

3-1-1984

Paying the Price for Vietnam: Post-Traumatic Stress Disorder and Criminal Behavior

C Peter Erlinder

Follow this and additional works at: <http://lawdigitalcommons.bc.edu/bclr>



Part of the [Criminal Law Commons](#), [Law and Psychology Commons](#), and the [Military, War, and Peace Commons](#)

Recommended Citation

C P. Erlinder, *Paying the Price for Vietnam: Post-Traumatic Stress Disorder and Criminal Behavior*, 25 B.C.L. Rev. 305 (1984), <http://lawdigitalcommons.bc.edu/bclr/vol25/iss2/2>

This Article is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Law Review by an authorized editor of Digital Commons @ Boston College Law School. For more information, please contact nick.szydowski@bc.edu.

PAYING THE PRICE FOR VIETNAM: POST-TRAUMATIC STRESS DISORDER AND CRIMINAL BEHAVIOR†

C. PETER ERLINDER*

[T]hroughout the country, . . . Vietnam veterans, especially those who served in heavy combat, bear to this day more symptoms of psychological distress than other Vietnam era veterans or than comparable men who were not in the military during the years of the Vietnam war. These symptoms, called "stress reactions," were more intense and more likely to persist among men whose position in our society makes them least able to cope — blacks and other minority members, the unemployed or the irregularly employed, the poor, and men with varying levels of stability in their families when they were children.¹

Many psychological and behavioral problems existing among Vietnam veterans may be attributed to Post Traumatic Stress Disorder (PTSD). Although estimates of the number of Vietnam combat veterans who suffer from PTSD vary from as few as 500,000 to as many as 1,500,000,² it has become increasingly clear that a substantial number of those who served in Vietnam continue to feel the psychological after-effects of their wartime experiences.³ The behavior associated with PTSD not only presents diagnostic

† Copyright C. Peter Erlinder 1984

* Assoc. Prof. of Law, William Mitchell College of Law, St. Paul, Minn. The author, along with Prof. David Thomas of Chicago-Kent College of Law, was attorney of record in *People v. Jeart Wood*, one of the first cases in which PTSD was successfully presented as a defense in May, 1982. As a consultant or expert witness, Prof. Erlinder has participated in several PTSD cases and has presented numerous seminars to both attorneys and mental health experts on the application of PTSD to legal issues.

The author is indebted to Jennifer Webb, J.D., William Mitchell College of Law, 1985, for her assistance in the preparation of this article. This article is an expansion of an article by the author published at 1 BEHAV. SCI. & LAW No. 3, 25 (1983). The section on litigation strategy is drawn from a presentation by the author at *The First National Symposium on Vietnam Veterans, Post Traumatic Stress Disorder and the Law* sponsored by William Mitchell College of Law, St. Paul, Minn., May 21 and 22, 1983.

¹ Egendorf, Kadushin, Laufer, Rothbart, & Sloan, *Legacies of Vietnam: Comparative Adjustment of Veterans and Their Peers*, Final Report to the Veterans Administration, Mar. 1981, at 49 [hereinafter cited as Egendorf]. The foregoing quotation is one of the conclusions of the most comprehensive study of the impact of Vietnam service upon veterans undertaken to this date. The Center for Policy Research interviewed and studied nearly 1400 Vietnam veterans under the auspices of the Veterans Administration (V.A.). The results of that report remain the major source of data regarding the status of Vietnam veterans. *Id.* See also *Black Vietnam Vets: Study Says They Suffer More*, 2 National Leader, Aug. 23, 1983, at 1, col. 1.

² Of the approximately three million veterans who served in Vietnam, 57,000 were killed and 153,000 were wounded or injured. PRESIDENTIAL REVIEW MEMORANDUM ON VIETNAM ERA VETERANS, H.R. REP. NO. 38, 96th Cong., 1st Sess. 12 (1979). For estimates on the number of veterans who may need psychiatric help, see generally Walker & Cavenar, *Vietnam Veterans: Their Problems Continue*, 170 J. NERVOUS & MENTAL DISEASE 174 (1982).

³ See generally STRESS DISORDERS AMONG VIETNAM VETERANS: THEORY, RESEARCH AND TREATMENT (C. Figley ed. 1978) [hereinafter cited as STRESS DISORDERS AMONG VIETNAM VETERANS]; STRANGERS AT HOME: VIETNAM VETERANS SINCE THE WAR (Figley & LeVantman ed. 1980).

and treatment issues for mental health professionals,⁴ but may have legal implications as well.⁵

There are indications that PTSD is receiving increased attention in the legal community.⁶ Nevertheless, its application to legal issues is far from widespread. Until very recently, few mental health professionals, and even fewer attorneys understood PTSD or its symptoms.⁷ This lack of understanding, combined with the inability or reluctance of many veterans to discuss their Vietnam experiences,⁸ has made it extremely difficult for attorneys to discover and prove the link between PTSD and client behavior.⁹ As a result, many attorneys may fail to recognize that various client problems ranging from criminal charges and substance abuse, to family problems and employment disputes may be related to PTSD and to service in Vietnam.¹⁰

The enhanced awareness of PTSD, its effect on veterans, and its role in the legal

⁴ PTSD has apparently been the subject of misdiagnosis and improper treatment due to the similarity between PTSD symptoms and other disorders, the clinician's lack of familiarity with combat situations, and the relatively recent recognition of PTSD by the American Psychiatric Association (APA). Schulz, *Trauma, Crime and the Affirmative Defense*, 11 COLO. LAW. 2401, 2403 (1982). See Walker & Cavenar, *supra* note 2, at 175; Nash & Walker, *Stress Disorders in Vietnam Returnees: The Problem Continues*, 146 MILITARY MED. 582 (1981). This was precisely the problem illustrated in *People v. Wood*, No. 80-7410 (Cir. Ct. Cook County, Ill., May 5, 1982) (discussed *infra* at note 56).

⁵ It has been estimated that 25% of those who saw heavy combat have been charged with a criminal offense. Schulz, *supra* note 4, at 2401. Alcohol and substance abuse problems among veterans have also been found to be related to combat experience. See R. LAUFER, T. YAGER, E. FREY-WOULERS, J. DONNELLAN, 3 LEGACIES OF VIETNAM 51 (Mar. 1981). See also Park, *Adjustment Differences Among Male Substance Abusers Varying in Degrees of Combat Experience in Vietnam*, J. CONSULTING & CLINICAL PSYCHOLOGY 426 (1981); Schulz, *supra* note 4, at 2407. There are also a number of implications in the context of the family. See Figley, *Delayed Stress Response Syndrome: Family Therapy Indications*, J. OF MARRIAGE & FAM. COUNS., July 1978, at 53; *Vietnam Combat Linked to Crime*, Chi. Sun-Times, Mar. 4, 1981, at 32, col. 3.

⁶ See generally Schulz, *supra* note 4; Note, *Post Traumatic Stress Disorder — Opening Pandora's Box?*, 17 NEW ENG. L. REV. 91 (1982); Milstein & Snyder, *PTSD, The War is Over, the Battle Goes On*, 19 TRIAL MAG., Jan. 1983, at 86; Jack, *The Vietnam Connection: Charles Heads Verdict*, 9 CRIM. DEF., No. 1 at 7 (1980); *The "Bombshell" Defense*, Nat. L.J., May 12, 1980, at 1, col. 1; Ford, *In Defense of the Defenders: The Vietnam Vet Syndrome*, 19 CRIM. L. BULL. 434 (1983); Erlinder, *Post Traumatic Stress Disorder, Vietnam Veterans and the Law*, 1 BEHAV. SCI. & LAW, No. 3 at 25 (1983) (available from Van Nostrand Rheinhold Pub. Co., N.Y., N.Y.); Larson, *Vietnam Stress Disorder Defense*, GUILD NOTES, Sept.-Oct. 1983, at 16, col. 2. In addition, the *First National Symposium on PTSD and the Law* was held on May 21 and 22, 1983 at William Mitchell College of Law, St. Paul, Minn. A two-volume set of materials from the Symposium is available from the College.

⁷ See *infra* notes 18-22 and accompanying text. As recently as September 1983, judges and attorneys have had difficulty finding any case law that would support the validity of PTSD as a diagnostic or forensic tool. One court stated that "The 'Vietnam Stress Syndrome' is a new theory of defense. *Neither party cites to a case in which this theory was utilized* [C]learly this 'Vietnam Stress Syndrome' is a novel theory of defense." *Miller v. State*, 338 N.W.2d 673, 678 (S.D. 1983) (emphasis added). One major purpose of this article is to make such misapprehensions less likely in the future.

⁸ Many Vietnam veterans are reluctant to seek assistance and feel mistrust for authority figures or fear being stigmatized. See generally Figley & Sprenkle, *Delayed Stress Syndrome: Family Therapy Implications*, J. OF MARRIAGE AND FAM. COUNS., July 1971, at 54.

⁹ See generally *The "Bombshell" Defense*, *supra* note 6; *Vietnam Stress Defense A Winner in Drug Case*, Nat. L.J., Oct. 6, 1980, at 4, col. 4; Jack, *supra* note 6, at 7; Ford, *In Defense of the Defenders: The Vietnam Vet Syndrome*, 19 CRIM. L. BULL. 434 (1983). See *infra* notes 151-85.

¹⁰ See *supra* notes 4 & 5.

process has not developed without controversy. Vietnam veterans have suffered from a stereotypical image as disturbed individuals.¹¹ This fact, when coupled with the sensational publicity surrounding the use of psychological defenses, such as that which arose out of the trial of presidential assailant John Hinckley, has called into question the propriety of raising issues such as PTSD.¹² Furthermore, the fear is often expressed that the use of PTSD in the courtroom will give Vietnam veterans a "blank check" to commit crimes or other antisocial acts.¹³ Even health care professionals who are supportive of veteran's issues are concerned that PTSD may be misused by overzealous attorneys who attempt to stretch the diagnosis beyond scientifically justifiable limits.¹⁴

The task facing attorneys and mental health professionals is to develop an understanding of PTSD that allows its application to legal issues when appropriate, while avoiding potential abuses. The best way to prevent abuse or misapplication is for attorneys and mental health professionals to be thoroughly educated about the nature of the disorder and how it may affect client behavior.

The purpose of this article is to add to the growing body of knowledge that is helping to demystify PTSD as a legal/ psychological phenomenon.¹⁵ The article begins with a brief description of the symptoms characteristic of PTSD¹⁶ and a history of the scientific understanding of the disorder. Next, a number of cases in which PTSD has been a factor are reviewed and some solutions to strategic problems posed by PTSD in criminal litigation.¹⁷ The article then discusses the application of PTSD in other contexts, including plea negotiations, sentencing, and post-conviction relief.¹⁸ The article concludes that proper legal representation of veteran clients requires sensitivity to PTSD in issues of client behavior and that the legal system must be allowed to take PTSD into account, where it exists, to resolve adequately the legal issues raised by PTSD-related conduct.

¹¹ *In Search of Peace*, Chi. Trib., Jan. 17, 1984, Sec. 3, at 12, col. 1.

¹² *Stress Defenses Total Nonsense*, Hammond Ind. Times, May 11, 1982, at 2, col. 1; Crimmins, *Vet Says Viet Nerves Made Him Kill Foreman*, Chi. Trib., Jan. 24, 1982, at 6, col. 1. See *infra* note 236.

¹³ See *supra* note 12. Testimony in at least one trial indicates that a veteran may have erroneously believed that such a "blank check" may have existed. See *State v. Simonson*, 100 N.M. 297, 669 P.2d 1092, 1094 (1983). In *Simonson*, the Supreme Court of New Mexico refused to grant a retrial where the jury heard inadmissible testimony that the defendant planned to kill the victim and blame it on his Vietnam service. 669 P.2d at 1095-96. The witness was never cross-examined on that statement. *Id.* Compare *supra* note 12 and *infra* note 236. The testimony of a psychiatrist called by the State was held inadmissible because the defense had not had a chance to depose the witness or to evaluate his notes in preparation for trial. 669 P.2d at 1095. Furthermore there is good reason to think that PTSD defenses are not always successful from a defendant's viewpoint. See *infra* note 291.

¹⁴ See comments of Dr. Charles Figley quoted in Crimmins, *supra* note 12. Most of the cases concerning PTSD as a defense to a violent crime with which Dr. Figley has been consulted, he considers dubious. *Id.* This is "because the defendants 'are in a desperate situation. They need some kind of excuse . . .'. Some of the defendants 'were misguided by their attorneys.' " *Id.* See also Schulz, *supra* note 4, at 2402.

¹⁵ See *supra* notes 6 & 9; J. Wilson, *infra* note 27; Dondershine, *infra* note 29; Milstein & Snyder, *supra* note 6, at 86; Jack, *supra* note 6, at 7.

¹⁶ See *infra* note 19 and accompanying text.

¹⁷ See *infra* notes 20, 129-50, 304-12 and accompanying text.

¹⁸ See *infra* notes 313-20. PTSD also has implications in personal injury litigation. See Smith, *Post Traumatic Stress Disorder — An Often Overlooked Element of Trauma*, TRIAL MAG., Feb. 1984, at 92. See also Walker, *Post Traumatic Stress Disorder After A Car Crash*, 69 POST GRAD. MED. 2:83 (1981). For cases involving battered spouses, see *infra* note 244.

I. POST TRAUMATIC STRESS DISORDER — An Overview

Post Traumatic Stress Disorder (PTSD) is the designation assigned to a group of symptoms in the current edition of the Diagnostic and Statistical Manual of the American Psychiatric Association (DSM III).¹⁹ Prior to 1980, when the most recent edition of the manual was published, the symptoms that are now grouped under PTSD were not included under a single diagnostic heading.²⁰ Consequently, prior to 1980, mental health professionals and attorneys lacked an identifiable and accepted description of the symptoms now known as PTSD that could be employed in diagnosis, treatment, or legal proceedings.²¹ In cases involving veterans, the lack of a recognized definition of these

¹⁹ AMERICAN PSYCHIATRIC ASS'N., DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS 236 (3d ed. 1980) [hereinafter cited as DSM III].

DSM III provides:

Diagnostic criteria for Post-traumatic Stress Disorder

- A. Existence of a recognizable stressor that would evoke significant symptoms of distress in almost everyone
- B. Reexperiencing of the trauma as evidenced by at least one of the following:
 - (1) recurrent and intrusive recollections of the event
 - (2) recurrent dreams of the event
 - (3) sudden acting or feeling as if the traumatic event were reoccurring, because of an association with an environmental or ideational stimulus
- C. Numbing of responsiveness to or reduced involvement with the external world, beginning some time after the trauma, as shown by at least one of the following:
 - (1) markedly diminished interest in one or more significant activities
 - (2) feeling of detachment or estrangement from others
 - (3) constricted affect
- D. At least two of the following symptoms that were not present before the trauma:
 - (1) hyperalertness or exaggerated startle response
 - (2) sleep disturbance
 - (3) guilt about surviving when others have not, or about behavior required for survival
 - (4) memory impairment or trouble concentrating
 - (5) avoidance of activities that arouse recollection of the traumatic event
 - (6) intensification of symptoms by exposure to events that symbolize or resemble the traumatic event

Id.

²⁰ See *infra* notes 66-102 and accompanying text. The original edition of the DIAGNOSTIC AND STATISTICAL MANUAL, which was published during the period of the Korean War, included a diagnostic category for "Gross Stress Reaction" that referred to combat as a precipitating factor. AMERICAN PSYCHIATRIC ASS'N., DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS 40 (1st ed. 1952) [hereinafter cited as DSM I]. "Gross Stress Reaction" was dropped in the 1968 edition of the manual, and the symptoms were categorized under "Transient Situational Disturbances." AMERICAN PSYCHIATRIC ASS'N., DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS (2d ed. 1968) [hereinafter cited as DSM II]. For a review of the development of the two previous editions, see Spitzer, *Introduction to DSM III*, *supra* note 19, and *Introduction to STRESS DISORDERS AMONG VIETNAM VETERANS*, *supra* note 3.

²¹ See *infra* note 22. There are few reported cases, prior to 1980, that discuss the attempt to connect military service with criminal conduct. As early as 1960, however, veterans were attempting to describe the condition now known as PTSD. For example, in *Meadows v. United States*, 282 F.2d 942 (5th Cir. 1960), a veteran who had been discharged from the service as a "psychoneurosis patient" explained that "the irresponsible acts held against him at his trial were acts beyond the control of petitioner which happened when his war-scrambled brain failed to function as a normal person." *Id.* at 942.

By the early 1970's, both psychiatrists and Vietnam veterans were searching for an explanation of the veteran's criminal conduct which fit the diagnostic tools available at that time. In cases

symptoms diminished the validity of the theory that reactions to combat could influence behavior long after the war.²² Thus, the very real problems experienced by Vietnam veterans were often misdiagnosed, unrecognized and untreated for almost a decade after the end of the Vietnam war.²³ Veterans who attempted to seek help were often misdiagnosed as psychotic, substance dependant or malingers who suffered from a fictional malady.²⁴

PTSD, however, is far from being a fictional malady invented to get Vietnam veterans "off the hook."²⁵ Although experts differ over the incidence of PTSD in the veteran population, and over its application in particular cases, there is little dispute that it exists. The Veteran's Administration (VA), for example, not only has adopted the diagnostic

involving veterans, psychiatrists and psychologists referred to such conditions as "a disassociative state of mind . . . [that] was a direct result of extreme pressure and stress experienced by the defendant during combat in Vietnam." *Harvey v. State*, 225 Tenn. 316, 319-20, 468 S.W.2d 731, 732 (1971). In another case, apparent PTSD symptoms were diagnosed as "anxiety, poor interpersonal relationships and passive and aggressive qualities If he imbibes sufficiently of drugs, alcohol or a combination of both, he could develop total amnesia," and the defendant was diagnosed as a "cyclothymic personality, hypermanic type, and a hysterical neurosis, disassociative type." *State v. Seeley*, 212 Kan. 195, 198-99, 50 P.2d 115, 118-19 (1973). The court determined defendant's behavior was the result of voluntary intoxication, however, holding that his drinking was not an involuntary response to his service in Vietnam and the related stress. *Id.* at 200-03, 510 P.2d at 120-21. As a result, the court in *Seeley* upheld the trial court's refusal of an insanity instruction. *Id.* at 200, 510 P.2d at 120.

The difficulty in linking PTSD symptoms to a description of the disorder that lay persons could understand was highlighted in *Kemp v. State*, 61 Wis. 2d 125, 211 N.W.2d 793 (1973). In a case which, when viewed in retrospect, clearly implicated PTSD, six psychiatrists examined the defendant. *Id.* at 135, 211 N.W. 2d at 797. A defense psychiatrist and two court-appointed psychiatrists concluded that the defendant could not be held responsible for his conduct. *Id.* The three state psychiatrists would not offer an opinion, although one of them indicated that the defendant might be insane. *Id.* The jury, nonetheless, returned a verdict of guilty. The Wisconsin Supreme Court, however, reversed the defendant's conviction as a miscarriage of justice. *Id.* at 138, 211 N.W. 2d at 799. As late as 1975, a defendant who apparently suffered extreme PTSD reactions was convicted without the presentation of any psychiatric or psychological testimony on behalf of the defendant. *State v. Cooper*, 286 N.C. 549, 557, 213 S.E.2d 305, 313 (1975). The defendant's PTSD symptoms were improperly diagnosed as paranoid schizophrenia. *See id.* at 559, 213 S.E. 2d 305, 315. It appears that the defendant's attorney was simply unaware of PTSD.

By 1979, psychiatrists were beginning to refer to "traumatic neurosis" and "a disassociative condition," but could not link a recognized psychological condition to the behavior at issue. *Houston v. State*, 602 P.2d 784, 786-87 (Alaska 1979). Even as late as 1980, mental health experts were still explaining PTSD symptoms as a "disassociative hysterical neurosis, arising in part from the defendant's military combat experience . . ." *See People v. Meatte*, 98 Mich. App. 74, 76-77, 296 N.W.2d 190, 191 (1980).

