

Principles and Practices for Representing Veterans

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Echoes of War:

Defending Combat Veterans in Criminal Court¹

By
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“They carried all they could bear, and then some, including a silent awe for the terrible power of the things they carried.” — **TIM O'BRIEN, *THE THINGS THEY CARRIED* (1990).**

¹ These CLE materials provide a brief overview of the unique problems facing criminally-involved veterans with service-related disorders and how attorneys can effectively defend their veteran-clients. For a much more thorough treatment of these issues, see *THE ATTORNEY'S GUIDE TO DEFENDING VETERANS IN CRIMINAL COURT* (Brockton Hunter & Ryan Else, eds., 2014). To learn more about the *Defending Veterans* book or to order a copy, visit the Veterans Defense Project web site at www.veteransdefenseproject.org.

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I. Overview

More than 2.6 million Americans have now served in Iraq or Afghanistan.² A U.S. government study, released in July 2012 estimated that up to 20%, approximately 500,000 of these veterans are suffering from Post Traumatic Stress Disorder.³ The same study also noted, however, that the true numbers are likely higher.⁴ A 2008 RAND Corporation study found that 320,000 veterans are suffering from Traumatic Brain Injury (“TBI”).⁵ Both reports concluded that less than half of these PTSD or TBI-suffering veterans had previously reported or sought help for their condition.⁶

Untreated, many of these psychologically injured veterans are acting out in reckless, self-destructive and, sometimes violent ways that bring them into contact with the criminal justice system. History tells us that as the wars in Iraq and Afghanistan wind down, the numbers of troubled veterans flooding into our criminal courts will swell. Our criminal justice system and, particularly, the defense bar can and must be better prepared than previous generations.

² INSTITUTE OF MEDICINE OF THE NATIONAL ACADEMIES, TREATMENT FOR POSTTRAUMATIC STRESS DISORDER IN MILITARY AND VETERAN POPULATIONS: INITIAL ASSESSMENT 39 (2012).

³ *Id.*

⁴ *Id.*

⁵ TERRI TANELIAN ET AL., RAND CORP., INVISIBLE WOUNDS OF WAR: SUMMARY AND RECOMMENDATIONS FOR ADDRESSING PSYCHOLOGICAL AND COGNITIVE INJURIES 64 (2008) [hereinafter INVISIBLE WOUNDS OF WAR].

⁶ *Id.*, *Supra* note 2.

II. Links Between Combat Trauma and Criminal Behavior

A. Historic Post-War Spikes in Veteran-Committed Crimes

Historical research reveals a pattern of veteran-committed crime waves following every major conflict. Though scientific studies have only recently been conducted on this issue, a look back at history through this lens clearly reveals this pattern.

Following the American Revolutionary War, one author noted a marked increase in crime that caused many states to institute new laws and penalties in response.⁷ A Revolutionary veteran, describing conditions in South Carolina after the war, wrote, “highway robbery was a common occurrence, and horse-stealing so frequent that the Legislature made it a crime punishable with death.”⁸

Studies conducted after the Civil War, World War I and World War II found a disproportionate number of veterans in the criminal justice system. Following the Civil War a great wave in crime and disorder was documented.⁹ One prison in Pennsylvania reported a large influx of prisoners in the last three months of 1865, “most in poor physical condition, and nine-tenths incapacitated and demoralized by the war.”¹⁰ In 1866 they reported an unprecedented influx, three-fourths of whom had fought in the war and were “shattered” by their experiences.¹¹ Nationwide, in 1866 two-thirds of all commitments to state prisons in northern states were men who had seen service in the war.¹²

⁷ ALLAN NEVINS, *THE AMERICAN STATES DURING AND AFTER THE REVOLUTION, 1775-1789* 454 (1924).

⁸ *Id.* (citing JOSEPH JOHNSON, *TRADITIONS AND REMINISCENCES* 400 (1851)).

⁹ Edith Abbott, *Crime and the War*, 9 J. AM. INST. CRIM. L & CRIMINOLOGY 41 (1918).

¹⁰ *Id.* at 43.

¹¹ *Id.*

¹² E.C. Wines & Theodore Dwight, *The Reformation of Prison Discipline*, 105 N. AM. REV., 580–81 (1867), available at

http://books.google.com/books?id=Kn8FAAAAQAAJ&pg=PP7&lpg=PP7&dq=Ticknor+and+Fields,+The+North+American+Review,+Boston,+Vol.+CV,+1867&source=bl&ots=5JWYeUkEQ4&sig=01A0d6Lbo61dQYVxwFXhEvCXwYc&hl=en&sa=X&ei=_OSDT-S8Boqk8AST6PjsBw&ved=0CElQ6AEwBQ#v=onepage&q=Ticknor%20and%20Fields%2C%20The%20North%20American%20Review%2C%20Boston%2C%20Vol.%20CV%2C%201867&f=false.

