

BORN AGAIN ON DEATH ROW: RETRIBUTION, REMORSE, AND RELIGION

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INTRODUCTION

In the early morning hours of May 26, 1980, William Payton committed three brutal and senseless attacks. He first raped and murdered Pamela Montgomery, stabbing her twelve times with a butcher knife. He then attacked and attempted to kill Patricia Pensinger and her 10-year-old son Blaine, stabbing them over sixty times.¹ Charged with capital murder, there was little Payton could do to contest his guilt. But he did argue that he did not deserve to die. Interestingly, though, Payton did not present the usual evidence in mitigation. He did not, for example, argue that he suffered from some kind of defect or deprivation (whether it be mental retardation, childhood abuse, or some other mental or emotional trauma) that explained his violence. Instead, Payton focused solely on his conduct *after* the crime. Specifically, Payton argued that he should not be executed because while in prison awaiting trial he had found God, had become a committed Christian, and had begun helping other inmates with their

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¹ See *People v. Payton*, 839 P.2d 1035, 1039–40 (Cal. 1992).

spirituality. The prosecutor, on the other hand, argued that Payton's conduct after the crime—and his religious conversion in particular—was irrelevant to his punishment. The jury sentenced Payton to death.²

That was twenty-three years ago. Since then, Payton's case has had a tortuous appellate history.³ Eventually, a federal judge overturned the death sentence, reasoning that Payton's religious conversion was indeed relevant and that the prosecutor's argument was improper and unfair. California has appealed, and now the Supreme Court will decide whether Payton's death sentence should be reinstated. The actual issue before the Supreme Court is a technical one relating to the specific language of the California death penalty statute, the effect of the trial judge's instruction to the jury about mitigating evidence, and the standard of review for habeas petitions.⁴ The case of William Payton, however, raises much broader questions about the death penalty, retribution, and religion.

In short, was the prosecutor right? Is Payton's religious conversion irrelevant to his punishment? If so, is that because the conversion might be insincere? Or is it because the conversion occurred after the crime? Or is it because religion and spirituality should have nothing to do with secular punishment?

Or was the prosecutor wrong? As a matter of law, should Payton be allowed to argue that his religious conversion should mitigate his punishment? As a matter of practicality, do juries consider a defendant's spiritual condition when imposing sentence? As a matter of morality, should they?

This essay will only begin to answer those questions.

² See *id.* at 1040, 1047.

³ See *id.* at 1054 (affirming conviction and sentence on direct appeal); *Payton v. Woodford*, 258 F.3d 905, 926 (9th Cir. 2001) (reversing District Court's grant of habeas petition); *Payton v. Woodford*, 299 F.3d 815, 830 (9th Cir. 2002) (en banc) (affirming District Court's grant of habeas petition); *Woodford v. Payton*, 538 U.S. 975 (2003) (vacating en banc opinion and remanding for further proceedings); *Payton v. Woodford*, 346 F.3d 1204, 1219 (9th Cir. 2003) (en banc) (affirming District Court's grant of habeas petition on remand), *cert. granted*, *Goughnour v. Payton*, 124 S. Ct. 2388 (U.S. May 24, 2004) (No. 03-1039) (now pending as *Brown v. Payton*, No. 03-1039).

⁴ See *infra* note 36.

I. THE FACTS

A. *The Guilt Phase: Evidence of the Crimes*⁵

The prosecution presented the jury with undisputed evidence of a horrifying crime.

At about 4:00 in the morning on May 26, 1980, William Payton showed up unannounced at the home of Patricia Pensinger, where Pensinger lived with her three sons and several borders. Payton knew Pensinger because he and his wife had previously boarded at the home. When Payton arrived, he found Pensinger sitting in the kitchen working on a crossword puzzle. He complained of car trouble and sat with Pensinger, talking and drinking beer. While Payton and Pensinger sat talking, Pamela Montgomery came into the kitchen briefly for a glass of water. Pensinger introduced Payton to Montgomery, who was boarding with Pensinger while her husband was serving in the National Guard, and then Montgomery went back to bed. After Payton sat with Pensinger for almost an hour, he asked whether he could sleep on the couch. Pensinger agreed and then retired to her bedroom and went to sleep. Her ten-year-old son Blaine was also sleeping in her room.

Some time later, Pensinger was awakened by blows on her back. When she rolled over, Payton jumped on top of her and began stabbing her repeatedly in the face and neck. When Blaine woke up and tried to protect his mother, Payton began stabbing the boy as well. As Pensinger pleaded for Payton to spare her son, Payton turned back to attacking her, repeatedly trying to stab her in the abdomen. But, because the knife blade had bent, it would not penetrate. Payton then stopped, shouted “ ‘I’m leaving now,’ ” and left the bedroom.

Pensinger and Blaine attempted to escape through the kitchen, but they once again encountered Payton, who grabbed another knife and renewed his attack. As others began to be awakened by the noise, Payton dropped the knife and fled. Pensinger had been stabbed forty times; Blaine had been stabbed twenty-three times. They both survived.

Pamela Montgomery did not. After the police responded, she was found in her bedroom, dead from a dozen stab wounds. Six of the stab wounds were in a line from her stomach to her groin. Other wounds indicated that, before dying, she had fought to defend herself.

⁵ Unless otherwise indicated, the description of the guilt phase evidence in this section is taken from the California Supreme Court’s opinion on direct appeal, *People v. Payton*, 839 P.2d at 1039–40, and the Ninth Circuit’s first panel opinion, *Payton v. Woodford*, 258 F.3d at 910–12.

She had also been raped. Her body was clad only in a nightgown, which was open in the front. A pair of panties entwined in some shorts were found in her bed. Saliva that could have come from Payton was found on her breast. Semen that could have come from Payton was found in her vaginal area.

After fleeing Pensinger's house, Payton went home, where his wife saw that he was covered with blood, some of it still wet. When he took off his clothes, she saw "a 'lot' " of blood on his torso, legs, and genitals, but not on his pants. He was also covered with scratches and " 'fingernail digs.' " Payton and his wife fled to Florida, where he was eventually arrested.

The prosecution's witnesses included the law enforcement officers who responded to the scene, forensics experts who testified about the saliva and semen, Payton's wife, and Patricia and Blaine Pensinger, who gave their first-hand accounts of Payton's attack.

The prosecution also called one of Payton's fellow prison inmates, who testified that Payton told him he had raped and stabbed Montgomery because he had " 'this urge to kill.' "

Payton presented no witnesses, even though his counsel had suggested to the jurors that they would be hearing psychiatric testimony.⁶ Instead, Payton's attorney argued in summation that the bizarre nature of the attack provided circumstantial evidence that the perpetrator must have been suffering from some sort of mental defect or diminished capacity.⁷

The jury convicted Payton of capital murder, finding that he had killed Pamela Montgomery while raping her.

B. The Penalty Phase: Evidence of Payton's Life Before the Crimes

In the penalty phase of a capital trial, many defendants present evidence suggesting that they bear diminished responsibility for the crime because of some physical, mental, or emotional deprivation in their backgrounds.⁸ And indeed, it appears that Payton could have presented

⁶ See Petitioner's Combined Brief at 31, *Payton v. Woodford*, 258 F.3d 905 (9th Cir. 2001) (Nos. 00-99000 & 00-99003).

⁷ *Id.* at 31-32. Defense counsel repeated this argument in the penalty phase. See Trial Transcript of November 23, 1981, at 2147, *People v. Payton*, No. C-45040 (Super. Ct. Orange Co.), reprinted in Joint Appendix, *Brown v. Payton*, No. 03-1039, 2004 WL 1900264 (U.S. Aug. 6, 2004) (hereinafter "Penalty Phase Transcript") (defense summation arguing that the attacks were "[h]ardly the act of someone who is not under some kind of mental disorder resulting from some kind of diminished capacity").

⁸ See, e.g., *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982) ("Evidence of a difficult family history and of emotional disturbance is typically introduced by defendants in mitigation." (citing *McGautha v. California*, 402 U.S. 183, 187-88, 193 (1971))).

such evidence.⁹ But defense counsel chose to focus on evidence of Payton's life after the crimes. Only the prosecution presented evidence about Payton's background. And it did not paint a pretty picture.

First, the jury learned that Payton had two prior felony convictions: one for possession of over three ounces of marijuana and the other for unlawful consensual sexual intercourse with a minor under the age of eighteen.¹⁰ Then the jury heard from Patricia Stone, a former girlfriend of Payton's. Stone testified that one night after having sexual intercourse with Payton she awoke to find Payton holding a kitchen knife to her neck. He then stabbed her in the arm and chest approximately six times before getting off her and then assisting her with first aid until the police arrived. Finally, the prosecution called another of Payton's fellow inmates, who testified that Payton told him that he "had a severe problem with sex and women," that he wanted to "[s]tab . . . and rape them," and that he saw "all women on the street" as "potential victim[s]."¹¹

C. *The Penalty Phase: Evidence of Payton's Life After the Crimes*

The defense presentation during the penalty phase focused almost exclusively on Payton's religious conversion and his religious activities while in prison awaiting trial. The first witness was Payton's pastor, who testified that he had known Payton since Payton was a teenager.¹² At that time, the pastor had thought Payton was "a very bright, articulate young man" who had "outstanding potential," but was not "committed to serving the Lord."¹³ Since Payton had been incarcerated, however, the pastor had visited him numerous times and had sensed a profound change. The pastor testified that he "sensed a great remorse and regret in [Payton] for the life that he had—the things that he had done" and sincerely felt that Payton

⁹ In arguing that Payton's trial counsel was ineffective, Payton's appellate counsel claimed that a thorough investigation of Payton's background would have revealed:

physical abuse; sexual exploitation; domestic violence; multiple marriages of his parents; a multi-generational family history of alcoholism; personal and familial psychiatric distress; profound emotional neglect and abandonment; lack of meaningful support from family members; inconsistent, inadequate, or punitive parenting; exposure to war trauma; and organic risk factors and impairments, including learning difficulties, possible dissociative symptomology secondary to seizure disorders, sleep disorders, memory impairments, and chronic polysubstance abuse beginning at a critical developmental juncture.

