IN THE CRIMINAL COURT
FOR THE THIRTIETH JUDICIAL DISTRICT
AT MEMPHIS, TENNESSEE

2003 MAY 31 P 3:46

LARRY McKAY,

Petitioner

v.

STATE OF TENNESSEE,

Respondent.

Case Numbers
B87597 & B87598
Division I

DISTRICT ATTORNEY STEVE MULROY'S REPLY
IN SUPPORT OF HIS AND PETITIONER'S JOINT MOTION TO DISQUALIFY
TENNESSEE ATTORNEY GENERAL'S OFFICE FROM
REPRESENTING THE STATE IN THIS CASE

INTRODUCTION

Shelby County District Attorney General Steve Mulroy ("DA Mulroy") submits the following Reply Brief in Support of Petitioner's Motion filed May 1, 2023.

The Attorney General and Reporter ("AG") may not legitimately represent the State of Tennessee in these proceedings. Petitioner's Motion, and DA Mulroy's response, identified three core constitutional defects in the statute that purports to authorize the AG's participation, 2023 Public Acts Chapter 182 (Apr. 28, 2023) (the "Divestiture Act").

First, the Divestiture Act improperly divests District Attorneys of their authority under Article VI, Section 5 of the Tennessee Constitution to represent the State in criminal proceedings before trial courts, including post-conviction proceedings. This ignores the DA's constitutional obligation to weigh evidence that emerges over the course of a criminal proceeding and seek justice based on that evidence before the trial court.

Second, the Divestiture Act undermines the structures of local democracy and self-government enshrined in the Tennessee Constitution by transferring authority over the most grave exercises of discretion – those pertaining to life and death – from voters' locally elected DAs to the unelected AG.

Third, the Divestiture Act pursued these illegitimate ends through a process that was constitutionally deficient under Article II, Section 17 of the Tennessee Constitution. Nothing in the AG's response rescues the Divestiture Act from these essential flaws.

Additionally, DA Mulroy provided proper notice to the AG regarding the constitutional challenge to the Divestiture Act under *State v. Chastain*.

Accordingly, DA Mulroy respectfully requests that this Court conclude that the Divestiture Act is unconstitutional, grant his and Petitioner's motion, and disqualify the Attorney General and Reporter from representing the State of Tennessee in this matter.

I. DA MULROY PROVIDED ADEQUATE NOTICE TO THE AG REGARDING HIS CHALLENGE TO THE CONSTITUTIONALITY OF THE DIVESTITURE ACT

There is no basis for the AG's suggestion (AG Resp. at 4-5) that DA Mulroy failed to follow the procedure set out in *State v. Chastain*, 871 S.W.2d 661, 666 (Tenn. 1994), which requires a DA to provide prior notice to the AG of a constitutional challenge. Any notice required by *Chastain* has been adequately provided.

As the AG acknowledges (AG Resp. at 4), on May 1, 2023, DA Mulroy filed a Response in Support of Petitioner's Motion[1], which notified the AG of his contention that the Divestiture Act violates Article VI, Section 5, and Article II, Section 17 of the Tennessee Constitution. The Response was served on the AG via email and U.S. Mail on May 1, 2023. The AG also acknowledges that DA Mulroy thereafter orally joined Petitioner's motion before the Court on May 3, 2023. *Id.* Thus, DA Mulroy provided the AG written notice prior to initiating the constitutional challenge.[2]

Moreover, there is no requirement that the District Attorney General consult or receive the approval of the Attorney General and Reporter. As to consultation, the *Chastain* Court merely stated, in *dicta,* that "we suggest" that "the better practice" would be to consult the AG. *Chastain*, 871 S.W.2d at 666. In fact, the AG admits as much by quoting this specific language from the *Chastain* decision. AG Response at 4. Here, any fresh attempt at consultation would have been

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[1] Petitioner's Motion, which was also served on the AG on May 1, 2023, also provided notice to the AG of the constitutional challenge.

[2] Likewise, the AG has received adequate notice under T.C.A. 29-14-107(b), since he was "served a copy of" McKay's initial pleading and DA Mulroy's responsive pleading.

futile. DA Mulroy conferred with the AG repeatedly on the merits of the Divestiture Act while the Act was progressing through the Legislature, expressing his concerns about the allocation of responsibility between the AG and DAs. *See* Declaration of Stephen Mulroy ("Mulroy Dec.") ¶ 3. DA Mulroy understood from those discussions the AG strongly believed the Act to be constitutional and supported the Act's passage. Accordingly, there was little purpose to further consultation regarding the constitutionality of the Act. Indeed, the unique nature of this controversy, pitting the authority of the AG against the authority of local DAs, suggests the futility of such consultation, as the AG seems to acknowledge. *See* AG Resp. at 5 ("the State recognizes the unique situation here, where the challenge relates to the constitutional division of authorities between the two offices").

Because the notice was adequate and further notice or consultation would be futile, there is no barrier to DA Mulroy's support and joining thereto of Petitioner's motion.

II. THE TENNESSEE CONSTITUTION BARS THE LEGISLATURE FROM STRIPPING DISTRICT ATTORNEYS GENERAL OF THEIR POWERS TO REPRESENT THE STATE IN CRIMINAL, EVIDENTIARY PROCEEDINGS AT THE TRIAL COURT, INCLUDING WRITS OF *CORAM NOBIS*.

A. The District Attorney General's Constitutional Authority in the Trial Court Includes a Responsibility to Seek Justice by Evaluating New Evidence and Discontinuing Prosecution When Warranted.

