

# WHAT JUSTICE REQUIRES: A CASE OF INEFFECTIVE ASSISTANCE OF COUNSEL

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On September 22, 1982, a probationary fireman was found in his van, shot to death.<sup>1</sup> On September 24, 1982, Sheila DeLuca, a retired police officer, was arrested for his murder.<sup>2</sup> In April 1984, DeLuca was found guilty of murder in the second degree<sup>3</sup> and was given a sentence of twenty years to life.<sup>4</sup> Today, she is a free woman.

The purpose of this note is to provide some hope for those languishing in prisons, convicted of crimes they did not commit, and for those who could have been convicted of a lesser crime had an appropriate and viable affirmative defense been raised on their behalf. This note also contains a warning for attorneys regarding the scope of their responsibility to their clients. To accomplish this purpose, the decisions of the United States District Court for the Southern District of New York and the Second Circuit Court of Appeals which dealt with Sheila DeLuca's case will be examined. The effect of these decisions on later cases will also be explored. The right to effective assistance of counsel,<sup>5</sup> the right to testify,<sup>6</sup> and the affirmative defense of extreme emotional disturbance<sup>7</sup> will be addressed in the context of these decisions.

## I. UNDISPUTED FACTS

On the evening of September 21, 1982, Sheila DeLuca met with friends and family at a bar in the Bronx to celebrate her birthday, her retirement from the police force, and her team's victory in

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<sup>1</sup> DeLuca v. Lord, 858 F. Supp. 1330, 1334 (S.D.N.Y. 1994), *aff'd*, 77 F.3d 578 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 83 (1996).

<sup>2</sup> *Id.* at 1335.

<sup>3</sup> N.Y. PENAL LAW § 125.25(1) (McKinney 1987) ("A person is guilty of murder in the second degree when: 1. With intent to cause the death of another person, he causes the death of such person or of a third person . . .").

<sup>4</sup> DeLuca, 858 F. Supp. at 1344.

<sup>5</sup> U.S. CONST. amend. VI; *Reece v. Georgia*, 350 U.S. 85 (1955).

<sup>6</sup> *Rock v. Arkansas*, 483 U.S. 44 (1987) (holding that based on the Fifth, Sixth, and Fourteenth Amendments, criminal defendants have a right to testify on their own behalf).

<sup>7</sup> N.Y. PENAL LAW § 125.25(1) (McKinney 1987).

a women's softball league.<sup>8</sup> She took her husband home early because he was sick, and upon his insistence she returned to the bar.<sup>9</sup>

Later, she and a friend went to an after-hours club, arriving at approximately 5 a.m.<sup>10</sup> They met Robert Bissett and his friends Eugene Murphy and Robert Barrett, none of whom they knew.<sup>11</sup> Around 7 a.m. they left the club together in Bissett's van.<sup>12</sup> At some point DeLuca and Bissett, being alone in his van, parked in a deserted area along the service road of a highway.<sup>13</sup> At about 2 p.m. on September 22, 1982, DeLuca left the van, called her husband, and went home.<sup>14</sup>

That evening around 7 p.m., DeLuca's husband, a retired police captain, called the police and told them where they could find Bissett's body.<sup>15</sup> Mr. DeLuca called the police again, about an hour later, and asked for the rape squad.<sup>16</sup> When a sergeant returned the call, Sheila DeLuca described her abduction and rape.<sup>17</sup>

DeLuca then hired John Patten, an attorney who had never before tried a case involving homicide.<sup>18</sup> After conferring with the attorney and his partner, DeLuca gave the police the clothes that she wore the previous evening.<sup>19</sup> She then went to a hospital for a medical examination.<sup>20</sup> Upon returning home, she gave the police her service revolvers and her husband turned over the off-duty revolver which had been used to kill Bissett.<sup>21</sup>

## II. THE TRIAL

At trial, the prosecution presented only circumstantial evidence.<sup>22</sup> They attempted to show DeLuca was a "loose" woman trying to satisfy her sexual desires and then killing Bissett in cold blood.<sup>23</sup> There were also apparent discrepancies in the evidence given by prosecution witnesses which were never pursued by the

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<sup>8</sup> *DeLuca*, 858 F. Supp. at 1333.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 1334.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 1334 n.2.

<sup>19</sup> *Id.* at 1334-35.

<sup>20</sup> *Id.* at 1335.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 1340.

<sup>23</sup> *Id.*

defense.<sup>24</sup> Nor was the prosecution able to prove the victim's time of death since the body had been refrigerated, thus altering the progression of signs which could have indicated the approximate time of death.<sup>25</sup>

The defense attempted to call only one witness, an expert on rape trauma syndrome, to rebut the prosecution's theory that DeLuca had lied about being raped. The trial judge refused to allow the testimony.<sup>26</sup> Not only was the defense unsuccessful at its only attempt to call a witness, but they rested without presenting any evidence.<sup>27</sup>

DeLuca was then convicted of second-degree murder.<sup>28</sup>

### III. SUBSEQUENT HISTORY

DeLuca's conviction was upheld without opinion on April 11, 1985 by the New York Appellate Division, First Department.<sup>29</sup> Subsequently, her leave to appeal to the New York Court of Appeals was denied.<sup>30</sup> The conviction became final on February 24, 1986, when DeLuca's petition for certiorari to the United States Supreme Court was denied.<sup>31</sup> Arguing that she received ineffective assistance of counsel and admitting for the first time that she had killed Bissett, DeLuca made a post conviction motion to vacate the judgment.<sup>32</sup> That motion was denied.<sup>33</sup>

After exhausting all state remedies, DeLuca petitioned for a writ of habeas corpus in the United States District Court for the Southern District of New York.<sup>34</sup> Her contention was that her trial counsel was ineffective in two respects.<sup>35</sup> First, he failed to ade-

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<sup>24</sup> *Id.* at 1341 n.9, 10. Bissett's mother testified that Bissett and a woman had stopped by the house that morning, and the owner of a paint store testified that Bissett had visited. But neither of his friends who had been with him mentioned either stop. *Id.* at n.9.

<sup>25</sup> *Id.* at 1343.

<sup>26</sup> *Id.* at 1344.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *People v. DeLuca*, 488 N.Y.S.2d 529 (App. Div. 1st Dep't 1985).

<sup>30</sup> *People v. DeLuca*, 484 N.E.2d 677 (N.Y. 1985).

<sup>31</sup> *DeLuca v. New York*, 475 U.S. 1012 (1986).

<sup>32</sup> N.Y. CRIM. PROC. LAW § 440.10(1)(h) (McKinney 1994) (stating that any time after a judgment has been rendered, the court upon which it was entered may vacate the judgment, upon motion of the defendant, on the ground that it was obtained in violation of the constitutional rights of defendant).

