

Caveats of the Death-Qualified Jury: Ways Capital Defense Attorneys Can Use Psycholegal Research to Their Advantage

By Brooke Butler, Ph.D.

University of South Florida--Sarasota



What is Death Qualification?

Death qualification is a process unique to capital trials in which venirepersons (i.e., prospective jurors) are questioned about their beliefs regarding the death penalty. In order to be eligible for capital jury service, a venireperson must be able and willing to consider both legal penalties (i.e., death or life in prison without the possibility of parole) as appropriate forms of punishment. A person who meets the aforementioned *Witt* (1985) standard is deemed "death-qualified" and is eligible for capital jury service; a person who does not meet the aforementioned *Witt* (1985) standard is deemed "excludable" and is barred from hearing a death-penalty case.

Technically, the judge has the ultimate opinion on capital sentencing and the jury's decision is considered advisory in nature (*Ring v. Arizona*, 2002). However, the jury's recommendation is rarely overturned.

The death qualification process is extremely unusual. Jurors in non-capital cases are prohibited from hearing about post-conviction penalties, as exposure to this information has been deemed to be prejudicial. However, in capital voir dire, the focus of jury selection is drawn away from the presumption of innocence and onto post-conviction events. It is particularly ironic that in cases where the defendant is facing the ultimate punishment are the standards for jury selection most in violation of capital defendants' right to due process.

Death-Qualification Theory

Death-qualified jurors are very different from their excludable counterparts. My research has suggested that death-qualification status is actually a constellation of dispositional factors which may, in fact, be more typical of certain demographic subgroups than others (Butler & Moran, 2008c). The aforementioned dispositional factors tend to drive certain attitudinal indices which tend to drive certain behaviors (Butler & Moran, 2008c).

Demographic Differences

Death-qualified jurors are demographically different from jurors excluded from capital jury service. For example, death-qualified jurors are more likely to be male, Caucasian, moderately well-educated, politically conservative, Catholic or Protestant, and middle-class (Butler & Moran, 2002).

Dispositional Differences

Death-qualified jurors are also dispositionally different from their excludable counterparts. For example, death-qualified jurors are more likely to have a high belief in a just world (Butler & Moran, 2007a). Lerner's (1980) just world theory suggests that some people want to believe that the world is a fair place and that people generally get what they deserve. When an unjust event occurs, there are two ways in which people with a high belief in a just world can restore this aforementioned belief: (1) attribute blame to the victim or (2) alleviate the victim's suffering. This may suggest that capital defendants are at a "double-disadvantage." Clearly, they are on trial for having perpetrated victimization. If their defense attorney portrays the defendant as having been victimized during the sentencing phase of the capital trial, jurors with a high belief in a just world might react in a punitive fashion. In fact, research has suggested that jurors with a high belief in a just world are extremely skeptical of mitigating factors (i.e., arguments for a life sentence), many of which involve aspects of victimization (Butler & Moran, 2007a).

Death-qualified jurors are also more likely to espouse legal authoritarian beliefs. Legal authoritarians are more likely to feel that the rights of the government outweigh the rights of the individual with respect to legal issues and are more likely to be conviction- and death-prone than their civil-libertarian counterparts (Butler, 2007a; 2007c; Butler & Moran, 2007a; Narby, Cutler, & Moran, 1993). Legal authoritarians are also more receptive to aggravating circumstances and less receptive to mitigating circumstances (Butler & Moran, 2002; 2007a).

Death-qualified jurors are more likely to exhibit an internal locus of control (Butler & Moran, 2007a). An internal locus of control is characterized by participants' belief that the events in their lives are due to things that they control (Nowicki & Duke, 1983). People with an internal local of control can be particularly skeptical of others claiming to be affected by things outside of their control, such as victimization or addiction (two of the most frequently-used mitigating circumstances in capital cases).

Finally, death-qualified jurors have a low need for cognition (Butler & Moran, 2007b). The need for cognition is defined as "the tendency to engage in and enjoy effortful cognitive activity" (Cacioppo, Petty, & Kao, 1984). Although participants with a low need for cognition are no less capable of engaging in such contemplation, they tend not to do so unless they are extrinsically motivated. Low need for cognition affects the way jurors process complex scientific evidence and evaluate methodologies (Butler & Moran, 2007b). In fact, death-qualified jurors, when compared to their excludable counterparts, are not as able to draw appropriate conclusions from flawed science (Butler & Moran, 2007b).

