Pretrial Motions for ASD Cases

Your client's autistic challenges should be considered in every step of the legal process. In this section we discuss:

- Did they possess criminal intent?
- Did they have the ability to consent to the police interview?
- Are they competent to assist you?
- What are special questions for voir dire of the members?
- How should the jury be educated about ASD during the findings phase?

Deeper-dive:

The Americans with Disabilities Act and Rehabilitation Act should be front-and-center in the development of the theory for your case.

Mahoney notes:

> We have a national policy to protect and accommodate those with developmental disabilities, reflected in the Americans with Disabilities Act, and the correlative Rehabilitation Act. This sets a national policy that applies to those in law enforcement and must circumscribe their exercise of discretion. In "Examples and Resources to Support Criminal Justice Entities in Compliance with Title II of the Americans with Disabilities Act." USDOJ, Civil Rights Division, Technical Assistance Publication, January 11, 2017, p.2:
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> > Nondiscrimination requirements, such as providing reasonable modifications to policies, practices, and procedures and taking appropriate steps to communicate effectively with people with disabilities, also support the goals of ensuring public safety, promoting public welfare, and avoiding unnecessary criminal justice involvement for people with disabilities. (Emphasis added).
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> This is express acknowledgment of the problem of "counterfeit deviance," and in the "unnecessary criminal justice involvement for people with disabilities" arising from their involvement in behaviour which is only apparently deviant, but lacks the culpable mental state or blameworthiness which would normally attend such actions by persons who are typically developed.
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> This guidance expressly notes the importance of "assessing individuals for diversion programs" on the basis of DD [Developmental Disability]. Id. It later gives as an example of compliance with the ADA the setting of "eligibility criteria for diversion programs such as community services, specialty courts, or probation programs" Id. and "[r]equir[ing] court staff to explore reasonable modifications to allow qualified individuals with these disabilities to participate in diversion and probation programs and specialty courts." Id. at 3. This falls under the category of "reasonable modifications in policies, practices, or procedures when necessary to avoid disability discrimination."
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> Mark Mahoney (2017). *Caught in the Web of the Criminal Justice System*, (p. 23).

A. The Question of Mens Rea

As is the case with those with intellectual disabilities (mental retardation), individuals with ASD can be compromised in their ability to fully understand the legal and moral ramifications of child pornography. The caution for the defense attorney is whether the client made any efforts to hide their child pornography material, which suggests awareness of the wrongfulness of their acts.

Deeper-dive:

Mesibov and Sreckovic observe:

> Individuals with ASD have difficulty understanding the criminal responsibility of child pornography for many reasons. First is their intent to search for and download child pornography. These adolescents and adults may search for child pornography as a learning tool to understand more about sexuality in the comfort and privacy of their own home. Once they access the pornography, they may become obsessed with accumulating large amounts of it, because of the compulsivity that accompanies most of their routines. Therefore, an adult with ASD with an average to extremely above-average IQ may be intensely focused on one narrow topic, downloading as many files as they can, without even thinking about the broader picture of what they are doing and how it impacts the children in the images. Second is the way their brain processes information. As previously described, individuals with ASD often have disruptions in communication between different regions of the brain. Understanding the criminal responsibility of child pornography requires a person to understand that the children in the images did not give consent and do not want to participate, the people taking the videos/pictures are harming the children, and by viewing the children in the videos/pictures the viewer is harming the children. This requires a person to be able to understand the intentions of others and how other people are feeling (also known as ToM). As previously mentioned, neuroimaging studies have indicated that the communication between frontal and posterior ToM regions of the brain is lower in individuals with ASD compared with individuals without ASD (e.g. Kana et al., 2009), which would clearly impact their ability to intuitively understand that viewing and downloading child pornography is illegal. Finally, individuals with ASD view the world very literally and it would not cross their minds that something so freely available on the internet would be illegal. In their naive and trusting minds, if it is wrong, then it should not be available. The social immaturity of these individuals, coupled with deficits in ToM, make it difficult for them to understand that their actions are wrong.
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> The social immaturity of adolescents and adults with high-functioning ASD, despite their average intelligence and biological development for their age, often makes them interested in knowing about younger girls/boys because they are of about the same age emotionally and socially as these children. Moreover, for the individual with ASD, the demarcation between observing an adult and observing a child is often unclear. Clinical observations confirm that individuals with ASD are poor judges of character and age. Many individuals with ASD are unclear about the moral and legal line between the two as well.