Many Civil War veterans also headed west after the war. In fact they are largely responsible for putting the “wild” in the “wild west.” Jesse James and his brother Frank, for instance, served in a Confederate guerilla unit similar to today’s special operations forces. When the war ended, they and other members of their unit formed the James Gang and headed west, plying their war-honed skills in robbing trains, stagecoaches and banks.¹³

A similar pattern of veteran-committed crimes was noted in Europe following WWI. In 1920, one English writer observed:

The war has destroyed with a hand more desolating than the Black Death or the most terrible plagues of history. But its consequences do not end with destruction. The people who have taken serious part in it are not the same people as those who went into it. . . . They are changed peoples. They have passed through an experience which has altered habits, temper, outlook, in five years, more than fifty years of ordinary life would have altered them. Some of the consequences of that experience are obviously bad. The epidemic of crimes of violence is the natural sequel of war, for men learn in that school to think little of life. The same increase of crime of this kind followed the Napoleonic Wars both here and in France.¹⁴

In the United States, post-WWI veteran-committed crimes were also a cause for grave concern. The President of the Institute of Criminal Law and Criminology, in his annual address in 1919, stated:

Last year saw the ending of the War. From England to France, and in our own country, statistics have been gathered which show that

¹³ “Jesse James Was His Name”; William A Settle

Deseret News; Visitors Drawn to Jesse James’ Hometown; Amy Shafer; July 2000:

<http://www.deseretnews.com/article/772331/Visitors-drawn-to-Jesse-James-hometown.html>

PBS: Interview: Guerilla Tactics:

<http://www.pbs.org/wgbh/americanexperience/features/interview/james-guerrilla/>

PBS: Biography: Jesse James: <http://www.pbs.org/wgbh/americanexperience/features/biography/james-jesse/>

The State Historical Society of Missouri: Jesse James (1847-1882):

<http://shs.umsystem.edu/famousmissourians/folklegends/james/>

US News; How the Civil War Shaped Jesse James; James M. McPherson:

<http://www.usnews.com/news/articles/2007/06/24/how-the-civil-war-shaped-jesse-james>

¹⁴ Edith Abbott, *The Civil War and the Crime Wave of 1865-70*, 1 SOC. SERV. REV. 212 (Jun., 1927) (citing NATION, XXVI, 498 (Jan. 10, 1920)).

serious crime, which had been on the decrease during the period of the War was again stalking in the foreground. . . . The newspapers are filled with accounts of crimes of such daring and boldness as to make the average citizen stand aghast at the manner in which the security of life and rights of property are ruthlessly disregarded and imperiled.”¹⁵

A study entitled *Military Service and Criminality*,¹⁶ published in 1952, a few years after WWII, tallied the number of men committed to 11 prisons in the upper-Midwest during 1947, 1948 and 1949 and found that fully one third of them were veterans. Similarly, a study of Vietnam veterans receiving care for PTSD in the VA system during the mid-1980’s found that almost half of all Vietnam veterans suffering from PTSD had been arrested or in jail at least once, 34.2 percent more than once, and 11.5 percent reported being convicted of a felony.¹⁷

In the case of the Vietnam generation, involvement in the criminal justice system has lingered for decades. A 1998 Department of Justice study found that more than 20 years after the war, approximately a quarter million veterans, a large portion from the Vietnam era, were still housed in our nation’s prisons.¹⁸

Those who attempt to deny the link between war trauma and crime often cite this same 1998 Department of Justice study, pointing out that veterans are imprisoned in smaller percentages than the civilian population. What they overlook, however, is that since WWI, the military has aggressively screened out those it deems psychologically or morally unfit. During the call-up for World War II, for instance, 1,681,000 men were rejected and excluded from the draft for emotional, mental, or educational disorders or deficiencies.¹⁹ Another 500,000 were subsequently separated from the Army during training on psychiatric or behavioral grounds.²⁰ This recruit screening continued through Vietnam and into

¹⁵ Betty Rosenbaum, *The Relationship Between War and Crime in the United States*, 30 J. CRIM. L. & CRIMINOLOGY, 730 (1940) (citing Hugo Pam, *Annual Address of the President of the Institute of Criminology*, 10 J. OF AM. INST. OF CRIM. L. & CRIMINOLOGY 327 (1919)).

¹⁶ Walter A. Lunden, *Military Service and Criminality*, J. CRIM. L., CRIMINOLOGY, & POLICE SCI., 766–73 (1952).

¹⁷ RICHARD KULKA, ET AL., NATIONAL VIETNAM VETERANS READJUSTMENT STUDY, VII-21-1 (1990).

¹⁸ CHRISTOPHER J. MUMOLA, BUREAU OF JUSTICE STATISTICS, VETERANS IN PRISON OR JAIL, NCJ 178888 (2000), <http://www.ojp.usdoj.gov/bjs/>.

¹⁹ Marlowe, *supra* note **Error! Bookmark not defined.**, at 48.

²⁰ *Id.*

our current conflicts. Thus, any direct comparison of incarceration rates between veterans and the civilian population is flawed. Given the military's screening, the fact that veterans are incarcerated at even close to the same rates as the civilian population is alarming and is prima facie evidence that military service, itself, played a role.

