No.

In the Supreme Court of the United States

STEVEN NYGREN,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. A defendant with a medically documented cognitive impairment, which defendant was engaged in rehabilitation, was progressing positively in said rehabilitation, and received consistent medical prognoses indicative of further improvement in cognitive ability, purportedly malingered during forensic evaluations to assess his competence to stand trial, which forensic evaluations were administered at different times during rehabilitation and medically documented progress.

The important federal question raised thereby is the standard under which malingering may support an obstruction of justice enhancement, U.S.S.G. § 3C1.1. More particularly, must a district court find that the purported malingering statements, made to someone who was not a court officer, were "material," "significantly obstructed or impeded the official investigation or prosecution of the instant offense" and constituted "relevant conduct"?

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The judgment of the United States Court of Appeals for the First Circuit is reprinted at Pet. App. 1a. The opinion of the United States Court of Appeals for the First Circuit is reprinted at Pet. App. 2a. See United States v. Nygren, 933 F.3d 76 (1st Cir. 2019).[1] The judgment of the United States District Court for the District of Maine at Bangor, Docket No. 1:16-cr-00106-JAW, is reprinted at Add. 1.

JURISDICTION

The First Circuit entered judgment on August 6, 2019. See Pet. App. 1a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

The Appendix, Pet. App. 10a, reproduces the text of United States Sentencing Guideline, U.S.S.G. § 3C1.1, which is at issue.

STATEMENT OF THE CASE

Steven Nygren ("Nygren") was indicted in the United States District Court for the District of Maine on 63 counts of knowingly and intentionally executing a scheme and artifice to obtain money, funds, credits, assets or other property owned by and under the custody of Camden National Bank by means of false and fraudulent pretenses, representations, and promises, in violation of 18 U.S.C. § 1344(2). See A 6-10 (counts 1-63).

Nygren also was indicted for knowingly and with the intent to defraud using

[1] The appendix filed with this petition is cited as "Pet. App.;" the appendix filed First Circuit is cited as "A;" and the addendum to the petitioner's brief filed in the First Circuit is cited as "Add."

unauthorized access devices (Capital One and Camden National Bank Visa credit cards) and obtaining things of value aggregating $1,000 or more, in violation of 18 U.S.C. § 1029(a)(2); and willfully attempting to evade and defeat the payment of employment and income taxes due and owning by him, plus penalties and interest, over several years, in violation of 26 U.S.C. § 7201. See A 11-13 (counts 64, 65).

On August 25, 2016, Nygren came before the district court for presentment, and counsel stated his intent to secure a forensic evaluation on competency since Nygren had suffered a stroke in April 2016. See A 17, 32. The government agreed that evaluation was appropriate. See A 17-18. The court deferred taking Nygren's not guilty plea, see A 18-19, and he was released pretrial, see A 22.

On October 24, 2016, Nygren again came before the district court, entered not guilty pleas, and his counsel confirmed his intent to file a motion for a competency hearing, which he filed November 7, 2016 based on a letter from primary treating neurologist, Alvin Das, MD, and a forensic evaluation by Peter Donnelly, Psy.D. See A 28-29, 31-37; A 371-82 (Doc. 20). [2]

In July 2016, Das stated that Nygren "suffered from a brain injury and has had profound deficits from that injury that have affected his cognition and memory." Das continued: "These deficits are expected to last for several months, but will slowly improve over time," noting that Nygren was receiving "outpatient rehabilitation." See A 382.[3]

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[2] Counsel represented Nygren pre-indictment, offering comparison of cognitive functioning before and after the stroke. See A 401.

[3] Nygren was arrested on related state charges that were dismissed February

In an October 15, 2016 report, Donnelly stated that Nygren's mother accompanied him to the informed consent and history-taking portions of the examination, providing additional historical information. See A 371-72.

Donnelly recounted Nygren's diagnoses and treatments. Nygren recently had undergone a neuropsychological evaluation by Robert Sedgwick, EED, see A 460-465, who reported that "Nygren often works slowly and carefully when presented with testing routines but also seems highly motivated," see A 375. Sedgwick noted that "Nygren presented with processing difficulties, sequential and simultaneous. It seems likely that his processing difficulties are related to the integrative functions associated with this part of the brain (that was damaged)." Certain tests "placed demands on sustained attention, and…Nygren found this very challenging…Nygren's chief complaint involves memory, and testing supported his self-perception. He has trouble with long-term memory retrieval and has difficulty with short-term verbal and visual memory tasks." Sedgwick described "Nygren's social and emotional presentation" as "typical of stroke/head injury patients that I have worked with in the past." See A 375.

Donnelly also administered several tests, e.g. the Kaufman Brief Intelligence Test, Second Edition, noting: "[t]here was a pattern in all three subtests that once questions reached a certain level of complexity, [Nygren] began to fail." See A 377. The Validity Indicator Profile, administered, was designed to assess the validity of responses.

2016. See A 441. Das wrote the letter when Nygren did not have pending charges.

> In some cases a finding of invalidity on the VIP indicates insufficient effort to respond correctly, or suboptimal attention and concentration during the testing. In other instances, invalidity indicates a lack of cooperation, reflecting a deliberate attempt to perform poorly.

