

ate” with respect to Mr. Evans as an individual. The appellate court therefore found that the government had not satisfied the demands of the fourth criterion of *Sell*. The court of appeals, noting the deficiency of the government’s proofs, vacated the trial court’s findings on criteria two and four of *Sell* and remanded the case to the district court for reconsideration of the motion to medicate.

Discussion

The liberty interest of all persons, including defendants, is closely guarded in the United States. By refusing medications, a defendant is invoking his or her liberty interest. *Sell* set forth specific guidelines under which this liberty interest would be weighed against the opposing government’s prosecutorial interests. This case expands and clarifies the specificity necessary for an involuntary medication treatment plan to meet the criteria set forth in *Sell*.

It is important to point out that under *Sell*, the first criterion (“important interest”) is a legal argument. The remaining three criteria of *Sell* are matters that fall under the purview of medicine, specifically psychiatry. The second criteria of *Sell* specifies that in determining if involuntary medication will “significantly further” the government’s interest in trying a defendant, the court must be able to determine if the proposed medication is “substantially likely” to restore the competency of the defendant and “substantially unlikely” to cause side effects that will interfere with the defendant’s ability to assist counsel. In this case, the court of appeals made clear that *Sell* requires an involuntary medication treatment plan that includes the specific medications to be given, a dosage range, and the likely side effects. The *Sell* criteria also require a showing that involuntary medication would “significantly further” the government interest and that the treatment is “medically appropriate.” The treatment plan must demonstrate consideration for the particular mental and physical condition of the individual who is to be treated.

The appellate court noted that *Sell* allows for more than one treatment plan to be proposed in a motion for involuntary medication. If the initial treatment plan is ineffective for any reason, the government may file a second motion for involuntary medication and propose an alternate treatment plan. The court of appeals also explicitly stated that the government may set forth alternate treatment plans under the initial motion for involuntary medication. The order in which the treatment plans will be applied to the

defendant must be specified, and information regarding how each alternate treatment plan will be applied to the particular defendant must be provided. Given the specificity of treatment planning that *Sell* requires, it can be anticipated that in some cases, as in the instant case, there will be “battles of the experts” concerning the proposed use of competency-restoring medications. The grist of these battles will no doubt involve current questions surrounding the efficacy and safety of psychotropic medications.

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Federal Sentencing Guidelines

Guidelines Are Effectively Advisory, Not Mandatory; Appeals Should Follow the Standard of Unreasonableness

The U. S. Supreme Court concurrently heard two cases—*United States v. Booker*; *United States v. Fanfan*, 543 U.S. 220 (2005)—that asked the Court to “determine whether our *Apprendi* line of cases (*Apprendi v. New Jersey*, 530 U.S. 466 (2000)) applies to the [Federal] Sentencing Guidelines, and if so, what portions of the Guidelines remain in effect.” In *Apprendi* the Court held that “other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”

Facts of the Case

Freddie J. Booker was charged with possession with intent to distribute 50 g or more of crack cocaine. A jury found Mr. Booker guilty beyond a reasonable doubt after hearing testimony that he had 92.5 g of cocaine in his possession. During the post-trial sentencing hearing, the judge found additional facts by a preponderance of the evidence. These included that Mr. Booker possessed an additional 566 g of crack cocaine and was also guilty of obstruc-

tion of justice. The additional facts found at sentencing resulted in a mandated sentence of 360 months to life in prison, rather than the 210 to 262 months mandated for the amount of cocaine for which the jury found Mr. Booker guilty. The judge sentenced Mr. Booker to 30 years in prison, at the lower end of the mandated enhanced-sentencing range. Mr. Booker appealed his case to the U.S. Court of Appeals for the Seventh Circuit. It found that the application of the Guidelines violated the Sixth Amendment as addressed in *Apprendi* and in *Blakely v. Washington*, 542 U.S. 296 (2004), in which the Supreme Court held that “The ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” The case was remanded to the district (trial) court with instructions either to sentence Mr. Booker within the sentencing range supported by the jury’s findings or to hold a separate sentencing hearing before a jury. The government filed for a writ of *certiorari* to the U.S. Supreme Court.

In the second case, Ducan Fanfan was charged with conspiracy to distribute and to possess with intent to distribute at least 500 g of cocaine and was convicted by a jury. The maximum sentence mandated by the Guidelines based on the jury’s findings was 78 months in prison. During sentencing, additional facts were presented, and the judge concluded by a preponderance of the evidence that Mr. Fanfan had 2.5 kg of cocaine powder and 261.6 g of crack cocaine and was an organizer, leader, manager, or supervisor in the criminal activity. Based on the new information, the Guidelines mandated a sentence of 188 to 235 months’ incarceration. The sentencing judge, citing *Blakely*, sentenced Mr. Fanfan according to the Guidelines pertaining to the jury’s findings. The government appealed to the First Circuit Court of Appeals and filed a petition for *certiorari* before judgment to the U.S. Supreme Court.

The Supreme Court agreed to hear both cases concurrently and identified two main issues in both cases:

1. Whether the *Sixth Amendment* is violated by the imposition of an enhanced sentence under the United States Sentencing Guidelines based on the sentencing judge’s determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant.
2. If the answer to the first question is “yes,” the following question is presented: whether, in a case in which the Guidelines would require the court to find a sentence enhancing fact, the Sentencing Guidelines as a whole would be inapplicable, as a

matter of severability analysis, such that the sentencing court must exercise its discretion to sentence the defendant within the maximum and minimum set by statute for the offense of conviction (*Booker*, 543 U.S. 220, p 1).

