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The Role of Death Qualification in Venirepersons' Evaluations of Aggravating and Mitigating Circumstances in Capital Trials

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Previous research has found that death qualification impacts jurors' receptiveness to aggravating and mitigating circumstances (e.g., J. Luginbuhl & K. Middendorf, 1988). However, the purpose of this study was to investigate whether death qualification affects jurors' endorsements of aggravating and mitigating circumstances when Witt, *rather than* Witherspoon, *is the legal standard for death qualification. Four hundred and fifty venirepersons from the 11th Judicial Circuit in Miami, Florida completed a booklet of stimulus materials that contained the following: two death qualification questions; a case scenario that included a summary of the guilt and penalty phases of a capital case; a 26-item measure that required participants to endorse aggravators, nonstatutory mitigators, and statutory mitigators on a 6-point Likert scale; and standard demographic questions. Results indicated that death-qualified venirepersons, when compared to excludables, were more likely to endorse aggravating circumstances. Excludable participants, when compared to death-qualified venirepersons, were more likely to endorse nonstatutory mitigators. There was no significant difference between death-qualified and excludable venirepersons with respect to their endorsement of 6 out of 7 statutory mitigators. It would appear that the* Gregg v. Georgia *(1976) decision to declare the death penalty unconstitutional is frustrated by the* Lockhart v. McCree *(1986) affirmation of death qualification.*

INTRODUCTION

In the United States, the jury has a central role in capital (or death penalty) trials. In all but a few states that retain capital punishment, the jury has the primary responsibility of pronouncing either a death or life sentence. A primary difference between capital jurors and jurors in other cases is that death penalty jurors must undergo an extremely controversial process called death qualification.

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Death qualification is a part of voir dire that is unique to capital trials. During death qualification, prospective jurors are questioned regarding their beliefs about capital punishment. This process serves to eliminate jurors whose attitudes toward the death penalty would render them unable to be fair and impartial in deciding the fate of a defendant. In order to sit on a capital jury, a person must be willing to consider all legal penalties as appropriate forms of punishment. Jurors who "pass" the aforementioned standard are deemed "death qualified" and are eligible for capital jury service; jurors who "fail" the aforementioned standard are deemed "excludable" or "scrupled" and are barred from hearing a death penalty case.

Two United States Supreme Court cases are pivotal in defining the standards for death-qualified and excludable jurors. In *Witherspoon v. Illinois* (1968), the Court ruled that death qualification could exclude any venireperson who would decide the guilt or penalty or both without regard to the evidence. A major change in the standard for death qualification occurred in *Wainwright v. Witt* (1985). According to this ruling, in the opinion of the judge, if a potential juror feels so strongly about the death penalty that [his/her] belief would "prevent or substantially impair the performance of his duties as a juror, it is grounds for dismissal for cause" (p. 852).

Opposition to the death penalty, however defined, is more frequent in certain demographic and attitudinal subgroups than others (Dillehay & Sandys, 1996; Fitzgerald & Ellsworth, 1984). This results in juries that are anticivil libertarian in nature, especially regarding such critical trial issues as presumption of innocence and burden of proof (Fitzgerald & Ellsworth, 1984; Moran & Comfort, 1986; Thompson, Cowan, Ellsworth, & Harrington, 1984).

In addition, Haney (1984a, 1984b) argues that the experience of death qualification itself affects jurors' perceptions of both the guilt and penalty phases of a death penalty case. Capital voir dire is the only voir dire that requires the penalty to be discussed before it is relevant. Thus, the focus of jurors' attention is drawn away from the presumption of innocence and toward postconviction 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 (Haney, Hurtado, & Vega, 1994).

Perhaps, more importantly, the aforementioned attitudes translate into behavior. Zeisel (1968), Cowan, Thompson, and Ellsworth (1984), and Moran and Comfort (1986) found that, when compared to *Witherspoon* excludables, pro–death-penalty persons were significantly more willing to convict in both mock and real trials. This effect occurred on initial ballots as well as after deliberation.

