APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX A

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE
May 31, 2018 Session

No. E2017-00696-SC-R11-CD

[Filed August 23, 2018]

STATE OF TENNESSEE	)
	)
v.	)
	)
ROSEMARY L. DECOSIMO	)
	)

Appeal by Permission from the Court of Criminal Appeals
Criminal Court for Hamilton County
No. 287934 Paul G. Summers, Senior Judge

In this appeal of a certified question of law, the defendant challenges the constitutionality of a statute that imposes a fee upon persons convicted of certain drug and alcohol offenses when forensic scientists employed by the Tennessee Bureau of Investigation ("TBI") have conducted chemical tests to determine blood alcohol or drug content. The challenged statute earmarks the fees imposed to an intoxicant testing fund, and monies within this fund do not revert to the State's general fund but "remain available for appropriation to the [TBI] as determined by the [G]eneral [A]ssembly." Tenn. Code Ann.

§ 55-10-413(f)(3)(B) (2017). The defendant argues that this statutory scheme provides TBI forensic scientists with a personal and institutional financial incentive to produce blood alcohol test results that secure convictions, which, in turn, increases fees and funding for the TBI. Relying on Tumey v. Ohio, 273 U.S. 510 (1927); Ward v. Vill. of Monroeville, 409 U.S. 57 (1972); and Connally v. Georgia, 429 U.S. 245 (1977), the defendant asserts that these financial incentives create an appearance of impropriety and deprive her of the federal and state constitutional right to a fair and impartial trial. We conclude that, under both the federal and state constitutions, the standards of neutrality announced in Tumey, Ward, and Connally apply only to persons exercising judicial or quasi-judical authority and do not apply to TBI forensic scientists, who do not exercise such authority. Furthermore, even if the Tumey standards applied to TBI forensic scientists, the defendant's constitutional claim would fail because, as salaried employees, the TBI forensic scientists have no direct, personal, substantial pecuniary interest in fees imposed pursuant to the statute, and any institutional financial interest the TBI forensic scientists may have as a result of the statute is too remote to give rise to an appearance of impropriety. We also disagree with the Court of Criminal Appeals' holding that the statute violates substantive due process by creating a situation analogous to an expert witness contingency fee arrangement. Accordingly, the judgment of the Court of Criminal Appeals is reversed, and the judgment of the trial court is reinstated.

Tenn. R. App. P. 11 Appeal by Permission; Judgment of the Court of Criminal Appeals Reversed; Judgment of the Trial Court Reinstated

CORNELIA A. CLARK, J., delivered the opinion of the court, in which JEFFREY S. BIVINS, C.J., and SHARON G. LEE, HOLLY KIRBY, and ROGER A. PAGE, JJ., joined.

Herbert H. Slatery III, Attorney General and Reporter; Andrée S. Blumstein, Solicitor General; Jonathan David Shaub, Assistant Solicitor General, for the appellant, State of Tennessee.

Jerry H. Summers, Benjamin McGowan, and Marya Schalk, Chattanooga, Tennessee, for the appellee, Rosemary L. Decosimo.

Stephen Ross Johnson, Brennan M. Wingerter, and William Gill, Knoxville, Tennessee, and Joseph S. Ozment, Memphis, Tennessee, for the amici curiae, National Association of Criminal Defense Lawyers and Tennessee Association of Criminal Defense Lawyers.

OPINION

I. Background

This appeal involves a challenge to the constitutionality of a statute that imposes a $250 "blood alcohol or drug concentration test (BADT) fee" [hereinafter "BADT fee statute"] on every person

convicted of certain statutorily specified offenses,[1] including driving under the influence, if the offender "has taken a breath alcohol test on an evidential breath testing unit provided, maintained and administered by a law enforcement agency for the purpose of determining the breath alcohol content" or the offender "has submitted to a chemical test to determine the alcohol or drug content of the blood or urine." Tenn. Code Ann. § 55-10-413(f)(1) (2017).[2] Clerks of "the

---

[1] The other offenses to which the BADT fee statute applies are vehicular assault, aggravated vehicular assault, vehicular homicide, simple possession or casual exchange of a controlled substance, reckless driving, and aggravated vehicular homicide. Tenn. Code Ann. § 55-10-413(f) (2017).

[2] The General Assembly first enacted a statute in 2005 imposing a blood alcohol concentration test fee of $100. 2005 Tenn. Pub. Acts, ch. 483, § 7 (codified at § 55-10-419 (2005)). In 2006, the General Assembly changed the name of the fee to BADT fee. Tenn. Code Ann. § 55-10-419 (2006); 2006 Tenn. Pub. Acts, ch. 998, § 2. In 2010, the General Assembly increased the BADT fee from $100 to $250, based on the TBI's recommendation. See Tenn. Code. Ann. § 55-10-419 (2010); 2010 Tenn. Pub. Acts, ch. 1020, §§ 1, 2. At the time of the defendant's arrest and indictment, the BADT fee statute was codified at Tennessee Code Annotated section 55-10-419 (2012). On July 1, 2013, the relevant statutory provisions were transferred to Tennessee Code Annotated section 55-10-413(f). 2013 Tenn. Pub. Acts, ch. 154, § 13. This statute was subsequently amended in 2016 and 2017, but these amendments did not change any of the statutory provisions relevant to the constitutional issue presented in this appeal. See 2016 Tenn. Pub. Acts, ch. 876, § 10; 2017 Tenn. Pub. Acts, ch. 16, §1. However, by an amendment effective May 21, 2018, the General Assembly substantially revised the provisions of the BADT fee statute at issue in this appeal. See 2018 Tenn. Pub. Acts, ch. 1044, §§ 3, 4. Therefore, citations in this opinion reference the version of Tennessee Code Annotated section 55-10-413(f) (2017) in effect prior to the 2018 amendment.

various courts of the counties" collect BADT fees and forward them monthly to the state treasurer for deposit into "the Tennessee bureau of investigation (TBI) toxicology unit intoxicant testing fund" [hereinafter "Intoxicant Testing Fund"]. Id. § 55-10-413(f)(2), (f)(3)(A). Monies deposited in the Intoxicant Testing Fund "shall be invested pursuant to [Tennessee Code Annotated section] 9-4-603" and "shall not revert to the general fund of the [S]tate, but shall remain available for appropriation to the [TBI], as determined by the [G]eneral [A]ssembly." Id. § 55-10-413(f)(3)(B). Money in the Intoxicant Testing Fund shall be used, "to the extent permitted by federal law and regulation, to fund a forensic scientist position in each of the three (3) [TBI] crime laboratories, to employ forensic scientists to fill these positions, and to purchase equipment and supplies, pay for the education, training and scientific development of employees, or for any other purpose so as to allow the [TBI] to operate in a more efficient and expeditious manner." Id. § 55-10-413(f)(3)(C). Any additional available funds in the Intoxicant Testing Fund "shall be used to employ personnel, purchase equipment and supplies, pay for the education, training and scientific development of employees, or for any other purpose so as to allow the bureau to operate in a more efficient and expeditious manner." Id.

The defendant, Rosemary L. Decosimo, challenged the constitutionality of section 55-10-413(f) after her arrest in the early morning hours of August 18, 2012. She consensually provided a blood sample upon her arrest, and this blood sample was submitted to the forensic services division of the TBI for analysis. Nothing in the record reflects that the defendant had an additional blood sample procured for independent

testing as permitted by statute. See Tenn. Code Ann. § 55-10-408(e) (2017) ("The person tested shall be entitled to have an additional sample of blood or urine procured and the resulting test performed by any medical laboratory of that person's own choosing and at that person's own expense; provided, that the medical laboratory is licensed pursuant to title 68, chapter 29.").

The TBI is comprised of three divisions—the criminal investigation division, the forensic services division, and the narcotics investigation division. Tenn. Code Ann. § 38-6-101(a)(2) (2014). The TBI's forensic services division "consist[s] of experts in the scientific detection of crime." Tenn. Code Ann. § 38-6-103(a) (2014). These experts are salaried state employees.[3] The forensic services division must "establish, authorize, approve and certify techniques, methods, procedures and instruments for the scientific examination and analysis of evidence, including blood, urine, breath or other bodily substances, and teach and certify qualifying personnel in the operation of such instruments to meet the requirements of the law for the admissibility of evidence." Id. § 38-6-103(g). "When examinations, tests and analyses have been performed in compliance with these standards and procedures, the results shall be prima facie admissible into evidence in any judicial or quasi-judicial proceeding, subject to the rules of evidence as administered by the courts." Id.

---

[3] The record includes an exhibit listing four categories of TBI forensic scientists and providing the following salary ranges for these positions, as of May 1, 2014: (1) $33,108 to $51,372; (2) $45,324 to $70,320; (3) $49,500 to $76,788; and (4) $58,752 to $91,140.

The results of the TBI's forensic services division's testing of the blood sample the defendant provided showed the defendant's blood alcohol content at 0.16%. In May 2013, the Hamilton County Grand Jury charged the defendant with five driving offenses,[4] including driving under the influence ("DUI") with a blood alcohol content above 0.08%, which constitutes DUI per se. See Tenn. Code Ann. § 55-10-401(2) (2017).[5]

On January 31, 2014, the defendant filed a motion to dismiss, or in the alternative, to suppress the TBI's blood alcohol test results. She challenged the constitutionality of the BADT fee statute, arguing that by conditioning imposition of the BADT fee upon conviction and earmarking the monies to the Intoxicant Testing Fund, rather than to the State's general fund, the BADT fee statute incentivizes TBI forensic scientists to generate test results that produce convictions and BADT fees. The defendant argued that such a statutory system gives rise to an appearance of impropriety that violates her fundamental right to a fair trial guaranteed by both the Due Process Clause of the Fourteenth Amendment to the United States Constitution and article I, section 8 of the Tennessee Constitution.

Twenty-two other persons charged in Hamilton County with an offense for which a BADT fee would be

---

[4] The defendant also was charged with failing to yield, violating the driver's license law by not having a driver's license in her possession, failing to keep her vehicle in a single lane of traffic, and driving under the influence.

[5] This statutory provision has not changed since the defendant's arrest; thus, we cite the current statute.

assessed upon conviction also filed motions to dismiss their indictments and suppress the results of blood alcohol testing. These persons had provided either a blood or breath sample to law enforcement. Blood samples were sent to the TBI forensic services division for testing. Breath samples were tested by a model EC/IR II breath analysis machine calibrated, maintained, and certified by the TBI. These persons raised the same constitutional challenge to the BADT fee statute as the defendant.

On August 1, 2014, three judges of the criminal courts for Hamilton County held a single joint hearing on all of these motions. At this joint hearing, counsel for the defendants acknowledged that the constitutional claim involved no allegations of actual unfair or inappropriate action on the part of any TBI forensic scientist and that no evidence of that sort would be presented at the hearing. Rather, the defendants explicitly premised their constitutional challenge solely on "the appearance" of impropriety and the "potential" for abuse resulting from the BADT fee statute creating in the TBI and TBI forensic scientists a "financial interest" to obtain convictions of certain offenses and collect BADT fees.

As evidence to support this constitutional claim, the defendants introduced a transcript of the testimony that former TBI Director Mark Gwyn ("Director Gwyn") provided the General Assembly's Senate Judiciary Committee on February 11, 2014. Director Gwyn provided the following overview of revenue generated from BADT fees and TBI expenses for forensic testing of blood alcohol and drug content 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

He explained that the total surplus of $1,600,000 for this four-year period had been used on equipment and training. He stated 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." To avoid those options, the TBI asked the General Assembly to increase the BADT fee from $100 to $250. Director Gwyn acknowledged that the TBI had "no way to project how many" BADT fees would be collected in a given year or "what type of expenses are going to go out." Director Gwyn emphasized that "[f]orensic testing is very expensive." By increasing the BADT fee, Director Gwyn said that the TBI had been able to avoid "lay[ing] off forensic scientists" and had also avoided passing the cost of forensic testing "back onto local law enforcement [which] could not pay it at the end of the day."

When one state senator asked Director Gwyn whether earmarking BADT fees to the TBI via the Intoxicant Testing Fund might provide an inappropriate incentive for the TBI to do extra testing and raise additional money for its expenses, Director Gwyn responded, "Absolutely not. There's no way to do

any extra testing." The same senator then asked whether depositing BADT fees into the State's general fund might be preferable, as it would avoid any appearance of impropriety or basis for believing that the BADT fee was a "revenue-generator." To this comment, Director Gwyn responded:

> Yes. I mean, I think someone can say almost anything they want to say. You know, does a patrol officer out here calibrate his radar gun so it shows someone speeding at a higher rate of speed to write a ticket to generate revenue from tickets?
>
> I think we just have to let our testing stand on its own. There's been plenty of trial and defense attorneys that have taken our toxicology and our blood alcohol exams, outsourced them to private laboratories.
>
> Unfortunately, we had one incident in the Chattanooga area where a young forensic scientist made a mistake. He paid for that mistake. He was dismissed. We've outsourced all of the cases that [the dismissed forensic scientist] had worked. We have 2,000 of them back, and there's been no other mistake.
>
> So, obviously, we don't want the appearance that we're doing anything wrong. We're an open book. We're as transparent as it can be, and we welcome anybody to come in and outsource any type of testing that they would like to see.
>
> We just felt like that, on a conviction, part of the court fee could go to this so that we would not have to bring it back on local law

> enforcement and hurt them in that way, with some of them not being able to fund [these tests]. This type of testing is very expensive.
>
> The [BADT fees were] not meant to make [the] TBI rich. And, as you can see, with a million and something left over, that could be used up probably in about two instruments within the laboratory.
>
> So, but, at the will of whatever the [L]egislature thinks, you know, obviously, I will abide by that. But, you know, and I guess that's the best answer. I mean, we don't want any negative hanging over our head, obviously.

Another defense exhibit at the joint hearing contained the TBI's financial report for the Intoxicant Testing Fund. This report reflected (consistently with Director Gwyn's testimony) that revenue from the Intoxicant Testing Fund had been used to support "TBI operating expenditures in all its divisions, which include travel, training, supplies and equipment" and that "[i]n any given year, when revenue exceeds expenditures, those [surplus] funds are reserved, as directed by Tennessee Code Annotated."

Director Gwyn provided written stipulations in lieu of a personal appearance and testimony at the joint hearing. Director Gwyn stated that increasing the BADT fee from $100 to $250 in 2010 had been "necessary to offset state budget cuts that would have severely hampered state law enforcement efforts." He stated that, in fiscal year 2008-2009, "the actual cost to [the] TBI for each test of bodily fluids for ethyl alcohol was approximately $84," and "[the] cost for each test of

bodily fluids for drugs was approximately $275." 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.

Director Gwyn also clarified that the ethyl alcohol retesting performed by an independent lab at the flat fee of $35 for each sample among the large batch of samples initially tested by a TBI forensic scientist who mistakenly switched two blood samples was "not comparable with the total toxicological services" the TBI provides. For example, he explained that this flat $35 rate "did not include any courtroom testimony" and that the scope of the testing "was clearly defined and restricted to ethyl alcohol—a luxury that [the] TBI is not afforded." According to Director Gwyn, between thirty-five and forty percent of samples submitted to the TBI for toxicological analysis "require a full drug screen in addition to ethyl alcohol analysis." Director Gwyn also characterized courtroom testimony provided by TBI forensic scientists as "a significant expense due to employees' time spent preparing to testify, travel time, fuel and vehicle expenses, hotel and per diem if necessary, employees' time spent waiting to testify, and actual testimony time." He stated that, over the prior six months, TBI forensic scientists had "spent an average of 80.6 hours per month testifying about test results as expert witnesses." Because testifying is a significant part of a TBI forensic scientist's job, the TBI spends "significant time and money training to maintain the expertise of these employees," including an annual training budget for the toxicology unit of $60,000. New employees are required to train for twelve-to-eighteen months before they are allowed to

work independently, and during training they receive "a salary without producing case work."

Director Gwyn reiterated that BADT fees "are used for all TBI agency operational costs as permitted by Tennessee's statutes." He also reiterated that, even though a defendant is assessed a single BADT fee upon conviction, "[t]he conviction may be based on a breath alcohol analysis, a blood alcohol analysis performed on the subject's bodily fluid sample, a drug screen performed on the subject's bodily fluid sample, or a combination of testing. The type of testing performed is unrelated to the fee."

The defense also introduced as exhibits TBI documents titled "Budget Presentation" for fiscal years 2010-2011, 2011-2012, 2012-2013, and 2013-2014. These documents had been provided to the Senate Judiciary Committee of the Tennessee General Assembly, along with an oral presentation by Director Gwyn and other TBI personnel. In fiscal year 2010-2011, the TBI had a total budget request of $63,000,000, and the forensic services division had conducted 270,000 laboratory tests on 83,000 pieces of evidence. In fiscal year 2011-2012, the TBI had a total budget request of $64,970,600, and the forensic services division had conducted 315,600 laboratory tests on 80,000 pieces of evidence. In fiscal year 2012-2013, the TBI had a total budget request of $66,000,000 and the forensic services division had conducted 331,125 laboratory tests on 82,872 pieces of evidence. In 2013-2014, the TBI had a total budget request of $70,000,000. The record does not contain information about the number of tests the forensic services division conducted that fiscal year.

The defendants also presented evidence about the TBI forensic scientist who had been fired for switching two blood samples.[6] According to the proof, this forensic scientist failed to follow TBI protocol and mistakenly switched two blood samples. This mistake resulted in a person with an actual blood alcohol content of 0.01% being charged with vehicular homicide based on the other person's blood alcohol content of 0.24%. When the State discovered the error, it moved to dismiss the charge. The TBI fired the forensic scientist and sent all samples he had tested to an outside laboratory for retesting. In a letter introduced as a defense exhibit, TBI Assistant Director Robert Royse stated:

> On October 3, 2013[,] TBI was notified of a discrepancy in blood alcohol testing results. Both an independent and an internal reanalysis of the data associated with these samples indicate that [a single forensic scientist] inadvertently switched two blood tubes at the time of analysis. While all indications were that this was an isolated incident, confidence in the results issued by our Laboratory is of paramount importance to the TBI.
>
> Therefore, arrangements were made for an independent laboratory to reanalyze every positive Blood Alcohol Analysis performed by this examiner. Through the State of Tennessee's competitive bidding process AIT Laboratories was awarded the contract for retesting, which totaled 2,827 samples. The scope of this

[6] The defendants were allowed to present this proof even though they were not alleging any actual misconduct or mistakes in the handling and testing of their own samples.

> independent laboratory retesting was to determine if any samples had been switched by [the forensic scientist]. Review of these 2,827 retested samples indicates that in all other cases the correct blood sample was originally analyzed by TBI.

The defendants emphasized that there were variations between the results of the TBI testing and the results of the independent laboratory retesting. In some cases, the independent laboratory retesting showed a blood alcohol content of less than the 0.08% threshold necessary for DUI per se or less than the 0.20% threshold necessary for enhanced punishment. The State responded that in most cases the independent laboratory retesting reflected blood alcohol content levels higher than the TBI's initial testing results. Additionally, TBI Assistant Director Royse explained:

> Some variation should be expected between any two scientific measurements. When comparing the retested data one must consider that ethyl alcohol is a volatile compound and many factors such as sample age, volume of sample available for retesting, sample condition, and the number of times the blood tube has been opened may influence the results. Additionally, it must be noted that the supplied TBI result is the lower of two analyses and has been truncated from four decimal points supplied by the analytical instrument down to two decimal places for reporting purposes; therefore any statistical comparison between truncated and non-truncated data may be problematic.

Also testifying at the joint hearing for the defendants were two defense attorneys specializing in DUI defense. Attorney Raymond W. Fraley, who practiced law in Lincoln County at the time of the hearing in 2014, had handled over 2000 DUI cases. Mr. Fraley described the increased emphasis on the results of forensic testing of blood and breath samples in DUI prosecutions and the increased number of offenses and penalties that can be established with proof of blood alcohol test results alone. Mr. Fraley opined that TBI test results greatly influence judges and prosecutors and often determine whether a defendant goes to trial or enters a guilty plea. Mr. Fraley viewed the BADT fee statute as impinging on the right to a fair trial. He did not consider cross-examination of TBI forensic scientists about the BADT fee statute a sufficient safeguard, partly because eighty-five percent of DUI cases settle prior to trial. Mr. Fraley also disagreed that the availability of independent testing of blood and urine samples[7] sufficiently protects a defendant's right to fair trial. He characterized independent testing as "moderately inexpensive" and said that, in his experience, most clients who had consumed any alcohol before being stopped did not pursue independent testing. Mr. Fraley estimated that only fifteen to twenty percent of his clients seek independent testing, and he theorized that errors in TBI forensic testing are likely often never discovered because of the infrequency of independent testing. Mr. Fraley acknowledged, however, that of his clients who had sought independent testing, none of the independent test results had ever differed from the TBI's initial test results. Mr. Fraley also acknowledged

[7] See Tenn. Code Ann. § 55-10-408(e).

that the TBI has implemented a policy of duplicate testing of blood samples, which he characterized as "good science."

Attorney Lloyd Levitt, who practiced in Hamilton County and had handled over 1000 DUI cases at the time of the hearing in 2014, described the TBI's blood alcohol test results as "the driving factor in any DUI case." Mr. Levitt stated that a 2012 change in Tennessee law mandating blood tests when an impaired person kills or injures another person resulted in "a huge increase in blood testing." According to Mr. Levitt, the increased number of blood samples submitted for testing after the 2012 change in the law had overwhelmed the TBI forensic services division and had resulted in a four to five month delay in receiving results from blood alcohol testing. Receipt of test results could be delayed for more than a year if retesting was required. Mr. Levitt agreed that the increased number of blood samples submitted for forensic testing had translated to the TBI receiving more money from the $250 BADT fee assessed upon each conviction.

At the conclusion of the hearing, defense counsel acknowledged that no evidence of actual TBI bias had been presented and that no evidence had been offered to establish that TBI forensic scientists manipulate blood alcohol tests to generate more convictions and more BADT fees. The defendants contended, however, that they had shown an appearance of impropriety and that this showing was sufficient to establish the statute's constitutional invalidity. The defendants maintained that the separate statute declaring TBI test results prima facie admissible in any judicial or

quasi-judicial proceeding exacerbates the appearance of impropriety created by the BADT fee statute. See Tenn. Code Ann. § 38-6-103(g). The defendants argued that, just as paying a trial judge a $250 bounty for each conviction violates the state and federal constitutional due process guarantees, so too does paying the TBI a $250 bounty contingent upon conviction.

