Electronically RECEIVED on February 01, 2024
Appellate Court Clerk

Electronically FILED on February 06, 2024
Appellate Court Clerk

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

LARRY MCKAY,	)	
	)	
Petitioner/Appellee,	)	No. W2023-01207-CCA-R9-CO
	)	DEATH PENALTY CASE
v.	)	
	)	
STATE OF TENNESSEE,	)	
	)	
Respondent/Appellant.	)	

On Permission for Interlocutory Appeal Under Rule 9 from the Order of The Criminal Court of Shelby County, Case Nos. B87597 and B87598

BRIEF OF *AMICUS CURIAE* 64 CURRENT AND FORMER PROSECUTORS AND ATTORNEYS GENERAL, AND FORMER JUDGES, UNITED STATES ATTORNEYS, AND FEDERAL OFFICIALS IN SUPPORT OF APPELLEE

Kevin H. Sharp (BPR #016287)
Sanford Heisler Sharp, LLP
611 Commerce Street, Suite 3100
Nashville, TN 37203
(615) 434-7010 Telephone
(615) 434-7020 Facsimile
ksharp@sanfordheisler.com

Counsel for the proposed Amici Curiae

TABLE OF CONTENTS

TABLE OF CONTENTS 2

TABLE OF AUTHORITIES 3

STATEMENT OF IDENTITY AND INTEREST OF *AMICI CURIAE* 6

SUMMARY OF ARGUMENT 8

ARGUMENT 10

I. The Act Unconstitutionally Undermines Local Control 10

A. The Act Follows a Deeply Concerning National Trend of Attacks on Duly Elected Leaders 10

B. Tennessee's Constitution Requires Local Oversight of, and Accountability For, Elected Prosecutors 13

C. The Act Unconstitutionally Disrupts the System of Representation and Accountability in the State 17

II. The Act Undercuts Well-Established Principles of Prosecutorial Discretion and Undermines the Ability of Elected District Attorneys to Carry Out their Job as Ministers of Justice 18

III. The Tennessee Legislation, If Allowed to Stand, Undermines Democracy and Therefore Threatens Public Safety 22

CONCLUSION 24

CERTIFICATE OF COMPLIANCE 26

CERTIFICATE OF SERVICE 27

APPENDIX A LIST OF *AMICI* 28

TABLE OF AUTHORITIES

PAGE(S)

Tennessee Cases

Foute v. State, 4 Tenn. 98 (1816) 19
State v. Banks, 271 S.W.3d 90 (Tenn. 2008) 14
State v. Gillam, 901 S.W.2d 385 (Tenn. Crim. App. 1995) 11
State v. McCollum, 904 S.W.2d 114 (Tenn. 1995) 19
State v. Spradlin, 12 S.W.3d 432 (Tenn. 2000) 13
State v. Superior Oil, Inc., 875 S.W.2d 658 (Tenn. 1994) 13, 19

Supreme Court Cases

Berger v. U.S., 295 U.S. 78 (1935) 20

Other Cases

Commonwealth v. Brown, 196 A.3d 130 (Pa. 2018) 21
Commonwealth v. Dascalakis, 140 N.E. 470 (Mass. 1923) 21

Constitutional Provisions

Tenn. Const. Article VI, §5 .... 9, 13, 18

Statutes

Tenn. Code Ann. § 2-5-151 16

Other Authorities

Action News 5 Staff, *Shelby Co. Justice Review Unit Receives Nearly $527K Grant to Support Post-Conviction Advocacy, DA's Office Announces*, Action News 5 (Oct. 12, 2023), https://www.actionnews5.com/2023/10/12/shelby-co-justice-review-unit-receives-nearly-527k-grant-support-post-conviction-advocacy-das-office-announces/ 15

Alice Herman, *Republicans Threaten to Impeach Newly Elected Wisconsin Supreme Court Judge*, The Guardian (Sep. 11, 2023), https://www.theguardian.com/us-news/2023/sep/11/wisconsin-

republicans-impeachment-threat-state-supreme-court 12

Brooke Schultz and Mark Scolforo, *Court Splits on Legality of Move to Impeach Philadelphia DA*, AP (Jan. 12, 2023), https://apnews.com/article/politics-pennsylvania-philadelphia-impeachment-03a585cefc72d14d7048a3c96f3a54ee 11

Craig Lerner, *Impeachment, Attainder, and a True Constitutional Crisis: Lessons from the Strafford Trial*, 69 U. Chic. L. Rev. 2057 (2002) 10

Death Penalty Information Center, The Death Penalty in 2022: Year End Report, (Dec. 16, 2022) available at https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2022-year-end-report 22

Fair and Just Prosecution, *Building Community Trust: Key Principles and Promising Practices in Community Prosecution and Engagement* (2018), https://fairandjustprosecution.org/wp-content/uploads/2018/03/FJP_Brief_CommunityProsecution.pdf 23

Fair and Just Prosecution, *Conviction Integrity Units and Internal Accountability Mechanisms* (2017), https://fairandjustprosecution.org/wp-content/uploads/2017/09/FJPBrief.ConvictionIntegrity.9.25.pdf........ 15

German Lopez, *Police Have to Repair Community Trust to Effectively do Their Job*, Vox (Nov. 14, 2018), https://www.vox.com/identities/2016/8/13/17938262/police-shootings-brutality-black-on-black-crime... 24

