

**CASE ANNOTATIONS AND RESOURCES
MILITARY SERVICE
USSG §5H1.11 DEPARTURES AND *BOOKER* VARIANCES**



**Prepared by
The Office of General Counsel
U.S. Sentencing Commission**

January 2012

Disclaimer: This document was developed to help judges, lawyers and probation officers locate relevant authorities involving issues related to military service. The research presented here does not represent views adopted by the Commission. The document is not comprehensive and does not include all authorities that may be pertinent to consideration of a §5H1.11 departure or *Booker* variance related to a defendant's military service. Instead, it presents authorities that represent recent federal jurisprudence in this area. The document is not a substitute for researching the specifics of the sentencing issues related to a defendant's military service.

This document contains case annotations to federal judicial opinions that involve USSG §5H1.11 (Military, Civic, Charitable, or Public Service; Employment-Related Contributions; Record of Prior Good Works (Policy Statement)) departures and *Booker* variances related to a defendant's military service. Included in this document is a brief introduction discussing how courts have recognized military service and mental health issues relating to combat service, followed by annotations to some relevant case law. An appendix provides links to helpful internet sites.

I. INTRODUCTION

Effective November 1, 2010, USSG §5H1.11, in relevant part, reads:

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.¹

In considering the relevance of military service to sentencing, courts are confronted with many issues. The length, nature, context, an experience of military service can vary widely. One defendant may have served entirely within the United States, perhaps in an administrative post similar to that of a civilian employee, while another may have served under harsh and dangerous combat conditions abroad. Or, a veteran-defendant may have developed a mental or physical condition while serving in the military, and that condition may have been the result of the military experience and may have contributed to commission of the crime. Courts have weighed and will continue to weigh various factors in any given case against the goals of sentencing.

Two aspects of military service have been important in cases involving veteran-defendants. First, courts have considered the type of service and whether it warrants consideration based on a traditional practice of recognizing military service to one's country. Second, courts have considered whether the defendant suffers from a mental or emotional condition that is traceable to the defendant's military service and whether the condition contributed to commission of the offense. Accordingly, this report first takes note of traditional notions of leniency toward veterans, and next discusses some of the mental health and other consequences of military service that may be relevant to sentencing.

II. TODAY'S VETERAN POPULATION

In the last 50 years, the United States has committed its military to service in a number of large-scale military mobilizations. The current veteran population includes those who have served in combat in conflicts such as the Viet Nam War (1964-1973), Operation Desert Storm (The Gulf War, 1990-1991), and Operations Enduring Freedom and Iraqi Freedom (Afghanistan and Iraq, 2001-present). During this same period, American military personnel have participated

¹ USSG §5H1.11 (Military, Civic, or Public Service; Employment-Related Contributions; Record of Prior Good Works (Policy Statement) (Nov. 1, 2009)).

in other military actions including Operation Urgent Fury (the 1983 Grenada invasion), Operation El Dorado Canyon (the 1986 Libya bombing strike), and Operation Just Cause (the 1989 Panama invasion). Veterans have also served in non-combat arenas, such as the peacekeeping missions in Somalia and Kosovo.

III. COMBAT EXPERIENCE AND MENTAL HEALTH

The stress of military service and combat experience can affect the health of service personnel. Researchers have documented the relationship between military service and such conditions as Post Traumatic Stress Syndrome (PTSD), anxiety and depressive disorders, and substance abuse.² The advent of new explosive devices has meant that a large number of veterans are returning with traumatic brain injuries (TBI). Although it is widely accepted that combat experience is linked to the onset of certain mental conditions, and it is well recognized that traumatic brain injury affects behavior and brain function, there is still debate about what makes individuals more likely to develop PTSD, and what behavioral issues result from TBI.

In federal criminal cases, courts may look to various sources to assess whether a defendant suffers from PTSD. Treatment professionals may rely on the veteran's own reporting of experiences and symptoms, and on more objective tests. In the criminal justice context, formal testing may be appropriate to validate a claim of PTSD.³ Courts may review the veteran's DD-214, a standard discharge document.⁴ Additionally, courts can obtain records from the National Personnel Records Center to verify combat exposure.

A. What is PTSD?

Symptoms of PTSD can include re-experiencing the traumatic event in the form of nightmares or flashbacks, numbing of feelings and emotional withdrawal from others, hypervigilance, and irritability that can quickly evolve into anger and rage that is excessive for the circumstances. Consequently, PTSD sufferers may experience problems in their interpersonal relationships. Because many service personnel and their family members may be confronted with the effects of PTSD, explanations for laypeople are readily available. The National Institute of Mental Health provides this one:

PTSD is an anxiety disorder that some people get after seeing or living through a dangerous event. When in danger, it's natural to feel afraid. This fear triggers many split-second changes in the body to prepare to defend against the danger or to avoid it. This "fight or flight" response is a healthy reaction meant to protect a person from harm. But in PTSD, this reaction is changed or damaged.

² INST. OF MEDICINE OF THE NAT'L ACAD., GULF WAR AND HEALTH, VOL. 6: PHYSIOLOGIC, PSYCHOLOGIC, AND PSYCHOSOCIAL EFFECTS OF DEPLOYMENT-RELATED STRESS 2 (2008).

