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Take the Motherless Children off the Street: Fetal Alcohol Syndrome and the Criminal Justice System

Michael L. Perlin

Heather Ellis Cucolo

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ARTICLES

“Take the Motherless Children off the Street”: Fetal Alcohol Syndrome and the Criminal Justice System

MICHAEL L. PERLIN & HEATHER ELLIS CUCOLO*

Remarkably, there has been minimal academic legal literature about the interplay between fetal alcohol syndrome disorder (“FASD”) and critical aspects of many criminal trials, including issues related to the role of experts, quality of counsel, competency to stand trial, the insanity defense, and sentencing and the death penalty. In this Article, the co-authors will first define fetal alcohol syndrome and explain its significance to the criminal justice system. We will then look at the specific role of experts in cases involving defendants with FASD and consider adequacy of counsel. Next, we will discuss the impact of FASD on the major fundamentals of criminal law and procedure, especially as it relates to questions of culpability. Under this broad umbrella of topics, we

* Michael L Perlin is a Professor Emeritus of Law at New York Law School, where he was Founding Director of the International Mental Disability Law Reform Project, and Co-founder of Mental Disability Law and Policy Associates. Heather Ellis Cucolo is a Distinguished Adjunct Professor of Law at New York Law School, Adjunct Professor of Law at Emory University School of Law, and Co-founder of Mental Disability Law and Policy Associates. The authors wish to thank Drs. Joel Dvoskin, Patricia Zapf, Denis Zavodny, and Megan Carter for their helpful suggestions and ideas. The authors presented webinars based on this Article remotely on Sept. 28, 2022, at Palo Alto University (as part of the CONCEPT continuing education program), and remotely on October 4, 2022, at the University of New Mexico as part of its Law and Mental Health program.

consider questions that may arise in the criminal trial process, such as those related to competency to stand trial (and, to a limited extent, other criminal competencies), the insanity defense, sentencing, and the death penalty. We look carefully at the way that courts all too often dismiss effectiveness-of-counsel claims in such cases, and the implications of this case law. Finally, we investigate why it is so significant that the caselaw in this area has totally ignored the teachings of therapeutic jurisprudence and offer some conclusions and recommendations (based on therapeutic jurisprudence principles) that, we hope, can (at least partially) ameliorate this situation.

INTRODUCTION563

I. THE SCIENCE BEHIND FETAL ALCOHOL SYNDROME, FETAL ALCOHOL SPECTRUM DISORDER, AND PARTIAL FETAL ALCOHOL SYNDROME569

II. EXPERT TESTIMONY AND THE ADEQUACY OF COUNSEL IN FAS CASES577

 A. *Supreme Court Decisions*577

 B. *Perceptions of Expert Testimony*578

III. FAS AND THE CRIMINAL TRIAL PROCESS584

 A. *Introduction*.....584

 B. *Criminal Competencies*.....584

 1. INTRODUCTION584

 2. THE CASELAW585

 C. *The Insanity Defense*.....589

 D. *Sentencing and the Death Penalty*592

 E. *One Recent Case Example: The Parkland Shootings*.....596

 F. *Conclusion*600

IV. THERAPEUTIC JURISPRUDENCE IN GENERAL601

V. APPLYING TJ TO FAS/FASD CASES604

CONCLUSION.....611

INTRODUCTION*

During the time that I was a law professor at New York Law School, I did a series of on-site visits to Central and Eastern Europe—on behalf of what was then called Mental Disability Rights International¹—to facilities for persons with alleged mental disabilities.² On one of these visits, my colleague, Professor Eva Szeli, and I³

* The first two paragraphs of this Introduction (and the first sentence of the third paragraph) were written by co-author Michael L. Perlin, drawing on his personal experiences.

¹ Mental Disability Rights International is now called Disability Rights International. See DISABILITY RTS. INT’L, www.driadvocacy.org (last visited Dec. 11, 2022).

² E.g., Michael L. Perlin, *An Internet-Based Mental Disability Law Program: Implications for Social Change in Nations with Developing Economies*, 30 FORDHAM INT’L L.J. 435, 446 (2007).

³ Professor Szeli and I have written about international human rights law and mental disability law frequently. See generally MICHAEL L. PERLIN ET AL.,

went to the national psychiatric hospital in Riga, Latvia. We walked into one room, a classroom, filled with young people in the, I would estimate, 8-to-12-year range. They stood at attention when we walked in (which we both found unnerving) and stayed that way during our entire visit. When we left, I asked our guide why they were in the hospital. She replied that they were all born with fetal alcohol syndrome and that, “of course, they would be there for the rest of their lives.”⁴

At the time that we had this conversation (over twenty years ago), I was aware of fetal alcohol syndrome (“FAS”) disorder but knew little of it. The first reported case mentioning FAS was decided

INTERNATIONAL HUMAN RIGHTS LAW AND COMPARATIVE MENTAL DISABILITY LAW 3 (2006) (Professor Szeli is a co-author); MICHAEL L. PERLIN ET AL., PSYCHIATRIC ETHICS AND THE RIGHTS OF PERSONS WITH MENTAL DISABILITIES IN INSTITUTIONS AND THE COMMUNITY 1 (Lisa Cosgrove et al. eds., 2008) (Professor Szeli is a co-author); Michael Perlin & Eva Szeli, *Article 14 Liberty and Security of the Person*, in THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: A COMMENTARY 402 (Ilias Bantekas et al. eds., 2018); Michael L. Perlin & Éva Szeli, *Mental Health Law and Human Rights: Evolution and Contemporary Challenges*, in MENTAL HEALTH AND HUMAN RIGHTS: VISION, PRAXIS, AND COURAGE 80 (Michael Dudley et al. eds., 2012); Michael L. Perlin & Eva Szeli, *Mental Health Law and Human Rights: Evolution, Challenges and the Promise of the New Convention*, in UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: MULTIDISCIPLINARY PERSPECTIVES 241 (Jukka Kumpuvuori et al. eds., 2010). She and I team-taught a course in International Human Rights and Mental Disability Law at New York Law School for many years.

⁴ We learned during that visit that “if a person who lives in Riga (Latvia’s capital and largest city) is absent from his leased residence for a year, the lease then is terminated (at the time I was there (late 2000), the rental occupancy rate was at least 98%). Thus, for any such person still institutionalized after that year, it became, in effect, a lifetime commitment.” Michael L. Perlin, “*Striking for the Guardians and Protectors of the Mind*”: *The Convention on the Rights of Persons with Mental Disabilities and the Future of Guardianship Law*, 117 PENN ST. L. REV. 1159, 1162 n.11 (2013). Although these children were, of course, too young to be leaseholders, there was no expectation that *anyone* institutionalized for an extended period in that hospital would ever be released. My conversations with adult patients—including one, memorably, with two adult males who were arranging music in very complex (but totally appropriate) ways—suggested that there were many who should have been discharged.

in 1981,⁵ its first mention in a law review article was in 1983.⁶ It was not until recent years that courts have begun to examine its impact in a wide range of legal areas,⁷ including, but not limited to, issues of parental rights,⁸ the death penalty,⁹ mitigation in other criminal cases,¹⁰ children in need of social services,¹¹ and social security benefits cases.¹² Scholars have begun to explore its impact on mandated rehabilitation for mothers who give birth to children with FAS,¹³ criminal liability on the part of the mother and the child,¹⁴ tort liability for failure to warn (in the context of liquor purchases),¹⁵ and the specific impact of fetal alcohol spectrum disorder ("FASD") on Native Americans.¹⁶

⁵ See *In re Price*, No. 43443, 1981 WL 4645, at *3 (Ohio Ct. App. Nov. 25, 1981).

⁶ See Susan R. Weinberg, *A Maternal Duty to Protect Fetal Health?*, 58 IND. L.J. 531, 534 (1983).

⁷ See Rachel L. Kretser, *Bringing Awareness to FAS and FASD in the Legal System*, N.Y. L.J. (2021) (When it comes to FASD, "[u]nfortunately, those of us in the courts, like most of us in society, have no idea what we are seeing.").

⁸ E.g., *N.J. Div. of Youth and Fam. Servs. v. B.M.*, 993 A.2d 258, 261 (N.J. Super. Ct. App. Div. 2010).

⁹ E.g., *State v. Cooper*, 979 A.2d 792, 812 (N.J. Super. Ct. App. Div. 2009); see *infra* notes 113–14 and accompanying text.

¹⁰ E.g., *Anderson v. Kelley*, 938 F.3d 949, 956, 958 (8th Cir. 2019); see *infra* note 124.

¹¹ E.g., *S.C. v. Ind. Dep't of Child Servs.*, No. 21A-JC-550, 2021 WL 4258820, at *1 (Ind. App., 2021).

¹² E.g., *Nauman v. Comm'r of Soc. Sec.*, No. 1:20-cv-00144-HSO-JCG, 2021 WL 4096547, at *1 (S.D. Miss. 2021).

¹³ See Grace Lykins, *Prohibition During Pregnancy: Supporting Mandatory Outpatient Rehabilitation for Women Who Give Birth to Babies with Fetal Alcohol Syndrome*, 21 J.L. & POL'Y 155, 158 (2012).

¹⁴ See Judith A. Jones, *Fetal Alcohol Syndrome—Contrary Issues of Criminal Liability for the Child and His Mother*, 24 J. JUV. L. 165, 166 (2003–2004).

¹⁵ See Rhondetta Goble, *Fetal Alcohol Syndrome: Liability for Failure to Warn—Should Liquor Manufacturers Pick Up the Tab?*, 28 J. FAM. L. 71, 73–74 (1989).

¹⁶ See Claire E. Dineen, *Fetal Alcohol Syndrome: The Legal and Social Responses to Its Impact on Native Americans*, 70 N.D. L. REV. 1, 4 (1994). We have known of the prevalence of FASD in this population for at least forty years. See, e.g., Jon M. Aase, *The Fetal Alcohol Syndrome in American Indians: A High Risk Group*, 3 NEUROBEHAVIORAL TOXICOLOGY & TERATOLOGY 153, 153 (1981).

Despite these advancements, there has been minimal academic legal literature¹⁷ about the interplay between FAS and critical aspects of many criminal trials, including issues related to the role of experts, quality of counsel, competency to stand trial, the insanity defense, and sentencing and the death penalty.¹⁸ Nor has there been virtually any literature about the interplay between FASD-related issues and the legal school of thought known as therapeutic jurisprudence.¹⁹

¹⁷ Interestingly, there has been much more literature about this intersection in behavioral science journals. *E.g.*, Diane K. Fast & Julianne Conry, *The Challenge of Fetal Alcohol Syndrome in the Criminal Legal System*, 9 ADDICTION BIOLOGY 161, 161 (2004); Diane K. Fast et al., *Identifying Fetal Alcohol Syndrome Among Youth in the Criminal Justice System*, 20 J. DEVELOPMENTAL & BEHAV. PEDIATRICS 370, 370 (1999); Lori Vitale Cox et al., *Knowledge and Attitudes of Criminal Justice Professionals in Relation to Fetal Alcohol Spectrum Disorder*, 15 CAN. J. CLINICAL PHARMACOLOGY 306, 306 (2008); Francesco Sessa et al., *Understanding the Relationship Between Fetal Alcohol Spectrum Disorder (FASD) and Criminal Justice: A Systematic Review*, 10 HEALTHCARE 1, 1 (2022); Jacqueline Pei et al., *Fetal Alcohol Spectrum Disorder and the Criminal Justice System: A Research Summary*, 2 J. MENTAL HEALTH & CLINICAL PSYCH. 48, 48 (2018); *see infra* Part I.

¹⁸ *See* David A. Davis, *A New Insanity—Fetal Alcohol Syndrome*, 66 FLA. BAR J. 53, 54 (1992). There is some mention in the literature of FAS as a potential level-of-crime-reducer in cases that do not rise to the level of legal insanity. *See* Rebecca Hollander-Blumoff, *Crime, Punishment, and the Psychology of Self-Control*, 61 EMORY L.J. 501, 523 (2012) (“A defendant’s medical history, for example, may suggest problems from conception onward that could include neurological defects, mental retardation, fetal alcohol syndrome, chemical dependencies, or a wide variety of other mental health disorders that do not rise to the level of insanity but nonetheless suggest to the jury that the defendant was in some way incapable of exercising full agency in deciding to commit the crime in question.”).

¹⁹ There is virtually no literature that discusses FAS from a therapeutic jurisprudence perspective, or that even mentions both topics, and almost nothing from the past two decades. *But see, e.g.*, David C. Brody & Heidee McMillin, *Combating Fetal Substance Abuse and Governmental Foolhardiness Through Collaborative Linkages, Therapeutic Jurisprudence and Common Sense: Helping Women Help Themselves*, 12 HASTINGS WOMEN’S L.J. 243, 246, 264–65 (2001); Larry N. Chartrand & Ella M. Forbes-Chilibeck, *The Sentencing of Offenders with Fetal Alcohol Syndrome*, 11 HEALTH L.J. 35, 49 (2003). Although “therapeutic jurisprudence” is not mentioned, David Boulding’s consideration of FAS and the law is written from a therapeutic jurisprudence perspective. *See* David Boulding, *Fetal Alcohol and the Law*, in REHABILITATING LAWYERS: PRINCIPLES OF THERAPEUTIC JURISPRUDENCE FOR CRIMINAL LAW PRACTICE 188 (David B. Wexler ed., 2008).

In this Article, the co-authors will first define fetal alcohol syndrome and explain its significance to the criminal justice system.²⁰ We will then look at the specific role of experts in cases involving defendants with FASD²¹ and consider adequacy of counsel.²² Next, we will discuss how FASD impacts the major fundamentals of criminal law and procedure, especially as it relates to questions of culpability.²³ Under this broad umbrella of topics, we consider questions that may arise in the criminal trial process, such as those related to competency to stand trial (and, to a limited extent, other criminal

²⁰ See *infra* Part I.

²¹ See *infra* Part II. Beyond the scope of this Article is an investigation of cases in which the victim has been diagnosed with FAS. See, e.g., Jacqueline McMurtrie, *The Criminal Justice System's Disparate Treatment of Individuals with Fetal Alcohol Spectrum Disorders in Cases Involving Sexual Activity*, 39 J. PSYCHIATRY & L. 159, 160 (2011). We expect to consider that question in the future.

²² With another co-author, one of the co-authors of this Article has recently considered this question in a cohort of death penalty cases and concluded that caselaw was "bizarre and frightening," noting that, "in virtually all cases, *Strickland* errors [involving ineffectiveness of counsel]—often egregious errors—were ignored." Michael L. Perlin & Talia Roitberg Harmon, "*Insanity Is Smashing Up Against My Soul*": *The Fifth Circuit and Competency To Be Executed Cases After Panetti v. Quarterman*, 60 U. LOUISVILLE L. REV. 557, 560 (2022) (discussing and quoting, in part, Michael L. Perlin, Talia Roitberg Harmon & Sarah Chatt, "*A World of Steel-Eyed Death*": *An Empirical Evaluation of the Failure of the Strickland Standard to Ensure Adequate Counsel to Defendants with Mental Disabilities Facing the Death Penalty*, 43 U. MICH. J.L. REFORM 261, 308 (2019) [hereinafter *Steel-Eyed Death*]); see also Michael L. Perlin, Talia Roitberg Harmon & Haliegh Kubiniec, "*The World of Illusion Is at My Door*": *Why Panetti v. Quarterman Is a Legal Mirage*, 59 CRIM. L. BULL. (2023) (forthcoming) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4172316).

