Post-Traumatic Stress Disorder in the Criminal Justice System: From Vietnam to Iraq and Afghanistan

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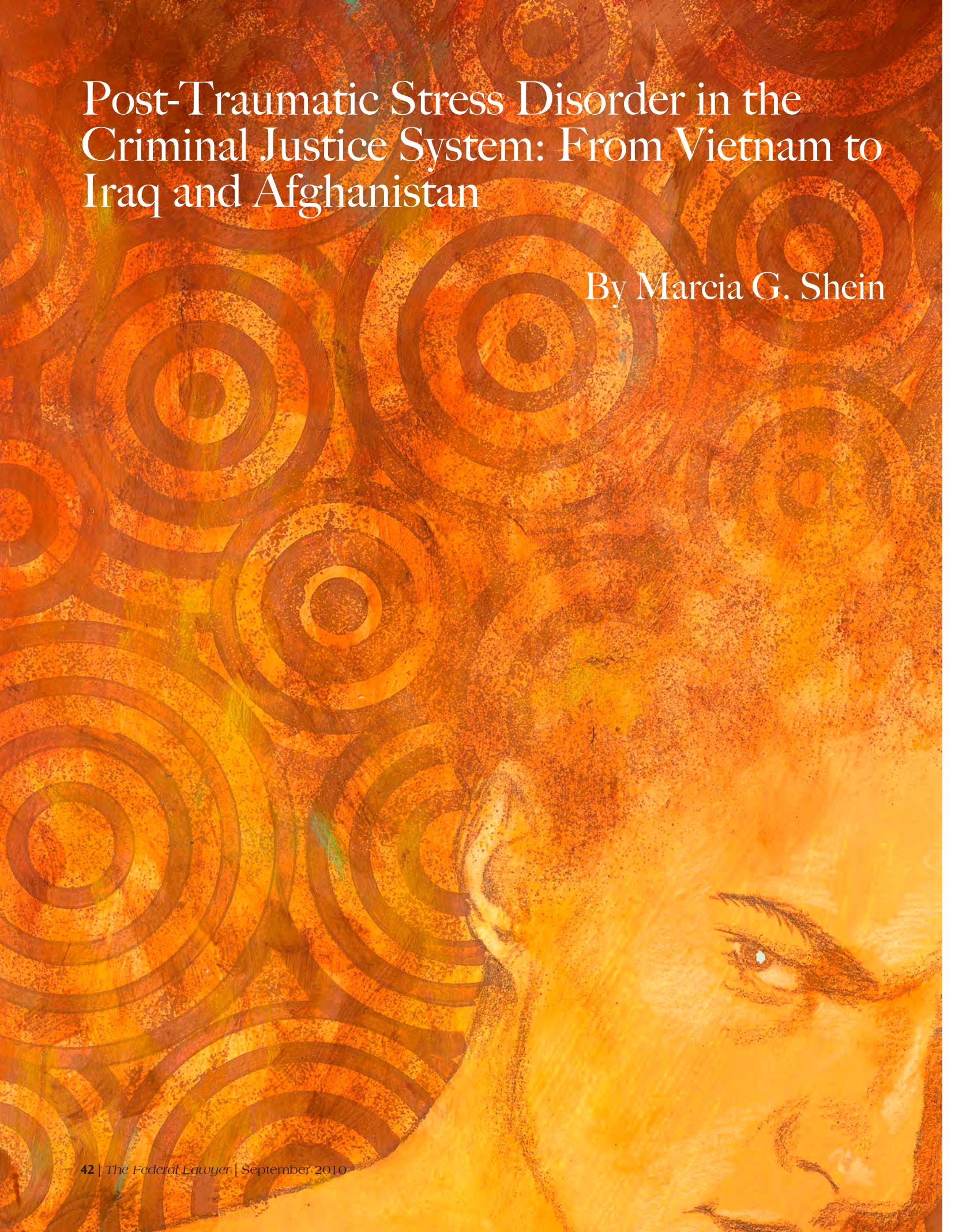

If we wait long enough, history will repeat itself. War veterans prior to the Vietnam War presented limited information concerning post-traumatic stress disorder (PTSD). There was little history or information related to the long- or short-term effects of PTSD. However, with the onset of the Vietnam War, things changed. Perhaps the kind of war that was fought had something to do with the spike in PTSD problems after the war ended. History has indeed repeated itself: PTSD has once again raised its ugly head as a result of the wars in Iraq and Afghanistan. This condition has had a deep impact on our criminal justice system following the Vietnam War and will continue to do so long after the wars in Iraq and Afghanistan have ended.

