

No. 290557

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

LEWIS A. LAWRENCE, Appellant

APPEAL FROM THE SUPERIOR COURT
OF WHITMAN COUNTY

THE HONORABLE DAVID FRAZIER
THE HONORABLE WILLIAM ACEY

CORRECTED BRIEF OF APPELLANT

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SUMMARY OF ARGUMENT

Lewis Lawrence, a 21-year-old Native American, was sentenced to 75 years in prison for non-homicide crimes. He was twice found incompetent to stand trial. He was eventually found competent and permitted to represent himself at trial. The court erred both in finding him competent to stand trial and competent to act as his own attorney.

The trial court improperly instructed the jury by failing to instruct on lesser-included offenses and giving an erroneous instruction for a special verdict. Finally, the trial court erred in failing to recognize its authority to consider mitigating factors. Mr. Lawrence requests this court to reverse the trial court judgment and remand for a new trial.

I. ASSIGNMENTS OF ERROR

- A. The trial court erred when it failed to obtain an evaluation of Mr. Lawrence's developmental disability.
- B. The trial court erred when it found Mr. Lawrence competent to stand trial.
- C. The trial court erred when it allowed Mr. Lawrence to represent himself at trial.
- D. The trial court erred when it failed to instruct the jury on lesser-included offenses.

- E. The trial court erred in instructing the jury that a special verdict finding of not guilty had to be unanimous.
- F. The trial court erred by failing to recognize its authority to impose an exceptional downward sentence and failing to consider mitigating factors.

Issues Pertaining To Assignments of Error

1. Did the trial court err when it failed to obtain an evaluation for Mr. Lawrence's developmental disability of fetal alcohol syndrome?
2. Did the trial court err when it found Mr. Lawrence competent to stand trial despite its reservations about his mental competence?
3. Does Washington case law allow a trial court to require legal representation for a mentally ill defendant who has been found competent to stand trial?
4. Did the trial court err when it failed to instruct the jury on lesser-included offenses?
5. Did the trial court incorrectly instruct the jury that a not guilty special verdict finding must be unanimous?

6. Did the trial court abuse its discretion by failing to recognize its authority to exercise its discretion in sentencing and by failing to consider mitigating factors?

II. STATEMENT OF FACTS

Lewis Lawrence, a registered member of the Nez Perce tribe, had an abusive and chaotic early childhood. During the first year of his life, he was hospitalized 12 times for a variety of injuries, including broken bones, pneumonia, dehydration, and cigarette burns. (RP 1630; CP 371-73). During those early years of his life, he was moved between six foster-care homes before finally being placed long-term with a stable family at six years old. After he "aged out" of the foster-care system at age 18, he moved into an apartment, got a job as an assembler at Schweitzer Engineering Lab, and stopped taking his psychotropic medication. (RP 1630; CP 372).

At age 20, Mr. Lawrence was charged with three separate counts of attempted murder in the first degree with a firearm for firing a shotgun into his friends' apartment. Nine months earlier, Mr. Lawrence's foster mother had contacted both the Moscow and Pullman police departments to express her concerns that Mr. Lawrence was no longer taking his medication. She was very alarmed about his mental status. (RP 1632).

The incident leading to the charges occurred on March 17, 2009. (CP 1-4). Mr. Lawrence and brothers Michael and Yuteson Fuaau had been friends for about a year. (RP 798). On the afternoon of March 16, 2009, Michael Fuaau and Mr. Lawrence made plans to have dinner together at the Fuaau apartment. (RP 803). Mr. Lawrence was asked to "pitch in" by bringing some rice for the dinner. (RP 803). He did not want to contribute, and Yuteson Fuaau joked that if Mr. Lawrence didn't want to help out, then he could go home. Mr. Lawrence left the apartment. (RP 804). He was upset and over the telephone told Michael Fuaau, "You know, what the F, man. I thought we were friends. You know? Your brother kicked me out of the house and said that you hated me, you didn't like me any more." Mr. Lawrence's reaction surprised Michael Fuaau. (RP 805).

Later that evening, Mr. Lawrence withdrew money from his checking account and purchased a shotgun. (RP 1312). Around midnight, Mr. Lawrence and a friend, Rylan Wallace, drove to the home of Michael and Yuteson Fuaau in Mr. Lawrence's car. (RP 1315). Mr. Lawrence took his loaded shotgun, walked to the Fuaau apartment, and knocked on the door. (RP 1317). Michael Fuaau answered the door. (RP 812). Mr. Lawrence fired the 12-gauge shotgun, striking Michael Fuaau in the head and face with birdshot. (RP 813-14). He fired two more shots into

the apartment. (RP 816). Yuteson Fuaau and Ahferom Zerai were in the apartment at the time but were not injured.

Mr. Lawrence ran back to his car, and Mr. Wallace drove them away from the area. (RP 1326). Soon after, Idaho police stopped and arrested them, recovering two shotguns from Mr. Lawrence's vehicle (RP 391-93).

A detective from the Pullman police department advised Mr. Lawrence of his *Miranda* rights and questioned him. (RP 1471). Mr. Lawrence said he wanted to kill the Fuaau brothers. Although they had been his friends, he told police that he firmly believed they were part of a large Samoan gang that had threatened Mr. Lawrence's family. (RP 1490-94). Officers who investigated the crime later determined that there was no gang affiliation, Mr. Lawrence's family had not been threatened, and his account of being deeply involved in a gang and drug trafficking was fabricated. (RP 1495).

Arrest and Request for Competency Evaluation: On March 27, 2009, the court granted defense counsel's request to order an off-site competency evaluation of Mr. Lawrence. (RP 33-34; CP 10-12).

First Formal Competency Review Hearing: The sanity commission evaluation report, submitted to the court on May 8, 2009, recommended Mr. Lawrence's immediate commitment to Eastern State Hospital ("ESH")

for competency restoration. (RP 38). Mr. Lawrence objected to being transferred to ESH and requested a new lawyer. (RP 43).

At the formal review hearing on May 15, 2009, the evaluating psychiatrist, Dr. William Grant, testified: "Mr. Lawrence is mentally ill. He has delusional thinking and a certain amount of mental confusion." (RP 52). Mr. Lawrence was uncooperative with the evaluation interviews and testing and was diagnosed with "psychosis not otherwise specified." (RP 55, 66). The psychiatrist testified the standard treatment for Mr. Lawrence's condition included administration of antipsychotic medication. (RP 53).

The court found Mr. Lawrence not competent to stand trial and ordered him committed to ESH for competency restoration. It further ordered antipsychotic and/or psychotropic medications to be administered to him as needed. (CP 13-14).

Second Competency Review Hearing: Mr. Lawrence was discharged from ESH on July 22, 2009. On August 20, 2009, the court reviewed the findings of the ESH personnel. (RP 76-83). Both evaluating doctors indicated that Mr. Lawrence had unrealistic thinking and bad judgment, was uncooperative and intransigent. Further, he suffered from antisocial personality disorder and narcissistic personality features rather than a mental disease or defect. (RP 82). Although Mr. Lawrence was

uncooperative with treatment and the ESH team found Mr. Lawrence's competence a "close call," the court found Mr. Lawrence competent to stand trial. (RP 77-78, 94).

After being deemed competent, however, Mr. Lawrence asked the trial judge whether his "UCC-1 form" had been filed, prompting the following exchange:

The Court: "After hearing that, Mr. Snyder [defense counsel], are you comfortable that this man is competent to proceed to trial?" (RP 87).

Addressing Mr. Lawrence, the court said:

And it's difficult for me to understand, sir, how any rational, competent person could even raise that issue or think that was a valid issue in a case.

So what you just told me makes me wonder, should I send you back to Eastern State Hospital for an additional period of time, and encourage you to cooperate with those people, so we can do everything we can here to protect your right to a fair trial. (RP 88.)

Despite its concerns, the court signed an order finding Mr. Lawrence competent to proceed. (RP 94; CP 16-17).

Second Competency Evaluation Request: On September 28, 2009,

Mr. Lawrence told the court:

I went through two lawyers already . . . I feel I haven't had the proper representation and counsel . . . I want to find out answers and everything.
And I feel—at this time I should represent myself and go to court—and go to trial at this time. (RP 97-98).

Defense counsel again raised issues of competence, and the State joined in requesting an independent evaluator in another sanity commission evaluation. (RP 100). The State spoke to the court:

I do have some additional concerns about the defendant's competency . . . given the nature of the past reports from Eastern, that they were—not equivocal, but not overwhelmingly certain in one direction or another. (RP 100-01).

In comments directed to Mr. Lawrence, the court stated:

Based on some of your previous appearances before the court, quite frankly and quite honestly with you, I have to tell you I've been—and I think I've said it before—very concerned about your competency. Your lawyer has expressed concern, and the prosecutor has expressed concern as well. (RP 106-07).

In reference to the previous ruling finding Mr. Lawrence competent, the court stated:

And no sooner had I found you to be competent that you said some things that made me really wonder whether you did truly understand the nature of the proceedings, here.

Then I read the letter that you provided to the court . . . and the letter itself gives me concern, now, about your ability to assist counsel and to understand the proceedings. (RP 107-08; CP 23-36).

[W]hen I previously found that you were competent and made the decision to proceed, it was a very difficult and very close call. As I said, no sooner had I made that call than you almost talked me out of it by some of the things that you've said, here—or said that day. (RP 108-09).

The court again appointed a sanity commission to evaluate Mr. Lawrence's competence, this time with independent evaluator

Dr. Greg Wilson. (RP 109: CP 44-46). Mr. Lawrence's counsel advised the court that Mr. Lawrence had previously been diagnosed with Fetal Alcohol Syndrome (FAS). Both defense and counsel for the State requested an evaluation by a professional specializing in evaluating developmental disabilities. (RP 112).

Dr. Wilson was appointed for this purpose. Although present at a meeting in which FAS was discussed, Dr. Wilson never filed a report or opinion on the effects of FAS on Mr. Lawrence's ability to understand the charges against him or the ability to assist counsel in his defense, control his actions, or form the requisite intent.

Between September 28, 2009, and November 6, 2009, Mr. Lawrence sent more letters to the court, the prosecutor's office, and the Clerk of the Court, detailing his desire to be released on his own recognizance; his disapproval of the court's rulings on his case; his belief that his right to a speedy trial had been violated, necessitating his immediate release; his belief that the judge and prosecutor were prejudiced, biased, and racist; his belief that his right to "habeas corpus" had been violated; his belief that the judge had not witnessed the crime and was therefore falsely accusing Mr. Lawrence; and his outrage that the court was "ruling [him] with 'diminished capacity.'" (CP 47-48, 49-58).

Third Competency Review Hearing: On November 6, 2009, the court held a third competency review hearing. (RP 114). Defense counsel informed the court, once again, that Mr. Lawrence no longer wished to have him as counsel and wished to proceed pro se. (RP 117, 124). The court responded to Mr. Lawrence:

It's because your statements that you've made here, the letters that you provided to the court, your demeanor here today, the position that you're trying to argue, here, in very many respects, is irrational, and gives me great concern that you're not able to, number one, represent yourself, and number two, make a decision as to whether you should represent yourself, and number three, here, whether you're capable of understanding the proceedings and assisting whoever the lawyer is to represent you in your defense of these very serious charges. (RP 126-27).

