The Dangers of Malingering as the Basis for a Two-Level Sentence Enhancement Under U.S.S.G § 3C1.1.

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INTRODUCTION

Efficient case resolution is necessary to effectuate the accused's right to a speedy trial under the Sixth Amendment, but it is also necessary to ensure the effective utilization of judicial resources more broadly.[1] Yet, balancing judicial efficiency with quality case processing and ensuring just outcomes remains a challenge.[2] Additionally, there are constant reminders throughout the legal system that truth and honesty are among the highest values.[3] Witnesses are sworn in by oath to ensure truthful testimony, judges and lawyers swear to conduct themselves honestly, and the legal process is expected to result in truthful and just outcomes.[4] Accordingly, dishonest and disruptive conduct that obstructs the judicial process is taken extremely seriously.[5] Obstructive conduct undermines respect for the justice system and strikes against the integrity of the court.[6] For these reasons, judges tend to take great offense to deliberate attempts to impede the administration of justice and will punish culprits harshly upon conviction.[7] However, shielding the legal system from obstructive conduct risks injuring

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[1] *Speedy Trial*, AM. BAR ASS'N, https://perma.cc/883S-JGAR (last visited Nov. 4, 2021).

[2] *Efficiency, Timeliness, and Quality: A New Perspective from Nine State Criminal Trial Courts*, NCJ No. 181942, at 1 (DOJ National Institute of Justice June 2000), https://perma.cc/4XXT-BX5B.

[3] Joseph T. McCann, Review, Detecting Malingering and Deception: Forensic Distortion Analysis (FDA), by *Harold V. Vall & David A. Pritchard*, 24 VT. B.J. & L. DIG. 63 (1998).

[4] *Id.*

[5] *See Obstruction of Justice*, LAW OFFICES OF JEFFREY LICHTMAN, https://perma.cc/WZQ7-TTRS (last visited Nov. 4, 2021).

[6] *Id.*

[7] *Id.*

equally important individual rights because, for example, proving *specific intent to obstruct*, a required element of obstruction of justice, is a challenge.[8] Obstructive conduct that results from confusion or mistake on a defendant's part can look a lot like intentional obstruction.[9] Still, the general distaste for obstructive conduct among judges leads to legal consequences on the basis of perceived intent without sufficient proof.[10] Without proper protection mechanisms and clearly defined standards, this risk can materialize itself and threaten the integrity of the court.[11]

In a case of first impression, the U.S. District Court for the District of Maine confronted conduct that is particularly susceptible to being misperceived as intentionally obstructive in *United States v. Nygren.* [12] In that case, the Court determined that the defendant intentionally feigned incompetence in an effort to evade criminal responsibility, and, as a result, the Court significantly increased the length of the defendant's sentence.[13] This Comment will illustrate that the U.S. Court of Appeals for the First Circuit erred in affirming that feigned incompetence determined by a diagnosis of malingering can be used as the basis for a two-level sentence enhancement under Federal Sentencing Guideline § 3C1.1, because of unreliable testing methods and insufficient notice requirements.

Part I of this Comment examines the process of calculating and assigning sentences to criminal defendants in federal court, including the application of the obstruction of justice enhancement. Part I further explains how competency evaluations are ordered and conducted, paying particular attention to malingering diagnoses. Part II explores *U.S. v. Nygren*. Part III discusses the limits of confidentiality and informed consent in the context of court-ordered competency evaluations and argues that insufficient notice should bar the use of evaluation results outside of a competency determination. Part IV discusses the main issues surrounding the reliability of evaluation results and details the dangers of using such inconsistent data

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[8] *See, e.g.*, United States v. Young, 811 F.3d 592, 604–05 (2d Cir. 2016) (holding that the defendant did not possess the specific intent to obstruct justice for the obstruction of justice enhancement to apply).

[9] *See, e.g.*, *id.* (rejecting the trial court's obstruction of justice increase, finding that the defendant did not deliberately lie).

[10] *See generally Obstruction of Justice*, *supra* note 5.

[11] *See generally* Kathy Faulkner Yates, *Therapeutic Issues Associated with Confidentiality and Informed Consent in Forensic Evaluations*, 20 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 345, 349–52 (1994).

[12] 933 F.3d 76, 87–88 (1st Cir. 2019).

[13] *Id.* at 82, 88.

to support a sentence enhancement beyond the otherwise applicable guidelines for the charged crime.

