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# Strategic Jury Selection in Sexual Assault and Homicide Cases

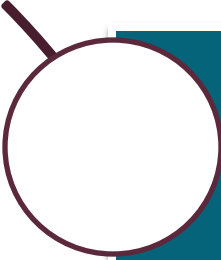
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# Objectives

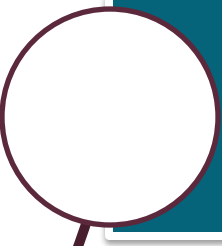
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Guide the jury's response to the evidence, from jury selection through closing argument



Conduct an experience-based *voir dire*



Employ themes that place the evidence in the context of common experience



Prepare to respond to challenges during jury selection

“She didn’t act like a victim.”

“They had so many problems---- how can we find him guilty when he says he didn’t do it?”

“He’s too successful to be out there taking risks like this.”

“He made a mistake, but we felt like we couldn’t throw his life away.”

We the Jury Find the Defendant Guilty....

What does it take to get there?

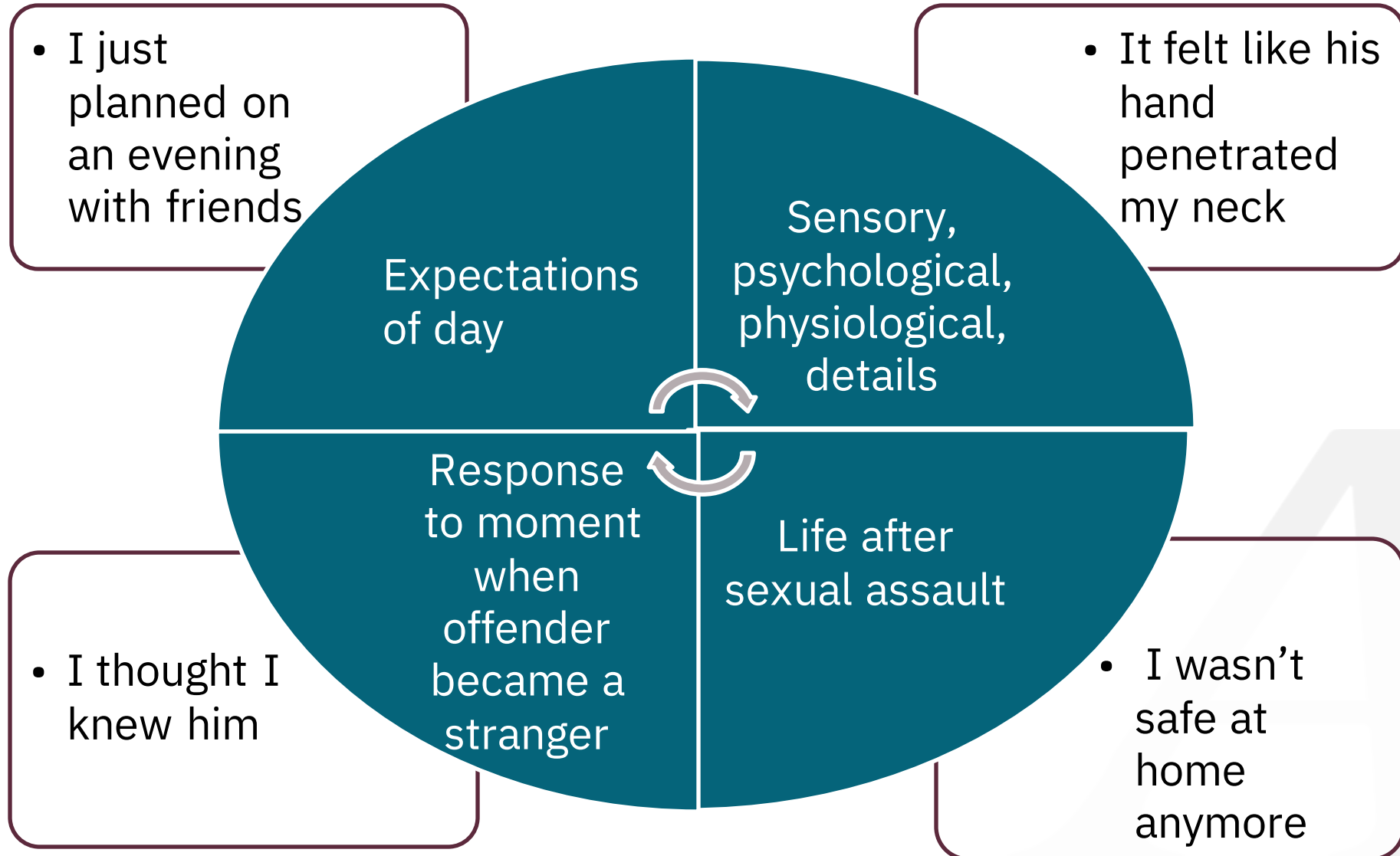
# The Work Begins With Preparation and Knowing Your Case

