

FAS/FAE Legal Issues Resource Center  
Fetal Alcohol and Drug Unit  
University of Washington  
Department of Psychiatry and Behavioral Science  
School of Law

**SENTENCING AND SUPERVISING OFFENDERS WITH FASD**

**Introduction**

When a woman drinks during pregnancy, exposure of the fetus to alcohol can cause birth defects. Those birth defects, known as Fetal Alcohol Spectrum Disorder (FASD), can vary in nature and severity. The most common, and most serious birth defect, is organic brain damage. That damage, observable through Magnetic Resonance Images of abnormalities of the corpus callosum (the bridge between the two hemispheres of the brain), impairs executive brain function and the ability to process and assimilate information. FASD often involves reduced IQ, but the reduction is generally not sufficient to qualify them for appropriate services. Moreover, whatever the tested I.Q., those individuals with FASD function far less well than others with the same IQ.

Individuals with FASD are frequently involved in the criminal justice system. About 60% of those with FASD get in trouble with the law, and about 50% are confined in a jail, prison, drug treatment facility or psychiatric hospital at some point in their lives.

The fact that a defendant has FASD may bear on sentencing in one or more of three ways:

- the presence of FASD may reduce the culpability of the defendant's conduct.
- the presence of FASD will require different measures to reduce the chances that the defendant will again violate the law.

--the presence of FASD usually means that the defendant has significant difficulties functioning in adult society, problems which a sentence may aggravate or alleviate.

Adults with FASD often have, throughout their lives, the maturity, social skills and understanding of a child of 8-12; sentences need to be crafted against that background.

Set out below are ten principles for sentencing defendants with FASD. These principles are intended to both reduce recidivism and improve the level of functioning of the disabled individual.

(1) Responsible Parents Can Be Partners With The Court In Sentencing

To assist the court in achieving the goals of reducing recidivism and improving the level of functioning, whenever possible the court should consult with responsible parents of defendants with FASD, regardless of the defendant's age. These parents will have had many years of experience dealing with this individual and his or her disability and can be an invaluable resource for information and sentencing strategies. They will know what strategies have been effective in the past and what have been ineffective. With those defendants over 18, attorneys represent their client, not the parents so attorneys are scrupulous in maintaining this professional distance. But, with these defendants, although they are chronologically 18 or over, they may function like a 12 year old so that parental involvement is still appropriate.

If encouraged by the court the parents can supplement the supervision provided by Probation Officials, adding needed structure and providing assistance. Probation caseloads are high and help from responsible parents can be very useful. Because individuals with this disability require more oversight than is generally provided to the non-disabled probationer, the additional attention can be crucial.

Probation practice is to attempt to teach Probationers responsibility for their lives and conduct. So, parents of non-disabled, adult probationers are discouraged from interfering with this process, lest it undermine the growth that takes place.

However, with Probationers disabled by FASD, this growth in responsibility will take place very slowly, if at all. The court can draw on the expertise of functional parents and encourage a partnership with the court and with probation. And, despite many years of frustration and even disengagement with their adult children, the court's request for help can usher in a new era of parental participation in the lives of these individuals. Moreover, the authority of the court can add weight to the parent's efforts, eliciting cooperation from the probationer that might not otherwise be obtained. Responsible parents can also be excellent partners with the court in implementing the sentencing goals if they are encouraged to participate.

(1) Consider Whether The Disability Entails Reduced Culpability and Thus Warrants A Less Severe Sentence

Section 9.94A.535(e) of the RCW permits an exceptional (lower) sentence where "The defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired."

Either or both of those mitigating factors may be present when an offender has FASD.

First, individuals with FASD frequently do not fully grasp the standards of conduct reflected in the criminal law. For example, an individual would usually understand that it was wrong to steal from a store, but might not understand that it was wrong to temporarily take an acquaintance's car without permission.

