

**THE NEW JERSEY FORENSIC LAB SCANDAL  
&  
RECENT CONFRONTATION CLAUSE JURISPRUDENCE:  
“PERFECT TOGETHER”**



**CHRISTOPHER L. BAXTER, ESQ.**

# THE NJSP LITTLE FALLS LAB SCANDAL

- NJSP OFFICE OF FORENSIC SCIENCES
- OPERATES 4 REGIONAL LABS: HAMILTON (MOTHERSHIP), SEA GIRT, HAMMONTON, AND LITTLE FALLS
- HANDLE ALL FORENSIC DISCIPLINES AND SUB-DISCIPLINES INCLUDING SOLID DRUG ANALYSIS
- “PROCEDURAL MANUALS” FOR EACH DISCIPLINE

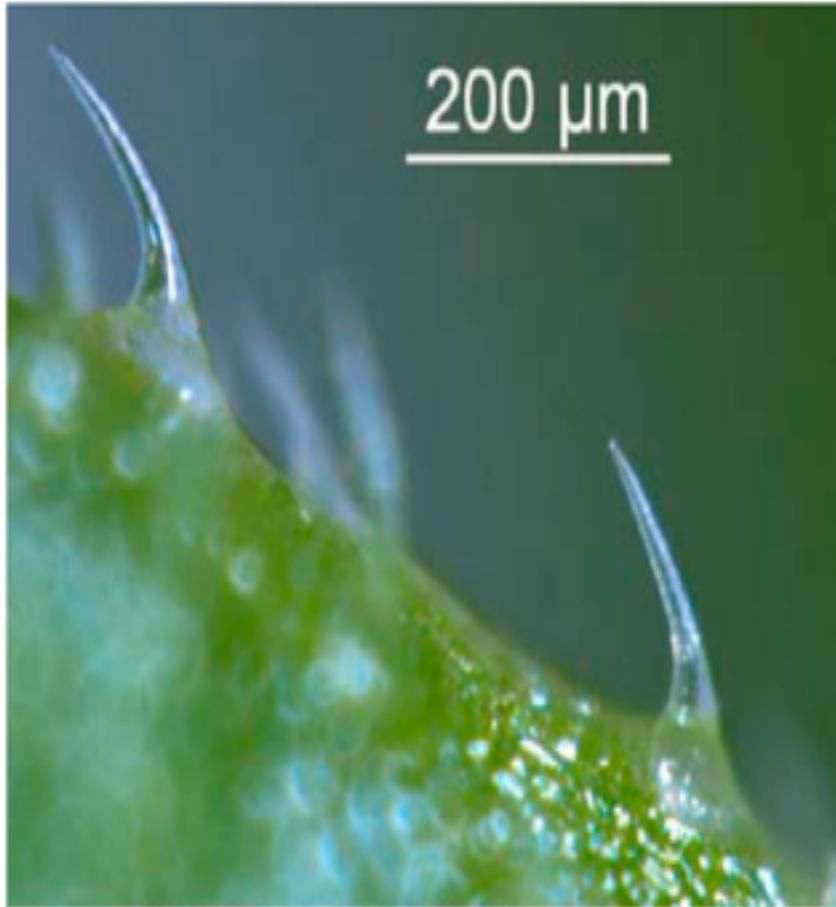
# THE NJSP LITTLE FALLS LAB SCANDAL

- NJSP DRUG PROCEDURAL MANUAL ALLOWED 5 DIFFERENT “CRITERIA” TO QUALITATIVELY TEST FOR THE PRESENCE OF MARIJUANA
- CRITERIA #2 THROUGH #5 GENERATE REVIEWABLE AND VERIFIABLE DATA/MATERIALS WITH GC-MS OR TLC

# THE NJSP LITTLE FALLS LAB SCANDAL

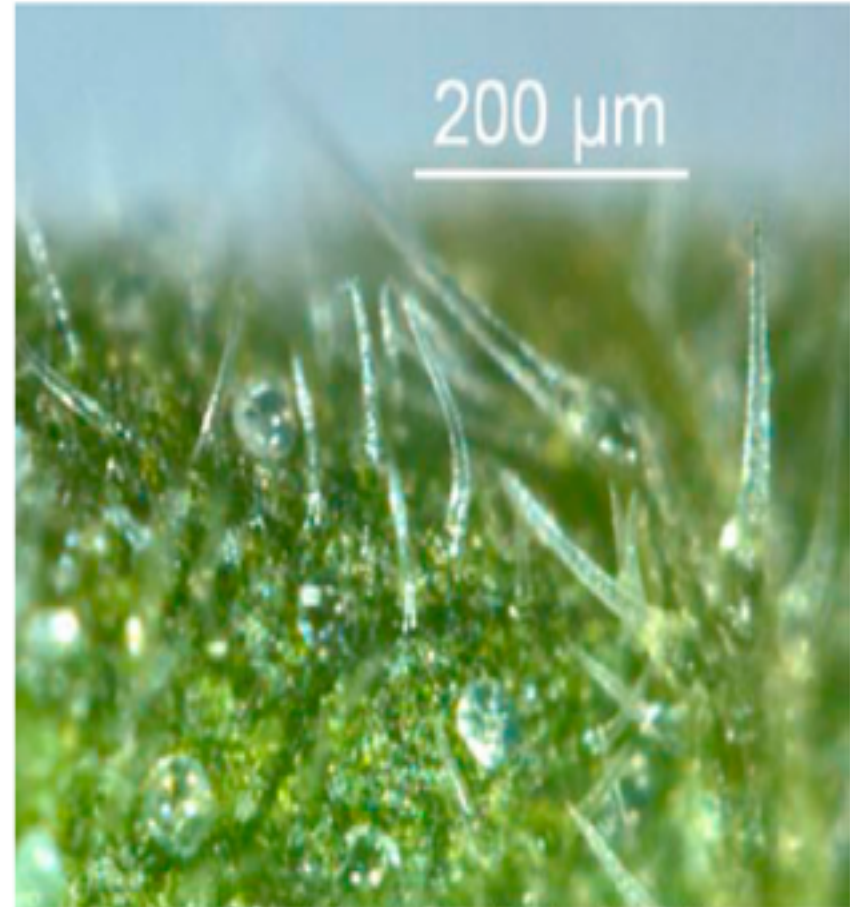
- BUT...ALL FOUR NJSP LABS EXCLUSIVELY USED “CRITERIA #1” -- A COMBINATION OF TWO “PRESUMPTIVE” TESTS:
  - MICROSCOPIC/MACROSCOPIC EXAM
  - MODIFIED DUQUENOIS-LEVINE COLOR TEST (D-L test)

# TRICHOMES



© Wissenschaftlicher Dienst Stadtpolizei Zürich

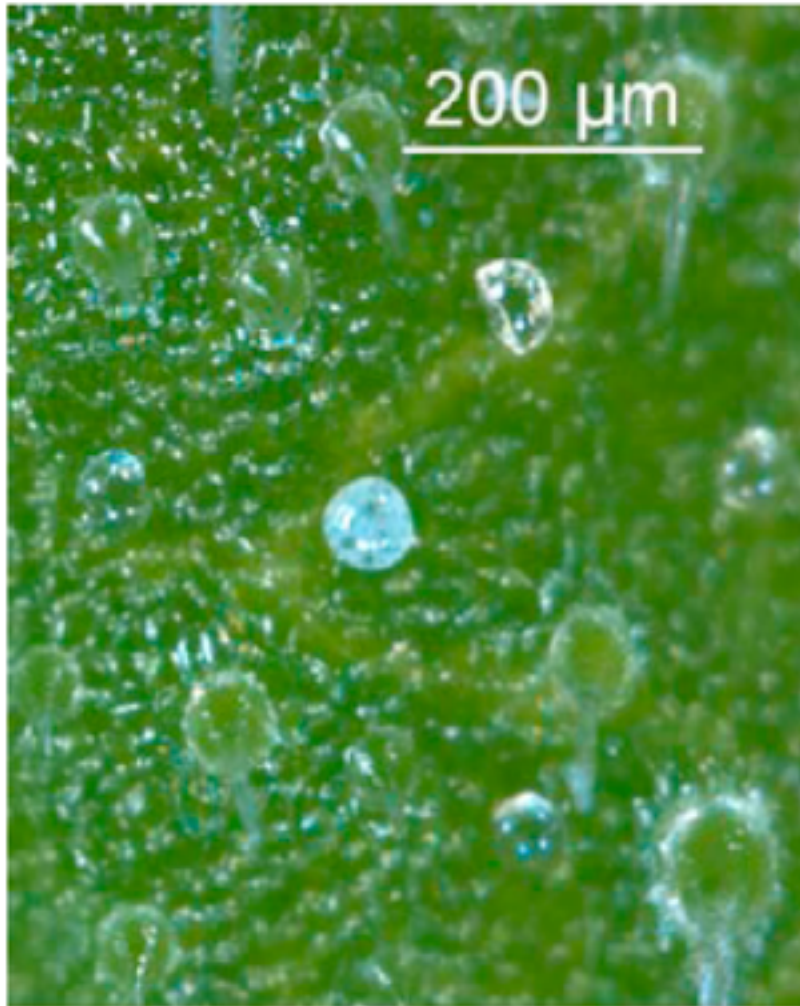
Cystolithic trichomes



© Wissenschaftlicher Dienst Stadtpolizei Zürich

Non-cystolithic trichomes

# TRICHOMES



© Wissenschaftlicher Dienst Stadtpolizei Zürich

Sessile glands



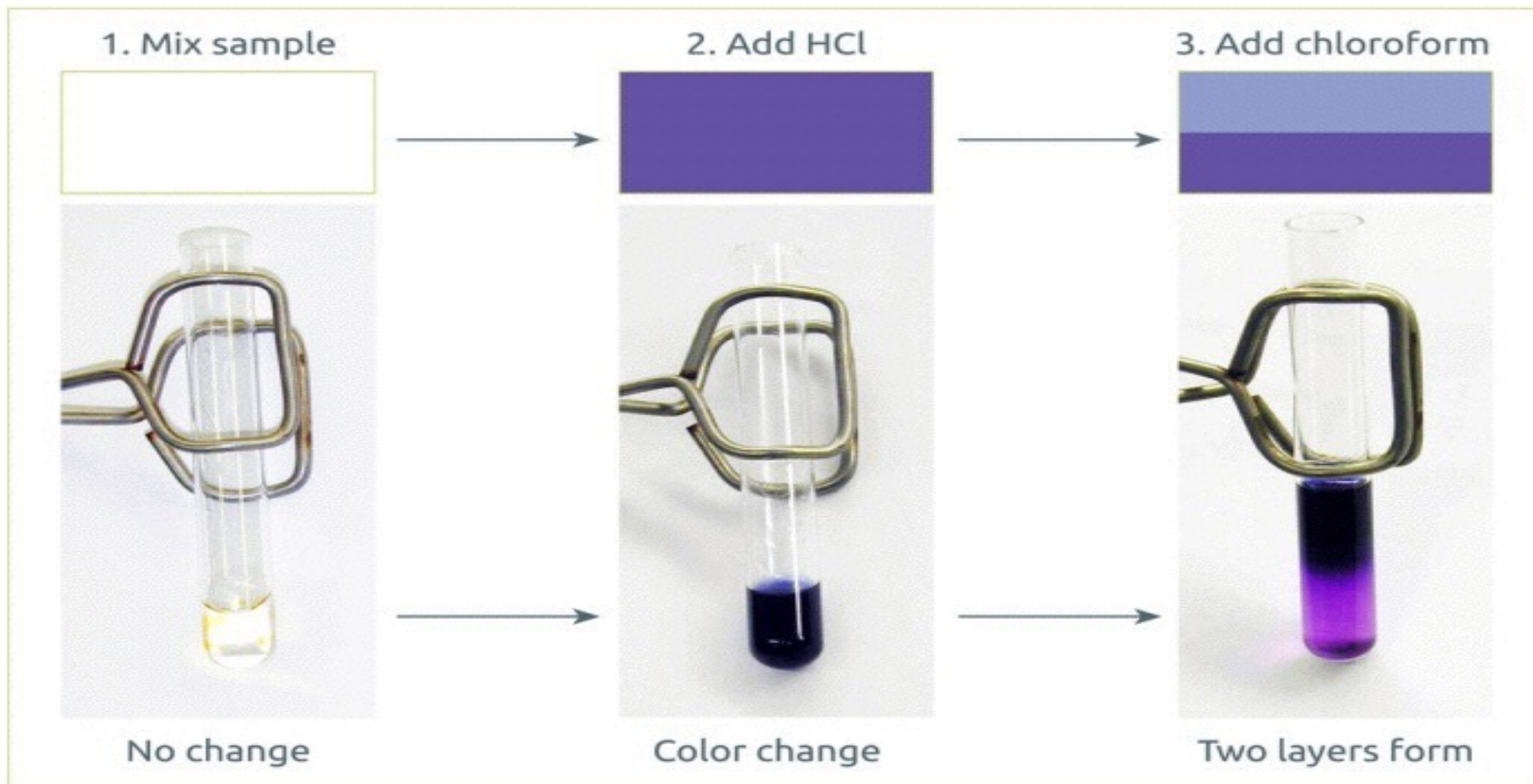
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Stalked glandular trichomes

