UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION at LEXINGTON
No. 5:14-CR-74-6-DCR

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| UNITED STATES OF AMERICA, | ) | |
| | ) | **Defendant's Exceptions to Magistrate's Order & Opinion Regarding Discovery Request and Motion for Issuance of Subpoenas** |
| Plaintiff | ) | |
| | ) | |
| vs. | ) | |
| | ) | |
| KATHERINE MICHELLE JONES, | ) | |
| | ) | |
| Defendant | ) | |
| | ) | **e-filed** |

The right of defendant Katherine Michelle Jones to the information and documentation sought by her discovery request and motion for issuance of subpoenas is secured her by the due process principles recognized by the Supreme Court in *Morrissey v. Brewer,* 408 U.S. 471 (1972) and codified in Fed.R.Crim.Pro. 32.1. Jones is entitled to a fair and meaningful opportunity to refute or impeach the evidence against her in order to assure that any finding of a supervised release violation will be based on verified facts. Two circuits, the Seventh and Fifth, have indicated that the type of information sought by her discovery request and motion for subpoenas is properly obtained by a defendant in supervised release revocation proceedings.

Jones respectfully submits that the magistrate judge erred in denying entirely her *Defendant's Discovery Request re Supervised Release Violation Report* (DE 416) and *Motion for Issuance of Subpoenas* (DE 420) by the *Memorandum Opinion and Order* (DE 426). Accordingly, Jones requests the

Court to enter an Order granting both her discovery request and motion for subpoenas.

## Statement of the Case

The United States has moved for revocation of defendant's supervised release, the basis for the request being as follows. On November 18, 2016, a Pharmchek "sweatpatch" manufactured by PharmChem, Inc. was applied to defendant's arm, where it remained to November 28. The "sweatpatch" was then sent to Clinical Reference Laboratory for analysis. The drug test results were reported positive for cocaine and marijuana. It appears, although it remains to be seen if this is so, that the sweatpatch was subjected to an initial and a confirmatory test.

Jones denies use of either marijuana or cocaine in the relevant time period. In support of her position, she has filed in the record the results of drug tests administered through her doctor's office (defendant is a Suboxone patient and therefore subject to regular urinalysis testing) and at the Montgomery County Detention Center, which was part of the ongoing requirements for judicial proceedings related to defendant's relationship with her child. *See Notice of Filing* (DE 414). In sum, Jones disputes the reliability and accuracy of the test results derived from the sweatpatch, and she has presented evidence supporting her position.

The discovery and subpoena requests sought information and documentation regarding the (1) testing performed on the sweatpatch applied to defendant, and, (2) reliability and/or accuracy issues regarding the sweatpatch, whether such information and/or documentation was possessed by the United

States, the sweatpatch manufacturer, PharmChem, Inc., the FDA, or the lab. *See Defendant's Discovery Request re Supervised Release Violation Report* (DE 416); *Motion for Issuance of Subpoenas* (DE 420)

The magistrate denied completely both defendant's discovery request and the motion for issuance of subpoenas. The magistrate did indicate that a more limited subpoena to the lab would be approved; defendant so moved and a subpoena was authorized and limited to "test results and lab documentation regarding Sample ID 58221948." *Defendant's Amended Motion for Issuance of Subpoena to Clinical Reference Laboratory* (DE 427); *Order* (DE 428).

## Argument

### Defendant Is Entitled to the Information and Documentation Sought by Her Discovery Request and Motion for Issuance of Subpoenas

Fed.R.Crim.Pro. 32.1 governs supervised release revocation proceedings, providing in part most pertinent at present that a defendant "is entitled to … an opportunity to appear, present evidence, and question any adverse witness unless the court determines that the interest of justice does not require the witness to appear[.]" Fed.R.Crim.Pro. 32.1(b)(2)(C).

The "same procedural requirements applicable to hearings regarding revocation of parole apply to hearings regarding revocation of supervised release." *United States v. Lowenstein,* 108 F.3d 80, 85 (6th Cir. 1997). A defendant's due process rights in supervised release proceedings include the "opportunity to be heard in person and to present witnesses and documentary evidence." *Morrissey v. Brewer,* 408 U.S. 471, 489 (1972). This should not be read as a static or categorical articulation of due process, as the Court cautioned

in *Morrissey*: "It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands. ... not all situations calling for procedural safeguards call for the same kind of procedure." 408 U.S. at 481.