Review case from  
a trial perspective

Focus on physical,  
psychological,  
and physiological  
evidence

Connect jury with  
evidence

# Trial Perspective: Building the Case in Sexual Assault Cases



# Trial Perspective: Intimate Partner Homicide

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## Victim's last day

- The victim was born on x day. During the victim's last day, these were her activities

## What happened before

- Context: history of assault, sexual assault, stalking, strangulation

## Victim's words: prior statements

- Excited utterance, present sense impression, statement for purposes of medical diagnosis

## End of victim's life

- How and when life ended; victim's experience of the crime

## Physical, psychological, physiological details of crime

- Autopsy findings: defense wounds, multiple injuries
- Single shot and range



# Preparation

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Encapsulate the evidence in a theme and introduce it during jury selection

Turn perceived challenges into strengths and develop insight into the reality of the crime

Keep the focus on the offender and the impact of trauma on the victim.

Establish a connection between the jury and the evidence.

# Dive Deeper Into Evidence


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- Recognize evidence of predatory conduct
- Assess evidence of premeditation and planning
- Did the offender exploit known or perceived vulnerabilities?
- Was the offender relying on known social misperceptions involving alcohol/drugs?

***The key is to analyze and convey the effect of the offender's conduct on the victim.***

# Using the Theme Effectively

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- 
- Incorporate theme into questions: *e.g.*, Have you ever been put in a position when you were alone and concerned about a situation you were in?

- 
- Be open to developing or modifying the theme during trial...or even during cross

- 
- Weave the theme through cross-exam in anticipation of closing

Experience  
and  
Emotion



Minds

Verdict

What themes have you developed  
that are effective?

