

1 Probation's ("OAP") Substance Abuse and Alcohol Testing Policy ("OAP Policy") does not cover
2 pre-trial release, i.e. the tests administered by the OAP were impermissible ad hoc tests.

3 After reviewing the facts of this case as well as the relevant law the Court finds that the
4 Commonwealth's motion to revoke Defendant's pre-trial release should be **GRANTED**; the drug
5 testing at issue does not give rise to a 5th Amendment violation and the alleged deficiencies of the
6 OAP Policy do not make denial of the Commonwealth's motion appropriate.

7 **II. BACKGROUND**

8 This case centers on the Commonwealth's allegation that Defendant illegally trafficked,
9 possessed, and conspired to traffic a controlled substance. On December 5, 2016, Defendant
10 appeared before Associate Judge Joseph Camacho ("Judge Camacho") for a bail hearing. A few
11 days later, on December 13, 2015, the Commonwealth filed its information charging Defendant
12 with the aforementioned three offenses. Then, on December 27, 2016, a bail modification hearing
13 was held before Judge Camacho; after which, Defendant was released to a third party custodian
14 after posting a \$100,000 property bond. On February 2, 2017, the Commonwealth sought to have
15 Defendant's bail conditions modified to include random drug testing, which would be administered
16 by the OAP. The undersigned judge granted the Commonwealth's motion. On the same day,
17 Defendant went to the OAP and underwent a drug test, which came up positive for
18 methamphetamine.

19 Thereafter, the Commonwealth filed a motion to revoke Defendant's pre-trial release as a
20 result of his failure to comply with the conditions of his release. On February 15, 2017, the Court
21 heard arguments on the Commonwealth's motion as well as testimony from Probation Officer
22 Oscar Torres ("Officer Torres") about the test in question. During the hearing, Defendant raised a

1 potential 5th Amendment issue. As such, the Court ordered the parties to brief the matter. However,
2 on February 23, 2017, the parties agreed that the Commonwealth would withdraw its motion to
3 revoke Defendant's pre-trial release provided that Defendant agreed to undergo a drug test that day
4 and also be subject to further random drug testing.¹ That evening, Defendant reported to the OAP to
5 undergo the drug test ordered by the Court. Defendant was unable to provide a sample.² Officer
6 Torres determined that he would allow Defendant to provide a sample the next day, February 24,
7 2017. Defendant reported back to the OAP on February 24, 2017, as instructed by Officer Torres,
8 yet once again he tested positive for methamphetamine.

9 Based on the foregoing chain of events, the Commonwealth filed, on December 13, 2016,
10 another motion to revoke Defendant's pre-trial release on the grounds that he has repeatedly failed
11 to comply with the conditions of his release. The Court heard arguments on the motion at the March
12 13, 2017 hearing. At this time, the Court is confronted with the question of whether the
13 circumstances and relevant law justifies revoking Defendant's pre-trial release.

14 III. LEGAL STANDARD

15 Generally, defendants in the CNMI have a right to bail pursuant to 6 CMC § 6401(a), which
16 provides:

17 Any person arrested for a criminal offense . . . shall be entitled as a matter of right to
18 be released on bail before conviction; provided, however, that no person may be so
19 released while so under the influence of intoxicating liquor or drugs that there is a
20 reasonable ground to believe the person will be offensive to the general public

21 ¹ When the first motion to revoke was withdrawn briefing the potential 5th Amendment issue was moot until the
22 Commonwealth's renewed motion to revoke.

23 ² The Commonwealth noted in its submissions to the Court that failing to provide a sample is treated as a positive test
24 under the OAP Policy. *See* OAP Policy at 12.

1 (2) In determining which conditions of release will reasonably assure appearance,
2 the judge shall, on the basis of available information, take into account the nature
3 and circumstances of the offense charged, the weight of the evidence against the
4 accused, the accused's family ties, employment, financial resources, character and
5 mental condition, the length of his/her residence in the community, his/her record of
6 convictions, and his/her record of appearance at court proceedings or of flight to
7 avoid prosecution or failure to appear at court proceedings.

