No. E2017-00696-SC-R11-CD

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

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| STATE OF TENNESSEE,<br>Appellant,<br><br>v.<br><br>ROSEMARY L. DECOSIMO,<br>Defendant/Appellee. | On Appeal by Permission from the Tennessee Court of Criminal Appeals, No. E2017-00696-CCA-R3-CD<br><br>Hamilton County Criminal Court, No. 287934; Hon. Paul G. Summers |

# Brief of *Amici Curiae*, National Association of Criminal Defense Lawyers and Tennessee Association of Criminal Defense Lawyers, Filed in Support of the Defendant/Appellee

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## INTRODUCTION AND STATEMENT OF INTEREST

Pursuant to Tennessee Rule of Appellate Procedure 31, the National Association of Criminal Defense Lawyers and the Tennessee Association of Criminal Defense Lawyers respectfully submit this joint brief as *amici curiae*. As permitted by Tennessee Rule of Appellate Procedure 27(b), the *amici* defer to the jurisdictional statement, statement of the issues, statement of the case, statement of the facts, and standard of review as set forth in the parties' briefs.

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice.

NACDL files numerous *amicus* briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.[1] To ensure the integrity of the criminal justice system, NACDL is committed to improving the reliability of forensic science and the labs and practitioners responsible for testing forensic evidence.[2] In addition to supporting the groundbreaking National Academy of Sciences Report, *Strengthening Forensic Science in the United States: A Path Forward*, NACDL's Board of

[1] NACDL's *amicus* briefs may be accessed at https://www.nacdl.org/amicus/ (last visited May 8, 2018).
[2] NACDL's statement regarding crime labs and forensics reform is available at https://www.nacdl.org/criminal-defense/crime-labs-and-forensics-reform/ (last visited May 9, 2018).

Directors has adopted additional *Principles and Recommendations to Strengthen Forensic Evidence and Its Presentation in the Courtroom*.[3] NACDL is routinely involved in federal and state initiatives to improve the accuracy and reliability of forensic science by setting priorities and making recommendations for standards development, training programs, proficiency testing, and independent investigations.

The Tennessee Association of Criminal Defense Lawyers ("TACDL") is a non-profit corporation chartered in Tennessee in 1973. It has over 1000 members statewide, primarily lawyers who actively represent persons accused of criminal offenses. TACDL seeks to promote study and provide assistance within its membership in the field of criminal law. TACDL is committed to advocating for the fair and effective administration of criminal justice. Its mission includes education, training, and support to criminal defense lawyers, as well as advocacy before the courts and the legislature. TACDL has a special interest in advocating for the interests of criminal defendants, including those found guilty and incarcerated.

The local and national *amici* have an interest in this case because the independence of forensic scientists who provide expert proof in criminal cases is required to protect the integrity of the entire criminal justice system. This case affects whether an individual accused of a drug- or alcohol-related crime has a due process right to a criminal proceeding devoid of a financial incentive for a state-employed forensic scientist, whose role in providing expert evidence or testimony requires that the scientist remain independent and avoid any potential for bias. This case also affects the appropriate level of scrutiny and the proper due process framework for analyzing the constitutionality of the state statute that mandates this type of financial incentive.

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[3] A PDF of NACDL's February 2010 report may be downloaded at https://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=21802&libID=21772.

## SUMMARY OF THE ARGUMENT

The primary purpose of this *amici* brief is to explain why the Court should apply strict scrutiny and hold that Tennessee Code Annotated section 55-10-413(f) is unconstitutional on substantive due process grounds. The secondary purpose of the *amici* brief is to clarify various due process principles that have been misapprehended or misapplied by the State.

Section 55-10-413(f) requires the payment of a $250 fee when the Tennessee Bureau of Investigation ("TBI") provides expert proof to local law enforcement agencies in the form of a blood alcohol or drug concentration test. Notably, the fee is assessed only when the expert proof provided by the TBI results in a conviction for certain crimes, including driving under the influence ("DUI"). Because the statute creates an impermissible contingent-fee system that interferes with the fundamental right of a criminal defendant to a fair trial, it is subject to strict scrutiny. The State cannot meet its burden of showing that the statute is narrowly tailored to serve a compelling state interest because there are less intrusive alternatives for funding the TBI's forensic science division. Accordingly, when the Court applies the correct legal standards under the appropriate due process framework, the result should be to affirm the Court of Criminal Appeals' decision in favor of the defendant.

