

# FASD Evidence in Canadian Criminal Cases: A CASE LAW REVIEW

Kaitlyn McLachlan, Ph.D., C. Psych  
Katelyn Mullally, M.A.  
Jonathan Rudin, LLB LLM



## Fetal Alcohol Spectrum Disorder Evidence in Canadian Criminal Cases: A Case Law Review

Katelyn Mullally<sup>1</sup>, Kaitlyn McLachlan<sup>1</sup>, Emma Jewell<sup>1</sup>, Jodi Viljoen<sup>2</sup>, and Jonathan Rudin<sup>3</sup>

<sup>1</sup> Department of Psychology, University of Guelph  
<sup>2</sup> Department of Psychology, Simon Fraser University  
<sup>3</sup> Aboriginal Legal Services, Toronto, Ontario

Increasing evidence highlights the relevance and frequent consideration of fetal alcohol spectrum disorder (FASD) in Canadian criminal legal cases, though systematic evaluation of the impact of such evidence on legal outcomes remains limited. We sought to fill this gap via a systematic review of reported Canadian criminal cases mentioning evidence of FASD (including prenatal alcohol exposure, PAE) between 2012 and 2020. The final sample of 350 cases primarily included male (92.3%) adult defendants (86.9%). The majority focused on sentencing determinations (76.3%), along with dangerous/long-term offender (DO/LTO) designations (11.4%), guilt/innocence (3.4%), criminal responsibility (0.8%), fitness to stand trial (0.6%), and other decisions (7.4%). Indigenous defendants were overrepresented (76.9%), with a subset of cases (33.1%) addressing FASD evidence alongside *Gladue* sentencing considerations, findings that must be situated in the context of systemic inequities and colonization. Often, evidence about FASD was mentioned only once (42.3%), and roughly half of the cases referenced a formal FASD diagnosis (53.1%). Evidence about FASD was assessed as having “great relevance” in 21.7% of decisions, and among these cases, there was relative consensus that FASD can reduce a defendant’s responsibility and moral blameworthiness, and general acceptance as a mitigating factor. However, decision-making challenges were evident across cases due to competing concerns about risk, public protection, rehabilitation, and the long-term nature of the disability. Findings highlight the importance of improving evidence-based FASD knowledge, increasing access to evidence-informed resources, and bringing a culturally informed lens that highlights Indigenous ways of knowing when working within the criminal legal system.

**Keywords:** fetal alcohol spectrum disorder, FASD, legal decision making, Canadian criminal legal system, sentencing decisions

**Supplemental materials:** <https://doi.org/10.1037/law0000391.supp>

## Acknowledgements

PLAN lab research team members who contributed their time reviewing and coding cases

Our Co-Author, Dr. Jodi Viljoen

Dr. Billie Joe Rogers

The Canada FASD Research Network

Currently Free to Read!

<https://psycnet.apa.org/fulltext/2023-74139-001.pdf>

BACKGROUND

# FETAL ALCOHOL SPECTRUM DISORDER

- Diagnostic term used to describe neurodevelopmental impacts on the brain and body of individuals prenatally exposed to alcohol (PAE)
- Lifelong impacts and interindividual variability
- Individuals with FASD will experience some degree of challenges in their daily living and need support to reach their full potential

# Fetal Alcohol Spectrum Disorder (FASD)

- Individuals are unique and have areas of both strengths and challenges
  - Intellectual functioning
  - Attention and executive functioning
  - Language
  - Learning and memory
  - Psychosocial immaturity
  - Impulsivity
  - Difficulty making decisions
  - Problems learning from cause and effect
  - Strong self-awareness
  - Receptiveness to support
  - Capacity for connection
  - Perseverance
  - Hope for the future

# PREVALENCE & COST

- Prevalence estimates: 2-5%
  - (4%; 4 in 100) = 1.45 million people in Canada
  - \*30-60% in FASD clinical settings
- High estimated\* lifetime costs = \$1-2 million per person, including CLS drivers
- High rates of missed and misdiagnosis
  - Complicate recognition, understanding, and intervention

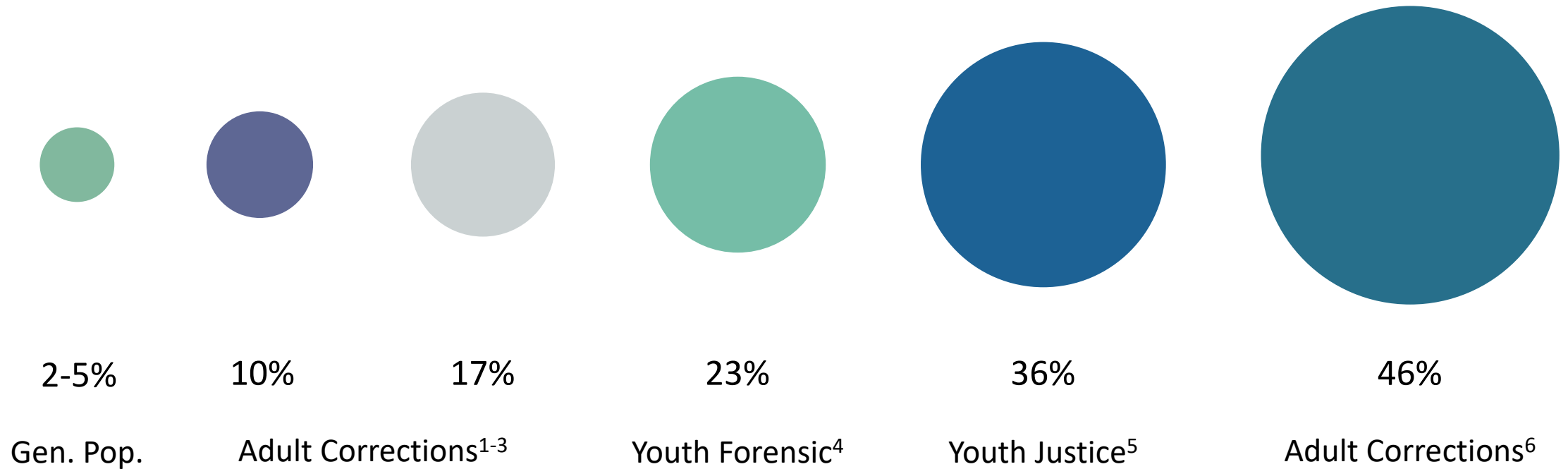
# KEY MESSAGES

- Early identification and tailored interventions support leveraging strengths, achieving healthy outcomes, play an important protective role buffering against difficulties
- Wide variability in pathways, experiences, and needs



