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# The Practitioner's Guide to Due Process Issues in Veterans Treatment Courts

Evan C. Tsai

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**THE PRACTITIONER’S GUIDE TO DUE PROCESS  
ISSUES IN VETERANS TREATMENT COURTS**

Evan C. Tsai<sup>†</sup>

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## I. INTRODUCTION

Plenty of written materials exist on the benefits of problem-solving courts and, particularly, veterans treatment courts. The existence of those courts has, at the very least, demonstrated that legal professionals are attuned to the needs of veterans involved in the criminal justice system. And certainly, research conducted by several organizations suggests that specialty courts, when established and structured to follow evidence-based best practices, will reduce recidivism in their participants, save taxpayer dollars, and protect public safety. But even as the greater good is ostensibly being served, the ends cannot justify the means. The safeguards established by both state and federal constitutions require that, even in something as wholesome and valuable as a veterans treatment court, concerns of due process be effectively addressed.

This article begins with a brief synopsis of veterans treatment courts.<sup>1</sup> Then, Part III discusses the history, components, and practice standards of veterans treatment courts.<sup>2</sup> Part IV outlines the construct of the veterans treatment courts in the Second and Fourth

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1. See *infra* Part II.  
 2. See *infra* Part III.

Districts of Minnesota.<sup>3</sup> Turning to the central issue, Part V discusses the due process concerns that exist in veterans treatment courts in Minnesota;<sup>4</sup> specifically, this article will identify and discuss how veterans treatment courts in the Second and Fourth Districts of Minnesota are addressing the requirements of due process.<sup>5</sup> With an understanding of the issue, this article then turns to recommendation; Part VI will make recommendations that, while unsavory for certain courtroom practitioners, will nevertheless address the concerns specifically enumerated under the Fifth and Fourteenth Amendments of the U.S. Constitution.<sup>6</sup> While this article focuses on the issues identified in Minnesota's veterans treatment courts, it certainly has implications beyond Minnesota. Even as each treatment court is somewhat different in organization and procedure, each treatment court has similar due process challenges. Accordingly, this article implicates all veterans treatment courts and problem-solving courts generally.

## II. WHAT ARE VETERANS TREATMENT COURTS?

To the uninitiated or uninformed, a veterans treatment court is a problem-solving court that involves heavy collaboration between judges, defense attorneys and public defenders, prosecutors, supervisors or probation officers, and treatment providers. These criminal justice partners form a team that addresses the criminogenic needs<sup>7</sup> of the veteran through treatment planning and provides intense supervision in a courtroom setting.<sup>8</sup> Veterans treatment courts, like other problem-solving courts, are a viable alternative to standard criminal courts where a defendant is subjected to the standard adversarial series of court hearings:

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3. See *infra* Part IV.

4. See *infra* Part V.

5. See *infra* Sections V.A–B.

6. See *infra* Part VI.

7. "Criminogenic needs" are understood as dynamic factors that correlate with a veteran's potential for criminal recidivism. See Edward J. Latessa & Christopher Lowenkamp, *What Are Criminogenic Needs and Why Are They Important?*, FOR THE REC. 15, 15 (2005). Those factors can include substance use, lack of problem-solving skills, attitudes and values, and employment and educational status. *Id.*

8. For a more in-depth discussion of the rise of problem-solving courts, see generally GREG BERMAN & JOHN FEINBLATT, CTR. FOR COURT INNOVATION, PROBLEM-SOLVING COURTS: A BRIEF PRIMER (2001).

arraignments, pre-trial conferences, trial, and, assuming the defendant is convicted or admits guilt, sentencing and probation violation hearings. Instead of the standard series of criminal court proceedings, participants in a veterans treatment court are given an intensely supervised court setting that immediately addresses the needs of individuals charged with crimes. Unlike a traditional adversarial setting in a courtroom where a defense attorney and prosecutor argue before a neutral and unbiased magistrate, the traditional adversaries partner with other chemical and mental health treatment providers to establish a plan of rehabilitation, supervision, and monitoring.<sup>9</sup>

Participants who are considered for veterans treatment court must have a history of serving with the armed forces.<sup>10</sup> Some courts require that participants be eligible for services through the Department of Veterans Affairs (VA).<sup>11</sup> Others, including the courts in Ramsey and Hennepin counties in Minnesota, require only that the participant have a history of serving in the armed forces of the United States without regard to discharge status or eligibility to receive services through the VA.

Participants are required to attend regular court appearances, at least bi-weekly.<sup>12</sup> Participants are also required to attend treatment sessions as recommended by treatment providers and subject themselves to random substance use testing at least twice a week.<sup>13</sup> While some veterans will have difficulty complying with the requirements of veterans treatment court, many will find the increased rigor and structure a welcome change, as it replicates the

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9. See Douglas Longshore et al., *Drug Courts: A Conceptual Framework*, 31 J. DRUG ISSUES 7, 8 (2001).

10. Each veterans treatment court considers service differently. For example, Hennepin County Veterans Court evaluates eligibility on a case-by-case basis. See *Hennepin County Veterans Court*, MINN. JUD. BRANCH, [http://www.mncourts.gov/mncourtsgov/media/scao\\_library/Drug%20Courts/4th%20District/Veterans%20Court/Veterans-Court-Brochure.pdf](http://www.mncourts.gov/mncourtsgov/media/scao_library/Drug%20Courts/4th%20District/Veterans%20Court/Veterans-Court-Brochure.pdf) (last visited Apr. 27, 2017).

11. See, e.g., *Veterans Treatment Court*, DANE COUNTY CLERK CTS., <https://courts.countyofdane.com/alternative/veterans> (last visited Apr. 27, 2017).

12. See *What Is a Veterans Treatment Court?*, JUST. FOR VETS, <http://www.justiceforvets.org/what-is-a-veterans-treatment-court> (last visited Apr. 27, 2017).

13. See *id.*; see also 2 NAT'L ASS'N OF DRUG COURT PROF'LS, ADULT DRUG COURT BEST PRACTICE STANDARDS 28 (2015), [http://www.ndcrc.org/sites/default/files/adult\\_drug\\_court\\_best\\_practice\\_standards\\_volume\\_ii.pdf](http://www.ndcrc.org/sites/default/files/adult_drug_court_best_practice_standards_volume_ii.pdf).

demands of a military schedule.<sup>14</sup> Those who struggle are the ones whom the courts need to help, since they have a greater likelihood of recidivating.<sup>15</sup>

The end result is a participant-centered, highly structured court with the goal of connecting veterans to veteran-centered holistic rehabilitation and eventual reintegration into the community, which fosters greater public safety.<sup>16</sup> This alternative is proven to reduce criminal recidivism and substance abuse at a greater rate than simple punishment in the form of incarceration.<sup>17</sup>

### III. HISTORY AND BACKGROUND OF VETERANS TREATMENT COURTS

Veterans treatment courts arose from the recognition that our women and men fighting in the armed forces often return from their service with a host of mental illnesses, complicated all too often by substance abuse.

When you put PTSD, TBI, and substance abuse together, it isn't difficult to imagine the potential for behavior issues that could place the veteran in the hands of the legal system. When that happens, the crisis of criminal involvement must be used as an opportunity to ensure that the veteran receives the treatment and support that he or she needs.<sup>18</sup>

Roughly thirty percent of veterans returning home from combat suffer from those unseen injuries: post-traumatic stress, brain injuries, military sexual trauma, and major depression.<sup>19</sup>

#### A. *Origins*

The first veterans treatment court was founded in Buffalo, New York, by Judge Robert T. Russell.<sup>20</sup> He, like many of the courtroom

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14. See *What Is a Veterans Treatment Court?*, *supra* note 12.

15. *Id.*

16. Robert T. Russell, *Veterans Treatment Courts*, in *THE ATTORNEY'S GUIDE TO DEFENDING VETERANS IN CRIMINAL COURT* 523, 524 (Brockton Hunter & Ryan Else eds., 2014).

17. Justin Holbrook & Sara Anderson, *Veterans Courts: Early Outcomes and Key Indicators for Success*, WIDENER L. SCH. LEGAL STUD. RES. PAPER SERIES, no. 11-25, 2011, at 1, 3-4.

18. Max Cleland, *Foreword to THE ATTORNEY'S GUIDE TO DEFENDING VETERANS IN CRIMINAL COURT*, *supra* note 16, at iii.

19. Russell, *supra* note 16, at 524.

20. *The History*, JUST. FOR VETS, <http://justiceforvets.org/vtc-history> (last visited

professionals around the country who followed, recognized the need for a nontraditional type of supervision and support with increased collaboration with local VA agencies and law enforcement.<sup>21</sup> The veterans treatment court that Judge Russell established was born from a tradition started in substance abuse courts and other problem-solving courts.<sup>22</sup> Those traditions stem from the first drug court, started in 1989 in Miami-Dade County, Florida.<sup>23</sup>

The Miami-Dade County Drug Court was established after a growing frustration with overwhelming caseloads without any direct way of addressing the root causes of increased recidivism.<sup>24</sup> In response to the skyrocketing numbers of drug-fueled crimes, the Miami-Dade County courts decided to sentence “addicted [criminal] defendants to long-term, judicially-supervised drug treatment instead of incarceration.”<sup>25</sup> Treatment and participation in other rehabilitation therapies were intensely monitored by the drug court judge, who responded to successes and failures “with a system of graduated rewards and sanctions,” respectively.<sup>26</sup> The graduated rewards ultimately culminated in graduation from the program and a legal benefit, such as dismissal of the charge or reduction of severity of the charge.<sup>27</sup> Graduated sanctions ultimately culminated in short-term jail consequences and, eventually, termination from the program.<sup>28</sup>

The Miami-Dade County Drug Court program drew plenty of attention from scholars and criminal justice professionals. The National Institute of Justice conducted research showing that Miami-Dade County Drug Court participants had lower numbers of re-arrests than defendants who did not participate in a drug court or similar program.<sup>29</sup> In response, drug courts began proliferating.<sup>30</sup>

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Apr. 27, 2017).

21. *See id.*; *see also* Russell, *supra* note 16, at 524.

22. *See* Russell, *supra* note 16, at 524.

23. BERMAN & FEINBLATT, *supra* note 8, at 4.

24. *See id.*

25. *Id.*

26. *Id.*

27. *See id.*

28. *See id.*

29. *Id.*

30. *Id.*

### B. Key Components

In 1996, a group of drug court professionals gathered to describe the necessary parts of a working drug court. Those parts became the ten guiding principles (known in the greater problem-solving court community as the Ten Key Components) to establish and operate their problem-solving court.<sup>31</sup> Importantly, these components were found to apply directly to veterans treatment courts.<sup>32</sup>

Component One: “Veterans Treatment Court integrate alcohol, drug treatment, and mental health services with justice system case processing.”<sup>33</sup> This is the first component that directs how a problem-solving court operates. Criminal courts have the capacity to immediately influence a defendant shortly after a “significant triggering event such as arrest” and, as such, compel specific accomplishments, such as entering treatment or therapy.<sup>34</sup> Problem-solving courts take that notion through a collaborative effort of all justice partners (i.e., judge, defense attorney, prosecutor, probation, law enforcement, and treatment providers) and begin effecting change that promotes recovery in the defendant.<sup>35</sup>

Component Two: “Using a non-adversarial approach, prosecution and defense counsel promote public safety while protecting participants’ due process rights.”<sup>36</sup> Both attorneys and the

31. U.S. DEP’T OF JUSTICE: BUREAU OF JUSTICE ASSISTANCE & NAT’L ASS’N OF DRUG COURT PROF’LS, *DEFINING DRUG COURTS: THE KEY COMPONENTS* (2004), <https://www.ncjrs.gov/pdffiles1/bja/205621.pdf> [hereinafter *DEFINING DRUG COURTS*].

32. See *The Ten Key Components of Veterans Treatment Court*, JUST. FOR VETS, <http://justiceforvets.org/sites/default/files/files/Ten%20Key%20Components%20of%20Veterans%20Treatment%20Courts%20.pdf> (last visited Apr. 27, 2017) (“The Buffalo Veterans Treatment Court adopted with slight modification the essential tenements of the U.S. Department of Justice Publication entitled ‘*Defining Drug Courts: The Key Components*’ . . . . These Key Components provide the foundation for the successful operation of Veterans Treatment Court.”); see also Robert T. Russell, *Veterans Treatment Court: A Proactive Approach*, 35 *NEW ENG. J. ON CRIM. & CIV. CONFINEMENT* 357, 363–67 (2009) (discussing implementation of the Key Components in Buffalo’s veterans treatment court).

33. *The Ten Key Components of Veterans Treatment Court*, *supra* note 32; see also *DEFINING DRUG COURTS*, *supra* note 31, at 1.

34. *DEFINING DRUG COURTS*, *supra* note 31, at 1.