## ARGUMENT

"Substantive due process claims may be divided into two categories: (1) deprivations of a particular constitutional guarantee[,] and (2) actions by the government which are 'arbitrary, or conscience shocking[,] in a constitutional sense.'" *Lynch v. City of Jellico*, 205 S.W.3d 384, 392 (Tenn. 2006) (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 128 (1992)). The first step in any substantive due process analysis is to determine the asserted constitutional interest at stake. *Washington v. Glucksberg*, 521 U.S. 702, 722 (1997). Depending on whether the asserted interest

is a fundamental constitutional right, the Court must apply either strict scrutiny or rational basis review to determine when the government has exceeded its authority and violated due process. *Gallaher v. Elam*, 104 S.W.3d 455, 463 (Tenn. 2003) (citing *Riggs v. Burson*, 941 S.W.2d 44, 51 (Tenn. 1997)).

In this case, Tennessee Code Annotated section 55-10-413(f) encroaches upon the right to a fair trial in a criminal proceeding. Because this is a fundamental liberty interest, the Court should apply strict scrutiny and find that the conviction-dependent funding scheme in section 55-10-413(f) deprives criminal defendants of the constitutional guarantee of a fair trial. Even if the Court does not apply strict scrutiny, the statute should be struck down because it creates an appearance of impropriety that offends the principles of due process.

## I. Applying strict scrutiny, this Court should find that section 55-10-413(f) is more restrictive than is necessary to achieve the State's interest in funding the TBI's forensic testing operation.

The substantive due process issue before the Court hinges on two main questions: (1) whether the conviction-dependent funding regime of section 55-10-413(f) implicates a fundamental right; and (2) if so, whether the statute is narrowly tailored to serve a compelling state interest. *Gallaher*, 104 S.W.3d at 463.

### A. Because section 55-10-413(f) encroaches upon the criminal defendant's fundamental right to a fair trial, strict scrutiny is the applicable standard of review.

Substantive due process requires the application of strict scrutiny when a regulation implicates a liberty interest that is so rooted in the history and tradition of our system of justice that it has been deemed "fundamental." *Michael H. v. Gerald D.*, 491 U.S. 110, 122–23 (1989) (plurality opinion); *Lynch*, 205 S.W.3d at 392. The term "liberty" encompasses more than just the freedom from physical restraint. *Glucksberg*, 521 U.S. at 719–20. One of the most fundamental liberty interests protected by the federal and state constitutions is the right of a criminal defendant

to a fair trial. *Estes v. Texas*, 381 U.S. 532, 560 (1965) ("[S]tate prosecutions must, at the least, comport with 'the fundamental conception' of a fair trial."); *State v. Ferguson*, 2 S.W.3d 912, 917 (Tenn. 1999) ("[W]e deem the preservation of the defendant's fundamental right to a fair trial to be a paramount consideration . . . ."); *see also* U.S. Const. amends. VI, XIV; Tenn. Const. art. I, § 8. In evaluating whether a state regulation interferes with the right to a fair trial, the U.S. Supreme Court has warned against a limited, "formalistic[]" reading of the relevant constitutional protections. *Estes*, 381 U.S. at 560. Accordingly, a statute implicates a criminal defendant's fundamental right to a fair trial whenever it permits "the intrusion of factors into the trial process that tend to subvert its purpose." *Id.*