When Mr. Lawrence asked the court, "Why can't you grant me my wish?" the court responded, "I don't think, sir, that you're competent to make the decision." (RP 128).

Doctors from ESH provided a written report that Mr. Lawrence had refused to meet with them for the evaluation. (RP 116). Dr. Wilson met with Mr. Lawrence but did not provide a written report to the court. (RP 119).

Fourth Competency Review Hearing: At the November 12, 2009, hearing, Mr. Lawrence raised his voice and interrupted the court, saying to the trial judge:

[T]his whole shit and your scheme and the foul play, the reason why I want to go to jury trial is so I can point out your motherfuckin' lies to the jury. (RP 146).

Man I can't wait to fuckin' sue your ass and shit. . . . My tribe wants to get involved so much and tear the fuckin' shit out of you guys. . . . Convict me. Convict me. I ain't scared of no fuckin' 45 years. (RP 148).

This is a white man's law right here. This is a white man's court, man. . . . [If] Chief Joseph didn't save Lewis and Clark I wouldn't have to be here. (RP 150).

Mr. Lawrence then voluntarily left the courtroom, telling the court, "Shut the fuck up, bitch." (RP 151).

At the same hearing, according to Dr. Wilson, Mr. Lawrence's demeanor in the interview had been similar to that in the courtroom: using profanities and pressured speech, and continued talking despite security, jail officials, and the court's requests for him to be quiet. (RP 155).

Dr. Wilson's preliminary diagnosis for Mr. Lawrence was "manic episode occurring as part of a bipolar illness, with psychotic features." (RP 157).

In Dr. Wilson's expert opinion the mental illness precluded Mr. Lawrence's cooperation with the rules of the court and in his own defense. "He believes everyone, in a somewhat paranoid way, is biased against him." (RP 159).

Dr. Wilson's opinion was that Mr. Lawrence suffered from a mental disease or defect; that is, he understood the rudimentary components of the judicial process and that he could be found guilty, but he could not grasp

legal procedural issues and the need for representation by counsel. He instead professed that he was more capable of defending himself than was his attorney. Dr. Wilson concluded that Mr. Lawrence was so disorganized that there was serious question about his ability to assist in his own defense and that he presented a substantial danger to himself or others. (RP 159-60). Dr. Wilson offered no testimony about FAS and developmental disability, and the court did not inquire about Dr. Wilson's findings on the subjects.

The court stated that there are "many things he appears to be rational about and he seems knowledgeable about certain aspects of the process, but he has difficulty putting those in context." (RP 167-68). The court, again concluded that Mr. Lawrence was not competent to stand trial, and committed him to ESH for a second competency restoration period. (RP 168; CP 62-64).

Fifth Competency Review Hearing: On February 5, 2010, ESH provided the court with a report indicating that Mr. Lawrence was competent. (RP 177-79). Dr. Wilson, the independent evaluator, did not submit a report, but defense counsel informed the court that his observations were consistent with those of the ESH personnel. (RP 179). Judge Frazier again expressed concern about Mr. Lawrence's competence as follows:

Some of the letters, again, were obnoxious, obscene, bordered on being contemptuous. And it is for many of these reasons that I have had real concerns about Mr. Lawrence's competency to stand trial, and to assist his lawyer . . .

I think [I] have the ability to be concerned, be suspicious, that someone is not able to represent themselves or to assist counsel in their defense, or to understand the proceedings . . . but . . . I feel I must defer to the professionals that have spent a lot of time conducting testing and examination of Mr. Lawrence.

. . . I will find for the record . . . that Mr. Lawrence is competent to proceed . . . I'm finding that based on the professional evidence, despite my personal reservations . . . (RP 182; CP 65-70, 71-81, 82-86, 96-101, 102-05).

The court stated that although ESH had found Mr. Lawrence competent to proceed, its report also indicated that Mr. Lawrence had mental health issues. The court expressed continued concern about his mental health issues, but found Mr. Lawrence competent to proceed. (RP 182, 183, 188). No documentation was offered showing Mr. Lawrence had cooperated or participated in any treatment during the commitment period at ESH.

February 17, 2010, Hearing: Mr. Lawrence renewed his earlier motion to proceed pro se. He stated, "the reason why I want to fire him is so I can get all that evidence, so he can't withhold the evidence from me." (RP 257).

Judge Frazier reiterated his reservations that although Mr. Lawrence had been deemed competent to stand trial, the court did not see "a clean

bill of mental health." (RP 260). Nevertheless, the court explained the rights and risks of proceeding pro se but also said: "[I]f a person's mentally competent the person also has a constitutional right to represent himself and to act as his own lawyer." (RP 222). Judge Frazier noted that a waiver must be voluntary and intelligent, and then said, "I hate to use the word 'intelligent' under these circumstances." (RP 272).

The next day, Mr. Lawrence waived counsel. (RP 277). The court expressed its reservations, saying:

I have evaluations showing that you do have some mental health issues, and it's the opinions of some experts that those could impair the way you behave in court, particularly in a stressful situation.

I have some concern that the mental health issues could, while not rendering you incompetent, according to the experts, could impair your judgment or affect your ability to defend yourself. (RP 288-89).

In spite of these concerns, the court found he knowingly, voluntarily, and intelligently waived his right to counsel, and appointed standby defense counsel. (RP 296).

February 23, 2010, Hearing: Mr. Lawrence sent a letter to the prosecutor's office indicating that he had changed his mind and he wanted to have defense counsel reappointed. (CP 141-42). In the February 23, 2010, hearing, he stated: ". . . And I think it would be significant to have

him on my court case, still, too, because I do need a lawyer to help represent me properly and stuff . . . " (RP 335).

The court reappointed defense counsel and an additional second counsel for the limited purpose of assisting Mr. Lawrence and counsel to communicate with one another. (RP 338).

March 26, 2010, Hearing: One week before trial, Mr. Lawrence learned that the court had ruled the evidence removed from his vehicle and statements he made during interrogation with the Pullman Detective the night of the shooting were admissible. (RP 503). He told the court:

I just wished—I'm not—I'd like new counsel but if—can't begin then I guess I'll just go pro se at this time. 'Cause frankly all those lawyers that I've dealt with are just uncompetent [sic] and just—the[y] don't address stuff that I want done and stuff like that. We talk, and it just—we don't talk correctly and stuff, and stuff I address, they're like, "Well, I don't agree with this; I feel like arguing this way," and it just—just doesn't work out. (RP 504-5).

He then requested private counsel at government expense, stating his belief that there exists a special fund composed of federal income tax dollars for private criminal defense counsel:

It's—it's—it's a fund for everybody. I don't know how it goes about but I know it exists, and it's—it's a way you file paper work—I don't know how you do it, but it's—it exists. . . . And—it's—you file it with the courts and the courts read it and like, well, with the serious case that I'm facing, I'm facing at a lot of time and stuff. And it's kind of scary. And I [n]eed proper counsel to help me get through this. And—and this

motion that you file or however you do the paper work grants it so you get this counsel, this legal counsel. (RP 507).

After a heated exchange with the court, Mr. Lawrence asked the court to allow him to proceed pro se. The trial judge denied the motion, "because you are not competent to represent yourself. You do not have the judgment or the ability to properly represent yourself." (RP 509). Mr. Lawrence interrupted and argued with the court, stating, "I never signed by my habeas corpus rights away. I never signed the speedy trial away." (RP 510). After further interruptions and argument with the court, Mr. Lawrence said:

I'm not even going to show up, man. So, that's—that's what—that's how ridiculous I think this is. You might think it's a serious charge—crime. But I even told John Snyder that I pretty much know who probably did this crime, and I'm not even going to say their names 'cause I intend to take care of them myself, man. (RP 517).

The court stated:

I allowed him to proceed pro se, [and] he discovered he couldn't do it on his own—And now we're one week from trial. He—I'd be extremely reluctant to allow him to proceed without a lawyer, particularly given his behavior. (RP 522).

March 29, 2010, Hearing: Mr. Lawrence again asked that defense counsel be removed. (RP 529). He made a motion to "petition [his] habeas corpus in the matter that [I] have the right to a speedy trial." (RP 539). With the assistance of the attorney who had been appointed for the limited purpose of facilitating communication between

Mr. Lawrence and defense counsel, Mr. Lawrence filed a formal written affidavit of prejudice against Judge Frazier. (RP 584; CP 224-30).

Following Judge Frazier's removal, Judge Acey was appointed to sit as trial judge. (RP 588). Mr. Lawrence petitioned the court for permission to proceed pro se. The new trial court presented Mr. Lawrence with the choice of waiving his right to a speedy trial or waiving his right to counsel and representing himself at trial. (RP 601). Mr. Lawrence chose waiver of counsel. After prompting from the State, the court engaged in an on-the-record colloquy with Mr. Lawrence on the risks and dangers of proceeding pro se. The court found Mr. Lawrence's waiver of right to counsel to be knowing and voluntary. (RP 612).

Trial

Mr. Lawrence was the only defense witness. He testified that he drove to an apartment complex in the opposite direction of the Fuaaus' building with Rylan Wallace to rob some residents, whom he had been watching for months, of their black diamonds. (RP 1530-31). He went to the apartment door, knocked, and saw six men in the apartment. He claimed that he used Mr. Wallace's shotgun to subdue the men, and escape with the bag of black diamonds, the current location of which he refused to disclose. (RP 1538).

Jury Instructions

The court gave Special Jury Instruction No. 15:

If you find the defendant guilty of this crime, you will then use the special verdict form and fill in the blank with the answer "yes" or "no" according to the decision you reach. Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form. In order to answer the special verdict forms "yes" you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "no." (CP 277).

Mr. Lawrence was found guilty on all counts with the special firearm enhancements. (RP 1604-08).

Sentencing Hearing

At the sentencing hearing, Mr. Lawrence's foster brother-in-law informed the court that when Mr. Lawrence was off medication, he consistently reported fears that someone was going to harm his family. He also reported to the court that Mr. Lawrence had been diagnosed with FAS as a child. (RP 1628-29). His foster mother addressed the court, saying, "He'd been in six foster homes in six months, and was thrown out. . . . In his six years he . . . had been run over [and] cut with beer bottles." (RP 1630).

In its sentencing ruling, the court stated, " [B]ecause they are serious violent offenses, and different victims, I don't have any choice but to run Counts 1, 2, and 3 consecutive; I'm required by law to run them

consecutive." (RP 1644). In imposing the maximum sentence,

Judge Acey commented:

I am thoroughly convinced—that you cannot believe you did these things to your friends, you did these crimes. I am convinced you don't believe it to this day, that you—that you are capable of doing this to your friends. And so it appears to me, outside observer, that you created this alternate reality—of black diamonds, drugs, shooting a safe, and just kind of wildly shooting a gun behind you. But no offense, sir, that's make-believe. . . That's make-believe. (RP 1641-1642).

Mr. Lawrence was sentenced to 900 months in prison. (RP 1647).

This timely appeal follows.