# Offender Focus

The Victim is Not on Trial

# Knowing the Offender

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Sexual Assault

Stalking

Image Exploitation

Violation of Protection Orders

Witness Intimidation

Homicide

# Lead Jurors...

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Understand

dynamics of offender conduct

Recognize

impact of trauma on victims

Identify

danger of offenders both known and unknown to victims

Realize

that for victims of sexual assault, the effects of the crime remain



# Recognize Dangerousness

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Suspect Known  
to Victim

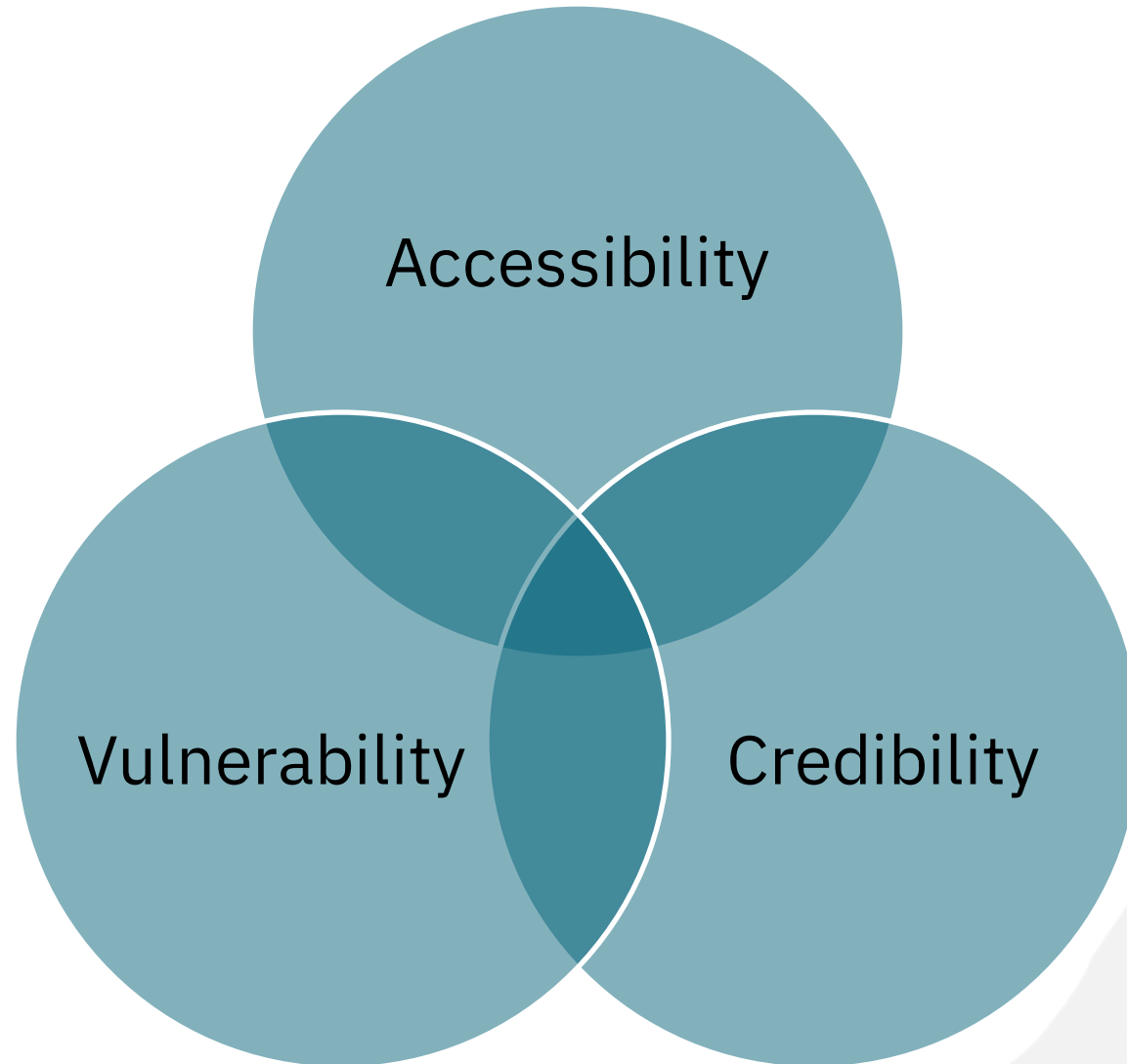
Hybrid  
Offenders

Suspect  
Unknown Victim

Serial  
Offenders

Crossover  
Offenders

# Dissecting the Offender's Plan and Impact on the Victim



# Stacking the Deck

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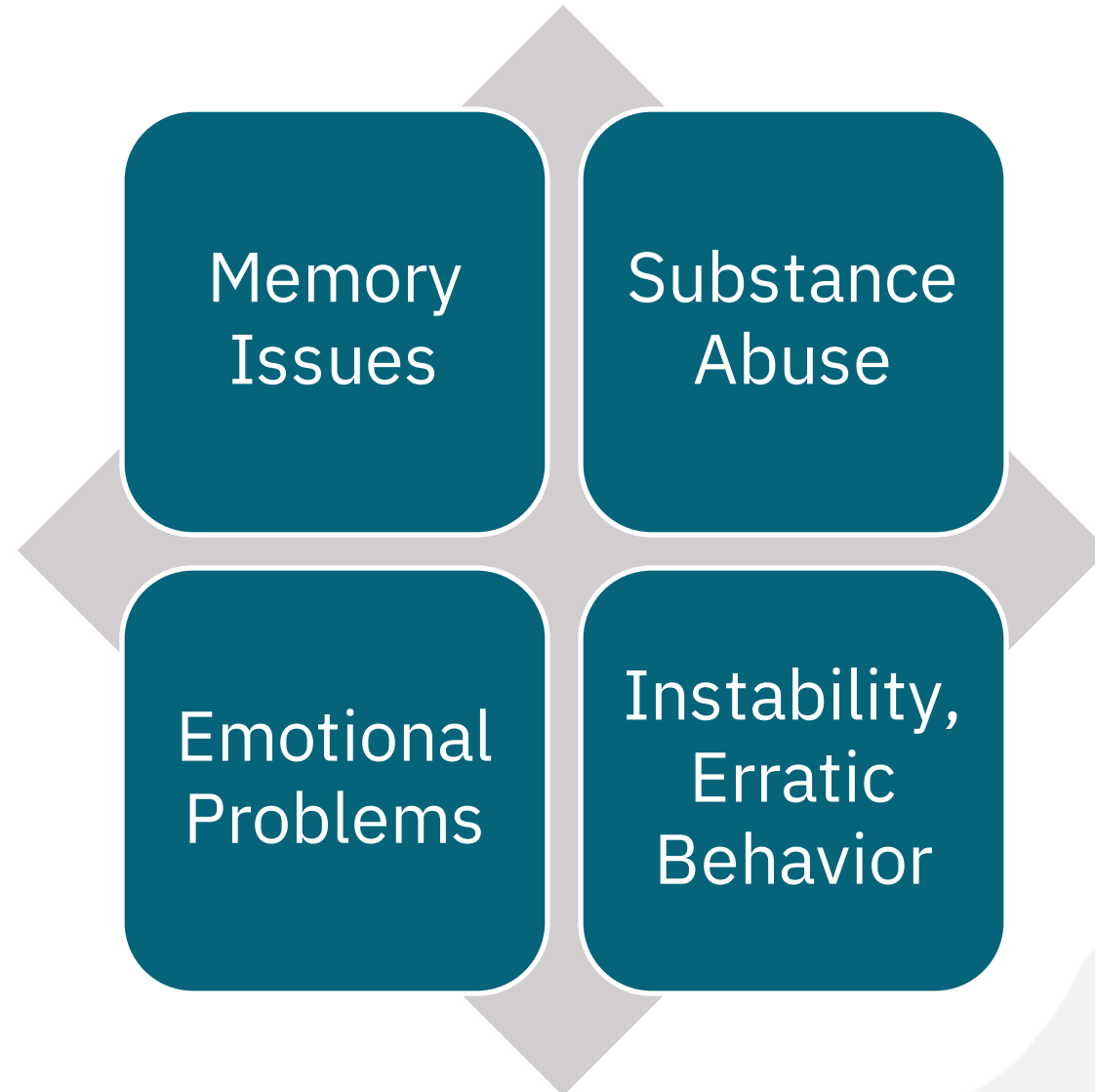
Offenders target victims who ***they*** believe lack credibility—based on a comparison of social circumstances, status, or other historical or situational factors—including, but not limited to:

- Alcohol or drug use
- Differences in age, experience, or education
- Intellectual or developmental disability
- Isolation
- Sexual exploitation



# Offenders Create or Aggravate Symptoms

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# Analyze Offender Behavior

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Garners trust

Blames others

Denies some or all of the victim's account

Tries to play the victim

Hides behind reputation, relationship

Makes confrontation and suspicion uncomfortable

# Recognize the Reality of the Crime

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Delayed disclosure

- Who caused it?

Voluntary intoxication

- Who needs force when you have alcohol?

Prior relationship

- He knew her, but she didn't know him

How are you incorporating offender  
focus into *voir dire* questions?

# Court's Orientation for the Panel

What film is your Court using for orientation?



# Jurisdictional Juror Orientation

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Video to introduce jury selection process: What is the content?

Should additional or updated content be suggested?

Opportunity for prosecutor to refer back to the video

Do you use questionnaires?

What is your experience with questionnaires?  
What questions do you incorporate?

# Considering Juror Questionnaires

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1

Attorneys have the opportunity to prepare and identify any issues with any panelist

2

Provides opportunities for interviews on sensitive information in open court, but outside presence of rest of panel

3

Are part of the public record, but not live-streamed, and usually require the court's permission to access

# Key Information

## Juror Questionnaires

Occupation  
(in or outside  
of home)

Work  
responsibilities

Relationship  
status

Educational  
background

Prior jury  
service

Community  
involvement

Knowledge  
of judge,  
attorneys,  
witnesses

Information  
about case from  
media, social  
commentary

# Composition of Questionnaire

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Nature of crime and ability to assess evidence

Prior victimization or knowledge of family member or close friend's victimization

Prior accusation or knowledge of a family member or close friend's accusation

# Composition of Questionnaire

Cont'd

List of potential witnesses who may be called at trial:  
acquaintance or relationship with any potential witness

Concern with credibility of any particular group of witnesses  
(*e.g.*, law enforcement)

Knowledge or information about the case from any source,  
including newspaper, social media, television, online

# Questionnaire Strategies

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Defense may request separate interviews with some victims in open court but outside presence of other panelists

- *E.g.*, sexual assault victims or their family/friends

Consider objecting to request for separate interview, unless panelist requests separate interview or there is need for more restrictive setting

Panelist's answers to *voir dire* questions in a public setting may provide other panelists with a better understanding of sexual violence

