Courts Must Give Adequate Consideration to Statutory Sentencing Factors: *United States v. Olhovsky*

CRIMINAL LAW — SENTENCING AND PUNISHMENT — MITIGATING CIRCUMSTANCES — The Court of Appeals for the Third Circuit held that a subpoena should have been issued to the defendant's treating physician, that not doing so was not a harmless error, the district court did not give sufficient consideration to all statutory sentencing factors, and the sentence ultimately imposed was too harsh.

United States v. Olhovsky, 562 F.3d 530 (3d Cir. 2008).

I. THE *OLHOVSKY* DECISION

In August 2004, an undercover officer discovered defendant Nicolau Olhovsky ("Olhovsky") exchanging pornographic pictures of children while logged into an Internet Relay Chat (IRC).[1] Law enforcement officials searched the Olhovsky household in December 2004, and discovered a computer hard drive containing over 600 illegal images.[2] Olhovsky confessed that he owned the computer and that he used the IRC to obtain and disseminate child pornography.[3] Olhovsky also admitted to creating a file server in which he announced to fellow traffickers his intention to exchange illicit images.[4] The defendant waived his right to indictment,[5] and pled guilty to possessing child pornography.[6]

The maximum penalty for Olhovsky was ten years imprisonment,[7] and the United States Sentencing Commission Guidelines suggested a 120-month duration.[8] Olhovsky was sentenced to six years incarceration and three years of supervised release, with

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1. U.S. v. Olhovsky, 562 F.3d 530, 533 (3d Cir. 2008).
2. *Olhovsky*, 562 F.3d at 533.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Olhovksy*, 562 F.3d at 541. The relevant statute lays forth the elements necessary for a child pornography possession conviction, stating that:

> [a]ny person [who] either knowingly possesses, knowingly accesses with intent to view, any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported using any means or facility of interstate or foreign commerce or in affecting interstate or foreign commerce or in affecting interstate or foreign commerce by any means, including by computer, or that was produces using materials that have been mailed, or shipped or transported in affecting interstate or foreign commerce by any means, including by computer . . . shall be punished as provided [within the following subsection].

18 U.S.C. § 2252(a)(5)(B) (2008).
8. *Id.*

special conditions attached.[9] The sentencing court noted that possessing and distributing child pornography was a serious offense, and the sentence should correspond to the gravity of the crime.[10] The tribunal believed Olhovsky's best chance for rehabilitation was not the continued out-patient care he was receiving, but rather, incarceration; it therefore eschewed the defense's claim that prison life would be detrimental to Olhovsky.[11] Following his arrest, and as part of his conditions of pre-trial release, Olhovsky participated in counseling provided by Dr. Howard Silverman, a psychologist who specialized in the treatment of sex offenders.[12] Dr. Silverman was under contract with Probation and Pretrial Services.[13] Representatives of Probation and Pretrial Services believed that Dr. Silverman's extended treatment of the defendant made him an interested witness.[14] Therefore, the organization would not allow him to testify at sentencing.[15] The defense moved to subpoena the doctor's testimony at the sentencing hearing, and the court denied the motion.[16] Olhovsky appealed.[17]

The issues before the Court of Appeals for the Third Circuit were: (1) whether the district court erred when it refused to issue the subpoena to Dr. Silverman, and (2) whether Olhovsky's sentence was unreasonable.[18] The court first assessed the subpoena issue.[19] It found that the sentencing court committed legal error when it concluded that it could not subpoena the doctor because he would provide expert testimony, when he in actuality would have been providing fact testimony.[20] The court found that there was a high probability that the sentence would not have been the same had Dr. Silverman testified at sentencing, and a subpoena should have been issued.[21]

The next issue confronted by the Third Circuit was whether the record demonstrated that the district court's sentence was unreasonably long, and therefore, harsh for an individual convicted of possessing and distributing child pornography.[22] District courts are required to follow a three-step process at sentencing, which includes the application of § 3553(a).[23] Section 3553(a) calls for courts to give thought to factors

