

# Addicted to Prada?: *United States v. Roach* Shopping Addiction, Significantly Reduced Mental Capacity, and United States Sentencing Guideline § 5K2.13

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Scott Weiland (recovering drug addict, Stone Temple Pilots' lead singer):  
*[S]omeone who is a shopping addict . . . you start buying [and] something happens . . . . [I]t's not just a physical thing . . . there's a mental thing. It's like something that happens for whatever reason . . . you don't feel right about yourself – and you start to learn that through [this] medicating – medicating the way you feel, it starts to make you feel . . . like a whole person. And so when you're left with those empty feelings and there's nothing—you're not treating it with any kind of way, no kind of program.*

Dr. Drew Pinsky (psychotherapist): *You can't. Your brain won't let you.*

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Bill Maher (host, comedian): *But at some point, you made the choice not to [get better].*

Dr. Pinsky (to Weiland): *You didn't make a choice.*

Weiland: *[I got better] with the help of other people —*

Dr. Pinsky: *With the help of law enforcement.*<sup>1</sup>

## I. INTRODUCTION

Addiction is a disease with many causes and levels of addiction may vary from person to person.<sup>2</sup> Many of those who suffer from addiction lose the ability to act rationally.<sup>3</sup> Accordingly, United States Sentencing Guideline ("USSG") § 5K2.13 allows a judge to reduce an addicted federal criminal defendant's sentence when that defendant suffers from a "significantly reduced mental capacity."<sup>4</sup> This is defined as a loss of control over reasoning ability and physical actions.<sup>5</sup>

1. *Politically Incorrect with Bill Maher: Addiction is a Choice* (ABC television broadcast, Mar. 13, 2002), available at <http://www.schaler.net/addictionisachoice/Pltranscript.htm> (last visited Aug. 30, 2003).

2. See, e.g., AMERICAN PSYCHIATRIC ASSOC., DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 193 (4th ed. 2000) (explaining that substance-related disorders can be grouped into eleven classes: alcohol; amphetamines; caffeine; cannabis; cocaine; hallucinogens; inhalants; nicotine; opioids; phencyclidine, and sedatives, hypnotics, or anxiolytics).

3. Stephen J. Morse, *Crazy Reasons*, 10 J. CONTEMP. LEGAL ISSUES 189, 197 (1999) (defining rationality as "the ability to perceive accurately, to get the facts right, and to reason instrumentally, including weighing the facts appropriately and according to a minimally coherent preference-ordering. Rationality includes the general ability to recognize and be responsive to the good reasons that should guide action").

4. U.S. SENTENCING GUIDELINES MANUAL § 5K2.13 (2000). The guidelines state that:

A sentence below the applicable guideline range may be warranted if the defendant committed the offense while suffering from a significantly reduced mental capacity. However, the court may not depart below the applicable guideline range if (1) the significantly reduced mental capacity was caused by the voluntary use of drugs or other intoxicants; (2) the facts and circumstances of the defendant's offense indicate a need to protect the public because the offense involved actual violence or a serious threat of violence; or (3) the defendant's criminal history indicates a need to incarcerate the defendant to protect the public. If a departure is warranted, the extent of the departure should reflect the extent to which the reduced mental capacity contributed to the commission of the offense.

*Id.*; see also *United States v. Roach*, 296 F.3d 565, 568 (7th Cir. 2002).

5. U.S. SENTENCING GUIDELINES MANUAL § 5K2.13, cmt. n.1 (2000).

However, it becomes difficult to prove a significantly reduced mental capacity due to judges' use of non-statutory considerations in interpreting § 5K2.13.<sup>6</sup> The addict must show that his or her reduced capacity is "both (1) sufficiently serious and (2) connected to the offense."<sup>7</sup> While holding, in one instance, that an addicted defendant failed to meet these requirements, judges typically leave the possibility open that similarly addicted defendants can receive a reduced sentence.<sup>8</sup> These unhelpful opinions fail to tell lawyers what facts they must prove to get a reduced sentence for such a client.

Facts that may lead a judge to grant an addiction-related sentence reduction tend to be similar to facts in cases with contrary holdings.<sup>9</sup> Adding to the confusion, judges may grant a reduction in sentence when the defendant suffers from an unusual or novel addiction.<sup>10</sup> This mixed precedent prevents lawyers from being able to predict when a client will be granted a reduced sentence.

*United States v. Roach*, a Seventh Circuit decision, provides a perfect example of federal judges' unpredictable treatment of addicts who seek a reduced sentence.<sup>11</sup> In that case, defendant Elizabeth Roach claimed that her shopping addiction significantly reduced her mental capacity, leading a district court judge to reduce her sentence.<sup>12</sup> After Roach received the reduced sentence, the appellate court held that

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6. See, e.g., *United States v. Goossens*, 84 F.3d 697, 701 (4th Cir. 1996) (holding that a defendant must be unable to reason or process information); *United States v. Glick*, 946 F.2d 335, 339 (4th Cir. 1991) (upholding a finding of diminished capacity based on the testimony of a psychiatrist).

7. *Roach*, 296 F.3d at 568 (citing *United States v. Frazier*, 979 F.2d 1227, 1230 (7th Cir. 1992); *United States v. Gentry*, 925 F.2d 186, 189 (7th Cir. 1991)).

8. See, e.g., *United States v. Leandre*, 132 F.3d 796, 804 (D.C. Cir. 1998) (holding that the district court was within its discretion when denying a reduced sentence to a defendant with diminished capacity, even though the court may well have reached a different result with the same information).

9. Compare *United States v. Webb*, 49 F.3d 636, 639 (10th Cir. 1995) (finding that a history of psychological problems was not sufficient for a reduced sentence), with *United States v. Lewinson*, 988 F.2d 1005, 1006 (9th Cir. 1993) (holding that a history of psychological problems was sufficient to reduce the sentence since the guidelines do not qualify the mental problem, outside of voluntary drug use).

10. See, e.g., *United States v. Silleg*, 311 F.3d 557, 562 (2nd Cir. 2002) (stating that "the departure guideline for diminished capacity . . . [does not contain] any language suggesting that diminished capacity is not a permissible basis for departure in child pornography cases. [The departure guideline] prohibits diminished capacity departures under three circumstances, but none of those circumstances apply . . . to child pornography offenses generally"); see also *United States v. McBroom*, 991 F. Supp. 445, 450-51 (D.N.J. 1998); Alan Ellis, *Answering the 'Why' Question: The Powerful Departure Grounds of Diminished Capacity, Aberrant Behavior, and Post-Offense Rehabilitation*, FED. SENTENCING REP., May-June 1999, available at <http://www.alanellis.com/html/pub/pub4.html> (last visited Sept. 10, 2003).

