Legal Strategies for Defending the Combat Veteran in Criminal Court

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LEGAL STRATEGIES FOR DEFENDING THE COMBAT VETERAN IN CRIMINAL COURT

Brockton D. Hunter† and Ryan Christian Else††

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† This article is excerpted and adapted from Chapter 17 of The Attorney’s Guide to Defending Veterans in Criminal Court (Brockton Hunter & Ryan Else eds., 2014) [hereinafter Defending Veterans], available for purchase at www.veteransdefenseproject.org.

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I. PRELUDE

In early November 2015, we stood in a Mankato, Minnesota, courtroom and held our breaths as a jury announced the fate of our client, a man we had come to love. Levi Minissale is a former Marine who never should have served in the military due to severe mental illness, but who did serve in some of the worst fighting of the Afghan war. Now, he faced a sentence of life without parole, because he had done at home what the Marines taught him to do in war: killed his ex-girlfriend and attempted to kill her husband. We had argued at trial that, in a perfect storm of mental illness, military conditioning, and violent combat experiences, Levi was following the orders of a voice in his head that he perceived to be God to kill these people and was therefore not criminally responsible for his actions.

“Not guilty by reason of mental illness” was read for all four counts, starting with first-degree murder. This was the first such jury verdict in a Minnesota murder case in more than thirty years and only the second such verdict in the country for a veteran of our current wars. With tears of relief, we grabbed Levi to hug him, then stood by as he shared hugs with his emotional family members. We then saw him off to his civil commitment at the state mental hospital, where he would receive treatment for his illness and, one day, have a chance to return home to his family. Seeing Levi’s mother hug him for the first time in two-and-a-half years was one of the most rewarding moments of our lives.

Levi’s case was an ideal opportunity to apply many of the special strategies and cultural competencies we have worked so hard over the past decade to develop and spread throughout the nation’s criminal defense bar. We had the honor of working with two amazing psychological experts, Drs. Jennifer Service and Ernest Boswell, in discovering and ultimately telling the story of the very foreign landscape of Levi’s ill mind. We were inspired by the courage of Levi’s former squad leader to boldly tell the jury of how Levi struggled in the Marine Corps and about his rapid mental
deterioration under the strain of intense combat. We were grateful to the former Marine officer, who had served in the same area of Afghanistan, as he educated the jury on the nature of modern counter insurgency warfare and its confusing, morally ambiguous nature. We formed a bond with the Minissale family and were amazed by their bravery in the face of such incredible scrutiny, uncertainty, and turmoil. Despite the long time it took to prepare and the risks we faced, they never lost faith in our ability to tell Levi’s story. Finally, we were awe struck by a jury that looked at both the horror of Levi’s offense and his experiences, taking on the incredible weight of their decision and finding in their hearts the ability to stand for justice, which in this case required forgiveness.

Levi’s trial was also rewarding because we have made—and, we hope, kept—a commitment to helping veterans like Levi who would likely not be in criminal trouble but for their military service. We have worked to establish best practices for the defense of veterans whose service-related disorders, such as posttraumatic stress disorder (PTSD) or traumatic brain injury (TBI), significantly contributed to their criminal behavior. We wrote *The Attorney’s Guide to Defending Veterans in Criminal Court* (hereinafter *Defending Veterans*), a treatise on the art and science of such defenses. We also founded the Veterans Defense Project (VDP), a nonprofit corporation seeking to educate attorneys nationally on these issues to help ensure that they, and the American justice system as a whole, do a better job in dealing with this generation of veterans than we did with past generations. This article is an excerpt from that text, and we hope it continues to aid attorneys, families, and other advocates in fighting on behalf of our warriors when their lives are on the line. We all know they would readily have done the same for us in their service.

II. 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 our nation and our 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.”

As criminal defense attorneys, we are all that stands between these protectors and the nation they sacrificed to protect. We are the only ones who can hold the State, and society as a whole, accountable for its role in their behavior. Ours is a sacred duty. We must defend these veterans with the same focus and intensity with which they defended us. The United States Supreme Court agrees. Its recent landmark decision, Porter v. McCollum, makes this our legal duty as well.

The veteran defendant’s service can be relevant throughout the case, from pre-charge 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 PTSD or 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 an insanity defense, a self-defense claim, an automatism defense, or negating the mens rea requirement of the crime.

III. BUILDING ON THE WORK OF THE VIETNAM GENERATION’S DEFENDERS

We owe much to the pioneers, the defense attorneys and mental health experts who, in the wake of Vietnam, first brought combat trauma–based defenses into American courtrooms. Armed with little more than a newly recognized PTSD diagnosis, their own experiences, and courage to stand up for the veterans on whom our

3. See Porter v. McCollum, 558 U.S. 30, 43 (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)).
nation had turned its back, their relentless and passionate advocacy saved many lives and paved the way for the transformations in the justice system we are seeing today. We would not be in the position to properly prepare for the coming wave of troubled veterans without the relentless, and often discouraged, work of that generation’s defenders. While we could never adequately acknowledge all of these advocates, some deserve specific mention.

Starting in the early 1970s, years before PTSD was even formally recognized, Floyd “Shad” Meshad, a Department of Veterans Affairs (VA) social worker, essentially practiced law without a license, advocating on behalf of his veteran patients in the Los Angeles criminal courts. Meshad’s foray into legal practice was necessary in this era because, unfortunately, there were an insufficient number of attorneys prepared to take up the cause of troubled combat veterans, especially in areas like San Diego and Los Angeles where such veterans were overloading the system as it was. Meshad’s experience as an Army Social Worker/Psychology Officer in Vietnam, along with his reputation as a pioneering VA outreach specialist on the streets of Los Angeles, earned him credibility and respect in the courts. His advocacy was ahead of its time and helped many of his veteran patients avoid jail time in favor of treatment. Meshad details his early advocacy in Chapter 3 of Defending Veterans.⁴

Meshad eventually found the ideal attorney to take over the actual legal representation of his veteran patients. Barry Levin was a highly decorated Vietnam combat veteran who shared Meshad’s deep passion for defending his fellow veterans. Levin and Meshad eventually created a veterans defense team, which included some of the other top PTSD experts in the country. Together, they traveled the nation defending many high profile Vietnam veteran cases throughout the 1980s. Later, Levin and David Ferrier,⁵ another member of the team, distilled their years of hard-won experience in their book, Defending the Vietnam Combat Veteran,⁶ the direct predecessor to Defending Veterans.

