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## Continuing Combat at Home: How Judges and Attorneys Can Improve Their Handling of Combat Veterans with PTSD in Criminal Courts

Jeffrey Lewis Wieand Jr.

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# Continuing Combat at Home: How Judges and Attorneys Can Improve Their Handling of Combat Veterans with PTSD in Criminal Courts

By Jeffrey Lewis Wieand, Jr.\*

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\* J.D., 2013 Washington and Lee University School of Law; B.A., 2008, Lehigh University. I would like to thank my parents, my girlfriend Meaghan, and my sister Christine for their enduring support and patience during my three years at W&L. I would also like to extend a special thanks to the Montgomery County Pennsylvania Veterans Treatment Court for inspiring me to write this Note.

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### I. Introduction

For over eleven years, the United States has engaged in two wars that have strained the resources of our military men and women to a far greater extent than any conflict in the past forty years. The battles fought in Iraq and Afghanistan have been marked not only by their often intense close quartered fighting, but by the tactics of our enemies who often fight in civilian clothes and utilize hidden improvised explosive devices to maim and kill American soldiers and Marines. This combat, over the course of repeated multiple combat deployments, has taken a devastating toll on the mental, emotional, and physical welfare of our military service members.<sup>1</sup> Many returning service members struggle with the horrors they face in their adjustment to civilian life. At the same time, the treatment their service has earned them is often inadequate or missing.<sup>2</sup> Sadly, many resort to self-medication through drugs or alcohol while some attempt to recreate the adrenaline rush of combat through dangerous activities. Others simply recall their trauma through violent outbursts or flashbacks.<sup>3</sup> As a result, an alarming number of combat veterans have found themselves on the wrong side of the law, facing criminal charges as a result of the “unseen injuries” they suffered in combat.

This Note will discuss developments in specialty treatment courts and criminal sentencing to address the problems veterans face upon return to

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1. See Melody Finnemore, *Firestorm on the Horizon: Specialists Say Legal Professionals Ill-Prepared to Help Growing Population of U.S. Military Members with Post-Traumatic Stress Disorder*, 70 OR. ST. BAR BULLETIN 19 (Apr. 2010) (“What is different in these wars is that soldiers have multiple tours, multiple kills and multiple close calls without a break in between . . . . One incident can cause a person to live with PTSD for the rest of their lives, and these people are experiencing multiple traumas.”).

2. See Gordon P. Erspamer, *The New Suspect Class: Tragically Our Veterans*, 35 HUM. RTS. Q. 17 (Spring 2008) (describing insufficient Veteran’s Administration facilities and providers available for returning veterans, and a shocking increase in the number of suicides among veteran patients of the VA).

3. See Finnemore, *supra* note 1 (“The symptoms of PTSD range from violent flashbacks, nightmares and anxiety attacks to insomnia, irritability and poor concentration.”).

civilian life. These developments have evolved from recognition of the unseen psychological wounds that some veterans return home with and a desire to find a new way for courts to assist these veterans while still holding them accountable for their crimes. This Note will analyze whether both treatment courts designed for veterans and the use of combat trauma as a mitigating factor during sentencing can fit within two current legal doctrines: therapeutic jurisprudence and restorative justice.<sup>4</sup>

Therapeutic jurisprudence focuses on the operational aspects of legal systems, and the effect that court interaction has on the mental health of defendants.<sup>5</sup> Ultimately, therapeutic jurisprudence personalizes the legal process for defendants. In the end, it becomes a more positive experience with benefits for both the offender and the criminal justice system.<sup>6</sup> In the criminal law context, the goal is to find ways to creatively incorporate aspects of mental health law into the existing due process and adjudication framework.<sup>7</sup> This doctrine strives to make judges and attorneys aware of the social benefits that the law can have on offenders, but is mindful that the overall priorities and framework of the criminal justice system still take preeminence.<sup>8</sup>

Restorative justice, on the contrary, focuses on how all “stakeholders in a specific crime” can be included in the sentencing process in a decision-making framework to address the crime, and produce positive results to reduce its negative future effect on the offender and the community.<sup>9</sup>

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4. See Erik Luna & Barton Poulson, *Restorative Justice in Federal Sentencing: An Unexpected Benefit of Booker?*, 37 MCGEORGE L. REV. 787, 801–02 (stating that both “therapeutic jurisprudence and restorative justice ‘are both part of a return to problem-oriented adjudication’”) (quoting John Braithwaite, *Restorative Justice and Therapeutic Jurisprudence*, 38 CRIM. L. BULL. 244, 246 (2002)).

5. See David B. Wexler, *Two Decades of Therapeutic Jurisprudence*, 24 TOURO L. REV. 17, 20 (2008) [hereinafter *Two Decades*] (stating that the “underlying concern [of therapeutic jurisprudence] is how legal systems actually function and affect people”).

6. See David B. Wexler, *Therapeutic Jurisprudence: An Overview*, 17 T.M. COOLEY L. REV. 125, 125 (2000) [hereinafter *TJ Overview*] (explaining how therapeutic jurisprudence focuses on “humanizing the law and concerning itself with the human, emotional, psychological side of the law and legal process”).

7. See Wexler, *Two Decades*, *supra* note 5, at 20–21 (noting that “therapeutic jurisprudence does not seek to promote therapeutic goals over other ones” but tries “to creatively make the law as therapeutic as possible without offending those other values”).

8. See Wexler, *TJ Overview*, *supra* note 6, at 125 (claiming “therapeutic jurisprudence perspective . . . regards the law as a social force that produces behaviors and consequences” and asks “whether the law can be made or applied in a more therapeutic way so long as other values, such as justice and due process, can be fully respected”).

9. See Luna & Poulson, *supra* note 4, at 789 (“Restorative justice can be defined as

Unlike traditional theories of criminal justice such as retributivism and utilitarianism, restorative justice examines the actual chain of events that brought the offender in to court, unraveling in the process the offender's retributive obligation to the victims and community.<sup>10</sup> This doctrine diverges from traditional approaches to punishment through a belief that the state, as well as the victims and community, have a stake in the criminal justice process.<sup>11</sup> Even more so, restorativeness draws away from strictly punitive measures and provides offenders an opportunity to proactively "make amends" for their offenses.<sup>12</sup>

Part I of this Note will discuss how PTSD and combat trauma affect returning combat veterans at present and how this condition has evolved through the history of armed conflict to become a recognized medical condition. Part II will introduce Veterans Treatment Courts, a new and novel specialty treatment court that recognizes the combat service of veterans and provides treatment that rehabilitates them and works to ease their return into civilian life. Part III analyzes how criminal courts have approached PTSD at trial and during sentencing, and addresses recent changes to the United States Sentencing Commission Guidelines that may have beneficial effects on judicial outcomes for combat veterans in the courts. Part IV draws comparisons between the two approaches and ties them into the conceptual framework of therapeutic jurisprudence and restorative justice while offering suggestions for attorneys and judges handling cases with combat veterans.

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an approach to sentencing that incorporates all stakeholders in a specific crime—the offender, the victim, family members, community representatives, and other interested parties—in a process of group decision-making on how to respond to the crime and its implications for the future.”).

10. *See id.* at 790 (“Unlike these traditional theories [of utilitarianism and retributivism], restorative justice recognizes that a successful criminal sanction must be both backward-looking—condemning the offense and uncovering its cause—and forward-looking—making amends to the victim and the general community while actively facilitating moral development and pro-social behavior in the offender.”).

11. *See id.* at 791 (noting that “crime is not just an action against the state but against specific victims and the relevant community”).

12. *Id.* (“Restorativeness contends that crime creates affirmative duties that the offender must meet with an active response instead of passive submission come penalty.”).

*II. PTSD: A Problem for the Courts*

Since October 2001, over 1.64 million U.S. troops have been deployed to Iraq and Afghanistan for Operation Iraqi Freedom (OIF) and Operation Enduring Freedom (OEF).<sup>13</sup> Of those Iraq and Afghanistan veterans returning from combat, as many as one in four may have mental health conditions such as post-traumatic stress disorder (PTSD), major depression, or anxiety.<sup>14</sup> PTSD is an “anxiety disorder that can develop after direct or indirect exposure to a terrifying event or ordeal in which grave physical harm occurred or was threatened.”<sup>15</sup> Due to the increased use of improvised explosive devices throughout Iraq and Afghanistan, traumatic brain injuries have also become an increasing concern among combat veterans.<sup>16</sup> Advances in combat medical treatment have led to more veterans surviving their wounds, but often with long lasting, painful injuries and vivid memories of the horrific events that disabled them.<sup>17</sup> As a result, nearly half of veterans seeking treatment with the Veterans Health Administration have been diagnosed with a mental health disorder.<sup>18</sup>

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13. See RAND CORPORATION, CENTER FOR MILITARY HEALTH POLICY RESEARCH, INVISIBLE WOUNDS OF WAR: PSYCHOLOGICAL AND COGNITIVE INJURIES, THEIR CONSEQUENCES, AND SERVICES TO ASSIST RECOVERY 1 (Terri Tanielian & Lisa H. Jaycox, eds.) (2008) [hereinafter RAND Study] (providing these statistics); Hon. Robert T. Russell, *Veterans Treatment Courts: A Proactive Approach*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 357, 357 (2009) (quoting RAND Study).

14. RAND, *supra* note 13, at 3.

15. *Id.* at 4.

16. See *id.* at 2 (“[A]pproximately 2,700 U.S. troops have suffered a traumatic brain injury, and potentially hundreds of thousands more (at least 30 percent of troops engaged in active combat in Afghanistan and Iraq for four months or more) may have suffered a mild TBI as a result of IED blast waves.”) (citations omitted).

17. See Stacy Lee Burns, *The Future of Problem-Solving Courts: Inside the Courts and Beyond*, 10 UNIV. OF MD. J. OF RACE, RELIGION, GENDER AND CLASS 73, 82 (noting that more military personnel survive severe injuries than would have in the past due to advances in battlefield medicine. Some of these veterans endure chronic pain and long-lasting symptoms which are associated with mental health and substance use disorders, including exposure to opiates for managing this chronic pain) (citations omitted).

18. See William H. McMichael, *The Battle on the Home Front: Special Courts Turn to Vets to Help Other Vets*, A.B.A. J. (Nov. 1, 2011), [http://www.abajournal.com/magazine/article/the\\_battle\\_on\\_the\\_home\\_front\\_special\\_courts\\_turn\\_to\\_vets\\_to\\_help\\_other\\_vets/](http://www.abajournal.com/magazine/article/the_battle_on_the_home_front_special_courts_turn_to_vets_to_help_other_vets/) (“Of those seeking VA treatment from fiscal years 2002 through 2009, mental disorders were listed as a possible diagnosis for 48 percent, according to the Veterans Affairs Office of Public Health and Environmental Hazards.”).

The symptoms of PTSD can potentially affect a veteran's behavior upon returning to the U.S. in a way that endangers their safety and that of the community in general.<sup>19</sup> For veterans who have spent a year or more serving in a dangerous environment, where the slightest mistake could mean death or injury, it is often difficult to lower a well-entrenched shield of preparedness and anxiety to interact in civilian society.<sup>20</sup> Early intervention is essential to counterattack the trauma experienced in combat. For many veterans, a sense of loss, helplessness, or lack of purpose upon return to the U.S. can set in, and an alarmingly increasing number of returning OIF and OEF veterans have turned to suicide as a result.<sup>21</sup> These struggles are exemplified by the failure of the overwhelmed Veterans Administration, where the suicide rate amongst returning veterans exceeds the combat death toll in Iraq and Afghanistan combined.<sup>22</sup>

#### A. PTSD Throughout the History of U.S. Wars

Recognition of PTSD as a concern among combat veterans did not begin with military operations in Afghanistan or Iraq. In the aftermath of the American Civil War, the toll of intense, close quartered, and bloody combat began to manifest itself in returning veterans who exhibited symptoms of what was then known as "soldiers heart."<sup>23</sup> At the time, many

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19. See *id.* (noting that "VA studies have found PTSD victims typically exhibit more aggression than nonsufferers, and symptoms can lead indirectly to criminal behavior").

20. See F. Don Nidiffer & Spencer Leach, *To Hell and Back: Evolution of Combat-Related Post Traumatic Stress Disorder*, 29 DEV. MENTAL HEALTH L. 1, 12 (stating that combat creates "[h]eightened levels of awareness increase irritability, outbursts of anger, and poor sleep patterns, making normal social interactions with family and friends very difficult. These adjustment problems can be compounded when returning veterans are also suffering from PTSD or other war-related psychological injuries").

21. See Samantha Walls, *The Need for Special Veterans Courts*, 39 DENV. J. INT'L L. & POL'Y 695, 697 n.4 (2011) (noting "that in 2008, there were 192 suicide[] deaths among active-duty soldiers and soldiers in inactive reserve status, and that from January to mid-July of 2009, 129 suicides were confirmed or suspected") (citations omitted); see also RAND Study, *supra* note 13, at 128 (noting that "population based studies have indicated that male veterans face roughly twice the risk of dying by suicide as their civilian counterparts").

22. See Erspamer, *supra* note 2, at 17 (pointing to a recent study that showed "veterans under VA care were attempting suicides at a rate of about 1,000 per month and succeeding an average of eighteen times every day . . . . Thus the total number of veteran suicides in a single year eclipsed the number of combat deaths in Iraq and Afghanistan wars combined").