Petitioner's Combined Brief at 33–34, *Payton* (Nos. 00-99000 & 00-99003).

¹⁰ See Penalty Phase Transcript, *supra* note 7, at 1927.

¹¹ *Id.* at 1936–37.

¹² See *id.* at 1944–45 (testimony of John O. Kirk).

¹³ *Id.* at 1946.

“had made a commitment of his life to the Lord Jesus according to the New Testament and Bible principles.”¹⁴

Payton’s second witness was a woman who coordinated a local prison ministry.¹⁵ She testified that she had met with Payton over a dozen times, sometimes for hours at a time, to talk about scripture and Bible studies. During those meetings, Payton would ask her “questions as to the Holy Spirit and learning about the spirit of God, how to pray, how to worship God, what . . . would be necessary to take a life, like such as his own, and consecrate it to God’s work and what kind of manner of person he would have to be to serve the Lord.”¹⁶ She added that Payton had been accepted by a well known correspondence Bible college, was organizing Bible classes for other inmates, and was corresponding with inmates in other jails about his faith.¹⁷ She was convinced that his religious conversion was sincere.¹⁸

Payton then called four of his fellow inmates, each of whom testified that Payton was “born again,” that they frequently discussed religion with him, and that his religious commitment was “sincere.”¹⁹ In addition, one testified that Payton had “saved [his] life” by showing him “the way to the Lord” and convincing him that he “didn’t have to commit suicide.”²⁰ And three of them testified that he had a “calming influence” or “calming effect” on other inmates.²¹ Payton next called a deputy sheriff, who confirmed that Payton led Bible sessions in the jail and that Payton had a “positive” influence on the other inmates.²²

Finally, Payton called his mother, who testified that Payton was “totally immersed in the Lord” and “sincere” about being “born again.”²³

¹⁴ *Id.* at 1948–49.

¹⁵ *See id.* at 1950–51 (testimony of Barbara Seglie).

¹⁶ *Id.* at 1952–53.

¹⁷ *See id.* at 1953–57.

¹⁸ *See id.* at 1955. This witness also testified that Payton was writing an autobiography that might be published by a Christian publishing house. She then read two excerpts from the autobiography, which were ostensibly offered not for their content but to show Payton’s writing ability. *Id.* at 1958, 1960.

¹⁹ *See id.* at 1969–2000 (testimony of Phillip Robert Arellano, Dennis Ray Howie, Keith Dandley, and Bruno Martin Palko).

²⁰ *Id.* at 1983–84.

²¹ *Id.* at 1971, 1984, 2000.

²² *Id.* at 2006–10 (testimony of Vincent Woodrow Engen).

²³ *Id.* at 2017 (testimony of Virginia Payton).

II. THE PUNISHMENT

A. *The Legal Relevance of Payton's Conversion*

There is little question that Payton's religious conversion is legally relevant. In a series of cases over the past twenty-five years, the Supreme Court has recognized a defendant's constitutional right to put mitigating evidence before the sentencing jury, including evidence that relates solely to a defendant's conduct after the offense.

First, in *Woodson v. North Carolina*, the Court held that the unique nature of capital punishment requires individualized sentencing: "the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."²⁴ The Court then extended this principle in *Lockett v. Ohio* to protect a defendant's right to present mitigating evidence: "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."²⁵

In *Lockett*, however, the mitigating evidence proffered by the defendant related solely to her conduct and character before the crime was committed.²⁶ Indeed, most capital defendants who present mitigating evidence focus on their lives before the crime.²⁷ It was not until *Skipper v. South Carolina* in 1986 that the court explicitly recognized the constitutional relevance of post-offense mitigation evidence.²⁸ Skipper had been convicted of capital murder and rape. At his sentencing hearing, he presented the usual type of mitigating evidence relating to "the difficult circumstances of his upbringing."²⁹ But he also sought to introduce evidence of his good behavior in the over seven months he had been in jail

²⁴ *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion) (citation omitted).

²⁵ *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (emphasis in original); *see Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982) ("[T]he sentencer in capital cases must be permitted to consider any relevant mitigating factor . . .").

²⁶ *See Lockett*, 438 U.S. at 589–94, 597 (overturning death sentence because the statute did not permit the sentencing judge to consider defendant's "prior record, age, lack of specific intent to cause death, and her relatively minor part in the crime"); *see also Eddings*, 455 U.S. at 107–09 (overturning death sentence because sentencing judge refused to consider mitigating effect of defendant's "troubled youth" and emotional disturbance at the time of the crime).

²⁷ *See supra* note 8.

²⁸ *Skipper v. South Carolina*, 476 U.S. 1, 4–5 (1986).

²⁹ *Id.* at 2–3.

awaiting trial.³⁰ The trial court, however, ruled that the evidence about Skipper's prison adjustment was irrelevant and therefore inadmissible.³¹

The Supreme Court reversed, reasoning that the evidence of Skipper's good behavior in jail was plainly relevant.³² The Court implicitly assumed that the evidence was *not* relevant in any retributive sense: it affected neither the harm caused by the crime nor Skipper's culpability for that crime. But, even if the evidence did not affect his "just deserts," it could provide a utilitarian reason to spare his life if it meant that he would be less dangerous in prison.³³ Under *Eddings*, the Court reasoned, such mitigating evidence "may not be excluded from the sentencer's consideration."³⁴

For William Payton, then, there is little question that his post-offense religious conversion is relevant mitigating evidence—if not because it says something about his spirituality, then because it suggests that he will be less dangerous while incarcerated. Thus, the prosecutor at Payton's sentencing was plainly wrong when he said that the evidence of Payton's conversion was irrelevant.³⁵ *Skipper* requires that the sentencer be permitted to consider such evidence.³⁶

³⁰ *Id.* at 3. Skipper and his wife testified that he had "conducted himself well" in prison. *Id.* Skipper also sought to call "two jailers and one 'regular visitor' to the jail" who would testify that he "had 'made a good adjustment' during his time spent in jail." *Id.*

³¹ *Id.*

³² *Id.* at 4.

³³ *Id.* at 4–5 (noting that although such evidence did "not relate specifically to petitioner's culpability for the crime he committed," it was "indicative of his probable future behavior" and mitigating because it suggested that he "would not pose a danger if spared (but incarcerated)").

³⁴ *Id.* at 5. Writing separately, three justices disagreed that post-offense conduct was relevant to mitigation. Justices Powell, Burger, and Rehnquist argued that post-offense conduct could not be mitigating because it "neither excuses the defendant's crime nor reduces his responsibility for its commission." *Id.* at 12 (Powell, J., concurring); see *infra* note 53 and accompanying text.

³⁵ See *People v. Payton*, 839 P.2d 1035, 1047 (Cal. 1992) (finding the prosecutor's argument to be incorrect as a matter of law). For a more detailed discussion of the prosecutor's argument, see *infra* note 45.

³⁶ The prosecutor's error, however, does not necessarily mean that Payton will prevail in the Supreme Court. Unlike Skipper, Payton was allowed to introduce his post-offense mitigation evidence, and the trial court instructed the sentencing jury to "consider '[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.'" *Payton v. Woodford*, 346 F.3d 1204, 1208 (9th Cir. 2003) (en banc) (quoting CAL. PENAL CODE § 190.3(k) (Deering 1985)) (alteration in original). And, when the prosecutor improperly argued to the jury that the evidence of Payton's religious conversion was legally irrelevant, defense counsel immediately objected, prompting the court to remind the jurors that lawyers' comments were "'not evidence,'" but "'argument,'" and should be placed in their "'proper perspective.'" *Id.* at 1209. Finally, even if the Court is convinced that that prosecutor's error infringed on Payton's constitutional right, it must still conclude that the California Supreme Court's decision to the contrary was "'objectively unreasonable'" under the AEDPA. See *id.* at 1209–10 (quoting *Wiggins v. Smith*, 539 U.S. 510, 521 (2003)).

B. *The Practical Relevance of Payton's Conversion*

While a religious conversion such as Payton's is plainly legally relevant, whether a jury will see it as a reason to spare the defendant's life is a separate question. Payton's jury, obviously, did not. And while we can never know what made Payton's jury choose death, there are several possibilities.

