PTSD: Effective Representation of a Vietnam Veteran in the Criminal Justice System

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COMMENTS

PTSD: EFFECTIVE REPRESENTATION OF A VIETNAM VETERAN IN THE CRIMINAL JUSTICE SYSTEM

"You know you never get over combat. I don’t think you ever do."

On December 18, 1982, Michael Mann, a double amputee and an unemployed Vietnam Veteran, attended a party at the home of Robert and Patricia Freed in the rural community of Amberg, Wisconsin. While at the party, Mann opened fire with a .357 magnum revolver, shooting and critically injuring the Freeds. As a result of this incident, Mann was charged with three counts of attempted murder.

What course of events caused Mann to go on this shooting spree was uncertain, but there was no dispute about whether

1. The statement was made by Audie Murphy, this country’s most decorated veteran of World War II. The quote may be found in SHATAN, Stress Disorders Among Vietnam Veterans: The Emotional Content of Combat Continues in STRESS DISORDERS AMONG VIETNAM VETERANS 43, 47 (C. FIGLEY ed. 1978).

2. State v. Mann, Case No. 82-CR-310 (Cir. Ct. Door County, Wis., Dec. 1982). Additional information about the Mann case may be found in Milstein, War Is Hell. It’s Also A Good Defense, Am. Law., Oct. 1983 at 100.

3. Milstein, supra note 2, at 100.

4. Id. In Wisconsin, where Mann was charged, the applicable statutes governing attempted murder are Wis. Stat. § 939.32 (1)(a)(1983-84) and Wis. Stat. § 940.01 (1983-84). The statute governing attempt must be read in conjunction with the statute governing the crime attempted.

5. Michael Mann claimed that he attended the party at the Freeds’ home in hopes of selling his .357 magnum revolver. Mann needed money from the sale for the upcoming Christmas season. Mann said that Robert Freed had shown some interest in purchasing the revolver. As a result, Mann left the party to retrieve the revolver from his truck. Mann and Freed discussed the sale price outside the house and this discussion resulted in an argument between the two men. Unhappy with Freed’s offer, Mann turned to leave the party and was still carrying his revolver when he felt a blow to the back of his head. Mann remembered little after the blow to his head, other than a vision or a dream of being back in Vietnam. MILSTEIN, supra note 2, at 100.

Freed's version of the circumstances preceding Mann's shooting spree was much different. Freed told the police that Mann had been harassing Freed’s wife, Patricia, and that he had asked him to leave the party. As Freed was seeing Mann out the front door, Mann went on a shooting spree. Freed’s recollection was somewhat hazy about the shooting incident because he had undergone brain surgery following the shooting;
Mann actually shot the Freed's. His shooting spree ended when another of the party guests was able to wrestle away Mann's revolver. As soon as his revolver was taken from him, Mann went completely limp and remembered nothing of his past act.

In August of 1983, Michael Mann and his attorney went to trial claiming that Mann could not be held criminally responsible for the three counts of attempted murder, despite his admission that he did commit the acts. The trial lasted five days and thirty-eight witnesses were called by the state and the defense. Despite the lengthy trial, the jury deliberated less than ten minutes before reaching the unanimous decision that Michael Mann was not guilty of any of the crimes charged.

I. INTRODUCTION

The Mann jury determined that Michael Mann was a victim of Post-Traumatic Stress Disorder (PTSD) due to his service in Vietnam. The jury also found that Mann was suffering from PTSD at the time of the shooting incident and that it caused him to behave as he did; therefore excusing him from criminal liability. The jury was able to make this decision only because it had been given such an option by Mann's attorney, Thomas Schwaba.

The preparation of Mann's case for trial was long and tedious. Schwaba began the process by first inquiring as to but Freed remembered nothing about a conversation regarding the sale of Mann's revolver. Id.

6. Id.
7. Id.
8. Id.
9. Id. at 102.
10. Id. at 100.
11. Id. Only one vote was necessary for the jury to find Mann not guilty by reason of disease or mental defect. Id. at 104.
12. Id. A not guilty by reason of mental disease or defect verdict is allowed in Wisconsin pursuant to Wis. Stat. § 971.15 (1983-84).
14. Id.
15. Attorney Schwaba spent approximately 500 to 600 hours in the representation of Michael Mann. Much of this time was spent acquainting himself with PTSD and its uses as a defense. Telephone interview with Attorney Thomas Schwaba, defense counsel for Michael Mann (Feb. 18, 1985).
Mann's prior military service. Without initially asking his client whether he was a veteran, Schwaba's use of a PTSD defense, based upon Vietnam service, at trial would have been impossible.

After his initial inquiry disclosed that his client was a veteran of combat in Vietnam, Schwaba followed through on his hunch that Mann's service in Vietnam was directly related to his recent criminal activity. A thorough investigation of Mann's military records and much discussion with psychiatric experts proved Schwaba's hunch correct. Therefore, the key to Michael Mann's defense against three counts of attempted murder was going to be his service in Vietnam and its psychological effect on him—post-traumatic stress disorder.

Post-Traumatic Stress Disorder was first officially recognized as a distinct disorder by the American Psychiatric Association in 1980. Since its recognition, PTSD has been diagnosed in an estimated 500,000 to 1.5 million veterans. Research provides that there is a direct correlation between post-traumatic stress disorder and various mental health issues.

16. In his initial telephone conversation with Attorney Schwaba, Mann mentioned that he was a Vietnam veteran. During this conversation, Schwaba became aware that Mann's military experience may have been a factor in causing the shooting incident. Id.

17. Attorney Schwaba initially requested a competency evaluation of Mann. While the examining mental health professional determined that Mann was competent to continue with criminal proceedings, he did alert Schwaba that Mann's Vietnam service might be a major factor in future proceedings. Id.

18. It is absolutely essential to obtain military records and psychiatric evaluations of the veteran in the very early stages of the criminal proceedings. Id.

19. AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 236-38 (3d ed. 1980) [hereinafter cited as DSM III]. The recognition of stress conditions resulting from military service is not recent; such conditions have existed since ancient times. Telephone interview with Doctor John Lipkin, Psychiatrist with the Veterans' Administration, Washington, D.C. (Feb. 15, 1985).


It has been estimated that approximately three million veterans returned from Vietnam. Figley, Psychological Adjustment Among Vietnam Veterans: An Overview of the Research in STRESS DISORDERS AMONG VIETNAM VETERANS 57, 57 (C. Figley ed. 1978). A return of three million veterans, out of which 500,000 to 1.5 million developed PTSD, would tend to support the contention that half the people experiencing an extremely traumatic event will develop a stress disorder. Schulz, Trauma, Crime and the Affirmative Defense, 11 COLO. LAW, 2401. 2401-02 (1982).
developing PTSD and participation in heavy combat. Researchers also have found that 25% of the soldiers who participated in and survived heavy combat have since been charged with a criminal offense. It would, therefore, appear that there is a correlation between PTSD and criminal activity among Vietnam veterans. Currently, there are anywhere from 49,000 to 125,000 Vietnam veterans incarcerated in this nation’s prisons and jails. Despite the large number of victims suffering from PTSD in this country; the established correlation between developing PTSD and the increased incidence of criminal arrests; and the large number of incarcerated Vietnam veterans, only 200 attempts have been made by attorneys to use PTSD as a criminal defense at trial.

