

DE-CRIMINALIZING MILITARY SERVICE THROUGH DEFERRED PROSECUTION IN VETERAN TREATMENT COURTS

by
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Veteran Treatment Courts in Oregon are failing to successfully rehabilitate and reintegrate veterans into society largely due to their deferred adjudication sentencing. Veterans carry unique burdens and would benefit from an approach that allows them to avoid a criminal record and prison time, while giving them skills to readjust to civilian life. For Veteran Treatment Courts to rehabilitate veterans successfully, the courts should use deferred prosecution. Using deferred prosecution meets combat veterans' needs—receiving treatment for mental illness, bettering chances of employment, and staying out of prison.

INTRODUCTION 28

I. VETERAN TREATMENT COURTS ARE A NECESSARY STEP IN RECOVERY FOR SERVICE-RELATED ILLNESSES THE MILITARY HAS FAILED TO SUCCESSFULLY ADDRESS 29

 A. *Military Veterans Suffer from High Rates of Mental Illness and Drug Abuse upon Re-Aclimation to Civilian Life* 30

 B. *Veterans Returning to Civilian Life are Negatively Affected by Their Service-Incurred Mental Illness*..... 31

II. VETERAN TREATMENT COURTS WERE CREATED TO HELP VETERANS SUFFERING FROM MENTAL ILLNESS AND SUBSTANCE ABUSE..... 32

 A. *The Objective of Veteran Treatment Courts* 32

 B. *The Empirical Successes of Veteran Treatment Courts* 33

III. TO QUALIFY FOR VETERAN’S COURT, A VETERAN MUST PLEAD GUILTY, LEAVING AN ALREADY DISADVANTAGED VETERAN MORE DISADVANTAGED 33

 A. *The Goals, Objectives, and Theory of Deferred Adjudication are Detrimental to the Purpose and Goals of Veteran Treatment Courts*..... 35

 B. *The Consequences of Deferred Adjudication are Detrimental to Veterans in Veteran Treatment Court* 36

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1.	<i>Employment is Beneficial for Veterans with Mental Illness and Deferred Adjudication Decreases Employment Opportunities</i>	36
2.	<i>Prison is Especially Harmful for Veterans with Mental Illness</i>	38
IV.	STATES, INCLUDING OREGON, SHOULD CHANGE THEIR PRACTICE TO DEFERRED PROSECUTION TO ALLOW VETERANS TO EXIT VTC WITHOUT A CRIMINAL RECORD.....	39
A.	<i>Deferred Prosecution is Better Suited for Veterans</i>	40
1.	<i>The Significance of Leaving a VTC Without a Criminal Record</i>	40
2.	<i>The Importance of Avoiding Incarceration</i>	41
a.	<i>Alternative to Incarceration for VTC Sanctions</i>	42
b.	<i>The Importance of Resources for Alternative Prosecution</i>	43
	CONCLUSION	44

INTRODUCTION

Patton [visited] . . . the 93rd Evacuation Hospital near San Stefano, Sicily. Pvt. Paul Bennett had been diagnosed with combat fatigue,¹ and upon seeing Bennett cry, Patton repeatedly slapped him, cursed him, and threatened to either send him to the front lines or have him killed by firing squad.²

In war, there are no unwounded soldiers.³

Veterans have had extraordinary roles throughout history in shaping countries, nations, and political leaders. With that history comes a dark side riddled with trauma that returning soldiers have struggled to shake.⁴ Cultures have had to adjust.⁵ Although war is a longstanding part of our history, to this day people struggle with how to deal with the consequences of war, namely the resulting mental illnesses

¹ Combat fatigue is one of many antiquated terms for Post-Traumatic Stress Disorder. Throughout history the mental illness has had several terms. In the Civil War, it was called “nostalgia”; in World War I, “shell shock” or “combat neurosis”; and in World War II it was called “combat fatigue,” “operational fatigue,” “old sergeant syndrome,” or “gross stress reaction.” Samantha Walls, *The Need for Special Veteran Courts*, 39 DENV. J. INT’L L. & POL’Y 695, 700 (2011).

² Alex Lovelace, *George Patton*, ENCYCLOPEDIA BRITANNICA (Jan. 18, 2018), <https://www.britannica.com/biography/George-Smith-Patton> (showing the disdain people in American history have had for soldiers suffering from mental illness).

³ José Narosky, *Epigraph* to GOLDIE GOLDBLOOM, *THE PAPERBARK SHOE* (2011).

⁴ Jonathan O’Callaghan, *Did Ancient Warriors Suffer PTSD Too? Texts Reveal that Battles 3,000 Years Ago Left Soldiers Traumatized by What They Saw*, DAILY MAIL (Jan. 23, 2015), <http://www.dailymail.co.uk/sciencetech/article-2923799/Did-ancient-warriors-suffer-PTSD-Texts-reveal-battles-3-000-years-ago-left-soldiers-traumatized-saw.html>.

⁵ See, e.g., Vincent Schilling, *Healing Post Traumatic Stress Disorder with Native Medicine*, INDIAN COUNTRY TODAY (May 26, 2014), <https://indiancountrymedianetwork.com/culture/health-wellness/healing-post-traumatic-stress-disorder-with-native-medicine/> (showing how traditional Native American methods for treating Post-Traumatic Stress Disorder are being used in a modern context).

veterans face. While communities and societies differ in how they deal with this trauma, the first step is recognizing the trauma and working with those that have been affected by combat. Many times, combat-related trauma goes unrecognized while people are in military service. Moreover, some of those affected veterans end up in the criminal justice system.

Veteran Treatment Court (VTC) is an emerging method of dealing with combat trauma. VTCs are still growing and learning from one another in how to be effective with returning veterans.⁶ Specifically, courts in Oregon require veterans to plead guilty to be placed into VTC;⁷ however, this process may be harmful to veterans seeking treatment.⁸ This Note proposes that VTCs would be more successful at decreasing recidivism if they use a deferred prosecution model instead of the current deferred adjudication model.