PTSD Before the Vietnam War

Despite the huge surge in PTSD experienced during the Vietnam era, the condition has certainly been around a lot longer than that. Before Vietnam, PTSD had many different names, including "*battle fatigue* or *gross stress reaction* for soldiers who came down with PTSD after World War II[;] *combat fatigue* or *shell shock* for soldiers who experienced PTSD symptoms after World War I[; and] *soldier's heart* for soldiers who developed the symptoms of PTSD after the Civil War." *The History of Post-Traumatic Stress Disorder (PTSD)*, www.psychiatric-disorders.com/articles/ptsd/causes-and-history/history-of-ptsd.php (last visited June 8, 2010). Perhaps it is because "[m]any consider the Civil War the first step on the road to modern warfare"—including the use of the first frontal assaults—"psychological symptoms" were "common" among soldiers during the Civil War era. Steve Bentley, *A Short History of PSTD: From Thermopylae to Hue, Soldiers Have Always Had a Disturbing Reaction to War*, The VVA Veteran (2005), available at www.vva.org/archive/TheVeteran/2005_03/feature_HistoryPTSD.htm.

During World War I, there was a surge in "psychologically wounded" individuals as a result of the brutalities of that war. What little had been learned during previous eras was largely forgotten. As Bentley writes,

> It was believed the impact of the shells produced a concussion that disrupted the physiology of the brain; thus the term 'shell shock' came into fashion. … By the end of World War I, the United States had hundreds of psychiatrists overseas who were beginning to realize that psychiatric casualties were not suffering from "shell shock." These psychiatrists came to comprehend it was emotions and not physiological brain damage that was most often causing soldiers to collapse under a wide range of symptoms.

According to one author, "Of the 300,000 disabled World War I veterans, some 50,000 were still hospitalized twenty years later for psychiatric illnesses." Penny Coleman, Flashback: Posttraumatic Stress Disorder, Suicide, and the Lessons of War, 46 (Beacon Press, 2006).

During World War II, it started to become clear that not all individuals suffering from psychological disorders as a result of war were weak in character. Thus, the terminology began to change: "'combat neurosis' began to give way to the term 'combat exhaustion.'" Bentley, *supra,* at 4. *See also* Coleman, *supra*, at 51–52. One of the lessons to come out of World War II was that "every man has a breaking point." *Id.* at 53.

During the Korean War, after a rough start on the psychiatric front, well-trained psychiatrists were deployed into combat zones to treat soldiers, and soldiers were rotated home, regardless of the situation on the front, after certain conditions were met. The percentage of psychiatric casualties dropped dramatically, and "Korea was ultimately considered a success for military psychiatrists." *Id.*

Increase in PTSD in Vietnam

Despite the seeming success of military psychiatrists in Korea, the situation in Vietnam was a catastrophe. "[A]ccording to the findings of the congressionally mandated *National Vietnam Veterans Readjustment Study*, 30.9 percent, or about one million men, were projected to have a lifetime prevalence of PTSD." *Id.* at 65. *See also The Numbers Count: Mental Disorders in America,* www.nimh.nih.gov/health/publications/the-numbers-count-mental-disorders-in-america/index.shtml#PTSD (last visited June 8, 2010). (About 19 percent of veterans suffered from PTSD after the Vietnam War.) Several factors could have contributed to this drastic increase in those suffering from PTSD after serving in Vietnam:

1. Many of the soldiers were drafted, rather than having enlisted (and many of these draftees came from the less fortunate sector in society). Coleman, *supra*, at 66–68.
2. The average age of the American soldier was 19 (compared with 26 during World War II and approximately 17–24 during the Korean War). *Id.* at 68. *See also* wiki.answers.com /Q/What_was_the_%27average_age%27_of_Korean_War_soldiers (listing statistics regarding the age of Korean War veterans based on the age of those veterans in 2000, according to the U.S. Department of Veterans Affairs).
3. The military did not necessarily implement "appropriate training and equipment, unit cohesion, and competent, ethical, properly supported leadership." Coleman, *supra* at 68.
4. The homecoming that Vietnam veterans experienced also could have contributed to the rise in PTSD, because, as opposed to what had occurred earlier, Vietnam veterans came home within a very short time after their last battles; and, when they did arrive home, they may not have had anyone with whom to share their experiences because of the attitude at home about the war. *Id.* at 85–87.
5. Treatment options for veterans of the Vietnam War were limited because of limited benefits, "inadequate facilities, and professional understanding." *Id.* at 87.
6. Finally, many veterans resisted looking to the government for help. *Id.*

Along with the increase in PTSD, Vietnam veterans have also struggled with suicide and drug use, perhaps caused, at least in part, by PTSD. The exact number of Vietnam veterans who have committed suicide after the war has not been determined, but some estimate that as many as 100,000 Vietnam veterans have ended their lives. *Id*. at 129–131. In fact, an article published in the *New England Journal of Medicine* "found that 'veterans were 65 percent … more likely [than nonveterans] to die from suicide….'" *Id*. at 130. In addition, abuse of alcohol and drugs is a continuing problem among Vietnam veterans. According to a fact sheet produced by the National Center for PTSD, which relied on the National Vietnam Veterans Readjustment Survey, "alcohol abuse or dependence among male theater veterans is 39.2%, and the estimate for current alcohol abuse or dependence is 11.2%. The estimated lifetime prevalence of drug abuse or dependence among male theater veterans is 5.7%, and the estimate for current drug abuse or dependence is 1.8%." *What Causes Posttraumatic Stress Disorder? How Common Is It? Who Gets It?* ncptsd. va.gov/ncmain/ncdocs/fact_shts/fs_epidemiological.html (last visited June 8, 2010). *See also Current Trends: Postservice Mortality Among Vietnam Veterans,* MMWR (1987), available at www.cdc.gov/mmwr/preview/mmwrhtml/00000865.htm (discussing mortality rates of Vietnam veterans compared to veterans of other wars and areas where mortality rates for Vietnam veterans are higher). Whatever the reasons, the Vietnam War clearly resulted in a significant increase in the number of veterans returning to the United States with PTSD and suffering from problems relating to PTSD.

