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BEFORE THE BOARD OF PARDONS AND PAROLE
STATE OF UTAH

In re. the death sentence of TABERON DAVE HONIE Offender Number: 134877	RESPONSE IN OPPOSITION TO PETITION FOR A COMMUTATION HEARING

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INTRODUCTION

After threatening to kill Claudia Benn, Taberon Dave Honie arrived at her home uninvited. He reported that she shouted disparaging remarks at him from inside her home, so he smashed his way into the home through a glass door and severely beat Claudia, bit her, slashed her throat four times, stabbed her in the vagina three times, stabbed her in and around her anus, and was about to rape her but stopped when he realized she was already dead. He did this in front of at least one of her young granddaughters. And while hiding

from police in the home, he put his finger in the vagina of Claudia's four-year old granddaughter, rubbing so roughly that she bled there for hours afterward.

For these atrocities, a judge sentenced Honie to death.

Honie asks the Board to show him mercy because he claims he is remorseful, he grew up in a difficult environment, he was intoxicated at the time of the offense, and his family does not want him to die. But the sentencing judge considered these arguments and still found beyond a reasonable doubt that a death sentence was appropriate and justified. Honie has not shown that that sentence is unduly harsh. Nor has he shown an "evident mistake in the operation or enforcement of the criminal law." Instead, he does little more than attempt to relitigate the penalty phase and ask the Board to substitute its judgment for the sentencing judge's.

Honie says the Board should show him mercy because he has taken responsibility for killing Claudia from the time of his first police interview. The record, however, shows otherwise. And the commutation petition itself is a long deflection of responsibility that never once acknowledges any of the savage acts he inflicted on Claudia or her granddaughters; instead, it euphemizes the murder as a "tragic death" resulting from a "domestic dispute."

The Board should deny his petition.

CASE SUMMARY

Statement of Facts.

Claudia Benn lived in her Cedar City home with her two daughters, Carol Pikyavit and Benita Rogers, and her granddaughters, T[redacted], D[redacted], and T[redacted]. T[redacted] is Carol and

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Honie's daughter. Carol and Honie were not married and had been seeing each other only "off and on" over that summer. TR607:236-39, 248, 255-56.[1]

On July 9th, 1998, Honie called Carol at her mother's house at about 8:00 p.m. He wanted Carol to come to the home where he was staying. Carol refused because she had to leave for work at 10:30 p.m. Honie told Carol that if she did not do what he told her, he would go to Claudia's home, kill Claudia, kill Benita's children, and leave with T[redacted]. Honie had made threats like this in the past without following through. So Carol went to work. TR607: 239-43, 258.

Rick Sweeny, a Cedar City taxi driver who knew Honie a "little bit," picked Honie up at about 11:30 p.m. Honie told Sweeny to drive him to Fiddler's Canyon—the area where Claudia lived—but gave no physical address. Instead, Honie told Sweeny that he would show him where to go when they arrived at Fiddler's Canyon. When they arrived, Honie directed Sweeny to a parking lot and got out. TR607:264-69, 288.

At about midnight, Claudia's neighbor heard what she thought were gunshots at Claudia's home. She also heard a man and a woman yelling, a woman screaming, and children crying or upset. Within a minute or two of hearing the "gunshot[]" sounds, she called police. TR607:278-79.

Police arrived at Fiddler's Canyon about two or three minutes after getting the call from dispatch. After getting directions from Claudia's neighbor, they surrounded Claudia's

[1] The State cites the trial and sentencing transcripts as they were originally Bates numbered. "TR" means trial record. Those transcripts are attached as State's Exhibit 6. The remaining State's Exhibits are cited herein as "SE[page number]."

home, where they noticed the glass broken out of a sliding door. TR607:288-90, 310-11, 318-19.

Eventually, Honie obeyed repeated police commands and left the home through the garage. An officer ordered him to put his hands up and ordered him to the ground. Honie complied. TR607:292, 316, 321-22.

The officer saw blood on Honie's arms from his fingertips to his elbows. He asked Honie where he got the blood. Honie responded, "I killed her. I stabbed her with a knife." TR607:293, 304, 321.

When officers entered the home, they found Claudia's body lying face down in the living room. Claudia's underwear was pulled down below her buttocks. One officer observed large amounts of blood around Claudia's anus. Another officer checked for life signs; there were none. Officers observed a rock on the living room floor and saw a butcher knife by Claudia's body. TR607:294, 299, 314; SE5 (crime scene photos).

While officers were in the home, two small children came into the living room. After putting those children in a patrol car, the officers looked back and saw a smaller child standing in the doorway looking toward Claudia's body. TR607:294-97; SE5 (crime scene photos of children).

The medical examiner who did the autopsy reported that blood covered Claudia's face, neck, and upper chest. She also saw blood smeared on Claudia's upper left arm, blood drops crossing her right forearm, blood smears on Claudia's back, and blood on Claudia's sacrum that looked like a handprint. There were additional linear blood smears on Claudia's

dress that looked like hand marks. She observed blood coming from the area of Claudia's genitals and anus. TR608:439-40; SE5.

The medical examiner identified knife wounds that began under Claudia's left ear and went all the way across her neck to her right ear. She observed at least four start marks under the left ear that merged under the right "into this big, huge, deep cut." The wounds penetrated to the backbone, cutting everything between: skin, fat, muscle, and organs. Claudia's larynx had two, separate, horizontal cut marks. Her esophagus was severed. The carotid arteries and jugular veins were sliced. TR608:440-42; SE5.

The medical examiner concluded that the neck wounds were caused by something linear with a sharp edge and with enough strength and substance to cut through all of the tissue, including the voice box bones, and with enough rigidity to make three cuts in the backbone behind the voice box and esophagus. TR608:442; SE5.

The medical examiner also observed multiple blunt force injuries. The entire left side of Claudia's face had swollen so that it stuck out half an inch. Claudia's lower left eyelid was purple and bruised. There was a semi-circular abrasion under Claudia's left eye, and a similar injury beginning at the left side of her nose and going across her cheek. Claudia had a bruise on the left side of her mouth and her lower lip was purple and swollen. She had a scraping injury across her left cheek and onto the left jaw. She had multiple bruises on the inside of her tongue and multiple patterned bruises inside her scalp that an object appeared to have caused. And she had a bite mark on her left forearm. TR608:445-49; SE5.

The medical examiner also detailed numerous stabbing and cutting wounds to Claudia's genitals and anus. She observed three distinct cutting and stabbing injuries into Claudia's vagina. At least two went through the top of Claudia's vagina behind the cervix, entered the pelvic cavity, and ended somewhere inside the abdomen. She saw superficial cuts around Claudia's anus. She believed at least one entered the anus because it cut the external anal surfaces and the perineum, but she did not see a deeper penetrating anal injury. TR608:449-51; SE5.

When Claudia's three granddaughters arrived at the shelter shortly after the murder, T and T had a "little" blood on them. D "was covered, literally, head to toe with blood." Honie told police that the blood came from a cut on his hand. But there was testimony suggesting that at least one girl witnessed the murder: she would later say, "'The water spilled,'" referring to Claudia's blood; "'Grandma Dee, blood all over'"; and "'Grandma Dee butt cut.'" TR605:65-68; TR607:356-57, 382-83; SE5.

Evidence showed, and the sentencing judge found, that Honie sexually abused four-year-old D after murdering Claudia. When Carol and Benita left for work, D was wearing underwear and a T-shirt. Carol testified that she had never seen D without her underwear. Before the murder, D had not complained to Benita about her private parts, and the two had a relationship where D would tell Benita if something were wrong. TR607:244-45, 257-58.

After the murder, D was no longer wearing her underwear. At a family shelter, a worker gave D new underpants. When the worker removed them later, she observed

fresh blood drops on the crotch. D talked about it the next morning but did not identify who injured her. TR607:382-83.

D was taken to Primary Children's Medical Center and examined by a pediatric emergency physician. He found abrasions on the area around D 's hymen. He concluded the abrasions were consistent with "rubbing," most commonly with a finger or penis. He testified that D 's injury was consistent with one inflicted less than twenty-four hours before the examination because the abrasions were still oozing. TR607:390, 392- 94, 396-99.

Later, D reported to a family member that Honie had hurt her. During a prayer, D said, "'Pray that [Honie] stays in jail, that he won't come get me.'" TR605:66-67. Much later, Honie finally admitted to the defense mitigation witness that he had digitally penetrated D . TR605:192-93. And the sentencing judge found that Honie had "violated the genitalia of four year old D ...by fondling the area around her hymen, and the area toward the bottom side of her hymen, called the 'posterior forsheath,' to the degree that it caused bodily injuries in the nature of abrasions which continued to bleed over a period of hours." SE1 at 549-48.

The day after Honie murdered Claudia, Cedar City Detective Lynn Davis went to the Iron County Jail to interview and photograph Honie. When Davis first walked into the holding cell and before he could say anything to Honie, Honie said, "Claudia wasn't supposed to die." Honie followed up that he only wanted to scare Claudia. TR607:347-49.

Davis interviewed Honie three times. In the first interview Honie said (1) he was sorry and should die for what he had done wrong; (2) he did not know "what the hell" he

had done; (3) *if* he killed Claudia, he was "very, very sorry"; (4) "God please forgive me," and "Dee [Claudia], please forgive me"; (5) he could have killed Claudia; and (6) he had done something bad. But Honie also claimed that he had blacked out and talked about another person being involved in the murder, "some Mafia that was a hit man." TR607:349-50, 357-59; SE3 (Honie's police interviews).

