

## GAMBLING ADDICTION: INCREASING THE EFFECTIVENESS AND POPULARITY OF PROBLEM GAMBLING DIVERSION IN NEVADA COURTS

*Kimber Laux\**

### I. PROBLEM GAMBLING DIVERSION

In a country where gambling is legal in forty-eight states and approximately 85 percent of adults have gambled at least once in their lives, it may be unsurprising that four to six million U.S. adults or 2-3 percent of the adult population are considered problem gamblers.<sup>1</sup> About 2.2 percent of the U.S. population had a gambling problem in 2012, and about 2.7 percent of Nevadans had a gambling problem in 2001.<sup>2</sup> In 2012, an estimated six percent of Nevada adults were compulsive gamblers, according to the Nevada Council on Problem Gambling.<sup>3</sup>

Nevada law defines problem gambling as “persistent and recurrent maladaptive behavior relating to gambling that causes disruptions in any major area of life, including, without limitation, the psychological, social or vocational

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\* J.D. Candidate at William S. Boyd School of Law, University of Nevada, Las Vegas, 2019. The author would like to thank the UNLV Gaming Law Journal editors who reviewed this note with care, her former colleagues at the Las Vegas Review-Journal for bringing the problems addressed in this note to the foreground, and her family and friends for their endless support and encouragement.

<sup>1</sup> Nat’l Council on Problem Gambling, *Help & Treatment: FAQ*, NCPGAMBLING.ORG, <https://www.ncpgambling.org/help-treatment/faq/> (last visited May 15, 2019).

<sup>2</sup> DON FEENEY & KEITH WHYTE, PUBLIC OPINION ON PROBLEM GAMBLING: MYTHS & MISCONCEPTIONS, NAT’L COUNCIL ON PROBLEM GAMBLING, 4 (June 2016), <http://www.ncpgambling.org/wp-content/uploads/2016/10/NCPG-PublicOpinionReport-July-2016.pdf>; ROBERT J. WILLIAMS, ET AL., ONTARIO PROBLEM GAMBLING RESEARCH CENTRE, THE POPULATION PREVALENCE OF PROBLEM GAMBLING: METHODOLOGICAL INFLUENCES, STANDARDIZED RATES, JURISDICTIONAL DIFFERENCES, AND WORLDWIDE TRENDS 39, 45 (May 8, 2012), [https://opus.uleth.ca/bitstream/handle/10133/3068/2012-PREVALENCE-OPGRC%20\(2\).pdf](https://opus.uleth.ca/bitstream/handle/10133/3068/2012-PREVALENCE-OPGRC%20(2).pdf).

<sup>3</sup> Doug McMurdo, *Catholic priest’s defense to target gambling*, LAS VEGAS REV.-J. (Jan. 2, 2012, 1:59 AM), <https://www.reviewjournal.com/crime/courts/catholic-priests-defense-to-target-gambling/>; David Ferrara, *Treatment for problem gamblers a long shot in Las Vegas courts*, LAS VEGAS REV.-J. (Aug. 1, 2015, 8:40 AM), <https://www.reviewjournal.com/crime/courts/treatment-for-problem-gamblers-a-long-shot-in-las-vegas-courts/>.

areas of life.”<sup>4</sup> In 2008, the Nevada Department of Health and Human Services sponsored Assembly Bill 102 (“AB 102”), which strived to address problem gambling as a primary motivation of criminal defendants’ behavior in order to reduce the likelihood of recidivism and aid problem gamblers in the criminal system in returning to a productive role in society.<sup>5</sup>

The Nevada Legislature in 2009 passed AB 102, which authorized a court to establish a treatment program for problem gambling in criminal cases where the defendant committed a crime in furtherance of their problem gambling.<sup>6</sup> Like other specialty court programs, problem gambling diversion acts as a post-conviction sentencing alternative, whereby the Court orders intensive counseling and retains oversight of the defendant’s progress.<sup>7</sup> If the defendant elects to submit to treatment and is accepted into a problem gambling treatment program, sentencing will be postponed.<sup>8</sup> The conviction will be set aside only if the individual completes the ordered treatment program, abides by conditions set by the Court, and makes full restitution to the victim of her crime.<sup>9</sup> According to the Nevada Council on Problem Gambling, “[p]roblem gambling is a progressive behavioral disorder in which an individual has a psychologically uncontrollable preoccupation and urge to gamble.”<sup>10</sup> Individuals with problem gambling tend to gamble excessively, which leads to loss of time, money, and self-esteem.<sup>11</sup> In the face of the resulting stress, gamblers often seek relief in more gambling, a cycle which can eventually progress to the point that it destroys the gambler’s personal relationships and vocational pursuits.<sup>12</sup> In support of AB 102, the Honorable Judge Cheryl B. Moss, a family court judge in the Eighth Judicial District Court located in Las Vegas, testified during arguments before the Nevada State Assembly Judiciary Committee that about 6 percent of gamblers in Nevada casinos are problem gamblers.<sup>13</sup> Judge Moss argued that problem gambling diversion was “merely an extension to the availability of services allowed by the

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<sup>4</sup> NEV. REV. STAT. § 641C.110 (2017).

<sup>5</sup> Assemb. B. 102, 2009 Leg., 75th Sess. (Nev. 2009) (as referred to the Assemb. Comm. on the Judiciary, Dec. 15, 2008); NEV. COUNCIL ON PROBLEM GAMBLING, PROBLEM GAMBLING AND THE LAW: AN INFORMATION AND RESOURCE GUIDE, 8 (2010), <http://www.nevadacouncil.org/wp-content/uploads/2016/08/Legal-Guide-Small-file-APPROVED-6.2010.pdf> [hereinafter PROBLEM GAMBLING AND THE LAW].

<sup>6</sup> ASSEMB. JOURNAL, 75th Sess. at 1607 (Nev., Apr. 17, 2009); PROBLEM GAMBLING AND THE LAW, *supra* note 5.

<sup>7</sup> See Ferrara, *supra* note 3.

<sup>8</sup> NEV. REV. STAT. § 458A.240(1) (2017).

<sup>9</sup> NEV. REV. STAT. § 458A.220(2)(d) (2017); NEV. REV. STAT. § 458A.240(1) (2017).

<sup>10</sup> PROBLEM GAMBLING AND THE LAW, *supra* note 5, at 1.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Hearing on Assemb. B. 102 Before the Assemb. Committee on Judiciary*, 2009 Leg., 75th Sess. 35 (Nev. Feb. 27, 2009) (statement by Cheryl Moss, J. of 8th Jud. Dist. Ct, Clark Cty., Nev.)

statute to criminal defendants who acknowledge they have substance abuse and alcohol problems.”<sup>14</sup> The additional services proposed in the bill, she argued, would hopefully keep criminal defendants from a life of crime.<sup>15</sup> AB 102 went into effect October 1, 2009, after it passed thirty-four votes to eight in the Nevada Assembly, was passed unanimously in the Senate, and was approved by the Governor.<sup>16</sup>

*A. Example Defendants Under the Current Statute*

In October 2011, Las Vegas attorney Douglas Crawford pleaded guilty to two counts of theft for stealing more than \$300,000 from clients between November 2005 and May 2007.<sup>17</sup> Instead of sentencing Crawford to probation or up to 20 years in prison, the Honorable Judge Donald Mosley allowed him to participate in the gambling diversion program Crawford had helped pass into law.<sup>18</sup> Crawford, a criminal defense and family attorney who was admitted to the Nevada Bar in 1985, successfully completed the program and paid \$304,000 in restitution, had his case dismissed in March 2017, and was reinstated to the practice of law by the Nevada Supreme Court in June 2015.<sup>19</sup>

