

NCDD SFSTs February 6-8, 2020 TRIAL TECHNIQUES



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TRIAL TECHNIQUES

SHARE

REVISE

UPGRADE AND RETURN

DON'T BE BORING!!

- If you're not having fun, you are not winning
- Emotional Story Telling
- Personal Connection
- HOW DO YOU LEARN?
 - Visual
 - Tactile
 - Verbal

VISUAL LEARNERS

- You must be VISUAL, USE YOUR PROPS

Power Point

White Paper

Sticky Paper

Photos

Elmo

TACTILE

- You must reach out and have something to HOLD
- PHOTO
- Chart
- Summary

VERBAL LEARNERS

- Repeat, Repeat, Repeat by Three
- Loop, Loop, Loop by Three
- Start strong
- End strong

SFSTs

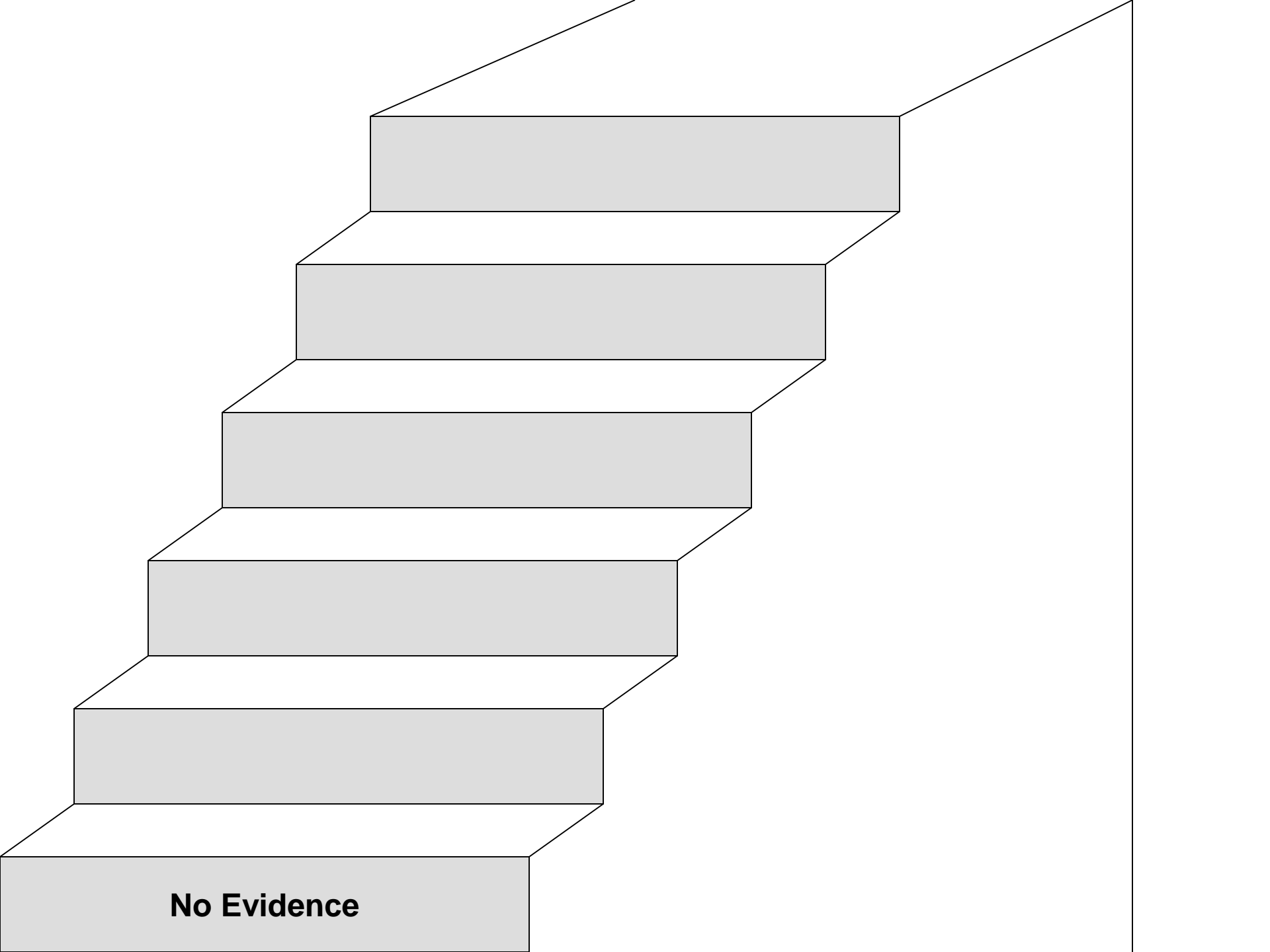
- Vehicle in Motion
- Personal Contact
- Arrest Criteria

- Saw What They Wanted to See

- CHECKLISTS HANDOUTS

PRESUMPTION OF INNOCENCE

A DEFENDANT IN A CRIMINAL ACTION IS
PRESUMED TO BE INNOCENT
UNLESS PROVEN GUILTY BEYOND A
REASONABLE DOUBT



No Evidence



No Evidence

No trace of evidence whatsoever.



No Evidence

Not Guilty

No trace of evidence whatsoever.



Reasonable Suspicion

Not Guilty

No Evidence

No trace of evidence whatsoever.





