

# THE CONSTITUTIONALITY OF A PROSECUTORIAL VETO IN VETERANS TREATMENT COURTS

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## VALUE STATEMENT

This legal commentary discusses the constitutional implications of the prosecutorial veto in veterans treatment courts, and includes practical guidance for judges and attorneys in avoiding potential constitutional violations.

## ABSTRACT

Veterans treatment courts (VTCs) must safeguard constitutional rights, including fundamental due process and equal protection rights. To protect those fundamental rights, VTCs must adopt written policies and procedures about their court's target population, implement objective eligibility and enrollment criteria, and eliminate subjective influences, including any prosecutorial vetoes, from enrollment decisions. VTCs must also maintain fidelity to constitutional separation of powers. When VTC prosecutors exercise a unilateral veto over a defendant's enrollment in the program, these important constitutional rights are threatened. As treatment court jurisprudence develops, courts affirm that while a prosecutor retains discretion on pre-plea or pre-adjudication plea agreements, prosecutors may not unconstitutionally infringe on the judiciary's discretionary power to impose a lawful sentence, including a VTC sentence for eligible defendants.

## KEYWORDS

Veterans treatment court, prosecutor, prosecutorial veto, separation of powers, judicial branch, executive branch, due process, equal protection, gatekeeper

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## INTRODUCTION

A prosecutor is a key member of a veterans treatment court (VTC) team (National Association of Drug Court Professionals (NADCP) 2015). A recent nationwide survey of 99 VTCs revealed that 88 percent of responding VTCs had a prosecutor assigned to their VTC (Justice Programs Office 2016). Prosecutors perform many functions in the administration and operation of a VTC. In some VTCs, these functions include prosecutors serving as a de facto gatekeeper on a veteran's participation in VTC. When this gatekeeping function becomes a veto on a veteran's participation in VTC, it can violate a veteran's equal protection and due process rights and unconstitutionally infringe on the executive branch-judicial branch separation of powers. By implementing written policies and procedures on a VTC's target population, using objective eligibility and enrollment criteria, defining team member

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roles, and maintaining fidelity to constitutional separation of powers, a prosecutorial veto is unnecessary, and VTCs ensure a veteran's constitutional rights are protected.

## NADCP BEST PRACTICE STANDARDS

A VTC cannot properly function without a multidisciplinary team, including a judge, program coordinator, prosecutor, defense counsel, treatment providers, supervision officer, and law enforcement officer (NADCP 2015). VTC teams ideally discuss the enrollment of potential veterans at pre-court staff meetings (NADCP 2015). When sharing information about a potential veteran participant, team members should share specific data relating to a participant's eligibility for VTC (NADCP 2015). Likewise, the communication of all team members' "relevant insights, observations, and recommendations based on their professional knowledge, training, and experience" is critically important (NADCP 2015, 38).

To facilitate this team communication about potential veteran participants, VTCs must adopt objective written eligibility and exclusion criteria and ensure all team members, especially judges and prosecutors, understand those criteria (NADCP 2013). A VTC cannot "apply subjective criteria or personal impressions to determine participants' suitability for the program" (NADCP 2013, 5). Including informal or subjective enrollment criteria or allowing a prosecutor or other team member to serve as a gatekeeper heightens the likelihood that otherwise eligible veterans will be rejected from a VTC (NADCP 2013). It is clear that "[r]emoving subjective eligibility restrictions and applying evidence-based selection criteria significantly increases the effectiveness and cost-effectiveness of Drug Courts by allowing them to serve the most appropriate population" (NADCP 2013, 6).

