

Veterans and the Death Penalty:

Defending the Lives of Veterans with Post-Traumatic Stress Disorder

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I. Introduction

The latest era of wars engaged in by the United States has ushered in numerous changes in American society and in the lives of the soldiers who signed up to protect this country. One of the most concerning developments, highlighted by advances in science and medicine, is the prevalence of post-traumatic stress disorder (PTSD) among troops returning home. Given that aggressive behavior and behavioral control issues are common features of the hyper-arousal element of PTSD,¹ it is unsurprising that an increase in the number of veterans charged with capital murder has accompanied this rise in incidence of PTSD.

The issue of veterans facing the death penalty is one of prime moral significance. This is especially the case when veterans suffering from PTSD face death sentences. PTSD is a mental disorder that functions to reduce culpability because its sufferers cannot control their reactions to certain stimuli as a result of trauma.² It is particularly morally repugnant to hold defendants accountable with sentences of death when their crimes were not only a result of their PTSD, but when they suffer from PTSD as a result of the service and sacrifice that the United States has asked of them by placing them into combat. However, despite this, numerous veterans find themselves facing execution when prosecutors choose to seek the death penalty against them, and when juries and judges find them to be fully responsible for their crime and to be without significant enough mitigating circumstances to spare their lives.

In this paper I will explore the issue of veterans with PTSD facing the death penalty. First, I will briefly review the causes, symptoms and consequences of PTSD. Second, I will

¹ Hal S. Wortzel & David B. Arcineigas, Combat Veterans and the Death Penalty: A Forensic Neuropsychiatric Perspective, J Am Acad Psychiatry Law, 38: 407–14, (2010), <http://www.jaapl.org/content/38/3/407.full.pdf+html>.

² Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders, 467 (4th rev. ed. 2000).

examine four case studies of veterans with PTSD who have faced the death penalty. Specifically, I will use these case studies to analyze the legal avenues available to veterans with PTSD for either submitting a legal defense to capital murder charges at the guilt phase, or disputing their eligibility for a death sentence at the sentencing phase. Third, I will discuss the particular strategies that have contributed to the success or failure of the veteran in each case.

II. PTSD as a Consequence of Modern War

PTSD has long been a tragic consequence of combat exposure for veterans from every war. However, the increasing numbers of relatively young veterans returning home with combat exposure from places like Iraq and Afghanistan has necessarily been accompanied by an increase in the population that suffers from PTSD and the longevity of this population.³

The Department of Veterans Affairs reported that as of November 2011, of the more than 1.3 million combat veterans who have fought in Iraq and Afghanistan, the VA has treated 211,819 individuals for PTSD.⁴ These numbers do not include those who suffer from PTSD, but do not seek treatment or seek treatment elsewhere.⁵ This means that the rate of incidence of PTSD among troops returning home is likely much higher than 16%. In a 2008 report, the RAND Corporation found that 300,000 of those who served in Iraq and Afghanistan presently suffer from PTSD.⁶ This rate of PTSD is not unprecedented by any means. For instance, it is estimated that almost seventy percent of the troops returning from Vietnam suffered from

³ Daniel Burgess et. al., Reviving the "Vietnam Defense": Post-Traumatic Stress Disorder and Criminal Responsibility in A Post-Iraq/Afghanistan World, 29 Dev. Mental Health L. 59, 60 (2010).

⁴ Gregg Zoroya, Rise in PTSD Cases From Two Wars Strains Resources, USA Today, Nov. 29, 2011, <http://www.usatoday.com/news/military/story/2011-11-29/PTSD-cases-rise/51476604/1>.

⁵ Id.

⁶ Terri Tanielian & Lisa H. Jaycox, Invisible Wounds of War: Psychological and Cognitive Injuries, Their Consequences, and Services to Assist Recovery, RAND Corporation, 434 (2008), <http://www.rand.org/pubs/monographs/MG720.html>.