⁴ Shad Meshad, The War at Home: Learning from the Aftermath of Vietnam as We Prepare for the Coming Wave, in Defending Veterans, supra note 1, at 73.

⁵ David Ferrier, a Vietnam combat veteran, VA counselor, and private investigator, whose role on the veterans defense team was to investigate and document their clients’ military service, shares his expertise in Chapter 14 of Defending Veterans. See David Ferrier, Understanding and Documenting Your Veteran Client’s Military Service, in Defending Veterans, supra note 1, at 337.

⁶ Barry Levin & David Ferrier, Defending the Vietnam Combat Veteran:
Levin and his team’s first client was Albert Dobbs, a troubled Vietnam veteran already serving a lengthy prison term for armed robbery in Louisiana. They took Dobbs’s case pro bono after seeing it profiled in an ABC documentary entitled *Vietnam Requiem.* Levin filed a Writ of Habeas Corpus, arguing an insufficient pre-sentence investigation, and won Dobbs a resentencing in 1982. In discussing Mr. Dobbs’s case, Levin summarized what is, generally, the strategy promoted in *Defending Veterans:*

What I successfully demonstrated to the Court was that Albert not only was a clearly defined case of [PTSD], but that his actions were directly linked to the disorder. This was accomplished by educating the Court [on] the symptoms of PTSD and presenting Albert’s military and post-military behaviors as grievously impacted by this condition. Levin and his team ultimately gained Dobbs’s release from prison and full pardon by the Governor of Louisiana. Upon his release, the team brought Dobbs to California where he began treatment with Ferrier, who at the time was still a counselor with the VA. With Ferrier’s help, Dobbs was able to rebuild his life and learn to cope with his PTSD.

Wellborn Jack Jr. holds the distinction of being the first attorney in America to mount a successful PTSD-based murder defense of a veteran. Jack defended Charles Heads, a Marine Recon veteran, in Louisiana in 1981, arguing that he was in a dissociative flashback at the time he shot and killed his brother-in-law. The jury agreed, finding Heads not guilty by reason of insanity. Jack joined Barry Levin and the rest of his team the following year in defending Albert Dobbs.

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8. *LEVIN & FERRIER,* supra note 6, at 3.
9. *Id.*
10. *Id.*
11. *Id.*
Attorney and Law Professor Peter Erlinder was also a pioneer of the PTSD defense, beginning with his co-defense of Jearl Wood, another of the first successful combat PTSD-based insanity defenses.\(^\text{13}\) Erlinder went on to author the first, and still among the best, law review articles on combat PTSD-based insanity defenses.\(^\text{14}\) He also served as a consultant and expert witness in many more PTSD cases and presented numerous seminars to attorneys and mental health experts on the application of PTSD to legal issues. The successful trial defenses in the Heads and Wood cases set the standard for PTSD defenses to follow.\(^\text{15}\)

While Meshad, Levin, Ferrier, Jack, and Erlinder deserve special mention, many others—too many to credit here—did similar work. These pioneers were ahead of their time, and though they saved many Vietnam veterans, they were but a few standing against a tidal wave of veterans flooding into America’s criminal courts. It would ultimately take our nation and its justice system decades to catch up. In the meantime, the most troubled Vietnam veterans in the system did not benefit from these innovative defenses. To the extent their military service was taken into consideration at all, it was often held against them. They either were told that, as veterans, they should have “known better,” or, worse, were demonized for their service in an unpopular war and discarded into cages, in misguided attempts to protect the public.

Our society’s failures with the Vietnam generation have cost us in countless enduring ways. Fortunately, we seem to be learning from those mistakes. We are building on the work of the pioneers in veterans’ defense and transforming the way the entire justice system interacts with troubled veterans. We owe those pioneers a perpetual debt for “prepping the objective” for us.\(^\text{16}\)

\(^{13}\) See People v. Wood, No. 80-7410 (Ill. Dist Ct. May 5, 1982).


\(^{15}\) For a more in-depth discussion on the successful trial defenses in the Heads and Wood cases, as well as others, see generally Brockton D. Hunter & Ryan C. Else, Legal Strategies for Defending the Combat Veteran in Criminal Court, in DEFENDING VETERANS, supra note 1, at 414–20.

\(^{16}\) “Prepping the objective” is a military term for bombardment to weaken an
IV. THE CHANGING TERRAIN: LEGAL TRENDS FAVORING TREATMENT OVER INCARCERATION FOR VETERANS

In the 2009 landmark case Porter v. McCollum, the United States Supreme Court marked its approval of a growing legal trend towards leniency and a therapeutic approach to criminally involved veterans.\(^\text{17}\) Porter recognized that “[o]ur Nation has a long tradition of according leniency to veterans in recognition of their service.”\(^\text{18}\) This finding was a loud and clear endorsement of the principles underlying the development of state veteran-sentencing statutes and veterans treatment courts that had already begun. The decision in Porter was followed by amendments to the United States Sentencing Guidelines\(^\text{19}\) and a vast expansion of the use of veterans treatment courts throughout the United States.\(^\text{20}\) These developments evince a strong legal trend and changing legislative intent that pervades all levels of government.

Porter cited to two veteran-specific sentencing statutes to support its finding that “the relevance of Porter’s extensive combat experience is not only that he served honorably under extreme hardship and gruesome conditions, but also that the jury might find mitigating the intense stress and mental and emotional toll that combat took on Porter.”\(^\text{21}\) The two statutes were section 1170.9 of the California Penal Code—created in 2007—and section 609.115, subdivision 10 of the Minnesota Statutes—created in 2008—which served as the proverbial “tip of the spear” in creating legal mechanisms unique to veteran defendants with service-related disorders. As of early 2017, there are a total of five states with veterans sentencing statutes.\(^\text{22}\) There are five more states with statutes

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\(^{18}\) Id.

\(^{19}\) U.S. SENTENCING GUIDELINES MANUAL § 5H1.11 (U.S. SENTENCING COMM’N 2010) (“Military service may be relevant in determining whether a departure is warranted, if the military service, individually or in combination with other offender characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines.”).


\(^{21}\) Porter, 558 U.S. at 43–44.