35. *Id.*

36. *The Ten Key Components of Veterans Treatment Court*, *supra* note 32; see also *DEFINING DRUG COURTS*, *supra* note 31, at 3.



bench must collaborate to facilitate a participant's progress in treatment.<sup>37</sup> The team focuses on the participant's well-being and continued adherence to the conditions of the treatment court. The team does not strictly focus on the case being charged and prosecuted.<sup>38</sup>

Component Three: "Eligible participants are identified early and promptly placed in the Veterans Treatment Court program."<sup>39</sup> Arrests and events leading to a criminal charge are traumatic. Accordingly, the period right after arrest or apprehension "provides a critical window of opportunity for intervening and introducing the value of . . . treatment" and therapy.<sup>40</sup> Moreover, quick and decisive action increases public confidence in the criminal justice system.<sup>41</sup>

Component Four: "Veterans Treatment Court provide access to a continuum of alcohol, drug, mental health and other related treatment and rehabilitation services."<sup>42</sup> The court must also call upon all other health care providers and utilize social support systems in order for treatment initially imposed by a problem-solving court to be effective.<sup>43</sup> The continuum of care also requires that the problem-solving court maintain constant contact with the court team members, treatment providers, and, of course, the participants, whose progress in treatment is monitored.<sup>44</sup> Furthermore, maintaining a continuum of care also means keeping treatment providers accountable to the participants.<sup>45</sup> That accountability is maintained through constant communication and integration of shared information both in the treatment provided and the monitoring accomplished by the court and the court team.<sup>46</sup>

Component Five: "Abstinence is monitored by frequent alcohol and other drug testing."<sup>47</sup> The single most important measure of

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37. DEFINING DRUG COURTS, *supra* note 31, at 3.

38. *Id.*

39. *The Ten Key Components of Veterans Treatment Court*, *supra* note 32; *see also* DEFINING DRUG COURTS, *supra* note 31, at 5.

40. DEFINING DRUG COURTS, *supra* note 31, at 5.

41. *Id.*

42. *The Ten Key Components of Veterans Treatment Court*, *supra* note 32; *see also* DEFINING DRUG COURTS, *supra* note 31, at 7.

43. DEFINING DRUG COURTS, *supra* note 31, at 7.

44. *Id.*

45. *Id.* at 10.

46. *Id.*

47. *The Ten Key Components of Veterans Treatment Court*, *supra* note 32; *see also* DEFINING DRUG COURTS, *supra* note 31, at 11.

success is accurate testing to confirm abstinence.<sup>48</sup> That measure is not limited to the participant. The measure of success is applicable to the treatment program and, to a greater extent, the success of the problem-solving court.<sup>49</sup>

Component Six: “A coordinated strategy governs Veterans Treatment Court responses to participants’ compliance.”<sup>50</sup> Part of treating participants with substance abuse issues is anticipating that relapses will occur and utilizing the relapse as a learning opportunity for the participant who wants to maintain long-lasting sobriety.<sup>51</sup>

Component Seven: “Ongoing judicial interaction with each Veteran is essential.”<sup>52</sup> The judge is the hub to the spokes of treatment providers and the rest of the criminal justice system. The judge is also the spokesperson for the entire treatment court team. Constant communication between judge and participant increases a participant’s chances of success.<sup>53</sup> Part of that success, and the communication leading to that success, shows that the court and the treatment team is concerned about the participant and is constantly evaluating the participant’s recovery and behavior.<sup>54</sup>

Component Eight: “Monitoring and evaluating measures the achievement of program goals and gauge effectiveness.”<sup>55</sup> This eighth component addresses the greater goals of the court and its effectiveness towards its mission. Systems that observe and track participants should provide information about the ongoing successes and failures of the treatment court program with precision and expedience.<sup>56</sup> Evaluation strategies should include comparing participants to non-problem-solving-court defendants in the regular criminal justice system and its probation monitoring components (i.e., those defendants not receiving problem-solving-court services).<sup>57</sup>

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48. See DEFINING DRUG COURTS, *supra* note 31, at 11.

49. See *id.*

50. *The Ten Key Components of Veterans Treatment Court*, *supra* note 32; see also DEFINING DRUG COURTS, *supra* note 31, at 13.

51. Cf. DEFINING DRUG COURTS, *supra* note 31, at 13.

52. *The Ten Key Components of Veterans Treatment Court*, *supra* note 32; see also DEFINING DRUG COURTS, *supra* note 31, at 15.

53. DEFINING DRUG COURTS, *supra* note 31, at 15.

54. *Id.*

55. *The Ten Key Components of Veterans Treatment Court*, *supra* note 32; see also DEFINING DRUG COURTS, *supra* note 31, at 17.

56. DEFINING DRUG COURTS, *supra* note 31, at 17.

57. See *id.*

Component Nine: “Continuing interdisciplinary education promotes effective Veterans Treatment Court planning, implementation, and operations.”<sup>58</sup> All team members of the problem-solving court should be involved in education and training even prior to the court’s establishment and acceptance of its first participant. Criminal justice officials should expose themselves to treatment issues, and treatment providers should familiarize themselves with relevant criminal justice issues.<sup>59</sup> Team members should understand why and how treatment courts work.<sup>60</sup> More specifically, judges and attorneys should be familiar with issues stemming from mental health and substance abuse. With respect to veterans, judges and attorneys should be sufficiently competent to understand why veterans are particularly susceptible to mental health and substance abuse problems. Similarly, treatment providers must understand how the court system holds criminal defendants responsible.<sup>61</sup>

Component Ten: “Forging partnerships among Veterans Treatment Court, Veterans Administration, public agencies, and community-based organizations generates local support and enhances Veteran Treatment Court effectiveness.”<sup>62</sup> Veterans treatment courts take a unique position within the criminal justice system.<sup>63</sup> Through its positioning, a veterans treatment court builds partnerships among private community-based organizations, public criminal justice agencies, and medical treatment providers.<sup>64</sup> Forming these partnerships expands the foundation of care available to participants and educates the community about the concepts of problem-solving courts.<sup>65</sup> Ultimately, a treatment court cultivates and establishes relationships between all criminal justice partners to make certain participants are being served.<sup>66</sup> Veterans treatment courts can help to restore overall confidence in the

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58. *The Ten Key Components of Veterans Treatment Court*, *supra* note 32; *see also* DEFINING DRUG COURTS, *supra* note 31, at 21.

59. DEFINING DRUG COURTS, *supra* note 31, at 21.

60. *Id.*

61. *Id.*

62. *The Ten Key Components of Veterans Treatment Court*, *supra* note 32; *see also* DEFINING DRUG COURTS, *supra* note 31, at 23.

63. *Cf.* DEFINING DRUG COURTS, *supra* note 31, at 23.

64. *Cf. id.*

65. *Cf. id.*

66. *Cf. id.*

criminal justice system by participating and leading in the creation and operation of these community coalitions.

Two decades ago, in 1996, these key components were nothing more than the collective wisdom of a group of drug court professionals who “convened to describe the key ingredients of the Drug Court model.”<sup>67</sup> While the successes of strict adherence to the Ten Key Components have not been fully studied, use of the components “help[s] unify the drug court movement by creating a set of universal principles.”<sup>68</sup> In order to facilitate implementation, drug court professionals, social scientists, and other criminal justice partners have developed specific guidance in administering the Ten Key Components into a set of best practice standards.<sup>69</sup>

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67. 1 NAT'L ASS'N OF DRUG COURT PROF'LS, ADULT DRUG COURT BEST PRACTICE STANDARDS 1 (2013), <http://www.nadcp.org/sites/default/files/2014/TS-10.pdf>.

68. STEPHEN M. THOMAS, TEXAS DRUG COURTS: ARE THE TEN KEY COMPONENTS BEING UTILIZED? 19 (2009) (quoting AUBREY FOX & ROBERT V. WOLF, THE FUTURE OF DRUG COURTS: HOW STATES ARE MAINSTREAMING THE DRUG COURT MODEL 14 (2004)), <https://digital.library.txstate.edu/bitstream/handle/10877/3642/fulltext.pdf?sequence=1>.

69. 1 NAT'L ASS'N OF DRUG COURT PROF'LS, *supra* note 67, at 3.

The terms best practices and standards are rarely used in combination. Best practices are aspirational whereas standards are obligatory and enforceable. Many professions choose instead to use terms such as guidelines or principles to allow for latitude in interpreting and applying the indicated practices (e.g., American Psychological Association, 2013). Other professions have focused on enforcing minimum standards for competent practice rather than defining best practices for the field. In other words, they have focused on defining the floor of acceptable practices rather than the ceiling of optimal practices.

The NADCP chooses to combine aspirational and obligatory language because best practice standards may be ambitious at present, but they are expected to become obligatory and enforceable within a reasonable period of time. Once best practices have been defined clearly for the field, it is assumed that Drug Courts will comport their operations accordingly. How long this process should take will vary from standard to standard. Drug Courts should be able to comply with some of the standards within a few months, if they are not already doing so; however, other standards might require three to five years to satisfy.

*Id.*

*C. Best Practice Standards*

Target Population: Veterans courts are designed primarily for individuals who are addicted or dependent on illicit drugs or alcohol or who have chronic mental health issues and are at a substantial risk to either commit new crimes or fail under a less intensive form of community supervision.<sup>70</sup> The problem-solving court community refers to such individuals as “high-risk, high-need.”<sup>71</sup> If the problem-solving court addresses low-risk offenders, then the high-risk population must be separated from the low-risk population.<sup>72</sup>

Of course, problem-solving courts cannot intuitively make determinations about the risk level and need level of a potential participant. In order for a veteran to participate in veterans treatment court, the veteran must be examined using validated assessment tools that measure both risk to recidivate and need for rehabilitative services.<sup>73</sup> A potential candidate should not be excluded due to criminal history alone, unless empirical evidence demonstrates that such an individual cannot be safely or effectively supervised in the problem-solving court.<sup>74</sup>

Historically Disadvantaged Groups: Veterans courts cannot limit eligibility, retention, or disposition based upon immutable factors such as race, gender, religion, sexual identity, physical or mental disability, or socioeconomic status.<sup>75</sup> Equivalency among participants is of utmost importance with regards to incentives, sanctions, and dispositions.<sup>76</sup>

While this may seem like a simple instruction to treat people equally and fairly, equivalency is the first step towards the notion of fundamental fairness.<sup>77</sup> The mere implication that minority groups may be underrepresented in problem-solving courts<sup>78</sup> requires the

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70. *Id.* at 5.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 6.

75. *Id.* at 11.

76. *Id.*

77. See William G. Meyer, *Constitutional and Legal Issues in Drug Courts*, in NAT'L DRUG COURT INST., THE DRUG COURT JUDICIAL BENCHBOOK §§ 8.5–8.8 (Douglas B. Marlow & William G. Meyer eds., 2011).

78. JIMMY STEYEE, PROGRAM PERFORMANCE REPORT: ENHANCEMENT GRANTEES OF ADULT DRUG COURT DISCRETIONARY GRANT PROGRAM 3 (2016) (showing that roughly 20% of eligible drug court candidates are black, roughly 10% are Latino, and more

court professionals to be vigilant about the impacts of admissions criteria<sup>79</sup> and policies regarding incentives, sanctions, and terminations.<sup>80</sup> The same implication requires problem-solving court professionals to be vigilant about the process afforded participants.<sup>81</sup>

Roles and Responsibilities of Judges<sup>82</sup>: Naturally, a veterans court judge must be trained and maintain a supporting demeanor and commitment to the process while acting as the final arbiter. The judge should be familiar with certain military cultural competencies and understand the Ten Key Components. The judge must remain in his assignment with the veterans court for at least two years.<sup>83</sup> The judge is also the final vanguard of fairness and due process.<sup>84</sup>

Incentives,<sup>85</sup> Sanctions,<sup>86</sup> and Therapeutic Adjustments<sup>87</sup>: This is where the rubber meets the road, so to speak. First, policies and procedures concerning punishment and rewards are to be promulgated to participants in advance.<sup>88</sup> The promulgated policies must communicate what behavior warrants what action and the range of actions appropriate for the corresponding behavior.<sup>89</sup> Those same promulgated policies and procedures must include what is necessary to achieve advancement in the treatment program and

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than 50% are white).

79. Admissions criteria differ from court to court and jurisdiction to jurisdiction. *See infra* Part IV.

80. *See* 1 NAT'L ASS'N OF DRUG COURT PROF'LS, *supra* note 67, at 11–12.

81. *See id.* at 13–14.

82. To be fair, there is no research on who acts as the judge; it could be a judge, magistrate, commissioner, or referee. *See generally id.* at 20–24.

83. *Id.* at 20.

84. *Id.* at 21.

85. 1 NAT'L ASS'N OF DRUG COURT PROF'LS, *supra* note 67, at 26. Incentives refer to consequences for behavior desired by participants and include verbal praise, social recognition, tangible rewards, phase advancement in the treatment program, or graduation from the treatment program. *Id.*

86. *Id.* Sanctions include “consequences . . . such as verbal reprimands, increased supervision requirements, community service,” temporary incarceration, or termination from the problem-solving court. *Id.*

87. *Id.* (“Therapeutic adjustments refer to alterations to a participant’s treatment requirements that are intended to address unmet clinical or social services needs, and are not intended as an incentive or sanction.”).

88. *Id.* at 26.

