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

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### *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 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 victim impact statements that occur during the sentencing phase of capital trials (Butler, in press). Death-qualified jurors are more supportive of capital punishment as it relates to the elderly and the physically disabled (Butler, 2008b). 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, 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 (Citation?).

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.

*Academics 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!

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## 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.