FASD and Competency to Stand Trial: A Review for Forensic Evaluators

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CONCEPT

Presenter’s Biography
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Presenter Biography: Patricia Zapf
• Dr. Patricia A. Zapf obtained her PhD in Clinical forensic psychology from Simon Fraser University in Canada and currently holds the position of Professor in the Department of Psychology at John Jay College of Criminal Justice, The City University of New York. Dr. Zapf is the Editor-in-Chief of the American Psychology-Law Society book series, Associate Editor of Law and Human Behavior, and is on the editorial boards of 5 journals in psychology and law. Dr. Zapf has served as the President of the American Psychology-Law Society (AP-LS; Division 41, APA) and was appointed Fellow of the American Psychological Association and Distinguished Member of the American Psychology-Law Society in 2006 for outstanding contributions to the field of law and psychology for her work in competency evaluation. In addition to her research, she serves as consultant to various criminal justice and policy organizations and has testified as an expert witness in criminal and civil cases in the United States and Canada and has served as an expert witness in a number of cases in state, federal, and military courts. Dr. Zapf is the author of Best Practices in Forensic Mental Health Assessment, Evaluating Competency to Stand Trial; editor of Forensic Assessments in Criminal and Civil Law: A Handbook for Lawyers; and Editor-in-Chief of the forthcoming APA Handbook of Forensic Psychology. She served on National Judicial College’s Mental Competency—Best Practices Model panel of experts and travels throughout the United States and internationally to train legal and mental health professionals on best practices in forensic evaluation. Email address: patricia.zapf@gmail.com
Training Objectives

• Learn about the risk factors, red flag indicators, and symptoms of FASD
• Acquire a basic understanding of the legal requirements of competency to stand trial
• Understand the process by which competency to stand trial decisions are made in the United States
• Discuss the different ways that FASD can limit a defendant’s competency to stand trial

Training Objectives

• Appreciate how deficits in memory and proneness to social pressure predispose defendants with FASD to suggestibility and confabulation
• Become familiar with Bonnie’s (1992) and Grisso’s (2003) conceptualizations of competency to stand trial
• Learn about how the presence of FASD has impacted CST in several case law examples
• Discuss current gaps in knowledge of FASD and CST and identify future research directions

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Agenda

I. What is FASD?

II. What is Competency?

III. How can FASD impact a Defendant’s CST-related abilities?

IV. What can be done?

What is FASD

FASD: The Basics

- Pervasive
- Permanent/irreversible brain damage
- Adverse life experiences
- Worldwide problem
- Serious condition with widespread implications
- Hidden epidemic
- Underreported/Commonly misdiagnosed
- Many misconceptions
- Often overlooked
- Believed to be overrepresented in certain populations
- Impacts millions of individuals in North America
- Massive impact on the criminal justice system
FASD: The Basics Continued

Fetal Alcohol Spectrum Disorder (FASD) is a life-course persistent disorder resulting from prenatal alcohol exposure.

This disorder is characterized by a diverse array of deficits and symptoms:

- Cognitive (e.g., intelligence, attention, and short- and long-term memory)
- Social (e.g., communication skills, social pressure, and social cues)
- Adaptive (e.g., problem-solving and decision-making abilities) symptoms

FASD - An Introduction

FASD is an all-encompassing term that includes:

- Fetal Alcohol Syndrome (FAS)
- partial Fetal Alcohol Syndrome (pFAS)
- Alcohol Related Neurodevelopmental Disorder (ARND)
- Alcohol Related Birth Defects (ARBD)

FASD: Primary Domains Impacted by Prenatal Alcohol Exposure

- Achievement (learning disabilities, specific math deficit)
- Adaptive Behavior (communication, social skills)
- Attention/Hyperactivity (ADD/ADHD)
- Cognition (abstract/sequential thinking)
- Language (receptive/expressive skills)
- Memory (encoding, working memory)
- Motor Skills (coordination, balance, control)
- Sensory Integration (visual-spatial learning)
- Social Skills (social perception, boundaries)
- Executive Skills (judgment, reasoning, impulse control)
Review of Important Statistics

An estimated 2-5% of the U.S. population has FASD (May et al., 2009).

Research has estimated that 60% of individuals with FASD will become involved in the criminal justice system (Streissguth et al., 1996).

The vast majority of the estimated 50,000-60,000 CST evaluations that occur in the U.S. each year are conducted by mental health experts without specialized training in FASD.

Despite the fact that there are over a dozen structured tools and protocols designed to assess competency to stand trial (Pirelli, Gottdiener, & Zapf, 2011), there is not a single tool or protocol developed for defendants with FASD.