\(^{22}\) See CAL. PENAL CODE ANN. § 1170.9 (West, Westlaw through 2016); MINN. STAT. § 609.115, subdiv. 10 (2016); MINNESOTA SENTENCING GUIDELINES AND
imposing a duty on the court, the VA, or community corrections to inquire about veteran status, inform the veteran about services available, or consider a veteran’s service-related disorder in creating a treatment plan.\textsuperscript{23}

The existence of veteran treatment courts also signals a trend toward favoring a therapeutic approach to veteran defendants with service-related disorders. In December 2011, \textit{The Atlantic} reported that “[n]early 80 veterans courts have sprung up across the country over the past four years, and 20 more are expected to open by the end of [2011].”\textsuperscript{24} By mid-2012, there were “168 formally established Veterans Treatment Courts, Veterans Courts, Veterans Dockets or tracks within Mental Health and/or Drug Treatment Courts, or criminal Courts,” and “[s]ince the courts’ inception, 7,724 Veterans have been admitted, and 3,883 of these Veterans are still being monitored by and treated through the courts.”\textsuperscript{25} The rapid growth of these courts across the country signals a national acceptance of their underlying principles favoring therapeutic treatment over incarceration or punishment. As of early 2017, there are ten states with statutes authorizing the creation of veterans treatment courts or analogous veteran treatment programs.\textsuperscript{26}


\textsuperscript{25} Jim McGuire et al., \textit{An Inventory of VA Involvement in Veterans Courts, Dockets and Tracks} 5, 7 (2015), http://www.justiceforvets.org/sites/default/files/files/An\%20Inventory\%20of\%20VA\%20Involvement\%20in\%20Veterans\%20Courts.pdf.

The United States Congress is also taking significant interest in the reintegration issues faced by veterans with service-related disorders. The National Defense Authorization Act for Fiscal Year 2010 mandated that the Institute of Medicine of the National Academy of Sciences conduct an unprecedented governmental study of PTSD and its effects on service members, 27 “reflecting congressional concern about the number of service members and veterans who were at risk for or had received a diagnosis of PTSD.” 28 The study found that “PTSD is commonly associated with substance abuse, unregulated anger, aggressive behavior, and hazardous use of alcohol, all of which are themselves associated with legal problems and incarceration” 29 and that “outreach to veterans who have PTSD and who are incarcerated or have been recently released may help them to access comprehensive treatment and rehabilitation options to improve functioning and reduce the risk of recidivism and future legal problems.” 30

These recent developments reflect a growing public recognition that when our Nation sends young men and women to prepare for and fight wars, as San Diego Prosecutor William C. Gentry so eloquently stated, “[y]ou are unleashing certain things in a human being we don’t allow in civic society, and getting it all back in the box can be difficult for some people.” 31 The public, courts, and elected leaders nationwide are beginning to recognize that the responsibility for these veterans falls on all of the American public. Thus, even where these statutes are not applicable and specialty courts are not available, this change in public sentiment should be used to argue to judges that they also have a duty to show compassion toward and promote the rehabilitation of veteran defendants.

V. PRE-TRIAL STRATEGIES

Even before charges are filed by the State, there is an opportunity for the defendant’s military service to become relevant

29. Id. at 322.
30. Id.
and maybe even dispositive. Prosecutors wield incredible discretion to decline or under-charge an offense. A veteran client’s military service may be relevant to many of the National District Attorneys Association’s (NDAA) factors for screening whether to charge or what to charge, including: doubt as to the accused’s guilt, the availability of suitable diversion and rehabilitative programs, the attitudes and mental status of the accused, the characteristics of the offender, and “any other . . . mitigating circumstances.” These factors show that there are various reasons why a prosecutor should consider a veteran defendant’s military service in the charging decision or in the context of a plea agreement. Many states have created valuable statutory tools that may be implemented at the pretrial stage. Diversion to a veterans treatment court is expressly authorized in ten states, and five states provide duties that the court, the state, or community corrections must perform.

Prosecutorial sympathy for veterans has been tested and shown as significant, at least with respect to minor offenses, through social science research as well. A University of Alabama study polled a
sample of thirty-five 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, non-veterans with PTSD, and a control group that was neither a veteran nor had PTSD. 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 non-veteran with PTSD had been in a car accident that injured him and killed a passenger. The following findings suggest significant sympathy for both veteran groups amongst prosecutors:

Overall, prosecutors viewed veterans as less blameworthy for the low-level offense than nonveterans. As hypothesized, prosecutors were significantly more likely to empathize and identify with veteran defendants, as well as find them less criminally culpable, than with nonveteran defendants . . . . We anticipated that prosecutors would recommend similar sentences and dispositions to veterans and nonveterans alike, but sentencing leniency for veterans almost reached statistical significance. 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.

The study found that veterans overall, both with and without PTSD, were perceived by prosecutors as less culpable: “The hierarchy of least to most culpable was veterans with PTSD, veterans without PTSD, nonveterans with PTSD, and nonveterans without PTSD; however, the absolute differences were small between conditions.” The authors of the study hypothesized that the reason for this is that “in the case of defendants who are military veterans, prosecutors may recognize that some experience significant practical and psychological barriers to readjustment to civilian life. Thus, veterans may be found somewhat less culpable for committing crimes and may receive a treatment approach from the courts, instead of retribution.”

SERVS. 319 (2011).

36. Id. at 321.
37. Id. at 322.
38. Id. at 326.
39. Id. at 327.
40. Id.
There is at least significant anecdotal evidence that this same rationale among prosecutors extends to serious violent crimes as well. The case of Matthew Sepi in Las Vegas, Nevada, 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.\footnote{41} In Brock Savelkoul’s case in Watford City, North Dakota, defense counsel used pretrial release to establish a treatment record—a strategy which can demonstrate a veteran client’s amenability to probationary treatment and even secure a plea-agreement for diverting charges based upon the veteran client’s completion of available courses of PTSD-specific treatment at the VA. 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.

A. Prosecutorial Declination: Nevada v. Matthew Sepi

In the summer of 2005, Matthew Sepi walked to the 7-Eleven in his violent Las Vegas neighborhood with an AK-47 concealed underneath a trench coat and bought two tall cans of beer.\footnote{42} The beer was to self-medicate Mr. Sepi’s PTSD symptoms.\footnote{43} On the way home, he entered an alley where he encountered two large, armed gang members. Upon seeing a butt of a gun, seeing a flash, and hearing a bang, in the words of Mr. Sepi, he “engaged the targets” and “broke contact” with the enemy by firing rounds at the two people, escaping to his home the way he would return to his home unit in a fire-fight and loading his car with 180 rounds of ammunition.\footnote{44} One of his “targets” died, and one was left wounded. Mr. Sepi was arrested and booked.

