

Chapter Fourteen

Veterans in the Criminal Justice System

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This chapter is for veterans who, since separation, have gotten into trouble with the law. The very basic information contained here may be helpful to those who have been charged with a crime, but who have not yet gone to trial; it may be help those convicted of a crime, but not yet sentenced; and it may be helpful even to those who have been in prison for quite some time. (When the word “prison” or the word “jail” is used in this chapter, it means “prison or jail.”)

Combat vets and non-combat vets who served in a dangerous area may have special problems that may provide special alternatives or advantages when they find themselves entwined with the criminal justice system. The key issue here involves war-related Post-Traumatic Stress Disorder (PTSD) and whether the vet may suffer from the disorder or already has been diagnosed with it. PTSD can make a critical difference in what happens to the vet who has been arrested and charged with a crime.

For information on PTSD in general, see Chapter Three. Note particularly the discussion of the VA-funded Vet Centers as a potential source for help for vets with PTSD.

The following discussion concerning the veteran and the criminal justice system has been crafted to familiarize the vet with some basic terms and con-

cepts. It is most important to stress that the laws and procedures vary from state to state and that the complexity of the rules and the systems requires the services of a qualified attorney. While knowing something about the contents of this chapter will help the vet discuss his or her case with his or her lawyer, criminal charges present waters too deep and too full of hidden hazards for the vet to try to swim alone. When possible, try to secure a lawyer who has defended vets before and, if PTSD might be implicated in the vet's behavior, try to find an attorney who understands the disorder and who has worked with vets or others who have suffered from it.

Before Trial

Most criminal cases are concluded without going to trial before a judge or jury. The prosecuting attorney and the lawyer for the person charged with a crime (the defendant) work out an agreement or plea bargain to settle the matter. Under the terms of the agreement, the defendant agrees to plead guilty in return for being charged with fewer crimes or a less severe crime or crimes, in return for a shorter prison sentence, in return for a different kind of sentence (such as in-patient treatment instead of prison), in return for testimony against a co-defendant, or some combination of those alternatives.

PTSD may be helpful to the defendant interested in negotiating a plea agreement. Given the fact that the presence of the disorder itself may provide a defense (or partial defense) to the charged misconduct, the prosecutor might be more willing to secure a conviction for some (lesser) crime rather than risk the vet being found not guilty. It can also present a valid ground for sentencing an offender, perhaps as part of a probation plan, to serve a term in a treatment facility or hospital rather than a jail or prison. Obviously, if the conduct charged does not involve violence, injury or the use of a weapon, the opportunity for a more favorable outcome is increased.

In some circumstances, the defense attorney might even be able to persuade the prosecutor to simply not proceed with the criminal matter. Where the behavior of the vet has been unusual or strange, but non-violent, and the vet clearly has recognized he or she has a problem and has voluntarily commenced treatment, prosecutors can elect to drop or dismiss the charges on the condition that the vet continue treatment and not repeat the offending behavior in the future. Alternatively, there are programs where the vet must enter a guilty plea and is then placed on a period of probation during which he or she

must get treatment. If he or she successfully completes that treatment, the conviction can sometimes be expunged (erased) from the record.

At Trial

For the veteran who has PTSD and has been charged with a crime, a whole new world was created in 1980. In that year, the American Psychiatric Association published its *Diagnostic and Statistical Manual*, Third Edition, better known as *DSM-III*. *DSM-III* provided the first official recognition of the existence and characteristics of PTSD. Before the Association's recognition, it was difficult, if not impossible, to use a PTSD diagnosis in court. Subsequent editions of *DSM* further discuss PTSD.

While PTSD as an officially recognized diagnosis may literally open criminal justice doors, vets must remember that most vets do not have the disorder even if their experiences during the war were highly traumatic. Furthermore, even for those who have a legitimate PTSD problem, many of the crimes that were committed have nothing to do with the disorder and cannot be explained by or related to that diagnosis.

However, if you have PTSD and your crime is the product of or can be connected to the disorder, your lawyer can and should take the necessary steps to your advantage. As noted before, it might help in securing an acquittal, PTSD might provide enough mitigation (something that reduces the severity of a crime) to secure a charge of lesser severity, and it might help when it comes to sentencing—enabling the vet to receive probation or treatment rather than prison.

Obviously, if a PTSD defense is going to be used, your lawyer must be well prepared. He or she must be familiar with the kinds of defenses and the requirements that are viable in the (state or federal) court in which the vet has been charged. He or she should also be well versed in how PTSD has been used in previous cases both in that court and elsewhere and how to employ experts and other evidence in its regard. And, without question, he or she should be fluent specifically in how PTSD occurs, its typical symptoms and its usual treatment, and how those items have occurred in your case and your overall situation. While you will need diagnostic and treatment experts, your lawyer must be or become familiar with the basic aspects of PTSD.