89. *Id.*

the legal and collateral consequences that arise from either graduation or termination.<sup>90</sup>

Participants must be afforded the right to be heard in instances of factual controversies and the imposition of incentives, sanctions, and therapeutic adjustments.<sup>91</sup> Certainly, due process—written notice and the opportunity to be heard—is necessary to satisfy constitutional requirements and ensure a level of fundamental fairness. But the perception of fundamental fairness is just as important and impactful.<sup>92</sup> A study conducted by the Multi-State Adult Drug Court Evaluation (MADCE) demonstrated that outcomes for participants were significantly better when participants perceived the judge as fair and when the independent observers rated the judge's interactions with participants as respectful, fair, consistent, and predictable.<sup>93</sup>

Substance Abuse Treatment: Veterans treatment courts with participants diagnosed with substance abuse disorder should offer a continuum of care, including the appropriate level of substance abuse treatment, aftercare, relapse prevention, and other care as recommended by a chemical health assessment.<sup>94</sup> Participants should not be incarcerated to achieve any treatment objectives, including detoxification and sober living environment.<sup>95</sup> Indeed, incarceration should never be used as anything beyond a punitive sanction.<sup>96</sup> Furthermore, all treatments provided to participants must be demonstrated to improve outcomes for participants that are involved in the criminal justice system.<sup>97</sup> Treatment providers should also be proficient in delivering the interventions found necessary.<sup>98</sup> Those providers should be supervised regularly to ensure adherence to the models found to best improve outcomes.<sup>99</sup>

Complementary Treatment and Social Services<sup>100</sup>: The problem-solving court should offer (or refer) participants

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90. *Id.*

91. *Id.* at 26–27.

92. *Id.* at 30.

93. See 4 SHELLI B. ROSSMAN ET AL., URBAN INST. JUSTICE POLICY CTR., THE MULTI-SITE ADULT DRUG COURT EVALUATION: THE IMPACT OF DRUG COURTS 259 (2011).

94. See 1 NAT'L ASS'N OF DRUG COURT PROF'LS, *supra* note 67, at 38.

95. *Id.*

96. *See id.*

97. *Id.* at 39.

98. *Id.*

99. *See id.* at 38–40.

100. 2 NAT'L ASS'N OF DRUG COURT PROF'LS, *supra* note 13, at 5. The term

complementary services to address other needs that stem from substance abuse and other co-occurring disorders, especially as these other needs can interfere with treatment of the substance abuse and other co-occurring disorders.<sup>101</sup> The problem-solving court team must first address the primary diagnoses and recommendations from mental health and chemical health assessments and address housing (or homelessness).<sup>102</sup> In subsequent phases of the treatment program, the problem-solving court should then look to resolve other criminogenic needs that would increase the potential for recidivism.<sup>103</sup> This may involve referring or providing services addressing criminal thinking patterns, criminal peer interaction, and familial conflict.<sup>104</sup> In later phases of the treatment program, participants should receive services that enhance and maintain gains from treatment and therapies by improving long-term adaptive functioning, such as vocational or educational counseling.<sup>105</sup>

**Drug and Alcohol Testing:** The cornerstone of an abstinence-based problem-solving court is the frequent and random testing of participants' sobriety.<sup>106</sup> Drug and alcohol testing must be unpredictable and observed,<sup>107</sup> and testing must be performed through a scientifically-validated and reliable set of procedures.<sup>108</sup> Drug and alcohol testing is one of the fundamental bases for incentives and sanctions.<sup>109</sup>

**Multidisciplinary Team:** The problem-solving court team must have a member from all partner criminal justice and treatment agencies involved in the creation and operation of the program.<sup>110</sup> This team should include a judge, program coordinator, defense attorney, prosecutor, treatment representative, probation officer or

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"complementary treatment and social services" refers to other services beyond substance abuse treatment that improve quality of life, ameliorate distress, and/or improve the participant's long-term adaptive functioning. *Id.* at 5 n.1. This does not include things like restitution, supervisory interventions, or sobriety and recovery-oriented programming like support-group meetings or peer mentoring. *Id.*

101. *Id.* at 5.

102. *Id.*

103. *Id.*

104. *Id.* at 5–6.

105. *Id.* at 6.

106. *See id.* at 26.

107. *Id.*

108. *Id.* at 27.

109. *See id.* at 26–33.

110. *Id.* at 38.



case manager, and a member of law enforcement.<sup>111</sup> Each member of the team should be trained in the best practice standards and how to implement those standards in the problem-solving court.<sup>112</sup> Moreover, that training should be continuous even as the court progresses and changes with the needs of participants. Finally, team members should be at each status hearing and pre-court staff meeting.<sup>113</sup>

Census and Caseloads: The problem-solving court should maintain as many eligible individuals as practicable while maintaining continued adherence to both the best practice standards and Ten Key Components.<sup>114</sup>

Monitoring and Evaluation: The problem-solving court must continually monitor its adherence to the best practice standards—annually, at a minimum.<sup>115</sup> Additionally, the problem-solving court should continually monitor the progress of participants and their outcomes during their participation in the program.<sup>116</sup>

#### IV. VETERANS TREATMENT COURTS IN THE TWIN CITIES, MINNESOTA

Beyond the best practice standards, problem-solving courts, including veterans treatment courts, vary widely as to how they are administered and how they operate. In Minnesota, eight veterans courts exist today. Each veterans treatment court institutes a series of discrete steps that veteran-participants who are criminal defendants must complete in order to be eligible for graduation. Each veterans treatment court provides for some form of legal benefit, perhaps in the form of the potential for pre-adjudication participation, a lesser disposition, or the promise of no additional time incarcerated at the outset of participation.<sup>117</sup> For reference, this article examines the Hennepin County Veterans Court and the Ramsey County Veterans Court.<sup>118</sup>

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111. *Id.*

112. *Id.* at 39.

113. *Id.* at 38–39.

114. *Id.* at 51.

115. *See id.* at 59–61.

116. *See id.*

117. *See generally* Daniel R. Devoy, *Unconventional Rehabilitation: Military Members' Right to Veterans Treatment Court*, JUDGES' J., Winter 2017, at 14, 14.

118. Even between Hennepin County Veterans Court and Ramsey County Veterans Court, substantial differences exist. Judge Kevin Burke, a district court judge in Hennepin County and an early proponent of problem-solving courts,

A. *Hennepin County Veterans Court*

Established in 2010, Hennepin County's Veterans Court was the first of its kind in Minnesota. Hennepin County Veterans Court is both a pre- and post-adjudication court, whereby participants are admitted either pre-plea and pre-adjudication of guilt or post-plea and post-adjudication.<sup>119</sup> The Hennepin County Veterans Court is a voluntary program open to criminal defendants who have previously served in the armed forces.<sup>120</sup> Participants in Hennepin County Veterans Court are intensely supervised by case management services provided by the Department of Veterans Affairs Medical Center (VAMC) (or probation, if the participant is not eligible for services through the VAMC).<sup>121</sup> Hennepin County Veterans Court is designed to treat and monitor veterans that have diagnosed and treatable chemical or mental health issues through a rigorous and structured environment.<sup>122</sup>

According to the Hennepin County Veterans Court Policy and Procedure Manual, veterans choosing to participate in the veterans court prior to a disposition hearing (but after a plea of guilty is entered) "will have three reviews . . . to determine whether [they] stay in the program."<sup>123</sup> If a potential participant receives a disposition in Hennepin County Veterans Court, then after they are screened, the participant will have volunteered to participate in veterans court. Once accepted, the participant is required to abide by all terms and conditions of the program until she or he graduates or is terminated from the program. Probation violation hearings, formal or otherwise, are held by the respective county's veterans court judge.<sup>124</sup> No waivers of probation violation hearings are

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states, "[C]ourts around the country operate in different ways and achieve a wide variety of outcomes. If there is any singular description of these drug courts, it is that each operates according to its own unique protocol. They have their own local legal culture. However, the theory behind their operation is largely the same." Kevin S. Burke, *Just What Made Drug Courts Successful?*, 36 NEW ENG. J. CRIM. & CIV. CONFINEMENT 39, 54 (2010).

119. See KERRY MEYER, HENNEPIN COUNTY VETERANS COURT POLICY AND PROCEDURE MANUAL 4 (2014).

120. See *id.* at 5.

121. See *id.* at 4.

122. See *id.*

123. *Id.* at 5.

124. *Id.* Since the Minnesota Court of Appeals decision in *State v. Cleary*, 882 N.W.2d 899 (Minn. Ct. App. 2016), if a participant in Hennepin County Veterans Court requests a contested probation violation hearing, the presiding judge will

conducted either in writing or on the record. If a participant wishes to have the probation violation proceedings heard before a different judge, the participant is accommodated. The participant is not penalized with removal from the Hennepin County Veterans Court. Finally, jail sanctions are sparingly used by the veterans court. However, a participant can be jailed at any time if the treatment court team believes incarceration is necessary to stop a participant from continuing to use substances that may endanger the participant's life.

Participants in Hennepin County Veterans Court must complete three phases: the Conditional Release Phase, the Supervision Phase, and the Administrative Phase.<sup>125</sup> The Conditional Release Phase begins the veteran defendant's participation in Hennepin County Veterans Court. During this phase, veteran defendants learn if they have been accepted into the program. The potential participant begins complying with the veterans court requirements, including establishing a treatment plan and individual goals with case managers, following treatment provider recommendations, attending support group meetings, demonstrating sobriety through random drug and alcohol testing, and attending court as ordered. Participants are expected to appear in court once a month, or as often as the veterans court sees fit.<sup>126</sup>

Once the veteran defendant is accepted and sentenced (or accepted with an agreement for a continuance without prosecution in place), the participant enters the Supervised Phase of veterans court. Veterans court participants must maintain regular contact with their supervising probation agent, whether it be in person or through electronic or telephonic means.<sup>127</sup> Participants are required to make all court appearances.<sup>128</sup> Moreover, the participants will be told of their next court appearance at each probation review meeting. Participants who receive care through the VAMC are required to make all appointments as directed by the Veterans Justice Outreach Specialist.<sup>129</sup>

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recuse and the matter will be scheduled to a different non-veterans court judge. *See infra* notes 250–51 and accompanying text.

125. *See* MEYER, *supra* note 119, at 8–9.

126. *Id.* at 8.

127. *Id.*

128. *Id.* at 9.

129. *Id.*

Participants who do not receive (and are not eligible to receive) care through the VAMC will work with their supervising probation agents in order to assess what community resources are available to meet the rehabilitation needs of the participant. If a participant does not complete the court-ordered regimen of treatment, aftercare, and any other necessary therapies, the participant faces a potential probation violation and appropriate sanction.<sup>130</sup>

If the participant graduates from the Supervised Phase of the Hennepin County Veterans Court, that participant will remain on probation with the veterans court probation officer without the requirement of appearing in veterans court.<sup>131</sup> This is the Administrative Phase. In the Administrative Phase, veterans court participants must have no new infractions of the law, maintain abstinence from non-prescribed drugs and alcohol, and adhere to any other orders, such as no-contact orders, that the veterans court may impose as a condition of participation.<sup>132</sup> The administrative phase ends only when the veterans court judge discharges the participant early or probation has expired.<sup>133</sup>

#### B. Ramsey County Veterans Court

Established in 2013, the Ramsey County Veterans Court is a voluntary program for veterans with chemical or mental health issues facing criminal charges in Ramsey County.<sup>134</sup> The Ramsey County Veterans Court team consists of a presiding judge, a Ramsey County Attorney prosecutor, a prosecutor representing each Ramsey County municipality, a public defender or criminal defense attorney, a probation officer, a case manager through Project Remand, Inc.,<sup>135</sup> a representative from the Ramsey County Veterans Service Office,

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130. *See id.*

131. *See id.*

132. *Id.*

133. *Id.*

134. *See Veterans Court*, RAMSEY COUNTY ATT'Y'S OFF., <https://www.ramseycounty.us/your-government/leadership/county-attorneys-office/community-initiatives/veterans-court> (last visited Apr. 27, 2017); *see also* RAMSEY COUNTY VETERANS TREATMENT COURT, PARTICIPANT HANDBOOK 2 (2016) [hereinafter RAMSEY COUNTY HANDBOOK].

135. Project Remand, Inc. is a non-profit organization that provides Ramsey County District Court with pretrial services, including monitoring and supervision, case management, and administration of diversion programs. *See* PROJECT REMAND INC., <http://www.projectremand.org/index.html> (last visited Apr. 27, 2017).

and a Veterans Justice Outreach Counselor through the Department of Veterans Affairs Medical Center.<sup>136</sup>

Criminal defendants who have served in the armed forces are able to participate either pre-adjudication or post-adjudication, based on the prosecutor's preference. Participants begin observing<sup>137</sup> veterans court after they are identified as eligible to participate.<sup>138</sup> Once a treatment plan<sup>139</sup> is in place and the veterans court team establishes the final eligibility of the participant, the participant will sign a contract and certain waivers memorializing his or her desire to participate.

Participants are able to enter Ramsey County Veterans Court under one of four acceptance tracks, predicated upon prosecutor approval. Track 1 is tantamount to a continuance without prosecution or a continuance for dismissal,<sup>140</sup> where the participant can avoid further criminal prosecution by completing all the requirements of veterans court; Track 2 is a post-plea, pre-adjudication status that applies where the participant enters a guilty plea, but the court reserves acceptance and does not formally adjudicate guilt. For both Tracks 1 and 2, the participant's criminal charges are summarily dismissed<sup>141</sup> after successful completion of veterans court.

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136. RAMSEY COUNTY HANDBOOK, *supra* note 134, at 4.

137. Since participation in Ramsey County's Veterans Court is voluntary, eligible criminal defendants are given the opportunity to watch veterans court proceedings to make a decision whether or not to participate.

138. In order to be eligible, participants must identify as having served in the armed forces of the United States; must reside in Ramsey County, or if homeless, be able to access community-based services in Ramsey County; must express interest in participating; and, finally, receive approval to participate from the Ramsey County Attorney.

139. A treatment plan refers to the initial plan of rehabilitation. The plan is based, in part, on the recommendations of case management assessments, chemical dependency assessments, mental health assessments, and cognitive skills assessments. Often, participants will be required to comply with some form of chemical dependency treatment, followed by some form of moral recognition therapy.