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9. *Id.* at 541, 543.
10. *Id.* at 542.
11. *Id.* at 543-44.
12. *Olhovsky*, 562 F.3d at 543-44.
13. *Id.* at 533.
14. *Id.* at 536.
15. *Id.*
16. *Id.*
17. *Olhovsky*, 562 F.3d. at 543.
18. *Id.* at 546. A court will review the district court's decision regarding evidence for abuse of discretion, and its legal conclusions de novo. *Id.* at 543.
19. *Id.* at 544.
20. *Id.* The court stated that it did not believe that Dr. Silverman would be supplying expert testimony, but that he would be a witness testifying to facts. *Id.* However, even if the doctor were to give definitive expert testimony, the court disputed the existence of legal authority that would disallow the sentencing court from subpoenaing him. *Id.*
21. *Id.*
22. *Olhovsky*, 562 F.3d at 546, 550.
23. *Id.* at 546-47. The three-step process is as follows:

> (1) Courts must continue to calculate a defendant's Guidelines precisely as they would have before *Booker*. United States v. Booker, 543 U.S. 220 (2005). (2) In doing so, they must formally rule on the motions of both parties and state on the record whether they are granting a departure . . . (3) Finally, they are to exercise their discretion considering the

such as the severity of the crime and the personal characteristics of the defendant, the public policy and safety considerations that necessitate the defendant's punishment, and the establishment of uniform sentences among defendants convicted of similar offenses.[24] The court reviewed the district court's implementation of the applicable factors, and determined that the judge did not properly consider these factors.[25] It noted that the record demonstrated the sentencing judge's failure to properly weigh the reports assembled by the three experts regarding those elements that were favorable to Olhovsky, and focused too heavily on punishing him for the crime committed.[26] In particular, the court lost sight of its responsibility to issue a punishment that was adequate but not unduly harsh based on Olhovsky's documented progress in therapy.[27] The sentence was not reasonable because the district court ignored some of the statutorily endorsed sentencing factors.[28]

Dr. John S. O'Brien, a government witness, gave testimony that was also influential in the district court's issuance of the six-year prison sentence.[29] The court considered the "treating physicians' doctrine," which requires that a court give greater weight to a treating physician's findings rather than those of a non-treating physician.[30] The court believed the record reflected that the judge focused on Dr. O'Brien's negative testimony while glossing over positive reports from others.[31] The treating physician, Dr. Silverman, was fearful for his patient's physical and mental health if he were to face prison time.[32] The court failed to address the physical health concern, and likewise neglected to consider other mitigating factors such as the defendant's age, subsequent

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> relevant § 3553(a) factors in setting the sentence they impose regardless whether it varies from the sentence calculated under the Guidelines.

Id.

24. *Id.* 18 U.S.C. § 3553(a) requires that the sentencing court consider:

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed—(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed education or vocational training, medical care, or other correctional treatment in the most effective manner; (3) the kinds of sentences available; (4) the kinds of sentence and the sentencing range established for—(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines . . .; (5) any pertinent policy statement . . . issued by the Sentencing Commission . . . [that] is in effect on the date the defendant is sentenced; (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and (7) the need to provide restitution to any victims of the offense.

Id. (citing United States v. Gunter, 462 F.3d 237, 247 (3d Cir. 2006)).

25. *Id.* at 547. The court states that the sentencing court must render its decision after reflecting upon all of the elements in 18 U.S.C. § 3553(a); it cannot simply declare that all factors were considered while dismissing concerns grounded in legal merit raised by either party. *Id.*

26. *Id.* at 547-48.

27. *Olhovsky*, 562 F.3d at 548.

28. *Id.*

29. *Id.*

30. *Id.* at 549.