²³ See *infra* Part III.

competencies), the insanity defense, sentencing, and the death penalty.²⁴ We then consider what we have discussed in relation to Nicholas Cruz, the defendant in the Parkland school shooting.²⁵ Finally, we investigate why it is so significant that the caselaw in this area has totally ignored the teachings of therapeutic jurisprudence²⁶ and offer some conclusions and recommendations that, we hope, can (at least partially) ameliorate this situation.²⁷

The title from our Article comes from Bob Dylan's song *Jokerman*.²⁸ As we have noted before in another law review article that draws on this song for part of its title, the lyrics suggest that "'evil' is not 'out there', among 'the others', but is inside us all."²⁹ And the lyric in question represents "people without any direction, stability or proper guidance in their lives . . . [who] make no choices in their lives."³⁰ Some of the defendants in the cases that we discuss are, in many ways, at least constructively "motherless children," and ones who have, sadly, had little to no "guidance in their lives."³¹ These facts are utterly disregarded in virtually the entire body of caselaw

²⁴ There has been only one reported case that relates to the question of FASD and the jury charge. *Bryant v. State*, 951 So.2d 732, 736, 753–54 (Ala. Crim. App. 2003). There, a defendant had been sentenced to death (a sentence subsequently vacated) in a case in which the judge found that the 47 non-statutory mitigating circumstances were outweighed by aggravating circumstances. *Id.* at 753. One of those 47 circumstances was "that Bryant suffered from 'fetal alcohol effects' (a milder version of fetal alcohol syndrome)." *Id.* at 753 n.5. This language came from the defendant's requested jury charge. *Id.*

²⁵ See *infra* Section III.E.

²⁶ See *infra* Parts IV and V.

²⁷ See *infra* Part IV.

²⁸ BOB DYLAN, *JOKERMAN* (Special Rider Music 1983).

²⁹ Michael Gray, *THE BOB DYLAN ENCYCLOPEDIA* 359 (2006); Heather Ellis Cucolo & Michael L. Perlin, "Far from the Turbulent Space": Considering the Adequacy of Counsel in the Representation of Individuals Accused of Being Sexually Violent Predators, 18 UNIV. PA. J.L. & SOC. CHANGE 125, 134 (2015). One of the co-authors has drawn on this song for another article title as well. See Michael L. Perlin & Naomi M. Weinstein, "Friend to the Martyr, a Friend to the Woman of Shame": Thinking About the Law, Shame and Humiliation, 24 S. CAL. REV. L. & SOC. JUST. 1, 6 (2014).

³⁰ See Kees de Graaf, *Bob Dylan's 'Jokerman': An Analysis of the Lyrics*, KEES DE GRAAF, <https://www.keesdegraaf.com/media/Misc/8558jokermanfullversion.pdf> (last visited Dec. 11, 2022).

³¹ *Id.*; see, e.g., *infra* Section III.E.

that we examine here.³² We hope that this Article helps shine a light on the legal significance of the underlying circumstances in cases of FASD.

I. THE SCIENCE BEHIND FETAL ALCOHOL SYNDROME, FETAL ALCOHOL SPECTRUM DISORDER, AND PARTIAL FETAL ALCOHOL SYNDROME

Fetal alcohol spectrum disorder (“FASD”) generally refers to the range of birth defects that results from prenatal alcohol exposure and includes several sub-classifications.³³ Significantly, prenatal alcohol consumption has been documented as one of the main contributors to preventable birth defects and the later onset of lifelong developmental disabilities.³⁴ Due to the intense stigma that surrounds women who drink during pregnancy, accurate data and fully supported studies on the prevalence of FASD are difficult to achieve.³⁵ Alcohol exposure *in vivo* can cause a number of conditions that become apparent postpartum, and the presentation of those conditions

³² See *infra* Section III.B.2.

³³ Kenneth Lyons Jones & David W. Smith, *Recognition of the Fetal Alcohol Syndrome in Early Infancy*, 302 LANCET 999, 999 (1973) (coining the phrase “fetal alcohol syndrome”); see also Larry Burd et al., *Prevalence of Fetal Alcohol Spectrum Disorder and Screening in the Forensic Context*, in EVALUATING FETAL ALCOHOL SPECTRUM DISORDERS IN THE FORENSIC CONTEXT 59, 60, 70–78 (Natalie Novick Brown ed., 2021) (discussing the use of the Alcohol Related Neurodevelopmental Disorder Behavioral Checklist (“ABC”), a screening instrument designed to detect possible FASD in children and adolescents).

³⁴ Sessa et al., *supra* note 17, at 1; see Philip A. May et al., *The Epidemiology of Fetal Alcohol Syndrome and Partial FAS in a South African Community*, 88 DRUG & ALCOHOL DEPENDENCE 259, 260, 269 (2007).

³⁵ See Ernest L. Abel, *Was the Fetal Alcohol Syndrome Recognized by the Greeks and Romans?*, 34 ALCOHOL & ALCOHOLISM 868, 868 (1999) (discussing the inaccuracy of an FASD study). “In *Problemata* (322 BCE), Aristotle had observed that ‘foolish, drunken or hare-brained women, for the most part, bring forth children like unto themselves, difficult and listless.’” Daniel J. Bonthius & Daniel Bonthius Jr., *Fetal Alcohol Syndrome*, MEDLINK NEUROLOGY (Mar. 4, 2022), <https://www.medlink.com/articles/fetal-alcohol-syndrome>. “The Babylonian Talmud (200 CE to 500 CE) warns that ‘one who drinks intoxicating liquor will have ungainly children.’” *Id.* The Old Testament of the Hebrew Bible contains a very specific proscription to the wife of Zorah to “beware, and drink no wine or strong drink, and eat nothing unclean, for lo, you shall conceive and bear a son.” BOOK OF JUDGES 13:4-5 (Revised Standard Version).

is contained under the umbrella of FASD.³⁶ Studies have suggested that between one and five percent of people can be diagnosed with FASD,³⁷ but, “due to under-reporting, unclear diagnostic criteria, and inconsistent clinical presentation, the exact number of infants and children who suffer from fetal alcohol exposure and related abnormalities is unknown.”³⁸

To highlight our particular focus in this Article, estimations of FASD in correctional settings reveal that “[n]early one out of four children in juvenile corrections has FASD, and prevalence estimates range from 23 percent to 60 percent.”³⁹ Incarcerated adults with FASD ranges from 11 percent to 25 percent.⁴⁰ These estimates are posited despite the fact that identification and diagnosis of FASD in a correctional setting is extremely rare, and, as a result, a diagnosis-informed treatment plan tailored to FASD is usually absent.⁴¹ Consensus amongst clinicians reveals that there is no cure for FASD, and the resulting deficits usually extend into adulthood.⁴² “People who suffer from the [various] manifestations of FASD struggle with limited intelligence, poor social judgment, impulsivity, the inability to learn from experiences, and trouble understanding social cues.”⁴³ Importantly, experts fear that the greater use of alcohol during the

³⁶ Jonathan B. Jassey, *Symptoms of Fetal Alcohol Spectrum Disorders*, VeryWellHealth (Sept. 03, 2021), <https://www.verywellhealth.com/symptoms-of-fetal-alcohol-spectrum-disorders-67319>.

³⁷ Larry Burd & William Edwards, *Fetal Alcohol Spectrum Disorders: Implications for Attorneys and the Courts*, 34 CRIM. JUST. 21, 21 (2019).

³⁸ Adam J. Duso & John Stogner, *Re-Evaluating the Criminalization of in Utero Alcohol Exposure: A Harm-Reduction Approach*, 24 WM. & MARY BILL. RTS. J. 621, 628 (2016).

³⁹ Burd & Edwards, *supra* note 37, at 21. On specific issues raised in the juvenile justice system, *see generally* Dilys Haner et al., *Psychological Assessment for Juvenile Courts*, in EVALUATING FETAL ALCOHOL SPECTRUM DISORDERS IN THE FORENSIC CONTEXT 285 (Natalie Novik Brown ed., 2021); Douglas Waite, *Identifying and Providing Alternatives to Detention for Adolescents with Fetal Alcohol Spectrum Disorder in the Juvenile Justice System*, in EVALUATING FETAL ALCOHOL SPECTRUM DISORDERS IN THE FORENSIC CONTEXT 309 (Natalie Novik Brown ed. 2021).

⁴⁰ Burd & Edwards, *supra* note 37, at 21.

⁴¹ *Id.*

⁴² *See id.*

⁴³ Christopher Fanning, *Defining Intellectual Disability: Fetal Alcohol Spectrum Disorders and Capital Punishment*, 38 RUTGERS L. REC. 97, 98 (2010–2011).

COVID-19 pandemic may contribute to a higher number of cases involving individuals with FASD.⁴⁴

Oftentimes, the term fetal alcohol syndrome will be used (both in the caselaw and in scholarly articles) interchangeably with fetal alcohol spectrum disorder, but understanding the distinctions, particularly in the law, between the two terms and other terms under the FASD umbrella is crucial.⁴⁵ FASD "is an umbrella term which includes a wide range of neurological and behavioral problems that can affect a person who was born to a woman who had abused alcohol during pregnancy."⁴⁶ Distinguishing FASD delineations is accomplished by observing the specific symptoms identified and diagnosed in each individual.⁴⁷ Although it is often difficult to accurately diagnose under FASD for a whole host of reasons,⁴⁸ the characteristic distinctions within the spectrum are outlined via published guidelines.⁴⁹

FAS, for instance, is considered to be the most severe in its presentation, and is diagnosed through an examination of various defects acquired at birth and manifesting throughout early development, such as: height and/or weight at less than the tenth percentile; unique cluster of facial anomalies; severe structural, neurological, and/or functional abilities; and the extent of the prenatal alcohol exposure (confirmed, unknown, or disconfirmed).⁵⁰ Although individuals with FAS tend to be the most impaired on the spectrum, other delineations under FASD, such as PFAS (Partial Fetal Alcohol Syn-

⁴⁴ Kirsten Weir, *A Hidden Epidemic of Fetal Alcohol Syndrome*, MONITOR ON PSYCHOLOGY, July/Aug. 2022, at 24.

⁴⁵ May et al., *supra* note 34, at 260, 268 (demonstrating how terms under the FASD umbrella, including FAS, can have different severity levels).

⁴⁶ Sessa et al., *supra* note 17, at 1.

⁴⁷ See May et al., *supra* note 34, at 261.

⁴⁸ Diagnosis challenges are due to less severe cases, reluctance of the mother to self-report alcohol abuse during pregnancy, and presentation of FASD without observable physical symptoms. See Kenneth Lyons Jones & Ann P. Streissguth, *Fetal Alcohol Syndrome and Fetal Alcohol Spectrum Disorders*, 38 J. PSYCH. & L. 373, 378 (2010).

⁴⁹ Sessa et al., *supra* note 17, at 2.

⁵⁰ *Id.*

drome) and ARND (Alcohol Related Neurodevelopmental Disorders), show the most severe secondary disabilities.⁵¹ A determination of PFAS occurs when an individual is lacking in one or more of the criteria used to evaluate FAS but still presents with various physical and emotional deficits.⁵² ARND is considered when the individual does not display any outward physical abnormalities but has documented central nervous system abnormalities and other cognitive/behavioral problems.⁵³

Although FASD impairments increase the risk for intellectual disability, it is not the most typical presentation.⁵⁴ Thus, any firm reliance on IQ as the key marker for FASD is just as detrimental as it is when assessing persons with intellectual disability and/or developmental disability.⁵⁵ A person with FASD may struggle with a whole host of limitations and yet still score within the average range on IQ tests.⁵⁶ If the absence of outward physical manifestations, such as facial abnormalities, is coupled with fluctuating IQ scores, FASD is often overlooked and has rightfully earned the designation of an “invisible disease.”⁵⁷ In fact, FASD is referenced in the Diagnostic and Statistical Manual (DSM-5) as a central nervous system dysfunction (i.e., brain damage), and as a neurodevelopmental disorder associated with prenatal alcohol exposure.⁵⁸ The DSM-5 designates the prenatal alcohol disorder as the mental health diagnosis for FASD without requiring the presence of physical dysmorphism (i.e., facial abnormalities and growth deficits seen in FAS), and thus recognizes “that there is no consistent difference in scope or degree of brain damage among the various FASD medical conditions.”⁵⁹

⁵¹ See May et al., *supra* note 34, at 260, 268.

⁵² *Id.* at 261.

⁵³ *Fetal Alcohol Spectrum Disorders (FASD)*, OCALI, https://www.ocali.org/project/learn_about_fasd (last visited Dec. 11, 2022).

⁵⁴ Burd & Edwards, *supra* note 37, at 27 (“Overemphasizing the importance of IQ alone as a criterion for either intellectual disability or developmental disability is often misleading.”).

⁵⁵ See *Trevino v. Davis*, 861 F.3d 545, 549–50 (5th Cir. 2017).

⁵⁶ Fanning, *supra* note 43, at 107.

⁵⁷ *Id.* at 108.

⁵⁸ Natalie Novick Brown & Stephen Greenspan, *Diminished Culpability in Fetal Alcohol Spectrum Disorders (FASD)*, 40 BEHAV. SCIS. & L. 1, 3 (2022).

⁵⁹ *Id.*

The significance for legal professionals is the broad range of identifying markers—there is no “one size fits all” set of characteristics.⁶⁰ Attorneys representing individuals in this population should focus on the adaptive deficits of a client with FASD and should stress the low adaptive behavioral skills and longevity of the condition (extending to the client’s entire lifespan).⁶¹ Markers to look out for include:

- having a sibling with FASD;
- a history of adoption or continuous child protective services involvement;
- special education placement;
- compounded ADHD diagnosis;⁶²
- sleep disorders;
- attachment disorders, and
- co-occurring psychiatric disorders.⁶³

Persons with FASD typically do not make connections between cause and effect, struggle to anticipate consequences, and/or fail to exhibit empathy and take the perspective of another person.⁶⁴ A recent survey article underscores “how FASD can affect legal defendants, including vulnerability to peer pressure, being easily manipulated, insufficient comprehension of legal proceedings, difficulty in

⁶⁰ See Burd & Edwards, *supra* note 37, at 23 (showing different indicators attorneys should look out for).

⁶¹ See Fanning, *supra* note 43, at 104 (demonstrating how courts look to adaptive skills when determining mental retardation issues); Tracy Jirikowic et al., *Children with Fetal Alcohol Spectrum Disorders: A Descriptive Profile of Adaptive Function*, 75 CAN. J. OCCUPATIONAL THERAPY 238, 239 (2008) (“Adaptive skill deficits are clearly a primary clinical concern for this population.”).

⁶² Amanda Chan, *ADHD vs. Fetal Alcohol Syndrome: Kids’ Learning Problems Differ*, LIVE SCIENCE (May 30, 2013), <https://www.livescience.com/35547-learning-problems-kids-adhd-prenatal-alcohol-exposure.html>. The constellation of FASD behaviors that most commonly comes to the attention of educational, legal, or medical caregivers is the same as the cluster of symptoms characteristic of attention deficit /hyperactivity disorder (AD/HD). See *id.* These symptoms form the core disabilities of FASD. See *id.*

⁶³ Burd & Edwards, *supra* note 37, at 23.