I. ARGUMENT

A. The Trial Court Erred When It Found Mr. Lawrence Competent to Stand Trial Despite Having Serious Reservations About His Mental State and Reason to Believe He Suffered From FAS.

The Due Process Clause of the United States Constitution and Washington law prohibit the court from trying an incompetent defendant. *Pate v. Robinson*, 383 U.S. 375, 386, 86 S.Ct. 836, 15 L. Ed. 2d 815 (1966); RCW 10.77.050. In Washington, a defendant is competent to stand trial only if he understands the nature of the charges against him and is capable of assisting in his own defense. *State v. Lewis*, 141 Wn. App. 367, 381, 166 P.3d 786 (2007). It is within the trial court's discretion to determine whether the defendant is competent, and the court is not bound by the opinion of experts. *State v. Benn*, 120 Wn.2d 631, 662, 845 P.2d

289 (1993); *State v. Loux*, 24 Wn. App. 545, 548, 604 P.2d 177 (1979).

The court may base its determination of competency on several factors, including the court's observations of the defendant's conduct, appearance, and demeanor; medical and psychiatric records; and statements of counsel.

Benn, 120 Wn.2d at 662; *Loux*, 24 Wn. App. at 548.

1. The Trial Court Erred When It Found Mr. Lawrence Competent To Stand Trial Despite Knowledge That He Suffered From FAS.

The trial court twice found Mr. Lawrence incompetent to stand trial and twice committed him to ESH for competency restoration. The court ordered the second competency evaluation based on its own observations of Mr. Lawrence and a motion filed by defense counsel. (CP 44).

Defense counsel noted in the motion and during the motion hearing that Mr. Lawrence's family believes he suffers from FAS. (RP 112; CP 41).

When a defendant's competency is called into question and the court is aware that the defendant may be developmentally disabled, RCW 10.77.060(1)(a) requires that at least one of the two experts appointed to assess the defendant's competency be a developmental disabilities professional. Following the hearing, the court appointed two experts from ESH and an independent defense expert, Dr. Wilson, to assess Mr. Lawrence's competency and for developmental disabilities. The appointed experts failed to provide any evidence to the court

demonstrating they had examined Mr. Lawrence for developmental disabilities or, more specifically, the effects of FAS.

Dr. Wilson reported Mr. Lawrence suffered from a mental disease or defect, and the court ordered Mr. Lawrence committed to ESH for a second competency restoration period. Under RCW 10.77.084(1)(b), an incompetent defendant must be evaluated for developmental disabilities as soon as possible following the commitment. ESH failed to provide evidence that it complied with the statute.

The report issued to the court by ESH does not indicate whether Mr. Lawrence was ever tested for developmental disabilities or whether the staff evaluated the potential effects of FAS on his competency. Although staff members were aware of his previous FAS diagnosis, the report does not reflect any meaningful analysis related to the effects it had on Mr. Lawrence. (CP 110). That oversight deprived the court of important information when it made its finding of competence.

FAS is a birth defect resulting from prenatal alcohol exposure that causes lifelong consequences and secondary disabilities.¹ Its cognitive shortfalls are often invisible to the untrained observer and, as a result, are

¹ Robin A. LaDue & Ton Dunne, *Legal Issues and the Fetal Alcohol Syndrome*, 3 FEN Pen 6 (Fall 1995). Please see Appendix A.

often missed by judges, counsel, and psychiatrists not specifically trained in its detection.²

Individuals who suffer from FAS frequently lack abstracting abilities, which makes it difficult for them to comprehend social rules and expectations.³ Some of the characteristics associated with FAS are impulsivity, poor judgment, lack of understanding of cause and effect, and difficulty predicting or understanding consequences of behavior.⁴ Persons with FAS often have better expressive language skills than receptive language skills, so they appear to understand more than they actually do,⁵ and even though many have cognitive IQs in the borderline to average range, they often have adaptive functioning abilities in the mentally handicapped range.⁶

Throughout his pretrial hearings, in the letters he sent to the court, and during his incarceration, Mr. Lawrence demonstrated each of those characteristics. He yelled, interrupted proceedings, used profanities, accused the court and counsel of racism, and made threats against the court and counsel alike. He insisted he could represent himself better than

² Timothy E. Moore & Melvyn Green, *Fetal Alcohol Spectrum Disorder (FASD): A Need for Closer Examination by the Criminal Justice System*, 19 *Crim. R.* 6th (Can.) 99-108 (July 2004). *Please see* Appendix B.

³ LaDue & Dunne, *supra*, 3 *FEN Pen* at 7.

⁴ Caron Byrne, *The Criminalization of Fetal Alcohol Syndrome (FAS)*, 2 (June 2002), available at <http://depts.washington.edu/fadu/legalissues/lawarticles.html>. *Please see* Appendix C.

⁵ *Id.* at 2.

⁶ *Id.* at 1.

trained legal counsel could. Finally, he often made statements which reflected a clear lack of understanding of the proceedings. His behavior and mental state consistently showed signs of the effects of FAS.

If the trial court had insisted the appointed experts act in compliance with the statute and conduct a thorough analysis of the effects FAS had on Mr. Lawrence's competency, the results in this case would likely have been different. "If the person is not evaluated appropriately and with an understanding of the behavioral, cognitive, and judgmental deficits found in people with FAS, the person may be found to be competent when, in reality, they have little or no sense of the legal process or implications of being in the legal system."⁷

The trial court must have access to accurate information regarding the effects of FAS, to make a determination of competence. Under Washington law, the experts had a duty to determine whether Mr. Lawrence was developmentally disabled. Here, the trial court abused its discretion. It found Mr. Lawrence competent to stand trial in the absence of any expert testimony regarding the effect of FAS on his ability to meaningfully assist counsel and understand the charges against him.

⁷ LaDue & Dunne, *supra*, 3 FEN Pen at 7; for more information on legal issues presented by FAS, please visit the FASD Legal Issues Resource Center at <http://depts.washington.edu/fadu/legalissues/>. The FASD Legal Issues Resource Center is a collaboration between the University of Washington School of Law, the University of Washington School of Medicine, and the University of Washington Department of Psychiatry and Behavioral Sciences, Fetal Alcohol and Drug Unit.

The court erred when it based its finding of competence on an insufficient report. That error was harmful to Mr. Lawrence and constitutes reversible error.

B. The Trial Court Abused Its Discretion When It Found Mr. Lawrence Competent To Stand Trial Despite Its Reservations.

The trial court is not bound by the opinion of experts and may base its determination of a defendant's competence on many factors, including its observations of the defendant's conduct, appearance, and demeanor. *Benn*, 120 Wn.2d at 662; *Loux*, 24 Wn. App. at 548. A court abuses its discretion when the decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *State v. Hayes*, 55 Wn. App. 13, 16, 776 P.2d 718 (1989).

Here, the court observed Mr. Lawrence's behavior on numerous occasions and was aware that Mr. Lawrence largely refused to participate in the competency restoration process during each of his commitments at ESH. Defense counsel informed the court the doctors from ESH stated the first time they found Mr. Lawrence competent, it was based on "one of their weakest reports, ever." (CP 39).

The court repeatedly expressed concern over Mr. Lawrence's ability to assist counsel and to meaningfully contribute to his own defense. The court had the power and the duty to weigh all the factors in front of it

when making its determination. In making its finding, the court referenced the obnoxious, obscene, contemptuous, and repetitive letters Mr. Lawrence had sent to the court as well as the extremely repetitive things he said in court. (RP 181-82). The court went on to state:

But the reason that I made the decision, on two occasions, to send Mr. Lawrence to Eastern State Hospital for an evaluation is because I have no training in psychology, very little training in psychology, none in psychiatry; I do not have the professional expertise to make a diagnosis. I certainly, I think, have the ability to be concerned, be suspicious, that someone is not able to represent themselves or to assist counsel in their defense or to understand the proceedings. *But that's why we have professionals, and I feel I must defer to the professionals that have spent a lot of time conducting testing and examination of Mr. Lawrence.* So at this time I will be entering an order, I will find for the record, here, at this point that Mr. Lawrence is competent to proceed. *Again, I am finding that based on the professional evidence, despite my personal reservations.* (RP 182-83). (emphasis added).

The court abused its discretion when it deferred to the professionals; competence is a legal not a medical decision.

C. The Trial Court Erred When It Did Not Insist Upon Representation by Counsel for Mr. Lawrence, Who Had Been Found Competent to Stand Trial, but Suffered From Mental Illness.

The trial court twice found Mr. Lawrence incompetent to stand trial and twice committed him to a state hospital to restore competency. The Due Process Clause and Washington law protect incompetent defendants from being tried, convicted, or sentenced for the commission of a crime so long as the incapacity continues. U.S. Const. amend. XIV;

RCW 10.77.050; *Drope v. Missouri*, 420 U.S. 162, 171, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975).

Eleven months after he had been arrested, the trial court found Mr. Lawrence sufficiently competent to stand trial; that is, he understood the nature of the charges against him and was capable of assisting in his own defense. RCW 10.77.010 (15); *Dusky v. United States*, 362 U.S. 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960); *State v. Hahn*, 106 Wn.2d 885, 894, 726 P.2d 25 (1986).

A mere week before trial, the trial court went a step further and granted Mr. Lawrence's request to waive counsel and represent himself. Mr. Lawrence makes two arguments about his waiver of counsel and self-representation at trial. First, the *Dusky* basic mental competence standard alone is insufficient to establish the requisite capacity to *conduct* a trial pro se; second, in Washington State, a court has the authority to find a mentally ill defendant competent to stand trial but not competent to *defend* pro se.

1. The *Dusky* Basic Mental Competence Standard Is Alone Insufficient To Establish The Requisite Mental Capacity To Proceed To Trial Pro Se.

The determination a defendant is competent to stand trial is not, in itself, sufficient to find him competent to waive counsel. *Westbrook v. Arizona*, 384 U.S. 150, 150-51, 86 S. Ct. 1320, 16 L. Ed. 2d 429 (1966).

Further, the competence required of a defendant to waive the constitutional right to counsel is the competence to waive the right, not the competence to represent himself. *Godinez v. Moran*, 509 U.S. 389, 401, 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993).

A request for pro se status is a waiver of a constitutional right to counsel, and denial is reviewed under an abuse-of-discretion standard. *State v. Hemenway*, 122 Wn. App. 787, 792, 95 P.3d 408 (2004). Presumably, a grant of pro se status is reviewed under the same standard. Discretion is abused if the decision is manifestly unreasonable, rests on facts unsupported by the record, or was reached by applying an incorrect legal standard. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

A long line of both federal and state case law has established a two-part test to balance the explicit right to self-representation and the admonition to courts to indulge in every real presumption against a waiver of counsel. U.S. Const. amend. VI; Wash. Const. art. I § 22; *Faretta v. California*, 422 U.S. 806, 819, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938); *In re Det. of Turay*, 139 Wn.2d 379, 396, 986 P.2d 790 (1999). First, the request must be both timely and unequivocal. *State v. DeWeese*, 117 Wn.2d 369, 377, 816 P.2d 1 (1991); *State v. Stenson*, 132 Wn.2d 668, 737, 940 P.2d 1239 (1997). Second, if the first part is met, the court must

then determine whether the request is knowing, voluntary, and intelligent. *Faretta*, 422 U.S. at 835.

