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IS RELIGION AN EFFECTIVE MITIGATING FACTOR IN CAPITAL CASES? NEAR MISS CHRISTIAN FACTORS AND DISREGARDED MUSLIM ONES

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Introduction

Throughout the history of American jurisprudence, the death penalty has been subject to an ongoing evolution in theory and application. From overruling mandatory death sentences for first-degree murder convictions,[1] to outlawing the practice of the death penalty all together,[2] the view of the death penalty has been in constant flux on every level of the court system.[3] Amid this evolution, the process of balancing mitigating

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[1] *See* Woodson v. North Carolina, 428 U.S. 280 (1976). The Court held that North Carolina's mandatory death sentence for first-degree murders violated the Eighth and Fourteenth Amendments of the Constitution.

[2] Furman v. Georgia, 408 U.S. 238 (1972). The Court held that the use of the death penalty in general violated the Eighth and Fourteenth Amendments of the Constitution. This holding was later overturned.

[3] 18 U.S.C.A. § 3591 (1994) now states in part:

(a) A defendant who has been found guilty of--

(1) an offense described in section 794 or section 2381; or

(2) any other offense for which a sentence of death is provided, if the defendant, as determined beyond a reasonable doubt at the hearing under section 3593--

(A) intentionally killed the victim;

(B) intentionally inflicted serious bodily injury that resulted in the death of the victim;

(C) intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person, other than one of the participants in the offense, and the victim died as a direct result of the act; or

(D) intentionally and specifically engaged in an act of violence, knowing that the act created a grave risk of death to a person, other than one of the participants in the offense,

and aggravating factors to determine whether or not to impose a death sentence or a life sentence has emerged as a separate penalty phase in first-degree murder trials.[4] Consequently, the list of pertinent mitigating and aggravating factors has been subject to its own respective evolution.[5] One of the major debates in the history of the practice of using this factor test in the penalty phase has been the use of religion as a mitigating

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such that participation in the act constituted a reckless disregard for human life and the victim died as a direct result of the act, shall be sentenced to death if, after consideration of the factors set forth in section 3592 in the course of a hearing held pursuant to section 3593, it is determined that imposition of a sentence of death is justified, except that no person may be sentenced to death who was less than 18 years of age at the time of the offense.

[4] *See* Gregg v. Georgia, 428 U.S. 153 (1976). The Court upheld the state's use of mitigating and aggravating factors as Constitutional.

[5] 18 U.S.C.A. §3592 offers the current list of allowable mitigating and aggravating factors to be considered. The first section of the statute states:

a) Mitigating factors.--In determining whether a sentence of death is to be imposed on a defendant, the finder of fact shall consider any mitigating factor, including the following:

(1) Impaired capacity.--The defendant's capacity to appreciate the wrongfulness of the defendant's conduct or to conform conduct to the requirements of law was significantly impaired, regardless of whether the capacity was so impaired as to constitute a defense to the charge.

(2) Duress.--The defendant was under unusual and substantial duress, regardless of whether the duress was of such a degree as to constitute a defense to the charge.

(3) Minor participation.--The defendant is punishable as a principal in the offense, which was committed by another, but the defendant's participation was relatively minor, regardless of whether the participation was so minor as to constitute a defense to the charge.

(4) Equally culpable defendants.--Another defendant or defendants, equally culpable in the crime, will not be punished by death.

(5) No prior criminal record.--The defendant did not have a significant prior history of other criminal conduct.

(6) Disturbance.--The defendant committed the offense under severe mental or emotional disturbance.

(7) Victim's consent.--The victim consented to the criminal conduct that resulted in the victim's death.

(8) Other factors.--Other factors in the defendant's background, record, or character or any other circumstance of the offense that mitigate against imposition of the death sentence.

factor under the open-ended eighth factor in the mitigating factors list and in similar state statutes.[6] While courts have continually held that religious participation in someone's background or in someone's post-conviction life[7] is a relevant consideration as a mitigating factor, that consideration has been mostly unpersuasive.

The goal of this Note is to evaluate the use of religion in the mitigation process, and to compare the varying results and circumstances that have arisen from its application to defendants who have attempted to use their Christian beliefs and practice as a mitigating factor and those who have attempted to use Islamic beliefs and practice as a mitigating factor. The Note also examines how the development of the penalty phase process and how its intentions have been skewed by public perception in regards to religion as a mitigating factor. Finally, the Note concludes that because religion has failed as a mitigating factor for Christians and Muslims, its application should be limited to a more general factor of remorse.[8]

I. The Evolution of the Death Penalty

Because the death penalty has been debated for so long and courts have had varied holdings on its application, there are topics that remain unsettled. One of the common threads in judicial holdings, however, has been the desire for fair application.[9] In *Gregg*, the Court echoed the tenets of *Furman*[10] by endorsing the weighing of

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[6] *Brown v. Payton*, 544 U.S. 133, 137 (2005), scrutinized California's catchall factor (k), which instructed jurors to consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." Cal. Penal Code Ann. §190.3 (West 1988). The statute at issue in *Brown* has since been amended. *Id.*

[7] *See* Skipper v. South Carolina, 476 U.S. 1 (1986).

[8] Stephen P. Garvey, *Punishment as Atonement*, 46 UCLA L. Rev. 1801, 1813 (1999). Garvey takes a secular view of criminal repentance, focusing on general remorse through a theory expiation stating: "The entire process of atonement has two stages: expiation and reconciliation. The process begins with the wrongdoer and requires of him four things: repentance, apology, reparation, and penance. Together, these pieces of the atonement puzzle constitute expiation, which signals the removal of the wrongdoer's guilt."

[9] *See* Furman v. Georgia, 408 U.S. 238, 242 (1972). Although its ultimate ruling that the use of the death penalty violated the Eighth and Fourteenth Amendments was overruled, its discussion of the general effects of the death penalty introduce a theme that was reverberated in death penalty cases to follow. *Id*. ("It would seem to be incontestable that the death penalty inflicted on one defendant is 'unusual' if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices.") *Id.*

[10] *Gregg*, 428 U.S. at 189. The Court states: "*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human

mitigating and aggravating circumstances in the penalty phase.[11] The importance of determining a convicted murderer's fate through the factor system by means of individual assessment was the essence of the holding in *Woodson* as well.[12] *Woodson* barred mandatory death for first-degree murderers by eliciting the oft-cited 'evolving standards of decency' language in *Trop v. Dulles.*[13] The Court stated that when deciding whether to impose the death penalty upon someone, the jury must judge the defendant on an individual basis.[14] The Court went as far as to suggest that the mitigation process is important because it allows for some subjectivity among juries to decide that, in certain circumstances, mercy may be warranted.[15]

A. The Evolution of the Mitigating Factor

Just as courts had heard cases that facilitated the process of developing the modern application of the death penalty and factor-weighing in the penalty phase, they also began to hear cases that helped determine which of these factors are worthy of

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life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."

[11] *Id*. at 195. The Court stated that the balancing system of mitigating and aggravating factors provided guidance for jurors, saying "Where the sentencing authority is required to specify the factors it relied upon in reaching its decision, the further safeguard of meaningful appellate review is available to ensure that death sentences are not imposed capriciously or in a freakish manner."

[12] *Woodson*, 428 U.S. at 280.

[13] Trop v. Dulles, 356 U.S. 86, 100 (1958). (determining that the sentence given to an expatriate soldier who was convicted by the military court martial from the United States army during a time of war was in violation of the Eighth Amendment of the Constitution). It validated its point by stating that, "the words of the Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."

[14] *Woodson*, 428 U.S. at 304. The Court said that the implementation of a mandatory death penalty "treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." *See also Lockett v. Ohio*, 438 U.S. 586 (1978).

