

MONTEREY COUNTY

OFFICE OF THE DISTRICT ATTORNEY
JEANNINE M. PACIONI, DISTRICT ATTORNEY



September 13, 2019

VIA USPS

Shilpi Agarwal
ACLU of Northern California
39 Drumm Street
San Francisco, CA 94111

Re: Jury Selection and Batson/Wheeler Training Materials – Public Records Request

Dear Ms. Agarwal:

This is a supplemental response to your letter, dated July 29, 2019, received by this office via electronic mail on that same date and second letter requesting further consideration, dated August 26, 2019.

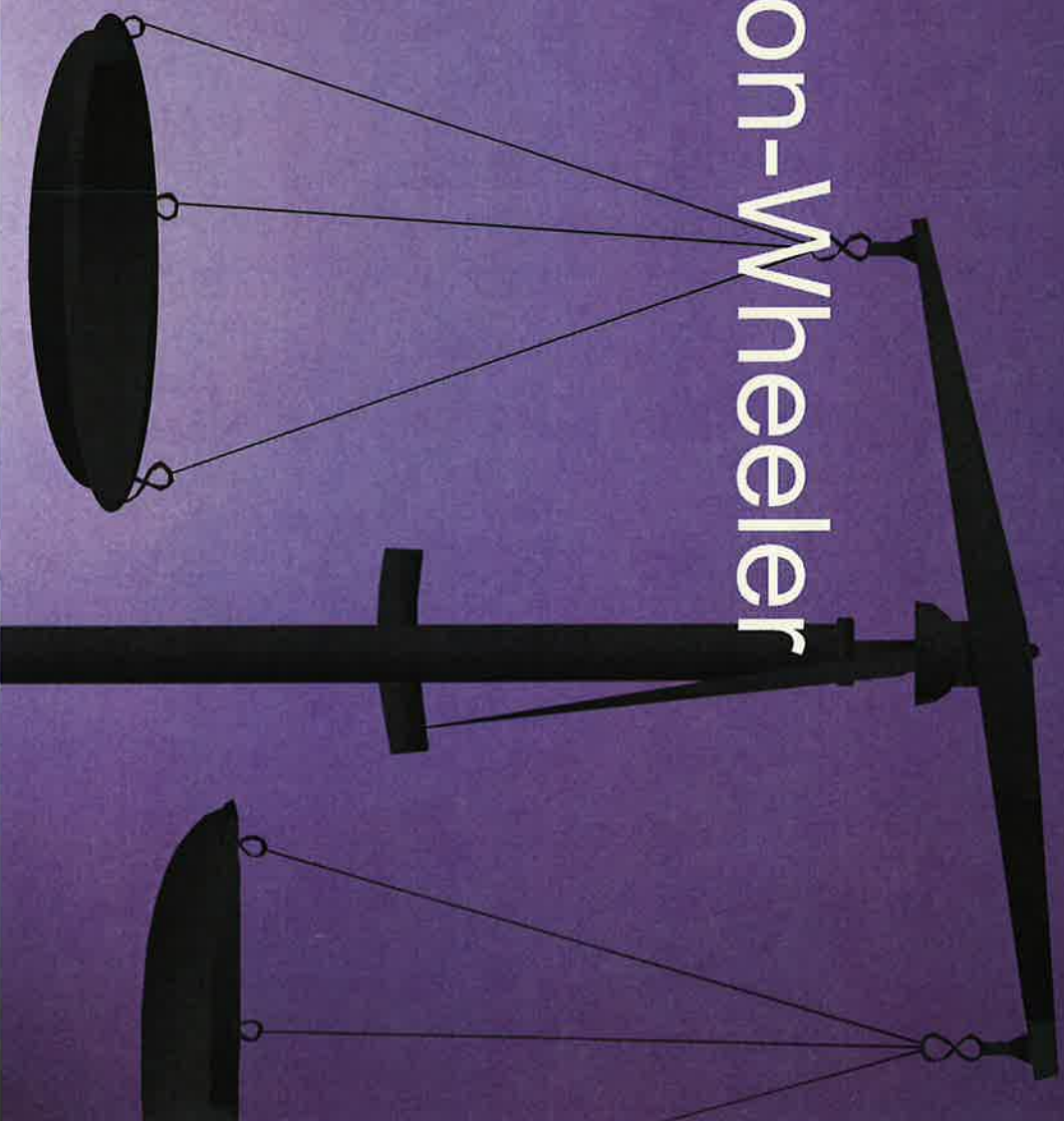
As we discussed on the phone on September 10, 2019, I am enclosing a copy of the power-point presentation from our only in-house *Batson/Wheeler* training. As agreed, I will await further conversation with you regarding any review of CDAA materials related to *Batson/Wheeler*, which would take place at our offices in Salinas.

I believe this resolves your request.

Sincerely,

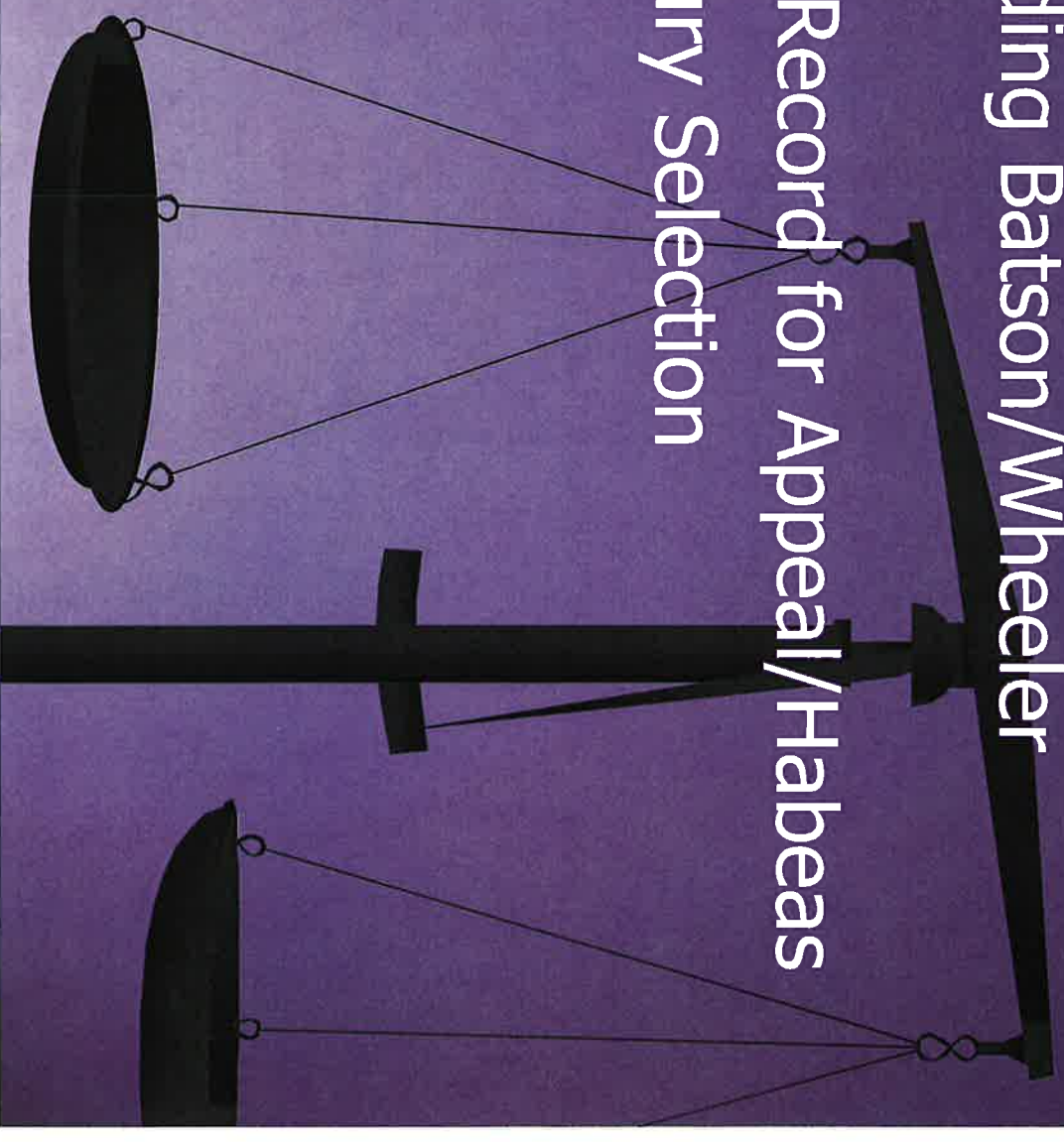
Cristina Johnson
Deputy District Attorney