The rise in veterans suffering from PTSD after the Vietnam War has had an effect on the criminal justice system. According to the fact sheet issued by the National Center for PTSD, "Almost half of all male Vietnam theater veterans currently suffering from PTSD had been arrested or in jail at least once— 34.2% more than once—and 11.5% had been convicted of a felony." *What Cause Posttraumatic Stress Disorder? supra*. Naturally, in the years following the Vietnam War, the American justice system has seen an increase in crimes in which either the defendant's justification for the crime or the basis for requesting leniency at sentencing is that he is suffering from PTSD as a result of his service to his country. The problems that the justice system faces on this front include competency to stand trial or to be sentenced. *See, e.g.*, *Warren v. Schriro*, 162 Fed. Appx. 705 (9th Cir. 2006) (dissent believed that the defendant was entitled to a competency hearing to determine whether he was competent to enter a plea based on his PTSD); *United States v. Tracy*, 36 F.3d 187 (1st Cir. 1994) (in determining that the defendant was competent to stand trial, the court considered the defendant's PTSD); *United States v. Morris*, 550 F. Supp. 2d 1290 (M.D. Ala. 2008) (finding that a defendant with mental health issues, including PTSD, is incompetent to stand sentencing). Leniency or mitigation at sentencing may also be based on the presence of PTSD. *See, e.g.*, *Porter v. McCollum*, 130 S. Ct. 447 (2009) (counsel was ineffective for failing to present evidence of PTSD, among other things, in support of mitigation at a defendant's sentencing in a death penalty case); *Bell v. Cone*, 535 U.S. 685, 712-713 (2002), Stevens, J., dissenting (dissent believed that counsel was ineffective and stated "there is a vast difference between insanity—which the defense utterly failed to prove—and the possible mitigating effect of drug addiction incurred as a result of honorable service in the military. By not emphasizing this distinction, [trial counsel] made it far less likely that the jury would treat either the trauma resulting from [the defendant's] tour of duty in Vietnam or other traumatic events in his life as mitigating."); *United States v. Risse*, 83 F.3d 212 (8th Cir. 1996) (affirming the district court's downward departure based on PTSD under U.S. Sentencing Guidelines Manual § 5K2.13); *United States v. Cantu*, 12 F.3d 1506 (9th Cir. 1993) (finding that PTSD can support a downward departure under U.S. Sentencing Guidelines Manual § 5K2.13); *United States v. Perry*, No. 4:CR94-3035, 1995 WL 137294 (D. Neb. Mar. 27, 1995) (granting five-level downward departure based on mental conditions including PTSD under U.S. Sentencing Guideline § 5K2.13). *Compare, e.g., United States v. Cope*, 282 Fed. Appx. 369, 370 (6th Cir. 2008) (affirming the district court's refusal to depart based on the defendant's PTSD because the district court recognized that it had the authority to depart from the guidelines under U.S. Sentencing Guidelines Manual § 5K2.12 but declined to do so); *United States v. May*, 359 F.3d 683 (4th Cir. 2004) (vacating district court's departure from the guidelines based on the defendant's aberrant behavior caused by his PTSD under U.S. Sentencing Guidelines Manual § 5K2.20, because the PTSD did not contribute to the criminal conduct or the motivation for engaging in the criminal conduct).

PTSD also may have an impact on issues related to conditions of confinement. *See, Rashad v. Doughty*, 4 Fed. Appx. 558, 561 (10th Cir. 2001) (rejecting the prisoner's claim that the prison did not provide adequate treatment for his PTSD, because the Department of Corrections had a mental health professional on staff: "The fact that [plaintiff] has not been provided with treatment at the facility of his choice is insufficient to state an Eighth Amendment claim."); *McCabe v. Dubois*, Civ. A. No. 92-11806 1-1MA, 1993 WL 364419, *16 n. 22 (D. Mass. June 8, 1993) ("With respect to the degree and conditions of confinement to which the Treatment Center patient in *Cameron v. Tomes* was entitled, the First Circuit notes that: 'Any professional judgment that decides an issue involving conditions of confinement must embrace security and administration, and not merely medical judgments. …' The First Circuit allows such a balancing of security and conditions of confinement, notwithstanding the court's acknowledgement that Cameron is a Vietnam veteran who suffers from severe psychological disorders and who 'suffers from a borderline or mixed personality disorder and post-traumatic stress disorder.'") (*citing Cameron v. Tomes*, 990 F.2d 14 (1st Cir. 1993)).

