

Evidence Offered in Mitigation Ruled Aggravating Factor in Capital Murder Case

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Supreme Court of Utah Affirms Reasonableness of Defense Strategy to Use an Inculpatory Statement in the Context of Demonstrating a Mitigating Factor

Honie v. Utah, 326 P.3d 79 (Utah 2014), reviewed the decision of Utah's Fifth District Court regarding the adjudication of Mr. Honie in a capital murder case. Following a death sentence, Mr. Honie appealed to the Supreme Court of Utah for postconviction relief on the basis that his counsel during the trial in chief was ineffective and that the ineffectiveness was prejudicial to the outcome of the trial. Among other points, Mr. Honie asserted that his counsel unreasonably relied on a single forensic expert to evaluate him. Further, he contended that it was a flawed strategy to admit an inculpatory statement (disclosed to a forensic psychologist) during the sentencing phase, though the statement was used in an effort to illustrate the petitioner's remorse.

Facts of the Case

In May 1999, Taberone Honie was convicted of aggravated murder of his girlfriend's mother, Claudia Benn. On July 9, 1998, Mr. Honie had contacted his girlfriend, Carol Pikyavit, informing her that he needed to see her. Ms. Pikyavit refused, after which Mr. Honie threatened to kill her mother and her nieces. That evening, Mr. Honie, who reportedly was under the influence of alcohol, methamphetamine, and cannabis, forced entry into Ms. Benn's home where he stabbed her, killing her, and then used the knife to mutilate her genitalia. A neighbor phoned police. Upon the arrival of law enforcement, Mr. Honie admitted to murdering Ms. Benn. In addition, a female minor who was in the home at the

time (the niece of Ms. Pikyavit and the granddaughter of Ms. Benn) was discovered partially nude. An examination by medical professionals determined that the child had injuries on her genitals consistent with fondling. Notably, during an interview by detectives on the night of the murder, Mr. Honie admitted killing Ms. Benn and expressed remorse for the act.

During the trial in chief, Mr. Honie's defense team conceded the defendant's guilt, instead opting to focus on countering the various aggravating factors presented by the prosecution. Although the jury convicted him of aggravated murder, it could not reach unanimity on the charge of aggravated child sexual abuse. During sentencing, on the advice of counsel, Mr. Honie waived his right to a jury.

For the sentencing phase, a forensic psychologist was employed by the defense to assist in formulating mitigating factors. In the forensic interviews, Mr. Honie confessed to the psychologist that he had sexually assaulted the child and communicated his remorse (per the psychologist's testimony, Mr. Honie wept). Part of the defense strategy during sentencing was to illustrate the depth of his remorse for his crime. As a result, during testimony, the forensic psychologist disclosed an inculpatory statement (the admission of sexual assault on a minor) to demonstrate Mr. Honie's sincere remorse. At conclusion, the judge found that the aggravating factors outweighed the mitigating ones, and he sentenced Mr. Honie to death. One of the aggravating factors cited by the judge was the sexual assault of the minor. This sentence was affirmed by the Supreme Court of Utah upon direct appeal (*State v. Honie*, 57 P.3d 977 (Utah 2002)).

Upon exhaustion of his appeal options, Mr. Honie again petitioned Utah's Supreme Court for postconviction relief on the basis of ineffective assistance of counsel. He contended that the use of a single forensic psychologist to evaluate him was inadequate and that the defense had disclosed an inculpatory statement (*via* the forensic mental health expert) in an unsuccessful attempt to demonstrate the defendant's remorse.

Specifically, Mr. Honie claimed that evidence related to his mental state was not fully examined or presented during his trial. He claimed a history of traumatic brain injury, fetal alcohol syndrome, and chronic substance abuse, in addition to a traumatic formative history, all of which, he argued, were sub-

stantial and relevant mitigating factors. Mr. Honie also criticized the defense’s decision not to present evidence of his voluntary intoxication, which potentially skewed his judgment so much on the night of the murder that he could not have formed a specific intent to kill.

Ruling and Reasoning

The Supreme Court of Utah held that the forensic psychologist was, in fact, qualified to evaluate the mitigating factors and, further, that she conducted an exhaustive evaluation of the factors. The court noted that the forensic psychologist was a well-educated mitigation expert who reviewed Mr. Honie’s extensive psychiatric and substance abuse record. In addition, she spent approximately 20 hours interviewing him and administering various psychological tests. The court concluded that he failed to demonstrate that the psychologist’s evaluation was deficient and further that “It is not enough to speculate that another expert might have explored other areas of mitigation” (*Honie*, p 91).

Mr. Honie also raised the objection that the defense counsel incompetently used his inculpatory statements as a means to demonstrate his remorse during sentencing. The Supreme Court of Utah disagreed, stating “Trial counsel may make the strategic choice to use potentially inculpatory evidence if it furthers the client’s interest” (*Honie*, p 95).

Both police and Ms. Pikyavit noted that Mr. Honie was intoxicated on the evening of the murder. Despite his intoxication, Utah’s Supreme Court cited evidence to demonstrate that he was capable of forming specific intent. In fact, his immediate admission of guilt to the police showed that he was cognizant that he had engaged in lethal conduct. Furthermore, while he alleged at one point that he had blacked out during the murder, he admitted to the forensic psychologist that he only wished he had lost consciousness, because the memory of what he had done haunted him.

The Supreme Court of Utah relied on the standards set forth by *Strickland v. Washington*, 466 U.S. 668 (1984), to make a determination of ineffective counsel. *Strickland*, a United States Supreme Court case, outlined two standards for evaluating whether counsel’s proposed incompetence violates a defendant’s Sixth Amendment rights. The petitioner must demonstrate that counsel’s performance fell below reasonable expectations, and that, had counsel acted

differently, the outcome of the trial would have likewise been different. Utah’s Supreme Court held in this instance that Mr. Honie failed to demonstrate incompetent counsel per *Strickland* jurisprudence and that his due process liberties were therefore not compromised.

Discussion

The *Honie* holdings underscore the importance of the mental health expert retained by the defense in a capital case. In this case, the forensic psychologist completed an exhaustive evaluation of the defendant and his psychosocial history. It was the strategy of the defense counsel to use her expertise in the context of portraying the defendant as a remorseful character. The Supreme Court of Utah emphasized that it is an appropriate tactic to use potentially condemning evidence in an effort to demonstrate a mitigating circumstance. Though it was an unsuccessful strategy in this situation, it was deemed by the court to be, per United States Supreme Court precedent, reasonable nonetheless.

This case highlights the importance of a thorough evaluation by the forensic mental health expert. Presumably, through hours of interview and psychological examination coupled with the various facts of the case, the defense concluded that the best strategy was to concede guilt while presenting their most robust mitigating factors. In this instance, the defense relied on a mental health expert to offer a representation of the defendant as sincerely regretful for his actions.

The court’s sentencing decision demonstrates how a defense strategy can result in unintended consequences. The trial judge found an additional aggravating factor where the jury (not privy to Mr. Honie’s admission of sexual molestation) did not and sentenced the defendant to death. From a research perspective, it would be useful to know how often situations such as these arise wherein proffered mitigating factors also include potentially condemning evidence and whether and to what extent these types of strategies are successful. With such empiric knowledge mental health experts might better assist counsel by further informing decisions regarding defense strategy.

We might also speculate as to whether the trial judge’s finding of an additional aggravating factor motivated him to sentence Mr. Honie to death. Indeed, it was the testimony of the mental health expert that established what the jury could not—that Mr.

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.

Disclosures of financial or other potential conflicts of interest: None.

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