A Nontraditional Approach

Your First DUI Case

From Intake to Jury Trial

"I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution."

–Thomas Jefferson, 1789

Why (not) DUI?

5 Rules of Criminal Defense

- 1. Always read the complaint
- 2. Make sure your name is not in the complaint
- 3. How do I know if it's a good plea deal?
- 4. All bad things start with a favor
- 5. Always go home

Who are the Players?

- The Criminal Defendant
- Person in the Robe
- Court Staff, DA
- The DUI Defense Attorney
- The Peace Officer
- Jury

Who is my client?

- First Offender v. the Multiple Offender Profile (us and "them")
- Private v. court-appointed defense (a word about resources, experts)
- Confidentiality, written waivers, family support
- Substance abuse treatment?
- Professional licenses
- Immigration issues (always ask)
- Expectations are created by you
- Listen
- Fees

Why should we care what the person on the bench thinks about our case?

Allegory of The First Year Lawyer

Who am I?

- **Do I (really) care about my client?**
- **Would I convict if I were on this jury?**
- **I can’t stand losing!**
- **Don’t get bitter, get better**

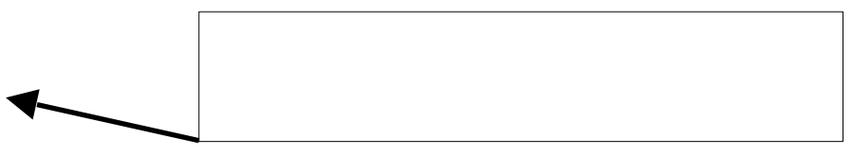
Do Legal Standards Matter?

Beyond a Reasonable Doubt

- "Probably guilty" = not guilty
- "Maybe guilty" = not guilty
- "Seems guilty" = not guilty
- "Highly likely guilty" = not guilty
- ONLY verified proof = guilty verdict

Burden of Proof

NOT GUILTY



← **PROVEN NOT GUILTY**

Burden of Proof

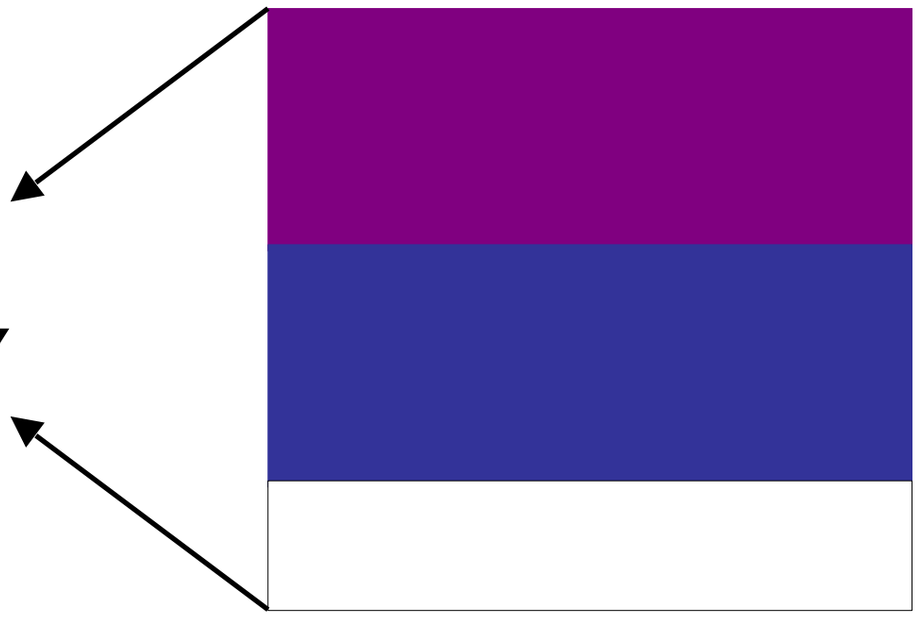
NOT GUILTY

← LESS THAN LIKELY

← HIGHLY UNLIKELY

← PROVEN NOT GUILTY

Burden of Proof



← UNLIKELY

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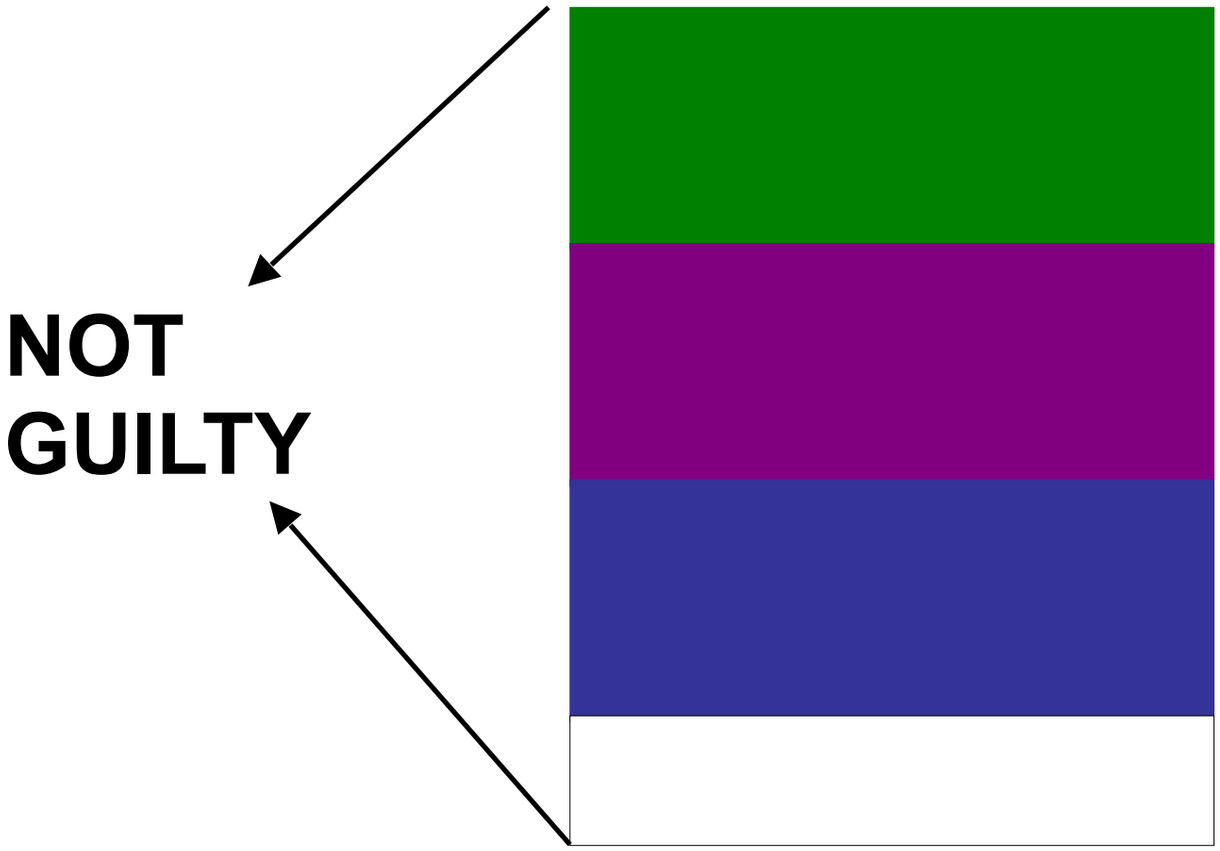

