

Fetal Alcohol Spectrum Disorder and the Courts: An Introduction for Legal Professionals

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Abstract

Fetal Alcohol Spectrum Disorders (FASD) is a complex, permanent condition resulting in a host of social, educational, vocational, and cognitive impairments. These impairments sometimes bring individuals with FASD into contact with the criminal justice system. Current estimates of FASD in the United States are believed to impact between 2 to 5 percent of the general population. Higher rates of FASD are commonly found in criminal justice populations. The present article is intended to provide legal professionals with an introduction to FASD, with special consideration given to the challenges defendants with this disorder face while navigating through the criminal trial process.

Keywords: court, fetal alcohol spectrum disorders (FASD), legal, screening

Fetal Alcohol Spectrum Disorder and the Courts: An Introduction for Legal Professionals

Fetal Alcohol Spectrum Disorder (FASD) is a pervasive, permanent, and serious condition with widespread implications for the criminal justice system. In fact, some scholars classify FASD as a hidden epidemic and societal health concern (Shankar, 2015). A mother's exposure to alcohol while pregnant can cause significant, lifelong impairments for her unborn child (Ware et al., 2015). Such deficits can place prenatally alcohol exposed individuals at a significant disadvantage throughout life, including involvement in the criminal justice system. Additionally, cognitive impairment associated with FASD can have adverse outcomes when passing through the various stages of the criminal justice system (Boland, Chudley, & Grant, 2002; Brown, Connor, & Adler, 2012). Impairments come in the form of processing, form filling, and other complicated government requirements (Mela & Luther, 2013), often due poor executive functioning, impulsivity, inability to link cause and effect, confabulation, memory deficits and suggestibility (Baumbach, 2002; Brown, Gudjonsson, & Connor, 2011; McMurtrie, 2011; Wheeler, Stevens, Sheard, & Rovet, 2012). Moreover, individuals exposed to alcohol prenatally are at an increased risk of suffering adverse early life experiences. Adverse experiences seen most often are reported as abuse, exposure to family violence, neglect, and trauma, which may lead to child protection involvement, and elevated comorbid mental health and substance abuse disorders in birth parents (American Psychological Association, 2013; Conry & Fast, 2011; Thiel et al., 2011). Although the impact of FASD on the legal system is believed to be massive, the impact of the legal system on people with FASD is beyond understanding. Few scholarly publications have examined the complexities associated with FASD within the context of the legal system, but it is likely that some individuals with FASD are in prison for minor crimes, failure to report, or to meet bail conditions or warrants. Moreover, much is now known about the etiology, (i.e., the factors which can increase the severity of the condition and the life consequences of prenatal exposure to alcohol), although this information is rarely applied or practice in the criminal justice system (Mela & Luther, 2013; Popova, Lange, Bekmuradov, Mihic, & Rehm, 2011). Hence, the aim of this article is to provide a brief overview of the challenges, obstacles, and limitations faced by defendants with FASD as they proceed through the criminal process in an attempt to help guide legal professionals to better serve this population.

FASD within Legal Settings

Current rates of FASD are estimated to be as high as 2 to 5 percent of the general population (May et al., 2014; May et al., 2009). This equates to millions of individuals in the United States directly or indirectly affected by the harmful effects of prenatal alcohol exposure. However, some believe the number of individuals with FASD is way underrepresented, especially within criminal justice and forensic populations (Brown, Gudjonsson, & Connor, 2011; Popova, Lange, Bekmuradov, Mihic, & Rehm, 2011).

