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Appellate Courts

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

GARY SUTTON v. STATE OF TENNESSEE

Circuit Court for Blount County
No. C-28405

No. E2025-01849-CCA-R9-PD

ORDER

The capital Petitioner, Gary Sutton, has filed an application for interlocutory appeal, *see* Tenn. R. App. P. 9, seeking review of the trial court's August 14, 2025 order denying the Petitioner's motion to disqualify the Attorney General's Office from representing the State at the trial court level litigation of the Petitioner's intellectual disability petition. The Petitioner argues that interlocutory review of the trial court's order is required to prevent irreparable injury, to prevent needless and protracted litigation, and to develop a uniform body of law. Tenn. R. App. P. 9(a)(1), (2), and (3).

The State has filed an answer in opposition to the Petitioner's application, arguing that the Petitioner lacks standing to challenge the Attorney General's representation of the State in the trial court proceedings and, in any event, interlocutory review is not warranted. Upon full consideration of the Petitioner's application, State's response, and attachments thereto, we agree with the State and respectfully deny the Petitioner's application for interlocutory review.

FACTUAL BACKGROUND

The Petitioner and his codefendant, James Henderson Dellinger, were convicted of the 1992 first degree premeditated murder of Tommy Mayford Griffin and sentenced to death. On direct appeal, the Tennessee Supreme Court affirmed the Petitioner's conviction and sentence. *State v. Dellinger*, 79 S.W.3d 458, 462 (Tenn. 2002).

After unsuccessfully seeking post-conviction relief,[1] the Petitioner filed a petition in May 2022 to determine his ineligibility for execution due to intellectual disability. Tenn. Code Ann. § 39-13-203(g)(1). Two months later, the District Attorney General moved to dismiss the petition, arguing that the Petitioner's direct appeal had already adjudicated the intellectual-disability issue and that the claim was therefore procedurally barred. *Id.* § 39-13-203(g)(2).[2]

While the case was pending, the General Assembly enacted a law designating the Attorney General as the State's representative in collateral review proceedings arising in capital cases. *See generally* 2023 Tenn. Pub. Acts, ch. 182 ("the Act").[3] Under the Act, the Attorney General filed a notice of appearance in this case on May 4, 2023. *See* Tenn. Code Ann. § 40-30-114(c)(1).

A. PETITIONER'S MOTION TO DISQUALIFY THE ATTORNEY GENERAL

Shortly thereafter, the Petitioner moved to disqualify the Attorney General from representing the State in the intellectual disability proceedings. The Petitioner argued that the Act violated both Article VI, section 5 and Article II, section 17 of the Tennessee Constitution. Article VI, section 5 provides for the election of a district attorney general in each judicial district and allows a court to appoint an attorney pro tempore when the district attorney general fails or refuses to attend and prosecute a case. Article II, section 17 requires that a bill's subject appear in its title so that legislators and the public are fairly informed of its scope before enactment. The Petitioner asserted that the Act's transfer of representational authority to the Attorney General usurped power the Tennessee Constitution reserves to the locally elected district attorney general, and that the bill's caption failed to disclose that change.

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[1] *See Sutton v. State*, No. E2004-02305-CCA-R3-PD, 2006 WL 1472542 (Tenn. Crim. App. May 30, 2006), *perm. app. denied* (Tenn. Oct. 2, 2006); *see also Sutton v. State*, No. E2016-02112-CCA-R28-PD (Tenn. Crim. App. Jan. 23, 2017) (Order) (affirming the denial of a motion to reopen based upon *Johnson v. United States*, 576 U.S. 591 (2015)), *perm. app. denied* (Tenn. May 18, 2017); *Sutton v. State*, No. E2017-01394-CCA-R28-PD (Tenn. Crim. App. Sept. 13, 2017) (Order) (affirming the denial of a motion to reopen based upon *Hurst v. Florida*, 577 U.S. 92 (2016)), *perm. app. denied* (Tenn. Jan. 18, 2018); *Sutton v. State*, No. E2025-00090-CCA-R28-PD (Tenn. Crim. App. Nov. 10, 2025) (Order) (affirming the denial of a motion to reopen based upon *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181 (2023)), *no perm. app. filed*.

[2] Tennessee Code Annotated section 39-13-203(g)(2) provides that "[a] defendant shall not file a motion under subdivision (g)(1) if the issue of whether the defendant has an intellectual disability has been previously adjudicated on the merits."

