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Post-Traumatic Stress Disorder, Vietnam Veterans and the Law: A Challenge to Effective Representation
ABSTRACT

The legal system's increasing awareness of and understanding regarding post-traumatic stress disorders is presented. PTSD is discussed primarily in the context of litigation involving both violent criminal and nonviolent offenses. Other potential applications of PTSD at trial are reviewed. Post-conviction strategies involving PTSD are also discussed. A comprehensive review of case law involving PTSD is summarized.

INTRODUCTION

"... throughout 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."

Although estimates of the number of Vietnam combat veterans who suffer from Post-Traumatic Stress Disorder vary from as few as 500,000
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... to as many as 1,500,000, it is becoming increasingly clear that a substantial number of those who served in Vietnam continue to feel the psychological effects of that experience. The behavior associated with PTSD not only presents diagnostic and treatment issues for mental health professionals, but may have legal implications as well.

While there are indications that PTSD is receiving increased attention in the legal community, 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. This lack of understanding combined with the inability or reluctance of many veterans to discuss their Vietnam experiences has made it extremely difficult for attorneys to discover and prove the link between PTSD and client behavior. As a result, few attorneys are likely to recognize that a wide range of client problems from criminal charges and substance abuse to family problems and employment disputes may be related to PTSD and to service in Vietnam.

At the same time, stories of “crazed Vietnam veterans” and sensational publicity surrounding the use of psychological defenses, such as occurred in the Hinckley case, have called into question the propriety of even raising issues such as PTSD. The fear is often expressed that the use of PTSD in the courtroom will give Vietnam veterans a “blank check” to commit crime or other antisocial acts. Even health care professionals who are supportive of PTSD have been misdiagnosed and improperly treated due to the similarity between PTSD symptoms and other disorders, clinicians’ lack of familiarity with combat situations and the relatively recent recognition of PTSD by the American Psychiatric Association. PTSD has apparently been the subject of misdiagnosis and improper treatment due to the similarity between PTSD symptoms and other disorders, clinicians’ lack of familiarity with combat situations and the relatively recent recognition of PTSD by the American Psychiatric Association. Schulz, Trauma, Crime and the Affirmative Defense, 11 COLD. L. REV. 2401 (1982). See also supra note 2; see generally C templates. STRANGERS AT HOME: VIETNAM VETERANS SINCE THE WAR (Figley & LeVantman, ed. 1980).

PTSD has apparently been the subject of misdiagnosis and improper treatment due to the similarity between PTSD symptoms and other disorders, clinicians’ lack of familiarity with combat situations and the relatively recent recognition of PTSD by the American Psychiatric Association. Schulz, Trauma, Crime and the Affirmative Defense, 11 COLD. L. REV. 2401 (1982). See also supra note 2; see generally C templates. STRANGERS AT HOME: VIETNAM VETERANS SINCE THE WAR (Figley & LeVantman, ed. 1980).

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 been found to be related to combat experience. See 3 R. LAUER, T. YAGER, E. FREY-WOULERS; J. DONNELLAN, LEGACIES OF VIETNAM VOL. 3 at 51. See also Park, Adjustment Differences Among Male Substance Abusers Varying in Degrees of Combat Experience in Vietnam, 17 CONSULTING & CLINICAL PSYCHOLOGY 426 (1981); Milstein & Snyder, PTSD, The War is Over, the Battle Goes On, 9 CRIM. DEF. (No. 1) (1980); Additional, the first symposium on PTSD and the law occurred May 21 and 22, 1983 at William Mitchell College of Law, St. Paul, Minnesota. Conference materials available at William Mitchell College of Law.

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veterans' issues are concerned that PTSD may be misused by overzealous attorneys who attempt to stretch the diagnosis beyond medically justifiable limits.\footnote{See comments of Dr. Charles Figley quoted in Crimmins, supra note 11; Schulz, supra note 4, at 2402.}

The task facing attorneys and mental health professionals, then, is to develop an understanding of the realities of PTSD that allows its application to legal issues where appropriate, while avoiding potential abuses. This article will attempt to add to the growing body of knowledge that is helping to "demystify" PTSD as a legal/psychological phenomenon.\footnote{See notes 18-25 infra.} It will begin with a brief description of some symptoms characteristic of PTSD\footnote{See notes 26-57 infra.} and will then review a number of cases in which PTSD has been a factor and suggest some solutions to litigation and strategic problems in PTSD cases\footnote{See notes 57-164 infra.}. It will not suggest other potential applications of PTSD in litigation and other settings.\footnote{See notes 165-244 infra.} In conclusion, it will be suggested 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 adequately resolve the legal issues raised by PTSD related conduct.

A LAWYER'S VIEW OF POST-TRAUMATIC STRESS DISORDER

Post-Traumatic Stress Disorder is the designation assigned to a group of symptoms in the current edition of the Diagnostic and Statistical Manual (DSM) of the American Psychiatric Association (DSM III)\footnote{AMERICAN PSYCHIATRIC ASS'N., DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS at 236 (3d ed. 1980).}. 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.\footnote{Diagnostic criteria for Post-Traumatic Stress Disorder: A. Existence of a recognizable stressor that would evoke significant symptoms of distress in almost everyone. B. (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 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.} The result was that prior to 1980 mental health professionals, and attorneys, lacked an identifiable and accepted description of the symptoms now known as PTSD that could be used to diagnose and treat veterans.\footnote{\textsuperscript{17}} The absence of a recognized definition of these symptoms called into question the
validity of the entire notion that reactions to combat, long after the war, could influence behavior. 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. Veterans who attempted to seek help were often misdiagnosed as psychotic, substance dependant or malingers who suffered from a fictional malady. Both inpatient and outpatient treatment programs have been established in VA hospitals to provide treatment for veterans with symptoms of PTSD.

Any principled description of Post-Traumatic Stress Disorder must begin with the clear recognition that PTSD is not a new phenomenon in combat veterans, nor it is limited to veterans. A substantial body of research exists which suggests that stress reactions among veterans have followed every major conflict in this century and, perhaps, are an unavoidable consequence of war. 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 the WW II Holocaust survivors, Hiroshima atomic blast victims and survivors of other catastrophic events. Thus, any attempt to present PTSD as a "Vietnam Veterans Problem" is clearly misplaced and tactically unwise.