The most recent and definitive tie between combat trauma and criminal behavior comes from the military, itself. In 2009, following a highly-publicized wave of homicides and other violent crimes committed by recently-returning combat soldiers on and around Fort Carson, Colorado, the Army commissioned a study called the Epidemiological Consultation, or EPICON, for short.²¹

Epidemiology is the branch of medicine that seeks to study the factors affecting the health and illness of entire populations. Most of the time, epidemiologists focus on infectious disease, but increasingly the Army has used its experts to look at behavioral health issues. A team of 24 physicians and Ph.D.s from Walter Reed Institute of Research descended on Ft. Carson, studying soldiers who had acted out violently, looking for common factors.

The EPICON team, first, found that violent crime among the soldiers at Ft. Carson was well outside normal levels of crime in civilian society. The murder rate for Ft. Carson had doubled since the start of the Iraq war. Rape arrests had tripled and stood at nearly twice the rate of other Army posts.²²

Second, the EPICON team ruled out the “bad seed” theory. Long a favorite of military commanders, the “bad seed” theory posits that the only troops acting out criminally were troubled before their military service and would have acted out whether they had served or not. The EPICON team found no such common tie. Soldiers who had acted out had disparate pre-service criminal backgrounds and mental health issues. They also came from diverse racial, socioeconomic, and educational backgrounds.

²¹ U.S. ARMY CENTER FOR HEALTH PROMOTION AND PREVENTIVE MEDICINE, EPIDEMIOLOGIC CONSULTATION NO. 14-HK-OB1U-09: INVESTIGATION OF HOMICIDES AT FORT CARSON, COLORADO NOVEMBER 2008–MAY 2009, ES-1 (2009).

²² *Id.* at 10–11.

The common thread among all those who had committed violent crimes was that they had seen serious combat. From a public health standpoint, combat seemed to be a contagion. PTSD, drug and alcohol abuse, violence, and murder were just the symptoms. The more soldiers were exposed to combat, the more they showed the effects.

The EPICON study also concluded that the crimes reported on and around Ft. Carson were just the tip of the iceberg. Of the Ft. Carson soldiers surveyed, 40% reported choking, beating, kicking, or pointing a gun at someone—in other words they had committed some kind of felony assault.²³

In the end, the EPICON team found two major factors contributed to post-deployment violent behavior: (1) repeated deployments and (2) the intensity of combat in those deployments. The study concluded with a carefully worded assertion that “[s]urvey data from this investigation suggest a possible association between increasing levels of combat exposure and risk for negative behavioral outcomes.”²⁴ In other words, the military finally confirmed what civilian sociologists had long believed: combat contributes to crime. Soldiers come home different. By sending young men and women to war, a country is unintentionally bringing violence back on itself.

Closely linked to the criminal justice system is the homeless population. A 2006 study found that fully 24% of Minnesota’s male homeless population are veterans. More than half of those homeless veterans were deemed to have a “serious mental illness.”²⁵ Nationally,

An estimated 136,334 veterans spent at least one night in an emergency shelter or transitional housing program between October 1, 2008 and September 30, 2009. This accounts for 1 of every 168 veterans in the U.S. or 1 out of every 10 veterans living in poverty.²⁶

This statistic illustrates just how difficult it can be for veterans to make the transition from military to civilian life.

²³ *Id.* at 12–13.

²⁴ *Id.* at 18.

²⁵ WILDER RESEARCH, OVERVIEW OF HOMELESSNESS IN MINNESOTA 2006, 40–41 (2007).

²⁶ U.S. DEP’T OF HOUS. & URBAN DEV., OFFICE OF CMTY. PLANNING & DEV., VETERAN HOMELESSNESS: A SUPPLEMENTAL REPORT TO THE 2010 ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS i (2009).

B. How Combat Trauma Sometimes Manifests in Criminal Behavior

Combat trauma can be linked to criminal behavior in two primary ways. First, symptoms of PTSD can incidentally lead to criminal behavior. Second, offenses can be directly connected to the specific trauma that an individual experienced.²⁷ Many symptoms of PTSD can lead to behaviors likely to result in criminal behavior and/or sudden outbursts of violence. Individuals with PTSD are often plagued by memories of the trauma, chronically anxious, and unable to sleep without terrifying nightmares. They often self-medicate with drugs and alcohol in an attempt to calm their nerves and sleep. The emotional numbness many trauma survivors experience can lead the survivor to engage in sensation-seeking behavior in an attempt to experience some type of emotion. Some combat veterans also may seek to recreate the adrenaline rush experienced during combat. “Hypervigilance,” feeling the need to be always “on guard” can cause veterans to misinterpret benign situations as threatening and cause them to respond with self-protective behavior. Increased baseline physiological arousal results in violent behavior that is out of proportion to the perceived threat. It is common for trauma survivors to feel guilt and to resort to self-destructive behaviors, which can sometimes lead them to commit crimes that will likely result in their apprehension, punishment, serious injury, or death.²⁸

A particular traumatic stressor can lead an individual suffering combat trauma to commit a specific crime in three primary ways. First, crimes at times literally or symbolically recreate important aspects of a trauma. The second way that traumatic stressors can be linked to specific crimes is that environmental conditions similar to those existing at the time of the trauma can induce behavior similar to that exhibited during the trauma, in particular, violent responses. The final way that traumatic stressors can be linked to specific crimes is that life events immediately preceding the offense can realistically or symbolically force the

²⁷ Claudia Baker & Cessie Alfonso, *PTSD and Criminal Behavior: A National Center for PTSD Fact Sheet*, <http://www.traumatic-stress-treatment.com/artptsdandcriminalbehavior.html>.