8 (3) A judge authorizing the release of a person under this section shall issue an
9 appropriate order containing a statement of the conditions imposed, if any, shall
10 inform such person of the penalties applicable to violations of the conditions of
11 his/her release and shall advise him/her that a warrant for his/her arrest will be issued
12 immediately upon any such violation.

13 (4) A person for whom conditions of release are imposed and who after 24 hours
14 from the time of the release hearing continues to be detained as a result of his/her
15 inability to meet the conditions of release, shall, upon application, be entitled to have
16 the conditions reviewed by the judge who imposed them. Unless the conditions of
17 release are amended and the person is thereupon released, the judge shall set forth in
18 writing the reasons for requiring the conditions imposed. A person who is ordered
19 released on a condition which requires that he/she return to custody after specified
20 hours shall, upon application, be entitled to a review by the judge who imposed the
21 conditions. Unless the requirement is removed and the person is thereupon released
22 on another condition, the judge shall set forth in writing the reasons for continuing
23 the requirement. In the event that the judge who imposed conditions of release is not
24 available, any other judge may review such conditions.

(5) A judge ordering the release of a person on any condition specified in this section
may at any time amend his/her order to impose additional or different conditions of
release, provided, that, if the imposition of such additional or different conditions
results in the detention of the person as a result of his/her inability to meet such
conditions or in the release of the person on a condition requiring him/her to return
to custody after specified hours, the provisions of subsection (4) shall apply.

(6) Information stated in, or offered in connection with, any order entered pursuant
to this section need not conform to the rules pertaining to the admissibility of
evidence in a court of law

NMI R. CRIM. P. 46(a) unequivocally reinforces the Court's inherent authority to impose and
enforce pre-trial release conditions.

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1 **IV. DISCUSSION**

2 In its motion, the Commonwealth argues that Defendant's release should be revoked
3 because he has repeatedly failed the drug tests administered by the OAP. In response, Defendant
4 argues that when Officer Torres administered the first test, on February 2, 2017, he asked
5 Defendant whether he had been using any drugs. Defendant contends that Officer Torres' questions
6 amounted to an impermissible 5th Amendment custodial interrogation. Further, in the alternative,
7 Defendant argues that even if there is no 5th Amendment violation his pre-trial release should not
8 be revoked because (1) the OAP Policy only applies to persons on probation and/or (2) Officer
9 Torres did not follow the exact procedure outlined in the OAP Policy, which calls into question the
10 validity of the test results.

11 At this stage, the Court is tasked with analyzing Defendant's arguments as well as
12 determining whether Defendant violated the terms of his pre-trial release.

13 **A. Contours of the 5th Amendment as Applied to Pre-Trial Release Conditions.**

14 Defendant's lead argument is that his 5th Amendment rights were violated because Officer
15 Torres testified that he asked Defendant whether he had been using drugs recently. The
16 Commonwealth responds that such questioning does not trigger 5th Amendment protections
17 because questions by a probation officer in connection with pre-trial release drug testing does not
18 amount to an impermissible custodial interrogation.

19 The 5th Amendment guarantees that defendants have a right against self-incrimination as
20 well as the coercive effects of custodial interrogations.³ See U.S. CONST. amend. V; see also NMI

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³ The 5th Amendment of the United States Constitution is applicable in the Commonwealth via the Covenant.
23 COVENANT TO ESTABLISH A COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS IN POLITICAL UNION WITH THE
24 UNITED STATES OF AMERICA, 48 U.S.C. § 1801.

1 CONST. art. I, § 5; *Commonwealth v. Mettao*, 2008 MP 7 ¶ 16. Courts have long held that in a
2 criminal case a defendant's due process rights are violated when the conviction is based, in whole
3 or in part, upon an involuntary confession. *See Mettao*, 2008 MP at ¶ 16 (citing *Rogers v.*
4 *Richmond*, 365 U.S. 534, 540–41 (1961)). Further, any statement made by a defendant, which was
5 elicited during an impermissible custodial interrogation cannot be used by the state in a subsequent
6 adjudication of criminal liability. *See Mettao*, 2008 MP at ¶ 17 (citing *Miranda v. Arizona*, 384 U.S.
7 436, 445 (1966)).