In particular, judges, prosecutors, and defense counsel must be aware of the challenges and complexities of living with FASD (Malbin, 2004; Wartnik & Carlson, 2011). The courts often lack awareness and understanding when an individual with FASD is required to navigate through the trial process as either a victim, witness, or defendant (Chartrand & Forbes-Chilibek, 2003; Cox, Clairmont, & Cox, 2008). Defendants with FASD present with unique challenges and needs that can significantly impair their ability to appropriately traverse the criminal prosecution and trial process due to adverse sequelae associated with this disorder (Brown, Gudjonsson, & Connor, 2011; Conry & Fast, 2000; Cox, Clairmont, & Cox, 2008; Gagnier, Moore, & Green,

2011; McLachlan et al., 2014; Roach & Bailey, 2010; Verbrugge, 2003). Obstacles defendants with FASD may face often relate to the comprehension of legal terminology and jargon used in the legal system, the frustration of being told to go from one section to another and to complete one form or another, along with understanding and responding to orders or conditions of release and other court-related sanctions (Cox, Clairmont, & Cox, 2008). This lack of competency may result in disproportionate consequences including not understanding *Miranda* rights, violating pre-trial release leading to longer confinement, and violating probation leading to an executed prison sentence. With regard to not understanding *Miranda* rights, individuals with FASD will oftentimes simulate or mimic understanding of an instruction or concept due to a desire to cooperate or please authority figures, or to be compliant (State v. Fardan, 2009). A lack of comprehension of key legal concepts is counterintuitive to our adversarial system of justice that requires individuals to make active assertions regarding their constitutional rights. *Miranda* requires that a defendant knowingly, voluntarily, and intelligently waive his or her rights (Miranda v. Arizona, 1966).

In order to maximize success for FASD-affected defendants, witnesses, or victims; professional staff in the criminal justice and legal system must have the knowledge to identify and support these highly vulnerable individuals through each respective process. This knowledge and support will reduce future involvement in the system (Chartrand & Forbes-Chilibeck, 2003), and is profoundly important for a person's sense of dignity, autonomy, sense of control, and decision-making. The following subsections will provide legal professionals with a greater understanding of FASD.

Invisible Disability. FASD is a largely “invisible” disorder resulting in considerable frustration by legal professionals (Mela & Luther, 2013; Olson, Oti, Gelo, & Beck, 2009). Unfortunately, FASD frequently goes undetected within legal settings. In our experience, individuals with FASD commonly struggle to navigate complex systems such as the criminal justice system, which can result in recidivism or escalation of the crime through frustration, and an inability, (not necessarily an unwillingness) to do what is required. Reasons for this assumption include the often-invisible nature of this disability. The overwhelming majority of people with FASD show no visible differences, for example in the form of abnormal facial feature characteristics. Many individuals with FASD will have, through mimic, the ability to disguise the true extent of their disability and limitations (Gagnier, Moore, & Green, 2011) for a short period. As such, legal professionals must be aware of and recognize the “red flags” associated with FASD. Table 1 illustrates common disabilities associated with this condition.

Table 1. Invisible Disabilities often associated with FASD

Invisible Disabilities

Attention deficits
 Confused social skills
 Difficulty learning from consequences
 Difficulty with abstract concepts (e.g., math, time, idiom and money)
 Hyperactivity
 Immature behavior
 Memory deficits
 Poor impulse control
 Poor judgment
 Poor problem-solving skills

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Defendants with FASD. Individuals with FASD often lack appropriate judgment and decision-making abilities (Kodituwakku, 2007; Streissguth, 2007) explaining why there is a vital need for ongoing guidance and support. Persons with FASD appearing before the court may present to the uninformed legal professional as disorganized, impulsive, immature, lazy, non-compliant, and remorseless. In some instances, they may laugh at inappropriate times during proceedings, further giving the impression of an indifferent, callous individual when in fact; they may be innocent without the full understanding of their predicament to modify their behavior (Aragon et al., 2008; Boland, Burrill, Duwyn, & Karp, 1998; Nash et al., 2006; Streissguth, Moon-Jordan and Clarren, 1995). Therefore, professionals must recognize these behaviors as a direct result of impairments caused by exposure to alcohol in utero (Mela & Luther, 2013). Defense counsel should also become familiar with the behaviors sometimes exhibited by defendants with FASD. Table 2 represents possible behaviors defense attorneys may observe while interviewing defendants suspected of or confirmed to have FASD.