By a single order entered December 11, 2014, the three trial judges denied the defense motions for suppression and dismissal but granted the defendants the right to a jury instruction concerning the financial interest the BADT fee statute creates in the TBI obtaining convictions. In so holding, the trial judges described the TBI's financial interest in BADT fees as "not negligible" and "very large" in the aggregate. The trial judges nevertheless rejected the defendants' constitutional challenge, explaining:

> Presumably, it is impossible to calibrate breath-test machines to overstate any positive result. Thus, no financial interest on the calibrator's part can affect the results of breath tests.
>
> As for blood tests, presumably, despite the evidence of acknowledged and unacknowledged errors in blood tests, it is impossible to calibrate blood-test machines to overstate any positive result. The sole acknowledged error in the record was a transposition error; perhaps the unacknowledged errors in the record lie within the margin of error. Presumably, too, despite the statement in the reports in the record that "[t]he above represents the interpretations and

> opinions of the analyst[,"] blood tests are subject to minimal, if any, interpretation or opinion.
>
> Although deliberate falsifications attributable to financial interest remain a possibility, presumably, what protects defendants from accidental transposition errors also protects them from deliberate falsifications: the availability of independent analysis of blood, at state expense in appropriate cases, and the availability of underlying "technical notes and data" that, according to a statement in the reports in the record, the laboratory maintains in its case records. Thus, the financial interest in obtaining DUI convictions is offset by financial and other interests in continuing to have employment and avoiding criminal liability, making the possibility of a deliberate falsification attributable to financial interest remote without necessarily changing defendants' calculations regarding the advisability of independent analysis.[8]

After this order was entered, the trial judge initially assigned to Ms. Decosimo's case retired, and two successor trial judges recused themselves. Senior Judge

---

[8] The trial court judges granted the defendants' consolidated motion for an interlocutory appeal, but the Court of Criminal Appeals denied the application for an interlocutory appeal, and this Court also denied the defendants' application for permission to appeal. State v. Repass, No. E2015-00336-CCA-R9-CD (Tenn. Crim. App. July 9, 2015), perm. app. denied (Tenn. Oct. 16, 2015). The trial court judges dismissed as untimely the State's application for an interlocutory appeal, noting that the State could still file an extraordinary appeal under Tennessee Rule of Appellate Procedure 10.

Paul G. Summers was then designated to hear the case, and the defendant renewed her motion. The defendant relied on the evidence presented at the August 2014 hearing, but she also introduced evidence from the TBI's March 3, 2015 budget hearing before the General Assembly's Senate Judiciary Committee, as well as letters and charts from the Tennessee Department of Revenue containing data about BADT fee collections from 2005 to 2016. BADT fees collected over this *eleven-year* period totaled $22,059,970.90. In his March 3, 2015 testimony before the Senate Judiciary Committee, Director Gwyn stated that the TBI had a total *annual* budget of $70,000,000.00. Other TBI officials testified that same day that BADT fee collections averaged approximately $3,000,000 per year—less than five percent of the TBI's total budget. In one letter, a representative of the Department of Revenue explained that no data showed "which portion of the total amount of the BADT fees collected is the result of a DUI or reckless driving conviction" and that no data showed the year of conviction because court costs may be paid "in installments over time," meaning "the BADT fee may be spread out over multiple years, or even not paid at all if the individual is unable to pay the court costs."

Upon considering all the evidence, the Senior Judge denied the defendant's renewed motion for suppression and dismissal. The defendant then entered a nolo contendere plea to DUI per se and reserved the following certified question of law for appeal:

> Whether the trial court erred in not dismissing this case, or alternatively, suppressing the blood alcohol evidence without

> which the State could not proceed against the defendant on this DUI per se conviction, where T.C.A. § 55-10-413(f) is unconstitutional in violation of due process and rights to a fair trial under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and under article I, sections 8 and 9 of the Tennessee Constitution based on the fact that the [TBI] receives a $250 BADT/BAT fee in every case in which a conviction is obtained for driving under the influence or other listed offense, wherein a TBI blood test or TBI-calibrated breath test result is used, thereby creating a "contingent-fee-dependent system" susceptible to bias because the TBI's testing and interpretation of these tests play the determinative role in the prosecution of the charge, and a jury instruction regarding this statutory incentive in favor of conviction is insufficient to cure the magnitude of the constitutional violation.[9]

The State dismissed all other charges against the defendant.

---

[9] Although the certified question is framed as challenging the entire BADT fee statute, including the portion that provides for imposition of a BADT fee in cases involving a "TBI blood test or TBI-calibrated breath test result," the defendant submitted only a blood sample, and the proof offered at the joint hearing focused on blood samples not breath samples. Nevertheless, our analysis and rejection of the defendant's facial constitutional challenge to the statute is not dependent on the type of sample involved and applies with perhaps even greater force to breath tests, where the only role TBI forensic scientists have is calibrating, maintaining, and certifying the breath analysis machines.

The Court of Criminal Appeals resolved the certified question by holding that the BADT fee statute violates "due process principles." State v. Decosimo, No. E2017-00696-CCA-R3-CD, 2018 WL 733218, at *8 (Tenn. Crim. App. Feb. 6, 2018), perm. app. granted (Tenn. Mar. 21, 2018). The intermediate appellate court began by reviewing three decisions of the United States Supreme Court: Tumey v. Ohio, 273 U.S. 510 (1927); Ward v. Vill. of Monroeville, 409 U.S. 57 (1972); and Connally v. Georgia, 429 U.S. 245 (1977). It described these decisions as holding that judges may not, consistent with due process, "have a direct or indirect pecuniary interest in the litigation before them." Decosimo, 2018 WL 733218, at *10-13. The Court of Criminal Appeals determined, however, that this due process principle applies only to persons performing adjudicatory functions and does not apply to TBI forensic scientists, who typically serve as expert witnesses and perform no "judicial or quasi-judicial functions." Decosimo, 2018 WL 733218, at *14.

Nevertheless, the Court of Criminal Appeals chose not to end its analysis there, commenting that it "[could] not ignore the fact that, pursuant to . . . section 55-10-413(f)(2), the TBI receives a fee for each conviction where a blood or breath test is performed but does not receive a fee if a defendant's charges are dismissed or reduced or if a defendant is acquitted." Decosimo, 2018 WL 733218, at *16. The Court of Criminal Appeals determined that the BADT fee statute creates in the TBI "a direct pecuniary interest in securing convictions." Id. It described the BADT fee statute as "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." Id. The intermediate appellate court analogized "the close relationship between the BADT fees and the operational expenses of the TBI . . . to an expert witness contingency fee" and pointed out that this Court had already held such arrangements void because they encourage bias. Id. (citing Swafford v. Harris, 967 S.W.2d 319, 323 (Tenn. 1998); Tenn. Sup. Ct. R. 8, RPC 3.4(h); Crowe v. Bolduc, 334 F.3d 124, 132 (1st Cir. 2003)). Although the Court of Criminal Appeals acknowledged that TBI forensic scientists may "lose their jobs if they falsify test results and these falsifications are discovered," it dismissed this fact as insignificant because "forensic scientists would most certainly lose their jobs if funding for their positions disappears, a result of which these forensic scientists are no doubt well aware." Decosimo, 2018 WL 733218, at *17. The intermediate appellate court held the BADT fee statute unconstitutional, declaring that it "calls into question the trustworthiness of the TBI forensic scientists' test results" and "violates due process." Id. To remedy this constitutional violation, the Court of Criminal Appeals reversed the trial court, granted the defendant's motion to suppress the results of the TBI blood alcohol testing, and dismissed the DUI per se charge to which the defendant had entered a nolo contendere plea. Id. at *17-18.

The State then filed an application for permission to appeal, which this Court granted. Thereafter, this Court directed the parties to file supplemental briefs addressing whether the constitutional challenge to the BADT fee statute had been rendered moot by 2018 legislation amending that statute. See State v. Decosimo, No. E2017-00696-SC-R11-CD (Tenn. May

11, 2018) (order directing supplemental briefing). The 2018 legislation, which became effective May 21, 2018, abolishes the Intoxicant Testing Fund and provides for depositing BADT fees in the State's general fund for appropriation as the General Assembly determines. See 2018 Tenn. Pub. Acts, ch. 1044, §§ 3, 4.

Both parties argued in their supplemental briefs that this appeal had not been rendered moot because the 2018 legislation does not apply to the defendant's appeal, which is governed by the BADT fee statute existing before the 2018 legislation became effective. We agree and will analyze the BADT fee statute as it existed prior to the 2018 legislation.[10]

II. Standard of Review

The issue in this appeal—whether a statute is constitutional—is a question of law to which de novo review applies. Hughes v. Tenn. Bd. of Prob. and Parole, 514 S.W.3d 707, 712 (Tenn. 2017). We afford no deference to the legal conclusions of the courts below. Creech v. Addington, 281 S.W.3d 363, 372 (Tenn. 2009). We "start with a strong presumption that acts passed by the legislature are constitutional." Lynch v. City of Jellico, 205 S.W.3d 384, 390 (Tenn. 2006). We "'indulge every presumption and resolve every doubt in favor of the statute's constitutionality.'" Gallaher v. Elam, 104 S.W.3d 455, 459 (Tenn. 2003) (quoting State v. Taylor,

[10] We note, however, that the defendant has stated throughout this litigation, including in her supplemental brief and again at oral argument before this Court, that amending the statute to deposit BADT fees in the State's general fund rather than earmarking BADT fees to the TBI would eliminate the basis of her constitutional challenge. The 2018 legislation revised the BADT statute in precisely this manner.

70 S.W.3d 717, 721 (Tenn. 2002)). This presumption applies with even greater force when, as here, the facial constitutional validity of a statute is challenged. Id.

III. Analysis

The federal and state constitutions explicitly guarantee the right to due process of law. The Fourteenth Amendment to the United States Constitution prohibits the deprivation of "life, liberty, or property without due process of law." U.S. Const. amend. XIV. Article I, section 8 of the Tennessee Constitution provides that "no man shall be taken or imprisoned, or disseized of his freehold, liberties, or privileges . . . 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." Tenn. Const. art. I, § 8. These constitutional provisions have been described as "synonymous" in the scope of protection they afford. Gallaher, 104 S.W.3d at 463. The same analysis therefore applies to the defendant's state and federal constitutions claims.

"[O]ne of the most basic due process requirements is a fair trial in a fair tribunal." State v. White, 362 S.W.3d 559, 566 (Tenn. 2012). This right "entitles a person to an impartial and disinterested tribunal in both civil and criminal cases." Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980). In criminal cases, the denial of the right to an impartial tribunal is a structural constitutional error that requires automatic reversal. Smith v. State, 357 S.W.3d 322, 342-43 (Tenn. 2011); State v. Rodriguez, 254 S.W.3d 361, 371 (Tenn. 2008). Such errors defy harmless error analysis, and a defendant is not required to establish prejudice. Smith, 357 S.W.3d at 342-43. The defendant alleges that the

BADT fee statute denies her of the state and federal constitutional right to a fair and impartial tribunal by giving TBI forensic scientists both a personal and an institutional financial incentive to produce blood alcohol test results that will generate convictions and BADT fees.

Several United States Supreme Court decisions govern our analysis of this claim, beginning with a trilogy of decisions that arose from criminal trials in Ohio mayor courts where the mayors also served as the judges. See Tumey v. Ohio, 273 U.S. 510 (1927); Dugan v. Ohio, 277 U.S. 61 (1928); Ward v. Vill. of Monroeville, 409 U.S. 57 (1972).

In Tumey, the Supreme Court held that a statutory scheme providing a mayor-judge direct compensation for each conviction in his court violated due process. The statutory scheme established a "liquor court," in which the mayor-judge adjudicated prohibition violations and imposed fines. 273 U.S. at 521. The mayor-judge received a portion of each fine he imposed as compensation *in addition* to his salary. Id. at 520. He received this additional compensation *only* for convictions. Id. A substantial portion of the fines also were allocated for improvements and repairs to the village where the mayor-judge owned a house, id. at 521, and served as chief executive officer of the village, with the responsibility for managing village finances, id. at 533.

The Supreme Court held that this statutory scheme deprived Tumey of the right to a fair and impartial tribunal. The Supreme Court explained that the mayor-judge had "a direct, personal, substantial pecuniary interest . . . in convicting the defendant who

came before him for trial," 273 U.S. at 523, and also had an "official motive to convict and to graduate the fine to help the financial needs of the village," id. at 535. Not only did the Supreme Court strike down the statutes at issue in Tumey, but it also announced the following test for evaluating such due process claims in future cases:

> [e]very 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.

Tumey, 273 U.S. at 532 (emphasis added). The Supreme Court observed that "[a] situation in which an official . . . occupies two practically and seriously inconsistent positions, one partisan *and the other judicial*, necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him." Id. at 534 (emphasis added).

The Supreme Court revisited the issue one year later in Dugan. There, the city where the mayor-judge served operated under "a commission form of government, with five commissioners." 277 U.S. at 63. The mayor-judge served as a member of the commission, but unlike the mayor-judge in Tumey, in Dugan the mayor-judge had no executive authority. Id. A city manager served as the city's "active executive," and the commission, of which the mayor-judge was only a member, exercised "all the legislative power of the city." Id. The mayor-judge had primary individual responsibility for judicial functions, and he received a

fixed salary set by the four other members of the city's commission. Id. The Dugan mayor-judge's salary was not dependent at all on his judicial responsibilities, unlike the mayor-judge in Tumey. Id. at 65. The Supreme Court acknowledged that the mayor-judge's salary was paid from a general fund into which fines imposed in his court were deposited, but the Supreme Court emphasized that the Dugan mayor-judge's failure to convict did not "deprive him of or affect his fixed compensation" and that he did not have executive responsibility for the finances of the city. Id. The Supreme Court concluded that the Dugan mayor-judge's alleged financial interests were too "remote" to constitute a violation of the defendant's due process right to a fair trial in a fair tribunal. Id.; see also Ward, 409 U.S. at 60-61 (stating that the Dugan mayor-judge's "relationship to the finances and financial policy of the city was too remote to warrant a presumption of bias toward conviction in prosecutions before him as judge"). See also Long v. Bd. of Prof'l Responsibility, 435 S.W.3d 174, 188-89 (Tenn. 2014) (rejecting a due process challenge to lawyer-disciplinary proceedings because the members of the hearing panel that imposed the discipline "receive[d] no compensation" and "ha[d] no responsibility for the budget or the finances" of the Board of Professional Responsibility).

Almost fifty years after Dugan, the Supreme Court decided Ward. 409 U.S. at 57. The mayor-judge in Ward had broad executive powers, exercised overall supervision of village affairs, and accounted annually to the village council about village finances. Id. at 58. A substantial part of village income derived from fines, forfeitures, costs, and fees the mayor-judge imposed in

his court. Id. But, unlike the mayor-judge in Tumey, the mayor-judge in Ward did not personally receive any portion of the fees as compensation. Id. at 60. Nevertheless, focusing on the second part of the test announced in Tumey, the Supreme Court in Ward held that the mayor-judge's interest in city finances was sufficient to deprive the defendant of his right to an impartial tribunal. The Supreme Court explained:

> "[P]ossible temptation may also exist 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. This, too, is a "situation in which an official . . . occupies two practically and seriously inconsistent positions, one partisan and the other judicial, (and) necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him.

Id. at 60 (quoting Tumey, 273 U.S. at 534). See also Gibson v. Berryhill, 411 U.S. 564, 579 (1973) (holding that an administrative board composed of optometrists had a pecuniary interest of "sufficient substance" so that it did not constitute a fair and impartial tribunal to preside over a hearing against competing optometrists).

Five years later, the Supreme Court applied the Tumey principle in Connally v. Georgia, 429 U.S. 245 (1977) (per curiam). The Georgia statute at issue in Connally compensated justices of the peace when search warrants were issued but provided no compensation when search warrant applications were denied. Id. at 246. The justices of the peace were not salaried, so their "financial welfare" depended on

issuing search warrants. Id. at 250. The Supreme Court struck down the statute, comparing it to Tumey and Ward and describing it as "another situation where the defendant is subjected to what surely is *judicial action* by an officer of a court who has 'a direct, personal, substantial, pecuniary interest' in his conclusion to issue or to deny the warrant." Id. (quoting Tumey, 273 U.S. at 523) (emphasis added). See also In re Dender, 571 S.W.2d 491, 492 (Tenn. 1978) (holding that the issuance of an arrest warrant "by a non-salaried justice of the peace" who received compensation for issuing the warrant violates due process).

In the foregoing cases in which the Supreme Court found a due process violation, the persons responsible for adjudicating a case or determining whether a legal standard had been satisfied for issuance of a warrant had a direct, personal, substantial pecuniary interest in reaching an outcome adverse to the person raising the constitutional challenge. In other words, the direct, personal, and substantial pecuniary interest was held by persons exercising judicial authority. Indeed, only three years after Connally, the Supreme Court explained that the strict due process impartiality standards of Tumey and its progeny apply only to persons exercising judicial or quasi-judicial authority. Marshall, 446 U.S. at 248.

At issue in Marshall was a due process challenge to a portion of the Fair Labor Standards Act pertaining to the enforcement of federal child labor law provisions. Id. at 240. The Secretary of the Department of Labor had designated the Employment Standards Administration ("ESA") as the agency responsible for

enforcing these child labor law provisions. Id. The ESA elected to fulfill its responsibilities through its regional offices, and "the assistant regional administrator of each office ha[d] been charged with the duty of determining violations and assessing penalties." Id. Another provision of the law provided that any civil penalties assessed for child labor law violations would be returned to the ESA as reimbursement for the costs. Id. at 239. In Marshall, the provision returning civil penalties to the ESA was challenged as creating "an impermissible risk and appearance of bias by encouraging the assistant regional administrator to make unduly numerous and large assessments of civil penalties." Id. at 241.

In analyzing this claim, the Supreme Court first emphasized that it had "jealously guarded" the due process requirement of an impartial and disinterested judge. 446 U.S. at 242. But it rejected the constitutional challenge, explaining "that the strict requirements of Tumey and Ward are not applicable to the determinations of the assistant regional administrator, whose functions resemble those of a prosecutor more closely than those of a judge." Id. at 243. The Supreme Court clarified that the Tumey requirements are "designed for officials performing judicial or quasi-judicial functions" and "are not applicable to those acting in a prosecutorial or plaintiff-like capacity." Id. at 248. The Supreme Court observed that Tumey had "explicitly" recognized this "distinction between judicial and nonjudicial officers" when it declared that state legislatures "'may, and often ought to, stimulate prosecutions for crime by offering to those who shall initiate and carry on such prosecutions rewards for thus acting in the interest of

the State and the people.'" Id. at 249 (quoting Tumey, 273 U.S. at 535).

The Supreme Court refused to equate the assistant regional administrator in Marshall with the decision makers in Tumey and its progeny, explaining:

> He is not a judge. He performs no judicial or quasi-judicial functions. He hears no witnesses and rules on no disputed factual or legal questions. The function of assessing a violation is akin to that of a prosecutor or civil plaintiff. If the employer excepts to a penalty—as he has a statutory right to do—he is entitled to a de novo hearing before an administrative law judge. In that hearing the assistant regional administrator acts as the complaining party and bears the burden of proof on contested issues. Indeed, the Secretary's regulations state that the notice of penalty assessment and the employer's exception "shall, respectively be given the effect of a complaint and answer thereto for purposes of the administrative proceeding." It is the administrative law judge, not the assistant regional administrator, who performs the function of adjudicating child labor violations.

446 U.S. at 247-48 (footnote and citations omitted).

Although the Supreme Court refused to apply the Tumey requirements, it also declined to hold "that the Due Process Clause imposes no limits on the partisanship of administrative prosecutors." Id. at 249. The Supreme Court referred to earlier decisions holding that courts may scrutinize "enforcement

decisions of an administrator" if the decisions "were motivated by improper factors or were otherwise contrary to law." Id. (citing Dunlop v. Bachowski, 421 U.S. 560, 567, n.7 (1975); Rochester Tel. Corp. v. United States, 307 U.S. 125 (1939)). The Supreme Court posited that "[a] scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions." Marshall, 446 U.S. at 249-50 (citing Bordenkircher v. Hayes, 434 U.S. 357, 365 (1978)). Nevertheless, the Supreme Court declared that "the strict requirements of neutrality cannot be the same for administrative prosecutors as for judges, whose duty it is to make the final decision and whose impartiality serves as the ultimate guarantee of a fair and meaningful proceeding in our constitutional regime." Marshall, 446 U.S. at 250.

The Supreme Court found it unnecessary in Marshall to determine "with precision what limits there may be on a financial or personal interest of one who performs a prosecutorial function" because "the influence alleged to impose bias [was] exceptionally remote." 446 U.S. at 250. The Supreme Court pointed out that no government official stood "to profit economically from vigorous enforcement of the child labor provisions," and that "[t]he salary of the assistant regional administrator [was] fixed by law" and not dependent on the imposition of civil penalties. Id. The type of personal, direct, substantial pecuniary interests at stake in Tumey and Connally were, thus, "entirely absent" in Marshall. Id.

The Supreme Court also found no "realistic possibility that the assistant regional administrator's judgment w[ould] be distorted by the prospect of institutional gain as a result of zealous enforcement efforts," pointing out that civil penalties represented "substantially less" than one percent of the ESA budget. Id. The Supreme Court also noted that the ESA national office, not any assistant regional administrator, controlled the allocation of civil penalties, so no assistant regional administrator had any assurance that the civil penalties they assessed would be returned to their offices at all. Id. at 251. Ultimately, the Supreme Court declared that, "[u]nlike in Ward and Tumey, it is plain that the enforcing agent is in no sense financially dependent on the maintenance of a high level of penalties." Id. at 251.