John McGinnis & Michael Rappaport, *Our Supermajoritarian Constitution*, 80 Tex. L. Rev. 703 (2002) 11

Jolie McCullough & Eleanor Kibanoff, *Texas Legislature Passes Bill Reining in "Rogue" Prosecutors*, Texas Trib. (May 28, 2023), https://www.texastribune.org/2023/05/28/texas-legislature-prosecutors-removal/ 12

Mary Ellen Klas, *State Attorney is Latest Example of Desantis' Use of Power to Suspend Elected Officials*, Tampa Bay Times, (Aug. 9, 2023), https://www.tampabay.com/news/florida-politics/2023/08/09/state-attorney-is-latest-example-desantis-use-power-suspend-elected-officials/ 11

Seri Irazola et al., *Addressing the Impact of Wrongful Convictions on Crime Victims*, 274 National Institute of Justice Journal (2014), available at: https://www.ojp.gov/pdffiles1/nij/247881.pdf 21

Shelby County Justice Review Unit, https://www.shelbyjru.com/ (last visited Jan. 18, 2024) 15

Steve Mulroy for District Attorney, Steve's Platform, https://www.stevemulroyforda.com/platform (last visited Jan. 18, 2024) 15

The ABA Standards for Criminal Justice, Prosecution Function and Defense Function 3.8 (2014) 14, 19

The National Registry of Exonerations, 2022 Annual Report (2023), https://www.law.umich.edu/special/exoneration/Documents/NRE%20Annual%20Report%202022.pdf 15

Todd Richmond, *Wis. DA Says He Won't Prosecute Some Gun Laws*, San Diego Union-Tribune (July 2, 2010), https://www.sandiegouniontribune.com/sdut-wis-da-says-he-wont-prosecute-some-gun-laws-2010jul02-story.html 12

Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 Ohio St. J. Crim. L. 231 (2008) (available at: https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1388&context=faculty_scholarship) 23, 24

Tom R. Tyler & Jonathan Jackson, *Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation and Engagement*, 20 Psych., Pub. Pol'y & L. 78 (2014) (available at: https://law.yale.edu/sites/default/files/area/center/justice/document/ssrnpopularlegitimacy.pdf) 23

STATEMENT OF IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici curiae are a bipartisan group of 64 current and former prosecutors and Attorneys General, and former judges, United States Attorneys, and federal officials who are committed to protecting the integrity of our justice system. A full list of *Amici* is attached as Appendix A.

Amici recognize that protecting democracy and the rule of law is essential to preserving both the integrity of the justice system and public safety. When democracy is eroded, especially at the hands of political officials, it harms public trust in government structures and institutions that are part of the legal system and tasked with preserving order. The work of District Attorneys' offices, which have a duty to uphold the law and protect communities, is especially threatened. When people don't have trust in the legal system, they may refuse to cooperate with those seeking to keep communities safe, opt out of the legal system, and even ignore its laws. Public safety is compromised when our community loses faith in the rule of law and the proper functioning of our criminal legal system.

Right now, anti-democratic attacks are on the rise, and some have sought to create a political wedge issue aimed at eroding the autonomy and independence of duly elected prosecutors. Tennessee's recently passed law, 2023 Tenn. Pub. Acts ch. 182 ("The Act"), which removes locally elected District Attorneys from post-conviction death penalty cases proceeding in the local trial court and grants "exclusive control over the state's defense" in these cases to the judicially appointed Attorney

General, follows this trend. The Act removes power from locally elected officials and redistributes it to an appointee with little accountability to the voters and who need not reside in the jurisdiction. It sidelines the duly elected District Attorney in criminal cases in which the consequences could not be more critical, and in proceedings where a prosecutor must address the very essence of justice—including questions like whether new evidence undercuts the validity of a conviction. Addressing and remedying unjust past convictions is an integral part of an elected prosecutor's role as a minister of justice. It is essential to protecting the integrity of the justice system, and a fundamental part of the vision for that system that communities are entitled to guide through their elected prosecutor.

The legislature offered no meaningful reason for this change and did not credibly claim it was necessary to protect public safety. Instead, The Act attacks local control and the ability of voters to be represented by someone who reflects their values and is accountable to them.

Amici hail from various parts of the country and have experience in different areas of the criminal legal system. They share a deep concern about The Act's interference with well-settled prosecutorial independence and discretion and undermining of local voters' will and the democratic process. Moreover, *Amici* are profoundly worried about the impact these consequences will have on the public's trust in the legal system and, more broadly, democratic institutions and public safety.

This Act, if allowed to stand, destabilizes the administration of justice in Tennessee, paves the way for further erosion of local control

and democracy in subsequent legislative sessions, and potentially creates adverse ripple effects in other parts of the country. For all these reasons, the issues raised in this case are of grave concern to *Amici*.

SUMMARY OF ARGUMENT

One of the bedrock principles of our democracy is that people have the ability to elect their representatives at every level of government. Their preferred candidate may not always win, but people have the right to vote for the candidate of their choosing and, if that individual receives the majority of the vote, to have that person carry out the duties of the office until the next election, barring criminal activity or grievous misconduct. This principle should apply whether the elected official is a Democrat, Republican, Independent, or a candidate from another third party.