**“FASD does not *result* in criminality but rather...FASD *might* increase a cluster of risk factors, not the least of which is engagement in the justice system”**

# RATES IN LEGAL SETTINGS



<sup>1</sup>MacPherson et al., 2011; <sup>2</sup>Forrester et al., 2015; <sup>3</sup>McLachlan et al., 2019; <sup>4</sup>Fast et al., 1999; <sup>5</sup>Bower et al., 2019; <sup>6</sup>Mela et al., 2022

# FASD & The Criminal Legal System

- FASD evidence is being **increasingly considered** within the criminal legal system
  - e.g., sentencing, dangerous offender/long term offender designation, fitness/competency to stand trial, criminal responsibility
- FASD may challenge the **fundamental assumptions** of the criminal legal system
- Proposals for **legislative and policy changes**
  - SB 151 in Alaska, Bill C-235 and Bill C-583 in Canada, Steering Committee on FASD & Access to Justice, 2016

# Case Law Reviews: Key Findings

- Few mentioned formal FASD assessment or diagnosis
- Discussed in relation to mitigation, deterrence, treatability, risk
  - Double-edged sword
- Gaps: Many comprised smaller samples, specific case types, older decisions



# Current Study: Aim

Complete a systematic review of published Canadian criminal cases between 2012 and 2020 where **FASD** or **PAE** was mentioned in relation to the defendant