[15] *Id*. Mandatory death is unacceptable because it "excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind."

consideration.[16] Eventually a definitive list of mitigating factors developed and they seemed to be grouped by common themes.[17] While all of the mitigating factors are allowed in the penalty phase, some have been more effective than others.[18]

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[16] *See* Skipper v. South Carolina, 476 U.S. 1, 5 (1986). (holding that a death row inmate's good behavior in jail post conviction should be considered as a mitigating factor). "The Court has therefore held that evidence that a defendant would in the future pose a danger to the community if he were not executed may be treated as establishing an 'aggravating factor' for purposes of capital sentencing." Jurek v. Texas, 428 U.S. 262, 275 (1976); *see also* Barefoot v. Estelle, 463 U.S. 880 (1983). Likewise, evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating. This determination was unique in the determination of mitigating factors and is crucial to allowing post-conviction religious conversions in as a mitigating factor.

[17] *See* Jeffrey L. Kirchmeier, *A Tear in the Eye of the Law: Mitigating Factors and the Progression Toward A Disease Theory of Criminal Justice*, 83 Or. L. Rev. 631, 658 (2004) (grouping mitigating factors into four general categories: 1. Mitigating circumstances that reveal something about the defendant's good character but are unrelated to the crime; 2. Mitigating circumstances about the crime that reveal a reduced involvement by the defendant; 3. Mitigating legal circumstances dealing with the case and 4. Mitigating circumstances of someone's background that helps explain why a defendant committed the crime or help explain it) [hereinafter Kirchmeier].

[18] *Id*. at 664-65 (explaining that since good character evidence does not involve circumstances of the crime, it exists to persuade the jury that the defendant is not completely evil and has the potential to not be a danger to society after the trial. Because this plays to a jury's sense of compassion rather than evaluation of facts it is sometimes hard to use successfully.). Kirchmeier writes:

> As a practical matter, these factors usually are not given great weight in sentencing capital defendants. For example, despite the fact that a defendant has not committed crimes in the past, juries seem to consider that the defendant has now committed capital murder argues strongly for the defendant's moral culpability and future dangerousness. Still, these factors should carry more weight than courts often give to them. When a person is executed, society is destroying not only the murderer but the entire person, who may have been a parent, sibling, and child who was not entirely evil. *Id*. at 665.

B. Religion As a Mitigating Factor

Often left with little to work with regarding the circumstances of the crime,[19] capital murder defense counsels have turned to the "good character"[20] argument. Furthermore, because murderers often have little good character to rely on, religious conversion while in prison or even before conviction is one of few choices. While the showing of remorse for murder can certainly affect a jury's decision on whether to show mercy to the defendant, it is less likely to have an effect when seen as an act of desperation.[21] As such, defense attorneys employ religion to show sincere remorse.[22]

II. Brown v. Payton

Although the use of Christian conversion as a mitigating factor had been tested before, it finally seemed to take center stage in the case of *Brown v. Payton*.[23] Although

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[19] *See, e.g.,* Belmontes v. Brown, 414 F.3d 1094 (2005) (defendant killed the victim by striking her 15-20 times in the head with a dumbbell bar); Johnson v. United States, 267 F.2d 813 (1959) (defendant savagely beat his victim, leaving him to die, then returned later to carve a cross in his back and cut off his genitals); People v. Kraft, 23 Cal. 4th 978 (2000)(defendant killed 16 males each listed on his "death list" by drugging them, bounding and killing them, then engaging in sexual conduct and mutilation with them).

[20] Kirchmeier, *supra* note 17, at 658.

[21] Michael Simons, *Born Again on Death Row: Retribution, Remorse, and Religion*. 43 Cath. Law. 311, 324 (2004)

> Not surprisingly, prosecutors and defense attorneys are acutely aware of the important mitigating (and aggravating) effect of remorse. But for defense attorneys, the power of remorse presents a dilemma. An expression of remorse that does not come until the penalty phase may well seem hollow and insincere, especially if the defendant has denied responsibility during the guilt phase of the trial. Indeed, one empirical study found that 'statements of remorse and acceptance of responsibility that first come at the penalty phase generally do not persuade the jury to grant mercy.") [hereinafter Simons].

[22] *Id*. at 332-33 ("While this sort of ethical transformation need not be religious, a religious conversion is a particularly appropriate vehicle for it. On a practical level, religion provides a framework through which a defendant can express his atonement in ways that a jury can understand.").

[23] Brown v. Payton, 544 U.S. 133 (2005).

the criminal facts[24] of the case do not appear to be dissimilar from other capital murder cases, the trial facts[25] were unique. Additionally, the role that the Antiterrorism and Effective Death Penalty Act (AEDPA)[26] had on the procedural history[27] made *Brown* unique as well. Although the attempt to use defendant's religious conversion as a mitigating circumstance ultimately proved to be unsuccessful, defense counsel's claim that the prosecutor's misinterpretation[28] was the significant factor held enough weight to convince the Circuit court[29] and to influence the dissent to believe this may have been a result of misapplication of law rather than merit.[30] For example, the goal of the defense

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[24] *Id*. at 136. Payton raped and stabbed to death Pamela Montgomery while both were staying at the same boarding house in 1980. *Id.*

[25] *Id*. at 136-37. During the penalty phase, defense counsel introduced evidence that Payton had made a sincere commitment to God, participated in Bible classes and was supposedly having a positive effect on other inmates. Counsel tried to use this as a mitigating factor under California's catchall factor (k). *Id*. At several times in the case the prosecutor told the jury that they should not consider the evidence of post-crime religious conversion as a mitigating factor under factor (k) even though both counsels conceded that this posture was incorrect. *Id*.

[26] 28 U.S.C.S. §2254 (d)(1) (1996) provides that: "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."

[27] The California Supreme Court affirmed the jury's sentence of death given in the lower court. The Federal District Court granted habeas relief, ruling that AEDPA did not apply. The Ninth Circuit affirmed and on remand from the Supreme Court affirmed again, but this time did so on the standard that the AEDPA did apply and the California's Supreme Court's ruling unreasonably applied Boyde v. California, 494 U.S. 370 in its holding in *Brown*. The Supreme Court then reversed the Ninth Circuit, saying that the holding was not within the limits of the AEDPA. *Id*. at 133-34.

[28] *Id*. at 134-35.

[29] Payton v. Woodford, 346 F.3d 1204 (2003).

[30] *Brown*, 544 U.S. at 166. (Souter, J., dissenting) ("There is no more room here to doubt the reasonable possibility that Payton's jurors failed to consider the post offense mitigation evidence that the Constitution required them to consider.").

was clear,[31] but what was not clear was if the jury was able to understand the relevance of this evidence within the scope of the law. As Michael Simons points out in "Born Again on Death Row: Retribution, Remorse and Religion," this is not the first religious conversion appeal to a higher authority that has failed.[32]

It appeared as though the battle to include post-crime conversion as a mitigating circumstance was gaining momentum until November 2006, when the Supreme Court again overruled the Ninth Circuit.[33] Following a similar fact pattern as *Brown v. Payton*,[34] the only difference here was that the AEDPA was not controlling.[35] Although the attempt to clarify mandatory inclusion of such mitigation failed again, it is worth noting that the dissenting judges increased to four and expressed their feelings vigorously.[36]

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[31] Simons, *supra* note 21. Defense counsel tried to prove that Payton would no longer be a danger to society by showing a newfound commitment to Christianity. *Id*.

[32] *Id*. Simons notes the Texas case of Karla Faye Tucker who killed two people with a pickaxe during a robbery. She was convicted and sentenced to death. She sent a letter to then-Governor George W. Bush, describing the remorse she felt, facilitated through what appeared to be a sincere religious conversion. *Id*. Bush was not persuaded. *Id*.