8 As a threshold matter, the Court must first determine if Defendant was in custody because if
9 the alleged interrogation did not take place in custody then the 5th Amendment's right against self
10 incrimination is not activated. *See Mettao*, 2008 MP at ¶ 17. "Custody" has been defined as when a
11 person is formally arrested or otherwise deprived of freedom of action in a significant way. *See*
12 *Mettao*, 2008 MP at ¶ 17 (citing *Miranda v. Arizona*, 384 U.S. at 445; *Orozco v. Texas*, 394 U.S.
13 324, 327 (1969)). Moreover, in *Howes v. Fields*, 565 U.S. 499, 509 (2012), the U.S. Supreme Court
14 recently reaffirmed the contours of "custody," by opining:

15 In determining whether a person is in custody in this sense, the initial step is to
16 ascertain whether, in light of "the objective circumstances of the
17 interrogation," *Stansbury v. California*, 511 U.S. 318, 322–23, 325 (1994) (*per*
18 *curiam*), a "reasonable person [would] have felt he or she was not at liberty to
19 terminate the interrogation and leave." *Thompson v. Keohane*, 516 U.S. 99, 112
20 (1995). And in order to determine how a suspect would have "gauge[d]" his
21 "freedom of movement," courts must examine "all of the circumstances surrounding
22 the interrogation." *Stansbury*, 511 U.S. at 322, 325 (internal quotation marks
23 omitted). Relevant factors include the location of the questioning, see *Maryland v.*
24 *Shatzer*, 559 U.S. 98, 105–06 (2010), its duration, see *Berkemer v. McCarty*, 468
U.S. 420, 437–38 (1984), statements made during the interview, see *Oregon v.*
Mathiason, 429 U.S. 492, 495 (1977); *Yarborough v. Alvarado*, 541 U.S. 652, 665
(2004); *Stansbury*, 511 U.S. at 325, the presence or absence of physical restraints
during the questioning, see *New York v. Quarles*, 467 U.S. 649, 655 (1984), and the
release of the interviewee at the end of the questioning, see *California v. Beheler*,
463 U.S. 1121, 1122–23 (1983) (*per curiam*).

1 (citations were standardized and converted from short forms for clarity).

2 In this case, Defendant argues that when Officer Torres questioned him about drug use, as
3 dictated by the OAP Policy, he was effectively in custody. However, Defendant has failed to
4 demonstrate to the Court how his freedom was interrupted and/or what coercive elements were at
5 play. The Court does not even recall Defendant arguing that the circumstances surrounding the drug
6 tests suggested he was not free to leave and/or exposed to a coercive environment. Quite the
7 opposite, after failing to produce a sample on February 23, 2017 Defendant was allowed by Officer
8 Torres to come back for testing the next day; per the OAP Policy, Officer Torres could have
9 immediately started the process of moving to revoke Defendant's pre-trial release. The U.S.
10 Supreme Court has placed some emphasis on the ability of the defendant to freely leave after an
11 interaction with law enforcement personnel. *See Beheler*, 463 U.S. at 1122–23. In *Beheler*, the
12 defendant voluntarily came to the police station, gave incriminating statements, was allowed to
13 leave, and then was later arrested. *Id.* The U.S. Supreme Court suggested that whether or not the
14 defendant was allowed to leave after initiating an encounter with law enforcement is a significant
15 factor to be weighed because it highlights how coercive the interaction was. *Id.* In this case,
16 Defendant was not only allowed to leave after failing to give a urine sample on February 23, 2017
17 he was allowed to return the next day. While the specific facts of this case are dissimilar to the facts
18 of *Beheler*, the underlying logic is still instructive. Defendant was allowed to leave after testing,
19 which indicates that the nature of his interactions with Officer Torres and other members of the
20 OAP staff were not custodial in nature. Moreover, Officer Torres testimony suggests that the testing
21 environment was not coercive and there was nothing indicating that Defendant was in custody,
22 there were no restraints and the interaction was limited to a short period of time. In the Court's

1 view, it would have been clear to Defendant that he was free to come and go during all times
2 immediately before, during, and after the testing at issue.

