



*A Nontraditional Approach*

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# Your First DUI Case

From Intake to Jury Trial

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“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?

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# 5 Rules of Criminal Defense

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- ❖ 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



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# Who are the Players?

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



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# Who is my client?

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- ❖ 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

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# Who am I?

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- ❖ 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?



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# Beyond a Reasonable Doubt

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- ❖ "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





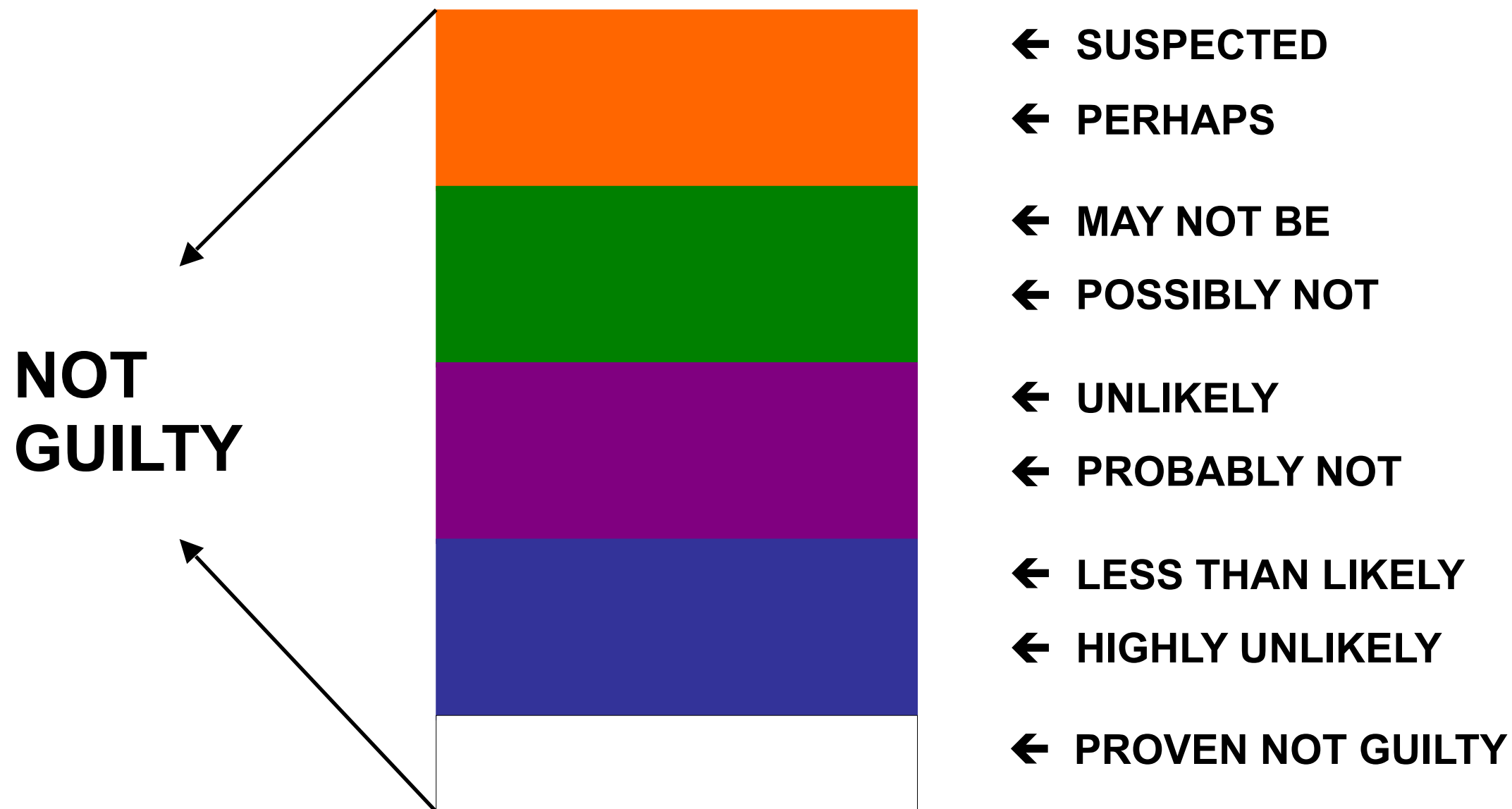
# Burden of Proof



# Burden of Proof

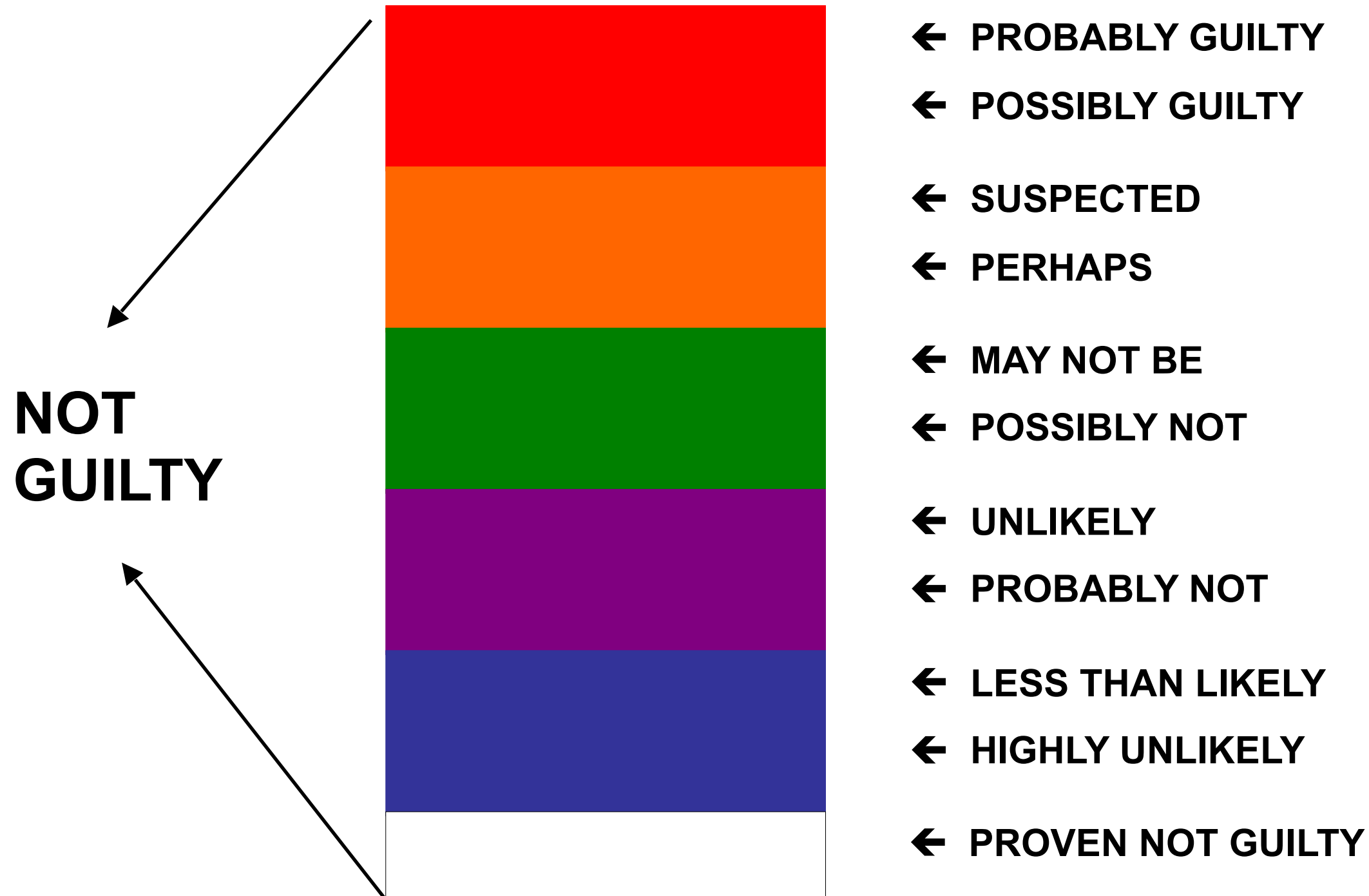


# Burden of Proof

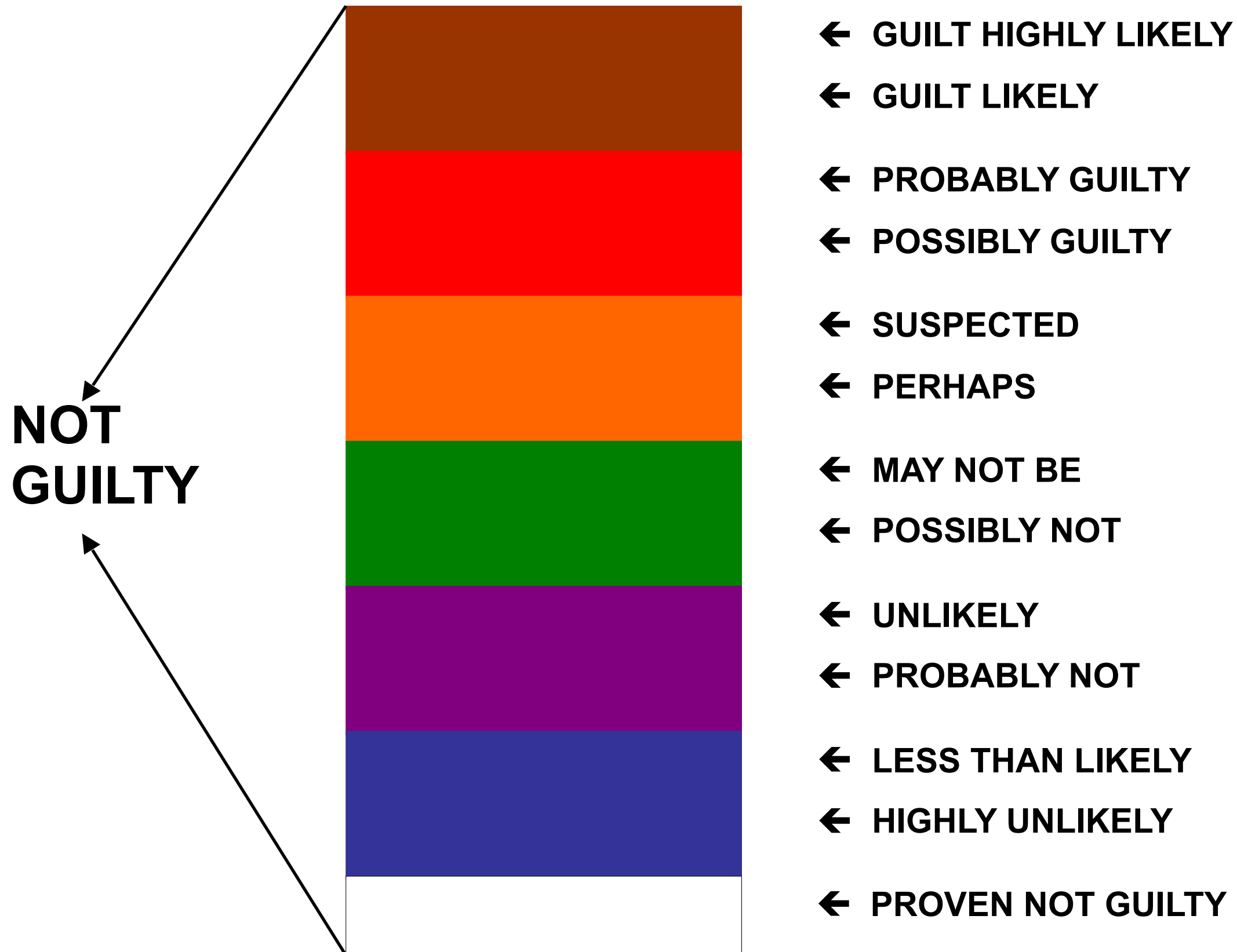




# Burden of Proof



# Burden of Proof



# Burden of Proof

**GUILTY**

**NOT  
GUILTY**



← **GUILTY BEYOND A REASONABLE DOUBT**

← **GUILT HIGHLY LIKELY**

← **GUILT LIKELY**

← **PROBABLY GUILTY**

← **POSSIBLY GUILTY**

← **SUSPECTED**

← **PERHAPS**

← **MAY NOT BE**

← **POSSIBLY NOT**

← **UNLIKELY**

← **PROBABLY NOT**

← **LESS THAN LIKELY**

← **HIGHLY UNLIKELY**

← **PROVEN NOT GUILTY**



“To accept as true on the basis of insufficient  
proof.”