Possible Red Flag Indicators

• Special Education Involvement/Learning Problems
• Child Protection Involvement
• History of Adoption/Removal from Birth Parents
• Multiple Childhood Mental Health Diagnosis (e.g., Attention Deficit/Hyperactivity Disorder [ADHD], Conduct Disorder [CD], Oppositional Defiant Disorder [ODD], Reactive Attachment Disorder [RAD], etc.)
• Rage Control/Impulse Control Problems
• Sexually Inappropriate Behaviors
• Social Boundary Limitations/Violations
• Memory Problems/Confabulation
• Suggestibility/Easily Influenced/Manipulated/Inability to Say No
• Substance Misuse

Common behavioral/psychological symptom overlap

• Autism Spectrum Disorders (ASD)
• Attention Deficit/Hyperactivity Disorder (ADHD)
• Bipolar Disorder
• Conduct Disorder (CD)
• Intellectual Disability/Developmental Disability (ID/DD)
• Learning Disorder
• Oppositional Defiant Disorder (ODD)
• Personality Disorders
• Post-Traumatic Stress Disorder (PTSD)
• Reactive Attachment Disorder (RAD)
• Traumatic Brain Injury (TBI)
Suggested Resource


FASD: Key Forensic Findings

- 23.3% for FASD in a sample of youthful forensic inpatients. Further, less than 1% of this sample had been previously diagnosed with such a disorder.
- 60% lifetime involvement in the CJS (Streissguth et al., 1996)
- 10% among adult prisoners for FASD with another 18% of prisoners exhibiting cognitive and neurological symptoms that may be indicative of FASD (MacPherson and Chudley, 2007)

In a study of Canadian youth, FASD was observed to increase the likelihood of incarceration by 19 times (Popova et al., 2011)

Possible Reasons for CJS Involvement

An increased likelihood of criminal behavior among individuals with FASD may be contributed to by the following:

- Neurocognitive deficits (e.g., executive control, disinhibition, and short- and long-term memory)
- Social difficulties (e.g., suggestibility, difficulty linking behaviors to consequences)
- Comorbidity with other mental health issues (e.g., ADHD and substance use disorders)
Key Reminders

Criminal justice and mental health professionals are likely to encounter individuals with FASD without recognizing the presence of the debilitating disorder. This is particularly true of adolescents and adults with FASD who do not have physical impairments, communication deficits, or a documented history of prenatal alcohol exposure. Criminal justice and mental health professionals should be careful to screen suspects, defendants, witnesses, and victims for FASD to prevent potential miscarriages of justice.

Suggested Resource

The Importance of Screening for FASD in Criminal Justice Settings
http://online.csp.edu/blog/forensic-scholars-today/the-importance-of-screening-for-fasd-in-criminal-justice-settings

Neurobehavioral Disorder-Associated with Prenatal Alcohol Exposure (ND-PAE)
ND-PAE: Neurocognitive Impairment

- Below 70 IQ
- Executive Functioning Impairment
- Learning Impairment
- Memory Impairment
- Visual-Spatial Reasoning

ND-PAE: Continued

A diagnosis of ND-PAE requires that lifelong characteristics including neurocognitive impairment, deficiencies in adaptive functioning, and self-regulation deficits must be present during childhood.

Features mistakenly believed to be inherent for all FASD diagnoses (FAS, pFAS, ARND, ARBD), such as growth problems, intellectual disability, and dysmorphic facial features are not required features of ND-PAE.

Can be diagnosed without growth problems, dysmorphic facial features, and intellectual disability.

ND-PAE

Most recently in the new Diagnostic and Statistical Manual of Mental Health Disorders (DSM-5)

- Other Specified Neurodevelopmental Disorder-315.8 (F88) specified using the "other specified" designation (Neurodevelopmental disorder associated with prenatal alcohol exposure (page 86))
- Neurobehavioral Disorder-Associated with Prenatal Alcohol Exposure (ND-PAE) Condition (page 798-801)

American Psychiatric Association, 2013
ND-PAE: Self-Regulation Impairment

- Mood or Behavior Regulation Impairment
- Attention Deficit
- Impulsivity

ND-PAE: Adaptive Impairment

- Communication Impairment*
- Social Communication and Interaction Impairment*
- Daily Living Skills Impairment
- Motor Skills Impairment

ND-PAE: Differential Diagnosis

- Cornelia de Lange Syndrome
- Fetal Hydantoin Syndrome
- Maternal Phenylketonuria
- Pastoral Substance Use
- Traumatic Brain Injury
- Huntington’s Disease
- Parkinson’s Disease
- Williams Syndrome
- Down Syndrome
- Child Neglect
- HIV Infection
- Delirium
- Dementia
ND-PAE: Common Comorbid Conditions

- Attention-Deficit/Hyperactivity Disorder
- Conduct Disorder
- Mood Disorders
- Oppositional Defiant Disorder
- Trauma-Based Disorders

ND-PAE: Serious Behavioral Outcomes

- Alcohol Abuse/Dependence
- Criminality
- Drug Abuse/Dependence
- Elementary School Misbehavior
- Guardianship Instability
- Involuntary Hospitalization
- Living Instability
- Suicidal Attempts/Thoughts
- Truancy
- Unemployment

Suggested Resource

What is Competency?