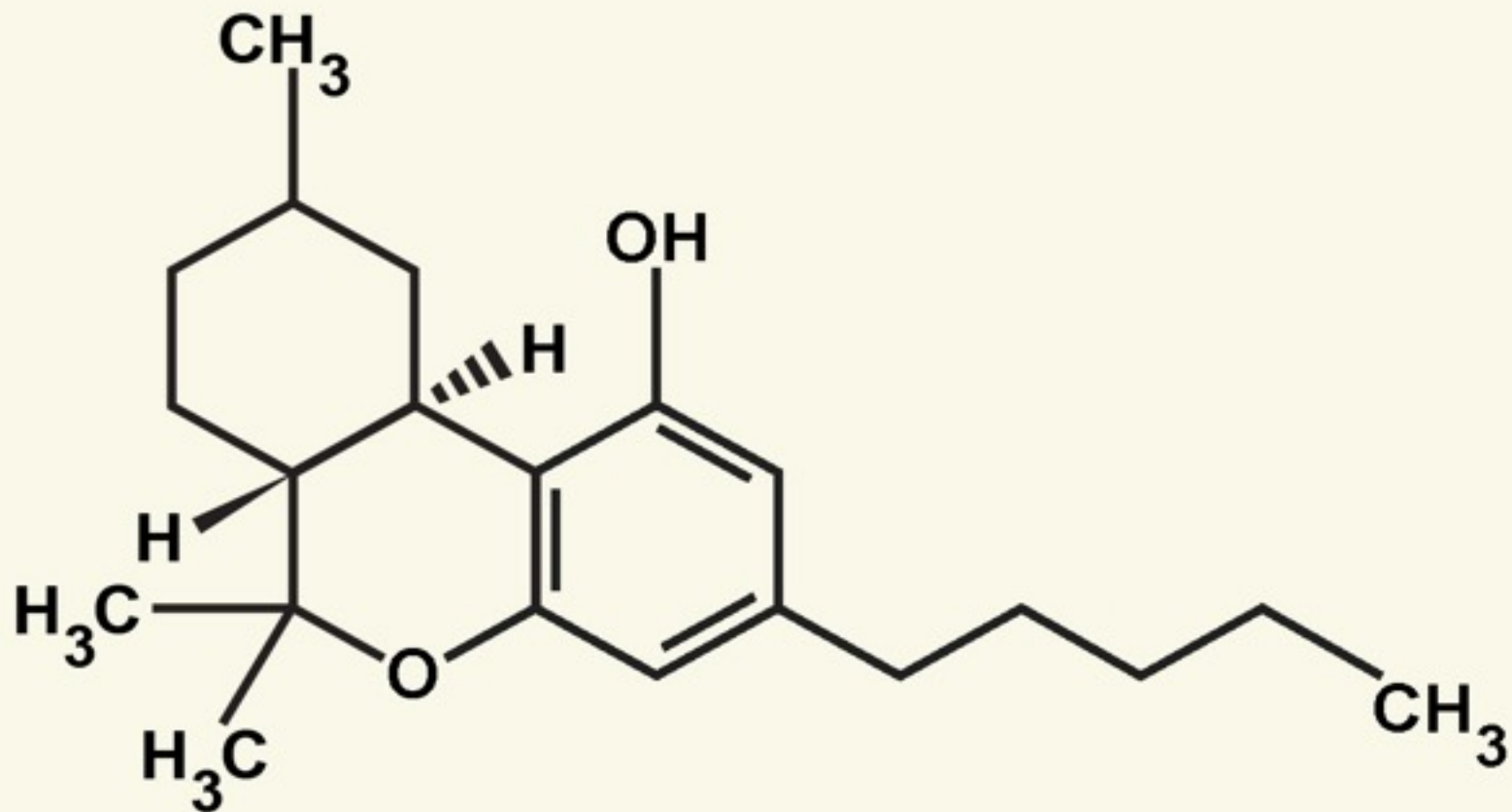
# DUQUENOIS-LEVINE COLOR TEST



## Duquenois-Levine - Color Guide

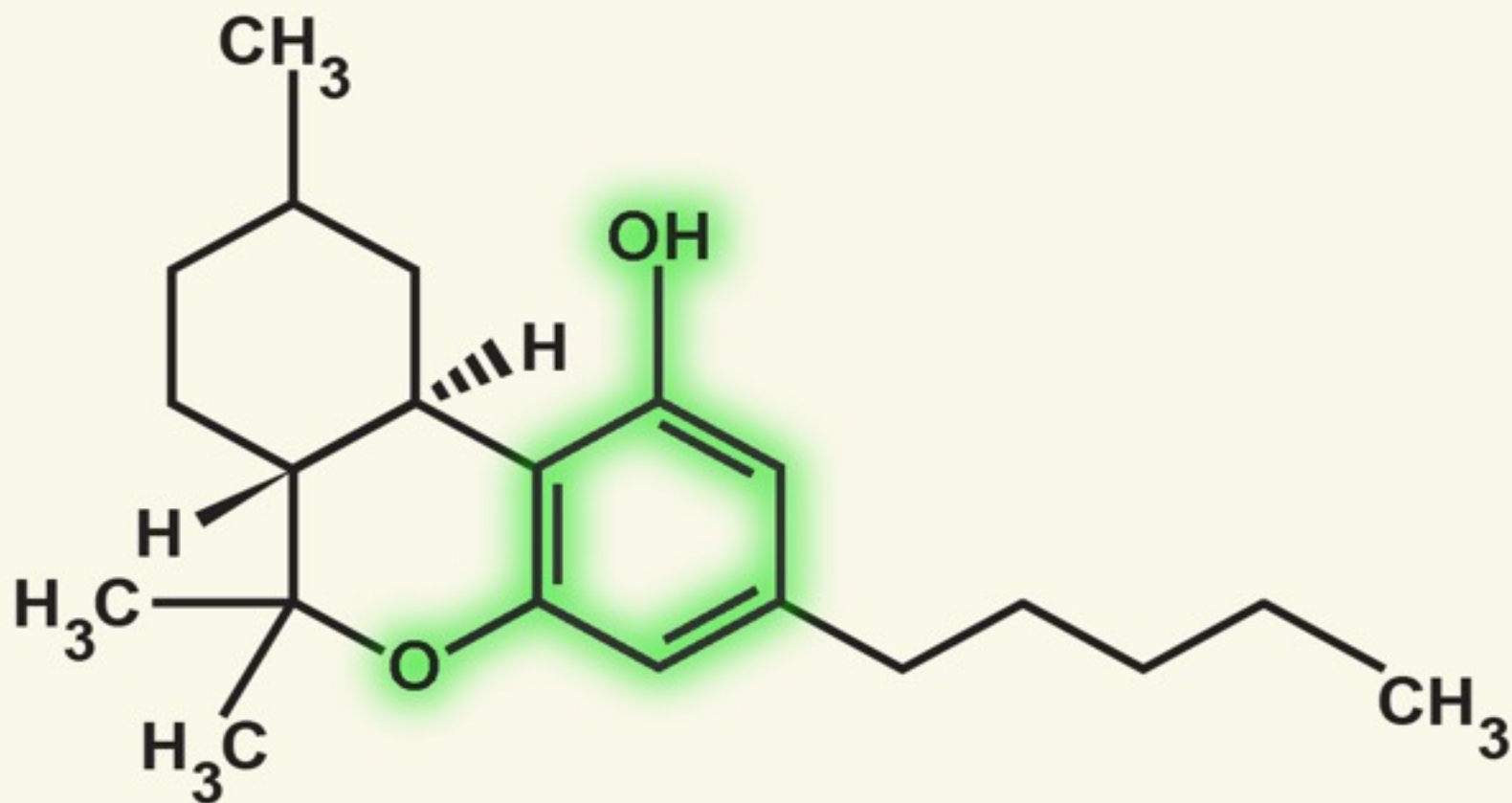


# $\Delta^9$ -Tetrahydrocannabinol



# THC

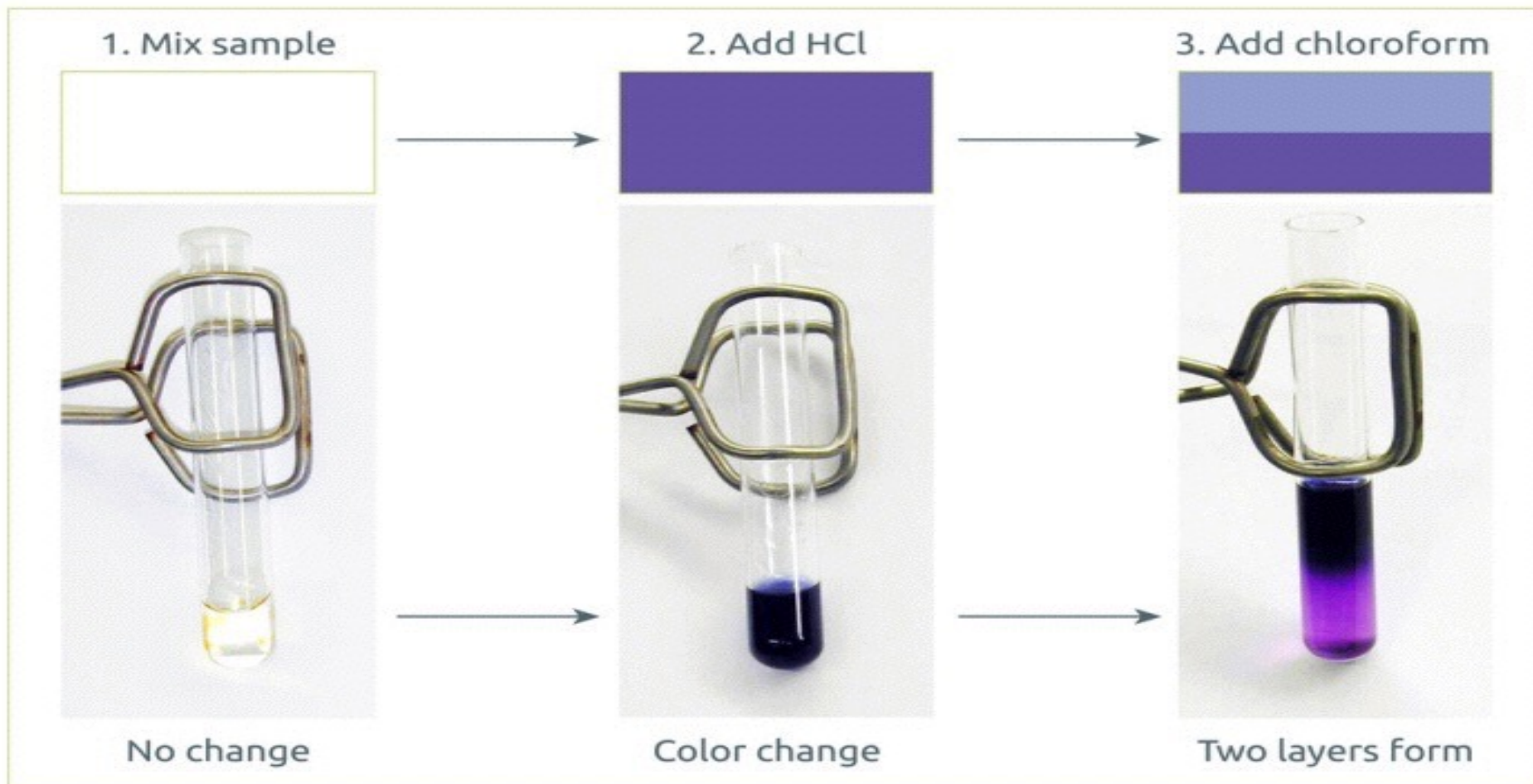
## RESORCINOL GROUP HIGHLIGHTED



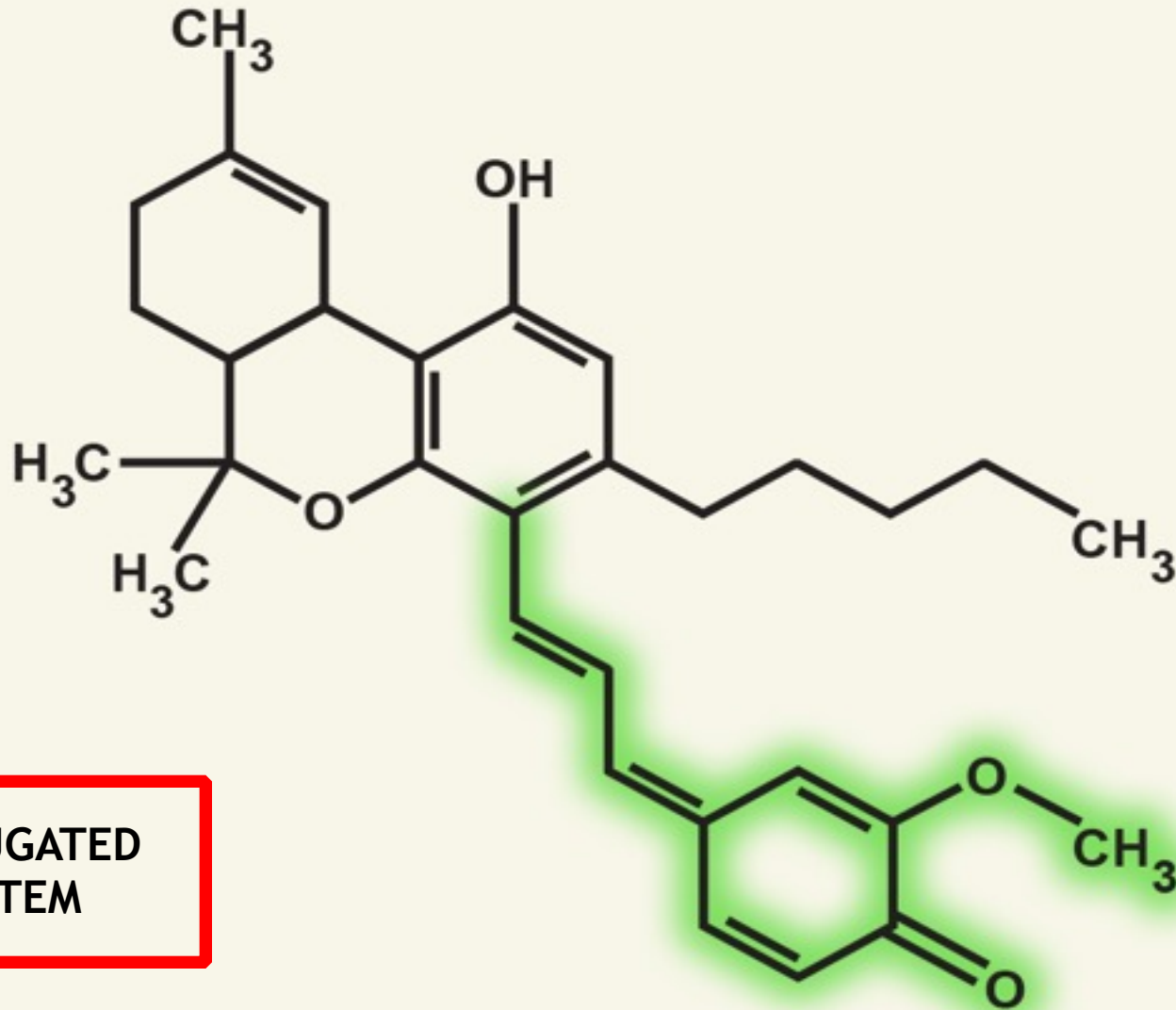