Part I will discuss why VTCs are needed. Part II will give the reasoning, objective, and theory of VTCs. Part III will demonstrate why using deferred adjudication is harmful to VTCs. Part IV will explain why deferred prosecution should be used instead and give a proposal to courts for how to implement it.

I. VETERAN TREATMENT COURTS ARE A NECESSARY STEP IN RECOVERY FOR SERVICE-RELATED ILLNESSES THE MILITARY HAS FAILED TO SUCCESSFULLY ADDRESS

The criminal justice system should be lenient on veterans who commit crimes and are suffering from mental illness when both their illnesses and offenses can be traced back to government-sanctioned combat. While the military has come a long way in attempting to recognize “invisible wounds”⁹—PTSD, major depression, and traumatic brain injury—there are still barriers in getting treatment for veterans before exiting the military.¹⁰ If mental illness is not discovered during a veteran’s service, the illness might not be found until a veteran is arrested, charged with a crime,

⁶ See Scott Johnson et al., *An Analysis of Sanctions and Respective Psychiatric Diagnoses in Veterans’ Court*, 43 J. AM. ACAD. PSYCHIATRY & L. 171, 171 (2015).

⁷ See, e.g., Julie Frantz, *Multnomah County Veterans Docket and Justice Outreach Project Memorandum of Understanding*, in OREGON STATE BAR CLE SEMINARS: REPRESENTING MILITARY VETERANS IN OREGON 2A-1, 2A-2 (May 19, 2016); MARION CTY. CIRCUIT COURT, MARION COUNTY VETERANS TREATMENT COURT POLICIES AND PROCEDURES MANUAL 3 (2017), <https://www.courts.oregon.gov/courts/marion/programs-services/Pages/treatmentcourt-adult.aspx>.

⁸ See *infra* Part IV.

⁹ Steven Berenson, *The Movement Toward Veterans Courts*, 44 CLEARINGHOUSE REV. J. POVERTY L. & POL’Y 37, 37 (2010) (The invisible wounds of war of this era are defined as post-traumatic stress disorder, major depression, and traumatic brain injury.).

¹⁰ One example is a social barrier within the military called “warrior mentality” where military members feel weak if they admit they have a mental illness. Robert T. Russell, *Veterans Treatment Courts*, 31 TOURO L. REV. 385, 400 (2015). Another barrier is that some who are found to have an impairment caused by war will not admit that they are a veteran because of a

or incarcerated.¹¹ Veterans with invisible wounds may be prone to criminal behavior, suicide, substance abuse, and homelessness.¹² This puts veterans who go to combat for their country at risk of being branded as criminals due to symptoms of illnesses directly caused by their service. Being branded a criminal only increases instability, addiction, and homelessness with mentally ill veterans. VTCs, however, offer an escape. Within a VTC, veterans may avoid incarceration, a criminal record, and increased risk of homelessness by obtaining diversion and resources.¹³

VTCs provide the leniency that veterans require and are best equipped to deal with the special circumstances veterans experience. VTC processes and personnel acknowledge the particular stresses veterans face, which is instrumental to their recovery.¹⁴ VTCs address the issues underlying combat-related mental illness and the stress of exiting the military with invisible wounds.

A. Military Veterans Suffer from High Rates of Mental Illness and Drug Abuse upon Re-Acclimation to Civilian Life

The stress veterans suffer during their service hinders many from adequately acclimating to civilian life. In fact, many come back from military service with several mental illnesses. Veterans suffer from an estimated 5% to 15% chance of PTSD, and 2% to 10% chance of depression.¹⁵ Up to 35% of returning veterans with brain injuries have PTSD.¹⁶

Statistics show that 7.3% of all living Americans are veterans, with 5.5 million of those veterans serving during peacetime.¹⁷ In total, there are 16.5 million wartime

feeling of shame. When a veteran does not admit they are one, a state is unable to access federal resources to help the veteran. *Veterans Treatment Courts are a "Game Changer" and Easy to Implement, Judges Say*, ABA NEWS (Aug 15, 2017), https://www.americanbar.org/news/abanews/aba-news-archives/2017/08/veterans_treatmentc.html.

¹¹ See Russell, *supra* note 10, at 386.

¹² RAND CENTER FOR MILITARY HEALTH POLICY RESEARCH, INVISIBLE WOUNDS OF WAR: PSYCHOLOGICAL AND COGNITIVE INJURIES, THEIR CONSEQUENCES, AND SERVICES TO ASSIST RECOVERY 123 (Terri Tanielian & Lisa H. Jaycox eds., 2008); Alana Frederick, Note, *Veterans Treatment Courts: Analysis and Recommendations*, 38 L. & PSYCHOL. REV. 211, 218 (2014); Russell, *supra* note 10, at 386.

¹³ Eileen M. Ahlin & Anne S. Douds, *Military Socialization: A Motivating Factor for Seeking Treatment in a Veterans' Treatment Court*, 41 AM. J. CRIM. JUST. 83, 84–85 (2016); Allison E. Jones, Note, *Veterans Treatment Courts: Do Status-Based Problem-Solving Courts Create an Improper Privileged Class of Criminal Defendants?*, 43 WASH. U.J.L. & POL'Y 307, 308 (2013).

¹⁴ Russell, *supra* note 10, at 398.

¹⁵ RAND, *supra* note 12, at 55 (explaining prevalence of mental illness among servicemembers but noting that there are no good numbers for TBI as of yet).

¹⁶ Marilyn Lash, *TBI and PTSD: Navigating the Perfect Storm*, BRAIN INJURY JOURNEY 20, 20 (2013).

¹⁷ Mona Chalabi, *What Percentage of Americans Have Served in the Military?*, FIVETHIRTYEIGHT (Mar. 19, 2015), <https://fivethirtyeight.com/features/what-percentage-of-americans-have-served-in-the-military>.

veterans—1.02 million from World War II, 1.89 million from the Korean Conflict, 7.25 from the Vietnam War, and 7.03 from the Gulf Wars (1.6 million served in multiple Gulf Wars skewing the numbers).¹⁸ Based on the estimated percentage of veterans suffering from PTSD, approximately 825,000 to 2,475,000 wartime veterans have returned with PTSD.

