STATE OF MAINE
CUMBERLAND, ss.

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
DOCKET NO. CUM-23-4

ERNEST WEIDUL,
Appellant

v.

STATE OF MAINE,
Appellee

ON APPEAL FROM THE SUPERIOR COURT

BRIEF OF APPELLEE

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STATEMENT OF THE ISSUES

I. The post-conviction court properly denied Weidul's petition for post-conviction review.

II. The post-conviction court properly relied on the record and transcripts of the prior evidentiary hearings after the initial assigned justice retired.

SUMMARY OF THE ARGUMENT

1. The post-conviction court properly denied Weidul's petition for post-conviction review. Each of the court's factual findings were supported by competent evidence in the record. The court found that Weidul failed to carry his burden of proving both ineffective assistance of counsel and prejudice regarding each of his many claims.
2. The post-conviction court properly relied on the record and transcripts of the prior evidentiary hearings after the initial assigned justice retired. Given the passage of time between the trial, the first two evidentiary hearings, and the third evidentiary hearing, even the initial assigned justice would have had to review the record and transcripts to refresh her recollection. Weidul demonstrated no prejudice other than the inability of the successor justice to visually observe the demeanor of

trial counsel while they were testifying, which, while potentially important, was not a prerequisite to a fair disposition of the petition.

STATEMENT OF THE CASE

The Procedural History and Statement of Facts sections of the State's Brief in Petitioner's direct appeal to the Law Court are attached to this brief as an addendum. On June 20, 2013, the Law Court affirmed Weidul's judgment of conviction in a memorandum of decision. *State v. Weidul*, Mem-13-69.

On June 19, 2014, Weidul filed a *pro se* state petition for post-conviction review pursuant to 15 M.R.S. §§ 2121 et seq. and M.R.U. Crim. P. 65. (Appendix at pages 1, 45, hereinafter "(App. 1, 45).") The matter was specially assigned to Superior Court Justice Joyce Wheeler, who had presided over Weidul's trial proceedings. (App. 1)

On April 25, 2016, Weidul's first post-conviction attorney filed an amended petition. (App. 56). On March 29, 2017, Weidul's second post-conviction attorney filed a second amended petition. (App. 58).

On April 11, 2017 and January 3, 2018, testimonial evidentiary hearings were held on the petition/amended petitions before Justice Wheeler.[1] (App. 7, 8). Petitioner's trial counsel, Amy Fairfield, Esq., Luke Rioux, Esq., and Thomas Connolly, Esq., testified at those hearings. (Apr. 2017 T.16-117, 120-207; Jan. 2018 T.5-112).

Following those hearings, Justice Wheeler retired, and the matter was first re-assigned to Superior Court Chief Justice Robert Mullen. (App. 10). Chief Justice Mullen ordered the parties to submit memoranda regarding the future course of proceedings. The parties submitted their memoranda on April 21, 2021 and April 26, 2021. (App. 10). Chief Justice Mullen re-assigned the matter to now-retired Superior Court Justice William Anderson without issuing an order regarding the future course of proceedings. (App. 11).

On June 8, 2022, a third evidentiary hearing was held on the petition at which Petitioner Weidul testified. (App. 12; Jun. 2022 T.10-109). At the outset of the hearing, Justice Anderson informed Weidul that he would be relying on the record and transcripts of the prior evidentiary hearings, but that Weidul could recall witnesses if there was new information he wished to present.

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[1] There were significant delays in scheduling and completing the evidentiary hearings attributable to Weidul's mental condition and the pandemic.

(App. 42-43; Jun. 2022 T.3-6). Weidul did not inform the court that he had new information to present from his trial attorneys.

On September 7, 2022, Petitioner Weidul submitted his post-hearing memorandum. (App. 12). On September 19, 2022, the State submitted its post-hearing memorandum. (App. 12). On November 25, 2022, the post-conviction court issued a decision and order denying the petition/amended petitions. (App. 13, 14-39). The court specifically found that Weidul had failed to carry his burden of proving both ineffective assistance of counsel and prejudice regarding each of his claims.

On December 13, 2022, Weidul filed a notice of discretionary appeal to the Law Court. (App. 13). On March 3, 2023, Weidul filed a memorandum in support of his application for a certificate of probable cause to appeal.

On June 1, 2023, this Court issued an order granting the certificate of probable cause. The order stated that the Court determined "that further hearing was necessary to reach a fair disposition of the matter with regard to Weidul's assertions," namely that the post-conviction court erred by ruling that he had not demonstrated that his attorneys were ineffective and that he was unfairly prejudiced by the court's special assignment of a new justice after the court (*Wheeler, J.*) completed two of three evidentiary hearings

because the court (*Anderson, J.*) relied on the record and transcripts from the prior two evidentiary hearings as a basis for its ruling.