In 2008, the United States Supreme Court squarely addressed for the first time the question whether competency to represent oneself is a separate question from knowingly, voluntarily, and intelligently waiving the constitutional right to counsel. *Indiana v. Edwards*, 554 U.S. 164, 128 S. Ct. 2379, 171 L. Ed. 2d 345 (2008). Prior to *Edwards*, the Court had dealt with two separate issues: (a) whether a defendant had the constitutional right to proceed pro se, and, if so, what necessary safeguards for a fair trial must be in place; and (b) whether a defendant who is competent to stand trial must have a heightened standard of competency to waive the right to counsel or to plead guilty.

In *Faretta*, the Court held that a criminal defendant had an independent constitutional right to self-representation, without the assistance of counsel, when he voluntarily and intelligently elected to do so. *Faretta*, 422 U.S. at 807. The Court held that a state may not constitutionally "hale a person into its criminal courts and there force a lawyer upon him, even when he insists that he wants to conduct his own defense." *Id.*

In *Godinez*, the defendant shot and killed three people and attempted to take his own life. He confessed to the killings, but pleaded not guilty.

The court ordered a competency evaluation, and psychiatrists found Godinez competent to stand trial. Months later, Godinez informed the court that he wished to discharge his attorneys and enter pleas of guilty. *Godinez*, 509 U.S. at 391-92. The court held a lengthy colloquy with Godinez and determined his waiver was knowing and intelligent, and his guilty pleas were freely and voluntarily given. He was sentenced to death.

On review, the Supreme Court took up the question whether the competency standard for pleading guilty or waiving the right to counsel was higher than the competency standard to stand trial. *Godinez*, 509 U.S. at 395. Building on its holdings in earlier cases, the Court found the standard for competence to stand trial to be the same standard of competence required for waiver of counsel or to a plea of guilty. *See generally Dusky*, 362 U.S. 402; *Drope*, 420 U.S. 162; *Faretta*, 422 U.S. 806.

Mr. Lawrence's case is distinguished from both *Godinez* and *Faretta*. Like the defendant in *Godinez*, Mr. Lawrence was found competent to stand trial but suffered from mental illness. Unlike the situation in *Godinez*, however, Mr. Lawrence sought not only to waive his right to assistance of counsel, but also to represent himself at a jury trial. This is a critical difference.

On the surface, it may appear that Mr. Lawrence's case is similar to *Faretta*. He wished to exercise a constitutional right to represent himself. Unlike *Faretta*, however, Mr. Lawrence suffered and continues to suffer from mental illness.

Mr. Lawrence's case much more closely resembles that of the defendant in *Edwards*. There, the defendant shot at a security guard during a shoplifting attempt, wounding a bystander. The court held three competency hearings for Edwards. Similar to Mr. Lawrence, he was found incompetent, then competent, then incompetent, and, finally, competent. *Edwards*, 554 U.S. at 168-69. Jurors failed to reach a verdict on some counts in Edwards' first trial, and a second trial ensued. At the second trial, Edwards renewed his request to represent himself. The court reviewed the psychiatric reports and noted that Edwards, like Mr. Lawrence in this case, was competent to stand trial, but still mentally ill. The Indiana court refused to allow Edwards' self-representation, stating that he was not competent to defend himself. *Id.* He was convicted on all the remaining counts.

On review, the Court drew a distinction between *Godinez* and *Edwards*, reasoning that in *Godinez* the "higher standard of competence" sought to measure the defendant's ability to proceed on his own to enter a guilty plea, whereas the court in *Edwards* was struggling with whether

there could or should be a higher standard "to measure the defendant's ability to conduct trial proceedings." *Edwards*, 554 U.S. at 173. The Court observed that the *Dusky* and *Drope* standard of mental competence focused directly on a defendant's ability to consult with his lawyer. Thus, the standard for competence presumed assistance of counsel. *Id.* at 174-75.

The *Edwards* Court observed that the *Faretta* conclusion rested in part on preexisting state law in 16 states, which "assur[ed] a mentally competent defendant the right to conduct his own defense[,] provided that no unusual circumstances exist such as, e.g., mental derangement that would deprive the defendant of a fair trial if allowed to conduct his own defense." *Id.* at 175. "[W]hether unusual circumstances are evident is a matter resting in the sound discretion granted to the trial judge." *Id.* And again, "the assignment of counsel was necessary where there was some special circumstance such as when the criminal defendant was mentally defective." *Id.*

Here, Mr. Lawrence's mental health issues were a concern beginning at arraignment. The eventual conclusion of competence was tenuous and not based on any improvements in Mr. Lawrence's condition, since there had been none. Indeed, his obstreperous behavior in court, repetitious recitations about minute discrepancies in witness accounts, insistent

demands for his "habeas corpus," requests to represent himself because his attorney was "uncompetent," and voluminous letters referring to the court and prosecutor as racist, biased, and prejudiced were all indicative of a mental disease.

The *Edwards* Court further noted, "Mental illness itself is not a unitary concept. It varies in degree. It can vary over time. It interferes with an individual's functioning at different times in different ways." *Edwards*, 554 U.S. at 175. Like that of *Edwards*, the history of Mr. Lawrence's proceedings demonstrates that the *Dusky* standard for mental competence was satisfied, but that because of mental illness, his functioning widely fluctuated.

At times, Mr. Lawrence was lucid and cooperative with counsel, but most often, he was unable to rationally assist counsel or even participate in a meaningful way. For example, he repeatedly demanded that counsel file untimely, baseless, and tactically unwise motions. He interrupted, raised his voice, swore, and threatened the court. After seeking to acquire and maintain control over all the evidence in order to represent himself, he realized that conducting his own defense was too much and asked the court to reappoint counsel—only to change his mind again a week before trial. Mr. Lawrence's mental health issues were exacerbated at different points in time and were exactly the type of issue the *Faretta* Court

highlighted when it cautioned that counsel should be appointed when the defendant has a special circumstance of mental illness. *Faretta*, 422 U.S. at 813 & n.9.

The *Edwards* Court concluded the United States Constitution permitted the states to insist upon representation by counsel for those competent enough to stand trial under *Dusky*, but who suffered from mental illness to the point at which they were not competent to conduct trial proceedings by themselves. *Edwards*, 554 U.S. at 178. As the Court noted, the Constitution permits judges to take realistic account of a particular defendant's mental capacities by asking whether the defendant who seeks to conduct his own defense at trial is mentally competent to do so. *Id.*

In the same way the determination of whether there has been an intelligent waiver of the right to counsel depends on the facts and circumstances in each case (including the background, experience, and conduct of the accused), so should a determination whether a defendant is mentally competent to represent himself. *Johnson v. Zerbst*, 304 U.S. at 464. In Mr. Lawrence's case, Judge Frazier (who conducted all the pretrial proceedings) expressed grave concern over Mr. Lawrence's ability to represent himself at every point in the proceedings.

Judge Acey, who had *not observed* Mr. Lawrence during pretrial proceedings, granted the request for self-representation during the first hearing. The motion was granted despite its presentation only a week before trial, Mr. Lawrence was equivocal in that he wanted a new attorney but did not want to wait for trial, and there was a long record of questionable competence. In fact, it was not until sentencing that Judge Acey saw the full manifestation of the symptoms of disorganized thinking, deficits in attention, anxiety, and pressure of speech that characterized Mr. Lawrence's illness.

Judge Frazier's pretrial ruling denying Mr. Lawrence's motion to represent himself was the correct ruling. Judge Acey abused his discretion when he granted the motion in the face of overwhelming evidence that Mr. Lawrence was not competent to do so.

2. Under Washington Case Law, The Competency To Appear And Competency To Defend Without Assistance Of Counsel Are Not Equivalent.

Reiterating the Supreme Court decision in *Godinez*, Washington courts have held that the competency standard for pleading guilty or waiving right to counsel is the same as the competency standard for standing trial. *In re Fleming*, 142 Wn.2d 853, 16 P.3d 610 (2001); *State v. Madsen*, 168 Wn.2d 496, 505, 229 P.3d 714 (2010)

In a pre-*Faretta* case, the Court held that the right of an accused to act as his own counsel was not an absolute right in all cases. *State v. Kolocotronis*, 73 Wn.2d 92, 98, 436 P.2d 774 (1968). There, a mentally ill defendant was found competent to stand trial, but the question remained whether he was competent to waive counsel and represent himself. The court reasoned that if a defendant, either by mental illness or by lack of knowledge, could not in the trial court's opinion be considered competent to conduct his own defense, the court must appoint counsel to represent the defendant. *Id.* at 101.

There were no decisions by the Washington Supreme Court on the waiver of counsel by mentally ill defendants until *State v. Hahn*, 106 Wn.2d 885, 726 P.2d 25 (1986). There the court noted no cases had come before it in which the trial court had *granted* a mentally ill defendant's request to waive counsel, as opposed to denying it, as in *Kolocotronis*. *Hahn*, 106 Wn.2d at 890. In *Hahn*, the court upheld the ruling that it was the trial court's responsibility to determine a defendant's competency to intelligently waive the services of counsel and act as his own counsel. It further held that any consideration of a defendant's ability to exercise the necessary skills and judgment to secure a fair trial was no longer appropriate under *Faretta*. *Hahn*, 106 Wn.2d at 890.

The court clarified that the standard for waiving the right to counsel is (a) competency to stand trial and (b) a knowing and intelligent waiver with "eyes open," which includes an awareness of the dangers and disadvantages of the decision. *Hahn*, 106 Wn.2d at 895. Reversing the Court of Appeals, it affirmed the trial court, ruling that Hahn, a paranoid schizophrenic, was competent to stand trial, had validly waived his right to counsel, and under *Faretta* had the right to represent himself.

In a very recent case the Court upheld the right of a defendant to self-representation. *State v. Madsen*, 168 Wn.2d 496, 505, 229 P.3d 714 (2010). The issue of competence in *Madsen* was raised in a perfunctory manner at two hearings. In the second hearing, in direct contradiction to the original attorney, the newly appointed counsel indicated she had no concerns about Madsen's competence. No competency hearing or exam was ever ordered. *Madsen*, 168 Wn.2d at 501-502. On review, the Court clearly stated that incompetency may be a legitimate basis to find a request for self-representation equivocal, involuntary, unknowing, or unintelligent. But concerns about incompetency without ordering a competency review were insufficient. *Madsen*, 168 Wn.2d at 510.

Attorney discipline cases are more instructive in Mr. Lawrence's case because it is there that the Washington Supreme Court has most directly addressed the question of competence and self-representation. *In re*

Meade, 103 Wn.2d 374, 693 P.2d 713 (1985); *In re Keefe*, 159 Wn.2d 822, 154 P.3d 213 (2007). In *Meade*, a complaint was filed with the state bar against attorney Meade, and he failed to cooperate in the investigation. In reviewing the eventual transfer to inactive status, the court held that Meade was competent to appear at the hearings, but was *not competent to appear pro se at those hearings*. *Meade*, 103 Wn.2d at 380.