Moreover, studies show that combat veterans serving in Operation Enduring Freedom (OEF) and Operation Iraqi Freedom (OIF) have the highest risk of PTSD and TBI.¹⁹ In fact, today one in five veterans has a mental disorder.²⁰ It is estimated that one in three returning veterans from OEF and OIF suffer from at least one invisible trauma.²¹ If these conditions are not treated early, they may lead to homelessness and increased recidivism.²²

B. Veterans Returning to Civilian Life are Negatively Affected by Their Service-Incurred Mental Illness

Mental illness is a significant contributor to the incarceration problem within the veteran community.²³ As a result, military veterans are over-represented in the criminal justice system. In fact, while 7.3% of the U.S. population has served in the military, an estimated 700,000 prisoners are veterans—approximately 9% of the inmate population.²⁴ That number may increase as those who have served in OEF and OIF become civilians at higher numbers.²⁵ The military is now attempting to screen people for PTSD and TBI at discharge; however, veterans may be reluctant to admit symptoms of mental illness.²⁶ The stigma against mental illness has been

¹⁸ *Id.*

¹⁹ Enemy tactics have been changing. People are no longer engaged in face-to-face combat. Instead, soldiers are dealing with roadside bombs, improvised explosive devices, and suicide bombers. These factors certainly increase the chance of TBI as the shock causes severe damage to the brain. They may also increase the chance of PTSD. Berenson, *supra* note 9, at 37–38 (“[T]he counterinsurgency type of warfare blurs periods of battle and periods of rest”); *see also* Walls, *supra* note 1, at 702.

²⁰ Frederick, *supra* note 12, at 212.

²¹ RAND, *supra* note 12, at xxi (looking at veterans suffering from PTSD, TBI, and major depression).

²² Michelle Slattery et al., *Catch, Treat, and Release: Veteran Treatment Courts Address the Challenges of Returning Home*, 48 *SUBSTANCE USE & MISUSE* 922, 924 (2013).

²³ *Id.* at 922.

²⁴ Ahlin & Douds, *supra* note 13, at 84; Chalabi, *supra* note 17.

²⁵ William H. McMichael, *The Battle on the Home Front: Special Courts Turn to Those Who Served to Help Troubled Vets Regain Discipline, Camaraderie*, 97 *ABA J.* 42, 48 (2011); *see* Slattery et al., *supra* note 22, at 923 (noting that PTSD symptoms can develop slowly in the years following a veteran’s return to civilian life).

²⁶ RAND, *supra* note 12, at 43, 101; Russell, *supra* note 10, at 398.

called the “warrior[’s] mentality” that a person should stay strong, even when suffering.²⁷ Therefore, early detection can be difficult and mental illness among veterans may only be discovered after they are arrested.²⁸ VTCs can help veterans reintegrate into civilian life and recover from mental illness even after late detection.

II. VETERAN TREATMENT COURTS WERE CREATED TO HELP VETERANS SUFFERING FROM MENTAL ILLNESS AND SUBSTANCE ABUSE

VTCs aim to tailor the justice system to veterans in a civilian world. The very first small-scale VTC occurred in Anchorage, Alaska in 2004.²⁹ But most credit is given to Judge Robert Russell in Buffalo, New York for creating the movement towards veteran specialty courts.³⁰ The court was created as a mix of Drug Court and Mental Health Court.³¹ Judge Russell created the court because he saw a lot of veterans coming through his courtrooms, specifically his Drug and Mental Health Courts.³² Furthermore, he saw that veterans were more successful when they were able to work with other veterans, rather than civilians.³³

A. *The Objective of Veteran Treatment Courts*

The entire reason for creating the veteran treatment court was because “service members and their families experience unique stressors as part of the military experience.”³⁴ Veterans have experienced a unique culture; for instance, because part of an infantryman’s job may be to kill enemy combatants, a legal job in the military may be criminal behavior in the civilian world.³⁵ Therefore, “the delivery of high quality care for psychological health, including prevention, early intervention, and treatment, requires providers who are knowledgeable about and able to empathize with the military experience.”³⁶ The mentoring program is integral to the VTC and allows people with shared experience to deal with the stressors of transitioning to civilian life.³⁷

²⁷ Russell, *supra* note 10, at 400.

²⁸ RAND, *supra* note 12, at 108.

²⁹ Jones, *supra* note 13, at 311 n.26.

³⁰ Berenson, *supra* note 9, at 39; Russell, *supra* note 10, at 385 n.*.

³¹ Russell, *supra* note 10, at 391.

³² *Id.* at 392.

³³ *Id.*

³⁴ Frederick, *supra* note 12, at 217 (quoting Robert T. Russell, *Veterans Treatment Court: A Proactive Approach*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 357, 363 (2009)).

³⁵ Kristine A. Huskey, *Justice for Veterans: Does Theory Matter?*, 59 ARIZ. L. REV. 697, 707 (2017) (explaining that combat skills do not translate well to civilian life).

³⁶ Frederick, *supra* note 12, at 217 (quoting Robert T. Russell, *Veterans Treatment Court: A Proactive Approach*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 357, 363 (2009)).

³⁷ See Berenson, *supra* note 9, at 42.

B. The Empirical Successes of Veteran Treatment Courts

Several factors may influence the success of a VTC. A significant factor is how a VTC judge interacts with a participant veteran and the sanctions and rewards that are given. Focusing on the sanctions, a judge needs to look at two important factors, a veteran's needs and their risk.³⁸ The chance of recidivism is the main focus of "risk," while "needs" focuses on the person's requirements for resources—mental health, substance abuse, homelessness, and employment status.³⁹

The early data on VTCs shows a high level of success. For instance, the Buffalo VTC "has famously maintained a zero percent recidivism rate since its inception."⁴⁰ A 2011 study looking at VTCs at a national level found that there was a 2% recidivism rate for those who graduated the program, as compared to a 70% recidivism rate among those not participating in the program.⁴¹ However, not all programs have had the same level of success. For example, between 2004 and 2010 the Anchorage treatment court had a recidivism rate of 45%, compared to a recidivism rate of 50.4% in Alaska generally.⁴² This prompts the question: what makes the difference? While the answer is certainly multi-faceted, one factor is whether a criminal record follows the veteran.