Second, individuals with FASD at times engage in compulsive behavior, unable to resist the urge to do something they may grasp is wrong. Shoplifting items for personal use or the use of a "friend" is among the offenses they commit most often.

Section 9.94A.535(d) also permits an exceptional sentence where "The defendant, with no apparent predisposition to do so, was induced by others to participate in the crime." Individuals with FASD, often anxious to please others and unsophisticated about whether they are being used, can too easily be persuaded to engage in conduct (which they may or may not fully realize is criminal) by individuals with substantial criminal records.

(2) Avoid Lengthy (Or Any) Incarceration In Favor of Longer Supervision

Lengthy incarceration usually does not contribute in any way to preventing further offenses by individuals with FASD; often it may do the opposite.

The prospect of a lengthy sentence (or of a longer sentence for a more serious crime) is unlikely to affect an individual with FASD. These individuals have only a limited grasp of cause and effect, and have trouble planning for even a single day; they would usually be incapable of weighing the risk of a long prison term against the hoped for gain from a particular offense.

Having served a long sentence may have no effect on future conduct. Individuals with FASD at times do not fully understand why they are (or were) in prison.

Conversely, prolonged incarceration may severely harm the ability of an already disabled individual with FASD to function when he or she returns to society. (Think of the emotional effect of putting a 10-year-old in an adult prison). Additionally, those disabled by FASD are often vulnerable to victimization, both physically and emotionally, by their fellow inmates. An introduction of the defendant with FASD to an inmate population may result in continued destructive influences even after the individual is released from custody. The social arrangements that earlier assisted an individual with FASD to function in society (housing, jobs, etc.) are likely to disappear when they are incarcerated for an extended period.

(3) Use Milder But Targeted Sanctions

Sanctions can work if they are sufficiently limited so as to be non-destructive, are used prospectively, and are targeted at affecting very specific conduct. Generalized deterrence is unlikely to be effective because it is directed at a large and complex set of rules ("obey the law or you will go to prison") which an individual with FASD does not fully understand; in any event, the connection is simply too abstract.

What may work is linking a particular sanction (say, 10 hours

of community service) to a very specific type of conduct the court wants to prevent (e.g. getting drunk, or shoplifting). These individuals can master the importance and meaning of a particular rule (or a few) tied to known sanctions.

For such a system to work, the individual with FASD must be repeatedly reminded of the rule (and rule-sanction connection). Repetition is key to effective learning for those with this disability. And the sanction should focus on something that is of major significance (e.g. a sanction for using drugs, but not a sanction for being late for an appointment).

(4) Impose or Arrange for Longer Term Supervision

Individuals with FASD have a life-long need for guidance from a non-disabled individual, and for a variety of social services. These are not defendants who merely need to (or can) straighten their lives out, or who (as in the case of juvenile offenders) are going to mature with time.

Supervision by a Department of Corrections (or other) probation official who understands FASD is of ongoing importance for as long as it can be arranged, both to avoid recidivism and to improve functioning. The court should attempt to impress the importance of this on both the prosecution (which may focus primarily on the amount of prison or jail time) and the defense (which usually seeks to have the defendant on the street and off supervision as soon as possible). The extended supervision sentence is one that, generally, neither side will ask for.

Judges should be creative in finding ways to prolong DOC supervision, through the consent of the parties, by postponing final sentencing, or otherwise.

(5) Use The Judge's Stature with The Defendant

Individuals with FASD often have great respect for authority figures and are anxious to please. The particular authority and stature of a judge, and the trappings of a courtroom (or chambers) can be important tools in shaping their behavior.

Where practicable, a defendant with FASD should be asked (over and above any DOC supervision) to return on a regular basis to report to the judge on how he or she is doing. Positive behavior should be greeted with much praise and support. Recognition of success(certificates, tokens memorializing periods of sobriety, courtroom applause) may be helpful. Failures should be the occasion to review the sentencing plan, call together the interested agencies, implement other services and discuss with the defendant and the sponsor or advocate, the defendant's plan for improvement.