31. *Id.*

32. *Olhovsky*, 562 F.3d at 549.

good behavior and positive lifestyle.[33] The court reasoned that the judge lost sight of Olhovsky as an individual and focused too heavily on the offense he committed, leading to a sentence that was inappropriate.[34] The Third Circuit Court of Appeals therefore vacated the sentence and remanded for further proceedings consistent with its opinion.[35]

II. THE PRECEDENTIAL HISTORY BEHIND THE *OLHOVSKY* DECISION

The Supreme Court heard its first case concerning the Sentencing Guidelines in 1989.[36] In *Mistretta v. United States*, the defendant was indicted on federal cocaine trafficking charges.[37] He argued that the newly formed Sentencing Guidelines, created by the Sentencing Commission pursuant to the Sentencing Reform Act of 1984, were unconstitutional because they violated the separation of powers doctrine.[38] The Supreme Court rejected Mistretta's argument.[39] The Guidelines were next challenged on Sixth Amendment grounds in cases such as *Apprendi v. New Jersey* in 2000,[40] *Blakely v. Washington* in 2004,[41] and in the landmark case, *United States v. Booker* in 2005.[42]

In *Booker*, the Court considered the appeals of Freddie Booker and Duncan Fanfan, who were separately convicted of drug possession.[43] *Booker* illustrates the

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33. *Id.* at 549-50.

34. *Id.*

35. *Id.* at 553.

36. Gaspard, Chris, *Kimbrough and Gall: Taking Another "Crack" at Expanding Judicial Discretion Under the Federal Sentencing Guidelines*. 36 PEPP. L. REV. 757, 765 (2009).

37. Mistretta v. United States, 488 U.S. 361, 370 (1989).

38. Gaspard, *supra* note 36, at 761. In 1984, Congress desired a cohesive statutory modality of sentencing, and so formed the United States Sentencing Commission ("the Commission") via the Sentencing Reform Act of 1984 ("the 1984 Act"). *Id.* The Commission's task was to create federal guidelines for criminal offenders. *Id.* Mistretta's two-fold argument centered on the theories that the Commission's existence was a breach of the separation of powers doctrine and that the legislature was vested with too much power. *Id.* at 765.

39. *Mistretta*, 488 U.S. at 412. The Court explained the 1984 Act did not upset the balance of power when it created the Sentencing Commission, nor did it grant the legislature excessive power. *Id.* The Commission was an autonomous bureau of the Judicial Branch, and Congress's ability to delegate the undertaking of assembling sentencing guidelines to an entity within that branch was not Constitutionally outlawed. *Id.* Additionally, the Court specifically stated that the Guidelines as adopted by Congress were mandatory, not advisory. *Id.* at 367. Justice Scalia dissented, arguing that Congress was in effect creating a new branch of government. *Id.* at 427 (*but see* State v. Philipps, 521 N.W.2d 913, 916 (Neb. 1994)).

40. Apprendi v. New Jersey, 530 U.S. 466 (2000). The defendant admitted to shooting into the home of an African-American family because of his desire to prevent the family from residing in an all-white neighborhood. *Id.* at 469. He entered into a plea agreement and was convicted of two counts of firearm possession for an unlawful purpose and one count of possessing a bomb. *Id.* at 469-70. The trial judge, upon a finding that the crime was committed in order to perpetrate racial intimidation, increased his sentence. *Id.* at 468-69. The Supreme Court reversed, deciding that an increase in a sentence that exceeds the statutory maximum would have to be heard by a jury or pled to by the defendant. *Id.* at 475-76.

41. Blakely v. Washington, 542 U.S. 296 (2004). Defendant Blakely pled guilty to kidnapping, and the court utilized a sentence that called for a greater penalty than the statutory maximum because it found that the act was purposely committed in a cruel manner. *Id.* at 298. The Court held that Blakely's sentence should not have been extended absent jury deliberation on the matter, and thus, his Sixth Amendment rights, as applied by the state, were violated. *Id.* at 313-14.