The most basic "purpose of a criminal trial, or for that matter any legal proceedings aimed at developing facts, is the ascertainment of truth." *Roberts v. State*, 489 S.W.2d 263, 265 (Tenn. Crim. App. 1972). To that end, trial judges have long been understood as the "gatekeepers" who "must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589 (1993). Whether by statute, rule, or common law, "virtually every jurisdiction" in the U.S. ensures the reliability of scientific testimony or evidence, in part, by prohibiting the payment of contingency fees to expert witnesses. Steven Lubet, *Expert Witnesses: Ethics and Professionalism*, 12 Geo. J. Legal Ethics 465, 477 (1999) (citing *Tagatz v. Marquette Univ.*, 861 F.2d 1040, 1042 (7th Cir. 1988), and *Swafford v. Harris*, 967 S.W.2d 319, 323 (Tenn. 1998)); *see also 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 . . . contingent on the outcome of a controversy."). In Tennessee, specifically, the prohibition of contingent expert compensation has been codified into this Court's Rules of Professional Conduct

and has been "adopted by the State as the public policy of Tennessee." *Swafford*, 967 S.W.2d at 322; *see also* Tenn. Sup. Ct. R. 8, RPC 3.4(h) & cmt. 4.

Moreover, Tennessee's appellate courts have held that due process concerns forbid the presentation of expert testimony in criminal cases when the testimony "casts any doubt on the fairness of the proceedings." *State v. Larkin*, 443 S.W.3d 751, 800 (Tenn. Crim. App. 2013) (quoting *State v. Tate*, 925 S.W.2d 548, 555 (Tenn. Crim. App. 1995)); *accord Johnson v. McReynolds*, Shelby Equity No. 35, 1990 WL 204298, at *4 (Tenn. Ct. App. Dec. 17, 1990). When payment is conditioned on the outcome of litigation, expert witnesses are improperly incentivized to present outcome-oriented testimony or evidence—an incentive that encourages bias and runs contrary to an expert's duty to accurately evaluate the evidence for the jury. *See Swafford*, 967 S.W.2d at 322 (citing *Belfonte v. Miller*, 243 A.2d 150, 153 (Pa. Super. Ct. 1968)). Even in the absence of actual bias, courts have recognized that allowing contingency payments to expert witnesses engenders the appearance of bias, thereby "threaten[ing] the integrity of the judicial system." *Dupree v. Malpractice Research, Inc.*, 445 N.W.2d 498, 500 (Mich. Ct. App. 1989); *see also Crowe*, 334 F.3d at 132 ("Th[e] rule was adopted precisely to avoid even potential bias."); *Larkin*, 443 S.W.3d at 800 ("A criminal defendant's due process rights walk hand-in-hand with maintaining the integrity of the criminal justice system and promoting the public's confidence in the system."). In the criminal context, therefore, the ban on contingent fees is absolute. *See* Note, *Contingent Fees for Expert Witnesses in Civil Litigation*, 86 Yale L.J. 1680, 1713 n.12 (1977) (noting that "policy considerations in criminal litigation have led to a prohibition of all contingent fees, including attorney contingent fees" and "contingent expert compensation").

This rule against outcome-contingent compensation for expert witnesses dates back more than 100 years. *See, e.g., Laffin v. Billington*, 86 N.Y.S. 267, 269 (App. Term 1904); *Sherman v.*

*Burton*, 130 N.W. 667, 668 (Mich. 1911); *see also* Restatement (First) of Contracts § 552(2) (1932) ("[P]ay[ing] an expert witness for testifying to his opinion . . . is illegal . . . if the agreed compensation is contingent on the outcome of the controversy."). In fact, the rule is so entrenched in the history and tradition of our society that it has become a principle of professionalism among forensic scientists as expert witnesses. As the State has admitted, the TBI's forensic scientists are prohibited from "accept[ing] or participat[ing] in any case on a contingency fee basis or in which they have any other personal or financial conflict of interest or an appearance of such a conflict."[4] ANSI-ASQ National Accreditation Board, "2017 ISO/IEC 17025 Forensic Accreditation Documents," *Guiding Principles of Professional Responsibility for Forensic Service Providers and Forensic Personnel* 2, available at https://www.anab.org/2017-iso-iec-17025-forensic-accreditation-documents; *see* State's Br. 20. In short, the extensive and consistent maintenance of the rule against contingent-based expert fees demonstrates that the rule is deeply rooted in the history and tradition of our system of justice. *See Glucksberg*, 521 U.S. at 710, 719 (examining our nation's evolving philosophical, cultural, ethical, medical, spiritual, and legal mores to determine the history and tradition of rules prohibiting assisted suicide).