More recently, in July 2016, Jerry Nann Meador became the third person to successfully invoke Nevada’s law establishing problem gambling diversion.<sup>20</sup> Meador was convicted in January 2014 of stealing \$542,971 from her employer, a plumbing company where she had worked for 25 years.<sup>21</sup> Before she was caught, Meador ran \$1.5 million or more per year through gambling machines

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<sup>14</sup> PROBLEM GAMBLING AND THE LAW, *supra* note 5, at 8.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> See *State v. Crawford*, No. C-11-275513-1 (8th Jud. Dist. Ct., Clark Cty., Nev.) (dismissed on Mar. 9, 2017); Francis McCabe, *Suspended lawyer avoids prison in gambling case*, LAS VEGAS REV.-J. (Jan. 12, 2012, 5:39 PM), <https://www.reviewjournal.com/crime/courts/suspended-lawyer-avoids-prison-in-gambling-case/>.

<sup>18</sup> McCabe, *supra* note 17.

<sup>19</sup> Douglas Crawford, *The Gambling Diversion Program is a Win-Win for Nevada’s Citizens*, VEGAS LEGAL MAG. (last visited May 15, 2019), <http://www.vegaslegalmagazine.com/gambling-diversion-program-win-win-nevadas-citizens/>; Preston Rezaee, LINKEDIN (Apr. 4, 2017), <https://www.linkedin.com/pulse/gambling-diversion-program-win-win-nevadas-citizens-preston-rezaee/>; *About Douglas Crawford*, DOUGLAS CRAWFORD LAW, <https://douglascrawfordlaw.com/about-douglas/> (last visited May 19, 2019).

<sup>20</sup> Ken Ritter, *DA fighting gambling diversion law for Las Vegas grandma in theft case*, LAS VEGAS REV.-J. (Jul. 23, 2016, 4:56 PM), <https://www.reviewjournal.com/local/local-las-vegas/da-fighting-gambler-diversion-law-for-las-vegas-grandma-in-theft-case/>.

<sup>21</sup> David Ferrara, *Judge frees Las Vegas grandmother asking for gambler diversion in six-figure theft case*, LAS VEGAS REV.-J. (July 26, 2016), <https://www.reviewjournal.com/crime/judge-frees-las-vegas-grandmother-asking-for-gambler-diversion-in-six-figure-theft-case/>.

and likely stole as much as \$900,000 from her employer while she worked there as an office manager.<sup>22</sup> Meador was released from Florence McClure Women's Correctional Center on her own recognizance and with no special conditions on July 25, 2016, two years in to her four-to-ten-year prison term, after defense attorneys argued she should be enrolled in the rarely used gambler's diversion treatment program.<sup>23</sup> "The vitality of this type of treatment is important for any community where gambling exists. . . And it can be argued there is no place that it is more important for this type of attitude to finally take hold," one of Meador's attorneys urged at the time of her release.<sup>24</sup>

Kevin McAuliffe, a Las Vegas pastor, did not fare so well in defending himself against three counts of mail fraud: In 2011, McAuliffe pleaded guilty to the three counts after stealing \$650,000 from St. Elizabeth Ann Seton as a result of his problem gambling.<sup>25</sup> Unlike Meador and Crawford, McAuliffe was convicted in federal court, where diversion is rare and difficult to attain.<sup>26</sup> While there are no diversion programs available in the federal court system, there are treatment programs available.<sup>27</sup> When defendants are convicted of a crime that was committed to fund a gambling habit, specific conditions can be placed on them, including an outright prohibition on gambling upon their release from prison or if they are given probation.<sup>28</sup> This was the ultimate result in McAuliffe's case. In January 2012, the Honorable Judge James C. Mahan sentenced McAuliffe to three years in prison, as well as three years of probation after his release.<sup>29</sup> Special conditions of McAuliffe's probation included a prohibition on gambling and compulsory participation in gambling addiction treatment.<sup>30</sup> McAuliffe was prohibited from entering any gambling institution except for employment (in which case he would need approval from his probation officer) and was required to participate in a gambling addiction program at his own expense and under the supervision of his probation officer.<sup>31</sup> He was also ordered to pay \$650,000 in restitution.<sup>32</sup> Judge Mahan provided for a fee schedule within the conditions of McAuliffe's release: "Any remaining balance shall be paid during the term of supervised release at a rate of no less than 10 [percent] of gross income, subject to an adjustment by the probation

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<sup>22</sup> Ferrara, *supra* note 3 (Meador's theft went so far back that the statute of limitations had run on some of the years).

<sup>23</sup> Ferrara, *supra* note 21.

<sup>24</sup> *Id.*

<sup>25</sup> McMurdo, *supra* note 3.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Amended Judgment in a Criminal Case at 1–6, *United States v. McAuliffe*, No. 2:11-cr-0365-JCM-RJJ (D. Nev. Jan. 13, 2012).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

officer based upon the [defendant's] ability to pay.”<sup>33</sup> Although diversion did not play a role in McAuliffe's sentencing, his case further evinces the emphasis Nevada courts place on the payment of full restitution as a component of successfully completed treatment.

In July 2015, Daniel Ortega elected to participate in the gambling diversion program after his attorneys introduced thousands of dollars in gambling receipts from 2010 to 2014, ultimately convincing the Honorable Judge Eric Johnson that Ortega should not be sent to prison.<sup>34</sup> Ortega tried to use a phony credit card to obtain a \$2,000 cash advance at an off-Strip casino, but the cashier immediately noticed that the card was fake and Ortega was charged with felony attempted theft.<sup>35</sup> At Ortega's sentencing, Judge Johnson acknowledged that he was “walking a tightrope in allowing for the diversion so rarely granted,” but said he was prepared to give Ortega, who had already enrolled in Gamblers Anonymous, the opportunity to complete treatment.<sup>36</sup> Because Ortega's crime was victimless, the Court did not have to consider restitution.<sup>37</sup> Ortega was ordered to participate in the gambling diversion program for one year, attend six weeks of the Problem Gambling Center's Intensive Outpatient program, and refrain from all gambling.<sup>38</sup> The Court required Ortega to reappear every sixty days for a progress assessment.<sup>39</sup> He successfully completed the treatment program and his case was dismissed in April 2017.<sup>40</sup>

But what result if the defendants in the aforementioned cases were not a successful attorney, a grandmother, a priest, and a criminal with no victims? Less sympathetic defendants who struggle with problem gambling should also have the opportunity to invoke the law. After all, the statute does not limit accessibility to defendants who are *capable* of making restitution.<sup>41</sup> “Figler acknowledged it is unlikely that Meador can ever repay all that she stole from her former employer. But he called a promise of ongoing restitution a key element of gambling addiction recovery.”<sup>42</sup> Carole O'Hare, the executive director of the

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<sup>33</sup> *Id.*

<sup>34</sup> Ferrara, *supra* note 3.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Minutes of Sentencing, State v. Ortega, No. C-15-304057-1 (8th Jud. Dist., Clark Cty., Nev. July 14, 2015).

