No. _____

In the Supreme Court of the United States

ROSEMARY L. DECOSIMO,
Petitioner,
v.
STATE OF TENNESSEE,
Respondent.

On Petition for Writ of Certiorari to the Tennessee Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the right to a fair trial guaranteed by the Sixth Amendment and right to due process under the Fifth and Fourteenth Amendments of the United States Constitution were violated by Tennessee Code Annotated section 55-10-413(f)(2017) which awarded the Tennessee Bureau of Investigation $250 for every chemical test it conducted that led to a conviction?

Whether there is a standard of impartiality required by the right to a fair trial under the Sixth Amendment and the right to due process under the Fifth and Fourteenth Amendments of the United States Constitution that is applicable to forensic scientists working for law enforcement agencies?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONS AND STATUTES

RULES

OTHER AUTHORITIES

OPINIONS BELOW

The opinion of the Tennessee Supreme Court is published at 2018 Tenn. LEXIS 471. See Pet. App. A. The opinion of the Tennessee Court of Criminal Appeals is published at 2018 Tenn. Crim. App. LEXIS 85. See Pet. App. B. A copy of the trial court's Order denying the initial Motion to Dismiss is Appendix C to the petition. See Pet. App. C.

JURISDICTION

The opinion and judgment of the Tennessee Supreme Court was entered on August 23, 2018. Pet. App. A. This Court has jurisdiction pursuant to 28 U.S.C. § 1257. Pet. App. E. The Tennessee Supreme Court had jurisdiction pursuant to Tennessee Code Annotated section 16-3-201. Pet. App. F.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property without due process of law[.]"

The Sixth Amendment to the United States Constitution[1] provides in relevant part: "In all criminal

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[1]Article I, section 9 of the Tennessee Constitution provides similar protection stating in relevant part: "That in all criminal prosecutions, the accused hath the right to be heard by himself and his counsel; to demand the nature and cause of the accusation against him . . . to meet witnesses face to face, to have compulsory process for obtaining witnesses in his favor, and in prosecutions by

prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution[2] provides in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The relevant portion of subsection (f) of Tennessee Code Annotated section 55-10-413 (2017)[3] is reproduced at Petition Appendix D. See Pet. App. D.

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indictment or presentment, a speedy public trial, by an impartial jury of the county in which the crime shall have been committed, and shall not be compelled to give evidence against himself."

[2] Article I, section 8 of the Tennessee Constitution provides similar protection in relevant part: "That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty, or property, but by the judgment of his peers or the law of the land."

[3] This statute has been amended by the Tennessee Legislature as a result of the challenge in this case. The contested part of the statute was in effect from 2013 through May 20, 2018. Prior to 2013, the statute was codified under 55-10-419 (2012). See State v. Rosemary L. Decosimo, No. E2017-00696-SC-R11-CD, 2018 Tenn. LEXIS 471, at *4, n.2 (providing the history of the statute challenged). Pet. App. A.

STATEMENT OF THE CASE

Petitioner Rosemary L. Decosimo entered a plea of nolo contendere to driving under the influence (DUI) per se based on a blood alcohol level of .08% or greater with the reservation of a certified question of law. The parties agreed that the issue in the certified question was dispositive on appeal. Pet. App. A.

At issue in the certified question of law was the constitutionality of Tennessee Code Annotated section 55-10-413(f)(2017), which had been challenged in a Motion to Dismiss, Supplement, and Memorandum filed on behalf of more than 20 defendants. The trial court, sitting en banc with the county's three criminal court judges, denied the Motion to Dismiss in a joint opinion prior to entry of Petitioner's plea. Pet. App. C.

Following the entry of the trial court's denial, Petitioner sought an interlocutory appeal but it was denied by the Tennessee Court of Criminal Appeals and the Tennessee Supreme Court. A new trial judge was appointed in the Petitioner's case. He adopted the trial court's previous order when asked to reconsider the denial of the Motion to Dismiss. Pet. App. A. Petitioner entered a nolo contendere plea reserving a certified question on the constitutionality of the statute. Pet. App. G.

Pursuant to the plea agreement, the trial court sentenced Petitioner to eleven months and twenty nine days, all suspended except 48 hours. Pet. App. G. In a 3-0 decision, the Tennessee Court of Criminal Appeals reversed the trial court and found in favor of the Petitioner by declaring Tennessee Code Annotated

section 55-10-413(f) unconstitutional and in violation of due process. Pet. App. B.

In a 5-0 decision, the Tennessee Supreme Court reversed the judgement of the Tennessee Court of Criminal Appeals and reinstated the judgment of the trial court. Pet. App. A.

A. FACTUAL BACKGROUND AND RELEVANT TRIAL EVIDENCE

Petitioner was arrested and charged with driving under the influence on August 18, 2012. She consented to providing a blood sample upon her arrest. She, along with twenty-two other defendants, filed a Motion to Dismiss to challenge the constitutionality of Tennessee Code Annotated section 55-10-413(f). The Motion was heard before the three Hamilton County Criminal Court judges sitting en banc. Pet. App. A.

The parties submitted written stipulations of fact prior to the hearing on the Motion to Dismiss which included that: (1) Each of the defendants was charged with DUI, vehicular assault, and/or vehicular homicide; (2) Each defendant provided a breath or blood sample to law enforcement; (3) The blood samples were sent to the Tennessee Bureau of Investigation (TBI) Forensic Services Division where they were tested for the presence of alcohol or other intoxicant; (4) TBI forensic scientists are routinely called as witnesses to testify regarding the testing process, equipment, results, and other matters relating to chemical analysis of the blood and breath evidence; (5) Written reports may be admitted into evidence; (6) Each defendant, if convicted, was subject to certain fees under the challenged statute, including the BADT (Blood Alcohol

or Drug Concentration Test) and BAT (Blood Alcohol Concentration Test) fees, to be paid as part of his or her court costs; (7) No BADT or BAT fee is charged where a case is dismissed, a not guilty verdict is returned, or where a defendant pleads to a non-DUI related offense; and (8) By statute, the BADT and BAT fees are collected by the court clerk for the applicable court and are paid ultimately to the TBI where they are used for all TBI agency operational costs as permitted by statute. Pet. App. B.