³ See Karl Kirkland, *Post-Traumatic Stress Disorder v. Pseudo Post-Traumatic Stress Disorder*, 56 ALA. LAW. 90, 92 (1995) (advocating the use of the Minnesota Multiphasic Personality Inventory (MMPI) and the Minnesota Multiphasic Personality Inventory 2 (MMPI2) to determine whether a criminal defendant suffers from PTSD).

⁴ See Richard J. McNally, *Progress and Controversy in the Study of Posttraumatic Stress Disorder*, 54 ANNUAL REVIEW OF PSYCHOLOGY 229, 252 (2003).

People who have PTSD may feel stressed or frightened even when they're no longer in danger.⁵

Surveys of service personnel reveal some of the circumstances that contribute to the development of PTSD. These include: "being attacked or ambushed, . . . being shot at or receiving small arms fire, . . . seeing dead bodies or human remains, . . . knowing someone else seriously injured or killed, . . . seeing ill or injured women or children whom they were unable to help, . . . [having] a buddy shot or hit who was near them, . . . and engaging in hand-to-hand combat."⁶

A study of nearly 3,000 Iraq War veterans found killing in combat "a significant predictor of PTSD symptoms and alcohol abuse . . . suggesting that taking a life in combat is a potent ingredient in the development of mental health difficulties." The authors note that killing "was also a significant predictor of . . . anger and relationship difficulties."⁷ Another study suggests that service personnel with "higher levels of exposure to violent combat, who had killed another person" were more likely to engage in risky behaviors, which may include excessive alcohol use, use of illicit drugs, and aggressive driving.⁸ Army mental health officials have found that among personnel deployed to Afghanistan and Iraq, lengthy deployments, multiple re-deployments, and little "down time" between deployments contributed directly to development of mental health conditions.⁹

There is general agreement that PTSD is "dose-dependent." In other words, the greater the exposure to traumatic events, the more severe the symptoms will be.¹⁰ However, the relationship between these factors and the development and severity of PTSD in today's veteran population remains unclear. Both the Veterans Administration and the National Institute of

⁵ National Institute of Mental Health, What is Post-Traumatic Stress Disorder, or PTSD <http://www.nimh.nih.gov/health/publications/post-traumatic-stress-disorder-ptsd/what-is-post-traumatic-stress-disorder-or-ptsd.shtml>, viewed November 21, 2011.

⁶ Don Nidiffer and Spencer Leach, *To Hell and Back: Evolution of Combat-Related Stress Disorder*, 29 DEV. MENTAL HEALTH L. 1, 11-12 (January, 2010) (citing Hoge, et al, *Combat Duty in Iraq and Afghanistan, Mental Health Problems, and Barriers to Care*, NEW ENG. J. OF MED., 351, 13-22 (2004)).

⁷ Shira Maguen, Barara A. Lucenko, Mark A. Reger, Gregory A. Gahm, Brett T. Litz, Karen H. Seal, Sara J. Knight, and Charles R. Marmar, *The Impact of Reported Direct and Indirect Killing on Mental Health Symptoms in Iraq War Veterans*, 23:1 J. OF TRAUMATIC STRESS, 86 (February 2010).

⁸ William D.S. Killgore, Dave I. Cotting, Jeffrey L. Thomas, Anthony L. Cox, Dennis McGurk, Alexander H. Vo, Carl A. Castro & Charles W. Hoge, *Post-combat Invincibility: Violent Combat Experiences Are Associated with Increased Risk-Taking Propensity Following Deployment*, 42(13) J. OF PSYCHIATRIC RESEARCH 1112 (Oct. 2008).

⁹ THE CENTER FOR MENTAL HEALTH SERVICE'S GAINS CENTER, U.S. DEPT. OF HEALTH AND HUMAN SERVICES, SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, RESPONDING TO THE NEEDS OF JUSTICE-INVOLVED COMBAT VETERANS WITH SERVICE-RELATED TRAUMA AND MENTAL HEALTH CONDITIONS: A CONSENSUS REPORT OF THE CMHS NATIONAL GAINS CENTER'S FORUM ON COMBAT VETERANS, TRAUMA, AND THE JUSTICE SYSTEM (August 2008), available at: http://gainscenter.samhsa.gov/text/veterans/Responding_to_Needs_8_08.asp (reviewed September 13, 2010).

¹⁰ Norman Poythress, Christopher Slobogin, Tomika K. Stevens & Kirk Heilbrun, § 9:37. *Posttraumatic Stress Disorder – Areas of Scientific Agreement*, 2 MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY (2005-2006).

Mental Health provide ongoing and updated information specific to PTSD through their web sites, available in the appendix.

