

IN THE CRIMINAL COURT OF HAMILTON COUNTY, TENNESSEE

STATE OF TENNESSEE, : NO. 290128  
 :  
vs. : DIVISION I  
 :  
AMANDA N. HARB. : JUDGE BARRY STEELMAN

**MOTION TO DISMISS:**  
**BLOOD TESTING EVIDENCE**

COMES NOW defendant Amanda N. Harb, by and through counsel, and moves the Court pursuant to *Tenn.R.Crim.P.* 12 to dismiss the above-styled case, or, in the alternative, moves this Court for an Order that any evidence relating to blood or breath testing (for ethyl alcohol or any other substance) which was performed, evaluated, certified, confirmed or otherwise generated by the Tennessee Bureau of Investigation [TBI] or on equipment certified by the TBI be excluded from evidence at the trial of the instant matter.

AS GROUNDS, defendant was arrested at approximately 2:18 a.m. on May 5, 2013, by Trooper Stoney Morton of the Tennessee Highway Patrol and taken to the Hamilton County Jail (“Jail”) on a charge of Driving Under the Influence and related charges. Once at the Jail, defendant was asked to consent to a chemical test to determine blood alcohol content. Blood was procured for the purposes of testing and sent for chemical testing to the Nashville Laboratory of the Tennessee Bureau of Investigation, a Tennessee law enforcement entity<sup>1</sup>, where the blood was allegedly subjected to ethyl alcohol testing. The Official Alcohol Report subsequently generated by Special Agent Melinda Quinn and provided to defendant in discovery purports to show a blood alcohol content of 0.13 %. Defendant was subsequently indicted and is pending a jury trial.

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<sup>1</sup> TENN. CODE ANN. § 38-6-103(c) “[t]he Tennessee crime laboratory and all regional crime laboratories shall be under the supervision of the director of the bureau of the director’s designated representatives.”

## ARGUMENT

### Tennessee's Statutorily Prescribed DUI Fee System Creates a Direct and Substantial Pecuniary Incentive for the Forensic Services Division of the TBI to Procure Criminal Convictions.

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

By analogy, the evidence proffered by the State and generated by the TBI in this case is no less tainted by a financial conflict of interest than the situation in *Connally*. According to figures released by the TBI, the agency collected \$2,881,181.39 for the fiscal year 2012-2013<sup>2</sup>, based solely on convictions obtained in Driving Under the Influence and related cases. This revenue is directly traceable to the \$250 Blood Alcohol or Drug Concentration Test (BADT) fee and other fees assessed by statute *upon conviction* against any defendant who underwent a breath or blood alcohol chemical test.<sup>3</sup> The revenue generated by these convictions does not go to the general fund of the state, but is eventually deposited exclusively for use by the TBI in the 'TBI

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<sup>2</sup> For the first four months of 2013 fiscal year, starting July 1 and up to October 1 (the most recent data available), TBI had so far collected \$949,627.46.

<sup>3</sup> TENN. CODE ANN. § 55-10-413(f)(1), see Addendum A.

Toxicology Unit Intoxicant Testing Fund.’

The money from these convictions is designated,

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.

TENN. CODE ANN. § 55-10-413(f)(3)(B).

Notably, this money is earmarked to directly finance laboratory salaries and other tangible benefits to laboratory personnel, while surplus money reverts to TBI’s other law enforcement operations. See *id.* Like the search warrant fees in *Connally* which were only earned where the magistrate issued the warrant, the TBI fees are outcome dependent and generated for TBI only in the event that the defendant is criminally convicted either by plea or trial.

In essence, a fee system which links, directly and inextricably, payment to TBI to the procurement of a conviction violates fundamental fairness and substantive due process. This is not merely a question of bias or interest, which is properly addressed in cross-examination, but rather infects the legitimacy of the toxicology evidence itself – evidence upon which juries so heavily rely – and the integrity of the trial. See TENN. CODE ANN. § 38-6-103(g) (statutorily designating TBI test results as “prima facie admissible into evidence in any judicial or quasi-judicial proceeding”).

Moreover, the mere fact that the revenue generated is not paid personally to the testing or testifying Special Agent does not change the analysis. See *Ward v. Village of Monroeville*, 409

U.S. 57 (1972) (finding a constitutional violation “[a]lthough the mayor had no direct personal financial stake in the outcome of cases before him, a major portion of the village’s income was derived from the fines, fees, and costs imposed in the mayor’s court”). The case law recognizes that, at its core, financial interests can be broader and still have the same corrupting and improper effect on results that are otherwise supposed to be objective and neutral.

WHEREFORE, defendant moves this Court to dismiss the case for violations of due process and defendant’s right to a fair trial under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and art. I, sections 8 and 9 of the Tennessee Constitution, which would be inherent if the State proceeds in reliance on the tainted and inadmissible laboratory findings. Defendant further moves the Court to rule that the portions of TENN. CODE ANN. § 55-10-413 which assign fees to the TBI based on convictions in cases wherein the TBI has supplied testing and/or testimony is unconstitutional in violating a defendant’s due process and fair trial rights.

ALTERNATIVELY, defendant moves the Court to rule in advance of trial that admission of any and all toxicology evidence obtained, conducted, handled, or derived from the TBI’s Forensic Services Division or obtained on equipment certified by the TBI, is inadmissible as it would result in a denial of due process and defendant’s right to a fair trial under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and art. I, sections 8 and 9 of the Tennessee Constitution. Absent exclusion, defendant moves that the jury be instructed as to the TBI’s and/or testifying agent’s direct and substantial financial interest in the outcome of the trial and, necessarily, in the ultimate conviction of the defendant.

Respectfully submitted,

SUMMERS & WYATT, P.C.,

By: 

Jerry H. Summers, BPR No. 534  
The James Building  
735 Broad Street, Suite 800  
Chattanooga, Tennessee 37402  
(423) 265-2385; (423) 266-5211/fax

By: 

Benjamin L. McGowan, BPR No. 25560  
The James Building  
735 Broad Street, Suite 800  
Chattanooga, Tennessee 37402  
(423) 265-2385; (423) 266-5211/fax


**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that a true and correct copy of the foregoing document has been duly served upon:

AMANDA MORRISON  
Assistant District Attorney  
600 Market Street, Room 310  
Chattanooga, TN 37402

either by hand delivery or by placing a copy of same in the United States mail, properly addressed with sufficient postage affixed thereto to carry same to its destination.

This 2<sup>nd</sup> day of January 2014

  
Benjamin L. McGowan

**TENN. CODE ANN. § 55-10-413, Fees**

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

(A) 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.

(B) 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.