Insanity Defense

In most states, a person charged with a crime has the potential for securing an acquittal—being found not guilty—for the offense if it has been demonstrated that he or she was insane the time when the crime was committed. While the definition of insanity typically involves not knowing or understanding the nature and consequences of the criminal act and/or not knowing or understanding that the act was wrong, the precise language of the statutes here vary greatly. The advice and counsel of a lawyer, while generally a wise thing to secure, is particularly necessary to have on this issue.

The existence of PTSD may be a key element in putting forward an insanity defense. The disorder may, for instance, have caused such confusion in the mind of the veteran that, when he or she was firing a weapon at an otherwise innocent person, he or she may have been thinking he or she was still in combat using a weapon to repel an assault by the enemy. Psychiatrists and other mental health experts are needed by the defense to assist the defense lawyer in understanding PTSD and to testify as to matters such as the veteran's PTSD-induced confusion and the nature of PTSD. While the insanity defense is similarly available in non-violent crimes, its use has been significantly restricted in recent years because of the difficulties in meeting the increasingly strict standards for its application.

Additionally, the vet must understand that, even if there is a finding of not guilty by reason of insanity or not guilty but insane (some states permit such a finding), the offender is rarely then released back into society. Most states require the immediate transfer into a mental hospital where the period of incarceration may well exceed the time the vet was facing in jail or prison. Beware of using this defense except in the most serious cases.

Other Defenses

The number of other defenses or arguments that can be linked to PTSD and thus used to negate an element of a crime is limited only by the creativity of the attorney and the prior court decisions in the jurisdiction in question. For instance, it can be argued that PTSD had the effect of eliminating the mental state (for instance, the intent to kill) necessary for a finding of guilt. The successful use of such a defense may result in an acquittal or, more frequently, in a negotiation for a guilty plea to a lesser offense than the one initially charged.

Additionally, PTSD may serve to support a self-defense argument whereby the veteran asserts that he or she legitimately believed that he or she was under attack and/or faced imminent bodily harm from the victim. Courts have excused aggressive or assaultive behavior in such instances. Also, though more rare, courts have excused reactive conduct toward others (in the law this is called “automatism”), likening the veteran’s behavior to action without conscious thought.

Sentencing

Once an offending veteran has been convicted of a crime or has entered a plea of guilty, the next step in the criminal justice process is sentencing. Even in those instances where the diagnosis of PTSD has not been successfully used to eliminate charges or lessen their severity, the existence of the disorder and its consequences can play an important role in determining the extent and type of penalty to be imposed for the offense. The creativity of the attorney is key, with his or her presentation of the case generally proceeding from the argument that the veteran is less culpable than the typical offender because of the disorder and how it was acquired. The position here should be that the offender requires treatment instead of punishment and that, even where imprisonment will be imposed, access to treatment during incarceration is a requirement.

Nevertheless, research into and knowledge about the available treatment programs is a must to ensure that the penalty imposed is not more severe than might be otherwise imposed. For instance, an offender might be eligible for a minimum security facility where “doing time” might be relatively easier (and safer) than a period in the penitentiary. If the treatment program exists only in the high- or medium-security institutions (as in the federal system), the veteran might be better off foregoing the treatment alternative. The vet’s attorney might ask the judge to recommend placement in a specific facility. Ask the judge to order or recommend placement in a particular facility.

Sentences in cases prosecuted in the U.S. district courts (federal crimes) are greatly influenced by the so-called “federal sentencing guidelines,” which are in many instances not rational. The courts have upheld the guidelines’ rule that good military service is not a factor in giving a lower sentence than those in the guidelines. Only in the most exceptional case is a federal judge likely to provide a lesser sentence than provided in the guidelines because of military service.

The consideration of service is most likely to be useful in negotiating a favorable pretrial agreement.

After Trial

Even after a veteran has been tried, convicted and sentenced, he or she might still benefit from arguments based on the existence of PTSD.

Reducing the Sentence

While the window of opportunity is often quite small, there does exist some opportunity in some jurisdictions to introduce the existence of the disorder and its consequences for the first time even after the sentence has been imposed. Basically, the argument is that the offender's PTSD was just discovered, there was no reasonable way of knowing about it or discovering it beforehand and, if it had been known before and fully explored and detailed, the outcome of the case would have been different. Another possible argument is that the lawyer at trial was incompetent for not raising PTSD.

Seeking a New Trial

Similarly, and also limited by strict time constraints, an offender might seek to withdraw the plea of guilty and/or seek a new trial based upon newly discovered evidence. Thus, if the lawyer can legitimately argue that he or she did not know about the existence of the disorder and all reasonable steps taken would not have uncovered its existence, an effort can be launched to state that the offender would not have entered a plea of guilty and is entitled to withdraw the plea. Basically, the veteran can start the trial over again. Caution needs to be exercised here as the chance always exists for the second outcome to be more harsh than the first. Also, grants of new trials are rare.