See A 377. Donnelly concluded that Nygren's results on the verbal and nonverbal VIP subtests were invalid.

> A major hypothesis for this may have been that…Nygren was distracted by internal or external factors…[A]t the time of this evaluation…Nygren would yawn from fatigue…He appeared confused…and frustrated at times, but did attempt to complete each item...[H]is inconsistent responding may have been due to being distracted or tired. He appeared to respond correctly to easier items, and when he progressed to more difficult items, his responses became more random.

See A 377. On the Test of Memory Malingering, Nygren's results were "suggestive of not putting forward sufficient effort during the test-taking and may be associated with exaggeration of memory problems." See A 377.

> [T]he VIP and TOMM taken together, two hypotheses can be generated. In one…Nygren is still at a point of brain injury where his capacity for sustained attention and being able to deal with complexity continues to be substantially impairing his ability to give the best performance on these tests. A second hypothesis, at least regarding memory, is that he may be exaggerating his memory ability. See A 377.

Donnelly concluded: "Psychological testing…on a cognitive measure similar to that found in recent neuropsychological testing of his overall intellectual ability was in the borderline range." See A 379. Donnelly noted: Nygren "appeared to apply himself to all tests administered. He did not give up nor skip items. He appeared… more tired on the day where he was administered a malingering test." Donnelly reiterated the "primary hypothesis" for the invalid results: Nygren's "difficulties in…sustain[ed] attention and perhaps be[ing] internally distracted. He appeared to

succeed on easier items and then once he hit items that were too complex…his response style became more random, as it was likely that his problem-solving skills failed him." See A 380.

Nygren had a basic understanding of court processes, but "current cognitive limitations substantially interfere with his capacity to assist in his defense." See A 380-81. Donnelly found a "reasonable probability that…Nygren's [competence] can be restored with continued rehabilitation for his stroke." See A 380.

At a conference on December 21, 2016, the district court agreed with Nygren that "there are issues of mental competency that bear…investigation." See A 38. Nygren's counsel noted that "if he [Nygren] is progressing, because of the…unique nuances…he could get better over time, that it seems…we would want to make sure that that evaluation done at Devens[4] is done at the right time" other-wise "we've got to redo this all." See A 41. The court asked counsel to secure further medical records with a plan to hold another conference January 10, 2017. See A 41-42.

At the next conference, counsel indicated: Donnelly spoke to the outpatient psychologist, Jonathan Perry at Spaulding Rehabilitation Network, who "did not see any barriers to Nygren being reassessed for competency…in the near future." See A 44, 467-49. Nygren had a re-evaluation scheduled at Spaulding on February 1, 2017; the parties agreed that he should self-report to Devens on a date thereafter for a second competency evaluation. See A 45. The court directed the government to file a motion for a psychiatric evaluation, see A 46-47, which the court granted,

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[4] Bureau of Prisons Federal Medical Center Devens.

see A 49-57.

Nygren's evaluation at Devens resulted in a forensic report dated April 25, 2017, by Miriam Kissin, Psy.D. See A 383-406 (Doc. 39). In Nygren's self-reported medical history, Kissin noted that Nygren "noticed diminished memory capacities" since the stroke, but "'came up with strategies' to compensate for his deficits, such as writing everything down." Nygren further admitted "'a lot of improvement' in his memory and overall cognitive skills." See A 386-87.

Kissin administered several tests, e.g. the Minnesota Multiphasic Personality Inventory-Second Edition, designed to assess personality characteristics and emotional adjustment. On the MMPI-2, Kissin found that Nygren's "profile was significant for an elevation on the validity scale measuring over-reporting of psychopathology" and "neurocognitive deficits." See A 393.

On the VIP, Kissin found that "Nygren's response pattern produced a valid score on the Non-Verbal subtest, indicating good effort and motivation to perform well…[H]is Verbal subtest responses were…Inconsistent, indicating his performance was compromised by insufficient effort." See A 394.[5] On the TOMM, Kissin found that "Nygren's scores were significantly below those that would be expected …of individuals presenting with the most severe effects of traumatic brain injury." Based on the invalid results, Kissin did not administer cognitive testing. See A 394.

Kissin further noted that "there was no indication of memory problems that interfered with [Nygren's] daily routine, effective social functioning, or capacity to

[5] The results are improved over those in Donnelly's administration of the VIP in October 2016, six months earlier in Nygren's rehabilitation. See A 377.

provide information." See A 394.

> Nygren related he believes his memory capacities to be at "90%" of previous levels. He reported the persisting deficits are related to "juggling many things at once" in his head, but asserted in light of the ongoing progress…he is confident the remaining deficits would be ameliorated within the next six months…Nygren added that he feels he has made progress in his abilities since his previous evaluation by…Donnelly in October 2016.

See A 395. Kissin found that both Nygren malingered and his "present competency-related skills are not significantly compromised by symptoms of a serious mental illness or defect." See A 397, 406.