²² *See supra* note 4, and *infra* text accompanying notes 66-102. Prior to the publication of DSM III, veterans attempted without much success to explain the relationship between their service and the criminal conduct with which they were charged. *See Bradley v. United States*, 447 F.2d 264, 266-67 (8th Cir. 1971); *Houston v. State*, 602 P.2d 784, 786 (Alaska 1979); *People v. Danielly*, 33 Cal. 2d 362, 382-83, 202 P.2d 18, 30 (1949); *People v. Walker*, 33 Cal. 2d 250, 252-53, 201 P.2d 6 (1949); *People v. Gilberg*, 197 Cal. 306, 240 P. 1000, 1002 (1925); *State v. Seely*, 212 Kan. 195, 510 P.2d 115 (1973); *State v. Cooper*, 286 N.C. 549, 213 S.E.2d 305 (1975); *Harvey v. State*, 225 Tenn. 316, 468 S.W.2d 731 (1971); *Kemp v. State*, 61 Wis. 2d 125, 211 N.W.2d 793 (1973).

²³ *See supra* note 22 and cases cited therein.

²⁴ *See supra* notes 21-22 and accompanying text. *See also The Troubled Vietnam Vet*, NEWSWEEK, Mar. 30, 1981, at 25.

²⁵ Symptoms now known as PTSD can be seen in cases following both WW I and WW II. *See Bradley v. United States*, 447 F.2d 264, 266-67 (8th Cir. 1971); *People v. Danielly*, 33 Cal. 2d 362, 382-83, 202 P.2d 18, 30 (1949); *People v. Walker*, 33 Cal. 2d 250, 252-53, 201 P.2d 67-68 (1949).

criteria for PTSD set out in DSM III,²⁶ but has also set up over 100 out-reach centers that have provided counselling for thousands of veterans who experience PTSD symptoms.²⁷ PTSD is also recognized by the VA as a basis for disability claims.²⁸ In addition, both in-patient and out-patient treatment programs have been established in VA hospitals to provide treatment for veterans with symptoms of PTSD.²⁹

Any principled description of PTSD must begin with the clear recognition that it is not a *new* phenomenon in combat veterans,³⁰ nor is it limited to veterans.³¹ A substantial body of research suggests that stress reactions among veterans have resulted from every major conflict in this century and, perhaps, are an unavoidable consequence of war.³² In addition, over the past several decades research has indicated that reactions similar to the PTSD diagnostic criteria can be seen in such apparently diverse groups as rape victims,³³ World War II (WW II) and Korean War veterans,³⁴ Holocaust survivors, Hiroshima atomic blast victims³⁵ and survivors of other catastrophic events.³⁶ Thus, any attempt to present PTSD as a "Vietnam Veterans Problem" is clearly misplaced and tactically unwise.³⁷

The fact that PTSD encompasses reactions to stressful events other than combat in Vietnam is recognized in the diagnostic criteria for PTSD set forth by the American Psychiatric Association in DSM III. In that discussion, DSM III states that: "[t]he essential feature is the development of characteristic symptoms following a psychologically traumatic event that is generally outside the range of normal human experience."³⁸ According to DSM III, traumatic events that can precipitate PTSD symptoms include floods, earthquakes, car or plane accidents, bombing, torture, and, of course, combat.³⁹

Following the traumatic event, a person who suffers from PTSD may have a number of symptoms that include: self medication through substance or alcohol abuse,⁴⁰ memory loss, loss of sleep, nightmares reliving the original traumatic event, intrusive thoughts,

²⁶ *Rating Practices and Procedures*, VETERANS ADMINISTRATION MEMORANDUM PG 21-1 § 0-12 at 1-3 (revised June 30, 1981). See also 38 C.F.R. §§ 4.125 & 4.132 (1983).

²⁷ J. Wilson, *Stress Response Syndrome Among Vietnam Veterans: The Need for Continued Outreach Programs* (testimony before U.S. Senate Subcommittee on government spending) (Oct. 19, 1981) (unpublished manuscript). See *The Troubled Vietnam Vet*, *supra* note 24, at 24.

²⁸ V.A. DIAGNOSTIC CODES, RATING PRACTICES AND PROCEDURES, DISABILITY MENTAL DISORDERS, PROGRAM GUIDE 21-1, § 0-12, June 30, 1981.

²⁹ H. Dondershine, *The Veteran and the Criminal Process: Three Subtypes of Post-Traumatic Stress Disorder Associated with Criminal Behavior* (1983) (unpublished manuscript) (available at Dept. of Psychiatry, Stanford University Medical School) (Dr. Dondershine is staff psychiatrist at the Vietnam Veterans' Treatment Unit, V.A. Medical Center, Palo Alto, Cal.).

³⁰ See generally *Psychiatric Disorders in Crews Overseas and in Returnees*, 29 MED. CLINICS N. AM. 729 (1945); DSM I, *supra* note 20, at 40; Kardiner, *The Neurosis of War*, 1 WAR MED. 219 (1941). See also *infra* note 25.

³¹ DSM III, *supra* note 19, at 236.

³² For historical review of reports of psychiatric disorders arising from combat, see Note, *supra* note 6, at 92-100. See also *infra* text accompanying notes 66-102.

³³ *State v. Marks*, 231 Kan. 645, 653-54, 647 P.2d 1292, 1299 (1982). See also Burgess, *Rape Trauma Syndrome*, 1 BEHAV. SCI. & LAW, No. 3 at 97 (1983).

³⁴ DSM III, *supra* note 19, at 237; see also *infra* notes 85-86.

³⁵ Wilson & Ziglebaum, *The Vietnam Veteran on Trial: The Relation of Post-Traumatic Stress Disorder to Criminal Behavior*, 1 BEHAV. SCI. & LAW, No. 3 at 69 (1983).

³⁶ *Id.* See also DSM III, *supra* note 19, at 236-37.

³⁷ See *infra* notes 103-17.

³⁸ DSM III, *supra* note 19, at 236.

³⁹ *Id.*

⁴⁰ *Id.* at 237.

exaggerated startle response, reduction in emotional response, a feeling of alienation, and, "disassociative states" during which the original event is relived and "*the individual behaves as though experiencing the event of the moment.*"⁴¹ To a lay observer, these symptoms may not seem terribly surprising following a traumatic event of the magnitude described in DSM III. The more difficult aspect of PTSD for many to accept is that the *symptoms of PTSD can occur long after the original traumatic event has ended.* According to DSM III, those individuals affected by PTSD may experience symptoms when environmental or emotional situations approximate the original event.⁴² Thus, long after the traumatic event, persons affected by PTSD may react as though they were back in the original traumatic situation.⁴³

This tendency to "reexperience" or "re-live" the original event is common to those who experience PTSD symptoms after a traumatic event, regardless of its source.⁴⁴ For those trained to survive in combat, a "reexperiencing" of the original event may include combat-like reactions.⁴⁵ Accordingly, DSM III specifically mentions "unpredictable explosions of aggressive behavior" as characteristic of war veterans with PTSD.⁴⁶

Recent studies have reported that "explosive behavior" may be only one variant of the stress reactions experienced by veterans.⁴⁷ Dr. John Wilson and Dr. Sheldon Ziglebaum have suggested that at least three types of PTSD reactions can be seen in the veterans they have interviewed and treated. First, a dissociative reaction in which the veteran behaves as he did in combat.⁴⁸ Second, a compulsive "living on the edge" response in which the veteran repeatedly seeks out dangerous or highly stimulating situations.⁴⁹ Third, a profound "survivor guilt" reaction which leads to intense despair, suicide attempts or attempts to get caught, punished or killed.⁵⁰

As one might expect, these reactions may lead to behavior that has a wide range of legal implications for veterans. Some authorities have suggested, that twenty-five to thirty percent of Vietnam veterans who saw heavy combat have been arrested on criminal charges.⁵¹ In addition, high suicide rates,⁵² substance abuse, marital difficulties, and employment problems, all of which have legal implications, occur more frequently among Vietnam veterans who saw heavy combat than among the general population.⁵³ To the

⁴¹ *Id.* at 236-37 (emphasis added). "Exaggerated startle response" is a psycho-physiological change that is brought on by an unexpected sudden stimulus, such as a loud noise. It includes tremor, sweating, dry mouth, and a feeling of fear or panic, and is sometimes followed by escape or avoidance reactions. WEBSTER'S 3D NEW INT'L DICTIONARY 2228 (17 ed. 1976). A "disassociative state" is one that lasts from a few minutes to several hours or even days, during which components of the event are relived and the individual behaves as though experiencing the event at that moment. DSM III, *supra* note 19, at 236.

⁴² DSM III, *supra* note 19, at 237.

⁴³ *Id.* at 236-37.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 237. "Explosive behavior" is a bursting, sudden increase in movement or response.

WEBSTER'S 3D NEW INT'L DICTIONARY, 802 (17 ed. 1976). See also DSM III, *supra* note 19, at 237.

⁴⁷ See J. Wilson, *supra* note 27; H. Dondershine, *supra* note 29.

⁴⁸ J. Wilson, *supra* note 27, at 8.

⁴⁹ *Id.* at 9.

⁵⁰ *Id.* at 11.

⁵¹ Schulz, *supra* note 4, at 2401; H. Dondershine, *supra* note 29, at 4.

⁵² The suicide rate among Vietnam veterans is 23% higher than that of the same age group in the general population. Egendorf, *supra* note 1, at 38.

⁵³ See generally Egendorf, *supra* note 1. This study examined the adjustment patterns of veterans and their nonveteran peers in nine areas of concern, which included educational careers and benefit

extent that such behavior is causally related to PTSD in a given case, the most important conclusion that attorneys can draw from these studies is that *PTSD can affect virtually every aspect of a veteran/client's behavior.*

It is crucial for attorneys to understand that the effects of PTSD while widespread, may be subtle. Furthermore, if Wilson and Ziglebaum's suggestions are correct, the effects of PTSD may not initially appear to be related to combat at all.⁵⁴ PTSD symptoms, for example, may mimic those of alcohol or substance abuse.⁵⁵ Because symptoms are episodic in nature, a veteran client may not exhibit abnormal behavior characteristics when the client and lawyer come in contact with each other and PTSD may be overlooked.⁵⁶ Often veterans who experience PTSD symptoms will deny a connection to Vietnam or will be unable to remember significant events which might indicate a PTSD connection.⁵⁷ For attorneys who are not trained in psychology or psychiatry, this implies an increased duty to examine a veteran client's psychological history for a PTSD connection with particular care, even when the relationship is not readily apparent.⁵⁸ Failure to do so may amount to ineffective assistance of counsel,⁵⁹ and is certainly a disservice to the client.

Another important aspect of PTSD that attorneys should recognize is that *PTSD is a psychological condition brought about by factors external to the person who experiences symptoms.*⁶⁰ This is important because unlike many other psychological disorders, it is possible to point to specific events to establish a causal link to client behavior.⁶¹ As a result, once PTSD is

utilization, occupational careers, mental health, capacities to deal with stress, drug and alcohol use, arrests and convictions, marital status and satisfaction, peer integration and the nature of friendship networks, and the working through of war experiences. *Id.* See also generally STRESS DISORDERS AMONG VIETNAM VETERANS, *supra* note 3; Schulz, *supra* note 4; *A Delayed Reaction: Vietnam Casualties at Home*, *Ms. MAG.*, Sept. 1980, at 39.

⁵⁴ See *supra* text accompanying notes 48-50.

⁵⁵ In *People v. Wood*, discussed *infra* notes 151-85 and accompanying text, the defendant sought treatment for alcoholism, only to find that the source of the alcohol abuse was an attempt to self-medicate the effects of PTSD. See also DSM III, *supra* note 19, at 237; Walker, *Vietnam Combat Veterans with Legal Difficulties: A Psychiatric Problem*, 138 AM. J. PSYCHIATRY 1384, 1385 (1981).

⁵⁶ For example, in at least two cases, *State v. Heads*, No. 106, 126 (1st Jud. Dist. Ct. Caddo Parish, La., Oct. 10, 1981) and *People v. Wood*, No. 80-7410 (Cir. Ct. Cook County, Ill., May 5, 1982), the attorneys representing the veteran defendants were unaware that PTSD could be a factor in client behavior. In *Heads*, the connection was made only after an earlier conviction had been reversed on appeal. In *Wood*, a one-line notation in a hospital record from a year before the offense mentioned, "patient reports nightmares about Vietnam." That notation led the author to begin to explore the client's military history. In both cases, had counsel not investigated the client's service history and reactions after Vietnam, the connection would probably never have been made.

⁵⁷ This problem is not limited to the attorney-client setting. Some veterans have developed a mistrust of authority figures generally. A "chip-on-the-shoulder" attitude often sets up an "adversarial relationship even in a treatment context." Walker & Cavenar, *supra* note 2, at 175. The description of PTSD in DSM III also makes clear that memory impairment is a characteristic of the disorder. DSM III, *supra* note 19, at 236.

⁵⁸ See *supra* note 56.

⁵⁹ In at least two PTSD cases where convictions have subsequently been overturned in appellate or post-conviction proceedings, the issue of ineffectiveness of counsel at trial was raised. *People v. Cohea*, No. 1 Crim. 21566 (Sup. Ct. Contra Costa, Cal., Nov. 1983); Brief for Appellant, *State v. Dobbs*, No. 105349 (16th Jud. Dist. Ct., St. Mary Parish, La., Mar. 1983). In both *Dobbs* and *Cohea*, convictions of sentences in which PTSD had not been raised by the defense were reopened. *Id.* See also *infra* text accompanying notes 385-87.

⁶⁰ See *infra* text accompanying notes 19, 31-37.

⁶¹ For a discussion of the importance of making the specific connections between the Vietnam

found to be a factor in client behavior, an attorney may present in a systematic and logical manner the events that brought about the acts in question.⁶² This means that PTSD may require far less of the "leap of faith" based upon expert opinion than other psychological disorders. Perhaps most importantly, and perhaps because PTSD is brought about by external factors, many health professionals agree that PTSD is highly amenable to treatment.⁶³ Thus, it is possible to explain a client's behavior in a specific setting as a reaction to certain conditions without also requiring the conclusion that the client is beyond treatment or that the behavior will necessarily recur.⁶⁴ In order to better understand PTSD and its proper role, attorneys should be aware of the disorder's development and recent recognition.

A. A Short History of the Scientific Understanding of PTSD

Western literature reflects a long standing awareness that the shock and trauma of combat have left an indelible imprint upon the soldier.⁶⁵ As has been noted by others, even *The Aeneid* contains in a speech by Aeneas a reference to the inner conflict of the returned warrior:

In me it is not fit, holy things to bear
Red as I am from slaughter and new from war
Till in some living stream I cleanse the guilt
Of dire debate and blood in battle spilt.⁶⁶

The advent of modern warfare and the science of psychiatry in the early decades of the twentieth century gave rise to the first attempts to explain and categorize psychological reactions to combat.⁶⁷ During World War I (WW I), post combat reactions, then called "shell shock," were thought to be the result of changes in air pressure that caused physiological damage to the brain. By the end of WW I, it was recognized that aberrant behavior was also manifested in soldiers who may not have sustained physiological damage.⁶⁸ "War neurosis," the new description as this phenomenon was then described,

experience and the conditions that brought about the criminal behavior, see the discussion of *Heads and Wood* *infra* at notes 129-85. For a discussion of the strategy and tactics in PTSD litigation, see *infra* text accompanying notes 241-312.

⁶² See *infra* notes 270-312 and accompanying text.

⁶³ See J. Wilson, Towards An Understanding of Post-Traumatic Stress Disorder Among Vietnam Veterans (testimony before U.S. Senate Subcommittee on Veterans' Affairs, May 21, 1980, Wash., D.C.). In its first year of operation, for example, the Veterans Outreach Program reached some 80,000 veterans and provided successful treatment in 60% of the cases. J. Wilson, *supra* note 27, at 1.

⁶⁴ The importance of this aspect of PTSD is apparent when treatment programs are suggested in lieu of incarceration or other punishment. See *infra* notes 230-43.

⁶⁵ See Note, *supra* note 6, at 92 (referring to literary treatment of post-war reaction).

⁶⁶ Speech from THE AENEID, Memorandum accompanying Petition for Post-Conviction Relief filed in State v. Jensen, No. CR 75687, at 4-5 (Maricopa Co., Ariz., Feb. 1983) [hereinafter cited as Memorandum in Petition, *State v. Jensen*]. The author is indebted to the attorney for Mr. Jensen, Victor Aronow of Phoenix, Ariz., for his assistance in preparing this portion of the article.

⁶⁷ The first attempt to classify psychological disorders was published by the American Psychiatric Association (APA) in 1917. See generally FREEDMAN, KAPLAN & SADOCK, I *Comprehensive Textbook on Psychiatry*, 824, 845 (1975). See also Goodwin, *The Etiology of Combat-Related Post-Traumatic Stress Disorders* (a monograph published by Disabled American Veterans, Cin., Ohio).

⁶⁸ See S. FREUD, *PSYCHOANALYSIS AND WAR NEUROSES*, INTERNATIONAL PSYCHOLOGICAL LIBRARY, VOL. 5 (1919); A.J. Glass, *Introduction to THE PSYCHOLOGY AND PHYSIOLOGY OF STRESS* (P. Bourne ed. 1969). See also C. Figley, *Introduction to STRESS DISORDERS AMONG VIETNAM VETERANS*, *supra* note 3.

was thought to develop in individuals whose backgrounds and personalities caused them to be predisposed to neurotic reactions rather than being a predictable result of the traumatic experience of combat itself.⁶⁹ It is clear that WW I veterans recognized that combat had changed their lives and that the "shell shock" they experienced had an impact upon behavior, including criminal conduct.⁷⁰ Nevertheless, the scientific foundation of psychiatry, much less shell shock, was not well understood at that time and courts appeared to be reluctant to recognize the existence of a connection between combat and aberrant post-war behavior.⁷¹

During the same period, the American Psychiatric Association (APA) undertook to create a uniform and standardized classification system as a reference for the diagnosis and treatment of "war neurosis" and other disorders. By 1934, this classification system was revised and incorporated into the American Medical Association's (AMA) *Standard Classified Nomenclature of Diseases*.⁷²

During the early stages of World War II (WW II), the practice of focusing on an individual's predisposition as the major factor in psychological reactions to combat began to be questioned. The high rate of psychiatric casualties during the early part of the war caused a reassessment of the impact of predispositional factors and a corresponding increased focus on the impact of combat itself.⁷³ The resulting description of "combat fatigue" identified the stress of combat as the cause of the psychiatric trauma, and it was thought that on-site treatment and removal from the combat arena would relieve the condition.⁷⁴

Following WW II, there were indications that the popular media recognized that veterans who returned from war were experiencing psychological distortions related to combat long after the war had ended.⁷⁵ Although there may have been some recognition that returned veterans experienced adjustment difficulties following the war, veterans were largely unsuccessful in proving a causal relationship between their war experience and subsequent conduct which resulted in criminal proceedings.⁷⁶

For example, in a 1949 case, *People v. Danielly*,⁷⁷ a defendant with a diagnosis of

⁶⁹ Goodwin, *supra* note 67, at 6.

⁷⁰ See *supra* note 68. See also *People v. Gilberg*, 197 Cal. 306, 240 P. 1000, 1002 (1925).

⁷¹ See *supra* note 68. See also *People v. Gilberg*, 197 Cal. 306, 240 P. at 1002-03 (1925).

⁷² See generally STANDARD CLASSIFIED NOMENCLATURE OF DISEASES, AMERICAN MEDICAL ASS'N (AMA) (1939). See Memorandum in Petition, *State v. Jensen*, *supra* note 66, at 9.

⁷³ See C. Figley, *Introduction to STRESS DISORDERS AMONG VIETNAM VETERANS*, *supra* note 3; R.R. GRINKER & J.P. SPIEGEL, *MEN UNDER STRESS* (1945). In the early years of WW II, psychiatric casualties increased 300% over WW I. At one point the number of soldiers being discharged for psychiatric reasons exceeded the total number of men being drafted. See Tiffany & Allerton, *Army Psychiatry in the Mid-60's*, 123 AMER. J. OF PSYCHIATRY 810-21 (1967).

⁷⁴ P. BOURNE, *MEN, STRESS AND VIETNAM* (1970); Glass, *Psychotherapy in the Combat Zone*, 110 AMER. J. OF PSYCHIATRY 725 (1954).