Table 2. FASD: Possible Defense Interview Behaviors

Defense Interview Behaviors
Client seems oblivious to the severity of charges
Client freely admits but cannot explain offensive behavior
Client seems overly compliant; they trust immediately
Affect is incongruent with gravity of situation

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If FASD is not identified, the above listed behaviors will cause a defendant to present poorly to the judge, prosecutor, or probation officer. The adverse effect is that the defendant may not present as having mitigating circumstances to depart favorably from the sentencing guidelines. Some factors that are considered legal reasons for departure include: the defendant's age, prior criminal record, remorse or lack thereof, personal cooperation, attitude while in court, and the support of friends and/or family.

Client Interview Suggestions for Defense Attorneys

When representing clients that exhibit FASD behaviors (as noted in Table 2) it is important to collect a full social and medical history. Clients may possess important information that can help determine whether further investigation is necessary. Questions must be specific such as: "Did your mother drink alcohol while pregnant with you?" Ask if there was a diagnosis in the past for FASD. Some clients may not be aware of past diagnoses, but may remember past placements or hospital stays.

A complete social and medical history may assist legal counsel in gaining more accurate information because they will be able to consider reframing questions that take into account the developmental capacity of the defendant with FASD (Douglas, 2010). Possible communication challenges include clients with a chronological age of 30, who may function at a developmental age of 15 or younger. Defendant's affected by FASD could be problematic because of the typical inability to understand abstract concepts such as metaphors. Counsel should use language that is developmentally-age appropriate rather than chronologically age appropriate and

provide very concrete examples (Douglas, 2010), since the process of communication is generally impaired in persons with FASD (Church, Eldis, Blakley, & Bawle, 1997; Jirikowic, Kartin, Olson, 2008). Individuals with FASD also often have difficulty understanding cause and effect, actions and reactions/consequences, thus they may not relate to or connect their actions with consequences or punishment.

Trial Right Deficits. The physical, cognitive, and behavioral deficits of individuals with FASD likely impair the ability to successfully navigate the arrest, interrogation, and trial process. These individuals have problems converting the words of their *Miranda* rights into informed action and difficulties with the skillset needed in the adjudication process (e.g., ability to effectively converse with and instruct an attorney about his/her case) (McLachlan, Roesch, Viljoen, & Douglas, 2014). Moreover, defendants with FASD may be unable to provide the court with reliable testimony and/or factual account of their situation (Gagnier, Moore, & Green, 2011), due to impairments associated with their disability.

Therefore, defense counsel may need to allow extra time for FASD-affected defendants to answer and process questions. Additional time may be needed to re-teach new information consistently throughout the trial process. Counsel should also consider separating various legal tasks into easier to understand segments for the defendant to better understand the information being presented (Douglas, 2010). McLachlan, Roesch, Viljoen, & Douglas (2014) recommended the following modifications to trial preparation for FASD-involved cases:

- Extra time to explain key case-specific concepts and court procedures
- Use of simple language when communicating
- Repeat information
- Ensure attention is captured prior to communicating
- Communicate for short periods – 30 minutes is maximum
- Frequently check on comprehension
- Present information in multiple ways

Judges. Increasingly, more courts have to address various legal issues related to defendants with FASD. As such, judges should be attentive when a defendant appears in court because a defendant with FASD will be unlikely to fully comprehend the legal process and understand their constitutional rights (Roach & Bailey, 2009). Judges should also take into account that the overall pace of the hearing may need to proceed at a slower than normal speed when the defendant has FASD (Douglas, 2010). Individuals, particularly youth, with FASD have short attention spans, thus mental fatigue may set-in quickly, causing a deficit in concentration. Noise and bright lights can distract and frustrate, so the court should consider making accommodations for litigants such as a quiet room during recesses, more frequent recesses and shorter length of court sessions without breaks, assistance in court and during breaks of a mentor or social worker to help the defendant refocus. These modifications may assist the defendant in returning to the courtroom prepared to assist counsel in a more meaningful way.