11. 296 F.3d at 565-73.

12. *Id.* at 567.

the district court judge committed a clear error in his application of § 5K2.13.<sup>13</sup> What this case shows is that federal judges treat addiction as a factor in both the grant and reversal of a defendant's sentence reduction.<sup>14</sup>

Section II of this article begins by describing the facts leading to the *Roach* decision. Since *Roach* cannot be understood without an analysis of § 5K2.13, Section III discusses the United States Sentencing Guidelines' evolution, the legislative history of § 5K2.13, and the *ad hoc* application of § 5K2.13. Section IV explains the importance of judges understanding the various theories of why addiction occurs in order to properly analyze how it creates reduced mental capacity. Due to addictions' differing effects on individuals' mental capacity, Section V explains why a tiered theory of addiction should be used by judges when interpreting § 5K2.13. Finally, Section VI uses this determination to show how the appellate court applied an incorrect standard of review and therefore wrongly decided *Roach*.

## II. *UNITED STATES V. ROACH*: SHOPPING ADDICTION AND WIRE FRAUD

As a young adult, Elizabeth Roach began engaging in "unnecessary and excessive shopping," which arguably sparked an addiction significantly reducing her mental capacity.<sup>15</sup> Charged in federal court with committing wire fraud, Roach argued that the reduced mental capacity that resulted from her shopping addiction existed at the time of her crime.<sup>16</sup> Consequently, Roach argued that she deserved a reduced sentence.<sup>17</sup>

Prior to working at Andersen Consulting ("Andersen"), Roach carried debt that included "tens of thousands of dollars in credit card[s] . . . at upscale stores like Neiman Marcus and Barneys New York."<sup>18</sup> Demonstrating the extent of her addiction, she once "applied for and obtained a store credit card and charged \$10,000 that same day."<sup>19</sup> Arguably, her addiction was so severe that she had to conceal it from her husband.<sup>20</sup>

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13. *Id.* at 573.

14. *See id.* at 565 (recognizing that the district court can use the guidelines to limit a sentence, yet holding that the downward guideline did not apply to the addiction in this case).

15. *Id.* at 566.

16. *Roach*, 296 F.3d at 567-68.

17. *Id.* at 567.

18. *Id.* at 566.

19. *Id.*

20. *Id.* (discussing Roach's methods of concealing her addiction, including sending bills to friends' houses and overcharging her credit card at the grocery store to receive the extra cash).

After Roach began working for Andersen in 1996, her employer mistakenly reimbursed registration fees for a conference that she was unable to attend.<sup>21</sup> Spurred by the 1996 windfall and continuing in 1999, Roach designed schemes to take money from Andersen in order to fund her extraordinary shopping sprees.<sup>22</sup> Roach padded her expense account, submitted expense reports for reimbursement of air fares that had already been billed to Andersen, requested reimbursement for conferences that she registered for but never attended, and obtained money for purchases that she falsely labeled "business expenses."<sup>23</sup> Despite earning \$150,000 per year, Roach stole money from Andersen to fund her extraordinary shopping binges.<sup>24</sup> In sum, her three year effort to defraud Andersen resulted in a total of \$241,061.<sup>25</sup>

In an effort to reduce her sentence, Roach's lawyer introduced evidence of her psychiatric history.<sup>26</sup> Roach had suffered from bulimia, chronic severe depression, and sexual molestation during her adolescence.<sup>27</sup> Depressed by suicidal thoughts, she occasionally burned herself with cigarettes.<sup>28</sup> Such factors led Roach to receive psychiatric treatment for most of her adult life.<sup>29</sup> Nevertheless, Roach began compulsively shopping as a method of "self-medication."<sup>30</sup> Shopping provided Roach with relief from her depression.<sup>31</sup> Spending vast sums of money provided a physical thrill similar to the rush that a gambler receives by placing extraordinary wagers.<sup>32</sup> Despite her psychiatrists' efforts, Roach persisted with her extravagant shopping for years before embarking on her first illegal scheme at Andersen.<sup>33</sup> Swayed by the severity of Roach's shopping addiction, psychiatric history, and reduced mental capacity, the district court judge reduced her sentence pursuant to §

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21. *Roach*, 296 F.3d at 567.

22. *Id.*

23. *Id.*

24. *Id.* at 566-67.

25. *Id.* at 567.

26. *Roach*, 296 F.3d at 566.

27. *United States v. Roach*, No. 00 CR 411, 2001 WL 664438, at \*1 (N.D. Ill. June 4, 2001), *vacated by* 296 F.3d 565 (7th Cir. 2002).

28. *Id.*

29. *Roach*, 296 F.3d at 566.

30. *Roach*, 2001 WL 664438, at \*2.

31. *Id.* at \*1.

32. Mark Skertic, *Are Shopoholics for Real?*, CHI. SUN-TIMES, June 3, 2001, available at <http://www.schaler.net/inthenews/shopping.html> (last visited Sept. 4, 2003) (explaining that "3 per cent of the population suffers from an unreasonable need to buy things" and that shopping addicts "don't do anything with the stuff they buy, but they love purchasing . . . . They like the social gratification, the talking to clerks. They get to know the UPS drivers by name.").

33. *Roach*, 2001 WL 664438, at \*1.

5K2.13.<sup>34</sup> As a result, the district court judge did not sentence Roach to any prison time.<sup>35</sup>

To the skeptical observer, this decision may seem patently wrong. A highly educated, wealthy white woman committed a white-collar crime and escaped a prison term.<sup>36</sup> The critical media ignored both the legislature's decision to reduce an addict's culpability and Roach's psychiatric history and instead focused on the novel nature of Roach's addiction.<sup>37</sup> As one columnist wrote, "All addictions are sad, but addicts are still responsible for their acts, whether their weakness is dope or Prada."<sup>38</sup> Members of the general public shared in this opinion.<sup>39</sup>

Apparently, the Seventh Circuit judges agreed with both the public and the press.<sup>40</sup> The court of appeals reversed the district court, holding that the judge committed clear error.<sup>41</sup> The court held that the addiction was a "but-for" cause of Roach's crime.<sup>42</sup> Nevertheless, the court held that her shopping addiction lacked a sufficient connection to her mental capacity at the time that she committed the crime of wire fraud.<sup>43</sup>

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34. *Roach*, 296 F.3d at 567-68.

35. *Id.* at 568. Roach was sentenced to:

five years' probation, and imposed, as special conditions of probation, six weeks' work release at the Salvation Army Center, six months' home confinement with weekend electronic monitoring, and a prohibition against Roach's obtaining any new credit cards without the court's permission. The court also ordered restitution in the amount of \$241,061.08 and imposed a \$30,000 fine and mandatory special assessment of \$100.