First, the jury could have doubted the sincerity of Payton's conversion. Of course, such matters of the mind and heart can always be faked.³⁷ But given the evidence at trial, there seems little doubt that Payton's conversion was real. Each of the witnesses who had conversations with Payton about his religion testified that his "commitment to the Lord" was sincere.³⁸ The prosecutor presented little evidence to contradict them.³⁹ And in summation, while the prosecutor noted that "everybody seems to get religion in jail when facing the death penalty," he did not argue that Payton's conversion was faked or that his witnesses were untruthful.⁴⁰

Second, the jury could have believed the conversion evidence but felt constrained to ignore it based upon the prosecutor's argument and a misunderstanding of the court's instructions. The California death penalty statute sets forth eleven aggravating and mitigating factors that the jury should consider in deciding whether to impose the death penalty.⁴¹ The only factor into which Payton's conversion evidence fits is the eleventh, which is known as "factor (k)." Factor (k) instructs the jury to consider "[a]ny other circumstance which extenuates the gravity of the crime."⁴² Both the California Supreme Court and the United States Supreme Court have held that factor (k) includes any evidence of the defendant's

³⁷ See Amitai Etzioni, *REPENTANCE: A COMPARATIVE PERSPECTIVE* 1, 9 (Amitai Etzioni & David E. Carney eds., 1997) ("How can one determine that remorse is true? Many people, when faced with the apologies of politicians, criminals, and even friends and spouses, have doubts as to the motivation behind such expressions."); B. Douglas Robbins, *Resurrection from a Death Sentence: Why Capital Sentences Should Be Commuted upon the Occasion of an Authentic Ethical Transformation*, 149 U. PA. L. REV. 1115, 1166 (2001) (noting the challenge in distinguishing between "an authentic conversion and a fraudulent one").

³⁸ See Penalty Phase Transcript, *supra* note 7, at 1949 (testimony of Payton's pastor); see also *id.* at 1955, 1970–71, 1981, 1982, 1999, 2017 (similar testimony of a pastoral worker, four prisoners, and Payton's mother).

³⁹ The prosecution did question some of the defense witnesses about whether Payton gambled and about whether he "extract[ed] money from other inmates to make telephone calls." See, e.g., *id.* at 1979. The prosecution received little in the way of affirmative answers and did not pursue these issues in the penalty summation.

⁴⁰ See *id.* at 2130–31.

⁴¹ See CAL. PENAL CODE § 190.3 (Deering 1985).

⁴² *Id.* § 190.3(k).

“character” offered in mitigation.⁴³ Nevertheless, the prosecutor at Payton’s trial incorrectly argued that factor (k) applies only to facts in existence “at the time of the offense.”⁴⁴ Thus, according to the prosecutor’s argument, Payton’s evidence of religious conversion did not fit within the statute and should not be considered by the jury as mitigation evidence.⁴⁵ The trial court’s instruction, which simply parroted the statutory language, did little to correct the prosecutor’s misstatement.⁴⁶

⁴³ See *People v. Easley*, 671 P.2d 813, 826 (Cal. 1983) (holding that under factor (k) juries are permitted to consider any aspect of a defendant’s “character or background”); *Boyde v. California*, 494 U.S. 370, 382 (1990) (holding that factor (k) directs the jury “to consider *any other circumstance* that might excuse the crime, which certainly includes a defendant’s background and character”); see also *People v. Payton*, 839 P.2d 1035, 1047 (Cal. 1992) (noting that the *Easley* court “recommended that courts in the future adorn factor (k) with the explanatory gloss that juries are permitted to consider ‘any other aspect of defendant’s character or record . . . that the defendant proffers as a basis for a sentence less than death’ ” (quoting *Easley*, 671 P.2d at 826 n.10)).

⁴⁴ Penalty Phase Transcript, *supra* note 7, at 2121–22. To be fair to the prosecutor, *Easley* and *Boyde* were both decided well after Payton’s trial. See *People v. Payton*, 839 F.2d at 1047 (stating that the court decided *Easley* “two years after defendant’s trial”).

⁴⁵ See Penalty Phase Transcript, *supra* note 7, at 2122–25. Specifically, the prosecutor argued first that factor (k) “doesn’t refer to anything after the fact or later. That’s particularly important here because the only defense evidence you have heard has been about this new born Christianity.” *Id.* at 2122. After defense counsel’s objection was overruled, the prosecutor continued to argue that the religious conversion was both logically and legally irrelevant:

Referring back to “k” which I was talking about, any other circumstance which extenuates or lessens the gravity of the crime, the only defense evidence you’ve heard had to do with defendant’s new Christianity and that he helped the module deputies in the jail while he was in custody.

The problem with that is that evidence is well after the fact of the crime and cannot seem to me in any way to logically lessen the gravity of the offense that the defendant has committed.

.....

What I am getting at, you have not heard during the past few days any legal evidence [of] mitigation. What you’ve heard is just some jailhouse evidence to win your sympathy, and that’s all.

You have not heard any evidence of mitigation in this trial.

Id. at 2125. The prosecutor later argued that the conversion evidence was not “really applicable” and did not fit within “any of the eleven factors” set out in the California statute. See *id.* at 2129.

⁴⁶ See *id.* at 2159–60. Of course, whether the jury was in fact misled by the prosecutor’s argument is unknowable. The California Supreme Court held that it probably was not. See *People v. Payton*, 839 P.2d at 1048 (concluding, based upon the entire record of the penalty phase, that it was not “reasonably likely that the jurors believed the law required them to disregard defendant’s mitigating evidence”). The Ninth Circuit disagreed, finding a “reasonable likelihood that, as a result of the prosecutor’s legally erroneous arguments and the court’s failure to correct the arguments with proper jury instructions, the jury did not consider and give effect to the post-crime mitigating evidence of Payton’s religious conversion and good behavior in prison.” *Payton v. Woodford*, 346 F.3d 1204, 1215, 1216 (9th Cir. 2003) (en banc) (concluding that the California Supreme Court’s decision to the contrary constituted “constitutional error”). Thus, the United States Supreme Court will have the last word.

Third, it is possible that the jury was unwilling to consider the mitigating effect of the conversion evidence because of the vicious and brutal nature of the crime. Common sense tells us that the more vicious and brutal a crime, the more likely the jury is to impose death. And empirical studies confirm that the perceived brutality of the crime is one of the most important factors in a jury's decision to impose the death penalty.⁴⁷ In particular, juries are especially likely to choose death if the killing was "bloody or gory" and if the defendant made the victim "suffer before death."⁴⁸ Indeed, these factors may be so aggravating that they outweigh any mitigating evidence presented by the defense⁴⁹—a particular problem for Payton because his crime was especially bloody and because he raped his victim before (or perhaps while) killing her.⁵⁰

The final possibility is that the jury believed the conversion evidence and considered it as a mitigating factor but found it to be outweighed by other factors. There are, as I see it, two main reasons why the jury could have discounted the conversion evidence. For one, the jury could have seen the conversion evidence through the same utilitarian light that the Supreme Court viewed the post-offense evidence in *Skipper*. There, the court found the post-offense evidence to be mitigating not because it lessened Skipper's "culpability," but because it suggested that he would "not pose a danger if spared (but incarcerated)."⁵¹ Viewed in this light, Payton's conversion evidence becomes almost trivial. Indeed, assuming that the California prison system is competent, Payton will be incapacitated from inflicting future harm, regardless of whether he has found God.⁵² Put another way, the simple fact that a defendant is likely to

⁴⁷ See Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1538, 1541, 1555–56 (1998) (reporting the results of the Capital Juror Project in South Carolina, which interviewed 153 jurors who sat in forty-one capital murder cases).

⁴⁸ See *id.* at 1555.

⁴⁹ See, e.g., Theodore Eisenberg, Stephen P. Garvey & Martin T. Wells, *But Was He Sorry? The Role of Remorse in Capital Sentencing*, 83 CORNELL L. REV. 1599, 1609–14 (1998) (describing an empirical study finding that jurors who believe that a murder was "vicious" were less likely to consider remorse (an otherwise important mitigating factor), indicating that "jurors simply don't care about remorse if they consider the crime bad enough").

⁵⁰ The prosecutor made this argument explicitly. After detailing the gruesome particulars of Pamela Montgomery's death by stabbing, presumably while she was being raped, the prosecutor concluded: "For what the defendant did to Mrs. Montgomery, he deserves the death penalty, and there is nothing that I could think of that could conceivably mitigate this type of murder." Penalty Phase Transcript, *supra* note 7, at 2126–29.

⁵¹ See *Skipper v. South Carolina*, 476 U.S. 1, 5 (1985).

