

Juvenile Tribal Court Systems: An Opportunity

The implications of the global impact of an FASD on an individual, their family and their community, is nowhere better reflected than from the context of a juvenile within the corrections or tribal court setting. The needs of the juvenile and the services required to meet those needs are dramatically illustrated by the case histories of the tribal courts and family services. Understood in its broadest terms, “right to counsel” suggests an understanding of the potential of that legal support as an intervention to interrupt the cycle of repeated probation violations, new charges and overall rates of recidivism. Considered further, “access to justice” presumes an ability to perceive, to comprehend and to advocate for components of justice. Seeking to provide access to appropriate counsel and understanding the reciprocal nature of intervention and prevention, in turn, reveals the need to define the requirements of “appropriate”. When we consider these requirements from the context of an FASD, the organicity and manifestations of the brain damage associated with prenatal exposure to alcohol dictate an approach with methodologies that acknowledge the cognitive impairments to executive function and the compromised processing, memory retrieval, auditory comprehension and ability to generalize that so characterizes the landscape of FASD. In addition “patients affected by Fetal Alcohol lack endorphins, leading to more hostile behaviors because they don’t feel good” (Dipak Sarkar N.I.H. 10/14/2010).

The impulsivity, inability to functionally understand cause and effect and “bipolar” like depressive episodes may have precipitated the criminal activity, but it is the “hard wired” inability to “learn from mistakes” coupled with difficulties in “response inhibition” (Joseph Jacobson Jan. 2011) that can capture the defendant as a victim within the corrections or tribal court system. Behavioral characteristics compromising culpability include these processing deficits which are often masked by a “desire to please”...to “say what people want”, which of course is another facet of being easily lead and manipulated and appearing to present seemingly “shifting realities.” With an FASD, “when you smile at me and nod with encouragement you become my friend and I will say or do whatever will keep you smiling. When you frown or look angry I will see you as someone who might be an enemy and my stressed out response will be to dig in, react, or to shutdown”.

The defendant with FASD echoes their environment. This echolalic behavior simply means, “I am who and what I am with.” Often the manipulative victimization begins with the “friends” with whom they are either an accessory or perpetrator of the act, and then it continues through interviewing, interrogation, plea bargaining, trial and sentencing. All phases are viewed by the defendant as disparate different “moments” and circumstances that are understood less from the verbiage and content of the process and more from the body language and social affect of the people involved in the process. Within this cognitive neuro-behavioral landscape one cannot fit the normative assumptions of the criminal justice system that presume a person’s actions are volitional and reflect informed choices regarding their decisions to commit a crime or that they can learn from their own behavior. One cannot “form intent” if one cannot pre plan, sequence or understand cause and effect.

Recognition of these legal issues and their collision with the current criminal justice system for people with an FASD has resulted in the Canadian Bar Association issuing a resolution that addresses and promotes creating alternatives to the “current practice of criminalizing

individuals with FASD.” The CBA further identifies “those with an FASD are entitled to “substantive and not merely formal equality before and under the criminal law without discrimination on the basis of their disability”.

The access to justice, the right to counsel, and access to appropriate programs and strategies, dictate a thorough understanding of the prenatally, ethanol exposed central nervous system that informs the following strategies:

- ❖ Identification of trained legal counsel that can serve as a navigator of systems in concert with appropriate services offering advocacy that provides the defendant with support from assessment and evaluation through referral and all court and sentencing related activities would integrate services and resources through a Collaborative Circle of Care model. Tribal court systems are well positioned to utilize such an approach in a manner that functionally extends the frequency and duration of interventions, and that conceptually accesses the methodologies of Restorative Justice and Circle Sentencing. Perhaps even more important, when this occurs the implications and momentum for holistic culturally congruent, strengths based, family focused community model emerges, revealing a powerful potential for tribal court systems to generate positive behavior community change. The cooperation and integration across disciplines, services and naturally occurring community helpers and settings have been found to extend and enhance the service outcomes for the community as a whole.

Legal Counsel Steps

- identify trained, or wanting to be trained, legal counsel
 - identify appropriate support team inclusive of related professional services providers and relevant family or elders
 - screen for referral to diagnosis (see diagnostic steps)
 - identify any other team member that may be suggested as a result of diagnosis
 - develop strategic work plan, inclusive of incarceration, transition and identification of long term planning for the lifelong of disability of FASD
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- ❖ Accessing diagnosis is essential. Having no utility in and of itself, diagnosis is an essential tool in the delivery of justice. Existing within a continuum of intervention strategies, it is critical to both the identification and understanding of the defendant’s culpability and the design of sentencing transitional behavior methods that will diminish the risk of future corrections involvement. Diagnosis should be understood philosophically and conceptually for its purpose to increase information that will result in positive outcomes. It should “help;” should never “hurt.” It must be driven from a multigenerational family focus that draws on the strengths and identity of the family within their culture and community landscape. The traditions, values and beliefs of the client and their family should inform the process and shape the pre- and post-diagnostic procedures and protocol. Prior to entering the diagnostic process elders, family and advocates, need to be identified to serve as primary support people helping the defense counsel to navigate systems and services; helping to process the information in a positive, concrete manner that is structured, functional and culturally appropriate.