⁷⁵ Several films such as "The Man in the Grey Flannel Suit" and "The Pride of the Marines" helped prepare the population for the returning veterans. In the 1946 film, "The Best Years of Our Lives," a returning Air Force gunner finds he is unable to adapt to civilian life. He finds a wrecked B-29 in a local scrapyard and appears to experience a disassociative "flash back" while sitting in the cockpit of the wrecked plane. Memorandum in Petition, *State v. Jensen*, *supra* note 66, at 9. See also V.J. DeFazio, *Dynamic Perspectives on the Nature and Effects of Combat Stress in STRESS DISORDERS AMONG VIETNAM VETERANS*, *supra* note 3, at 23.

⁷⁶ See generally *Bradley v. United States*, 447 F.2d 264, 266-67 (8th Cir. 1971); *People v. Danielly*, 33 Cal. 2d 362, 382-83, 202 P.2d 18, 30 (1949); *People v. Walker*, 33 Cal. 2d 250, 252-53, 210 P.2d 6, 7-8 (1949).

⁷⁷ *People v. Danielly*, 33 Cal. 2d 362, 202 P.2d 18 (1949).

"combat fatigue" and a psychiatric discharge was precluded from even making an offer of proof regarding the existence of a war-related psychological disorder.⁷⁸ In upholding the denial of the offer of proof, the court relied on the testimony of a psychiatrist who stated that the defendant's combat experience in the Mediterranean could not be related to later psychological disorders because an explosion which severely wounded him "didn't involve the brain."⁷⁹ Although it is now possible to recognize apparent symptoms of PTSD outlined in the opinion, the defendant was unable to present any expert testimony to support his temporary insanity claim.⁸⁰

During WW II, the AMA classification system proved inadequate as a diagnostic tool because, at least in part, it lacked classifications for psychosomatic and personality disorders, acute disturbances and other disorders that were observed by military doctors.⁸¹ In response, Dr. William Menninger was commissioned by the Veteran's Administration to develop a standard psychiatric nomenclature system for the military.⁸² In 1951, based in part upon the VA classification system produced by Menninger, the APA published the first comprehensive post-war classification system which was more suited to use by non-military doctors. This Diagnostic and Statistical Manual I (DSM I) contained a diagnostic category entitled "Gross Stress Reaction" which was characterized by exposure to strong emotional and mental stress, such as combat.⁸³ Like the "combat fatigue" of WW II, "Gross Stress Reaction" was seen as a situational disorder that would abate with a reduction in exposure to the stressor.⁸⁴

The experience of the Korean War appeared to confirm this conclusion because the rate of psychiatric casualties were reduced from twenty-three percent of battlefield evacuations in WW II to six percent in the Korean conflict.⁸⁵ This apparent success in the reduction of battlefield psychiatric casualties, and the focus on "Gross Stress Reaction" or "combat fatigue" as purely situational may explain the lack of attention paid to the reports of stress reactions experienced by WW II veterans many years after the end of the war as evidenced in follow-up studies of WW II veterans.⁸⁶

In the mid-1960s, the United Nations' World Health Organization promulgated a revised international nomenclature system that differed from DSM I.⁸⁷ As a result of these differences, the APA published a revised Diagnostic and Statistical Manual (DSM II) in 1968.⁸⁸ With the WW II and Korean experiences far in the past, the "gross stress reaction" of DSM I received little attention. Combat-related stress was categorized as incidental to a broad category called "transient situational disturbances" that included a wide range of symptoms with varying levels of severity.⁸⁹

⁷⁸ *Id.* at 374, 202 P.2d at 28.

⁷⁹ *Id.* at 372, 202 P.2d at 28.

⁸⁰ *Id.*

⁸¹ A.M. FREEDMAN, H.I. KAPLAN & B.J. SADOCK, I COMPREHENSIVE TEXTBOOK ON PSYCHIATRY, II, 826-845 (1975); see generally Spitzer, *Introduction to DSM III*, *supra* note 19.

⁸² *Id.*

⁸³ Spitzer, *Introduction to DSM III*, *supra* note 19.

⁸⁴ Goodwin, *supra* note 67, at 7.

⁸⁵ P. BOURNE, *supra* note 74, at 17.

⁸⁶ Follow-up studies after five years: Futterman & Pumpion-Mindlin, *Traumatic War Neuroses Five Years Later*, 108 AMER. J. OF PSYCHIATRY, No. 6, 401-08 (1951); and after 20 years, H.E. Archibald & R.D. Tuddenham, *Persistent Stress Reaction After Combat: A Twenty Year Follow-up*, 12 ARCHIVES OF GEN. PSYCHIATRY, 475-81 (1965) (both studies reported PTSD reactions in returning WW II veterans). See also Goodwin, *supra* note 67, at 6.

⁸⁷ Memorandum in Petition in *State v. Jensen*, *supra* note 66, at 9-10.

⁸⁸ See Goodwin, *supra* note 67.

⁸⁹ See *supra* note 20.

This was the state of the diagnostic materials available to mental health professionals until 1980. Thus during the entire period of the Vietnam War, the major diagnostic manual available to clinicians made no mention of the severe psychiatric disorders observed during WW I, WW II, and the Korean War. Moreover, the available diagnostic information provided no insight into the possibility that the onset of stress reactions might be delayed long beyond the end of exposure to the source of the stress.

B. *The Vietnam Experience*

Initially, psychiatric reports from Vietnam seemed to confirm that military psychiatrists had "solved" the ancient problem of psychiatric casualties. Battlefield psychological breakdowns occurred at much lower rates in Vietnam than in Korea.⁹⁰ The one-year tour of duty, regular leaves from combat zones, and other techniques were originally thought to have provided a solution to the "combat fatigue" that had proved so costly in WW II.⁹¹

As the fighting wore on, however, both those who experienced acute combat reactions, and many who did not, began reporting symptoms identical to those reported by some WW II veterans. These symptoms included intense anxiety, battle dreams, depression and explosive, aggressive behavior.⁹² Unlike WW II and Korea, the frequency of these psychiatric casualties did not increase as the war intensified. Rather, it was not until after veterans began returning home in large numbers and the war began winding down that the reports of psychological disorders began to appear.⁹³

Prior to 1972 most research into combat stress in Vietnam concentrated on "front line" breakdowns. The first articles hinting at the existence of some sort of delayed reaction to the stress of Vietnam combat were published in 1972 and 1973.⁹⁴ Dr. Chiam Shatan reported that veteran patients were experiencing "frustrated mourning," "impacted grief" and "psychological numbing."⁹⁵ He concluded that the DSM II failed to provide a category for what appeared to be a specific set of symptoms that appeared regularly in the Vietnam veteran population.⁹⁶ Despite Dr. Shatan's work, it was not until 1975 that *The Journal of Social Sciences* published a special volume that provided the first statistical information on the symptoms he had observed.⁹⁷ It was in this volume that the disorders known as "Post-Vietnam Syndrome" were first analyzed and the term "delayed stress response" was applied consistently.⁹⁸

Following the publication of *The Journal of Social Sciences* special volume, experts on veteran's issues such as Dr. Shatan, Dr. Robert Lifton and others were named by the APA

⁹⁰ P. BOURNE, *supra* note 74, at 18-19.

⁹¹ See C. Figley, *Introduction to STRESS DISORDERS AMONG VIETNAM VETERANS*, *supra* note 3, at xvii; Goodwin, *supra* note 67, at 7-11.

⁹² See Shatan, *The Grief of Soldiers — The Vietnam Combat Veterans' Self-Help Movement*, 43 AM. J. OF ORTHOPSYCHIATRY 640 (1973). See *supra* note 86 for references to WW II veteran reactions.

⁹³ *President's Commission on Mental Health, Report of the Special Working Group: Mental Health Problems of Vietnam Era Veterans*, Feb. 15, 1978, cited in Goodwin, *supra* note 67, at 6-7. For a discussion of differences between military service in Vietnam and other combat experiences, see C. Figley, *Introduction to STRESS DISORDERS AMONG VIETNAM VETERANS*, *supra* note 3, at xvii.

⁹⁴ See C.F. Shatan, *The Grief of Soldiers*, 2 AMERICAN REPORTS 1-3 (1972) and Shatan, *supra* note 92, at 640-53; Shatan, *Post Vietnam Syndrome*, N.Y. Times, May 6, 1972, p. 35.

⁹⁵ See generally Shatan, *supra* note 92, at 640-53; Shatan, *Through the Membrane of Reality: Impacted Grief and Perceptual Dissonance in Vietnam Combat Veterans*, 11 PSYCHIATRIC OPINION NO. 6 at 10 (1974).

⁹⁶ *Id.*

⁹⁷ See generally *Soldiers In and After Vietnam* (Mantell & Pilisuk eds.), 31 J. OF SOC. SCI. 25, 25-37 (1975).

⁹⁸ *Id.*

to study and revise the DSM II treatment of reactive disorders.⁹⁹ At about the same time, under the sponsorship of the Disabled American Veterans, Dr. John Wilson of Cleveland State University published the first in depth study of the adjustment problems of Vietnam veterans.¹⁰⁰ Publication of *The Forgotten Warrior Project* along with other reports published at about the same time, made it clear that stress reactions were far more common among Vietnam veterans than had previously been recognized.¹⁰¹ Between 1978 and 1980, the revised draft of DSM III circulated among committees of the APA and on March 20, 1980 the final form of DSM III was adopted.¹⁰² Finally, almost two decades after the Vietnam War began, psychiatrists and psychologists had a diagnostic category that described the symptoms now known as Post Traumatic Stress Disorder (PTSD).

Once PTSD was recognized as a disorder that could be isolated and diagnosed by psychiatrists and psychologists, it became a legitimate issue to be raised in legal proceedings. After the publication of DSM III, therefore, PTSD was raised in several cases as an explanation for a defendant's criminal conduct. The next section of this article examines a few of these cases, focusing in particular on the use of PTSD.

II. PTSD IN LITIGATION

Because PTSD is a relatively new way of describing and explaining client behavior in litigation, and because none of the cases in which it has been used successfully by the defense at trial have reached the appellate level, the "case law" on PTSD is necessarily limited to cases in which defendants were unable to present the defense in a convincing manner.¹⁰³ The cases, however, make it clear that PTSD is recognized as a proper subject

⁹⁹ Spitzer, *Introduction to DSM III*, *supra* note 19.

¹⁰⁰ J. WILSON, *THE FORGOTTEN WARRIOR PROJECT* (Clev. St. Univ. 1978).

¹⁰¹ See generally *President's Commission on Mental Health, Report of Special Working Group: Mental Health Problems of Vietnam Veterans*, Washington, D.C., Feb. 15, 1978; *The Adjustment of Vietnam Era Veterans to Civilian Life* (report commissioned by the Veterans Administration, compiled by the Center for Policy Research, N.Y., 1979).

¹⁰² DSM III, *supra* note 19, at 236.

¹⁰³ Some cases in which PTSD has been raised at trial include: *United States v. Burgess*, 691 F.2d 1146 (4th Cir. 1981); *United States v. Valdez*, Cr. No. 81-0030-E (U.S.D.F., S.D. Cal. 1982); *United States v. Oldham*, 1P-82-28-0 Cr. (S.D. Ind. Dec. 1981); *United States v. Krutschewski*, 541 F. Supp. 142 (D. Mass. 1981), *cited in Vietnam Stress Defense a Winner*, Nat. L. J., Oct. 6, 1980; *United States v. Tindall*, Cr. No. 79-376 (D. Mass. Sept. 19, 1980); *State v. Lowe*, No. 81-00896 (Cir. Ct. Jefferson County, Ala. Oct. 26, 1981); *People v. Pettibone*, No. 9632 (Sonoma County Super. Ct., Cal. Feb. 29, 1980), *cited in* Nat. L. J., May 12, 1980, at 26, col. 1; *State v. Lisnow*, 80 Cal. App. 3d 21, 151 Cal. Rptr. 621 (1978); *State v. Marshall*, No. 83-214-CF-A-01 (Cir. Ct., 12th Jud. Cir., Sarasota County, Fla. Dec. 1983); *People v. Donnelly*, No. 83 CF 113 (Cir. Ct. 16th Jud. Cir., Kane County, Ill. 1983); *People v. Wood*, No. 80-7410 (Cir. Ct. Cook County, Ill. May 5, 1982); *Commonwealth v. Nicholls*, No. 79C0962 (Louisville Dist. Ct., Ky. July 21, 1980); *State v. Heads*, No. 106, 126 (1st Jud. Dist. Ct. Caddo Parish, La. Oct. 10, 1981); *State v. Felde*, 422 So. 2d 370 (La. 1983) *discussed in* Magee, *The Long War of Wayne Felde, Slow Coming Dark: Interviews on Death Row* 103 NATION, Jan. 2-9, 1982, at 11; *State v. Gregory*, No. 19205 (Cir. Ct. Montg. County, Md. 1979); *State v. Simonson*, 100 N.M. 297, 669 P.2d 1092 (1983); *State v. Gossell*, No. 81L14749 (Licking County C.P., Ohio Feb. 5, 1981); *State v. Leach*, Cr. No. 27672 (Cleveland Ct. C.P., Ohio April 4, 1977), *aff'd*, Cr. No. 37686 (Cleveland Ct. App., Ohio Dec. 7, 1978); *State v. Pard*, No. 25975 (Deschutes County Cir. Ct., Or. March 18, 1980) (*discussed in* transcript of NBC MAC., Dec. 5, 1980); *Commonwealth v. Mulcahy*, Cr. No. 460-464 (Phila. Ct. C.P., Crim. Trial Div., Pa. Dec., 1978); *State v. Smith*, Tr. Ct. F-82-80575-JK (Cr. Dist. Ct. 4, Dallas County, Tex. Aug. 16, 1982); *State v. Mann*, Cr. 80-F-75 (Kanawha County, Charleston, W. Va. April 2, 1981); *State v. Mann*, *cited in* Milstein, *War Is Hell. It's Also A Good Defense*, AM. LAW., Oct. 1983, at 100; *State v. Lukowski*, No. 84 Cr. 245 (Arapahoe County Dist. Ct. Div. 3, Colo. Aug. 20,

for expert testimony in at least twenty-one states and five federal districts.¹⁰⁴ In addition, a number of majority and dissenting opinions have taken trial judges and attorneys to task for failing to take PTSD seriously in both sentencing and at trial.¹⁰⁵ In one appellate case in which PTSD was implicated, the Supreme Court of Minnesota rejected an appellate argument based upon PTSD because counsel had failed to properly raise the issue at trial.¹⁰⁶ This disposition, however, should not be read as a rejection of PTSD. Rather, it is an indication that, like other factors influencing client behavior, PTSD must be properly presented at trial.¹⁰⁷ It re-emphasizes the premise of this article, that attorneys must properly present PTSD, in order to adequately represent those veteran clients exhibiting symptoms of PTSD.¹⁰⁸

As more attorneys begin to understand and apply PTSD to explain behavior, the number of reported cases in which PTSD is a factor is likely to increase. At this point, however, the discussion of the successful applications of PTSD must focus primarily on cases at the trial level which are largely unreported.¹⁰⁹

Probably the most dramatic and well publicized application of PTSD in the courtroom is in the defense of criminal charges.¹¹⁰ Defenses based on PTSD have been advanced in cases ranging from violent offenses, such as murder¹¹¹ and attempted murder,¹¹² to nonviolent crimes such as drug conspiracies¹¹³ and tax fraud.¹¹⁴ As mentioned earlier, it would be incorrect for attorneys to conclude that these more notorious cases represent the only application of PTSD to legal issues. PTSD may be a factor in

1982); *People v. Kahan*, cited in Milstein & Snyder, *supra* note 6, at 88; *State v. Cocuzza*, reported in Nat. L.J., June 29, 1981.

¹⁰⁴ PTSD has been mentioned in a number of reported opinions: see, e.g., *United States v. Crosby*, 713 F.2d 1066, 1069-77 (5th Cir. 1983); *Scarborough v. United States*, 683 F.2d 1323, 1324 (11th Cir. 1982); *State v. Pettit*, 104 Idaho 601, 603, 661 P.2d 767, 769 (Idaho App. 1983); *Stader v. State*, 453 N.E.2d 1032, 1034 (Ind. 1983); *State v. Marks*, 231 Kan. 645, 653-54, 647 P.2d 1292, 1299 (1982); *State v. Serrato*, 424 So. 2d 214, 222-24 (La. 1983); *State v. Felde*, 422 So.2d 370, 377 (La. 1982), *cert. denied*, 103 S.Ct. 1093 (1983); *State v. Sharp*, 418 So. 2d 1344, 1345-46 (La. 1982); *State v. Simonson*, 100 N.M. 297, 669 P.2d 1092, 1097 (1983); *Miller v. State*, 338 N.W.2d 673, 677-78 (S.D. 1983); *State v. Spawr*, 653 S.W.2d 404, 405 (Tenn. 1983); *Nash v. State*, 651 S.W.2d 432, 432 (Tex. App. 1983); *Schmidt v. State*, 668 P.2d 656, 659-60 (Wyo. 1983).

¹⁰⁵ See, e.g., *State v. Spawr*, 653 S.W.2d 404, 406 (Tenn. 1983) (reversal of denial of probation); *Miller v. State*, 338 N.W.2d 673, 679 (S.D. 1983) (Henderson, J., dissenting) (failure to raise PTSD denial of competent counsel); *Schmidt v. State*, 668 P.2d 656, 662-63 (Wyo. 1983) (Rose, J., dissenting).

¹⁰⁶ *State v. Hardimon*, 310 N.W.2d 564, 567 (Minn. 1981). *But see* *People v. Lisnow*, 88 Cal. App. Supp. 3d 121, 123-27, 151 Cal. Rptr. 621, 622-24 (1978) (supporting the use of PTSD on the issue of intent).

¹⁰⁷ See *United States v. Burgess*, 691 F.2d 1146 (4th Cir. 1982); *United States v. Kruschewski*, 541 F.Supp. 142 (D. Mass. 1981); *State v. Lisnow*, 80 Cal. App. 3d 21, 151 Cal. Rptr. 621 (1978). *State v. Hardiman*, 310 N.W.2d 564, 566 (Minn. 1981).

¹⁰⁸ See *infra* notes 271-312 and accompanying text.

¹⁰⁹ See *infra* notes 129-85 and accompanying text.

¹¹⁰ *Pleading PTSD*, TIME, May 26, 1980, at 59; *War Echoes in the Courts*, NEWSWEEK, Nov. 23, 1981, at 103; Magee, *supra* note 103; *The Bombshell Defense*, *supra* note 6; *Vietnam Veterans Advisor*, PENTHOUSE, Aug. 1982, at 100.

¹¹¹ *State v. Heads*, No. 106, 126 (1st Jud. Dist. Ct. Caddo Parish, La. Oct. 10, 1981). See *infra* notes 129-50.

¹¹² *People v. Wood*, *supra* note 103. See *infra* notes 151-85 and accompanying text.

¹¹³ *United States v. Tindall*, Cr. No. 79-376 (D. Mass. Sept. 19, 1980). See *infra* notes 196-210 and accompanying text.

¹¹⁴ *United States v. Oldham*, IP 81-28-CR (S.D. Ind. Dec. 1981). See Nat. L. J., Dec. 28, 1981, at 3, cols. 3-4.

virtually any legal issue involving the conduct of a client. Because many of the same issues arise in the preparation and presentation of PTSD in criminal cases and other settings, this article will focus on the use of PTSD in criminal cases to illustrate some of the applications of PTSD to legal issues in which client conduct or state of mind plays a role.¹¹⁵

Although all PTSD cases have a great deal in common, this article will examine cases involving violent and nonviolent behavior separately.¹¹⁶ This division is based not only upon some differences in legal strategy but also upon a recognition that some disagreement exists among mental health professionals regarding the application of a PTSD diagnosis to crimes not obviously linked to the violent aspects of combat.¹¹⁷

A. PTSD and Explosive Criminal Behavior

The range of violent offenses to which PTSD has been advanced as a defense range from murder¹¹⁸ to assault¹¹⁹ and weapons offenses.¹²⁰ Although there is no "typical" set of facts in PTSD cases, there are several factors which appear with some regularity. Very often the criminal behavior apparently occurred spontaneously.¹²¹ Incidents which might otherwise appear to be relatively benign, such as an argument with a supervisor,¹²² a co-worker,¹²³ or a domestic dispute between husband and wife¹²⁴ may suddenly erupt into violence. In several cases, the defendants have had a history of substance or alcohol abuse that began after the service.¹²⁵ Many defendants have not been able to explain why the incident occurred or remember details of how it occurred.¹²⁶ Frequently, the defendants have had no previous criminal history.¹²⁷ Often the defendant will be unaware of any connection between Vietnam service and the offense or other current problems.¹²⁸

Examples of PTSD as a factor in explaining violent criminal conduct may be found in two cases in which a jury found veterans not guilty by reason of insanity: *State v. Heads*¹²⁹ and *People v. Wood*.¹³⁰ These cases are of particular interest, not only because successful

¹¹⁵ See *infra* notes 271-312.