Fidelity to the best practice standards is jeopardized when a prosecutor usurps a gatekeeping function, exercising unfettered veto power over a veteran defendant's suitability or participation in the VTC program. Such suitability determinations have the "potential to exclude individuals from Drug Courts for reasons that are empirically invalid" and "should be avoided" (NADCP 2013, 6). Utilization of a prosecutorial veto undermines the goal that treatment courts "serve every drug-addicted person in the criminal justice system who meets evidence-based eligibility criteria for the programs" (NADCP 2015, 52). The emphasis in enrollment decisions must be on objective criteria, not a prosecutor's individual preferences. For instance, if a veteran is found guilty of possession of illegal drugs, has a diagnosed substance use disorder, and meets a high risk/high need standard, it is inappropriate for a prosecutor to usurp a judge's authority to allow that veteran entry into a VTC.

## PROSECUTOR ROLES AND RESPONSIBILITIES IN VTC

The roles and responsibilities of a treatment court prosecutor differ from a prosecutor's traditional roles and responsibilities in the criminal justice system (Koozmin 2016).

*In a traditional court of law, the prosecutor is obligated to seek justice by convicting those who have violated the law. In [treatment] courts, prosecutors are expected to use a therapeutic*

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*approach, with a willingness to work with others on the [treatment] court team, and support the mission and goals of problem-solving courts. (Koozmin 2016, 1)*

In the early days of treatment courts, prosecutors were afforded gatekeeper status. Prosecutors unilaterally determined who participated in drug treatment courts and the conditions of that participation (Koozmin 2016).

While many prosecutors continue to perform a gatekeeping function or veto, this is not a role that is contemplated by evidence-based best practice standards. The National Drug Court Institute (NDCI) identifies the following nine core competencies of a treatment court prosecutor (2010, 11-14):

- 1) Participates fully as a drug court team member, committing him or herself to the program mission and goals and works as a full partner to ensure their success.
- 2) The prosecutor, while in drug court, participates as a team member, operating in a non-adversarial manner, promoting a sense of a unified team member.
- 3) As part of the drug court team, in appropriate non-court settings (i.e. staffing), the prosecutor advocates for effective incentives and sanctions for program compliance or lack thereof.
- 4) Ensures community safety concerns by maintaining eligibility standards while participating in a non-adversarial environment which focuses on the benefits of therapeutic program outcomes.
- 5) Monitors offender progress to define parameters of behavior that allow continued program participation and suggest effective incentives and sanctions for program compliance.
- 6) Is knowledgeable about addiction, alcoholism and pharmacology generally and applies that knowledge to respond to compliance in a therapeutically appropriate manner.
- 7) Is knowledgeable of gender, age and cultural issues that may impact the offender's success.
- 8) Contributes to the team's efforts in community education and local resource acquisition.
- 9) Contributes to education of peers, colleagues and judiciary in the efficacy of drug courts.

However, a prosecutor's veto power over a veteran's participation in VTC undermines the integrity of NDCI's core competencies two and four. Core competency two requires a prosecutor to function as a team member and participate equally with other team members in reaching decisions. When a prosecutor uses his or her veto power, the prosecutor disrupts the non-adversarial balance inherent in a VTC.

Core competency four requires prosecutors to address community safety concerns through eligibility standards. For instance, if a VTC excludes sex offenders, then the exclusion must be due to an eligibility standard, and all sex offenders are to be excluded. This core competency requires that enrollment decisions are made based on objective eligibility standards, not the unilateral whims of prosecutors or other team members. While prosecutors may argue that a veto is necessary to protect public safety, the veto must be accomplished through objective written enrollment criteria, not individualized decisions. Prosecutors should be directly involved in formulating objective eligibility criteria that is "evidence-

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based in order to target the ideal population that will maximize cost savings and public safety outcomes, while maintaining consistency among the participant population” (Koozmin 2016, 2). Through the collaborative nature of a VTC, prosecutors can fulfill their public safety obligation by regularly participating in staffing and conducting legal screenings of potential veteran participants, as well as demonstrating why a particular veteran is not an ideal participant if the prosecutor objects to a candidate (Koozmin 2016). A prosecutor’s objection to enrolling a particular participant, however, must be based on a legal disqualifier, clearly outlined in the eligibility criteria, and not subjective determinations or an outright veto that threatens evidence-based best practices and core competencies (Koozmin 2016).