PTSD.⁷ However, the high number of surviving soldiers from the wars in Iraq and Afghanistan, the young age of many of those who are returning with PTSD, and the ongoing nature of these modern wars promises to produce a larger population of those suffering PTSD than ever before.⁸ Floyd Meshad, president of the National Veterans Foundation, also emphasizes that the nature of the conflicts in Afghanistan and Iraq is creating a new and increased risk of PTSD, stating, ““What is different in these wars is that soldiers have multiple tours, multiple kills and multiple close calls without a break in between. One incident can cause a person to live with PTSD for the rest of their lives, and these people are experiencing multiple traumas.”⁹

It is also necessary to note that in addition to PTSD, large numbers of combat veterans from Iraq and Afghanistan, over 200,000 individuals from according to the Department of Defense, are returning with traumatic brain injury (TBI) that can have similar symptoms and impacts as PTSD. With the combined numbers of returning troops suffering from PTSD and TBI, roughly half a million individuals from our most recent wars currently need treatment, not even including veterans from previous conflicts such as those in Vietnam, the Persian Gulf, and even places like Honduras. The total impact of these higher than ever numbers of veterans suffering is sure to have an impact on society. As one Vietnam veteran, Meshad, has postulated, “This is something we haven’t dealt with before, and it’s scary because we don’t know what is going to happen, [but] those of us with forty-plus years of experience with PTSD have a pretty

⁷ Burgess at 59-60.

⁸ Alan Fontana, & Robert Rosenheck. Treatment-seeking veterans of Iraq and Afghanistan: Comparison With Veterans of Previous Wars, *Journal of Nervous and Mental Disease*, 196: 513-19 (2008).

⁹ Melody Finnemore, Firestorm on the Horizon: Specialists Say Legal Professionals Ill-Prepared to Help Growing Population of U.S. Military Members with Post-Traumatic Stress Disorder, *Or. St. B. Bull.* 70: 19, 20-21 (2010).

good idea of what will happen. We're going to see more homicides, suicides, domestic violence and divorces."¹⁰

Although it is unclear what the broader societal impacts of the rise in PTSD will be, the key characteristics of the disorder make it clear that the increase in the kinds of activities that Meshad predicts is possible and perhaps even likely. PTSD operates in a number of ways to negatively impact the personality, social functioning, and responses to stimuli of those who suffer from it. A diagnosis of PTSD is based on five criteria being met.

- First, a person must have experienced or witnessed an event(s) that involved "actual or threatened death or serious injury, or a threat to the physical integrity of oneself or others," and their response to this must have involved "intense fear, helplessness, or horror."¹¹

It is easy to see how so many of the combat veterans from Iraq and Afghanistan, where fighting has been characterized by urban insurgency and close combat, would meet this criteria.¹²

- Second, a person must have intrusive recollections of the traumatic event that is persistently experienced through flashbacks, recurring distressing dreams, recurring distressing and intrusive recollections, and/or physiologic reactivity or intense psychological distress when exposed to "internal or external cues that symbolize or resemble an aspect of the traumatic event."¹³

This criteria encompasses extreme symptoms that can involve visual hallucinations and blackouts as well as fight or flight responses being triggered in response to things such as quick movement in one's peripheral vision, loud noises mimicking explosions, the sound of airplanes overhead, or even soft noises that might resemble the click of a gun before firing.

- Third, a person must experience "avoidance" or "numbing" in a number of ways, that can include efforts to avoid places, people, and things that remind them of the trauma, a sense that their future is foreshortened, and an inability to feel particular emotions such as love.¹⁴

¹⁰ Finnemore at 21.

¹¹ Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders.

¹² Fontana & Rosenheck at 513-14.

¹³ Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders.

¹⁴ Id.

- Fourth, a person must experience hyper-arousal in persistent symptoms that must include two of the following:
 - Difficulty falling or staying asleep
 - Irritability or outbursts of anger
 - Difficulty concentrating
 - Hyper-vigilance, and/or
 - Exaggerated startle response¹⁵

This hyper-arousal criteria and set of symptoms is particularly relevant to veterans who are facing the death penalty because of their participation in crimes. The presence of outbursts of anger and exaggerated startle responses, in particular, can interact with other symptoms of PTSD such as physiologic or extreme psychological reactions to stimuli to produce behaviors that these individuals never would have engaged in before their exposure to trauma. For example, exposure to external stimuli such as perceiving an abrupt approach by another person in peripheral vision at night could trigger a flashback in which a PTSD sufferer may react in aggressive self-defense, believing that they are back in combat in Iraq, Afghanistan, Vietnam or elsewhere. For this individual, arguing self-defense with regard to the killing of a defenseless man who approached to ask for change would not be possible if the judge or jury did not understand the effects of PTSD.

