

Harming Children: Uncovering and Overcoming Bias When Defending Sex Crimes against Children

BY BETH BOCHNAK

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If you frequently work on criminal defense cases where violence is alleged, you tend to develop a peculiar worldview, where nothing is really shocking anymore. Years ago, the National Jury Project² was working on a book about representing women who killed their abusers (*Women's Self Defense Cases: Theory and Practice, Michie, 1981*). My next door neighbor, a psychologist, later told me she would eavesdrop from her kitchen while I sat in my backyard, talking about these murder cases with a fellow consultant. She was horrified by how casually we could discuss such topics as dismemberment and torture.

Certain crimes are so offensive and upsetting to people that they can't even imagine someone charged with such a crime being worthy of defending. In doing capital work, I've found there are three kinds of cases in which jurors indicate they would be most inclined to give the death penalty: Killing a police officer; killing a child; harming a child. Rape comes in fourth. They will give this response even after being told that the death penalty doesn't apply except for murder.

In any criminal case, jurors have a hard time accepting the presumption of innocence.³ When someone is charged with a sex crime against a child, potential jurors have even greater difficulty accepting the presumption of innocence. The challenge for the consultant - and attorney representing someone charged with such a crime - is overcoming the jurors' visceral response in order to ensure a fair trial for the defendant. I've found it is sometimes difficult for attorneys and consultants to overcome their own visceral response as well.

Most of the time, I have no problem working closely with defendants charged with the most heinous crimes; separating the crime from the person. However, like jurors, when children are involved, I have a harder time. When incest is alleged, it is harder still. The presumption of innocence in factually disturbing cases is difficult for all of us, but without it, our defendants don't have a chance of a fair trial. I have a pretty good idea what most jurors will be thinking coming into a case when incest is alleged: "This crime is too awful for anyone to lie about." The trick in voir dire will be to find those people, and get rid of them.

The best way to unearth these jurors is with a supplemental juror questionnaire. As has been said in many previous articles, a questionnaire promotes honesty by providing the jurors a private way to recount their exposure to sex abuse.⁴ If you do a little online demographic homework, and include it in your motion/memo, it will be easier to convince the judge that a questionnaire is needed in a particular case. You don't need to find specific mentions of incest to show the judge the likely number of potential jurors who have been exposed to sex crimes. FBI Crime Statistics and state or county level sex abuse statistics will help illustrate how widespread is the problem of child sex abuse and incest in your jurisdiction. Local or state websites for anti-rape groups can also provide relevant data.⁵

In your memo, include the pertinent data. For example:

The use of a supplemental questionnaire is particularly appropriate in this case because it involves allegations of [CHARGES].

Child sexual abuse is unfortunately fairly prevalent in American society. National statistics from the Bureau of Justice Statistics report that 67% of all sexual assault victims reported to law enforcement agencies were between 12 and 18 years of age. Of the alleged offenders in that age category, 24.3% were family members of their victims; 66% were acquaintances of their victims (Snyder, H., National Center for Juvenile Justice, July 2000, NCJ 182990). Thus, a number of jurors in the panel can be expected to have personal knowledge of, or experience with, sexual abuse.

Mr. _____ is entitled to inquire into the experiences of prospective jurors concerning this subject in order to determine whether they, or persons close to them (including family members), have ever been the victim of sexual misconduct. It is necessary to evaluate juror attitudes and experiences on this subject because of their potential to produce predisposition or prejudice, which could easily affect their ability to decide this case fairly and impartially. This is information that the attorney for the Defendant must have in order to determine whether prejudice exists which would justify a cause challenge or, in the alternative, to intelligently exercise peremptory challenges.

Child sexual abuse and assault is obviously a very private and potentially painful subject. Parents have difficulty talking to their own children about sexual matters in the comfort of their own homes. Many potential jurors will have great difficulty talking candidly about such experiences in front of other jurors. They are likely to feel embarrassed and possibly resentful if they are compelled to answer such questions in front of others. In fact, some may not be willing to come forward publicly with such information, in spite of their oath. The use of a confidential supplemental questionnaire would protect and respect the privacy of potential jurors and, at the same time, meet the needs of the attorneys for the parties.

Defendant has also requested that those prospective jurors who state that either they, persons in their family, or persons they are close to, have been the victim of physical or sexual misconduct be questioned about this matter out of the hearing of the panel of prospective jurors. Individual sequestered voir dire on this subject would avoid unnecessary embarrassment and would further protect their privacy concerning this very personal and sensitive topic. These steps would meet the requirements of Standard 7(c) of the ABA Standards Relating to Juror Use and Management, which requires reasonable protection of juror privacy. (A copy of the Standards is attached as Appendix 1).⁶

Finally, the proposed supplemental questionnaire would also increase the efficiency of the voir dire process. The questionnaire covers some other basic demographic information which would otherwise be part of the oral voir dire – information about crime victim status, knowledge of law enforcement or other law related personnel, and specific knowledge of witnesses and parties. This too is consistent with Standard 7(a) of the ABA Standards Relating to Juror Use and Management which advises that such information be made available to the attorneys for the parties prior to the commencement of the voir dire process.

Including these questions on the supplemental questionnaire will save additional time. Follow-up questions, based on responses to the questionnaire, can be pursued in an efficient manner to complete the voir dire process.

Defendant volunteers to do the necessary photocopying and distribution of the completed questionnaires to the attorneys for the Prosecution if the Court wishes. This will minimize the expense and burden on the Court's personnel.

For these reasons, Defendant requests that his motion be granted.