Batson-Wheeler



Overview

- The Law Regarding Batson/Wheeler Challenges
- Making a Good Record for Appeal/Habeas
- Documenting Jury Selection



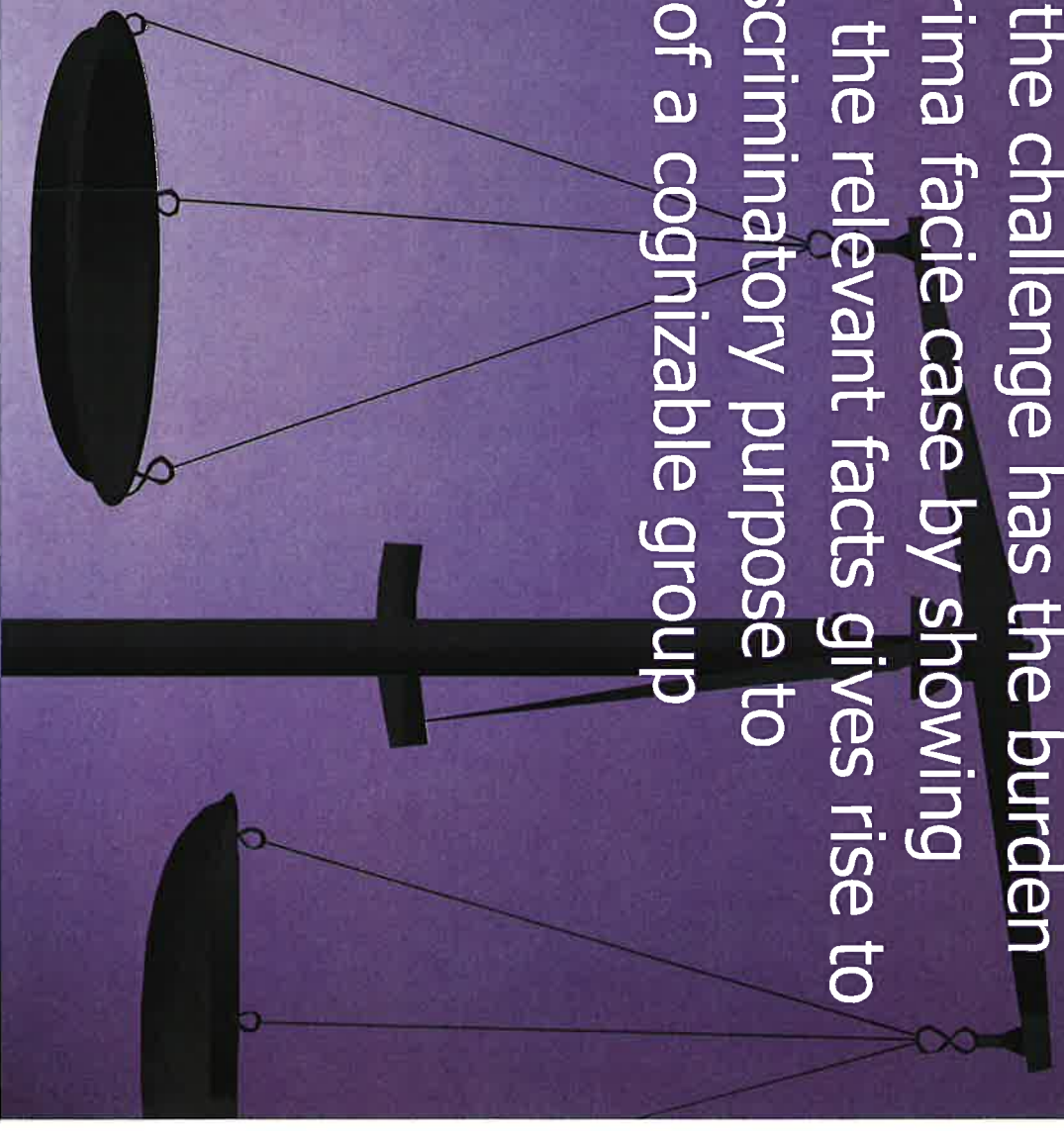
3- Prong Test

- 1. Prima Facie Case
- 2. Justifications for challenge(s)
- 3. Court's Decision



Step One: The Prima Facie Case

- The party making the challenge has the burden of making out a prima facie case by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose to exclude members of a cognizable group



Step One: The Prima Facie Case

- Cognizable Group?
 - Race, religion, national origin, sexual orientation, gender, age, disability
 - Also includes subgroups: Hispanic females, old men



