

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**

**Jessica Boudreaux, DO**  
*Fellow in Forensic Psychiatry*

**D. Clay Kelly, MD**  
*Associate Professor of Psychiatry*

Department of Psychiatry and Behavioral Sciences  
Tulane University School of Medicine  
New Orleans, LA

**The United States Court of Appeals for the Eleventh Circuit Considers Appropriate Standard for Competence to Waive Counsel at the Time of Sentencing**

In *United States v. Morris*, 489 F. App'x 407 (11th Cir. 2012), the United States Court of Appeals for the Eleventh Circuit affirmed the decision of a United States District Court that a *pro se* defendant was competent to waive counsel at the time of sentencing. The court rejected the defendant's claims that he was incompetent to represent himself, that the trial court had erred in requiring him to proceed *pro se*, and that his due process rights were violated. The court addressed the appropriate standard that defendants must meet to waive the right to counsel, as well as whether an uncooperative *pro se* defendant should be allowed to proceed through the sentencing phase of a trial.

*Facts of the Case*

After being indicted by a federal grand jury for making a false statement in an application for a passport, George Hoey Morris refused to testify in the guilt phase of his trial. At a colloquy during his trial, he revealed that he had posttraumatic stress disorder (PTSD). Nevertheless, neither he nor his attorneys raised the question of his competence to waive his right to testify at trial. The United States District Court for the Middle District of Alabama found him competent to waive his right to testify, and the jury convicted him.

Before sentencing, Mr. Morris's attorney twice filed motions for psychiatric testing, citing Mr. Morris's bizarre behavior. The attorney related that Mr. Morris had forwarded a self-authored child pornography book to the trial court and was obsessed with matters not pertinent to his case or sentencing. Dr. Guy Renfro was appointed by the trial court to evaluate Mr. Morris regarding his competency for sentencing. Dr. Renfro's report noted that Mr. Morris believed that there was a conspiracy against him by various law enforcement agents, politicians, and lawyers. Dr. Renfro's diagnosis for Mr. Morris was PTSD and bipolar disorder with psychotic features. Dr. Renfro opined that Mr. Morris most likely possessed above-average intelligence and a rational understanding of the legal process. However, Dr. Ren-

fro believed that Mr. Morris's delusions of persecution prevented him from functioning competently at a sentencing hearing.

In May 2008 the trial court found Mr. Morris incompetent for sentencing and remanded him to the Federal Medical Center (hereafter, the Center) in Butner, North Carolina, for assessment and treatment. The Center forwarded reports to the trial court in September and October of 2008. These reports concluded that he was incompetent to understand the nature and consequences of the sentencing proceedings and was unable to assist in his own defense. The reports also indicated that the Center believed that he could be restored to competency with additional treatment. In February 2009, the Center reported that, although he continued to have some mental health problems and distress, he was not delusional or psychotic and did not have severe mental disease or defect. The Center's principal diagnosis was malingering.

In April 2009 the trial court convened to review Mr. Morris's motion to dismiss counsel. He asserted that his attorney was not pursuing his case aggressively enough and that he wanted a previous attorney reappointed to represent him. This prior attorney, his second in the case, had been granted a petition to withdraw from the case after Mr. Morris submitted a copy of his child pornography book to her. Mr. Morris steadfastly refused to proceed *pro se*, however, and the court denied his motion to dismiss counsel. Citing the Center's February 2009 report, the trial court found him competent to be sentenced. He continued to refuse to participate with his attorney. The trial court elected to proceed to sentencing, relying on the Eleventh Circuit Court's approach in *United States v. Garey*, 540 F.3d 1253 (11th Cir. 2008). In *Garey*, the court of appeals outlined how to approach cases in which an uncooperative defendant does not want to be represented by appointed counsel and yet does not want to proceed *pro se*. Mr. Morris was informed of the possible penalties that he faced and the dangers of self-representation. The trial court designated his appointed attorney as standby counsel. Mr. Morris was sentenced to 120 months' imprisonment. He appealed.