Most significantly, the court stated:

[E]ven if Meade was in fact competent to *appear* under this standard [*Dusky*], it does not follow that he was capable of *defending* himself, pro se, in the disciplinary proceedings. Analogously, a finding that a criminal defendant is competent to stand trial is not equivalent to a finding that a criminal defendant is competent to appear pro se. We extend this rule to attorneys appearing in disciplinary proceedings. *Id.* at 380-81 (citation omitted.)

The court went on:

If an attorney does not have the requisite mental competency to intelligently waive the services of counsel or to adequately represent himself or herself, the attorney's due process right to a fair hearing is violated if the attorney is allowed to appear pro se. *Id.* at 381. (Emphasis added.)

In 2007 in *Keefe*, the court underscored its distinction between competency to appear and competency to proceed pro se in that defense. This is especially instructive because attorneys are versed in court rules, rules of evidence, and proper defenses. To disallow an attorney to represent himself because he will not receive a fair hearing, but to allow

an inexperienced, mentally ill individual to represent himself at trial is a double standard. Such a standard is unacceptable.

The Supreme Court holding in *Edwards*, allowing the trial court to take a realistic account of a particular defendant's mental capacities by asking whether the defendant who seeks to conduct his own defense at trial is mentally competent to do so is the correct standard.

The Constitution demands that a trial meet the requirements of due process. In this case, the trial court's error in allowing Mr. Lawrence to proceed pro se was severe enough to deny that due process.

Under both the United States Constitution and Washington case law, the trial court had the authority and should have insisted upon representation by counsel.

D. The Court Had a Duty to Instruct the Jury Regarding Lesser Included Offenses.

The adequacy of jury instructions is a question of law, which is reviewed *de novo*. *State v. Clausing*, 147 Wn.2d 620, 626, 56 P.3d 550 (2002). A party is entitled to an instruction on a lesser included offense if (1) each element of the lesser offense is a necessary element of the greater offense charged (the legal prong), and (2) the evidence in the case supports an inference that only the lesser crime was committed (factual prong). *State v. Meneses*, 169 Wn.2d 586, 595, 238 P.3d 495 (2010).

The United States Supreme Court has held that it is the "solemn duty" of a judge before whom a defendant appears without counsel "to make a thorough inquiry and to take all steps necessary to insure the fullest protection of this constitutional right *at every stage of the proceedings*. This duty cannot be discharged as though it were a mere procedural formality." *Von Moltke v. Gillies*, 332 U.S. 708, 722, 68 S. Ct. 316, 92 L. Ed. 309 (1948) (emphasis added) (citations omitted). Components for a thorough inquiry are codified in RCW 10.77.020.

Here, the court informed Mr. Lawrence regarding the maximum punishment under the charges brought, but there was no discussion of any lesser included offenses, defenses, or ability to plead mitigating circumstances. (*See* RP 212-24, 527-37, 604).

Later, the court failed to sufficiently inquire to protect Mr. Lawrence's rights during review of the jury instructions. Mr. Lawrence submitted proposed jury instructions to the court. (RP 1375). The court sustained the State's objection to the instructions because they were a running narrative, impermissibly commented on the evidence, and were better suited as a closing statement. (RP 1375-76).

Mr. Lawrence did object to instruction 11 regarding the definition of "substantial step." He appeared focused on an instruction on intent and premeditation, stating, "'Cause how could the courts understand if I had

the intent to go do it, like premeditated thinking process of murder, trying to commit murder. And—basically I didn't step towards it." (RP 1355.)

Mr. Lawrence then appeared to argue for inclusion of an instruction on a lesser-included offense of assault. He said:

If I may ask, your Honor, how do—how do people know if—Like supposedly people that you're accusing me of this crime aren't trying to hurt people? Maybe they're trying to wound them and make a statement, say, "Hey, I'm trying to hurt you," like—there's people out there that just like—like inflict wounds on people but not kill them or something. Then you've got the psychopaths, that's—that's what you're trying to categorize me. And I'm—I just don't agree with it.

(RP 1356-1357). Under *Von Moltke*, the court had a duty to inquire whether Mr. Lawrence was seeking to include an instruction on assault, intent to do great bodily harm, assaulting another with a firearm.

Further, Mr. Lawrence was entitled, under the facts, to an instruction on first-degree assault. The appellate court, in determining whether there is sufficient evidence to support an instruction, is to view the supporting evidence in a light most favorable to the party requesting instruction.

State v. Fernandez-Medina, 141 Wn.2d 448, 455-456, 6 P.3d 1150 (2000).

There was affirmative evidence from which a jury could find the facts of the lesser offense of assault. The failure of the court to inquire regarding Mr. Lawrence's desired jury instructions resulted in the jury having to

make an “all or nothing” decision. The court’s failure to inquire and give a lesser-included instruction requires a new trial.

E. The Trial Court Incorrectly Instructed The Jury That A Not Guilty Special Verdict Must Be Unanimous.

The appellate court reviews challenged jury instructions de novo.

State v. Bennett, 161 Wn.2d 303, 307, 165 P. 3d 1241 (2007).

The trial court instructed the jury as follows:

If you find the defendant guilty of this crime, you will then use the special verdict form and fill in the blank with the answer "yes" or "no" according to the decision you reach. Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form.

In order to answer the special verdict form "yes" you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer.

If you unanimously have a reasonable doubt as to this question you must answer "no." (RP 1566; CP 277). (emphasis added).

Washington courts have held that unanimity for a special finding increasing the maximum penalty is unnecessary. *State v. Goldberg*, 149 Wn.2d 888, 895, 72 P.3d 1083 (2003); *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010). Here, the court erroneously gave the jury an incorrect statement of law.

Even a polling of the jury affirming the unanimous verdict does not cure the error. *Bashaw*, 169 Wn.2d at 147. Because the reviewing court cannot say with unassailable confidence what might have occurred had the

jury been properly instructed, this court must vacate the sentence enhancements and remand for further proceedings in the trial court. *Id.*

F. The Trial Court Abused Its Discretion By Failing To Recognize Its Authority To Exercise Discretion In Sentencing And To Consider Mitigating Factors.

1. Failure To Recognize Authority To Exercise Discretion.

The trial court failed to recognize its authority to consider or impose an exceptional downward sentence at Mr. Lawrence's sentencing hearing. Generally, a defendant may not appeal a trial court's refusal to impose an exceptional sentence but appellate review is permitted when a court refuses to exercise discretion or relies on an impermissible basis for refusing to impose an exceptional sentence below the standard range. *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997). A failure to exercise discretion is an abuse of discretion. *State v. Pettitt*, 93 Wn.2d 288, 296, 609 P.2d 1364 (1980).

At sentencing, the trial court stated the convictions were serious violent offenses with different victims, thus, "I don't have any choice but to run Counts 1, 2 and 3 consecutive; I'm required by law to run them consecutive." (RP 1644). However, the court may depart from the standards in RCW 9.94A.589(1) and (2), and impose an exceptional sentence if it finds that mitigating factors justify it. RCW 9.94A.535; *In re Mulholland*, 161 Wn.2d 322, 332, 166 P.3d 677 (2007).

The trial court did have a choice and was required to consider it. Its failure to recognize its authority and exercise its discretion was a fundamental defect, and a different sentence could likely have been imposed had the trial court correctly applied the law.

2. Failure To Consider Mitigating Factors.

Sentencing Mr. Lawrence within the standard range does not support the goals of the Sentencing Reform Act. A defendant's incapacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law is a mitigating factor in sentencing. RCW 9.94A.535(1)(e). To be applicable, there must be evidence that impaired judgment, irrational thinking, a mental disorder, and lack of self-control, were sufficiently combined such that there was a significant impairment in a defendant's ability to appreciate the wrongfulness of his conduct or conform to the law. *State v. Rogers*, 112 Wn.2d 180, 185, 770 P.2d 180 (1989).

The trial court here should have considered this mitigating factor even though Mr. Lawrence did not raise it. There was overwhelming evidence that Mr. Lawrence's thinking was irrational, his judgment impaired, and he had a long-standing mental disorder and developmental disability. These factors combined and led to a significant impairment in his ability

to appreciate the wrongfulness of his conduct and the ability to conform to the requirements of the law.

Rather than considering such evidence as a mitigating factor, the sentencing court did the opposite, commenting:

I am thoroughly convinced—that you cannot believe you did these things to your friends, you did these crimes. I am convinced you don't believe it to this day, that you—that you are capable of doing this to your friends. And so it appears to me, outside observer, that you created this alternate reality of—black diamonds, drugs, shooting a safe, and just kind of wildly shooting a gun behind you. But, no offense, sir, that's make-believe. . . . That's make-believe. (RP 1641-42).

It is more than likely the very mental illness that precipitated the crimes precluded Mr. Lawrence from understanding the mental illness was a mitigating factor at sentencing. Rather than advocate for himself, Mr. Lawrence argued and interrupted the court, exhibited disruptive, counterproductive, threatened people in the courtroom (including the judge), asked for life in prison rather than a 75-year sentence, and gave a long and rambling discourse on his Nez Perce heritage. (RP 1633-40).

The court reacted strongly to Mr. Lawrence's conduct at the sentencing hearing: "Until I heard your comments today I was inclined to go along with the state's recommendation for a mid-range sentence[.]" (RP 1644). The court then imposed the maximum saying it constitutes " . . . what I hope will be a life sentence for you." (RP 1647). Such a response lacks

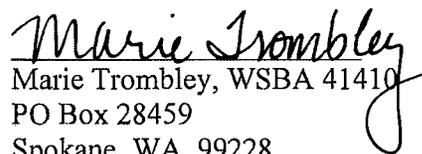
even the appearance of fairness. Obvious evidence of mitigating factors was displayed to the court throughout this case—evidence that the court could and should have considered before imposing the sentence of 75 years in this non-homicide case. Imposing the harshest sentence based on manifestations of Mr. Lawrence's mental illness was cruel, wrong, and an abuse of judicial discretion.

IV. CONCLUSION

Based on the foregoing facts and authorities, appellant Lawrence respectfully asks this court to vacate the judgment and sentence and remand for a new trial.

Dated this 28th day of January 2011.

Respectfully submitted,


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APPENDIX A

Legal Issues and the Fetal Alcohol Syndrome

Robin A. LaDue, Ph.D. and Tom Dunne

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

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

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

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

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

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

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

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

Diagnosis

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

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

Legal Issues

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

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

Competency and FAS

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

continued on page 7...

...continued from page 6

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

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

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

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

In addition, police reports, victim's

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

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

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

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

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

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

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

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

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APPENDIX B

Fetal Alcohol Spectrum Disorder (FASD): A Need for Closer Examination by the Criminal Justice System

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Melvyn Green**

Fetal Alcohol Spectrum Disorder (FASD) is a clinically recognized disability. Persons with FASD are at a profound disadvantage within the criminal justice system. This article describes the range of deficits that characterize FASD and suggests that understanding FASD has important legal implications for the criminal justice system. Consideration is given to issues of suggestibility, witness reliability, false confessions and sentencing.