B. Traumatic Brain Injury (“TBI”)

Along with PTSD, TBI has been called one of the “signature” injuries of the Afghanistan and Iraq conflicts.¹¹ In these conflicts, TBI is caused most often by explosive devices. Because blasts pose such a high risk of physical injury, most of the brain injuries are part of polytrauma, or injury to multiple organs.¹² In a study of blast victims admitted to Walter Reed Army Medical Center between 2003 and 2005, 59 percent had TBI, and of those brain injuries, 56 percent were moderate or severe, while 44 percent were categorized as mild.¹³

Psychiatric effects of TBI are unclear. Studies suggest that sufferers of mild, moderate, or severe TBI have higher rates of major depression six months after the injury than did comparison groups.¹⁴ A committee commissioned to study the effects of TBI concluded that “there is sufficient evidence of an association between TBI and . . . aggressive behaviors.”¹⁵ The effects of TBI on social functioning and mental health may be relevant to courts sentencing veterans with TBI. Depending on the severity of the injury, difficulties in social functioning may persist for up to 15 years after the injury.¹⁶ Where the injury is severe enough to limit social functioning, some researchers believe that mood disorders such as major depression result from the stress attendant to not being able to function at previous levels at work and at home.¹⁷

C. Other Effects of Deployment

Deployment to combat arenas involves stressors that add to the risk of psychological problems. In the case of the Afghanistan and Iraq combat arenas, for example, these stressors include “130 degree temperatures, unrelenting noise, lack of privacy, and the constant threat of being attacked by mortar rounds, rocket propelled grenades, or biological and chemical agents” as well as unsanitary living conditions.¹⁸ For service personnel everywhere, rates of emotional

¹¹ INST. OF MEDICINE OF THE NAT’L ACAD., GULF WAR AND HEALTH, VOL. 7: LONG-TERM CONSEQUENCES OF TRAUMATIC BRAIN INJURY 3 (2009). Outside of combat zones, the most common causes of TBI are car accidents, assaults, falls, and recreational activities such as contact sports. *See also*, Laura Snodgrass, Brad Justice, “*Death is Different*”: Limits on the Imposition of the Death Penalty to Traumatic Brain Injuries, 26 DEV. MENTAL HEALTH L. 81, 86 (July 2007) (citing Jonathan M. Silver, TEXTBOOK OF TRAUMATIC BRAIN INJURY 7 (2005)).

¹² *Id.* at 3, 36.

¹³ *Id.* at 3, 36.

¹⁴ *Id.* at 3, 36.

¹⁵ INST. OF MEDICINE OF THE NAT’L ACAD., GULF WAR AND HEALTH, VOL. 7: LONG-TERM CONSEQUENCES OF TRAUMATIC BRAIN INJURY 3, 36 (2009).

¹⁶ INST. OF MEDICINE OF THE NAT’L ACAD., GULF WAR AND HEALTH, VOL. 7: LONG-TERM CONSEQUENCES OF TRAUMATIC BRAIN INJURY 6-7 (2009).

¹⁷ *Id.* at 265.

¹⁸ AMERICAN PSYCHOLOGICAL ASSOCIATION PRESIDENTIAL TASK FORCE ON MILITARY DEPLOYMENT SERVICES FOR YOUTH, FAMILIES AND SERVICE MEMBERS, THE PSYCHOLOGICAL NEEDS OF U.S. MILITARY SERVICE MEMBERS AND THEIR FAMILIES: A PRELIMINARY REPORT, at 4, 9 (February 2007).

problems increase with repeated deployments.¹⁹ While away, service members may worry about their employment prospects after deployment.²⁰ They may also worry about a spouse left at home, who must deal with children's behavior issues that arise when one parent is deployed.²¹ Even service members deployed to non-combat zones can face significant stressors. A study of several thousand troops deployed as peacekeepers to Somalia showed that they experienced stress from "frustration with the rules of engagement, such as exercising restraint in dangerous situations; demoralization; hostility and anger; and witnessing death and violence."²²

IV. THE COURTS' VIEW OF MILITARY SERVICE AND VETERAN-DEFENDANTS

A capital case that reached the United States Supreme Court brings the issues of leniency towards veterans and the effect combat can have on mental health into sharp focus. In *Porter v. McCullom*,²³ the Supreme Court considered the defendant's conviction and death sentence for fatally shooting his former girlfriend and her boyfriend. In holding that the defendant's trial counsel had rendered ineffective assistance by failing to investigate or present mitigating evidence about, among other things, the defendant's military record, the Court described Porter's military record:

Petitioner George Porter is a veteran who was both wounded and decorated for his active participation in two major engagements in the Korean War; his combat service unfortunately left him a traumatized, changed man.²⁴

The Court observed that, had Porter's counsel been effective in presenting mitigating evidence,

the judge and jury would have learned of the 'kind of troubled history we have declared relevant to assessing a defendant's moral culpability.' They would have heard about (1) Porter's heroic military service in two of the most critical – and horrific – battles of the Korean War, (2) his struggles to regain normality upon his

¹⁹ *Id.* at 21.

²⁰ INST. OF MEDICINE OF THE NAT'L ACAD., GULF WAR AND HEALTH, VOL. 6: PHYSIOLOGIC, PSYCHOLOGIC, AND PSYCHOSOCIAL EFFECTS OF DEPLOYMENT-RELATED STRESS 2, 13(2008)

²¹ *Id.*

²² *Id.*

²³ *Porter v. McCollum*, 130 S.Ct. 447 (2009). Two differences between capital and non-capital sentencings are notable. First, courts evaluate capital sentencings carefully because imposition of the death penalty requires the utmost scrutiny for any trial or sentencing deficiencies *See, e.g.*, *Gardner v. Florida*, 430 U.S. 349, 357-359 (1977) (Stevens, J. plurality opinion). Second, *any* mitigating evidence is relevant to the decision whether to impose the ultimate punishment. *Tennard v. Dretke*, 542 U.S. 274, 285 (2004) ("[V]irtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances") (quoting *Eddings v. Oklahoma*, 455 U.S. 104 (1982)). Nevertheless, the opinion's discussion of military service is instructive.