However, across the country, attempts to undermine the will of the voters by removing duly elected officials or restricting their authority are spreading, and this bedrock democratic norm is at grave risk. The Tennessee Legislature has followed in these footsteps. Last legislative session, it passed an Act replacing the locally elected District Attorney with the judicially appointed Attorney General in trial court post-conviction capital cases, where, for example, newly discovered evidence is often uncovered by the government or presented by the defense. 2023 Tenn. Pub. Acts ch. 182 ("The Act"). The Act divests District Attorneys of their traditional and well-settled duties to represent the state and their voters in all criminal matters that are attached to the local criminal

court.[1] The legislature offered no valid reason for the change, but this enactment notably followed the election of District Attorneys who pledged to review and correct wrongful convictions. *See* Order, 12, *McKay v. State*, Nos. B87587 & B87598 (Crim. Ct. 13th Dist. Mem., TN).

If The Act is allowed to stand, it will set a dangerous precedent that erodes the settled role and autonomy of elected prosecutors and their well-established obligations to pursue justice for the entire community, including post-conviction justice.

In passing this Act, the legislature ignored the careful balance of power and duties of prosecutors defined by the Tennessee Constitution. It overrode the will of the voters who chose the District Attorney who would best exercise prosecutorial discretion and right past wrongs, in line with the community's interests and values. Such misuse of the legislative power, and undermining of the function of a duly elected local District Attorney, cannot stand.

When we start chipping away at the foundational underpinnings of our democracy in this fashion, people lose trust in our system of government. When public trust in the justice system suffers, so does public safety. In order to combat crime, the legal system needs the full cooperation of the community, particularly victims and witnesses. When members of the community cannot rely on democratic norms, and do not think the system is fair, they may not feel compelled to participate in it.

---

[1] Tenn. Const. Article VI, §5 (stating that "[a]n 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." (Emphasis added)).

This reluctance limits the ability of police and prosecutors to seek justice and promote public safety, making everyone less safe.

For all of these reasons, *Amici*—criminal justice leaders past and present—urge this Court to protect the very pillars of our nation of government and rule of law, and find that this Act violates the Tennessee Constitution and essential principles of prosecutorial independence and respect for the democratic will of local voters.

ARGUMENT

I. The Act Unconstitutionally Undermines Local Control

A. The Act Follows a Deeply Concerning National Trend of Attacks on Duly Elected Leaders

Our democracy is based upon the core principle that people have the ability to elect their representatives at the local level, and their representatives are charged with carrying out their duties in a way that reflects their voters' values. This core principle should apply whether the elected official is a Democrat, a Republican, or from another party. However, nationwide attempts to undermine the will of the voters by removing duly elected officials or restricting their authority are spreading, and this foundational democratic norm is in jeopardy.

Previously, removal and impeachment provisions were utilized only as safety valves when an elected official committed crimes or serious misconduct.[2] But now, some state officials are using these provisions to

[2] *See*, e.g. Craig Lerner, *Impeachment, Attainder, and a True Constitutional Crisis: Lessons from the Strafford Trial*, 69 U. Chic. L. Rev. 2057, 2060 (2002); John McGinnis & Michael Rappaport, *Our*

remove duly elected officials because of policy disagreements, or worse, simply to fuel a political wedge issue. All of this is occurring at the expense of the democratic process and in ways that erode the will of local voters and communities.

In Florida, for example, Governor Ron DeSantis has removed two elected local State Attorneys, along with a sheriff, mayors, and school board members. In total, he has suspended at least 23 elected officials since 2019.[3] In Pennsylvania, legislators in the State House voted along party lines to impeach recently re-elected Philadelphia District Attorney, Larry Krasner, based largely on his use of well-established prosecutorial discretion. (A lower court has since found the impeachment unlawful; and the Senate thereafter voted to postpone the trial indefinitely.)[4] The Texas Legislature passed a bill last year that allows any county resident to file a removal petition against the elected District Attorney, based not on

---

Supermajoritarian Constitution, 80 Tex. L. Rev. 703, 756 n. 219 (2002); *see also State v. Gillam*, 901 S.W.2d 385, 389 (Tenn. Crim. App. 1995) (holding that absent a violation of law, courts may not interfere with a District Attorney's free exercise of their discretionary authority over the criminal prosecutions in their districts).

[3] *See* Mary Ellen Klas, *State Attorney is Latest Example of Desantis' Use of Power to Suspend Elected Officials*, Tampa Bay Times, (Aug. 9, 2023), https://www.tampabay.com/news/florida-politics/2023/08/09/state-attorney-is-latest-example-desantis-use-power-suspend-elected-officials/.

[4] Brooke Schultz and Mark Scolforo, *Court Splits on Legality of Move to Impeach Philadelphia DA*, AP (Jan. 12, 2023), https://apnews.com/article/politics-pennsylvania-philadelphia-impeachment-03a585cefc72d14d7048a3c96f3a54ee. The case is still pending on appeal.

criminal misconduct, but because of his or her policy decisions about how to utilize discretion.[5] These efforts are not limited to elected prosecutors—last year, the threat of impeachment loomed large over Wisconsin's judiciary, following threats to impeach a recently-elected State Supreme Court Justice in an effort by some to protect gerrymandered legislative maps.[6]

Such efforts are not limited to "red state" actors reining in so-called "progressive" prosecutors.[7] Allowing these state-level efforts to stand puts "traditional" or "conservative" locally elected prosecutors at risk just as much as "reform-minded" or "progressive" prosecutors.

