

Considering the Fetal Alcohol Spectrum Disorders As A
Mitigating Factor In The Death Penalty:
A Case for Compassion

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Background

- We have evaluated 38 men and 2 women charged with murder and sentenced to die in 10 states
- The vast majority have been post-conviction appeals based on lack of quality counsel at their initial trial
- In all cases their lawyer contacted us because of new information regarding prenatal alcohol exposure
- Challenges to defending these individuals include the following:
 1. Incompetence of the trial attorney
 2. Failure to persuade the jury that FASD should be considered a significant mitigating factor
 3. Confusion with terms such as FASD, FAS, PFAS, ARND.
 4. Dealing effectively with stigma
 5. The concept of Therapeutic Jurisprudence

FETAL ALCOHOL SPECTRUM DISORDER

Institute of Medicine of The National Academies of Science
1996



Fetal Alcohol
Syndrome

Partial Fetal
Alcohol Syndrome

Alcohol Related
Neurodevelopmental
Disorder

Fetal Alcohol Syndrome

Growth

- Prenatal Growth Deficiency
- Postnatal Growth Deficiency
- Microcephaly

Face

- Short Palpebral Fissures
- Long, Smooth Philtrum
- Thin Vermilion Border

Neurobehavioral Deficits









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Fetal Alcohol
Syndrome

Partial Fetal
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Alcohol Related
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Disorder

Alcohol Related Neurodevelopmental Disorder (ARND)

- Confirmation of maternal alcohol use during pregnancy is required
- Intellectual disabilities and problems with behavior and learning.
- Lacks growth deficiency, small head and typical facial features of Fetal Alcohol Syndrome
- For every 10 individuals with prenatal exposure to alcohol one has FAS and 9 have ARND
- Individuals with ARND frequently have more severe neurobehavioral abnormalities than those with FAS