- Fifth, the symptoms addressed by the first three criteria must have endured for more than one month.
- Sixth, “The disturbance causes clinically significant distress or impairment in social, occupational, or other important areas of functioning.”¹⁶

Overall, the criteria that must be met for a diagnosis of PTSD are quite rigorous.

Individuals will largely be unable to receive a PTSD diagnosis without demonstrating the serious impact that a past traumatic experience is persistently having on their day-to-day functioning.

For veterans diagnosed with PTSD who have committed crimes for which they are on trial for

¹⁵ Id.

¹⁶ DSM, *supra* at note 8.

murder, it becomes easy to see how their PTSD impacted their functioning to produce their crime, which they never would have previously committed. For these reasons, the American Bar Association Perhaps this would not be the case in a sophisticated, pre-meditated murder where clear motive existed. However, again and again, we are seeing cases of veterans who have committed seemingly random and motive-less murders, which upon understanding their PTSD diagnoses were clearly prompted by their exaggerated startle responses to stimuli that resemble their experience of extreme trauma. It is hard to justify subjecting veterans to the ultimate punishment of death, when they would not have killed but for their PTSD, and would not have PTSD (or would not have it in such severe form¹⁷) but for their military service.

III. Case Studies

In order to analyze the legal defenses and strategies pursued by veterans with PTSD, I will review the cases of four veterans who faced the death penalty. In all of these cases, a prosecutor sought the death penalty against a military veteran defendant who was charged with first-degree or felony murder (and often both). In two of these cases, the defendants were able to successfully avoid a death sentence. Both of these defendants were also relatively young veterans of the Iraq War. In the remaining two cases, the defendants were sentenced to death and executed. Both of

¹⁷ Some veterans, including some of those whose cases I will discuss, have PTSD not only as a result of their service, but from other traumatic experiences from their past such as child abuse or sexual abuse. The incidence of PTSD where multiple triggers have operated to produce the disorder should not be discounted with regard to the moral dilemma of holding veterans accountable for their actions resulting from combat trauma. In many cases, experiences such as childhood abuse can put an adult at greater risk for PTSD, meaning that although childhood abuse is partially responsible for their PTSD, combat trauma is still a but-for cause of the PTSD, which led to their crime. *See* Briere J. Psychological assessment of adult posttraumatic states. 1st ed. Washington, D.C.: American Psychological Association, 1–23 (1997).

these defendants were older veterans who had served in Vietnam. In all four of these cases, the defendants' PTSD played a major role in the trial.

a. *Joshua Stepp*

Joshua Stepp served in the Army in Iraq. He had significant exposure to combat and experienced numerous traumatic events including repeatedly witnessing his fellow soldiers dying in the explosion of roadside bombs.¹⁸ In a particularly traumatic event, Stepp attempted to recover the severed bodies of his comrades, collecting their limbs and other body-parts and carrying them in a pizza box because no other container was available.¹⁹ Stepp suffers from severe PTSD and has been diagnosed as such by multiple doctors.²⁰

In 2011, Stepp faced charges of first-degree murder and felony murder for the killing of his 10-month-old stepdaughter.²¹ Stepp had been at a bar drinking, when his wife called him and asked him to come home to take care of their children so that she could go to work (both stepdaughters from his wife's previous partners).²² While taking care of the 4-year-old and the infant, Cheyenne, Stepp was unable to get Cheyenne to stop crying as she repeatedly soiled her diapers.²³ Stepp does not remember exactly how it happened, but admits that he killed Cheyenne when he hit her head on the carpet and put a wet paper towel in her mouth.²⁴ At the time, Stepp was not only under the influence of the multiple drinks he had at the bar, but also prescription

¹⁸ David Zuchinno, More Veterans Are Using PTSD as Defense in Criminal Cases, L.A. Times, Sept. 14, 2011, <http://articles.latimes.com/2011/sep/14/nation/la-na-ptsd-20110915>.

¹⁹ Telephone Interview with Thomas Manning, Partner, Manning Law Firm, (May 14 2012).

²⁰ Id.