Gary Mesibov and Melissa Sreckovic (2017). *Caught in the Web of the Criminal Justice System*, pp. 86-87.

Mesibov and Sreckovic continue:

> Again, this information would need to be presented explicitly, concretely, and visually because individuals with ASD are such concrete learners. It would also need to be presented repeatedly, as these individuals have difficulty transferring new information to other situations. For example, understanding that a principal is an adult and a student is a child would not necessarily translate to an individual with ASD that a 30-year-old is an adult and a 12-year-old is a child.
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> What is often presented explicitly in the sexual education curriculum for adolescents and adults with ASD is masturbation. In fact, many curriculums provide visuals and explicit directions on how to masturbate. Keep in mind this may be one of the only modes for these individuals to achieve sexual gratification. They are taught that it is acceptable to masturbate in the privacy of their own home and bedroom. Rules about the distinction between public and private are repeatedly taught in these curriculums. This is relevant as

individuals with ASD have been known to masturbate in public. However, they typically are not being explicitly taught what they cannot do in private. Because individuals with ASD are rule-governed and need explicit directions, if they are not explicitly taught behaviors that are inappropriate to engage in while masturbating in private (e.g. viewing child pornography), they likely do not recognize they are engaging in illegal behavior. Rather, because they are in the privacy of their own home or bedroom, they think all behaviors related to masturbation are acceptable.

Theory of Mind

Individuals with ASD have limited ability to empathize, often referred to as their problem with ToM, which makes it hard for them to intuit or understand how their viewing an image on the internet can be promoting the victimization of the child on the screen. The person who doesn't understand the intentions and emotions of others has considerable difficulty in perceiving when a child is being victimized, even though they might have the technical skill to find and collect the child's images on the internet. In addition, because their maturity level and moral understanding is the equivalent of a young child's, they do not fully appreciate the morally reprehensible aspects of what they are viewing and the illegality of downloading these images. Although pedophiles or antisocial personalities usually understand the repercussions of their criminal actions when observing illegal child pornography on the internet, unless explicitly and repeatedly told, coached, and rehearsed, an individual with ASD would not understand that the mere viewing of child pornography or even the mere act of clicking on a link can be a serious criminal act.

In prosecuting child pornography cases, a critical premise is that the person viewing such images understands that the children might not have given informed consent for participating in the pictures and are being exploited and perhaps psychologically and physically abused. [1]Whereas individuals without ASD would likely be attuned to the possibilities of exploitation and the potential for harm, adults with ASD frequently lack the empathetic understanding and sensitivity to the perspectives of others to make these deductions and connections. When asked why they sometimes watched children involved in child pornography, a common answer of teens and adults with ASD is because they could relate better to younger girls/boys because their social-emotional age is at about that level (which in fact it is). Not only is their social and emotional age well below their chronological age, but many individuals with ASD view themselves as younger than their chronological age, which is the case with Nick Dubin, as described in Chapter 10. Typical adults observing child pornography usually understand that an observer is morally and legally culpable for promoting that victimization. Living in a narrower and very literal world, however, a person with ASD is usually unable to make these connections and deductions, and it would be very hard for them to fathom all of the negative consequences for the child in question.

Further, while individuals without ASD can likely recognize that the children in videos or pictures look upset, distressed, or anxious, individuals with ASD have extreme difficulties reading meaning in eye gaze, facial expressions, body language, gestures, and prosody. . .

[1] Attorney Daryl Johnson offered important feedback in formulating this paper. He notes that prosecuting the possession of child pornography requires knowledge. Specifically, knowledge that the image is possessed. Children can't consent and even in the case of 16 & 17 year old "children" (who can consent to a sex act), whether they did or not does not change impact whether the image is child pornography. It might be helpful for mitigation but it doesn't help with findings.

Despite these challenges, individuals with ASD can learn that child pornography is illegal if they have been explicitly taught; however, the availability of illegal materials like those on the internet are very recent developments, so few programs or families have had time to adjust and make this specific teaching a part of school curriculums or home learning activities.

Gary Mesibov and Melissa Sreckovic (2017). *Caught in the Web of the Criminal Justice System*, pp. 89-90.