Kissin's report was filed, and the district court held a conference on June 16, 2017, at which Nygren's counsel indicated his intent to withdraw his motion, noting Donnelly's opinion that Nygren had regained competence. See A 59, 66; A 407-10 (Doc. 46).[6] The court, however, stated a plan to make findings on the question of competence before taking Nygren's guilty pleas. See A 68.

On June 20, 2017, the district court found Nygren competent, see A 82, 88, and accepted his guilty pleas to all 65 counts in the indictment, without an agreement see A 93, 96.

Over Nygren's objection, the presentence report recommended: (1) a two-level

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[6] In the supplement, Donnelly noted that Spaulding records (e.g. re-evaluation February 1, 2017) indicated that "all long-term and short-term goals have been met," e.g., "using external memory aids independently to recall complex information related to daily activities and vocational tasks; independently us[ing] compensating memory strategies to recall complex novel information with greater than 90% accuracy given additional time; solving complex problems related to daily activities and vocational tasks; and solving complex problems with 90% accuracy given additional time." See A 408. Donnelly concluded: "Nygren, who no doubt has not fully returned to his pre-stroke level of cognitive functioning, nevertheless demonstrates at least the minimal skills associated with competency." See A 410.

enhancement for obstruction of justice, U.S.S.G. § 3C1.1, and (2) denial of a three-level reduction for acceptance of responsibility, U.S.S.G. § 3E1.1. See A 413-16, 433-436, 438, 457-58.

On obstruction of justice, the probation officer relied largely on United States v. Greer, 158 F.3d 228 (5th Cir. 1998), suggesting that "Nygren engaged in a sustained pattern of trying to appear more impaired than his actual condition." See A 433-34. The report incorrectly identified that Nygren's: "efforts took planning and resolve, were not spur of the moment, and presented an inherent risk justice would be obstructed, as he was…found to be incompetent." See A 435.

The probation officer recommended denial of an acceptance of responsibility reduction based on the obstruction of justice. See A 436. The report relied on Nygren's "alleged malingering," in particular, "while in BOP custody…well after the detection of the offense by authorities." See A 436.

The district court convened a presentence conference on September 21, 2017, at which Nygren's counsel stated his intent that Donnelly testify at the sentencing hearing, and the government "suppose[d]" he may have Kissin testify. See A 103. The government filed a sentencing memorandum with exhibits, see A 115-44, 470-552, to which Nygren filed a responsive sentencing memorandum with exhibits and a motion for a variant sentence, 18 U.S.C. § 3553(a), see A 145-96, 460-469.[7]

Nygren further filed additional medical records, including a December 2017 letter from Perry, a psychologist at Spaulding, which noted that Nygren "has never

[7] The government filed replies. See A 197-220.

…denied responsibility for his crimes or implied he was aware he would be hurting others. In the fog of his substance abuse he thought he would hurt no one." Perry stated that: "I can honestly say I have never seen a patient turn around his life as profoundly as I have seen…Nygren turn his life around." See A 467.

A Spaulding speech therapy discharge dated February 1, 2017 indicated that Nygren initially "presented with a mild-moderately severe cognitive-linguistic disorder in the areas of attention, memory, executive functioning, and word finding. Standardized test scores…reflect improvements in immediate memory, visuospatial skills, and attention as compared to re-evaluation…on 9/28/2016." See A 469. His "verbal expression" was "functional for complex tasks," but his "cognitive-linguistic skills, executive functioning has improved slowly. He demonstrates adequate planning to complete complex daily tasks, with additional time;" "divided attention to complete complex structured tasks in a quiet environment;" and use of "compensatory strategies (e.g. repetition, rehearsal, alarms, calendars) to recall complex novel information when additional time is provided."[8] See A 469.

Nygren was discharged successfully from Spaulding with recommendations that he "continue to work with his psychiatrist and participate in a stroke support group to maximize adjustment/coping." See A 469.

Despite references to additional testimony, the district court entered a sentencing order. See A 221-47. In that April 10, 2018 order, the court held that Nygren: "attempted to obstruct justice…by malingering during competency evaluations" and

[8] Despite the recommendations, Kissin's report does not reflect implementing those accommodations in the test administrations. See A 469.

"is not entitled to a reduction…for acceptance of responsibility." See A 221.

On obstruction of justice, the court relied solely on the malingering findings in Nygren's forensic evaluations. See A 246-50. The court cited Greer and United States v. Wilbourn, 778 F.3d 682 (7th Cir. 2015), in that:

> While a…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.

See A 247. The court concluded that "Nygren was malingering in order to delay or avoid the criminal proceedings against him." See A 247.

On acceptance of responsibility, the court cited United States v. Gonzalez, 12 F.3d 298 (1st Cir. 1993): "[t]here is a logical inconsistency between…attempting to obstruct justice, and…accepting responsibility in a timeous manner." See A 250. Nygren has the "burden of proving that his case is 'extraordinary' and…within the narrow confines of the exception," i.e., applying adjustments under both § 3C1.1 and § 3E1.1. See A 250-51. The court held that this case was not "extraordinary" based on Nygren's "pattern of attempts to delay or avoid criminal responsibility through further deception and evasion." See A 251.

