



© Graphic Stock

## Echoes of War

### Part Two: Legal Strategies For Defending the Combat Veteran in Criminal Court

#### I. Introduction

**A** combat veteran arrested and charged in the criminal justice system presents an irony absent from most other cases: a man or woman who was once willing to sacrifice his or her life and do violence to protect the United States and its system of government now faces violence, be it incarceration or execution, at the hands of that same government. Professor Youngjae Lee of Fordham University School of Law has argued that when veterans' military service and resulting psychological damage lead to criminal activity, "the state's standing to condemn their behavior is undermined because the state itself has caused the condition leading to the crimes."<sup>1</sup>

Criminal defense attorneys are all that stands between these protectors and the nation they sacrificed to protect. Defense attorneys are the only ones who can hold the state, and society as a whole, accountable for its role in their

behavior. It is a sacred duty. Defense attorneys must defend these veterans with the same focus and intensity with which they defended the United States. The U.S. Supreme Court agrees. Its recent landmark decision, *Porter v. McCollum*, makes this the *legal* duty of defense attorneys as well.<sup>2</sup>

The veteran defendant's service can be relevant throughout the case, from precharge and plea negotiations to trial and sentencing mitigation. When possible, the prosecutor should be made aware of the veteran's service, any service-related mental health problems, and available treatment options before charges are even filed to allow consideration of these factors in the charging decision. Before trial, defense attorneys can point to the veteran's service, connection to the community, and veterans' organizations, which offer treatment resources and supervision, in arguing for pretrial release. If the veteran is suffering from a service-related post-traumatic stress disorder (PTSD) or traumatic brain injury (TBI), the need for treatment and available treatment resources can be used both in plea negotiations and sentencing. Such conditions may even be exculpatory, providing the basis for various defenses. This article will provide an introductory overview of the available strategies for defending the military veteran. More comprehensive coverage of these topics is provided in the forthcoming book *Attorney's Guide to Defending Veterans in Criminal Court* (hereinafter *Defending Veterans*).<sup>3</sup>

#### II. Combat PTSD in Criminal Cases and the New DSM-V

The defense strategies discussed in this article are largely based on the presentation of a disorder that developed in the veteran because of the veteran's military service. The disorder is tied to the criminality. The most

**Editor's Note:** This article is the final part of a two-part series. Part One, which addressed the history of combat trauma and its ties to criminal behavior, appeared in the August 2013 issue of *The Champion*.

BY BROCKTON HUNTER AND RYAN ELSE

common of such disorders is PTSD, and thus it is important to have a basic understanding of its admissibility and diagnostic criteria.

A diagnosis of PTSD meets the scientific criteria of admissibility requirements announced in *Daubert v. Merrell Dow Pharms., Inc.* and Federal Rule of Evidence 702:

PTSD has been empirically tested. It has been subjected to critique for several decades, and PTSD studies have been published and peer reviewed. PTSD has been accepted as textbook science by the scientific community for 20 years. Applying the *Daubert* factors, we have a falsifiable hypothesis and data that has been tested to support the theory. PTSD studies have been published in peer-reviewed journals and the diagnostic features are accepted in the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV), so it fits well within the scope of general consensus. As with any medical diagnosis, there may be variations in judgment, but the underlying studies have met statistical criteria for validity.<sup>4</sup>

In June 2013, the American Psychiatric Association released the newest version of the Diagnostic and Statistical Manual of Mental Disorders, DSM-V. Chapter 309.81 of the DSM-V presents the diagnostic criteria for PTSD. The following is a summary of these diagnostic criteria and the important changes made from the previous DSM-IV.

The recent release of the DSM-V offers new insights into the classification of PTSD and the array of symptoms associated with the diagnosis.<sup>5</sup> For example, the DSM-V has removed PTSD from the Anxiety Disorders section and placed in a new category entitled Trauma and Stress-Related Disorders.<sup>6</sup> The changes in classification in the DSM-V underscore two critical points about the understanding of PTSD. First, it is the only diagnosis that directly specifies an external situation or event as the cause of the disorder. Second, placing PTSD into a separate category of Trauma and Stress-Related Disorders emphasizes that PTSD is a complex disorder that exerts influences far in excess of anxiety symptoms. The DSM-V recognizes that PTSD affects mood, cognition, awareness, affect, and physiological responses.<sup>7</sup> Thus, it is currently concep-

tualized as a complex manifestation of multiple symptoms.

The DSM-V acknowledges PTSD can result in cognitive symptoms, which interfere with normal consciousness. In fact, under criterion B3 the DSM-V states, "Dissociative reactions (e.g., flashbacks) in which the individual feels or acts as if the traumatic event(s) were reoccurring. (Such reactions may occur on a continuum, with the most extreme expression being a complete loss of awareness of present surroundings.)"<sup>8</sup> In fact, the DSM-V specifies a subtype of PTSD with dissociative symptoms when the individual is positive for either depersonalization or derealization symptoms. Depersonalization symptoms include persistent or recurrent experiences of feeling detached from, and as if one were an outside observer of, one's mental processes or actions. Derealization symptoms consist of persistent or recurrent experiences of feelings of unreality, e.g., the world is experienced as unreal, dreamlike, distant or distorted.<sup>9</sup>

The DSM-V added a new diagnostic element in order to address the cognitive and affective changes related to PTSD. Criterion D incorporates negative alterations in cognitions and mood associated with the traumatic event(s). Specific symptoms of negative cognitions and mood include the following:

1. Inability to remember an important aspect of the traumatic event(s) (typically dissociative amnesia; not due to head injury, alcohol, or drugs);
2. Persistent and exaggerated negative beliefs or expectations about one's self, others, or the world (e.g., "I am bad." "No one can be trusted." "The world is completely dangerous." "My whole nervous system is permanently ruined.");
3. Persistent distorted cognitions about the cause or consequences of the traumatic event(s) that lead the individual to blame himself/herself or others;
4. Pervasive negative emotional state (e.g., fear, horror, anger, guilt, or shame);
5. Markedly diminished interest or participation in significant activities;

6. Feeling of detachment or estrangement from others; and
7. Persistent inability to experience positive emotions (e.g., inability to experience happiness, satisfaction, or loving feelings).