The testimony of TBI Director, Mark Gwyn, before a Senate Judiciary Committee of the Tennessee General Assembly on February 11, 2014, was entered as an exhibit to the Motion to Dismiss. TBI Director Gwyn testified that the BADT fee was originally $100, but in 2010, it was increased to $250 per conviction, because the TBI had a financial shortfall and was going to be faced with having to shut down labs or charge local law enforcement for testing. Director Gwyn testified that by increasing the fee, the TBI was able to avoid "lay[ing] off forensic scientists" and able to avoid charging law enforcement for testing. Director Gwyn estimated that eight special agent positions and eight special agent/forensic scientist positions "were in jeopardy" if the BADT fee had not been increased. Pet. App. A.

Director Gwyn provided the following statistics on revenue generated under the statute from the BADT fees for blood testing from 2009 to 2012:

- 2009 – Revenue $999,000 and Expenses: $750,000
- 2010 – Revenue $1,011,000 and Expenses: $690,000

- 2011 – Revenue $1,500,000 and Expenses: $1,400,000
- 2012 – Revenue $2,500,000 and Expenses: $1,500,000

Pet. App. A.

Petitioner presented evidence about a TBI forensic scientist, Agent Bayer, who had been fired for switching two blood samples which resulted in a person with a blood alcohol content of .01% being charged with vehicular homicide based on another person's blood alcohol content of 0.24%. As a result of that case, the TBI retested 2,827 blood samples through an independent out-of-state laboratory. For the majority of the retests, the BAC was the same or slightly higher on the new test than in Agent Bayer's tests. However, 43 tests showed a slightly lower BAC than Agent Bayer's result. Pet. App. B.

Two defense attorneys testified as witnesses. Attorney Raymond W. Fraley, who had handled over 2000 DUI cases, stated that judges and prosecutors relied heavily on the accuracy of the TBI's test results and that these test results influenced whether a defendant would fight the case or enter a plea. Fraley stated that cross-examination of a forensic scientist was not an adequate safeguard because 85% of DUI cases settled before trial. Pet. App. B.

Attorney Lloyd Levitt testified that he had handled over 1000 DUI cases and that the Official Alcohol Report from the TBI was "the driving factor in any DUI case." Pet. App. A.

Additional evidence showed other cases in which the TBI tests had been incorrect. The first was a blood test on Michael Barrett Dorne, who had a blood alcohol level of .23% according to the TBI test. A retest showed that the level was a .17%. See T.C.A. §55-10-402(a)(1)(B) (providing for enhanced penalties when BAC is .20% or higher). The second was the blood test of Heatherly Dawn Fischer, which showed a BAC of .09% according to the TBI test but a .07% on the independent lab test. The third example of an inaccurate result was in a Hamilton County case wherein the official alcohol report for Joseph Tyler Gallant, reported the BAC to be .21%. The report did not reveal that the test involved serum blood, rather than whole blood, making the actual blood test result .18%. (Vol. II, p. 146-153).[4]

On behalf of the 23 defendants involved in the Motion to Dismiss, counsel argued that the appearance of impropriety and potential for bias were sufficient to challenge the statute's constitutionality and the system as a whole and acknowledged he was not presenting evidence of actual bias for each defendant. Pet. App. A. In a joint opinion by the three criminal court judges, the Motion to Dismiss was denied, but defendants were granted the right to have a jury instruction given concerning the financial incentive the BADT fee created for the TBI to obtain convictions. Pet. App. A.

Following the appointment of a new trial judge to the Petitioner's case, the trial court was asked to reconsider the ruling on the Motion to Dismiss and additional evidence was presented. Records from the

[4] These exhibits are part of the appellate record.

Tennessee Department of Revenue showing the BADT fees collected by the TBI from 2005 to 2016 were admitted into evidence. The following table shows the fees collected by the TBI during that twelve year period, totaling more than $22 million:

Year	BADT Collection
2005	$138,437.90
2006	$794,822.83
2007	$1,011,324.52
2008	$1,019,760.76
2009	$970,221.02
2010	$989,049.49
2011	$2,018,651.25
2012	$2,655,556.39
2013	$3,005,840.02
2014	$3,145,794.60
2015	$3,306,940.32
2016	$3,003,571.80
TOTAL	$22,059,970.90

Pet. App. B.

B. PROCEEDINGS ON APPEAL

Petitioner challenged the constitutionality of Tennessee Code Annotated section 55-10-413(f) in a certified question following entry of a nolo contendere plea to DUI. Pet. App. B. The issue on appeal was whether a statute which awarded the TBI a $250 fee for each case in which a conviction was obtained using one of its tests violated due process or the right to a fair trial. Pet. App. G. On February 6, 2018, the Tennessee Court of Criminal Appeals reversed the judgment of the trial court and found the statute to be

unconstitutional. Pet. App. B. The State of Tennessee sought an Application for Permission to Appeal to the Tennessee Supreme Court, which was granted. On August 23, 2018, the Tennessee Supreme Court reversed the judgment of the Court of Criminal Appeals and reinstated the judgment of the trial court. Pet. App. A.