[3] The Act designates the Attorney General to represent the State in the trial court in all capital proceedings brought via the Post-Conviction Procedure Act, *see* Tenn. Code Ann. § 40-30-114(c)(1); intellectual disability proceedings, *see* Tenn. Code Ann. § 39-13-203(g)(1); and the writ of error coram nobis statute, *see* Tenn. Code Ann. § 40-26-105.

The trial court stayed the proceedings pending a related interlocutory appeal, *McKay v. State*, No. W2023-01207-CCA-R9-CO, 2024 WL 4404318 (Tenn. Crim. App. Oct. 4, 2024), which raised a similar Article VI, section 5 challenge on behalf of another capital petitioner and the Shelby County District Attorney General. In *McKay*, this court held that capital collateral review proceedings are not "prosecutions" within the meaning of Article VI, section 5, and that the Act therefore does not violate that provision by transferring representation in such proceedings from the locally elected district attorney general to the Attorney General. *See id.* at *12. This court accordingly reversed the trial court's order disqualifying the Attorney General from representing the State in the capital petitioner's coram nobis proceeding. *Id.*

On review, the Tennessee Supreme Court disagreed in part. The supreme court held that the District Attorney General had constitutional standing to raise the Article VI, section 5 challenge, because the Act's transfer of exclusive control over the State's defense injured the District Attorney General's own asserted authority to represent the State. *See McKay v. State*, 706 S.W.3d 338 (Tenn. 2025). The supreme court otherwise left undisturbed the remainder of this court's opinion and judgment, including its holding on the merits of the Article VI, section 5 challenge. *See id.* at 341 ("The remainder of the Court of Criminal Appeals' opinion and judgment are left undisturbed, including its holding that section 40-30-114(c)(1) does not violate Article VI, Section 5.").

On May 29, 2025, the trial court held a hearing on the Petitioner's motion to disqualify. Regarding the Article VI, section 5 claim, the Petitioner argued that:

- the Act divested the District Attorney General of his authority to represent the State by transferring his powers and duties to the Attorney General;
- the Act was unconstitutional because the legislature lacked authority to designate the Attorney General to prosecute death penalty matters;
- the Act divested voters of their sovereignty over local prosecutors and denied voters the right to ensure that prosecutors reflect local community values; and
- the Attorney General had previously recognized a proper constitutional "division of labor" between that office and local prosecutors' offices.

The State responded that this court's *McKay* opinion, in distinguishing collateral proceedings from prosecutions, had already resolved the Petitioner's additional Article VI, section 5 arguments.

Regarding the Article II, section 17 claim, the Petitioner argued that the legislature improperly captioned and amended the bill. Specifically, the Petitioner argued that the bill originally addressed statewide rape-kit inventory and reporting, yet in its final form it addressed only the designation of the Attorney General in capital collateral proceedings. The State responded that the Act served a single, narrow purpose: giving the Attorney General control over the defense of collateral challenges in capital cases.

B. THE TRIAL COURT'S ORDER

On August 14, 2025, the trial court entered a written order denying the Petitioner's motion. The trial court found that the Petitioner had standing to challenge the Act: the Attorney General's notice of appearance and exercise of exclusive authority over the proceeding constituted a distinct and palpable injury, traceable to the State's conduct, that a favorable decision could redress. *Order Denying Mot. to Disqualify* at 14-15; *see also City of Memphis v. Hargett*, 414 S.W.3d 88 (Tenn. 2013).

As to the Article VI, section 5 challenges, the trial court found that this court's decision in *McKay* had already addressed the Petitioner's transfer-of-power argument. The trial court further found that *McKay*'s distinction between prosecutions and collateral proceedings defeated the Petitioner's remaining arguments. As to the Article II, section 17 challenge, the trial court ruled that the Act did not violate the captions clause because it remained focused on a single criminal-justice subject and adequately referenced the statutes it amended.

C. THE PETITIONER'S MOTION FOR AN INTERLOCUTORY APPEAL

On September 11, 2025, the Petitioner filed a timely application for interlocutory review of the trial court's order. On November 10, 2025, the trial court granted that application, finding that interlocutory review would prevent irreparable injury, prevent needless litigation, and help develop a uniform body of law. Tenn. R. App. P. 9(a)(1), (2), and (3). The trial court certified two issues for review:

(1) Does Public Chapter 182 of the Tennessee Public Acts of 2023 violate article II, section 17 of the Tennessee Constitution where it was passed under a title that was too broad and generic to inform legislators and the public of its nature and scope?