²⁴ *Porter*, 130 S.Ct at 448.

return from war, (3) his childhood history of physical abuse, and (4) his brain abnormality, difficulty reading and writing, and limited schooling.”²⁵

The Court emphasized the importance of Porter’s military service as a mitigating factor, stating,

“[o]ur Nation has a long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines as Porter did. Moreover, the relevance of Porter’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 Porter.”²⁶

Listed below are additional opinions from the Supreme Court, Circuit Courts of Appeals and District Courts involving issues related to sentencing defendants who have served in the military. Some of the cases listed below are unpublished and therefore, generally, not suitable to cite in legal pleadings. Please consult the local rules of your jurisdiction.

Supreme Court

Kimbrough v. United States, 552 U.S. 85, 110 (2007). Kimbrough pleaded guilty to drug trafficking offenses involving both powder and crack cocaine. The Court noted in passing that Kimbrough had no prior felony convictions, that he had served in combat during Operation Desert Storm and received an honorable discharge from the Marine Corps, and that he had a steady history of employment.

Rita v. United States, 551 U.S. 338 (2007). Rita was convicted of lying to the grand jury. The Fourth Circuit affirmed his sentence finding that a sentence within the advisory guidelines range was subject to a presumption of reasonableness. The Court reviewed the circumstances surrounding a defendant who had performed over 25 years’ active and reserve military duty and had received 35 medals, awards, and nominations. After doing so, the Court “simply [could not] say that Rita’s special circumstances [were] special enough that, in light of § 3553(a), they require[d] a sentence lower than the Guidelines provide.” A concurring opinion by Justice Stevens highlights the need to consider military service as a sentencing factor. 551 U.S. at 367.

First Circuit

United States v. Chapman, 209 Fed. Appx. 3 (1st Cir. 2006). 40-month sentence, a reduction from the guideline range of 70-87 months, for illegal reentry offense was not unreasonable where the district court considered, among other things, defendant’s military service.

²⁵ *Id.* at 454 (quoting *Wiggins v. Smith*, 539 U.S. 510, 535 (2003)).

²⁶ *Id.* at 454 (citing Abbott, *The Civil War and the Crime Wave of 1865-70*, 1 SOC. SERV. REV. 212, 232-234 (1927) (discussing the movement to pardon or parole prisoners who were veterans of the Civil War); Rosenbaum, *The Relationship Between War and Crime in the United States*, 30 J. CRIM. L. & C. 722, 733-734 (1940) (describing a 1922 study by the Wisconsin Board of Control that discussed veterans imprisoned in the State and considered “the greater leniency that may be shown to ex-service men in court.”). The opinion also cited two state statutes providing for a special hearing or alternate sentencing processes for veterans who suffer from mental illness caused by military service. 130 S.Ct. at 455 n. 9; Cal. Penal Code Ann. § 1170.9(a); Minn.Stat. § 609.115, subd. 10.

Second Circuit

United States v. Canova, 412 F.3d 331 (2d Cir. 2005). Canova was convicted of offenses involving a multi-million-dollar Medicare fraud. The district court did not err when departing downward to a sentence of probation in consideration of, among other things, defendant's extensive, exemplary service as a volunteer firefighter; and six-year Marine Corps service.

United States v. Bruder, 103 F.Supp.2d 155 (E.D.N.Y. 2000), *rev'd in part, vacated in part*, by *United States v. Schwarz*, 283 F.3d 76 (2d Cir. 2002). Bruder was convicted of violating the civil rights of an arrestee and conspiracy, aiding and abetting in the sexual assault of Abner Louima. The district court did not err when it departed downwards four offense levels based, in part, on defendant's family ties, solid employment history, and military service in the Marine Corps (which included various decorations and honorable discharge).

United States v. Caruso, 814 F.Supp. 382 (S.D.N.Y. 1993). Caruso pleaded guilty to wire fraud related to gambling. The district court downwardly departed from 12-18 months to 6 months home confinement and probation term in consideration of 66-year old defendant's age, medical problems, good employment record, and military service in the Navy (two years Pacific tour in World War II and military decorations).

Third Circuit

United States v. Howe, 543 F.3d 128 (3rd Cir. 2009). Sentence of probation in a wire-fraud case was not unreasonable where district court varied downward from an advisory 18-24 month range in consideration of, among other things, defendant's lack of criminal history, 20 years military service (including honorable discharge).

United States v. Fogle, 331 Fed. Appx 920 (3rd Cir. 2009). Fogle pleaded guilty to being a felon in possession of a firearm. The district court did not err when it varied downward from an advisory 46-57 month range to 41 months in consideration of defendant's "long period of military service, long history of gainful employment, and the way he accepted responsibility in the case."

United States v. Velasquez, 329 Fed. Appx. 365 (3rd Cir. 2009). Sentence of 360 months (in child pornography and Inducement of Minor to Perform Illegal Sex Acts case) was reasonable where district court varied downward from an advisory Life Imprisonment in consideration of the defendant's "honorable service in the Navy, the positive letters received..., [the defendant's] lack of criminal record, and his [military] injuries." .

