obligated to accept such a concession if the issue had been properly preserved for review. *See State v. Shepherd*, 902 S.W.2d 895, 906 (Tenn. 1995) (rejecting the State's concession at oral argument that defendant's death sentence should be modified to life).

Our analysis begins with several well-settled principles of constitutional construction in mind. "When construing a constitutional provision we must give 'to its terms their ordinary and inherent meaning.'" *Gaskin v. Collins*, 661 S.W.2d 865, 867 (Tenn. 1983) (quoting *State v. Phillips*, 21 S.W.2d 4, 5 (Tenn. 1929)). "The text of a constitutional provision is the primary guide to the provision's purpose." *Estate of Bell v. Shelby Cnty. Health Care Corp.*, 318 S.W.3d 823, 835 (Tenn. 2010). This court "must construe each provision in a way that gives the fullest possible effect to the intent of the Tennesseans who adopted it." *Id.*; *see also Hooker v. Haslam*, 437 S.W.3d 409, 426 (Tenn. 2014) ("The intent of the people adopting the Constitution should be given effect as that meaning is found in the instrument itself, and courts must presume that the language in the Constitution has been used with sufficient precision to convey that intent"). "While the text must always be the primary guide to the purpose of a constitutional provision, we should approach the text in a principled way that takes into account the history, structure, and underlying values of the document." *Cleveland Surgery Ctr., L.P. v. Bradley Cnty. Mem'l Hosp.*, 30 S.W.3d 278, 282 (Tenn. 2000) (quoting *Martin v. Beer Bd.*, 908 S.W.2d 941, 947 (Tenn. Ct. App. 1995)).

## III. Article VI, § 5 and Duties of the District Attorney

The office of district attorney "is an extension of the common law attorney general in England, which became a part of the colonial government in America." *State v. Superior Oil, Inc.*, 875 S.W.2d 658, 660 (Tenn. 1994) (citing 1 Blackstone's Commentaries, 45 (1769); Hammonds, *The Attorney General in the American Colonies, Anglo-American Legal History*, Series V.1, no. 3, at 2-21 (1939)). From the founding of our state in 1796, the Tennessee Constitution has provided for an "Attorney or Attorneys for the State"; however, the duties attendant to this office were largely defined by statute. *See* Andy D. Bennett, *The History of the Tennessee Attorney General's Office*, Tenn. Bar Journal, at 12 (Apr. 2000). Throughout Tennessee's early history, "[t]he term 'Attorney for the State' was used interchangeably with 'Attorney General' or 'District Attorney' to designate the office of the prosecutor," and various statutes "placed upon them certain prosecution functions as well as other responsibilities." David L. Raybin, *Criminal Practice and Procedure*, Vol. 9, § 6:1 n.2. For example, in addition to prosecuting criminal offenses in the trial courts, the district attorney "in whose district the Supreme Court met was to handle all criminal cases carried to that court" until the legislature passed a statute in 1835 creating the office of the Attorney General and designating it as the State's representative in appeals. Bennett, at 12-13. A constitutional amendment in 1853 recognized both the Attorney General and the district attorney as constitutional officers and made both of them elected positions. *Id*.

The present Tennessee Constitution, ratified in 1870, maintains both the Attorney General and the district attorney as constitutional officers. Article VI, § 5 provides as follows:

> An Attorney General and Reporter for the State, shall be appointed by the Judges of the Supreme Court and shall hold his office for a term of eight years. An Attorney for the State for any circuit or district, for which a Judge having criminal jurisdiction shall be provided by law, shall be elected by the qualified voters of such circuit or district, and shall hold his office for a term of eight years, and shall have been a resident of the State five years, and of the circuit or district one year. In all cases where the Attorney for any district fails or refuses to attend and prosecute according to law, the Court shall have power to appoint an Attorney pro tempore.