Rationale for Competency Doctrine

• Protect the accuracy of the proceedings
  • ensuring defendant can give appropriate assistance

• Protect the right of the defendant to due process
  • opportunity to choose and assist legal counsel, confront accusers, and testify on own behalf

• Protect the dignity and integrity of the proceedings
  • State and public interest in fair, reliable proceedings

Historical Context

Writing in the 18th century, Sir William Blackstone wrote:

If a man in his sound memory commits a capital offence, and before arraignment
for it, he becomes mad, he ought not to be arraigned for it; because he is not
able to plead to it with that advice and caution that he ought.

And if, after he has pleaded, the prisoner becomes mad, he shall not be tried: for
how can he make his defence? If, after he be tried and found guilty, he loses his
senses before judgment, judgment shall not be pronounced;

and if, after judgment, he becomes of nonsane memory, execution shall be stayed:
for peradventure, says the humanity of the English law, had the prisoner been of
sound memory, he might have alleged something in stay of judgment or

Blackstone commentaries
Legal Standards

• Early standards for competency set out in the U.S. in Youstey (1899)
  - traced standards from English Common Law
  - referenced Frith’s case, R. v. Berry

• Constitutional standard for competency was set out by U.S. Supreme Court in Dusky in 1960

• Further elaboration of the standard came in subsequent cases

Dusky v. United States

362 U.S. 402 (1960)

It is not enough for the district judge to find that the defendant is oriented to time and place and has some recollection of events, but that the test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding — and whether he has a rational as well as factual understanding of the proceedings against him (p. 402)

Minimal Criteria for Competence

• Dusky (1960)
  - Defendant doesn’t have to be perfectly competent
  - Only legally sufficient abilities are required
  - May vary with legal demands of case
  - Distinguished from insanity evaluation
  - Assessment of present (& ST future) abilities
  - Consider trajectory with and without treatment
  - Functional/legal abilities are of primary importance
  - Psychosis vs incompetence
  - Ability vs willingness
**Wieter v. Settle**
- that he has mental capacity to appreciate his presence in relation to time, place and things;
- that his elementary mental processes be such that he apprehends (i.e., grasps and groups with what mind he has) that he is a defendant charged with a criminal offense;
- that there is a judge on the Bench;
- a Prosecutor present who will try to convict him of a criminal charge;
- that he has a lawyer (self-employed or Court-appointed) who will undertake to defend him against that charge;
- that he will be expected to tell his lawyer the circumstances, to the best of his mental ability, of the events (past or not) to mental aberrations that facts surrounding him at the time and place where the law violation is alleged to have been committed;
- that there is, or will be, a jury present to pass upon evidence adduced as to his guilt or innocence of such charge; and
- he has memory sufficient to relate those things in his own personal manner. Such a person from a consideration of legal standards, should be considered mentally competent to stand trial under criminal procedure, lawfully enacted.

**Wilson v. United States**
391 F. 2d. 460 (1968)
- **Wilson v. United States** (1968) dealt with the relevance of amnesia to adequate participation in legal proceedings. Six factors to consider:
  1. The extent to which the amnesia affected the defendant's ability to consult with and assist his lawyer.
  2. The extent to which the amnesia affected the defendant's ability to testify in his own behalf.
  3. The extent to which the evidence in suit could be extrinsically reconstructed in view of the defendant's amnesia (e.g., evidence relating to the crime itself, reasonable possible alibi).
  4. The extent to which the Government assisted the defendant and his counsel in that reconstruction.
  5. The strength of the prosecution's case— Whether the Government's case is such as to negate all reasonable hypotheses of innocence. If there is any substantial possibility that the accused could, but for his amnesia, establish an alibi or other defense, it should be presumed that he would have been able to do so.
  6. Any other facts and circumstances which would indicate whether or not the defendant had a fair trial.