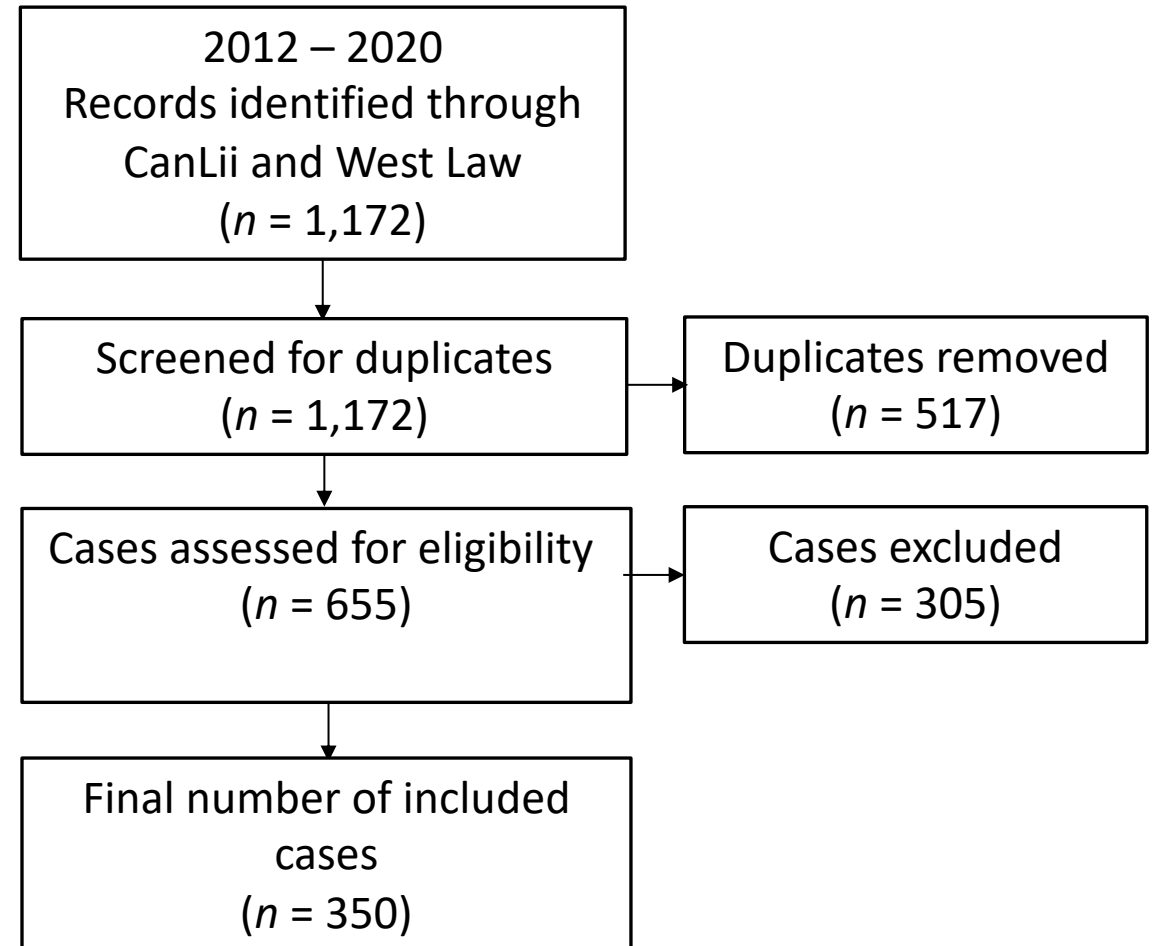


# METHOD

# Method

**Databases:** CanLii, WestLaw

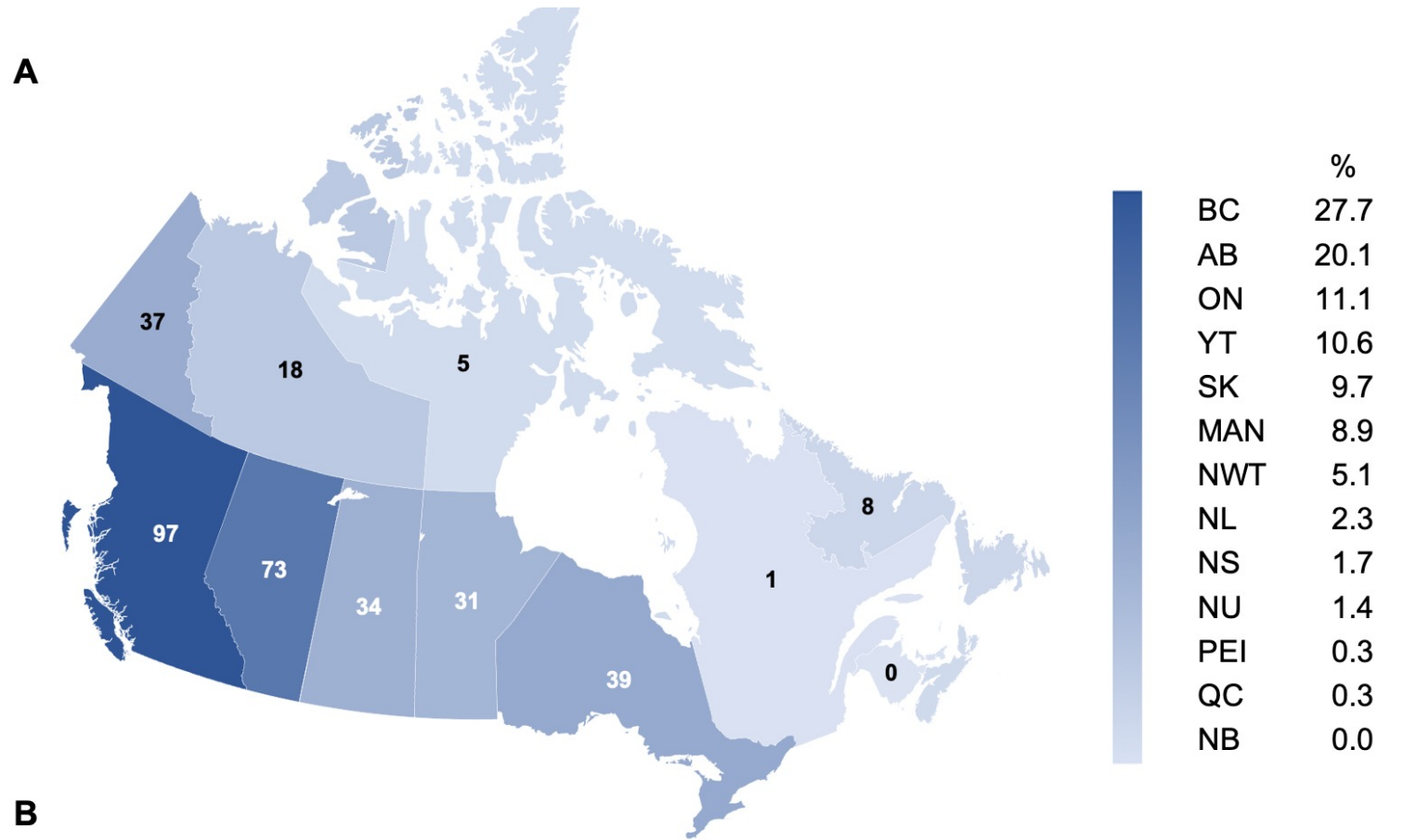
**Search terms:** Fetal alcohol spectrum disorder, FASD, fetal alcohol syndrome, FAS, alcohol related neurodevelopmental disorder, ARND, fetal alcohol effects, FAE, partial fetal alcohol syndrome, PFAS, prenatal alcohol exposure, foetal alcohol spectrum disorder, alcohol related birth defects, ARBD, alcohol-related brain damage, static encephalopathy, sentinel facial features



# RESULTS

# Case Characteristics (*N* = 350)

---

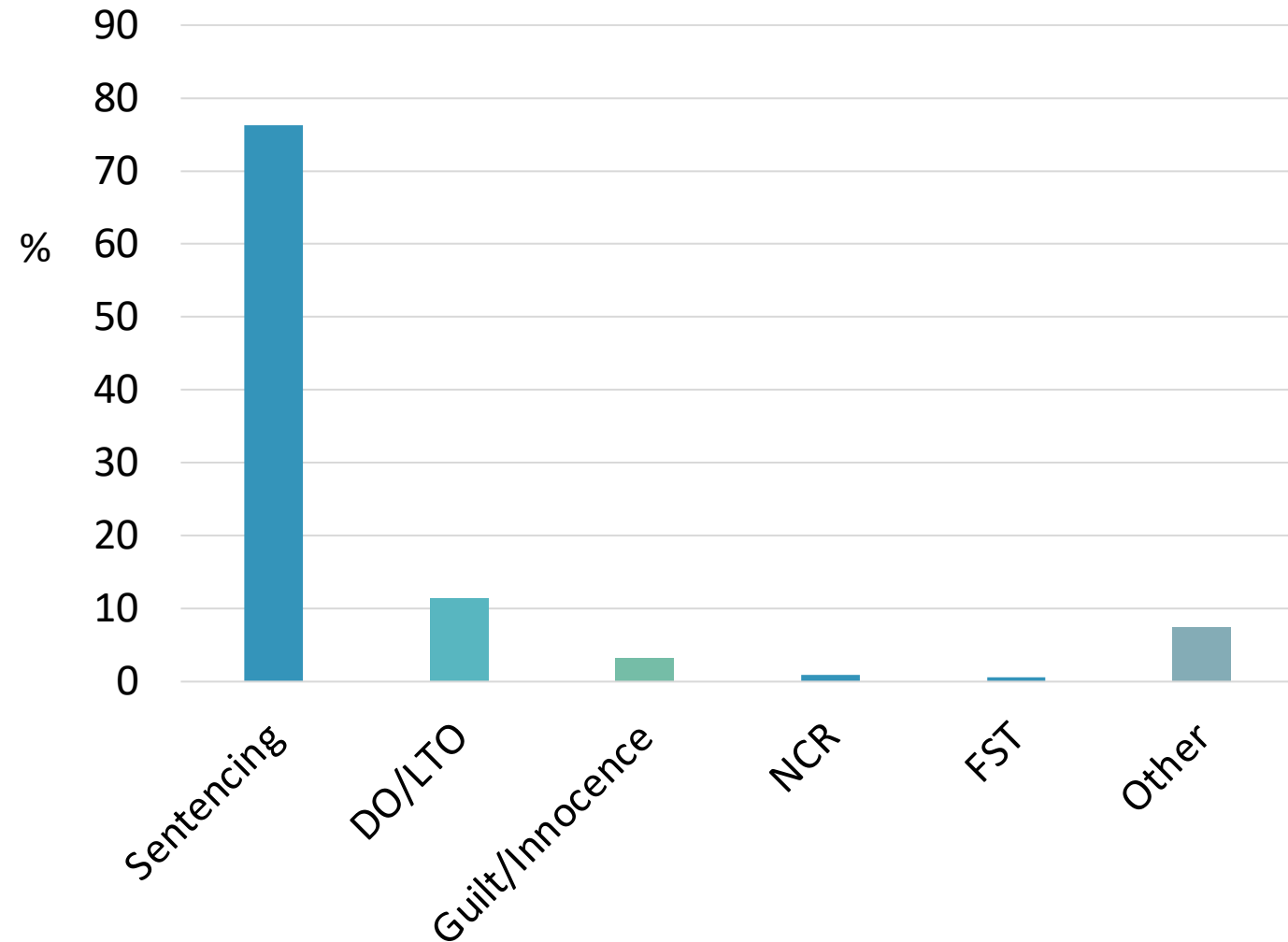


**B**

	2012	2013	2014	2015	2016	2017	2018	2019	2020*
n	27	46	50	41	39	37	39	53	18
%	7.7	13.1	14.3	11.7	11.1	10.6	11.1	15.1	5.1

