

**People v Graham**

2013 NY Slip Op 32700(U)

October 17, 2013

Supreme Court, Kings County

Docket Number: 9216/1995

Judge: James P. Sullivan

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SUPREME COURT OF THE CITY OF NEW YORK  
COUNTY OF KINGS: PART 3

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THE PEOPLE OF THE STATE OF NEW YORK :  
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 -against- :  
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 DARYL GRAHAM, :  
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 Defendant. :  
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DECISION AND ORDER

Indictment No. 9216/1995

JAMES P. SULLIVAN, J.

The defendant has filed a motion to vacate his judgment of conviction pursuant to CPL § 440.10 and to set aside his sentence pursuant to CPL § 440.20. Defendant was convicted, following a jury trial, of murder in the second degree (P.L. § 125.25 [2]) (depraved indifference) for killing his former girlfriend, Roxanne Thomas. On May 29, 1996, the court sentenced defendant to a term of imprisonment of twenty-five years to life (Anne Feldman, J.).

In his present motion, defendant claims that trial counsel provided ineffective assistance of counsel. Defendant’s main allegation is that trial counsel was ineffective for failing to obtain defendant’s psychiatric records and to have defendant examined by a psychiatrist to determine whether defendant had a viable psychiatric defense. Defendant also contends that his trial counsel was ineffective for failing to use defendant’s psychiatric history in regard to mitigation purposes at sentencing. The People filed an answer in opposition. The defendant filed a reply memorandum of law. Both parties supplied additional case law regarding issues contained in this motion. Further, the court was provided with extensive documentation, including transcripts of prior proceedings, defendant’s psychiatric records, defendant’s prior competency reports pursuant to CPL § 730, and defendant’s pre-sentence psychoanalytic evaluation prepared pursuant to CPL § 390.30 (2). In addition, the court has reviewed the record of the prior proceedings in this matter including the trial transcript, and the evidentiary hearings held pursuant to defendant’s petition for a writ of *habeas corpus* in the United States District Court for the Eastern District of New York.

On October 11, 2012, this court ordered a hearing to determine whether trial counsel provided effective assistance regarding the claims raised in defendant’s motion. A hearing was conducted before this court on February 14, February 28, and April 11, 2013. Two witnesses testified at the hearing. Defendant called Eric Goldsmith, M.D., on his behalf. The People called Alexander Bardey, M.D. Both witnesses were qualified as experts in forensic psychiatry and both had interviewed defendant prior to the federal court hearing in this case, and had testified at that hearing. Defendant then filed post-hearing papers on the motion to vacate his judgment of conviction and set aside the sentence. The People then filed a post-hearing memorandum of law in opposition to defendant’s motion, and the defendant filed a reply memorandum. In their post-hearing memoranda, both parties addressed recent case law concerning the issues involved in this hearing.

### *Procedural History*

On July 20, 1995, defendant's former girlfriend, Roxanne Thomas, was driving in her car on Rockaway Parkway, in Kings County, New York, with defendant and Nadine Ennis as passengers. Ms. Thomas had picked the defendant up at a local subway station, at his request. The defendant had asked her to discuss the return of some of his personal belongings to him. While Ms. Thomas was driving, defendant stabbed her with a knife several times. After Ms. Thomas staggered from the car, defendant pursued her and continued to stab her even after she collapsed on the ground. Ms. Thomas was stabbed nineteen times, and died from the injuries. For these acts, defendant was charged under Indictment Number 9216/1995 with two counts of murder in the second degree (P.L. § 125.25 [1] [intentional]) and ( P.L. § 125.25 [2] [depraved indifference]) and one count of criminal possession of a weapon in the fourth degree (P.L. § 265.01 [2]).

At the time of the incident, Nadine Ennis was sitting in the back seat of the vehicle, behind the defendant, who was seated in the passenger seat in the front of the vehicle. As Ms. Ennis was looking out the window, she heard Ms. Thomas scream her name. Ms. Ennis turned and saw the defendant stabbing Ms. Thomas repeatedly. As the car struck a parked car and stopped, Ms. Ennis ran out and tried to get help. Ms. Thomas first moved to the back seat of the vehicle as defendant continued to stab her. She then fled the vehicle. Robin Stakofsky, who worked at a nearby office, heard screaming and saw a male stab Ms. Thomas in the back. Edwin Lopez, who was passing by in his car, saw Ms. Ennis trying to get help. He further observed Ms. Thomas running from the defendant, who was holding a knife. Andre Watson, who was in the vicinity, heard Ms. Ennis screaming for help, and observed that Ms. Thomas' blouse was drenched with blood. Mr. Watson observed the defendant run after Ms. Thomas while holding a knife, and observed the defendant continue to stab Ms. Thomas. Mr. Watson then kicked the defendant off the victim and held him in a choke hold until the police arrived on the scene. Mr. Lopez stepped on the knife and kicked it away from the defendant.

