

cated that Mr. Grell's mother was given the Vineland Adaptive Behavior Scales and asked to self-report his behaviors, which is not the standardized administration method. Furthermore, the record suggested that she did not want her son to be labeled as having mental retardation, which the court held could have biased her responses on the test. Third, the court gave little weight to other tests of adaptive functioning presented by the prosecution, because the tests were completed by family members who did not know Mr. Grell before he was 18 years of age and who might have harbored ill feelings toward him.

Discussion

State v. Grell lends insight into the reasoning of courts in considering psychological and psychiatric evidence as it pertains to the adaptive functioning of defendants with mental retardation. First, the case focuses on the significance of perceived partiality of sources of information on which experts base their opinions. The court gave little weight to the results of the Vineland Adaptive Behavior Scale that had relied on the responses of Mr. Grell's mother, because the record noted the she did not want her son to be labeled as having mental retardation. Along the same lines, the court gave little weight to the Vineland Scale completed by members of the victim's family because they had not met him before he was 18 years of age and may have harbored ill feelings toward him. Similarly, the court believed that the records from his school were reliable because they were created for an educational purpose unrelated to any legal proceedings, and the staff therefore had no motive to fabricate or distort their findings. The court's reasoning highlights the importance of having forensic examiners scrutinize the impartiality of sources of information and of their acknowledging the weaknesses or limitations of data when appropriate.

Second, the court held that results from tests not administered in a standardized manner were unreliable. This ruling indicates that the results of tests administered in a nonstandardized manner may be considered weak evidence in the eyes of courts. If this reasoning is representative of most courts, it suggests that forensic examiners should avoid relying on results of psychological tests that were not administered in a standardized manner.

Third, the opinion emphasizes that experts should practice within the scope of their competence. Specifically, the court relied on the testimony of Drs. Cun-

ningham and Keyes more than that of Dr. Scialli because Dr. Scialli did not have the same level of expertise on the topic of mental retardation, was not regularly involved in diagnosing mental retardation, was not qualified to administer tests in the diagnosis of mental illness, and had never published an article in this area.

Finally, there is the matter of the behavioral problems displayed by Mr. Grell and to which disorder these behaviors can be attributed. The court relied on Dr. Cunningham's testimony to conclude that these behavioral problems were most likely the result of adaptive functioning deficits rather than antisocial personality disorder. The court also held that even if Mr. Grell met the criteria for antisocial personality disorder, it would still be possible for him to have mental retardation and therefore to be ineligible for the death penalty. For forensic examiners, this highlights the importance of ruling out impulsive behavior and behavioral dyscontrol due to mental retardation before attributing them to antisocial personality disorder. Furthermore, even if a defendant demonstrates antisocial behavior that can be linked to a personality disorder, he could nevertheless be spared the death penalty if he also meets criteria for mental retardation. Although determining the source of symptoms in the presence of comorbidity can be a challenging task for examiners, it can be a crucial one, especially when the consequences of the decision are significant, as in death penalty cases.

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Habeas Petition on Ineffective Assistance of Counsel when Counsel Called a Mental Health Expert Who Had Already Provided Damaging Testimony

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Testimony of a Psychiatrist Permitted in the Second Penalty Phase, Despite Its Damaging Nature During the First Penalty Phase

In *Morton v. Sec'y Fla. Dep't of Corr.*, 684 F.3d 1157 (11th Cir., 2012), the Eleventh Circuit Court of Appeals considered whether the Florida Supreme Court unreasonably applied federal law when it found that the inmate's counsel, at his second penalty phase hearing, made a "reasonable strategic decision to present the testimony of . . . a mental health expert who had provided some damaging testimony during the first penalty phase" (*Morton*, p 1165). In particular, defense counsel downplayed harmful aspects of the expert testimony by calling the expert as a witness and acknowledging the negative implications of the defendant's antisocial personality disorder (ASPD). Counsel decided not to pursue further investigation of the defendant's mental health because the inmate refused further mental health testing.

Facts of the Case

On Super Bowl Sunday in 1992, Alvin Leroy Morton and two friends approached the house of a 75-year-old woman and her 55-year-old son. The three, in possession of a survival knife and a shotgun, cut the telephone line and kicked in the front door. The mother and son were then brutally murdered. Although the assailants reported that nothing in particular had made them decide on that particular house, Mr. Morton had planned the home invasion and the murders days before they were carried out. He had also told an associate that he would bring back a body part as proof of the murder.

Mr. Morton's attorneys decided to pursue an unbonded child theory for mitigation. Investigation indicated that Mr. Morton had not been nurtured as an infant and grew up in a dysfunctional family. The attorneys hired Dr. Donald DelBeato, a psychologist, who administered a battery of examinations and submitted a report to Mr. Morton's attorneys. The report indicated that Mr. Morton was raised in a troubled household. His parents had divorced when he was very young, and his biological father had had limited contact with his son and had sexually abused Mr. Morton's sister. Mr. Morton also did not have a strong relationship with his mother's second husband. Dr. DelBeato described Mr. Morton as "shy, isolative and withdrawn and a loner. A very lonely, aimless and drifting person" (*Morton*, p 1163). In diagnosing mixed personality disorder, Dr. DelBeato reported that Mr.

Morton did not form close relations with either men or women. He had emotional instability and personality deficits, and "without supervision and guidance, [Mr. Morton's] ability to develop into a fully functioning individual was extremely limited" (*Morton*, p 1163).

Dr. DelBeato testified that, in common with Mr. Morton, "every male serial killer that has been found, tried, and convicted . . . has had no significant male figure in their lives between ages three and nine" (*Morton*, p 1163). Dr. DelBeato reported that Mr. Morton was a sociopath and that his disorder was not amenable to treatment.