III. TO QUALIFY FOR VETERAN'S COURT, A VETERAN MUST PLEAD GUILTY, LEAVING AN ALREADY DISADVANTAGED VETERAN MORE DISADVANTAGED

The procedure to enter a VTC, generally speaking, starts when a veteran is taken to a traditional court. There, the veteran is given an option to enter a VTC instead. But no two courts are created equally. Since the first veteran treatment court in 2004, VTCs have increased in number to more than 300 now in existence.⁴³ Within each VTC there are different eligibility and procedural requirements.⁴⁴ For instance, some courts limit eligibility to type of discharge, type or level of crime, and whether the defendant has a mental illness.⁴⁵ Additionally, some courts follow a

³⁸ Faye S. Taxman & Alex Breno, *Alternatives to Incarceration*, in OXFORD RESEARCH ENCYCLOPEDIA, CRIMINOLOGY AND CRIMINAL JUSTICE 3 (Apr. 2017), <http://criminology.oxfordre.com/view/10.1093/acrefore/9780190264079.001.0001/acrefore-9780190264079-e-259>.

³⁹ *Id.*

⁴⁰ Jones, *supra* note 13, at 314.

⁴¹ Frederick, *supra* note 12, at 225.

⁴² See Jack W. Smith, Comment, *The Anchorage, Alaska Veterans Court and Recidivism: July 6, 2004–December 31, 2010*, 29 ALASKA L. REV. 93, 107 (2012).

⁴³ *Hundreds of Veterans Courts See Success but More Are Needed*, NPR (Jan. 3, 2017), <https://www.npr.org/2017/01/03/507983947/special-courts-for-military-veterans-gain-traction>.

⁴⁴ Berenson, *supra* note 9, at 41; Frederick, *supra* note 12, at 220–221.

⁴⁵ Claudia Arno, *Proportional Response: The Need for More—and More Standardized—Veterans' Courts*, 48 U. MICH. J.L. REFORM 1039, 1047–1048 (2015); see, e.g., ANNE CARON, MINN. JUDICIAL BRANCH FOURTH JUDICIAL DIST., FOURTH JUDICIAL DISTRICT VETERANS

“deferred adjudication” model, while others follow a “deferred prosecution.” Under deferred adjudication a court may delay sentencing until the veteran finishes probation.⁴⁶ This model makes the veteran plead guilty prior to VTC so that the prosecution and the judge can end VTC and immediately move to sentencing without the option of a trial.⁴⁷ The concern is that the enticement of deferring a prosecution may persuade a person not guilty of the charged crime to admit guilt and later be convicted and carry the detriments of a conviction without the option of a trial.

On the other hand, deferred prosecution causes a charge to be dropped entirely with the option to be re-prosecuted if the veteran fails to finish treatment.⁴⁸ Courts differ as to whether a guilty plea is required prior to transferring a veteran to the VTC.⁴⁹

Although eligibility to enter a VTC differs, once admitted, the procedure within VTCs tend to be similar. In all VTCs participation is voluntary.⁵⁰ Mental health specialists evaluate the participant, usually through the Veterans Health Administration, to identify the participant’s needs.⁵¹ Participants generally remain in the community and work towards treatment goals.⁵² If there are mental health issues, the VTC focuses on addressing them before focusing on any addiction concerns.⁵³ Treatment and services can include mental health and substance abuse treatment, employment services, access to computers, GED programming, and peer mentoring.⁵⁴ If a participant fails to comply with the requirements, sanctions are imposed on the participant.⁵⁵ If a participant is doing well, however, rewards and benefits are given.⁵⁶

COURT—TWO YEAR REVIEW: JULY 2010–JUNE 2012, 3, 8 (2013), http://www.mncourts.gov/Documents/4/Public/Research/Veterans_Court_Two_Year_Review.pdf.

⁴⁶ Berenson, *supra* note 9, at 41.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Frederick, *supra* note 12, at 222.

⁵⁰ Participation in the court must be voluntary because compulsory VTCs could violate due process. AMERICAN BAR ASSOCIATION POLICY RESOLUTION 105A, 8 (2010), https://www.americanbar.org/content/dam/aba/migrated/homeless/PublicDocuments/ABA_Policy_on_Vets_Treatment_Courts_FINAL.authcheckdam.pdf.

⁵¹ Jones, *supra* note 13, at 313.

⁵² *Id.* at 314.

⁵³ See *Veteran Treatment Courts are a “Game Changer” and Easy to Implement, Judges say*, ABA NEWS, (Aug. 15, 2017), https://www.americanbar.org/news/abanews/aba-news-archives/2017/08/veterans_treatmentc.html.

⁵⁴ Kelli E. Canada & David L. Albright, *Veterans in the Criminal Justice System and the Role of Social Work*, 4 J. FORENSIC SOC. WORK 48, 53 (2014).

⁵⁵ *Id.* at 53–54; Jones, *supra* note 13, at 314 (explaining that failing a regular drug screen or missing a court appearance may result in sanctions such as community service, fines, jail time, or re-arrest, followed by a transfer back to the traditional criminal justice system).

⁵⁶ Canada & Albright, *supra* note 54, at 53–54.

In Oregon, all VTCs require a veteran to enter a deferred adjudication.⁵⁷ This practice is incredibly detrimental to the veteran and is antithetical to the purpose of veteran treatment courts.