<sup>33</sup> *DeLuca*, 484 N.E.2d 677.

<sup>34</sup> 28 U.S.C.A. § 2241(a)(d) (West 1994) (providing that a writ of habeas corpus may be granted by a judge of a circuit court or a district court).

<sup>35</sup> *DeLuca v. Lord*, 858 F. Supp. 1330, 1344 (S.D.N.Y. 1994), *aff'd*, 77 F.3d 578 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 83 (1996).

quately explore and use a possible defense based on extreme emotional disturbance.<sup>36</sup> Second, he also failed to advise DeLuca that it was her decision whether or not to testify in her own behalf.<sup>37</sup>

#### IV. TESTIMONY AT THE MAGISTRATE'S HEARING

District Court Judge Robert Ward referred the petition to Magistrate Court Judge Roberts in January 1991.<sup>38</sup> An evidentiary hearing was held in July 1992.<sup>39</sup> In 294 pages of testimony, DeLuca gave her version of the facts for the first time.<sup>40</sup> Her attorney and his partner, as well as three other witnesses who testified at the hearing, confirmed that DeLuca's statements were consistent with her account of the events prior to her trial in 1982.<sup>41</sup> Her version of the events had also been recorded in the notes of a forensic psychiatrist with whom her attorney had consulted prior to trial.<sup>42</sup>

At the magistrate's hearing, DeLuca testified that she had been kidnapped by the three men.<sup>43</sup> She stated that after driving around the Bronx for a while and listening to the men talk about their various sexual exploits, she thought that she was going to be raped and killed.<sup>44</sup> Two of the men then left on foot and DeLuca and Bissett drove around in Bissett's van and eventually parked under a highway.<sup>45</sup> DeLuca testified that Bissett punched her several times and forced her to perform oral sex and have vaginal intercourse.<sup>46</sup> DeLuca eventually grabbed a bottle and hit him in the head.<sup>47</sup> She then fled from the van and ran to a gas station, called her husband, and asked him to pick her up.<sup>48</sup> She later realized that she had given her husband the wrong address and, afraid that Bissett might follow her, she walked back to her own car and

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<sup>36</sup> N.Y. PENAL LAW § 125.25(1) (McKinney 1987) (including an affirmative defense of extreme emotional disturbance to the charge of murder in the second degree).

<sup>37</sup> *DeLuca*, 858 F. Supp. at 1344.

<sup>38</sup> 28 U.S.C.A. § 636(b)(1) (granting a judge power to designate a magistrate judge to conduct an evidentiary hearing and submit proposed findings of fact and a recommendation for disposition).

<sup>39</sup> *DeLuca*, 858 F. Supp. at 1344.

<sup>40</sup> See Transcript of Magistrate's Hearing, *DeLuca v. Lord*, 858 F. Supp. 1330 (S.D.N.Y. 1994) (No. 90 Civ. 4026).

<sup>41</sup> *DeLuca*, 858 F. Supp. at 1335 n.4.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 1336.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 1337.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

drove home.<sup>49</sup> She testified that at that time she did not have her gun with her.<sup>50</sup>

After arriving home, DeLuca broke down and told her husband what had happened.<sup>51</sup> Her husband wanted her to report the incident but DeLuca was embarrassed and in pain and wanted to go to a hospital.<sup>52</sup> Mr. DeLuca insisted that the incident be reported, and he offered to make the report himself.<sup>53</sup> DeLuca could not remember the names of the streets where the van had been parked, but offered to show her husband on the way to the hospital.<sup>54</sup> Before leaving for the hospital, DeLuca got her gun because she felt vulnerable.<sup>55</sup>

When they arrived at the rape site, the van was still parked where DeLuca had left it.<sup>56</sup> DeLuca drew her gun.<sup>57</sup> She and her husband approached the van, one on either side.<sup>58</sup> They opened the front doors simultaneously and saw no one.<sup>59</sup> Suddenly Bissett lunged from inside the van and knocked Mr. DeLuca down.<sup>60</sup> Sheila DeLuca told Bissett not to move.<sup>61</sup> Bissett grabbed her arm, saying he was going to kill her.<sup>62</sup> DeLuca shot him.<sup>63</sup> DeLuca and her husband then immediately drove home, and Mr. DeLuca called the police.<sup>64</sup>

#### V. HOLDING AND RATIONALE

Magistrate Judge Roberts issued her report in December 1993 recommending that the petition for habeas corpus be denied upon a finding that DeLuca's counsel had not been ineffective and that the refusal of the trial court to allow evidence of rape trauma syndrome did not deprive DeLuca of her constitutional rights.<sup>65</sup> Peti-

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 1338.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 1344.

tioner filed an objection to the report<sup>66</sup> and Judge Ward reviewed the recommendations of the magistrate.<sup>67</sup> After a review of the record de novo, the court rejected the magistrate's recommendations.<sup>68</sup> Judge Ward found that DeLuca's counsel had been ineffective on both the ground of failure to prepare and preserve the affirmative defense of extreme emotional disturbance and on the ground of failure to inform DeLuca that it was ultimately her decision whether or not to testify.<sup>69</sup> After serving ten years in prison, DeLuca's petition for a writ of habeas corpus was granted.<sup>70</sup>

The State of New York appealed the decision of the district court.<sup>71</sup> On February 13, 1996, in a two to one decision, the Court of Appeals for the Second Circuit upheld the district court's finding that failure to prepare and preserve the defense of extreme emotional disturbance had prejudiced DeLuca's case and that defense counsel was ineffective.<sup>72</sup> The Court of Appeals for the Second Circuit did not address the issue of defendant's right to testify.<sup>73</sup> Eight months later, the Supreme Court denied the state's appeal for certiorari.<sup>74</sup>

## VI. INEFFECTIVE ASSISTANCE OF COUNSEL

A defendant in a criminal case is guaranteed the right to effective assistance of counsel.<sup>75</sup> This guarantee is found in the Sixth Amendment to the United States Constitution<sup>76</sup> and in the New York State Constitution.<sup>77</sup> Respect given to the principle of the

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<sup>66</sup> 28 U.S.C.A. § 636(b)(1) (West 1993); FED. R. CIV. P. 72(a) (providing that within ten days after receiving a copy of a report, a party may file written objections to the findings).

<sup>67</sup> 28 U.S.C.A. § 636(b)(1) (West 1993) (stating that the judge may accept or reject the recommendations of the magistrate); FED. R. CIV. P. 72(a); *DeLuca*, 858 F. Supp. at 1345.