Section 55-10-413(f) creates an unconstitutional expert witness payment system by mandating that the TBI be paid a set fee in exchange for evidence that leads to the conviction of a criminal defendant. The payment required by section 55-10-413(f) is properly classified as an expert contingency fee because the core function of TBI forensic scientists is to provide expert proof, and the payment required for that proof is a fee that is "contingent upon . . . the outcome of the case." Lubet, *supra*, at 477. In fact, both the trial court and the Court of Criminal Appeals

[4] This ethical requirement, by its plain terms, must be read in the disjunctive: a forensic scientist is prohibited from participating in any case that involves (1) a contingency fee, (2) a personal conflict of interest, (3) a financial conflict of interest, (4) an appearance of a personal conflict of interest, or (5) an appearance of a financial conflict of interest.

determined that the conviction-dependent funding scheme in section 55-10-413(f) is a contingency-fee arrangement between the State's prosecutors and the TBI's forensic scientists as expert witnesses. *State v. Decosimo*, No. E2017-00696-CCA-R3-CD, 2018 WL 733218, at *6, *14, *16 (Tenn. Crim. App. Feb. 6, 2018).

In the trial court, "[t]he [S]tate [did] not dispute that the contingent fee of [section] 413(f) gives TBI forensic scientists and expert witnesses a financial interest in DUI convictions." Order at 4 (Dec. 11, 2014) (Steelman, Stern, Poole, JJ.). This financial interest in the outcome of a criminal case—whether it encourages actual bias or merely engenders the appearance of bias—threatens the integrity of the entire criminal justice system. *See Crowe*, 334 F.3d at 132; *Dupree*, 445 N.W.2d at 500; *Larkin*, 443 S.W.3d at 800. "In each case[,] 'due process of law' requires an evaluation based on a disinterested inquiry pursued in the spirit of science." *Rochin v. California*, 342 U.S. 165, 172 (1952). In the DUI cases currently before the Court, the evidence used to convict the defendants was not based on a "disinterested inquiry pursued in the spirit of science," as it should have been. Instead, the forensic evidence was based on financially incentivized test results that were pursued in the spirit of convicting criminal defendants. Because such outcome-contingent payments to scientific experts are strictly prohibited in criminal cases, section 55-10-413(f) runs contrary to the longstanding rules of public policy, professional ethics, and due process discussed above.

Furthermore, these concerns are amplified by the nature of TBI forensic scientists' role in the criminal justice system and the impact of the proof they supply in criminal proceedings. Reports by TBI forensic scientists analyzing blood and "other bodily substances" are presumptively admissible as evidence against a criminal defendant. Tenn. Code Ann. § 38-6-103(g). And, as noted by the Court of Criminal Appeals in this case, a toxicology report submitted

by a TBI forensic scientist is routinely the sole proof needed to secure a conviction or, more commonly, to induce a guilty plea. *Decosimo*, 2018 WL 733218, at *13. Under Tennessee law, due process concerns are heightened when expert proof pertains to "key issues" to the "prosecution." *Larkin*, 443 S.W.3d at 803. Given the critical nature of the expert proof provided by TBI scientists—along with its presumptive admissibility in criminal litigation—when the proof is tainted by a contingency payment scheme, the effect is to introduce a "factor into the trial process that tend[s] to subvert its purpose." *Estes*, 381 U.S. at 560.

As a result, section 55-10-413(f) interferes with the fundamental right to a fair trial in criminal cases, meaning that strict scrutiny is the appropriate standard of review.

### B. Section 55-10-413(f) cannot withstand strict scrutiny because it is not narrowly tailored to serve the State's interest in funding the forensic testing performed by the TBI.

Because section 55-10-413(f) is subject to strict scrutiny, the State must demonstrate two things: (1) that the burden on the right to a fair trial imposed by section 55-10-413(f) is justified by a compelling state interest; and (2) that section 55-10-413(f) is narrowly tailored to achieve that state interest. *City of Memphis v. Hargett*, 414 S.W.3d 88, 102 (Tenn. 2013) (citing *Bemis Pentecostal Church v. State*, 731 S.W.2d 897, 903 (Tenn. 1987)). A regulation does not qualify as narrowly tailored if there are any alternative means of achieving the state interest. *Id.*

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

First, the State has not attempted to meet its burden of demonstrating the absence of less intrusive alternatives to the contingency-fee structure of section 55-10-413(f). That alone compels the conclusion that the statute fails to meet strict scrutiny. *See McCullen v. Coakley*, 134 S. Ct. 2518, 2524 (2014) ("To meet the narrow tailoring requirement, . . . the government must demonstrate that alternative measures . . . would fail to achieve the government's interests . . . .").

