ods; require longer, perhaps indefinite, periods of hospitalization; and incur a greater financial cost. What appears lost in the balancing of the liberty interests of avoiding unwanted medication is that remaining involuntarily hospitalized and under the yoke of an untreated mental illness is, in and of itself, a great loss of liberty.

This decision further separates the need for confinement of mentally ill and dangerous individuals to protect society from the need for these ill individuals to receive treatment. The opinion assumes that the lesser restrictive alternative to forced medication is confinement, a holding courts have consistently upheld but one that needs further scrutiny. It is possible to identify a cohort of involuntarily hospitalized patients who are dangerous when outside of an institution; are rendered nondangerous by the security, structure, and services provided inside a hospital; and then become ill and dangerous again after they are discharged.

It deserves comment, although it is perhaps not surprising, that the *Sell* test was not applied to the application for involuntary medication, even though Mr. Kelly was involuntarily hospitalized for the dual purpose of decreasing his dangerousness and restoring his competency to stand trial. In *Sell v. United States*, 539 U.S. 166 (2003), the U.S. Supreme Court opined that for a nondangerous individual to be involuntarily treated for the purpose of competency restoration, the testimony must focus on trial-related side effects and risks of the antipsychotic and how it could affect the defendant's right to a fair trial. In *Kelly*, the issue of competency restoration was not taken into consideration when the request for treatment over objection was brought to the Maryland court. The test was probably not applied because of the state's heeding the Supreme Court's warning in *Sell* that:

> . . . the medical experts may find it easier to provide an informed opinion about whether, given the risk of side effects, particular drugs are medically appropriate and necessary to control a patient's potentially dangerous behavior (or to avoid serious harm to the patient himself) than to try to balance harms and benefits related to the more quintessentially legal questions of trial fairness and competence [*Sell*, 539 U.S., p 182].

If rulings such as *Kelly* proliferate, and dangerousness must be shown to exist inside institutions for ill defendants to be treated properly, *Sell* hearings may become more commonplace.

Competence to Stand Trial

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Feigning Mental Illness Is Punishable by Enhancement of Sentence for Obstruction of Justice

In *United States v. Batista*, 483 F.3d 193 (3rd Cir. 2007), Braulio Antonio Batista knowingly feigned mental illness. His fraud was discovered, and he received a sentence enhancement. He appealed on the grounds that the enhancement was unfair because he was "exploring a potential defense." The enhancement was affirmed.

Facts of the Case

Mr. Batista was arrested September 19, 2002, for being involved in the sale of 450 grams of crack cocaine. He acted as the middleman in a sale between a police informant and the seller. He pleaded guilty to "possessing only 150 grams of crack cocaine." After Mr. Batista had pleaded guilty, his lawyer requested that her client be evaluated to determine whether he was competent to stand trial. He was evaluated at least five times over the next two years. Dr. Barber saw Mr. Batista and opined that he was not competent to stand trial. Later, Dr. Ryan evaluated Mr. Batista and agreed with Barber, but commented that the apparent lack of competence might be the result of malingering. Dr. Ryan suspected malingering, because Mr. Batista did so poorly on an administered memory test that even someone with severe brain damage would have scored better.

The court subsequently asked Dr. Simring to evaluate Mr. Batista. He found that Mr. Batista was "simulating mental illness" and concluded that Mr. Batista was "faking or exaggerating . . . to avoid going to trial." Dr. Ryan re-evaluated Mr. Batista and determined that he was "probably malingering." She stated that, during the evaluation, Mr. Batista had said that he was at home and had opened an imaginary refrigerator and offered her a drink. Dr. Morgan was the final clinician to evaluate Mr. Batista. Morgan (a neuropsychologist) concluded, after examining Mr. Batista, that he was malingering and con-

cluded that there was "significant, incontrovertible and overwhelming evidence regarding the presence of suboptimal effort and malingering in [sic] the part of the examinee" (*Batista*, 483 F.3d, p 194).

Mr. Batista was sentenced on June 2, 2005. He had expected a reduction in his sentence due to his guilty plea. The prosecution asked for an obstruction-of-justice enhancement of his sentence because of his feigning mental illness. The district court denied his request for a reduction due to acceptance of responsibility and granted the prosecution's request for an enhancement due to obstruction of justice. Mr. Batista appealed on four grounds. First, he claimed that the district court should not have given him an enhanced sentence due to obstruction of justice. Second, he complained that he did not receive a reduction for acceptance of responsibility. Third, he opined that there should have been a downward departure for decreased mental capacity. Fourth, he stated that the court failed to apply a "safety valve" in sentencing.

Ruling and Reasoning

The Third Circuit Court of Appeals ruled on all points that the district court had been correct in its decisions.

Mr. Batista argued that by feigning mental illness he was "exploring a potential defense or mitigation." The district court disagreed and concluded that he had knowingly feigned mental illness. The court found that he had even told his co-conspirators that he was planning to fake mental illness. The appellate court found that the district court had "ample evidence" that Mr. Batista was faking. The evidence included the testimony of the doctors and the testimony of Agent Steven Sutley. Sutley had been told by one of Mr. Batista's co-conspirators that Mr. Batista was planning to feign mental illness. His malingering had caused a substantial expenditure of the government's resources and the court's time.