A final United States Supreme Court case is critical in the discussion of death qualification. In *Lockhart v. McCree* (1986), despite the body of research that suggested that death qualification is prejudicial, the Supreme Court deemed the process constitutional. Although death qualification appears to be moot in law, it is not settled fact. Additional research is warranted concerning the fairness of death qualification.

One such area of research is jurors' perceptions of aggravating and mitigating circumstances. In most states that have capital punishment, the jury is primarily responsible for the sentence. If a conviction occurs in a capital case, the jury then determines the penalty by weighing the aggravating circumstances (i.e., arguments for death) against the mitigating circumstances (i.e., arguments for life). The sentence

that the jury advises must be based on this consideration. In Florida, the judge has the ultimate opinion in capital cases. However, the recommendation of the jury is rarely overturned (Luginbuhl & Middendorf, 1988).

The Supreme Court has ruled in *Lockett v. Ohio* (1978) that aggravating circumstances are limited by statute; mitigating circumstances are not. The vast majority of states that retain capital punishment employ this version of guided discretion. Although each state is unique, the circumstances that may be considered during trial tend to overlap.

In Florida, there are 14 *specific* aggravating circumstances. The judge has the final opinion on which, if any, of the 14 the jury may consider. In contrast, there are seven *examples* of mitigating circumstances. Although the judge also has the final word on which, if any, will be presented to the jury, mitigating circumstances are merely suggestions. In fact, the jury may consider any aspect of the crime or defendant's character in mitigation.

Previous research has found that excludable jurors are more receptive to mitigating than aggravating circumstances (Haney et al., 1994; Luginbuhl & Middendorf, 1988; Robinson, 1993). However, some of these studies utilized the now-defunct *Witherspoon* rule. It is imperative to investigate whether death qualification affects jurors' endorsements of special circumstances when they are categorized under the current *Witt* standard.

In addition, all earlier studies relating to death qualification have asked jurors to classify a list of circumstances as either aggravators or mitigators without including a stimulus case vignette or penalty-phase arguments. We felt providing the aforementioned would serve to both sensitize jurors to their preexisting attitudes as well as enhance the external validity of the research.

The purposes of the current study are twofold: (1) we plan to replicate previous research by investigating the differences between death-qualified and excludable jurors' evaluations of aggravating and mitigating circumstances under the more current *Witt* standard; and (2) we plan to extend previous research through the utilization of a sample and methodology that are both externally valid. Based on the findings of similar studies, it is hypothesized that death-qualified jurors, when compared to *Witt* excludables, will be more likely to endorse aggravating circumstances. It is also predicted that excludables, as opposed to death-qualified jurors, will be more likely to endorse both nonstatutory and statutory mitigating circumstances.

METHOD

Participants

Participants consisted of 450 venirepersons who had been called for jury duty (via a random selection of drivers' license and voters' registration lists) at the Eleventh Judicial Circuit in Miami, Florida. Fifty-nine percent of participants were women; 41% were men. The median age was 41; the median income was $60,000.

The ethnic origin of the sample was as follows: 32% were White/Non-Hispanic; 51% were White/Hispanic; 2% were Black/Hispanic; 10% were Black; and 5% were

of an ethnic origin other than what was specified on the questionnaire. Although a disproportionately large percentage of the sample was Hispanic, it is representative of that population.

One percent of respondents had no high school education; 4% had some high school; 14% had completed high school; 40% had some college or junior college; 27% had a college degree; and 15% had a postgraduate or professional degree. Twenty-seven percent of the jurors had served on a jury before.

Stimulus Case

First, venirepersons read the summary of testimony presented during the guilt phase of a capital trial involving the robbery and murder of a convenience store clerk. The scenario was constructed with the assistance of an attorney experienced in capital cases.