# DUQUENOIS-LEVINE COLOR TEST



## Duquenois-Levine - Color Guide



# THC WITH CHROMOPHORE

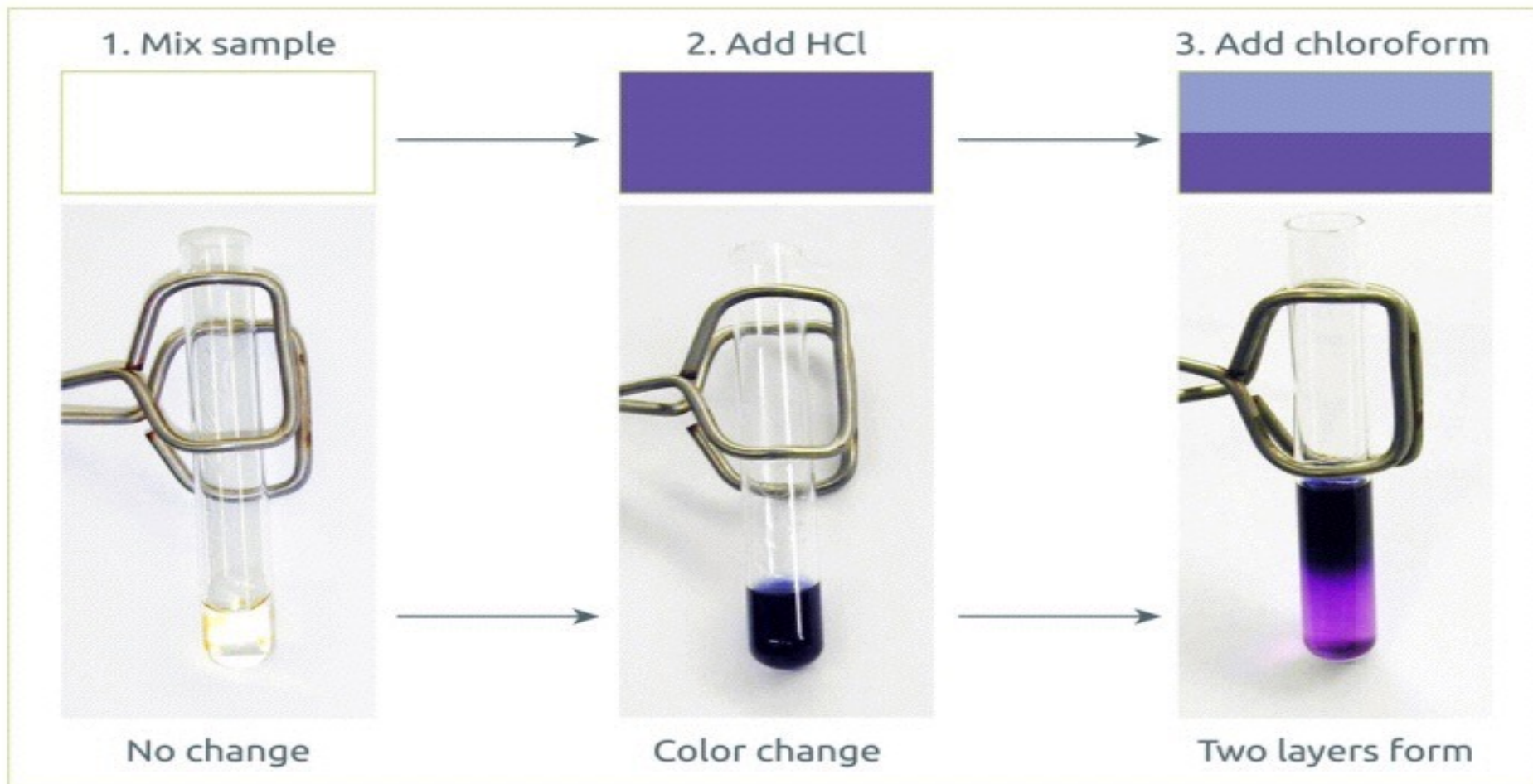


CONJUGATED  
SYSTEM

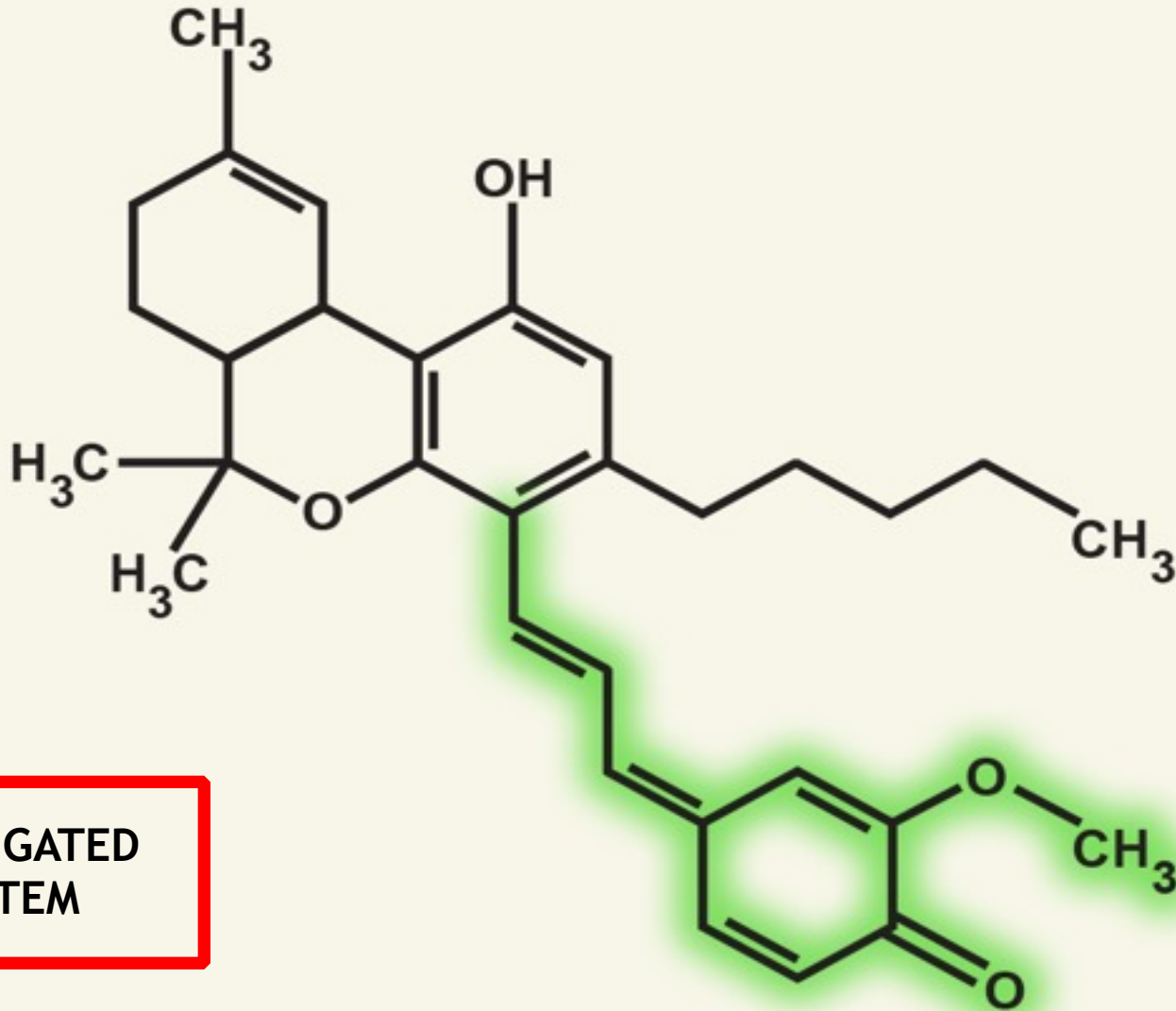
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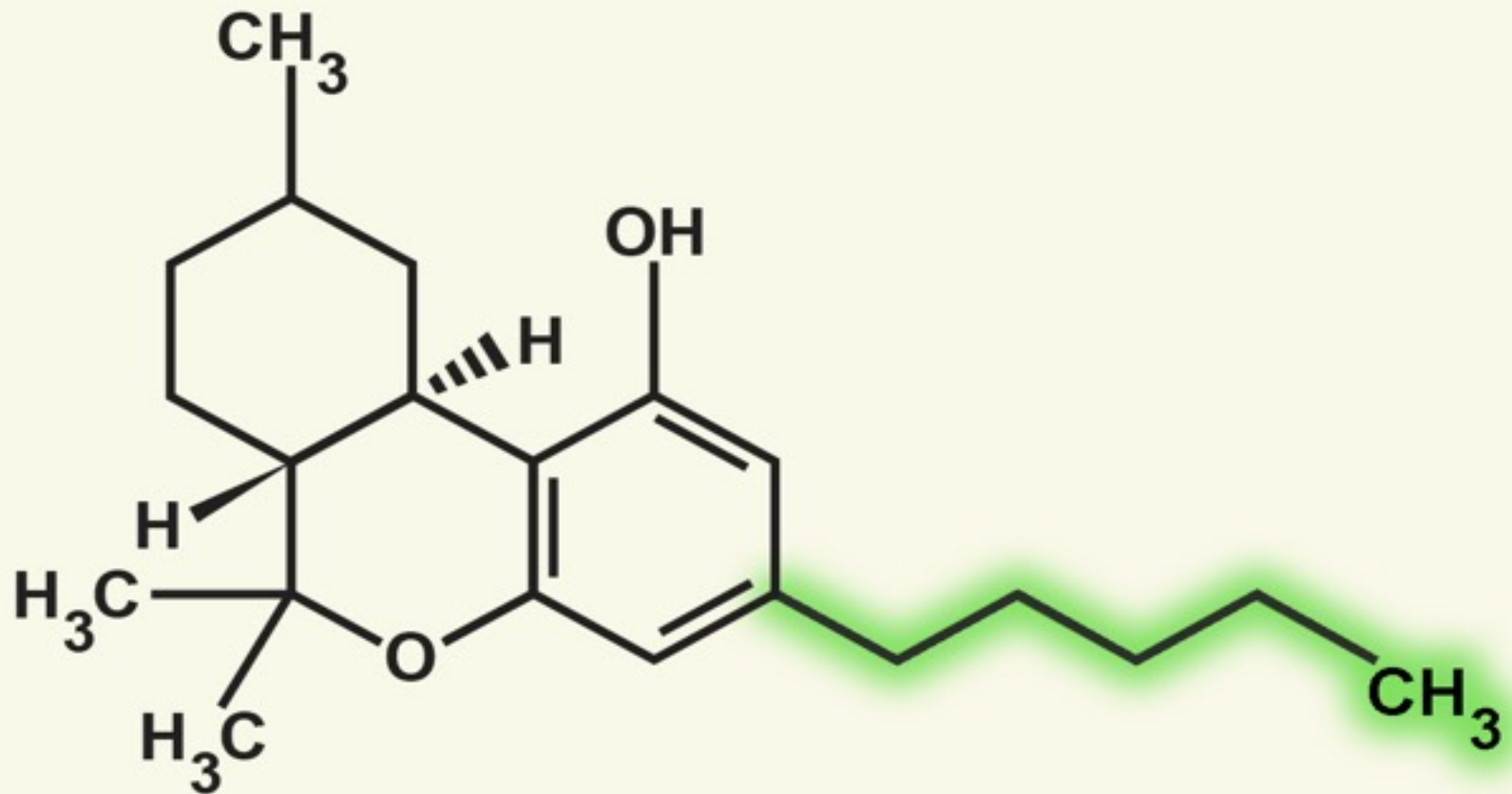
# THC WITH CHROMOPHORE