← MAY NOT BE

← POSSIBLY NOT

← UNLIKELY

← PROBABLY NOT

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← HIGHLY UNLIKELY

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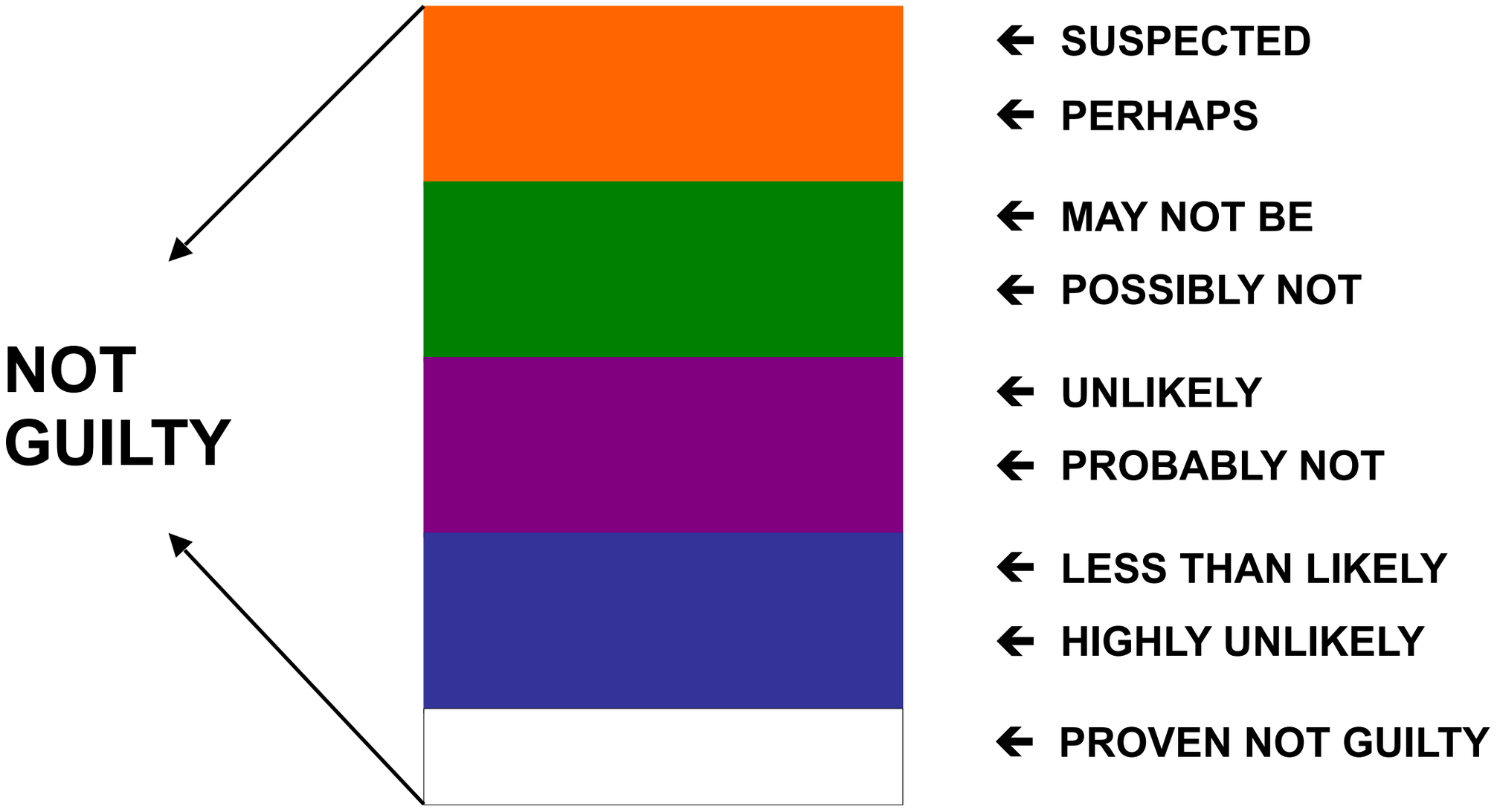
Burden of Proof



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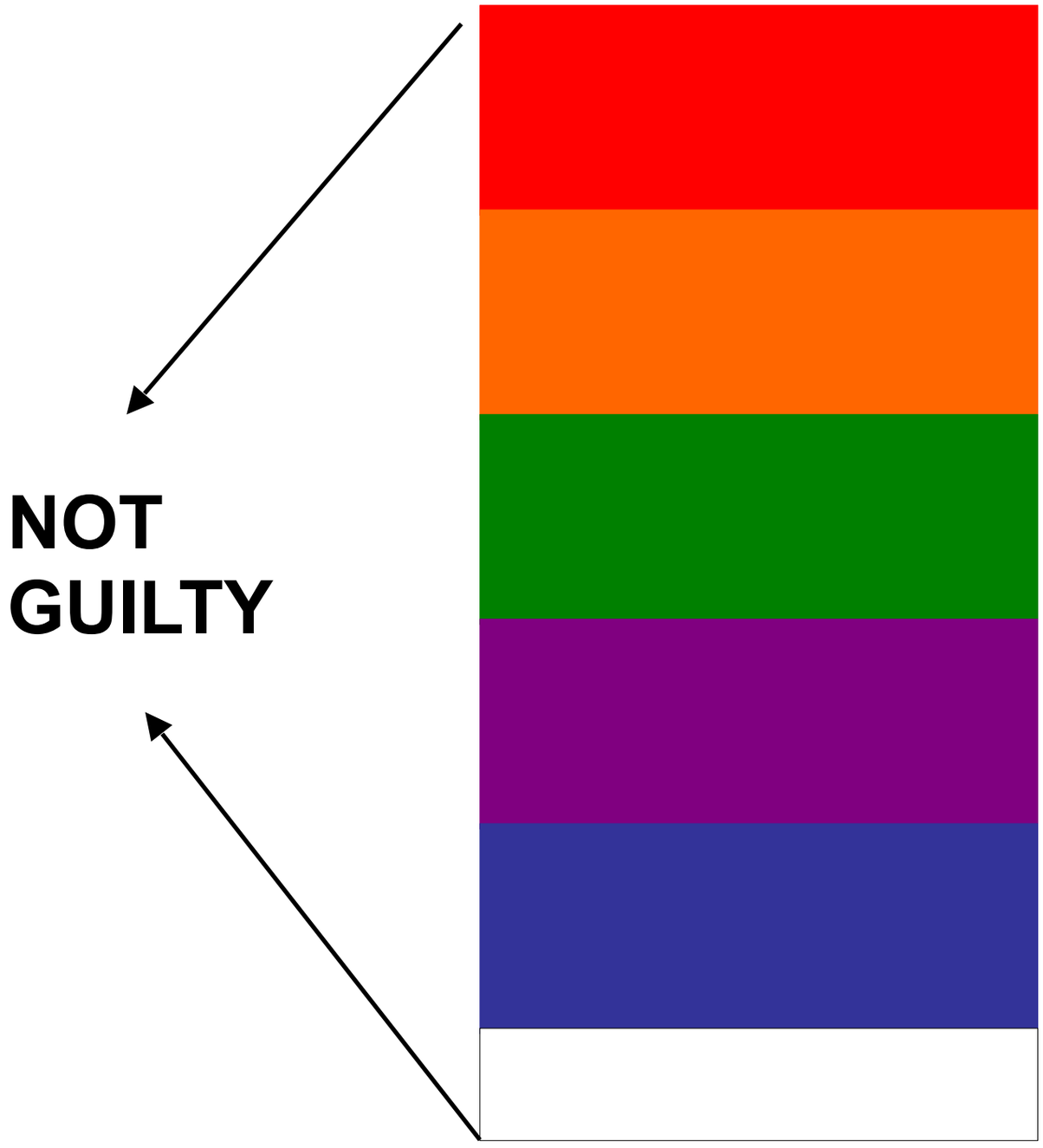