140. In Minnesota, a continuance for dismissal or a continuance without prosecution is authorized pursuant to Minnesota Statutes section 609.132.

141. "Dismissed" means the charges will no longer be pursued by the prosecutor. The original crimes charges will still appear on court records. The participant, if successful, may move to have his or her arrest and charging records expunged from the court record. *See* MINN. STAT. §§ 609A.01-.04 (2016).

If the prosecutor elects post-adjudication, participants may enter under Track 3 at the post-plea, post-adjudication, pre-execution of sentence stage, or they may enter Track 4, where the participant is already under conventional community supervision and is alleged to have violated at least one term or condition previously imposed at a sentencing hearing. For participants that are entering post-adjudication, the participants must sign a plea petition identifying a panoply of pre-trial and trial rights being waived. Post-adjudication participants also must sign a waiver of their rights to a probation violation hearing. Pre-adjudication participants (Track 1 or Track 2 participants) are not required to sign a probation violation waiver.<sup>142</sup>

To be eligible for the Ramsey County Veterans Court, a potential participant must first be charged with a crime that is acceptable to the county attorney, pursuant to a promulgated list of acceptable charges.<sup>143</sup> Potential participants are screened prior to acceptance in order to determine their likelihood of reoffending and necessary level of supervision and services.<sup>144</sup> Eligible participants must need a high level of supervision and services to participate. Eligible participants are divided between two different calendars: one calendar is devoted strictly to those participants deemed a high risk to reoffend, while the other calendar is devoted strictly to those participants determined to be a low risk of reoffending.

Ultimately, the Ramsey County Attorney is the final arbiter in determining who is accepted and who is not. The requirements used by the county attorney are not promulgated to defense attorneys, all prosecutors, law enforcement, treatment professionals, or community supervision officials. The attorney that makes the determination to accept the potential participants makes her decision based on subjective considerations.<sup>145</sup>

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142. The different “track” by which a participant enters the court does not change the requirements for completing participation. Rather, it simply denotes the potential disposition of the charges. For defense practitioners, the track is indicative of the type of legal benefit a participant enjoys upon graduation.

143. Like most jurisdictions, Ramsey County will not accept defendants charged with any manner of homicide or serious or violent criminal sexual conduct. But unlike many veterans courts, Ramsey County will also not accept first-time strangulation domestic assault cases and offenses involving firearms.

144. See 1 NAT'L ASS'N OF DRUG COURT PROF'LS, *supra* note 67, at 55.

145. These statements are based upon the professional experience and observations of the author.

Upon acceptance, a participant will acknowledge the terms and conditions of the Ramsey County Veterans Court participant contract and waive, both orally and in writing, rights protecting medical information confidentiality. The participant will also consent to releasing all relevant medical records and information. If the participant is being accepted through Track 2, 3, or 4, the participant will enter a plea on the record and complete a plea petition outlining the rights that are being waived in order to enter a plea of guilty. If the participant is being accepted through Track 3 or 4, the participant will also waive his or her right to a probation violation hearing, both orally and in writing.<sup>146</sup> The participant is informed on the record that while the waiver is not an absolute waiver, the waiver is only in operation until the participant seeks a hearing. If the participant seeks a probation violation hearing, the participant is ostensibly asking to be removed from veterans court.<sup>147</sup> A participant can be jailed if the treatment court team believes incarceration is necessary to stop a participant from continuing to use substances that may endanger the participant's life.

The Ramsey County Veterans Court is divided into four phases: Reception Phase, Phase 1, Phase 2, and Phase 3. A participant graduates veterans court by successfully completing each of the following phases of the court. The purpose of the Reception Phase is to perform and complete any intake procedures, establish abstinence from controlled substances and alcohol, complete mental and chemical health assessments, and begin identifying support structures.<sup>148</sup> The participant is assigned a veteran mentor,<sup>149</sup> and the court will identify and begin implementing a

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146. Since the writing of this article, the Ramsey County Veterans Court has dissolved the requirement of waiving a participant's right to a probation violation hearing. Participants now acknowledge that in light of an infraction of the participant contract, a participant has a panoply of rights under *Morrissey* available as well as the ability to request the presiding judge recuse herself.

147. These statements are based upon the professional experience and observations of the author.

148. See RAMSEY COUNTY HANDBOOK, *supra* note 134, at 14–15.

149. See BUFFALO VETERANS TREATMENT COURT, ATTACHMENT B: VOLUNTEER PROJECT MENTORING PROGRAM INFORMATION SHEET, <http://justiceforvets.org/sites/default/files/files/Volunteer%20Mentoring%20Program%20Information%20Sheet.pdf> (last visited Apr. 27, 2017). Veteran mentors are a necessary component to any veterans treatment court. Veteran mentors, like their mentees, have previously served in the military in much the same capacity as those they mentor. See *id.* Mentors offer personal support and encouragement as the veteran

treatment plan as developed from the recommendations of the different assessments. The reception will last a minimum of thirty days but may take longer if a treatment plan is not established. Participants are required to begin complying with monitoring requirements, including frequent and random drug testing, home visits, and treatment and support group meetings.<sup>150</sup> Participants are also required to begin attending court weekly (or bi-weekly, if the participant is assessed at being a low-risk offender). In order to advance to Phase 1, the participant must have fourteen consecutive days of verified sobriety and begin working on treatment plan goals.<sup>151</sup>

Phase 1 completes the orientation and assessment work started in the Reception Phase.<sup>152</sup> Participants begin chemical or mental health treatment and start identifying and becoming aware of triggers that cause chemical or alcohol use. The participant is expected to begin weekly contact with her or his mentor and continue demonstrating sobriety by submitting to random and frequent drug testing. Participants continue to attend court weekly (or bi-weekly, if the participant is assessed to be a low-risk offender). Moreover, participants with an identified substance abuse disorder are required to obtain a sponsor.<sup>153</sup> Finally, participants and their case managers begin identifying life goals and the steps to achieve those goals.

To advance to Phase 2, a participant must spend at least three months in Phase 1 and have a minimum of thirty consecutive days of

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transitions to civilian life through the veterans treatment court. Mentors also offer friendship and guidance while addressing mental health issues, chemical health issues, and reintegration issues.

150. Support groups are generally a group of people with common experiences or concerns who provide each other with encouragement, comfort, and advice. By example, participants are expected to find a group of people similar to Alcoholics or Narcotics Anonymous, Health Realization, and Smart Recovery.

151. See RAMSEY COUNTY HANDBOOK, *supra* note 134, at 15.

152. See *id.* at 15–16.

153. Alcoholics Anonymous defines a sponsor as a person to “guide the member through the AA program” who also is “there to listen.” *How to Choose an AA Sponsor*, ALCOHOL REHAB, <http://alcoholrehab.com/addiction-articles/how-to-choose-an-aa-sponsor/> (last visited Apr. 27, 2017). Being able to rely on a sympathetic ear can be particularly important when the individual feels on the verge of relapse. A sponsor is not something found only in Alcoholics Anonymous; a sponsor can come from any different support group. See *Sponsorship in AA—6 Characteristics of a Good Sponsor*, DISCOVERY PLACE, <https://www.discoveryplace.info/sponsorship-aa-6-characteristics-good-sponsor> (last visited Apr. 27, 2017).



demonstrated sobriety. A participant must also complete a phase move application and receive approval. Moreover, the participant eligible for a move to Phase 2 must satisfactorily complete treatment (or at least make substantial progress while still in treatment) and maintain satisfactory compliance with the requirements of veterans court. Ultimately, the veterans court team grants approval for the phase move.<sup>154</sup>

In Phase 2, participants continue maintaining abstinence from chemicals and alcohol (minus those that have been prescribed by a medical professional and approved by the court).<sup>155</sup> Participants also begin any additional treatment requirements that had been identified in previous chemical and mental health assessments, such as counseling, cognitive skills programming, or other therapies. Participants begin to make restitution payments or payments towards participation fees and court fines. Participants continue to attend support group meetings, and participants continue maintaining at least weekly contact with their mentors. Participants also begin identifying vocational or educational goals with their case managers. Participants begin identifying sober living environments that are not provided through county services or other government-funded services. Additionally, participants are required to attend court bi-weekly (or monthly, if the participant is deemed a low-risk to reoffend).

To advance to Phase 3, the participant must complete a phase move application. The participant must have sixty days of continuous sobriety and have spent three months in Phase 2. The participant must make some payment towards any restitution order and have paid half of the participation fee. Moreover, the participant eligible for a move to Phase 3 must satisfactorily complete treatment (or at least make substantial progress while still in treatment) and maintain satisfactory compliance with the requirements of a veterans court. Ultimately, the veterans court team grants approval for the phase move.<sup>156</sup>

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154. RAMSEY COUNTY HANDBOOK, *supra* note 134, at 16. In determining whether or not a phase move is appropriate, the team reviews the application of the participant. The application should reflect significant improvement and change in the participant.

155. *See id.* at 16–17.

156. *Id.* at 14.

Phase 3 is the final stage in Ramsey County Veterans Court.<sup>157</sup> Phase 3 is also the phase through which participants begin transitioning from the intense supervision to full integration into the community. By this time, participants will have completed the majority of their therapeutic programming and counseling, and participants will have completed the goals of their case plan and any other supervision conditions established in the Reception Phase.<sup>158</sup> Moreover, participants will begin to pursue their educational or vocational goals in earnest. Participants continue to meet with mentors and sponsors, attend support group meetings as necessary, and demonstrate sobriety through frequent and random testing.

To graduate from Ramsey County Veterans Court, participants must spend 180 days in Phase 3 and maintain verified sobriety for a minimum of six months. Participants must complete a pre-graduation life plan and pay off all remaining participation fees, court fines and fees, and any restitution.<sup>159</sup>

#### V. DUE PROCESS CHALLENGES

The good that veterans treatment courts perform cannot justify the potential due process issues that exist. Plenty of scholars and courts have recognized that the non-adversarial nature of problem-solving courts promotes friction with the due process rights of the courts' participants.<sup>160</sup> To be specific, some scholars and some courts have struggled with the dilemma between the rigors demanded by due process and the need for swift sanctioning to ensure the

157. *See id.* at 17–18.

158. Some readers may wonder how much participation in a treatment or problem-solving court like a veterans court may cost. Others may wonder how much moneys are saved. The National Association of Drug Court Professionals argues that for one dollar spent in treatment courts, twenty-seven dollars are saved. *See* SHANNON M. CAREY ET AL., CALIFORNIA DRUG COURTS: OUTCOMES, COSTS AND PROMISING PRACTICES: AN OVERVIEW OF PHASE II IN A STATEWIDE STUDY 352 (2006); *see also* ROBERT BARNOSKI & STEVE AOS, WASHINGTON STATE'S DRUG COURTS FOR ADULT DEFENDANTS: OUTCOME EVALUATION AND COST-BENEFIT ANALYSIS (2004); MICHAEL FINIGAN, SHANNON CAREY & ANTON COX, THE IMPACT OF A MATURE DRUG COURT OVER 10 YEARS OF OPERATION: RECIDIVISM AND COSTS (2007); L. A. LOMAN, A COST-BENEFIT ANALYSIS OF THE ST. LOUIS CITY ADULT FELONY DRUG COURT INSTITUTE OF APPLIED RESEARCH (2004).

159. *See* RAMSEY COUNTY HANDBOOK, *supra* note 134.

160. *See, e.g., In re Hill*, 803 N.Y.S. 2d 365, 365 (2005); Richard C. Boldt, *Rehabilitative Punishment and the Drug Court Movement*, 76 WASH. U. L.Q., 1205, 1233–34 (1998).

effectiveness of correctional consequences. But to entertain such a dichotomy is to introduce a false dilemma.<sup>161</sup>

A. *Due Process in the Face of Allegations of a Violation of Conditions*

Wherever law ends, tyranny begins . . . .

—John Locke, Book II of *Two Treatises of Government* (1689)

The Constitution of the United States promulgates only one command twice. Even as the language of the Due Process Clauses of both the Fifth and Fourteenth Amendments seems quite broad, the fact that this fundamental proposition of governmental fairness is mentioned twice states a central proposal. The Fifth Amendment to the U.S. Constitution requires that a criminal defendant cannot be “deprived of life, liberty, or property, without due process of law.”<sup>162</sup> The Fourteenth Amendment yields similar language: “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law . . . .”<sup>163</sup>

The concept of due process has existed since the signing of the Magna Carta.<sup>164</sup> That idea was muted, even as governments shifted towards a more representative and democratic nature. During the migration of English legal traditions in the thirteen colonies, some colonies included “due course of law” provisions.<sup>165</sup> These latter provisions were directed specifically to the processes by which an

161. 2 NAT’L ASS’N OF DRUG COURT PROF’LS, *supra* note 13.

162. U.S. CONST. amend. V.

163. U.S. CONST. amend. XIV, § 1.

164. See Frederick M. Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585 (2009). Interestingly enough, “[i]n actuality, Magna Carta had very little to say about principles of due process. It was intended to subject the King to law, not expand the rule of law to persons other than the King—and certainly not to the villeins and serfs who comprised the majority of the English population at the time. Magna Carta arose because of baronial frustration with the arbitrary excesses of the King, not because of some awakening of a revolutionary sense of equal justice for all.” M.A. Drumbl, *Process for the Dispossessed: Procedural Due Process from the Magna Carta to Modern International Law*, 9 CRIM. L. & PHIL. 577, 582–83 (2015) (reviewing LARRY MAY, *GLOBAL JUSTICE AND DUE PROCESS* (2011)).

