

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

United States of America

v.

Aticha Jittaphol

No. 21-CR-10270-MLW

DEFENDANT’S PRELIMINARY MEMO RE PROBATION PETITION

In response to Probation’s Petition for Action on Conditions of Pretrial Release, the Court ordered the parties to file memoranda by February 23rd. Ms. Jittaphol intends to file an additional memorandum by that date, more fully addressing the matter. However, Ms. Jittaphol wishes to now provide the Court with information regarding the Petition and give the Court the option to compel observed urine testing. Ms. Jittaphol has not used methamphetamine or any other illegal drug since she was admitted to a detox on December 6, 2021. Accordingly, Ms. Jittaphol provides the Court with a chronology of relevant events.

January 20, 2022

During a hearing scheduled for Waiver of Indictment and Plea to Information, the Court ordered Probation to conduct regular urine tests. Prior to the hearing, and after Ms. Jittaphol’s release from treatment, Probation had conducted one urine test, with a sample taken on January 11th and a negative result reported on January 18th. After January 11th, until the hearing, Probation used a sweat patch for testing and stopped urine testing, based on a policy of not having a woman observe the taking of a urine sample from an individual with male genitals, and Ms. Jittaphol expressing discomfort over being observed by a

man. A sweat patch was removed for testing on January 14th; a negative result was reported on January 25th.

Immediately after the hearing, counsel spoke to Ms. Jittaphol about the importance of allowing a man to observe urine sampling. Ms. Jittaphol agreed that she would permit a man to observe, and to promptly tell this to Probation.

Ms. Jittaphol went to the court after the Zoom hearing. A sweat patch was removed for testing and replaced. The removed patch recently tested positive.

January 21, 2022

Ms. Jittaphol went to the court and provided a urine sample. She did not meet Ms. Wertz and believes that she spoke with a male supervisor. She offered to provide a urine sample while observed by a man. She was told that it was “fine” to provide the sample unobserved. She questioned whether unobserved testing would cause a problem that could result in her soon having to come back to provide another sample and was told it would not be a problem. The urine sample was taken unobserved. A negative result was reported on January 27th.

January 26, 2022

Ms. Wertz conducted a home visit. Prior to the visit, she did not tell Ms. Jittaphol of her intention to take a urine sample. From the time that Ms. Wertz arrived until when Ms. Jittaphol went into a bathroom to provide a sample, Ms. Jittaphol was never outside of Ms. Wertz’s observation. A negative result was reported on February 1st.

January 27, 2022

Ms. Jittaphol went to the court. A sweat patch was removed for testing. The result has not yet been produced. No new patch was put on.

February 3, 2022

Ms. Jittaphol went to the court and met with Ms. Wertz. She again offered to be observed by a man, and Ms. Wertz replied that it was, “O.K.” to provide a urine sample unobserved. A negative result was reported on February 7th.

February 7, 2022

Ms. Jittaphol went to the court and a new sweat patch was placed. She also provided another unobserved urine sample to Ms. Wertz.

The result of the sweat patch test for the patch removed on January 20th was received, with a positive finding for methamphetamine.

Probation files Petition for Action.

February 11, 2022

In response to concerns raised by counsel, including the failure to notify the Court or counsel of the negative tests, Probation agreed to produce the test results and inform the Court of the negative results. However, in a phone call between counsel, Ms. Wertz and Ms. Affsa, Probation asserted that the negative urine tests were unreliable because the sampling was unobserved and Ms. Jittaphol could have provided someone else’s urine, despite acknowledging that Ms. Jittaphol had offered to be observed by a man. Probation speculates that Ms. Jittaphol brought someone else’s urine to court even though she repeatedly offered to be observed, knew that she could avoid observation and provide the imagined counterfeit

sample if she just kept quiet, and had no way of knowing whether Probation would take her up on her offer to be observed. Ms. Affsa stated that Probation would consider what to do about conducting observed sampling. Thus, despite the Court's order requiring urine testing, and Ms. Jittaphols's repeatedly raising the fact that she had no objection to being observed by a man, Probation now maintains that the tests it conducted should not be deemed reliable.

Counsel did a Google search for medical literature on the topic of reliability of sweat patch vs. urine test, and in a matter of seconds found numerous articles stating that sweat patch tests have a far higher rate of false positives. One such article is Joseph A. Levisky, et al., *Comparison of Urine to Sweat Patch Test Results in Court Ordered Testing*, Forensic Science International 122, 65-68 (2001), finding a "... high incidence of false positive sweat patch tests," and referencing studies reporting false positive rates of 21.1% in cocaine detection and 7.9% in opiate detection. *See* Attachment 1.

Counsel did a caselaw search for First Circuit opinions concerning sweat patches and immediately found *United States v. Alfonso*, 284 F.Supp.2d 193 (D. Mass. 2003), in which Judge Young expressed concern over the reliability of sweat patches and emphasized that his finding that the defendant had likely used drugs was based on the repetition of four positive patch tests.

In summary, the testing of Ms. Jittaphol since January 2022 is as follows:

<u>Type of Test</u>	<u>Date of Sample</u>	<u>Date of Result</u>	<u>Result</u>
Urine	1/11/22	1/18/22	Negative

Patch	1/14/22	1/27/22	Negative
Patch	1/20/22	2/7/22	Positive
Urine	1/21/22	1/27/22	Negative
Urine	1/26/22	2/1/22	Negative
Urine	2/3/22	2/7/22	Negative
Urine	2/7/22		

ATTICHA JITTAPHOL

By her Attorney,

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CERTIFICATE OF SERVICE

I hereby certify that this document, filed through the ECF system, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on February 12, 2022.

/s/ Keith Halpern