The dichotomy between the minor percentage of cases in which the PTSD issue was actually raised and the large percentage of cases in which PTSD was a likely issue could possibly be explained as a result of ignorance, misunderstanding and a lack of diligence on the part of attorneys representing Vietnam veterans in the criminal justice system. In order to adequately represent and protect the rights of a client facing criminal charges, an attorney must be aware of PTSD and its impact on behavior. "[P]roper legal representation of veteran clients requires sensitivity to PTSD in issues of client behavior and . . . the legal system must be allowed to take PTSD into account, where it exists, to adequately resolve the legal issues raised by PTSD-related conduct." The legal system cannot

21. Milstein & Snyder, PTSD: The War is Over, the Battle Goes On, Trial, Jan. 1983, at 86. While victims of PTSD are not limited to Vietnam veterans, this comment will discuss the stress disorder only among that particular group.

22. Schulz, supra note 20, at 2401. The criminal charge rate of 25% for veterans involved in heavy combat is higher than the charging rate for either veterans not involved in heavy combat or non-veterans. Milstein & Snyder, supra, note 21, at 86.


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take PTSD into account unless the system is aware of the disorder existence. Quite often the burden of discovery falls on the shoulders of the defense attorney.

II. DISCOVERING THE EXISTENCE OF PTSD

A. Manifestations of the Disorder

The chief reason why most attorneys fail to use the PTSD defense in the criminal process is a lack of knowledge as to what PTSD truly is and how to recognize the possibility of its presence. Post-traumatic stress disorder is characterized as an anxiety disorder by the American Psychiatric Association (APA). The APA has established diagnostic criteria for the existence of PTSD. The initial criterion is the presence of a stressor in an individual's past. A stressor, for the purpose of a PTSD analysis, is a psychologically traumatic event or series of events generally outside the range of usual human experience — for example, a war. Another essential criterion for establishing the existence of PTSD is that the event, or series of events identified as the stressor, would evoke significant symptoms of stress in most anyone exposed.

Some of the symptoms common to Vietnam veterans suffering from PTSD are:

1. Re-experiencing of Vietnam through dreams or intrusive recollections.

26. Id. at 1.
27. See DSM III, supra note 19, at 236.
28. Id. at 238.
29. Milstein & Snyder, supra note 21, at 86.
30. DSM III, supra note 19, at 238.
31. These dreams or intrusive recollections of Vietnam are also known as flashbacks. Flashbacks or "reexperiencing of the traumatic episode is the sine qua non of PTSD." Wilson & Zigelbaum, The Vietnam Veteran on Trial: The Relation of Post-Traumatic Stress Disorder to Criminal Behavior 6 (presented at a professional education symposium on post-traumatic stress disorder at the William Mitchell College of Law on May 20-22, 1983) (available at William Mitchell College of Law). Such flashbacks are often triggered by:
   a. a stimulus of physiological sensations, such as weather conditions similar to those in Vietnam.
   b. an environment tending to recreate a feeling of helplessness or urgency, such as losing a job.

2. Numbing of responsiveness; alienation; estrangement or detachment; inability to express one’s feelings, especially intimacy, love, friendship or joy.

3. At least two of the following symptoms:
   a. hyperalertness or exaggerated startle response.
   b. sleep disturbance.
   c. guilt about surviving or actions taken to survive.
   d. memory or concentration impairment.
   e. avoidance of activities which arouse memories.
   f. intensification of symptoms when exposed to events that symbolize or resemble experiences in Vietnam.

4. Associated symptoms of:
   a. depression.
   b. anxiety.
   c. irritability.
   d. explosive episodes or aggressive behavior.
   e. unpredictable impulsive acts. \(^{32}\)

Another aspect of PTSD is that it often has a delayed onset. \(^{33}\)

**B. Difficulties in Discovering the Disorder**

Despite the concrete manifestations of PTSD and the APA’s attempt to list them under one heading, it is still quite difficult for someone — even a mental health professional, much less an attorney — to determine when an individual is suffering from PTSD. There are various reasons for such difficulty.

First and foremost, many PTSD victims are completely unaware of their disorder. \(^{34}\) Second, the symptomatic behavior of PTSD is episodic and the victim may appear to be quite normal for the majority of the time. \(^{35}\) Third, the victim quite often suffers a memory loss as a result of the disorder and is, therefore, unable to remember the original traumatic experience that served as the stressor and the resultant criminal behavior that arose from the disorder. \(^{36}\) If the victim is unable

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32. Schulz, supra note 20, at 2401.
33. DSM III, supra note 19 at 237. “Symptoms may begin immediately or soon after the trauma. It is not unusual, however, for the symptoms to emerge after a latency period of months or years following the trauma.” Id.
34. Schulz, supra note 20, at 2401.
35. Erlinder, supra note 20, at 6-7.
36. Milstein, supra note 2, at 102. In the Mann case, Attorney Schwaba encountered just such a difficulty with Michael Mann. Mann was able to remember very little of his Vietnam experience, other than the accident in which Mann lost both of his legs.
to remember the original traumatic experience, it is difficult to diagnose PTSD; because the first criterion for diagnosis is the existence of a stressor. Fourth, victims of the disorder have a tendency to make rational explanations for inexplicable behavior when they are truly unaware of what their behavior was and the context in which it was set. By so doing, the victim undermines the possibilities of a third party realizing the peculiarities of behavior that exist. Fifth, there seems to be a hesitancy by both PTSD sufferers and Vietnam veterans to discuss their past traumatic experiences and their present adjustment problems.

Due to all the inherent difficulties an attorney might have in discovering that his or her client could be suffering from PTSD, an attorney must make a concerted effort to investigate the veteran’s background for possible signs of the disorder.

Telephone interview with Attorney Thomas Schwaba, defense counsel for Michael Mann (Feb. 18, 1985).

37. See DSM III, supra note 19, at 238.
38. Milstein, supra note 2, at 102.
39. Erlinder, supra note 20, at 1. Michael Mann often woke after having nightmares about the war but always refused to discuss them with anyone. Although he lost both his legs in the war when he tripped an anti-tank land mine, Mann often lied about how he lost his legs and would tell people he lost them in a train accident. Milstein, supra note 2, at 101.
40. The following guidelines assist in weighing information concerning a Vietnam veteran facing prosecution:

a. No single item of evidence is conclusive regarding the veteran’s mental state. Developing a comprehensive picture from a variety of sources is essential.
b. Determine whether the criminal activity can be seen as a reasonable extension of wartime behavior. The most plausible behavior relating to PTSD would be related to self-preservation or anxiety reduction.
c. Actions demonstrating premeditation may reduce the likelihood that the criminal activity was an outgrowth of the wartime experiences. However, premeditation does not preclude a PTSD claim.
d. Look at the veteran’s actions immediately after the crime. An attempted cover-up may prove harmful to a PTSD defense.
e. Obtain an accurate record of all previous charges and incarcerations. A history of property crimes might increase the likelihood of criminal behavior by choice; whereas assault-like crimes might indicate the presence of an explosive personality symptomatic of a stress disorder.
f. Look for a history of chronic, disturbing symptoms, resulting in episodes similar to actions during the crime.
g. Find out if the veteran has been previously treated or diagnosed as having stress-related disorders. Diagnoses prior to 1980 might be listed as personality disorders or psychoses when truly PTSD was the problem.
h. Obtain a history of the veteran prior to entering the service and compare this with his post-service lifestyle and his adjustment to civilian life.
This investigation should be made, even if the existence of PTSD seems highly unlikely.