*Id.*

36. *See generally id.*

37. I was employed by Roach's attorney, Jeffrey B. Steinback, during the summer of 2001. While working there, I fielded calls from the World Weekly News, L.A. Times, London Times, and Endeavor Agency. Though most calls sought a quote from Steinback, Endeavor was interested in developing Roach's story into a novel or motion picture.

38. Mary Schmich, *Addiction Plays No Favorites; Law is Another Story*, CHI. TRIB., May 25, 2001, at 1N, available at 2001 WL 4076663.

39. *See, e.g.,* Rob Peeters, *Bad Judgment*, CHI. TRIB., May 30, 2001, at 18N, available at 2001 WL 4078170 ("After reading [that] U.S. district Judge Matthew Kennelly effectively [gave] Elizabeth Roach a slap on the wrist for theft from her company and shoplifting habits, I realize that for the past 30 years I have been doing what is proper and prudent at the voting booth—I vote "no" for all judges on the retention ballots."). District court judges are not elected or re-elected. Rather, the President appoints such judges to life tenures on the bench with the advice and approval of the Senate. *See* U.S. CONST. art. II, § 2, cl. 2; U.S. CONST. art. III, § 1. Nevertheless, responses such as these indicate the general hostility held by the public towards Roach.

40. *See Roach*, 296 F.3d at 573.

41. *Id.* at 571.

42. *Id.* at 570.

43. *Id.* at 570, 573.

The court's conclusion simply ignores the evidence and gives insufficient deference to the district court judge's application of § 5K2.13. The appellate court also ignores the differing levels of addiction and varying effects suffered by addicts.<sup>44</sup> Section 5K2.13 takes into account such factors.<sup>45</sup>

### III. THE UNITED STATES SENTENCING GUIDELINES AND A BRIEF HISTORY OF § 5K2.13

Roach became subject to the USSG when she was federally charged with wire fraud.<sup>46</sup> The USSG uses a point system that is intended to set consistent and predictable standards for the amount of punishment that offenders receive for their crimes.<sup>47</sup> By assigning various points to crimes and their attendant circumstances, each federal defendant receives a cumulative point total.<sup>48</sup> Then, each defendant receives a sentence corresponding to his or her total.<sup>49</sup>

However, point totals can be reduced, within the judge's limited discretion, based on aggravating or mitigating circumstances.<sup>50</sup> For example, the USSG provides for a two-point reduction when a defendant accepts responsibility for his or her actions.<sup>51</sup> Thus, the ordinary cases that comprise the bulk of judges' caseloads receive uniform treatment, while still allowing for sentencing variation in exceptional cases.<sup>52</sup>

Under the USSG, Roach should have received twelve to eighteen months imprisonment.<sup>53</sup> However, § 5K2.13 of the USSG provides that:

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44. See *supra* note 2.

45. U.S. SENTENCING GUIDELINES MANUAL § 5K2.13 (2000).

46. Fraud by wire, radio, or television.

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1343 (2000 & Supp. 2003).

47. U.S. SENTENCING GUIDELINES MANUAL ch.5, pt. A, introductory cmt. (2000); see ANDREW VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* 98 (Northeastern Univ. Press 1986) (1976).

48. U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A, introductory cmt. (2000).

49. *Id.*

50. U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2000); VON HIRSCH, *supra* note 47, at 99.

51. U.S. SENTENCING GUIDELINES MANUAL § 3E1.1(a) (2000).

52. See U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2000).

53. *United States v. Roach*, 296 F.3d 565, 567 (7th Cir. 2002).

A sentence below the applicable guideline range may be warranted if the defendant committed the offense while suffering from a *significantly reduced mental capacity*. However, the court may not depart below the applicable guideline range if (1) the significantly reduced mental capacity was caused by the voluntary use of drugs or other intoxicants; (2) the facts and circumstances of the defendant's offense indicate a need to protect the public because the offense involved actual violence or a serious threat of violence; or (3) the defendant's criminal history indicates a need to incarcerate the defendant to protect the public. *If a departure is warranted, the extent of the departure should reflect the extent to which the reduced mental capacity contributed to the commission of the offense.*<sup>54</sup>

The definition of "'significantly reduced mental capacity' means the defendant, although convicted, has a significantly impaired ability to (A) understand the wrongfulness of the behavior comprising the offense or to exercise the power of reason; or (B) control behavior that the defendant knows is wrongful."<sup>55</sup> Judges typically only grant sentence reductions for emotional or mental disorders when those disorders cause a defendant to suffer from a significantly reduced mental capacity.<sup>56</sup> Even then, the disorders' resulting impairment must be "both (1) sufficiently serious and (2) connected to the offense."<sup>57</sup>

Legislative history provides insight to § 5K2.13's application.<sup>58</sup> In 1984, unreasonable sentencing discrepancies among the district courts led the United States Sentencing Commission ("Commission") to determine whether mental or emotional conditions, "with respect to a defendant, have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence. . . ."<sup>59</sup> As a result of this inquiry, the Commission stated that "mental and emotional conditions are not *ordinarily* relevant in determining whether a sentence should be outside the applicable guideline range."<sup>60</sup> Due to uncertainty as to which extraordinary circumstances could "render mental and emotional conditions relevant," the USSG recognized that a judge's decision to grant a sentence reduction depends on the facts of each case.<sup>61</sup>

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54. U.S. SENTENCING GUIDELINES MANUAL § 5K2.13 (2000) (emphasis added).

55. U.S. SENTENCING GUIDELINES MANUAL § 5K2.13, cmt. n.1 (2000).

56. *Roach*, 296 F.3d at 568.

57. *Id.* (citing *United States v. Frazier*, 979 F.2d 1227, 1230 (7th Cir. 1992)).

58. *United States v. Shore*, 143 F. Supp. 2d 74, 78 (D. Mass. 2001).

59. *Id.* (internal quotations omitted) (citing 28 U.S.C. § 994(d) (2000)).

60. *Id.* n.10 ("Section 5H1.3 is a policy statement rather than a guideline . . . . [T]he Court held that under some circumstances, policy statements are an authoritative guide to interpreting the Guidelines." (citing *Williams v. United States*, 503 U.S. 193, 201 (1992))).

61. *Id.* at 78-79.