165. See, e.g., 3 CHARLES Z. LINCOLN, *THE CONSTITUTIONAL HISTORY OF NEW YORK* (1906), <https://archive.org/stream/cu31924032657631#page/n11/mode/2up> (discussing Clause 15 of the Charters of Liberties and Privileges of 1683).

accused could be brought before a court of law.<sup>166</sup> Since then, due process is understood as the hallmark of fairness in any legal proceeding that involves the government. More specifically, the concept of due process is a commitment to legality—to a system free from arbitrariness and capriciousness.

Our legal system is premised largely upon the notion that the State shall not deprive “any person of life, liberty, or property, without due process of law.”<sup>167</sup> Determining procedural due process rights involves a two-step analysis: first, determining whether a governmental decision would deprive an individual of a liberty or property interest within the meaning of the Fourteenth Amendment’s Due Process Clause; and second, if a liberty or property interest is implicated, applying a balancing test to determine what process is due.<sup>168</sup> Both *Morrissey v. Brewer*<sup>169</sup> and *Gagnon v. Scarpelli*<sup>170</sup> outline the due process rights of a criminal defendant on supervision after a sentence has been pronounced. *Morrissey* established that, *as a minimum*, the government has a due process obligation to inform a person on parole or supervised release in writing of any violation that would put in jeopardy the parolee’s liberty interests.<sup>171</sup> The parolee would then be entitled to two hearings: the first hearing determines if probable cause exists to violate the parolee;<sup>172</sup> the second hearing determines the merits of

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166. Ryan Williams, *Substantive Due Process in Historical Context*, CATO UNBOUND (Feb. 10, 2012), <https://www.cato-unbound.org/2012/02/10/ryan-williams/substantive-due-process-historical-context>.

167. U.S. CONST. amend. XIV, § 1.

168. *Mathews v. Eldridge*, 424 U.S. 319, 333–35 (1976).

169. 408 U.S. 471 (1972). *Morrissey*, an Iowa parolee originally convicted of check forgery charges, was returned to prison based upon accusations that he violated several conditions of his parole. *Id.* at 472–73. *Morrissey* was accused of purchasing a car and obtaining credit under a false name, failing to report his address of residence to his parole officer, and giving false information about his address after a car accident. *Id.* at 473. *Morrissey* did not have a hearing. *Id.* After *Morrissey*’s parole was revoked, he filed a habeas corpus petition claiming that his due process rights were violated because he had received no hearing prior to revocation of parole. *Id.* at 474.

170. 411 U.S. 778 (1973). *Scarpelli* was on probation in Wisconsin for armed robbery. *Id.* at 779. He was subsequently charged with burglary while on probation. *Id.* at 779–80. His probation was revoked without a hearing. *Id.* at 780. *Scarpelli* filed a writ of habeas corpus claiming that revocation of probation without the right to a hearing and to counsel was a denial of due process. *Id.*

171. *Morrissey*, 408 U.S. at 471.

172. By “violate the parolee,” the Court means to make a determination that the

the substance of the allegations against the parolee.<sup>173</sup> The due process rights in *Morrissey* were extended to individuals on probation in *Gagnon v. Scarpelli*.<sup>174</sup> Both the *Morrissey* and *Gagnon* Courts found that both plaintiff supervisees had liberty interests that were being threatened.<sup>175</sup> To take away that liberty interest meant requiring not just a hearing, but the ability to have advance written notice, a neutral magistrate, and the ability to present exculpatory evidence.<sup>176</sup>

*Pearson v. State* is the case that outlines the necessary elements that satisfy the due process requirements of the United States and Minnesota Constitutions.<sup>177</sup> These elements include:

- (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a “neutral and detached” hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole. We emphasize there is no thought to equate this second stage of parole revocation to a criminal prosecution in any sense. It is a narrow inquiry;

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parolee has not complied with requirements imposed by the supervising parole agent or order of the court. *See id.* at 485 (“Arrest of Parolee and Preliminary Hearing”).

173. *See id.* at 487–88. (“Revocation Hearing”).

174. *See Gagnon*, 411 U.S. at 782.

175. *See id.*; *Morrissey*, 408 U.S. at 482.

176. *See Gagnon*, 411 U.S. at 786 (“[P]robationer or parolee is entitled to notice of the alleged violations of probation or parole, an opportunity to appear and to present evidence in his own behalf, a conditional right to confront adverse witnesses, an independent decisionmaker, and a written report of the hearing.” (citing *Morrissey*, 408 U.S. at 487)).

177. 308 Minn. 287, 289, 241 N.W.2d 490, 492 (1974); *see also* *State v. Beaulieu*, 859 N.W.2d 275, 280 (Minn. 2015). *Pearson* was revoked on probation and received an executed five-year prison term. *Pearson*, 308 Minn. at 288, 241 N.W.2d at 491. The post-conviction petition subsequently filed was denied, and *Pearson* appealed, claiming that his due process rights to written notice and a preliminary hearing were denied. *Id.* On appeal, the Minnesota Supreme Court ruled that, while *Pearson* was entitled to written notice and a preliminary hearing, claiming lack of notice when *Pearson* evidently knew of the hearing and failed to appear at the preliminary hearing did not warrant reversal. *Id.* at 292.

the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial.<sup>178</sup>

For much of our modern jurisprudence, procedural due process is understood simply as the right to be heard along with notice of that right in the face of the deprivation of liberty.<sup>179</sup> The right of notice and opportunity to be heard is only meaningful if that right is available at a meaningful time and manner.<sup>180</sup> That notion also existed in the common law.<sup>181</sup>

Veterans treatment courts operate, in part, upon the premise that the service and sacrifice given by veterans will be recognized. That recognition would suggest that veterans would be treated fairly. As legal practitioners dedicated to fairness, we have an inherent duty to ensure that each and every participant is afforded the due process protections the Constitution guarantees.

But those due process requirements promulgated in *Morrissey* and *Gagnon* have been short-circuited in favor of the view that sanctions must be imposed as soon as possible following a violation of a condition of the problem-solving court. Problem-solving courts operate under the idea that celerity is vital in ensuring that sanctions against a participant will have the maximum effect.<sup>182</sup> Some problem-solving courts have difficulty reconciling the need for temporal immediacy with the requirements of due process.

The Ramsey County Veterans Court model implements two procedures in order to accommodate the objective that a punitive sanction be imposed as quickly as possible towards any offending behavior. First, the participant must waive her or his right to a probation violation hearing.<sup>183</sup> Second, the participant is notified

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178. *Morrissey*, 408 U.S. at 489.

179. *Fuentes v. Shevin*, 407 U.S. 67, 79–80 (1972).

180. *Id.* (citing *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

181. *See Baldwin v. Hale*, 68 U.S. 223, 233 (1863) (“Common justice requires that no man shall be condemned in his person or property without notice and an opportunity to make his defence.”).

182. Douglas B. Marlowe, *Strategies for Administering Rewards and Sanctions*, in *DRUG COURTS: A NEW APPROACH TO TREATMENT AND REHABILITATION* 317, 319 (James E. Lessenger & Glade F. Roper eds., 2007).

183. Participants are generally informed on the record, either by defense counsel or by the presiding judge, that the right to a probation violation is not waived completely. Rather, if a participant invokes his right to a probation violation hearing, then the participant is implicitly requesting termination from veterans treatment court. However, certain jurisdictions find this kind of waiver

either by the participant's case manager or by the court at the time of the participant's next court hearing (which would likely be scheduled for the next time the veterans treatment court meets). This holds true regardless of the severity of the sanction. That is, even when a participant faces incarceration, however temporary, as a sanction for offending behavior, the participant faces the choice of either accepting the consequence or requesting a hearing that ultimately ends the participant's involvement in veterans treatment court.

This model seems incongruent with standards established by the National Association of Drug Court Professionals. Judge William G. Meyer (Ret.) poses the question this way: "Does due process mandate all the procedural requirements contained in a revocation or termination hearing, even where the defendant has consented to the imposition of such sanctions as a condition to drug court participation?"<sup>184</sup> The answer is no.

First, *Morrissey* and *Gagnon* tell us that notice is necessary.<sup>185</sup> Notice begins the process necessary to ensure that the participant is treated fairly. In *Morrissey*, the parolee was arrested and incarcerated without being informed as to the reason for the revocation of parole and the subsequent incarceration.<sup>186</sup> The *Morrissey* Court determined that, even as a parolee may not have the same "panoply of rights" that a person accused of a crime enjoys, the parolee must be entitled to due process given the potential grievous loss suffered in the revocation of parole.<sup>187</sup> That due process includes notice "that the hearing will take place and that its purpose is to determine whether there is probable cause to believe he has committed a parole violation. The notice should state what . . . violations have been

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unconstitutional. *See, e.g.*, *State v. LaPlaca*, 27 A.3d 719, 725–26 (N.H. 2011).

184. Meyer, *supra* note 77, § 8.7.

185. Two schools of thought have emerged in light of the Supreme Court's silence as to the form of such written notice. Some maintain that oral notice with an accompanying transcript satisfies the requirements promulgated in *Morrissey* and *Gagnon*. *See, e.g.*, *United States v. Yancey*, 827 F.2d 83, 89 (7th Cir. 1987), *cert. denied*, 485 U.S. 967 (1988). Others maintain that the mandate of *Morrissey* and *Gagnon* requires independent notice outlining the reason for the violation. *See, e.g.*, *United States v. Smith*, 767 F.2d 521, 524 (8th Cir. 1985). For a more in-depth discussion of the Supreme Court's failure to address this issue and the constitutionally acceptable forms of notice, see generally Mihal Nahari, *Due Process and Probation Revocation: The Written Statement Requirement*, 56 FORDHAM L. REV. 759 (1988).

186. *Morrissey v. Brewer*, 408 U.S. 471, 473–74 (1972).

187. *Id.* at 482.

alleged.”<sup>188</sup> After all, even if the government has an important interest in expeditiously returning parolees to incarceration if they violate their parole, society has just as great an interest “in not having parole revoked because of erroneous information or because of an erroneous evaluation of the need to revoke parole, given the breach of parole conditions.”<sup>189</sup> Society also has an additional “interest in treating the parolee with basic fairness: fair treatment in parole revocations will enhance the chance of rehabilitation by avoiding reactions to arbitrariness.”<sup>190</sup>

In Minnesota, the written notice requirement is codified in Minnesota Rule of Criminal Procedure 27.04.<sup>191</sup> The participant who is accused of violating the terms of Ramsey County Veterans Court receives oral notice from his case manager, and the matter is heard on the next available veterans court calendar.<sup>192</sup> This does not change if the participant faces the possibility of a jail sanction or potential termination. Even in the direst of situations, participants are only given some form of oral notice, either by the case manager outside of court or by the veterans court judge who informs the participant at the next potential hearing. This does not comport with the understanding of due process requirements. Oral notice is not sufficient, given *Morrissey* and its progeny.<sup>193</sup> Written notice is necessary under *Morrissey* because it allows the probationer the ability to understand the basis for the violation and provides a record for appeal.<sup>194</sup> Ultimately, the written statement requirement ensures,

188. *Id.* at 486–87.

189. *Id.* at 484 (citations omitted).

190. *Id.*

191. MINN. R. CRIM. P. 27.04, subd. 1(1)(a) (“Probation revocation proceedings must be initiated by a summons or warrant based on a written report, signed under penalty of perjury pursuant to Minnesota Statutes, section 358.116, showing probable cause to believe a probationer violated probation.”); *see, e.g.*, *State v. Enebak*, 272 N.W.2d 27, 29 (Minn. 1978) (“[B]etter practice dictates that [probation] serve . . . written notice on the defendant rather than orally state the amendments on the record at the initial hearing.”).

192. To be fair, most allegations of infractions in Ramsey County Veterans Court do not involve a restriction of liberty or property.

193. *But see* *Nahari*, *supra* note 185, at 761 (stating that written notice can come in the form of notice given on the record and a copy of a transcript given to the participant or probationer).

194. *See* *Haymes v. Regan*, 525 F.2d 540, 544 (2d Cir. 1975); *Rastelli v. Warden*, 610 F. Supp. 961, 974 (S.D.N.Y. 1985), *rev'd in part*, 782 F.2d 17 (2d Cir. 1986).



in appearance and reality, that the revocation comports with ideals of fairness.<sup>195</sup>

Second, while participants are given the opportunity to explain the occurrence behind the conduct meriting a sanction, the participant is not given the rights outlined in *Morrissey* to choose to contest the allegation and require that a burden of proof be met to justify any sanction.<sup>196</sup> Without this due process mechanism, participants will see the proceedings as unfair and less concerned about the participant's success.<sup>197</sup>

Third, the notion of waiving a probation violation, while not directly addressed in Minnesota, has been found unconstitutional in other state supreme courts.<sup>198</sup> Those courts have agreed that, while it is undeniable that a criminal defendant has the ability to waive certain rights and certain hearings (e.g., the right to trial and the right to a probation violation after adequate notice has been provided),<sup>199</sup> a blanket waiver to a probation violation prior to any notice or opportunity to be heard cannot be said to be done knowingly and voluntarily,<sup>200</sup> especially in light of an allegation of probation violation that the participant contests.<sup>201</sup> Such a waiver "would impugn the integrity of the judicial system and undermine public confidence in the system" as the defendant "would be subject to imprisonment without a hearing and without a court determination that the evidence against him was sufficient."<sup>202</sup>

The Minnesota Supreme Court has found a defendant's waiver of his rights to an appeal as part of a plea agreement invalid as

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195. *Morrissey*, 408 U.S. at 489.