Not Guilty

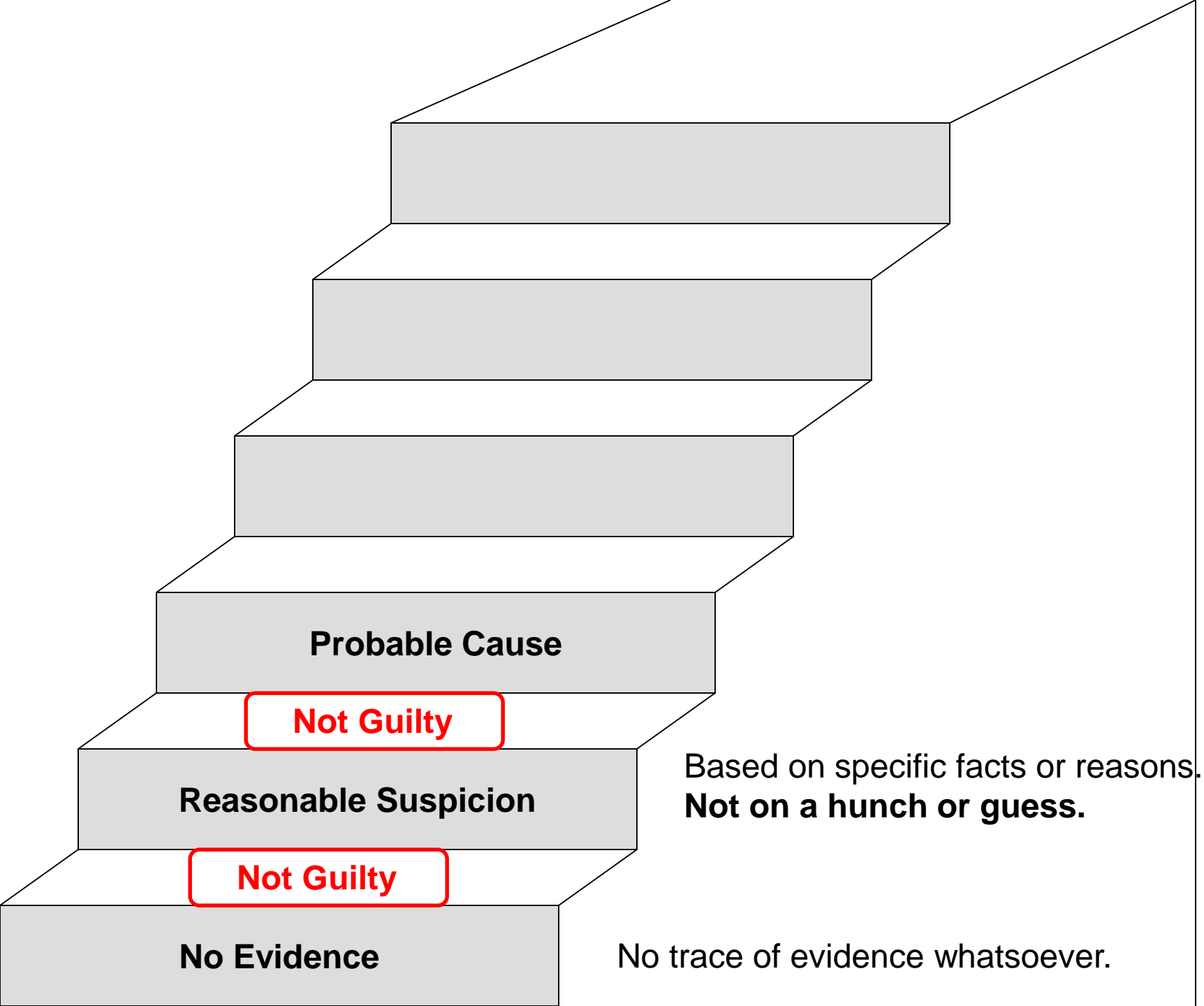
Reasonable Suspicion

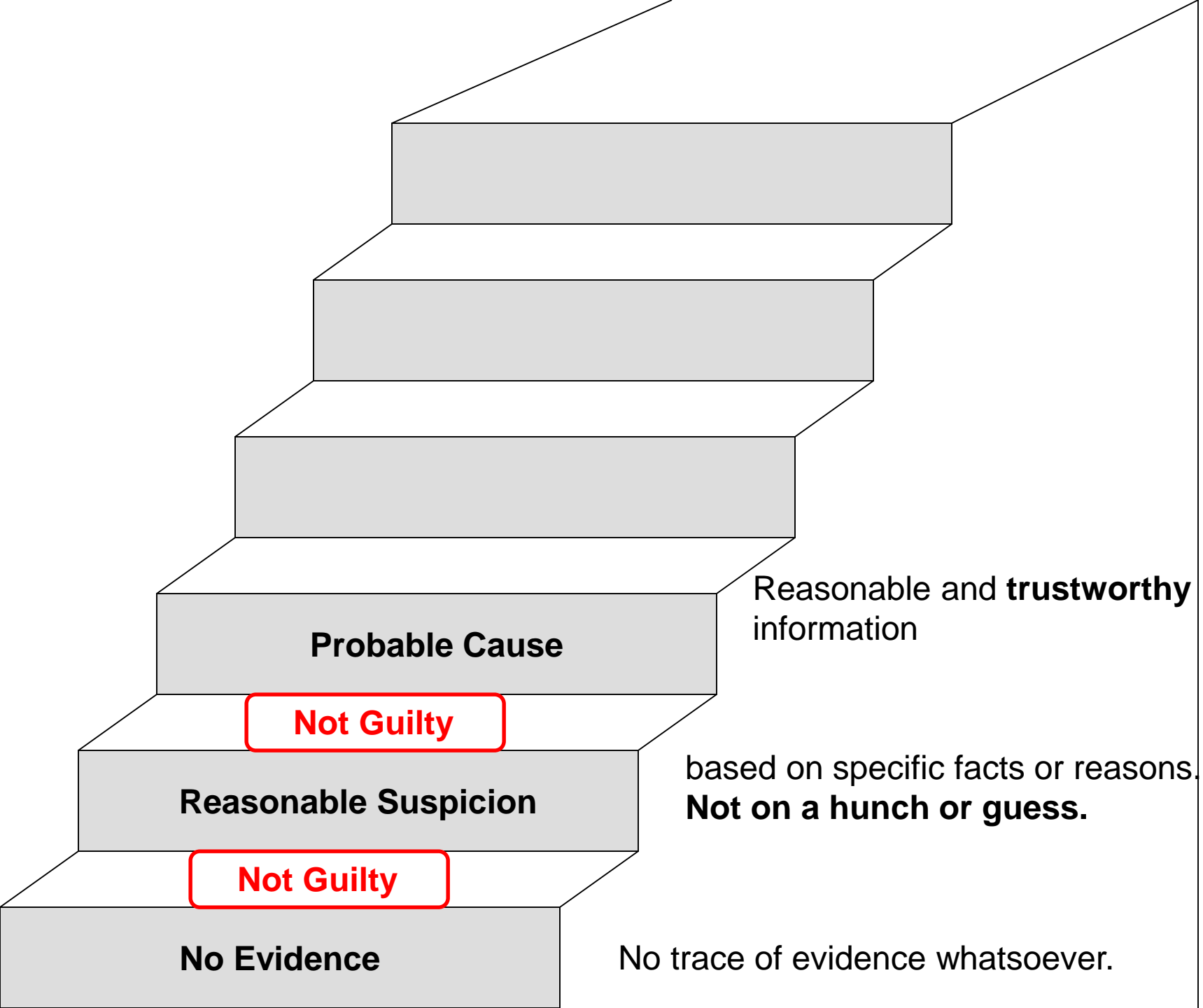
Based on specific facts or reasons.
Not on a hunch or guess.

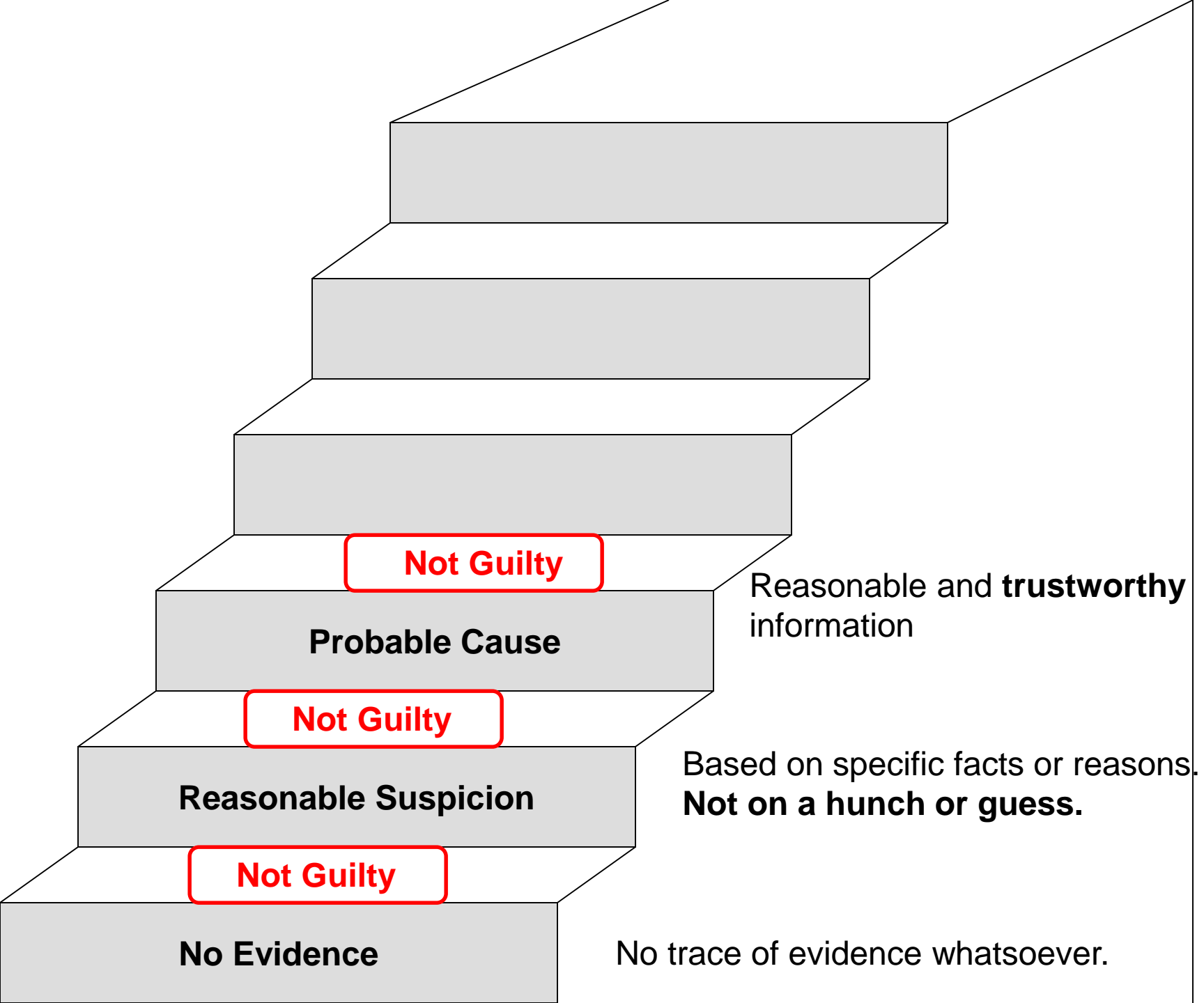
Not Guilty

No Evidence

No trace of evidence whatsoever.