Defendant testified in his own behalf at trial. He indicated that he had been living with Ms. Thomas, but that in February of 1995, she had asked him to move out. Defendant indicated that he had not seen Ms. Thomas again until the day of the incident. He further testified that Ms. Thomas had never previously refused to give him his personal property, and never withheld these items from him. The defendant called Ms. Thomas on the day of the incident, requesting that she pick him up in order for them to discuss plans for him to get his belongings. He testified that while he was in the car, he argued with Ms. Thomas about arranging for the retrieval of his personal belongings, which he initially specified as "basically clothes and books." Upon further questioning by his counsel, defendant further testified that he wanted to retrieve his papers, including his respiratory therapist's license. Defendant indicated that he needed this license because he was "going to inquire about a job." Defendant testified that he got "very, very angry" because Ms. Thomas would not give him a definite date and time to pick up his belongings. He also indicated that he believed she was trying to humiliate him. He testified that, although Ms. Thomas did not refuse to give him his personal property, he could not get the items that day. Defendant indicated that he saw a knife on the floor of the car which was not his. Being "completely blind with rage," he got an "uncontrollable urge," and



began to stab Ms. Thomas.

The trial court submitted both the depraved indifference murder and the intentional murder counts to the jury. The court instructed the jury to render a verdict on depraved indifference murder first, and then go on to consider intentional murder only if it found defendant not guilty of depraved indifference murder. The jury found defendant guilty of depraved indifference murder. On May 29, 1996, the trial court sentenced defendant to a term of imprisonment of twenty-five years to life (Anne Feldman, J. at sentencing).

Defendant appealed from his judgment of conviction to the Appellate Division, Second Department. The defendant did not raise a claim of ineffective assistance of counsel in his main brief. However, in his *pro se* supplemental brief, the defendant asserted, among other claims, that he was deprived of effective assistance of counsel in that counsel failed to utilize a court-appointed psychiatrist to assist him in presenting an extreme emotional disturbance defense at trial.

The Appellate Division affirmed the conviction and sentence. Finding that “the defendant gave testimony in a rational manner,” the Court held that the trial court did not abuse its discretion in finding petitioner fit to stand trial based on his demeanor on the stand and the independent determination of two psychiatrists. Defendant’s remaining contentions, including those involving ineffective assistance of trial, were held to be without merit (*People v. Graham*, 272 A.D.2d 479 [2d Dept. 2000]). By order dated August 18, 2000, defendant’s application for leave to appeal to the New York Court of Appeals was denied (*People v. Graham*, 95 N.Y.2d 865 [2000].)

By *pro se* papers dated August 23, 2001, the defendant filed a petition for a writ of *habeas corpus* before the United States District Court, Eastern District of New York (the district court). Defendant asserted, among other claims, that he was deprived of effective assistance of trial counsel in that counsel had failed to investigate his psychiatric history to determine whether he had a viable psychiatric defense. A hearing was conducted on October 29, 2003. Defendant represented himself at the hearing. Defendant’s trial counsel testified at the hearing. In a decision dated October 30, 2003, the district court rejected defendant’s claim on the merits. (*Graham v. Portuondo*, NOS 03 MISC-006, 01-CV-6911, 2003 U.S. Dist. LEXIS 241222, at \*17 [E.D.N.Y. Oct. 30 2003]).

Defendant then sought a certificate of appealability from the United States Court of Appeals for the Second Circuit.

On October 3, 2007, the Second Circuit issued an order granting defendant a certificate of appealability, vacating the judgment of the district court, and remanding the case to that court for a new hearing at which defendant was to be represented by counsel (*Graham v. Portuondo*, 506 F.3d 105, 108 [2d Cir. 2007] [per curiam]).

Defendant, now represented by counsel, filed supplemental papers asserting that trial counsel was ineffective for failing to obtain defendant’s available psychiatric records to be used to support a psychiatric defense at trial and as mitigation at sentencing. Defendant presented extensive



psychiatric records which had not previously been presented in state court.

On March 5 and March 17, 2010, the district court conducted a hearing on defendant's claim of ineffectiveness assistance of trial. Forensic psychiatrist, Eric Goldsmith, M.D., testified on behalf of the defendant. Forensic psychiatrist, Alexander Bardey, M.D., and defendant's trial counsel testified on behalf of the People. Prior to the hearing, both psychiatrists interviewed defendant and prepared reports for the court.