<sup>68</sup> *DeLuca*, 858 F. Supp. at 1347.

<sup>69</sup> *Id.* at 1363-64.

<sup>70</sup> *Id.* at 1364.

<sup>71</sup> *DeLuca v. Lord*, 77 F.3d 578 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 83 (1996).

<sup>72</sup> *Id.* at 579.

<sup>73</sup> *Id.* at 590. *See DeLuca*, 858 F. Supp. at 1353-59 (discussing defendant's right to testify).

<sup>74</sup> *DeLuca v. Lord*, 117 S. Ct. 83 (1996).

<sup>75</sup> U.S. CONST. amend. VI; N.Y. CONST. art. 1, § 6.

<sup>76</sup> U.S. CONST. amend. VI (providing in part that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial and have the assistance of counsel for his defense). *See Reece v. Georgia*, 350 U.S. 85, 90 (1955) (holding that the right to effective assistance of counsel is required by due process).

<sup>77</sup> N.Y. CONST. art. 1, § 6 (providing in part that in any trial the party accused shall be allowed to defend in person and with counsel and be informed of the nature and cause of the accusation and be confronted with witnesses against him).

right to effective assistance of counsel reflects a commitment to provide defendants with the opportunity to be participants in the adversarial process.<sup>78</sup>

In *Strickland v. Washington*,<sup>79</sup> the United States Supreme Court addressed for the first time the standards by which to judge a claim of ineffective counsel.<sup>80</sup> Justice O'Connor stressed that the purpose of the effective assistance guarantee of the Sixth Amendment was not to improve the quality of representation, but rather to ensure a fair trial for criminal defendants.<sup>81</sup> The counsel's role was viewed by Justice O'Connor as critical to the production of just results in the adversarial system.<sup>82</sup> Therefore, in determining a claim of ineffective counsel, the court must decide whether counsel's conduct so undermined the proper functioning of the system as to make the justice of the trial's outcome questionable.<sup>83</sup>

A convicted defendant's claim of ineffective counsel is subject to a two part test.<sup>84</sup> She "must show that counsel's representation fell below an objective standard of reasonableness"<sup>85</sup> and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the trial would have been different."<sup>86</sup> In assessing counsel's conduct, a court must presume that the challenged conduct fell within a "wide range of professional assistance."<sup>87</sup> In making a fair assessment of counsel's conduct, the court must try to view that performance from the perspective of the attorney at the time of the trial and eliminate the effects of hindsight.<sup>88</sup>

## VII. OBJECTIVELY UNREASONABLE PERFORMANCE

The Court in *Strickland* gave only basic guidance to lower courts on how to determine what standard of reasonableness estab-

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<sup>78</sup> William J. Genego, *The Future of Effective Assistance of Counsel: Performance Standards and Competent Representation*, 22 AM. CRIM. L. REV. 181, 201 (1984).

<sup>79</sup> 466 U.S. 668 (1984).

<sup>80</sup> *Id.* at 684.

<sup>81</sup> *Id.* at 685 (the Court defined a fair trial as "one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding.").

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 686.

<sup>84</sup> *DeLuca v. Lord*, 77 F.3d 578, 584 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 83 (1996) (citing *Strickland*, 466 U.S. at 687).

<sup>85</sup> *Strickland*, 466 U.S. at 688.

<sup>86</sup> *Id.* at 694.

<sup>87</sup> *Id.* at 689.

<sup>88</sup> *Id.*

lishes ineffective counsel.<sup>89</sup> The dissent in *Strickland* points out that "the majority has instructed judges called upon to assess claims of ineffective assistance of counsel to advert to their own intuitions regarding what constitutes 'professional' representation, and has discouraged them from trying to develop more detailed standards governing the performance of defense counsel."<sup>90</sup> The development of the requirements for reasonable competency came about, for the most part, on a case-by-case basis as courts evaluated what lawyers were or were not doing in individual cases.<sup>91</sup> In regard to counsel's duty to investigate and make strategic choices—an issue in *DeLuca*<sup>92</sup>—the Court held that thoroughly investigated choices were not challengeable, while the decision not to investigate or the choices made without thorough investigation were to be evaluated for reasonableness in light of all the circumstances.<sup>93</sup>

In determining the reasonableness of such choices, a heavy measure of respect should be accorded to the decisions of counsel.<sup>94</sup> The Court did suggest that the standards of the American Bar Association (ABA) would be helpful in determining what is reasonable, but cautioned that the standards were only guides.<sup>95</sup> The ABA Standards for Criminal Justice call for a defense attorney to investigate and explore all avenues leading to facts that are relevant to a case and the sentence in the event that the defendant is found guilty.<sup>96</sup> In the commentary, it is noted that an attorney has an important function in raising such mitigating factors as a defendant's background, employment record, emotional stability, and circumstances surrounding the crime.<sup>97</sup> The commentary also cautions attorneys that inadequate preparation or lack of pretrial investigation could lead to a finding of ineffective assistance.<sup>98</sup>

The Court of Appeals for the Second Circuit has held that "not all strategic choices are sacrosanct. Merely labeling [counsel's] errors 'strategy' does not shield his trial performance from

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<sup>89</sup> Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. ILL. L. REV. 323, 335 (1993).

<sup>90</sup> *Strickland*, 466 U.S. at 708 (Marshall, J., dissenting).

<sup>91</sup> Genego, *supra* note 78, at 190.

<sup>92</sup> *DeLuca v. Lord*, 77 F.3d 578, 588 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 83 (1996).

<sup>93</sup> *Strickland*, 466 U.S. at 690-91.

<sup>94</sup> *Id.* at 691.

<sup>95</sup> *Id.* at 688.

<sup>96</sup> ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION & DEFENSE FUNCTION § 4-4.1(a) (1993).

<sup>97</sup> *Id.* at § 4-4.1 commentary at 183.