The first two clauses of Article VI, § 5 establish the offices of Attorney General and district attorney, but the duties assigned to each office are still primarily determined by statute. As early as 1897, the Tennessee Supreme Court recognized that Article VI, § 5, "while providing for the appointment of the attorney general and reporter by this court and for the election of the attorneys of the state for the various districts or circuits, does not prescribe their duties." *State v. Spurgeon*, 47 S.W. 235, 236 (Tenn. 1897). Instead, "the powers conferred to, and the duties imposed upon, the incumbents of these offices had been long defined by general laws, and were at th[e] time [of the adoption of the 1870 Constitution] thoroughly understood." *Id*. In his often cited concurring opinion in *Pace v. State*, Chief Justice Joe Henry acknowledged that "our Constitution (Art. VI, Sec. 5) creates the office and various statutes define and assign duties to the District Attorney General." 566 S.W.2d 861, 867 (Tenn. 1978) (Henry, C.J., concurring).

Many of the duties of the district attorneys are presently codified in Tennessee Code Annotated section 8-7-103, foremost among them being the duty to "prosecute in the courts of the district all violations of the state criminal statutes and perform all prosecutorial functions attendant thereto[.]" Tenn. Code Ann. § 8-7-103(1). The district attorney may even institute certain civil proceedings but only if "specifically empowered" by the legislature. *Effler v. Purdue Pharma L.P.*, 614 S.W.3d 681, 689-90 (Tenn. 2020) (citing statutes). In *State v. Simmons*, this court examined the applicable statutes and "conclude[d] that the *legislature* has given the District Attorney General the power to prosecute criminal cases at the trial level," whereas the Attorney General was given exclusive authority over criminal cases at the appellate level. 610 S.W.2d 141, 142 (Tenn. Crim. App. 1980) (citing Tenn. Code Ann. §§ 8-7-103, 8-6-109) (emphasis added).

The third clause of Article VI, § 5 provides trial courts with the authority to appoint an attorney pro tempore whenever a district attorney "fails or refuses to attend and prosecute according to law." Defendant and DA Mulroy argue that the third clause gives the district attorney authority to "attend and prosecute" "in all cases" within the trial court's criminal jurisdiction. However, changing the syntax of this clause changes the meaning thereof. "In all cases" modifies the *failure* or *refusal* of the district attorney to "attend and prosecute according to law." In other words, regardless of the reason for the failure or

refusal, the trial court has authority to appoint an attorney pro tempore. *See Turner v. State*, 15 S.W. 838, 841 (Tenn. 1891) (holding "though he attend, yet should he fail to prosecute, whether from sickness or any other cause, the court may appoint"); *see also Moreland v. State ex rel. McCray*, 76 S.W.2d 319, 321 (Tenn. 1934) (holding that the trial court had jurisdiction to appoint an attorney pro tempore when the district attorney was "willfully refusing to prosecute" witnesses for perjury despite probable cause). This clause has been held to permit even trial courts without criminal jurisdiction, such as chancery court, to appoint an attorney pro tempore "so long as [the district attorney] has an official duty to appear in such chancery or other trial court." *Goddard v. Sevier Cnty.*, 623 S.W.2d 917, 919 (Tenn. 1981).

This court has previously recognized that "the key phrase in Article [VI], § 5 of the Constitution stating the duty of the District Attorney General" is that he must "attend and *prosecute according to law*." *State v. Taylor*, 653 S.W.2d 757, 760 (Tenn. Crim. App. 1983) (emphasis in original).

> Article [II], of the Constitution, establishing the distribution of powers of the separate branches of government, expressly reserves to the legislative branch the unlimited power to enact such laws pertaining to the operation of the government of the people, as it deems necessary, except insofar as it may be restrained by the state and federal constitutions.

*Id*. Thus, "it appears that the Constitution has placed no restrictions on the District Attorneys General in the prosecution of their duties, leaving it to the Legislature in its wisdom to enact laws designating those duties[.]" *Id*. at 761.