[33] Ayers v. Belmontes, 127 U.S. 469 (2006). In a 5-4 decision, the Supreme Court overruled the Ninth's circuit's determination that the jury had been confused by factor(k)'s application. *Id*.

[34] *Id*. at 10. Defense counsel used Belmontes' previous religious conversion and desire to reconnect with his religion and make positive contributions to society. Despite this, the jury was not told that it must include this in its determination of death. *Id*.

[35] *Id*. at 14-15. This case was filed before the effective date of the AEDPA, thus it did not apply. Because the AEDPA takes a deferential stance to state decisions, surviving the pre-AEDPA was even more of a statement from the Ninth Circuit. *Id*.

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> The Court today heaps speculation on speculation to reach the strange conclusion, out of step with our case law, that a properly instructed jury disregarded its instructions and considered evidence that fell outside the narrow confines of factor (k). Holding to the contrary, the Court insists, would reduce two days of sentencing testimony to "a virtual charade," *ante*, at 5 (internal quotation marks omitted) -- but in so concluding the Court necessarily finds that the judge's instructions were themselves such a "charade" that the jury paid them no heed.

Id. at 65. (Stevens, J., dissenting).

III. The Plight of Muslim Mitigation

If trying to use a defendant's Christian beliefs as a mitigating factor has been unsuccessful, then using a defendant's Muslim affiliation has been so tenfold. In *State v. Sanders*,[37] the defendant's affiliation with a Muslim group even had the appearance of an aggravating factor.[38] Whether it is improper or not, prosecutors can often play to traditional Judeo-Christian principals in their arguments.[39] They can even play to stereotypes that might exist within this realm about other religions.[40] Even though this use of religion may not be an express factor either way, the use of religious imagery is common in death penalty proceedings[41] and is usually of the Christian variety.[42] It would

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[37] State v. Sanders, 92 Ohio St.3d 245 (2001).

[38] *Id*. at 120-121. There were two lists, one for aggravating circumstances and one for mitigating circumstances. *Id*. After the list titled, "Aggravating Circumstances," there were three listed. *Id*. Then there was a paragraph of facts, mentioning that the defendant was the leader of a Muslim group. *Id*. After that came the mitigating list. *Id*. The Court held that this did not confuse the jury, but the argument was made that his religious affiliation could be mistaken for an aggravating circumstance. *Id*.

[39] *Id*. at 75. Sanders argued that the prosecutor used "nonstatutory aggravating circumstances," because he included in his argument the fact that the prison riot that resulted in the murder on trial occurred during Easter week. *Id*.

[40] *Id*. at 78. Sanders did not object at trial to prosecutor's comment that the victim must have felt "terror" when being approached by the Muslim defendant. *Id*. Sanders seemed to be claiming that this was an improper use of words designed to play on stereotypes of Muslims as being terrorists, thus creatively turning his religion into an unofficial aggravating circumstance. *Id*. Since his counsel did not object when it was said in the penalty phase, the court simply stated that this was not plain error. *Id*.

[41] John H. Blume and Sheri Lynn Johnson, *Symposium: Religion's Role in the Administration of the Death Penalty: Don't Take His Eye, Don't Take His Tooth, and Don't Cast the First Stone: Limiting Religious Arguments in Capital Cases*, 9 Wm. & Mary Bill of Rts. J. 61 (2000).

[42] *Id*. at 67-68. Blume and Johnson observe that:

> Both of the first two types of argument are quite generic; either the prosecutor is claiming that God desires the death penalty or that He desires compliance with the state. In the next three categories, the prosecutor attempts to focus on the particular facts of the case and derive some guidance from the Bible about those facts. One way to do so is to compare the defendant to some despicable biblical character. Thus, in three cases, the prosecutor analogized the defendant to Judas Iscariot. Three

be naïve to think that prosecutors employ this kind of religious argument because of any personal religious beliefs. They do this because they believe it is relevant to a juror's perspective of the facts and the ultimate determination.[43] Defense counsels in capital cases often take the Christian values approach as well.[44] The reliance on these themes of Christianity has not bided well for Muslim defendants. In fact, many defense lawyers are reluctant to raise what could otherwise be a relevant mitigating factor of religious involvement.[45] Because of the stringent standard for claims of ineffective assistance of counsel,[46] defendants are left with no recourse.

> prosecutors made a more extreme comparison, likening the defendant to the devil himself. In three more cases, the prosecutor told the story of Cain and Abel, and in one, the story of David and Goliath.

Id. at 67-68.

[43] Some courts do not allow such religious imagery to be used by counsel, especially prosecutors, in the penalty phase. However the effects of any persuasion of such speech are obviously perpetual.

[44] *Id*. at 72. Discussing a capital case in which religion was inserted into counsel's argument, Blume and Johnson note that:

> In three instances defense counsel quoted the Fifth Commandment: "Thou shalt not kill." Another two argued that the Sermon on the Mount replaced "an eye for eye." More indirectly, defense counsel in another case quoted: "Love your neighbor as yourself." *Id*. Defense counsel made the related argument that life and death decisions belong to God in an additional two cases. In one, he paraphrased: "Vengeance is mine, thus sayeth the Lord." In a second, he referred to the Sermon on the Mount, quoting: "Judge not that ye be not judged." Rather more coercively, yet another attorney argued, during the guilt phase of a capital prosecution, that the death penalty is un-Christian, and that if the jurors impose it, they will suffer after death.

Id.

[45] Mills v. Singletary, 63 F.3d 999 (1995). Despite evidence of the defendant's positive Muslim influence, defense counsel's failure to raise it as a mitigating factor did not qualify as ineffective counsel. *Id*. at 1024 ("A lawyer's election not present mitigation evidence is a tactical choice accorded a strong presumption of correctness which is 'virtually unchallengeable.'). *Id*.

[46] Strickland v. Washington, 466 U.S. 668, 687 (1984). In *Strickland*, the Court stated the two-tiered requirement that defendant had to prove to show that his counsel was so ineffective that it should lead to a reversal of a death sentence:

It is important to understand how the reception of such factors such as Islamic conversion works into a lawyer's argument. Reflecting on his own experience, former capital defense lawyer Michael Mello[47] describes the general presentation ethos.[48] Whether prudent or not, lawyers often revel in the idea of creating a story so captivating it wins over a capital murder jury. But this desire is often very strong, and it may be wise for the attorney to hide it.[49] Consequently, a lawyer may be less likely to include a possible tenuous factor that juries have proven not to be sympathetic to.[50] Still, of all the possible problems of capital defense counsels that Mello raises, the biggest is simply lack of counsel altogether.[51]

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id.

[47] Michael Mello, *A Letter on a Lawyer's Life of Death*, 38 S. Tex. L. Rev. 121 (1997). Now a school teacher, Mello was a former defense attorney who tried many capital murder cases in the "Florida Death Wars" of the 1980s. *Id*. [Hereinafter Mello]

[48] *Id*. at 162. "Putting together a capital post-conviction case is crafting a story. Litigating that story has its academic side and involves rational analysis and the creation of intellectual order out of factual chaos, but it's also visceral, intuitive and imaginative." *Id*.

[49] Mello describes how exciting it can be to create a story and why it is important to hide this excitement since others may not relate. *Id.* "It's prudent to conceal one's enjoyment from those in the profession who see law as a mission, since exuberance in the workplace implies a lack of seriousness or commitment to La Causa, making one suspect by the morally inclined, and the comically challenged." *Id*.

[50] Although Mello does not specifically address the creative crafting of capital defense arguments in terms of including or excluding Islamic conversion as a mitigating factor, one can logically conclude that since a defense attorney reasonably assumes this argument will fail (even though it may have merit), he may also reasonably believe it will ruin the story he is crafting and be less likely to present it as evidence. *See* Mello, *supra* note 47.