CONJUGATED  
SYSTEM

# THC

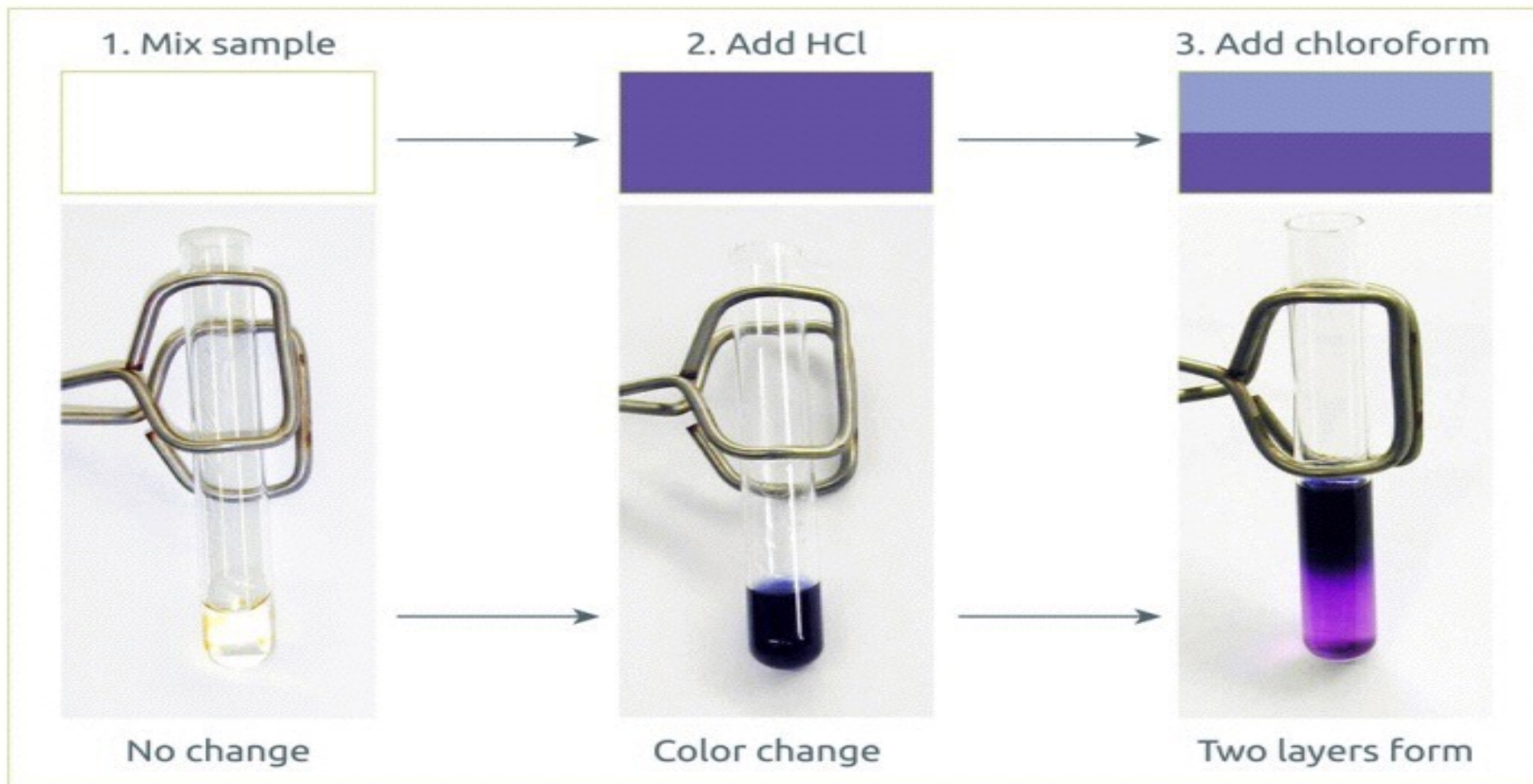
## PENTANE-ALKANE CHAIN



# DUQUENOIS-LEVINE COLOR TEST

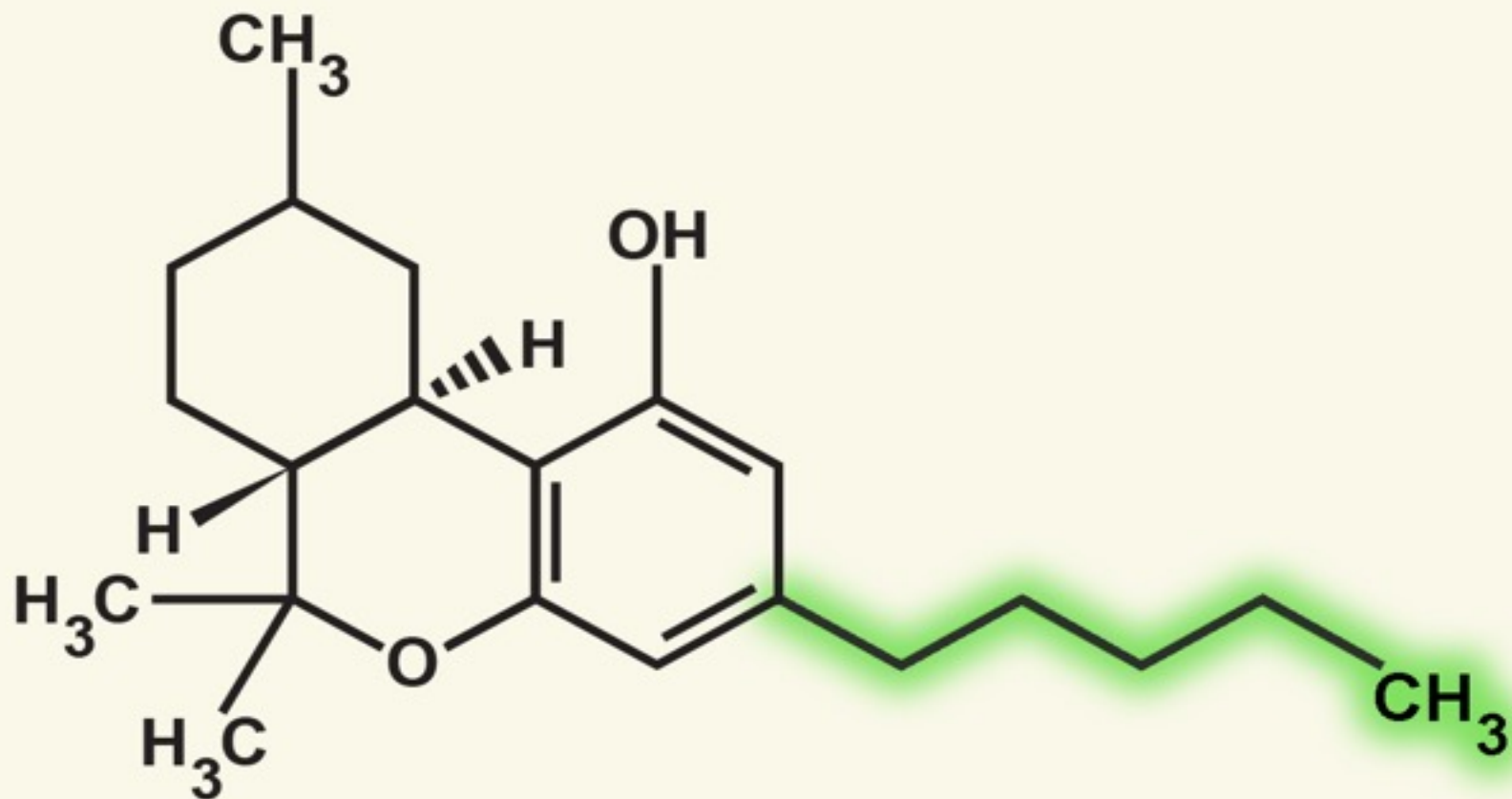


## Duquenois-Levine - Color Guide



# THC

## PENTANE-ALKANE CHAIN



# THE NJSP LITTLE FALLS LAB SCANDAL

- NJSP analyst Kamalkant Shah suspected of “dry labbing” marijuana test results
- Pulled from bench work December 2015
- AG notifies OPD and county prosecutors in February 2016
- June 2016 – Special Master appointed

# THE NJSP LITTLE FALLS LAB SCANDAL

- Superior court cases and DPs at the municipal level impacted
- Approximately 8,000 cases total; 750 at indictable level
- AG's policy is to retest marijuana if still in evidence; dismiss if evidence unavailable for testing (**problematic**)

# OPPORTUNITY TO EFFECT CHANGE

## NON-VERIFIABLE

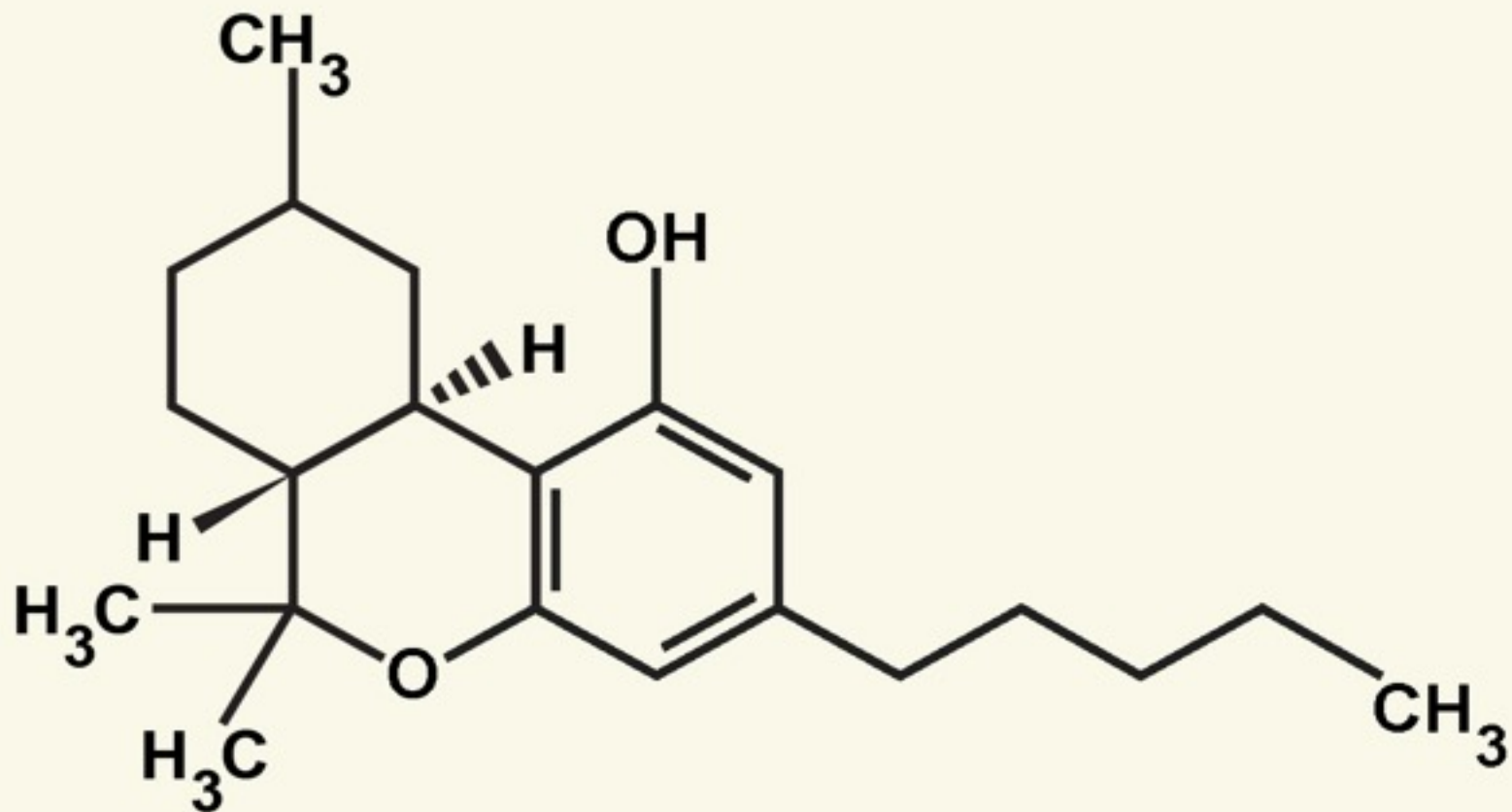
- TAKE ANALYST'S "WORD FOR IT"
- OTHER AVAILABLE, VERIFIABLE METHODS ("CRITERIA") IN OFS DRUG PROCEDURES MANUAL
- SUSCEPTIBLE TO FRAUD – NO MEANINGFUL INTERNAL & EXTERNAL REVIEW

# OPPORTUNITY TO EFFECT CHANGE

## NOT SCIENTIFICALLY ACCURATE

- **NO SCIENTIFIC CONSENSUS ON COMBINATION MICRO + D-L ; selective/specific**
- **ORIGINAL RESEARCH--THORTON & NAKAKAMURA ON BOTANICAL DICOTS**
  - 32,000...200,000 DICOTS
  - 600 TESTED; 81 SAME MORPHOLOGICALLY
  - ALSO AWARE OF OTHER "POSITIVE" PLANTS-DIDN'T GET
- **NON-SPECIFIC D-L TESTING (RESORCINOL + OLIVETOL)**
  - SOME GLUES, TEAS, COFFEES, SHAMPOOS, ANESTHETICS, ANTISEPTICS, DISINFECTANTS, MOUTHWASH

# $\Delta^9$ -Tetrahydrocannabinol



# **FRYE CHALLENGE**

## ***STATE v. NASH***

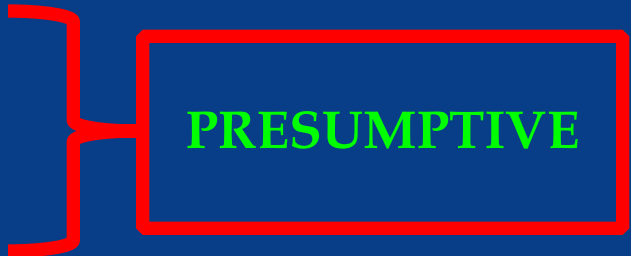
### **CHALLENGE TO CRITERIA #1**

- **PRIMARY RESISTANCE--MONETARY**