Having examined these Supreme Court decisions, we first conclude that, like the assistant regional administrator in Marshall, the TBI forensic scientists in this case "simply cannot be equated with the kind of decisionmakers" to which the strict due process requirements of Tumey and its progeny apply. TBI forensic scientists are not judges. They do not perform judicial or quasi-judicial functions. They do not hear witnesses or rule on disputed factual or legal questions or determine guilt or innocence. Judges and jurors perform these tasks. Indeed, their responsibilities are much more different from persons exercising judicial authority than were the responsibilities of the assistant regional administrator in Marshall. For example, TBI forensic scientists have absolutely no control over procuring evidence, making arrests, or initiating prosecutions. They simply perform scientific tests on evidence samples submitted to them by law

enforcement. Law enforcement officers make arrests. Unlike judicial officials and prosecutors, TBI forensic scientists exercise "minimal, if any interpretation or opinion" when conducting blood alcohol testing. They are required to conduct scientific tests in accordance with uniform procedures and standards the TBI forensic services division is required by statute to adopt. See Tenn. Code Ann. § 38-6-103(g). It is true that the results of tests TBI forensic scientists perform are prima facie admissible in judicial and quasi-judicial proceedings, but only insofar as the tests have been performed in compliance with the applicable uniform standards and procedures and also "*subject to the rules of evidence as administered by the courts.*" Id. (emphasis added). For all these reasons, we conclude that TBI forensic scientists are not judicial officials to whom the Tumey requirements apply and are at least one step farther removed from having adjudicatory responsibilities than are prosecutors and the assistant regional administrator in Marshall. This distinction alone is a sufficient basis for rejecting the defendant's constitutional challenge to the BADT fee statute. See Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust, 508 U.S. 602, 619 (1993) (applying Marshall in a subsequent case and stating that the "distinction between adjudication and enforcement disposes of the [defendant's] claim that the assumed bias or appearance of bias . . . alone violates the Due Process Clause"); Long, 435 S.W.3d at 187–88 (rejecting an attorney's argument that Tennessee Supreme Court Rule 9 "creates a financial incentive" for the Board of Professional Responsibility "to initiate formal disciplinary proceedings" and "results in an 'institutional bias' in favor of finding the respondent guilty of misconduct and imposing a disciplinary

sanction" and distinguishing Tumey, Ward, and Connally); Brown v. Edwards, 721 F.2d 1442, 1451 (5th Cir. 1984) (rejecting a constitutional challenge to a Mississippi statute by which constables received a fee for each charge that resulted in a conviction and describing Tumey, Ward, and Connally as "fundamentally distinct" because they all "involved a form of judicial action"); Henley v. State, 41 S.W. 352, 360 (Tenn. 1897) (upholding a statute providing for paying fees to officers and witnesses only upon conviction on the grounds that "[t]here is no [constitutional] provision for impartial sheriffs or impartial clerks or impartial witnesses" and stating that "under this act the court and jury are left impartial as before; nothing that affects them is left to depend upon the result of the trial").

By not extending the Tumey "strict requirements of neutrality" to TBI forensic scientists, we are not holding that due process imposes no limits at all. Marshall, 446 U.S. at 249. Like the Supreme Court in Marshall, we simply need not determine "with precision" in this appeal what, if any, due process "limits there may be on a financial or personal interest of one who performs" forensic scientific testing because the financial "influence alleged to impose bias" here is "exceptionally remote." Id. at 250. Indeed, the alleged financial interest is so remote that the defendant's constitutional challenge cannot prevail even under the strict Tumey requirements.

The defendant has not and cannot establish that the BADT fee statute provides TBI forensic scientists with a "direct, personal, substantial pecuniary interest in reaching a conclusion against [the defendant]" in a

particular case. Ward, 409 U.S. at 60 (quoting Tumey, 273 U.S. at 523). TBI forensic scientists are salaried employees. Their compensation is not at all dependent on the results of blood alcohol tests or whether a particular defendant is or is not convicted. Nor do their salaries decrease or increase based on the aggregate amount of BADT fees imposed or collected. These facts alone illustrate that TBI forensic scientists do not have a personal, direct, substantial pecuniary interest in producing a particular test result. See In re Dender, 571 S.W.2d at 492 (stating that the Tumey principle "has no application to salaried public officials or employees whose personal compensation is not enhanced by the issuance of warrants or prejudiced by failure to issue" and noting that the Tumey requirements address "[t]he evil" that "arises solely in the context of the non-salaried personnel having a direct, personal pecuniary interest").

The defendant also has failed to show "a realistic possibility that the [TBI forensic scientist's] judgment will be distorted by the prospect of institutional gain . . . ." Marshall, 446 U.S. at 250. The Court of Criminal Appeals based its ruling on the premise that TBI forensic scientists have an institutional financial incentive to increase BADT fees to generate funding for the TBI and secure their positions. Decosimo, 2018 WL 733218, at *16. The record does contain proof that increasing the BADT fee from $100 to $250 allowed the TBI to avoid laying off eight forensic scientists, but, like the mayor in Dugan and unlike the mayor in Ward, the TBI forensic scientists had no management authority or "executive power[]" to determine how increased BADT fees would be allocated. Indeed, despite the defendant's emphasis of the fact that BADT

fees are deposited into the Intoxicant Toxicant Testing Fund and do not revert to the State's general fund, we note that the BADT fee statute requires the monies to "be invested pursuant to [Tennessee Code Annotated section] 9-4-603" and "remain available for appropriation to the Tennessee bureau of investigation, *as determined by the [G]eneral [A]ssembly*." Tenn. Code Ann. § 55-10-413(f)(3)(B) (emphasis added). This statutory provision indicates that the General Assembly, rather than the TBI director, retained ultimate control over appropriating these funds to the TBI and determining the uses to which the TBI could put these funds. Indeed, the BADT fee statute describes many purposes for which the Intoxicant Testing Fund may be used, in addition to hiring and retaining TBI forensic scientists. The proof also indicates that BADT fees were indeed used to fund operations in all divisions of the TBI, not just the forensic services division.

More importantly, unlike the mayor-judges in Tumey and Ward and the justice of the peace in Connally, TBI forensic scientists have no control whatsoever over the imposition or collection of BADT fees. As already noted, TBI forensic scientists do not make arrests. Although they perform scientific tests on evidence, they do so pursuant to statutorily mandated uniform standards and procedures and utilize scientific equipment that produces results that do not depend upon the subjective judgments of the TBI forensic scientists. Although they report the results of scientific testing to law enforcement, TBI forensic scientists do not decide whether criminal charges are brought. If criminal charges are brought, TBI forensic scientists do not determine whether an offense to which the BADT

fee statute applies will or will not be charged. If a BADT fee statute offense is charged, TBI forensic scientists do not decide whether a defendant will be allowed to plead guilty to a lesser or different criminal offense. All of these tasks are performed by prosecutors.

Even if a defendant is charged with an offense to which the BADT fee statute applies, TBI forensic scientists have no control over when the case will be resolved. Indeed, many months, or even years, may pass between a TBI forensic scientist reporting the results of blood alcohol testing and a trial or plea that resolves the case with conviction of an offense that triggers *imposition* of a BADT fee. Even if a TBI forensic scientist could predict when a case would be resolved by a conviction, the TBI forensic scientist cannot predict when, or even if, a BADT fee will be collected. The record clearly establishes that not even the TBI can predict how many BADT fees actually will be collected in any given year, regardless of how many have been imposed. The record also establishes that some BADT fees are paid by installments or never paid at all, when defendants are indigent. Given the lack of control TBI forensic scientists have over the lengthy and uncertain processes that must occur after blood alcohol test results are reported before any BADT fees are imposed or collected, any institutional financial incentive the BADT fee statute creates is far too remote to qualify as a possible temptation to a reasonable TBI forensic scientist to manipulate blood alcohol test results. Indeed, such a remote institutional financial incentive is far outweighed by the personal, direct, and substantial pecuniary financial interest that salaried TBI forensic scientists have in continued employment.

See also Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 825-26 (1986) (holding that the due process right to an impartial tribunal was violated when a state supreme court justice cast the deciding vote to uphold a punitive damages award against an insurance company for bad-faith refusal to pay a claim when, at the time of his vote, the justice was the lead plaintiff in a nearly identical potential class action lawsuit pending in a state trial court, *but also holding that the pecuniary interests six other justices had as potential members of the same class action were "too remote and insubstantial to violate the constitutional constraints*" (emphasis added) (internal quotation marks omitted.))

As the State points out, a TBI forensic scientist's continued employment depends much more heavily on the forensic scientist's accurate, objective job performance than on any institutional financial incentive to produce test results that increase convictions and generate BADT fees that may or may not be allocated to the forensic services division. Indeed, the record on appeal illustrates that mistakes, even a single mistake, may well lead to a TBI forensic scientist's dismissal and may result in substantial administrative costs to the TBI for retesting samples initially tested by the dismissed forensic scientist. The TBI as an institution and individual TBI forensic scientists have much more to lose than to gain by altering or fabricating evidence in an attempt to increase convictions and generate BADT fees.

With the availability of independent testing, the uniform scientific standards applicable to the TBI's forensic testing, the TBI's internal review mechanisms, and the TBI's response to a forensic scientist who made

a mistake, it strains logic to suggest that a reasonable forensic scientist would engage in criminal, unethical, and career-ending conduct to alter or fabricate forensic scientific test results on the hope that: (1) the test results *might* lead to criminal charges of a BADT fee offense; (2) the criminal charges *might* result in conviction of a BADT fee offense; (3) the BADT fee *might* be collected expeditiously; (4) the TBI director *might* use BADT fees to retain the TBI forensic scientist instead of using the monies for some other statutorily permissible purpose; and (5) the General Assembly will not appropriate the BADT fees to another purpose within the TBI. Indeed, only an irrational and unreasonable TBI forensic scientist would risk losing a salaried position and continued employment in this manner when BADT fees amount to less than five percent of the TBI's overall budget.[11] In summary then, even applying the rigid Tumey requirements, any institutional financial incentive the BADT fee statute creates is far too remote to constitute a possible temptation to any reasonable forensic scientist to manipulate or falsify test results to increase conviction rates and generate BADT fees.

The defendant urges us to hold that the Tennessee Constitution provides greater protection than the United States Constitution and entitles her to relief on

---

[11] We also note the long line of Tennessee authority recognizing "that public officials in Tennessee are presumed to discharge their duties in good faith and in accordance with the law." West v. Schofield, 460 S.W.3d 113, 131 (Tenn. 2015); see also Reeder v. Holt, 418 S.W.2d 249, 252 (Tenn. 1967); Mayes v. Bailey, 352 S.W.2d 220, 223 (Tenn. 1961).

her due process claim.[12] This Court is the final arbiter of the Tennessee Constitution and may interpret state constitutional provisions more broadly than corresponding provisions of the United States Constitution. State v. Watkins, 362 S.W.3d 530, 554 (Tenn. 2012). This Court typically departs from federal interpretations of similar constitutional provisions where appropriate interpretive grounds, such as textual differences or historical context, support such different interpretations. Id. at 555. As already noted, however, this Court has stated that the Fourteenth Amendment to the United States Constitution and article I, section 8 are "synonymous" in the scope of protection they afford. Gallaher, 104 S.W.3d at 463. The defendant has not pointed to any textual, historical, or other basis that supports interpreting them differently in this context. Additionally, the defendant has failed to point to a single decision in Tennessee or elsewhere granting relief under either a state or federal constitutional due process provision on a similar due process challenge.[13] The two cases we

---

[12] We will address the defendant's argument on this point out of an abundance of caution although it is not clear from the record that this issue was raised in the courts below or encompassed within the single certified question of law from which this appeal arises.

[13] In a supplemental letter brief filed after oral argument, the defendant cited a Massachusetts case in which a chemist actually altered test results, Commonwealth v. Scott, 5 N.E.3d 530 (Mass. 2014), and a Texas decision—designated not for publication and not for citation as authority—in which a forensic scientist's failure to follow accepted standards rendered the test results unreliable, Ex parte Jackson, No. AP-77,008, 2013 WL 1232325 (Tex. Crim. App. Mar. 27, 2013). These decisions involved actual misconduct, while the defendant's due process claim is based on an allegation that, even in the absence of misconduct or mistake, the BADT fee

have discovered through independent research rejected similar federal due process challenges to statutes earmarking fines for certain purposes.

For example, the United States Court of Appeals for the Ninth Circuit considered "whether a statute of the Commonwealth of the Northern Mariana Islands (CNMI) that earmark[ed] civil and criminal fines imposed by the courts for a judicial building fund" deprived the defendant of due process of law in violation of the Fourteenth Amendment when he was fined by a judge of the CNMI superior court. Northern Mariana Islands v. Kaipat, 94 F.3d 574, 574 (9th Cir. 1996). The Ninth Circuit concluded that the defendant had failed to establish a due process violation under Tumey and its progeny. Id. at 575. In concluding that the superior court judge had no "direct, personal, substantial, pecuniary interest in reaching a conclusion against" the defendant, id. at 580 (quoting Tumey, 273 U.S. at 523), the Ninth Circuit pointed out that the judge received a fixed salary and had a fixed tenure unaffected by the rate at which defendants were convicted and fined. Id. It also noted that the judge exercised judicial functions only, had no executive responsibility for raising revenue, and had no control over how the monies in the judicial building fund were spent. Id. at 581. The Ninth Circuit emphasized too that, while the fines had been earmarked to the judicial building fund, "the legislature could just as easily have decided, or . . . could decide at any time, to earmark

---

statute gives rise to an appearance of impropriety by giving TBI forensic scientists a financial incentive to alter or falsify blood alcohol test results to generate convictions and BADT fees. Decisions involving actual misconduct or mistake are not instructive on the defendant's constitutional challenge.

these same fees and fines" for other purposes. Id. The Ninth Circuit acknowledged that "judges are only human and (along with the public, litigants and attorneys) will no doubt welcome courthouse facilities that are more comfortable, efficient and secure-if and when they are built and if the judges are still in office to serve in them." Id. But, it ultimately concluded that "this kind of interest is too contingent and speculative and insubstantial to constitute the direct stake in the outcome of a case that is constitutionally infirm." Id. The Ninth Circuit concluded that it was "not reasonable to assume that a CNMI judge might be tempted to impose a fine, or to impose a higher fine, to enhance the prospects of building a building or building a building sooner rather than later." Id.

An Arizona appellate court reversed a trial court's ruling that a statute providing for "payment of fines for drug-related offenses to the drug enforcement fund" violated the defendant's "[federal] due process right to a fair and impartial adjudication of guilt when the sentencing judge's court is funded in part with monies from the drug enforcement fund." State v. Conlin, 832 P.2d 225, 225 (Ariz. Ct. App. 1992). While the Arizona court applied the Tumey requirements, it rejected the defendant's due process challenge, stating "that a superior court judge whose court is funded with monies from the drug enforcement fund does not have a 'direct, personal, substantial, pecuniary interest' in assessing the fine" for drug-related offenses. Id. at 228. In so holding, the Arizona court pointed out that judges did not "control expenditures from the drug enforcement account," that judges received a salary fixed by statute and not dependent on fines levied in criminal cases,

and that judges were not responsible for the executive function of raising revenue. Id.

In summary then, the defendant has provided no authority from this State or elsewhere to support her assertion that article I, section 8 of the Tennessee Constitution should be interpreted as providing greater protection than the Fourteenth Amendment, as interpreted in Tumey and its progeny. Nor has she described any other persuasive interpretive basis for holding that the Tennessee Constitution provides greater protection in this context.

In rejecting the defendant's due process challenge, we disagree with the Court of Criminal Appeals' conclusion that the BADT fee statute creates a situation analogous to that of paying expert witnesses contingency fees. As we have already emphasized, TBI forensic scientists receive salaries not dependent in any way on whether the results of the forensic tests they perform produce convictions and generate BADT fees. The BADT fee statute simply is not similar to an expert witness contingency fee arrangement.

We also disagree with the Court of Criminal Appeals that the BADT fee statute creates a situation that "closely resembles cases in which expert witnesses or attorneys have been disqualified for conflicts of interest." Decosimo, 2018 WL 733218, at *17. In one of the decisions cited by the Court of Criminal Appeals as support for this proposition, a forensic pathologist who had been employed as a defense expert in a civil case subsequently sought to testify on behalf of the State in a criminal prosecution of the previous client on the same matter. State v. Larkin, 443 S.W.3d 751, 801

(Tenn. Crim. App. 2013).[14] In the second case, the attorney left a firm where he had worked while representing one party to a lawsuit and went to work for a firm that was representing the opposing party of the same lawsuit. Analogizing to baseball, this Court stated that the lawyer had "not only switched teams, he ha[d] switched teams in the middle of the game after learning the signals" and that the "new team" "bench[ing]" the lawyer was insufficient "to ameliorate the public perception of an unfair game." Clinard v. Blackwood, 46 S.W.3d 177, 188 (Tenn. 2001). This appeal involves neither scenario. It involves only a facial constitutional challenge to a statute based on an allegation that the BADT fee statute creates financial incentives for the TBI, and in particular TBI forensic scientists, to provide blood alcohol test results that produce convictions and generate BADT fees. As already explained, this allegation lacks merit for three reasons: (1) the Tumey requirements of neutrality that govern the due process analysis under both the state and federal constitutions do not apply because the TBI forensic scientists do not exercise judicial or quasi-judicial functions; and (2) even evaluated against the strict Tumey requirements, the defendant's constitutional challenge fails because the BADT fee statute does not provide TBI forensic scientists with either a direct, personal, substantial pecuniary interest or a sufficiently substantial institutional financial

[14] Moreover, the Larkin court set forth an applicable legal framework that should be used to analyze such cases. Id. at 798-801. The Larkin court then applied that legal framework to the facts of that case. Id. at 801-02. In the opinion below in this case, the Court of Criminal Appeals failed to identify any structural legal framework for its ultimate conclusion.

incentive that qualifies as a possible temptation to any reasonable forensic scientist to falsify or alter test results to produce more convictions and BADT fees; and (3) the BADT fee statute does not create a situation comparable to an expert witness contingency fee arrangement.

Although we reject the defendant's constitutional claim, we acknowledge that the General Assembly could have devised a "more felicitious way" to provide funding. Kaipat, 94 F.3d at 575. 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. However, it remains our own judicial obligation to determine, based on relevant precedent, whether the statute deprives the defendant of due process guaranteed by both the federal and the state constitutions. We conclude that it does not.

We reiterate that this decision addresses only the statute that existed prior to May 21, 2018, the effective date of the legislation amending the BADT fee statute to eliminate the bases of the defendant's constitutional challenge. We note that this decision neither mandates nor precludes cross-examination of TBI forensic scientists about the BADT fee statute or the giving of a jury instruction regarding this issue. We leave the resolution of these matters to the sound discretion of trial judges to determine on a case-by-case basis.

IV. Conclusion

For all these reasons, the judgment of the Court of Criminal Appeals is reversed, and the judgment of the trial court is reinstated. Costs of this appeal are taxed to the defendant, for which execution may, if necessary, issue.

_____

CORNELIA A. CLARK, JUSTICE

APPENDIX B

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE AT KNOXVILLE
October 10, 2017 Session

No. E2017-00696-CCA-R3-CD

[Filed February 6, 2018]

STATE OF TENNESSEE	)
	)
v.	)
	)
ROSEMARY L. DECOSIMO	)
	)

Appeal from the Criminal Court for Hamilton County No. 287934
Paul G. Summers, Senior Judge

Defendant-Appellant Rosemary L. Decosimo entered a plea of nolo contendere to driving under the influence per se and reserved a certified question regarding the trial court's denial of her motion to dismiss the indictment, or in the alternative, motion to suppress the test results from her blood test. She argues on appeal that the trial court erred in denying her motion on the basis that Tennessee Code Annotated section 55-10-413(f), which gives the Tennessee Bureau of Investigation $250 for each DUI conviction that is obtained using a blood or breath test, is unconstitutional. For the reasons that follow, we agree

with Decosimo and reverse the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Reversed

CAMILLE R. MCMULLEN, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR. and ROBERT L. HOLLOWAY, JR., JJ., joined.

Jerry H. Summers, Benjamin McGowan, and Marya Schalk, Chattanooga, Tennessee, for the appellant, Rosemary L. Decosimo.

Herbert H. Slatery III, Attorney General and Reporter; Courtney N. Orr, Assistant Attorney General; M. Neal Pinkston, District Attorney General; Matthew O'Brien, Special Prosecutor Pro Tem; and Kate Lavery, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

In May 2013, the Hamilton County Grand Jury indicted Decosimo with failure to yield, driving without a license in her possession, failure to maintain her lane, driving under the influence (DUI), and DUI per se. On January 31, 2014, Decosimo filed a motion to dismiss the indictment, or in the alternative, to suppress the evidence from her blood test, arguing that Code section 55-10-413 is unconstitutional because it creates a fee system that violates the right to due process and a fair trial. Decosimo's motion was consolidated for the purpose of argument with the motions of over twenty similarly-situated defendants who also had provided blood or breath samples to law enforcement, and these motions were heard before the

three Hamilton County Criminal Court Judges, sitting en banc.

Hearing on Motion to Dismiss, or in the Alternative, Motion to Suppress. At the August 1, 2014 hearing on this consolidated motion, the defense argued that Code section 55-10-413(f) violated the defendants' right to due process and a fair trial. Defense counsel suggested that the trial court had four options in ruling on this motion: (1) the court could deny the motion; (2) the court could order that the jury be given an instruction that the TBI has a financial interest in obtaining DUI convictions and that the jury would determine the credibility of any breath or blood tests in light of this financial interest; (3) the court could suppress and exclude the results from the blood or breath tests; or (4) the court could dismiss the indictments in light of the egregiousness of the constitutional violations.

The parties then submitted the following written stipulations of fact for the purposes of this hearing:

> 1. The above named defendants as well as the defendants listed on Exhibit A attached hereto (hereinafter "Defendants") are charged in the Hamilton County Criminal Court with driving under the influence (DUI), vehicular assault and/or vehicular homicide related to the operation of a motor vehicle while allegedly under the influence of an intoxicant.
>
> 2. Each of the Defendants has filed a Motion to Dismiss: Blood Testing Evidence which raise[s] identical issues of law and the hearing of which has been consolidated for hearing before the

three judges of the Hamilton County Criminal Court.

3. Each of these Defendants provided, either voluntarily or involuntarily, a breath or blood sample to law enforcement in conjunction with their arrests.

4. In the case of the blood samples, the Defendants' blood was sent to the Tennessee Bureau of Investigation Forensic Services Division where it was tested for the presence and concentration of ethyl alcohol or other intoxicants.

5. In the case of the breath samples, the Defendants provided a breath sample which was tested by a breath analysis machine, specifically model EC/IR II, for the presence and concentration of ethyl alcohol. The breath analysis machines upon which this testing was performed are calibrated, maintained and certified by the Tennessee Bureau of Investigation.

6. In addition to testing the blood samples and calibrating and certifying the breath analysis machines, agents of the Tennessee Bureau of Investigation (TBI) are regularly called as witnesses in court at pretrial hearings and trial to testify regarding the testing process, equipment, results of testing, and other matters relevant to the chemical analysis of the blood or breath evidence. In some cases, the actual written reports of the chemical testing are

> admitted into evidence at pretrial hearings and/or trial.
>
> 7. Each of the Defendants, if convicted, will be subject to certain fees, specifically BADT and BAT fees, to be paid as part of their court costs.
>
> 8. No BADT or BAT fees are charged where a case is dismissed, a not guilty verdict returned, or where a defendant pleads to a non-DUI related offense.
>
> 9. By statute, these BADT and BAT fees are collected by the court clerk for the applicable court and are paid ultimately to the Tennessee Bureau of Investigation where they are used for all TBI agency operational costs as permitted by statute.