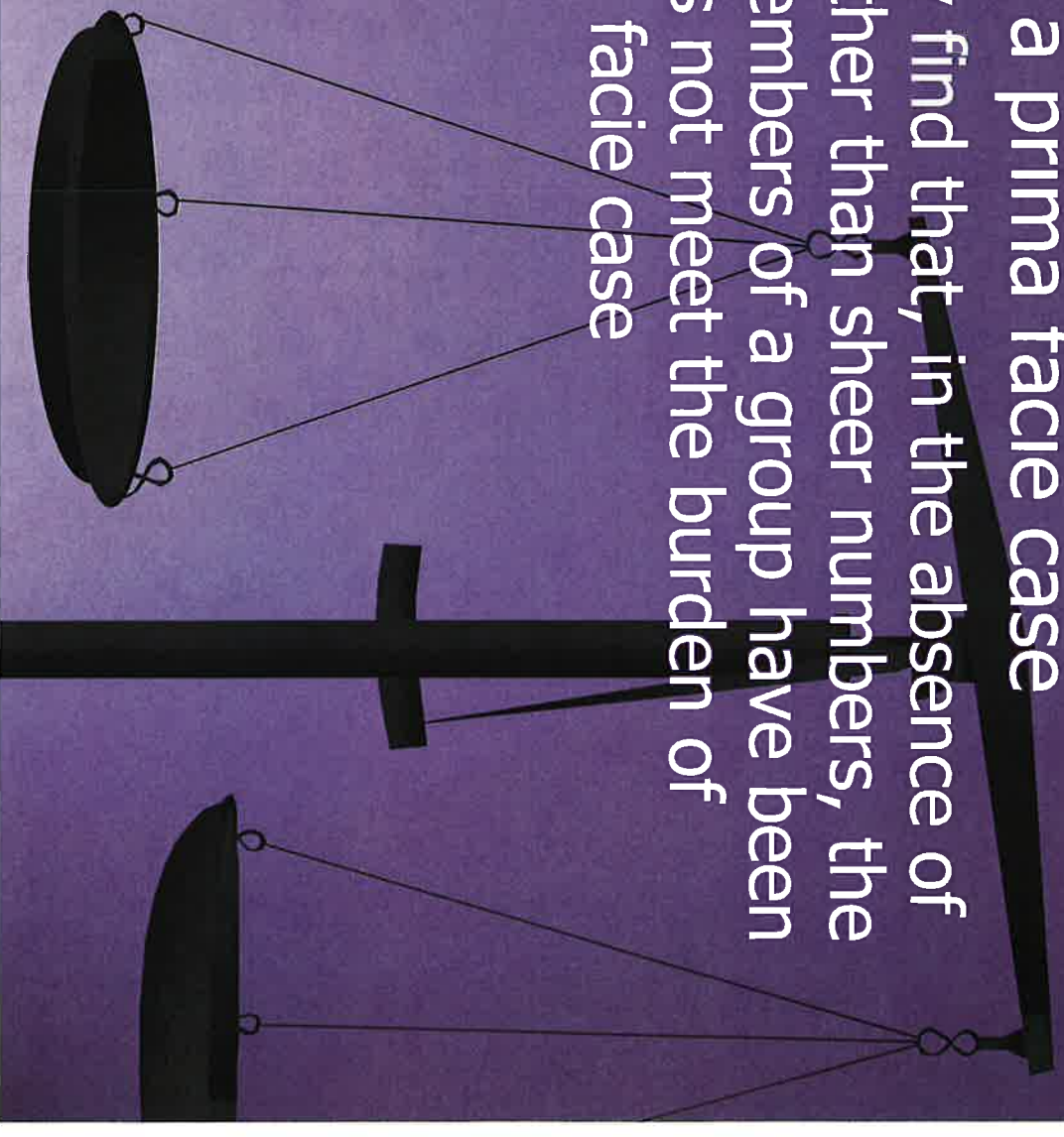
Step One: The Prima Facie Case

- Not a cognizable group
 - Arrestees
 - Citizenship status
 - Crime victims
 - Education-related groups
 - Employment-related groups
 - Ex-felons
 - Income or Wealth-Based Groups
 - Issue-Viewpoint Groups



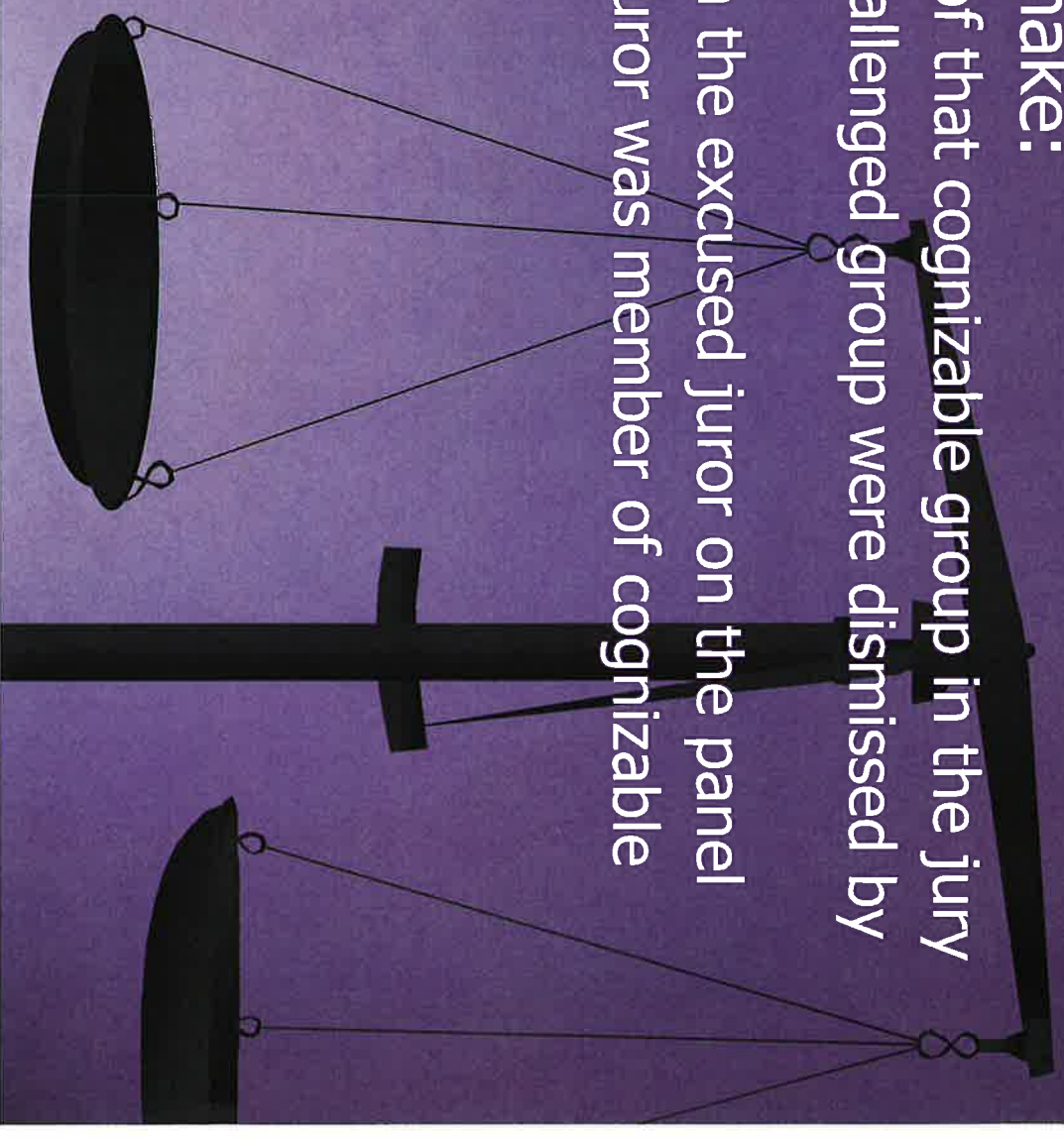
Step One: The Prima Facie Case

- Do not concede a prima facie case
 - Courts routinely find that, in the absence of any evidence other than sheer numbers, the fact multiple members of a group have been challenged does not meet the burden of making a prima facie case