The fact that PTSD encompasses reactions to stressful events other than combat in Vietnam is borne out in the diagnostic criteria for PTSD in the Diagnostic and Statistical Manual of the American Psychiatric Association which states in pertinent part:

19. The original edition of the Diagnostic and Statistical Manual 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). "Gross Stress Reaction" was dropped in the 1968 edition of the Manual, and the symptoms were categorized under "Transitory Situational Disturbances." For a review of the development of the two previous editions, see Spitzer, Introduction to American Psychiatric Ass'n., Diagnostic & Statistical Manual of Mental Disorders (3d ed. 1980).

20. Id.

21. See note 4, supra.


25. 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 staff psychiatrist Vietnam Veteran's Treatment Unit, V.A. Medical Center, Palo Alto, Cal.).


28. For an historical review of reports of psychiatric disorders arising from combat, see Note, Post Traumatic Stress Disorder - Opening Pandora's Box, supra note 6, at 92-99.


31. Id. See also Diagnostic & Statistical Manual (3d ed. 1980), supra note 18, at 236-37.

32. See notes 81-128 infra.
The essential feature is the development of characteristic symptoms following a psychologically traumatic event that is generally outside the range of normal human experience.\textsuperscript{13}

The kinds of "traumatic events" that can cause such a reaction include floods, earthquakes, car or plane accidents, bombing, torture, and, of course, combat.\textsuperscript{14}

Following the original traumatic event, a person who suffers from PTSD may have a number of symptoms that include: self-medication through substance or alcohol abuse;\textsuperscript{15} memory loss; loss of sleep; nightmares reliving the original traumatic event; intrusive thoughts; exaggerated startle response; reduction in emotional response; a feeling of alienation; and, "dissociative states..." during which the original event is relived and "the individual behaves as though experiencing the event of the moment."\textsuperscript{16} To a lay observer, these symptoms do not seem terribly surprising following a traumatic event of the magnitude described earlier. The more difficult aspect of PTSD for many to understand is that the symptoms of PTSD can occur long after the original traumatic event has ended. According to DSM III, symptoms may appear when situations or activities occur which approximate the original event.\textsuperscript{17} Thus, long after the original event, a person suffering from PTSD may react as though they were back in the original traumatic situation.\textsuperscript{18}

This tendency to "reexperience" or "relive" the original event is common to those who experience PTSD symptoms after a traumatic event whatever its source.\textsuperscript{19} However, for those trained in combat, a "reexperiencing" of the original event may include combat-like reactions.\textsuperscript{20} DSM III, for example, specifically mentions "unpredictable explosions of aggressive behavior" as characteristic of war veterans with PTSD.\textsuperscript{21}

More recent studies have reported that this "explosive behavior" may be only one variant of the stress reactions experienced by veterans.\textsuperscript{22} For example, Dr. John Wilson and Dr. Sheldon Zigelbaum have suggested that at least three types of PTSD reactions can be seen in the veterans they have interviewed and treated: (a) a dissociative reaction in which the veteran behaves as he did in combat;\textsuperscript{23} (b) a compulsive "living on the edge" response in which the veteran repeatedly seeks out dangerous or highly stimulating situations;\textsuperscript{24} (c) a profound "survivor guilt" reaction which leads to intense despair, suicide attempts or attempts to get caught, punished or killed.\textsuperscript{25}

\begin{itemize}
\item \textsuperscript{13} Diagnostic & Statistical Manual (3d ed. 1980) supra note 18, at 236.
\item \textsuperscript{14} Id.
\item \textsuperscript{15} Id. at 237.
\item \textsuperscript{16} Id. at 236-237.
\item \textsuperscript{17} Id. at 237.
\item \textsuperscript{18} Id. at 236-237.
\item \textsuperscript{19} Id.
\item \textsuperscript{20} Id.
\item \textsuperscript{21} Id. at 237.
\item \textsuperscript{22} See Wilson, supra note 30; Dondershine, supra note 25.
\item \textsuperscript{23} Wilson, supra note 30 at 8.
\item \textsuperscript{24} Id. at 9.
\item \textsuperscript{25} Id. at 11.
\end{itemize}
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 25% to 30% of Vietnam veterans who saw heavy combat have been arrested on criminal charges.\(^46\) In addition, high suicide rates,\(^47\) 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.\(^44\)

For attorneys, probably the most important conclusion that can be drawn from these studies is that PTSD can affect virtually every aspect of a veteran/client's behavior. Additionally, the effects may be subtle, and, if Wilson's and Zigelbaum's suggestions are correct, the effects may not appear to be related to combat at all.\(^49\) For attorneys untrained in psychology or psychiatry, this implies a duty to examine a veteran client's psychological history for a PTSD connection with particular care, even when the relationship is not readily apparent.\(^50\)

PTSD, then, confronts attorneys with a society-wide psychological condition that is very unlike many more readily recognizable disorders. PTSD symptoms, for example, may mimic those of alcohol or substance abuse.\(^51\) 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.\(^52\) 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.\(^53\)

However, 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.\(^54\) The importance of this

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46. Schulz, supra note 4, at 2401; Dondershine, supra note 25 at 4.
47. The suicide rate among Vietnam Veterans is 23% higher than the same age group in the general population.
49. See supra text accompanying notes 43-45.
50. For example, in at least two of the cases that are the subject of this article, State v. Heads, No. 106, 126 (1st Jud. Dist. Ct. Caddo Parish, 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 counsel 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.
51. In People v. Wood, see notes 100-126 infra, 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 Diagnostic & Statistical Manual (3d ed. 1980) supra note 18, at 237. Walker, Vietnam Combat Veterans with Legal Difficulties: A Psychiatric Problem, 138 Am. J. Psychiatry 1384, 1385 (1981).
52. See note 50 supra.
53. This problem is not limited to the attorney-client setting. Veterans have developed a mistrust of authority figures and 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. Diagnostic & Statistical Manual (3d ed. 1980) supra note 18, at 236.
54. Id.
fact is that, unlike many other psychological disorders, it is possible to point to specific events to establish a causal link to client behavior.\textsuperscript{55} As a result, once PTSD is found to be a factor in client behavior, an attorney can describe the events that brought about the acts in question in a systematic and logical manner.\textsuperscript{56} This means that PTSD requires far less of the "leap of faith" based upon expert opinion than do some 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.\textsuperscript{57} 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.\textsuperscript{58}

**PTSD IN THE LITIGATION CONTEXT**

Because PTSD is a relatively new way of describing and explaining client behavior in litigation and because few of the cases in which it has been used have reached the appellate level, the "case law" on PTSD is very limited.\textsuperscript{59} In one of the few appellate cases in which it was mentioned, the Supreme Court of Minnesota rejected an appellate argument based on PTSD because counsel had failed to properly raise the issue at trial.\textsuperscript{60} However, this should not be read as a rejection of PTSD. Rather, it is an indication that, like other factors

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\textsuperscript{55} For a discussion of the importance of making the specific connections between the Vietnam experience and the conditions that brought about the criminal behavior, see the discussion of the *Heads and Wood* cases at notes 81-128. See also Jack supra note 6.