ARGUMENT

I. The post-conviction court properly denied Weidul's petition for post-conviction review.

Weidul first challenges the post-conviction court's denial of his petition/amended petition for post-conviction review. (Blue Brief 32-37). "In appeals from judgments issued in post-conviction proceedings, we review questions of law de novo and apply a deferential standard of review to factual findings." *Theriault v. State,* 2015 ME 137, ¶ 12, 125 A.3d 1163. Because Weidul had the burden of proof on his ineffectiveness claims, he must demonstrate on this appeal that the evidence compels a contrary conclusion. *See Heon v. State,* 2007 ME 131, ¶ 8, 931 A.2d 1068.

The test for determining whether trial counsel's performance is ineffective for purposes of the Sixth Amendment to the United States Constitution and article I § 6 of the Maine Constitution requires a two-part inquiry: whether there has been serious incompetency, inefficiency or inattention of counsel -- performance by counsel that falls below that which might be expected from an ordinary fallible attorney -- and whether such ineffective representation by counsel likely deprived the defendant of an

otherwise available substantial ground of defense. *Theriault v. State,* 2015 ME 137, ¶ 14, 125 A.3d 1163, 1168; *Brewer v. State,* 1997 ME 177, ¶ 15, 699 A.2d 1139, 1143-44; *Strickland v. Washington,* 466 U.S. 668 (1984); *Kimball v. State,* 490 A.2d 653, 656 (Me. 1985) (federal and state ineffective assistance of counsel standards are virtually identical). Pursuant to this standard, the defendant bears the burden of establishing not only that trial counsel's performance was deficient, but also that the deficiency likely affected the outcome of the trial. *Brewer,* 1997 ME 177, at ¶ 15, 699 A.2d at 1143. "Under *Strickland*, therefore, the trial court must engage in an analysis that is not quantitative—that is, to determine if prejudice is probable. Rather, the court's analysis must be *qualitative* in nature—that is, to determine whether the petitioner has demonstrated that trial counsel's performance undermines confidence in the outcome of the case and renders that outcome unreliable." *Theriault,* 2015 ME 137, ¶ 19.

In *Strickland,* the Supreme Court emphasized that great deference must be paid to the strategic decisions of trial counsel:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the

> distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.

466 U.S. at 689 (internal citation omitted); *See also Levesque v. State,* 664 A.2d 849, 851 (Me. 1995) (deference to trial counsel's strategic decisions is substantially heightened); *Twist v. State,* 617 A.2d 548, 550 (Me. 1992) (trial counsel's strategic decisions are reviewed only for manifest unreasonableness).

In his pro se petition, Petitioner Weidul alleged multiple claims of ineffective assistance of counsel:

1. Failure to utilize money for experts;
2. Failure to properly prepare for cross-examination of State's experts;
3. Failure to properly investigate pretrial;
4. Failure to present DNA and fingerprint evidence;
5. Failure to utilize discovery;

6. Failure to impeach/object to "perjured" testimony of State's witnesses;
7. Failure to consult with defendant over trial strategy;
8. Failure to file motions for the ability to prepare for trial;
9. Failure to assist with pro se motions;
10. Failure to object to mass blanket denial of pro se motions;
11. Failure to assist in defense;
12. Failure to object to State's "withholding" of exculpatory evidence;
13. Failure to object to evidence presented by State's attorney;
14. Failure to protect defendant's constitutional rights pretrial, at trial, and at sentencing.

In Weidul's first post-conviction counsel's April 25, 2016 amended petition, Petitioner Weidul added and/or supplemented claims of ineffective assistance of counsel:

1. Failure to investigate self-defense claim and develop and locate witnesses that would have verified Mr. Weidul's assertion that the victim attacked him;
2. Failure to employ experts to corroborate Mr. Weidul's claim of self-defense;

3. Failure to address being seen in custody by a juror;[2]
4. Failure to object to Justice Wheeler's participation and bias against Mr. Weidul, and not requesting recusal;
5. Failure to consult and honor Mr. Weidul's directions and orders on how to proceed with his defense;
6. Failure to investigate the medical opinion of the State's expert that would have revealed that opinion to be unreliable;[3]
7. Failure to investigate and develop mental disease or defect as mitigating factor for sentencing;
8. The State failed to produce evidence favorable to Mr. Weidul;[4]
9. The State tampered with evidence to implicate Mr. Weidul.[5]

In Weidul's second post-conviction counsel's March 29, 2017 amended petition, Petitioner Weidul added and/or supplemented claims of ineffective assistance of counsel:

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[2] This claim was withdrawn at the beginning of the April 2017 hearing.

[3] This claim was withdrawn during the April 2017 hearing (Apr. 2017 T.107-108); but see item I on page 10 of Petitioner's post-hearing memorandum, which includes the claim.

[4] This claim was withdrawn at the beginning of the April 2017 hearing.

[5] While not formally withdrawn, counsel for Petitioner Weidul conceded there would be no evidence introduced to support this claim at the beginning of the April 2017 hearing.