*Ruling and Reasoning*

Mr. Morris contended, *inter alia*, that he was incompetent to represent himself and that the trial court had erred in requiring him to proceed *pro se* at

sentencing. The Eleventh Circuit Court agreed with the trial court that he was competent to waive counsel and to proceed to sentencing with only standby counsel. The court of appeals pointed out that he had demonstrated his competence during the trial process via communicated objections and arguments made to the court. The court also noted that the final report from the Center had recommended that he be deemed competent to proceed. The Eleventh Circuit asserted that, while all criminal defendants have a right to counsel, “they do not have an unqualified right to [the] counsel of their choice; and absent good cause to dismiss a court-appointed lawyer, an indigent defendant must accept the appointed lawyer or proceed *pro se*” (*Morris*, p 411). Citing its own opinion in *Garey*, the court asserted that when a trial court is:

... confronted with a defendant who has voluntarily waived counsel by his conduct and who refuses to provide clear answers to questions regarding his Sixth Amendment rights, it is enough for the court to inform the defendant unambiguously of the penalties he faces if convicted and to provide him with a general sense of the challenges he is likely to confront as a *pro se* litigant [*Garey*, p 1267].

The court asserted that “a defendant may waive his right to counsel by his uncooperative conduct, so long as his decision is made with knowledge of his options and the consequences of his choice” (*Garey*, p 1267). The Eleventh Circuit affirmed the trial court’s decision to find Mr. Morris competent to waive counsel and to allow him to proceed to the sentencing phase *pro se*. The court held that through his uncooperative conduct, he had “knowingly and voluntarily waived his right to counsel” (*Garey*, p 1267).

#### Discussion

In reviewing the question of trial competence, the Eleventh Circuit Court first made a distinction between “*Dusky* competence” (*Dusky v. United States*, 362 U.S. 402 (1960)) and the arguably higher standard necessary to waive counsel and proceed *pro se*. The court approached the issue in *arguendo*, since the idea of a uniformly higher *pro se* competency standard remains unresolved. The Eleventh Circuit categorized *Dusky* as the “standard governing the issue of competence to stand trial with counsel” (*Morris*, p 411), but then demurred to articulate the higher standard. The court of appeals simply stated that the record generated by the trial court “amply” supported the conclusion that Mr. Morris “was compe-

tent to waive counsel and proceed to sentencing as he did” (*Morris*, p 410). He had asserted that the trial court had “erroneously required [him] to proceed *pro se* at sentencing, in violation of the Supreme Court’s decision in *Indiana v. Edwards*” (554 U.S. 164 (2008)). The court of appeals found that *Edwards* did not require a different result, since it “decides a different question” (*Morris*, p 410). The court asserted that *Edwards* “focused on the right of a defendant to represent himself” and “whether a court may lawfully require a criminal defendant who, although competent to stand trial, suffers from severe mental illness to proceed with counsel, despite the defendant’s request for self-representation” (*Morris*, pp 410–11). In reality, the scenario in *Morris* was antithetical to that in *Edwards*. Although Mr. Morris had a history of mental health treatment, his assessment at the Center indicated that he was malingering. The trial court did not regard Mr. Morris as a possibly incompetent, mentally ill defendant seeking to proceed *pro se*, but rather as a competent, uncooperative defendant refusing to proceed *pro se*.

Uncooperativeness is not, *per se*, a mental disorder. In a criminal trial uncooperativeness might be interpreted as a sign of mental illness, even severe mental illness, but, if a defendant is thoroughly evaluated in a hospital setting and is determined, with reasonable certainty, to be voluntarily uncooperative, such behavior should not be labeled incompetence. One cannot choose incompetence any more than one can choose intellectual disability. The concept of “voluntary incompetence” is inherently oxymoronic.

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## Social Security Disability Regulations regarding the Assessment of Intellectual Disability

**Gagandeep Jattana, MD**  
Fellow in Forensic Psychiatry

**J. Richard Ciccone, MD**  
Professor of Psychiatry  
Director, Psychiatry and Law Program

University of Rochester Medical Center  
Rochester, NY