Attitudinal Differences

Death qualified jurors are attitudinally distinguishable from their jurors ineligible for capital jury service. Death-qualified jurors are more likely to be racist, sexist, and homophobic (Butler, 2007c). They are more likely to weigh aggravating circumstances (i.e., arguments for death) more heavily than mitigating circumstances (Butler & Moran, 2002; 2007a). Death-qualified jurors are more likely to evaluate ambiguous expert scientific testimony more favorably (Butler & Moran, 2007b). They are also more likely to be skeptical of defenses involving mental illness (including the insanity defense) (Butler & Wasserman, 2006).

Death-qualified jurors are also more susceptible to the pretrial publicity that surrounds capital cases (Butler, 2007a). They are more affected by the victim impact statements that occur during the sentencing phase of capital trials (Butler, 2008b). Death-qualified jurors are more supportive of capital punishment as it relates to the elderly and the physically disabled (Butler, 2008a). They are more likely to evaluate mitigating circumstances more negatively when a



combination of strong and weak mitigation is presented than when only strong mitigation is presented (Butler & Moran, 2008a).

Behavioral Differences

Most importantly, death qualified jurors are behaviorally different from their excludable counterparts: Death-qualified jurors are more likely to find capital defendants guilty and sentence them to death. This pro-conviction, pro-death bias has been found in death-qualified jurors' evaluations of both adult and juvenile defendants (Butler, 2007b).

Process Effects

The mere process of death qualification profoundly affects jurors in capital trials. For example, Haney (1984a; 1984b) found that jurors exposed to death qualification were significantly more likely to find the defendant guilty, think that other jurors believed the defendant to be guilty, sentence the defendant to death, and assume that the law disapproves of opposition to the death penalty. Since capital voir dire is the only voir dire that requires the penalty to be discussed before it is relevant, the focus of jurors' attention is drawn away from the presumption of innocence and onto post-conviction events. The time and energy spent by the court presents an implication of guilt and suggests to jurors that the penalty is relevant, if not inevitable.

Death qualification also forces jurors to imagine themselves in the penalty phase. Research has shown that simply imagining that an event will happen makes it more likely that the event will actually occur (Tversky & Kahneman, 1974).

During death qualification, jurors are repeatedly questioned about their views on the death penalty. Consequently, jurors can become desensitized to the imposition of the death penalty due to repeated exposure to this extremely emotional issue and jurors are forced to publicly commit to a particular viewpoint, both of which increase the likelihood that jurors will vote for a death sentence.

In addition, jurors who do not endorse the death penalty also encounter implied legal disapproval by being judged "unfit for service" and the connotation of the terms "excludable" and "scrupled" are quite negative. All of the research concerning the process effects of death qualification was conducted under the now-defunct *Witherspoon* (1968) standard. One day, I hope to replicate this earlier study under the current *Witt* (1985) standard (Butler & Moran, 2008a).

Death Qualification is Here to Stay

In *Lockhart v. McCree* (1986), the Supreme Court reviewed the research surrounding death qualification and concluded the process to be both constitutional and necessary. Twenty years later, the data have only grown more conclusive. Yet, in *Uttecht v. Brown* (2007), the Court not only ignored the growing body of social scientific data suggesting that the death qualification process was a violation of capital defendants' right to due process, but granted the prosecution even more leeway in excusing jurors who do not make their views about the death penalty "unmistakably clear." In doing so, I suspect that *Uttecht* will magnify preexisting differences between death-qualified and excludable jurors. Consequently, although the Court might have thought that it slammed the door on the issue of death qualification; *Uttecht* might have the opposite effect.

My Research Practices

Through my 10 years as a litigation consultant, I understand that attorneys are skeptical of psycholegal research. This is why I collect all of my data at courthouses in Florida. I think that surveying venirepersons is important for several reasons: 1) Venirepersons are a random sample of the jurisdiction from which they are selected and 2) Venirepersons are a representative sample of the jurisdiction from which they were selected. In addition, I think that surveying participants in field settings (i.e., "real people in the real world") enhances both the ecological and external validity of my research.

All of my studies involve parsimonious designs. I like to keep things simple for two reasons: 1) I think straightforward designs yield more powerful, practically significant findings; and 2) I want my research to be accessible to both legal scholars and legal practitioners.

