

STATE OF MAINE

KENNEBEC, ss.

SMOKEY HEATH,

Petitioner

v.

STATE OF MAINE,

Respondent

RECEIVED AND FILED
KENNEBEC SUPERIOR COURT
2005 SEP 16 10 26 AM
CRIMINAL ACTION
DOCKET NO. CR-02-480

HENRY DESJARDIN
CLERK OF COURTS

SKS-1007-9/3/05

DECISION

This matter comes before the court on the amended petition of Smokey Heath for post-conviction review. The petitioner alleges three grounds for review: first, that trial counsel was ineffective by failing to advise petitioner of the actual sentence at that time of plea; second, trial counsel was ineffective at the time of sentencing; and third, ineffective assistance of counsel in failing to recognize that the petitioner was suffering from a mental disease or defect which would render his plea involuntary. The record before the court consists of transcripts of the petitioner's guilty plea and sentencing, mental health evaluations and the testimony and exhibits presented at hearing. The three allegations will be considered separately below.

The petitioner's first ground concerns whether his trial counsel was effective in advising him of the nature and consequences of the sentence. In his final argument, the petitioner concedes that "defense counsel was competent and industrious." Further, the lawyer/client letter sent by trial counsel and acknowledged by the petitioner (exhibit 1) is so complete and detailed that there can be no question that the petitioner understood the consequences of his plea at that time.

The second ground of the petition concerns the presentation of trial counsel at the time of sentencing. A review of the transcript of the sentencing proceeding shows that the sentence is one that had been negotiated between the State and the defense prior to the hearing. Nevertheless, trial counsel spoke at some length concerning the various problems faced by the petitioner during his life including his mental illness. At no time was counsel's performance any less than one would expect from an attorney of average experience and competence.

The petitioner's third ground, and the ground most vigorously argued after hearing, is that his attorney did not adequately recognize and take into account petitioner's mental abnormalities. However, the evidence is quite to the contrary. Both in counsel's comments to the sentencing court and in his testimony on this petition, it is clear that counsel fully understood the nature of the petitioner's mental illness and his assessment that the petitioner was competent to enter the plea and be sentenced. In addition, counsel hired an independent psychologist to interview the petitioner and the psychologist was also present during the plea. The psychologist's opinion was that the petitioner was competent as a matter of law, despite the anxiety, depression, post-traumatic stress disorder and personality disorder from which she believes the petitioner suffers. Finally, the court was quite careful and clear in addressing the petitioner during the Rule 11 proceeding and made specific findings concerning the defendant's mental capacity to waive his constitutional right and that his plea was not tainted or affected by any mental illness. The petitioner fails on this ground also.

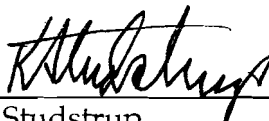
Finally, during the hearing the petitioner testified that although he was present, it was his sister, not himself, who killed the victim for which he was convicted. That testimony was the first time that any of the participants throughout the entire process

had heard of this claim and the court found the testimony to be incredible even if the issue were properly before the court.

For the reasons stated above, the entry will be:

Petition DENIED.

Dated: September 15, 2005



S. Kirk Studstrup
Justice, Superior Court

SMOKEY D HEATH
vs
STATE OF MAINE

SUPERIOR COURT
KENNEBEC, ss.
Docket No AUGSC-CR-2002-00480

DOCKET RECORD

PL. DOB: 08/06/1975
PL. ATTY: DANIEL PURDY
PO BOX 131
13C MEDOMAK TERRACE
WALDOBORO ME 04572
WITHDRAWN 04/13/2005
PL. ATTY: JOSEPH STEINBERGER
PO BOX 7
ROCKLAND ME 04841
APPOINTED 04/13/2005

State's Attorney: ANDREW BENSON

Filing Document: PETITION
Filing Date: 12/26/2002

Major Case Type: POST CONVICTION REVIEW

Charge (s)

Docket Events:

12/26/2002 FILING DOCUMENT - PETITION FILED ON 12/26/2002

PETITION FOR POST CONVICTION REVIEW, STATEMENT OF FACTS AND SUPPORTING MEMORANDUM FOR
PETITION OF POST CONVICTION REVIEW, ALSO MOTION FOR APPOINTMENT OF COUNSEL WITH AFFIDAVIT
AND STATEMENT OF PRISONER'S ACCOUNT.

12/26/2002 POST CONVIC. REVIEW - REVIEW SENT FOR REVIEW ON 12/26/2002

ALL PAPERWORK SENT TO JOHN SIMMONS, LAW CLERK TO JUSTICE HUNTER, TO PENOBSCOT SUPERIOR
COURT.