Thus, the primary duty of the district attorney is to "prosecute" on behalf of the State pursuant to statutes passed by the legislature. According to *Black's Law Dictionary*, "prosecute" is defined as "[t]o commence and carry out (a legal action)"; "[t]o institute and pursue a criminal action against (a person)"; or "[t]o engage in; carry on." *Black's Law Dictionary* (12th ed. 2024). *Merriam-Webster* defines "prosecute" in the legal context as "to bring legal action against for redress or punishment of a crime or violation of law" or "to institute and carry on a legal suit." Prosecute, *Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/prosecute (accessed Sep. 4, 2024). In a collateral review proceeding, it is not the State but the convicted person who commences, institutes, or brings the legal proceeding to challenge the validity of an otherwise final conviction. *See, e.g*., Tenn. Code Ann. § 29-21-101(a) (stating that an imprisoned person "may prosecute a writ of habeas corpus"); *Williams v. State*, 831 S.W.2d 281, 283 (Tenn. 1992) (holding that a post-conviction court's "dismissal of the action for failure to prosecute" is proper if the petitioner is abusing the process or acting in bad faith); *Jones v. State*, 457 S.W.2d 869, 870 (Tenn. Crim. App. 1970) (acknowledging that a petitioner has a "right to a free transcript in order to prosecute a claim for post[-]conviction relief"). In

our adversarial system, this places the State in the position of defense.[8] *See* Tenn. Code Ann. § 40-30-114(c)(1) (as part of Public Chapter 182, stating "the attorney general and reporter has exclusive control over the [S]tate's defense of the request for collateral review"); *Bryan v. State*, 848 S.W.2d 72, 81 (Tenn. Crim. App. 1992) (holding that "implied waiver of [attorney-client] privilege would be appropriate upon the [S]tate's showing that the information possessed by the trial attorney was vital to its defense in the post-conviction action").

Defendant and DA Mulroy cite Judge John Bush's concurring opinion in *Turner v. U.S.* for the proposition that historically, the word "prosecute" had "a broader meaning than referring only to the post-indictment critical stages of a judicial criminal action." 885 F.3d 949, 960 (6th Cir. *en banc* 2018) (Bush, J., concurring *dubitante*). Judge Bush, analyzing the Sixth Amendment right to counsel in "criminal prosecutions," noted that seven of nine general English dictionaries from the time the Amendment was ratified "give a primary definition of that term such as '[a] pursuit, an endeavor to carry on any design,'" which "contemplates a broad meaning of 'prosecution'—something reminiscent of its etymological meaning of pursuing a goal." *Id*. at 959. Even applying this broader definition, it is the convicted person who is pursuing a goal of overturning his conviction or sentence in a collateral review proceeding. Significantly, the United States Supreme Court has held that the Sixth Amendment right to counsel in "criminal prosecutions" does not apply to collateral review proceedings, when it is the convicted person who is "attacking a conviction that has long since become final upon exhaustion of the appellate process." *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987).

Collateral review proceedings clearly are not criminal prosecutions. *See Bryan*, 848 S.W.2d at 81 ("A post-conviction case is not a criminal prosecution, but is a means to address a petitioner's allegations of constitutional wrongdoing in a previous convicting or sentencing process"). Indeed, they share many similarities with civil proceedings. *See* Tenn. Code Ann. § 40-26-105(a) ("There is made available to convicted defendants in criminal cases a proceeding in the nature of a writ of error coram nobis, to be governed by the same rules and procedures applicable to the writ of error coram nobis in civil cases, except insofar as inconsistent herewith."); *Watkins v. State*, 903 S.W.2d 302, 305 (Tenn. 1995) (describing post-conviction proceedings as "a hybrid affair" combining elements of