In the second and third interviews, Honie said that (1) Claudia did not like him, thought that Carol was too good for him, and did not think that Carol should see him; (2) he was upset because Claudia was interfering in his relationship with Carol; (3) he went to Claudia's home intending to sleep under the porch while he waited for Carol but did not go there intending to hurt Claudia; (5) he and Claudia got into an argument that they carried on through the glass door; (6) Claudia started the argument by cutting him down and calling him "a lot of names"; and (7) his emotions eventually came out, and he broke the glass door and went into the home intending to scare Claudia. Honie also claimed that Claudia got the knife, but he grabbed it from her. He then asserted that he moved behind Claudia and brought the knife to her throat. At that point, according to Honie's telling, they tripped and fell with the knife at Claudia's throat, and Claudia "went onto the knife." TR607:346-61; SE3.

The photographs Detective Davis took at the jail and later at the hospital showed blood all over Honie, including on his right hand, top of his head, stomach, legs, scrotum, scrotal area, and penis TR607:342-45, 362.

Evidence at Sentencing.

Honie waived a sentencing jury before jury selection for the guilt phase began. TR425-423; 602-603. Before accepting Honie's waiver, the judge told the parties that he did not have "a philosophical opposition to the death penalty," and that he would impose it if he felt it was appropriate under the facts and circumstances. But he added that imposing a death sentence was "the last thing a judge would want to do," and that it was "not what [he] would want to do." TR602:7-8.

In support of a death sentence, the State relied on the brutality of the murder. TR606:52. And it submitted an exhibit with Honie's criminal history, including his violent assault on Carol in 1995. SE8 (Honie's criminal history).

The State also called Carol to testify about that assault, which the sentencing judge found "chillingly similar" though "less flagrant" than his attack on Claudia. Carol testified that while Honie and Carol were driving, Honie punched her in the mouth. Carol slammed the car into park, took the keys, and ran. TR605:20-25; SE1 at 549.

But Carol was wearing sandals and did not get far. Honie grabbed her and pulled her by the hair. Carol thought Honie dragged her because the tops of her feet bled. Honie hit Carol a second time. TR605:25.

When Carol returned to her car, Honie was already there. Honie got into the car and suggested returning home. Honie apologized and promised not to hit her again. *Id.*

When they arrived home, Carol went to the bathroom to look at her face. She had a swollen lip and the beginnings of a black eye. Honie came in and apologized. He asked

Carol if she could hug him because he was sorry. She agreed and hugged Honie. Honie told her that everything would be all right. TR605:26.

Honie left, then returned, grabbed Carol by the hair, and pulled it. She ran under his arm. Honie grabbed her by the bra and broke it. She ran for the door, but Honie had bolted it. She unlocked and opened the door, but before she could make it outside, Honie grabbed her shirt. Carol managed to slip out of the shirt and get away. TR605:26-27.

Honie caught up to Carol by the car. He hit her and kicked her in the head. While Carol lay on the ground, Honie bit her stomach and her nipple. She remembered Honie spitting something out. Honie punched and kicked Carol and pulled her hair. Honie eventually let her get up. TR605:27-29.

Honie tried to pull Carol back into the house. She held onto the car and eventually managed to slip away. When Honie ran after her, he slipped and fell. Carol ran next door, where her cousin called the police. The investigating officer found Honie intoxicated and passed out. The State introduced photographs of Carol's swollen lip and mouth, bite marks on both arms, lacerations on both legs from Honie dragging her, the bite mark on her stomach, and the bite mark on her breast. TR605:15-17, 29-30.

The State also offered testimony about Claudia's life and her contributions to the community. Claudia helped any person in need. The community revered her as an example and leader. She encouraged people to continue their education. After getting her degree, Claudia returned to her tribe to help with substance abuse counseling because she had seen the devastation of alcoholism in her own family. She passed up more lucrative job opportunities in favor of helping her tribe. Claudia also served on the tribal council. The

witnesses testified that Claudia's family and friends had suffered a great loss. TR605:41-56, 61, 69-73.

The State presented evidence of the lasting effects the murder had on Claudia's grandchildren. TR605:65-68.

The defense called several family members to testify about Honie's past. Honie's older brother described Honie as a "likeable" child who loved animals, and who would help older people by chopping wood and by hauling wood, coal, and water. Honie would always agree to help his siblings when asked. TR605:74-77.

Honie's brother testified that the "experience" had put a strain on the family, that his mother and the "grandmas" cried a lot, and that the family was "tired about it" because they could do nothing about it. He testified that he missed Honie. And he asked the trial court to spare Honie's life: "It would be better for all of us." TR605:76-77.

Honie's father testified the family lived on the mesa until Honie was about fourteen years old. There, they had no running water and used outhouses. The family moved off the mesa when they bought their HUD home. TR605:79-80, 95-96, 98-100.

Honie's father testified that he was in a serious car accident that left him injured and unable work. After that, he stayed home and cared for the family. TR605:82.

Honie's father testified that he raised Honie in the Hopi culture with Hopi traditions. He raised Honie to be a good son, and Honie was raised in a good home and in a good environment. Honie's father made sure that Honie got alcohol counseling, and the counseling worked until Honie chose to get involved with his friends again. TR605:95, 100.

Honie's father testified that Honie participated in spiritual teachings and religious ceremonies, including Kachina dances and the ceremony for becoming a man. The family, including Honie, got up early to pray for the whole world so that people would grow strong, and no one would be sick. TR605:83-84.

Honie's father described the family as "tight-knit" and testified that Honie got along with his siblings. Through junior high school, Honie was a normal, outgoing, respectful child who did what he was told. Honie played football in junior high and high school. Honie hauled water and coal and volunteered to help old people by chopping wood, getting their groceries, and cleaning their houses. Honie was an animal lover who nursed injured animals back to health. TR605:84-86, 90-91.

Honie's father testified that Honie dropped out of school in the tenth grade and began causing problems at about age fifteen. Honie got suspended from school for smoking marijuana with a friend. TR605:84-87.[2]

Honie's father testified that when Honie got into trouble again, the juvenile court sent him to a rehabilitation center in Arizona. Honie showed "a lot of change" after that counseling, and he returned home as the son his father knew before Honie started getting into trouble. TR605:87-88.

But, Honie's father testified, the "alcohol took control" again. At age nineteen, Honie went into the Indian Alcohol Recovery Center in Salt Lake City. TR605:88-89.

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[2] More recently, Honie's father has declared that Honie was "the only one of [his] children who got into serious trouble" and "all of [his] other children graduated from high school." *See* Declaration of Franklin Honie, Sr., Apr. 14, 2015 at 2 (Honie's Exhibit D).

Honie's father testified that he still had unconditional love for Honie. He acknowledged that Honie had done something horrible that had affected many people. But he told the court he did not want to see his son die. TR605:92-94.

Honie's mother described Honie as a happy, outgoing, lovable, quiet child. She described him as a follower who could be talked into things easily, which led Honie into problems. TR605:131-33.

She testified that Honie began acting out, drinking, and staying out all night when he was about fourteen. She suspected that Honie got involved with those things through his friends. Honie became involved with two boys whose mother left them alone when she moved in with a boyfriend. Honie started rebelling when his mother discouraged him from going to their house. TR605:132-33.

Honie's mother testified that she first saw Honie drink when Honie was in junior high school and described him as "pretty much" an alcoholic at that time. She testified that other family members had alcohol problems. She admitted that she was drinking heavily when Honie was in about the third grade until Honie went to junior high school. She described it as a "daily thing" for her. She testified that, occasionally, Honie's father would drink to the point of passing out, then go for a while without drinking at all. TR605:133-35.

Honie's mother recounted that a neighbor once told Honie that he had a different father. This bothered Honie, and he brought it up even though she told Honie it was not true. TR605:133-35

Honie's mother admitted that she and Honie's father fought verbally and physically, and that Honie witnessed the fights. She agreed that police were called to the home several times. TR605:135-36.

Honie's mother testified that she and other family members suffered from depression. She attempted suicide when Honie was about eight years old. She took a gun into the bedroom to shoot herself. Honie's father stopped her. She thought Honie saw her go into the bedroom, but Honie was not in the bedroom. TR605:137-39.

She testified she suspected Honie suffered from depression that began at about age fifteen. Honie sought counseling but never received medication. She contacted several places in an attempt to obtain intense counseling for Honie. People told her Honie could get counseling, but nothing was ever done. She agreed that this occurred about the time Honie began drinking and associating with the friends whom she considered a bad influence. She testified that Honie often came home drunk or stoned and sometimes left for two days at a time. TR605:139-42.

Honie's mother sent him to her sister's home to get him away from his friends. But when Honie returned, he got involved with his friends again. TR605:142.

Honie's mother testified that Honie was a good father to T[redacted]. She described Honie bathing T[redacted], combing her hair, and singing to her. TR605:145.

Honie's mother told the judge that she had seen a big change in Honie since his incarceration. Honie used to be a selfish person who had to have everything immediately. But Honie had apologized for putting her "through all this." She testified about Honie's concern for Claudia's family. Honie also had been praying a lot. And Honie had written to

a boy at home who got into trouble. Honie told the boy to learn from Honie's mistake. TR605:145-48.