Fourth Circuit

United States v. Goode, 309 Fed. Appx. 693 (4th Cir. 2009). Sentence of 36 months for DWI-habitual offender was not unreasonable where district court considered sentencing range between 12-60 months pursuant to Assimilative Crimes Act but imposed 36 months imprisonment in consideration of defendant's military service.

United States v. Gill, 150 Fed. Appx. 205 (4th Cir. 2005). Bottom-of-range sentence for cocaine offenses was not unreasonable where district court imposed 262 months in consideration of defendant's previous, lengthy, military service.

United States v. Conyers, 2011 U.S. Dist. LEXIS 83949 (S.D.S.C. July 29, 2011). Counsel's failure to inform defendant about the newly revised departure under USSG §5H1.11 did not constitute ineffective assistance of counsel because district court took defendant's military service into consideration under the § 3553(a) factors. Further, the sentencing court would not have granted a departure under §5H1.11 because defendant's military service was not "present to an unusual degree" to warrant such a departure.

United States v. Pipich, 688 F. Supp. 191 (D.Md. 1988) District court departed from 1-7 month guideline range to impose probation for theft of mail offense and spoke about defendant's 4-year military service, which included combat duty in Viet Nam and receipt of over 45 awards (including two Purple Hearts and heroism award).

Fifth Circuit

United States v. Williams, 332 Fed. Appx. 937 (5th Cir. 2009). Williams pleaded guilty to attempting to commit extortion affecting interstate commerce. Rule 35(a) resentencing adjustment from 188-235 months to 120 months based upon defendant's pre-indictment military service was not unreasonable. Documents showed that defendant rejoined the army after the offense conduct and pre-indictment. "Williams's service to his country is admirable and worthy of consideration as a mitigating factor supporting a downward departure."

United States v. Deal, 237 Fed. Appx. 909 (5th Cir. 2007) (unpublished). At sentencing for defendant's immigration offense, the district court did not err when declining to depart downward where it "expressed concern that an educated man with a military background and an important trucking job would turn to being a felon."

United States v. Winters, 105 F.3d 200 (5th Cir. 1997). At the defendant's sentencing for civil rights violations, obstruction, and illegal possession of a firearm, the district court reversibly erred when it departed downwards and imposed probation based, among other things on defendant's combat service in Viet Nam (and his receipt of two Purple Hearts medals). Under a *Koon* analysis, such facts did not take the case out of the heartland of cases.

United States v. Peters, 978 F.2d 166 (5th Cir. 1992). At defendant's sentencing for violating Arms Export Control Act, the district court did not err when declining to depart downward on the basis of defendant's military service which included, among other things, the award of two Purple Heart medals and a Distinguished Flying Cross award. The lower court concluded that defendant's military decorations were insufficiently extraordinary to compel such departure.

Sixth Circuit

United States v. Hughes, 370 Fed. Appx. 629 (6th Cir. 2010). In defendant urologist's sentencing for fraud, district court varied below the advisory 24-30 month range to impose 14 months imprisonment after balancing seriousness of offense against the defendant's service to under-served medical population and his military service.

United States v. Cope, 282 Fed. Appx. 369 (6th Cir. 2008)). Reviewing a 188-month, within-guideline sentence for drug offenses, the court rejected defendant's claim that lower court placed too little emphasis on his military service in Viet Nam and his accompanying PTSD. It observed

the lower court had remarked that “even individuals with [this] disorder[] have to take responsibility for their actions.”

United States v. Haworth, 187 Fed. Appx. 458 (6th Cir. 2006). Concurrent bottom-of-range, 41-month sentences for possession and trafficking of child pornography were not unreasonable where district court recognized defendant’s military service but concluded that “adequate deterrence” weighed more heavily.

United States v. Jared, 50 F. App’x. 259 (6th Cir. 2002). Jared pleaded guilty to three counts of bank robbery. Applying *Koon*, circuit court concluded district court erred when departing for military service where such service, which occurred 25 years before the instant offense, was not shown to be outside the heartland of cases.

United States v. Theunick, 651 F.3d 578 (6th Cir. 2011). Defendants were convicted of possessing automatic weapons and making false entries on weapons application and transfer forms. District court’s denial of downward departure for military service was not reviewable; the sentence was found reasonable in spite of denial of downward departure motion.

United States v. Panyard, 2009 WL 1099257 (E.D. Mich. 2009). At defendant’s sentencing for environmental offenses, district court reasonably varied below the advisory 27-33 month range to impose 15 months imprisonment after concluding that military service during Desert Storm (served on a Navy destroyer and carried a top secret clearance) lent moderate support for a variance.

United States v. Cole, 622 F.Supp.2d 632 (N.D. Ohio 2008). At defendant’s sentencing for securities fraud offenses, the district court varied below the advisory 30-37 month range to impose 366 days imprisonment and a \$180,000 fine in consideration of the defendant’s lack of criminal history, admirable military service (which included a combat tour in Viet Nam as a Special Forces officer and the receipt of 2 Bronze Stars), community involvement, and a history of having sacrificed to raise two children.

