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When is Gambling Not Gambling?

An Examination of *United States v. DiCristina*

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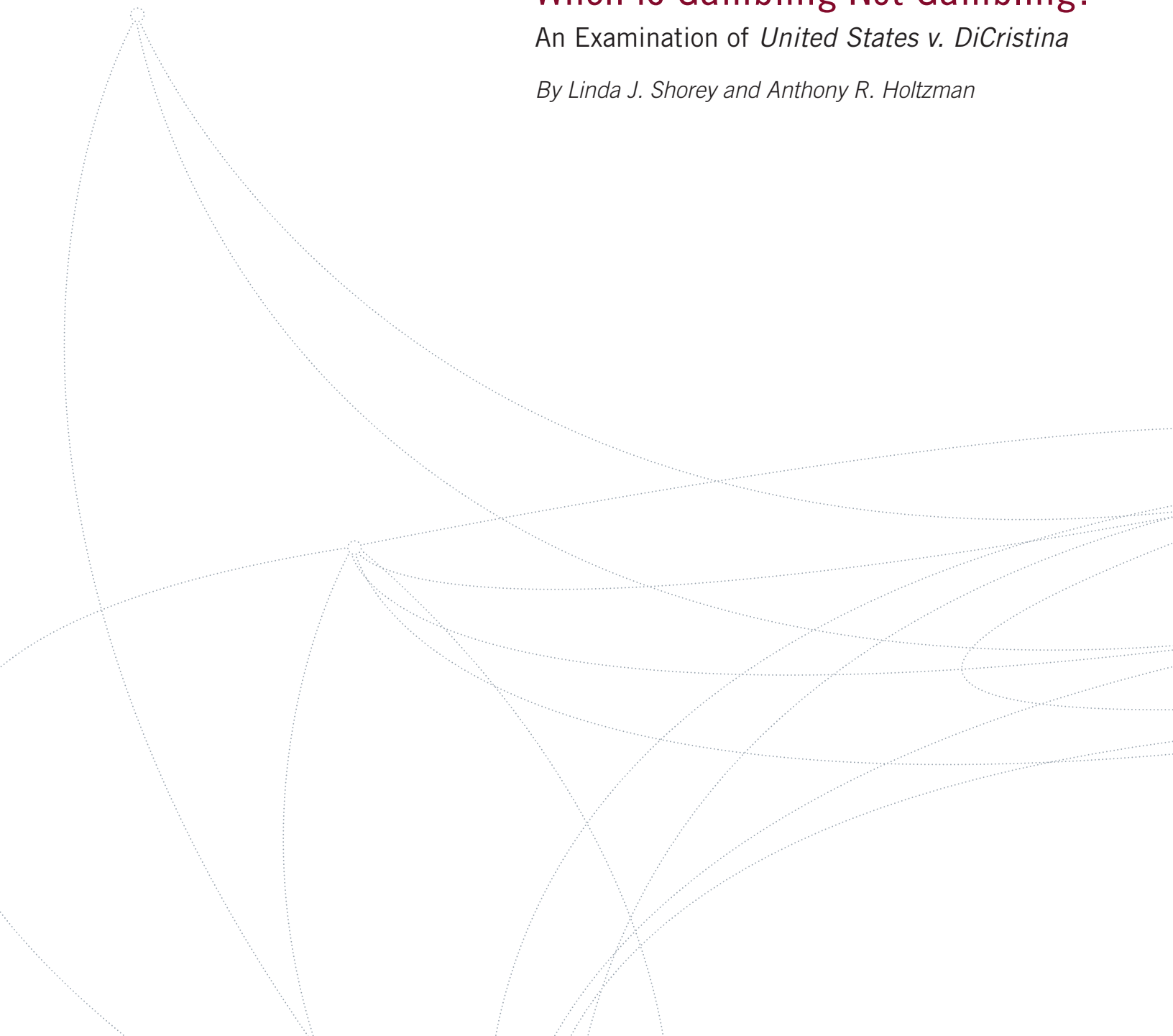

On August 21, 2012, the federal district court for the Eastern District of New York, in *United States v. DiCristina*, No. 11-CR-414, 2012 U.S. Dist. LEXIS 118037 (E.D.N.Y.) ("*DiCristina*"), set aside Defendant's conviction under the Illegal Gambling Business Act ("IGBA"), 18 U.S.C. §1955, and dismissed the indictment against him. In doing so, the district court determined that Texas Hold'em poker is not "gambling" under the IGBA's definition of that term, even if it is gambling under New York law. This holding was based on the district court's conclusion that Texas Hold'em poker is a game predominated by skill, which was derived from two critical legal conclusions that arose out of the "rule of lenity" – (1) not all violations of state gambling law can serve as the predicate for a violation of IGBA and (2) IGBA's definition of gambling does not include games predominated by skill.