REASONS FOR GRANTING THE PETITION

The impact of this case is not limited to a single DUI defendant. Between 2005 and 2017, there were more than 336,000[5] arrests for DUI in the State of Tennessee from which the TBI had the potential to perform a chemical test and the potential to be paid for a conviction in each case. It is unknown how many of those cases are still pending.[6]

The Tennessee Supreme Court has decided an important question of federal law that has not been, but should be, settled by this Court: whether a fee paid to a forensic scientist's laboratory that is contingent upon convicting a defendant creates an appearance of impropriety, impartiality, or potential for bias so egregious that it violates due process and right to a fair trial. See Sup. Ct. R. 10(c). The question of whether a statute which provides for paying a contingent fee to a

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[5] DUI statistics for the years of 2005-2016 can be found under Crime in Tennessee under Statewide Statistics at https://www.tn.gov/tbi/divisions/cjis-division/recent-publications. .html. DUI statistics for 2017 can be found at https://crime insight .tbi.tn.gov/public/View/dispview.aspx?ReportId=50

[6] Tennessee Code Annotated section 40-30-102(a) provides that the statute of limitations for obtaining post-conviction relief is within one year of the judgment becoming final.

forensic scientist upon obtaining a conviction violates the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution has not been decided by this Court. This Court also has never addressed or set a standard for impartiality required of a forensic scientist working for a state lab in a criminal case or determined if paying forensic scientists a contingency fee creates an incentive for partiality, which makes a trial fundamentally unfair.

Tennessee is not the only state with a statute that pays forensic scientists for alcohol testing only when the results lead to a conviction. See Ky. Rev. Stat. Ann. §189A.050(2) (providing that a $45 fee (12% of $325) is to be paid to the State Police Forensic Laboratory for each person convicted of DUI); Nev. Rev. Stat. Ann. §484C.510(1) (providing that upon conviction if a chemical test is performed, the defendant must pay $60 as a fee for chemical analysis); N.C. Gen. Stat. §7A-304(a)(7) (providing that a $600 fee is to be paid to the state Department of Justice for support of the Laboratory in each case wherein a conviction is obtained and a test is performed); Vt. Stat. Ann. tit. 23 §1210(i) (providing that person convicted of DUI must pay a $60 fee to be deposited to the Blood and Breath Alcohol Testing Special Fund).

The Tennessee Supreme Court found that the United States Supreme Court cases of Tumey v. Ohio, 273 U.S. 510 (1927), Ward v. Village Of Monroeville, 409 U.S. 57 (1972), and Connally v. Georgia, 429 U.S. 245 (1977), which announced neutrality standards for individuals exercising a judicial or quasi-judicial authority, could not be extended to TBI forensic scientists, despite having a duty to be neutral in

conducting their scientific testing, to produce results based solely on scientific processes, and to conduct testing free from any influence or possible bias towards a certain outcome. Pet. App. A.

Tennessee Code Annotated section 55-10-413(f)(2017) that is drawn into question in this appeal is repugnant to the Constitution. 28 U.S.C. § 1257. The statute created an expert witness contingency fee that was paid only upon the conviction of a defendant. Such expert witness contingency fees have been rejected by states across the country as bad policy. An expert witness working on behalf of the State and prosecution that has an interest in the outcome of a case, because payment is contingent upon obtaining a conviction, cannot be said to comport with the principles of a fair trial or due process.

This case presents a particularly compelling reason why this Court should address the issue before it. This issue is not limited to the Petitioner's case. It applies to all DUIs in the State of Tennessee, wherein a chemical test was performed, from 2005 until May 20, 2018. It also could apply to DUIs in other states, including but not limited to, Kentucky, Nevada, North Carolina, and Vermont. Every case in which a chemical test was performed by a TBI forensic scientist and a conviction was obtained, the TBI directly received either $100 (prior to 2010) or $250 (2010 and after). Additionally, if the Tumey line of cases is inapplicable to forensic scientists, there is no standard for lower courts to apply in addressing the impartiality of forensic scientists. Therefore, this Court should grant this Petition to address this extremely important constitutional issue.

I. WHETHER THE RIGHT TO A FAIR TRIAL GUARANTEED BY THE SIXTH AMENDMENT AND RIGHT TO DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION ARE VIOLATED BY TENNESSEE CODE ANNOTATED SECTION 55-10-413(f)(2017), WHICH AWARDED THE TBI $250 FOR EVERY CHEMICAL TEST IT CONDUCTED IN A DUI CASE THAT LED TO A CONVICTION?

Tennessee Code Annotated section 55-10-413(f)(2017) created a constitutional violation in every DUI case in which a chemical test was performed. Chief Justice Jeffrey Bivens of the Tennessee Supreme Court stated at oral argument that "I don't think you are going to get many folks that are going to argue with you that it [the challenged statute] stinks to high heaven."[7] The $250 fee that was paid to the TBI for every DUI conviction violated a defendant's due process rights and right to a fair trial under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. Just as "no Act of Congress can authorize a violation of the Constitution[,]" neither can an act of a state legislature. See Almeida-Sanchez v. U.S., 413 U.S. 266, 272 (1973).

The fee under Tennessee Code Annotated section 55-10-413(f) was first adopted in 2005, at which time the fee was $100 to cover the cost of the blood test itself. See T.C.A. §55-10-419(2005). In 2010, the fee was increased to $250 and was acknowledged by the TBI as an effort to offset costs and budget shortfalls far

[7] https://tncourts.gov/courts/supreme-court/arguments/2018/05/31/state-tennessee-v-rosemary-l-decosimo at 32:36.

exceeding and unrelated to the testing costs. TBI Director Gwyn testified before the Tennessee General Assembly that, "[i]n 2008, we were faced with some pretty deep cuts, cuts that would have at least caused us to do one of two things: [w]e would've had to shut down some disciplines with[in] our crime laboratory, or we would've had to start charging local law enforcement for testing." Pet. App. A. By increasing the fee to $250, Director Gwyn stated that the TBI avoided "lay[ing] off forensic scientists" and avoided passing the cost of the forensic testing "back onto local law enforcement [who] could not pay it at the end of the day." Pet. App. A.

