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Feature

GAMBLING ADDICTION
Making the Case for Sentencing Relief

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When imposing a sentence, the US Sentencing Guidelines (USSG) instruct judges to consider and weigh two distinct aspects of the crime: “the nature and circumstances of the offense and the history and characteristics of the defendant.” (18 U.S.C. § 3553(a).) These factors can be used to determine where within the guidelines range a sentence should be given, and whether and to what degree to depart from the guidelines (generally downward, rarely upward) if the offense or offender is otherwise outside the “heartland” of similarly situated offenders.

When promulgating and amending the guidelines, Congress specifically directed that they be “entirely neutral” as to “race, sex, national origin, creed, and socioeconomic status.” (U.S. SENTENCING GUIDELINES MANUAL (USSG) ch. 5, pt. H, introductory cmt. (2014) (citing 28 U.S.C. § 994(d)).) However, the US Sentencing Commission was given authority to determine the relevancy of additional offender characteristics, and in so doing developed three distinct categories.

The first category is the prohibited group mentioned above; these factors are never to be considered when ***13** imposing a sentence. The second category contains those characteristics the commission has deemed relevant for sentencing purposes, and include conditions that may serve to determine whether a sentence is within the range or a departure from the range, or even the type of sanction to be imposed, e.g., prison versus probation. These include age, mental and emotional conditions, and physical condition. The third category contains those characteristics that are “not ordinarily relevant” but nevertheless could be in exceptional circumstances--drug or alcohol abuse being the primary example.

There is, however, a *sut generis* “fourth” category: gambling addiction. While Congress has never directed the commission to prohibit gambling addiction from consideration, the commission nevertheless has placed a per se ban on its use as a ground for a departure. According to USSG § 5H1.4, “Addiction to gambling is not a reason for a downward departure.” The commission does not give any reason for this particular position or indicate why it has chosen to single out gambling addiction, as opposed to any other addiction, for such a ban. Further, when the commission first adopted this prohibition via emergency amendment 651 (effective November 1, 2003), it simply stated: “The Commission determined that addiction to gambling is never a relevant ground for departure.” (USSG

app. C, vol. II at 355 (amend. 651); USSG § 5K2.0(d)(1).)

Although gambling addiction currently cannot, in and of itself, serve as a ground for a departure from the guidelines (discussed further below) under USSG § 5H1.4, it can serve as a reason for departure pursuant to USSG § 5K2.13. Section 5K2.13 provides that “[a] downward departure may be warranted if (1) the defendant committed the offense while suffering from a *significantly reduced mental capacity*, and (2) the significantly reduced mental capacity *contributed substantially to the commission of the offense*” (emphasis added).

“Significantly reduced mental capacity” means the defendant, although convicted, has a greatly impaired ability to understand the wrongfulness of the offense behavior or to exercise the power of reason, or to control behavior that the defendant knows is wrongful. (USSG § 5K2.13 cmt. n.1.) Also, since 2005, it has been able to serve as a ground for a below-guidelines sentence, i.e., a downward variance.

A decade ago, in *United States v. Booker*, 543 U.S. 220 (2005), the US Supreme Court invalidated the guidelines if applied in a mandatory fashion as a violation of a defendant’s Sixth Amendment right to actual notice of the penalty the defendant faced for the conduct charged. The Court therefore held in *Booker* that the guidelines now were to be considered as merely advisory, and, as a result, courts could vary downward from the guidelines (as opposed to depart from the guidelines--a distinction that will be discussed later). Such variances could be based on factors that otherwise could not serve as a basis for a departure.

This article explores the current definition of gambling addiction, why that particular condition is relevant for purposes of sentencing, and how the courts have recently addressed gambling addiction, and reviews methods for obtaining sentencing variances for clients diagnosed with gambling addiction.