As you can see, you have to be creative in thinking about the kinds of issues and the types of documentation that could help to persuade a judge of the importance of questioning in a certain area and the reasons why a questionnaire would be the best way to do so.

If you know of any questionnaires which have been used in the same or nearby jurisdictions, cite them by case. It could be helpful to discuss any similarities in the cases or, if you know any of the parties, anecdotal information about how the process worked.

In a previous article⁷ published in *The Jury Expert*, NJP trial consultant Diane Wiley described many considerations in deciding questionnaire length. Many judges, especially in state courts where more extensive voir dire is permitted, are unfriendly to the idea of a questionnaire. While it might be wonderful to ask as many questions as you think necessary, a 3-page questionnaire can be effective and is more likely to be allowed. In 3 pages you can learn basic juror information as well as experience and attitudes about sexual abuse.

Obviously, your questions should be tailored to your specific case facts and issues. What follows are some questions about juror's attitudes and experience that have been effective in the past. For the sake of brevity, we have omitted the 3 lines of space after questions that call for a written response.

1. Have you or any relatives or friends ever worked with adults or young people who have been physically or sexually abused? YES NO

IF YES, please tell us about that:

2. Do you or anyone close to you work in a job where you are mandated to report sexual abuse if you suspect it has occurred? YES NO

IF YES, have you ever reported anyone? YES NO

3. Have you, any family members or friends ever been sexually assaulted or had any unwanted physical or sexual contact, including any sexual behavior that you or they believed was inap-

appropriate? YES NO

IF YES, was this: You spouse/partner child family friend

IF YES, please explain and include whether anyone was told about the abuse and when:

4. Have you ever suspected that someone you know was being or had been sexually abused?
 YES NO

IF YES: What did you do?

5. The defendant in this case, _____, is charged with aggravated sexual assault for sexually abusing his daughter from ages _____. Is there anything about a case involving sexual abuse of a child that would affect your ability to serve as a juror? YES NO

IF YES, please explain:

6. Under the law a person who is charged with a crime is presumed to be innocent. How difficult would it be for you to presume innocent a person who is charged with sexual assaulting his daughter?

Very difficult Somewhat difficult Not too difficult Not difficult at all

Please explain:

For me, question 6 is the key. With a decent judge, you should be able successfully to challenge for cause anybody who does not answer “not difficult at all” because they can’t accept the presumption of innocence. If necessary, the follow up question would be, “why do you feel that way?” Then ask, “how will you be able to presume that _____ is innocent, given your feelings about this?” By framing the question in terms of your case facts, you are not requiring the juror to admit s/he doesn’t believe in the presumption of innocence at all, only to admit that s/he can’t be fair to your client because the charges are too upsetting.

Without a questionnaire, a similar question series in voir dire for Question #6 above would be:

1. A young woman is going to come into this courtroom, swear an oath to tell the truth, and say that her father repeatedly had sex with her from ages ___-___. That’s going to happen.

a. Because that’s going to happen, I’m going to show you a statement and ask you to rate whether you agree or disagree with the statement. I’ll ask you to pick a number on a scale of 1-10. You’ll get a gut feeling right away about what your number is. Keep that number in your mind and I’ll ask you about that gut feeling. (The judge may not allow you to use a graphic, in which case you give the same instruction but give the statement aloud, demonstrating with your hands the difference between numbers 1 and 10 and give the definition of each. I’ve seen it done both ways and it works.)

b. IT IS POSSIBLE FOR A YOUNG WOMAN TO FALSELY ACCUSE HER FATHER OF HAVING SEX WITH HER FOR _____ YEARS.

- i. CHART – 1 Agree (it’s possible) – 10 Disagree (that’s not possible)
 - 1. How many of you are 1-3?
 - 2. How many of you are 7-10?
 - 3. How many of you are 10?
 - ii. Why do you think IT IS NOT POSSIBLE?
 - iii. Why do you think IT IS POSSIBLE?
- c. Why would a young woman falsely accuse her father of this?

Again, the argument can be made that anyone self-rated 7-10 should be excused for cause. At best you get rid of any juror who cannot accept the presumption of innocence in this type of case. At worst, you know your strikes. In any event, whether you ask about case specific presumption of innocence in a questionnaire or in voir dire, the answers will help you decide your strikes.

In defending cases alleging sex crimes against children, there is going to be bias. The trick is to get jurors to think about their biases, and admit to them. Some jurors will be able to overcome them and some will not. The questions posed above are designed to help jurors think seriously about whether or not they can be fair.

References

1. Beth Bochnak is the President of NJP Litigation Consulting/East.
2. Now called NJP Litigation Consulting
3. Research conducted by the National Jury Project among juror eligible respondents in trial jurisdictions throughout the country over the last 30 years has consistently shown that: 16% - 45% agree “If the government brings someone to trial that person is probably guilty.” 30% - 62% agree “Defendants should prove their innocence.”
4. For a full discussion of supplemental juror questionnaires, see *Jurywork: Systematic Techniques*, NJP Litigation Consulting, West Publication, 2nd ed. Updated annually.
5. For example: Cityrating.com provides rape statistics for states and cities; [Federal Bureau of Investigation Uniform Crime Reports](http://www.fbi.gov/stats-services/crimestats) (FBI.gov/stats-services/crimestats); Rainn.org provides statistics on victims of sex crimes nationally; local area crime statistics can be found through Google, key words “sex crime statistics” for your area.
6. Wiley, *Jury Expert*, Vol. 23, Issue 6.
7. If possible, make a chart with that statement and the numbers 1 (agree that it’s possible) to 10 (disagree that it’s possible) to show the jurors.