\textsuperscript{57} See J. Wilson, *Towards An Understanding of Post-Traumatic Stress Disorder Among Vietnam Veterans* (Testimony before U.S. Senate Subcommittee on Veteran's 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. Wilson, *supra* note 24.

\textsuperscript{58} The importance of this aspect of PTSD is apparent when treatment programs are suggested in lieu of incarceration or other punishment. See notes 206-218 infra.


\textsuperscript{60} State v. Hardiman, 310 N.W.2d 564, 466 (Minn. 1981). But see, State v. Lisnow, 80 Cal. App. 3d 21, 151 Cal. Rptr. 621 (1978) for a case which supports the use of PTSD on the issue of intent.
influencing client behavior, PTSD must be properly presented. It re-emphasizes the premise of this article, that attorneys who represent veterans must properly present PTSD, when appropriate, to adequately represent veteran clients.

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. However, at this point the discussion of the legal applications of PTSD must focus primarily on cases at the trial level which are largely unreported.

Probably the most dramatic and well-publicized application of PTSD in the courtroom is in the defense of criminal charges. Defenses based on PTSD have been advanced in cases ranging from violent offenses, such as murder and attempted murder, to nonviolent crimes such as drug conspiracies and tax fraud.

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. However, 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.

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

PTSD AND VIOLENT CRIMINAL BEHAVIOR

The range of violent offenses to which PTSD has been advanced as a defense range from murder to assault and weapons offenses. Although

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62. See note 59 supra.
68. See infra text accompanying notes 72-105.
69. Id.
70. Even generally sympathetic mental health professionals disagree that nonviolent conduct can be explained as a PTSD reaction. Schultz, supra note 4, at 2402.

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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.\textsuperscript{73} Incidents which might otherwise appear to be relatively benign such as an argument with a supervisor,\textsuperscript{77} a coworker,\textsuperscript{76} or a domestic dispute between husband and wife\textsuperscript{77} may suddenly erupt into violence. In several cases, the defendants have had a history of substance or alcohol abuse that began after the service.\textsuperscript{78} Many defendants have not been able to explain why the incident occurred or details of how it occurred.\textsuperscript{79} Frequently, the defendants have had no previous criminal history.\textsuperscript{80}

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, \textit{State v. Heads}\textsuperscript{74} and \textit{People v. Wood}.\textsuperscript{75} These cases may be interesting to attorneys, not only because successful insanity defenses are rarely, if ever, argued to a jury,\textsuperscript{81} but also because they each took very different tactical approaches to presenting PTSD at trial.\textsuperscript{82}

The defendant in \textit{State v. Heads}\textsuperscript{76} was charged with murder in the shooting death of his sister-in-law's husband. 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 empty 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.\textsuperscript{83} Mr. Heads was tried in 1978, found guilty of murder, and sentenced to life in prison.\textsuperscript{84} In 1980, through a series of appeals not related to PTSD, Charles Heads was granted a new trial.\textsuperscript{85} It was in preparing for the second trial that the PTSD connection was made.

Between the first trial in 1978 and the retrial in October 1981, the American Psychiatric Association recognized PTSD as a diagnostic category. According to Mr. Head's counsel, no one connected with the case had heard of PTSD un-

\footnotesize{73. See note 203 infra.}
\footnotesize{74. Jack, supra note 6. See infra discussion of People v. Wood, notes 100-119.}
\footnotesize{75. People v. Wood, 80-7410 (Cir. Ct. of Cook County, Ill., May 5, 1982). See infra text accompanying notes 100-102.}
\footnotesize{76. See Magee supra note 59 at 11.}
\footnotesize{78. See notes 113-115 infra.}
\footnotesize{79. Jack, supra note 6 at 18.}
\footnotesize{82. No. 80-7410 (Cir. Ct. of Cook County, Ill., May 5, 1982). See infra discussion at notes 100-128.}
\footnotesize{83. 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, Illinois (Chicago) in the last decade. \textit{Three Cases Fuel Debate Over Insanity Defense}, Chi-Tribune, July 7, 1982.}
\footnotesize{84. See infra discussion at notes 85-129.}
\footnotesize{85. See note 81 supra.}
\footnotesize{86. Jack, supra note 6, at 7.}
\footnotesize{87. Id. at 8.}
\footnotesize{88. Id.}
Learning of the existence of PTSD gave substance to psychological aspects of the case that had previously defied explanation. The effect of the new knowledge provided by the diagnostic criteria in DSM III not only helped explain Mr. Head’s previously unexplained behavior, but provided the legal theory necessary to put the whole of Mr. Head’s life before the jury. 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, PTSD provided a theory of admissibility for virtually the entirety of Charles Heads’ life. In addition, the requirement that the original traumatic event “evoke[s] significant symptoms of distress in most people,” provided a basis for admitting testimony of those who had shared the Vietnam experience. The language in DSM III, then, provided the theory of legal relevance for admitting into evidence testimony of Mr. Head’s childhood, his work history, his Vietnam experiences, his difficulties with adjustment on return and the fact that he had no serious criminal record and the testimony of others regarding their Vietnam experiences and reactions.

The structure of the presentation of this evidence at trial consisted of: (a) three experts in the diagnosis and treatment of PTSD who had examined Charles; (b) testimony to corroborate the existence of the facts in Mr. Heads’ life upon which the diagnosis was based; (c) testimony regarding conditions leading up to the shooting incident and details of the scene of shooting; (d) the testimony of Mr. Heads. The testimony at trial tended to establish that Charles Heads had been a 19-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, together with the emotional threat of losing his wife and family, combined to cause a reaction in which Mr. Heads “was on automatic”; after the shooting Mr. Heads was quietly arrested at the scene, still holding his weapon.

