

## Legal Issues and the Fetal Alcohol Syndrome

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Tony H. was a seventeen year old youth of Hispanic descent who was referred by his attorney and social worker for a psychological evaluation to determine his competency to stand trial on charges of assault. He was accused of assaulting his mother, a woman known to have used alcohol and other substances during her pregnancy. Tony had been in and out of his mother's home and was currently residing on the street and periodically with one of his older siblings. Tony presented as a short, slender youth looking several years younger than his chronological age. He had small eyes, a long, smooth philtrum, mild ptosis and strabismus and a pattern of behavior consistent with prenatal alcohol exposure.

Tony's IQ scores were in the low average range but his adaptive behavior skills were only at the 50-60th percentile. His academic achievement scores were in the 3rd to 4th grade range. Tony showed a rudimentary understanding of the charges against him and the legal process. He was able to recount what had lead to the assault charges and what had been inappropriate about his behavior. On this basis, coupled with his IQ scores, Tony was found competent to stand trial.

Frankie D. was a fourteen year old boy of Asian/Caucasian/Native American descent who was referred for testing by his probation officer and social worker to determine his competency to stand trial on burglary charges. He had gone into several houses on his street and taken a variety of items. He then took these items home to his mother and told her how he and his friends had "found" them. His mother called the police, Frankie was charged with 2nd degree burglary, and referred for testing. He resided with his mother, step-father, and two younger half-siblings. He had not had any previous legal problems.

Frankie presented as a very small, slender child who appeared closer to ten

than fourteen. He had small, wide-spread eyes, a long, smooth philtrum, a flattened midface, marked ptosis, mild strabismus, and noticeably rotated ears. His mother acknowledged consuming at least a fifth of vodka almost every day during her pregnancy. Frankie was born six weeks premature and only weighed 3 pounds at birth.

Frankie's IQ scores were in the mildly mentally retarded range, his achievement scores for reading, spelling, and arithmetic were all below the third grade level, and his adaptive behavior scores were in the 40th percentile. He was not able to articulate what the charges were against him nor could he explain why he was in court. The evaluator found him incompetent to stand trial.

A second evaluation was conducted by a psychologist hired by the State. This psychologist, and later the judge, found Frankie competent. As a result of the Court's finding, Frankie entered a plea of guilty rather than waiting for a trial. When the judge attempted to enter the plea, he was required to interview Frankie. He found Frankie was unable to answer even rudimentary questions regarding the legal process or charges against him. The judge reversed himself, found Frankie incompetent, and the charges against him were dropped.

Both of these youth were prenatally exposed to alcohol and both were diagnosed with Fetal Alcohol Syndrome. However, only one was found incompetent to stand trial. This decision was not based solely on IQ, but on a variety of factors. This article is intended to present an overview of the competency issue and its connection with Fetal Alcohol Syndrome. It is intended to provoke thought but, by no means, is the final word on the subject. Given how many people with FAS appear to already be in or entering the legal system, it is a critical issue to explore (1).

### Diagnosis

Fetal Alcohol Syndrome (FAS) is a birth defect with life-long consequences and secondary disabilities caused by prenatal alcohol exposure. Diagnosis is based on a marked constellation of effects primarily in three realms (2-6):

- ◆ growth deficiency;
- ◆ a classic picture of facial dysmorphism; and
- ◆ central nervous system effects.

### Legal Issues

There are four main legal areas that will be discussed: *competency, capacity, decline/remand, and sentencing issues.*

- ◆ *Competency* issues concern the person's ability to understand the charges against them, the legal process, and to aid their attorney in their defense in a reasonable fashion.
- ◆ *Capacity* is usually based on a child's age; under twelve, children are presumed (at least in the State of Washington) to not have the ability to understand the charges against them, the legal process, nor to aid their attorneys in their own defense. Diminished capacity is a concept different from capacity. "Diminished Capacity" refers to the lack of specific intent to commit a crime caused by the individual's mental disorder.
- ◆ Juvenile's (again, in the State of Washington) may be evaluated for a *decline/remand* hearing. Decline is a decision where the court may turn jurisdiction of a juvenile over to the adult legal system. This decision is based on several factors including the seriousness of the offense, the criminal record of the child, the risk of reoffending, and the protection of the community at large.