(2) Does Public Chapter 182 of the Tennessee Public Acts of 2023 violate article VI, section 5 of the Tennessee Constitution by divesting elected district attorneys of

their inherent duties and usurping judicial authority to appoint a prosecutor pro tempore?[4]

The trial court denied the State's request to certify the question of the Petitioner's constitutional standing. The Petitioner timely applied to this court for permission to appeal the trial court's order granting review, and the State timely answered in opposition. The application and its attachments are sufficient for this court's review.

RULE 9 INTERLOCUTORY APPEALS

Rule 9 provides the following criteria for determining whether to grant an interlocutory appeal:

> (1) the need to prevent irreparable injury, giving consideration to the severity of the potential injury, the probability of its occurrence, and the probability that review upon entry of final judgment will be ineffective;
>
> (2) the need to prevent needless, expensive, and protracted litigation, giving consideration to whether the challenged order would be a basis for reversal upon entry of a final judgment, the probability of reversal, and whether an interlocutory appeal will result in a net reduction in the duration and expense of the litigation if the challenged order is reversed; and
>
> (3) the need to develop a uniform body of law, giving consideration to the existence of inconsistent orders of other courts and whether the question presented by the challenged order will not otherwise be reviewable upon entry of final judgment.

Tenn. R. App. P. 9(a).

The Tennessee Supreme Court has stated repeatedly that "interlocutory appeals to review pretrial orders or rulings, *i.e.*, those entered before a final judgment, are 'disfavored,' particularly in criminal cases." *State v. Gilley*, 173 S.W.3d 1, 5 (Tenn. 2005); *see also State v. Meeks*, 262 S.W.3d 710, 720 (Tenn. 2008); *State v. McKim*, 215 S.W.3d 781, 790 (Tenn. 2007); *State v.*

[4] The Petitioner also raised constitutional challenges alleging violations of the equal protection and ex post facto provisions of the Tennessee and United States Constitutions. These issues, however, were not certified by the trial court in its order granting interlocutory review.

Scarborough, 201 S.W.3d 607, 612 n.2 (Tenn. 2006); *Reid v. State*, 197 S.W.3d 694, 699 (Tenn. 2006); *State v. Williams*, 193 S.W.3d 502, 506 (Tenn. 2006).

This is so because interlocutory review of pretrial rulings risks "piecemeal appellate litigation and the 'encouragement of delay [that] is fatal to the vindications of the criminal law.'" *Gilley*, 173 S.W.3d at 5 (quoting *United States v. MacDonald*, 435 U.S. 850, 853 (1978)). Although this proceeding is collateral to, rather than a direct prosecution of, the Petitioner's capital conviction, that same concern for delay applies with undiminished force: this action exists to test the finality of a capital judgment, and piecemeal interlocutory review of pretrial rulings within it delays that resolution no less than piecemeal review within the underlying prosecution itself—a concern this case shares with the approximately twenty capital cases in which the same challenge to the Act has been raised. "[T]hus, it is incumbent on the party seeking the appeal . . . to satisfy the court or courts that there are appropriate grounds for an interlocutory appeal." *Meeks*, 262 S.W.3d at 720.

Rule 9(b) requires a trial court to "specify: (1) the legal criteria making the order appealable, as provided in subdivision (a) of this rule; (2) the factors leading the trial court to the opinion those criteria are satisfied; and (3) any other factors leading the trial court to exercise its discretion in favor of permitting an appeal." Tenn. R. App. P. 9(b). The rule also requires a trial court to "state in writing the specific issue or issues the court is certifying for appeal and the reasons for its opinion." *Id.*

ANALYSIS

In his application before this court, the Petitioner argues that interlocutory review of the trial court's denial of his motion to disqualify is necessary to prevent irreparable harm, to prevent needless and protracted litigation, and to develop a uniform body of law.

As to standing specifically, the Petitioner argued below that he has a personal stake in the Act's constitutionality because the Act affects the resolution of his capital case, that the Act requires him to negotiate with two adversarial parties rather than one, and that the Attorney General will be "more adversarial in nature" than the district attorney general. *Order Denying Mot. to Disqualify* at 10 (quoting *Reply in Supp. of Mot. to Disqualify* at 2, 4-5). He further argued that his interest differs from that of the public at large because the Act targets a narrow class—capital petitioners seeking collateral review—and that membership in that targeted class alone confers standing. *Id.* (quoting *Reply in Supp. of Mot. to Disqualify* at 6, 8).