⁶⁴ Fanning, *supra* note 43, at 107.

assisting legal counsel, learning impairment, acquiescence or higher levels of suggestibility, and difficulty understanding consequences.”⁶⁵

Recognizing the role of attorneys, the American Bar Association passed a resolution advocating for “training to enhance awareness of FASD and its impact on individuals in the child welfare, juvenile justice, and adult criminal justice systems and the value of collaboration with medical, mental health, and disability experts.”⁶⁶ The Resolution further urged “the passage of laws, and adoption of policies at all levels of government that acknowledge and treat the effects of prenatal alcohol exposure and better assist individuals with FASD.”⁶⁷ Accompanying the Resolution is a report that provides the background on FASD and discusses its impact on the justice system.⁶⁸

In a recent research article, two clinicians have identified these relevant behavioral characteristics for persons with FASD:

1. too easily led by others,
2. deficient risk perception (“does not foresee potential danger”),
3. impulsivity,
4. unaware of the consequences of behavior,
5. forgets previously learned information,
6. indiscriminately friendly,

⁶⁵ Jerrod Brown et al., *Fetal Alcohol Spectrum Disorder (FASD) and Suggestibility: A Survey of United States Federal Case Law*, 80 INT’L J.L. & PSYCHIATRY 1, 1 (2022).

⁶⁶ *FASD Resolution*, A.B.A., https://www.americanbar.org/groups/public_interest/child_law/resources/attorneys/fasd-resolution/ (Sept. 24, 2018).

⁶⁷ *Id.*

⁶⁸ *Id.* Interestingly, the report emphasizes that “[n]either the Resolution nor this Report should be construed as suggesting that use of alcohol during pregnancy is, or should be, a criminal act.” *Id.* See John Stogner, *The War on Whiskey in the Womb: Assessing the Merit of Challenges to Statutes Restricting the Alcohol Intake of Pregnant Women*, 7 RUTGERS J.L. & PUB. POL’Y 259, 260, 277 (2009) (emphasis added) (noting that state statutes aimed at restricting alcohol consumption while pregnant are constitutional because “[t]he Supreme Court has acknowledged that states have a more than legitimate interest in the health of a viable fetus.”).

7. superficially communicative (“chatty”),
8. talks about unrealistic/fantastical subjects,
9. exaggerates to impress,
10. tries hard and wants to please, and
11. misses social cues and fine points or subtleties in communication.⁶⁹

These characteristics, such as impulsivity, put individuals with FASD at a greater risk of ending up in the criminal justice system.⁷⁰ Such characteristics have the potential to impact all stages of the criminal justice process—from arrest through sentencing and punishment.⁷¹ For example, because of the diminished ability to recognize risk, people with FASD “tend to be suggestible and gullible,” and more likely to be coerced by peer pressure or succumb to the whim of a more forceful co-conspirator.⁷² People with FASD may make false confessions and may not understand their *Miranda* rights.⁷³ They may have trouble remembering bail conditions or court dates and be sanctioned with breaches of court orders.⁷⁴ The deficits that have an impact upon executive functioning⁷⁵ strongly suggests that

⁶⁹ Brown & Greenspan, *supra* note 58, at 8–9.

⁷⁰ See Kelly Herrmann, *Filling the Cracks: Why Problem-Solving Courts Are Needed to Address Fetal Alcohol Spectrum Disorders in the Criminal Justice System*, 18 SCHOLAR: ST. MARY’S L. REV. & SOC. JUST. 241, 244, 255 (2016); see also *Roper v. Simmons*, 543 U.S. 551, 569 (2005) (indicating that impulsivity, lack of maturity, and other factors make youthful offenders less deterrable).

⁷¹ Another significant problem for those with FASD as well as ID is acquiescence bias or tendency to agree with statements or answer yes/no questions with “yes.” See Brown and Greenspan, *supra* note 58, at 8. This could very well have an impact on statements made upon arrest and in securing a confession because the individual feels compelled to respond in an agreeable manner without assessing the content of questions or “true” preferences. See *id.*

⁷² *Id.* at 7 (“In fact, social vulnerability in offenders with ID was one of the reasons cited by Justice Stevens for taking the death penalty off the table in the *Atkins* opinion.”).

⁷³ See Kaitlyn McLachlan et al., *Evaluating the Psycholegal Abilities of Young Offenders with Fetal Alcohol Spectrum Disorder*, 38 LAW & HUM. BEHAV. 10, 10 (2014).

⁷⁴ See Jerrod Brown et al., *Perceptions of FASD by United States District Attorneys*, 7 J. INTELL. DISABILITIES & OFFENDING BEHAV. 195, 198 (2016).

⁷⁵ This includes one’s planning, organizing, sequencing and abstracting abilities. See e.g., *United States v. Rothman*, No. 08-20895-CR, 2009 WL 426282, at

we must scrutinize whether the individual has the legal capacity to commit deliberate or intentional crimes.⁷⁶ Without a qualified assessment or diagnosis, it is up to the courts and the attorneys to recognize the impact, if any, of FASD on arrest, interrogation, and any confession during pretrial procedures and any procedural and substantive rights throughout plea bargaining, trial, and sentencing.⁷⁷

The first published study that attempted “to empirically evaluate the psycho-legal abilities of young offenders with FASD”⁷⁸ concluded that there is strong support to suggest that persons with FASD may “be at increased risk for misunderstanding, misappreciation, and miscommunication across arrest and trial contexts.”⁷⁹ The study cautioned that not all young offenders with FASD experienced limitations, such as exemplifying the wide disparities on the “spectrum.”⁸⁰ Having the diagnosis was not necessarily a strong predictor of impairment in “police interrogations, and only partially accounted for deficits in adjudicative capacities.”⁸¹ The authors also concluded that “the utility of tailoring legal accommodations or interventions to this specific subset of young offenders remains questionable, particularly in light of limited resources,” and suggested these factors be taken into account when analyzing policy suggestions that promote “wide-ranging specialized accommodations for individuals with FASD under the law.”⁸²

*28 (S.D. Fla. Feb. 19, 2009). For a recent reconsideration of this issue, see Stephen J. Morse, *Is Executive Function the Universal Acid?* 16 CRIM. J. & PHIL. 299, 299 (2022).

⁷⁶ See Herrmann, *supra* note 70, at 255.

⁷⁷ See McLachlan et al., *supra* note 73, at 20. For a model of FAS assessment, see Natalie Novick Brown et al., *A Proposed Model Standard for Forensic Assessment of Fetal Alcohol Spectrum Disorders*, 38 J. PSYCHIATRY & L. 383, 383 (2010).

⁷⁸ McLachlan et al., *supra* note 73, at 20.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* The study directly pointed to the American Bar Association, FASD Resolution (2012). *Id.* at 10, 11, 20. See Herrmann, *supra* note 70, at 244; see also FASD Resolution, August 2012, AMERICAN BAR ASSOCIATION, https://www.americanbar.org/groups/public_interest/child_law/resources/attorneys/fasd-resolution/ (last updated Sept. 24, 2018).

In addition to these many diagnostic features, criminal justice professionals must also acknowledge the cultural and ethnic component to FASD. In the United States, aboriginal communities seem to be among those particularly vulnerable to the incidence of FASD.⁸³ Native Americans and Alaskan Eskimo-Inuit peoples have the highest rate of FASD among various ethnic groups, followed by African Americans.⁸⁴ "FASD is both worsened by and further perpetuates the financial, legal, interpersonal, and health disasters that often accompany poverty."⁸⁵ Without the means or access to interventions and appropriate resources, a child with FASD will have a much greater chance of eventual interaction with the criminal justice system.⁸⁶

In the next sections, we will evaluate the caselaw that has developed around this population, looking both at issues of experts, quality of counsel, and forensic aspects of the criminal trial process.

II. EXPERT TESTIMONY AND THE ADEQUACY OF COUNSEL IN FAS CASES

A. *Supreme Court Decisions*

In *Ake v. Oklahoma*, the Court concluded that a "criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense."⁸⁷ Subsequently, in *McWilliams v. Dunn*, the Court built on *Ake*, holding that

⁸³ Bryan P. Schwartz et al., *A Prevention Strategy: Eliminating FASD in Indigenous Communities*, 40 MAN. L.J. 123, 125 (2017). In a 1991 study of Native Americans living in the Southwest, for instance, tribes whose customs led pregnant women to drink heavily and frequently had the highest ratio of FAS to Fetal Alcohol Effects (FAEs) in children. See Philip A. May & J. Phillip Gossage, *Maternal Risk Factors for Fetal Alcohol Spectrum Disorders: Not as Simple as It Might Seem*, 34 ALCOHOL RES. & HEALTH 15, 19 (2011).

⁸⁴ Phillip A. May & J. Phillip Gossage, *Estimating the Prevalence of Fetal Alcohol Syndrome: A Summary*, 25 ALCOHOL RES. & HEALTH 159, 163 (2001).

⁸⁵ Kathryn Page, *Issue Facing Family Courts: The Invisible Havoc of Prenatal Alcohol Damage*, 4 J. CTR. FOR FAMS. CHILD. & CTS. 67, 71 (2003).

⁸⁶ See *id.* at 80.

⁸⁷ *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985).

the defendant had the right to an expert to “translate these data [medical records, other doctors’ reports] into a legal strategy”⁸⁸ It is remarkable that there is so little caselaw on the key question of whether such testimony is actually made available to a defendant, a question that grows in importance in an inquiry such as the one we are making here in which the public’s attitudes are so discordant from the science we have discussed above.⁸⁹

B. *Perceptions of Expert Testimony*

In an earlier paper, one of the co-authors had this to say about factfinders’ perceptions in the criminal justice system:

The public—and for the purposes of this paper, this includes judges as well as jurors along with those whose knowledge base flows from TV news and Internet websites—is dead wrong about everything it thinks it knows about the full range of topics that matter so much in the criminal justice system.⁹⁰

These erroneous views can, in large part, be attributed to “the unthinking use of heuristic thinking devices (including, but certainly not limited to, the vividness effect and confirmatory bias)”⁹¹ and the

⁸⁸ *McWilliams v. Dunn*, 137 S. Ct. 1790, 1800 (2017).

⁸⁹ The co-authors discuss this in a parallel (and to some extent, overlapping) context (traumatic brain injury) in Alison J. Lynch, Michael L. Perlin & Heather Ellis Cucolo, “*My Bewildering Brain Toils in Vain*”: *Traumatic Brain Injury, The Criminal Trial Process, and the Case of Lisa Montgomery*, 74 *RUTGERS L. REV.* 215, 262 (2021).

⁹⁰ Michael L. Perlin, “*Deceived Me into Thinking/I Had Something to Protect*”: *A Therapeutic Jurisprudence Analysis of When Multiple Experts Are Necessary in Cases in which Factfinders Rely on Heuristic Reasoning and “Ordinary Common Sense”*, 13 *L.J. SOC. JUST.* 88, 89 (2020).

⁹¹ “Heuristics” is a cognitive psychology construct that refers to the implicit thinking devices that individuals use to simplify complex, information-processing tasks, the use of which frequently leads to distorted and systematically erroneous decisions and causes decision-makers to “ignore or misuse items of rationally useful information.” Michael L. Perlin & Naomi Weinstein, *Said I, ‘But You Have No Choice’: Why a Lawyer Must Ethically Honor a Client’s Decision about Mental Health Treatment Even if It Is Not What S/he Would Have Chosen*, 15 *CARDOZO PUB. L. POL’Y & ETHICS J.* 73, 86–87 (2016) (citing and discussing, in part, Michael J. Saks & Robert F. Kidd, *Human Information Processing and Adjudication: Trial by Heuristics*, 15 *L. & SOC’Y REV.* 123, 123 (1981)); see John S.

similarly unthinking use of false "ordinary common sense"⁹² in decision-making in such cases.⁹³

Among the markers of the use of this false "ordinary common sense" is decision-making that reflects these thought patterns: "I see it that way, therefore everyone sees it that way; I see it that way, therefore that's the way it is."⁹⁴ Importantly, as it relates to the question before us in this Article, judges treat "biologically-based evidence in criminal cases involving questions of mental disability law (via privileging and subordination) so as to conform to the judges' pre-existing positions."⁹⁵ A relatively recent study looked at the perceptions of FASD by 216 U.S. District Attorneys with an average of over 25 years of legal practice.⁹⁶ The findings demonstrated that there were "variable levels of knowledge concerning the signs and symptoms of FASD and underestimated how often persons with FASD become involved in the criminal justice system."⁹⁷ The majority of participants had never received training on the psycholegal impairments of individuals diagnosed with FASD and reported that they would benefit from a Continuing Legal Education course on the subject.⁹⁸

The significance of expert testimony in this context is clear. In the American Bar Association's guidelines for the performance of

Carroll & John W. Payne, *The Psychology of the Parole Decision Process: A Joint Application of Attribution Theory and Information-Processing Psychology*, in COGNITION & SOC. BEHAV. 13, 21 (John S. Carroll & John W. Payne eds., 1976). For a discussion of those heuristics that most contaminate the criminal trial process, see Heather Ellis Cucolo & Michael L. Perlin, "They're Planting Stories in the Press": *The Impact of Media Distortions on Sex Offender Law and Policy*, 3 UNIV. DENV. CRIM. L. REV. 185, 214–15 (2013).

⁹² "Ordinary common sense" is "a powerful unconscious animator of legal decision making that reflects 'idiosyncratic, reactive decisionmaking,' and is a psychological construct that reflects the level of the disparity between perception and reality that regularly pervades the judiciary in deciding cases involving individuals with mental disabilities. *Steel-Eyed Death*, *supra* note 22, at 281.

⁹³ See Perlin & Weinstein, *supra* note 91, at 96.

⁹⁴ See Michael L. Perlin, "She Breaks Just Like a Little Girl": *Neonaticide, the Insanity Defense, and the Irrelevance of "Ordinary Common Sense"*, 10 WM. & MARY J. WOMEN & L. 1, 8 (2003).

⁹⁵ Lynch Perlin & Cucolo, *supra* note 89, at 235, *quoted in* Perlin & Harmon, *supra* note 22, at 577 n.133.

⁹⁶ Brown et al., *supra* note 65, at 200.

⁹⁷ *Id.*

⁹⁸ *Id.*

counsel in death penalty cases, the need to consider FAS as a mitigating factor is clearly stated: “For example, expert testimony may explain the permanent neurological damage caused by fetal alcohol syndrome or childhood abuse, or the hereditary nature of mental illness, and the effects of these impairments on the client’s judgment and impulse control.”⁹⁹

An examination of the caselaw, however, shows us that courts are not likely to reverse convictions in cases in which counsel did not adequately explore the ramifications of a defendant’s FAS¹⁰⁰ and reject arguments that such failures violated the teachings of *Strickland v. Washington*.¹⁰¹ *Strickland* had held that the defendant is entitled to a “reasonably competent attorney” whose advice is “within the range of competence of attorneys in criminal cases.”¹⁰² In such cases, the benchmark for judging an ineffectiveness claim is whether counsel’s conduct “so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.”¹⁰³

⁹⁹ Am. Bar Ass’n, *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 1061 (2003).

¹⁰⁰ On the other hand, in at least one case, a conviction was reversed where experts were prohibited from offering testimony about the impact of FAS in the latter cases on a child witness’s ability to remember and restate events. *See State v. Goldenstein*, 505 N.W.2d 332, 341–42 (Minn. Ct. App. 1993).

¹⁰¹ *Strickland v. Washington*, 466 U.S. 668 (1984). On the courts’ failure to take *Strickland* seriously, *see, e.g.*, Perlin & Harmon, *supra* note 22. On the global inadequacy of counsel in death penalty cases involving defendants with mental disabilities, *see Steel-Eyed Death*, *supra* note 22; MICHAEL L. PERLIN, MENTAL DISABILITY AND THE DEATH PENALTY: THE SHAME OF THE STATES 1, 138–154 (2013). It should be noted that, going forward, it will be more difficult for defendants to be successful in *Strickland* claims. The Supreme Court recently limited the scope of *Strickland* inquiries that could be made in cases involving federal habeas corpus filings following state court convictions, ruling in *Shinn v. Ramirez*, 142 S. Ct. 1718, 174950 (2022), that a federal habeas court may not conduct an evidentiary hearing or otherwise consider evidence beyond the state court record based on the ineffective assistance of state postconviction counsel. *See* Perlin, Harmon & Kubiniec, *supra* note 22, manuscript at 53.