By memorandum, order and judgment dated August 12, 2010, the district court granted defendant's *habeas corpus* petition. (*Graham v. Portuondo*, 732 F. Supp.2d 99 [E.D.N.Y. 2010]). Based on the record at the new hearing, the district court determined beyond a reasonable doubt that defendant's trial counsel had not sought defendant's psychiatric records, and "never consulted meaningfully with Dr. Eshekananzi or any other psychiatrist about whether defendant had a viable psychiatric presentation or defense."<sup>1</sup> The district court found that in failing to get defendant's records and having him examined, "counsel did not meet minimum standards required by the Sixth Amendment." (*Graham v. Portuondo*, at 108-109). The court further determined that defendant was prejudiced by counsel's failure to utilize defendant's psychiatric records and his failure to present psychiatric testimony in support of an extreme emotional disturbance defense. (*Graham v. Portuondo*, at 109).

The district court acknowledged that in defendant's conviction for depraved indifference murder, the defense of extreme emotional disturbance is not available. However, the district court ruled that it was probable that "the jury would have been deeply troubled by available psychiatric evidence in determining whether defendant was guilty of killing as a result of deliberate indifference." Thus, the district court found that "any jury would consider, and would be affected in its deliberations by, extensive available psychiatric evidence in determining whether petitioner was guilty of depraved indifference murder..." (*Graham v. Portuondo*, at 109). The district court also determined that if the psychiatric records had been before the trial court, the trial court likely would have imposed a lesser sentence on defendant (*Graham v. Portuondo*, at 110). The court stayed the judgment granting the *habeas corpus* petition pending completion of an appeal by the prosecution to the Second Circuit.

Upon the appeal, the prosecution argued that defendant's claim of ineffective assistance of counsel was unexhausted because defendant had never presented the psychiatric records on which his claim was based to a state court for review. Thus, the prosecution argued that defendant still had available to him the opportunity to present his claim in state court by way of a motion pursuant to C.P.L. § 440.10. Although the prosecution conceded that trial counsel did not act competently in failing to obtain defendant's psychiatric records, the prosecution argued that defendant's claim was meritless because defendant was not prejudiced by counsel's conduct.

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<sup>1</sup>The defense counsel had indicated at the first hearing before the district court that he recalled consulting with Dr. Eskenazi, a psychiatrist at Elmhurst Hospital.

By order dated November 15, 2011, the Second Circuit determined that defendant had not exhausted his state court remedies because defendant's psychiatric and medical records, as well as the psychiatrist's testimony presented at the hearing in the district court, "yielded significant, new evidence not previously presented to state court." (*Graham v. Portuondo*, 446 Fed. Appx. 350, 351 [2d Cir. 2011]). The Second Circuit did not rule on the merits of defendant's claim but vacated the district court's order granting the *habeas corpus* petition, and remanded the case to the state court. The Second Circuit directed that the district court hold the case in abeyance to allow defendant to file a motion to vacate judgment pursuant to C.P.L. § 440.10 in the state court.

### *The Current Motion to Vacate the Judgment of Conviction*

This matter as it now stands, involves court proceedings at the state and federal level, starting with the trial in state court in 1995. This court has reviewed the voluminous records including the court file, the trial and sentencing transcripts, and the state court appellate decisions. Further, this court has reviewed the defendant's psychiatric records, his prior competency reports pursuant to CPL § 730, and his pre-sentence psychoanalytical evaluation prepared pursuant to CPL § 390.30 [2]. Additionally, this court has reviewed the record regarding evidentiary hearings held pursuant to defendant's petition for a writ of *habeas corpus* in United States District Court for the Eastern District of New York. This court has further reviewed the decisions and orders rendered by the United States District Court and the United States Court of Appeals, Second Circuit.

As indicated, a CPL § 440 hearing was held before this court on the dates indicated hereinabove. The parties stipulated into evidence the exhibits introduced for the original motion, as well as additional exhibits. Accordingly, all of these materials have been evaluated in reaching this court's findings of facts and conclusions of law.

Dr. Eric Goldsmith testified for the defendant. Dr. Goldsmith testified that based on his interview with the defendant, and his review of the defendant's hospital records, he concluded that the defendant was suffering from schizophrenia. He further testified that at the time defendant killed Roxanne Thomas, defendant met the criteria for an extreme emotional disturbance defense. Although Dr. Goldsmith further reached the conclusion that it was reasonably likely that the defendant was suffering from a mental disease or defect, and lacked the substantial capacity to know or appreciate the nature of his conduct or its wrongfulness when he stabbed Ms. Thomas, he could not make this determination to a reasonable degree of medical certainty. Further, Dr. Goldsmith testified that he was unable to say, to a reasonable degree of medical certainty, that when defendant killed Roxanne Thomas, he did not know what he was doing was wrong because of a specific psychotic belief. Dr. Goldsmith testified that "defendant was under the belief that his respiratory therapist's license was being held from him, and that was what triggered defendant's emotional outburst and stabbing and killing of Roxanne Thomas." However, Dr. Goldsmith admitted that defendant never told him what he was thinking or feeling at the time of the stabbing. Further when Dr. Goldsmith examined him, the defendant was not able to describe the incident at all.