Mr. Sepi’s public defender was Nancy Lemcke, who would work to build sympathy for Mr. Sepi within the law enforcement community and county attorney’s office.\footnote{45} Detective Laura Anderson was convinced that Mr. Sepi was falling back on his military training when he carried the AK-47, and she “felt very bad for him.”\footnote{46} It did not hurt Mr. Sepi that the people he shot were gang members who

\footnote{41}{Sontag & Alvarez, supra note 31.}
\footnote{42}{Id.}
\footnote{43}{Id.}
\footnote{44}{Id.}
\footnote{45}{Id.}
\footnote{46}{Id.}
tested positive for alcohol, cocaine, and methamphetamines. Still, Ms. Lemcke was able to capitalize on the sympathy of the officers, the support of fellow soldiers and veterans’ advocates, Mr. Sepi’s service record, and available VA treatment resources to reach an excellent agreement with the State. The parties agreed that “in exchange for the successful completion of treatment for substance abuse and PTSD, the charges against Mr. Sepi would be dropped.”

B. Pretrial Diversion for Treatment: North Dakota v. Brock Savelkoul

The story of Brock Savelkoul’s armed-standoff with the North Dakota State Patrol was well-documented by National Public Radio:

At 8:20 p.m. on Sept. 21, 2010, Iraq veteran Brock Savelkoul decided it was time to die. He lurched from his black Tacoma pickup truck, gripping a 9-mm pistol. In front of him, a half-dozen law enforcement officers crouched behind patrol cars with their weapons drawn. They had surrounded him on a muddy red road after an hourlong chase that reached speeds of 105 miles per hour. Savelkoul stared at the ring of men and women before ducking into the cab of his truck. He cranked up the radio. A country song about whiskey and cigarettes wafted out across an endless sprawl of North Dakota farmland, stubbled from the recent harvest. Sleet was falling, chilling the air. Savelkoul, 29, walked slowly toward the officers. He gestured wildly with his gun. “Go ahead, shoot me! . . . Please, shoot me,” he yelled, his face illuminated in a chiaroscuro of blazing spotlights and the deepening darkness. “Do it. Pull it. Do I have to point my gun at you to . . . do it?”

Twenty feet away, the officers shifted nervously. Some placed their fingers on the triggers of their shotguns and took aim at Savelkoul’s chest. They were exhausted, on edge after the chase and long standoff. They knew only the sketchiest of details about the man in front of them, his blond hair short, his face twisted in grief and anger. Dispatchers had told them that Savelkoul had been diagnosed with post-traumatic stress disorder. They warned that he might have been drinking. Family members told police that Savelkoul had fled his home with six weapons, including a semi-automatic assault rifle and several hundred rounds of hollow point ammunition. To

47. Id.
Megan Christopher, a trooper with the North Dakota Highway Patrol, Savelkoul’s intentions seemed obvious. “Suicide by cop,” she thought. “He wants to go out in a blaze of glory.”

Two hours later, as a result of the calm prodding of Trooper Christopher, Mr. Savelkoul put down his weapons, was arrested and charged with three felonies and one misdemeanor, and was detained on $20,000 bond.

Brock Savelkoul served three combat tours in Iraq and was diagnosed with PTSD, depression, insomnia, anxiety disorder, hypersensitivity, hypervigilance, and leg pain from a shrapnel wound. As the local newspaper, The Bismarck Tribune, would report, this was “a case where the judge, the state’s attorney, the public defender, the county veterans service officer and others agreed that this man needed treatment first, the law second.” As such, at a preliminary hearing on October 6, 2010, the judge agreed to reduce Mr. Savelkoul’s detention bond to $1,000 on the condition that he enter and remain in treatment at the Fargo, North Dakota, VA Medical Center and later be transferred to a forty-five-day PTSD program at the St. Cloud, Minnesota, VA Medical Center as soon as a bed was available. The McKenzie County Veterans Service Officer, Jerry Samuelson, said that he had “never seen this before . . . . The judge, the state’s attorney, the public defender, they’re all doing the right thing.”

Five months later, on March 4, 2011, McKenzie County State Attorney Dennis Johnson and the public defender reached an exceptionally lenient agreement. Mr. Savelkoul would plead guilty to the misdemeanor reckless driving charge, with a stayed thirty-day

50. Id.
52. Id.
53. Id.
jail sentence, and the state would conditionally suspend prosecution of the three felonies.\textsuperscript{54} If Mr. Savelkoul abided by the seven conditions, including “that he remain in counseling until a mental health professional says it’s no longer needed,” for three years, the three felonies would be dismissed.\textsuperscript{55} The prosecution must have worried that the court would not accept such a lenient agreement, as Dennis Johnson argued to the judge on Mr. Savelkoul’s behalf that the criminal acts were caused by PTSD and that “consciously, or not, [Mr. Savelkoul] wanted to die by law enforcement.”\textsuperscript{56}

Both of these cases illustrate the benefits of informing the prosecutor about a veteran client’s military service and its relevance as early in the case as is possible. The defense should work closely with the VA and other veteran or community resources to present a treatment plan that gives the prosecution a viable and reasonable alternative to prison time. When appropriate, pretrial release, conditioned on adherence to a structured mental health and chemical dependency treatment program, can be used to get the veteran into a treatment program more quickly. Subsequently, the veteran’s success in treatment can be used to show the prosecution and the court that the veteran is amenable to treatment and not a threat to public safety. For example, five months separated Mr. Savelkoul’s pretrial release and the plea agreement, ensuring the State that he did not pose a public safety risk. This five-month track record and the heavy consequences the State could levy if Mr. Savelkoul violated the agreed-upon conditions were apparently sufficient to satisfy the prosecution’s concerns. This is instructive of how the veteran’s service or mental illness can be used to cut charges off before trial.

C. Caution: Due Diligence Required

Unfortunately, history shows that it is essential that the veteran defendant’s attorney confirm the details of his or her client’s military service and resulting psychological injuries before moving forward. There have been publicized cases of defendants falsifying their status


\textsuperscript{55} \textit{Id.}

\textsuperscript{56} \textit{Id.}
as veterans as well as veterans exaggerating their military experiences in order to assert a PTSD defense and/or gain leniency in sentencing.