The parties requested a conference, which the district court held on April 13, 2018. See A 257. The court issued an order vacating the relevant findings in the April 10, 2018 order. See A 4, 264.

The matter came before the district court for sentencing on May 25, 2018. See A 266. Kissin testified that she administered the effort or validity testing, i.e., the VIP and the TOMM, before conducting any cognitive testing; though she usually

would administer the cognitive testing first, she began with the effort testing based on information that Nygren "may not be of full effort." She administered the MMPI, which has "scales that also speak to how frank and honest one is when approaching the test-taking procedures." See A 273.

On the VIP and TOMM, Kissin stated that Nygren's "results…were actually somewhat better in terms of sort of a less degree of malingering effects that were seen than in the previous one" conducted by Donnelly, but still showed "a problem with the way [Nygren] approached the test." See A 274. On the VIP, Nygren scored inconsistently on the verbal portion only; on the TOMM (a test of visual memory), he scored "significantly below what would be expected both for someone with a normal…cognitive capacity and…someone who's suffering…acute effects of traumatic brain injury. See A 274-75.

Specific to the TOMM, Kissin testified that Nygren scored 32 out of 50 on the first administration and 41 out of 50 on the second administration. See A 274-75.[9] "[N]ormal people would score somewhere between…48, 49, 50," whereas "[p]eople with impairment including cognitive limitations and traumatic brain injuries might get…in the mid 40s, although they could also score perfectly." Kissin found that "[t]here is no other explanation" than malingering. See A 275.

Kissin further testified that, even without the effort testing, she still would have found that Nygren was malingering because he "did not exhibit any problems

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[9] These results are improved over those derived in Donnelly's administration of the TOMM, when Nygren scored 24 out of 50 on the first administration and 28 out of 50 on the second. See A 377.

in day-to-day functioning in terms of memory," and "gave…detailed accounts about his life,"[10] but lacked memory only for "the actual acts that are alleged in terms of the offense." See A 276-77.

Kissin admitted that Nygren "may have said that" the reason that he would not discuss "the underlying misconduct…was…that the information could be used against him," but also that "he is not aware of them." See A 280-81; A 402 (report, Nygren "doesn't 'feel comfortable' discussing…his thoughts about the chance he could be found guilty of the charges because 'The other side will read this.'")

On the MMPI, Kissin testified that Nygren's results on one portion reflected a "moderate elevation," i.e., a score of 72 when a score of 50 was expected. He was not endorsing "psychiatric symptoms that were bizarre or unusual," but may have been "expressing…distress…what could be described as…a cry for help, if …feeling pressure, distress." See A 282. On another portion, Kissin testified that the scores were elevated like those "typically see[n]….in like workmen's compensation cases… when there are secondary gains around potential cognitive deficits." See A 282.

Finally, Kissin testified that a malingering result on effort testing meant that the individual was "not putting forth as much effort as one can." See A 283. Kissin would not ascribe a different hypothesis to invalid results. But see A 377, 380.

Donnelly testified, to the contrary, that the invalid effort testing results led to two hypotheses. One, "he could be exaggerating his symptoms…And the second was, what was his neurological status at the time that [he was] evaluated." See A

[10] Nygren's historical recall improved since October 2016, when his mother gave historical information to Donnelly. See A 372.

291. Donnelly testified:

> I saw him approximately five months after his stroke. Typically, it's understood that recovery – major gains are made within six months to one year and then more can happen in a second year…[I]n reading…all the records…he initially wasn't able to walk…talk. He had to participate in therapy…He had a consistent concern even when hospitalized about memory, confusion, fatigue, difficulty concentrating, even his body temperature he constantly was cold…[B]ut amongst all those concerns…all the doctors' conclusions were that his prognosis for recovery were good.

See A 291. Donnelly testified: "[i]t would be unusual to have someone" malingering "on testing alone when looking for the secondary gain of being…found incompetent to…delay a proceeding…or…have…charges dropped." See A 292.

Additional factors precluded a definitive conclusion of malingering: Nygren "was having a hard time sustaining attention, fatigued quite a lot. He took a long time to answer questions. He never gave up, but he took a very long time to process information." See A 292. Donnelly was "concerned about other variables such as his stage of recovery from his stroke, his test-taking abilities, and…how…performance on tests is different from what his behavior is in…rehabilitation." Donnelly noted that Nygren "would not be considered a very good malingerer to bomb out on just the memory tests," particularly based on his effort in treatment and recovery. See A 294.

Specific to the MMPI, Donnelly reviewed Kissin's raw data and disagreed with her. Donnelly testified that result of 80 or above was invalid; Nygren's "scores were elevated, but not to the point…you would invalidate the entire administration." See A 293-94. Specific to the VIP administered by Kissin, Donnelly noted that Nygren improved on the nonverbal area. See A 297.

The district court then ruled on application of U.S.S.G. § 3C1.1. The court relied on the cases cited in the vacated April 13, 2018 sentencing order, noting that courts "have upheld the enhancement…when defendants malingered in an attempt to convince the [c]ourt that they were insane or not competent to stand trial." See A 303. The question was whether "someone who has suffered a stroke giving his absolute and full effort to recover from the stroke" could "at the same time attempt[] to manipulate the results of a psychiatric examination…that may benefit him on a…criminal case." See A 304-05. The court did not find "any contradiction between the two," and applied the two-level enhancement, U.S.S.G. § 3C1.1. See A 305-06. The court also denied the three-level reduction for acceptance of responsibility. See A 316.