Appeal

While offenders who have entered a guilty plea have limited opportunities to challenge their convictions on appeal, certain issues decided by the trial court when there was a plea of not guilty may still be raised as part of appel-

late review. Generally, the successful appeal requires a demonstration that the lower court made an error of law (not fact) such as failing to recognize that PTSD is an actual disease and/or failing to recognize that PTSD can be used to support an insanity defense or a self-defense defense in that particular jurisdiction. Furthermore, even when the conviction itself cannot be appealed, some sentencing decisions may be challenged, especially in those jurisdictions that have adopted sentencing guidelines or other systems which require specific findings of fact to warrant a particular sentence.

Habeas Corpus

Even if an appeal is unavailable or has been unsuccessful, many state and federal offenders still have an opportunity to make another challenge to their conviction and sentence. The challenge would be outside the normal appellate system. An example is the *habeas corpus* procedure. While there are hard-and-fast time limits for the filing of *habeas corpus* petitions (typically one year from the date that direct appeals were final) and while issues already litigated on appeal are typically not permitted to be addressed again, *habeas* petitions afford offenders the chance to raise issues implicating the Constitution and the rights that flow from it. For instance, the failure of a trial lawyer to raise the veteran's known PTSD as a defense or to use it as a vehicle for an alternative sentence, or both, may form grounds for a claim of ineffective assistance of counsel. Another basis for this claim is that the lawyer's failure to fully explore and document the existence of the disease denied the defendant the right to an adequate defense.

Parole

While the federal system and many states have eliminated the potential for early release from incarceration through parole, PTSD and its treatment can serve as a means for demonstrating why veterans should receive favorable treatment in states that have other types of clemency systems. For instance, arguing that the offender has a disease that is being addressed through treatment clearly may demonstrate the lowered culpability of the veteran and point to the likelihood for success while under post-release supervision. Obviously, if such treatment is ongoing at the institution where the parole hearing is taking place, it is important that the treating professional participates at the

hearing (in person or in summary reports or both) and it is similarly important that the release plans being proposed include demonstrable commitment to continuing the treatment once placed back in the home area. Sometimes VA Vet Centers can help in this regard. See also the following section of this chapter which discusses the VA's new program to assist incarcerated veterans to reenter society

Even if no treating professional is available for testimony, it is advisable to have written materials to provide to the paroling authorities which fully detail and explain the diagnosis and implications of PTSD. Educating the paroling authority and providing a post-release treatment plan will afford the veteran a better opportunity to secure release. Again, a Vet Center may be able to provide such information.

In Prison (Or Jail)

The veteran in prison should attempt to use the time there as productively as possible, including participating in as much educational and vocational programming as might be available. Additionally, voluntary participation in treatment programs and other self-help opportunities make sense in and of themselves and, importantly, are looked upon favorably by paroling or similar clemency authorities (authorities with the power to reduce sentences).

If the particular facility does not have a specific program to deal with PTSD or if the health staff and treating professionals have no specific experience in dealing with the disease and its symptoms, or both, an effort can be made to secure a transfer to a facility where competent help is available. Additionally, your counsel might contact local Vet Centers, the VA transitional assistance program official (at the nearest VA Regional Office or VA Medical Center) or local chapters of veterans groups such as the American Legion, the Disabled American Veterans, the Veterans of Foreign Wars and Vietnam Veterans of America to see if someone there might visit the institution or might set up a program within the walls, or both. Working with the prison authorities to create such a program is something else that should be looked upon favorably by the parole authorities. Again, see the following section on the VA's new incarcerated assistance program.

VA Benefits

All potential recipients of VA benefits (veterans and their families) may apply for disability compensation and other money benefits even while the potential recipient is in jail or prison. Nevertheless, payments are usually reduced to recipients who were receiving benefits before being incarcerated. Any recipient of VA benefits who is imprisoned for more than 60 days as a result of the conviction of a felony will not be paid in excess of the amount paid to a vet with a 10 percent disability rating. If an imprisoned vet has a 10 percent rating, he or she will receive only half of what a vet with that rating is ordinarily paid.

The result is the same if the imprisoned person is receiving DIC (Dependency and Indemnity Compensation, for survivors of veterans) payments. Still, the money the vet would receive if he or she were not in prison can be paid to his or her family. If, for example, a veteran is rated as 100 percent disabled but gets payments at only the 10 percent rate because of imprisonment, the difference between the 10 percent rate and the 100 percent rate can be sent to his or her family—if the family can prove need. Veterans in prison should encourage their families to apply to a VA Regional Office for an “apportionment”—division of the disability compensation. The family must be prepared to explain why it needs the money. The form the family files is VA Form 4-5655.