C. Linking PTSD to Criminal Activities

Even if the veteran displays the outward signs of PTSD and the existence of the disorder appears probable, it is still necessary to establish a nexus between the disorder and the criminal activity in question. "In the case of a Vietnam veteran, accurately evaluating the degree to which a stress disorder has contributed to a criminal action can be difficult."41

When trying to determine the relation of PTSD to criminal activity, it might prove helpful to look at five factors common to crimes involving PTSD sufferers. These factors are:

1. Spontaneous behavior resulting in a crime.
2. Usually somewhat benign incidents resulting in bouts of violence.
3. History of alcohol or substance abuse.
4. Inability to explain reason for behavior resulting in the criminal conduct.42
5. No previous criminal record.43

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i. Obtain the defendant's service history including the dates he was in Vietnam, the amount of combat he saw and his duties. Readjustment problems have been most severe for those veterans in Vietnam after the 1968 Tet Offensive.

j. Inquire about any wounds or injuries sustained in the service, especially those relating to the nervous system.

k. Get a history of alcohol or substance abuse. A presence of either may demonstrate an attempt to alleviate symptoms of PTSD.

l. If experts are consulted concerning the existence of PTSD, make sure they come to their conclusions separate from one another. This will ensure against bias.

Schulz, supra note 20, at 2402-03.

Contact the veterans' co-ordinator for the Veterans' Administration Office in the veteran's home county to obtain military service records. Telephone interview with Attorney Thomas Schwaba, defense counsel for Michael Mann (Feb. 18, 1985).

41. Schultz, supra note 20, at 2402.
42. See supra note 38 and accompanying text.
43. Erlinder, supra note 20, at 9. There has proven to be a significant relationship between PTSD and four types of criminal behavior. They are:

   a. driving under the influence of alcohol.
   b. disorderly conduct.
   c. assault.
   d. weapons charges.

Wilson & Zigelbaum, supra note 31, at 18.
If any of these factors are present and the possibility of a stress disorder exists, a relationship between the disorder and the criminal activity is likely.

D. Types of Stress Disorders

Research shows that a stress disorder may affect an individual in one of three ways. First, the disorder may be manifested by dissociative states—flashbacks—which are triggered by stressful situations and cause the sufferer to act as if he were in the original stressful situation, such as Vietnam. Second, the stress disorder may result in a sensation-seeking syndrome, in which the sufferer must constantly engage in activity that is dangerous and/or arousing. Third, the stress disorder could manifest itself in the depression-suicide syndrome as a result of guilt — for surviving, while combat buddies were killed — and the sufferer may desire death to relieve the psychic pain. The type of PTSD effect the veteran suffers may have a great impact upon the kind of criminal activity in which he might indulge and the probability of linking the disorder to that criminal activity.

1. Dissociative States

Experiencing dissociative states seems to be the most common manifestation of PTSD. "The core feature of PTSD is that the survivor [veteran] re-experiences elements of the trauma in dreams, uncontrollable and emotionally distressing intrusive images, dissociative states of consciousness, and in unconscious behavioral re-enactments of the traumatic situation."

A classic example of a Vietnam veteran suffering from the dissociative state type of PTSD is that of ex-marine Charles Heads. Heads served one year in Vietnam and had taken part in an extraordinarily high number of long-range missions

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44. Wilson & Ziegelbaum, supra note 31, at 8.
45. Id. at 8-10.
46. Id. at 10-12.
47. Id. at 2.
48. Id.
while there.\textsuperscript{50} Heads returned home from the war to his family in Houston, making a comfortable living and re-adjusting well — at least outwardly — to civilian life.\textsuperscript{51} Since Heads’ return from Vietnam, he and his wife were experiencing increasing marital problems,\textsuperscript{52} finally resulting in her leaving Heads and taking their children to stay with her sister in Shreveport, Louisiana.\textsuperscript{53} Four days after his wife left him, Heads went to Shreveport to retrieve her.\textsuperscript{54} When he reached the house of his wife’s sister and her husband, the stress that had been building within Heads finally caused him to snap and he flashed back to his life in Vietnam.\textsuperscript{55} He pulled a rifle from his car and began shooting wildly as if in pursuit of the Vietcong. A bullet struck and mortally wounded his brother-in-law.\textsuperscript{56} When the police arrived on the scene, Heads was unable to recall anything that had happened and put up no resistance.\textsuperscript{57}

2. Sensation-seeking syndrome

The second type of PTSD response is that of the sensation-seeking syndrome where the veteran has a compulsive need to "live on the edge" and seek out dangerous or highly stimulat ing situations.\textsuperscript{58} Like an ex-fighter pilot who served in Vietnam, this type of PTSD sufferer might engage in criminal activities such as large-scale drug smuggling operations.\textsuperscript{59} The veteran had taken up potentially dangerous and exciting hobbies such as scuba diving and skydiving since the war, and hoped to get a commercial pilot’s license.\textsuperscript{60} His failure to get

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\textsuperscript{50} Heads served in a total of 38 missions. Jack, \textit{supra} note 49, at 11. For a discussion of the relationship between the development of PTSD and heavy combat, see \textit{supra} note 21 and accompanying text.


\textsuperscript{52} \textit{Id.} at 17-18.

\textsuperscript{53} \textit{Id.} at 7.

\textsuperscript{54} \textit{Id.}

\textsuperscript{55} \textit{Id.} at 18.

\textsuperscript{56} \textit{Id.} at 8.

\textsuperscript{57} \textit{Id.} at 18.

\textsuperscript{58} See \textit{supra} note 45 and accompanying text.


\textsuperscript{60} \textit{Note}, \textit{supra} note 31, at 112.
the license served as the triggering event that sent him into the drug smuggling scheme that he viewed as "just another mission" to fulfill his need for excitement and allow him to live on the edge.  

3. Depression-suicide syndrome

The depression-suicide syndrome is the third manifestation of PTSD and a suffering veteran feels such guilt for his survival that he secretly desires death to end his misery.  

This person might engage in poorly planned or executed criminal activity for the chief purpose of getting caught, or even getting killed. An example of a veteran whose stress disorder possibly surfaced as depression-suicide syndrome is an incident concerning James Hopkins of West Los Angeles, California. In March of 1981, Hopkins, dressed in camouflage greens, drove his jeep into the local veterans' hospital. He sprayed the lobby with bullets from his semi-automatic rifle and screamed he was losing his mind. Hopkins was quickly apprehended, but subsequently released. Two months later, Hopkins was found dead with an empty jug of whiskey and a pill bottle beside him, a suspected victim of suicide.

E. Psychiatric Assistance

Once an attorney suspects that the veteran is possibly suffering from PTSD, the attorney should elicit the aid of a mental health professional who can best determine whether the disorder truly exists. The mental health professional also can assist in determining whether or not the disorder can reasonably be linked to the criminal activities. It is becoming

61. Id. at 112-13. The Tindall case resulted in an acquittal. Id. at 113.
62. See supra note 46 and accompanying text.
65. There is currently a list on file with the Veterans Education Project in Washington, D.C naming 264 mental health professionals experienced in the treatment of PTSD. Of those 264, 73 also have experience with the use of PTSD in legal settings. Contacting the nearest Veterans Outreach Center also might prove helpful in order to locate a mental health professional to assist in diagnosis, trial preparation and treatment recommendations.

