

a danger to themselves or others from guns. Of course, these two classes of persons are not the same from a risk-assessment perspective.

The Third Circuit said that there is no historical justification for restoration of Second Amendment rights. Whether one forfeits the Second Amendment right because of a felony conviction or because one has been deemed a danger to himself or others and involuntarily hospitalized, the forfeiture cannot be overturned by “rehabilitation.” It also noted that “federal courts are ill-equipped to determine whether any particular individual who was previously deemed mentally ill should have his or her firearm rights restored” (*Beers*, p 159).

The *Beers* decision concludes that the irrelevance of rehabilitation for felons regarding forfeiture of Second Amendment rights is equally applied to those adjudicated as mentally ill. This conclusion supports the very stigmatization so many have worked to reverse. Interestingly, the court found it necessary to comment on the topic of further stigmatization. In response to that concern, the court in *Beers* noted, “Nothing in our opinion should be read as perpetuating the stigma surrounding mental illness . . . Historically our forbearers saw a danger in providing mentally ill individuals the right to possess guns” (*Beers*, p 159).

The Third Circuit’s ruling that a history of commitment to a psychiatric hospitalization indefinitely disqualifies the person from owning a firearm under existing federal law contradicts efforts in psychiatry to address the topics of dangerousness, mental illness, and firearms. The American Psychiatric Association’s official position statement on firearm access states, “. . . the process for restoring an individual’s right to purchase or possess a firearm following a disqualification related to mental disorder should be based on adequate clinical assessment, with decision-making responsibility ultimately resting with an administrative authority or court” (Pinals DA, *et al.*: American Psychiatric Association: Position statement on firearm access, acts of violence and the relationship to mental illness and mental health services. *Behav Sci & L* 33:195–8, 2015).

A measure for regulating gun violence that strives to respect the Second Amendment is the “extreme risk protection order” (ERPO), sometimes referred to as a “red flag” law, currently adopted by 17 states and the District of Columbia (Blocher J, Jacob C: Firearms, extreme risk, and legal design: ‘red flag’

laws and due process. *Va L Rev* 106:8–9, 2020). The ERPO allows courts to quickly and temporarily remove firearms from individuals who pose a substantial threat to themselves or others. The ERPO laws allow a more tailored approach to restricting firearm access in that they are not based solely on broad categories of people and are time-limited. Eligibility for initiation of an ERPO varies by state. Opponents to the ERPO laws commonly argue that removing someone’s firearms preemptively, without the person having committed a crime or risky act, violates due process (Blocher, p 15). While there are many factors to consider, this permits restructuring firearm restrictions in those experiencing symptoms of mental illness, whether these symptoms are transient or are more refractory, while addressing public safety. In addition, this approach does not create a category or class of individuals on the basis of mental illness who then are permanently separated from their Second Amendment rights.

## Mental Illness Without Dangerousness in Conditional Release

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**A Defendant’s Mental Illness Does Not Need to Be Cured to Be Considered No Longer a Danger to Self or Others in the Presence of Medication Adherence and Adequate Community Treatment and Supervision**

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**Key words:** conditional release; violence risk; resentencing; review petition

In the case of *In re Capser*, 448 P.3d 1084 (Mont. 2019), the Supreme Court of Montana reversed the

judgment of a Montana district court that denied a petition for review of sentence for a person with schizophrenia who had been committed to the state hospital 15 years earlier when there was considerable evidence to support resentencing.

#### Facts of the Case

Kevin Capser was found guilty of deliberate homicide on June 5, 2002 for the death of his father, John Capser, on December 8, 2000. Mr. Capser received a diagnosis of schizophrenia when he was 18 and was started on antipsychotic medications. In 1999, Mr. Capser was involuntarily committed to the Montana State Hospital (MSH) after an altercation with his father. Mr. Capser was discharged from MSH in January 2000. Several months after his discharge, Mr. Capser was resisting taking his medications and had a rapid decline in his school performance. On December 8, 2000, Mr. Capser shot and killed his father. Shortly after he was charged, Mr. Capser was transferred to MSH and was found incompetent to proceed to trial. He received treatment until he was found competent to proceed on January 17, 2002.

Mr. Capser entered a plea of *nolo contendere* and was found guilty of deliberate homicide on June 5, 2002. The court found that Mr. Capser had a mental disease or disorder that rendered him unable to appreciate the criminality of his behavior or to conform his behavior to the requirements of the law, and hence committed Mr. Capser to the custody of the Department of Public Health and Human Services (DPHHS) pursuant to Mont. Code Ann. § 46-14-312(2) (2003) for 100 years, with 30 years suspended, and an additional 10 years imposed for the use of weapon. Mr. Capser resided at MSH for over 15 years, was documented to have been engaging in his treatment without problems, and was described as a “model patient.” In June 2016, the Forensic Review Board at MSH filed a petition for review of sentence with the 14th Judicial District Court advocating for the release of Mr. Capser to a group home in Missoula, Montana. The petition claimed that, while he continued to have schizophrenia, he no longer represented a substantial risk of harm to himself or others. On July 13, 2017, the district court denied the petition, finding that the proposed group home lacked adequate safeguards to ensure the safety of both the community and Mr. Capser, and that Mr. Capser remained a danger to himself and others. Mr.

Capser appealed on the basis of abuse of discretion by the court.