In the scenario, three eyewitnesses saw a man enter the convenience store and demand money from the cashier. When the cashier turned around to open the register, the perpetrator shouted at him to "hurry up." The cashier fumbled with the register, and the perpetrator shot him once, killing him instantly. The perpetrator then took the money out of the register (amounting to $300) and fled. A short time later, the police found a man who matched the description of the murderer walking near the convenience store. The man, Andrew Jones, did not have an alibi for his whereabouts at the time of the crime. They searched him and found $300. The police arrested Mr. Jones and took him to the police station. In a subsequent lineup, the three eyewitnesses positively identified Mr. Jones as the person they had seen kill the convenience store clerk. His fingerprints were also found at the scene of the crime.

Second, venirepersons then read the summary of arguments and testimony presented during the penalty phase of the aforementioned capital trial. The prosecution presented the following aggravating circumstances and urged participants to vote in favor of the death penalty: the murder occurred during the commission of another felony; the defendant has a prior history of violence; the crime was committed while Mr. Jones was on probation; the crime was committed in order to avoid identification and arrest; the victim was murdered for $300; and the crime was committed in a cold, calculated, and premeditated manner.

The defense attorney presented the following mitigating circumstances and urged venirepersons to sentence the defendant to life in prison without the possibility of parole: Andrew Jones was physically abused as a child; Andrew Jones had served in the military; he had a history of alcoholism and using illegal drugs; he was under the influence of extreme mental or emotional disturbance; and Mr. Jones was taking two types of antidepressants when the murder occurred.

In an actual trial, the judge determines which aggravating circumstances the jury will be allowed to consider. In contrast, jurors may consider any aspect of the defendant's character or crime in mitigation. Consequently, it would have been impossible (as well as unrealistic) to include all possible aggravating and mitigating circumstances. Therefore, we randomly selected six aggravators and five mitigators. In addition, we felt that an accurate scenario would simulate capital jurors' experiences more accurately, and, hence, make the results more generalizable.

Predictor Variables

Venirepersons' specified their level of support for the death penalty in two ways. First, participants were asked to circle the statement that they agreed with most: (1) The death penalty is never an appropriate punishment for the crime of first-degree murder; (2) In principle, I am opposed to the death penalty, but I would consider it under certain circumstances; (3) In principle, I favor the death penalty, but I would not consider it under all circumstances; and (4) The only appropriate punishment for the crime of first-degree murder is the death penalty. Venirepersons who answered (2) or (3) to the aforementioned question were classified as death-qualified according to *Witherspoon*; those who answered (1) or (4) were classified as excludable.

Second, venirepersons were asked to indicate if they felt so strongly about the death penalty (either for or against it) that their views would prevent or substantially impair the performance of their duties as a juror in a capital case. Participants who answered "No" to the aforementioned question were classified as death-qualified according to *Witt*; those who answered "Yes" were classified as excludable.

Dependent Measure

Florida Statute 921.141(5) specifies 14 aggravating factors and Florida Statute 921.141(6) suggests 7 mitigating factors that a jury can consider when deciding to sentence a defendant to either death or life in prison without the possibility of parole. Aggravators are limited by statute; mitigators are not. Aggravators are legal justifications for the imposition of the death penalty; mitigators are legal justifications for a life sentence. If the jury finds that aggravating circumstances do exist, they then determine whether mitigating circumstances exist that outweigh the aggravating circumstances.

Twenty-six items were constructed: 14 represented aggravating factors; 5 represented nonstatutory mitigating factors; and 7 represented statutory mitigating factors. Some special circumstances were relevant to the case; others were not. Venirepersons were asked to read each item and indicate their opinion on a 6-point Likert scale, ranging from strong disagreement to strong agreement.

Although participants were told that they could consider anything in mitigation, they were not specifically instructed on the law (i.e., burden of proof, presumption of innocence, bifurcation, decision rules for finding the presence of aggravators/mitigators). We felt that instructions on the aforementioned issues were unnecessary as our focus is not upon verdict or group decision-making processes. Rather, we were primarily interested in individual venirepersons' perceptions of aggravating and mitigating circumstances.

