FA/NB IN THE CRIMINAL JUSTICE SYSTEM

Presented By
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Fetal Alcohol Spectrum Disorder: What It Is

• An umbrella term describing the range of effects that can occur in an individual whose mother drank alcohol during pregnancy.

• A physical condition which causes a variety of primary and secondary symptoms.

• An incurable disability resulting from permanent damage to the brain.
Infants with FAS tend to have a particular pattern of facial abnormalities such as:

- abnormally small head
- low nasal bridge
- abnormally small eyes
- flat midface
- short nose
- thin upper lip

FAS also includes deformities in the major organ systems, especially the heart.

FAS represents only a small percentage of those affected by prenatal alcohol exposure, those who were exposed between days 18-21 of pregnancy.
Pre-and postnatal events affecting brains

-alcohol 
-drugs 
-trauma 
-TBI 
-genetics 
-illness 
-anoxia

Brain function
Memory
Processing pace
Executive functioning
Just How Many?

- About half of all pregnancies are unplanned.
- 75% of women drink prior to sexual relations.
- Many women don’t know they are pregnant and stop drinking as soon as they find out.
- This disability crosses all economic, social and cultural lines.
- Many doctors still tell women it’s okay to have a drink while pregnant!
- Overall research suggests that 1 in 10 women will drink at some point in their pregnancy.
- More than one in five women report using alcohol in the first trimester, while
- one in fourteen report use in the second trimester, and
- one in twenty report use in the third trimester.
- Binge drinking, which is known to increase the chance of FASD, is reported by one in nine women during the first trimester, while one in thirty pregnant women report high-risk drinking.
- A recent study in a “typical” Midwest community suggested that as many as 5% of first graders were affected.
Fetal Alcohol Spectrum Disorders (FASD)

**Prevalence**

<table>
<thead>
<tr>
<th>Birth Defect</th>
<th>Rate of Occurrence</th>
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<tbody>
<tr>
<td>Cerebral Palsey</td>
<td>2 in 1,000</td>
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<tr>
<td>Spina Bifida</td>
<td>.7 in 1,000</td>
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<td>Down Syndrome</td>
<td>1.4 in 1,000</td>
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<tr>
<td>Fetal Alcohol Syndrome (FAS)</td>
<td>9 in 1,000</td>
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<tr>
<td>Autism</td>
<td>14 in 1,000</td>
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<tr>
<td>Fetal Alcohol Spectrum Disorders (FASD)</td>
<td>24-48 in 1,000</td>
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Source of information: mofas.org (MN Organization Fetal Alcohol Syndrome)

revised 1/21/15
Alcohol is a teratogen (kills brain cells)

Alcohol is toxic and it passes directly from mom to baby across the placenta.

The brain is particularly sensitive to alcohol and alcohol can reduce the number of cells growing in the brain and result in neurons being in the wrong places.
Not Just About Birth Defects

Many FASD characteristics are related to brain development and maturation, not structure.

• FAS social, behavioral, and developmental issues include lower IQ’s, learning disabilities, lower level of adaptive functioning, balance and coordination impairments, sensory deficits or sensitivities, trouble with information processing and decision making.
• Growth restriction at birth and throughout life are common with FAS/FASD

Many women think its okay to have a drink or two later in pregnancy. But...
Alcohol During Pregnancy Can Create A Lifelong Brain That:

...can’t read the emotions or body language of other people

...thinks like the brain of someone much younger

...forgets information

...has difficulty with time and money

...responds slowly

...can’t link cause and effect

...thinks in a disorganized way

....has trouble moving information from one situation to another

...uses poor judgment
Primary Symptoms

Symptoms relating to brain structure, function and dysfunction

- Developmental level of functioning
- Sensory systems
- Nutrition
- Language and communication
- Processing pace – how fast the brain works
- Learning and memory
- Abstract thinking
- Executive functioning
- Strengths
Understanding The Developmental Level Of The Adolescent

- FASD has a neurological basis
- Results in juvenile with FASD being developmentally at a lower age than their actual physical age
- Research suggests they are about half their physical age
  - 14-year-old would be at an 8- or 9-year-old level emotionally and socially.
  - However, would share many characteristics with other 14-year-olds, such as likes and dislikes about music and clothing.
# Functional And Academic Deficits: Adolescents And Adults With FAS/FAE