When looking for a mental health professional to assist in diagnosis and possible trial preparation, it is absolutely essential that the professional has both clinical expertise and extensive knowledge of the Vietnam experience. The professional must be able
much easier to find a mental health professional to evaluate a veteran to determine the presence of PTSD symptoms, assess the likelihood that criminal behavior arose out of the syndrome and make a persuasive presentation at trial.\(^6\)

It is absolutely essential to obtain the assistance of a mental health professional from the very outset of the case. Such a professional, not an attorney, is the only person truly capable of determining whether PTSD exists and whether it can be linked to the criminal activities.

III. PRACTICAL APPLICATION OF POST-TRAUMATIC STRESS DISORDER TO THE CRIMINAL JUSTICE SYSTEM

A. Pre-Trial Use of PTSD

After the veteran has been positively diagnosed as suffering from PTSD and it has been determined that the syndrome significantly related to the individual’s commission of the criminal activity, the attorney must determine how to use such information to the advantage of the veteran-client.

In the initial stages of criminal prosecution, the veteran’s attorney could approach the prosecutor and attempt to persuade the prosecutor to dismiss the charges. This would be done by arguing that the veteran was laboring under such mental duress that he lacked the necessary mental element to commit a crime.\(^7\) The best chance for success in making such an argument is to suggest an appropriate treatment program

\(^6\) Milstein & Snyder, supra note 21, at 87. Due to the increased interest in PTSD by mental health professionals there is emerging a trend already existent in personal injury litigation. There are distinct groups of plaintiff (state) and defense experts. Telephone interview with Doctor John Lipkin, psychiatrist with the Veterans’ Administration, Washington, D.C. (Feb. 15, 1985).

\(^7\) Milstein & Snyder, supra note 21, at 87. For all practical purposes, the prosecutor will be very unlikely to dismiss criminal charges even if the veteran’s ability to form the necessary intent is minimal. As long as the prosecutor believes that the veteran did commit the charged act, the State will likely wish to proceed with the criminal proceedings. While making the lack of intent argument in favor of dismissal of criminal charges is advisable, its chances for success are not great. Interview with Victoria McCandless, Staff Attorney, Wisconsin State Public Defenders Office, Milwaukee, Wisconsin. (Feb. 15, 1985).
as an alternative to criminal prosecution. However, the biggest obstacle confronting an attorney proposing such an alternative is devising a program that will be beneficial to the veteran and, at the same time, satisfy the prosecutor that the veteran will not present a danger to himself or others. Another significant factor when requesting that the charges against the veteran be dismissed is whether anyone was harmed as a result of his actions. If so, chances of an alternative to criminal prosecution are somewhat diminished.

If the above factors weigh against dismissing all charges against the veteran, PTSD might be of some value in a plea bargaining arrangement. In the case of Stephen Gregory from Rockville, Maryland, the prosecuting attorney agreed to lesser charges and made a light sentencing recommendation when the veteran entered his guilty plea. Gregory had entered a bank heavily armed and held the people inside the bank hostage for several hours. While in the bank, Gregory fired his gun frequently, but only at inanimate objects. While Gregory did release all the hostages completely unharmed, the prosecutor felt the gravity of the offense necessitated some incarceration and refused to dismiss the charges completely.

However, in an attorney's desire to make a good deal for the veteran-client, the attorney should not deal away a plausible defense. In the past, many attorneys encouraged veterans with valid PTSD defenses to plead to a bargained charge. At

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68. This type of arrangement is commonly known as a diversion program and, for example, is authorized in Wisconsin by Wis. Stat. § 971.37 (1983-84). In a diversion program, the charges against a criminal defendant are dismissed, conditioned upon the defendant's compliance with certain terms prescribed by the prosecuting authority.

An example of this type of practice concerns veteran John Coughlin. In May of 1978, Coughlin carried a shotgun to a cemetery in Quincy, Massachusetts, where two of his marine friends were buried. Coughlin experienced a flashback of a 1967 firefight in Vietnam and began firing the shotgun uncontrollably. He was finally apprehended by the police and several weapons charges were brought against him. Coughlin was diagnosed as suffering from "traumatic war neurosis" and authorities decided against pressing for criminal prosecution. As an alternative, Coughlin agreed to two years of psychiatric treatment. After treatment was successfully completed, the charges against Coughlin were dropped. Boston Globe, Jan. 23, 1981, at 18, col. 3.

69. Milstein & Snyder, supra note 21, at 87.

70. Id.

71. State v. Gregory, No. 19205 (Cr. Ct. Montgomery County, Md. 1979) as discussed in Milstein & Snyder, supra note 21, at 87.

72. Id. See also Erlinder, supra note 20, at 19-20.
present, encouraging action which results in incarceration for
the veteran is a questionable practice.73

B. PTSD at Trial—Not Guilty by Reason of Insanity

If attempts to divert or plea bargain the charges prove un-
successful and the case against the veteran proceeds to trial,
the most obvious, and possibly most attractive,74 method of
defense would be to use the insanity defense. Whatever test is
used to define legal insanity,75 PTSD is remarkably well-

BULL. 434, 437 (1983). However, an attorney representing a veteran should not com-
pletely rule out the possibility of a plea bargain arrangement. This is because of what
might eventually happen to the veteran if a PTSD defense is used at trial. If a PTSD
defense is successfully used at trial and the veteran is found not guilty by reason of
insanity, it is possible that the veteran could spend a great deal of time in a mental
health facility. On the other hand, if the veteran would plead guilty the plea bargain
arrangement offered by the prosecutor may contain a lesser period of commitment. In-
terview with Victoria McCandless, Staff Attorney, Wisconsin State Public Defenders
Office, Milwaukee, Wisconsin (Feb. 15, 1985).

74. However, admitting that the veteran-defendant did commit the criminal act,
but claiming that his stress disorder absolves him from liability, is not always so attrac-
tive. A “risk of portraying the defendant as having committed an uncontrollable act of
violence is that the judge or jury may find that he is responsible for his acts, blamewor-
thy at the highest level, and extremely dangerous.” Milstein & Snyder, supra note 21, at
88.

Sometimes, despite the severity of the veteran-defendant’s problem, a PTSD defense
has little chance for success. David Addlestone, co-director of the National Veteran's
Law Center, has been quoted as saying, “If you have a gruesome, bloody murder or sex
crime, the jury's not going to let the guy back on the street no matter what's wrong with
him.” Milstein, supra note 2, at 101.

75. The most commonly used tests to determine whether a criminal defendant was
legally insane at the time of committing the criminal act are the M’Naghten Test and
the Model Penal Code Test devised by the American Law Institute. For a criminal
defendant to be found insane under the M’Naghten test,

it must be clearly proved, that at the time of committing the act, the party ac-
cused was laboring under such a defect of reason, from disease of the mind, as
not to know the nature and quality of the act he was doing; or if he did know,
that he did not know that he was doing wrong.

G. Morris, The Insanity Defense: A Blueprint for Legislative Reform 11
(1975).

For a criminal defendant to be found insane under § 4.01 of the Model Penal Code
the following test must be met:

(1) A person is not responsible for criminal conduct if at the time of such
conduct as a result of mental disease or defect he lacks substantial capacity
either to appreciate the criminality [wrongfulness] of his conduct or to conform
his conduct to the requirements of law.
suited. While using an insanity-type defense could seem somewhat risky, considering the public outcry following the Hinckley acquittal, much of the defense's bad press is undeserved and inaccurate and success with a PTSD insanity defense is possible.