Other portions of the USSG provide that the following categories may justify a reduced sentence: “(1) Prohibited; (2) discouraged; (3) encouraged; and (4) not mentioned.”<sup>62</sup> Prohibited factors include the “individual’s race, sex, national origin, creed, religion, socio-economic status [], lack of guidance as a youth [], drug or alcohol dependence [], and economic hardship [].”<sup>63</sup> Discouraged grounds include “family ties and responsibilities, education and vocational skills, and military, civil, charitable or public service record.”<sup>64</sup>

Conversely, the USSG encourage the judiciary to use certain factors in deciding whether to reduce a defendant’s sentence, including “those [factors] the Commission has not been able to take into account fully in formulating guidelines.”<sup>65</sup> When the USSG fail to mention a factor, district court judges must consider the “structure and theory of both relevant individual guidelines and the Guidelines taken as a whole, [and then] decide whether the factor is sufficient to take the case out of the Guidelines heartland.”<sup>66</sup>

In 1998, the Commission amended § 5K2.13 to allow for reduced sentences based on “volitional impairment, in addition to cognitive impairment.”<sup>67</sup> As stated above, the definition of “significantly reduced mental capacity” in § 5K2.13 includes both an inability to reason and an inability to control one’s actions, despite knowing that such action is illegal.<sup>68</sup> These inability seem consistent with addictions’ effects.

Additionally, reduced mental capacity caused by volitional and cognitive impairments does not have to “be the but-for or sole cause of the offense.”<sup>69</sup> In fact, “the standard does *not* require a finding that the defendant’s impairment is somehow extraordinary [or] unique. . . .”<sup>70</sup> Rather, “the disorder need be only a contributing cause . . . of the offense.”<sup>71</sup>

Consequently, § 5K2.13 gives district court judges discretion to reduce a sentence based on the severity of a defendant’s mental capacity and its connection to the crime.<sup>72</sup> The severity of the reduced mental capacity depends on the severity of the addiction, thus judges must consider the addiction itself when deciding to reduce

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62. *Id.* at 79 (citing *Koon v. United States*, 518 U.S. 81, 92-96 (1996)).

63. *Shore*, 143 F. Supp. 2d at 79 n.13; *accord Koon*, 518 U.S. at 93; *see* U.S. SENTENCING GUIDELINES MANUAL § 5H1.10 (2000); U.S. SENTENCING GUIDELINES MANUAL § 5K2.12 (2000).

64. *Shore*, 143 F. Supp. 2d at 79 n.14 (citing *Koon*, 518 U.S. at 95).

65. *Id.* at 79 n.15 (citing *Koon*, 518 U.S. at 94).

66. *Id.* at 79 n.16 (internal quotations omitted) (citing *Koon*, 518 U.S. at 95).

67. *Id.* at 79.

68. U.S. SENTENCING GUIDELINES MANUAL § 5K2.13, cmt. n.1 (2000).

69. *Shore*, 143 F. Supp. 2d at 80 (citing *United States v. McBroom*, 124 F.3d 533, 548 n.14 (3d Cir. 1997)).

70. *Id.* at 80.

71. *United States v. Cantu*, 12 F.3d 1506, 1515 (9th Cir. 1993).

72. *Id.*

an addict's sentence. Lawmakers have used broad definitions of the word addiction that describe a wide range of human afflictions.<sup>73</sup> Typical of addiction definitions, the World Health Organization defines dependence as:

A cluster of physiological, behavioural and cognitive phenomena of variable intensity, in which the use of a psychoactive drug (or drugs) takes on a high priority. The necessary descriptive characteristics are preoccupation with a desire to obtain and take the drug and persistent drug-seeking behaviour. Determinants and problematic consequences of drug dependence may be biological, psychological or social, and usually interact.<sup>74</sup>

This definition clearly encompasses many ranges of addiction. It uses indefinite terms like "preoccupation" and "variable intensity" and acknowledges that addiction's consequences may be "biological, psychological, or social."<sup>75</sup> Since addictions have many contributing causes and resulting effects,<sup>76</sup> § 5K2.13 should be applied on an *ad hoc* basis, depending on the individual defendant's addiction.<sup>77</sup> In order to adequately determine when an addiction significantly reduces a defendant's capacity, judges must understand the many causes of addiction. A brief overview of the various causes of addiction will show why the legislature decided to grant trial judges broad discretion to reduce the sentences of addicts through an effects-oriented statute.<sup>78</sup>

#### IV. THEORIES ON ADDICTION'S CAUSE

In reducing a sentence pursuant to § 5K2.13, the cause of an addiction is less important than the effects of the addiction on the defendant's mental capacity.<sup>79</sup> This

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73. *E.g.*, 21 U.S.C. § 802 (2000); 42 U.S.C. § 201(K) (2000).

74. WORLD HEALTH ORG., NARCOTIC & PSYCHOTROPIC DRUGS: ACHIEVING BALANCE IN NATIONAL OPIOIDS CONTROL POLICY, GUIDELINES FOR ASSESSMENT 7-8 (2000), *available at* <http://www.who.int/medicines/library/qsm/who-edm-qsm-20004/Balance%20in%20Nat%20Opioids%20Control%20Policy%20final.doc> (last visited Sept. 12, 2003); *see also* ALFRED R. LINDSMITH, DRUG ADDICTION: CRIME OR DISEASE? REPORTS OF A.B.A.—A.M.A. JOINT COMMITTEE ON NARCOTIC DRUGS 4, 23 (8th ed. 1971) (explaining that the American Medical Association and the American Bar Association created a joint committee on narcotic drugs. The committee used the World Health Organization's definition of addiction).

75. WORLD HEALTH ORG., *supra* note 74, at 7-8.

76. *Id.*; FRANCIS F. SEEBURGER, ADDICTION AND RESPONSIBILITY: AN INQUIRY INTO THE ADDICTIVE MIND 73, 79 (1993).

77. *See* U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 (2000).

78. *See* United States v. Cantu, 12 F.3d 1506, 1512 (9th Cir. 1993).

79. *Id.*

is particularly true, given the disagreement among scholars about the causes of addiction.<sup>80</sup> Nevertheless, district court judges must clearly understand the various theories concerning addictions' causes to appreciate the extent to which an addiction diminishes a defendant's mental capacity.<sup>81</sup> Furthermore, an understanding of addictions' causes would help judges determine the degree of connection between a reduced capacity and the crime charged.<sup>82</sup>

Some theorists believe that addiction involves irresistible impulses and an absence of responsibility.<sup>83</sup> If such impulses are truly irresistible, then addicts have no choice but to pursue their respective course of addiction.<sup>84</sup> Assuming this to be true, an addict would similarly lack a choice when attempting to secure the means of satisfying his or her addiction.<sup>85</sup>

This theory fails to address whether the initial choices to engage in addictive behavior are irresistible or whether irresistibility only arises once someone becomes psychologically dependent on a given activity.<sup>86</sup> This viewpoint also ignores the existence of varying levels of addiction.<sup>87</sup> While some addicts truly lack control, many people can be addicted yet control their behavior with respect to that addiction.<sup>88</sup> Section 5K2.13 disposes of the notion that an addict's desire to engage in certain behavior must be irresistible.<sup>89</sup> Instead, it grants judges the ability to grant a 'sentence reduction that reflects "the extent to which the reduced mental capacity contributed to the commission of the offense."<sup>90</sup> Thus, defendants similar to Roach need not show that they are irresistibly drawn to an addictive behavior.