Under Louisiana law, a defendant is “exempt from criminal responsibility” if the offender was incapable of distinguishing “right and wrong.” After two weeks of trial, the jury returned a verdict of not guilty by reason of insanity,

89. Id.
90. Id.
91. Id.
92. Id.
93. Id.
94. Id.
95. Id.
96. Id. at 13-18
97. Id. at 18
98. Id. at 17. The insanity issue in Louisiana is governed by LA. REV. STAT. ANN. §14 (West 19). §14 Insanity. 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.
apparently after concluding that Mr. Heads could not distinguish right and wrong during the shooting episode.99

In People v. Wood,100 a 1982 case in Chicago, Illinois, the defendant was charged with attempted murder in the shooting of his foreman after a dispute at work.101 Mr. 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. He was sent out of the plant. He 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 with one shot. He turned himself into the police within hours and confessed.102

Like the defendant in the Heads case, Mr. Wood is a veteran who had no criminal record. He is married, has a family and possessed a good work record. Like Mr. Heads, he was completely unaware that he was affected by PTSD.103

As one might expect, many parallels exist between the Heads and Woods cases. Both were tried before jury, both advanced PTSD to help explain the behavior of the defendants, both resulted in findings of not guilty by reason of insanity. The principle distinctions are that Mr. Wood did not testify at trial and he was released for treatment as an outpatient rather than being institutionalized.104

Like 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.105 However, the structure of the presentation of the evidence differed markedly from the Heads case. In the Wood case, the diagnosis of PTSD did not occur until the last witness testified. Thus, the entire case was put into evidence before the diagnosis conclusively established the relevance of the preceding testimony.106

The structure of the presentation of evidence 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;107

(b) family, friends and acquaintances testified to significant events in Mr. Wood’s life that occurred before and after Vietnam on the theory that these facts established and corroborated the basis for the opinion which was to follow;108

100. No. 80-7410 (Cir. Ct. of Cook County Ill., May 5, 1982).
101. Id.
102. Id. See generally Crimmins, supra note 11; Worker Who Shot Foreman Claims Racial Harassment, Chi. Defender, Oct. 18, 1980, at 3.
103. Counsel for Mr. Wood did not learn of the effects of PTSD on Mr. Wood until several months after entering the case. Mr. Woods did not talk about his Vietnam experience until he began therapy for the previously undiagnosed PTSD.
104. Order Wood Treatment on Outpatient Basis, Chi. Heights Star, July 15, 1982, at 1, col. 3.
105. See supra discussion accompanying notes 93-95.
106. See generally People v. Wood, No. 80-7410 (Cir. Ct. Cook County, Ill., May 5, 1982).
107. Id.
108. Id.
(c) Mr. Wood’s service records and those of his unit were read into evidence as business records exceptions to the hearsay rule to verify his combat service and to illustrate the conditions in Vietnam;\textsuperscript{109}

(d) veterans who served with Mr. Wood, and some who did not, testified about conditions in Vietnam on the theory that this testimony corroborated the existence of stressful conditions in Vietnam;\textsuperscript{110}

(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.\textsuperscript{111}

(f) Coworkers testified that Mr. Wood had not appeared to have been drinking but that he appeared to begin “acting strangely” when confronted by the foreman.\textsuperscript{112}

(g) Dr. John Wilson, the psychologist who made the original PTSD diagnosis which was later confirmed by others,\textsuperscript{113} 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.\textsuperscript{114} 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.

Since Illinois has 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.”\textsuperscript{115} The general verdict of the jury “not guilty by reason of insanity” did not make clear

\textsuperscript{109} Id.
\textsuperscript{110} Id.
\textsuperscript{111} Id. Dr. Braun spent some fourteen 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 that 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 had 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. For a discussion of the use of hypnosis as a form of PTSD therapy, see, Brende and Benedict, \textit{The Combat Delayed Stress Response Syndrome: Hypnotherapy of "Dissociative Symptoms."} \textit{Am. J. of Clin. Hypnosis}, Vol. 23, No. 1 (July 1980) at 34.
\textsuperscript{112} People vs. Wood, No. 80-7410 (Cir. Ct. Cook County, Ill., May 5, 1982).
\textsuperscript{113} Id. See also Order Wood Treatment on Outpatient Basis, supra note 104, at 1, col. 3.
\textsuperscript{114} Id.
\textsuperscript{115} Ill. Ann. Stat. ch. 38, § 6-2(a) (Smith-Hurd 1982).6-2. Insanity. (a) A person is not criminally responsible for conduct if at the time of such conduct, as a result of mental disease or mental defect, he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

(b) The terms “mental disease or mental defect” do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

(c) A person who, at the time of the commission of a criminal offense, was not insane but was suffering from a mental illness, is not relieved of criminal responsibility for his conduct and may be found guilty but mentally ill.

(d) For purposes of this Section, “mental illness” or “Mentally Ill” means a substantial disorder of thought, mood, or behavior which afflicted a person at the time of the commission of the offense and which impaired that person’s judgment, but not to the extent that he is unable to conform his conduct to the requirements of law. Amended by P.A. 82-553, § 1, eff. Sept. 17, 1981.
Although Mr. Wood did not testify on his own behalf, the jury apparently saw a connection between the life incidents described by others, the diagnosis and the shooting. In a separate commitment hearing after the trial, a psychiatrist for the Illinois Department of Mental Health confirmed the PTSD diagnosis. He went on to make clear 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, or that he would be dangerous in the future. As a result, Mr. Wood was released to receive court-supervised outpatient care.

Each of these cases illustrates a slightly different strategy dictated by the circumstances of each case. For example, in the Wood case, the defendant’s emotional difficulty with his memories of Vietnam and his memory lapses made testimony both painful for the defendant and unreliable. However, there are several common factors in the two cases:

(a) In each case, neither the defendants nor their attorneys were initially aware that PTSD existed, or that it had anything to do with the case.

(b) Both defendants had experienced symptoms of PTSD long before the DSM III made diagnosis of the disorder possible. In the case of Mr. Wood he had actually sought treatment of alcoholism and psychological problems in 1979 and had not been properly diagnosed.