What PTSD Is Today

Although the term "gross stress reaction" was used in the original edition of the *Diagnostic Manual of Mental Disorder* (DSM) (but removed from the second edition, DSM-II), PTSD was not included as an official diagnosis until 1980, when it was noted in the DSM-IV. Coleman, *supra*, at 88–90; *see also The History of Post-Traumatic Stress Disorder*, *supra; Posttraumatic stress disorder*, www.psychiatric-disorders.com/articles/ptsd/causes-and-history/history-of-ptsd.php; en.wikipedia.org/wiki/ (last visited June 8, 2010). Circumstances and factors to consider in making a PTSD diagnosis include the following**:**

- A person has been exposed to a catastrophic event involving actual or perceived death or injury. This event must be characterized by intense fear.
- The duration of the PTSD symptoms last at least a month.
- The person experiences significant occupational, social, or other distresses as a result of the PTSD.
- The person starts to avoid anything that will cause him or her to re-experience the event. The person also generally experiences a numbing effect that interferes with personal relationships.
- The person tends to be in a state of *hyper-arousal* that results in being startled very easily and being vigilant to the point of paranoia.
- The traumatic event persists as a dominating psychological experience, typically causing a person to experience flashbacks of the event from other stimuli.

The History of Post-Traumatic Stress Disorder, *supra*; *Posttraumatic Stress Disorder, DSM-IV Diagnosis & Criteria,* www.psychiatric-disorders.com/articles/ptsd/causes-and-history/history-of-ptsd.php. *See also* www.mental-health-today.com/ptsd/dsm.htm (last visited June 8, 2010).

Criminal Justice Problems Among Vietnam Veterans with PTSD

In *United States v. Morris*, 550 F. Supp. 2d 1290 (M.D. Ala. 2008), the court found that the defendant was incompetent to stand for sentencing partly because of the PTSD from which he suffered as a result of his service during the Vietnam War. In that case, the district court granted the defendant's request for a mental evaluation before sentencing. The evaluation established that the defendant

> suffer[ed] from Bipolar II disorder, chronic post-traumatic stress disorder, and narcissistic personality disorder. [The psychiatrist] concluded that [the defendant] suffered from "delusions of prosecution" that "appear to be the result of Bipolar II Disorder, severe with psychotic features,"… that his delusions "would render him unable to participate [in a sentencing hearing] in a reasonable and understanding manner in his own behalf,"… that [the defendant] should receive treatment in order to restore him to mental competency; and that this treatment should take place in a facility where [defendant's] medicines could be adjusted and his behavior monitored. *Id*. at 1292.

The district court ultimately deferred to those expert findings and found that the defendant was not competent to stand for sentencing. *Id*. at 1293.

In *United States v. Cantu*, 12 F.3d 1506 (9th Cir. 1993), the Ninth Circuit Court of Appeals addressed some of the sentencing issues that arise as a result of a veteran's PTSD and provided an in-depth discussion of the propriety of a departure from the guidelines under U.S. Sentencing Guidelines Manual § 5K2.13 based on PTSD. The court explained that "[t]he goal of the guidelines is lenity toward defendants whose ability to make reasoned decisions is impaired. … The focus of the guideline provision is reduced mental *capacity*, not the cause-organic, behavioral, or both-of the reduction." *Id*. at 1512 (emphasis in original). The court also explained that U.S. Sentencing Guidelines Manual § 5K2.13 does not require a specific severity of condition but, rather, is concerned with the "*effect* of the impairment on the defendant. …" *Id*. at 1513 (emphasis in the original). The court found that the defendant's PTSD was a "grave affliction," *id*. at 1513, and ultimately remanded the case for further consideration based on the court's findings. *Id*. at 1516–17 (also examining other U.S. Sentencing Guidelines Manual § 5K2.13 requirements).

In *Cameron v. Tomes*, 990 F.2d 14 (1st Cir. 1993), the First Circuit Court of Appeals addressed some of the issues relating to conditions of confinement that may arise with a veteran suffering from PTSD. In *Cameron*, the defendant suffered from "borderline or mixed personality disorder and post-traumatic stress disorder" and alleged that the conditions of his confinement violated his constitutional rights. In assessing the defendant's claim, the First Circuit explained that the conditions of confinement must be balanced against the need for security. The court stated that, "when it comes to appraising the judgments of the administrators, it does not follow that they are bound to do what the doctors say is best for Cameron even if the doctors are unanimous." *Id*. The court ultimately affirmed the district court's order "directing the Treatment Center to undertake a good faith reappraisal of its policies as applied to [the defendant]." *Id*. at 22.

The foregoing cases provide just a glimpse into the issues that the American judicial system has faced in the aftermath of the Vietnam War as a result of veterans suffering from PTSD.