Not Guilty

No Evidence

No trace of evidence whatsoever.

Reasonable Suspicion

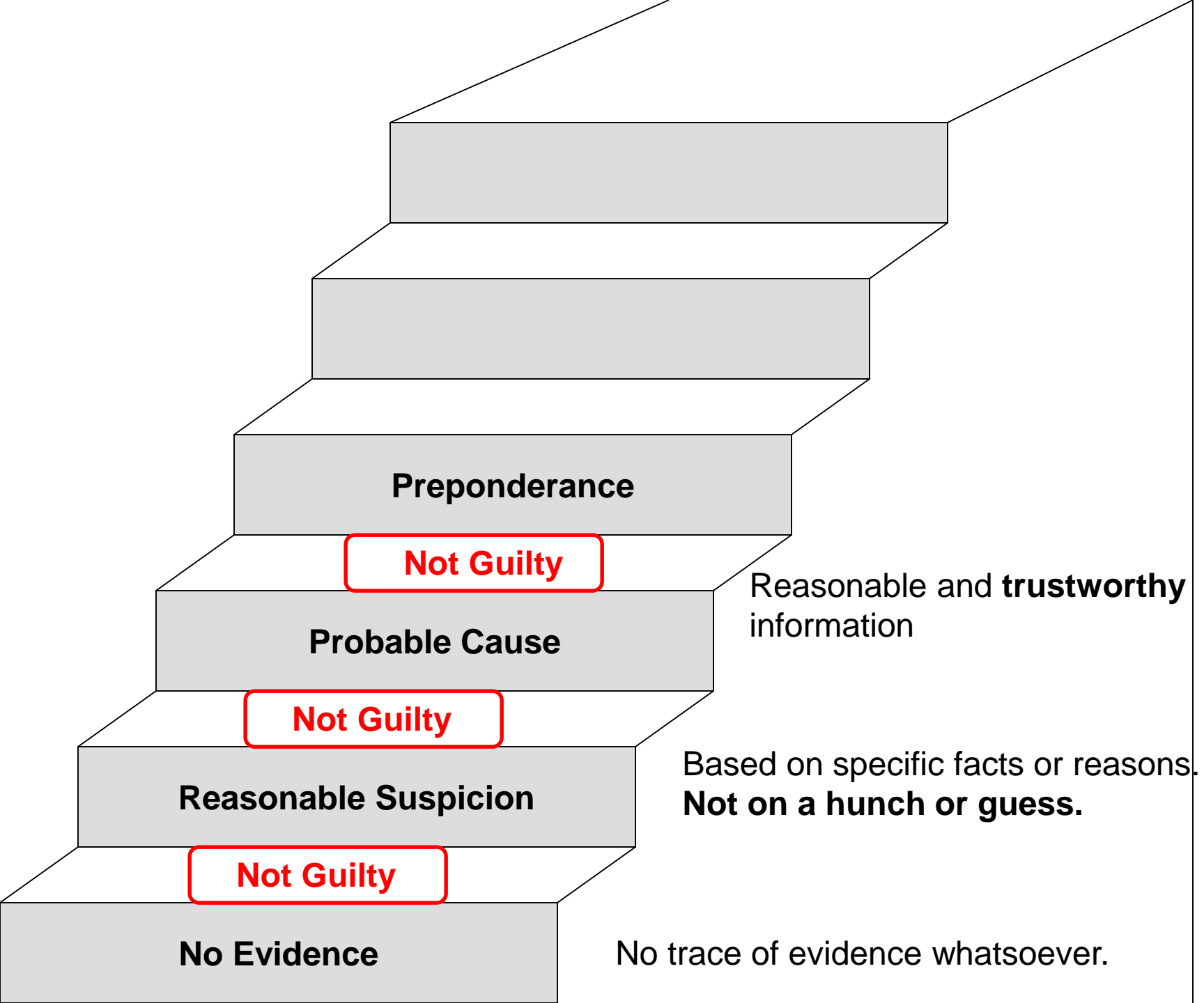
Based on specific facts or reasons.
Not on a hunch or guess.

Not Guilty

Probable Cause

Reasonable and **trustworthy** information

Not Guilty



No Evidence

No trace of evidence whatsoever.

Reasonable Suspicion

Based on specific facts or reasons.
Not on a hunch or guess.