Others believe that addiction is caused by unavoidable social attitudes and uncontrollable personal experiences.<sup>91</sup> "[E]xperiences of abuse, neglect and abandonment are highly related to addiction's development."<sup>92</sup> This theory seems reasonable, but could become the basis for more questionable theories. For example, one feminist philosopher suggests that women are consistently barraged by the

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80. *E.g.*, SEEBURGER, *supra* note 76, at 74.

81. U.S. SENTENCING GUIDELINES MANUAL § 5K2.13 (2000).

82. *See id.*

83. JOHN MARTIN FISCHER & MARK RAVIZZA, RESPONSIBILITY AND CONTROL: A THEORY OF MORAL RESPONSIBILITY 48 (1998).

84. *See id.*

85. *Id.*

86. Michael Corrado, *Addiction and Causation*, 37 SAN DIEGO L. REV. 913, 952-53 (2000).

87. *Id.* at 953.

88. FISCHER & RAVIZZA, *supra* note 83, at 48.

89. U.S. SENTENCING GUIDELINES MANUAL § 5K2.13, cmt. n.1 (2000).

90. U.S. SENTENCING GUIDELINES MANUAL § 5K2.13 (2000).

91. NAN VAN DEN BERGH, FEMINIST PERSPECTIVES ON ADDICTIONS 6-7 (1991).

92. *Id.* at 7.

societal assumption that they are inferior to men.<sup>93</sup> The general sense of “inadequacy, insecurity, and alienation” leads women to addiction; women feel a need for “‘something’ external to [make] themselves . . . feel whole.”<sup>94</sup>

Another theory explains addiction as “a rational reaction to the circumstances of the addict’s life together with the addict’s pursuit of utility (rational addiction theories).”<sup>95</sup> In other words, addiction is caused when someone decides to engage in addictive behavior to feel pleasure.<sup>96</sup> That pleasure can outweigh the activity’s detrimental effects and, as the person continues to engage in that behavior, an addiction forms.<sup>97</sup>

“Rational addiction theories” fail to explain why an addict maintains his or her behavior in the face of diminished returns and severe negative consequences.<sup>98</sup> For example, if rational addiction theory were true, Roach would not have continued to shop and spend vast amounts of money in the face of extraordinary debt. Moreover, rational addiction theory does not explain why an addict should receive special consideration from the courts.<sup>99</sup> People like to feel good.<sup>100</sup> Breaking the law in order to maintain that pleasant feeling is not a sound basis for reducing a defendant’s culpability.

Other theories concentrate on addiction’s effects and describe addiction “as a rational reaction to the threat of withdrawal pains (withdrawal theories).”<sup>101</sup> That is, a person seeks to maximize his or her pleasure through potentially addictive behavior.<sup>102</sup> Once an addiction sets in, the addict feels pain whenever he or she is not enjoying the addictive behavior.<sup>103</sup>

“Withdrawal theories” contemplate addiction as a result of heightened tolerance to the good feeling that comes from addictive behavior and fear of the negative consequences of discontinuing such behavior.<sup>104</sup> This utility argument does a better job than the “rational addiction theory” of explaining why the addict should receive special consideration from a judge.<sup>105</sup> A defendant who feels withdrawal pain and commits a crime to alleviate that pain might be less culpable than a defendant who

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93. *Id.* at 4, 6-7.

94. *Id.* at 6-7.

95. Corrado, *supra* note 86, at 926.

96. *Id.* at 929.

97. *Id.*

98. *Id.* at 930.

99. *Id.* at 935.

100. *See* Corrado, *supra* note 86, at 932.

101. *Id.* at 926.

102. *Id.* at 927.

103. Robert Coombs, *Addiction’s Defining Nature*, 64 TEX. B.J. 166, 168 (Feb. 2001).

104. Corrado, *supra* note 86, at 935.

105. *See id.* at 935-36.

commits the crime based on purely evil intentions.<sup>106</sup> For example, Roach committed wire fraud to go on allegedly uncontrollable shopping sprees, which in turn alleviated her pain and social anxiety.<sup>107</sup> She is arguably less culpable than somebody who commits wire fraud out of malice toward his or her employer.<sup>108</sup> However, withdrawal pains do not always diminish an addict's capacity because someone can suffer withdrawal pain and still obey the law.<sup>109</sup>

These theories of addiction are not universally agreed upon, but both § 5K2.13 and the judges interpreting the statute recognize that there are many strong, and often unavoidable, influences acting upon addicted defendants.<sup>110</sup> Moreover, these influences create a range of effects that are more readily identifiable than addiction's causes.<sup>111</sup> Rather than arbitrarily granting a reduced sentence based on the uncertain causes of addiction, judges should focus on addiction's effects when applying § 5K2.13.<sup>112</sup>

## V. A FIVE-STEP TIERED VIEW OF ADDICTION'S EFFECTS

Although § 5K2.13 should be applied on an *ad hoc* basis, predictability and uniformity in its application are still desirable.<sup>113</sup> As a result, I propose that judges adopt a tiered theory of addiction when applying § 5K2.13. Drug addicts can be classified according to a "drug-user continuum," which extends from "Type 1" to "Type 5" users.<sup>114</sup> Though the continuum refers explicitly to drug users, its description of the various stages of addiction easily applies to all forms of addiction.<sup>115</sup>

"Type 1" users abstain from drugs and should receive no departure under § 5K2.13.<sup>116</sup> Likewise, a "Type 1" shopper would completely abstain from shopping sprees. "Type 2" users are social drug users while "Type 3" users abuse drugs, but are not yet chemically dependent.<sup>117</sup> Thus, "Type 2" shoppers comprise the majority of shoppers one may see at the local shopping mall and "Type 3" shoppers might spend more money than they can afford, but know when to stop spending before

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106. *See id.* at 936.

107. *United States v. Roach*, 296 F. 3d 565, 566 (7th Cir. 2002).

108. *See* U.S. SENTENCING GUIDELINES MANUAL § 2F1.1 (2000).

109. Corrado, *supra* note 86, at 936.

110. *See Roach*, 296 F.3d at 573.