12/26/2002 MOTION - MOTION FOR APPOINTMENT OF CNSL FILED BY DEFENDANT ON 12/26/2002

12/31/2002 MOTION - MOTION FOR APPOINTMENT OF CNSL GRANTED ON 12/31/2002
DONALD H MARDEN , JUSTICE
COPY TO PARTIES/COUNSEL

12/31/2002 Party(s): SMOKEY D HEATH
ATTORNEY - APPOINTED ORDERED ON 12/31/2002

Attorney: MARY DAVIS

01/09/2003 POST CONVIC. REVIEW - ASSIGNMENT ASSIGNED TO DOCKET ON 01/09/2003

POST CONVICTION ASSIGNMENT ORDER FILED AND INCORPORATED HEREIN BY REFERENCE; CASE ASSIGNED
TO THE REGULAR CRIMINAL DOCKET; CONDITIONAL APPOINTMENT OF COUNSEL; TIME LIMITS
ESTABLISHED.

01/21/2003 MOTION - MOTION FOR EXTENSION OF TIME FILED BY DEFENDANT ON 01/21/2003

01/21/2003 MOTION - MOTION FOR FUNDS FILED BY DEFENDANT ON 01/21/2003

01/29/2003 MOTION - MOTION FOR EXTENSION OF TIME GRANTED ON 01/27/2003
DONALD H MARDEN , JUSTICE
COPY TO PARTIES/COUNSEL DEADLINE FOR AMENDMENT MAY 30, 2002 AND DEADLINE FOR
WITNESS LIST JUNE 30, 2002

01/29/2003 MOTION - MOTION FOR FUNDS GRANTED ON 01/27/2003

DONALD H MARDEN , JUSTICE
COPY TO PARTIES/COUNSEL; TOTAL AMOUNT APPROVED IS \$700.

01/30/2003 MOTION - MOTION TO PREPARE TRANSCRIPT FILED BY PETITIONER ON 01/15/2003

01/30/2003 MOTION - MOTION TO PREPARE TRANSCRIPT GRANTED ON 01/16/2003

DONALD H MARDEN , JUSTICE

COPY TO PARTIES/COUNSEL

RULE 11

TRANSCRIPT AND SENTENCING COPY TO PHIL GALUCKI AND JANETTE COOK

01/30/2003 OTHER FILING - TRANSCRIPT FILED ON 01/09/2003

RULE 11 TRANSCRIPT FILED BY PHIL GALUCKI

04/03/2003 OTHER FILING - TRANSCRIPT FILED ON 04/03/2003

SENTENCING TRANSCRIPT BY JANETTE COOK FILED.

06/30/2003 MOTION - MOTION FOR WITHDRAWAL OF CNSL FILED BY COUNSEL ON 06/30/2003

07/23/2003 POST CONVIC. REVIEW - ASSIGNMENT ASSIGNED TO JUSTICE ON 07/14/2003

JOHN R ATWOOD , JUSTICE

PER ASSIGNMENT ORDER OF CHIEF JUSTICE MILLS

07/23/2003 Party(s): STATE OF MAINE

ATTORNEY - LIMITED ENTERED ON 07/23/2003

Attorney: DAVID CROOK

07/23/2003 Party(s): SMOKEY D HEATH

ATTORNEY - APPOINTED ORDERED ON 07/23/2003

Attorney: DAVID CROOK

07/23/2003 Party(s): SMOKEY D HEATH

ATTORNEY - LIMITED ENTERED ON 07/23/2003

Attorney: DAVID CROOK

07/23/2003 Party(s): SMOKEY D HEATH

ATTORNEY - WITHDRAWN ORDERED ON 07/18/2003

Attorney: MARY DAVIS

07/23/2003 Party(s): SMOKEY D HEATH

ATTORNEY - APPOINTED ORDERED ON 07/23/2003

Attorney: DAVID PARIS

07/23/2003 Party(s): STATE OF MAINE

ATTORNEY - RETAINED ENTERED ON 07/23/2003

Attorney: LARA NOMANI

07/23/2003 Party(s): STATE OF MAINE

ATTORNEY - LIMITED ENTERED ON 07/23/2003

Attorney: LARA NOMANI

07/29/2003 Party(s): STATE OF MAINE

ATTORNEY - WITHDRAWN ORDERED ON 07/23/2003

Attorney: LARA NOMANI

07/29/2003 Party(s): STATE OF MAINE

ATTORNEY - RETAINED ENTERED ON 07/23/2003

Attorney: ANDREW BENSON

10/20/2003 SUPPLEMENTAL FILING - AMENDED PETITION FILED ON 10/01/2003

10/23/2003 POST CONVIC. REVIEW - PCR CONFERENCE SCHEDULED FOR 12/29/2003 @ 8:30
JOHN R ATWOOD , JUSTICE

10/23/2003 POST CONVIC. REVIEW - PCR CONFERENCE NOTICE SENT ON 10/23/2003

12/17/2003 POST CONVIC. REVIEW - RESPONSE TO PETITION FILED ON 12/17/2003

12/31/2003 POST CONVIC. REVIEW - PCR CONFERENCE HELD ON 12/29/2003

12/31/2003 POST CONVIC. REVIEW - ORDER RESULTING FROM PCR CONF FILED ON 12/29/2003
JOHN R ATWOOD , JUSTICE
COPIES TO COUNSEL.