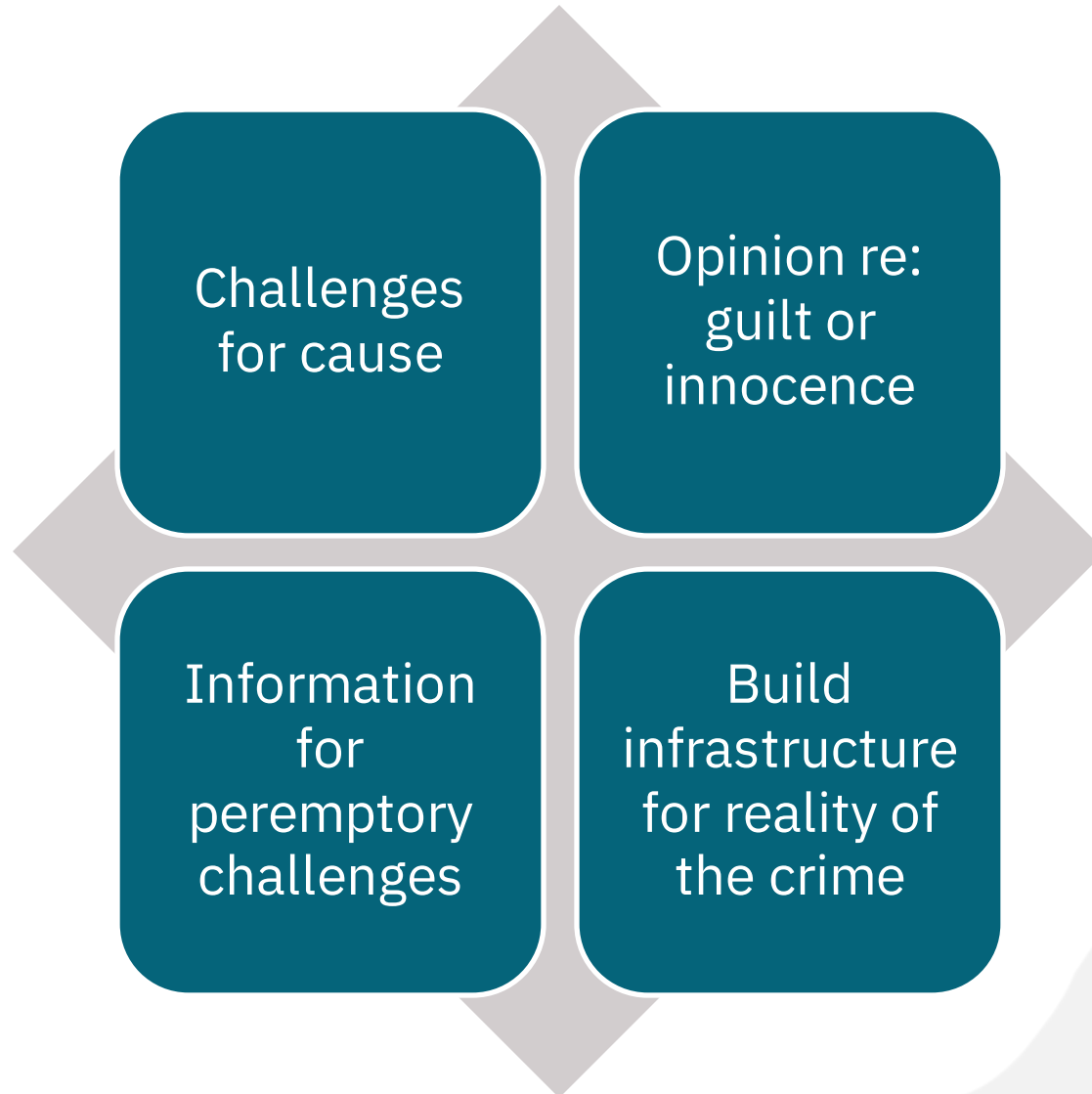
- *E.g.*, impact of sexual assault and widespread incidence of the crime