Afghanistan and Iraq Wars

Statistics

With veterans returning from the wars in Iraq and Afghanistan, the United States is seeing another surge in individuals suffering from PTSD, although the exact number is hard to determine because PTSD is frequently not reported. Estimates of the number of soldiers

returning from these wars who will suffer from PTSD hover around 20 percent. *See, e.g.*, *The History of Post-Traumatic Stress Disorder*, *supra*; (one in 10 returning from Iraq); *20% of Iraq, Afghanistan Soldiers Have Depression or PTSD*, oldtimer.wordpress.com/2008/04/19/20-of-iraq-afghanistan-soldiers-have-depression-or-ptsd/ (last visited June 9, 2010)(one in five of active duty veterans from Iraq and Afghanistan); Lisa O. DeLuca, *Treating PTSD: Types of Therapy for Combat Vets*, post-traumatic-stress-disorder.suite101.com/article.cfm/treating_ptsd_types_of_therapy_for_combat_vets (last visited June 9, 2010) ("between 15 and 29 percent of veterans from Iraq and Afghanistan will suffer from PTSD"); John J. Spollen and Lawrence A. Labatte, *Posttraumatic Stress Disorder in Veterans*, www.psychiatrictimes.com/display/article/10168/1147456?verify=0. Spollen and Labatte quoted a study that found PTSD diagnosed for 13 percent of veterans but posited that this number is no doubt higher because it was reported two years before the article was written; These numbers should be compared to the less than 10 percent of the general population who suffer from PTSD. *See The History of Post-Traumatic Stress Disorder*, *supra*. *See also Mental Health: A Report of the Surgeon General,* www.psychiatric-disorders.com/articles/ptsd/causes-and-history/history-of-ptsd.php; www.surgeongeneral.gov/library/mentalhealth/chapter4/sec2.html (last visited June 9, 2010) ("Overall, among those exposed to extreme trauma, about 9 percent develop post-traumatic stress disorder.").

The incidence of PTSD may also be higher among female veterans, or perhaps they cope with the disorder in different ways. *The History of Post-Traumatic Stress Disorder*, *supra* (more severe); Spollen and Labatte, *supra* (looking at study of deployed soldiers and finding for mental illness overall that the "highest rates were seen in women."). In fact, one report stated the following:

> Never before has this country seen so many women paralyzed by the psychological scars of combat. As of June 2008, 19,084 female veterans of Iraq or Afghanistan had received diagnoses of mental disorders from the Department of Veterans Affairs, including 8,454 women with a diagnosis of post-traumatic stress—and this number does not include troops still enlisted, or those who have never used the VA system. … Psychologically, it seems, they are emerging as equals. Officials with the Department of Defense said that initial studies of male and female veterans with similar time outside the relative security of bases in Iraq showed that mental health issues arose in roughly the same proportion for members of each sex, though research continues.

Women Combat Veterans Often Suffer Post-Traumatic Stress in Silence, www.cleveland.com/nation/index.ssf/2009/10/women_vets_often_suffer_post-c.html (last visited June 9, 2010).

One researcher has posited theories as to why veterans of the wars in Iraq and Afghanistan may be more vulnerable to PTSD than the general population is. Those theories include the following:

- Because of the lack of a formal battlefront, soldiers

deal with constant threat and combat uncertainty.
- Many of the troops are from National Guard units; as such, these soldiers frequently receive much less training than active-duty units.
- Tours of duty are long and they frequently include direct combat exposure.
- Many military service members face redeployment.

William B. Brown, *Another Emerging "Storm": Iraq and Afghanistan Veterans with PTSD in the Criminal Justice System,"* 5 JUST. POLICY J. no. 2, p. 10–11, available at www.cjcj.org/files/another_emerging.pdf (recognizing distinctions between the wars in Iraq, Afghanistan, and Vietnam, including multiple tours and stop-loss provisions). *See also* Spollen and Labatte, *supra*.

The foregoing theories that indicate a higher susceptibility to PTSD after service in Iraq and Afghanistan embody circumstances that are similar to some of the issues faced by soldiers during the Vietnam War. In addition, as was the case with the Vietnam War, domestic support for the wars in Iraq and Afghanistan has decreased. *See, e.g.*, Peter Baker, *Could Afghanistan Become Obama's Vietnam?* www.nytimes.com /2009/08/23/weekinreview/23baker.html (last visited June 9, 2010) (discussing support for the war in Afghanistan); *see also* www.cbsnews.com/stories/2005/10/10/opinion/polls/main930772.shtml (discussing support for the war in Iraq). What is even more alarming is that many of these veterans who are suffering from PTSD will not seek treatment for fear of being stigmatized. Brown, *supra*, at 17. It is not surprising, as discussed below, that the criminal justice system is again facing problems dealing with veterans of these wars who suffer from PTSD.

Criminal Justice Concerns

Some veterans of the wars in Iraq and Afghanistan have faced troubles as they re-enter civilian life. One researcher has posited that these troubles may be the result of their military training (for example, killing in the military is seen as a more natural act), unemployment, homelessness, substance abuse, and domestic issues. *Id.* at 18–27. Whatever the reason, the criminal justice system is facing many similar issues relating to PTSD endured by veterans of the current wars that it has faced for years with Vietnam veterans, including the appropriateness of downward departures in sentencing and the viability of PTSD as a defense.