02/23/2004 SUPPLEMENTAL FILING - AMENDED PETITION FILED ON 02/20/2004

02/25/2004 POST CONVIC. REVIEW - PCR CONFERENCE SCHEDULED FOR 02/25/2004

02/25/2004 POST CONVIC. REVIEW - PCR CONFERENCE HELD ON 02/25/2004
JOHN R ATWOOD , JUSTICE
Attorney: DAVID PARIS
DA: ANDREW BENSON
CONFERENCE HELD BY TELEPHONE

02/25/2004 POST CONVIC. REVIEW - ORDER RESULTING FROM PCR CONF FILED ON 02/25/2004

PETITIONER TO HAVE UNTIL 3/19/04 TO FILE WITNESS LIST. PETITIONER MAY SEEK COMPETENCY EXAMINATION BEFORE HEARING. -STATE TO RESPOND TO ORIGINAL PETITION AND THE SECOND AMENDMENT TO BE DONE BY 3/2/04 RESPONDENT TO FILE WITNESSLIST ON 3/26/04. PETITIONER TO GIVE ONE WEEKS NOTICE TO RESPONDENT AS TO EXHIBITS TO BE USED AT HEARING I.E. ONE WEEK BEFORE HEARING.
COPIES TO COUNSEL.

03/02/2004 POST CONVIC. REVIEW - RESPONSE TO PETITION FILED ON 03/01/2004

STATE'S RESPONSE TO AMENDED PETITION

03/10/2004 MOTION - MOTION FOR WITHDRAWAL OF CNSL FILED BY COUNSEL ON 03/10/2004

03/26/2004 OTHER FILING - WITNESS LIST FILED BY STATE ON 03/25/2004

WITNESSES: GREGG BERNSTEIN, KATHRYN THOMAS, JOHN NEWCOMB, BRIAN RINES.