<table>
<thead>
<tr>
<th>Vineland</th>
<th>Chronological Age Mean</th>
<th>Developmental Age Equivalent</th>
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<tbody>
<tr>
<td>Adaptive Behavior</td>
<td>16.6</td>
<td>9.1</td>
</tr>
<tr>
<td>Communication Skills</td>
<td>16.6</td>
<td>9.0</td>
</tr>
<tr>
<td>Daily Living Skills</td>
<td>16.6</td>
<td>10.1</td>
</tr>
<tr>
<td>Socialization Skills</td>
<td>16.6</td>
<td>7.5</td>
</tr>
<tr>
<td>Receptive Language</td>
<td>16.6</td>
<td>6.8</td>
</tr>
</tbody>
</table>

*Source: Streissguth 1996*
### What It Can Look Like

<table>
<thead>
<tr>
<th>Age 13</th>
<th>Age 13 going on 8 developmentally</th>
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</thead>
<tbody>
<tr>
<td>Act responsibly</td>
<td>Need reminding and supervision</td>
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<tr>
<td>Organize themselves, plan ahead, follow through</td>
<td>Need visual cues, modeling, someone to organize for them</td>
</tr>
<tr>
<td>Meet deadlines after being told once</td>
<td>Comply w/simple short term expectations</td>
</tr>
<tr>
<td>Initiate, follow</td>
<td>Need prompting</td>
</tr>
<tr>
<td>Have appropriate social boundaries</td>
<td>Kinesthetic, tactile, lots of touching</td>
</tr>
<tr>
<td>Understand body space</td>
<td>In your space</td>
</tr>
<tr>
<td>Establish &amp; maintain friendships</td>
<td>Forming early friendships</td>
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</tbody>
</table>
Secondary Behavioral Characteristics

These are the behaviors you see.

They are defensive behaviors developed over time where there is a ‘poor fit.’
Secondary Behavior Symptoms

- Fatigued, frustrated
- Anxious
- Angry
- Shut down, avoidant, blaming
- Poor self esteem
- Depressed
- Impulsive
Some Typical Difficulties

- Say they understand when they do not
- Misinterpret others’ words, actions or body movements
- Has trouble following multiple directions
- Repeatedly breaks the rules
- Do not learn from mistakes or natural consequences
- Have trouble with time, space and money
- Often appear to lie for no reason
Difficulties, Cont’d

- Have hygiene problems
- Seen as lazy, uncooperative and unmotivated
- Have trouble transitioning or with change
- Do not accurately pick up on social cues
- Give in to peer pressure
- Memory problems
- Have trouble determining what to do in a given situation
Accumulation Of Diagnoses:
Select List

**Primary symptoms:**
- Failure to thrive
- Pervasive Developmental Delay
- Speech and Language Delay
- Attention Deficit Disorder

**Secondary symptoms:**
- Reactive Attachment Disorder
- Conduct Disorder
- Emotionally Disturbed
- Oppositional Defiant Disorder
Brain Based Model

The brain is the organizing principle
<table>
<thead>
<tr>
<th>Overlapping Characteristics &amp; Mental Health Diagnoses</th>
<th>FASD</th>
<th>ADD ADHD</th>
<th>Sensory Int. Dys.</th>
<th>Autism</th>
<th>Bi-Polar</th>
<th>RAD</th>
<th>Depression</th>
<th>ODD</th>
<th>Trauma</th>
<th>Poverty</th>
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<tr>
<td>Easily distracted by extraneous stimuli</td>
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<td>Developmental Dysmaturity</td>
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<td>Feel Different from other people</td>
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<td>Often does not follow through on instructions</td>
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<td>Often interrupts/intudes</td>
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<td>Often engages in activities without considering possible consequences</td>
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<td>Often has difficulty organizing tasks &amp; activities</td>
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<td>Difficulty with transitions</td>
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<td>No impulse controls, acts hyperactive</td>
<td>X</td>
<td>X</td>
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<td>X</td>
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<td>Sleep Disturbance</td>
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<td>Indiscriminately affectionate with strangers</td>
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<td>Lack of eye contact</td>
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<td>Not cuddly</td>
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<td>Lying about the obvious</td>
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<td>No impulse controls, acts hyperactive</td>
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<td>Learning lag: “Won’t learn, some can’t learn”</td>
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<td>Incassant chatter, or abnormal speech patterns</td>
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<td>Increased startle response</td>
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<td>Emotionally volatile, often exhibit wide mood swings</td>
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<td>X</td>
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<td>Depression develops, often in teen years</td>
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<td>Problems with social interactions</td>
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<td>Deficit in speech and language, delays</td>
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<td>Over/under-responsive to stimuli</td>
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<td>Perseveration, inflexibility</td>
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<td>Escalation in response to stress</td>
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<td>Poor problem solving</td>
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<td>Difficulty seeing cause &amp; effect</td>
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<td>Exceptional abilities in one area</td>
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<td>Guess at what “normal” is</td>
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<td>Lie when it would be easy to tell the truth</td>
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<td>Difficulty initiating, following through</td>
<td>X</td>
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<td>Difficulty with relationships</td>
<td>X</td>
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<td>Matures time poorly/lack of comprehension of time</td>
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<td>Information processing difficulties, speech/language receptive vs. expressive</td>
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<td>Often loses temper</td>
<td>X</td>
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<td>Often argues with adults</td>
<td>X</td>
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<td>X</td>
<td></td>
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<td>Often actively defies or refuses to comply</td>
<td>X</td>
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<td>Often blames others for his or her mistakes</td>
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<td>Is often touchy or easily annoyed by others</td>
<td>X</td>
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<td>Is often angry and resentful</td>
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Tertiary Symptoms