²¹ Interview with Thomas Manning, *supra* note 19.

²² Zuchinno, *supra* note 19.

²³ Id.

²⁴ Id.

drugs.²⁵ Because trauma to Cheyenne’s genital area was found in addition to blood in her diaper, prosecutors also charged Stepp with digital anal penetration, a felony, which qualified him for the additional charge of felony murder, a death-eligible crime in North Carolina.²⁶

At trial the state submitted five theories of culpability, all of which would result in death-eligible convictions.²⁷ These theories were all variations on one of two theories: first, that Stepp murdered his daughter with malice and pre-meditation, making him guilty of first-degree murder; or second, the theory that Cheyenne’s death occurred in the course of Stepp committing a felony, making him guilty of felony murder. The important distinction between these two charges is that first-degree murder is a specific intent-based crime, whereas a felony murder conviction does not require proving the defendant had intent to kill.

Joshua Stepp was represented by Thomas Manning. Manning reports that they spent more than two years preparing the defense in Stepp’s case.²⁸ Even initially, it was clear that Stepp’s PTSD and related trauma would be a primary focus of the defense.²⁹ At trial, Stepp presented a defense of diminished capacity under North Carolina law, in which they argued that Stepp was incapable of forming the intent to kill because he was incapacitated as a result of his PTSD and the effects of the drugs and alcohol he had taken that night, which he regularly abused as a form of self-medication to cope with his PTSD.³⁰

If this defense was successful in establishing the lack of intent to kill, the state’s only avenue for acquiring a death sentence would be to prove felony murder, which was a possibility,

²⁵ Zuchinno, *supra* note 19.

²⁶ Interview with Thomas Manning, *supra* note 21.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

but not as dangerous of a possibility as a first-degree murder conviction.³¹ However, Manning says that the defense team knew from the beginning that if they lost this affirmative PTSD defense, that Stepp would be faced with certain death. The first degree murder conviction based on premeditation and malice was more dangerous given that all the state would have to prove would be the homicide charge and then not only would Stepp be death-eligible, but also likely to receive the death sentence since intentional killings are not looked favorably upon by juries. In contrast, felony murder is harder to prove because it involves proving a separate felony apart from the death. Felony murder convictions are also viewed more kindly upon by sentencing juries considering the death penalty given the lack of proven intent to kill implicit in a felony murder conviction.³²

Given the importance of the diminished capacity or “PTSD defense,” Stepp’s defense team prepared methodically, amassing significant amounts of evidence relating to head trauma in addition to PTSD, including brain waive imaging, MRI’s, and expert evaluations. Regarding Stepp’s PTSD, specifically, the defense consulted with at least seven experts who confirmed Stepp’s diagnosis. A renowned Duke psychiatrist known for his expertise and specialization in PTSD in veterans who worked at the nearby Veterans Administration Hospital, Jonathan Weiner, volunteered to serve as the primary expert witness for the defense, and Manning credits him with convincing the jury that Stepp suffered from PTSD.³³ Importantly, Weiner was a local authority in the relatively small field of PTSD in veterans.³⁴ Manning reports that having such a reputable expert meant that “the state’s attempts to cross-examine and challenge Wiener’s techniques and

³¹ Interview with Thomas Manning, *supra* note 26.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

science failed because he essentially wrote the books on how to diagnose PTSD in veterans.”³⁵

Manning was able to draw out on re-direct that whatever sources the state cited in their attempts to attack the PTSD diagnosis were often either written by or contributed to by Weiner, who could then provide credible testimony on how the state’s experts erred in their diagnosis of Stepp and on how to correctly apply the methods of determining the existence of PTSD.³⁶

The Stepp defense team also experienced a “lucky break” in the case, when the state’s initial forensic psychiatric expert evaluated Stepp and determined that he did suffer from PTSD.³⁷ The report written by this psychiatrist for the state, was then submitted into evidence by the defense, and the psychiatrist testified to her diagnosis as a defense witness. Manning said that the defense made sure to highlight to the jury that this psychiatrist’s report confirming the diagnosis of PTSD was commissioned and then abandoned by the state.³⁸

Stepp’s defense team also spent a considerable amount of time collecting evidence of developmental issues that impacted Stepp, including his birth mother’s negligence and her alcohol and drug abuse. This evidence was used to bolster the diminished capacity defense in that it provided a backdrop for the pre-existing brain injury and diminished mental health that made Stepp more at risk for PTSD as he patrolled house to house in Iraq, experiencing combat in close quarters, and faced IED explosions in which he witnessed friend after friend die by being blown apart.³⁹ This evidence also doubled as mitigation for the sentencing phase.