The Act, sadly, follows in these footsteps, divesting Tennessee District Attorneys of their traditional and well-settled duties to represent the state and their voters in all criminal matters that are attached to the local criminal court, and replacing their discretion with that of the unelected Attorney General.

---

[5] Jolie McCullough & Eleanor Kibanoff, *Texas Legislature Passes Bill Reining in "Rogue" Prosecutors*, Texas Trib. (May 28, 2023), https://www.texastribune.org/2023/05/28/texas-legislature-prosecutors-removal/.

[6] Alice Herman, *Republicans Threaten to Impeach Newly Elected Wisconsin Supreme Court Judge*, The Guardian (Sep. 11, 2023), https://www.theguardian.com/us-news/2023/sep/11/wisconsin-republicans-impeachment-threat-state-supreme-court.

[7] *See, e.g.*, Todd Richmond, *Wis. DA Says He Won't Prosecute Some Gun Laws*, San Diego Union-Tribune (July 2, 2010), https://www.sandiegouniontribune.com/sdut-wis-da-says-he-wont-prosecute-some-gun-laws-2010jul02-story.html (pro-gun-rights DA disavows prosecution of gun restrictions).

B. Tennessee's Constitution Requires Local Oversight of, and Accountability For, Elected Prosecutors

Historically, and under Tennessee's Constitution, all criminal matters that occur in local criminal courts fall within the purview of locally elected prosecutors. Specifically, the Tennessee Constitution requires that all criminal matters in the jurisdiction's courts be attended to by the locally elected District Attorney. Under Article VI, §5, a District Attorney, who is elected by "qualified voters of such circuit or district," is tied to a "judge having criminal jurisdiction" as the entity to "attend or prosecute" according to the law. Put differently, and as the lower court held, the District Attorney is the attorney for the state within his or her district in any trial-court-level criminal case. *See State v. Spradlin*, 12 S.W.3d 432, 436 (Tenn. 2000) ("[I]t is well-settled law and custom that a district attorney general has the sole duty, authority, and discretion to prosecute criminal matters."). In contrast to the District Attorney, the Attorney General is appointed by Supreme Court Justices but the office's duties are not tied to any criminal local, trial court proceeding.

Furthermore, under separation of powers law, the General Assembly cannot interfere with the scope of the District Attorney's authority. "Although the General Assembly may enact laws prescribing or affecting the 'procedures for the preparation of indictments or presentments,' it cannot enact laws which impede the inherent discretion and responsibilities of the office of district attorney general without violating [the Tennessee Constitution]." *State v. Superior Oil, Inc.*, 875 S.W.2d 658, 661 (Tenn. 1994).

This demarcation of authority, with elected District Attorneys handling criminal cases at the trial level in local courts, and in a district where they must reside and are therefore readily accessible to voters, has ample and sensible justification. As the Tennessee Supreme Court has stated: "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." *State v. Banks*, 271 S.W.3d 90, 154-55 (Tenn. 2008). "[N]o one else is in a better position to make charging decisions which reflect community values as accurately and effectively as the prosecutor." *Id.* (citing Frank W. Miller, *Prosecution: The Decision to Charge a Suspect With a Crime* 294–95 (1969)).

As explained *infra*, advocating for community values does not end after conviction and sentencing. The ABA Standards for Criminal Justice, Prosecution Function and Defense Function make clear that prosecutors' role as ministers of justice include the obligation to seek to remedy wrongful convictions.[8] It is incumbent that the elected District Attorney be able to enter the local trial court and rectify these past wrongs, in accordance with both the requirements of the prosecutorial function and his own obligations to the community he represents.

Thus, Conviction Integrity Units ("CIUs") in District Attorneys' offices have become more prevalent in recent years as communities have elected District Attorneys who promise to pursue post-conviction justice and ensure that past wrongful convictions are corrected. CIUs have made

---

[8] *See infra* note 15.

significant contributions to identifying and remedying wrongful convictions.[9] For example, in 2022, CIUs helped secure 122 exonerations.[10] This work is crucial to pursuing justice, not only for those who were wrongfully convicted and spent years behind bars—or are awaiting their execution—but also for the community at large, as ensuring public trust and public safety requires that convictions are credible and that the actual perpetrator is held accountable. DA Mulroy made clear during his campaign that this is part of his mission,[11] and he indeed established Shelby County's Justice Review Unit in 2022.[12] This unit recently received a substantial grant from the U.S. Department of Justice to "bolster its mission to rectify wrong convictions," making it one of the largest post-conviction units in the nation.[13]

Removing a prosecutor from representing the state in the trial

---

[9] Fair and Just Prosecution, *Conviction Integrity Units and Internal Accountability Mechanisms* (2017), https://fairandjustprosecution.org/wp-content/uploads/2017/09/FJPBrief.ConvictionIntegrity.9.25.pdf.

[10] The National Registry of Exonerations, 2022 Annual Report (2023), https://www.law.umich.edu/special/exoneration/Documents/NRE%20Annual%20Report%202022.pdf.