Honie's mother told the judge she wanted Honie to live. She said she did not raise the horrible monster everybody thought Honie was. She testified, "We make mistakes. He made a horrible mistake, if he did. But I can tell you I never never will believe that he did what some of the things that were said he did...nobody will ever convince me that my son would do something as horrible as the things that were said. If his hands did do what they said he did, I know his mind was not Tate's mind. I know my son. I raised him to know right from wrong." She asked the court to spare Honie's life. TR605:148-50.

Honie's aunt Dellarita Leslie described Honie as a loving, caring, affectionate, model child who got along well with other children. She testified that Honie always helped the elderly, and that he cared for injured animals. She understood that Honie had problems later on, but she did not witness them. TR605:105-107.

Honie went to live with Leslie and her family at about age seventeen and stayed for about two years. While Honie lived with Leslie, he was a happy, outgoing child who had no problems. He did well in school, earning A's and B's, and only rarely a C. He never skipped school. After school, he played football or came straight home to do his homework. Honie never stayed out all night and had no drinking problems. TR605:107-110.

Honie planned to graduate from high school while he was living with Leslie. She began to save to buy Honie a stereo for a graduation present. TR605:110-11.

But Honie did not graduate. About six months before graduation, Leslie and Honie went to his home for a visit. Honie met some of his friends and decided not to return with Leslie. TR605:111.

Leslie described that there was little to do in Honie's town. It had one small village store, three trading posts, and no movie theater. R605:116.

Leslie testified that she suffered from depression and tried to kill herself about thirty years before the trial. One of Honie's sisters also suffered from depression and tried to kill herself. Leslie believed Honie's mother suffered from depression as well. TR605:113-14.

Leslie testified that she believed Honie's sisters drank on occasion and drank heavily at one time. She thought that Honie's father drank many years before. TR605:115-16.

Leslie testified that Honie was very caring and affectionate with his daughter T[redacted]. She had heard Carol comment that she wanted Honie around so that T[redacted] would have a father. TR605:117.

Leslie testified that she had visited Honie recently and that Honie had changed his life. She described Honie as a lot more mature and still the same affectionate person. Honie had been doing a lot of thinking, felt sorry, and had apologized to his parents and to her. Honie expressed that alcohol and drugs had affected his life negatively, and he had written about it to his cousins and his mother. TR605:118-19.

Leslie told the sentencing court, "I think, Your Honor, I would really like to see" Honie "stay around so that he can show other—other people that drugs and alcohol can do a lot of damage to a person; and I definitely don't want him to die." The trial court granted her request to hug Honie "for the last time." TR605:120.

Honie called Dr. Nancy Cohn, a credentialed psychologist with forensic training. She detailed her extensive preparation for her report that included (1) reviewing police reports, medical reports, psychotherapy and other mental health reports, substance abuse treatment reports, school records, histories of Honie's past criminal behavior, and a "very detailed file" on Claudia's murder; (2) interviewing Honie three times, totaling approximately twelve to fourteen hours; (3) interviewing his family members, including Dellarita Leslie; and (4) interviewing a prior counselor of Honie's, Farrell Hoosava. She performed a "battery" of psychological tests on Honie, including IQ and personality testing. She performed neuropsychological tests to screen Honie for brain damage. TR605:158, 161-70, 187-89.

Dr. Cohn determined that Honie had an average IQ, in the 90's. She found that Honie did better than average on the neurological screening tests for brain damage and concluded that Honie suffered from no neuropsychological deficits from using drugs and alcohol. She testified that the personality tests corroborated family accounts that Honie is a troubled young man who struggles with anxiety and depression. TR605:188-90, 201.

Dr. Cohn explained that Honie had an insecure bond with his family, and that from age fourteen, Honie did not feel loved by them. Where Honie's family members described him as a child who liked to stay outside and play with animals, Honie perceived that he spent time with animals because his family did not pay attention to him. She stressed, however, that Honie expressly disavowed this as an excuse for his bad behavior. TR605:171-78.

Dr. Cohn testified that the loss of some attachment figures (three older women, with whom Honie developed surrogate parent relationships, had all died when Honie was about ten years old) and a lost sense of safety resulting from an attempted rape triggered the defiant and oppositional behavior that Honie began to exhibit and that escalated over the next several years. Honie sought outside attachments in his friends. He turned to a group of older adolescents and started abusing substances with them. TR605:171-77, 186.

Dr. Cohn recounted Honie's attempts at substance abuse treatment and testified that Honie wanted to get "straightened out." But Honie's siblings abused substances and returning to that environment undermined Honie's ability to maintain the necessary behavioral controls. TR605:182-86.

Dr. Cohn testified about widespread family dysfunction, including alcoholism, and about insufficient structure on the reservation. She testified that there was a dearth of role models for employment, success, and achievement. TR605:181-82.

Dr. Cohn testified that she tested Honie for psychopathy, and that he was not a psychopath. She explained that psychopathy has malignant predictive features for treatment and risk of harm over time, and that it involves more predatory violence. She testified that, while Honie had some antisocial features, he did not have "full blown" anti-social personality disorder. TR605:196-97.

Dr. Cohn also testified that Honie presented a low risk for future violence, especially in a prison setting. She cited to Honie's intelligence and attempts to get help. She noted that his past violence coincided with drug and alcohol use, and that he would have less access to those in prison. She cited the absence of brain damage as a good indication that

he presented a low risk for future violence. She noted statistical evidence that violent acting out decreases with age and testified that she could reliably predict that Honie would settle down as he aged even if nothing else happened. She also testified that Honie did not find his violence gratifying and cited that feature as demonstrating a low risk for future violence. TR605:200-02.

Dr. Cohn told the court that, in their first meeting, Honie reported he could not remember large parts of the murder and was in a "blackout" when it occurred. However, he told the "whole story" in the last interview and explained "he *wished* that he'd been in a blackout." She testified that, at that point, Honie was very open and forthcoming. TR605:172 (emphasis added).

Dr. Cohn also testified that Honie admitted to digitally penetrating D[redacted]. She testified that Honie could offer no explanation, started to cry, and stated, "That happened to me and I can't believe I did that. I don't know why I did that. I can't believe I did that." Dr. Cohn hypothesized that Honie was in "such a charged up rage" that he was hurting anything that was Claudia's. TR605:192-93.

At the sentencing hearing, Honie read a written statement to the court. He expressed his sorrow and remorse. And he told the court that he deserved whatever he got. TR606:24-28.

The trial court sentenced Honie to death, stating its reasons in a detailed ruling. SE1. The court found as aggravating circumstances (1) that Honie murdered Claudia while engaged in object rape, aggravated sexual assault based on the attempted forcible sodomy, and aggravated burglary; (2) Honie's criminal history, principally the attack on Carol; (3)

that Honie committed the murder while children were present; (4) the loss to the community of a contributing member; and (4) that Honie committed aggravated sexual abuse of D[redacted]. *Id.* at 551-546.

On the mitigation side, the court agreed that Honie's criminal history was not significant in number, but it was significant in nature—particularly his drunken, "brutal," and "unprovoked" assault on Carol four years before the murder. The court noted that the evidence indicated Honie "suffered from both alcohol abuse and depression." *Id.* at 545, 548.

The court recognized that Honie was "'somewhat' intoxicated" when he murdered Claudia, noting that it used "somewhat" because there was no breath test and because the witness testimony conflicted. It continued, however, that Honie was sufficiently sober to give the taxi driver directions, converse with police, and determine a way to get into Claudia's house. Also, Honie eventually admitted that he remembered the crime details. The court concluded that his intoxication did not prevent him from appreciating that what he did was wrong or from conforming his conduct to the law. *Id.* at 545-544.

The court also recognized that Honie was relatively young. It continued, however, that none of the prior attempts at counseling "had a discernible [e]ffect on" Honie. *Id.* at 544.

The court found as additional mitigation that Honie was kind as a child, that he carried water and chopped wood for older people, and that his family loved him. The court also found Honie's remorse as a mitigating factor. *Id.*

Minor Names Redacted

The trial court found "beyond any reasonable doubt" that "the totality of aggravating circumstances outweigh[ed] the totality of mitigating circumstances," not in terms of their relative numbers, "but in terms of their respective substantiality and persuasiveness." The court then found "beyond a reasonable doubt" that a death sentence was "justified and appropriate under the circumstances." Because the State proved both elements for a death sentence, the trial court sentenced Honie to death. *Id.* at 543, 557-56.

Subsequent Judicial Review.

Honie appealed his conviction and sentence. The Utah Supreme Court affirmed both. *State v. Honie*, 2002 UT 4, 57 P.3d 977 (SE12). The United States Supreme Court denied review. *Honie v. Utah*, 537 U.S. 863 (2002) (SE13).

Honie then petitioned for state post-conviction relief. That relief was denied over twelve years ago. *See* Rulings, *Honie v. State*, No. 030500157 (5th D. Ct. Utah 2005-2012) (SE14-16). Among other things, the post-conviction court ruled as a matter of law that trial counsel's penalty-phase investigation and case met Sixth Amendment requirements. SE15 at 3330-41.