¹¹⁶ *Id.*

¹¹⁷ Even generally sympathetic mental health professionals disagree that nonviolent conduct can be explained as a PTSD reaction. Schulz, *supra* note 4, at 2402.

¹¹⁸ *State v. Heads*, No. 106, 126 (1st Jud. Dist. Ct. Caddo Parish, La. Oct. 10, 1981); *State v. Felde*, No. 196240 (9th Jud. Dist. Ct. Parish of Rapides, La. Feb. 13, 1981).

¹¹⁹ *People v. Pettibone*, No. 9632-C (Sonoma County Super. Ct., Cal. Feb. 29, 1980).

¹²⁰ See *infra* note 211.

¹²¹ Jack, *supra* note 6, at 7. See *infra* discussion of *People v. Wood*, notes 151-85 and accompanying text.

¹²² *People v. Wood*, *supra* note 103. See *supra* text accompanying notes 151-185.

¹²³ See Magee, *supra* note 103, at 11.

¹²⁴ *People v. Pettibone*, *supra* note 119. See discussion of *Pettibone* in Nat. L. J., May 12, 1980, at 26, col. 2.

¹²⁵ See *infra* notes 137-62.

¹²⁶ Jack, *supra* note 6, at 18.

¹²⁷ *United States v. Burgess*, 691 F.2d 1146 (4th Cir. 1982); *United States v. Krutschewski*, 509 F. Supp. 1186, 1188 (D. Mass. 1981); *United States v. Oldham*, IP 81-28-CR (S.D. Ind. Dec. 1981); *United States v. Tindall*, Cr. No. 79-376 (D. Mass. Sept. 19, 1980); *People v. Pettibone*, No. 9632-C (Super. Ct. Sonoma County, Cal. Feb. 29, 1980); *People v. Wood*, No. 80-7410 (Cir. Ct. Cook County, Ill., May 5, 1982); *State v. Heads*, No. 106, 126 (1st Jud. Dist. Ct. Caddo Parish, La. Oct. 10, 1981). See notes 174-80.

¹²⁸ See the discussion of *Wood* and *Heads*, *supra* notes 129-85 and accompanying text.

¹²⁹ No. 106, 126 (1st Jud. Dist. Ct. Caddo Parish, La. Oct. 10, 1981) The discussion of the *Heads* case is drawn from an article written by one of Heads' defense lawyers. See Jack, *supra* note 6, at 7-19. There is no other written record of the case.

¹³⁰ No. 80-7410 (Cir. Ct. Cook County, Ill. May 5, 1982). See *infra* discussion at notes 151-83.

insanity defenses are rarely, if ever, argued to a jury,¹³¹ but also because they each took very different tactical approaches to presenting PTSD at trial.¹³²

The defendant in *State v. Heads* was charged with murder in the shooting death of his sister-in-law's husband.¹³³ Mr. Heads broke into his sister-in-law's house in search of his estranged wife and began firing a pistol. After the pistol was emptied of bullets, Mr. Heads got a rifle from the trunk of his car and kept firing. One shot struck his sister-in-law's husband.¹³⁴ Mr. Heads was tried in 1978, found guilty of murder, and sentenced to life in prison.¹³⁵ In 1980, through a series of appeals not related to PTSD, Charles Heads was granted a new trial.¹³⁶ It was in preparing for the second trial that the PTSD connection was first made.

Between the first trial in 1978 and the retrial in October 1981, the APA recognized PTSD as a diagnostic category.¹³⁷ According to Mr. Heads' counsel, no one connected with the case had heard of PTSD until after the publication of DSM III.¹³⁸ This new information provided substance for the psychological aspects of the case which had previously defied explanation.¹³⁹

The effect of the new knowledge provided by the diagnostic criteria in DSM III aided the presentation of the *Heads* case in two significant ways. First, DSM III's description of PTSD helped explain Mr. Heads' previously unexplained behavior. Second, because PTSD is caused by a traumatic event in the defendant's past and because comparisons in a defendant's life before and after the traumatic event help identify the effects of the traumatic event,¹⁴⁰ PTSD provided a theory of admissibility for virtually the entirety of Charles Heads' life.¹⁴¹ These factors were essential to enable the jury to understand the psychologically devastating effects of combat.¹⁴² In addition, DSM III's requirement that the original traumatic event "evoke[s] significant symptoms of distress in most people,"¹⁴³ provided a basis for admitting testimony of those who had shared the Vietnam experi-

The author, together with a defense team composed of Prof. David Thomas, Chicago-Kent College of Law, John Guzzardo, Chicago-Kent '83 and Tami Redding, Chicago-Kent '83, represented Mr. Jearl Wood in *People v. Wood*, No. 80-7410 (Cir. Ct. Cook County, Ill. May 5, 1982). Thanks to the work of the defense team and the support of the workers from Ford Motor Company, Torrance Ave. plant, the assistance of the Jearl Wood Defense Committee, and the contributions of hundreds of supporters that made preparing the case possible. Mr. Wood was found not guilty by a jury. The discussion of the *Wood* case is drawn from the trial notes of the author. Because Mr. Wood was acquitted, there is no written court opinion of the case.

¹³¹ The *Wood* case, for example, was believed to be only the second "not guilty by reason of insanity" verdict returned by a jury in Cook County, Ill. (Chicago) in the last decade. *Three Cases Fuel Debate Over Insanity Defense*, Chi-Trib., June 7, 1982. See also *State v. Mann*, cited in Milstein, *War Is Hell. It's Also A Good Defense*, AM. LAW., Oct. 1983, at 100 (jury found defendant not guilty after deliberating for less than ten minutes).

¹³² See *infra* discussion at notes 174-80 and accompanying text.

¹³³ Jack, *supra* note 6, at 7.

¹³⁴ *Id.*

¹³⁵ *Id.* at 8.

¹³⁶ *Id.*

¹³⁷ DSM III, *supra* note 19. See *supra* notes 19-24 and accompanying text.

¹³⁸ Jack, *supra* note 6, at 8.

¹³⁹ *Id.* "The insanity defense at the first trial never got off the ground because neither of the psychiatrists who had examined the defendant had found evidence of any recognized disorder." *Id.*

¹⁴⁰ See *supra* text accompanying notes 271-312.

¹⁴¹ Jack, *supra* note 6, at 9.

¹⁴² *Id.* at 8.

¹⁴³ *Id.* at 9.

ence.¹⁴⁴ The language in DSM III, therefore, provided the theory of legal relevance for admitting into evidence testimony of Mr. Heads' childhood, his work history, his Vietnam experiences, his difficulties with adjustment on return and the fact that he had no serious criminal record,¹⁴⁵ as well as the testimony of others regarding *their* Vietnam experiences and reactions.¹⁴⁶

Evidence was amassed to attribute Mr. Heads' behavior to PTSD. The structure of the presentation of this evidence at trial consisted of four components. First, testimony from three experts in the diagnosis and treatment of PTSD who had examined Mr. Heads was presented. Second, testimony to corroborate the existence of the facts in Mr. Heads' life upon which the diagnosis was based was offered. Third, the defense offered testimony regarding conditions leading up to the shooting incident and details of the scene of shooting. Fourth, the court heard the testimony of Mr. Heads.¹⁴⁷ The testimony at trial tended to establish that Charles Heads had been a nineteen-year-old combat soldier who had no significant criminal history before or after Vietnam. After returning from Vietnam, he had experienced at least one "dissociative state" in which he reverted to combat-type behavior; the Vietnam-like physical conditions at the scene of the shooting which, together with the emotional threat of losing his wife and family, combined to cause a reaction in which Mr. Heads "was on automatic"; and that after the shooting Mr. Heads was quietly arrested at the scene, still holding his weapon.¹⁴⁸

Under Louisiana law, a defendant is "exempt from criminal responsibility" if the offender was incapable of distinguishing "right and wrong."¹⁴⁹ After two weeks of trial, the jury returned a verdict of not guilty by reason of insanity, apparently after concluding that Mr. Heads could not distinguish right and wrong during the shooting episode.¹⁵⁰

In *People v. Wood*,¹⁵¹ a 1982 case in Chicago, Illinois, the defendant was charged with attempted murder in the shooting of his foreman after a dispute at work.¹⁵² Jearl Wood was accused of drinking on the job by his foreman and was given a breathalyzer test by a nurse that apparently confirmed the foreman's charge. As a result, he was sent out of the plant. Mr. Wood then went to his car in the parking lot, returned to the plant and, in front of several dozen witnesses, fired twice, severely wounding the foreman. Within hours he turned himself into the police and confessed.¹⁵³

Like the defendant in the *Heads* case, Mr. Wood was a veteran who had no criminal record. He was married, had a family and possessed a good work record. Also like Mr. Heads, he was completely unaware that he was affected by PTSD.¹⁵⁴

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 18.

¹⁴⁹ *Id.* at 17. The insanity issue in Louisiana is governed by LA. REV. STAT. ANN. § 14 (West 1977). It provides that "if the circumstances indicate that because of a mental disease or mental defect the offender was incapable of distinguishing between right and wrong with reference to the conduct in question, the offender shall be exempt from criminal responsibility." *Id.*

¹⁵⁰ Jack, *supra* note 6, at 7. As of 1980, Charles Heads was in jail waiting to be sent to an appropriate mental institution, as required by Louisiana law. *Id.* at 19. The V.A. has refused to accept responsibility for him. *Id.*

¹⁵¹ No. 80-7410 (Cir. Ct. Cook County, Ill. May, 1982).

¹⁵² *Id.*

¹⁵³ *Id.* See generally Crimmins, *supra* note 12; *Worker Who Shot Foreman Claims Racial Harassment*, Chi. Defender, Oct. 18, 1980, p. 3.

¹⁵⁴ Counsel for Mr. Wood did not learn of the effects of PTSD on Mr. Wood until several

As one might expect, many parallels exist between the *Heads* and *Wood* cases. Both were tried before a jury, both advanced PTSD to help explain their behavior, and both resulted in findings of not guilty by reason of insanity. The principal distinctions are that Mr. Wood did not testify at trial and he was released for treatment as an outpatient rather than being institutionalized.¹⁵⁵

As in the *Heads* case, PTSD in the *Wood* case provided the theory of legal relevance which allowed the introduction of most of the significant events in Mr. Wood's life.¹⁵⁶ The structure of the presentation of the evidence however, differed markedly from that in the *Heads* case. In the *Wood* case, the diagnosis of PTSD was not presented until the last witness testified. Thus, the entire case was put into evidence before the diagnosis conclusively established the relevance of the preceding testimony.¹⁵⁷

The structure of the presentation of evidence in *People v. Wood* was as follows:

(a) Dr. Charles Figley, an expert in PTSD who had never met Jearl Wood testified about the symptoms of PTSD to establish that such a condition existed;¹⁵⁸

(b) Family, friends and acquaintances testified to significant events in Mr. Wood's life that occurred before and after Vietnam under the theory that these facts corroborated the basis for the opinion which was to follow;¹⁵⁹

(c) Mr. Wood's service records and those of his unit were read into evidence under the business records exception to the hearsay rule in order to verify his combat service and to illustrate the conditions in Vietnam;¹⁶⁰

(d) Veterans who served with Mr. Wood, and some who did not, testified about conditions in Vietnam under the theory that this testimony corroborated the existence of traumatic events experienced by Mr. Wood in Vietnam;¹⁶¹

(e) Dr. Bennett Braun, a former army captain and a psychiatrist, who had treated the defendant, testified that he had toured the plant and that the sights and sounds of the plant were much like combat. Tape recordings of loud plant sounds and photographs of physical conditions were made by the psychiatrist to illustrate his testimony.¹⁶²

(f) Co-workers testified that Mr. Wood had not appeared to have been drinking but rather that he appeared to begin "acting strangely" when confronted by the foreman.¹⁶³

(g) Dr. John Wilson, the psychologist who made the original PTSD diagnosis of Jearl

months after entering the case. Mr. Wood did not talk about his Vietnam experience until he began therapy for the previously undiagnosed PTSD. *People v. Wood*, *supra* note 103.

¹⁵⁵ *Order Wood Treatment on Outpatient Basis*, Chi. Heights Star, July 15, 1982, at 1, col. 3.

¹⁵⁶ See *infra* text accompanying notes 271-312.

¹⁵⁷ See generally *People v. Wood*, *supra* note 103.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* Dr. Braun spent some 14 hours with Mr. Wood in sessions that employed hypnosis as a therapy and as an aid to memory. In those sessions, Mr. Wood recalled many events from Vietnam which he had repressed. The effect of the therapy was beneficial as a method to help Mr. Wood "release" many of the memories he had never shared. In addition, the sessions aided Mr. Wood's recollections of the men with whom he has served and provided counsel with the clues that were used to locate members of his unit whom he had not seen in over ten years. The testimony of one of the members of his unit was particularly crucial to explaining the Vietnam experience because Mr. Wood did not testify at trial (reported by author who was co-counsel in *People v. Wood*). For a discussion of the use of hypnosis as a form of PTSD therapy, see Brende & Benedict, *The Combat Delayed Stress Response Syndrome: Hypno Therapy of "Dissociative Symptoms"*, 23 AM. J. OF CLIN. HYPNOSIS, July 1980, at 34.

¹⁶³ *People v. Wood*, *supra* note 103.

Wood which was later confirmed by others,¹⁶⁴ was the last witness. He testified that Mr. Wood's attempts to get psychiatric treatment in 1979, his bouts with alcohol, his strange behavior at the plant the night of the shooting, and the shooting incident itself all grew out of his reactions to Vietnam.¹⁶⁵ In Mr. Wood's case, the precipitating incidents that caused the PTSD reaction were the death of a brother, also a Vietnam veteran, with whom he was very close and the threat of the loss of his job.¹⁶⁶

The testimony at trial tended to establish that Mr. Wood entered a "survivor mode" of behavior before and during the shooting. His actions during the shooting were closely analogous to the survival reactions he had learned as a Marine. For a brief time Mr. Wood was once again the frightened eighteen-year-old Marine who carried his .45 caliber automatic pistol everywhere and who survived his traumatic Vietnam experiences by learning to react without thinking.¹⁶⁷

Because Illinois had adopted the Model Penal Code test for insanity, the jury was asked to decide whether Mr. Wood could "substantially appreciate the criminality of his acts" or "conform his conduct to the law."¹⁶⁸ The general verdict of the jury of "not guilty by reason of insanity" did not make clear whether the verdict was based on one or both prongs of the test.¹⁶⁹

Although Mr. Wood did not testify in his own behalf, the jury apparently saw a connection between the life incidents described by others, the diagnosis and the shooting.¹⁷⁰ In a separate commitment hearing after the trial, a psychiatrist for the Illinois Department of Mental Health confirmed the PTSD diagnosis.¹⁷¹ He also explained that the unique episode that precipitated the PTSD reaction which led to the shooting did not indicate that Mr. Wood was dangerous at the time of the hearing, nor that he would be dangerous in the future.¹⁷² As a result, Mr. Wood was released to receive court-supervised outpatient care.¹⁷³

Both *State v. Heads* and *People v. Wood* illustrate a slightly different strategy dictated by the circumstances of each case. For example, in *Wood*, the defendant's emotional difficulty with his memories of Vietnam and his memory lapses made testimony both painful for the defendant and unreliable.¹⁷⁴ There are, however, several common factors in the two cases.

First, neither the defendants nor their attorneys were initially aware that PTSD existed, or that it might provide a theory of defense.¹⁷⁵ Second, both defendants had experienced symptoms of PTSD long before the DSM III made diagnosis of the disorder

¹⁶⁴ *Id.* See also *Order Wood Treatment on Outpatient Basis*, *supra* note 155.

¹⁶⁵ *People v. Wood*, *supra* note 103.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ See ILL. ANN. STAT. ch. 38, § 6-2(a) (Smith-Hurd 1982).

¹⁶⁹ *People v. Wood*, *supra* note 103.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ See *supra* note 155.

¹⁷⁴ During pretrial motions in *People v. Wood*, the defendant admitted that he could not recall many incidents on the night of the shooting. A psychiatrist, who is an expert in hypnosis, was employed to assist the defendant to recall his Vietnam experience (reported by author, who was co-counsel of record in *People v. Wood*).

¹⁷⁵ See *supra* notes 117-68. Just before the case was to go to trial, counsel in the *Wood* case discovered one line in a medical report, from an earlier hospitalization, that mentioned nightmares about Vietnam. This was the first indication of a psychological condition related to Vietnam.

possible.¹⁷⁶ In the case of Mr. Wood he had actually sought treatment of alcoholism and psychological problems in 1979 and had not been properly diagnosed.¹⁷⁷ Third, both defendants were teenage combat veterans, who apart from the violent acts which lead to the pending charges, had little or no criminal history.¹⁷⁸ Fourth, the trials were presented almost as one would prove up a personal injury claim in which great care was taken to precisely describe the original traumatic event and to explain its relation to the emotional or environmental conditions at the time of the crime.¹⁷⁹ Fifth and finally, PTSD provided the theory of legal relevance that allowed a full disclosure of defendant's life before, during and after Vietnam.¹⁸⁰

As criminal defense practitioners will recognize, this approach to the presentation of a psychological defense contravenes the accepted wisdom in many insanity cases. 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.¹⁸¹ 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.¹⁸² With PTSD, however, the source of the mental disorder can be described in great detail.¹⁸³ It is also possible to show overt symptoms and behavior which allow the judge or jury to test the validity of the diagnosis.¹⁸⁴ Thus, if the facts do not logically support the diagnosis or the conclusion that the behavior at issue was logically consistent with the defendant's behavior in Vietnam, a PTSD defense is unlikely to be successful before either a judge or a jury.¹⁸⁵

B. PTSD and Nonviolent or Compulsive Behavior

Both the *Heads* and *Wood* cases were based upon the "explosive behavior"-survivor mode" type of response described in DSM III and more fully described by numerous researchers.¹⁸⁶ A more controversial application of PTSD has been the use of PTSD to

¹⁷⁶ DSM III was not published until 1980, which was after the defendants in *Heads* and *Wood* had manifested PTSD symptoms. See *supra* notes 19-24 and accompanying text.

¹⁷⁷ See Jack, *supra* note 6, at 12.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ For a comparison of *Wood* and other insanity cases, see *Three Cases Fuel Debate Over Insanity Defense*, *supra* note 131.

¹⁸² An example of a case of this sort is *United States v. Hinckley*, Nos. 81-2350, 81-2838 (D.C. Cir. June 21, 1982). For a discussion of the insanity defense which reflects the skepticism about psychiatric defenses underlying much of the criticism of expert testimony, see D. NISSMAN, B. BARNES, G. ALPERT, *BEATING THE INSANITY DEFENSE* 1-9 (1980). For a contrary assessment of the insanity defense see MacCarthy, *The Insanity Defense: What It Is and What Should It Be?*, 7 CHAMPION, Sept.-Oct. 1983, at 13.

¹⁸³ See *infra* text accompanying notes 271-312.

¹⁸⁴ *Id.*

¹⁸⁵ See, e.g., *United States v. Kruschewski*, 509 F. Supp. 1186 (D. Mass. 1982); *United States v. Oldham*, IP-82-28-0 Cr. (S. D. Ind. Dec. 1981); *State v. Simonson*, 100 N.M. 297, 669 P.2d 1092 (1983). See also *supra* note 104, and *infra* text accompanying notes 304-12.