Neither the prosecuting authority nor law enforcement remitted payment if there was an acquittal or dismissal, meaning the TBI was paid only for testing in cases if there was a conviction. If a defendant was not convicted, the TBI was not paid the $250 fee. The fee did not go to the state general fund but went directly to the TBI, who became reliant on this fee as part of its annual budget. TBI forensic scientists had a direct pecuniary interest and a financial incentive to obtain convictions. From 2005 through 2016, the TBI collected more than $22 million from this fee. Pet. App. A.

The trial court found that this statute created a "contingent-fee-dependent system" but did not find a due process violation. Pet. App. C. The Tennessee Court of Criminal Appeals reversed the trial court and held that §55-10-413(f) was unconstitutional and violated due process. Pet. App. B. In response to the Tennessee Court of Criminal Appeals' decision, the Tennessee Legislature remedied the statute by making

the fee go to the state's general fund and not to the TBI. The Tennessee Legislature was then commended by the Tennessee Supreme Court in its decision for taking action to change the statute:

> [W]e acknowledge that the General Assembly could have devised a "more felicitous way" to provide funding. . . Indeed, the Legislature has now done just that by amending the BADT fee statute, effective May 21, 2018. We applaud this timely action by the Legislature to eliminate the grounds on which the defendant based her claim of a statutory appearance of impropriety and her constitutional challenge.

Pet. App. A; see T.C.A. § 55-10-413(f)(2018).

Due process applies to all three branches of government. See Ex parte Va., 100 U.S. 339, 347 (1880) (providing that a "State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws"). "[O]ur judicial system recognizes significantly more due process protections in criminal cases than in civil cases." State v. Larkin, 443 S.W.3d 751, 799 (Tenn. Crim. App. 2013). "[T]he overarching concern in criminal prosecutions is that the defendant not be convicted except upon being afforded the due process of law, including the right to a trial that is fundamentally fair." Id. at 800. "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system has

always endeavored to prevent even the probability of unfairness." In re Murchison, 349 U.S. 133, 136 (1955).

There are two categories of implied rights protected by the Due Process Clause: (1) "fundamental rights, which cannot be taken away at all absent a compelling state interest" and (2) "not-so-fundamental rights, which can be taken away so long as procedural due process is observed." Kerry v. Din, 135 S. Ct. 2128, 2137 (2015). The first step in any substantive due process analysis is to determine the constitutional interests at stake. Washington v. Glucksberg, 521 U.S. 702, 722 (1997). Depending on whether the asserted interest is a fundamental constitutional right, the Court must apply either strict scrutiny or rational basis review to determine when the government has exceeded its authority and violated due process. Clark v. Jeter, 486 U.S. 456, 466 (1988).

The impermissible contingent-fee-dependent system under this statute interferes with the fundamental right of a criminal defendant to a fair trial. Therefore, to survive strict scrutiny, the State must demonstrate two things: (1) that the burden on the right to a fair trial is justified by a compelling state interest; and (2) that the statute is narrowly tailored to achieve that state interest. Reed v. Town of Gilbert, 135 S. Ct. 2218, 2232 (2015); City of Memphis v. Hargett, 414 S.W. 3d 88, 102 (Tenn. 2013). A regulation does not qualify as narrowly tailored if there are any workable alternative means of achieving the state interest. City of Memphis, 414 S.W.3d at 102-103; see also Fisher v. Univ. of Tex., 570 U.S. 297, 312 (2013) ("reviewing court must ultimately be satisfied that no workable race-neutral

alternatives would produce the educational benefits of diversity").

Courts have recognized that states have an interest in maintaining forensic testing operations to provide reliable data for use in the prosecution of crimes that depend upon the amount of alcohol or drugs in the body. See, e.g., Winston v. Lee, 470 U.S. 753, 763 (1985). Assuming such an interest would qualify as a compelling state interest, section 55-10-413(f) was not narrowly tailored to serve that interest for two reasons.

First, the State never attempted to meet its burden of demonstrating the absence of less intrusive alternatives to the contingency-fee-dependent structure of Tennessee Code Annotated section 55-10-413(f). That alone compels the conclusion that the statute fails to meet strict scrutiny. See McCullen v. Coakley, 134 S. Ct. 2518, 2524 (2014) ("To meet the narrow tailoring requirement, . . . the government must demonstrate that alternative measures . . . would fail to achieve the government's interests").

Secondly, there are readily available alternatives that impose less of a burden on a criminal defendant's right to a fair trial by removing the incentive for bias that the statute created. Whether due process is violated by an arbitrary legislative action is not a question that exists in a vacuum; it is gauged by whether there exist other viable alternatives that would not compromise constitutional rights. The unconstitutionality here could have been fixed if the fees had been deposited into the state general fund or if the statute de-incentivized any conflict by requiring that the counties, state prosecutor's offices, or local law enforcement also be required to pay the $250 statutory

fee in the event of acquittals or dismissals. Here, the existence of obvious, constitutionally neutral, and readily available alternatives were available.

Jury trials have become the exception in criminal cases. In our criminal justice system, the majority of cases end in guilty pleas, rather than trials, making the right to confront and cross-examine TBI forensic scientists an ineffective remedy to address the system-wide legislative action that codified a conflict of interest and impacted tens of thousands of cases statewide annually for over thirteen years.

Giving a jury instruction or allowing for cross-examination of forensic scientists does not provide a sufficient safeguard or remedy under strict scrutiny. In many DUI cases, the blood or breath test results may be the most compelling evidence against a defendant. Additionally, jurors often see scientific evidence as unimpeachable even when challenged. "The content of an expert's testimony is significant because juries attach heightened value to scientific evidence, incorrectly believing it is infallible." Kayla Marie Mannucci, Framed by Forensics: Fulfilling Daubert's Gatekeeping Function by Segregating Science from the Adversarial Model, 39 Cardozo L. Rev. 1947, 1950 (2018) Neither of these "remedies" can cure the fair trial or due process violations of having an interested forensic scientist with an incentive toward conviction. At a certain point, expert evidence has to be inadmissible for lack of impartiality. This should be that point.