The Tennessee Constitution has long established the DA as a locally "elected constitutional officer whose function is to prosecute criminal cases in his or her circuit or district." *Ramsey v. Town of Oliver Springs*, 998 S.W.2d 207, 209 (Tenn. 1999) (private act could not authorize city attorney to prosecute cases in city court without DA approval); Tenn. Const. art. VI, § 5. As such, the Legislature cannot "impede the inherent discretion and responsibilities of the office of District

Attorney General." *State v. Superior Oil*, 875 S.W.2d 658, 662 (Tenn. 1994) (statute could not require DA to seek permission from state agency to prosecute under Water Quality Control Act).

The AG acknowledges (AG Resp. at 13-15) that a DA has such inherent discretion free from legislative interference, and that such inherent discretion extends "beyond initial charging decisions" to deciding what evidence to present, whether and how to plea bargain, and whether to grant immunity. AG Resp. at 13, 15 (quoting *State v. Culbreath*, 30 S.W.3d 309, 316 (Tenn. 2000)); *see also* Tenn. Op. Att'y Gen. No. 08-39 (Feb. 29, 2008) (acknowledging inherent DA discretion to plea bargain, and thus finding unconstitutional a proposed statute barring DUI plea deals); A.G. Opin. No. 16-40 (Nov. 16, 2016) (City could not pass marijuana decriminalization ordinance, because, *inter alia*, it would infringe on inherent DA discretion). And the Tennessee Supreme Court has further held that such discretion applies broadly to the decision to "*nolle pros*" a case; whether to seek the death penalty; and whether to withdraw a death penalty notice. *State v. Layman,* 214 S.W.3d 442, 454 (Tenn. 2007).[3] The AG asserts, without any authority, that such discretion regarding evidence, plea deals, immunity, ultimate dismissal, and the death penalty, while clearly applicable to post-conviction collateral evidentiary proceedings, nonetheless abruptly ends at the point of a final judgment. AG Resp. at 15.

But it is "well settled law" in Tennessee "that a district attorney general has the *sole* duty, authority, and discretion to prosecute criminal matters," *State v. Spradlin*, 12 S.W.3d 432, 436 (Tenn. 2000) (emphasis added) (holding that an immunity agreement between law enforcement and a defendant was invalid without the agreement of the DA), and that the DA generally has "broad discretion in administering criminal justice" in his jurisdiction, *Effler v. Purdue Pharma L.P.*, 614 S.W.3d 681, 689 (Tenn. 2020). In general, the DA is solely responsible for deciding

[3] The AG's discussion (AG Resp. at 14) of cases purporting to limit a DA's authority are inapposite, as they merely stand for the anodyne proposition that parties cannot waive jurisdictional requirements.

whether circumstances warrant that a prosecution should be discontinued. *Layman*, 214 S.W.3d at 452 (noting DA's inherent power to move to dismiss a case, with judicial oversight limited to "extraordinary circumstances indicating betrayal of the public interest"). Significantly, Article VI, Section 5 does not temporally limit the DA's duties in such cases, but extends them to post-conviction criminal proceedings before the trial court by requiring that the DA – and only the DA – attend and prosecute "all cases" in the trial court within his judicial circuit, including post-conviction proceedings. *See State v. Ray*, 973 S.W.2d 246, 248 (Tenn. Ct. Crim. App. 1997) (protecting the DA's constitutionally-vested discretionary authority *in post-conviction proceedings* against judicial interference).

In the context of capital prosecutions, the DA's discretionary power to direct a prosecution is at its zenith: it is within the DA's exclusive constitutional authority to decide whether a capital prosecution should be initiated, *State v. Brimmer*, 876 S.W.2d 75, 86 (Tenn. 1994), or abandoned, *State v. Hines*, 919 S.W.2d 573, 578 n.2 (Tenn. 1995). Each of these decisions requires careful analysis of the facts, evidence, and circumstances to determine whether justice demands that a death sentence should no longer be sought before the trial court – exactly what is asked of the state in *coram nobis* proceedings. Courts have permitted other actors, such as the AG or the courts, to participate in these discretionary decisions only within their own constitutional domains: appellate practice, for the AG, *Abdur'Rahman v. State*, 648 S.W.3d 178, 191, 192 (Tenn. Cr. App. 2020), and review of plea bargains, for the court, *Hines*, 919 S.W.2d at 578.

The authority cited in the AG's lengthy discussion of *nolle prosequi* is not to the contrary. AG Response at 11-12. First, the cited opinion in *Pace* is a non-controlling concurring opinion. More significantly, the Tennessee Supreme Court later clarified in *Layman* that judicial intervention regarding a DA's *nolle prosequi* decision must be limited to narrow circumstances.

The *Layman* Court overruled a court's rejection of a DA's uncontested motion to dismiss, holding that courts may not second-guess a DA's decision to "*nolle pros*" if the DA's decision does not reflect "bad faith" or motivation "by considerations that could be fairly characterized as clearly contrary to manifest public interest." *Layman*, 214 S.W.3d at 452. Outside of these limited circumstances laid out by the Tennessee Supreme Court, the decision not to continue pursuing a prosecution remains part of "[t]he discretion *inherent* to the position of prosecutor." *Id.* (emphasis added). An "inherent" power is one derived from the Constitution itself which cannot be interfered with by another branch of government. A court's "disagree[ment] with the [DA's] decision to terminate the prosecution" in the exercise of the "discretion inherent" to his office "is an insufficient reason to deny" a motion to "*nolle pros*". *Id.* Likewise, even while the Tennessee Supreme Court has held that courts retain authority to reject a plea bargain, it noted that the DA may unilaterally decide to withdraw the intent to seek the death penalty. *Hines*, 919 S.W.2d at 578 n.2. *Layman* further answers the AG's reliance on the century-old case of *Costen*. *See* AG Resp. at 11-12. *Layman* makes clear that the discretion to "*nolle pros*" is of constitutional dimension, applies post-indictment, and prevents interference by the other branches of government.