Some cases from the Vietnam generation illustrate how entire criminal proceedings, through sentencing, have been conducted without anyone discovering that the supposed veteran was a fraud. The following cases demonstrate the need for the attorney to conduct diligent research before utilizing the veteran client’s service record.\(^\text{57}\) These examples also show the need to verify every major fact upon which an expert witness relies in making his or her recommendations or conclusions.\(^\text{58}\)

The first case, *People v. Lockett*,\(^\text{59}\) illustrates that a supposed veteran can so convincingly falsify combat service that only a detailed review of military records will prevent the fraud from having a substantial effect on the legal proceedings. Samuel Lockett was charged with a series of eighteen robberies in Brooklyn, New York, during a thirty-day period at the end of 1980 and the beginning of 1981.\(^\text{60}\) Mr. Lockett raised a PTSD-based insanity defense. In a pre-plea examination by the prosecution’s psychiatrist, Mr. Lockett convinced the psychiatrist that he suffered from PTSD as a result of his service in the Vietnam War. The court would later note, “[D]efendant had consistently informed the examining psychiatrists at the various mental examinations that he had served in Vietnam where he had horrible combat experiences.”\(^\text{61}\) Based upon this evaluation, both the prosecution and the court consented to a plea of “not responsible by reason of a mental disease or defect,” terminating the criminal proceeding.\(^\text{62}\)

While awaiting a hearing on whether Mr. Lockett was dangerously mentally ill, the prosecution received a copy of Mr. Lockett’s military records, which had been subpoenaed earlier but delayed in their delivery. These records revealed that, though he was in the U.S. Air Force, Mr. Lockett had never been in Vietnam.\(^\text{63}\) On the prosecution’s motion, the court vacated the plea on the ground

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57. Levin & Ferrer, *supra* note 6, at 89–90.
58. See Erlinder, *Vietnam on Trial*, *supra* note 14, at 73.
60. Lockett v. Juvenile, 490 N.Y.S.2d at 765.
61. *Id.* at 766–67.
62. *Id.* at 766.
63. *Id.*
that it was induced by fraud, noting that Mr. Lockett’s “misrepresentations played a crucial part in [the examining psychiatrist’s] mental evaluations and opinions that he suffered from a posttraumatic stress disorder.”\textsuperscript{64} The Appellate Division ruled that the trial court lacked the power to vacate the plea. The Court of Appeals of New York reversed the Appellate Division and affirmed the trial court’s decision because “[c]ourts traditionally have inherent power to vacate orders and judgments obtained by fraud or misrepresentation.”\textsuperscript{65}

The second example illustrates the trap that legal and medical professionals must avoid in veterans criminal cases: the crafting of a false defense based on a service-related disorder. In October 1979, Michael Pard was charged with three counts of attempted murder after he chased his ex-wife, her husband, and an Oregon state trooper while firing a weapon at them from his vehicle.\textsuperscript{66} Mr. Pard’s attorney decided to assert a defense of diminished capacity and mental disease based upon service-related psychological trauma, hiring psychologist Dr. Kevin McGovern among other experts.\textsuperscript{67}

Dr. McGovern did not record his first interview with Mr. Pard but did record his second, during which Dr. McGovern asked a number of leading and suggestive questions designed to show that Michael was suffering from combat stress and that he had the symptoms of post traumatic stress disorder. It was during this videotaped session that Michael, crying, first told McGovern or any other doctor or therapist that he had killed three children in Vietnam, that he saw Karen’s face superimposed on theirs during nightmares, and that he experienced flashbacks to Vietnam when he was welding.\textsuperscript{68}

Building on Dr. McGovern’s questioning and conclusions, at trial Mr. Pard testified that during the four and one half months he was in Vietnam, he and the other crew chiefs flew sixteen hours a day during which time they averaged five combat missions. He also testified that he personally killed at least thirty people, and that he and his helicopter crew killed

\textsuperscript{64} Id. at 766–67.
\textsuperscript{65} Id. at 767.
\textsuperscript{67} Id.
\textsuperscript{68} Id.
Michael also described how he had killed three Vietnamese children after one of them shot an American soldier, and how he and members of his crew rescued a general. Michael testified that he received the Distinguished Flying Cross for his part in the rescue of the general, and that he had also received a Bronze Star for valor.69

Mr. Pard was found not guilty by reason of mental disease, escaping all criminal liability. Apparently emboldened by this victory, Mr. Pard and his wife Kerry then initiated two claims against the U.S. government totaling $9.5 million, claiming that the VA was responsible for the injuries resulting from his crimes because the VA negligently failed to diagnose and treat his PTSD.70

It was the litigation of these subsequent civil claims that exposed the fraudulent nature of Mr. Pard’s criminal trial defense. Though the State had failed to call members of Mr. Pard’s military unit to testify during the criminal trial, the U.S. government called them during the civil trial. Mr. Pard’s commanding officer and fellow crew chief testified that their unit served mostly in an administrative capacity and saw very little, if any, combat. Mr. Pard’s commanding officer further stated “he had never recommended [Mr. Pard] for either the Bronze Star or the Distinguished Flying Cross, and that [Mr. Pard] would have been ineligible to receive them.”71 Mr. Pard’s service record confirmed that he never received either decoration. In dismissing Mr. and Mrs. Pard’s claims, the court determined “that Michael Pard did not suffer from [PTSD] and that the acts of violence he committed against his ex-wife . . . had no relationship to his war experiences or to any war-related illnesses.”72

These fraudulent acts on the court are incredibly risky, particularly in the age of the internet, when social media and military alumni web sites make tracking down former members of a defendant’s unit easier than ever. The ramifications of getting caught can range from an aggravated sentence for the defendant to irreparable damage to the attorney’s credibility with the court. Perhaps most importantly, such frauds also undermine the credibility of legitimate veteran defendants earnestly seeking legal and public support in dealing with service-related disorders.

69. Id. at 522.
70. Id.
71. Id. at 523.
72. Id. at 526.
It is the attorney’s professional responsibility as an officer of the court to avoid conduct that undermines the integrity of the adjudicative process, so it will be necessary to ensure the veteran’s story is consistent with his or her service records.

VI. 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. A diagnosis of PTSD meets the scientific criteria of admissibility requirements announced in Daubert v. Merrell Dow Pharmaceuticals, Inc. and Federal Rule of Evidence 702 because 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 twenty 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.