The State responds that the Petitioner's lack of standing presents "an absolute and unavoidable bar to interlocutory review" and, in any event, that interlocutory review is not

warranted because "the challenged law does not injure" the Petitioner. State's Answer to Application for Permission to Appeal at 2. Because standing is a threshold question that determines whether this court may reach the Rule 9(a) factors at all, we address it first.

A. CONSTITUTIONAL STANDING

A consideration of this court's jurisdiction is a prerequisite to our review of the Petitioner's application. *See* Tenn. R. App. P. 13(b) ("The appellate court shall also consider whether the trial and appellate court have jurisdiction over the subject matter, whether or not presented for review[.]"); *see also McKay v. State*, 706 S.W.3d 338, 340 (Tenn. 2025). As discussed by the supreme court in *McKay*,

> To present a justiciable controversy, plaintiffs alleging the violation of a public right must establish constitutional standing. Constitutional standing is an "irreducible" and "indispensable" jurisdictional requirement in public-rights cases that courts must always consider.

McKay, 706 S.W.3d at 340 (citations omitted). Regardless of whether the trial court certified the standing issue, this court has "an independent obligation" to determine the Petitioner's constitutional standing to challenge the Act. *Id.* Discharging that obligation requires two steps: first, identifying which standing framework applies to the Petitioner's claim, and second, applying that framework to the injury the Petitioner has actually alleged.

1. The Public-Rights Standard Governs

We begin with the first step of that inquiry: confirming that the public-rights standard governs here, rather than the lower private-rights standard. In *Case v. Wilmington Trust*, the supreme court departed from the federal three-part standing test for claims involving private rights and held that private-rights claims require only an "injury in law"—a violation of a legal right, without a separate concreteness requirement—while public-rights claims require the traditional injury-in-fact, causation, and redressability elements. *See Case v. Wilmington Trust*, 703 S.W.3d 274, 287-91 (Tenn. 2024). The supreme court has since cautioned that "distinguishing between the two categories is not always straightforward" and has not attempted to mark their outer boundaries in the abstract, resolving instead whether the particular claim before it fell within one category or the other. *See Houghton v. Malibu Boats, LLC*, __ S.W.3d __, 2025 WL 2971436, at *9 (Tenn. Oct. 22, 2025) (declining to define the contours of the two categories because the private, commercial nature of the dispute before it "clearly" involved private rights).

Case and *Houghton* nonetheless make clear that a dispute between private parties over private property or contractual interests is the paradigm private-rights case, *see Houghton*, 2025 WL 2971436, at *9, while a dispute over which office of state government is authorized to exercise governmental authority is a public-rights case, *see McKay*, 706 S.W.3d at 340. The Petitioner's challenge is not a dispute between private parties; it concerns which office of state government is authorized to represent the State in capital collateral proceedings, a question of governmental structure and authority. *McKay* accordingly treated an identical challenge as implicating a public right, and we do the same here. *See McKay*, 706 S.W.3d at 340.

Having confirmed that the public-rights standard applies, we turn to what that standard requires. In *City of Memphis v. Hargett*, 414 S.W.3d 88 (Tenn. 2013), the supreme court succinctly set forth the necessary considerations in determining whether a party has constitutional standing:

> To establish constitutional standing, a plaintiff must satisfy three "indispensable" elements. First, a party must show an injury that is "distinct and palpable"; injuries that are conjectural, hypothetical, or predicated upon an interest that a litigant shares in common with the general citizenry are insufficient in this regard. Second, a party must demonstrate a causal connection between the alleged injury and the challenged conduct. While the causation element is not onerous, it does require a showing that the injury to a plaintiff is "fairly traceable" to the conduct of the adverse party. The third and final element is that the injury must be capable of being redressed by a favorable decision of the court.

City of Memphis, 414 S.W.3d at 98 (citations and internal quotation marks omitted).