1. Failure to object to or appeal the denial of Mr. Weidul's right to proceed pro se or to the trial court's insistence that he work with an attorney with whom he had an irreparable relationship;
2. Failure to communicate with Mr. Weidul before or at trial;
3. Failure to consult with Mr. Weidul concerning the grounds of his appeal or to appeal any aspect of his trial or motion hearings concerning the admission of medical evidence against Petitioner;
4. Failure to move to continue the trial to allow Petitioner to adjust to mental health medications or to allow Petitioner's third counsel to adequately understand and prepare for his defense.

The evidence presented at the post-conviction hearings demonstrated that trial counsel exercised their best strategic judgment on how to present Weidul's defense before and during trial. In reviewing the testimony of Weidul's three trial attorneys, this Court must apply the "strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance." *Burt v. Titlow,* 134 S.Ct. 10,17 (2013); *see also Hoxsie v. Kerby,* 108 F.3d 1239, 1246 (10th Cir.1997) ("For counsel's [decision] to rise to the level of constitutional ineffectiveness, the decision ... must have been completely

unreasonable, not merely wrong, so that it bears no relationship to a possible defense strategy." (internal quotation marks omitted)).

Each of Weidul's trial attorneys testified that they received and reviewed discovery; filed appropriate motions, *e.g.* motion to suppress, motion for Mercy Hospital records; that they thoroughly investigated the case pretrial, with the assistance of a private investigator; prepared for cross-examination of the State's witnesses; hired experts (Doctors Wisch and Beliveau); communicated with Weidul about the defense (especially Attorney Connolly); and objected to the State's evidence when they deemed it appropriate to do so. (Apr. 2017 T. at 98-115, 177-201; Jan. 2018 T. at 77-103). Justice Wheeler indicated in her 1/6/11 order denying Attorney Fairfield and Attorney Rioux's motion to withdraw that "the Court concludes that counsel has approached this case very professionally and done all that is possible in defending this case."

None of the trial attorneys indicated that the State had withheld any exculpatory evidence. (Jan. 2017 T. at 112, 193; Jan. 2018 T. at 101). Only Attorney Connolly suggested at the PCR hearing that he believed that a State's witness had perjured herself (meaning the Chief Medical Examiner), but

nevertheless acknowledged that Attorney Rioux's cross-examination of her was "brilliant." (Jan 2018 T. at 97-98).

Weidul argued at the hearings and in his post-hearing memorandum that the trial attorneys should have had fingerprint and DNA testing done of certain items at Mr. Downs's apartment, or called an ear/nose/throat expert, but he presented no such evidence himself. Thus, it is sheer speculation that such testing or testimony would have undermined confidence in the result of the trial. Similarly, Weidul failed to present any evidence as to what additional investigation should have been done, what additional cross-examination questions should have been asked, what objections to any of the State's questions should have been made, what additional motions should have been filed, or what assistance trial counsel should have provided to Petitioner with his pro se motions, etc.

Weidul argued that trial counsel should have moved to recuse Justice Wheeler because of her so-called bias against him. Yet each trial counsel testified that Weidul's sole basis for this alleged bias was her rulings adverse to him. (Apr. 2017 T. at 105-106, 185-186; Jan. 2018 T. at 92-93). Each of the trial attorneys acknowledged that the mere fact of adverse rulings against a party is not a basis for recusal. *Id.*

Weidul argued that trial counsel failed to develop mental disease or defect as a mitigating factor at sentencing, and in a similar vein failed to develop evidence to support an abnormal condition of mind defense. Yet trial counsel testified that they had Doctor Andrew Wisch conduct a mental health evaluation of Weidul and that the doctor's findings did not support such efforts.[6] (Apr. 2017 T. at 104-105, 184-185; Jan. 2018 T. at 89-92, 95); Moreover, Attorney Connolly argued at sentencing that Weidul's mental health was a mitigating factor (Sentencing Transcript at 41) and Justice Wheeler found that it was. (Sentencing Transcript at 56).

Weidul argued that Attorney Connolly did not consult with him about what grounds to raise on appeal, and specifically that he did not raise sufficiency of the evidence regarding the medical evidence. Attorney Connolly, however, testified that he did consult with Weidul about the appeal and included Weidul's supplemental brief of issues in the appendix. (Jan. 2018 T. at 78-79). He further testified that he did not include the sufficiency of the evidence issue because in his experience the potential for such an issue being beneficial was "negligible," and it would have detracted from the suppression

[6] Attorney Connolly further testified that he thought abnormal condition of mind was a "bad defense" in terms of receptivity of jurors, and that it would have conflicted with Petitioner's self-defense claim. (Jan. 2018 T. at 90-92).

issue that he did raise, and on which he thought he was going to prevail. (Jan. 2018 T. at 71-72, 79).

