

violence, and how thoughtful judges can look at the same evidence and reach quite opposite opinions when it comes to making judgments about future risk.

Feigned Incompetency and Sentence Enhancement

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Feigned Incompetency May Constitute the Basis for an Obstruction-of-Justice Sentence Enhancement

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In *United States v. Nygren*, 933 F.3d 76 (1st Cir. 2019), Steven Nygren was found to be feigning cognitive limitations during an evaluation of competency to stand trial. He received an obstruction-of-justice sentence enhancement under the U.S. Sentencing Guidelines (USSG) § 3C1.1 (2014). Mr. Nygren appealed. The U.S. Court of Appeals for the First Circuit affirmed the judgment of the district court in holding that feigned incompetency may constitute the basis for an obstruction-of-justice sentence enhancement.

Facts of the Case

In just over a year as the chief financial officer of Brooklin Boat Yard in Brooklin, Maine, Mr. Nygren stole over \$800,000 from the company through forged checks and unauthorized purchases. In a secretly recorded conversation with the company owner, Mr. Nygren admitted to stealing funds. Mr. Nygren was subsequently arrested and later charged with 63 counts of bank fraud, one count of use of an unauthorized device, and one count of tax evasion.

On October 24, 2016, approximately one year after his arrest and six months after having a stroke, Mr. Nygren pled not guilty to all counts. Mr. Nygren subsequently filed a motion for a competency hearing, accompanied by a letter from his treating neurologist and a competency evaluation written by a retained expert. The neurologist's letter stated that Mr. Nygren's stroke caused deficits affecting his cognition and memory that would improve over time. The competency evaluation indicated that Mr. Nygren was not competent to stand trial.

The government objected to the motion and pointed out that the expert's report cautioned that Mr. Nygren might have misrepresented his memory difficulties. The district court granted the defendant's motion for a competency hearing but ordered Mr. Nygren to undergo an additional competency evaluation at a government facility.

The second competency evaluator concluded that Mr. Nygren was competent to stand trial. This conclusion was based, in part, on her assessment that Mr. Nygren was feigning or exaggerating cognitive limitations. Mr. Nygren's own expert re-examined Mr. Nygren and agreed that Mr. Nygren was competent to stand trial. The district court subsequently found Mr. Nygren competent to stand trial and accepted his changed plea of guilty to all counts.

In a presentence investigation report, the probation officer recommended a two-level sentence enhancement for obstruction of justice, based on Mr. Nygren's feigning incompetency to avoid legal culpability. The probation officer also recommended against an offense-level reduction for acceptance of responsibility, using similar reasoning.

At the disposition hearing on May 25, 2018, the district court found that the government had shown by a preponderance of the evidence that Mr. Nygren had attempted to obstruct justice by feigning incompetency to bias the justice system in his favor. The court concluded that an obstruction-of-justice enhancement was appropriate and similarly found that Mr. Nygren did not qualify for an acceptance-of-responsibility credit.

Mr. Nygren was sentenced to 95-month terms for each of the 63 bank-fraud counts and 60-month terms on the two remaining counts, with all sentences to run concurrently. He was also ordered to pay restitution. Mr. Nygren appealed.

Ruling and Reasoning

The First Circuit affirmed the ruling of the district court. The court found that Mr. Nygren had no factual basis to challenge the lower court’s finding of feigned incompetency, nor did he have a legal basis to challenge the use of feigned incompetency as the foundation for an obstruction-of-justice sentence enhancement.

In determining whether feigned incompetency may be the foundation of an obstruction-of-justice sentence enhancement, the court turned to the commentary in the USSG § 3C1.1, which states that “[o]bstructive conduct can vary widely in nature, degree of planning, and seriousness” (USSG § 3C1.1 cmt. n.3). The court noted that the commentary provides examples of both obstructive conduct and limitations to the enhancement’s application. Feigned incompetency is not specified as an example of obstructive conduct nor as an example of nonobstructive conduct.

The court stated in its opinion that, although feigned incompetency is not listed as an example of obstructive conduct in the USSG § 3C1.1 commentary, the conduct involved in feigning incompetency closely resembles some of the listed examples, such as attempting to produce a false record and providing false information to a judge or probation officer. This interpretation suggests that the obstruction-of-justice enhancement should be construed to encompass feigned incompetency. The court opinion stated that feigning incompetency is serious because, even if the defendant’s attempt to feign incompetency is unsuccessful, criminal proceedings are halted while competency is being determined, a process that requires significant time and resources. In addition, an individual who feigns incompetency successfully secures protections for himself that are reserved for those individuals who are actually incompetent to stand trial. Therefore, feigning incompetency serves not only to evade justice in the case of the feigning individual but also disrupts the administration of justice on a system-wide level.

The First Circuit opinion stated that imposing an obstruction-of-justice enhancement on a defendant who deliberately feigns incompetence would not discourage legitimate requests for competency hearings to an unconstitutional degree. The court added that in seeing feigned incompetency as

fitting in the obstruction-of-justice enhancement, imposters would be discouraged, thus bolstering the constitutional rights of those legally incompetent. Without a means of deterring individuals from feigning incompetency, judges would have to approach any request for a competency hearing with greater skepticism.