Second, there are readily available alternatives that impose less of a burden on a criminal defendant's right to a fair trial. The General Assembly has already adopted one such alternative by enacting legislation, currently pending approval by the Governor, which would allocate all fees collected pursuant to section 55-10-413(f) to the general fund instead of directing the fees to a fund used to pay the salaries of TBI forensic scientists. S.B. 1974 / H.B. 1959, 110th Gen. Assemb., Reg. Sess. (Tenn. Apr. 24, 2018). Another alternative is that section 55-10-413(f) could be modified to provide for the payment of a fee for forensic testing regardless of whether the testing results in a conviction, making it so that the payment does not constitute a contingency fee for expert proof. The implementation of either or both of these alternatives would result in a less intrusive regulation, and the State has failed to demonstrate that these alternatives would not achieve its interest in maintaining forensic testing operations.

Accordingly, section 55-10-413(f) is not narrowly tailored, and this Court should affirm the decision of the Court of Criminal Appeals that the statute imposes an unconstitutional burden on the right to a fair trial.

## II. Even if strict scrutiny does not apply, none of the State's arguments demonstrate that section 55-10-413(f) comports with due process principles.

Regardless of the applicable standard of review, the State's arguments for the constitutionality of section 55-10-413(f) are unavailing because the State relies almost exclusively on cases that are inapplicable or distinguishable under these circumstances. To assist the Court in

its application of the appropriate legal authorities within the due process framework, the *amici* emphasize the following four principles: (1) the impartiality required of forensic scientists in their role as expert witnesses, as opposed to various categories of non-expert witnesses; (2) the financial independence required of expert witnesses, as distinguished from prosecutors or other government officials; (3) the prohibition of any appearance of impropriety in a criminal case, even in the absence of a direct financial conflict of interest; and (4) the presumption in favor of excluding expert proof that is constitutionally suspect, regardless of whether the expert is actually biased.

### A. Partiality on the part of TBI forensic scientists is not consistent with due process.

First, the State asserts that sustaining the due process challenge in this instance "would be at odds with a number of long-standing statutes and practices that accept, and even encourage, some partiality on the part of witnesses and non-judicial actors, including interests that are contingent on the outcome of the case or proceedings." State's Br. 19–20 (citing *State v. Bolden*, 979 S.W.2d 587, 591–93 (Tenn. 1998), *United States v. Cuellar*, 96 F.3d 1179, 1182–83 (9th Cir. 1996), *United States v. Branham*, 97 F.3d 835, 852–53 (6th Cir. 1996), and other similar authorities). Notably, the authorities cited by the State all involve accomplices, informants, and whistleblowers. *See id.* Our criminal justice system tolerates partiality and bias on the part of those non-expert witnesses. But the TBI's forensic scientists are not accomplices, informants, or whistleblowers. Instead, they occupy the role of the expert witness, and, as such, any payment for their services that is contingent upon the outcome of litigation is both unethical and contrary to the public policy of Tennessee. *Swafford*, 967 S.W.2d at 323.

### B. The conviction-dependent, contingency-fee system in this case is different than the administrative system of assessing civil penalties at issue in *Marshall v. Jerrico*.

Equally unconvincing is the State's assertion that the due process challenge here is foreclosed by *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980). *See* State's Br. 12–14. In *Marshall*,

the U.S. Supreme Court upheld a statutory system in which civil penalties assessed by an administrative prosecutor were returned to the prosecutor's agency to offset the costs involved in the assessment of the penalties. *Id.* at 239, 252. The Court held that the strict due process requirements applicable to officials performing adjudicatory functions—as established in a line of cases beginning with *Tumey v. Ohio*, 273 U.S. 510 (1927)—were "not applicable to those acting in a prosecutorial or plaintiff-like capacity." *Marshall*, 446 U.S. at 248. The core rationale in *Marshall* was that prosecutors, unlike judges, "need not be entirely 'neutral and detached,'" and "are necessarily permitted to be zealous in their enforcement of the law." *Id.* (quoting *Ward v. Vill. of Monroeville*, 409 U.S. 57, 61–62 (1972)).