The Utah Supreme Court affirmed the denial of post-conviction relief. *Honie v. State*, 2014 UT 19, 342 P.3d 182 (SE17). That included affirming that lower court's holding that trial counsel's penalty phase investigation and presentation were constitutionally sufficient as a matter of law. *Id.* ¶¶35-46.

Honie next petitioned for federal habeas relief. The federal district court denied relief. *See* Memorandum Decision and Order, *Honie v. Crowther*, No. 2:07-cv-628 JAR, 2019 WL 2450930 (D. Utah June 12, 2019) (SE18). And it denied Honie's post-judgment

motion to alter or amend the judgment. *See* Memorandum Decision and Order, *Honie v. Benzon*, No. 2:07-CV-628 JAR, 2019 WL 5066738 (D. Utah Oct. 9, 2019) (SE19). The Tenth Circuit Court of appeals affirmed. *Honie v. Powell*, 58 F.4th 1173 (10th Cir. 2023) (SE20). The United States Supreme Court denied review last year. *Honie v. Powell*, 144 S. Ct. 504 (Dec. 11, 2023) (SE21).

With all legal challenges exhausted, the State applied for an execution warrant. The sentencing court signed the warrant on June 10, 2024 (SE22).

This petition followed.

DISCUSSION

Honie's petition—a recitation of mitigation information deflecting responsibility for his heinous crime—raises no substantial issue warranting a commutation hearing.

The Board should deny a hearing because Honie does not raise any substantial issue and instead seeks to relitigate the sentencing phase of his criminal trial. The United States Supreme Court has held that "an inmate has 'no constitutional or inherent right' to commutation of his sentence." *Connecticut Bd. of Pardons v. Dumschat,* 452 U.S. 458, 464 (1981). A "petition for commutation, like an appeal for clemency, 'is simply a unilateral hope.'" *Ohio Adult Parole Authority v. Woodard,* 523 U.S. 272, 280 (1998) (citing *Dumschat,* 452 U.S. at 465). The administrative rules governing Honie's petition specifically acknowledge this: "No person has a right, privilege, or entitlement to commutation or clemency; nor to the scheduling of a commutation hearing.... The decision to schedule a commutation hearing is within the exclusive power and authority of the Board." Utah Admin. R. 671-312-1(2).

Utah law allows the Board of Pardons and Parole to "consider the commutation of a death sentence only to life without parole." Utah Code Ann. § 75-27-5.5. The statute provides that the "board shall review the petition and determine whether the petition presents a substantial issue which has not been reviewed in the judicial process." *Id.* § 77-27-5.5(5). It prohibits consideration of "legal issues" that "have been reviewed previously by the courts; should have been raised during the legal process; or if based on new information are subject to judicial review." *Id.* § 77-27-5.5(6).

The statute further provides "[i]f the board does not find a substantial issue the board shall deny the hearing to the petitioner." *Id.* 77-27-5.5(7)(a). That the petition must raise new and substantial issues is a "necessary prerequisite[] for the grant of a commutation hearing." *Andrews v. Utah Bd. of Pardons*, 836 P.2d 790, 793 (Utah 1992).

Nearly all of the information Honie provides in his commutation petition is not new, and none of it is substantial. As addressed below, most of Honie's proffer to this Board is information that was known and considered at the time of his sentencing, or mere embellishment or critique on his penalty-phase case. The only arguably new information is how Honie has behaved while in prison. But at the sentencing hearing, Dr. Cohn testified that Honie presented a low risk for future violence, especially in a prison setting. TR605:200-202. The judge already considered that predictive information at the time of sentencing. Honie's argument now that he has lived up to that prediction is not a substantial issue.

The term "substantial" means something "[i]mportant, essential, and material; of real worth and importance…[c]onsiderable in extent, amount, or value; large in volume or

number." *Substantial*, Black's Law Dictionary (11th ed. 2019). The information Honie provides in his commutation petition does not meet this standard because it merely repackages what previous courts have considered while upholding the constitutionality and appropriateness of Honie's penalty. And Honie's claim of remorse rings hollow considering his demonstrable pattern of failing to confront the atrocities he committed—a pattern culminating in his omission and whitewashing of those atrocities in his petition here. No commutation hearing should be held.

I. Honie's petition does not raise any issue that could warrant undoing a sentence rendered under exacting judicial scrutiny and upheld as constitutionally fair by state and federal courts.

Other than specifying that it has to be a substantial issue not reviewed in the judicial process, the commutation statute provides no guidance on what justifies commuting a death sentence. Therefore, in determining whether to commute Honie's death sentence, the Board should be guided by what commutation is, its traditional role in the penal process, and what it would mean to commute Honie's death sentence.

Commutation is an extraordinary measure—an exercise of the power to substitute a lesser sentence for a death sentence imposed in judicial proceedings. *See* Utah Code Ann. § 75-27-5.5. In *Herrera v. Collins*, the United States Supreme Court recognized that commutation's quintessential role is to correct injustices where there is evidence that raises a substantial doubt about the condemned's guilt. 506 U.S. 390, 411-14 (1993).

"Clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for presenting miscarriages of justice where judicial process has been exhausted." *Id.* at 411-412. Commutation "exists to afford relief from undue harshness or

evident mistake in the operation or enforcement of the criminal law." *Ex parte Grossman*, 267 U.S. 87, 120 (1925). But Honie has not established that any miscarriage of justice occurred in his case, or that he suffered from undue harshness or any mistake in the operation or enforcement of the law.

The State recognizes that commutation also allows the Board to show mercy where intervening events establish that mercy is deserved. "The defendant in effect accepts the *finality* of the death sentence for purposes of *adjudication,* and appeals for clemency as a matter of *grace.*" *Woodward,* 523 U.S. at 282 (emphasis in original). But Honie has not provided a "substantial issue" establishing that mercy is deserved. There is no question about Honie's guilt; he does not—and cannot—contend otherwise. There is also no question about the brutality and heinous nature of his crime, although Honie's petition does not begin to confront those facts and instead euphemizes what he did as a "tragic death"—the consequence of a "domestic dispute." Nor can he dispute his crime's impact on Claudia's family and the Paiute Tribe that she benefitted as a substance abuse counselor. The State presents some of that impact here in victim statements from Claudia's daughter, two of Claudia's grandchildren, Claudia's cousin, and The Paiute Indian Tribe of Utah Tribal Council. SE23.

In determining whether other considerations justify commuting Honie's sentence, the Board should bear in mind that Honie asks the Board to vacate a sentence lawfully imposed following a sentencing hearing in front of a judge. The Board should also bear in mind the exacting standards that had to be met before the judge imposed that sentence.

The judge carefully applied the legal standard in a capital felony sentencing, as set

out in Utah Code Ann. § 76-3-207(4)(a)-(d). SE1. The judge considered all of the evidence presented to him in aggravation and mitigation of the penalty. *Id.* Evidence in aggravation included statutory and nonstatutory aggravating factors such as the nature and circumstances of the crime; Honie's sexual assault against D ; Honie's character, background, history, and mental and physical condition; the victim and the impact of the crime on the victim's family and community; Honie's commission of the murder while children were present; and his use of a deadly weapon to commit the murder. *Id.* As for mitigating circumstances, the judge considered whether the homicide was committed while Honie was under the influence of mental or emotional disturbance; whether, at the time of the homicide, Honie's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirement of law was impaired as a result of intoxication or the influence of drugs; his youth at the time of the crime; and other factors, including Honie's remorse for the crime. *Id.*

The judge next weighed the aggravating factors against the mitigating factors in terms of their substantiality, not number. *Id.* He had to be persuaded, *beyond a reasonable doubt*, that the total aggravation outweighed total mitigation, and be persuaded, beyond a reasonable doubt, that imposition of the death penalty was justified and appropriate in the circumstances. Utah Code Ann. § 76-3-207 (1999).

The judge concluded that "the totality of aggravating circumstances outweighed the totality of mitigating circumstances beyond any reasonable doubt" and that the death penalty was "justified and appropriate under the circumstances of this case beyond a reasonable doubt." SE1. The standards the sentencing judge followed far exceed what the

United States Constitution requires. Honie had no federal constitutional right to 1) imposition of a life sentence unless the State met the beyond-a-reasonable-doubt standard, which is the highest standard of proof the law requires; 2) a finding that the aggravating circumstances outweigh the mitigating circumstances; and 3) the additional step of determining whether death is appropriate and justified even when the aggravating circumstances outweigh the mitigating circumstances.

The Board should also bear in mind that Honie asks the Board to commute a sentence that the Utah Supreme Court has twice affirmed, the federal district court has upheld, and the United States Supreme Court has declined to review. Commuting Honie's sentence would mean vitiating a sentence, and a penalty-phase case, that every reviewing state and federal court has found to be morally and constitutionally fair.

Executing Honie will exact from him the punishment that the People of the State of Utah demanded for the horrendous murder he committed. Honie essentially asks the Board to show him mercy because he claims that he is remorseful for the crime he committed and that he has not had chronic problems while incarcerated. But his proffer is insufficient to raise a substantial issue about whether the Board should commute his sentence. His professed remorse and unremarkable disciplinary record are not substantial reasons for commuting the sentence. The sentence imposed is a sound determination of the appropriate punishment society demanded from Honie.