<sup>98</sup> *Id.*



Sixth Amendment scrutiny.<sup>99</sup> In *Maddox v. Lord*,<sup>100</sup> the court held that after counsel raised a defense of extreme emotional disturbance, his failure to investigate it and pursue it was unreasonable.<sup>101</sup> But, the New York Court of Appeals in *People v. Flores*<sup>102</sup> held that "a simple disagreement with strategies, tactics[,] or the scope of possible cross-examination, weighed long after the trial, does not suffice" to conclude that counsel was ineffective.<sup>103</sup>

However, the dissent in *Flores* argued that the toleration of professional errors in trial strategy must have some limitations, measured in part by the assumption "that a criminal defense attorney will do whatever is necessary and appropriate . . . to help the client avoid an unfavorable [judgment] . . . ."<sup>104</sup>

In *DeLuca*, the district court judge clearly set out the *Strickland* standard.<sup>105</sup> The court recognized that *Strickland* did not establish mechanical rules, but "instructs examining courts to judge each claim individually by looking to the legal profession's 'prevailing norms of practice' in order to determine whether, under the particular circumstances present, the attorney's actions constitute reasonable assistance."<sup>106</sup>

DeLuca's trial attorney, Patten, believed in her innocence from the very beginning and zealously attempted to secure her acquittal.<sup>107</sup> However, that zeal led to the decision to pursue an objectively unreasonable strategy.<sup>108</sup> According to Patten's testimony at the evidentiary hearing, he believed that there were only two possible defense strategies. The first strategy was to claim the justification defense that DeLuca's actions were in self defense.<sup>109</sup> Patten did not pursue this strategy. The second strategy, the one he did pursue, was to argue that the state could not prove its case beyond a reasonable doubt.<sup>110</sup> Patten was certain that the prosecu-

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<sup>99</sup> *Quartararo v. Fogg*, 679 F. Supp. 212, 247 (E.D.N.Y. 1988), *aff'd*, 849 F.2d 1467 (2d Cir. 1988) (citations omitted).

<sup>100</sup> 818 F.2d 1058 (2d Cir. 1987).

<sup>101</sup> *Id.* at 1061-62.

<sup>102</sup> 639 N.E.2d 19 (N.Y. 1994).

<sup>103</sup> *Id.* at 20 (citation omitted).

<sup>104</sup> *Id.* at 23 (Titone, J., dissenting). See THE LAWYER'S CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (N.Y. State Bar Ass'n 1994).

<sup>105</sup> *DeLuca v. Lord*, 858 F. Supp. 1330, 1346-52 (S.D.N.Y. 1994), *aff'd*, 77 F.3d 578 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 83 (1996).

<sup>106</sup> *Id.* at 1345.

<sup>107</sup> *Id.* at 1346.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

tion was wrong about the time of the shooting.<sup>111</sup> Patten thought that a jury could believe that Peter DeLuca, having access to the murder weapon and having a possible motive, had committed the murder.<sup>112</sup> However, at the trial, the defense never attempted to present any evidence that Mr. DeLuca might be implicated or as to the correct time of the shooting.<sup>113</sup> Patten attempted to call only one witness, a rape trauma expert.<sup>114</sup> Because the defense did not present any evidence that DeLuca had been raped, the trial court did not allow the witness.<sup>115</sup>

Testimony at the magistrate's hearing provided insight into some of the evidence that was available to DeLuca's attorney during the eighteen months before the trial began. For example, DeLuca had spoken to a bartender from another establishment who had observed Bissett and his friends snorting cocaine and had asked them to leave the bar that night.<sup>116</sup> DeLuca had a written statement from another woman who had been previously abducted and assaulted by Bissett.<sup>117</sup> She also had found a police report alleging that Bissett had killed someone.<sup>118</sup> Furthermore, Ellen Yaroshefsky, a lawyer who worked for the Center for Constitutional Rights, met with DeLuca and Patten and explained why she thought DeLuca had a justification of self defense.<sup>119</sup> DeLuca's marriage was purely platonic.<sup>120</sup> DeLuca was a lesbian.<sup>121</sup> There were pictures taken of her bruised body with her family physician present.<sup>122</sup> In addition, there were other witnesses to support a defense of extreme emotional disturbance who were available to testify, including a friend who was with Sheila DeLuca the night of the party and the physician who examined her on the night of Bissett's death.<sup>123</sup>

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<sup>111</sup> *Id.* at 1344.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> Transcript of Magistrate's Hearing at 70-71, *DeLuca v. Lord*, 858 F. Supp. 1330 (S.D.N.Y. 1994) (No. 90 Civ. 4026).

<sup>117</sup> *Id.* at 64. The woman would also have been available to testify at trial. *Id.* at 65.

<sup>118</sup> *Id.* at 68.

<sup>119</sup> *Id.* at 309-17.

<sup>120</sup> *Id.* at 28-30.

<sup>121</sup> *Id.* at 28.

<sup>122</sup> *Id.* at 55-56.

<sup>123</sup> *DeLuca*, 858 F. Supp. at 1338-39. In fact, the trial had been adjourned several times because Mr. DeLuca had developed cancer and his ability to testify was questionable. He eventually had the nerve endings in his back cut so that he would be able to testify. *Id.* Evidence of prior conduct by the victim could also have been presented. *Id.*

## VIII. THE DEFENSE OF EXTREME EMOTIONAL DISTURBANCE

It is no longer true in modern criminology that "[a] homicide is a homicide is a homicide."<sup>124</sup> The current trend is to lessen criminal accountability when mitigating circumstances are proven which render the defendant less liable.<sup>125</sup>

[I]t is an affirmative defense that . . . [t]he defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime . . . .<sup>126</sup>

The purpose of this affirmative defense is to allow a defendant to show that a mental infirmity of a lesser degree than insanity caused her actions and, therefore, rendered her less culpable.<sup>127</sup> If the defense is successful, the defendant is found guilty of manslaughter in the first degree rather than murder in the second degree.<sup>128</sup> A conviction of a lesser charge could significantly reduce the sentence.<sup>129</sup>

In deciding whether to submit this defense to the jury, the court must decide if there is enough credible evidence so that a jury may determine whether the elements of the defense are met.<sup>130</sup> In determining the reasonableness of a defendant's reac-

<sup>124</sup> *People v. Patterson*, 347 N.E.2d 898, 910 (N.Y. 1976) (Breitel, C.J., concurring), *aff'd sub nom. Patterson v. New York*, 432 U.S. 197 (1977).

<sup>125</sup> *Id.* at 908.

<sup>126</sup> N.Y. PENAL LAW § 125.25(1)(a) (McKinney 1987).

<sup>127</sup> *Patterson*, 347 N.E.2d at 907. See *People v. Owens*, 611 N.Y.S.2d 67, 68 (App. Div. 4th Dep't 1994) (mem.) (explaining why evidence showing that defendant suffered from multiple personality disorder entitled her to extreme emotional disturbance defense and reduced her conviction from second degree murder to first degree manslaughter).

<sup>128</sup> A person is guilty of manslaughter in the first degree when . . . [w]ith intent to cause the death of another person, he causes the death of such person . . . under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance . . . . The fact that a homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree . . . .

N.Y. PENAL LAW § 125.20(2). See also N.Y. PENAL LAW § 125.25(1)(a) ("Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree . . .").