**Drope v. Missouri**
420 U.S.L. 302 (1975)
- **Drope** dealt mainly with procedural issues
  - "Evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but that even one of these factors standing alone may, in some circumstances, be sufficient."
- **However, Chief Justice Burger's opinion in Drope included the phrase** "assist in preparing his defense"
  - AMA Criminal Justice Mental Health Standards (1989) (which Drope added an additional prong, requiring defendant to "otherwise assist with [their] defense" p. 170)
  - Likewise, the federal standard (U.S. Code Annotated, Title 18, Part II, chapter 13, section 4241), broadens the consult with counsel prong with the more encompassing language, "assist properly in his defense"
Competency to the 1990s

- Until the 1990s, the modern tests for competency were based on two Supreme Court decisions that described competence as comprised of two or three elements (Philipsborn, p.424)
  - Sufficient present ability to consult with lawyer… (Dusky)
  - Rational as well as factual understanding… (Dusky)
  - Assist in preparing defense (Drope)

- Justice Kennedy, in Riggins (1992), explained part of the requirement for an accused's competence as follows:
  - "Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the right to present one's defense, with a cross-examination, witnesses, and the right to confront the witnesses against him. "
  - Ultimately, when an accused is not competent, we fear that his or her ability to exercise these rights is compromised.

Godinez v. Moran


- Main issue in Godinez was whether different standards for standing trial, pleading guilty, or moving counsel exist
- Court determined that the standards for all three were to be the same constitutional minimum as per Dusky
- However, the opinion in Godinez appeared to include the defendant's decision making abilities as being encompassed by the Dusky standard

Justice Thomas, writing for the majority, opined:
- "While the decision to plead guilty is a profound one, it is no more complicated than the vast total of decisions that a defendant may be called upon to make during the course of a trial... Nor do we think that a defendant who waives his right to the assistance of counsel must be more competent than a defendant who does not waive this right. The decision to proceed to trial with representation requires an appreciably higher level of mental functioning than the decision to waive other constitutional rights.

Indiana v. Edwards


- The Edwards Court considered the issue of whether a state, in the case of a D who meets the Dusky standard of CST, can limit the right to self-representation by requiring that D be represented by counsel at trial
- The Court cited an APA/AAPL brief, which argued that mental illness could impair a defendant's ability to engage in the expanded role required for self-representation even in cases where the D could proceed to trial with representation
- Edwards makes it clear that the standard for competence may indeed vary in certain limited circumstances
- The Edwards court addressed the seeming inconsistency with Godinez:
  - "Godinez provides no answer here because the defendant's ability to conduct a defense at trial was expressly not an issue in that case... and because the case's constitutional holding that a State may permit a grey-area defendant to represent himself does not tell a State whether it may deny such a defendant the right to represent himself at trial" (p. 365, italics in original)
Implications of *Edwards*

- *Edwards* establishes that competence to proceed *pro se* requires a higher level of competence than CST but remains silent on how this should be determined.

- Various amici provide some guidance for evaluating competency in the case of a D who wishes to represent him/herself.
  - ABA
  - APA/AAPL

- Highlights and underscores the contextual nature of competence and the need for functional evaluation.

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- In 1960 and 1975 the Court’s basic definition of competence centered on whether the accused had:
  - a combination of situational awareness (“a rational as well as factual understanding of the proceedings against him”) and
  - a basic ability to deal with counsel (“sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding”)

- In the 1990s/2000s the Court more fully described its view of the ingredients of the necessary interaction between client and lawyer:
  - with "the assistance of counsel, the defendant is also called upon to make myriad smaller decisions [than those discussed in the basic competence definitions] concerning the course of his defense" – Cooper v. Oklahoma

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A Final Note Regarding Standards

- Controlling case law must guide the review of competence inquiries at the trial level.

- “Understanding competence to stand trial requires understanding all currently applicable law and is beyond any one basic local statutory source” (Philipsborn)
  - State statutes have not kept up (so don’t stop there)
Steps in Opinion Formation

1. Determine whether "mental disease or defect" is met (signs, symptoms, diagnosis)
2. Evaluate relevant psycholegal abilities and deficits (Understanding, Appreciation, Reasoning, Decision Making, Consulting/Assisting)
3. Determine whether there is a causal connection between any noted deficits and mental disorder/cognitive impairment
4. Specify how these deficits might impact functioning (functional deficits) at trial (or for proceeding to next stage)

Prerequisites for Incompetence

- Mental Illness
- Mental Disease or Defect
- Cognitive Impairment

Spoiler Alert: This all comes down to symptoms

Conceptualizations of Competence

- Multiple conceptualizations of Dusky (Rogers, 2001)
  - 2 prong cognitive complexity model
    - Factual understanding
    - Rational abilities
  - 2 prong syntactical analysis
    - Rational ability to consult
    - Factual and rational understanding of the proceedings
  - 3 prong discreet abilities model
    - Rational ability to consult
    - Factual understanding of courtroom proceedings
    - Rational understanding of courtroom proceedings
Conceptualizations of Competence

- Bonnie (1992, 1993)
  - 2 separate but related constructs
    - Foundational (Competence to Assist Counsel)
    - Contextualized (Decisional Competence)
  - Proposed a 2-step approach to adjudicative competence

Bonnie’s Reconceptualization

Competence to assist counsel: A foundational concept that encompasses the minimum conditions required to participate in one’s own defense.