These PTSD- or TBI-related defenses can be separated into four categories: (1) insanity defenses, negating all culpability; (2) self-defense defenses based upon the veteran’s mistaken belief in the amount of force necessary to protect him or herself; (3) an

73. MODEL RULES OF PROF’L CONDUCT r. 3.3 cmt. 2 (AM. BAR ASS’N 2012).
74. For an in-depth explanation of how to properly document a veteran client’s military service, see generally Ferrier, supra note 5, at 337–56.
75. See Markku A. Sario, Brat Dog: Handling a PTSD-Based Insanity Defense, in DEFENDING VETERANS, supra note 1, at 465. In Chapter 19 of DEFENDING VETERANS, Markku Sario describes the case of Jessie Bratcher, 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. See id. passim.
automatism defense when the veteran’s actions are the result of reflex, sleep-walking, 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. These categorizations blur when actually proving an insanity defense to a jury; but, for analytical purposes, it is helpful to examine them separately in forming a defense strategy.

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.

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 entire life in a way

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79. Markku Sario’s account of the Jessie Bratcher insanity defense in Chapter 19 of DEFENDING VETERANS demonstrates clearly how these categorizations blur when actually proving an insanity defense to a jury. See Sario, supra note 75.

80. Erlinder, Paying the Price for Vietnam, supra note 14, at 324.

81. Id. at 331.
that allows the attorney a lot of creativity in presenting the defendant’s case to a judge or jury.\textsuperscript{82}

\section*{VII. SENTENCING}

Historically, veterans have often received longer sentences than their civilian peers charged with the same offenses. A report by the Bureau of Justice Statistics analyzing data as of 2004 stated, “[V]eterans had shorter criminal records than nonveterans in State prison, but reported longer prison sentences and expected to serve more time in prison than nonveterans . . . . On average veterans expected to serve twenty-two months longer than nonveterans.”\textsuperscript{83} But the sentencing law landscape is shifting rapidly and dramatically.

In 2009, the United States Supreme Court stated in \textit{Porter v. McCollum} that
\begin{quote}
[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].\textsuperscript{84}
\end{quote}

In fact, \textit{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

\begin{flushright}
\textsuperscript{82} See generally \textit{id. at 320}. For a significantly more detailed presentation of these defenses and how to apply them to the trial setting, see generally Brockton D. Hunter & Ryan C. Else, \textit{Legal Strategies for Defending the Combat Veteran in Criminal Court, in Defending Veterans, supra note 1, at 399.}
\textsuperscript{83} \textit{Margaret E. Noonan & Christopher J. Mumola, Veterans in State and Federal Prison, 2004, Bureau of Justice Statistics Special Report 1 (2004).}
\textsuperscript{84} \textit{Porter v. McCollum, 558 U.S. 30, 43–44 (2009).}
\end{flushright}
to support a *Strickland* claim of prejudicially ineffective assistance of counsel.\(^{85}\)

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. The sample sentencing memorandum in Appendix G of *Defending Veterans* provides an example of how this process has been applied in one of our cases, and Chapter 20 of *Defending Veterans*, on sentencing, describes in greater detail the process our office has had success with in veteran sentencing arguments.\(^{87}\)

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. The argument is that the government, through the prosecution or the court, is also culpable because it is the government’s wars and military indoctrination that created the source of the criminality: the veteran defendant’s service-related disorder. Youngjae Lee, Professor of Law at Fordham University School of Law, 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

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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 counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversarial process that renders the result unreliable.

*Id.* at 687.

\(^{86}\) *Porter*, 558 U.S. at 43–44.

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.\(^88\)

The footnote to this quotation further 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.\(^89\)

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 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.\(^90\)

In 2008, Brockton Hunter, along with other Minnesota veterans’ advocates, led an effort to draft and pass Minnesota’s law.\(^91\) The law is designed to ensure that mental health diagnoses and available treatment options are taken into account in sentencing a veteran whose combat trauma played a role in his or her criminal

\(^{88}\) Lee, supra note 2, at 302–03.

\(^{89}\) Id. at 303 n.118.

\(^{90}\) Porter, 558 U.S. at 44 n.9.

\(^{91}\) See Minn. Stat. § 609.115, subdiv. 10 (2016).
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 California Penal Code section 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. Like Minnesota, 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 section 1170.9 again, adding subsection (h), which allows a judge to reduce a felony to a misdemeanor and then remove the conviction from the veteran’s record if he or she successfully completes probation and treatment and 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, just as the United States Sentencing Guidelines section 5H1.11 did in 2010. The Guidelines provide 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 early 2013, there were a total of five states with veterans sentencing statutes: California, Minnesota, Nevada, New Hampshire, and Rhode Island.

This multi-state 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

94. U.S. SENTENCING GUIDELINES MANUAL § 5H1.11 (U.S. SENTENCING COMM’N 2010).
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 its behalf have made an affirmative decision not to repeat the mistakes made when the Vietnam-generation of veterans first came into contact with the criminal justice system.96

Veterans Treatment Courts are another creative way to use the veteran defendant’s criminal charges as leverage to ensure the veteran actively participates in treatment of his or her service-related disorder. The fact that the veteran gets to work through his or her problems in an environment with other veterans with similar problems allows for higher accountability, greater respect for the process, and specialized treatment of service-related disorders.97 A study conducted during the summer and fall of 2012 by the Department of Veterans Affairs Veteran Justice Outreach (VJO) Specialists revealed that there are “168 formally established Veterans Treatment Courts, Veterans Courts, Veterans Dockets or tracks within Mental Health and/or Drug Treatment Courts, or criminal Courts,” and “[s]ince the courts’ inception, 7,724 Veterans have been admitted, and 3,883 of these Veterans are still being monitored by and treated through the courts.”98 California, Colorado, Illinois, Oregon, Texas, and Virginia have passed legislation specifically permitting the establishment of county veterans treatment courts.99 Other states have done so directly in their local judicial jurisdictions.