Not Guilty

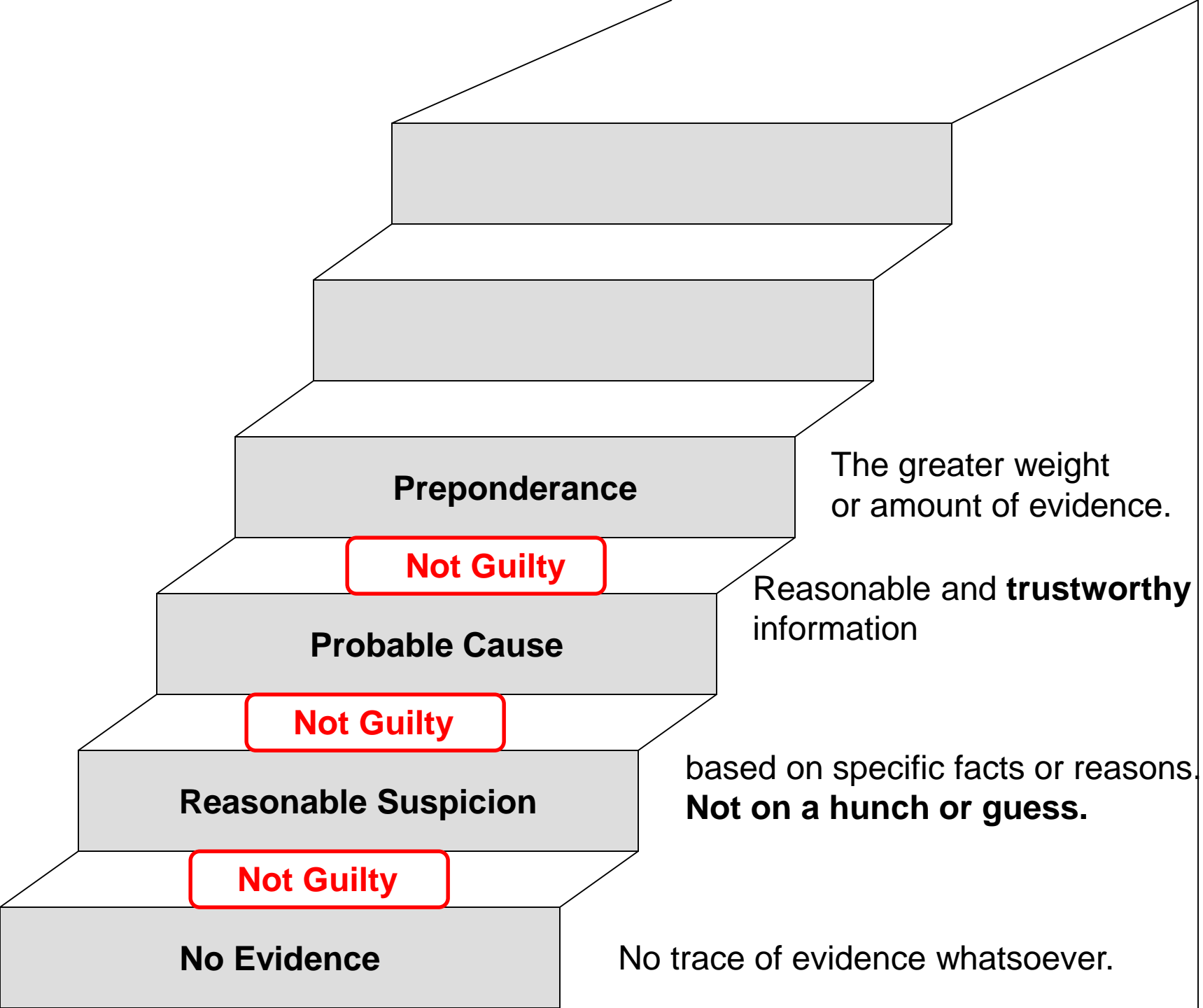
Probable Cause

Reasonable and **trustworthy** information

Not Guilty

Preponderance

Not Guilty



No Evidence

No trace of evidence whatsoever.

Reasonable Suspicion

based on specific facts or reasons.
Not on a hunch or guess.

Not Guilty

Probable Cause

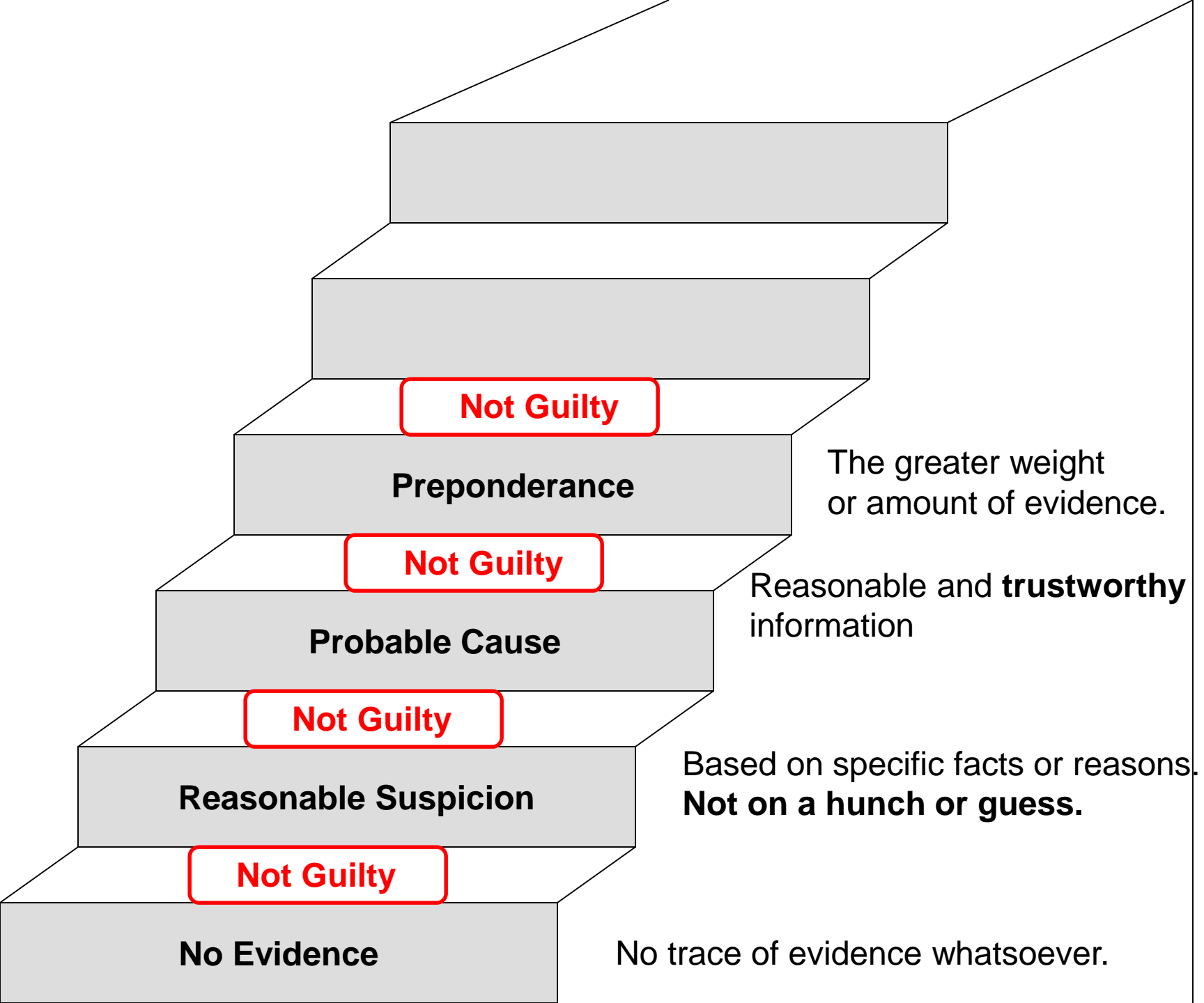
Reasonable and **trustworthy** information

Not Guilty

Preponderance

The greater weight or amount of evidence.

(Unlabeled top step)



Not Guilty

No Evidence

No trace of evidence whatsoever.

Reasonable Suspicion

Based on specific facts or reasons.
Not on a hunch or guess.

Not Guilty

Probable Cause

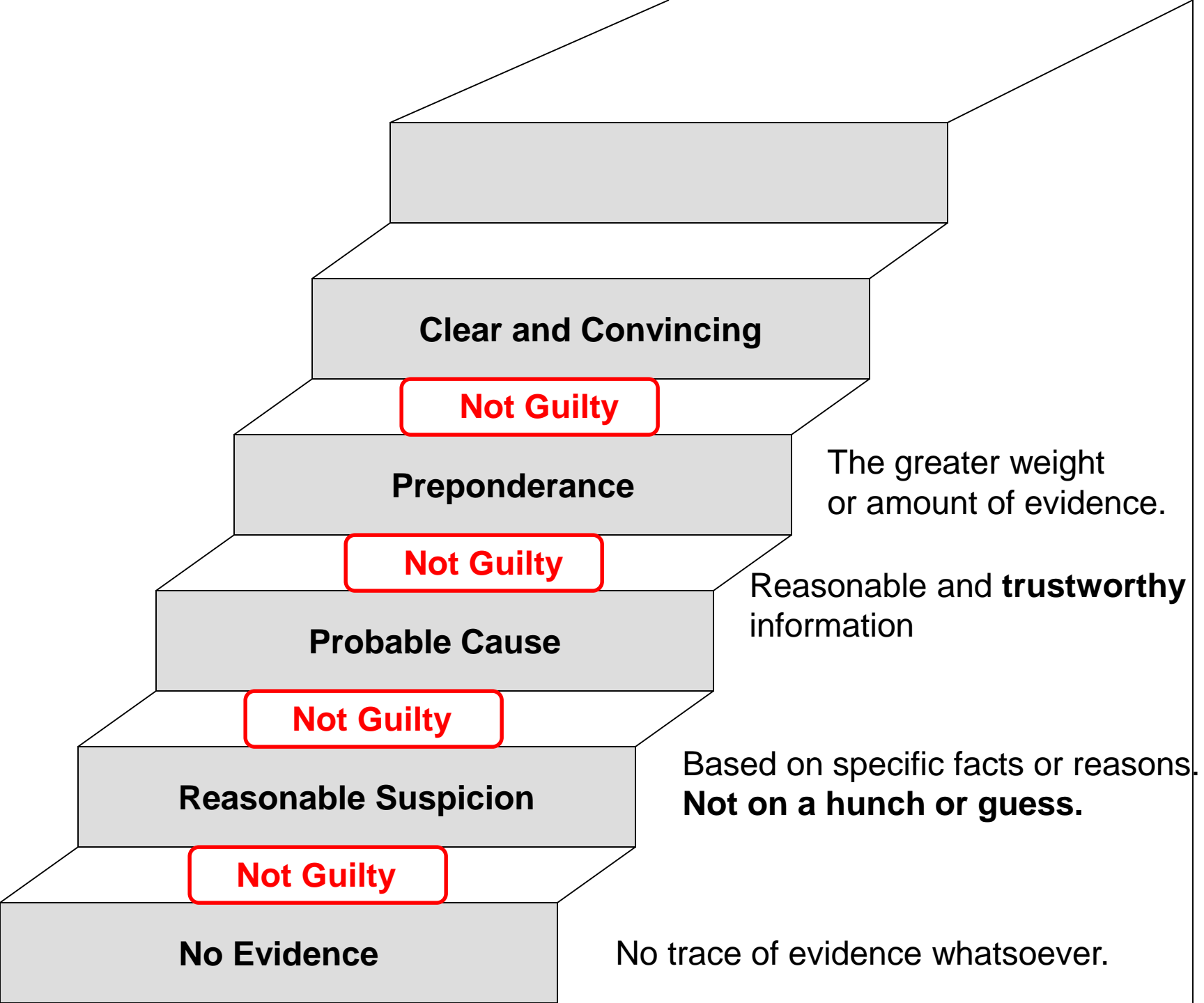
Reasonable and **trustworthy**
information