¹⁸⁶ See DSM III, *supra* note 19, at 236, 237; Walker, *Vietnam Combat Veterans with Legal Difficulties: A Psychiatric Problem?*, 138 AM. J. PSYCHIATRY, Oct. 1981, at 1384; Apostle, *The Unconscious Defense as Applied to Post Traumatic Stress Disorder in a Vietnam Veteran*, 8 BULL. AAPL, at 426; Schulz, *supra* note 4, at 2401. See also *supra* notes 40-43 and accompanying text.

explain nonviolent criminal conduct.¹⁸⁷ At first blush, the suggestion that PTSD can legitimately explain conduct such as burglary, robbery, drug dealing or tax evasion seems hardly plausible. In light of the recent work of Wilson and Ziglebaum, however, this explanation may not be as remote or implausible as it appears.¹⁸⁸

If, as suggested by these researchers, PTSD results in (a) reactions that include danger and sensation-seeking, or (b) a guilt/punishment/suicide reaction in addition to explosive behavior, the link to nonviolent behavior may not be so remote. For example, a veteran who is compelled to seek danger and heightened sensation may engage in activities that are both risky and have criminal consequences.¹⁸⁹ Wilson and Ziglebaum suggest that this sensation seeking may compel veterans to repeatedly engage in quasi-military, sensation-fraught criminal conduct.¹⁹⁰ A self-destructive, survivor guilt response, for example, may explain the apparent tendency of some veterans to undertake criminal activity that has little chance of success.¹⁹¹ This reaction, it is suggested, is manifested by veterans suffering from PTSD attempting to get killed, or to get "caught," and thus obtain help for their symptoms, or punishment for surviving. This may explain examples of unarmed veterans attacking armed police¹⁹² or committing a crime with no hope of escape.¹⁹³ Two examples of the use of PTSD to explain nonviolent criminal behavior can be found in *United States v. Tindall*¹⁹⁴ and *State v. Gregory*.¹⁹⁵

Tindall was one of the first cases litigated after the publication of DSM III, and in which PTSD was successfully advanced as an explanation for nonviolent criminal conduct.¹⁹⁶ *Tindall* involved a large scale drug smuggling operation that was carried out by fifteen people, including a number of veterans who had served together in Vietnam.¹⁹⁷ Several co-defendants were tried and convicted on similar charges in another proceeding in which PTSD was also advanced as a defense.¹⁹⁸

The smuggling operation involved importing a large amount of marijuana or hashish by sea.¹⁹⁹ The veteran members of the plot had all been crew members on a COBRA helicopter gun ship in Vietnam and none had serious criminal records.²⁰⁰ The compli-

¹⁸⁷ See Schulz, *supra* note 4, at 2402.

¹⁸⁸ See generally Wilson & Ziglebaum, *supra* note 35, at 74.

¹⁸⁹ *Id.* at 10.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 12.

¹⁹² See report in Nat. L.J., Oct. 6, 1980, at 4. The defendant attacked armed police officers with a log for no apparent reason. The defendant was acquitted. Nat. L.J., June 29, 1981, at 4. See also Ford, *supra* note 6, at 439.

¹⁹³ Testimony in *State v. Lowe*, No. 81-00896, 987 (Cir. Ct. Jefferson County, Ala. Oct. 26, 1981) indicated that the defendant was attempting to commit suicide in two robberies, *cited in* Milstein & Snyder, *supra* note 6, at 86; *State v. Gregory*, No. 19205 (Cir. Ct. Montgomery County, Md. Feb. 28, 1981). See *infra* notes 165-82 and accompanying text.

¹⁹⁴ Cr. No. 79-376 (D. Mass. Sept. 19, 1980).

¹⁹⁵ No. 19205 (Cir. Ct. Montgomery County, Md. 1979).

¹⁹⁶ See *The "Bombshell" Defense*, *supra* note 6, at 26; *Vietnam Stress Defense a Winner in Drug Case*, *supra* note 9, at 4, col. 1.

¹⁹⁷ *Vietnam Stress Defense A Winner in Drug Case*, *supra* note 9, at 4, col. 4.

¹⁹⁸ It has been suggested that the PTSD defense in the related case, *United States v. Kruschewski*, 509 F. Supp. 1186 (D. Mass. 1981), was not successful because the defendant was the moving party in the conspiracy and had financed the operation and recruited Tindall into the operation. See Note, *supra* note 6, at 113.

¹⁹⁹ See *Vietnam Stress Defense a Winner in Drug Case*, *supra* note 9, at 4, cols. 2-3.

²⁰⁰ *Id.* at col. 4.

cated scheme was replete with intrigue, dangerous sea voyages across the Atlantic, and quasi-military organization.²⁰¹ Apparently, those involved continued to live out the relationships that had been established in Vietnam.²⁰²

The defendant in *Tindall* was a highly decorated Army helicopter pilot who flew some 755 combat missions in Vietnam during 1970.²⁰³ Mr. Tindall's participation in the drug importation scheme was never disputed. The defense, however, asserted that his involvement was an act of compulsion induced by PTSD.²⁰⁴

According to testimony at trial, Mr. Tindall returned from Vietnam with PTSD symptoms brought about by his service in Vietnam.²⁰⁵ The stress reaction that caused him to return to the behavior he had learned in Vietnam was precipitated by the psychological devastation following the rejection of his application for a pilot's license.²⁰⁶

The defense in *Tindall* asserted that the defendant had "action addiction" that led him to engage in a series of dangerous endeavors, such as sky diving and stunt flying.²⁰⁷ Under the defense's theory the feeling of loss, rejection and helplessness that followed the destruction of his goal to become a charter pilot caused him to revert back to the method of surviving he learned in Vietnam.²⁰⁸ He became part of a dangerous para-military operation that involved his military superior and in which all the participants adopted the same roles they had in Vietnam.²⁰⁹

A federal jury ultimately found that Mr. Tindall was not legally responsible for his action during the six months he participated in the scheme. He was found not guilty by the reason of insanity in September, 1980.²¹⁰

The defendant in *State v. Gregory*²¹¹ was charged with eight counts of false imprisonment and four counts of assault arising from an incident in a bank in Silver Spring, Maryland.²¹² On Feb. 9, 1977, Stephen Gregory entered the bank armed with two rifles and announced he was *not* holding up the bank.²¹³ He told hostages, including children that they could leave and offered beer to the remaining hostages.²¹⁴ He wore a business

²⁰¹ *Id.* See *The "Bombshell" Defense*, *supra* note 6.

²⁰² See Wilson & Ziglebaum, *supra* note 35 at 74.

²⁰³ *Vietnam Stress Defense A Winner in Drug Case*, *supra* note 9, at 4, col. 2.

²⁰⁴ *Id.* at col. 3.

²⁰⁵ *Id.*

²⁰⁶ Dr. John Wilson testified that Tindall had a need to release anger and rage that resulted from the futility and horror of Vietnam. See discussion of *Tindall* in Note, *supra* note 6, at 113 n.130.

²⁰⁷ *Id.* at 112-113. Testimony at trial indicated that Tindall had become highly excitable during missions in Vietnam. Upon his return to the United States, Tindall hung his bed from the ceiling and decorated his room to resemble his quarters in Vietnam. *Id.* at 112 & n.124. His hands twitched as if he were firing rockets, much in the same way he did when he was flying in Vietnam. *Id.* at 112 n.122.

²⁰⁸ Dr. Wilson testified that "he [Tindall] engaged in the alleged crime because in many ways it represented another mission to him. It has all the elements of a combat mission in many ways." Record, day 4, at 141, *United States v. Tindall*, Cr. No. 79-376 (D. Mass. Sept. 19, 1980) (testimony of Dr. John Wilson), *cited in* Note, *supra* note 6, at 112.

²⁰⁹ Note, *supra* note 6, at 113.

²¹⁰ *Id.* at 111. See also *Vietnam Stress Defense a Winner in Drug Case*, *supra* note 9, at 4.

²¹¹ No. 19205 (Cir. Ct. Montgomery County, Md. 1979). *Gregory* is discussed in Milstein & Snyder, *supra* note 6.

²¹² *Id.* See Defense Presentence Report at 1, filed in *State v. Gregory*, No. 19205 (Cir. Ct. Montgomery County, Md. 1979).

Gregory is discussed in this section of this article because even though he was charged with assault, the defendant made no attempt to harm bank customers and the episode took place over a relatively long period of time.

²¹³ *Id.*

²¹⁴ *Id.* at 22.

suit with a diamond tie tac and cufflinks. In his pockets he had military ribbons and awards.²¹⁵

Over the next five hours, Gregory fired some 250 rounds of ammunition at the air vents in the roof, and at other inanimate objects and noises in the bank because in the words of the defendant in the bank, "in the bush you couldn't see the enemy but could only hear them."²¹⁶ He allowed police to bring food and beer to the hostages and eventually released all but one.²¹⁷ Finally, he allowed himself to be taken into custody by the police SWAT team that had surrounded the bank. After the ordeal, he wrote letters of apology to the bank and the hostages.²¹⁸

Stephen Gregory was first tried in 1977. The issue was whether the psychological condition from which he suffered was the sort that would constitute legal insanity.²¹⁹ At that time, of course, PTSD had not yet appeared in the diagnostic materials and there was disagreement over whether or not Mr. Gregory's behavior was related to a mental illness arising from combat experiences.²²⁰ Gregory was convicted, but that conviction was reversed on appeal.²²¹

After his appeal, Mr. Gregory elected to plead guilty to the charges pursuant to an agreement with the prosecutor.²²² At sentencing, the defense presented a report that explained the defendant's behavior in terms of PTSD reaction.²²³

According to the psychiatrist who examined the defendant, his behavior in the bank was directly related to his feelings that he was "a very, very bad person because he survived the ambush in 1969 when others died. . . ."²²⁴ When he came back from Vietnam, this guilt about surviving caused him to be depressed, suicidal, and guilt ridden. Prior to the bank incident he had made three attempts to commit suicide.²²⁵ Thus, the psychiatrist linked the behavior in the bank to the defendant's experiences as a platoon leader who wanted to protect his patrol in much the same way he "protected" the unharmed hostages.²²⁶ In addition, in the bank, his guilt caused him to point his gun at himself and to talk about suicide.²²⁷ Under the court's order Stephen Gregory was put on probation and was required to receive treatment for PTSD.²²⁸

Cases such as *Tindall* and *Gregory* illustrate that PTSD can govern behavior in ways other than the typical "combat flashback." The subtleties of the impact of PTSD on client behavior create an obligation upon attorneys who represent Vietnam veteran clients to take particular care before rejecting a possible PTSD connection as an explanation for client behavior.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.* at 23.

²¹⁹ Milstein & Snyder, *supra* note 6, at 87.

²²⁰ See *supra* note 212.

²²¹ State v. Gregory, No. 19205 (Cir. Ct. Montgomery County, Md. 1979).

²²² See *infra* text accompanying notes 318-19.

²²³ *Id.*

²²⁴ "Traumatic War Neurosis," DISCHARGE UPGRADE NEWSLETTER (March 1979) (Published by Veterans' Education Project, Wash., D.C.).

²²⁵ See testimony of Dr. Steven Sonnenberg, State v. Gregory, No. 19205 (Cir. Ct. Montgomery County, Md. 1979), excerpt of testimony from March 2, 1979, at 8.

²²⁶ *Id.* at 10.

²²⁷ *Id.*

²²⁸ See *infra* text accompanying notes 319-42.

C. Other Applications of PTSD at Trial

The previous examples of trials in which PTSD was introduced were all based upon the use of PTSD as part of the affirmative defense of insanity.²²⁹ It would be incorrect, however, to conclude that the insanity defense is necessarily the most appropriate method for raising PTSD in a litigation context. Moreover, the continuing attacks on the insanity defense may reduce its utility in the future. For example, at this point, one state has "outlawed" the insanity defense,²³⁰ several others have introduced guilty but mentally ill verdicts,²³¹ and other jurisdictions have shifted the burden of proof to the defendant.²³² Even the American Bar Association (ABA) and the APA and the AMA have suggested substantial alterations in the insanity standard.²³³

In addition to any changes in the defense itself, an attorney who considers asserting an insanity defense must not ignore tactical limitations that are implicit in the defense. For example, the general hostility to the insanity defense may make jury selection very difficult.²³⁴ Furthermore, many jurors may be particularly unsympathetic to Vietnam veterans.²³⁵ Also, in spite of the public furor over the verdict in the trial of would-be assassin John Hinckley, it is not always clear that defendants found not guilty by reason of insanity are substantially better off than those convicted. Often, defendants will merely be involuntarily hospitalized rather than be imprisoned.²³⁶ Once hospitalized or incarcerated, there is no guarantee that the client will be treated for PTSD.²³⁷ In addition, the stigma of being found not guilty by reason of insanity is no small burden for veterans who already feel ostracized by society to bear. In light of these built-in limitations in the insanity defense, it may be necessary to consider other alternatives for presenting PTSD.

Even in states where the insanity defense, *per se*, has been eliminated, the necessity of proving the mental element of crime remains.²³⁸ Because mental state or *mens rea*, is an essential element of the definition of crime,²³⁹ PTSD may be a factor in the proof of the

²²⁹ See *supra* notes 133-85.

²³⁰ IDAHO CODE § 18-207 (1979 & Supp. 1983).

²³¹ ILL. ANN. STAT. ch. 38 § 6-2(c) (Smith-Hurd 1972-1982 PP.); IND. CODE § 35-35-1-1 (1981); MICH. COMP. LAWS ANN. § 768.20a (1975).

²³² MINN. R. CRIM. P. 20.02 subd. 6(5)(b). See also *Stader v. State*, 453 N.E.2d 1032 (Ind. 1983).

²³³ See generally *ABA Policy on the Insanity Defense*, Approved by The House of Delegates, Feb. 9, 1983. See also *Insanity Defense Reexamined*, 22 SCIENCE 994 (1983).

²³⁴ Counsel in *People v. Wood* carried out extensive pre-trial interviews to determine community attitudes regarding the defendant's psychological condition and his ability to control behavior. The survey resulted in a motion requesting the judge to ask particular questions that would reveal juror attitudes about these issues. *People v. Wood*, No. 80-7410 (Cir. Ct. Cook County, Ill. May 5, 1982). The problems of jury selection may be even more difficult in light of the public outcry following the jury verdict in *United States v. Hinckley*, 672 F.2d 115 (D.C. Cir. 1982). Jurors, for example, may wish to avoid the sort of recrimination directed at the *Hinckley* jury.

²³⁵ For a discussion of public perceptions of Vietnam veterans, see MYTHS AND REALITIES: A STUDY OF ATTITUDES TOWARD VIETNAM ERA VETERANS, prepared by Louis Harris and Assoc. for the V.A. (July 1980).

²³⁶ See *United States v. Hinckley*, 672 F.2d 115 (D.C. Cir. 1982). See also *It's Just Gonna Be Insanity: Tears, Anger, and Remorse at the Trial of John Hinckley*, TIME, May 24, 1982, at 31; *Insane on All Counts: After Torturous Deliberations, A Jury Acquits John Hinckley*, TIME, July 5, 1982, at 22; *Is The System Guilty? A Stunning Verdict Puts the Insanity Defense on Trial*, TIME, July 5, 1982, at 26.

²³⁷ In *Heads*, even after the verdict of not guilty, Mr. Heads was not admitted to treatment. Jack, *supra* note 6, at 19.

²³⁸ IDAHO CODE § 18-207(c) (1983 Supp.). See generally Erlinder, *Mens Rea Due Process and the Supreme Court: Toward a Doctrine of Substantive Criminal Law*, AM. J. CRIM. LAW 163 (1981); Milstein & Snyder, *supra* note 6.

²³⁹ See Erlinder, *supra* note 238, at 165.

necessary "mental element" of an offense. For example, a specific intent crime such as attempted murder, which usually requires the specific intent to kill the victim, may be attacked by demonstrating that the defendant's actions resulted from PTSD, not from an intention to kill the victim.²⁴⁰ Alternatively, in jurisdictions which recognize other psychological defenses, such as diminished capacity, PTSD has obvious importance.²⁴¹ Even in cases in which the defendant does not meet the definition of insanity, a reduction in criminal culpability is possible and should be explored.²⁴²

Another possible legal theory to which PTSD may be relevant is self defense. The Model Penal Code would allow the defendant to demonstrate that his or her responses were subjectively reasonable.²⁴³ The use of PTSD in this context might parallel that of the "battered spouse syndrome" that has been used to explain a female defendant's violent acts towards her spouse.²⁴⁴ It may be possible to show that a particular type of provocation caused a PTSD-type reaction in which the defendant felt attacked and responded involuntarily or even reasonably given his or her experiences. In this circumstance, the existence of PTSD would again make the whole of a defendant's life relevant to show his state of mind at the time of the occurrence.²⁴⁵

Perhaps the most likely alternative theory for the introduction of PTSD at trial lies in the well accepted, but little used defense of automatism. Automatism is grounded in the notion that "a person who, though capable of action, is not conscious of what he is doing" cannot be criminally liable.²⁴⁶ Unlike insanity, automatism is not necessarily grounded in mental illness,²⁴⁷ and commitment issues are not raised in its presentation.²⁴⁸

The theory of automatism arises from the historically-required-volitional act, a necessary element of *any* criminal conviction.²⁴⁹ Although some cases refer to automatism as relating to the mental state of the defendant,²⁵⁰ the defense is more properly understood

²⁴⁰ Schulz, *supra* note 4. For example, in *State v. Marshall*, No. 83-214-CF-A-01 (Cir. Ct. Sarasota County, Fla. 1983), the jury returned a verdict of second degree, rather than first degree, homicide. PTSD had been raised as a defense at the trial. The result of conviction of this lesser offense was that the punishment was incarceration, rather than capital. *Id.*

²⁴¹ The concept of "diminished capacity" as a defense was central to the outcome of the trial of former Black Panther Huey Newton. *See People v. Newton*, 8 Cal. App. 3d, 87 Cal. Rptr. 394 (1970). PTSD may also be a causative factor in reducing culpable mental state. *See People v. Lisnow*, 88 Cal. App. 3d Supp. 21, 151 Cal. Rptr. 621 (1978).

²⁴² *See* Schulz, *supra* note 4, at 2404.

²⁴³ The Model Penal Code, for example, suggests only that an actor "believes" that the use of force is necessary. MODEL PENAL CODE § 3.04(1). *See generally* W. LAFAVE & A. SCOTT, CRIMINAL LAW, § 53, at 393-94 (1972). For a discussion of a subjective theory of self-defense as applied to women, see E. BOCHNAK, WOMEN'S SELF DEFENSE CASES (1981).

²⁴⁴ *See Ibn-Tamas v. United States*, 407 A.2d 626, 634-35 (D.C. 1979). In another case, the Supreme Court of the state of Washington struck down a jury instruction which prevented the jury from considering self defense "in light of all of the circumstances." *See State v. Wanrow*, 88 Wash. 2d 221, 559 P.2d 548 (1977).

²⁴⁵ *See supra* notes 243-44, and *supra* notes 133-50 and accompanying text.

²⁴⁶ F.A. WHITLOCK, CRIMINAL RESPONSIBILITY AND MENTAL ILLNESS 119 (1963). *See* D.A. Apostle, *The Unconscious Defense as Applied to Post Traumatic Stress Disorder*, 8 BULL. AABL 426, 1980, at 429.

²⁴⁷ *See generally* W. LAFAVE & A. SCOTT, CRIMINAL LAW 644 (1983).

²⁴⁸ *Carter v. State*, 376 P.2d 351, 358 (Okla. Cir. 1962).

²⁴⁹ *See* MODEL PENAL CODE § 62.01 (Comment, text draft No. 4, 1955). For a discussion of the constitutional and historical basis for the actus reus requirement, see Erlinder, *supra* note 238, at 166-75.