Procedure

Permission to collect data at the courthouse was obtained from the Director of the Jury Pool under the assumption he had the opportunity to review the proposal before the research was undertaken. After the proposal was approved, the experimenter collected data in seven sessions during June–July of 2000. Volunteers were

solicited from an area designated for prospective venirepersons who were waiting to be called randomly and assigned to particular cases.

Prior to their participation, venirepersons read an informed consent form, which described the nature of the study, ensured that their participation was completely voluntary and anonymous, and reiterated that they would not receive compensation for their participation. Venirepersons were also given a contact number in case they were interested in the final results of the study once the data were collected and analyzed.

Participants were then asked to complete a booklet of measures. Venirepersons were first asked to complete two death qualification questions. Participants then read a summary of the guilt and penalty phases of a capital case. They were told that the defendant has already been convicted of capital murder; they are responsible for determining the punishment. Participants were also told that they could consider anything in mitigation. Venirepersons were then asked to evaluate a list of aggravating and mitigating circumstances, select a sentence (either death or life in prison without the possibility of parole), and answer standard demographic questions.

RESULTS

In reference to the *Witherspoon* standard, venirepersons were normally distributed across the four categories of death penalty attitudes. Thirteen percent ($n = 57$) felt the death penalty is never an appropriate punishment for the crime of first-degree murder; 33% ($n = 148$) opposed the death penalty, but would consider it under certain circumstances; 37% ($n = 167$) favored the death penalty in principle, but would not consider it under all circumstances; and 17% ($n = 78$) said the only appropriate punishment for the crime of first-degree murder is the death penalty.[3] In reference to the *Witt* standard, 20% ($n = 90$) of participants felt so strongly about the death penalty that they said their views would prevent or substantially impair the performance of their duties as a juror in a capital case. Consequently, these venirepersons were classified as *Witt* excludables.

The distribution of sentence showed no evidence of ceiling or floor effects. Forty percent ($n = 178$) of venirepersons recommended the death penalty; 60% ($n = 270$) suggested a sentence of life in prison without the possibility of parole. Twenty-one percent ($n = 19$) of *Witt* excludables elected to sentence the defendant to death, whereas 79% ($n = 71$) of excludables voted to sentence the defendant to life in prison without the possibility of parole.

Aggravating and mitigating circumstances were divided into three groups: aggravators; nonstatutory mitigators; and statutory mitigators. A regression equation revealed that evaluations of aggravating and mitigating circumstances were predictive of sentence, $F(3, 139) = 12.20$, $p < .001$. Additional analyses revealed that

[3]Although the *Witherspoon* standard is moribund, we reported these findings for the purpose of comparison with earlier published results. It should be noted that a MANOVA demonstrated that death qualification using the *Witherspoon* standard was significantly related to evaluations of aggravating circumstances, $F(42, 399) = 3.87$, $p < .001$, $\eta^2 = 0.29$; nonstatutory mitigating circumstances, $F(15, 429) = 3.31$, $p < .001$, $\eta^2 = 0.10$; and statutory mitigating circumstances, $F(21, 411) = 2.21$, $p < .01$, $\eta^2 = 0.10$.

Table 1. Evaluations of Aggravators as a Function of Death Qualification

Aggravator	Death-qualified	Excludable	F value	η^2
Crime especially heinous, atrocious, or cruel	4.86	3.00	98.53	0.18
Crime committed while engaged in another crime	4.66	2.89	85.96	0.16
Crime committed to avoid arrest/effect escape	4.63	2.87	80.37	0.15
Member of a gang	4.58	3.06	60.45	0.12
Victim elderly/disabled	4.91	3.31	74.19	0.14
Crime committed for financial gain	4.69	3.17	62.53	0.12
Crime cold, calculated, and premeditated	5.33	3.45	119.39	0.21
Victim under 12	3.78	2.51	35.28	0.07
Victim police officer	4.39	2.76	70.78	0.14
Victim public official	3.93	2.52	52.41	0.11
Crime committed while on felony probation	3.60	2.73	17.46	0.04
Crime committed to disrupt/hinder laws	4.61	3.33	39.97	0.08
Previous conviction of violent felony	3.73	2.71	27.72	0.06
Knowingly caused great risk to many	4.27	3.01	42.34	0.09