<sup>39</sup> *Id.*

<sup>40</sup> Minutes of Status Check, State v. Ortega, No. C-15-304057-1 (8th Jud. Dist. Nev. Mar. 21, 2017); Register of Actions, State v. Ortega, No. C-15-304057-1 (8th Jud. Dist. Nev. Apr. 29, 2017).

<sup>41</sup> State v. Meador, No. 70594, 2017 WL 1944311, at \*1 (Nev. May 9, 2017) (“The State's argument that Meador did not have the financial means to pay restitution is inapposite, as NRS Chapter 458A does not exclude anyone based on *ability* to pay restitution.”).

<sup>42</sup> Ken Ritter, *Grandma in theft case invoking problem gambler diversion law*, WASH. TIMES (June 29, 2016), <https://www.washingtontimes.com/news/2016/jun/29/grandma-in-theft-case-invoking-problem-gambler-div/>.

Nevada Council on Problem Gambling, was a proponent of AB 102 when it was passed.<sup>43</sup> “Lacking a gambling addiction, grandmothers don’t steal. . . This is a fully treatable disorder. The win-win is that we get them treatment so it doesn’t happen again, they get to be a productive member of society, and the victim can get restitution[.]” O’Hare told a reporter after Meador was released.<sup>44</sup>

*B. Legislative History and Intent*

The two primary purposes of AB 102—obtaining restitution for the victim and reducing the likelihood of recidivism on behalf of the defendant—are inextricably linked: A defendant is more likely to pay restitution if she is able to avoid jail time and find or retain employment.<sup>45</sup> Douglas Crawford, who said he gambled away \$2.5 million of his own money before dipping into his clients’ accounts, has testified since he was permitted to go through the diversion program that the alternate sentence in his case was a three-way win: The victims of his theft were repaid in full, Nevada taxpayers were relieved of the cost of incarcerating him, and he kept his “progressive, incurable and often deadly disease” in remission for nearly a decade.<sup>46</sup> Crawford repaid \$85,000 in the first three years of his diversion program and paid the remainder by February 2017.<sup>47</sup>

However, how are the twin goals of the statute achieved if the Court has no guideline to consider whether the defendant can make restitution? If Douglas Crawford were not in the legal profession, he would not have had the opportunity to steal from his clients to begin with, but he also may not have been able to pay them back so quickly if he worked in another field. Fortunately for less affluent defendants, the statute doesn’t consider whether defendants are *able* to make restitution.<sup>48</sup> Unfortunately for those same defendants, the lack of guidance from the statute may be cause for hesitation for judges whose only criteria are that the defendant committed the crime in furtherance of a diagnosed gambling problem and that the defendant promises to make restitution.<sup>49</sup>

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> See *Hearing on A.B. 102 Before the S. Comm. on Health & Educ.*, 2009 Leg., 75th Sess. 11 (Nev. May 11, 2009) (statement of Craig Swope, attendee, who benefitted from gambling diversion and testified before the senate committee: “A case I remember best was a woman who owed \$100,000 with 6 months jail. Because of the jail time, she lost her job. If she had kept her job, she could have been able to repay some restitution. Because she went to jail, her husband moved from the State, and the marriage dissolved. Anything that can be done under the parameters of identifying the people that this program can help to save a family, save a job and pay restitution makes sense.”); see generally Ritter, *supra* note 42.

<sup>46</sup> Crawford, *supra* note 19.

<sup>47</sup> *Id.*; see Ferrara, *supra* note 3.

<sup>48</sup> State v. Meador, No. 70594, 2017 WL 1944311, at \*1 (Nev. May 9, 2017).

<sup>49</sup> See NEV. REV. STAT. §§ 458A.220(1)(a), (2)(b)(2) (2017).

*C. Application in Nevada Courts: How the Statute Works*

Problem gambling diversion operates within the criminal justice system as a post-conviction alternative to prison.<sup>50</sup> Under Nevada law, the Court shall hold a hearing before sentencing if it (1) has reason to believe the convicted defendant is a problem gambler; (2) has reason to believe the defendant committed the crime in furtherance of problem gambling; and (3) finds that the defendant is eligible to elect to participate in the program.<sup>51</sup> If a judge elects to offer the treatment alternative to a criminal defendant, the diversion program must: (1) include terms and conditions for successful completion of the program, (2) require that the defendant agree to pay restitution as a condition of choosing the treatment program over prison, and (3) provide for progress reports at intervals set by the court to ensure the person is making satisfactory progress toward completion of the program.<sup>52</sup> The defendant must also agree to pay the cost of the treatment program she is assigned to, unless she is financially unable to pay for it, in which case the Court must, to the extent practicable, assign the person to a program with sufficient federal or state funding to offset the remaining costs.<sup>53</sup>

*D. Popularity and Effectiveness*

Despite the commonness of problem gambling in Nevada and the passage of the problem gambling law in October 2009, problem gambling diversion has been used infrequently.<sup>54</sup> The statute was invoked for the first time in Clark County in Crawford's case in January 2012 and had only been allowed twice by August 2015.<sup>55</sup>

*1. Lack of Awareness*

In *State v. Meador*, the Supreme Court of Nevada held that a then-52-year-old grandmother who had stolen more than \$500,000 from the company she worked at for 25 years should have been offered, or at least made aware of a gambling diversion program as an alternative to her prison sentence.<sup>56</sup>

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<sup>50</sup> PROBLEM GAMBLING AND THE LAW, *supra* note 5, at 10.

<sup>51</sup> NEV. REV. STAT. § 458A.220(1) (2017).

<sup>52</sup> NEV. REV. STAT. § 458A.200(1) (2017).

<sup>53</sup> NEV. REV. STAT. § 458A.200(3) (2017).

<sup>54</sup> See Cheryl B. Moss, *Why U.S. States Should Have Gambling Courts*, ADDICTIONBLOG (Aug. 31, 2017), <http://gambling.addictionblog.org/why-u-s-states-should-have-gambling-courts/> (Judge Cheryl B. Moss estimates that gambling addiction is raised as an issue in ten to twelve of the cases assigned to her each year).

<sup>55</sup> See Ferrara, *supra* note 3.

<sup>56</sup> See *State v. Meador*, No. 70594, 2017 WL 1944311, at \*2–3 (Nev. May 9, 2017); Ferrara, *supra* note 3.

When the Honorable Judge Jessie Walsh sentenced Meador to four to ten years in prison in January 2014, she focused on Meador's betrayal.<sup>57</sup> Judge Walsh said at Meador's sentencing, "[i]t's really hard for the court to comprehend how you could come to work every day for a period of four years, look the people in the eyes that you work with, including your boss and colleagues, and steal them blind[.]"<sup>58</sup> A year and a half later, the same judge wanted to know whether Meador should have been offered a chance to avoid prison by enrolling in the problem gambling diversion program.<sup>59</sup>

Meador's attorney claimed on appeal to the Nevada Supreme Court that he did not know at the time that he argued Meador's case that a diversion program was available to defendants whose crime was committed in furtherance of a gambling problem if a treatment program was not already funded.<sup>60</sup> The Supreme Court affirmed the district court's grant of Meador's petition for a writ of habeas corpus, which would eventually lead to her release, finding that Meador's "counsel's performance is deficient because he does not understand an area of law fundamental to the case and as a result did not believe that he could request diversion under NRS Chapter 458A."<sup>61</sup> The Court held that Meador's case was prejudiced by her counsel's deficient performance because she would have been granted a hearing under NRS 458A.220(1) if her attorney had requested it.<sup>62</sup>

Many defense lawyers may not even know that gambling diversion exists, according to Clark County District Attorney Steve Wolfson.<sup>63</sup> Wolfson said his office had only received a "handful" of requests for the program in 2015.<sup>64</sup> "We're going to take these cases on a case-by-case basis. . . [a]nd we're going to determine if the person is appropriate for consideration. Restitution is oftentimes a huge part of the equation."<sup>65</sup> Carol O'Hare, who has been executive director of the Nevada Council on Problem Gambling since 1996 and helped write the problem gambling diversion law, believes one issue contributing to the infrequency of the law's invocation is that defense attorneys are not trained to recognize gambling addiction.<sup>66</sup> Moreover, even attorneys who are aware that their clients suffer from problem gambling might hesitate to invoke the statute because diversion is not guaranteed: "[L]awyers are often wary of letting their clients admit to an addiction on top of any particular crime[.]"<sup>67</sup>

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Meador*, 2017 WL 1944311, at \*2.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 2-3.