Honie argues that "[t]he modern justifications for the use of the death penalty, deterrence, and retribution, will not be served by taking his life." Petition at 2. But this argument is a challenge to the desirability of the death penalty itself. That is a policy

decision reserved for the Legislature, not a matter for commutation. The Board is not a court of law or a place to review the legal validity of a sentence that all courts have affirmed.

Regarding retribution, Honie asserts that his former girlfriend Carol, the daughter of the victim, "testified at trial that she would be satisfied with a sentence of life without parole." Petition at 1. But her opinion does not lessen the retributive purpose of Honie's death sentence. "In part, capital punishment is an expression of *society's* moral outrage at particularly offensive conduct." *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (Stewart, J., with two justices concurring) (emphasis added). Honie's death sentence represents the price Honie must pay for his injuries to society, not just to the victim and the victim's family. The injuries Honie caused by murdering Claudia went far beyond her own death.[3]

II. Honie's proffer to this Board of essentially the same mitigation information he presented to the courts does not raise a substantial issue for a commutation hearing.

Honie's petition does not show that a commutation hearing is warranted because it merely seeks a forum to relitigate the penalty phase of his trial. And he relies on essentially the same information considered by a judge who determined that the horrific circumstances of the crime and Honie's criminal history outweighed it beyond any reasonable doubt and made death the appropriate sentence. To the extent his proffer deviates from what the judge

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[3] State's counsel is not unsympathetic to the anxiety Honie's execution may cause to the victim's daughter and granddaughter. But it is not sufficient to overcome the wanton brutality of his crimes. And Honie's violence and criminality go past the single murder of their mother and grandmother. The judge imposed a sentence not just for his crimes against Claudia Benn but also for his crimes against society as a whole.

heard, it merely embellishes it or offers critiques that no subsequent court has found constitutionally troubling. The Board should deny what is in essence Honie's request that it replace its judgment for that of the sentencing court.

A. Honie's level of intoxication during the murder has been the subject of decades of litigation that Honie has lost; it is not a substantial issue for commutation.

The sentencing court found that Honie was "somewhat intoxicated" when he murdered Claudia. But it concluded that he was not so intoxicated that he could not understanding that killing Claudia was wrong or stop himself from murdering her. The court recognized that the evidence on Honie's intoxication conflicted. And it recognized that while Honie at first claimed he blacked out, he later admitted he remembered what he had done and only wished he had blacked out. SE1 at 546-45.

Honie has already challenged those findings on direct appeal, in post-conviction, and in federal habeas. Each court has rejected his challenge. *Honie I*, 2002 UT 4, ¶¶61, 65 (SE12); SE14 at 43 n.11, 50-59; SE15 at 20-32; SE16; *Honie II*, 2014 UT 19, ¶¶34-35, 47-62 (SE17); SE18 at *4-8. And Honie presents nothing new here about his intoxication to create a substantial issue.

Ample evidence supported that Honie was not so drunk that night that he could not appreciate the horrors he visited on Claudia and the children. All agreed that Honie drank that night. But not all witnesses agreed about how intoxicated he was.

To "intoxicate" means "to affect temporarily with diminished physical or mental control by means of alcoholic liquor" or "another substance," "to excite or stupefy with liquor." Webster's Encyclopedic Unabridged Dictionary, 1996 ed., at 1000.

The evidence supported that Honie was not stupefied. One of the officers who said Honie smelled of alcohol also said that Honie could obey commands, and in his experience, intoxicated persons could not. TR607:321,325. Another officer at the scene testified that although he could smell alcohol on Honie, Honie needed no assistance walking and he would not describe Honie as rambling. TR597:62-63.

As for the cab driver, Honie had the wherewithal to direct him to an area near Claudia's home, then walked the rest of the way there. Plainly, Honie knew where he was going, but chose to stop short of his final destination. This evidence shows Honie had the wherewithal to keep the cab driver—who was acquainted with Honie—from learning that Claudia's home was his final destination. While breaking through a glass door to get into a locked home may not be a complex task, it certainly represents problem solving. By his own account, Honie had been arguing with Claudia through the closed door. When he had had enough of her name calling, he decided to get to her. Breaking the door to accomplish that goal represents problem solving.

Honie ignores his own expert's testimony at sentencing that, in their first meeting, Honie reported he could not remember large parts of the murder and was in a "blackout" when it occurred. However, he told the "whole story" in the last interview and explained "he wished that he'd been in a blackout." She testified that, at that point, Honie was very open and forthcoming. TR605:172. That telling contradiction was not lost on the sentencing court. TR546-45.

And the evidence conclusively established that Honie drank to excess for years before the murder, supporting that he had a high tolerance for alcohol. TR605:86, 141; TR607:250, 269-70, 275, 306, 325-26, 349.

Honie repeated statements he made during his arrest—suggesting that someone else killed Claudia and that cult activity was involved—the next day in his first two police interviews. TR607:306-08, 340-50, 632-69. One can reasonably infer from this evidence that even immediately after butchering Claudia, Honie thought rationally enough to craft a story to escape responsibility for his acts.

Honie nevertheless proffers affidavits from three guilt-phase jurors claiming that it would have been helpful if they heard an emergency room doctor's testimony that Honie was "highly intoxicated" and "not of sound, composed lucid mind at the time he examined him." Petition at 26-27; Honie's Exhibits N-P. But Honie's proffer of juror declarations is irrelevant for two critical reasons.

First, Honie's intoxication was never a question to be considered in determining his guilt—under Utah law, it could only negate his intent to kill if he was so intoxicated that he did not know he was killing a person. *Honie*, 2014 UT 19, ¶¶49-50 (SE17). Immediately after police called Honie out of Claudia's home, he admitted, "I killed her. I stabbed her with a knife." TR607:293,304,321. Only hours earlier, Honie had threatened to kill Claudia if Carol did not come see him. And, as discussed, Honie admitted to Dr. Cohn that he remembered the details of the crime—he simply *wished* he had blacked out so that he would not remember them. TR605:172. These facts, along with the other evidence of his

intent to kill Claudia, amply demonstrated that he knew he was killing a person and that a voluntary intoxication defense was simply not available to him at the guilt phase.

Second, the guilt-phase jurors' declarations—including two that claim they would not have sentenced Honie to death after hearing the guilt-phase evidence—have no relevance at all because Honie waived sentencing by jury. These declarants did not decide Honie's fate. And it is not clear they could have. Because Honie waived jury sentencing before voir dire, the jury panel did not need be death qualified. The process of death qualification, upheld as constitutional by both the United States Supreme Court and Utah Supreme Court, concerns the removal of jurors whose "views on capital punishment would prevent or substantially impair the performance of the juror's duties as a juror in accordance with the instructions of the court." *State v. Maestas*, 2012 UT 46, ¶345, 299 P.3d 892. This process would have likely changed the composition of the jury had Honie not waived it for his penalty. Indeed, a voir dire member expressing her view that Honie should not have been sentenced to death because only non-LDS people get sentenced to death in Utah may have been rejected from the panel outright. *See* Honie's Exhibit P.

B. Honie presented ample evidence of his family history, mental health issues, and alcohol and drug abuse to the sentencing court; Honie's embellishments and critiques on that evidence do not present a substantial issue for a commutation hearing.

Honie misrepresents the record when he states that during state post-conviction proceedings, "the judge *found* that 'trial counsel did not present the most important mitigating evidence—the correlation between [Honie's] unconventional social behavior throughout his life and credible scientific explanations for these behavior patterns.'"

Petition at 27 (emphasis added). Honie does not cite the record for his purported quotation. But the language can be found in the post-conviction court's first summary judgment ruling, which Honie attaches as Exhibit LL to his petition. *See* Honie's Exhibit LL at 67 (PCR1035). And it is not the court's finding. Rather, Honie misidentifies as the court's finding his own mitigation consultant's statement about what he believed was "most important" for mitigation. *Id.* The state district court ruled only that the post-conviction mitigation consultant's affidavit was enough to raise a fact issue on whether trial counsel's investigation met Sixth Amendment standards. That simply meant that Honie could temporarily survive summary judgment. The court emphasized that, because neither party submitted an affidavit from trial counsel, there was "little in the record" to contradict Honie's post-conviction consultant's assessment of trial counsel's investigation. *Id.* at 69-72 (PCR1037-40). But the court at no point "found" that trial counsel omitted the most important mitigation evidence. To the contrary, after the State filled the gap by providing the court an affidavit from trial counsel, the post-conviction court summarily rejected Honie's ineffective assistance claim and held that his mitigation case was constitutionally firm. SE15 at 16-27. Each subsequent court to review the issue has agreed. *Honie II*, 2014 UT 19, ¶¶34-46,71-82 (SE17); SE18 at *22-26.[4]

[4] Honie also repeats his challenge to the prosecutor's closing statement during sentencing that Claudia—a Native American—was not a "drunken Indian in a park" but instead an asset to the Paiute community. The prosecutor certainly drew an improper comparison. But Honie does not disclose that the sentencing judge found it impermissible and expressly excluded the statement from his sentencing calculus. SE1 at 547-46. Nor does Honie disclose that his challenges to the prosecutor's statement have been raised and denied in both state and federal courts. *Honie I*, 2002 UT 4, ¶¶38-39 (SE12); SE14 at 19, 27-30, 72-75; SE18 at *27.