Gambling as a Disease

Despite a history of being viewed as a shortcoming of intelligence, control, or moral fiber, pathological gambling has been a recognized medical condition for more than three decades. It has been included in the *International Classification of Diseases* of the World Health Organization, as well as the primary authoritative publication addressing psychiatric illness, the *Diagnostic and Statistical Manual of Mental Disorders* of the American Psychiatric Association, currently in its fifth edition (*DSM-5*).

Gambling was first documented as a psychiatric illness in *DSM-III* (1980) and included in subsequent volumes through 2000, in which pathological gambling was listed as an “impulse control disorder” (diagnostic code 312.31). Well-known conditions, such as kleptomania, fall into this diagnostic category, which recognizes impulsive, usually negative, behaviors that occur for no rational reason.

The earliest professional proponent of recognizing gambling as an illness was Dr. Robert Custer, a psychiatrist who first voiced his views publicly in the mid-1970s, challenging the long-standing notion that gamblers were simply “degenerates.” Custer was the individual mostly responsible for seeing that gambling first appeared in the *DSM* as a disease. A well-known and highly respected addiction professional and a key player in the early understanding of alcoholism as an illness, Custer played a critical role in the design of the Veterans Administration’s addiction treatment models.

After meeting with and clinically interviewing gamblers (primarily members of Gamblers Anonymous) and their families, Custer came to the now proven but then revolutionary conclusion that for a percentage of the population, gambling is an addictive disease. He speculated that, at some point, a biological basis would be proven for this illness, and that it would turn out to be related in a substantial way to alcoholism and other substance addictions.

His predictions have proven to be incredibly accurate.

It has been scientifically and medically proven that gambling addiction is not, as former beliefs and stigmatism held, simply the action of an impulsive or immoral *14 individual. It is a real biogenetic disease, occurring at the molecular level. Gambling addicts gamble the way an alcoholic drinks or a heroin addict shoots up--not impulsively, but in an all-consuming, life-controlling, and even life-threatening way. They are very ill, not impulsive.

The science of gambling. Modern medical science, particularly brain scan technology, has significantly advanced the understanding of gambling as an illness. Many top neurological and biological experts (most notably including Drs. Timothy Fong at UCLA and Marc Potenza at Yale) have demonstrated conclusively that, for a percentage of the gambling population (that percentage being a highly political number varying from 2-6 percent depending on research reviewed), gambling activates a different neurotransmitter response that is consistent with the response of an alcoholic drinking or a drug addict using drugs.

Some gamblers simply have a different brain relative to gambling. The middle parts of their brains are different from nongamblers. The midbrain is a primitive but very powerful area of the brain that controls, among other things, the survival instinct. It is separate from and functions very differently than the frontal cortex, which governs decision making and the determination of right and wrong, honor, morality, and judgment.

Simply stated, in addicts, the levels of the brain chemical dopamine (the pleasure receptor) increase dramatically when the addiction is engaged. There is a measurable difference in chemical and electrical activity in the brain of the addict that is not present in nonaddicts. The addictive substance or behavior (gambling) essentially gives survival salience to the addiction, placing alcohol, drugs, or gambling on par with sleep, food, and reproduction. In effect, the midbrain overrides the rational and intelligent frontal cortex where good decisions are made and moral judgment resides. A part of the brain incapable of logic is directing an addict's behavior.

This is not to suggest that addicts are not responsible for their behavior. In fact, part of recovery from addiction involves accepting responsibility and making restitution. Individuals with the legitimate medical condition of addictive gambling are impaired. They are ill and in need of treatment--a fact that has begun to be legally addressed. The most recent version of *DSM* (*DSM-5*, 2013) now lists gambling as "gambling disorder" and has moved it from impulse control disorders to the addictive disorders section, among similar disorders such as alcohol and substance use. Gambling is viewed on a par with alcohol and drug addiction and is medically regarded as arising from the same neurological and biogenetic roots as alcohol and drug addiction. This is a significant departure from past views on

gambling and one with implications for criminal attorneys and their clients.