Because the DA is "answerable to no superior and has virtually unbridled discretion" in the exercise of his inherent prosecutorial powers, the Supreme Court has repeatedly affirmed that he has "the inherent responsibility and duty to seek justice rather than to be just an advocate for the State's victory at any cost." *Superior Oil.*, 875 S.W.2d at 660, 661. Because of his office's awesome powers, he must be – and is elected for his capacity to be – "an arbiter and, in many cases, an umpire between the people and the people's government" whose most fundamental duty is "safeguarding and advocating the rights of the people" against abuse of the state's laws. *Quillen v. Crockett*, 928 S.W.2d 47, 51 (Tenn. Crim. App. 1995) (dismissing an alleged crime victim's

complaint to disqualify a district attorney pro tem for failure to prosecute a particular crime, in light of the borrowed constitutional discretion of the DA).

B. The DA's Constitutional Authority Particularly Extends to Coram Nobis Proceedings.

The AG contends that the DA's constitutionally protected discretion does not extend beyond a final judgment. AG Resp. at 15. However, the DA's constitutional duties carry a specific responsibility with respect to exculpatory or mitigating evidence that implicates his discretionary power to reconsider a prosecution when the evidence so warrants, including in post-conviction proceedings before the trial court. He must timely disclose such evidence and "should not intentionally avoid pursuit of evidence merely because [he] believes it will damage [his] case or aid the accused." *Culbreath*, 30 S.W.3d at 314 (quoting Tenn. R. Sup. Ct. 8, EC 7-13).

In accordance with this weighty constitutional obligation, it has been the locally elected DA – not the unelected AG – who has traditionally been responsible for evaluating new evidence when responding to writs of error *coram nobis* that arise from criminal prosecutions in his jurisdiction. This responsibility's constitutional dimensions arise from three core aspects of *coram nobis*: it is a trial, not appellate, writ; it is not civil in nature, but goes to the facts of the underlying criminal proceeding; and it allows for reexamination of the evidence core to the trial proceeding – the very evidence that a DA is constitutionally entrusted to weigh throughout a criminal proceeding to determine whether continuing a prosecution is warranted.

First, *coram nobis* is not an appeal. Instead, it is an "ancient" remedy for correcting errors in a conviction that is addressed not to an appellate court, but to the trial court that rendered the underlying judgment in a criminal proceeding, *Nunley v. State*, 552 S.W.3d 800, 810 & n.9 (Tenn. 2018), the same "circuit or district . . . having criminal jurisdiction" in which the DA performs his constitutional duties, Tenn. Const. Art. VI, Section 5. Indeed, *coram nobis* predates the right to

move for a new trial or for an appeal, providing a procedural mechanism by which to correct "errors of fact not apparent in the record." *Nunley,* 552 S.W.3d at 810 (internal quotation marks omitted). The writ has been available in Tennessee criminal cases as a matter of common law since at least the 1850's. *Wlodarz v. State*, 361 S.W.3d 490, 498 (Tenn. 2012). Thus, it bears no relationship to the AG's traditional responsibility for appellate advocacy on behalf of the state.

Second, *coram nobis* is not strictly civil, despite the AG's cited *dicta* to the contrary. *See* AG Response at 13. Although the writ was generally used for civil cases, and accordingly was codified in the civil portion of the Tennessee code, the writ no longer has any applicability in civil cases in Tennessee. *Nunley*, 552 S.W.2d at 811 (citing *State v. Mixon*, 983 S.W.2d 661, 668 (Tenn. 1999)); *see also id.* at 824 (noting that Tennessee Rules of Civil Procedure do not apply in *coram nobis* proceedings). Indeed, its history as a common law writ available in *criminal* cases dates back to at least the 1850's. *Wlodarz*, 361 S.W.3d at 498.

Third, the writ addresses the exact kind of evidentiary questions that lie at the core of the DA's exclusive constitutional duty to do justice while prosecuting "all cases" within his judicial circuit. *See* Tenn. Const. Art. VI, § 5. It is frequently used to introduce exculpatory or mitigating evidence that calls into question the justice of a conviction, including by presenting newly discovered evidence potentially establishing actual innocence of a capital offense. *See Workman v. State*, 41 S.W.3d 100, 103 (Tenn. 2001) (holding that due process requires ability to toll the statute of limitations for writ of *coram nobis* due to undiscovered facts).

Coram nobis is thus fundamentally different from the state habeas corpus proceeding, contrary to the AG's assertion that they are analogous. *See* AG Resp. at 19-20. Habeas corpus is both clearly designated as an "independent civil suit" and prohibits collateral attack on the record of the original proceeding. *Pirtle v. State*, No. W2008-01934-CCA-R3-HC, 2009 WL 1819251,

at *3 (Tenn. Ct. Crim. App. June 25, 2009) (slip op.) (quoting *State ex rel. Folds v. Hunt*, 391 S.W.2d 629, 632 (Tenn. 1965)) (Attorney General could file a motion to dismiss in a *habeas* proceeding because it was not a criminal matter, which is reserved to the District Attorney). State habeas may not be used to challenge the underlying validity of a criminal conviction, but only judgments that are void because the court of conviction lacked jurisdiction or because a defendant's term of "imprisonment or other restraint" has expired. *Hickman v. State*, 153 S.W.3d 16, 20 (Tenn. 2004) (quoting *State v. Ritchie*, 20 S.W.3d 624, 630 (Tenn. 2000). [4]

Additionally, unlike *coram nobis*, writs of habeas corpus are not solely entrusted to criminal courts' jurisdiction, *see* Tenn. Code Ann. § 29-21-103, and are indeed available to petitioners in a wide array of non-criminal circumstances. Pet'r's Reply to the Attorney General's Response to Motion to Disqualify Tennessee Attorney General at 26.