3 The fact that failure to come to testing could and likely would result in revocation of
4 Defendant's pre-trial release is the only factor that weighs in favor of finding that he was in
5 custody. Yet, the Court is not convinced that this factor alone supports a finding that Defendant was
6 in custody during the drug testing at issue. For one, in *State v. Widmyer*, 313 P.3d 770, 775 (Ct.
7 App. 2013), the court discussed how a defendant is free to observe or breach a release condition and
8 that the decision to do so rests with the defendant. *Widmyer* dealt with a probationer who argued
9 that mandating that he participate in a psychosexual evaluation amounted to a custodial
10 interrogation because he would be required to discuss topics, which may produce incriminating
11 responses. *Id.* While *Widmyer* is not a perfect analogy it is nonetheless informative because it
12 suggests that the decision whether or not to comply with a release condition rests with the defendant
13 and that merely going to diagnostic testing does not amount to custody. *See Id.* Essentially, in this
14 case, Defendant was free to decide whether or not to comply with the drug testing condition; the
15 mere imposition of such a condition does not mean that his interaction with Officer Torres was per
16 se custodial in nature.

17 In sum, after reviewing the facts of this case as well as the relevant 5th amendment case law
18 it is evident that Defendant's 5th Amendment rights were not violated by Officer Torres questions
19 and/or the drug testing procedure employed because Defendant was not in custody. Defendant's
20 argument that the 5th Amendment bars the Court from relying on the testimony of Officer Torres
21 and/or the test results obtained from Defendant fails. Simply put, pre-trial drug testing and
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1 questions posed to a defendant during said testing does not automatically give rise to a 5th
2 Amendment violation absent circumstances that indicate the defendant was in custody.

3 **B. Reliability of the Testing Procedure and Impact of the OAP Policy.**

4 In the alternative, Defendant argues that even if there is no 5th Amendment violation in this
5 case the drug testing results should nonetheless not be considered by the Court because the OAP
6 Policy does not cover pre-trial release, only probation, and the OAP failed to strictly comply with
7 the OAP Policy by failing to send out at least one of the samples for confirmatory testing. The
8 Commonwealth responds that Officer Torres' testimony clearly highlights that he is trained in this
9 kind of testing and conducted the testing using reliable kits and a reliable method. The
10 Commonwealth also contends that while the OAP Policy does discuss confirmatory testing
11 Defendant never requested confirmatory testing. Further, even if confirmatory testing should have
12 been performed to ensure accuracy, the fact that Defendant has arguably failed three drug tests
13 should alleviate any concern as to the results of the tests.

14 Generally, in the Commonwealth, for a breathalyzer or urinary drug test to be admissible the
15 party seeking introduction must demonstrate that the personnel who administered the test were
16 properly trained and that the equipment used was in good working order. *See generally*
17 *Commonwealth v. Quemado*, 2013 MP 13 ¶ 18–20 (discussing the standard for introducing
18 breathalyzer results into evidence at trial, which is analogous to drug testing).