- **\$28-60 DEPENDING ON THROUGHPUT**
- **SCIENCE ON DEFENDANT'S SIDE**
- **HYPOCRISY OF NJSP-OFS DRUG MANUAL**
- **FRAUD HIGHLIGHTED THESE PROBLEMS**

# THE NEW PROTOCOL EFFECTIVE 04/17/17

- **MACROSCOPIC EXAM**
- **D-L COLOR TEST**
- **GC-MS ANALYSIS MUST REFLECT  
PRESENCE OF THC AND CBN OR CBD**
- **IF NO CBN OR CBD, THEN  
MICROSCOPIC EXAM WITH PHOTOS**

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# THE NEW PROTOCOL EFFECTIVE 04/17/17

➤ MACROSCOPIC EXAM

➤ D-L COLOR TEST

PRESUMPTIVE

➤ GC-MS ANALYSIS MUST REFLECT  
PRESENCE OF THC AND CBN OR CBD

CONFIRMATORY

➤ IF NO CBN OR CBD, THEN  
MICROSCOPIC EXAM WITH PHOTOS

# WHY DO WE CARE?

- GC-MS SIGNIFICANTLY MORE ACCURATE IF PERFORMED PROPERLY
- MAKES FOR A BETTER ANALYST
- INSULATION FROM FRAUD

# THERE ARE STILL SOFT SPOTS

- PLENTY OF DATA TO REVIEW FROM NEW GC-MS METHOD
- THC “REFERENCE” STANDARDS
- VIRTUALLY ALL COUNTY LAB PROTOCOLS REMAIN UNCHANGED AND VULNERABLE TO ATTACK
- 2C:35-19 ISSUES WITH NJSP LAB “CERTIFICATES”





NEW JERSEY STATE POLICE  
OFFICE OF FORENSIC SCIENCES

**CERTIFIED LABORATORY REPORT  
DRUG ANALYSIS**

Laboratory Address:  
Narc Regional Laboratory  
NISP Office of Forensic Sciences  
1750 State Hwy. 45  
Little Falls, NJ 07424  
(973) 334-3300

Laboratory No.  
N14-06271

Submitting Agency  
Morris Plains PD

**CERTIFIED**

Item No.	No. Analytes	Quantity Not Sufficient for Complete Analysis	No. Concentrated/Repacked Substances Deleted	Deceptive	Marijuana	Cocaine	Heroin	Controlled Substance	Qualitative/Quantitative Analysis (GC/MS)	Controlled Substance	Other Drugs	Non-Drug Analytes	Investigative/Forensic/Police/Trace
1-1					X								
1-2		X											
1-6													

The estimated net weight of item(s) 1 is less than 50 g.