### Entry into VTC

VTCs enroll eligible veterans at multiple points in the criminal case disposition process, including on a pre-plea diversionary sentence, post-plea or post-adjudication sentence, or probation violation disposition (Justice Programs Office 2016). American University’s survey of 109 VTC programs revealed that most were post-plea, post-adjudication, and/or probation violation options, while pre-plea was the least common and evident in only 38 percent of VTCs (Justice Programs Office 2016, 13).

A VTC’s structure impacts a prosecutor’s veto over a veteran’s enrollment in the program. While all decisions should be made using objective written eligibility criteria, a prosecutor is afforded broad discretion on charging decisions and plea agreements under constitutional separation of powers (*In re Ellis* 2004; *United States v. Banuelos-Rodriguez* 2000). In a constitutional system, the executive branch decides what criminal charges to file and whom to charge with crimes, and the judicial branch is not involved in such decisions (*Manduley v. Superior Ct.* 2001). On the other hand, once charges are filed, the judicial branch has authority over the criminal justice process and, subject to legislative guidelines, imposes sentence on a convicted defendant (*Manduley v. Superior Ct.* 2001). The prosecution has no involvement in the judicial branch’s sentencing function. As one court explained, while plea agreements affecting sentencing powers of courts generally fall within the discretion of the court, plea bargains involving charging decisions are primarily within the discretion of the prosecutor (*United States v. Robertson*, 1995).

In a VTC, prosecutors possess broad discretion on whether to allow a veteran’s pre-plea or pre-adjudication diversion into a VTC program. No judge can force a prosecutor into a pre-plea or pre-adjudication diversion agreement where a prosecutor objects. In that respect, a prosecutor has a de facto veto over such a diversionary arrangement. After a defendant is found guilty, however, separation of powers dictates that the judicial branch has exclusive jurisdiction over sentencing a defendant. If a prosecutor vetoes a court’s legally imposed sentence,

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whether VTC or otherwise, constitutional separation of powers issues are implicated. As one court emphasized, “It is the court’s duty to impose the sentence, not the prosecution’s” (*Mower v. State* 1988).

## LEGAL CHALLENGES TO THE PROSECUTORIAL VETO

Before treatment courts, courts routinely addressed analogous separation of powers cases involving a prosecutor’s express or de facto veto over a judge’s sentencing power. These cases continued with the inception of treatment courts. Most courts considering the issue have held that a prosecutorial veto violates separation of powers, but other courts in specific, limited instances have reached a contrary holding.

### Separation of Powers Doctrine

Former United States Supreme Court Chief Justice Warren Burger explained the separation of powers doctrine as:

*The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial. The declared purpose of separating and dividing the powers of government, of course, was to diffuse power the better to secure liberty. [These words] echo the famous warning of Montesquieu, quoted by James Madison in the Federalist No. 47, that ‘there can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates...’ (Bowsher v. Synar 1986)*

In applying these separation of powers principles to criminal law, the legislature prescribes statutes and penalties (*United States v. Grayson* 1978). The executive investigates, indicts, and files cases to the court and jury (*United States v. Grayson* 1978). The judiciary imposes a sentence by applying the sentencing statutes to the facts in each case (*United States v. Grayson* 1978). Sentencing is a quintessential judicial function (*United States v. Grayson* 1978).

Determining whether a statute or practice violates the separation of powers doctrine requires analyzing whether the scheme grants powers to one government branch that are reserved to another branch (*Jose Gubiensio-Ortiz v. Kanahele* 1988). This analysis also requires considering whether the scheme “prevents [the affected branch] from accomplishing its constitutionally assigned functions” and, if so, whether the impairment is justified by an “overriding need to promote objectives within the constitutional authority of [the infringing] branch” (*Nixon v. Administrator of Gen. Svcs.* 1977).