[8] This is not to say that the representative of the State is obligated to defend the conviction at all costs; rather, the ethical duty remains to seek justice. *See State v. Culbreath*, 30 S.W.3d 309, 314 (Tenn. 2000) (citing Tenn. R. Sup. Ct. 8, EC 7-13; *ABA Standards for Criminal Justice*, Standard 3-1.1(c) (1979)); *Superior Oil, Inc*., 875 S.W.2d at 661. We will not presume that one representative of the State is more likely to uphold this ethical duty than another. *See State ex rel. Com'r of Transp. v. Med. Bird Black Bear White Eagle*, 63 S.W.3d 734, 775 (Tenn. Ct. App. 2001) (noting that "the courts must always presume that public officials, including the Attorney General, will discharge their duties in good faith and in accordance with the law").

criminal law and civil procedure). The Attorney General already represents the State at the trial court level in one type of collateral proceeding: petitions for writ of habeas corpus. This court has held that such representation does not offend the Tennessee Constitution precisely because of the civil-like nature of the proceeding. *Pirtle v. State*, No. W2008-01934-CCA-R3-HC, 2009 WL 1819251, at *2-3 (Tenn. Crim. App. June 25, 2009). Defendant attempts to distinguish habeas corpus proceedings because the writ may be used in non-criminal cases, such as challenging a civil commitment or a child custody order. *See, e.g.*, *State ex rel. McCormick by Hirst v. Burson*, 894 S.W.2d 739 (Tenn. Ct. App. 1994); *Coury v. State ex rel. Webster*, 374 S.W.2d 397 (Tenn. 1964). But when an incarcerated person uses the writ to challenge the legality of the person's criminal conviction or sentence, the petition must be filed in a court with criminal jurisdiction. *See Hodges v. Bell*, No. M2007-01623-CCA-R3-HC, 2008 WL 5069131, at *3 (Tenn. Crim. App. Dec. 2, 2008) ("Chancery Court has no jurisdiction of criminal matters, and a Chancellor may not grant the writ to enquire into the restraint of prisoners or the validity of a criminal conviction") (internal citation omitted). We further note that habeas corpus is the only form of collateral relief provided for in the Tennessee Constitution, *see* TENN. CONST. art. I, § 15, and prior to the 1950s, was "the only means of state collateral or post-conviction review in Tennessee, as well as most other states[.]" *House v. State*, 911 S.W.2d 705, 708 (Tenn. 1995); *see Nunley v. State*, 552 S.W.3d 800, 810-11 (Tenn. 2018) (noting that the writ of error coram nobis was not available in criminal cases under the common law or statute until 1955). This belies Defendant's assertion that the framers of the Tennessee Constitution intended "for the [district attorney], and only the [district attorney], to represent the State before trial courts with criminal jurisdiction," including in as-yet unestablished collateral review proceedings.

## IV. Article VI, § 5 and Prosecutorial Discretion

Defendant argues that the legislature "cannot enact laws which impede the inherent discretion and responsibilities of the office of district attorney general without violating Article VI, § 5 of the Tennessee Constitution." *Superior Oil, Inc.*, 875 S.W.2d at 661. However, the Tennessee Supreme Court has found a violation or potential violation of Article VI, § 5, it has been in the context of statutes and policies that impede the district attorney's discretion to *initiate* a prosecution. *See City of Chattanooga*, 54 S.W.3d at 280; *Ramsey v. Town of Oliver Springs*, 998 S.W.2d 207, 209 (Tenn. 1999); *Superior Oil, Inc*., 875 S.W.2d at 661. "*Prior to indictment*, the district attorney 'has virtually unbridled discretion in determining whether to prosecute and for what offense.'" *State v. Mangrum*, 403 S.W.3d 152, 163 (Tenn. 2013) (quoting *Dearborne v. State*, 575 S.W.2d 259, 262 (Tenn. 1978)) (emphasis added); *see State v. Gilliam*, 901 S.W.2d 385, 389 (Tenn. Crim. App. 1995) (quoting *Wayte v. United States*, 470 U.S. 598, 607 (1985)) (holding that "the decisions of whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion"); *cf. State v. Spradlin*, 12 S.W.3d 432, 434 (Tenn. 2000) (holding that police officers are "without authority to bind

the district attorney general to an agreement not to prosecute"). Thus, what is not subject to restriction by the legislature is "the exercise of the prosecutorial discretion traditionally vested in the [district attorney] in determining whether, when, and against whom to institute criminal proceedings." *Superior Oil, Inc.*, 875 S.W.2d at 660.