Decosimo also admitted as an exhibit TBI Director Mark Gwyn's February 11, 2014 testimony before the Senate Judiciary Committee. As a part of this testimony, Director Gwyn referenced the TBI's financial report from the Intoxicant Testing fund where the $250 Blood Alcohol or Drug Concentration Test (BADT) fees are deposited, which depicted the total amount of revenue from this fund and the total expenses for the fiscal years of 2009-2012. He stated that in 2009, the TBI had revenues from the intoxicant testing fund of approximately $999,000 and expenses of $750,000; in 2010, the TBI had revenues from the fund of around $1,011,000 and expenses of $690,000; in 2011, the TBI had revenues from the fund of approximately $1,500,000 and expenses of $1,400,000; and in 2012, the TBI had revenues from the fund of around $2,500,000 and expenses of $1,500,000, which

accounted for a total surplus for the years 2009-2012 of approximately $1,600,000. Director Gwyn stated that this surplus was used for "equipment, training" in the TBI. He added, "in 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 our crime laboratory, or we would've had to start charging local law enforcement for testing." He explained that because neither of these options were good, the TBI decided to increase the BADT fee on toxicology and blood alcohol testing to $250. The TBI's financial report for the Intoxicant Testing was also admitted as an exhibit at the hearing. This report, which was consistent with Director Gwyn's testimony regarding the revenues and expenses, stated that the revenue from the Intoxicant Testing fund supports "TBI operating expenditures in all its divisions, which include travel, training, supplies and equipment" and that "[i]n any given year, when revenue exceeds expenditures, those [surplus] funds are reserved, as directed by Tennessee Code Annotated."

Director Gwyn said there was no way to project how many of these BADT fees would be collected or what types of expenses the TBI would have in a given year. However, he said that by increasing this fee, the TBI was able to avoid "lay[ing] off forensic scientists" and was able to avoid "pass[ing] that [fee] back onto local law enforcement who could not pay it at the end of the day."

When Senator Todd Gardenhire asked if there might be an incentive for the TBI to do extra testing to get additional money to pay for its expenses, Director

Gwyn responded, "Absolutely not. There's no way to do any extra testing." Senator Gardenhire then noted that some of the senators on the committee had suggested that to avoid the appearance of impropriety, the money from these fees should flow into the general fund, and the TBI could request appropriations to cover its expenses, which would remove the appearance that the fee was a "revenue-generator." To this, Director Gwyn replied:

> Yes. I mean, I think someone can say almost anything they want to say. You know, does a patrol officer out here calibrate his radar gun so it shows someone speeding at a higher rate of speed to write a ticket to generate revenue from tickets?
>
> I think we just have to let our testing stand on its own. There's been plenty of trial and defense attorneys that have taken our toxicology and our blood alcohol exams, outsourced them to private laboratories.
>
> Unfortunately, we had one incident in the Chattanooga area where a young forensic scientist [Kyle Bayer] made a mistake. He paid for that mistake. He was dismissed. We've outsourced all of the cases that [Kyle Bayer] had worked. We have 2,000 of them back, and there's been no other mistakes.
>
> So, obviously, we don't want the appearance that we're doing anything wrong. We're an open book. We're as transparent as it can be, and we welcome anybody to come in and outsource any type of testing that they would like to see.

We just felt like that, on a conviction, part of the court fee could go to this so that we would not have to bring it back on local law enforcement and hurt them in that way, with some of them not being able to fund [these tests]. This type of testing is very expensive.

[The Intoxicant Testing Fund] was not meant to make [the] TBI rich. And, as you can see, with a million and something left over, that could be used up probably in about two instruments within the laboratory.

So, but, at the will of whatever the legislature thinks, you know, obviously, I will abide by that. But, you know, and I guess that's the best answer. I mean, we don't want any negative cloud hanging over our head, obviously.

But, I think, no matter sometimes what you do, it's hard to—you know, you can be painted in a bad light no matter what you do.

And we could have probably asked to have a fee placed on all testing whether they were convict[ed] or not convict[ed], but we didn't think that was the way to go either.

We just felt like that, if there was a conviction, it went through the court process, and that person, they had an attorney or whoever and they chose to take that sample and get it outsourced to check behind us, then that would take care of any need for any type of reason of why we would have wrongly accused someone[.]

Director Gwyn stated that in years' past, when the TBI's budget had been reduced, the TBI "cut back on training, and we gave up positions where I was down to nothing but agents left to cut and forensic scientists," which he said affected the cases being worked and the efficiency of the lab testing and could result in the "shut down of the court system." He added that one of the ways he had tried to alleviate the backlog for testing was to see if there was a way "to generate some revenue internally" so that the TBI did not "have to keep coming back. . . every year asking for appropriations, more and more appropriations[.]"

The defense also submitted, by stipulation, an exhibit containing testimony of Director Gwyn that was made in lieu of a personal appearance at the motion hearing. Therein, Director Gwyn stated that the increase to $250 BADT fee was "necessary to offset state budget cuts that would have severely hampered state law enforcement efforts." He acknowledged that in 2008-09,the actual cost to the TBI for a blood alcohol test was $84 and for a toxicology test was $275 and that in the three years prior to the increase in the BAT/BADT fee, the TBI charged a BADT fee of $100. Director Gwyn said that if the BADT fee had not been increased from $100 to $250, eight Special Agents positions and eight Special Agent/Forensic Scientists positions would have been at risk for being eliminated. Director Gwyn acknowledged that AIT Laboratories[1] was charging the TBI a flat rate of $35 for ethyl alcohol

[1] AIT Laboratories is an independent lab that the TBI hired to retest blood samples after it discovered that Agent Kyle Bayer, a forensic scientist, had inadvertently switched two samples when he failed to follow TBI protocol.

testing in its retesting of a large batch of TBI samples. However, he said this amount was "not comparable with the total toxicological services provided by TBI" and "did not include any courtroom testimony." He also asserted that 35% to 40% of the samples submitted to the TBI for toxicological analysis required a full drug screen in addition to the ethyl alcohol analysis. Director Gwyn stated that the proceeds from the increased BADT fee were used to cover all TBI operational costs, including retesting samples at AIT Laboratories, testing for drugs other than alcohol, courtroom testimony, and travel and training for its forensic scientists. Finally, he said that convictions could be based on a breath alcohol analysis, a blood alcohol analysis, a drug screen, or a combination of testing and that the type of testing performed was unrelated to the amount of the fee.

The defense also submitted an exhibit containing documents from a case involving Dale Ferrell, who had been charged with vehicular homicide and DUI. The documents showed that the State filed a motion to dismiss the indictment against Ferrell after it discovered that TBI Agent Kyle Bayer, a forensic scientist, had failed to follow TBI protocol and had switched another defendant's sample with Ferrell's sample. As a result, Agent Bayer's TBI report showed that Ferrell had a blood alcohol concentration (BAC) of .24%, when Ferrell's actual blood alcohol concentration was .01%. After discovering this error, the TBI had all samples tested by Agent Bayer retested by AIT Laboratories. Additional records regarding the retesting of some of the blood samples originally tested by Agent Bayer were admitted as an exhibit. For the majority of the samples, the retesting showed a BAC

that was the same or slightly higher than Agent Bayer's test result; however, for 43 out of the approximately 250 samples, the retesting showed a slightly lower BAC than Agent Bayer's test result.

The defense also presented testimony from Raymond W. Fraley, an attorney in Lincoln County, who stated that he had handled over 2000 DUI cases. Fraley said that over the years, he noted that there was an increase in emphasis on blood and breath tests and that there were now crimes and penalties that were proved through a chemical test result, like DUI per se for individuals with a BAC of 0.08% or increased jail time for individuals with a BAC of 0.20% or more. Fraley said he did not always have blood samples independently tested because in some cases, for example, when a defendant had admitted to drinking several beers, retesting would not be helpful. He asserted that some of the errors in TBI testing would escape notice because the test result, whether correct or incorrect, would not necessarily be at odds with what the defendant disclosed to his attorney, i.e., that he had some drinks prior to submitting to the blood or breath test. He also said 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, which was very expensive, or enter a guilty plea.

Fraley acknowledged that the $250 fee for independent testing of the sample was "moderately inexpensive." However, he said that in those cases where he gets a variance from the TBI test results, he then files a motion to dismiss, for which he must charge his client an additional legal fee. Fraley added

that in cases he has to try in circuit or criminal court, experts can cost his clients $15,000 to $40,000. As to the claim that any TBI bias could be explored through cross-examination, Fraley countered that cross-examination was not an appropriate safeguard because 85% of DUI cases settled prior to trial.

Fraley stated that he had his clients' blood independently tested in less than 15% to 20% of his cases and that in those cases, the independent test results had not differed from the TBI test results. He stated that the TBI had recently started doing duplicate testing of blood samples, which he believed was "good science."

Fraley said he was aware of a case in Marshall County, where Agent Kyle Bayer had found that the sample had a BAC of 0.09% but an independent test of the sample showed that it had a BAC was 0.07%. In addition, he was aware of a case in Maury County, where Agent Bayer said the BAC was 0.21%, and the independent test of the sample showed that it had a BAC of 0.17%. Fraley stated that in one of his own cases, he took the deposition of Agent Bayer's supervisor, Jeff Crews, who claimed that Agent Bayer had made only one mistake with his test results, which was not true, in light of the two aforementioned cases in Marshall County and Maury County. Fraley noted that the information he received about the retests of the samples originally tested by Agent Bayer came from the State's experts or from practitioners that he knew and that there was no committee overseeing the retests to determine if there were further inaccuracies. During this hearing, the State made a continuing

objection to all of Fraley's testimony, with the exception of his anecdotal experiences.

The defense also presented the testimony from Lloyd Levitt, an attorney in Hamilton County, who testified that he had handled over 1000 DUI cases. Levitt stated that the Official Alcohol Report from the TBI was "the driving factor in any DUI case" and that the BAC results included in this report greatly influenced the prosecutor's desire to reduce the charge. Levitt said that since the 2012 change in the law making blood tests mandatory if an impaired person killed or injured another person, there had been "a huge increase in blood testing." He stated that the TBI had gotten overwhelmed with the increasing number of blood draws following the 2012 change in the law, which had resulted in a four- to five-month delay in receiving the test results and sometimes a delay of over a year if the samples were sent back for a retest. Levitt agreed that the increasing number of blood draws meant that the TBI was receiving substantially more money from the $250 BADT fees assessed for each conviction.

At the conclusion of the hearing, the court heard arguments from defense counsel and the State. Defense counsel noted that the fact that this $250 BADT fee went directly to the TBI was an exception to the general rule in Tennessee that all revenue went into the State's general fund before being disbursed to the various state entities. He admitted that there was no overwhelming evidence that the TBI was biased or was trying to manipulate the blood test results in order to increase its chances of receiving the BADT fee. However, he asserted that he did not have to show

actual bias, only an appearance of impropriety, in order to establish that the statute violates due process. He also said that the fact that Code section 38-6-103(g) makes TBI test results prima facie admissible in any judicial or quasi-judicial proceeding only further enhances the appearance of impropriety. Defense counsel said it was very difficult to defend DUI cases because 85% percent of defendants, when faced with the TBI test results, pled guilty rather than hiring an expert to contest the TBI's test results. He also noted that the experts who were available to most defendants worked for the TBI, and these experts had a financial incentive to convict in order for the TBI to collect the BADT fee. Defense counsel asserted that just as it would be unconstitutional for trial judges to receive a $250 fee for each conviction, it was also wrong for the TBI to receive a $250 bounty for convicting individuals.

Finally, as to the independent retests in the wake of discovery of Agent Bayer's error, defense counsel acknowledged that most of the 2800 samples that were retested did not have a large variance; however, he asserted that several of the retested samples showed a BAC that was lower than Agent Bayer's results. Defense counsel said that he was not arguing that the TBI falsified BAC test results but was contending that the $250 fee violated the defendants' right to due process because it created the appearance of impropriety and the potential for abuse based upon financial interest.

In response, the State argued that due process was not violated by the collection of fines and that the only way the defense could succeed in its motion was if it showed that the TBI forensic scientists were falsifying

test results in order to obtain this $250 BADT fee for each conviction.

Before the trial court entered an order regarding this motion, the defense supplemented the record with the TBI's summary of Agent Kyle Bayer's blood alcohol tests and the AIT Laboratory's retests of these samples, which the defense received in response to its Open Records Act request. In a cover letter that was part of this response, TBI Assistant Director Robert Daniel Royse made the following statements:

> On October 3, 2013[,] TBI was notified of a discrepancy in blood alcohol testing results. Both an independent and an internal reanalysis of the data associated with these samples indicate that Kyle Bayer inadvertently switched two blood tubes at the time of analysis. While all indications were that this was an isolated incident, confidence in the results issued by our Laboratory is of paramount importance to the TBI. Therefore, arrangements were made for an independent laboratory to reanalyze every positive Blood Alcohol Analysis performed by this examiner. Through the State of Tennessee's competitive bidding process AIT Laboratories was awarded the contract for retesting, which totaled 2,827 samples.
>
> The scope of this independent laboratory retesting was to determine if any samples had been switched by Kyle Bayer. Review of these 2,827 retested samples indicates that in all other cases the correct blood sample was originally analyzed by TBI. Some variation should be expected between any two scientific

> measurements. When comparing the retested data one must consider that ethyl alcohol is a volatile compound and many factors such as sample age, volume of sample available for retesting, sample condition, and the number of times the blood tube has been opened may influence the results. Additionally, it must be noted that the supplied TBI result is the lower of two analyses and has been truncated from four decimal points supplied by the analytical instrument down to two decimal places for reporting purposes; therefore[,] any statistical comparison between truncated and non-truncated data may be problematic.
>
> The enclosed data lists the first and second retest as performed by AIT Laboratories, the average of the AIT Laboratories' retested data, and for comparison the original TBI result as reported. Any identifying information, e.g. subjects' names and laboratory case numbers, has been redacted to protect the privacy of those individuals.

The summary of Agent Kyle Bayer's blood alcohol tests and the AIT Laboratory's retests showed that in some cases the retested samples had a BAC that was lower than Agent Bayer's results, which meant that the 0.08% and 0.20% thresholds for DUI per se and enhanced DUI punishment were not met on retest.

Denial of Motion to Dismiss, or in the Alternative, Motion to Suppress. On December 11, 2014, the three Hamilton County Criminal Court Judges, sitting en banc, entered an order denying the motion but granting the defense's request for a jury

instruction. In this order, the trial court made the following findings of fact and conclusions of law:

> [W]hat the Court must determine is whether the statute in issue creates such pressure on TBI forensic scientists and expert witnesses that admission of their evidence deprives defendants of due process or a fair trial.
>
> The statutory financial interest is not negligible. It is true that, in any one case, the interest is small. Were there no statute, i.e., were there no reason to consider more than one case at a time, thorough cross-examination and jury instruction would suffice to preserve a defendant's rights to due process and a fair trial.
>
> The statute, however, not only creates a contingent-fee system, like the one in Brown [v. Edwards, 721 F.2d 1442 (5th Cir. 1984)]; it creates a contingent-fee-dependent system. In the aggregate of cases, the financial interest is very large. The statutory fees fund laboratory positions, equipment, professional development, and more.
>
> Arguably, the statutory, contingent-fee dependent system encourages both personal and institutional bias in scientific work much of the value of which even the state recognizes depends on the lack of influence on the scientist. Apparently, too, such a system is unnecessary, the state not disputing the existence of acceptable alternatives. Furthermore, that the parties do not cite and the Court does not find any precedent for giving forensic scientists and

laboratories a statutory financial interest in DUI convictions suggests that other states, who, presumably, share this state's legitimate goal of discouraging DUI in part by making offenders responsible for laboratory costs, do not regard such an interest as fair.

Despite the magnitude of the aggregate financial interest, however, the Court concludes that it does not necessitate the exclusion of the results of breath or blood tests. Presumably, it is impossible to calibrate breath-test machines to overstate any positive result. Thus, no financial interest on the calibrator's part can affect the results of breath tests.

As for blood tests, presumably, despite the evidence of acknowledged and unacknowledged errors in blood tests, it is impossible to calibrate blood-test machines to overstate any positive result. The sole acknowledged error in the record was a transposition error; perhaps the unacknowledged errors in the record lie within the margin of error. Presumably, too, despite the statement in the reports in the record that "[t]he above represents the interpretations and opinions of the analyst[,"] blood tests are subject to minimal, if any, interpretation or opinion.

Although deliberate falsifications attributable to financial interest remain a possibility, presumably, what protects defendants from accidental transposition errors also protects them from deliberate falsifications: the availability of independent analysis of blood, at state expense in appropriate cases, and the

> availability of underlying "technical notes and data" that, according to a statement in the reports in the record, the laboratory maintains in its case records. Thus, the financial interest in obtaining DUI convictions is offset by financial and other interests in continuing to have employment and avoiding criminal liability, making the possibility of a deliberate falsification attributable to financial interest remote without necessarily changing defendants' calculations regarding the advisability of independent analysis.

Denial of Application for Interlocutory Appeal. Following entry of the December 11, 2014 order, Decosimo and the other defendants filed a consolidated motion for an interlocutory appeal, which the trial court granted. Thereafter, this court denied the defendants' application for an interlocutory appeal, and the Tennessee Supreme Court denied the defendants' application to appeal from this court's order of denial. The State also filed a motion for an interlocutory appeal regarding the trial court's decision to grant a jury instruction regarding the $250 BADT fee, but this motion was dismissed by the trial court on the grounds that the motion was untimely, that another hearing on the State's motion would subject the defendants to additional and unnecessary burden and expense, and that the State could file an extraordinary appeal pursuant to Rule 10 of the Tennessee Rules of Appellate Procedure. Following the denial of the interlocutory appeal, the trial judge assigned to Decosimo's case recused himself from the case, and the case was reassigned to a special judge.

September 27, 2016 Hearing. At a hearing on September 27, 2016, Decosimo made an oral motion for the special judge to reconsider the previous ruling made by the three criminal court judges, sitting en banc, regarding her motion to dismiss, or in the alternative, motion to suppress. Although the special judge denied this motion, he did allow information from the TBI's March 3, 2015 Budget Hearing before the Senate Judiciary Committee[2] as well as new financial information from the Tennessee Department of Revenue regarding the BADT fees collected on convictions for vehicular assault, vehicular homicide, aggravated vehicular homicide, simple possession or casual exchange of a controlled substance, reckless driving, and DUI to be made exhibits to this hearing.

Plea Submission Hearing. At the March 8, 2017 plea submission hearing, Decosimo reiterated her assertion that Code section 55-10-413(f) was unconstitutional, and the trial court heard additional argument regarding the defense's request that the trial court reconsider its previous ruling on the motion to dismiss, or in the alternative, motion to suppress.

---

[2] During the March 3, 2015 Budget Hearing, Senator Gardenhire said he had reviewed TBI's report, which stated that the State made approximately 29,554 DUI arrests, with an 89% conviction rate, and that defendants who were convicted of DUI paid a fee of $250 to the TBI. Senator Gardenhire made the statement that with an 89% conviction rate, this would mean that the TBI received over $6,000,000 each year from these fees. He then questioned why the TBI only reported earning $3,000,000 from these fees. Ed Jones, the Deputy Director of the TBI responded that this disparity could be caused by the difference between the time of arrest and the time of adjudication, and Director Gwyn added that the TBI had never received $6,000,000 in any given year from this fee.

During the course of this hearing, the trial court commented that Decosimo's argument regarding the unconstitutionality of the statute rested on her showing that the TBI had manipulated the test results in order to obtain convictions. When the trial court asserted its belief that the $250 BADT fee was no different from any other court cost assessed following a conviction, defense counsel replied that the BADT fee to the TBI was different because it went directly into the TBI special fund, over which the TBI has total control, rather than State of Tennessee's general fund. The trial court also asserted that because the district attorney had the authority to determine whether an individual is charged, a buffer existed between the citizen and the TBI, even though the TBI had a financial interest in obtaining convictions, and defense counsel replied that DUI prosecutors might have an interest in obtaining convictions based upon how their salaries were funded. During the course of the plea submission hearing, the trial court allowed new financial information regarding the money obtained by the TBI from BADT fees to be entered as a supplemental exhibit pursuant to an agreement between the parties.[3] After hearing the parties'

[3] This supplemental exhibit included the Department of Revenue's responses to the defense's public records request for the total amounts collected from the $250 BADT fee imposed by Code section 55-10-413(f) as well as the following table, which corresponded to the Department of Revenue's more detailed response that listed the BADT fee collections for each county:

arguments and reviewing this new financial information regarding BADT fee collections, the special judge found that the statute was not unconstitutional and denied the motion to dismiss, or in the alternative, motion to suppress.

At that point, the parties moved on to Decosimo's plea submission hearing. The State recited the facts underlying the plea, explaining that Decosimo had been stopped by law enforcement and had submitted to a blood test, which showed her BAC to be 0.16%. Decosimo then entered a nolo contendere plea to DUI

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

per se, reserving a certified question of law, and the State entered a nolle prosequi as to her remaining charges. Pursuant to her plea agreement, Decosimo reserved the following certified question of law:

> Whether the trial court erred in not dismissing this case, or alternatively, suppressing the blood alcohol evidence without which the State could not proceed against [Decosimo] on this DUI per se conviction, where T.C.A. § 55-10-413(f) is unconstitutional in violation of due process and right to a fair trial under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and under article I, sections 8 and 9 of the Tennessee Constitution based on the fact that the Tennessee Bureau of Investigation (TBI) receives a $250 BADT/BAT fee in every case in which a conviction is obtained for driving under the influence or other listed offense, wherein a TBI blood test or TBI-calibrated breath test result is used, thereby creating a "contingent-fee-dependent system" susceptible to bias because the TBI's testing and interpretation of these tests play the determinative role in the prosecution or the charge, and a jury instruction regarding the statutory incentive in favor of conviction is insufficient to cure the magnitude of the constitutional violation?

Both the judgment for Decosimo's DUI per se conviction and the agreed order on the certified question were filed on March 8, 2017. On March 30, 2017, Decosimo filed a timely notice of appeal.

ANALYSIS

Decosimo argues that because Tennessee Code Annotated section 55-10-413(f), which gives the TBI $250 for each DUI conviction that is obtained using a blood or breath test, is unconstitutional, the trial court erred in denying her motion to dismiss, or in the alternative, motion to suppress on that basis. Decosimo specifically asserts that Code section 55-10-413(f) violates her right to due process and a fair trial because it creates a "contingent-fee-dependent system" that gives the TBI and its forensic scientists a financial incentive to ensure convictions. The State counters that the trial court properly denied Decosimo's motion because Code section 55-10-413(f) is constitutional. After reviewing the record in this case, we conclude that Code section 55-10-413(f) violates due process principles and that the trial court erred in failing to grant the motion to suppress.