Nevertheless, the Court in *Marshall* observed that "[a] scheme injecting a personal interest, financial or otherwise, . . . may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions." *Id.* at 249–50. Considering the civil penalties at issue in *Marshall*, the Court identified several reasons why the circumstances in that case did not rise to the level of constitutional concern:

- "No governmental official stands to profit economically from vigorous enforcement . . . of the Act. The salary of the [administrative prosecutor] is fixed by law." *Id.* at 250.
- "[T]he civil penalties . . . represent substantially less than 1% of the budget [of the administrative prosecutor's agency]." *Id.*
- The administrative prosecutor's agency "is in no sense financially dependent on the maintenance of a high level of penalties." *Id.* at 251.
- The administrative prosecutors "have no assurance that the penalties they assess will be returned to their offices at all." *Id.*

In summary, the Court held that the administrative prosecutor's system of assessing and collecting civil penalties did not violate due process because the alleged possibility of bias was "exceptionally remote." *Id.* at 250, 252.

All of the circumstances in *Marshall* are distinguishable from the facts in *Decosimo*. First, the State's reliance on *Marshall* is misplaced because prosecutors "are expected to behave in a biased—although not improperly biased—manner, whereas the expert must remain objective and independent, both in fact and in appearance." Jeffrey J. Parker, *Contingent Expert Witness Fees: Access and Legitimacy*, 64 S. Cal. L. Rev. 1363, 1371–72 (1991) (footnote omitted); *see also* Dr. Cyril Wecht, *The Role of the Forensic Scientist in Maintaining Integrity in the Criminal Justice System*, 52 S. Tex. L. Rev. 459, 460 (Spring 2011 Symposium) ("Forensic scientific investigation must be an objective, independent endeavor. We are not part of the armamentarium of the prosecutor's office. We are not an extension of the prosecutor's office."); Committee on Identifying the Needs of the Forensic Sciences Community, National Research Council, *Strengthening Forensic Science in the United States: A Path Forward* 23 (Aug. 2009), https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf ("Scientific and medical assessment conducted in forensic investigations should be independent of law enforcement efforts either to prosecute criminal suspects or even to determine whether a criminal act has indeed been committed."). Neither *Marshall* nor the *Tumey* line of cases addresses the applicability of due process principles to expert witnesses in criminal cases. However, given that Tennessee public policy expressly requires the independence of expert witnesses, *see Swafford*, 967 S.W.2d at 323, the Court should reject the State's invitation to apply a relaxed due process standard when evaluating a contingency payment scheme for the services of state-employed forensic scientists.

Second, the financial interest created by section 55-10-413(f) is not "exceptionally remote" as it was in *Marshall*. Unlike the administrative prosecutor's agency in *Marshall*, the TBI is guaranteed to recoup the $250 fee assessed for each conviction secured by its scientists' expert proof. *See* Tenn. Code Ann. § 55-10-413(f)(2) (providing that the funds collected shall be

deposited in a toxicology testing fund for the exclusive use of the TBI). Between 2009 and 2012, the accumulation of these fees amounted to a $1.6 million surplus for the TBI, which was facing significant budget cuts that included the potential elimination of several forensic scientist positions. *Decosimo*, 2018 WL 733218, at *3. The fees collected pursuant to section 55-10-413(f) have guaranteed the availability and security of those forensic scientist positions. *Id.* at *17; *see also* Tenn. Code Ann. § 55-10-413(f)(3)(C) (requiring that the toxicology testing fund be used, among other things, to "fund a forensic scientist position in each of the three (3) bureau crime laboratories . . . [and] to employ forensic scientists to fill these positions"). Thus, the TBI and its forensic scientists have become financially dependent on these fees, which now account for a significant portion of the TBI's annual budget and the scientists' salaries. *Decosimo*, 2018 WL 733218, at *17.