While the preceding is just a general description of the restrictions, the following rules are worth noting:

- Payments cease on the 61st day after incarceration following a conviction for a felony. If the VA continues to pay after 61 days, the VA should be told to stop so the vet can avoid an overpayment which will be recouped by the VA from payments made after the vet’s release from prison.
- There are special rules for fugitive felons and their families, usually resulting in the cut-off of all benefits.
- A felony is usually defined as an offense punishable by more than one year in prison, unless the offense is specified as a misdemeanor in the court where the sentence was imposed.
- Full benefits are restored if the person is released on work release or to a halfway house to complete his or her sentence. The VA must be notified of the vet’s changed circumstances. The vet can notify the VA with help from a veterans service organization or a VA Re-Entry Specialist (such specialists are discussed below).

Any attempt by the VA to reduce the disability compensation rating previously assigned by the VA while the vet is incarcerated should be resisted and, if necessary, appealed. If the percentage rating is reduced, the payments upon release will be less than before incarceration. And they will take years to be increased if the vet must reopen the claim. So the attempt to reduce the rating should be opposed. See the chapters in this book that describe the VA claims and appeals process.

- An imprisoned person who wants to begin to receive VA benefits or to increase his or her disability rating for VA benefits upon release can apply while in prison. Positive results will immediately affect the amount of the payments the person will receive upon release from prison.
- Any need-based VA pension is totally cut off if the recipient is imprisoned for any offense, not just a felony.
- Notify the VA Regional Office which handled your claim of any impending release from prison. Try to get a veterans service organization to help you. Examples of these organizations are the American Legion, DAV, VFW, and Vietnam Veterans of America. The VA may start to reopen your file, but do not count on it. You will likely need to show it a certificate of release. See the following section on the VA's new transitional assistance program, which provides Incarcerated Veterans Re-Entry Specialists. The transitional assistance program may help get your payments started right away.

New VA Transitional Assistance Program For Vets Getting Out Of Jail Or Prison; Re-Entry Specialists

The VA has started a potentially very useful program to assist the incarcerated vet in making a smooth transition upon release. The program is very new, so do not expect instant miracles. One of the authors of this chapter has spoken with those responsible for the program and he has concluded that they are sincere.

By September 2007, the VA had hired 21 Incarcerated Veterans Re-Entry Specialists. They will be stationed at all 21 VA Health Administration locations ("VISNS"), which are responsible for their regions of the country. They in turn will train Re-Entry Specialists at all other VA medical facilities. Sometimes these specialists will be located at the VA Medical Center nearest to prisons

with large veteran populations. Their work will be governed by VHA Information Letter 10-2006-007 (Healthcare for Re-Entry Veterans). Similarly, each VA Regional Office, where claims are processed, is supposed to have an employee assigned to help vets returning from prison to receive or apply for compensation or pension payments.

The goals of the program are to provide outreach to enable pre-release re-entry counseling and assessment services to include housing information to prevent homelessness; to arrange for medical or social services appointments; and to provide employment information, counseling, and short-term case management as needed. These services are to include referrals and appointments with local agencies and/or VA facilities.

The VA has prepared pamphlets for each state (regarding the particular benefits available in each state) to describe local services available to newly released vets. Ask the prison social services or similar department or pre-release counseling service, if any, how to obtain a pamphlet, or go to the VA Web sites that exist or which will be set up for more information. Two of these sites are www.va.gov (for a huge variety of VA information) and www1.va.gov/homeless/page.cfm?pg=38 (for information on Incarcerated Veterans Re-Entry services and resources). If you have a problem locating a Re-Entry Specialist, call (310) 478-3711, extension 41450.

Educational Benefits

Veterans convicted of a felony and confined in a prison are not eligible for full educational benefits under the G. I. Bill or other VA educational programs. The VA will pay for only tuition, fees, necessary books, equipment, and supplies not otherwise paid for by a government agency. (This is because the veteran has no essential living expenses while in prison.) Regardless of the reduced VA payments, vets in prison may benefit from joining educational programs offered within the prison or (for certain prisoners) at colleges or other institutions outside the prison.

Legality Of Loss Of Benefits

Thus far, all court challenges by incarcerated vets regarding the restrictions of educational benefits and compensation have failed.

Help For Lawyers

Vets in trouble with the law need lawyers. Lawyers representing vets, especially vets with PTSD, often need help themselves. Lawyers representing veterans with PTSD will benefit from getting a copy of the excellent article on PTSD in the criminal justice system written by Prof. C. Peter Erlinder and published in the March 1984 issue of the *Boston College Law Review*. Another resource, available from Amazon.com, is the 1989 book by the late Barry Levine, *Defending the Vietnam Combat Veteran: Recognition and Representation of Military History and Background of the Combat Veteran Legal Client*.

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