Independent testing by defendants also does not provide protection against these violations to due process and fair trial. Independent testing as a

safeguard impermissibly shifts the burden to the defendant. Independent testing can also be expensive and cost prohibitive. See Id. at 1961 (The majority of felony defendants are indigent with limited resources and cannot afford to present their own expert testimony at trial). The Tennessee Court of Criminal Appeals rejected independent testing as a solution:

> [I]ndependent testing is not an adequate safeguard because it impermissibly shifts the burden of proof from the State to the defense. Because the State has the duty to pursue truth and justice, it has the obligation to provide an accurate, unbiased BAC result, not a result that is deemed correct until disproved by the defendant. Under the scenario suggested by the State, the defendant is forced to obtain an independent test, to pay for an attorney to defend him, and to hire an expensive expert to challenge the BAC result in order to do what an unbiased TBI forensic scientist should have done from the beginning.

Pet. App. B.

The legislature has amended the statute to direct any fees collected to go to the general fund, and TBI no longer gets a fee only upon a conviction. However, the constitutional rights of the Petitioner and all defendants who had chemical testing performed by a TBI forensic scientist, who had an incentive toward conviction, remain without a remedy for the unconstitutional statute and contingent-fee-dependent system under which their blood/breath testing results were produced. Tennessee Code Annotated section 55-10-413(f) created an obvious injustice that rendered the

trial process fundamentally unfair. Suppression of the chemical test and dismissal of this case are the only remedies under strict scrutiny that can be applied for these violations of the fundamental right to a fair trial and right to due process.

II. WHETHER THERE IS A STANDARD OF IMPARTIALITY REQUIRED BY THE RIGHT TO A FAIR TRIAL UNDER THE SIXTH AMENDMENT AND RIGHT TO DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION THAT IS APPLICABLE TO FORENSIC SCIENTISTS WORKING FOR LAW ENFORCEMENT AGENCIES?

The United States Supreme Court has given direction on the impartiality required of judicial actors in a trilogy of cases that addressed due process concerns when a person in a judicial position received a fee which could have affected the judge's impartiality. See Tumey v. Ohio, 273 U.S. 510 (1927); Ward v. Village of Monroeville, 409 U.S. 57 (1972); and Connally v. Georgia, 429 U.S. 245 (1977).

However, if that impartiality test is limited to the judicial branch and not extendable to forensic scientists as found by the Tennessee Supreme Court, then what is the standard of impartiality for a forensic scientist working at a state crime lab? What standard can be applied to address concerns that an interest or possible bias exists that could tempt a scientist to disregard his or her own neutrality? The Tumey line of cases is a reasonable starting place for applicable standards for a forensic scientist tasked as an expert witness who

performs the chemical analysis on the most important piece of evidence in a DUI case – the blood alcohol content.

TBI forensic scientists have a pecuniary interest, creating a potential for bias, which is unacceptable for any expert witness who is expected to be neutral. The role of the forensic scientist doing blood alcohol testing is unique in that the one piece of evidence for which she is responsible is case determinative in almost every DUI. See State v. Livesay, 941 S.W.2d 63, 64 (Tenn. Crim. App. 1996) ("It is difficult to overstate the importance of evidence of blood alcohol content in DUI prosecutions . . . any compromise of the accuracy of such a test 'is a crucial consequence, given the importance of scientific evidence in DUI cases'"). Forensic scientists are expert witnesses cloaked as impartial and neutral scientific experts. Their function is to determine a disputed fact – the blood alcohol content of a defendant's blood at the time of arrest – and, therefore scientists act in an almost quasi-judicial capacity as well. Compare Roberta K. Flowers, Article: What You See Is What You Get: Applying the Appearance of Impropriety Standard to Prosecutors, 63 Mo. L. Rev. 699, 728 (Summer 1998) (discussing the quasi-judicial role of a prosecutor).

The Tennessee Court of Criminal Appeals in finding the statute unconstitutional recognized the interests of forensic scientists and made four important conclusions. First, "[t]his fee system, which was created by the legislature at the urging of the TBI, creates a mechanism whereby the TBI forensic scientists have a pecuniary interest in BADT fees in the form of continued employment, salaries,

equipment, and training within the TBI." Secondly, TBI forensic scientists "who engage in the objective testing of blood samples to determine a defendant's BAC, are expected to be neutral and unbiased," much like judicial actors. Thirdly, "[t]he close relationship between the BADT fees and the operational expenses of the TBI creates a scenario closely akin to an expert witness contingency fee, which the Tennessee Supreme Court has held to be void because it encourages bias." Lastly, "[w]hile TBI forensic scientists are obviously employees of a state law enforcement bureau, they must serve as objective, independent experts in order to protect the integrity of the criminal justice system" much like judicial actors. Pet. App. B.

This Court should address whether Tumey can apply to forensic scientists and settle this important question of federal law and constitutional protections. If Tumey does not extend beyond judicial actors, there is a specific and critical need for this Court to address (1) the standard that should apply to forensic scientists working in state crime labs and (2) if there is any impropriety with forensic scientists and state crime labs being paid contingency fees.