As the Court of Criminal Appeals has reasoned, the Attorney General can represent the State in a *habeas* case precisely *because* "it is not a criminal proceeding." *Pirtle,* 2009 WL 1819251, at *3. Otherwise, the AG could not participate, because "the Attorney General and Reporter has no authority to prosecute violations of state criminal statutes in the Circuit Courts of Tennessee." *Id.* Unlike *habeas, coram nobis* is only available to convicted defendants in criminal cases and goes to the "underlying prosecution and conviction" in a "criminal proceeding[]" that is relegated to "the exclusive power and authority of the District Attorney General," *Pirtle*, 2009 WL 1819521, at *3.

All of these reasons explain why it has been the locally elected DA who has historically been responsible for responding to writs of error *coram nobis* before the trial court. If, as the AG

[4] Though the AG asserts that *coram nobis* is a collateral proceeding just like habeas corpus, which implicates the AG's authority in civil cases, *see* AG Resp. at 19-20, the Divestiture Act's definition of collateral review proceedings specifically includes *coram nobis* but not habeas. Tenn. Code Ann. § 40-30-114 (c)(4).

argues, the writ were a civil or appellate proceeding, it would be strange for the DA to have exercised the power without comment for so long (especially in light of the AG's longstanding statutory duty to respond to civil writs like habeas, *Pirtle*, 2009 WL 1819251, at *3), and for the legislature to reassign the power only for a small subset of criminal defendants.[5]

The State notes that, in some states, the AG represents the State in post-conviction proceedings. AG Response at 21-22. However, many states, including Tennessee's neighbors, empower the DA and not the AG to represent the State in such proceedings, including Kentucky, Mississippi, Missouri, Alabama, North Carolina and Virginia. See, e.g., Ky. R. Cr. P. 11.42 (explicitly providing for the locally elected Commonwealth's Attorney to represent Kentucky in those proceedings, *not the AG*); *Peterson v. State*, 2021 WL 4436826, at n. 2, 3. (Miss. Ct. App. 2021) (indicating DA's involvement in Mississippi post-conviction proceedings); *Bell v. State*, 751 So.2d 1035, 1037 (Miss. 1999) (same); *McFadden v. State*, 619 S.W.3d 434, 460 (indicating DA's involvement in Missouri post-conviction proceedings); Ala. R. RCRP. 32.6 (a); 32.7 (a)(establishing that Alabama petitions for post-conviction relief are held in the trial court, where the local DA is the respondent); *State v. Oakley*, 330 S.E.2d 59, 61 (N.C. App. 1985) (indicating DA's involvement in North Carolina post-conviction proceedings); *State v. Ellis*, 605 S.E.2d 168, 170 (N.C. App. 2004) (same); *Commonwealth v. Castro*, 90 Va. Cir. 90 (Va. Cir. Ct. 2015) (indicating DA's involvement in Virginia post-conviction proceedings); and *Commonwealth v. Morris*, 705 S.E.2d 503, 506 (Va. 2011) (same). In other states the AG and DA appear to share responsibilities related to post-conviction proceedings, such as Arkansas and Georgia. *See, e.g.*,

[5] For this reason, the Divestiture Act violates the equal protection guarantees of the 14th Amendment to the United States Constitution, and Article I, Section 8 and Article XI, Section 8 of the Tennessee Constitution, as it singles out forty-five specific, arbitrarily chosen death row inmates to have their collateral review matters handled by the unelected AG, as opposed to DAs. *See e.g.*, *State v. Tester*, 879 S.W.2d 823, 827 (Tenn. 1994) (striking down law providing work release option for DUI defendants in three selected counties).

Ark. Code Ann. § 16-112-203 (d) (establishing that that Arkansas habeas petitions for new scientific testing are served on both the prosecuting attorney and the AG); and GCA § 5-5-41 (establishing that Georgia extraordinary motions for a new trial are served on the DA and the AG).

C. The Legislature May Not Divest the District Attorney General of his Inherent Constitutional Responsibilities.

The AG argues that the Legislature may allocate the authority to represent the state in *coram nobis* proceedings as it sees fit, because *coram nobis* is statutory in nature. AG Resp. at 17–18. This argument misses the mark. While the Legislature may codify rules for criminal proceedings, it may not do so in a way that infringes on the DA's protected constitutional authority. *Superior Oil*, 857 S.W.2d at 661. As established above, the power to represent the state in *coram nobis* proceedings is within the DA's protected constitutional authority. Therefore, the Divestiture Act's attempt to strip the DA of this authority by transferring it to the AG cannot stand.

The inherent and exclusive power of the DA to fairly evaluate evidence and seek justice before the trial court is not subject to revocation by the Legislature.