23. See Marcia G. Shein, *Post-Traumatic Stress Disorder in the Criminal Justice System: From Vietnam to Iraq and Afghanistan*, 57 FED. LAW. 42, 43 (Sep. 2010) (noting

Civil War soldiers' symptoms of "hyperlertness, dizziness, and chest pain" were misdiagnosed as heart conditions.<sup>24</sup> During World War I, there was a surge in "psychologically wounded" soldiers whose PTSD symptoms became known as a condition called "shell shock," that was believed to be a result of the intensive use of artillery to disrupt firmly entrenched forces.<sup>25</sup> However, it later became apparent that the horrors of war had wrought permanent damages on the emotional and mental well-being of these veterans as one in six disabled World War I veterans remained hospitalized twenty years following.<sup>26</sup>

The effects of PTSD and combat trauma were not fully realized before World War II, when its symptoms were again misdiagnosed as simply "battle fatigue" or a "gross stress reaction."<sup>27</sup> These conditions presented personnel problems throughout the war and resulted in "more than 500,000 discharges for psychiatric reasons."<sup>28</sup> While many in the military regarded "battle fatigue" as a clear sign of cowardice,<sup>29</sup> military officials took steps to prevent the escalation of combat related mental issues and the perceived threat it posed to the fighting capabilities of U.S. forces.<sup>30</sup> Despite this divergence of opinions, World War II led to one critical revelation

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that "because [m]any consider the Civil War the first step on the road to modern warfare—including the use of the first frontal assaults—'psychological symptoms' were 'common' among soldiers during the Civil War").

24. Daniel Burgess, et al., *Reviving the "Vietnam Defense": Post-Traumatic Stress Disorder and Criminal Responsibility in a Post-Iraq/Afghanistan World*, 29 DEV. MENTAL HEALTH L. 59, 61 (2010).

25. See Shein, *supra* note 23, at 43 (describing a post-war belief that "the impact of shells produced a concussion that disrupted the physiology of the brain").

26. See *id.* (noting that the continued hospitalization of 50,000 (of the 300,000 disabled) World War I veterans led psychiatrists to realize that "it was emotions and not physiological brain damage that was most often causing soldiers to collapse under a wide range of symptoms") (quoting Steve Bentley, *A Short History of PTSD: From Thermopylae to Hue, Soldiers Have Always Had a Disturbing Reaction to War*, THE VVA VETERAN (2005)).

27. *Id.*

28. Burgess, et al., *supra* note 24, at 61 (noting also that during the North African Campaign "American soldiers were being evacuated for battle fatigue faster than they could be replaced").

29. See *id.* (providing the infamous account of General George S. Patton, who upon encountering a soldier with a nervous condition called him a "yellow coward" and then "threatened to shoot the patient if he did not return to the front lines").

30. See *id.* (describing U.S. Army efforts to prevent mental health issues before they became disabling by dispatching psychiatrists to combat zones to directly treat troops in contact with enemy forces).



regarding soldiers with combat related PTSD: “[E]very man has a breaking point.”<sup>31</sup>

The lessons learned during World War II were employed during the Korean War as psychiatrists were routinely deployed to treat soldiers in combat zones.<sup>32</sup> Their presence on the front lines allowed for early intervention to treat soldiers suffering from combat trauma and, if necessary, remove them from combat in order to prevent a further deterioration of their condition. As a result of these preventative measures, the number of soldiers suffering from combat related mental illness decreased<sup>33</sup> and “Korea was ultimately considered a success for military psychiatrists.”<sup>34</sup>

Unfortunately, military health specialists failed to capitalize on the progress made during World War II and the Korean War.<sup>35</sup> The Vietnam War, was in many ways, a war unlike any other fought by the U.S. military. It produced in soldiers a “hyper vigilant . . . state of mind where they attempted to be constantly aware of their surrounding environment in order to anticipate and react to potential attacks.”<sup>36</sup> Many of these veterans carried their war time mind-sets and psychological baggage home with them as they struggled to readjust to life outside the military as civilians.<sup>37</sup> It is therefore not surprising that post-war studies show that nearly thirty-one percent of Vietnam veterans are expected to suffer from a lifelong prevalence of PTSD.<sup>38</sup>

31. Schein, *supra* note 23, at 43 (quoting Penny Coleman, FLASHBACK: POSTTRAUMATIC STRESS DISORDER, SUICIDE AND THE LESSONS OF WAR 46 (Beacon Press 2006)).

32. *See id.* (noting that “after a rough start on the psychiatric front, well-trained psychiatrists were deployed to combat zones to treat soldiers”).

33. *See id.* (stating that because “soldiers were rotated home, regardless of the situation on the front, after certain conditions were met, [t]he percentage of psychiatric casualties dropped dramatically”).

34. *See id.* (quoting Coleman, *supra* note 31).

35. *See* Burgess, et al., *supra* note 24, at 62 (stating that “the unique characteristics of the Vietnam War increased the proportion of soldiers with severe psychological reactions to unprecedented levels”).

36. *Id.* (pointing to a “loss of unit cohesiveness,” and ultimately omnipresent combat zone that “left soldiers more vulnerable to the psychological trauma experienced during [the] war”).

37. *See* Schein, *supra* note 23, at 43 (describing incidents of violent crime and pop culture portrayals of stress reactions in Vietnam combat veterans attempting “to readjust to life as a civilian after experiencing the horror of war”).

38. *See id.* at 44 (“According to the findings of the congressionally mandated *National Vietnam Veterans Readjustment Study*, 30.9 percent, or about one million men, were

The interpretation of PTSD by the American Psychiatric Association (APA) has proceeded along an equally disoriented path. In the first edition of the APA's *Diagnostic and Statistical Manual of Mental Disorders* (DSM-I), post-traumatic stress disorder was not even considered a psychiatric condition, while combat stress was simply considered in the category of "gross stress reactions."<sup>39</sup> During the height of the Vietnam War, the APA published DSM-II which removed combat stress from the category of "gross stress reactions" but again failed to categorize it as a genuine mental disorder.<sup>40</sup> As a result of the common public perception of returning Vietnam war veterans<sup>41</sup> and the increasing evidence of long term life altering trauma among Vietnam veterans, combat trauma could no longer be ignored as a "legitimate psychological ailment" in the 1980 publication of DSM-III.<sup>42</sup> Following the recognition of PTSD as a distinct psychological disorder in DSM-III, this classification has remained unchallenged and was included unamended in the APA's most recent revision—DSM-IV.<sup>43</sup>

### *B. Why PTSD Needs to be Addressed Now*

Many of today's returning veterans cope with serious issues such as "alcohol and substance abuse, mental illness, homelessness, unemployment, and strained relationships."<sup>44</sup> As a result, many veterans have found their way into the criminal justice system and courts have been forced to adapt by creating unique systems that address their special issues and unique

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projected to have a lifetime prevalence of PTSD.") (emphasis added).

39. Burgess, et al., *supra* note 24, at 61–62.

40. *See id.* at 62 ("[I]nstead of recognizing [combat stress] as a mental disorder, the DSM-II placed combat stress under the general heading adjustment reactions of adult life.").

41. *See supra* note 37 (describing public perception of returning Vietnam war veterans).

42. *See* Burgess, et al., *supra* note 24, at 63–64 (noting that "thirty to seventy percent of Vietnam veterans were exhibiting psychological symptoms as a result of combat trauma" resulting in "veterans' groups put[ing] a tremendous amount of pressure on the APA to recognize combat fatigue as a legitimate psychological ailment").

43. *See id.* at 63 ("PTSD remains a recognized psychiatric disorder under current APA diagnostic criteria.").

44. *See* Russell, *supra* note 13, at 357 (quoting RAND CTR. FOR MILITARY HEALTH POLICY RESEARCH, *INVISIBLE WOUNDS OF WAR: PSYCHOLOGICAL AND COGNITIVE INJURIES, THEIR CONSEQUENCES, AND SERVICES TO ASSIST RECOVERY* (Terri Tanielian & Lisa H. Jaycox eds., 2008)).

needs.<sup>45</sup> These courts have sought to intervene early before veterans proceed down an often irreversible path of self-destructive behavior.<sup>46</sup>

To achieve this purpose, a cogent approach must be developed that provides needed treatment for veterans while dispelling the myth that veterans are being “cut a break.” This approach must recognize that an individual’s combat service *and* trauma have damaged the psychological well-being of these veterans in a way that inhibits their ability to assimilate back into society. Judge Robert T. Russell, presiding judge of the nation’s first formal veterans treatment court, recognized that the impact of a veteran’s service might not be immediately apparent, could present itself long after discharge and have drastic effects on the daily lives and ability of these veterans to function normally in society.<sup>47</sup> He noted that the effect of military service and combat trauma specifically, can manifest itself through “alcohol and substance abuse, mental illness, homelessness, unemployment, and strained relationships.”<sup>48</sup> The intensity of the close counter insurgency combat in OIF and OEF indicates that these concerns are especially serious among recently returned veterans.<sup>49</sup>

PTSD among returning combat veterans is not a new concern, but scrutiny of the situation in Iraq and Afghanistan veterans has flowed from the evidence of high rates of PTSD and crime in returning Vietnam veterans.<sup>50</sup> It is now believed that veterans currently comprise ten to twelve

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45. *See id.* (“With the increase of veterans with serious needs in our criminal justice system, comes need for the system to develop innovative ways of working to address these issues and needs.”); *see also*, Burns, *supra* note 17, at 81 (noting that OIF and OEF veterans are not alone in their post-deployment struggles as “[n]early one quarter of all Gulf War vets are incarcerated at some point upon their return”) (quoting Donald W. Black et al., *Incarceration and Veterans of the First Gulf War*, 170 MIL. MED. 612, 612–18 (2005)).

46. *See* McMichael, *supra* note 18 (noting the criminal justice system must act early to address the increased number of veterans in the courts otherwise “we’re going to start seeing those young veterans on the streets, homeless, in jail . . . for things that could have been addressed earlier with assistance from the VA”).

47. *See* Russell, *supra* note 13, at 358 (“While some of these costs are immediate and obvious, like death or injury, other costs may not surface or be fully realized until years later. The impact of military service on veterans can be immense and long-lasting.”) (citations omitted).

48. *See id.* at 358–60 (recognizing that the costs to veterans may include, but are not limited to, these factors).

49. *See id.* at 360 (“Rates of mental illness are particularly high within the deployed veteran population . . . [And i]n particular, 17% to 28% of brigade combat teams are at risk for serious symptoms of PTSD.”).

50. Tiffany Cartwright, “*To Care for Him Who Shall Have Borne the Battle*”: *The Recent Development of Veterans Treatment Courts in America*, 22 STAN. L. & POL’Y REV.

percent of the prison population in the United States.<sup>51</sup> Incarcerated combat veterans have also been found more likely to be convicted of violent crime as compared to nonveteran inmates.<sup>52</sup> Prior to incarceration, these veterans report substantial rates of mental illness, drug use, and alcohol use.<sup>53</sup> Recent years have also shown a three and a half fold increase in veteran involvement in alcohol related incidents.<sup>54</sup> Many of these soldiers were not directed to treatment programs, and overall alcohol dependence programming did not increase to meet the soldiers' needs.<sup>55</sup>

### *III. Veterans Treatment Courts as a Possible Solution for Combat Veterans in the Criminal Justice System*

Since the first Veterans Treatment Courts ("VTC") was formed in

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295, 297 (2011) (pointing to post-Vietnam era studies showing that "fifteen percent of all male combat veterans had PTSD," "nearly half [of those veterans] had been arrested at least once" and that "[b]y 1986 veterans accounted for twenty percent of all state prisoners") (citations omitted).

51. See Russell, *supra* note 13, at 362 ("Other estimates conclude that the 12 percent figure is also reflective of the current number of incarcerated veterans.") (citing James McGuire, *Closing a Front Door to Homelessness Among Veterans*, 28 J. Primary Prevention 389, 390 (2007)), available at <http://www.springerlink.com/content/rq387463916175g7/fulltext.pdf> (last visited Sept. 18, 2012); see also Cartwright, *supra* note 50, at 298 (stating that in 2004 "ten percent of state prisoners reported prior military service") (citing MARGARET E. NOONAN & CHRISTOPHER J. MUMOLA, BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, SPECIAL REPORT: VETERANS IN STATE AND FEDERAL PRISONS, 1 (2007)).

52. See Cartwright, *supra* note 50, at 298 ("Among veterans, fifty-seven percent were convicted of a violent crime, as opposed to forty-seven percent of nonveterans.").

53. See Russell, *supra* note 13, at 362 (finding that "prior to incarceration in jail or prison, 81% of veterans report drug use problems, . . . 35% were identified as having current alcohol dependency, . . . and 25% were identified as mentally ill").

54. See *id.* at 362–63 (demonstrating an increase during 2006 from 1.73 per 1,000 soldiers to 5.71 per 1,000 soldiers in alcohol-related incidents, including driving under the influence, reckless driving, and drunk and disorderly conduct) (citing DEP'T OF DEF. TASK FORCE ON MENTAL HEALTH, AN ACHIEVABLE VISION: REPORT OF THE DEPARTMENT OF DEFENSE TASK FORCE ON MENTAL HEALTH, at 21 (2007), available at <http://www.health.mil/dhb/mhtf/MHTF-Report-Final.pdf> (last visited Sept. 18, 2012)).

55. See *id.* at 363 ("Distressing to note that *only 41% of soldiers* involved in these alcohol-related incidents 'were even referred to [an] alcohol program'" while "[t]here has also been no increase in alcohol program participation to match the increase in incidents") (citing DEP'T OF DEF. TASK FORCE ON MENTAL HEALTH, AN ACHIEVABLE VISION: REPORT OF THE DEPARTMENT OF DEFENSE TASK FORCE ON MENTAL HEALTH, at 21 (2007), available at <http://www.health.mil/dhb/mhtf/MHTF-Report-Final.pdf> (last visited Sept. 18, 2012)) (emphasis added).

Buffalo in 2008, over 80 similar courts have been formed across the country.<sup>56</sup> As their mission, these specialty courts connect returning veterans to treatment and assistance that may have been overlooked on their return to the U.S.<sup>57</sup> These courts recognize the struggles of many veterans in their post-military lives, and that treatment now provides a superior alternative to simply incarcerating them and overlooking their serious mental and emotional conditions.<sup>58</sup> VTCs work to provide returning veterans with the regimented lifestyle and atmosphere that more closely resembles the close knit purposeful experience of a combat unit.<sup>59</sup> To create this atmosphere, the Buffalo VTC, for example, created a veteran mentor program to capitalize on the “noticeably positive reaction [of offender veterans] to two fellow vets who worked for the court, former soldier Jack O’Connor and former Marine Hank Pirowski.”<sup>60</sup> Throughout the entire process, however, the veteran participant must remain driven to help themselves, and while the court is there to help, it will not cut them any slack.<sup>61</sup>

While VTCs have been formed through a variety of frameworks, Judge Robert T. Russell, author of *Veterans Treatment Courts: A Proactive Approach* and the presiding judge of Buffalo’s VTC, has identified ten key components that drive his mission to “successfully rehabilitate [each] veteran” outside “the traditional criminal justice system” by providing them

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56. See McMichael, *supra* note 18 (noting, also, that the substantial development of veterans courts across the country over the past three and one half years has been “largely independent of the federal government”).