← PROBABLY GUILTY

← POSSIBLY GUILTY

← SUSPECTED

← PERHAPS

← MAY NOT BE

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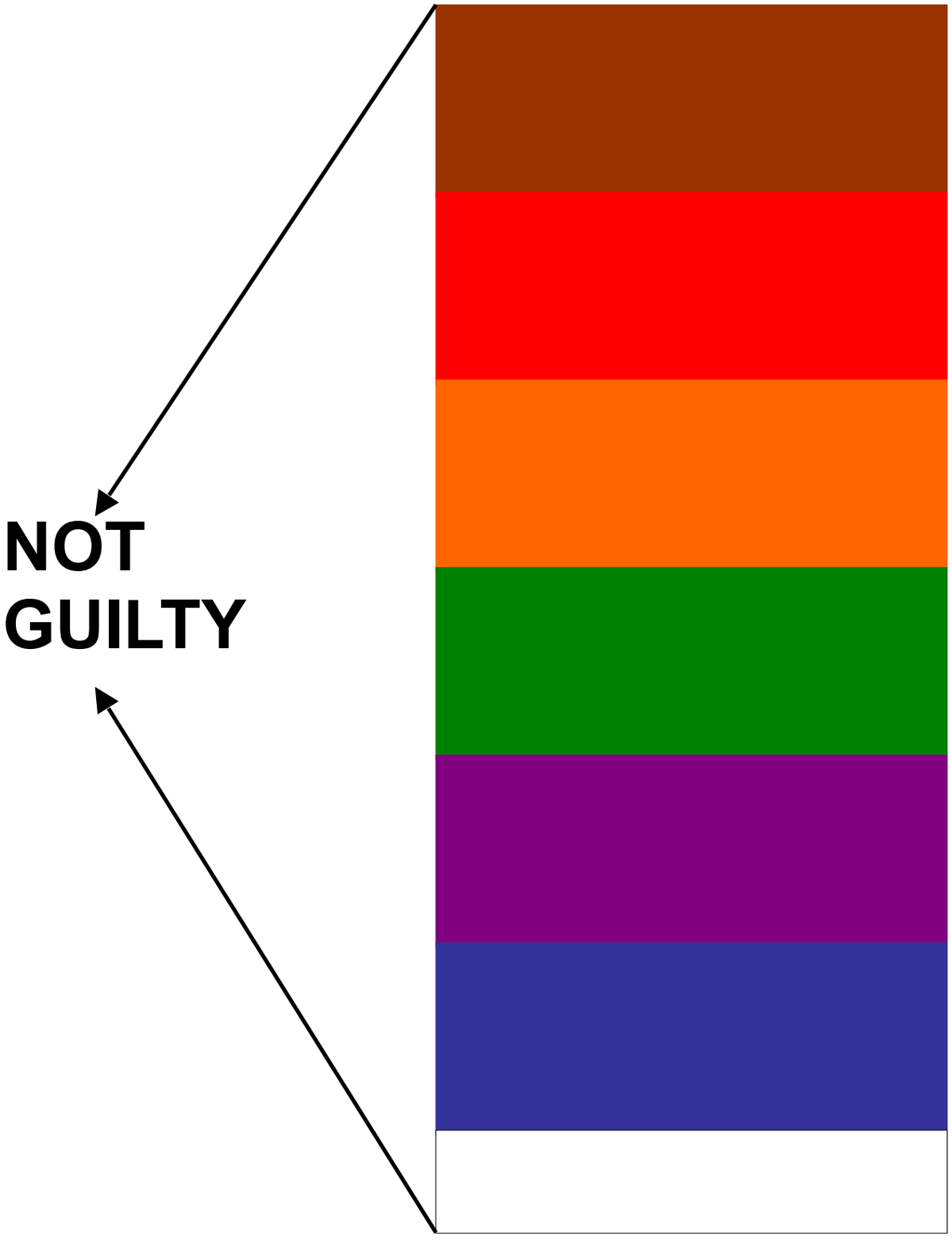

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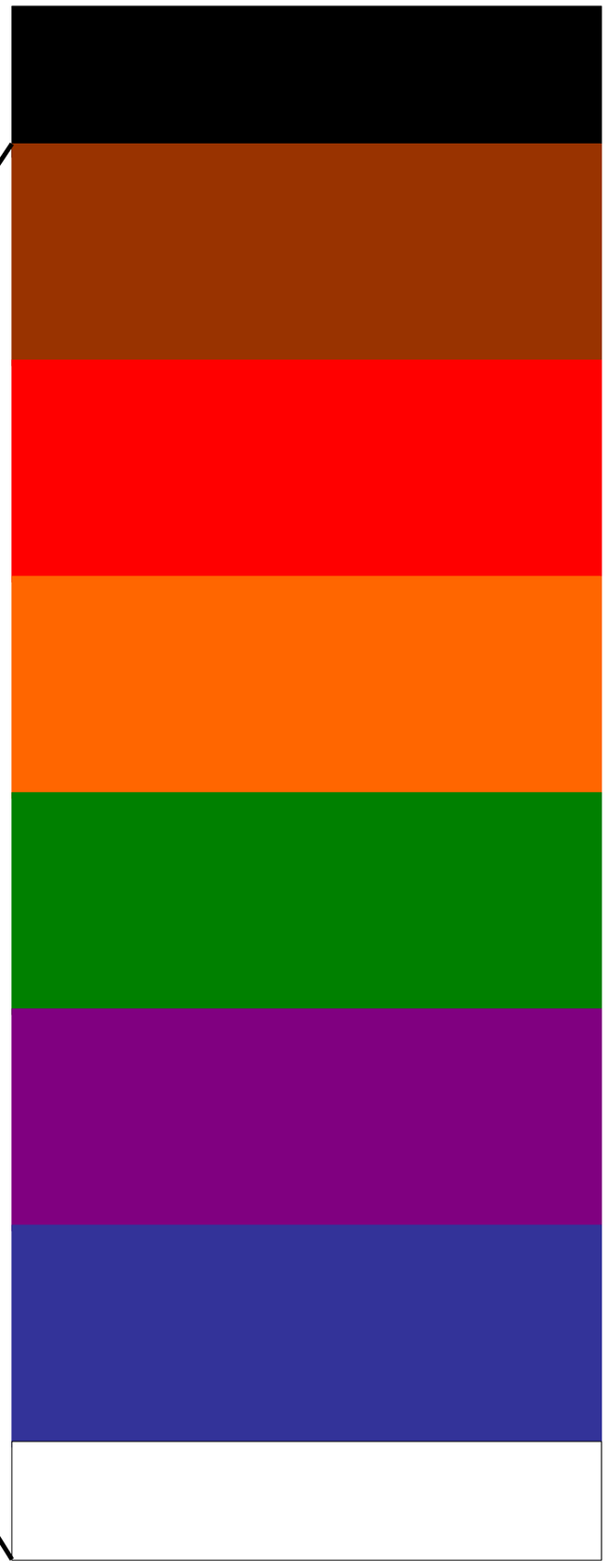
Burden of Proof

GUILTY



NOT GUILTY

- ← GUILTY BEYOND A REASONABLE DOUBT
- ← GUILT HIGHLY LIKELY
- ← GUILT LIKELY
- ← PROBABLY GUILTY
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"To accept as true on the basis of insufficient proof."

–To Speculate

Search for verified proof

NHTSA papers are not peer reviewed

Research Resources

Google It

- California DUI Lawyers Association
- The Green Books
- Learn from that 1st Year Lawyer (DA and LE materials)
- Find a Mentor, Join a Donut Group
- Collect Articles, Read Them Too
- Cross-Examination (yes, you get to testify)

trial by jury

Circumstantial Evidence

Circumstantial Evidence: Sufficiency of Evidence

"Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the People have **proved each fact essential to that conclusion** *beyond a reasonable doubt*."