Confabulation. Confabulation, not to be confused with lying, occurs when a person with FASD is unaware that he/she is mixing aspects of both false and accurate information together without the intent to deceive. In contrast, the individual who lies is fully aware of the inaccuracies in his/her statements and intends to deceive the judge or jury. This is not to say that individuals with FASD do not purposefully lie or malingering; however, lying and malingering

require an ability to foresee consequences and appreciate the potential benefits of giving inaccurate information. Individuals with FASD have an increased propensity to confabulate (Burd, Fast, & Conry, 2010; Fotopoulou, 2008; Fraser, 2008; Gibbard, Wass, & Clarke, 2003; Kully-Martens, et al., 2012; Rutman & Van Bibber, 2010). Executive functioning deficits may also contribute to confabulatory responses (Kapur & Coughlan, 1980; Stuss & Benson, 1984; Schnider, Von Daniken, & Gutbrod, 1996; Moscovitch & Melo, 1997; Schnider & Ptak, 1999). Most individuals with FASD have executive function impairments that preclude perspective, making inaccurate reporting more likely to stem from confabulation rather than deliberate deception (Kully-Martens, Pei, Job, Rasmussen, 2012). Criminal justice professionals commonly lack the necessary training to detect when an individual with FASD is confabulating (Brown et al., 2014). The occurrence of confabulation should alert professionals to consider the possibility that some clients may suffer from profound cognitive deficits and other limitations (Brown et al., 2014).

Testimony. Memory impairment and an inability to relate context can cause individuals with FASD to provide inaccurate testimony, which can lead to further complications, errors, and inaccuracies in criminal proceedings. In fact, persons with FASD appearing before the court may be at an increased risk of providing unreliable testimony and exhibit an impaired ability to report factual accounts (Gagnier, Moore, & Green, 2011). This has been found to be especially true for child witnesses with FASD (Moore & Green, 2004). Inaccurate witness testimony can create a host of consequences with widespread implications for the criminal justice and legal systems. As such, legal professionals need to recognize this fact when encountering and/or preparing defendants and witnesses for testimony who have FASD.

Sentencing Considerations. Many issues surround the topic of sentencing for a defendant with FASD (Gagnier, Moore, & Green, 2011). Fetal Alcohol Spectrum Disorder (FASD) is a relevant factor to take into account at the time of sentencing (Verbrugge, 2003), as traditional sentencing approaches may not prove suitable (Chartrand & Forbes-Chilibek, 2003). Some states allow courts to consider what role the defendant played in the crime including coercion, if there is a physical impairment/or defendant lacked substantial capacity for judgement, and the defendant's mental health history. Failure to consider these factors can lead to inappropriate sentencing for a person with FASD. The wrong sentence can leave defendants with FASD more entrenched in the criminal justice system or can create additional problems associated with cognitive impairment. For example, a requirement to report at particular times to police or to probation or parole officers is likely to result in confusion about who to report to and when, resulting in possible additional charges. Additionally, people with FASD can be victimized when serving custodial sentences. Defendants with FASD may also have an impaired ability to comprehend the agreements of a plea bargain (Douds, Stevens & Sumner, 2012).

Screening. A primary goal for the legal system should be to increase its capacity to identify individuals suspected of having FASD (Fraser, 2008). Early identification and appropriate interventions are key ingredients for diverting such defendants away from future legal involvement. When a defendant comes before the courts on a regular basis and repeatedly does not learn from mistakes or consequences, legal professionals should consider the possibility of FASD (Malbin, 2004). Confirmation or formal diagnosis of FASD can only be completed by a medical professional well versed in the diagnosis of the full syndrome Fetal Alcohol Syndrome

(FAS). However, without the ability to have a formal diagnosis conducted, legal professionals can use the 'red flag' screening process. Table 3 was created by the first author and highlights intended benefits associated with 'red flag' screening for FASD within criminal justice settings.

Table 3. Intended Benefits of Routine Screening for FASD within Criminal Justice Settings

Routine Screening

Routine screening for FASD may promote and validate the use of a standardized, evidence-based metric of FASD signs and symptoms across mental health, correctional, and legal systems.