Not Guilty

Preponderance

The greater weight
or amount of evidence.

Not Guilty



Clear and Convincing

Not Guilty

Preponderance

The greater weight or amount of evidence.

Not Guilty

Probable Cause

Reasonable and **trustworthy** information

Not Guilty

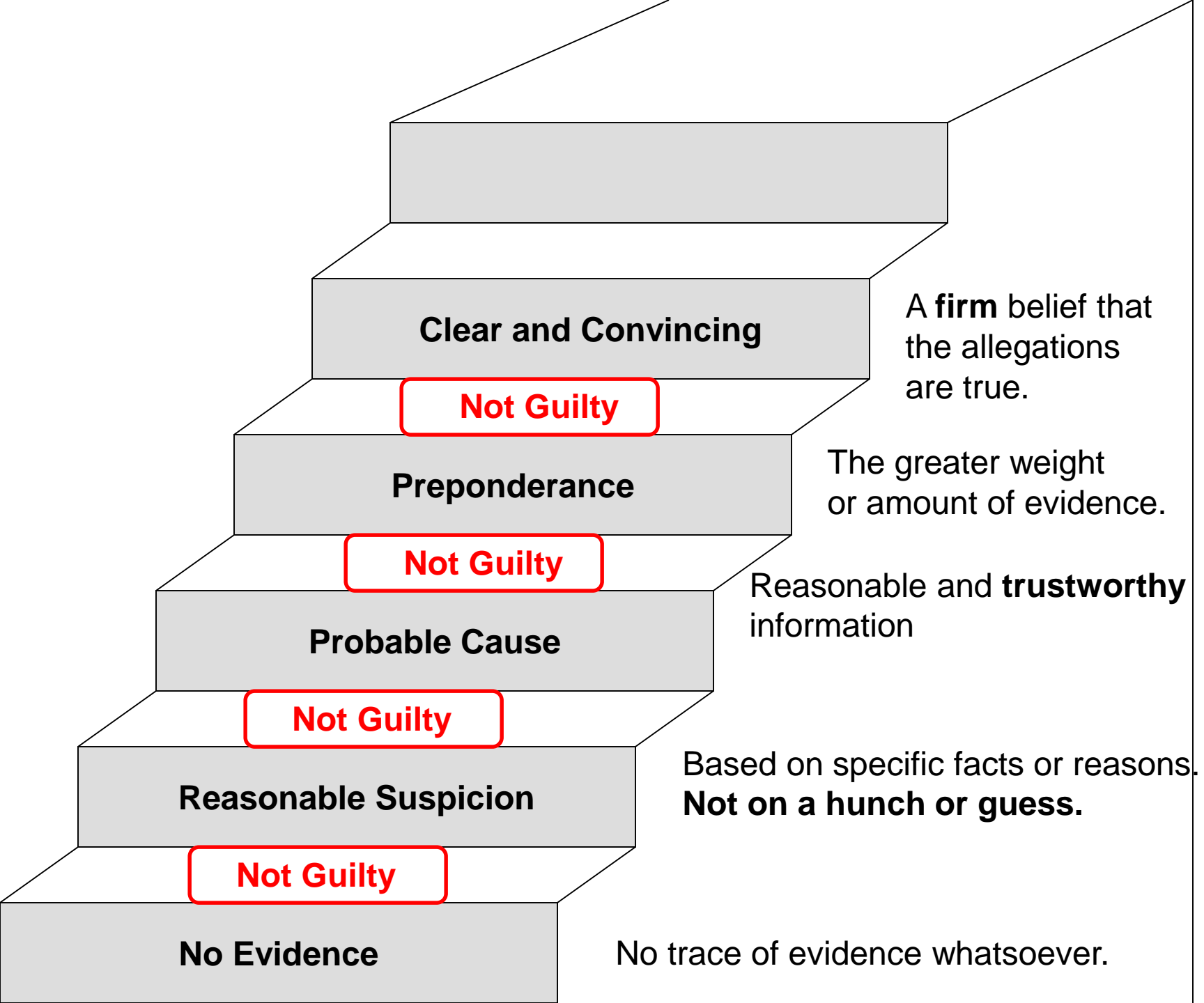
Reasonable Suspicion

Based on specific facts or reasons.
Not on a hunch or guess.

Not Guilty

No Evidence

No trace of evidence whatsoever.



Clear and Convincing

A **firm** belief that the allegations are true.

Not Guilty

Preponderance

The greater weight or amount of evidence.