57. See *id.* (“Like similar courts created over the past few years across the nation, Smith’s court specializes in working with troubled veterans to get them counseling, and linking them to government treatment and other benefits they may have not known about or skipped over upon their return home.”).

58. See Jillian M. Cavanaugh, *Helping Those Who Serve: Veterans Treatment Courts Foster Rehabilitation and Reduce Recidivism for Offending Combat Veterans*, 45 NEW ENG. L. REV. 463, 480 (2011) (“Those involved in the veterans treatment courts agree that incarceration is not going to solve these veterans’ problems; rather, a collaborative effort to provide offending veterans with treatment will better serve their needs.”).

59. See McMichael, *supra* note 18 (“The program is aimed at helping them regain the sense of discipline and camaraderie they had in uniform, and steering them onto a more positive course in life.”).

60. *Id.* (“It was, wait a minute, there’s something to this . . . how a veteran responds to another veteran,” Judge Russell says.”).

61. See *id.* (“‘It’s really up to the person,’ Buffalo ADA Herman explains. ‘And if they want to do it, help’s available and the judge is willing to work with them it’s a choice they have to make.’”).

with the tools they need in order to lead a productive and law-abiding lifestyle.<sup>62</sup> Each of these components has been adopted and modified from the Department of Justice (“DOJ”) publication, *Defining Drug Courts: The Key Components*, so that Veterans Treatment Courts are “a hybrid of drug and mental health treatment courts” to specifically service *veterans* with “addiction, serious mental illness and co-occurring disorders.”<sup>63</sup>

Components One and Two of the DOJ’s model VTC system incorporate alcohol, drug treatment, and mental health services with justice system care processing through a “non-adversarial approach” by a prosecution and defense team that works to focus “on the veteran’s recovery and law-abiding behavior—not on the merits of the pending case.”<sup>64</sup> Component Three instructs the court to identify eligible participants early and promptly place them in the Veterans Treatment Court Program.<sup>65</sup> Component Four urges the court to consider and assist with “co-occurring problems” such as “basic educational deficits, unemployment and poor job preparation, spouse and family troubles . . . and the ongoing effects of war time trauma.”<sup>66</sup> Peer mentors are an especially important part of this component as they provide active support, which increases the “likelihood that a veteran will remain in treatment and improves the chances for sobriety and law-abiding behavior in the future.”<sup>67</sup> In Component Five, the court monitors abstinence through “frequent alcohol and other drug testing.”<sup>68</sup>

Components Six and Seven create a coordinated strategy of ongoing judicial interaction through regular court appointments, a coordinated strategy that “rewards cooperation but also responds to noncompliance.”<sup>69</sup> The judge serves as the leader of the VTC and “[o]ngoing judicial supervision also communicates to veterans that someone with authority

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62. See Russell, *supra* note 13, at 364 (describing also that the program provides “treatment, academic and vocational training, job skills and placement services” that “meet the distinctive needs of each individual participant, such as housing, transportation, medical, dental and other supportive services”).

63. *Id.* at 365.

64. *Id.*

65. See *id.* at 364–65 (discussing Component Three).

66. *Id.* at 366.

67. *Id.*

68. See Russell, *supra* note 13, at 366 (“An accurate testing program is the most objective and efficient way to establish a framework for accountability and to gauge each participants progress.”).

69. *Id.* (requiring that the strategy include a “continuum of graduated responses to continuing drug use and other noncompliant behavior”).

cares about them and is closely monitoring them.”<sup>70</sup> Component Eight provides for “[m]onitoring and evaluation [that] measures the achievement of program goals and gauges effectiveness” so that adjustments in treatment can be made when necessary.<sup>71</sup> Component Nine requires continuing interdisciplinary training between all members of the VTC team to “maintain a high level of professionalism, provid[e] a forum for solidifying relationships among criminal justice officials, the VA, veteran volunteer mentors and treatment personnel, while promoting a spirit of commitment and collaboration.”<sup>72</sup> The team based mentality and interdisciplinary training ultimately assists in Component Ten to forge partnerships among the VTC, the Veterans Administration, public agencies, and community based organizations that generates local support and enhances the VTCs effectiveness.<sup>73</sup>

#### *A. How VTCs Meet the Needs of PTSD Veterans*

Veterans courts across the country have been formed in a variety of fashions resulting in differing approaches to how veterans enter the program, and what result successful completion will achieve.<sup>74</sup> In the Buffalo treatment court, Judge Russell identifies eligible veterans through “evidence-based screening and assessments.”<sup>75</sup> Typically, the “offenders who are transferred to this docket have committed felony or misdemeanor

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70. *Id.* at 366–67 (noting that the “active, supervising relationship [of the judge], maintained throughout treatment, increases the likelihood that a veteran will remain in treatment and improves the chances for sobriety and law-abiding behavior”).

71. *Id.* at 367 (“[I]nformation and conclusions developed from periodic monitoring reports, process evaluation activities, and longitudinal evaluation studies may be used to modify the program.”).

72. *Id.* (“Interdisciplinary education exposes criminal justice officials to veteran treatment issues, the Department of Veterans Affairs (VA), veteran volunteer mentors, and exposes treatment staff to criminal justice issues while . . . develop[ing] a shared understanding of the values, goals, and procedures of the VA, treatment, and the justice system.”).

73. *See id.* (“Forming such coalitions expands the continuum of services available to Veterans Treatment Court participants and informs the community about the Veterans Treatment Court concepts.”).

74. *See* Cartwright, *supra* note 50, at 306–07 (pointing to the differences between courts: Anchorage (required to plead guilty and successful completion can result in a lower sentence), Buffalo (wider variety of crimes results in some charges being dismissed or agreements that avoid incarceration), and Allegheny County, PA (adjudication is postponed pending successful completion of the program)).

75. Russell, *supra* note 13, at 368.

non-violent crimes.”<sup>76</sup> The veterans court judge maintains a central role throughout the entire treatment process that provides consistency for the veterans involved and stability for the long term success of the court.<sup>77</sup> The central role of the judge who oversees the court and directs orders for the defendant veteran’s specific treatment plan provides veterans with a command structure that is familiar to them and directly aids their ability to respond to and receive the treatment they need.<sup>78</sup> VTCs only admit veterans that have received an other than dishonorable discharge, which reinforces the perception that only deserving veterans receive assistance and allows the court to direct these veterans to the services they need.<sup>79</sup> Because of the duration and demanding nature of the court’s treatment program, “participation is *voluntary*.”<sup>80</sup> The case by case admissions process recognizes the “individualized . . . unique and substantial needs of this nation’s service members.”<sup>81</sup> Service members with PTSD often suffer from “co-morbid” disorders that bring them afoul of the court system and influence the treatment that each needs.<sup>82</sup> The courts seek to address the “reciprocating impacts” of these needs, by adequately addressing those co-

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76. *Id.*

77. See Hon. Michael Daly Hawkins, *Coming Home: Accommodating the Special Needs of Military Veterans to the Criminal Justice System*, 7 OHIO ST. J. CRIM. L. 563, 565 (2010) (“An important if not essential part of the process is that the same judge who approves the treatment plan and any related plea agreement maintains supervision over the process from beginning (participation approval) to end (successful completion of the treatment program and compliance with all plea agreement conditions).”).

78. See Cavanaugh, *supra* note 58, at 481 (“The fact that veterans [have] had discipline and followed orders at previous times in their lives’ gives veterans treatment courts an in-road to helping offending veterans . . . [by] ‘tap[ping] into veterans’ [disciplinary abilities], which will help the court to help veterans get the treatment they need.”).

79. See Cartwright, *supra* note 50, at 306 (“The requirement that participants have discharges under honorable conditions . . . reflects the sense that participants deserve the help provided in the treatment court because of their honorable service . . . [and] ensures that most participants will be eligible for federally funded VA services.”).

80. Russell, *supra* note 13, at 368 (emphasis added).

81. *Id.*

82. See Nidiffer & Leach, *supra* note 20, at 14 (noting that “approximately 80% of service members with PTSD have a co-morbid diagnosis, most typically an affective disorder, substance abuse disorder, or other anxiety disorder” and that “[i]dentifying and distinguishing the impact of these disorders have important implications for targeted treatment”).



occurring problems that may lead into other issues which only tend to reinforce and increase the initial problems.<sup>83</sup>

The Buffalo VTC also relies heavily on the “Four S” principle—that veterans need “services, support, skills and spirit to be successful.”<sup>84</sup> The court has found that this principle provides a “link between the criminal justice system, treatment, veteran’s services, and the community” such that the absence or weakness of one link tends to exacerbate and break down the help provided to each participant.<sup>85</sup> To support this linkage, the courts provide structure for the veterans while encouraging responsibility for their actions and skill development that is reminiscent of their service.<sup>86</sup> As a result, VTCs thrive by allowing veterans to remain in their communities while providing a “therapeutic environment” that promotes accountability among veterans to overcome the issues they face in pursuit of a brighter and more productive future.<sup>87</sup>

Remaining in the community to which veterans have returned surrounds veterans with individuals who are concerned with their treatment, and creates an ever present reminder for veterans to be conscious of how their behavior affects the important people in their lives.<sup>88</sup> At the same time, the program works to identify the triggers that would bring back the negative behaviors of the participants, to promote a mentality of self-awareness.<sup>89</sup> Overall, these programs encourage veterans to be accountable, to make positive choices in how they conduct their lives, and emphasize the effects of their actions on themselves and other members of the community.

Established mentor programs provide an essential part of enacting the “Four S” principle and encouraging veteran participation in VTCs. These veteran mentors provide participants with an individual coach who can

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83. See Russell, *supra* note 13, at 368 n.64 (indicating that some veterans “experiencing mental illness may self-medicate through the use of alcohol or illicit drugs” which “may increase the impact of the persons mental illness or cause the person to be reliant on those substances”).

84. *Id.*

85. *Id.*

86. See *id.* at 369 (“The one element that resonates throughout . . . the VTC . . . is the emphasis on personal accountability and the utilization of learned tools.”).

87. *Id.*

88. See *id.* (“Particular emphasis is placed on behavior modification and the idea of being mindful of the people, places and things that participants associate with.”).

89. See *id.* at 369 (discussing how the program works).

otherwise relate to the participant as a result of their shared backgrounds.<sup>90</sup> These mentors provide “support for the veteran participant in a way that only other veterans can.”<sup>91</sup> Mentorship allows veterans to reconnect with the camaraderie and pride veterans felt while working together as a single unit toward a common goal.<sup>92</sup> The mentor relationship even strengthens the future of the program by inspiring current court participants to give back upon graduation.<sup>93</sup>

### *B. Concerns and Differences of Established Veterans Courts*

Cartwright identified three categories of concerns regarding VTCs. The first concern relates to the message conveyed by a court just for veterans.<sup>94</sup> One local chapter of the American Civil Liberties Union (ACLU) has argued against the creation of separate court systems for veterans and nonveterans, while disregarding other individual PTSD sufferers.<sup>95</sup> The ACLU National disagrees with that assessment and prefers to focus on ensuring that VTCs (and other specialty courts) provide participants their full constitutional rights without punishing them more strictly than the ordinary criminal justice system.<sup>96</sup> Specific tailoring for combat veterans is especially important for combat veterans with PTSD that

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90. See McMichael, *supra* note 18 (stating that mentors “give the veteran offenders someone to relate to but also can serve as adviser, facilitator and liaison with the court”).

91. Russell, *supra* note 13, at 370.

92. See McMichael, *supra* note 18 (noting that veteran mentors can be “blunt” in their interactions with court participants, while providing them with the structure they need to “tap into the sense of pride they had in the military”).

93. See *id.* (describing the interest of one veterans court participant who saved his marriage and turned his life around as a result of the program and now “hopes to give something back by joining [the] ranks [of mentors] after he graduates”).

94. See Cartwright, *supra* note 50, at 307–08 (stating that the ACLU has expressed concern that identifying veterans as a special class of defendants provides them with a “get out of jail free card” that is unavailable to many members of the public, especially other nonveteran individuals with their own form of PTSD).

95. See McMichael, *supra* note 18 (recognizing that “certain veterans have special needs” but then asking how far the creation of separate court systems could go, i.e. could “we then have courts where police are treated because of a certain status”) (quoting Allen Lichtenstein, General Counsel, Nevada Chapter, American Civil Liberties Union).

96. See *id.* (“We are always on the lookout for making sure that problem-solving courts comply with procedural fairness and actually don’t end up being more punitive than the normal criminal justice system.”) (quoting Vanita Gupta, Deputy Legal Director, American Civil Liberties Union).

has resulted from sustained long-term contact and combat with the enemy over the course of multiple long-term deployments.<sup>97</sup>

Second, there are concerns about the fairness to veterans who may forfeit some of their due process rights as a consequence of choosing to participate in the courts.<sup>98</sup> Veterans courts that are purely diversionary by admitting veterans without the condition of a guilty plea could potentially avoid this problem entirely and encourage more veterans to participate in the program.<sup>99</sup> On the contrary, most courts, and the prosecutors necessary for the existence of VTCs, disagree that easing the requirements for veteran participants better serves the interests of the community and administration of justice.<sup>100</sup> Results have also shown that guilty plea dependent treatment courts provide greater incentives to participants and are more successful than diversionary programs.<sup>101</sup> Participants know that failure to comply results in a return to court and imposition of the sentence that their guilty plea requires.<sup>102</sup>

This last concern raises the possibility that veterans will be barred from participation in veterans courts because of their geographic location or the nature of their crimes.<sup>103</sup> Many veterans courts have been created in

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97. See Walls, *supra* note 21, at 697 (“As opposed to civilians who suffer from PTSD after encountering a traumatic experience, PTSD is more severe for veterans because they are exposed to a greater number of traumatic experiences through continuous and unrelenting combat.”) (citing Constantina Aprilakis, *The Warrior Returns: Struggling to Address Criminal Behavior by Veterans with PTSD*, 3 GEO. J. L. & PUB. POL’Y 541, 545 (2005)).