I. Background

A. *Calculating Criminal Sentences Under the U.S. Sentencing Guidelines*

Federal sentencing begins with the calculation of the applicable sentencing range under the U.S. Sentencing Guidelines [hereinafter Guidelines].[14] Each federal crime is assigned to one of forty-three sentencing levels, depending on the severity of the crime, which will then fall within one of six sentencing length ranges.[15] Sentence length depends on the base offense level for the convicted crime and the extent of the individual's criminal history.[16] For example, a level fifteen offense carries a sentence range of eighteen to twenty-four months in prison for a first-time offender and from forty-one to fifty-one months for a defendant with an extensive criminal record.[17] Two levels higher, at offense level seventeen, the range for first time offenders is increased from twenty-four to thirty months and from fifty-one to sixty-three months for a defendant with substantial criminal history.[18]

Regardless of the offense for which an individual is convicted, the base sentence may be enhanced as a consequence of various aggravating factors including obstruction of justice.[19] If applicable, § 3C1.1 of the Guidelines provides for a two-level increase in offense level.[20] The impact of a two-level increase spans from a relatively small adjustment at the lowest base offense levels "to a difference of an additional sixty-eight months [in prison] at the highest levels."[21] The obstruction of justice enhancement is applicable if:

> (1) the defendant willfully obstructed or impeded, or attempted to

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[14] CHARLES DOYLE, OBSTRUCTION OF JUSTICE: AN OVERVIEW OF SOME OF THE FEDERAL STATUTES THAT PROHIBIT INTERFERENCE WITH JUDICIAL, EXECUTIVE, OR LEGISLATIVE ACTIVITIES, CRS No. RL34303, at 81 (2014), https://perma.cc/XG5V-3MH2. *See generally* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 5–7 (1988).

[15] DOYLE, *supra* note 14, at 82.

[16] *See* Breyer, *supra* note 14, at 6.

[17] FEDERAL SENTENCING: THE BASICS, U.S. SENTENCING COMM'N 42 (2018), https://perma.cc/GJR4-GKYA.

[18] *Id.*

[19] *See* DOYLE, *supra* note 14, at 81.

[20] DOYLE, *supra* note 14, at 81–82.

[21] DOYLE, *supra* note 14, at 82.

> obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and (2) the obstructive conduct related to (A) the defendant's offense of conviction and any relevant conduct; or (B) a closely related offense, increase the offense level by 2 levels.[22]

Obstructive conduct can vary widely in nature, degree of planning, and seriousness; thus, courts are given broad discretion in determining whether application of the enhancement is warranted.[23] It is imperative that courts exercise the utmost caution in making this determination as the enhancement is not meant to punish defendants for the exercise of a constitutional right, nor is it intended to penalize defendants for inaccurate testimony or statements resulting from confusion, mistake, or faulty memory that do not reflect a willful attempt to obstruct justice.[24]

To make its determination, a court compares a defendant's alleged obstructive conduct to the examples set forth in application notes four and five of the Guidelines.[25] Note four lists conduct to which the adjustment is intended to apply.[26] The list includes conduct that is considered to be seriously obstructive and deserving of additional deterrence beyond the general sentencing range.[27] For example, eligible conduct includes, but is not limited to: (1) threatening or otherwise unlawfully influencing a co-defendant, witness, or juror; (2) producing a false, altered, or counterfeit document or record during an official investigation or judicial proceeding; (3) destroying or concealing evidence that is material to an official investigation or judicial proceeding; or (4) providing materially false information to a judge or magistrate judge or law enforcement, or probation officer or pre-sentencing officer of the court.[28]

For comparison, note five sets forth examples of less serious conduct to which the enhancement is not meant to apply.[29] However, such conduct may result in a greater sentence within the otherwise applicable guideline range, or may be a factor in determining whether to reduce a defendant's sentence

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[22] U.S. SENTENCING GUIDELINES MANUAL § 3C1.1 (U.S. SENTENCING COMM'N 2018).

[23] *Id.*

[24] *See generally* Hark & Hark, *Federal Sentencing Enhancements for Obstruction,* PHILA-CRIMINAL-LAWYER.COM, https://perma.cc/EPV9-MGVM (last visited Nov. 4, 2021).

[25] *See* U.S. SENTENCING GUIDELINES MANUAL § 3C1.1 cmt. nn. 4–5.

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

under § 3E1.1 (Acceptance of Responsibility).[30] Such conduct includes, but is not limited to: (1) making false statements, not under oath, to law enforcement officers; (2) providing incomplete or misleading information, not amounting to a material falsehood, in respect to a presentence investigation; or (3) lying to a probation or pretrial services officer about a defendant's drug use while on pretrial release.[31]

In addition to determining the nature of a defendant's conduct in comparison to the application notes, courts also consider recommendations made by a defendant's probation officer, oral arguments made at the sentencing hearing, and most notably, expert opinion.[32] If a court establishes by a preponderance of the evidence that a defendant's conduct was sufficiently obstructive, the enhancement may be applied.[33]

B. *Competency Hearings and Evaluations*

Conviction of a defendant who is mentally incompetent violates due process.[34] Under 18 U.S.C § 4241(a), a court must order a competency hearing if there is a reasonable belief that "the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense."[35] A hearing may result from an order on a motion by the defendant, the attorney for the Government, or by the court, and may be made at any point throughout the adjudication process.[36] Pursuant to 18 U.S.C. § 4247(d), the defendant, represented by counsel, "shall have the opportunity to testify, to present evidence, to subpoena witnesses on his or her behalf, and to confront and cross-examine witnesses who appear at the hearing."[37] A defendant is competent to stand trial if the defendant is determined to have sufficient mental capacity to consult with a lawyer with a reasonable degree of rational understanding of the proceedings.[38] In

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[30] *Id.*

[31] U.S. SENTENCING GUIDELINES MANUAL § 3C1.1 cmt. n.5.