Courts have rejected legislative attempts—like the Divestiture Act—to transfer the DA's inherent powers to unelected state officials. *Superior Oil*, 875 S.W.2d at 661. They have also admonished the AG not to "second-guess[] the judgment of the local prosecutor in settling a case" in post-conviction proceedings. *Abdur'Rahman v. State*, 648 S.W.3d 178, 191, 192 (Tenn. Crim. App. 2020) (quoting *State v. Watkins*, 804 S.W.2d 884, 887 (Tenn. 1991) (AG on appeal could not "second-guess" on appeal a DA's trial-level settlement decisions)). The AG, too, has understood that "because the district attorney's jurisdiction is constitutionally vested, it cannot be limited by statute." Tenn. Op. Att'y Gen. No. 08-39 (Feb. 29, 2008) (opining that bill purporting to prohibit DAs from plea bargaining in certain cases would violate Art. VI, Section 5).

Through history and tradition, the Legislature and the AG himself have historically respected the DA's sphere of exclusive constitutional authority. Statutes codify the Constitution's allocation of trial level prosecutorial power to the DA, and appellate prosecutorial power to the AG. *State v. Simmons*, 610 S.W.2d 141, 142 (Tenn. Crim. App. 1980); *see also* Tenn. Code Ann. §§ 8-7-103 (1) and 8-6-109 (b)(2). The AG has recognized that there are likely constitutional dimensions of this "division of labor between the two offices that represent the state in court," *see* Tenn. Op. Att'y Gen. No. 80-454 (Sept. 19, 1980) (noting the longstanding statutory designation of DA's authority to represent the state at the trial level), and the Legislature has made clear that it does not require the AG to "approve of, participate in, or supervise actions instituted by the various DAs." Tenn. Code Ann. § 8-6-303. It has also statutorily specified the situations in which the appointment of a constitutional DA *pro tempore* to prosecute in the stead of the DA is appropriate, but has never empowered the AG to supersede the DA in the trial court at will. Tenn. Code Ann. § 8-7-106.[6]

III. THE DIVESTITURE ACT INTERFERES WITH THE STRUCTURES OF SELF-GOVERNANCE ENSHRINED BY THE TENNESSEE CONSTITUTION, WHICH GUARANTEES THAT THE VOTERS, NOT THE LEGISLATURE, RETAIN SOVEREIGN AUTHORITY OVER THEIR ELECTED DISTRICT ATTORNEYS GENERAL.

[6] To the extent that statutes purport to allocate any discretionary power to the AG to bring criminal prosecutions in the trial court, such grants of authority are rare and do not attempt to displace the prosecutorial authority of an unconflicted DA. *See, e.g.*, Tenn. Code Ann. §§ 8-6-112 (certain public corruption cases where the DA has a conflict); 48-1-123 (*concurrent* jurisdiction with DAs to criminally prosecute securities offenses); 69-3-112 (*concurrent* jurisdiction to criminally prosecute Water Quality Control Act violations at request of state agency); 47-25-1222 (*concurrent* jurisdiction to criminally prosecute certain misdemeanors arising from invention development); 50-7-714 (*concurrent* jurisdiction to criminally prosecute certain Employment Security Law violations); 55-17-120 (d) (*concurrent* jurisdiction to prosecute violations of certain record keeping requirements related to automobile auctions). In the only instance in which one of these statutes has been constitutionally challenged, the Tennessee Supreme Court invalidated its restriction on local DA discretion under Article VI, Section 5. *See Superior Oil,* 875 S.W.2d at 661 (invalidating provision of Water Quality Control Act which required DA to seek permission from state agency before prosecuting).

A. The Tennessee Constitution Enshrines the Power of the People and the Right to Vote.

The Tennessee Constitution contains strong protections for self-governance, which is focused on the right to vote. Tenn. Const. art. I, § 1; Tenn. Const. art. IV, § 1; Tenn. Const. art. I, § 5. As the Supreme Court has explained: "It is beyond question that the right to vote is a precious and fundamental right . . . Even the most basic of other rights are illusory if the right to vote is undermined . . . This fundamental right is expressly guaranteed under the Tennessee Constitution." *Fisher v. Hargett*, 604 S.W.3d 381, 400 (Tenn. 2020) (citations omitted).

The Legislature may therefore not limit the right to vote beyond the constitutional abridgement of the right upon conviction. Tenn. Const. art. I, § 5; *Trotter v. City of Maryville*, 191 Tenn. 510, 521–22, (1950) (The Legislature's control of elections "does not, and cannot, go beyond the limitation expressed in Article I, Section 5"). The people's will, as expressed through their vote, is the bedrock of Tennessee democratic government and the vote may not be diminished or denied by the Legislature. *Cf. See Dunn v. Blumstein*, 405 U.S. 330, 353-55 (1972) (invalidating Tennessee durational residency requirement as an impermissible burden on the right to vote); *Tate v. Collins*, 496 F. Supp. 205, 206-11 (W.D. Tenn. 1980) (invalidating Tennessee absentee voter requirements). The Divestiture Act abrogates the people's vote by improperly removing DAs from their role in collateral proceedings.

B. The Constitution Enshrines DAs as Elected Officers to Manifest the People's Power in Criminal Proceedings

It is thus not surprising that the Tennessee Constitution expressly provides that DAs are elected by their constituents. From 1796 through 1853, DAs were appointed by the General Assembly. *See* 9 Tenn. Prac. Crim. Prac. & Procedure § 6:1, n. 2. However, in an effort to curb patronage, and to make officials more responsive to the people, Tennessee adopted popular

election of various officials, including district attorneys general by way of the constitutional amendments of 1853. *See* Michael J. Ellis, *The Origins of the Elected Prosecutor*, 121 YALE L.J. 1528, 1551 (2012). The 1853 amendment requiring election of DAs was "a further assumption of sovereignty by the people." *Richardson v. Young*, 125 S.W. 664, 672 (Tenn. 1910). Since then – and for the past 170 years – the electorate, not the legislature, has been vested with sovereign authority to select district attorneys general.[7]