Dr. Goldsmith rejected the conclusion reached by Dr. Bardey, the forensic psychiatrist called



by the People, that all of Graham's symptoms, prior to the killing, were the result of alcohol abuse. Further, Dr. Goldsmith found no evidence supporting Dr. Bardey's conclusion that defendant's post-arrest symptoms were malingered. Although a CPL § 390 examination was conducted to aid the trial court in sentencing, Dr. Goldsmith believed that said examination was insufficient, as the examining doctor did not have the benefit of reviewing all prior medical and psychiatric records.<sup>2</sup>

Dr. Alexander Bardey testified on behalf of the prosecution. Dr. Bardey testified that he did not credit the defendant when he claimed that he could not recall any of the events at or around the time of the homicide. Dr. Bardey concluded that since defendant had recalled the events at trial and during the pretrial competency exam, his present assertion was untrue. Dr. Bardey described defendant as resistant, uncooperative and not forthcoming. Dr. Bardey also disagreed with Dr. Goldsmith's conclusion that the defendant was suffering from schizophrenia.

Looking at defendant's defendant's prior hospitalizations, Dr. Bardey determined that defendant's symptoms were not consistent with a diagnosis of schizophrenia. Specifically referring to defendant previous psychiatric records, Dr. Bardey testified that he could find no objective verification supporting the diagnosis of schizophrenia. He indicated that a review of the psychiatric records demonstrates that defendant was previously diagnosed as having an antisocial personality disorder, temporal lobe epilepsy, and severe alcohol abuse. Further, defendant's records from the mental health shelter which he attended shortly before the incident showed no indication of a chronic mental disease such as schizophrenia. Additionally, Dr. Bardey concluded that the results of the court-ordered CPL § 730 exam were consistent with previous diagnoses of defendant's mental condition. Based upon his review of the entire record, and his interview with defendant, Dr. Bardey concluded, to a reasonable degree of medical certainty, that there was no indication that defendant was suffering from schizophrenia, or schizo-affective disorder, at the time in the weeks and months up to the incident. Further, Dr. Bardey discounted defendant's complaints regarding his evaluation at the mental observation unit at the Rikers Island detention facility, determining that the defendant was malingering. Dr. Bardey further testified that there was no evidence that defendant lacked responsibility or suffered from a mental disease or defect at the time of the incident. Dr. Bardey indicated that he believed that defendant suffered from an alcohol problem.

With respect to the defense of defense of extreme emotional disturbance, Dr. Bardey concluded that even if defendant believed that Ms. Thomas was withholding his respiratory therapist's license, that is not the type of trauma, real or imagined, that would justify a loss of control so extreme as to result in a killing. Further, Dr. Bardey testified that there was no support in any of the records, or by the defendant himself, that he ever believed this to be true. Although defendant mentioned the recovery of the respiratory therapist's license briefly during his trial testimony, he never mentioned it during his treatment at the mental health center prior to the crime, nor did he mention it in his pre-sentence evaluation. Further, during the recent interviews conducted by Dr. Bardey and Dr. Goldsmith, defendant never mentioned there was any great significance to the

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<sup>2</sup>The defendant had been found "fit to proceed" by psychiatrists who had examined him in both the pre-trial CPL § 730 examination and in the post-trial CPL 390 examination.



respiratory license. Based upon these factors, Dr. Bardey concluded that there was no support for Dr. Goldsmith's conclusion that the respiratory license and the killing were linked. Thus, although Dr. Bardey believed defendant to be angry at the time of the killing, Dr. Bardey concluded, to a reasonable degree of medical certainty, that defendant was not suffering from extreme emotional disturbance at the time of the murder.

### *Findings of the Court*

Defendant contends that trial counsel was ineffective for failing to obtain defendant's psychiatric records and to have him examined by a psychiatrist to determine whether defendant had a viable psychiatric defense. Defendant's primary argument is that his psychiatric history demonstrates that he was under the influence of extreme emotional disturbance when he killed Roxanne Thomas. Thus, he claims that trial counsel's failure to obtain these records, and have defendant evaluated compromised defendant's right to a fair trial. Defendant further claims that if counsel had used his psychiatric records for mitigation purposes at sentencing, he would have received a less severe sentence. Additionally, in his post-hearing motion defendant now claims that he wished to address the court at sentencing, but that he was deprived of the opportunity to do so.

The People contend, on the other hand, that defendant's ineffective assistance of counsel claim is without merit. Although the People have conceded that trial counsel did not act competently in failing to obtain defendant's psychiatric records, the People contend that this deficiency did not result in prejudice to the defendant.

The right to effective assistance of counsel is guaranteed by the Federal and State Constitutions (US Const 6<sup>th</sup> Amend; NY Const, Art 1 §6). The standard by which counsel's performance is judged under federal and state law are similar, but not identical.