At the time of Decosimo's arrest, Code section 55-10-419 (2012), which imposed a $250 BADT fee for blood and breath tests and required the deposit of this fee into the TBI's toxicology unit intoxicant testing fund, provided:

> (a)(1) In addition to all other fines, fees, costs and punishments now prescribed by law, including the fee imposed pursuant to § 55-10-403(h), a blood alcohol or drug concentration test (BADT) fee in the amount of two hundred and fifty dollars ($250) shall be assessed upon a conviction for a violation of § 39-13-106, § 39-13-213(a)(2), § 39-13-218, § 39-17-418, § 55-10-205 or § 55-10-401, for each offender who has taken a breath alcohol test on

an evidential breath testing unit provided, maintained and administered by a law enforcement agency for the purpose of determining the breath alcohol content or has submitted to a chemical test to determine the alcohol or drug content of the blood or urine.

(2) In addition to all other fines, fees, costs and punishments now prescribed by law, including the fee imposed pursuant to § 55-10-403(h), a blood alcohol or drug concentration test (BADT) fee in the amount of one hundred dollars ($100) shall be assessed upon conviction for a violation of § 39-13-106, § 39-13-213(a)(2), § 39-13-218 or § 55-10-401, if the blood or urine of the convicted person was analyzed by a publicly funded forensic laboratory or other forensic laboratory operated by and located in counties having a population of not less than eighty-seven thousand nine hundred (87,900) nor more than eighty-eight thousand (88,000), according to the 2000 federal census or any subsequent federal census, for the purpose of determining the alcohol or drug content of the blood.

(b)(1) The fee authorized in subdivision (a)(1) shall be collected by the clerks of the various courts of the counties and forwarded to the state treasurer on a monthly basis for deposit in the Tennessee [B]ureau of [I]nvestigation (TBI) toxicology unit intoxicant testing fund created as provided in subsection (c), and designated for exclusive use by the TBI for the purposes set out in subsection (c).

(2) The fee authorized in subdivision (a)(2) shall be collected by the clerks of the various courts of the counties and shall be forwarded to the county trustees of those counties on a monthly basis and designated for the exclusive use of the publicly funded forensic laboratory in those counties.

(c)(1) There is created a fund within the treasury of the state, to be known as the TBI toxicology unit intoxicant testing fund.

(2) Moneys shall be deposited to the fund pursuant to subsection (b), and as may be otherwise provided by law, and shall be invested pursuant to § 9-4-603. Moneys in the fund shall not revert to the general fund of the state, but shall remain available for appropriation to the Tennessee bureau of investigation, as determined by the general assembly.

(3) Moneys in the TBI toxicology unit intoxicant testing fund and available federal funds, to the extent permitted by federal law and regulation, shall be used to fund a forensic scientist position in each of the three (3) bureau crime laboratories, to employ forensic scientists to fill these positions, and to purchase equipment and supplies, pay for the education, training and scientific development of employees, or for any other purpose so as to allow the bureau to operate in a more efficient and expeditious manner. To the extent that additional funds are available, these funds shall be used to employ personnel, purchase equipment and supplies, pay for the education, training and scientific

> development of employees, or for any other purpose so as to allow the bureau to operate in a more efficient and expeditious manner.

T.C.A. § 55-10-419 (2012)(emphases added).[4]

In 2005, the legislature first introduced a $100 fee for blood and breath tests. See T.C.A. § 55-10-419 (2005) (identifying the fee as a blood alcohol concentration test (BAT) fee); 2005 Tenn. Pub. Acts, ch. 483, § 7; see also T.C.A. § 55-10-419 (2006); 2006 Tenn. Pub. Acts, ch. 998, § 2 (identifying the fee as a blood alcohol or drug concentration test (BADT) fee rather than a blood alcohol concentration test (BAT) fee). In 2010, the legislature, based on a proposal from the TBI, raised the BADT fee to $250. See T.C.A. § 55-10-419 (2010); 2010 Tenn. Pub. Acts, ch. 1020, §§ 1, 2.

TBI Director Gwyn, in his testimony before the Senate Judiciary Committee on February 11, 2014, explained that in 2008 the TBI was "faced with some pretty deep cuts" that would have required the TBI to "shut down some disciplines with our crime laboratory" or to "start charging local law enforcement for testing." He said that in order to avoid either of those alternatives, the legislature "increase[d] the fee on the toxicology testing and blood alcohol testing." He added that by increasing the fee, the TBI was able to avoid "lay[ing] off forensic scientists." Despite the fact that the BADT fee was raised to $250 to cover the TBI's

---

[4] On July 1, 2013, this section of the code was transferred from Code section 55-10-419 to Code section 55-10-413. In 2016 and 2017, the legislature made minor amendments to Code section 55-10-413, although the provisions regarding the $250 BADT fee for blood and breath tests and its deposit into the TBI toxicology unit intoxicant testing fund remained the same.

budget deficits, Director Gwyn acknowledged that between the years of 2009 and 2012, the TBI's toxicology unit intoxicant testing fund netted a surplus of approximately $1,600,000. The record is silent as to the how the surplus was used.

Both the version of the statute that was in effect at the time of Decosimo's arrest and the current version of Code section 55-10-413(f)state that the money from the $250 BADT fee shall be deposited in the TBI toxicology unit intoxicant testing fund "for exclusive use by the TBI" and shall be used to "fund a forensic scientist position in each of the three (3) bureau crime laboratories, to employ forensic scientists to fill these positions, and to purchase equipment and supplies, pay for the education, training and scientific development of employees, or for any other purpose so as to allow the bureau to operate in a more efficient and expeditious manner." T.C.A. §§ 55-10-419(b)(1), (c)(3) (2012); 55-10-413(f)(2), (f)(3)(B) (2017). Moreover, any surplus in the intoxicant testing fund shall be used to "employ personnel, purchase equipment and supplies, pay for the education, training and scientific development of employees, or for any other purpose so as to allow the bureau to operate in a more efficient and expeditious manner." Id. §§ 55-10-419(c)(3) (2012), 55-10-413(f)(3)(B) (2017).

Historically, fee system courts have been condemned because judges should not have a direct or indirect pecuniary interest in the litigation before them. See Dr. Bonham's Case, 77 Eng. Rep. 638 (C.P. 1610) (holding that "no person may be a judge in his own cause" and that "when an act of parliament is against common right or reason, or repugnant, or

impossible to be performed, the common law will control it, and adjudge such Act to be void"); see also Theodore F.T. Plucknett, Bonham's Case and Judicial Review, 40 Harv. L. Rev. 30, 34 (1926) (discussing Chief Justice, Sir Edward Coke's holding in Dr. Bonham's case that no man should be a judge in his own case). The general rule is that "officers acting in a judicial or quasi[-]judicial capacity are disqualified by their interest in the controversy to be decided." Tumey v. Ohio, 273 U.S. 510, 522(1927)(internal citations omitted).

It is also well-established that fines and fees should not be used to generate revenue for a court or government agency. In 1974, the American Bar Association adopted certain standards regarding court policies and rules. See Brown v. Vance, 637 F.2d 272, 277 (5th Cir. 1981). Section 1.53 of these standards provided the following:

> "1.53 Revenues from Fines. The purpose of fines and other exactions imposed through judicial proceedings is to enforce the law and not to provide financial support for the courts or other agencies of government. All revenues from fines, penalties, and forfeitures levied by a court should be transferred to the state general fund, and should not be appropriated to the court receiving them or by a local unit of government that supports such a court."

Id. (emphasis added) (quoting ABA Comm. Standards of Judicial Administration 107 (1974)). While Section 1.53 specifically identifies "fines and other exactions," the commentary for this section clarifies that this standard also applies to fees. Id. n.6 (citing ABA

Comm. Standards of Judicial Administration 107 (1974)). Specifically, the commentary states:

> "The use of courts as revenue-producing agencies is a continuing abuse of the judicial process. It has long been recognized as unconstitutional for a judge to have his income dependent on the outcome of cases before him, but a similar result often occurs indirectly when the budget of the court in which he sits is established with reference in whole or in part to the fine revenues produced by the court. This is at present a common practice in local courts of limited jurisdiction. It should be eliminated. See Ward v. Village of Monroeville, 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267 (1972), Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927)."

Id. (emphasis added) (quoting ABA Comm. Standards of Judicial Administration 107 (1974)).

The concept that a judge, or other individual serving in an adjudicatory capacity, should not have a pecuniary interest in the outcome of a case has been comprehensively developed in case law. In support of her constitutional claim, Decosimo relies, in part, on Tumey, Ward, and Connally, the trilogy of Supreme Court cases governing bias of a judge or adjudicator based on a pecuniary interest in the controversy. We will address each case in turn. In Tumey, 273 U.S. at 514-15, the United States Supreme Court considered whether a state statute that allowed charges for violating the Prohibition Act to be tried without a jury before the village mayor, who had a pecuniary interest in the case, violated the Fourteenth Amendment. The mayor, who had primarily executive duties, was paid a

salary but was also compensated for his duties as a judge directly from fees or costs that were assessed against convicted defendants. Id. at 519-20. In addition, the fines from the mayor's court provided substantial funds that were used for village improvements and repairs, for which the mayor indirectly benefitted as an owner of a house in the village. Id. at 521. The Court held, "But it certainly violates the Fourteenth Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case." Id. The Court then outlined the test for determining whether a fee system violated due process:

> 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.

Id. The Court also concluded that aside from the mayor's direct, pecuniary interest in convicting defendants, due process was also violated because of the close relationship between the fees collected in the mayor's court, which helped to relieve the village from further taxation, and the mayor's responsibility for the finances of the village:

> The mayor represents the village and cannot escape his representative capacity. On the other hand, he is given the judicial duty, first, of

> determining whether the defendant is guilty at all; and, second, having found his guilt, to measure his punishment between $100 as a minimum and $1,000 as a maximum for first offenses, and $300 as a minimum and $2,000 as a maximum for second offenses. With his interest as mayor in the financial condition of the village and his responsibility therefor, might not a defendant with reason say that he feared he could not get a fair trial or a fair sentence from one who would have so strong a motive to help his village by conviction and a heavy fine? The old English cases cited above in the days of Coke and Holt and Mansfield are not nearly so strong. A situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him.

Id. at 533-34(citations omitted).

In Ward v. Village of Monroeville, 409 U.S. 57 (1972), the United States Supreme Court rejected certain procedural safeguards as a way to circumvent Tumey. In Ward, the mayor of Monroeville had broad executive duties because he was president of the village council and accounted annually to the council regarding the village's finances; however, the mayor also had judicial duties because he presided over a mayor's court that handled ordinance violations and specific traffic offenses. Id. at 57-58. While the mayor had no direct, pecuniary interest in the outcome of his cases, a substantial portion of the village's income came

from the fines, forfeitures, costs and fees assessed against convicted criminal defendants in the mayor's court. Id. at 58. The Court, reiterating the Tumey standard, held that "the test is whether the mayor's situation is one '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 . . . .'" Id. at 60 (quoting Tumey, 273 U.S. at 532). The Court specifically noted that a "'possible temptation'" could occur "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." Id.

Next, in Connally v. Georgia, 429 U.S. 245 (1977), the United States Supreme Court considered whether a fee system that governed the issuance of search warrants by justices of the peace was constitutional. In that case, the justice of the peace did not receive a salary, and he was only compensated by receipt of a $5 fee fixed by statute when he issued a warrant but was not paid when he declined to issue a warrant. Id. at 246-47. The appellant in that case argued that marijuana found pursuant to the search warrant should be suppressed because the justice of the peace who issued the warrant was not a neutral and detached magistrate, given his pecuniary interest in issuing the warrant. Id. at 246. The trial court denied the motion, and the Supreme Court of Georgia affirmed the trial court. Id. On appeal, the United States Supreme Court recognized that the facts in Connally varied from those in Tumey or Ward but nevertheless applied the Tumey-Ward test to the issuance of warrants by justices of the

peace. Id. at 250. The Court noted that the justice's financial welfare was "enhanced by positive action and [was] not enhanced by negative action," which created the possible temptation to an average man as a judge "'not to hold the balance nice, clear and true between the State and the accused.'" Id. (quoting Ward, 409 U.S. at 60). Consequently, the Court held that the fee system governing the issuance of search warrants by justices of the peace violated the Fourth and Fourteenth Amendments. Id. at 251.

In the present case, Decosimo argues that Code section 55-10-413(f) is unconstitutional. We recognize that issues of constitutional interpretation are questions of law, which this court reviews de novo with no presumption of correctness. State v. Merriman, 410 S.W.3d 779, 791 (Tenn. 2013); State v. White, 362 S.W.3d 559, 565 (Tenn. 2012) (citing Colonial Pipeline Co. v. Morgan, 263 S.W.3d 827, 836 (Tenn. 2008)). "In construing legislative enactments, we presume that every word in a statute has meaning and purpose; each word should be given full effect if the obvious intention of the General Assembly is not violated by so doing." Lawrence Cnty. Educ. Ass'n v. Lawrence Cnty. Bd. of Educ., 244 S.W.3d 302, 309 (Tenn. 2007) (citing In re C.K.G., 173 S.W.3d 714, 722 (Tenn. 2005)). "When the statutory language is clear and unambiguous, we must apply its plain meaning in its normal and accepted use, without a forced interpretation that would limit or expand the statute's application." Eastman Chem. Co. v. Johnson, 151 S.W.3d 503, 507 (Tenn. 2004). On the other hand, if the statute is ambiguous, we must look to the "broader statutory scheme, the history of the legislation, or other sources to discern its meaning." State v. Casper, 297 S.W.3d 676, 683 (Tenn. 2009).

Moreover, we must presume that a statute is constitutional. White, 362 S.W.3d at 566 (citing State v. Pickett, 211 S.W.3d 696, 700 (Tenn. 2007)). This court has a "'duty to adopt a construction which will sustain a statute and avoid constitutional conflict if any reasonable construction exists that satisfies the requirements of the Constitution.'" State v. Burgins, 464 S.W.3d 298, 305 (Tenn. 2015) (quoting Davis-Kidd Booksellers, Inc. v. McWherter, 866 S.W.2d 520, 529 (Tenn. 1993)). Because the statutory language in Code section 55-10-413(f) is clear and unambiguous, we must apply the plain meaning of the words used.

Decosimo argues initially that the fee system established in Code section 55-10-413(f) denies due process and a fair trial in part because it fails to ensure a blood or breath test free from bias under the Tumey-Ward test. The State responds that the Tumey-Ward test is inapplicable because the TBI does not perform judicial functions in criminal cases. It contends that TBI forensic scientists are experts, not judges, and are therefore not required to be neutral. See Tenn. R. Evid. 702. It also contends that the TBI forensic scientists are salaried employees, and that even if their salaries are paid from the funds generated by BADT fees, this connection is too remote to constitute a due process violation. Based on the following law and analysis, we are unable to conclude that TBI forensic scientists perform adjudicatory functions.

In order to fully examine this issue and based on the extensive record developed in the trial court, we recognize that in the vast majority of prosecutions for DUI, vehicular assault, vehicular homicide, etc., the

BAC test result provided by the TBI forensic scientists is the most significant piece of evidence against the defendant. This BAC result determines whether the defendant is found guilty of DUI per se under Code section 55-10-401(2) or is subject to enhanced jail time pursuant to Code section 55-10-402(a)(1)(B), affects the defendant's decision to pursue a trial or enter a guilty plea, and provides persuasive evidence to a judge or jury regarding whether a defendant was impaired. 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."). In particular, the DUI per se law, which makes it a crime for an individual to have a BAC of 0.08% while operating an automobile, removes the State's burden of proving that a defendant was driving while impaired and creates a strict liability offense that, in the overwhelming majority of cases, is based solely on the finding of the TBI forensic scientist regarding the defendant's BAC. See T.C.A. § 55-10-401(2). What is more, the TBI's BAC results are "prima facie admissible into evidence in any judicial or quasi-judicial proceeding" so long as the tests are performed in compliance with the standards and procedures established by the TBI. See id. § 38-6-103(g). We agree with Decosimo that as a practical matter, the blood samples collected from defendants travel first to the TBI forensic scientists before they are eventually released, at a time determined by the TBI, to the defense for independent testing, assuming that a court order is obtained before the samples are destroyed. We also agree that in most cases, the TBI's Official Alcohol Report will induce a defendant to enter a guilty plea unless BAC result appears scientifically impossible or is completely at odds with the defendant's

claim regarding the amount of alcohol consumed. Not surprisingly, because so few blood or breath samples are ever independently tested, TBI forensic scientists typically provide the only proof regarding a defendant's blood alcohol content. Indigent defendants charged with DUI are particularly affected by this reality because they cannot afford to independently test their blood or breath sample, much less hire an expensive expert to challenge the BAC result at trial, and are unlikely to be given state funds to cover these expenses in a misdemeanor prosecution.

Given the clearly dispositive nature of the BAC test results in criminal prosecutions, it is indeed a close question as to whether TBI forensic scientists do, in fact, perform adjudicatory functions. However, Decosimo has not provided, and we have not found, any authority in which a forensic examiner has been included in the definition of a judge or an administrative adjudicator as contemplated by Tumey-Ward. We derive some guidance, however, from Marshall v. Jerrico, Inc., 446 U.S. 238 (1980) (holding generally that the Tumey-Ward restrictions on decision-makers do not apply to those engaged in prosecution of administrative cases). In Marshall v. Jerrico, Inc., an assistant regional administrator imposed a substantial fine on the appellee for a child labor violation. The appellee, relying on Tumey and its progeny, claimed that the rule against bias was violated by a section of the Fair Labor Standards Act which provided money collected as civil penalties for employment of child labor must be returned to the Department of Labor as reimbursement for amounts expended in determining the violation. In holding that the financial interest bar was not applicable to

determinations of the assistant regional administrators, the Supreme Court stated:

> The assistant regional administrator simply cannot be equated with the kind of decisionmakers to which the principles of Tumey and Ward have been held applicable. He is not a judge. He performs no judicial or quasi-judicial functions. He hears no witnesses and rules on no disputed factual or legal questions. The function of assessing a violation is akin to that of a prosecutor or civil plaintiff. . . .
>
> The rigid requirements of Tumey and Ward, designed for officials performing judicial or quasi-judicial functions, are not applicable to those acting in a prosecutorial or plaintiff-like capacity. Our legal system has traditionally accorded wide discretion to criminal prosecutors in the enforcement process, and similar considerations have been found applicable to administrative prosecutors as well[.]

Marshall v. Jerrico,(internal citations omitted).

Moreover, a forensic scientist typically serves as an expert witness subject to Rule 702 of the Tennessee Rules of Evidence.[5] She performs no judicial or

---

[5] Rule 702 of the Tennessee Rules of Evidence governs the admissibility of expert testimony. It provides:

> If scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise.

quasi-judicial functions, hears no witnesses, and rules on no disputed factual or legal questions. We therefore agree with the State and hold that Tumey-Ward is inapplicable to this issue.

Our analysis however does not end here. Both the United States Constitution and the Tennessee Constitution protect the right to due process of law. Section 1 of the Fourteenth Amendment to the United States Constitution provides, "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. . . ." U.S. Const. amend. XIV, § 1. In addition, article I, section 8 of the Tennessee Constitution states, "[N]o 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." Tenn. Const. art. 1, § 8. The Tennessee Supreme Court has held that article I, section 8 of the Tennessee Constitution is "synonymous" with the Due Process Clause of the Fourteenth Amendment. Gallaher v. Elam, 104 S.W.3d 455, 463 (Tenn. 2003) (citing Riggs v. Burson, 941 S.W.2d 44, 51 (Tenn. 1997)).

Substantive due process has been defined in the following way:

> In contrast to procedural due process, substantive due process bars oppressive government action regardless of the fairness of the procedures used to implement the action. Lynch, 205 S.W.3d at 391-92. Substantive due

> process claims are divided into two categories: (1) deprivations of a fundamental constitutional guarantee, and (2) government actions that are "arbitrary, or conscience shocking, in a constitutional sense." Id. at 392 (quoting Collins v. City of Harker Heights, 503 U.S. 115, 128, 112 S. Ct. 1061, 117 L.Ed.2d 261 (1992)). "Appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful 'respect for the teachings of history [and] solid recognition of the basic values that underlie our society.'" Moore v. City of E. Cleveland, Ohio, 431 U.S. 494, 503, 97 S. Ct. 1932, 52 L.Ed.2d 531 (1977) (quoting Griswold v. Connecticut, 381 U.S. 479, 501, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965) (Harlan, J., concurring)).

Mansell v. Bridgestone Firestone North American Tire, LLC, 417 S.W.3d 393, 409 (Tenn. 2013).

Substantive due process prohibits the States from infringing on fundamental liberty interests, regardless of the procedures provided, unless the infringement is narrowly tailored to serve a compelling state interest. Chavez v. Martinez, 538 U.S. 760, 775 (2003); Washington v. Glucksberg, 521 U.S. 702, 721 (1997); Reno v. Flores, 507 U.S. 292, 301-02 (1993). In order to qualify for such protection, the individual's fundamental rights and liberties must be "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." Glucksberg, 521 U.S. at 721 (citations and internal quotation marks omitted). "A substantive due process inquiry focuses on 'what' the government has

done, as opposed to 'how and when' the government did it." See Amsden v. Moran, 904 F.2d 748, 754 (1st Cir. 1990). Individuals who claim that their right to substantive due process has been violated must show that the State's conduct shocks the conscience, or interferes with rights implicit in the concept of ordered liberty, or offends judicial notions of fairness, or is offensive to human dignity, or is taken with deliberate indifference to protected rights. See Anderson v. Larson, 327 F.3d 762, 769 (8th Cir. 2003).

Criminal defendants, in particular, are entitled to considerable due process protections:

> Criminal cases, as opposed to civil cases, directly involve the fundamental constitutional liberty rights of the defendant. As a result, our judicial system recognizes significantly more due process protections in criminal cases than in civil cases. For instance, in recognition that our system of criminal justice would rather set a guilty person free than to convict an innocent one, we permit criminal defendants to be convicted only upon proof of guilt beyond a reasonable doubt. See In re Winship, 397 U.S. 358, 372, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970) (Harlan, J., concurring). Of course, most civil proceedings are decided on the much lower standard of the preponderance of the evidence. Additionally, persons defending criminal charges are vested with numerous state and federal constitutional rights to ensure a fair trial, including the constitutional rights to legal counsel, to present a defense, and to confront the State's witnesses. See U.S. Const. Amend. VI; Tenn. Const. art. I § 9. Of course, the

> 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. See, e.g., State v. White, 362 S.W.3d 559, 566 (Tenn. 2012) ("Due process, at its most basic level, 'mean[s] fundamental fairness and substantial justice.'") (quoting Vaughn v. State, 3 Tenn. Crim. App. 54, 456 S.W.2d 879, 883 (1970)).