[51] Mello writes that:

IV. The Negative Perception of Islam in General

The obvious question to ask pertaining to levels of success for mitigating factors is why they vary between different religions. Public perception seems to be one factor. One of the major arguments that defense counsels use in their mitigation is the idea of 'disease theory'.[52] In terms of religious conversion, the disease theory perspective can be used to further the idea that conversion quells the effects of such a background.[53] However, this argument does not seem to be applicable to Muslim defendants. This may be due in part to the public view of the religion since the tragedy of September 11th.[54]

> I was a relatively experienced capital litigator, the key word being relatively. At any given time, I was lead attorney in approximately 35 cases. My title was "Senior Assistant," which meant that in addition to my regular caseload I helped train and supervise lawyers with even less experience in capital post conviction litigation than I had. I also monitored capital cases being handled pro bono by private law firms and kept track of the antics of the Florida legislature. This was absurd beyond any metaphor: I was a baby lawyer at that time. I had been an attorney for all of two years, and my caseload, as surrealistic as it sounds and as it was, was a function not of any professional precociousness on my part, but rather was a function of the desperate dearth of attorneys willing to take on these ridiculously impossible cases. I wasn't much - no one is very much after only two years of practice - but I hoped I was better than the alternative, which was no lawyer at all.

Mello, *supra* note 47, at 136.

[52] Kirchmeier, *supra* note 17 at 631 (talking about the determinism view of disease theory that looks at factors such as a defendant's negative upbringing, otherwise termed as "rotten social background" as explanations for the motivation of criminal action).

[53] Simons, *supra* note 21 at 311. In *Payton*, defense counsel tried to make the argument that his new religious beliefs will replace his old moral standards. *Id*. Simons states that this argument is "under utilitarian theory because it speaks to his future dangerousness." *Id*. By "commitment of his life to the Lord," Payton is presumably committing himself to live by gospel values as a "selfless" servant of God. *Id*. Put more simply, if Payton obeys the Ten Commandments, he won't kill again." *Id*.

[54] Leonard M. Baynes, *Racial Profiling, September 11th and the Media: A Critical Race Theory Analysis*, 2 Va. Sports & Ent. L.J. 1, 62 (2002).

> Before September 11th, individuals with olive-complexions and those of Middle Eastern ancestry were stereotyped by the news media and society

Because of September 11th and other Muslim extremist terrorist attacks, Muslims have often dealt with an implied sense of public suspicion.[55] This suspicion may then transfer to the courtroom.[56] Of course, the worst-case scenario is a juror's inability to set aside any prejudices against Muslims, or to find a Muslim defendant guilty as an indirect form of revenge for acts of terrorism.[57] In *Illinois v. Brisbon*, the effects of this perception were so strong that the defendant wanted to use the circumstance of his Islamic religion as part of the disease theory rather than a cure for it.[58] Even when defense counsel did bring in the defendant's Muslim religion as a positive mitigating

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> as a blend of two extremes - the positive stereotype of royal oil millionaire and the negative image of the fanatical terrorist. Since September 11th, the negative stereotype has all but completely overpowered the positive stereotype. At the moment, this segment of the population has been "darkened" in the American public's mind.

Id.

[55] *Id*. at 9. (drawing the comparison between alleged prejudice against African-American drivers by police officers, sometimes referred to as "driving while black or brown.").

[56] Although jurors are asked to leave any preconceived notions at the courtroom door and hear a case with an open-mind, it is asking more of a juror to take what could be a preconceived negative perception and use it as a mitigating factor in the defendant's favor. Because the voir dire process is the only real means the judicial system has for rooting out jurors with prejudices or preconceived notions, and the process is vulnerable to voirdiremen concealing true feelings, it is not always the proper screening method. Since voir dire is often ineffective in screening out prejudice jurors, it is logical to assume it is even more likely to be unsuccessful in producing a jury that is completely open-minded.

[57] James Curry Woods, *The Third Tower: The Effect of the September 11th Terrorists Attacks on the American Jury System*, 55 Ala. L. Rev. 209, 217 (2003)(warning of the potential problem of jurors blaming what they perceived to be bad guys for terrorist attacks and not the crime they are on trial for) [hereinafter Woods]. "Defendants charged with crimes involving acts of espionage and terrorism, particularly those defendants who are Muslim or Middle Eastern, will likely face a high risk of conviction due to an increased level of patriotism, which might compel some jurors to blindly convict any perceived 'bad guy.'" *Id*.

[58] Illinois v. Brisbon, 164 Ill. 2d 236 (1995). The defendant claimed that he was brainwashed into the Nation of Islam and that it was his Islamic beliefs that led to his desire to kill, playing on the idea of rotten social background. When counsel did not raise this as a mitigating factor, he unsuccessfully sued for ineffective assistance of counsel. *Id*.

factor,[59] it failed.[60] Unlike other religious evidence, because of prevalent stereotypes associated with Muslims, proper voir dire is necessary.[61] Because there seems to be a greater need for the voir dire process when it comes to weeding out jurors with preconceived notions of Islam as a religion or of its followers, counsel's presentation options can be limited.[62] As many people's[63] perceptions of Muslims and Middle Easterners are now tainted by terrorist attacks and other negative publicity, defense attorneys have to be careful to avoid potential preconceived notions by jurors not only in regard to their client, but also to the witnesses they use[64] and even themselves.[65] In fact,

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[59] Ohio v. Smith, N.K.A. Mahdi, 89 Ohio St. 3d 323, 328 (2000) (showing the jury a clip from the movie "Malcolm X" so defense counsel could make the point that the type of Islamic religion that the defendant was now converting to was not the nationalistic type portrayed in the movie).

[60] *Id*. at 339. (holding that although the majority did believe that the evidence of the defendant's religious conversion was a valid mitigating factor, it was not enough to outweigh the aggravating factors that were presented at trial).

[61] *Id*. at 661-62 (Lundberg Stratton, J., dissenting) ("But I believe that issues or race and religion so infected this trial that the failure to voir dire the jury venire on those issues made counsel's performance so deficient that counsel were not functioning as the counsel guaranteed by the Sixth Amendment."); *see also* Ohio v. Sanders, N.K.A. Hasan, 92, 124 Ohio St. 3d 245 (2001).

[62] *Smith* at 342 (Lundberg Stratton, J., dissenting).

> Some people believe, rightly or wrongly, that the tenets of the Nation of Islam urge militant violence, a powerful image that could have infected the jury's deliberation. Without a careful rooting our of any potential juror who harbored prejudicial racial or religious views, or who had formed preconceived prejudices about either of the movies or the Islamic movement, there is no way to be sure that jurors who deliberated were truly fair and impartial.

Id.

[63] Of course all people who are qualified to serve as jurors should be considered potential jurors.

[64] Woods, *supra* note 57 at 217 (warning that jurors may look at key witnesses who are Muslim or Middle Eastern with more skepticism than others). Woods parallels this with the possible extra sense of sympathy they may have towards firemen and police officers who are brought in as witnesses. *Id*.

stereotypes against Muslims have even been reported to plague the courtroom through the actions of judges.[66]

Because the attacks on September 11th were so tragic and polarizing, their effects are lasting. Although the extent to which they still influence the American courtroom is uncertain, it is undeniable that stereotypes against Muslims persist.[67]

V. Race and Religion

Many factors may help explain why it is almost impossible for Muslim defendants to use their religion as a successful mitigating factor in the penalty phase—but the connection of race and religion cannot be overlooked. Many Muslims are black and there has been a significantly disproportionate[68] amount of black people executed compared to whites in national census numbers.[69] Studies have revealed high rates of discrimination in death penalty cases as well.[70] One study even showed that jurors use racial prejudices as

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[65] Woods suggests that it is the duty of the attorney to realistically determine any possible negative effects his or her being Muslim and/or Middle Eastern might have on his client's case. *Id.* He cites Muslim attorney Hamdi Rifai, who claims to have lost a personal injury case because he is Muslim. *Id.*

[66] *Id. at 218*. A New York judge resigned amid allegations that he referred to a Lebanese woman as a terrorist during an action to challenge parking tickets. *Id.* he woman claimed the judge even said to her, "You don't have money to pay a ticket, but you have money to support terrorists." *Id.*

[67] *See* Harvard, Word Association Test, https://implicit.harvard.edu/implicit/Study?tid=-1 (offering a word association test to see if you have any preconceived notions or subconscious stereotypes against Muslims).