For example, in *United States v. Perry*, No. 4:CR94-3035, 1995 WL 137294, (D. Neb. March 27, 1995), the district court was faced with a request for a downward departure from the sentencing guidelines based on the defendant's PTSD, from which he suffered as a result of his service during the Persian Gulf War, which, like the current war in Iraq, exposed servicemembers to many situations that might lead to the development of PTSD. In granting the departure, the court acknowledged the government's argument that U.S. SENTENCING GUIDELINES MANUAL § 5K2.13 should not apply, because the guidelines state that mental illness is not ordinarily relevant and because so many people are "potentially victims of post-traumatic stress disorder." *Id.* at *9. However, the court ultimately rejected this argument and granted the departure from the guidelines, explaining that it is "important to recognize that § 5K2.13, while an exception to a general rule, should not be interpreted in such a way as to make it a 'dead letter.'" *Id.* The court explained that its "inquiry into the defendant's mental condition and the circumstances of the offense must be undertaken 'with a view to lenity, as section 5K2.13 implicitly recommends.'" *Id.* (quoting *United States v. Chatman*, 986 F.2d 1446, 1454 (D.C. Cir. 1993)). The court then examined the disruption that PTSD had caused in the defendant's life, and decided that a departure from the guidelines was warranted, and found that the departure should be five levels. *Perry*, 1995 WL 137294, at *10–11. That five-level departure under the guidelines is significant because it could result in a substantial decrease in the amount of time served; in *Perry* it resulted in an offense level of 10 (with a criminal history category of I), which corresponds to a sentence of six months to one year, rather than an offense level of 15 (with a criminal history category of I), which corresponds to a sentence of 18–24 months. *Id.* at *11; *see also* U.S. SENTENCING GUIDELINES MANUAL Sent. Table, Ch. 5, Part A.

In October 2009, an American service veteran was tried for murder in Oregon, and his "PTSD was successfully considered to mitigate the circumstance of [the] crime." The defendant, a law-abiding citizen, had killed the man he believed raped his girlfriend. The defendant was "rated as 100% disabled due to PTSD he developed while deployed in Iraq." Specifically, the defendant convinced the jury to find him not guilty by reason of insanity based on his PTSD. In Iraq, the defendant had "witnessed the death of a friend from an IED [improvised explosive device] explosion, which commanders reported drastically changed [the defendant's] mental state." The defense case consisted, in part, of expert testimony. As a person associated with the case said, "[t]his [was] a significant decision, for [the defendant] and for Vets around the country, who were law abiding citizen[s] before they went to war and who have been accused of crimes since returning home. … The military and the VA have not done enough to diagnose soldiers and Veterans with PTSD and provide them with the needed counseling and support to ease their readjustment to civilian life." *A Groundbreaking Court Decision for Vets with PTSD,* www.reuters.com/article/idUS147712+28-Oct-2009+PRN20091028 (last visited June 9, 2010).

As more and more veterans suffering from PTSD return from the wars in Iraq and Afghanistan, the criminal justice system will certainly be forced to cope with and adapt to the use of PTSD as a defense and as a source for a departure from the guidelines or a variance at sentencing. Practitioners should be prepared to argue these factors when it is appropriate to do so.

Psychological Evaluations of PTSD

The discussion above makes it clear that PTSD is fertile ground for trial strategy, sentencing mitigation, or both.

If a client is suffering from PTSD as a result of his or her service to our country, a criminal defense attorney should consider requesting a departure from the guidelines (under U.S. Sentencing Guidelines Manual § 5K2.13) and a request for a variance based on each veteran's unique characteristics (under 18 U.S.C. § 3553(a)).

Departures Under U.S. Sentencing Guidelines Manual § 5K2.13

The guidelines provide for a departure based on a defendant's reduced mental capacity. Specifically, the guidelines provide the following:

> A downward departure may be warranted if (1) the defendant committed the offense while suffering from a significantly reduced mental capacity; and (2) the significantly reduced mental capacity contributed substantially to the commission of the offense. Similarly, if a departure is warranted under this policy statement, the extent of the departure should reflect the extent to which the reduced mental capacity contributed to the commission of the offense.
>
> However, the court may *not* depart below the applicable guideline range if (1) the significantly reduced mental capacity was caused by the voluntary use of drugs or other intoxicants; (2) the facts and circumstances of the defendant's offense indicate a need to protect the public because the offense involved actual violence or a serious threat of violence; (3) the defendant's criminal history indicates a need to incarcerate the defendant to protect the public; or (4) the defendant has been convicted of an offense under chapter 71, 109A, 110, or 117, of title 18, United States Code.

U.S. Sentencing Guidelines Manual § 5K2.13 (emphasis in original).

In *United States v. Cantu,* 12 F.3d 1506 (9th Cir. 1993), the Ninth Circuit Court of Appeals discussed in depth the requirements for application of the quoted criteria for departure from the guidelines. The court stated that departure based on the defendant's mental capacity requires a view toward lenity and that, even though U.S. Sentencing Guidelines Manual § 5H1.3 states that "[m]ental and emotional conditions are not ordinarily relevant in determining a sentencing, …" U.S. Sentencing Guidelines Manual § 5K2.13 governs "whether a mental ailment makes a defendant eligible for a downward departure at sentencing." 12 F.3d at 1512. The court noted that the severity of the condition was not controlling. Rather, the focus is on the "*effect* of the impairment on the defendant. …" *Id.* at 1513 (emphasis in original).

