

REVIEW OF SELECTED COURT TESTIMONY BY NEIL FORTNER

A review of Mr. Neil Alan Fortner's testimony in court cases regarding his company's drug testing technology reveals a pattern of falsehoods and misrepresentations of facts about which he claims specialized training and experience. Mr. Fortner has provided demonstrably false testimony under oath in several court cases regarding sweat testing for illicit drugs. This false testimony has in every case exaggerated the scientific support for sweat testing.

Mr. Fortner has testified falsely regarding his own credentials; the methodology of the crucial controlled-dose studies; the conclusions of these studies; and the existence of other studies supporting the reliability of sweat testing. As detailed below, these misrepresentations misled several courts as to the scientific underpinnings of PharmChem's drug testing technology. The sheer number and weight of Mr. Fortner's false statements – all made under oath – warrant attention from professional colleagues with whom he claims an association.

A. Mr. Fortner has repeatedly testified falsely regarding his credentials.

Mr. Fortner routinely submits the attached *Curricula Vitae* when he testifies in court.¹ In this document, Mr. Fortner claims that he has completed “90% of his doctoral work in neurochemistry.”² Mr. Fortner's C.V. does not list any university affiliation for this work. Regarding the university affiliation, Mr. Fortner has testified as follows:

“My doctorate work was in the area of neurochemistry, looking at L.S.D. -- ah, brain receptors -- ah, at Cleveland State and San Francisco State.”³

He has likewise testified:

“I'm just in the process of completing my doctorate work in the area of neurochemistry between Cleveland State University and San Francisco State University.”⁴

He has never identified any other universities as sites for his PhD. work.

None of this testimony is true. Mr. Fortner has never been enrolled at San Francisco State.⁵ Mr. Fortner was briefly enrolled in a Masters program at Cleveland State in 1987-88, but has never been enrolled in a Ph.D. program there.⁶ Neither Cleveland State nor San Francisco State even has a Ph.D.

¹See Fortner C.V. (Exhibit A).

²See Fortner C.V., page __ (Exhibit A).

³See *Gray v. Thompson*, Superior Court of the State of California for the County of Contra Costa, February 23, 1998, page 4, line 9 (Exhibit B).

⁴See *United States v. Hanford Sax*, United States District Court for the Central District of California, January 30, 1998, page 2, line 8 (Exhibit C).

⁵See Letter from Supervisor of Graduate Division of San Francisco State University, January 7, 1999 (Exhibit D).

⁶See Letter from Dean of Graduate Studies and Research of Cleveland State University, February 17, 1999 (Exhibit E).

program in neurochemistry.⁷

Despite the fact that Mr. Fortner has apparently never been enrolled in a Ph.D. program, he regularly describes his “ongoing” Ph.D. work to courts. When a judge asked him in 1997 if he had a Ph.D., Mr. Fortner replied, “Just finishing that, your honor.”⁸ He also gave the following quite detailed testimony in early 1998; when asked how far along on his doctorate he was at that time, he replied:

“Um, completed all the course work, um, the majority of the research, and we’re trying to wind up a couple projects.”⁹

Mr. Fortner last attended Cleveland State in the fall of 1988.¹⁰ The Vice Provost and Dean of Graduate Studies and Research at Cleveland State University reviewed the transcript of Mr. Fortner’s testimony in a recent hearing, and wrote that “it is clear . . . that the facts have been misrepresented with respect to Mr. Fortner’s academic career at Cleveland State”¹¹

Mr. Fortner’s false statements regarding his credentials likely led courts to lend more credence to Mr. Fortner’s “scientific” testimony than it deserved.

B. Mr. Fortner has repeatedly testified falsely regarding methodology and results of the two “controlled-dose” studies of sweat testing for methamphetamine.

In his testimony in support of his company’s sweat patch testing, Mr. Fortner relies heavily upon data from two studies which were submitted to the FDA. Mr. Fortner has repeatedly given false testimony about the methods and results of these two so-called “controlled-dose” studies, the effect of which has been to wrongly inflate the studies’ reliability and usefulness.

1. False testimony regarding sequestration of study subjects.

An important limitation of the two “controlled-dose” studies was that the test subjects were not sequestered in a controlled environment, and thus may have ingested drugs outside the study’s guidelines.

⁷See Letter from Supervisor of Graduate Division of San Francisco State University; Letter from Dean of Graduate Studies and Research of Cleveland State University (Exhibits D and E).

⁸See *In re Jane Doe #2*, Superior Court of the State of California for the County of Contra Costa, July 2, 1997, page 4, line 18 (Exhibit F).

⁹See *Gray v. Thompson*, Superior Court of the State of California for the County of Contra Costa, February 23, 1998, page 4, line 18 (Exhibit B).

¹⁰See Letter from Dean of Graduate Studies and Research of Cleveland State University, February 7, 1999 (Exhibit E).