[32] *See id*. § 6A1.1.

[33] *See* United States v. Robertson, 946 F.3d 1168, 1171 (10th Cir. 2020).

[34] 1 U.S. DEP'T OF JUSTICE, CRIMINAL RESOURCE MANUAL: 1–499 § 63 (2018) [hereinafter CRIMINAL RESOURCE MANUAL].

[35] 18 U.S.C. § 4241(a).

[36] CRIMINAL RESOURCE MANUAL, *supra* note 34.

[37] CRIMINAL RESOURCE MANUAL, *supra* note 34.

[38] CRIMINAL RESOURCE MANUAL, *supra* note 34.

practice, such determinations are based almost entirely on the recommendations of psychological or psychiatric evaluators.[39]

The court selects evaluators from a list of board-certified psychiatrists and licensed clinical psychologists maintained by the U.S. Attorney's Office.[40] There is no required method for administering competency evaluations.[41] However, evaluators will typically begin by reviewing all of a defendant's medical and criminal records to become familiar with a defendant's mental health history and pattern of criminal history, if applicable.[42] A sit-down interview is also typically conducted, which generally lasts from two to six hours.[43] During the interview, the evaluator asks questions pertaining to a defendant's memory of the incident, knowledge of the charges being brought, and the defendant's understanding of the court procedures and participants.[44] In addition to the record review and the in-person interview, examiners administer psychological testing.[45] Psychological testing may include: an IQ test to measure intellectual deficiencies, a neurological assessment to evaluate possible organic conditions, or diagnostic screening interviews to gather information about and detect a variety of possible symptoms and conditions, including malingering.[46]

Malingering "is the faking or intentional exaggerating of symptoms of psychiatric illness."[47] There is no single test or method that experts use to detect malingering. [48] Rather, testing measures range in "time required for administration, technique, format and theoretical approach."[49] However, studies suggest that across all measures, malingering test accuracy remains

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[39] Patricia A. Zapf & Ronald Roesch, *Mental Competency Evaluations: Guidelines for Judges and Attorneys,* 37 CT. REV., no. 2, 2000, at 28, 29.

[40] CRIMINAL RESOURCE MANUAL, *supra* note 34, § 64.

[41] Zapf & Roesch, *supra* note 39, at 31.

[42] *See* Mark Walker, *How Court-Ordered Competency Evaluations Work,* ARGUS LEADER (Nov. 14, 2015, 6:26 PM CT), https://perma.cc/Y7UF-98MB.

[43] *Id.*

[44] *Id.*

[45] *See* Michael Welner, *Competency to Stand Trial, Proceed Pro Se, Plea, Receive Sentencing*, FORENSIC PANEL, https://perma.cc/SX5U-QHPM (last visited Nov. 4, 2021).

[46] *See id.*

[47] *Id.*

[48] Melanie R. Farkas et al., *Do Tests of Malingering Concur? Concordance Among Malingering Measures*, 24 BEHAV. SCI. & L. 659, 660 (2006).

[49] *Id.*

a major obstacle in psychology and law.[50] Though comparing results of multiple testing instruments may help to offset some level of inaccuracy, experts still question whether clinicians have any real ability to detect malingering at all.[51] Despite such challenges, courts rely upon expert diagnoses of malingering to make competency and sentencing determinations.[52] The Third, Fifth, Ninth, and now the First Circuit (in *U.S. v. Nygren*), have held that a malingering diagnosis establishes, by a preponderance of the evidence, that a defendant has intentionally obstructed justice and is thus eligible for enhancement under § 3C1.1.[53]

II. Court's Opinion

A. *Factual Background and Procedural History*

In September 2015, Steven Nygren was arrested and charged with sixty-three counts of bank fraud, one count of use of an unauthorized device, and one count of tax evasion.[54] The following April, Nygren suffered a stroke which caused "profound deficits" affecting his cognition and memory.[55] On August 25, 2016, Nygren appeared before a magistrate judge for initial presentment.[56] The magistrate judge deferred the proceedings until October 24, 2016, in light of the defendant's medical condition.[57] At his postponed arraignment, Nygren pleaded not guilty to all counts.[58]

Two weeks later, Nygren filed a motion for a competency hearing pursuant to 18 U.S.C. § 4241(a)-(c).[59] With his motion, Nygren included a "letter from [his] treating neurologist and a forensic competency report prepared by a retained expert."[60] After he reviewed the defendant's medical

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[50] *Id.*

[51] *See* John Parry & Eric Y. Drogin, *Malingering Addendum*, 25 MENTAL & PHYSICAL DISABILITY L. REP. 716, 716–17 (2001).

[52] *See, e.g.*, United States v. Nygren, 933 F.3d 76, 81 (1st Cir. 2019); United States v. Bonnett, 872 F.3d 1045, 1046 (9th Cir. 2017); United States v. Batista, 483 F.3d 193, 197 (3rd Cir. 2007); United States v. Greer, 158 F.3d 228, 239 (5th Cir. 1998).