Gambling and the Guidelines

Despite the USSG's apparent disfavor toward at least certain mental and emotional conditions, courts are taking such factors into account, and departing downward for mental and emotional conditions--at least in part. According to the latest available Sentencing Commission data, in fiscal year 2014, there were 620 instances of downward departures or variances citing USSG § 5H1.3 or § 5K2.13 that did not involve a government motion for substantial assistance. (*See Commission Datafiles*, U.S. SENT'G COMMISSION, <http://tinyurl.com/q7s6z2a> (follow "Fiscal Year 2014" hyperlink under "Individual Offender Datafiles").) Thus, departures or variances for mental or emotional conditions, while far from frequent, are not unheard of and most often involve drug, economic, or firearms offenses.

The commission, however, does not capture data on the number of instances where courts have granted downward departures or variances based specifically on gambling addiction. As influential judge and scholar Jack Weinstein of the Eastern District of New York observed over a decade ago, there also "is a dearth of cases addressing the question of whether a pathological gambling addiction can constitute a significantly reduced mental capacity" for purposes of a downward departure. (*United States v. Liu*, 267 F. Supp. 2d 371, 374 (E.D.N.Y. 2003).)

Since November 1, 2003, when the commission expressly ruled that "[a]ddiction to gambling is not a reason for a downward departure," USSG § 5H1.4, the authors could identify only six cases wherein the phrases "gambling addiction" and "sentencing guidelines" occur together with the terms "departure" or "variance." (*See United States v. Quinn*, 566 F. App'x 659 (10th Cir. 2014); *United States v. Frazier*, 547 F. App'x 729 (6th Cir. 2013); *United States v. Logan*, 542 F. App'x 484 (6th Cir. 2013); *United States v. Dikiara*, 50 F. Supp. 3d 1029 (E.D. Wis. 2014); *Wosotowsky v. United States*, No. 2:11-cr-00203, 2014 U.S. Dist. LEXIS 53488 (W.D. Pa. Apr. 17, 2014); *16 *United States v. McCloskey*, No. 09-225, 2013 U.S. Dist. LEXIS 168220 (W.D. Pa. Nov. 26, 2013).) Despite the dearth of case law, at least two of these cases provide significant guidance with respect to how gambling addiction still may fit within the rubric of the USSG.

In *United States v. Quinn*, the Tenth Circuit addressed whether gambling addiction still can serve as a ground for a departure despite being expressly ruled out in the guidelines. The defendant, an attorney, was convicted after a jury trial of seven counts of failing to pay employment taxes in violation of 26 U.S.C. § 7202. (*Quinn*, 566 F. App'x at 661.) At trial, part of Quinn's defense was that "her gambling addiction prevented her from making a rational decision to [willfully] refuse to pay" her employment taxes. (*Id.* at 662.) Quinn again raised her gambling addiction at sentencing in an effort to receive a downward departure or variance, claiming that "her severe depression caused her gambling problem which, in turn, blinded her to her legal responsibilities." (*Id.* at 670.) The district court denied her request for a departure or variance, and imposed a within-guidelines sentence of 36 months. (*See id.* at 669.)

Among Quinn's issues on appeal was whether the district court had erred by "denying a downward departure under USSG § 5H1.3 (mental and emotional conditions) or § 5K2.13 (diminished capacity)." (*Id.*) The Tenth Circuit began its analysis by observing that "[s]everal inter-related guideline provisions

address the court's consideration of a downward departure due to mental and emotional conditions and diminished capacity." (*Id.* at 670.) The Tenth Circuit noted that USSG § 5K2.13 addresses a defendant's diminished capacity, even though USSG §5H1.3 states that "[m]ental and emotional conditions are not ordinarily relevant" to departure considerations, and USSG § 5H1.4 expressly excludes gambling addiction as a reason for a downward departure. In other words, "[w]hile other departure requests based on mental and emotional conditions may be governed by [the general departure considerations and limitations set forth at] § 5K2.0, diminished capacity claims are governed solely by §5K2.13." (*Id.* at 671 (internal quotation marks omitted).)