<sup>129</sup> *Patterson*, 347 N.E.2d at 907.

<sup>130</sup> *People v. Moyer*, 489 N.E.2d 736, 739 (N.Y. 1985) (mem.).

tion, the appropriate test is whether, by examining the totality of the circumstances, the fact finder can understand how a person could lose control of her reason.<sup>131</sup> This test requires proof of a subjective element, that the defendant acted under the influence of extreme emotional disturbance, and an objective element, that there was a reasonable excuse for the disturbance.<sup>132</sup> Whether an excuse is reasonable is determined "by viewing the subjective, internal situation in which the defendant found [herself] and the external circumstances as [she] perceived them . . . ."<sup>133</sup> The defendant must be able to prove both elements of the affirmative defense by a preponderance of evidence.<sup>134</sup>

While psychiatric testimony may provide objective reasons for a person's conduct,<sup>135</sup> it is not legally necessary in order to raise the defense.<sup>136</sup> Where conflicting expert testimony is presented, a jury may accept whatever opinion it finds more credible.<sup>137</sup> Conduct influenced by extreme emotional disturbance need not be immediate, but may be caused by a trauma which had affected the person's mind for some period of time and then came forward.<sup>138</sup> However, a defendant needs to provide proof that a provoking act affected her at the time of the murder, so that a jury could conclude that she acted under the influence of extreme emotional disturbance.<sup>139</sup>

DeLuca testified at the evidentiary hearing that her attorney, Patten, had discussed an insanity defense with her but not the de-

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<sup>131</sup> *People v. Casassa*, 404 N.E.2d 1310, 1313 (N.Y. 1980).

<sup>132</sup> *Id.* at 1316.

<sup>133</sup> *Id.*

<sup>134</sup> *See Moyer*, 489 N.E.2d at 738; *Patterson*, 347 N.E.2d at 901; *People v. Drake*, 629 N.Y.S.2d 361, 362 (App. Div. 4th Dep't 1995) (mem.) (holding that jury was entitled to find that defendant did not meet the burden of proof required to establish defense); *People v. Walker*, 473 N.Y.S.2d 460, 461 (App. Div. 1st Dep't 1984) (holding that defendant provided no specific evidence to establish the defense); N.Y. PENAL LAW § 25.00 (McKinney 1987).

<sup>135</sup> *People v. Feris*, 535 N.Y.S.2d 17, 18 (App. Div. 2d Dep't 1988) (holding that defendant's claim of extreme emotional disturbance was not substantiated by expert testimony).

<sup>136</sup> *See Moyer*, 489 N.E.2d at 738; *People v. Harris*, 491 N.Y.S.2d 678, 688 (App. Div. 2d Dep't 1985).

<sup>137</sup> *See People v. Ayala*, 633 N.Y.S.2d 548, 549 (App. Div. 2d Dep't 1995); *People v. Tolbert*, 625 N.Y.S.2d 259 (App. Div. 2d Dep't 1995); *People v. Owens*, 611 N.Y.S.2d 67, 68 (App. Div. 4th Dep't 1994) (Balio, J. and Callahan, J., dissenting in part).

<sup>138</sup> *Patterson*, 347 N.E.2d at 908.

<sup>139</sup> *People v. White*, 590 N.E.2d 236, 238 (N.Y. 1992) (holding that victim's repeated humiliation of defendant was sufficient to establish provocation, but the provocation was so remote that, alone, it was not enough to prove that defendant was extremely emotionally disturbed at the time of the murder).

fense of extreme emotional disturbance. In explaining the insanity defense, he told her about a police officer who had pled temporary insanity to the shooting of a child and spent less than a year in a mental institution for the crime.<sup>140</sup> Patten testified that he dropped the defense at an early stage because of his client's aversion to seeing a psychiatrist.<sup>141</sup> However, DeLuca testified that she had agreed to see a psychiatrist, but Patten had canceled the appointment.<sup>142</sup> Although the magistrate judge gave credence to Patten's testimony, the district court found DeLuca's account supported by other witnesses who had been involved in these discussions.<sup>143</sup> Her attorney consulted with a psychiatrist whose notes of the meeting included two possible defenses, but nothing about extreme emotional disturbance.<sup>144</sup> Patten's law partner could not remember any discussions about an extreme emotional disturbance defense.<sup>145</sup> The court was not persuaded that Patten understood the defense of extreme emotional disturbance.<sup>146</sup> All of this may help to explain why DeLuca was not informed of the defense of extreme emotional disturbance.<sup>147</sup>

The court found that the defense attorney's failure to adequately consider the extreme emotional disturbance defense resulted in a breakdown of the process which should "produce just results."<sup>148</sup> Judge Ward reasoned that counsel's disclaimer that he did not know whether the defendant understood the defense was evidence of an insufficient attempt to "consult with his client on [an] important decision."<sup>149</sup> In light of these circumstances, especially considering that counsel consulted with and attempted to call a rape trauma expert, it was unreasonable to have abandoned the one defense about which the expert could testify.<sup>150</sup>

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<sup>140</sup> Transcript of Magistrate's Hearing at 73, *DeLuca v. Lord*, 858 F. Supp. 1330 (S.D.N.Y. 1994) (No. 90 Civ. 4026).

<sup>141</sup> *DeLuca v. Lord*, 858 F. Supp. 1330, 1348 (S.D.N.Y. 1994), *aff'd*, 77 F.3d 578 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 83 (1996).

<sup>142</sup> Transcript of Magistrate's Hearing at 73-74.

<sup>143</sup> *DeLuca*, 858 F. Supp. at 1348.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 1347.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 669 (1984)).

<sup>149</sup> *Id.* at 1350 (quoting *Strickland*, 466 U.S. at 688).

<sup>150</sup> *People v. Taylor*, 552 N.E.2d 131, 136 (N.Y. 1990) (holding that the patterns of responses of rape victims are not within the understanding of a lay juror).