*–To Speculate*



*Search for verified proof*

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NHTSA papers are  
not peer reviewed

Research Resources

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# Google It

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- ❖ 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

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# Circumstantial Evidence: Sufficiency of Evidence

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"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**

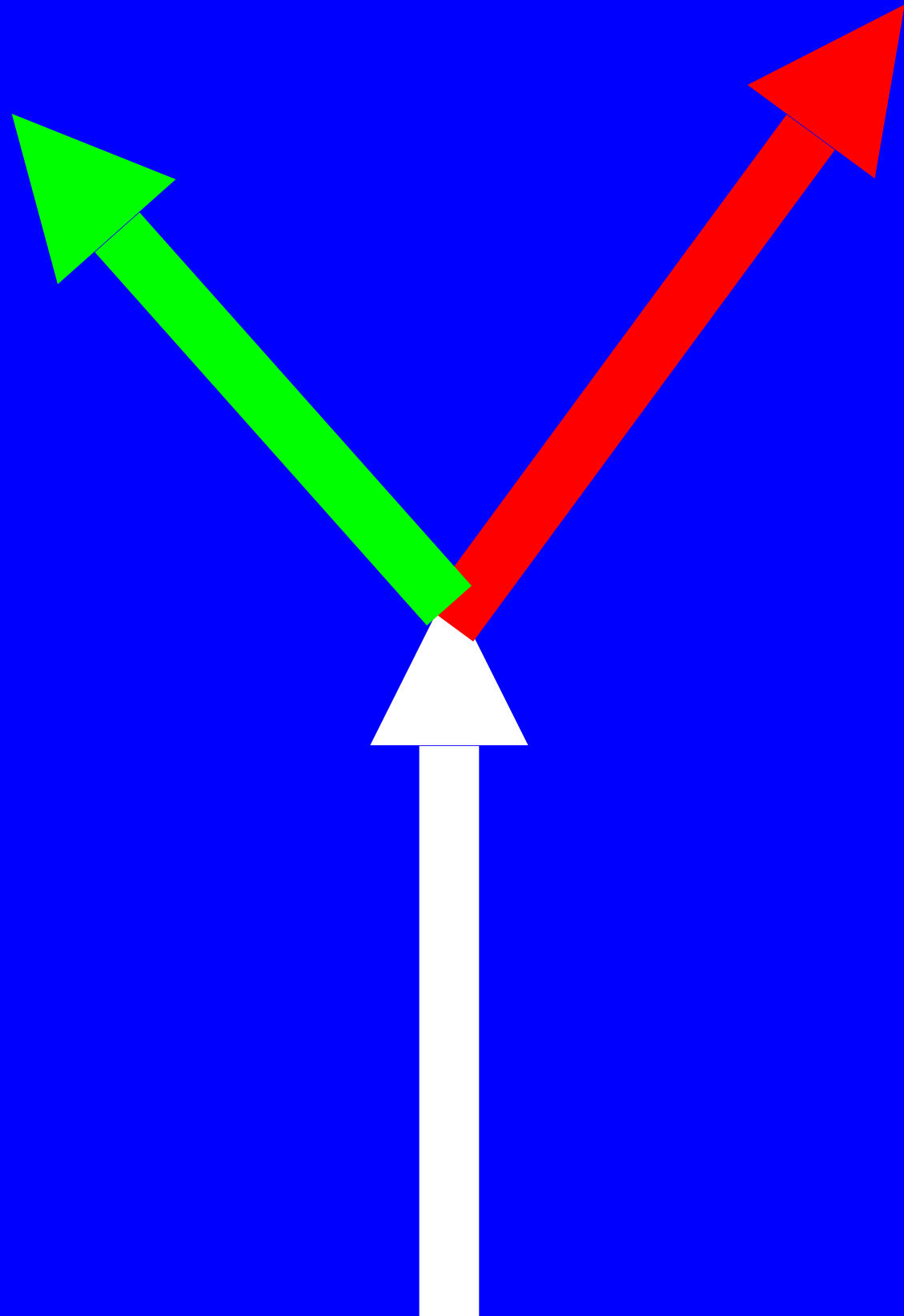


**WHAT DO YOU DO WITH  
CIRCUMSTANTIAL  
EVIDENCE THAT HAS TWO  
REASONABLE  
INTERPRETATIONS, ONE  
POINTING TO GUILT AND  
ONE POINTING TO  
INNOCENCE?**



**NOT GUILTY**

**GUILTY**



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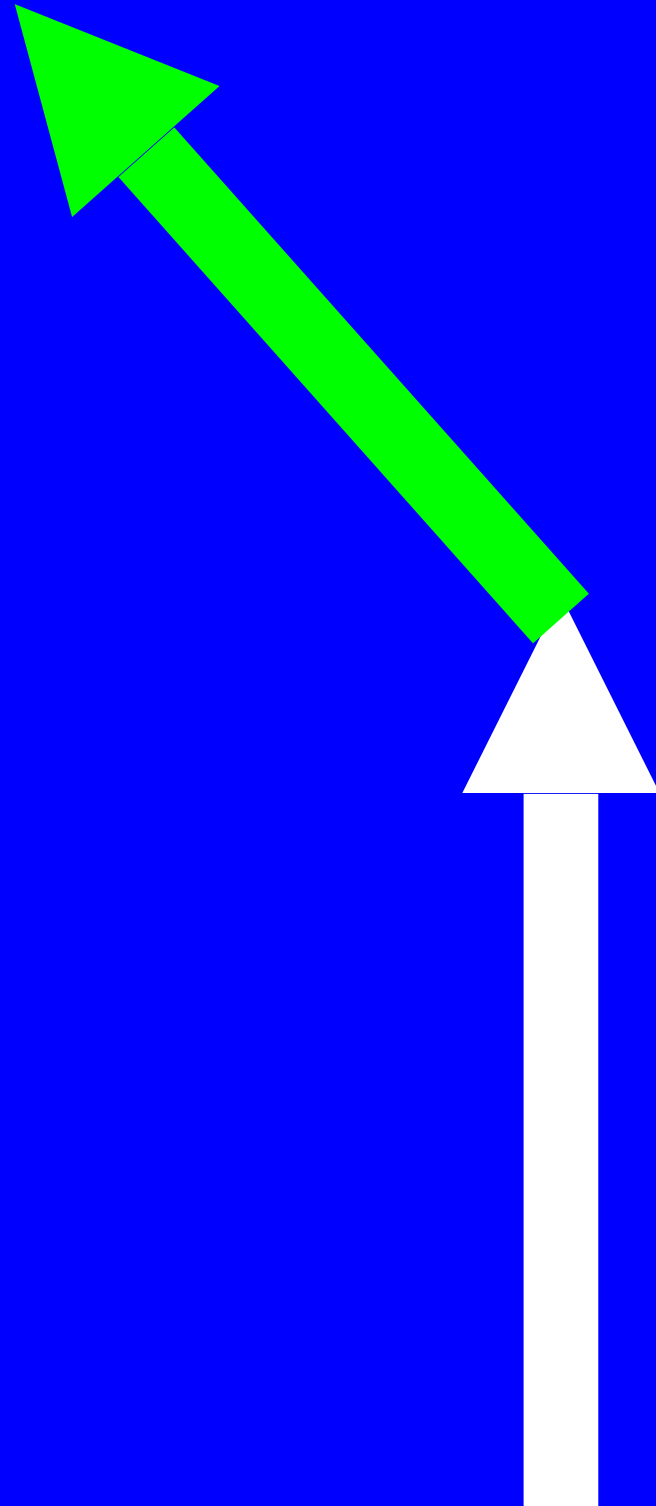
# Conflicts in the Evidence

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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**



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# 23152(a) = Drunk Driving

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- ❖ 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*

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# Title 17

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- ❖ 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



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23152(b) = 0.08 at time of driving

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

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# Preliminary Alcohol Screen

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- ❖ 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

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# Preliminary Alcohol Screen Sources of Error

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



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# 15 Minute Observation

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- ❖ 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

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# Slope Detection

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



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# Two tests?