[11] *See* Steve Mulroy for District Attorney, Steve's Platform, https://www.stevemulroyforda.com/platform (last visited Jan. 18, 2024).

[12] *See* Shelby County Justice Review Unit, https://www.shelbyjru.com/ (last visited Jan. 18, 2024).

[13] Action News 5 Staff, *Shelby Co. Justice Review Unit Receives Nearly $527K Grant to Support Post-Conviction Advocacy, DA's Office Announces*, Action News 5 (Oct. 12, 2023), https://www.actionnews5.com/2023/10/12/shelby-co-justice-review-unit-receives-nearly-527k-grant-support-post-conviction-advocacy-das-office-announces/.

court, including in post-conviction review, has serious adverse consequences, because a trial court is where factual development occurs, and where the locally elected prosecutor has the ability to right a wrongful conviction or disclose to the defense newly discovered evidence. If the local prosecutor is replaced by the Attorney General, he will have no ability to rectify erroneous convictions or address *Brady* violations committed by the office and could not be held accountable by his community for carrying out these critical functions.

Having locally elected prosecutors adhere to the community's values and vision of justice necessarily means that across the state, prosecutors may opt to make different decisions, guided by the different starting point they—and their community—embrace and value. Prosecutors will make different choices over how to address newly discovered evidence, new evidence that support claims of intellectual disability that might make a sentence illegal and claims of innocence. But whatever decisions a prosecutor makes, they are obligated to advance justice for the entire community and pursue public safety, even if they have a different vision of how to do that or what justice looks like. And if they do not pursue justice or protect public safety in the way the community wants, they are accountable at the end of the day to the public and to the voters who elected them. Their immense power is checked, as Tennessee's Constitution intended. If the community disapproves of the way their elected District Attorney performs their job, the voters can attempt to legally recall him or her (Tenn. Code Ann. § 2-5-151), or could vote for a different District Attorney in the next elections.

The system, as it was prior to The Act, makes sense—the District Attorney, accountable to the people, handles local criminal decisions in trial courts, where factual development occurs, where criminal charging occurs, and where wrongful convictions can be righted. Any alteration of authority disrupts this carefully crafted balance and undermines Tennessee's democratic structures.

C. The Act Unconstitutionally Disrupts the System of Representation and Accountability in the State

The Act undermines the constitutional principles of local-level democracy and accountability, as it, without justification, gives the Attorney General the ability to control all post-conviction litigation in death penalty cases, including those that arise at the trial court post-conviction level and involve factual development and serious claims of innocence. It does so even though the local District Attorney has long handled those cases, and the decisions in post-conviction trial court death penalty proceedings require the knowledge, expertise, values and careful balancing of equities that exist in every other trial court criminal case.

Post-conviction death penalty determinations involve the exact type of decision-making that a local official should make. These cases involve assessments of new evidence, of forensic evidence, of claims that a trial lawyer was ineffective, and of issues around mental health and intellectual disability. And they involve even more than just a decision about a person's liberty, they involve a decision about a person's life. These are just the type of cases that should be decided, at their first impression, by someone who is accountable to his or her community and is experienced in the criminal trial court.

It is notable that the legislature has taken away local control only when it appears that certain elected prosecutors might take a different stance than some officials want in an individual death penalty post-conviction case (although to date there is no evidence that this outcome is preordained). But if allowed to stand, there is no limit to a rule like this. A harsher Attorney General can step in to ensure no death sentences are overturned, but a more lenient Attorney General could step in and agree to overturn them all. If this Court does not overturn the law, it will have created precedent that allows for further erosion of a District Attorney's control.[14]

Regardless of the political and policy motivations behind this law, it is patently unconstitutional, as will be any other similar law that follows in its footsteps and erodes local autonomy. As the lower court's opinion carefully outlined, the Tennessee Constitution, and the case law interpreting it, makes clear that the legislature cannot divest the District Attorney of his authority to advise over criminal decision making in the county. Deciding how to handle post-conviction death penalty cases at the trial court falls squarely within the District Attorney's duties.

II. The Act Undercuts Well-Established Principles of Prosecutorial Discretion and Undermines the Ability of Elected District Attorneys to Carry Out their Job as Ministers of Justice

The exercise of sound discretion and independent judgment is

[14] Furthermore, if the Legislature can divest a locally elected prosecutor of duties under Article VI, Section 5, then it could act similarly with respect to the Attorney General himself, whose powers derive from that same constitutional provision.

critical to the performance of the prosecutorial function and to prosecutors' ability to pursue justice. As Tennessee's Supreme Court has noted, prosecutors are obligated to "seek justice rather than to be just an advocate for the State's victory at any cost," *Superior Oil, Inc.*, 875 S.W.2d at 661; "pay particular attention to constitutional rights and to concepts of fairness," *State v. McCollum*, 904 S.W.2d 114, 117 (Tenn. 1995); and "protect innocence." *Foute v. State*, 4 Tenn. 98, 99 (1816).

That discretion should extend beyond the trial phase. As discussed *supra*, prosecutors must be able to correct errors committed by their offices. That includes reevaluating convictions derived from since-discredited junk science which has led to many wrongful convictions across the country, or convictions in which new evidence indicates that a person is not guilty or is not eligible for the death penalty. Prosecutors must also be able to reevaluate convictions or sentences tainted by *Brady* violations, including cases where officers coerced confessions or planted evidence, or where prosecutors withheld exculpatory evidence. And prosecutors must be able to reexamine convictions with the benefit of newly discovered critical evidence, new technologies to test old evidence, or new reliable witnesses.

