MADFREEDOM
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April 22, 2021

House Committee on the Judiciary
Vermont General Assembly
115 State Street
Montpelier, VT 05633-5301

Re: *S.3 – an act relating to competency to stand trial and insanity as a defense*

Dear House Committee on the Judiciary:

I write on behalf of MadFreedom, a human and civil rights advocacy organization whose mission is to end the discrimination and oppression of people based on their perceived mental states.

Thank you for the invitation to comment on the below language:

> (2)(A) ~~If the psychiatrist or and, if applicable, the psychologist has been asked to provide opinions as to~~ If the court orders examinations of both the person's competency to stand trial and the person's sanity at the time of the alleged offense, those opinions shall be presented in separate reports and addressed separately by the court. In such cases, the examination of the person's sanity shall only be undertaken if the psychiatrist ~~or~~ and, if applicable the psychologist is able to form the opinion that the person is competent to stand trial, provided that the psychiatrist and, if applicable, the psychologist shall collect and preserve any evidence necessary to form an opinion as to sanity if the person regains competence.
>
> (B) Notwithstanding subdivision (A) of this subdivision, the court may order, upon motion of the defendant and for good cause shown, that the examinations of the person's competency to stand trial and the person's sanity at the time of the alleged offense occur concurrently. If the court issues such an order pursuant to this subdivision (B), the report on the person's sanity shall not be made available to the prosecutor until the person is found competent to stand trial.

While the proposed language represents an improvement over the current language in S.3, as passed by the Senate, the proposed language does not negate the deprivation caused by denying defendants an unfettered right to concurrent competency and sanity evaluations if defendants so chose.

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As someone who was significantly harmed by the delayed evaluation of her mental status during a protracted period of psychosis, it is my position that denying a defendant the absolute right to a timely sanity evaluation is a substantial deprivation of the constitutional right to a fair trial.

I am particularly concerned about the requirement that a defendant show "good cause" for concurrent competency and sanity evaluations. The Sixth Amendment to the United States Constitution, among other things, guarantees defendants the right to have assistance of counsel for their defense. Requiring defendants to apply to the court for an order compelling their own sanity examinations effectively deprives defendants of counsel because it substitutes the court's (or a psychiatrist's) judgment for counsel's judgment. It also has the potential to violate the attorney work product doctrine because a showing of good cause may necessarily reveal an attorney's legal theories and mental impressions of a defendant's criminal case.

In addition, concurrent competency and sanity examinations are a common practice in the United States. According to research estimates, simultaneous assessments of both competency and sanity occur in at least one-third of evaluations of competency to stand trial and/or sanity at the time of the alleged offense.[1] As a result, there is no body of case law that establishes what constitutes "good cause" for compelling concurrent competency and sanity evaluations.

"Good cause" is a "relative and highly abstract term, and its meaning must be determined not only by verbal context of statute in which term is employed but also by context of action and procedures in involved in type of case presented."[2] The bill's proposed language does not set forth what would constitute legally sufficient grounds for compelling concurrent evaluations.

Finally, contrary to the testimony received during legislative hearings on S.3, there is no national consensus that supports depriving defendants of their right to timely assessments of their sanity. Neither the American Bar Association (ABA) nor the American Academy of Psychiatry and the Law (AAPL)[3] supports depriving defendants of their right to concurrent examinations if they so request. Neither recommends requiring defendants to show "good cause" for concurrent examinations. Specifically, the American Bar Association states that concurrent examinations should take place if "the defendant so requests."[4]

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[1] Chauhan, P., Warren, J., Kois, L., & Wellbeloved-Stone, J. (2015). The significance of combining evaluations of competency to stand trial and sanity at the time of the offense. *Psychology, Public Policy, and Law, 21*(1), 50–59, at p. 50. https://doi.org/10.1037/law0000026

[2] *Good Cause,* Deluxe Black's Law Dictionary (6th Ed., Centennial Edition, 1990).

[3] AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial**,** Volume 35, Number 4, 2007 Supplement, p. S23

[4] ABA Criminal Justice Mental Health Standards. Washington, DC: American Bar Association, August 8, 2016, Standard 7-3.4. Procedures for initiating evaluations, subdivision (c)**.**

There is no support for Dr. Ravven's assertion that "in a combined Competence to Stand Trial and Criminal Responsibility Evaluation, that the evaluation be suspended if the evaluator's recommendation is Not Competent …" In support of this assertion, Dr. Ravven's cites page S21 of the *AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial*. However, there is nothing on page S21 about suspending evaluations if the evaluator's recommendation is Not Competent. (For your information, I am enclosing a copy of page S21 with this letter).

I urge the Committee to be mindful of the fact that an assessment of competency is not a medical diagnosis. Rather, it is a legal adjudication that is decided by a judge after an adversarial hearing. Allowing a psychiatrist to suspend an examination based on the examiner's opinion as to competence before that opinion has been litigated and adopted by a judge would constitute an unprecedented usurpation of the judge's authority.