The Ninth Circuit in *United States v. Martin,* 984 F.2d 308 (9th Cir. 1993), perhaps has stated best the general rule: "We construe that right as requiring that a supervised releasee receive a fair and meaningful opportunity to refute or impeach the evidence against him in order 'to assure that the finding of a [supervised release] violation will be based on verified facts.'" 984 F.2d at 310, *quoting Morrissey,* 408 U.S. at 484.

In *Martin,* the defendant contested the drug test results reported by PharmChem. At the supervised release revocation hearing, the defendant requested his sample be retested, a request the district court denied. 984 F.2d at 309-10. Based solely on the test results and the testimony of a drug counselor who collected the sample, the district court revoked defendant's supervised release and imposed an enhanced term of imprisonment based on the drug test results. *Id.*

The Ninth Circuit reversed and held that the denial of defendant's request for a retest violated his confrontation right.[1] First, the court advised that the

[1] The court acknowledged that the defendant's retest request could be evaluated "as a possible violation of Martin's right to present evidence in his own behalf" and that "[s]uch an approach might be preferred in other cases." 984 F.2d at 310 n.3. Because the "primary purpose of the requested retest was to impeach directly the accuracy of the test results submitted by the government," the court concluded the best approach would be to *Morrissey* right to confrontation approach. *Id.* Here, while Jones does seek to impeach the accuracy of the test results, it is anticipated that the information and documentation obtained by way of the discovery request and/or the requested subpoenas will also provide a platform for her to affirmatively present expert testimony directed also at the accuracy of the test results. Accordingly, Jones' rights both to present evidence and of confrontation are at issue here.

defendant's confrontation right should be construed "as requiring that a supervised releasee receive a fair and meaningful opportunity to refute or impeach the evidence against him in order 'to assure that the finding of a [supervised release] violation will be based on verified facts.'" 984 F.2d at 310, *quoting Morrissey,* 408 U.S. at 484.

Second, the Ninth Circuit (as does the Sixth) applies a balancing test comparing the releasee's confrontation right against the government's rationale for denying it. 984 F.2d at 310; *Lowenstein, supra,* 108 F.3d at 85. *Martin* identified five factors to consider in this balancing test: (1) the importance of the evidence to the court's finding, (2) the defendant's opportunity to refute the evidence, (3) the consequences of the court's findings, (4) the difficulty and expense of procuring witnesses, and (5) the traditional indicia of reliability borne by the evidence. 984 F.2d at 310-11.[2]

Third, the *Martin* court began by examining the "specific parameters of a releasee's right to confrontation," a topic for which it then found "sparse" authority, a condition that endures. *Morrissey,* however, the court noted, emphasized "the flexible nature of due process" eschewing a "static right." 984 F.2d at 310. As this Court has observed, "[t]he *Morrissey* right to confrontation is one that must be contoured to 'the specific circumstances presented.'" *Johnson v. Samuels*, No. CIV.A. 05-CV-419-KKC, 2005 WL 2219288 at *2 (E.D. Ky. Sept. 12, 2005), *quoting Martin*, 984 F.2d at 311.

[2] The Sixth Circuit cited *Martin* and applied these factors in its analysis in *United States v. Torrez,* 132 F.3d 34 (table), 1997 WL 745520 (6th Cir. 1997).

While recognizing that a "releasee's *Morrissey* rights at a revocation hearing" are less than those of a defendant at trial, the *Martin* court, nevertheless, had "no difficulty in concluding that [the defendant's] *Morrissey* right to confrontation was substantial," because of "the importance of the evidence to the Court's ultimate finding, the virtually complete denial of any opportunity to review the evidence, and the consequences of the court's finding." *Id*. at 311.

The importance of the evidence derived from the Supreme Court's requirement that findings be based on "verified facts." *Id*. The point being that "[t]he more significant particular evidence is to a finding, the more important it is that the releasee be given an opportunity to demonstrate that the proffered evidence does not reflect 'verified fact.'" *Id*. The lab results in *Martin* (like the lab results here) were "uniquely important" to the district court's finding that the defendant possessed and used a controlled substance, a reality granting defendant "a very strong interest in refuting the laboratory results [.]" *Id*. Jones' interest here is likewise.

Despite the defendant's "very strong interest" in refuting the laboratory results, the district court's denial of his retest request had left defendant "virtually no opportunity to refute the test results." 984 F.2d at 311. This "nearly complete denial of *any* confrontation" with regard to such important and central evidence weighed "heavily" in the balancing process. *Id*. A retest, the court observed, "would have allowed him to impeach more directly the positive laboratory results [.]" *Id*.