Hypervigilance may also factor into alleged criminal behavior. Many individuals with PTSD report feeling "on guard" much of the time. They may be constantly scanning the environment to detect any potential threats. Chronic hypervigilance can result in paranoid-like states and lead the person to overreact to situations in an attempt to protect themselves or others. Finally, exaggerated startle response may result in veterans reacting instinctively to noises, movements, or other environmental changes without adequate processing of the information.

In order to address these features of PTSD, the DSM-V added some symptoms within criterion "E" assessing alterations in autonomic arousal and reactivity that are associated with the trauma. Specific symptoms include the following:

1. Irritable behavior and angry outbursts (with little or no provocation) typically expressed as verbal or physical aggression toward people or objects;
2. Reckless or self-destructive behavior;
3. Hypervigilance;
4. Exaggerated startle response;
5. Problems with concentration; and
6. Sleep disturbance.

While symptoms three through six were part of the DSM-IV, the first two symptoms of aggressive and/or reckless behavior are new to the DSM-V.

A positive diagnosis of PTSD is necessary, but not sufficient, to form a basis for a legal defense. Defense counsel should carefully review the elements of the alleged crime in concert with findings from the psychological assessment. There should be a logical connection between the actions of the individual and the underlying diagnosis of PTSD. It is important to reiterate that in many respects a successful defense is predicat-



ed on how logical and understandable the alleged crime and symptoms of PTSD are.

The release of the DSM-V has strengthened the applicability of PTSD as a defense in criminal cases. PTSD as a defense can be used in a variety of contexts. PTSD can, in some cases, be used as a formal mental health defense of not guilty by reason of insanity. Alternatively, PTSD may be quite effective during pre-trial negotiations to reduce or even dismiss charges. Finally, PTSD can also be highly instrumental during the post-trial sentencing phase of litigation. Generally, psychologists are granted more latitude in terms of expert testimony during sentencing. Additionally, other issues such as co-morbid disorders and attempts to self-medicate can be introduced. Finally, defense counsel can use testimony of the psychologist to offer expert opinion regarding treatment programs, prognosis, and long-term interests of both the defendant and society.

### III. Pretrial Strategies

Even before charges are filed, the defendant's military service is relevant and maybe even dispositive. Prosecutors wield incredible discretion to decline or undercharge an offense. A veteran client's military service may be relevant to many of the National District Attorneys

## The evidence presented must tell the story of the veteran defendant's life before, during, and after combat service.

Association's (NDAA) factors for determining whether to charge or what to charge: doubt as to the accused's guilt, the availability of suitable diversion and rehabilitative programs, the attitude and mental status of the accused, the characteristics of the offender, and "any other ... mitigating circumstances."<sup>10</sup> These factors show that there are various reasons a prosecutor should consider a veteran defendant's military service in the charging decision or in the context of a plea agreement.

Prosecutorial sympathy for veterans has been tested and shown as significant, at least with respect to minor offenses, through social science research.<sup>11</sup> A University of Alabama study polled a sample of 35 active prosecutors from Alabama, Mississippi, California, and Kansas regarding a charged assault with

consistent fact patterns and four types of defendants: veterans with PTSD, veterans without PTSD, nonveterans with PTSD, and a control group that was neither a veteran nor had PTSD.<sup>12</sup> The veteran defendant with PTSD had been in a blast that struck his vehicle, injuring him and killing two others from his unit, and the nonveteran with PTSD had been in a car accident that injured him and killed a passenger.<sup>13</sup> The study found that "[o]verall, prosecutors viewed veterans as less blameworthy for the low-level offense than nonveterans. ... A further important finding was that veterans were offered significantly more treatment-focused diversion programs than nonveteran defendants, as opposed to simply jail or probation."<sup>14</sup>

There is at least significant anecdotal evidence that this same rationale among prosecutors extends to serious violent crimes as well. The murder case of Matthew Sepi in Las Vegas, Nev., is an excellent example of prosecutorial declination, or refusal to charge, due to his public defender's efforts to educate the prosecutor about the veteran client's service and its relevance.<sup>15</sup>

In Brock Savelkoul's case in Watford City, N.D., defense counsel used pretrial release to establish a treatment record — a strategy that can demonstrate a veteran client's amenability to probationary treatment and even secure a plea agree-

ment for diverting charges based upon the veteran client's completion of available courses of PTSD-specific treatment at the Veterans Administration (VA) hospital.<sup>16</sup> In Savelkoul's case, the defense used this strategy to reach a diversionary resolution in which felony counts of reckless endangerment, fleeing an officer, and terrorizing would be dismissed after three years of successful VA treatment and probation.<sup>17</sup> If successful, Savelkoul will conclude his case — involving a fear assault with a firearm, multihour high-speed chase, and an armed standoff with officers — with only a conviction for misdemeanor reckless driving.<sup>18</sup> Both of these cases involved serious violent charged offenses, showing the potential influence of the veteran's service and available resources on prosecutors' charging decisions.