[68] Of the 38 states (including the U.S. Government and the U.S. military) where the death penalty has been legal since 1976, 1,057 people have been executed (six states have not executed anyone in that time despite the death penalty being legal). Of the 1,057, 34 percent of defendants have been black while only 14 percent of the victims were black. There are currently 3,344 inmates on death row; 42 percent of them are black. Death Penalty Info, http://www.deathpenaltyinfo.org/FactSheet.pdf (last visited March 13, 2008).

[69] In the 2000 census of the United States, 12.3 percent of people listed their race as being black. United States Census, http://censtats.census.gov/data/US/01000.pdf (last visited March 13, 2008).

[70] Of states surveyed, 96 percent stated that there was some sort of discrimination – either in the race of the defendant or the race of the victim. In North Carolina, a study revealed that the odds of receiving the death penalty increased by three and a half times

a default.[71] While these disparities are initially linked simply to race, it would make for a specious argument not to include them in a discussion of the effect of being Muslim.[72]

In general, the connection between race and religion is so strong that we can instead elect to view them together as 'ethno-religious groups.'[73] In the case of Muslims, it is hard to separate notions of being Muslim to those of being 'Arab' or being 'black.' Even if such prejudices were distinct, it is hard to believe they would be treated so practically.[74] Of course, the worst-case scenario here is that a defendant may be subject to two separate and co-existing biases—against both Muslims and African-Americans.[75]

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when the victim was white. Death Penalty Fact Sheet, http://www.deathpenaltyinfo.org/FactSheet.pdf (last visited March 13, 2008).

[71] M.K. Miller and B.H. Bornstein, 29 Law and Psychol. Rev. 29 at 52 (citing Mona Lynch and Craig Haney, *Discrimination and Instructional Comprehension: Guided Discretion, Racial Bias, and the Death Penalty*, 24 Law and Hum. Behav. 337 (2000)).

> The use of mental shortcuts can have a detrimental effect on legal decision-making. A study by Lynch and Haney found that mock jurors issued more severe sentences to black defendants than white defendants. This pattern was stronger for those participants who had the poorest understanding of the jury instructions. These findings suggest that participants who were unable to understand or use the instructions given to them used their racial prejudices as cues to making their sentencing decision.

Id.

[72] Since there are several factors that could alone be a cause for bias or coupled together for bias, it is impossible to tell to which degree each has on the situation. However, regardless of where a bias comes from, if it exists it affects the defendant's mitigation evidence.

[73] Danielle M. Hinkle, *Preemptory Challenges Based On Religious Affiliation: Are They Constitutional?* 9 Buff. Crim. L. Rev 139, 171. (2005)("Race, ethnicity, and religion, and the discrimination based on them, are sometimes so interwoven that it is difficult to separate the religious bigotry from the racial prejudice.").

[74] *Id*. at 172. ("People using the stereotypes are unlikely to apply such conceptual rigor to their prejudices. Hence, it seems silly to debate whether individual instances of discrimination were due to religion or ethnicity rather than simply saying that such discrimination is morally wrong either way and people deserve constitutional protections from it.") *Id*.

[75] *Id*. at 172.

We would like to think that it would be easy to fetter out biases based on religion and race before trial, but unfortunately the courtroom often reflects the plagues of society.[76]

VI. Religion's Internal Stance

One of the reasons people may view particular religious affiliations differently, and jurors may take different religious appeals more seriously than others, could be the respective religion's own stance on the death penalty.[77] Although the death penalty is a matter of law—not religion[78]—and mitigation must specifically be linked to the defendant's character,[79] a religion's stance on the practice may be relevant.

Although every Christian faith is not in total agreement about their stances on the death penalty, the Roman Catholic Church[80] and most mainline and liberal

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[76] Melynda J. Price, *Litigating Salvation: Race, Religion and Innocence in the Karla Faye Tucker and Gary Graham Cases*, 15 S. Cal. Rev. L. & Soc. Just. 267, 282 (2006) ("The criminal justice system, however, is not a laboratory where one can manipulate factors of interest in a controlled environment.") [hereinafter Price].

[77] Although the remorse and rehabilitation that religious mitigation evidence is usually supposed to reveal arguably has little to do with whether or not that religion condones the death penalty as a practice, it still can play a factor in a juror's decision how to weigh such evidence.

[78] Miller and Bornstein, *supra* note 71 at 40. Miller and Bornstein discuss how courts have denied religious claims in the penalty phase because they negate the process of finding aggravating and mitigating circumstances. *Id*.

[79] State v. Rose, 576 A.2d 235, 236 (1990). ("Evidence proffered by a defendant at the penalty phase must be "relevant to [the] defendant's character or record, or to the circumstances of the offense.").

[80] The official website for the Vatican lists the Catholic Church's abolitionist stance with regards to the death penalty. The Vatican, Death Penalty, http://www.vatican.va/roman_curia/secretariat_state/documents/rc_seg-st_doc_20010621_death-penalty_en.html (last visited March 13, 2008) ("Pope John Paul II has personally and indiscriminately appealed on numerous occasions in order that such sentences should be commuted to a lesser punishment, which may offer time and incentive for the reform of the guilty, hope to the innocent and safeguard the well-being of civil society itself.").

denominations are abolitionist.[81] As stated, the use of Christian conversion as mitigation has been unsuccessful, but this firm stance may help its cause in general.[82]

Contrary to the Christian-abolitionist position, the Qur'an, the essential text of the Muslim religion, does seem to support the death penalty.[83] Despite many Muslims being weary of the practice[84] and contradictory Islamic writings,[85] Americans may have heard

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[81] *See* Religious Tolerance, http://www.religioustolerance.org/execut7.htm (last visited March 13, 2008).

[82] Jurors who put weight into truly believing what you preach may look at someone's conversion to an abolitionist religion favorably.

[83] *See* Understanding Islam, http://www.understanding-islam.com/related/text.asp?type=question&qid=3160 (last visited March 22, 2008).

> The punishment of those who wage war against Allah and His messenger and strive to make corruption (Fasad) in the land is only this, that they should be murdered or crucified or their hands and their feet should be cut off on opposite sides or they should be banished from the land; this shall be as a disgrace for them in this world, and in the hereafter they shall have a grievous chastisement. (Al Ma'idah 5:33) Similarly, we also have the following directive from the Qur'an for the punishment of murder among Muslims:
>
> O you who believe! Qisas [retaliation] is prescribed for you in the matter of the murdered; the freeman for the freeman, and the slave for the slave, and the female for the female . . . .(Al Baqarah 2:178)
> As you can see, the verses of Al Ma'idah 5:33 and Al Baqarah 2:178 are inline with the verse Al Ma'idah 5:32. The Qur'an has not allowed killing a person as punishment for any other crime other than the above two (murder or Fasad Fil Ardh). In fact, the appropriate punishment for other crimes (like adultery in Al Noor 24:2) are mentioned by the Qur'an to be other than taking life of the criminal.

Id.

[84] William A. Schabas, *Symposium: Religion's Role in the Administration of the Death Penalty*, 9 Wm. & Mary Bill Rts. J. 223, 230 (2000). (claiming that it is a stereotype to suggest that all Muslims and Muslim countries believe in the death penalty when it is really only a matter of national laws).

