

**University of Washington
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**JUDICIAL DECISIONS
REGARDING FASD**

There are over a hundred reported federal and state decisions related to FASD. The most important of those decisions concern criminal cases in which a defendant, victim, or witness had FASD.

These decisions are summarized, and organized by subject matter and jurisdiction, at the website maintained by the FAS/FAE Legal Issues Resource Center at the University of Washington, Fetal Alcohol and Drug Unit. To access the Web site, go to

<http://depts.washington.edu/fadu/legalissues/>

Or search Google for "fadu", select the Fetal Alcohol and Drug Unit, and then select Legal Issues. Among the various topics available, select "court cases," and then either the jurisdiction in which you are interested or "subject matter." The general subject matter index, and the index of criminal cases, are attached.

In most instances judicial response to the issues raised by FASD are at a fairly early stage. The reported decisions rarely if ever cite other decisions regarding FASD, and often reflect an imperfect understanding of the symptoms, methods of diagnosing, and behavioral consequences of FASD. This body of caselaw, however, reflects a fairly widespread recognition that FASD affects behavior in ways that may be relevant to the criminal law and an initial body of experience with the problems that FASD raises.

Waiver of Rights: FASD may affect the validity of a waiver of rights under Miranda, or of a consent to a search. The reported decisions necessarily involve only cases in which the trial court found such a waiver or consent was valid. The appellate courts have tended to focus on whether waivers or consents were voluntary. In the case of FASD, this often fails to address the real problem: whether a waiver or consent was knowing. An individual with FASD may have serious problems understanding the meaning of a Miranda warning, or may not realize that he or she does not have to agree if

a law enforcement official asks to search a house or car. Those are the problems which attorneys and courts will have to address on a case-by-case basis.

False Confessions: Individuals with FASD are particularly likely to falsely confess to a crime which they did not commit, or which did not even occur. There are several reported cases in which this evidently occurred, and more unreported cases. This problem occurs because individuals with FASD are very anxious to please interrogators or other authority figures and may confuse the events which actually occurred with stories recounted to them by the police or others. Where a crime has actually occurred, such acceptance of a false confession leaves the actual offender at large, and the public at risk. Police need to be particularly careful not to use leading questions with suspects with FASD, and attorneys representing such clients need to double check the reliability of confessions.

Testimony by Victims and Other Witnesses With FASD: These witnesses, like suspects with FASD, are at risk of providing statements and testimony that improperly reflect the suggestions of questioners, rather than actual events. In addition, although individuals with FASD are at particular risk of being victimized, especially by sexual abuse, those individuals, because they may lack a firm grasp of the line between reality and fiction, may make (and believe in) accusations which are not correct. These witnesses should be questioned very carefully, in a manner which does not indicate what answer the questioner wants to hear.

Competency to Stand Trial: The competency of a defendant with FASD to stand trial, and to assist with his or her own defense, is not simply a matter of IQ. Individuals with FASD generally function at a level below what is typical of others with the same IQ. Assessment of this issue should focus, not merely on general competency, but on three problems likely to affect a defendant with FASD. First, does the defendant have a clear enough grasp of the distinction between reality and fiction that he or she can assist counsel in evaluating and responding to testimony or argument about what that defendant actually did? Second, does the defendant have a sufficient grasp of cause and effect that he or she understands in a meaningful way the effect of actions he or she wants the attorney to take? Third, does the defendant understand what is taking place in the courtroom? For a defendant with FASD to do so, the court may need to take regular recesses so that the defense attorney can provide an explanation to his or her client.

Diminished Capacity/Guilt: Whether FASD may support a defense of diminished capacity depends on the state law standard for that defense, and the nature of the underlying offense. Individuals with FASD are impulsive, and have difficulty planning and organizing their activities much in advance. The existence of this disability could be highly relevant to whether a defendant had premeditated an act, or had actually committed an act which would have required significant planning and preparation.

Sentencing: The relevance of FASD to sentencing, and to plea bargaining, depends at the outset on the nature and elements of state sentencing statutes. As a practical matter, FASD might be relevant to sentencing in one or more of several ways:

(a) Individuals with FASD may be less culpable. They may not fully understand the relevant norms of conduct; ignorance of the law may not be a defense, but an incomplete ability to understand standards of conduct bears on culpability. Some offenses by individuals with FASD may be the result of impulsive behavior, over which the offender had less control than non-disabled defendants.

(b) The existence of FASD may be important in determining what role a defendant played in an offense. Individuals with FASD are often manipulated by sophisticated criminals into taking part in offenses they may not understand, fully or at all.

(c) The existence of FASD may be critical in designing a sentence or sentencing alternative that will reduce the risk of recidivism, and will avoid causing to a defendant with FASD far greater harm than would be inflicted on a non-disabled defendant. Sentencing a defendant with FASD to prison will not teach the defendant a lesson or deter future offenses, if the defendant does not really understand why he or she has been incarcerated.

Vulnerable Victim: Some sentencing statutes authorize a sentence enhancement where the victim is particularly vulnerable to abuse. Courts have relied on that rule to enhance sentences where the victim had FASD.

Ineffective Assistance of Counsel: There are a significant number of cases regarding whether a defendant was denied the effective assistance of counsel because his or her defense attorney did not discover that the defendant had FASD. Most of this litigation is in capital cases, and many of the decisions appear to rest on a misunderstanding about the nature and signs of FASD.

This is an area of the law in which substantial additional developments can be anticipated. The likely issues, and the problems to which defense counsel should be sensitive, include the following:

(1) When was there sufficient indication of possible FASD that the defense attorney should have made some sort of inquiry?

(2) How much evidence of alcohol use by the defendant's mother is sufficient to warrant continued inquiry? (Some decisions mistakenly assume that only heavy drinking can cause FASD)

(3) If the defense attorney retains an expert to evaluate mental capacity, should the attorney (a) assure that the expert is competent to assess FASD and (b) actually ask the expert to do so? (Where there is reason to believe that a defendant may have been exposed to alcohol prenatally, the correct answer to both questions would be yes.)

Sexual Offenses: In a number of the reported decisions regarding offenders with FASD, the defendant was charged with a sexual offense. Professional understanding of this situation is still limited. However, in the case of sexual offenses it is exceptionally important that both the prosecution and defense pursue indications that the defendant may have FASD, because the existence of that disability would have important implications regarding treatment and other measures that would be effective in preventing future offenses.

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