For all of these reasons, the Court should not be distracted by the State's argument that *Marshall*—a civil case involving a quasi-prosecutorial administrative official—somehow precludes the application of due process principles in this criminal case involving a contingency-fee system between the State and its expert witnesses.

### C. The TBI's pecuniary interest in obtaining criminal convictions is sufficient to sustain the due process claim.

Following its reliance on *Marshall*, the State attempts to portray the pecuniary interest created by section 55-10-413(f) as too remote to establish an appearance of partiality on the part of the TBI's forensic scientists. The State claims that "a financial incentive creates an appearance of partiality . . . only if that interest is a 'direct, personal, substantial pecuniary interest in reaching a conclusion against [the defendant]' in a particular case." State's Br. 14 (quoting *Ward*, 409 U.S. at 60) (second alteration in original). However, a careful reading of the applicable precedent shows that the State's formulation of this rule is inaccurate.

In *Tumey*, where a mayor was authorized to assess criminal penalties and keep the proceeds, the Court held that the mayor had a "direct, personal, substantial pecuniary interest" in the conviction of criminal defendants, which violated due process. *Tumey*, 273 U.S. at 523. In *Ward*, the Court clarified that the facts of *Tumey* "did not define the limits of the principle" and held that the type of direct financial incentive in *Tumey* is not required to establish an appearance of impropriety. *Ward*, 409 U.S. at 60; *see also United States v. Jordan*, 49 F.3d 152, 155–56 (5th Cir. 1995) ("Put simply, avoiding the appearance of impropriety is as important in developing public confidence in our judicial system as avoiding impropriety itself."). The Court later reaffirmed this conclusion, explaining that "the financial stake need not be as direct or positive as it appeared to be in *Tumey*" for a bias-inducing regulation to violate due process. *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973); *see also Estes*, 381 U.S. at 541 (rejecting the State's argument that proof of prejudice is required for a denial of due process, and discussing various cases in which the Court has "found instances in which a showing of actual prejudice is not a prerequisite to reversal" on due process grounds).

The correct standard is whether the regulation creates a "possible temptation to the average man" to depart from the impartiality required of his position, which occurs when the regulation makes an official "partisan to maintain the high level of contribution" that comes from criminal convictions. *Ward*, 409 U.S. at 60 (quoting *Tumey*, 273 U.S. at 532, 534). Section 55-10-413(f) creates precisely that type of temptation by making the TBI, its forensic testing division, and the salaries of the forensic scientists dependent upon fees that result directly from criminal convictions. That is what distinguishes this case from those relied upon by the State, in which the financial incentive was too remote because the officials' salaries or the departmental budgets were not dependent on outcome-contingent fees. *See, e.g., Dugan v. Ohio*, 277 U.S. 61, 65 (1928)

(finding that there was no "dependence . . . upon convictions for compensation for [the official's] services"); *Jones v. Greene*, 946 S.W.2d 817, 826 (Tenn. Ct. App. 1996) (upholding a civil forfeiture law where neither the government official nor his department received any benefit from the forfeiture proceeds). The conviction-dependent funding scheme in section 55-10-413(f)—which has generated more than $22 million for the TBI since 2005 and has guaranteed that the TBI's forensic scientists will continue to be employed—directly violates the prohibitions of a financial conflict of interest and the appearance of a financial conflict of interest.

Accordingly, the Court of Criminal Appeals properly concluded that the financial interest created by section 55-10-413(f) is substantial enough to give rise to a possible temptation for a TBI forensic scientist to depart from the impartiality required by law.

### D. The Court of Criminal Appeals properly suppressed the forensic evidence without requiring a showing of actual bias.

Finally, the State challenges the Court of Criminal Appeals' conclusion that suppression of the TBI's forensic evidence was the proper remedy for the due process violation caused by section 55-10-413(f). According to the State, under *State v. Larkin*, even when expert proof is presumptively inadmissible because of an appearance of bias, the State should be able to rebut that presumption by showing a lack of actual bias, thereby "demonstrat[ing] the error to be harmless beyond a reasonable doubt." State's Br. 21 (alteration in original) (quoting *Larkin*, 443 S.W.3d at 801). This argument by the State is premised upon a misinterpretation of *Larkin* and a misapplication of the harmless error standard for constitutional violations.