What to Avoid in Death Qualification

We know is this: Demographic variables predict very little about attitudes and even less about behavior. We simply can't generalize about a particular gender, ethnicity, sexual orientation, religion, occupation, or political affiliation. I understand why attorneys rely on stereotypes, given the way categorizing people is part of human nature, the nonexistent training attorneys receive in law school regarding how to pick good juries, and the fact that most judges view jury selection as a formality and would love to have it completed in an hour or less.

In an Ideal World...

I also understand that mock trials, focus groups, community attitude surveys, shadow juries, paid litigation consultants are very informative, but expensive and time-consuming. I also know that capital defense attorneys (many of whom are paid by the state) don't have the money or time to pull something like that together.

Use Psycholegal Research to Your Advantage

The best way to pick a capital jury is to ask attitude-specific questions...and as many as the judge will allow. The good news is that many legal psychologists have constructed well-designed measures (i.e., surveys) which have questions that tap into dispositions (e.g., belief in a just world; legal authoritarianism; locus of control; need for cognition; see Appendix) and attitudes toward specific things (like the death penalty, the insanity defense, implicit racism, sexism, and homophobia; see Appendix).

My research has demonstrated that responses on these measures predict verdicts in capital cases. These measures can be easily located by both academic and Internet searches as well as in the "References" section at the conclusion of this article (Wrightsmen, Batson, & Edkins, 2004).

The Benefits of Pretrial Surveys

As I mentioned, judges like to limit the amount of time spent on jury selection. To complicate matters, many jurors are reluctant to admit their prejudices in public (and sometimes this can be because they aren't aware of them, as research indicates that the most prejudiced people tend to be the least aware of their prejudices). This is where a pretrial survey comes into play. This way, jurors can answer questions privately, and, quite possibly, more honestly (although, of course, both sides will be privy to the information). In addition, it saves time during voir dire, so certain responses can be explained and explored, etc. We know that judges like saving time, and this can be a major selling point when arguing for the inclusion of a pretrial survey.

Academicians Can be Your Friends

Finally, never underestimate the value of your local university or community college. My students and I have done a substantial amount of pro bono work for the Public Defender's Office of the Twelfth Judicial Circuit. Many academicians are willing to assist capital attorneys at reduced rates and many capable students are usually eager for internship opportunities at community agencies. It doesn't hurt to ask!

References

- Butler, B. (2007a). The role of death qualification in capital trials involving juvenile defendants. *Journal of Applied Social Psychology, 37*(3), 549-560.
- Butler, B. (2007b). The role of death qualification in jurors' susceptibility to pretrial publicity. *Journal of Applied Social Psychology, 37*(1), 115-123.
- Butler, B. (2007c). Death qualification and prejudice: The effect of implicit racism, sexism, and homophobia on capital defendants' right to due process. *Behavioral Sciences and the Law, 25*(6), 857-867.
- Butler, B. (2008a). *Moving beyond Ford, Atkins, and Roper: A community attitude survey regarding the execution of the elderly and the physically disabled*. Manuscript submitted for publication.
- Butler, B. (2008b). The role of death qualification in venirepersons' susceptibility to victim impact statements. *Psychology, Crime, and Law, 14*(2), 133-141.
- Butler, B. & Moran, G. (2002). The role of death qualification in venirepersons' perceptions of aggravating and mitigating circumstances in capital trials. *Law and Human Behavior 26*, 175-184.
- Butler, B. & Moran, G. (2007a). The impact of death qualification, belief in a just world, legal authoritarianism, and locus of control on venirepersons' evaluations of aggravating and mitigating circumstances in capital trials. *Behavioral Sciences and the Law, 25*(1), 57-68.
- Butler, B. & Moran, G. (2007b). The role of death qualification and need for cognition in venirepersons' evaluations of expert scientific testimony in capital trials. *Behavioral Sciences and the Law, 25*(4), 561-571.
- Butler, B. & Moran, G. (2008a). *Further analysis of the process effects of death qualification under Witt*. Manuscript in progress.
- Butler, B. & Moran, G. (2008b). Is "more" mitigation "better?" A comparison of the additive and averaging models in capital cases. Manuscript submitted for publication.
- Butler, B. & Moran, G. (2008c). *The impact of death-qualification status on susceptibility to eyewitness testimony in capital trials: Can eyewitness expert testimony moderate this effect?* Manuscript in progress.
- Butler, B. & Wasserman, A. W. (2006). The role of death qualification in venirepersons' attitudes toward the insanity defense. *Journal of Applied Social Psychology, 36*(7), 1744-1757.
- Cacioppo, J. T., Petty, R. E., & Kao, C. P. (1984). *The efficient assessment of need for cognition*. *Journal of Personality Assessment, 119*, 306-307.
- Haney, C. (1984a). On the selection of capital juries: The biasing effects of the death qualification process. *Law and Human Behavior, 8*, 121-132.
- Haney, C. (1984b). Examining death qualification: Further analysis of the process effect. *Law and Human Behavior, 8*, 133-151.
- Hingula, R. (2001). Jurors' understanding of instructions in death penalty cases. Unpublished honors thesis. Department of Psychology, University of Kansas, Lawrence, KS.
- Lerner, M. J. (1980). *The belief in a just world: A fundamental delusion*. New York, NY: Plenum.
- Lockhart v. McCree, 476 U.S. 162 (1986)*.
- Narby, D. J., Cutler, B. L., & Moran, G. (1993). A meta-analysis of the association between authoritarianism and jurors' perceptions of defendant culpability. *Journal of Applied Psychology, 78*, 34-42.