Weidul argued that trial counsel should have appealed or objected to Justice Wheeler's order precluding him from representing himself or that he be forced to be represented by attorneys with whom he had an "irreparable" relationship, *i.e.,* Attorneys Fairfield and Rioux. The right of a criminal defendant to the assistance of counsel "cannot be manipulated so as to obstruct the orderly procedure in the courts or to interfere with the fair, efficient and effective administration of justice." *State v. Ayers,* 464 A.2d 963, 966 (Me.1983). "The Sixth Amendment right to counsel does not confer upon a defendant an absolute right to counsel of defendant's choice." *State v. Barrett,* 577 A.2d 1167, 1171 (Me.1990) (citing *Ayers,* 464 A.2d at 966). Nor does it "guarantee[ ] a 'meaningful relationship' between an accused and his counsel." *Id.* (quoting *Morris v. Slappy,* 461 U.S. 1, 13 (1983)) (alteration in original). As Weidul requested, Attorneys Fairfield and Rioux moved to withdraw, but Justice Wheeler denied their motion, given that jury selection was to start just three weeks later.[7] Instead, as a compromise, she designated Weidul as "co-counsel" and appointed Attorney Connolly as a third attorney to

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[7] On February 1, 2012, the trial was continued after the jury was selected but before the jurors were sworn. (Docket record, CUMCD-CR-2010-03000).

assist with managing his requests. Attorney Connolly testified that he had good communication with Weidul after that. (Jan. 2018 T. at 81-82). Even Attorneys Fairfield and Rioux testified that their communication with Weidul improved after Attorney Connolly's appointment. (Apr. 2017 T. at 100-101, 178-181).

Weidul argued that trial counsel should have moved to continue the trial to allow him to adjust his mental health medications to allow him to be alert and aware during the trial.[8] Trial counsel testified that Justice Wheeler noticed one instance where Weidul appeared not to be alert during trial, and she ordered a recess to allow him to adjust his medications. (Apr. 2017 T. at 89-90, 102, 171-173, 182-183; Jan. 2018 T. at 73-75, 85-87). Attorney Connolly, who was seated next to Weidul at trial, testified that "at no point were [he and Weidul] unable to talk fluidly, candidly, intelligently." (Jan. 2018 T. at 42, 86). He further testified that, while Weidul was stressed because of the trial, it was "not to the point where [he] thought we could not proceed." *Id.* Still further, he testified that Weidul "never had a period where he was not competent to assist" him should he have needed it. *Id.* at 87.

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[8] He further argued that the trial should have been continued to allow Attorney Connolly to "adequately understand and prepare for his defense." Weidul failed to address that the trial was continued from January 2012 to May 2012, and that Attorney Connolly testified that he did not need to ask for a continuance. (Jan. 2018 T. at 63).

There is no question that Petitioner Weidul wanted to be very involved in his defense and had very strong opinions about how to present his defense. Until his appointment as "co-counsel" on February 1, 2012, however, his attorneys oversaw deciding what defenses to raise and what witnesses to call. *MCILS Standards of Practice for Attorneys who Represent Adults in Criminal Proceedings*, section 7.6 at p. 10. After Feb. 1, 2012, Weidul informed his trial counsel that he wanted to press a self-defense theory before the jury and that is what Attorney Connolly did. (Jan. 2018 T. at 94). Pursuing this theory was challenging in light of the fact that Weidul had told the police and his social worker that he had struck Mr. Downs dozens of times in response to merely being taunted. (State's Trial Exhibit 8; 5/22 Trial T. at 231-236). While the jury must have reached the conclusion that the State had proven beyond a reasonable doubt that Weidul's belief that he had to use deadly force was objectively unreasonable, that fact is not attributable to the representation of his three trial attorneys. Rather, it is due to his own admissions about what he did to cause Mr. Downs's death.

In sum, the post-conviction court's factual findings are all supported by competent evidence in the record, and the court properly concluded that Weidul failed to carry his burden of proving that his counsels' representation

was ineffective on any of his claims and that he was prejudiced by their representation.

II. The post-conviction court properly relied on the record and transcripts of the prior evidentiary hearings after the initial assigned justice retired.

Weidul finally claims that the post-conviction court improperly relied on the record and transcripts of the prior evidentiary hearings after the assigned justice who presided over those hearings retired. (Blue Brief 37-40). This Court reviews a trial court's application of the Maine Rules of Criminal Procedure de novo. *State v. Johnson,* 2006 ME 35, ¶ 9, 894 A.2d 489.

Maine Rule of Unified Criminal Procedure 25(a) provides:

> If by reason of death, resignation, removal, sickness, or other disability, a judge before whom a defendant has been tried is unable to perform the duties to be performed by the court after a verdict or finding of guilt, any other judge assigned thereto by the Chief Justice of the Superior Court or the Chief Judge of the District Court may perform those duties; but if such other judge is satisfied that he or she cannot perform those duties because the judge did not preside at the trial or for any other reason, the judge may in the exercise of discretion grant a new trial.