In *Larkin*, the Court of Criminal Appeals adopted a "modified appearance of impropriety standard" for determining when a defense expert switching sides and testifying for the State results in a violation of due process. *Larkin*, 443 S.W.3d at 801. Under that standard, expert testimony must be excluded on due process grounds if it "poses a substantial risk of disservice to the public

interest and/or the defendant's fundamental right to a fair trial." *Id.* The court provided a non-exhaustive list of factors—none of which focuses on actual bias—and held that "due process concerns mandate a presumption" against the admission of constitutionally suspect expert proof in criminal cases. *Id.* The presumption of a due process violation will stand "[u]nless the record clearly demonstrates" that the expert proof does not pose a substantial risk of disservice to the public interest or the defendant's fundamental right to a fair trial. *Id.* Harmless error comes into play only when an appellate court determines that a trial court erroneously admitted expert proof, at which point the State must demonstrate "beyond a reasonable doubt" that the admission of the improper expert proof "did not contribute to the verdict obtained." *Id.* at 801, 804 (quoting *State v. Rodriguez*, 254 S.W.3d 361, 371 (Tenn. 2008)).

Applying the principles from *Larkin* here, section 55-10-413(f) poses a substantial risk of disservice to the public interest because it makes the expert proof provided by TBI scientists subject to an outcome-contingent fee, thereby "threaten[ing] the integrity of the judicial system." *Dupree*, 445 N.W.2d at 500. The statute also poses a substantial risk to the defendant's right to a fair trial by attaching an improper financial incentive to expert testimony or evidence that results in a criminal conviction. The TBI's scientific proof—which is sufficient on its own to sustain the defendant's conviction—relates to "the key issues . . . in this [DUI] prosecution." *Larkin*, 443 S.W.3d at 803–04. This factor "weighs heavily in favor of" excluding the proof on due process grounds. *Id.* The State cannot rebut the presumption in favor of excluding this expert proof by showing a lack of actual bias; indeed, the court in *Larkin* held that the admission of the expert proof violated due process without any finding of actual bias on the part of the expert. *See id.* at 801–04. Finally, given that the toxicology report was the primary factual basis for the DUI prosecution in this case, the State is plainly unable to demonstrate that the TBI's expert proof did

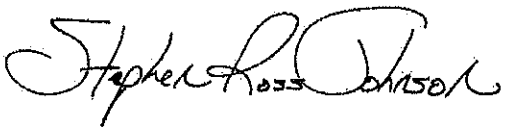
not contribute to the defendant's conditional nolo contendere plea. Accordingly, the State cannot show that the trial court's error in refusing to suppress the expert proof was harmless beyond a reasonable doubt.

In sum, a proper application of the principles from *Larkin* confirms that the Court of Criminal Appeals appropriately ordered the suppression of the expert proof submitted by the TBI.[5]

## CONCLUSION

The Court of Criminal Appeals properly concluded that the contingency-fee system created by section 55-10-413(f) offends the principles of due process. *See Decosimo*, 2018 WL 733218, at *6–8, *16–17. Therefore, this Court should affirm the Court of Criminal Appeals' decision and require the suppression of all evidence obtained in violation of the defendant's due process rights.

Respectfully submitted by:



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[5] The General Assembly appears to agree with the Court of Criminal Appeals that the direct and substantial funding of the TBI through these conviction-dependent fees is unconstitutional. *See* Hearing Before the Senate Finance, Ways and Means Committee, S.B. 1974, 110th Gen. Assemb., Reg. Sess. (Tenn. Apr. 24, 2018), available at http://tnga.granicus.com/MediaPlayer.php?view_id=354&clip_id=15224&meta_id=358955. The constitutionality of the amended version of section 55-10-413(f) is not at issue in this case and is not ripe for the Court's review. As explained in the Defendant's Supplemental Brief, the enactment of the new legislation would not render the issue in this case moot because a favorable judgment is necessary to provide meaningful relief to the Defendant and similarly situated litigants. *See Hargett*, 414 S.W.3d at 96 ("An issue becomes moot if an event occurring after the commencement of the case . . . prevents the prevailing party from receiving meaningful relief in the event of a favorable judgment.").

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