196. As of this writing, no authority can be found to justify the waiver of such a hearing in this particular context. Indeed, probation violation hearing waivers prior to notice of a probation violation are arguably not valid.

197. 2 NAT'L ASS'N OF DRUG COURT PROF'LS, *supra* note 13, at 23.

198. See, e.g., *Staley v. State*, 851 So. 2d 805 (Fla. Dist. Ct. App. 2003); *State v. LaPlaca*, 27 A.3d 719 (N.H. 2011).

199. See *Staley*, 851 So. 2d at 807; *LaPlaca*, 27 A.3d at 724.

200. See *Staley*, 851 So. 2d at 807 (noting that the defendant "simply could not have knowingly and intelligently waived his right to contest allegations against him without knowing what those allegations were").

201. Cf. *Staley*, 851 So. 2d at 807; *LaPlaca*, 27 A.3d at 725 ("The defendant's advance waiver of the right to any and all hearings was akin to pleading guilty to any future allegations brought against him because the effect of such a waiver eliminated the obligation of the State to prove the allegations against him, and deprived him of the opportunity to contest them.").

202. *Staley*, 851 So. 2d at 808.

contrary to public policy.<sup>203</sup> Appeals rights are not waivable because those rights, along with the requirement that a defendant receive a fair trial, ensure fundamental fairness in due process.<sup>204</sup> More specifically, public policy requires that the criminal justice institution concern itself with the fairness and propriety of a conviction.<sup>205</sup> Such conviction requires the process of evaluating the rightfulness or wrongfulness of a conviction.<sup>206</sup>

The same basic principles of fundamental fairness and due process should apply to probation violations within veterans courts. The voluntariness of the waiver of a participant's right to a probation violation hearing, even with the advice of counsel, can easily be called into question given the disparity of bargaining power between the prosecutor and the participant.<sup>207</sup> Forcing a defendant to choose between the known benefit of participating in a treatment court and fair hearings associated with probationary accusations puts a defendant in an untenable position that erodes the fairness of probation violation hearings.<sup>208</sup> Allowing courts to accept waivers to rights that cannot be fully realized outside of an accusation of violating probation means insulating the courts, probation, and all criminal justice partners from being accountable for substantive and procedural errors at the expense of a defendant's liberty.<sup>209</sup> Moreover, if one considers the practical implications of waiving a right before it is realized, one can simply see the absurdity in such a practice: a participant in veterans court waiving her right to a probation violation hearing even before being able to cognize such a right is tantamount to a potential defendant entering into an agreement in exchange for a waiver of her trial rights even before

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203. See *Spann v. State*, 704 N.W.2d 486 (Minn. 2005). In *Spann*, the defendant entered into an agreement with the State of Minnesota, whereby the prosecutor agreed to recommend a particular sentence in exchange for the defendant waiving his right to appeal. *Id.* at 488. The Minnesota Supreme Court found, "based on public policy and due process considerations, that a defendant may not . . . waive the right to appeal." *Id.* at 493.

204. *Id.* at 493.

205. *Id.* at 493-94.

206. *Id.* at 493.

207. *Cf. id.* at 494 ("Allowing the state to require a defendant to waive the right to appeal . . . in order to obtain some benefit has the potential to frustrate [the courts' duty to ensure the fairness of trials]. Simply saying that the defendant is free to reject the state's offer does not eliminate the problem.").

208. *Cf. id.*

209. *See id.*

being charged with a crime.<sup>210</sup> That kind of waiver is simply untenable.

A participant's termination from a veterans treatment court is generally the penultimate act prior to probation revocation. The National Association of Drug Court Professionals Best Practice Standards states that participants "may be terminated from the Drug Court if they no longer can be managed safely in the community or if they fail repeatedly to comply with treatment or supervision requirements."<sup>211</sup>

In Ramsey County, a participant is removed when a participant has demonstrated a distinct lack of amenability or rehabilitative programming and resources have been exhausted. A participant in Ramsey County is told at the hearing prior to that participant's termination that the court and team are considering terminating the participant. That announcement is delayed by one week so that the team members may confer over that time period. If the team or, absent any consensus, the court decides that the participant is to be terminated, that announcement is made at the subsequent hearing one week from when oral notice was given.<sup>212</sup>

In Hennepin County Veterans Courts, participants are terminated "for failing to comply with program requirements after all attempts have been made to improve performance and motivation without success."<sup>213</sup> But that termination is preceded by some form of probation violation hearing.<sup>214</sup>

What due process is afforded the participant? We already know that procedural due process dictates that a participant be given

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210. *Cf.* *Staley v. State*, 851 So. 2d 805, 807 (Fla. Dist. Ct. App. 2003) ("[Defendant] simply could not have knowingly and intelligently waived his right to contest allegations against him without knowing what those allegations were. A probationer can certainly waive his rights to due process and to statutory procedures after they have been implicated. . . . But we do not believe he can *prospectively* waive these rights." (emphasis added)); *State v. LaPlaca*, 27 A.3d 719, 725 (N.H. 2011) ("It was impossible for the defendant to have full knowledge of the allegations against him when the facts giving rise to those allegations had yet to occur. The defendant's advance waiver of the right to any and all hearings was akin to pleading guilty to any future allegations brought against him . . .").

211. 2 NAT'L ASS'N OF DRUG COURT PROF'LS, *supra* note 13, at 28.

212. These statements are based upon the professional experience and observations of the author.

213. HENNEPIN COUNTY VETERANS COURT POLICY AND PROCEDURE MANUAL 11 (2014).

214. E-mail from Paul J. Maravigli, Assistant Hennepin Cty. Pub. Def., Hennepin Cty. Pub. Def.'s Office, to author (Dec. 11, 2016, 14:19 CST).

adequate notice and be granted a hearing in the event a participant is accused of violating the conditions of probation supervision. In a contested hearing, the prosecuting authority would present evidence to demonstrate that a participant has violated the conditions of participating in veterans treatment court. But does termination from a veterans treatment court require the same level of due process as a probation violation?

Some states have found that participation in a problem-solving or treatment court program is considered a liberty interest that, when threatened, deserves the same due process as a probation revocation hearing.<sup>215</sup> That liberty interest is similar to the liberty interest a parolee enjoys in that the parolee's liberty is conditional and taking away liberty requires due process.<sup>216</sup>

*B. The Right to a Fair and Impartial Magistrate*

The question of a defendant's right to a fair and impartial magistrate has existed since the inception of problem-solving courts in the late 1980s. Perhaps the best illustration of this comes from a colloquy between Judge Cindy Lederman, the first judge in the Miami-Dade County, Florida, drug court, and Professor Richard B. Cappalli of Temple University's Beasley School of Law:

Hon. Cindy Lederman: . . . If we as judges accept this challenge, we're no longer the referee or the spectator. We're a participant in the process. We're not just looking at the offense any more. We're looking more and more at the best interests, not just of the defendant, but of the defendant's family and the community as well.<sup>217</sup>

Cappalli: . . . When judges move out of the box of the law and into working with individual defendants, transforming them from law-breaking citizens into law-abiding citizens, we have to worry. Because what has always protected the bench has been the law. . . . If we take the mantle of the law's protections off of the judges and put

215. See, e.g., *State v. Rogers*, 170 P.3d 881 (Idaho 2007); *Gosha v. State*, 931 N.E.2d 432 (Ind. Ct. App. 2010); *Harris v. Commonwealth*, 689 S.E.2d 713 (Va. 2010).

216. *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972). Interestingly enough, the liberty interest does not exist until *after* acceptance into veterans treatment court. See, e.g., *People v. Realmuto*, D067789, 2016 WL 762326, at \*6 (Cal. Ct. App. Feb. 26, 2016).

217. Colloquium, *What Is a Traditional Judge Anyway? Problem Solving in the State Courts*, 84 JUDICATURE 78, 80 (2000).

them into these new roles, we have to worry about judicial neutrality, independence, and impartiality.<sup>218</sup>

While problem-solving courts continue to proliferate and thrive, the question has not simply disappeared. Most recently, the Minnesota Court of Appeals in *State v. Cleary* ruled that a judge, previously presiding over a defendant participant in drug court, was required to recuse himself in the interests of due process.<sup>219</sup> The striking feature of the *Cleary* decision is the implication that a drug court judge is not necessarily neutral, nor detached.<sup>220</sup> As the *Cleary* court indicated, “the relationship between a drug court judge and drug court probationer is more personal than the traditional relationship between a judge and a criminal defendant appearing before that judge.”<sup>221</sup> The court further noted that when a drug court judge is directly involved in the decision-making process to terminate a participant from drug court, that judge becomes “directly involved in the case.”<sup>222</sup> That direct involvement necessarily disqualifies a judge from presiding over any probation revocation hearing, as that judge is necessarily deemed neither neutral nor detached. If the judge is neither neutral nor detached, then “a reasonable examiner would question whether the judge could impartially conduct the proceeding,” thus disqualifying that judge.<sup>223</sup>

How, then, do judges in problem-solving courts reconcile the ability to be intimately involved in the recovery of the veterans treatment court participant with the easily-questioned impartiality of the presiding judges? How do judges in veterans treatment court address the implication that they are not neutral and detached if they regularly preside over veterans treatment court? The answer is,

218. *Id.* at 82.

219. 882 N.W.2d 899, 906 (Minn. Ct. App. 2016) (“Because the drug court judge was directly involved in the decision to terminate appellant from drug court . . . the judge became ‘directly involved in the case.’” (quoting *Morrissey*, 408 U.S. at 485)).

220. *Cf. id.* at 905–07; *see also* *Pearson v. State*, 308 Minn. 287, 289–90, 241 N.W.2d 490, 492 (1976) (discussing the importance of using an impartial and detached judge).

221. *Cleary*, 882 N.W.2d at 905.

222. *Id.* at 906.

223. *Id.* at 904 (citing *State v. Finch*, 865 N.W.2d 696, 705 (Minn. 2015)). Other courts require that the defendant make an affirmative showing that the presiding judge in a problem-solving court appears to be biased. *See, e.g.*, *Miss. Comm’n on Judicial Performance v. Thompson*, 169 So. 3d 857 (Miss. 2015); *State v. Baylea*, 999 A.2d 1080 (N.H. 2010).

sadly, not the fix-all answer that will make problem-solving court judges magically impartial, or at least not give the appearance of impropriety.<sup>224</sup> But the following suggestions, if followed, will help ensure that the participant will receive the best outcome based upon the presiding judge's actions.

The first step begins with ensuring procedural due process and fairness.<sup>225</sup> The perception of fairness by participants and anyone exposed to problem-solving courts will lead to significantly better outcomes for participants and for the veterans court as a whole.<sup>226</sup> Judges Kevin Burke and Steve Leben argue that judges are subject to four basic expectations that encompass procedural fairness.

The first is voice: "The ability to participate in a case by expressing one's" viewpoint engages individuals in the process of courtroom decision-making.<sup>227</sup> This participation is a critical indicator of overall satisfaction with a court proceeding. It turns out that the ability to talk to the judge increases satisfaction with the process even if individuals are told that their input will not affect the outcome.<sup>228</sup> The presence of voice, or lack thereof, has been shown

224. See MODEL CODE OF JUDICIAL CONDUCT R. 1.2 (AM. BAR. ASS'N 2011); MINN. CODE OF JUDICIAL CONDUCT R. 1.2 (2015).

225. Kevin Burke & Steve Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction*, 44 CT. REV. 1/2, 2007, at 4, 4.

226. See 1 NAT'L ASS'N OF DRUG COURT PROF'LS, *supra* note 67, at 23.

The [National Institute of Justice Multistate Adult Drug Court Evaluation] study found that significantly greater reductions in crime and substance use were produced by judges who were rated by independent observers as being more respectful, fair, attentive, enthusiastic, consistent and caring in their interactions with the participants in court. Similarly, a statewide study in New York reported significantly better outcomes for judges who were perceived by the participants as being fair, sympathetic, caring, concerned, understanding and open to learning about the disease of addiction. In contrast, outcomes were significantly poorer for judges who were perceived as being arbitrary, jumping to conclusions, or not giving participants an opportunity to explain their sides of the controversies. Program evaluations have similarly reported that supportive comments from the judge were associated with significantly better outcomes in Drug Courts whereas stigmatizing, hostile, or shaming comments from the judge were associated with significantly poorer outcomes.

*Id.* (citations omitted).