In *State v. Ruybal,* 408 A.2d 1284 (Me. 1979), the Law Court held that Rule 25 did not bar a successor justice from ruling on a motion for new trial based on newly discovered evidence following the death of the justice that

had presided over the trial. This was in part because the successor justice thoroughly familiarized himself with the written record of the case, including the trial transcripts, which documented the testimony, and exhibits from the prior hearing. Of import for this matter, the Law Court noted that the fact that the successor justice did not preside at the original jury trial was of reduced significance because fully five years had elapsed between the trials and the ultimate submission of the new trial motions for decision. "The original presiding justice, had he survived, would himself have had to rely extensively on the original trial record, rather than on any independent memory of what had transpired years before." *See also In re C.P.,* 2016 ME 18, 132 A.3d 174 (relying on *Ruybal* to allow a successor judge in child protection case to rule on post-verdict motions to amend judgment and make findings without holding new trial because judge familiarized herself with the entire record, including audio recordings of prior testimony).

Here, Petitioner Weidul's trial was held in May 2012, almost five years before the first evidentiary hearing in 2017, five and a half years before the second evidentiary hearing in 2018, and more than ten years before the third evidentiary hearing in 2022. As in *Ruybal,* the now-retired Justice Wheeler would have had to review the transcripts of the trial and the two evidentiary

hearings she presided over to re-familiarize herself with the testimony of the trial witnesses as well as that of Petitioner Weidul's former trial counsel Fairfield, Rioux, and Connolly. "When a successor judge reviews a complete record of the proceedings, including all exhibits and an audio recording or transcript of all testimony, the risk of erroneous deprivation of [a post-conviction petitioner's rights] is not so high that a new [hearing] is required." *In re C.P.,* ¶ 27. "Rather, a successor court has the discretion to determine whether the record available for decision-making is sufficient for it to rule on [post-judgment] motion[s]." *Id.; Cf. State v. Fleming,* 450 P.3d 1286 (Ct. App. Haw. 2019) (unpublished) (affirming successor judge presiding over second day of bench trial in part because judge familiarized himself with entire record of proceedings, including video recordings of first day of trial testimony); *United States v. LaSorsa,* 480 F.2d 522 (2d Cir. 1973)(affirming successor judge presiding over conclusion of jury trial in part because judge certified that he was familiar with the record and because defendant failed to show prejudice).

The only possible basis for prejudice that Petitioner Weidul is able to note is that the successor justice did not have the opportunity to visually observe the demeanor of trial counsel Fairfield, Rioux, and Connolly while

they were testifying at the two prior evidentiary hearings. While it is true that demeanor can play an important role in assessing a witness's credibility, visual observation of a witness while testifying is not an indispensable means of assessing witness credibility.[9] "[C]redibility determinations do not rest solely on the factfinder's ability to perceive the witness and the use of deposition testimony is an accepted practice. Here, the trial court's credibility determination did not render the post-conviction hearing fundamentally unfair." *Oken v. State,* 1998 ME 196, ¶ 14, 716 A.2d 1007.

Due process was satisfied in this matter through the successor justice's review of the audio recordings and transcripts of the prior evidentiary hearings, as well as by the successor justice's determination that Weidul would have the opportunity to recall witnesses to present new matter (which he chose not to do).

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[9] The Court can take judicial notice of the fact that the late Judge Courtland Perry made credibility determinations all the time, yet he never once *saw* a witness testify – because he was blind.

CONCLUSION

For the foregoing reasons, this Court should affirm the trial court's order denying Weidul's petition for post-conviction review.

Respectfully submitted,

Dated: September 28, 2023

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CERTIFICATE OF SERVICE

I, Donald W. Macomber, Assistant Attorney General, hereby certify that I have caused two copies of the foregoing "Brief of the Appellee" to be served upon Donald S. Hornblower, Esq., Petitioner Weidul's attorney of record via regular mail.

Dated: September 28, 2023

/s/ Donald W. Macomber
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<u>Addendum</u>

Procedural History & Statement of Facts

State's Brief on Direct Appeal, CUM-12-357

PROCEDURAL HISTORY

On May 10, 2010, the State filed a criminal complaint in the Unified Criminal Docket at Cumberland County charging the defendant Ernest Weidul ("Weidul") with the May 5, 2010 aggravated assault of Roger Downs in Mr. Downs's Portland apartment, in violation of 17-A M.R.S. § 208(1)(A). *State of Maine v. Ernest Weidul,* Unified Criminal Docket, Cumberland County, Docket No. CUMCD-CR-2010-03000; (App. 1).[10] The complaint also charged Weidul with operating after suspension on May 8, 2010, in violation of 29-A M.R.S. § 2412-A(1-A)(A). (App. 1). Weidul made his initial appearance in the Superior Court that same day. (App. 1).

