

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

FILED

02/20/2025

Clerk of the
Appellate Courts

LARRY MCKAY v. STATE OF TENNESSEE

**Criminal Court for Shelby County
No. B87597, B87598**

No. W2023-01207-SC-R11-CO

ORDER

In 1982, a jury found Larry McKay guilty of felony murder and sentenced him to death. McKay's conviction and sentence were affirmed on direct appeal, *State v. McKay*, 680 S.W.2d 447 (Tenn. 1984), and his multiple post-conviction and habeas petitions were denied, *McKay v. State*, No. W2008-02274-CCA-R3-PD, 2010 WL 2384831 (Tenn. Crim. App. June 15, 2010); *McKay v. State*, No. M2005-02141-CCA-R3-CO, 2006 WL 288107 (Tenn. Crim. App. Feb. 7, 2006); *State v. McKay*, No. 02C01-9506-CR-00175, 1996 WL 417664 (Tenn. Crim. App. July 26, 1996); *McKay v. State*, No. 02C01-9104-CR-00062, 1995 WL 66563 (Tenn. Crim. App. Feb. 15, 1995); *McKay v. State*, No. 25, 1989 WL 17507 (Tenn. Crim. App. Mar. 1, 1989).

McKay filed this coram nobis proceeding in March 2023 in the Shelby County Criminal Court. The Attorney General entered an appearance for the State pursuant to Tennessee Code Annotated § 40-30-114(c)(1), which, as recently amended, provides that the Attorney General has "exclusive control" of the State's defense of any request for collateral review in capital cases.

McKay filed a motion to disqualify the Attorney General, arguing that section 40-30-114(c)(1) violates Article VI, Section 5 of the Tennessee Constitution because it interferes with the District Attorney's authority to represent the State in all proceedings before a trial court exercising criminal jurisdiction. Shelby County District Attorney Steven Mulroy joined McKay's motion to disqualify the Attorney General and actively participated in the Criminal Court proceedings.

The Criminal Court determined that section 40-30-114(c)(1) violates Article VI, Section 5 of the Constitution and certified an interlocutory appeal of that issue pursuant to Tennessee Rule of Appellate Procedure 9. The Court of Criminal Appeals accepted the appeal and reversed the Criminal Court's judgment. The Court of Criminal Appeals'

opinion expressed “serious reservations” about whether McKay and District Attorney Mulroy have standing but determined that the court could not consider that issue because the Criminal Court did not certify it for appeal. The Court of Criminal Appeals proceeded to the merits and held that section 40-30-114(c)(1) does not violate Article VI, Section 5 of the Tennessee Constitution. McKay has now filed an application for permission to appeal pursuant to Tennessee Rule of Appellate Procedure 11.

Upon consideration of McKay’s application, the State’s response, the supplemental filings submitted by McKay, the State, and District Attorney Mulroy, the briefs filed by the amici curiae, and the record before us, we conclude that we must vacate that part of the Court of Criminal Appeals’ opinion stating that it could not consider standing. Because we are satisfied that District Attorney Mulroy had constitutional standing to challenge section 40-30-114(c)(1)’s constitutionality, we leave the remainder of the Court of Criminal Appeals’ opinion and judgment undisturbed and deny McKay’s Rule 11 application.

To present a justiciable controversy, plaintiffs alleging the violation of a public right must establish constitutional standing. *See Case v. Wilmington Trust*, 703 S.W.3d 274, 291 (Tenn. 2024). Constitutional standing is an “irreducible” and “indispensable” jurisdictional requirement in public-rights cases that courts must always consider. *See City of Memphis v. Hargett*, 414 S.W.3d 88, 98 & n.8 (Tenn. 2013). Appellate courts, in particular, have an independent obligation to consider constitutional standing, regardless of whether the parties raise the issue or the trial court certifies the issue for interlocutory appeal. *See* Tenn. R. App. P. 13(b) (directing that, in addition “to those issues presented for review,” an “appellate court shall also consider whether the trial and appellate court have jurisdiction over the subject matter, whether or not presented for review”).

In this case, McKay and District Attorney Mulroy claim that section 40-30-114(c)(1) unconstitutionally usurps the District Attorney’s authority under Article VI, Section 5 of the Tennessee Constitution. Because this claim involves public rights and raises separation-of-powers concerns, it triggers constitutional standing requirements. *See Case*, 703 S.W.3d at 290–91. Accordingly, the Court of Criminal Appeals should have ensured that constitutional standing requirements were met even though the Criminal Court did not certify the issue for interlocutory appeal. The language in the Court of Criminal Appeals’ opinion to the contrary is hereby vacated.

We are satisfied that both the Criminal Court and the Court of Criminal Appeals had subject-matter jurisdiction in this case. District Attorney Mulroy was a party to the proceedings in both courts with constitutional standing to challenge section 40-30-114(c)(1) as violating Article VI, Section 5 of the Tennessee Constitution.

Although District Attorney Mulroy did not formally move to intervene in the Criminal Court, he actively participated in the proceedings with the Criminal Court's permission and without any objection from the State. Indeed, the Criminal Court's order certifying an interlocutory appeal expressly determines that Mulroy "is a proper party and appellee in this cause." As such, District Attorney Mulroy was a party to the proceedings. Even if the Criminal Court had not expressly granted District Attorney Mulroy party status, he could still be considered a de facto party. *See, e.g., In re Application of Beach Props., Inc.*, 133 A.3d 854, 859–60 (Vt. 2015) (collecting federal and state case law holding that nonparties participating fully in trial court proceedings are properly treated as though they had intervened formally); Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, 15A *Federal Practice & Procedure* § 3902.3 & n.1 (3d ed., June 2024 Update) (explaining that courts treat persons as de facto parties if they "participate[d] in trial court proceedings as if they had intervened" and were "treated on all sides as de facto parties").

On appeal, District Attorney Mulroy entered an appearance as an appellee in the Court of Criminal Appeals. The Court of Criminal Appeals struck his notice of appearance, emphasizing that the legislature has tasked the Attorney General with the responsibility to attend to all of the State's legal business. But Mulroy was participating in this litigation in his own capacity as District Attorney, not as a representative of the State. And because District Attorney Mulroy obtained party status in the Criminal Court without any objection from the State, District Attorney Mulroy was a proper party on appeal. The Court of Criminal Appeals should not have struck his appearance.

Finally, District Attorney Mulroy readily satisfies the three-element constitutional-standing test. *See City of Memphis*, 414 S.W.3d at 98. District Attorney Mulroy alleged a distinct and palpable injury to his alleged constitutional authority to represent the State in all proceedings before a trial court exercising criminal jurisdiction. He demonstrated a causal connection between this alleged injury and section 40-30-114(c)(1), which gives the Attorney General "exclusive control" of the State's defense of any request for collateral review in capital cases. And District Attorney Mulroy's alleged injury was capable of being redressed by a court order declaring section 40-30-114(c)(1) unconstitutional. Consequently, District Attorney Mulroy had constitutional standing to challenge section 40-30-114(c)(1)'s constitutionality. Because District Attorney Mulroy had constitutional standing, we need not consider whether McKay also had standing. *See, e.g., Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (explaining that the presence of one plaintiff with standing to challenge a legislative act's constitutionality is jurisdictionally sufficient).

For these reasons, we vacate that part of the Court of Criminal Appeals' opinion stating that it could not consider standing. 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. McKay's Rule 11 application is

denied and this case is remanded for further proceedings consistent with this Order. The State's motion to consider post-judgment facts is denied.

This Order is designated for publication pursuant to Tennessee Supreme Court Rule 4.

PER CURIAM