98. See Cartwright, *supra* note 50, at 308 (comparing intervention at sentencing once a veteran has been able to exercise his constitutional rights to intervention before adjudication that requires a guilty plea which could have collateral consequences even with successful completion).

99. See McMichael, *supra* note 18 (stating the argument of some veterans’ advocates that “veterans with mental illness or substance abuse issues would be far better served, as would society, if more courts offered diversion programs—that is, allowed veterans charged with nonviolent crimes to be placed into treatment without having to enter a plea”).

100. See *id.* (finding that allowing certain defendants to walk would be seen as a “miscarriage of justice” by law enforcement and the DA’s Associations, and that courts see diversion programs as “taking too much off the veterans’ shoulders”).

101. See *id.* (“It’s been shown that, actually, individuals who have pled guilty or pled no-contest tend to do better in these courts and graduate more often than individuals who are put into diversionary status.”) (quoting Brian Chubb, Veterans Treatment Court Project Director, National Association of Drug Court Professionals).

102. See *id.* (“It’s kind of a stick. You know what’s going to happen if you don’t do well.”).

103. See Cartwright, *supra* note 50, at 308–09 (expressing concern that existing courts, in large metropolitan areas, do not provide access to more rural veterans who need them and

heavily populated areas where criminal courts have large enough dockets to support a separate court for military veterans.<sup>104</sup> The unpreparedness of the regular U.S. military to wage two world wars, however, has led to the deployment of large numbers of Reserve and National Guard troops “that are more likely to be from suburban or rural areas.”<sup>105</sup> These veterans, who often return not to their permanent home on a military base but are thrust more abruptly into civilian society, are even more susceptible to the adverse effects of PTSD and combat, but lack the support and camaraderie that can be found surrounding other combat veterans. Unfortunately, the total effect of PTSD on Reserve and National Guard troops remains difficult to determine because Reserve and Guard troops are considered “activated” and thus included as “active duty soldiers” when deployed.<sup>106</sup>

Another main concern is that veterans courts focus on low-level nonviolent crime, rather than the violent crimes which may be associated more directly to the veterans combat trauma.<sup>107</sup> Veterans courts should, however, strive to expand the class/group/etc. of veteran offenders who are admitted, in an attempt to address those charges which more closely relate to the training and experiences of combat veterans.<sup>108</sup> After all, this training is at the heart of a veteran’s profession and, after the intense combat experience that creates PTSD and other mental issues, this background is most likely to reflexively return and exhibit itself in a veteran’s illegal conduct.<sup>109</sup> Veterans courts address a veteran’s struggle to leave his combat

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that an “honorable discharge requirement” could proscribe participation for veterans whose symptoms manifested themselves during service and resulted in a less than honorable discharge).

104. *See id.* at 308 (acknowledging that “[v]eterans courts tend to be created in large metropolitan areas”).

105. *See id.* at 308–09.

106. *See* RAND Study, *supra* note 13, at 49–50 (noting that “because Reserve/National Guard personnel are considered ‘activated’ and therefore on ‘active duty’ when deployed, these terms are ambiguous” when attempting to distinguish them from regular active duty forces in studies).

107. *See* Cartwright, *supra* note 50, at 309 (noting that in combat “many soldiers learn to be hyper-vigilant and to respond to threats with violence,” resulting in a paranoia that lasts when they return and often results in returning veterans carrying firearms which can elevate a minor crime to a violent crime in some jurisdictions).

108. *See* Burns, *supra* note 17, at 82 (“The aim of veteran’s court is to *understand and respond to the specific problems of veterans which manifest themselves in various crimes*. It is therefore not surprising that, unlike most other problem-solving courts, . . . veterans court allows defendants with violent offenses to participate.”) (emphasis added).

109. *See id.* at 82 (“Permitting some violence is appropriate because, as soldiers,

training and experience behind by providing the veteran with the support and resources necessary to return to civilian life.<sup>110</sup> In some cases, defendant veterans charged with violent crimes may be more deserving of special treatment than nonviolent offenders as they learn to adjust to civilian life without resorting to the skills which played a life or death role during their military service.<sup>111</sup> Furthermore, it is conceivable that those violent offenders who are truly violent and have no desire or ability to recover and rehabilitate their lives will not be able to complete the entire veterans court program and would thus be returned to the criminal court docket for sentencing.<sup>112</sup>

At the same time, the longer probationary treatment period may also dissuade some veterans from entering a treatment court when faced with brief sentences for first offenses of certain crimes.<sup>113</sup> This underscores the important role VTCs play in preventing the escalation of crime, through early intervention and treatment, before veterans find themselves responsible for repeated minor or more serious, often violent crimes.<sup>114</sup> Veteran mentors use their shared experience to play a significant role in encouraging offender veterans to weigh the risks and join the program now. The

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veterans were trained in combat and to kill.”).

110. See Hawkins, *supra* note 77, at 569 (quoting a prosecutor with recent military experience: “You are unleashing certain things in a human being we don’t allow in civic society, and getting it all back in the box can be difficult for some people”) (quoting Deborah Sontag & Lizette Alvarez, *Across America, Deadly Echoes of Foreign Battles*, N.Y. TIMES, Jan.13, 2008 (quoting William C. Gentry, San Diego County Prosecutor and Iraq Veteran)).

111. See Cavanaugh, *supra* note 58, at 486 (“[T]he very skills these people are taught to follow in combat are the skills that are a risk at home. If you are going to create special judicial programs to help veterans, does it make sense to give special services only to those who need help the least?”) (citing Dahlia Lithwick, *A Separate Peace: Why Veterans Deserve Special Courts*, NEWSWEEK, Feb. 11, 2010, at 20, available at <http://www.newsweek.com/id/233415> (quoting Robert Alvarez, Psychotherapist, Wounded Warrior program)).

112. See *id.* (“Just as nonviolent veteran offenders remain accountable to the court for the entire eighteen-month long rehabilitation program, so too should veteran offenders charged with violent crimes.”).

113. See *id.* (pointing to a participant in the Anchorage court who would have had to undergo an eighteen month long treatment program as compared to a jail sentence of less than thirty days); Cartwright, *supra* note 50, at 310 (“[T]he focus on low-level offenses might also keep out soldiers whose crimes are too minor for punishment to provide an incentive to choose treatment.”).

114. See Cartwright, *supra* note 50, at 309 (pointing to the “crescendo” pattern of crimes found in some Fort Carson veterans whose later more serious crimes could have possibly been prevented if they had been diverted as a result of earlier petty crimes).

ability to trust veteran mentors helps offenders understand the worth behind the significant time it often takes for completion, rather than run the risk that a short sentence now could lead to more drastic criminal penalties at a later date.<sup>115</sup> Early intervention has proven to be a successful component of other specialty treatment courts that should continue to be an equally necessary component for the successful rehabilitation of returning combat veterans.<sup>116</sup>

Established veterans courts primarily disagree on whether veterans courts should include violent crimes as well as more minor nonviolent crimes. Many courts do restrict the charges they see to nonviolent crimes, but even some of those will still accept low-level domestic violence charges.<sup>117</sup> In those courts that do accept participants charged with violent crimes, the applicant faces heightened scrutiny for admission.<sup>118</sup> For example, Judge Russell of the Buffalo VTC considers whether the violent offender had any occurrence of violent crime prior to deployment, or if the sudden post-deployment change in disposition and action could be traced to combat service.<sup>119</sup> Ultimately, a failure to accept perpetrators of violent crimes would undermine both the purpose of the court system to protect communities, and also the priority of rehabilitating veterans who have been most affected by combat service.<sup>120</sup>

One final concern asks whether veterans treatment courts ultimately go too far in allowing veterans to escape culpability for the crimes they

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115. See Cavanaugh, *supra* note 58, at 481 (“Further, the comfort level that veterans feel relating to other veterans also encourages offending veterans to participate in veterans treatment court programs since many members of the courts are themselves veterans.”).

116. See Hawkins, *supra* note 77, at 571 (“Drug court professionals recognize that the earlier intervention occurs in the dependency cycle, the greater the chance of success. There is every reason to believe the same would be true of veterans courts.”).

117. See Cartwright, *supra* note 50, at 306 (citing Tracy Carbasho, *Veterans’ Court Provides Support and Services for Local Veterans*, J. ALLEGHENY COUNTY B.A., Jan. 29, 2010, at 4).

118. See McMichael, *supra* note 18 (noting that courts that accept violent crimes impose “significant caveats and checks” during admissions consideration, including “[t]he degree of violence, the offender’s prior record and the victim’s views”).

119. See *id.* (stating that “it’s a matter ‘of distinguishing between those with a predisposition for domestic violence, and those whose behavior has changed after their service and related to their service’”).

120. See *id.* (quoting Orange County California Combat Veterans Court judge Wendy Lindley, who does not understand why all the veterans courts do not accept violent offenders because the court’s goal “is to protect our communities and make them a safer place, [so] why wouldn’t we take cases of violence?”).

commit.<sup>121</sup> It is possible that the failure to apply punitive measures in response to crimes committed by veterans could potentially increase their susceptibility to criminal behavior and further distance them from acceptable behavior in civilian society.<sup>122</sup> But VTCs do not simply treat the substance abuse or mental health issues of veteran offenders; they provide the opportunity to receive specialized treatment in an environment that is understanding and oriented to the combat trauma that is the specific cause of their problems.<sup>123</sup> Veterans courts do not provide a “free pass” for military veterans, but recognize that veterans’ honorable and voluntary service to the country has resulted in emotional and mental health problems. Thus, VTCs seek to provide veterans with an environment and structured framework that supports a rehabilitative approach to redressing their criminal behavior.<sup>124</sup> For this reason, veterans treatment courts are the superior solution to combat-related PTSD and mental illness, and veterans welcome and accept the courts with greater ease than other opportunities presented by existing mental health and drug courts.<sup>125</sup>

### C. *The Future of Veterans Treatment Courts*

Veterans courts have found approval as a means of simultaneously treating the thousands of battle-scarred veterans who are returning from OIF and OEF, facilitating their transition back into civilian life and

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121. See Nidiffer & Leach, *supra* note 20, at 16 (“The dilemma remains, to what extent does PTSD as an origin of problem behaviors diminish the need to hold veterans responsible for their behavior?”).

122. See *id.* (“If allowed to escape the consequences of their misbehavior, veterans may then be less motivated to change their behavior to be more socially acceptable, thus decreasing social support and increasing the isolation frequently associated with PTSD.”).

123. See Cartwright, *supra* note 50, at 303 (“But for combat veterans, their underlying problem is not their substance abuse, or even their PTSD—it is their combat trauma, and that is something that cannot be addressed as effectively in a traditional drug or mental health court.”).

124. See Cavanaugh, *supra* note 58, at 479 (“[W]hen it comes to admitting veterans into a veterans treatment court . . . eligibility is based not upon their status as a military veteran, but rather upon the notion that their criminal conduct was caused by an underlying physical or psychological injury that was incurred during military service in a combat zone.”).

125. See *id.* (“[L]umping combat veterans in with civilian drug users and schizophrenics might only reinforce [the] perception held by many veterans that services provided by the civilian world do not understand their experiences or the trauma they have faced.”).

removing any threat their maladjustment may pose to the community.<sup>126</sup> As a result, veterans treatment courts have proven extremely successful to date. Nationally, seventy percent of VTC participants have successfully completed their program and seventy-five percent of graduates have not been rearrested within two years of graduation.<sup>127</sup> The original VTC in Buffalo serves as the symbol of the promise of veterans courts: none of the court's fifty-six graduates have been rearrested, and seventy percent of veterans admitted finish the program.<sup>128</sup>

#### *IV. Combat Related Post-Traumatic Stress Disorder as a Factor During Sentencing*

The VTCs success has inspired attorneys to begin incorporating their clients' combat trauma into arguments and appeals during criminal cases.<sup>129</sup> As the following case demonstrates, attorneys should continue to do so as evidence of combat experience and military service can play a significant role in the outcome for a veteran defendant.

In *Porter v. McCollum*,<sup>130</sup> the Supreme Court reviewed a habeas petition of the death sentence imposed on George Porter in light of his attorney's failure to present evidence of traumatic experiences stemming from his military service during the Korean War.<sup>131</sup> At trial, Porter presented testimony from his former commanding officer<sup>132</sup> and conclusions

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126. See Russell, *supra* note 13, at 372 (arguing that veterans treatment courts are "not only a means of meeting [a veteran's] needs, but as a way of preventing future crime").

127. See McMichael, *supra* note 18 (citing statistics provided by the National Association of Drug Court Professionals).

128. See *id.*

129. See Cartwright, *supra* note 50, at 314–15 (noting that "attorneys are raising combat trauma in plea negotiations, at sentencing, and as evidence for the defendant's state of mind" not through a "full-fledged insanity defense, but instead . . . [as] the source of the defendant's behavior in hopes of winning understanding and leniency").

130. *Porter v. McCollum*, 130 S. Ct. 447, 453 (2009) (per curiam) (holding that defense counsel's failure to fully investigate the defendant's background and present evidence of his military service and combat trauma was deficient).

131. See *id.* at 448 (finding that it was "objectively unreasonable to conclude that there was no reasonable probability the sentence would have been different if the sentencing judge and jury had heard the significant mitigation evidence that Porter's counsel neither uncovered nor presented").