111. Coombs, *supra* note 103, at 172.

112. *See* U.S. SENTENCING GUIDELINES MANUAL § 5K2.13, cmt. n.1 (2000).

113. U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 (2000).

114. Coombs, *supra* note 103, at 167.

115. *See id.* at 172.

116. *Id.* at 167.

117. *Id.*

incurring insurmountable debt. Neither of these types of users should receive a departure under § 5K2.13, as their mental capacity is not yet significantly reduced.

"Type 4" addicts are physically, but not psychologically dependent.<sup>118</sup> Although this "type" refers to addicts who experience withdrawal-type pains, the categorization fails to comport with the debated belief that physical dependency is a form of psychological dependency.<sup>119</sup> In either case, physical dependency might lead to an inability to control one's actions.<sup>120</sup> Thus, judges should grant § 5K2.13 departures to "Type 4" users on an *ad hoc* basis.<sup>121</sup>

"Type 5" users are so "physically and psychologically dependent" that drug use dominates their lives.<sup>122</sup> These users "do not . . . walk away from drugs when the reward-pain ratio shifts" unfavorably because they regard drugs as a solution.<sup>123</sup> They "continue to medicate their feelings even as their lives deteriorate" and the drugs fail to bring any pleasure.<sup>124</sup> Their addiction and loss of control is *chronic* and *permanent*<sup>125</sup> and their addiction interferes with their "life experience, character, and temperament."<sup>126</sup> It follows that "Type 5" users should receive reduced sentences under § 5K2.13 for their crimes.

Few select addicts could qualify as "Type 5" addicts, given the characteristics needed to establish oneself as such.<sup>127</sup> Using this tiered theory allows judges to exercise uniform treatment of the various types of addicts. Judges could deny a reduced sentence to some addicted defendants, while retaining the ability to reduce sentences pursuant to § 5K2.13 for others.<sup>128</sup>

## VI. AN ANALYSIS OF ROACH AS A "TYPE 5" ADDICT

If Roach is a "Type 5" addict, the Seventh Circuit incorrectly reversed the trial court's decision.<sup>129</sup> Roach regarded spending vast sums of money as a solution to her problems.<sup>130</sup> She continued to self-medicate through shopping, even as her life fell

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118. *Id.* at 167-68.

119. Coombs, *supra* note 103, at 168.

120. *Id.* at 171.

121. *See id.* at 168.

122. *Id.* at 168.

123. *Id.*

124. Coombs, *supra* note 103, at 168.

125. *Id.* (emphasis added).

126. *Id.* at 170.

127. *Id.* at 167.

128. *See id.* at 170.

129. Compare Coombs, *supra* note 103, at 170, with *United States v. Roach*, 296 F.3d 565, 566-73 (7th Cir. 2002).

130. *Roach*, 296 F.3d at 566.

apart.<sup>131</sup> She lied to her husband, committed several federal crimes to obtain funds, and went to extreme lengths to satisfy her shopping addiction.<sup>132</sup> Her addiction was permanent and affected every facet of her life.<sup>133</sup>

Section 5K2.13 is tailored for "Type 5" addicts like Roach. Establishing Roach as a "Type 5" addict supports the notion that the addiction caused her significantly reduced mental capacity and that such reduced capacity existed at the time that she committed wire fraud.<sup>134</sup> Despite the novel nature of shopping addiction, Roach is still entitled to a reduced sentence.<sup>135</sup>

*A. Roach's Addiction-Caused Impairment Was Sufficiently  
Connected to the Wire Fraud*

The severity of Roach's addiction failed to persuade the Seventh Circuit, as the appellate court judges demanded a showing that the addiction was connected to the crime.<sup>136</sup> In finding a connection between the crime and the addiction-caused reduced capacity, § 5K2.13 does not distinguish between impairments that explain the behavior constituting the crime and behavior explaining a motive for the crime.<sup>137</sup> Roach stole from Andersen solely to maintain her addiction.<sup>138</sup> Nevertheless, the Seventh Circuit agreed that although feeding an addiction might be motivation to commit a crime, the addictive behavior must actually constitute a crime itself for § 5K2.13 to apply.<sup>139</sup> In Roach's case, this means that she needed to be charged with a shopping-related crime in order to receive a reduced sentence.<sup>140</sup> For demonstrative purposes, the Court drew upon an example: If a defendant with an eating disorder steals money in order to buy food, the disorder alone is *neither* a direct nor indirect cause of the crime.<sup>141</sup>

Federal case law calls the Seventh Circuit's hypothetical into question.<sup>142</sup> As the court in *United States v. Cantu* stated, "the disorder need be only a contributing

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131. *Id.*

132. *Id.* at 566-67.

133. *Id.*

134. See U.S. SENTENCING GUIDELINES MANUAL § 5K2.13 (2000).

135. See *id.*

136. *Roach*, 296 F.3d at 569-70.

137. *Id.* at 569 (quoting *United States v. Sadolsky*, 234 F.3d 938, 943 (6th Cir. 2000)).

138. See *id.* at 567.

139. See *id.* at 569.

140. See *id.* (citing *United States v. Miller*, 146 F.3d 1281, 1286 (11th Cir. 1998)).

141. *Roach*, 296 F.3d at 569 (citing *Sadolsky*, 234 F.3d at 943) (emphasis added).

142. "Nothing in the text of §5K2.13 or elsewhere in the Guidelines . . . suggests that the Commission intended to redefine the term 'diminished capacity.' Thus, the term should be applied . . . in a narrow inquiry that *avoids* comparison with other defendants to determine if a particular defendant's mental capacity is uniquely or extraordinarily diminished."

cause . . . of the offense," not the sole cause.<sup>143</sup> The same court again demonstrated this notion in *United States v. McFadzean*.<sup>144</sup> In *McFadzean*, a drug addicted defendant sought a reduced sentence for his robbery charge based on § 5K2.13.<sup>145</sup> The *McFadzean* Court held that the fact that a drug-addicted defendant had money to buy drugs prior to the charged robbery was an insufficient reason to deny a sentence reduction in the presence of other mitigating factors.<sup>146</sup> In other words, a person with an eating disorder *can* obtain a reduced sentence for stealing food, despite the fact that he has money with which he can purchase that food.<sup>147</sup> The person with the eating disorder just needs to show, as Roach did, that there are mitigating circumstances that supplement a claim of significantly reduced mental capacity.<sup>148</sup>

The Seventh Circuit failed to take into account many mitigating circumstances peculiar to Roach.<sup>149</sup> Roach did not merely state that she stole money because she liked to shop, rather, she supplied plenty of evidence of her psychiatric history, debt, and supporting expert testimony.<sup>150</sup> Moreover, Roach "self-medicated" through shopping for over thirteen years and only committed fraud for the last three.<sup>151</sup> Her addiction caused her to pursue legal means of covering up her shopping before she inadvertently discovered a new source of cash flow through fraudulent activity.<sup>152</sup> Roach's defense expert testified that "Roach had a significantly reduced mental capacity both during her shopping binges and when she submitted the false expense reports."<sup>153</sup> The judges failed to account for this additional evidence and

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*United States v. Shore*, 143, F. Supp. 2d, 74, 81 (D. Mass. 2001) (internal quotations omitted) (emphasis added). Thus, judges should *avoid*, but not *ignore*, comparison with other defendants. *See id.*

143. 12 F.3d 1506, 1515 (9th Cir. 1993).