Instruction 224

Use of Circumstantial Evidence

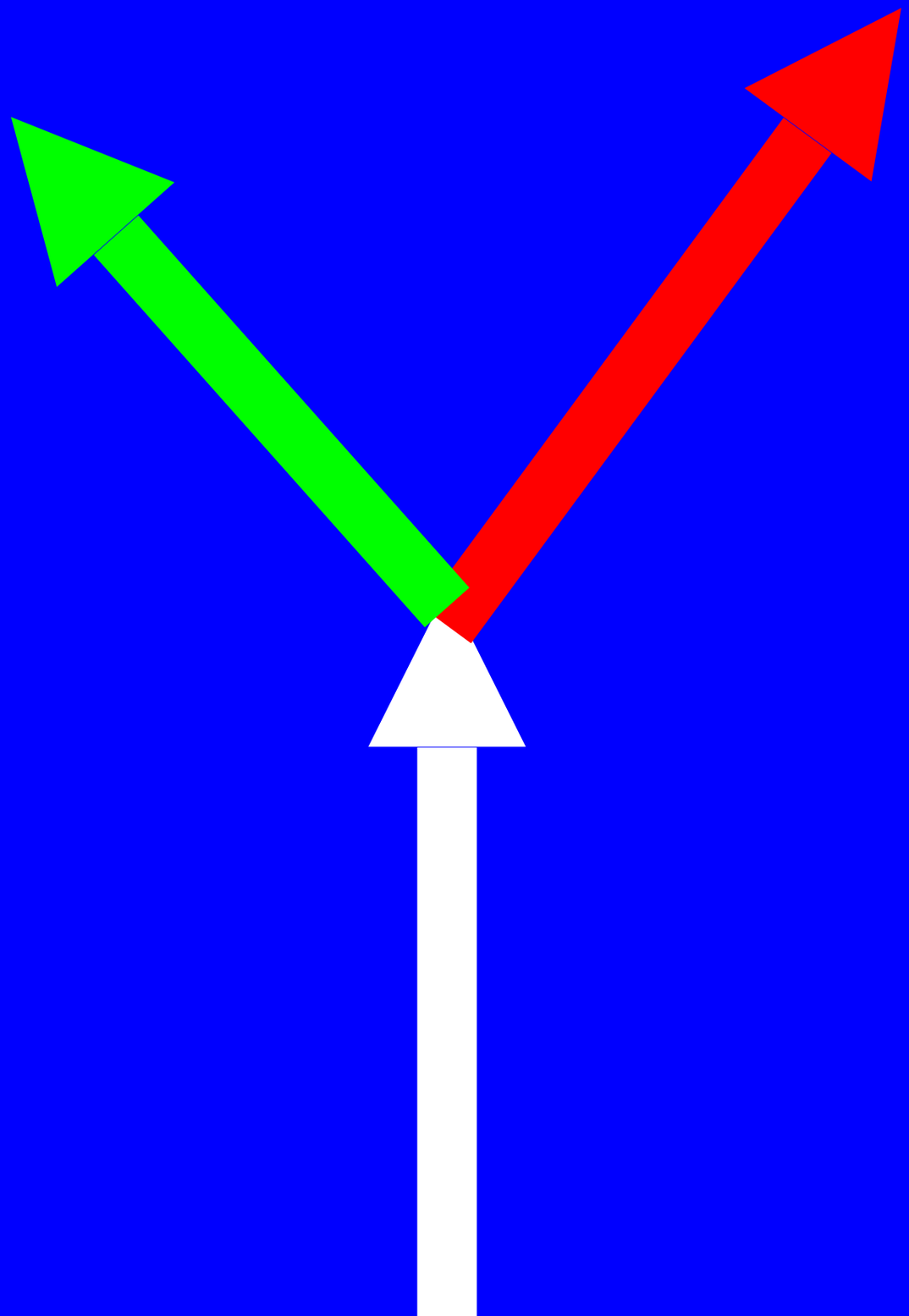
"Also, before you may rely on circumstantial evidence to find the defendant guilty, you must be convinced that **the only reasonable conclusion supported by the circumstantial evidence** is that the defendant is guilty."

Instruction 224

WHAT DO YOU DO WITH CIRCUMSTANTIAL EVIDENCE THAT HAS TWO REASONABLE INTERPRETATIONS, ONE POINTING TO GUILT AND ONE POINTING TO INNOCENCE?

NOT GUILTY

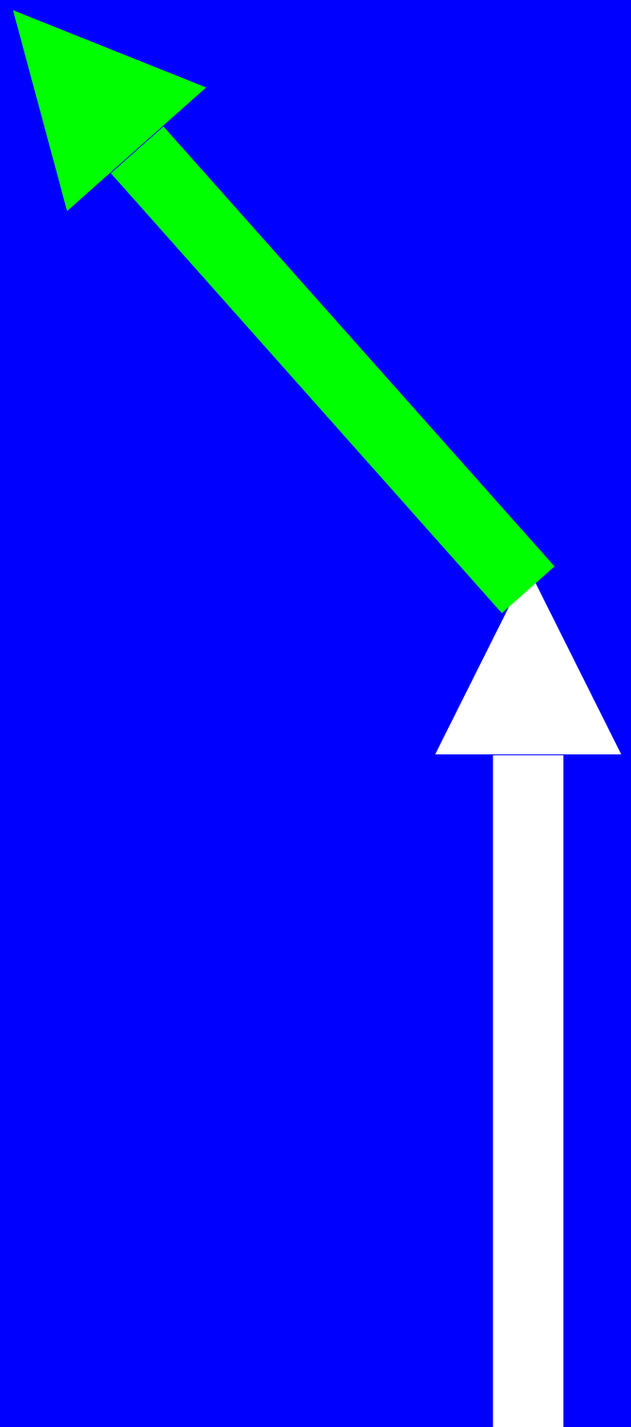
GUILTY



Conflicts in the Evidence

If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions points to innocence and another to guilt, ***you must accept the one that points to innocence.*** However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable.