After argument on the 18 U.S.C. § 3553(a) factors, the district court sentenced Nygren to: 95 months in prison on counts 1-63; 16 months in prison on counts 64-5, all served concurrently; five years of supervised release on counts 1-63; three years of supervised release on counts 64-65, served concurrently; mandatory restitution of $815,496.27; and a $100 special assessment on each count, totalling $6,500. See A 352-361, Add. 2-3, 6.

Judgment dated May 25, 2018 entered on May 29, 2018. See Add. 1. The statement of reasons, including "Exhibit A" findings affecting sentencing, noted the application of U.S.S.G. § 3C1.1 and denial of U.S.S.G. § 3E1.1, resulting in a multiple count adjusted offense level of 28, a criminal history category II, and guideline range of 87-108 months. See A 557-59. Nygren timely appealed. See A 369-70.

By judgment dated August 6, 2019, the First Circuit affirmed the judgment of the district court. See Pet. App. 1a. By opinion, the First Circuit explained: "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.' United States v. Greer, 158 F.3d 228, 237 (5th Cir. 1998)." See Nygren, 933 F.3d at 82. The First Circuit continued:

> The court's use of [the malingering] factual finding as the foundation of an obstruction-of-justice enhancement raises an important question…unresolved in this circuit: May feigned incompetency comprise the basis for an obstruction-of-justice enhancement and, thus, support an upward offense-level adjustment under U.S.S.G. § 3C.1.1?...Although this is a question of first impression, we do not approach it without some guidance…[T]he application notes make pellucid that obstruction of justice is capacious enough to encompass a broad swathe of conduct…And in keeping with the tenor of those application notes, our determination must be tethered to considerations such as the nature and gravity of the defendant's conduct and the likelihood that such conduct will interfere with the administration of justice.

See Nygren, 933 F.3d at 84.

The First Circuit concluded that "since a defendant 'is accountable for [his] own conduct and for conduct that [he]…counseled, commanded, induced, procured, or willfully caused,' U.S.S.G. § 3C1.1 cmt. n. 9, it seems logical that he should be held responsible for erroneous conclusions that he has caused another to reach." See Nygren, 933 F.3d at 85 (citing Greer, United States v. Cline, 332 Fed. Appx. 905, 910-11 (4th Cir. 2009)).

Further, "[r]egardless of whether a defendant's pretense of incompetency is successful, a serious risk exists that his efforts will significantly impede or at least delay the progress of his case." See Nygren, 933 F.3d at 85. "This reasoning applies

with equal force when a defendant has not spun a fictitious illness from whole cloth but, rather,…willfully exaggerated the symptoms of a genuine illness in a manner intended to influence a competency assessment." See Id. (citing United States v. Batista, 483 F.3d 193, 195-96 (3d Cir. 2007), United States v. Patti, 337 F.3d 1317, 1320, 1325 (11th Cir. 2003)).

The First Circuit rejected Nygren's argument that "false statements to competency evaluators must cross a materiality threshold before triggering the enhancement;" see Nygren 933 F.3d at 86; "obstructive conduct must be 'related to…the defendant's offense of conviction and any relevant conduct;'" see Id. at 87; and "feigned incompetency may comprise obstruction of justice only when it 'significantly obstructed or impeded the official investigation or prosecution of the instant offense,'" see Id. at 87. The First Circuit further rejected Nygren's argument that "his conduct bears closer resemblance to providing false information to a law enforcement officer," holding, "the defendant's conduct is more similar to providing materially false information to a probation officer than a law enforcement officer." See Id. at 87.

This petition for a writ of certiorari is filed timely.

REASONS FOR GRANTING THE WRIT

I. THE IMPORTANT QUESTION OF FEDERAL LAW ON APPLICATION OF U.S.S.G. § 3C1.1 TO MALINGERING.

The First Circuit has decided an important question of federal law that has not been, but should be, settled by this Court, to wit, whether purported malingering during forensic evaluations to assess competence to stand trial, administered to a defendant with a documented cognitive impairment, which defendant is engaged

in rehabilitation, is progressing positively in said rehabilitation, and has received consistent medical prognoses indicative of further improvement in cognitive ability, warrants a three-level obstruction of justice enhancement under U.S.S.G. § 3C1.1, particularly when the purported malingering was not "material," did not "significantly obstruct[] or impede[] the official investigation or prosecution of the instant offense," and did not constitute "relevant conduct." See S.Ct. R., Rule 10(c).