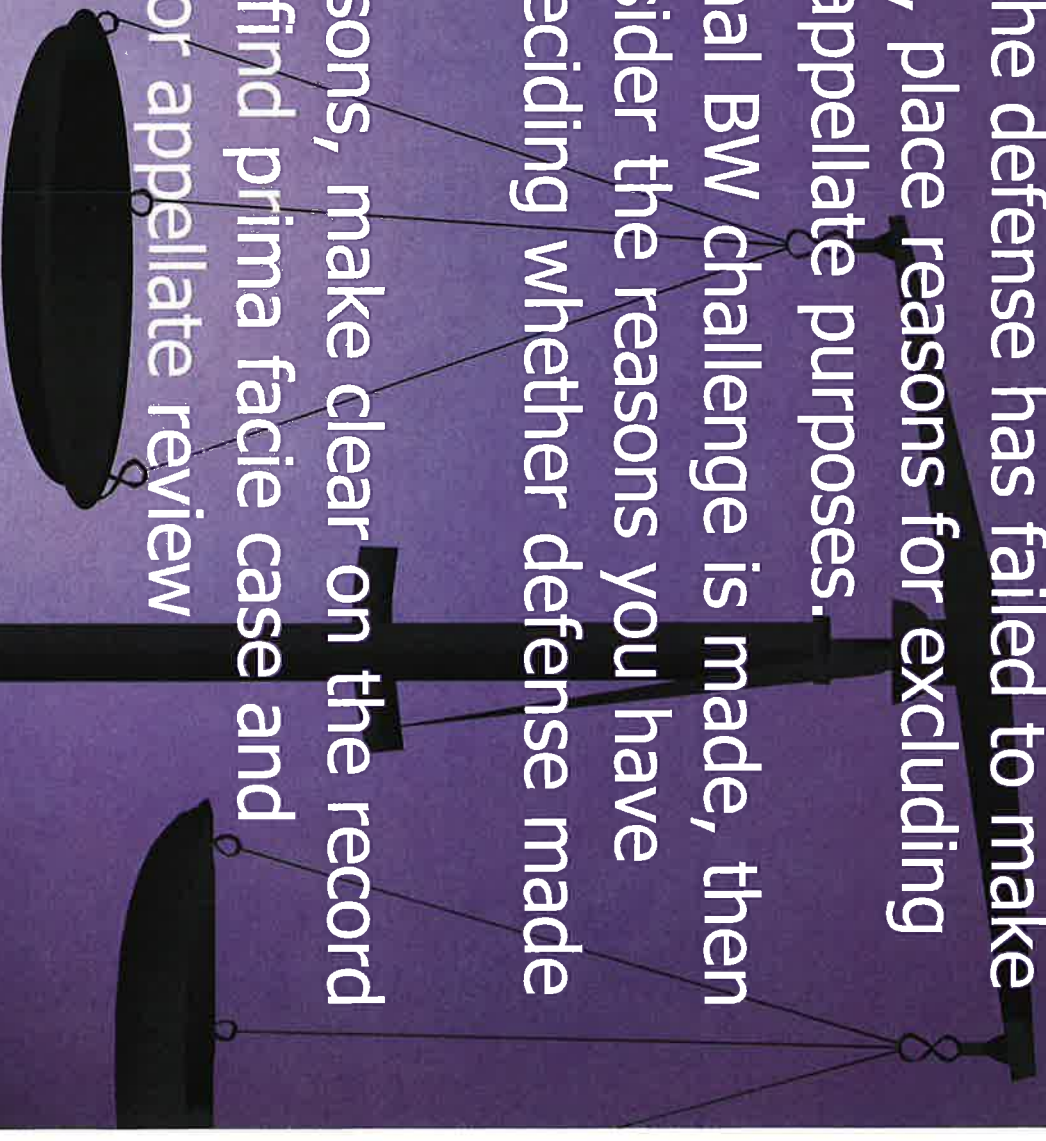
Step One: The Prima Facie Case

- Arguments to make:
 - Still members of that cognizable group in the jury
 - Members of challenged group were dismissed by defense
 - DA passed with the excused juror on the panel
 - Did not know juror was member of cognizable group



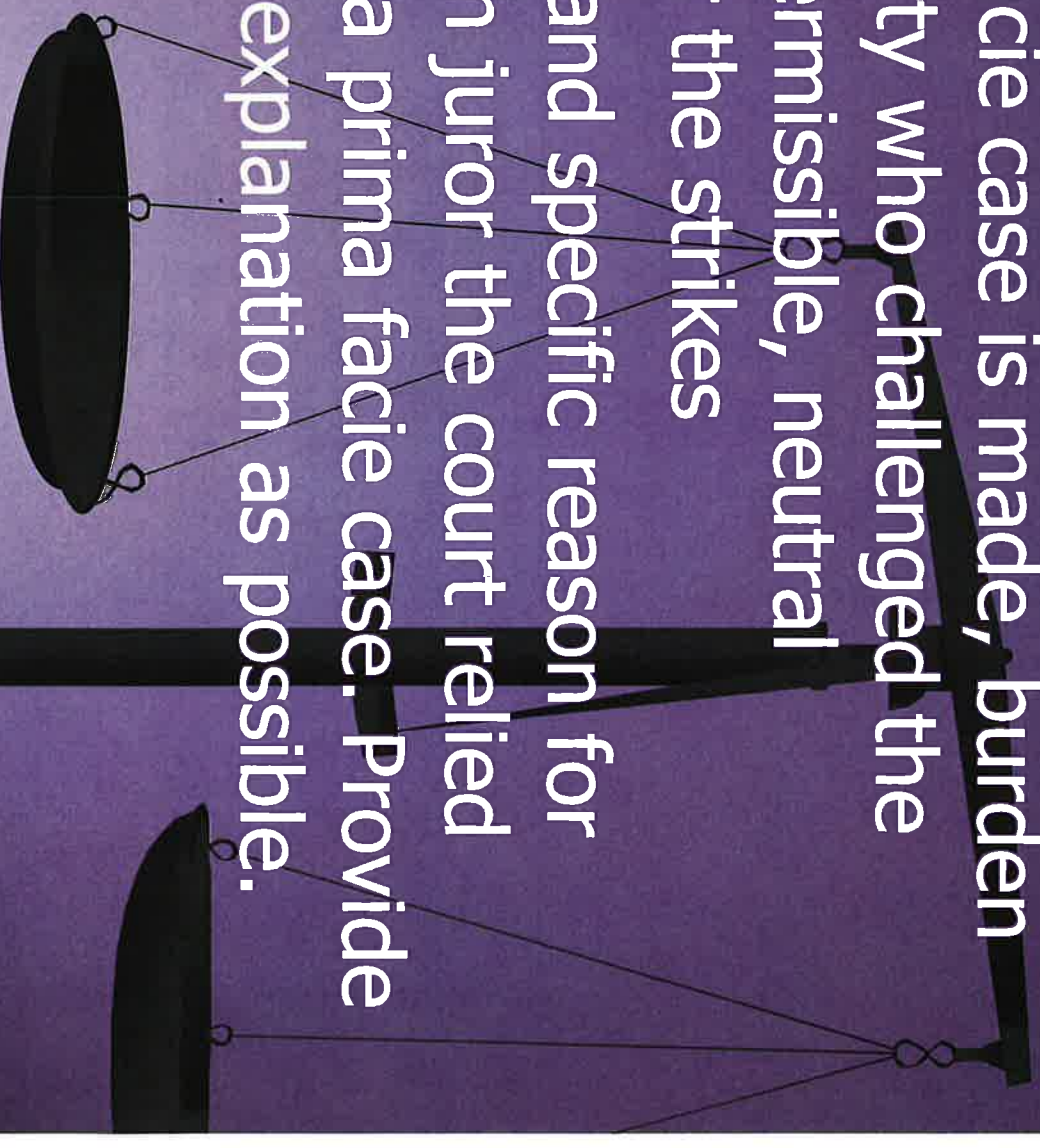
Step One: The Prima Facie Case

- If the court finds the defense has failed to make a prima facie case, place reasons for excluding on the record for appellate purposes.
- Also, if an additional BW challenge is made, then the court can consider the reasons you have already given in deciding whether defense made a prima facie case
- Before stating reasons, make clear on the record that court did not find prima facie case and reasons are only for appellate review