NOT GUILTY



23152(a) = Drunk Driving

- The person is "under the influence" if his or her mental or physical abilities are *so impaired* that he or she is no longer able to drive a vehicle with the caution of a sober person using ordinary care under *similar circumstances*

Title 17

- In evaluating any test results in this case, you may consider whether or not the person administering the test or the agency maintaining the testing device followed the regulations of the California Department of Health Services

23152(b) = 0.08 at time of driving

- Drove with a blood alcohol level 0.08% or more (time of driving)

Preliminary Alcohol Screen

- Pre-arrest
- Toxicology experts agree: only for the presence of alcohol, not the numerical "result"; + or - (indication)
- Subject to mouth alcohol error
- Study shows can obtain same result after 2 minutes
- Government expert agrees: strength of blow affects result

Preliminary Alcohol Screen Sources of Error

- Mouth alcohol (no slope detector) error
- Breath temperature error
- "Strong blow" error
- Breath versus true blood content error
- Radio interference, low battery, etc.

15 Minute Observation

- Required by:
- Federal Law; National Highway Transportation Safety Administration (NHTSA)
- State Law (title 17)
- California Highway Patrol enforcement manual
- The Manufacturer (15-20 minutes)
- Experience and training

Slope Detection

- Title 17
- County Crime Lab
- The Draeger company
- Peer reviewed studies

Two tests?

- A test for precision, not accuracy (the "strike zone")
- Study shows two test procedure does not correct for mouth alcohol

The Undisputed Safeguards

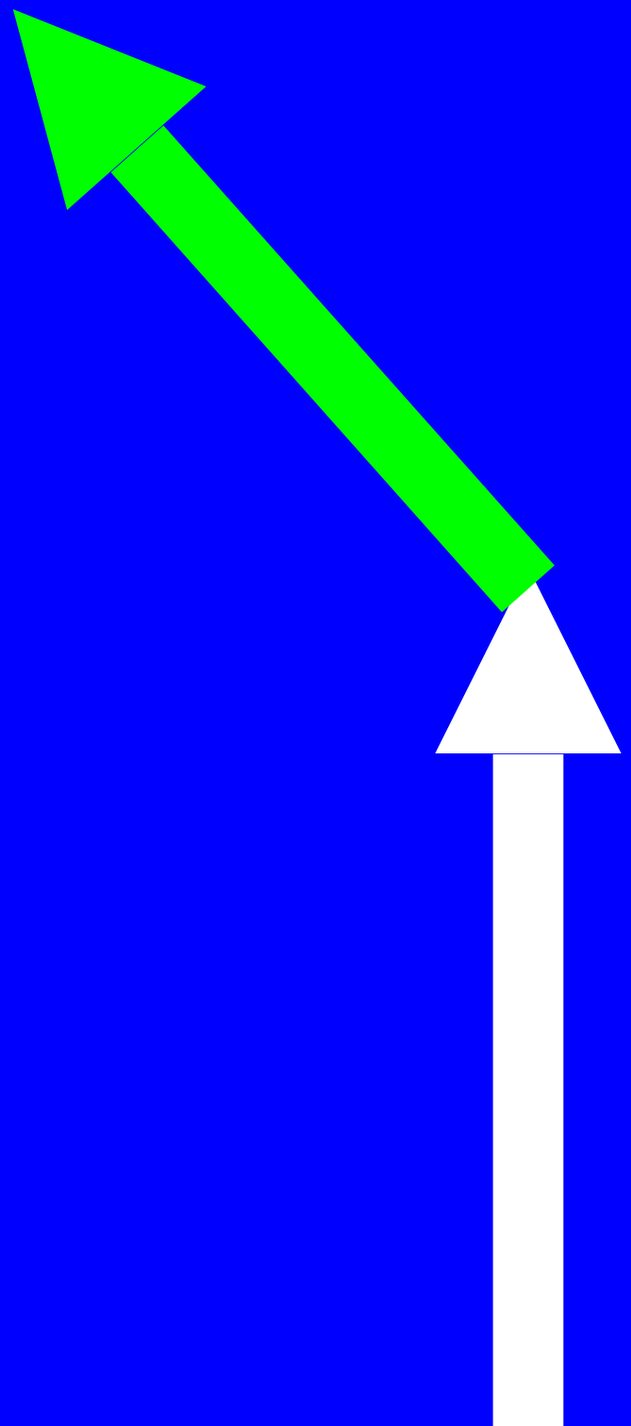
3 Undisputed Safeguards

- 15 minute observation period ("the only way to eliminate doubt")
- Questions about factors (belch, drink fluids, bubblegum, etc)
- Slope detector

Undisputed Evidence about the PAS test

- Odor of alcoholic beverage in cabin of vehicle = mouth alcohol (PAS Coordinator)
- No 15 minute observation period
- No questions about factors
- No Slope Detection

MOUTH
ALCOHOL



Machine Reading High

- Accuracy checks on:
- 5/21/14
- 5/29/14 (new gas cylinder)

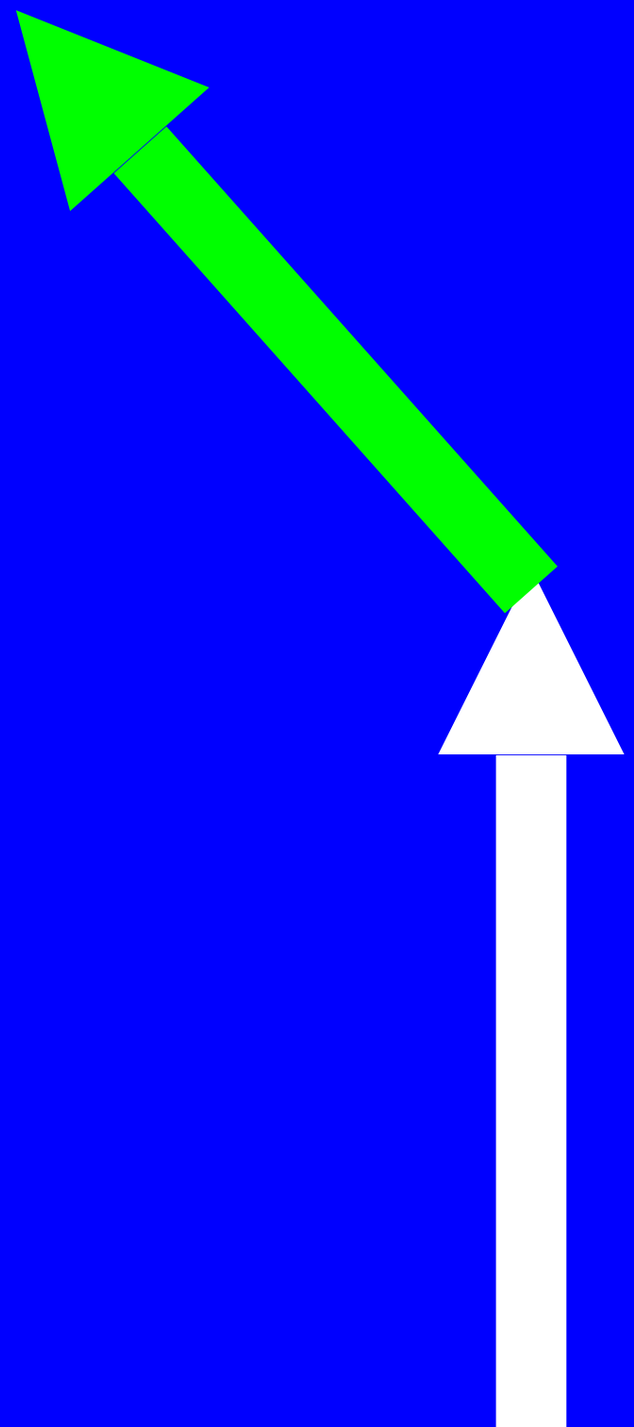
Machine Reading High

- Tests from 5/25/14, earlier that evening

".002 Makes a .08 an .07"

- Title 17 prohibits a reported result to the thousandth

READING HIGH
BEFORE TEST



The Government Assumptions

"Billy had to have been in the post-absorptive phase"

- No food to eat = empty stomach (not plausible, 14 hours without food)
- Drinking timing
- Number of drinks (Margaritas missing from profile)
- Healthy liver
- Average person

Post-Absorptive Phase

- Critical assumption made by the government toxicologist

No food in stomach?