Despite its adaptability to the classic insanity defenses, PTSD and its victims have sufficiently unique characteristics to merit a discussion of the defense separate from insanity defenses in general. Generally, PTSD victims appear quite normal throughout the majority of everyday life and a jury, sitting in a courtroom, may have great difficulty believing that such a seemingly normal person's criminal acts could be the product of a mental disorder.


66. Milstein & Snyder, supra note 21, at 87.


78. Many people erroneously believe that the insanity defense is frequently pleaded and often successful. Morris, Dealing Responsibly with the Criminally Irresponsible, 1982 ARIZ. ST. L.J. 855, 857. One federal official estimates that fewer than 100 not guilty by reason of insanity acquittals occur in more than 50,000 federal criminal prosecutions. Id. at 857 n.12.

80. "The Vietnam veteran in the criminal justice system, on the surface, will seem much more like [a person] most of us judge to be normal or antisocial rather than the profoundly disturbed individual whom we would class as insane." Schulz, supra note 20, at 2405. An effective method of demonstrating to the jury the severity of the veteran's disorder is to videotape a psychiatric interview at which the veteran discusses his problems and his attitudes about his service in Vietnam. This technique was used in State v. Pard, No. 25975 (Deschutes County Cir. Ct., Or., March 18, 1980), as discussed in Note, supra note 31, at 110-11. Showing these interviews at trial is quite dramatic
However, once the defense begins to present its case establishing the veteran’s mental illness, aspects of the illness itself make its establishment much more probable than with a classic claim of insanity. "Unlike other psychiatric illnesses in which the causes of a person’s behavior are quite abstract, the fact that PTSD stems from specific and identifiable horrific events, which are more easily understood, has meant that it is easier to convince prosecutors, judges and juries that a defendant’s blameworthiness is slight."\textsuperscript{81}

Another advantage to a PTSD insanity defense — as opposed to the general claim of insanity — is that the concrete nature of the disorder and its recognizable symptoms make it appear less susceptible to recent fabrication in order to explain away criminal conduct.\textsuperscript{82} The concreteness of the disorder and its recognizable symptoms alleviate the heavy reliance placed upon psychiatric testimony often found in many insanity trials.\textsuperscript{83} Classic insanity trials often turn into a battle between experts—state psychiatrists claiming the defendant is sane, and defense psychiatrists suggesting the contrary.

After the existence of the stress disorder is established, connecting the disorder to the veteran’s criminal activities is often easier than with other psychological disorders. It is possible for an attorney to “describe the events that brought about the acts in question in a systematic and logical manner”\textsuperscript{84} and “requires far less of the 'leap of faith' [on the part of a jury] based upon expert opinion than do some other psychological disorders.”\textsuperscript{85}

The definitional distinctions between PTSD and a general claim of insanity also provide a theory of admissibility for a great deal of favorable evidence for the veteran-defendant at trial. As previously mentioned, the first criterion for the existence of PTSD is an identifiable stressor in the individual’s

\begin{footnotes}
\item[81.] Milstein & Snyder, supra note 21, at 89.
\item[82.] Id. at 86.
\item[83.] Id. But see Note, supra note 31, at 114 (arguing that one of the biggest problems with PTSD as a defense is the far too heavy reliance placed upon expert witnesses to establish the disorder’s existence).
\item[84.] Erlinder, supra note 20, at 8.
\item[85.] Id.
\end{footnotes}
Because a stressor encompasses an event or events outside the range of human experience, any evidence tending to establish that such events were outside the range of human experience would be relevant. One of the more effective methods of establishing this would be to include the testimony of other veterans who fought alongside the veteran-defendant, graphically describing the experiences they all shared during combat in Vietnam. Showing combat footage of the war at trial also would effectively demonstrate the horrors of Vietnam, the viability of such experience serving as a stressor and would give the jury an opportunity to see the impact of such footage on the defendant while watching.

As previously noted, not only must the events or series of events — in order to serve as a stressor — be outside the range of human experience, but they also must produce significant symptoms of distress in most people exposed to them. The most obvious method of establishing that others, other than the veteran-defendant, were significantly affected by the horrors of Vietnam is to put those other veterans on the stand to discuss the impact of the war upon their own lives. Not only does such testimony effectively address the significant impact of the stressor on the lives of others, it also creates a sympathetic atmosphere in which the jury judges the veteran-defendant.

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86. See supra note 28 and accompanying text.
87. See supra note 29 and accompanying text.
88. Jack, supra note 49, at 9. The federal rule governing the relevancy of evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” FED. R. EVID. 401.
89. Jack, supra note 49, at 9. This method of establishing the existence of a stressor was used in the Michael Mann trial. Several of the soldiers who served in Vietnam with Mann were called as witnesses to describe the horrors of their experience in Vietnam. Such testimony had a significant emotional impact upon the jury and served to place Mann in a more sympathetic light. Telephone interview with Attorney Thomas Schwaba, defense counsel for Michael Mann (Feb. 18, 1985).
90. Milstein & Snyder, supra note 21, at 88.
91. See supra note 30 and accompanying text.
92. Jack, supra note 49, at 9. A word of caution must be given as to using other Vietnam veterans with war experiences similar to the veteran-defendant as witnesses. There might be a tendency for these veterans to be very hesitant in discussing the war and its impact upon their lives. As a result, these veteran-witnesses might become difficult to deal with and may offer little helpful information. Telephone interview with Attorney Thomas Schwaba, defense counsel for Michael Mann (Feb. 18, 1985).
After submitting evidence tending to support the presence of a stressor in the life of the veteran-defendant, it also becomes vital to outline the individual’s life since first experiencing the traumatic events until the commission of the criminal activity. This will assist the jury in determining the impact of the traumatic events upon the veteran’s life. Such accounts will almost always include the alienating experiences common to the majority of Vietnam veterans trying to readjust after their return from the war and will increase the understanding and sympathy the jury feels for the defendant. Recounting the defendant’s life since exposure to the stressor, and demonstrating the increase in PTSD-related symptoms prior to the commission of the criminal activity will also negate any inferences of fabrication made by the prosecution.

Although an attorney may have convinced a jury that the veteran-defendant is truly suffering from PTSD, the most difficult hurdle to successfully asserting the PTSD defense has yet to be overcome — a causal connection between the disorder and the criminal behavior. The most effective means of overcoming this hurdle is to portray the symbolic similarity between the stressor — the veteran’s experiences in Vietnam — and the circumstances regarding the commission of the crime. Portraying this symbolic similarity sets a plausible stage for the occurrence of a flashback. The more similar the stressor to the circumstances surrounding the commission of the crime, the more plausible the possibility of a flashback precipitating the criminal activity becomes to a judge and jury. If possible, a heavy emphasis should be placed upon the simi-

93. Milstein & Snyder, supra note 21, at 88.
94. Id. Joseph Oteri, the Boston lawyer who successfully used PTSD in his defense of Michael Tindall, spoke of the sympathy a jury feels for the veteran/defendant when he said, “You play off the collective guilt of the country over Vietnam. And it works everywhere. In the rural, red-neck areas, people are patriotic. And in the urban areas, they’re guilt-ridden over the war.” Milstein, supra note 2, at 101.
95. Milstein & Snyder, supra note 21, at 88.
97. Milstein & Snyder, supra note 21, at 88.
larity of sensory stimuli, due to the tangible nature of such evidence.®

Presenting and establishing the existence of PTSD in a veteran criminal defendant and its relationship with the criminal activity at issue has been characterized as similar to the establishment of a plaintiff's medical disorder in a personal injury action.100 The defense should accept the burden of proof and systematically and logically set out to convince the jury that the defendant suffers from PTSD and should, therefore, be absolved from criminal liability for any actions resulting from the disorder. The defense's susceptibility to this logical and systematic approach makes it significantly different from the classic insanity defenses.