²⁸ *Id.*

individual to face unresolved conflicts related to the trauma. This creates a disturbed psychological state in which otherwise unlikely behaviors emerge.²⁹

III. Defending the Combat Veteran in Criminal Court

There are opportunities to make the veteran's service and service-related trauma relevant throughout the case, from pre-charge to sentence mitigation. If possible, before charges are even filed the prosecutor should be made aware of the veteran's service, any service-related mental health problems, and available treatment options to allow this to be considered in the charging decision. The veteran's service, connection to the community, available treatment resources, and veterans' organizations that may supervise the release can all be used to argue for pretrial release. If the veteran is suffering from service-related PTSD or TBI, the need for treatment and available treatment resources can be used both in plea negotiations and sentencing. When such conditions are present to an extreme degree, they may even be exculpatory in negating the *mens rea* requirements of the crime. These materials will provide an introductory overview of the strategies in defending the military veteran, which are fully addressed in *The Attorney's Guide to Defending Veterans in Criminal Court*.

A. The Changing Terrain: State Statutes And Veterans Courts

Fortunately, federal, state, and local governments are beginning to recognize the unique situation of combat veterans in criminal courts. To prevent reliving the mistakes made with the Vietnam generation of veterans, the federal government has made military service a relevant consideration for departures in sentencing;³⁰ a few states have passed legislation to expressly allow the Court to consider the Defendant's service and service-related mental illness at sentencing; and many

²⁹ *Id.*

³⁰ U.S. SENTENCING GUIDELINES MANUAL, § 5H1.11 (2010) ("Military service may be relevant in determining whether a departure is warranted, if the military service, individually or in combination with other offender characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines.")

counties have created veterans specialty courts to directly address veterans' unique situations and to supervise the veterans rehabilitation. These are all evidence of a changing legislative intent that pervades at all levels of government, showing any court that there is a popular-public interest in providing veteran-defendants special consideration and, when necessary, the treatment resources necessary to ensure their combat service does not lead into a perpetual cycle of incarceration.

In 2007 and 2008, along with other Minnesota veterans advocates, I, Brockton Hunter, led an effort to draft and pass legislation that addresses deficiencies in the way the Minnesota's criminal courts deal with psychologically-injured veterans.³¹ The law is designed to ensure that mental health diagnoses and available treatment options are taken into account in sentencing a veteran whose combat trauma played a role in his or her criminal offense. The law does not force a judge to do anything in a particular case. Rather, it gives the judge the tools to make an informed decision, recognizing that probationary treatment is often preferable to a single stint of incarceration in getting to the root of the problem and ensuring long-term public safety. This is not a "get out of jail free card" for veterans. Completion of treatment is a condition of probation and failure to follow through can result in execution of a jail or prison sentence.

In 2007, California also updated past legislation that had been found ineffective at dealing with the veterans returning from wars in Afghanistan and Iraq.³² Like the Minnesota statute cited above, California has given judges the express authority to utilize treatment over incarceration while not mandating that the Courts follow any particular type of sentence.

What the Minnesota and California statutes do, in effect, is make the veteran's service a relevant sentencing consideration, just as the United States Sentencing Guidelines § 5H1.11 did in 2010 in stating that "Military service may be relevant in determining whether a departure is warranted, if the military service, individually or in combination with other offender characteristics, is present to an

³¹ Minn. Stat § 609.115 Subd. 10.

³² Adam Caine, *Fallen from Grace: Why Treatment Should Be Considered for Convicted Combat Veterans Suffering from Post Traumatic Stress Disorder*, 78 U.M.K.C. L. REV. 215, 225–29 (2009).

unusual degree and distinguishes the case from the typical cases covered by the guidelines.” This multi-state and federal push for such sentencing mitigation guidelines shows that the public’s interests have shifted towards placing a higher priority on the treatment of a veteran’s service-related impairment and less of a priority on a strictly punitive approach to veteran-defendants. It seems that, amidst the recent wars in Iraq and Afghanistan, the American public and the policy makers working on their behalf have made an affirmative decision not to relive the mistakes made when the Vietnam generation of veterans first came in contact with the criminal justice system.