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

# The Undisputed Safeguards

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# 3 Undisputed Safeguards

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



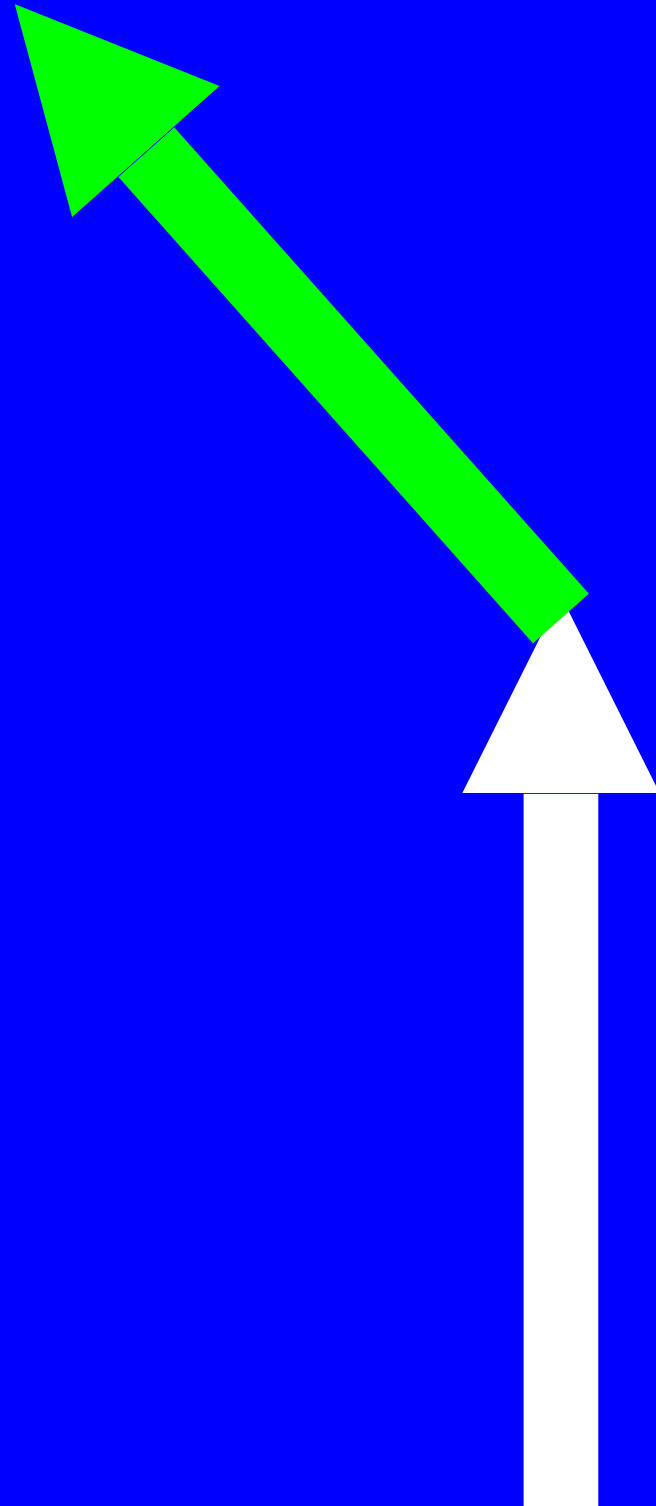
# Undisputed Evidence about the PAS test

- ❖ 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**



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# Machine Reading High

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



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# Machine Reading High

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



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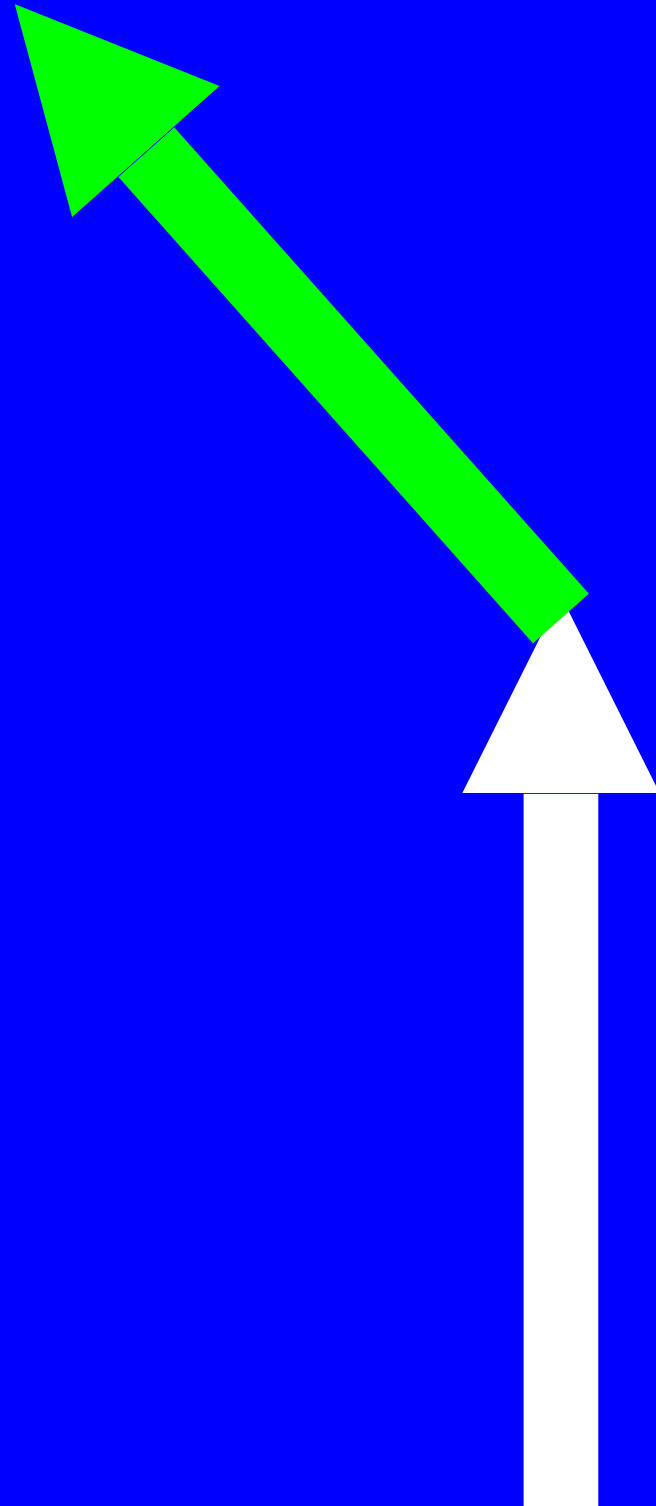
**“.002 Makes a .08 an .07”**