- Nowicki, S., & Duke, M. P. (1983). The Nowicki–Strickland life span locus of control scales: Construct validation. In H. M. Lefcourt (Ed.), *Research with the locus of control construct* (p. 33). New York: Academic.
- Swim, J. K., Aikin, K. J., Hall, W. S., & Hunter, B. A. (1995). Sexism and racism: Old-fashioned and modern prejudices. *Journal of Personality and Social Psychology*, *65*, 199–214.
- Ring v. Arizona*, 536 U.S. 584 (2002).
- Tversky, A., & Kahneman, D. (1974). Judgment under uncertainty: Heuristics and biases. *Science*, *185*, 1124–1131.
- Uttecht v. Brown*, 451 F. 3d 946 (2007).
- Wainwright v. Witt*, 469 U. S. 412 (1985).
- Witherspoon v. Illinois*, 391 U.S. 510 (1968).
- Wright, L. W., Adams, H. E., & Bernat, J. (1999). Development and validation of the homophobia scale. *Journal of Psychopathology and Behavioral Assessment*, *21*, 337–347.
- Wrightsman, L. S., Batson, A. L., & Edkins, V. A. (2004). *Measures of legal attitudes*. Belmont, CA: Wadsworth/Thomson.

Appendix

Sample Questions from Dispositional Measures

Belief in a Just World

1. I've found that a person rarely deserves the reputation they have.
2. Basically, the world is a just place.
3. People who get "lucky breaks" have usually earned their good fortune.
4. Careful drivers are just as likely to get hurt in traffic accidents as careless ones.

Legal Authoritarianism

1. Unfair treatment of underprivileged groups and classes is the chief cause of crime.
2. Too many obviously guilty persons escape punishment because of legal technicalities.
3. Evidence illegally obtained should be admissible in court if such evidence is the only way of obtaining a conviction.
4. Search warrants should clearly specify the person or things to be seized.

Locus of Control

1. Do you believe that most problems will solve themselves if you don't fool with them?
2. Do you believe that you can stop yourself from catching a cold?
3. Are some people just born lucky?
4. Most of the time, do you feel that getting good grades meant a great deal to you.

Need for Cognition

1. I would prefer complex to simple problems.
2. I like to have the responsibility of handling a situation that requires a lot of thinking.
3. Thinking is not my idea of fun.
4. I would rather do something that requires little thought than something that is sure to challenge my thinking abilities.

Sample Questions from Attitudinal Measures

Attitudes Toward the Death Penalty

1. A judge should have the right to sentence the defendant to death, even if the jury has recommended life in prison.
2. People on death row are permitted to appeal their sentence too often.
3. If there is any doubt about a defendant's guilt, he or she should not be executed.
4. If a defendant on death row wants a DNA test of evidence, the state should automatically grant it.

Attitudes Toward the Insanity Defense

1. If a person is unable to appreciate the wrongfulness of their conduct, then they should be found not guilty by reason of insanity (NGRI).
2. The insanity defense is used on a frequent basis.
3. The insanity defense is a "legal loophole."
4. If a person is unable to control their conduct, then they should be found not guilty by reason of insanity (NGRI).