A prosecutorial veto disrupts the interplay between these elementary governmental powers. As the Pennsylvania Supreme Court emphasized, “A prosecutorial veto power, immune from judicial review and serving no legitimate interest, derogates both the fairness and the appearance of fairness which are essential to the administration of criminal justice” (*Commonwealth v. Wharton* 1981). When prosecutors veto a judge’s lawful sentence, the appearance of justice is eviscerated, particularly involving a VTC sentence.

### Courts Holding the Prosecutorial Veto Unconstitutional

In an early case, the California Supreme Court considered whether a prosecutor could veto a judge’s sentencing decision diverting a defendant into a treatment program (*People v. On Tai Ho* 1974). In *People v. On Tai Ho*, a statute required prosecutorial consent to a diversionary treatment program sen-

tence. The court's analysis on the separation of powers doctrine, as it relates to treatment programs, is instructive and persuasive.

*By the time the case goes through the probation investigation and report...and reaches the hearing mandated...the prosecutorial die has long since been cast. The case is "before the court" for disposition, and disposition is a function of the judicial power no matter what the outcome...*

*[W]hen the jurisdiction of a court has been properly invoked by the filing of a criminal charge, the disposition of that charge becomes a judicial responsibility. It is true that acquittal or sentencing is the typical choice open to the court, but in appropriate cases it is not the only termination. With the development of more sophisticated responses to the wide range of antisocial behavior traditionally subsumed under the heading of "crime," alternative means of disposition have been confided to the judiciary...In turn, civil commitment to the narcotics addict rehabilitation program is a disposition which may be viewed as a specialized form of probation...it too is an exercise of the judicial power...*

*In other words, the district attorney may screen for eligibility, the probation department may investigate the facts, but it is the court who makes the decision. (People v. On Tai Ho, 1974)*

Because the diversionary program gave the prosecutor an absolute veto, the California Supreme Court determined it violated separation of powers by impermissibly infringing on the court's sentencing power. The court severed the prosecutorial consent language from the statute.

In *Sledge v. Superior Court* (1974), a companion case to *People v. On Tai Ho* (1974), the defendant challenged the constitutionality of a statute affording a prosecutor the power to disqualify a defendant from a diversionary program. Although the prosecutor's role was performed after charges were filed, the court concluded that the statute did not violate the separation of powers doctrine because the statute did not involve the exercise of broad discretionary powers. Rather, the prosecutor simply applied specific legislatively-prescribed criteria, making the de facto veto automatic rather than discretionary. The court concluded this limited and ministerial prosecutorial function did not constitute an exercise of judicial authority (*Sledge v. Superior Ct.* 1974).

Taken together, *People v. On Tai Ho* (1974) and *Sledge v. Superior Court* (1974) hold that if a prosecutor can usurp judicial discretion and authority by issuing a veto over a judicial decision, then the exercise of that veto power is unconstitutional. If, however, a prosecutor is exercising broad discretion before charges are filed or engaging in a ministerial function after charges are filed, then the separation of powers doctrine is not implicated.

Since *People v. On Tai Ho* (1974) and *Sledge v. Superior Court* (1974), many courts have examined the prosecutorial veto in non-drug treatment court contexts. The Minnesota Supreme Court determined a statute giving prosecutors sole authority to seek an exception to a mandatory minimum sentence acted akin to the prosecutorial veto in *People v. On Tai Ho* (1974) and violated separation of powers by infringing upon the judge's sentencing power (*State v. Olson* 1982). The court held that the final disposition of a criminal case is ultimately a matter for the presiding judge, not the prosecutor. As the court stated in *State v. Olson*, once the legislature has defined the range of punishments for a particular offense, it cannot "condition the imposition of the sentence by the court upon the prior approval of the prosecutor" (1982). Similarly, the Arizona Court of Appeals determined a statute giving prosecutors sole power to make an alternative sentencing recommendation was analogous to the pros-



ecutorial veto in *People v. On Tai Ho* (1974) and violated separation of powers by infringing on the judicial function of deciding the sentence (*State v. Jones* 1984).