Fetal Alcohol Spectrum Disorder (FASD) and Related Cognitive Deficits

Fetal Alcohol Syndrome (FAS) is considered the single most common nonhereditary cause of mental retardation, with prevalence estimates of from .5 to 3 per 1000 live births in the general population¹. The diagnosis of FAS has typically been based on documented prenatal alcohol exposure in conjunction with a triad of characteristics including growth retardation, central nervous system (CNS) dysfunction and craniofacial anomalies (i.e., small eye slits, flat midface, thin upper lip). However, cognitive deficits can occur independently of morphological anomalies. In these cases, the diagnosis is Alcohol Related Neurodevelopmental Disorder (ARND) or Fetal Alcohol Effects (FAE). Recently the term Fetal Alcohol Spectrum Disorder (FASD) has been adopted as an umbrella term that refers to the full range of prenatal alcohol-induced impairments. FASD thus subsumes previous diagnostic categories (i.e., FAS, ARND, FAE). FASD is a lifelong disability; one does not "outgrow" it. Indeed, some FASD-related impairments may intensify over time.

Research employing magnetic resonance brain imaging techniques has revealed that FASD-related neurological deficits are uncorrelated with facial abnormalities². Consequently, a child without distinctive morphological features may be as severely impaired in functional skills as someone displaying the full range of traditional diagnostic criteria. This means that that critical aspects of FASD – organic brain damage and the

¹ K. Stratton, C. Howe & F. Battaglia (eds.), *Fetal Alcohol Syndrome: Diagnosis, Epidemiology, Prevention and Treatment* (Washington, DC: National Academy Press, 1996).

² See F. L. Bookstein, P. D. Sampson, P. D. Connor & A. P. Streissguth, "Midline Corpus Callosum is a Neuroanatomical Focus of Fetal Alcohol Damage", *The Anatomical Record*, 269 (2002), 162-174; F. L. Bookstein, A. P. Streissguth, P. D. Sampson, P. D. Connor & H. M. Barr, "Corpus Collosum Shape and Neuropsychological Deficits in Adult Males with Heavy Fetal Alcohol Exposure", *NeuroImage* 15 (2002), 233-251.

concomitant cognitive shortfalls -- are invisible to the naïve observer, thus allowing the police, counsel and the courts to "miss" the underlying pathology.

The CNS dysfunctions associated with FASD manifest in various cognitive deficits including problems with memory, language and social skills. Differences between children who have and have not been exposed to alcohol prenatally have been found for verbal memory³, nonverbal memory⁴ and specific types of verbal or nonverbal memory, such as spatial memory⁵, auditory memory, and declarative memory⁶. Deficits in verbal memory continue through childhood to adolescence⁷. Similarly, social-behavioural problems are conspicuous and remain consistent throughout preschool, school age, and adolescence^{8,9}. In addition, FASD children have inferior expressive and receptive language skills¹⁰. They are rated by teachers as having poor grammar, reading skills, written expression, and spelling ability¹¹. These language impairments interfere with academic progress because FASD children have difficulty understanding their teachers and other adults. They learn to exploit nonverbal cues to maintain conversational flow, but their degree of comprehension may be much lower than it appears. They develop a glibness that belies their actual competence. Subtleties of language use are beyond them. Idioms or sarcasm are likely to cause confusion.¹²

³ S. N. Mattson, E. P. Riley, L. Gramling, D. C. Delis & K. Lyons-Jones, "Neuropsychological Comparison of Alcohol-Exposed Children with or without Physical Features of Fetal Alcohol Syndrome", *Neuropsychology* 12(1) (1998), 146-153.

⁴ K. L. Kaemingk, S. Mulvaney & P. Tanner-Halverson, "Learning Following Prenatal Alcohol Exposure: Performance on Verbal and Visual Multitrial Tasks", *Archives of Clinical Neuropsychology* 18 (2003), 33-47.

⁵ A. Uecker & L. Nadel, "Spatial Locations Gone Awry: Object and Spatial Memory Deficits in Children with Fetal Alcohol Syndrome", *Neuropsychologia* 34(3) (1996), 209-223.

⁶ H. Carmichael-Olson, J. J. Feldman, A. P. Streissguth, P. D. Sampson & F. L. Bookstein, "Neuropsychological Deficits in Adolescents with Fetal Alcohol Syndrome: Clinical Findings", *Alcoholism: Clinical & Experimental Research* 22(9) (1998), 1998-2012.

⁷ A. P. Streissguth, H. M. Barr, F. L. Bookstein, P. D. Sampson & H. Carmichael-Olson, "The Long-Term Neurocognitive Consequences of Prenatal Alcohol Exposure: A 14-year Study", *Psychological Science* 10(3) (1999), 186-190.

⁸ H. C. Steinhausen, & H. L. Spohr, "Long-Term Outcome of Children with Fetal Alcohol Syndrome: Psychopathology, Behavior, and Intelligence", *Alcoholism: Clinical & Experimental Research* 22(2) (1998), 334-338.

⁹ S. J. Kelly, N. Day & A. P. Streissguth, "Effects of Prenatal Alcohol Exposure on Social Behavior in Humans and Other Species", *Neurotoxicology & Teratology* 22 (2000), 143-149.

¹⁰ L. A. Janzen, J. L. Nanson & G. W. Block, "Neuropsychological Evaluation of Preschoolers with Fetal Alcohol Syndrome", *Neurotoxicology & Teratology* 17(3) (1995), 273-279.

¹¹ *Supra* note 7.

¹² J. Conry, "Effects of Parental Substance Abuse on Children's Development", in S. Harrison & V. Carver (eds.), *Alcohol and Drug Problems: A Practical Guide for Counsellors (2nd edition)* (Toronto: Addiction Research Foundation, 1997).

'Executive control' is yet another domain of functioning that is compromised in FASD children. Planning, organizing and learning from past mistakes are not in their repertoire. They are egocentric, impulsive and very concrete in their thinking. Typically they do not make connections between cause and effect, anticipate consequences or take the perspective of another person.

In *R. v. J. (T.)*¹³ the Yukon Territorial Court set out in vivid detail some of the forensically significant attributes of FASD:

... The cognitive processes that most people use to regulate their conduct and to adapt to their social environment are located primarily in the anterior frontal lobe of the brain. The effect of alcohol on the fetal brain is such that this region does not develop sufficiently to allow the FAS individual to appropriately control his or her actions. As such, FAS patients tend to be impulsive, uninhibited, and fearless. They often display poor judgment and are easily distracted. Difficulties in perceiving social cues and a lack of sensitivity often cause interpersonal problems.

FAS patients have difficulties linking events with their resulting consequences. These consequences include both the physical, e.g. getting burned by a hot stove, and the punitive, e.g. being sent to jail for committing a crime. Because of this, it is difficult for these individuals to learn from their mistakes. Lacking sufficient cognizance of the threat or fear of consequences, the FAS patient is less likely to control his or her impulsive behaviour. Similarly, FAS individuals have trouble comprehending that their behaviour can affect others. As such, they are unlikely to show true remorse or to take responsibility for their actions.

Some Forensic Implications

This constellation of deficits poses significant obstacles to the fair treatment of FASD persons in the criminal justice system. Persons with FASD, as a group, challenge the underlying premise that defendants understand the relationship between actions, outcomes, intentions, and punishment. The treatment of FASD defendants raises fundamental questions about how we assess individual responsibility, both at the guilt-determining and sentencing stages of the adjudicative process. It raises questions, as

¹³ (1999) Y. J. No. 57

well, about the appropriateness of law enforcement and, more generally, the criminal law, as social control models for the management of FASD-related deviance.

The ability of FASD adolescents to comprehend the consequences of their actions is severely compromised. One recent study¹⁴ found that over 23% of youth remanded for psychiatric inpatient assessment in British Columbia suffered from FASD. For many, the risk of conflict with the law is even greater in adulthood when the structure and supervision provided by parents or schools no longer obtain. For most FASD defendants, the response of the criminal justice system only exacerbates their difficulties. As Conry and Fast¹⁵ note, during legal proceedings

an accused person with [FASD] may give a false confession or a false statement and, in court, may appear confused or give contradictory explanations. A witness .. may interpret questions too literally or deny something that seems obviously true. The victim with [FASD] may not clearly remember details of time, place, and sequence, and may be easily influenced by leading questions.

Witnesses and complainants who suffer from FASD are equally vulnerable¹⁶.

The participation rates of FASD persons in criminal proceedings, raise a wide array of concerns, including but not limited to issues related to investigative procedures, witness advocacy, fitness to stand trial, diminished responsibility, pre-trial diversion, effective representation, the role of expert evidence, persistent recidivism, special supervision needs during probation and parole, testimonial capacity and reliability, false confessions and sentencing. This paper provides an introduction to these last three issues, with particular emphases on the plight of young persons – both defendants and complainants -- who suffer from the disorder.

(a) *Suggestibility/FASD Witnesses: Confusing Fact with Fiction*

There is no shortage of evidence that people without any apparent impairments are susceptible to suggestion and diverse social pressures. During the Martensville, Saskatchewan sexual abuse scandal, many family members and several police officers were charged with engaging in various acts of child abuse, including oral and anal sex, locking a naked child in a cage, and anal penetration with an axe handle. One child testified to seeing a boy's nipple cut off and eaten. All but one of over a hundred charges

¹⁴ D. K. Fast, J. L. Conry & C. A. Loock, "Identifying Fetal Alcohol Syndrome (FAS) Among Youth in the Criminal Justice System", *Journal of Developmental and Behavioral Pediatrics* 20 (1999), 370-372.

¹⁵ J. Conry & D. K. Fast, *Fetal Alcohol Syndrome and the Criminal Justice System* (Vancouver: The Law Foundation of British Columbia, 2000) at 3.

¹⁶ R. LaDue & T. Dunne, "Legal Issues and FAS", in A. Streissguth & J. Kanter (eds.) *The Challenge of Fetal Alcohol Syndrome: Overcoming Secondary Disabilities* (Seattle: University of Washington Press, 1997); C. Barnett, "A Judicial Perspective on FAS: Memories of the Making of Nanook of the North", in A. Streissguth & J. Kanter (eds.) *The Challenge of Fetal Alcohol Syndrome: Overcoming Secondary Disabilities* (Seattle: University of Washington Press, 1997).

were eventually dismissed. The Saskatchewan Court of Appeal in *R. v. Sterling*¹⁷ observed that:

...the use of coercive or highly suggestive interrogation techniques can create a serious and significant risk that the interrogation will distort the child's recollection of events, thereby undermining the reliability of the statements and subsequent testimony concerning such events.

The case law¹⁸ and scientific literature offer many examples of both children and adults having been induced to describe non-experienced events¹⁹. Controlled laboratory studies have confirmed the ease with which leading and suggestive questions can provoke entirely false accounts, including reports of genital touching²⁰.

*R. v. R. (A)*²¹ is a telling and recent Canadian illustration of the problem. The accused was charged with 4 counts of sexual misconduct involving his adopted daughter who was 11 when the assaults were alleged to have occurred and 14 at the time of trial. The daughter was first diagnosed with FAS when she was 7. Two independent psychological assessments, conducted at ages 11 and 13, referred to pronounced deficits in her expressive and receptive language abilities:

It is necessary to be very concrete and to keep the questions very, very short as the more words there are in the question, the more confused C can become.