Seventh Circuit

United States v. Arnold, 263 Fed. Appx. 507 (7th Cir. 2008). The district court’s imposition of a 20-year statutory maximum sentence was not unreasonable for child pornography offenses. The court considered defendant’s circumstances—he was serving on active-duty in Iraq when he communicated with under-age women and forwarded them child pornography—and even called him “courageous,” however the court’s concern for protecting the public outweighed such mitigating circumstances.

United States v. Brock, 433 F.3d 931 (7th Cir. 2006). At sentencing for drug trafficking and firearms charges, the district court’s imposition of a mid-range 360-month sentence was not unreasonable: the court was aware of the defendant’s 8-year United States Navy service and also aware of his difficult childhood. But the court weighed those considerations against the leniency extended the defendant in a previous offense and found the former factors to be less compelling.

United States v. Day, 168 Fed. Appx. 87 (7th Cir. 2006). In sentencing a geriatric defendant to a 25-month, within-range sentence for odometer fraud, district court did not error by concluding that defendant’s military service (and advanced age [73]) and infirmities “are counterbalanced

by his repeatedly taking advantage of the trusting and unsuspecting people in his own community and his excessive fraudulent activities over a significant period of time.”

United States v. Given, 164 F.3d 389, 395 (7th Cir. 1999). Defendant pleaded guilty to mail fraud. The district court did not err when it found that defendant’s military service, though exemplary, occurred twenty five years before sentencing and did not counter-balance the instant offense.

United States v. Graf, 2008 WL 5101696 (E.D.WI., Dec. 1, 2008). In sentencing defendant for his cocaine offense and its resulting 87-108 month advisory range, the district court considered among other things the defendant’s USMC service during Desert Storm (the Gulf War), his low risk of recidivism, and his positive personal qualities to vary downward to 78 months.

United States v. Hogge, 2101 U.S. Dist. LEXIS 142344 (N.D. IND March 29, 2010). Hogge defrauded numerous victims in an insurance fraud scheme. In varying downward, the district court noted that Hogge’s distinguished military record was relevant to departure and variance considerations under both USSG §5H1.11 and § 3553(a).

United States v. Moses, (E.D. WI.), 2007 WL 42752 (Jan 5, 2007). In sentencing defendant for firearms violations and considering a 110-137 month advisory range, court considered, among other things, his United States Marine Corps service (including his dishonorable discharge for larceny as well as his National Defense Service Medal, Sharpshooter badge, and Good Conduct medal) under 3553(a)(1) to vary downward to 84 months. The court considered these in combination with defendant’s solid employment history, dedication to his children, and lack of violence or intent to harm, as well as his good performance on pretrial release.

United States v. Nellum, 2005 WL 300073 (N.D. IN. 2005). At sentencing for crack cocaine offenses, district court varied below the advisory 168-210-month range to impose 108 months imprisonment after balancing seriousness of offense against improbability of recidivism, defendant’s poor health, lack of previous criminal history, and Army veteran status. (“This court finds it very relevant that a defendant honorably served his country when considering his history and characteristics....”).

Eighth Circuit

United States v. Chesnut, 421 Fed. Appx. 662 (8th Cir. 2011) (unpublished). After the defendant pleaded guilty to five bank robberies, the district court denied a downward variance based on the defendant’s prior military service and lack of criminal record.

United States v. Graham, 32 F.3d 571 (8th Cir. 1994) (table). District court rejected defendant’s argument that PTSD brought on by his Viet Nam military service caused him to abuse drugs and possess methamphetamine, for which he was convicted. Court understood its authority to depart but chose not to do so.

United States v. Griffin, 413 Fed. Appx. 574 (8th Cir. 2011). On appeal, an upward variance was affirmed where the defendant brandished a weapon and ordered bank employees to the floor including the manager who was eight months pregnant. The district court found that the defendant’s prior military service and resulting PTSD diagnosis did not outweigh the violent nature of the offense conduct.

United States v. Lamoreaux, 422 F.3d 750 (8th Cir. 2005). 21-month sentence for mail fraud was not unreasonable where district court considered defendant's previous military service, his wife's pregnancy and their other children, and his entrepreneurial spirit.

United States v. Neil, 903 F.2d 564 (8th Cir. 1990). At defendant's sentencing for cocaine offense, district court reversibly erred when departing downwards from 63-78 month sentence to 28 months based upon stable family, community service, and satisfactory military service. Recognizing that military service "could constitute grounds for departure in an unusual case," the circuit court said that defendant's 11 years of service as stateside recruiter is essentially indistinguishable from analogous civilian employment and thus cannot support a departure.

United States v. Risse, 83 F.3d 212 (8th Cir. 1996). In a case involving drug trafficking and weapons possession, the court upheld a downward departure from a range of 57-71 months to 18 months under 5K2.13 (Diminished Capacity), based on the defendant's PTSD connected to serving in Viet Nam.

United States v. Robinson, 516 F.3d 716 (8th Cir. 2008). At defendant's sentencing for bribery, district court did not abuse its discretion when assessing within-guideline, 33-month sentence after finding that twenty-five years of military service did not warrant departure or variance.

United States v. Perry, 1995 WL 137294 (D.Neb., 1994) (unpublished). The court granted a five-level downward departure under §5K2.13 (Diminished Capacity). The court found that the defendant's distribution of cocaine resulted from his addiction to cocaine, a substance he began using after serving in the Persian Gulf War and developing PTSD.

