

When Autistic People get Arrested in the Justice System

People with autism are more likely to be victims. They are seven times more likely to intersect with the criminal justice system than individuals without Autism (Berryessa, 2014).

<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4392381/>

Autistic people that have behavioral problems can easily get arrested and find themselves incarcerated. It is not hard to imagine an autistic person being arrested for assault. My child has hit strangers with a closed fist to the face. We have been lucky in that the strangers have been very kind and understanding about the situation and have not pressed charges. It could still happen so it is scary. I do know of other young autistic people that have spent time in jail and /or state pen for sending threatening notes and have been arrested for armed robbery.

Things to understand about Adult Criminal Court (a little of it applies to Juvenile Court, but big differences):

Prosecutors must prove both a criminal act (actus reus) and a criminal intent (mens rea) to convict a defendant. The only exception relates to statutory offenses, where commission of the crime alone establishes culpability by legislation.

In itself, autism or any disability is not a defense in the law.

If your adult child is under guardianship or conservatorship, this is not a defense under the law. It may come into play in whether your adult child can waive their rights if they did that.

Competency can be used as a mitigating circumstance. Competency refers to the mental ability to understand problems and make decisions. It also refers to a criminal defendant's ability to stand trial. [https://en.wikipedia.org/wiki/Competence_\(law\)](https://en.wikipedia.org/wiki/Competence_(law)) Evidence of intellectual disability/mental retardation factors in two limited phases of a criminal trial: during a preliminary competency hearing, and if the defendant is convicted, to mitigate the severity of the punishment. Court competency hearings determine whether an individual can comprehend the nature of the charges against him/her and assist in their own defense. Competency and insanity defense are two different determinations.

Mental illness can be used as an insanity defense but that means if the person is found guilty they may spend an indeterminate amount of time in a mental institution. Is autism a mental illness? There is no scientific basis on which to separate a psychiatric disorder from a neurological or developmental one, yet. DSM-5 makes no distinction between a psychiatric disorder from a neurological or developmental one. The problem is that the underlying scientific reasons for autism are not known. There are a number of states that have laws such as State Mental Illness Parity Laws that classify autism as a mental illness. Autistic individuals with high intelligence levels cannot invoke legal insanity as a defense in most states (King & Murphy, 2014) <https://www.ncbi.nlm.nih.gov/pubmed/24577785> Autistic individuals that cannot tell the difference between “right” and “wrong” may qualify for the insanity defense (Woodbury-Smith & Dein, 2014) <https://www.ncbi.nlm.nih.gov/pubmed/25155337> The insanity defense is the specific legal theory that the defendant didn't understand what he was doing at the time of the crime. Most intellectually disabled people are not found to be legally insane.

“Unlike psychopathy, however, ASD has nosological* status and... is associated with significant socio-emotional impairments that may, arguably, affect the ability to form intent” (Woodbury-Smith & Dein, 2014) <https://link.springer.com/article/10.1007/s10803-014-2216-5>

**Nosology- The branch of medicine that deals with the classification of diseases. A classification of diseases.*

Because of mandatory sentencing laws, judges have become administrators and hold less power in decision making. In Juvenile Court, judges have a lot of discretion.

District attorneys have all the power in a court case. They are the people who determine if a person will be brought to trial and on what charges. This affects bail and sentencing. Even though you are innocent until proven guilty, a judge assumes that charges made by the District Attorney are true in determination of bail.

Only interrogations of a person who is in custody are subject to Miranda Rights. Interrogation is the keyword in the previous sentence. A person who is arrested and not under interrogation, does not have to have their Miranda rights given to them. Anything they say outside of interrogations can be used against them. A person who is not in custody is not protected by Miranda rights and anything they say can be used in a court case or later when they are arrested.

For someone to invoke their Miranda Rights an individual can indicate in any manner and at any time prior to or during questioning, that he or she wishes to remain silent. The interrogation must cease.

If the individual states that he or she wants an attorney, the interrogation must cease until an attorney is present. An individual must have an opportunity to confer with the attorney and be allowed to have that attorney present during any questioning. You have to ask for an attorney. Your attorney could be right outside the interrogation room and the police do not have to tell you.