[53] *See, e.g.*, *Nygren*, 933 F.3d at 82; *Bonnet*, 872 F.3d at 1047; *Batista*, 483 F.3d at 197; *Greer*, 158 F.3d at 240–41.

[54] *Nygren*, 933 F.3d at 80.

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Nygren*, 933 F.3d at 80.

records, Nygren's retained expert concluded that he was not legally competent to stand trial.[61] The government objected to the motion for a competency hearing, citing Nygren's problematic performance on the test of memory malingering ("TOMM") and the validity indicator profile ("VIP"), which are used to detect malingering and valid versus invalid responses, respectively.[62] The court overruled the government's objection to the defendant's motion for a competency hearing and ordered that the defendant continue rehabilitation and submit to a second competency evaluation at a government facility.[63]

In February and March, an evaluator at the Bureau of Prisons ("BOP") conducted the second competency evaluation.[64] The BOP evaluator first administered the Minnesota Multiphasic Personality Inventory ("MMPI") before repeating the TOMM and VIP.[65] According to the evaluator, Nygren failed all three tests designed to detect malingering and concluded that Nygren was competent to stand trial.[66] Nygren's own expert conducted a re-evaluation and concurred in the BOP examiner's judgment.[67] However, Nygren's expert did not join in the BOP evaluator's conclusion that malingering was the only explanation for Nygren's test results.[68]

In light of the BOP examiner's results, Nygren's probation officer "recommended a two-level enhancement for obstruction of justice" reasoning that the defendant "intentional[ly] under[performed] . . . on objective testing as part of his evaluations in an effort . . . to avoid legal culpability."[69]

On May 25, 2018, the district court convened a disposition hearing, at which each side presented expert testimony.[70] Ultimately, the court found that the government proved by a preponderance of the evidence that the defendant had attempted to obstruct justice by deliberately feigning incompetence "in order to skew the justice system in his favor."[71] The applicable guideline sentencing range, calculated with an enhancement for

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[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Nygren*, 933 F.3d at 80.

[67] *Id.* at 81.

[68] *Id.* at 83.

[69] *Id.* at 81.

[70] *Id.*

[71] *Id.*

obstruction of justice was 87 to 108 months.[72] The district court sentenced Nygren to a ninety-five-month incarcerate term on each of the sixty-three counts of bank fraud and a sixty-month incarcerate term for the remaining two counts.[73]

B. *U.S. Court of Appeals' Holding*

The question on appeal was whether the district court's use of feigned incompetence as a foundation for an obstruction of justice sentence enhancement was adequate to support an offense-level increase under § 3C1.1 of the Guidelines.[74] The Appeals Court addressed this case as a question of first impression.

The Appeals Court did not revisit the district court's factual findings with regard to Nygren's competence.[75] Despite testimony from the defendant's expert, who concluded that a diagnosis of malingering was not certain, the district court relied on testimony from the BOP expert.[76] The Appeals Court stated that if "there are two plausible views of the record, the sentencing court's choice between them cannot be clearly erroneous," and upheld the district court's factual finding.[77]

Based on that finding the Appeals Court held that "it is a common-sense proposition that 'a defendant who feigns incompetency misrepresents his psychiatric condition to his examiners, intending that they will believe him and convey their inaccurate impressions to the court.'"[78] After an analysis of the Guidelines, the Court concluded that the "type of conduct involved in feigning incompetency closely resembles several of the listed examples of obstructive conduct."[79] Specifically, the Court found that the defendant's conduct was more like providing materially false information to a probation officer than to a law enforcement officer.[80]

The Court rejected the defendant's arguments that he lacked the requisite intent to obstruct justice, that his conduct did not significantly obstruct or impede the proceedings, and that his conduct did not amount to

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[72] *Nygren*, 933 F.3d at 82.

[73] *Id.*

[74] *Id.* at 79.

[75] *See id.*

[76] *See id.* at 83.

[77] *Id.*

[78] *Nygren*, 933 F.3d at 82 (quoting United States v. Greer, 158 F.3d 228, 237 (5th Cir. 1998)).

[79] *Id.* at 85.

[80] *Id.*

a material falsehood.[81] Instead, the court concluded that such conduct is serious as it threatens to undermine legitimate protections, has the potential to allow evasion of justice, and may significantly disrupt the administration of justice.[82]

ANALYSIS

III. A Court Ordered Competency Evaluation Should Not be Used for Any Other Purpose Unless the Defendant is Adequately Warned

A. *Limits of Confidentiality and Informed Consent Under Federal Law*

The existence of privilege in federal proceedings is governed by federal law.[83] Federal law generally recognizes a psychotherapist-patient privilege; however, a party asserting privilege must show three elements: (1) an expectation of confidentiality (2) between a licensed psychotherapist and patient (3) in the course of diagnosis or treatment.[84] The First Circuit has, in the past, been reluctant to attach patient privilege to court-ordered psychiatric interviews, viewing privilege as an obstacle to fact-finding.[85] Federal rules of evidence governing privilege in federal courts empower federal courts to develop rules of privilege on a case-by-case basis.[86] However, the authority of federal courts to create new privileges and to develop existing privileges is narrow in scope and is meant to be exercised only after careful consideration of a strong showing of a need for the privilege.[87] The First Circuit has not yet been convinced of a need for patient privilege in court-ordered evaluations, reasoning that by definition there can be no expectation of confidentiality because the purpose of the assessment is to convey information to the court to aid in a competency determination.[88]

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[81] *Id.* at 86 (defining "material" as "evidence, fact, statement, or information that, if believed, would tend to influence or affect the issue under determination").