¹⁰² *Strickland*, 466 U.S. at 687 (quoting *McMann v. Richardson*, 397 U.S. 759, 770 (1970)).

¹⁰³ *Id.* at 686. *See generally* Lynch, Perlin & Cucolo, *supra* note 89, at 250–52; Cucolo & Perlin, *supra* note 29, at 125–26.

Typical of FAS cases rejecting *Strickland* arguments is *Floyd v. Filson*,¹⁰⁴ a Ninth Circuit death penalty case in which the court ruled that trial counsel's failure to present expert testimony showing that petitioner suffered from FASD did not amount to ineffective assistance under *Strickland*.¹⁰⁵ There, the court concluded, "Even assuming [counsel's performance was deficient], there is no reasonable probability that, had the jury heard from an FASD expert, it would have concluded that mitigating factors outweighed aggravating factors such that Floyd did not deserve a death sentence."¹⁰⁶ Similarly, the Missouri Supreme Court found that counsel's failure to present expert testimony specifically related to fetal alcohol syndrome was not deficient performance,¹⁰⁷ suggesting that the testimony would solely have been "cumulative" to testimony in which a defense expert testified that the defendant's "adolescent behavior was characteristic of the syndrome," and that "the test data suggest fetal alcohol syndrome,"¹⁰⁸ though apparently the syndrome was never explained nor defined.

Also, a federal district court in Iowa found that defense counsel did not perform deficiently under the ineffective assistance standard in investigating and ultimately rejecting the defense of FAS for a defendant who had confessed to murder.¹⁰⁹ There, counsel researched cases, consulted two psychiatrists regarding possible use of the defense, and contacted attorneys in another area with a heavy Native American population about their success in using FAS as a defense, but rejected FAS as a viable defense because of a lack of expert testimony that FAS deprived defendant of specific intent.¹¹⁰

Elsewhere, in *People v. Ray*, a death penalty case in which an expert psychiatrist had testified that the defendant suffered from "fetal alcohol syndrome" and "severe parental deprivation, including likely sexual abuse,"¹¹¹ the appellate court affirmed the judgment of the trial court that "any sympathetic inferences that could be drawn

¹⁰⁴ *Floyd v. Filson*, 949 F.3d 1128, 1141–42 (9th Cir. 2020).

¹⁰⁵ *Id.* at 1139–40.

¹⁰⁶ *Id.* at 1139.

¹⁰⁷ *State v. Johnson*, 333 S.W.3d 459, 465 (Mo. 2011).

¹⁰⁸ *Id.* at 466.

¹⁰⁹ *Foell v. Mathes*, 310 F. Supp. 2d 1020 (N.D. Iowa 2004).

¹¹⁰ *Id.* at 1043–44.

¹¹¹ *People v. Ray*, 914 P.2d 846, 854–56 (Cal. 1996).

from evidence of defendant's troubled childhood, mental defects, and religious conversion were far 'outweighed' by the calculated nature of the capital crimes and by his extensive criminal history."¹¹²

Similarly in *State v. Cooper*,¹¹³ the court held that an alleged deficiency by defense counsel, in failing at the penalty phase of the defendant's capital case to present mitigation evidence that the defendant had brain damage from FAS or FASD, was not prejudicial and thus did not constitute ineffective assistance of counsel.¹¹⁴ Despite considerable evidence about the defendant's life, including the tragic effects of his prenatal and postnatal exposure to alcohol, the jury found that the significant damning factors involved in the criminal offense outweighed any mitigating factors.¹¹⁵

On the other hand, in *Hearn v. Quarterman*,¹¹⁶ the court, in granting a reconsideration motion, found that although defense counsel, "through the exercise of due diligence and reasonable competence," could have concluded earlier than he did that evidence of Hearn's neuropsychological deficits and fetal alcohol syndrome would show "significant limitations in intellectual functioning" (in the context of the state statutory definition of what was then characterized as "mental retardation")¹¹⁷, and that he could have secured supporting expert testimony before responding to the state's summary judgment motion, "the importance of the new evidence and the fact that the state is unlikely to suffer unfair prejudice" led the court

¹¹² *Id.* at 875. *Ray* is discussed extensively in this context in Deborah Denno, *How Courts in Criminal Cases Respond to Childhood Trauma*, 103 MARQ. L. REV. 301, 358–59 (2019).

¹¹³ 979 A.2d 792 (N.J. Super. Ct. App. Div. 2009), *certif. den.*, 988 A.2d 1177 (N.J. 2010).

¹¹⁴ *Id.* at 808–10, 819.

¹¹⁵ *Id.* at 813.

¹¹⁶ *Hearn v. Quarterman*, No. 3:04-CV-0450-D, 2008 WL 679030 (N.D. Tex. Mar. 13, 2008).

¹¹⁷ *Hearn*, 2008 WL 679030, at *3. In 2014, the Supreme Court made clear that this would, going forward, be referred to as an "intellectual disability" in accordance with the then-most recent version of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-5). *Hall v. Florida*, 572 U.S. 701, 704 (2014).

to grant the requested relief.¹¹⁸ More recently, in *Williams v. Stirling*,¹¹⁹ the Fourth Circuit held that defense counsel's failure to collect any evidence of FAS as part of a mitigation strategy during the penalty phase of a capital murder trial prejudiced the defendant under *Strickland*.¹²⁰

Cases such as *Hearn* and *Williams* are, however, the exceptions. Much more typical are decisions like *Floyd v. Filson*.¹²¹ It is beyond comprehension how, in *Floyd*, the Ninth Circuit could have assumed that there was "no reasonable probability" that testimony from an FASD expert might have led to a different jury outcome.¹²² There, the court reasoned in this manner:

For Floyd to have been prejudiced by the lack of testimony by an FASD expert, at least one juror would have had to have considered a formal FASD diagnosis more severe and debilitating than ADD/ADHD and Floyd's other developmental problems, which the defense had suggested included effects of his mother's drinking and drug use during pregnancy, but without using FASD terminology. In other words, at least one juror would have had to view a formal FASD diagnosis as a weightier mitigating factor than those presented.¹²³

¹¹⁸ *Hearn*, 2008 WL 679030, at *3; see also, *James v. Ryan*, 679 F.3d 780, 810, 820 (9th Cir. 2012), *vacated on other grounds*, 568 U.S. 1224 (2013) (noting that only "meager" mitigation evidence was presented at sentencing, and concluded "that there is a reasonable probability that a sentencing court confronted with the powerful mitigating evidence developed by James's habeas counsel would not have returned a death sentence").

¹¹⁹ *Williams v. Stirling*, 914 F.3d 302, 319 (4th Cir. 2019).

¹²⁰ *Id.* at 307–09, 312–14. This failure was despite direction from a clinical psychiatrist on the defense's mitigation team to order an MRI of the defendant's brain and request medical records of his head circumference at birth to analyze information that might be correlated with a FAS diagnosis. *Id.* at 309. The court also stated that the Fourth Circuit noted that FAS evidence was widely acknowledged to be significant mitigating factor, and that sufficient evidence existed in the form of a social worker's concern and evidence of the defendant's brain damage, including an impairment of the front lobe. *Id.* at 315.

¹²¹ See *supra* text accompanying notes 104–08.

¹²² *Floyd v. Filson*, 949 F.3d 1128, 1139 (9th Cir. 2020).

¹²³ *Id.* at 1140.

It shocks the conscience as to how the court could have concluded—reading the minds of all twelve jurors—that there was no “reasonable probability” that the outcome might have been different had this testimony (of a “formal . . . diagnosis”) been offered. This is a clear example of the sort of false “ordinary common sense” to which we must always be alert.¹²⁴

III. FAS AND THE CRIMINAL TRIAL PROCESS

A. *Introduction*

To understand the questions that we raise in this Article, it is necessary to consider how courts have weighed (or chosen not to weigh) the significance of FAS in multiple aspects of the criminal trial process. As our discussion in this section should demonstrate, courts have not considered these issues carefully or sensitively.

B. *Criminal Competencies*

1. INTRODUCTION

It is axiomatic that, to be competent to stand trial, a defendant must have “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding,” a “rational as well as factual understanding of the proceedings against him,”¹²⁵ and the ability to “assist in preparing his defense.”¹²⁶ To be competent to stand trial, a defendant must have the ability to communicate, to reason “from a simple premise to a simple conclusion,” to “recall and relate facts concerning his actions,” as well as “to comprehend instructions and advice and make decisions based on well-explained

¹²⁴ See *supra* note 92. See also, e.g., *Anderson v. Kelley*, 938 F.3d 949, 956–58 (8th Cir. 2019) (petitioner not denied effective assistance as result of counsel’s failure to investigate evidence of fetal alcohol spectrum disorder: “Though his case may have benefitted had his counsel investigated FASD, we consider ‘not what is prudent or appropriate, but only what is constitutionally compelled.’” (quoting *Burger v. Kemp*, 483 U.S. 776, 794 (1987))).

¹²⁵ *Dusky v. United States*, 362 U.S. 402, 402 (1960).

¹²⁶ *Drope v. Missouri*, 420 U.S. 162, 171 (1975). See generally on competency, 3 MICHAEL L. PERLIN & HEATHER ELLIS CUCOLO, *MENTAL DISABILITY LAW: CIVIL AND CRIMINAL* ch.13 (3d ed. 2016) (updated Autumn 2022).

alternatives."¹²⁷ The standard for determining competency to plead guilty is the same as that for competency to stand trial.¹²⁸

2. THE CASELAW

"The brain damage in FASD manifests in a combination of cognitive and adaptive impairments that potentially reduce ability to function adequately during the criminal justice process, including capacity to stand trial ('CST')."¹²⁹ But what impact has FAS had on defendants' competency evaluations? Succinctly, not much. Thus, in *Dobyne v. State*,¹³⁰ where the defendant alleged that his lawyer was ineffective for not adequately investigating and presenting evidence to support a motion for a competency hearing, the court concluded that he "does not offer any facts in his pleading that would support a motion for a competency hearing," notwithstanding the fact that, in his petition to the court, the defendant pointed out that:

[T]he trial judge was confronted with extensive and significant evidence, before and during the trial of this case, that [he] had an I.Q. of only 73 and a mental age of 12 or 13 years, and [that he] suffered from Fetal Alcohol Syndrome as well as possible brain damage, aggravated by chronic alcoholism and cocaine abuse.¹³¹

¹²⁷ PERLIN & CUCOLO, *supra* note 126, at § 13-1.2.1, at 13-11 to 13-12. See generally Peter R. Silten & Richard Tullis, *Mental Competency in Criminal Proceedings*, 28 HASTINGS L.J. 1053, 1053-56 (1977).

¹²⁸ *Godinez v. Moran*, 509 U.S. 389, 399 (1993). One of the co-authors has criticized *Godinez* sharply in Michael L. Perlin, "Dignity Was the First to Leave": *Godinez v. Moran*, *Colin Ferguson*, and the Trial of Mentally Disabled Criminal Defendants, 14 BEHAV. SCI. & L. 61, 65-71 (1996).

¹²⁹ Jerrod M. Brown et al., *Fetal Alcohol Spectrum Disorders (FASD) and Competency to Stand Trial (CST): Suggestions for a 'Best Practices' Approach to Forensic Evaluation*, 52 INT'L J. L. & PSYCHIATRY 19, 19 (2017). On competency evaluation of defendants with FAS, see generally Kaitlyn McLachlan, *Evaluating Competency in Defendants with Fetal Alcohol Spectrum Disorder*, in EVALUATING FETAL ALCOHOL SPECTRUM DISORDERS IN THE FORENSIC CONTEXT 397-425 (Natalie N. Brown ed. 2021).

¹³⁰ *Dobyne v. State*, 805 So. 2d 733 (Ala. Crim. App. 2000).

¹³¹ *Id.* at 747 (the court nonetheless found that "Dobyne has failed to establish that 'but for' trial counsel's performance the trial court would have granted his motion for a competency hearing").

By way of further example, in *Lambert v. Blodgett*,¹³² the court found that counsel was not ineffective for failing to investigate a defense of fetal alcohol syndrome and advising petitioner to plead guilty after mental health experts determined petitioner had no mental defense.¹³³ “The slim potential for success renders highly doubtful any conclusion that Lambert suffered prejudice because his attorney failed to uncover evidence of FAS.”¹³⁴ *Lambert* was a non-capital homicide case, and the court specifically distinguished those Supreme Court cases and other federal cases that had imposed specific investigative obligations on defense counsel,¹³⁵ noting there was no such obligation in the case before it.¹³⁶

Elsewhere, in *Twitty v. United States*,¹³⁷ the fact that the defendant was diagnosed at approximately the age of thirteen with, *inter alia*, possible fetal alcohol syndrome, “did not support a conclusion that the Petitioner was incompetent, almost ten years later, to enter a guilty plea.”¹³⁸ And an appellate court in Michigan, while noting that the defendant had been born with FAS and “continues to suffer the effects of fetal alcohol syndrome and has been diagnosed as mildly retarded and emotionally impaired,” found no error in the

¹³² *Lambert v. Blodgett*, 393 F.3d 943 (9th Cir. 2004).

¹³³ *Id.* at 982–84 (cited approvingly on this point in *Dailey v. Allison*, No. EDCV 08-1040, 2010 WL 1798228, at *6 (C.D. Cal. 2010)).

¹³⁴ *Lambert*, 393 F.3d at 984.

¹³⁵ *E.g.*, *Wiggins v. Smith*, 539 U.S. 510, 521–34 (2003) (concluding that counsel’s failure to adequately investigate prior to deciding not to introduce mitigating evidence in capital case constituted ineffective assistance); *Williams v. Taylor*, 529 U.S. 362, 395–99 (2000) (concluding that counsel’s failure to introduce the voluminous evidence of defendant’s “nightmarish childhood” was ineffective assistance in a capital trial); *Stankewitz v. Woodford*, 365 F.3d 706, 720–22 (9th Cir. 2004) (finding duty to investigate aggravating circumstances presented by prosecution in penalty phase of capital case); *Wallace v. Stewart*, 184 F.3d 1112, 1115–17 (9th Cir. 1999) (finding a duty to investigate possible mental defense at sentencing phase of capital case); *Caro v. Calderon*, 165 F.3d 1223, 1228 (9th Cir. 1999) (concluding that attorney’s failure to investigate rendered the penalty phase of capital case unreliable). *See also Lambert*, 393 F.3d at 983–84.

¹³⁶ *Lambert*, 393 F.3d at 983.

¹³⁷ *Twitty v. United States*, No. 1:10CV19, 2010 WL 5211456, at *3 (W.D.N.C. Dec. 16, 2010).