# Case Characteristics ( $N = 350$ )

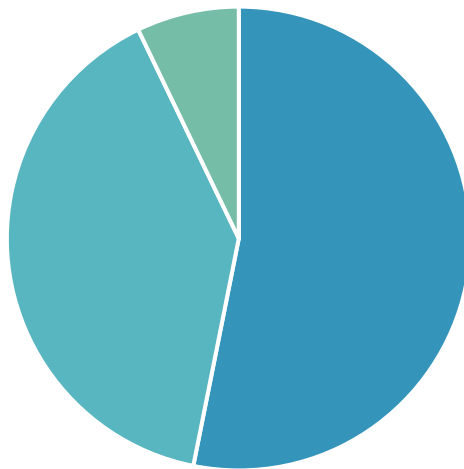
- 87% criminal court
- 92% male defendants
- 77% Indigenous; 22% not mentioned; 1% other ethnicity
- 80% initial decisions



# FASD-Related Evidence

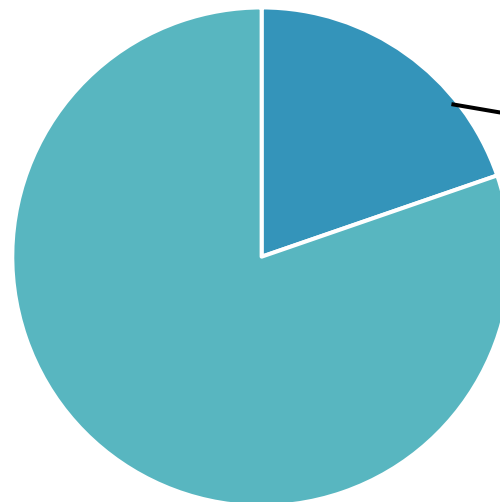
- Number of FASD mentions\* varied substantially ( $M = 4.38$ ,  $SD = 6.73$ , 1 – 56)
- Many mentioned FASD once ( $n = 148$ , 42.3%)

Formal Diagnosis



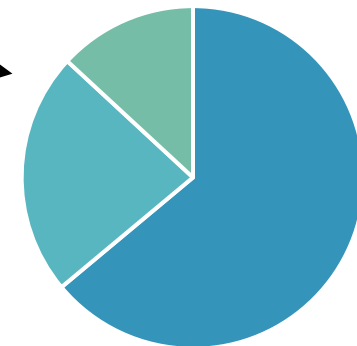
■ Diagnosed   ■ Not Diagnosed  
■ Unclear

Formal FASD Assessment



■ Yes   ■ No

Time of Assessment



■ Historical   ■ Current   ■ Both

\*Mention defined as 1-3 consecutive sentences discussing FASD

# Relevance

Category	Definition	# Cases
No Relevance	FASD mentioned briefly, not connected with legal decisions or key aspects of legal decision-making	161
Unclear Relevance	FASD was discussed thoroughly and throughout the case, not connected to key legal decisions/considerations	29
Some/Possible Relevance	FASD mentioned in the decision/analysis. Could be inferred that FASD was connected to legally relevant factors in decision-making, no explicit mention of FASD in the decision/analysis.	84
Great Relevance	FASD was directly connected to legally relevant factors in the decision/analysis (e.g., sentencing principles/goal, moral culpability, blameworthiness, risk, credibility, or criminal responsibility).	76

# Relevance

Category	Definition	# Cases
No Relevance	FASD mentioned briefly, not connected with legal decisions or key aspects of legal decision-making	161
Unclear Relevance	FASD was discussed thoroughly and throughout the case, not connected to key legal decisions/considerations	29
Some/Possible Relevance	FASD mentioned in the decision/analysis. Could be inferred that FASD was connected to legally relevant factors in decision-making, no explicit mention of FASD in the decision/analysis.	84
<b>Great Relevance</b>	<b>FASD was directly connected to legally relevant factors in the decision/analysis (e.g., sentencing principles/goal, moral culpability, blameworthiness, risk, credibility, or criminal responsibility).</b>	<b>76</b>

67

Sentencing

3

DO/LTO

2

Guilt/Innocence

2

NCR

# Sentencing Decisions

Proportionality  
(*n* = 58, 86%)

Mitigation  
(*n* = 33, 49%)

Risk & public  
safety  
(*n* = 34, 50%)

Rehabilitation  
(*n* = 39, 58%)

Deterrence  
(*n* = 38, 56%) &  
denunciation  
(*n* = 33, 49%)

Need for more  
information  
(*n* = 8, 12%)

# Sentencing Decisions

Proportionality  
(*n* = 58, 86%)

Mitigation  
(*n* = 33, 49%)

Risk & public  
safety  
(*n* = 34, 50%)

Rehabilitation  
(*n* = 39, 58%)

Deterrence  
(*n* = 38, 56%) &  
denunciation  
(*n* = 33, 49%)

Need for more  
information  
(*n* = 8, 12%)

# Sentencing Decisions

Proportionality  
(*n* = 58, 86%)

Mitigation  
(*n* = 33, 49%)

Risk & public  
safety  
(*n* = 34, 50%)

Rehabilitation  
(*n* = 39, 58%)

"The law is now clear that FASD is a disorder that can be a mitigating circumstance" at para. 48.  
*R v. Shingoose* (2014)

# Sentencing Decisions

"Imposing a sentence on an offender who suffers from a mental disability or illness requires a careful balancing of conflicting interests. **Such circumstances are prima facie a significant mitigating factor.** This is because the fundamental principle of sentencing is that the punishment must be proportionate to the moral blameworthiness of the offender. A person involved in criminal activity wholly or in part because of mental illness or disability is not a free actor; thus, their moral blameworthiness is necessarily less than that of one who freely chooses to act. **However, where mental illness or disability creates a risk to the safety of others, these circumstances can turn into aggravating factors and may require that the individual be separated from society"** (at para. 21).

*R v. Laquette* (2012)

Risk & public  
safety  
(*n* = 34, 50%)

Need for more  
information  
(*n* = 8, 12%)

# Sentencing Decisions

Proportionality  
(*n* = 58, 86%)

Rehabilitation  
(*n* = 39, 58%)

“...rehabilitation, as it is conventionally understood, is largely a cognitive process premised on the ability to understand, to learn, to remember and to make choices. **None of these assumptions fit well with what is known about FASD**, a permanent form of brain damage that can affect all parts of the brain” (at para. 81).