On July 9, 2010, the Cumberland County Grand Jury returned an indictment charging Weidul with one count of aggravated assault and one count of operating after suspension. (App. 2). At his arraignment on July 21, 2010, Weidul entered pleas of not guilty to the charges. (App. 2).

On December 9, 2010, the Cumberland County Grand Jury returned a superseding indictment charging Weidul with one count of reckless or criminally negligent manslaughter in violation of 17-A M.R.S. § 203(1)(A), one count of aggravated assault, and one count of operating after suspension. (App. 4, 21-22). At his arraignment on December 16, 2010, Weidul entered pleas of not guilty to the charges. (App. 4).

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[10] Citations to the Appendix will be in parentheses as follows: "(App. ___)."

On December 1, 2011, Weidul filed a motion to suppress his pretrial police statement. (App. 6, 23). On January 19, 2012, the trial court (Wheeler, J.) issued a written order denying the motion. (App. 8, 34-41).

On May 14, 2012, the parties selected a jury for Weidul's trial (Wheeler, J., presiding). (App. 13). On May 18, 2012, the jury began receiving evidence. (App. 15; 5/18/12 Trial Transcript, page 14, hereinafter "(5/18/12 T.14)"). On May 30, 2012, the jury returned its verdict that the State had proven beyond a reasonable doubt that Weidul was guilty of all three charges. (App. 16; 5/29 & 30/12 T.71-72).

On June 19, 2012, the Superior Court (Wheeler, J.) adjudged Weidul guilty as charged and convicted. (App. 18). The court then imposed a 20-year term of imprisonment in the custody of the Department of Corrections on Count 1, with all but 16-years suspended, to be followed by a 4-year period of probation. (App. 18-19; Sentencing Transcript at 60). The court also imposed a concurrent 10-year term of imprisonment on Count 2, and a $250 fine on Count 3. (App. 19-20; Sentencing Transcript at 61).

On June 27, 2012, Weidul filed a notice of direct appeal pursuant to M.R. App. P. 2(a)(1) and 15 M.R.S. § 2115. *State of Maine v. Ernest Weidul*, CUM-12-358. On the same day, Weidul also filed an application for leave to appeal his sentences pursuant to M.R. App. P. 20 and 15 M.R.S. § 2151. *State of Maine v. Ernest Weidul*, SRP-12-279. On November 21, 2012, the Sentence Review Panel denied Weidul's application.

STATEMENT OF FACTS

On the evening of May 5, 2010, the defendant Ernest Weidul was driving his Dodge pickup truck in the parking lot of an apartment building on Forest Avenue in Portland when his truck scraped a guardrail as he was trying to pull around another car parked in the driveway. (State's Exhibit 8). The victim Roger Downs, who lived in one of the upstairs apartments, saw this and started yelling at the person in the car that Weidul was trying to pull around. (State's Exhibit 8). Downs asked Weidul, who he had never met before, if he would like to come up to his apartment to have a drink. (State's Exhibit 8). Weidul said yes and went up to Downs's apartment. (State's Exhibit 8). The two men started drinking coffee brandy heavily. (State's Exhibit 8). Later, they drove to the store to get more alcohol. (State's Exhibit 8).

At some point that evening, Downs's stepson Josh Robertson came by the apartment to ask his stepfather for assistance getting a job on the waterfront. (5/18 T.14, 22, 47). He saw a man with a ponytail sitting with his stepfather in the apartment. (5/18 T.25). Robertson could tell that his stepfather was very inebriated because he was unusually "huggy" with him and did not want him to leave. (5/18 T.36-37).

Later that night, Down's neighbor in the adjoining apartment was sitting by a window. (5/18 T. 95-6). He could hear Downs and another man talking inside of Down's apartment. (5/18 T.96-97). He could tell that they were both

drunk, could hear them joking with each other, and heard Downs say "I could kick your ass." (5/18 T.97-98).

At some point after that, Downs started to annoy Weidul by flicking at his hair and putting his fingers in Weidul's face. (State's Exhibit 8). Weidul warned Downs several times to stop, but Downs did not listen. (State's Exhibit 8). Finally, Weidul could not take it anymore and began striking Downs in the face with his fist. (State's Exhibit 8). Blood spattered all over the couch, the wall, and on Weidul's shirt. (State's Exhibit 8). By his own estimate, Weidul thought he struck Downs about 30 times in the face and neck. (State's Exhibit 8).

Downs was rendered unconscious by the blows. (State's Exhibit 8). Weidul used his shirt to try to clean up some of the blood from Downs's face. (State's Exhibit 8). He left the shirt in a vanity in Downs's bathroom. (State's Exhibit 8).