Discussion

In this case, the First Circuit joins multiple other circuits in holding that feigned incompetency may serve as the basis for an obstruction-of-justice enhancement. This decision highlights the impact of a malingering diagnosis and that forensic reports may be used for unintended reasons.

Forensic evaluators are likely to encounter malingering individuals in many contexts, including competency-to-stand trial evaluations. Prior studies indicate that as many as 10 percent of defendants referred for competency to stand trial evaluations feign incompetency (Rogers R, Sewell KW, Goldstein AM: Explanatory models of malingering: a prototypical analysis. *Law & Hum Behav* 18:543–52, 1994; Gothard S, Rogers R, Sewell KW: Feigning incompetency to stand trial: an investigation of the Georgia court competency test. *Law & Hum Behav* 19:363–73, 1995). An accurate diagnosis of malingering can therefore be of great value to the court, but evaluators must also be cautious of its biasing effect.

Traditionally, forensic psychiatrists approach competency-to-stand trial evaluations with the expectation that their reports will be used solely to make a determination of competency. As illustrated by this case and by cases from other jurisdictions (*United States v. Greer*, 158 F.3d 228 (5th Cir. 1998); *United States v. Binion*, 132 F. App’x. 89 (8th Cir. 2005); *United States v. Batista*, 483 F.3d 193 (3d Cir. 2007); *United States v. Bonnett*, 872 F.3d 1045 (9th Cir. 2017)), information from competency-to-stand trial evaluations has been used in sentencing and has done harm to the evaluatee.

The ethics framework guiding forensic work differs from that of traditional medicine, in which physicians are required, above all, to do no harm. Forensic evaluators do not have a traditional physician–patient relationship, and treatment is not the goal. The role of the forensic evaluator, however, is not free from ethics obligations.

Central to the ethics concerns of forensic work are the principles of truth-telling and respect for persons (Appelbaum PS: Ethics and forensic psychiatry: translating principles into practice. *J Am Acad Psychiatry Law* 36:195–200, 2008). In applying these principles to competency evaluations of individuals suspected of malingering, truth-telling prompts forensic psychiatrists to give honest, supported diagnoses but to also be aware of their own limitations.

In commenting on *United States v. Greer*, 158 F.3d 228 (5th Cir. 1998), Drs. Knoll and Resnick articulated that the assessment of malingering can be difficult, and a label of malingering can be given erroneously (Knoll JL, Resnick PJ: *U.S. v. Greer*. Longer sentences for malingerers. *J Am Acad Psychiatry Law* 27: 621–5, 1999). In light of the significant biasing effects that a diagnosis of malingering may have in the court, the principle of truth-telling calls for evaluators to make a diagnosis when confident and the evidence is present, but to not avoid truthfully stating uncertainty.

The principle of respect for persons also raises concerns for forensic psychiatrists in competency evaluations. In defining respect for persons, Dr. Appelbaum articulates that forensic psychiatrists should “not engage in deception, exploitation or needless invasion of the privacy” of individuals we evaluate (Appelbaum, p 197). Particularly with the knowledge that forensic reports could be used for unintended reasons, respect for persons calls upon forensic psychiatrists to take consideration of the information contained in reports so as to not exploit or needlessly invade privacy.

The principle of respect for persons raises the question of whether evaluatees should be warned that information obtained from the competency assessment could be used for purposes aside from a competency determination, with feigned incompetency affecting sentencing being one such example. Such a determination is not without consequences. Defendants may be more reluctant to engage in evaluations, and a chilling effect on the right to request competency hearings could result.

How to approach these considerations is for each forensic evaluator to decide but the growing number of cases similar to *Nygren* suggests forensic psychiatrists should be thoughtful about the accuracy of their assessments, what information to include in a

statement of non-confidentiality, and the breadth of information to include in their reports.

Competency to Stand Trial of Sovereign Citizens

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Adherence to Sovereign Citizen Movement Is Not Evidence of Incompetence to Stand Trial

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In *United States v. DiMartino*, 949 F.3d 67 (2d Cir. 2020), the Second Circuit Court of Appeals considered whether the U.S. District Court for the District of Connecticut abused its discretion in denying a posttrial competency hearing to a member of the Sovereign Citizen Movement.

Facts of the Case

Terry DiMartino had been a successful independent insurance agent since the 1980s. Starting in 1996, he either did not file tax returns or filed erroneous tax returns. When the Internal Revenue Service (IRS) attempted to file liens against his property or to garnish his commissions, Mr. DiMartino tried to hinder the IRS's efforts. For example, he purchased a home through a trust as a means of concealing his ownership of the property. He also sent letters to the IRS in which he stated that the federal government lacked legal or constitutional authority to collect taxes. He threatened IRS agents with legal action. He went so far as to pay his taxes with counterfeit bonds. He was largely successful in his attempts, paying less than 1.5 percent of his \$2.4 million income to the IRS between 2004 and 2013. Mr. DiMartino was ultimately charged in 2014 with one count of corruptly endeavoring to obstruct the