Homophobia

1. Gay people make me nervous.
2. Gay people deserve what they get.
3. Homosexuality is acceptable to me.
4. If I discovered a friend was gay I would end the friendship.

Implicit Racism

1. Discrimination against blacks is no longer a problem in the United States.
2. It is easy to understand the anger of black people in America.
3. Blacks have more influence upon school desegregation plans than they ought to have.
4. Blacks are getting too demanding in their push for equal rights.

Implicit Sexism

1. Discrimination against women is no longer a problem in the United States.
2. Women often miss out on good jobs due to sexual discrimination.
3. It is rare to see women treated in a sexist manner on television.
4. On average, people in our society treat husbands and wives equally.

Brooke Butler, PhD (bbutler@sar.usf.edu) is on the Psychology faculty at the University of South Florida-Sarasota. Information on her research program can be viewed at <http://www.sarasota.usf.edu/CAS/butler/>.

Correspondence should be addressed at the University of South Florida-Sarasota; Department of Psychology; 8350 N. Tamiami Trail; Sarasota, FL 34243; e-mail: bbutler@sar.usf.edu.

Reactions from trial consultants:

We asked three experienced trial consultants who are ASTC members to respond to Dr. Butler's article based on their own experiences in capital cases. In the following pages, Sonia Chopra, Carey Crantford, and Julie Howe offer their reactions to Dr. Butler's ideas.

**Response to Butler by
Sonia Chopra, Ph.D.
National Jury Project**

First and foremost I want to thank Dr. Butler for revitalizing research in the area of death qualification. Following the Supreme Court's decision in *Lockhart v. McCree*¹ in which the Court chose to essentially ignore solid social scientific evidence demonstrating the conviction-prone and demographically unrepresentative juries that death qualification produces, many academics gave up hope and abandoned research in this area. As someone who was recently asked to write a declaration on the prejudicial effects of death qualification in terms of a non-capital co-defendant's right to a fair trial, it was extremely helpful to be able to point to research conducted and published within the last few years.

From a practical standpoint, research demonstrating the prejudicial effects of death qualification is probably most helpful to attorneys seeking to have the death qualification process modified or limited. Defense counsel can (and should) argue first and foremost against death qualification. Research and practical experience shows

that the defense is hurt worse by death qualification than the prosecution. This is because greater numbers of jurors who have reservations about capital punishment will be lost due to prosecution cause challenges as compared to those who are successfully challenged by the defense for being strong or "automatic death penalty" (ADP) jurors. Individuals who are against the death penalty tend to be less susceptible to attempts at "rehabilitation" by the trial judge or counsel (likely because they are also lower in measures of legal authoritarianism than death penalty supporters as demonstrated by Dr. Butler). While it is unlikely that death qualification will be completely abandoned, defense counsel should, in the alternative, ask for individual questioning of prospective jurors during the death qualification portion of voir dire. This takes into account Dr. Haney's research on the biasing "process effects" of death qualification that Dr. Butler refers to.

Dr. Butler's findings regarding death qualified jurors and locus of control, need for cognition, and belief in a just world are theoretically very interesting and help explain

why certain people are less inclined to weigh and consider evidence in mitigation, and how people will evaluate scientific evidence. In my experience, however, I have found these constructs to be less practical for jury selection. Typically, the prosecution and/or judge will want to argue about many of the questions the defense wants to put on a jury questionnaire. There will be the competing interests of efficiency and information gathering. A judge may ask, "What do those questions about people getting lucky breaks or being about to stop yourself from catching a cold have to do with anything?" Answering that the question is part of the belief in a just world/locus of control scale will not likely get you very far. For the most part, it will be difficult to get any complete scale onto a jury questionnaire². Using one or two questions may be possible, but then there are concerns about scale validity and decisions to be made about which questions to use and which to omit.

The sad reality is that *all* of the jurors on a capital jury are ultimately going to be "death qualified." The primary goal for most capital defense attorneys is

to determine which of these death qualified jurors, because of the strength of their views, personality and beliefs, will *always* vote for the death penalty if they are convinced of guilt, and get them off the jury. A potential juror with an internal locus of control and/or belief in a just world probably *is* more likely to be skeptical of mitigation evidence. But rather than identify these jurors through their completion of a locus of control or belief in a just world scale, I find it more effective to simply ask jurors what they think about the idea of listening to or considering information about a defendant's background, childhood, mental health issues, alcohol/drug use, etc. It is not socially unacceptable to say you don't think these things should matter, and a large percentage of prosecution, ADP jurors will be happy to do so.