227. Burke & Leben, *supra* note 225, at 12.

228. Brian MacKenzie, *The Judge Is the Key Component: The Importance of Procedural Fairness in Drug-Treatment Courts*, 52 CT. REV. 8, 14 (2015) (citing Burke & Leben, *supra* note 225).

to affect an individual's willingness to accept the decision in a courtroom.<sup>229</sup>

The second expectation that encompasses procedural fairness is neutrality. Neutrality requires a judge to consistently apply legal principles, be an unbiased decision maker, and maintain "transparency" about how decisions are made.<sup>230</sup> Neutrality is, conceptually, fairness.<sup>231</sup> A participant who believes that a judge is fair, and that the judge balanced the participant's interests and the interests of the prosecutor, is much more likely to accept the decision than one who believes that the judge has already decided the case for justifications outside of the law.<sup>232</sup>

The third expectation is respectful treatment: Individuals are treated with dignity and their rights are obviously protected.<sup>233</sup> However, while judges are ethically obliged to maintain fairness and impartiality while respecting the due process rights of participants, such obligations do not convey respectful treatment.<sup>234</sup> Veterans treatment court participants must be acutely aware of the fairness of the judge and, by extension, the veterans court team.<sup>235</sup> Participants must understand that their due process rights will be both observed and protected.<sup>236</sup> Research has shown that legitimacy is created through respectful treatment, which, in turn, affects compliance.<sup>237</sup>

229. Burke & Leben, *supra* note 225, at 6.

230. *Id.*

231. MacKenzie, *supra* note 228, at 14.

232. *Id.*

233. Burke & Leben, *supra* note 225, at 6. This is a direct reflection of Canon 2 of the Code of Judicial Conduct and arguably connects the judge's authority with the requirement of procedural due process. *Cf.* MINN. CODE OF JUDICIAL CONDUCT Canon 2 (2016) (requiring judges to perform the duties of the office "impartially, competently and diligently").

234. MacKenzie, *supra* note 225, at 14.

235. *Id.*

236. *Id.*

237. *See* Burke & Leben, *supra* note 225, at 7 (citing E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988); citing Jerald Greenberg, *Looking Fair Versus Being Fair: Managing Impressions of Organizational Justice*, in *RESEARCH IN ORGANIZATIONAL BEHAVIOR* 111, 111-57 (Barry M. Staw & Larry L. Cummings eds., 1990)); *see also* JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* (1975); Jerald Greenberg, *Determinants of Perceived Fairness of Performance Evaluations*, 71 *J. APPLIED PSYCHOL.* 340 (1986); Jerald Greenberg & Robert Folger, *Procedural Justice, Participation, and the Fair Process Effect in Groups and Organizations*, in *BASIC GROUP PROCESSES* 235 (Paul B. Paulus ed. 1983); Larry Heuer et al., *The Generality of Procedural Justice Concerns: A*

The fourth expectation is trustworthy authorities. The veterans court judge must be seen as “benevolent, caring, and sincerely trying to help” the veterans court participants.<sup>238</sup> This trust is achieved “by listening to [the participants] and by explaining . . . decisions that address the [participants’] needs.”<sup>239</sup>

Judges Kevin Burke and Steve Leben suggest that if a presiding judge exercises these four principles, participants will be “more willing to accept a negative outcome in their case” so long as they believe “the decision was arrived at through a fair method.”<sup>240</sup> Moreover, “even a judge who scrupulously respects the [due process] rights of participants may nonetheless be perceived as unfair if [that judge] does not meet these expectations for procedural fairness.”<sup>241</sup>

Veterans court judges still have an ethical obligation to ensure that the due process standards required by the Constitution are strictly adhered to even if the judge is perceived to be fair. That is, the four principles of procedural fairness do not ameliorate the necessity to adhere to the bedrock principles of due process. The Minnesota Supreme Court has adopted the Code of Judicial Conduct that reflects the Model Code of Judicial Conduct promulgated by the American Bar Association.<sup>242</sup> Canon 2 requires a judge to perform the duties of the office “impartially, competently and diligently.”<sup>243</sup> Rule 2.6 of Canon 2 requires the veterans court judge to allow “every person who has a legal interest in a proceeding, or that person’s lawyer, the right to be heard according to law.”<sup>244</sup> In

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*Deservedness Model of Group Value and Self-interest Based Fairness Concerns*, 25 PERS. SOC. PSYCHOL. BULL. 1279 (1999); Tom R. Tyler, *The Relationship of the Outcome and Procedural Fairness: How Does Knowing the Outcome Influence Judgments About the Procedure?*, 9 SOC. JUST. RES. 311 (1996); Tom R. Tyler, *Psychological Models of the Justice Motive: Antecedents of Distributive and Procedural Justice*, 67 J. PERS. SOC. PSYCHOL. 850 (1994); Kees Van den Bos et al., *Sometimes Unfair Procedures Have Nice Aspects: On the Psychology of the Fair Process Effect*, 77 J. PERSONALITY & SOC. PSYCHOL. 324 (1999); Kees Van den Bos et al., *Evaluating Outcomes by Means of the Fair Process Effect: Evidence for Different Processes in Fairness and Satisfaction Judgments*, 74 J. PERSONALITY & SOC. PSYCHOL. 1493 (1998).

238. Burke & Leben, *supra* note 225, at 6.

239. *Id.*

240. *Id.*

241. *Id.*

242. MINN. CODE OF JUDICIAL CONDUCT Canon 2 (2016).

243. *Id.*

244. *Id.* R. 2.6.



some states, if a judge has directly violated a defendant's right to due process, that judge can be reprimanded or even removed.<sup>245</sup>

Some jurisdictions have suggested that, in the face of problem-solving court termination or probation revocation, due process standards require the judge to recuse herself from consideration.<sup>246</sup> In Oklahoma, for instance, the Court of Criminal Appeals recognized

the potential for bias to exist in a situation where a judge, assigned as part of the Drug Court team, is then presented with an application to revoke a participant from Drug Court. Requiring the District Court to act as Drug Court team member, evaluator, monitor and final adjudicator in a termination proceeding could compromise the impartiality of a district court judge assigned the responsibility of administering a Drug Court participant's program.<sup>247</sup>

The court recommended, in the instance where termination is likely and sought by the prosecutor and the defendant objects to the problem-solving court judge presiding over such a hearing, that "the defendant's application for recusal should be granted and the motion to remove the defendant from the [problem-solving court] should be assigned to another judge for resolution."<sup>248</sup> The court further stated, "It is the defendant's responsibility, when presenting this claim of bias and his request for recusal, to provide facts sufficient to support his claim that the judge assigned . . . was a member of the defendant's Drug Court Team."<sup>249</sup> In *State v. Cleary*, the Minnesota Court of Appeals recognized that same issue where "the drug court judge was directly involved in the decision to terminate appellant from drug court, which was the sole basis to revoke probation."<sup>250</sup> The *Cleary* court opined that the judge became

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245. See, e.g., *Miss. Comm'n on Judicial Performance v. Thompson*, 169 So. 3d 857, 874 (Miss. 2015); *Ohio State Bar Ass'n v. Goldie*, 894 N.E.2d 1226, 1230 (Ohio 2008); *In re Comm'n on Judicial Tenure and Discipline*, 916 A.2d 746, 755 (R.I. 2007).

246. See *Alexander v. State*, 48 P.3d 110, 114 (Okla. Crim. App. 2002). *But see* *Wilkinson v. State*, 641 S.E.2d 189, 191 (Ga. Ct. App. 2006) ("In connection with entering the drug court contract . . . [defendant] waived her right to seek recusal of [the drug court] judge . . .").

247. *Alexander*, 48 P.3d at 115.

248. *Id.*

249. *Id.*

250. *State v. Cleary*, 882 N.W.2d 899, 906 (Minn. Ct. App. 2016).

“directly involved in the case,” given the judge’s participation in terminating the defendant and therefore presented the appearance of bias.<sup>251</sup>

A judge, therefore, has both a legal and ethical obligation to uphold the rigors of due process. That means, when facing the potential deprivation of a liberty or property interest of the court participant, the veterans court judge must immediately consider what the canons and due process require. In light of the potential deprivation of liberty or property, the judge must ensure that notice is given to the participant.<sup>252</sup> The presiding judge of the veterans treatment court must consider whether the court is truly able to preside over the termination hearing.<sup>253</sup> If the participant wishes a contested evidentiary hearing to be held in front of a different judge, the presiding judge must grant that request.<sup>254</sup> The participant must have the opportunity to receive an evidentiary hearing.<sup>255</sup> The hearing must comport to standards promulgated in *Morrissey*,<sup>256</sup>

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251. *Id.* In *Cleary*, the participant appealed the probation revocation on the basis that the judge created an appearance of bias, violating Minnesota Rule of Judicial Conduct 2.9. *See id.* at 905. The Minnesota Court of Appeals noted that even before the judge participated in the collective team decision to terminate the participant, the judge enjoyed a “more personal [relationship] than the traditional relationship between a judge and a criminal defendant appearing before that judge.” *Id.* The judge participated in a party that celebrated the participant’s sobriety. *Id.* The judge further read journal entries from a journal maintained by the participant as ordered by the judge. *Id.* The *Cleary* court stated, “[W]here the judge learns the intimate details of the participant’s daily life, a reasonable observer with full knowledge of these facts and circumstances, could reasonably question the judge’s impartiality.” *Id.*

252. *See Gosha v. State*, 931 N.E.2d 432, 433 (Ind. Ct. App. 2010). The appellant in *Gosha* argued that he was not afforded minimal due process, including written notice and an evidentiary hearing, prior to termination from drug court. *Id.* The State simply argued that no formal due process requirement was codified in Indiana. *Id.* The Indiana Court of Appeals reversed, ordering the lower court to provide written notice and allow an evidentiary hearing to determine if termination was appropriate. *Id.* at 435.

253. *See* MODEL CODE OF JUDICIAL CONDUCT R. 1.2 (AM. BAR ASS’N 2010).

254. *Cleary*, 882 N.W.2d at 908; *see also* MODEL CODE OF JUDICIAL CONDUCT R. 1.2.

255. *Gosha*, 931 N.E.2d at 434–35.

256. *See Morrissey v. Brewer*, 408 U.S. 471 (1972).

*Gagnon*,<sup>257</sup> local case law,<sup>258</sup> and rules.<sup>259</sup> And if the evidentiary hearing yields a finding that the participant has indeed violated the terms and conditions of probation, the participant should receive a sanction that comports with the promulgated best practice standards.<sup>260</sup>

#### VI. THE CASE FOR A PRE-ADJUDICATION (OR DIVERSION) VETERANS TREATMENT COURT: A BIGGER CARROT AND AN EVEN BIGGER STICK

Different jurisdictions can determine what kind of veterans treatment court model they will adopt. Some jurisdictions have adopted a pre-plea diversion veterans treatment court.<sup>261</sup> Other jurisdictions can model their veterans court as post-plea, pre-adjudication,<sup>262</sup> while other jurisdictions can model their court after a post-adjudication, probation model.<sup>263</sup> Some jurisdictions can

257. See *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

258. See *Pearson v. State*, 308 Minn. 287, 289, 241 N.W.2d 490, 492 (1974); see also *State v. Beaulieu*, 859 N.W.2d 275, 280 (Minn. 2015); *State v. Cleary*, 882 N.W.2d 899, 906 (Minn. Ct. App. 2016).

259. MINN. R. CRIM. P. 27.04 (promulgating how probation violation and revocation hearings are conducted). The prosecutor has the burden of proving, by clear and convincing evidence, that the participant violated the terms and conditions of the veterans treatment court. See *State v. Ornelas*, 675 N.W.2d 74, 79 (Minn. 2004) (citing MINN. R. CRIM. P. 27.04, subd. 3).

260. See *supra* Section III.C.

261. “Pre-plea diversion court” means the pending criminal matter is diverted to veterans treatment court pre-plea; no plea is taken, and the participant begins the court program. See Carolyn Harden & Carson Fox, *Getting Started*, in NAT’L DRUG COURT INST., *supra* note 77, § 2.15.

262. See *id.* § 2.17. Also known as the “Deferred Entry of Judgment,” this model “offers prosecutors the opportunity to put more ‘teeth’ into the diversion program.” *Id.* § 2.17. Here, the participant enters a formal guilty plea. *Id.* “Upon successful completion, the participant may face a lighter sentence in some jurisdictions, such as a probationary sentence when jail time was a realistic probability. Alternatively, the graduate might have the ability to withdraw the guilty plea and have the charges dismissed. Upon unsuccessful termination, the participant faces regular sentencing.” *Id.*

263. See *id.* § 2.18. A post-adjudication, probation model “requires participants to plead guilty and receive a sentence of probation, with the term of probation requiring compliance with the drug court.” *Id.* Similar to other post-plea models, “the case will not get old, but the additional time that is needed for court preparation and entries of judgment often delay treatment entry.” *Id.* Prosecutors may recommend this model for more serious offenders “because a final judgment of guilt has been entered.” *Id.* Moreover, “the participant may have his or her probation terminated successfully or reduced” upon successful completion. *Id.*

adopt a probation violation or revocation model for veterans treatment courts that takes potential participants from the pool of individuals already on probation.<sup>264</sup> Many courts have adopted mixed models, allowing for participants to enter pre-plea, post-plea, pre-adjudication, post-adjudication, or post-probation violation.<sup>265</sup>

Is one model more effective than the other? Some practitioners argue that veterans treatment courts should be post-adjudication since the real incentive for participants is to become clean, sober, and productive.<sup>266</sup> But that justification cannot be enough. Other criminal justice academics may argue that convictions are a necessary function of criminal prosecution.<sup>267</sup> The average American might maintain that the purpose of convictions is to protect public safety by identifying individuals who have been proven to have committed crimes.<sup>268</sup> Do convictions actually protect public safety? Is it possible to enact a framework that protects public safety and reduces recidivism while minding the inherent rights of the criminally-involved veteran? While the idea of a pre-adjudication veterans treatment court may seem to flummox the uninformed prosecutor, the implementation of exactly such a court may indeed enhance public safety, save taxpayer money, and promote less recidivism better than a post-adjudication court or a model that combines both pre- and post-adjudication participants.