This constitutional scheme ensures that the people, rather than unelected state officers, can direct the criminal trial proceedings in their communities via their electoral control of the DA. *State v. Banks*, 271 S.W.3d 90, 154–55 (Tenn. 2008) (citations omitted) ("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. 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"). The Legislature, the AG, and the courts may not improperly interfere in the DA's exercise of their core constitutional responsibilities. *See Ramsey*, 998 S.W.2d at 209; *Dearborne*, 575 S.W.2d at 262 (Tenn. 1978) (summarizing that the DA "is answerable to no superior . . .No court may interfere with his discretion to prosecute, and in the formulation of this decision he or she is answerable to no one. In a very real sense this is the most powerful office in Tennessee today"). Instead, the Constitution ensures that DAs are held accountable by first and foremost the oversight of the voters through their exercise of the franchise. *Quillen v. Crockett*, 928 S.W.2d

[7] However, uniquely, the Constitution of 1870, shifted responsibility for selecting the Attorney General and Reporter for the State to the Judges of the Supreme Court. *See The History of the Tennessee Attorney General's Office*, TENN. B.J., APRIL 2000, at 12, 14. The legislative history of the 1870 amendments shows that the Framers specifically wanted *locally elected* prosecutors to have authority over *criminal* matters arising in the courts within their judicial districts.

47, 51 (Tenn. Crim. App. 1995) ("If voters are in disagreement with a prosecutor's charging determinations, they have the ultimate veto at the ballot box"). [8]

C. The Statute Violates the Voting Rights of Voters by Improperly Infringing on the Elected DA's Authority

The Tennessee Constitution therefore carefully delineates the DA as a constitutional officer subject to the will of their votes. The Divestiture Act improperly dismantles this democratic structure by removing collateral proceedings from the DA – the elected voice of the local community, its values, and its policy preferences – to the unelected State AG. This, in turn, nullifies the voters' supervisory role over the DA, and their constitutional right to vote outright. *See e.g., Riley v. Kennedy*, 553 U.S. 406, 420 (2008) (confirming that "it is undisputed that a 'change' from election to appointment is a change 'with respect to voting'" that may infringe on voting rights); *Johnson v. De Grandy*, 512 U.S. 997, 1018 (1994) (explaining that limiting the power of elected officials, such as through the "impeachment of office-holders" and "creation or elimination of elective offices", can be an example of improper dilution and "hobbling" of voting power).[9]

This abridgement of voter's control over local democratic affairs is even more striking given the gravity of death penalty proceedings and the numerous and complicated legal, ethical,

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[8] One of the key issues in the election that swept DA Mulroy into office was criticism of his opponent, the incumbent DA, for persistently refusing to consider new mitigating and exculpatory evidence brought forth by a death row prisoner before ultimately conceding that his claims were meritorious. *See* Death Penalty Info. Ctr., *Shelby County Voters Oust Prosecutor Who Sought to Execute Pervis Payne* (Aug. 9, 2022), https://deathpenaltyinfo.org/news/shelby-county-voters-oust-prosecutor-who-sought-to-execute-pervis-payne.

[9] DA Mulroy clearly has standing to raise this issue. In Tennessee, any individual voter has standing to challenge abridgments of his or her right to vote. *See Fisher v. Hargett*, 604 S.W.3d 381, 396 (Tenn. 2020) (voters had standing to challenge absentee voting rules); *City of Memphis v. Hargett,* 414 S.W.3d. 88, 98-101 (Tenn. 2013). In voting rights cases, the type of plaintiff "with the clearest claim to standing" is a candidate in the election. Steven J. Mulroy, *Baby & Bathwater: Standing in Election Cases After 2020*, 126 Dickinson Law Review 9, 21 (2021) (collecting cases). This is the case in Tennessee. *See McFarland v. Pemberton*, 530 S.W.3d 76 (Tenn. 2017) (candidates have "special interests" in election procedures); *Lawrence v. Blackwell*, 430 F.3d 368, 371 (6th Cir. 2005) (further holding that standing "is somewhat relaxed" in voting rights cases). A successful candidate, now sitting elected incumbent, thus has standing to challenge as a voting rights violation a diminution of his authority as an elected official.

and policy questions intrinsic therein. *See, e.g., Gregg v. Georgia*, 428 U.S. 153, 187, (1976) ("There is no question that death as a punishment is unique in its severity and irrevocability"). If the views of voters, as expressed through their votes for local leadership, no longer matter when addressing these questions of literal life and death, quite simply their votes do not matter. The Legislature, in passing the Divestiture Act and removing public input from collateral review proceedings, risks degrading Tennessee's local democratic institutions and the integrity of and public confidence in the government. *Bemis Pentecostal Church*, 731 S.W.2d at 901 (concluding that a state campaign finance disclosure statute did not violate the federal constitution, while noting that "the effective exercise of the right to vote is essential to the continued existence of democratic institutions . . . The informed exercise of that right by every qualified individual enhances the integrity of and public confidence in the government.").