STIGMA: A major reason
FASD is being ignored
throughout the world

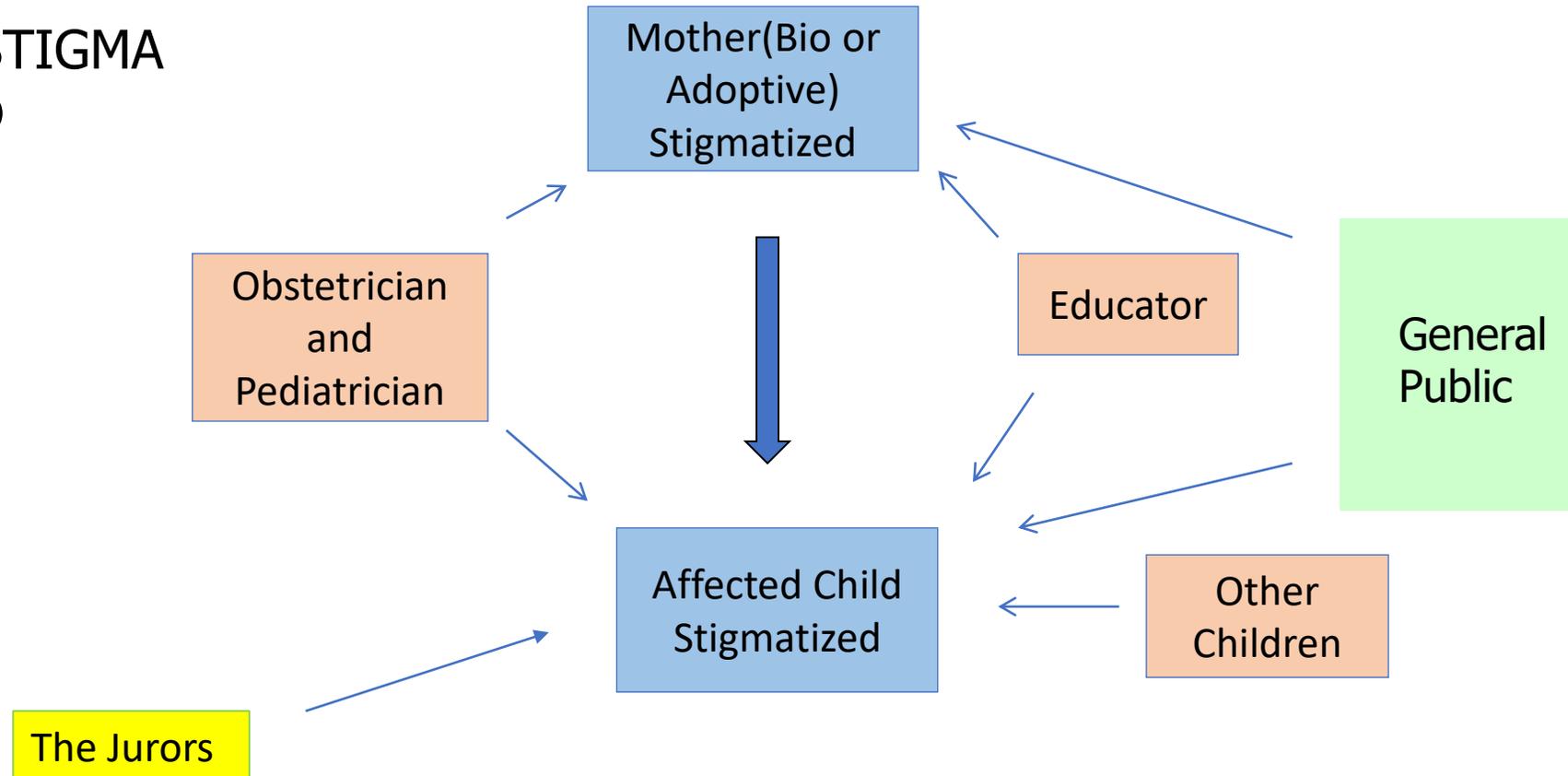
An attribute that is deeply
discrediting and reduces the
individual from a whole and
usual person to a tainted
discounted one



4 Types of Stigma
Public Stigma
Stigma by Association
Self Stigma
Structural Stigma

Overcoming Stigma

PUBLIC STIGMA
OF FASD



**If we do not overcome stigma
We will never Prevent FASDs**

Stigma Results In and is Caused by Ignorance

Because of stigma children with FASD do not get proper help through the school system

Stigma leads to obstetricians being loath to even ask a pregnant women If she is drinking alcohol

Stigma leads to Pediatricians being loath to give a child a diagnosis of FASD because they feel it will insult the mother



Stigma leads to lack of a diagnosis of FASD leading to a failure to be referred for appropriate services

Lack of early diagnosis is directly related to worse outcome

Because of stigma individuals with FASD are not treated equally before the law

Because of stigma judges believe that individuals with FASD cannot be rehabilitated

