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Representing the FAS Client in a Criminal Case

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Introduction

In February, 1995, I was asked to represent a 20-year-old man affected by Fetal Alcohol Syndrome (FAS) in a criminal appeal. The young man had been convicted by plea of criminal sexual conduct. His parents felt that the trial attorney did not understand the social and intellectual functioning of their son, whom they had adopted at birth. Consequently, the court originally had not been told about FAS, nor about how it affected their son's mental state.

In the state where the prosecution took place, there was no legal precedent which included FAS as a relevant factor. Thus, through the significant and interesting case described above, I became familiar with FAS as it impacts a criminal case. Through this experience, it became clear to me that Fetal Alcohol Syndrome is a significant factor in the crimes of many of those accused; it is a condition which affects a person's ability to plan conduct or, conversely, to resist impulse. As a direct or indirect consequence, many of these individuals find themselves in the criminal justice system at some point in their lives. Yet, a great many of those prosecuted either should not have been convicted, sentenced to traditional punishment, or both. Why is this? First, FAS may negate the "guilty mind" requirement essential to establishing legal culpability.^{1,2} Second, it is not clear that incarceration is of any value in experientially punishing the FAS offender, or in assuring the community that he or she will not be a threat to public safety upon release.³

This chapter will look at some of the areas where FAS evidence might be pertinent in the preparation and presentation of a criminal defense. As the body of knowledge about FAS grows, so too must discussion among those concerned with the legal representation of individuals affected by it. It is imperative that legal professionals be cognizant of the unchangeable reality of the FAS client's singular circumstances as he or she is subjected to the criminal justice system.

Identification

FAS may be identified initially by the presence of some or all of a number of distinct physical characteristics. A number of these have

been documented by researchers; a few are growth deficiency (height and weight), absent or nearly absent philtrum (groove above upper lip), thin upper lip, ear irregularities, and indistinct nose which is small and has a low bridge. They often are hyperactive and have poor attention spans. Individuals affected by FAS have small brain sizes, brain malformations, delayed development, and some level of mental retardation and learning disabilities (Streissguth, LaDue, & Randels, 1988).

As children grow into adults, their hyperactivity evolves into problems of distractibility, inability to attend to relevant information, and, conversely, the inability to ignore irrelevant information (LaDue, Streissguth, & Randels, 1992). Individuals with FAS also often have trouble with interpersonal relationships and daily living skills. They are unlikely to have successful social relationships; this is likely related, at least in part, to an inability to listen and respond appropriately to others, to a tendency to interrupt with unrelated comments, and to a tendency to talk a great deal without communicating any real thoughts or information.

Attorneys should look for the above physical, intellectual and behavioral characteristics. An attorney always should investigate the client's family history for maternal alcohol abuse during pregnancy. In addition, a poor school history, placement in special education, and an inability to complete tasks should bring up the possibility that FAS impacts the client's case. Clients of concern should be referred to a specially trained physician who can make an FAS diagnosis.

Relevance of FAS to Investigation, Trial, and Sentencing of the Affected Client Trial Phases

In general, trials have four major phases: investigation, pre-trial, actual trial (or plea), and sentencing (if there is a conviction). The question of a client's mental functioning is important at all of these stages. It may be relevant for appeal purposes as well. Some ways in which defense of alcohol-affected clients might be benefited by expert testimony or other information on Fetal Alcohol Syndrome are discussed below.

Confessions

A very early, powerful part of the state investigation of a criminal case is police questioning. Obviously, this often results in an incriminating statement by the suspect, which gives rise, in turn, to a criminal prosecution. Confessions are a very important part of the prosecution's arsenal; what could be more compelling than a defen-

dant's own statement that he or she committed the charged acts? All too frequently, criminal defense attorneys do not become involved with a case until after the filing of criminal charges and cannot intervene in the questioning.⁴ As a result, inculpatory statements may be made by suspects which later support arrest and prosecution. It is imperative that attorneys become involved in a case at the earliest possible time and scrutinize the circumstances under which any confessions are obtained.

Right to Remain Silent and Right to Counsel

In situations where an individual is approached by police for questioning, even when police stress that they do not suspect the individual, but only believe that he or she may have "important information" about a crime, the individual may remain silent and avoid self-incrimination.⁵ *This is a fundamental constitutional right* which is available to a suspect from the very inception of a criminal investigation.^{6, 7}

Individuals with FAS are vulnerable to manipulation and coercion by police in a far greater way than are those not affected. These clients frequently are impulsive and not socially inhibited. In addition, socialization is most often at children's age levels, even when individuals are actually much older. For example, in one study, individuals with FAS generally functioned at a level of 6 years, 7 months even though the median age was 16 years, 5 months (Streissguth, LaDue, & Randels, 1988).