The third factor – the consequences of the possession finding – further supported the court's conclusion that the defendant's "right to confrontation was substantial." *Id*. at 312. Those consequences were, of course, an enhanced prison term. Jones here faces similar consequences.

The court attached no weight to the fourth factor – the difficulty or expense in presenting a witness – "because the government provided no substitute for live testimony." *Id*. at 313. That no alternative was permitted, one alternative being retesting, further supported this conclusion. *Id*.

The fifth factor – reliability of the drug test results – presented "a more difficult issue." *Id*. Then in 1989 there was judicial acceptance of the reliability of urinalysis reports. *Id*. Nevertheless, the court observed that no evidence established that the urinalysis "reports are always inherently reliable." *Id*. Furthermore, the court noted that although "PharmChem has extensive experience in this area" and that "its reports carry greater indications of "reliability," it was insufficient to outweigh the defendant's right to confrontation. *Id*. at 314.

*Martin* holds that a defendant's confrontation right was violated by the district court's refusal of the defendant's retest request. Jones has not previously requested a retest; rather, she has sought types of information from several sources. The type of information and documentation that Jones seeks is the same type that two circuits, the Seventh in *United States v. Pierre,* 47 F.3d 241 (7th Cir. 1995), and the Fifth Circuit in *United States v. McCormick,* 54 F.3d 214 (5th Cir. 1995), have indicated that a defendant could and should seek to challenge drug test results in supervised release proceedings.

In *Pierre,* the government moved for revocation of the defendant's probation based on a number of positive drug test results. "[The defendant] denied using drugs and insisted that the lab reports must be in error." 47 F.3d at 242. The proof in support of revocation was written and included "laboratory analyses, together with chain-of-custody forms" and "an affidavit by the lab's director, describing the kind of tests performed and the efficacy of these procedures." *Id.*

The defendant's main argument on appeal to the Seventh Circuit was that "the prosecutor had to put in live testimony showing that his urine actually contained cocaine or its metabolites." *Id.* "Not so" responded the Seventh Circuit, pointing out that the rules of evidence do not apply to revocation proceedings, that "written reports of medical tests are in the main reliable," and that "a prosecutor may rely on documents at a probation revocation hearing without any need to demonstrate that live testimony is unavailable or impractical." *Id.* The probation revocation was affirmed.

More important to present purposes, the Seventh Circuit also discussed in *Pierre* the types of evidence and the steps a defendant could take to challenge the reliability of written drug test results. First, the court observed that a "defendant is entitled to go beneath the surface of written reports." *Id.* Toward that end "he may subpoena the technician to obtain live testimony, in the nature of cross-examination of the reports." *Id.* But the court also observed that this measure may not prove helpful or effective, since the technician could not be expected to testify to anything beyond the lab's "normal procedures" and nothing specific regarding the defendant's specimen. *Id.* at 243.

Beyond this the Seventh Circuit suggested that a "court could inquire whether this lab, in particular, produces reliable results[,]" a measure entailing use of "statistical methods" and requiring "information on the error rate of PharmChem, the lab that analyzed [defendant's] samples." *Id.* The court assumed "that reputable labs collect such information, putting samples through their tests on a double-blind basis to find out how frequently their employees err and to learn how to improve their procedures," all information the defendant "might have sought … from PharmChem" but did not. *Id.* Alternatively, the court suggested that "before engaging a laboratory or renewing its contract, the government submits an assortment of samples containing different drugs (and the statistically appropriate number of sample known not to be contaminated) to see how well the lab distinguishes among them." *Id.* But again the defendant "did not seek from the government any information of this kind." *Id.* Finally, "[i]f neither PharmChem nor the Executive Branch of government collects this information, [defendant] could have asked the district court to distrust PharmChem's reports until the United States put the lab to such a test." *Id.*

*McCormick* is similar and to the same effect. The defendant was subject to supervised release revocation due to, among other things, positive drug test results, the testing also having been performed by PharmChem Laboratories. The government offered at the revocation hearing testimony from a probation officer regarding the test results and chain of custody; an affidavit from PharmChem's lab director "describing PharmChem's general testing procedures and results specific to analyses conducted on [the defendant's] urine specimen." 54 F.3d at

218. The government also introduced other testimony from the probation officer in support of revocation. *Id.*

As did the defendant in *Pierre,* the defendant in *McCormick* contended on appeal to the Fifth Circuit that his right of confrontation was violated by denial of opportunity to cross-examine the lab techs, which, in turn, denied him fair opportunity to challenge the reliability of the PharmChem test results. *Id.* at 222.