In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court established a two-part test for evaluating a defendant's Sixth Amendment claim of ineffective assistance of trial counsel. To prevail upon such a claim, a "defendant must show that counsel's performance was deficient," and "that the deficient performance prejudiced the defense." (*Strickland*, 466 U.S. at 687; *People v. McDonald*, 1 N.Y.3d 109, 113 [2003]). "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different" (*Strickland* at 694). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Ibid*) (*Cullen v. Pinholster*, 131 S.Ct. 1388 [2011]). The "benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper function of the adversarial process that the trial cannot be relied on as having produced a just result." (*Strickland* at 686).

With regard to the New York interpretation, in *People v. Baldi*, 54 N.Y.2d 137, 147, (1981), the New York Court of Appeals set standards for claims of ineffective assistance of counsel in this state. The Court held that the constitutional requirements are met whenever the defense attorney provides "meaningful representation." The Court has indicated that the "standard of meaningful

representation, by contrast, does not require defendant to fully satisfy the prejudice test of *Strickland*, although we continue to regard a defendant's showing of prejudice as a significant but not indispensable element of assessing meaningful representation. Our focus is on the fairness of the proceedings as a whole." (*People v. Stulz*, 2 N.Y.3d 277, 284 [2004]). In *People v. Stultz*, *supra*, the Court stated that "we are not indifferent to whether the defendant was or was not prejudiced by trial counsel's ineffectiveness. We would indeed, be skeptical of an ineffective assistance of counsel claim absent any showing of prejudice." (*People v. Stulz*, at 284; *see also*, *People v. Ennis*, 11 N.Y.3d 403 [2008]).

The New York State standard is considered "somewhat more favorable to defendants, "focusing on "the fairness of the process as a whole rather than its particular impact on the outcome of the case" (*People v. Canales*, 2013 WL 5451226 [N.Y. A.D. 2 Dept], *citing*, *People v. Benevento*, 91 N.Y.2d 708, 714; *People v. Georgiou*, 38 A.D.3d 155 [2d Dept. 2007]). "While the inquiry focuses on the quality of the representation provided to the accused, the claim of ineffectiveness is ultimately concerned with the fairness of the process as a whole rather than its particular impact on the outcome of the case." (*People v. Benevento*, 91 N.Y.2d 708, 714 [1998]; *People v. Georgiou*, 38 A.D.3d 155 [2d Dept. 2007]). Under the state standard, "a defendant's showing of prejudice is a significant but not indispensable element in assessing meaningful representation" (*People v. Canales*, *id.*, *citing*, *People v. Georgiou*, 38 A.D.3d at 161; *see* *People v. Stulz*, 2 N.Y.3d at 284). "Whether defendant would have been acquitted of the charges but for counsel's errors is relevant, but not dispositive under the State constitutional guarantee of effective assistance of counsel," because "our legal system is concerned as much with integrity of the judicial process as with the issue of guilt or innocence." (*Benevento*, 91 N.Y.2d at 714, *quoting* *People v. Donovan*, 13 N.Y.2d 148, 153-154). Thus, under our State Constitution, even in the absence of a reasonable probability of a different outcome, inadequacy of counsel will still warrant reversal whenever a defendant is deprived of a fair trial" (*People v. Caban*, 5 N.Y.3d 143, 155-156 [2005]). "To meet the New York standard, a defendant need not demonstrate that the outcome of the case would have been different but for counsel's errors" (*Rosario v. Ercole*, 601 F.3d 118, 124).

In determining whether counsel provided meaningful representation, "courts use a flexible approach in reviewing the totality of the circumstances, evidence and law as of the time of representation (*see*, *People v. Henry*, 95 N.Y.2d 563, 565-566 [2000]; *see, also* *People v. Hobot*, 84 N.Y.2d 1021, 1022 [1995]). "[T]rial tactics which terminate unsuccessfully do not automatically indicate ineffectiveness. So long as the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation, the constitutional requirement will have been met. (*People v. Baldi*, 54 N.Y.2d 137, 146-147). Therefore, the question to be resolved is not only whether the defendant demonstrated that his counsel provided "less than meaningful representation," but "whether the attorney's conduct constituted 'egregious and prejudicial' error such that the defendant did not receive a 'fair trial'". (*Benevento*, 91 N.Y.2d at 713, *quoting* *People v. Flores*, 84 N.Y.2d 184, 188 [emphasis added]).