42. United States v. Booker, 543 U.S. 220 (2005).

43. *Booker*, 543 U.S. at 226, 228. Booker's case was appealed to the Court of Appeals for the Seventh Circuit. *Id.* at 226. Fanfan's was in the Court of Appeals for the First Circuit. *Id.* at 229.

constitutional problems that arise when a jury does not make a finding on all relevant facts that relate to sentencing.[44] Section 3553(b)(1) of the Sentencing Code was found to reduce the role of the jury, thus eroding a defendant's Sixth Amendment rights,[45] as it required the same sentence to be imposed despite factual differences from case to case.[46] The U.S. Supreme Court remedied this conflict by holding that § 3553(b)(1) was unconstitutional.[47] The question remained whether the Sentencing Guidelines continued to be binding.[48] Justice Breyer, in pronouncing this portion of the opinion, stated that the Guidelines are consultative, and not mandatory.[49] Therefore, a sentencing court must continue to consider the factors set forth in the Guidelines, but may also integrate other elements into its decision according to § 3553(a).[50]

In 2006, the Third Circuit Court of Appeals in *United States v. Cooper* explained that a sentence's reasonableness is determined according to the factors promulgated in § 3553(a) and which are contained in the record.[51] In *Cooper*, the issue was whether the defendant's sentence was unreasonable because of its location at the higher end of the sentencing spectrum.[52] Chief Judge Scirica noted that the sentencing court's rationale as contained in the record need not be lengthy, but must demonstrate that the court arrived at its result after considering all relevant factors.[53] If this is apparent, then there is no abuse of discretion.[54] The court refused to automatically accept the validity of a sentence merely because it fell within the applicable range.[55] *Cooper* directs trial courts to decide appropriate sentencing ranges in relation to specific facts.[56]

In *Gall v. United States*, the Supreme Court reaffirmed the finding in *Booker* holding that that the Sentencing Guidelines are not mandatory and appellate review of sentences employs the principle of reasonableness.[57] *Gall* involved a challenge to a low-

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44. *Id.* Booker and Fanfan received sentences after their respective jury trials, but upon further proceedings, the judges found additional facts. *Id.* The judge in Booker's case increased the sentence according to the new facts, but Fanfan's judge sentenced according to the jury verdict. *Id.* at 226, 228-29.

45. U.S. CONST. amend. VI. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . ." *Id.*

46. *Booker*, 543 U.S. at 244. Section 3553(b)(1) requires the court to impose a sentence according to the range established by the Guidelines for that particular crime, unless a specific departure would apply to the situation. *Id.* at 270.

47. *Id.* at 234-37. The Court was concerned with the preservation of an individual's right to a trial by jury. *Id.* at 237.

48. *Id.* at 245.

49. *Id.*

50. *Id.*

51. United States. v. Cooper, 437 F.3d 324, 329 (3d Cir. 2006). An appellate court's review of the sentence must be performed according to the same factors the district court used from § 3553. *Id.* at 328 (citing *Booker*, 543 U.S. at 260).

52. *Cooper*, 437 F.3d at 326. Cooper pled guilty to conspiring to distribute and possess illegal drugs. *Id.* at 325. She had previously been convicted of conspiracy to deliver and possess cocaine. *Id.*

53. *Id.* at 329.

54. *Id.* The court had jurisdiction to review the sentence under 18 U.S.C. § 3742(a)(1), which allows the appeal of sentences that were inflicted in contravention of the law. *Id.* at 328.

55. *Id.* at 329.

56. *Id.* at 330.

57. Gall v. United States, 128 S.Ct. 586, 594-95 (2007).

range sentence imposed upon the appellant, who voluntarily withdrew from a conspiracy to distribute drugs.[58] The Court, reversing the Eighth Circuit Court of Appeals,[59] approved the district judge's sentencing decision.[60] The Judge determined the appropriate Guidelines range, permitted the prosecution and the defense to present arguments, and properly heeded the § 3553 factors.[61]