These courts follow a variety of models, but all offer a veteran defendant lower exposure to prison time through diversion to

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96. See generally Brockton D. Hunter, Echoes of War: Combat Trauma, Criminal Behavior and How We Can Do Better this Time Around, in Defending Veterans, supra note 1, at 1.
97. See, e.g., Shevory, supra note 24.
judicially supervised rehabilitation programs if the veteran is willing to accept responsibility for his or her actions and get help for his or her underlying conditions, which usually include PTSD and substance abuse. This structure is quite similar to older drug and mental health specialty court models, but, by using the existing structure and resources of the VA, veterans treatment courts are an attractive option for districts that are under budget constraints. Even in districts without problem-solving courts, this fiscal reasoning is a strong argument in favor of probationary treatment that is uniquely available to veteran defendants. Veterans treatment courts are not “get out of jail free” courts. Rather, they often employ longer terms of probation than the defendant would otherwise be exposed to in order to supply leverage and ensure that the veteran stays committed to the treatment program until rehabilitated. The level of oversight and accountability for participants is often very demanding. By having other veterans hold the veteran client accountable, these courts “offer the most easily accepted ‘tough love’ support.”

Just as a veterans treatment court gets to know a veteran individually, an essential element of arguing to the court for a lenient or treatment-based sentence outside of veterans court is to help the court get to know the veteran, as well as 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 section 5H1.11 of the U.S. Sentencing Guidelines illustrates, the goal is to distinguish the veteran defendant from other defendants via his or her service and from all other veteran defendants through his unique experiences, as well as to demonstrate that his or her case is not “covered by the

For an extensive discussion of veteran treatment courts, see generally Robert T. Russell, Veterans Treatment Courts, in DEFENDING VETERANS, supra note 1, at 523; Evelyn Lundberg Stratton & Corey C. Schaal, Connecting the Dots: Using the Courts and Your Own Initiative to Navigate the System, in DEFENDING VETERANS, supra note 1, at 537.
Guidelines” or the recommended sentence for the particular conviction.\textsuperscript{101}

Even before the section 5H1.11 change to the Sentencing Guidelines, legal scholars, such as Professor Douglas Berman of Ohio State, recognized 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.”\textsuperscript{102}

This has certainly borne out in the federal courts: analysis of the thirteen cases for which specific sentencing departure and variance information was provided in the United States Sentencing Commission’s \textit{Case Annotations and Resources: Military Service, USSG \textsection 5H1.11 Departures, and Booker Variances}\textsuperscript{103} reveals that the average sentence reduction was between 36\% and 49\% of the guideline sentence range for defendants with significant military service.\textsuperscript{104}

\begin{table}[h]
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\begin{tabular}{|l|l|l|l|}
\hline
\textbf{Case} & \textbf{Sentence Imposed} & \textbf{Guidelines Range for Sentence} & \textbf{Difference Between Sentence and Guidelines} \\
\hline
United States v. & 40 mos. & 70–87 mos. & 30–47 mos. 43\%–54\% \\
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a specific example, Federal District Court Judge Robert Chambers sentenced Timothy Oldani to only five months in prison with three years of supervised release conditioned upon treatment, departing

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<thead>
<tr>
<th>Case</th>
<th>Sentence Details</th>
<th>Percentage of Variance</th>
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<tr>
<td>Chapman, 209 F. App’x 3 (1st Cir. 2006)</td>
<td>6 mos. 12–18 mos. 6–12 mos.</td>
<td>50%–67%</td>
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<tr>
<td>United States v. Caruso, 814 F. Supp. 382</td>
<td>41 mos. 46–57 mos. 5–16 mos.</td>
<td>11%–28%</td>
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<td>United States v. Fogle, 331 F. App’x 920</td>
<td>120 mos. 188–235 mos. 68–115 mos.</td>
<td>36%–49%</td>
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<tr>
<td>United States v. Caruso, 814 F. Supp. 382</td>
<td>41 mos. 46–57 mos. 5–16 mos.</td>
<td>11%–28%</td>
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<td>United States v. Williams, 332 F. App’x 937</td>
<td>120 mos. 188–235 mos. 68–115 mos.</td>
<td>36%–49%</td>
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<td>United States v. Hughes, 370 F. App’x 629</td>
<td>14 mos. 24–30 mos. 10–16 mos.</td>
<td>42%–53%</td>
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<td>United States v. Panyard, 2009 WL 1099257</td>
<td>15 mos. 27–33 mos. 12–18 mos.</td>
<td>44%–55%</td>
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<td>United States v. Cole, 622 F. Supp. 2d 632</td>
<td>12 mos. 30–37 mos. 18–25 mos.</td>
<td>60%–68%</td>
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<tr>
<td>United States v. Graf, 2008 WL 5101696</td>
<td>78 mos. 87–108 mos. 9–30 mos.</td>
<td>10%–28%</td>
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<tr>
<td>United States v. Moses, 2007 WL 42752</td>
<td>84 mos. 110–137 mos. 26–53 mos.</td>
<td>24%–39%</td>
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<tr>
<td>United States v. Nellum, 2005 WL 300073</td>
<td>108 mos. 168–210 mos. 60–102 mos.</td>
<td>36%–49%</td>
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<tr>
<td>United States v. Shipley, 560 F. Supp. 2d 739</td>
<td>90 mos. 210–240 mos. 120–150 mos.</td>
<td>57%–63%</td>
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<tr>
<td>United States v. Lett, 483 F.3d 782</td>
<td>60 mos. 70–87 mos. 10–27 mos.</td>
<td>14%–31%</td>
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significantly from the presumptive sentence of nearly five years for selling stolen military night vision equipment. The veteran defendant was given a downward departure despite the prosecution’s argument that he “committed a serious crime and he merits serious punishment.”

The best and most effective versions of the veteran defense counsel’s arguments can be lengthy memoranda, half of which are devoted to providing evidence of the veteran as an individual service member in a chronological story format. Of course, this story should be supported by official service documents, such as the veteran’s DD-214, corroborating letters or affidavits from people who served with the veteran, and any relevant medical treatment records.

The next step is to make the court aware of the authority on which to base its decision to extend leniency to a veteran defendant in a way that can be easily cut and pasted into its sentencing order. As shown in the above section on statutes and veterans courts, there is either a statutory or judicial mechanism designed specifically for veteran sentencing in many jurisdictions throughout the country. Even where such a veteran-specific sentencing statute or veteran specialty court is not available, there will always be some grounds on which a judge is able to depart from the recommended sentence. This may be a general mental health sentencing statute similar to the Minnesota statute, which states,

When a court intends to commit an offender with a serious and persistent mental illness . . . the court, when consistent with public safety, may instead place the offender on probation . . . and require as a condition of the probation that the offender successfully complete an appropriate supervised alternative living program having a mental health treatment component.