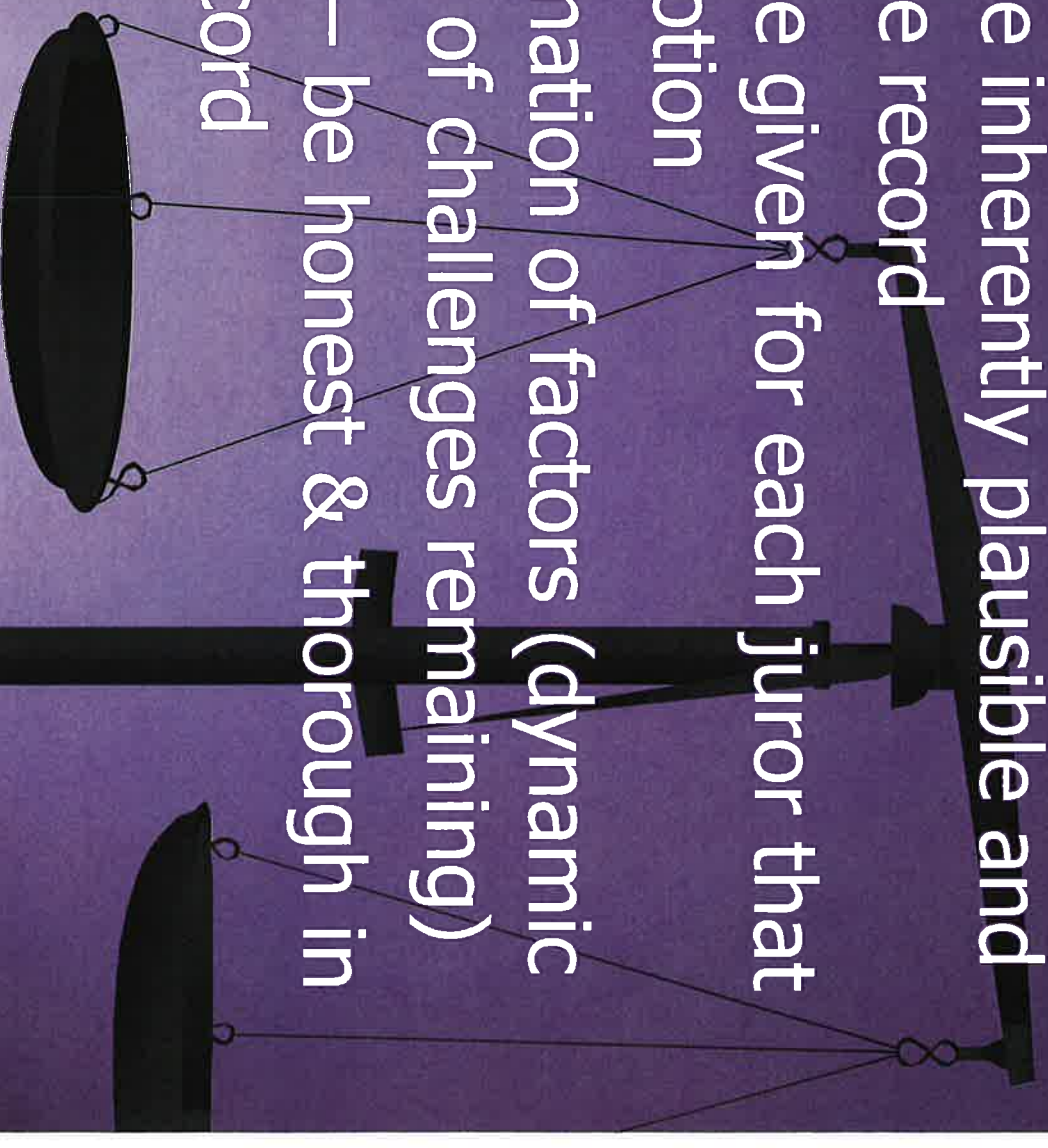
Step 2: Justification for Challenge

- Once a prima facie case is made, burden shifts to the party who challenged the juror to offer permissible, neutral justifications for the strikes
- Provide a clear and specific reason for challenging each juror the court relied upon in finding a prima facie case. Provide as complete an explanation as possible.



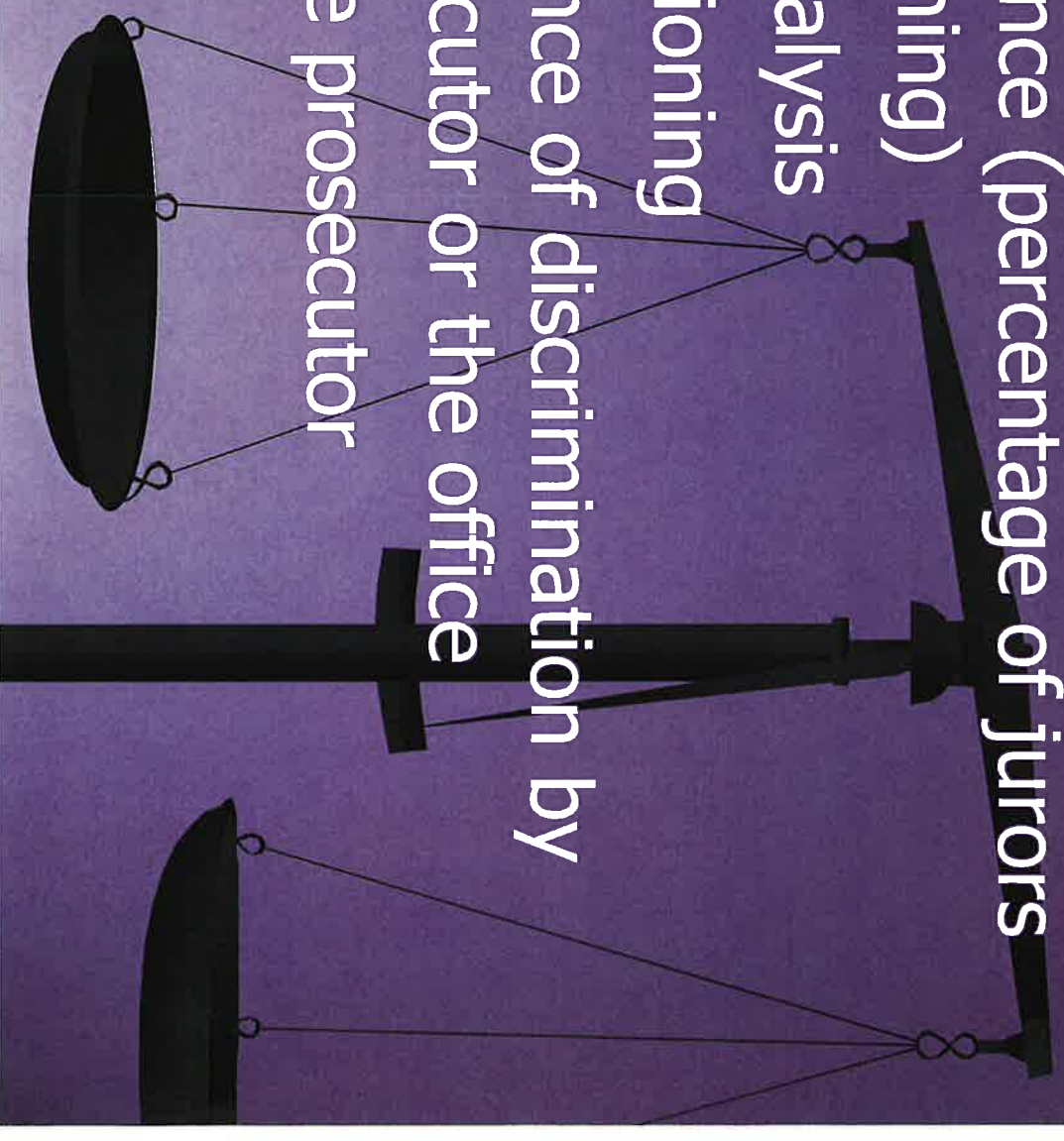
Step 2: Justification for Challenge

- Reasons must be inherently plausible and supported by the record
- Reasons must be given for each juror that is part of the motion
- Can be a combination of factors (dynamic of jury, number of challenges remaining)
- Most important – be honest & thorough in making your record