Decisional competence: A contextualized concept that encompasses the defendant’s ability to make decisions regarding issues that he or she may be confronted with during the course of their proceedings.

Godinez: decisional abilities now clearly appear to be part of the competency standard

Competence-Relevant Abilities

- Understanding
- Appreciation
- Reasoning
- Consulting/Assisting
- Decision-making
Understanding

• Legal proceedings, strategies, and plea options
• Roles of key participants within the legal process
  • Defense counsel, prosecutor, judge, jury, etc.
• Current charges
• Elements of an offense
• Consequences of conviction
• Rights waived in making a guilty plea

Appreciation

• Likelihood of being found guilty
• Consequences of being convicted
  • Range & nature of possible penalties and how they affect D
• Appraisal of available legal defense and their likely outcomes
• Appraisal of whether or not to testify
• Make rational case-specific decisions

Reasoning

• Distinguish more relevant from less relevant information
• Seek out relevant information
• Weigh and evaluate various legal options and their consequences
• Make comparisons
• Provide reality-based justification for making particular case-specific decisions or conclusions
Assisting/Consulting

- Consult with counsel
- Relate to the lawyer
- Plan legal strategy
- Engage in own defense
- Challenge witnesses
- Testify relevantly
- Manage courtroom behavior

Decision Making

- Consider alternatives
- Weigh options
- Make crucial legal decisions
  - whether to accept the plea agreement or proceed to trial, which plea to enter and which steps to take, e.g., testifying or calling witnesses at trial
- Myriad smaller decisions throughout the course of the proceeding

How can FASD impact a Defendant’s CST abilities?
Suggested Resource


Why is this Topic of Such Importance?

Competency to stand trial necessitates that a defendant comprehend the:

(a) Purpose of court proceedings
(b) Responsibilities of different court staff (e.g., judge, attorneys, and jury)
(c) Consequences of conviction for different charges

As exemplified by these examples, comprehension is a basic building block of competency. The foundational cognitive, social, and adaptive deficits of FASD can profoundly interfere with an individual’s competency to stand trial. In light of these threats to competency, defendants with FASD will likely necessitate help in competently participating in the development and execution of their legal defense.

Problems with Forensic Assessment of FASD

Forensic assessment of FASD can be difficult due to a lack of understanding of the disorder including:

(a) Intelligence levels can fluctuate from low to good levels
(b) Verbal intelligence deficits are not required
(c) Facial malformations are not necessary and do not dictate severity level
(d) Maternal self-report of alcohol use during pregnancy can be inaccurate
(e) A lack of evidence of alcohol use during pregnancy does not rule out FASD
(f) Prenatal alcohol exposure alone cannot account for antisocial and criminal behavior
(g) Evidence of criminal planning does not preclude the presence of cognitive deficits

Brown, Austin, Connor, & Jakic, 2002
Possible Post-Arrest Behaviors

After being arrested, individuals with FASD can display a number of behaviors including:

(a) Eagerness to waive rights and agree with interrogators
(b) Poor and inconsistent memory
(c) Difficulty in creating a clear and coherent narrative
(d) A failure to make a direct link between the cause and effect of a behavior
(e) A lack of maturity
(f) Grandiose behavior and posturing
(g) A limited ability to alter one’s own views or opinions
(h) An inability to recognize the risk of consequences and punishment
(i) An unreasonable faith in one’s attorney in obtaining the desired disposition

Brown, Wartnik, Connor, & Adler, 2010

FASD and CST Abilities

The deficits of FASD can severely hinder a defendant’s competency to stand trial. Such deficits may include:

• Cognitive processing deficits (e.g., information processing speed, sensory processing, abstract thinking, and communication)
• Short- and long-term memory issues (e.g., encoding, maintenance, and retrieval of information)
• Behavioral (e.g., disinhibition, attention), and broader developmental immaturity

These symptoms can result in difficulties with comprehending and following basic directions and poor or inconsistent courtroom performance

FASD should be considered during questions of competency and sentencing proceedings

Executive Functioning Deficits
Adaptive Functioning
Memory Deficits
Social Skill Deficits
Misinterpretation of Intent

The deficits (e.g., cognitive, neurological, and social) of FASD contribute to the misinterpretation of their criminal behavior as premeditated and manipulative, which emphasizes the importance of ensuring greater recognition of FASD in the legal system.