In addition to the finding of proper procedure, the Court held that the sentence was not substantively flawed.[62] The Court found that Gall's withdrawal from the conspiracy demonstrated his intent to live a better life that would not pose a danger to society, and cited 18 U.S.C. §§ 3553(a)(2)(B), (C).[63] The Court also stated that it was not improper for the district court to emphasize Gall's youth at the time he committed the crimes,[64] despite the fact that he was an adult.[65] Finally, the Court found it acceptable for a judge to consider punishments other than imprisonment.[66]

In *Kimbrough v. United States*, the Supreme Court followed *Booker* and held that the guidelines for drug offenses are advisory, and that a sentence based upon a ratio of cocaine powder ("powder") to crack cocaine ("crack") was not mandatory.[67] Kimbrough pled guilty to conspiracy to distribute crack and powder, possession with intent to distribute more than fifty grams of crack, possession with intent to distribute powder, and possession of a firearm in furtherance of a drug-trafficking offense.[68] The district court considered § 3553, the extent of Kimbrough's involvement, and the Guidelines range for imprisonment.[69] After so doing, the court concluded that the Guidelines range was excessive because it was unfair to impose a greater punishment for possession of crack

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58. *Gall*, 128 S.Ct. at 592. Gall entered into a plea agreement with the prosecution in which he stated his intent to stop distributing ecstasy to his former co-conspirators. *Id.* The agreement stipulated that the newly altered Guidelines, which heightened the punishment for such an offense, would not apply to him because of his withdrawal. *Id.* The district court judge sentenced him to probation that would last for thirty-six months. *Id.* at 592-93.

59. *Id.* at 598. The Court of Appeals found that there existed too great a disparity between the Guidelines and Gall's sentence, *Id.* at 594, and that the district judge ignored the seriousness of the crime. *Id.* at 598-99.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Gall*, 128 S.Ct. at 600. These sections provide that "(a) [t]he court shall impose a sentence sufficient, but not greater than necessary . . . The court, in determining the particular sentence to be imposed, shall consider . . . (2) the need for the sentence imposed . . . (B) to afford adequate deterrence to criminal conduct [and] (C) to protect the public from further crimes of the defendant . . ." 18 U.S.C. §§ 3553(a)(2)(B), (C) (2003).

64. *Id.* at 591-92. Gall was a second-year college student when he began to engage in the illegal activity.

65. *Id.* at 601. The district judge found that even though Gall was twenty-one years of age, and therefore an adult, his maturity level was more akin to that of a younger individual when he committed the crime. *Id.* The Court agreed with the district judge's treatment, and found that a defendant's immaturity, in conjunction with his or her subsequent positive behavior, are proper extenuating factors in sentencing. *Id.*

66. *Id.*

67. Kimbrough v. United States, 128 S.Ct. 558, 564 (2007).

68. *Kimbrough*, 128 S.Ct. at 564.

69. *Id.* at 565.

cocaine as opposed to cocaine powder.[70] The Court of Appeals reversed the district court, and the Supreme Court granted certiorari.[71]

The Supreme Court began its analysis by examining the reasons for the Sentencing Commission's different treatment of crack and powder cocaine.[72] The Commission concluded that crack posed a greater danger to society than powder.[73] However, the far lengthier sentence imposed on an individual found guilty of a crime involving crack was deemed inappropriate in subsequent years by those who propagated the disparate ratio, as the Commission had tried to change the ratio on several occasions since the 1990s.[74] Furthermore, the sentencing court has a greater familiarity with the facts of the case and can more accurately assess the § 3553(a) factors.[75] It concluded that the district court did not abuse its discretion in departing from the Guidelines range because the departure was reasonable.[76]

In *United States v. Levinson*, the Third Circuit Court of Appeals held that the district court erred when it characterized the defendant's criminal act as one that did not have any public repercussions, and likewise held that the court failed to provide a sufficient explanation regarding its decision to depart from the Sentencing Guidelines.[77]

Levinson had entered into a negotiated plea after being indicted on one count of wire fraud and three counts of filing a false income tax return.[78] The court then calculated a Guidelines range of twenty-four to thirty months' imprisonment, plus supervised release time and restitution.[79] Levinson's request for a downward variation

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70. *Id.* The punishment for possessing one gram of crack cocaine was the same as that for possession of 100 grams of powder cocaine. *Id.* at 567.