As the result of a chronic poor fit, anger, failure and alienation:

- Mental health issues – 94%
- Disrupted school experience – 43%
- Inappropriate sexual behavior – 45%
- Trouble with the law – 60% 12 and older
- Confinement in jail or treatment facilities -50%
- Alcohol and drug problems – 35%
- Employment problems – 79%
- Dependent living – 80-90%
Adaptive functioning is much more important than IQ. The higher the IQ, the more problems the individual is likely to have.

“Adaptive functioning is an individual’s ability to cope with every day life demands in order to function safely and appropriately in their community.”

Diane Russell, PhD
More Important Than IQ: Discrepancies

- Between IQ level and adaptive skills
- Between IQ level and academic achievement
- Between verbal IQ and performance IQ
- Uneven profile of cognitive abilities

Fact: only 25% of those with full FAS are mentally retarded
“Flags” FASCETS

These questions screen for the possible presence of underlying brain-based conditions to determine the appropriateness of using a neurobehavioral screening tool.

Was the person adopted? (Yes = positive; there is a 50% probability of prenatal exposure)

Was the person ever in foster care? (Yes = positive; there is an 80% probability of coming from an alcoholic/addicted family system)

Was there difficulty in school? (Yes = positive) Some examples include:
- Ever having an IEP
- “Behavior” problems
- Social difficulty – few friends, isolated, bullied
- Suspended
- Expelled
- Dropped out

Involvement with justice? (Positive: Research has found a disproportionate representation of people with FASD/brain-based conditions in justice.)

How many diagnoses has the person been given? (More than one = positive; the greater the number of diagnoses the greater the likelihood of underlying neurobehavioral involvement)
General Issues With FASD

- Often undiagnosed or misdiagnosed among persons without the facial features
- More difficulties seen in those without FAS facial features and with higher IQ’s
- Adaptive functioning more impaired than intelligence
- Traditional treatments based on behavioral changes do not work
Learning Theory

Some Typical Strategies for Changing Behavior

- Punishment
- Time out
- Lecturing
- Yelling/Scolding
- Grounding
- ?

These techniques are used in all systems – parenting, education, justice, mental health, addictions treatment, social services...
The Sounds Of Judgement

- Manipulative, conning
- Unmotivated, lazy
- Intentional, deliberate, on purpose
- Doing it to me
- Acting like a baby
- Shows no remorse
- Controlling
Changing How We Think!

Beliefs Dictate Interventions!

Behaviors are willful = Punish
Behaviors are symptoms = Support
The Sounds Of Understanding Differently