(c) Both defendants were teenage combat veterans, who apart from the violent acts which led to the pending charges, had little or no involvement with the law.

(d) 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 conditions at the time of the crime.

(e) PTSD provided the theory of legal relevance that made events legally relevant that allowed a full disclosure of defendant’s life before, during and after Vietnam.

As criminal defense practitioners will recognize, this approach to the presentation of a psychological defense contravenes the accepted wisdom in insanity cases. Often insanity cases are tried before a judge as a matter of law rather than a jury. The goal of the attorney is often to demonstrate that the

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117. See note 239, supra note 6.
118. The United States vs. Hinkley, No’s 81-2350, 81-2838 (D.C. Cir. June 21, 1982).
119. During pretrial motions in People v. Wood, the defendant admitted that he could not recall many incidents on the night of the shooting. In Wood, 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).
120. See notes 88-93 supra; Just before the case was scheduled for 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.
121. See Jack supra note 6.
122. Id.
123. Id.
124. Id.
events were so bizarre that insanity is required as a legal conclusion. The decision regarding the legal responsibility of the defendant in insanity cases is often totally dependent upon conflicting opinions advanced by mental health professionals, often with little opportunity for laymen to test the validity of those opinions.\textsuperscript{126}

With PTSD, the source of the mental disorder can be described in great detail. It is also possible to show overt symptoms and behavior to allow the judge or jury to test whether the diagnosis fits.\textsuperscript{127} If the facts do not logically support the diagnosis, a PTSD defense is unlikely to be successful before either a judge or a jury.\textsuperscript{128}

**PTSD AND NONVIOLENT OFFENSES**

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.\textsuperscript{129} A more controversial application of PTSD has been the use of PTSD to explain nonviolent criminal conduct.\textsuperscript{130} At first blush, the suggestion that PTSD can legitimately explain conduct such as burglary, robbery, drug dealing or tax evasion seems hardly plausible. However, in light of the recent work of Wilson and Zigelbaum, this explanation may not be as remote or implausible as it appears.\textsuperscript{131}

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 after all. For example, a veteran who is compelled to seek danger and heightened sensation may engage in activities that are both risky and which have criminal consequences.\textsuperscript{132} Wilson and Zigelbaum suggest that this sensation seeking may compel veterans to repeatedly engage in quasi-military sensation-fraught criminal conduct.\textsuperscript{133} 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.\textsuperscript{134} This reaction, it is suggested, is manifested by attempts to get killed or to get "caught" to get

\textsuperscript{125} For a comparison between *Wood* and other insanity cases, see *Three Cases Fuel Debate Over Insanity Defense*, supra note 83.

\textsuperscript{126} An example of a case of this sort is, D.C. v. Hinckley, 672 F.2d 115 (D.C. Cir. 1982). Much of the criticism of the insanity defense is directed toward this problem. See generally —.

\textsuperscript{127} See discussion accompanying notes 85 through 128 supra.


\textsuperscript{130} See, Schulz, supra, note 4 at 2402.

\textsuperscript{131} See generally Wilson, supra note 30.

\textsuperscript{132} Id. at 10.

\textsuperscript{133} Id.

\textsuperscript{134} Id. at 12.
help for their symptoms or punishment for their guilt in surviving. This may explain examples of unarmed veterans attacking armed police or committing a crime with no hope of escape. Two examples of the use of PTSD to explain nonviolent criminal behavior can be found in United States v. Tindall and State v. Gregory.

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. The Tindall case involved a large scale drug smuggling operation that was carried out by 15 people, including a number of veterans who had served together in Vietnam. Several codefendants were tried and convicted on similar charges in another proceeding in which PTSD was also advanced as a defense.

The smuggling operation involved importing a large amount of marijuana or hashish by sea. 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. The complicated scheme was replete with intrigue, dangerous sea voyages across the Atlantic, and quasi-military organization. Apparently, those involved continued to live out the relationships that had been established in Vietnam.

The defendant in Tindall was a highly decorated Army helicopter pilot who flew some 755 combat missions in Vietnam during 1970. The fact that Mr. Tindall later became involved in the drug importation scheme was never disputed. However, the defense asserted that his involvement in the scheme was an act of compulsion induced by PTSD.

According to the testimony adduced at the trial, Mr. Tindall returned from Vietnam with PTSD symptoms brought about by his service in Vietnam. In his case, 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.
The defense in *Tindall* argued that the defendant had "action addiction" that led him to engage in a series of dangerous endeavors, such as sky diving and stunt flying.\(^{147}\) 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.\(^{148}\) He became part of a dangerous paramilitary operation that involved his military superior.\(^{149}\)

A federal jury 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.\(^{150}\)

The defendant in *Gregory*\(^{151}\) was charged with eight counts of false imprisonment and four counts of assault arising from an incident in a bank in Silver Spring, Maryland.\(^{112}\) On Feb. 9, 1977, Stephen Gregory entered the bank armed with two rifles and announced he was not holding up the bank. He told hostages with children that they could leave and offered beer to the remaining hostages.\(^{152}\) He wore a business suit with diamond tie tac and cufflinks. In his pockets he had military ribbons and awards. He brought a can of hair spray, deodorant and a six pack of beer into the bank with him.

Over the next five hours, he shot some 250 rounds of ammunition at the air vents to the roof, and other inanimate objects and noises in the bank because in the bank, like “in the bush you couldn’t see the enemy but could only hear them.” He allowed police to bring food and beer to the hostages and eventually released all but one.\(^{153}\) Finally, he allowed himself to be taken into custody by the SWAT team that surrounded the bank. After the ordeal, he wrote letters of apology to the bank and the hostages.\(^{154}\)

Stephen Gregory was first tried in 1977. The issue in that case was whether the psychological condition from which he suffered was the sort that would constitute legal insanity.\(^{155}\) At that time, of course, PTSD had not yet appeared in the diagnostic materials and there was disagreement as to whether Mr. Gregory’s behavior was related to a mental illness arising from combat experiences.\(^{156}\) He was convicted in the first trial, but that conviction was reversed on appeal.\(^{157}\)

After his appeal, Mr. Gregory elected to plead guilty to the charges pursuant

\(^{147}\) Testimony at trial indicated that Tindall had become highly excitable during missions in Vietnam. Upon his return to the U.S., Tindall hung his bed from the ceiling and decorated his room to resemble his quarters in Vietnam. His hands twitched as if he were firing rockets, much in the same way he did when he was flying in Vietnam. *Id.*


\(^{149}\) *Id.* at 113.