As a final, key component to Stepp’s defense, fellow veterans who had served with Stepp and endured some of the same traumatic experiences he had faced in Iraq testified on Stepp’s

³⁵ Interview with Thomas Manning, *supra* note 31.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

behalf.⁴⁰ They focused not only on his good record of service, but also on the way that the experience of trauma had impacted their own lives upon returning home and their experiences suffering from PTSD or watching fellow soldiers suffer from it. Manning noted that the prosecutors' strategy of ridiculing the PTSD defense—one prosecutor argued before jurors that claiming diminished capacity due to PTSD is an insult to veterans because it "taints their suffering" and "perverts this disease"⁴¹—failed in large part because of the credible testimony of Stepp's fellow veterans who had served and sacrificed with him, and who could share their own first-hand experiences with PTSD.⁴²

Manning emphasized that, in addition to comprehensively preparing for the diminished capacity defense, it was also imperative to ensure that this defense did not fall on deaf ears.⁴³ Stepp's defense team utilized the Colorado theory of jury selection to try to ensure that the selected panel of jurors would be as receptive as possible to the PTSD defense and to a life sentence.⁴⁴ Potential jurors were scored on a scale of one to seven, one representing that they would never impose the death penalty and seven representing that they would always impose the death penalty. Manning's goal was to restrict the jury panel to scores of two, three and four (one being desirable, but unlikely to survive the prosecutions strikes for cause and peremptory strikes).⁴⁵

Not only was the defense team largely able to accomplish this goal, they were additionally able to seat seven veterans on the jury, both male and female.⁴⁶ Manning noted that

⁴⁰ Interview with Thomas Manning, *supra* note 35.

⁴¹ Zuchinno, *supra* note 21.

⁴² Interview with Thomas Manning, *supra* note 40.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

the impact of the presence of veterans on the jury cannot be overstated. In particular, upon interviewing jurors after the conclusion of the case, it became clear that those who were veterans were not impressed with the prosecution's attack on the defense's PTSD case and the prosecutor's statements that the defense's argument that PTSD incapacitated Stepp "taints [other veterans'] suffering" and "perverts this disease."⁴⁷ Manning observed, "fortunately, neither prosecutor had served in combat or in the armed services in any capacity," which meant that statements like these were perceived as offensive.

At the conclusion of the trial, the jury deliberated for three days. The bulk of this time, as jurors reported when interviewed after the trial, was spent arguing over the digital anal penetration felony count. The jurors shared that they were all in agreement that Stepp was not guilty of any of the counts that included the element of intent, and that they had come to this determination once they accepted the PTSD defense.⁴⁸ However they were split as to whether Cheyenne's genital area was injured by aggressive wiping during the repeated diaper changes that Stepp had to perform that night or whether she was injured as a result of sexual abuse. In the end, the jury found Stepp not guilty on all but one of the state's theories of culpability, and found him guilty of digital anal penetration, which made him guilty of felony murder.⁴⁹

Immediately following this guilt phase verdict, the defense presented its pre-prepared mitigation case that ranged from more evidence regarding Stepp's PTSD, military service, childhood neglect, and his character. The jury was unable to produce a unanimous verdict, voting 11 to one for life.⁵⁰ As a result, the judge was required to sentence Stepp to life imprisonment, as is required by North Carolina statute where a jury cannot produce a unanimous verdict on life

⁴⁷ Interview with Thomas Manning, *supra* note 35; *See also* Zuchinno, *supra* note 41.

⁴⁸ Interview with Thomas Manning, *supra* note 47.