Veterans treatment courts are further evidence of this trend in changing policy interests and show that this trend is not limited to the legislative branch. As of June 2, 2011, there were at least 62 county veterans courts in 26 different states.³³ In December 2011, *The Atlantic* reported that “[n]early 80 veterans courts have sprung up across the country over the past four years, and 20 more are expected to open by the end of this year,”³⁴ showing a rapid growth of these courts across the country that signals a national acceptance of their underlying principles. Texas, California, Colorado, Illinois, Oregon and Virginia have passed legislation specifically permitting the establishment of county veterans treatment courts.³⁵ Other states have done so directly through county court systems.

These courts follow a variety of models, but all offer a defense attorney a way to lessen their client’s exposure to incarceration and, sometimes, conviction through diversion to judicially supervised rehabilitation programs if the veteran is willing to accept responsibility for his actions and get help for his underlying conditions, usually PTSD and/or substance abuse. This structure is quite similar to long-used

³³ Nat’l Ass’n of Drug Court Prof’ls, Justice for Vets: The National Clearinghouse for Veterans Treatment Courts, <http://www.nadcp.org/JusticeForVets> (last visited June 1, 2011).

³⁴ Kristina Shevory, *Why Veterans Should Get Their Own Courts: As Troops Surge Back into Domestic Life, Incarceration Isn’t Always the Answer*, ATLANTIC MAGAZINE, Dec. 2011, <http://www.theatlantic.com/magazine/archive/2011/12/why-veterans-should-get-their-own-courts/8716/>.

³⁵ Nat’l Ass’n of Drug Court Prof’ls, Veterans Treatment Court Legislation, <http://www.nadcp.org/JusticeForVets-Legislation> (last accessed June 1, 2011); CAL. PENAL CODE, § 1170.9 (2010); COL. REV. STAT., §§ 13-3-101; 13-5-144 (2010); 730 ILL. COMP. STAT. ANN. 167 (2010); OR. REV. STAT. § 135.886(2)(j)(3) (2010); TEX. HEALTH & SAFETY CODE, § 617 (2010); VA. CODE, § 2.2-2001.1 (2010).

drug and mental health specialty court models, but, by using the existing structure and resources of the VA, these courts are an attractive option to districts that are under budget strains. Even in districts where there is not a veterans problem-solving court, this fiscal reasoning is a strong argument in favor of probationary treatment that is unique to veteran-defendants. These courts are not “get out of jail free” courts that are showing veterans a preferred status. Rather, these courts often use longer terms of probation than the defendant would be exposed to in a standard criminal court in order to provide the court with the proper leverage to ensure the veteran stays committed to the treatment program until rehabilitated. The level of oversight and accountability is often very demanding. By having other veterans hold the veteran-client accountable, these courts “offer the most easily accepted ‘tough love’ support.”³⁶

Both the statutes and the veterans courts have arisen out of the public’s recognition that when our Nation is sending young men and women to prepare for and fight wars, as San Diego Prosecutor William C. Gentry so eloquently stated, “you are unleashing certain things in a human being we don’t allow in civic society, and getting it all back in the box can be difficult for some people.”³⁷ The public and courts nationwide are recognizing that the responsibility for these veterans falls on all of the American public. Thus, even where these statutes are not applicable and these courts are not available, this change in public sentiment should be used to argue to the Court that it, as well, has a duty to show compassion toward, and promote the rehabilitation of, veteran-defendants.

B. Voir Dire

Studies on conducted on public attitudes toward military service-connected PTSD indicate potential jurors are more empathetic in this context than toward

³⁶ Michael Daly Hawkins, *Coming Home: Accommodating The Special Needs of Military Veterans to the Criminal Justice System*, 7 OHIO ST. J. CRIM. L. 563, 570 (2010).

³⁷ *Id.* at 569 (quoting Deborah Sontag & Lizette Alvarez, *Across America, Deadly Echoes of Foreign Battles*, N.Y. TIMES, Jan. 13, 2008).

other mental health issues. For example, in a 1988 study of the effects of various stigmas,

Participants viewed service-related PTSD as highly treatable and having an uncontrollable onset and thus attributed low responsibility for the illness and low blame in general. The diagnosis of PTSD elicited greater liking and pity and less anger than any other mental-behavioral stigma in the study. Participants who viewed veterans with PTSD as less blameworthy also exhibited charitable attitudes and a tendency toward helping behavior with such individuals, pointing to a possible link between attitudes and behavior.³⁸

A 2003 study had similar findings when applied directly to excuse defenses in the criminal justice context:

Not surprisingly, mock jurors viewed the PTSD defense as highly excusable, with low criminal culpability and control over illness relative to other defenses. Thus, jurors generally tend to view people with PTSD as less responsible for criminal offenses. Such beliefs, together with feelings of sympathy, could influence verdicts and sentencing behavior of judges, jurors, and prosecutors.³⁹

Finally, a 2011 study found a “positive juror bias toward veterans with PTSD [that] represents a strong indicator of community support for this group of individuals, support documented by various public surveys.”⁴⁰ When these findings are taken with the fact that “research has revealed a generally high level of public support for troops in recent years,”⁴¹ the defense for the veteran-client can afford to be slightly more cautiously optimistic about trial than with a non-veteran client and perhaps push the envelope on the above defenses a little bit further.