The first in the trilogy of Supreme Court cases is Tumey v. Ohio, 273 U.S. 510 (1927). In Tumey, an Ohio statute permitted a liquor violation to be tried before the village mayor who was an executive officer. Any fine imposed was divided between the State and the city. The important part of the 9-0 decision by Chief Justice Taft held that when the mayor convicted a defendant, he "received fees and costs . . . in addition to his salary." Tumey 273 U.S. at 531-32. The defendant in Tumey had been denied due process

under the Fourteenth Amendment because the mayor had a "direct personal pecuniary interest in convicting the defendant." Tumey, 273 U.S. at 523. TBI scientists also have a direct pecuniary interest – their interest is continued employment.

In Tumey v. Ohio, wherein the mayor was acting in a judicial capacity, the United States Supreme Court rejected the argument that judges would carry out their duties and could perform their duties without risk of injustice simply because of who they were. Tumey, 273 U.S. at 532. Therefore, it would be inconsistent to say the same thing for forensic scientists or to argue that scientists are not likely to succumb to the temptations of bias simply because they are scientists.

The second case in the trilogy of cases to be considered was Ward v. Village of Monroeville, 409 U.S. 57 (1972). In 1972, the holding from Tumey was re-iterated in Ward where a state statute authorized mayors to sit as judges on ordinance violations and traffic offenses. The fees produced from the mayor's court accounted for a substantial portion of the municipal revenues, and even though the mayor's salary was not augmented by those sums, the Court still concluded that a "forbidden temptation" was present "when the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court." Ward, 409 U.S. at 60.

The dissent in Ward pointed out that the mayor had no direct personal financial stake in the outcome of cases before him, but the majority still held that said procedure violated due process. Ward, 409 U.S. at 62 (White, J. dissenting). Similarly, even though the TBI

forensic scientists do not directly receive a portion of the $250 fee, having the funds to pay the TBI scientists' salaries (just like the mayor's salary in Ward) was dependent on having the funding provided directly to the TBI by the fees under Tennessee Code Annotated section 55-10-413(f). This is exactly what TBI Director Gwyn testified to before the Tennessee General Assembly: that forensic scientists' jobs were "in jeopardy" and the increased fee made it possible to avoid "lay[ing] off forensic scientists." Pet. App. A.

The third in the trilogy of cases is Connally v. Georgia, 429 U.S. 245 (1977). In Connally, the Supreme Court addressed the constitutional impropriety of a fee system whereby Georgia magistrates were compensated a set fee of $5 for the issuance of each search warrant, but not paid any fee for denied applications. In its analysis, the Court recalled a line of cases in which a financial interest of the adjudicating official – either in fees paid directly to that individual or in revenue generated to the municipality for which they worked – was tethered to the outcome of a criminal matter under consideration. Connally, 429 U.S. at 247-50. Ruling that such a process violated a defendant's due process right to a neutral and detached hearing officer, the Court in Connally vacated the conviction on due process grounds. Id. at 251.

Other than Tumey and its progeny, this Court has left standards for impartiality of experts unaddressed. In Daubert v. Merrell Dow Pharmaceuticals, this Court set the standard for the admission of expert testimony. 509 U.S. 579, 585 (1993). "Expert evidence can be both powerful and quite misleading because of the difficulty

in evaluating it." Id. at 595. "[U]nder the Rules [of Evidence,] the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." Id. at 589. Although Daubert provides some guidance, it does not address impartiality or the issues raised here with regard to forensic scientists working for state labs who produce scientific findings on the most important piece of evidence in a DUI case while being paid for the testing only if a conviction is obtained.

The Court in Daubert provided five factors that are relevant to determining if expert testimony is scientific and well–supported knowledge: (1) whether the particular scientific theory "can be (and has been) tested," (2) whether the theory "has been subjected to peer review and publication," (3) the "known or potential rate of error," (4) the "existence and maintenance of standards controlling the technique's operation," and (5) whether the technique has achieved "general acceptance" in the scientific or expert community. Id. at 593-94. The Court made it clear, however, that its list of factors was not exhaustive. Id. at 593. "Notably absent from this list is any mention of the possible biases or conflicts of interest of the expert." Mark R. Patterson, Conflict of Interest in Scientific Expert Testimony, 40 Wm. & Mary L. Rev. 1313, 1319 (1999). Impartiality and potential bias are most certainly necessary considerations when assessing the reliability of an expert's work.

Because criminal cases involve life and liberty, something more stringent than Daubert is needed to protect against the bias and interest of forensic scientists working in state crime labs. "In each case[,]

'due process of law' requires an evaluation based on a disinterested inquiry pursued in the spirit of science." Rochin v. California, 342 U.S. 165, 172 (1952). How to address biases and conflicts of interest of experts (forensic scientists) in criminal cases is an issue of constitutional magnitude, greater than what Daubert addressed, that should be addressed by this Court.

The application of the Tumey line of cases may seem to be a novel application to forensic scientists but this Court has provided no other guidance as to the neutrality requirements or propriety of contingency fees for forensic scientists who act as the sole judges of the most critical piece of evidence in DUI cases.

> Tumey and Ward [did] not require proof of actual judicial prejudice or of a direct pecuniary interest in the outcome of particular cases. The test is whether a fee system presents a "possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused."

Brown v. Vance, 637 F.2d 272, 282 (5th Cir. 1981) (quoting Tumey, 273 U.S. at 532). "Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." Caperton v. A.T. Massey Coal Co., Inc., 556 U.S. 868, 878 (2009) (quoting Tumey, 273 U.S. at 532).