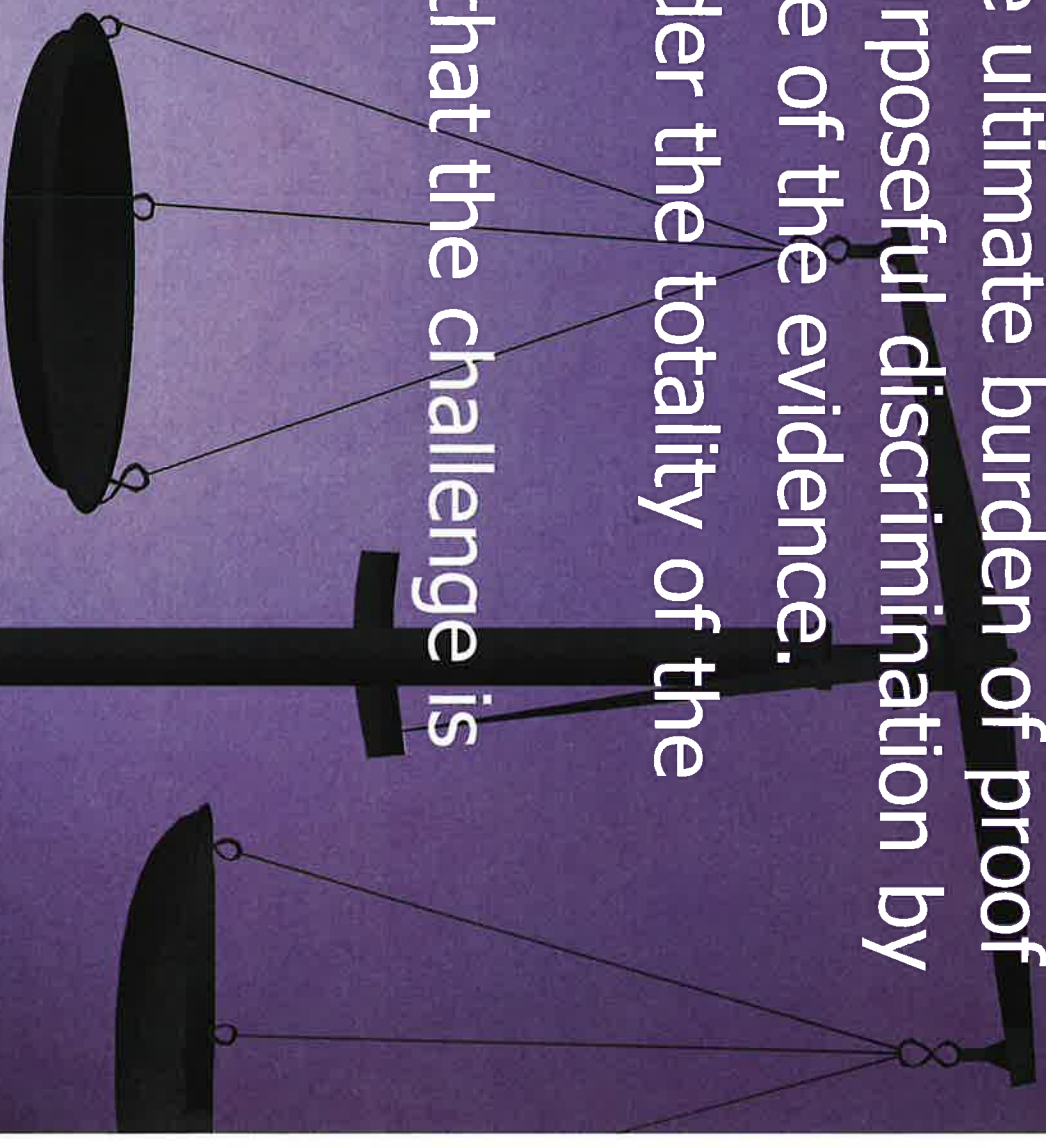
Step 3: Court's Decision

- Statistical evidence (percentage of jurors excused, remaining)
- Comparative analysis
- Disparate questioning
- Historical evidence of discrimination by individual prosecutor or the office
- Credibility of the prosecutor



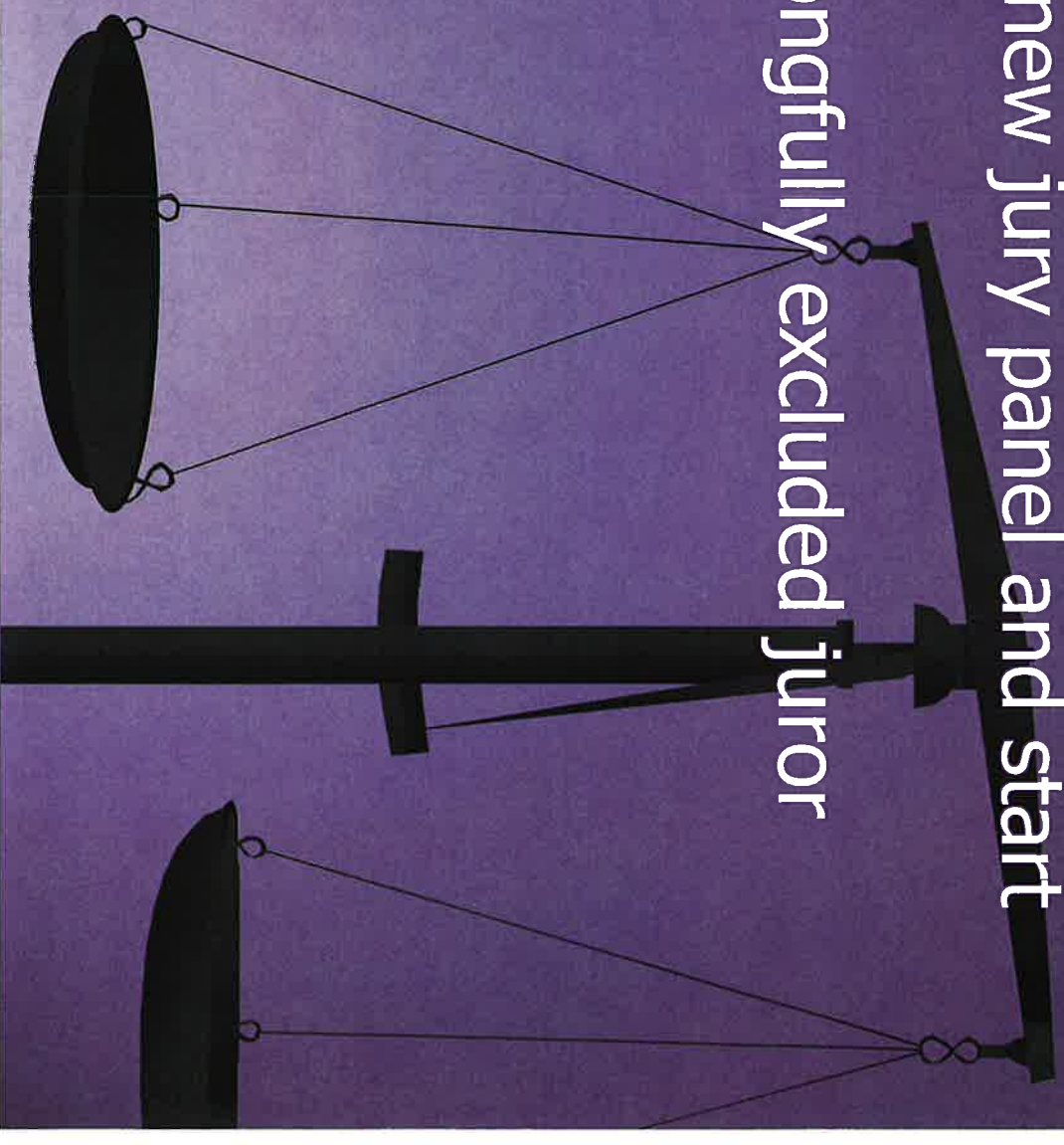
Burden of Proof

- Defense has the ultimate burden of proof
 - must show purposeful discrimination by a preponderance of the evidence.
- Court will consider the totality of the circumstances
- Presumption is that the challenge is proper