\(^{150}\) *Id.* at 111. See also, *Vietnam Stress Defense a Winner in Drug Case*, supra note 8.

\(^{151}\) No. 19205 (Cr. Ct. Montg. County, Md., 1979)

\(^{152}\) See Defense Presentence Report at 1, filed in *Id.*

\(^{153}\) *Id.* at 22.

\(^{154}\) *Id.*

\(^{155}\) *Id.* at 23.

\(^{156}\) *Id.* at 2

\(^{157}\) *Id.*

to an agreement with the prosecutor. At sentencing, the defense presented a report which explained the defendant's behavior in terms of PTSD reaction.

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 dies..." When he came back from Vietnam, this guilt about surviving caused him to be depressed, suicidal, guilt ridden. Prior to the bank incident he had made three attempts to commit suicide.

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. In addition, when in the bank, his guilt caused him to point his gun at himself and to talk about suicide.

Stephen Gregory was put on probation and required to receive treatment for PTSD.

OTHER APPLICATIONS OF PTSD AT TRIAL

These examples of trials in which PTSD was introduced were all based upon the use of PTSD as part of the affirmative defense of insanity. It would be incorrect, however, to conclude that the insanity defense is necessarily the most appropriate method for raising PTSD in a litigation context.

The continuing attacks on the insanity defense may actually preclude its use in the future. For example, at this point, one state has "outlawed" the insanity defense; several others have introduced guilty but mentally ill verdicts; several others have introduced guilty but mentally ill verdicts;

159. See notes 204-205 infra.

160. Id.


163. Id. at 10.


(a) Mental condition shall not be a defense to any charge of criminal conduct.

(b) If by the provisions of section 19-2523, Idaho Code, the court finds that one convicted of crime suffers from any mental condition requiring treatment, such person shall be committed to the board of correction or such city or county official as provided by law for placement in any appropriate facility for treatment, having regard for such conditions of security as the case may require. In the event a sentence of incarceration has been imposed, the defendant shall receive treatment in a facility which provides for incarceration or less restrictive confinement. In the event that a course of treatment thus commenced shall be concluded prior to the expiration of the sentence imposed, the offender shall remain liable for the remainder of such sentence, but shall have credit for time incarcerated for treatment.

(c) Nothing herein intended to prevent the admission of expert evidence on the issues of mens rea or any state of mind which is an element of the offense, subject to the rules of evidence. [I.C. § 18-207, as added by 1982, ch. 368, § 2 p. 919.]


166. See Minn. R. Crim. P. 20.02 Subd. 6(5)(b).
other jurisdictions shift the burden of proof to the defendant. Even the American Bar Association and the American Psychiatric Association have suggested substantial alterations in the insanity standard. 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. In addition, many jurors may be particularly unsympathetic to Vietnam veterans. Also, in spite of the public furor over the Hinckley verdict, it is not always clear that defendants are substantially better off following a finding of not guilty by reason of insanity. Often, defendants will merely be involuntarily hospitalized rather than being imprisoned. Once hospitalized or incarcerated, there is no guarantee that the client will be treated for PTSD. 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. 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. Because mental state, mens rea is an essential element of definition of crime, PTSD may be a factor in the proof of the 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. In jurisdictions which recognize other psychological offenses, such as diminished capacity, PTSD has obvious importance. 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.

Another possible legal theory to which PTSD may be relevant is self-defense. The Model Penal Code would allow the defendant to demonstrate

171. Id.
173. In the Heads case, even after the verdict of not guilty Mr. Heads was not admitted to treatment. Jack, supra note 6.
175. Schulz, supra note 4.
177. See Schultz, supra note 4 at 2404.
that his or her responses were subjectively reasonable.\textsuperscript{178} 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.\textsuperscript{179} 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.\textsuperscript{180}

Perhaps the most likely alternative theory for the introduction of 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.\textsuperscript{181} Unlike insanity, automatism is not necessarily grounded in mental illness,\textsuperscript{182} nor are commitment issues raised in its presentation.\textsuperscript{183}

The theory of automatism arises from the historically required volitional act, a necessary element of any criminal conviction.\textsuperscript{184} Although some cases refer to automatism as relating to the mental state of the defendant,\textsuperscript{185} the defense is more properly understood as the absence of a volitional act since the body movement in question is not voluntary.\textsuperscript{186}

There is substantial support for the assertion of automatism in both statutory\textsuperscript{187} and case authority.\textsuperscript{188} It has been described clinically as resulting from conditions such as epileptic and post-epileptic states,\textsuperscript{189} "clouded states of consciousness associated with organic brain disease, concussional states following head injuries and less commonly, in some types of schizophrenic and acute emotional disturbance."\textsuperscript{190} In at least one case an appellate court has ruled that the failure to give an automatism instruction in a PTSD case was reversible error.\textsuperscript{191}

\textsuperscript{178} 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, LaFave and Scott, Criminal Law, ch. 5, § 53, at 393,94 (1972).

\textsuperscript{179} For example, the Supreme Court of the State of Washington struck down a jury instruction which the defense in light prevented the jury from considering the defense in light of all of the circumstances". See State v. Wanrow, 88 Wash. 2d 221, 559 P.2d 548 (1977).

\textsuperscript{180} See notes 178, 179 supra. See also 85-99 supra.


\textsuperscript{182} Ellis v. United States, 274 F.2d 52 (10th Cir. 1959).

\textsuperscript{183} Carter v. States, 376 p. 2d 351 (Okla. Crim. 1962)

\textsuperscript{184} See The Model Penal § Code 62.01 (Comment, text draft No. 4 1955); for a discussion of the constitutional and historical basis for the actus rea requirement see, Erleider, Mens Rea, Due Process and the Supreme Court: Toward a Doctrine of Substantive Criminal Law, 9. AM. J. CRIM. L. 163, (1981).


\textsuperscript{186} See discussion of the "act" requirement in LaFave and Scott, supra note 178 and 177.

\textsuperscript{187} ARIZ. REV. STAT. ANN. § 13-145(2); IDAHO CODE ANN. § 18-201(5); MONT. REV. CODES ANN. § 94-201(5); NEV. REV. STAT. § 194.010(6); OKLA. STAT. ANN. Tit. 21, § 152(6); S.D. CODE § 13.0201(6); UTAH CODE ANN. § 76-1-41(6).