¹³⁸ *Id.* at *3. The defendant had informed his counsel of his mental health history but argued (pro se) that his attorney ineffectively counseled him to plead guilty without investigating his mental health or competency. *Id.* at *1.

trial court failing to seek a competency hearing, noting that the defendant had been found competent to stand trial three years before the incident in question.¹³⁹ Finally, in another Michigan case, on cross-examination, defense counsel asked an examining psychologist if he was aware that the defendant had been diagnosed with fetal alcohol syndrome. The psychologist replied in the negative, but "testified that this would not change his opinion even if true."¹⁴⁰ The finding of competency to stand trial was affirmed on appeal.¹⁴¹ And, in *State v. Winstrom*, affirming a sentence based on a guilty plea, the court noted, "the PSR [pre-sentence report] also shows that Wistrom . . . was diagnosed with fetal alcohol syndrome, but the PSR does not explain the impact of these diagnoses on his competency."¹⁴²

On the other hand, in *State v. Lawrence*,¹⁴³ the appellate court initially found that the trial court's determination that defendant was competent to stand trial was not flawed by the failures of the sanity commission¹⁴⁴ and the court to even *consider* the issue of fetal alcohol syndrome.¹⁴⁵ Then, however, the state Supreme Court vacated a

¹³⁹ *People v. Rueckert*, No. 250829, 2005 WL 473931, at *1 (Mich. Ct. App. Mar. 1, 2005). Competency, of course, is to be evaluated at the time of the trial. This has been black-letter law for well over a century. *See, e.g.*, *United States v. Chisolm*, 149 F. 284, 289 (S.D. Ala. 1906); *see also Stokes v. United States*, 538 F. Supp. 298, 307 (N.D. Ind. 1982) (holding the relevant question is "whether the evidence relates to observations made or knowledge possessed at or near the time of trial").

¹⁴⁰ *People v. Fleming*, No. 239684, 2003 WL 21675890, at *2 (Mich. Ct. App. July 17, 2003).

¹⁴¹ *Id.* at *1.

¹⁴² *State v. Wistrom*, No. A-10-1091, 2011 WL 3273906, at *3 (Neb. Ct. App. Aug. 2, 2011).

¹⁴³ *State v. Lawrence*, 271 P.3d 280 (Wash. Ct. App. 2012).

¹⁴⁴ In the state of Washington, when the court refers a defendant for a competency evaluation, at least two experts shall be appointed to conduct the examination and report to the court. RCW 10.77.060(1)(a). In long-standing common parlance, this evaluation committee is known as a "sanity commission." *Id.* at 284.

¹⁴⁵ *Id.* According to the court, "[w]hen the expert reported back to the court, no mention was made of the condition. Similarly, the written report from the sanity commission did not touch on the topic. On this record, there is simply no basis for believing that Mr. Lawrence has FAS." *Id.*

subsequent decision that found this competency decision was reasonable under the circumstances.¹⁴⁶ At a subsequent hearing (before a new trial judge), the following was found:

1. the defendant suffered from FASD at the time of his trial, conviction, and sentencing;
2. the FASD, along with bipolar disorder, post-traumatic stress disorder, periods of delusional thinking, and psychotic symptoms, impaired his ability to understand and assist in his defense;
3. he was therefore incompetent at the time of trial, conviction, and sentencing;
4. his pervasive and severe impairments due to FASD and the other disorders—impairments that caused difficulty in relating actions to consequences—interfered with his ability to knowingly and intelligently waive the right to counsel; and
5. he did not knowingly and intelligently waive his right to counsel at the time of his trial, conviction, and sentencing.¹⁴⁷

In this array of cases, only in *Lawrence* did the court carefully consider the possible impact of FASD on a defendant's competency to stand trial. We simply have no way of knowing whether the defendants in the other cases cited here did have, per the *Lawrence* court, the "ability to understand and assist in [their] defense."¹⁴⁸ Without having such information, the question as to how widespread the *Strickland* failures are in right to trial competency for persons with FASD remains wholly unknown.

¹⁴⁶ Matter of Personal Restraint of Lawrence, No. 31827-3-III, 2016 WL 4395384, at *1 (Wash. App. Aug. 16, 2016) (citing Amended Order, *In re Pers. Restraint of Lawrence*, 357 P.3d 664 (Wash. Oct. 12, 2015)).

¹⁴⁷ *Lawrence*, 2016 WL 4395384, at *2. The appellate court then reversed the defendant's conviction. *Id.*

¹⁴⁸ *Id.*

C. *The Insanity Defense*

Two issues that must be considered in assessing the relationship between FASD disorders and the insanity defense¹⁴⁹ are those of *volition* and those of *risk*. In arguing that persons with these disorders are like those with intellectual disabilities that were the subject of the Supreme Court's opinion in *Atkins v. Virginia* (declaring the death penalty an unconstitutional punishment in such cases),¹⁵⁰ Professors Greenspan and Brown have stressed:

Volitional behavior is an act that is consciously and intentionally chosen, while risk involves a criminally sanctioned outcome because the act violates some person's or entity's legally protected interest (e.g., preservation of life or wealth). Thus, if a defendant has brain-based impairments in reasoning or other aspects of [executive functioning] that affect capacity to choose, then it stands to reason that the person should be fully or partially exempt from criminal responsibility.¹⁵¹

The question to be considered here is the extent to which courts have found a correlation between FASD and an insanity defense that

¹⁴⁹ There are multiple substantive insanity defense tests, *see* PERLIN & CUCOLO, *supra* note 126, §§ 14-1.2 to 14-1.7 (discussing the prevailing test in the jurisdiction in question at the time of the court decision). Omitted from this Article for reasons of space are discussions of discharge standards and post-acquittal conditions, *see id.*, §§ 14-2.4 to 14-2.4.3, and of the prevailing myths that contaminate all insanity defense discourse, *see id.*, §§ 14-3.2 to 14-3.6. On the latter, *see generally*, Michael L. Perlin, *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, 40 CASE W. RES. L. REV. 599, 599 (1990); Michael L. Perlin, "The Borderline Which Separated You from Me": *The Insanity Defense, the Authoritarian Spirit, the Fear of Faking, and the Culture of Punishment*, 82 IOWA L. REV. 1375, 1375-80 (1997); Michael L. Perlin, *The Insanity Defense: Nine Myths That Will Not Go Away*, in THE INSANITY DEFENSE: MULTIDISCIPLINARY VIEWS ON ITS HISTORY, TRENDS, AND CONTROVERSIES 3, 3-4 (Mark D. White ed., 2017).

¹⁵⁰ *See generally* Michael L. Perlin, Talia Roitberg Harmon & Sarah Wetzel, "Man Is Opposed to Fair Play": *An Empirical Analysis of How the Fifth Circuit Has Failed to Take Seriously Atkins v. Virginia*, 11 WAKE FOREST J.L. & POL'Y 451, 451-59 (2021), discussing *Atkins v. Virginia*, 536 U.S. 304 (2002).

¹⁵¹ Brown & Greenspan, *supra* note 58, at 7.

does exempt individuals from criminal responsibility.¹⁵² A survey of the caselaw tells us, however, that courts have paid virtually no attention to the presence of FAS in assessing cases that raised the insanity defense. Thus, in *State v. Johnson*, the appellate court ruled that precluding an FASD expert from testifying as to whether FASD impaired the ability to tell right from wrong was not an abuse of discretion.¹⁵³ There, the court disallowed expert testimony that people with FASD have an impairment in reasoning about “[t]he right thing to do in a situation with competing equally worthy looking goals,” because it considered “moral reasoning in the legal context.”¹⁵⁴ Others have found that, notwithstanding the finding of FAS, it was not unreasonable for counsel not to pursue an insanity defense,¹⁵⁵ and that failure to fully investigate so as to uncover evidence of FAS (and then pursue an insanity defense) was not ineffectiveness of counsel.¹⁵⁶ On the question of *waiver* of an insanity defense, a federal court has concluded that, notwithstanding the defendant’s FAS, he had made an intelligent and voluntary decision to forgo the insanity defense, and there was thus no reversible error.¹⁵⁷

¹⁵² See, e.g., MICHAEL L. PERLIN, *THE JURISPRUDENCE OF THE INSANITY DEFENSE* (1994).

¹⁵³ *State v. Johnson*, 208 P.3d 1265, 1270 (Wash. Ct. App. 2009) (*M’Naghten* right-from-wrong test); see, e.g., *State v. Crenshaw*, 659 P.2d 488 (Wash. 1983).

¹⁵⁴ *Johnson*, 208 P.3d at 1270. On the relationship between insanity and moral reasoning, see, e.g., E. Lea Johnston & Vincent T. Leahey, *The Status and Legitimacy of M’Naghten’s Insane Delusion Rule*, 54 U.C. DAVIS L. REV. 1777, 1777–78 (2021). On how brain injury can impair moral reasoning in an insanity defense context, see Richard E. Redding, *The Brain-Disordered Defendant: Neuroscience and Legal Insanity in the Twenty-First Century*, 56 AM. U. L. REV. 51, 52–54 (2006).

¹⁵⁵ E.g., *Dailey v. Allison*, 2010 WL 1798228, *6 (C.D. Cal. 2010) (*M’Naghten*).

¹⁵⁶ *Two Elk v. United States*, No. CIV. 09-5090, 2010 WL 545394, at *5 (D.S.D. Feb. 12, 2010) (Federal Insanity Defense Reform Act). On the question of the impact of the tardy discovery of a defendant’s FAS (that might have led to an insanity defense plea being entered), see *State v. Jordan*, 174 So. 3d 1259, 1272 (La. Ct. App. 2015) (finding no showing of specific prejudice against defendant) (*M’Naghten*).

¹⁵⁷ See *Melcher v. Holland*, No. 12-0544, 2014 WL 31359, *19–20. (N.D. Cal. Jan. 3, 2014).

The opinion in *Two Elk* is, to our thinking, incomprehensible.¹⁵⁸ There, in rejecting the defendant's claim that counsel was ineffective in failing to perform a competent investigation that might have led to an insanity defense where the defendant alleged he "suffered from 'Fetal Alcohol Syndrome . . . ADHD, Depression, Dysthymia, Conduct disorder, [and] Learning disabilities,'" the Court stated—with no further explanation—"[t]he mental diseases and/or defects which defendant alleges that he suffers from are, unfortunately, not uncommon among defendants who appear before the Court,"¹⁵⁹ and concluded, "[a]s a result, the Court finds that petitioner was not prejudiced by any lack of investigation into his alleged mental defects."¹⁶⁰

In deciphering one's ability to tell right from wrong, executive functioning—which can be significantly distorted in persons with FASD¹⁶¹—remains at the heart of the analysis. Moral reasoning, which can be connected to the legal concept of distinguishing right from wrong, is "a way of applying executive function to the kinds of questions that typically arise for people in a society where they have to decide what is right to do in a particular setting, and . . . this ability is affected by FASD."¹⁶²

Considering the courts' analyses and verdicts cited above, it might be necessary to rethink the criteria supporting a diminished responsibility/capacity defense¹⁶³ and "recognize[] the 'grey zone' between 'knowing' and 'not knowing' based on neurocognitive disparities in FASD" with this particular population.¹⁶⁴

¹⁵⁸ See *supra* text accompanying note 77.

¹⁵⁹ *Two Elk*, 2010 WL 545394, at *5.

¹⁶⁰ *Id.* (emphasis added).

¹⁶¹ See Herrmann, *supra* note 70, at 245.

¹⁶² *State v. Johnson*, 208 P.3d 1265, 1270 (Wash. Ct. App. 2009).

¹⁶³ See generally PERLIN & CUCOLO, *supra* note 126, § 13-1.2.6. The diminished responsibility/capacity doctrine holds that trial courts should accept evidence of reduced mental capacity tending to show the absence of any mental state essential to the alleged crime, *whether or not an insanity plea was entered*. See, e.g., *People v. Wells*, 202 P.2d 53, 63–70 (Cal. 1949).

¹⁶⁴ Mansfield Mela & Glen Luther, *Fetal Alcohol Spectrum Disorder: Can Diminished Responsibility Diminish Criminal Behaviour?* 36 INT'L J. L. & PSYCHIATRY 46, 46 (2013).

D. Sentencing and the Death Penalty

The lead case in this context is *Trevino v. Davis*,¹⁶⁵ holding that counsel's failure to adequately investigate and present certain mitigating evidence at sentencing (on the question of the presence of FAS) did not prejudice the petitioner and thus was not ineffective assistance because the evidence would not have created a reasonable probability of a different outcome at sentencing.¹⁶⁶ However, in dissent, Judge Dennis stressed that the testimony in question showed that FASD "clearly had an impact on [Trevino's] cognitive development, academic performance, social functioning, and overall adaptive functioning" and that these deficits "would . . . have impacted . . . [his] decisions to participate in or refrain from any activities that resulted in his capital murder charges."¹⁶⁷ Certiorari in *Trevino* was subsequently denied with Justice Sotomayor and Justice Ginsburg writing in dissent and quoting from Judge Dennis's opinion.¹⁶⁸

In addition, the Ninth Circuit Court of Appeals has also held that "organic brain damage," such as FASD, and other situations that render an offender less culpable, should be considered during sentencing and that punishment should match the culpability of the offender.¹⁶⁹

Unfortunately, prior decisions have also found that failure to present mitigating evidence of fetal alcohol syndrome was not prejudicial to the defendant.¹⁷⁰ In one typical case, the Eighth Circuit imposed a "but for" test, concluding that the defendant failed to demonstrate reasonable probability that, but for counsel's failure to

¹⁶⁵ *Trevino v. Davis*, 861 F.3d 545 (5th Cir. 2017), *cert. den.*, 138 S. Ct. 1793 (2018). One of the authors has previously discussed earlier aspects of *Trevino v. Davis*, 829 F.3d 328 (5th Cir. 2016) extensively in the context of its *Strickland* issues in *Steel-Eyed Death*, *supra* note 22, at 291–92.

¹⁶⁶ *Trevino*, 861 F. 3d at 550.

¹⁶⁷ *Id.* at 554.

¹⁶⁸ *Trevino*, 138 S. Ct. at 1794–800.

¹⁶⁹ *Stankewitz v. Woodford*, 365 F.3d 706, 723 (9th Cir. 2004).

¹⁷⁰ For an exhaustive consideration of all relevant issues, see *State v. Cooper*, 979 A.2d 792, 800 (N.J. App. Div. 2009), *certif. den.*, 988 A.2d 1177 (N.J. 2010).

present evidence of FASD during penalty phase of his capital murder trial, the jury would have rejected the death penalty.¹⁷¹ The significance of such testimony is frequently minimized.¹⁷² For example, a federal district court in Arizona cursorily concluded that evidence concerning FASD and the QEEG¹⁷³ results “would have barely altered the sentencing profile presented to the sentencing judge.”¹⁷⁴

Another issue weighed in these cases is the extent to which testimony about a defendant’s FASD might be “double-edged.”¹⁷⁵ Thus, in a decision denying habeas corpus relief in a capital murder case, the court made this point:

The evidence regarding petitioner’s fetal alcohol syndrome and fetal alcohol effects presented by petitioner to this Court is, at best, clearly double-edged in nature because it necessarily led to a conclusion that petitioner would forever be unable to control his aggressive, anti-social, impulses and would never be able to learn from his mistakes.

For the foregoing reasons, this Court concludes there is no reasonable probability that, but for the failure of petitioner’s trial counsel to present such double-edged evidence during the punishment phase of petitioner’s 2000 capital murder trial, the outcome of the punishment phase of petitioner’s capital murder trial would have been any different.¹⁷⁶

On the question of the connection between FAS and whether a defendant was intellectually disabled, and thus ineligible for the

¹⁷¹ *Anderson v. Kelley*, 938 F.3d 949, 959 (8th Cir. 2019).

¹⁷² *See id.*

¹⁷³ QEEG is a quantitative electroencephalograph designed to show brain damage. *Smith v. Ryan*, No. CV-03-01810-PHX, 2019 WL 3412587, at *6 (D. Ariz. July 29, 2019).

¹⁷⁴ *Id.* at *9, (quoting *Strickland v. Washington*, 466 U.S. 668, 699–700 (1984)).

¹⁷⁵ *See, e.g., Sells v. Thaler*, No. SA-08-CA-465, 2012 WL 2562666, at *62–63 (W.D. Tex. June 28, 2012).