To begin, U.S.S.G. § 3C1.1 provides that:

> If (1) the defendant willfully obstructed or impeded, or attempted to 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…increase the offense level by 2 levels.[11]

The Fifth Circuit first explained: "commentary to § 3C1.1 does not explicitly refer to the act of feigning incompetence in order to avoid trial, conviction or sentencing." See Greer, 158 F.3d at 235 ("no cases precisely on point"). Thus, based on the "and" language in § 3C1.1, the questions are: (1) whether "malingering" fits in the "non-exhaustive list of…the types of conduct to which this adjustment applies" under U.S.S.G. § 3C1.1 n. 4, and (2) whether "malingering" is related to "the defendant's offense of conviction and any relevant conduct," defined under U.S.S.G. § 1B1.3.

First, application note 4 provides, in part, that an enhancement applies to:

> (F) providing materially false information to a judge or magistrate judge;
>
> (G) providing a materially false statement to a law enforcement officer that significantly obstructed or impeded the official investigation or prosecution of the instant offense;

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[11] Emphasis added.

(H) providing materially false information to a probation officer in respect to a presentence or other investigation for the court;

(I) other conduct prohibited by obstruction of justice provisions under Title 18, United States Code (e.g., 18 U.S.C. § 1510, 1511)…

See U.S.S.G. § 3C1.1 n.4. On subsection (I), 18 U.S.C. § 1510 prohibits "willfully endeavor[ing] by means of bribery to obstruct, delay, or prevent the communication of information relating to a violation of any criminal statute of the United States by any person to a criminal investigator;" 18 U.S.C. § 1511 prohibits conspiring "to obstruct the enforcement of the criminal laws of a State or political subdivision… with the intent to facilitate an illegal gambling business."

The common hallmark of conduct identified in subsections (F) through (H) is materiality; the common hallmark of conduct identified in subsection (I) is illegality in addition to the obstruction, e.g., bribery[12] and illegal gambling.[13] On the former, the critical role of a materiality determination is reinforced by the "non-exhaustive list of…conduct to which" the adjustment is inapplicable, and for which "materiality" is not evident, e.g.:[14]

(B) making false statements, not under oath, to law enforcement officers…

(C) providing incomplete or misleading information, not amounting to a material falsehood, in respect to a presentence investigation…

(E) lying to a probation or pretrial services officer about defendant's drug use while on pretrial release…

See U.S.S.G. § 3C1.1 n. 5. Thus, determination of whether purported malingering

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12 See 18 U.S.C. § 201 (bribery of public officials and witnesses).

13 See 18 U.S.C. § 1955 (illegal gambling businesses).

14 The latter (i.e., additional illegal conduct) does not apply here.

constituted willful obstruction or attempt to obstruct "the administration of justice with respect to the…prosecution" should require a determination that the purported malingering was "material."

Application note 6 defines "[m]aterial:" "evidence, fact, statement, or information that, if believed, would tend to influence or affect the issue under determination." See U.S.S.G. § 3C1.1 n. 6. "[T]he test for materiality under the obstruction-of-justice guideline is not stringent." United States v. Quirion, 714 F.3d 77, 81 (1st Cir. 2013). Of course, "materiality is a case-by-case issue, and that identical falsehoods could be material" in one context, but not another. United States v. Biyaga, 9 F.3d 204, 205 (1st Cir. 1993).

A second distinction between the non-exhaustive lists in application notes 4 and 5 is the degree to which the "evidence, fact, statement, or information" (referred to as "statements") obstructed justice. Contrasted to material statements made to court officers, material statements made to someone other than a court officer must have "significantly obstructed or impeded the official investigation or prosecution of the…offense." See U.S.S.G. § 3C1.1 n. 4(G), 5(A) ("actually resulted in a significant hindrance to the investigation or prosecution of the instant offense"); United States v. Restrepo, 53 F.3d 396, 397 (1st Cir. 1995).

Thus, a district court should find that statements were "material" and were made to a court officer to support the enhancement, see U.S.S.G. § 3C1.1 n. 4; if not made to a court officer, a district court should find that material statements "significantly obstructed or impeded the official investigation or prosecution of the instant

offense" to support the enhancement see U.S.S.G. § 3C1.1 n. 4-5. Absent a requirement that the district court render said factual findings, "malingering" should not fit in "non-exhaustive list" under U.S.S.G. § 3C1.1 n. 4.

It should be made clear, for malingering to sustain an enhancement under § 3C1.1, it should correlate to, or generally be consistent with, the conduct identified in the non-exhaustive list in application note 4. To hold otherwise would contravene "'a cardinal principle of statutory construction' that 'a statute [or here, a guideline] ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." See e.g. TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001) ("It is our duty 'to give effect, if possible, to every clause and word of a statute.'").

The most-oft-cited Circuit decision on application of § 3C1.1 to malingering, the Fifth Circuit Greer decision, did not address that analysis.[15]

Rather, Greer explained that "courts have found behavior similar in purpose or effect to feigning incompetency to trigger § 3C1.1." 158 F.3d at 235. However, the decisions cited in Greer included conduct directly before the court, in contravention of a court order, or in reliance on a clear finding of materiality, none of which the Fifth Circuit ultimately articulated were required. See Id. at 235 ("lies on the stand about mental state," "material lies about physical condition and…effect on mental state," "willfully disguise[ing] a handwriting exemplar," "[f]ailing to report to give examples" or to submit to court ordered evaluations).