## IV. Trial Defenses

In cases involving extreme service-related disorders, the veteran's psychological injuries may be relevant to the determination of guilt or innocence because they may negate the requisite intent of the crime or mitigate the veteran's legal culpability.<sup>19</sup> These PTSD or TBI-related defenses can be separated into four categories: (1) insanity defenses, negating all culpability, (2) enhanced self-defense defenses based upon the veteran's mistaken belief in the amount of force necessary to protect himself or herself, (3) an automatism defense when the veteran's actions are the result of reflex, sleepwalking, or a 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.<sup>20</sup> These categorizations blur when actually proving an insanity defense to a jury. For the sake of brevity, only insanity defenses are discussed in this article.

Psychological defenses based on PTSD differ in some significant ways from defenses based on other mental disorders because the source of the disorder, combat trauma, is readily identifiable and describable:

Insanity cases are often tried before a judge, and the goal of the attorney is usually to demonstrate that the events were so bizarre that insanity is required as a legal conclusion. The decision regarding the legal responsibility of the defendant in insanity cases is often totally dependent upon conflicting opinions advanced by mental health professionals, often with little opportunity for laymen to test the validity of those opinions. With PTSD, however, the source of the mental disorder can be described in great detail. It is also possible to show overt symptoms and behavior, which allow the judge or jury to test the validity of the diagnosis.<sup>21</sup>

A PTSD defense requires the presentation of at least four factors: (1) pre-trauma history as a baseline for the defendant's behavior before the disorder, (2) history of the trauma, (3) post-trauma history showing the change in the defendant, and (4) an expert evaluation of the defendant's psychological condition and its connection to the crime. The PTSD defense theory, thus, provides for the potential admissibility of the defendant's



# WE'VE EXPANDED. *But our* WORLD STILL REVOLVES *around* YOU.

Thanks to our recent merger, our firm, formerly Holtz Rubenstein Reminick, has an even broader depth and breadth of resources to solve our clients' complex business problems. And while our name has changed, our level of commitment and dedication remains the same, delivering the high level of service in tax, assurance, and consulting our clients have relied on for generations.

Connect with us: [bakertilly.com](http://bakertilly.com)



© 2013 Baker Tilly Virchow Krause, LLP. Baker Tilly refers to Baker Tilly Virchow Krause, LLP, an independently owned and managed member of Baker Tilly International.



**BAKER TILLY**

formerly  
HOLTZ RUBENSTEIN REMINICK

entire life in a way that allows the attorney a lot of creativity in presenting the defendant's case to a judge or jury.<sup>22</sup> The following three cases illustrate differing successful approaches to PTSD-based insanity defenses.

In *State v. Heads*,<sup>23</sup> on remand, the defendant successfully pleaded not guilty by reason of insanity under the *M'Naghten* test after he shot his brother-in-law during a marital breakup, and "the defense successfully argued that the stress of losing his family, coupled with the similarity of the shooting scene to Vietnam, caused the normally law-abiding veteran to go 'on automatic' and revert to combat-like behavior."<sup>24</sup>

Wellborn Jack, Jr., the leader of Mr. Heads' trial team, stated:

[The defense's approach] was not conventional criminal defense. It was a conventional, plaintiff's personal injury approach and employed all of the techniques appropriate to it. The personal injury approach is to accept the burden of proof by a preponderance of the evidence and then (1) to tell the jury in your opening statement what you are going to prove, (2) to

prove it during the case-in-chief, and (3) in your summation tell the jury what you have proved.

This approach is appropriate when presenting the insanity defense in any jurisdiction. Regardless of where the law of the jurisdiction places the burden of proof or persuasion, common sense presumes sanity and puts the burden squarely on he who asserts insanity. This is particularly true where the sanest looking guy in the courtroom is your own client.<sup>25</sup>

The evidence in Mr. Heads' defense was presented in four parts. First, three experts were presented on the diagnosis and treatment of PTSD.<sup>26</sup> Second, witnesses from throughout Mr. Heads' life, including fellow service members, were presented.<sup>27</sup> Third, evidence that tied the scene of the shooting to the experiences in Vietnam, such as the weather and local vegetation, were presented.<sup>28</sup> Finally, Mr. Heads himself testified.<sup>29</sup>

Mr. Jack described this presentation of evidence as "serv[ing] a subtle and unspoken evidentiary purpose. Our job was to prove things which were, by the definition in the DSM-III, 'beyond ordinary

human experience,'" referring to one of the DSM elements of PTSD.<sup>30</sup> By presenting expert testimony on combat-related PTSD first, all evidence of Mr. Heads' life before, during, and after combat became unquestionably relevant to satisfying the elements of PTSD and its causal connection to the offense. Next, more testimony was offered which was devoted to fighting, feeling, and seeing the war through the eyes of five good men who had fought it with Mr. Heads. Each in his own way from his own perspective painfully described what Mr. Heads had seen, heard, and smelled, and what Mr. Heads had done during nine months in Vietnam.<sup>31</sup>

The defense also presented a graphic documentary film on the Vietnam combat experience to the jury. Finally, Mr. Heads' PTSD was connected to the criminal act in a way that was "more morally satisfying than scientific."