This paper examines the district court's decision in *DiCristina*, particularly its use of the rule of lenity and its determination that poker is a game predominated by skill. In doing so, we look at the background of the case, provide a brief summary of IGBA, discuss the rule of lenity, and examine the court's analysis related to its determinations that (1) a violation of IGBA occurs only if the alleged gambling activity meets the statute's definition of "gambling" (in addition to a violation of a state or local gambling law); (2) the gambling defined by IGBA is predominated by chance; and (3) the Texas Hold'em games conducted by Defendant were predominated by skill. The paper concludes with a discussion of some potential impacts of the decision, including some potential impacts on Internet poker.

BACKGROUND

Defendant and others "operated a poker club in the backroom of a warehouse out of which he conducted a legitimate business." *DiCristina*, 2012 U.S. Dist. LEXIS 118037 at *67. About twice a week, Texas Hold'em was played at two tables in the warehouse. *Id.* The average buy-in ranged from $100 for the 1-2 table to $300 for the 5-5 table. *Id.* at *68. Five percent of each pot (a "rake") was paid to the "house," out of which expenses were paid, including 25% to the dealers. *Id.* at *69.

Defendant was "charged with operating an illegal gambling business involving poker games in violation of [IGBA] and with conspiring to do so." *Id.* at **2-3. The government alleged the operation of the poker games was illegal under New York Penal Law §§225.05 and 225.20 (promotion of gambling). *See* ¶1 of redacted indictment (Docket Entry No. 5 in *DiCristina*).

Defendant initially pled guilty, but at his sentencing hearing he changed his plea to "not guilty" and a jury trial was scheduled. Defendant filed a pre-trial motion asking that the charges be dismissed. He argued that the government failed to allege that the operation of a poker club violated IGBA, reasoning that the poker played at the club – Texas Hold'em – did not constitute "gambling" under the statute's definition of that term because it was a game predominated by skill, even if the operation of the poker club violated New York law[1]. After a hearing on Defendant's motion and the government's motion to preclude, at trial, expert testimony on the question of whether poker is a game of skill, the district court granted the government's motion and declined to rule on the issue raised by Defendant.

At the conclusion of the evidence at trial, Defendant renewed his motion to dismiss, requesting "a judgment of acquittal under Rule 29 of the Federal Rules of Criminal Procedure." *See* Defendant's Memorandum of Law in support (Docket No. 92). When the jury returned a verdict against the Defendant, the district court ordered additional briefing on Defendant's motion and held a post-trial hearing at which it (not a jury) heard more testimony regarding whether Texas Hold'em poker is a game predominated by skill.

In issuing its decision, the district court explained that, in Defendant's view, a state gambling law cannot trigger IGBA if the activity at issue is not a game similar to the nine games listed in the statute's definition of gambling, meaning that, in order to be gambling, the poker games Defendant conducted had to be "house-banked and predominantly by chance." *DiCristina* at *7. The district court explained that the government, by contrast, took the position that, under the "plain language" of the statute's text, the games that trigger IGBA are not limited to those similar to the nine that are enumerated, but rather encompass "any gambling activity that is illegal under state law." *Id.* at *8.

IGBA

IGBA provides: "Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business" commits a crime. 18 U.S.C. §1955(a). IGBA defines an "illegal gambling business" as one that

> (i) is a violation of the law of a State or political subdivision in which it is conducted;
>
> (ii) involves five or more persons who conduct, finance, manage, supervise, direct or own all or part of such business; and
>
> (iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

18 U.S.C. §1955(b)(1). IGBA defines "gambling" as "includ[ing] but ... not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein," 18 U.S.C. §1955(b)(2), and defines "State" as "any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States." 18 U.S.C. §1955(b)(3). IGBA does not apply "to any bingo game, lottery, *or similar game of chance* conducted by an organization exempt from tax under" §501(c)(3) of the Internal Revenue Code, "if no one associated with the organization profits from the receipts of the games." 18 U.S.C. §1955(e).

THE RULE OF LENITY

The rule of lenity is a longstanding doctrine of statutory interpretation. It provides that when a defendant is alleged to have violated a criminal statute, and the statute is ambiguous on its face or as it applies relative to the defendant, the ambiguity should be resolved in the defendant's favor. As the U.S. Supreme Court explained in *United States v. Bass,* 404 U.S. 336, 347 (1971): "[W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite," and thus "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." In 2008, this position was re-affirmed in *United States v. Santos*:

> The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them. … This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party [the government] that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead.

553 U.S. 507, 514 (2008) (plurality op.) (citations omitted).

The rule of lenity originated in 17th Century England, when many criminal statutes called for hanging as a penalty. In many instances, British courts found hanging to be cruel and, therefore, developed the principle that criminal statutes are to be strictly construed. In considering a criminal statute that made "stealing sheep or other cattle" a crime, one British court concluded that the words "or other cattle" were "much too loose to create a capital offence, and the act was held to extend to nothing but mere sheep." I WILLIAM BLACKSTONE, COMMENTARIES at 88.