³⁸ Jennifer Kelly Wilson, Stanley L. Brodsky, Tess M.S. Neal, & Robert J. Cramer, *Prosecutor Pretrial Attitudes and Plea-Bargaining Behavior Toward Veterans with Posttraumatic Stress Disorder*, 8 PSYCHOL. SERVS. 319 (2011) (discussing B. Weiner, R. Perry, & J. Magnusson, *An Attributional Analysis of Reactions to Stigmas*, J. PERSONALITY & SOC. PSYCHOL., 55, 738–48 (1988)).

³⁹ *Id.* (discussing W.P. Heath, J. Stone, J.M. Darley, & B.D. Granneman, *Yes I Did It, But Don't Blame Me: Perceptions of Excuse Defenses*, J. PSYCHIATRY & L., 187–226 (2003)).

⁴⁰ Jennifer Kelly, *Veterans on Trial: Juror Attitudes and Behaviors Toward Veterans with Posttraumatic Stress Disorder* 28 (2011) (unpublished M.A. thesis, University of Alabama), *available at* http://acumen.lib.ua.edu/content/u0015/0000001/0000579/u0015_0000001_0000579.pdf.

⁴¹ Wilson, Brodsky, Neal, & Cramer, *supra* note 86 (citing D.L. Leal, *American Public Opinion Toward the Military: Differences by Race, Gender, and Class*, ARMED FORCES & SOC., 123–38 (2005); PEW RESEARCH CENTER FOR PEOPLE AND THE PRESS, *TRENDS IN POLITICAL VALUES AND CORE ATTITUDES: 1987 – 2007* (2007); & B. Knickerbocker, *This Time, Vets Return to Welcome*, CHRISTIAN SCI. MONITOR, Nov. 9, 2007, at 1-4.

In addition to seeking jurors who are open and empathetic towards PTSD, an obvious choice would be jurors who have served in the military. A veteran on your jury can be your best friend or your worst enemy. Some veterans, particularly higher ranking officers may have a rigid attitude towards PTSD and those who profess to suffer from it, particularly if they never served in combat, themselves. Great caution is warranted here. Look for veterans from the lower ranks who served as close as possible to the front lines. Even then, beware of those who may have served in such a capacity and may be in denial about their own combat trauma. Veterans, regardless of their attitudes toward PTSD, are likely to assume a leadership role among other jurors who did not serve, so be very careful. When you pick a veteran, you are very likely picking the foreman of your jury. Choose wisely.

Family members and friends of veterans are often a safer bet. They will be familiar with the service and sacrifice of veterans, in general, and their own stories and experiences with those veterans may play a large educational role with other jurors.

Jurors who are familiar with and sensitive to mental health issues, in general, are also often good choices. They will understand these issues are real and can often educate their fellow jurors on these issues during deliberation.

Emphasize during voir dire that you are seeking a “few good men and women” your particular case. Emphasize that some of the information about your client’s military service and actions that led to the criminal charges may be difficult to hear. That is ok. They just need to be honest if they don’t think they can hear them weigh the evidence fairly.

C. Trial Defenses: Insanity and Self Defense

Sometimes, trial will be necessary. In cases of extreme service-related disorders, the veteran’s service may be relevant to the determination of guilt or innocence because the disorder may negate the requisite intent of the crime or

mitigate the veteran's culpability.⁴² PTSD meets the scientific criteria of admissibility requirements laid down in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993) and Federal Rule of Evidence 702.⁴³

PTSD or TBI-related defenses can be separated into four categories: (1) insanity defenses, negating all culpability; (2) self-defense defenses based on the veteran's altered belief of the amount of force necessary to protect him or herself; (3) an automatism defense when the veteran is acting out of reflex, sleep-walking, or conditioned stimulus response; and (4) *mens rea* defenses other than insanity defenses, mitigating the veteran's culpability in order to reach a lesser-included-offense.⁴⁴ A brief overview of each is provided below. For more detailed discussion of these defenses, see Brockton Hunter & Ryan Else, *Legal Strategies for Defending the Combat Veteran in Criminal Court*, THE ATTORNEY'S GUIDE TO DEFENDING VETERANS IN CRIMINAL COURT (Brockton Hunter ed., 2012).

1. Insanity Defenses

The applicability of insanity defenses "will vary depending on the jurisdiction's applicable insanity test and the severity of the individual's [disorder]."⁴⁵ To meet the minimum threshold of any of the four insanity tests used in the US,⁴⁶ the Defendant must make a prerequisite showing that the criminal activity was the result of a "mental disease," which typically requires a psychotic

⁴² See also Marku Sario's description of the Jessie Bratcher case in Chapter 19 of *The Attorney's Guide to Defending Combat Veterans in Criminal Court*, in which he successfully asserted an insanity defense in a murder trial based on the Defendant's PTSD and conditioned stimulus-response based on his combat training.

⁴³ Edgar Garcia-Rill & Erica Beecher-Monas, *Gatekeeping Stress: The Science and Admissibility of Post-Traumatic Stress Disorder*, 24 U. ARK. LITTLE ROCK L. REV. 9, 30 (2001).