However, "this discretion has its outer limits. When the charging process—in this state the indictment—has been completed, the disposition of the charge becomes a judicial function." *Id.* at 660-61 (quoting *Dearborne*, 575 S.W.2d at 262). In other words, the legislature may enact statutes and rules requiring judicial scrutiny of a district attorney's discretionary decision to dispose of a charge other than through a trial verdict. In *State v. Coston*, the Tennessee Supreme Court upheld the constitutionality of a statute prohibiting the dismissal of a criminal prosecution without the payment of costs, holding that even though district attorneys had long exercised the power to terminate a prosecution by entering a nolle prosequi,

> the right to so exercise it is not conferred by the Constitution. The Legislature, therefore, has the power to take it away, and when it does so it is not an interference, in a constitutional sense, either with the judicial power of the state, or the ministerial duties of the [District] Attorney General.

*State v. Costen*, 213 S.W. 910, 911 (Tenn. 1919); *see State v. Layman*, 214 S.W.3d 442, 448 (Tenn. 2007) ("Although under common law the decision to nolle prosequi a case was entirely within the discretion of the prosecutor, [Tennessee] Rule [of Criminal Procedure] 48(a) requires the court's permission."). In *Pace v. State*, the Tennessee Supreme Court upheld the constitutionality of pretrial diversion statutes, with Chief Justice Henry explaining that judicial scrutiny of the district attorney's discretionary decision is allowable because it occurs "after the prosecutorial die has been cast" and "the jurisdiction of the court has been invoked by indictment." *Pace*, 566 S.W.2d at 870 (Henry, C.J., concurring). Similarly, while a district attorney has the sole discretion whether to engage in plea negotiations, *State v. Head*, 971 S.W.2d 49, 51 (Tenn. Crim. App. 1997), any plea agreement reached must be approved by the trial judge pursuant to Tennessee Rule of Criminal Procedure 11.

We are highly persuaded by the following description of the scope of prosecutorial discretion from the Pennsylvania Supreme Court:

> [T]he scope of prosecutorial discretion changes as a criminal case proceeds, narrowing as the case nears completion. At the outset, a prosecutor has almost unfettered power to charge, or not charge, as he or she sees fit. Once charges are filed, the prosecutor may withdraw them by nolle prosequi, subject to judicial oversight. A prosecutor may also choose to enter into a plea agreement, again subject to appropriate judicial oversight. . . .

> After trial and the entry of a capital verdict, however, a district attorney's prosecutorial discretion narrows significantly. . . . A representative cross section of the community has issued its decision, and the prosecutor, having sought and obtained the death sentence, may not thereafter unilaterally alter that decision. The community now has an interest in the verdict, which may thereafter be disrupted only if a court finds legal error.

*Commonwealth v. Brown*, 196 A.3d 130, 146 (Pa. 2018).