With the expansion of treatment courts, these separation of powers principles precluding a prosecutorial veto from interfering with a judge's sentencing power have been applied to treatment court programs. In *Stromberg v. Second Judicial District Court* (2009), the Nevada Supreme Court determined that prosecutorial consent was not required for a court to sentence a defendant into a treatment program. In *Comai v. State* (2007), the Indiana Court of Appeals determined it was properly within a judge's discretion whether to allow someone to enter a drug treatment court, even though the prosecutor incorrectly claimed to possess veto power.

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In *State v. Easley* (2014), the most prominent and applicable case to treatment courts to date, the Idaho Supreme Court directly confronted whether a prosecutorial veto over participation in a post-adjudication mental health treatment court violated separation of powers. The court plainly held the prosecutorial veto was unconstitutional:

*The post-judgment prosecutorial veto violates the Separation of Powers doctrine. Whatever authority prosecutors have as 'judicial officers,' that authority does not extend to determining sentencing when a defendant has been adjudicated guilty of a violation. That is the court's authority. It cannot be contracted away... Diversion in the pre-judgment process remains collaborative. But the post-judgment authority to sentence is the prerogative of the courts within the bounds of existing law and constitutional standards. The courts cannot contract or bargain away this authority. And, the prosecutor cannot veto this judicial function. (State v. Easley 2014)*

These cases clarify that the legislative branch decides what constitutes a crime and the range of potential sentences. The executive branch enforces the laws enacted by the legislative branch. The judicial branch interprets the laws. In the criminal context, the judicial branch's role in interpreting the laws involves determining the sentence. This judicial power may not be encroached by the other branches of government, including an executive branch prosecutor.

## **Courts Holding the Prosecutorial Veto Constitutional**

In varying limited contexts, other courts have reached the contrary conclusion that a prosecutorial veto does not violate the separation of powers doctrine. In *State v. Taylor* (2000), the Louisiana Supreme Court rejected a separation of powers challenge to a statute allowing a prosecutor to initiate the screening process for treatment court when a judge could ultimately decide whether a defendant could enter the treatment court program. The statute at issue provided only for pretrial diversion. In that context, the court's holding follows separation of powers principles and a prosecutor's treatment court roles and responsibilities. Since *State v. Taylor* (2000) was decided, the Louisiana legislature enacted a 2014

VTC statute, which allows a prosecutor to refer participants to VTC but expressly provides that “the judge shall make the final determination of eligibility” (La. Rev. Stat. Ann. § 13:5366 2017). Although *State v. Taylor* (2000) is not overruled in Louisiana, the practical effect of the opinion is unclear given the subsequent statutory mandate on a judicial eligibility determination.

In *Woodward v. Morrissey* (1999), the Oklahoma Court of Criminal Appeals found no separation of powers violation with a statute that gave the prosecutor veto power over drug court admission. The court explained that the governing statute required a participant to enter a plea agreement for the drug court. Since no defendant has a constitutional right to a plea agreement and the prosecutor decides how and when to prosecute a defendant, separation of powers was not implicated. *Woodward v. Morrissey* (1999) also supports the distinction between pre-adjudication and post-adjudication cases because it recognizes the court has no authority to force the prosecutor to extend a plea agreement to a defendant, and in Oklahoma, a participant cannot enter the treatment program except through a plea agreement (Okla. Stat. Ann. § 471.6 2017).

In *C.D.C. v. State* (2001), the Alabama Court of Criminal Appeals determined there was no due process violation for a prosecutor’s veto over admission into a drug court. The court found this decision was solely within the prosecutor’s discretion and not subject to appellate review. The reasoning was based upon a statute that allowed entry into drug court solely for deferred prosecution cases. Similarly, this supports the distinction between pre-adjudication and post-adjudication cases.