Conry & Fast, 2011

Structured Settings

Individuals with FASD can perform reasonably well in very structured settings, but have difficulty adapting to more dynamic and stressful settings.

Brown, Wartnik, Connor, & Adler (2010); Streissguth, 1997; Streissguth et al., 2004

Questioning Styles

Different styles and strategies of questioning can result in very discrete interpretations of a defendant.

For example, the use of simple yes/no questions may decrease the likelihood of detecting FASD and its related impairments.
Communication Skills

The cognitive dysfunction and global functioning issues of FASD can often be masked by adequate to above average communication skills. These communication skills are often superficial, with limited comprehension underlying this façade.

This phenomenon has a fundamental disadvantage in criminal justice settings, where defendants may be found competent when they lack the ability to comprehend legal proceedings and participate in the planning of their legal defense.

To prevent such violations of constitutional rights, the assessment of both competency and culpability is necessary for defendants who may suffer from FASD.

Brown et al., 2016; Mela, 2015

High-Stress Situations

Individuals with FASD are prone to anxiety, fear, and confusion when exposed to high-stress contexts (e.g., police interrogations).

In such settings, individuals with FASD may resort to acting outwardly (e.g., aggression) or inwardly (e.g., silence and restricted motion).

Although CST evaluations are usually not as stressful as other events in the criminal justice system, mental health professionals should be aware of such possibilities and take the necessary precautions.

Information Processing Deficits

- Information processing deficits are common among individuals with FASD (Kodituwakku, 2009).
- Information Recall Deficits (Mela, & Luther, 2013).
- Processes Information Slowly (Jacobson, Jacobson, & Sokol, 1994).
- May need to spend longer periods of time with their clients (Jeffery, 2010).
- May need to repeat information several times and possibly over the course of multiple visits (Jeffery, 2010).
Auditory Processing Deficits

Suspects with FASD may not be equipped to waive their Miranda rights because of their auditory processing deficits, which limit their ability to understand verbal communication, and reading difficulties, which limit reading comprehension.

Brown, Gudjonsson & Connor, 2011

Erratic Courtroom Behaviors

Individuals with FASD often have issues with understanding and following simple directions and exhibit erratic courtroom performance. These difficulties are directly contributed to by cognitive (e.g., executive control), memory (e.g., short- and long-term memory), and attention (e.g., concentration and impulsivity) deficits of FASD.

Sensory Stimulation

Sensitivity to sensory stimulation is common among individuals with FASD. In particular, bright lights and loud sounds can be bothersome to those with FASD. Interactions may be improved in quiet and calm environments. Such an approach will help maximize the validity of any information obtained from individuals with FASD.
Deficits in Intellectual Functioning

The intellectual functioning impairments of FASD can have several negative consequences. Because the capacity to learn and apply basic information can be extremely limited, the defendant may have trouble grasping the seriousness of the charges or their consequences. The defendant may be ill-equipped to assist their attorney develop a case and may not comprehend legal decisions or processes. The defendant may be prone to poor and uninformed decision making as it relates to the case including an increased potential for acquiescence, suggestibility, and confabulation. Unfortunately, these intellectual deficits are typically permanent, so restorative treatment is unlikely to resolve many of these CST-related issues for a defendant with FASD.

Acquiescence

Individuals with FASD are far more likely than the general population to acquiesce to the information presented by individuals in a position of power (e.g., police interrogators) and are particularly vulnerable to suggestibility, and confabulation. This vulnerability is likely contributed to by the social impairments (e.g., communication skills and social pressure) of FASD. If this propensity is not adequately considered by those conducting CST evaluations, then the phenomenon of acquiescence will likely taint the findings of the evaluation.

Defining Confabulation

“Confabulation, the pathological production of false memories, occurs following a variety of pathologies involving the frontal lobes, and is frequently held to be underpinned by combined memory and executive deficits.”

Turner, Cipolotti, Young, & Shallice, 2008, pg. 627
FASD and Confabulation

"Memory impairment stemming from hippocampus damage and impaired frontal lobe functioning is a common deficit in FASD, causing free recall difficulties accompanied by intrusions and confabulation."