Honie's complaints about his mitigation case are therefore not a substantial reason to hold what would in essence be another penalty phase hearing.

Honie already had that, and it was constitutionally adequate. Honie's trial counsel hired an experienced investigator and a psychologist with forensic training. Counsel had worked previously with both of them on other cases. Counsel relied on them to help prepare the defense's mitigation case. That case covered Honie's personal history, his family history, his substance abuse problems, and his mental health issues, both generally and specifically related to the crime. Counsel called Honie's father, mother, brother, and two maternal aunts; his former counselor Farrell Hoosava; Carol Pikyavit, Claudia's daughter; and Dr. Cohn to detail Honie's life history. They told the sentencer about dysfunction in his family, including mental health issues and substance abuse; Honie's personal substance abuse challenges, including the lack of adequate treatment and the events in his life that both led him to it and frustrated his attempts to stop it; and his passive personality, which left him vulnerable to following his friends' bad choices. They also testified to Honie's good qualities: his willingness to help the elderly, his generally good and loving nature, his caring for wounded animals, and his academic achievement the year he spent away from his friends. They testified about the positive aspects of Honie's family.

And Dr. Cohn presented evidence that Honie would not pose a threat of violence in prison because there he could not access the one thing that made him violent—alcohol.[5]

[5] His disciplinary record shows, however, that he has had access to illicit amphetamines. SE7 at 9-12 (MD1).

Based on his lack of brain damage and average intelligence, she opined that he would age out of his aggression in prison.

The Utah Supreme Court has concluded that this mitigation case satisfied constitutional requirements, and every subsequent reviewing court has validated that opinion.

Honie's proffers here merely repeat his 1999 mitigation case, embellish it, or critique it.

For example, Honie argues that his crime "would not have happened but for [his] extreme intoxication from alcohol and drugs, as well as his traumatic childhood, which impacted his brain development and ability to control his behavior." Petition at 27. But Honie presented these theories through evidence at sentencing. Dr. Cohn testified that Honie's alcohol and drug consumption contributed to the violent assault on Claudia. She testified that the only two documented episodes of Honie being violent occurred when he had been drinking. She relied on that evidence to testify that he presented a low risk of violence in prison where he would not have access to alcohol, the trigger for his past violence. She also testified that the traumas Honie experienced, including the loss of the elderly women whom he had befriended and Boone's attempted sodomy, contributed to his defiant behavior and his substance abuse. She also testified that he did not receive the sustained treatment he needed to defeat it.

Perhaps most importantly, the evidence refuted the conclusion Honie says should have been drawn—that his substance abuse and general environment were outside of his control. Honie apparently did well in substance abuse treatment, but fell back into his abuse

when he returned home. And for a time, he apparently defeated his addictions and escaped from the environment he suggests led him on the path that ended in his brutal murder of Claudia when he left his family and friends to live with his aunt. Honie made the choice to leave that productive and prosocial environment to return to the environment he now blames for his murder.

Honie also says that he fell 121 feet from a mesa, and that he was exposed to alcohol in-utero. But these concern whether Honie had brain damage. Dr. Cohn screened him for brain damage and found none. Honie simply found a different expert who came to a different conclusion. But Honie has never shown that Dr. Cohn lacked the qualifications to evaluate him for brain damage. And perhaps more fundamentally, evidence of brain damage—as with most mitigation evidence—is a double-edged sword. It "may diminish [the defendant's] blameworthiness for his crime." But it also "indicates that there is a probability that he will be dangerous in the future." *Penry v. Lynaugh*, 492 U.S. 302, 324 (1989), *overturned on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002); *see also Gardner v. Galetka*, 568 F.3d 862, 881 (10th Cir. 2009) (presenting additional evidence of a dysfunctional background likely would not have changed the sentencing verdict because "the greater the dysfunction in his family, the less likely it is that [the defendant's] violence would subside if ever released").

And the manner in which Honie disclosed his mother's testimony over the years does not establish that he was exposed to alcohol in-utero. At trial, she testified about her drinking, but she did not say that she drank when she was pregnant with Honie. Later, in his post-conviction case, Honie identified additional testimony he would present from his

mother in the post-conviction proceedings. It did not include testimony that she drank while pregnant. PCR1344-46. In fact, Honie waited until after the post-conviction court denied him relief to proffer some evidence of in-utero alcohol exposure. Even then, his mother testified only that it was "possible," "even probable" that she drank while pregnant with Honie. PCR3469. This history of testimony does not leave a firm impression that Honie had substantial prenatal exposure to alcohol. It looks rather like iterative attempts at coming up with a mitigation theory that will work. And he does not assert that he has fetal alcohol syndrome in any event.

Honie complains that he was denied funding to present different expert testimony to the post-conviction court, and that "this information was not developed until [his] federal habeas proceedings." Petition at 2. But Honie offers an incomplete and misleading account of both the state post-conviction court's funding decisions and how it impacted his ability to present new experts.

As the federal district court found, the state post-conviction court only denied funding to develop evidence to prove that he was prejudiced under the Sixth Amendment because Honie had not proven that his trial counsel was constitutionally deficient in presenting Honie's mitigation case at sentencing. SE18 at *22-26.

Before 2008, funding for litigation costs in Utah death-penalty post-conviction cases had an absolute cap of $20,000 set by administrative rule. Utah Code Ann. § 78-35a-202(2)(c) (West 2004); Utah Admin. R. 25-14-4, -5 (2007). Honie received the full $20,000. In 2008, the Utah legislature amended the funding statute to provide funds for reasonable litigation costs. The revision set a presumptive $20,000 limit but gave courts

authority to exceed that amount on a showing of "good cause." Utah Code Ann. § 78B-9-202(c). To determine "good cause" courts must consider two factors: (1) the extent to which a petitioner requests funds to duplicate work done in the criminal case; and (2) the extent to which the funds will allow a petitioner to develop evidence and legal arguments to support post-conviction relief. *Id.* § 78B-9-202(3)(a), (e).

After those amendments, Honie requested funds beyond $20,000 to develop penalty phase evidence in addition to and different from the evidence trial counsel presented. The state district court denied his funding requests after the State submitted trial counsel's affidavit explaining his reasons and strategy for mitigation. The court ruled that considering the affidavit, Honie could not prove deficient performance. And if he could not prove one element of ineffective assistance, there was no reason to provide him funds to develop evidence in support of the other.[6]

The Utah post-conviction courts determined that trial counsel's mitigation case was not deficient as a matter of law. *Honie*, 2014 UT 19, ¶86 (SE17). Therefore "an award of funds would have been inappropriate." *Id.* ¶92 n.13.

And Honie ignores evidence suggesting that the lack of state funding may not have actually impaired his ability to develop more evidence during the state post-conviction proceedings. Honie supplied a partial report from Robert L. Smith, Ph.D., to the post-conviction court in his motion for relief from the post-conviction court's judgment. SE16

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[6] Under *Strickland v. Washington*, a defendant must prove *both* deficient performance by his counsel *and* prejudice as a result of the constitutionally deficient performance. 466 U.S. 668, 687-88 (1984). A failure on one element makes even a successful showing on the other irrelevant.

at 5, 12-14. The post-conviction court's order denying that motion noted that Honie's state and federal (current) counsel had consulted with Smith "for as long as two years before" Honie opposed the State's summary judgment motion. *Id.* at 13. Honie has never adequately explained why two years was insufficient time to get a report from Smith and present it in opposition to the State's motion for summary judgment on Honie's post-conviction petition. *Id.* Honie has never explained why he could proffer that evidence only after the state post-conviction court entered judgment against him or why even then he could proffer only part. Honie moved to appoint federal habeas counsel three and one-half years before he opposed the second summary judgment motion in the state case. SE24. Honie represented that the "immediate appointment of counsel" was "necessary to begin the investigation into Mr. Honie's case." *Id.* at 4. The Court granted the motion the same day. SE25. So three and one-half years after the "immediate appointment" of federal habeas counsel to investigate his case, Honie proffered nothing from that investigation to oppose the State's motion. Instead, he waited until the state court entered judgment against him to proffer it, and then proffered only part. He therefore failed to show that he could not have developed and timely presented alternative penalty-phase evidence with the assistance of federal habeas counsel who instead belatedly supplied some evidence for the state proceedings.

The same lack of explanation goes for Honie's proffer of Gregory Meyer, Ph.D. Honie presented Meyer's neuropsychological report for the first time in his federal habeas case. Yet he does not explain why he could not have presented it to the post-conviction court in response to the State's summary judgment motion.

So, too, with Honie's proffer of Victoria Reynolds, Ph.D.'s report. Honie presents her as an expert for the first time in his commutation petition. But he does not explain why he could not have hired her earlier and included her report in his post-conviction filings. Reynolds opines about the trauma Honie experienced during his life and "inter-generational trauma" she claims he inherited from his parents, extended family, and tribal community. Petition at 33-34. But Dr. Cohn testified about widespread family dysfunction, including alcoholism, and about insufficient structure on the reservation. She testified that there was a dearth of role models for employment, success, and achievement. TR605:181-82.

Honie's sentencer heard from Honie's father, mother, brother, two maternal aunts, former counselor, Carol Pikyavit, and Dr. Cohn about the family's widespread mental health and substance abuse issues; Honie's own substance abuse, and the events in his life that led him to it and frustrated his attempts to stop it. And his witnesses testified about his good qualities—helping the elderly, his loving nature, and his care for wounded animals.

