

## **Court Is Directed to Admit Treating Psychologist Testimony at Sentencing**

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### **Trial Court Made a Substantive Error in Excluding Favorable Testimony by a Court-Contracted Psychologist at a Federal Sentencing Hearing**

In *United States v. Olhovsky*, 562 F.3d 530 (3d Cir. 2009), the United States Court of Appeals for the Third Circuit reviewed on appeal the sentencing of Nicolau Olhovsky, who argued both that the trial court erred in not subpoenaing testimony from the treating psychologist appointed by probation to testify at sentencing and that the sentence of six years' imprisonment for possession of child pornography was unreasonable.

#### *Facts of the Case*

In August 2004, law enforcement identified Mr. Olhovsky, who was 17 years old, as a user of a child pornography website on which he traded images via the Internet. In December 2004, officers searched Mr. Olhovsky's home, where he lived with his mother and sister, and found over 600 images of child pornography on his computer hard drive. Mr. Olhovsky, now 18 years old, admitted that the hard drive and images belonged to him and that he traded pornographic materials on the Internet. He was arrested and charged with possession of child pornography. He pleaded guilty to the charge.

While Mr. Olhovsky awaited sentencing, Probation and Pretrial Services arranged for him to receive individual therapy with one of their vendors, Dr. Howard Silverman, a psychologist specializing in sex offender treatment. After more than a year of treating the patient, Dr. Silverman learned that Mr. Olhovsky was facing up to 10 years' incarceration. He wrote to Pretrial Services, the defense counsel, the prosecutor, and the court, offering opinions about factors related to the offense, Mr. Olhovsky's progress in treatment, and

his positive prognosis. Dr. Silverman identified Mr. Olhovsky's birth defects, repeated hospitalizations and surgeries, small stature, history of being bullied in school, and limited support at home as factors contributing to his social anxiety, immaturity, psychiatric difficulties including depression, and suicidal tendencies, which led to at least one psychiatric hospitalization. Socially isolated, Mr. Olhovsky spent a great deal of time alone and on his computer. Dr. Silverman opined that Mr. Olhovsky fit the characteristics of a juvenile sexual abuser (therefore, his sexual interests and arousal patterns were not fixed) and that loneliness, social incompetence, and naïve experimentation led Mr. Olhovsky to learn about sex and fulfill his sexual needs through the fantasy world of the Internet. Dr. Silverman further stated that Mr. Olhovsky had a good prognosis, citing his progress thus far and that incarceration would likely cause regression and threaten his personal safety because of his physical limitations.

The defense counsel asked Dr. Silverman to testify at sentencing, and he agreed. Pretrial Services objected, because, according to the vendor contract, Dr. Silverman was precluded from testifying on behalf of a client. The defense counsel decided to subpoena Dr. Silverman, but the court denied the motion on grounds that an expert witness could not be subpoenaed and that Dr. Silverman, because he would offer an opinion on prognosis, was an expert. The defense informed the court that Dr. Silverman was willing to testify and that it was requesting a subpoena only because of Pretrial Services' refusal to allow him to testify voluntarily. The court then stated that Dr. Silverman could testify if he wished to do so and that the court and Pretrial Services would resolve the contract issue. The matter was not resolved, and Dr. Silverman did not testify. Instead, the defense submitted Dr. Silverman's letter and the treatment records. It also sought evaluations and expert testimony by two other psychologists, both of whom agreed with Dr. Silverman's opinions. The prosecution included testimony by a psychiatrist who did not evaluate Mr. Olhovsky or review Dr. Silverman's notes. He offered a less favorable assessment of future risk. Mr. Olhovsky was sentenced to six years of a possible 10-year sentence followed by three years of supervised release with special conditions.

*Ruling and Reasoning*

The U.S. Court of Appeals for the Third Circuit held that the trial court had erred in refusing to subpoena Dr. Silverman, concluding that Dr. Silverman was a fact witness as a treating psychologist, and that there was no legal obstacle to subpoenaing expert witnesses. The appeals court also held that the absence of Dr. Silverman's testimony was not a harmless error and that the appeals court was "unable to conclude that it is highly probable that the district court would have imposed the same sentence given an opportunity to discuss its concerns with Dr. Silverman . . ." (*Olhovsky*, p 545).

In its ruling, the court recognized "the treating physician doctrine," citing *Mason v. Shalala*, 994 F.2d 1058 (3rd Cir. 1993), which in disability cases "must give greater weight to the findings of a treating physician than to the findings of a physician who has examined the claimant only once or not at all" (*Olhovsky*, p 549). The appellate court extended the doctrine to this case, noting the potential force of testimony by a psychologist who had been treating Mr. Olhovsky for almost two years.

Regarding Mr. Olhovsky's claim that the sentence was unreasonable, the court held that although the sentence of six years was below the advisory guideline range, the sentence must be reviewed "under an abuse-of-discretion standard" (*Olhovsky*, p 549) for procedural errors. The appellate court then ruled that the trial court had committed a procedural error by not considering all relevant factors in setting Mr. Olhovsky's sentence and emphasizing the need to punish. That is, the trial court emphasized the potential of future risk, stating that that Mr. Olhovsky "could turn around and become again a predator—a pedophile monster" (*Olhovsky*, p. 542). The court of appeals held that "revulsion over these crimes cannot blind us as jurists to the individual circumstances of the offenders who commit them" (*Olhovsky*, p 552). The court also cited *Gall v. United States*, 552 U.S. 38 (2007) and noted that the trial court had not considered the immaturity of Mr. Olhovsky, a point emphasized by Dr. Silverman and the defense experts, or Dr. Silverman's opinion that incarceration would have a negative effect on Mr. Olhovsky's progress in treatment.