In *State By & Through Town of S. Carthage, Tenn. v. Barrett*, the Supreme Court held that "judges charged with interpreting the criminal laws of this state should be elected in accordance with Article VI, § 4 of the Tennessee Constitution, in order to assure an independent judiciary free of the political caprice and whims of other government branches." *State By & Through Town of S. Carthage, Tenn. v. Barrett*, 840 S.W.2d 895, 899 (Tenn. 1992). Thus, a DUI conviction imposed by an unelected municipal judge was void. *Id.* at 899. This logic applies, here, as well – no more can an unelected judge convict than can an unelected prosecutor prosecute. It is particularly important to recognize that the constitutional provision requiring the election of judges, Article VI, Section 4, immediately precedes the constitutional provision establishing elected district attorneys general, Article VI, Section 5. The two provisions should be interpreted *in pari materia.*

IV. THE DIVESTITURE ACT VIOLATES ARTICLE II, SECTION 17 OF THE TENNESSEE CONSTITUTION.

Beyond violating Article VI, Section 5 and the Tennessee Constitution's provisions enshrining voting rights, the Divestiture Act is constitutionally inadequate under Article II, Section 17. Because the Divestiture Act encompasses more than one subject and contains an inadequate caption, it fails to give proper notice of the Divestiture Act's effect.

The original versions of the bills that would become the Divestiture Act, House Bill 1002 ("HB 1002") and Senate Bill 1500 ("SB 1500"), concerned the maintenance, storage, and preservation of sexual assault kits. Pet'r's Mot., Ex. 2, at 34. The Divestiture Act's current language, which obviously has nothing to do with sexual assault kits, was added when the Legislature amended the bills in their totality. Despite replacing the entirety of the bills via amendment, the Legislature did not update the bills' captions or subject.

In doing so, the Legislature induced the very problems Article II, Section 17 seeks to prevent. Article II, Section 17 requires the Legislature to provide notice of its legislative actions both to legislators and the general public so as to ensure democratic accountability. *Cannon v. Mathes*, 55 Tenn. 504, 521 (1872) (explaining that the purpose of the provision is "to prevent surprise or fraud . . . by means of provisions in bills of which the titles gave no intimation, and which might therefore be overlooked, and carelessly and unintentionally adopted"). It thus works to prevent bills from containing "hidden provisions of which legislators and other interested persons might not have appropriate or fair notice." *State ex rel. Blanton v. Durham*, 526 S.W.2d 109, 111 (Tenn. 1975).

The Act also requires that the AG be reimbursed for any expenses incurred. Tenn. Code Ann. § 40-30-114 (a). Crucially, the AG admits that the bill's caption failed to reserve Title 9, concerning financial matters. AG Response at 27. This compounds the notice problem.

The *Hailey* decision remains instructive. *State v. Hailey*, 505 S.W.2d 712, 715 (Tenn. 1974). There, the Supreme Court concluded a statute with a caption addressing the death penalty for murder in the first degree violated Article II, Section 17 as its body also contained provisions governing rape and victims in the context of drug crimes. *Hailey*, 505 S.W.2d at 715. The caption stated a purpose to not only "prescribe the death penalty for murder in the first degree" but also "for other related purposes." *Id.* at 713. This might arguably have reached the somewhat related topic of punishment for rape, the Court nonetheless held that the caption did not provide fair notice. Moving from rape kit testing deadlines to prosecution of collateral capital cases is no less of a stretch than moving from first degree murder "and other related purposes" to rape.

The AG purports that the *Hailey* Court struck down the statute because "the body of the bill was decidedly broader than its limited caption". AG Response at 26. While technically true, this is only half the story. The *Hailey* Court explained that the reason the incongruity between the bill's caption and body was unconstitutional under Article II, Section 17 was because it ultimately "did not give to the Legislature and to the public notice" of the bill's contents. It thus violated the Article's prohibition against "surprise and fraud" in legislation. *Hailey*, 505 S.W.2d at 714.

The problem with that caption was not, as the AG avers, that it dealt with public finances. *Cf.* AG Resp. at 27. The problem was that "the restrictive caption failed to adequately inform the members of the General Assembly and the citizens of this state about the nature and scope of the legislation." *Tenn. Mun. League*, 958 S.W.2d at 338. Although "technical and narrow construction of a caption is not favored" for Article II, Section 17 analysis, *Citicorp Fin. Servs. Corp. v. Adams*, 674 S.W.2d 705, 709 (Tenn. 1984), bills with captions that give "no notice to the Legislature or to the public of some of the subjects contained in its body" must be struck down. *Hailey*, 505 S.W.2d at 715.

The Divestiture Act's caption not only violates Article II, Section 17's prohibition against "surprise" provisions in legislation through omission, it also obscures the true purpose of the Act with an inaccurately expansive caption. Because the Legislature did not update the caption for the bill to reflect its changed subject matter, the caption manages to be both overly broad while also insufficient to fully describe the Divestiture Act. By purporting to amend large swaths of the Tennessee Code, the bill's caption fails to provide realistic notice as to which subjects are being amended. Indeed, the caption suggests that unrelated portions of the code involving public officials (Title 8), juveniles (Title 37), correctional facilities (Title 41), and driving offenses (Title 55, Chapter 10) were amended under the Act. In fact, ultimately, only Titles 8, 39, and 40 were amended.

The caption's specific reference to Title 55, Chapter 10, Part 4, which is titled "Accidents, Crimes and Penalties—Part 4—Alcohol and Drug Related Offenses," is particularly puzzling. Illustrative provisions of this Part include "Tests to determine alcohol or drug content; when authorized; implied consent; admissibility of results; refusal, prevention, or obstruction of testing" (Tenn. Code Ann. § 55-10-406); "Refusal to submit to tests" (Tenn. Code Ann. § 55-10-407); and "Blood samples" (Tenn. Code Ann. § 55-10-408). Each of these code provisions, while hypothetically relevant to administration of collateral proceedings, appear to be much more closely linked to the bill's original purpose to govern the maintenance, storage, and preservation of sexual assault kits. Further, the Divestiture Act and its caption do not purport to amend Title 9 of the Tennessee Code, which addresses public finance, despite the Act containing financial provisions regarding the AG's reimbursement. The caption therefore provides very little notice about what the Divestiture Act actually intends to do. In reviewing the caption, a reasonable reader would

have had no idea that this particular bill would be transformed to become the Divestiture Act—the Act's legislative text is in fact an improper "surprise". *Cannon*, 55 Tenn. at 521.