²⁵⁰ *People v. Lisnow*, 88 Cal. App. 3d Supp. 21, 26-27, 151 Cal. Rptr. 621, 624 (1978).

as the absence of a volitional act because the body movement in question is not voluntary.²⁵¹

There is substantial support for the assertion of automatism in both statutory²⁵² and case authority.²⁵³ It has been described clinically as resulting from conditions such as epileptic and post epileptic states,²⁵⁴ "clouded states of consciousness associated with organic brain disease, concussion states following head injuries, and less commonly, in some types of schizophrenic and acute emotional disturbance."²⁵⁵

In at least one case, *People v. Lisnow*, an appellate court has ruled that the failure to allow testimony regarding automatism or unconscious acts in an early PTSD-type case was reversible error.²⁵⁶ In *People v. Lisnow*, the appellate department of the Superior Court, Los Angeles County, held that the trial court had erred in refusing to allow evidence of automatism and evidence regarding Vietnam in a battery case involving a Vietnam veteran.²⁵⁷ According to the court, the defendant struck a maitre d' in a restaurant for "no apparent reason."²⁵⁸ He then went into the parking lot and engaged in other, unspecified "acts of violence."²⁵⁹ At trial the defendant testified that he had experienced lapses of memory and "dream like" experiences since returning from Vietnam in 1968. He also testified that he attributed these conditions to his service in Vietnam and that he had been receiving therapy for this condition.²⁶⁰

A VA psychiatrist testified that the defendant had no memory of the incident and was in a dissociative fugue-like state brought on by traumatic neurosis due to combat. The defendant was "reliving a particular combat experience he had in Vietnam."²⁶¹ The psychiatrist also testified that the dissociative or fugue-like state would cause a person to be unaware of his behavior.²⁶² The trial judge struck the testimony of the psychiatrist and instructed the jury to disregard it.²⁶³ He also instructed the jury to disregard the defendant's testimony about Vietnam.²⁶⁴ The court's reasoning was apparently grounded in the misapprehension that the existence of a mental disorder, traumatic neurosis, precluded a defense based in unconsciousness.²⁶⁵

The appellate court reviewed cases where the relationship between soundness of

²⁵¹ See discussion of the "act" requirement in W. LAFAVE & A. SCOTT, *supra* note 243, at 177 (1972).

²⁵² ARIZ. REV. STAT. ANN. § 13-201 (1983) (requiring a voluntary act for criminal culpability); IDAHO CODE ANN. § 18-201(2)(1983) (persons committing acts without being conscious of the actions are not capable of committing crimes); NEV. REV. STAT. § 194.010(6); OKLA. STAT. ANN., Tit. 21 § 152(6); S.D. CODE LAWS § 22-3-1(5).

²⁵³ Gov't of the Virgin Islands v. Smith, 278 F.2d 169, 171-75 (3d Cir. 1960) (epilepsy); *People v. Freeman*, 61 Cal. App. 2d 110, 112-17, 142 P.2d 435, 436-40 (1943) (same); *Fain v. Commonwealth*, 78 Ky. 183, 184-93 (1879) (somnambulism).

²⁵⁴ F.A. WHITLOCK, *supra* note 246, at 120. See also *Gov't of Virgin Islands v. Smith*, 278 F.2d 169, 171 (3d Cir. 1960); *People v. Freeman*, 61 Cal. App.2d 110, 112, 142 P. 2d 435, 436-37 (1943).

²⁵⁵ F.A. WHITLOCK, *supra* note 246, at 120. See also F.L. WILLIAMS, AUTOMATISM, ESSAYS IN CRIMINAL SCIENCE (Mueller ed. 1961).

²⁵⁶ *People v. Lisnow*, 88 Cal. App. 3d Supp. 21, 26-27, 151 Cal. Rptr. 621, 623 (1978).

²⁵⁷ *Id.* at 23, 151 Cal. Rptr. at 622.

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.* at 24, 151 Cal. Rptr. at 622.

²⁶⁵ *Id.* at 25, 151 Cal. Rptr. at 623.

mind and the unconsciousness defense was raised.²⁶⁶ The court looked to *People v. Wetmore*²⁶⁷ for an analysis that would resolve the apparent division of authority on this issue.²⁶⁸ The court noted that *Wetmore* required that evidence of a defendant's mental state be admitted at the stage in a trial when criminal liability must be established.²⁶⁹ According to the *Lisnow* court, the requirement that both intent and additional act be proved by the state implied that a defendant should be able to introduce evidence of unconsciousness to negate culpability irrespective of the cause of the unconscious state of mind.²⁷⁰

As the above cases demonstrate, PTSD may be applied in criminal litigation in a number of different ways. In any of these contexts, however, it is crucial that an attorney present a thorough and detailed body of evidence to advance any PTSD-related legal theory. To assist practitioners confronted with the task of gathering evidence to support an argument based on PTSD, the next section of this article examines some of the concerns which must be addressed as an attorney prepares to try a PTSD case.

III. STRATEGY AND TACTICS IN PTSD LITIGATION

Because PTSD is attributable to specific, identifiable incidents which are external to the individual,²⁷¹ it is possible to describe in a logical, and detailed manner, the events which support the conclusion that PTSD is a determinative factor in client behavior.²⁷² If the diagnosis is accurate, a mental health professional should be able to point to objective data regarding the defendant's behavior before and after the traumatic event which would lead to the conclusion that PTSD is present.²⁷³ It should also be possible to point to specific aspects of the traumatic experience itself which would logically lead to the conclusion that the behavior at issue at trial was a product of the traumatic experience.²⁷⁴ This aspect of the expert testimony is obviously crucial and may require the services of a specialist who has made a study of PTSD.²⁷⁵

A survey of cases, in which factfinders have concluded that a defendant should not be held responsible for criminal conduct, reveals that these cases have in common the detailed presentation of events from four distinct periods of the defendant's life:

- a) the period preceeding the traumatic event in which there is little evidence of anti-social behavior or psychological impairment;
- b) the traumatic event itself in which the defendant's experiences in Vietnam are explained in great detail;
- c) the period following the traumatic event during which behavioral changes are observed;
- d) the exact circumstances of the offense in which similarities to the traumatic event are described and explained.²⁷⁶

²⁶⁶ *Id.* at 25, 151 Cal. Rptr. at 623-24.

²⁶⁷ 22 Cal. 3d 318, 149 Cal. Rptr. 265, 583 P.2d 1308 (1978).

²⁶⁸ *People v. Lisnow*, 88 Cal. App. 3d Supp. 21, 151 Cal. Rptr. 621 (1981).

²⁶⁹ *Id.* at 25, 151 Cal. Rptr. at 623-24.

²⁷⁰ *Id.*

²⁷¹ See *supra* text accompanying notes 19-64.

²⁷² See *supra* text accompanying notes 129-85.

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ PTSD is often misdiagnosed. See *supra* text accompanying note 7. See also *Miller v. State*, 338 N.W.2d 673 (S.D. 1983) and Ford, *supra* note 6, at 438.

²⁷⁶ These are conclusions of the author based upon a study of the presentation of evidence in several unreported PTSD cases, including the cases described in this article.

In the cases in which defendants have been found not to be responsible for their conduct, the events from each of these periods have been used as the basis for a diagnosis by mental health experts and have been corroborated by evidence from sources independent of the defendant.²⁷⁷

The periods before and after Vietnam are often described by co-workers, family members, friends, or a spouse and may be documented by various records including school records, military records, criminal or arrest records where they exist and hospital records. The goal is to corroborate with objective evidence all of the factual data upon which the diagnosis is based and to demonstrate the changes in behavior that followed the Vietnam experience.²⁷⁸ Failure to introduce this evidence will leave the expert's diagnosis open to attack on the grounds that it is the result of self-serving statements by the client.²⁷⁹

Once the diagnosis of PTSD has been established the remaining question to be resolved is whether the defendant's functioning was so impaired to the extent that a reduction in liability or penalty is warranted under the laws of the jurisdiction.²⁸⁰ Because PTSD does not effect all Vietnam veterans, and because the severity of PTSD reactions varies from individual to individual depending on their particular ability to cope with the traumatic events to which they were exposed, most successful PTSD defenses have presented very detailed descriptions of the Vietnam experience of the individual in question and an extensive analysis of the factors surrounding the criminal conduct.²⁸¹ Typically, these descriptions of the Vietnam experience and the details of the circumstances surrounding the crime will allow an expert in PTSD to explain quite logically both the similarities between the emotional or environmental circumstances at the time of the crime and those experienced by the veteran in Vietnam.²⁸² The expert may also establish the relationship between the stimulus of the criminal conduct and the behavioral responses to such stimuli learned and internalized during the defendant's Vietnam experience.

The need to make these links between the circumstances surrounding the offense and the particular experiences of the defendant in Vietnam requires meticulous examination and presentation of facts. These crucial facts, however, may be difficult to discover. Details of the offense and the circumstances leading to the offense may or not be available from the defendant. Even if a defendant is capable of recalling these events a prudent practitioner should corroborate all potentially relevant facts through other witnesses or records.²⁸³

A more difficult problem arises in attempting to "re-create" the Vietnam experience. Often veterans will consciously remember only fragments of their Vietnam experience and many important events will be suppressed entirely.²⁸⁴ In addition, it is fairly common for veterans to deny vociferously any connection between their criminal conduct and their service experience in order to avoid the further stigma of mental illness or the pain of recollection.²⁸⁵ As a result, it is imperative that attorneys make every attempt to recon-

²⁷⁷ See *supra* text accompanying notes 77-182.

²⁷⁸ *Id.* See also Ford, *supra* note 6, at 437.

²⁷⁹ See Raifman, *Problems of Diagnosis and Legal Causation in Courtroom Use of Post-Traumatic Stress Disorder*, 1 BEHAV. SCI. & LAW, No. 3, at 115 (1983).

²⁸⁰ See *supra* text accompanying notes 118-228.

²⁸¹ See *supra* text accompanying notes 129-228.

²⁸² *Id.*

²⁸³ *Id.* See Raifman, *supra* note 279, at 127.

²⁸⁴ See text accompanying note 162, *supra*. See also Ford, *supra* note 6, at 437.

²⁸⁵ The problem of veteran denial of PTSD is evident in *State v. Serrato*, 424 So. 2d 214 (La.

struct the defendant's experience and to help the veteran through the process of dredging up the past in a manner that will be both productive and therapeutic. These methods may include counselling or hypno-therapy for the veteran and extensive research by the attorney about the conditions of service in Vietnam.²⁸⁶ In addition to working with the client, it is possible to reconstruct much of a veteran's service record through military records and through other veterans. Although many records from Vietnam were originally classified and some remain so,²⁸⁷ it is possible to obtain reports such as:

- a) service and military medical records;
- b) operational reports of major campaigns;
- c) unit reports and day-by-day logs of various units;
- d) records of VA benefits or claims;
- e) news reports published contemporaneously with the war in U.S. newspapers;
- f) maps of terrain and photographs.²⁸⁸

In some cases, films about Vietnam and films about PTSD have been admitted to illustrate the basis for an expert's opinions.²⁸⁹ Photos, maps and other visual aids have also been used to explain the reality of the defendant's experience.²⁹⁰

Perhaps the most crucial factor in the presentation of the Vietnam experience is the description of the conditions of service by other veterans who served with the defendant. In virtually every case in which the defense has resulted in a reduction of liability or punishment, the defense was able to call to the stand other veterans who could paint in graphic detail the experiences they shared with the defendant.²⁹¹ This testimony has the

1983). In *Serrato*, two psychiatrists testified that the original diagnosis of the defendant by one of the psychiatrists was incorrect because the defendant had denied PTSD symptoms. *Id.* at 223 n.9. The second psychiatrist made the correct diagnosis and both psychiatrists agreed that the defendant's conduct was PTSD-related. *Id.* at 223. In spite of this testimony the trial court and the Louisiana Supreme Court rejected the defendant's argument that discovery of the PTSD connection required a new trial. *Id.*

²⁸⁶ See *supra* note 162.

²⁸⁷ In *State v. Jensen*, No. CR 75687 (Maricopa County, Ariz. 1983), defense counsel learned that the defendant's combat records in Cambodia were not available until 1977, and some records are still classified. Conversation with Victor Aronow, Esq., Counsel for Defendant, Jan. 19, 1984.

²⁸⁸ These documents and descriptive materials are admissible under three major evidentiary theories: (1) a defendant's military records may be admitted under the business records exceptions to the hearsay rule, see *McCORMICK ON EVIDENCE* 304-14 (1977); (2) records relating specifically to a defendant's military or medical history are relevant as the basis for expert testimony, see *McCORMICK ON EVIDENCE* 304-14 (1977); (3) photographs, diagrams and maps are demonstrative evidence which can be used by a witness to better explain his testimony, see *McCORMICK ON EVIDENCE* 304-14 (1977).

²⁸⁹ Jack, *supra* note 6, at 8.

²⁹⁰ In *People v. Wood*, No. 80-7410 (Cir. Ct. Cook County, Ill. May 5, 1982), the defense team used snapshots from the defendant's album, operational maps of Vietnam and visual aids to describe PTSD, the Vietnam experience and the conditions which gave rise to the PTSD reaction.

²⁹¹ In every case in which a PTSD defense resulted in a reduction in penalty or liability, testimony about Vietnam from other veterans played an important role in the trial. See *supra* notes 129-210.

In several recently reported cases, evidence of the details of the Vietnam experience was not introduced at trial and the defendants were convicted as charged in jury trials. See *United States v. Crosby*, 713 F.2d 1066 (5th Cir. 1983); *United States v. Burgess*, 691 F.2d 1146 (4th Cir. 1983); *Stader v. State*, 453 N.E.2d 1032 (Ind. 1983); *State v. Sharp*, 418 So. 2d 1344 (La. 1983); *State v. Felde*, 422 So. 2d 370 (La. 1983); *State v. Simonson*, 100 N.M. 297, 669 P.2d 1092 (1983); *Nash v. State*, 651 N.W.2d 432 (Tex. 1983).

In *United States v. Burgess*, 691 F.2d 1146 (4th Cir. 1983), evidence of the Vietnam experience

effect of corroborating the facts upon which the diagnosis was based and helping the factfinder to understand how it felt to be in the Vietnam war, thus establishing the connection between Vietnam service and the behavior during the offense.²⁹²

Although this evidence may be very beneficial, it may be the most difficult to develop. Often defendants will not have seen their comrades in arms for over ten years. In Vietnam, nicknames were common and home-towns were not always mentioned. Although this is true of military service generally, this is particularly true of the Vietnam experience because most soldiers served in Vietnam for less than one year and the composition of each unit changed regularly. As a result, few soldiers maintained ties with each other or veterans' organizations when they returned home.²⁹³ Nevertheless, a number of attorneys have devised rather ingenious methods for tracking down their clients' compatriots including publishing ads in veterans' magazines, making use of VA facilities for contacting veterans who have received benefits, culling operational reports, searching phone books, making use of veterans' organizations, securing the help of a local congressional office, working with the local Vet's Center counselors and contacting the Veterans' Law Center in Washington, D.C. for advice or research.²⁹⁴

Other aspects of PTSD cases which may require particular attention by attorneys include jury selection and treatment concerns.²⁹⁵ While no unitary theory of jury selection can be advocated at this point, several practitioners have suggested that developing a profile for jury selection is an extremely important part of the litigation.²⁹⁶ It has been suggested that the persons who were of draft age during the Vietnam War or persons who had close personal attachments to persons of draft age may be the most appropriate jurors.²⁹⁷ Even jurors who express skepticism or hostility about PTSD may, in fact, be good jurors, if they fit the previously mentioned criteria. A proper presentation of PTSD will not require general acceptance of PTSD, rather it will require a determination of whether the facts presented in a *particular* case support the diagnosis for a *particular* veteran. It should also be noted that at least one practitioner has commented that she was surprised to discover that her assumption that Vietnam vets would be viewed unsympathetically by the public at large may have been incorrect.²⁹⁸ The experience of the attorneys in *State v. Cohea*²⁹⁹ was that a substantial portion of the venire was aware of the psychological problems experienced by Vietnam veterans and also felt that Vietnam

was saved for rebuttal on the theory that it would rebut any inference that the defendant was lying about the Vietnam experience. *Id.* at 1115-52. The trial court refused to allow the testimony, however, because the prosecution did not directly challenge the defendant's veracity. As a result, the most graphic sort of evidence available to the defense never was admitted. *Id.* *Burgess* demonstrates one reason that the entirety of the defense case should be presented to support the diagnosis.

²⁹² See *infra* text accompanying notes 304-11.

²⁹³ A survey of the attorneys who have litigated PTSD cases conducted by the author shows that locating other veterans can often be very difficult but is essential to properly present the case.

²⁹⁴ The techniques mentioned are a composite of investigatory approaches used by the author in preparing *People v. Wood*, and methods use by attorneys interviewed by the author. See also *supra* note 162 (discussing the use of hypnosis in stimulating recall of the Vietnam experience).

²⁹⁵ See Jack, *supra* note 6, at 12-13 and 17-18.

²⁹⁶ For suggested techniques in jury instructions see C. BOARDMAN, JURY WORK (1983) (a publication of the National Jury Project).

²⁹⁷ Jack, *supra* note 6, at 14. Telephone interview with Joyce Ladar, Esq., attorney for Charles Cohea, San Francisco, Cal., Jan. 27, 1984.

²⁹⁸ Telephone interview with Joyce Ladar, Esq., attorney for Charles Cohea, San Francisco, Cal., Jan. 27, 1984.

²⁹⁹ No. 1 Crim. 21566 (Sup. Ct. Contra Costa County, Cal. Nov. 1983).

veterans may have been treated unfairly. Moreover, in several cases, Vietnam veterans were accepted as jurors in spite of their initial hostility to PTSD, because of their enhanced ability to understand the conditions in Vietnam.³⁰⁰

Finally, practitioners should be aware that an unspoken issue may be the amenability of the defendant to treatment.³⁰¹ It may be difficult for judges or jurors to absolve a defendant of liability without a clear understanding that PTSD is an eminently treatable condition.³⁰² In explaining what PTSD is and how it is manifested, it may be wise to describe the effectiveness of the treatment offered through the VA and other sources and to make clear that PTSD is a psychological condition that could happen to anyone who has experienced an extremely traumatic event. Failure to do so may create the inaccurate impression that veterans are fundamentally different from others or that veterans experiencing PTSD symptoms are incurable and thus a continuous threat. Indeed, once a veteran discovers the source of his or her psychological difficulties and receives counseling, a reduction in symptoms is common.³⁰³

A case which provides a graphic example of the effects of a failure to insure that the jury completely understand the effects of PTSD and the failure to introduce specific details of the Vietnam experience is *State v. Felde*.³⁰⁴ Mr. Felde is a Vietnam veteran who was convicted of the murder of a police officer by a jury and was sentenced to death.³⁰⁵ Extensive expert testimony regarding the validity of PTSD as a diagnostic category and its effect on Wayne Felde was introduced at trial, but no evidence of the Vietnam experience was introduced to establish the relationship between Vietnam service and the shooting incident.³⁰⁶ On appeal, defense counsel made clear that other veterans who served with Mr. Felde were not located until after the trial.³⁰⁷

³⁰⁰ *People v. Wood*, No. 80-7410 (Cir. Ct. Cook County, Ill. May 1982); *People v. Cohea*, No. 1 Crim. 21566 (Sup. Ct. Contra Costa County, Cal. Nov. 1983). In *People v. Wood*, for example, the author and the defense team agreed to accept a Vietnam veteran juror who vociferously objected to the validity of PTSD. During trial, the juror began to evidence his own PTSD symptoms during the trial testimony about Vietnam. A similar strategy was reported to the author by attorneys Wellborn Jack, Esq. and Joyce Ladar, Esq., attorneys for Charles Heads and Charles Cohea. See *supra* notes 129-50, 299, and *infra* notes 386-87 and accompanying text. See also *infra* note 301.

³⁰¹ This is a conclusion of the author based upon interviews with jurors and prospective members of the venire. The author gratefully acknowledges the assistance of the National Jury Project, Minneapolis, Minn., for their assistance in framing a juror interview strategy which revealed underlying juror attitudes. Because not all jurors have personally experienced Vietnam and because PTSD is, in fact, a psychological condition that may affect anyone, it is tactically unwise to suggest that PTSD is a condition that is limited to Vietnam veterans, or that all veterans suffer from PTSD. The jury must understand that PTSD arises from many sorts of traumatic events so that they can identify their own reactions to trauma, if not to the particular sort of trauma experienced by the defendant. No juror should ever be left with the erroneous impression that all veterans suffer from PTSD or that the reactions are identical. The presentation of the case should be particularized to the experiences of the individual on trial.

³⁰² See Ford, *supra* note 6, at 440.