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[15] Respectfully, the First Circuit in Nygren is the first to do so on this important federal question.

That distinction should be pivotal to any analysis of whether a defendant's statements or conduct correlate to the statements or conduct in the non-exhaustive list in application note 4. The Fifth Circuit wrongly assigned no significance to "[t]he fact that each of the above examples, unlike feigning incompetency, fits under one of the categories of behavior that, according to Application Note [4], triggers the obstruction enhancement." Greer, 158 F.3d at 236.

Though the Fifth Circuit contemplated that "feigning incompetence may well fall under a broad interpretation of Application Note 3(b), which refers to producing or attempting to produce a false record,"[16] or "may...implicate Application Note 3(i), which states that § 3C1.1 applies to conduct prohibited by 18 U.S.C. §§ 1501-1516,"[17] consistent with well-settled precedent, see Biyaga, supra., a district court should render such factual findings to hold that a "malingering" test result, in a specific case, supports an obstruction of justice enhancement under U.S.S.G.§ 3C1.1. Greer, 158 F.3d at 236 (quotations, emphasis added).

Other Circuits that applied an obstruction of justice enhancement based on malingering relied on, and offered far less analysis than, Greer. Rather than articulate a standard by which malingering supported an obstruction of justice enhancement, most Circuits merely reiterated that application of "the obstruction of justice enhancement to defendants who willfully feign incompetency in order to avoid trial and punishment does not unconstitutionally chill a defendant's right to seek a competency hearing." See Patti, 337 F.3d 1325; United States v. Bonnett, 872 F.3d

16 This provision correlates to 2016 U.S.S.G. § 3C1.1 n. 4(C)
17 This provision correlates to 2016 U.S.S.G. § 3C1.1 n. 4(I).

1045, 1046 (9th Cir. 1998) (citing "at least four other Circuits"); Batista, 483 F.3d 197-98; Wilbourn, 778 F.3d at 684.

Other Circuits, without analysis, further generically stated that, like "several of our sister circuits have found," "feigning…mental illness is sufficient grounds for the imposition of the obstruction of justice enhancement." See Batista, 483 F.3d at 197-98; Wilbourn, 778 F.3d at 684 ("other federal courts of appeals that have confronted it and issued published opinions" have held that a defendant obstructs justice "by exaggerating symptoms at a competence hearing"). Adoption of Greer, without analysis, when Greer did not explore the non-exhaustive lists in the application notes to articulate a standard, falls short of answering this important federal question, not previously decided by this Court.

Briefly applied here, Donnelly and Kissin were not court officers, and thus, to support an obstruction of justice enhancement, a district court should have to find that Nygren's statements were "material" and "significantly obstructed or impeded the official investigation or prosecution of the instant offense."[18]

The purported malingering, however, was not "material;" even "if believed, [it] would [not] tend to influence or affect the issue under determination." See U.S.S.G. § 3C1.1 n. 6. Nygren's results on the effort or validity testing administered by Donnelly, i.e., VIP and TOMM, did not lead Donnelly to find that Nygren malingered. See A 377. Donnelly's "primary hypothesis" for the invalid results was that Nygren had difficulty with sustained attention and internal distraction; "[h]e…

[18] Even if deemed court officers, a district court still should have to find that the statements were material.

succeed[ed] on easier items and then once he hit items that were too complex…his response style became more random, as it was likely that his problem-solving skills failed him." See A 380.

> Typically, it's understood that recovery – major gains are made within six months to one year and then more can happen in a second year…He had a consistent concern even when hospitalized about memory, confusion, fatigue, difficulty concentrating…[B]ut amongst all those concerns…all the doctors' conclusions were that his prognosis for recovery were good.

See A 291. Any purported malingering on the October 2016 VIP and TOMM tests administered by Donnelly was not "material;" it did not influence the determination of competence.

Of note, the October 2016 evaluation occurred only five months post-stroke; another six months passed before the April 2017 evaluation, with the intervening medical records providing evidence of the predicted improvement. See e.g. A 469.

Consistent with those cognitive improvements, Nygren's effort or validity test results improved when Kissin administered the VIP and the TOMM in April 2017. On the VIP, "Nygren's response pattern produced a valid score on the Non-Verbal subtest," but "his Verbal subtest responses were…Inconsistent, indicating…insufficient effort." Compare A 394 with A 297, 377 (Donnelly). On the TOMM, "Nygren's scores were significantly below those that would be expected even of individuals presenting with the most severe effects of traumatic brain injury." See A 394. However, the raw data evidenced improvement. See A 274-75, 377.

Even so, Nygren's purported malingering in Kissin's April 2017 evaluation did not "tend to influence or affect the issue under determination." See U.S.S.G. §

3C1.1 n. 6. Nygren provided consistent responses to both Donnelly and Kissin on questions about the charge, the legal process and assisting his attorney. See A 378-79, 398-403. In October 2016, Donnelly concluded that Nygren had "a basic understanding of the charges against him" and "the function of key participants in the courtroom," but that "current cognitive limitations substantially interfere[d] with his capacity to assist in his defense." See A 380. Concern on the latter was answered by Nygren's well-documented, intervening progress in rehabilitation, regardless of the results of Kissin's effort testing administration. See A 371-82, 407-10, 460-49.