- Doesn’t understand
- Shut down, overwhelmed
- Exhausted
- Doesn’t get it
- It’s not personal or on purpose
- Is developmentally young for his age
- Has history of chronic frustration
- Rigid, has difficulty shifting gears
<table>
<thead>
<tr>
<th>From…</th>
<th>To</th>
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<tbody>
<tr>
<td>Won’t</td>
<td>Can’t</td>
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<tr>
<td>IS the problem</td>
<td>HAS a problem</td>
</tr>
<tr>
<td>Doesn’t work</td>
<td>Has trouble starting</td>
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<tr>
<td>Acts immature</td>
<td>Is dysmature</td>
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<tr>
<td>Doesn’t try</td>
<td>Tired of failing</td>
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<td>Assuming</td>
<td>Observing</td>
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<td>Punishing</td>
<td>Preventing Problems</td>
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<tr>
<td>High Expectations</td>
<td>Appropriate Expectations</td>
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<tr>
<td>Failure</td>
<td>Success</td>
</tr>
<tr>
<td>Changing PEOPLE</td>
<td>Changing ENVIRONMENTS</td>
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<tr>
<td>Lying</td>
<td>Storytelling to compensate for memory</td>
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<tr>
<td>Fussy</td>
<td>Hypersensitive</td>
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If FA/NB is an invisible physical disability...

Then Providing accommodations for people with FA/NB is as appropriate and effective as providing accommodations for people with other physical disabilities.
Why is FASD Relevant In Court?

FASD = brain damage that may affect executive functioning →

Executive functioning = judgment, decision making, impulse control →

Judgment, decision making, impulse control impact all aspects of behavior in the legal context

Over 100 court decisions regarding FASD reflect general recognition that FASD affects behavior in ways that are relevant to the justice system
The purposes of sentencing such as deterrence, denunciation and rehabilitation assume that the defendant can make choices and learn from their mistakes. Depending on the degree of cognitive deficit, the role of special deterrence may be limited. As has already been noted, many FASD sufferers do not understand cause and effect and will therefore find it difficult or impossible to connect the sentence to their crime. Given the inability to connect cause and effect and therefore to learn from past actions, special deterrence often has little, if any, value.

Balancing Community Protect And Rehabilitation

In many FASD cases the defendant will have a reduced capacity to understand actions and learn from the past and this will contribute to re-offending, these aspects of the disability are likely to make community protection a significant consideration. While high levels of supervision in the community are thought to address the concern of re-offending, the necessary level of supervision is often difficult to arrange or assure.


What The Behaviors May Look Like In The Criminal Justice System

• Easily led by more sophisticated peers
• Multiple low-grade offenses in adolescent years, often with others / frequently arrested
• Offenses don’t “make sense” (e.g., stealing something of little value; engaging in crime when likelihood of being detected is high)
• Impulsive, opportunistic crimes
• Failure to change strategy when something goes wrong (perseveration)
• No exit strategy for crimes resulting in “fight-or-flight” behavior in chaotic high-stress situations
What The Behaviors May Look Like In The Criminal Justice System, Cont’d

- Rights against self-incrimination waived immediately upon arrest
- Guileless confessions (occasionally to offenses subject hasn’t committed)
- No *apparent* guilt or remorse
- Unable to appreciate magnitude of crime (nonchalance, inappropriate smiling)
FASD Is A Potential Mitigating Factor

• It is organic in nature rather than the result of a bad disposition;
• It arises from circumstances entirely beyond the individual’s control (unlike, for example, alcohol or drug abuse); and
• It affects the defendant’s ability to understand society’s norms and/or to conduct his behavior within those norms.

Judge Anthony Wartnik, JD
The Question of Intent

“The following three slides are based on a presentation by Karen Steele, Esq/JD as part of the 2014 Living with FASD Summit

“It makes sense that we should be looking at a person with FASD and what their deficits are in the context of whether a crime has even been committed, because if a person has a difficult time because of their brain based disability, if they have a difficult time understanding and foreseeing the consequences of their actions, if they have a difficult time understanding that if they do a certain act somebody is going to be injured, then it’s hard to say that they actually have the intent to hurt that person.”

• If the person with FASD was not able to foresee the consequences of their action, is there intent there?

• If they are not able to do the planning is there intent there?
Do They Understand Their Rights?

- If an investigator is asking a person with FASD questions, you wonder – does that person understand the consequences of answering these questions?
- Do they understand the consequences of confessing to a crime?
- Are they relating the facts correctly, due to their problems with memory storage and recall?
Are They Able to Help With Their Defense?

- Are they able to contribute in a meaningful manner so that you can understand your client? And can they fully understand the act they are accused of committing?
- Are they able to participate in making key decisions along the way?
- What if there is a plea offer? Will they be able to appreciate the consequences of acting or refusing it?
- Since persons with FASD often have a hard time processing information, do we know for sure that the fully understand the process and its implications in a meaningful way?
Should Developmental Age/Dysmaturity Be Considered?

