

Legal Update

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Elder Law Evolved: Beyond Civil Issues

We are getting older. A one-hundred-year trend analysis illustrated that from 1920 to 2020, the 65 and older population grew almost five times faster than the general population; with most recent Census data indicating the population of older adults was 55.8 million or 16.8% of the population.ⁱ With the increase in the aging population generally, criminal legal systems are similarly experiencing issues that affect an aging population. Despite these trends, scholarship with older adults in the criminal legal system has been remarkably limited and most research has focused narrowly on traditional Elder Law civil matters, such as guardianship and estate planning.

Following population trends, the criminal legal system is experiencing unique and rapidly increasing problems due to aging— most recently aging and dementia-related issues. While little data are currently available, some preliminary figures in Israel of a sample aged 65 and older found one in five (21%) individuals at their first arrest presented dementia symptoms.ⁱⁱ Indeed, the American Bar Association recognized this in 2022 and urged for systematic dementia screening across all points of the criminal legal system.

Although 30 to 40% of adults over 85 years old display symptoms of dementia, dementia symptoms are not a “normal” part of aging, and the aging process itself is highly individualized. Instead, dementia is caused by underlying pathology such as Alzheimer’s disease or other cognitive-related disorders. Medical scholars specializing in geriatrics believe that incarceration modifies aging patterns and contributes to an “accelerated” or “premature” aging process, whereby functional abilities decline much faster while incarcerated than while living in the community.ⁱⁱⁱ For many individuals who have been system involved, underlying medical issues may also be exacerbated by cumulative social and economic disadvantages leading to declines in health.^{iv}

To date, there has been little research studying dementia in criminal legal settings with most studies conducted in non-forensic settings like hospitals or nursing homes. Of the research and cases that do exist, there are substantial human, legal, medical, and financial problems criminal legal systems will need to address. The forthcoming AP-LS Book Series sponsored book titled *The Psychology of Aging in the Criminal Legal System* authored by Lindsey E. Wylie and Eve M. Brank, details these issues by bridging legal and social psychological theories on aging and the law to practice and research with older adults.

The following case examples were taken from the book’s chapters on law enforcement and forensic evaluation and illustrate foremost issues confronting older adults presenting dementia symptoms within legal systems.

Dementia and Law Enforcement Interactions

In Charleston County, South Carolina, Joseph Jackson aged 72 years-old, failed to register as a sex offender after a conviction in 2000 at age 51. When law enforcement served an arrest warrant to his home, Jackson yelled at the officers to leave his property and began shooting in their direction. One officer was shot and wounded with a non-life-threatening injury to his arm. When the SWAT team entered the home, they found Jackson on the floor with injuries sustained from gunshots returned from the officers. After receiving medical care, Jackson was transported to jail and charged with attempted murder and possession of a firearm during the commission of a violent crime.^v

As a first responder making a fast decision, how do you think Jackson's characteristics and the scenario impacted how officers perceived Jackson and subsequent decisions to shoot? As Stereotype Content Model research suggests, the officers should perceive an elderly man as warm but incompetent.^{vi} However, how might Jackson's warrant for failing to register as a sex offender, his refusal to comply with leaving his home, and his possession of a weapon (and firing that weapon) further impact the officers' judgements?

Jackson does not necessarily meet our expectations for an "elderly person"—so while the officers likely still perceived him as having diminished capacity because he is older, his stereotype-inconsistent behavior of *not being warm* likely increased the officer's negative biases towards him. To exacerbate the complexity of the scenario, Joseph Jackson is also a Black elderly man.

According to the classic social psychological decision-to-shoot research, research participants in an experimental laboratory setting (typically undergraduate students) are more likely to shoot an unarmed Black person than an unarmed White person.^{vii} More recent research with police officer participants, however, indicates that while an officer's decision to shoot is affected by the suspect's race, officers generally do not show a biased pattern of shooting and their performance depends on whether the officer is under anxiety-provoking conditions like gunfire^{viii} and their ability to overcome the influence of stereotypes.^{ix} In Jackson's case, many of these complex issues were at play, including the intersectionality of the multiple stereotyped groups to which Jackson belonged and the dangerousness of the situation.

As later reported, Jackson also exhibited symptoms of dementia at the time of the incident. While we do not know the exact details of what happened once Jackson was brought to jail, most likely a health or legal professional (hospital staff, law enforcement, jail personal, attorney, judge) identified symptoms that appeared to impede Jackson's capacity, thus indicating a need for a full assessment to determine whether he lacks the capacity to proceed with his criminal legal case.

Dementia and Fitness to Proceed

After his arrest, Jackson was transported to jail in April 2021. More than a year and a half later in January 2023, Jackson (then aged 74) was determined to be Incompetent to Stand Trial (IST) following an evaluation that identified a delusional disorder, dementia, and a history of post-traumatic stress disorder (PTSD).

South Carolina's Fitness to Stand Trial (FST) standard is akin to the *Dusky* standard and states that a defendant is not FST if they "lack the capacity to understand the proceedings against him or to

assist in his own defense,” but further adds from the *Dusky* standard that their lack of capacity is “as result of a lack of mental capacity” (SC Code Section 44-23-410(A)).

The media reported Jackson was court ordered to a state psychiatric hospital for 60 days to undergo competency restoration services. Jackson waited four months in jail for an available bed at the psychiatric hospital, and after 60 days, he returned to jail—18 months after the incident. Although it is difficult to have sympathy for someone who shoots a gun at law enforcement, it is concurrently difficult to think about an older man with mental health disorders and dementia in jail for 18 months, undergoing restoration services, just to return to jail so the case can proceed.