Gibbard, Wosu, & Cliner, 2003; Hand in Brown, Budijono, & Cernes, 2013, pg. 45

Suggested Resources


Confabulation: An Introduction for Psychologists
http://online.csp.edu/blog/forensic-scholars-today/introduction-to-confabulation

Understanding Confabulation: An Introduction for Criminal Justice and Mental Health Professionals
http://online.csp.edu/blog/forensic-scholars-today/understanding-confabulation

Book Resources
Suggestibility

- Interrogative pressure (Interrogative Suggestibility)
- Misleading questions
- False confessions
- Easily guided
- Confabulation
- Memory recall deficits
- Memory confidence
- Blame taking
- Over-endowment
- Distorted responses
- Admitting to greater involvement
- Desire to please others
- Clinical considerations

Suggestibility-Continued

- Complex/advanced vocabulary questioning
- Executive functioning
- IQ
- Anxiety/Stress
- Unfamiliar demands
- Self-esteem
- Memory distrust
- Impaired narrative abilities
- Free-recall/Open-ended prompts
- Manipulation on part of the interviewer
- Contradictory misinformation

FASD and Suggestibility

FASD’s social and cognitive deficits predispose individuals to suggestibility and an inclination to agree with others, which could result in concurring with leading questions, false confessions, and, ultimately, wrongful convictions.
FASD and Suggestibility Resources

Interrogative Suggestibility in People with Fetal Alcohol Spectrum Disorder (FASD): Neurocognitive and Behavioral Challenges


FASD and Suggestibility Peer Reviewed Journal Resources


FASD Book Chapter Resource


What can be done?

Expert Witness Testimony

Effective expert testimony on the topic of FASD likely requires a detailed PowerPoint presentation.
Developmentally Sensitive Approach

A developmentally sensitive approach is integral

Why?

The presence of average to good verbal skills can result in inaccurate assessments of the defendant’s true developmental level

Interviewing Suggestions

• Try to avoid the following when interviewing individuals with an FASD:
  • Multi-step questions
  • Avoid yes or no and true and false questions
  • Complex questions
  • Limit the amount of words used per question
  • Closed-ended questions
  • Misleading questions
  • Be aware of using advanced vocabulary
  • Repeating the same question over and over again
  • Suggestive questioning approaches

Proposed Guidelines for Attorneys

Proposed a guideline for attorneys to determine the need for an FASD evaluation:
(a) Discern if the defendant’s mother or family has a history of substance use
(b) Obtain a behavioral and criminal history of the defendant
(c) Gauge the cognitive and adaptive functioning of the defendant
(d) Troubleshoot the defendant’s physical development (e.g., facial malformations), educational history (e.g., poor performance), mental health (e.g., treatment history, hospitalizations), and family life (e.g., adoption, foster care, incidents with child protective services) for potential FASD markers
(e) Investigate the possibility of FASD in the defendant’s siblings

Wartnick & Carlson, 2011
Key Reminder-Legal Terminology

As professionals, we must ensure that we are properly explaining complex legal terminology, regulations, and requirements to those with FASD (suspected and/or confirmed) in developmentally appropriate language.

Trial Preparation Modifications

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

Suggested Resource


D.E.A.R.

D. Direct Language
E. Engage Support System
A. Accommodate Needs
R. Remain Patient

Gaps in the Literature

- It is generally unclear how well the evidence based practices for managing risk and treating general offenders apply to adolescents and adults with FASD.
- Little is known about the criminal behavior and experiences of suspects with FASD within the criminal justice system.
- Research is needed to determine which strategies are needed to guide criminal justice professionals in how to maximize the effectiveness of legal participation in this population.
- Development of a CST screening tool that is geared towards defendants with FASD.
- Police interrogations, waiving Miranda rights, entering pleas, standing trial, providing testimony, and sentencing.
- There is a dearth of empirical studies on the role of FASD in the behavior of sexually violent predators. This is problematic because such behavior could be the result of brain damage rather than deviance per se.
Legal Cases


The trial court distinguished between incompetency due to mental illness and incompetency due to mental retardation. The former presented a capability for restoration and the latter being a static condition which is not likely to permit restoration to competency.

The court indicated that because of this difference, separate assessment protocols should be used when diagnosing these two different forms of incompetency.

Unable to achieve trial competency because of the permanent nature of his disability.

Need to be able to apply the understanding, not just recite it (Rote learning).


The Atkins case is relevant to FASD in that the court, in discussing mental retardation (intellectual disability) identifies the same neurocognitive, executive and adaptive behavioral deficits as those identified with individuals with FASD.

Executing someone with ID violates the 8th Amendment.

States can define who would be considered ID.
Hall v. Florida (2014)

Identifies the same neurocognitive, executive and adaptive behavioral deficits as does Atkins.

Hall adopts the DSM-5 definition of Intellectual Disability, holding that Full Scale IQ is no longer the predominant consideration in the assessment of the neurocognitive, flow, executive and adaptive behavioral deficits when evaluating whether a person is intellectually disabled.

The DSM-5 puts full scale IQ on equal footing with the adaptive behavioral deficits.