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264. *See id.* § 2.19. The probation revocation model “takes individuals who are already on probation, and who are up for a violation and possible revocation.” *Id.* Under this model, instead of “possibly having their probation revoked, the participants are offered drug court. If they successfully complete the drug court, their probation may be terminated successfully or shortened, or they may avoid a jail or prison sentence.” *Id.*

265. *See id.* § 2.20.

266. Veterans Court Track CLE at the Second Judicial District Court (Feb. 26, 2014).

267. *See* CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION 3-1.2(b) (AM. BAR ASS'N 4th ed. 2015).

268. DeAndre Brown, *What Is the Purpose of the Felony Conviction?*, LINKEDIN (May 11, 2015), <https://www.linkedin.com/pulse/what-purpose-felony-conviction-deandre-brown> (arguing that while many people believe the purpose of a felony conviction is to promote public safety, it more often results in an undue truncation of individual rights).

A. *A Pre-Adjudication Veterans Court Will Promote Less Recidivism Because Criminally-Involved Veterans Will Receive a Greater Legal Incentive to Succeed*

To be perfectly fair, no clear answer exists as to which model of veterans treatment courts is the most effective, with respect to outcome.<sup>269</sup> However, research suggests that many veterans facing the potential of a conviction for a felony or a crime of violence will do better in a treatment court when the court can apply some degree of coercive leverage<sup>270</sup> over participants to maintain engagement in treatment and in the court process.<sup>271</sup>

Part of why pre-trial diversion courts have not become the prevailing problem-solving court (let alone veterans treatment court) model is likely because not enough studies have been conducted to demonstrate effectiveness as a whole.<sup>272</sup> Part of why pre-trial diversion courts have not become the norm is also likely because prosecutors are disinclined to allow them for criminal defendants who have criminal histories.<sup>273</sup> Indeed, prosecutors are institutionally disinclined to favor pre-trial diversion programs.<sup>274</sup>

Despite any misgivings about pre-trial diversion veterans treatment courts, researchers have hypothesized that a problem-solving court has greater actual or perceived leverage over a participant.<sup>275</sup> Some problem-solving courts determined this issue in

269. CAREY ET AL., *supra* note 158, at 35.

270. “Coercive leverage” as used here means some form of legal benefit, whether it be in the form of stayed adjudication with the possibility of dismissal and expungement or perhaps even the potential of no incarcerated time to serve. *See id.* at 34–35.

271. John S. Goldkamp et al., *Do Drug Courts Work? Getting Inside the Drug Court Black Box*, 31 J. DRUG ISSUES 27, 31–41 (2001). *See generally* Longshore et al., *supra* note 9, at 7.

272. Melinda Tanner et al., *Evaluating Pretrial Services Programs in North Carolina*, 72 FED. PROB. J. 18 (2008).

273. *See, e.g.*, David B. Wexler, *Therapeutic Jurisprudence, Legal Landscapes and Form Reform: The Case of Diversion*, 22 FED. SENT’G REP. 17, 23 (2009) (arguing that even as the U.S. Attorney’s Criminal Resource Manual encourages innovative approaches, such as pre-trial diversion, that encouragement is undermined wholly by the fact that these approaches are not actually practiced).

274. *See generally* OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, AUDIT OF THE DEPARTMENT’S USE OF PRETRIAL DIVERSION AND DIVERSION-BASED COURT PROGRAMS AS ALTERNATIVES TO INCARCERATION (2016), <https://oig.justice.gov/reports/2016/a1619.pdf>.

275. Longshore et al., *supra* note 9, at 7.

recent evaluations.<sup>276</sup> One study shows that pre-adjudication problem-solving courts have a greater decline in recidivism than post-adjudication courts.<sup>277</sup> But while other forms of leverage exist,<sup>278</sup> a pre-adjudication veterans court offers other advantages.

*B. A Pre-Adjudication Veterans Court Will Give the Court Greater Flexibility*

Beyond the small body of research suggesting that a greater legal incentive results in better outcomes, it is necessary to consider due process protections afforded to the participant pre-adjudication. Participants on probation are necessarily afforded the due process rights decreed in *Morrissey* and *Gagnon*.<sup>279</sup> Do the same procedures apply pre-adjudication?<sup>280</sup> Consider the previous discussion explaining that participation in a veterans court first requires acceptance of the participant after being fully vetted as appropriate.<sup>281</sup> The prosecutor allows the participant to enter the court post-adjudication with no incarceration time to be served. The

276. AMANDA CISSNER ET AL., CTR. FOR COURT INNOVATION, A STATEWIDE EVALUATION OF NEW YORK'S ADULT DRUG COURTS 32 (2013), [https://www.bja.gov/Publications/CCI-UI-NYS\\_Adult\\_DC\\_Evaluation.pdf](https://www.bja.gov/Publications/CCI-UI-NYS_Adult_DC_Evaluation.pdf). Research with the New York Unified Court System suggests that pre-trial diversion was less effective than post-adjudication problem-solving courts. On the other hand, the leverage from drug courts in New York comes in the form of dismissal of the charge or reduction in severity of the crime, which is significant leverage. See MICHAEL REMPEL ET AL., CTR. FOR COURT INNOVATION, THE NEW YORK STATE ADULT DRUG COURT EVALUATION POLICIES, PARTICIPANTS AND IMPACTS 24 (2003), <https://www.nycourts.gov/reports/NYSAdultDrugCourtEvaluation.pdf>.

277. RYAN S. KING & JILL PASQUARELLA, THE SENTENCING PROJECT, DRUG COURTS: A REVIEW OF THE EVIDENCE 5 (2009).

278. See *supra* note 270 and accompanying text.

279. See *supra* notes 169–74 and accompanying text.

280. At first blush, the argument made here might appear to suggest that the procedural due process required by *Morrissey* and *Gagnon* is not necessary pre-adjudication. First, there is an important distinction between pre-adjudication and a stay of adjudication. In Ramsey County Veterans Court, the participant is still supervised by probation and is entitled to the same procedural rights guaranteed under *Morrissey* and *Gagnon* when the court stays adjudication. A participant who is accepted post-plea, pre-adjudication (i.e., the matter is simply continued without any adjudicative finding) is supervised outside the auspices of probation. The procedural rights are necessarily different and can be tailored under the law to provide the same fairness and rigor demanded by *Morrissey* and *Gagnon*, while also streamlining the process.

281. See *supra* notes 123–24, 137–38 and accompanying text; see also RAMSEY COUNTY HANDBOOK, *supra* note 134, at 3.

participant is adjudicated guilty of a crime and given a stayed sentence by the presiding veterans court judge. The participant is then subject to supervision in a post-adjudicative setting (i.e., probationary supervision). If the participant is accused of violating probation and potentially faces losing liberty or property, then the panoply of rights promulgated in *Morrissey* applies.

Now, consider the participant who is admitted to a veterans court pre-adjudication; that is, envision a participant who is gainfully involved in veterans treatment court prior to receiving a finding of guilt and the imposition of a sentence. The participant is not strictly on a post-adjudicative probationary supervision. Rather, Rule 6 of the Minnesota Rules of Criminal Procedure promulgates the rights of the accused on pre-trial release status. There is little discussion regarding the due process rights of the accused pre-trial when faced with a violation of release terms, except that a defendant is entitled to a hearing if he or she is accused of violating a condition of release that necessitates a revocation of release.<sup>282</sup>

Outside of Minnesota, some case law is instructive. In Florida, a participant in a pre-trial drug court intervention is not entitled to an evidentiary hearing prior to termination from the program.<sup>283</sup> Moreover, revocation of a criminal defendant's pre-trial release when the defendant is accused of committing a new crime does not necessitate a separate hearing.<sup>284</sup> Indeed, the procedural safeguards available post-adjudication are not available to the criminal defendant pre-trial.<sup>285</sup> In Texas, participation in a pre-trial diversion DWI court is not a liberty interest that triggers due process.<sup>286</sup>

The point is simple: in a post-adjudicative (or even a post-plea) veterans treatment court environment, a veterans court participant is subject to the due process rights outlined in *Morrissey*.<sup>287</sup> After a participant has entered a guilty plea, she enjoys the right to written notice, the right to a hearing to determine the sufficiency of the allegations, and the right to an evidentiary hearing. The participant may waive her right to either hearing. The participant enjoys a right to due process in light of any sanction that violates liberty or

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282. MINN. R. CRIM. P. 6.03, subd. 3.

283. See *Batista v. State*, 951 So. 2d 1008, 1009 (Fla. Dist. Ct. App. 2007).

284. See, e.g., *Harris v. Ryan*, 147 So. 3d 1100, 1101 (Fla. Dist. Ct. App. 2014).

285. See *Batista*, 951 So. 2d at 1011.

286. See, e.g., *Tope v. State*, 429 S.W.3d 75, 81 (Tex. Ct. App. 2014).

287. See *supra* notes 169–76 and accompanying text.

property,<sup>288</sup> and the participant enjoys a right to a neutral and detached magistrate.

In a pre-adjudicative veterans treatment court environment, the participant must necessarily waive her right to a speedy trial. The participant is not subject to *Morrissey* hearings because she is not placed on post-plea supervision. Therefore, the requirement for a separate “probable cause” and evidentiary hearing is not necessary. For those practitioners who believe the rigors of *Morrissey* impede the necessity of celerity, the pre-adjudication court alleviates those concerns.

*C. A Pre-Adjudication Veterans Court Will Provide Better Outcomes While Saving Money and Alleviating Limited Post-Adjudication Resources*

Among our Nation's conventional wisdom is the understanding that our criminal justice system is replete with too many defendants and not enough resources. Prisons and jails are over-crowded, resources to treat inmates in prisons are stretched thin, and ultimately public safety is threatened because ill-treated non-violent offenders are chronically incarcerated and released.<sup>289</sup> But plenty of studies demonstrate both the cost-effectiveness and better control over growing court calendars for criminal justice systems that implement diversion programs.<sup>290</sup> Moreover, consistent evidence exists that shows pretrial diversion programs result in positive outcomes for participants, including less time spent incarcerated, avoidance of criminal convictions that make finding gainful employment difficult, and improved substance use and mental health outcomes.<sup>291</sup> These outcomes surely bode well for protecting public safety, even if these outcomes seem counterintuitive to those with a “law and order” disposition. Naturally, these same outcomes have a direct impact on incarceration populations and post-

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288. See Kenneth W. Macke, *Pretrial Diversion from the Criminal Process: Some Constitutional Considerations*, 50 IND. L.J. 783, 794 (1975).

289. See Audrey Williams, *Prison Overcrowding Threatens Public Safety and State Budgets*, AM. LEGIS. EXCHANGE COUNCIL (Apr. 8, 2014), <https://www.alec.org/article/prison-overcrowding-threatens-public-safety-state-budgets/>.

290. See Joseph M. Zlatic et al., *Pretrial Diversion: The Overlooked Pretrial Services Evidence-Based Practice*, 74 FED. PROB. J., June 2010, at 41, 47.

291. Nahama Broner et al., *Outcomes of Mandated and Nonmandated New York City Jail Diversion for Offenders with Alcohol, Drug, and Mental Disorders*, 85 PRISON J. 18, 20 (2005).



adjudicative resources, including probationary supervision and prisons. In more than two decades of research and study, the costs of veterans courts and other problem-solving courts have yielded a savings of \$3,000 to \$13,000 per participant.<sup>292</sup> This is money saved directly from overcrowded and understaffed prisons and the costs of recidivism.

## VII. CONCLUSION

Veterans of our Armed Services face seemingly insurmountable challenges post-service. The United States has an ever-growing population of combat veterans returning from wars in Iraq, Afghanistan, and the Global War on Terror.<sup>293</sup> These extended wars have caused a considerable percentage of combat veterans to develop serious mental health or substance abuse problems.<sup>294</sup> Those same combat veterans find themselves becoming involved in the criminal justice system for crimes directly tied to the substance abuse and mental health issues attributed to their combat trauma. For those veterans, many criminal justice players have developed veterans courts to directly address the problems of veterans to reduce recidivism and enhance public safety. These veterans courts have been developed through a tradition started in drug courts across the country and enhanced through decades of studies and development of best practice standards.

Some courts have eschewed the requirements of due process to meet the need for temporal immediacy to sanction participants in veterans courts for infractions of veterans court conditions.<sup>295</sup> But temporal immediacy cannot justify violations of the due process guaranteed in the United States Constitution and case law. Due process in veterans courts is necessary, not only because it protects the criminally-involved veteran participating in a treatment court, but also because it gives the perception of fairness, which increases the effectiveness of the court. Furthermore, an effective court will reduce recidivism and ultimately promote public safety in ways that

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292. DOUGLAS B. MARLOWE, NAT'L ASS'N OF DRUG COURT PROF'LS, RESEARCH UPDATE ON ADULT DRUG COURTS 1, 3 (2010).

293. See Brockton D. Hunter, *Echoes of War: Combat Trauma, Criminal Behavior, and How We Can Do Better This Time Around*, in THE ATTORNEY'S GUIDE TO DEFENDING VETERANS IN CRIMINAL COURT, *supra* note 16, at 35.

294. See *id.*

295. See Russell, *supra* note 16, at 524.

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traditional forms of community supervision and incarceration cannot.

Due process is only part of the equation for success in any veterans court. Participants should expect a presiding judge who will treat all participants fairly, respectfully, and truthfully. Presiding judges should make certain that due process standards are followed alongside best practice standards.

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