Accordingly, USSG § 5K2.13 "allows a downward departure [for gambling addiction] if the offense was committed while suffering from a significantly reduced mental capacity which 'contributed substantially to the commission of the offense.'" (*Id.* at 672 (citing *United States v. Sadolsky*, 234 F.3d 938, 942-3 (6th Cir. 2000) (affirming application of USSG § 5K2.13 based on gambling addiction)).) In short, at least in the Tenth Circuit, while gambling addiction itself cannot serve as a ground for a downward departure, because it can be a substantial contributor to diminished capacity, a departure on that ground is appropriate.

Unfortunately for Quinn, the Tenth Circuit affirmed the district court with respect to all her claims of error: "The judge properly recognized a departure was unwarranted solely due to her gambling under the sections dealing with her mental and emotional condition." (*Id.* at 671.) Further, "he found neither her severe depression nor her gambling addiction to have contributed substantially to the commission of the offense." (*Id.* at 672.)

In *United States v. Dikiara*, the defendant, a 56-year-old married woman and first-time offender, pleaded guilty to one count of mail fraud pursuant to 18 U.S.C. § 1341. (50 F. Supp. 3d 1029, 1029 (E.D. Wis. 2014).) Over an 11-year period, the defendant, an office manager for an entertainment company, embezzled in excess of \$1 million from her employer by forging the employer's name on checks made out to the defendant. "Defendant gambled away virtually all of the proceeds of her crime In addition to the money she stole, defendant spent most of her husband's approximately \$300,000 in retirement money [.]" (*Id.* at 1030.) As a result, the defendant and her husband lost their home to foreclosure. The guidelines sentencing range was calculated to be 41-51 months, with the government advocating for 41 months. The defendant sought a below-guidelines sentence of a year and a day.

In deciding to impose a sentence of 15 months, US District Court Judge Lynn Adelman focused extensively on the defendant's demonstrated gambling addiction. While acknowledging that USSG § 5H1.4 excludes gambling addiction as a ground for departure, Judge Adelman nonetheless observe that "such provisions are not binding on the court in determining the sentence under [18 U.S.C] § 3553(a)." (*Id.* at 1033 n.1.) And so the court varied downward accordingly.

According to Judge Adelman, the "[d]efendant did not act out of a desire to harm her employer, nor did she steal in order to finance a lavish lifestyle. Virtually all of the money went to the casino. The records from the casino demonstrated substantial losses, which ate up not just the proceeds of the crime but also defendant and her husband's savings." (*Id.* at 1032.) Quoting an opinion by prolific author and sentencing scholar US District Court Judge Mark Bennett, Judge Adelman analogized gambling addiction to drug addiction: "By physically hijacking the brain, addiction *17 diminishes the addict's

capacity to evaluate and control his or her behaviors. Rather than rationally assessing the costs of their actions, addicts are prone to act impulsively, without accurately weighing future consequences.” (*Id.* (quoting *United States v. Hendrickson*, 25 F. Supp. 3d 1166, 1174 (N.D. Iowa 2014) (Bennett, I)).)

Further, and importantly, Judge Adelman also noted, as discussed above, that “[t]he American Psychiatric Association recently reclassified pathological gambling from an impulse control disorder to an addiction-related disorder.” (*Id.* (citing AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-5) 585 (5th ed. 2003); Ferris Jabr, *How the Brain Gets Addicted to Gambling*, SCI. AM., NOV. 5, 2013).) Accordingly, “[g]iven the impact of her gambling addiction, which was well-supported by the defense materials, a below range term sufficed to provide just punishment.” (*Id.* at 1033.)