144. No. 98 CR 754, 1999 WL 1144909, at \*3 (N.D. Ill. Dec. 8, 1999).

145. *Id.* at \*1.

146. *See id.* at \*3 (noting that the court looked at mitigating factors such as the presence of a schizophrenic disorder, auditory hallucinations, and mild concussive head injuries).

147. *See United States v. Saldosky*, 234 F.3d 938, 943 (6th Cir. 2000).

148. *See id.*

149. *United States v. Roach*, 296 F.3d 565, 570-73 (7th Cir. 2002) (failing to consider other factors such as chronic and severe depression, bulimia, sexual molestation, self-motivation, and suicidal thoughts); *see also United States v. Roach*, No. 00 CR 411, 2001 WL 664438, at \*1 (N.D. Ill. Jun. 4, 2001).

150. *Roach*, 296 F.3d at 571-73.

151. *Id.* at 572.

152. *See id.* at 566.

153. *Id.* at 572.

During both the compulsive shopping and the commission of the charged offense Mrs. Roach appears to have been functioning in a dissociated state in which information about the legal, practical and moral consequences of her actions was not effectively available to her. This constitutes a significant reduction in her mental capacity at the time of commission of the charged offense.



unnecessarily narrowed the circumstances in which a crime can be motivated by an addiction-caused reduced capacity.<sup>154</sup>

Just as illogically, in the face of strong evidence to the contrary, the appellate judges classified Roach's addiction as "episodic."<sup>155</sup> Roach's expert testified otherwise, but the court was skeptical about the testimony.<sup>156</sup> This appearance of bias is lost, however, when compared to the testimony of Dr. Paul Pasulka, the government's expert.<sup>157</sup> Oddly, the judges disregarded Dr. Pasulka's conclusion because he did not specifically state that Roach was unable to control her actions when she committed wire fraud.<sup>158</sup> Rather, he testified that "Roach was not fully able to control unspecified wrongful behavior."<sup>159</sup>

Though Dr. Pasulka did not specifically state that Roach suffered from reduced capacity when she committed wire fraud, it stands to reason that the government's expert would make every truthful statement possible in order to help obtain Roach's conviction.<sup>160</sup> It can be inferred that by failing to state that Roach was in control of her actions when she committed wire fraud, Dr. Pasulka believed that such a statement would be untruthful.<sup>161</sup> Nevertheless, the appellate judges concluded that four separate experts provided a mere bottom-line devoid of sufficient evidentiary support.<sup>162</sup>

The New Jersey District Court holding in *United States v. Checoura* supports the notion that obtaining money to engage in an addiction is tantamount to engaging in the addictive behavior itself.<sup>163</sup> Assuming that Roach suffered from significantly reduced mental capacity when she committed wire fraud to obtain money for shopping, at least one court indicates that this is sufficient to trigger § 5K2.13.<sup>164</sup> Indeed, the *Checoura* judges stated that they were influenced by the district court judge's opinion in *Roach*.<sup>165</sup>

In *Checoura*, a bookkeeper diverted over \$4 million dollars from the firm to cover up gambling debts, totaling more than \$100,000 per month.<sup>166</sup> This theft enabled the bookkeeper to maintain a gambling addiction, which the defense's expert

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*Id.*

154. *Id.* at 570-71.

155. *Roach*, 296 F.3d at 572.

156. *See id.*

157. *Id.* at 573 (suggesting that Roach was not in full control of her actions).

158. *See id.*

159. *Id.*

160. *See generally Roach*, 296 F.3d at 573.

161. *See generally id.*

162. *Id.* at 571.

163. 176 F. Supp. 2d 310, 312-13 (D.N.J. 2001).

164. *See id.* at 312.

165. *Id.* at 312.

166. *Id.* at 311-12.

described as a pathological disorder that drove “her to do anything possible to obtain money to indulge her gambling habit.”<sup>167</sup>

Like Roach, defendant Checoura suffered from past psychological harm, including molestation.<sup>168</sup> Moreover, like Roach’s inability to control her spending, defendant Checoura could not control her gambling activity nor, as evidenced by the gross nature of her fraud, “anything related to the gambling.”<sup>169</sup> Significantly, the Court explained that both the gathering of funds and the gambling itself comprise gambling addiction:

the term “compulsive gambler” might describe a person whose ordinary volition disappears only when their hand is actually resting on the arm of the slot machine, or it might describe a person who cannot resist swiping the odd unguarded quarter. Both . . . are equally entitled to benefit from § 5K2.13 if the acts that fall within their compulsion prove to be criminal.<sup>170</sup>

Thus, according to the District Court of New Jersey, obtaining money to feed an addiction falls within the ambit of § 5K2.13, so long as the actual crime committed is not one excluded by the statute’s policy limitations.<sup>171</sup> *Checoura* highlights another issue that the Seventh Circuit failed to address, i.e., merely because addictive behavior is episodic does not mean that the reduced capacity resulting from that addiction is similarly episodic.<sup>172</sup> The District Court of New Jersey held that a person can have the need to engage in addictive behavior in particular instances and yet their ability to reason and control themselves continues to be significantly reduced in the intervening time.<sup>173</sup> It appears that at least one court in the Third Circuit would have decided *Roach* differently than the Seventh Circuit did.

### B. *The Seventh Circuit Erred in the Way it Reviewed Roach*

In light of the holdings of other federal circuits, the appellate court judges inappropriately reversed the district court decision in *Roach*. In particular, they failed

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167. *Id.* at 312.

168. *Checoura*, 176 F. Supp. 2d at 312.

169. *Id.* at 313.

170. *Id.* at 315. *But see* United States v. Carucci, 33 F. Supp. 2d 302, 303 (S.D.N.Y. 1999) (holding that “While defendant’s large gambling losses may have sufficiently exceeded his . . . income as to create an incentive to engage in lucrative unlawful trading, economic pressure hardly equates with diminished mental capacity”).