03/30/2004 MOTION - MOTION FOR WITHDRAWAL OF CNSL GRANTED ON 03/30/2004
JOHN R ATWOOD , JUSTICE
COPY TO PARTIES/COUNSEL

03/30/2004 MOTION - MOTION FOR APPOINTMENT OF CNSL FILED BY DEFENDANT ON 03/30/2004

03/30/2004 MOTION - MOTION FOR APPOINTMENT OF CNSL GRANTED ON 03/30/2004
JOHN R ATWOOD , JUSTICE
COPY TO PARTIES/COUNSEL

03/30/2004 Party(s): SMOKEY D HEATH
ATTORNEY - WITHDRAWN ORDERED ON 03/30/2004

Attorney: DAVID PARIS

03/30/2004 Party(s): SMOKEY D HEATH
ATTORNEY - APPOINTED ORDERED ON 03/30/2004

Attorney: PAMELA AMES

07/22/2004 HEARING - EVIDENTIARY HEARING SCHEDULED FOR 08/12/2004 @ 9:00

NOTICE TO PARTIES/COUNSEL

08/27/2004 HEARING - EVIDENTIARY HEARING NOT HELD ON 08/12/2004

09/22/2004 HEARING - EVIDENTIARY HEARING SCHEDULED FOR 10/27/2004 @ 9:00

NOTICE TO PARTIES/COUNSEL
STATE PRISON

AT THE MAINE

09/22/2004 HEARING - EVIDENTIARY HEARING NOTICE SENT ON 09/22/2004

09/27/2004 MOTION - MOTION FOR WITHDRAWAL OF CNSL FILED BY COUNSEL ON 09/23/2004

09/27/2004 MOTION - MOTION FOR WITHDRAWAL OF CNSL GRANTED ON 09/27/2004

JOHN R ATWOOD , JUSTICE
COPY TO PARTIES/COUNSEL

09/27/2004 Party(s): SMOKEY D HEATH
ATTORNEY - WITHDRAWN ORDERED ON 09/27/2004

Attorney: PAMELA AMES

09/27/2004 MOTION - MOTION FOR APPOINTMENT OF CNSL FILED BY DEFENDANT ON 09/27/2004

10/04/2004 MOTION - MOTION FOR APPOINTMENT OF CNSL GRANTED ON 09/29/2004

JOHN R ATWOOD , JUSTICE
COPY TO PARTIES/COUNSEL

10/04/2004 Party(s): SMOKEY D HEATH
ATTORNEY - APPOINTED ORDERED ON 09/29/2004

Attorney: DANIEL PURDY

10/28/2004 HEARING - EVIDENTIARY HEARING CONTINUED ON 10/27/2004

JOHN R ATWOOD , JUSTICE
Attorney: DANIEL PURDY

DA: ANDREW BENSON Reporter: KIMBERLY MCCULLOCH
Defendant Present in Court

CONTINUED OVER STATES'S OBJECTION, HEARING WAS TO BE HELD AT THE MAINE STATE PRISON;
DEFENDANT TO FILE MOTION FOR STAGE 1 EXAM, DEFENSE TO GET PAPERWORK FROM MASSACHUSETTS,
DEFENSE TO GET HIS CLIENT HIS MEDICATION AND DEFENSE TO LET COURT KNOW WHEN HE IS READY TO
PROCEED.

11/03/2004 MOTION - MOTION FOR MENTAL EXAMINATION FILED BY DEFENDANT ON 11/01/2004

DA: DANIEL PURDY

MOTION FOR FIRST STAGE EVALUATION, FILED. (MOTION FORWARDED TO JUSTICE ATWOOD IN KNOX
COUNTY)

11/09/2004 OTHER FILING - COUNSEL VOUCHER FILED ON 11/02/2004

Attorney: PAMELA AMES

11/09/2004 OTHER FILING - COUNSEL VOUCHER APPROVED ON 11/04/2004

JOHN R ATWOOD , JUSTICE

11/09/2004 MOTION - MOTION FOR MENTAL EXAMINATION GRANTED ON 11/04/2004

JOHN R ATWOOD , JUSTICE

SECOND

COPY SENT TO STATE FORENSIC SERVICE
APPOINTMENT SCHEDULED FOR 2/23/05 BY DE.. SCHETKY AT MSP AT 3:00 AND FEBRUARY 24 AT
8:30 BY DR. BAEDER AT MSP

12/20/2004 PSYCHIATRIC EXAM - STAGE ONE REPORT FILED ON 12/20/2004

INCOMPLETE REPORT FILED.

02/28/2005 PSYCHIATRIC EXAM - STAGE ONE REPORT FILED ON 02/28/2005

03/09/2005 PSYCHIATRIC EXAM - STAGE ONE REPORT FILED ON 03/07/2005

BY DIANE SCHETKY, M.D.

04/13/2005 MOTION - MOTION FOR WITHDRAWAL OF CNSL FILED BY COUNSEL ON 04/13/2005

04/13/2005 MOTION - MOTION FOR WITHDRAWAL OF CNSL GRANTED ON 04/13/2005

COPY TO PARTIES/COUNSEL

04/13/2005 MOTION - MOTION FOR APPOINTMENT OF CNSL FILED BY DEFENDANT ON 04/13/2005

04/13/2005 Party(s): SMOKEY D HEATH
ATTORNEY - WITHDRAWN ORDERED ON 04/13/2005

Attorney: DANIEL PURDY

04/13/2005 Party(s): SMOKEY D HEATH
ATTORNEY - APPOINTED ORDERED ON 04/13/2005

Attorney: JOSEPH STEINBERGER

04/25/2005 ORDER - SPECIAL ASSIGNMENT ENTERED ON 04/25/2005

JUSTICE STUDSTRUP ASSIGNED

05/03/2005 OTHER FILING - COUNSEL VOUCHER FILED ON 04/19/2005

Attorney: DANIEL PURDY

05/03/2005 OTHER FILING - COUNSEL VOUCHER APPROVED ON 04/21/2005
JOHN R ATWOOD , JUSTICE

05/10/2005 HEARING - EVIDENTIARY HEARING SCHEDULED FOR 06/17/2005 @ 8:30

NOTICE TO PARTIES/COUNSEL
STATE PRISON.

AT THE MAINE

05/10/2005 HEARING - EVIDENTIARY HEARING NOTICE SENT ON 05/10/2005

06/21/2005 HEARING - EVIDENTIARY HEARING HELD ON 06/17/2005 @ 9:00

S KIRK STUDSTRUP , JUSTICE

Attorney: JOSEPH STEINBERGER

DA: ANDREW BENSON

Reporter: MAUREEN BRADFORD

Defendant Present in Court

PETITIONER'S BRIEF DUE IN 21 DAYS, STATE'S RESPONSE WITHIN 7 DAYS AFTER RECEIPT OF
PETITIONER'S BRIEF

07/11/2005 OTHER FILING - OTHER DOCUMENT FILED ON 07/11/2005

PETITIONER'S FINAL ARGUMENT

07/13/2005 OTHER FILING - OTHER DOCUMENT FILED ON 07/13/2005

STATE'S FINAL ARGUMENT

09/19/2005 FINDING - DENIED ENTERED BY COURT ON 09/16/2005

A TRUE COPY

ATTEST: _____

Clerk