¹⁷⁶ *Id.* at *62–63.

death penalty,¹⁷⁷ an appellate court simply found that the trial court did not err in discounting the pediatrician's diagnosis of FASD as a factor justifying conclusion that defendant was intellectually disabled.¹⁷⁸

Relatedly, elsewhere, a federal district court rejected a defendant's argument that persons with FASD should be categorically exempted from the death penalty on the grounds that FASD is the "functional equivalent" of conditions already recognized as disqualifying exemptions to the death penalty, such as intellectual disability (citing to *Atkins v. Virginia*).¹⁷⁹ Here, the court made two separate findings:

Here, Fell has presented no evidence of any national consensus as to whether the death penalty is a disproportionate punishment for individuals with FASD. He cites no enactments by Congress or state legislatures addressing that question, and the court has found none in its own research. The lack of any community consensus is entitled to "great weight" in the court's analysis, *see* [*United States v.*] *Reingold*, 731 F.3d [204,] 213 [(2d Cir. 2013)], and in this case weighs against a categorical exemption for individuals with FASD¹⁸⁰

Fell has not shown that all persons with FASD (or even all persons with a diagnosable subcategory within FASD) have cognitive and behavioral impairments that result in the same (or "equivalent") diminishment in moral culpability, ability to be deterred, and capacity to assist in their defense as individuals with ID. *See Atkins*, 536 U.S. at 320. [There may be] "intellectual disability equivalence" in the sense of

¹⁷⁷ *See, e.g., Atkins v. Virginia*, 536 U.S. 304, 304 (2002); *Hall v. Florida*, 572 U.S. 701, 701 (2014).

¹⁷⁸ *Commonwealth v. Flor*, 259 A.3d 891 (Pa. 2021).

¹⁷⁹ *United States v. Fell*, No. 5:01-cr-12-01, 2016 WL 11550800, at *1 (D. Vt. Nov. 7, 2016).

¹⁸⁰ *Id.* at *4.

need for public benefits. But it does not prove equivalence with ID for Eighth Amendment purposes.

Unlike intellectual disability, which is measured on a relatively objective scale, FASD takes many forms, including diminished psychological functioning. But many other very serious and disabling psychological conditions play a role in causing criminal behavior. Speaking very broadly, only psychosis¹⁸¹ and ID of sufficient severity have achieved recognition as frequently disqualifying defendants from conviction and punishment. Other conditions, including FASD, may provide grounds for death penalty mitigation, but they are not recognized as categorical disqualifiers by courts or legislatures. Unlike the differences between juvenile and adult offenders, for example, FASD is not so uniformly “marked” and “well understood” that capital punishment of individuals with FASD would in all cases be unacceptable It is for these reasons that the court declines to extend the *Atkins* ruling to FASD.¹⁸²

On the other hand, courts have granted relief where trial counsel were ineffective for failing to develop and present evidence that the defendant suffered from FAS.¹⁸³ In such a case, the court stressed:

¹⁸¹ Here, the Court is likely referring (though not citing) to *Panetti v. Quarterman*, 551 U.S. 930, 956 (2007) (a mentally ill defendant had a constitutional right to make a showing that his mental illness “obstruct[ed] a *rational understanding* of the State’s reason for his execution” (emphasis added)). See Perlin & Harmon, *supra* note 21; Perlin, Harmon & Kubiniec, *supra* note 22, manuscript at 4.

¹⁸² See also, *In re Soliz*, 938 F.3d 200 (5th Cir. 2019) (Texas death-row inmate’s claim that *Atkins*, which exempted individuals with intellectual disabilities from death sentences, should have been extended to create a categorical exemption for individuals with Fetal Alcohol Spectrum Disorder (FASD) did not present a new claim of a retroactive constitutional right recognized by the Supreme Court).

¹⁸³ *Williams v. Stirling*, 2018 WL 1240310 (D.S.C. 2018), *cert. den.*, 140 S. Ct. 105 (2019).

Because of trial counsel's omissions in this case, the jury was deprived of powerful evidence—that the petitioner suffered from organic brain damage and that FAS had impaired his judgment and his ability to control his behavior. The petitioner has presented a compelling case that he suffers from FAS, a dysfunction that affected his cognitive ability and his ability to conform his actions. This evidence should have been presented to the sentencing jury.¹⁸⁴

E. *One Recent Case Example: The Parkland Shooting*

Consider the recent case of Nikolas Cruz. In 2018, Nikolas Cruz, then a teenager, killed and injured a total of 34 people during a shooting rampage at his former high school in Parkland, Florida.¹⁸⁵ Cruz subsequently pled guilty to 17 counts of murder and 17 counts of attempted murder; the only remaining issue to consider was whether he would be sentenced to life without parole or to death under Florida law.¹⁸⁶ The defense team focused, almost exclusively, on the presentation of FASD as a mitigating factor during the penalty phase in an attempt to spare Cruz from the death penalty.¹⁸⁷ The

¹⁸⁴ *Id.* at *14. The defendant was also successful in this context in *Ex Parte Garza*, 620 S.W.3d 801 (Tex. Crim. Ct. App. 2021) (defense counsel's investigation into defendant's mitigation case fell below objective standard of reasonableness; expert witness had recommended "a comprehensive neuropsychological evaluation to look for neurological impairment in critical functions and neurological abnormalities associated with possible fetal alcohol syndrome," *id.* at 819-20).

¹⁸⁵ Courtney Lauren Anderson, *Opioids Are the New Black*, 69 DEPAUL L. REV. 55, 85 (2019).

¹⁸⁶ Hannah Phillips, Valentina Palm & Jorge Milian, *Nikolas Cruz Trial Live Updates Wednesday: Jury Requests May Delay Verdict in Death-Penalty Case*, PALM BEACH POST (Oct. 13, 2022, 6:28 AM), <https://www.palm-beachpost.com/story/news/local/2022/10/12/nikolas-cruz-sentencing-trial-live-updates-parkland-school-shooter-jury-deliberation/10468095002/>.

¹⁸⁷ See Kenneth Williams, *The Ultimate Dilemma: Conceding a Client's Guilt to Avoid a Death Sentence*, 52 CONN. L. REV. ONLINE 1, 3 (2019). In response to the facts of the Cruz case, FASD UNITED, a non-profit organization that educates the public, practitioners, and policymakers about the risk of prenatal exposure to alcohol, drugs, and other substances known to harm fetal development, issued a statement:

While FASD United does not typically comment on specific individuals affected by fetal alcohol spectrum disorders (FASD),

testimony presented revealed that Nikolas Cruz’s birth mother drank heavily during her pregnancy.¹⁸⁸ Accordingly, “medical and other records show Brenda Woodard [Cruz’s birth mother] well exceeded the standards that grossly endanger a fetus: six drinks per week for two weeks or three drinks in a sitting twice.”¹⁸⁹ “A friend had also testified that Woodard, a Fort Lauderdale prostitute, heavily drank fortified wine and malt liquor during her pregnancy with Cruz before putting him up for adoption.”¹⁹⁰ One testifying expert stated, “[y]ou can take all of the illicit drugs you can think of—heroin, marijuana, methamphetamine, cocaine¹⁹¹—and wrap them up in a single bag and they don’t hold a candle to alcohol for its effect on a developing baby.”¹⁹²

due to the publicity surrounding this case the organization has issued the following statement: Nikolas Cruz admitted killing 17 people at Marjory Stoneman Douglas High School in Parkland, Florida, in February 2018, and reports indicate that his sentencing trial could reference a diagnosis of a condition on the FASD spectrum—the range of developmental disabilities and birth defects that can occur in an individual prenatally exposed to alcohol. With no involvement in Cruz’s trial, FASD United cannot comment specifically on his diagnosis or his case.

FASD United, *FASD United Statement in Response to Reports n Nikolas Cruz and FASD*, FASD UNITED (July 18, 2022, 4:27 PM), <https://fasdunited.org/fasd-united-statement-in-response-to-reports-on-nikolas-cruz-and-fasd/>.

¹⁸⁸ Terry Spencer, *Expert: School Shooter’s Mother Drank Heavily in Pregnancy*, AP NEWS (Sept. 13, 2022), <https://apnews.com/article/health-shootings-education-florida-fort-lauderdale-2a89b5dde897d5cc47586ee5b3a70157/>.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.* Significant, but outside the parameters of this Article, is a consideration of the legal implications for fetal opioid syndrome and other narcotics, barbiturates, and illegal drugs used by pregnant mothers. See generally Stacey L. Klamman et. al., *Concurrent Opioid and Alcohol Use Among Women Who Become Pregnant: Historical, Current, and Future Perspectives*, SUBST. ABUSE: RSCH. & TREATMENT (May 30, 2019), <https://doi.org/10.1177/1178221819852637> (“[A]lthough both untreated opioid use disorder and alcohol misuse pose risks for maternal, fetal, and child morbidities, alcohol is the substance with the most significant documentation of harms.”).

¹⁹² Spencer, *supra* note 188.

Dr. Kenneth Jones, a defense expert hailed as “one of the nation’s leading fetal alcohol researchers,”¹⁹³ was called by the defense team to offer testimony on the impact FAS may have had on Cruz’s mental functioning.¹⁹⁴ In articulating the symptomology and broad presentation of FASD, Jones explained that his examination placed Cruz “into fetal alcohol spectrum disorder—a broad category—but does not have the more narrowly defined fetal alcohol syndrome.”¹⁹⁵ “He said the latter has certain physical traits that pediatricians can recognize such as thin lips, narrow eyelid openings and a smooth philtrum—the ridge between the nose and mouth.”¹⁹⁶ The expert also concluded that a lack of physical abnormalities can be detrimental in the early identification and assessment of FASD, “as the child won’t get the proper early treatment for the damage the alcohol has done to the brain.”¹⁹⁷ Furthermore, reporting of the birth mother’s alcohol abuse would be limited “because of the stigma it can attach to their child.”¹⁹⁸

Dr. Paul Connor, a neuropsychologist, also testified for the defense at the Cruz sentencing trial “that people with fetal alcohol spectrum disorder show at a young age problems with motor skills, impulse control, socializing and paying attention.”¹⁹⁹ Dr. Connor believed that throughout Cruz’s life he had shown indications on tests that he has alcohol-related mental issues.²⁰⁰

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* The witness has written about related issues. See Annika C. Montag et al., *Prenatal Alcohol Exposure Can Be Determined from Baby Teeth: Proof of Concept*, 114 BIRTH DEFECTS RSCH. 797 (2022).

¹⁹⁷ Spencer, *supra* note 188.

¹⁹⁸ *Id.* In response, the prosecution presented testimony by a neuropsychologist that Nikolas Cruz likely faked Fetal Alcohol Syndrome Symptoms, see Hannah Phillips, *Nikolas Cruz Sentencing Trial Updates: ‘Perfectly Normal’ People Have Gunman’s IQ of 83, Doctor Says*, PALM BEACH POST (Oct. 4, 2022), <https://www.palmbeachpost.com/story/news/courts/2022/10/04/parkland-shooter-nikolas-cruz-trial-doctor-says-cruz-can-control-his-behavior/8175065001/> (a prosecution expert testified “that Cruz was either faking or exaggerating his symptoms and could control his behavior when he wanted to”).

¹⁹⁹ Terry Spencer, *Psychologist: School Shooter Suffered Fetal Alcohol Damage*, AP NEWS (Sept. 12, 2022), <https://apnews.com/article/health-shootings-education-florida-fort-lauderdale-5118601ab8a80eb7781375a6a050d0d2>.

²⁰⁰ *Id.*

It is important to note that it was not until Nikolas Cruz’s sentencing trial in 2022 that an FASD diagnosis was put on full display. The misidentification or failure to include a FASD diagnosis is evident in an earlier 2021 amended complaint and demand for jury trial.²⁰¹ Statements in the complaint refer to various diagnoses absent an identification of FASD:

- “Cruz suffered from and was subject to severe mental illness and was prone to violence;”²⁰²
- Lynda Cruz [adoptive mother] relayed that Cruz suffered from ADHD, OCD, and anger issues;²⁰³
- A counselor with Henderson Behavioral Health, Inc. determined that Cruz did not warrant hospitalization for a mental health evaluation,²⁰⁴ and
- Counselors from Henderson Behavioral Health, Inc., advised police that Cruz “was not a risk to harm himself or anyone else” because he was on a treatment plan for ADHD, depression, and autism.²⁰⁵

²⁰¹ See generally Am. Compl. & Demand for Jury Trial, *Pollack v. Cruz*, (Fla. 11th Cir. Ct. Dec 27, 2019) (No. CACE-18-009607); Am. Compl. & Demand for Jury Trial, *Pollack v. Cruz* (Fla. 11th. Cir. Ct. June 26, 2018) (No. CACE-18-009607), reprinted in 2 JOHN ELLIOT LEIGHTON, LITIGATING PREMISES SECURITY CASES § 19:20 (2021) [hereinafter 2018 Am. Compl. & Demand for Jury Trial].

²⁰² 2018 Am. Compl. & Demand for Jury Trial, *supra* note 201, at 2.

²⁰³ *Id.* at 3.

²⁰⁴ *Id.* at 3. See also WPTV Webteam, *DCF Releases Records on Parkland School Shooting Suspect Nikolas Cruz*, ABC ACTION NEWS: WFTS TAMPA BAY (Feb. 20, 2018), <https://www.abcactionnews.com/news/state/dcf-releases-records-on-parkland-school-shooting-suspect-nikolas-cruz>; Dean Balsamini, *School Shooter’s Brother Committed to Mental Facility*, N.Y. POST (Feb. 17, 2018), <https://nypost.com/2018/02/17/school-shooters-brother-committed-to-mental-facility>.

²⁰⁵ 2018 Am. Compl. & Demand for Jury Trial, *supra* note 201, at 3.

In October 2022, Nikolas Cruz was sentenced to life in prison without parole for all 17 counts of murder and 17 counts of attempted murder.²⁰⁶ Now that Cruz's fate has been decided, it is worth contemplating what the outcome would have been had there been an incomplete presentation of FASD mitigating factors in the penalty phase.

F. Conclusion

Individuals with FASD are over-represented in forensic and correctional settings.²⁰⁷ The complexity of the difficulties faced by the FASD population extends to varying life experiences, diagnostic profiles, and levels of functional ability which likely have a negative impact on the experiences in and outcomes for such individuals involved in the criminal justice system.²⁰⁸ Accommodation for a cognitive disability like FASD is both a human rights issue and a due process issue.²⁰⁹ Scholars and advocates need to focus on the need for better education on these matters, and to encourage all "players" in the system to best understand how our current practices fail this population. In furtherance of that objective, it is "critical that a clear understanding of existing evidence is established to facilitate the implementation of ongoing evidence-based reforms, and evaluate current justice and treatment approaches."²¹⁰ Only then might we succeed in shaping judicial responses to fairly treat and adjudicate persons with FASD.

²⁰⁶ Arian Campo-Flores, *Parkland Shoot Nikolas Cruz Sentenced to Life Without Parole*, WALL ST. J. (Nov. 2, 2022, 5:27 PM), <https://www.wsj.com/articles/parkland-shooter-nikolas-cruz-is-expected-to-get-life-without-parole-11667356333>.

²⁰⁷ Katherine Flannigan et al., *Fetal Alcohol Spectrum Disorder and the Criminal Justice System: A Systematic Literature Review*, 57 INT'L J. L. & PSYCHIATRY 42, 46 (2018). On the specific issues raised by an FAS diagnosis in a forensic setting, see EVALUATING FETAL ALCOHOL SPECTRUM DISORDERS, *supra* note 33.