[85] *Id.* ("Such authorities can also be found within Islamic texts. Despite popular impressions to the contrary, Moslem penal law is characterized by a strong undercurrent of clemency and sympathy for the oppressed. Punishment is ordered to be free of any spirit of vengeance or torture.").

extreme stories of the death penalty being used in the courts of some Muslim countries.[86] Even though this should not play into presentation of mitigating religious evidence (like abolitionist stances of Christians should not either), it still may have a negative effect.[87]

VII. Eliminating Religion in the Courtroom

The American Justice system places great importance on eliminating any potential for bias among the jury and in the courtroom in general. Consistent with the American government's reluctance to let religion be a bias (most notably seen in the Establishment Clause[88] and the Free Exercise Clause[89] in the First Amendment of the U.S. Constitution), judges have been wary of allowing religion to affect trials. While many believe this is a futile task, whether because of the nature of being a juror[90] or because of the history of law and religion,[91] judges have gone to great lengths to accomplish it.

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[86] Wikipedia, Abdul Rahman, http://en.wikipedia.org/wiki/Abdul_Rahman (last visited March 13, 2008). Abdul Rahman, an Afghan man who was going to be tried for death after switching from the Taliban to Christianity, was eventually released as the Afghan government buckled under pressure from foreign leaders. *Id*.

[87] Converse to the possible Christian effect of a converting defendant embracing the abolitionist views of most Christian religions, jurors may be quick to dismiss mitigating evidence of Muslim conversion or practice because they see that plea as hypocritical to the historical Islamic stance on the death penalty.

[88] U.S. Const. amend. I, ("Congress shall make no law respecting an establishment of religion.")

[89] *Id*. *(*"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.")

[90] Elizabeth A. Brooks, *Thou Shalt Not Quote the Bible: "Determining the Propriety of Attorney Use of Religious Philosophy and Themes in Oral Arguments,*" 33 Ga. L. Rev. 1113, 1149-50 (1999) ("Critics may claim that jurors should not make moral determinations based on their religious beliefs; they should simply apply the law. The problem is that some decisions will inherently involve a degree of discretion requiring personal moral judgments. This is because, in certain instances, the law is indeterminate.").

[91] *Id*. at 1148. (arguing that even though the idea that religion and law should be intertwined is no longer accepted, it has lingering effects since it was held by many not long ago.)("As late as the nineteenth century, legal scholars and the Supreme Court proclaimed without reservation, 'the Christian religion is a part of the common law.") *Id*.

Although the elimination of religious bias in the courtroom is a positive precaution, it still can raise issues in death penalty cases.[92]

The first major decision on the exclusion of jurors came in *Witherspoon v. Illinois*[93] where the court said a jury could not put a man to death when it was picked by excluding all those opposed to the death penalty. However, the exclusion of jurors who could not impartially decide on death because of their opposition to the death penalty was upheld in *Wainwright v. Witt*.[94] This certainly tests the faith of a potential Christian juror.[95] But while this allowance means many Christians will be turned away from capital murder jury duty, it does not mean this is automatic.[96]

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[92] Because potential jurors in a death penalty are voir dired to try and eliminate any religious bias, the eventual jurors that are picked are less likely to be sympathetic to a defendant who is presenting his religious conversion or religious practices (whether they be Christian, Muslim, or of another religion) as a mitigating factor in the penalty stage of a capital murder case. Although the original intentions of the judge are different when giving a voir dire – that is to weed out jurors who so value religious beliefs that may conflict with a judgment that it might effect their decision – it could have the additional effect of disproportionately stacking the jury with people who do not put much weight on religion and are thus less likely to consider religious conversion to be a true mitigating factor.

[93] Witherspoon v. Ill., 391 U.S. 510 (1968).

[94] Wainwright v. Witt, 469 U.S. 412 (1985).

[95] Gary J. Simpson and Stephen P. Garvey, *Knockin' On Heaven's Door: Rethinking The Role of Religion in Death Penalty Cases*. 86 Cornell L. Rev. 1090, 1093 (2001).

> Any members of the jury pool whose religious beliefs or convictions would 'prevent or substantially impair' them from following the law can properly be excused for cause. Thus, for example, if a Catholic veniremember reveals on voir dire that she could never, consistent with her religious convictions, vote to impose death, the prosecutor would be entirely justified in asking that she be removed for cause. *Id*.

[96] Gerald F. Uelmen, *Catholic Jurors and the Death Penalty,"* 44 J. Cath. Legal Stud. 355, 361 (2005) [hereinafter Uelmen].

> Thus, unless a Catholic juror believes the death penalty is never appropriate under any circumstances - which is neither the position of the Catechism of the Catholic Church nor the position of the U.S. Catholic Bishops - he or she should not be excluded from sitting on a jury in a death penalty case. Under the Witherspoon standard, the Pope and every Catholic bishop in America could be 'death qualified' jurors. Even under the limitations of the Witt standard, a Catholic juror

The proper use of preemptory strikes and the effects these strikes have at trial has been debated for decades; the landmark case is *Batson v. Kentucky*.[97] *Batson* stated that the exclusion of a juror based on race was against the equal protection clause.[98] The *Batson* rule was later extended to include gender in *J.E.B. v. Alabama ex rel. T.B.*[99] However, courts have been reluctant to extend this same protection when it came to religion.[100] When the case of *State v. Davis*[101] came to the Supreme Court, the Court denied certiorari, despite strong dissents from Justices Thomas and Scalia.[102] This means

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> who embraces the Catechism of the Catholic Church can truthfully state that his or her view would not 'prevent or substantially impair the performance of his [or her] duties as a juror...' As the death penalty is currently administered under the 'guided discretion' laws enacted in the wake of Furman v. Georgia and Gregg v. Georgia, the jury is called upon to weigh the mitigating and aggravating circumstances of the case and determine whether death is the appropriate penalty under the law. Personal objections to the death penalty law, or even a predisposition to rarely utilize it, does not disqualify a juror either if he is willing to set aside his own beliefs in deference to the rule of law, or his beliefs would not actually preclude him from engaging in the weighing process and returning a verdict of death.

Id.

[97] *Skipper*, 476 U.S. 79 (1986).

[98] *Id*. The rule set forth a burden shifting situation, where if a prime facie case revealed that a prosecutor used their preemptory strike, the burden was on the prosecutor to produce a race-neutral explanation for the strike. *See also* Miller-El v. Dretke, 545 U.S. 231 (2005).

[99] 511 U.S. 127, 114 (1994).

[100] *See* State v. Davis, 504 N.W.2d 767 (Minn. 1993)(upholding the exclusion of a juror when the prosecutor's only explanation was that he was a Jahovah's Witness); *see also State v. Purcell*, 199 Ariz. 319 (2001).

[101] State v. Davis, 511 U.S. 1115 (1994)

[102] *Id.* (Thomas, J., and Scalia, J., dissenting).

> I find it difficult to understand how the Court concludes today that the judgment of the court below should not be vacated and the case remanded in light of our recent decision in J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994), which shatters the Supreme Court of Minnesota's understanding that Batson's equal protection analysis

that while courts have been careful to eliminate any potential for misrepresenting the public by excluding jurors because of race or gender,[103] the same care has not been extended to religion.[104]

Consistent with their attempts to eliminate jurors who are swayed by religious beliefs, courts have also tried to limit the use of religious arguments in the courtroom.[105] It can be argued that the line courts have drawn with religious imagery by prosecutors[106] can be both beneficial[107] and detrimental[108] to defendants.

> applies solely to racially based peremptory strikes. It is abundantly clear that the lower court was relying on just such a reading of Batson, for it reasoned that Batson embodies 'a special rule of relevance' that operates only in the context of race, and concluded that '[o]utside the uniquely sensitive area of race the ordinary rule that a prosecutor may strike without giving any reason applies.'