#### Ruling and Reasoning

The Supreme Court of Montana reversed the judgment of the district court and remanded with instructions to fashion an appropriate order consistent with the holding of their opinion. The Supreme Court of Montana ruled that Mr. Capser was not required to be “cured” of his mental illness to no longer be a danger to himself or others.

The state supreme court concluded that the district court abused its discretion when it did not consider the “uncontroverted” evidence provided by professionals. The court pointed to the evidence that was presented regarding Mr. Capser’s stability on his current medication regimen, including testimony from Mr. Capser’s treating physician, unanimous support of the MSH Forensic Review Board, and Mr. Capser’s family support. The court also considered the evidence presented that Mr. Capser had no history of non-compliance with his medication since his sentence began at MSH. The court noted that among the factors considered was the similarity of Mr. Capser’s recommended group home placement in Missoula and current placement at MSH in terms of staffing and monitoring of medication compliance. The court also noted that the group home indicated their willingness to accommodate any special recommendations by Mr. Capser’s parole officer.

The district court, in its denial of the petition, noted that Mr. Capser was on conditional release from MSH when he stopped taking his medications and killed his father. The Montana Supreme Court noted that this was inaccurate. Mr. Capser was not on conditional release at the time of the crime. Mr. Capser had an admission at MSH prior to the crime and was not under legal supervision. The Montana Supreme Court expressed concern that the district court had erroneously concluded, therefore, that Mr. Capser had been on conditional release previously, stopped his medication, and killed his father. The court said that Mr. Capser was a teenager with untreated schizophrenia when he was not compliant with his medications, and that when he became appropriately medicated in 2001, he had full compliance with his medication.

The court noted that the district court determined that Mr. Capser was not “cured” of his mental illness and that he required continued treatment with psychiatric medications. The court argued that schizophrenia cannot be “cured” to the point where an individual does not require treatment with medications. The court noted, “The District Court’s finding infers that a person suffering from schizophrenia will always be deemed a danger to themselves or others – regardless of unanimity of professional opinion otherwise – as it is impossible to eliminate any chance that the person will stop taking his or her medications” (*Capser*, p 1088).

#### Dissent

Justice Rice offered a dissent. He wrote that the majority erred in finding that the district court abused its discretion. He said that the statutory requirement for petition of a review of sentence is “the defendant suffers from a mental disease or disorder or developmental disability but is not a danger to the defendant or others” (*Capser*, p 1089). He then noted that the petition from DPHHS included the qualification that Mr. Capser was not dangerous “with continued treatment in a community setting, as long as defendant complies with the proposed conditions of release, under the supervision of the Adult Probation and Parole Division of the Montana Department of Corrections” (*Capser*, p 1089). Justice Rice reviewed the same testimony and came to the opposite opinion, that the district court did not abuse its discretion, and was troubled by the qualifications stated in the DPHHS petition as related to risk assessment.

#### Discussion

This case illustrates one variety of jurisdictional interpretation on the relationship between mental illness and dangerousness in the context of progressing patients to conditional release. With *In re Capser*, Montana makes clear that some mental illnesses are not cured, therefore the question of dangerousness is core to the determination of progression. This case also highlights the difficulties that courts face when considering the uncertainty of future events as it pertains to potential dangerousness. Such uncertainty includes factors such as medication adherence and the presence of highly structured and monitored environments in the community.

Montana is one of four states that has abolished the insanity defense. Instead, Montana allows for the mental state of the defendant to be considered at all stages of criminal proceedings according to Mont. Code Ann. § 46-14-101(1). Defendants who are found by the court to have a mental disease or disorder that rendered them unable to appreciate the criminality of their behavior or to conform their behavior to the requirements of the law, are not subject to mandatory minimum sentences for the crime and are instead committed to the custody of DPHHS following Mont. Code Ann. § 46-14-312 (2). The defendant or the director of DPHHS can then petition the sentencing court for a review of sentence if a professional determines that the defendant is no longer a danger to self or others. The sentencing court can “make any order not inconsistent with its original sentencing authority, except the length of the confinement or supervision must be equal to that of the original sentence” Mont. Code Ann. § 46-14-312(4), and the defendant would then be subject to a yearly status review by a professional.

Sentencing courts have had to consider both the presence of a mental illness as well as dangerousness when evaluating conditional release cases. The presence of both is needed to justify continued confinement of an insanity acquittee, as was demonstrated in *Foucha v. Louisiana*, 504 U.S. 71 (1992). In *Foucha*, the treating psychiatrist testified that, although Mr. Foucha did not have a mental illness, he continued to be dangerous due to his antisocial personality traits. The sentencing court denied Mr. Foucha’s conditional release on the basis that he continued to be dangerous to himself and others. On appeal, the U.S. Supreme Court reversed, clarifying that the presence of mental illness is required for continued confinement. *In re Capser* recognizes that some mental disorders are not cured, but the symptoms are mitigated by medication, and that it is the management of dangerousness that matters most. The Montana Supreme Court acknowledged, “While decisions of this type are among the most difficult made by a district court judge, and while the District Court was understandably apprehensive and fearful of the future which could not be fully known, this apprehension should not take the place of the evidence actually presented” (*Capser*, p 1088). *In re Capser* highlights how apprehensive judges can be about those who have committed

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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**Key words:** malingering; obstruction of justice; incompetency

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.