- "3 hours and 12 minutes" -Kurt Dubowski, PhD
- It is a range....

What if Billy had food in stomach?

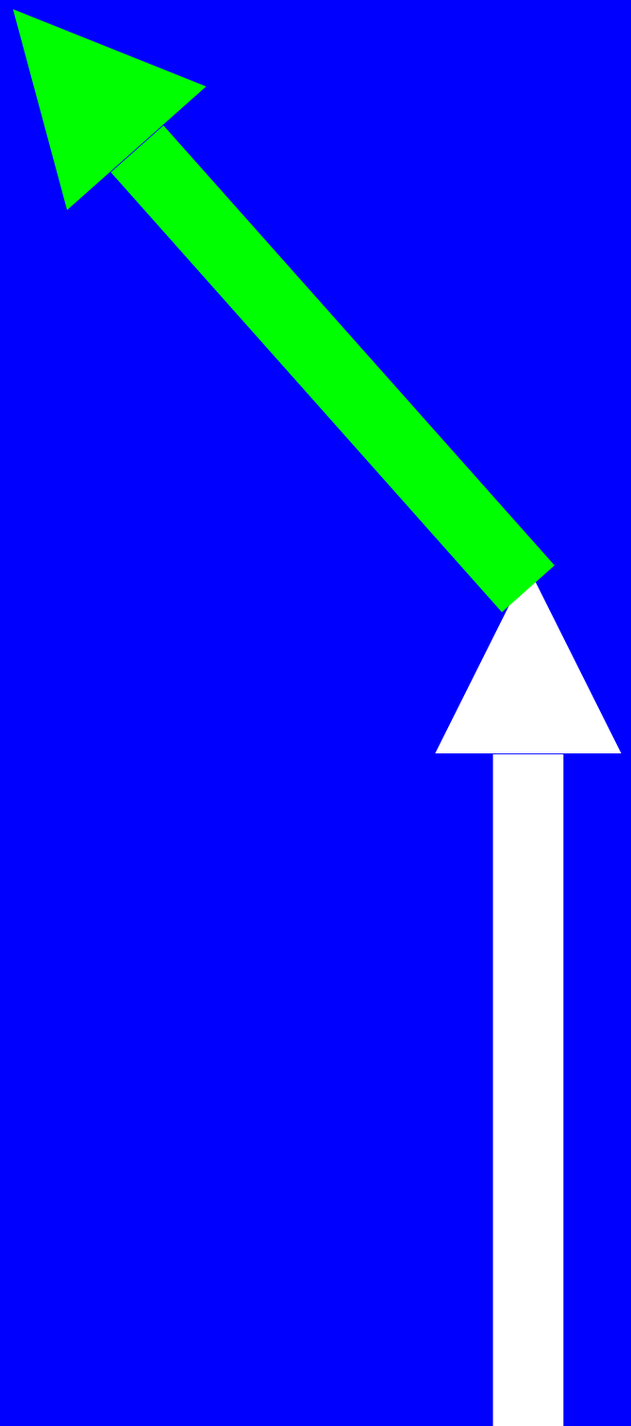
Assume 1/2 cup of food

- As high as 10 hours...

With food = rising BAC

In the Absorptive Phase
government expert cannot provide
reverse extrapolation opinion and…
BAC less than .08%
at time of driving

ABSORPTIVE PHASE



The Roadside Olympics

Scoreboard

- Walk and Turn: thrown out
- One Leg Stand (**no clues**)
- Romberg Balance (28 out of 30 seconds; incorrect to say "look at stars" versus "tilt head slightly back"; only 1 clue (eyelid tremors); opened eyes (but didn't list time)
- HGN (3 clues in each eye)