¹¹See Letter from Dean of Graduate Studies and Research of Cleveland State University, February 7, 1999 (Exhibit E).

The studies themselves indicate as much.¹² Nonetheless, Mr. Fortner has repeatedly testified that the subjects *were* maintained in a controlled environment and thus could not ingest drugs without the knowledge of those running the study.

For example, in an evidentiary hearing in a California court, Mr. Fortner testified as follows:

Q: “In the trials where volunteers were administered drugs and then sweat and urine samples were collected, were these conducted in a controlled environment?”

A: “Yes.”

Q: “So that there could be no drugs administered to the person that were not known about?”

A: “Yes.”¹³

Mr. Fortner has provided similar false testimony in at least two other evidentiary hearings.¹⁴ This testimony erroneously inflated the reliability of these studies by concealing a serious methodological shortcoming.

2. False testimony regarding baseline testing of the study subjects.

The two studies’ results demonstrate that a majority of subjects showed evidence of drug use at the beginning of the study, prior to administration of the controlled-dose.¹⁵ On cross-examination in a recent hearing Mr. Fortner admitted that many of the subjects “had methamphetamine in their system

¹²See Results of UCLA and SCRI studies submitted with FDA application (Exhibit G).

¹³See *In re Jane Doe*, Superior Court of the State of California for the County of Contra Costa, December 8, 1997, page 27, line 6 (Exhibit H).

¹⁴ See *In re Jane Doe #2*, Superior Court of the State of California for the County of Contra Costa, July 21, 1997, page 78, line 18, (Exhibit F), testimony regarding a subject in the controlled-dose studies:

Q: Was the person in a locked-type facility during the seven days? Or was the person free to come and go?

A: No, they were in a clinical, controlled environment.

See also *Gray v. Thompson*, Superior Court of the State of California for the County of Contra Costa, February 23, 1998, page 26, line 1-7 (Exhibit B)

Q: And, could you explain then, how did that controlled study work?

A: ... [T]hese were individuals that were recruited and placed in, um, clinics or hospital wards. The – these research facilities have their own hospitals associated with them, so they can control access to the patients.

¹⁵See Results of UCLA and SCRI studies submitted with FDA application (Exhibit G).

prior to the controlled dose.”¹⁶ This fact meant that the study’s guidelines were violated, and that the intended controlled-dose nature of the studies was negated.

In an earlier evidentiary hearing on sweat testing for methamphetamine, however, Mr. Fortner testified falsely that the subjects of these very same studies were “absolutely negative” for drugs prior to controlled dosing:

Q: “And, could you explain then, how did that controlled study work?”

A: “... [T]hese were individuals that were recruited and placed in, um, clinics or hospital wards. ... They were tested, then, urine and patch, for a week, in order to establish baseline. So, *they had to be absolutely negative before the program started.*”¹⁷

This false statement also served to bolster the reliability of the two studies by concealing violations of the study’s guidelines by the subjects.

3. False testimony regarding the studies’ results.

In December of 1997, Mr. Fortner was questioned regarding the results of the controlled-dose studies. Mr. Fortner falsely testified that the highest levels of methamphetamine demonstrated in the controlled-dose studies were “65 to 70” ng/ml.¹⁸ This testimony was false. Twenty different tests in the SCRI study alone produced readings above 500 ng/ml; many readings were over 1000 ng/ml.¹⁹ Mr. Fortner’s false testimony had the effect of wrongly validating the sweat test results of the defendant in that case, who had tested positive for low levels of methamphetamine.

C. Mr. Fortner has given false testimony regarding the existence of other clinical studies of the sweat patch.

¹⁶See *United States v. Stumpf*, United States District Court for the District of Nevada, January 15, 1999, page 112, line 12 (Exhibit I).

¹⁷See *Gray v. Thompson*, Superior Court of the State of California for the County of Contra Costa, February 23, 1998, page 26, line 1-11 (Exhibit B). (emphasis added).

¹⁸See *In re Jane Doe #2*, Superior Court of the State of California for the County of Contra Costa, July 21, 1997, page 77, line 21, (Exhibit F):

Q: “What was the highest level that you were able to achieve in controlled testing? – the highest methamphetamine level?”

A: “Um, somewhere – if I recall, our data was 65 to 70 nanograms per ml, and that was following what we had classified as the “high-dose” administration of methamphetamine.”

¹⁹See Results of UCLA and SCRI studies submitted with FDA application (Exhibit G).

Sweat patch testing for methamphetamines has never been subjected to studies on crucial issues such as passive exposure and the effectiveness of the isopropyl alcohol rub. Mr. Fortner has nonetheless testified under oath that these studies have been performed, and has inflated the number and source of controlled-dose studies.