71. *Id.* at 567.

72. *Id.* at 566. The Anti-Drug Abuse Act of 1986 created the system of mandatory minimum sentences for production and distribution, as well as the 100-to-1 ratio. *Id.* at 566-67. The variance was primarily based upon Congress's concern over crack cocaine's increasing popularity in the 1980s, especially among teenagers, the violence that surrounded the trafficking of the drug, and the highly damaging effects on a fetus when used by its mother. *Id.* at 567.

73. *Kimbrough*, 128 S.Ct. at 566-67.

74. *Id.* at 569. The Court cites the Commission's proposals in 1995, 1997, 2002, and 2007 as proof that the 100-to-1 ratio was disfavored. *Id.* Suggestions included 1-to-1, 5-to-1, and 20-to-1 ratios. *Id.* These numbers were suggested in part because the fears surrounding the use of crack cocaine were discovered to be exaggerated, and because those who distributed massive quantities of powder cocaine—which could later be converted to the more potent crack cocaine—were receiving punishments that were far less than those who distributed minor quantities of crack. *Id.* at 568.

75. *Id.* at 574.

76. *Id.* at 576. According to the Court, the district court conducted an appropriate probe of the circumstances surrounding Kimbrough's case. *Id.* For example, it addressed the relevant factors under § 3553(a), finding that the crime was a normal drug trafficking offense. *Id.* at 575. Next, it considered that Kimbrough himself had never been convicted of a felony, was consistently employed, and had served in the Armed Forces. *Id.* Also, the district court seemed to recognize that the predicted effects of crack cocaine were not as pervasively harmful as they were envisioned to be when the 100:1 ratio was formulated. *Id.* Finally, the court did not attempt to fashion a ratio of its own, and simply phrased its decision in terms of § 3553(a), stating that the sentence was uncalled for in relation to Kimbrough's crime. *Id.*

77. United States. v. Levinson, 543 F.3d 190, 200-02 (3d Cir. 2008).

78. *Levinson*, 543 F.3d at 192. Levinson owned a portion of and managed CoolerSmart, LLC ("CoolerSmart"), a subsidiary of Elkay Manufacturing Company ("Elkay"). *Id.* at 191. He misrepresented CoolerSmart's financial situation to Elkay, used funds allotted for CoolerSmart from Elkay for personal expenses and failed to report such on his income tax returns. *Id.* at 191-92.

79. *Id.* at 192-93.

from that range was subsequently granted, and he was ultimately sentenced to probation and restitution.[80]

Upon review, the court held that the district court failed to provide an adequate explanation for its decision to grant the reduced sentence.[81] It determined that *Gall* requires that the record reflect the district court's consideration of § 3553(a) factors in relation to the specific facts of the case.[82] Here, there was a complete lack of explanation as to how this defendant differed from other white-collar criminals.[83] It also found that the district court erroneously characterized Levinson's tax fraud as a private versus a public harm.[84] But even if the district court clarified the tax issue, the case would have been remanded due to the inadequacy of the record, because it failed to properly explain the court's sentencing procedure.[85] Without the district court's rationale for its divergence from the Sentencing Guidelines, it could not be certain that the district court had exercised discretion.[86]

III. AN ANALYSIS OF THE *OLHOVSKY* DECISION

Jurisdictions differ in their practice of applying the Sentencing Guidelines since *Booker*.[87] Some closely adhere to the Guidelines' suggestions in order to avoid inconsistency and to implement the intent of Congress.[88] Others give greater weight to particular facts that may have influenced the defendant in the perpetration of his or her crime.[89] In either instance, when a sentence falls within a recommended range, it can be reviewed to ascertain whether the Guidelines were employed in a correct manner.[90]