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- ❖ Title 17 prohibits a reported result to the thousandth



**READING HIGH  
BEFORE TEST**



# The Government Assumptions

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## “Billy had to have been in the post-absorptive phase”

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- ❖ 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

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# Post-Absorptive Phase

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- ❖ Critical assumption made by the government toxicologist





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# No food in stomach?

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

What if Billy had food in stomach?

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# Assume $1/2$ cup of food

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❖ As high as 10 hours...



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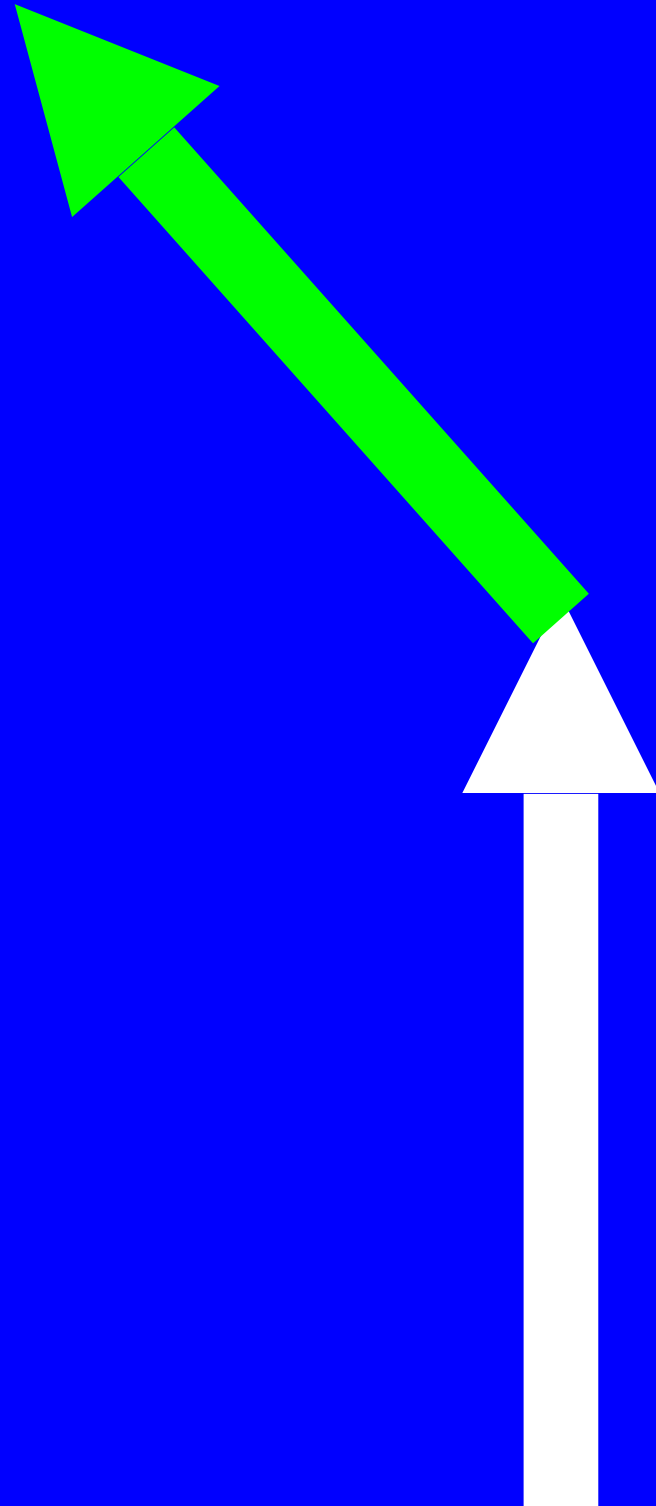
# With food = rising BAC

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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**