### Competency and FAS

People with FAS are often described as being impulsive, not being able to learn from previous mistakes, not being able to connect cause and effect, having poor personal boundaries, and being easily influenced. These behavioral

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problems are associated with frontal lobe damage which is associated with midface dysmorphism. However, many of the behavioral difficulties just described are seen in people prenatally alcohol exposed but lacking in the growth deficiency and facial dysmorphism. Dr. Sterling Clarren has described this pattern of behavior as the "Omega Personality" (6).

Another problem area frequently seen in people with FAS is their lack of abstracting abilities. This makes it difficult for them to comprehend social rules and expectations. Many people with FAS give the appearance of capability but lack the substance to follow through on tasks in either a timely or reasonable fashion. Their ability to retain information is often compromised and they will commonly give what ever answer is "on the top of their head" or what they think is wanted.

A major concern as people with FAS grow is their impulsivity without fully comprehending the consequences of their actions. They tend to have a high need for interaction but without the social or cognitive skills to help establish safe, long-term relationships. People with FAS may have difficulty distinguishing between strangers and "friends." Their emotional immaturity and need for inclusion plus their poor judgment and impulsivity have lead to a not uncommon participation in petty crime, gang involvement, and in a few cases, serious crimes.

There are several concerns that arise when a person with FAS is arrested, charged, and then enters the legal system. Often the first step once the person with FAS enters the legal system is to determine competency to stand trial. A competency evaluation should include an intelligence test, a measure of social interaction style and competency, projective tests looking at emotional functioning, and a screening test for possible organic damage.

In addition, police reports, victim's

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statements, past psychological evaluations, past probation reports, school reports, and any other background information should be gathered and reviewed prior to completing and writing up the evaluation. The clinical interview should be used to provide collaboration for test results and background information. The evaluator needs to ask open-ended questions allowing a full determination of the person's ability to comprehend, plan, and understand social rules and expectations.

For example, when questioning the person with FAS to help determine competency, questions should be phrased to elicit as much information as possible, e.g., What are the charges against you? What do these mean? Why are you going to court? What is your attorney's job? What does the prosecutor do? What does the judge do? What will happen when you go to court?

There are instances where the person was asked closed ended questions and was found competent, e.g., Who is your attorney? Who is the judge? Do you understand that you are on trial? This second set of questions does not allow the person to articulate their level of comprehension nor does it demonstrate their ability to help their attorney in a reasonable fashion, both criteria for competency.

Competency is not simply a matter of "yes" or "no" responding. The person with FAS can do this; what is lacking is a deeper understanding of the consequences of behavior and all possible outcomes. Their impulsivity and lack of insight may lead to giving out damaging information at inappropriate times. They may give conflicting stories and be seen as lying rather than the actuality of having poor memory, recall, and articulation skills.

People with FAS, as noted, often appear able to comprehend questions and to

respond in a semi-appropriate fashion. If the questions are not phrased in such a way as to demonstrate the person's full functioning level, they may be found competent when, in reality, they are not.

If the person is found competent, they are sent to trial where they may not be able to participate in a full, reasonable manner. A difficulty at this point then becomes what is appropriate in terms of a defense and, if convicted, the right sentence. Another concern if the person is a juvenile and found competent is the possibility of being declined into the adult system. These issues will be discussed more fully in the next articles.

In summation, a competency evaluation is often a starting point into the legal system for people with FAS. If the person is not evaluated appropriately and with an understanding of the behavioral, cognitive, and judgmental deficits found in people with FAS, the person may be found to be competent when, in reality, they have little or no sense of the legal process or implications of being in the legal system. It is important for evaluators to make sure their evaluations are complete, appropriate, and address not only the issue of competency, but also appropriate placements within and outside the legal system. Without such efforts and understanding, people with FAS can easily end up on the most restrictive setting.

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