Miranda Rights explained in further detail:

<http://www.mirandawarning.org/whatareyourmirandarights.html>

Supreme Court has ruled interrogators can lie and play dirty tricks during an interrogation (FRAZIER v. CUPP)

An interrogator's objective is to get someone to admit to a certain set of facts and that the crime was committed for a certain purpose. In order to get a confession, interrogators will state facts pertaining to the case and get the individual to repeat those facts back into a confession. Interrogators can also make promises which are not true like: "If you confess, you can go home."

It is better to negotiate and settle with the District Attorney before a court case. If you go to trial and lose, your adult child will be subject to mandatory sentences. You may be able to negotiate better terms before court. Jurors tend to look at conduct as intentional and done on purpose. They may have a hard time factoring in the mind of someone who is autistic or intellectually disabled.

Avoid settling for a strike offense in a three strike state.

Beware of probation.

With probation, a sentence will be imposed but not executed (Execution of Sentence Suspended: ESS). Violation of probation will result in the original sentence being imposed and the judge cannot modify the sentence. Parole violations are heard before a parole board. The parole violation is considered a new offense.

Before a parole board, the prosecution need not prove “beyond a reasonable doubt” that the claimed violations occurred for parole revocation.

Both the Berryessa, 2014 and Woodbury-Smith & Dein, 2014 studies cited above are overviews of autistic people in the judicial system.

Things to understand about Juvenile Court:

The juvenile justice system maintains rehabilitation as its primary goal.

In 2013, 40 states (including the District of Columbia) consider individuals up to 17 as juvenile. In nine states, the age is 16. In New York and North Carolina, individuals are considered juveniles up to 15. New York made changes in 2017, diverting most defendants age 16 or 17 away from adult proceedings. In 2017 Vermont enacted a law that will eventually bump the criminal responsibility age up to 21. Since juvenile age considerations can change through legislation, you will need to verify what it is for your state and situation.

Most states do hold that children seven years and younger do not fully understand “right” and “wrong” and excuse them from responsibility for acts they commit. The court may hold their parents responsible and require compensation. The court may find parents unfit for the child and place the child with relatives or in foster care.

Most states consider a child 14 to 17 as capable of criminal intent and therefore their case can be adjudicated in juvenile court.

Between the age of 7 to 14, it is up to the judge to determine whether the child had criminal intent and how the case will be handled.

Police, prosecutors, juvenile court intake officials, and juvenile court judges all have broad discretion to take more informal steps in handling a juvenile case. Many young offenders never reach the point of a formal adjudicatory hearing.

Police have the option of issuing a warning, and then let the minor go- counseled and released, issue a warning and then release the minor to the custody of a parent or guardian, or refer the minor to juvenile court.

If a minor is referred to juvenile court, a juvenile court intake officer (often a probation officer) or a prosecutor can decide to dismiss the case (about 20% of cases get dismissed), handle the matter informally (about 25%), or file formal charges (called "petitioning the case"). Advocacy at this point can be very pivotal. Informal resolutions often require one or more: listen to a stern lecture, attend counseling, attend after-school classes, repay the victim for damages, pay a fine, perform community service work, or enter probation.

To start a formal juvenile adjudicatory hearing, a prosecutor or probation officer files a civil petition, charging the juvenile with violating a criminal statute and asking that the court determine that the juvenile is delinquent. The juvenile has a right to have an attorney at the adjudicatory hearing.

The judge will determine whether the minor should be detained or released for the time period before the initial hearing. In about 80% of cases, the judge allows a minor to remain at home while awaiting the hearing.

Judges in juvenile courts have a lot of power and a broad range of sentencing options, "disposition orders". In juvenile court, advocacy and supporting documents of autism and intellectual disabilities can make a real difference.

Three things can happen before a judge in juvenile court:

The minor can enter a plea agreement that they will comply with certain conditions like a curfew, attend counseling, attend after-school classes, repay the victim for damages, pay a fine, perform community service work, or enter probation.

The judge can divert a case with required completion to some type of rehabilitation program or counseling or community service or reparations. Failure to complete, a judge can reinstate formal charges.

An adjudicatory hearing is a "trial" in juvenile court. It is similar to a trial in that attorneys from both sides present evidence before a judge. There are no jury adjudicatory hearings. The judge decides whether a minor is delinquent or not. A delinquency ruling is called "sustaining the petition."