*R v. McDonald* (2018)

Deterrence

"Rehabilitation is **not limited** to the traditional view of correcting the accused's attitude to prevent him from recidivating. It can also deal with finding a way to control and modify the behaviour" (at para. 36).

*R v. Friesen* (2016)

# Sentencing Decisions

Proportionality  
(*n* = 58, 86%)

Mitigation  
(*n* = 33, 49%)

Risk & public  
safety  
(*n* = 34, 50%)

Rehabilitation  
(*n* = 39, 58%)

Deterrence  
(*n* = 38, 56%) &  
denunciation  
(*n* = 33, 49%)

Need for more  
information  
(*n* = 8, 12%)

# Sentencing Decisions

Proportionality  
(*n* = 58, 86%)

Mitigation  
(*n* = 33, 49%)

Risk & public  
safety  
(*n* = 34, 50%)

Rehabilitation  
(*n* = 39, 58%)

Deterrence  
(*n* = 38, 56%) &  
denunciation  
(*n* = 33, 49%)

Need for more  
information  
(*n* = 8, 12%)

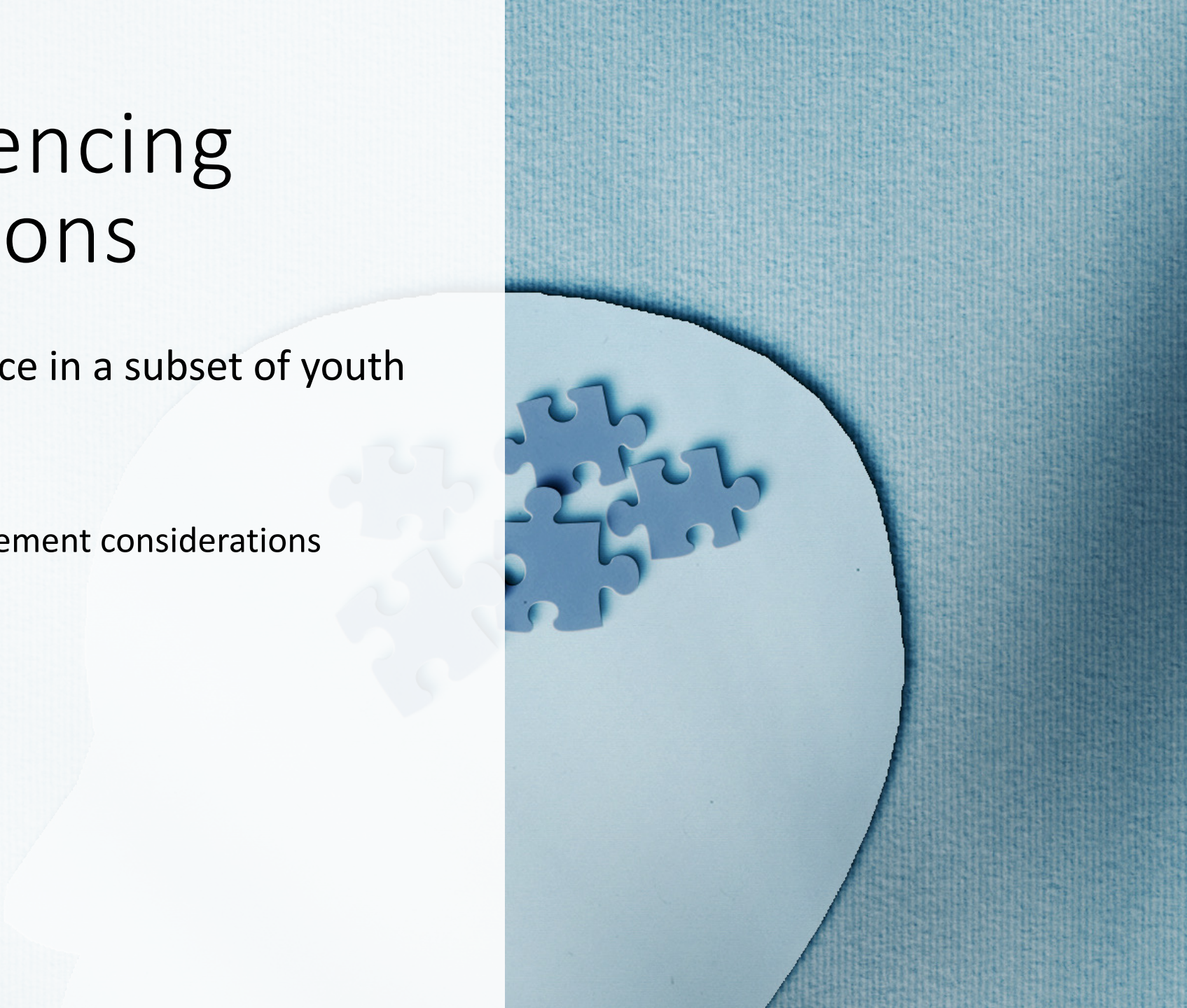
# FASD & *R v. Gladue*

- FASD discussed in the context of *Gladue* considerations ( $n = 28, 50.9\%$ ):
  - Identified as a *Gladue* factor ( $n = 9, 32.1\%$ )
  - Mentioned in *Gladue* report ( $n = 8, 28.6\%$ )
  - Intertwined with *Gladue* factors or Indigenous background ( $n = 11, 39.3\%$ )

**“As already indicated, Goodman’s *Gladue* factors are, in many regards, intertwined with his cognitive deficits.** His family’s history of residential schools, substance abuse and child welfare involvement has had a direct impact on Goodman. Not only has his brain been affected by his mother’s alcohol and substance consumption during pregnancy, the loss of his family and community connections exposed him to a life of significant neglect and trauma, including victimization. These *Gladue* factors clearly reduce Goodman’s moral blameworthiness” (at para. 30).  
*R v. Goodman* (2018)

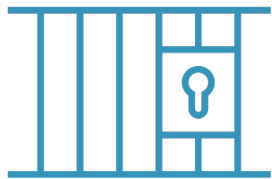
# Youth Sentencing Considerations

- FASD had great relevance in a subset of youth cases ( $n = 13, 17.1\%$ )
  - Adult sentencing and placement considerations
  - "Double jeopardy"



# Impact on Sentencing

- FASD had impact in one-third of sentencing cases ( $n = 12$ , 32.8%)