In the United States, an early discussion of the rule of lenity appears in *United States v. Wiltberger*, 18 U.S. 76 (1820), where the U.S. Supreme Court construed a federal statutory provision criminalizing manslaughter "upon the high seas." The Court considered whether "high seas" included rivers in foreign nations, which was plausible given that another provision in the same statute conferred jurisdiction on federal courts to adjudicate criminal matters charging robbery "upon the high seas, or in any river, haven, basin or bay." *Id.* at 79. Stressing that the language at issue was not ambiguous, the Court determined that foreign rivers were not included. In dicta, the Court described the rule of lenity, noting that for a court to construe an ambiguous criminal statute broadly would be to infringe upon a legislature's power to criminalize behavior:

> The rule that penal laws are to be construed strictly is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment.

Id. at 95. The Court then explained that, while an ambiguous criminal statute should be strictly construed, the rule of lenity should not be applied to thwart the plain intention of the legislative body that enacted the statute:

> It is said, that notwithstanding this rule, the intention of the law maker must govern in the construction of penal, as well as other statutes. This is true. But this is not a new independent rule which subverts the old. It is a modification of the ancient maxim, and amounts to this, that though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature has obviously used them, would comprehend.

Id.

U.S. Supreme Court Justice Story, sitting as a Circuit Judge, used the rule of lenity in multiple early 19th Century cases. For example, in *United States v. Shackford*, 27 F. Cas. 1038 (C.C.D. Me. 1830), he applied the rule in connection with a statute providing that if a ship obtained a temporary registry in a district other than that of its home port, it was required, under penalty of a fine, to deliver the temporary registry within ten days of its "arrival" in the home port. Justice Story addressed the question of whether a ship that briefly entered its home port during the course of a journey had "arrived" and was therefore required to deliver its temporary registries within ten days of entry. Because the term "arrival" was ambiguous on its face, Justice Story invoked the rule of lenity:

> But if one construction be exceedingly inconvenient, and the other safe and convenient, a fortiori ought the latter to be deemed the true exposition of the legislative intention; for it can never be presumed that the government means to impose irksome regulations, unless for some known object, or from some express declaration.

Id. at 1039. Justice Story reviewed the plain language of the statute, and of related statutes, and concluded that construing "arrival" so as to allow for the imposition of a fine on a ship making a brief stop in its home port would be inconsistent with legislative intent.

Throughout the remainder of the 19th Century, U.S. courts used this approach in applying the rule of lenity. That is, they determined whether a term in a criminal statute was ambiguous by considering the term's ordinary facial meaning in conjunction with legislative intent, which was gleaned by considering the language of the statute in light of text-based canons of construction.

In the 20th Century, however, the U.S. Supreme Court shifted its approach to the rule of lenity and began to show a willingness to consider legislative history to discern legislative intent. For example, in 1961, the Court reviewed legislative history (but found it to be unenlightening) when determining whether to apply the rule of lenity in connection with the issue of whether, under the Hobbs Anti-Racketeering Act, 18 U.S.C. §1951, a substantive violation of the Act and a conspiracy under the Act were punishable as separate offenses:

> Petitioner relies on numerous statements by members of Congress concerning the severity of the twenty-year penalty to illustrate that cumulative sentences were not contemplated. But the legislative history sheds no light whatever on whether the Congressmen were discussing the question of potential sentences under the whole bill or merely defending the maximum punishment under its specific sections. All the legislative talk only reiterates what the statute itself says – that the maximum penalty is twenty years.

Callanan v. United States, 364 U.S. 587, 591-92 (1961). The Court ultimately refrained from applying the rule of lenity and concluded that the offenses could be punished separately, reasoning: "This is an ordinary case of a defendant convicted of violating two separate provisions of a statute, whereby Congress defined two historically distinctive crimes composed of differing components. If petitioner had committed two separate acts of extortion, no one would question that the crimes could be punished by consecutive sentences; the result seems no less clear in the present case." *Id.* at 597.

In *Moskal v. United States*, the Court addressed the issue of "whether a person who knowingly procures genuine vehicle titles that incorporate fraudulently tendered odometer readings receives those titles 'knowing [them] to have been falsely made'" within the meaning of 18 U.S.C. §2314, which criminalizes, among other things, the knowing transportation of falsely made, forged, altered, or counterfeited securities in interstate

commerce. 498 U.S. 103, 105 (1990) (emphasis in original). The Petitioner argued that, because it is possible to read the relevant statutory language to mean that a valid vehicle title containing a fraudulently tendered odometer reading is not "falsely made" – and some courts had read it that way – the Court "should simply resolve the issue in his favor under the doctrine of lenity." *Id.* at 107. The Court rejected this argument, explaining: "[W]e have always reserved lenity for those situations in which a reasonable doubt persists about a statute's intended scope even after resort to the language and structure, legislative history, and motivating policies of the statute." *Id.* at 108 (emphasis added) (internal quotation omitted). Adhering to this approach, the Court concluded that Congress unambiguously intended for 18 U.S.C. §2314 to receive a construction contrary to the Petitioner's. In reaching this conclusion, it placed emphasis on legislative history:

> Our conclusion that "falsely made" encompasses genuine documents containing false information is supported by Congress' purpose in enacting §2314. Inspired by the proliferation of interstate schemes for passing counterfeit securities, see 84 Cong. Rec. 9412 (statement of Sen. O'Mahoney), Congress in 1939 added the clause pertaining to "falsely made, forged, altered or counterfeited securities" as an amendment to the National Stolen Property Act. 53 Stat. 1178. Our prior decisions have recognized Congress' "general intent" and "broad purpose" to curb the type of trafficking in fraudulent securities that often depends for its success on the exploitation of interstate commerce. In *United States v. Sheridan*, 329 U.S. 379, 91 L.Ed. 359, 67 S.Ct. 332 (1946), we explained that Congress enacted the relevant clause of §2314 in order to come to the aid of the states in detecting and punishing criminals whose offenses are complete under state law, but who utilize the channels of interstate commerce to make a successful getaway and thus make the state's detecting and punitive processes impotent. This, we concluded, was indeed one of the most effective ways of preventing further frauds.
>
> We think that "title-washing" operations are a perfect example of the "further frauds" that Congress sought to halt in enacting §2314.

Id. at 110 (internal quotations and citations omitted).

Contemporary U.S. Supreme Court Justices have differing views as to whether legislative history should be consulted in determining whether a term in a criminal statute is ambiguous and, therefore, subject to a strict construction. The differences are illustrated by *United States v. R.L.C.*, 503 U.S. 291 (1992), where the Court considered the interpretation of a provision in the Juvenile Delinquency Act limiting the time period for which certain juvenile delinquents could be detained to "the maximum term of imprisonment that would be authorized if the juvenile had been tried and convicted as an adult." The Court addressed whether the maximum penalty was the maximum statutory penalty or the maximum sentence permitted under Federal Sentencing Guidelines. The statutory provision was silent on this issue, creating an ambiguity.

Justice Souter, writing for a plurality on certain issues – including the rule of lenity – and for a majority on others, concluded that the rule did not need to be applied. Quoting Moskal, he commented that the Court has "'always reserved lenity for those situations in which a reasonable doubt persists about a statute's intended scope even after resort to the language and structure, legislative history, and motivating policies of the statute.'" *Id.* at 305-06 (emphasis in original). He concluded that, in light of these factors, Congress did not intend for the statutory provision at issue to receive a broad construction (which, ironically, is the same result he would have reached had he applied the rule of lenity).

In concurring, Justice Scalia (joined by Justice Thomas) disagreed with the *Moskal* approach. He explained that when the Court considers legislative history and "motivating policies" in determining whether a term in a criminal statute is ambiguous, it inappropriately puts people at risk of being punished not only for violating the statute's plain language, but also for "violating" the Court's speculative notion of what the majority of a body of legislators had in mind when the statute was enacted:

> It may well be true that in most cases the proposition that the words of the United States Code or the Statutes at Large give adequate notice to the citizen is something of a fiction, albeit one required in any system of law; but necessary fiction descends to needless farce when the public is charged even with knowledge of Committee Reports.

Id. at 309 (internal citation omitted). Justice Scalia also said that the *Moskal* approach violates separation-of-powers principles by elevating the Court's view of extra-statutory materials and individual legislators' personal motives above the legislature's collective will, as expressed through the language of the statutes that it enacts as a body.

More recently, in *Santos*, Justice Scalia, writing for a plurality that included Justice Souter, applied the rule of lenity. At issue was the construction of the money laundering provision at 18 U.S.C. §1956(a)(1), which is violated if, among other things, a person conducts a transaction that "in fact involves the proceeds of specified unlawful activity" while knowing "that the property involved in" the transaction "represents the proceeds of some form of unlawful activity." The issue before the Court was whether "proceeds" meant "receipts" or "profits" (the latter of which is a narrower term more favorable to criminal defendants under Section 1956(a)(1)). Citing several dictionary definitions, Justice Scalia stated: "'Proceeds' can mean either 'receipts' or 'profits.' Both meanings are accepted, and have long been accepted, in ordinary usage."553 U.S. at 511. He explained: "'Proceeds'…has not acquired a common meaning in the provisions of the Federal Criminal Code." *Id.* He next considered the term "Proceeds" in the larger context of the money laundering statute and determined that contextual factors did not resolve the ambiguity, noting: "Under either of the word's ordinary definitions, all provisions of the federal money-laundering statute are coherent; no provisions are redundant; and the statute is not rendered utterly absurd." *Id.* at 513-14. He then applied the rule of lenity to conclude that, for purposes of Section 1956(a)(1), "proceeds" means "profits" because "[u]nder a long line of our decisions, the tie must go to the defendant. The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *Id.* at 514.

Justice Stevens concurred. In his view, the rule of lenity applied only because there was no legislative history to use in resolving the ambiguity at issue. In dissent, Justice Alito pointed to a piece of legislative history in support of his conclusion that, for purposes of 18 U.S.C. §1956(a)(1), "proceeds" means "receipts."