If the jury acquits the defendant using a not guilty by reason of insanity verdict, the defense attorney's role as an effective advocate for the defendant is far from over. In many jurisdictions an acquittal based upon an insanity defense creates a situation of automatic commitment to a mental institution.101 There also might be a situation where the failure of

99. The similarity of sensory stimuli was noted in a magazine account describing the factual circumstances and environmental surroundings in the case of Charles Heads.

The fog rolled in over the field across from Roy LeJay's house like a smoky cloud of napalm. The tall grass slumped lazily in a Mekong funk. The humidity squeezed a grunt's temples and wouldn't let go. Charles Heads watched the tree line silhouetted against the sky and, with-out warning, was tragically transformed. He was no longer a scorned husband chasing a wife through the heat from Houston to Shreveport. Heads was back in Vietnam, a Marine ready for combat. The man before him wasn't LeJay, his brother-in-law, but a dangerous Viet Cong. Heads pulled a rifle from his car, shot LeJay through the eye and then maniacally stalked the ranch house as though it were a straw hooch. When the police arrived, they found him standing silently, slowly coming out of his trance, unable and unwilling to resist.

War Echoes in the Court, NEWSWEEK, Nov. 23, 1981, at 103.

100. Jack, supra note 49, at 14. Thomas Schwaba, defense attorney for Michael Mann, also noted the similarity in proving the existence of PTSD and a medical disorder in a personal injury action. In order to prove that the stressor had a significant impact upon the veteran's life, it is necessary to show the jury that the veteran was different prior to experiencing the traumatic event. Schwaba said that this is very much like demonstrating that someone's life has been affected by a personal injury for the purpose of establishing damages. Telephone interview with Attorney Thomas Schwaba, defense counsel for Michael Mann (Feb. 16, 1985).

defense counsel to propose any legitimate alternatives to involuntary commitment could result in the defendant's commitment. This is despite the fact that alternatives to involuntary commitment are possible.\textsuperscript{102}

As previously discussed,\textsuperscript{103} tailoring a treatment plan to the needs of a veteran suffering from PTSD is not easy.\textsuperscript{104} However, developing such a program is not impossible\textsuperscript{105} and

\textit{Id.} Confinement after acquittal on an insanity defense is also automatic in Wisconsin. State v. Field, 118 Wis. 2d 269, 347 N.W.2d 365 (1984) (prior to this case a hearing was held after acquittal to determine whether confinement was necessary).

One author opposes automatic commitment upon an insanity acquittal for the following reasons:

a. Just because a defendant was deemed insane at trial in regard to when the crime was committed does not mean he is still insane or in need of institutional care.

b. It is wrong to presume that a defendant is still insane at the time of trial. The defendant's competency to stand trial should help overcome this presumption. (Although the incompetency test differs from the insanity test, the commencement of a trial undermines an inflexible presumption of continued insanity).

c. Automatic commitment is not necessary in order to prevent fabricated insanity pleas.

d. A defendant should not be estopped from claiming that he is no longer mentally ill simply because he claimed insanity.

e. Not all mentally ill defendants present a danger to themselves or others.

Morris, \textit{supra} note 78, at 857-60.

\textsuperscript{102} In those states where the trial judge determines the necessity of commitment, G. MORRIS, \textit{supra} note 75, at 97-126, offering an alternative to institutional commitment might spare the veteran-defendant from the institutionalization that so often worsens his condition.

\textsuperscript{103} See notes 68 - 70 and accompanying text.

\textsuperscript{104} Two problems associated with developing a treatment program and selling it to a judge are that the quality of care offered at many Veterans' Administration facilities varies greatly and is not always acceptable, and that the Veterans' Administration will rarely provide any custody assurances upon accepting a veteran into treatment. Milstein & Snyder, \textit{supra} note 21, at 89.

\textsuperscript{105} The best way to begin devising a treatment plan for a veteran-defendant suffering from PTSD is to contact the nearest Veterans' Outreach Center or Veterans' Administration hospital. Attorney Peter Erlinder successfully defended James Wood using a PTSD-insanity defense. Because Erlinder developed a viable treatment program for trial, the court did not order commitment to a state mental facility. Erlinder, \textit{supra} note 20, at 27.

Michael Mann's attorney, Thomas Schwaba, played a major role in devising a treatment plan for Mann after he had been acquitted on an insanity-PTSD defense. Schwaba was able to arrange for treatment on an out-patient basis after Mann served a short time on an in-patient basis. This was done by contacting the Veterans' Administration and constructing a treatment program for the particular needs of his client and then selling this plan to the judge. Schwaba did all this at a time when commitment to a mental health facility was not automatic upon an insanity acquittal. (Prior to State v.
should be thoroughly investigated, because commitment to a state mental institution will often make the veteran’s disorder worse.

C. PTSD at Trial — Alternative Defenses

Due to the hostility many judges and potential jurors feel toward insanity defenses that seek to absolve a defendant from all criminal liability and the cynicism harbored for Vietnam-related stress disorders, alternative methods for presenting PTSD as a defense or mitigating factor might possibly be considered.

1. Diminished Capacity

The first of these possible alternatives would be to assert that the veteran-defendant’s disorder made it impossible for him to entertain the necessary mental element for the crime charged. This has been identified as a diminished capacity defense and has been recognized in only a few jurisdictions. Generally, the diminished capacity defense has been used to negate the mental element necessary in specific intent crimes. In asserting the diminished capacity defense, a de-

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Field, 118 Wis. 2d 269, 347 N.W.2d 365 (1984)). Telephone interview with Attorney Thomas Schwaba, defense counsel for Michael Mann (Feb. 18, 1985).

106. The best way to approach creating a treatment program that would specifically apply to a veteran suffering from PTSD is to contact the nearest Veterans’ Outreach Center. There are presently 188 of these centers located throughout the country and they have referral services to mental health professionals who can assist in devising a treatment plan.

The National Center for Stress Recovery in Cleveland, Ohio, is presently under construction. This center is scheduled to open in the spring of 1985 and will specifically deal with victims of PTSD. This center and its staff could possibly serve as a resource for devising an effective treatment plan. Telephone interview with Dr. John Lipkin, Psychiatrist with the Veterans' Administration, Washington, D.C. (Feb 15, 1985).

107. Erlinder, supra note 20, at 28. Veterans suffering from PTSD must be treated for their disorder and not merely warehoused in a state mental facility that has neither the time, the staff, nor the ability to adequately deal with PTSD. Id. at 21-22.

108. Id. at 21.


111. G. Morris, supra note 75, at 97-126 gives a state-by-state analysis of the admissibility of evidence of an abnormal mental condition to establish that a defendant did not have the mental capacity to entertain the necessary intent for the commission of a particular crime.

112. See generally W. LaFAVE & A. SCOTT, CRIMINAL LAW § 42 (1972).
fendant does not seek complete absolution from criminal liability, but merely punishment for a lesser-included general intent crime for which he has the mental capacity to commit.114

If the veteran-defendant is tried in a jurisdiction that recognizes the diminished capacity defense, he may then assert that PTSD constitutes diminished capacity.115 If the jury is satisfied that the severity of the defendant's disorder rises to the level of diminished capacity and that due to this diminished capacity he is unable to form the specific intent necessary — if the veteran is charged with a specific intent crime — to be convicted of the crime charged, then the defendant will be held accountable only for a lesser-included general intent crime. While this will not serve as a complete defense, a conviction on a lesser charge would most likely require a lesser sentence or a greater chance for an alternative to incarceration.