Reduced sentencing duration



Non-custodial sentencing



Increased credit for time served



Specialized placement or conditions

# Other Cases

3 (7.7%)

Dangerous Offender/  
Long Term Offender

2 (16.7%)

Guilt/Innocence

2 (66.7%)

Not Criminally  
Responsible

# Other Cases

3 (7.7%)

## Dangerous Offender/Long Term Offender

- FASD referenced in court-ordered forensic assessments, connected to similar concepts/considerations

"To summarize therefore, a clinical formulation of risk places his FASD as the fundamental etiological event that has led to a number of cognitive, affective, social, and behavioural deficits and difficulties that have collectively promoted Mr. Smarch's sexual offending. This is not to say that his FASD 'caused' sexual violence. Rather, **FASF [sic] 'set up' the conditions promoting the development of his antisocial personality (an indirect, general risk factor) as well as his propensity to abuse alcohol (a direct, proximal risk factor). Given the permanence of these deficits**, the ubiquity of substance in our society and in his peer group, and the frequency with which he is going to encounter a potential victim (a sleeping female) **he remains at high risk regarding the likelihood of sexual offending in the foreseeable future"** (at para. 76)

*R v. Smarch (2014)*

# Other Cases

## Determinations of Guilt/Innocence

- FASD linked to the credibility of the defendant
  - Defendant as a "difficult witness", lacking insight, vague

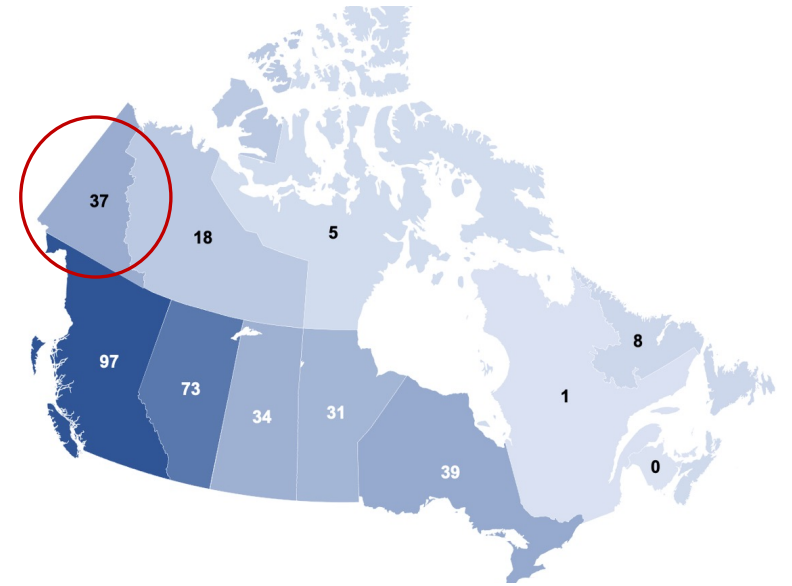
2 (16.7%)

# Other Cases

## Criminal Responsibility

- FASD-related deficits met criteria for mental disorder, defendants found NCRMD
- **Not meant** to establish a new legal framework or precedent related to FASD and criminal responsibility

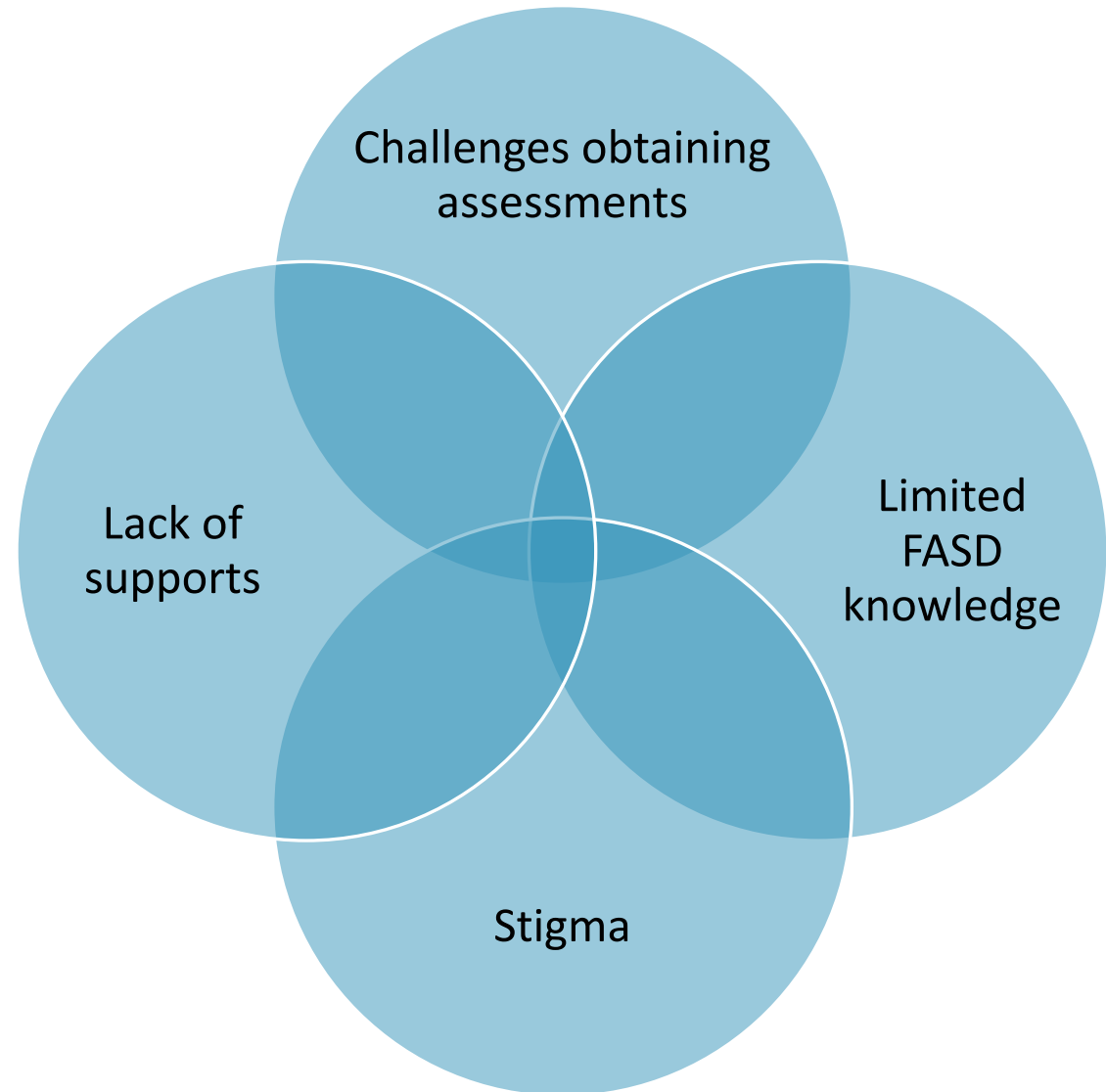
2 (66.7%)