2. The Petitioner Has Not Shown a Distinct and Palpable Injury

We turn now to the second step: applying this framework to the injury the Petitioner has actually alleged. *McKay* itself applied this framework, but its holding does not supply the answer here. In *McKay*, the supreme court held that the Shelby County District Attorney General—who had joined the defendant's motion to disqualify and actively participated in the proceedings below—had constitutional standing to challenge section 40-30-114(c)(1), because the statute's transfer of "exclusive control" over the State's defense allegedly injured the District Attorney's own asserted authority to represent the State in proceedings before a trial court exercising criminal jurisdiction. *McKay*, 706 S.W.3d at 341. Having found the District Attorney's standing sufficient, the supreme court expressly declined to decide whether McKay, the capital defendant, independently had standing to raise the same challenge. *Id.* ("Because [the] District Attorney [General] had constitutional standing, we need not consider whether McKay also had standing.").

In this case, no district attorney general has joined the Petitioner's motion to disqualify the Attorney General; the Petitioner alone presses the Article VI, section 5 and Article II, section 17 challenges. *McKay*'s holding therefore does not resolve, and cannot be extended to resolve, whether the Petitioner himself has constitutional standing, and we apply the three-part test above to the Petitioner's own claimed injury. We consider, in turn, the trial court's findings on that test, why the injury it identified is not particular to this Petitioner, and two further injury theories the Petitioner presses on appeal.

a. The Trial Court's Findings

In its order denying the motion to disqualify, the trial court found that the Petitioner satisfied all three elements of constitutional standing. It found that the Petitioner's alleged injury was "distinct and palpable," rather than conjectural or hypothetical, because an attorney from the Attorney General's Office had filed a notice of appearance and because the Act grants the Attorney General exclusive authority over the proceeding based on the Petitioner's death sentence. *Order Denying Mot. to Disqualify* at 14. The trial court further found the injury "concrete" because the Attorney General's appearance and control "actually exist[ed]" and "actual or imminent" because that control remained ongoing. *Id.* As to causation, the trial court found that the Act's grant of exclusive control to the Attorney General, and the Attorney General's exercise of that control, established the necessary causal connection. *Order Denying Mot. to Disqualify* at 15. As to redressability, the trial court found that a ruling declaring the Act unconstitutional would remove the Attorney General's exclusive control over the Petitioner's case. *Id.*

b. The Injury Is Not Particular to the Petitioner

We respectfully disagree with the trial court's conclusion. The trial court's injury finding rests on the fact that an attorney from the Attorney General's Office filed a notice of appearance and now exercises the authority the Act assigns to that office. *Order Denying Mot. to Disqualify* at 14. But every capital petitioner subject to the Act experiences an identical notice of appearance and an identical transfer of exclusive control; the trial court's reasoning identifies nothing particular to this Petitioner, as distinct from an injury "conjectural, hypothetical, or predicated upon an interest that [he] shares in common with" every other capital petitioner litigating a collateral proceeding under the Act. *City of Memphis*, 414 S.W.3d at 98.

Indeed, the Act currently applies to approximately twenty capital defendants seeking some form of collateral review in the state's trial courts, each of whom is subject to the same notice of appearance and the same transfer of exclusive control. *See Hawkins v. State*, No. W2025-02015-CCA-R10-PD, 2026 WL 497031, at *2 n.2 (Tenn. Crim. App. Feb. 23, 2026); *Rice v. State*, No. W2025-02029-CCA-R10-PD, 2026 WL 461537, at *2 n.4 (Tenn. Crim. App. Feb. 18, 2026). This

shared-applicability point, however, is not itself the deficiency in the Petitioner's standing theory; a statute of general applicability does not defeat standing merely because it regulates a defined class rather than a single individual. The deficiency, rather, is that the Petitioner has not identified any injury—to a legal interest independent of the identity of opposing counsel—that separates his position from that of any other litigant who faces a substituted or more diligent adversary, an argument we address below.

Unlike District Attorney General in *McKay*, the Petitioner does not allege an injury to his own institutional authority to represent a party in litigation; he alleges only that a different office than the one that would otherwise appear is now representing his adversary, and that the Act places him in a class of similarly situated capital petitioners. The identity of opposing counsel, and membership in a class subject to the same statute, are not the kind of "distinct and palpable" injury that separates a plaintiff's claim from "an interest that [he] shares in common with the general citizenry." *Id.* The Petitioner has identified no injury particular to him, such as a demonstrated conflict of interest, a change in litigation position adverse to a right he independently holds, or some other concrete consequence flowing specifically from the identity of the State's counsel. *Cf. McKay*, 706 S.W.3d at 341 (the District Attorney's injury was to "his alleged constitutional authority to represent the State," an authority personal to his office).

c. Neither More Vigorous Advocacy Nor Speculative Future Harm Establishes Standing

In addition, we respectfully disagree with the Petitioner's argument that the prospect of more vigorous advocacy by the Attorney General's Office is sufficient to establish a cognizable injury. So long as the positions the Attorney General advances have arguable merit, raising and litigating additional issues is the ordinary business of adversarial litigation, not a harm the law recognizes; a litigant has no protected interest in facing a less capable or less thorough adversary. Were it otherwise, a party would acquire standing to challenge the State's choice of counsel whenever new counsel might litigate more effectively than the old, a result no authority supports.