¹⁷ (1995) S. J. No. 612 (C.A.)

¹⁸ The recent judgement in the case of Richard Klassen (see *Kvello v. Miazga*, 2003 SKQB 559) details equally heinous allegations which, despite the prosecutions that followed, had no basis in fact. For similar U. S. cases, see *State v. Michaels*, 136 N.J. 299, 642 A.2d 1372 (N.J., 1994) and *State v. Fijnje*, 11th Judicial Circuit Court, Dade County, Florida, #89-43952 (1991).

¹⁹ W. Bernet, "Case Study: Allegations of Abuse Created in a Single Interview", *Journal of the American Academy of Child and Adolescent Psychiatry* 37(7) (1997), 966-970; M. Bruck, & S. Ceci, "Amicus Brief for the Case of *State of New Jersey v. Margaret Kelly Michaels* Presented by Committee of Concerned Social Scientists", *Psychology, Public Policy, & Law* 1(2) (1995), 272-322; M. Garry & D. L. Polaschek, "Imagination and Memory", *Current Directions in Psychological Science* 9 (2000), 6-10; E. F. Loftus, "Creating False Memories", *Scientific American* 277 (September, 1997), 70-75.

²⁰ S. Garven, J. Wood & R. Malpass, "Allegations of Wrongdoing: The Effects of Reinforcement on Children's Mundane and Fantastic Claims", *Journal of Applied Psychology* 85 (2000), 38-49; S. J. Lepore & B. SESCO, "Distorting Children's Reports and Interpretations of Events Through Suggestion", *Journal of Applied Psychology* 79 (1994), 108-120; D. A. Poole & D. S. Lindsay, "Interviewing Preschoolers: Effects of Nonsuggestive Techniques, Parental Coaching, and Leading Questions on Reports of Nonexperienced Events", *Journal of Experimental Child Psychology* 60 (2001), 129-154; D. A. Poole & D. S. Lindsay, "Children's Eyewitness Reports After Exposure to Misinformation from Parents", *Journal of Experimental Psychology: Applied* 7 (2001), 27-50.

²¹ (2003) Carswell Ont 1401 (OSCJ). The case resulted in an acquittal. The senior author was retained as an expert witness by the defence.

A test measuring her memory for meaningful material was administered. [...] Even a simple sentence was difficult for her. At times she confabulated from a single word, almost making up a sentence with different ideas in it.

C is very vulnerable to suggestion and also is likely to become confused when questions are lengthy or involved. She will have considerable difficulty responding to questions requiring her to remember things that happened three years ago. [...] In a normal courtroom setting, C will not be able to maintain a consistent and believable story.

The evidence showed that the complainant had reported, at various times, that her father had had sex with her one time, four times, 10 times, 40 times, and, finally, every day during a 12-month period. During the preliminary inquiry she reported having had sex with her playmate's six year-old brother. In a police interview conducted two years later, she described sexual activities that she had never mentioned on any previous occasion. While investigative irregularities further jeopardized the reliability of the complainant's testimony, the elasticity of her accounts posed the largest challenge to the court's truth-seeking function. Most importantly, the dubious reliability of the complainant's statements was less a product of her own idiosyncrasies or any investigative overreach than it was a reflection of the frailties inherent in the testimony of any person with FAS.

The American case of *U. S. v. Butterfly*²² offers a rare appellate pronouncement on the forensic impact of FAS. In *Butterfly*, the U. S. 9th Circuit Court of Appeal reversed convictions for the sexual assault of four boys, all of whom had been diagnosed with FAS. During a previous appeal, the defendants had not been permitted to submit evidence showing that FAS had compromised the reliability of the boys' testimony. All four "victims" subsequently recanted. Their initial accounts included testimony about several murders for which no evidence was ever unearthed. "[F]etal Alcohol Syndrome", said the court, "often makes it difficult for its victims to separate fact from fiction." One boy's therapist testified that the boy did not know whether his stories of abuse were true or false.

(b) *Suggestibility/FASD Suspects: The Spectre of False Confessions*

Juvenile "false confessions" have recently attracted considerable judicial scrutiny²³. The convictions of five teenagers in the infamous 1989 "Central Park Jogger" rape case were vacated in December 2002. DNA evidence implicated a different culprit

²² (1999) WL 369954 (9th Cir.)

²³ See M. B. Johnson "Juvenile *Miranda* Case Law in New Jersey, from *Carlo*, 1966, to *JDH* 2001: The Relevance of Recording All Custodial Questioning", *Journal of Psychiatry and Law* 30 (2002, Spring), 3-57. More generally, the Supreme Court of Canada acknowledged the very real risk of false confessions in *R. v. Oickle* [2000] 2 S.C.R. 3. See also W. S. White "False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions", *Harvard Civil Rights & Civil Liberties Law Review* 32 (1997), 105-156.

who had acted alone. The original convictions rested on their videotaped confessions²⁴. In 1998, two young boys (aged 7 and 8) in Chicago confessed to the murder and sexual assault of an 11 year-old. The boys had been interviewed individually without a parent or lawyer present. The charges were later dropped when DNA evidence linked the assault to an adult with a record of sexual offences²⁵. That same year, a 14 year-old in San Diego confessed to the murder of his sister after 11 hours of questioning. The confession was later ruled inadmissible and another man was indicted through the use of DNA evidence²⁶. While the age of the initial suspects in each of these cases undoubtedly rendered them especially vulnerable, their “confessions” are largely attributable to the potency of police interrogation methods²⁷. The vulnerability of suspects with FASD – and thus the risk of false confessions – is greater still. As Professor Yarmey²⁸ of the University of Guelph cautions: “What is the worth of a confession given by someone who is intellectually handicapped, and/or extremely frightened, anxious, hyper-suggestible and overly compliant? Probably very little.”

Whatever its worth as accurate reportage, the inculpatory value of a confession cannot be overestimated. Police and prosecutors have little incentive to look beyond the face validity of an admission of guilt, particularly when it conforms to the police theory of the case. The American case of *State v. Christoph*²⁹ provides an extreme version of such single-mindedness. The defendant, who had been diagnosed with FAS, told a staff member at a psychiatric facility that she had abused her younger sister. The police promptly charged her with first-degree rape. The alleged victim was never interviewed. The appellate court affirmed the finding of a lower court of appeal that there was no evidence a crime had been committed: “. . . a minimally adequate investigation could have discovered [the defendant’s] documented long-term mental and emotional difficulties and sufficient exculpatory evidence to warrant dismissal of the information. . . .”

In most cases, the underlying problem is widespread ignorance of (or, at best, insensitivity to) the cognitive impacts of FASD. Defence counsel are likely no better informed than police and prosecutors. While not specific to confessions, the U. S. case of

²⁴ *New York v. Wise et al.*, Affirmation in Response to Motion to Vacate Judgment of Conviction, Indictment No. 4762/89 (December 5, 2002).

²⁵ A. Kotlowitz, “The Unprotected”, *The New Yorker*, 2/8/99, 42-53.

²⁶ S. A. Drizin & B. A. Colgan, “Tales From the Juvenile Confession Front: A Guide to How Standard Police Interrogation Tactics Can Produce Coerced and False Confessions From Juvenile Suspects”, in G. Daniel Lassiter (ed.), *Interrogations, confessions, and entrapment*, (New York: Plenum, 2004).

²⁷ See S. Kassin, “The psychology of confession evidence”, *American Psychologist* 51 (1997), 221-233; S. Kassin & K. L. Kiechel, “The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation”, *Psychological Science* 7 (1996), 125-128; G. Daniel Lassiter (2004) *supra* note 26.

²⁸ D. Yarmey, “Police Investigations”, in R. Schuller & J. Ogoloff (eds.), *Introduction to Psychology and Law: Canadian Perspectives*, (Toronto: University of Toronto Press, 2000) at 81.

²⁹ (2000) WL 1854134 (Wash. App. Div. 3)

*State v. Brett*³⁰ highlights the problem. There, the Washington Supreme Court, in vacating a death sentence, held, that the appellant (who suffered from FAS) had been denied the effective assistance of counsel during the penalty phase of his prosecution for murder:

When defense counsel knows . . . of mental problems that are relevant to making an informed defense theory, defense counsel has a duty to conduct a reasonable investigation into the defendant's medical and mental health, have such problems fully assessed and, if necessary, retain qualified experts to testify accordingly.

(c) *Sentencing*

Convicted FASD persons are, by definition, special need defendants. The special programs and services essential to meeting these needs are woefully lacking. Too frequently, sentencing courts are simply unaware of the disability. Even when aware of the complexity of problems associated with FASD persons³¹, sentencing courts are too often powerless to craft an appropriate disposition or are frustrated in their efforts to do so. The necessary programs are simply unavailable. Even courts that are mindful of the problem are frustrated in their efforts to fashion responsive dispositions. For example, in *R. v. K. (L. E.)*³², as part of a probation order a youth court judge directed that a youth court worker with specialized training in organic brain impairment be assigned to the FASD defendant's file and, further, that a detailed service plan for the accused be provided to the judge on the day of the youth's release. The Saskatchewan Court of Appeal set aside these portions of the probation order because they exceeded the court's jurisdiction. The court, however, was not unaware of the dilemma posed by FASD defendants:

Having said all that, it must be recognized that the youth court judge in this case was attempting to act in the best interests of the young offender and to obtain for him the best treatment possible. She was attempting to ensure that the young offender who suffers from fetal alcohol syndrome (FAS) would receive the kind and type of treatment and post-disposition care most appropriate to permit him to function in society. Her motivation and that of her colleagues in similar cases is to try to break the cycle of criminal behaviour. When one reads her reasons and those rendered by youth court judges in other cases dealing with FAS (see for example, *R. v. L. (M.)* (2000), 187 Sask.

³⁰ (2001) 16 P. 2d 601

³¹ Some Canadian cases bearing on FASD-related issues can be found in Conry and Fast's groundbreaking monograph: *supra*, note 15.

³² (2001) SKCA 48

R. 195, 45 W. C. B. (2d) 86 and *R. v. D. (W.)* (2001), 49 W. C. B. (2d) 25.) one discerns a clear cry for assistance and help. There is a strong request for help from the provincial authorities to assist youth court judges with appropriate programs so they can impose dispositions that will assist in breaking the insidious cycle of in/out as exemplified by this young offender who, at 16 years of age, has a string of at least 45 convictions. As Judge Stuart pointed out in *R. v. Sam* [1993] Y. J. No. 112 (QL) this is not a complex legal case as much as a complex medical case and the goal should be one of attempting to ensure that the young offender receives appropriate treatment, a goal which requires an aggressive comprehensive intervention and preventative treatment program. The difficulty is that at the moment no such program exists.

*R. v. Gray*³³ paints a similarly disheartening picture of the prospects for FASD persons caught in the revolving door of criminal justice in British Columbia.

Conclusion

Reported decisions of judicial efforts to grapple with the challenges posed by FASD are exceptional. More typically, police, prosecutors, defence counsel, judges and the general public are profoundly uninformed about the disorder. Training and education are crucial. Front-line judges need legislative and appellate sanction to fashion FASD-sensitive dispositions.³⁴ Absent special programs and support services, FASD offenders have a reduced probability of parole because they are unlikely to demonstrate “progress” or rehabilitation. In any event, sending FASD persons to jail to “learn a lesson” is futile because of their impaired appreciation of cause and effect. Indeed, almost any sentence founded on specific or general deterrence is meaningless.