<sup>63</sup> Ferrara, *supra* note 3.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> Ken Belson, *New York Gambling Treatment Court Stresses Help*, N.Y. TIMES (May 1, 2007), <https://www.nytimes.com/2007/05/01/nyregion/01gamble.html>.



## 2. Popular Perception

Perhaps another explanation for the unpopularity of the problem gambling diversion law is the common public perception that problem gambling is not a legitimate medical diagnosis. “The public is far more likely to believe that gambling addiction is caused by personal or moral weakness than they are to accept a medical explanation.”<sup>68</sup> In 2015, forty-nine percent of survey respondents thought addiction to gambling was a personal or moral weakness, while only six percent thought it was a medical problem.<sup>69</sup> While seventy-two percent of respondents in 2011 were willing to accept a gambling disorder as an addiction akin to an addiction to drugs or alcohol, in 2013, seventy percent or more of respondents endorsed four of seven potential causes of gambling addiction: having an addictive personality, not having enough willpower, being around people who gamble a lot, and having a parent or family member who gambles a lot.<sup>70</sup>

Defendants face a second hurdle in appealing to the justice system for treatment over incarceration: Many judges, attorneys, and the public worry that defendants who invoke therapy courts and diversion programs only do so to evade punishment. Even legislators who helped establish the program expressed concern that allowing defendants to invoke the problem gambling diversion program under AB 102 in its early stages would amount to their “getting out of any type of punishment for their crimes.”<sup>71</sup>

During a hearing to determine whether Douglas Crawford would be admitted to the problem gambling diversion program, the Honorable Judge Donald Mosley asked pointed questions and raised germane issues, emphasizing that he “didn’t want to open a Pandora’s Box paving the way for unqualified defendants to call upon this legislation to avoid incarceration.”<sup>72</sup> Judge Mosley asked about prior convictions that would render Crawford ineligible for the program, and determined the attorney had regularly gone to Gamblers Anonymous meetings, attended therapy sessions at the Las Vegas Recovery Center, and had an otherwise clean record.<sup>73</sup>

Like so many of us crippled by our gambling addiction, this defendant didn’t “get away” with anything. Over the past few years he [] lost his job, moved in

<sup>68</sup> Feeney & Whyte, *supra* note 2, at 6.

<sup>69</sup> *Id.* (noting that thirty-one percent of respondents said gambling addiction was “both” a personal or moral weakness and a medical problem, and fourteen percent said it was “something else”).

<sup>70</sup> *Id.*

<sup>71</sup> *Hearing on Assemb. B 102 Before the Assemb. Comm. on Judiciary*, 2009 Leg., 75th Sess. 27 (Nev. Apr. 7, 2009) (statement of Assemb. Ty Cobb, Member, Assemb. Comm. on Judiciary).

<sup>72</sup> Bea Aikens, *Problem Gambling Law Invoked in Compulsive Gambler Sentencing*, LANIE’S HOPE, <http://lanieshope.org/problem-gambling-law-invoked-in-compulsive-gambler-sentencing> (last visited May 15, 2019).

<sup>73</sup> *Id.*

with his elderly father, faced shame and pain and contemplated suicide as a result of his gambling addiction. In recovery he [] vowed to do “whatever it takes” to make restitution to his victims.<sup>74</sup>

The prosecutor in Jerry Nann Meador’s case, Chief Deputy Clark County District Attorney Jay P. Raman, also questioned whether diversion was appropriate for Meador, claiming the woman stole far more from her employer than she needed to cover her problem gambling.<sup>75</sup> On the day Meador was released, Raman reiterated that Meador was “a thief that liked to gamble. . .[n]othing more.”<sup>76</sup> Unsurprisingly, the owner of Rakeman Plumbing, the North Las Vegas business Meador worked at and stole from, also suggested that Meador was using the statute to get out of punishment: After Meador was released, Rhonda Hawley said Meador was “getting away with thievery.”<sup>77</sup>

### 3. *The Restitution Provision*

The problem gambling statute’s restitution requirement may also play a role in attorneys’ and courts’ decision not to invoke the statute. The legislature intended to give judicial discretion to judges who, after hearing information learned in a thorough intake assessment, are tasked with evaluating the suitability of gambling diversion for each party attempting to use it.<sup>78</sup> Senator Valerie Wiener emphasized while AB 102 was being pushed through the Nevada legislature that “a person who wants to participate in the problem-gambling program must agree to pay full restitution. It is important that participants buy into the program.”<sup>79</sup> However, it is difficult to imagine a case wherein a defendant who seeks treatment over incarceration will not agree to repay his victim.

In response to a reporter’s inquiries about why the Clark County District Attorney’s Office employs the problem so rarely, Wolfson said, “[w]e have to be sensitive to the payment of restitution when we review all of this.”<sup>80</sup> It seemed that in Douglas Crawford’s case, Judge Mosley relied, at least in part, on Crawford’s ability to make restitution.<sup>81</sup> Although prosecutors argued that

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<sup>74</sup> *Id.*

<sup>75</sup> Ferrara, *supra* note 21 (“[Meador] spent the money on video poker and slot machines but also used the money for trips to Disneyland and to make credit card, cellphone, satellite television and mortgage payments, prosecutors said.”).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Hearing on Assemb. B 102 Before the Assemb. Committee on Judiciary*, 2009 Leg., 75th Sess. 28 (Nev. Apr. 7, 2009) (statements of Chairman Bernie Anderson, Assemb. John C. Carpenter, and Assemb. William C. Horne, Assemb. Comm. on Judiciary).

<sup>79</sup> S. Journal, 75th Sess., at 13 (Nev., May 21, 2009) (Statement by Senator Wiener).

<sup>80</sup> Ferrara, *supra* note 3.

<sup>81</sup> *See generally* McCabe, *supra* note 17.

Crawford had four years to pay back the money he stole and had failed to do so before he was sentenced and despite Crawford's difficulties finding work, Crawford told the judge he had obtained a \$74,000 loan from a friend to make a payment toward restitution, and said he would work tirelessly to repay the rest.<sup>82</sup> The judge found Crawford eligible for the program.<sup>83</sup>

However, Crawford's case was unusual; the restitution requirement was a lower bar for him because of his profession. Crawford's law license was reinstated so that he could make restitution, and his salary was capped at \$25,000 a year, plus five percent every subsequent year until restitution was fully paid.<sup>84</sup>

Judges who order the program for defendants who may not be able to make good on their restitution promise risk the defendant's reoffending, the victim being harmed a second time by being denied restitution that was promised to them, and burdening the courts with further proceedings to re-sentence the defendant. Although the Nevada Supreme Court did away with any suggestion that Nevada law requires defendants to be *able* to make restitution,<sup>85</sup> Courts would likely be more willing to exercise the statutory diversion program if the law were amended such that they could consider the defendant's ability to pay based on predicted annual income, retention of employment, and the defendant's own suggestions of feasible payments.