The governing query in determining the constitutional validity of a confession is whether the acts were admitted to voluntarily *and understandingly*.⁷ When the capacity to fully understand the consequences of making an incriminating statement to police is compromised or inadequate, the statement can be excluded from evidence.⁸

Methods of Questioning

Police questioning frequently is based on achieving a rapport with the suspect and making the individual think that police are not necessarily suspicious of him or her. Some examiners call this using "minimizing themes" or the "false friend" method. Police might ask in a criminal sexual conduct investigation, for example, "Have you ever fantasized about showing your penis to a girl, not that it is something you would do, but more like just a daydream?" It is easy to see that this is an effective technique for engaging a suspect in a conversation which will result in an inculpatory statement.

The common trait among individuals affected by FAS of trusting persons in authority and the desire to please others may easily result

in self-incrimination. Disturbingly, the truth of a self-incriminating statement is questionable, due, in part, to the tendency of FAS clients to have stronger expressive language skills than receptive language skills. They may speak and sound better than they are actually able to comprehend. They may also have difficulty with short-term memory (Malbin, 1993). For this reason, attorneys should consider the fact that some clients can be led into making statements about supposedly past conduct that they literally cannot remember.

Another interrogation technique is isolating the suspect from family and friends. He or she may be kept in a small interrogation room for hours without contact with anyone other than police. With no witnesses and often with no recording of the interrogation, police question the suspect and attempt to obtain a confession. Promises that the individual will be free to leave, or that one or more charges or potential charges will be dropped once a statement is made are not uncommon.^{9, 10}

Another tactic is to have a youthful individual's parent present when implied or express promises are made. The parent may place pressure on the suspect to talk to police, believing that if this is done, release will follow. Confessions may result from this method, although this tactic has been disapproved by the United States Supreme Court.¹¹

Advice of Rights

Police must advise those being questioned of their constitutional rights prior to questioning. These are read from a card, and/or suspects are read the rights from a form which they are often asked to initial or sign.

It is obvious that many FAS individuals being questioned in a station house setting or in a police car, without a parent or other support person, may not be able to discern the meaning of their advice of rights, and, in many if not most instances, will not have the ability to waive them voluntarily. If a person later charged with a crime does not have the capability of understanding what these rights mean and that the rights may be asserted at any time, the advice itself is meaningless.

It is not the boilerplate recitation of a suspect's constitutional rights which satisfies the requirements of *Miranda v. Arizona*.¹² Rather, it is the individual's ultimate ability to avail himself or herself of those rights, if that is the suspect's choice, which is the basis for assessment of police compliance. Such understanding will not be present if an individual does not have the ability to appreciate the import of the rights given by police. Thus, it is important for an

attorney, parent or guardian to accompany an FAS client into an interview. At a minimum, this insures that a witness is present to document police questioning techniques. Improperly obtained confessions can occur whether the interview is at the police station or somewhere else. The key is if questioning takes place in compulsive and "police-dominated atmosphere."¹³

Legal Responsibility and Competency

The law has long acknowledged that an individual must have both a criminal mind and commit a criminal act (*mens rea* and *actus reus*) before being found legally responsible for prohibited conduct. Accordingly, when defendants either do not understand what they do, or cannot control their actions, they are not guilty of a crime. Additionally, if a client is not able to understand the nature of the proceedings or to assist the defense attorney at the time the state proceeds against him or her, the defendant may be incompetent to stand trial.

Insanity, or lack of requisite mental capacity, must not be confused with competency, which is governed by different law. Insanity relates to the Defendant's mental state *at the time of the alleged criminal act*, i.e., if the Defendant (1) did not know the difference between right and wrong, or (2) did not know what he or she was doing at the time of the criminal act, or (3) even if the defendant did know these things but could not control himself or herself, the Defendant may assert a viable insanity defense. While insanity is an affirmative defense subject to a controlling statutory time frame, competency is a fundamental due process requirement.¹⁴ It may be raised at *any* time during criminal proceedings.^{15, 16} Further, competency is so critical to the very legitimacy of a proceeding that it is not solely the defendant's burden to raise or waive it (as exculpatory evidence, affirmative defenses such as insanity, or objections would be). There can be no criminal proceedings against a defendant who is incompetent; it goes to the *rightfulness of any prosecution at all* rather than to the question of guilt or innocence.¹⁷

The diagnosis of FAS raises numerous questions about the fairness of the proceedings relative to legal responsibility and competency. How can a defendant form the requisite intent for the criminal offense if he or she does not appreciate the wrongfulness of the act due to learning and memory difficulties? Or, where an act requires a specific intent (a requirement in some crimes that the defendant not only intended to do the act, but also intended that the prohibited result occur), does an individual with FAS have that kind of forward thinking and planning ability? A defendant may not be capable of

having the scienter or intent required to commit a punishable criminal act, especially if it requires a showing of specific intent. He or she also may be incompetent to stand trial. Although those who are mentally ill are often brought to a state of competency within a period of treatment, with developmentally disabled individuals this will not occur.