³⁰³ See generally *Towards an Understanding of Post-Traumatic Stress Disorders Among Vietnam Veterans*, Testimony of Dr. John Wilson before the U.S. Senate Subcommittee on Veterans' Affairs, Mar. 21, 1980.

³⁰⁴ 422 So. 2d 370 (La. 1982).

³⁰⁵ *Id.* at 375.

³⁰⁶ *Id.* at 376. See *supra* notes 276-79 and accompanying text for a discussion on the importance of presenting evidence that links Vietnam service and the criminal incident.

³⁰⁷ *State v. Felde*, 422 So. 2d 370, 396 (La. 1982). The conviction and sentence of defendant Felde were affirmed. *Id.* at 398.

Some indication of the significance of this missing evidence may be seen in the moral turmoil revealed in a statement made by the jury foreperson when rendering the verdict:

We, the jury recognize the contribution of our Vietnam veterans and those who lost their lives in Vietnam. We feel that the trial of Wayne Felde has brought to the forefront those extreme stress disorders prevalent among thousands of our veterans.

We have attempted through great emotional and mental strain to serve and preserve the judicial branch of our government by serving on this Jury. This trial will forever remain indelibly imprinted on our minds, hearts and consciences.

Through long and careful deliberation, through exposure to all evidence, we felt that Mr. Felde was aware of right and wrong when Mr. Thompkin's life was taken. However, we pledge ourselves to contribute whatever we can to best meet the needs of our veterans.³⁰⁸

Apparently the jury was deeply moved by the evidence of the experience of Vietnam veterans in general but was unconvinced that Wayne Felde's conduct was governed by his reactions to Vietnam. Perhaps a detailed analysis of his Vietnam experience would have made it possible for the jury to draw the parallels found in cases such as *Wood* and *Heads*.³⁰⁹

The difficulty experienced by attorneys in representing veterans suffering from PTSD can also be seen in *Felde*. After his conviction Wayne Felde was the only witness at his sentencing hearing.³¹⁰ At that hearing Mr. Felde asked the jury to help him by ending his life. The following is part of his statement to the jury:

All I can say to you all is. . . I would advise you to return the death penalty in this case. . . Keith Oliver, I know your cousin Joe Oliver. We were cell partners for about eight (8) months. . . Mr. Coker, I know one of your good friends, too, Tommy Strange. We picked this Jury and we picked them on intelligence. I consider all of you people intelligent so I hope you will take my advice, return the death penalty. . .

I think other deaths will result. . . And that's why I suggested it, to prevent it from happening. They would be on your conscience if you can't return it. Now, I'm not trying to put you all in a bad position but you are all taking other people's lives in your hands, along with mine, so I think you should return it. I don't think no more needs to be said, Mr. Thomas. They're upset. Thank you.

I'm not coming out and threatening anybody because that's not what it is. A walking time bomb, that's what it is. Somebody else will die as a result of it if I'm not put to death, I'm sure. It's happened twice in eight years. There's been ten years of proof shown to you. I don't know where it went so, please, return that. I think, as countrymen, you owe me that much. I did my part. Please do yours. Okay?³¹¹

His attorney argued that Wayne Felde should be given his wish. The jury complied.³¹²

The preparation and presentation of a case involving PTSD can be complicated.

³⁰⁸ *Id.* at 380.

³⁰⁹ See *supra* notes 129-85 and accompanying text.

³¹⁰ *State v. Felde*, 422 So. 2d 370 (La. 1982).

³¹¹ *Id.* at 394.

³¹² *Id.* at 375.

Nevertheless, the results of a methodical presentation of evidence to a court and jury can be extremely beneficial for a client. The benefits of a proper application of PTSD in a criminal case, however, are not limited to the raising of PTSD during trial. PTSD may be raised in a client's behalf in other contexts. The next section of this article explores the use of PTSD in two of those contexts: plea negotiations and alternative sentencing.

IV. APPLICATIONS OF PTSD

A. PTSD In Plea Negotiations

In addition to cases in which PTSD has been introduced at trial, there are several reported cases in which PTSD has played an important role in reaching agreement on treatment or sentencing.³¹³ As has been observed elsewhere, such agreements are far more likely in cases in which the defendant has not injured others.³¹⁴ Other factors, however, including the success of PTSD defenses, the existence of treatment programs and the defendant's background, are also likely to be conducive of a favorable settlement.³¹⁵

For example, in one Massachusetts case, weapons charges against a defendant were dropped completely.³¹⁶ A veteran who had entered a veteran's cemetery and had begun a frenzied incident, received treatment for PTSD and the charges against him were dismissed.³¹⁷ Another negotiated settlement occurred in a case in which a defendant had held hostages in a bank for several hours.³¹⁸ Although he was armed and had fired at a number of objects during the incident, no one was injured during the episode. In that case, a settlement was reached whereby the defendant was placed on probation.³¹⁹

The problem faced by veterans who plead guilty to an offense without having benefit of an evaluation for PTSD or a proper presentation of PTSD evidence in sentencing can be seen in a number of cases in which veterans have sought to withdraw earlier guilty pleas.³²⁰ In *Scarborough v. U.S.*,³²¹ for example, the defendant apparently filed a *pro se* post-conviction petition to vacate a plea entered prior to the publication of DSM III. The defendant asserted that he failed to raise an insanity defense because earlier doctors' reports failed to recognize his PTSD condition which was first diagnosed in 1981.³²² In rejecting the defendant's petition, the court revealed the importance of properly explaining the history of the development of the PTSD diagnosis. The court concluded that the differences between the PTSD diagnosis in 1981 and a Navy medical report from July 8,

³¹³ *State v. Gregory*, No. 19205 (Cir. Ct. Montgomery County, Md. Feb. 28, 1979); *Commonwealth v. Coughlin* (Mass.), discussed in *Agonies of Viet Battle Still Haunts Many Vets*, Chi. Sun-Times, May 10, 1981, at 38, col. 1.

³¹⁴ Milstein & Snyder, *supra* note 6, at 87.

³¹⁵ See *infra* notes 230-43 and accompanying text.

³¹⁶ Note, *supra* note 6, at 113 n.136 (citing accounts of the case published in the Boston Globe, Jan. 23, 1982, at 18, col. 3.)

³¹⁷ *Id.*

³¹⁸ *State v. Gregory*, No. 19205 (Cir. Ct. Montgomery County, Md. Feb. 28, 1979). For a detailed discussion of this case see *supra* notes 211-28 and accompanying text.

³¹⁹ Milstein & Snyder, *supra* note 6, at 87.

³²⁰ See generally *United States v. Lake*, 709 F.2d 43 (11th Cir. 1983); *Scarborough v. United States*, 683 F.2d 1323 (11th Cir. 1983); *State v. Pettit*, 104 Idaho 601, 661 P.2d 767 (1983); *State v. Spawr*, 653 S.W.2d 404 (Tenn. 1983); *Schmidt v. State*, 668 P.2d 656 (Wyo. 1983).

³²¹ 683 F.2d 1323 (11th Cir. 1983).

³²² *Id.* at 1324.

1969 describing the defendant as suffering from an "anxiety reaction to combat and recommending a medical discharge" was not a sufficient basis for overturning the trial court decision not to allow a competency evaluation.³²³

The *Scarborough* court also rejected the veteran's contention that he was unaware of the effects of his PTSD condition and that he was therefore denied an opportunity to raise an insanity defense.³²⁴ The language of the opinion reflects the lack of appreciation for the development of the scientific understanding of PTSD and also reveals the skepticism which the issue often engenders. The court stated:

Because of the existence of the 1969 medical report [of anxiety reaction to combat], we are not convinced that Scarborough only recently became aware of a possible defect in his medical condition. His Navy discharge sufficiently delineates the symptoms and causes of his combat stress and even suggests that the effects may be permanent. Although Scarborough and his attorney were aware of the report, no mention was ever made of a possible insanity defense.³²⁵

The court in *Scarborough* obviously missed the point. It was not until 1980 *at the earliest*, that either Scarborough, his attorney, or the psychiatrist who evaluated him in 1981, could have linked the criminal conduct to his Vietnam service under an accepted diagnostic category.³²⁶ Thus, *Scarborough*, also provides an example of the need to make a proper record to allow the court to evaluate the applicability of PTSD to a given set of facts.

The dissent in *Schmidt v. State*,³²⁷ further illustrates this point. In *Schmidt*, the Supreme Court of Wyoming upheld the trial court's denial of a post-conviction petition seeking to withdraw a guilty plea entered a few months after the publication of DSM III, but before a PTSD evaluation of the veteran had been made.³²⁸ In spite of an opinion of legal insanity by Dr. John Yost, one of the foremost experts in the study and treatment of PTSD, the majority refused to consider the new diagnosis as sufficient to set aside the plea.³²⁹ Justice Rose, in dissent, noted that the previous psychiatric evaluation had been conducted by psychiatrists who did not have Dr. Yost's extensive PTSD experience.³³⁰ Thus, until the evaluation was conducted by an expert who could identify PTSD and relate it to the criminal conduct, the defendant was not able to assert a meritorious defense.³³¹ Although Justice Rose did not mention that PTSD was so recently added to the psychiatric literature that it would be unlikely that psychiatrists not specially trained in the diagnosis would be able to properly evaluate a Vietnam veteran, he concluded that the withdrawal of the plea would be "fair and just."³³²

In contrast to *Scarborough*, in *State v. Spawr*, the Supreme Court of Tennessee when presented with an appeal of the sentence imposed by the trial court recognized that a subsequent PTSD diagnosis constituted grounds for remanding the case for another probationary hearing.³³³ The opinion contained a lengthy report from a psychologist who

³²³ *Id.* at 1325.

³²⁴ *Id.*

³²⁵ *Id.*

³²⁶ See *supra* text accompanying notes 66-102.

³²⁷ 668 P.2d 656 (Wyo. 1983).

³²⁸ *Id.* at 661.

³²⁹ *Id.* at 659-61.

³³⁰ *Id.* at 662 (Rose, J., dissenting).

³³¹ *Id.* at 663.

³³² *Id.* at 661.

³³³ 653 S.W.2d 404, 406 (Tenn. 1983).

had particular expertise in diagnosing and treating Vietnam veterans and who testified at the sentencing hearing.³³⁴ In spite of an apparently hostile trial judge, who asked witnesses that if the defendant had "shot your relative, would you be here making excuses for him,"³³⁵ the supreme court remanded the case for a new probationary hearing with a suggestion that if rehabilitation had been successful,³³⁶ probation, rather than incarceration, should be granted.

B. PTSD Treatment As An Alternative

Even after liability has attached, the relationship between PTSD and client behavior can have a substantial impact upon the sentence imposed by the court. Of course, the relationship between the criminal behavior and PTSD must be established before a judge is likely to take PTSD into account. Once that connection is made, however, treatment options become available.³³⁷ PTSD treatment as an alternative to incarceration or as a part of a reduced sentence has been applied to a variety of offenses including tax evasion,³³⁸ drug offenses,³³⁹ false imprisonment³⁴⁰ and assault.³⁴¹

A substantial step forward in the application of PTSD to sentencing issues was made when California enacted a statute in 1982 that expressly allowed judges to consider PTSD in sentencing and to mandate treatment alternatives when sentencing veterans.³⁴² Although specific references to treatment programs have been eliminated from the statute by a 1983 amendment, the statute is extremely important because it constitutes legislative recognition of the psychological and physical effects of Vietnam service. Thus, it provides an additional basis for arguing that judges should take PTSD into account and adds credence to both the existence of PTSD and the need to recognize special veteran problems caused by PTSD. This statute provides an excellent model for the enactment of

³³⁴ *Id.* at 405-06.

³³⁵ *Id.* at 406.

³³⁶ *Id.*

³³⁷ See *supra* note 344 and accompanying text.

³³⁸ *Id.* See also *United States v. Oldham*, 1P-82-280 Cr. (S.D. Ind. Dec. 1981).

³³⁹ See *United States v. Tindall*, Cr. No. 79-376 (D. Mass. Sept. 19, 1980).

³⁴⁰ See *State v. Gregory*, No. 19205 (Cir. Ct. Montgomery County, Md. Feb. 28, 1981).

³⁴¹ See *People v. Wood*, *supra* note 103.

³⁴² The 1982 statute had provided:

The Department of Corrections may enter into cooperative arrangements with the Veterans Administration Vet Centers, the California Department of Veterans' Affairs, the Department of Alcohol and Drug Programs and programs under its jurisdiction, and community-based veterans' organizations for the purpose of providing appropriate counseling and treatment for those defendants who are specified

Section 2 of Stats. 1982 C. 964 (1982).

The statute now states:

In the case of any person convicted of a felony who would otherwise be sentenced to state prison the court shall consider whether the defendant was a member of the military forces of the United States who served in Vietnam and who suffers from substance abuse or psychological problems resulting from that service. If the court concludes that the defendant is such a person, the court may order the defendant committed to the custody of federal correctional officials for incarceration for a term equivalent to that which the defendant would have served in state prison. The court . . . may make such a commitment only if the defendant agrees to such a commitment, the court has determined that appropriate federal programs exist, and federal law authorizes the receipt of the defendant under such conditions.

Cal. Penal Code § 1170.9 (1984).

similar statutes in other states. In addition, legislation has been proposed in at least two states that would require evaluations and treatment programs for veterans convicted of criminal offenses.³⁴³

The existence of a growing number of treatment facilities makes it possible to provide a range of options to the court, other than incarceration. Treatment facilities range from store front counselling centers to in-patient facilities.³⁴⁴ The task of counsel is to convince the court that treatment is likely to be successful and arrange the appropriate treatment as an alternative. A good example of the presentation of PTSD in sentencing can be seen in *State v. Gregory*.³⁴⁵ In *Gregory*, Elliot Milstein and David Addlestone of the Veterans Law Center presented an extensive pre-sentencing report that included psychiatric reports, military records and a full client history.³⁴⁶ Both a psychologist and psychiatrist testified as to diagnosis and treatment and a V.A. representative agreed to accept the defendant into a program.³⁴⁷

A similar problem confronts attorneys who have successfully asserted an insanity defense.³⁴⁸ Most jurisdictions have a commitment procedure to determine the proper treatment for those found not guilty by reason of insanity.³⁴⁹ The attorney's task in this setting is to develop a treatment plan that is suitable for his client. As mentioned earlier, the defendant in the *Wood* case was found not guilty by reason of insanity of attempted murder in the shooting of his foreman.³⁵⁰ In that case, at both the trial and commitment-hearing stage, counsel presented evidence that the shooting was an isolated violent act.³⁵¹ A psychiatrist from the Illinois Department of Mental Health testified that Mr. Wood was not dangerous and recommended out-patient treatment provided by the V.A.³⁵² Mr. Wood was released to receive counselling through a V.A. vet center near his home.³⁵³

V. POST-CONVICTION STRATEGIES

For veterans convicted of offenses before the inclusion of PTSD in the DSM III in 1980, it is unlikely that PTSD was ever raised either as a defense or at sentencing.³⁵⁴ For these veterans, or for those convicted after 1980 who had attorneys unfamiliar with

³⁴³ Commonwealth of Massachusetts, a petition, Senate No. 762 (accompanied by bill, Senate No. 762) (proposed by Sen. Jack Backman, 1983). Another bill is presently before the State Assembly in the California Legislature. Assembly Bill No. 3723 (introduced by Richard Floyd, Feb. 17, 1984). This bill is set forth in the Appendix.

³⁴⁴ Over 140 Veterans' Centers have been established by Congress in cities across the country to provide counseling for veterans and their families. P.L. 92-66. See *The Troubled Vietnam Vet*, *supra* note 24, at 24; *A Delayed Reaction: Vietnam Casualties at Home*, *supra* note 53, at 40. PTSD treatment centers have also been created at many veterans hospitals including residential programs. See H. Donder-shine, *supra* note 29, at 4.

³⁴⁵ No. 19205 (Cir. Ct. Montgomery County, Md. Feb. 28, 1979).

³⁴⁶ See generally Defense Pre-sentence Report, submitted in *State v. Gregory*, No. 19205 (Cir. Ct. Montgomery County, Md. Feb. 28, 1979) (available from the Veterans' Law Center, Wash., D.C.).

³⁴⁷ *Id.*

³⁴⁸ Milstein & Snyder, *supra* note 6, at 87.

³⁴⁹ In Illinois, for example, after a finding of not guilty by reason of insanity, a commitment hearing is held to determine what treatment is appropriate for the defendant. ILL. ANN. STAT. ch. 38 § 1005-2.4 (Smith-Hurd 1981).

³⁵⁰ See *supra* text accompanying note 169.

³⁵¹ *People v. Wood*, *supra* note 103 (reported by the author who was co-counsel in the case).

³⁵² *Id.*

³⁵³ *Id.*

³⁵⁴ See *supra* note 242 and accompanying text.

PTSD, strategies must be devised to raise PTSD in a context that will allow the criminal justice or penal system to take PTSD into account in determining the appropriate disposition of the case. Although there are no reliable figures on the number of Vietnam veterans who are incarcerated, the estimates range from a low of 49,000 to as many as 125,000.³⁵⁵ When the number of veterans on parole, probation or awaiting trial are added to those figures, the size of the problem is readily apparent.³⁵⁶

Presently, few programs exist for incarcerated veterans to receive counselling or treatment for PTSD while incarcerated.³⁵⁷ A notable exception is the Veterans In Prison Project administered by the V.A. hospital in Brentwood, California³⁵⁸ and efforts by the Wisconsin Public Defender's Office to provide a veteran liaison to identify veterans and help arrange treatment or counselling.³⁵⁹ A study of incarcerated veterans in Massachusetts found that they were far less likely to have had criminal backgrounds than the general prison population and that they experienced fewer adjustment problems in the institution.³⁶⁰ In the absence of institutional diagnosis, screening and treatment programs, however, it is not at all certain that incarcerated veterans will be able to identify their own difficulties as PTSD related, or that they will receive counselling.³⁶¹ Without such intervention, there is little to insure that PTSD related criminal problems will not be repeated. The best response to this situation is for attorneys and mental health professionals to develop strategies that will allow the corrections system, or the judiciary, to respond to the needs of veterans. These strategies would include presenting PTSD in parole hearings, in motions to reduce sentence, or even in post conviction petitions.

An example of the sort of petition that might be submitted in support of a parole plan that takes PTSD into account was prepared by attorneys from the Veteran's Law Center in a Virginia murder case.³⁶² In an extremely well documented presentation, the petition makes the important point that had PTSD been understood at the time of the offense, the outcome of the trial might have been different.³⁶³ In addition, it sets forth a description of PTSD with supporting footnotes, a complete history of the client, a description of the homicide incident, the client's prison history and a parole plan.³⁶⁴ The petition is supported by a psychiatrist's report which makes the PTSD diagnosis and includes a treatment plan, military records, family history, and post-Vietnam history.³⁶⁵

An example of a somewhat successful motion to reduce sentence may be found in *U.S. v. Krutschewski*,³⁶⁶ a case related to the *Tindall* case discussed earlier.³⁶⁷ The defendant

³⁵⁵ See May, *Inmate Veterans: Hidden Casualties of A Lost War*, 5 CORRECTIONS 3, 4 (1979). These figures reflect estimates made in the mid-1970's. *Id.*

³⁵⁶ As of 1974, 37,500 veterans were on parole, 250,000 veterans were on probation and 87,000 veterans were awaiting trial. *Presidential Review Memorandum on Vietnam Era Veterans*, H.R. REP. NO. 38, 96th Cong., 1st Sess. 32 (1979).

³⁵⁷ See May, *supra* note 355, at 6.

³⁵⁸ Telephone interview with Mr. Bruce Pentland, Director, Veterans in Prison Project (Mar. 8, 1983).

³⁵⁹ Telephone interview with Mr. David Niblack, Esq., Madison, Wis., Wis. State Public Defender (Mar. 9, 1983).

³⁶⁰ See May, *supra* note 355, at 6.

³⁶¹ *Id.*

³⁶² REPORT TO THE VIRGINIA PAROLE BOARD, NAT'L VETERANS' LAW CENTER, Wash., D.C., May 28, 1981 (available through Veterans' Law Center, 4900 Massachusetts Avenue, Wash., D.C., 20016).

³⁶³ *Id.* at 1.

³⁶⁴ *Id.* at 3-17, 28-34.