**"I HEREBY  
CERTIFY AND  
ATTEST"**

1. Sample = 14.17 grams

2. Sample = 28.35 grams

3. Sample = 459.5 grams

**TEST PROCEDURE KEY**

1. Macroscopic & Microscopic Examination
2. Duquenois Color Test
3. Color Tests
4. Gas Chromatography/Mass Spectrometry
5. Infrared Spectrometry
6. High Performance Liquid Chromatography
7. Microcrystalline Tests
8. Thin Layer Chromatography
9. Thin Layer Chromatography
10. Thin Layer Chromatography
11. Physical Identification

12. Weight Determination  
(Used only for specimens with  
"No Further Analysis")

I, the undersigned, have been employed by the State of New Jersey for 2 years, I have a B.S. degree in Forensic Science from the University of New Jersey and I am currently employed as a Forensic Scientist in the Forensic Sciences Office of the State of New Jersey. I am duly sworn and qualified to perform the duties of a Forensic Scientist and I am duly sworn and qualified to perform the duties of a Forensic Scientist and I am duly sworn and qualified to perform the duties of a Forensic Scientist.

**NOTARY**

Subscribed and sworn to before me this  
day of July, 2015

TERESA J. WELDE  
NOTARY PUBLIC OF NEW JERSEY  
COMMISSION EXPIRES DEC. 31, 2019

Jeffrey Neelan  
Forensic Scientist I



**NEW JERSEY STATE POLICE  
OFFICE OF FORENSIC SCIENCES**

**LABORATORY REPORT  
DRUG ANALYSIS**

Laboratory Address:

South Regional Laboratory  
NJSP Office of Forensic Sciences  
3401 White Horse Pike (Rt.130)  
Mantoloking, NJ 08057  
609-561-1000

Laboratory No.

S16-10337



Submitting Agency

Morristown Twp PD (GLD)

Agency No.

16-26830

Case

Date of Report

02-17-2017

**RESULTS OF DRUG ANALYSIS**

Page 1 of 1

Item No.	Net Weight	Quantity and Delivery or Sample Analysis	To, From, and Container Description	Locate	Container		Sample(s) and in Quantity	1. Manufacturer	2. Manufacturer (NDA)	3. Caffeine	4. Cocaine, PPV	5. Test Procedures	6. Further Analysis	OTHER REASONS AND COMMENTS	Controlled Substance Schedule	Prescription Drug	Non-Prescription Drug	NET WEIGHT	
					Signature	Initial													1
																			3.18 g

10 Sample # 14, 17 grams

1 Sample # 28, 25 grams

1 Sample # 40, 6 grams

**TEST PROCEDURE KEY**

- |   |                                    |   |
|---|------------------------------------|---|
| 1. Macroscopic Examination                      | 6. Infrared Spectrophotometry (IR) | 12. High Performance Liquid Chromatography  |
| 2. Microscopic Examination                      | 7. Gas Chromatography (GC)         | 13. GC/MS - Chemical Ionization             |
| 3. Duquenois Color Test                         | 8. Ultraviolet Spectrophotometry   | 14. Liquid Chromatography/Mass Spectrometry |
| 4. Color Tests                                  | 9. RFLOR                           | 15. Gemination                              |
| 5. Gas Chromatography/Mass Spectrometry (GC/MS) | 10. Microcrystalline Tests         | 16. Physical Identification                 |
|   | 11. Thin Layer Chromatography      | 17. Weight Determination (NFA Samples)      |

I have been employed by the NJSP Office of Forensic Sciences for 20 years, I have a PhD degree, and I have qualified as an expert witness in New Jersey Superior Courts in New Jersey. The police laboratory used for this analysis comments the types and results of the analysis performed. I am the person responsible for the analysis, reviewed results and the conclusions set forth in the above laboratory report, my training and experience in this area, the equipment used in performing the types of analyses described above was functioning properly, and accuracy documented in a certificate.

The test procedures used are accurate, reliable, objective in nature, and performed on a routine basis within the laboratory.

*Stephanie Miller*

Stephanie Miller, Forensic Scientist

Peer Reviewed By

Approved By: *JP*



NEW JERSEY STATE POLICE  
OFFICE OF FORENSIC SCIENCE

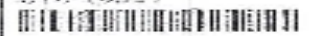
LABORATORY REPORT  
DRUG ANALYSIS

Laboratory Address:

South Jersey Laboratory  
NJSP Office of Forensic Sciences  
3101 White Horse Pike (BLL10)  
Mantoloking, NJ 08057  
609-541-3090

Laboratory No.

SJG-10337



Submitting Agency

Maple Shade PD (GLO)

Agency No.

16-26330

Case

Date of Report

06/12/2017

RESULTS OF DRUG ANALYSIS

Item No.	Acquisition	Quantity, Individual or Composite Analysis	U.S. Controlled Substances Schedule	Location	Appearance	Color	Smell	Crystal/Grain/Flake Structure	Microscopic Examination	Microscopic Examination (MMA)	Supine	Refractive Index (RI)	Leaf Preparation	In Further Analysis	OTHER FINDINGS AND COMMENTS	Number of Packages & Units Analyzed	Assay (Drug)



10 samples = 24.13 grams

1 sample = 28.7 grams

1 sample = 49.6 grams

TEST PROCEDURE KEY

- 1. Macroscopic Examination
- 2. Duquenois Color Test
- 3. Color Tests
- 4. Gas Chromatography/Mass Spectrometry (GC/MS)
- 5. Infrared Spectroscopy (IR)
- 6. Gas Chromatography (GC)
- 7. Ultraviolet Spectrophotometry
- 8. ECD/ED
- 9. Microscopic Tests
- 10. Thin Layer Chromatography
- 11. High Performance Liquid Chromatography
- 12. GC/MS - Chemical Ionization
- 13. GC/MS - Selected Ion Monitoring
- 14. Liquid Chromatography/Mass Spectrometry
- 15. Geminalich
- 16. Physical Identification
- 17. Weight Determination (NRC Samples)

I, the undersigned, being a duly qualified forensic scientist, have analyzed the above samples and have determined the results of the analyses performed. I am the person responsible for the accuracy of these results and the conclusions set forth in the above laboratory report, my training and experience in this field, and my adherence to the standards set forth in the above laboratory report, my training and experience in this field, and my adherence to the standards set forth in the above laboratory report.

The test procedures used are appropriate, reliable, objective in nature, and performed on a routine basis within the laboratory.

*Stephan M. Miller*

Stephan M. Miller, Forensic Scientist

Peer Reviewed By

Approved By: *[Signature]*

# IF I DON'T HAVE A MARIJUANA CASE, THEN SO WHAT?

- LAB SCANDALS HELP DEBUNK CREDIBILITY BIAS WHEN MAKING OTHERWISE “BURDENSOME” DISCOVERY REQUESTS
- LAB SCANDALS HIGHLIGHT THE IMPORTANCE OF PEER REVIEW SINCE THERE WILL BE TANGIBLE, REVIEWABLE DATA
- LAB FRAUD v. HUMAN ERRORS/ INCOMPETENCE/LAZINESS

# 1974-77 LAB COMPETENCY STUDY

## “UNACCEPTABLE SCIENTIFIC ERRORS”

- 71% BLOOD TESTING
  - 50% PAINT SAMPLE MATCH
  - 68% HAIR ANALYSIS
  - 35% SOIL TESTING
  - 28% FIREARMS/BALLISTICS IDENTIFICATION
- 
- 50% OF INNOCENCE PROJECT DNA EXONERATIONS SINCE 1989 WERE DUE TO FLAWED FORENSIC SCIENCE
  - 33% SEX ASSAULT EXONOREES CONVICTED THROUGH MISLEADING FORENSICS

**SO HOW DOES LAB FRAUD CONNECT TO  
CONFRONTATION CLAUSE JURISPRUDENCE  
AND ASSIST IN OUR DISCOVERY PRACTICE?**



# IDENTIFYING CONFRONTATION

## IMPLIES CROSS-EXAMINATION

- **EASY: EYEWITNESS, POLICE WHO INVESTIGATE SCENE IMMEDIATELY THEREAFTER**
- **HARDER: POLICE WHO PROCESS PAST TENSE INFORMATION**
- **HARDER STILL: FORENSIC WITNESS WITH NO DIRECT KNOWLEDGE OF GUILT OR INNOCENCE**
- **HARDEST YET: A COLLABORATIVE SCIENCE WITNESS UPSTREAM FROM FINAL CONCLUSION**

# **CRAWFORD AND FORENSIC SCIENCE EXPERT WITNESSES**

## **THREE UNIQUE CONFRONTATION ISSUES**

- **Must the witness who generates inculpatory evidence testify “live” or are sworn affidavits, reports, or certified lab reports sufficient**
- **If live testimony required, what can they say about procedures they didn’t conduct personally?**
- **If there are multiple contributors to the analysis, which ones must appear?**

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## **CRAWFORD PARADIGM**

➤ **IS IT TESTIMONIAL?**

➤ **THEN WITNESS MUST TESTIFY AND  
BE SUBJECT TO CROSS-EXAM**

**UNLESS:**

➤ **WITNESS UNAVAILABLE AND**

➤ **DEFENDANT HAD PRIOR  
OPPORTUNITY TO CROSS-EXAMINE**

# TESTIMONIAL?

## “PRIMARY PURPOSE” TEST

*HAMMON*

Statements are **testimonial** when the circumstances objectively indicate that there is no such ongoing emergency, and that the **primary purpose** of the interrogation is to **establish or prove past events potentially relevant to later criminal prosecution**

# **CRAWFORD PARADIGM**

## **IS IT TESTIMONIAL?**

### **NON-EXHAUSTIVE LIST**

- **EX PARTE IN-COURT TESTIMONY OR IT'S EQUIVALENT**
- **AFFIDAVITS**
- **CUSTODIAL EXAMINATIONS**
- **PRIOR TESTIMONY WHERE CROSS-EXAM NOT AVAILABLE**
- **SIMILAR PRE-TRIAL STATEMENTS MADE UNDER CIRCUMSTANCES WHICH AN **OBJECTIVE WITNESS** WOULD REASONABLY BELIEVE THAT THE STATEMENT WOULD BE AVAILABLE FOR LATER USE AT TRIAL**