Regardless of the ongoing differences of opinion among the Justices regarding the relationship between legislative history and the rule of lenity, many lower federal courts only apply the rule in relation to an ambiguous term in a criminal statute if the ambiguity is not resolved by either a review of the language and structure of the statute *or* consideration of the statute's legislative history. As will be seen below, that is exactly what the district court did in *DiCristina*, plus more.

THE DECISION

The district court's opinion, in slip opinion format, is 120 pages long. It is worth looking at how the court worked its way through the legal issues that implicated the rule of lenity so as to reach its ultimate conclusion that poker is predominantly a game of skill and therefore, even if gambling under state law, not an activity that can implicate IGBA.

The Preliminaries

After summarizing the case in an introduction, the court set forth the relevant "facts," including a lengthy review of the "evidence on poker," in which it sets forth: (1) a brief history of poker in the U.S.; (2) a description of how Texas Hold'em is played; (3) a lengthy summary (31 pages) of the expert testimony presented by Defendant and by the government; (4) a discussion of poker studies not objected to by the government; (5) a discussion of state statutes concerning gambling and state and federal court decisions addressing poker; and (6) a short discussion of federal cases concerning video poker. After the facts, the district court reviewed the relevant legal standards – (1) the rules applicable to deciding Defendant's motion; (2) the general rules of statutory construction; and (3) how the rule of lenity comes into play. The district court stressed that the rule of lenity "places a burden of proof on the government with respect to statutory interpretation" by requiring that "to prevail, the government must show that it is more probable than not that the meaning that it relies upon is the appropriate interpretation of the statute. A state of equipoise on the issues requires favoring the defendant's view." *DiCristina*, 2012 U.S. Dist. LEXIS 118037 at *73.

Next, the district court reviewed the items that would assist it in applying the statutory construction rules and the rule of lenity. It first looked to the text of IGBA, noting that a "[c]lose reading … reveals that it requires both a violation of an applicable state law and proof of additional federal elements." *Id.* at *75. The court specifically pointed to the definitions of "illegal gambling business," "gambling," and "State," and to the provision providing the exception for "any bingo game, lottery, or similar game of chance" conducted by an organization that is tax-exempt under IRC Section 501(c)(3). *Id.* at **75-76 (emphasis in original). Finding that "IGBA does not define the federal component of gambling precisely" and does not "explicitly state how this list of gambling activities in subsection (b)(2) relates to the crime of running an illegal business as defined by subsection (b)(1)," the court explained that it needed to "[r]esort to techniques other than plain meaning [] to determine the meaning of the term and its relation to the rest of the statute." *Id.* at *78. The district court then proceeded to review a myriad of other sources: (1) dictionary definitions; (2) common law (focused on state statutes and cases); (3) IGBA's legislative history (purpose, definition of gambling, discussion of particular games); (4) the report of the Commission on the Review of the National Policy Towards Gambling; (5) Mafia involvement in poker after the enactment of IGBA in 1970; and (6) other gambling statutes enacted contemporaneous with, as well as before and after, IGBA (including, among others, another portion of the Organized Crime Act of 1970, 18 U.S.C. §1511; the Paraphernalia Act, the Gambling Ships Act, the Wire Act, the Travel Act, the Indian Gambling Regulatory Act, the National Gambling Impact Study Commission Act, and the Unlawful Internet Gambling Enforcement Act). *See id.* at **79-131.

The Analysis

A. What Is the Role of IGBA's Gambling Definition?

The district court started with a discussion of why it did not find persuasive a Third Circuit decision – *United States v. Atiyeh*, 402 F.3d 354 (3d Cir. 2005) – which, the court believed, was the only decision that had directly addressed the issue of whether a violation of IGBA occurs only if there is an activity that meets the statute's definition of "gambling." In *Atiyeh*, the Third Circuit heard an appeal from the trial court's grant of Atiyeh's post-trial motion for acquittal. The jury had convicted Atiyeh, finding that the illegal gambling business in which he was engaged was "becoming a custodian of funds that were wagered or to be wagered" in connection with sports betting. Slip op. at 92. The trial court granted Atiyeh's motion for acquittal on the basis that his conduct had not violated Pennsylvania state law. On appeal, Atiyeh alternatively argued that even if being a custodian of funds that were wagered or to be wagered violated Pennsylvania law, it did not constitute "gambling" under IGBA. The Third Circuit disagreed with both the trial court's basis and Atiyeh's alternative:

> The relevant definition for our purposes is that of an "illegal gambling business," provided for in 18 U.S.C. §1955(b)(1), not the definition of "gambling" provided for in §1955(b)(2). The jury found that [the defendant] violated 18 Pa. Cons. Stat. §5514(4), and therefore operated an "illegal gambling business" as defined by 18 U.S.C. §1955(b)(1). We have held that the mere custodianship of gambling-related funds is sufficient to constitute a violation of 18 U.S.C. §1955, because such custodianship is considered to be "gambling" under state law even though it may not appear to fit within "gambling" as defined in §1955(b)(2).

DiCristina at **133-34 (quoting *Atiyeh*, 402 F.3d at 372).