They testified how Honie's experiences—including lack of opportunities on the reservation, lack of positive role models, pervasive substance abuse in his family, and an attempted rape—all contributed to his substance abuse. Honie's trial attorney presented evidence that Honie attempted to get treatment for his addictions. And the evidence showed that Honie was only violent when drunk. Cohn also testified that Honie's polysubstance abuse history had *not* left him with brain damage, which she testified was a good predictor that he would not be violent in the future. Honie wholly ignores this evidence.

Finally, Honie's blame on his environment for his actions does not explain why, out of the cast of family witnesses he has proffered over the years and now against imposing the death penalty—family who presumably experienced similar traumas living on the Hopi reservation—only Honie chose to commit a crime of such magnitude. *See* Declaration of Franklin Honie, Sr., Apr. 14, 2015 at 2 (Honie's Exhibit D) (stating that Taberon was "the only one of [Franklin's] children who got into serious trouble" and "all of [his] other children graduated from high school").

In sum, Honie's proffered experts merely repackage theories on how Honie's upbringing, alcohol and substance abuse, mental health, and intoxication affected his judgment the night of the murder. Dr. Cohn assisted Honie's trial counsel in providing a constitutionally effective mitigation case that covered these topics. And while a different trial attorney with Honie's now-preferred experts might have presented a different mitigation case that could also meet constitutional scrutiny, that does not mean that Honie's death sentence was unwarranted. And because his proffers are rationalizations for his atrocities—relegating the blame to his environment and upbringing—they are not consistent with a genuine plea for mercy or claim of remorse.

III. Honie's prison disciplinary record offers no substantial issue for a commutation hearing.

Honie points to his behavior while incarcerated as a reason for granting him mercy. But his prison record is not as benign as his petition suggests. His decision to downplay the seriousness of his prison violations is consistent with his decision to downplay the gravity of the crime he committed against Claudia.

While he references his assault on another prisoner in July of last year, he euphemizes it. Surveillance footage showed Honie and the inmate exchanging words. When the inmate approached Honie, Honie took time to set down a cup, then swung at the inmate, and the inmate fell to the floor. SE7 at 5. Honie's violent response to what he told officers was the inmate being "disrespectful" left a deep, gaping gash on the inmate's chin. *Id.* at 8. According to the disciplinary report, Honie told officers that he "slapped" the inmate. *Id.* at 6. A slap could not have caused such a cut:

Honie also does not mention testing positive for non-prescribed amphetamines in 2022, or his violation for fashioning a makeshift club capable of causing serious bodily injury in 2014. *Id.* at 9-10. These omissions further reinforce his failure to accept responsibility for his conduct.

And while Honie may have otherwise demonstrated some positive contributions to prison society, good behavior should not be a reason for commutation. For one thing, good behavior is simply the minimum requirement society can reasonably expect from everyone; it is no great achievement. And granting commutation on a spotless record—Honie's is not—would undercut the Legislature's decision to reserve for the worst of crimes a punishment that depends on factors known at the time of sentencing, not on a prisoner's

subsequent conduct while incarcerated. Setting such precedent would further incentivize death-row inmates to delay their sentences so they could build a record of good behavior. "Delay" is already the "name of the game in death penalty cases." *Burris v. Parke*, 95 F.3d 465, 471 (7th Cir. 1996) (Manion, J., concurring). Giving Utah's death-row inmates further incentive to delay would further erode the People's interest in finality of judgment.

IV. Honie's petition identifies no substantial issue for commutation because it contradicts his claims that he is remorseful and fails to acknowledge any of the horrific acts he committed.

Remorse "must be the act of a morally free person who accepts responsibility for his behavior and its consequences." Bruce Ledewitz & Scott Staples, *The Role of Executive Clemency in Modern Death Penalty Cases*, 27 U. Rich. L. Rev. 227, 237 (1993). Despite Honie's insistence that he has always expressed remorse and taken accountability for murdering Claudia, his entire petition defers responsibility to his circumstances, drunkenness, substance abuse, and other people's choices. And Honie's posture of remorse is belied even more fundamentally by his petition's euphemistic account of the murder. He presents his conduct on the night of Claudia's murder in the mildest of terms and almost as if he believes it were not his fault. He says he was "extremely intoxicated" and "became involved in a domestic dispute" with Claudia, "which resulted in him tragically taking [her] life." Petition at 1. Relying on the testimony of his trial defense expert Dr. Cohn and cherry picking some of his self-serving statements to police, he says that he merely "wanted to scare" Claudia, that she "wasn't supposed to die," and that she provoked him by "verbally cutting him down" after he arrived and waited outside her sliding glass door. *Id.* at 23.

Honie's characterization of the events and his omission of the aggravating circumstances found by the sentencing court are grossly misleading and should be reason enough for this Board not to find a substantial issue for commutation. This was no mere "domestic dispute," Honie did much more than take Claudia's life, and his express intent to murder Claudia and other deliberate actions belie the excuse that several courts have now heard—that he was too intoxicated to appreciate what he was doing.

Honie does not acknowledge that he announced his intent to kill Claudia that night only hours before he carried out his purpose. He told Carol over the phone that if she didn't come see him, he would kill Claudia and Benita's children. He later viciously executed that threat against Claudia, and he had already sexually assaulted one of the children before police called him out of hiding.

Nor does Honie acknowledge that in the course of murdering Claudia he stabbed her vagina with a butcher knife three times, cutting through her cervix and into her pelvic cavity. Nor does he acknowledge that he stabbed her in and around her anus several times. He does not mention the fatal wounds he inflicted with the butcher knife—four deep slashes to Claudia's neck that merged in a "huge, deep cut" penetrating to her backbone through skin, fat, muscle, and organs. There's no mention of the brutal beating he inflicted on Claudia, including a blunt-force injury that made the entire left side of her face swell outward half an inch and another that caused her eyelid to turn purple. Nothing about the bite marks he left on her, the patterned injuries he caused by hitting her with a blunt object, and other bruises she endured.

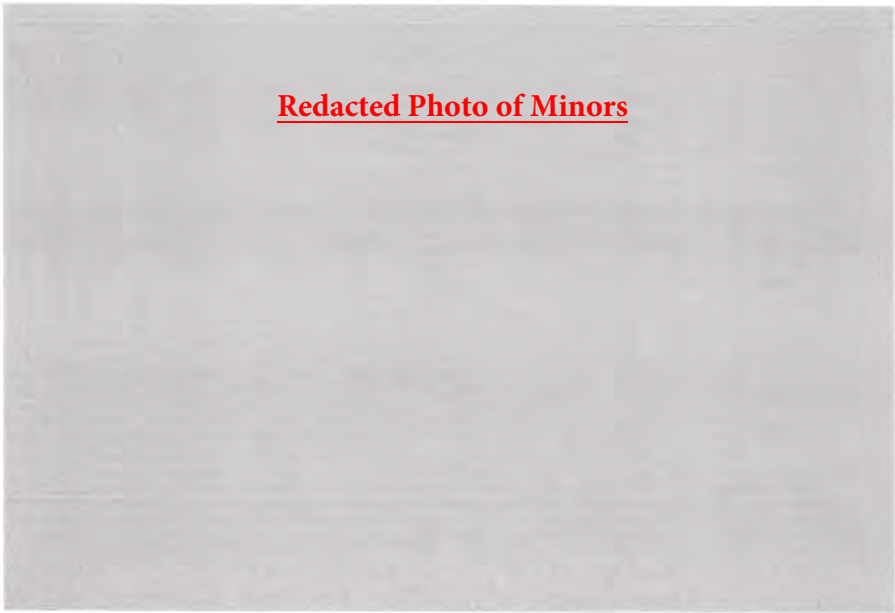
Nor does Honie disclose the fact found by the sentencing court that he prepared to anally rape Claudia after cutting her throat but decided against it when he realized she had died.

He doesn't acknowledge the sentencing court's finding, based in part on Honie's own confession to his defense expert, that after brutally murdering Claudia he violated four-year-old D's vagina by fondling her hymen and posterior forsheath so violently that she bled there for hours.

And while Honie relies on his trial expert's testimony that he "just wanted to scare" Claudia, he disregards not only the clear evidence above that he intended to do much more, but also the sentencing court's finding that Dr. Cohn "rationalized [Honie's] behavior by asserting that the victim 'provoked' [him], by stating that he is not a predator, and by minimizing the defendant's repeated biting behavior by describing it as a 'low frequency' behavior." SE1.

Perhaps the most disturbing aspect of Honie's murder—if one can be named—was his committing it in the presence of Claudia's grandchildren, at least one of who saw grandmother's ravaged, bleeding body. D, whom Honie sexually abused that night, was "covered, literally, head to toe with blood." TR607:379-83. The other two granddaughters also had blood on them. *Id.*

Minor Names Redacted



Honie also fails to acknowledge his vicious attack on Carol four years before the murder, which the sentencing judge found bore striking similarities to his attack on Claudia.