⁵² Ironically, contemporary society's success in safely and permanently incarcerating dangerous killers provided at least some of the impetus for the Catholic Church's recent shift in thinking about the death penalty. See JOHN PAUL II, ENCYCLICAL LETTER *EVANGELIUM VITAE* ¶ 56 (1995) ("[P]unishment . . . ought not go to the extreme of executing the offender except in

“refrain[] from assaulting anyone in prison” says little about the “important and legitimate interests in retribution and deterrence” that “provide the necessary justification for imposing the death penalty.”⁵³

Alternatively, and importantly for my purposes, the jury may have believed the conversion evidence and may have considered it relevant to Payton’s desert (i.e., not simply relevant to his future dangerousness), but still found it an insufficient reason to spare his life. If so, the likely reason is that Payton’s religious conversion—at least as presented to the jury—was not coupled with remorse for his crime. The importance of a defendant’s remorse in capital sentencing is well documented.⁵⁴ Empirical studies of capital juries have demonstrated that a defendant’s remorse (or lack of remorse) is one of the single most important factors in the jury’s sentencing decision.⁵⁵ As one study of California jurors concluded:

The interviews of jurors who served on a jury that imposed a sentence of death (“death jurors”) strongly corroborated earlier findings that the defendant’s degree of remorse significantly influences a jury’s decision to impose the death penalty. Jurors not only identified the perceived degree of the defendant’s remorse as

cases of absolute necessity: in other words, when it would not be possible otherwise to defend society. Today however, as a result of steady improvements in the organization of the penal system, such cases are very rare, if not practically non-existent.”); Thomas C. Berg, *Religious Conservatives and the Death Penalty*, 9 WM. & MARY BILL RTS. J. 31, 40–42 (2000) (noting that the “longstanding teaching” of the Catholic Church “that the death penalty was legitimate” has “changed quite dramatically in the last thirty years,” crystallizing in *EVANGELIUM VITAE*, which “appears to condemn capital punishment as unnecessary in any advanced Western society where a secure term of life imprisonment is possible”). For a criticism of this shift away from “retribution as the primary goal of punishment,” see Joseph L. Falvey, Jr., *Crime and Punishment: A Catholic Perspective*, 43 CATH. LAW. 149, 155 (2004).

⁵³ *Skipper*, 476 U.S. at 13, 15 (Powell, J., concurring). The three concurring justices in *Skipper* argued that the minimal probative value of post-offense prison conduct removed it from “those factors that are central to the fundamental justice of execution”:

Society’s interest in retribution can hardly be lessened by the knowledge that a brutal murderer, for self-interested reasons, has been a model of deportment in prison while awaiting trial or sentence. Nor is society’s important interest in deterrence served by allowing such a murderer to avoid the death penalty by following his counsel’s advice to behave himself in a tightly controlled prison environment.

Id. at 13, 14.

⁵⁴ See Michael A. Simons, *Retribution for Rats: Cooperation, Punishment, and Atonement*, 56 VAND. L. REV. 1, 38–40 (2003) (discussing evidence of role that remorse plays in capital sentencing).

⁵⁵ See Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 CORNELL L. REV. 1557, 1559–60 (1998) (study based on interviews of jurors from thirty-seven capital cases tried during the years 1988–92 in California); Eisenberg et al., *supra* note 49, at 1600–01 (study based on interviews of over 150 jurors from forty-one capital juries in South Carolina, including jurors from each of the state’s capital cases between 1986 and mid-1993).

one of the most frequently discussed issues in the jury room during the penalty phase, but the topic also pervaded the interviews themselves. Overall, 69% of the death jurors who participated in the study (fifty-four of seventy-eight jurors) pointed to lack of remorse as a reason for their vote in favor of the death penalty. Many of those jurors cited it as the most compelling reason for their decision. Moreover, it was a theme that arose in every one of the death cases; at least one interviewed juror in each of the nineteen cases raised lack of remorse as a factor that had influenced his decision to sentence the defendant to death.⁵⁶

The study further observed that for many defendants, a lack of remorse was the difference between life and death:

Given the great importance that the death jurors placed on the defendant's remorselessness, it is not surprising that many jurors said that if the defendant had made some showing of remorse they might have switched their votes from death to life.

. . .

In thirteen of the nineteen death cases, at least one juror explicitly insisted that he would have voted for life rather than death had the defendant shown remorse.⁵⁷

The importance that capital juries place on remorse⁵⁸ is consistent with the role remorse plays in popular culture. As Austin Sarat has observed, popular culture "gives a central role to accepting responsibility

⁵⁶ Sundby, *supra* note 55, at 1560; *see also* Eisenberg et al., *supra* note 49, at 1600 (concluding that the defendant's perceived remorse or lack of remorse was a significant factor in jurors' sentencing decisions, so long as the jurors did not think the crime was especially "vicious").

⁵⁷ Sundby, *supra* note 55, at 1565.

⁵⁸ Remorse is relevant in non-capital sentencing as well. In their influential study of white collar crime sentencings, Wheeler, Mann, and Sarat found that "it is important for many judges that defendants recognize the gravity of their offense, accept the blame for their misdeeds, and express remorse or contrition for them." *See* STANTON WHEELER, KENNETH MANN & AUSTIN SARAT, *SITTING IN JUDGMENT: THE SENTENCING OF WHITE-COLLAR CRIMINALS* 115-18 (1988) (recounting interviews with several federal judges who indicated the importance of remorse and contrition as a sentencing consideration, and not only in white-collar cases); *see also* Scott v. United States, 419 F.2d 264, 282 (D.C. Cir. 1969) (Leventhal, J., concurring) ("There is a natural, and I believe sound, disposition to adjust sanctions when an offender admits his responsibility . . . I dare say that many judges, possibly the overwhelming majority, respond in this way . . ."); United States v. Torres, No. 84 CR 583, 1987 WL 15173, at *2 (N.D. Ill. July 24, 1987) ("Remorse is of course a factor to be taken into account in the sentencing process . . ."); Austin Sarat, *Remorse, Responsibility, and Criminal Punishment: An Analysis of Popular Culture* 168, in *THE PASSIONS OF LAW* (Susan Bandes ed., 1999) ("Traditionally, law has encouraged remorse by rewarding it."); Robbins, *supra* note 37, at 1141 & n.143 (observing that "in almost every jurisdiction an expression of remorse for a violation of criminal law is treated as a mitigating circumstance" and citing numerous cases).

and expressing remorse in representations of crime and punishment.”⁵⁹ As one example, Sarat points to the film *Dead Man Walking*, which, he argues, dramatically and effectively reaffirms the centrality of remorse in our judgment of the wrongdoer’s character and, by extension, his desert.⁶⁰ Similar treatments of remorse in popular culture abound.⁶¹

Not surprisingly, prosecutors and defense attorneys are acutely aware of the important mitigating (and aggravating) effect of remorse.⁶² 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.⁶³ 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.”⁶⁴

Notwithstanding all the evidence of his religious conversion, Payton presented little evidence of remorse and no evidence that he accepted responsibility for his actions. Payton himself never testified, either in the guilt phase or the penalty phase.⁶⁵ And although one of Payton’s witnesses

⁵⁹ See Sarat, *supra* note 58, at 171.

⁶⁰ In Sarat’s probative analysis, the central dramatic tension of *Dead Man Walking* involves the efforts of the film’s protagonist, Sister Helen Prejean, to get a death row inmate, Matthew Poncelet, to accept responsibility for his part in a brutal double murder. See *id.* at 172–83. Poncelet eventually does accept responsibility and becomes genuinely remorseful on the eve of his execution, which sets the stage for the ultimate question posed by the film: Having committed a brutal murder and then repented, does Poncelet “deserve” to be executed? *Id.*

⁶¹ See *id.* at 171 (“Popular culture representations of crime and punishment often are centrally tales of responsibility and remorse.”).

⁶² See *id.* at 1558 & n.1 (noting that a “study of prosecutors’ closing arguments in favor of a death sentence concluded that ‘whenever possible, prosecutors emphasized the defendant’s apparent lack of remorse’ ” (quoting Mark Costanzo & Julie Peterson, *Attorney Persuasion in the Capital Penalty Phase: A Content Analysis of Closing Arguments*, J. SOC. ISSUES, Summer 1994, at 125, 137)); Eisenberg et al., *supra* note 49, at 1606 & n.25 (citing Dennis N. Balske, *New Strategies for the Defense of Capital Cases*, 13 AKRON L. REV. 331, 356 (1979) (“ ‘It is . . . important that the client, where appropriate, express remorse, both for the victim and the victim’s family.’ ”); Phyllis Brown, *Testimony of “Mitigating Circumstances”: What Purpose Does It Serve?*, FED. LAW., Sept. 1997, at 5 (“Common wisdom is that a show of remorse may result in mitigation.”)).

⁶³ See Sundby, *supra* note 55, at 1574–96 (analyzing in some detail the tension between protestations of innocence in the guilty phase and expressions of remorse in the penalty phase).

⁶⁴ *Id.* at 1586. “Without any prior acceptance, jurors often view statements of regret that are first made during the penalty phase as disingenuous attempts to avoid a death sentence after the jury already has convicted him of capital murder.” *Id.* at 1586–87.

⁶⁵ Interestingly, one of the defense witnesses may have inadvertently revealed to the jury that Payton was undecided about testifying during the penalty phase. On cross-examination of a defense witness during the penalty phase, the prosecutor asked the witness about a conversation she had with Payton after the guilty verdict but before the penalty phase:

Q: Did he talk to you about testifying?

(his pastor) did testify that he “sensed a great remorse and regret” in Payton, he pointedly did not testify that Payton felt remorse for killing Pamela Montgomery. Instead, the pastor testified that Payton felt remorse “for the life that he had – the things that he had done.”⁶⁶ Payton’s other witnesses, by emphasizing how Payton was focused on the future and on developing his Christian “ministry,” may have only reinforced the jury’s view that Payton was neither remorseful nor particularly concerned with what he had done to Pamela Montgomery.⁶⁷ Similarly, in the penalty phase summation, Payton’s lawyer never argued that Payton was remorseful for his crimes.⁶⁸ Indeed, defense counsel did not even use the religion conversion evidence to argue that Payton was in some way a “new man.”⁶⁹ Instead, defense counsel used the conversion evidence only to argue that Payton “can play a productive role in a lifetime prison setting.”⁷⁰

By not accepting responsibility for killing Pamela Montgomery, Payton may have missed his best opportunity to avoid the death verdict. It is, of course, impossible to know what would have happened had Payton convinced the jury that he was not just converted but also remorseful, not

A:He didn’t know whether he was testifying or not.