Note. All means within rows are significantly different at the $p < .001$ level.

higher endorsements of aggravators indicated a greater likelihood of sentencing the defendant to death ($t = -4.14$, $p < .001$). Higher endorsements of nonstatutory mitigators indicated a greater likelihood of sentencing the defendant to life in prison without the possibility of parole ($t = 2.57$, $p < .05$). Evaluations of statutory mitigators were not predictive of sentence ($t = -1.18$, $p = .24$).

Aggravators were negatively correlated with nonstatutory mitigators ($r = -.322$, $p < .001$) and nonstatutory mitigators were positively correlated with statutory mitigators ($r = .429$, $p < .001$). Surprisingly, aggravators were not correlated with statutory mitigators ($r = .037$, $p = .66$). Because aggravators were correlated with one another (r ranged from .40 to .81, $M = 0.61$); nonstatutory mitigators were correlated with one another (r ranged from .33 to .57, $M = 0.42$); and statutory mitigators were correlated with one another (r ranged from .00 to .49, $M = 0.15$), multivariate analyses of variance (MANOVAs) were performed.

A MANOVA revealed a significant effect of death qualification on evaluations of aggravating circumstances, $F(14, 430) = 10.58$, $p < .001$, $\eta^2 = 0.26$ (see Table 1). Univariate tests demonstrated death-qualified venirepersons, as opposed to excludables, exhibited higher endorsements of all 14 aggravators.

A MANOVA revealed a significant effect of death qualification on evaluations of nonstatutory mitigating circumstances, $F(5, 443) = 11.71$, $p < .001$, $\eta^2 = 0.12$ (see Table 2). Univariate tests demonstrated excludables, as opposed to death-qualified venirepersons, were more likely to endorse all five nonstatutory mitigators.

Table 2. Evaluations of Nonstatutory Mitigators as a Function of Death Qualification

Nonstatutory mitigator	Death-qualified	Excludable	F value	η^2
History of alcoholism	2.64	3.72	28.05	0.06
Use of illegal drugs	2.40	3.53	32.77	0.07
Physical abuse as a child	2.67	3.61	21.34	0.05
Prior service in military	2.38	3.62	38.86	0.08
Use of prescription psychotropic medication	3.53	4.42	22.69	0.05

Note. All means within rows are significantly different at the $p < .001$ level.

Table 3. Evaluations of Statutory Mitigators as a Function of Death Qualification

Statutory mitigator	Death-qualified	Excludable	*F* value	η^2
Person suffering from mental/emotional disturbance	3.52*	4.21*	12.63*	0.03*
Crime committed while defendant was a teenager	3.32	2.96	5.47	0.02
Person unable to appreciate actions/conform behavior	4.08	4.12	3.12	0.01
Person was an accomplice to crime	4.22	4.48	5.63	0.02
Person under substantial duress/domination	3.77	3.47	6.01	0.02
No prior criminal history	3.46	3.34	4.68	0.02
Victim participated/consented to crime	3.66	3.55	3.44	0.01

*$p < .001$.

A MANOVA showed that death qualification was significantly related to evaluations of statutory mitigating circumstances, $F(7, 436) = 2.68$, $p = .01$, $\eta^2 = 0.04$ (see Table 3). Univariate tests demonstrated excludables, as opposed to death-qualified venirepersons, were significantly more likely to endorse only one of the seven statutory mitigators: the defendant was suffering from an extreme mental or emotional disturbance, $F(1, 442) = 12.63$, $p < .001$, $\eta^2 = 0.03$.

A chi-square test did, however, reveal a significant effect of death qualification on sentence, $\chi^2(1) = 16.31$, $p < .001$. Death-qualified venirepersons, as opposed to excludables, were more likely to sentence the defendant to death. Another chi-square test showed a significant effect of gender on sentence, $\chi^2(1) = 16.13$, $p < .001$. Men were more likely than women to sentence the defendant to death.

