



Fetal Alcohol Spectrum Disorders (FASD) and Competency to Stand Trial (CST) Case Law: A Need for Further Understanding and Research

By Jerrod Brown and Anthony P. Wartnik

The devastating impact of fetal alcohol spectrum disorders (FASD) on competency to stand trial is highlighted by summarizing the case law review literature. Although these case law reviews may not be peer-reviewed and might include inaccuracies, case law reviews can illuminate the complexities of accounting for FASD during legal proceedings. In particular, a failure to adequately consider the impact of the cognitive and adaptive symptoms of FASD on a defendant's competency to stand trial and as a mitigating factor for sentencing have served as the basis of a number of appeals. Here, we provide overviews of a handful of cases, both for non-violent and violent crimes, where FASD resulted in questions of competency and/or mitigation.

Nebraska v. Wistrom

FASD was at the center of a defendant's appeal over concerns of incompetency and an excessive sentence. The defendant has a diagnosed case of FASD and a troubled background. This includes a history of being the victim of emotional and physical abuse in the foster care system and

sexual abuse in a treatment facility. Prior to this offense, the 20-year-old already had a lengthy criminal history including assault, theft, and possession of marijuana.

In this case, the defendant was accused of burglarizing a residence/domicile. Although a competency evaluation was requested by the defendant's defense counsel, this request was withdrawn when the defendant agreed to entering a plea agreement. Problematically, this plea agreement did not stipulate a recommended sentence. Notwithstanding the evidence of his disorder and the supportive pleas of his adoptive family, the defendant was sentenced to three to six years in prison on two counts of burglary.

In response to what he and his family perceived as an unfair sentence, the defendant sought to appeal his conviction on the grounds that he was incompetent to enter a plea. Specifically, the defendant may not have understood the content of his legal proceedings or comprehended the potential severity of any sentence that came with his guilty plea. This could, at least in part, be due to his FASD diagnosis. FASD is characterized by cognitive and adaptive deficits that often include verbal and non-verbal communication deficits and difficulty comprehending the consequences of one's actions. If true, the defendant's defense counsel failed to procure the necessary competency evaluation to determine whether the defendant was of sound mind and body to competently enter a plea. Despite these concerns, the court declined to address the defendant's claims on appeal.

Kansas v. Ramirez

The role of FASD in competency to stand trial also contributed to an appeal in another case. In 2007, the defendant entered the home of a man and woman through a bedroom window in the middle of the night. The residents were awakened by the cries of their 15-month-old son. Upon entering their son's room, the residents found the defendant holding a duffle bag, which now contained their child. The residents restrained the defendant until the police arrived. The defendant was charged with burglary and the endangerment of a child in Kansas.

During his trial, the defendant's defense counsel requested a mental health evaluation to assess if he (a) had the capacity to form criminal intent at the time of the crime and (b) was competent to stand trial. An evaluation conducted at a state hospital suggested that the defendant could form criminal intent at the point of the crime and demonstrated competence to stand trial. In contrast, a psychologist retained by the defendant's legal defense team found that the defendant had several issues that precluded his ability to form criminal intent. These issues included the defendant's prenatal exposure to alcohol, which may have resulted in FASD, and a history of intellectual (e.g., mild intellectual deficits), psychological (e.g., emotional dysregulation and hearing voices), and behavioral (e.g., theft, arson, impulsivity, and violence) problems dating back to childhood. Testimony from the defense expert was not allowed by the court. As such, the defendant was found competent to stand trial and ultimately sentenced to over four years in prison.

The defendant appealed his conviction on the grounds that expert witness testimony was inappropriately excluded from his original trial. Specifically, this prevented the jury from being able to consider and contextualize the impact of the defendant's mental health issues on his capacity to form criminal intent and competency to stand trial. Despite these concerns, the defendant's appeal was denied.

Florida v. Hunter

Questions of FASD's impact on competency to stand trial have also served as the basis of appeals for more serious convictions. This includes a defendant with FASD who was sentenced to death in Florida. The defendant in this case was charged with first-degree murder, attempted murder, and robbery. The defendant and a group of five other people were accused of committing a series of robberies. The most severe of these robberies involved forcing four men to lie face down on the ground. Each of these four men was relieved of his personal property. Afterward, the defendant reportedly shot each of his victims, one of whom died. One of the surviving victims later identified the defendant as the shooter. The defendant was convicted of these charges and sentenced to death.

There were at least two central focuses of the defendant's appeal of this conviction and sentence. First, the defendant's appeal accused the original trial court of mistakenly finding him competent to stand trial. In light of testimony and/or reports from five different mental health experts as well as the defendant's conduct during court proceedings, the court found the defendant competent to stand trial. This decision was made despite the conflicting opinions of experts on the defendant's competency to stand trial and repeated disruptions of the trial by the defendant. As discussed earlier, the pervasive cognitive and adaptive symptoms of FASD could have limited the defendant's capacity to understand and participate in his legal proceedings.

