

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-

ical tests interpreted under the guidance of Dr. Richard L. DeMier. Based on the test results and their discrepancy with Mr. Binion's behavior, Dr. DeMier concluded that he was probably malingering. Dr. Wolfson opined that there was no mental illness and concluded that Mr. Binion's deceitfulness was a form of recreation rather than a design to accomplish secondary material gain.

Mr. Binion entered a straight guilty plea rather than entering into a plea agreement. A presentence investigation report recommended a two-point enhancement to his base offense level for obstruction of justice due to his feigning of mental illness and its impact on the time and money expended to resolve his case. The report also recommended that the court not grant a sentence decrease for acceptance of responsibility as is typically awarded when defendants enter a guilty plea. The recommendations were based on the reasoning that Mr. Binion's fabrication of a mental illness indicated that he had not accepted responsibility for his criminal behavior. Subsequently, the court denied Mr. Binion's objections and applied the recommendations of the presentence report, concluding that Mr. Binion's fabrication affected the course of prosecution. He was sentenced to 78 months followed by 24 months of supervised release.

Mr. Binion appealed the sentencing on three grounds: (1) the trial court had violated *United States v. Booker* by enhancing his offense level based on a finding of obstruction of justice related to feigning a mental illness; (2) the trial court erred in assessing a two-level enhancement for obstruction of justice as Mr. Binion did not have a specific intent to obstruct justice by feigning mental illness; and (3) the trial court erred in declining to reduce Mr. Binion's offense level for acceptance of responsibility even though he pleaded guilty.

#### Ruling

The U.S. Eighth Circuit Court of Appeals affirmed the decision of the U.S. District Court for the Eastern District and dismissed the appeal on all three issues raised by the defendant.

#### Reasoning

The first issue raised by the appellant referenced the U.S. Supreme Court's decision in *Booker*, which held that a defendant's Sixth Amendment rights are violated if Federal Sentencing Guidelines are applied in a mandatory rather than advisory fashion. Mr. Binion argued that the trial court violated *Booker* by

enhancing his offense level based on a finding that he obstructed justice by fabricating mental illness. The court of appeals held that because Mr. Binion did not "couple his objection with a specific reference to *Apprendi*, *Blakely*, or the Sixth Amendment," the review of the *Booker* issue would be on the basis of a "plain error test." That test requires the error by the trial court to have affected Mr. Binion's substantial rights. After review of the appellate record, the court of appeals affirmed the judgment of the trial court and ruled that Mr. Binion had failed to show that there was a reasonable probability that his sentence would have been more favorable if the Sentencing Guidelines had been applied in an advisory fashion. The court concluded that Mr. Binion's substantial rights had not been affected.

With respect to the appellant's second issue involving the assertion that the trial court erred in raising the defendant's offense level for obstruction of justice, Mr. Binion claimed that there was insufficient evidence to prove that he had specific intent to obstruct justice. He argued that the trial court did not take into account the psychiatrist's finding that there was insufficient evidence to conclude that the defendant was specifically trying to influence the disposition of his case or was otherwise feigning mental illness for material gain. Mr. Binion acknowledged that he feigned mental illness, after a *pro se* motion for a mental evaluation demonstrated he did so, but stated that his intention was simply to amuse himself and not to affect his prosecution. The court of appeals rejected Mr. Binion's arguments and concluded that he did have intent to obstruct justice, as he was clearly informed by the magistrate, his attorney, and the examining physician that the purpose of the competency evaluation was to determine whether he was competent to proceed to trial. Moreover, by making a *pro se* motion for a competency evaluation, he had demonstrated an awareness of its purpose. The court of appeals held that there was a sufficient basis of fact to conclude that Mr. Binion had knowingly fabricated symptoms of a mental illness in an effort to impede his prosecution and that the trial court did not err in enhancing his offense level.

On the third and last issue raised, Mr. Binion argued that the trial court erred in not reducing his offense level for acceptance of responsibility. The court of appeals cited commentary in the United States Sentencing Guidelines Manual § 3E1.1, cmt. N.4 (2001 & 2003), that "conduct resulting in an enhancement [for obstructing the administration of

justice] ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct” and concluded that the trial court had not been in error in refusing to reduce his sentence on the basis that he had accepted responsibility.

*Discussion*

Competency-to-stand-trial evaluations begin with a statement of disclosure to the defendant regarding the nature and purpose of the evaluation and that information discussed is not confidential. Another component of the disclosure clarifies that the purpose of the evaluation is to assess the defendant’s ability to move his case forward rather than to be used in the actual guilt or sentencing phase of the trial. The disclosure primarily shows respect for persons, in adherence to medical ethics guidelines, because it is a weak and often ineffective warning to the defendant against revealing information that may be construed later as self-incriminatory or that may have a negative impact on the outcome of the case. In the report to the court, the psychiatrist often assumes the responsibility for weeding out the content that could be self-incriminatory but is essentially irrelevant for the question of competency.

In the case of Mr. Binion, the question of feigning a mental illness was essential to the question of competency but the psychiatrist’s conclusion was used for a purpose beyond its initial intention as understood by the psychiatrist and the defendant. The opinions offered by the psychiatrist relevant to competency ultimately had a negative impact on the defendant’s sentence. The ruling of the court of appeals raises critical issues for forensic psychiatrists. Based on this

ruling, is it necessary to inform the defendant that information gathered as part of the evaluation may be used for purposes outside of the competency evaluation? Would it also follow that the defendant should be advised that uncooperativeness or feigning of symptoms could lead to a finding of obstruction of justice and, therefore, a harsher sentence? The challenge in adopting this warning becomes the determination of the level of uncooperativeness that might rise to the level of obstruction of justice.

Competency-to-stand-trial evaluations are often requested by attorneys who want to protect their clients from an unfair trial by ensuring that their clients understand the legal proceedings against them and are able to assist in their defense. In this case, however, the competency evaluation was not protective but rather contributed to a harsher penalty for Mr. Binion, although this outcome may have depended on the particular fact in this case that the defendant himself filed a *pro se* motion for determination of competence to stand trial. The impact of the disposition in this case might still lead to discouraging attorneys from asking for competency evaluations, out of fear that their client might be subject to a harsher penalty if by chance the psychiatrist concludes that there is a lack of cooperation or the presence of feigning but no mental illness.

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