Establishing the Foundation for the  
Victim's Testimony Through *Voir Dire*



# *Voir Dire*: To Speak the Truth

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# Individual *Voir Dire*

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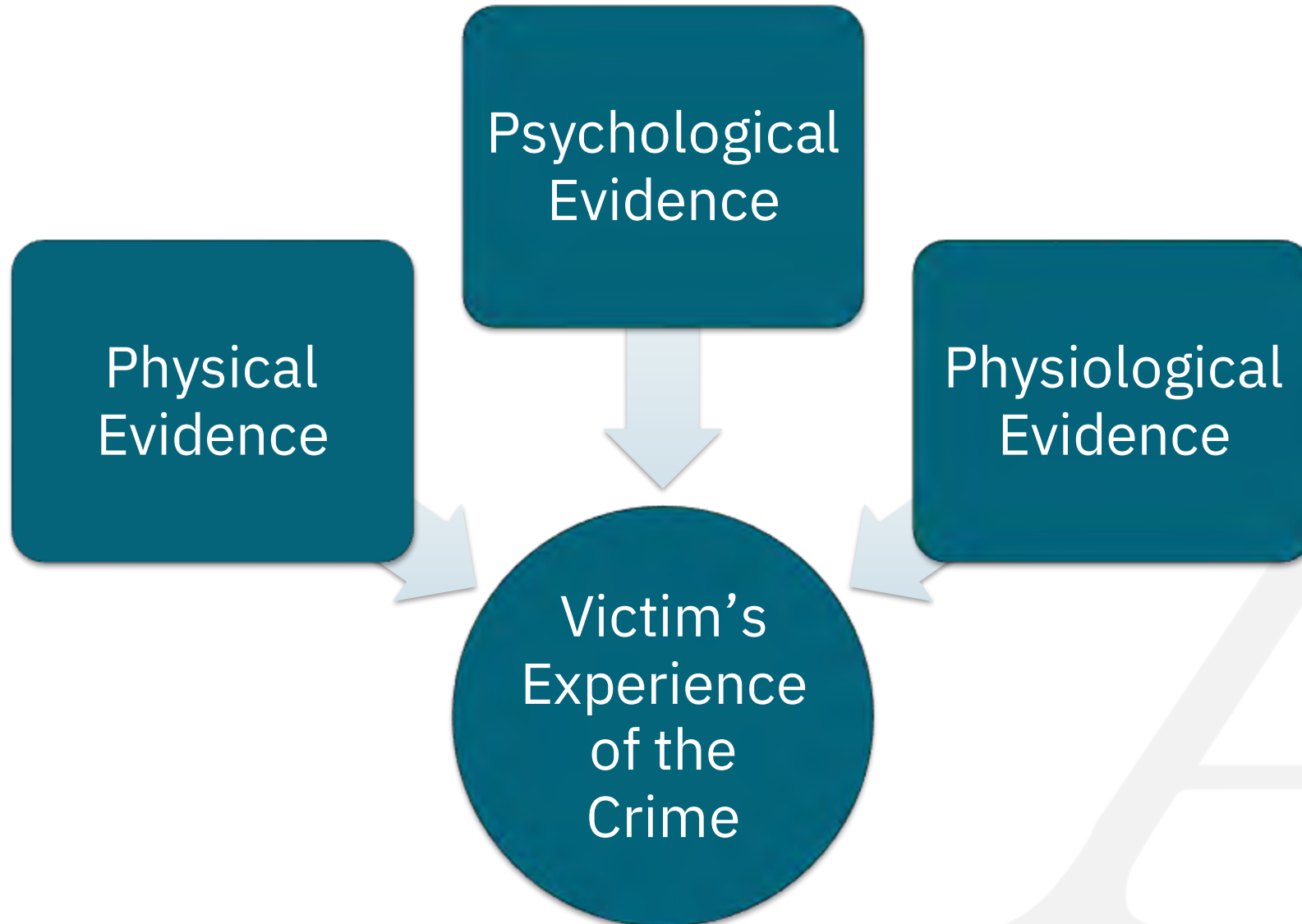
Protect the privacy of jurors

Allow an opportunity for personal questions to be asked outside of presence of panel and in open court, as permitted

Members of the panel may include survivors of sexual assault and other violent crimes

- Consider making referrals available

# Connecting the Jury With Victim's Experience of the Crime



# Practice Tips

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Use “we” and “us” whenever possible

*E.g.*, “We are all in this together”



Maintain unfailing professionalism with panelists, opposing counsel, the court, and court staff



Organization also speaks to professionalism

# Experiential Questions

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Determine specific issues in the case: *e.g.*,  
response to trauma



Ask about relevant personal experience (self,  
family, friends)



Elicit appropriate details with sensitivity




Establish if juror can be fair and impartial

# Connect With the Jury

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**VICTIM'S  
EXPERIENCE**



**LIFE  
EXPERIENCE  
OF JURY**

# Educate Jury on Predatory Conduct Through Questions

## ACCESSIBILITY

The evidence will establish that the victim was in a relationship with the offender.

Can you consider evidence of a crime in the context of a relationship?

## VULNERABILITY

Have you ever had your confidence betrayed?

Have you shared information with someone you trusted, who betrayed that confidence?

## CREDIBILITY

As a potential juror, you are the judge of credibility in this case.

Are you able to fairly decide credibility in the context of a person's vulnerability?

# Experience-Based Questions

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Impact of  
Trauma

Delayed  
Disclosure

Consumption  
of Alcohol

Offender Known  
to Victim and  
Breach of Trust

Unknown  
Offender/  
Identification

Expert  
Testimony

Witness  
List

Work of  
the Jury



What other experience-based questions  
do you use — or can we develop?