\textsuperscript{188} Fain v. Commonwealth, 78 Ky. 183(1879); Government of the Virgin Islands v. Smith, 278 F.2d 169 (3d Cir. 1960); People v. Freeman, 61 Cal. App. 2d 110, 142, P. 2d 435(1943)160.

\textsuperscript{189} Whitlock, CRIMINAL RESPONSIBILITY AND MENTAL ILLNESS 120 (1963). See also Government of Virgin Islands v. Smith, 278 F.2d 169 (3d Cir. 1960); People v. Freeman 51 Cal. App.2d 100, 142 P. 2d 435 (1943).

\textsuperscript{190} Whitlock, supra note 189 at 120. See also Williams, AUTOMATISM, IN ESSAYS IN CRIMINAL SCIENCE (Mueller ed. 1961).
In *People v. Lisnow*, the appellate department of the Superior Court, Los Angeles County, held that the trial court had erred in refusing an automatism instruction in a battery case involving a Vietnam veteran.

According to the Court, the defendant struck a maître d’ in a restaurant for “no apparent reason.” He then went into the parking lot and engaged in other, unspecified “acts of violence.” 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.

A V.A. 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 had in Vietnam.” The psychiatrist also testified that the dissociative or fugue state would cause a person to be unaware of his behavior. The trial judge struck the testimony of the psychiatrist and instructed the jury to disregard it. He also instructed the jury to disregard the defendant’s testimony about Vietnam. The court’s reasoning was apparently grounded in the misapprehension that the existence of a mental disorder, traumatic neurosis, precluded a defense based on unconsciousness.

In its opinion, the appellate court reviews the cases in which the relationship between soundness of mind and the unconsciousness defense was raised. The court looked to *People v. Wetmore* for an analysis that would resolve the apparent division of authority on this issue. 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. According to the *Lisnow* court, the requirement that intent and act both 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.

**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. As has been observed elsewhere,
such agreements are far more likely in cases in which the defendant has not in-
jured others.\textsuperscript{201} However, other factors including the success of PTSD
defenses, the existence of treatment programs and the defendant’s back-
ground are also likely to be important factors.\textsuperscript{202}

In at least one reported case, weapons charges against a defendant were
dropped completely. A veteran who had entered a veteran’s cemetery and had
begun to shoot at the local police station, received treatment for PTSD and the
charges against him were dismissed.\textsuperscript{203} Another negotiated settlement oc-
curred in a case in which a defendant had held hostages in a bank for several
hours.\textsuperscript{204} 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 which resulted in the defendant receiving probation.\textsuperscript{205}

\textbf{PTSD TREATMENT AS AN ALTERNATIVE}

Even after liability has been assessed, 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,
but once that connection is made, treatment options become available.\textsuperscript{206}

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,\textsuperscript{207}
drug offenses,\textsuperscript{208} false imprisonment\textsuperscript{209} and assault.\textsuperscript{210}

A substantial step forward in the application of PTSD to sentencing issues
was made when California enacted a statute that requires judges to consider
PTSD and treatment alternatives when sentencing veterans.\textsuperscript{211} The existence
of this statute is extremely important, not only for veterans in California, but
elsewhere. The statute is likely to have the effects of not only providing an ad-

\begin{footnotes}
\footnote{201. Milstein and Snyder, \textit{supra} note 6, at 87.}
\footnote{202. See note 2 \textit{206-218 infra.}}
\footnote{203. Note, \textit{Post Traumatic Stress Disorder: Opening Pandora’s Box}, \textit{supra} note 6 citing accounts of the case
published in the Boston Globe, Jan. 23, 1982, at 18, col. 3.}
\footnote{204. State v. Gregory, No. 19205 (Cir. Ct. Montg. County Md. Feb. 28, 1979.)}
\footnote{205. \textit{Milstien, supra} note 6.}
\footnote{206. \textit{Id. See also} note United States vs. Oldham, 1P-82-28-OCr. (S.D. Ind., Dec. 1981).}
\footnote{209. See \textit{People v. Lisnow, 88 Cal. 3d Supp. 25, 151 Cal. Rptr. 621} (1978); \textit{People v. Wood, No. 80-7410}
(Cir. Ct. of Cook County, Ill., May 5, 1982);}
incarceration.}
\footnote{211. 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 combat 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 is authorized to
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. (Added by Stats. 1982, c. 964, p. \textit{______}, § 1.)}
\end{footnotes}
ditional basis for arguing that judges in other jurisdictions should take PTSD into account, but it 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 similar statutes in other states.

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 counseling centers to inpatient facilities. 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. In Gregory, Elliot Milstein and David Addlestone of the Veterans Law Center presented an extensive presentence report that included psychiatric reports, military records and a full client history. Both a psychologist and psychiatrist testified as to diagnosis and treatment and a V.A. representative agreed to accept the defendant into a program.

A similar problem confronts attorneys who have successfully asserted an insanity defense. Most jurisdictions have commitment procedures to determine the proper treatment for those found not guilty by reason of insanity. The attorney’s task in this setting is to develop a treatment plan that is suitable for his client. As was 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. In that case, counsel presented through both trial and a commitment hearing, evidence that the shooting was an isolated violent act. A psychiatrist from the Illinois Department of Mental Health testified that Mr. Wood was not dangerous and recommended outpatient treatment provided by the V.A. Mr. Wood was released to receive counseling through a V.A. Vet Center near his home.

**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. For these veterans, or for those convicted after 1980 who had attorneys unfamiliar with PTSD, strategies must be devised to raise PTSD in a

212. 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 22, at 24; A Delayed Reaction: Vietnam Casualties At Home, supra note 48, at 40. PTSD treatment centers have also been created at many veterans hospitals including residential programs. See, Dondershine, supra note 25, at 4.


215. Milstein & Snyder supra note 6, at 87.

216. 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).