Items from two of the scales Dr. Butler has used in her research do have potential to be helpful for jury selection: The Revised Legal Attitudes Questionnaire (RLAQ) (used to measure legal authoritarianism) and the Attitudes Toward the Death Penalty Scale. Even though inclusion of the complete scales would be unwieldy and thus unlikely³, these

scales deal with legal concepts and beliefs about the justice system, therefore individual questions from these measures are less likely to raise objections from the other side and are easier to justify including. I have found that often times it is easier to get a juror excused for cause based on their beliefs regarding criminal justice concepts like the defendant's right not to testify or the presumption of innocence as opposed to a juror's strong pro-death penalty views. The RLAQ can provide some assistance in formulating questions to get at jurors' attitudes on these issues.

I was also intrigued by Dr. Butler's findings regarding death qualified jurors being more aware of case specific facts from pre-trial publicity. The research demonstrating the biasing effects of pre-trial publicity is about parallel to the research on death qualification in terms of breadth of scope and convergent validity. When arguing for change of venue in a capital case, it would be helpful to cite Dr. Butler's research as evidence that pretrial publicity is likely to be an even greater concern in seating a jury, due to the inevitable death qualification process that will take place.

Once again, I applaud Dr. Butler for contributing to the literature on death qualification, and even more so for her willingness to assist counsel pro bono and her suggestion that capital defenders reach out to academic institutions for trial assistance. Many defenders think consultants are out of reach financially, but the reality is that it is becoming more and more common for at least some state funds to be awarded for trial consultants in capital cases.

¹ 476 U.S. 162 (1986).

² For example, the Locus of Control scale consists of 40 items, the Belief in a Just World scale has 20 items, and the Need for Cognition scale has 18 items.

³ The RLAQ is 23 items long, as is the Attitudes Toward the Death Penalty scale.

Sonia Chopra, PhD (schopra@njp.com) is a trial consultant with the National Jury Project where she designs, implements and analyzes focus groups and trial simulations for both civil and criminal cases, and assists attorneys with case analysis and jury selection. She is highly skilled in examining and appraising potential juror bias through community attitude surveys, media content analysis, and voir dire. Dr. Chopra is experienced working with both trial attorneys and witnesses on their communication and persuasion skills. She has also interviewed hundreds of jurors following verdicts.

Response to Butler
by Carey Crantford
Crantford & Associates

Dr. Brooke Butler does an excellent job of cataloging the major psychological/ demographic factors that influence jury behavior when confronting death penalty choices. The factors she cites provide a clear, useful checklist of influences that profoundly shape a juror's performance when considering a death penalty verdict. Although there might be an argument about some of the demographic components she combines to make up the class of jurors more predisposed to vote for a death penalty verdict, as a whole her list of variables offers practitioners a useful screening tool for classifying jurors during death penalty voir dire.

The dynamics of a death penalty trial are so unique that the ability to adequately define a juror's predisposition to vote for the death penalty does not provide enough information on which to build a successful jury selection strategy. In many areas of the country support for capital punishment is so widespread that the majority of potential jury members are predisposed to vote for the death penalty. The application of an analysis of

the factors Dr. Butler outlines plays a first step role in grading these jury pools. This initial analysis illuminates the worse case choices which are either targeted for disqualification or put on the strike list. Ultimately, both the bias in the selection process and the presence of a large number of death penalty supporters in the pool means that those who favor the death penalty will be seated. The issue at this point is not how to identify them but what to do with them once they make their way into the jury box.

Every juror seated on a death penalty case has affirmed in open court that they believe in capital punishment and can be fair in its application. Prosecutors certainly work hard to reinforce the fairness concept during voir dire. We all want to be regarded as fair and, in a matter as grave as a death penalty case, only jurors who hold very extreme views on the issue seem willing to admit their inability to bring an open mind to the proceedings. Consequently, the jurors who are ultimately seated represent an uncertain group in terms of what factors will determine when a death sentence is warranted. At this point the concern about seating a juror is not so

much about his or her predisposition to applying the death penalty but what will trigger a "fair application" of the death penalty sentence. And gauging how a juror will approach defining what constitutes the "fair application" of the death penalty sentence presents the defense team's biggest problem in forecasting how a juror will act if seated.