Screening for signs and symptoms of FASD will enable mental health, correctional, and legal professionals to communicate more effectively with individuals with FASD, especially through the subsequent use of prompts and language matched to the individual's cognitive abilities.

Correctional and legal professionals need not rely solely on professionals with medical and mental health expertise to preliminarily screen for evidence of FASD.

Legal counsel will be able to better guide individuals with FASD through complex legal proceedings.

Judges will be able to make informed sentencing decisions, including the use of diversion opportunities to promote treatment rather than incarceration.

Correctional and forensic mental health professionals will be better able to ethically obtain informed consent for both intra-institutional and community treatment.

Preventative measures (e.g., increased monitoring) can help reduce the likelihood of peer-victimization common with this population in correctional settings.

More effective reentry plans established by parole and probation boards to maximize the likelihood of individuals with FASD adhering to conditions of release by matching them with available services, ultimately reducing recidivism and unnecessary spending of state funds.

Researchers could extract easy-to-analyze quantitative data from completed screening tools and run independent studies on the accuracy and reliability of the screening tool to validate its evidentiary support.

Early identification of FASD may help to minimize the detrimental effects of confabulation and false testimony during criminal investigations and court processes.

Predicting the efficacy of treatment modalities will become easier for mental health and correctional professionals due to a better understanding of the signs and symptoms of FASD.

Appropriate screening and diagnosis will allow individuals without support to self-advocate after release.

Adapted from Brown, J. (2014). The Importance of Screening for FASD in Criminal Justice Settings, *Fetal Alcohol Forum*, 12, 43-44.

Intervention Approaches. People with FASD who lack appropriate support, guidance, and monitoring are at a significant risk of becoming involved in the criminal justice system. As such, FASD-based interventions are important in legal settings to ensure due process, although such efforts may be fraught with difficulties due to problems with competency remediation as well as limited resources in legal settings (McLachlan, Roesch, Viljoen, & Douglas, 2014). Table 4 was developed by the first author and illustrates suggested approaches and strategies that legal professionals may consider when encountering defendants suspected of having FASD.

Table 4. D.E.A.R.: An Intervention Approach

D.E.A.R.

DIRECT LANGUAGE

When interviewing an individual diagnosed with or suspected of having FASD use simple and direct language. This population has difficulty using and understanding abstract concepts. Using abstract concepts and idiom will result in the individual misunderstanding the actual context of the conversation. Use concrete language that is based in the here and now. Explain things slowly to allow more time to process the information. Ask the interviewee for their understanding of what has been said to ensure they understand the direction or question. Ask open-ended questions, not leading questions in order to better determine what the interviewee understands and/or doesn't understand.

ENGAGE SUPPORT SYSTEM

When interviewing an individual diagnosed with, or suspected of having FASD, be sure to ask whether they carry with them the card of a mentor, advocate, or case worker who can offer support and/or act as interpreter. Given that this population frequently does not understand the consequences of providing police with incriminating statements, avoid leading questions and, if possible, do not begin instruction or inquisition until a member of their support system is present.

ACCOMMODATE NEEDS

When interviewing an individual diagnosed with or are suspected of having FASD conduct the interview in a quiet place without distractions. Give the individual space and avoid physical confrontation. As this population usually functions at a lower developmental level than their chronological age, adapt your choice of words and your style of communication accordingly. Additionally, those individuals with FASD who also have a Sensory Integration Disorder may experience a light touch on the shoulder as a hit and react accordingly. Therefore until the individual is better known, avoid touch unless necessary.

REMAIN CALM

When interviewing an individual diagnosed with or suspected of having FASD, do not rush, as this will cause stress and may result in the individual becoming overwhelmed. This population is characterized by an inability to manage their emotions and situations may escalate quickly. It is necessary to maintain a calm and collected demeanor with this population.

Adapted from Brown, J., Herrick, S., & Long-McGie, J. et al. (2014). Fetal Alcohol Spectrum Disorders and Offender Reentry: A Review for Criminal Justice and Mental Health Professionals. *Behavioral Health, 1*(1), 1-19.