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# HGN

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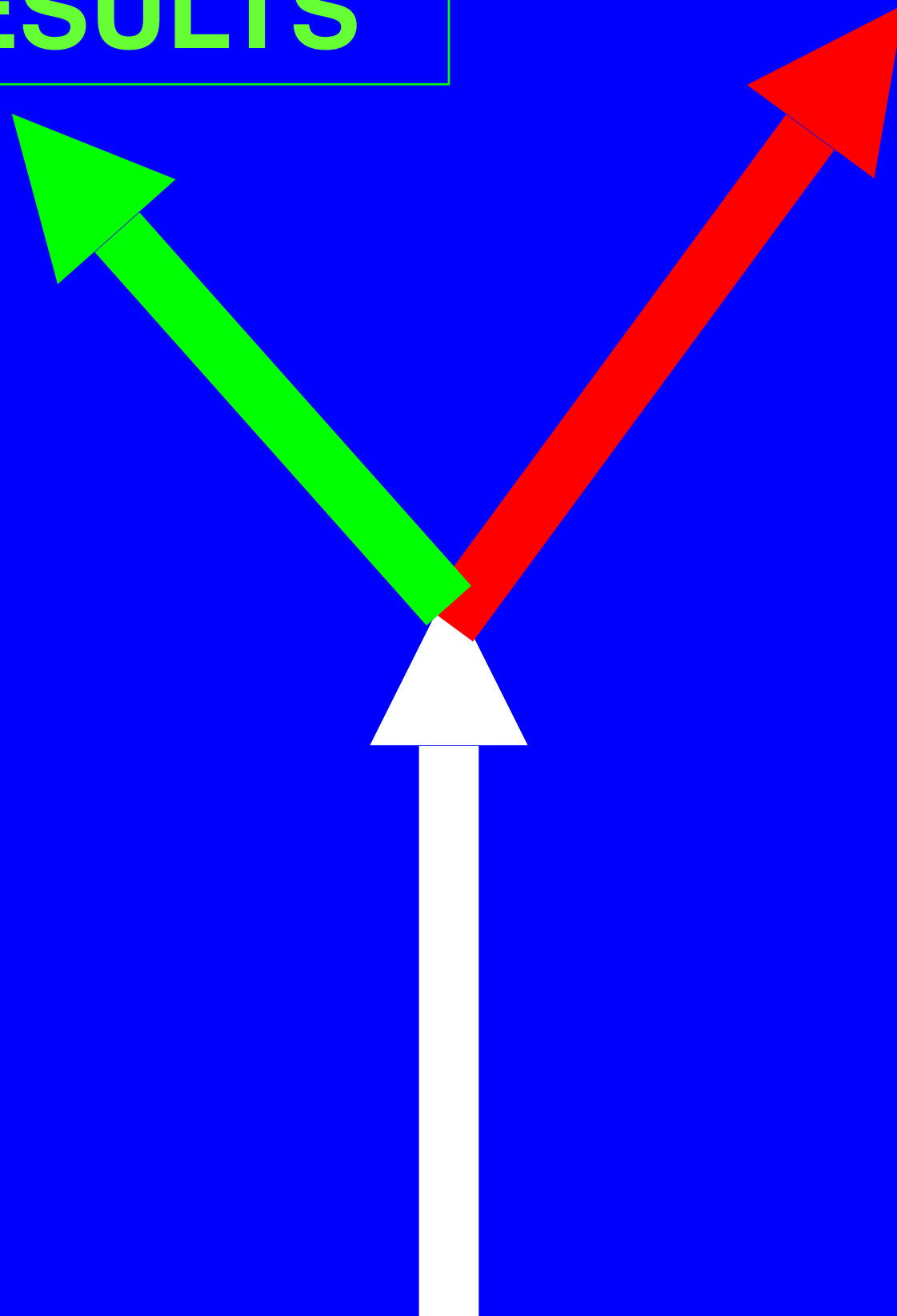
- ❖ Should not be given at night (tired eyes, jet lag)
- ❖ Only presence of alcohol