Olhovsky and other cases decided post-*Booker* emphasize the need for a thorough record. These decisions demonstrate the flexibility afforded to the trial judge in making his or her sentencing determination.[91] Likewise, Sixth Amendment concerns regarding an active jury role in criminal trials demonstrate the importance of recognizing

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80. *Id.* at 194.
81. *Id.*
82. *Id.* at 196.
83. *Levinson*, 543 F.3d at 199-200. Because the district court placed the defendant among stereotypical white-collar offenders, the court attributes the district court's departure from the Guidelines for such criminals as stemming from its disagreement with the policy behind the Sentencing Guidelines for this particular crime, as it could have no other reason for departing from the Guidelines. *Id.* at 199. But it must explain its decision and it failed to do so. *Id.*
84. *Id.* at 199. With respect to the tax charge, the government argued on appeal that the amount not paid to the United States Treasury as a result of the false filings exacted a harm upon the public, and the district court's failure to recognize such was an error upon which it should not have based its decision. *Id.* The Third Circuit agreed with this argument. *Id.*
85. *Id.* at 196. The court explains that cases such as *Booker*, *Gall*, and *Kimbrough* uphold the abuse of discretion standard of review even in light of the non-mandatory nature of the Guidelines. *Id.* at 197. However, the district court must expound on its reasons for bestowing a particular sentence. *Id.* The court states that this is especially so when a district court decides that a sentence should fall outside of the Guidelines range. *Id.*
86. *Id.* at 202.
87. 9A FED. PROC., L. ED. § 22:1566 (2009).
88. *Id.*
89. *Id.*
90. *Id.*
91. *Booker*, 543 U.S. at 245.

uniqueness in fact patterns presented by individual defendants. The necessity of an individualized appraisal of such situations and the gravity of sex crimes underscore the importance of a reviewing court's ability to see exactly how a lower court arrived at its sentence. As is articulated by *United States v. Lessner*, the court does not need to address each specific aspect of § 3553 as if it were administering a test, but the record must disclose that the court accounted for all of the factors.[92]

Olhovsky was guilty of a serious crime. As the Third Circuit recognized, collecting and distributing child pornography is not a victimless offense and should not go unpunished.[93] Section 3553(a) calls for the imposition of a punishment that relates to the seriousness of the offense, so that it may guard against the exploitation of children and deter prospective offenders.[94]

Additionally, § 3553 requires that a court not focus too heavily on the offense committed at the expense of viewing the defendant as an individual with a distinct set of circumstances.[95] The district court's analysis was meager in this area, as it nearly ignored vital facts about the defendant himself. For instance, there was little discussion concerning the defendant's youth or age at the time of the offense. During his plea hearing, he admitted that he was fifteen when he began to collect and distribute the illegal images.[96] He was caught in the IRC and arrested shortly after his eighteenth birthday.[97] Indeed, he was a minor during most of the time that he was committing the offense. While this does not excuse his actions, it at least warranted the sentencing court's consideration under § 3553(a)(1).[98] Yet, there was little evidence in the record to show that the court paid proper attention to these facts. The main purpose of § 3553(a)(2)(A) was defeated by the superficial attention and resulting overly harsh sentence instituted by the sentencing judge. One could say that the sentence devalued § 3553.[99]

The court agreed that Olhovsky was making progress. He expressed remorse for his actions. He was acting more like a normal twenty year old by working, socializing, and dating partners his own age. Clearly, the psychological treatment was beneficial. These factors, however, were outweighed by the sentencing judge's fear of Olhovsky's recidivism. The period of incarceration he prescribed for Olhovsky conflicted with § 3553(a)(2)(D),[100] likely negating Olhovksy's social strides and perhaps even jeopardizing his physical health.

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92 United States v. Lessner, 498 F.3d 185, 203 (3d Cir. 2007). Defendant Lessner plead guilty to twenty-one counts of wire fraud, defense procurement fraud, and obstruction of justice. *Id.* at 188. She was sentenced to fifty-one months in prison and nearly one million dollars in restitution damages. *Id.* The court held, in part, that the sentence was not unreasonable. *Id.* at 203.