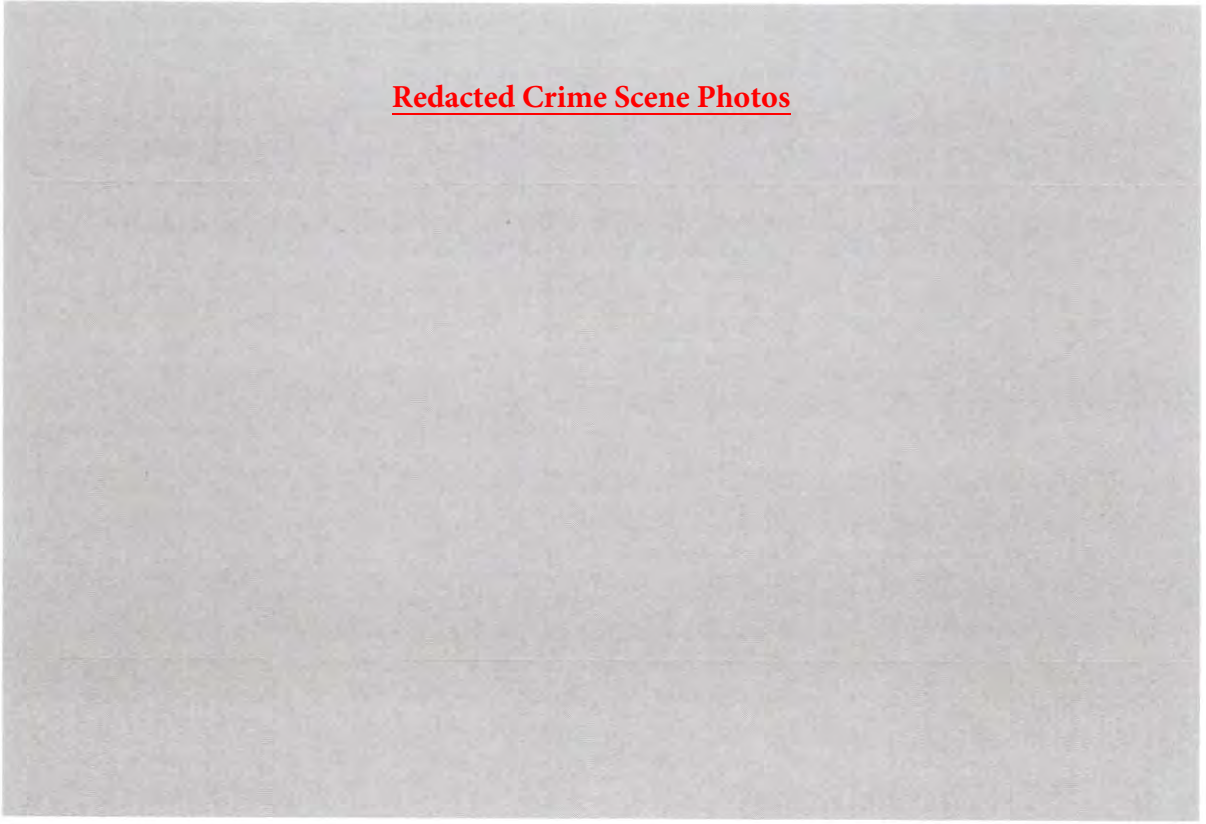
Honie's failure to confront these facts renders his claims of remorse suspect, at best. Instead of taking accountability for his horrendous acts, he declines to even mention them and seeks to lay them at the feet of his upbringing, substance abuse, mental health, and his decision to drink and take drugs leading up to the murder.

This is not the first time Honie has abdicated responsibility for his actions that night. Contrary to his assertion that he has "always taken responsibility" for Claudia's murder, he began evading responsibility starting with his police interviews in 1999. Honie told several different stories to police at first, claiming he blacked out and could not recall the events that night, blaming the murder on a Mexican mafia hit man or another unidentified intruder, and casting Claudia in the role of the aggressor whose anger stemmed from what he claimed was her past sexual relationship with him. TR607:345, 348-51, 353-54, 360, 362-

69. Ultimately, his story was that Claudia provoked his response and the murder was an accident. TR607:348-69.[7]

Honie told officers that "Claudia wasn't supposed to die" and that he only wanted to scare Claudia. TR607:347-49. Honie said (1) he was sorry and should die for what he had done wrong; (2) he did not know "what the hell" he had done; (3) *if* he killed Claudia, he was "very, very sorry"; (4) "God please forgive me," and "Dee [Claudia], please forgive me"; (5) he could have killed Claudia; and (6) he had done something bad. Honie also said that he didn't intend to hurt Claudia when he went to her home, despite having told Carol only hours earlier that he would kill Claudia and Benita's children. Honie further claimed that he and Claudia tripped and fell with the knife at Claudia's throat, and Claudia "went onto the knife." TR607:346-61. But he did not explain how her throat was cut four times if she fell only once, why he then vaginally and anally raped her with the knife, and why he attempted to anally rape her with his penis if the events had been an accident up to the point of their fall. His acts were not the result of accident:

[7] Transcripts of Honie's police interviews are attached as SE3.



The State agrees that mercy is within this Board's discretion. But Honie's horrific acts, their life-long impact on Claudia's family and her tribal community[8], together with Honie's demonstrated failure to own up to the terror and gravity of his conduct, all weigh decidedly against commutation.

CONCLUSION

Based on the foregoing, the Board should deny Honie's request for commutation without a hearing. He does not, and cannot, dispute his guilt. Instead, he omits nearly all details of his crime that were critical to the sentencing judge's determination that death was

[8] The State attaches current victim impact statements from Claudia's daughter and two of Claudia's grandchildren. SE23. They wish to remain anonymous at this time. Also attached are impact statements from Claudia's cousin Corrina Bow and The Paiute Indian Tribe of Utah Tribal Council. *Id.*

warranted. Those details, presented in the State's penalty-phase evidence and summarized in the sentencing court's findings and conclusions, alone show that the judge had little choice but to sentence Honie to death even under Utah's exacting standards, and even though he said it was the last thing he would want to do. Utah's death penalty is reserved for only the most horrific of the State's crimes, and this was truly one of them. The Board should decline to reweigh the mitigating evidence that Honie presented to Utah courts. Honie, by omitting troubling details from his prison disciplinary history, also shows that he does not take accountability for those actions. And that record can never erase what he did to Claudia, D[redacted], their family, and the Paiute community. None of the proffered evidence that Honie presents in his petition could make this lawful death sentence unduly harsh.

DATED this 21st day of June 2024.

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Minor Names Redacted

STATE'S WITNESSES

Should the Board hold a hearing, the State does not intend to call witnesses.

INDEX OF WRITTEN EVIDENCE

Exhibit 1: Findings of Fact and Conclusions of Law (Sentencing), 5.24.99

Exhibit 2: Statement of Conviction and Judgment of Death, 5.24.99

Exhibit 3: Honie's Police Interviews, 1998

Exhibit 4: Other Police Interviews and Reports, 1998

Exhibit 5: Crime Scene Photos, 1998

Exhibit 6: Trial Transcripts (Guilt and Penalty Phases)

Exhibit 7: Honie's Prison Disciplinary Records (Protected)

Exhibit 8: Honie's Criminal Record, 1999 (Penalty Phase)

Exhibit 9: Jury Verdict, 5.18.99 (Guilt Phase)

Exhibit 10: Special Verdict Questions, 5.18.99 (Guilt Phase)

Exhibit 11: Minutes Jury Trial Sentence, Judgment, Commitment, 5.21.99

Exhibit 12: *State v. Honie*, 2002 UT 4, 57 P.3d 977 (direct appeal)

Exhibit 13: *Honie v. Utah*, 123 S.Ct. 257 (2002), *denying cert.*

Exhibit 14: Ruling on Motion to Dismiss Amended Petition and for Partial Summary Judgment, 12.1.05 (post-conviction)

Exhibit 15: Memorandum Decision Re: State's Second Summary Judgment Motion, 6.22.11 (post-conviction)

Exhibit 16: Order Denying Motion for Relief From and to Set Aside Judgment, 2.9.12 (post-conviction)

Exhibit 17: *Honie v. State*, 2014 UT 19, 342 P.3d 182 (post-conviction)

Exhibit 18: Memorandum Decision and Order, *Honie v. Crowther*, No. 2:07-cv-628 JAR, 2019 WL 2450930 (D. Utah June 12, 2019) (federal habeas)

Exhibit 19: Memorandum Decision and Order, *Honie v. Benzon*, No. 2:07-cv-628 JAR, 2019 WL 5066738 (D. Utah Oct. 9, 2019) (federal habeas)

Exhibit 20: *Honie v. Powell*, 58 F.4th 1173 (10th Cir. 2023) (federal habeas)

Exhibit 21: *Honie v. Powell*, 144 S.Ct. 504 (Dec. 11, 2023), *denying cert.*

Exhibit 22: Warrant of Execution, June 10, 2024

Exhibit 23: Victim Impact Statements

Exhibit 24: Motion to Appoint Counsel in Federal Habeas, 8.23.07

Exhibit 25: Order Appointing UT Federal Defender Office, 8.23.07

CERTIFICATE OF SERVICE

I hereby certify that on June 21, 2024, I electronically filed the foregoing RESPONSE TO PETITION FOR COMMUTATION OF DEATH SENTENCE with the Utah Board of Pardons and Parole by email and served a copy of the same to the following by email and overnight mail of a flash drive containing the response and exhibits:

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