[82] *Id.* at 85.

[83] United States v. Gillock, 445 U.S. 360, 368 (1980); *see also,* FED. R. EVID. 501.

[84] United States v. Whitney, No. 05-40005-FDS, 2006 WL 2927531, at *2 (D. Mass. Aug. 11, 2006).

[85] *See, e.g.*, *id.* at *4.

[86] *Gillock,* 445 U.S. at 367. *See generally* FED. R. EVID. 501.

[87] *See* United States v. Pineda-Mateo, 905 F.3d 13, 21 (1st Cir. 2018) ("[P]rivilege should only apply in a particular case if it 'promotes sufficiently important interests to outweigh the need for probative evidence.'") (quoting Univ. of Pa. v. EEOC, 493 U.S. 182, 189 (1990)).

[88] Yates, *supra* note 11, at 347–48.

Thus, a lack of privilege is implied.[89] Accordingly, there is no requirement that a defendant be given explicit notice of how interactions with the clinician and the evaluation results may be used by the court.[90] Due to the important role that psychiatric competency and other related evaluations play in the judicial truth-seeking process, it would be impractical to advocate for a blanket privilege to attach to such court-ordered communications.[91] However, affording no protections to defendants can result in dire consequences.[92]

In *Estelle v. Smith,* for example, the Fifth Circuit addressed the ability of psychiatrists to accurately evaluate patients and make predictions about future behavior with information derived from just one evaluation.[93] At trial, the expert's testimony, which stated that the defendant was a sociopath who felt no remorse and was a threat to society, functioned as the sole basis for sentencing the defendant to the death penalty.[94] On a writ of habeas corpus, the U.S. District Court for the Northern District of Texas vacated the defendant's capital sentence.[95] The court's decision rested on the fact that neither the defendant nor his counsel were warned that information learned at the time of the competency examination might be used as a basis for testimony against the defendant at the sentencing stage.[96] The American Psychiatric Association echoed the court's concern and filed an *amicus curiae* brief that clearly implied the need for the defendant to understand how the information gleaned from his examination would be used in court and of the need for informed consent by the defendant.[97] *Estelle v. Smith* is an example of the most egregious misuse of forensic evaluations and the extreme

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[89] Yates, *supra* note 11, at 347–48.

[90] *See* FED. R. EVID. 501.

[91] Susan Berney-Key, Note, *The Scope of the Physician-Patient Privilege in Criminal Actions: A New Balancing Test:* People v. Florendo, *92 Il. 2d 155, 447 N.E.2d 282 (1983),* 64 NEB. L. REV. 772, 780 (1985).

[92] *See, e.g.*, Estelle v. Smith, 451 U.S. 454 (1981) (sentencing defendant to the death penalty based on psychologist testimony that defendant was a sociopath and would commit violent acts in the future).

[93] *Id.* at 472; *see, e.g.*, United States v. Nygren, 933 F.3d 76, 80 (1st Cir. 2019) (completing only three tests designed solely to detect malingering, the BOP examiner prematurely terminated the competency evaluation and made a determination).

[94] *See Estelle,* 451 U.S. at 466.

[95] *Id.* at 454.

[96] *Id.*

[97] *Id.* at 461, 470–71.

consequences that can flow from a defendant's uninformed participation.[98]

However, the use of information gleaned in the course of participation in a competency evaluation at sentencing resulting in a two-level sentence increase is similarly jarring.[99] A defendant's informed consent should be required before information gathered at competency evaluations is disseminated at the sentencing stage regardless of the resulting punishment.[100] A defendant cannot provide informed consent unless the defendant understands how information can be used in a judicial proceeding and the limits of confidentiality associated with statements made in the course of the evaluation.[101] On that logic, several courts have required a warning prior to commencing a forensic examination, including Massachusetts courts.[102] Massachusetts provides a good example of a variation of the suggested notice model.[103]

B. *The Massachusetts Model of Presumed Privilege Absent Informed Consent*

1. The Benefits of the Massachusetts *Lamb* Warning and How It Falls Short

In Massachusetts, a court appointed clinician is required to give the defendant a *Lamb* warning prior to conducting a competency evaluation.[104] A *Lamb* warning is sometimes referred to as the "psychiatric equivalent of a *Miranda* warning."[105] The warning must state that an individual's participation in the evaluation is voluntary and may be terminated at any time, that any communications made during the course of the evaluation will not be privileged, and that such communications will be disclosed in court proceedings.[106] The warning is not valid unless the individual, after

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[98] Brief Amicus Curiae for the American Psychiatric Association at 8, Estelle v. Smith, 451 U.S. 454 (1981) (No. 79-1127) [hereinafter APA Amicus Brief].

[99] *See generally* DOYLE, *supra* note 14.