To prevail on a claim of ineffective assistance of counsel, the defendant must “demonstrate the absence of strategic or other legitimate explanations for counsel’s failure.” (*People v. Rivera*, 71 N.Y.2d 705, 709; *see, People v. Taylor*, 1 N.Y.3d 174, 177, *Benevento*, 91 N.Y.2d at 714). Additionally, the defendant must overcome the legal presumption that counsel’s performance falls within the wide range of reasonable professional competence. (*Strickland v. Washington*, 466 U.S. 668 [1984]). Without such demonstration, “it will be presumed that counsel acted in a competent manner and exercised professional judgment.” (*Rivera*, 71 N.Y.2d at 709).

Defendant’s primary contention in the instant case is that if his trial counsel had obtained defendant’s psychiatric records and utilized them in presenting the defense of extreme emotional disturbance or not responsible by reason of mental disease or defect at trial, it is likely that the jury would have either accepted the extreme emotional disturbance defense and convicted defendant of manslaughter in the first degree rather than of depraved indifference murder, or accepted the mental disease or defect defense and acquitted defendant entirely. Further, defendant contends that if the jury received this information, the jury would have likely rejected the testimony of the People’s witness, Dr. Bardey. Thus, the defendant argues that the jury would have been sufficiently troubled by the psychiatric evidence, and that it would likely not have convicted defendant of either intentional murder or depraved-indifference murder.

Under the statutory scheme, a defendant who proves the elements of the affirmative defense of extreme emotional disturbance by a preponderance of the evidence establishes a mitigating circumstance reducing murder to manslaughter in the first degree (*see, Penal Law* §§ 25.00 [2]; 125.20 [2]; 125.25 [1] [a]; *People v. Diaz*, 15 N.Y.3d 40, 44-45 [ ]; *People v. Patterson*, 39 N.Y.2d 288, 303 [1976]). “The influence of an extreme emotional disturbance explains the defendant’s intentional action, but does not make the action any less intentional” (*People v. Patterson*, 39 N.Y.2d at 302; *see also, Penal Law* § 125.20 [2]). The defense “does not absolve the defendant of criminal responsibility, but allows him/her to demonstrate the existence of mitigating factors which indicate that he/she should be punished less severely” (*People v. Cass*, 18 N.Y.3d 553, 561 n.4 [2012]; *see, People v. Roche*, 98 N.Y.2d 70, 75 [2002]).

However, extreme emotional disturbance is not a defense to depraved indifference murder (*see, People v. Fardan*, 82 N.Y.2d 638, 644-45 [1993]). Penal Law § 125.25 [2], which defines depraved indifference murder, does not provide for mitigation of that charge by the affirmative defense of extreme emotional disturbance.

To establish the affirmative defense, a defendant is required to prove two elements by a preponderance of the evidence (*see, People v. Roche*, 98 N.Y.2d 70, 75 [2002]). It is possible for a defendant to establish the presence of such a disturbance without psychiatric testimony (*see, People v. Moye*, 66 N.Y.2d 887, 890 [1985]). However, this is a factor which can impact whether sufficient evidence to support the defense has been presented at trial (*People v. White*, 79 N.Y.2d 900, 903 [1992]). The first element of the defense, which is that the defendant acted under the influence of an extreme emotional disturbance, is a subjective determination. This requires a “determination that the particular defendant did in fact act under extreme emotional disturbance, that the claimed



explanation as to the cause of his action is not contrived or sham.” (*People v. Casassa*, 49 N.Y.2d 668, 678-679 [1980]). Further, not all mental infirmities merit a manslaughter charge based on extreme emotional disturbance (*Casassa*, 49 N.Y.2d at 677).

The first subjective element is established with evidence that a defendant actually suffered from a “mental infirmity not arising to the level of insanity.” (*People v. Patterson*, 39 N.Y.2d 288, 302, *aff’d*, 432 U.S. 197 [1977]; *People v. Roche*, 98 N.Y.2d at 75). Extreme emotional disturbance is typically manifested by a loss of control (*People v. Walker*, 64 N.Y.2d 741 [1984]). The subjective element is met if there is evidence that defendant’s conduct at the time of the incident was actually influenced by an extreme emotional disturbance (*People v. Roche*, 98 N.Y.2d at 75).

The second element of the extreme emotional disturbance defense is that there must exist a reasonable explanation or excuse for the extreme emotional disturbance. This second prong of the standard must be determined from viewpoint of a person in the defendant’s situation under the circumstances as he believed them to be. Further, this determination must be made by “viewing the subjective, internal situation in which the defendant found himself and the external circumstances as he perceived them at the time, however inaccurate that perception may have been...” (*People v. Casassa*, 49 N.Y.2d at 679; *People v. Cass*, 18 N.Y.3d 553, 561 [2012]). “The ultimate test, however, is objective; there must be a ‘reasonable’ explanation or excuse for the actor’s disturbance” (*People v. Casassa, id.*). Thus, there must be an “objective determination” that there was a “reasonable explanation” for the defendant’s extreme emotional disturbance at the time he committed the homicide, determined from the viewpoint of a person in his situation (*People v. Casassa*, 49 N.Y.2d at 679; *People v. Cass*, 18 N.Y.3d at 561; *People v. Roche*, 98 N.Y.2d at 76; *People v. Harris*, 95 N.Y.2d 316, 319 [2000]). In the absence of the requisite proof, an extreme emotional disturbance charge should not be given because it would invite the jury to engage in permissible speculation concerning defendant’s state of mind at the time of the homicide (*People v. Walker*, 64 N.Y.2d 741, 743 [1984]).