The district court concluded the "*Atiyeh* decision is not persuasive on the issue of whether a violation of a state anti-gambling law is sufficient to permit a federal criminal conviction," explaining that the Third Circuit "did not have the benefit of the extensive briefing on the text and history of IGBA available to this court [and] [r]ather than grappling with the text of the statute itself, [it] relied on prior decisions which did not consider that issue of interpretation." *Id.* at *134. The district court noted that the "overwhelming majority of cases have assumed, without analysis, that the government need only prove that the business involved gambling as defined by state law, not that the game operated constituted 'gambling' as defined by the IGBA [and that IGBA] has been used to prosecute games that are not enumerated in Section 1955(b)(2), including poker." *Id.* at **135-36. The district court then proceeded to explain its conclusion that IGBA requires proof that its definition of "gambling" is met, as well as proof that a state gambling law is violated.

The district court first explained what it considered to be the two equally plausible interpretations of the import of the definition of gambling in IGBA.

> Based on the text of the IGBA, §1955(b)(2) could serve two distinct purposes. First, as advocated by the defendant, it could limit what kinds of state gambling crimes would trigger IGBA liability by providing an independent federal definition of gambling. Second, as advocated by the government, it could simply indicate what categories of state laws are gambling laws – *i.e.*, laws that criminalize "pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers

> games, or selling chances therein" or similar activities forbidden by state law, as opposed to laws criminalizing the practice of medicine by unlicensed professionals. Under the government's interpretation, a business that violates any state criminal prohibition on gambling, as gambling is defined by that state, would be prosecutable under the IGBA. Further, it would ensure that a business that violates other state criminal prohibitions unrelated to that state's definition of gambling – such as an unlawful medical corporation – would not be prosecutable.
>
> Both readings are plausible. Neither would violate the "cardinal principle of statutory construction" that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant."

DiCristina at **142-43 (citations omitted, emphasis in original).

The district court then explained its conclusion that "[t]he legislative history does not settle the dispute" between the two plausible interpretations:

> The purpose of the IGBA was to extend federal criminal jurisdiction over intrastate gambling businesses of a significant size in order to attack organized crime. During the debates, the bill's proponents were chiefly concerned about the games enumerated in §1955(b)(2), since those were the games which were, at the time, most frequently subject to Mafia control. … Yet members of Congress were uninterested in prohibiting any particular kind of gambling, which it viewed as a matter best left to the states. … Some members of Congress indicated that the IGBA included a broad definition of gambling encompassing every violation of State law; others implied that the definition was limited to the particular games enumerated in the statute. …
>
> Neither the IGBA as first introduced in both houses, nor the final adopted version, makes clear whether the statute federalizes all state gambling offenses. … The addition of a separate definition of gambling in a distinct section of the IGBA in the final version of the statute suggests a design adopting a distinct federal definition of gambling. No explanation for this change could be found in the legislative record.

Id. at **143-45. The district court also noted that "[w]here other federal statutes are designed to incorporate all state law gambling offenses, this intent is specified explicitly." *Id.* at *145.

Having determined that the import of IGBA's definition of gambling is ambiguous, the district court applied the rule of lenity and adopted the narrower position, *i.e.*, that to violate IGBA it must be shown that IGBA's definition of gambling is met, along with a violation of a state gambling law.

B. What Are the Criteria for an Activity to Constitute "Gambling" Under IGBA's Definition?

The district court began by pointing out that, "unlike other provisions of the United States Code dealing with gambling, the IGBA does not provide explicit criteria for what constitutes gambling," which, the court explained, required it to glean the criteria "by determining what common characteristics unify the games listed in [IGBA's definition] into a cohesive group." *DiCristina* at **152-53. It set out the contentions of the parties, describing Defendant's contention as being "that all the enumerated games are 'house-banked' and that chance predominates over the skill of the players in determining the outcome," and the government's position as being that "any game in which something of value is wagered on a future event constitutes gambling." *Id.* at **153-54.

As with the issue of the import of IGBA's definition of gambling, the district court first determined that the relevant text and legislative history are ambiguous, *i.e.*, the text "does not provide sufficient guidance to decide the meaning of 'gambling'" and the legislative history is "inconclusive." *Id.* at **154, 156. It found dictionary definitions to be unhelpful, but noted that, at common law, "gambling consisted of wagering something of value on the outcome of a game in which chance predominated over skill." *Id.* at *155. Turning to other federal statutes, it pointed out that "[n]either poker nor any other game of skill is explicitly included under the purview of other federal laws criminalizing gambling [and that] [f]ederal gambling laws historically targeted games of chance." *Id.* at **157-58.