[100] *See generally* Commonwealth v. Harris, 468 Mass. 429 (2014).

[101] *See id.*

[102] Yates, *supra* note 11, at 348; *see, e.g.,* United States v. Byers, 740 F.2d 1104 (1984) (appealing the use of evaluation results in the capital sentencing phase without warning).

[103] *See generally Guide on the Disclosure of Confidential Information: Appendix B,* MASS.GOV, https://perma.cc/D72G-HY8V (last visited Nov. 4, 2021).

[104] *See* Commonwealth v. Lamb, 365 Mass. 265 (1974); *All Things Considered: The* Lamb *Warning,* (Nat'l Pub. Radio broadcast Jan. 10, 2002) (audio at https://perma.cc/7U37-86WB).

[105] *All Things Considered: The* Lamb *Warning*, *supra* note 104.

[106] *Guide on the Disclosure of Confidential Information: Appendix B*, *supra* note 103.

receiving it, knowingly and voluntarily waives the privilege.[107] Notice is required because "such court-initiated interviews entail certain risks for the person to be examined."[108] Yet, because the *Lamb* warning only provides notice that the evaluation may be used in court proceedings generally, it is likely that a defendant will only anticipate use of privileged communications in the proceeding for which the evaluation was ordered—the competency hearing.[109]

2. Expanding the Massachusetts *Lamb* Warning

In *Commonwealth v. Harris,* the Supreme Judicial Court of Massachusetts addressed the use of competency evaluations for purposes other than competency determinations.[110] There, the results of the defendant's competency evaluation were used later at trial to determine the defendant's guilt on the offense charged.[111] The Court in that case noted that, while the defendant was warned that anything he stated in the interviews with the evaluator was not private or confidential, "he was not expressly informed (and was not required to be so expressly informed) that his statements could be used against him in a proceeding . . . to determine his guilt on the offense charged."[112] The Court, troubled by the absence of such a specific warning, observed that "[a] person suffering from a mental condition, even if found competent to stand trial, may not be able to make the inference that statements that are no longer private or confidential could be used outside a hearing on the issue of competency and in a proceeding to determine guilt."[113] Accordingly, the *Harris* Court held that "in cases going forward, a defendant should be specifically informed, when given the *Lamb* warnings, that the results of, and content of the report of, a competency evaluation may be used against him at trial."[114] The *Harris* Court's holding should be extended to all forms of forensic assessments, such as malingering, at all stages of judicial proceedings, including sentencing.[115]

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[107] *Guide on the Disclosure of Confidential Information: Appendix B*, *supra* note 103.

[108] *Lamb*, 365 Mass. at 269.

[109] Commonwealth v. Harris, 468 Mass. 429, 451 (2018); *Guide on the Disclosure of Confidential Information: Appendix B*, *supra* note 103.

[110] *Harris*, 468 Mass. at 452.

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *See generally id.*

C. *Specific Notice Should Be Extended to Malingering Evaluations for Use at the Sentencing Stage*

A defendant should be specifically informed how information gathered in the course of a competency hearing can affect him or her at sentencing.[116] Absent comprehensive notice of the potential uses of evaluation results, "[a] person suffering from a mental condition may not otherwise fully comprehend the significance of the use to which the examination may be put."[117] Put simply, a defendant may not be aware that such information could result in a two level increase in sentence.[118] In order to adequately satisfy the notice requirement, with regard to use at sentencing, the required warning should be sufficiently specific.[119] Without any notice, a competency evaluator's scope of influence seems narrowly confined to the competency hearing.[120] Given a *Lamb* warning, the evaluator's scope of influence broadens, but the extent and nature of the evaluator's influence remains ambiguous.[121] This ambiguity should be clarified by requiring that the warning include notice of the specific sentencing implications of speaking to an evaluator and participating in competency testing.[122] However, it may be challenging to determine what such notice should sound like given that the enhancement provisions are themselves broadly construed.[123] As explained earlier in this Comment, courts determine the appropriateness of the obstruction of justice enhancement by comparing applicable facts to the conduct set forth in notes four and five of the commentary.[124] The examples in these notes detail how interactions with probation officers, judges, magistrate judges, and law enforcement officers can affect the statute's application.[125] The distinction between these officials is often the difference

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[116] *See* Yates, *supra* note 11, at 362.

[117] *Harris,* 468 Mass. at 452.

[118] *See id.*

[119] *See* Yates, *supra* note 11, at 362–63.

[120] *See Harris,* 468 Mass. at 452–53 (explaining that a defendant is not likely to anticipate how evaluation results and related interactions will be used against him outside of determining competence to stand trial).

[121] U.S. SENTENCING GUIDELINES MANUAL § 3C1.1 (U.S. SENTENCING COMM'N 2018) (failing to adequately instruct courts on how to treat competency evaluators for the purpose of establishing applicability of the enhancement).

[122] *See generally* Yates, *supra* note 11, at 363.

[123] *See supra* Part II(A).

[124] U.S. SENTENCING GUIDELINES MANUAL § 3C1.1 cmt. nn. 4–5.