In summary, a statute cannot be effective where it is not used. Carol O'Hare, executive director of the Nevada Council on Problem Gambling, has said that "few judges in the state with the most legalized gambling seem to know that the law lets them create a structured sentence to avoid putting people with a diagnosed mental health disorder in prison."<sup>86</sup> As of 2016, there had been only a few Nevada cases that invoked the gambling diversion program.<sup>87</sup> This is surprising in a state whose rate of imprisonment was 712 per 100,000 in 2015 (about two percent higher than the national rate of 698 per 100,000 that year) and where an estimated six percent of the population has a gambling problem.<sup>88</sup>

## II. PROPOSED CHANGES

### A. *Narrow the Restitution Requirement*

The gambling diversion statute can only achieve its purpose if diversion

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<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> Judge Cheryl B. Moss, *Shuffling the Deck: The Role of the Courts in Problem Gambling Cases*, 6 UNLV GAMING L.J. 145, 165-66 (2016).

<sup>85</sup> *State v. Meador*, No. 70594, 2017 WL 1944311, at \*1 (Nev. May 9, 2017).

<sup>86</sup> Ritter, *supra* note 42.

<sup>87</sup> Moss, *supra* note 84.

<sup>88</sup> Mark Robison, *Nevada imprisons at higher rate than U.S.*, RENO GAZETTE J. (last updated Jan. 27, 2016, 6:58 AM), <http://www.rgj.com/story/news/2016/01/25/nevada-imprisons-higher-rate-us/79315528/>; Ferrara, *supra* note 3.

programs are more accessible to the statute's target beneficiaries – problem gamblers. As it is written, the statute requires criminal defendant problem gamblers to agree to pay restitution before they can be considered for diversion.<sup>89</sup> NRS § 458A.058 defines restitution as “the total amount of money owed to a victim of a crime to compensate the victim for all losses suffered as a result of the crime and any statutory fees and costs associated with the collection of that amount of money.”<sup>90</sup> The statute reiterates this requirement in two different sections without providing specific instruction to the court considering the appropriateness of the diversion treatment for a criminal defendant.<sup>91</sup>

It is reasonable that a statute offering treatment as an alternative to imprisonment requires the defendant to provide restitution to the victim of her crime. Diversion programs often permit defendants to obtain gainful employment, thus increasing the likelihood of restitution to the victims, and recognize financial accountability as one of the goals of treatment.<sup>92</sup> Furthermore, requiring a defendant to provide restitution is an integral part of treatment and recovery and, with the benefit of treatment, can help the problem gambler “relieve financial stress, learn how to manage money, and [re-]build self-esteem through repayment of gambling debt.”<sup>93</sup> Lastly, at first blush, it may seem reasonable that the statute reserves the determination of restitution with the judge's discretion because the judge is hearing the nuances of the case and whether the defendant will be able to repay it.<sup>94</sup>

The difficulty, however, arises in practically applying this vague condition. “Because of the nature of the addiction, the defendants are often broke when they reach court—few can meet the repayment qualification.”<sup>95</sup>

In *State of Nevada vs. Douglas Crawford*, discussed *supra* Section (I)(A) of this note, an attorney who helped write the problem gambling diversion law later benefitted from it when it was revealed he had gambled away more than \$300,000 of his clients' money.<sup>96</sup> In 2012, a judge allowed Douglas Crawford to take part in a three-year diversion program, on the condition that he repay the \$304,831 he stole and successfully complete treatment.<sup>97</sup> Crawford, who had gambled away \$2.5 million of his own money before using his clients' money, had his attorney's license reinstated and had paid back about one-third of the

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<sup>89</sup> NEV. REV. STAT. § 458A.200(1)(b) (2017).

<sup>90</sup> NEV. REV. STAT. § 458A.058 (2017).

<sup>91</sup> NEV. REV. STAT. § 458A.220(2)(b)(2) (2017); NEV. REV. STAT. § 458A.230(4) (2017).

<sup>92</sup> PROBLEM GAMBLING AND THE LAW, *supra* note 5, at 10 (table indicating “Benefits of Treatment Diversion for Problem Gamblers”).

<sup>93</sup> *Id.* at 5.

<sup>94</sup> See generally *id.* at 6, 8.

<sup>95</sup> Ferrara, *supra* note 3.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

money he owed (\$85,000) by August 2015.<sup>98</sup> He estimated it would take him another two years to pay the remaining debt.<sup>99</sup> With treatment, the court had ruled in 2012, Crawford could make enough money to pay restitution.<sup>100</sup>

Another Nevada case that invoked the problem gambling diversion laws involved a woman who had stolen more than \$542,000 from the plumbing business where she had worked as an office manager for twenty-five years.<sup>101</sup> Jerry Nann Meador (introduced *supra* Section (I)(A) of this note) avoided a four-to ten-year prison term in July 2016 after her attorneys argued she should be enrolled in a treatment program instead.<sup>102</sup> While prosecutors argued Meador should stay at the women's prison (where she was sent after her first attorney neglected to invoke the diversion statute) because she had no way to repay the money she stole, the court vacated her sentence and determined she was a suitable candidate for the treatment.<sup>103</sup> Meador, whose attorneys said she ran through nearly \$1.5 million on gambling machines per year, was released on her own recognizance with no special conditions.<sup>104</sup>

While the result of each of these cases was positive for the defendant, neither decision illuminated a clear standard for determining whether a defendant is capable of repaying restitution, or what threshold amount of restitution a judge should be allowed to consider when deciding whether a defendant qualifies for problem gambling diversion. The requirement that a person utilizing the gambling diversion program must *promise* to pay restitution to the victims of his or her crime should be more narrowly tailored to each defendants' financial circumstances. As the Nevada Supreme Court held in the State's appeal of Meador's case, NRS 458A.220 doesn't require that the defendant prove he or she can make restitution; it requires only that the defendant desire treatment and *agree* to make restitution.<sup>105</sup> Although the statute does provide for regular hearings to determine whether a criminal defendant is meeting the conditions of the alternative sentence, perhaps a judge would more confidently assert her discretion and assign the defendant to a diversion program if she had guidelines for determining whether the defendant would be able to comply with the restitution requirement.<sup>106</sup>

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<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> David Ferrara, *Judge vacates conviction for Las Vegas grandmother with gambling Problem*, LAS VEGAS REV.-J. (May 17, 2016, 3:22 PM), <https://www.reviewjournal.com/crime/judge-vacates-conviction-for-las-vegas-grandmother-with-gambling-problem/>.

<sup>102</sup> Ferrara, *supra* note 21.

<sup>103</sup> *State v. Meador*, No. 70594, 2017 WL 1944311, at \*2 (Nev. May 9, 2017); Ferrara, *supra* note 3; Ferrara, *supra* note 21.

<sup>104</sup> Ferrara, *supra* note 21.

<sup>105</sup> *Meador*, 2017 WL 1944311, at \*3.