19 The Court finds Defendant's argument that the OAP Policy does not cover persons on pre-
20 trial release to be unpersuasive because it sidesteps the main inquiry, whether the testing was
21 performed by a competent person, using adequate tools, and in accordance with some defined
22 process. *See Quemado*, 2013 MP at ¶ 18–20. The mere fact that the language in Section VI of the

1 OAP Policy is somewhat ambiguous does not alter the fact that Officer Torres, a trained
2 professional, used the OAP procedure to conduct the tests while also contemporaneously
3 documenting the entire process. A finding that the testing is reliable and admissible is appropriate
4 because the Commonwealth provided detailed documentation as well as the testimony of Officer
5 Torres. Yet, even if there was a question as to the admissibility of the evidence presented by the
6 Commonwealth, NMI R. CRIM. P. 46(a)(6) allows the Court to consider evidence during a bail
7 revocation proceeding that might otherwise be barred by the Commonwealth Rules of Evidence.⁴
8 Essentially, while Defendant presents a novel argument that the exact language of the testing policy
9 does not cover him, the fact that his drug tests were administered in a manner consistent with the
10 policy and by a trained professional eviscerates his argument.

11 Additionally, Defendant argues that the OAP did not follow the OAP Policy strictly and that
12 any deviation from the policy should prohibit any test results from being used by the
13 Commonwealth to seek revocation of Defendant's pre-trial release. Specifically, Defendant argues
14 that during the second test, which took place on February 24, 2017, he denied the positive test
15 result. Per the OAP Policy, when there is a test administered by court order and the person denies
16 the positive result the sample is supposed to be sent for confirmatory testing. *See* OAP Policy at 7.
17 As of the March 13, 2017 hearing, the Commonwealth had not sent the February 24, 2017 sample
18 out for confirmatory testing. While the Court understands Defendant's concerns, the mere fact that
19 the February 24, 2017 test was not sent for confirmatory testing is not fatal to the Commonwealth's
20 motion. The Court is convinced that, even if it threw out the third test, a finding in favor of the
21 Commonwealth would still be appropriate because of the February 2, 2017 positive test as well as

22 ⁴ "Information stated in, or offered in connection with, any order entered pursuant to this section need not conform to
23 the rules pertaining to the admissibility of evidence in a court of law"

1 the February 23, 2017 failure to provide a sample. Additionally, the February 24, 2017 sample can
2 still be considered by the Court because it still has indicia of reliability, i.e. it was administered by a
3 trained professional, using good equipment, and following a strong process. The Court takes the
4 view that the OAP Policy's confirmatory testing requirement goes above and beyond what is
5 required.⁵

6 After reviewing the OAP Policy in light of the circumstances of this case, the Court is
7 convinced that Defendant's arguments to throw out the testing results fail. Specifically, the
8 probationer versus pre-trial release distinction is a red herring and Defendant's argument that the
9 OAP Policy was not strictly complied with goes some of the way, but not all of the way towards
10 defeating the Commonwealth's motion.

11 V. CONCLUSION

12 Overall, based on the foregoing, the Court is persuaded that the Commonwealth's motion to
13 revoke Defendant's pre-trial release pursuant to NMI R. CRIM. P. 46(a)(4) and (a)(5) should be
14 **GRANTED**. The Commonwealth has presented the Court with enough information to make a
15 finding that Defendant violated the conditions of his release and that revocation is the best course at
16 this time. In particular, the Court is concerned that Defendant will not or is incapable of refraining
17 from using methamphetamine, due to alleged addiction. After the first test came back positive the
18 Court was somewhat inclined to give Defendant the benefit of the doubt, i.e. another chance to
19 show that he is committed to observing the conditions of his release. His subsequent unwillingness
20 or inability to provide a sample as ordered on February 23, 2017 coupled with his positive test the

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22 ⁵ Generally speaking, the Court would prefer for the Commonwealth to conduct confirmatory testing as provided for in
23 the OAP Policy so that an even greater degree of weight can be placed on the testing results. A positive test goes a long
24 way, but a lab tested and confirmed sample enhances an already strong argument.

1 following day suggests that revocation of Defendant's release is the appropriate course of action at
2 this juncture.⁶

3 **IT IS SO ORDERED** this 4th day of April, 2017.

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6 **ROBERTO C. NARAÑA**
7 Presiding Judge

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⁶ Further, the Court considers it self evident that drug use negatively impacts the chances that a person will appear,
23 thereby making the imposition of such a condition in the first place appropriate.