93. *Olhovsky*, 562 F.3d at 545.

94. § 3553(a)(2)(A), (B), (C).

95. § 3553(a)(1). This section requires that the court view "the nature and circumstances of the offense and the history and characteristics of the defendant." *Id.*

96. *Olhovsky*, 562 F.3d at 533.

97. *Id.*

98. *Supra*, note 87.

99. § 3553(a)(2)(A). The "sentence imposed [should] reflect the seriousness of the offense, . . . promote respect for the law, and . . . provide just punishment of the offense." *Id.* In Olhovsky's situation, which provided sufficient mitigating circumstances, the result undermines the law.

100. § 3553(a)(2)(D). The sentence "need[s] [to] . . . provide the defendant with the needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." *Id.*

In 2008, the Ninth Circuit affirmed a five-year probationary sentence that allowed a defendant who pled guilty to possessing child pornography to remain at liberty while receiving psychiatric treatment.[101] In that case, the Guideline range was forty-one to fifty-one months' imprisonment.[102] Unlike Olhovsky, whose physical health could be endangered by a stay in prison, the defendant was fit to serve such a sentence.[103] The court, however, found that his rehabilitation, in accord with § 3553(a)(2)(D), was better served through probation.[104] The dissent expressed merited concern over the courts' frequent use of probation over incarceration. But Olhovsky—and defendants like him—is a prime candidate for respectable § 3553(a)(2)(D) consideration. His young age, physical condition, and positive response to therapy indeed call for an alternative to jail time.

The Third Circuit's reasoning was highly critical of the rationale put forth by the judge during Olhovsky's sentencing phase—and rightfully so. Perhaps most perplexing was the sentencing judge's finding that the treating physician would be giving expert testimony and, therefore, could not be subpoenaed. Additionally, the judge believed that the relevant evidence would be accurately reflected by Dr. Silverman's analysis as contained in his letters and reports. He concluded an in-court appearance by the doctor would be repetitive. However, the record reflects a major inconsistency because the sentencing judge was willing to strike a bargain with Probation and Pretrial Services that would have allowed Dr. Silverman to testify without jeopardizing his employment contract. This would contradict the judge's explanation for prohibiting the doctor's appearance. While Dr. Silverman's presence would be voluntary, therefore resolving the judge's problem with issuing a subpoena, the supposed cumulative nature of the doctor's testimony would remain.

Finally, even if Olhovsky's motion to subpoena was granted, it is acutely possible that the sentence would have remained the same. A court must apply the § 3553(a) factors in a reasonable manner consistent with the facts of the case,[105] and the court did not do so. By refusing to subpoena Dr. Silverman, the sentencing court created a substantive problem,[106] but it appears unlikely that his presence would have changed the sentencing judge's seemingly inflexible bias. The materials submitted at sentencing reflected the judgment of three experts, each of whom submitted materials corroborating findings that Olhovsky was mentally stunted. All three experts concluded that there was a reduced probability of recidivism.[107] Nevertheless, the sentencing judge appeared determined to impose a punishment that would befit a "pedophile monster."[108] A lengthy stay in prison would be more than appropriate for someone who was rightfully characterized as such, but that label was inappropriate to apply in this case. It is more indicative of the sentencing judge's failure to conduct a careful analysis of his defendant

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101. 33 MENTAL & PHYSICAL DISABILITY L. REP. 368, 421 (May/June 2009) (citing United States v. Autery, 555 F.3d 864 (9th Cir 2009)).

102. *Id.*

103. *Id.*

104. *Id.*

105. *Cooper*, 437 F.3d at 330.

106. *Olhovsky*, 562 F.3d at 553.

107. *Id.* at 548.

108. *Id.* at 545.

than it is of the reality of Olhovsky's situation. The Third Circuit recognized that, while Olhovsky's crime was a serious one, the spirit of § 3553 would be undermined if such a heavy sentence were to be upheld.

Danielle Diethorn