Any discretion the district attorney may have in the context of collateral review proceedings is curtailed due to the finality of the conviction. Certain defenses, such as the statute of limitations or the prior determination of issues, cannot be waived. *See Nunley*, 552 S.W.3d at 828; *Anderson v. State*, 692 S.W.3d 94, 104 (Tenn. Crim. App. Oct. 18, 2023); *Black v. State*, No. M2022-00423-CCA-R3-PD, 2023 WL 3843397, at *9-10 (Tenn. Crim. App. June 6, 2023). Any agreements made to forego a collateral review proceeding must pass stricter judicial scrutiny than a plea agreement under Tennessee Rule of Criminal Procedure Rule 11 because the trial court's jurisdiction is limited by statute to granting only certain forms of relief under specific circumstances. *See Abdur'Rahman v. State*, 648 S.W.3d 178, 197 (Tenn. Crim. App. 2020) (holding that under the Post-Conviction Procedure Act, "[o]nly upon a finding that either the conviction or sentence is constitutionally infirm can the post-conviction court vacate the judgment and place the parties back into their original positions, whereupon they may negotiate an agreement to settle the case without a new trial or sentencing hearing") (internal citation omitted). While a district attorney has sole discretion to file or withdraw a notice of intent to seek the death penalty prior to conviction, *see State v. Hines*, 919 S.W.2d 573, 578 n.2 (Tenn. 1995), he cannot bypass the statutory requirements of a collateral review proceeding by entering an agreement to amend a final judgment from death to life imprisonment. *See Abdur'Rahman*, 648 S.W.3d at 198; *see also State v. Avila-Salazar*, No. M2019-01143-CCA-R3-PC, 2020 WL 241605, at *2 n.1 (Tenn. Crim. App. Jan. 15, 2020) (noting that "[n]othing in the record explains how the State would nolle prosequi a final judgment of conviction" offered to settle a pending post-conviction petition); *cf. Bennett v. State*, 10 Tenn. 472, 475 (1830) (holding that the attorney for the State could not enter an extrajudicial agreement regarding the payment of fines because he "had no power over the final judgment" in a criminal case).

Defendant and DA Mulroy cite *State v. Ray*, 973 S.W.2d 246 (Tenn. Crim. App. 1997), as an example of this court's upholding the inherent authority and discretion of the district attorney in collateral proceedings. In *Ray*, the State challenged the actions of two Shelby County Criminal Court judges occurring more than two decades after James Earl Ray pled guilty to the murder of Dr. Martin Luther King, Jr. This court held that the judge in whose court Mr. Ray's seventh petition for post-conviction relief was pending, "d[id] not have the authority to embark upon a non-adversarial fact-finding mission" or to

"independently investigate facts in a case." *Id*. at 249. Further, the judge's criticism of the district attorney for failing to vigorously investigate the "true facts" of the case was "clearly inappropriate" because "the [S]tate is under no obligation to assist defense counsel in attacking the [] conviction." *Id*. These findings would be the same regardless of whether the State was represented by the locally elected district attorney or the Attorney General due to the adversarial nature of the proceedings and the role of the trial judge as "a fair and impartial adjudicator, not an investigator." *Id*.

The judge in Division III, who had entered Mr. Ray's judgment of conviction but in whose court there was no pending post-conviction petition, had appointed a special master with "the authority to 'act with subpoena power and take testimony concerning allegations of a conspiracy to kill Dr. King by any person.'" *Id*. at 248. This court held that the judge did not have the authority to do so because there was no pending "case in controversy." *Id*. This court stated as follows:

> The actions of the trial court in appointing a Special Master in this matter exceeded the trial court's authority and encroached upon the constitutional province of the executive branch of government. The District Attorney General is an officer "with the executive branch of the government and as an incident of the constitutional separation of powers, the courts are not to interfere with the free exercise of this discretionary authority in [the district attorney's] control over criminal prosecution."

*Id*. (quoting *State v. Gilliam*, 901 S.W.2d 385, 389 (Tenn. Crim. App. 1995)). The "constitutional province" and "discretionary authority" in this instance referred not to the district attorney's authority over Mr. Ray's post-conviction proceeding, but to the investigation and possible indictment of related but previously uncharged conspiracy offenses. *See id*. (quoting *State v. Cash*, 867 S.W.2d 741, 749 (Tenn. Crim. App. 1993) ("The judge is . . . [not] a prosecutor. . . . He is [not] to follow trails of suspicion, to uncover hidden wrongs, to build up a case as a prosecutor builds one"). Again, Article VI, § 5, protects "the exercise of the prosecutorial discretion traditionally vested in the [district attorney] in determining whether, when, and against whom to institute criminal proceedings." *Superior Oil, Inc.*, 875 S.W.2d at 660. Nothing about this court's opinion in *Ray* implied that the district attorney has the same level of constitutionally protected discretion or the exclusive authority to represent the State in collateral review proceedings.

