

those individuals who may not be able to protect themselves.

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## Impact of Diagnosis of Malingering on a Defendant's Sentence

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### **A Sentence Enhancement for Obstruction of Justice Involving a Defendant Who Malingered Did Not Discourage a Defendant's Utilization of the Right to Obtain a Competency Hearing**

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In *United States v. Bonnett*, 872 F.3d 1045 (9th Cir. 2017), the Ninth Circuit Court of Appeals affirmed the lower court's sentencing enhancements following a guilty plea for receipt and distribution of child pornography. The appeals court ruled that malingering qualified for the district court's application of an obstruction of justice sentence enhancement.

#### Facts of the Case

Daniel Bonnett was charged with one count of receipt and distribution of child pornography in June 2013. Upon arrest, officers discovered thousands of sexually explicit pictures and videos of children on Mr. Bonnett's multiple computers. His attorney raised the question of competency, and he underwent a court-ordered psychiatric evaluation. While detained, he was observed to behave and interact differently with medical staff compared with how he interacted with other staff or fellow inmates. He refused medical examinations and tests that were or-

dered to assist in evaluating his mental condition, including those designed to check for malingering. He also made damaging statements on recorded jail telephone calls with his wife. The evaluation concluded that Mr. Bonnett was feigning incompetency. The defense never objected to the conclusion of malingering. After his guilty plea, he received a two-level increase to his offense level for obstruction of justice due to malingering pursuant to the U.S. Sentencing Guidelines (U.S.S.G) § 3C1.1. In conjunction with other measures, such as criminal history, offense levels are used by courts as guidelines for deciding how many months of imprisonment a defendant should uniformly receive when convicted of a crime; theoretically, an increased offense level results in more time imprisoned. Mr. Bonnett was sentenced to 15 years in prison followed by 25 years of supervised release. He appealed his sentence arguing that the court erred in using malingering as a basis for an obstruction of justice enhancement, and that the court erred in not resolving factual disputes from the Presentence Report and the Psychiatric Evaluation.

#### Ruling and Reasoning

The U.S. Court of Appeals for the Ninth Circuit affirmed the sentence given to Mr. Bonnett by the U.S. District Court for the Eastern District of California. The court affirmed that Mr. Bonnett had neither a legal nor a factual basis to challenge the sentence enhancement that resulted from obstruction of justice.

Mr. Bonnett argued that permitting an obstruction of justice sentence enhancement based on his behavior in a competency to proceed evaluation discourages his exercise of the right to obtain a competency hearing. Citing *United States v. Greer*, 158 F.3d 228 (5th Cir. 1998), the Ninth Circuit noted that precedent allowing for an obstruction of justice enhancement for a defendant who feigns mental illness is well established. In *Greer*, the court stated: "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" (*Greer*, p 237).

The argument that an obstruction of justice sentence enhancement chills a defendant's exercise of the right to a competency hearing has been declined by three other circuit courts ruling after *Greer*: *United States v. Wilbourn*, 778 F.3d 682 (7th Cir.

2015); *United States v. Batista*, 483 F.3d 193(3d Cir. 2007); and *United States v. Patti*, 337 F.3d 1317 (11th Cir. 2003). Although *Greer* was the lead decision of the other circuit courts, *Greer* relied on the U.S. Supreme Court's decision in *United States v. Dunnigan*, 507 U.S. 87 (1993), in which the Court unanimously held that a sentence enhancement, pursuant to U.S.S.G § 3C1.1 (1989), in which there has been a proper determination of perjury, "is not in contravention of the privilege of an accused to testify in her own behalf" (*Dunnigan*, p 98).

Additionally, the Ninth Circuit, in a previous appellate case, *United States v. Fontenot*, 14 F.3d 1364 (9th Cir. 1994), affirmed a sentence enhancement after Mr. Fontenot refused to cooperate with a court-ordered psychiatric examination that would have provided material evidence to challenge his defense. The Ninth Circuit court stated that their conclusion in *Bonnett* was a direct result of the court's previous ruling on sentence enhancement in *Fontenot*.

Mr. Bonnett also argued that the district court failed to resolve factual disputes pursuant to Fed. R. Civ. P. 32 (2011). In order to argue a factual dispute, Mr. Bonnett would have had to deny the facts found in the Presentence Report or the Psychiatric Evaluation. The state noted that he did not deny the facts in either report despite having ample opportunity to review them both. Because there were no factual disputes to resolve, the court found no evidence of violation of Fed. R. Civ. P. 32.

#### Discussion

This case supports the court's authority to use forensic mental health evaluation findings, specifically a diagnosis of malingering, to help guide sentencing decisions, which often results in worse penalties for defendants. Such was the case in *United States v. Binion*, 132 F. App'x 89 (8th Cir. 2005), where "the opinions offered by the psychiatrist relevant to competency ultimately had a negative impact on the defendant's sentence" (Darani S: Behavior of the defendant in a competency-to-stand-trial evaluation becomes an issue in sentencing. *J Am Acad Psychiatry Law* 34: 126–8, 2006, p 128). In the U.S. District Court for the Eastern District, Mr. Binion received a two-point enhancement to his base offense level for obstruction of justice after feigning a mental illness and its subsequent impact on the state's resources. The decision was affirmed by the U.S. Eighth Circuit Court of Appeals.

This case and others similar to *Bonnett* remind forensic mental health practitioners that much is at stake for defendants who are found to be feigning mental illness. In *Greer*, the court advised that "counsel should warn" the client that feigning mental illness would result in a sentence enhancement. Ethically, what can forensic practitioners do to best handle evaluations in which the defendant is malingering? First, one might consider providing a more comprehensive informed consent. In that consent, one may divulge the potential legal ramifications if a defendant is found to be feigning mental illness.

Such an approach is not without its challenges, however. A defendant may become afraid and uncooperative after hearing about potential legal jeopardy; subsequently, a forensic practitioner may wonder about the appropriate timing for disclosing this information with the aforementioned concern in mind. The American Academy of Psychiatry and the Law (AAPL) has published general guidance related to malingering (Glancy GD, Ash P, Bath EPJ, *et al.*: AAPL Practice Guidelines for the Forensic Assessment. *J Am Acad Psychiatry Law*: 43: S3–53, 2015). The authors wrote that the decision to warn an evaluatee that malingering will be assessed in a forensic evaluation is up to the evaluator, as opinions vary. The authors suggested that if the caution about malingering is given, it can be documented in the informed consent section of the report. Additionally, evaluators could consider explaining to a defendant the consequences of a finding of incompetency. Some defendants may misunderstand the process of determining competency and think that a finding of incompetency results in the case being dismissed. Knowing that the case will ultimately proceed can potentially change a defendant's presentation.

Finally, as Drs. Phillip Resnick and James Knoll advise, "Because of serious legal implications of malingering, such a diagnosis should not be made unless there is a high degree of certainty" (Knoll JL, Resnick PJ: *U.S. v. Greer: longer sentences for malingerers. J Am Acad Psychiatry Law* 27: 621–5, 1999, p 624). *Bonnett* illustrates that it is imperative that a diagnosis of malingering be made cautiously and with well-grounded evidence. Ultimately, the decision of how to proceed in the interview is up to each forensic practitioner, but practitioners who decide to explore the question of malingering with defendants should carefully consider the accuracy of their diagnosis, the timing of their disclosures, and the transparency of potential risks.

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