After his altercation with Downs, Weidul left the apartment. (State's Exhibit 8). Later that morning, Weidul met his DHHS caseworker Todd Prevatt, who was giving him a ride to an appointment. (5/22 T.226-227, 230). Prevatt could see that Weidul's hand was bruised. (5/22 T.23). Weidul told Prevatt about the fight in Downs's apartment the night before. (5/22 T.231-236).

Also that morning, Downs briefly awoke and looked at himself in the mirror. (5/21 T.176-77). His eyes were swollen shut, his face was swollen, bruised and bloody, and he was in a great deal of pain. (5/21 T. 176-178). He went into his bedroom and went back to sleep. (5/21 T.177). At about 4 pm, he

re-awoke. (5/21 T.177). He called 911, and the dispatcher sent an ambulance and a police officer to Downs's apartment. (5/18 T.115, 119).

When the officer arrived, he saw ambulance attendants helping Downs (who was able to walk) down the stairs. (5/18 T.138). The officer saw Downs's swollen eyes, lips and face, as well as the blood all over his face and in his hair. (5/18 T.139-140). It appeared to the officer to be the most "brutal assault" he had seen in his 16 years on the force. (5/18 T.141). The officer followed the ambulance as it transported Downs to Mercy Hospital. (5/18 T.141-14). The officer called the station and requested that an evidence technician be sent to the hospital to document the severity of Downs's injuries. (5/18 T.142).

The emergency room physician saw that Downs had a significant amount of facial trauma. (5/18 T.192-193). She spoke to Downs, who informed her that he had no memory of receiving the injuries. (5/18 T.192-193). He also reported that he was taking Coumadin, a blood thinner, for a medical condition. (5/18 T.192, 197). She sutured lacerations on the inside and outside of Down's lip. (5/18 T.203).

The doctor ordered CT scans for Downs to try to detect internal injuries. (5/18 T.195). When she got the results, she saw that Downs had multiple facial fractures, but there was no sign of internal bleeding. (5/18 T.195, 198-199). She also saw no active signs that Downs had pneumonia. (5/21 T.25-26).

She cleared Downs for discharge. (5/18 T.200). His sister, however, had come to the hospital and when she saw her brother's condition she insisted that he be admitted overnight for observation. (5/18 T.200). After consulting

with Downs's primary care physician, the doctor acquiesced to Downs's sister's wishes. (5/18 T.202).

Later that night a physician's assistant spoke to Downs. (5/21 T.174). He told her that he was in pain from the neck up. (5/21 T.178). She thought that Downs was the "most severely injured" person she had seen to that point in the hospital. (5/21 T.177-17). He told her how he had woken up earlier that morning in pain, but with no memory of the assault. (5/21 T.175-177). She too did not see any signs of pneumonia when speaking to Downs. (5/21 T.181).

The following morning, Downs spoke with a student physician's assistant. (5/21 T.129-130). He told her that he had significant discomfort from the collarbone up, and that his pain level was an 8 out of 10. (5/21 T.131). He had mild shortness of breath, but otherwise no acute respiratory distress. (5/21 T.133).

That afternoon Downs's sister came to visit him at the hospital. (5/21 T.276). He complained about his pain, his face was swollen, and he had "gurgly" breathing. (5/21 T.276-277). She saw that Downs was falling in and out of sleep while she was there. (5/21 T.276-277). A nurse checked in on Downs while his sister was visiting. (5/21 T.233-234). Shortly before the nurse had checked his vital signs and they were relatively normal. (5/21 T.231-232). She gave Downs some medication for his pain. (5/21 T.232-233). She did not see any signs of pneumonia at the time. (5/21 T.234-235).

That night at about 9:30, this same nurse woke Downs up to give him his next dosage of medication. (5/21 T.235-236). He sat up in bed. (5/21

T.236). She saw that his eyes were quite large. (5/21 T.237). Suddenly he cried out “no, no, no” then collapsed backward onto the bed. (5/21 T.236). The nurse lifted him back up. (5/21 T.238). She activated a “code blue” and was quickly joined by other nurses and doctors. (5/21 T.238-239).

The attending emergency room physician tried to intubate Downs but could not because his larynx was too swollen. (5/22 T.30-32). The doctor ended up performing a tracheostomy to try to establish an airway. (5/22 T.37). The “code blue” team tried for about 40 minutes to resuscitate Downs, but they were unsuccessful. (5/22 T.39-40). The doctor pronounced Downs’s death at 10:15 pm. (5/22 T.45).

The police were notified about Downs’s death and immediately sent evidence technicians and detectives to the hospital and to Downs’s apartment. (5/22 T.101-104). At Downs’s apartment, they saw the blood spatter on the living room couch and on the wall behind the couch. (5/22 T.113-114). They saw the empty coffee brandy bottles. (5/22 T.110-111). They found the bloody shirt in the bathroom. (5/22 T.120). They also found a Maine Medical Center hospital bracelet bearing the name “Ernest B. Weidul.” (5/22 T.117-118).