The district court then discussed the parties' contentions. In connection with the Defendant's position, it rejected the argument that the IGBA definition of gambling requires the games to be "house-banked," because it found nothing in the text, legislative history, other federal statutes, or other record evidence "that Congress considered whether a game was house-banked [as] a relevant characteristic in determining whether it constituted gambling under the IGBA." *Id.* at *160. With respect to the government's contention "that chance is not the relevant criterion limiting the IGBA's definition of gambling because other forms of gambling involve skill," the district court, while acknowledging that bookmaking and other card games require skill, noted the skill required in poker is greater, explaining:

> The influence of skill on the outcome of poker games is far greater than that on the outcomes of the games enumerated in the IGBA's illustrations of gambling. While a gambler with an encyclopedic knowledge of sports may perform better than others when wagering on the outcome of sporting events, unlike in poker, his skill does not influence game play.

Id. at *162.

The district court concluded that the criterion proposed by Defendant – an activity predominated by chance – and the one proposed by the government – any activity in which something of value is risked on a future outcome – are equally plausible and therefore, applying the rule of lenity, stated that "'the tie must go to the defendant.'" *DiCristina* at **164-65 (quoting *Santos*, 553 U.S. at 514). In sum, the district court concluded that "[i]n order to constitute an illegal gambling business under the IGBA, as at common law, the business must operate a game that is predominantly a game of chance." *Id.* at *165.

C. Is Poker Predominated by Skill and; therefore, Not Gambling Under IGBA?

By this point, the district court had already "shown its hand." There was no tie. According to the court, the Texas Hold'em game conducted by Defendant is predominated by skill and is therefore not gambling under IGBA.

The district court began this, the final, component of its analysis (and the one that captured the headlines) by reiterating that it is the government's burden to show "it is more probable than not that poker is predominated by chance rather than by skill [and] [i]t has failed to do so." *Id.* at *165.

The court distinguished the skill used by players in poker from that used by participants in some of the games listed in the IGBA's gambling definition: "The ability of players to influence game play distinguishes poker from other games, such as sports betting (bookmaking), enumerated in the IGBA." *Id.* at *166. It rejected the argument that because "chance plays some role in the outcome of the game" it implies "that poker is predominantly a game of chance," illustrating its conclusion by contrasting poker to chess and analogizing it to bridge and golf:

> Chess, a game in which all possible moves are known in advance, can be characterized as a pure game of skill …. In poker, by contrast, players cannot know what cards the "luck of the draw" will deal them. The same can be said of bridge, where the "luck of the draw" is an element in overall wins and losses. Chance also influences many sports, such as golf. ...

Id. The court formulated the "fundamental question" as being "not whether *some* chance or skill is involved in poker, but what element predominates." *Id.* at *167 (emphasis in original).

The district court then reviewed the testimony of the experts, noting that Defendant's expert "presented persuasive evidence proving that skill predominates over chance in poker" and that the government's expert "has not submitted any contrary analysis, nor any studies which support the conclusion that chance predominates over skill in poker." *Id.* at **167, 168. Of interest are the four points made by Defendant's expert that the district court found persuasive:

> (1) [P]oker involves a large number of complex decisions, which allow players of varying skill to differentiate themselves …; (2) many people play poker for a living and consistently win money over time …; (3) players who obtain superior results with other starting hands tend to obtain superior results with any given hand, indicating that the players' abilities, not the cards, are responsible for the results …; (4) the published studies are all consistent with [these] conclusions.

Id. at **167-68 (quoting Defendant's Post-*Daubert* Letter, Docket No. 104).

The district court concluded that Defendant's expert had rebutted the four objections of the government's expert concerning the Defendant's testimony.

- While the differences between skilled and unskilled players can be duplicated by random, unskilled play, "the most skilled poker players continue to perform well, and the least skilled players continue to perform poorly, prospectively, [which] could not be said of players in a game of pure chance, indicating that the persistence of success (or failure) in poker is the result of relative skill."

- The fact that from a single-hand reference (versus the large number of hands used by Defendant's expert), chance may be determinative regardless of player skill is not dispositive because "[e]ven in games of skill such as golf or bridge, … chance may play a determinative role in the outcome of a single hole or hand[, but] across a series of games – in numbers that would be expected to be played in a local poker establishment – the influence of skill becomes obvious and overwhelming."

- The claim that the average poker player would not play sufficient hands for skill to predominate, made by the non-poker playing government expert, was rebutted by the poker-playing Defendant expert who concluded that highly skilled players "predominate" in a few hands and serious amateur players "can easily play thousands of hands a month."[2]

- The fact that "all but the most skilled participants break even or lose money at poker" and poker is played to win money does not make poker a game predominated by chance and, for that matter, is not even relevant because "[t]he fact that many players lose does not affect the quantity of skill demanded by a particular game." Again analogizing to bridge, the district court said that "the champions who can consistently demonstrate that skill underlies success in the game are few."

DiCristina at **167-75.

In short, the district court concluded that the government had failed to meet its burden of showing that chance predominated over skill. This is not, however, a conclusion of law, as were the conclusions that (1) one of the elements of proving a violation of IGBA is showing that the activity at issue constitutes "gambling" under the statute's definition of that term and (2) a game must be predominated by chance in order to meet the statutory definition.