Ruling

In *Booker* and *Fanfan*, the Supreme Court held that an upward departure in sentencing, under the Federal Sentencing Guidelines, based on a judge’s determination of fact by a preponderance of the evidence, but not on facts that have been presented to the jury and proved beyond a reasonable doubt, constitutes a Sixth Amendment violation. The Court, to bring the Guidelines under compliance with the Sixth Amendment, severed and excised two sections of the Guidelines—the mandatory nature of the Guidelines and the appellate review standards.

The Court affirmed the ruling of the Seventh Circuit Court of Appeals and remanded Mr. Booker’s case to the trial court for sentencing under the new remedial Guidelines.

The Court ruled that the sentencing of Mr. Fanfan did not violate the Sixth Amendment, because Mr. Fanfan’s sentence was based solely on the facts found by the jury. The Court, however, vacated the judgment of the trial court and remanded the case for resentencing according to the amended Guidelines.

In addition, the Court held that its ruling applied to all cases on direct review and that the standard of review for appeals should be the reasonableness of the sentence.

Reasoning

The essence of this case encompasses the preservation of the right to a jury trial guaranteed by the Sixth Amendment. Judicial fact-finding during the sentencing process reduced the significance of the jury’s determination by placing greater significance on sentence enhancements. The Court held that juries, not judges, must find facts relevant to sentencing if such facts are used to enhance sentences. Therefore, the Guidelines violated the Sixth Amendment guarantee to jury trial with all elements of the alleged crime proved beyond a reasonable doubt.

To conform the Guidelines to the Sixth Amendment, the Court interpreted the original intent of the U.S. Congress when it enacted the Sentencing Reform Act of 1984 as striving for greater uniformity in federal sentencing by paying close attention to details of the crime and by sentencing offenders based on their real conduct. The Court considered two remedial options to bring the Guidelines in compliance

with the Sixth Amendment: either the superimposition of the constitutional requirement of jury determination on the existing Guidelines or the elimination of provisions of the statute. The Court determined that the option of superimposing the constitutional requirement would create too complex a system and would create greater sentence disparity by preventing judges from relying on the presentencing report, which contained facts not heard by a jury, but related to the offender's circumstances. Therefore, the Court chose the second option and severed two provisions from the statute—the mandatory use of the Guidelines and the appellate review standards made explicit in the Guidelines. The Court ruled that a review for unreasonableness shall replace the explicit review standards. With these two provisions eliminated, the Guidelines would function constitutionally and with the original intent of Congress.

To continue to pursue greater uniformity after the severance and excision, the Court laid out factors to be considered by judges when imposing a sentence and referred to 18 USC § 3553(a): “The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes” regarding the factors to be considered in imposing a sentence. The seven factors referred to are: (1) the nature and circumstances of the offense and history and characteristics of the defendant; (2) the need for the sentence imposed; (3) the kinds of sentences available; (4) the sentencing range established (referring to the Guidelines); (5) any pertinent policy statement; (6) avoidance of unwarranted sentence disparities among similarly situated defendants with similar records; (7) and the need to provide restitution to victims.

Discussion

The Sentencing Reform Act of 1984 enacted by Congress created the Sentencing Commission that developed the ever-evolving Sentencing Guidelines. Undoubtedly, the goal of these Guidelines continues to be sentence uniformity with regard not only to the real conduct of the offender, but across federal courts. Widespread variability existed before the Sentencing Reform Act of 1984 and continues to this day. Though the Guidelines may not have accomplished judicial uniformity, they introduced a formal mechanism for introducing mental health factors. Under the Guidelines before this Court ruling, consideration of mental health factors pertinent to sen-

tencing was specific and limited. Courts can now be more flexible with regard to sentencing without precisely meeting the mental health factor criteria addressed in the Guidelines. Despite the change in the Guidelines from mandatory to advisory, courts will still be more or less interested in mental health factors in sentencing. Forensic psychiatrists should be attuned to their respective courts' interpretation of the Supreme Court's decision and the potential aggravating and/or mitigating nature of mental health factors. The advisory nature of the Guidelines and the unreasonableness standard for appeals may broaden the role of psychiatric testimony in both the sentencing and appeal processes.

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Behavior of the Defendant in a Competency-to-Stand-Trial Evaluation Becomes an Issue in Sentencing

Fabricating Mental Illness in a Competency-to-Stand-Trial Evaluation Used to Enhance Sentencing Level After a Guilty Plea

In *United States v. Binion*, 132 Fed. Appx. 89 (8th Cir. 2005), the U.S. Court of Appeals for the Eighth Circuit applied the recent U.S. Supreme Court decisions (*United States v. Booker*; *United States v. Fanfan*, 543 U.S. 220 (2005)) in reviewing the sentencing decision by the trial court, the U.S. District Court for the Eastern District.

Facts of the Case

Police officers received a call reporting “a man with a gun,” and a second call reporting that the man, Mr. Dammeon Binion, had left the residence in a car with a gun. The officers located Mr. Binion and arrested him after discovering a pistol in the side panel of the driver's door, charging him with possession of a firearm by a convicted felon.

Mr. Binion filed a *pro se* motion for a competence-to-stand-trial evaluation and was transported to a medical facility for evaluation. He was assessed by Dr. James K. Wolfson, who administered psycholog-