⁴⁴ Thomas Hafemeister & Nicole Stockey, *Last Stand? The Criminal Responsibility Of War Veterans Returning From Iraq and Afghanistan With Posttraumatic Stress Disorder*, Ind. L.J. 87, 107–32 (2010); see also Daniel Burgess, Kara Coen & Nicole Stockey, *Reviving the "Vietnam Defense": Post-Traumatic Stress Disorder and Criminal Responsibility In a Post-Iraq/Afghanistan World*, 29 DEV. MENTAL HEALTH L. 59, (2010); Alyson Sincavage, *The War Comes Home: How Congress' Failure to Address Veterans' Mental Health Has Led to Violence in America*, 33 NOVA. L. REV. 481, 496 (2010).

⁴⁵ Hafemeister & Stockey, *supra* note, 44 at 112.

⁴⁶ There are four insanity tests currently used in US jurisdictions: (1) The M'Naghten Rule, or Cognitive Test; (2) the Product Test; (3) the American Law Institute (ALI)/Control Test; and (4) the Model Penal Code (MPC) Rule.

disorder involving a “gross impairment in reality testing.”⁴⁷ Most, but not all, of the successful service-related-PTSD insanity defenses have been cases of dissociative flashbacks, in which the Defendant had believed he was back in combat, where violence was not only acceptable but rewarded, when he committed the crime, thus did not appreciate the wrongful nature of his actions.⁴⁸

2. Self-Defense: A Parallel with Battered Women’s Syndrome

A veteran-defendant’s service-related disorder can also support a claim of self-defense in a situation that the Defendant’s conduct would not normally be “reasonable” in reacting to a perceived threat but for the effect of the military experience on his perception of and reaction to threats. Model Penal Code (MPC) § 3.04(1) states that, “a person is justified in using force upon another person if he believes that such force is immediately necessary to protect himself against the exercise of unlawful force by the other on the present occasion.” The defendant’s service is relevant to a self-defense claim because the defendant’s combat service altered what defendant reasonably believed was the immediately necessary amount of force to protect himself, much like battered women’s syndrome is invoked to claim that past violent trauma “can alter an individual’s perception of the surrounding environment and cause the individual to react unexpectedly to certain cues or events that are perceived to be threatening.”⁴⁹

Limited case law is available, but what is available shows that war veterans in some jurisdictions can raise self-defense claims when there is a diagnosis of PTSD, “supported by findings that the disorder impacted a defendant’s cognitive and emotional state and causes him or her to react to a situation differently than would otherwise be expected” in a reasonable person.⁵⁰ In *State v. Mizell*, the District Court of Appeal for Florida held that the Defendant’s service-related PTSD was admissible as state of mind evidence, as opposed to diminished capacity evidence, and expert

⁴⁷ Hafemeister & Stockey *supra* note 44, at 113 (quoting AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 297 (4th ed. 2009)[hereinafter DSM-IV-TR]).

⁴⁸ Michael Davidson, *Post-Traumatic Stress Disorder: A Controversial Defense for Veterans of a Controversial War*, 29 WM. & MARY L. REV. 415, 424–29 (1980).

⁴⁹ Hafemeister & Stockey, *supra* note 44, at 128–29.

⁵⁰ *Id.* at 127.

testimony of PTSD is relevant to the defendant's actual belief that the danger was real in the same way that battered women's syndrome is admissible and relevant.⁵¹

3. Unconsciousness/Automatism During the Criminal Act

Although seldom used, the defense of unconsciousness or automatism may be available to veteran-defendants who have an unconscious dissociative flashback, act reflexively, or are sleepwalking while committing the offense.⁵² This defense is operative when the Defendant was not acting voluntarily, will result in full acquittal, and is recognized in "virtually all jurisdictions."⁵³ Because this defense is based upon the defendant's inability to control his or her actions, it is close to the ALI standard's control test for an insanity defense, but does is not dependent on an established mental illness.

Though rare, this defense may be more relevant in the representation of combat veterans than the civilian population. Chronic traumatic brain injury (TBI) has been proven to contribute to the development of REM behavior disorder (RBD),⁵⁴ in which sufferers appear to be unconsciously acting out their dreams in ways that can be violent in nature and in some cases will result in injury to either the patient or their bed partner. PTSD can cause dissociative flashbacks that cause a person to believe they are in a situation similar to the combat trauma.⁵⁵ Sleep-related violence during dreaming, similar to the RBD experienced by TBI sufferers, is also a problem for PTSD sufferers.⁵⁶ Since TBI and PTSD are more common in the

⁵¹ State v. Mizell, 773 So. 2d 618, 620-621 (Fla. Dist. Ct. App., 2000).

⁵² Burgess, Coen & Stockey, *supra* note 44, at 71.

⁵³ *Id.*

⁵⁴ Arunima Verma, Vivek Anand, & Narayan P. Verma, *Sleep Disorders in Chronic Traumatic Brain Injury*, 3 J. CLINICAL SLEEP MED. 357, 357-62 (2007).

