

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

United States of America

v.

Aticha Jittaphol

No. 21-CR-10270-MLW

**DEFENDANT'S POST-HEARING MEMORANDUM**

Defendant wishes to add a few remarks to those made in closing argument.

Counsel asked why it was that Ms. Jittaphol was the only person being patch tested. The Court interjected that Probation had been ordered to do the testing. The issue counsel intended to raise was not why she had been singled out for testing, but why everyone else was not being patch tested. This goes to counsel's opinion that the materials attached to the Court's April 4, 2022 Order were useless, and that Probation's conduct indicates that it, too, finds the documents unpersuasive.

In 1998, the Administrative Office documented a PharmChem executive's statements that the patch was better than urine tests -- more reliable, less subject to adulteration, less expensive. If the patch test has been so good for the past 24 years, and if FDA approval in 1995 means that the test is an equally reliable and less expensive alternative to urine testing, then why isn't Probation using it for everyone? Probation has declined to answer the question. Counsel thinks it may have something to do with scientific literature reporting false positive rates of up to 21%.

Initially, Probation's use of the patch was to be sensitive to Ms. Jittaphol

being transgender. But the rationale for continuing the patch test after Ms. Jittaphol agreed to being observed, and the Court's continuation of the protocol, is more difficult to understand. Counsel suspects that Ms. Jittaphol may be the only transgender defendant being drug tested, and also may be the only person being patch tested at all. Probation has declined to say whether anyone other than Ms. Jittaphol is being patch tested. Ms. Jittaphol is not the only defendant to have a positive drug test. Are the others being patch tested? If the only defendant being patch tested also is the only transgender defendant, continuing this protocol despite Probation's apparent belief that urine testing is more reliable than patch testing, consistent with all the scientific literature, is problematic.

Counsel noted that if the two positive tests were accurate, it is extremely difficult to square Ms. Jittaphol's use of methamphetamine a couple of times this year with a lengthy addiction history of daily use, several times a day, and an inability to stop. Probation speculated, as did the Court, that Ms. Jittaphol's drug treatment could account for the occasional use. This speculation deserves some further consideration. Ms. Jittaphol has not received treatment guidance on how to use just once in a while. How exactly would treatment to eliminate drug use help an addict avoid a full-blown relapse if they use again? Getting treatment for alcoholism and going to AA meetings does not make it more likely that someone can have an occasional drink and avoid relapse. Treatment does not explain the inconsistency. Nothing does.

It also should be noted how much luck would have to be involved to

account for the negative urine tests if the sweat patch tests were legitimate.

Counsel pointed out that the 72-hour window mentioned by Ms. Wertz is based on a PharmChem document, and this is not a particularly reliable source given the company's goal of replacing urine testing ("It stinks"). The defendant has provided evidence supporting a 3-7 day window, Ex. 14, American Addictions Center article, and medical literature finding "highly variable" methamphetamine metabolite elimination, "highly dependent on urinary pH." Ex. 32, Wagner article, p.1. But even if a 72-hour window were assumed, then there would be a period of 2-3 days that was covered by the first positive patch on 1/27/22 that was not covered by a negative urine on 1/26/22, and she would have had to stop use after those 2-3 days. *See* Ex. 6, Wertz Memo, p.3. All the negative urines were randomly conducted. Putting aside the idea that she has developed the remarkable ability to use and then stop for weeks, it would be extraordinary if Ms. Jittaphol somehow managed to use meth only on occasions when she would not be caught by a urine test. There is a much simpler explanation: she didn't use.

ATICHA 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 April 9, 2022.

/s/ Keith Halpern