²⁰⁸ Flannigan et al., *supra* note 207, at 49.

²⁰⁹ Michael I. Jeffery, *An Arctic Judge's Journey with FASD.*, 38 J. PSYCHIATRY & L. 585, 614 (2010).

²¹⁰ Flannigan et al., *supra* note 207, at 49.

IV. THERAPEUTIC JURISPRUDENCE IN GENERAL²¹¹

Briefly, therapeutic jurisprudence ("TJ") recognizes that, as a therapeutic agent, the law can have therapeutic or anti-therapeutic consequences, and asks whether legal rules, procedures, and lawyer roles can or should be reshaped to enhance their therapeutic potential while not subordinating due process principles.²¹² It "look[s] at law as it actually impacts people's lives"²¹³ and supports "an ethic

²¹¹ See generally Michael L. Perlin, "I've Got My Mind Made Up": How Judicial Teleology in Cases Involving Biologically Based Evidence Violates Therapeutic Jurisprudence, 24 CARDOZO J. EQUAL RTS. & SOC'L JUST. 81, 93–95 (2018) [hereinafter *Mind Made Up*]; Michael L. Perlin & Alison J. Lynch, "In the Wasteland of Your Mind": Criminology, Scientific Discoveries and the Criminal Process, 4 VA. J. CRIM. L. 304, 357 (2016).

It also distills the work that one of the co-authors has done on this topic for the past 30 years, beginning with Michael L. Perlin, *What Is Therapeutic Jurisprudence?* 10 N.Y.L. SCH. J. HUM. RTS. 623, 626–29 (1993) [hereinafter *What is Therapeutic Jurisprudence?*], and that the co-authors have done on related topics in recent years. See, e.g., Heather Ellis Cucolo & Michael L. Perlin, *Promoting Dignity and Preventing Shame and Humiliation by Improving the Quality and Education of Attorneys in Sexually Violent Predator (SVP) Civil Commitment Cases*, 28 FLA. J.L. & PUB. POL'Y 291, 321–23 (2017); Michael L. Perlin & Heather Ellis Cucolo, "Something's Happening Here/But You Don't Know What It Is": How Jurors (Mis)Construe Autism in the Criminal Trial Process, 82 U. PITT. L. REV. 585, 616–17 (2021) (hereinafter Perlin & Cucolo, *How Jurors (Mis)Construe Autism*); Michael L. Perlin & Heather Ellis Cucolo, "Tolling for the Aching Ones Whose Wounds Cannot Be Nursed": The Marginalization of Racial Minorities and Women in Institutional Mental Disability Law Policing Rape Complaints, 20 J. GENDER RACE & JUST. 431, 454–57 (2017).

²¹² Michael L. Perlin, "And My Best Friend, My Doctor/Won't Even Say What It Is I've Got": The Role and Significance of Counsel in Right to Refuse Treatment Cases, 42 SAN DIEGO L. REV. 735, 751 (2005); see also David Wexler, *New Directions in Therapeutic Jurisprudence: Restructuring Mental Disability Law Scholarship*, 10 N.Y.L. SCH. J. HUM. RTS. 739, 756–58 (1993).

²¹³ Perlin, *Mind Made Up*, *supra* note 211, at 94 (citing Bruce J. Winick, *Foreword: Therapeutic Jurisprudence Perspectives on Dealing with Victims of Crime*, 33 NOVA L. REV. 535, 535 (2009)).

of care,”²¹⁴ attempting “to bring about healing and wellness,”²¹⁵ and valuing psychological health.²¹⁶

Central to TJ are dignity²¹⁷ and compassion.²¹⁸ TJ teaches that people “possess an intrinsic worth that should be recognized and respected, and that they should not be subjected to treatment by the state that is inconsistent with their intrinsic worth.”²¹⁹ If we embrace

²¹⁴ *Id.* (citing Bruce J. Winick & David B. Wexler, *The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Law Clinic*, 13 CLINICAL L. REV. 605, 605–07 (2006)); BARBARA BABB & JUDITH MORAN, *CARING FOR FAMILIES IN COURT: AN ESSENTIAL APPROACH TO FAMILY JUSTICE* (2019) (proposing reconstructing family courts as “care centers,” that blend existing theories surrounding court reform in family law with an ethic of care and narrative practice).

²¹⁵ Perlin, *Mind Made Up*, *supra* note 211, at 94 (citing Bruce Winick, *A Therapeutic Jurisprudence Model for Civil Commitment*, in INVOLUNTARY DETENTION & THERAPEUTIC JURISPRUDENCE: INTERNATIONAL PERSPECTIVES ON CIVIL COMMITMENT 23, 26 (Kate Diesfeld & Ian Freckelton eds., 2003)).

²¹⁶ See generally Michael L. Perlin, “Pistol Shots Ring Out in the Barroom Night”: Bob Dylan’s “Hurricane” as an Exam (or Course) in Criminal Procedure, 48 AM. J. CRIM. L. 253, 279 (2021). Consider here further what Professor Amy Ronner characterizes as the “three Vs” that are integral to the implementation of TJ: voice (litigants must have a sense of voice or a chance to tell their story to a decision maker), validation (if a litigant feels that a tribunal has genuinely listened to, heard, and taken seriously her story, she feels a sense of validation), and voluntariness (voice and validation create a sense of voluntary participation, one in which the litigant experiences the proceeding as less coercive). Amy D. Ronner, *The Learned-Helpless Lawyer: Clinical Legal Education and Therapeutic Jurisprudence as Antidotes to Bartleby Syndrome*, 24 TOURO L. REV. 601, 627 (2008).

²¹⁷ See Perlin, *supra* note 4, at 1186; Cucolo & Perlin, *supra* note 194; Michael L. Perlin, “Have You Seen Dignity?”: The Story of the Development of Therapeutic Jurisprudence, 27 N.Z.U. L. REV. 1135 (2017) (discussing the relationship between dignity and therapeutic jurisprudence in general).

²¹⁸ Michael L. Perlin, “Who Will Judge the Many When the Game Is Through?”: Considering the Profound Differences Between Mental Health Courts and “Traditional” Involuntary Civil Commitment Courts, 41 SEATTLE U. L. REV. 937, 962 (2018) (Hereinafter, Perlin, *Who Will Judge*). On dignity and compassion in this context in particular, see Michael L. Perlin, “In These Times of Compassion When Conformity’s in Fashion”: How Therapeutic Jurisprudence Can Root out Bias, Limit Polarization and Support Vulnerable Persons in the Legal Process, 11 TEX. A&M L. REV. (forthcoming 2023) (manuscript at 9–11) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3961674).

²¹⁹ Carol Sanger, *Decisional Dignity: Teenage Abortion, Bypass Hearings, and the Misuse of Law*, 18 COLUM. J. GENDER & L. 409, 415 (2009), as quoted in Perlin & Cucolo, *supra* note 194, at 617–18.

the dignity-enhancing principles of TJ, "we enhance the likelihood that shame and humiliation will diminish and that greater dignity will be provided."²²⁰

The role of compassion in TJ is now being looked at more carefully.²²¹ TJ is based on the "psychology of compassion, understood as a sensitivity to and concern for the suffering of others and a commitment to alleviating and preventing it."²²² Indeed, in David Wexler's two-pronged framework for engaging in TJ inquiries—modalities he characterizes as Therapeutic Design of the Law (Therapeutic Design) and Therapeutic Application of the Law (Therapeutic Application)²²³—compassion is front and center. David Yamada's analysis of Wexler's framework is clear: "Therapeutic Design suggests that we should also regard well-being, dignity, compassion, and psychological health as desirable outcomes in law and legal procedures."²²⁴

²²⁰ Michael L. Perlin & Alison J. Lynch, "She's Nobody's Child/The Law Can't Touch Her at All": Seeking to Bring Dignity to Legal Proceedings Involving Juveniles, 56 FAM. CT. REV. 79, 88–89 (2018).

²²¹ Lorie Gerkey, *Legal Beagles, a Silent Minority: Therapeutic Effects of Facility Dogs in the Courtroom*, 1 INT'L J. THERAPEUTIC JURIS. 405, 415 (2016); see also Jamey Hueston, *The Compassionate Court: Reforming the Justice System Inside and Outside*, 57 CT. REV. 108, 108 (2021).

²²² Perlin, Harmon & Kubiniec, *supra* note 22 (manuscript at 46) (quoting Anthony Hopkins & Lorana Bartels, *Paying Attention to the Person: Compassion, Equality and Therapeutic Jurisprudence*, in THE METHODOLOGY AND PRACTICE OF THERAPEUTIC JURISPRUDENCE 107 (Nigel Stobbs, Lorana Bartels & Michel Vols eds., 2019) [hereinafter, METHODOLOGY AND PRACTICE]).

²²³ See David B. Wexler, *The DNA of Therapeutic Jurisprudence*, in METHODOLOGY AND PRACTICE, *supra* note 222, 3, 6, 8. On how TJ "empowers practitioners to design emotionally intelligent and remedial strategies to either minimize harmful consequences or enhance restorative legal goals and outcomes," see Anna Kawalek, *A Tool for Measuring Therapeutic Jurisprudence Values During Empirical Research*, 71 INT'L J. L. & PSYCHIATRY 101581, 101581 (2020). Professor Kawalek considers the philosophical underpinnings of Professor Wexler's TDL and TAL insights in her recent article, *Strengthening the Theoretical Commitments Underpinning Therapeutic Jurisprudence Research: Ontology and Epistemology* (article under submission; on file with authors).

²²⁴ David C. Yamada, *Teaching Therapeutic Jurisprudence*, 50 U. BALT. L. REV. 425, 431 (2021). There is certainly more of a move toward incorporating compassion values in the justice process in general. See, e.g., Eda Katharine Tinto & Jenny Roberts, *Expanding Compassion Beyond the COVID-19 Pandemic*, 18 OHIO ST. J. CRIM. L. 575, 600–02 (2021) (citing recent, and growing, examples of "presumptive compassion" in efforts at criminal justice reform); see also Angela

Quality counsel is an integral component of TJ-supported lawyering. As stated flatly by Judge Juan Ramirez and Professor Amy Ronner, “the right to counsel is . . . the core of therapeutic jurisprudence.”²²⁵ As one of the co-authors wrote over 25 years ago, “any death penalty system that provides inadequate counsel and that, at least as a partial result of that inadequacy, fails to insure that mental disability evidence is adequately considered and contextualized by death penalty decision-makers, fails miserably from a therapeutic jurisprudence perspective.”²²⁶

The question here before us is this: In the context of cases involving defendants with FASD, to what extent do the courts’ “track records” match up to these TJ principles and aspirations?

V. APPLYING TJ TO FAS/FASD CASES

We know that TJ can be a valuable framework, both bridging the chasm between ethics in clinical and forensic practice and by supporting forensic mental health professionals in adopting and implementing trauma-informed assessment practices in cases of individuals with FASD.²²⁷ “Adopting trauma-informed practices not

P. Harris, *Toward Lawyering as Peacemaking: A Seminar on Mindfulness, Morality, and Professional Identity*, 19 RICH. J.L. & PUB. INT. 377, 381 (2016) (“The restorative justice movement—and ‘new lawyer’ practices such as holistic lawyering, collaborative lawyering, and therapeutic justice—all seek to build compassion directly into the legal process.”). On the relationship between restorative justice and therapeutic jurisprudence in this context, see Michael L. Perlin, “*I Hope the Final Judgment’s Fair*”: *Alternative Jurisprudences, Legal Decision-Making, and Justice*, in THE CAMBRIDGE HANDBOOK OF PSYCHOLOGY OF LEGAL DECISION-MAKING (Monica Miller et al., eds.) (forthcoming) (manuscript at 13–14) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3989991).

²²⁵ Juan Ramirez Jr. & Amy D. Ronner, *Voiceless Billy Budd: Melville’s Tribute to the Sixth Amendment*, 41 CAL. W. L. REV. 103, 119 (2004).

²²⁶ Michael L. Perlin, *The Executioner’s Face Is Always Well-Hidden: The Role of Counsel and the Courts in Determining Who Dies*, 41 N.Y.L. SCH. L. REV. 201, 235 (1996).

²²⁷ See Julie Goldenson, Stanley Brodsky & Michael L. Perlin, *Trauma-Informed Forensic Mental Health Assessment: Practical Implications, Ethical Tensions, and Alignment with Therapeutic Jurisprudence Perspectives*, 28 PSYCH., PUB. POL’Y & L. 226, 234 (2022).

only may afford examinees dignity and respect, but also will likely improve the quality of forensic mental health assessment."²²⁸

TJ speaks to expert witnesses as well as to lawyers.²²⁹ Thus, in a comprehensive series of recommendations as to what experts should do in competency-to-stand-trial cases involving defendants with FASD, Dr. Jerrod Brown and his colleagues offer this blueprint, one that aligns perfectly with TJ principles:

[W]e recommend the following steps be phased into CST evaluation procedures at a minimum, especially in high-stakes cases: (1) early inquiry with counsel regarding the possibility of prenatal alcohol exposure; (2) complete record review, including birth, medical, and school records as well as any other childhood records that may be available (e.g., child protective services, adoption records, juvenile records); (3) comprehensive neuropsychological testing (e.g., intellectual, attention, memory and learning, communication, and executive functioning skills), including adaptive assessment with respondents who have observed the defendant's everyday behavior on a regular basis and suggestibility assessment; (4) use of a standardized CST measure to investigate specific psycholegal capacities and interpreting results in the context of the defendant's cognitive/adaptive profile [. . .]; (5) using open-ended evaluation questions and ensuring understanding of questions with in-depth probing; and (6) corroborating self-report

²²⁸ *Id.*

²²⁹ See, e.g., Astrid Birgden & Michael L. Perlin, "Tolling for the Luckless, the Abandoned and Forsaken": *Therapeutic Jurisprudence and International Human Rights Law as Applied to Prisoners and Detainees by Forensic Psychologists*, 13 *LEGAL & CRIMINOLOGICAL PSYCHOL.* 231, 234 (2008) [hereinafter Birgden & Perlin, *Tolling for the Luckless*]; Astrid Birgden & Michael L. Perlin, "Where the Home in the Valley Meets the Damp Dirty Prison": *A Human Rights Perspective on Therapeutic Jurisprudence and the Role of Forensic Psychologists in Correctional Settings*, 14 *AGGRESSION & VIOLENT BEHAV.* 256, 259–60 (2009) [hereinafter Birgden & Perlin, *Where the Home in the Valley*].

with documented third-party data and/or collateral interviews.²³⁰

TJ is also an integral component of successful mental health courts (“MHCs”).²³¹ As it is possible for someone to have FASD and yet test at an average or above average IQ level,²³² such individuals “do not qualify as intellectually disabled and do not receive treatment.”²³³ Thus problem-solving courts need to be developed that specifically address and adjudicate offenders with FASD.²³⁴ The promotion and creation of such courts are consistent with TJ’s aims and aspirations, especially where litigants are given the “voice” that TJ demands. “The courts are grounded and rooted in TJ; they reflect TJ ‘theory in practice;’ and they acknowledge that a defendant’s appearance in such a court comes at a ‘painful and crucial point in life.’”²³⁵

²³⁰ Brown et al., *supra* note 129, at 24–25.