Training and Education. Fetal Alcohol Spectrum Disorder (FASD) has been largely understudied within the context of legal settings and is typically misunderstood by relevant professionals. It is unknown how many legal professionals receive education and training pertaining to FASD or how many individuals with FASD are incarcerated in American prisons. By increasing awareness and training, criminal justice professionals will be better equipped to appropriately approach, communicate with, and assist individuals with FASD throughout the trial process (Brown & Singh, 2015; Cox, Clairmont, & Cox, 2008). This will help reduce the amount of money spent on incarcerating people for missed reporting or not abiding by bail requirements. In addition, it may help reduce crimes typically committed by individuals with FASD in the early stages of their criminal justice history like failure to report, joy riding, or opportunistic property crimes. The ability of professionals in the criminal justice system to identify that the individual potentially has FASD, may prevent them from returning to more significant crimes.

Conclusion

Fetal Alcohol Spectrum Disorder (FASD) is a complex disorder warranting the attention of criminal justice and legal professionals (Wartnik, 2011). The FASD-informed professional who understand the consequences of prenatal alcohol exposure on a defendant's cognitive ability should be in a better position to assist individuals with FASD throughout the complex trial process (Chartrand & Forbes-Chilibeck, 2003). It is believed that a disproportionate number of individuals affected by FASD may be appearing before the courts on a regular basis. Unfortunately, FASD frequently goes unnoticed or unrecognized in the courtroom (Chartrand & Forbes-Chilibeck, 2003). Creating training opportunities for judges, attorneys, and other courtroom professionals regularly coming into contact with defendants with suspected or confirmed FASD (Cox, Clairmont, & Cox, 2008). Such opportunities could place legal practitioners and specialists in a better position to establish appropriate and reasonable accommodations to assist these highly vulnerable defendants throughout all stages of the justice system (Douglas, 2010).

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Judge Anthony P. (Tony) Wartnik served as a trial judge for 34 years, nine of which were on the Bellevue District Court, a limited jurisdiction court and almost 25 years on the King County, Washington Superior Court, a general jurisdiction court. In the latter capacity, he presided over involuntary mental illness treatment commitment cases, juvenile offender and dependency cases, adult criminal cases, and family law cases in addition to other assigned responsibilities. He chaired a task force in the mid-1990s to establish protocols in Juvenile Court for determining the competency of youth with organic brain damage and chaired the Governor's Advisory Panel of Fetal Alcohol Syndrome (FAS) and Fetal Alcohol Effects (FAE). Since retirement from the court in 2005, Tony has served as a consultant to the Fetal Alcohol and Drug Unit, University of Washington, School of Medicine and as the Legal Director/Liaison for FASD Experts, a multidisciplinary Forensic Assessment and Diagnostic Team, and has presented at workshops and conferences throughout the United States, in Canada, New Zealand and Australia. In addition, he has authored and co-authored numerous articles on issues involving Fetal Alcohol related issues, mental health, and other subjects as they relate to the law and the court. Email: TheAdjudicator@comcast.net

Anne Russell is the mother of two adult children with Fetal Alcohol Spectrum Disorder [FASD]. In 2000, both her children have been diagnosed and both are now adults. Anne has worked for the last 15 years to help raise awareness of the condition and to help families living with FASD. In 2007, Anne established her own charity the Russell Family Fetal Alcohol Disorders Association [rffada] to pay homage to her children and the family that supported her in her work with FASD. Anne has attended and presented at national and international conferences and workshops in every state and territory in Australia, New Zealand, Canada, and the United States. In 2005, Anne published her first book 'Alcohol and Pregnancy: A Mother's Responsible Disturbance.' Additionally Anne was a Senior Consultant with the FASD Consortium, a group of health professionals, researchers, and community members to develop Australian diagnostic guidelines for FASD. Currently she is a member of the Parent Advisory Group and the Collaboration for Alcohol Related Developmental Disorders at the University of Queensland. Email: anne@mpath.com.au

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