# Fairness: The Core of Prosecution

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- If we establish the elements of the crime beyond a reasonable doubt, is there any reason you would be unable or reluctant to hold the defendant accountable for his conduct and find him/her guilty?
- At the same time, if we do *not* establish the elements of the crime beyond a reasonable doubt, would you be unable or reluctant to find him/her not guilty?



# Peremptory Challenges

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Prosecution and defense are entitled to peremptory challenges

No explanation is necessary, but ...

A peremptory challenge may not be used to impermissibly discriminate against a member based on race or gender

Race: *Batson v. Kentucky*,  
476 U.S. 79 (1986)

Gender: *J.E.B. v. Alabama ex rel. T.B.*,  
511 U.S. 127 (1994)

# Race-Based Challenges

Batson v. Kentucky, 476 U.S. 79, 86 (1986)

- “Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure.”
- Courts have treated *Batson* as prohibiting peremptory challenges based on classifications that warrant heightened judicial scrutiny (e.g., strict or intermediate scrutiny).

*See, e.g., Bowles v. Sec’y for the Dept. of Corrections*, 608 F.3d 1313, 1316 (11th Cir. 2010), *cert. denied*, 131 U.S. S.Ct. 652 (2010);  
*United States v. Watson*, 483 F.3d 828, 831 (D.C. Cir. 2007);  
*United States v. Santiago-Martinez*, 58 F.3d 422, 423 (9th Cir. 1995).

# *Batson* and Heightened Scrutiny

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Test to determine when a classification should receive heightened scrutiny:

- 1) the classified group has experienced a history of discrimination;
- 2) the distinguishing characteristic of the class has any bearing on a person's ability to contribute to society;
- 3) the group is politically powerless; and
- 4) the defining characteristic of the group is immutable or highly visible.

*See, e.g., Lyng v. Castillo*, 477 U.S. 635, 638 (1986);  
*San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

# Gender-Based Challenges

*J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 129 (1994)

- “Today we are faced with the question whether the Equal Protection Clause forbids intentional discrimination on the basis of gender, just as it prohibits discrimination on the basis of race. We hold that gender, like race, is an unconstitutional proxy for juror competence and impartiality.”



# *Batson* Analysis

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Moving party must establish a *prima facie* case of impermissible discrimination;



Burden shifts to the opposing party to articulate a neutral, nondiscriminatory reason for the peremptory; and



The court determines whether the moving party has carried their burden of proving purposeful discrimination.

# Jury Instructions



# Jury Instructions

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1

Review instructions carefully to determine the impact of current case law, *e.g.* *Counterman v. Colorado* and/or any updates in court rules or statutes

2

Determine whether updates to Court's instructions to the jury should be considered and discussed at pre-trial

3

Be prepared to offer cautionary instructions if FRE 404b evidence is admitted

Do you have any challenges with case law  
and need updated jury instructions?

# Counterman v Colorado

143 S. Ct. 2106 (2023)

- Defendant was convicted of stalking in CO for communicating hundreds of messages from various social media accounts to the victim, an aspiring singer
- CO proved that the messages were unwanted and would make a reasonable person feel afraid and threatened



# Colorado Stalking Statute

Colo. Rev. Stat. Ann. § 18-3-602(1)(c)

- “[A person commits stalking if the person]. . .makes any form of communication with another person . . . in a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person . . .to suffer emotional distress[.]”



# The *Counterman* Decision

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- Communications at issue fit the definition of “true threats”
- “True threats” are not protected under the 1st Amendment
- For “true threats” to be punishable, there must be proof that defendant had subjective understanding of the threatening nature of communication(s)
  - Proof of intent/*mens rea* of recklessness is sufficient

What if your statute doesn't indicate intent/*mens rea*?         

Culpability Required Unless Otherwise Provided. When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts purposely, knowingly or recklessly with respect thereto.

Model Penal Code § 2.02(3) (emphasis added)

Does your jurisdiction have the equivalent of §2.02?