<sup>106</sup> NEV. REV. STAT. § 458A.230(3) (2017).

*B. Cast a Broader Net*

During discussion of AB 102, at least one member of the state assembly raised a concern about the amount of discretion the bill gave to judges.<sup>107</sup> Assemblyman Ty Cobb said that while he favors diversion programs generally, the bill establishing a gambling diversion program gave too much discretion to judges in the highly subjective task of identifying a problem gambler, and lacked guidelines for concrete supervision.<sup>108</sup> Cobb fretted that there was “no test for problem gaming” comparable to those required of participants in drug or alcohol diversion programs.<sup>109</sup> Assemblyman Bernie Anderson, however, testified that the district attorney’s office has a good relationship with community treatment providers, who had long acknowledged that problem gambling is a physiological problem for which there are established tests.<sup>110</sup> Thirty-four assemblypersons (out of forty-two) agreed and the bill was passed to the Senate.<sup>111</sup>

The Honorable Judge Cheryl B. Moss has also addressed what she calls the “There is No Pee Test for Problem Gambling” concern by outlining a non-exhaustive list of evidence that a person is problem gambling, including: ATM withdrawals, large cash outs of retirement funds or savings accounts, recent credit or loan applications, player’s card activities, credit reports, thefts, embezzlement, pawn shop receipts, time spent away from work or home, failure to supervise children or participate in their activities, alcohol or substance abuse, and lying (including making excuses for not going to work or coming home, and denial of having a gambling problem).<sup>112</sup>

Additionally, in a letter addressed to the Senate Health and Education Committee, the Honorable Judge Harold Albright emphasized that the bill relies not on judicial discretion alone, but “upon certified treatment providers to discern a defendant’s problem and to treat it, similar to the procedure used in the domestic violence scenario.”<sup>113</sup> The Court regularly relies on guidance from evaluators and counselors to determine what type of treatment a person needs, Judge Albright said, adding that the specialty court programs he oversaw witnessed a low 13 percent recidivism rate and kept defendants employed and paying taxes, rather than incarcerated at the Washoe County jail for about \$130 per day.<sup>114</sup>

With more guidance on (1) identifying the warning signs of problem

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<sup>107</sup> See ASSEMB. JOURNAL, 75th Sess., at 1606-1607 (Nev. Apr. 17, 2009).

<sup>108</sup> See *id.* at 1606.

<sup>109</sup> *Id.*

<sup>110</sup> See *id.* at 1607.

<sup>111</sup> *Id.*

<sup>112</sup> Moss, *supra* note 84, at 171-172.

<sup>113</sup> *Hearing on Assemb. B. 102 Before the S. Comm. on Health & Educ.*, 2009 Leg., 75th Sess., 98 (Nev. May 11, 2009) (Exhibit F, letter from the Honorable Harold Albright, Judge, Reno Justice Court).

<sup>114</sup> *Id.* at 98-99.

gambling and (2) determining the likelihood that a defendant will be able to make restitution, judges would be in a better position to accurately assess whether the defendant is a good candidate for gambling addiction treatment and whether traditional penal measures would be as effective in treating them and making their victims whole again.

*C. Increase Awareness*

Attorneys should be compelled to consider whether gambling addiction played a role in their clients' crimes and whether gambling diversion is an option they should pursue for their clients. As the statute reads now, a person is only considered for diversion if the court "[h]as reason to believe. . . a person who has been convicted of a crime is a problem gambler[,] and. . . committed the crime in furtherance of or as a result of problem gambling[.]"<sup>115</sup> If a defendant's attorney does not ask his client whether problem gambling had a role in her commission of the crime, and request an alternate sentence of diversion from the judge, the Court has no other way of knowing whether a defendant is eligible for the program. Absent a case-by-case screening process, whereby the Court asks each defendant who committed an eligible offense whether their commission of the crime was linked to problem gambling, the burden falls to attorneys to know that diversion is available to their client and to investigate their clients' motivations to determine their eligibility for the program.

According to the legislative history of AB 102, legislators considered whether it would be wise to allow defendants to enter into treatment simply because they self-certify that they are problem gamblers; Assemblyman Ty Cobb said in an Assembly meeting in April 2009,

This will be a tremendous problem for our criminal justice system to absorb. In addition, there is no type of monitoring system, as we would have with an alcohol or drug abuse situation. There is no monitoring authority. There is no way to test someone to see if he is continuing to gamble.<sup>116</sup>

Assemblyman William Horne pushed back on the idea that self-certification would take discretion from the Court:

With other courts, particularly drug and alcohol abuse, that is how the court finds out that there is a problem. The person tells the court "I am a meth user" or "I am an alcoholic." The situation would be the same for gambling. The person would say, "I went into a store and stole items because of my gambling addiction." It is not so much a self-diagnosis as a self-affirmation of a problem. From there the judge makes the determination.<sup>117</sup>

<sup>115</sup> NEV. REV. STAT. § 458A.220(1)(a) (2017).

<sup>116</sup> *Hearing on Assemb. B. 102 Before the Assemb. Comm. on Judiciary*, 2009 Leg., 75th Reg. Sess., at 27 (Nev. Apr. 7, 2009) (Statement of Assemblyman Ty Cobb, Member, Assemb. Comm. on Judiciary).

<sup>117</sup> *Hearing on A.B. 102 Before the Assemb. Comm. on Judiciary*, 2009 Leg., 75th

In the end, the Assembly agreed to strike language requiring that defendants self-identify as problem gamblers to the court, and instead placed the burden of identifying problem gambling on the Court.<sup>118</sup> Assembly Chairman Bernie Anderson suggested,

Let us take the baby step of putting the entire onus on the court. If the court has reason to believe that a person who has been convicted of a crime is a problem gambler, the court shall hold a hearing before it sentences the person to determine if he is eligible for the program.<sup>119</sup>

The language requiring defendants to call their problem gambling to the attention of the Court was struck, and the language requiring the Court to have “reason to believe” a defendant convicted their crime in furtherance of a gambling problem remained.<sup>120</sup> While this negated concerns that defendants would be able to “simply self-certify[] to the court that they are problem gamblers and get[] out of any type of punishment for their crimes, whether or not they have a gambling problem,” it merely shifted the burden to the Court to inquire into the motives of the defendant’s crime.<sup>121</sup> Assemblyman Tick Segerblom urged that putting the onus on the Court “is fine because the first thing a judge is going to say is ‘Are you a problem gambler?’”<sup>122</sup> However, this is evidently not the first thing a judge will ask when confronted with a defendant whose crime was committed in furtherance of their gambling problem: Meador prevailed on her request for gambling diversion and her claim of ineffective assistance of counsel after her attorney failed to request diversion in lieu of sentencing.<sup>123</sup> It is hard to imagine that her attorney would have failed to request diversion if the first thing the Honorable District Judge Jessie Walsh had asked Meador were, “Are you a problem gambler?” Thus, the law governing problem gambling diversion should mandate a screening process requiring either the Court or criminal defense attorneys to ask defendants, at a minimum, whether they are a problem gambler or were problem gambling at the time their crime was committed.

Moreover, three consequences will undoubtedly follow from attorneys’ failure to request problem gambling diversion for qualified defendants: (1) taxpayers will continue to pay for the incarceration of inmates who would be better rehabilitated with treatment and by making restitution; (2) the Court will be burdened by appeals from inmates who learn of the gambling diversion

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Sess. 29 (Nev. Apr. 7, 2009) (statement of Assemb. William C. Horne, Member, Assemb. Comm. on Judiciary).