A. The Goals, Objectives, and Theory of Deferred Adjudication are Detrimental to the Purpose and Goals of Veteran Treatment Courts

The Model Penal Code states that the purposes of a deferred adjudication, where a court delays sentencing until the veteran finishes probation, are to facilitate rehabilitation and ensure that the offender is capable of reintegrating into the community as a law-abiding citizen.⁵⁸ Deferred adjudication holds the defendant accountable for their criminal conduct through a formal court process, but helps those who qualify avoid a formal conviction.⁵⁹ First, the individual pleads guilty. Then, sentencing is suspended until the defendant successfully completes conditions set by the court, at which point the conviction becomes a diversion.⁶⁰

One treatise describes the “negative and positive incentives” of the deferred adjudication system as a “stick” and “carrot.”⁶¹ The “stick” is usually the threat of actual incarceration, while the “carrot” is avoiding convicted status and the consequences that attach.⁶² “In insulating successful defendants from the collateral consequences and stigma attached to a criminal conviction, deferred adjudication improves defendants’ long-term prospects for employment and housing, which are the two most reliable predictors of desistance from crime.”⁶³

But with those suffering from mental illness or addiction, there is a strong chance of coercion in the deferred adjudication process.⁶⁴ Prosecutors prefer deferred adjudication because it allows “swift and certain sentencing” for defendants who fail in their diversion and treatment programs.⁶⁵ A court generally prefers the entry of a guilty plea as well, because it “enhances the court’s authority to utilize

⁵⁷ See, e.g., Frantz, *supra* note 7, at 2A-2 (stating that guilt must be established first); MARION CTY. CIRCUIT COURT, *supra* note 7, at 3.

⁵⁸ MODEL PENAL CODE: SENTENCING § 6.02B(2) (AM. LAW INST., Proposed Final Draft 2017).

⁵⁹ *Id.*

⁶⁰ MARGARET COLGATE LOVE ET AL., COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE § 7:22, at 438 (2013 ed. 2013).

⁶¹ *Id.*

⁶² *Id.* Other sanctions can also be imposed including verbal warnings, community service, increased court appearances, monitoring devices, or incarceration. Johnson et al., *supra* note 6, at 172.

⁶³ COLGATE LOVE ET AL., *supra* note 60, § 7:22, at 438.; see also Scott Johnson et al., *Predictors of Incarceration of Veterans Participating in U.S. Veterans’ Courts*, 68 PSYCHOL. SERV. 144, 147–48 (2017) (showing that employment and housing stability are highly correlated with success in VTCs).

⁶⁴ COLGATE LOVE ET AL., *supra* note 60, § 7:22, at 439.

⁶⁵ *Id.* § 7:22, at 440.

potential incarceration as a threat in obtaining a participants full commitment to treatment.⁶⁶ Although a defendant may have onerous duties and tasks in exchange for a suspended sentence, the guilty plea is retained until the completion of the conditions of the court when a diversion is entered into the veteran's criminal record.⁶⁷

B. The Consequences of Deferred Adjudication are Detrimental to Veterans in Veteran Treatment Court

Having a criminal record can be detrimental to rehabilitation, especially for combat veterans and those with mental illness and substance abuse issues. Furthermore, if a veteran is incarcerated, his or her chances of success may decrease due to the obstacles that incarceration creates for veterans.⁶⁸ VTCs make it harder to gain employment and easier for veterans to be incarcerated. These two factors are detrimental to veterans in that a veteran is more likely to lose benefits, become homeless, and recidivate. Furthermore, due to the harm deferred adjudication may have, potential veteran participants may decline to enter VTC even though the resources that VTCs offer would be beneficial for the veteran.

1. Employment is Beneficial for Veterans with Mental Illness and Deferred Adjudication Decreases Employment Opportunities

Being employed is beneficial for veterans participating in VTC. Participants of VTC, especially those that are employed, have a decreased chance of recidivism.⁶⁹ Furthermore, being employed increases the chance of the veteran completing the treatment court.⁷⁰ However, for veterans entering VTC in the deferred adjudication model, employment rates do not increase significantly from program entrance to exit.⁷¹ One factor may be the stigma of hiring those with a criminal record.⁷²

Employers may conduct criminal background checks, and may see interactions with the criminal justice system even if those interactions did not end in conviction. For example, arrests or diversions may appear on a background check.⁷³ These kinds

⁶⁶ WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 1.4(i) (Supp. 2017).

⁶⁷ *Id.*

⁶⁸ Canada & Albright, *supra* note 54, at 51–52.

⁶⁹ Jack Tsai et al., *A National Study of Veterans Treatment Court Participants: Who Benefits and Who Recidivates*, 45 ADMIN. & POL'Y MENTAL HEALTH 236, 240–41 (2018).

⁷⁰ Johnson et al., *supra* note 63, at 147.

⁷¹ Slattery et al., *supra* note 22, at 927 (giving a slightly better picture of unemployment at 34% upon entering VTC compared to 28% after six months); Tsai et al., *supra* note 69, at 243 (finding that among one group, 27% entered the program employed and 28% exited the program employed).

⁷² Slattery et al., *supra* note 22, at 929.

⁷³ See Jake Wayne, *How Does a Diversion on a Background Check Affect My Chances of Getting a Job?*, SAPLING (June 25, 2011), <https://www.sapling.com/8645741/diversion-affect-chances-getting-job>.

of interactions with police can potentially harm employment opportunities.⁷⁴ While it is better to be upfront about incidents that may appear on a background check, veterans suffer problems that employers may not understand—this problem is exacerbated during the application process.⁷⁵ For veterans, behavior that is criminal as a civilian is normalized during military service—violence is a part of the job for soldiers.⁷⁶ Some veterans returning from combat suffer from mental illness and substance abuse that may deter many employers from hiring them.⁷⁷ Background checks may also contain information on drug and polygraph tests associated with criminal history.⁷⁸

Having a job aids treatment by promoting the mental well-being of veterans.⁷⁹ This mental well-being is shown in better familial relationships and appreciation for one's own life. For instance, employment reduces the stress veterans experience while they are involved in the criminal justice system, and makes them more able to support themselves and their family.⁸⁰ In fact, the inability to get a job due to a criminal record combined with the time that VTCs require from veterans can exacerbate mental health issues to the point that the veteran becomes a higher risk for suicide.⁸¹ A study on the relationship between unemployment and suicide indicated that people who are unemployed are 100–200% more likely to commit suicide.⁸² Additionally, veterans already suffer from a high rate of unemployment compared to their civilian counterparts.⁸³ In 2011, a report stated that veterans from recent conflicts suffer from an unemployment rate of 12.1% compared to the general population rate of 7.8%.⁸⁴ Those who enter VTC with a history of incarceration are

⁷⁴ See Kat Saks, *How Criminal Records Affect Employment*, DMV.ORG (Aug. 11, 2012), <https://www.dmv.org/articles/how-criminal-records-affect-employment/>; see Berenson, *supra* note 9, at 41.