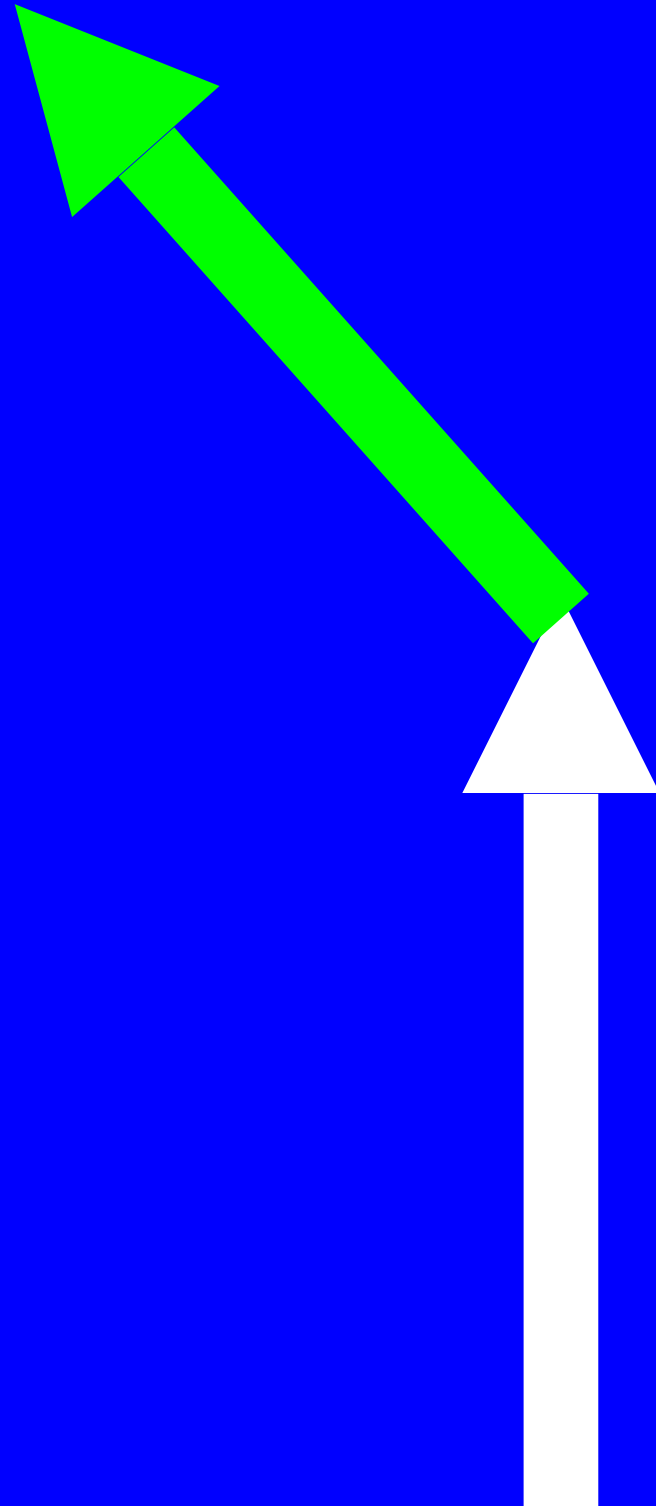


**3 FAVORABLE  
TEST RESULTS**

**TOLERANCE**

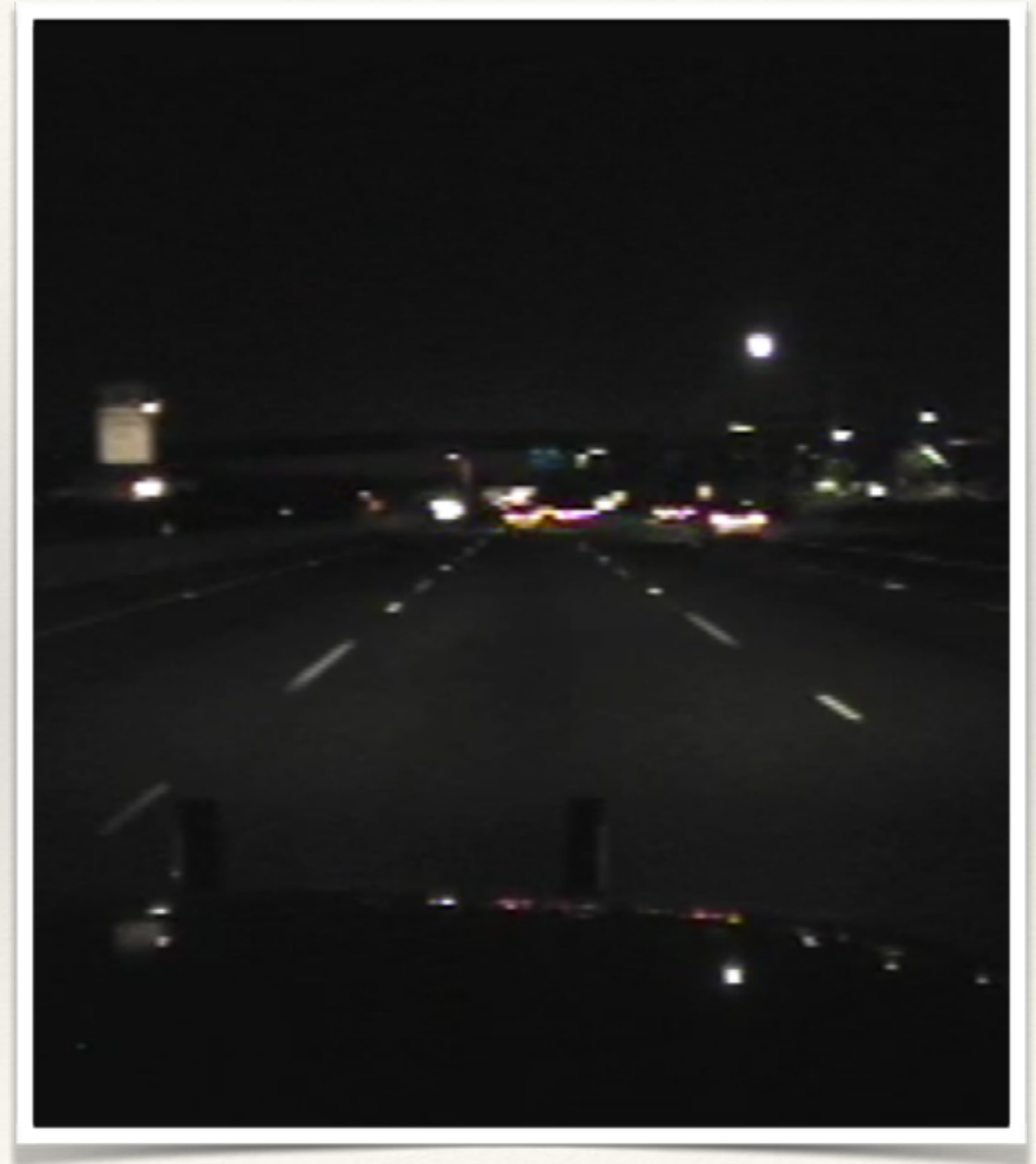


**FST RESULTS =  
NO IMPAIRMENT**

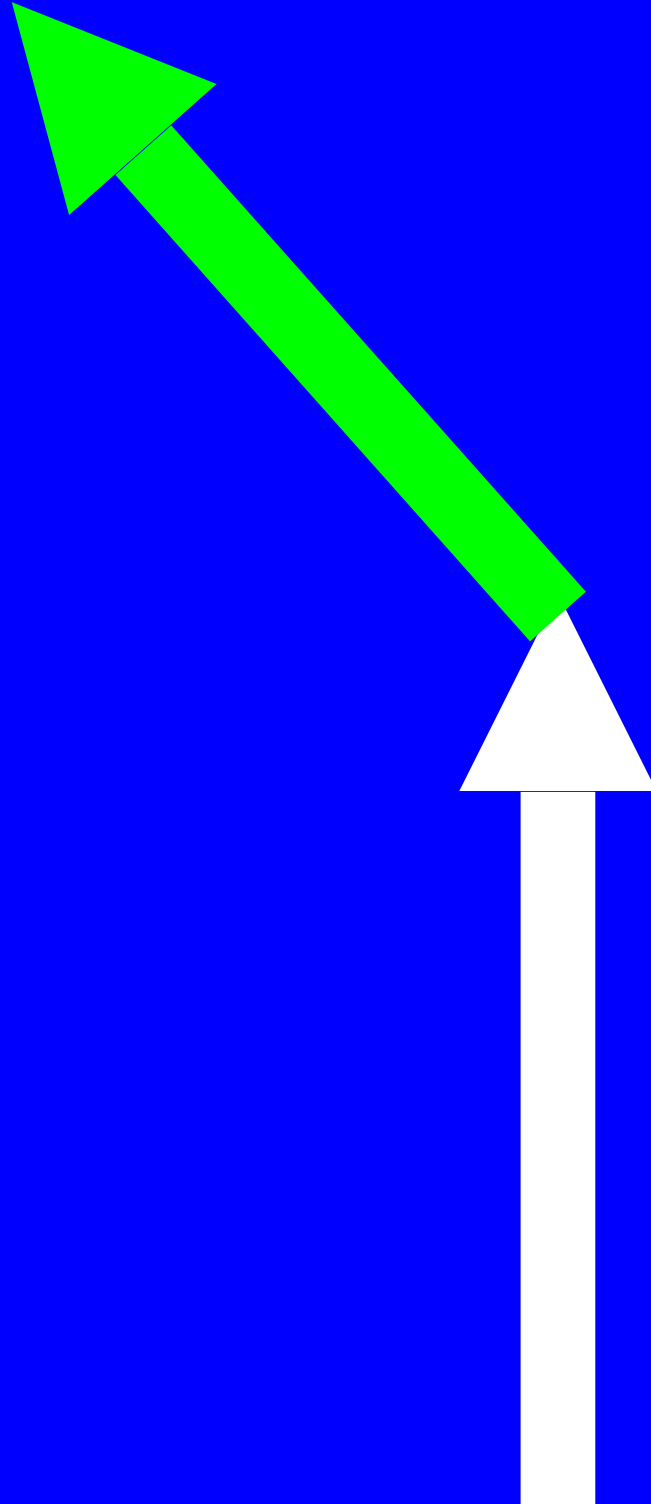


# Favorable Driving Pattern

- ❖ 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)