State v. Larkin, 443 S.W.3d 751, 799-800 (Tenn. Crim. App. 2013). When discussing the importance of due process protections, this court has reiterated that "'[w]e cannot allow public confidence in the complete fairness and impartiality of our tribunals to be eroded and nothing which casts any doubt on the fairness of the proceedings should be tolerated.'" Id. at 800 (quoting State v. Tate, 925 S.W.2d 548, 555 (Tenn. Crim. App. 1995)).

Based on this record, we cannot ignore the fact that, pursuant to Code section 55-10-413(f)(2), the TBI receives a fee for each conviction where a blood or breath test is performed but does not receive a fee if a defendant's charges are dismissed or reduced or if a defendant is acquitted. Because the money from the $250 BADT fees is placed directly in the intoxicant testing fund which is "designated for exclusive use by the TBI," there is no question that the TBI, an agency of the State, has a direct pecuniary interest in securing convictions. The TBI forensic scientists also have a financial interest in securing convictions because the collection of the BADT fees affects their continued employment and salary, which gives them an incentive

to find that defendants' blood alcohol content is 0.08% or higher. Even though we have concluded that forensic scientists are not judges or administrative adjudicators under Tumey, we are compelled to address the inherent conflict between the requirement that a forensic scientist be neutral and objective and Code section 55-10-413, which deposits the monies received from the BAC and BADT tests directly to the TBI, rather than the State general fund.

Although the State contends that TBI forensic scientists have no obligation to be neutral, we reject any assertion that TBI forensic scientists, who are agents of the State, have no obligation to ensure that their BAC test results are accurate. While 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. Although police officers and informants, who often have an interest in the outcome of a case, are not expected to be neutral, forensic scientists, who engage in the objective testing of blood samples to determine a defendant's BAC, are expected to be neutral and unbiased. See Joseph L. Peterson and Anna S. Leggett, The Evolution of Forensic Science: Progress Amid the Pitfalls, 36 Stetson L. Rev. 621, 653 (Spring 2007) ("Theoretically, at least, forensic evidence should be neutral, with the scientist not having a stake in the outcome of the case.").

The requirement of a neutral and objective TBI forensic scientist fits well with the State's duty to pursue truth and justice in criminal cases. The United States Supreme Court has made it clear that "[a

prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." Berger v. United States, 295 U.S. 78, 88 (1935); see State v. Culbreath, 30 S.W.3d 309, 314 (Tenn. 2000) ("[P]rosecutors are expected to be impartial in the sense that they must seek the truth and not merely obtain convictions [and] are also to be impartial in the sense that charging decisions should be based upon the evidence, without discrimination or bias for or against any groups or individuals."). The need for an unbiased TBI forensic scientist is also consistent withholdings prohibiting the State's suppression of evidence or its use of false testimony, which likewise implicate due process concerns. See Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution"); Kyles v. Whitley, 514 U.S. 419, 438 (1995) (holding that a prosecutor retains the responsibility, under Brady, to disclose favorable evidence to the defendant, even if police investigators fail to inform the prosecutor of this evidence); see also Napue Illinois, 360 U.S. 264, 269 (1959) (reiterating that the State's failure to correct false evidence violates due process).

This 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. As argued by Decosimo, the 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. See Swafford v. Harris, 967 S.W.2d 319, 323 (Tenn. 1998) (holding that "a contingency fee contract for the services of a physician acting in a medico-legal expert capacity is void as against public policy and therefore unenforceable."); Tenn. Sup. Ct. R. 8, RPC 3.4(h) (stating that a lawyer shall not "offer an inducement to a witness that is prohibited by law; or pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent on the content of his or her testimony or the outcome of the case."); 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 State claims that the cases prohibiting expert contingency fees are distinguishable from Decosimo's case because TBI forensic scientists are paid a salary, rather than a contingency fee. It asserts that the scientists' salaries are not dependent on convictions in specific cases and that if blood or breath samples are compromised, then the TBI forensic scientist responsible for this error is dismissed, and the samples are retested. While we acknowledge that the BADT fees do not directly compensate the TBI forensic scientists, we nevertheless recognize that the BADT

fees provide substantial funding to the state bureau employing these scientists.

The aggregate BADT fees, which currently total over $3,000,000 per year,[6] are not deposited in the state's general fund but are deposited directly in the TBI's intoxicant testing fund that is reserved "exclusively for the use of the TBI." Director Gwyn, during his 2014 testimony before the Senate Judiciary Committee, acknowledged that without increasing the BADT fees in 2010, the TBI would have had to eliminate several forensic scientist positions. Cf. Dugan, 277 U.S. at 65 (holding that because the mayor received the same salary from the city's general fund regardless of whether he convicted or acquitted the defendants in the cases before him, there was no showing that failure to convict in a case or cases would affect his fixed compensation). As recently as the TBI's 2013-14 state budget presentation, Director Gwyn stated,

> In order to meet the 5% reduction of $1,557,000 in this agency's base appropriation for the (2013-2014) budget, we will need to eliminate 18 filled positions. Due to the previously mentioned buyout, we are extremely thin in administration, so these cuts must come from the commissioned ranks. These positions will consist of 9 criminal investigators and 9 forensic scientists, further diminishing the ability to respond as quickly and will increase already lengthy backlogs.

---

[6] The record shows that there has been a generally upward trend in the collection of BADT fees, which indicates that the total amount of these fees will increase over time.

Based on the record before us, the TBI, and specifically the forensic science division, is dependent on these BADT fees. Given the upward trend in BADT collections for each successive year, we believe that the TBI will become increasingly reliant on these fees in the future, which only serves to heighten the potential for bias among TBI forensic scientists.

The fee system in Code section 55-10-413(f) also closely resembles cases in which expert witnesses or attorneys have been disqualified for conflicts of interest. See Larkin, 443 S.W.3d at 801-804 (stating that due process mandated a presumption in favor of disqualification of an forensic pathologist, who had been employed as an expert by the defense, to testify as an expert for the State on the same or substantially similar matter in a later criminal prosecution of the defendant and concluding that the forensic scientist was, in fact, disqualified); Clinard v. Blackwood, 46 S.W.3d 177, 186 (Tenn. 2001) (confirming that "Tennessee courts have and will continue to apply the appearance of impropriety standard as a basis for [the] disqualification" of attorneys). While we acknowledge that TBI forensic scientists could lose their jobs if they falsify test results and these falsifications are discovered, we also recognize that forensic scientists would most certainly lose their jobs if funding for their positions disappears, a result of which these forensic scientists are no doubt well aware. Because the fee system at issue in this case calls into question the trustworthiness of the TBI forensic scientists' test results, it violates due process.

While the State contends that any possible bias on the part of forensic scientists can be offset by

procedural safeguards, such as an independent testing of samples, a thorough cross-examination of the forensic scientist at trial, or a jury instruction addressing the credibility of TBI forensic scientists, we conclude that these procedural safeguards fail to remedy the due process violations resulting from the fee system itself. Cf. Ward, 409 U.S. at 61-62 (rejecting the claim that the procedural safeguards of an appeal and trial de novo corrected the due process violation); Brown, 637 F.2d at 280 (recognizing that an accused has a right to an unbiased magistrate or judge with or without a jury and with or without the right to appeal and a trial de novo before a jury); see also City of White House v. Whitley, 979 S.W.2d 262, 267 (Tenn. 1998) (concluding that "the due process violation resulting from the lack of an attorney judge is not cured by the statutory right to a de novo appeal."). We conclude that independent 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. Lastly, because so many DUI cases end in guilty pleas, rather than trials, we conclude that neither a jury instruction nor vigorous cross-examination of TBI forensic scientists corrects the fact that Code section 55-10-413(f) violates due process. Accordingly, we hold that the trial court erred in failing to suppress the test results in this case.

CONCLUSION

Because Code section 55-10-413 violates the Due Process Clause of the Fourteenth Amendment and article I, section 8 of the Tennessee Constitution, we reverse the judgment of the trial court and remand for proceedings consistent with this opinion.

_____

CAMILLE R. MCMULLEN, JUDGE

APPENDIX C

COURT MET PURSUANT TO ADJOURNMENT, PRESENT AND PRESIDING THE HONORABLE BARRY A STEELMAN, JUDGE, FIRST DIVISION OF CRIMINAL COURT, WHEN THE FOLLOWING PROCEEDINGS WERE HAD, TO-WIT:

COURT MET PURSUANT TO ADJOURNMENT, PRESENT AND PRESIDING THE HONORABLE REBECCA STERN, JUDGE, SECOND DIVISION OF CRIMINAL COURT, WHEN THE FOLLOWING PROCEEDINGS WERE HAD, TO-WIT:

COURT MET PURSUANT TO ADJOURNMENT, PRESENT AND PRESIDING THE HONORABLE DON W POOLE, JUDGE, THIRD DIVISION OF CRIMINAL COURT, WHEN THE FOLLOWING PROCEEDINGS WERE HAD, TO-WIT:

IN THE CRIMINAL COURT FOR HAMILTON COUNTY, TENNESSEE

[Filed December 11, 2014]

Division I

Nos. 287842, 288251, No. 289981, No. 290128, No. 291012, No. 291492

STATE OF TENNESSEE	)
	)
v.	)
	)
LUKE REPASS	)

BETTY MUNDY)
AMANDA HARB)
CHRISTIAN LORENZEN)
CHARLES CORDELL)
_____)

Division II

No. 284246, No. 284506, No. 284525, No. 285239
No. 286862, No. 287934, No. 288461, No. 288625,
No. 289827, No. 289849, No. 290144

_____
STATE OF TENNESSEE)
)
v.)
)
JUAN ROJAS)
TYLER GALLANT)
NEAL CRUTCHFIELD)
KYLE BAKER)
ROBERT FRANKLIN)
ROSEMARY DECOSIMO)
ANDREW PENLAND)
MICHAEL MULLINS)
JACOB VANUCCI)
NIC BROWN)
JACOB PARKERSON)
_____)

Division III

~~No. 285957~~, No. 288460, No. 288733, No. 288770, ~~No. 289455~~, No. 289862, No. 291591

_____
STATE OF TENNESSEE)

v.	)
	)
KATHERINE BURKHART	)
NICOLE PAYNE	)
STEVE WARREN	)
ROBERT CROSSLIN	)
JOSHUA RICHARDS	)
BRENDA EYSSEN	)
TINA LOWERY	)
_____	)

ORDER

Before the Court are the motions and supplemental motions, with memoranda of law, post-hearing supplemental brief and a supplement to the supplemental brief, of the defendants, by and through counsel, to dismiss the indictment, exclude the results of blood tests performed by or breath tests performed on machines calibrated by Tennessee Bureau of Investigation ("TBI"), or instruct the jury regarding the financial interest of TBI expert witnesses in convictions for driving under the influence ("DUI") and a half-page, post-hearing "memorandum" and one-page, subsequent "addition" thereto of the state, by and through the district attorney general.[1] The Court understands the defendants to allege or contend in the motions, supplemental motions, or memoranda:

(1) that subsection (f)(2) of T.C.A. § 55 10 413 establishes a conviction-dependent fee of two

[1] The defendants' names appear in the caption as they do on the list accompanying defense counsel's 29 July 2014 letter to the undersigned judges, which is not necessarily how they appear on the indictments.

hundred fifty dollars for blood tests performed by TBI to determine concentrations of alcohol and other substances in the blood and for breath tests performed on machines calibrated by TBI to determine concentrations of alcohol in the blood;

(2) that subsection (f)(3) of the statute allocates the fee to TBI to fund laboratory positions and provide tangible benefits to laboratory personnel and allows the surplus to revert to TBI's other law enforcement operations;

(3) that, as a consequence, TBI scientists and expert witnesses have a financial interest in DUI convictions;

(4) that such a financial interest violates their rights to a fair trial and substantive due process under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and article I, sections 8 and 9 of the Tennessee Constitution;

(5) that such a financial interest also violates their rights to effective assistance of counsel and the presentation of a defense under the Sixth Amendment of the United States Constitution and article I, section 9 of the Tennessee Constitution;

(6) that such a fee in such an amount constitutes an excessive fine within the meaning of the Eighth Amendment of the United States Constitution and article I, section 16 of the Tennessee Constitution;

(7) that the legislative acts creating the financial interest burden a fundamental right, the

right to a fair trial, and may therefore deserve strict scrutiny;

(8) that TBI's executive acts in collecting and profiting from the fees bear the taint of an improper motive and shock the conscience;

(9) that obvious, constitutionally neutral, and readily available alternatives to the conviction-dependent fee exist, specifically, deposit of the fee in the state's general fund or payment of a conviction-independent fee by another governmental entity in the event of dismissal or acquittal; and

(10) that the exhibits are relevant to show "the degree to which the TBI laboratory depends for its financial well-being" on the fees in issue and the mistakes in testing or reporting the results of testing that the current funding structure will encourage.

The defendants cite *Connally v. Georgia*, 429 U.S. 245 (1977), which holds that a fee directly payable to a magistrate for the issuance of a warrant is unconstitutional, and *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), which holds that an outcome-dependent fee that redounds to the benefit of the fact-finding mayor's city is unconstitutional. They also submit numerous exhibits, including stipulations of TBI Director Mark Gwyn and the results of all of one forensic scientist's tests in this county and in the state and an independent laboratory's retests of the same samples.

The Court understands the state to contend in the post-hearing memorandum or addition:

(1) that, until conviction, no defendant has standing to challenge a conviction-dependent "fine";
(2) that there can be no violation of any right, constitutional or non-constitutional, without wrongdoing, of which the defendants do not accuse TBI;
(3) that a jury instruction about a "fine", a sentencing issue, is inappropriate and potentially prejudicial to the state and may lead to jury instructions about every possible "fine" and its distribution; and
(4) that cross-examination, argument, and pattern instructions suffice.

The state cites *Brown v. Edwards*, 721 F.2d 1442 (5th Cir. 1984), which holds that a conviction-dependant fee payable to a constable is constitutional.

The Court understands the defendants to allege or imply in the post-hearing, supplemental brief:

(1) that the sole ground for relief on which they rely is the due-process violation that invalidates the statute;
(2) that, although their application of constitutional principles of due process to the executive branch of government is novel, the principle equally constrains all three branches of government;
(3) that, under *Jones v. Greene*, 946 S.W.2d 817 (Tenn. Ct. App. 1996), members of state administrative agencies are subject to the

same disqualification standards "'that apply to judges when they are performing adjudicatory functions'"; and

(4) that the statutory financial interest in DUI convictions disqualifies TBI toxicologists as much as it would a judge.

The Court understands the defendants to allege in the supplement to the supplemental brief:

(1) that *State v. Kennedy*, 2014 Tenn. Crim. App. LEXIS 930 (3 October), reversing a trial court, upholds the constitutionality of T.C.A. § 55 10 406 because it is silent regarding the necessity of a search warrant for an involuntary blood-alcohol test and

(2) that, even though there is no similar silence in T.C.A. § 55 10 413(f), *Kennedy* may be helpful in their cases because, while it acknowledges the existence of a presumption in favor of constitutionality and the necessity to indulge every doubt in favor of constitutionality, it also recognizes that no legislative act can authorize a constitutional violation.

The motions were consolidated for hearing before all three judges of the Court on 1 August 2014. At the hearing, the defendants called two witnesses Raymond W. Fraley, Esq., and Lloyd A. Levitt, Esq., and introduced fourteen exhibits, including the director's stipulations. The state requested that the defendants file a fifteenth exhibit after the hearing and stipulated the foundations for all exhibits but objected to all the

proof, exhibits and testimony, on the ground of relevance.

The state does not dispute that the contingent fee of § 413(f) gives TBI forensic scientists and expert witnesses a financial interest in DUI convictions. The Court agrees with the parties that the statute creates such an interest and notes that it is this interest, not the fee as fee, that the defendants challenge and from which, logically, they seek pre-conviction relief.

What the state disputes is that the statutory financial interest violates any constitutional right of the defendants. It describes as insulting the implication that TBI forensic scientists and expert witnesses allow or will allow financial interest to influence them.

The defendants disavow any wish to insult TBI or its forensic scientists and expert witnesses and make no attempt to prove influence. They submit evidence of outcome-affecting mistakes in three cases, only one of which TBI acknowledges as a mistake.[2] Each of the acknowledged and unacknowledged mistakes predates the 2014 enactment of the statutory contingent fee.

> The Due Process Clause provides that "no State shall . . . deprive any person of life, liberty, or property, without due process of law." 9 As

---

[2] Mr. Fraley's testimony was that TBI does not admit overstating blood-alcohol concentration by two hundredths of one percent in two cases in which the mistakes, though they did not affect guilt, did affect punishment. The state offers no evidence to explain the discrepancies. From one of the exhibits, it appears that TBI reports blood-alcohol concentrations to two decimal places and one independent laboratory reports them to three decimal places. Does TBI ever round up?

> interpreted by the United States Supreme Court, the Due Process Clause safeguards rights in two ways. First, procedural due process requires state and local governments to employ fair procedures when they deprive persons of a constitutionally protected interest in "life, liberty, or property." Procedural due process protections do not prevent deprivations of "life, liberty, or property" but rather guard against "substantively unfair or mistaken deprivations of property." *Fuentes v. Shevin*, 407 U.S. 67, 80-81, 92 S. Ct. 1983, 1994, 32 L. Ed. 2d 556 (1972).
>
> FOOTNOTES
>
> 9 U.S. Const. amend. XIV, § 1.
>
> The Due Process Clause, however, guarantees more than fair process. *Washington v. Glucksberg*, 521 U.S. 702, 719, 117 S. Ct. 2258, 2267, 138 L. Ed. 2d 772 (1997). It also has a substantive component that bars certain governmental actions regardless of the procedures used to implement them. *County of Sacramento v. Lewis*, 523 U.S. 833, 840, 118 S.Ct. 1708, 1713, 140 L.Ed.2d 1043 (1998); *Daniels v. Williams*, 474 U.S. 327, 331, 106 S. Ct. 662, 665, 88 L. Ed. 2d 662 (1986). Thus, substantive due process is the second way that the Due Process Clause protects "life, liberty, or property."

Parks Properties v. Maury County, 70 S.W. 3d 735, 743-4 (Tenn. Ct. App. 2001).

> Every criminal defendant is guaranteed the right to a fair trial under the Due Process

> Clause of the Fourteenth Amendment to the United States Constitution and the "Law of the Land" Clause of Article I, section 8 of the Tennessee Constitution. *See*, *e.g.*, *State ex rel. Anglin v. Mitchell*, 596 S.W.2d 779, 786 (Tenn. 1980).

State v. Johnson, 38 S.W.3d 52, 55 (Tenn. 2001).

The procedural-due-process right to a fair trial does not encompass a right to disinterested witnesses, though it does encompass a right to a disinterested judge and a right to a disinterested factfinder. *See*, *e.g.*, Tenn. R. Evid. 616 (authorizing impeachment of a witness by proof of bias or prejudice). Perhaps it is for this reason that the defendants, relying on *Jones*, which holds administrative factfinders to the same standard of impartiality as judges, explicitly liken TBI forensic scientists and expert witnesses to judges and the state, relying on *Brown*, which upholds the constitutionality of a contingent-fee system for constables on the grounds that the neutrality of the magistrate and the fact finder sufficiently protects defendants from baseless charges and convictions, implicitly likens them to constables or other fact witnesses. The Court respectfully rejects both comparisons.

Jones reads in part:

> Parties to administrative proceedings, like parties to judicial proceedings, are entitled to a neutral decision-maker. *Cooper v. Williamson County Bd. of Educ.*, 803 S.W.2d 200, 202 (Tenn. 1990); *Ogrodowczyk v. Tennessee Bd. for Licensing Health Care Facilities*, 886 S.W.2d

246, 252-53 (Tenn. Ct. App. 1994) (Cantrell, J., concurring). Accordingly, members of administrative agencies are subject to the same disqualification standards that apply to judges when they are performing adjudicatory functions. *Tennessee Cable Television Ass'n v. Tennessee Pub. Serv. Comm'n*, 844 S.W.2d 151, 164-65 (Tenn. Ct. App. 1992); Tenn. Code Ann. § 4-5-302(a) (1991).

Judges cannot have a personal financial stake in the proceedings before them. Tenn. S. Ct. R. 10, Canon 3(C)(1)(c). Accordingly, judicial officers must disqualify themselves if their decision affects their personal compensation. *Connally v. Georgia*, 429 U.S. 245, 250, 97 S. Ct. 546, 548, 50 L. Ed. 2d 444 (1977); *In re Dender*, 571 S.W.2d 491, 492 (Tenn. 1978). This principle applies to administrative decision-makers. *Gibson v. Berryhill*, 411 U.S. 564, 579, 93 S. Ct. 1689, 1698, 36 L. Ed. 2d 488 (1973); *Ogrodowczyk v. Tennessee Bd. for Licensing Health Care Facilities*, 886 S.W.2d at 253.

This record contains no evidence that the Commissioner of Safety has a direct, personal pecuniary interest in the outcome of forfeiture hearings like the one involved in this case. His decisions do not affect his personal compensation. Forfeited property seized by a state agency is sold at a public sale by the Commissioner of General Services, and the proceeds of the sale are deposited in the state treasury subject to being allocated back to the Department of Safety to be used to enforce the

> laws regulating narcotic drugs and marijuana. The Department of Safety does not have access to the proceeds from the sale of property seized by the Tennessee Bureau of Investigation or local law enforcement agencies.
>
> Administrative decision-makers are presumed to carry out their duties with honesty and integrity. *Cooper v. Williamson County Bd. of Educ.*, 803 S.W.2d at 203; *Tennessee Cable Television Ass'n v. Tennessee Pub. Serv. Comm'n*, 844 S.W.2d at 165. Thus, the party claiming bias bears the burden of proving the grounds for disqualification. *Gay v. City of Somerville*, 878 S.W.2d 124, 127 (Tenn. Ct. App. 1994). Neither the commissioner nor his department could have benefited from this forfeiture proceeding since the money at issue was seized by a local law enforcement agency. Accordingly, Mr. Jones has failed to substantiate his bias claim with either legal authority or facts.