Not Guilty

Probable Cause

Reasonable and **trustworthy** information

Not Guilty

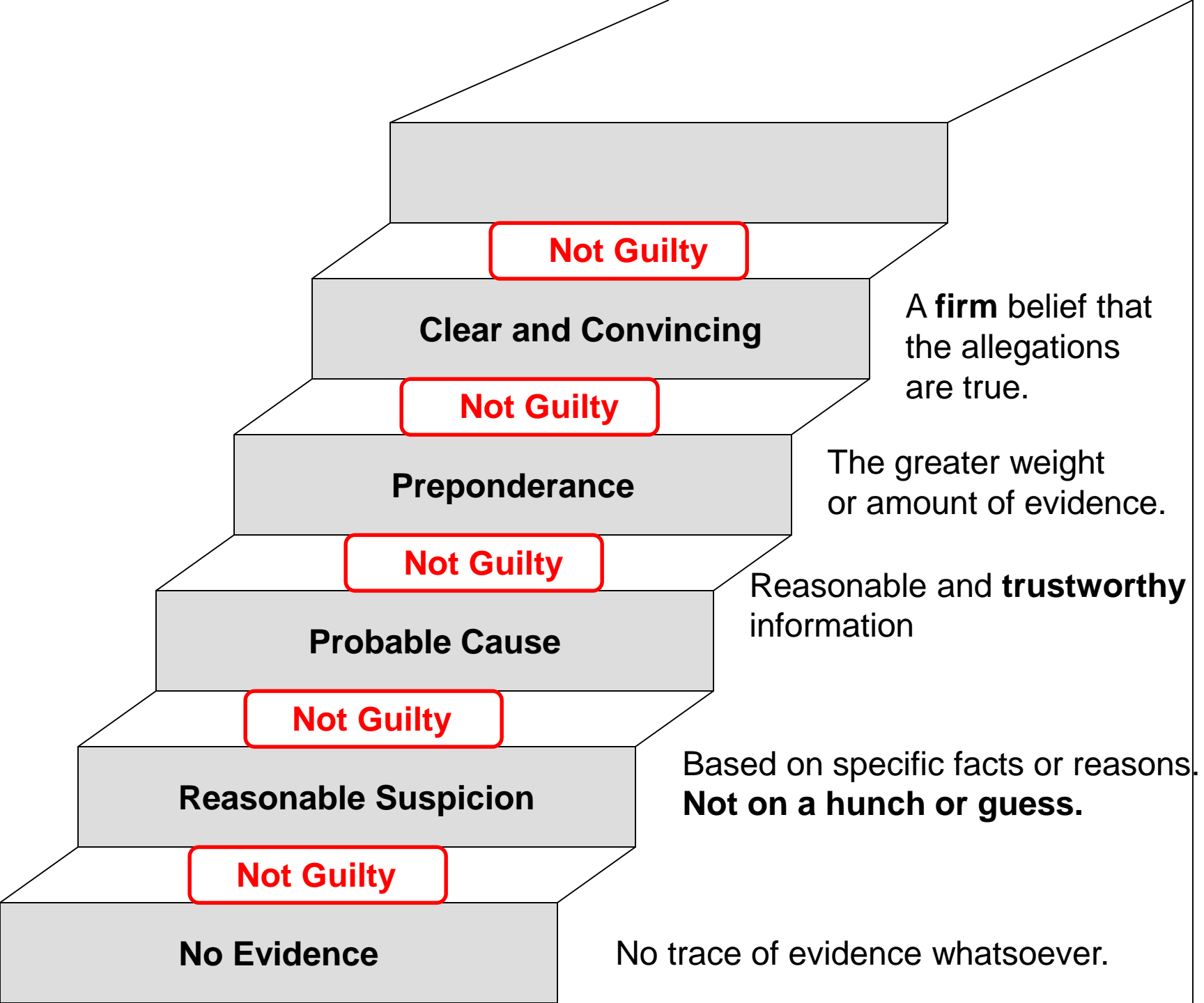
Reasonable Suspicion

Based on specific facts or reasons. **Not on a hunch or guess.**

Not Guilty

No Evidence

No trace of evidence whatsoever.



Not Guilty

Clear and Convincing

A **firm** belief that the allegations are true.

Not Guilty

Preponderance

The greater weight or amount of evidence.

Not Guilty

Probable Cause

Reasonable and **trustworthy** information

Not Guilty

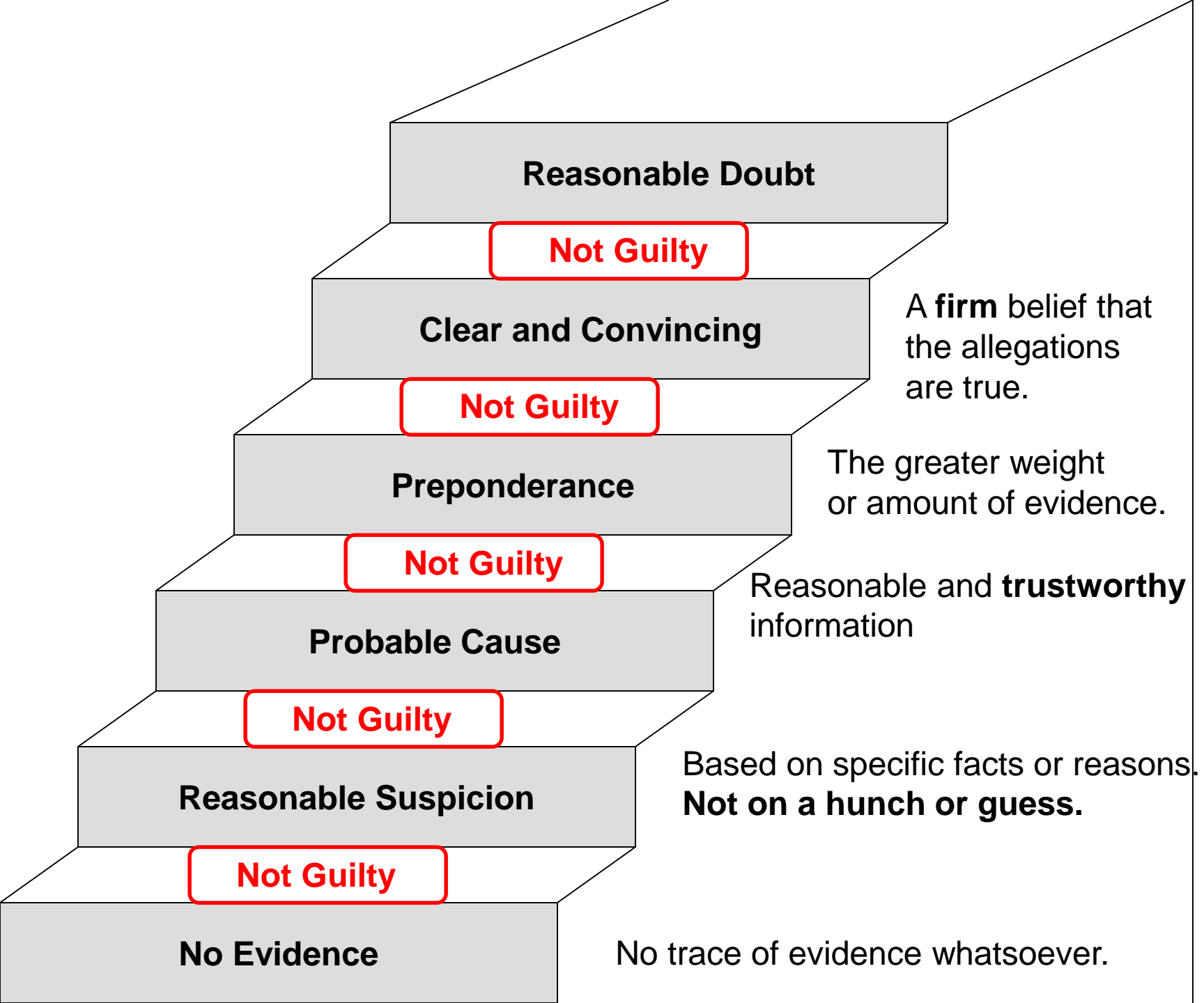
Reasonable Suspicion

Based on specific facts or reasons.
Not on a hunch or guess.

Not Guilty

No Evidence

No trace of evidence whatsoever.



Reasonable Doubt

Not Guilty

Clear and Convincing

A **firm** belief that the allegations are true.

Not Guilty

Preponderance

The greater weight or amount of evidence.

Not Guilty

Probable Cause

Reasonable and **trustworthy** information

Not Guilty

Reasonable Suspicion

Based on specific facts or reasons.
Not on a hunch or guess.

Not Guilty

No Evidence

No trace of evidence whatsoever.

YOU must be FREE of reasonable doubt or

Not Guilty

Reasonable Doubt

Not Guilty

Clear and Convincing

A that the allegations are true.

Not Guilty

Preponderance

The greater weight of evidence.

Not Guilty

Probable Cause

Reasonable and trustworthy information

Not Guilty

Reasonable Suspicion

Based on specific facts or reasons.

Not Guilty

No Evidence

No trace of evidence whatsoever.

Proof: Circumstantial Evidence

- $2 + 2 = 4$ (Jury Instruction 224)
- If there are TWO (or more) reasonable interpretations of the evidence, and one (or more) point TO innocence, You must vote FOR NOT GUILTY

Under the Influence

- Not capable of driving with the caution of a sober person due to alcohol.
- Not Capable, Not Able To Drive
- Because of alcohol alone, not something else.