[The jury was given a] conceptual framework and a vision within which the bits and pieces of their own experience and [Mr. Heads'] life could comfortably be fitted, a whole formed, and a morally responsible verdict rendered. Within this framework, it was not necessary

that each juror have the same reasons for believing that there was a connection. It was sufficient if all believed. It was not even necessary that a juror be able to articulate or even know what the connection was. It was sufficient if all of the facts and circumstances presented in evidence were powerful enough to compel a conclusion that there must be a connection, even if neither I nor anyone else knew what it was.<sup>32</sup>

In another landmark case, the defendant in *People v. Wood*<sup>33</sup> successfully argued that he was not guilty by reason of insanity, under the *M'Naghten* test, because the sounds in

## The goal is to distinguish the veteran defendant from other defendants via the veteran's military service.

the factory where he was employed mimicked the artillery noises he had heard while deployed in Vietnam and triggered a dissociative flashback following an argument with his foreman, whom he murdered.<sup>34</sup> Peter Erlinder, an attorney for Mr. Wood, contrasted the strategy of the *Wood* case with the *Heads* case:

The structure of the presentation of the evidence however, differed markedly from that in the *Heads* case. In the *Wood* case, the diagnosis of PTSD was not presented until the last witness testified. Thus, the entire case was put into evidence before the diagnosis conclusively established the relevance of the preceding testimony.

The testimony at trial tended to establish that Mr. Wood entered a "survivor mode" of behavior before and during the shooting. His actions during the shooting were closely analogous to the survival reactions he had learned as a Marine. For a brief time Mr. Wood was once again the frightened 18-year-old Marine who carried his .45 caliber automatic pistol everywhere and who survived his traumatic Vietnam experiences by learning to react without thinking.<sup>35</sup>

Contrasting the successful PTSD defenses in *Heads* and *Wood* shows that

while there may be different strategic approaches to presentation, the evidence presented must tell the story of the veteran defendant's life before, during, and after the combat service. Trial strategy should use this story to connect the combat trauma to the criminal act in a logical manner — "the trials were presented almost as one would prove up a personal injury claim in which great care was taken to precisely describe the original traumatic event and to explain its relation to the emotional or environmental conditions at the time of the crime."<sup>36</sup>

Alternatively, some defense strategies have rested on the argument that, because of the veteran defendant's combat training and psychological indoctrination during military service, the defendant was unable to control his actions sufficiently

to be held responsible for his actions. Jessie Bratcher killed a man accused of raping his girlfriend. In 2009, he was found not guilty by reason of insanity, not because he experienced a dissociative flashback, but because following his combat-intensive deployment to Iraq he could not control his response to the threat presented when he confronted the man accused of raping his girlfriend:

"Nobody had deprogrammed Bratcher when he got home," [Marku] Sario[, Bratcher's public defender,] told the jury. "He was the same hair-trigger killing machine he had been trained to be around Kirkuk. ... In previous wars, soldiers were told to aim carefully till you knew what you were shooting at. In this war, that's not the case," Sario argued. "The one thing they always emphasized was instant reaction to threats. If there's a threat, eliminate it. Eliminate it now, without thinking, with overwhelming force."<sup>37</sup>

Another variation of the insanity defense that has begun to gain traction, at least in military courts martial cases, is the defense of a "polysubstance-induced delirium" leading to verdicts of not guilty "by reason of lack of mental capacity."<sup>38</sup> This was the verdict secured

in the assault, DUI, and auto theft case against Air Force pilot Patrick Burke.<sup>39</sup> He was prescribed an amphetamine to keep him alert during long flights.<sup>40</sup> After one such flight, he and a buddy went to get drinks and, on the ride back, he began assaulting his friend, yelling, "Jack Bauer told me this was going to happen — you guys are trying to kidnap me!"<sup>41</sup> Then, "[w]hen the woman giving them a lift pulled the car over, Burke leaped on her and wrestled her to the ground. 'Me and my platoon are looking for terrorists,' he told her before grabbing her keys, driving away, and crashing into a guardrail."<sup>42</sup>

Testifying before the House Committee on Veterans' Affairs, Dr. Peter Breggin, a physician and a scientific expert on antidepressant-induced violence and suicide, stated:

There is overwhelming evidence that the SSRIs and other stimulating antidepressants cause suicidality and aggression in children and adults of all ages. ... Antidepressants frequently cause manic-like reactions, including loss of impulse control and violence, posing potentially grave risks among military personnel.<sup>43</sup>

Dr. Breggin further argued for the causal connection between these medications and misconduct by citing to the DSM.

This is especially troubling since, "from 2002 through 2008, there has been nearly a doubling of psychiatric medications prescribed to military personnel and their families."<sup>44</sup> Considering the high volume of such prescriptions, which have been shown to cause criminal behavior, this issue and the corresponding insanity or competency defense must be explored for any veteran client prescribed psychotropic drugs.

## V. Sentencing

Historically, veterans have often received longer sentences than their civilian peers who were charged with the same offenses. A report by the Bureau of Justice Statistics analyzing data as of 2004 found that in state prisons, despite having shorter criminal records, veterans reported longer prison sentences and "on average veterans expected to serve 22 months longer than nonveterans."<sup>45</sup> But the sentencing law landscape is shifting rapidly and dramatically.

In *Porter v. McCollum* (2009), the U.S. Supreme Court stated:



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].<sup>46</sup>

In fact, *Porter* held that for a defense attorney to fail to present the defendant's combat service and the resulting trauma as a mitigating factor at sentencing in a capital case is sufficient grounds to support a *Strickland*<sup>47</sup> claim of prejudicially ineffective assistance of counsel.<sup>48</sup>

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.<sup>49</sup>

In addition to *Porter's* assertion that

the veteran defendant's service should be recognized with leniency and that service-related disorders are relevant mitigating evidence, there is a novel and compelling argument to be made that the government, through the prosecution or the court, is also culpable because it is the government's wars and/or military indoctrination that created the source of the criminality: the veteran defendant's service-related disorder. Law professor Youngjae Lee makes this argument quite succinctly, even controlling for factors such as violations of *Jus in Bello* and *Jus ad Bellum* principles:

Even if the state engages only in morally justified conflicts and even if we grant that the state's efforts to train soldiers to obey orders and overcome their inhibitions to killing are not culpable, the state's total, intimate, and intrusive involvement in shaping the soldiers' psyche and day-to-day lives makes it difficult to declare that the state is not to share the blame in soldiers' criminal behaviors, no matter the justness of the source

of the criminality. In other words, to the extent that the state has created and operated the military and turned individuals into those capable of killing efficiently and deployed them into combat, the state must share the blame for some of the foreseeable negative manifestations of such training and deployments, even if we cannot say that the state has done anything wrong.<sup>50</sup>

Professor Lee also states:

One implication of this argument, for those who are interested in implementation questions, is that courts, when deciding whether to grant a sentencing discount for offenders with military backgrounds, may bypass the vexing question as to whether a particular conflict is morally justified and still grant the discount, simply because mitigation is called for whether the war that a veteran was involved in was just or not.<sup>51</sup>

**Table 1: Average Sentence Reduction (Percentage) of Guideline Range for Defendants With Significant Military Service**

These figures were reached by (a) subtracting the actual sentence given from the high and low ends of the Guideline range, reaching a reduction range; then (b) dividing that range by the Guideline range to reach a percentage reduction for both the low end and the high end of the reduction. For example, in *United States v. Chapman*, 209 Fed. Appx. 3 (1st Cir. 2006), a 40-month sentence was given compared to a Guidelines Range of 70-87 months. This is a reduction of between 30-47 months. Thirty months divided by 70 months provides a reduction of 43 percent (the low end of the range of reduction) and 47 months divided by 87 months provides a reduction of 54 percent (the high end of the reduction range). Thus, the sentence was reduced 43 percent-54 percent of the Guideline sentence. Then these percent reduction ranges were averaged by adding all 12 of the low ends and dividing by 12, yielding an average reduction of 35.6 percent from the low end of the Guideline ranges; and repeating the process for the high end reduction range percentages, yielding an average reduction of 48.7 percent from the high end of the Guideline ranges.

Case	Sentence Imposed	Guidelines Range for Sentence	Difference Between Sentence and Guidelines	
			Months	Percentage
1) <i>U.S. v. Chapman</i> , 209 Fed. Appx. 3 (1st Cir. 2006)	40 mos.	70-87 mos.	30-47 mos.	43%-54%
2) <i>U.S. v. Caruso</i> , 814 F. Supp. 382 (S.D.N.Y. 1993)	6 mos.	12-18 mos.	6-12 mos.	50%-67%
3) <i>U.S. v. Fogle</i> , 331 Fed. Appx 920 (3rd Cir. 2009)	41 mos.	46-57 mos.	5-16 mos.	11%-28%
4) <i>U.S. v. Williams</i> , 332 Fed. Appx. 937 (5th Cir. 2009)	120 mos.	188-235 mos.	68-115 mos.	36%-49%
5) <i>U.S. v. Hughes</i> , 370 Fed. Appx. 629 (6th Cir. 2010)	14 mos.	24-30 mos.	10-16 mos.	42%-53%
6) <i>U.S. v. Panyard</i> , 2009 WL 1099257 (E.D. Mich. 2009)	15 mos.	27-33 mos.	12-18 mos.	44%-55%
7) <i>U.S. v. Cole</i> , 622 F. Supp.2d 632 (N.D. Ohio 2008)	12 mos.	30-37 mos.	18-25 mos.	60%-68%
8) <i>U.S. v. Graf</i> , 2008 WL 5101696 (E.D. WI. 2008)	78 mos.	87-108 mos.	9-30 mos.	10%-28%
9) <i>U.S. v. Moses</i> , 2007 WL 42752 (E.D. WI. 2007)	84 mos.	110-137 mos.	26-53 mos.	24%-39%
10) <i>U.S. v. Nellum</i> , 2005 WL 300073 (N.D. IN. 2005)	108 mos.	168-210 mos.	60-102 mos.	36%-49%
11) <i>U.S. v. Shipley</i> , 560 F. Supp. 2d. 739 (S.D. Iowa 2008)	90 mos.	210-240 mos.	120-150 mos.	57%-63%
12) <i>U.S. v. Lett</i> , 483 F.3d 782 (11th Cir. 2007)	60 mos.	70-87 mos.	10-27 mos.	14%-31%

Source: U.S. SENTENCING COMMISSION, CASE ANNOTATIONS AND RESOURCES: MILITARY SERVICE, USSG §5H1.11 DEPARTURES, AND BOOKER VARIANCES 6-12 (2012).

While this argument does not affect legal standing for the state to pursue a conviction, it does challenge the state's moral standing to pursue a strictly punitive sentence because it shares in the blame for the underlying causes of the criminality. Not only is this a mitigating factor, it requires from the government its sincere and persistent efforts toward rehabilitation in an effort to prevent future crimes for which the government, under this theory, would be at least partially to blame.

There is also statutory support for using a veteran's service as mitigation at sentencing. For instance, the *Porter* Court cited veteran sentencing statutes in Minnesota and California as examples of why Mr. Porter's combat service may have been mitigating.<sup>52</sup>

In 2008, Minnesota veterans' advocates led an effort to draft and pass a veterans sentencing statute.<sup>53</sup> 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 the 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.

In 2007, California passed Cal. Penal Code § 1170.9, updating an earlier, Vietnam-specific law that had been found ineffective in dealing with the veterans returning from wars in Afghanistan and Iraq.<sup>54</sup> 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.

In 2012, California amended § 1170.9 again. The amendment added subsection (h), to allow a judge to reduce a felony to a misdemeanor and then to remove the conviction from the veteran's record if the veteran (1) completes probation and treatment and (2) demonstrates that he or she is not a danger to the public and has benefitted from the court-ordered treatment.