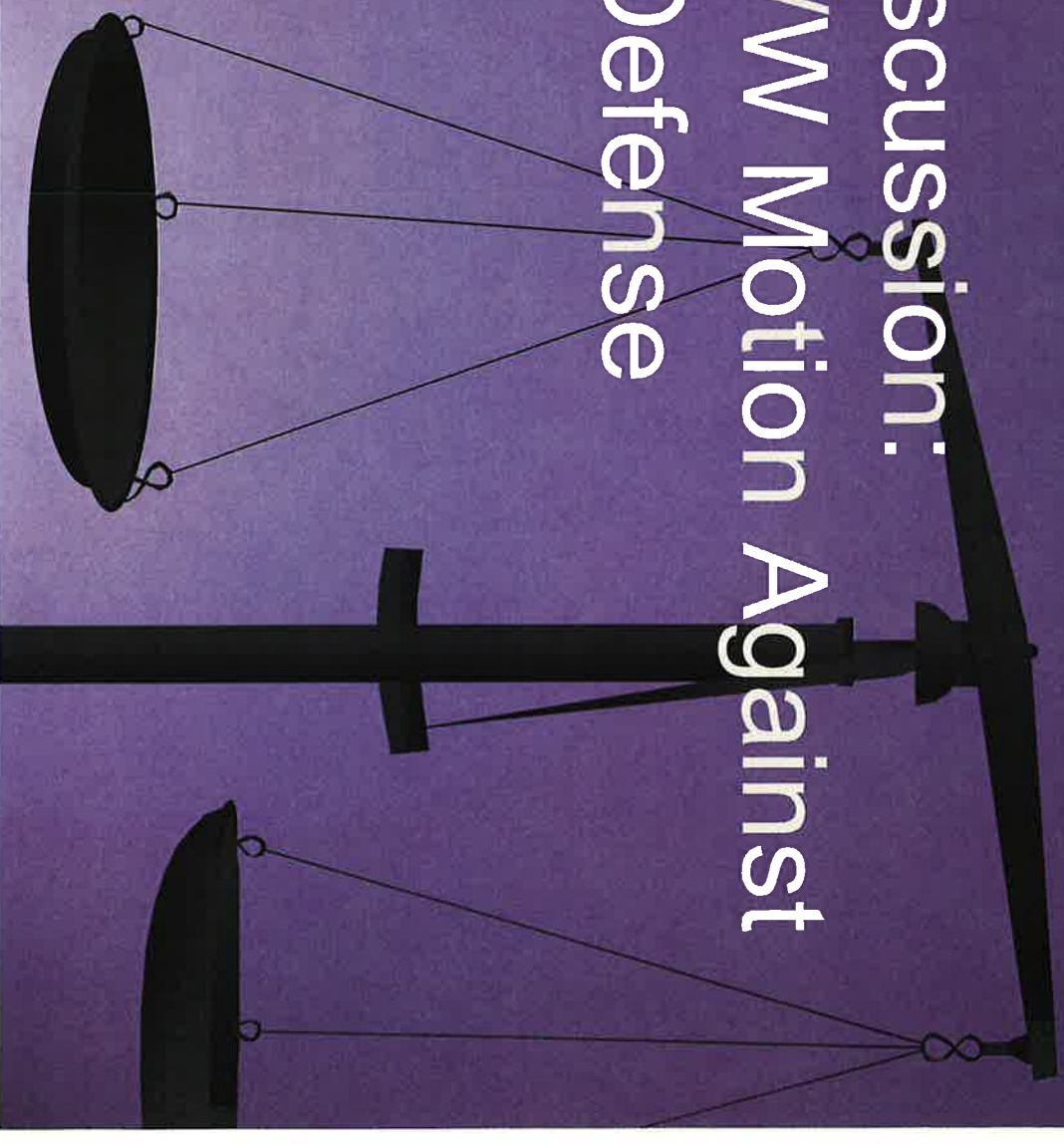


Remedy

- Mistrial – get a new jury panel and start all over again
- Re-seat the wrongfully excluded juror

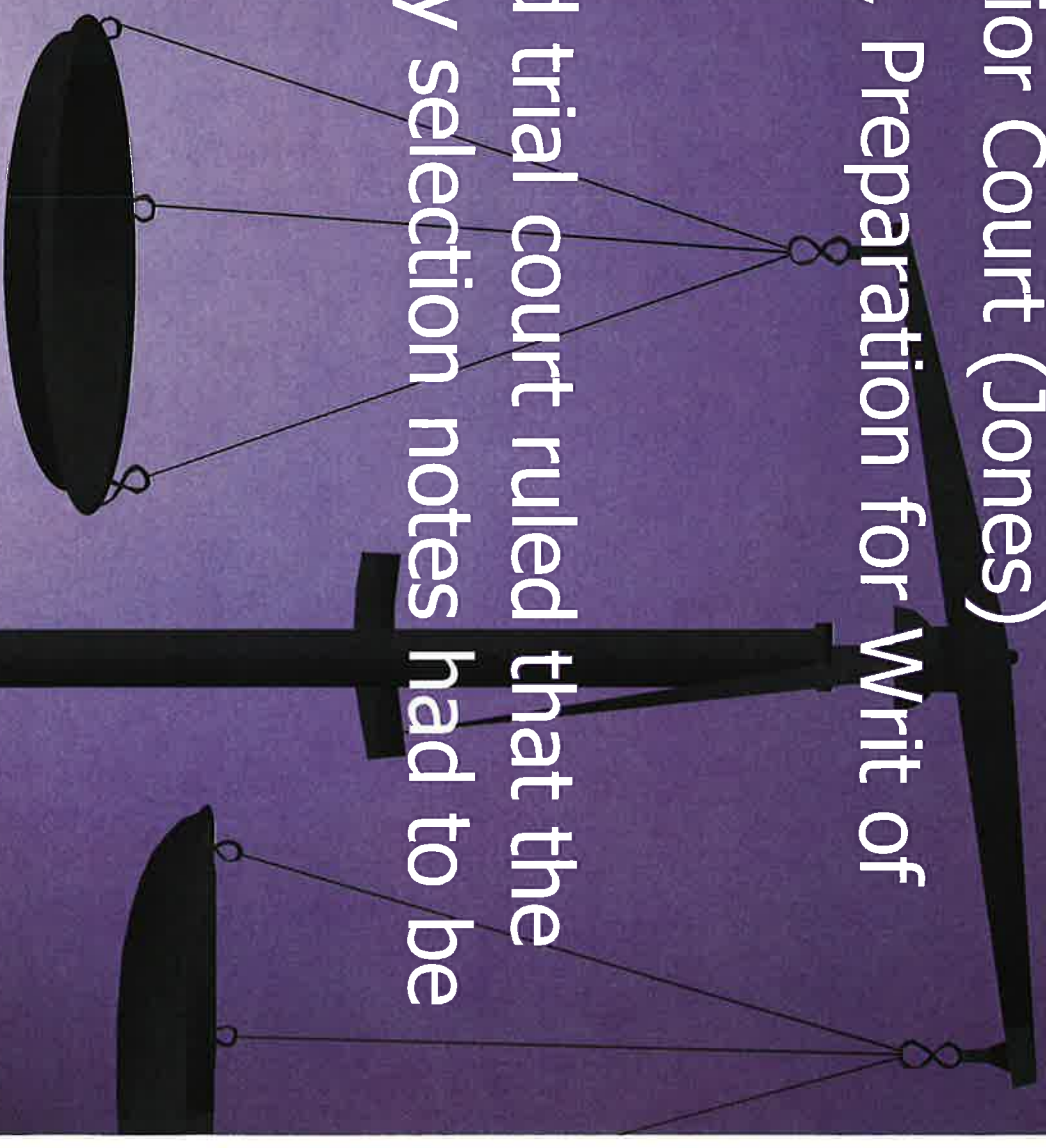


Discussion: Making a B/W Motion Against Defense



Disclosure of Prosecutor Notes

- People v. Superior Court (Jones)
- Post-Conviction, Preparation for Writ of Habeas Corpus
- Lower court and trial court ruled that the prosecutor's jury selection notes had to be turned over.