Q:No, whether you would testify.

Penalty Phase Transcript, *supra* note 7, at 1964.

⁶⁶ *Id.* at 1948 (testimony of John O. Kirk).

⁶⁷ *See, e.g., id.* at 1959 (testimony of Barbara Seglie that as a result of Payton’s focus on his bible studies and prison ministry “he’s kind of taken his mind off the problem situation of the trial”); *id.* at 1964 (testimony of Barbara Seglie that, when she spoke with Payton after the guilty verdict, “he didn’t dwell on the verdict” because he was “focused in on the future of the [ministry] work”); *id.* at 2017 (testimony of Payton’s mother that “he’s totally immersed in” being “an instrument of the Lord” and “doesn’t think of anything else”).

⁶⁸ Indeed, the defense lawyer even avoided expressly admitting that Payton was guilty. For example, in arguing that “the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance,” CAL. PENAL CODE § 190.3(d) (Deering 1985), defense counsel used a passive construction that avoided naming Payton as the killer. *See* Penalty Phase Transcript, *supra* note 7, at 2145 (“I don’t see how anybody can reach the conclusion that this stabbing death was a result of anything other than (snapping fingers) some kind of a psychiatric disorder that manifested itself under pressure at the time.”); *id.* at 2147 (“[A]sk yourself whether or not the acts involved in the Pensinger home . . . are the acts of a rational person . . .”). Defense counsel’s awkward use of the passive voice was even more glaring when he discussed Payton’s stabbing of Patricia Stone:

Certainly, the Stone case, I think illustrates even better than the current one the irrationality of the acts: asleep in bed, having had sex, she’s awakened, she’s threatened with a knife, she says, “come on, cut it out,” or, “get out of here,” something like that; and for no reason at all, no reason at all is stabbed.

See id. Defense counsel’s reluctance to concede that Payton was the killer is puzzling, given that the sole defense seems to have been a lack of intent. *See supra* notes 6–7 and accompanying text (discussing defense attorney’s argument that perpetrator must have suffered from a mental defect).

⁶⁹ *See infra* notes 94–95 and accompanying text.

⁷⁰ Penalty Phase Transcript, *supra* note 7, at 2154.

just redeemed but also repentant. But the empirical study of capital juries in California provides a clue. In one of the cases studied, the defendant had raped an acquaintance's girlfriend, then "took the acquaintance and his girlfriend hostage, eventually killing the acquaintance without any provocation."⁷¹ At trial, the defendant admitted his guilt and expressed his remorse. While the study found that most juries are quite skeptical of such statements of remorse, this jury believed the defendant's claim of remorse because it was accompanied by a sincere "religious transformation."⁷² Like Payton, this defendant had been in prison for well over a year between arrest and trial, during which time he had become "very religious."⁷³ And like Payton, this defendant called two prison ministers in the penalty phase who testified to his conversion and described how he had "become an active member of the prison's religion program."⁷⁴

Payton, then, was particularly well positioned to convince the jury that he was genuinely remorseful. There was little doubt about the depth and sincerity of his religious conversion: it was attested to by seven witnesses, corroborated by numerous concrete acts in prison, and not seriously disputed by the prosecution. Assuming the jury believed the conversion evidence (and there is no reason to think it did not), the jury likely would have been receptive to an expression of remorse. Without remorse, however, the jury may have felt that the conversion was incomplete. Without a repentant acceptance of responsibility, the jury may have felt that Payton's religious re-birth was meaningless. And the jury may have been right.

C. *The Moral Relevance of Payton's Conversion*

Determining whether Payton's religious conversion is morally relevant first requires identifying the moral justification for the death penalty. Traditional punishment theory provides different possible justifications for executing an offender: utilitarian notions of incapacitation and deterrence, and retributive notions of just deserts.⁷⁵ Whether or not these theories in fact justify the death penalty, either in general or for any particular defendant, is well beyond the scope of this essay. Instead, I will take the various justifications at face value, and weigh Payton's conversion against them.

⁷¹ Sundby, *supra* note 55, at 1572.

⁷² *Id.* The jurors also reported finding the defendant's demeanor to be convincing. *See id.*

⁷³ *Id.*

⁷⁴ Scott E. Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 VA. L. REV. 1109, 1148 (1997).

⁷⁵ *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 2.03 (3d ed. 1995).

The most obvious relevance of Payton's conversion is under utilitarian theory because it speaks to his future dangerousness.⁷⁶ By "commitment of his life to the Lord," Payton is presumably committing himself to live by gospel values as a "selfless" servant of God.⁷⁷ Put more simply, if Payton obeys the Ten Commandments, he won't kill again. This is essentially the use to which Payton's lawyer put the conversion evidence.⁷⁸ From a utilitarian perspective, however, Payton's lack of future dangerousness provides little reason to spare him the death penalty. Undoubtedly, Payton's conversion is powerful evidence that it is not necessary to execute him to protect society. But incapacitation is a weak moral justification for the death penalty in the first place.⁷⁹ There is no reason to think that the California prison system cannot keep Payton imprisoned and cannot keep him from committing murder inside prison.⁸⁰ Moreover, from the perspective of general deterrence, sparing Payton's life may actually be counter-utilitarian.⁸¹

⁷⁶ See *supra* I.C. (summarizing defense witnesses' testimony regarding the defendant's conversion).

⁷⁷ See Penalty Phase Transcript, *supra* note 7, at 1949, 1954.

⁷⁸ See *id.* at 2151–54 (arguing that Payton's conversion will allow him to devote his life to the ministry and help others in the process).

⁷⁹ See *supra* note 52 (discussing the official stance of the Catholic Church regarding the death penalty); Dan Markel, *State, Be Not Proud: A Retributivist Defense of the Commutation of Death Row and the Abolition of Execution*, 40 HARV. C.R.-C.L. L. REV. (forthcoming 2004) (manuscript at 78–79, on file with the author) ("[T]he advent of the SuperMax security prison has the capability to detain offenders and dramatically reduce if not eliminate the corresponding threat to prison guards or other inmates because in that environment, the prisoner can live his entire existence in isolation of human contact.").

⁸⁰ That is not to say that juries do not put weight on their evaluation of a defendant's future dangerousness. Studies have shown that juries consistently consider future dangerousness to be an important factor, even in states like California where the alternative to death is life without parole. See Sundby, *supra* note 55, at 1590. Typically, jurors simply do not believe that "without parole" means what it says. See Blaine LeCesne, *Tipping the Scales Toward Death: Instructing Capital Jurors on the Possibility of Executive Clemency*, 65 U. CIN. L. REV. 1051, 1064–66 (1997) (discussing the common juror misconception that a life sentence does not necessarily mean "without parole" and the resulting juror hesitation to impose life sentences for fear defendant may be released).

⁸¹ See *Skipper v. South Carolina*, 476 U.S. 1, 13–14 (1986) (Powell, J., concurring) ("Nor is society's important interest in deterrence served by allowing such a murderer to avoid the death penalty by following his counsel's advice to behave himself in a tightly controlled prison environment."). Of course, whether the death penalty acts as a deterrent is an open (and hotly debated) question. Most empirical studies have concluded that the death penalty does not deter homicides. See Alan W. Clarke, Eric Lambert & Laurie Anne Whitt, *Executing the Innocent: The Next Step in the Marshall Hypotheses*, 26 N.Y.U. REV. L. & SOC. CHANGE 309, 341–42 (2000–01) (summarizing findings of social scientists regarding the death penalty and deterrence). *But see* Hashem Dezhbakhsh, Paul H. Rubin, and Joanna M. Shepherd, *Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data*, 5 AM. L. & ECON. REV. 344, 344 (2003) (finding that "each execution results, on average, in eighteen fewer murders – with a margin of error of plus or minus ten").

The retributive relevance of Payton's conversion is more complex. Retributive notions of just deserts probably provide a more compelling moral justification for the death penalty than utilitarian notions of incapacitation or deterrence.⁸² Whether Payton in fact deserves to die for his crime is, of course, a matter about which theorists can disagree.⁸³ But the jury most likely concluded that he did.⁸⁴ So the question then becomes whether his conversion is morally relevant to his desert. In other words, if Payton deserves death based on what he did to Pamela Montgomery, does he somehow deserve something less than death based on his subsequent religious conversion?