2. Automatism

Another possible method of using PTSD at trial to defend against criminal liability is to claim that the conduct out of which the criminal charges arose was involuntary.116 This type of defense has been called automatism and is rarely used.117 A defendant claiming an automatism defense is essentially claiming that his actions constituting the criminal act were not voluntary because they were not consciously performed.118 Because an actor is not guilty of an offense unless the conduct on which the offense is based was voluntary, 119

113. Id.
114. Id.
115. Some courts have recognized that a veteran with a stress disorder might be suffering from diminished capacity. Schulz, supra note 20, at 2402.
116. This defense was codified by the American Law Institute in the Model Penal Code.

(1) A person is not guilty of an offense unless his liability is based on conduct which includes a voluntary act or the omission to perform an act of which he is physically capable.

(2) The following are not voluntary acts within the meaning of this Section: . . . (b) a bodily movement during unconsciousness or sleep;

MODEL PENAL CODE § 2.01 (1962).
117. Erlinder, supra note 20, at 23.
118. See generally W. LAFAYE & A. SCOTT, supra note 112, at § 25.
119. Id.
establishing that the conduct was performed while the actor was in an unconscious state would negate the voluntariness of the actor's conduct and, therefore, his criminal liability.

A California court recognized the viability of an unconsciousness defense\(^{120}\) when it held that failure to give the defendant's requested instruction regarding unconsciousness was reversible error.\(^{121}\) The defendant, a Vietnam veteran who had been undergoing therapy for psychological problems since his return from the war,\(^{122}\) assaulted the maitre d' in a public restaurant.\(^{123}\) The veteran claimed that he remembered nothing of his assaultive behavior and must have been experiencing one of the dream-like states he had suffered since serving in Vietnam.\(^{124}\) The trial court excluded from evidence the testimony of the veteran's therapist that substantiated the veteran's claims and all the defendant's testimony regarding his Vietnam experiences and subsequent psychiatric treatment.\(^{125}\) The appellate court held that such an exclusion was reversible error and that the excluded evidence supported the defendant's claim of unconsciousness, which is a valid criminal defense in California.\(^{126}\) The California court's holding demonstrates the possibility that PTSD may be used to argue the veteran-defendant was unconscious of his actions, making such actions involuntary and, therefore, freeing him of criminal liability.

One advantage to asserting the defense of automatism, or unconsciousness, is that it is not a defense grounded in mental illness.\(^{127}\) Therefore, acquittal upon such a defense would not raise issues concerning the need for commitment to a mental health facility.\(^{128}\)

\(^{120}\) People v. Lisnow, 88 Cal. App. 3d 21, 151 Cal. Rptr. 621 (1978).
\(^{121}\) Id. at 23, 151 Cal. Rptr. at 622.
\(^{122}\) Id.
\(^{123}\) Id.
\(^{124}\) Id.
\(^{125}\) Id. at 24, 151 Cal. Rptr. at 622.
\(^{126}\) Id. at 26-27, 151 Cal. Rptr. at 624.
\(^{127}\) Ellis v. United States, 274 F.2d 52 (10th Cir. 1959).
3. Self-defense

A last defense the veteran-defendant might try to use at trial in connection with PTSD is self-defense. This, of course, would be possible only if the criminal charge involved the use of force or a threat of force. The argument could be made that the defendant reasonably believed his use of force or his threat to use force was necessary under the circumstances. Although the requirement of a reasonable belief might serve as a qualifier in the use of this defense, the veteran could argue that the PTSD had a substantial effect on what he viewed as reasonable under the circumstances.129

D. PTSD After an Unsuccessful Trial or a Guilty Plea — Sentencing

Even after a veteran-defendant pleads or is found guilty of a criminal offense, there are measures that a conscientious attorney can take to protect a client from harsh or detrimental sentencing. Post-Traumatic Stress Disorder might be used as a mitigating factor131 for a lighter132 or alternative sentence.

129. The defense of self-defense was codified by the American Law Institute in the Model Penal Code.

(1) Use of Force Justifiable for Protection of the Person. Subject to the provisions of this Section and of Section 3.09, the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.


130. "It may be possible to show that a particular type of provocation caused a PTSD type reaction in which the defendant felt attacked and responded involuntarily or even reasonably given his or her experiences." Erlinder, supra note 20, at 22.


132. In some jurisdictions a sentencing judge may be given some latitude in the severity of sentence imposed, and may be allowed to impose a lighter sentence than statutorily required. An example of such a jurisdiction is Wisconsin, which has a statute allowing for indeterminate sentencing.

If imprisonment in the Wisconsin state prisons for a term of years is imposed, the court may fix a term less than the prescribed maximum. The form of such sentence shall be substantially as follows: "You are hereby sentenced to the Wisconsin state prisons for an indeterminate term of not more than . . . (the maximum as fixed by the court) years."

The effectiveness of PTSD as a means to lighten or vary the sentence normally imposed upon conviction of a crime will depend upon several factors. If the crime committed by the veteran-defendant was nonviolent and no one was injured by his actions, a reduced or alternative sentence is more probable. A sentencing judge will be more open to developing an alternative sentence, if the veteran’s attorney can present some viable treatment program at the sentence proceeding. Of course, it also is necessary that the veteran’s attorney make a convincing argument to the sentencing judge that the defendant was suffering from a stress disorder at the time of the crime’s commission and that the disorder was somehow related to the criminal activity.

Possibly, with the increasing recognition given to the problems faced by Vietnam veterans and their related stress disorders, more courts and state legislatures will follow the lead of one state that mandates consideration of military service in Vietnam when a judge is making a sentence determination.

If the issue of a veteran-defendant’s PTSD is not raised at the sentencing phase or the sentencing judge fails to consider it, the issue can be raised after a sentence is imposed. This can

133. Erlinder, supra note 20, at 20.
134. Id. See supra notes 65 and 104. There are currently over 188 Veterans’ Centers throughout the country to provide counseling and assist in devising treatment programs. Telephone interview with Dr. John Lipkin, psychiatrist with the Veterans’ Administration, Washington, D.C. (Feb. 15, 1985).
135. Milstein & Synder, supra note 21, at 87.
136. In California, the legislature created a statute that allows a judge to commit the veteran to the custody of federal officials in order to best facilitate treatment of the veteran through the Veterans’ Administration. CAL PENAL CODE. § 1170.9 (West 1985).

The effectiveness of such a statute has recently come into question. Vietnam Vet Sentencing Law May Have Little Meaning, Nat’l J., May 2, 1983, at 3, col. 2. While this statute allows judges to sentence state offenders to federal facilities for treatment, there is no assurance that the federal facility will accept the state offender or that appropriate treatment programs even exist to deal with the stress disorder.