United States v. Shipley, 560 F.Supp.2d. 739 (S.D. Iowa 2008). In sentencing defendant to 90 months imprisonment for child pornography offenses that carried a 210-240 month advisory range, court considered among other things defendant's 10 years of military service (including 3 years overseas service, a National Defense Service Medal, a Meritorious Service Medal, and an Army Commendation Medal), honorable discharge, and demonstrated remorse manifested in a suicide attempt.

United States v. Tabor, 365 F. Supp.2d 1052 (D.Neb., 2005), *rev'd on other grounds*, 531 F.3d 688 (8th Cir. 2008). Tabor, a 40-year-old man with no criminal history points, was convicted of conspiracy to distribute crack cocaine. The court found that his military service in the United States Army (followed by his honorable discharge) and other factors did not "singly or collectively warrant a departure under pre-*Booker* departure theory or a variance under post-*Booker* jurisprudence."

United States v. Vue, 865 F.Supp. 1353 (D.Neb., 1994). The district court did not err when, in sentencing narcotics defendants, both Hmong tribesmen who had fled Laos after serving the American military and who, upon arriving stateside, lacked any language skills, education, or other means to obtain lawful support, it departed downwards.

Ninth Circuit

United States v. Blinkinsop, 606 F.3d 1110 (9th Cir. 2010). Bottom-of-range 97-month sentence was substantively reasonable in child pornography case where court considered seriousness of offense alongside defendant's personal record, military service, and lack of criminal history.

United States v. Carper, 659 F.3d 923 (9th Cir. 2011). A variance was affirmed where the defendant, a Marine, violated the Arms Export Control Act. The sentencing court granted the variance based on Casper's military service and because there was little to no likelihood of recidivism.

United States v. Stange, 225 Fed. Appx. 618 (9th Cir. 2007). Within-range sentence of 117-month sentence for armed bank robbery was not unreasonable where the district court considered defendant's post-service PTSD and a psychologist's report that he was prone to violence. The circuit court agreed that PTSD could support a shorter sentence but affirmed in deference to the lower court's discretion.

United States v. Cantu, 12 F.3d 1506 (9th Cir. 1993) PTSD supported a downward departure under §5K2.13 in a felon in possession case. The defendant had served for two years in Viet Nam and suffered from a "grave affliction" including flashbacks and anxiety. The district court erred in concluding it could not depart.

Tenth Circuit

United States v. Townley, 472 F.3d 1267 (10th Cir. 2007). Middle-of-the-advisory-range sentence of 240 months for drug-trafficking offenses was not unreasonable where the district court considered, among other things, defendant's military service.

United States v. Jager, 2011 U.S. Dist LEXIS 21203 (D. N. Mex. Feb. 17, 2011). In a child pornography possession case, the district court denied a downward departure under the §5H1.11 guideline finding that, in spite of the defendant's outstanding military record, his case did not fall outside the heartland of other similar pornography cases. However, the court did consider Jager's military service when granting a downward variance based on the § 3553(a) factors.

Eleventh Circuit

United States v. Lett, 483 F.3d 782 (11th Cir. 2007). At sentencing for crack cocaine offenses, the court imposed the 60 month statutory minimum, a reduction from the 70-87 month range, noting that the defendant was "an extremely valuable asset to the United States Army, an outstanding non-commissioned officer, a model soldier, a role model with excellent work ethic, a dynamic, innovative leader, a shining example for his peers and subordinates," who had served in the Iraqi Freedom Campaign. After deciding that the safety valve applied, the court resentenced Lett under Rule 35(a) to time served plus supervised release. In addition to Lett's military record, the court cited his limited role in the offense, voluntary withdrawal from the criminal enterprise followed by re-enlisting in the Army, and lack of criminal history. On appeal, the circuit court reversed because the district court lacked authority to resentence Lett to less than the statutory minimum.

United States v. Manuel, 208 Fed. Appx. 713 (11th Cir. 2006). Sentence of 168 months for 7 unarmed bank robberies that generated a 78-97-month advisory range was not unreasonable where the district court initially announced a contemplated upward departure to 180 months but actually imposed 168 months in consideration of defendant's, childhood circumstances, character, and military service.

V. CONCLUSION

Courts have often considered the impact military service has on the individual before the court; sometimes courts impose more lenient sentences when, in the court's view, the defendant suffers from a mental or emotional condition that is traceable to the defendant's military service. Courts will continue to confront the issues related to PTSD, TBI, and other effects of military service, as well as how to appropriately recognize one's service to one's country. As the knowledge of the physical, mental, and social effects of military service continues to evolve, it will be important to be aware of current developments in the medical establishment. An appendix to this report contains links to helpful web sites, including the Veterans Administration and national medical institutes, as well as a selected bibliography for further reading.