²³¹ See, e.g., Perlin, *Who Will Judge*, *supra* note 218, at 946–51. On the “robust connection” between TJ and MHCs, see, e.g., Michael L. Perlin et al., “*On Desolation Row*”: *The Blurring of the Borders between Civil and Criminal Mental Disability Law, and What It Means to All of Us*, 24 TEX. J. ON C.L. & C.R. 59, 114 (2018). Although the majority of MHCs are limited to misdemeanor cases, an increasing number of jurisdictions now statutorily empower such courts to hear felony cases as well. See, e.g., Norma Jaeger, *Where We Have Been and Where We Are Going: A Review of Idaho’s Drug and Mental Health Courts*, 48 ADVOCATE 26, 26–27 (2005); Mike Eidelbes, *Mental Health Court Shows Promise*, 87 MICH. B.J. 16, 16 (2008); E. Lea Johnston & Conor P. Flynn, *Mental Health Courts and Sentencing Disparities*, 62 VILL. L. REV. 685, 686 (2017); Matthew J. D’Emic, *The Promise of Mental Health Courts*, 22 CRIM. JUST. 24, 25–28 (2007). For more on Judge D’Emic’s court, see Mark Fass, *Program Steers Mentally Ill Defendants Away from Jail and Toward Treatment*, N.Y. L.J. (2008).

²³² See Fanning, *supra* note 43, at 107.

²³³ Herrmann, *supra* note 70, at 243.

²³⁴ In an in-progress article, the authors recommend the creation of special juvenile problem-solving mental health courts both for juveniles with autism spectrum disorder and those with FAS or FASD. See Michael L. Perlin & Heather Ellis Cucolo, “*I Saw Guns and Sharp Swords in the Hands of Young Children*”: *Why Mental Health Courts for Juveniles with Autism Spectrum Disorder and Fetal Alcohol Spectrum/Disorder Are Needed* (manuscript in progress, on file with authors).

²³⁵ Perlin, *Who Will Judge*, *supra* note 218, at 959 (quoting Matthew J. D’Emic, *Mental Health Courts: Bridging Two Worlds*, 31 TOURO L. REV. 369, 376 (2015)).

As we noted above, quality counsel is a robust aspect of TJ.²³⁶ As we stated at the outset of this Article, legal professionals must understand the significance of the broad range of potential deficits and identifying markers—there is no “one size fits all” set of characteristics. Consider here the scholarly focus on counsel representing capital defendants:

- Recommendations to “gather as much information as possible about the defendant’s history including police reports, medical records, birth records, pediatric records and hospital records”²³⁷ set out a TJ blueprint for a mitigation strategy in cases of individuals with FASD.
- Sentencing and mitigation trainings offered nationwide by the National Association of Sentencing Advocates, that are grounded in the core principles of therapeutic jurisprudence,²³⁸ should be obligatory for all lawyers who represent defendants with FASD.

Especially significant in this context is Justice Sotomayor’s dissent from a denial of certiorari in *Trevino v. Davis*.²³⁹ In *Trevino*, the Court initially remanded “with the expectation that, if [the inmate] could establish that his underlying ineffective-assistance-of-trial-counsel claim was substantial and that his initial-review counsel was ineffective, courts would afford him meaningful review of the underlying claim.”²⁴⁰ But Justice Sotomayor said that did not happen because the Fifth Circuit “failed to view the prejudice inquiry holistically” in concluding that the inmate was not prejudiced by his trial counsel’s alleged failure to adequately investigate and

²³⁶ Ramirez & Ronner, *supra* note 225, at 119.

²³⁷ Rebecca J. Covarrubias, *Lives in Defense Counsel’s Hands: The Problems and Responsibilities of Defense Counsel Representing Mentally Ill or Mentally Retarded Capital Defendants*, 11 SCHOLAR 413, 467 (2009).

²³⁸ Perlin & Lynch, *supra* note 211, at 354; Michael L. Perlin & Alison J. Lynch, “My Brain Is So Wired”: Neuroimaging’s Role in Competency Cases Involving Persons with Mental Disabilities, 27 B.U. PUB. INT. L.J. 73, 89 (2018).

²³⁹ *Trevino v. Davis*, 138 S. Ct. 1793, 1794 (2018) (Sotomayor, J., dissenting).

²⁴⁰ *Id.* at 1794.

present mitigating evidence regarding his FASD at the sentencing phase of his capital murder trial.²⁴¹

In order to effectively and zealously represent their clients, counsel must be aware of the ethical standards in this area and in particular the recommendations laid out by the ABA. TJ instructs us to do better than what the Fifth Circuit in *Trevino* concluded—that the standards are mere guides—after recognizing that to provide effective assistance, “counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.”²⁴² TJ not only encourages the attorney to follow those “guides” but to use them as a baseline whereupon the attorney can set the bar of adequate counsel even higher for persons with FASD.

It is critical that we assess the question of the interrelationship between trauma and FASD in the context of TJ.²⁴³ Although we know that almost three-quarters of youth and adults with FASD have experienced physical trauma, emotional abuse, and sexual abuse, and the risk of adverse childhood experiences (“ACEs”) among people with FASD is increased sevenfold when compared to people without FASD,²⁴⁴ it is still common for trauma symptoms to be disregarded or misconstrued in legal contexts.²⁴⁵ From a TJ perspec-

²⁴¹ *Id.* at 1797.

²⁴² *Trevino v. Davis*, 829 F.3d 328, 339, 343 (5th Cir. 2016) (citing the AMERICAN BAR ASSOCIATION (ABA) CRIMINAL JUSTICE STANDARDS). See *Steel-Eyed Death*, *supra* note 22, at 291–92 (discussing *Trevino*).

²⁴³ On how therapeutic jurisprudence can be used as a tool to remediate judicial stereotyping of defendants with traumatic brain injury, see Lynch, Perlin & Cucolo, *supra* note 89, at 267–68, discussing, *inter alia*, the work of Professor Colleen Berryessa on the inevitable negative outcomes of such stereotyping. See, e.g., Colleen M. Berryessa, *Judicial Stereotyping Associated with Genetic Essentialist Biases Toward Mental Disorders and Potential Negative Effects on Sentencing*, 53 L. & SOC’Y REV. 202, 204 (2019). On judicial attitudes in FAS cases, see Anthony P. Wartnik, Larry G. Anderson & Anthony J. FitzGerald, *Views from the Bench: Fetal Alcohol Spectrum Disorder in the Courtroom*, in EVALUATING FETAL ALCOHOL SPECTRUM DISORDERS 465 (Natalie Novick Brown ed., 2021).

²⁴⁴ Burd & Edwards, *supra* note 37, at 25 (citing Cassondra Kambeitz et al., *Association of Adverse Childhood Experiences and Neurodevelopmental Disorders in People with Fetal Alcohol Spectrum Disorders (FASD) and Non-FASD Controls*, 19 BMC PEDIATRICS 498, 503 (2019)).

²⁴⁵ B.L. Brand et al., *Assessing Trauma-Related Dissociation in Forensic Contexts: Addressing Trauma-Related Dissociation as a Forensic Psychologist, Part II*, 10 PSYCH. INJURY & L. 298, 302 (2017).

tive, achieving voice and validation (per Professor Ronner's teachings)²⁴⁶ has special significance and importance for those who have been severely traumatized. A TJ-informed approach can recognize how the demands of a mental health evaluation and the provision of testimony might impact a trauma survivor's responses and participation.²⁴⁷

It is essential, again, to consider the questions we raise in this Article in the context of adequacy of counsel.²⁴⁸ TJ is the best tool available to critically weigh the therapeutic (or anti-therapeutic) effects of the role of counsel in the mental disability system. In doing this weighing, TJ teaches us that cases of the sort we discuss in this Article require competent and informed counsel who understand the therapeutic potential inherent in mental disability litigation.

For TJ principles to be effectuated, lawyers representing persons with mental disabilities need to think carefully about all issues discussed here. The caselaw shows us that lawyers, in many cases involving the representation of persons with FASD, do a woeful job in virtually every aspect of the trial. It is essential that experts in the sorts of cases we discuss here incorporate TJ principles,²⁴⁹ both in their clinical evaluations and in their courtroom testimony.²⁵⁰

Consider the blueprint set out by a leading death penalty expert witness and his colleagues:

The defense team must investigate neurodevelopmental issues including birth traumas causing anoxia-related brain damage, in utero exposure to diseases, alcohol and other substances, Fetal Alcohol Syndrome, near drownings, use of inhalants, early

²⁴⁶ See Ronner, *supra* note 216.

²⁴⁷ Goldenson, Brodsky & Perlin, *supra* note 227, at 247.

²⁴⁸ See generally *Steel-Eyed Death*, *supra* note 22.

²⁴⁹ See, e.g., Jill Miller, *The Defense Teams in Capital Cases*, 31 HOFSTRA L. REV. 1117, 1131 (2003) ("Experts on such factors as alcohol and substance abuse, fetal alcohol syndrome, trauma and maltreatment, or risk assessment may be required.").

²⁵⁰ These may be among the cases where multiple experts are needed: one to explain to the factfinders why their "common sense" is fatally flawed, and one to provide an evaluation of the defendant in the context of the specific question (the impact of FASD on the defendant's actions before the court). See generally Perlin, *supra* note 90, at 10506; Lynch, Perlin & Cucolo, *supra* note 89, at 262–63 (in the context of cases involving defendants with traumatic brain injury).

motor vehicular accidents and subsequent brain injury, exposure to neurotoxins (lead, mercury, pesticides, chemical waste, alcohol and drugs), physical abuse, meningitis and encephalitis, convulsions and seizures²⁵¹

The cases that we discuss here reveal that, by and large, reviewing courts pay short shrift to these inadequacies.²⁵²

This goes beyond the limited set of cases we discuss in this Article: It is critical that lawyers, clinicians, court personnel and forensic witnesses must fully grasp the potential impact of FASD on litigants (and witnesses) in the whole range of civil and criminal cases that come before the courts as they fulfill their professional responsibilities. Doing this in the representation of persons with FASD is never easy, but it is essential and the *sine qua non* of effective counsel.²⁵³

It is also essential that, at least in those jurisdictions in which mental health courts are open to those charged with felonies,²⁵⁴ possible admission into such courts be explored as an alternative for defendants with FASD.²⁵⁵ A student note takes this idea a step further and makes the persuasive case that there should be separate,

²⁵¹ John Matthew Fabian et al., *Life, Death, and IQ: It's Much More than Just a Score: Forensic Psychological and Neuropsychological Evaluations in Atkins Intellectual Disability/Mental Retardation Cases*, 59 CLEV. ST. L. REV. 399, 411 (2011).

²⁵² See *Dobyne v. State*, 805 So.2d 733, 758 (Ala. Ct. App. 2000); *Lambert*, 393 F.3d 943, 979 (9th Cir. 2004); *Twitty v. United States*, Nos. 1:10cv19, 1:06cr250, 2010 WL 5211456, at *4 (W.D.N.C. Dec. 16, 2010); *State v. Wistrom*, No. A-10-1091, 2011 WL 3273906, at *3 (Neb. Ct. App. 2011), all discussed *supra*. As noted above, we expect issues of inadequate representation will be exacerbated in coming years by the Supreme Court's recent decision in *Shinn v. Ramirez*, 142 S. Ct. 1718, 1742 (2022), that a federal habeas court may not conduct an evidentiary hearing or otherwise consider evidence beyond the state court record based on the ineffective assistance of state postconviction counsel. See *supra* note 101.

²⁵³ For a discussion of the Cruz (Parkland shootings case), in which this testimony was offered, see *supra* Section III.E.

²⁵⁴ See generally *Williams v. Stirling*, No. 6:16-cv-01655-JMC, 2018 WL 1240310 (S.D.S.C. Mar. 8, 2018).

²⁵⁵ For a thoughtful recent article on the relationship between TJ and other treatment courts (commercial and sexual exploitation of children), see Emma Hetherington, Allison Dunnigan & Hannah Elias Sbaity, *CSEC Treatment*

specialist courts for defendants with FASD facing criminal charges,²⁵⁶ stressing that “implementing an FASD court offers offenders the most structure, treatment, and support they need in a framework proven to work.”²⁵⁷ Such courts would be a perfect example of therapeutic jurisprudence in action.²⁵⁸

CONCLUSION

A survey of relevant caselaw demonstrates that, by and large, courts have been dismissive of claims that FASD needs to be taken seriously in the criminal law process, whether on questions of capacity to stand trial, responsibility, or sentencing punishment.²⁵⁹ Evidence of this disorder (both when coupled with serious childhood physical trauma and otherwise) is often trivialized,²⁶⁰ and the relationship between trauma and FASD is rendered legally meaningless.²⁶¹

Similarly, the teachings of therapeutic jurisprudence are ignored in cases in which judges simply conclude—with no basis in fact or law—that testimony as to the etiology of, consequences of, and implications of FASD would have no impact on the jury. By way of

Courts: An Opportunity for Positive, Trauma-Informed, and Therapeutic Systems Responses in Family and Juvenile Courts, 43 MITCHELL HAMLINE L.J. PUB. POL’Y & PRAC. 200, 215–16 (2022).

²⁵⁶ See Herrmann, *supra* note 70, at 264.

²⁵⁷ *Id.* at 282.

²⁵⁸ On the role of trauma-informed principles in PSCs, see Hetherington, Dunning & Sbaity, *supra* note 255, at 216. On the need for trauma-informed lawyering in general, see generally Sarah Katz & Deeya Haldar, *The Pedagogy of Trauma Informed Lawyering*, 22 CLINICAL L. REV. 359 (2016), as discussed in Meghan Gallagher & Michael L. Perlin, ‘The Pain I Rise Above’: How International Human Rights Can Best Realize the Needs of Persons with Trauma-Related Mental Disabilities, 29 FLA. J. INT’L L. 271, 273 n.7 (2018).

²⁵⁹ See *Floyd v. Filson* 949 F.3d 1128, 1153 (9th Cir. 2020); *State v. Johnson*, 333 S.W.3d 459, 465 (Mo. banc 2011); *Foell v. Mathes*, 310 F. Supp. 2d 1020, 1049 (N.D. Iowa 2004); *People v. Ray*, 914 P.2d 846, 854–56 (Cal.), *cert. denied*, 117 S. Ct. 393 (1996).

²⁶⁰ See *Filson* 949 F.3d at 1153; *Johnson*, 333 S.W.3d at 465; *Foell*, 310 F. Supp. 2d at 1049; *Ray*, 914 P.2d at 854–56.

²⁶¹ See, e.g., Brand, *supra* note 245, at 301.

example, consider the court's baseless decision in *Floyd v. Fillion*²⁶²—that there was purportedly “no reasonable probability” the introduction of testimony by an FASD expert might have led the jury to conclude that mitigating factors outweighed aggravating factors²⁶³

If we were to utilize therapeutic jurisprudence as a prophylactic tool, it is far more likely (1) that there would be more informed, effective counsel in the cohort of cases we discuss here;²⁶⁴ (2) that there would be a movement to create problem-solving courts²⁶⁵ allowing for diversion and better treatment for FASD;²⁶⁶ and (3) that judges would incorporate FASD cutting-edge research and resources into their decisions, recommendations, and sentences.

In the same song upon which we drew for the title of this Article, Dylan also excoriates “false-hearted judges/ dying in the webs that they spin.”²⁶⁷ In some of the litigation, it is not the judges who are dying, but defendants whose death penalty sentences have been upheld by the courts despite the impact of FASD on their actions. It is time that we put an end to the “webs” in question.

²⁶² *Floyd*, 949 F.3d at 1145.

²⁶³ *Id.* at 1139.

²⁶⁴ See, e.g., Covarrubias, *supra* note 237, at 467.

²⁶⁵ See Perlin et al., *supra* note 231, at 114.

²⁶⁶ See Herrmann, *supra* note 70, at 258.

²⁶⁷ See Bob Dylan, *Jokerman*, BOB DYLAN (last visited Dec. 19, 2022), <https://www.bobdylan.com/songs/jokerman/>.