1. False testimony re the existence of a passive exposure study.

Mr. Fortner testified falsely that a passive exposure study was been performed with respect to methamphetamine and the sweat patch. On November 10, 1998, Mr. Fortner testified in a deposition for a federal court case in the U.S. District Court for the District of Iowa. Mr. Fortner was questioned regarding the amount of research that had been performed on the crucial issue of passive exposure. Mr. Fortner testified that, as part of the FDA application process, PharmChem had conducted passive exposure studies regarding methamphetamine and the sweat patch:

“[W]e conducted passive exposure studies with the patch and with cocaine and some of the other drugs such as methamphetamine.”²⁰

However, the FDA application contains no such study, and at a recent hearing Mr. Fortner admitted that his prior testimony on this point was untrue.²¹

2. False testimony regarding the existence of a study demonstrating the effectiveness of the isopropyl alcohol rub.

Part of PharmChem’s sweat testing procedure is to swab a tested individual’s skin with isopropyl alcohol before application of the sweat patch. Mr. Fortner has testified falsely that a study has demonstrated that the isopropyl alcohol rub cleanses the skin of drug residue.

In a July 1997 hearing on the reliability of the sweat patch for testing for methamphetamine, Mr. Fortner was asked about whether PharmChem had studied the possibility that drug residue on a person’s skin could trigger a false positive test result. Mr. Fortner testified that, as part of the FDA application process, the FDA had required Sudormed to perform a study demonstrating that the isopropyl alcohol rub would remove “any traces” of drugs from a person’s skin:

“[P]art of the FDA requirement [was] to ensure that the area was clean even if there were methamphetamine residuals on there ... FDA required us to demonstrate that the alcohol for preparation ... removed any traces of materials that were on there – and there was actually one study where we had to do [dermatological] application, and then physically swab that area – so we had to apply the solution, let it dry, swab it with isopropyl, then take the isopropyl, pad-test it, and then subsequent patches were applied to

²⁰See *United States v. Wilcox*, United States District Court for the Northern District of Iowa, November 10, 1998, page 31, line 13 (Exhibit J).

²¹See *United States v. Stumpf*, United States District Court for the District of Nevada, January 15, 1999, page 119, line 3 (Exhibit I).

that area to demonstrate that that was sufficient in removing it.²²

This detailed testimony appears to be entirely fabricated. The FDA application contains no such study. Mr. Fortner admitted at a recent hearing that the FDA required no such studies and that his prior testimony was false.²³

3. False testimony regarding the existence of a “controlled-dose” study by the Addiction Research Center.

Mr. Fortner testified falsely about the number and quality of “controlled-dose” studies concerning the sweat patch. In July 1997, Mr. Fortner was questioned about the number of controlled-dose studies that had been performed for methamphetamine testing. Mr. Fortner falsely testified that there were three such studies, including one performed at the Addiction Research Center, a prestigious government-run institution:

Q: How many clinical trials did you conduct or was conducted by any agency in determining the accuracy of the patches?

A: Specifically for methamphetamines, there were three controlled clinical trials ... One trial was conducted by the Addiction Research Center.

In re Jane Doe #2, Contra Costa County Superior Court for the State of California, July 21, 1997, at 84:21 (Exhibit L). This testimony was untrue. There have been only two studies of sweat testing for methamphetamines that have been labeled “controlled-dose” studies. As discussed below, neither study was performed by the Addiction Research Center.

D. Mr. Fortner has given false testimony regarding bias in hair testing.

In several cases in which Mr. Fortner has testified, the defendant had a negative hair test along with a positive sweat patch test. In an effort to establish that the sweat test is the more reliable of the two, Mr. Fortner has criticized hair testing on the witness stand. Mr. Fortner has repeatedly emphasized that hair incorporates drugs at different rates for light- and dark-haired individuals, which is true.

However, when the defendant in a particular case has *light* hair, Mr. Fortner testifies that light hair incorporates drugs more slowly;²⁴ when the defendant has *dark* hair, Mr. Fortner testifies that dark

²²See *In re Jane Doe #2*, Superior Court of the State of California for the County of Contra Costa, July 21, 1997, page 93, line 11 (Exhibit F).

²³See *U.S. v. Stumpf, United States v. Stumpf*, United States District Court for the District of Nevada, January 15, 1999, page 119, lines 10, 14 (Exhibit I).

²⁴See, e.g., *In re Hanford Sax*, United States District Court for the Central District of California, January 30, 1998, page 53, line 18 (Exhibit C) (light-haired defendant) (“Dark-haired individuals incorporate drug at a higher level than light-haired individuals.”).

hair incorporates drugs more slowly.²⁵ These flatly contradictory statements encourage the courts in each case to discount the defendant's negative hair test, thus making each particular defendant seem more likely to be guilty of illegal drug use.

²⁵ See, e.g., *United States v. Shabansky*, United States District Court for the District of Nevada, April 13, 1998, page 32, line 6 (Exhibit K) (dark-haired defendant) ("Methamphetamine and cocaine has (sic) a tendency to incorporate at a higher rate into lighter color hair as opposed to darker color hair from the scientific literature I've seen.").