Indeed, as explained, exercising discretion at the post-conviction trial court phase is critical to a prosecutor's mission of seeking justice.[15]

---

[15] *See* The ABA Standards for Criminal Justice, Prosecution Function and Defense Function 3.8 (2014); prosecutors' role as ministers of justice includes the obligation to "seek to remedy the conviction" "[w]hen [they] know[] of clear and convincing evidence establishing that a defendant in [their] jurisdiction was convicted of an offense the defendant did not

Stripping prosecutors of the ability to correct these past injustices will undermine faith in the integrity of the legal system. It is at the post-conviction phase that a prosecutor can show that the State is not just concerned with securing or preserving a guilty verdict or harsh sentence, but rather is committed to the broader role of promoting and protecting a system of justice. *See, e.g.*, *Berger v. U.S.*, 295 U.S. 78, 88 (1935) ("[A prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.") When a conviction no longer has integrity and validity, the elected prosecutor has an obligation to correct it.[16]

---

commit," or to disclose newly discovered evidence that "creates a reasonable likelihood" that the defendant did not commit the offense.

[16] The Attorney General argues that collateral review of a conviction is solely a judicial function and not a prosecutorial function, in Tennessee and across the country. *See* Brief of the State of Tennessee, pp. 28-38. Yet the fact that judges make the *ultimate* decision in post-conviction review is not unique to this context—this is the case with many other prosecutorial functions, such as bail decisions, pretrial motions, and sentencing. Determining there is a valid concern and seeking to review a prior conviction is in the discretion of District Attorneys just as seeking pretrial detention, bail, or a certain sentence is within the purview of the prosecutor. The prosecutorial function in these matters is separate from the judicial function—but it is undeniable and an inherent part of the duty of prosecutors to pursue just results. If the courts had a sole role in post-conviction cases, the authority of the Attorney General under the Act would similarly be nonexistent. Moreover, if the Attorney General's argument were true, all the Conviction Integrity Units in prosecutors' offices across the nation (*see supra* notes 9-13 and accompanying text) would be meaningless. Instead, as explained above (*see supra* note 15),

Moreover, allowing for the system to engage in self-correction through the exercise of discretion in trial court post-conviction proceedings ensures that victims can have greater faith in the justice process and its outcomes. Although victims want closure, they also want accuracy. When an innocent person remains behind bars—or worse, is executed—and the person who committed the crime is still free—there is no closure and no justice from victims' perspective.[17] Nor is there public safety if the actual perpetrator remains at large.

The Tennessee legislation removes a prosecutor's ability to exercise that discretion at the point where the stakes are the highest—when the outcome of the case is life or death. Suddenly, a community's locally elected prosecutor, who is accountable to it, cannot correct wrongs in

---

seeking to rectify past injustices by correcting wrongful convictions is a crucial part of the prosecutor's role as a minister of justice; stripping the prosecutor from this function fundamentally erodes their core-duty. None of the cases cited by the Attorney General in support of their argument that post-conviction review is a judicial function (Brief of the State of Tennessee, pp. 34-38) establishes that no prosecutorial function or role is involved in the process of rectifying wrongful convictions. These cases merely show that the District Attorney cannot *alone* vacate a prior conviction, and that the final determination is vested in the court. *See, e.g.*, *Commonwealth v. Brown*, 196 A.3d 130, 146 (Pa. 2018) ("Prosecutorial discretion provides no power to instruct a court to undo the verdict without all necessary and appropriate judicial review… a district attorney's concession of error is not a substitute for independent judicial review"); *Commonwealth v. Dascalakis*, 140 N.E. 470, 472 (Mass. 1923) ("[nolle prosequi] cannot spring into existence until a criminal proceeding has been commenced by some process in court").

[17] *See, e.g.*, Seri Irazola et al., *Addressing the Impact of Wrongful Convictions on Crime Victims*, 274 National Institute of Justice Journal (2014), available at: https://www.ojp.gov/pdffiles1/nij/247881.pdf.

death penalty cases if he or she believes that is the just outcome. Instead, someone who has no accountability to the community, who cannot be voted out of office, and who resides outside that community, will make those decisions about whether to correct errors. And in these capital cases, significant errors are anything but unheard of.[18]

Thus, it is not just problematic when a legislature invades prosecutorial discretion at trial. Rather, the public safety implications that occur when prosecutorial discretion is invaded amply extend to the trial court post-conviction phase. Indeed, people may lose even more trust when their elected official can do nothing to correct a clear injustice. These decisions are just as crucial in post-conviction proceedings as in pre-conviction proceedings; and the need for local control and oversight by the voters is just as great.

III. The Tennessee Legislation, If Allowed to Stand, Undermines Democracy and Therefore Threatens Public Safety

The Act, if not overruled, will undermine democracy and therefore threaten public safety. Simply put, communities suffer when their electoral decisions are not respected and when they cannot have faith in the integrity of the rule of law.