In extending Equal Protection Clause analysis to prohibit strikes exercised on the basis of sex, *J.E.B.* explicitly disavowed that understanding of *Batson*. *Id*.

Id.

[103] This ensures that any mitigation evidence presented that involves either race or gender was fairly weighed.

[104] This leaves the potential of a biased jury weighing religious mitigation evidence.

[105] As is stated earlier in the note, some religious imagery is tolerated. The line is crossed when religiosity takes the place of law.

[106] Sandoval v. Calderon, 241 F.3d 765, 776 (9th Cir. 2000). The court held that the prosecutor's religious remarks to the jury in the penalty phase of this capital murder case were highly prejudicial because it called on religious law. *Id.* ("You are not playing God. You are doing what God says. This might be the only opportunity to wake him up. God will destroy the body to save the soul. Make him get himself right...That's the only way to get his attention. You are not playing God. God ordains authority.").

[107] Directing jurors to follow particular religious law that automatically favors death is obviously against the law and against the best interests of death penalty defendants so should be avoided.

[108] Similar to the exclusion of religious beliefs among jurors, the exclusion of religious imagery may produce a jury that is unnaturally apathetic towards any religious mitigation evidence.

One of the biggest problems that judges have had with the use of religious arguments is that they can take away the gravity a juror feels about their decision.[109] After *Carruthers v. State*,[110] courts have a little more focus when deciding if religious arguments have gone too far. Instead of relying on subjective feelings about religion or trying to evaluate the intangible effect its role in the courtroom has on the jury, judges can adopt a three-pronged approach for clarity.[111] The desire to eradicate problems that come with these religious arguments have been so strong that Pennsylvania was bold enough to create a per se reversible error rule that does not allow prosecutors to make any religious references to the jury in support of the death penalty.[112] Following Pennsylvania's lead, the Tennessee state court and the Fourth and Ninth Circuits have adopted similarly strict (but not per se) rules.[113]

Many jurisdictions have looked to Pennsylvania's rule as the best means of ensuring that religion does not supplant law.[114] While making sure that jurors do not confuse their duty to follow the law in the penalty phase with a duty to follow a religious tenet is important, this can unfortunately have an undesirable dual effect.[115]

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[109] *See* Carruthers v. State, 272 Ga. 306, 309 (Ga. 2000) (quoting People v. Wrest, 3 Cal.4th 1088 (1992)) (commenting that quoting the Bible and other religious authorities can be misleading). "By quoting these texts during closing arguments, prosecutors may "diminish the jury's sense of responsibility and imply that another, higher law should be applied in capital cases, displacing the law in the court's instructions." *Id*. *See also* Monica K. Miller and Brian H. Bornstein, *Religious Appeals in Closing Arguments: Impermissible Input or Benign Banter?* 29 Law and Psychol. Rev. 29, 35 (2005). (referring to one prosecutor who called the jury a "tool or the Lord.").

[110] 272 Ga. 306 (Ga. 2000).

[111] Marcus S. Henson, *Casenote: Carruthers v. State: Thou Shalt Not Make Direct Religious References in Closing Argument.* 52 Mercer L. Rev. 731, 744 (2001)("When these references appear to be direct references, with commanding language and defense makes an objection at trial, the court will likely find proper grounds for reversal.").

[112] Brooks, *supra* note 87, at 1138.

[113] Miller and Bornstein, *supra* note 71, at 44.

[114] Simpson and Garvey, *supra* note 92, at 1120 (noting a preference for the per se rule adopted by Pennsylvania). "On the one hand, appeals to religion in closing arguments almost always violate the Establishment Clause. On the other hand, a bright-line rule would save trial and appellate courts valuable time and resources and help ensure greater uniformity and evenhandedness in decisionmaking." *Id.*

[115] This could lead a juror to believe that religion has no place in death penalty cases – while jurors are given the guidance that their personal feelings about the death penalty

VIII. Religion's Success in the Courtroom

To gain a better perspective of why there have been different degrees of success when using religion as a mitigating factor in death penalty cases, it is important to determine religion's degree of success in other facets of trials as well.[116] As stated earlier in this Note, there are restrictions to the use of religious arguments.[117] Still, attorneys have continually pushed the law's limits on religious pleas.

The obvious problem with defense counsel making religious arguments is that it leaves the door open for damaging rebuttal.[118] Even worse, at times the defense's own case can cause more harm than good. For instance, trying to use religion as means of revealing a defendant's good character may lead a juror to believe that he should be held to a higher standard than someone who has no religious background.[119] For this reason,

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should be set aside, this might also suggest that any mitigation evidence involving religion should not be weighed into the factor system.

[116] Even though the use of a defendant's religious conversion of beliefs in the penalty phase as a mitigating factor is unique from other religious ploys made by counsel or seen in other aspects of trial, they are all related to the jury's general sense of how religion should, or should not, fit into the trial.

[117] *See supra* notes 88-92 and accompanying text. *See also Carruthers*, 272 Ga. at 307. The court held that it was against Georgia law to allow the prosecutor of a death penalty case to urge the jury to follow tenets of religious law found in the Bible during a death penalty trial rather than following the factors in the balancing procedure. *Id*.

[118] *See* Simpson and Garvey, *supra* note 92, at 1105-06.

> In one case the defendant asserted at trial that he had become very religious in prison, regularly reading verses from the Bible and incorporating them into songs. The prosecutor was then permitted to ask him if he had ever read the verse "Thou shalt not kill." In another instance, where the defendant visibly wore a cross throughout his trial and his mother had testified that he wore a cross at times as a child, the prosecutor was allowed to present police testimony that the defendant was not wearing a cross at the time of arrest.

Id.

[119] *See* Miller and Bornstein, *supra* note 71 at 55 (comparing the results of mock trials in which a defendant on trial for child abuse got a longer sentence when presenting evidence of strong religious character to a defendant on trial for the same crime with no mention of religion who got a shorter sentence).

similar to a capital defense attorney's apprehension of using religion as a mitigating circumstance, defense attorneys are apprehensive about religion in general.[120]

Even though religion has not been successful as a mitigating circumstance, it can be argued that it has had some degree of success in the courtroom in general. In an indirect way, some claim that the use of religion may have positive results even when the decision is still death.[121] Simply put, the often contentious and always personal nature of religion[122] can lead to unpredictable results.[123]

IX. The Last Shot of Clemency

Once a capital murder defendant loses in the penalty phase and any subsequent appellate proceedings, his last chance of saving his own life is to be granted clemency,[124]

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[120] Uelmen, *supra* note 96, at 376. (answering critics who say defense counsel should not offer mitigating evidence of religion but say consider your own religion). "Perhaps one reason defense lawyers do not request such an instruction, and oppose it if it is requested by the prosecution, is because they fear that more jurors will rely upon religious views that favor the death penalty." *Id*.

[121] Price, *supra* note 76, at 279. Although the case of Karla Faye Tucker (described above) is about clemency and not a trial, it still involves a religious plea for life. Tucker was put to death but Price contends that, "Tucker's personal transformation through religious faith morally repaired her and cleansed her public image." *Id*.

[122] Miller and Bornstein, *supra* note 71 at 51.

[123] *Id*. ("In the case of religious appeals used during closing arguments, emotions aroused by the religious appeals may make it difficult for jurors to make legally proper decisions. Jurors may rely on the salient religious appeal instead of properly weighing aggravators and mitigators.")

[124] Law Dictionary, http://dictionary.law.com/default2.asp?typed=clemency&type=1 (last visited March 13, 2008).