If a client appears incompetent or insane (not legally responsible for criminal actions) an attorney may seek an order for a psychiatric exam. Generally, this is conducted by a state psychiatrist. If the state examination does not confirm incompetency or insanity, the defense attorney may request an independent examination. Obviously, if a defendant is indigent, this exam is problematic. The court must order payment for an expert; the expert, however, does not have to be one of the defendant's choosing.¹⁸ Expert testimony from a mental health professional experienced with FAS is essential; the earlier it is sought out, the better (see chapter by LaDue and Dunne).

Other important uses of the expert diagnosis and evaluation during trial include supporting a defendant's credibility through explanation of characteristics of clients with FAS (e.g., they may sound more socially mature than they are, or may exhibit inappropriate demeanor, each of which may alienate a jury if not explained). Another possibility is supporting justification of an FAS client's actions, or explaining involvement in a criminal enterprise.¹⁹ Explaining the defendant's mental functioning to prosecutors may result in an advantageous plea bargain or sentence recommendation whereas the same may not have been possible without this information.

Sentencing

FAS can be argued as a factor to support mitigation in sentencing. Once an FAS diagnosis is confirmed, the defendant's culpability can be diminished significantly for purposes of punishment.²⁰ If a defendant is affected by FAS, this is extremely relevant to the question of whether incarceration is proportionate and productive.²¹

An eloquent example of a court's acknowledgment of FAS as a powerful sentencing factor is found in *Rose Abou*, supra. There, the trial judge, Judge C.C. Barnett, heard extensive evidence detailing the defendant's impairments as they related to her tendency to commit assaultive offenses. He observed that due to the defendant's prenatal brain damage from maternal alcohol abuse, frustration, followed by over-reaction through violence, was characteristic for her. No amount of traditional punishment through incarceration would alter this pattern. Rather, the court placed Ms. Abou on probation for

three years and imposed a tightly structured rehabilitation program, including supervised living, education in basic life skills, and alcohol and drug treatment. In doing so, Judge Barnett refused to impose a term of incarceration as punishment, even though it was argued that this was necessary to deter others from similar conduct:

It is, I believe, simply obscene to suggest that a court can properly warn other potential offenders by inflicting a form of punishment upon a handicapped person who has, indeed, committed an offense for which some sanction must follow. That is not justice. That is unthinking retribution. If it were inflicted upon Ida Abou she could not fully comprehend it or possibly learn from it. *Id.*, 4.

These are thoughtful judicial actions which properly recognize the impact of FAS on an individual's ability to conform to societal norms, or to learn from traditional punishments. (see chapter by Barnett) However, such decisions are not yet common.²² One reason for this situation is the widespread but incorrect belief among people within the criminal justice system that prisoners can receive "education" and "therapy" while incarcerated. Available information indicates, however, that these remedial avenues are not easily entered into within the prison system. Further, in many prisons, the only therapy for assaultive and sex offenders is group therapy. This type of cognitive "talk" therapy is not useful to clients affected by FAS. Due to the memory and learning problems of clients affected by FAS, little or no benefit can result from this approach. For this reason, experts in FAS diagnosis and treatment hold the view that prison is inappropriate for FAS offenders (Clarren & Streissguth, 1995). Further, it is likely that FAS offenders will learn additional deviant behaviors if placed in a prison setting. They learn experientially and the chances are high that they will be victimized. They are likely to repeat, upon release, the negative behaviors to which they were exposed in prison.

Conclusion

This chapter only begins discussion about Fetal Alcohol Syndrome and the many criminal defendants impacted by it that must take place in criminal tribunals. The presentation of FAS-based defense arguments is crucial to constitutionally acceptable outcomes for criminal defendants with FAS. Our criminal justice system is based on true adjudication and fair penalties, and it must be true and fair for all of us. Increased awareness of FAS by judges, prosecutors, and

defense counsel is necessary so that affected individuals will no longer be subjected to the “unthinking retribution” that has been prevalent in the past.

Notes

1. It is axiomatic that there can be no crime without criminal intent, or scienter. “A criminal intent is a necessary ingredient of every crime.” *Pond v The People*, 8 Mich 149, 174 (1860). See also, *Morrisette v. United States*, 342 US 246; 72 S Ct 240 (1952). (US Supreme Court reversed a conviction for knowingly stealing and converting property of the United States when the defendant had taken spent bomb casings that appeared to be abandoned; the defendant did not know the Government owned the casings, and thus did not meet the requirement for criminal liability, i.e., “an evil-meaning mind and an evil-doing hand.”)

