

**Making it Happen:
Supported Decision-
Making in Practice**

RIGHTS ARE PRECIOUS: THE FOURTEENTH AMENDMENT

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; **nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.**

- U.S. Const. amend. XIV

FOR PEOPLE WITH DISABILITIES: THE AMERICANS WITH DISABILITIES ACT

“[P]hysical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society”

The Americans with Disabilities Act,
42 U.S.C. 12101

GETTING TO FULL PARTICIPATION: SELF-DETERMINATION

- Life control
- People's ability and opportunity to be "causal agents . . . actors in their lives instead of being acted upon"
- Wehmeyer, Palmer, Agran, Mithaug, & Martin, 2000

SELF-DETERMINATION AND FULL PARTICIPATION

People with greater self determination are:

- More independent
- More likely to be employed
- More likely to manage money well
- More likely to be a part of their community
- Better able to recognize and resist abuse

- e.g., Khemka, Hickson, & Reynolds, 2005;
Martinis & Blanck, 2015; Wehmeyer &
Schwartz, 1998

WHERE DO WE GO FROM HERE?

What we Need:

- A way to ensure that people with disabilities are able to understand and exercise their rights and choices in the criminal justice and civil systems
- A way to ensure that people with disabilities have enhanced self-determination and life outcomes, reduce recidivism, and minimize victimization

A WAY FORWARD: SUPPORTED DECISION-MAKING

“a recognized alternative to guardianship through which people with disabilities use friends, family members, and professionals to help them understand the situations and choices they face, so they may make their own decisions without the “need” for a guardian.”

- Blanck & Martinis, 2015

THINK ABOUT IT

How do you make decisions?

What do you do if you're not familiar with the issue?

- Taxes?
- Medical Care?
- Auto Repairs?

What Do You Do?

**SO, SUPPORTED DECISION-MAKING IS A
LOT OF WORDS FOR**

Getting help when its needed

Just like you and me

SUPPORTED DECISION-MAKING AND SELF DETERMINATION

“Supported Decision-Making has the potential to increase the self-determination of older adults and people with disabilities, encouraging and empowering them to reap the benefits from increased life control, independence, employment, and community integration”

- Blanck & Martinis, 2015

RESEARCH

In a study, young adults who used Supported Decision-Making showed:

- Increased independence, confidence, and decision-making abilities
 - Made better decisions
 - Had enhanced quality of life
- Martinis & Beadnell, 2021

<http://supporteddecisionmaking.org/node/488>

WHO SUPPORTS SUPPORTED DECISION-MAKING?

Endorsed by:

- US Department on Health and Human Services
- American Bar Association
- National Guardianship Association
- ASAN
- The Arc
- NAMI

SUPPORTED DECISION-MAKING CAN ADDRESS LIMITATIONS IN DECISION-MAKING

Supported Decision-Making can help people:

- Understand information, issues, and choices;
- Focus attention in decision-making;
- Weigh options;
- Ensure that decisions are based on their own preferences
- Interpret and/or communicate decisions to other parties.

- Salzman, 2011

IT'S A PARADIGM, NOT A PROCESS

There is no “one size fits all” method of Supported Decision-Making.

Can include, as appropriate

- Informal support
- Written agreements, like Powers of Attorney, identifying the support needed and who will give it
- Formal Micro-Boards and Circles of Support
- Martinis, Blanck, and Gonzalez, 2015

SUPPORTED DECISION-MAKING IN THE CRIMINAL JUSTICE SYSTEM

People must decide:

- Whether to invoke Miranda right to remain silent
- Whether to plead incapacity or NGRI
- How to present defense
- Whether and how to testify
- Whether to accept a plea
- Whether to make a victim statement at sentencing
- Whether to accept conditions of parole
- Whether to take part in programs or services

“INFORMED CHOICE”

DECISIONS REQUIRE UNDERSTANDING

A waiver of an important constitutional or statutory right must be knowing and voluntary to be valid. - *Boykin v. Alabama*, 395 U.S. 238, 243 (1969)

SO, how can you ensure:

A “Knowing” Waiver

A “Voluntary” Plea?

An “Informed” Choice?

KEY CONCEPT: “INFORMED” CHOICE

All Decisions Require Three Things:

- (1) Understanding the choice
- (2) Making the Choice
- (3) Communicating the Choice

EXAMPLE: MEDICAL DECISIONS

The “heart” of the Dr/Patient relationship

- Patient tells Dr symptoms and Dr tells patient diagnosis and treatment recommendation
- Patient considers the recommendation and decides whether or not to follow it
- Patient informs Dr of their choice
 - American Medical Association

TRANSLATED INTO THE CRIMINAL JUSTICE CONTEXT

Attorney or other representative must:

- (1) Explain to the person the choice ahead – whether to remain silent, accept a plea, testify, etc
- (2) The person must understand the choice and make a decision
- (3) The person must communicate that decision to the other

SUPPORTED DECISION-MAKING IN PRACTICE

- Providing access to a “supporter” – friend, family member, or professional – to help the person understand and make choices
- Offering “plain language” material and asking questions to make sure its understood
- Offering extra time for a person to review documents or material or offering to give them a chance to review with a supporter to ensure that agreements are “knowing” or “voluntary”

BY USING SDM

- People who might not otherwise be able to provide informed consent work with supporters to understand their choices, make informed decisions, and manage their lives;
- Professionals – doctors, attorneys, judges – who might otherwise find that people are incapacitated or wrongly find that they understood what they did not, can communicate more effectively with people, represent and treat them more effectively, and have better outcomes.
- Family members, friends, and other supporters help people with disabilities and professionals form an effective, working relationship that respects people's rights and preferences.

