Honie had sexually molested a minor. We do not know whether the judge would have sentenced him to death had he been uncertain on this additional aggravating factor. It is possible that using a strategy that did not rely on inculpatory statements would have resulted in a more favorable outcome for Mr. Honie, despite the court's determination that the trial strategy was not objectively unreasonable by law.

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Evidence of Mental Retardation in Death Penalty Proceedings: An Application of *Atkins* in Alabama

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U.S. Court of Appeals Ruled That the Lower Court Abused Its Discretion in Denying an Evidentiary Hearing to Determine the Defendant's Intellectual Disability in a Death Penalty Case

In *Burgess v. Commissioner, Alabama Department of Corrections* 723 F.3d 1308 (11th Cir., 2013), the Eleventh Circuit Court of Appeals reversed a federal district court's decision to deny Mr. Burgess an evidentiary hearing on his *habeas corpus* petition claiming that he was intellectually impaired and that the Eighth Amendment to the U.S. Constitution categorically barred his execution pursuant to *Atkins v. Virginia*, 536 U.S. 304 (2002). The Eleventh Circuit ruled that there was insufficient and contradictory information in the record to support the lower court's conclusion that Mr. Burgess did not have an intellectual disability. The court ordered that he be granted an evidentiary hearing to determine whether he was intellectually impaired and therefore not eligible for execution.

Facts of the Case

In 1994, Alonzo Burgess was convicted of capital murder for the killing of his girlfriend and two of her children. During the penalty phase of the trial, the defense relied on the testimony of Dr. John Goff, a neuropsychologist, to present evidence regarding Mr. Burgess's mental health as a mitigating factor. Dr. Goff diagnosed Mr. Burgess with cyclothymic disorder. He indicated that it had been difficult for him to communicate with Mr. Burgess, as he was in a "manically excited state." Dr. Goff testified that he did not conduct intelligence testing. Rather, his testimony as to Mr. Burgess's intellectual functioning was based on the reports of Dr. Shealy, an expert for the defense, and Dr. Maier, an expert for the state. Dr. Shealy administered intelligence testing after Mr. Burgess's arrest, and in his report, concluded that Mr. Burgess was "borderline mentally retarded." Dr. Maier did not report having conducted intelligence testing, but "estimated" that Mr. Burgess's intelligence was "below normal probably in the borderline range, IQ estimate somewhere between 70 and 80" (*Burgess*, p 1313). It was introduced into the record that Dr. Maier further reported that Mr. Burgess "may even be mildly mentally retarded," and that such a finding would be consistent with his "very limited educational and/or vocational achievements" (*Burgess*, p 1313). Mr. Burgess's school records were introduced into evidence and indicated that he had done poorly throughout school. He had to repeat the first grade, was placed in special education, and had dropped out of school after the ninth grade with all failing grades with the exception of one D.

After consideration of the evidence, the jury recommended, by a vote of 8 to 4, that Mr. Burgess be sentenced to life in prison without the possibility of parole. However, the trial court chose not to follow the jury's recommendation and instead sentenced him to death. The Alabama Court of Criminal Appeals affirmed his conviction and sentence. Mr. Burgess sought postconviction relief pursuant to Alabama Rule of Criminal Procedure 32, arguing ineffective assistance of counsel. Mr. Burgess claimed that his defense counsel failed to make an adequate presentation of evidence related to his mental health. Shortly before his Rule 32 hearing was to take place, the U.S. Supreme Court granted *certiorari* in *Atkins*. Mr. Burgess subsequently filed an amendment to his petition, claiming that the Eighth Amendment barred his execution because of his intellectual disability. The trial court denied the petition, and no hearing was held on the *Atkins* claim. The Alabama Court of Criminal Appeals upheld the denial on the

basis of the "finding" that his IQ was between 70 and 80. Other factors on which the conclusion was based included that "Burgess had completed the ninth grade; had completed one year at a training school" and had "worked as a welder while incarcerated in Mississippi" (*Burgess*, p 1314). The Alabama Supreme Court denied *certiorari*.

Mr. Burgess subsequently filed a writ of *habeas corpus* in the Federal District Court for the Northern District of Alabama. He presented an affidavit from Dr. Bryan Hudson, a neuropsychologist. Dr. Hudson conducted intelligence testing producing a full-scale score of 76 on the Wechsler Adult Intelligence Scale-III. After taking into account the standard error of measurement and the Flynn effect, Dr. Hudson concluded that Mr. Burgess's "true IQ would certainly fall in the range of mild mental retardation" (*Burgess*, p 1322). He also stated that based on a review of Mr. Burgess's family and personal history, he "has demonstrated deficits in all three areas of adaptive behavior skills" (*Burgess*, p 1322): conceptual skills, social skills, and practical skills. Further, Dr. Hudson's affidavit indicated that Dr. Goff had not testified to the IQ score of 66 obtained when Dr. Shealy tested the defendant.

The federal district court refused to consider the affidavit or to grant Mr. Burgess an evidentiary hearing. After review of the record, the court found that "Burgess's IQ scores placed him in the category of borderline intellectual functioning or borderline mentally retarded" and that "the Alabama court's finding that Burgess was not mentally retarded is not an unreasonable finding based on the evidence" (*Burgess*, p 1315).

Ruling and Reasoning

The Eleventh Circuit held that it was unreasonable to make a determination about whether the defendant had an intellectual disability on the basis of an estimated IQ and conflicting statements by the mental health experts regarding his intellectual functioning. The court reasoned that Dr. Goff did not conduct intelligence testing on Mr. Burgess, and instead relied on the report of Dr. Shealy, who had found him to have borderline intellectual impairment. Dr. Goff also relied on the report of Dr. Maier, who did not conduct intelligence testing, yet estimated an IQ in the range of 70 to 80. Further, Dr. Maier gave conflicting statements in his report, when he concluded that Mr. Burgess may be "mildly mentally retarded," which would correspond to an IQ of 50 or 55 to 70.

