

EXHIBIT 1

4/4/22, 9:02 AM

Sweat Patch Evidence | JNet



Home » Court Services » Probation & Pretrial Services » Legal Opinions and Articles » Revocation » Legal Opinions » Sweat Patch Evidence

SWEAT PATCH EVIDENCE

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

Memorandum

June 19, 1998

DATE:

Curtis L. Stevens, Probation Officer/Counsel

FROM:

SUBJECT: PharmChem Sweat Patch
To: Probation Administrator, FCSD

TO:

This office is responding to your memorandum regarding the PharmChem Sweat Patch and its use in revocation hearings. Based on the testimony transcript of Neil Fortner, vice president of PharmChem laboratory operations, and the absence of any successful federal challenges of the sweat patch, it is the position of this office that the sweat patch is a creditable illicit drug detection tool, the results of which might be used as evidence in a revocation proceeding, as long as proper sweat patch application and removal protocols are followed and chain-of-custody procedures are strictly adhered to by officers.

While we are aware of no reported decisions that upheld the viability of the sweat patch as evidence in a revocation or any other court proceeding, at least two district courts have heard the testimony of Neil Fortner and found the sweat patch test results to be reliable for purposes of a revocation hearing. The courts heard testimony as to the scientific reliability of the sweat patch, its advantages over urine tests, its ability to supplement urine tests, and the difficulty in adulterating the test results as compared to urine tests. This office too finds these arguments persuasive. While the scientific viability of the sweat patch rests ultimately with the court, officers maintain the credibility of the sweat patch through fulfillment of certain standard protocols.

On April 11, 1996, Eunice Holt Jones issued a memorandum which discussed the need for careful and complete documentation of urine test results and chain of custody procedures based on United States v. Grandlund, 71 F.3d 507 (5th Cir. 1995), clarified, 77 F.3d 811 (5th Cir. 1996), cert. denied, 516 U.S. 1152, 116 S.Ct. 1031 (1996). The sweat patch should be treated no differently. Districts must ensure their officers have been adequately trained on the sweat patch and have a general working knowledge of sweat patch capabilities and limitations. As evidenced by Neil Fortner's testimony, the issue of contamination or the suggestion of contamination of the sweat patch, by the officer or in general, was raised. Although contamination would be specifically detected in the test results, it can be avoided if the officer is properly trained on sweat patch application, inspection, and removal procedures. Equally important is the strict adherence to chain-of-custody procedures to maintain the necessary link between offender and sweat patch. A missing link would likely prohibit the initial testing of the sample, but if tested, it would surely open the door to a successful challenge of the test results and their connection to the offender. While oversights may occur, proper training on the completion, signing, and application of labels to the forms will keep such occurrences to a minimum.

In view of the *Grandlund* decision and the testimony of Neil Fortner, this office makes the following suggestions if districts choose to utilize sweat patch test results in revocation proceedings:

Officers who will administer the sweat patch should be trained on sweat patch application, inspection, removal, and detection of a compromised sweat patch as well as chain-of-custody.

As with challenges to laboratory tests or reports on urine tests, similar *Grandlund* procedures should be followed. The officer should supply the court and offender with (1) a copy of the report of the test; (2) a copy of the report on the chain-of-custody of the test, including the date of application and removal, name of a person(s) applying, removing, and

4/4/22, 9:02 AM

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labeling same as well as a description of the label; and (3) a copy of an affidavit by a responsible laboratory employee attesting to laboratory procedures and chain-of-custody routines as well as whether all required procedures were followed for the specific test and the results of the test.

Although the sweat patch is a physically different drug detection and sample collection tool as compared to the urine test, procedurally, the tools are no different for officers. Districts should ensure officers are adequately trained on sample collection, documentation, chain-of-custody, collection of test results, and revocation procedures for the sweat patch.