In Tumey, the "Court held that the Due Process Clause required disqualification 'both because of [the mayor's judge's] direct pecuniary interest in the outcome, and because of his official motive to convict and to graduate the fine to help the financial needs of the village.'" Caperton, 556 U.S. at 878. Looking at this fee in the aggregate - $22 million from 2005 to 2016 paid to the TBI - makes this case quite significant and extreme. Yet, even the individual $250 fee is sufficient to call into question the potential bias of the TBI in each case. The fine in Tumey was just $12, yet required disqualification. A fee of $12 in 1927 equates to approximately $172.90 today, which is less than the $250 fee at issue.[8]

"Most forensic scientists work for government crime labs and are part of the prosecution team. Therefore, they naturally identify with the prosecutor's goal of convicting a particular defendant." David E. Bernstein, Article: Expert Witnesses, Adversarial Bias, and the (Partial) Failure of the Daubert Revolution, 93 Iowa L. Rev. 451, 456 (2008). Prosecutors are "expected to behave in a biased—although not improperly biased—manner, whereas the expert must remain objective and independent, both in fact and in appearance." Jeffrey J. Parker, Note: Contingent Expert Witness Fees: Access and Legitimacy, 64 S. Cal. L. Rev. 1363, 1371–72 (1991) (footnote omitted); see also Dr. Cyril Wecht, Transcript: The Role of the Forensic Scientist in Maintaining Integrity in the Criminal Justice System, 52 S. Tex. L. Rev. 459, 460 (Spring 2011 Symposium) ("Forensic scientific investigation must be an objective, independent

[8] See https://www.bls.gov/data/inflation_calculator.htm.

endeavor. We are not part of the armamentarium of the prosecutor's office. We are not an extension of the prosecutor's office.").

Our criminal justice system tolerates partiality and bias on the part of non-expert witnesses, such as accomplices, informants, and whistleblowers. The TBI's forensic scientists are none of these, but occupy the role of an expert witness. Any payment for TBI's services – as expert witnesses - that is contingent upon the outcome of litigation is both unethical and contrary to public policy. See Sutherlin v. White, 71 Va. Cir. 184, 188 (Va. Cir. 2006) ("Indeed, maintaining the independence of an expert witness is the chief reason why the common law has long recognized that an expert may not be paid with a contingency fee"); Indiana Union Traction Co. v. Pheanis, 85 N.E. 1040, 1041 (Ind. Ct. App. 1908) ("An expert whose fee is contingent upon the result of the suit is an interested witness").

Paying a forensic scientist only if a conviction is secured is a contingent fee. There should be no differentiation whether the fee goes directly to the scientist or if it goes to her employer. See e.g. City, County of Denver v. Board of Assessment Appeals, 947 P.2d 1373, 1379 (Colo. 1997) (concluding that rule prohibiting contingency fees extended to corporations when an employer received a contingent fee for the testimony of their salaried employees); First Nat'l Bank v. Malpractice Research, 688 N.E. 2d 1179, 1185 (Ill. 1997) (finding that contingent fee contract in which consultant company provided experts in medical malpractice cases was contrary to public policy); Dupree v. Malpractice Research, Inc., 445 N.W.2d 498,

498-99 (Mich. Ct. App. 1989) (affirming decision that contingent fee contracts were void and unenforceable involving organizations engaged in the business of providing expert witnesses).

Whether by statute, rule, or common law, "virtually every jurisdiction" in the U.S. ensures the reliability of scientific testimony or evidence, in part, by prohibiting the payment of contingency fees to expert witnesses. See Steven Lubet, Article: Expert Witnesses: Ethics and Professionalism, 12 Geo. J. Legal Ethics 465, 477 (1999) (citing Tagatz v. Marquette Univ., 861 F.2d 1040, 1042 (7th Cir. 1988), and Swafford v. Harris, 967 S.W.2d 319, 323 (Tenn. 1998)); see also Restatement 3d of the Law Governing Lawyers, §117 ("A lawyer may not offer to pay to a witness any consideration . . . (2) contingent on the content of the witness's testimony or the outcome of the litigation").

In Tennessee and nearly every state in this Country, there are rules prohibiting lawyers from paying, offering to pay, or acquiescing in the payment of compensation to a witness contingent on the content of his or her testimony or the outcome of the case. See Pet. App. H[9]; see also Tenn. Sup. Ct. R. 8, RPC 3.4(h). The statute at issue here does exactly what is prohibited by all the rules: it pays the TBI a $250 fee contingent upon obtaining a conviction. It would be unethical in all states in this Country for a lawyer to pay such a fee to the forensic scientist. Pet. App. H. Therefore, to permit legislation to do what lawyers cannot ethically do, shows a fundamental need for a change to such a law and implicates due process and

[9] Petition Appendix H contains a list of citations to professional rules by State.

fundamental fairness rights. See also Crowe v. Bolduc, 334 F.3d 124, 132 (1st Cir. 2003) ("The majority rule in this country is that an expert witness may not collect compensation which by agreement was contingent on the outcome of a controversy. That rule was adopted precisely to avoid even potential bias").

The ANSI-ASQ National Accreditation Board, which sets accreditation standards for labs and scientists, provides a specific standard also prohibiting contingency fees. The standards instruct: "Do not accept or participate in any case on a contingency fee basis or in which they have any other personal or financial conflict of interest or an appearance of such a conflict." ANSI-ASQ National Accreditation Board, Governing Principles of Professional Responsibility for Forensic Service Providers and Forensic Personnel p. 2, #7 (Nov. 3, 2016).[10]

"The rule that expert witnesses may not collect contingent fees relates to a concern that contingent fees will improperly induce expert witnesses to provide outcome-oriented testimony." Larkin v. Dedham Medical Associates, Inc., 93 Mass. App. Ct. 661, 669 (Mass. Ct. App. 2018). "As a general rule, payments to witnesses in return for testimony are considered unethical and illegal." George C. Harris, Article: Testimony for Sale: The Law and Ethics of Snitches and Experts, 28 Pepp. L. Rev. 1, 1 (2000).

The substantive due process claim at issue does not require specific prejudice to the defendant, which is why this case is a challenge to the system as a whole.