171. *Checoura*, 176 F. Supp. 2d at 315.

172. *See id.* at 315-16.

173. *See id.*

to apply the correct standard of review.<sup>174</sup> The appellate court should review for clear error and reverse only when “left with a definite and firm conviction that a mistake has been committed.”<sup>175</sup> Roach proffered abundant evidence to demonstrate her reduced mental capacity.<sup>176</sup> Given these facts, the appellate court judges could not have definitely been convinced that the district court judge made a mistake.

Other circuits’ holdings indicate the appellate court’s error in *Roach*. In *United States v. Lewinson*, a Ninth Circuit case, defense experts testified that the defendant suffered from reduced mental capacity at the time he committed mail fraud.<sup>177</sup> Like *Roach*, there was no evidence to the contrary.<sup>178</sup> The district court granted a reduced sentence pursuant to § 5K2.13 and the appellate court held that the district court plausibly interpreted the evidence.<sup>179</sup> “[T]he court of appeals may not reverse [the reduced sentence] even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.”<sup>180</sup>

The evidence in Roach’s favor appears stronger than it was in *Lewinson* since, in *Roach*, the government’s expert witness determined that, while there was not a significantly reduced mental capacity, Roach was not fully able to control unspecified wrongful behavior.<sup>181</sup> However, the *Lewinson* judges accounted for other factors affecting defendant Lewinson’s capacity at the time he committed his crime.<sup>182</sup> The Seventh Circuit failed to account for Roach’s reduced capacity resulting from her depression and abuse.<sup>183</sup> Such discrepancies emphasize the district court judge’s plausible application of § 5K2.13 in *Roach*.

In reversing the district court, the Seventh Circuit not only applied an incorrect standard of review, but also ignored “the role of district courts as front-line sentencing decisionmakers.”<sup>184</sup> The district court enjoys “an institutional advantage over appellate courts in making [sentence reduction] determinations, especially as they see so many more Guidelines cases than appellate courts do.”<sup>185</sup> As a result, the

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174. See *United States v. Roach*, 296 F.3d 565, 566, 569-71, 573 (7th Cir. 2002).

175. *United States v. Huerta*, 239 F.3d 865, 875 (7th Cir. 2001) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948); *United States v. Brown*, 136 F.3d 1176, 1184 (7th Cir. 1998)).

176. *Roach*, 296 F.3d at 571.

177. 988 F.2d 1005, 1006 (9th Cir. 1993).

178. *Id.* at 1007.

179. *Id.* at 1006.

180. *Serv. Employees Int’l Union v. Fair Political Practice Comm’n*, 955 F.2d 1312, 1317 n.7 (9th Cir. 1992) (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985)).

181. See *Roach*, 296 F.3d at 573.

182. See 988 F.2d at 1007.

183. *Roach*, 296 F.3d at 573.

184. *United States v. Thompson*, 315 F.3d 1071, 1079 (9th Cir. 2002) (citing *Koon v. United States*, 518 U.S. 81, 98-99 (1996)).

185. *Id.* at 1079-80 (quoting *Koon*, 518 U.S. at 98-99).

Sentencing Commission relies upon district court judges' decisions in determining when it should revise the USSG such that, if the Commission spots a trend in district court judges' actions, then the Commission might decide to accordingly amend the USSG.<sup>186</sup>

Despite the error in the standard of review, the issue's novel nature, and the split in the circuits, rehearing was denied and *Roach* still stands in the Seventh Circuit.<sup>187</sup> After several years and a small fortune in legal fees, the case was remanded to Judge Kennelly in the Northern District of Illinois . . . the same judge who granted Roach's initial § 5K2.13 departure.<sup>188</sup> Judge Kennelly did not allow Roach's attorney to enter new evidence into the record and found that the existing evidence did not justify a downward departure pursuant to the Seventh Circuit's reasoning.<sup>189</sup> Although he believed that he

correctly interpreted the pertinent Seventh Circuit decisions, the matter is not free from doubt . . . [This holding] conflicts with the law in several other Circuits [including the Sixth Circuit and Eighth Circuit]. We are hopeful that further clarification will be forthcoming if and when an appeal is taken in the present case.<sup>190</sup>

Roach's attorney intends to appeal.<sup>191</sup> Should that appeal succeed and the district court analyze any new evidence, contrary precedent and modern conceptions of addiction should lead the district court to once again reduce Roach's sentence pursuant to § 5K2.13.

## VII. CONCLUSION

Though some people hold skeptical views of "shopping addiction," the Seventh Circuit held that shopping addiction could reduce a defendant's capacity.<sup>192</sup> When

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186. *Id.* at 1080 (citing *United States v. Rivera*, 994 F.2d 942, 951 (1st Cir. 1993)).

187. 296 F.3d at 565, *rehearing denied by* 40 Fed. Appx. 295, No. 01-2618, 2002 WL 1769956 (7th Cir. July 30, 2002).

188. Telephone Interview with Jeffrey B. Steinback, Attorney for Elizabeth Roach (Mar. 27, 2003); *see also* *United States v. Roach*, No. 00 CR 411, 2003 WL 21183997, at \*4 (N.D. Ill. May 20, 2003) (interpreting several conflicting cases and describing its holding as a "close call," Judge Kennelly announced that "[*United States v. Sumner* interpreted *United v. Wyss*, holding there to be] a general ban on the introduction of new evidence on remand of a sentencing where the trial court's finding on the issue in question was reversed, after plenary review, based on insufficiency of the evidence").

189. *Roach*, 2003 WL 21183997, at \*4.

190. *Id.*

191. Telephone Interview with Jeffrey B. Steinback, Attorney for Elizabeth Roach (July 24, 2003).

192. *United States v. Roach*, 296 F.3d 565, 571 (7th Cir. 2002).

determining whether a defendant should receive a § 5K2.13 reduced sentence, the proper inquiry should be how significantly the addiction reduces the addict's capacity and to what degree the reduced capacity is connected to the defendant's crime.

Thus, the Seventh Circuit improperly held that Roach could not receive a reduced sentence. Such a decision may reflect a fear of a slippery slope with respect to defendants' proffering new forms of addictions in order to benefit from § 5K2.13. However, hypothetical, line-drawing concerns alone should not justify a judge's refusal to reduce a sentence. Given Roach's extraordinary circumstances and the existence of a broader zone of reduced capacity than the Seventh Circuit acknowledged, the judges could have reasonably affirmed the district court judge's decision. In refusing to do so, the court established an unreasonably narrow standard of addiction-caused reduced capacity that a defendant must meet in order to benefit from § 5K2.13.