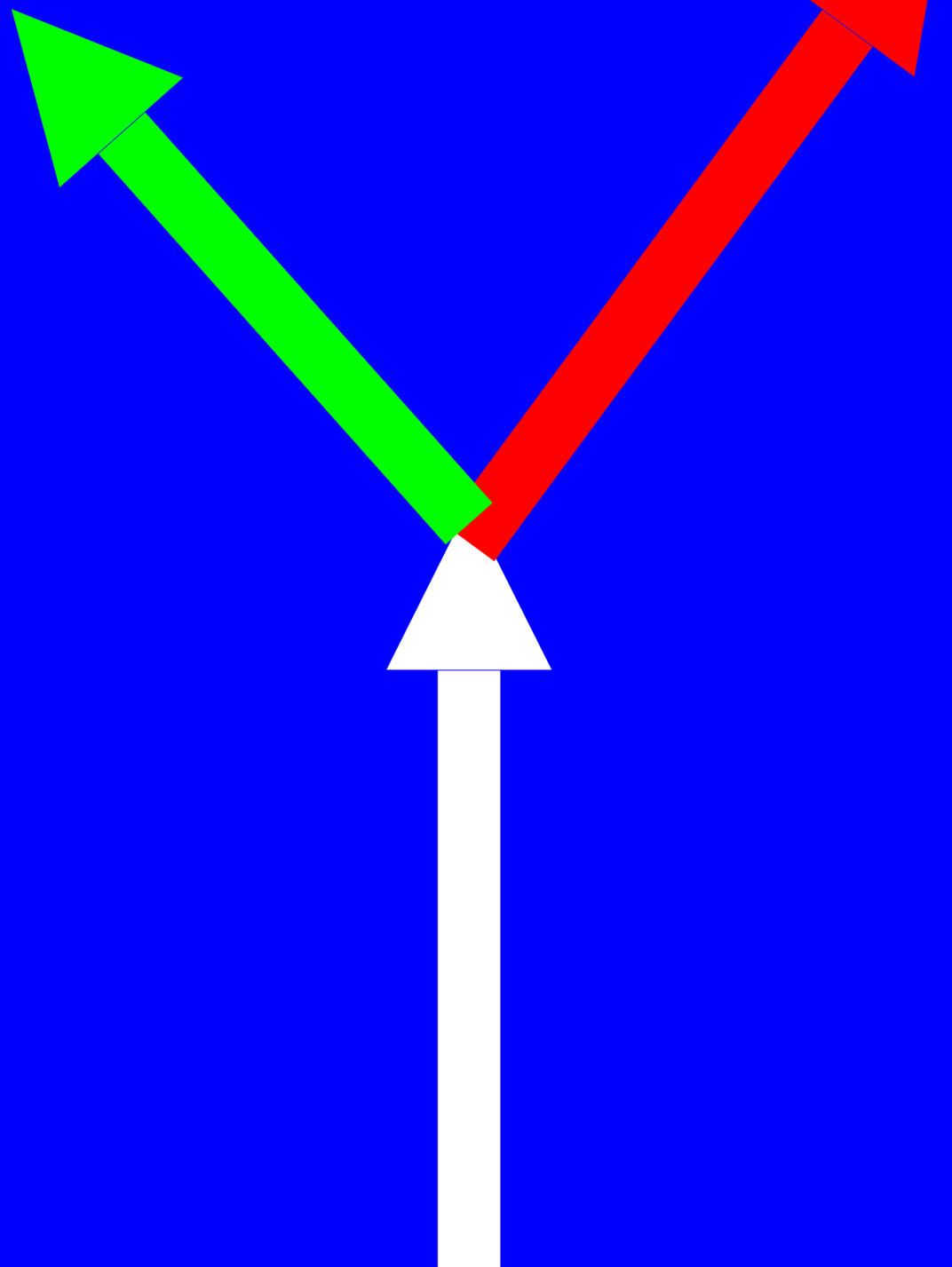
RESULTS DO NOT PREDICT BAC

HGN

- Should not be given at night (tired eyes, jet lag)
- Only presence of alcohol

3 FAVORABLE TEST RESULTS

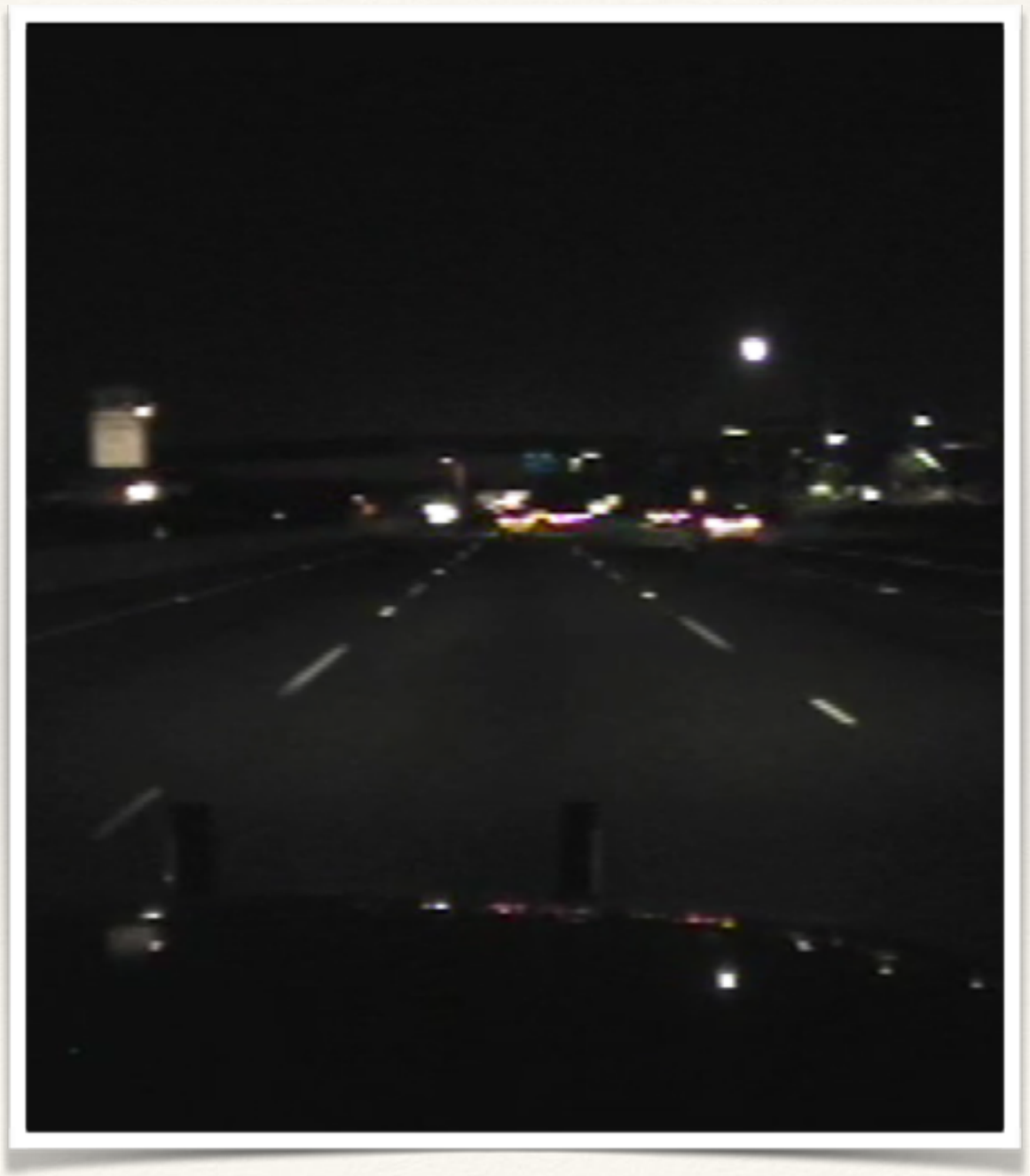
TOLERANCE



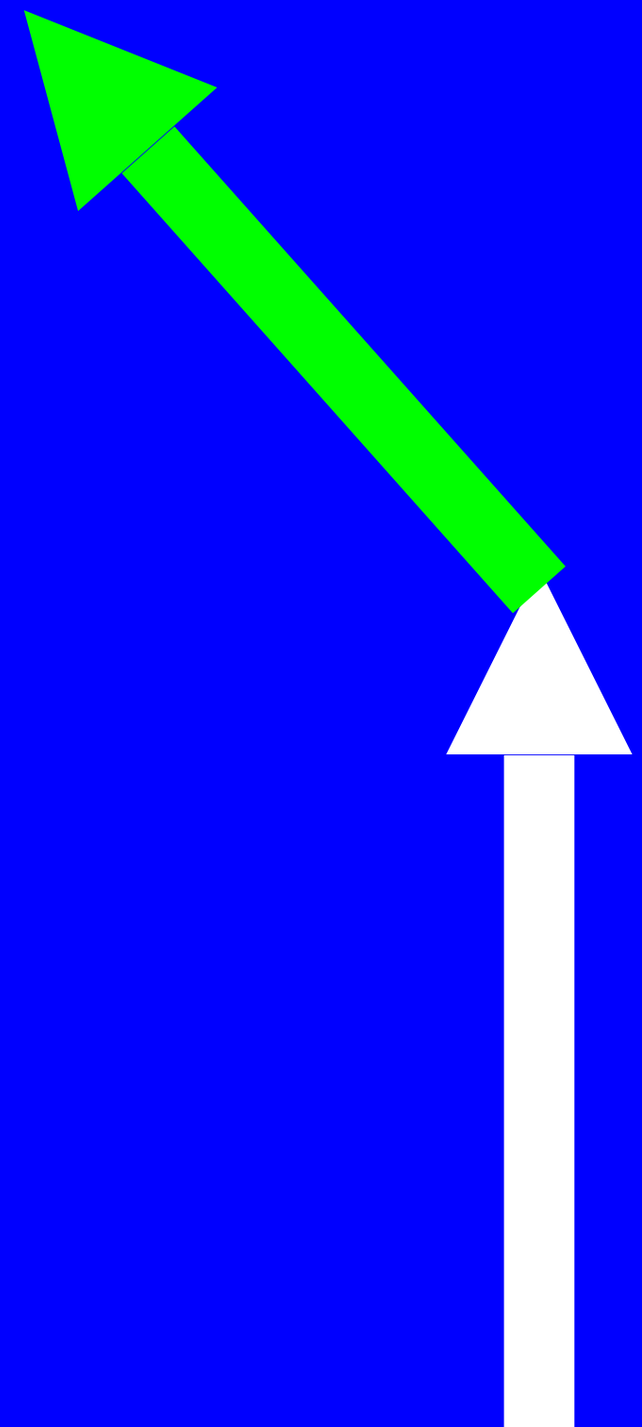
FST RESULTS =
NO IMPAIRMENT

Favorable Driving Pattern

- Consistent with BAC < .08%
- Did not touch broken white lines
- Did not drift back to touch the right lines
- Followed instructions
- Prior testimony on 11/14/14 (deficit in memory)