• If an 18 year old with FASD is accused of committing a crime, should they be tried as an adult or a juvenile?
  • What if developmentally they are functioning at the level of an 8 year old in factors associated with the offense? (Based on FA/NB theory, are we looking at an 8 year old or an 18 year old?)
• Should adaptive functioning be a consideration similar to mental retardation in assigning responsibility and criminal behavior?
Reasons For Hope
Protective Factors

• Stable home – good quality
• Not having frequent changes of home
• Not being a victim of violence, abuse or neglect
• Receiving developmental disability services
• Diagnosis before the age of 6
• Understanding of the disability by caregivers, and protective systems put in place as needed
Changes Over Time – The Brain Keeps Developing!

- Different parts of the brain mature at different rates
  - The temporal and frontal lobes develop later
  - The frontal lobe develops into the 30’s
- Myelin (the coating of the nerves) helps make conduction faster
  - It develops into the 30’s and 40’s
- Based on this, could it be reasonable to speculate that as those with FASD get older, their executive functioning – i.e., their coping strategies - improve?

Edward Riley, PhD
<table>
<thead>
<tr>
<th>From…</th>
<th>To</th>
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<tbody>
<tr>
<td>Independence, autonomy</td>
<td>Interdependence, community</td>
</tr>
<tr>
<td>Do everything alone</td>
<td>Work with others</td>
</tr>
<tr>
<td>Get a college degree</td>
<td>Turn strengths into livelihood</td>
</tr>
<tr>
<td>Manage a complex life</td>
<td>Enjoy simplicity</td>
</tr>
<tr>
<td>Hurry and grow up</td>
<td>Take time to develop</td>
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Questions??
Some Additional Information
Arrest Behaviors

- Immediate waiving of rights
- Naïve cooperation with “friendly” law enforcement officers
- Guileless confessions that most offenders would never make
- Behavioral regression (childlike)
- Confessing to improbable offense or offense behaviors (sometimes false confession)
- Flat affect: cognitive inability to appreciate significance of offense conduct
- No remorse: cognitive inability to appreciate effects of offense behavior on others
- Cognitive inability to grasp seriousness of penalties/sentences
- Inappropriate smiling or laughing
What Lawyers Might Encounter

Individuals with FA/NB

• Appear to understand more than they do in terms of the system
• Will repeat same offense in same set of circumstances, without learning or modifying behavior and still be surprised they get caught
• Will not understand the terms and workings of the system even if they’ve been through it a number of times (e.g. the consequences of a guilty plea)
• Will not understand time difference between sentence of 3 months and three years
• Will often have blanks in their memories, failing to remember important facts
• Appear to be pleasant, humorous, engaging in an interview situation
Lawyers, Cont’d

- Appears as if they don’t care, may be late or fail to show up for appointments
- Easily misled by police and probation officers. They will often act against their own interests
- Do not know how to “play the justice game’ no matter how many times they’ve been through it
- Easily led by others – usually the one who gets caught

David Boulding, Lawyer
What Those In Court Might Encounter

- Inability to understand court proceedings and to assist in own defense. Will not respond to step system of punishment (too abstract, too long, “where are the steps?”) Won’t heed warnings, will breach standard terms of probation

- Won’t be able to tell court “what happened” in a way that makes sense

- May misunderstand questions, be confused by language and confabulate to fill gaps in memory

- Appears not to respect the court, e.g. may stick out tongue, wave to friends, interrupt witnesses, etc.

- Appears to have no remorse to sentencing judge, i.e. takes no responsibility, no renunciation of crime
Court, Cont’d

• May act in appropriately in court, e.g. interrupt the process, correct the prosecutors’ facts without realizing this is an admission of being at the scene and committing the offense.

• Will participate without guile in pre-sentencing report, even when it’s against their own interests.

• Lack of escalation, usually impulsive, opportunistic behavior satisfying momentary desires, e.g. candy, smokes, money for beer, etc.

• In some circumstances they will confess to crimes they have not committed and in others they will deny crimes they have, even when there are witness.

• Often unable to fully understand abstract concepts, e.g. guilty/innocent.
• Many FASD sufferers do not understand cause and effect and will therefore find it difficult or impossible to connect the sentence to their crime

• Sentencing may occur so much later than the actual offense, the individual may not remember why s/he is being punished. If there was more than one charge or case, they may also not know which charge the punishment is for.