CONTINUED

- **>.05% TO <.08%**

OC Crime Lab says MOST PEOPLE affected

CalCrim 224 then requires you to find Jose Cuervo not most people because of the presumption of innocence and two reasonable interpretations

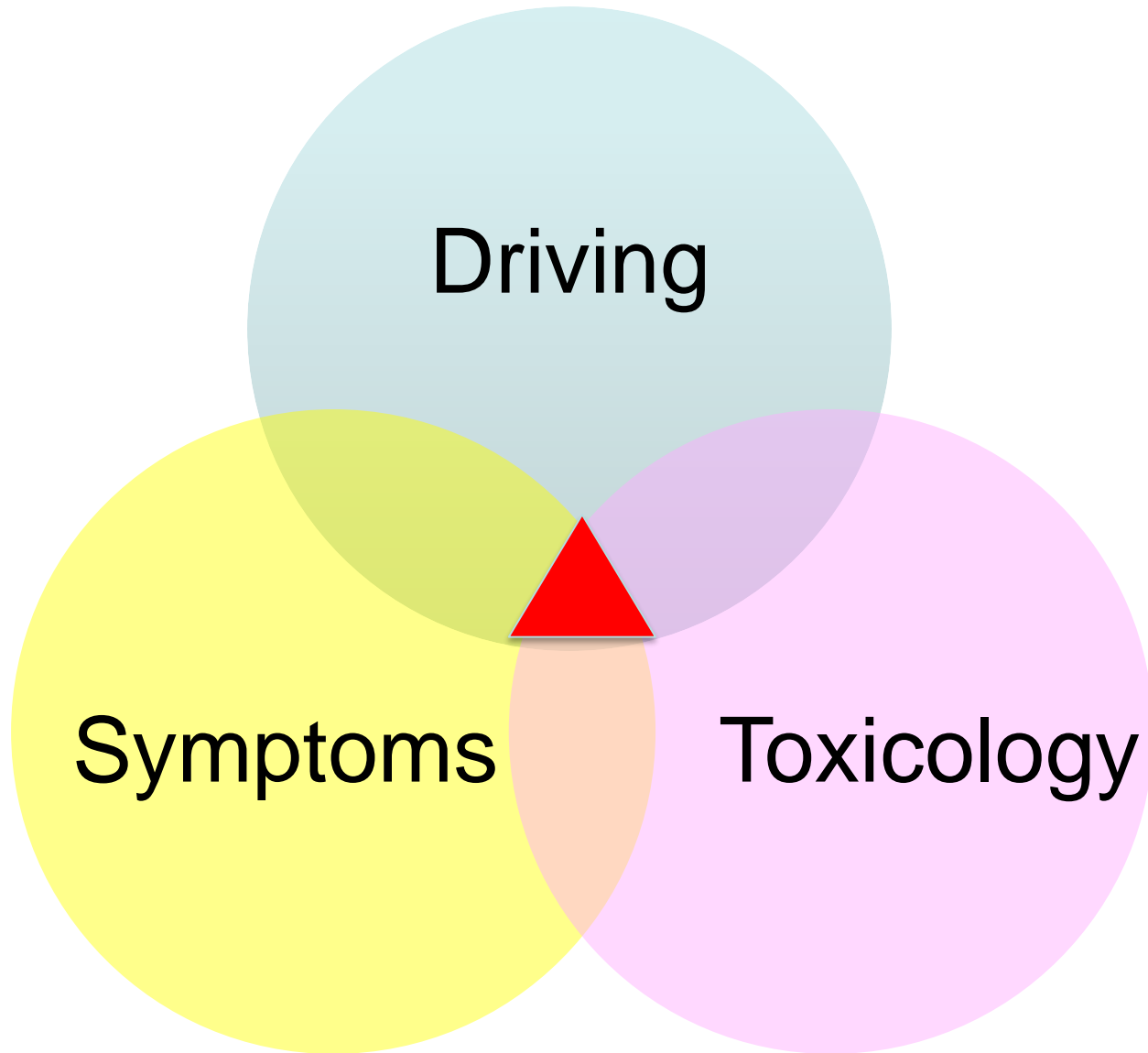
CONTINUED

- **>.08** IF the People prove beyond a reasonable doubt that the BAC level was .08% or more at the time of the chemical analysis, you may, BUT ARE NOT REQUIRED TO, conclude that the defendant was under the influence of an alcoholic beverage at the time of the alleged offense

Over .08 WHILE DRIVING

- BAC at time of test is circumstantial evidence of the BAC at time of driving.

Proving Impairment



MUST HAVE ALL 3

- The Government will want you to look at the totality of the circumstances to get you to fill in holes (CONNECT THE DOTS) in their case to put the parts all together to come up with an assumption of guilt. Less than beyond a Reasonable Doubt on the **Driving**, the **Symptoms** and the **Toxicology** can not be smashed together to make a weak case stronger than it really is.

NO APS

- IN THE UNITED STATES, WE DON'T
 - *ASSUME (times)
 - *PRESUME (time) or
 - *SPECULATE GUILT (time)

IT IS VERY DIFFICULT AND
HARD TO BE RIGHT

WHEN THE
GOVERNMENT IS WRONG

RECAP

- STANDARDIZED FIELD SOBRIETY TESTS

HGN

	Did Fine	Did Wrong	Comments
1. Stand Straight	__X__	_____	
2. Feet Together	__X__	_____	
3. Keep Arms at Side (Not raised over 6")	__X__	_____	
4. Keep Head Straight	__X__	_____	
5. Do Not Move Head	__X__	_____	
6. Look at Stimulus Only	__X__	_____	
7. Has Equal Pupil Size	_____	_____	Officer Did Not Check *
8. Equal Pupil Tracking	_____	_____	Officer Did But Only One Pass *
9. Sways During Test	__X__	_____	
10. Uses Arms For Balance	__X__	_____	
11. Lack of Smooth Pursuit	_____	_____	Officer Did Wrong *
12. Angle of Onset	_____	_____	Officer Did Wrong *
13. Nystagmus at the Extremes	_____	_____	Officer Did Wrong *
14. Does Not Pay Attention During Instructions	__X__	_____	_____
15. Starts Too Soon	__X__	_____	_____
16. Staggered Out of Position	__X__	_____	_____
17. Vertical Gaze Nystagmus	_____	_____	Not Done: OK per Manaloto

VALIDITY WILL BE COMPROMISED IF NOT DONE IN A STANDARDIZED FASHION
(National Highway Safety Administration Manual/Scientist Manaloto)

HGN PROCEDURE & INSTRUCTIONS

- 1) Check for eyeglasses
- 2) Verbal Instructions
 - I am going to check your eyes
 - Keep your head still and follow this stimulus with your eyes only
 - Keep following the stimulus until I tell you to stop
- 3) Position Stimulus 12-15 inches from subject, above eye level
- 4) Check for equal pupil size & Resting Nystagmus
- 5) Check for equal tracking (4 seconds each way)
- 6) Check for Lack of Smooth Pursuit (2 passes) (2 seconds each way)
- 7) Check for Distinct and Sustained Nystagmus at Maximum Deviation (Hold for *minimum* of 4 seconds, 2 passes)
- 8) Check for onset of nystagmus prior to 45 degrees (2 passes)
- 9) Total the clues
- 10) Check for Vertical Gaze Nystagmus (not required per Manaloto)

THIS TEST IS COMPROMISED

HGN CLUES

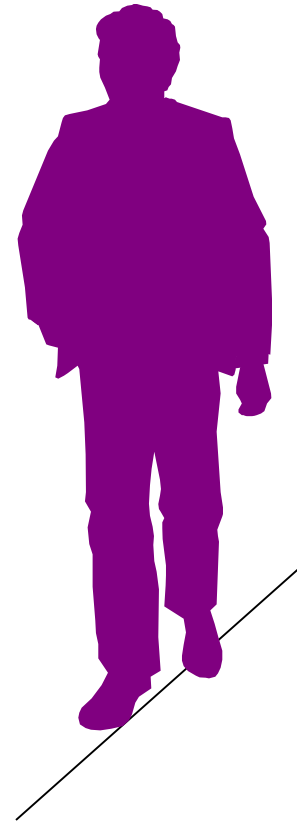
- ❑ LACK OF SMOOTH PURSUIT
- ❑ DISTINCT AND SUSTAINED NYSTAGMUS AT MAXIMUM DEVIATION
- ❑ ONSET OF NYSTAGMUS PRIOR TO 45 DEGREES

**VALIDITY WILL BE COMPROMISED IF NOT
DONE IN A STANDARDIZED FASHION**

Walk and Turn

(Divided Attention Test -
Mental Task and Physical Task)

- Instructions Stage
- Walking Stage



Administrative Procedures

1. Verbal Instructions:

- Assume heel-toe stance
- Arms down at sides
- Don't start until told
- Do you understand?