⁷⁵ See Heath Druzin, *Report: Despite Hiring Efforts, Veterans Face Employment Obstacles and Civilian Disconnect*, STARS & STRIPES (May 12, 2015), <https://www.stripes.com/news/veterans/report-despite-hiring-efforts-veterans-face-employment-obstacles-and-civilian-disconnect-1.345755>.

⁷⁶ Huskey, *supra* note 35, at 707.

⁷⁷ *What Statistics Show About Veteran Substance Abuse and Why Proper Treatment is Important*, NAT'L VETERANS FOUND. (Mar. 30, 2016), <https://nvf.org/veteran-substance-abuse-statistics/>.

⁷⁸ *Background Checks*, DMV.ORG, <https://www.dmv.org/background-checks.php>.

⁷⁹ See T.A. Blakely et al., *Unemployment and Suicide. Evidence for a Causal Association?*, 57 J. EPIDEMIOLOGY & COMMUNITY HEALTH 594, 598 (2003).

⁸⁰ Slattery et al., *supra* note 22, at 929; Tsai et al., *supra* note 68, at 242-43.

⁸¹ See Blakely et al., *supra* note 79, at 594; see Peter D. Kramer, *The Role of Unemployment in Veteran Suicide*, N.Y. TIMES (Nov. 20, 2011), <https://www.nytimes.com/roomfordebate/2011/11/20/how-can-we-prevent-military-suicides/the-role-of-unemployment-in-veteran-suicide>.

⁸² Blakely et al., *supra* note 79, at 594.

⁸³ See, e.g., Slattery et al., *supra* note 22, at 924.

⁸⁴ *Id.*

more likely to be unemployed and homeless at the time VTC ends.⁸⁵ By convicting veterans and making it easier for them to be sent to jail, VTCs increase their risk of joblessness, and in turn, their risk of suicide.

2. *Prison is Especially Harmful for Veterans with Mental Illness*

Veterans participating in VTCs are more likely than those in traditional courts to be incarcerated due to criminal sanctions such as violating parole.⁸⁶ In fact, veterans are more likely to be incarcerated due to court sanctions than failing out of the program.⁸⁷ One theory is that the increased incarceration rate is due to increased monitoring.⁸⁸ In fact, one study showed at least 20% of VTC participants experience jail sanctions.⁸⁹ Furthermore, for those who struggle to conform to the rules—such as those with mental illness and substance abuse—pleading guilty makes it easy for the judge and prosecutors to put a person in jail.⁹⁰ These two mechanisms in deferred adjudication decrease veteran employment and may re-traumatize veterans.⁹¹

A main purpose of VTC is the understanding that soldiers “traumatized by the horrors of war often face significant hurdles upon re-acclimation” to a civilian life. But, by creating a system that criminalizes the invisible wounds of military service, we are in turn re-traumatizing veterans and subjecting them to horrors in both warzones and civilian life. Studies show that those in prison, veteran and non-veteran, suffer PTSD at a higher rate than those not in prison.⁹² The causes may be the higher rate of criminal behavior associated with PTSD,⁹³ the trauma that happens in prison,⁹⁴ or it may be some of both. Either way, those with PTSD require aid and are not receiving adequate aid if they are in prison.

⁸⁵ Tsai et al., *supra* note 69, at 240.

⁸⁶ *Id.* at 237.

⁸⁷ *Id.* at 241 (showing that 20% of recipients received jail sanctions and 14% received incarceration for a new act compared to 11% in one study). See Slattery et. al., *supra* note 22, at 924.

⁸⁸ Tsai et al., *supra* note 69, at 237

⁸⁹ *Id.* at 241.

⁹⁰ See COLGATE LOVE ET AL., *supra* note 60, § 7:22, at 440.

⁹¹ See Penny Coleman, *Why Are We Locking Up Traumatized Veterans for Their Addictions Instead of Offering Them Treatment?*, ALTERNET (Nov. 10, 2009), https://www.alternet.org/story/143867/why_are_we_locking_up_traumatized_veterans_for_their_addictions_instead_of_offering_them_treatment; Canada & Albright, *supra* note 54, at 52.

⁹² Canada & Albright, *supra* note 54, at 52.

⁹³ Jones, *supra* note 13, at 316.

⁹⁴ Canada & Albright, *supra* note 54, at 52.

One of the reasons why incarcerated veterans are not receiving the care they require is that VA benefits lapse during incarceration.⁹⁵ This is not just family benefits, but also medical benefits as well.⁹⁶ For example, one veteran incarcerated in an Oregon state prison for driving under the influence told *The Oregonian* that he was unable to receive medical care he urgently needed.⁹⁷ He had “dents, ridges[,] and gaps” in his skull from a car accident.⁹⁸ He reported he was receiving conflicting medical advice from the individuals providing his medical care at Columbia River Correctional Institution.⁹⁹ He claimed he required specialized treatment from the VA but because his medical benefits with the VA lapsed while in prison, he was stuck receiving Department of Corrections care.¹⁰⁰ He worried he would die because he could not access the healthcare he needed—and that he had earned while serving his country.¹⁰¹

While the story of a Veteran serving a six-month sentence is not exactly analogous to a person serving a week for a sanction, benefits lapsing and restarting can put serious strains on a veteran’s access to the treatment the veteran needs to recover.