If the judge rules sustaining the petition, a probation officer will evaluate the juvenile and make a recommendation(s) to the judge at a disposition hearing (like a sentencing hearing in adult court). The evaluation can include ordering psychological examination or diagnostic tests. A probation officer will take into account advocacy and supports in place for the minor like release to a group home.

A judge should decide in the best interest of the juvenile and can order counseling, confinement in a juvenile detention facility, reimbursement of the victim, or probation.

A judge can order post-disposition hearings to see the juvenile in court and see how the juvenile is progressing.

Juvenile cases depending on age can be transferred to an adult court in a procedure called a "waiver" if the crime involves serious offenses, like rape or murder, or youth who have been in trouble before.

What to do if your child or someone you care about is arrested:

Advocate Immediately

Find out what the charges are and what they mean.

Talk to the police department detective assigned to the case. Provide the detective or police officers that are interrogating your child with documentation that your child has autism, any intellectual disabilities, and the extent of those disabilities. This will not stop any interrogation but will serve to note that they knew of the person's disabilities and can be used as part of the defense on competency and waiver of rights. (See card below, for not allowing waiver of rights.) You can establish a disability of autism and intellectual disabilities. You can use school records, IEP, social worker records, and doctors' reports. Make sure the district attorney also gets these documents.

If your adult child is charged with a felony, talk to an attorney immediately.

During arraignment and court proceedings have as many people as possible attend. The presence of support for your adult child in the court room does make a difference. Most of the time there is no one supporting the defendant. If after a procedure for a defendant a large number of people leave, judges and prosecutors notice this.

Have people write letters on behalf of the defendant. All written communications must be sent to all parties. The judge, the prosecutor, and the defendant's attorney should receive the same copy of any communications. Ex parte communications (to just one party) are prohibited. Keep writing.

Before the judge sets bail, they need to get the same documentation as the police about your child's disabilities and the extent of those disabilities. Any documentation from a social service agency for a plan to limit flight risk, harm and damage can factor in a reduction of bail. Bail is set at arraignment from a schedule depending on charges. A judge can make changes to the bail only if he knows of unusual circumstances before bail is set other than that they must follow the bail schedule. Once bail is set at arraignment, it stays set and cannot be changed at a later date with the exceptions of new facts or charges being dropped.

There are states that have moved away from money bail and are relying on risk assessments to determine if a person will return for their court date. In some states this is in an experimental stage, so see if you can be part of that experiment. The same type of documentation for setting the amount of bail is helpful for risk assessments. Any documentation from a social service agency for a plan to limit flight risk, harm and damage can factor in. "What are the supports in place?" documentation can go a long way to helping determine if an autistic child will spend time in jail or go home.

Many state social service agencies, like regional centers in CA, have forensic specialists. This is a recent growing trend. These forensic specialists help clients and families if a client of the state social service agency is arrested or otherwise caught in the judicial system. Contact your social worker/social service agency or state social service department to see if they have a forensic specialist or someone who deals with court cases of clients.

Have your attorney get a psychiatric and neurological report before the trial. This is paid for by the court, if you bring up competency. Beware the reports can be skewed negatively to your case. You may have to pay for additional reports yourself to counter any negative bias by the court reports.

As an advocate for your adult child, you are going to have to stay on top of making sure your attorney follows through with getting documentation to the judge about the extent of your child's disabilities before bail, plans to reduce flight risk, harm and damage and requesting court psychological and neurological assessments. Defense attorneys work many cases at the same time and have various abilities. Make sure things get done in a timely manner.

Advocate for a low impact statement for someone who is disabled especially if you can get it from any of the victims. This can reduce the sentence.

If an adult with disabilities is found guilty and incarcerated, prisons and jails must protect people that are susceptible to violence from other inmates. This may mean that your adult child is in solitary confinement for some time.

Get copies of all the case files and keep forever. This will help with appeals or if your child is arrested again in the future.

Example of information card to have your child with disabilities carry:

My Name is _____

I am _____

I wish to remain silent and do not wave my Miranda Rights.

I want my attorney to be present before any interrogation.

Please contact:

Parent's name and telephone number

Attorney's name and telephone number