In any event, the Petitioner's assertion that the Attorney General "will be more adversarial in nature" than the district attorney general is too speculative to establish standing on its own terms, describing at most a possibility that harm could occur rather than an actual or imminent injury. *Cf. Wygant v. Lee*, __ S.W.3d __, 2025 WL 3537313, at *20-21 (Tenn. Dec. 10, 2025) (holding that a voter lacked standing where the claimed injury rested on "a mere possibility that this sort of harm could occur in the future" rather than an actual or imminent injury).

Because the Petitioner cannot establish injury, the absence of that element is fatal to standing regardless of causation or redressability. *See City of Memphis*, 414 S.W.3d at 98. We

review this constitutional question de novo, with no presumption of correctness afforded to the trial court's legal conclusions. *See Fisher v. Hargett*, 604 S.W.3d 381, 395 (Tenn. 2020). As such, the Petitioner lacks constitutional standing to challenge the Act, and this court is without jurisdiction to review the merits of that challenge. *See* Tenn. R. App. P. 13(b).

B. RULE 9(A) FACTORS

Our holding that the Petitioner lacks constitutional standing is dispositive and independently requires denial of the application. We nonetheless separately address the Rule 9(a) factors below, for two reasons. First, Rule 9(a)(2) itself directs a court considering an interlocutory appeal to weigh "the probability of reversal" of the challenged order as one component of the threshold, discretionary decision whether to permit an interlocutory appeal at all. Tenn. R. App. P. 9(a)(2). That predictive assessment is a different exercise from adjudicating the underlying constitutional questions with preclusive effect, and our discussion of it here does not purport to resolve—and does not foreclose—litigation of the Article VI, section 5 or Article II, section 17 issues by a petitioner who can establish standing to raise them, whether on a further-developed record in this case or in another proceeding.

Second, because at least six post-conviction courts across the state have addressed materially identical challenges to the Act in the context of ongoing capital collateral litigation, we think it useful to the bench to explain why interlocutory review would not be warranted under Rule 9(a) even if the Petitioner could establish standing, rather than leaving that separate question unaddressed. Accordingly, the discussion that follows proceeds as an alternative and independent basis for denying the application, assuming without deciding, for the sake of argument, that the Petitioner has standing.

We address, in turn, the probability of reversal of each of the Petitioner's three constitutional theories under Rule 9(a)(2), whether interlocutory review is required to prevent irreparable injury under Rule 9(a)(1), and whether interlocutory review is needed to develop a uniform body of law under Rule 9(a)(3).

1. The Probability of Reversal

As to the first factor, the probability of reversal, the Petitioner raises three constitutional theories: (1) that the Act unconstitutionally transferred representational authority away from the locally elected district attorney general; (2) that the Act usurps the judicial power to appoint an attorney pro tempore; and (3) that the Act's caption fails to satisfy Article II, section 17. We address each in turn and conclude that the trial court's ruling on each theory carries a low probability of reversal.

a. Article VI, Section 5: Transfer of Representational Authority

We begin with the Petitioner's argument that the Act improperly transferred representational authority away from the locally elected district attorney general. As we noted in our opinion in *McKay*,

> Ruling on a constitutional challenge to a statute is often an exercise in judicial restraint. We must be careful not to impose our own policy views on the matter or overstep into the General Assembly's realm of making reasoned policy judgments. Accordingly, this court must start with a strong presumption that acts passed by the legislature are constitutional, particularly where the facial constitutional validity of a statute is challenged. A party challenging the constitutionality of a statute bears a heavy burden of overcoming that presumption.

McKay v. State, No. W2023-01207-CCA-R9-CO, 2024 WL 4404318, at *5 (Tenn. Crim. App. Oct. 4, 2024) (citations and internal quotation marks omitted), *vacated in part*, 706 S.W.3d 338 (Tenn. 2025).