Traditional retributive theory would argue that Payton's post-offense conduct is irrelevant to his just deserts. Because retributivism generally justifies punishment by "looking backward" at the offender's culpable choice to commit a crime,⁸⁵ it typically considers as mitigating only those events that happened before the crime.⁸⁶

⁸² See *Ring v. Arizona*, 536 U.S. 584, 614 (2002) (Breyer, J., concurring) ("I am convinced . . . that retribution provides the main justification for capital punishment . . ."); Markel, *supra* note 79 (observing (albeit critically) that "it is not uncommon for courts and commentators to justify the death penalty in the language of retributive justice"); Robbins, *supra* note 37, at 1130 ("Retributive justice, more than any other theory of punishment, is central to discussions of the death penalty. Neither of the other two major vying theories, deterrence nor rehabilitation, sufficiently explains why we sometimes put prisoners to death."); Carol S. Steiker & Jordan M. Steiker, *Abolition in Our Time*, 1 OHIO ST. J. CRIM. L. 323, 335 (2003) ("The central justification for the death penalty in the modern era has been retribution.").

⁸³ Compare, e.g., Ernest van den Haag, *The Ultimate Punishment: A Defense*, 99 HARV. L. REV. 1662, 1669 (1986) ("[Execution] is also the only fitting retribution for murder I can think of."), with Markel, *supra* note 79 (arguing, from retributive principles, for abolition of the death penalty).

⁸⁴ As the prosecutor argued in his penalty phase summation:

The defendant in this case deserves the death penalty not for his felony priors, not for stabbing Mrs. Stone, not even for stabbing Mrs. Pensinger 40 times and her son 23 times. Those acts may operate to seal the defendant's fate and to tell us what kind of person he is. But what he deserves the death penalty for is what he did to Mrs. Montgomery.

Penalty Phase Transcript, *supra* note 7, at 2126.

⁸⁵ DRESSLER, *supra* note 75, at § 2.03[C][1]; see also Stephen P. Garvey, "As the Gentle Rain from Heaven": Mercy in Capital Sentencing, 81 CORNELL L. REV. 989, 1012 (1996) ("[R]etributivism is deontological and backward-looking. In contrast to forward-looking consequentialist approaches that justify punishment in the name of what might be, retributivism justifies punishment in the name of what has been. Punishment strictly predicated on moral desert is blind to the future.").

⁸⁶ Under this version of retributivism, a defendant is not judged solely on his act (the crime); his background can also be relevant but only to the extent it informs our judgment of his decision to commit the crime (i.e., the extent to which the crime was the result of his free will).

Not all retributive theorists, however, are willing to so limit retributivism.⁸⁷ Jeffrie Murphy, for example, has attempted to account for post-offense events in a retributive theory by distinguishing between what he calls “grievance retributivism” and “character retributivism.”⁸⁸ According to Murphy, “grievance retributivism” posits that “punishment is deserved for responsible wrongful acts” and the “wrongfulness” of conduct at one time cannot be affected by subsequent changes in character.⁸⁹ Under “character retributivism,” on the other hand, “one’s deserts are a function not merely of one’s wrongful acts, but also of the ultimate state of one’s character.”⁹⁰

Murphy’s account of character retributivism—while authorizing the consideration of post-offense conduct—does not entirely explain how a defendant’s character (or change in character) is supposed to affect punishment.⁹¹ Other theorists, however, have offered more extended defenses of the relevance of post-offense character changes in determining desert. B. Douglas Robbins, for example, has used character retributivism to argue that an “authentic ethical transformation” warrants commutation of a death sentence.⁹² Stephen Garvey has put forth an even more expansive theory in which sentencing is reconceptualized, not as

⁸⁷ See, e.g., John Finnis, *Retribution: Punishment’s Formative Aim*, 44 AM. J. JURIS. 91, 97 (1999) (refusing to “concede that retribution is ‘purely backward-looking,’ as is so often said”).

⁸⁸ Jeffrie G. Murphy, *Repentance, Punishment, and Mercy*, in REPENTANCE: A COMPARATIVE PERSPECTIVE 143, 147 (Amitai Etzioni & David E. Carney eds., 1997).

⁸⁹ *Id.* at 149.

⁹⁰ *Id.*; see MICHAEL MOORE, PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW 104–52 (1997); JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 88–110 (1988) (defending character retributivism).

⁹¹ For example, Murphy suggests that repentance “might well play a crucial role” in determining desert. In explaining why repentance might matter, however, Murphy notes only that “a repentant person seems to reveal a better character than an unrepentant person.” Murphy, *supra* note 88, at 151. Indeed, Murphy has since expressed doubts about using character retributivism as the basis for determining desert. Jeffrie G. Murphy, *Moral Epistemology, the Retributive Emotions, and the “Clumsy Moral Philosophy” of Jesus Christ*, in THE PASSIONS OF LAW 154 (Susan A. Bandes ed., 1999). As Douglas Robbins explains, however, Murphy’s concerns about basing punishment on character retributivism are largely pragmatic ones. For example, Murphy wonders whether we are capable of knowing another’s character and, if so, whether we are capable of judging that character without hypocrisy and hubris. Robbins, *supra* note 37, at 1124–29. As Robbins points out, however, these concerns are not particular to character retributivism. *Id.* at 1125–28. Moreover, those concerns are less forceful when the character evaluation involves a complete religious conversion—both because the conversion is more demonstrable than most matters of the mind and because the relevance is only to mitigate, not aggravate, punishment.

⁹² See Robbins, *supra* note 37. In what Robbins terms the “Transformation Thesis,” he argues “for the dejustification of the death penalty” when a combination of “[g]uilt, remorse, and penance” change a defendant’s character “from empty and hollow to compassionate and empathic.” *Id.* at 1118.

retributive punishment (an end in itself), but rather as a means to secular “atonement.”⁹³

A religious conversion fits neatly into these theories: whether based on Robbins’ model of an “ethical transformation” or Garvey’s model of “atonement,” the idea is the same: by going through a process of expiation, the defendant becomes a “new man,” one who is in a position to reconcile with society.⁹⁴ Central to both theories is that the defendant changes himself through suffering—first, by enduring the emotional suffering of guilt and remorse, then, after repenting, by enduring the physical suffering of corporal punishment as penance.⁹⁵ Importantly, it is not enough that the defendant simply “change” his character. For example, the wrongdoer who successfully cures a substance abuse problem

⁹³ See Stephen P. Garvey, *Punishment as Atonement*, 46 UCLA L. REV. 1801 (1999). Under Garvey’s model, atonement has two basic stages: expiation (the process by which the wrongdoer atones for his wrong) and reconciliation (the process by which the victim forgives the wrongdoer and completes the wrongdoer’s reconciliation with the community). Expiation itself has four steps: repentance, apology, reparation, and penance. *Id.* at 1804. In his division of atonement into expiation and reconciliation, Garvey follows the moral philosopher and Christian theologian Richard Swinburne. See *id.* at 1804; RICHARD SWINBURNE, RESPONSIBILITY AND ATONEMENT 81 (1989) (“For perfect removal of guilt, then, the wrongdoer must make atonement for his wrong act, and the victim must forgive him. . . .”). For further exploration’s of Garvey’s theory, see Simons, *supra* note 54, at 41–44 (applying Garvey’s theory of atonement to cooperating witnesses); Samuel J. Levine, *Teshuva: A Look at Repentance, Forgiveness and Atonement in Jewish Law and Philosophy and American Legal Thought*, 27 FORDHAM URB. L.J. 1677, 1678–80 (2000) (comparing Garvey’s theory of atonement with atonement in Jewish thought and tradition); Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 102 (2004) (arguing that remorse and apology should be encouraged in the criminal law, not only because they affect the amount of punishment a defendant deserves or requires, but also because they can be “constructive, positive measures to heal offenders, victims, and communities”).

⁹⁴ Robbins explains his conception of guilt, remorse, and penance within a retributive framework as follows:

Guilt, it turns out, is a disassociative emotion that serves as a gateway to remorse, but guilt alone fails to catalyze character transformation. Remorse, by contrast, serves as an expression of the rejection of the wrongdoer’s bad act and the bad character that made such an act possible. Transformation begins here when remorse, harnessing emotional remonstrative force, breaks down the old self and aids in reconstructing a new one bearing a moral perspective. Penance finishes the process by exhausting guilt and remorse to make way for the newly autonomous, ethically transformed.

Robbins, *supra* note 37, at 1134. Robbins also emphasizes the idea of “self-forgiveness” in the transformation process. *Id.* at 1149–50. Garvey provides a different analysis, one that he says goes beyond retribution in aspiring to a higher goal—reconciliation with the victim and society. See Garvey, *supra* note 93, at 1810, 1827–29. For Garvey, “[r]epentance, apology, and reparation are necessary” and penance (which takes the form of punishment) is the final step for the defendant toward this reconciliation. *Id.* at 1823.

⁹⁵ For Robbins, this transformation is an end in itself and one that diminishes the defendant’s desert. Robbins, *supra* note 37, at 1140–43, 1150–51. For Garvey, the transformation is a necessary step on the path to a greater (and admittedly idealistic) goal: reconciliation. Garvey, *supra* note 93, at 1814, 1838–39.

will have changed in important ways, as will the schizophrenic who successfully treats his illness with antipsychotic drugs. While both the clean addict and the medicated schizophrenic may be “different” (and in ways that make them much less likely to repeat their offense), they have not undergone the kind of “ethical transformation” or expiation that meaningfully affects their desert because the change was not accomplished through repentance and penance.