## IX. PREJUDICE

There is a consensus among the courts that unless counsel's performance prejudices the defense, the criminal defendant's claim of ineffective counsel will not stand.<sup>151</sup> A court is not required to determine the reasonableness of defense counsel's performance unless it first determines that the performance prejudiced the defendant.<sup>152</sup> Prejudice could be found if there was a reasonable probability that counsel's performance undermined confidence in the outcome of the trial.<sup>153</sup> To meet the second prong of this test, the defendant must be able to demonstrate that the fact finder would have reasonable doubt concerning the defendant's guilt, absent counsel's error.<sup>154</sup> It is not enough to show that counsel's unreasonable performance had some possible effect on the outcome of the trial.<sup>155</sup> The burden on the defendant to prove prejudice helps to ensure that the court's standard will rarely result in a reversal.<sup>156</sup>

The district court found that this standard was easily met by DeLuca and concluded that the result of the trial would have been different had an extreme emotional disturbance defense been presented.<sup>157</sup> Judge Ward reasoned from DeLuca's testimony at the evidentiary hearing that she "would have been a very compelling witness."<sup>158</sup> DeLuca could have told the jury that she had been a police officer for fifteen years, a school teacher, a nun, and a

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<sup>151</sup> *Maddox v. Lord*, 818 F.2d 1058, 1061 (2d Cir. 1987); *Quartararo v. Fogg*, 679 F. Supp. 212, 239 (E.D.N.Y. 1988), *aff'd*, 849 F.2d 1467 (2d Cir. 1988). *See Winkler v. Keane*, 7 F.3d 304, 310 (2d Cir. 1993) (holding that counsel's conflict of interest did not prejudice defense's case); *see also Tippins v. Walker*, 77 F.3d 682, 685-87 (2d Cir. 1996) (holding that defendant suffered prejudice, by presumption, when counsel was asleep for substantial periods of time during the trial); *United States v. Malpiedi*, 62 F.3d 465, 469 (2d Cir. 1995) (holding that prejudice is presumed where defense counsel has conflict of interest).

<sup>152</sup> *Strickland*, 466 U.S. at 697.

<sup>153</sup> *Id.* at 694.

<sup>154</sup> *Id.* at 695; *Maddox*, 818 F.2d at 1062. *But see Henry v. Scully*, 918 F. Supp. 693, 717-18 (S.D.N.Y. 1995), *aff'd*, 78 F.3d 51 (2d Cir. 1996) (holding that even where evidence was sufficient for jury to find defendant guilty, the court could not be sure that admission of improper hearsay and absence of missing witness charge could have influenced jury to come to a different verdict); *People v. Smith*, 643 N.Y.S.2d 315, 322 (Sup. Ct. Kings County 1996) (holding that even though attorney's unreasonable representation might not have prejudiced outcome of trial, defendant was still deprived of a fair trial).

<sup>155</sup> *Strickland*, 466 U.S. at 693.

<sup>156</sup> *Genego*, *supra* note 78, at 199.

<sup>157</sup> *DeLuca v. Lord*, 858 F. Supp. 1330, 1352 (S.D.N.Y. 1994), *aff'd*, 77 F.3d 578 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 83 (1996).

<sup>158</sup> *Id.* at 1350.

basketball coach.<sup>159</sup> The judge felt that her most convincing argument might have been that she was a homosexual and her relationship with her husband was platonic.<sup>160</sup> Although defense counsel knew of DeLuca's background and employment record, he failed to raise any of these mitigating factors.<sup>161</sup> There were also many people who would have been available to testify as to her reputation for truthfulness.<sup>162</sup> Additionally, her version of the events was supported by physical evidence, medical reports, and other witnesses.<sup>163</sup> In summary:

DeLuca's account of her abduction and rape would clearly allow the jury to find that she had "been exposed to an extremely unusual and overwhelming stress" and had "an extreme emotional reaction to it, as a result of which, [she suffered] a loss of self-control and [her] reason [was] overborne by intense feelings, such as passion, anger, distress[,] . . . or other similar emotions."<sup>164</sup>

In reviewing the decision of the district court, the Court of Appeals for the Second Circuit noted that DeLuca's counsel's failure to present any defense left the jury with two choices: acquittal or guilty of second degree murder.<sup>165</sup> However, by testifying, DeLuca would have had to admit that she killed Bissett, which had the disadvantage of leaving the jury with no reasonable doubt and precluding a chance of acquittal.<sup>166</sup> But, proof of the influence of extreme emotional disturbance could have reduced the conviction from murder in the second degree to manslaughter in the first degree.<sup>167</sup> The court found that there was a reasonable probability that some of the jurors would have accepted DeLuca's testimony that she had been raped and had acted under the influence of extreme emotional disturbance.<sup>168</sup> Patten's abandonment of the extreme emotional disturbance defense without justification was not within the bounds of "reasonable professional judgment or a reasoned strategic choice."<sup>169</sup> In affirming the district court's deci-

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<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 1352.

<sup>161</sup> *Id.* at 1350-51.

<sup>162</sup> *Id.* These included police officers, former teachers, and members of the religious community of which she had once been a member. *Id.*

<sup>163</sup> *Id.* at 1351-52.

<sup>164</sup> *Id.* at 1352 (quoting *People v. Shelton*, 385 N.Y.S.2d 708, 717 (Sup. Ct. N.Y. County 1976)).

<sup>165</sup> *DeLuca v. Lord*, 77 F.3d 578, 586 (2d Cir.), *cert. denied*, 117 S. Ct. 83 (1996).

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*; N.Y. PENAL LAW §§ 125.25(1)(a), 125.20(2) (McKinney 1987).

<sup>168</sup> *DeLuca*, 77 F.3d at 590.

<sup>169</sup> *Id.* at 588 (footnote omitted).

sion, the Second Circuit Court of Appeals found that "the *Strickland* test of 'reasonable probability' of a different outcome was easily met."<sup>170</sup> Given the mitigating circumstances surrounding DeLuca's case, her desire to testify, other evidence, and witnesses available at the time of the trial, it seems likely that jurors would have accepted the defense of extreme emotional disturbance and convicted her of manslaughter.<sup>171</sup>

The dissent of Judge Kearse in the Second Circuit Court of Appeals' opinion found that defense counsel's performance did not fall below an objective standard of reasonableness.<sup>172</sup> Judge Kearse argued that faulting counsel for failure to present an extreme emotional disturbance defense, which had been prepared, constituted pure hindsight on the part of the majority.<sup>173</sup>

In the dissent's opinion, counsel's abandonment of the extreme emotional disturbance defense on the belief that psychiatric testimony was required in order to succeed was not defective.<sup>174</sup> The argument was based on *People v. Harris*.<sup>175</sup> That court, however, conceded that psychiatric testimony was not legally required.<sup>176</sup> Additionally, in that case the court found the allegations of faulty advice were unsupported by any evidence or affidavits, were contradicted by a lawyer actually present at the original discussions, and in view of other circumstances of the case, could not reasonably be true.<sup>177</sup> In *DeLuca*, the evidence, lack of contradiction, and testimony of experts pointed toward an extreme emotional disturbance defense and makes it clearly distinguishable from *Harris*.