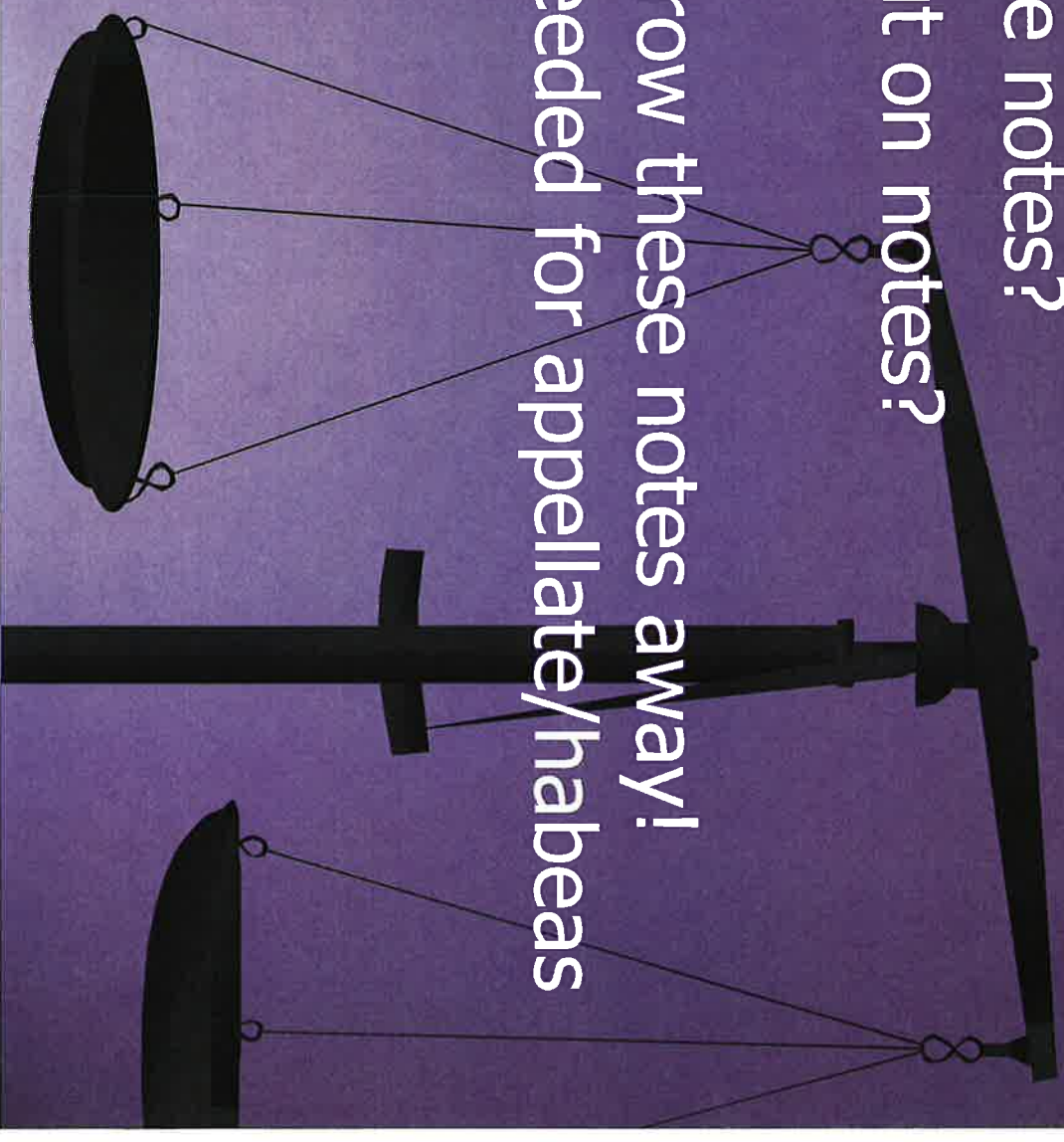
Disclosure of Prosecutor Notes

- Conflict of Work Product Privilege and Constitutional Rights of Defendant
- Impact on Trial Attorneys



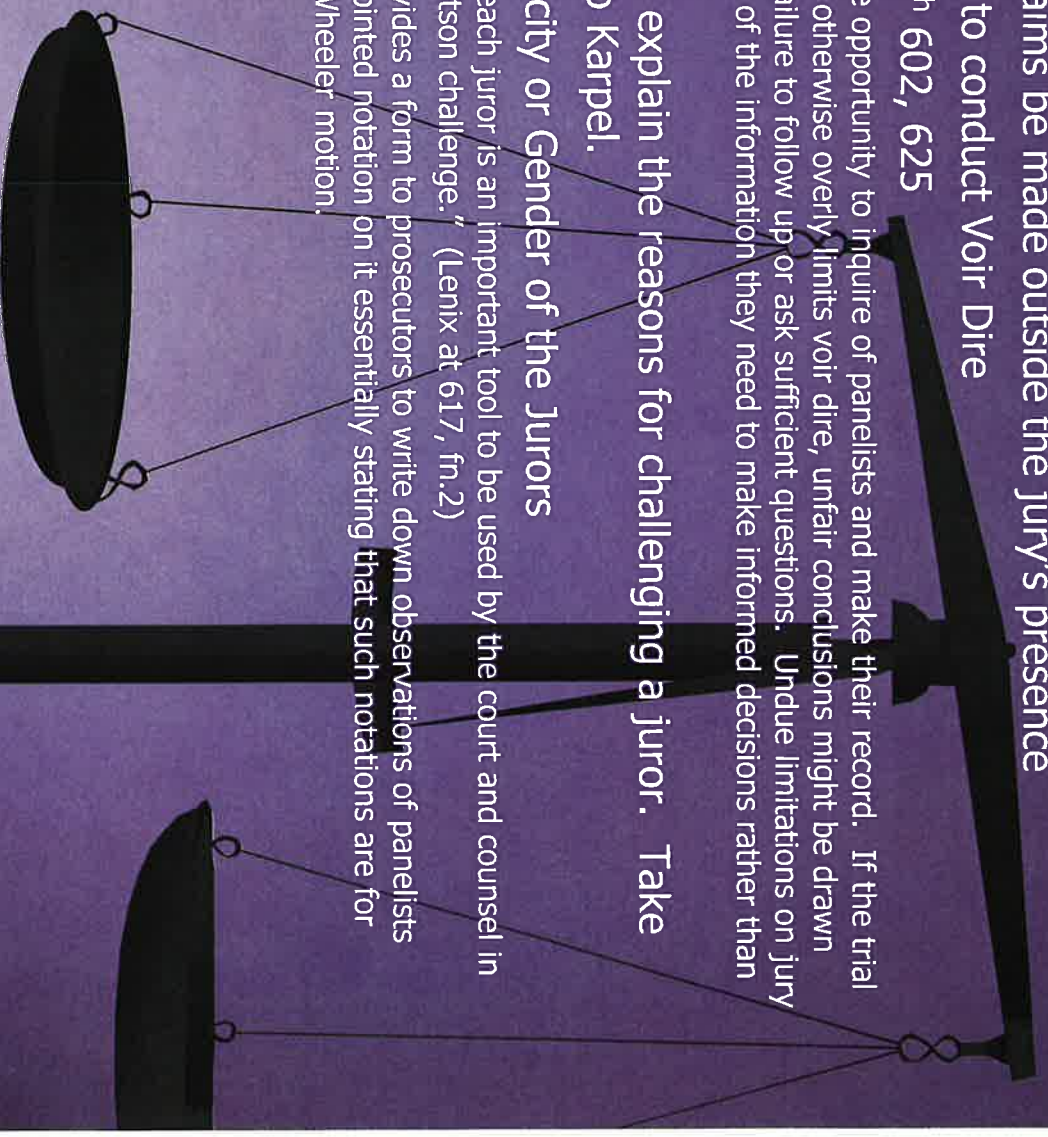
Documentation of Jury Selection

- How do you take notes?
- What do you put on notes?
- Do not **EVER** throw these notes away!
They may be needed for appellate/habeas purposes.



Anticipating the Batson-Wheeler Challenge

- Request that Batson-Wheeler claims be made outside the jury's presence
- Ask the court for sufficient time to conduct Voir Dire
- **People v. Lenix (2008) 44 Cal.4th 602, 625**
 - "Trial courts must give advocates the opportunity to inquire of panelists and make their record. If the trial court truncates the time available or otherwise overly limits voir dire, unfair conclusions might be drawn based on the advocate's perceived failure to follow up or ask sufficient questions. Undue limitations on jury selection also can deprive advocates of the information they need to make informed decisions rather than rely on less demonstrable intuition."
- Think about and be prepared to explain the reasons for challenging a juror. Take notes and save them – scan into Karpel.
- Taking notes on the Race, Ethnicity or Gender of the Jurors
 - "Post-Batson, recording the race or each juror is an important tool to be used by the court and counsel in mounting, refuting or analyzing a Batson challenge." (Lenix at 617, fn.2)
 - The LA District Attorney's Office provides a form to prosecutors to write down observations of panelists during jury selection that has a pre-pinted notation on it essentially stating that such notations are for purpose of responding to a Batson-Wheeler motion.



P. v. _____

Case# _____

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FOLLOW GUT INSTINCTS

ANY NOTES OF RACE, GENDER, ETC. ARE FOR PURPOSES OF ADDRESSING
ISSUES OF COMPARATIVE ANALYSIS AND DISPARATE QUESTIONS IN
WHEELER/BATSON LITIGATION