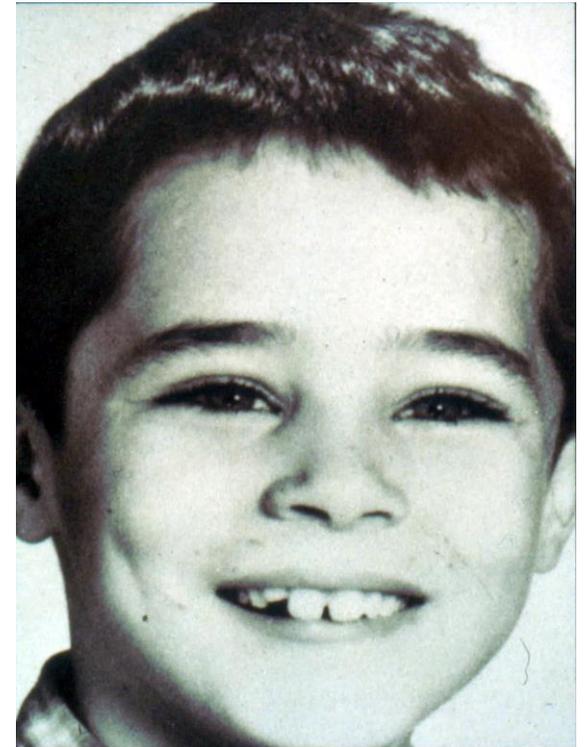
Therapeutic Jurisprudence

- The concept that the law should regard dignity and compassion as desirable outcomes
- Therapeutic Jurisprudence teaches that people possess an intrinsic worth that should be recognized and respected, and that they should not be subjected to treatment by the state that is inconsistent with their intrinsic worth.
- The right to quality counsel is an integral component of Therapeutic Jurisprudence
- Therapeutic jurisprudence is based on compassion, understood as a concern for the suffering of others and a commitment to alleviating and preventing it

(“Perlin M and Cucolo H: Take the motherless children off the street”: Fetal alcohol syndrome and the criminal justice system.. University of Miami Law Review Volume 77/Number 3. May 2023)

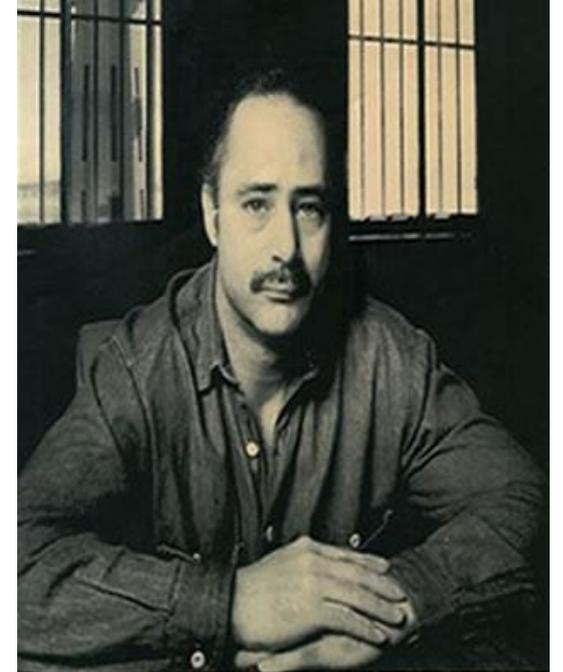
History

- Born 1953 to an alcoholic mother whose husband beat her unmercifully throughout her pregnancy.
- He was abused severely throughout childhood.
- IQ was 61, had severe behavior problems, was repeatedly expelled from school and ran into problems with the law at age 10
- Placed in juvenile detention at 13 years for stealing a car
- Mother abandoned him at age 14 years
- Placed in juvenile detention again at 14 for stealing another car



History (continued)

- At 22 years imprisoned for manslaughter
- Paroled 3 years later in 1978 at 25
- That same year murdered 2 teenage boys, stole their car, held up a bank, and then returned to scene of the murder where he ate their half-eaten McDonald's hamburgers
- Convicted and sentenced to death on 6/3/79
- Executed in San Quentin's gas chamber 21/4/92
- The case was described by Judge Stephen Reinhardt of the 9th Circuit Court of Appeals as a nightmare. "It served no one well. The process was ugly, cruel and injudicious"



History (continued)

- On April, 13, 8 days before his execution, Gov. Pete Wilson of California denied clemency for Harris stating that he was unconvinced by defense claims that the abuse Harris had received as a child left him incapable of bearing responsibility for his actions as an adult.
- Thereafter, there were four different stays of execution granted by the 9th circuit court of appeals in the 12 hours prior to Harris's execution. The primary appeal was based on the challenge that execution by lethal gas was cruel and unusual punishment
- At 3AM West Coast time on April 21st, the **U.S. Supreme Court** issued a decision vacating the Ninth Circuit's stays and allowing the execution to proceed. The majority of the justices vacated the stay on the grounds that the claim was brought too late.
- On April 21, at 3:49 a.m., Harris was strapped into the gas chamber. Seconds before execution, a **Ninth Circuit Judge** stayed the execution for the fourth time.
- Two hours later, the **U.S. Supreme Court** vacated that stay, explicitly ordering "No further stays of Robert Alton Harris' execution shall be entered by the federal courts except upon order of this Court."