As previously indicated, the People have conceded that counsel did not act competently in failing to obtain and utilize defendant’s psychiatric records. Thus, in the instant case, this court must determine whether counsel’s failure to obtain defendant’s psychiatric records and have him examined by a psychiatrist to determine whether defendant had a viable psychiatric defense, primarily, the extreme emotional disturbance defense, deprived defendant from receiving a fair trial.

Dr. Goldsmith testified during the hearing before this court that at the time defendant killed Roxanne Thomas, he met the criteria for an extreme emotional disturbance defense. Specifically, Dr. Goldsmith emphasized defendant’s belief that the victim was withholding his respiratory therapist license from him. Dr. Goldsmith concluded “that was what triggered defendant’s emotional outburst and stabbing and killing of Roxanne Thomas.” However, this court does not find that this conclusion to be supported by the record. After reviewing defendant’s psychiatric records from the mental health shelter where he was being treated during the five months prior to the killing, there appears to be no preoccupation by the defendant concerning the recovery of his respiratory license. Additionally, there is no evidence that he mentioned the recovery of this license during his pretrial competency

examinations or during his evaluation in aid of sentencing. When interviewed by Dr. Goldsmith and Dr. Bardey, defendant did not mention to either that he had a concern about Rochelle Thomas withholding his respiratory license prior to the incident.

Finally, during his testimony at trial, defendant did not put any emphasis on the recovery of this license, testifying that he wanted to get his personal property, "basically, clothes and books." After further questioning by his counsel, defendant agreed that he wanted his personal papers, including his respiratory therapist license so that he would be able to work. During cross-examination by the People, defendant was again asked about what personal property he was seeking, and he indicated clothes, books, and other personal effects, putting no special importance on his respiratory license. Defendant further testified that Ms. Thomas was not refusing to give him any of his personal property, but he wasn't going to get them that day. Defendant testified, on being asked, that he couldn't remember what threw him into an uncontrollable rage.

Further, the court has found no support for Dr. Goldsmith's conclusion that in Ms. Ennis' statement to the police regarding defendant's driver's license, she actually meant his respiratory therapist's license, as opposed to his driver's license.<sup>3</sup> Indeed, the parties agree that the respiratory therapist license did not exist, and the court sees nothing in Ms. Ennis' statement that would indicate that Ms. Thomas told defendant that she could not believe that he had not taken his respiratory therapist's license, as opposed to his driver's license.

The court agrees with Dr. Bardey's conclusion that the diagnosis of schizophrenia, or any other relevant mental defect or disease, is not supported by the record. Further, the court agrees that if the therapist's license were of such a concern that it would cause defendant to lose control and kill Roxanne Thomas, there would be some evidence in the record of the defendant's preoccupation with retrieving it. Crediting Dr. Bardey's testimony, the court finds that even if defendant believed that Ms. Thomas was withholding his respiratory therapist's license, it would not be the type of trauma, real or imagined, that would justify a loss of control so extreme as to result in a killing. Thus, the court finds that defendant did not meet the criteria for the extreme emotional disturbance defense.

Also, this court determines that even if the affirmative defense had been submitted, based on the testimony of the psychiatrists, it would have had little or no chance of success where the affirmative defense was inconsistent with the testimony of Ms. Ennis, as well as with the medical records and the court records, specifically the testimony by defendant at trial. Defendant testified at trial that Ms. Thomas agreed to meet him and picked him up in her car at the location he designated. Defendant further testified that Ms. Thomas did not refuse to give him his belongings, however, she would not give him a specific date or time that he could retrieve his belongings. Defendant did not attach particular significance to the respiratory therapist's license, as opposed to other items that he

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<sup>3</sup>Ms. Ennis did not mention the question regarding defendant's license during her testimony at trial. In her statement to the arresting detective soon after the incident, however, she indicated that Ms. Thomas said to the defendant (in the car before the stabbing), regarding items that defendant was seeking, that she didn't believe that the defendant didn't take his driver's license.



wanted to retrieve from Ms. Thomas.