In *McKay*, this court concluded that the petitioner failed to carry his "burden of overcoming the strong presumption that [the Act] is constitutional." *McKay*, 2024 WL 4404318, at *12. In so doing, this court held that collateral review proceedings are not prosecutions and, therefore, the Act "does not violate Article VI, § 5 by transferring representation of the State in trial-level capital collateral review proceedings from the locally elected district attorney to the Attorney General." *Id.* On review, the supreme court vacated only the portion of this court's opinion declining to consider constitutional standing; it left undisturbed "the remainder of the Court of Criminal Appeals' opinion and judgment," including its holding that section 40-30-114(c)(1) does not violate Article VI, Section 5. *McKay*, 706 S.W.3d at 341. This court's merits holding in *McKay* therefore remains the law of this court.

We acknowledge that the Petitioner's Article VI, section 5 challenges in this case are framed somewhat differently from those presented in *McKay*. The Petitioner here separately argues that the Act divests voters of their sovereignty over local prosecutors and that the Attorney General has previously recognized a constitutional "division of labor" between the two offices.

Each of these arguments, however, rests on the same premise *McKay* rejected: that the Tennessee Constitution reserves representation of the State in a capital petitioner's collateral proceedings exclusively to the locally elected district attorney. Because *McKay* held that collateral proceedings are not "prosecutions" within the meaning of Article VI, section 5, and that the General Assembly may therefore reassign representational authority over such proceedings

without offending the Constitution, the low probability of reversal of the trial court's order denying disqualification of the Attorney General weighs against granting interlocutory review of the Petitioner's Article VI, section 5 challenges. Tenn. R. App. P. 9(a)(2).

b. Article VI, Section 5: Appointment of an Attorney Pro Tempore

The Petitioner's related certified argument—that the Act usurps the judicial power to appoint an attorney pro tempore in violation of Article VI, section 5—fares no better. The post-conviction courts in other cases presenting identical challenges to the Act have reasoned that the Act's designation of the Attorney General as the State's representative in capital collateral proceedings does not equate to the appointment of an attorney pro tempore, because the Act does not extinguish a trial court's power to appoint an attorney pro tempore when a district attorney general fails or refuses to attend and "prosecute" a case, as that authority is defined in *McKay*. *See, e.g.*, *Hawkins v. State*, No. W2025-02015-CCA-R10-PD, 2026 WL 497031, at *2 (Tenn. Crim. App. Feb. 23, 2026), *perm. app. denied* (Tenn. Apr. 2, 2026); *Rice v. State*, No. W2025-02029-CCA-R10-PD, 2026 WL 461537, at *2 (Tenn. Crim. App. Feb. 18, 2026), *perm. app. denied* (Tenn. Mar. 31, 2026).

We note these Rule 10 orders only for the persuasive value of the reasoning they recount from the post-conviction courts below, reviewed there under the deferential "plain and palpable abuse of discretion" standard rather than de novo; we do not treat them as binding merits authority. Independently applying *McKay*'s construction of "prosecute" as an act undertaken by the party who "commences, institutes, or brings" the proceeding, we agree that a collateral review proceeding—brought by the convicted person, not the State—does not trigger the pro-tempore clause, which speaks only to the district attorney's failure or refusal to "attend and prosecute" a case the State itself has brought. Because the Act governs representation in collateral proceedings that *McKay* held are not "prosecutions," it does not displace the distinct judicial authority under Article VI, section 5 to appoint a prosecutor pro tempore when a district attorney general is unable or unwilling to prosecute a case. Accordingly, the probability of reversal on this theory is low. Tenn. R. App. P. 9(a)(2).

c. Article II, Section 17: The Captions Clause

The Petitioner's Article II, section 17 challenge stands on different footing and warrants independent analysis, as *McKay* did not address any single-subject or captions-clause challenge to the Act. The trial court found, as a factual matter, that the Act's title and body shared a common criminal-justice subject and that the title adequately referenced the statutes the Act amended. We presume that acts of the legislature are constitutional, and indulge every presumption and resolve

every doubt in favor of constitutionality. *See Gilliam v. Gerregano*, __ S.W.3d __, 2025 WL 617603, at *4 (Tenn. Feb. 26, 2025) (citation and internal quotation marks omitted).