[125] *Id.*

between eligibility for a sentence enhancement and ineligibility.[126]

For example, in *Nygren,* the Court likened the role of a court-appointed competency evaluator to that of a probation or law enforcement officer, in order to apply the enhancement.[127] However, there are fundamental problems with that comparison.[128] One major distinction is how the public perceives the two professionals in their official capacities.[129] In general, there is a level of comfort in talking to a psychologist or psychiatrist that does not exist when interacting with a law enforcement officer.[130] The public willingness to engage with an evaluator is likely due to a presumption of privilege, which of course does not legally exist in this context.[131] Clearly the comparison between a law enforcement officer and a psychiatrist is not an obvious one; thus, a defendant cannot be expected to anticipate the consequences of evaluation participation.[132] Therefore, defendants should be specifically informed that intentionally misleading a competency evaluator may be considered obstruction of justice, eligible for application of § 3C1.1.[133] The risk of a potential sixty-four month sentence increase is too great to allow the broad guidelines of the sentence enhancement commentary to govern application.[134] Instead, defendants must receive timely, specific notice of the potential consequences their participation in an exam, and even their conversations with an evaluator, can have at sentencing in order to make an informed decision about whether to participate.[135]

IV. A Malingering Diagnosis Should not be the Basis for an Obstruction of Justice Enhancement Absent Alternative Evidence of Intent

The obstruction-of-justice enhancement is premised on the theory "that 'a defendant who commits a crime and then . . . [makes] an unlawful attempt

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126 *See id.* (comparing the applicability of the enhancement depending on whether the defendant misled a judge, magistrate judge, or a law enforcement officer).

127 United States v. Nygren, 933 F.3d. 76, 84 (1st Cir. 2019).

128 *See* Harry Cheadle, *A Law Professor Explains Why You Should Never Talk to Police*, VICE (Sept. 20, 2016, 2:55 PM), https://perma.cc/3XA7-MN2A.

129 *See generally* Steven R. Smith, *Medical and Psychotherapy Privileges and Confidentiality: On Giving with One Hand and Removing with the Other*, 75 KY. L.J. 473 (1987).

130 *Id.*

131 FED. R. EVID. 501.

132 *See generally* Smith, *supra* note 129, at 547–48.

133 *See* Commonwealth v. Harris, 468 Mass. 429, 448 (2014).

134 *See* DOYLE, *supra* note 14, at 82.

135 *Harris*, 468 Mass. at 452.

to avoid responsibility is more threatening to society and less deserving of leniency than a defendant who does not so defy' the criminal justice process."[136] Accordingly, the purpose of the enhancement is properly served only where a defendant's actions were both intentional and willful.[137] Willfulness, in this context, has been defined by various courts as a "specific intent to obstruct justice."[138] As such, acts that merely create the appearance of incompetency, absent specific intent, are necessarily excluded from eligibility for the two-level enhancement.[139] In the context of feigned incompetence arising from a malingering diagnosis, the analysis is a rather dubious one given that a defendant's competence and thus ability to act knowingly to influence legal outcomes, let alone understand them, is in question.[140]

For the purposes of establishing competency, conclusions drawn by the expert psychologists and psychiatrists are not often disputed.[141] Though a defendant has a right to present evidence at a competency hearing, the evaluator's report is often dispositive in making the ultimate competency determination.[142] Accordingly, it is extremely important that the expert's findings are reliable, consistent, and accurate.[143] Unfortunately, accuracy, particularly in regard to diagnosing malingering, is a challenge recognized by the scientific community.[144] Professors of Psychology Patricia Zapf and Ronald Roesch lamented that there is no true way to assess the validity of competency determinations.[145] Comparing results from multiple testing measures may, in theory, offset limitations of a single test, but in practice is not always the case.[146]

A 2006 study entitled *Do Tests of Malingering Concur? Concordance Among Malingering Measures* was conducted to assess the accuracy and concurrence of malingering test measures.[147] The results of the study indicated that while

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[136] United States v. Emery, 991 F.2d 907, 912 (1st Cir. 1993) (quoting United States v. Dunnigan, 507 U.S. 87, 97 (1993)).

[137] U.S. SENTENCING GUIDELINES MANUAL § 3C1.1 (U.S. SENTENCING COMM'N 2018).

[138] United States v. Brown, 321 F.3d 347, 351 (2nd Cir. 2003).

[139] *See* U.S. SENTENCING GUIDELINES MANUAL § 3C1.1.

[140] *See* CRIMINAL RESOURCE MANUAL, *supra* note 34.

[141] *See* Zapf & Roesch, *supra* note 39, at 29.

[142] *See* Zapf & Roesch, *supra* note 39, at 29.

[143] APA Amicus Brief, *supra* note 98, at 8.

[144] *Speedy Trial*, *supra* note 51, at 716.

[145] Zapf & Roesch, *supra* note 39, at 34.

[146] *See* Farkas et al., *supra* note 48, at 669.