It may be possible to persuade a defendant, after formal DOC supervision has ended, to continue to come to the courtroom or chambers on a regular basis to report to the judge. While that would be voluntary, and most defendants would have no interest, individuals with FASD might be pleased to continue their connection with the court.

(6) Get A Sponsor or Advocate

Individuals with FASD need guidance and assistance from a non-disabled individual. DOC officials will only be available for the prescribed period, and can devote only a limited amount of time to any one probationer.

Whenever possible, someone else should be found who will agree to help the defendant on an ongoing basis. This might be a family member (such as a responsible parent), a family friend, a relative or someone in a local organization (e.g. a church group). Defense counsel or Probation officials could be asked to look for someone who would function in this way.

When found, this individual should be asked to come into court with the defendant to discuss his or her participation. Ideally, such a person would be found before sentencing, and at the hearing would assure the court, and the defendant, of his or her willingness to play a supportive role.

(7) Create Structure In The Defendant's Life

These individuals often lack the basic skills needed to organize a day. At best, needed tasks (shopping for and preparing

meals, getting to work or job training, laundry, personal hygiene etc.) may go undone; at worst the individual will drift into destructive conduct for want of the ability to better utilize his or her time.

External structure (like an "external brain") can be of great benefit. This might include (a) living in a group home or facility with an established regimen (when to get up, eat, etc.), (b) a very structured (even part time) paid or volunteer job (indeed one of the values of even part time employment is that it gives someone with FASD something regularized he or she needs to do every day.), (c) a daily schedule created in collaboration with the defendant and overseen by a parent, advocate, sponsor, or other party, or (d) involvement in frequently scheduled treatment programs such as classes in anger management, sexual deviancy treatment, drug testing, drug treatment, AA meetings, family counseling, group therapy and recreational groups.

(8) Write Out, Simplify and Repeat Rules

Individuals with FASD will not readily assimilate rules or admonitions from the court or probation. The steps they are to take need to be put in writing and framed in simple, non-legalistic terminology.

Repetition is key to the manner in which these individuals learn. Once is not enough. Probation officials and in certain instances the court need to go over the rules (what to do, what not to do) repeatedly.

(9) Make Sure the Defendant's Probation Officer Understands FASD

Once sentencing is over, the probation officer ultimately assigned to the defendant will have far more contact with the defendant than the court. For that reason, the court needs to make sure that the probation officer knows the defendant has FASD and understands the disability.

The sentencing order should include (in its body or an appendix) a statement that the defendant has FASD, and an explanation of the disability. Once a probation officer is assigned

to the defendant, where possible, that officer should be directed to accompany the defendant to court to discuss his or her case with the judge.

If the defendant is going to be incarcerated, the court should take appropriate steps to assure that prison or jail officials know that the inmate is disabled and receive information about the disability.

(10) Don't Overreact to Probation Violations, Particularly Status Offenses

Those disabled by FASD will often engage in behaviors for which non-disabled probationers would be punished. Individuals with FASD have difficulty remembering and keeping appointments; whether it is the required meeting with their Probation Officer or attendance at AA, their failure to do so is usually not an act of defiance, but a symptom of their disability. The Court could suggest to Probation that the problem of missed appointments be dealt with prospectively by setting up a system of prompts and by drawing on the support of the sponsor or advocate.

These individuals may have annoying personal mannerisms that in a non-disabled individual would be a sign of recalcitrance or defiant disrespect. Their characteristic impulsivity can yield inappropriate expressions of anger which in the non-disabled would call for sanctions. However, understanding the nature of the cognitive deficits, Probation officials can look past this, evaluating a probationer's conduct in the context of his or her disability. The focus should be on bringing about compliance with rules of substantial inherent importance (e.g., not using drugs), rather than rules that DOC would ordinarily enforce in order to encourage the non-disabled probationer to assume responsibility for fulfilling his or her supervision requirements.