# Questions Based Upon Jury Instructions

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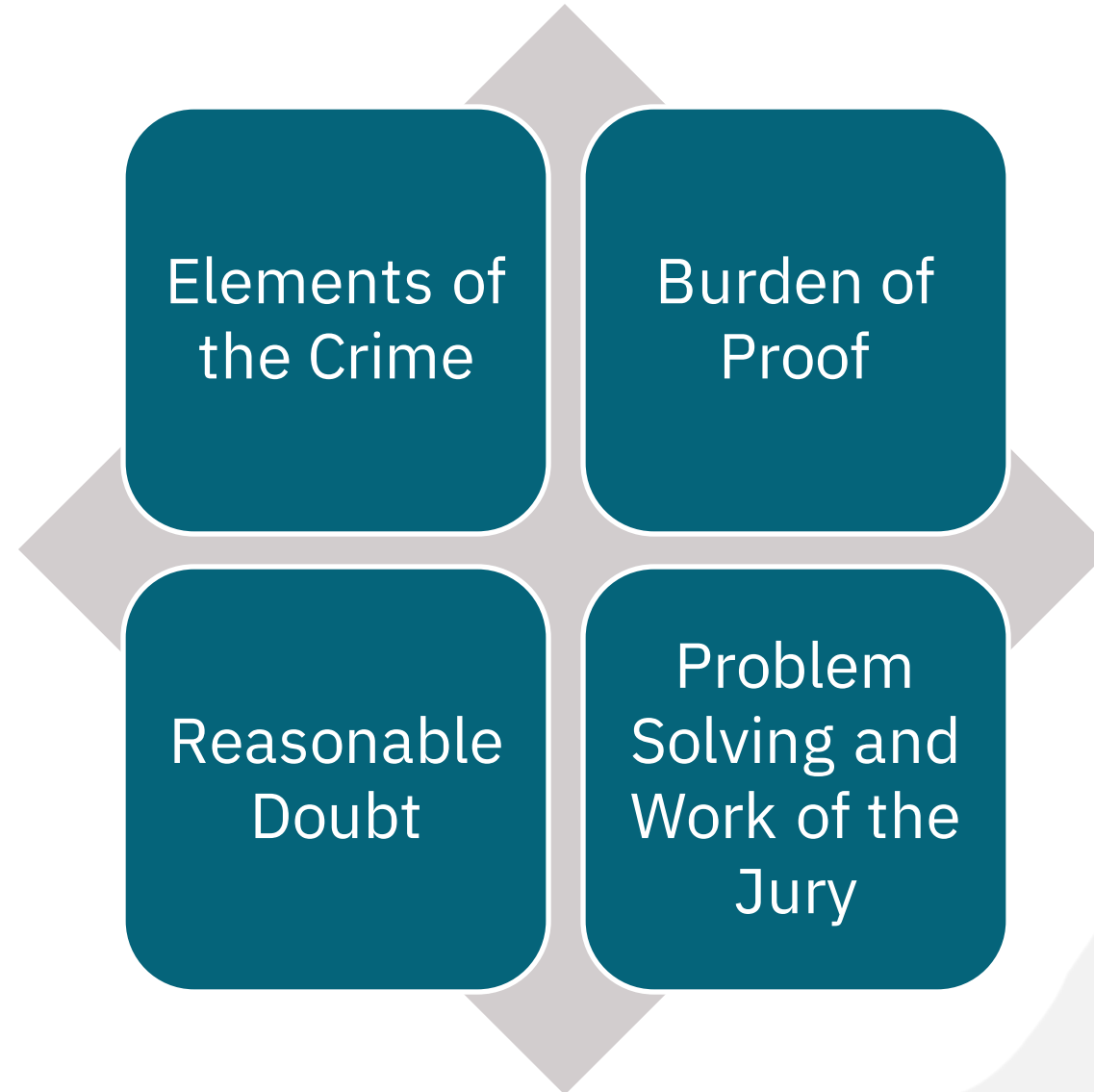
Use jury instructions to prepare

- What you have to prove
- What you do NOT have to prove

Use same language as jury instructions

# Instructions and Questions

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# Manual of Model Criminal Jury Instructions

## 9<sup>th</sup> Cir. Rule 1.1

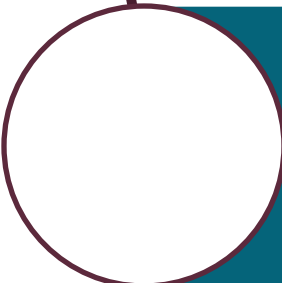
- “You should not be influenced by any person’s race, color, religious beliefs, national ancestry, sexual orientation, gender identity, gender, or economic circumstances. Also, do not allow yourself to be influenced by personal likes or dislikes, sympathy, prejudice, fear, public opinion, or biases, including unconscious biases. Unconscious biases are stereotypes, attitudes, or preferences that people may consciously reject but may be expressed without conscious awareness, control, or intention. Like conscious bias, unconscious bias can affect how we evaluate information and make decisions.”
- The Supreme Court emphasized the importance of jury instructions as a bulwark against bias in *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 871 (2017).

# Going Forward

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Craft experience-based questions that represent case specific issues



Focus on offender and how behavior impacted the victim



Develop themes beginning with *voir dire* encapsulating the evidence

“Justice is truth  
in action.”

Benjamin Disraeli



# Contact Information

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