Death penalty cases, by their definition, contain the most aggravating of circumstances surrounding the crime of murder. Crimes of this type are always disturbing and difficult to comprehend. But it is precisely the details of the crime which probably have more to do with structuring the "fair application" of the death penalty sentence by jurors who are qualified as eligible to serve. Although schemes like forecasting a juror's predisposition for supporting a death penalty verdict are useful, they do not take into consideration how specific details of the case are likely to influence a fair juror's view of the death penalty sentence. Having some notion of how the details of the case will influence juror types may be the most important analysis a trial team can undergo for two critical reasons. (1) During jury selection the case details are

not known by potential jurors so their notion of fairness can only be tested in the abstract. (2) Before sentencing can be considered, the jury will hear all of the vivid and emotional details of the crime as they are asked to determine if the defendant is guilty or not guilty. Consequently a juror's predisposition to support a death penalty sentence cannot be fully illuminated by even the best psychological/demographic scheme without taking into account how the details of the case either push jurors toward, or pull them away from, considering a death penalty verdict.

Carey Crantford (carey@crantford.com) is owner of Crantford & Associates a market research firm located in Columbia, SC. The firm offers a variety of research services to support both criminal and civil trial projects.

Response to Butler by

Julie Howe, Ph.D.
J. Howe Consulting

Applying research results to the courtroom and to a specific case is not always an easy task for litigators and is often considered one of the benefits of retaining skilled trial consultants. Dr. Brooke Butler's summary of research findings is an excellent place for

capital defense attorneys and trial consultants to start as they draft juror questionnaires and think about voir dire and the information they would like to elicit and learn about jurors.

As someone who sits next to capital defense attorneys in the courtroom and participates first hand in the death qualification process, the factors and concepts Butler identifies have a ring of truth to them. As I read the article, I was able to say to myself: "yes – that's true, I've seen that type of juror," or "yes, that is something I do take into account when I'm evaluating individual jurors, drafting questionnaires or helping attorneys craft their voir dire." Thus, for the most part, the findings line up with my experience observing and evaluating jurors in capital cases. For example, I tend to evaluate more negatively jurors who are politically conservative, hold authoritarian beliefs, have an internal locus of control, seem to have a low need for cognition, appear to be racist, etc. Most importantly, these concepts line up with juror responses in their questionnaires and during voir dire when asked the most direct, straightforward and truly the best indicator of jurors' predisposition in favor of the death penalty: "*How do you feel about the death penalty for a defendant convicted of intentional murder?*"

For a capital jury selection, all potential jurors will be "death qualified." Thus, the pool of candidates from which the jury will be selected is likely to hold many of the characteristics outlined by

Butler. The key is to determine which of the death qualified jurors are the most dangerous to the defendant in a particular case. In actuality, we are really de-selecting a jury.

So, how do we put this research into practice? The process is not as simple as it might seem. It's more than identifying well-researched and valid measures of dispositional or attitudinal differences, inserting them into the juror questionnaire, scoring the measure and picking a jury. However, putting the research into practice is extremely important. The factors and concepts that Butler identifies are ones to think about and try to incorporate into questionnaires and into rating scales when evaluating jurors and deciding peremptory challenges. Litigators and consultants alike might keep the following in mind:

- 1) Juror questionnaires need to be negotiated with the other side and accepted by the court. Capital defense attorneys should think about the strategy for working with prosecutors in developing a questionnaire that is informative, on target for the case and that will be approved by the court. In reality, we might not have the luxury of including the full "need for cognition" assessment. We might only be able to include a few questions from the scale or have to rely on other proxies for the concept. For example, depending on the

information I am able to glean from the questionnaire and during the voir dire, I may need to intuit “need for cognition” based on juror education level, occupation, the type of newspaper read, etc.

- 2) Case issues, specific case evidence, strength of the defense, specific aggravating and mitigating factors associated with the case on trial are central. For example, it’s important to think about the victims and what are the mitigating factors. It may be that the strongest mitigating factors have to do with the victims themselves, not the defendant. If the case does not entail traditional mitigation related to defendant background, abuse, victimization, etc., and the victims themselves are drug dealers or otherwise involved in criminal activity, etc., I might place less emphasis on dispositions like “belief in a just world” as I rate and identify the death qualified jurors whom I need to challenge. Jurors with this predisposition may believe the victims got what they deserved and I might chance keeping such a juror on the jury. Again, depending on the case specific mitigation.
- 3) It’s possible to incorporate many of these concepts into

a juror profile developed prior to jury selection. The most important part of the profile is to identify jurors who are bad for the defense in the specific case. Remember, we are deselecting a jury. Attorneys and their consultants then can develop and use meaningful rating scales to evaluate the juror immediately after questioning to help identify the worst of all the death qualified jurors.