Because of their disability, individuals with Asperger Syndrome would be likely to miss the connection between consuming child pornography and supporting the exploitation of children. Because of their difficulty reading emotion and understanding non-verbal communication, the person with AS would have difficulty recognizing or would entirely miss the emotions of fear, anxiety and discomfort on the faces of children in the pictures… Non-verbal communication that most people recognize and respond to intuitively is unseen by those with autism spectrum disorders. (2008a)

Lawrence A. Dubin (2017). *Caught in the Web of the Criminal Justice System*, p. 62.

B. Ability to Consent to the Police Interview

Police interviews of individuals with ASD have strong parallels to their interviews of those with intellectual disabilities (mental retardation). Research shows those with ASD can experience strong anxiety when talking with others, are quick to comply with directives, and are naïve about being manipulated by others (i.e. providing a written confession at the direction of the detective).

Deeper-dive:

Beginning with the pre-arrest, the criminal justice system presents an array of problems for individuals with ASD. First, the way the FBI enters the residence of an individual with ASD creates great havoc and confusion for the individual with ASD. As Nick Dubin describes in Chapter 10, the intensity of the situation and overstimulation of noises and behaviors can be overwhelming to the individual with ASD. People with ASD, who have difficulty quickly processing information and responding to requests and questions, will have extreme challenges defending themselves and will often volunteer answers to leading statements that the FBI asks, often without giving Miranda warnings.

Gary Mesibov and Melissa Sreckovic (2017). *Caught in the Web of the Criminal Justice System*, pp. 92.

Here are four important studies on this issue. If you want the full articles, contact me and I'll get them out to you.

High functioning autism spectrum disorders: an investigation of psychological vulnerabilities during interrogative interview

Alice S. North , Ailsa J. Russell & Gisli H. Gudjonsson

Pages 323-334 | Received 01 Nov 2006, Accepted 01 Feb 2007, Published online: 29 Jul 2008

Abstract

Forensic psychologists and psychiatrists are commonly asked to ascertain the reliability of statements made by suspects to the police during questioning and to assess an individual's vulnerability to providing information which is inaccurate, unreliable, and misleading during police interview. Autism spectrum disorders (ASD) are characterised by qualitative impairments in social communication and interaction, and a restricted or repetitive pattern of behaviours, interests, and activities. It is not clear whether people with ASD are more vulnerable at interview, or more prone to respond negatively to interrogative pressure, when compared with the general population. In the present study, 26 individuals with high functioning

ASD, and 27 gender- and IQ-matched controls, were compared on measures of interrogative suggestibility and compliance as well as on measures of anxiety, depression, the extent to which they feared negative evaluation by others, and whether they had a suspicious outlook. There were no significant between-group differences on the measures of suggestibility, but the group with ASD were rated as significantly more compliant than the controls in terms of both parental and self-report, and also had higher scores on measures of depression, anxiety, fear of negative social evaluation and paranoia. Bi-modal distribution of suggestibility scores within the ASD group indicates that individual characteristics should be taken into account when considering an assessment. Individuals with ASD may be more eager to please or to avoid conflict and confrontation than controls, and may be more prone to respond compliantly to requests and demands.

An evaluation of Miranda rights and interrogation in autism spectrum disorders
Lindsay M. Salseda, Dennis R. Dixon, Tracy Fass, Deborah Miora, Robert A. Leark,
Research in Autism Spectrum Disorders, Volume 5, Issue 1, 2011, Pages 79-85
Abstract

The primary deficits present in autism spectrum disorders (ASD) may lead to increased susceptibility to involvement in the criminal justice system. The same deficits may also cause individuals with ASD to be more vulnerable to interrogation techniques and other aspects of the legal system. Due to the increased level of vulnerability as well as impairments in social cognition, individuals with ASD may have difficulty understanding their legal rights, more specifically their Miranda rights. This review explores Miranda comprehension in general and how the specific deficits found in ASD may impact Miranda comprehension.

Brief report: Suggestibility, compliance and psychological traits in high-functioning adults with autism spectrum disorder.
Maras, Katie L., Bowler, Dermot M.
Research in Autism Spectrum Disorders, Vol 6(3), Jul-Sep, 2012. pp. 1168-1175.
Abstract:

Individuals with autism spectrum disorder (ASD) may be over-represented within the criminal justice system; it is therefore important to understand how they fare under police questioning. The present study examined interrogative suggestibility and compliance in individuals with ASD, and whether this is associated with certain psychological traits. Adults with ASD and their typical counterparts completed the Gudjonsson Suggestibility Scales (GSS), Gudjonsson Compliance Scale (GCS), and measures of state-trait anxiety, self-esteem, fear of negative evaluation by others and paranoia. In contrast to previous research (North, Russell, & Gudjonsson, 2008), there was no difference between the ASD and comparison groups on the measure of compliance, and groups also did not differ on any of the GSS measures, despite the ASD group reporting significantly higher paranoia. Findings indicate that individuals with ASD may be no more likely to succumb to interrogative pressures than their typical counterparts.