132. See *id.* (recounting Porter's service during subsequent hand to hand combats with Chinese forces during which he was twice wounded).



from an expert in neuropsychology that Porter's service left him with "brain damage that could manifest in impulsive, violent behavior."<sup>133</sup> During Porter's post-conviction appeals, the Florida Supreme Court disregarded the significance of this testimony regarding the intensity of Porter's combat experience and his inability to transition back into civilian life.<sup>134</sup> In reaching its conclusion, the Court acknowledged the effect this testimony might have had on the jury and the effect it could have potentially brought to his sentencing.<sup>135</sup> Regarding Porter's military service the Court ruled that "[i]t is also unreasonable to conclude that Porter's military service would be reduced to 'inconsequential proportions' simply because the jury would also have learned that Porter went AWOL on more than one occasion."<sup>136</sup> The Court found that the particularly horrific nature of his service and honorable discharge would override any evidence showing that he occasionally went AWOL.<sup>137</sup> Ultimately, the Court recognized the long-standing tradition of acknowledging that the combat service of veterans all too often leads to criminal conduct, and that the courts have a duty to consider the effect of that service in sentencing proceedings.<sup>138</sup>

*A. An End to Mandatory Application of the Federal Sentencing Guidelines*

Judges historically were constrained from considering combat trauma of military veterans by the mandatory U.S. Sentencing Guidelines. In *United States v. Booker*,<sup>139</sup> however, the Supreme Court changed that by

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133. *See id.* (summarizing the expert testimony of neuropsychologist Dr. Dee).

134. *See id.* at 451 (describing the Florida Supreme Court's finding that "Porter had failed to establish any statutorily mitigating circumstance and that the nonstatutory mitigating evidence would not have made a difference in the outcome of the case") (citations omitted).

135. *See id.* at 454 ("Evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background . . . may be less culpable.") (quoting *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989)).

136. *Id.* at 455.

137. *See id.* ("The evidence that he was AWOL is consistent with this theory of mitigation and does not impeach or diminish the evidence of his service. To conclude otherwise reflects a failure to engage with what Porter actually went through in Korea.")

138. *See id.* ("Our Nation has a long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines as Porter did.") (citations omitted).

139. *United States v. Booker*, 543 U.S. 220, 226 (2005) (holding that the Sixth

addressing two questions concerning the Sixth Amendment implications of departures from the Sentencing Guidelines. First, the Court addressed “[w]hether the Sixth Amendment is violated by imposition of an enhanced sentence . . . based on the sentencing judge’s determination of a fact . . . not found by the jury.”<sup>140</sup> Once the Court ruled that the Sixth Amendment was indeed violated,<sup>141</sup> it turned toward the remedy warranted to address the violation.<sup>142</sup> The Court’s remedial opinion found “the provision of the federal sentencing statute that makes the Guidelines mandatory . . . incompatible” with their constitutional holding.<sup>143</sup> As a result, the Guidelines became “effectively advisory,” allowing courts to adjust a defendant’s sentence “in light of other statutory concerns.”<sup>144</sup>

*B. The Potential Effects of Booker on Sentencing Military Veterans under the Guidelines*

Since *Booker* courts have begun to address the effects of combat trauma and military service as justification for a downward departure from the Sentencing Guidelines. At the same time, the rehabilitative concepts of criminal justice have also emerged in courts that recognize a need to assist veterans in criminal courts.<sup>145</sup> Judges have found the freedom and flex-

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Amendment applies to the Federal Sentencing Guidelines such that all facts considered at sentencing must be admitted by the defendant or found by a jury at trial beyond a reasonable doubt).

140. *Id.* at 229 n.1.

141. *See id.* at 244 (holding that the Sixth Amendment right to have a jury determine all facts at trial beyond a reasonable doubt overrules any other interest in concluding a trial swiftly or a judge’s decision to sentence beyond the maximum allowed by the jury’s determination).

142. *See id.* at 245 (addressing the question of “to what extent, as a matter of severability analysis, the Guidelines as a whole are inapplicable”) (quotations and citations omitted).

143. *Id.* (citing 18 U.S.C. § 3553(b)(1)).

144. *See id.* (finding that the removal of 18 U.S.C. § 3553(b)(1) now makes the Guidelines advisory, but courts must first still consider the Guideline ranges established under 18 U.S.C.A. § 3553(a)(4) but then allows the court to “tailor the sentence in light of” factors listed under 18 U.S.C. § 3553(a)).

145. *See* Luna and Poulson, *supra* note 4, at 796 (“And [judges should] impose sentences that reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, protect the public, and effectively provide the defendant with needed educational or vocational training and medical care.”) (citations omitted).

ibility to construct personalized sentences for veterans that reflect their own rehabilitative needs.

On November 17, 2008, John Brownfield, Jr., a veteran of OEF and OIF, pled guilty to a single count of Bribery of a Public Official.<sup>146</sup> Brownfield and the government both utilized aspects of the Sentencing Guidelines in construction of his plea agreement, and the government acknowledged Brownfield's acceptance of responsibility by recommending a sentence at the bottom on the guideline range.<sup>147</sup> The sentencing judge accepted the plea, but advised Brownfield that in considering his sentence he was not bound by the government's sentence recommendation of twelve months and one day.<sup>148</sup> Ultimately, the judge, in recognition that the guidelines are "advisory only," chose "not to apply them in this case."<sup>149</sup> Instead, he sentenced Brownfield to five years of probation but substantiated his reduction by imposing more stringent probationary conditions on Brownfield.<sup>150</sup>

The sentencing judge began his sentencing analysis by determining the applicable Guideline range,<sup>151</sup> in accordance with the Supreme Court's decision in *Gall v. United States*.<sup>152</sup> But after this initial assessment based on the Pre-Sentence Report provided by the Probation Office, the sentencing judge can apply the facts presented to the factors listed in

146. See 18 U.S.C. §§ 201(b)(2)(A) & (C) (2010) (requiring fines or imprisonment for any public official who "corruptly . . . seeks, receives, accepts, or agrees to receive or accept anything of value . . . in return for being influenced in the performance of any act . . . or being induced to do or omit any act in violation of the official duty of such official").

147. See *United States v. Brownfield*, Criminal Case No.08-cr-00452-JLK at 2 (D. Colo. Dec. 18, 2009) available at [http://graphics8.nytimes.com/packages/pdf/us/20100303\\_brownfield-opinion-order.pdf](http://graphics8.nytimes.com/packages/pdf/us/20100303_brownfield-opinion-order.pdf) (noting a recommended "three-point reduction in offense level for acceptance of responsibility and timely notification of his intention to plead guilty").

148. See *id.* (stating the judge desired to not be bound by the agreed upon sentence until he had "received and studied the Presentence Investigation Report prepared by the court's Probation Department").

149. *Id.* at 8.

150. See *id.* at 28 (sentencing Brownfield to five years of probation "subject to special conditions *in addition to* those imposed on all probationers in this district") (emphasis added).

151. See *id.* at 8 (determining that the Guideline recommended sentencing range was between 12 and 18 months because Brownfield had no prior criminal record (Criminal History Category I) and his offense warranted an offense level of 13).

152. See *Gall v. United States*, 552 U.S. 38, 49 (2007) ("[A] district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range . . . [T]o secure nationwide consistency, the Guidelines should be the starting point and initial benchmark.") (citations omitted).

Section 3553(a) of the Guidelines to determine his own sentence.<sup>153</sup> The judge in *Brownfield*, however, acknowledged that empirical data concerning crimes committed by veterans from war zones was not considered in constructing the Guidelines, and was not even available for him to use as consideration during sentencing.<sup>154</sup> After finding that the Guidelines were advisory, that both parties had considered the facts presented, and that both parties had been afforded an opportunity to respond, the judge applied Brownfield's specific facts to the factors prescribed in the Guidelines.<sup>155</sup> After noting the peculiarities of Brownfield's particular crime<sup>156</sup> and his lifestyle and employment before and since his military deployments,<sup>157</sup> the judge reviewed the drastic changes in his life following his honorable discharge from the military.<sup>158</sup> In reaching his decision, the judge further recognized the need to sentence Brownfield in a manner that would deter future similar crimes by others, but simultaneously provide him with necessary medical care to reduce his potential for recidivism.<sup>159</sup>

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153. *See id.* at 49–50 (stating that the judge “should then consider all of the 3553(a) factors to determine whether they support the sentence requested” but if he orders a sentence outside the range “he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support” it).

154. *See United States v. Brownfield*, Criminal Case No.08-cr-00452-JLK at 9 (D. Colo. Dec.18, 2009) (“We are now, in a manner of speaking, charting unknown waters. While I have considered the advice of the Guidelines, I find they do not address the myriad factors that must be considered in the circumstances of this case.”).

155. *See id.* at 10–15 (considering first “the nature and circumstances of the offense” and then “the history and characteristics of the defendant” in accordance with 18 U.S.C. § 3553(a)(1)).

156. *See id.* at 10–12 (stating that Brownfield did not commit any violations until 5 months into his employment when his then girlfriend aborted their child and that the Special Agent in charge of his case testified that he had never seen a corrections officer begin this activity within his first year of employment).

157. *See id.* at 12–15 (finding that Brownfield was a patriotic, church-going, athlete who did not drink or use drugs, and that he married and found steady employment since his resignation at the Bureau of Corrections).

158. *See id.* at 15 (finding that following his deployments Brownfield “has abused alcohol on several occasions and [his behavior] presents serious problems overlaid with alcohol including personality changes, hypersexual activity, road rage, and heightened anger”).

159. *See id.* at 26 (“The driving force of general deterrence is certainty, not severity or length, of punishment. It follows that imposing an unnecessarily severe or inappropriate sentence upon Brownfield will achieve no appreciable benefit in general deterrence.”) (citations omitted).

In concluding his opinion, the judge imposed “special” conditions on Brownfield’s probationary period that were uniquely tailored to supporting and rehabilitating the factors that led to the reduction in his sentence.<sup>160</sup> Brownfield was required to participate in “any and all treatment programs as ordered by his Probation Officer”<sup>161</sup> and immediately pursue a mental health evaluation and treatment with the Veterans Administration.<sup>162</sup> The judge even placed restrictions on Brown’s financial freedom by limiting his ability to spend without the approval of his probation officer.<sup>163</sup> Furthermore, in an attempt to avoid temptation and aid Brownfield on his road to recovery, he was even prevented from buying alcohol or entering establishments that primarily serve alcoholic beverages.<sup>164</sup>

Ultimately, the judge in *Brownfield* employed creative sentencing requirements and probationary accounting processes to account for veterans’ combat illness related criminal conduct. In many ways, this approach to sentencing on the federal level mirrors the process and purpose of veterans treatment courts. Providing judges with more flexible sentencing options could serve a comparable rehabilitative role in the absence of a formalized veterans court. First, the judge could place the veteran defendant in a probationary period requiring his full participation and cooperation in the terms of his probation, while warning that violation of the probation terms could result in an even higher sentence.<sup>165</sup> Second,

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160. *See id.* at 28–30 (listing special conditions imposed on Brownfield that reflected the seriousness of the crime, afforded adequate deterrence, protected the public from further crimes by Brownfield, and provided Brownfield with the medical care he needs in the most effective manner possible).

161. *See id.* at 28 (listing, but not limiting, treatment programs to “alcohol and other substance abuse programs, mental health treatment and counseling, financial counseling, marriage and family counseling” and requiring Brownfield to pay the costs of any and all of these programs).

162. *See id.* at 29 (“Brownfield shall pursue *without delay or procrastination*, and give *highest priority* to, securing a Veterans Administration mental health evaluation and, if accepted for treatment, *shall participate* in whatever treatment is offered and recommended by the Veterans Administration staff.”) (emphasis added).

163. *See id.* at 28–29 (“Brownfield shall prepare a budget based on his income and expenses to be approved by the Probation Officer, and he shall live within the limits of that budget . . . and not incur any new . . . financial obligations . . . without first obtaining . . . authorization to do so.”).

164. *See id.* at 29 (“In other words, he may frequent restaurants but not bars, beer joints, or recreation parlors.”).

165. *See id.* at 30 (stating that Brownfield “should anticipate a sentence to prison substantially in excess of that recommended by the Presentence Report” if he violates the terms and conditions of his probation).

exceptional obedience to the conditions of probation, like the potential reduction in sentence found in veterans courts, could result in a reduction or modification of the “special conditions” of a veteran’s probation term.<sup>166</sup> Finally, and most importantly, a rehabilitative probationary sentence, as compared to a jail sentence, provides a combat veteran with a clear cut path to the treatment that will return them to a productive role in society.<sup>167</sup>

In the absence of formalized veterans treatment courts, the *Brownfield* approach highlights the considerations and factors that judges can use during sentencing to accommodate military veterans with psychological problems. Whether knowingly or not, the judge in *Brownfield* incorporated many of the key components found in Judge Russell’s veterans treatment court.<sup>168</sup> Rather than “going easy on” veterans as a result of their service, greater discretion at sentencing will in turn allow courts to enforce more stringent penalties with more a punitive impact on veterans while providing accountability and support under the watchful eye of the judicial system and directing them along a rehabilitative path to the help they need.<sup>169</sup>

### C. Amendments to the Sentencing Guidelines

*Porter* demonstrated that combat related PTSD had become an important consideration for courts during sentencing.<sup>170</sup> In the wake of this decision, the United States Sentencing Commission sent to Congress a series of amendments to the U.S. Sentencing Guidelines that provided more alternatives to incarceration and increased consideration of certain offender characteristics, including military service.<sup>171</sup> Prior to these amendments,

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166. *See id.* at 29 (stating that, if it is in “Brownfield’s best therapeutic interest,” his probation officer may recommend a modification or reduction in the terms and conditions of his probation after 3 years from the inception of his sentence).

167. *See id.* at 4 (listing Brownfield’s difficulties with “relationships, maintaining stable employment, managing his finances, insomnia, . . . indifference to others, and alcohol abuse” that emerged following his multiple deployments and exposure to traumatic experiences).

168. *See supra* notes 64–73 (identifying ten key components used by Judge Russell to rehabilitate veterans outside of the traditional criminal justice system).

169. *See Gall v. United States*, 552 U.S. 38, 44 (2007) (acknowledging that “probation, rather than an act of leniency, is a substantial restriction of freedom”).