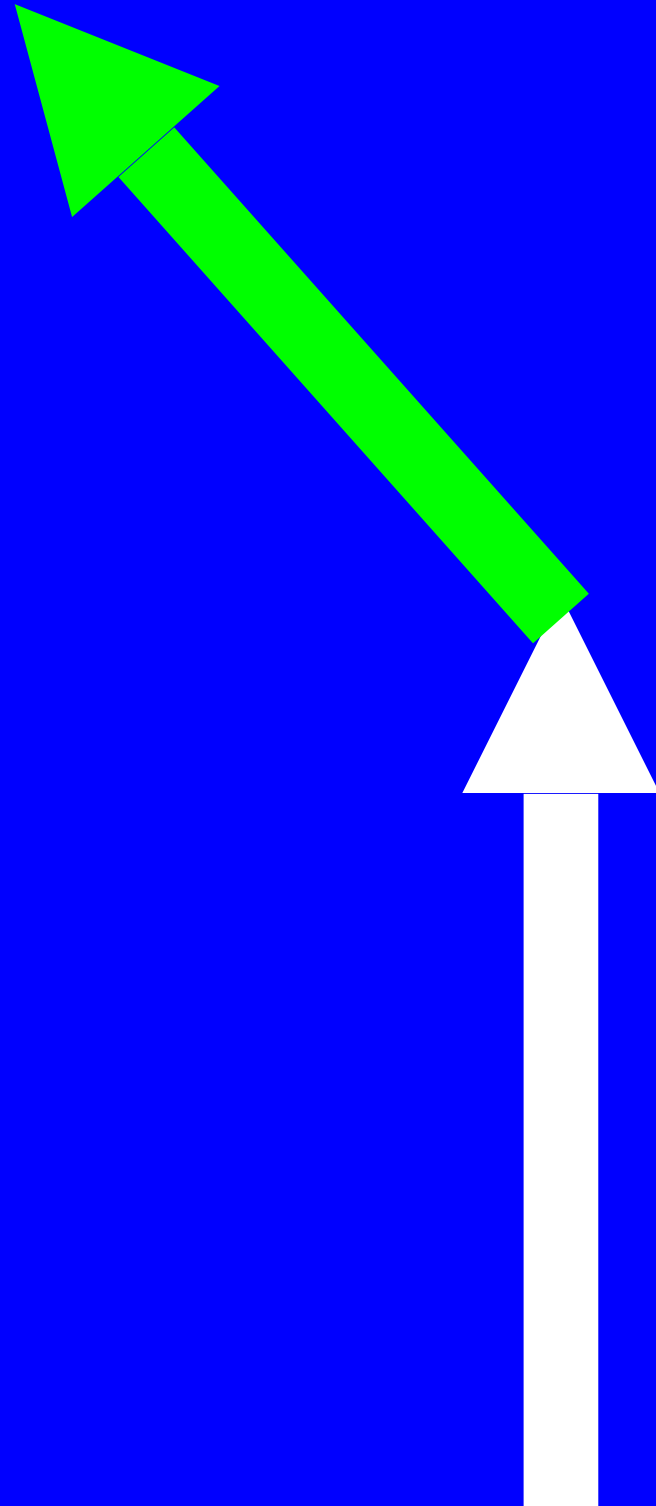


**DRIVING  
PATTERN**

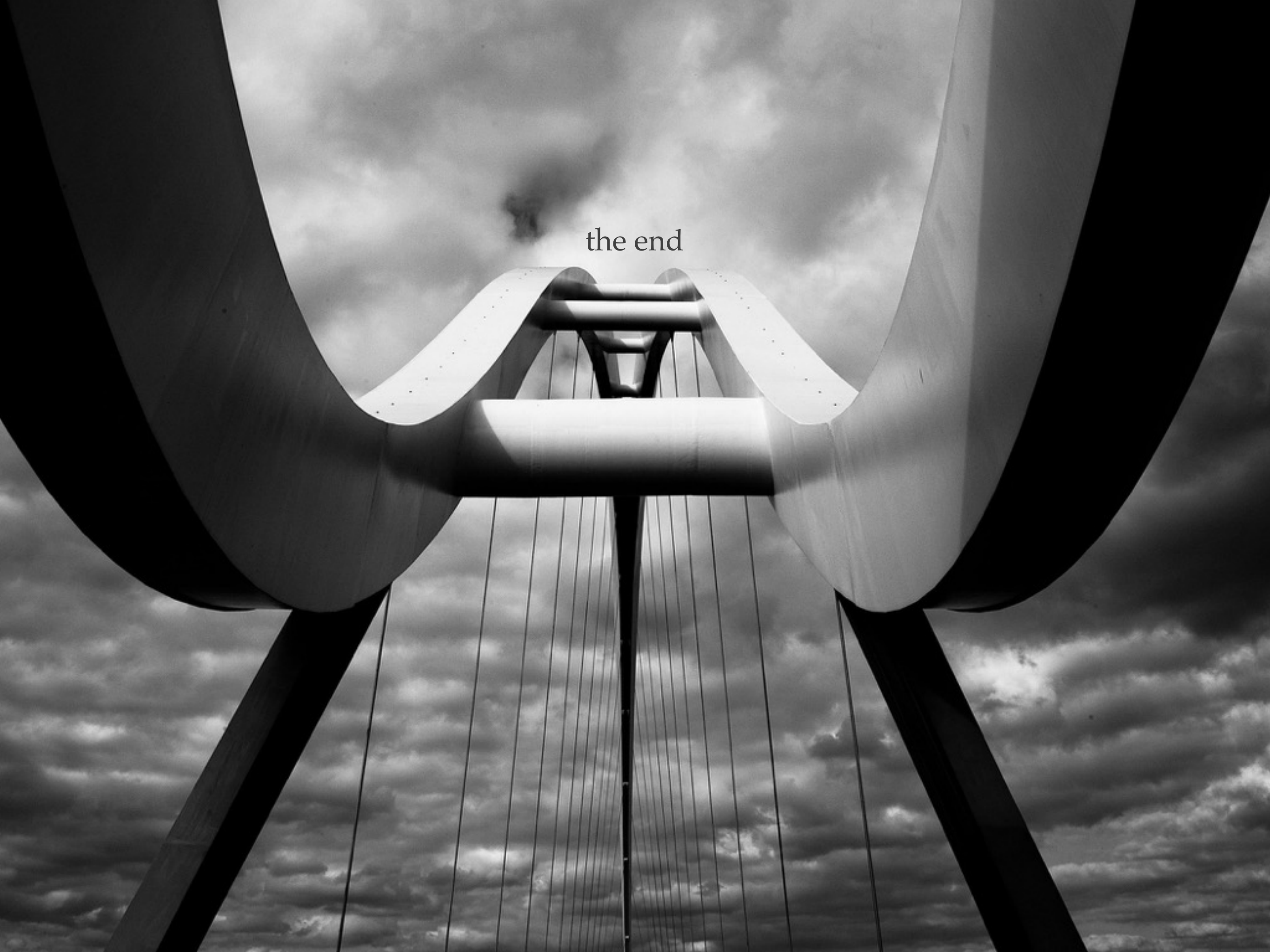




**NOT GUILTY**



the end





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