Compliance in autism: Self-report in action
Chandler, Robert ; Russell, Ailsa ; Maras, Katie.
Autism. 2018.
Abstract

Previous research indicates that autistic individuals are more likely to be bullied,

and that they experience heightened anxiety and diminished self-esteem. These factors are known to predict heightened compliance, which is the tendency to agree with or carry out the requests and demands of others. This has a range of potentially serious consequences, particularly for an autistic person. This study utilised self-report (the Gudjonsson Compliance Scale) and behavioural measures of compliance (the door-in-the-face task) with 26 autistic and 26 typically developing adults. Participants also completed measures of early life bullying experiences, anxiety and self-esteem. Autistic participants were more compliant on both self-report and experimental tasks, and they reported more bullying experiences, higher anxiety and reduced self-esteem. Looking at both groups, bullying, anxiety and self-esteem were all correlated with self-reported compliance on the Gudjonsson Compliance Scale, yet only self-esteem was a unique predictor. None of these predictor variables related to behavioural compliance on the door in the face; nor did Gudjonsson Compliance Scale scores predict door-in-the-face performance, which may be better explained by situational and motivational factors. Findings have important implications for a range of real-life settings including requests made in the context of research, schools, the criminal justice system and the workplace.

C. Competency: Theirs and Yours

This is a fundamental question to consider. Chances are you do not have an expertise in working with those with ASD. Do you need to find special counsel or an advisor to assist you?

Deeper-dive:

Individuals with ASD also may have difficulty understanding broad legal concepts (Mayes and Koegel, 2003). Indeed, Ericson and Perlman (2001) reported significant differences in knowledge of legal terms between adults with mild developmental disabilities (DD) and adults without delays. More specifically, 28 out of 34 legal terms were conceptually understood by at least 85% or more of the participants without delays and only eight legal terms were conceptually understood by at least 75% of the participants with DD. Additionally, individuals with ASD may have difficulty comprehending auditory information if visual supports are not provided to aid in understanding, which often they are not, and during times of stress and heightened anxiety it is more difficult for individuals with ASD to comprehend what is being said (Sperry et al., 2014).

. . . Finally, the academic ability and vast language and vocabulary skills of offenders with high-functioning ASD may make them appear independent and capable (Taylor et al., 2009). This may make them appear more capable than they actually are, especially in relation to communication and social deficits. The prosecutors, judge, and jury may misinterpret their academic intelligence and believe that if the individual demonstrates such academic capabilities, then s/he must have understood the consequences of the offense (Taylor et al., 2009).

Gary Mesibov and Melissa Sreckovic (2017). *Caught in the Web of the Criminal Justice System*, pp. 93-94.

D. Special Questions for Voir Dire

Your questions of potential members should include whether they have known someone with ASD and what they might have learned from that relationship.

E. Educating the Members about ASD

During the course of the trial, your client may display odd behaviors or facial expressions, laugh at inappropriate moments, avoid eye contact with the jury, or fail to show appropriate reactions during witness testimony. It is imperative that members receive instruction from the judge or from

your expert on typical behaviors that can be displayed by someone with ASD.

Deeper-dive:

> Throughout the entire criminal justice process, the unique behaviors displayed by individuals with ASD may give the wrong impression to lawyers, prosecutors, judges, juries, and interrogators. For example, in the courtroom, individuals with ASD may speak in a monotone voice, laugh at inappropriate times, display negative affect, and misread subtle cues from professionals, such as a judge making a facial expression to signal for people to quiet down (Taylor et al., 2009). This demeanor may be understood by the judge and jury as someone being disrespectful, rude, and maybe even guilty. Because of this, they may receive harsher sentences: the affective control theory suggests that offenders who are positively perceived by people in charge of sentencing are given a less harsh sentence than those who are negatively perceived (Tsoudis, 2000).
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> Gary Mesibov and Melissa Sreckovic (2017). *Caught in the Web of the Criminal Justice System*, pp. 94.