

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 10-12133-RWZ

KEVIN HENSLEY

v.

GARY RODEN, SUPERINTENDENT,
MASSACHUSETTS CORRECTIONAL INSTITUTE NORFOLK

Certificate of Appealability
February 21, 2013

ZOBEL, D.J.

Petitioner Kevin Hensley was convicted in the State court of first degree murder of his wife under both theories of premeditation and extreme atrocity of cruelty. His defense was that his mental impairment made him incapable of forming the requisite intent for murder in the first degree. After the Supreme Judicial Court affirmed the conviction and the subsequent denial of a motion for a new trial on the merits and on the ground that any violations were harmless, Hensley filed this petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254. He asserted that his Sixth Amendment right of confrontation was violated when the trial court, over his objections, allowed a pathologist who had not examined the deceased, to opine as to cause of death and to testify to factual findings in the autopsy report based on an autopsy he had not conducted or attended. Petitioner also claims that his counsel was ineffective by both, failing to call as a witness a forensic psychiatrist he had retained and who would have

testified that petitioner lacked the ability to form the mental state necessary to the conviction and by failing to offer medical records of his mental illness and treatment.

While I ruled that the Supreme Judicial Court's decision on both issues was not an unreasonable application of clearly established constitutional law, reasonable judges may disagree. Whether autopsy reports are or are not testimonial and admissible under the business record, hearsay exception has divided courts. Whether a decision by counsel not to offer evidence on a defendant's mental state is a tactical decision or evidence of ineffectiveness is in this case subject to debate.

Accordingly, the Certificate of Appealability shall issue.

February 21, 2013

DATE

/s/Rya W. Zobel

RYA W. ZOBEL
UNITED STATES DISTRICT JUDGE