Further, after reviewing the entire record, including the defendant's trial testimony and the psychiatric testimony given during the CPL § 440 hearing, this court determines that the trial attorney's error was not sufficiently prejudicial to have compromised defendant's right to a fair trial. Although "a single error may qualify as ineffective assistance...when the error is sufficiently egregious and prejudicial as to compromise a defendant's right to a fair trial" (*see, People v. Caban*, 55 N.Y.3d 143, 152 [2005]), the court finds that in regard to the circumstances of this case, it did not. Even if the affirmative defense had been submitted to the jury, it would have had little or no chance of success where it was inconsistent with the medical records and the defendant's statements, and was also contrary to the eyewitness' account of the events (*see, People v. Georgiou*, 38 A.D.3d 155 [2d Dept. 2007]).

As previously indicated, this court determines that defendant did not meet the first, subjective element of the extreme emotional disturbance defense, as there is no evidence that defendant actually suffered from a "mental infirmity not arising to the level of insanity." Further, even if sufficient evidence of the subjective element of extreme emotional disturbance were present in the records, proof of the objective element is lacking. The medical records prior to the incident, defendant's own actions before and after the killing, as well as his own statements do not meet the criteria for the objective standard. This court finds that the facts of the present case are distinguishable from those of *People v. Sepe*, 2013 WL 5340537 [N.Y.A.D.2d Dept.], a recently-decided case. In regard to the case at bar, at the CPL § 440 hearing, defendant did not show that he suffered from a mental trauma which affected his mind for a substantial time, nor that his "unique feeling" and perspective were not outside the bounds of reasonableness. Thus, this court determines that "no reasonable jury could have concluded that a resulting loss of self-control or similar disability constituted 'an understandable human response deserving of mercy' under these circumstances" (*see, People v. Roche*, 98 N.Y.2d 70, *citing, People v. Casassa*, 49 N.Y.2d at 680-681).

Clearly, to meet the New York standard, a defendant need not demonstrate that the outcome of the case would have been different but for counsel's error (*see, People v. Canales*, 2013 WL 5451221 [N.Y.A.D.2 Dept.], *citing, Rosario v. Ercole*, 601 F.3d 118, 124). However, looking at the "fairness of the process as a whole rather than its particular impact on the outcome of the case," this court finds that counsel's failure to obtain defendant's psychiatric records in order to present an extreme emotional disturbance, or any other psychiatric defense, while appearing to have no "strategic or other legitimate explanations" did not compromise defendant's right to a fair trial (*see, People v. Georgiou, supra, citing, People v. Benevento*, 91 N.Y.2d at 714; *see, People v. Rivera*, 71 N.Y.2d 705 [1988]).

Additionally, as previously indicated, the trial court submitted both depraved indifference murder and the intentional murder counts to the jury, and instructed the jury to render a verdict on depraved indifference murder first, and then go on to consider intentional murder only if it found defendant not guilty of depraved indifference murder. The jury found defendant guilty of depraved indifference murder. Extreme emotional disturbance is not a defense to depraved indifference murder



(see, *People v. Farden*, 82 N.Y.2d 638, 644-45 [1993]; Penal Law § 125 [2]). Thus, even if the psychiatric evidence had been introduced at defendant's trial, it would not have affected the jury's verdict that he was guilty of depraved indifference murder.


Further, the court does not find that counsel was ineffective for failing to request the trial court to instruct the jury to consider intentional murder before it considered depraved indifference murder. If the trial court had submitted the extreme emotional disturbance defense to the jury, the court would have instructed that the extreme emotional disturbance was applicable only to the intentional murder count. Moreover, it would be presumed that the jury would have followed the instruction of the court (see, *Richardson v. Marsh*, 481 U.S. 200, 206 [1987]; 599 F.3d 170, 174 [2d Cir. 2010] [quoting, *United States v. Saleme*, 152 F.3d 88, 116 [2d Cir. 1998]; *People v. Davis*, 58 N.Y.2d 1102 [1983]; *People v. Marji*, 43 A.D.3d 961 [2d Dept. 2007]).

In regard to defendant's further claim that his counsel was ineffective for failure to use defendant's psychiatric history for mitigation purposes at sentencing, this claim is not supported by the record. The trial court had information about defendant's psychiatric condition from the psychiatric report prepared prior to trial, pursuant to C.P.L. § 730, and defendant's history of psychiatric hospital admissions. Further, the sentencing court had information from the psychiatric report that it had ordered prior to sentencing. Thus, the court finds that counsel's failure to utilize defendant's previous psychiatric records at sentencing did not deny him meaningful representation.

Finally, defendant's claim that he was not allowed to address the court at sentencing is made solely by the defendant and contradicted by the record. Thus, this claim is denied (CPL § 440.30 [4] [d]).

This court has concluded that defendant has failed to substantiate his claims. The defendant has not shown that he was deprived of meaningful representation at trial, or at sentence. Accordingly, defendant's motions are denied in their entirety. This constitutes the decision and order of the court.

Dated: October 17, 2013

  
James P. Sullivan  
**HON. JAMES P. SULLIVAN**  
**J.S.C.**