In two treatment court cases, the Washington Court of Appeals similarly found no separation of powers violation involving a prosecutor’s veto in *State v. Diluzio* (2004) and *State v. Waldenburg* (2013). In *State v. Waldenburg* (2013), the Washington Court of Appeals considered a treatment court’s local eligibility criteria requiring prosecutorial approval for enrollment. The court upheld the local rule requirement because “it is within the prosecutor’s discretion whether to remove a charged offender from the regular course of prosecution and punishment and to refer him instead to drug court” (*State v. Waldenburg* 2013). Similarly, in *State v. Diluzio* (2004), the court specifically examined and rejected *People v. On Tai Ho* (1974), holding the veto was permissible because it related to an initial eligibility determination instead of ultimate entry. Although the court’s rationale may seem like a distinction without a difference, the court emphasized that the prosecutor determined the defendant did not meet the initial eligibility criteria for the Spokane Drug Court and properly exercised the veto power.

However, the statute underlying those cases was repealed and replaced in 2015, and the current version of Washington’s treatment court statute appears to abrogate these decisions. Washington Revised Code Section 2.30.030(8) (2017) expressly provides that “Nothing in this section prohibits a district or municipal court from ordering treatment or other conditions of sentence or probation following a conviction, with the consent of either the prosecutor or defendant.” The statute also places discretion in the therapeutic court judge to decline a participant and enumerates objective eligibility and enrollment criteria (Wash. Rev. Code § 2.30.030 2017). A fair conclusion is this statutory revision likely changes the prosecutorial veto previously recognized as constitutional in Washington.

## VTC-SPECIFIC STATE STATUTES

### Model Veterans Treatment Court Act

On July 20, 2017, the National Conference of Commissioners on Uniform State Laws Uniform Law Commission passed the Model Veterans Treatment Court Act. Under this proposed legislation, which



is recommended for enactment in all states, the Uniform Law Commission considered and adopted the New Jersey approach whereby a veteran's participation in a VTC is subject to prosecution and court approval for a pretrial diversion but approved solely by the court in all other cases. In its comment to the Act, the Commission noted the following:

*Requiring the approval of the prosecutor to allow [a pre-trial diversion] entry into the veterans treatment court allows the state to ensure that crimes or defendants the state feels are inappropriate for therapeutic diversion are prosecuted in the normal course.” (National Conference of Commissioners on Uniform State Laws 2017, 13).*

The Model Veterans Treatment Court Act (2017, 11-12) requires that prosecutors and judges consider eligibility and enrollment factors listed below in determining whether admission to a VTC is in the interests of justice and of benefit to the veteran and the community:

- 1) The nature and circumstances of the offense charged;
- 2) Special characteristics or circumstances of the defendant;
- 3) The defendant's criminal history and whether the defendant previously participated in a veterans treatment court or a similar program;
- 4) Whether the defendant's needs exceed treatment resources available to the veterans treatment court;
- 5) The impact on the community of the defendant's participation and treatment in the veterans treatment court;
- 6) Recommendations of any law-enforcement agency involved in investigating or arresting the defendant;
- 7) Special characteristics or circumstances of the victim or alleged victim;
- 8) Subject to subsection (c), a recommendation of the victim or alleged victim;
- 9) Provision for and the likelihood of obtaining restitution from the defendant over the course of participation in the veterans treatment court;
- 10) Mitigating circumstances;
- 11) Other circumstances reasonably related to the defendant's case.

In the event that a domestic violence offense is the basis for a veteran's participation in VTC (subsection c), the court and the prosecutor “shall seek the recommendation of the victim or alleged victim of the offense (National Conference of Commissioners on Uniform State Laws 2017, 11-12).