In Minnesota, and likely in most states with similar statutes, PTSD satisfies the statutory definition of a serious and persistent

105. Schwartz, supra note 102.
106. Id.
109. To illustrate the wide acceptance of probationary sentencing for offenders with serious and persistent mental illness, as of 2011, there are at least one hundred
mental illness because PTSD is an Axis I diagnosis under the American Psychiatric Association’s *Diagnostic and Statistical Manual of Mental Disorders*\(^\text{110}\) and “the underlying studies have met statistical criteria for validity.”\(^{111}\) Whatever is the best local legal authority available, 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 United States District Court Senior Judge John L. Kane’s Memorandum Opinion and Order on Sentencing in *United States v. Brownfield*, in which Judge Kane spends seven of the thirty 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 Sentencing Guidelines.\(^{112}\) 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 United States Sentencing Commission.\(^{113}\) This not only shows the immense concern that the issues surrounding veteran defendants can raise in judges but also demonstrates the need for those judges to ground their decisions in legal justification, even when they feel morally compelled to provide a lenient sentence. This same order is also a fine glimpse into the way judges can receive the arguments of the veteran’s individual service, as Judge Kane explains the service history of the defendant and the connection of this service to a PTSD mental health courts in thirty-four different states around the United States. See 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 (Steven A. Estrine et al. eds., 2011).


\(^{113}\) Id. at 1.
diagnosis in-depth. Judge Kane then cites to Porter’s statement of our Nation’s “long tradition of according leniency to veterans” to justify probation as a fitting consequence, even though both the defense attorney and the prosecutor were requesting a sentence of a year and a day. This departure is just 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.

VIII. THE SCIENTIFIC LINK BETWEEN PTSD AND CRIMINAL BEHAVIOR: WHY IT IS LEGALLY IRRELEVANT

Much is made of trying to find a definitive causal link between combat trauma or other service-related disorders and criminal behavior. Studies to this effect have been inconclusive, but this is immaterial to the task faced by the criminal justice system when a veteran defendant stands before it. A veteran defendant’s combat trauma is only relevant in two ways. First, in the case of insanity or other defenses discussed in Part VI above, there can be no question that the condition caused the criminal behavior because that is the entire presumption of the defense. Second, the disorder may be used in sentencing mitigation, which, by definition, means that the disorder is being considered within the totality of the defendant’s circumstances but is not being used as a defense to the conduct as an uncontrollable product of the disorder.

In the first case, it is not relevant whether or not there is generally a definitive link between PTSD and criminal behavior. The only relevant consideration is whether, in the present case, the defendant’s disorder was such that he or she did not understand that the act was wrong or that he or she was unable to control his or her conduct. Such PTSD-based insanity defenses usually arise out of a dissociative flashback in which the defendant believes he or she is back in combat or, in cases of automatism, in which the defendant was reacting without conscious thought in a manner consistent with

114. See id. at 3–5.
115. See id. at 2–3, 24 (quoting Porter v. McCollum, 558 U.S. 30, 43 (2009)).
a combat environment, such as reflexive shooting.\textsuperscript{117} In such cases, the fact finder will consider whether or not the defendant’s disorder was directly connected to the criminal behavior in that case alone.\textsuperscript{118} While it may be useful to be able to point to a scientific link between PTSD and crime in presenting such a defense, some defendants with PTSD will meet the insanity defense standard and some will not, depending upon the type and degree of the disorder.

In the case of sentencing mitigation, the defendant’s PTSD or other service-related disorder is not used to argue that the defendant’s conduct was a result of the disorder. Rather, the disorder is just one of multiple circumstances which are used to show that (1) the defendant is less culpable than the average person convicted of the offense,\textsuperscript{119} and (2) if the disorder is treated, there is a lower risk of recidivism and less public safety risk.\textsuperscript{120} Neither of these considerations relies upon the belief that the defendant’s PTSD caused the criminal act. These considerations are only presented in order to assert that the defendant’s PTSD and related problems, such as alcoholism or risk-taking behavior, contributed significantly to the defendant committing the offense and that the defendant would have been less likely to commit the offense but for the disorder.\textsuperscript{121} Once again, a definitive link between crime and PTSD may be superficially persuasive in seeking sentencing mitigation, but will never be as effective as making a detailed showing of how the veteran defendant’s disorder has contributed to the circumstances of the particular offense before the court.

To illustrate these points, it is helpful to look at how a disorder that has been definitively linked to criminal behavior is treated in a criminal case. The medical community has determined that schizophrenia increases a sufferer’s risk of committing a violent crime by four to six times.\textsuperscript{122} Despite this established link, however,

\begin{itemize}
\item \textsuperscript{118} \textit{Id}. at 345.
\item \textsuperscript{119} \textit{Id}. at 342.
\item \textsuperscript{120} \textit{Id}. at 362.
\item \textsuperscript{121} Anthony E. Giardino, \textit{Combat Veterans, Mental Health Issues, and the Death Penalty: Addressing the Impact of Post-Traumatic Stress Disorder and Traumatic Brain Injury}, 77 FORDHAM L. REV. 2955, 2961 (2009) (“Combat veterans would not have service-related PTSD or TBI but for government action in the form of training them to kill and sending them to war.”).
\item \textsuperscript{122} See Na Fazel et al., \textit{Schizophrenia, Substance Abuse, and Violent Crime}, 301 J.
when a schizophrenic defendant appears in criminal court asserting an insanity defense, he or she has the same burden to establish the lack of personal knowledge of the wrongful nature of the act or of the inability to control his or her actions at the time of the offense.\footnote{123} Even if the requirements for a legal defense are not met, a judge can consider the impact of schizophrenia on the defendant and the circumstances surrounding the offense.\footnote{124} There is no free pass for a schizophrenic just because academia has recognized a causal link between schizophrenia and criminal behavior in general, and there will be none for veterans with service-related disorders regardless of whether a causal link is ever established.

\section*{IX. Conclusion}

The take-away message is that the defense must present the veteran’s story to prosecutors, judges, and juries as soon as possible. The defense must demonstrate how the veteran’s service or any service-related mental health problems are relevant to the case and 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. As shown above, when this is done properly, it can achieve favorable results for the veteran client. Just as important, this can be incredibly rewarding professionally as it gives the defense attorney the opportunity to passionately defend one of those who has defended us.