Assuming arguendo that Nygren's statements were material, the purported malingering statements, made to someone not a court officer, did not significantly obstruct or impede the prosecution. See U.S.S.G. § § 3C1.1 n. 4(G), 5(A). The timeline here establishes the contrary.

Kissin concluded that Nygren malingered based on testing administered and observations made between March and April 2017; Kissin's report, dated April 25, 2017, resulted in a conference in the district court on June 16, 2017, followed four days later by Nygren pleading guilty to all 65 counts in the indictment. See e.g. A 59, 66, 93, 96, 393-94, 397, 406. Only one month after Kissin's report, Nygren also completed a follow-up forensic evaluation with Donnelly, which did not delay the June 2017 conference. See A 407.

Important, Kissin did not report or otherwise testify that Donnelly's opinion that Nygren was incompetent in October 2016 was incorrect. She only concluded, in April 2017, based in part on medical records post-dating Donnelly's evaluation, that

Nygren was competent, regardless of her opinion that Nygren malingered on effort and validity testing. See A 397, 406. A one-and-a-half-month delay between Kissin's report and Nygren's guilty plea could not have "significantly" obstructed or impeded the prosecution; notably, the government had extensive documentary evidence on the charges, see A 470-552, and readily secured lay witnesses to testify at Nygren's sentencing hearing, see A 266.

Turning to the second question: whether "the obstructive conduct related to (A) the defendant's offense of conviction and any relevant conduct." See U.S.S.G. § 3C1.1. Because Nygren's purported malingering occurred in October 2016 and April 2017, after he was indicted, the analysis must hinge on whether that constituted "relevant conduct." See A 6, 371, 383.

> As to Chapter Three, relevant conduct is defined under U.S.S.G. § 1B1.3 as:
>
> all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant…that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense.

See U.S.S.G. § 1B1.3(a)(1)(A). On the language "attempting to avoid detection or responsibility for that offense," the Eleventh Circuit has held:

> Deciding whether an act was committed "in the course of attempting to avoid detection or responsibility for [an] offense" is almost always a question of fact. It requires the sentencing judge to assess the defendant's intent for committing the additional crime. Because a district court has a "detailed understanding of the case before it"…it is generally better suited to determine whether the additional crime was committed "in the course of attempting to avoid detection or responsibility for [an] offense."

See United States v. White, 335 F.3d 1314, 1319 (11th Cir. 2003) ("giving a false

name to…police…was…an act taken 'in the course of attempting to avoid detection or responsibility' for the offense of illegally being in the United States").

Briefly applied here, the treating medical providers and evaluators expected Nygren's deficits to improve, and in fact, his deficits did improve, despite Nygren's understanding that improvement correlated to standing trial. See 285-86. As early as July 2016, Das at Massachusetts General Hospital wrote that "[t]hese deficits are expected to last for several months, but will slowly improve." See A 382. In October 2016, Donnelly opined there was a "reasonable probability that…Nygren's [competence] can be restored with continued rehabilitation for his stroke." See A 380. Rehabilitation continued and, by February 1, 2017, Nygren's "[s]tandardized test scores…reflect[ed] improvements in immediate memory, visuospatial skills, and attention." See A 469. With accommodations, Nygren demonstrated adequate planning and divided attention to complete complex tasks. See A 469.

Nygren's continued improvement in rehabilitation, with knowledge that said improvement would lead to facing the criminal charges, was inconsistent with any purported attempt to avoid responsibility for the offense, under U.S.S.G. § 1B1.3.

Further, Nygren consistently updated the district court on the diligent efforts undertaken to secure various medical records and evaluations to address the legitimate question of his competence post-stroke, beginning at his initial presentment. See e.g. A 17-18, 41, 44-45, 372, 383, 407. At a conference on June 16, 2017, only one-and-one-half months after Kissin found that Nygren was competent, Nygren informed the district court of his intent to withdraw his motion and plead guilty to

all 65 counts in the indictment, see A 59, 66, 68, which he did four days later, see A 82, 88, 93, 96.

That timeline does not evidence an "attempt to avoid…responsibility for the offense." See U.S.S.G. § 1B1.3(a)(1)(A). To the contrary, Nygren and his counsel diligently secured medical records, evaluations and resulting reports, which he then promptly provided to each subsequent evaluator. Nygren even agreed to an order to self-report to Devens for a second forensic evaluation on competence before completing the February 1, 2017 re-evaluation at Spaulding. See A 45.

This Court should grant a writ of certiorari to decide the important federal question of the standard under which malingering may support an obstruction of justice enhancement, U.S.S.G. § 3C1.1. Respectfully, this Court should hold that the purported malingering must be "material" to "the administration of justice with respect to the…prosecution," and constituted "relevant conduct" under U.S.S.G. § 1B1.3(a)(1)(A). Further, if the defendant's statements were provided to someone other than a court officer, like a forensic evaluator, then this Court should hold that the statements must have "significantly obstructed or impeded the official investigation or prosecution of the instant offense."

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,
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Dated: November 4, 2019