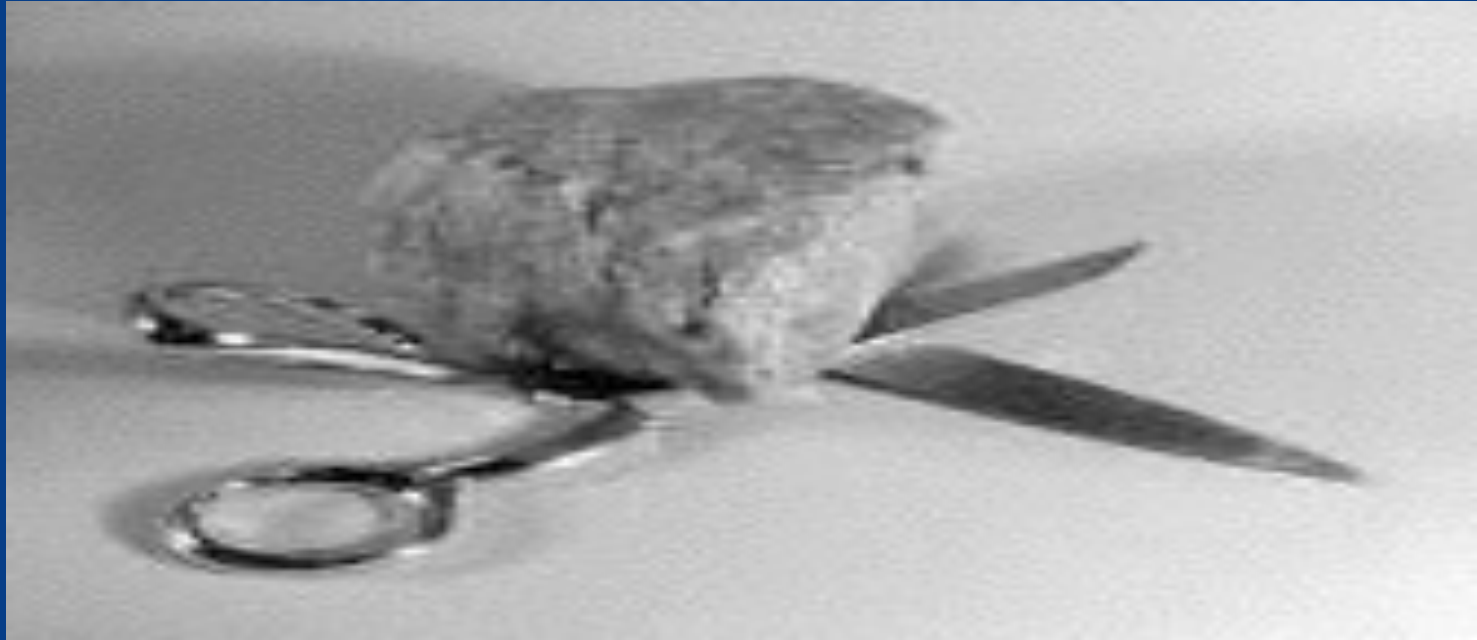
# PRE-CRAWFORD

PAPER COVERS ROCK

SCISSORS CUT  
PAPER



# ROCK SMASHES SCISSORS



CONFRONTATION  
CLAUSE TRUMPS HEARSAY  
RULES

ADMISSSION OF TESTIMONIAL SCIENTIFIC  
CONCLUSION WITHOUT **ANY** ANALYST OR  
WITNESS TO THE FORENSIC EVENT LEADING TO  
THE CONCLUSION REFLECTED IN THE REPORT  
--NO GOOD--  
*MELENDEZ-DIAZ, BEREZANSKY*

CRAWFORD AND FORENSIC SCIENCE EXPERT  
WITNESSES

THREE UNIQUE CONFRONTATION ISSUES

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- If there are multiple contributors to the analysis, which ones must appear?

**SO WE NEED A HUMAN BEING? BUT WHO?**



# **CRAWFORD AND FORENSIC SCIENCE EXPERT WITNESSES**

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- **If there are multiple contributors to the analysis, which ones must appear?**

**ADMISSSION OF REPORT WITHOUT ANY ANALYST—NO GOOD**

**ADMISSION OF REPORT WITH ANALYST WHO IS NOT THE AUTHOR AND ACTS AS CONDUIT WITHOUT ANY DATA REVIEW OR INDEPENDENT CONCLUSION—NO GOOD  
*BULLCOMING, REHMANN***

**CRAWFORD AND FORENSIC SCIENCE EXPERT WITNESSES**

**THREE UNIQUE CONFRONTATION ISSUES**

- Must the witness who generates inculpatory evidence testify "live" or are sworn affidavits, reports, or certified lab reports sufficient
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- **Must the witness who generates inculpatory evidence testify “live” or are sworn affidavits, reports, or certified lab reports sufficient**
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- **If there are multiple contributors to the analysis, which ones must appear?**

**WHAT ABOUT EXPERT WITNESS RENDERING CONCLUSION WHERE THERE ARE MULTIPLE UPSTREAM CONTRIBUTORS TO DATA UPON WHICH CONCLUSION IS BASED?**

**WHAT ABOUT EXPERT WITNESS WHO TESTIFIES ABOUT ANOTHER EXPERT'S CONCLUSIONS AS ONE OF THE BASES TO THE TESTIFYING WITNESS'S CONCLUSION?**

**CRAWFORD AND FORENSIC SCIENCE EXPERT WITNESSES**

**THREE UNIQUE CONFRONTATION ISSUES**

- Must the witness who generates inculpatory evidence testify "live" or are sworn affidavits, reports, or certified lab reports sufficient
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# **RULE 703 EVOLUTION**

## **Rule 703**

### **Bases of Opinion Testimony by Experts**

**The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence**

**PRE-RULE 703  
(1975 FEDERAL & 1992 NJ)**

**EXPERTS COULD ONLY OPINE  
ON FACTS WHERE THEY HAD  
FIRST HAND KNOWLEDGE**

**LIMITED TO**

- **FIRST HAND OBSERVATION (Tx)**
- **HEARD AT TRIAL (live or hypothetical question)**

# RULE 703 EVOLUTION

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# RULE 703 “COMPROMISE”

WHAT IS STATUS OF RULE 703 EVIDENCE OBTAINED BEFORE HEARING, SOME OF WHICH IS INADMISSIBLE?

- R. 703 NOT A HEARSAY RULE, SO CAN'T ALLOW FOR TRUTH OR WILL HAVE FUNNELING ABUSE OF RULE
- **SOLUTION:** “BASIS EVIDENCE” A/K/A/ NOT FOR TRUTH OF MATTER ASSERTED (NON-TMA)
- CAN'T USE IN CLOSING, CAN GIVE LIMITING INSTRUCTION, AVOIDS CONFRONTATION ISSUES SINCE NON-TMA

# ***CRAWFORD CHANGES LANDSCAPE***

- **CONFRONTATION CLAUSE REACH IS GREATLY EXPANDED**
- **CLAUSE RENDERS CERTAIN EVIDENCE INADMISSIBLE BASED ON THE CONSTITUTION, *NOT* BASED ON AN EVIDENCE RULE**

**WILLIAMS v. ILLINOIS**  
**132 S. Ct. 2221 (2012)**

- RAPE INVESTIGATION & DNA SWABS FROM VICTIM
- SENT TO CELLMARK (PRIVATE LAB) & PERPETRATOR DNA PROFILE GENERATED (“CELLMARK PROFILE”)
- DEFENDANT INDEPENDENTLY DEVELOPED AS SUSPECT & BLOOD DRAWN & DEFENDANT DNA PROFILE CREATED BY ISP ANALYST (“ISP PROFILE”)
- BENCH TRIAL: NO CELLMARK ANALYST CALLED--ISP ANALYST LAMBATOS CALLED – SHE DID NOT CREATE EITHER THE CELLMARK PROFILE OR THE ISP PROFILE
- LAMBATOS TESTIFIES THAT THERE WAS A COMPUTER MATCH BETWEEN THE CELLMARK PROFILE AND ISP PROFILE -IMPLICATING DEFENDANT
- PROSECUTOR: **“Was there a computer match generated of the male DNA profile found in semen from the vaginal swabs of [L. J.] to a male DNA profile that had been identified as having originated from Sandy Williams?”** LAMBATOS: **“YES, THERE WAS.”**
- 4-1-4 OPINION; PLURALITY, CONCURRENCE; DISSENT – DEEPLY DIVIDED COURT

# WILLIAMS v. ILLINOIS

## PLURALITY (4 JUSTICES)

- **FIRST BASIS:** IF TESTIMONIAL, CELLMARK EVIDENCE WAS NOT OFFERED FOR TRUTH – THEREFORE *CRAWFORD* CONCERNS NOT IMPLICATED SINCE NO NEED TO TEASE OUT RELIABILITY WITH CROSS-EXAM – THUS DISTINGUISHES *MELENDEZ-DIAZ* & *BULLCOMING*
- REFERENCE TO CELLMARK PROFILE WAS NON-TMA, BASIS EVIDENCE ONLY – **BUT** DISSENT’S ARGUMENT WOULD HAVE FORCE IF JURY TRIAL
- CELLMARK REPORT ITSELF NEVER ADMITTED INTO EVIDENCE
- **SECOND BASIS:** WAS NOT TESTIMONIAL BECAUSE ANALYST NOT AN “ACCUSATORY” WITNESS
- CHANGES “PRIMARY PURPOSE” TEST TO A “TARGETED ACCUSATION” TEST – GENERATED FOR THAT DEFENDANT (**NJ TREND?** *STATE v. WILSON*)

# **WILLIAMS v. ILLINOIS**

## **DISSENT (4 JUSTICES)**

- CELLMARK EVIDENCE WAS OFFERED FOR TRUTH AND WASN'T MERELY BASIS EVIDENCE
- CELLMARK REPORT **NO DIFFERENT** THAN LAB REPORT IN *BULLCOMING* – HAD TITLE, DESCRIBES SAMPLES, DESCRIBES METHOD, DISCLOSES RESULTS, SIGNED BY ANALYST
- IMPOSSIBLE THAT CELLMARK OPINION OFFERED FOR ANYTHING BUT THE TRUTH OF ITS CONTENTS – PROVIDED THE MISSING LINK PROSECUTOR NEEDED
- “THERE ARE 5 VOTES TO ALLOW ADMISSION OF EVIDENCE, BUT NOT A SINGLE UNIFIED EXPLANATION WHY”
- 5 JUSTICES AGREE THAT CELLMARK WAS OFFERED FOR TRUTH, BUT NEVERTHELESS CONFRONTATION NOT OFFENDED? (**BENCH TRIAL**)

# **WILLIAMS v. ILLINOIS**

## **CONCUR (THOMAS)**

- **CELLMARK REPORT WASN'T "TESTIMONIAL" SINCE IT LACKED OATH AND SOLEMNITY REQUIRED BY *CRAWFORD* CORE**
- **DISAGREES WITH PLURALITY THAT CELLMARK WAS "BASIS EVIDENCE" ONLY**
- **CAN'T ASSESS CREDIBILITY OF EXPERT WITHOUT ASSESSING VERACITY OF EVIDENCE UPON WHICH OPINION BASED**
- **CROSS-EXAM IMPORTANT – COULD BE POTENTIAL FOR "DRY LABBING" BY CELLMARK ANALYST**

## **BREYER CONCURRING**

- **SCRAP OPINION AND LIST FOR REARGUMENT-NO OPINION HERE GIVES SUFFICIENT GUIDANCE**
- **NEED TO DEFINE A LOGICAL STOPPING PLACE WHERE THERE IS LAYER UPON LAYER OF TESTIMONIAL STATEMENTS THAT LEAD TO ULTIMATE CONCLUSION**

# **CRAWFORD AND FORENSIC SCIENCE EXPERT WITNESSES**

## **THREE UNIQUE CONFRONTATION ISSUES**

- **Must the witness who generates inculpatory evidence testify “live” or are sworn affidavits, reports, or certified lab reports sufficient**
- **If live testimony required, what can they say about procedures they didn’t conduct personally?**
- **If there are multiple contributors to the analysis, which ones must appear?**

**WHAT ABOUT EXPERT WITNESS RENDERING CONCLUSION WHERE THERE ARE MULTIPLE UPSTREAM CONTRIBUTORS TO DATA UPON WHICH CONCLUSION IS BASED?**