The jury recommended a sentence of death on both counts. On appeal, the Supreme Court of Florida affirmed the convictions, but the sentences were vacated due to prosecutorial misconduct, and the case was remanded for a new penalty proceeding. The attorneys wanted to investigate the possibility that Mr. Morton had evidence of brain damage, but he refused to allow further testing. At retrial Dr. DelBeato provided essentially the same testimony as he had in the first penalty phase. Mr. Morton's mother testified that he had been physically abused and that his biological father had bragged to his son about committing murder and had even threatened to murder Mr. Morton himself.

At the retrial of the penalty phase, the new jury again recommended death on both counts. The prosecution argued five aggravating circumstances for the murder of the mother and three for the murder of her son, and the sentencing court applied two statutory and five nonstatutory mitigating circumstances to Mr. Morton's case. The trial court ruled that the aggravating circumstances outweighed the mitigating circumstances. The Florida Supreme Court affirmed.

Mr. Morton filed a motion for postconviction relief and filed a writ of *habeas corpus*, raising the question of "whether the trial court erred in rejecting Morton's claim that trial counsel rendered ineffective assistance during the penalty phase of the trial" (*Morton*, p 1165). At an evidentiary hearing, he called additional mental health experts. A social worker testified that "biological factors should have prompted further investigation" (*Morton*, p 1165), and a psychologist who had performed a new battery of tests, testified that Mr. Morton had Asperger's syndrome. The state supreme court denied the motion, as well as the writ.

Mr. Morton filed a petition for a writ of *habeas corpus* in a federal district court. The district court denied his petition for a writ, denied a certificate of

appealability, and entered a judgment against him. The Eleventh Circuit Court of Appeals granted his application for a certificate of appealability with respect to whether the state supreme court unreasonably applied clearly established federal law, as determined by the U. S. Supreme Court, when it determined that his attorney in the second penalty phase hearing made a reasonable, strategic decision to present the expert testimony of a mental health professional who had provided damaging testimony during the first penalty phase.

Ruling and Reasoning

On appeal to the Eleventh Circuit, Mr. Morton argued that his attorneys rendered ineffective assistance of counsel. The court of appeals held that, for such a claim to succeed, the appellant must establish that the trial counsels’ “performance was deficient and that the deficiency prejudiced the defense” (*Morton*, p 1166). With regard to trial counsels’ performance, the court defined “deficiency” as a counsel’s representation falling below “prevailing professional norms” (*Morton*, p 1166). A “prejudiced defense” requires a finding that a counsel’s errors were so serious as to deprive the defendant of a fair trial. Mr. Morton argued that allowing evidence of ASPD was deficient in a capital case, that it was deficient to allow this evidence at resentencing, and that his attorneys were deficient in not investigating further the possibility of other mental health problems. The Eleventh Circuit rejected the idea that the presentation of evidence of ASPD was inherently deficient, citing the U.S. Supreme Court’s opinion in *Eddings v. Oklahoma*, 455 U.S. 104 (1982), in which the Court held that a “sentencing court violated the constitutional rights of [the] defendant by failing to consider expert testimony that the defendant had an ‘antisocial personality’” (*Eddings*, pp 107–8). As to Mr. Morton’s claim that his attorneys did not adequately investigate mental health theories that might have provided additional mitigating evidence, the court of appeals cited their opinion in *Stano v. Dugger*, 921 F.2d 1125 (11th Cir. 1991), p 1151 “[w]hen a defendant preempts his attorney’s defense strategy, he thereafter cannot claim ineffective assistance of counsel.”

Finally, the Eleventh Circuit held that the Supreme Court of Florida logically concluded that there was no reasonable probability that the trial court would not have sentenced Mr. Morton to death if Dr. DelBeato had not testified again. The Eleventh Circuit stated that

the prosecution had proven its proffered aggravating factors and that Mr. Morton did not dispute any of this evidence. The Eleventh Circuit described the mitigating evidence as “weak” (*Morton*, p 1172).

Discussion

ASPD continues to be a conundrum for criminal courts. At issue in *Morton* was the degree to which the defendant’s ability to refrain from criminal conduct had been vitiated by his traumatic childhood. *Inter alia*, is ASPD a reliable outcome of a traumatic childhood? If it is, would it significantly undermine a person’s capacity to refrain from criminal conduct? Although defense teams often use evidence of their client’s psychiatric diagnosis toward goals of mitigation or exoneration, the use of ASPD as a defense has been much less reliable. Actually, ASPD has been deemed an aggravating factor. A defendant’s history of schizophrenia might be deployed to bolster the claim that the defendant lacked the ability to appreciate the wrongfulness of his actions; but ASPD may be regarded by a court as simple depravity. More fundamental, is ASPD deterministic? Does its development early in one’s life substantially limit a person’s volitional control? To wit, can a person with ASPD reliably refrain from criminal conduct? In *Morton*, the Eleventh Circuit asserted that the strategy of Mr. Morton’s attorneys “could have reasonably determined that Dr. DelBeato’s expert testimony that [Mr.] Morton’s childhood caused him to develop ASPD, which led [Mr.] Morton to murder” (*Morton*, p 1169) and that this testimony “was necessary to explain to the jury why [Mr.] Morton’s childhood might mitigate his moral culpability for the two murders” (*Morton*, p 1169). In *Morton*, both juries decided otherwise.

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Uncooperative Defendant Claims that He was Incompetent to Waive Counsel During Sentencing Phase of Trial

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