Contrary to the AG's assertion, it would be inappropriate to read Tennessee law to hold that such overbreadth can never create an Article II, Section 17 defect. *See* AG Resp. at 27. If so, the legislature could simply list every title of the code in a caption, which would provide no meaningful notice. The *Witt* case, on which the AG relies for this proposition, in fact stands for a much narrower proposition – that an incidental inclusion of an additional code section or title will not invalidate a caption. Consider the caption at issue in *Witt*:

> An Act to provide for the extension of municipal boundaries by the annexation of territory by municipalities and the settlement of resulting problems involving other State instrumentalities such as utility districts, sanitary districts, school districts, and other public service districts; amending Section 3322 of the Code of Tennessee 1932, relating to contraction of a municipality's boundaries; and prescribing the effects of this Act on other laws.

Witt v. McCanless, 292 S.W.2d 392, 393 (Tenn. 1956). This caption provides ample notice regarding the substance of the bill, regardless of the particular amended statute. Contrast this description with the scant explanation "relative to criminal justice" that the legislature provided for the Divestiture Act.

The AG makes a similar mistake in relying on the 1948 *Brown* decision for the proposition that Article II, Section 17 cannot be violated due to a mismatch between the caption and the body. AG Resp. at 25 ("the body of the text may accomplish the purpose in the caption through various titles and in various ways"). There, challengers claimed the relevant bill's deficiency was its alleged multiple *subjects*, not a caption that did not provide notice regarding the bill's body. *Brown v. Brown*, 216 S.W.2d 333, 334 (Tenn. 1948) ("It is very ably argued that the act, both in its caption and body, 'clearly contains two separate and distinct subjects' . . . in contravention of [Article II Section 17]"). The *Brown* Court therefore conducted a single-subject analysis, rather than opining

directly on the appropriateness of caption in relation to the body. *Id.* The Divestiture Act, with its caption listing six titles and its body amending only two, is clearly distinct.

Legislators and the public were initially led to believe that the bill concerned the maintenance of rape kits; the final bill had nothing to do with rape kits. The recitation of as many as seven different entire titles of the Tennessee Code hardly narrowed things down sufficiently for practical notice of what new topics the bill may encompass. And as many titles as were reserved, the caption still did not reserve the title dealing with financial matters, which are clearly dealt with in the final bill. The Divestiture Act thus violates Article II, Section 17 by containing multiple subjects, a body that is not germane to its restrictive caption, and a caption that does not provide proper notice regarding the Divestiture Act's effect. The Divestiture Act is consequently constitutionally invalid and the AG must be disqualified from representing the State in this matter.

CONCLUSION

For the foregoing reasons, DA Mulroy respectfully requests that the court find the Divestiture Act unconstitutional and grant his and Petitioner's joint motion to disqualify the Attorney General and Reporter from representing the State of Tennessee in this matter.

Respectfully submitted,

Steve Mulroy

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served upon the following parties via email and U.S. Mail on the 31st day of May, 2023.

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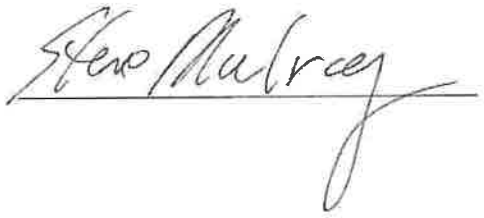

IN THE CRIMINAL COURT
FOR THE THIRTIETH JUDICIAL DISTRICT
AT MEMPHIS, TENNESSEE

LARRY McKAY,

Petitioner,

v.

Case Numbers
B87597 & B87598
Division I

STATE OF TENNESSEE,

Respondent.

DECLARATION OF DISTRICT ATTORNEY STEVE MULROY

I hereby make the following sworn declaration:

1. I am the Shelby County District Attorney General, a position I have held since September 2022. I submit this declaration as part of the above-captioned matter.

2. The above-captioned matter involves a constitutional challenge to the recent legislative amendments enacted by 2023 Public Acts Chapter 182 (the "Divestiture Act").

3. While the Divesture Act was moving through the Legislature, I consulted directly with the Attorney General repeatedly on the merits of the Act. My objections concerned the allocation of authority between the Attorney General and the local District Attorneys of

Tennessee. I understood from those discussions the Attorney General supported the Act's passage and its constitutionality despite my objections.

4. I filed a Response in Support of Petitioner's Motion filed on May 1st, 2023, which notified the Attorney General and Reporter of my contention that the Divestiture Act violates Article VI, Section 5, and Article II, Section 17 of the Tennessee Constitution. The Response was served on the Attorney General and Reporter via U.S. Mail on May 1st, 2023.

5. As of the filing of my Response, I believed that any consultation with the Attorney General and Reporter regarding the constitutionality of the Divesture Act would have been futile. This belief was grounded in my prior conversations with the Attorney General and Reporter regarding the constitutionality of the Act.

6. The Attorney General and Reporter has acknowledged that I filed this Response, indicating my agreement with McKay's motion. *See* AG's Response at 4.

7. The Attorney General and Reporter has further acknowledged that my office orally joined McKay's motion before the Court on May 3, 2023. *See* AG's Response at 4.

8. I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 31st day of May 2023.

Steve Mulroy

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