Using motor vehicle records they were able to find that a Dodge truck was registered to an “Ernest B. Weidul.” (5/22 T.64-65; 5/23 T.82-84). The police put out an “attempt to locate” for Weidul and his truck. (5/22 T.64-65; 5/23 T.83-84).

On May 8, 2010, an officer saw a truck at the intersection of Marginal Way and Franklin Street Arterial that matched the description in the attempt to

locate. (5/22 T.65). The officer saw that the truck's tail lights were out so he activated the blue lights in his cruiser to pull the truck over. (5/22 T.67-68). When the officer approached, he learned that Weidul was driving the truck. (5/22 T.71). The officer also learned through dispatch that Weidul's driver license was under suspension. (5/22 T.75-76). The officer notified his supervisor, who in turn notified the investigating detectives. (5/22 T.73-74). Approximately an hour later, the officer placed Weidul under arrest for operating after suspension, then transported him to the police station. (5/22 T.74, 76; 5/23 T.86).

At the station, Weidul was brought into an interview room. (5/23 T.88). He told the detective about the interaction with Downs, whose name he did not know. (State's Exhibit 8). He told the detective how many times he punched Downs in the face because he wouldn't stop annoyingly touching him. (State's Exhibit 8). At the end of the interview, Weidul voluntarily provided a DNA sample and he consented to a search of his truck. (5/22 T.248-249, 253).

An evidence technician also took pictures of Weidul. (5/22 T.248). He had a small cut on his forehead and minor abrasions on his forearm, but otherwise was uninjured. (5/22 T.249, 252). His left hand had a significant number of abrasions on the knuckles. (5/22 T.250). Later, the technician searched the truck. (5/22 T.254). He found a bottle of coffee brandy, and a receipt from the grocery store for the bottle. (5/22 T.254-255). He also saw that the address on the registration for Weidul's truck was the same as the address to which the Secretary of State mailed the notice of suspension. (5/23 T.7-8).

On May 9, 2010, Doctor Margaret Greenwald, the Chief Medical Examiner for the State of Maine, performed an autopsy on Downs's body. (5/23 T.208). She noted that Mercy Hospital had documented that Downs had multiple fractures in the bones of his face. (5/23 T.216). She saw that he had swollen eyes, bruises and a lacerated lip. (5/23 T.214-216). She saw a significant amount of swelling in Downs's neck. (5/23 T.222-223). Later she examined sections of Down's neck and could see hemorrhages in the internal strap muscles of the neck that she opined may have been caused by blunt trauma. (5/23 T.223-226). Based on her review of the medical records from the hospital, she estimated that Downs's alcohol level at the time he called 911 was approximately .36. (5/23 T.230-231).

When she examined Downs's lungs, she could detect a mild amount of pneumonia in one of the four lobes. (5/24 T.11-12). She determined that the pneumonia was in the early stages, possibly caused by aspirated gastric materials or blood from Downs's lacerated lip. (5/24 T.12-14, 127-130). Doctor Greenwald did not document the presence of the pneumonia in her initial report. (5/24 T.11). She later included the finding of pneumonia in an addendum to her report. (5/24 T.11, 15). In Doctor Greenwald's opinion, the mild pneumonia was not the cause of Mr. Downs's death, although it contributed to the other factors that were present for Mr. Downs. (5/24 T.15). In her view, it would have been highly unlikely for Downs to suddenly die from pneumonia when none of the medical personnel at Mercy Hospital saw any signs of it in the day or so before the death. (5/24 T.17-18). In Doctor

Greenwald's opinion the cause of Roger Downs's death was respiratory arrest brought about by laryngeal edema, which in turn was caused by blunt trauma to Down's head and neck. (5/23 T.233-234).

At trial, Weidul called Doctor Robert Belliveau, a pathologist, as his sole witness. (5/24 T.169-238; 5/25 6-63). Doctor Belliveau disagreed with Doctor Greenwald's opinion regarding cause of death. (5/24 T.233). In his view, the actual cause of Roger Downs's death was pneumonia triggered by aspiration of the alcohol Down's had consumed – even though the evidence established that Downs was a chronic alcoholic who drank significant quantities on a daily basis. (5/25 T.6-7, 14). According to Doctor Belliveau the blunt force trauma that Weidul admitted inflicting upon Downs was merely coincidental. (5/25 T.18).

On cross-examination, Doctor Belliveau agreed that aspiration pneumonia can be caused by a person being knocked unconscious. (5/25 T.21-22). He also agreed with Doctor Greenwald's determination that Downs had laryngeal edema (although he believed that it was not significant enough to totally shut off Downs's airway). (5/25 T.18).

Doctor Belliveau also admitted that he had earlier opined that Roger Downs's death had been caused by an adverse reaction to the Zoloft prescription he had been taking for years. (5/25 T.35-36). He changed his opinion after viewing slides provided by the Office of the Chief Medical Examiner. (5/25 T.40).