Prosecutors depend upon public trust to realize their mission of upholding justice and promoting public safety for all members of the community. When individuals have confidence in legal authorities and

---

[18] Death Penalty Information Center, The Death Penalty in 2022: Year End Report, (Dec. 16, 2022) available at https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2022-year-end-report.

view the police, the courts, and the law as legitimate, they are more likely to report crimes, cooperate as witnesses, and accept police and judicial system authority.[19] Locally elected prosecutors who reside and work within their communities are well-suited to engage with their communities; that engagement enhances public confidence in the criminal justice system, which in turn makes the public more likely to report crimes and to cooperate as witnesses.[20] In contrast, when the public does not trust law enforcement and prosecutors, community members may be less willing to report crimes, serve as witnesses, testify in cases, and generally accept police and judicial system authority.[21] This

[19] *See* Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 Ohio St. J. Crim. L. 231, 263 (2008) (available at: https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1388&context=faculty_scholarship) (hereinafter: Tyler & Fagan); Tom R. Tyler & Jonathan Jackson, *Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation and Engagement*, 20 Psych., Pub. Pol'y & L. 78, 78-79 (2014) (available at: https://law.yale.edu/sites/default/files/area/center/justice/document/ssrnpopularlegitimacy.pdf).

[20] Fair and Just Prosecution, *Building Community Trust: Key Principles and Promising Practices in Community Prosecution and Engagement* (2018), https://fairandjustprosecution.org/wp-content/uploads/2018/03/FJP_Brief_CommunityProsecution.pdf.

[21] *See* Tyler & Fagan, *supra* note 19, at 265; German Lopez, *Police Have to Repair Community Trust to Effectively do Their Job*, Vox (Nov. 14, 2018), https://www.vox.com/identities/2016/8/13/17938262/police-shootings-brutality-black-on-black-crime.

reluctance hampers the ability of the police and prosecutors to seek justice and promote public safety.

When a community thinks that someone can take away their say in how their democratically elected officials carry out their jobs, or that other elected officials—who they may not have voted for—are able to chip away at democracy when it suits them, public trust in the integrity of the rule of law suffers. And, as a result, so does public safety. The community cannot rely on democratic norms, will not think the system is fair, and may, as a result, not feel compelled to participate in it. This concerning consequence is especially likely here, where the legislature is interfering with the well-established role of duly elected prosecutors and is eviscerating the voters' right to choose who should represent them in cases involving the most serious punishment.

The erosion of trust that the legislation has created, and will continue to create, should thus be of great concern to all who value a system where the roles and independence of elected officials—and particularly prosecutors—are protected and free from inappropriate, and ultimately undemocratic, political interference.

CONCLUSION

The Act is a serious attack on local control over death penalty cases. Elected prosecutors must have discretion to correct serious errors that may have led to a person erroneously convicted or sentenced to death, at the moment where the consequences in the criminal legal system are at their highest. This Act takes the ability to correct serious wrongs away from prosecutors, and therefore, from the community that elected them.

It violates the Tennessee Constitution and undermines democracy. It erodes public trust in the integrity of the justice system, and therefore threatens public safety. The Court should not allow this deeply disturbing enactment to stand, and should find that the legislature has violated the Tennessee Constitution by eroding the independence and autonomy of elected local prosecutors and overturn The Act.

Respectfully submitted,

/s/ Kevin H. Sharp

Kevin H. Sharp (TN BPR #016287)
Sanford Heisler Sharp, LLP
611 Commerce Street, Suite 3100
Nashville, TN 37203
(615) 434-7010 Telephone
(615) 434-7020 Facsimile
ksharp@sanfordheisler.com
Counsel for the proposed Amici

<u>CERTIFICATE OF COMPLIANCE</u>

In accordance with Tenn. Sup. Ct. R. 46 § 3.02, the total number of words in this brief, exclusive of the Title/Cover page, Table of Contents, Table of Authorities, Attorney Signature Block, and this Certificate of Compliance, is 5,015. This word count is based on the word processing system used to prepare this motion.

/s/ Kevin H. Sharp
Kevin H. Sharp (TN BPR #016287)
Counsel for the proposed Amici

CERTIFICATE OF SERVICE

I, Kevin H. Sharp, do hereby swear or affirm that a copy of the **Brief of *Amicus Curiae* 64 Current and Former Prosecutors and Attorneys General, and Former Judges, United States Attorneys, and Federal Officials in Support of Appellee** has been filed and delivered upon all counsel this 1st day of February, 2024 via the Court's electronic filing system to:

Robert L. Hutton
Glankler Brown PLLC
6000 Poplar Avenue, Suite 400
Memphis, Tennessee 38119

Nicholas W. Spangler
Tennessee Attorney
General's Office
P.O. Box 20207
Nashville, Tennessee 37202

Steven J.Mulroy
Jessica L. Indingaro
Gavin A. Smith
Walter L. Bailey Criminal
Justice Center
201 Poplar Avenue, 11th Floor
Memphis, Tennessee 38103

/s/ Kevin H. Sharp
Kevin H. Sharp (TN BPR #016287)
Counsel for the proposed Amici

APPENDIX A
LIST OF *AMICI*

Roy L. Austin, Jr.
Former Deputy Assistant Attorney General, Civil Rights Division, U.S. Department of Justice
Former Deputy Assistant to President Obama for the Office of Urban Affairs, Justice, and Opportunity (White House Domestic Policy Council)