217. See note 100 supra.

218. See note 104 supra.

219. See discussion accompanying notes 217.
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.\textsuperscript{220} When the number of veterans on parole, probation or awaiting trial are added to that number, the size of the problem is readily apparent.\textsuperscript{221}

Presently, few programs exist for incarcerated veterans to receive counseling or treatment for PTSD while incarcerated.\textsuperscript{222} A notable exception is the Veteran's In Prison Project administered by the V.A. hospital in Brentwood, California\textsuperscript{223} and efforts by the Wisconsin Public Defender’s Office to provide a veteran liaison to identify veterans and help arrange treatment or counseling.\textsuperscript{224} 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.\textsuperscript{225} However, in the absence of institutional diagnosis, screening and treatment programs, 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 counseling.\textsuperscript{226} Without such intervention, there is little to insure that PTSD-related criminal problems will not be repeated. The best response to this state of affairs 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.\textsuperscript{227} 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 well have been different.\textsuperscript{228} 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. The petition is supported by a report by a psychiatrist which makes the PTSD diagnosis and suggests a treatment plan, military records, and other documentation.\textsuperscript{229}

\begin{footnotes}
\item[220] \textit{See Inmate Veterans: Hidden Casualties of War, 5 Corrections} 3, 4 (March 1979). These figures reflect estimates made in the Mid-1970’s.
\item[221] 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, House Comm. Print No. 38 (May 21, 1979) 96th Cong. 1st Session, at 32.
\item[222] \textit{See supra} note 220.
\item[223] Information supplied in telephone conversation with Mr. Bruce Pentland, Director, Veterans in Prison Project on March 8, 1983.
\item[224] Information supplied in telephone conversation with Mr. David Niblack, Wisconsin State Public Defender, on March 1983.
\item[225] \textit{See note} 220 \textit{supra}, at 6.
\item[226] \textit{Id.}
\item[227] \textit{See A Report to the Virginia Parole Board, May 28, 1981} (available through Veteran’s Law Center, Wash., D.C.)
\item[228] \textit{Id.} at 1.
\item[229] \textit{Id.} at 37.
\end{footnotes}
An example of a successful motion to reduce sentence may be found in *U.S. v. Krutschewski*,230 a case related to the *Tindall* case discussed earlier. The defendant in *Krutschewski* was convicted of multiple drug-related charges and was sentenced to consecutive 5-year terms and a fine of $60,000. 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.231

The trial judge in *Krutschewski*, was empowered to hear the defendant's petition for a modification of sentence under Rule 35 of the Federal Rules of Criminal Procedure.232 The petition was successful in 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.233

Since *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. Thus, unlike many cases involving veterans, the relationship between PTSD and the criminal conduct had already been established. 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. However, in many jurisdictions procedural mechanisms, such as Rule 35, which would allow reconsideration of sentences or determinations of liability may not be available.234

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.235 In many jurisdictions these petitions are limited to rather narrow issues. In Illinois, for example, post-trial petitions may be presented only on the grounds of incompetence of counsel, newly discovered evidence, or error of constitutional proportions.236 Typically, *habeas* petitions from a state sentence will be heard by federal courts only after state remedies have been exhausted.237 A necessary response, then, requires attorneys to develop post-conviction strategies that take these realities into account.

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231. *Id.* at 3.


233. *Id.*

234. In Illinois, for example, the trial court loses jurisdiction thirty days after the last action taken. *Ill. Rev. Stat. Ch. 110A § 606* (Smith Hurd 1982) 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.

235. Some suggested uses of *habeas* petitions may be found in Note, *Post Traumatic Stress Disorder — Opening Pandora's Box*, 17 New Eng. L. Rev. at 115-117 (1979). However, these focus primarily on fitness issues which may not be relevant to PTSD cases.


One potential basis for raising PTSD in a post-conviction context is implicit on the relatively recent inclusion of PTSD in the DSM III. Arguably, the certification of PTSD as an identifiable psychological disorder is in the nature of newly discovered evidence. Like a blood sample or fingerprint that defies classification until science develops to understand its significance, the relationship between PTSD and criminal behavior could not have been introduced until after PTSD was identified. Conversely, convictions of veterans that occurred after the promulgation of PTSD by the American Psychiatric Association in which counsel failed to raise PTSD may be attached on grounds that competent counsel should have investigated or presented PTSD. 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.

Theoretically, at least, failure to consider the existence of PTSD may be violative of either due process or equal protection. Many jurisdictions require courts to consider factors in mitigation and aggravation in reaching a sentencing decision. Arguably, at least, failure to consider PTSD as a factor in determining liability or in sentencing may contravene the statutory or constitutional rights of the defendant.

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 it is 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. These suggestions are, of course, highly speculative and attorneys should be encouraged to develop other theories, or to undertake legislative action such as occurred in California.

238. See for example the following cases in which habeas corpus petitions were granted, Kelly v. Ragen, 129 F.2d 811 (C.C.A. III. 1942), (in which the court held habeas corpus to be proper relief in criminal cases where newly discovered evidence is of such a nature as to completely undermine the entire structure of the case upon which prosecution was based); Shuler v. Wainwright, 341 F.Supp. 1061, vacated on other grounds 491 F.2d 1213 (D.C. Fla. 1972) (where the court held that newly discovered evidence which is material and of the type that, if presented to a jury at a new trial, would probably result in an acquittal. See also Reynolds v. Lockhart, 497 F.2d 100 (C.A.-Fla. 1975) where the trial 'judges' or prosecutor's "actual" knowledge that the defendant is receiving incompetent counsel was grounds for granting a habeas petition); Hall v. Wainwright, 441 F.2d 391 (C.A. Fla. 1977) (in which a habeas petition was granted where the public defender filed an untimely appeal). 239.

239. See Jack, supra note 6.

240. Failure to introduce relevant evidence is often evaluated in Competency of Counsel Grounds. Ill. ANN. STAT. ch. 38 § 122-1 (Smith-Hurd 1965). 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. Id.

241. See CAL. PEN. CODE § 1170.8 (1982). See also legislation proposed by State Senator Jack H. Backman of Massachusetts providing treatment for delayed stress syndrome for combat veterans: Such regional director in legal medicine, or any person appointed by the commissioner in his stead, may also serve as director of a court clinic facility or other legal medicine service within his region, and shall ensure that appropriate treatment services for delayed stress syndrome are made available to combat veterans referred by the court or incarcerated in state and county correctional institutions within his region. S. 762 (proposed 1983).


243. 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. In this situation, the importance of the California Statute requiring consideration of PTSD at sentencing is apparent. CAL. PEN. CODE § 1170.8 (1982).
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 these massive, war-induced psychological disorders.