Defendant further argues that "[g]iven the immense power and elevated ethical obligations of the [district attorney], sound policy reasons support having the actions of this office accountable to the local voters." Defendant, DA Mulroy, and the other amici curiae all cite *State v. Banks*, 271 S.W.3d 90, 154-55 (Tenn. 2008), for the following proposition: "Local control over prosecutors is a core component of the American criminal justice system because prosecutors reflect the values of their local communities. The fact

that they are elected by the voters of their districts assures their accountability." However, in *Banks*, the Tennessee Supreme Court was discussing the prosecutorial discretion to seek the death penalty during the initial trial proceeding. The Court continued: "Simply stated, no one else is in a better position to make *charging decisions* which reflect community values as accurately and effectively as the prosecutor." *Id.* (internal quotation omitted) (emphasis added). Similarly, in *Quillen v. Crockett*, this court noted that "[i]f voters are in disagreement with a prosecutor's *charging determinations*, they have the ultimate veto at the ballot box." 928 S.W.2d 47, 51 (Tenn. Crim. App. 1996) (emphasis added). Nothing about these cases supports Defendant's assertion that he "has a right under Article VI, § 5 of the Tennessee Constitution to have the locally elected [district attorney] evaluate his claims of newly discovered evidence" more than four decades after his conviction became final. Again, we find the words of the Pennsylvania Supreme Court to be very persuasive:

> [W]e note that the Philadelphia District Attorney's Office, through the exercise of its prosecutorial discretion, actively sought and obtained a death sentence for [the defendant]. It cannot now seek to implement a different result based upon the differing views of the current office holder with respect to the prior exercise of prosecutorial discretion. Elections alone cannot occasion efforts to reverse the result of judicial proceedings obtained by the prior office holder. Every conviction and sentence would remain constantly in flux, subject to reconsideration based upon the changing tides of the election cycles.

*Brown*, 196 A.3d at 149. With regard to the public policy argument, the Tennessee Supreme Court has consistently held that "[a]ll questions of policy are for the determination of the legislature, and not for the courts." *Smith v. Gore*, 728 S.W.2d 738, 747 (Tenn. 1987) (quoting *Cavender v. Hewitt*, 239 S.W. 767, 768 (Tenn. 1921)); *see Costen*, 213 S.W. at 911 ("With the policy of the statute neither we nor the Attorneys General have anything to do. It is a plain mandate of the Legislature to which we must all bow.").

## Conclusion

In conclusion, Defendant has not carried his burden of overcoming the strong presumption that Public Chapter 182 is constitutional. Article VI, § 5 of the Tennessee Constitution creates the office of district attorney, but the duties attendant to that office are largely defined by statute. Because the district attorney is required to "attend and prosecute according to law," the legislature may, by law, determine when such attendance is required. What the legislature may not do is interfere with the district attorney's virtually unbridled prosecutorial discretion to initiate criminal prosecutions. Collateral review proceedings, which, in the words of Justice Henry, occur long "after the prosecutorial die has been cast" and the conviction has become final, are not criminal prosecutions but are quasi-civil proceedings brought by the convicted person against the State. *Pace*, 566 S.W.2d at 870

(Henry, C.J., concurring). The State has long been represented by the Attorney General in trial-level habeas corpus proceedings collaterally attacking criminal convictions, which this court has held does not violate Article VI, § 5.

Based on the foregoing, we hold that Public Chapter 182 does not violate Article VI, § 5 by transferring representation of the State in trial-level capital collateral review proceedings from the locally elected district attorney to the Attorney General. Accordingly, the order of the trial court disqualifying the Attorney General from representing the State in this matter is reversed, and this case is hereby remanded for further proceedings consistent with this opinion.

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ROBERT L. HOLLOWAY, JR., JUDGE