<sup>118</sup> *Id.* at 30-31.

<sup>119</sup> *Id.* at 30.

<sup>120</sup> *Id.* at 30-31 (statement of Assemb. Bernie Anderson, Chairman, Assemb. Comm. on Judiciary).

<sup>121</sup> *Id.* at 27.

<sup>122</sup> *Id.* at 30.

<sup>123</sup> *See generally* State v. Meador, No. 70594, 2017 WL 1944311, at \*1 (Nev. May 9, 2017).



program after they have been convicted and sentenced; and (3) attorneys will face lawsuits for ineffective assistance of counsel.

The State of Louisiana launched its own “Gambling Referral Treatment Program” in 2004 with the goal of helping pathological gamblers solve their problems through treatment and reduce the number of persons incarcerated, thereby increasing the cost efficiency of its justice system.<sup>124</sup> “With the cost of incarceration averaging about \$36,000 a person per year and with treatment usually costing one-tenth this figure, it’s easy to see how this program can be very cost efficient,” former Louisiana Attorney General Charles Foti said.<sup>125</sup> Nevada, which incarcerated 13,665 prisoners in 2015, spent an average of \$17,851 per inmate.<sup>126</sup> While that figure is about fifty-four percent of the national average cost per inmate (\$33,274), the cost to Nevada’s non-incarcerated population was about \$85 per resident.<sup>127</sup> In contrast, the gambling diversion program, like other specialty courts, is self-funded.<sup>128</sup> Defendants placed under the supervision of a mental health professional through the program “shall pay the cost of the program of treatment to which the person is assigned and the cost of any additional supervision that may be required.”<sup>129</sup> As mentioned *supra* Section (I)(C) of this note, if the defendant cannot afford the treatment, the Court must assign the defendant to a program that receives sufficient federal or state funding to offset the remaining costs and may require the defendant to perform supervised community service in lieu of paying the remaining costs.<sup>130</sup>

As the above-mentioned cases are made popular by local media and inmates learn that the gambling diversion statute exists, the Courts will be overwhelmed with inmates claiming that ineffective assistance of counsel led to their incarceration and appealing their cases. This result can be avoided by requiring attorneys to investigate whether diversion is appropriate for each client at the start of their representation.

#### D. Establish and Popularize a Gambling Court

The Honorable Judge Cheryl B. Moss has successfully pushed for another

<sup>124</sup> Moss, *supra* note 84, at 152–153.

<sup>125</sup> *Id.* at 153.

<sup>126</sup> CHRIS MAI & RAM SUBRAMANIAN, VERA INST. OF JUSTICE, THE PRICE OF PRISONS: EXAMINING STATE SPENDING TRENDS, 2010-2015, 8 (May 2017), available at [https://storage.googleapis.com/vera-web-assets/downloads/Publications/price-of-prisons-2015-state-spending-trends/legacy\\_downloads/the-price-of-prisons-2015-state-spending-trends.pdf](https://storage.googleapis.com/vera-web-assets/downloads/Publications/price-of-prisons-2015-state-spending-trends/legacy_downloads/the-price-of-prisons-2015-state-spending-trends.pdf).

<sup>127</sup> *Id.* at 8, 12.

<sup>128</sup> Crawford, *supra* note 19, at 3 (“Nevada taxpayers do not bear any financial burden for the diversion program.”). See NEV. REV. STAT. § 458A.260 (2017) (the diversion program does “not require this State or any of its political subdivisions to establish or finance any program for the treatment of problem gambling.”).

<sup>129</sup> NEV. REV. STAT. § 458A.230(5) (2017).

<sup>130</sup> NEV. REV. STAT. § 458A.230(6) (2017).

fix to the ineffective gambling diversion statute: create a Gambling Court in Nevada (and in any states with significant sources of revenue from gaming opportunities).<sup>131</sup>

Although actual allegations of problem gambling and wasting of marital money were infrequent in her family courtroom, Moss, one of twenty Family Court judges in Clark County, had encountered ten to twelve cases where gambling addiction is raised as an issue by 2017.<sup>132</sup> Most of the judges in Clark County—including Family Court judges and those who oversee civil and criminal cases—are overwhelmed with 1,500 to 2,000 active cases at any time.<sup>133</sup> Las Vegas courts being among the busiest in the nation, coupled with judges' limited knowledge of problem gambling, has resulted in neglect of the problem gambling statute, Moss posited: “[I]ndividuals who could be eligible for diversion treatment are falling through the cracks.”<sup>134</sup>

In 2017, Moss made three primary arguments for creating a Gambling Court in Nevada: First, doing so would be inexpensive. “One judge can be trained at little to no cost to work with attorneys (prosecutors, defense attorneys), social service workers, and treatment providers (certified problem gambling counselors) on how to preside over and adjudicate diversion treatment cases in criminal settings.”<sup>135</sup> Moss pointed to a retired judge in Amherst, New York, who is the “only judge in the U.S. to successfully run a formal Gambling Court,” as a potential model for Nevada courts.<sup>136</sup>

Following the model of about 2,000 “therapy courts” devoted to drugs and spousal abuse that have opened nationwide in the last two decades, the setup [in Amherst] allows defendants to avoid jail time if they follow a court-supervised program that includes counseling sessions, credit checks and twice-monthly meetings with Justice [Mark] Farrell.<sup>137</sup>

Farrell started the court after he noticed an uptick in gambling-related crime; in a two-and-a-half-week span he had seen a dozen cases of car theft, larceny, and other crimes committed by “otherwise unlikely suspects.”<sup>138</sup> He called in experts, “who determined that gambling was the common theme.”<sup>139</sup> Farrell

<sup>131</sup> Moss, *supra* note 54; Howard Stutz, *Treatment and restitution: Nevada's new problem gambling court could become a model for the U.S.*, CDC GAMING REPS. (Jan. 14, 2019, 12:05 AM), <https://www.cdcgamingreports.com/treatment-and-restitution-nevadas-new-problem-gambling-court-could-become-a-model-for-the-u-s/> (“The Gambling Treatment Diversion Court was launched in December [2018] with two initial cases. [Judge] Moss holds status checks every two weeks to make sure defendants are getting treatment and paying restitution.”).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> Belson, *supra* note 67.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

established the Gambling Court, which met for one hour every other Tuesday, and began distributing leaflets on gambling addiction to all the defendants.<sup>140</sup> “[T]he judge and his staff members screen[ed] defendants after arraignments by asking those accused of, say, check forgery, why they needed the money. Court-appointed counselors look[ed] for signs of impulsiveness and weak self-control.”<sup>141</sup> Thus, the Amherst Gambling Court employed inexpensive solutions such as distributing pamphlets to defendants convicted of eligible crimes and screening them for indicia of problem gambling to reduce recidivism and potentially save the justice system thousands of dollars per defendant.<sup>142</sup>