Repentance is the necessary first step for two reasons. First, true repentance exacts a punishment from the defendant—the remorseful defendant suffers in a way that the recovered addict or medicated schizophrenic does not.⁹⁶ This extra-legal suffering, if significant enough, will meaningfully reduce the defendant’s desert.⁹⁷ Second, repentance allows the defendant to disassociate himself “not only from the bad act, but from the bad actor and the character that inspired the act.”⁹⁸ As Jeffrie Murphy explains:

Repentance is the remorseful acceptance of responsibility for one’s wrongful and harmful actions, the repudiation of the aspects of one’s character that generated the actions, the resolve to do one’s best to extirpate those aspects of one’s character, and the resolve to atone or make amends for the harm that one has done.⁹⁹

Paradoxically, by accepting responsibility for his wrongdoing, the repentant defendant actually transforms himself into a meaningfully different person, one who deserves less punishment.¹⁰⁰

⁹⁶ See Robbins, *supra* note 37, at 1141 (“Remorse exacts a punishment within the wrongdoer, much like guilt, but with greater force and of a quality that can have meaning in a retributive scheme.”); Sarat, *supra* note 58, at 169 (describing remorse as self-punishment that includes sorrow and empathic pain).

⁹⁷ See Murphy, *supra* note 88, at 157:

We normally expect the proper amount of suffering to be administered by the state through legal punishment. However, if there is reason to believe that the individual has already experienced a significant amount of relevant suffering through nonlegal channels, it is not unreasonable to suggest that the suffering he experiences at the hands of the state be reduced to that degree—perhaps eliminated entirely in those cases where we are inclined to say “he has suffered enough.”

Id.; see also Simons, *supra* note 54, at 31–33 (arguing that collateral suffering lessens the amount of legal punishment that must be imposed on a defendant).

⁹⁸ Robbins, *supra* note 37, at 1140; see MURPHY & HAMPTON, *supra* note 90, at 26 (suggesting that true repentance is “the clearest way in which a wrongdoer can sever himself from his past wrong”).

⁹⁹ Murphy, *supra* note 88, at 147; see Garvey, *supra* note 93, at 1814.

¹⁰⁰ See Murphy, *supra* note 88, at 157 (“The repentant person has a better character than the unrepentant person, and thus the repentant person . . . simply deserves less punishment than the unrepentant person.”); Sarat, *supra* note 58, at 170 (“[R]emorse involves a change of heart, an alteration of character.”); Simons, *supra* note 54, at 40 (“[Repentance] represents a changing of the self, a disassociation from the blameworthy self, that transforms the defendant into someone

The second essential step in the process of character transformation is penance. Penance is the logical and necessary result of repentance, the outward manifestation of the penitent's inner suffering.¹⁰¹ The defendant who is truly repentant will want to undergo penance because, through that suffering, he can replace the "self-immolation" of repentance with "self-forgiveness."¹⁰² He can also, through his penance, demonstrate his understanding of his victim's moral worth—a value that he denied through his wrongdoing.¹⁰³ Importantly, penance is also concrete. It is an outward manifestation of the ways in which the defendant has changed through suffering.¹⁰⁴

Having transformed himself through repentance and penance, having atoned for his wrong through expiation, the defendant can compellingly argue that he deserves less punishment than a similarly situated unrepentant wrongdoer. How much less punishment the defendant deserves is difficult, if not impossible, to measure. But in the context of the death penalty, the relevant measurement is readily apparent: enough that the otherwise deserved sentence of death should be mitigated to life in prison.

While this sort of ethical transformation need not be religious,¹⁰⁵ a religious conversion is a particularly appropriate vehicle for it.¹⁰⁶ On a

who is not just less dangerous, but who is 'better.'"). For an extended discussion of how becoming a "new man" affects desert, see Robbins, *supra* note 37, at 1160–62 (concluding that "to the extent that the new man really is a different person, he should not be punished, in full, for the bad acts of the person he once was.").

¹⁰¹ Garvey, *supra* note 93, at 1819 ("[P]enance is a self-imposed punishment, i.e., self-imposed hardship or suffering, which completes the process of expiation and finally rids the wrongdoer of his guilt.").

¹⁰² Robbins, *supra* note 37, at 1148.

¹⁰³ See Garvey, *supra* note 93, at 1822–23.

¹⁰⁴ See Robbins, *supra* note 37, at 1150–51 ("[P]enance serves as an excellent marker of a wrongdoer having experienced remorse.").

¹⁰⁵ As Garvey has noted: "Accounts of punishment that emphasize ideas like expiation, reconciliation, and atonement but that ignore the religious resonance of those ideas are less than candid. But, as I hope to show, atonement makes perfectly good sense independent of religion. You don't need religious faith to find atonement appealing." Garvey, *supra* note 93, at 1803. Garvey derives his "secular account of atonement" by shifting the goal from reconciliation with God to reconciliation with "one's community and its members." *Id.* at 1810.

¹⁰⁶ Interestingly, while not all recovered addicts will experience an "ethical transformation," see *supra* notes 92–95 and accompanying text, those who recover through the "twelve step" program popularized by such organizations as Alcoholics Anonymous may. As I have observed in another context, "former substance abusers who had embraced the 'twelve-step' program" can be particularly effective as cooperating witnesses "precisely because they had experienced a process that looked very much like expiation: they had accepted responsibility for their wrongs, they had apologized to those they had wronged, and they had sought to make amends for their wrongs." Simons, *supra* note 54, at 50 n.223. And while the "twelve steps" are explicitly

practical level, religion provides a framework through which a defendant can express his atonement in ways that a jury can understand. On a theoretical level, atonement has obvious religious resonance. Our fullest and most forceful explanations of atonement have come from theologians.¹⁰⁷ St. Anselm put forth a theory of atonement almost a millennia ago.¹⁰⁸ Atonement also played a central role in St. Thomas Aquinas's vision of desert and punishment.¹⁰⁹ And atonement remains important in contemporary religious thinking about corporal punishment.¹¹⁰

Having thus explained the moral relevance of a religious conversion, it is easy to see where Payton's conversion (or, at least, the evidence of his conversion presented to the jury) fell short. Not only did Payton never

spiritual (relying on "a Power greater than ourselves"), they are decidedly non-religious. See BILL WILSON, *TWELVE STEPS AND TWELVE TRADITIONS* 25 (29th ed. 1985).

¹⁰⁷ See Garvey, *supra* note 93, at 1808–09 (detailing atonement's religious roots in Christianity). For similar perspectives of other religious traditions on atonement, see a series of essays in *REPENTANCE: A COMPARATIVE PERSPECTIVE* (Amitai Etzioni & David E. Carney eds., 1997): Guy L. Beck, *Fire in the Ātman: Repentance in Hinduism* 76–95; Mahmoud Ayoub, *Repentance in the Islamic Tradition* 96–121; Malcolm David Eckel, *A Buddhist Approach to Repentance*, 122–42. For an additional related perspective, see Levine, *supra* note 93, at 1678–80 (atonement in Jewish thought and tradition).

¹⁰⁸ See St. Anselm, *Cur Deus Homo*, in *SAINT ANSELM: BASIC WRITINGS* 224–25 (S.N. Deane trans., 2d ed. 1962) (1098) (“[C]onsider it settled that, without satisfaction, that is, without voluntary payment of the debt, God can neither pass by the sin unpunished, nor can the sinner attain that happiness, or happiness like that, which he had before he sinned . . .”). Anselm's theory became the basis for the “satisfaction theory” of the incarnation. As explained by Garvey:

According to the satisfaction theory, man's original sin—his disobedience to God—dishonors God, because it denies God his due. In failing to give God his due, man becomes indebted to God, who is therefore entitled to just satisfaction. Unfortunately, finite man has nothing capable of discharging his infinite debt to God. God therefore gives up his only Son who, being part man and part God, can pay the debt on man's behalf. Once the debt is paid, man and God are once again at one.

Garvey, *supra* note 93, at 1809.

¹⁰⁹ See Garvey, *supra* note 93, at 1809 n.25; see also Philip L. Quinn, *Aquinas on Atonement*, in *TRINITY, INCARNATION, AND ATONEMENT: PHILOSOPHICAL AND THEOLOGICAL ESSAYS* 153, 153–54 (Ronald J. Feenstra & Cornelius Plantinga, Jr. eds., 1989) (discussing the importance of the satisfaction of sin in Aquinas's view of incarnation and atonement); Eleonore Stump, *Atonement According to Aquinas*, in *PHILOSOPHY AND THE CHRISTIAN FAITH* 61, 64–65 (Thomas V. Morris ed., 1988) (examining Aquinas's understanding of atonement as an integral part of both making satisfaction for past sin and meriting the grace of God).