Second, the defendant questioned the proportionality of his sentence in light of mitigating circumstances. Specifically, several mitigating factors were presented by the defense during sentencing including the defendant's FASD diagnosis and history of physical and sexual abuse victimization. In particular, FASD is characterized by difficulty linking actions to consequences, which may, at least in part, explain the seriousness of the accusations against the defendant. Despite these concerns about competency and proportionality, the defendant's death sentence was affirmed by the appeals court.

Arizona v. Poyson

FASD contributed to questions of competency to stand trial in another death penalty case. At the age of 19, the defendant was charged with armed robbery, conspiracy to commit murder, and the first-degree murder of three people in Arizona (*Arizona v. Poyson*, 2000). At the time of the crimes, the defendant had been the guest of the victims, a family of three, in their mobile trailer for several months. Shortly before the crimes, another two youths were invited to stay with the family. According to the state, the defendant was approached by these two other youths. Together, the group planned to kill the family members, steal their truck, and travel from Arizona to Chicago. Ultimately, each family member was either shot or bludgeoned to death. The defendant was sentenced to death for his role in the crimes.

After the failure of several appeals, the defendant petitioned for an evidentiary hearing as a last resort based on several claims. Each of these claims were related to the impact of FASD on his legal outcomes. First, the defendant contended that his statements to the police were involuntary in light of the cognitive and social impairments of his FASD symptoms. This included self-incriminating statements that the defendant made during three interrogations held within a 24-hour span. The combination of low levels of intelligence with a small and coercive environment increased the likelihood that the defendant was intimidated into a confession. Although original defense counsel moved to suppress the defendant's

statements during these interrogations because his *Miranda* rights may have been violated, the original court and appeals court ruled that the defendant's statements were voluntary.

Second, the defendant argued that he received ineffective assistance from his defense counsel. Key among the critiques of his original defense counsel were (a) the failure to employ experts who could establish his mental state, (b) an inadequate investigation into the possibility of prenatal exposure to alcohol and drugs, and (c) the ineffective challenge against the involuntary nature of his statements to police. Perhaps foremost among these concerns is the failure to incorporate expert testimony on the defendant's mental state along with the impact of FASD. These cognitive impacts include permanent brain damage, low intelligence scores, and emotional dysregulation, which are often accompanied by social and adaptive functioning issues. Without clearly establishing the impact of FASD on a suspect's capacity to function during police interrogations or a defendant's competency to stand trial, including comprehending legal proceedings and participating in the development of a legal defense plan, the court and jury were unable to contextualize the impact of FASD on the defendant. Nonetheless, this petition was denied largely on the grounds of a neuropsychological evaluation that reported no presence of cognitive dysfunction. This is troubling considering evidence that suggests individuals with FASD often perform adequately on cognitive tasks and assessments, but still have pervasive deficits in global functioning. This case highlights the limited awareness of FASD in the criminal justice system along with the devastating life-or-death consequences of such indifference.

Conclusion

This selection of case law reviews illustrates the impact that FASD symptoms may have on competency to stand trial and mitigation. These case law reviews emphasize how the outcomes of legal proceedings can be questioned when the impact of FASD symptoms on a defendant's competency to stand trial and as mitigation are not adequately considered. Wartnik & Carlson (2011) and Wartnik, Brown, & Herrick (2016) have contended that the problem may be due to an imperfect understanding of FASD by the legal profession, the judiciary, and the mental health profession, all three being in need of significant FASD education and training. See *Lambert v. Blodgett* (2004), where the Ninth Circuit Court of Appeals denied a defendant's claim of ineffective assistance of counsel for not investigating his claim of suffering from FASD, holding that the courts have never imposed a duty to investigate in non-death penalty cases, which seems to be illogical since incompetency and mitigation are just as relevant to non-death penalty cases as to death penalty cases. As such, courts should be careful to systematically evaluate each defendant's competency to stand trial and issues of mitigation, particularly in the presence of FASD. This should be viewed as both legal and ethical responsibilities. Going forward, the relationship between FASD symptoms and competency to stand trial is in need of systematic empirical research.

Biographies

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References

Hunter v. State, 660 So. 2d 244 (Fla. 1995).

Lambert v. Blodgett, 393 F.3d 943, (9th Cir. 2004).

State v. Poyson, 7 P.3d 79,198 Ariz. 70 (2000).

State v. Ramirez, No. 102,421 (Kan. Ct. App. 255 P.3d 51; 2011).

State v. Wistrom, No. A-10-1091 (Neb. Ct. App. Aug. 2, 2011).

Wartnik, A. P., Brown, J., & Herrick, S. (2015). *Evolution of the Diagnosis of Fetal Alcohol Spectrum Disorder from DSM-IV-TR to DSM-5: The Justice System in the United States—Time for a Paradigm Shift!* In Fetal Alcohol Spectrum Disorders in Adults: Ethical and Legal Perspectives (pp. 151-167). Springer International Publishing.

Wartnik, A. P., & Carlson, S. S. (2011). A judicial perspective on issues impacting the trial courts related to Fetal Alcohol Spectrum Disorders. *The Journal of Psychiatry & Law*, 39(1), 73-119.