What the Minnesota and California statutes do, in effect, is make the veteran's service a relevant sentencing consideration. The U.S. Sentencing Guidelines § 5H1.11 did the same thing in 2010 in stating that "[m]ilitary 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." As of 2013, there are five states with veterans sentencing statutes: California, Minnesota, Nevada, New Hampshire, and Rhode Island.<sup>55</sup>

This multistate and federal push for such sentencing mitigation guidelines shows that the public's focus has shifted towards placing a higher priority on the treatment of a veteran's service-related impairment and away from 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 repeat the mistakes made when the Vietnam generation of veterans initially came into contact with the criminal justice system.<sup>56</sup>

An essential element of arguing to the court for a lenient or treatment-based sentence, outside of a formal Veterans Treatment Court, is to help 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 describe the unique characteristics of the defendant 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. As § 5H1.11 of the U.S. Sentencing Guidelines illustrates, the goal is to distinguish the veteran defendant from other defendants via his service and from all other veteran defendants through his unique experiences and demonstrate that the veteran's case is not "covered by the Guidelines" or the recommended sentence for the particular conviction.<sup>57</sup>

Even before the § 5H1.11 change to the Guidelines, legal scholars, such as Ohio State's Professor Douglas Berman, were recognizing that "more and more courts are noticing and asserting, in a variety of ways, that there seems to be some relevance to military service, or history of wartime service, to our country."<sup>58</sup> This has certainly borne out in the federal courts: analysis of the 13 cases for which specific sentencing departure and variance information were provided in the U.S. Sentencing Commission's *Case Annotations and Resources: Military Service, USSG § 5H1.11 Departures, and*

Booker *Variances*<sup>59</sup> reveals that the average sentence reduction was between 37 percent and 49 percent of the guideline sentence range for defendants with significant military service.<sup>60</sup> In a specific example, Federal District Judge Robert Chambers sentenced Timothy Oldani to only five months in prison with three years of supervised release conditioned upon treatment, departing significantly from the presumptive sentence of nearly five years for selling stolen military night vision equipment.<sup>61</sup> The downward departure was despite the prosecution's argument that the veteran defendant "committed a serious crime and he merits serious punishment."<sup>62</sup> (See Table 1.)

Once the court *wants* to help the veteran defendant, it must have the authority to do so. In Minnesota, and likely in most states with similar statutes,<sup>63</sup> PTSD satisfies the statutory definition of a serious and persistent mental illness because PTSD is an Axis I diagnosis under the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*,<sup>64</sup> and "the underlying studies have met statistical criteria for validity."<sup>65</sup> Whatever the best local legal authority available is, it should be presented in the context of a national judicial and legislative movement in favor of leniency and treatment over incarceration in combat veteran cases. This allows the court to justify a departure on public policy grounds and avoid the label of being a "rogue" court.

The importance to the sentencing court of laying down adequate justification pinned to a legitimate source of authority when departing is articulated clearly in Senior U.S. District Court Judge John L. Kane's Memorandum Opinion and Order on Sentencing in *United States v. Brownfield*, in which Judge Kane spends seven of the 30 pages of the order tying his decision to "the need for the sentence imposed" factors from 18 U.S.C. § 3553(a), even after spending three pages explaining why he was justified in departing from the Guidelines.<sup>66</sup> The fact that "the Sentencing Guidelines do not address [issues] regarding the criminal justice system's treatment of returning veterans who have served in Afghanistan and Iraq" troubled Judge Kane, so he ensured that his order was published and distributed to the U.S. Sentencing Commission.<sup>67</sup> This shows the immense concern that the issues surrounding veteran defendants raise in judges but also demonstrates the need for those judges to ground their decisions in legal justification, even when they feel morally com-



pelled to provide a lenient sentence.

This same order is also a fine glimpse into the way judges receive the arguments of the veteran's individual service, as Judge Kane explains in-depth the service history of the defendant and the connection of this service to a PTSD diagnosis. Judge Kane then cites to *Porter's* statement of the nation's "long tradition of according leniency to veterans" to justify probation as a fitting consequence, even though the defense attorney and the prosecutor were requesting a sentence of a year and a day. This departure is one example of how successful an expertly crafted sentencing argument can be when the judge sees the defendant as a unique combat veteran with adequate alternatives to prison.

## VI. Conclusion

The most important point is that the defense must present the veteran's story to prosecutors, judges, and juries as soon as possible, must demonstrate how the veteran's service or any service-related mental health problems are relevant to the case, and must give the decision-maker an outlet through which to show leniency — be it dismissed charges, a mitigated sentence, or a not guilty verdict. Under all of these approaches, the most important element is to present the veteran's individual service history while placing that history into the context of the larger past failings in dealing with criminally involved veterans and the public policy necessity to avoid such failures with this generation of veterans. When this is done properly, it can achieve favorable results for the veteran client. Representing a veteran can be an incredibly rewarding experience because it gives the defense attorney the opportunity to passionately defend one of those who once defended us.

## Notes

1. Youngjae Lee, *Military Veterans, Culpability, and Blame*, 6 CRIM. L. & PHIL. (forthcoming 2013) (draft at 17), available at <http://ssrn.com/abstract+2191880>.

2. *Porter v. McCollum*, 130 S. Ct. 447, 455 (2009) (holding that a defense attorney's failure to present veteran defendant's combat service and its related trauma as a mitigating factor at sentencing is proper grounds for a claim of prejudicially ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984)).

3. THE ATTORNEY'S GUIDE TO DEFENDING VETERANS IN CRIMINAL COURT (Brockton Hunter & Ryan Else eds., 2013) [hereinafter

DEFENDING VETERANS].

4. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993); 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).

5. American Psychiatric Association, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, TR (5th ed., 2013); The summary was provided by Ernest G. Boswell, Ph.D. and Daniel E. Dossa, Ph.D.

6. *Id.* at 271.

7. *Id.*

8. *Id.*

9. *Id.* at 272.

10. NAT'L DIST. ATTORNEYS ASS'N (NDAA), NATIONAL PROSECUTION STANDARDS 50–52 (3d. ed. 2009), available at <http://www.ndaa.org/pdf/NDAA%20NPS%203rd%20Ed.%20w%20Revised%20Commentary.pdf>; see also Hans Sinha, *Prosecutorial Ethics: The Charging Decision*, 41 PROSC. 32, 39 (2007).

11. Jennifer Kelly Wilson, et al., *Prosecutor Pretrial Attitudes and Plea-Bargaining Behavior Toward Veterans With Post-Traumatic Stress Disorder*, 8 PSYCHOL. SERVICES 319 (2011).

12. *Id.*

13. *Id.* at 322.

14. *Id.* at 326.

15. Deborah Sontag & Lizette Alvarez, *Across America, Deadly Echoes of Foreign Battles*, N.Y. TIMES, [http://www.nytimes.com/2008/01/13/us/13vets.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2008/01/13/us/13vets.html?pagewanted=all&_r=0) (Jan. 13, 2008).

16. Lauren Donovan, *Troubled Vet Enters Plea Agreement; Felony Charges Diverted*, BISMARCK TRIB., [http://bismarcktribune.com/news/state-and-regional/troubled-vet-enters-plea-agreement-felony-charges-diverted/article\\_e7e3bcfe-46e1-11e0-92a8-001cc4c03286.html](http://bismarcktribune.com/news/state-and-regional/troubled-vet-enters-plea-agreement-felony-charges-diverted/article_e7e3bcfe-46e1-11e0-92a8-001cc4c03286.html) (Mar. 4, 2011, 10:33 PM).

17. T. Christian Miller & Daniel Zwerdling, *'Suicide by Cop' Leads Soldier on Chase of His Life*, NAT'L PUB. RADIO, <http://www.npr.org/2011/03/22/134657905/suicide-by-cop-leads-soldier-on-chase-of-his-life> (Mar. 22, 2011, 1:04 PM).

18. Lauren Donovan, *Court Agrees to Treatment for Iraq War Veteran Brock Savelkoul Before Legal Proceedings*, BISMARCK TRIB., [http://bismarcktribune.com/news/local/crime-and-courts/court-agrees-to-treatment-for-iraq-war-veteran-brock-savelkoul/article\\_f79b84c2-d1c7-11d1-9d12-001cc4c03286.html](http://bismarcktribune.com/news/local/crime-and-courts/court-agrees-to-treatment-for-iraq-war-veteran-brock-savelkoul/article_f79b84c2-d1c7-11d1-9d12-001cc4c03286.html) (Oct. 7, 2010, 2:10 AM).

19. See also Marku Sario's description of the Jessie Bratcher case in Chapter 19 of DEFENDING VETERANS, 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.

20. Thomas Hafemeister & Nicole

# SECURITY CLEARANCE LAWYERS



## MCADOO GORDON & ASSOCIATES, P.C.

# 202-293-0534

[www.mcadoolaw.com](http://www.mcadoolaw.com)

Stockey, *Last Stand? The Criminal Responsibility of War Veterans Returning From Iraq and Afghanistan With Post-Traumatic Stress Disorder*, 85 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).

21. C. Peter Erlinder, *Paying the Price for Vietnam: Post-Traumatic Stress Disorder and Criminal Conduct*, 25 B.C.L. REV. 305 (1984).

22. *Id.* at 320.

23. *State v. Heads*, 370 So. 2d 564 (La. 1979) vacated, 444 U.S. 1008 (1980), on remand, 385 So. 2d 230 (La. 1980).

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

25. Wellborn Jack, Jr., *The Vietnam Connection: Charles Heads' Verdict*, in DEFENDING THE VIETNAM COMBAT VETERAN 91 (1989) (Jack's own detailed account of the Heads trial).

26. Erlinder, *supra* note 21, at 321.

27. *Id.*



28. *Id.*  
 29. *Id.*  
 30. Jack, *supra* note 25, at 105.  
 31. *Id.* at 106.  
 32. *Id.* at 109.  
 33. *People v. Wood*, No. 80-7410 (Cir. Ct. of Cook Co., Ill., May 5, 1982).  
 34. Burgess, Coen & Stockey, *supra* note 76, at 66.  
 35. Erlinder, *supra* note 21, at 322-23.  
 36. Erlinder, *supra* note 21, at 324.  
 37. Kim Murphy, *Did the War Make Him Do It?*, L.A. TIMES (Nov. 28, 2009), <http://articles.latimes.com/2009/nov/28/nation/la-na-soldier28-2009nov28>.  
 38. Kim Murphy, *A Fog of Drugs and War: More Than 110,000 Active-Duty Army Troops Last Year Took Antidepressants, Sedatives and Other Prescription Medications*, L.A. TIMES (Apr. 7, 2012), <http://www.latimes.com/news/nationworld/nation/la-na-army-medication-20120408,0,2771033,print.story>.  
 39. *Id.*  
 40. *Id.*  
 41. *Id.*  
 42. *Id.*  
 43. Exploring the Relationship Between Medication and Veteran Suicide: Hearing Before the House Comm. on Veterans Affairs, 111th Cong. (2010) (statement of Dr. Peter Breggin, Psychologist), available at <http://democrats.veterans.house.gov/hearings/Testimony.aspx?TID=65592&Newsid=525>.  
 44. Exploring the Relationship Between Medication and Veteran Suicide: Hearing Before the House Comm. on Veterans Affairs, 111th Cong. (2010) (Bart P. Billings, Ph.D.) available at [http://democrats.veterans.house.gov/hearings/Testimony\\_Print.aspx?newsid=525&Name=\\_Bart\\_P\\_Billings,\\_Ph.D](http://democrats.veterans.house.gov/hearings/Testimony_Print.aspx?newsid=525&Name=_Bart_P_Billings,_Ph.D).  
 45. BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, MARGARET NOONAN & CHRISTOPHER MUMOLA, VETERANS IN STATE AND FEDERAL PRISON 1 (2004).  
 46. *Porter v. McCollum*, 130 S. Ct. 447, 455 (2009).  
 47. *Strickland v. Washington*, 466 U.S. 668 (1984). The *Strickland* Court said: 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 performance prejudiced the defense. This requires showing that coun-