170. *See Nidiffer & Leach, supra* note 20, at 16 (“Recent court decisions like *Porter* demonstrate that the legal system has begun to view combat-related PTSD as an important mitigating factor when assessing culpability, as well as the growing acceptance within the legal system and society of this diagnosis and its impact.”).

171. *See* Press Release, United States Sentencing Commission, U.S. Sentencing

military service was “not ordinarily relevant” in determining whether a sentence outside the guidelines was warranted.<sup>172</sup> But as a result, judges can now take a defendant’s military service into account if it is significantly relevant to warrant a departure from the recommended sentence.<sup>173</sup> The Commission’s decision specifically recognized the Court’s decision in *Porter* and expressed a desire “to draw a distinction between military service and the [civic, charitable and public service considerations] covered by that policy statement.”<sup>174</sup> At the same time, the amendments also provided for downward departures from the Guideline range, thus avoiding incarceration, and allowing treatment for the specific problems of the defendant.<sup>175</sup> These proposed amendments became effective on November 1, 2010 without opposition from Congress and are now available for sentencing judges to use.<sup>176</sup>

*V. How are the Interests of Justice, the Community, and Veterans Best Served?*

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Commission Votes to Send to Congress Guideline Amendments Providing More Alternatives to Incarceration, Increasing Consideration of Certain Specific Offender Characteristics During the Sentencing Process (Apr. 19, 2010), available at [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Newsroom/Press\\_Releases/20100419\\_Press\\_Release.htm](http://www.ussc.gov/Legislative_and_Public_Affairs/Newsroom/Press_Releases/20100419_Press_Release.htm) (“Expanding the availability of alternatives to . . . incarceration is a public safety issue. Providing flexibility in sentencing for certain low-level, non violent offenders helps lower recidivism, is cost effective, and protects the public.”).

172. *See id.* (“This amendment reflects the Commission’s extensive review of offender characteristics that included reviewing case law and relevant literature, receiving public comment and hearing testimony, and conducting extensive data analyses.”).

173. *See* Proposed Amendments to the Sentencing Guidelines, United States Sentencing Commission, at 8, available at [http://www.ussc.gov/Legal/Amendments/Official\\_Text/20100430\\_Amendments.pdf](http://www.ussc.gov/Legal/Amendments/Official_Text/20100430_Amendments.pdf) (“Military service may be relevant in determining whether a departure is warranted, if the military service, individually or in combination with other offender characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines.”).

174. *See id.* at 10 (“The Commission determined that applying this departure standard to consideration of military service is appropriate because such service has been recognized as a traditional mitigating factor at sentencing.”) (citing *Porter v. McCollum*, 130 S.Ct. 447, 455 (2009) (quotations omitted)).

175. *See id.* at 8, 10 (“In certain cases a downward departure may be appropriate to accomplish a specific purpose.”).

176. *See id.* at 1 (authorizing an effective date of November 1, 2010 for the sentencing guideline amendments).

*A. VTCs are Ultimately Best Suited for Addressing the Therapeutic and Rehabilitative Needs of Combat Veterans with PTSD in Criminal Courts*

Primarily, veterans courts instill in their participants a sense of pride in their service while avoiding any impression that they should feel ashamed or reluctant to seek treatment for the “invisible wounds” they received in combat.<sup>177</sup> Unlike exceptional variances or downward departures during sentencing, the teamwork based structure of VTCs, as well as the rigid system of rewards and punishment for non-compliance, avoids an impression that veterans are receiving unjustified leniency in the court system.<sup>178</sup> VTCs also provide a supportive environment in which all participants share a common and unifying bond of service that improves treatment through an increased willingness to be a part of the VTC team.<sup>179</sup> Veterans courts also provide a framework to continuously add to the experience of those involved while partnering with other community members and agencies to get veterans the help they need while improving the process for future court participants.<sup>180</sup>

Veterans courts further achieve therapeutic jurisprudence objectives through the voluntary nature of the program which requires defendants to willingly enter into the program, and agree to undertake it in a public setting.<sup>181</sup> The veteran’s voluntary admission flows from an agreement with the judge, essentially a “behavioral contract” that the veteran

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177. See Cartwright, *supra* note 50, at 303 (“First, veterans courts explicitly project the attitude that participants should be honored for their service, and that they are being diverted from traditional sentencing because the government is grateful for their sacrifice.”).

178. See *id.* (“Instead of unintentionally creating a perception that veterans are being pitied for being addicted to drugs or being mentally ill, this attitude creates a culture of respect and understanding for the veteran’s experience.”).

179. See *id.* at 303–04 (“[W]hen all of the eligible veterans are gathered on the same docket and in the same courtroom, they support each other. Seeing other defendants who have similar past experiences and problems helps to break down the stigma associated with treatment . . .”).

180. See *id.* at 303 (noting that interdisciplinary education opportunities allow VTC team members to “develop expertise on veterans issues and to connect participants with service providers that are also familiar with the military experience”) (citing Russell, *supra* note 13, at 363–64); see also, Burns, *supra* note 17, at 78–79 (“As the coordinator and ‘hub’ of the multi-disciplinary problem-solving court ‘team,’ some judges are acutely interested in what works and what does not and are flexible in making ongoing improvements to their programs and practices.”).

181. See Cartwright, *supra* note 50, at 306 (noting that in accordance with the Due Process Clause, veterans must voluntarily agree to participate in treatment programs).



defendant may be more willing to keep when goals, obligations, and punishments for noncompliance are stated.<sup>182</sup> The presence of family members and the support of the local veteran community also provide further encouragement and willingness among veteran offenders to comply.<sup>183</sup> As a first step, veterans treatment court judges should enter into an actual behavioral contract with the veteran participant.<sup>184</sup> This contract provides a framework for the veteran defendant's recovery plan and relationship with the judge, describing the steps and treatment necessary for successful completion and individualized guidance to help the veteran avoid the environment and habits that brought him into court.<sup>185</sup> Judges should encourage all parties involved to become signatories, including veteran mentors, psychiatric treatment professionals, family members, and friends. Increasing the number of parties involved serves as a multiplying factor and increases the number of people to whom the veteran is accountable.<sup>186</sup> Creation of this behavioral contract serves as a starting point and provides the judge a foundation for diverting the veteran defendant into the program while encouraging him or her to follow through with obligations under an understanding that successful completion could ultimately result in the charges being dismissed.<sup>187</sup>

Wexler suggests that this behavioral contract can also provide guidance for treatment of the cognitive disorders of offenders.<sup>188</sup> The

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182. See Wexler, *TJ Overview*, *supra* note 6, at 130–31 (stating that therapy patients were more likely to comply with medical advice after signing a behavioral contract or making a public commitment to comply, than if they had not).

183. See *id.* at 131 (noting that when the family members of therapy patients “were informed of what patients were to do, those patients were more likely to comply”).

184. See David B. Wexler, *Therapeutic Landscapes, and Form Reform: The Case for Diversion*, 10 FLA. COASTAL L. REV. 361, at 371–72 [hereinafter *The Case for Diversion*] (stating that memoranda of understandings should be sent to defendants deemed eligible and appropriate for participation in diversion programs).

185. See *id.* at 371 (stressing the importance of following a formal procedural framework throughout the course of the diversion program to aid in the implementation of “innovative” recovery plans) (citing United States Attorneys’ Manual § 9-22.200 (1997)).

186. See Russell, *supra* note 13, at 369 (recognizing that friendly and familial support provides veterans with support and motivation).

187. See Wexler, *The Case for Diversion*, *supra* note 184, at 363 (advocating that “[a]nother legally available option [for judges and offenders] . . . is the possibility of deferring imposition of sentence, [as] an attractive way of establishing a treatment plan and hoping the judge will in essence later ratify the arrangement”).

188. See Wexler, *TJ Overview*, *supra* note 6, at 131 (suggesting the advice of some therapists that “in order to take a first step in the treatment of offenders, one needs to tackle offender denial or minimization” while encouraging them “to take responsibility and to be

judge's discussion with the veteran about the root cause of his criminal activity and combat trauma parallels the idea of a broad and open guilty plea colloquy.<sup>189</sup> This type of cognitive behavioral treatment allows a judge to dig out and make aware to the veteran the chain of events that brought him to court, and encourages him to stop and think in advance "when similar situations arise."<sup>190</sup> Through this process, the veterans treatment court serves as a "reasoning and rehabilitation" program that in combination with mental health services can help veterans unearth the sources of their criminal activity and readjust their lifestyle to avoid potential recurrence of their criminal activity.<sup>191</sup>

From this behavioral contract, veterans court participants should be required to construct a preliminary plan describing their treatment, life and work goals.<sup>192</sup> This plan lays out how the veteran plans to achieve those goals and provides a basis for discussion with the judge and other veterans court team members.<sup>193</sup> This plan also provides a review framework for the regularly scheduled court meetings—a recommended component of therapeutic jurisprudence doctrine and almost universally required by veterans courts.<sup>194</sup>

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accountable").

189. *See id.* at 132 (discussing how some judges employ very broad defendant-driven open guilty plea colloquy's that "take[] the first step of confronting denial, minimization, and encouraging an offender to take responsibility").

190. *See id.* at 133 (stating that this process will enable an offender to figure out "what are the high risk situations, in my [particular] case, for criminality . . . and how [those] high risk situations [can] be avoided, or how . . . those situations [can] be coped with if they arise").

191. *See id.* (describing how "reasoning and rehabilitation type programs . . . teach offenders cognitive self-change, to stop and think and figure out the consequences, to anticipate high risk situations and to learn to avoid and cope with them").

192. *See id.* at 134 (recognizing that "cognitive self-change is an essential part of successful treatment") (citing Christine Knott, *The STOP Programme: Reasoning and Rehabilitation in a British Setting*, in *WHAT WORKS: REDUCING REOFFENDING GUIDELINES FROM RESEARCH AND PRACTICE* 115 (James McGuire ed., 1995)).

193. *See* Wexler, *TJ Overview*, *supra* note 6, at 134 (considering that judges might require a "preliminary plan" to be used as a "basis of discussion" [*sic*] that describes "why [the judge] should grant . . . probation and why [the judge] should be comfortable that you're going to succeed").

194. *See* David B. Wexler, *A Tripartite Framework for Incorporating Therapeutic Jurisprudence in Criminal Law Education, Research, and Practice*, 7 *FLA. COASTAL L. REV.* 95, 103–04 (2005) [hereinafter *Tripartite Framework*] ("[T]he therapeutic jurisprudence literature recommends . . . a process of ongoing judicial supervision by means of periodic review hearings. The review process is meant to monitor compliance . . . and, in cases of successful offender compliance, to provide an opportunity for the court to reinforce and

This framework allows veterans courts to supervise and rehabilitate veterans with greater ease and success than a probation officer could in the ordinary criminal justice system.<sup>195</sup> The mentorship component of a veterans court also provides participants with a court team member that shares a common veteran experience and is available both to assist with treatment and any problems a veteran participant may face.<sup>196</sup> In the context of therapeutic jurisprudence, this relationship provides veterans with a level of support that would not be found through a probation office. Mentors provide veteran participants with resources to clearly understand the steps they need to take to complete the program.<sup>197</sup> Likewise, the quasi-military structuring of veterans treatment courts and the phrasing of court orders in familiar terms ensures that participant veterans are able to comprehend exactly what they are required to do.<sup>198</sup>

Mandated court appearances are attended by the entire VTC team. This group structure models military “After Action Reviews” that are used to evaluate combat operations and have proven effective in helping veterans to address underlying adverse effects of their combat trauma and PTSD.<sup>199</sup> Veterans treatment courts can fulfill this role on their own or also remedy the shortcomings of poorly executed debriefings.<sup>200</sup> At the same time, the central role of the judge in a veterans treatment court could pose continuity

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praise the offender’s efforts.”).

195. See Hawkins, *supra* note 77, at 568 (noting that veterans court judges act “more like a probation officer[s] than jurist[s]” by establishing “a one-on-one relationship with the offender with the fear of reversion to traditional punishment as a motivator”).

196. See Cartwright, *supra* note 50, at 304 (“[T]he mentor can act as an advocate who really understands what the participant has been through, especially in areas where the court is not formally involved. Volunteer mentors . . . help participants with everything from getting to appointments, to finding an apartment, to retrieving their cars from impoundment.”).

197. See Wexler, *TJ Overview*, *supra* note 6, at 130 (noting that lessons learned from how doctors describe treatment programs to patients can instruct judges and mentors to deal “with some very common sense things, such as speaking in simple terms”).

198. See *id.* (finding that noncompliance among medical patients, like defendants, sometimes results from “insufficient clarity in giving instructions” or “because they just never really quite got the message”).

199. See Nidiffer & Leach, *supra* note 20, at 14 (noting the statement of one Marine who was able to overcome his symptoms of PTSD through use of “Small Group After Action Debriefings”).

200. See *id.* at 14–15 (noting that “[p]oorly executed debriefings leave important issues unexplored, and make feelings of guilt, anger, and alienation worse, while sometimes glamorizing and encouraging PTSD disability”).

problems or disrupt the treatment process of those veterans in the court when the presiding judges retire or transfer to other court dockets.<sup>201</sup> To solve this problem, veterans court professionals could form regional associations under the umbrella of Justice for Vets, the national clearinghouse for veterans treatment courts.<sup>202</sup> These associations could provide inter-regional mentoring services for new judges and collaborate on procedural and theoretical advances in the way veterans treatment courts operate, so that continuity can be improved during judicial transitions.

### *B. Helping Veterans in the Absence of Formal Veterans Courts*

Sentencing alternatives that take into account military service and combat trauma while providing treatment as an alternative to incarceration allow courts to rehabilitate veterans in the absence of formal veterans courts.<sup>203</sup> This is an especially critical consideration in communities where delays or inadequacies in VA health clinics do not allow for all the components of a veterans treatment court to be in place.<sup>204</sup>

PTSD based defense strategies and sentencing alternatives, however, often prove unsuccessful and fall short in addressing the needs of veterans who are affected by PTSD or other combat related trauma.<sup>205</sup> As seen in *Porter and Brownfield*, courts across the country have increased their willingness to consider PTSD during criminal trials as they face an ever

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201. See Burns, *supra* note 17, at 78 (noting that it is “often difficult to keep up momentum when a highly effective judge retires”).