> The power of a President in federal criminal cases, and the Governor in state convictions, to pardon a person convicted of a crime, commute the sentence (shorten it, often to time already served) or reduce it from death to another lesser sentence. There are many reasons for exercising this power, including real doubts about the guilt of the party, apparent excessive sentence, humanitarian reasons such as illness of an aged inmate, to clear the record of someone who has demonstrated rehabilitation or public service, or because the party is a political or personal friend of the Governor.

Id.

or commutation,[125] from the state. Interestingly, it is often the case that those convicted of death have a better shot at this stage than in the courts.[126] For example, while appeals for life based on future dangerousness have not been successful in the Supreme Court,[127] they have been grounds for commutation.[128]

Despite unsuccessful attempts at clemency, such as the previously discussed case of Karla Faye Tucker[129] and also that of Gary Graham[130] (both in Texas), there have also been many successful stories like Bill Moore's[131] and David Keith's[132]. Although the

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[125] "Commutation implies the penalty was excessive or there has been rehabilitation, reform or other circumstances such as good conduct or community service. Commutation is sometimes used when there is evidence that the defendant was not guilty, but it would prove embarrassing to admit an outright error by the courts." *Id.*

[126] *Id*. Note the language "demonstrated rehabilitation or public service," in the definition of clemency. This is certainly broad enough to include religious conversion. In fact, because the values are similar to those defense counsels attempt to portray through religious conversion evidence, but the polarizing language of religion is left out, clemency avoids the religion topic altogether while still reaching the same ends.

[127] *See, e.g.*, Franklin v. Lynaugh, 487 U.S. 164 (1988).

[128] *See e.g*. Walter C. Long, *Karla Faye Tucker: A Case for Restorative Justice*, 27 Am. J. Crim. L. 117, 119(1999) (noting in particular that in 1997, Governor George Allen commuted the death of William Ira Saunders based on the lack of potential future dangerousness).

[129] Price, *supra* note 76. Tucker's entire argument for clemency was based on religion. She even had Reverends Jerry Falwell and Pat Robertson fighting for her cause. *Id.* at 276.

[130] *Id*. ("Graham himself asserted that he had a message for young, incarcerated blacks; like himself, they had the potential to be transformed 'into a force that could uplift mind, spirit and soul.'") *Id.* at 274 (quoting Ahsanti Chimurenga, "I Remember Shaka," Essence, Sept. 2001, at 114.) Graham lost his plea for clemency despite having Reverends Al Sharpton and Jesse Jackson fighting for his cause. *Id*. at 275.

[131] Long, *supra* note 128 at 120. Moore was granted clemency based on his conduct in jail. He was baptized and helped others convert. In an editorial to the Atlanta Constitution, the Georgia Board of Pardons and Paroles noted that he had reformed so much that the victim's family even supported his clemency. They even said that in the eyes of many, Moore was a "saintly figure." (quoting Editorial, "When Mercy Becomes Mandatory," Atlanta Const., Aug. 16, 1990, at A10.) *Id*.

[132] Keith was commuted simply because he had converted to Christianity. *Id*. at 121.

statistics are not great for forgiveness from the victim's family,[133] the Moore commutation reveals how a simple plea from a family can have the desired effect that an entire mitigation presentation fails to have.

The most notable circumstance of commutation was in 2003 when Illinois Governor George Ryan commutated the death sentences of all 156 death row inmates in the state.[134] Ryan cited both his personal reservations about capital punishment and the inefficiency of the legal proceedings in his decision.[135] Again, this shows how one sweeping decision can accomplish what an entire penalty phase defense cannot.

X. Conclusion

Because death penalty trials are unable to properly weigh religious factors, both Christian and Muslim, their use should be replaced with a more general mitigating factor that combines intrinsic religious values of remorse and rehabilitation,[136] and evaluates the convict's character transformation, regardless of specific religious affiliation.

For whatever reason, the use of religious evidence as a mitigating factor simply is not effective in penalty phase proceedings. Even though Christianity has come close, jurors have still been skeptical to give religion considerable weight when presented with the cold-blooded facts of murders.[137] For Muslims, stereotypes and pre-conceived notions are embedded in some way in almost every part of the process, leaving defense counsels reluctant to even raise it as a factor.[138] Others see the problem stemming from a

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[133] Samuel R. Gross and Daniel J. Matheson, *Victims and the Death Penalty: Inside and Outside the Courtroom: What They Say at The End: Capital Victims' Families and the Press*. 88 Cornell L. Rev. 486, 497-98 (2003). Only 10 percent of the stories reported had members of the victims' families expressing compassion for the defendants and only seven percent mention that they supported clemency for the defendant. *Id*.

[134] *Ill. Gov. Commutes Death-Row Sentences*, The Associated Press, Jan. 11, 2003.

[135] *Id*.

[136] Garvey, *supra* note 8 at 1813.

[137] Brown v. Payton, 544 U.S. 133 (2005).

[138] *See* Mills v. Singletary, 63 F.3d 999 (11th Cir. 1995).

general faulty judicial system in capital murder cases.[139] Pick your reason, but the bottom line is that it is rarely considered to be a significant factor by juries.[140]

The current system of balancing mitigating and aggravating factors was put in place because the legislature believed that the determination of whether someone should live or die because of their crime deserves an independent evaluation based on more than just the facts of the crime.[141] If religious practice and/or religious conversion were truly intended to be some of these possible considerations, this intention is failing in practice.

Because the factor that religion falls into is a broad catch-all rather than a specific allowance,[142] it is more beneficial to look at the goals of introducing religious practice as a mitigating factor rather than the outcomes. If the simple fact of religious faith was meant to stand on its own as a mitigating factor, it would have been explicitly presented in its own factor.[143] Instead, the goals of the eighth factor are probably better reached by determining the beliefs and characteristics that are usually associated with religious practice and applying them instead. The major reasons most defendants present mitigating religious evidence is to show remorse and to convince the jury they are no longer a threat to society[144] —in some cases, even saying they can now be a benefit.[145] It does not matter what religion is being used; generally, these are the goals.

Rather than fighting a loaded topic such as religion, such mitigating evidence should be limited to a defendant's remorse and rehabilitation[146] exhibited through a jury's determination of his general character transformation. Because both counsels may still be inclined to introduce specific evidence of religion to play upon jurors' emotions, courts may avoid such problems by following Pennsylvania's lead in eliminating

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[139] *See* http://www.deathpenaltyinfo.org/FactSheet.pdf. (Last updated March 1, 2008. Last visited March 22, 2008).

[140] While no one seems to argue it should automatically be a factor, it is hard to ignore that courts have allowed it as one yet juries consistently choose not to give it weight.

[141] Gregg v. Georgia, 428 U.S. 153 (1976).

[142] 18 U.S.C.A. § 3592(8) encompasses "Other factors in the defendant's background, record, or character or any other circumstance of the offense that mitigate against imposition of the death sentence."

[143] Each of the other seven factors listed in the statute are specific. *Id*.

[144] Garvey, *supra* note 8.

[145] *See Brown*, 54 U.S. 133 (2005); *see also* Ayers v. Belmontes, 2006 U.S. LEXIS 8522 (2006).

[146] Garvey, *supra* note 8.

religious imagery[147] and by limiting specific evidence of remorse and rehabilitation to general terms like "religion" in lieu of "Christian" or "Muslim." This would make the use of religion as a mitigating factor more in line with its use in clemency.

Whether the practice of using these general notions of character transformation as a mitigating factor—rather than specific religiosity—would be successful is debatable. Juries would still have to weigh this evidence alongside any other mitigating evidence and against what are usually strong aggravating circumstances. And courts would still have to determine its relevance and veracity before allowing it into evidence. But by eliminating the emotionally charged topic of religion and instead presenting what its practice really represents, these mitigating factors can succeed or fail on their merit—and nothing more.

[147] Simpson and Garvey, *supra* note 92 at 1120.