While finding the majority's view shortsighted, the dissent never addressed the majority's view that DeLuca's attorney did not

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<sup>170</sup> *Id.* at 590 (citation omitted). See also *Maddox v. Lord*, 818 F.2d 1058, 1061-62 (2d Cir. 1987) (holding that defendant, who shot her husband because she was afraid of him, was found to have received ineffective assistance of counsel because her attorney raised the defense of extreme emotional disturbance but did not investigate it or pursue it thoroughly. The court found this failure to be unsound trial strategy.).

<sup>171</sup> *Ineffective Counsel; Extreme Emotional Disturbance*, 20 Mental & Physical Disability Law Rep. 185 (1996).

<sup>172</sup> *DeLuca*, 77 F.3d at 592 (Kearse, J., dissenting).

<sup>173</sup> *Id.* at 592-93 (Kearse, J., dissenting) (stating that the trial judge's suggestion of an exit route, in case of a not guilty verdict, was an insufficient reason to not present affirmative defense).

<sup>174</sup> *Id.* at 592. The defense attorney testified at the evidentiary hearing that he could not investigate this defense without the defendant agreeing to see a psychiatrist. *Id.* at 586.

<sup>175</sup> 491 N.Y.S.2d 678 (App. Div. 2d Dep't 1995).

<sup>176</sup> *Id.* at 688.

<sup>177</sup> *Id.* at 689.



understand or appropriately explain the extreme emotional disturbance defense to his client.<sup>178</sup> When Patten was asked when he decided not to pursue the defense, he admitted that he did not believe he ever decided.<sup>179</sup> With all of the evidence available to Patten at the time of DeLuca's trial, especially his attempt to call a rape trauma expert, it appears clear that Patten did not understand the defense well enough to consider it a viable option to no defense. Counsel's failure to consider this defense in light of the prosecution's case was a breakdown in a process that should lead to just results.<sup>180</sup> It was not hindsight<sup>181</sup> to conclude that the failure to understand the importance of this defense was equivalent to inadequate assistance. It was common sense.<sup>182</sup> Even with strong deference given to counsel's judgment, in light of the circumstances of the case,<sup>183</sup> his abandonment of the extreme emotional disturbance defense at an early stage of the trial<sup>184</sup> cannot be considered reasonable.

#### X. THE RIGHT TO TESTIFY

In *Rock v. Arkansas*,<sup>185</sup> the Supreme Court held that criminal defendants have a right to testify on their own behalf.<sup>186</sup> The defendant has the ultimate authority to make certain basic decisions about her case, including whether or not she wishes to testify.<sup>187</sup> However, "little has been written by the Supreme Court or [the Second] Circuit to explicitly flesh out the implications of *Rock*."<sup>188</sup> The Second Circuit has questioned the proposition that a defendant's failure to object, during a trial, to an attorney's refusal to allow her to testify, constitutes a waiver of the constitutional right of the defendant to testify.<sup>189</sup>

The question addressed in DeLuca's case was "what actions

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<sup>178</sup> *DeLuca*, 77 F.3d at 590-93.

<sup>179</sup> *Id.* at 587.

<sup>180</sup> *DeLuca v. Lord*, 858 F. Supp. 1330, 1347 (S.D.N.Y. 1994), *aff'd*, 77 F.3d 578 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 83 (1996).

<sup>181</sup> *Strickland v. Washington*, 466 U.S. 668, 689 (1984) (warning against the distorted effects of hindsight).

<sup>182</sup> *DeLuca*, 858 F. Supp. at 1347.

<sup>183</sup> *Strickland*, 466 U.S. at 690-91.

<sup>184</sup> *DeLuca*, 77 F.3d at 586.

<sup>185</sup> 483 U.S. 44 (1987).

<sup>186</sup> *Id.* at 49. The Court noted that the most important witness in a criminal trial may be the defendant. *Id.* at 52.

<sup>187</sup> *Jones v. Barnes*, 463 U.S. 745, 751 (1983).

<sup>188</sup> *DeLuca*, 858 F. Supp. at 1353 (footnote omitted).

<sup>189</sup> *United States v. Vargas*, 920 F.2d 167, 170 (2d Cir. 1990).

must be taken by courts and counsel to protect that right<sup>190</sup> of the defendant to testify. How does the defendant know that it is ultimately her right to testify? Who has the burden of informing the defendant of this right? The district court set out three methods that have been determined to be viable in deciding whose responsibility it is to ensure that the defendant knows that the decision to exercise this right is hers alone.<sup>191</sup> The first method puts the burden on the attorney,<sup>192</sup> while the second method puts the burden on the trial court to ensure that the defendant knowingly and willingly waived her rights.<sup>193</sup> The third method puts the burden of protecting the right to testify on the defendant.<sup>194</sup> However, as Judge Ward explained, if the defendant is unaware that the right to testify belongs to her, she cannot waive that right knowingly and voluntarily.<sup>195</sup>

The district court went to great lengths to determine if a subsequent holding that an attorney must notify his client of a right to testify should be retroactively applied to DeLuca.<sup>196</sup> After declining to do so because it would be announcing "a new constitutional rule of criminal procedure,"<sup>197</sup> the court established an exception<sup>198</sup> giving defense counsel the responsibility of informing the defendant that the right to testify was ultimately hers.<sup>199</sup>

Evidence was presented that DeLuca wanted to and expected to testify at her trial.<sup>200</sup> The court held that Patten's failure to inform DeLuca that the right to decide whether or not to testify ultimately belonged to her was also evidence of ineffective counsel.<sup>201</sup> Judge Ward's decision in this case became a point of disagreement between courts in the Second Circuit and the New York state courts which eventually led the United States Court of Appeals for the

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<sup>190</sup> *DeLuca*, 858 F. Supp. at 1355.

<sup>191</sup> *Id.* at 1355-56.

<sup>192</sup> *United States v. Teague*, 953 F.2d 1525, 1533 (11th Cir. 1992) (en banc) (holding that defense counsel has the responsibility of advising defendant of the right to testify, but the defendant has the ultimate right to decide).

<sup>193</sup> *Boykin v. Alabama*, 395 U.S. 238, 242 (1969).

<sup>194</sup> *United States v. Bernloehr*, 833 F.2d 749, 752 (8th Cir. 1987).

<sup>195</sup> *DeLuca*, 858 F. Supp. at 1356.

<sup>196</sup> *Id.* at 1357-59.

<sup>197</sup> *Id.* at 1359. See *Teague v. Lane*, 489 U.S. 288, 301 (1989) ("[A] case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." (citation omitted)).

<sup>198</sup> *Id.* The exception is when a new rule implicates the fundamental fairness of a criminal trial. *Id.* at 312; *DeLuca*, 858 F. Supp. at 1359.