# DISCUSSION

# VARIABILITY

- Variability in how FASD was considered across cases
- Many mentioned FASD only once

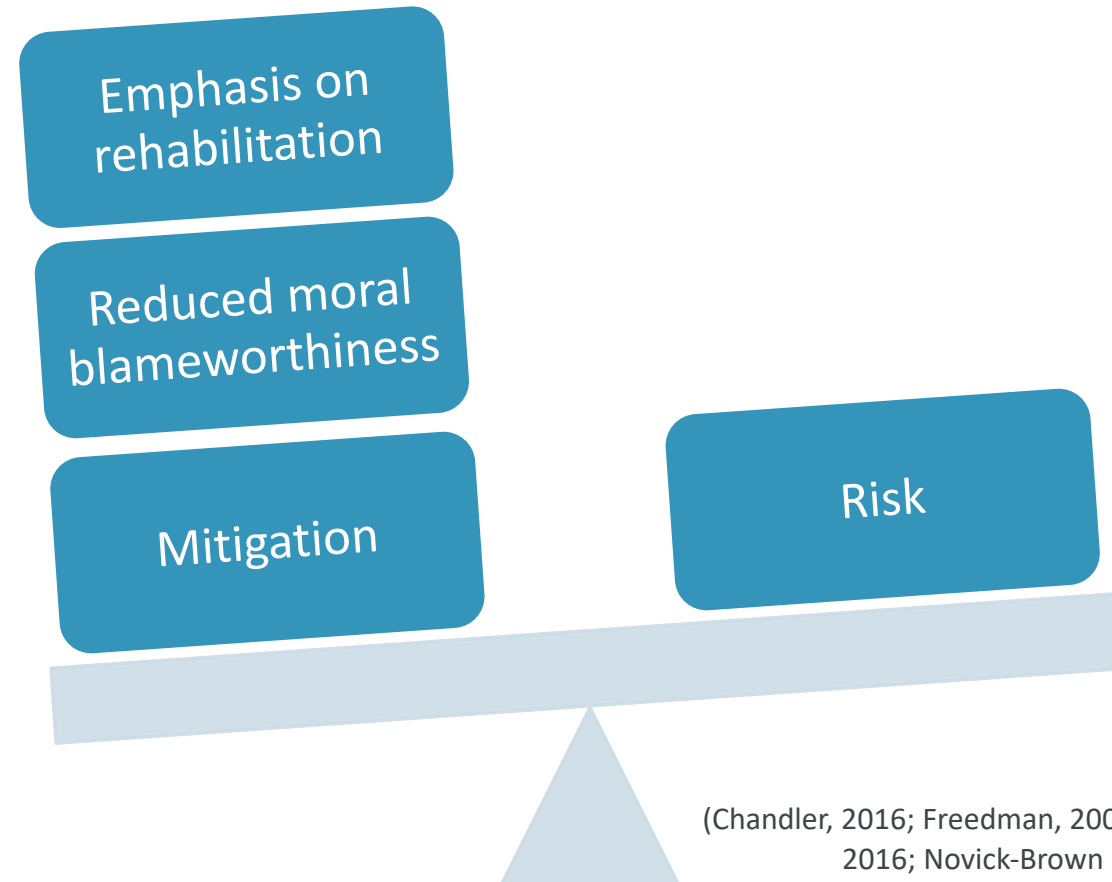


# CONSENSUS

- Current findings suggest there appears to be relative judicial consensus regarding FASD being recognized as a mitigating factor that reduces a defendant's responsibility and moral culpability, and de-emphasizes sentencing goals such as denunciation and deterrence, notwithstanding this requiring an individualized assessment of relevant deficits for each defendant.

# BALANCING

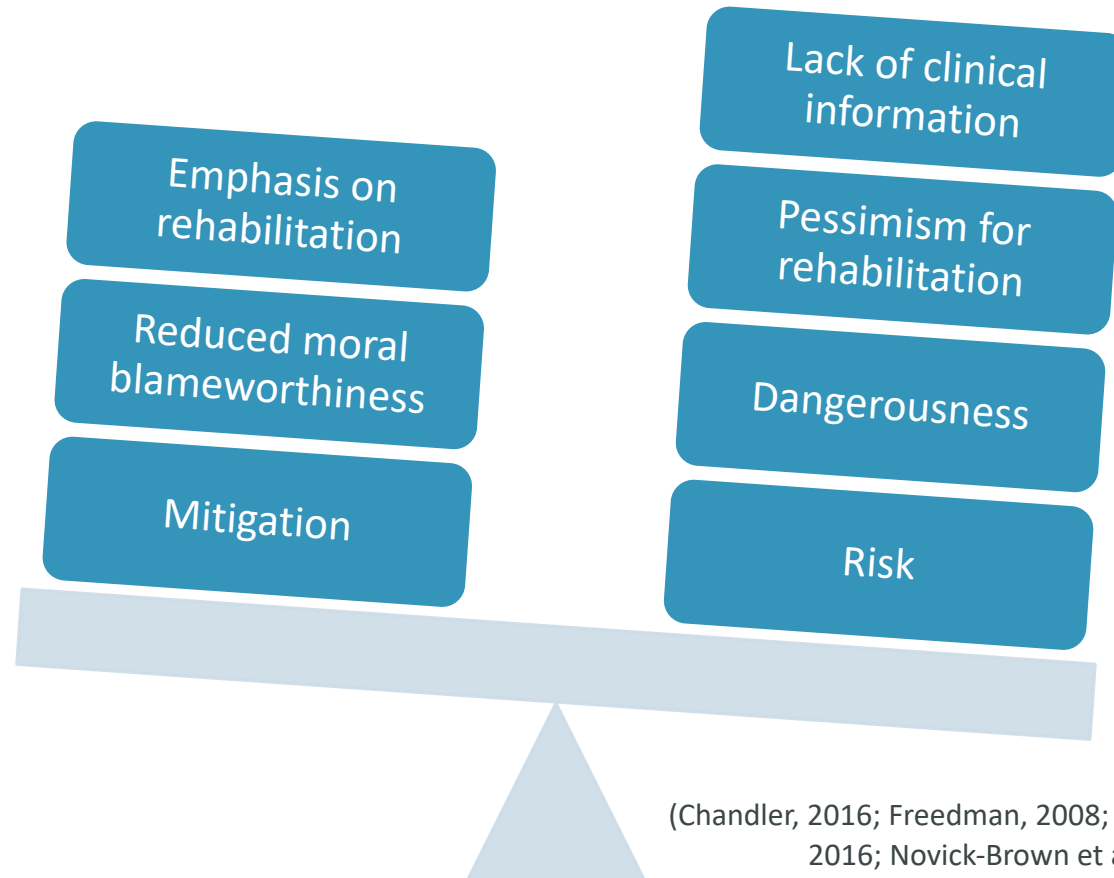
- Judges continue to grapple with competing considerations