The Eleventh Circuit also disagreed with the finding that Mr. Burgess failed to demonstrate deficits in adaptive behavior and therefore did not meet the diagnostic criteria for intellectual disability. The Eleventh Circuit reasoned that the evidence that was presented in mitigation (e.g., that Mr. Burgess had worked as a welder in a Mississippi prison, had worked as a brick mason, and was "cooperative" with a probation officer) amounted to "good character" evidence and "does not indicate anything substantive about Burgess's adaptive abilities as that term is used clinically" (*Burgess*, p 1316). Furthermore, the Eleventh Circuit found that the lower courts failed to take into account that Dr. Maier had noted that Mr. Burgess "may even be mildly mentally retarded," and "that the finding would be consistent with Burgess's poor adaptive skills: his poor school performance and his lack of vocational success" (*Burgess*, p 1317). The Eleventh Circuit also disagreed with the district court's decision not to consider Dr. Hudson's affidavit on adaptive functioning, given the limited evidence in the record. They noted that Dr. Hudson provided an analysis of Burgess's adaptive behavior deficits in the context of how it relates to intellectual disability. They concluded that "if the district court were to find Dr. Hudson's testimony to be credible, combined with prior record evidence and Dr. Shealy's reported IQ score of 66 . . . Burgess would be entitled to habeas relief" (*Burgess*, p 1322).

Discussion

In *Atkins v. Virginia*, the U.S. Supreme Court left to the individual states the task of developing standards for identifying intellectually impaired defendants. In *Burgess*, evidence for intellectual disability was presented in the penalty phase of the trial court proceedings. However, the Eleventh Circuit noted that the use of the disability as a mitigating factor is distinctly different than its use for *Atkins* purposes. Therefore, in the case of Mr. Burgess, although the jury heard evidence regarding intellectual disability as a mitigating factor, this was not sufficient to establish whether Mr. Burgess had such impairment under *Atkins*.

Given that expert testimony on a defendant's IQ is critical in determining the outcome of *Atkins* cases, it is inadequate to rely on an estimated IQ. Also, it is important to take into account certain psychometric considerations when interpreting intelligence test scores. In this case, had Dr. Hud-

son not taken the standard error of measurement and the Flynn effect into account, he would have found Mr. Burgess to have an IQ score of 76. The standard error of measurement becomes particularly important in cases of mild intellectual disability. In general, the accepted degree of measurement error is five points (Gresham F: Interpretation of Intelligence Test. . . . *Appl Neuropsychol* 16:91–7, 2009). Thus, a recorded IQ score of 74 may reflect a true IQ anywhere between 69 and 79. Another psychometric factor is the Flynn effect, which is based on the observation that average IQ scores for a given test increase as the test ages. An individual's true IQ score does not change; rather, only the norms change. As a result of the Flynn effect, fewer persons may be classified as having an intellectual disability. Therefore, it is critical for mental health experts to consider psychometric properties when interpreting IQ test scores given the considerable impact it may have on determining whether a defendant is intellectually impaired and thereby prohibited from receiving the death penalty under *Atkins*.

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Oral *Ex Parte* Communication With Claimant's Treating Physician in a Workers' Compensation Case

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Workers' Compensation Board May Require an Employee to Authorize a Treating Physician to Communicate With an Employer Without the Employee Present

In *Arby's Restaurant Group*, *Inc. v. McRae*, 734 S.E.2d 55 (Ga. 2012) the Georgia Supreme Court considered whether the Georgia Court of Appeals erred in holding that Ga. Code Ann. § 34-9-207 (2012) does not require an employee who files a workers' compensation claim under the Georgia Workers' compensation Act, Ga. Code Ann. § 34-9-1 *et seq*. (2012), to authorize her treating physician to engage in *ex parte* communication with her employer or her employer's representative. The Georgia Supreme Court reversed, holding that the lower court erred in construing the statutory language and that "information" meant not only "tangible documentation" but also informal oral communication.

Facts of the Case

Laura McRae sustained a work-related injury in February 2006, for which she filed a workers' compensation claim. Arby's Restaurant Group, Inc. (Arby's), her employer, accepted the claim as compensable and commenced income benefits in March 2006. Ms. McRae signed a form authorizing release of medical information as a part of her claim for benefits. Her treating physician then issued a report stating that Ms. McRae had reached maximum medical improvement and qualified for permanent partial disability. After receiving this report, counsel for Arby's attempted to arrange an *ex parte* meeting with her treating physician; however, the physician refused such a meeting without the presence of Ms. McRae or her counsel.

Arby's filed a motion with the Georgia Workers' Compensation Board either to dismiss Ms. McRae's hearing request or to request an order authorizing her treating physician to communicate with an Arby's representative. The board issued an order directing Ms. McRae to sign a medical release allowing her treating physician to meet privately with a representative of her employer and to provide medical information regarding Ms. McRae's claim. Ms. McRae refused to sign such a release, and her hearing request was subsequently removed from the hearing calendar. The appellate division of the State Board of Workers' Compensation and the superior court upheld the board's order. In December 2011, the Georgia Court of Appeals reversed and in a 4-to-3 majority opinion held that Ga. Code Ann. § 34-9-1 (2012) does not compel an employee to authorize her treating physician to participate in *ex parte* communication in exchange for receiving benefits for a compensable injury (*McRae v. Arby's Restaurant Group*, 721 S.E.2d 602 (Ga. Ct. App. 2011)).