[147] Farkas et al., supra note 48, at 661.

there was some overlap, the test results overall were not highly consistent.[148] For example, the study examined two of the tests used by the expert in *Nygren's* case, including the TOMM and the VIP.[149] The results were such that where "individuals [were] classified as probable malingerers by [the] TOMM[,] [they] were not necessarily identified as [such] by other measures."[150] The study concluded that its findings might reflect either a "greater sensitivity of the TOMM to detecting subtle forms of malingering, or [instead] might indicate a tendency to over-classify malingering."[151] Furthermore, the study revealed that all of the evaluated test measures resulted in a percentage of indeterminate classifications, signifying what would have, in actual practice, been multiple misdiagnoses.[152]

According to Professors Zapf and Roesch, evaluators themselves, like the testing tools, often disagree on diagnoses.[153] Studies of diagnostic reliability have revealed that pairs of evaluators agree in approximately 80% of cases on the yes or no question of whether an individual is competent to stand trial.[154] However, at a granular level, considering an individual's particular deficiencies, the level of agreement among experts is far less remarkable.[155] "[E]xaminer agreement on specific psycholegal deficits (as opposed to overall competency) averaged only 25% across a series of competency domains."[156] To summarize that conclusion, examiners who agree that a defendant is competent to stand trial are generally not in agreement as to the qualifications for competency.[157] An example of a manifestation of these results can be found in *U.S. v. Nygren*.[158] Though both the BOP examiner and the defendant's examiner concurred in the general competency determination, the two evaluators disagreed on the nature of the deficiency or symptom that led to Nygren's failing test results on the

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[148] *See* Farkas et al., *supra* note 48, at 669.

[149] *See generally* Farkas et al., *supra* note 48, at 669.

[150] Farkas et al., *supra* note 48, at 669.

[151] Farkas et al., *supra* note 48, at 669.

[152] *See* Farkas et al., *supra* note 48, at 669.

[153] Zapf & Roesch, *supra* note 39, at 30; *see* United States v. Nygren, 933 F.3d 76, 84 (1st Cir. 2019) (accepting the testimony of one expert over the other, despite disagreement with regards to the cause of the defendant's evaluation results).

[154] Zapf & Roesch, *supra* note 39, at 30.

[155] *See* Zapf & Roesch, *supra* note 39, at 30.

[156] Zapf & Roesch, *supra* note 39, at 30.

[157] Zapf & Roesch, *supra* note 39, at 30.

[158] 933 F.3d at 83.

TOMM and VIP.[159] The BOP cogently attributed Nygren's results to malingering, while the defendant's examiner cited other possible explanations for the results.[160] Consistency in determining a defendant's particular deficiency is key to accurately assigning blame on the basis of willful intent.[161] However, widely documented inconsistencies raise serious questions of reliability.[162]

Such inconsistency is particularly disturbing in cases in which competency evaluation results are the determinative factor in sentencing.[163] As it is well-documented that particular psychological testing has very low reliability, psychiatric testimony may actually distort the fact-finding process, if solely relied upon.[164] To the extent that there are important issues for a jury to consider, such as intent to feign incompetence in an effort to obstruct justice, the court should consider the totality of the circumstances—not just expert testimony.[165] In *U.S. v. Batista,* for example, the Court applied the obstruction of justice enhancement to the defendant's sentence, finding sufficient affirmative proof that the defendant intentionally feigned incompetence in an effort to obstruct justice based not only on his competency evaluation results, but also on the testimony of a federal agent who relayed that the defendant told his co-conspirator that he planned to feign mental illness to avoid trial.[166]

The risk of erroneous application of the obstruction of justice enhancement based on unreliable results is too great.[167] Accordingly, while courts may use an examiner's testimony and evaluation results to supplement a finding of intent to feign incompetence, the intent requirement should require additional proof to protect defendants and avoid misapplication of the obstruction of justice enhancement.[168]

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159 *Id.*

160 *Id.*

161 *See* Zapf & Roesch, *supra* note 39, at 30.

162 Loren Pankratz & Laurence M. Binder, *Malingering on Intellectual and Neuropsychological Measures*, *in* CLINICAL ASSESSMENT OF MALINGERING AND DECEPTION 223, 225 (Richard Rogers ed., 1997).

163 *See* James L. Knoll & Phillip J. Resnick, *Insanity Defense Evaluations: Toward a Model for Evidence-Based Practice*, 8 BRIEF TREATMENT & CRISIS INTERVENTION 92, 101–07 (2008).

164 *See* APA Amicus Brief, *supra* note 98, at 8.

165 *See, e.g.*, United States v. Batista, 483 F.3d 193, 197 (3rd Cir. 2007).

166 *Id.*

167 *See generally* Knoll & Resnick, *supra* note 163.

168 *See, e.g.*, *Batista*, 483 F.3d at 197.

CONCLUSION

The first issue of notice may be easily resolved by requiring a specific warning. However, even with notice, a defendant runs the risk of an evaluation test resulting in false positives for malingering or inaccurate reporting. Defendants may be so wary of risking self-incrimination or inadvertently giving answers that tend to suggest malingering that they will avoid exercising their right to move for a competency hearing at all. To avoid that chilling effect, the courts should not use feigned incompetence as the basis for an obstruction of justice enhancement. Rather, courts should implement stricter notice requirements and require alternate proof of intent to ensure appropriate application of the enhancement.