In addressing the requirement that the defendant's reduced mental capacity not be caused by drug or alcohol use, the *Cantu* court explained that this does not mean that the defendant may not use any alcohol or drugs at all. The court explained that, "[i]f the reduced mental capacity was caused by another factor, or if it, in turn, causes the defendant to use alcohol or another drug, the defendant is eligible for the departure." *Id.* at 1514. The court explained that "a defendant whose reduced capacity was caused *in part* by voluntary drug or alcohol use is not disqualified from departure. … Thus, a defendant whose 'drug use … is concurrent with, but to some extent distinct from' his reduced mental capacity, … may not be disqualified from a departure." *Id.* at 1514–1515 (internal citations omitted) (emphasis in original).

Finally, the *Cantu* court explained that "the disorder need be only a contributing cause, not a but-for cause or a sole cause of the offense." *Id.* at 1515. The court noted that the guidelines do not require that the illness contribute to a specific degree, just to "*some* degree." *Id.* (emphasis in original). The court also examined whether a felony committed while in possession of a firearm constitutes a crime of violence (it does not) as well as the need for incarceration. *Id.* at 1513–16.

Based on the ruling in the *Cantu* case, a defendant suffering from PTSD may argue for a departure from the guidelines under U.S. Sentencing Guidelines Manual § 5K2.13 if he or she can show that the PTSD in some way contributed to the commission of the crime and that he or she does not fall under any of the exclusions. The PTSD does not need to be the sole cause for commission of the crime, and the use of drugs or alcohol does not automatically eliminate the possibility of the departure. The court will need to look at the circumstances to determine if the requirements of U.S. Sentencing Guidelines Manual § 5K2.13 are met.

Another departure that may be applicable is U.S. Sentencing Guidelines Manual § 5K2.20 if (1) it is an exceptional case and (2) the crime was not planned (or not significantly planned), was limited in duration, and represents aberrant behavior of an otherwise law-abiding citizen. *See, e.g.*, *United States v. May,* 359 F.3d 683 (4th Cir. 2004) (rejecting a request by a veteran who was suffering from PTSD for a departure from the guidelines under § 5K2.20 because the case was not exceptional).

Even if the case does not fall within the framework of the departures under the guidelines, the advisory nature of the guidelines allows a court to consider the defendant's military record and the consequences of his or her service as a variance factor pursuant to 18 U.S.C. § 3553(a).

Variances Under 18 U.S.C. § 3553

When defendants suffer from PTSD as a result of their service to this country, not only should they consider requesting a departure from the guidelines under U.S. Sentencing Guidelines Manual § 5K2.13, but they should also consider requesting a variance under 18 U.S.C. § 3553(a), which authorizes the court to consider the general characteristics of the defendant. 18 U.S.C. § 3553(a) states the following, in pertinent part:

> (a) Factors to be considered in imposing a sentence.

> The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
>
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed—
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
>
> (3) the kinds of sentences available. …

Pursuant to the quoted language, defendants may argue that they are entitled to a variance based on their service to the country and their PTSD. The sentencing judge must make an individual determination based on all the § 3553 factors, including the guidelines, and impose a sentence that is not greater than necessary. *Gall v. United States*, 552 U.S. 38, 49–50 (2007). Thus, although a defendant's service to the military is the exact sort of offender characteristic that is not taken into account under the guidelines, the service can and should be considered by a sentencing court under § 3553. *Compare United States v. Rybicki*, 96 F.3d 754, 759 (4th Cir. 1996) ("Rybicki's 20 years of unblemished service to the United States and his responsibilities to his son and wife, both of whom have medical problems, are also factors that the Sentencing Guidelines have expressly addressed, instructing that they are ordinarily not relevant and therefore 'discouraged.' … Because the record does not indicate that these factors are present to an 'exceptional' degree, they may not form the basis for a downward departure.") (internal citations omitted) *with Rita v. United States*, 551 U.S. 338, 340 (2007) ("this Court simply cannot say that Rita's special circumstances—his health, fear of retaliation, and military record—are special enough, in light of § 3553(a), to require a sentence lower than the one the Guidelines provide.").

If defendants have honorably served their country, that should help distinguish them from the run-of-the mill defendant and help them qualify for a variance under the guidelines. In addition, defendants who are also veterans suffering from PTSD have the sort of unique characteristics that could qualify them for a variance under § 3553(a) of the guidelines. Not only may their PTSD affect their mental capacity (and qualify them for a departure from the guidelines), but it may also serve as a unique characteristic allowing for a variance even if it does not meet the departure requirements. Finally, the treatment needs associated with PTSD may also be the proper grounds to argue for a variance.

In the 2010 amendments to the Federal Sentencing Guidelines, which will take effect Nov. 1, 2010, the commission has appropriately changed several departure areas once labeled "not ordinarily relevant" to factors that are currently "relevant," including age, military service, mental and emotional condition, and physical condition. It will now be easier to request traditional departures based on these factors. However, they are equally relevant to variance factors pursuant to 18 U.S.C. § 3553(a).