⁵⁵ Arturo Silva, Dennis Derecho, Gregory Leong, Robert Weinstock, & Michelle Ferrari, *A Classification of Psychological Factors Leading to Violent Behavior in Posttraumatic Stress Disorder*, 46 J. FORENSIC SCI. 311, 311-312 (2001).

⁵⁶ *Id.* at 312 (citing J.A. Silva, G.B. Leong, C. Gonzales, & J. Ronan, *Dangerous Misidentification of People Associated with Post-Traumatic Stress Disorder*, 19 AM. J. FORENSIC PSYCHIATRY 17, 17-32 (1988); C.N. Scherick, S.R. Bundlie, M.G. Ettinger, & M.W. Mahowald, *Chronic Behavioral Disorders in Human REM Sleep: A New Category of Parasomnia*, 9 SLEEP 293, 293-308 (1986); I. Oswald & J. Evans, *On Serious Violence During Sleepwalking*, 147 BRIT. J. PSYCHIATRY 688, 688-91 (1985)).

veteran population than the civilian population, it stands to reason that these issues will be more common among veteran clients than non-veteran clients.

4. *Mens rea* Mitigation of Culpability

Even if complete acquittal cannot be secured, a veteran's service-related disorder may be used to mitigate culpability and reach a lesser-included offense because the disorder may have made the defendant incapable of forming the requisite *specific intent* of the offense.⁵⁷ Such an approach will be widely available to defendants because "the defendant claiming a lack of *mens rea* is not limited to when the PTSD induced a psychotic state – as is typically required for an insanity defense—but can include various other PTSD symptoms."⁵⁸ Such a defense may be the difference between a conviction of first-degree murder and manslaughter, so is worth considering as a trial strategy.

D. Sentencing Mitigation

In 2009, the United States Supreme Court stated that,

Our Nation has a long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines as [the Defendant] did. Moreover, the relevance of [the Defendant's] extensive combat experience is not only that he served honorably under extreme hardship and gruesome conditions, but also that the jury might find mitigating the intense stress and mental and emotional toll that combat took on [the Defendant].⁵⁹

In fact, *Porter* held that for a defense attorney to fail to present the Defendant's combat service and its related trauma as a mitigating factor at sentencing in a capital case is proper grounds for a *Strickland*⁶⁰ claim of prejudicially

⁵⁷ Hafemeister & Stockey, *supra* note 44, at 126.

⁵⁸ *Id.*

⁵⁹ *Porter v. McCollum*, 130 S. Ct. 447, 455 (2009).

⁶⁰ *Strickland v. Washington*, 466 U.S. 668 (1984) "A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient

ineffective assistance of counsel.⁶¹ As discussed in the section on statutes and veterans courts above, this “leniency” is often coupled with a desire to provide veterans with rehabilitative treatment to ensure they do not reoffend and there are an increasing number of creative options to structure such treatment. Of course, no matter what the Court wants to do, it must also know it has the authority and public support to do so. There is a three-step process that has worked well in this our office for arguing at a veteran-defendant’s sentencing: (1) make the court want to be lenient toward this veteran in particular and veterans in general; (2) provide the Court with a structured treatment or rehabilitation plan that will ensure the Defendant is well supervised and has a likelihood of not reoffending; and (3) provide the Court with the history of public, judicial, and legislative support for leniency towards combat veterans, and any law on the matter that gives the court the authority to act on the desires seeded in steps one and two.

An essential element of arguing to the Court for a lenient or treatment-based sentence is to let the Court get to know the veteran, his or her service history, and the history of veterans with combat trauma in the criminal justice system. By the time the case reaches sentencing, the Court will already know that the Defendant is a veteran, so the argument needs to make the Defendant a unique veteran by focusing in detail on exceptional service records, combat experiences, personal hardships caused by service, readjustment issues, service to the community, support of friends from the military, or any other evidence that will separate this veteran-defendant from the pack.

The A+ versions of the veteran-defense-counsel’s arguments often become more than 40-page-long memoranda, half of which is devoted to providing this evidence of the veteran as an individual service member in a chronological story format.⁶² Of course, this story should be supported by official service documents,

performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.” *Id.* at 687.

⁶¹ *Porter v. McCollum*, 130 S. Ct. 447, 455 (2009).

⁶² See Andrea George, Position of Def. with Respect to Sentencing, *U.S. v. Carson*, Criminal No. 10-26 PJS-AJB, Doc. 31, Jun. 11 (U.S. Dist. Ct. Minn., 2010); Brockton Hunter, Mem. of Law in Supp. of Mot. for

such as the veteran's DD-214; corroborating letters or affidavits from people that served with the veteran; and any relevant medical treatment records. The veteran's individual story should then be put in context with the plight of combat-stress inflicted veterans historically and the medical/psychological significance of the veteran's disorder, if any. Once the court is convinced that it wants to help this veteran, it is the defense attorney's job to structure a treatment or supervised release program that will make it feasible for the court to, at the same time, not imprison the defendant and still not endanger public safety.