Thus, although there is a dearth of case law regarding gambling addiction in the context of federal sentencing, two recent federal cases provide some significant insight and direction for counsel when confronted with a client diagnosed with gambling addiction. As the Tenth Circuit held in *Quinn*, gambling addiction still may serve as a ground for a departure pursuant to USSG § 5K2.13 provided that the addiction substantially contributes to the defendant’s diminished capacity. Additionally, as Judge Adelman made clear in *Dikiara*, counsel also may argue for a variance based on a client’s demonstrated gambling addiction. As noted in *Dikiara*, though, what is more important is not only that any such addiction be “well-supported by the defense materials,” but also that counsel is well-versed in the latest developments regarding gambling addiction, such as its recent reclassification as an addiction rather than a mere impulse control disorder.

When a Client Shows Signs of a Problem

When a client appears to have a gambling problem, counsel is well advised to have him or her evaluated by a competent forensic mental health professional to determine (1) if he or she is a gambling addict, and (2) if so, whether there is a nexus between the disease and the offense.

It is important to understand that USSG § 5K2.13 (diminished capacity policy statement) application note 1 defines “significantly reduced mental capacity” to mean the defendant has a significantly impaired ability to (A) understand the wrongfulness of his or her behavior comprising the offense or to exercise the power of reason; or (B) control behavior that the defendant knows is wrongful. This second prong is the volitional impairment test. Too many lawyers and judges misapprehend this. They often ask how a defendant can be suffering from diminished capacity while still able to operate a complex business or commit a sophisticated crime or even practice law. Because diminished capacity is an encouraged departure, *see, eg., United States v. McBroom*, 124 F.3d 533 (3d Cir. 1997), many more defendants qualify than quite a few lawyers and judges realize, in light of the volitional test.

Gambling addiction is a volitional disorder. This disease sometimes makes otherwise law-abiding individuals commit crimes--e.g., fraud, theft, etc.--to support their habit, much like a heroin junkie steals to support a habit. If an individual is capable of appreciating the nature, quality, and wrongfulness of certain acts but is unable to control his or her conduct due to a reduced mental capacity, USSG § 5K2.13 applies. Leniency is appropriate in such cases in determining diminished capacity because the purpose of § 5K2.13 is to treat with some compassion those in whom a reduced mental capacity has contributed

to the commission of a crime. Leniency is appropriate because two of the primary rationales for punishing an individual by incarceration-- retribution and deterrence--lose some of their relevance when applied to those with reduced mental capacity. The criminal justice system long has meted out lower sentences to persons who, although not technically insane, are not in full command of their actions. Persons who find it difficult to control their conduct do not--considerations of dangerousness aside--deserve as much punishment as those who act maliciously or for gain and avarice.

When possible, it is helpful to get the probation officer and the prosecutor on board. This does not necessarily mean that they wholeheartedly agree that your client is entitled to a downward departure, but merely that your position is not unreasonable. To this end, attorneys at the Law Offices of Alan Ellis have recently begun to meet with the probation officer, the prosecutor, and the case agents, accompanied by a forensic mental health professional to explain the expert's findings and answer their questions. This, coupled with an offer to have your client evaluated by an expert of the government's choice, can go a long way particularly if the government's expert agrees with yours.

Understand the disease so you can persuasively show the judge why it wrecked your client's life and caused the client to do what he or she did and explain what the client is now doing to rectify the situation. (See Alan Ellis, *Answering the "Why" Question: The Powerful Departure Grounds of Diminished Capacity, Aberrant Behavior and Post-Offense Rehabilitation*, 11 FED. SENT'G REP. 322 (1999); Alan Ellis, *Let Judges Be Judges! Post-Koon Downward Departures, Part 1: Diminished Capacity*, CRIM. JUST., Winter 1998, at 49.) If it can be demonstrated that your client has "stepped up to the plate," recognized his or her problem, done something about it, made significant efforts toward restitution, if applicable, and made substantial rehabilitative strides, the case may be on the road to a favorable outcome.

Footnotes

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