APPENDIX

Web Sites for PTSD and TBI

Department of Veterans Affairs

General website: <http://www.va.gov/>

“What is PTSD?” at:

<http://www.ptsd.va.gov/public/pages/what-is-ptsd.asp>

“New regulations on PTSD Claims” July 12, 2010 at:

http://www.va.gov/ptsd_qa.pdf

Traumatic Brain Injury (TBI) Data Collection (CDC/NASHIA) at:

http://www.virec.research.va.gov/Non-VADataSources/CDC_TBI.htm

TBI and Suicide Prevention Resources at:

http://www.mirecc.va.gov/VISN16/providers/TBI_and_Suicide_Prevention_Resources.asp

Institute of Medicine

General web site: <http://www.iom.edu/>

Veterans Health:

<http://www.iom.edu/Global/Topics/Veterans-Health.aspx>

National Academy of Science

General web site: <http://www.nasonline.org/>

National Institute of Health

General web site at: <http://www.nih.gov/>

National Institute of Mental Health

General web site: <http://www.nimh.nih.gov/index.shtml>

PTSD at:

<http://www.nimh.nih.gov/health/publications/post-traumatic-stress-disorder-ptsd/what-is-post-traumatic-stress-disorder-or-ptsd.shtml>

US Department of Health and Human Services

General web site:

<http://www.hhs.gov/>

The Center for Mental Health Services’ National Gains Center at:

http://gainscenter.samhsa.gov/text/veterans/Responding_to_Needs_8_08.asp

U.S. National Library of Medicine

General web site: <http://www.nlm.nih.gov/medlineplus/>

Post-Traumatic Stress Disorder at:

<http://www.nlm.nih.gov/medlineplus/posttraumaticstressdisorder.html>

Traumatic Brain Injury at:

<http://www.nlm.nih.gov/medlineplus/posttraumaticstressdisorder.html>

Selected Bibliography and Further Reading

AMERICAN PSYCHOLOGICAL ASSOCIATION PRESIDENTIAL TASK FORCE ON MILITARY DEPLOYMENT SERVICES FOR YOUTH, FAMILIES AND SERVICE MEMBERS, THE PSYCHOLOGICAL NEEDS OF U.S. MILITARY SERVICE MEMBERS AND THEIR FAMILIES: A PRELIMINARY REPORT, at 4, 9 (February 2007).

Thomas Barnard & James Ewing, *Pretrial Advice for Representing Mentally Ill Criminal Defendants in the Military Justice System*, 35 NEW ENG. J. CRIM. & CIV. CONFINEMENT 337, 340-341 (Summer, 2009).

INST. OF MEDICINE OF THE NAT'L ACAD., GULF WAR AND HEALTH, VOL. 6: PHYSIOLOGIC, PSYCHOLOGIC, AND PSYCHOSOCIAL EFFECTS OF DEPLOYMENT-RELATED STRESS (2008).

INST. OF MEDICINE OF THE NAT'L ACAD., GULF WAR AND HEALTH, VOL. 7: LONG-TERM CONSEQUENCES OF TRAUMATIC BRAIN INJURY (2009).

Major Timothy P. Hayes, Jr., *Post-Traumatic Stress Disorders on Trial*, 190/191 Military L. Rev. 67 (Winter, 2006 / Spring, 2007).

William D.S. Killgore, Dave I. Cotting, Jeffrey L. Thomas, Anthony L. Cox, Dennis McGurk, Alexander H. Vo, Carl A. Castro & Charles W. Hoge, *Post-combat Invincibility: Violent Combat Experiences Are Associated with Increased Risk-Taking Propensity Following Deployment*, 42(13) J. OF PSYCHIATRIC RESEARCH 1112 (Oct. 2008).

Karl Kirkland, *Post-Traumatic Stress Disorder v. Pseudo Post-Traumatic Stress Disorder*, 56 ALA. LAW. 90, 92 (1995).

Shira Maguen, Barara A. Lucenko, Mark A. Reger, Gregory A. Gahm, Brett T. Litz, Karen H. Seal, Sara J. Knight, and Charles R. Marmar, *The Impact of Reported Direct and Indirect Killing on Mental Health Symptoms in Iraq War Veterans*, 23:1 J. OF TRAUMATIC STRESS, 86 (February 2010).

Richard J. McNally, *Progress and Controversy in the Study of Posttraumatic Stress Disorder*, 54 ANNUAL REVIEW OF PSYCHOLOGY 229, 234-235 (2003).

Don Nidiffer and Spencer Leach, *To Hell and Back: Evolution of Combat-Related Stress Disorder*, 29 DEV. MENTAL HEALTH L. 1, 11-12 (January, 2010) (citing Hoge, et al, *Combat Duty in Iraq and Afghanistan, Mental Health Problems, and Barriers to Care*, NEW ENG. J. OF MED., 351, 13-22 (2004)).

Captain Evan R. Seamone, *The Veterans' Lawyer as Counselor: Using Therapeutic Jurisprudence to Enhance Client Counseling for Combat Veterans with Posttraumatic Stress Disorder*, 202 MIL. L. REV. 185, 210 (Winter 2009).

Laura Snodgrass, Brad Justice, *“Death is Different”*: Limits on the Imposition of the Death Penalty to Traumatic Brain Injuries, 26 DEV. MENTAL HEALTH L. 81, 86 (July 2007) (citing Jonathan M. Silver, TEXTBOOK OF TRAUMATIC BRAIN INJURY 7 (2005)).

Mary Tramontin, *Exit Wounds: Current Issues Pertaining to Combat-Related PTSD of Relevance to the Legal System*, 29 Dev. Mental Health L. 23, 26-27 (2010).