sel'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.  
 48. *Porter*, *supra* note 46, at 455.  
 49. See DEFENDING VETERANS, Chapter 20 (Sentencing Mitigation Strategies and Techniques). The sample sentencing memorandum in Appendix G of DEFENDING VETERANS provides an example of how this process has been applied in one case. Chapter 20 describes in greater detail the process with which the authors have had success in veteran sentencing arguments.  
 50. Youngjae Lee, *Military Veterans, Culpability, and Blame*, 6 CRIM. L. & PHIL. 19 (forthcoming 2013), available at <http://ssrn.com/abstract=2191880>.  
 51. *Id.* at 19 n.120.  
 52. *Porter*, *supra* note 46, at 455 n.9.  
 53. MINN. STAT. § 609.115, subd. 10.  
 54. 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).  
 55. CAL. PENAL CODE § 1170.9; MINN. STAT. §§ 609.115, subd. 10, 244, Guideline 3, subd. F; NEV. REV. STAT. § 176.015; N.H. REV. STAT. ANN. § 651:4-b; R.I. GEN. LAWS § 12-29-5.  
 56. Brockton Hunter & Ryan Else, *Echoes of War: Combat Trauma and Criminal Behavior by Veterans*, THE CHAMPION, August 2013 at 18.  
 57. U.S. SENTENCING GUIDELINES MANUAL § 5H1.11 (2010).  
 58. John Schwartz, *Defendants Fresh From War Find Service Counts in Court*, N.Y. TIMES, available at [http://www.nytimes.com/2010/03/16/us/16soldiers.html?\\_r=0](http://www.nytimes.com/2010/03/16/us/16soldiers.html?_r=0) (Mar. 15, 2010).  
 59. U.S. SENTENCING COMMISSION, CASE ANNOTATIONS AND RESOURCES: MILITARY SERVICE, USSG § 5H1.11 DEPARTURES, AND BOOKER VARIANCES 6-12 (2012), available at [http://www.ussc.gov/Legal/Primers/2012\\_01\\_Military\\_Service\\_5H1-11\\_Departures\\_Booker\\_Variences.pdf](http://www.ussc.gov/Legal/Primers/2012_01_Military_Service_5H1-11_Departures_Booker_Variences.pdf).  
 60. Twelve cases were used in this analysis because they provided the Guideline ranges and the specific sentences imposed. See Table 1 in this article.  
 61. Schwartz, *supra* note 58.  
 62. *Id.*  
 63. To illustrate the wide acceptance of probationary sentencing for offenders with serious and persistent mental illness, as of 2011, there are at least 100 mental health courts in 34 different states around the United States. Charles Amrhein & Virginia

Barber-Rioja, *Jail Diversion Models for People With Mental Illness*, in SERVICE DELIVERY FOR VULNERABLE POPULATIONS: NEW DIRECTIONS IN BEHAVIORAL HEALTH 329, 342 (2010).

64. DSM-IV-TR 467-68.  
 65. Garcia-Rill & Beecher-Monas, *supra* note 4, at 30.  
 66. Mem. Op. and Order on Sentencing at 23-30, 8-10, *United States v. Brownfield*, Crim. Case No. 08-CR-00452-JLK (D. Colo. 2008), available at <http://online.wsj.com/public/resources/documents/BrownfieldTakeThree.pdf>.  
 67. *Id.* at 1. ■

## About the Authors

Brock Hunter is a former President and Legislative Chair for the Minnesota Association of Criminal Defense Lawyers (MACDL). He is also a former Army scout who devotes a significant portion of his practice to defending veterans charged with crimes. He is lead editor and co-author of the forthcoming text *The Attorney's Guide to Defending Veterans in Criminal Court*.



### Brock Hunter

The Law Office of  
 Brockton D. Hunter P.A.  
 Lake Calhoun Center  
 3033 Excelsior Blvd., Suite 550  
 Minneapolis, MN 55416  
 612-874-1625  
 Fax 612-824-0311  
 E-MAIL [brock@brockhunterlaw.com](mailto:brock@brockhunterlaw.com)

Ryan Else is a graduate of the University of St. Thomas School of Law. Prior to law school, he served seven years as an Army Infantryman. He is a co-author of the book *The Attorney's Guide to Defending the Veteran in Criminal Court*.



### Ryan Else

The Law Office of  
 Brockton D. Hunter P.A.  
 Lake Calhoun Center  
 3033 Excelsior Blvd., Suite 550  
 Minneapolis, MN 55416  
 612-874-1625  
 Fax 612-824-0311  
 E-MAIL [ryan@brockhunterlaw.com](mailto:ryan@brockhunterlaw.com)