There are no simple answers to the challenges presented by FASD, but recognition of the problem is a *sine qua non* of its solution. A modest first step involves the cataloguing and analysis of recurring FASD-related legal issues, and the identification of the best practices and strategies for dealing with each of them.

Notes

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³³ (2002) BCSC 1192

³⁴ K. A. Kelly “The Victimization of Individuals with Fetal Alcohol Syndrome/Fetal Alcohol Effects”, *TASH Connections*, (Aug./Sept., 2003), 29-30.

APPENDIX C

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THE CRIMINALIZATION OF FETAL ALCOHOL SYNDROME (FAS)

Many persons with Fetal Alcohol Syndrome (FAS) or Fetal Alcohol Effects (FAE) end up in the criminal system. Persons with FAS/E are often not correctly diagnosed, do not receive the type of support they need and have unreasonable expectations placed upon them. Persons with FAS/E often have adaptive functioning abilities in the mentally handicapped range though their cognitive IQ's may be borderline to low average/average. The secondary disabilities that develop from the primary organic damage place persons with FAS/E at risk of victimization, criminalization, substance abuse and psychiatric illness.

Maternal drinking of alcohol during pregnancy causes permanent physical and neurological damage to the fetus. Alcohol is a teratogen and has a direct toxic effect on cell growth and development. The timing of the alcohol ingestion during the pregnancy, nutritional status of the mother and the unique physiological responses of the fetus to alcohol determine the degree and distribution of the damage

Persons who have been affected by maternal ingestion of alcohol during their embryonic and fetal development may have a wide range of disabilities and "no two individuals with FAS present with the same constellation of anomalies and disabilities. Growth, facial phenotype, CNS dysfunction and alcohol exposure all vary along separate continua. The term FAS only conveys that the condition is permanent and was caused by prenatal alcohol exposure. The term does not convey what the individual's disabilities are" (Astley 1999). The diagnosis of FAS is not black and white but many shades of grey because of the range of variability of disability.

Astley and Clarren (2nd edition 1999) have developed a 4 point diagnostic system for FAS that is attempting to address the amount of variability and is trying to bring more precision to the diagnosis of FAS and other disabilities associated with in utero alcohol exposure. At the Univ. of Washington they have produced a CD-ROM that teaches clinicians how to do the facial measurements that are part of the diagnostic work-up for FAS. The terminology for FAS is still undergoing a transition. and in the literature there are good discussions as to why the terms Fetal Alcohol Effects (FAE) or Partial FAS (PFAS) should not be used (but they are still used so they must still serve a purpose that has not been filled by newer terminology). There were also new concepts introduced in 1996, in Kathleen Stratton et al's book (4): Alcohol Related Birth Defects [ARBD] which includes heart, skeletal, brain and midline facial defects and Alcohol Related Neurodevelopmental Disorder [ARND], which describes someone with a history of prenatal alcohol exposure, without the characteristic physical features but with the behaviour, adaptive functioning and language (receptive) difficulties.

The initial descriptions of FAS described persons with all the hallmarks of the syndrome ['classic features']-1) pre/post natal growth/weight deficiency (below 10th percentile); 2) a characteristic set of minor facial anomalies {short palpebral fissures or eye openings; flat nasal bridge; flat/smooth philtrum or vertical groove between upper lip and nose; thin upper lip}; and 3) evidence of central nervous system involvement-including microcephaly, tremulousness, poor coordination, learning disabilities, memory deficits, motor problems, seizures, developmental delays, mental retardation and behavioural dysfunction {including hyperactivity}. Persons with a history of prenatal exposure to alcohol may not have all of the classic physical characteristics but do seem to have the adaptive behavioural dysfunction. The lack of facial anomalies in some persons has sparked the discussion over the use of different terms such as FAE or partial FAS. [The reason some persons do not have the facial anomalies is that the timing and the amount of the alcohol exposure can account for the differences in physical defects. In the first 7 weeks of development all the organ systems develop but the brain continues to grow and develop throughout pregnancy, therefore alcohol's toxic effects on the brain can happen through all or any of the 9 months of pregnancy].

Ann Streissguth in 'The Challenge of FAS' (1997) describes the secondary disabilities of persons with FAS/E as “those that a person is not born with and that could presumably be ameliorated through better understanding and appropriate interventions”. The secondary disabilities include “mental health problems, disrupted school experience, trouble with the law, inappropriate sexual behaviours, alcohol and drug use, difficulty with independent living, difficulty with employment and problems with parenting” (1997). Ann Streissguth and colleagues at the University of Washington have followed hundreds of persons with a diagnosis of FAS/E over 20+ years and tracking what happened to them forms the basis for their descriptions and statistics of secondary disabilities. They found out what made things worse and what the protective factors were (early diagnosis is a very important protective factor).

The secondary disabilities associated with alcohol exposure in utero often lead to the criminalization of these people. The characteristics of persons with the effects of pre-natal alcohol exposure can lead them to become criminalized. Some of these characteristics are: impulsivity, poor judgement, lack of understanding of cause and effect, difficulty predicting and/or understanding consequences of behaviour, inability to learn and generalize from past mistakes, poor and fluctuating memory so confabulation may occur, suggestible/easily manipulated, poor social skills/abilities but a desire to socialize, and difficulty with concepts of time and money (poor math skills). As well persons with FAS/E often have better expressive language skills than receptive language skills so they appear to understand more than they actually do.

The above list of characteristics is a 'recipe for disaster' in terms of how someone could come into contact with the law and how easily they could become a repeat offender. FAS when diagnosed, forces lawyers and judges to question whether persons with FAS are fit for trial and whether they have the ability to instruct counsel. Many persons without the full physical signs of FAS, but with the neurodevelopmental disability, who come into conflict with the law, are not recognized as disabled and are not assessed to find out their level of ability. When they are convicted and sent to jail they are often sexually and physically abused by fellow inmates and/or 'befriended', end up learning more about

criminal acts and will not have made the connection as to why they are even in jail. Even persons with a previous diagnosis of FAS may not have that diagnosis passed on to their lawyer or the Crown or the Judge and accommodations may not be made for their learning disability or vulnerability. This is not justice-this is criminalizing the mentally compromised.

As a psychiatrist, practicing for 17 years, I can report from personal experience that there is a lack of awareness and knowledge about FAS. There is a lack of political will to do the right thing for disabled offenders/substance addicted offenders in the criminal system and within the government.

Mental health screening, of persons charged with criminal code offenses, that would include screening for FAS is an absolute must. Mr. Justice David Vickers in the Foreword to 'Fetal Alcohol Syndrome and the Criminal Justice System' (2) states "Seldom are people prepared to link criminal conduct in their community to an inadequate social support system. Many first offenders have never had an assessment of any nature whatsoever. . . . Failure to address the underlying reason for criminal behaviour, at a much earlier date, may lead to more serious conflicts with the law. More often than not, precious years have passed without any help and support for the individual offender and his or her family before the question 'why' is asked in the sentencing process. Often underlying reasons are not even addressed at sentencing. How can that be in the interest of public safety and protection?"

What to do?-The most important thing is to become informed and as knowledgeable as possible about FAS whether you are a probation officer, a judge, a lawyer, police officer, a psychiatrist, social worker, psychologist, parent, politician, bureaucrat, physician, or guard.

As a psychiatrist I believe that only physicians with expertise in diagnosing FAS should be assessing persons for FAS. Developmental Paediatricians have the background and developmental approach that is needed in diagnosing FAS (in children and in adults-but there are funding issues for assessing adults). Psychiatrists generally have not been trained to recognize/diagnose the full spectrum of alcohol related birth disorders which surely must lead to the diagnosis being missed not just by Forensic Psychiatrists but by Child and Adolescent Psychiatrists and general Psychiatrists. As FAS is not (yet) included in the Diagnostic and Statistical Manual (DSM) that North American Psychiatrists use as the basis for psychiatric diagnosis, FAS has been ignored/dismissed or not recognized by many Psychiatrists. This lack of knowledge needs to be reversed. Any Psychiatrist working in the Forensic system needs to have considerable knowledge/awareness of FAS, as they will definitely come into contact with persons with FAS/E and ARND. Knowledge of the 'FAS' behavioural phenotype and cognitive limitations will have an impact on decisions around consent to treatment and should influence therapeutic approach. Streissguth et al (6) have shown in their long term prospective study that persons with FAS have a high incidence of mental health disorders including depression/mood disorders, anxiety, addictions. The 'Forensic System' can only benefit from collaboration with Paediatricians in assessing persons for FAS.

I have spoken with many persons as I prepared this paper. A Neuropsychologist asked me to pass on this advice –if a full psychological assessment can not be done for someone that is suspected of having FAS then the most important part is to assess their Adaptive Functioning. [use: The Scales of Independent Behaviour–Revised {SIB-R} or The Vineland Adaptive Behavior Scale]. Persons with FAS/E tend to have markedly impaired adaptive functioning. Judges and lawyers I have spoken with want to be able to have persons assessed for FAS because they have a concern about the accused’s cognitive or adaptive functioning (before sentencing). Judges and lawyers want to have a flexible and supportive system that will allow for alternate ways of sentencing that will not result in the disabled person being put at risk of victimization or repeat offenses. Accommodation for cognitive/learning disabilities must be made, as rehab programs/groups designed for non-cognitively impaired offenders will be of no use to someone with a learning disability. The lack of accommodation to a person’s cognitive/adaptive disability may result in the person not getting parole as they have not demonstrated ‘progress’ in rehabilitation. As well, sending persons with FAS, who have difficulty understanding cause and effect, to jail does not serve as a deterrent to future criminal activity and as stated earlier it may well introduce them to offenders that will take advantage of them in and out of prison. A network of community support outside of jail is needed, as without it persons with FAS will not be able to navigate normal societal rules. Persons with FAS do best with structure, black and white rules and consistency-knowledgeable persons in this field refer to the concept of the ‘external brain’.

Who pays?–Persons with FAS are not just one ministry’s ‘problem’ and perhaps the reluctance to acknowledge the enormity of the problem does come down to money but society pays now or pays later. Jailing people is expensive. Perpetuating criminal behaviour is expensive in terms of the cost to the public on an emotional as well as monetary level. Persons with FAS have organic brain damage-a birth defect that is caused by a legally sold substance (in Canada alcoholic products are as yet unlabelled and do not have warnings about FAS). FAS is 100% preventable. But persons will continue to be born with FAS because, as members of the forensic community, as well as being citizens, voters, parents, we have not shown the determination to solve this problem.

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CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for Appellant Lewis Lawrence, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the Brief of Appellant was sent by first class mail, postage prepaid on January 28, 2011, to Lewis Lawrence DOC # 340476, E-E-216, Washington State Penitentiary, 1313 N. 13th Avenue, Walla Walla, WA 99362; and Denis Tracy, Whitman County Prosecutor, PO Box 30, Colfax, WA 99111.



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