2. Physical Instructions:

- 9 heel-to-toe Steps, Turn, 9 heel-to-toe Steps

3. Turn Procedures:

- Turn around on line
- Several small steps

4. While Walking:

- Keep watching feet
- Arms down at sides
- Count steps out loud
- Don't stop during walk

Walk and Turn Test Clues

- 1. Can't balance during instructions**
- 2. Starts too soon**
- 3. Stops while walking**
- 4. Doesn't touch heel-to-toe**

Walk and Turn Test Clues

5. Steps off line

6. Uses arms to balance

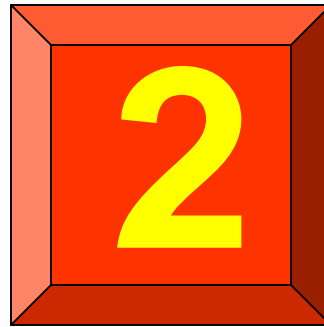
7. Improper turn (or loses balance on turn)

8. Wrong number of steps

NO MENTAL IMPAIRMENT

NO PHYSICAL IMPAIRMENT (1 MISS turned and raised both feet?)

Walk and Turn Test Criterion



ONE LEG STAND INSTRUCTIONS

- Instructions Stage: Initial Position and Verbal Instructions
 - “ Please stand with your feet together and your arms down at the sides, like this.” (Demonstrate)
 - “Do not start to perform the test until I tell you to do so.”
 - “Do you understand the instructions so far?”
- Balance and Counting Stage: Demonstration and Instructions
 - “When I tell you to start, raise one leg, either leg, with the foot approximately 6 inches off the ground, keeping your raised foot parallel to the ground” (Demonstrate one leg stance)
 - “ You must keep both legs straight, arms at your side.”
 - “While holding that position count out loud in the following manner, “one thousand and one, one thousand and two, one thousand and three, until told to stop” (Demonstrate without looking at foot- officer safety)
 - “Keep your arms at your sides at all times and keep watching the raised foot.”
 - “Do you understand?”
 - “Go ahead and perform the test.: (Officer should always time the 30 seconds. Test should be discontinued after 30 seconds.”

ONE LEG STAND CLUES

- 1) SWAYS WHILE BALANCING
 - 2) USES ARMS FOR BALANCE (6 INCHES OR MORE FROM SIDE)
 - 3) HOPPING
 - 4) PUTS FOOT DOWN
- DECISION POINT= 2**

SCORING ONE LEG STAND TEST

CLUES

- 1) Sways while balancing (>2")
- 2) Uses arms for balance (6" or more from side)
- 3) Hopping
- 4) Puts foot down

CLUES OBSERVED

?



ONE LEG STAND

- NO MENTAL IMPAIRMENT
- NO PHYSICAL IMPAIRMENT DUE TO
 - ALCOHOL
 - Mental Always 1st before Physical

TOXICOLOGY

Government:

Police

Prosecution

Laboratory

RUSH TO JUDGMENT BY GOVERNMENT

Filed case based on:

- ASSUMPTIONS
- PRESUMPTIONS
- SPECULATION

TOXICOLOGY

- OC Crime Lab STATES THAT THE HYPOTHETICAL PERSON WAS OVER .08% AT THE TIME OF DRIVING BECAUSE THEY ASSUME, PRESUME AND SPECULATE
- Using their APS, even as high as .10/.11%
BAD SCIENCE based on assumptions

Breath Testing

- Concepts
- Standard size drinks
- Absorption rate
- Elimination rate
- Post peak
- Officer Tennant wants you to convict JQ when Officer Tennant violated the law on the 15 minute continuous observation period

OC Crime Lab

- Reluctantly admitted there are ranges and **assumptions** OC Crime Lab **speculated** about
- Manaloto was not going to move off the OCCL's position, that most people are impaired at .05% opinion
- **HAS TO UNDERCUT THE LAW**

OC Crime Lab

- Reluctantly admitted there are other **ranges for elimination, burn-off, body water**
- Reluctantly admitted there are **variables in absorption** and hard to calculate
 - 15 to 30 minutes vs. 0 to 3.5 HOURS

OC Crime Lab

- “ It becomes clear that **speculative retrograde extrapolation of the BAC** to any point prior to an experimentally determined value must be avoided in forensic practice, or so qualified by stated **assumptions** that **the exercise becomes pointless.**”
- Kurt Dubowski, PhD, Human Pharmacokinetics of Ethanol in Peak Blood Concentrations and Elimination in Male and Female Subjects

OC Crime Lab

- “We do not intend to encourage back-estimate but instead we want to highlight the **uncertainty** associated with such calculations. **Estimating** the amount of alcohol consumed is difficult to defend since drinking histories are often **unreliable** and values for B and p are unknown for individual drunk driving suspects.”
- R.G. Gullberg and A.W. Jones, Guidelines for Estimating the Amount of Alcohol Consumed From a Single Measurement of Blood Alcohol Concentration: Re-Evaluation of Widmark’s Equation

PRESUMPTION OF INNOCENCE

- Scientist testified that it was entirely
REASONABLE AND POSSIBLE THAT WITH THE
ASSUMPTIONS HE CHOSE TO USE, JQ COULD
BE UNDER THE .076% RANGE

GOING TO GIVE HIM THE BENEFIT OF THE DOUBT
THEN YOU HAVE TO GIVE HIM THE BENEFIT OF THE
DOUBT THAT HE WASN'T AN IMPAIRED DRIVER NOR
OVER .08% AT THE TIME OF DRIVING (THE
PRESUMPTION OF INNOCENCE AND CALCRIM 224)

PRESUMPTION OF INNOCENCE

- Since the Government failed to prove his BAC level when driving by reliable testing results, with any clear facts other than on assumptions, presumptions and speculation, we believe you must correctly decide the Government has not met its burden of proof

RUSH TO JUDGMENT BY LAB

- California Legislature, Per Se Limit .08%
- OCCL, for the government, most people are impaired at .05% WHICH IS NOT THE LAW
- Would not have made it past the voir dire/jury selection process .05%
- They are diverting your attention away from the law and the facts of this case

Overview

- **No** Bad Driving
- **No** Mental Impairment
- **Some** Physical Impairment
- **Not** Under the Influence
- **EQUALLY REASONABLE UNDER .08%**

RUSH TO JUDGEMENT

WHEN THE GOVERNMENT

GETS ITSELF IN TROUBLE

TROUBLE = NOT GUILTY

#1 accusation: not true

TROUBLE = NOT GUILTY

DISCONNECT

MEDICAL INFORMATION

CAN'T TRUST THE RESULTS

TROUBLE = NOT GUILTY

- Reasonable Doubt
 - 1) Evidence
 - 2) Lack of Evidence
 - 3) Conflicts in the Evidence

SUMMARY

- Legally sealed
- Unfair advantage
- Please think of me when you go back there to deliberate; what would I have countered with concerning any issue brought up we have not already discussed
- You still think of me on your shoulder directing you to uphold your oath to always presume innocence when reasonable, you have to be me in the deliberation room looking for the 224 and Presumption of Innocence
- No APS, foundation of our Constitution

Be inquisitive and look for the reasonable answers

Look for the reasonable doubt based on the presumption for innocence (only 1 allowed)

SO VERY NOT GUILTY

- Treat each other with respect
- If there is a problem in the jury room, you may pass a note to the bailiff

REMEMBER CAL CRIM 224

SCOTTISH SYSTEM

ANALOGIES

- Tylenol
- Bathroom
- High levels
- HGN Here Goes Nothing
- Buckets
- House That the Government Built for You
- Fishing
- Chair

PPT

- Let me Thank You In Advance

I will STEAL your STUFF.

Send it BACK to ME.

For an electronic copy of these slides,
TEXT: SDSFSTs to: (949) 531-7060

And Follow The Prompts