The appellate court vacated the sentence and remanded the case for further proceedings consistent with the opinion of the Third Circuit. At resentencing, Dr. Silverman was allowed to testify. Mr. Ol-

hovsky was given credit for time served and sentenced to three years' probation with additional fees.

*Discussion*

This case illustrates the weight that the courts place on psychiatric and psychological opinions. The appeals court valued the input of Dr. Silverman, noting that, as Mr. Olhovsky's treating psychologist for over two years, he had knowledge relevant to the factors requiring consideration at sentencing. In this case, the appellate court extended to a criminal matter the treating physician doctrine that has been applied in disability cases. The doctrine weights opinions of treating clinicians over evaluations based on limited or no contact with clients. The ruling indicates that at least in the Third Circuit, forensic evaluations should be extensive, with multiple sessions, to be influential in the court.

In addition, the case exemplifies the complexities of contractual arrangements between clinical providers and the courts. In this case, the psychologist's contract limited his testimony without a subpoena to that requested by Pretrial Services and disallowed his acting as an advocate for the defendant in any legal proceeding unless approved by Pretrial. The contract constricted the independence of the clinician to determine how report of the treatment would best be utilized for the client. To the extent that a clinician under such a contract would testify at the behest of Pretrial Services in a nonadvocate role, there would be confusion of roles: is the clinician a treater or an evaluator and monitor acting as an extender of court services? Dr. Silverman acted according to ethics guidelines by identifying that his knowledge of the client and his expertise were relevant to the decision that the court was to make. His action followed the ethics mandate of truth-telling and that of addressing potential misinterpretation of psychological evaluations by clarifying the findings. Were Dr. Silverman hired privately by the client, his responsibility to notify the court of his treatment recommendations would have been in response to the defense attorney's request. In this case, Dr. Silverman recognized that, having been hired by Pretrial Services, the court knew of his involvement. Silence on his part would have implied that psychological factors were not relevant. He knew they were.

As a forensic psychologist or psychiatrist, one is supposed to treat or assess the client, making sure to do no harm to the client, unless it is for the protec-

tion of the community. Because Dr. Silverman believed that Mr. Olhovsky's risk of harm to others was low and incarceration would cause him to regress, he wanted to advocate those findings. Not being allowed to testify about those factors caused undue harm and an unfair administration of justice to Mr. Olhovsky, which goes against the roles of the treatment provider and the court. As such, the appeals court noted that future courts should give greater consideration to the role of treating psychologists, specifically to their view on prognosis.

Disclosures of financial or other conflicts of interest: None.

## Treatment Noncompliance: Free Will or Symptom of Illness?

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### Controlling Weight Given to Treating Psychiatrist in Determination of Psychiatric Disability

In *Pate-Fires v. Astrue*, 564 F.3d 935 (8th Cir. 2009), the U.S. Court of Appeals for the Eighth Circuit considered an appeal by Donna Pate-Fires of her denial of Social Security Disability benefits by the U.S. District Court for the Eastern District of Arkansas. The district court had affirmed the decision of an administrative law judge (ALJ) to deny her application for disability insurance benefits and supplemental security income (SSI) on the basis of the determination that she had the residual functional capacity (RFC) to perform past work, despite her treating psychiatrist's report that she was incapable of working because of the chronicity of her disorder.

#### *Facts of the Case*

Ms. Pate-Fires applied for SSI benefits in 2004, stating that her disability due to various mental impairments extended back to January 1980. According to her psychiatric record, Ms. Pate-Fires was first

hospitalized in 1987, at the age of 23, when she began experiencing manic and psychotic symptoms. Since that time, she had been hospitalized many times, often involuntarily. The frequency and duration of episodes of illness increased, and she carried several diagnoses, including bipolar I disorder, severe, with psychotic features; schizoaffective disorder; personality disorder NOS; and cannabis, alcohol, and opiate abuse. On three occasions, Ms. Pate-Fires was arrested and hospitalized involuntarily; the alleged offenses included threatening, disorderly conduct, harassment, and stealing.

Since the emergence of her symptoms, Ms. Pate-Fires was treated primarily at Western Mental Health Institute; Arkansas State Hospital, Division of Mental Health Services; and Mid-South Health Systems, Inc. At the time of her disability application, she was being treated by Dr. David Erby of Mid-South. During her treatment episodes from 1999 to 2005, Ms. Pate-Fires' Global Assessment of Functioning (GAF) scores ranged from 10 ("persistent danger of severely hurting self or others") to 58 ("moderate symptoms or moderate difficulty in social, occupational, or school functioning") (American Psychiatric Association: DSM-IV-TR. American Psychiatric Association, 2000). At a 2002 involuntary commitment hearing, the court concluded that "she was in complete denial of illness and judgment was poor" with "a lengthy history of noncompliance with medication" (*Pate-Fires*, p 938). Even during two rare periods when her GAFs were 50 and 51, her treating doctor reported poor judgment and insight, inability to be gainfully employed, low tolerance for stress, and difficulty maintaining focus, even on minor tasks.

Ms. Pate-Fires had a high school education. She reported that she had worked as a stocker at Wal-Mart. According to her ex-husband, she had held several jobs, "none of which had lasted more than a couple of weeks" (*Pate-Fires*, p 937), because of her psychiatric illnesses.

The Social Security Administration denied Ms. Pate-Fires' first application and reconsideration. In 2006, her case was heard before an ALJ. Ms. Pate-Fires testified at her disability hearing and described herself as being easily stressed, noting that stress leads to manic episodes. She reported that she had difficulty concentrating; depended on her sister to manage her bills and scheduling; and, because of herniated discs in her back, found standing and walking to