<sup>199</sup> *DeLuca*, 858 F. Supp. at 1360.

<sup>200</sup> *Id.* at 1361.

<sup>201</sup> *Id.*

Second Circuit to decide the issue of a criminal defense attorney's responsibility regarding a defendant's right to testify.<sup>202</sup>

#### XI. AFTERMATH

Within a few months after *DeLuca*, two districts courts faced the same issue. Using the reasoning in *DeLuca* as part of the basis for its decision, the United States District Court for the Eastern District of New York in *Campos v. United States*<sup>203</sup> held that counsel was ineffective because he never advised his client that it was the client's decision whether or not to testify.<sup>204</sup> In the Southern District of New York, the district court in *Brown v. Artuz*<sup>205</sup> affirmed Judge Ward's decision in *DeLuca* but distinguished the instant case. It was found that the defendant's allegations could not be corroborated, as they had been in *DeLuca*.<sup>206</sup> The court also found that even if the defendant had evidence that he was denied the right to testify, he failed to show that he was prejudiced by that denial.<sup>207</sup>

In upholding the district court decision in *Brown v. Artuz*, the Court of Appeals for the Second Circuit finally addressed and answered the question of what responsibilities the defense counsel has to inform his client of her right to testify.<sup>208</sup> The court held that this right is personal to the defendant and cannot be exercised by the defense counsel.<sup>209</sup> The issue was not whether a defendant knows she has the right to testify, but whether she knows that the right is hers alone.<sup>210</sup> More importantly, the court held that counsel must inform his client that the right to testify belongs entirely to the client.<sup>211</sup> Failure of counsel to do so would be evaluated under the first prong of the ineffective assistance of counsel test as set out

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<sup>202</sup> *Brown v. Artuz*, 124 F.3d 73 (2d Cir. 1997), *cert. denied*, 118 S. Ct. 1077 (1998).

<sup>203</sup> 930 F. Supp. 787, 792-93 (E.D.N.Y. 1996).

<sup>204</sup> *Id.*

<sup>205</sup> No. 95 Civ. 2740, 1996 WL 511558 (S.D.N.Y. 1996), *aff'd*, 124 F.3d 73 (2d Cir. 1997), *cert. denied*, 118 S. Ct. 1077 (1998).

<sup>206</sup> *Id.* at 6-8. See *United States v. DeFeo*, No. 90 Cr. 250, 1997 WL 3259 (S.D.N.Y. 1997).

<sup>207</sup> *Id.* at 7. Interestingly, after these cases were decided, Judge Tonetti, DeLuca's trial judge, disagreed with Judge Ward and held that defense counsel does not have to inform defendant of his right to testify in specific terms. He reasoned that if the defendant does not openly disagree with defense counsel, counsel's waiver is valid and binding on defendant. See *People v. Roman*, 658 N.Y.S.2d 196, 199-200 (Sup. Ct. Bronx County 1997).

<sup>208</sup> 124 F.3d 73 (2d Cir. 1997), *cert. denied*, 118 S. Ct. 1077 (1998).

<sup>209</sup> *Id.* at 78.

<sup>210</sup> *Id.* at 80.

<sup>211</sup> *Id.* at 79.

in *Strickland*.<sup>212</sup>

## XII. CONCLUSION

The two part *Strickland* test places a heavy burden on the defendant to prove by a preponderance of the evidence that she has received ineffective counsel which prejudiced the outcome of her case. In DeLuca's case, the defendant's version of the events and the trial proceedings were corroborated by her trial attorney, the records of a forensic psychiatrist, and witnesses who were available twelve years later.

When the Supreme Court enunciated the principles by which lower courts should decide questions of ineffective counsel, Justice O'Connor stated that it was most important that courts remember that those principles were not mechanical rules.<sup>213</sup> "[T]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged."<sup>214</sup> Reasonable people can always adamantly disagree on principles.<sup>215</sup> The present case is a prime example. The district court judge disagreed with the magistrate, while the Second Circuit Court of Appeals holding was a split decision.<sup>216</sup>

As seen by the present case and its aftermath, the question of what constitutes ineffective assistance of counsel is not moot. The question of who bears the responsibility for ensuring that a defendant is informed of her right to testify is settled for the moment, at least in the Second Circuit. Sheila DeLuca's case forced that issue.

To some, it may appear that Sheila DeLuca was given a second trial, a second chance. After ten years in prison, she was fortunate enough to be able to present the evidence of a case that told her side of an unfortunate incident. Others may feel that the manner in which DeLuca's original trial was handled was inexcusable. The question that must be answered is whether any trial can be fundamentally fair when an accused does not have the opportunity to defend herself.

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<sup>212</sup> *Id.*

<sup>213</sup> *Strickland v. Washington*, 466 U.S. 668, 696 (1984).

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 701-18 (Brennan, J. and Marshall, J., dissenting); *Bellamy v. Cogdell*, 974 F.2d 302, 309 (2d Cir. 1992) (en banc) (Feinberg, J., dissenting); *People v. Flores*, 639 N.E.2d 19, 22-24 (N.Y. 1994) (Titone, J., dissenting); *People v. Moye*, 489 N.E.2d 736, 739-40 (N.Y. 1985) (mem.) (Jason, J., dissenting); *People v. Patterson*, 347 N.E.2d 898, 911-15 (N.Y. 1976), (Cooke, J., dissenting), *aff'd*, 432 U.S. 197 (1977); *People v. Walker*, 473 N.Y.S.2d 460, 462-67 (1st Dep't 1984) (Sandler, J., dissenting).

<sup>216</sup> Interestingly, both the magistrate judge and the dissenting judge were women.

The need to show that counsel's performance prejudiced the possible outcome of a trial was a heavy burden imposed by the *Strickland* Court. The Court tried to ensure that counsel's errors would not automatically open the floodgates to any prisoner who felt that her attorney could have done a better job. However, when one is sitting in prison sensing that she has been the victim of an injustice, no burden is too heavy.

Sheila DeLuca's case has already had far reaching effects. It clarified the defense of extreme emotional disturbance. More importantly, *DeLuca* ensures that attorneys diligently consult with their clients and thoroughly explain their rights to them.

This is what justice requires.<sup>217</sup>

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<sup>217</sup> DeLuca eventually pleaded guilty to manslaughter and was sentenced to time already served. When leaving court on the day of her sentencing she met a brother of a man that Bissett had killed. He happened to be serving on a jury, saw her case listed, and wanted to meet her. He explained to her that he had attempted to contact her through the District Attorney's office when he heard of Bissett's death but had been unable to do so. DeLuca said that meeting him was the best thing that happened to her since her arrest.