## Selected State VTC Statutes

**New Jersey separation of powers and limitation on prosecutorial veto.** In 2012, New Jersey amended its treatment court statute to, inter alia, expressly eliminate a prosecutor's veto over drug treatment court participation (N.J. Stat. Ann. § 2C:35-14 2017). The New Jersey Attorney General issued a memorandum to county prosecutors explaining the new law and the prosecutor's role:

*The...elimination of prosecutorial control over the decision to sentence certain defendants to special probation does not mean that prosecutors can now stand back as idle spectators to the Drug Court admissions process. To the contrary, now more than ever, prosecutors will be expected to carefully review cases and articulate their concerns when they believe that a particular defendant's*

*participation in Drug Court poses a safety risk or is otherwise inappropriate. Prosecutors, in other words, will continue to exert considerable influence as gatekeepers, not by wielding de facto veto power, but rather through the strength of their case-specific arguments, and the credibility that they earn with Drug Court Judges through their own active involvements in all aspects of the program.* (Chiesa 2012, 2)

The New Jersey approach does not strip the prosecution of all influence. Rather, as the New Jersey Attorney General explains to local prosecutors, if a prosecutor does not believe a treatment court sentence is appropriate, the prosecutor should present sentencing arguments and advocate for an alternative sentence. Like any other sentence, the prosecutor is free to zealously advocate for a particular outcome, with the ultimate sentence committed to the sound discretion of the court (Chiesa 2012). New Jersey's approach fully follows the separation of powers doctrine and the prosecutor's VTC roles and responsibilities.

**Other state statutes limiting a prosecutorial veto.** Similar to the Model Veterans Treatment Court Act previously reviewed, many states enacting VTC legislation have limited prosecutorial objections to a veteran's entry into a VTC.<sup>2</sup> For example, Arizona simply requires a court to notify a prosecutor of a referral to a VTC (Ariz. Rev. Stat. § 22-601(C) 2017). Georgia allows a court to refer any criminal case to a VTC and only requires prosecutorial consent if the referral is prior to entry of a sentence (Ga. Code Ann. § 15-1-17(2) 2017). Illinois allowed a prosecutorial veto over a veteran's participation in VTC, but a legislative amendment effective January 1, 2018, expressly eliminated that prosecutorial veto (730 Ill. Comp. Stat. 167/20 2018). Michigan allows a prosecutorial veto if a veteran is referred to a VTC under a delayed sentence, deferred entry of judgment, or deviation from sentencing guidelines (Mich. Comp. Laws § 600.1205(2) 2017). Washington expressly provides that a prosecutor cannot prevent a court from imposing a treatment program as a sentencing condition (Wash. Rev. Code § 2.30.030(8) 2017).

**Other states with VTC statutes do not provide for a prosecutorial veto** (Colo. Rev. Stat. § 13-5-144 2017; Ind. Code Ann. § 33-23-16-10 2017; Me. Rev. Stat. Ann. § 433 2017; Mo. Rev. Stat. § 478.008 2017; R.I. Gen. Laws § 8-8-1.1 2017; S.C. Code Ann. § 14-29-10 2017; Tenn. Code Ann. § 16-6-101 2017; Utah Code Ann. § 78A-5-301 2017). These statutes, along with the Model Veterans Treatment Court Act, are fully consistent with the separation of powers doctrine and a prosecutor's VTC roles and responsibilities.

**State statutes preserving a prosecutorial veto.** Some states with VTC statutes have preserved a form of prosecutorial veto. Nevada allows a prosecutorial veto if a defendant is referred to a VTC and the underlying offense involved the use or threatened use of force or violence (Nev. Rev. Stat. § 176A.290(2) 2017). Florida provides that entry into a VTC must be based upon a sentencing court's assessment of a defendant's:

*[C]riminal history, military service, substance abuse treatment needs, mental health treatment needs, amenability to the services of the program, the recommendations of the state attorney and victim, if any, and the defendant's agreement to enter the program" (Fla. Stat. Ann. § 394.47891 2017; italics added for emphasis).*

Texas expressly requires prosecutorial consent to a veteran's participation in VTC (Tex. Govt. Code Ann. § 124.002 2017).