Second, more specialized operations and coordination with gambling treatment providers and organizations can reduce recidivism rates and save taxpayer dollars that would otherwise go toward costs of incarceration. Gambling Courts have more resources to work directly with organizations such as state arms of the National Council on Problem Gambling and to oversee the process of recovery and making restitution more closely than courts burdened with other matters, thereby increasing the likelihood of participants’ success.<sup>143</sup> In Justice Farrell’s Gambling Court, for example, defendants are enrolled in counseling, must submit to credit checks, and are required to meet with Farrell twice a month.<sup>144</sup> In 2007, Farrell ordered one nineteen-year-old defendant who had forged his father’s checks to feed a bingo and lottery addiction to attend Gamblers Anonymous meetings twice a week.<sup>145</sup> He stated, “I realize this is demanding. . . If you continue to apply yourself to the program, and you continue to go to the self-helps, we’ll get you through it.”<sup>146</sup> Although the gambling court was only six years old in 2007 and too young to show statistically significant results, staff at the Court said that more than half of the 100-plus defendants that had been diverted had completed the treatment program, and only one had been arrested again on an offense unrelated to gambling.<sup>147</sup>

Finally, Moss wrote, “it just makes sense that all states with legalized gaming opportunities should have a formal Gambling Court.”<sup>148</sup> Moss relied on two justifications for reasoning that the creation of gambling courts is common sense: (1) The general increase of gambling opportunities and (2) the relatively

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<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *See id.* (While the article is silent on the cost of running the Gambling Court, and evidence of savings were unavailable in 2007, the author cited to a Washington State study of drug courts conducted in 2003 that estimated participants were thirteen percent less likely to become repeat offenders than defendants who went through the regular criminal system, saving \$3,759 per participant in potential administrative costs and \$3,020 in costs to victims.).

<sup>143</sup> Moss, *supra* note 54.

<sup>144</sup> Belson, *supra* note 67.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> Moss, *supra* note 54.

recent recognition that problem gambling is a behavioral addiction with many parallels to and significant co-occurrence with substance addictions for which specialized courts already exist.<sup>149</sup> Though Justice Farrell's Gambling Court in Amherst, New York, saw only a handful of cases at the court's inception in 2001, the Court's caseload grew to several dozen cases a year by 2007.<sup>150</sup> "Gambling has become almost a genre in our society," said Farrell, whose increased caseload mirrored the rise in gambling nationally and the opening of two new casinos near Buffalo, New York.<sup>151</sup> "As gambling has become more popular, with the growth of online poker and with New York State lottery revenues nearly doubling to \$6.8 billion over the past six years, Justice Farrell's docket include[d] middle-aged parents with college degrees and steady jobs as well as young drug users with criminal records."<sup>152</sup> Compare New York's lottery revenues with Nevada's annual gaming revenue of about \$11.4 billion (the state saw \$1 billion in gaming wins in January 2018 alone), and it is hard to imagine that New York's need for a Gambling Court in 2001 was greater than Nevada's need today.<sup>153</sup>

### III. CONCLUSION

#### A. *The Problem*

The director of the Nevada Council on Problem Gambling, Carol O'Hare, told a reporter in August 2015 that "[m]any defense attorneys are not trained to recognize gambling addiction, and [their clients] may not know the law is in place".<sup>154</sup> "I don't think the lack of cases has anything to do with the lack of need. . . There's been a learning curve for the attorneys and the judges to understand this is available now."<sup>155</sup>

Moreover, many judges are also unaware of the prevalence of problem gambling. The Honorable Judge Cheryl Moss wrote on a gambling addiction website that "[m]ost of the 20 Family Court judges and the 32 Civil/Criminal judges that serve in Clark County have limited knowledge of problem gambling. While high profile criminal cases of problem gamblers have been highlighted in

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<sup>149</sup> *Id.*

<sup>150</sup> Belson, *supra* note 67.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> PRESS RELEASE, NEV. GAMING CONTROL BD., WIN REVENUE SUMMARY – JUNE 2017 (July 27, 2017), *available at* <http://gaming.nv.gov/modules/showdocument.aspx?documentid=12209> (Nevada's nonrestricted gaming licenses reported a total "gaming win" of \$11,444,388,104 in Fiscal Year 2016, a 2.9 percent increase from Fiscal Year 2015). *See also* PRESS RELEASE, NEV. GAMING CONTROL BD., WIN REVENUE SUMMARY – JANUARY 2018 (Feb. 28, 2018), *available at* <http://gaming.nv.gov/modules/showdocument.aspx?documentid=12946>.

<sup>154</sup> Ferrara, *supra* note 3.

<sup>155</sup> *Id.*

the media in the last decade, diversion treatment of problem gamblers has been less publicized.”<sup>156</sup> Because the potential outcome for defendants’ whose problem gambling goes unnoticed is lengthy incarceration, “the absence of specific training of a subset of the judiciary and a general lack of awareness of the statute and its provisions are major problems,” Moss contends.<sup>157</sup> Writing from her personal experience as a family judge, Moss suggested that judges’ recognizing and understanding problem gambling issues that come before them is especially crucial in Family Court, where court orders ensuring the preservation of marital assets must promote the best interest of children.<sup>158</sup>

Finally, without guidance on the requirement that defendants promise to make restitution, judges and attorneys who might question the legitimacy of problem gambling or have a negative perception about the effectiveness of diversion programs and therapy courts have rarely invoked Nevada’s law permitting treatment as an alternative to a prison sentence.<sup>159</sup>

#### *B. How the Proposed Changes Fix the Problem*

Increasing attorneys’ awareness of the availability of diversion to criminal defendants who commit crimes in furtherance of a gambling problem, and amending the statute to compel attorneys to screen clients for potential gambling issues would give the statute broader reach and invite more criminal defendants to invoke the law, thereby increasing the popularity and effectiveness of the statute. In Meador’s case, for example, her attorney would not have been able to claim he did not know his client was eligible for the program if the statute also imposed a requirement that he screen each client for eligibility.

Amending Nevada law to narrow the restitution requirement would resolve judges’ concerns about whether a given defendant is able to make restitution and would thus be more successful in problem gambling diversion than in jail. In Ortega’s case, for instance, Judge Johnson may not have felt like he was “walking a tightrope” if the problem gambling diversion statute provided for defendants whose crimes had no victims, or at least provided clear guidelines for determining whether and in what time frame a defendant can make restitution.<sup>160</sup>

Finally, Nevada’s newly-established gambling court will hopefully alleviate the administrative burdens judges will bear if they are required to become more familiar with signs of problem gambling and problem gambling diversion law and develop individual treatment plans for defendants invoking the statute. Judge

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<sup>156</sup> Moss, *supra* note 54.

<sup>157</sup> *Id.*

<sup>158</sup> Cheryl B. Moss, *Family court for gambling problems: A judge’s perspective*, ADDICTIONBLOG (Feb. 20, 2016), <http://gambling.addictionblog.org/family-court-for-gambling-problems-a-judges-perspective/>.

<sup>159</sup> See Belson, *supra* note 67.

<sup>160</sup> See Ferrara, *supra* note 3.

Cheryl Moss's gambling court, though still in its infancy, is almost certainly better-equipped to screen candidates for diversion, establish thorough treatment plans, and monitor defendants' progress than criminal and civil judges whose dockets are already bursting with cases unrelated to gambling.<sup>161</sup>

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<sup>161</sup> See generally *id.* See also Joe Bartels, *New Clark County gambling court gets national attention for dealing with addiction*, KTNV LAS VEGAS (Feb. 19, 2019, 12:23 PM), <https://www.ktnv.com/news/investigations/new-clark-county-gambling-court-gets-national-attention-for-dealing-with-addiction> (noting that, as of February 2019, the diversion court had only served a few people, who were referred by other judges).