Jones, 946 S.W.2d at 825-6 (footnotes omitted). The defendants' comparison of TBI forensic scientists and expert witnesses to judges depends on a misinterpretation of *Jones*, that a member of an administrative agency, like a judge, must be impartial, irrespective of whether the member is performing an adjudicatory function, or an illogical presupposition, that alcohol and drug analysis is an adjudicatory function.

The state's implicit comparison of TBI forensic scientists and expert witnesses to constables and other fact witnesses, however, is no more accurate. Presumably, even the state expects independence from

TBI scientists as scientists, though not as judges or administrative factfinders, or it would not regard the possibility of influence as insulting.

> The assistance a jury is to receive from expert opinion should not be tempered by the need to speculate how much of a discount to allow for personal interest. The very fact that a jury needs expert testimony means it lacks qualifications to make such a judgment. An agreement to give an opinion on a contingent basis, particularly on an arithmetical scale, attacks the very core of expert testimony. See *McPherson v. School Dist. No. 186*, S.D.Ill., 1978, 465 F. Supp. 749, 764; *Del Noce v. Delyar Corp.*, S.D.N.Y., 1978, 457 F. Supp. 1051, 1057; *Keyes v. School Dist. No. 1*, D.Colo., 1977, 439 F. Supp. 393, 419; cf. *Person v. Association of Bar of City of New York*, 2 Cir., 1977, 554 F.2d 534, cert. denied, 434 U.S. 924, 98 S. Ct. 403, 54 L. Ed. 2d 282. Such an agreement is classified by Williston on Contracts, 3d ed. 1972, § 1716 under "Bargains Obstructing Justice." See also Restatement of the Law, Contracts, 1932 § 552(2).
>
> It is true that Seltzer was not hired to, and did not, prepare his figures for use in the case at bar. However, he used in the case at bar figures that he had prepared under exactly the same temptations of self interest. Any distinction is lacking in substance. This conclusion is not affected by plaintiffs' representation during the argument on these motions, which I accept, that it is proper practice for insurance adjusters to be compensated on a percentage basis. It is not a

> question of ethics that concerns me, but testimonial worth. With many witnesses, and, of course, parties, interest is unavoidable. An expert, however, whose only relevance is his expertise, should not have that expertise flawed.

Gediman v. Sears, Roebuck & Co., 484 F. Supp. 1244, 1248 (D. Mass. 1980).

> In another issue, both defendants seek dismissal of the arrest warrants because the arresting police officer was entitled to a $30 fee upon the defendants' convictions. * The state argues, however, that such a payment evidences the officer's pecuniary interest in the trial and therefore affects her credibility as a witness, but does not disqualify her from testifying.
>
> FOOTNOTES
>
> * We note with approval that the practice of payment for convictions has been discontinued in Sumner County since this prosecution.
>
> Witnesses in a trial often have various interests, pecuniary and otherwise, in the outcome of a prosecution. Clearly, those interests and biases may be examined by counsel to test the witness's credibility. We do not believe, however, that the fee in this case should vitiate these convictions, given the independent corroboration of the officer's testimony that was provided by the results of the blood-alcohol test performed on Kemp. We also note Kemp's admission that when observed by the officer, she was driving at least 20 miles above the speed

> limit. Without regard to the officer's pecuniary interest in the matter, it thus appears that the evidence of Kemp's guilt was overwhelming and that any damage to the officer's credibility arising from the fee did not affect the outcome of the trial. *See Oliphant v. State*, 153 Tenn. 130, 282 S.W. 206, 209 (1926).

State v. Kemp, 1985 Tenn. Crim. App. LEXIS 2622, *7-8.

There is no evidence regarding the professional standards to which forensic scientists or TBI forensic scientists must adhere or the accreditation standards to which forensic laboratories or TBI laboratories must adhere. Nor is there evidence that subsection (f) of § 413 is consistent with any such standards.

> 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. *New Eng. Tel. & Tel. Co. v. Bd. of Assessors*, 392 Mass. 865, 468 N.E.2d 263, 265, 267 (Mass. 1984); *see Accrued Fin. Servs., Inc. v. Prime Retail, Inc.*, 298 F.3d 291, 300 (4th Cir. 2002). Maine enforces this policy in part by a Bar Rule which prohibits the hiring of witnesses on a contingent fee basis. Maine Bar Rule 3.7(g)(3).

Crowe v. Bolduc, 334 F.3d 124, 132 (1st Cir. 2003).

> Clearly, a contingency fee arrangement with an expert witness raises grave fairness and fair play considerations. Where the payment of the

expert is contingent, the witness' own interest will become intensified, and the reliability of the testimony and impartiality of the expert's position will be significantly weakened.

Section 117 of the Restatement (Third) of The Law Governing Lawyers provides, in relevant part:

> A lawyer may not offer or pay to a witness any consideration:
>
> (2) contingent on the content of the witness's testimony or the outcome of the litigation

Comment c. details further:

> Compensating an expert witness. A fee paid an expert witness may not be contingent on the content of the witness's testimony or *the result in the litigation*. On a lawyer's liability for an expert's fee, see § 30(2)(b). On a lawyer's advancing the costs of litigation, see § 36(2). An opposing party may inquire into the fee paid to an expert or other witness in order to impeach the testimony of the witness. The prohibition against contingent compensation does not apply to an expert retained only to consult and not to testify or otherwise provide evidence.

Id. (Emphasis added).

Taylor v. Courell, 2014 U.S. Dist. LEXIS 13476, *4-5 (E.D. Mo.).

Tennessee has a similar rule. *See* Tenn. Sup. Ct. R. 8, RPC 3.4(h) (prohibiting a lawyer from "pay[ing],

offer[ing] to pay, or acquiesc[ing] in the payment of compensation to a witness contingent on the content of his or her testimony or the outcome of the case"). *Cf* T.C.A. § 39 16 107 (b) (excepting from the definition of the criminal offense of bribing a witness payment to expert witnesses of more than the amount that the law allows for witnesses); T.C.A. § 39 16 705 (defining subornation of perjury as, "with the intent to deceive, induc[ing] another to make a false statement constituting perjury or aggravated perjury").

The Court notes that professional standards applicable to physicians and lawyers were a factor in the Supreme Court's decision that "a contingency fee contract for the services of a physician acting in a medico-legal expert capacity is void as against public policy and therefore unenforceable." *See Swafford v. Harris*, 967 S.W.3d 319, 321-3 (Tenn. 1998) (footnote omitted) (treating professional standards prohibiting expert contingency fees as relevant).

> Arguably, governments should abide by the same rules that they impose on others.
>
> Adhering to the views expressed in the panel opinion, I respectfully dissent. The truth has no marketplace.
>
> I write only to express three simple propositions. First, notwithstanding the majority's conclusion to the contrary, I continue to believe that Kelly's contingent fee depended upon the outcome of the case and the quality of his testimony. Second, the *Williamson* rule not only is wise policy, it is necessary to protect the very integrity of the judicial system and to

ensure that testimony will not be bought. Third, that plea-bargaining creates incentives to lie does not point out the lack of problems with contingent fees and associated testimony, but rather the presence of problems with plea-bargaining and associated testimony.

These simple propositions recall the eloquent words of Justice Brandeis:

> The court's aid is denied only when he who seeks it has violated the law in connection with the very transaction as to which he seeks legal redress. Then aid is denied despite the defendant's wrong. It is denied in order to maintain respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination. . . .
>
> *Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. . . . To declare that in the administration of the criminal law the end justifies the means -- to declare that the government may commit crimes in order to secure the conviction of a private criminal -- would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.*

> *Olmstead v. United States*, 277 U.S. 438, 484, 48 S. Ct. 564, 574-75, 72 L. Ed. 944 (1928) (Brandeis, J., dissenting) (footnote omitted).

Id. at 316-7 (Goldberg, J., dissenting) (emphasis added).

Courts do, however, distinguish between a rule of professional conduct and a rule of admissibility of evidence.

> The case is remarkable because, for the first time ever so far as we know, the plaintiff testified as his own expert witness. (We have found a case where a party's employees testified as expert witnesses; the practice was criticized by the judge. *See Rust Engineering Co. v. Lawrence Pumps, Inc.,* 401 F. Supp. 328, 334 (D. Mass. 1975).) Dr. Tagatz, a specialist in statistical evidence in employment discrimination cases, prepared the statistical evidence on which his case rides, and was permitted to introduce the evidence as an expert witness. Rule 702 of the Federal Rules of Evidence, which governs the qualification of expert witnesses, is latitudinarian, and nothing in its language suggests that a party cannot qualify as an expert; nor did Marquette object to Dr. Tagatz's testifying as an expert witness. As Dr. Tagatz's counsel pointed out at argument, the fact that a party testifying as his own expert is not disinterested does not distinguish him from any other party who testifies in his own behalf; and hired experts, who generally are highly compensated - and by the party on whose behalf they are testifying - are not notably

> disinterested. There is a rule against employing expert witnesses on a contingent-fee basis (that is, against paying them more for their testimony if the party that hired them wins), and this rule might be thought to imply that a party - whose "reward" for testifying depends, of course, on the outcome of the suit - is not eligible to be an expert witness. But it is a rule of professional conduct rather than of admissibility of evidence. It is unethical for a lawyer to employ an expert witness on a contingent-fee basis, 3 Weinstein's Evidence para. 706[03] at pp. 706-23 to 706-24 (1987), but it does not follow that evidence obtained in violation of the rule is inadmissible. *See United States v. Cervantes-Pacheco*, 826 F.2d 310, 316 (5th Cir. 1987) (en banc) (concurring opinion). The trier of fact should be able to discount for so obvious a conflict of interest. In any event, there was no objection to Dr. Tagatz's testifying as an expert witness, so we need not delve deeper into this intriguing subject.

Tagatz v. Marquette Univ., 861 F.2d 1040, 1042 (7th Cir. 1988).

A financial interest in the outcome of a prosecution does not render a witness incompetent. *Brown*, 721 F.2d at 1445 n.6 (citing *United States v. Murphy*, 41 U.S. 203, 205, 211 (1842)).

> But, at the same time, we desire to say, that although a competent witness, the credibility of his testimony is a matter for the consideration of the jury, under all the weight of circumstances

> connected with the case, and his interest in the result.

United States v. Murphy, 41 U.S. 203, 214 (1842).

The Supreme Court and four circuits have rejected the *Williamson* rule of per se exclusion either expressly or in principle. In *Hoffa v. United States*, 385 U.S. 293, 87 S. Ct. 408, 17 L. Ed. 2d 374 (1966), the Supreme Court affirmed a bribery conviction even though it was based in part upon the testimony of an informant who was compensated by the government for his assistance. In return for his assistance, the informant's wife received four monthly installment payments of $ 300 from government funds, and the state and federal charges against the informant were either dropped or not actively pursued. *Id.* at 298, 87 S. Ct. at 411. The Court rejected the argument that the receipt of these benefits created an impermissible risk that the informant might perjure himself. *Id.* at 311, 87 S. Ct. at 418.

> The petitioner is quite correct in the contention that Partin, perhaps even more than most informers, may have had motives to lie. But it does not follow that his testimony was untrue, nor does it follow that his testimony was constitutionally inadmissible. The established safeguards of the Anglo-American legal system leave the veracity of a witness to be tested by cross-examination, and the credibility of his testimony to be determined by a properly instructed jury. At the trial of this case,

> Partin was subjected to rigorous cross-examination, and the extent and nature of his dealings with federal and state authorities were insistently explored. The trial judge instructed the jury, both specifically and generally, with regard to assessing Partin's credibility. The Constitution does not require us to upset the jury's verdict.

Id. at 311-12, 87 S. Ct. at 418 (citations omitted).

Considering the strong policy articulated by the Court in *Hoffa* that the credibility of witnesses is to be determined by the jury, it is not surprising that no circuit court has embraced *Williamson.* Predictably, four circuits have expressly rejected *Williamson. United States v. Dailey*, 759 F.2d 192, 199-200 (1st Cir. 1985); *United States v. Hodge*, 594 F.2d 1163, 1165-67 (7th Cir. 1979); *United States v. Jones*, 575 F.2d 81, 86 (6th Cir.1978); *United States v. Reynoso-Ulloa,* 548 F.2d 1329, 1338 & nn. 18-19 (9th Cir. 1977). For example, the Sixth Circuit has stated that:

> (There is no overriding policy to exclude the testimony of an informant if he is paid under] a contingent fee agreement for the conviction of specified persons for crimes not yet committed. Although it is true that the informant working under this type of arrangement *may* be prone to lie and manufacture crimes, he is no more likely to commit these wrongs than witnesses acting for other, more common reasons. . . . Rather

> than adopting an exclusionary rule for a particular factual situation, . . . we prefer the rule that would leave the entire matter to the jury to consider in weighing the credibility of the witness-informant. In our view this approach provides adequate safeguards for the criminal defendant against possible abuses since the witness must undergo the rigors of cross-examination.

Jones, 575 F.2d at 86 (quoting *United States v. Grimes*, 438 F.2d 391, 395-96 (6th Cir.1971)) (emphasis in original) (citations omitted).

United States v. Cervantes-Pacheco, 826 F.2d 310, 313-4 (5th Cir. 1987) (footnote omitted).

> The employment of a witness for a fee contingent upon victory for the party in whose favor he testifies is a violation of both the Model Rules of Professional Conduct and the Code of Professional Responsibility. Yet, because a person interested in the outcome of a case is a competent witness, experts employed on such a contingent-fee basis have been permitted to testify. No court, so far as I have been able to find, now excludes contingent-fee testimony. The prosecuting attorney is therefore permitted to adduce evidence in a criminal case despite the fact that it is gained by a breach of ethical standards. As the majority opinion points out, the government may also offer witnesses plea bargains for either a reduced sentence or immunity in exchange for their testimony and thus provide an incentive greater even than a contingent fee. If the government may do so, the

> defendant presumably may also employ experts and other witnesses to testify for a fee contingent on his acquittal. While this balances opportunity equally, it patently permits perversion of the trial process, and I am therefore troubled by the possible results of our decision. Because, however, both the Supreme Court decision in *Hoffa v. United States* and the decisions of every other circuit appear to sanction the use of such testimony, I concur in the result.

Id. at 316 (Rubin, J., concurring) (footnotes omitted).

> As previously explained by the First Circuit in United States v. Cresta, "[w]hile the risk of perjury is recognized, courts have chosen to rely upon cross-examination to ferret out any false testimony." *United Slates v. Cresta*, 825 F.2d 538, 546 (1st Cir. 1987)(considering the interaction between "permitted testimony of a witness paid in a contingent fee basis and opportunity to cross-examine," *Crowe* at 132). To ensure the veracity of the witness "the jury must be informed of the exact nature of the contingency agreement; the defense counsel must be permitted to cross-examine the witness about the agreement; and the jury must be specifically instructed to weigh the witness' testimony with care." *Crowe v. Bolduc*, 334 F.3d at 133; but see *Gediman v. Sears, Roebuck & Co.*, Civ. A. No. 76-3456-Z(A), 484 F.Supp. 1244 (D.Mass. Feb. 20, 1980)(stating that "[t]he assistance a jury is to receive from expert opinion should not be tempered by the need to

> speculate how much of a discount to allow for personal interest . . . [a]n agreement to give an opinion on a contingent basis . . . attacks the very core of expert testimony.").

Morris v. Rhode Island Hosp., 2014 U.S. Dist. LEXIS 91746, *28-9 (D. R.I.).

Certain pressures on witnesses, however, may deprive a defendant of a fair trial. 21 A Am Jur 2d Criminal Law § 931 (2014).

> Bolden argues that he was denied his right to due process and a fair trial under the Tennessee and United States Constitutions because the prosecutor's plea agreement with Kabrian Hayes required Hayes to testify to specific facts. Specifically, Bolden contends that requiring Hayes to testify "as he stated in his statements to [TBI agent] Roger Hughes" was tantamount to requiring scripted testimony. The State maintains that the agreement required truthful testimony and that disclosure of the agreement to the jury and cross-examination of Hayes preserved the defendant's right to due process and a fair trial.
>
> We begin by observing that the testimony of an accomplice is generally admissible even if it is obtained through a plea agreement. *See Giglio v. United States,* 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972). A promise of leniency or other favorable agreement goes only to the credibility of a witness's testimony, not to its admissibility. *United States v. Hoffa*, 385 U.S. 293, 87 S. Ct. 408, 17 L. Ed. 2d 374 (1966); *see*

also State v. Garcia, 102 Idaho 378, 630 P.2d 665, 673 (Idaho 1981); *Kelley v. State,* 460 N.E.2d 137, 139 (Ind. 1984); *State v. Burchett*, 224 Neb. 444, 399 N.W.2d 258, 266 (Neb. 1987).

Many courts, however, require that safeguards be followed before admitting testimony procured through plea bargain agreements. These requirements, the purpose of which is to preserve the defendant's rights to due process and a fair trial, have been held to include the following: (1) full disclosure of the terms of the agreements struck with the witnesses; (2) the opportunity for full cross-examination of those witnesses concerning the agreements and the effect of those agreements on the testimony of the witnesses; and (3) instructions cautioning the jury to carefully evaluate the weight and credibility of the testimony of such witnesses who have been induced by agreements with the State to testify against the defendant. *See*, *e.g.*, *Garcia*, 630 P.2d at 673; *People v. Lopez*, 242 Ill. App. 3d 160, 610 N. E.2d 189, 182 Ill. Dec. 765 (Ill. Ct. App. 1993); *Caldwell v. State*, 583 N.E.2d 122 (Ind. 1991); *Sheriff, Humboldt County v. Acuna*, 107 Nev. 664, 819 P.2d 197 (Nev. 1991); *Stage v. Leonard*, 74 N.C. App. 443, 328 S.E.2d 593 (N.C. Ct. App. 1985); *State v. Nerison*, 136 Wis. 2d 37, 401 N.W.2d 1 (Wis. 1987).

As the Iowa Supreme Court has explained:

> In most instances, any potential for prejudice to a defendant's case will be avoided by allowing the witness to testify subject to

> searching cross-examination intended to develop fully any evidence of bias or motive on the part of the witness, or improper conduct on the part of the State. Every fact that might in some way influence the truthfulness and credibility of the witness's testimony should be laid before the jury. This ensures no unnecessary barriers will be imposed on the State's ability to bargain for truthful testimony, and at the same time ensures the jury will be able to determine what weight, if any, in light of all the evidence, to give the witness's testimony.

State v. McGonigle, 401 N.W.2d 39, 42 (Iowa 1987) (citation omitted).

> In addition to these safeguards, courts in Nebraska, Nevada, and California have emphasized that a plea bargain may not be conditioned on a witness giving false or scripted testimony. *Burchett*, 399 N.W.2d at 266; *Acuna,* 819 P.2d at 201. The California Supreme Court has stated, for instance, that a plea bargain consummated in exchange for testimony is unacceptable where "the testimony must be confined to a predetermined formulation" or must produce a "given result, that is to say, a conviction." *People v. Garrison,* 47 Cal. 3d 746, 765 P .2d 419, 254 Cal. Rptr. 257 (Cal. 1989); *see also State v. DeWitt, 286 N.W.2d 379, 384 (Iowa 1979)* (plea agreement for accomplice's false or specific testimony is inadmissible).
>
> Although we have not addressed this precise issue in the past, we agree with the principles

> espoused by the majority of other state courts and find that these principles are consistent with our Tennessee cases addressing related issues. For example, the safeguards attendant to allowing testimony induced by a plea agreement -- full disclosure of the terms of the plea agreement and cross-examination into the witness' motives and bias -- place the responsibility of weighing the testimony and credibility of the witness upon the jury. *E.g., State v. Hornsby*, 858 S.W.2d 892 (Tenn. 1993) (weighing evidence and credibility is function for trier of fact).
>
> Moreover, the limitations expressed in these cases -- that a plea agreement may not be conditioned upon false, scripted, predetermined, or specific testimony without regard for the truthfulness of the witness' testimony -- are consistent with established principles of due process which prohibit the State from using testimony known to be false or later learned to be false. *Giglio*, 405 U.S. at 154, 92 S. Ct. at 766; *State v. Spurlock*, 874 S.W.2d 602, 621 (Tenn. Crim. App. 1993).

State v. Bolden, 979 S.W.2d 587, 590-1 (Tenn. 1998). Thus, what the Court must determine is whether the statute in issue creates such pressure on TBI forensic scientists and expert witnesses that admission of their evidence deprives defendants of due process or a fair trial.

The statutory financial interest is not negligible. It is true that, in any one case, the interest is small. Were there no statute, *i.e.*, were there no reason to consider

more than one case at a time, thorough cross-examination and jury instruction would suffice to preserve a defendant's rights to due process and a fair trial.

The statute, however, not only creates a contingent-fee *system*, like the one in *Brown*; it creates a contingent-fee-*dependent* system. In the aggregate of cases, the financial interest is very large. The statutory fees fund laboratory positions, equipment, professional development, and more.

Arguably, the statutory, contingent-fee-dependent system encourages both personal and institutional bias in scientific work much of the value of which even the state recognizes depends on the lack of influence on the scientist. Apparently, too, such a system is unnecessary, the state not disputing the existence of acceptable alternatives. Furthermore, that the parties do not cite and the Court does not find any precedent for giving forensic scientists and laboratories a statutory financial interest in DUI convictions suggests that other states, who, presumably, share this state's legitimate goal of discouraging DUI in part by making offenders responsible for laboratory costs, do not regard such an interest as fair.

Despite the magnitude of the aggregate financial interest, however, the Court concludes that it does not necessitate the exclusion of the results of breath or blood tests. Presumably, it is impossible to calibrate breath-test machines to overstate any positive result. Thus, no financial interest on the calibrator's part can affect the results of breath tests.

As for blood tests, presumably, despite the evidence of acknowledged and unacknowledged errors in blood tests, it is impossible to calibrate blood-test machines to overstate any positive result. The sole acknowledged error in the record was a transposition error; perhaps the unacknowledged errors in the record lie within the margin of error. Presumably, too, despite the statement in the reports in the record that "[t]he above represents the interpretations and opinions of the analyst", blood tests are subject to minimal, if any, interpretation or opinion.

Although deliberate falsifications attributable to financial interest remain a possibility, presumably, what protects defendants from accidental transposition errors also protects them from deliberate falsifications: the availability of independent analysis of blood, at state expense in appropriate cases, and the availability of underlying "technical notes and data" that, according to a statement in the reports in the record, the laboratory maintains in its case records. Thus, the financial interest in obtaining DUI convictions is offset by financial and other interests in continuing to have employment and avoiding criminal liability, making the possibility of a deliberate falsification attributable to financial interest remote without necessarily changing defendants' calculations regarding the advisability of independent analysis.