DRIVING
PATTERN



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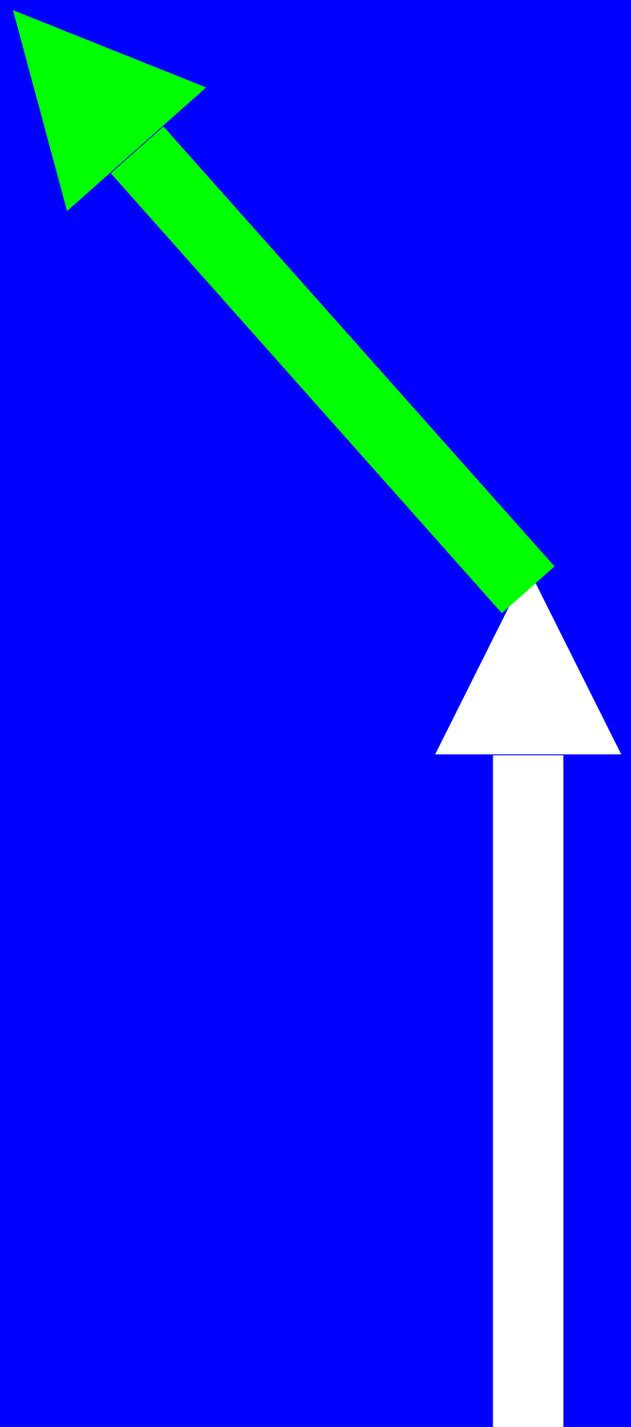

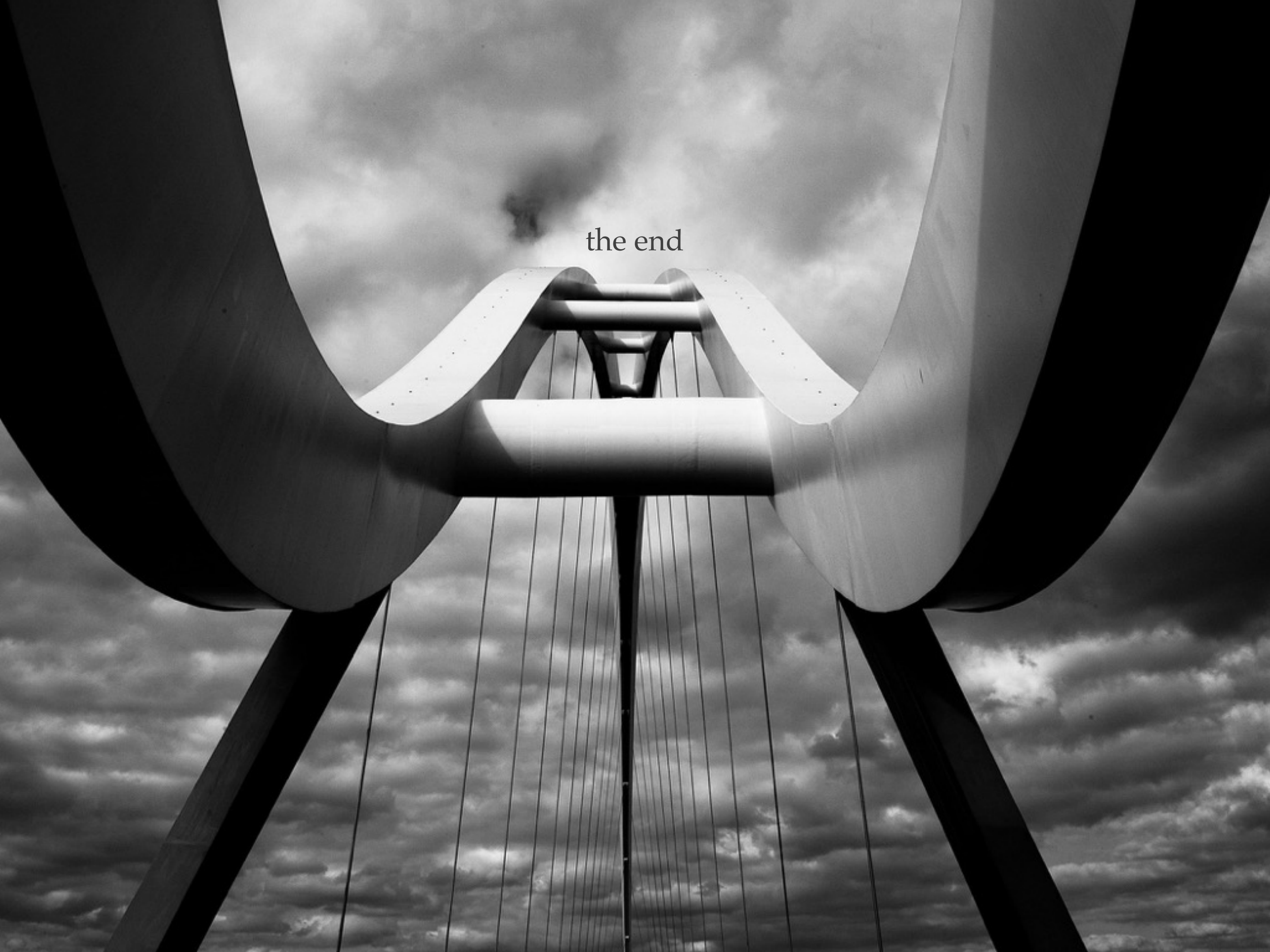
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List of Resources

- *Influence*, by Robert B. Cialdini, Ph.D.
- *California Drunk Driving Law*, by Ed Kuwatch, et al. (James Publishing, "the green books")
- *California Drunk Driving Defense*, by Lawrence Taylor, et al.
- *Fight Your Ticket & Win in California*, by David Brown (Nolo Press)
- *McCarthy on Cross-Examination*, by Terence F. McCarthy
- *Trial Techniques*, by Thomas A. Mauet
- "CHP DUI Enforcement Manual," found online, State of CA
- Title 15, California Code of Regulations (chemical testing)

- The information contained in this presentation is general in nature and should not be relied on for any specific situation. Consult a qualified attorney for any specific legal advice.

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