Butler’s comments about capital defendants being at a disadvantage because of the death qualification process are not only a reality, but something capital defense attorneys need to take to heart. Death qualified jurors are conviction prone and are more likely to impose the death penalty than non death qualified jurors. The problem, of course, is that every seated juror will have been death qualified. It is extremely important to address this disadvantage with jurors directly. I encourage capital defense attorneys to stress to jurors:

- 1) We are dealing with hypotheticals only: the defendant has not been found guilty, the only reason the death penalty is being discussed is because it’s our only opportunity to talk to jurors.
- 2) The law never requires jurors to impose the death penalty.

- 3) A unanimous vote is needed to impose the death penalty. Therefore each and every juror’s decision is important. Jurors should respect each others viewpoints and no juror should be pressured for their vote. If jurors are not unanimous then the defendant will be sentenced to life. A life sentence does not have to be unanimous. (Note: Florida is the only state in which unanimity is not required for a death sentence.)

Further, jurors should be asked, in the questionnaire and in person, if the emphasis on the death penalty has led them to believe the defendant is probably guilty or deserving of the death penalty and if they have any doubts about their ability to presume this defendant innocent and consider a life sentence.

In conclusion, I agree with Butler – the best way to pick a capital jury is to ask attitude specific questions and her article provides a nice starting point for capital defense attorneys. It highlights important concepts to keep in mind when evaluating death qualified jurors and identifying peremptory challenges. It also points the attorney and consultant to specific measures shown to be valid in identifying pro death penalty jurors. The capital defense attorney, however, also needs to keep the specific issues in his or her case in mind and incorporate questions designed to understand the

circumstances under which a death qualified juror would be more likely to impose the death penalty. The focus of a capital jury selection is not just to identify jurors predisposed to vote for the death penalty, but to identify the jurors who are most likely to vote for the death penalty in the particular case at trial.

Julie Howe, Ph.D.

(jhowe@jhoweconsulting.com) is a New York-based social psychologist with expertise in social psychological theories and social science methodology. As the principal trial consultant in her firm, J. Howe Consulting, Dr. Howe works closely with plaintiff and defense attorneys to effectively communicate their clients' case and to develop successful trial strategies. Dr. Howe has assisted defense counsel in numerous federal and state capital jury selections, been an invited speaker at CLE programs related to the death penalty, conducted in-depth interviews of capital jurors in conjunction with the Capital Jury Project and co-authored an article on jurors' misunderstanding of aggravating and mitigating circumstances.

Becoming Real

This is our first on-line edition of *The Jury Expert*. The labor was prolonged. We want to thank the authors in our first issue (and in those to come) for believing in this new digital concept of TJE and making its very existence possible by writing about their work. The Board Members of the American Society of Trial Consultants also deserve thanks for allowing us to dream big and to stretch the parameters of *The Jury Expert* into a living and breathing and changing entity.

We will continue to evolve over time based on your feedback and as we learn what works well and what we could rethink. Please send us your feedback, ideas, and perspectives on how we can make TJE a "must read" publication for litigators.

Send your comments to us at: EditorTJE@astcweb.org.



The Jury Expert is published bimonthly by the:

American Society of Trial Consultants

1941 Greenspring Drive
Timonium, MD 21093
Phone: (410) 560-7949
Fax: (410) 560-2563
<http://www.astcweb.org/>

The Jury Expert logo was designed in 2008 by:
Vince Plunkett of *Persuasium Consulting*
<http://www.persuasium.com/>

Editors

Rita R. Handrich, PhD — Editor
EditorTJE@astcweb.org

Kevin R. Bouly, PhD — Associate Editor
AssocEditorTJE@astcweb.org

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is distributed with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional service. If legal advice or other expert assistance is required, the services of a competent person should be sought. The publisher makes no warranty regarding the accuracy, integrity or continued validity of the facts, allegations or legal authorities contained in any public record documents provided herein, which said documents are provided for illustrative purposes only.