I am not insensitive to the concern that defendants who are deemed not competent to stand trial may unknowingly incriminate themselves. However, there are safeguards in place to address this concern without creating the irremediable hardship that a delay in evaluating sanity will create.

First, defendants have the assistance of counsel whose fiduciary duty it is to protect their interests. Second, defendants have the benefit of 13 V.S.A. § 4816, subsection (d) which provides that **no** statement made in the course of the examination by the person examined shall be admitted as evidence in **any** criminal proceeding for the purpose of proving the commission of **a** criminal offense or for the purpose of impeaching testimony of the person examined. (emphasis supplied)

Finally, perhaps the language that strikes the best balance between the proponents and opponents of the current (c)(2) and at the same time preserves the defendant's right to a timely sanity examination is the language of the ABA guidelines. Thus, MadFreedom proposes the following amendment:

(c)(2) An evaluation of the defendant's present competence should not be combined with an evaluation of the defendant's mental condition at the time of the alleged crime, unless the defendant so requests. If an evaluation addresses both the defendant's present competence and the defendant's mental condition at the time of the alleged crime, a separate report should be prepared on each issue.

Thank you again for your consideration.

Very truly yours,

Wilda L. White

Enclosure: *AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial,* page S21

was a form of recreation, and that Binion did not seem to be planning his false complaints for a specific material gain. After Binion entered a guilty plea, a presentence investigation report recommended a sentence enhancement because Binion's fabrication of mental illness had necessitated a labor-intensive, time-consuming, costly evaluation. Although Binion objected, the district court added a two-level increase to Binion's charge for obstruction of justice and sentenced him to six and one-half years in prison followed by two years of supervised release.

In appealing his sentence, Binion argued that the two-level increase violated the U.S. Supreme Court's ruling in *U.S. v. Booker*, 543 U.S. 220 (2005).[123] In *Booker*, which addressed the application of federal sentencing guidelines, the Court held that, under the Sixth Amendment, no fact other than a prior conviction could be used to support a sentence exceeding the maximum one authorized by the offense elements established by a guilty finding, unless that fact was admitted by the defendant or was proved to a jury beyond a reasonable doubt.

The appeals court disagreed with Binion's claim, however. Although the appeals court believed that the sentencing error under *Booker* was clear, Binion had not cited relevant Supreme Court decisions or the Sixth Amendment when objecting to his sentence. He therefore had failed to preserve his claim under *Booker*, and he could not show that the sentencing error affected his substantial rights, because he could not show a reasonable probability that he would have received a more favorable sentence had the trial court followed *Booker*.

The appeals court also held that the facts in Binion's case supported the trial court's conclusion that, by faking a mental illness, Binion had knowingly obstructed justice to affect his case favorably. Binion filed a *pro se* motion requesting an evaluation for competency to stand trial, and the examining psychiatrist told him that the evaluation was to determine whether he was competent to proceed with adjudication. Binion clearly knew why he was undergoing evaluation, and the appeals court concluded that the trial court did not err in finding that Binion had tried to hinder his prosecution by malingering and in enhancing his sentence accordingly.

Like *Greer*, *Binion* raises concerns for psychiatrists about how courts may use their findings. Ordinarily, a psychiatrist who undertakes an evaluation of adjudicative competence does so in the belief that information obtained during the evaluation will not be used for purposes unrelated to fitness for trial, unless the defendant places his mental condition at issue during his defense or during sentencing. Binion pleaded guilty without claiming a mental illness defense, yet the court used psychiatrists' findings and opinions to enhance his sentence. As Darani[124] points out, the *Binion* ruling raises important questions of ethics for psychiatrist:

> [I]s 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? [Ref. 124, p 128].

III. Agency Relationships

Defense attorneys, prosecutors, and trial courts may all request that a criminal defendant undergo an evaluation of his competence to stand trial. Before beginning a competence evaluation, the psychiatrist should know who requested it, because the source of the referral may affect how the psychiatrist will report findings and the psychiatrist's obligation to maintain confidentiality.

Every state has some mechanism that allows criminal courts to obtain an evaluation of a defendant's competence to stand trial.[125] When performing court-ordered evaluations, psychiatrists should anticipate that they will report their findings and opinions to the court and that their reports will be available to the defendant's lawyer and the prosecutor. In all U.S. jurisdictions, statutes or case law prohibit using information obtained during a competence evaluation to prove criminal culpability, unless the defendant places his mental state at issue.[23,126] If the defendant later testifies, however, some courts may permit the prosecution to use contents of a competence report for impeachment purposes if the report affords evidence of the defendant's prior inconsistent statements.[127–129] For this reason, whenever possible, a competence report should not mention potentially incriminating information obtained from interviewing a defendant.

Courts may request a competence evaluation for reasons other than wanting to obtain an expert opinion about a defendant's ability to proceed with adjudication. For example, requests for competence evaluations occasionally reflect the court's desire to facilitate prompt treatment of a severely impaired