IV. STATES, INCLUDING OREGON, SHOULD CHANGE THEIR PRACTICE TO DEFERRED PROSECUTION TO ALLOW VETERANS TO EXIT VTC WITHOUT A CRIMINAL RECORD

VTCs can still be successful at meeting their goals using deferred prosecution. Given the unique circumstances that veterans experience—the stress of maintaining veteran benefits and the higher risk of re-traumatizing an at-risk person—deferred prosecution is better suited for two main reasons. First, it allows veterans to exit VTC without a criminal record. Second, deferred prosecution insulates veterans who are suffering from mental illness from prison. Deferred prosecution places the burden upon the prosecutor to prove that prison is warranted, rather than using fear of prison as a stick for enforcing VTC rules.¹⁰² VTCs can still meet their rehabilitation goals and address the needs of veterans by using alternatives to incarceration that are specifically tailored to veterans.¹⁰³

⁹⁵ See Mike Francis, *Veterans in the Justice System Pose Special Challenges for Courts, Corrections*, OREGONIAN/OREGONLIVE (Aug. 20, 2012), http://blog.oregonlive.com/oregonatwar/2012/08/veterans_in_the_justice_system.html.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² MODEL PENAL CODE: SENTENCING § 6.02A (13) (AM. LAW INST., Proposed Final Draft 2017) (discussing deferred prosecution).

¹⁰³ *Id.* at § 6.02A (10).

A. *Deferred Prosecution is Better Suited for Veterans*

Deferred prosecution is better at meeting the goals of the VTC and the needs of the veteran than incarceration. When reviewing alternatives to incarceration, a judge considers two factors: the “risk” of the individual and the “needs” of the individual.¹⁰⁴ Veterans tend to be both high risk and high need.¹⁰⁵ Successful VTCs tend to focus on decreasing the needs of veterans to allow them to adjust to civilian life; veteran-mentors are especially useful in that respect.¹⁰⁶ Deferred adjudication, by contrast, does not meet the needs of veterans. Specifically, deferred adjudication ignores the needs for veterans to exit VTC without a criminal record and to ensure that mentally ill veterans are not entering prison.

1. *The Significance of Leaving a VTC Without a Criminal Record*

It is important for a veteran to leave VTC without a criminal record. Veterans require self-confidence and employment to fully recover through treatment; a criminal record hinders both. Additionally, the stigma of a criminal record is often compounded by other aspects of veterans’ lives. For instance, veterans with mental illness and substance abuse issues tend to also struggle with self-confidence.¹⁰⁷ Having a criminal record can bring shame to a veteran, which in turn can further contribute to the already existing mental illness and substance abuse issues veterans face. But having a criminal record diminishes morale, and if veterans “internalize” the shame, then their “confidence in their future prospects decline.”¹⁰⁸ When a veteran’s confidence drops, this in turn decreases the chance that a VTC will meet its goals because that veteran is less likely to “seek treatment for a mental health condition” and also “less likely to adhere to a treatment plan.”¹⁰⁹

A veteran with confidence will be more likely to have positive relationships with people rather than to seek isolation.¹¹⁰ Having strong bonds with other service-members while active aids in the “morale and psychological resilience” of soldiers.¹¹¹ It is reasonable to assume that having strong bonds after they have left military service will be equally important in the mental health of veterans. Strong bonds are important for both personal and professional relationships.

¹⁰⁴ See Taxman & Breno, *supra* note 38, at 3.

¹⁰⁵ See Arno, *supra* note 45, at 1055.

¹⁰⁶ See *id.* at 1048.

¹⁰⁷ RAND, *supra* note 12, at 276.

¹⁰⁸ See *id.* at 276.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 276.

¹¹¹ *Id.* at 278.

Veterans are concerned with how employers will perceive their mental health.¹¹² These perceptions, either warranted or unwarranted, cause veterans to believe that employers will think they are violent individuals.¹¹³ In fact, having a criminal record does make it harder for a veteran to get a job or housing.¹¹⁴ Both factors contribute to the chance of homelessness.¹¹⁵ By avoiding a criminal record, deferred prosecution allows a veteran to gain skills and opportunities that increase the chance of successful rehabilitation and reintegration to society.

2. *The Importance of Avoiding Incarceration*

Deferred prosecution better meets veteran needs by minimizing the likelihood that veterans will be incarcerated. Under deferred prosecution no criminal charges are filed.¹¹⁶ Therefore, to incarcerate a veteran the prosecutor's office needs to terminate the deferred-prosecution agreement and file formal charges with the court.¹¹⁷ Although treatment courts generally require pleading guilty before entering,¹¹⁸ prison is particularly detrimental to veterans.

Prison causes veterans to lose benefits and increases the chance of veterans being re-traumatized.¹¹⁹ Prison also is inherently isolating, which is a strong contributor to mental health and substance abuse issues. "After the Lebanon War, researchers found that social isolation was the best predictor of combat-stress reactions in Israeli soldiers."¹²⁰ On top of that, isolation increases the chances that veterans will suffer from, if not already suffering from, homelessness and substance abuse.¹²¹ In fact, socially isolated veterans tend to be in the category of "greatest need."¹²²

Prison contributes to isolation in two ways. First, prison literally isolates by physically separating the veteran from his or her support group. Isolation is taken to the extreme if an incarcerated veteran is put in solitary confinement. Second, friends and family members of those who are incarcerated face their own stigma and isolation.¹²³ Families and friends often have to deal with external social pressures to cold-

¹¹² *Id.* at 277.

¹¹³ *Id.* at 276.

¹¹⁴ Coleman, *supra* note 91.

¹¹⁵ See RAND, *supra* note 12, at 123.

¹¹⁶ MODEL PENAL CODE: SENTENCING § 6.02A (1) (AM. LAW INST., Proposed Final Draft 2017).

¹¹⁷ *Id.* at § 6.02A (13).

¹¹⁸ LAFAVE ET AL., *supra* note 66, at § 1.4(i).

¹¹⁹ See *supra* Part II Section B.

¹²⁰ RAND, *supra* note 12, at 278.

¹²¹ See *id.* at 123.

¹²² See *id.* at 121.