The Court therefore ORDERS:

(1) that the subject motions are denied with respect to the requests for dismissal of the indictments and the exclusion of evidence and granted with respect to the request for a jury instruction and

(2) that counsel for the defendants, Jerry H. Summers, Esq., and Benjamin L. McGowan, Esq., assistant district attorney general Kate Lavery, Esq., and the state attorney general and reporter be promptly provided with a copy of this order.

SO ENTER on this 11th day of December, 2014.

s/_____
Barry A. Steelman
Criminal Court Judge – Division I

s/_____
Rebecca J. Stern
Criminal Court Judge – Division II

s/_____
Don W. Poole
Criminal Court Judge – Division III

THEREUPON COURT ADJOURNED PENDING FURTHER BUSINESS OF THE COURT.

S/s BARRY A STEELMAN
JUDGE BARRY A STEELMAN

THEREUPON, COURT ADJOURNED PENDING FURTHER BUSINESS OF THE COURT.

S/s REBECCA STERN
JUDGE REBECCA STERN

THEREUPON, COURT ADJOURNED PENDING FURTHER BUSINESS OF THE COURT.

S/s DON W POOLE
JUDGE DON W POOLE

APPENDIX D

2017 Tenn. Code Ann. § 55-10-413

TENNESSEE CODE ANNOTATED > Title 55 Motor and Other Vehicles > Chapter 10 Accidents, Arrests, Crimes and Penalties > Part 4 Alcohol and Drug Related Offenses

55-10-413. Additional fees -- Ignition interlock fee -- Alcohol and drug addiction treatment fee -- Blood alcohol concentration test (BAT) fee -- Blood alcohol or drug concentration test (BADT) fee -- TBI toxicology unit intoxicant testing fund.

(a) In addition to all other fines, fees, costs and punishments now prescribed by law, an ignition interlock fee of forty dollars ($40.00) shall be assessed for each violation of *§ 55-10-401*, which occurred on or after July 1, 2010, and resulted in a conviction for such offense.

(b) In addition to all other criminal penalties, costs, taxes and fees now prescribed by law, any person convicted of violating *§ 55-10-401* will be assessed a fee of five dollars ($5.00), to be paid into the state treasury and deposited to the credit of the fund established pursuant to *§ 9-4-206*.

(c)

(1) In addition to all other fines, fees, costs and punishments now prescribed by law, an alcohol and drug addiction treatment fee of one hundred dollars

($100) shall be assessed for each conviction for a violation of *§ 55-10-401*.

(2) All proceeds collected pursuant to subdivision (c)(1), shall be transmitted to the commissioner of mental health and substance abuse services for deposit in the special "alcohol and drug addiction treatment fund" administered by the department.

(d)

(1) In addition to all other fines, fees, costs and punishments now prescribed by law, in counties having a population of not less than three hundred thirty-five thousand (335,000) nor more than three hundred thirty-six thousand (336,000), or in counties having a population of more than seven hundred thousand (700,000), according to the 1990 federal census or any subsequent federal census, a blood alcohol concentration test (BAT) fee in the amount of seventeen dollars and fifty cents ($17.50) will be assessed upon conviction of an offense of driving while intoxicated for each offender who has taken a breath-alcohol test on an evidential breath testing unit provided, maintained and administered by a law enforcement agency in the counties or where breath, blood or urine has been analyzed by a publicly funded forensic laboratory.

(2) In addition to all other fines, fees, costs and punishments now prescribed by law, in counties having a metropolitan form of government with a population greater than one hundred thousand (100,000), according to the 1990 federal census or any subsequent federal census, a BAT fee in an amount to be established by resolution of the

legislative body of any county to which this subdivision (d)(2) applies, not to exceed fifty dollars ($50.00), will be assessed upon conviction of an offense of driving while intoxicated for each offender who has taken a breath-alcohol test on an evidential breath testing unit provided, maintained and administered by a law enforcement agency in the counties or where breath, blood or urine has been analyzed by a publicly funded forensic laboratory.

(3) This fee shall be collected by the clerks of various courts of the counties and forwarded to the county trustee on a monthly basis and designated for exclusive use by the law enforcement testing unit of the counties if the BAT was conducted on an evidential breath testing unit. If the blood alcohol test was conducted by a publicly funded forensic laboratory, the fee shall be collected by the clerks of the various courts of the counties and forwarded to the county trustee on a monthly basis and designated for exclusive use by the publicly funded forensic laboratory.

(4) In counties having a metropolitan form of government with a population greater than one hundred thousand (100,000), according to the 1990 federal census or any subsequent federal census, this fee shall be collected by the clerks of the various courts of the counties and forwarded to the county trustee on a monthly basis. If the BAT was conducted on an evidential breath testing unit, seventeen dollars and fifty cents ($17.50) of the fee shall be designated for exclusive use by the law enforcement testing unit of the county. The county trustee shall deposit the remainder of the fee in the

general fund of the county. If the blood alcohol test was conducted by a publicly funded forensic laboratory, seventeen dollars and fifty cents ($17.50) of the fee collected by the clerks of the various courts of the counties and forwarded to the county trustee on a monthly basis shall be designated for exclusive use by the publicly funded forensic laboratory. The county trustee shall deposit the remainder of the fee in the general fund of the county.

(e) Notwithstanding any other law to the contrary, in any county having a population of not less than three hundred seven thousand eight hundred (307,800) nor more than three hundred seven thousand nine hundred (307,900), according to the 2000 federal census or any subsequent federal census, upon conviction for a violation of *§ 55-10-401*, *§ 55-10-415*, *§ 55-10-421* or *§ 55-50-408*, the court shall assess against the defendant a blood alcohol concentration test (BAT) fee to be established by the county legislative body of any county to which this subsection (e) applies in an amount not to exceed fifty dollars ($50.00) for obtaining a blood sample for the purpose of performing a test to determine the alcoholic or drug content of the defendant's blood pursuant to *§ 55-10-406* that is incurred by the governmental entity served by the law enforcement agency arresting the defendant. The fee authorized by this subsection (e) shall only be assessed if a blood sample is actually taken from a defendant convicted of any of these offenses and the test is actually performed on the sample.

(f)

(1) In addition to all other fines, fees, costs, and punishments now prescribed by law, including the fee imposed pursuant to subsection (d), a blood alcohol or drug concentration test (BADT) fee in the amount of two hundred fifty dollars ($250) shall be assessed upon a conviction for driving under the influence of an intoxicant under *§ 55-10-401*, vehicular assault under *§ 39-13-106*, aggravated vehicular assault under *§ 39-13-115*, vehicular homicide under *§ 39-13-213(a)(2)*, simple possession or casual exchange of a controlled substance under *§ 39-17-418*, reckless driving under *§ 55-10-205*, or aggravated vehicular homicide under *§ 39-13-218*, for each offender who has taken a breath alcohol test on an evidential breath testing unit provided, maintained, and administered by a law enforcement agency for the purpose of determining the breath alcohol content or has submitted to a chemical test to determine the alcohol or drug content of the blood or urine.

(2) The fee authorized in subdivision (f)(1) shall be collected by the clerks of the various courts of the counties and forwarded to the state treasurer on a monthly basis for deposit in the Tennessee bureau of investigation (TBI) toxicology unit intoxicant testing fund created as provided in subdivision (f)(3), and designated for exclusive use by the TBI for the purposes set out in subdivision (f)(3).

(3)

(A) There is created a fund within the treasury of the state, to be known as the TBI toxicology unit intoxicant testing fund.

(B) Moneys shall be deposited to the fund pursuant to subdivision (f)(2), and as may be otherwise provided by law, and shall be invested pursuant to *§ 9-4-603*. Moneys in the fund shall not revert to the general fund of the state, but shall remain available for appropriation to the Tennessee bureau of investigation, as determined by the general assembly.

(C) Moneys in the TBI toxicology unit intoxicant testing fund and available federal funds, to the extent permitted by federal law and regulation, shall be used to fund a forensic scientist position in each of the three (3) bureau crime laboratories, to employ forensic scientists to fill these positions, and to purchase equipment and supplies, pay for the education, training and scientific development of employees, or for any other purpose so as to allow the bureau to operate in a more efficient and expeditious manner. To the extent that additional funds are available, these funds shall be used to employ personnel, purchase equipment and supplies, pay for the education, training and scientific development of employees, or for any other purpose so as to allow the bureau to operate in a more efficient and expeditious manner.

(g)

(1) In addition to all other fines, fees, costs and punishments now prescribed by law, including the fee imposed pursuant to subsection (d), a blood alcohol or drug concentration test (BADT) fee in the amount of one hundred dollars ($100) shall be assessed upon conviction for a violation of *§ 39-13-106*, *§ 39-13-213(a)(2)*, *§ 39-13-218* or *§ 55-10-401*, if the blood or urine of the convicted person was analyzed by a publicly funded forensic laboratory or other forensic laboratory operated by and located in counties having a population of not less than eighty-seven thousand nine hundred (87,900) nor more than eighty-eight thousand (88,000), according to the 2000 federal census or any subsequent federal census, for the purpose of determining the alcohol or drug content of the blood.

(2) The fee authorized in subdivision (g)(1) shall be collected by the clerks of the various courts of the counties and shall be forwarded to the county trustees of those counties on a monthly basis and designated for the exclusive use of the publicly funded forensic laboratory in those counties.

APPENDIX E

28 U.S.C. § 1257

United States Code Service - *Titles 1 through 54 > TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE > PART IV. JURISDICTION AND VENUE > CHAPTER 81. SUPREME COURT*

§ 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

APPENDIX F

Tenn. Code Ann. § 16-3-201

Tennessee Code Annotated > Title 16 Courts > Chapter 3 Supreme Court > Part 2 Powers and Duties

16-3-201. Jurisdiction.

(a) The jurisdiction of the court is appellate only, under restrictions and regulations that from time to time are prescribed by law; but it may possess other jurisdiction that is now conferred by law upon the present supreme court.

(b) The court has no original jurisdiction, but appeals and writs of error, or other proceedings for the correction of errors, lie from the inferior courts and court of appeals, within each division, to the supreme court as provided by this code.

(c) The court also has jurisdiction over all interlocutory appeals arising out of matters over which the court has exclusive jurisdiction.

(d)

(1) The supreme court may, upon the motion of any party, assume jurisdiction over an undecided case in which a notice of appeal or an application for interlocutory or extraordinary appeal is filed before any intermediate state appellate court.

(2) Subdivision (d)(1) applies only to cases of unusual public importance in which there is a special need for expedited decision and that involve:

(A) State taxes;

(B) The right to hold or retain public office; or

(C) Issues of constitutional law.

(3) The supreme court may, upon its own motion, when there is a compelling public interest, assume jurisdiction over an undecided case in which a notice of appeal or an application for interlocutory or extraordinary appeal is filed with an intermediate state appellate court.

(4) The supreme court may by order take actions necessary or appropriate to the exercise of the authority vested by this section.

(e) Appeals of actions under title 2, chapter 17 relative to election contests shall be to the court of appeals in accordance with the Tennessee rules of appellate procedure.

APPENDIX G

IN THE CRIMINAL COURT FOR HAMILTON COUNTY, STATE OF TENNESSEE

JUDGMENT

[Filed March 8, 2017]

See Fold Out Exhibit Next Page

COURT MET PURSUANT TO ADJOURNMENT, PRESENT AND PRESIDING THE HONORABLE PAUL SUMMERS, JUDGE, SECOND DIVISION OF CRIMINAL COURT, WHEN THE FOLLOWING PROCEEDINGS WERE HAD, TO-WIT:

IN THE CRIMINAL COURT FOR HAMILTON COUNTY, STATE OF TENNESSEE

Case Number: 287934 Count #: 5 Counsel for the State: Matthew O'Brien

Judicial District: Eleven Judical Division: Counsel for Defendant: SUMMERS, JERRY

State of Tennessee ☑ Retained ☐ Pub Def Appt ☐ Private Atty Appt

vs ☐ Counsel Waived ☐ Pro Se

Defendant: DECOSIMO, ROSEMARY L Alias: Date of Birth: 12/23/1990 Sex: F

Race: W SSN: 414672166 Driver License #: 108967871 Issuing State: TN

State ID #: County Offender ID #(if applicable): TOMIS/TDOC #:

Relationship to Victim: Victim's Age:

State Control #: Arrest Date: 8/18/2012 Indictment Filing Date: 5/8/2013

JUDGMENT ☑ Original ☐ Amended ☐ Corrected

Come the parties for entry of judgment on the 8th day of March, 2017, the defendant:

☐ Pled Guilty ☐ Dismissed / Nolle Prosequi	Indictment: Class (circle one) 1st (A) B C D E ☐ Felony ☑ Misdemeanor
☐ Pled Nolo Contendere	Indicted Offense Name AND TCA §: DRIVING UNDER THE INFLUENCE 55100401
☑ Pled Guilty - Certified Question Findings Incorporated by Reference	Amended Offense Name & TCA§:
	Offense Date: 8/18/2012 County of Offense: Hamilton
Is Found: ☐ Guilty ☐ Not Guilty	Convicted Offense Name & TCA§: Driving under the influence 55100401
☐ Jury Verdict ☐ Not Guilty by Reason of Insanity	Indictment: Class (circle one) 1st A B C D E ☐ Felony ☐ Misdemeanor
☐ Bench Trial	Is this offense Methamphetamine related? ☐ Yes ☑ No
	Sentence Imposed Date: Sentence stayed pending resolution of certified question on appeal

After considering the evidence, the entire record, and in the case of sentencing, all factors in Tennessee Code Annotated Title 40, Chapter 35, all of which are incorporated by reference herein, it is ORDERED and ADJUDGED that the conviction described above is imposed hereby and that a sentence and costs are imposed as follows:

Offender Status (Check One)	Release Eligibility (Check One)			Concurrent With:	Pretrial Jail Credit Period(s):
☐ Mitigated	☐ Mitigated 20%	☐ Agg Rob w/Prior 100%	☐ 1st Degree Murder		From ____ To ____
☐ Standard	☐ Mitigated 30%	☐ Multiple Rapist 100%	☐ Drug Free Zone		
☐ Multiple	☐ Standard 30%	☐ Child Rapist 100%	☐ Gang Related		From ____ To ____
☐ Persistent	☐ Multiple 35%	☐ Child Predator 100%	☐ Repeat Violent Off		
☐ Career	☐ Persistent 45%	☐ Agg Rapist 100%		Consecutive To:	From ____ To ____
	☐ Career 60%	☐ Mult 39-17-1324(j) 100%	☐ Agg Child Neg/En 70%		
	☐ Agg Rob 85%	☐ 39-17-1324(a), (b) 100%	☐ Agg Child Neg/En 85%		From ____ To ____
	☐ 40-35-501(i) 100%	☐ Agg Assault w/Death 75%	☐ Meth 100%		
	☐ 39-13-518 100%	☐ Att 1st Degree Murder w/SBI 85%			

Sentenced To: ☐ TDOC ☐ County Jail ☑ Workhouse

Sentenced Length: ___ Years 11 Months 29 Days ___ Hours ☐ Life ☐ Life w/out Parole ☐ Death

Mandatory Minimum Sentence Length: _____ 39-17-417, 39-13-513, 39-13-514, or 39-17-432 in Prohibited Zone or _____ 55-10-401 DUI 4th Offense or _____ 39-17-1324 Possession/Employment of Firearm or _____ 40-39-208, -211 Violation of Sex Offender Registry or _____ Meth (39-17-434, -417, -418)

Period of incarceration to be served prior to release on probation or Community Corrections: ____Months ____Days 48 Hours

Minimum service prior to eligibility for work release, furlough, trusty status and rehabilitative programs: 100 % (Misdemeanor Only)

Alternative Sentence: ☐ Sup Prob ☐ Unsup Prob ☐ Comm Corr (CHECK ONE BOX) ____Years 11 Months 29 Days Effective: after serving 48 hours

WAS DRUG COURT ORDERED AS A CONDITION OF THE ALTERNATIVE SENTENCE? ☐ Yes ☑ No

Court Ordered Fees and Fines:	Cost to be Paid by	Restitution: Victim Name:
$____ Court Costs	☑ Defendant ☐ State	Address:
$ 350 Fine Assessed		
$____ Traumatic Brain Injury Fund(68-55-301 et seq.)		
$____ Drug Testing Fund (TN Drug Control Act)		Total Amount: $____ Per Month $____
$____ CICF $____ Sex Offender Tax		☐ Unpaid Community Service: ____ Hours ____ Days ____ Weeks ____ Months
$____ Other:		

( ) The Defendant having been found guilty is rendered infamous and is ordered to provide a biological specimen for the purpose of DNA analysis.
( ) Pursuant to T.C.A. 39-13-521 the Defendant is ordered to provide a biological specimen for the purpose of HIV testing.
( ) Pursuant to T.C.A. 39-11-524 the Defendant is sentenced to community supervision for life following sentence expiration.
( ) Pursuant to Title 68, Chapter 11, Part 10, the clerk shall forward this judgment to the Department of Health.

Special Conditions: Defendant shall complete Driver Safety School. Defendant's driving privileges in Tennessee to be revoked for 1 year. Plea entered pursuant to reserved Certified question of law attached hereto and incorporated by reference herein and also contained in the Agreed Order on Certified Question.

SUMMERS, PAUL G

Judge's Name

Judge's Signature: By Designation

Date of Entry of Judgment

Counsel for the State Signature (optional)

Defendant/Defendant's Counsel Signature (optional)

I _____, clerk, hereby certify that, before entry by the court, a copy of this judgment was made available to the party or parties who did not provide a signature above.

CR-3419 (Rev. 12-15) RDA 1167

THEREUPON, COURT ADJOURNED PENDING FURTHER BUSINESS OF THE COURT.

S/s PAUL SUMMERS
JUDGE PAUL SUMMERS

IN THE CRIMINAL COURT OF HAMILTON COUNTY, TENNESSEE

NO. 287934

DIVISION II

SR. JUDGE PAUL SUMMERS
By designation

STATE OF TENNESSEE,	)
	)
vs.	)
	)
ROSEMARY L. DECOSIMO.	)
	)

ADDENDUM TO JUDGMENT

As reflected in the attached judgment, the following certified question of law, is incorporated by reference, as is the Agreed Order on Certified Question submitted at the time of the plea,

Certified Question of Law:

> **Whether the trial court erred in not dismissing this case, or alternatively, suppressing the blood alcohol evidence without which the State could not proceed against the defendant on this DUI per se conviction, where *T.C.A.* § 55-10-413(f)[1] is unconstitutional in violation of due process and right to a fair trial under the Fifth, Sixth, and Fourteenth Amendments of the United**

[1] See **Addendum A**, *attached*.

States Constitution and under article I, sections 8 and 9 of the Tennessee Constitution based on the fact that the Tennessee Bureau of Investigation (TBI) receives a $250 BADT/BAT fee in every case in which a conviction is obtained for driving under the influence or other listed offense, wherein a TBI blood test or TBI-calibrated breath test result is used, thereby creating a "contingent-fee-*dependent* system" susceptible to bias because the TBI's testing and interpretation of these tests play the determinative role in the prosecution of the charge, and a jury instruction regarding this statutory incentive in favor of conviction is insufficient to cure the magnitude of the constitutional violation?

APPENDIX H

STATE LISTING -
EXPERT CONTINGENT FEES

- Alabama – Rules of Professional Conduct, Rule 3.4
- Alaska – Rules of Professional Conduct, Rule 3.4
- Arizona – Rules of Professional Conduct, Rule 3.4
- Arkansas – Rules of Professional Conduct, Rule 3.4
- California – Rules of Professional Conduct, Rule 5-310
- Colorado – Rules of Professional Conduct, Rule 3.4
- Connecticut – Rules of Professional Conduct, Rule 3.4
- Delaware – Rules of Professional Conduct, Rule 3.4
- Florida – Rules of Professional Conduct, Rule 4-3.4
- Georgia – Rules of Professional Conduct, Rule 3.4
- Hawaii – Rules of Professional Conduct, Rule 3.4
- Idaho – Rules of Professional Conduct, Rule 3.4
- Illinois – Rules of Professional Conduct, Rule 3.4
- Indiana – Rules of Professional Conduct, Rule 3.4
- Iowa - Rules of Professional Conduct, Rule 32:3.4
- Kansas – Rules of Professional Conduct, Rule 3.4

- Kentucky – Rules of the Supreme Court, Rule 3.130(3.4)
- Louisiana – Rules of Professional Conduct, Rule 3.4
- Maine - Rules of Professional Conduct, Rule 3.4
- Maryland - Rules of Professional Conduct, Rule 19-303.4
- Massachusetts – Rules of Professional Conduct, Rule 3.4
- Michigan - Rules of Professional Conduct, Rule 3.4
- Minnesota - Rules of Professional Conduct, Rule 3.4
- Mississippi - Rules of Professional Conduct, Rule 3.4
- Missouri – Rules of Professional Conduct, Rule 4-3.4
- Montana – Rules of Professional Conduct, Rule 3.4
- Nebraska – Rules of Professional Conduct, Rule 3-503.4
- Nevada – Rules of Professional Conduct, Rule 3.4
- New Hampshire – Rules of Professional Conduct, Rule 3.4
- New Jersey – Disciplinary Rules of Professional Conduct, Rule 3.4
- New Mexico – Rules of Professional Conduct, Rule 3.4
- New York – Rules of Professional Conduct, Rule 3.4

- North Carolina – Rules of Professional Conduct, Rule 3.4
- North Dakota – Rules of Professional Conduct, Rule 3.4
- Ohio – Rules of Professional Conduct, Rule 3.4
- Oklahoma – Rules of Professional Conduct, Rule 3.4
- Oregon – Rules of Professional Conduct, Rule 3.4
- Pennsylvania – Rules of Professional Conduct, Rule 3.4
- Rhode Island – Rules of Professional Conduct, Rule 3.4
- South Carolina – Rules of Professional Conduct, Rule 3.4
- South Dakota – Rules of Professional Conduct, Rule 3.4
- Tennessee – Supreme Court Rule 8, Rules of Professional Conduct, Rule 3.4
- Texas – Disciplinary Rules of Professional Conduct, Rule 3.04
- Utah – Supreme Court Rule 13, Rule of Professional Conduct, Rule 3.4
- Vermont – Rules of Professional Conduct, Rule 3.4
- Virginia – Rules of Professional Conduct, Rule 3.4
- Washington – Rules of Professional Conduct, Rule 3.4

- West Virginia – Rules of Professional Conduct, Rule 3.4
- Wisconsin – Supreme Court Rule 20, Rules of Professional Conduct, Rule 3.4