Practice Pointers

A practitioner who has a client suffering from PTSD as a result of military service should be sure to use this to the client's benefit either at trial or at sentencing. In either situation, a mental health examination (or perhaps the appropriate documentation) will be required to substantiate the claim that the client is suffering from PTSD. Although the type of mental health examination that is required at sentencing may differ from the one that is required at trial, it is still critical for a practitioner to substantiate the claim. *Cantu*, 12 F.3d at 1511 ("[I]t is unnecessary, for example, for a defendant who requests a departure under § 5K2.13 to undergo a mental health examination of the type used in determining guilt or innocence."). Sentencing judges are sure to be leery of this defense; therefore, it is important to provide the judge with the reasons to grant a departure from the guidelines or a variance.

The use of experts may be particularly powerful in explaining to the judge (or jury) how the PTSD affected a particular defendant's actions in order to make him or her less culpable. The expert may help distinguish the defendant before the court from the hundreds of other defendants who appear before the court asking for downward departures and variances.

It is important to remember that the average citizen (including the judge and the jury) may not know much about PTSD and may have attached a certain stigma to the disorder. It is important for advocates to educate the judge and/or jury regarding the cause of PTSD, the seriousness of the disorder, and the effect it has had in the case under consideration.

PTSD Military Courts

Some states have recognized the unique problems facing veterans returning home from war. To that end, in an effort to rehabilitate the veterans instead of putting them in jail, some states have developed courts that specifically deal with veterans' cases, giving them an opportunity to overcome any criminal behavior or drug problems that are a result of PTSD or other traumas caused by their military service. For example, Alaska's court for veterans who are charged with misdemeanors aims to connect veterans with treatment services rather than put them in jail. Alaska Court System, *Alaska Veterans Court* (2008), available at www.courts.alaska.gov/forms/pub-121.pdf. Similarly, Orange County, California, recently created a veterans court to handle veterans charged with some violent felonies and other crimes.

The California court has the following goals:

- Cooperative, therapeutic treatment strategy for veterans in the criminal justice system who suffer from post traumatic stress disorder (PTSD), psychological or substance abuse problems, as a result of having served in a combat theater.
- The goal and purpose of creating the Veterans Court is not to incarcerate defendants, but to give them access to the kind of treatment they need, which is often intense, depending on the circumstances they endured while at war.
- Veterans who will benefit from Veterans Court often suffer from addictions, mental illness and traumatic brain injuries. This newly-designed court does not follow the same procedures that Orange County courts follow, as these men and women who experience symptoms of PTSD need to be tried differently, according to their mental and physical condition.

Matthew B. Wallin, *Orange County, Creates a Veterans Court*, www.schools.com/news/law-criminal-justice/orange-county-veterans-court_201001193008.html (last visited June 9, 2010).

The foregoing is just a small sampling of approaches to dealing with veterans who suffer from PTSD. A Google search on this topic will reveal that the idea of veterans courts is being discussed in many areas of the country. This is a promising sign that the country is beginning to understand the severity of the problems facing many of the veterans returning from war zones, including the problems associated with PTSD. We need to honor our veterans and give them the help they need without looking to incarceration first when drug addiction or other behavioral problems that lead to an arrest can clearly be associated with the effects of post-traumatic stress disorder or other traumatic physical and psychological injuries sustained when they rendered service to this country. **TFL**

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who are in the dawn of life, the children; those who are in the twilight of life, the elderly; and those who are in the shadows of life, the sick, the needy, and the handicapped." **TFL**

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Endnotes

[1]527 U.S. 581 (1999).

[2]*Id.* at 597.

[3]28 C.F.R. § 35.130(b)(7).

[4]527 U.S. at 603–604, 615 (Kennedy, J. concurring).

[5]*Id.* at 605–606.

[6]*See* Samuel R. Bagenstos, *Justice Ginsburg and the Judicial Role in Expanding "We the People": The Disability Rights Cases*, 104 Colum. L. Rev. 49, 58 (2004).

[7]*See* David Ferleger, *Special Master Rules: Federal Rule of Civil Procedure 53, The Role of Special Masters in the Judicial System*, 2004 Special Masters Conference: Transcript of Proceedings, 31 William Mitchell L. Rev. 1193 (2005); David Ferleger, *Special Masters Under Rule 53: A Welcome Evolution*, in ALI-ABA, The Art and Science of Serving as a Special Master (2007).

[8]931 F. Supp. 974 (D. Conn. 1996), appeal dism'd, 116 F.3d 466 (table), 1997 WL 321594 (1997), cert. den. sub nom., *Connecticut v. United States*, 522 U.S. 1045 (1998).

[9]931 F. Supp. at 985.

[10]*Messier v. Southbury Training School*, 562 F. Supp. 2d 294, 299–300 (D. Conn. 2008) (describing the success of this judicial oversight in a parallel case involving the same institution).

[11]*Youngberg v. Romeo*, 457 U.S. 307 (1982).

[12]David Ferleger, *The Constitutional Right to Community Services*, 26 Georgia State U. La. Rev. 763 (2010).