2. “Scienter is not a word of mystery, or magic meaning. It is merely an expressive word . . . signifying in the connection commonly used that the alleged crime or tort was done designedly, understandingly, knowingly, or with guilty knowledge.” *People v. Gould*, 237 Mich 156, 164 (1927).

3. The Eighth Amendment guarantee against cruel and unusual punishment now governs the imposition and evaluation of all prison terms under both state and federal law. Sentences must be proportionate to both the offense and the offender. US Const, Am VIII; *Solem v. Helm*, 463 US 286; 103 S Ct 3001, 309; 77 L Ed 2d 637 (1983).

4. In Michigan, for example, appointed counsel often is not provided for defendants until after arrest and pre-trial arraignment at which the defendant is read the charges against him or her.

5. Investigators also may indicate that if an individual speaks with them, the individual will be “let go” or police will be helpful in any ensuing prosecution. Remaining silent is always a better course than is making a statement before consulting with defense counsel.

6. In the case referred to above, counsel was not retained until well after a statement was made by the defendant. In fact, he had willingly presented himself at the police station, accompanied by his father. His father, believing it was best to cooperate with police, allowed the defendant to speak with the investigator without a parent or other witness present.

7. US Const, Am V, XIV.

8. *Spano v. New York*, 360 US 315; 79 S Ct 1202; 3 L Ed 2d 694 (1966).

9. Baker, L. (1983). *Miranda: Crime, Law and Politics*, 13. New York: Atheneum.

10. *Culombe v. Connecticut*, 367 US 568; 81 S Ct 1860, 1862-1863; 6 L Ed 2d 1037 (1961). Where suspect had mental age of nine, was suggestible and easily intimidated, and questioned largely in isolation while in custody, the

Court reversed his conviction, noting that “what actually happens behind the closed door of the interrogation room is difficult if not impossible to ascertain . . . The prisoner . . . knows that no friendly or disinterested witness is present — and the knowledge may itself induce fear.”

11. *Id.* (The suspect’s wife was present and placed pressure on the suspect to confess; this was held to be one of the factors which rendered “the proceeding an effective instrument for extorting an unwilling admission of guilt,” which violated due process protections.)

12. 384 US 436; 86 S Ct 1602, 16 L Ed 2d 694 (1966).

13. *Illinois v. Perkins*, 496 US 292; 110 S Ct 2394, 2397; 110 L Ed 2d 243 (1990). Warnings must be given when a person is either in custody or otherwise feels deprived of freedom of action in any significant way. See *Berkemer v. McCarty*, 468 US 420; 104 S Ct 3138; 82 L Ed 2d 317 (1984).

14. US Const Am V, VI XIV; Const 1963, art 1, 17.

15. *Drope v. Missouri*, 420 US 162; 95 S Ct 896; 43 L Ed 2d 103, 113 (1975).

16. *Riggins v. Nevada*, US; 112 S Ct 1810; 118 L Ed 2d 479 (1992).

17. In *Godinez v. Moran*, US, 113 S Ct 2680; 125 L Ed 2d 321 (1993), the United States Supreme Court made clear that when a criminal defendant waives his or her rights, that defendant must be competent at the time of the waiver. This includes such trial-level strategic decisions as what defense to put on, and how, “ . . . and whether to raise one or more affirmative defenses.”

18. In *Ake v. Oklahoma*, 470 US 68; 105 S Ct 1087; 84 L Ed 2d 53, 61 (1985), the US Supreme Court held that in an insanity proceeding, where the mental state of the criminal defendant was a significant factor in his defense, failure to provide him with a court-appointed expert was a due-process violation. Much emphasis in the opinion is placed on the defense having the proper tools to work with during a criminal trial.

19. An example is found in drug cases, where individuals with diminished mental functioning often are intimidated or bribed by dealers to participate in drug sales. A related defense tactic would be to bring in FAS evidence to support an entrapment theory, meaning that the defendant was entrapped by the state to be involved in one or more drug transactions.

20. Expert testimony generally may be ordered and received by the court at any phase of the proceeding, even if only used for sentencing purposes .

21. *Regina v. Ida Rose Abou*, LC No. 17459, 17460T, 1/24/95.

22. At least one court has considered FAS a reason to increase a sentence. In *US v. Janis*, 71 F 3d 308 (8th Cir. 1995), the victim was affected by FAS and considered by the court to be unusually vulnerable. The court used this as a reason to adjust the sentence upward by two levels of the sentencing guidelines.