<sup>2</sup> Many states have generalized treatment court legislation. This article does not broadly analyze state treatment court statutes. This analysis is confined to veterans treatment court legislation.

**Other states provide conflicting eligibility requirements.** On the one hand, Mississippi’s statute requires “the attorney representing the state must consent to the defendant’s participation in the program” but also provides “[t]he court having jurisdiction over a person ... shall have the final determination about whether the person may participate in the Veterans Treatment Court program” (Miss. Code Ann. § 9-25-1 2017). Louisiana also provides conflicting eligibility requirements. In one subpart of its statute, Louisiana expressly requires prosecutor approval before a veteran is eligible for VTC but in a later section provides that the “judge shall make the final determination of eligibility” (La. Rev. Stat. Ann. § 13:5366 2017). These statutes have not been challenged on separation of powers grounds.

## RECOMMENDATIONS

Prosecutors play a crucial role in VTCs. Prosecutors perform a quasi-gatekeeper role, ensuring that a veteran convicted of a statutorily ineligible offense is not enrolled in a VTC. They must make recommendations to a sentencing court under statutory correctional and sentencing policies, including reasons supporting and opposing a veteran’s entry into a VTC. Prosecutors must ensure courts impose mandatory minimum sentences and argue whether an exception applies in a particular case.

As a treatment court team member, prosecutors must attend staff meetings and court hearings to facilitate information sharing, monitoring of participant compliance, and advocate for sanctions and incentives (Koozmin 2016). These roles and responsibilities are crucial to the success of a VTC. One comprehensive study revealed a 34 percent greater cost savings and 15 percent increase in graduation rates when prosecutors attended staff meetings (Carey, Finigan, and Pukstas 2008). In any VTC, a prosecutor must always advocate “on behalf of public safety, victim interests, and holding participants accountable for meeting their obligations in the program” (National Association of Drug Court Professionals 2015, 40). Each of these prosecutorial functions follows VTC best practices and a VTC prosecutor’s core competencies.

VTC judges and prosecutors must collaborate with other team members to adopt written objective eligibility and enrollment criteria. For instance, if a VTC adopts a written requirement that sex offenders are ineligible for a VTC program, then a prosecutor need not veto such an offender because the team has agreed upon the objective criteria rejecting that veteran. The adoption of evidence-based, objective eligibility and enrollment criteria and elimination of prosecutorial veto power also shields VTCs and prosecutors from equal protection, due process, discrimination, and other constitutional challenges (Cook v. Butler 2015; Krauel v. Florida 2008; People v. Webb 2011).

Treatment court best practices make clear that treatment courts are:

*first and foremost courts, and the fundamental principles of due process and equal protection apply to their operations. Drug courts have an affirmative legal and ethical obligation to provide equal access to their services and equivalent treatment for all citizens. (National Association of Drug Court Professionals 2015, 12)*

Utilization of a prosecutorial veto not only undermines the fundamental goals of all treatment courts and VTC best practices, but it clearly violates constitutional separation of powers when utilized during the post-plea, post-adjudication, or probation revocation stage of proceedings. Eliminating such veto power from VTC legislation and a court’s policies and procedures safeguards the constitutional separation of powers and furthers the underlying VTC principles of fairness and equality.

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**Judge Gregory G. Pinski** is a district judge for the State of Montana Eighth Judicial District Court. He founded and presides over a veterans treatment court and adult drug treatment court. Judge Pinski serves as a judicial consultant to the National Association of Drug Court Professionals, National Drug Court Institute, Justice for Vets, and American University, providing research, training, and technical assistance services to drug treatment courts and veterans treatment courts across the United States.