There is a federal prison in Butner, North Carolina, that has treatment programs for prisoners suffering from stress disorders. However, this facility has become overcrowded and the chances that it would accept state offenders are minimal. Telephone interview with Dr. John Lipkin, Psychiatrist with the Veterans’ Administration, Washington, D.C. (Feb. 15, 1985).
be done in a motion to reduce the sentence.\textsuperscript{137} The same factors that influence a judge at the initial sentencing phase probably are important in considering a motion to reduce.\textsuperscript{138}

\textit{E. PTSD After Trial or a Guilty Plea — Post-Conviction Relief}

An attorney giving legal assistance to the incarcerated veteran-defendant at the post-conviction phase has several available options. The attorney may seek the desired relief — such as a new trial or reduced sentence — through motions, on appeal or writ of habeas corpus, depending upon the appropriate post-conviction procedure for relief in the particular jurisdiction.\textsuperscript{139} Whatever procedure is necessary to secure the veteran’s release from incarceration should be followed because the untreated veteran’s condition will only worsen the longer he is imprisoned without psychiatric care.\textsuperscript{140}

If the veteran-defendant raised the issue of his PTSD at trial as a ground for defense and his defense failed — either because the trier of fact rejected his claim of PTSD or doubted that it was causal in his criminal conduct — there might be some problem at the post-conviction phase. The existence or non-existence of PTSD and its relationship to the defendant’s criminal activity is most likely a question of fact.\textsuperscript{141} Normally, a finding of fact as to the defendant’s mental status will not be overturned at the post-conviction phase unless he is “so seriously disabled that the finder of fact would be compelled

\textsuperscript{137} Federal Rule of Criminal Procedure 35 authorizes a motion to reduce the sentence.

\textsuperscript{138} See United States v. Lake, 709 F.2d 43 (11th Cir. 1983) (court was unconvinced that PTSD was causally connected to the defendant’s criminal activities and denied motion); United States v. Krutschewski, 509 F. Supp. 1186 (D. Mass. 1981) (severity of the defendant’s offense made sentence reduction impossible).

\textsuperscript{139} In Wisconsin, for example, the appropriate post-conviction procedure is outlined in Wis. Stat. § 974.06 (1983-84). A convicted defendant must first file a motion with the court in which he was tried requesting relief and specifying the grounds upon which relief is sought. Wis. Stat. § 974.06(4) (1983-84). If the trial court denies this motion, he may then appeal the conviction or sentence with the court of appeals. Id. § 974.06(7). He may petition for a writ of habeas corpus only after his post-conviction motion is denied or if he demonstrates that filing such a motion would be fruitless. Id. § 974.06(8).

\textsuperscript{140} Erlinder, \textit{supra} note 20, at 28.

\textsuperscript{141} See United States v. Green, 463 F.2d 1313 (D.C. Cir. 1972) (held that question of insanity is normally one of fact).
to doubt his responsibility."\textsuperscript{142} Therefore, it would be necessary to demonstrate that the veteran's disorder made him so obviously disabled that the finder of fact's determination was wrong and necessitates reversal.

On the other hand, if the veteran-defendant never raised the issue of PTSD and its effect upon his behavior at trial, some courts might hold that he is estopped from doing so at the post-conviction phase.\textsuperscript{143} If the defendant's conviction took place prior to 1980, when PTSD was officially recognized, an attorney could argue that the disorder is newly discovered evidence and request a new trial.\textsuperscript{144} If the defendant was convicted after 1980 and the issue of PTSD never came up at trial, a claim of ineffective assistance of legal counsel could possibly exist.\textsuperscript{145}

If attacking the lower court conviction based upon the issue of PTSD proves impossible, the tactic used by Attorney Wellborn Jack, Jr. in the case of Charles Heads might be a solution.\textsuperscript{146} Attack the lower court conviction on any grounds, even if unrelated to PTSD, and request a new trial.\textsuperscript{147} If the request for a new trial is successful, then raise the issue of PTSD at the new trial.\textsuperscript{148}

IV. CONCLUSION

No clear-cut answer exists to the question of why so many veterans of the Vietnam conflict have developed serious stress

\textsuperscript{142} Id. at 1315 (citing United States v. Eichberg, 439 F.2d 620, 621 (D.C. Cir. 1971)).

\textsuperscript{143} See State v. Hardimon, 310 N.W.2d 564 (Minn. 1981).

\textsuperscript{144} Federal Rule of Criminal Procedure 33 allows a motion for a new trial based upon newly discovered evidence. However, the rule further requires that this motion be made within two years of the final judgment, unless an appeal is pending.

\textsuperscript{145} The American Bar Association Standards Relating to the Defense Function have been accepted as guidelines to determine the effectiveness of defense counsel's representation in both the federal system, United States v. DeCoster, 624 F.2d 196 (D.C. Cir. 1979), and in Wisconsin, State v. Harper, 57 Wis. 2d 543, 205 N.W.2d 1 (1973). One of these standards places a duty to investigate upon an attorney, Defense Standard 4.1. Failing to investigate the possibility of PTSD, especially when the symptoms and manifestations are blatant, could be a breach of this duty.

\textsuperscript{146} See State v. Heads, 385 So. 2d 230 (La. 1980).

\textsuperscript{147} Id. The lower court conviction was reversed because the trial judge gave an erroneous jury instruction concerning intent.

disorders or why these disorders so often manifest themselves in criminal activity. However, there are several very valid theories concerning the adjustment difficulties that have plagued a large number of veterans since returning from Vietnam.

One theory regards the lack of preparation the military gave its personnel before returning them to the States. “In many instances soldiers were sent to their homes without any preparation toward readjustment to a society which they had left a year or more ago. In some cases, soldiers left the scarred battlefield of Vietnam and returned to their families on the same day.”\(^4\) These men were thrown back into the volatile society of the ’60s and ’70s and were expected to act as if they had never left home — as if the war had not changed them.\(^5\)

Another theory for explaining many of the adjustment problems experienced by the returning Vietnam veteran is the detrimental impact of a hostile society on his already damaged psyche.\(^1\)

More than two and a half million Americans served in Viet Nam: yet in many ways it is as though they never went, because America did not notice they had gone. Young men who felt they had been to the brink of hell, not to mention those who were permanently maimed, returned to this country, at worst to find their sacrifice hostilely repudiated, and at best treated with apathy.\(^2\)

In order to prevent any further damage to the “victims” of the Vietnam conflict, it is essential that those veterans suffering from war-related stress disorders be given effective representation when they enter the criminal justice system.

[I]t is reasonable to anticipate that the incidence of criminal acts attributable to combat veterans will continue to ex-

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150. It arose, rather, from a recognition of how deeply we had been changed, how different we were from everyone who had not shared with us the miseries of the monsoon, the exhausting patrols, the fear of combat assault on a hot landing zone. We had very little in common with them. Though we were civilians again, the civilian world seemed alien. We did not belong to it as much as we did to that other world, where we had fought and our friends had died.

P. CAPUTO, A RUMOR OF WAR xvi (1977).

151. As Lee Sloan, Associate Director at The Center for Policy Research, said, “They got blamed for losing. They got blamed for going. They got blamed for the atrocities.” The War Came Home, TIME, April 6, 1981, at 17.

pand in the future. Accordingly, it is important that the criminal defense attorney develop an understanding and awareness of the existence of combat-related mental and emotional disorders and the impact that they may have upon individual behavior. Once this understanding is achieved, it will be possible for the attorney to seek out qualified assistance in determining if there is a legitimate defense to the client's criminal actions. In this manner, those affected combat veterans, who have undoubtedly been denied many of the benefits and recognition afforded to veterans of other wars, will not be denied that which is the cornerstone of our justice system — a proper and effective defense. ¹⁵³

ANN R. AUBERRY

¹⁵³ Ford, supra note 73, at 441.