Applying that presumption here, the bill as introduced addressed statewide rape-kit inventory and reporting; as enacted, the Act also reassigned representational authority over capital collateral review proceedings, a related component of the State's criminal-justice apparatus reflected in the same legislative vehicle. The captions-clause requirement of Article II, section 17 is satisfied where the body of an act is reasonably germane to the subject expressed in its caption; it does not require that every amendment adopted during the legislative process track the bill's original scope, so long as the final subject remains within the field described in the caption. The Petitioner has identified no authority in which a materially similar amendment to a bill's scope during the legislative process was held to violate the captions clause, and the record before this court does not otherwise suggest that the trial court's finding—that the Act's title, though broad, adequately encompassed the criminal-justice subject matter ultimately addressed by its substantive provisions—is likely to be disturbed.

We conclude that the probability of reversal of the trial court's captions-clause ruling is low, and interlocutory review of that issue is likewise not required to prevent needless litigation. Tenn. R. App. P. 9(a)(2). To the contrary, granting interlocutory review of either constitutional challenge, on this record, would only prolong litigation unlikely to result in reversal. *See Gilley*, 173 S.W.3d at 5.

2. The Need to Prevent Irreparable Injury

Having found a low probability of reversal on each of the Petitioner's constitutional theories, we turn to the remaining Rule 9(a) factors, beginning with irreparable injury. The Petitioner has not established that interlocutory review is required to prevent irreparable harm. Tenn. R. App. P. 9(a)(1). Under the circumstances presented, the agreed positions taken by the District Attorney General and the Attorney General that the intellectual disability petition is procedurally barred create no risk of harm to the Petitioner beyond that inherent in litigating the procedural-bar question itself, which remains fully reviewable on direct appeal from any final judgment. *See* State's Answer to Application for Permission to Appeal at 16-17 (representing that "the Attorney General will defend that position in concert with the District Attorney").

3. The Need to Establish a Uniform Body of Law

Finally, the Petitioner has failed to establish the need to develop a uniform body of law concerning the constitutionality of the Act. Tenn. R. App. P. 9(a)(3). To date, every court to consider a challenge to the Act has reached the same result, and no division of authority exists for

this court to resolve. Six post-conviction courts have denied capital petitioners' motions to disqualify the Attorney General under the Act, and, on Rule 10 review of those denials, this court has consistently declined to disturb them under the standards governing extraordinary appeals.[5]

Indeed, three of the post-conviction courts denying these motions separately denied requests for Rule 9 certification on the same grounds we apply today, finding no irreparable injury, no reduction in the duration or expense of litigation, and no need to develop a uniform body of law "given similar rulings issued in other capital collateral review cases." *See, e.g.*, *Rice*, 2026 WL 461537, at *3.

Because the existing body of law on this question is uniform rather than conflicting, interlocutory review is not required to develop consistency where none is lacking. To the extent that further challenges to the Act may be adjudicated, they are better reserved for consideration on direct appeal.

CONCLUSION

Accordingly, the Petitioner's application for permission to appeal pursuant to Rule 9 of the Tennessee Rules of Appellate Procedure is respectfully DENIED. The STAY of the trial court proceedings is VACATED. Because the Petitioner has been determined to be indigent, the costs of this proceeding are taxed to the State of Tennessee.

JUDGE TOM GREENHOLTZ
JUDGE STEVEN W. SWORD
JUDGE STACY L. STREET

[5] *See, e.g.*, *Hawkins*, 2026 WL 497031, at *4; *Rice*, 2026 WL 461537, at *4; *Rimmer v. State*, No. W2025-01982-CCA-R10-PD, 2026 WL 461599, at *5 (Order) (Tenn. Crim. App. Feb. 18, 2026), *perm. app. denied* (Mar. 30, 2026); *Clayton v. State*, No. W2025-02045-CCA-R10-PD, 2026 WL 370074, at *3 (Order) (Tenn. Crim. App. Feb. 10, 2026), *perm. app. denied* (Tenn. Mar. 31, 2026); *Miller v. State*, No. W2025-01997-CCA-R10-PD, 2026 WL 370112, at *3 (Order) (Tenn. Crim. App. Feb. 10, 2026), *perm. app. denied* (Tenn. Mar. 31, 2026); *Jones v. State*, No. W2025-01838-CCA-R10-PD, 2026 WL 289263, at *5 (Order) (Tenn. Crim. App. Feb. 4, 2026), *perm. app. denied* (Tenn. Mar. 24, 2026).