Lack of Compassion

- To many, lack of compassion was most dramatically demonstrated by the strapping and unstrapping of Harris in the gas chamber, the filling of vats beneath his chair with acid and his removal from and then return to the death chamber on 2 occasions.
- To others it was Governor Pete Wilson's unwillingness to grant clemency to an individual who was intellectually disabled, had been abused as a child by his father and his alcoholic mother and who had been diagnosed with FASD
- To others it was the Supreme Court's decision that the cruel and unusual punishment claim should not be considered. The majority of the justices reversed the stay on the ground that the claim was brought too late.



Feb.14, 2018:

19 y/o Nikolas Cruz murdered 17 students and staff at Marjory Stoneman Douglas High School in Parkland , FL



His prenatal exposure to alcohol was well documented by his **biologic** mother on numerous occasions and was more excessive than I have ever encountered

His **adoptive** mother told everyone that she was his biologic mother and that the pregnancy was normal

Risk Factors - He was prenatally exposed to alcohol; his father died when he was 5 and he was the first to find him; thereafter in order to discipline he and his brother, his mother would call the police (this happened on at least 20 occasions); he was expelled twice from preschool; he repeated kindergarten; he had no extracurricular activities; he had no friends; he failed in everything he tried.

Protective Factor – He had one - His adoptive mother who died 3 months before he killed 17 people

He was first diagnosed as having ARND when he was 22 years of age in 2021 at the time he was examined by Tina Chambers and me and had neuropsychological testing by Paul Connor in the Broward County jail in Ft Lauderdale, FL.

Sentencing

Nikolas Cruz pleaded guilty in 2021 to fatally shooting 17 people so the trial was not to prove if he was guilty of murder, but whether he would be sentenced to death or to life in prison without the chance of parole

In Florida the prosecution was required to persuade all members of the jury to vote in favor of death. In this case 3 jurors voted in favor of life with no chance of parole and 9 voted for death.

For me the great challenge was to be able to show the jury why FASD should be a valid mitigating factor that should persuade them to vote in favor of life without a chance of parole. I thought that persuading the jury that Nikolas Cruz had an FASD would not be difficult. It was not.

But going one step farther – Persuading the jury that a diagnosis of an FASD - in this case ARND - was a sufficient mitigating factor to obviate the death penalty would be difficult. It was.

But the defense team was able through the concept of therapeutic jurisprudence to present a case to three out of the 12 jurors that the law should regard dignity and compassion as desirable outcomes

Compassion

Closing Arguments.



- She pressed the jury to take a breath, open their hearts and minds and make a moral decision for mercy.
- “And in a civilized humane society, do we kill brain damaged, mentally ill, broken people?” McNeill asked. “Do we? I hope not.”
- “There is no time in our life when we are more vulnerable to the will and the whim of another human being than when we are growing and developing in the womb,” McNeill said.
- “Because Nikolas was bombarded by all of those things, he was poisoned in the womb. Because of that, his brain was irretrievably broken, through no fault of his own,”

- The expert witnesses were honest and compassionate
- The defense team were brilliant and compassionate
- The law actually regarded dignity and compassion as desirable outcomes



Conclusion

- The Criminal Justice System and the public at large may be taking a more compassionate approach when using FASD as a mitigating factor in court cases in which prenatal alcohol exposure can be validated and an affected individual's neurobehavioral impairments can be documented
- As evidence we are now actively involved in 4 cases of individuals on death row who have been prenatally exposed to alcohol