The Fifth Circuit rejected the defendant's argument and relied upon the Seventh Circuit's decision and analysis in *Pierre*. *Id.* at 222-223. As did the Seventh Circuit in *Pierre,* the Fifth Circuit observed that there were numerous avenues available to the defendant to "impeach or refute the government's evidence" none of which he took and which included the following: (1) "he could have sought a subpoena ordering [the appearance of the lab techs or the lab director]; (2) he "could also have requested that his specimen be retested by PharmChem or another laboratory"; (3) "he could have sought to obtain evidence impugning the reliability of the laboratory or its testing methods." *Id.*

The information sought by defendant by way of her discovery request and motion for issuance of subpoenas is of the kind that the courts in both *Pierre* and *McCormick* indicated a defendant in supervised release revocation proceedings could and should properly seek consistent with her due process right to impeach or refute the government's evidence against her. PharmChem, consistent with the Seventh Circuit's observation in *Pierre,* can reasonably be assumed to collect information regarding the reliability of its sweatpatch to include "data, reports, internal studies etc. concerning … (a) false positive test results [derived from the sweatpatch]; and/or, (b) contamination of the sweatpants during its application.,

following removal and during testing." It appears that PharmChem's sweatpatch is FDA-approved; accordingly, that agency can reasonably be expected to have information regarding the same issues. Finally, Clinical Reference Laboratory, if a reputable lab and consistent again with the Seventh Circuit's observation in *Pierre,* can reasonably be expected to compile and maintain information regarding problems and issues it has encountered with the sweatpatch. Also consistent with the Seventh Circuit's observation in *Pierre,* the Executive Branch, the United States, can be expected to have developed and established or compiled some information regarding the reliability and/or lack thereof of the sweatpatch or the lab, which is the information that defendant's discovery request sought.

Jones stands on stronger ground in making her discovery request and subpoena request than did the defendants in *Martin, Pierre* or *McCormick*. Those defendants offered merely a denial of drug use; Jones has offered evidence – two negative drug test results – supporting her position. While a theory can be constructed to disregard Jones' evidence, the Court is required to make findings based on verified fact not supposition.

The magistrate characterized both defendant's discovery and subpoena requests as "a fishing expedition." *Memorandum Opinion and Order* at 6 n. 3, 7, PageID 1554-55. The magistrate added that defendant had not shown that PharmChem, the United States, the FDA or Clinical Reference Laboratory possessed any of the type of information she sought, or, if they possessed information of the type she sought that it would be relevant and material to her position. *Memorandum Opinion and Order* at 4-8, Page ID 1552-1555.

The analyses in *Pierre* and *McCormick* answer both these assertions. First, rather than being a "fishing expedition," *Pierre* and *McCormick* support defendant's discovery and subpoena requests as proper and consistent with her due process right to a fair opportunity to refute or impugn the evidence against her. Likewise, consistent with *Pierre* and *McCormick* defendant has shown the materiality of the requested information to her case.

The magistrate is correct that defendant has not shown that PharmChem, the United States, the FDA or Clinical Reference Laboratory actually do possess any of the information she seeks, or, if they do, that it will prove supportive of her position. This should not, however, foreclose her effort to obtain the requested information. *Pierre* and *McCormick* would indicate that these parties can reasonably be expected to possess such information, and that defendant's due process right to a fair opportunity to refute or impugn the evidence against her establishes sufficiently the necessity of the requested information. In addition, the absence of such information would cast doubt on the government's evidence against defendant, since the lack of ongoing efforts to assess and assure reliability should raise doubts for the Court regarding defendant's test results.

The magistrate, while expressing concern about whether Fed.R.Crim.Pro 16 had any application in the supervised release context, *Memorandum Opinion* at 3, did note that Jones was invoking section (a)(1)(E)(i), which makes discoverable, documents and materials etc. "material to the preparation of the defense." *Memorandum Opinion* at 5, PageID 1553. However, the magistrate then cited a Seventh Circuit case, *United States v. Neal,* 512 F.3d 427 (7th Cir. 2008), and a Ninth Circuit case, *United States v. Tham*, 884 F.2d 1262, 1265 (9th

Cir. 1989), for the proposition that neither "due process [nor] Rule 32.1 ... require disclosure of such evidence." *Memorandum Opinion* at 5, PageID 1553.

The analyses and discussion in *Pierre* and *McCormick* establish the materiality of the information Jones seeks from the government. Both courts chided the defendant for failing to request from the government information casting light on the drug test results. *Pierre,* 47 F.3d at 243; *McCormick,* 54 F.3d at 222-23 & n. 30. Rule 16, it would seem, is the proper vehicle for Jones' request.