**WHAT ABOUT EXPERT WITNESS WHO TESTIFIES ABOUT ANOTHER EXPERT'S CONCLUSIONS AS ONE OF THE BASES TO THE TESTIFYING WITNESS'S CONCLUSION?**

**--WHO KNOWS--**

**CRAWFORD AND FORENSIC SCIENCE EXPERT WITNESSES**

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**STATE v. ROACH, 219 NJ 58 (2014)**  
**STATE v. MICHAELS, 219 NJ 1 (2014)**

## **NJ's TAKE SINCE *WILLIAMS v. ILLINOIS***

- Neither *Roach* nor *Michaels* specifically address reliance on outside conclusion offered on non-TMA basis – STILL OPEN ISSUE

**Ignores *Williams v. Illinois***

Normally we would turn to the Supreme Court's most recent decision in an area of law to guide us in our interpretation and application of the court's case law. However, we find that the fractured holdings of *Williams* provide little guidance in understanding when testimony by a laboratory supervisor or co-analyst about a forensic report violates the Confrontation Clause

# ROACH

- RAPE CASE--PERPETRATOR DNA OBTAINED (FROM VICTIM) AND PROFILE CREATED BY NJSP ANALYST SCHIFFNER-INITIAL SUSPECT CLEARED
- SCHIFFNER RELOCATES TO WI; NJSP ANALYST BANAAG TAKES OVER FILE
- DEFENDANT INDEPENDENTLY DEVELOPED AS SUSPECT, BUCCAL SWABS OBTAINED, AND DNA PROFILE CREATED BY BANAAG
- BANAAG REVIEWS "EVERYTHING": SCHIFFNER'S REPORT, ALL UNDERLYING DATA, INITIALED PAGES, ALL "DATA CALLS", AND GENERATES REPORT WITH INDEPENDENT CONCLUSIONS/CALLS
- AT TRIAL, BANAAG TESTIFIES; SCHIFFNER DOES NOT
- CONFRONTATION RIGHTS ARE SATISFIED SO LONG AS THE TESTIFYING WITNESS IS QUALIFIED TO PERFORM, AND DID IN FACT PERFORM, AN INDEPENDENT REVIEW OF TESTING DATA AND PROCESSES; CANNOT PARROT FINDINGS OF ANOTHER

# MICHAELS

- VEHICULAR HOMICIDE-DEFENDANT'S BLOOD ANALYZED BY PRIVATE LAB AT REQUEST OF STATE
- **14 ANALYSTS** INVOLVED IN VARIOUS ASPECTS OF PROCESS AND 950 PAGES OF DATA
- ALL DATA GIVEN TO DR. BARBIERI, FORENSIC TOXICOLOGIST AND ASSISTANT LAB DIRECTOR OF THAT LAB
- AT TRIAL, DR. BARBIERI TESTIFIES; DEFENDANT OBJECTS TO LACK OF OPPORTUNITY TO CROSS-EXAMINE OTHER PARTICIPANTS IN TESTING PROCESS
- TESTIMONIAL FACTS CAN BELONG TO MORE THAN ONE PERSON-UPSTREAM
- HERE, DR. BARBIERI SUPERVISED THE ACTUAL ANALYSTS, **WAS QUALIFIED AS AN EXPERT IN THE AREA OF TESTING, ANALYZED THE DATA HIMSELF, PRODUCED A REPORT AND AN INDEPENDENT CONCLUSION**
- **Line drawing:** *State v. Bass*, 224 NJ Super. 285 (App. Div. 2016)

**WAIT A MINUTE...**  
**WHAT ABOUT SCOTUS IN *BULLCOMING*??**

- Caylor's certification reported more than a machine-generated number
- It reflected chain of custody info on sample, cross-check info, type of testing, oath of adherence to protocol, remarks regarding integrity of test
- These representations, relating to past events and human actions not revealed in raw, machine-produced data, are meat for cross-examination
- **YOU'RE RIGHT.....WILL AFFECT OUR DISCOVERY APPROACH**

**HERE ARE MY 5  
TIPS WHEN YOU  
HAVE A FORENSIC  
SCIENCE  
CONFRONTATION  
ISSUE**



# CONFRONTATION TIP #1

NJ COURTS HOLD THAT CROSS-EXAM OF SOME PARTICIPANTS IN SCIENTIFIC PROCESS IS INDISPENSIBLE TO ASSURE RELIABILITY OF TESTING

## A REVIEWING SURROGATE CAN'T SUBSTITUTE

### ➤ PHLEBOTOMIST

➤ *STATE v. KENT* and *STATE v. RENSHAW*

### ➤ MARIJUANA ANALYST (IF OLD PROTOCOL)

NOTHING TO REVIEW – NEED WITNESS

UNDERSTAND THE SCIENCE AND BE PREPARED TO ARGUE LACK OF PROCESS VERIFICATION AND IMPORTANCE OF CONFRONTATION OF THE “SCIENCE WITNESS”

# **KENT AND PHLEBOTOMISTS**

- we recognize that hospital nurses, phlebotomists and other medical personnel are not police officers
- nonetheless, their close interaction with law enforcement officers, in extracting blood from DWI suspects and in certifying as to the manner and circumstances under which the sample was taken, readily places them within the ambit of the "testimonial" boundaries of *Crawford*

## **CONFRONTATION TIP #2**

# **THE IMPORTANCE OF EXTERNAL PEER REVIEW**

# SCIENTIFIC PEER REVIEW

UNLIKE EPA OR FDA, THERE IS A GENERAL FORENSIC LACK OF COMMUTABILITY, BUT.....

- LAB ACCREDITATION-NATIONWIDE:
  - ASCLD/LAB
  - ISO 17025
  - SWGDAM
- INTERNAL AUDIT - SCIENTIFIC PEER REVIEW
- EXTERNAL AUDIT – SCIENTIFIC PEER REVIEW
- DEFENSE EXPERT-SCIENTIFIC PEER REVIEW

# CONFRONTATION TIP #2

## THE IMPORTANCE OF “PEER REVIEW”

- *ROACH AND MICHAELS* STRESS THE IMPORTANCE OF STATE EXPERT REVIEW OF *ALL* THE DATA AS PRE-REQUISITE FOR ADMISSIBILITY OF A DOWNSTREAM OPINION
- COURT IS SUBSTITUTING STATE PEER REVIEW AT THE EXPENSE OF DEFENDANT’S UPSTREAM CONFRONTATION RIGHTS
- PEER REVIEW ALSO REQUIRED INTERNALLY/EXTERNALLY FOR RE-ACCREDITATION
- ANALOG IS DEFENSE EXPERT/PEER REVIEW
- DEFENSE PEER REVIEW (**EXPANDED DISCOVERY**) BECOMES CRITICALLY IMPORTANT TO ASSURE RELIABILITY OF TESTING – **ESPECIALLY NOW IN THE WAKE OF DEMONSTRABLE LAB FRAUD**

# VARIABILITY OF “HUMAN FACTORS” IN FORENSIC SCIENCE

- KAMALKANT SHAH --LAB FRAUD
- SGT. MARC DENNIS – NJSP A.D.T.U. FRAUD
- 2010 DNA STUDY/ARTICLE--PREVIOUSLY ANALYZED COMPLEX MIXTURE: 17-1-4-12
- 2005 DNA STUDY--DR. DAN KRANE--MORE THAN 70% OF FOUR PERSON MIXTURES COULD BE WRONGLY INTERPRETED AS TWO OR THREE PERSON MIXTURES
- COLORADO SPRINGS INTERNAL STANDARD

# CONFRONTATION TIP #3

## BREAK THE STATEMENT INTO ITS PARTS AND ADVOCATE ACCORDINGLY (SETS UP TIP #4)

- FOR THE TESTIMONIAL PARTS, INSIST ON THE PRESENCE OF THE CONCLUDING WITNESS FOR CROSS-EXAM
- EXPERT CONCLUSIONS BASED ON OUT OF COURT SOURCES: ARE THEY BEING OFFERED FOR THE TRUTH OF THEIR CONTENT? **OF COURSE**
- 5 JUSTICES IN SCOTUS *WILLIAMS* AGREE AND IDENTIFY THAT AS A PROBLEM—PARTICULARLY IN A **JURY TRIAL (8 OF 9 AGREE)**--*ROACH AND MICHAELS* DON'T ADDRESS
- SINCE SCOTUS *WILLIAMS* HAS PROVIDED LITTLE GUIDANCE, AND NJ SUPREMES REFUSE TO RECOGNIZE IT AS AUTHORITY, THE AREA OF LAW IS STILL RAPIDLY DEVELOPING AND ALL GOOD FAITH ARGUMENTS SHOULD BE MADE

# CONFRONTATION TIP #4

## PENUMBRA OF HUMAN ERROR

- YOU MAY WANT TO CONFRONT TESTIFYING WITNESS ON NON-TMA “BASIS” EVIDENCE AND CONCLUSIONS OBTAINED FROM IT – **BUT BE PERPARED-DON'T WING IT-SANDY LAMBATOS EXAMPLE**
- KNOW THE NON-TMA SOURCE--DO YOU HOMEWORK--DISCIPLINE RECORD, ACCREDITATION LOSS OR AUDITS, ROOT CAUSE ANALYSES, PRIVATE WORK
- EXTERNAL PEER REVIEW ANALOGY FOR THIS EXTENDED DISCOVERY – WHAT'S GOOD FOR THE GOOSE
- APPEAR REASONABLE – ONLY SEEK ADDITIONAL DISCOVERY IN NON-TMA AREAS WHERE THERE IS THE HIGHEST CHANCE THEY FALL INTO THE **PENUMBRA OF HUMAN ERROR**

# CONFRONTATION TIP #5

## USE THE RULES

- RULES 3:3-13(B)(1)(I) AND 7:7-7(b)(11) BOTH REQUIRE THE STATE TO FURNISH DETAILED INFORMATION ABOUT ITS EXPERT
- IF THE STATE INTENDS TO CALL A SURROGATE UNDER THE *ROACH/MICHAELS* MODEL, THEN **A SEPARATE EXPERT REPORT IS NEEDED** CONTAINING ALL THE DETAILS TO SATISFY THE RULE

**SEE YOU DOWN THE ROAD**



**IS IT  
"TESTIMONIAL"?**



- "PRIMARY PURPOSE"**
- TO ESTABLISH/PROVE PAST EVENTS FOR LATER PROSECUTION?
  - ONGOING EMERGENCY?
  - NON-LAW ENFORCEMENT OFFICER?
  - CHILD PERSPECTIVE?
  - SOLEMN, OATH?
  - TOTALITY OF CIRCUMSTANCES?
  - "OTHER CHARACTERISTICS" OF DOCUMENT; MAP

YES

**MEANINGFUL PRIOR OPPORTUNITY TO CROSS-EXAMINE THE WITNESS UNDER OATH?**

NO

YES

NO

**ACCUSED PREVIOUSLY/  
CURRENTLY WAIVE  
OPPORTUNITY FOR CROSS-  
EXAM UNDER OATH OR  
PURPOSEFULLY ACT TO  
PRECLUDE PRIOR OR CURRENT  
MEANINGFUL OPPORTUNITY  
TO CROSS-EXAMINE UNDER  
OATH?**

**DOES NOT OFFEND  
CONFRONTATION**

**DECLARANT  
UNAVAILABLE?**

YES

NO

**DECLARANT  
UNAVAILABLE?**

YES

YES

**OFFENDS  
CONFRONTATION**