DISCUSSION

This study clearly demonstrates a relationship between death qualification under *Witt* and evaluations of aggravating and mitigating circumstances. As hypothesized, death-qualified participants, when compared to excludables, were more likely to endorse aggravators. Also as predicted, excludables, as opposed to death-qualified venirepersons, were more likely to endorse nonstatutory mitigators.

One surprising finding is that death qualification had minimal impact on participants' evaluations of statutory mitigators. It is noteworthy that venirepersons do not lend much weight to the factors that experienced defense attorneys have found to be the most effective in capital cases.

Excludables, when compared to death-qualified venirepersons, were more likely to endorse only one statutory mitigating circumstance: the defendant was suffering from an extreme mental or emotional disturbance. This may be due to several factors.

First, this statutory mitigator appeared to differ from the others because it implies the presence of psychopathology. Previous research has found death-qualified jurors are less receptive to psychological defenses (Cowan et al., 1984).

Second, excludables may have perceived this statutory mitigator to be most pertinent to the stimulus case. This explanation, however, appears unlikely. For example, death qualified participants exhibited higher endorsements of all 14 aggravators, regardless of their presence in the case scenario.

In general, it appears that all venirepersons, regardless of death qualification, may have considered most of the statutory mitigators to be legitimate reasons for sentencing someone to life in prison without the possibility of parole as opposed to

the death penalty. With regard to most of the statutory mitigators, it seems that all participants were inclined to give the defendant a break.

In contrast, death-qualified participants, when compared to *Witt* excludables, were less likely to believe that nonstatutory mitigators were valid reasons to give someone a life sentence. This may be due to the fact that most of the nonstatutory mitigators centered on character issues perceived to be within a person's control (e.g., alcoholism, past impairment by illegal drugs, use of psychotropic medications). It is plausible that venirepersons may have thought that the defendant assumed a certain risk factor when engaging in the aforementioned behaviors. In contrast, most of the statutory mitigators were not volitional in nature (e.g., age, unable to appreciate the criminality of their conduct or conform their conduct to the requirements of law, extreme duress or under the substantial domination of another person). Death-qualified participants may have viewed the nonstatutory mitigators as "excuses" as opposed to veritable explanations for a person's actions.

The results of this study have broad legal implications. The present findings extend a larger body of earlier research challenging capital jurors' comprehension of judicial instructions to demonstrate the salient effect that death qualification has on juries, and, consequently, due process (Diamond, 1993; Luginbuhl, 1992; Lynch & Haney, 2000; Wiener, Prichard, & Weston, 1995).

The current study points to yet another biasing effect of death qualification using the *Witt* standard. A death-qualified jury is significantly more likely to impose the death penalty than a jury comprised of excludables. This bias may arise out of the fact that death-qualified jurors are more receptive to aggravating, as opposed to mitigating circumstances. As a result, defendants in capital trials are subjected to juries that are oriented toward accepting aggravating circumstances and rejecting mitigating circumstances. Clearly, this effect can have grave legal implications.

So, what is the legal system to do? Behavioral scientists have repeatedly concluded that death qualification results in the seating of differentially partial jurors (Bersoff, 1987). Regrettably, the United States Supreme Court has reviewed this body of research and concluded that the death qualification process is both constitutional and necessary (*Lockhart v. McCree*, 1986). Given the recent controversy surrounding a proposed moratorium on the death penalty, this issue has been brought into the forefront of American consciousness. Uneasiness about the ultimate punishment is to be expected. However, it is imperative that future research be conducted to examine the factors that impact capital jurors' decision-making processes.

The endorsement of death qualification in *Lockhart* may be settled law, but it is not settled fact. Although the state does have a legitimate interest in having capital jurors that are able and willing to impose both penalties, it may be that this guarantee is at the cost of capital defendants' right to due process (Luginbuhl & Middendorf, 1988).

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