The flexible concept of due process that *Morrissey* mandates prevents a reading of *Neal* and *Tham* as establishing a rule precluding Jones' discovery request. Again, *Pierre* and *McCormick* distinguish Jones' request from those involved in *Neal* and *Tham*. Furthermore, this difference changes the due process calculus to render *Neal* and *Tham* inapposite to the present case.

The magistrate also indicated that Jones' discovery request should be denied, because neither the United States Attorney for the Eastern District of Kentucky nor the United States Probation Office for the Eastern District of Kentucky possessed the requested information. *Memorandum Opinion* at 5. The discovery obligations of the United States of America is not so limited.

"[I]information 'in the possession of the government' under Rule 16(a)(1)(C) may sometimes include out-of-district documents of which the prosecutor has knowledge and to which the prosecutor has access." *United States v. Bryan,* 868 F.2d 1032, 1036 (9th Cir. 1989). "Nothing in the text of Rule 16(a)(1)(C) suggests that the government's obligation to allow a defendant 'to inspect and copy or photograph' documents within its possession which are 'material,' or are intended to be used in the government's case-in-chief, or were

obtained from or belong to the defendant is satisfied by turning over only those documents physically located within the district in which the defendant is tried." *Id*. "Limiting 'government' to the prosecution alone unfairly allows the prosecution access to documents without making them available to the defense." *United States v. Robertson*, 634 F. Supp. 1020, 1025 (E.D. Cal. 1986), *aff'd,* 815 F.2d 714 (9th Cir. 1987); *see United States v. Auten,* 632 F.2d 478, 481 (5th Cir. 1980) ("different arms of the government are [not] such separate entities as to be insulated from the other"). There has been no representation from the U.S. Attorney's office nor from the probation office that the requested documents are not accessible; neither has there been an assertion that their production might or would be unduly burdensome or expensive. Since *Pierre* and *McCormick* indicate that the requested documents are material that the United States should reach beyond its local offices is not grounds to deny Jones' request.

The magistrate also questioned whether Fed.R.Crim.Pro. 17(b) applied in supervised release revocation proceedings and noted defense counsel's neglect in addressing the issue. *Memorandum Opinion and Order* at 7. The discussion in *Pierre* and *McCormick* regarding what the defendant could have subpoenaed for use at his supervised release revocation hearing indicate an affirmative answer to the question. *Pierre,* 47 F.3d at 243 ("Pierre did not procure subpoenas for either the technicians or the head of the laboratory"); *McCormick,* 54 F.3d at 222 ("[defendant] could have sought a subpoena"). Courts have found that Rule 17 subpoenas can be used for post-trial motions and sentencing. *See U.S. v. Winner,* 641 F.2d 825, 833 (10th Cir.1981) ("Although Rule 17 subpoenas are generally employed in advance of trial, we see no reason why their use should not be

available for post-trial motions and sentencing."); *U.S. v. Boender,* 2010 WL 1912425 *1 (N.D.Ill.2010) ("Although the structure of the federal rules as well as Rule 17's plain language suggest that the rule was meant to apply only before trial, courts have held that Rule 17 affords parties the ability to subpoena evidence for post-trial matters."); *see also U.S. v. Reaves,* 194 F.3d 1315, 1999 WL 824833 (6th Cir.1999) (unpublished) (applying Rule 17 in the context of a sentencing hearing); 2 Wright & Miller, *Federal Practice & Procedure* § 272 (4th ed. 2011) (Rule 17 is not limited to subpoenas for the trial. A Rule 17 subpoena may be issued for a preliminary examination, a grand jury investigation, a deposition, for a pre-trial motion, and for a post-trial motion.); *United States v. Reid*, No. 10-20596, 2011 WL 5075661, at *2 (E.D. Mich. Oct. 26, 2011). Accordingly, Jones respectfully submits that Rule 17 applies in a supervised release revocation hearing.

## Conclusion

For the foregoing reasons, the Court should issue an Order granting defendant's discovery request and her motion for issuance of subpoenas.

Respectfully submitted,

BY: s/Robert L. Abell
ROBERT L. ABELL
120 N. Upper St.
Lexington, KY 40507
859-254-7076 (phone)
859-281-6541 (fax)
E-mail: Robert@RobertAbellLaw.com
COUNSEL FOR DEFENDANT

**Certificate of Service**

I certify that on January 29, 2017, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send notice of electronic filing to the following: All Counsel of Record.

BY: s/Robert L. Abell
Robert L. Abell
COUNSEL FOR DEFENDANT