¹¹⁰ See, e.g., UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, *Responsibility, Rehabilitation, and Restoration: A Catholic Perspective on Crime and Criminal Justice* (Nov. 15, 2000), <http://www.nccbuscc.org/sdwp/criminal.htm> (“Centuries ago, St. Thomas Aquinas taught us that punishment of wrongdoers is clearly justified in the Catholic tradition, but is never justified for its own sake. A compassionate community and a loving God seek accountability and correction but not suffering for its own sake. Punishment must have a constructive and redemptive purpose.”).

express repentance or accept responsibility for his crime,¹¹¹ but, even worse, he seemed (through the arguments of his lawyer) to be trying to avoid responsibility for the crime.¹¹²

A revealing contrast may be drawn by comparing Payton's penalty phase presentation with the efforts of another (more famous) death row inmate to obtain mitigation based on a religious conversion. Karla Faye Tucker had viciously killed Jerry Dean and Deborah Thornton with a pickax during a robbery in 1983.¹¹³ One year later, she was convicted by a Texas jury of capital murder and sentenced to death. During the fourteen years she spent on death row, she underwent a profound religious conversion.¹¹⁴ When Tucker argued that her religious conversion should mitigate her death penalty, she wasn't arguing to the jury at trial, but rather to the Governor on the eve of her execution. In an open letter to then-Governor George W. Bush, Tucker described her conversion in language that made her repentance palpable. Indeed, as Tucker described it, accepting responsibility for her crimes was a central part of her conversion:

[The night I accepted] Jesus into my heart . . . the full and overwhelming weight and reality of what I had done hit me. I realized for the first time what I had really done. I began crying that night for the first time, and to this day tears are a part of my life.

. . .

Even though I did murder Jerry Dean and Deborah Thornton that night and not think anything of it back then, it is now the one thing I regret most in my life and in the frame of mind I am now in it is something that absolutely rips my guts out. I felt the pain of that night, and I feel the pain that goes on every day with others because of what I did that night. I know the evil that was in me then, and I know that what took place that night was so horrible that only a monster could do it. . . . It is not who I am today, and because of who I am today it makes it all the more harder

¹¹¹ See *supra* notes 65–67 and accompanying text.

¹¹² Penalty Phase Transcript, *supra* note 7, at 2145 (defense counsel arguing in penalty phase summation that “this stabbing death was a result of . . . some kind of a psychiatric disorder that manifested itself under pressure at the time”); see also Petitioner's Combined Brief at 8, 31, Payton v. Woodford, 258 F.3d 905 (9th Cir. 2001) (Nos. 00-99000 & 00-99003) (noting that defense counsel made similar argument in penalty phase summation).

¹¹³ Tucker v. State, 771 S.W.2d 523, 525–26 (Tex. Crim. App. 1988); see Paula M. Cooley, *Women's Religious Conversions on Death Row: Theorizing Religion and State*, 70 J. AM. ACAD. RELIGION 699, 700 (2002).

¹¹⁴ See Cooley, *supra* note 113, at 700; Walter C. Long, *Karla Faye Tucker: A Case For Restorative Justice*, 27 AM. J. CRIM. L. 117, 126 (1999) (describing Tucker's conversion and her conduct in prison in detail).

for me to have to think back on that night and after that night, and a lot of things I did while I was not saved.¹¹⁵

Tucker's plea did not persuade Governor Bush,¹¹⁶ but it did persuade many others, including at least one of the jurors who sentenced her to death.¹¹⁷

William Payton's religious conversion may have been just as profound as Tucker's; his good works in prison may have been just as remarkable as hers. But without accepting responsibility for his crimes, without demonstrating his repentance, he could not make the case for the kind of character transformation that would morally lessen his desert.¹¹⁸

¹¹⁵ Cooley, *supra* note 113, at 708 (quoting Karla Faye Tucker, Letter to Gov. George W. Bush and the Texas Board of Pardons (1998)). Tucker's argument for mercy was rooted in the kind of character retributivism posited by Robbins. See Robbins, *supra* note 37, at 1117. For example, one of the prosecutors who supported her plea for executive clemency wrote:

"The Karla Tucker who killed Jerry Dean and Debra Thornton *cannot* be executed by the State of Texas because that person no longer exists. The Karla Tucker who remains on death row is a completely different person who, in my opinion, is not capable of those atrocities . . . If the purpose of the death penalty is to execute an individual solely for a crime they have committed, then Karla Faye Tucker should be executed. However, if the purpose is to execute an individual for what they have done and what they now are, then Karla Faye Tucker should not die."

Long, *supra* note 114, at 121 (quoting Affidavit of Charley A. Davidson, Jan. 5, 1998, at 1).

¹¹⁶ Tucker was executed on February 3, 1998. See Long, *supra* note 114, at 117 n.*.

¹¹⁷ See Long, *supra* note 114, at 121–22 (noting that other supporters included four of her prison guards, the prosecutors who prosecuted her co-defendant, and the families of her victims). Among those not connected with the case who supported Tucker, perhaps the most noteworthy was the conservative Evangelical minister Pat Robertson, who later credited Tucker with fundamentally changing his view of the death penalty. See Rev. Pat Robertson, *Transcript of Speech on Religion's Role in the Administration of the Death Penalty*, 9 WM. & MARY BILL RTS. J. 215, 216–18 (2000). Of course, the broad support Tucker received from those who ordinarily support the death penalty (and the extensive media attention given to her execution) may have been influenced in large part by her gender, race, and physical appearance. See, e.g., Cooley, *supra* note 113, at 701 (arguing that "Tucker's whiteness, her physical attractiveness, [and] her charm" made her appealing to the "[Christian] Right"); Robertson, *supra*, at 217 (describing Tucker as a "beautiful Christian woman," "a lovely spirit," and "absolutely radiant"). For an example of a religious conversion that did persuade jurors to spare a defendant, see the recent case of Oklahoma bombing conspirator Terry Nichols. See Sylvia Moreno, *Nichols Gets 2nd Life Sentence; He Asks for Forgiveness, Offers to Correspond with Victims' Kin*, CHI. TRIB., Aug. 10, 2004, at 10; Tim Talley, *Nichols' Religious Awakening Saved His Life, Lawyers Say*, CHI. SUN-TIMES, June 13, 2004, at 6.

¹¹⁸ I do not mean to suggest that Payton was not (or is not) remorseful. His failure to accept responsibility at trial may have been a tactical decision. It is interesting to note, however, that Payton's recent writings, some of which are available on the web, do not include any expressions of remorse for his crimes. In contrast to Tucker, Payton describes his converted self as free from any sorrow:

Because of [the conversion] my life has been filled with miracles, freedoms, fulfillment and peace. Instead of drowning in sorrow, I swim freely in God's strength and power. Greatest of all, I know the Truth that sets men free no matter where they are or who they may be. That truth is a simple one . . . it's Jesus. In Him is a life

CONCLUSION

My conclusion is both descriptive and normative. The available empirical evidence suggests that a repentant religious conversion is relevant in capital sentencing because juries consider such a conversion to be an important mitigating factor. And whether such a conversion is viewed as an “ethical transformation” or as “atonement,” punishment theory explains why it should be relevant. It is important to emphasize, however, that the conversion mitigates not because it necessarily involves religion but because it involves a repentant acceptance of responsibility and a sincere desire to atone. Religion, of course, is the most likely vehicle through which such a conversion will be expressed.

Considering religious conversions at capital sentencing is not without its own problems. From the jury’s perspective, a conversion can always be faked (though I suspect that juries are quite able to distinguish the sincerely penitent from the superficially pious). From the defendant’s perspective, the conversion evidence could backfire in several different ways: non-religious jurors could be uncomfortable with the overt religiosity of the defendant’s evidence; bigoted jurors could be hostile to the defendant’s religion; or religious jurors could see the conversion as all the more reason to send the defendant to the final judgment.¹¹⁹ Added to these concerns, defense counsel must weigh the potential benefits of accepting responsibility against the certain costs of admitting guilt.

These are, of course, tactical decisions. But the central point remains: an authentic religious conversion is legally, practically, and morally

beyond the scope of our human imagination. He can turn any prison into a paradise, any sentence into freedom, and make any bad man good.

William C. “Bylle” Payton, *Changing the Future*, at www.survivingthe.com/Payton_William.htm (last visited Oct. 15, 2004). Like his counsel’s penalty phase summation, Payton’s writings focus on what he has become, not what he did:

The punishment of isolation from society causes a person to ponder his or her ways. At first we may tend to blame the causes of our imprisonment on family, friends or the neighborhood; but if we are wise we will come to realize it doesn’t matter what or who led us to destruction, but how do we change the course of our life. Just as with the Israelites, this change can come only when we turn our thoughts from the things of the world to being thoughts focused on pleasing God.

William C. “Bylle” Payton, *Choose Life or Death*, at www.survivingthe.com/Payton_William.htm (last visited Oct. 15, 2004). Of course, Payton’s continued public silence about his crimes may still reflect a tactical decision, given the pending legal proceedings.

¹¹⁹ In other words, some jurors may believe that the penance necessary for full atonement requires death (indeed, that the fully repentant defendant should welcome death). Interestingly, one empirical study found that a capital juror’s religion may affect the likelihood that the juror votes for death. See Theodore Eisenberg, Stephen P. Garvey, & Martin T. Wells, *Forecasting Life and Death: Juror Race, Religion, and Attitude Toward the Death Penalty*, 30 J. LEGAL STUD. 277, 279 (2001) (“Jurors who identify themselves as Southern Baptists (almost all of whom are white) are apt to cast their first vote for death.”).

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relevant to capital sentencing, but only if it begins with repentance and culminates in atonement (or at least expiation). If William Payton's religious conversion was that complete, the jury was never told. Payton may have been not just spiritually awakened, but also truly repentant. He may have been not just "born again" in the sense that he had "accepted Jesus," but also a "new man" in the sense that he had transformed his character through empathetic suffering. He may have been not just converted, but atoned. He may have been all these things and he may not have deserved to die. But the jury never knew.