(Chandler, 2016; Freedman, 2008; Hashmi et al., 2021; Jampolsky, 2018; McCarthy et al., 2016; Novick-Brown et al., 2012; Pei et al., 2016; Rodger, 2014; Vidovic, 2012)

# BALANCING

- Judges continue to grapple with competing considerations



(Chandler, 2016; Freedman, 2008; Hashmi et al., 2021; Jampolsky, 2018; McCarthy et al., 2016; Novick-Brown et al., 2012; Pei et al., 2016; Rodger, 2014; Vidovic, 2012)

Goal	Recommendation	Special Considerations
<b>Improved Identification and Understanding</b>	<ul style="list-style-type: none"> <li>Enhanced FASD screening and identification practices in community and legal contexts</li> <li>Increased availability of accurate and comprehensive clinical information about FASD to guide legal decisions</li> </ul>	<ul style="list-style-type: none"> <li>Evaluations should be current, comprehensive, and completed by experts (Flannigan et al., 2021; McLachlan et al., 2020; Reid et al., 2020)</li> <li>Ensure no biases, harmful trends in referral and screening identifications (Binnie &amp; Trussler, 2013; Grubb et al., 2021; McLachlan et al., 2022; Tait, 2003b)</li> <li>Forensic evaluations completed by clinicians with both forensic and FASD expertise can inform legal nexus (McLachlan et al., 2020; Novick Brown et al., 2010)</li> </ul>
<b>Improved knowledge</b>	<ul style="list-style-type: none"> <li>FASD-specific training needed for legal, clinical, and forensic professionals to provide greater awareness of FASD, and to support identification, understanding, and decision-making</li> </ul>	<ul style="list-style-type: none"> <li>Policy changes should focus on implementing FASD-specific training for criminal legal professionals and forensic clinicians that is evidence-based, debiasing, and addresses stigma (Binnie &amp; Trussler, 2013; Dickson &amp; Stewart, 2022; McCormack et al., 2022; McLachlan et al., 2020; Passmore et al., 2021)</li> <li>Training should include cultural considerations relevant to FASD, including impact of colonial and assimilationist policies on current rates of incarceration and FASD identification and diagnoses for Indigenous individuals, education about systemic racism (Dickson &amp; Stewart, 2022; Johansen-Hill, 2019;</li> </ul>

Goal	Recommendation	Special Considerations
<p><b>Improved services and supports</b></p>	<ul style="list-style-type: none"> <li>Increased resources are needed within community and legal contexts to address the unique needs of justice-involved individuals with FASD and identify alternative approaches for sentencing and management</li> </ul>	<ul style="list-style-type: none"> <li>Innovating approaches: therapeutic justice and restorative justice, problem-solving courts (e.g., Manitoba FASD court docket), specialized FASD assessment programs (e.g., FASD Federal Regional Psychiatric Centres, Saskatchewan FASD Network; Alexis Nakota Sioux Nation FASD Justice Program, Manitoba Youth Justice FASD Program (Evans &amp; Bourgon, 2020; Flannigan et al., 2018; Harvie et al., 2010; Johansen-Hill, 2019; Kerodal et al., 2021; Longstaffe et al., 2018; Mela et al., 2022; Steering Committee on FASD and Access to Justice, 2016)</li> <li>Research needed to ensure effective outcomes using a holistic lens that emphasizes management over traditional definitions of “treatment” and considers factors beyond reduced recidivism (Flannigan et al., 2021; Pei et al., 2016; Reid, White, et al., 2020; Tait et al., 2017)</li> </ul>
<p><b>Improved evidence to inform policy, programming, and practice</b></p>	<ul style="list-style-type: none"> <li>Need for more research to investigate the potential impact of FASD evidence on legal decision making and to evaluate the potential impact of FASD-specific policy changes</li> </ul>	<ul style="list-style-type: none"> <li>Apply diverse methods to better understand how FASD evidence impacts legal decision-making and outcomes</li> <li>Evaluate intersection of FASD, Indigenous populations, criminal legal system; situate research using culturally-specific frameworks, including systemic inequities and colonization and assimilationist policies, in collaboration/led by Indigenous scholars, and community agencies using appropriate methods and research approaches (Stewart &amp; Glowatski, 2018; Tait, 2003a; Wolfson et al., 2019)</li> </ul>

# International Relevance & Limitations

- Results most relevant to Canada
  - Similar barriers and tensions regarding FASD and the criminal legal system in other countries (e.g., US, New Zealand, Australia)
- Focus on reported decisions
  - Need for further research: surveys, interviews, courtroom observations, experimental studies
- Focus on great relevance cases

# % OF CASES VS % OF POPULATION

Province	% of Reported Cases	% of Population
British Columbia	27.7	13.5
Alberta	20.1	11.5
Saskatchewan	9.7	3.1
Manitoba	8.9	3.6
Yukon	10.6	0.1
<b>Total</b>	<b>77</b>	<b>31.8</b>

# RACE/ETHNIC ORIGIN OF ACCUSED/OFFENDER

Race/Ethnic Origin	% in cases
Indigenous	77
Not noted	22
White	1
<b>Total</b>	<b>100</b>

# CARE WITH CONCLUSIONS

- The data clearly shows that 77% of the reported cases come from provinces and territories west of Ontario (and under 5% from the provinces east of Ontario)
- These Western provinces and territories have only 32% of the population
- The data clearly shows that in 77% of the cases the individual was identified as Indigenous
- But there are a number of alternative explanations for this data
- Care needs to be taken when attempting to draw conclusions from the data

# Thank you!



[kmclac02@uoguelph.ca](mailto:kmclac02@uoguelph.ca)

[kmullall@uoguelph.ca](mailto:kmullall@uoguelph.ca)

[jonathan.rudin@als.clcj.ca](mailto:jonathan.rudin@als.clcj.ca)