¹²³ See Lorenza Brascia, *Married to an Inmate: The Ultimate Test of Commitment*, CNN (Nov. 25, 2016), <https://www.cnn.com/2016/11/24/us/marriage-prison-love-lisa-ling/index.html>.

shoulder those in prison, or fear themselves being cold-shouldered by their community.¹²⁴ Furthermore, family members who remain in contact with incarcerated veterans encounter difficulties, including forced separation, monitored phone calls, rare physical contact, and the lack of income from the veteran spouse, putting great strain on relationships.¹²⁵ Deferred prosecution avoids these issues because it makes a veteran's incarceration less likely.

a. Alternative to Incarceration for VTC Sanctions

Incarceration is often touted as a necessary consequence for failure to follow VTC rules. This remains true although, as discussed above, imprisonment is not an appropriate or effective sanction for such veterans. VTCs should offer an alternative to incarceration for veterans when the veterans fail to follow the VTC rules. Instead, particularly for those at the highest risk of recidivism, rehabilitative sanctions should be implemented. Rehabilitative sanctions better accommodate the needs of veterans who struggle to conform to the rules of a VTC and promote the VTC's goal of successful integration into society.

Veterans tend to need five things in rehabilitation: a social network, access to benefits, housing, employment, and treatment.¹²⁶ VTCs tend to succeed at treatment but fail in other areas. In fact, many veterans exit VTC in worse condition as it pertains to employment and non-VA benefits.¹²⁷ This may re-traumatize veterans or leave them homeless. Veterans also have lower risks of recidivism compared to non-veteran offenders¹²⁸—such that implementing a rehabilitative sanction should not significantly affect the justice system's burden to keep the public safe. Instead of prison, veterans should receive highly structured rehabilitative sanctions.

One example of a successful rehabilitative sanction is the “therapeutic/vocational” community, also called a vocational village.¹²⁹ Michigan has adopted a vocational village with great success.¹³⁰ The program focuses on education, employment, and self-sufficiency.¹³¹ During the program, the participants spend six hours a day in the classroom learning both practical and soft skills and earning credits for a community college or trade school.¹³² Job postings fill the bulletin boards and when someone is offered a job, the community comes together to celebrate.¹³³ This

¹²⁴ *See id.*

¹²⁵ *Id.*

¹²⁶ *See Russell, supra* note 10, at 392–393.

¹²⁷ Tsai et al., *supra* note 69, at 241.

¹²⁸ MARGARET E. NOONAN & CHRISTOPHER J. MUMOLA, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: VETERANS IN STATE AND FEDERAL PRISON 12 (2007).

¹²⁹ Heidi E. Washington, *Creating Offender Success: A New Vision at the Department of Corrections*, 96 MICH. B.J. 28, 29 (2017).

¹³⁰ *Id.* at 31.

¹³¹ *Id.* at 29.

¹³² *Id.*

¹³³ *Id.*

program has been applied to those with probationary sentences as a shorter, more intensive training.¹³⁴ This program has over an 80% success rate with those at high risk of recidivism.¹³⁵

The education and skills learned in a vocational village could rectify the difficulties veterans have with obtaining jobs. Moreover, these programs can teach soft skills particularly valuable to veterans, such as coping with stress, managing responsibilities, and reintegrating to civilian life. These programs are practical because these are not skills that are taught in the military; for example, while in the military veterans do not have to cook their own food, pay bills, or find health insurance. Most veterans enter the military between eighteen to twenty-years old¹³⁶ and may not have the simple skills their peers developed by beginning civilian life after high-school.

Another benefit of the vocational village as a sanction is that it increases veterans' access to veteran peers. Like the VTC's mentor program, veterans would benefit from having veteran peers around who understand their trauma. This also allows veterans the opportunity to apply for benefits with others who have gone through the process.¹³⁷ For example, the veteran can apply for housing and employment all while being in a restricted area that forces the veteran to remain sober and exhibit good behavior. Short-term 24-hour custody can also allow program managers to give mental health treatment and ensure that the veteran is taking prescribed medication and dealing with trauma in healthy ways.

b. The Importance of Resources for Alternative Prosecution

Jurisdictions may struggle to receive adequate funding for rehabilitative resources. However, for veterans, there are several sources for resources to pay for alternatives to prison. States can access federal VA funds, insurance funds for treatment, and use state funding that would normally be used to incarcerate the veterans. Furthermore, there are non-profit organizations that specialize in helping veterans with mental illness, such as The Soldiers Project,¹³⁸ Wounded Warrior Project,¹³⁹ and Returning Veterans Project,¹⁴⁰ that can help manage the program and funding. Accessing funds from several sources can mitigate the expense for the state.

While the government should be concerned with finding resources to help mentally ill veterans, there should be a social obligation to help veterans who suffer every day because of the sacrifice that they made for the country. Whether you are

¹³⁴ *Id.* at 30.

¹³⁵ *Id.*

¹³⁶ Gregg Zoroyo, *Recruits Trending Older in U.S. Military*, USA TODAY (Apr. 23, 2014), <https://amp.usatoday.com/story/8000817> (noting that while the age that military members are joining is increasing—65% of people joining before the age of 20 in 1992 compared to 44% in 2009, still the study showed that 62% of people join at or before the age of 21).

¹³⁷ RAND *supra* note 12, at 269.

¹³⁸ THE SOLDIERS PROJECT, <https://www.thesoldiersproject.org/>.

¹³⁹ WOUNDED WARRIOR PROJECT, <https://www.woundedwarriorproject.org/>.

¹⁴⁰ RETURNING VETERANS PROJECT, <https://www.returningveterans.org/>.

for or against war, those who struggle to function because of the government's choice to go to war should still have the support of their country and its states.

CONCLUSION

The criminal justice system in America is not well-suited for veterans who suffer from mental illness. The traditional system is detrimental to those veterans' families, employment, and health. Veterans require their benefits to continue to access healthcare, maintain healthy relationships with their family and significant others, find employment, and recover from the traumatic events of war. Incarceration causes the exact opposite to occur. Yet, the "hard on crime" mentality persists in many places, and as a society we suffer the consequences.

As Americans, we have a social responsibility to help those who have risked life and limb for our country. To fulfill this responsibility, treatment must be suited specifically for veterans in VTC. Deferred prosecution is a further step towards successfully treating veterans.