CONCLUSION

The district court's decision in *DiCristina* is thorough and may well have persuasive value in cases brought under IGBA or a statute that is implicated by an IGBA violation, especially if a case involves an activity similar to Texas Hold'em or is otherwise not mentioned in the IGBA definition and is arguably predominated by skill. It also may have persuasive value in a state criminal case involving the question of whether Texas Hold'em violates state gambling laws, where the state definition of gambling requires that chance predominate and there is an absence of binding state precedent on the issue.

Generally, however, the scope of the decision's precedential value is limited. It pertains only to IGBA, and, unless affirmed by the Second Circuit, its principles will not be binding as precedent. If it is appealed and affirmed, the Second Circuit's decision would have binding precedential value with respect to the federal district courts within its geographic territory, *i.e.*, those of New York, Connecticut, and Vermont. Because it is the first decision that explores the role of the IGBA's definition of gambling, it is unlikely that, if the Second Circuit reviewed it on appeal, the U.S. Supreme Court would grant *certiorari* to review the Second Circuit's decision. Indeed, the Supreme Court typically likes to wait for differences among the various circuits on a given issue before weighing in on the issue, and the issue in *DiCristina*, as important as it may be to poker players, is not necessarily one of broader public importance.

If the government appeals the *DiCristina* decision to the Second Circuit, there are arguments that it could make on appeal. For example, in concluding that the IGBA's definition of gambling covers only activities that are predominated by chance, the district court largely ignored that the statute, in subsection (e), provides that it does not apply to any "game of chance" conducted by certain charitable organizations. 18 U.S.C. §1955(e). Assuming that a "game of chance" is one that is predominated by chance, the fact that Congress used that phrase in creating the

exemption in subsection (e) but left it out of the definition of "gambling" in subsection (b)(2) suggests that "gambling" is meant to cover more than just games of chance – in other words, that it is meant to cover games of skill (on the theory that all games are either games of chance or games of skill). Put differently, in subsection (e), Congress would not have exempted only "games of chance" from the list of examples of "gambling" in subsection (b) unless the list in (b) includes more than just "games of chance," meaning that it includes games of skill.

From a purely poker perspective, the future value of the *DiCristina* decision may well be limited. The door is not closed on proving poker is predominated by chance in the context of an IGBA prosecution. As the district court pointed out, the government's expert chose not to offer any studies that showed a predominance of chance in poker but, instead, tried to poke holes in the study conducted by, and the opinion of, Defendant's expert. The next battle of the experts might end in a different result.

From a practical standpoint, this decision may have blunted an arrow in the quiver of federal prosecutors in connection with prosecuting what they consider to be an illegal gambling business involving poker, including online poker. However, as the district court also pointed out, the Defendant could have been prosecuted under state law and there were other federal statutes that, potentially, could have been charged in connection with a violation of state gambling law.

Speculation is being expressed that U.S. prosecutors will stop using IGBA to combat online poker because of the *DiCristina* decision. This speculation is premature because online poker may well be treated differently. The skill of bluffing, as described by Defendant's expert, which the district court found compelling, may not be the same or as predominant when poker is played online. *See e.g.* Martha Frankel, *Hats and Eyeglasses* (Penguin Group 2009) (memoir about author's poker playing that includes discussion of her inability to use bluffing skill when playing online). At least one state court has concluded that Internet poker presents different issues than land-based poker. *See Rousso v. State*, 239 P.3d 1084, 1089 (Wash. 2010) ("Internet gambling and brick and mortar gambling are two different activities, presenting risks and concerns of a different nature, and creating different regulatory challenges.").

What has not changed, however, is that the prosecution of illegal, non-sports-related online gambling rests on state law, especially after the U.S. Department of Justice released its opinion in December 2011 concerning the reach of the Wire Act.[3]

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[1] The district court opined that "New York courts have long considered that poker contains a sufficient element of chance to constitute gambling under that state's law" and described New York's standard as one of materiality rather than predominance. DiCristina at **4, 175-76. However, none of the cases cited by the district court, see slip op. at 6-7, concerned a form of poker similar to Texas Hold'em. See Linda J. Shorey and Anthony R. Holtzman, The DOJ's Wrath Descends on Internet Poker (K&L Gates Alert, April 22, 2011) (in discussing unsettled legal issues, authors note: "We are not aware of any reported New York decision that could be considered binding precedent that a player-to-player poker game, such as 5-card stud or Texas Hold 'Em, is a game in which 'the outcome depends in a material degree upon an element of chance.' However, some New York courts have expressed, in dicta, that it is."), available at http://www.klgates.com/the-dojs-wrath-descends-on-internet-poker-04-22-2011/.

[2] Of note on this point is the court's observation that the government presented "[n]o field research or testimony indicating that an average player plays fewer hands than claimed by [Defendant's expert]" and "testimony at trial established … that players at the defendant's establishment were regular customers who played for many hours at a stretch and returned again and again." DiCristina at *116.

[3] For a brief discussion of this opinion, see Linda J. Shorey and Anthony R. Holtzman, The US Online Gaming Market in 2012: Legislative Efforts, World Online Gambling Law Report (Jan. 2012).

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