Eighteen months is a long time but not uncommon according to forensic psychology experts in competency. ^xWhat should happen with someone like Joseph Jackson who has diminished capacity, mental illness, and dementia? While individuals found IST often have psychotic disorders like Jackson’s delusional disorder, many for whom competence is restored, we know much less about the restorability of someone with a dementia-related disorder.

Of the relatively few studies that specifically sample older defendants in competency research, most older adults referred for a competency evaluation will not be found legally incompetent and will return to the court to continue with their case, a similar pattern to younger adults.^{xi} If an older defendant is determined IST, however, then research shows that they often have dementia and psychotic disorders—similar to the case example of Joseph Jackson.

A 2022 case-law review by the American Bar Association (ABA) examined cases with dementia and FST, criminal responsibility, and mitigation in sentencing or release from incarceration based on diminished mental capacity. Dementia was most often cited in FST cases; specifically, the issue of whether due process rights were violated when the court failed to order a competency evaluation *sua sponte* (on its own motion). The authors concluded that incompetency may be more difficult to prove in cases where dementia is the underlying contributor to diminished capacity because of the gradual presentation of symptoms and individualized progression of dementia-related diseases.

To better understand how dementia and competency have appeared in U.S. cases, a 2020 case-law review identified 90 cases that included questions of competency and dementia from 2002 to 2019. Defendants in these cases were almost all male, the average age was 69 years old in the cases where age could be determined, and about one-third of the criminal charges were for violent offenses. The defense raised the issue of competency most often in three out of four cases. Almost half of defendants (47%) in the sampled cases were determined IST, with the most common diagnosis dementia NOS (not otherwise specified; 47%), followed by Alzheimer’s disease (10%) and vascular dementia (8%).^{xii}

As courts and researchers alike work toward improving systems, one avenue for doing so is for first responders like law enforcement to deflect cases from court processing and courts can divert them when public safety risk is low, and the individual has obvious signs of dementia that are unlikely to be restorable.^{xiii} To glean important knowledge about how to process individuals with dementia systems, however, researchers and practitioners must take interest in aging and the legal system.

For readers who read the publication *Elder Research: Filling and Important Gap in Psychology and Law*^{xiv} this current book should jog your memory and unintentionally yell louder (in the theme of

aging stereotypes) to the law-psychology discipline: now is the time to incorporate older adults as a subset population in traditional areas of research and practice and to expand to other emergent issues that uniquely impact older adults.

ⁱ Caplan, Z. (2023). *U.S. Older Population Grew From 2010 to 2020 at Fastest Rate Since 1880 to 1890*. Census.Gov. <https://www.census.gov/library/stories/2023/05/2020-census-united-states-older-population-grew.html>

ⁱⁱ Barak, Y., Perry, T., & Elizur, A. (1995). Elderly criminals: A study of the first criminal offence in old age. *International Journal of Geriatric Psychiatry*, 10(6), 511–516. <https://doi.org/10.1002/gps.930100611>

ⁱⁱⁱ Brinkley-Rubinstein, L. (2013). Incarceration as a catalyst for worsening health. *Health & justice*, 1(1), 3.

^{iv} Geronimus, A. T. (1992). The weathering hypothesis and the health of African-American women and infants: evidence and speculations. *Ethnicity & disease*, 207-221.; Forde, A. T., Crookes, D. M., Suglia, S. F., & Demmer, R. T. (2019). The weathering hypothesis as an explanation for racial disparities in health: a systematic review. *Annals of epidemiology*, 33, 1-18.

^v Yee, G. (2021, May 5). *Man who wounded Charleston County sheriff's deputy in shootout charged*. Post and Courier. https://www.postandcourier.com/news/man-who-wounded-charleston-county-sheriffs-deputy-in-shootout-charged/article_d4775e24-ade1-11eb-afdbaea0d8df.html

^{vi} Cuddy, A. J. (2002). Doddering but Dear: Process, Content, and Function in Stereotyping of Older Persons Amy JC Cuddy and Susan T. Fiske. *Ageism: Stereotyping and prejudice against older persons*, 1.

^{vii} E.g., Correll, J., Park, B., Judd, C. M., & Wittenbrink, B. (2002). The police officer's dilemma: using ethnicity to disambiguate potentially threatening individuals. *Journal of personality and social psychology*, 83(6), 1314.

^{viii} Nieuwenhuys, A., Savelsbergh, G. J. P., & Oudejans, R. R. D. (2012). Shoot or don't shoot? Why police officers are more inclined to shoot when they are anxious. *Emotion*, 12(4), 827–833.

^{ix} See above Correll et al. (2002)

^x e.g., Gowensmith, W. N. (2019). Resolution or resignation: The role of forensic mental health professionals amidst the competency services crisis. *Psychology, Public Policy, and Law*, 25(1), 1.

^{xi} Frierson, R. L., Shea, S. J., & Shea, M. E. (2002). Competence-to-stand-trial evaluations of geriatric defendants. *Journal of the American Academy of Psychiatry and the Law Online*, 30(2), 252-256.

^{xii} Miller, D. R. (2020). *Dementia and Competency in United States Courtrooms: A Case Law Review*. City University of New York John Jay College of Criminal Justice.

^{xiii} (ABA, 2022; Dubljevic, 2020).

^{xiv} Brank, E. M. (2007). Elder research: Filling an important gap in psychology and law. *Behavioral Sciences & the Law*, 25(5), 701-716.