³⁶⁵ *Id.* at 37.

³⁶⁶ 541 F. Supp. 142 (1982). See Memorandum of Amicus Curiae, *The Vietnam Veterans of*

in *Krutschewski* was convicted of multiple drug-related charges and was sentenced to consecutive 5-year terms and a fine of \$60,000.³⁶⁸ The Vietnam Veterans of America, as *amicus curiae*, filed a memorandum in support of the motion that persuasively sets forth the argument that in the case of a veteran defendant an "appropriate" sentence must take both military service and PTSD into account as substantial mitigating factors.³⁶⁹ The trial judge in *Krutschewski*, was empowered to hear the defendant's petition for a modification of sentence pursuant to Rule 35 of the Federal Rules of Criminal Procedure.³⁷⁰ The success of the petition is demonstrated by the fact that the order issued by the court in response to the motion allowed the defendant to be paroled prior to serving the minimum one third of his sentence, as is usually required.³⁷¹

Because *Krutschewski* was a federal prosecution, Rule 35 provided the legal basis for filing the petition for a reduction in sentence. It should also be noted that *Krutschewski* was a case in which PTSD had been raised both at trial and at sentencing.³⁷² Thus, unlike many cases involving veterans, the relationship between PTSD and the criminal conduct had already been established.³⁷³ In jurisdictions where procedural devices analogous to Rule 35 exist, petitions which include diagnosis and treatment plans similar to the Veterans Law Center petition mentioned earlier may have some value. In many jurisdictions, however, procedural mechanisms, such as Rule 35, which would allow reconsideration of sentences or determinations of liability, may not be available.³⁷⁴

A possible strategy for allowing the court to consider the impact of PTSD in liability and sentencing may exist in creative uses of post-trial petitions or *habeas corpus* petitions.³⁷⁵ One potential basis for raising PTSD in a post-conviction context arises from the relatively recent inclusion of PTSD in the DSM III.³⁷⁶ The certification of PTSD as an identifiable psychological disorder may be presented in the nature of newly discovered evidence.³⁷⁷ Like a blood sample or fingerprint that defies classification until science develops sufficiently to understand its significance, the relationship between PTSD and criminal behavior could not have been introduced until after PTSD was identified.³⁷⁸

America, in *Support of Defendant's Motion for Reduction of Sentence*, filed in *United States v. Krutschewski*, 541 F. Supp. 142 (D. Mass. 1982).

³⁶⁷ Cr. No. 79-376 (D. Mass. Sept. 19, 1980). See *supra* notes 196-210 and accompanying text.

³⁶⁸ *United States v. Krutschewski*, 509 F. Supp. 1186, 1189 (D. Mass. 1982).

³⁶⁹ Memorandum of Amicus Curiae, *supra* note 366, at 3.

³⁷⁰ Fed. R. Crim. P. 35.

³⁷¹ *Id.*

³⁷² *Id.*

³⁷³ *Id.*

³⁷⁴ In Illinois, for example, the trial court loses jurisdiction 30 days after the last action taken. ILL. REV. STAT. Ch. 110A § 606(b) (Smith-Hurd 1976). As a result, motions for modification of sentence or motion for a new trial may not properly be heard in the trial court after that time. See, e.g., *People ex rel. Carey v. Scottillo*, 84 Ill. 20170, 417 N.E.2d, 356 (1981) and *People v. Carter*, 91 Ill. App. 3d 635, 415 N.E.2d 17 (1980).

³⁷⁵ Some suggested uses of *habeas corpus* petitions may be found in Note, *supra* note 6, at 115-17 (1979). These applications, however, focus primarily on fitness issues which may not be relevant in PTSD cases. See ILL. ANN. STAT. Ch. 38 § 122-1 *et. seq.* (Smith-Hurd 1982) for an example of post-conviction remedies.

³⁷⁶ For examples of successful post-conviction cases, see *infra* notes 380-392 and accompanying text.

³⁷⁷ See *infra* notes 380-384 and accompanying text.

³⁷⁸ For example, in *State v. Jensen*, the trial court granted the defendant's post conviction petition based directly upon such an analysis. No. CR-75687 (Super. Ct., Maricopa County, Ariz. Feb. 17,

This theory provided the basis for a post-conviction petition filed in a ten-year-old murder conviction in Arizona.³⁷⁹ In *State v. Jensen*, an unreported opinion, the Arizona Supreme Court granted the defendant's petition for post-conviction relief on the issue of PTSD as recently discovered evidence.³⁸⁰ The case was remanded to the trial court for a hearing concerning whether the failure to introduce PTSD at trial in 1973 would have had an effect upon the verdict or the sentence.³⁸¹ In that hearing the defense introduced testimony establishing that the defendant had suffered from PTSD at the time of the offense.³⁸² Further, the defense introduced testimony from several experts that tended to show that, prior to the publication of DSM III in 1980, a competent attorney would not have been able to establish the relationship between Vietnam service and criminal conduct.³⁸³ In addition, there was some indication that experts who testified at the original trial perceived psychological abnormalities related to Vietnam service. They were not able

1984) (Cantor, J.). Following a hearing lasting several days, the trial court entered the following findings of fact and conclusion of law:

This matter having been under advisement, the Court makes the following findings:

Based upon the testimony of Drs. Wilson, Yost, Williams and Gray and taking into consideration also the testimony of Drs. Tuchler and Cleary, the Court finds that the mental disorder known as Post Traumatic Stress Disorder (PTSD) is a new diagnostic category that did not exist in 1973; that the *Diagnostic and Statistical Manual*, Third Edition (DSM III) was the first recognized authority that defined this term and therefore the diagnosis of PTSD could not have been made in 1973. While there is an overlapping of the common terms as shell shock used after World War I and battle fatigue used after World War II, the Vietnam War period was a different type of war and that the stress to the military was of a more intense and different nature.

The Court further finds that more probably than not the defendant suffered from PTSD since 1973. This finding does not mean that the Court finds that the defendant is legally insane. This is to be determined by the jury or trier of the facts.

The Court finds from the testimony that more probably than not the defendant was in a dissociativelike state. The Court finds that the military records and history of the defendant were not available in 1973, that some were classified secret and others could not be obtained within the time of trial.

The Court finds that more probably than not the verdict or sentence might have been different if the records of the defendant, the diagnostic category of PTSD and the research as to this disorder had been presented to the jury in 1973.

Therefore, the Court makes the following conclusions of law:

Pursuant to Rules of Criminal Procedure, Rule 32.1, the Court finds that newly-discovered material facts exist; that the Court has considered the following:

The probability of such facts, if introduced, would have changed the verdict, finding or sentence; the diligence which would have been required to discover and produce the evidence; that the petitioner acted with promptness in commencing a proceeding after discovery of such new facts; that for the foregoing reasons,

The Court finds that the conviction and sentence should be vacated.

Id.

³⁷⁹ Petition for Post-Conviction Relief filed in *State v. Jensen*, No. Cr. 75687 (Maricopa County, Ariz. Feb. 7, 1983)[hereinafter cited as Petition in *State v. Jensen*].

³⁸⁰ Sup. Ct. Order No. 2908-2-PC (Sup. Ct., Ariz. Sept. 22, 1983). *But see* Miller v. State, 338 N.W.2d 673 (S.D. 1983) for a case in which post-conviction relief was denied.

³⁸¹ Sup. Ct. Order No. 2908-2-PC (Sup. Ct., Ariz. Sept. 22, 1983).

³⁸² See *supra* note 378. The author was called as an expert witness for the defense to describe how PTSD has been used in other cases. The hearing was held on January 16-19, 1984, and resulted in the conviction and sentence being vacated. *Id.*

³⁸³ *Id.*

to explain, however, the relationship between the Vietnam experience and the defendant's behavior at the time of the original proceeding.³⁸⁴

Alternatively, convictions of veterans that occurred after the promulgation of DSM III by the APA in which counsel failed to raise PTSD may be attacked on grounds that competent counsel should have investigated or presented PTSD.³⁸⁵ It can be argued that attorneys who represent veterans fail to provide adequate representation, if they fail to explore such a widespread disorder as PTSD. The competency-of-counsel argument was successful in overturning a 1979 conviction that was the subject of another unreported opinion. In *State v. Cohea*, a California appellate court granted a new trial based upon the defendant's assertion that the attorney at the previous trial in which the defendant had been convicted of murder had failed to explore the implications of his Vietnam experience.³⁸⁶ In 1983, the defendant was found guilty of manslaughter, a lesser offense in a jury trial in which evidence of PTSD was advanced to explain the defendant's behavior during the criminal act.³⁸⁷

In addition, many jurisdictions require courts to consider factors in mitigation and aggravation in reaching a sentencing decision.³⁸⁸ Arguably, a failure to consider PTSD as a factor either in determining liability or in sentencing may contravene the procedural rights of the defendant.³⁸⁹ An example of a case in which this strategy was successfully employed is *State v. Dobbs*.³⁹⁰ In *Dobbs*, attorneys for the defendant argued that failure to take PTSD into account in sentencing required a new sentencing hearing.³⁹¹ Following that hearing, the defendant's sentence was reduced from seven-and-a-half years of hard labor to the three years already served.³⁹²

It is important to emphasize that these arguments are intended to serve as a vehicle for raising the PTSD issue before the trial or appellate court. They are premised on the assumption that only after the court has had an opportunity to have a full description of all of the factors related to an offense that a just result can occur. In a very real sense, veterans affected by PTSD who have not had that fact presented either at trial or sentencing have not had their day in court. The above suggestions for appropriately raising PTSD-related issues on behalf of a client should not, however, at this time be considered definitive. Attorneys should consider other theories, or undertake legislative action to ensure that psychological evaluations and PTSD treatment be made available to all Vietnam veteran defendants.

³⁸⁴ *Id.*

³⁸⁵ Failure to introduce relevant evidence is often subject to constitutional challenge as a denial of effective assistance. ILL. ANN. STAT. ch. 38 § 122-1 (Smith-Hurd 1982). See also *People v. Edmonds*, 78 Ill. App. 3933, 398 N.E.2d 230 (1979) and *People v. Brown*, 35 Ill. App. 3d 315, 343 N.E.2d 525 (1976). While, as a matter of law, PTSD has probably not become so widely known that an attorney can be held liable for failing to present a PTSD defense, the issue may provide a basis for presenting evidence of PTSD to the trial court. See *supra* note 380 and accompanying text.

³⁸⁶ Court Order in *State v. Jensen*, No. 1 Crim. 21566, at 20-23 (Super. Ct. Contra Costa County, Cal. Nov. 1983).

³⁸⁷ Telephone interview with Joyce B. Ladar, Attorney for the Defendant Cohea, San Francisco, Cal. (Jan. 26, 1984).

³⁸⁸ See, e.g., ILL. ANN. STAT. ch. 38 § 1005-4-1 (Smith-Hurd 1982).

³⁸⁹ In some cases failure to consider evidence of medical or physical condition when presented to the court has proved grounds for a new hearing as to sentence. See *infra* notes 390-91 and accompanying text.

³⁹⁰ No. 105349 (16th Jud. Dist. Ct., St. Mary Parish, La. 1983).

³⁹¹ *Id.*

³⁹² Telephone interview with Barry Levin, Esq., attorney for Mr. Dobbs, Los Angeles, Cal. (Jan. 31, 1983).

CONCLUSION

Because the relationship between PTSD and client behavior is only beginning to be understood, the potential for creative and responsible applications of the disorder is great. If, as many experts predict, the incidence of PTSD is likely to increase over the next few years, both attorneys and mental health professionals will have to grapple with the practical and ethical problems created by this prevalent, war-induced psychological disorder. The costs of Vietnam service are far too great to be borne by veterans alone. A big step in accepting responsibility as a society for the price of that war is recognition of the psychological impact that Vietnam had on the men and women who served there, and application of this new understanding, when appropriate, to the disposition of criminal cases.

APPENDIX

This legislation, Assembly Bill No. 3723, introduced by Assemblyman Richard Floyd on Feb. 17, 1984, is presently pending before the California State Assembly.

[PREAMBLE/LEGISLATIVE INTENT]

The Legislature finds that comprehensive recent studies establish that the particular attributes of the Vietnam War produced significant emotional disabilities among a substantial number of the men and women who served in the military forces of the United States in Vietnam; and that the emotional disabilities suffered by these veterans, ranging from disabling readjustment problems to acute or chronic post traumatic stress disorder, has resulted in the incarceration of many of them for antisocial behavior.

We further find that there is a need for rehabilitation programs directed to the specific problems and needs of these individuals, so that they can assimilate into and become productive members of society; and that the medical community has achieved an understanding of and ability to treat both substance abuse and psychological problems unique to Vietnam Veterans.

In view of these findings, and cognizant of the legislative purpose set forth in Penal Code § 1170(a)(1), the Legislature declares that the rehabilitation of Vietnam Veterans is an appropriate and compelling goal of the criminal justice system, and enacts the following statute[s] in furtherance of that goal.

[FELONY SENTENCING]

I. Upon motion of the defendant of counsel for the defendant, the Court shall, at or before the imposition of sentence, determine whether the defendant is or was a member of the military forces of the United States who served in Vietnam. If the Court determines that the defendant is or was a member of the military forces of the United States who served in Vietnam, the Court shall order a diagnostic study pursuant to Penal Code § 1203.03.

A. If the written report submitted by the Director of the Department of Corrections, in accord with Penal Code § 1203.03(b), as well as any additional evidence presented by the defendant, establishes by a preponderance of the evidence that:

1. The defendant suffers from substance abuse and/or psychological problems resulting from service in Vietnam;
2. The defendant is amenable to treatment for the foregoing problem(s); and

3. The defendant's release from custody does not pose an imminent threat to society;

the Court may, notwithstanding any other provision of law, suspend imposition or execution of sentence, and may direct that such suspension may continue for such period of time not exceeding the maximum possible term of such sentence upon such conditions and terms as the Court may deem appropriate in the furtherance of justice, including but not limited to a term and condition requiring the defendant to participate in an outpatient or inpatient program of treatment approved by the United States Government, or any agency thereof, the State of California, or any agency thereof, of the Court. The period of probation and the modification or termination thereof shall be established and effected in accord with Penal Code §§ 1203 and 1203.1.

B. If the written report submitted by the Director of the Department of Corrections, as well as any additional evidence presented by the defendant, establishes that:

1. The defendant suffers from substance abuse and/or psychological problems resulting from service in Vietnam;
2. The defendant is amenable to treatment for the forgoing problem(s); but
3. The defendant's release from custody does pose an imminent threat to society,

the Court shall sentence the defendant in accord with applicable provisions of the Penal Code, and shall further order that the defendant be provided adequate and appropriate psychiatric or psychological treatment by either the Sheriff of the County in which the defendant is incarcerated or, if the sentence is a commitment to state prison, the Director of the Department of Corrections, and shall require either the Sheriff or the Director of the Department of Corrections to submit periodic reports, as directed by the Court, regarding the treatment and rehabilitation of the defendant.

C. Should an individual granted probation for the purpose of treatment pursuant to subdivision (A) violate any term or condition of probation imposed by the Court, the Court may modify any term or condition, or revoke the grant of probation and sentence the defendant as provided in Penal Code § 1203.1.

[MISDEMEANOR SENTENCING]

I. Upon motion of the defendant or counsel for the defendant, the Court shall, at or before the imposition of sentence, determine whether the defendant is or was a member of the military forces of the United States who served in Vietnam. If the Court determines that the defendant is or was a member of the military forces of the United States who served in Vietnam, the Court shall, if requested by the defendant or counsel for the defendant, appoint such expert or experts as are necessary to determine:

- A. Whether the defendant suffers from substance abuse and/or psychological problems resulting from service in Vietnam;
- B. Whether the defendant is amenable to treatment for the foregoing problem(s), if any; and
- C. Whether the defendant's release from custody does or would pose an imminent threat to society.

II. If the evaluation performed and submitted in accord with subdivision I, as well as any additional evidence presented by the defendant, establishes by a preponderance of the evidence that:

- A. The defendant suffers from substance abuse and/or psychological problems resulting from service in Vietnam;

B. The defendant is amenable to treatment for the foregoing problem(s); and

C. The defendant's release from custody does not pose an imminent threat to society,

the Court may, notwithstanding any other provision of law, suspend imposition or execution of sentence, and may direct that such suspension may continue for such period of time not exceeding the maximum possible term of such sentence upon such conditions and terms as the Court may deem appropriate in the furtherance of justice, including but not limited to a term and condition requiring the defendant to participate in an outpatient program of treatment approved by the United States Government, or any agency thereof, the State of California, or any agency thereof, or the Court. The period of probation and the modification or revocation thereof shall be in accord with Penal Code §§ 1203 and 1203.1.

III. If the evaluation performed and submitted in accord with subdivision I, as well as any additional evidence presented by the defendant, establishes by a preponderance of the evidence that:

A. The defendant suffers from substance abuse and/or psychological problems resulting from service in Vietnam;

B. The defendant is amenable to treatment for the foregoing problem(s); but

C. The defendant's release from custody does pose an imminent threat to society, the Court shall sentence the defendant in accord with applicable provisions of the Penal Code, and shall further order that the defendant be accorded adequate and appropriate psychiatric or psychological treatment by the Sheriff of the County in which the defendant is incarcerated.

IV. Should an individual granted probation for the purpose of treatment pursuant to subdivision II violate any term or condition of probation imposed by the Court, the Court may modify any term or condition previously imposed, or revoke probation and sentence the defendant as provided in Penal Code § 1203.1.

BOSTON COLLEGE LAW REVIEW

VOLUME XXV

MARCH 1984

NUMBER 2

BOARD OF EDITORS

MICHAEL K. FEE
Editor in Chief

WILLIAM P. GELNAW, JR.
Executive Editor

JAMES M. KENNEDY
Executive Editor

LINDA A. OUELLETTE
Managing Editor for Production

ROBERT L. MISKELL
Topics Editor

ANNE F. ACKENHUSEN
Citations Editor

STEPHANIE MILLER GREENE
Executive Editor

JOHN J. AROMANDO
*Executive Editor-Annual
Survey of Massachusetts Law*

CHRISTOPHER R. VACCARO
*Managing Editor for Finance
and Articles Editor*

MICHAEL P. MALLOY
*Solicitations Editor
and Articles Editor*

BARBARA ZICHT RICHMOND
Citations Editor

Articles Editors

JOHN S. BRENNAN
LYMAN G. BULLARD, JR.
JOEL R. CARPENTER
RICHARD M. GRAF
RICHARD E. HASSELBACH
NANCY MAYER HUGHES

BRIAN J. KNEZ
RICHARD J. MCCREADY
PATRICK McNAMARA
MARY JEAN MOLTENBREY
ANDREW D. SIRKIN
JANE E. STILES

STEVEN C. SUNSHINE
PATRIC M. VERRONE
KRISTINA HANSEN WARDWELL
LAUREN C. WEILBURG
VALERIE WELCH
TAMARA WOLFSON

SECOND YEAR STAFF

TERRY I. BARCHENKO
STEVEN N. BERK
SUSANNA C. BURGETT
SHARON R. CHADAK
THEAOSEUS T. CLAYTON, JR.
KIMBERLY COLLINS
DAVID P. CURTIN
CAROLYN E. DAVIS
MARGUERITE M. DORN
JOHN EVAN EDWARDS
SCOTT A. FAUST
THOMAS L. FINIGAN

ANNE T. FOLEY
RONALD T. GERWATOWSKI
ROBERT J. GILSON
GEOFFREY E. HOBART
JENNIFER L. JORGENSEN
KENNETH LAMB
RENÉE M. LANDERS
MADELYN LEOPOLD
EDWARD F. MAHONEY
WALTER L. MARONEY
MARIANNE T. MCCABE
ANN P. MICHALIK

TRACY A. MINER
JENNIFER A. PARKS
ANDREA PETERSEN
CYNTHIA R. PORTER
TERESITA RODRIGUEZ
ERICA ROSENBERG
MICHAEL ROY
ETTORE A. SANTUCCI
LLOYD E. SELBST
RICHARD K. STAVINSKI
CYNTHIA TERZAKIS
CONANT M. WEBB

ROSALIND F. KAPLAN
Administrative Assistant

PETER A. DONOVAN
Faculty Advisor