The Court indicated intellectual disability is a "condition, not a number" (Hall v. Florida 2014, p. 21), citing the importance of considering deficits in addition to intelligence test results.

FASD and Case Law—Important Reminder

"Very few appellate cases involving FAS and Fetal Alcohol Effects were decided in the late 1980s. There has been an increase in these cases since 1996"

FASD and CST Media Case Studies

FASD and CST Media Case Studies


Questions

Thank You…
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  - American Institute for the Advancement of Forensic Studies (AIAFS) (http://www.aiafs.com/)
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  - Forensic Scholars Today (http://online.csp.edu/forensic-scholars-today)
  - Adult FASD Provider Network (https://www.facebook.com/AdultFASDProviderNetwork)

Supplemental Slides

Adjudicative Competence/Competency to Stand Trial
Civil & Criminal competencies

- Competency to Stand Trial (CST)
- Competency to Waive Miranda
- Competency to Waive Counsel
- Competency to be Sentenced
- Competency to be Executed
- Competency to Retain Custody of a Child
- Competency to Execute a Will or a Contract
- Competency to Consent to Sexual Activity

Competency to stand trial

- In the United States, competency to stand trial refers to an assessment of whether or not a defendant has the *wherewithal to comprehend and participate in legal proceedings* (Douglas et al., 2007).
- Competency to stand trial is a legal construct based on the idea that a defendant must be able to participate in his/her own defense (Davidson, Kovacevic, Cave, Hart, & Dark, 2015).
- A competency to stand trial evaluation hinges upon the defendant's legal comprehension, cognitive reasoning, and his/her ability to make decisions and communicate with attorneys (Davidson, Kovacevic, Cave, Hart, & Dark, 2015).

Competency to stand trial

- With approximately 50,000-60,000 competency evaluations per year, this may be the most frequent mental health assessment referral in U.S. judicial settings (Morris & DeYoung, 2012).
- The vast majority of competency assessments are requested by defense attorneys (77.6%), with fewer requests by the Court (20.7%) and even fewer from prosecuting attorneys (Morris, Warren, Koivu, & Daskal, 1993).
- Competency to stand trial is a *legal* rather than clinical decision because the formal decision is made by the judge in light of the mental health expert's evaluation. Nonetheless, a judge's competency ruling is usually consistent with the mental health expert's recommendation (Morris & Zelle, 2015).
Areas of Competence

- Crimes with which the person is being charged
- Capacity to communicate effectively with legal counsel
- Ability to comprehend and follow legal proceedings
- Waiving the right to proper counsel and/or plead insanity
- Containing one’s accounts
- Avoid self-incrimination
- Comprehend ramifications of pleading guilty
- Roles of different legal professionals
- Testifying at trial
- Calling of witnesses


CST and Comprehension

Comprehension is the basic foundational aspect of competency to stand trial

Murray & Zelle, 2015

CST-Key Consideration

Competency to stand trial evaluations should be sensitive to the presence of traumatic brain injuries, substance use-related cognitive functioning issues, and developmental and behavioral disorders in forensic samples because of the higher prevalence rates of these issues in this setting

White, Meares, & Batchelor, 2014
Cognition (e.g., executive functioning, intelligence, memory, attention) has been firmly established in the literature as central to competency to stand trial.

Cognition and Language abilities

Language skills, including both expressive and receptive aspects, are integral in establishing effective communication with one's legal counselor.

CST and Attention/memory

A defendant’s ability to comprehend and follow legal proceedings is dependent upon both attention and memory.
CST: Important Reminder

Criminal justice professionals should be careful not to confuse talkativeness with comprehension or competency.

Fast & Conry, 2009

CST and FASD

“Competency is the ability to understand information that is relevant to making decisions, to have knowledge of being confronted with a legal decision, to think rationally about available options, and to express choices. Defendants with FASD may “sound” or “look” competent, but may function at a level much younger than their chronological age. Individuals with FASD may present with many conditions that could impact their competency.”

Wartnik, Brown, & Herrick, 2015, pp. 157-158

Key Reminders

Individuals with FASD often:

(a) Rely on others support
(b) Have difficulty forming coherent thoughts
(c) Lack the capacity to reason and choose between legal and illegal behaviors

To properly assess if a defendant with an intellectual disability is competent to stand trial, the evaluation requires at least three components:

- First, the CST evaluation must be informed by expectations for the trial's complexity. This information should come from attorneys on both the defense and prosecution teams.
- Second, mental health experts should employ a standardized battery of assessment tools to serve as the basis of their competency recommendation.
- Third, the defense attorney must carefully query the defendant's capacity to communicate. All three components are imperative in adequately informing a CST decision.

Birgden & Thomson, 1999