The Due Process Clause protects a defendant from standing trial if he is not competent. Sentencing enhancements are not meant to interfere with constitutional rights. In a Fifth Circuit Court case, *United States v. Dunnigan*, 507 U.S. 87 (5th Cir. 1993), the court held that

> . . . while a criminal defendant possesses a constitutional right to a competency hearing if a bona-fide doubt exists as to his competency, he surely does not have the right to create a doubt as to his competency or to increase the chances that he will be found incompetent by feigning mental illness [*Dunnigan*, 507 U.S., p 96].

The appellate court also found that the district court did not give the enhancement simply because Mr. Batista was found competent, but rather it was imposed because there was sufficient evidence of his having feigned mental illness.

Discussion

The Third Circuit Court of Appeal's strong endorsement of the district court's decision shows that the courts are tiring of defendants who abuse their mental health protections by feigning mental illness. This move could have important ramifications for forensic psychiatrists. First, will clinicians become agents of the court, expected to gather evidence of an enforceable wrong? Second, might there be consequences for those clinicians whom the court deems to have failed to identify malingering in a defendant?

It is important to have the role of the psychiatrist well defined in a legal evaluation. In *U.S. v. Batista*, the competency evaluations themselves were used as evidence that ultimately led to an increased sentence. The reason for an evaluation of competency to stand trial is to protect those who are mentally ill from being forced to participate in a legal proceeding while unable to do so. The psychiatrists involved in such evaluations are gathering information to be used for the purpose of determining whether a defendant has the ability to understand the nature of the proceedings and to assist counsel in a rational manner. If psychiatrists are gathering information that could be used as evidence for an enhanced sentence, this possibility should be made explicit to the defendant before the evaluation. The evaluator may, for example, have to advise the defendant that evidence of feigning a mental illness will be reported to the parties receiving the doctor's conclusions. A further question is whether the evaluator should advise the defendant that such information could be used against the defendant. This could have the effect of deterring defendants from feigning mental illness. However, it could frighten defendants and keep them from participating in the evaluation. The impact of this change may not be positive.

What about those psychiatrists who are thought to have failed to identify someone who is found by the court to be feigning incompetence? If the courts begin punishing those individuals who are determined to be feigning mental illness, then could a psychia-

trist be held responsible for not discovering and reporting the subterfuge? If courts choose to hold psychiatrists responsible in this manner, could the psychiatrist receive consequences such as expulsion from court panels, medical board sanctions, fines, malpractice suits, or criminal penalties because the perceived error in judgment was found to contribute to obstruction of justice?

U.S. v. Batista has made the evaluation of competency to stand trial a source of potential criminal exposure, at least in the Third Circuit. Psychiatrists should be aware of how they must change their informed consent to reflect this, and how the information they gather can be used for purposes other than determining competence. They should also be concerned about the possible consequences of failing to discover that a defendant is feigning mental illness.

Immunity for Professional Review Committees

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Health Care Quality Improvement Act Provides Immunity for Professional Review Activities

In *Wojewski v. Rapid City Reg'l Hosp.*, 730 N.W.2d 626 (S.D. 2005), the Health Care Quality Improvement Act was found to provide immunity to doctors who participated in a meeting that reviewed Dr. Wojewski's actions and the question of whether his bipolar disorder rendered him unable to perform surgery on a particular day.

Facts of the Case

Dr. Paul Wojewski was a cardiothoracic surgeon at Rapid City Regional Hospital (RCRH). He experienced a few manic episodes that required inpatient hospitalization during 1996. The diagnosis was bipolar disorder, and he took a leave of absence from the hospital. He asked RCRH to reinstate him, and he was reinstated with conditions until a review of psychiatric records was completed. Then, the conditions were removed. Dr. Wojewski had another manic episode in June 2003 and took a voluntary leave of absence due to "difficulties." When he returned, RCRH gave him privileges with the condition that he inform them of any changes in his mental health. RCRH appointed Dr. Oury, a surgeon, to monitor him.

Upon Dr. Wojewski's returning to work, some people noticed that he was acting strangely. A meeting was held on the morning of August 19, 2003, to decide whether his surgical privileges should be continued. He had a surgery scheduled that morning and it was decided during this meeting that he could continue with the scheduled procedure. Dr. Oury watched Dr. Wojewski during the procedure that morning. During the surgery, Dr. Wojewski had a manic episode and was escorted from the room by security. His hospital privileges were suspended.

Dr. Wojewski asked for a fair-hearing panel, and a four-day hearing was conducted in which he was represented by counsel. The panel found that his privileges should not be reinstated because of the threat of future relapses of his bipolar disorder. The findings of the panel were reviewed and upheld by an appellate review committee and by RCRH's board of trustees. Dr. Wojewski sued the RCRH and two of the doctors who were at the August 19 meeting on six counts stemming from that meeting. The hospital asked for a dismissal because of immunity given to those in the meeting, or for a summary judgment. The trial court granted RCRH's motion to dismiss because of immunity and also found summary judgment as an alternative ground. Dr. Wojewski appealed and brought six issues forward, most of which had to do with challenging the immunity provided to the meeting on August 19, 2003, by the Health Care Quality Improvement Act. Dr. Wojewski died in a car accident, but his estate replaced him in his case.

Ruling and Reasoning

The Supreme Court of South Dakota affirmed the trial court's judgment. The court held that the review actions that took place during the August 19, 2003, meeting were protected by immunity afforded by the Health Care Quality Improvement Act (HCQIA). They reasoned that the Act was passed "to improve the quality of medical care by encouraging physicians to identify and discipline physicians who are incompetent or who engage in unprofessional behavior" (*Wojewski*, 730 N.W.2d, p 629).