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[10] Available at https://anab.qualtraxcloud.com/ShowDocument.aspx?ID=6732

See e.g. Connally, 429 U.S. 245 (no individual prejudice is necessary in challenging constitutional impropriety of fee system that governed the issuance of warrants); Ward, 409 U.S. 57 (no showing of actual bias or prejudice to defendant, but fee system found unconstitutional nonetheless). Even in the absence of actual bias, courts have recognized that allowing contingency payments to expert witnesses engenders the appearance of bias, thereby "threaten[ing] the integrity of the judicial system." Dupree v. Malpractice Research, Inc., 445 N.W.2d 498, 500 (Mich. Ct. App. 1989).

Testimony of forensic scientists is problematic for several reasons: (1) each jurisdiction typically has just one forensic laboratory, and the absence of competition reduces the incentive to perform well, (2) labs depend on police departments for their budgets, which naturally leads to the desire to please the department, even at the cost of honesty and thoroughness, (3) quality control is weak at most forensic labs, (4) forensic scientists often know what result they are "supposed to reach," which can lead to unconscious bias in interpretation of results, (5) scientists who perform a particular test also interpret the results, reducing the odds that anomalies will be discovered, and (6) the structure of the forensic science system means that bias, or even fraud, is likely to go undiscovered. David E. Bernstein, Article: Expert Witnesses, Adversarial Bias, and the (Partial) Failure of the Daubert Revolution, 93 Iowa L. Rev. 451, 460 (2008).

Science, not a financial interest, should be the only driving force behind the results obtained in a blood alcohol test. It is for this reason that such elaborate

pains are taken in the scientific community (e.g., double-blind testing, randomized sampling, peer review, independent verification) to guard against potential or implicit bias. The fact that errors or manipulations have occurred in the past is proof of the fact that it could happen again and could go undetected. See Christopher Tarver Robertson, Article: Blind Expertise, 85 N.Y. U. L. Rev. 174, 188 (2010) ("It is not usually the case that compensation bias causes experts to fabricate favorable opinions from whole cloth, but it can nudge them to shade their views and 'draw more favorable qualitative conclusions' from their findings than they otherwise would").

"[T]o perform its high function in the best way, 'justice must satisfy the appearance of justice.'" Aetna v. Life Ins. Co. v. Lavoie, 475 U.S. 813, 825 (1986). If the public sees the process as unjust or unfair, it will believe it is so and lose confidence in the governmental system. Flowers, Article: What You See Is What You Get: Applying the Appearance of Impropriety Standard to Prosecutors, 63 Mo. L. Rev. at 733. In the criminal context, therefore, it makes sense that the ban on contingent fees is absolute. See Notes: Contingent Fees for Expert Witnesses in Civil Litigation, 86 Yale L.J. 1680, 1684 n.12 (1977) (noting that "policy considerations in criminal litigation have led to a prohibition of all contingent fees").

The public's confidence in the judicial system requires a system wherein forensic scientists are not biased or subjected to outside influences that raise questions as to whether results may be influenced or reached because of anything other than reliable scientific testing. Appearance of fairness is an

essential consideration in evaluating the quality of any justice system. "One of the rightful boasts of Western civilization is that the State has the burden of establishing guilt solely on the basis of evidence produced in court and under circumstances assuring an accused all the safeguards of a fair procedure." Irvin v. Dowd, 366 U.S. 717, 729 (1961) (Frankfurter, J. dissenting).

The United States has an adversarial system in which litigants seek and obtain their own experts. However, in much of the rest of the world, the system that is used is an inquisitorial system in which the courts appoint the experts. See Christopher Tarver Robertson, Article: Blind Expertise, 85 N.Y. U. L. Rev. 174, 178 (2010). In Great Britain and in parts of Australia, forensic laboratories are independent of law enforcement rather than arms of the prosecution like they are in the United States. See David E. Bernstein, Article: Expert Witnesses, Adversarial Bias, and the (Partial) Failure of the Daubert Revolution, 93 Iowa L. Rev. 451, 462 (2008). Independent labs are paid to perform the work, regardless of whether a conviction is obtained. Id.

Petitioner is not suggesting that the inquisitorial model is a better model than the adversarial model we have in this Country. However, independent labs and independent scientists seem to be an ideal goal for any system of justice wherein due process and fundamental fairness are cornerstones - an ideal that is reached only by paying labs and forensic scientists for reliable scientific findings and not simply for a specific outcome. The complete independence of laboratories from law enforcement goes beyond what is being asked

in this case. Instead, Petitioner is arguing that forensic scientists and the labs they work for should not be paid a contingent fee based on obtaining convictions which can lead to bias and impartiality.

The evidence of problems, mistakes, and errors in the TBI's testing was introduced not to assert that there has been wholesale abuse and manipulation by the TBI. Instead, it was meant to underscore the vulnerability of scientific evidence to subtle, sometimes imperceptible, advertent and inadvertent manipulation. The Tennessee Legislature has fixed the system going forward by amending the statute, but the Petitioner and other defendants hurt along the way have not had the violations of their constitutional rights addressed. A contingent-fee-dependent system creating a financial incentive to ensure convictions cannot stand. This case has exposed a system in which the potential for bias existed and wherein the appearance of impropriety was great.

The following four principles: (1) the impartiality required of forensic scientists in their role as expert witnesses; (2) the financial independence required of expert witnesses; (3) the prohibition of any appearance of impropriety in a criminal case; and (4) the presumption in favor of excluding expert proof that is constitutionally suspect necessitates that there be a standard to address the issues raised in this case. Application of Tumey to forensic scientists, or alternatively a new standard for impartiality applicable to forensic scientists in criminal cases involving experts employed at state laboratories, is needed to insure the Petitioner's (and all similarly situated defendants) right to a fair trial and due

process. Requiring impartiality of forensic scientists will help to insure that the public's confidence in the judicial system is not eroded but remains strong.

CONCLUSION

For the reasons, given above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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