202. Justice for Vets: *The National Clearinghouse for Veterans Treatment Courts*, NADCP, <http://www.nadcp.org/learn/veterans-treatment-court-clearinghouse> (last visited Sept. 18, 2012).

203. See Erspamer, *supra* note 2, at 1 (describing the rehabilitation needed for Afghanistan veterans suffering from trauma).

204. See *id.* at 18 (noting that “[d]elay times preceding care is a critical problem” as some “VA clinics do not provide mental health or substance abuse care or [have] waiting lists [that] render . . . care virtually inaccessible” and in April, 2008 more than “85,000 U.S. veterans are waiting over thirty days for an appointment”).

205. See Nidiffer & Leach, *supra* note 20, at 16 (stating that “under . . . most . . . insanity tests, most individuals with PTSD will not be excused from punishment because “only in rare instances . . . [will they] experience [the required] dissociative or psychotic states during which their connection to reality is severely impaired”) (quoting Thomas L. Hafemeister & Nicole A. Stockey, *Last Stand? The Criminal Responsibility of War Veterans Returning from Iraq and Afghanistan with Post-traumatic Stress Disorder*, 85 IND. L. J. 87, 118–19 (2010)).

increasing number of OIF and OEF veterans accused of crimes.<sup>206</sup> Courts in these situations have looked to how the veteran defendant's PTSD or mental illness caused them to commit the alleged crime, and defense attorneys have attempted to use their combat trauma to undercut the specific intent elements they are charged with.<sup>207</sup> A favorable outcome is even more likely when sentencing judges, like veterans treatment courts, consider the alleged conduct in its present context and in light of the veteran defendant's behavior and conduct before the deployment during which his combat trauma occurred.<sup>208</sup>

In the context of sentencing, it is crucial that the defendant's alleged criminal conduct occur directly as a result of the veteran's combat related PTSD. In *United States v. May*<sup>209</sup>, the Fourth Circuit considered whether the Sentencing Guidelines afforded a Vietnam veteran a downward departure for "aberrant behavior."<sup>210</sup> While the court found that May's "mental or emotional condition is impaired in that he suffers from PTSD as a result of his military service during the Vietnam War," it declined to grant him a downward departure because of it.<sup>211</sup> The court reached this conclusion by determining that a downward departure on account of PTSD cannot be warranted when the conduct in question is not a contributing factor to the alleged criminal activity.<sup>212</sup>

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206. *See id.* ("However, notwithstanding the relatively strict requirements of the insanity test, there is an increasing number of OIF/OEF veterans with PTSD who have either successfully employed the insanity defense to avoid criminal conviction or who have received reduced sentencing as a result.").

207. *See* Mary Tramontin, *Exit Wounds: Current Issues Pertaining to Combat-Related PTSD of Relevance to the Legal System*, 29 DEV. MENTAL HEALTH L. 23, 38 (2010) ("[When] PTSD . . . undercut[s] a criminal defendant's free will or result[s] in a failure to accurately appraise surrounding circumstances, the . . . diagnosis may provide grounds for a "mental status defense," such as insanity, a lack of mens rea, . . . or be viewed as a mitigating factor . . . at sentencing.").

208. *See id.* at 39 (discussing the finding "that a legal defense using PTSD tends to be more likely to be accepted if the offense is not premeditated or planned and is somehow reminiscent of the original traumatic stressor or its context").

209. *United States v. May*, 359 F.3d. 683, 685 (4th Cir. 2004) (holding that a downward departure for aberrant behavior was unwarranted when the defendant's PTSD was not a contributing factor for his engaging in the criminal conduct).

210. *Id.* at 691.

211. *See id.* at 692–93 ("Weighing these factors both individually and in the aggregate, May's case is not exceptional, and a downward departure based on aberrant behavior is not justified.").

212. *See id.* at 692. (finding that there is "no evidence of a nexus between post-traumatic stress disorder and the events in question").

The case of James Cope<sup>213</sup> provides further support for veterans treatment courts or, at the least, early imposition of sentencing alternatives that take into account the co-occurring conditions often present in combat veterans with PTSD. By the time Cope, a Vietnam veteran suffering from PTSD, reached court on this occasion, his “significant criminal history” included “two prior felony drug convictions” that indicated his involvement “in the illegal drug trade for a significant period of time.”<sup>214</sup> The District Court chose to sentence him to 188 months, at the upper end of the recommended sentencing range, for a variety of drug possession and attempted distribution charges.<sup>215</sup> Based on a presumption that the district court’s sentence was reasonable, the Sixth Circuit declined to grant Cope a downward departure on account of Cope’s PTSD and military service.<sup>216</sup>

By the time James Cope reached the Sixth Circuit, his combat trauma had set him on a self-destructive, drug-filled path that ultimately brought him to prison for over fifteen years. His extensive criminal history, rich with drug dependence, is emblematic of the readjustment issues of many Vietnam veterans who returned from their service to a country<sup>217</sup> and Veterans Administration system that was poorly prepared to address the extensive trauma experienced in the jungles of Vietnam.<sup>218</sup> The changing attitude toward the effects of PTSD on the actions of today’s returning combat veterans brings hope that the next generation of James Copes does not fall into the same irreversible habits. If today a young recently returned combat veteran were to enter court faced with his drug related offense, like

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213. See *United States v. Cope*, 282 F. App’x 369 (6th Cir. 2008) (per curiam) (deciding that due to the defendant’s lengthy “criminal record and the presumption of reasonableness for a within-guidelines sentence, the court did not abuse its discretion in imposing” a within -guideline sentence).

214. *Id.* at 370.

215. See *id.* (stating that although “the district court recognized the advisory nature of the guidelines [it] still rejected Cope’s request for a below-guidelines sentence”).

216. See *id.* (“To the extent Cope also means to argue that he was entitled to a *departure* from the guidelines based upon his post-traumatic stress disorder, we may not review a district court’s determination on this score when, as here, the district court appreciated its discretion to grant the departure.”) (citations omitted).

217. See Schein, *supra* note 23, at 43 (“The homecoming that Vietnam veterans experience also could have contributed to the rise in PTSD, because, as opposed to what had occurred earlier . . . they may not have had anyone with whom to share their experiences because of the attitude at home about the war.”).

218. See *id.* (“Treatment options for veterans of the Vietnam War were limited because of limited benefits, inadequate facilities, and professional understanding.”) (citations omitted).

James Cope years ago, it is comforting to think that he could likely receive the treatment he needs at one of the veterans courts across the country. At the least, he could likely find himself represented by an attorney who recognizes that his military service, in light of an unblemished criminal record, could provide him with a strong argument before the court that warranted consideration of treatment as opposed to incarceration.

On account of *Booker* and changes to the Sentencing Guidelines, the inherent vagaries of sentencing combat veterans with PTSD should give pause to prosecutors during trial preparations.<sup>219</sup> Yet, after honorably serving their country and putting their lives at risk, many veterans with no criminal history are threatened by incarceration resulting from crimes stemming from the trauma they brought home. The Federal court system, however, does provide one opportunity that can be utilized by prosecutors and defendants to provide veterans with the treatment resources they need while holding them accountable to their community through the restorative justice framework.

United States Attorneys have the ability to identify defendants for the possibility of pretrial diversion (PTD), at any point before they have been formally charged or post-charging before the trial has actually begun.<sup>220</sup> Pretrial diversion serves as “an alternative to prosecution” by diverting “certain offenders . . . into a program of supervision and services administered by the U.S. Probation Service.”<sup>221</sup> Eligible defendants cannot have a case that “should be diverted for State prosecution, two or more prior felony convictions, be a public official or former public official accused of an offense arising out of an alleged violation of public trust, or be accused of an offense related to national security or foreign affairs.”<sup>222</sup>

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219. See Luna and Poulson, *supra* note 4, at 796 (“As a result [of *Booker*], there are no guaranteed sentences, possibly creating a different incentive structure for federal prosecutors, one that encourages them to think about considerations other than sheer convictions rates and cumulative prison terms.”); OFFICE OF GENERAL COUNSEL, U.S. SENTENCING COMMISSION, CASE ANNOTATIONS AND RESOURCES MILITARY SERVICE USSG § 5H1.11 DEPARTURES AND *BOOKER* VARIANCES (Jan. 2012) (listing Federal court cases considering departures from the Sentencing Guidelines under USSG § 5H1.11 and 18 U.S.C. § 3553(a)).

220. See U.S. DEP’T OF JUSTICE, CRIMINAL RESOURCES MANUAL § 712(A) (2011) [hereinafter CRIMINAL RESOURCES MANUAL] (“Divertees are initially selected by the U.S. Attorney based on the eligibility criteria stated in the U.S. Attorneys’ Manual § 9-22.100 [a]t the pretrial stage or at any point (prior to trial) at which a PTD agreement is effected.”).

221. U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-22.000 (2011) [hereinafter U.S. ATTORNEY’S MANUAL].

222. *Id.* § 9-22.100.

Individuals who are considered eligible for PTD must voluntarily participate and are required to sign a contract with the U.S. Attorney's office acknowledging that they have waived certain rights through enrollment, and are agreeing to comply with all terms of the diversion program.<sup>223</sup> Final eligibility is then determined by the U.S. Attorney in conjunction with the Pretrial Services or Probation office following a background check and investigation into the criminal history of the individual.<sup>224</sup> Enrollment then begins upon acceptance of a "Pretrial Diversion Agreement" that states the period of supervision<sup>225</sup> and how it will be tailored in whatever way possible to the individual's specific needs.<sup>226</sup>

In practice, the PTD program has been utilized in the case of low level misdemeanors or nonviolent crimes. This practice could present problems for those veterans whose combat trauma has manifested itself in violent criminal activity.<sup>227</sup> Recent standards from the National Association of Pretrial Service Agencies have, however, advocated for much broader crime eligibility requirements.<sup>228</sup> This recommendation should encourage

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223. See CRIMINAL RESOURCES MANUAL, *supra* note 220, at § 712(B) ("Participation in the program by the offender is voluntary [and] [t]he divertee must sign a contract agreeing to waive his/her rights to a speedy trial and presentment of his/her case within the statute of limitations."); see also Thomas E. Ulrich, *Pretrial Diversion in the Federal Court System*, 66 FED. PROBATION 30, 30 (2002) ("The offender who is selected for pretrial diversion enters into a contract with the U.S. Attorney's office, pledging to meet certain conditions and to refrain from criminal activity for a specified period of time.")

224. See CRIMINAL RESOURCES MANUAL, *supra* note 220, at § 712(D) (describing coordination with the U.S. Marshall's Office and FBI to confirm that the individual is eligible for enrollment in PTD).

225. See *id.* § 712(F) ("The offender must accept responsibility for his or her behavior, but is not asked to admit guilt. The period of supervision is not to exceed 18 months, but may be reduced.")

226. See *id.* § 712(E) (stating that the "supervision should be tailored to the offender's needs and may include employment, counseling, education, job training, psychiatric care, etc. Many districts have successfully required restitution or forms of community service as a part of the pretrial program. *Innovative approaches are strongly encouraged*") (emphasis added).

227. See Ulrich, *supra* note 223, at 31 (finding that "between 1995 and 1999, the most common major offense[s] charged in cases in which the defendants were enrolled in pretrial diversion were fraud and larceny/theft").

228. See NAT'L ASSOC. OF PRETRIAL SERV. AGENCIES, PERFORMANCE STANDARDS AND GOALS FOR PRETRIAL DIVERSION/INTERVENTION 8 (2008) [hereinafter PRETRIAL DIVERSION STANDARDS] ("Eligibility for diversion/intervention, however, should be established to include as many appropriate defendants as can benefit from the intervention without sacrificing public safety."), available at [http://www.napsa.org/publications/diversion\\_intervention\\_standards\\_2008.pdf](http://www.napsa.org/publications/diversion_intervention_standards_2008.pdf).



U.S. Attorneys and probation officials to recognize the service of these veterans, the negative consequences of a criminal conviction on their lives and livelihoods, and the promise that treatment, educational services, and community readjustment could provide them regardless of the nature of their crime.<sup>229</sup> Ultimately though, it is necessary to recognize that some veterans have committed crimes too egregious for PTD consideration and are more suitable for the traditional criminal justice system.<sup>230</sup>

Restorative justice practices can be incorporated at this pretrial stage to facilitate rehabilitation and provide community involvement to successfully achieve the goals of combat veteran PTD programs. Restorativeness, in the context of veteran PTD programs, should open up a dialogue between all parties involved—the offender, law enforcement, family, victims, and the community—to focus on the crime committed, its root causes, and the solutions that can be developed for future deterrence and avoidance.<sup>231</sup> Restorative justice practices parallel veterans treatment courts in their ability to address the underlying psychological problems of veterans through “perceived control” in the process, the development of “problem solving skills,” and encouraging greater “social integration.”<sup>232</sup>

By providing veterans a voice in constructing the form of their PTD program, restorativeness helps to alleviate the symptoms of mental health and feelings of helplessness that often come with criminal adjudication.<sup>233</sup> Through reporting requirements to the court, family, and the community, veterans are held accountable for their successes in their plan and can be

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229. *See id.* (“While a case may be made for excluding defendants with certain prior convictions, especially serious felonies, the Standards argue that little benefit is derived from uniform exclusions from diversion/intervention based on charge alone or some other factor.”).

230. *See id.* (“These Standards acknowledge that in the interest of justice and public safety, there are certain defendants whose criminal cases should be dealt with through traditional case processing.”).

231. *See* Luna & Poulson, *supra* note 4, at 791 (“Through discussion and deliberations, restorative justice contemplates mutual agreement on the steps that must be taken to heal the victim and the community, resulting in the formation of a plan to confront the factors contributing to the offender’s conduct and to facilitate his development as a law-abiding citizen.”).

232. *See id.* at 802 (stating that restorative practices may influence perceived control, problem-solving skills, social integration, and procedural justice).