Diana Becton
District Attorney, Contra Costa County, California
Former Judge, Contra Costa County Superior Court, California

Wesley Bell
Prosecuting Attorney, St. Louis County, Missouri

Buta Biberaj
Former Commonwealth's Attorney, Loudoun County, Virginia

Shay Bilchik
Former Associate Deputy Attorney General, U.S. Department of Justice
Former Administrator of the Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice

Sherry Boston
District Attorney, DeKalb County, Georgia

Chesa Boudin
Former District Attorney, City and County of San Francisco, California

Bobbe J. Bridge
Former Justice, Washington Supreme Court

John Choi
County Attorney, Ramsey County (St. Paul), Minnesota

Dave Clegg
Former District Attorney, Ulster County, New York

Laura Conover
County Attorney, Pima County (Tucson), Arizona

Shalena Cook Jones
District Attorney, Chatham County (Savannah), Georgia

John Creuzot
District Attorney, Dallas County, Texas
Former Judge, Dallas County District Court, Texas

Kara Davis
District Attorney, Gilliam County, Oregon

Parisa Dehghani-Tafti
Commonwealth's Attorney, Arlington County and the City of Falls Church, Virginia

Steve Descano
Commonwealth's Attorney, Fairfax County, Virginia

Michael Dougherty
District Attorney, Twentieth Judicial District (Boulder), Colorado

Mark Dupree
District Attorney, Wyandotte County (Kansas City), Kansas

Matt Ellis
District Attorney, Wasco County, Oregon

Ramin Fatehi
Commonwealth's Attorney, City of Norfolk, Virginia

Kimberly M. Foxx
State's Attorney, Cook County (Chicago), Illinois

William Royal Furgeson, Jr.
Former Judge, U.S. District Court, Western District of Texas

Gil Garcetti
Former District Attorney, Los Angeles County, California

Stan Garnett
Former District Attorney, Twentieth Judicial District (Boulder), Colorado

Delia Garza
County Attorney, Travis County (Austin), Texas

George Gascón
District Attorney, Los Angeles County, California
Former District Attorney, City and County of San Francisco, California

Sarah F. George
State's Attorney, Chittenden County (Burlington), Vermont

Nancy Gertner
Former Senior Judge, U.S. District Court, District of Massachusetts

Deborah Gonzalez
District Attorney, Western Judicial Circuit (Athens), Georgia

Christian Gossett
Former District Attorney, Winnebago County, Wisconsin

Scott Harshbarger
Former Attorney General, Massachusetts
Former District Attorney, Middlesex County, Massachusetts

Jim Hingeley
Commonwealth's Attorney, Albemarle County, Virginia

Elizabeth K. Humphries
Commonwealth's Attorney, City of Fredericksburg, Virginia

Natasha Irving
District Attorney, Sixth Prosecutorial District, Maine

Michael Jackson
Former District Attorney, Dallas County, Alabama

Justin F. Kollar
Former Prosecuting Attorney, County of Kaua'i, Hawaii

Lawrence S. Krasner
District Attorney, Philadelphia, Pennsylvania

Miriam Aroni Krinsky
Former Assistant U.S. Attorney, Criminal Appellate Chief, and General Crimes Chief, U.S. Attorney's Office for the Central District of California
Former Chair, Solicitor General's Advisory Group on Appellate Issues

Rebecca Like
Prosecuting Attorney, County of Kaua'i, Hawaii

Leesa Manion
Prosecuting Attorney, King County (Seattle), Washington

Beth McCann
District Attorney, Second Judicial District (Denver), Colorado

Ryan Mears
Prosecuting Attorney, Marion County (Indianapolis), Indiana

Mary Moriarty
County Attorney, Hennepin County (Minneapolis), Minnesota

Joseph Platania
Commonwealth's Attorney, City of Charlottesville, Virginia

Richard Pocker
Former U.S. Attorney, District of Nevada

Pamela Price
District Attorney, Alameda County, California

Josh Pond
District Attorney, Columbia County, Oregon

Dalia Racine
District Attorney, Douglas County, Georgia

Ira Reiner
Former District Attorney, Los Angeles County, California
Former City Attorney, Los Angeles, California

Eric Rinehart
State's Attorney, Lake County (Waukegan), Illinois

Marian Ryan
District Attorney, Middlesex County, Massachusetts

Jacqueline Sartoris
District Attorney, Cumberland County (Portland), Maine

Dan Satterberg
Former Prosecuting Attorney, King County (Seattle), Washington

Eli Savit
Prosecuting Attorney, Washtenaw County (Ann Arbor), Michigan

Mike Schmidt
District Attorney, Multnomah County (Portland), Oregon

Brian Schwalb
Attorney General, District of Columbia

Carol Siemon
Former Prosecuting Attorney, Ingham County (Lansing), Michigan

Eric Sparr
District Attorney, Winnebago County, Wisconsin

James Tierney
Former Attorney General, Maine

Matthew Van Houten
District Attorney, Tompkins County, New York

Cyrus R. Vance
Former District Attorney, New York County (Manhattan), New York

Jared Williams
District Attorney, Augusta Judicial Circuit, Georgia

Todd Williams
District Attorney, Buncombe County (Asheville), North Carolina

William Wilmoth
Former U.S. Attorney, Northern District of West Virginia