SUPPORTED DECISION-MAKING OPPORTUNITY

CAPACITY TO STAND TRIAL

Think about Capacity

- People may have “capacity” to make some decisions but not others.
- Or be “capable” to understand some things but not others
- Or be “capable” some times but not others
- Or be “incapable” UNLESS they get help understanding the situations they face.
- E.g. Salzman, 2010
 - Capacity to take medicine is NOT the same as capacity to prescribe it**

SUPPORTED DECISION-MAKING IN CAPACITY EVALUATIONS

Think about what happens in a capacity evaluation:

- Psychologist asks questions to the person
- Person Answers
- Psychologist gauges competency based on the person's answers

WHAT IF?

- The person doesn't understand the questions or the psychologist doesn't understand the person's answers?

If the Pscyh spoke English to a Spanish Speaker and expected English answers, what would be the result?

- Providing support to help the person understand and take part in the evaluation is no different than providing an interpreter!

SUPPORTED DECISION-MAKING OPPORTUNITY: PLEA NEGOTIATIONS AND PLEAS

“Guilty Plea Script”

[https://www.med.uscourts.gov/pdf/JDL Rule 11 Script.pdf](https://www.med.uscourts.gov/pdf/JDL_Rule_11_Script.pdf) - 14 pages!

- After all that, are you sure they’re making an knowing plea?
- If the Person was deaf, and the court only spoke, would it be knowing?
- Providing access to a supporter or to a plain language version of the script is no different than providing a sign language interpreter!

SDM IS ETHICAL

When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, **maintain a normal client-lawyer relationship with the client.**

VA State Bar Ethical Rule 1.14

COMMENT TO RULE 1.14

The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. . . . [A] client with diminished capacities often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being.

SDM AT WORK

Gooding, P., McSherry, B., Arstein-Kerlaske, A. (2021). Supported Decision-Making in Criminal Proceedings. *Journal of Disability Policy Studies*.

- Review of a project that used SDM to help “people with cognitive disabilities take part in proceedings on an equal basis with others to the maximum extent possible.”

“JASON’S CASE”

- Jason found unfit to stand trial after being arrested for manslaughter as a juvenile.
- If found guilty, guidelines were 4-8 years.
- He was found unfit to stand trial, detained in juvenile prison, then transferred when turned 18
- At the time of the article, he had been imprisoned 11 years because he had been found unfit to stand trial

PROJECT BACKGROUND

- Project was designed to train and provide “nonlegal support persons” to assist people with cognitive disabilities understand and take part in criminal proceedings
- Goal was to maximize people’s ability to participate in all facets of the proceedings and avoid being found unfit to stand trial

PROJECT WORK

Support persons trained to:

- Provide communication assistance, including learning individual communication styles and working with family and friends to communicate with the person
- Explain proceedings and answer questions
- Collaborating with community and government providers who are or could work with the person
- Providing information and resources to Judges and attorneys and creating referral lists for resources
- Building relationships between community resources and justice system.

RESULTS

- Assistance was provided to understand and make decisions
- Emphasis on effective communication, including “learning clients’ individual communication styles and providing accessible written or visual material.
- Attorney: “[The support person] has actually been better t explaining it to the clients than I am . . . It’s hard for us to explain what it means without getting wrapped up in the legal ramifications”

RESULTS

- Supporters improved understandings of disability among the lawyers and in the justice system in general
- Reduced administrative burden and increased system efficiency as supporters helped gather documentation on disabilities and make referrals for services
- Attorneys got better at identifying and addressing disability
- Support persons gathered and disseminated resources to legal community
- Some chargers were dropped, where person would normally have been found unfit, because supporter was able to identify government and community resources
- Support persons provided advice to courts to make criminal proceedings more accessible

CONCERNS

- Lack of legal training/knowledge of supporters
- Discussions with supporters may not be privileged
- Cost, funding for supporters and resources

NEXT STEPS FOR ARLINGTON

- How to provide information and training to attorneys and support staff in SDM to maximize outcomes
 - Law clerks, paralegals, investigators, victim witness coordinators and others can play the role of Supporters as appropriate

NEXT STEPS FOR ARLINGTON

- Making connections with community service providers that can serve as supporters and coordinate services
 - The Arc of Northern Virginia:
www.thearcofnova.org
 - ENDependence Center of Northern Virginia:
www.ECNV.org
 - disAbility Law Center: www.dlcv.org

NEXT STEPS FOR ARLINGTON

- Working with Judiciary to ensure that proceedings are accessible, not just buildings.
 - Developing bench cards
 - Judicial training on disability issue
 - Drafting plain language versions of “plea script” and other proceedings
 - Ensuring that supporters are able to attend proceedings

THE GOAL FOR ARLINGTON, VIRGINIA, THE U.S. AND THE WORLD

“[P]eople with disabilities with the same opportunities for success and security as their nondisabled peers. If we change the culture, we will change the world!”

- Gustin & Martinis, 2016

JOIN THE CONVERSATION

**National Resource Center for
Supported Decision-Making:**
SupportedDecisionMaking.Org

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