233. *See id.* (“The fact that appearing in court is a significant predictor for suicide makes restorative justice relevant, given its reduced emphasis on formal, in-court processes.”).

driven by the role they play in the outcome.<sup>234</sup> Participants can further develop the problem solving skills to overcome the “many dilemmas of life” over the course of supervision, through encouragement to fulfill designated tasks, and creating alternative plans to overcome any obstacles that arise.<sup>235</sup> One goal of the community and family centric nature of restorative justice is to bring isolated individuals back into the community fold.<sup>236</sup> Restorativeness can also employ a method of group “shaming” that provides “self-consciously reintegrative (rather than stigmatizing)” commentary that “express[es] disapproval of the individual’s behavior” in a non-condescending fashion.<sup>237</sup> This method applies constructive criticism that brings the individual’s wrongdoing to his mind, while also informing him that members of the community are there to support him. Finally, community involvement in the discussion regarding treatment options and programs is essential when considering the eligibility criteria for veterans.<sup>238</sup> Regardless of the success or failure of the PTD participant, members of the community will still be confronted by the potential root causes of this criminal conduct. Furthermore, this interest is embodied in the two fold aspects of restorative justice: protecting the rights of victims and concern and care for the well-being and future of family members and friends who participate in PTD programs.

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234. *See id.* at 804 (pointing to an Australian study that showed participants “were more likely to feel that they had some control over the outcome of the proceedings . . . that they had some control over the way things were run, and that they were less likely to feel pushed around by others in power”).

235. *See id.* at 805 (suggesting the use of “collaborative problem-solving exercise[s] in which participants are assisted by a competent facilitator in: (1) defining the problem (e.g., separating positions and interests); (2) coming up with creative alternatives; and (3) evaluating those alternatives”).

236. *See id.* at 806 (“Restorative justice may be particularly well suited to create the positive social support that these individuals frequently lack. Restorative practices are inherently social in nature and require the active, supportive involvement of at least three people . . . and possibly dozens more.”).

237. *See id.* (“In other words, [the shaming] censures the crime within a framework of respect and a circle of care, inviting the offender to join the law-abiding community.”).

238. *See* PRETRIAL DIVERSION STANDARDS, *supra* note 228, at 9 (recommending that “[l]ocal citizen groups and elected public officials may be consulted in the development of eligibility criteria in order to promote broad-based local support for a diversion/intervention program”).

*C. Strengthening the Role of Attorneys and Judges in Early Detection  
among Veterans with PTSD*

The therapeutic jurisprudence doctrine encourages attorneys to strive toward “practicing in a more holistic way” and “lawyering with an ethic of care.”<sup>239</sup> For an attorney representing a service member or combat veteran there are many challenges and obstacles to providing the best possible and holistic representation that may not be present while counseling civilians.<sup>240</sup> In many cases, a combat veteran may not have received treatment or a psychological evaluation following his deployment and the attorney may be the first person to recognize the veteran client’s mental health issues.<sup>241</sup> For many reasons, attorneys with veteran clients have become “first responders” who must detect and address the mental health issues of their clients.<sup>242</sup> While many veterans acknowledge that they have symptoms of PTSD, first responder status is warranted because as few as forty percent are willing to receive treatment.<sup>243</sup> As a result, attorneys with veteran clients must be prepared to identify the signs of PTSD and structure their representation to account for their client’s behavior.<sup>244</sup>

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239. See Wexler, *supra* note 194, at 95 (pointing to a recent comment that this movement could also be termed “law reform as if people mattered”) (quoting Mark Satin, *RADICAL MIDDLE: THE POLITICS WE NEED NOW*, 54–55 (2004)).

240. See Bob Brown & Joe Lovelace, *Veterans and PTSD: What Attorneys Need to Know*, 73 TEX. B. J. 836, 836 (2010) (stating that PTSD, traumatic brain injury, and depression “may influence the veteran client’s evaluation of an attorney’s advice, his or her priorities in resolving a legal issue or dispute and even the ability to cope with the stress of the legal process”).

241. See *id.* at 837 (stating that a “lawyer needs to be able to recognize the symptoms that may indicate a mental health issue and understand how to deal with that issue in the course of representation and to get the veteran the help he or she needs”).

242. See Captain Evan Seamone, *Attorneys as First Responders: Recognizing the Destructive Nature of Posttraumatic Stress Disorder on the Combat Veterans Legal Decisionmaking Process*, 202 MIL. L. REV. 144, 145 (2009) (“As a ‘signature’ disability evaluation characterizing the Iraq and Afghanistan campaigns, PTSD has transformed many legal assistance and trial defense attorneys into first responders in the quest to ensure the well-being of these combat veterans.”).

243. See *id.* 147 n.13 (“[A]lthough approximately 80% of Iraq and Afghanistan service members with a serious mental health disorder such as PTSD acknowledged that they had a problem, only approximately 40% stated that they were interested in receiving help.”).

244. See Brown & Lovelace, *supra* note 240, at 837 (noting that clients “not only can . . . have trouble focusing and keeping appointments, they can experience distorted thinking, they might be willing to give up legal rights due to feelings of guilt or a (sometimes unconscious) desire to punish themselves, and they may lack the capacity to trust others”).

While many attorneys may not desire their new role as client psychologists, as counsel they are provided with access to personal aspects of their client's lives, which could reveal his or her symptoms.<sup>245</sup> The attorney's representation of his veteran client then proceeds beyond in court substantive matters to recognition and action upon other aspects of the veteran client's mental and emotional well-being that may jeopardize the attorney client relationship itself.<sup>246</sup> Unfortunately, attorneys who are unaware of their veteran client's condition may overlook it while developing a trial strategy<sup>247</sup> and inadvertently exacerbate the client's personal problems.<sup>248</sup> The problems associated with an attorney's ignorance of a veteran client's PTSD are even more alarming when compared with statistics that show legal problems as a top risk factor for suicide among combat veterans.<sup>249</sup> Attorneys can seek to avoid the dangers that veteran clients might pose to themselves through a client-family centered treatment approach that allows concerned and interested family members to monitor the client for any further self-destructive behavior that reemerges during the course of litigation or trial preparation.<sup>250</sup> At the same time, judges can provide strict but gentle praise for veteran participant progress, through treatment, employment, or occupational endeavors and overall success in fulfillment of the "rehabilitation plan" they have been continually discussing with the court.<sup>251</sup>

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245. See Seamone, *supra* note 242, at 147 ("In these instances, first responder status arises from the legal counselor's uncommon access to the client's decision processes, personal history, and behavior, a combination of which can easily reveal PTSD symptoms or influence the client's evaluation of the attorney's advice.").

246. See *id.* at 148 ("While PTSD sometimes falls squarely within the substantive legal matters in a case, it is more likely to arise beneath the surface, influencing the client's evaluation of the attorney's advice and the client's priorities in resolving the legal dispute.").

247. See *id.* at 149 ("The resulting lack of concern for or knowledge of the effects of this disorder create a substantial risk that the attorney will be misled into believing that a client with PTSD either does not have the disorder or is not impaired by it.").

248. See *id.* at 149–50 ("[E]ven a well-meaning attorney can unknowingly contribute to the aggravation of a client's condition while believing she has fully satisfied her professional responsibilities . . . yet still cause harm beyond their client's legal cause.").

249. See *id.* at 151 ("Considering that legal problems have been ranked as the second risk factor for suicide, next to relationship problems at home and during military operations, the attorney's office or courtroom may be no different from the front line of a major disaster for a traditional first responder.").

250. See Wexler, *supra* note 194, at 108 (pointing to one studied case in which the defendant's mother was enlisted to provide reminders for taking medication to demonstrate that such practices are "noted as a worthwhile ingredient of facilitating treatment").

251. See *id.* (pointing to the judge's statement that the defendant "seemed to have

To develop the essential interdisciplinary skills that are often required by attorneys who may serve PTSD afflicted veteran clients, these attorneys must have access to CLE and clinical practice-driven classes and symposia that provide them with the background necessary to evaluate potential risk factors in their clients and locate treatment resources that can be utilized in conjunction with legal representation.<sup>252</sup> These programs can best assist attorneys if partnered with local mental health agencies or Veterans Administration officials that provide, at a minimum, a basic understanding of warning signs for at-risk veterans and the resources available for attorneys to help them.<sup>253</sup> Most veterans court teams include attorneys from the public defender's office who can further serve as a resource for other attorneys in the office or provide information to the criminal defense Bar as a whole.<sup>254</sup> For defense lawyers who do or may represent combat veterans, the need to gain an interdisciplinary understanding of mental health law should be considered as an affirmative obligation of the attorney to provide the most zealous and conscientious representation possible and be mindful that the stresses of litigation, if unheeded, may produce disastrous consequences for his client.

Due to the high numbers of returning veterans who experience symptoms of PTSD,<sup>255</sup> attorneys must also understand the effect it can have on the veteran client's decision-making process.<sup>256</sup> Attorneys who practice in the areas of criminal and family law must be especially willing to recognize the symptoms of PTSD that may be aggravated by the personal or perhaps punitive nature of the representation.<sup>257</sup> In a criminal trial for

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matters 'under control'" as a "statement . . . [that] likely serves as well to reinforce and maintain the offender's successful reform efforts").

252. *See id.* at 101 (stating that "[l]awyers need to have a basic understanding of these problem areas and of the programs designed to deal with them").

253. *See id.* ("[Although] this overall category is the proper province of the mental health, social work, and criminal justice fields . . . lawyers need to grasp the essentials and need to know how to relate to, ask questions of, and coordinate with those allied professions.").

254. *See id.* at 102 ("Working in partnership with social workers, the legal profession—especially . . . public defender officers—can embody this material in useful up-to-date manuals of services and resources.").

255. *See Seamone, supra* note 242, at 154 ("In general, between 15% and 40% of combat veterans develop PTSD.").

256. *See id.* at 155 ("Attorneys working in the fields of legal assistance and criminal justice will inevitably see clients who have PTSD because the condition often leads to marital discord and criminal behavior.").

257. *See id.* at 162 ("Common issues within these two practice areas can aggravate the

homicide or assault, awareness of the veteran client's PTSD can also assist an attorney who must repeatedly question his client over the specific events and actions that have resulted in criminal charges.<sup>258</sup> This awareness can ensure that the legal representation itself does not unintentionally increase the effect of the client's condition.<sup>259</sup> Attorneys must also be able to recognize the possibility that PTSD has damaged their client's ability to act in their own self-interest, and gently direct the representation to the best possible result.<sup>260</sup>

Attorneys who represent military service members should not automatically presume that their client is suffering from PTSD or another service related mental health condition. Captain Seamone, however, points to several indicators that could assist attorneys to recognize when caution or further questioning would be warranted. During an initial client meeting, attorneys should watch for military insignia, or awards that indicate the client saw combat.<sup>261</sup> Attorneys can also offer "casual questions probing prior or multiple deployments" to discover the extent and nature of a veteran client's military service.<sup>262</sup> Finally, Seamone suggests that an attorney should start with the fundamental question of "whether the client is capable of understanding their advice."<sup>263</sup> While psychological issues may be unfamiliar territory for many attorneys, they are nonetheless under an

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client's symptoms, trigger anxious responses, or produce other obstacles in client representation.").

258. *See id.* at 163 ("The avoidance of the triggers by the defendant who has self-inflicted PTSD will be severely tested by defense counsel who must actively implore the defendant to revisit the circumstances of the charged crime and discuss in detail with counsel the defendant's thoughts, feelings, and recollections of the [crime].").

259. *See id.* at 164 ("The common danger posed to the attorney-client relationship in each of these situations is the effect of compounded trauma.").

260. *See id.* at 167-68 ("The traumatizing event has the effect of challenging one or more of these assumptions, often resulting in destruction of the capacity for trust. Depending on the extent of the trauma suffered and the intensity of the disorder, the client's new assumptions could unknowingly or intentionally sabotage his well-being.").

261. *See Seamone, supra* note 242, at 182 (stating that a "Combat Infantryman Badge, a Marine Combat Aircrew Badge, a Combat Action Badge, a Combat Medical Badge, a ribbon or medal with a 'V' device, or other signs of engagements with an enemy . . . provide conversational starting points for the attorney").

262. *Id.* at 182.

263. *See id.* (believing that a client who is currently under treatment for PTSD or other combat related mental health illness would reveal his condition, or potential inability to fully understand the representation or litigation that may ensue).

obligation to pursue training that provides them with the resources and ability to effectively represent their clients.<sup>264</sup>

### *VI. Conclusion*

Although combat operations in Iraq have ended, and troop force scale-downs have begun in Afghanistan, the repercussions of PTSD and mental illness in the lives of our nation's combat veterans will not disappear quickly. Many of these veterans are returning to civilian worlds that will seem foreign compared to the regimented and ultra-vigilant lifestyle found in a combat theater. Furthermore, announced reductions in the current size of the military will result in more veterans being forced from their service and possibly thrust from the only line of work and way of life that they knew. Hopefully some of these veterans with PTSD will have their symptoms diagnosed upon their disassociation with the military. Unfortunately for some, the delayed onset PTSD might bury the indications of their conditions until they are manifested suddenly and in catastrophic fashion.

For those combat veterans who are unable to receive the help they need at first, and regrettably run afoul of the criminal justice system, they now may be fortunate enough to find a court system that is far more receptive and understanding of them. The establishment of over 80 veterans treatment courts, the evolution of therapeutic and rehabilitative legal doctrines, amendments to the sentencing guidelines and increased consideration of military service as a factor at trial all demonstrate the increased willingness of the courts to recognize the service and sacrifice of U.S. Servicemembers. For these men and women who volunteered to serve the United States, many of whom having done so while the country was engaged in two wars, there are now opportunities to receive treatment, rather than prison, and a chance to return to lives that enable them to contribute to their communities, and ultimately to the very veterans with which they served.

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264. *See id.* (“While this first responder frame surely requires education in areas that are unfamiliar to many attorneys, the legal profession imposes an ethical obligation to gain knowledge necessary to the effective representation of a client.”).