⁴⁹ *Id.*

⁵⁰ *Id.*

versus death.⁵¹ Stepp is now being represented by the North Carolina Center for Death Penalty Litigation, who is handling his appeal.⁵²

b. *Jessie Bratcher*

Jessie Bratcher's case is in many ways similar to that of Joshua Stepp. Jessie Bratcher also served in Iraq as recently as 2006. After the September 11th attacks, Bratcher chose to enlist in the Oregon National Guard, and in 2005 he shipped out for an 11-month tour.⁵³ Also like Stepp, Bratcher had an unblemished record of military service and was diagnosed with PTSD upon returning home.⁵⁴ Bratcher similarly admitted to the killing he committed. In 2008, after Bratcher's fiancé told him that Jose Ceja Medina had raped her, he shot him.⁵⁵

At Bratcher's trial, the defense team focused on his PTSD and advanced a claim of insanity. Like in Stepp's case, this defense was comprised of diagnoses by a series of forensic psychiatrists who served as expert witnesses, evidence related to the trauma Bratcher faced in Iraq that triggered his PTSD, testimony from fellow soldiers who served alongside Bratcher and similarly suffer PTSD as a result, and evidence of Bratcher's honorable military service record.⁵⁶

Bratcher survived numerous traumatic experiences while serving, including witnessing his close friend die by being crushed by a U.S. military vehicle in a routine patrol.⁵⁷ This type of unexpected tragic occurrence epitomizes why PTSD becomes an enduring disorder for so many combat veterans. Unlike people who have suffered or witnessed a tragic accident or disease in

⁵¹ Interview with Thomas Manning, *supra* note 48.

⁵² *Id.*

⁵³ Kim Murphy, *Did War Make Him Do It?*, L.A. Times, Nov. 28, 2009, <http://articles.latimes.com/2009/nov/28/nation/la-na-soldier28-2009nov28>.

⁵⁴ Finnemore, *supra* note 9, 19-21.

⁵⁵ Murphy, *supra* note 53.

⁵⁶ *Id.*

⁵⁷ *Id.*

their lives, and then who are able to recover as they go back to their normal lives, combat veterans soon learn that they could die at any moment while serving abroad, even during routine drills. Indeed, just weeks after losing his friend, Bratcher almost perished himself when a roadside bomb exploded at the very same intersection where he had watched his friend be crushed to death.

The feeling of never being able to let your guard down defines the hyper-arousal criteria of PTSD, and makes clear why so many veterans are not able to leave behind their combat instincts, unconscious reactions to stimuli, and general sense of impending doom when they return home. As Markku Sario, Bratcher's lead defense attorney described, "Unfortunately, if you have PTSD, everything is a threat," Sario says. "If somebody taps you on the shoulder and you're not expecting it, that's a very serious threat to your life. And they are taught to respond to those threats in a very aggressive manner. When in doubt, kill it."⁵⁸ To help jurors to understand this Sario not only introduced evidence regarding the trauma Bratcher experienced watching his close friend die and in his own very close brush with death, but also introduced evidence regarding the fear and need for vigilance that characterized Bratcher's day to day responsibilities of patrolling villages around Kirkuk and being prepared to face bombs and insurgent attacks at any moment.⁵⁹ As sociologist William Brown, who was formerly an army sergeant himself and who has recently written a book on treating PTSD and who served as an expert witness in the case explained to jurors, Bratcher was essentially a "walking time bomb" because of the trauma

⁵⁸ Finnemore, *supra* note 54, at 23.

⁵⁹ *Id.*

that he had endured.⁶⁰ Brown emphasized that for many veterans who have experienced combat, the only way to move past it and return to their normal selves would be to have a lobotomy.⁶¹

Indeed, Bratcher's squad leader and platoon sergeant, both of who testified at his trial, also suffer from PTSD as a result of their shared trauma from Iraq. As Martin Castellanoz, Bratcher's platoon leader, said, "People don't understand. There's times when I don't have no feelings for nothing. I don't care. I don't sleep. . . . It's like being disconnected from everything. Empty. I could see a dead man and wouldn't even care. And I know this is something Bratcher went through."⁶² In Bratcher's trial, the multiple accounts of the trauma that he experienced and the significant impact on not only his mental functioning, but also the functioning of his peers and leaders, likely helped make clear to the jury that Bratcher could not help but come home from combat with irreparable damage that was no fault of his own.

In addition, Bratcher's grandfather testified both to his good moral character and also to the change in him that he saw when Bratcher returned from Iraq. Bratcher's case is unique in that the defense was able to draw out numerous details from witnesses on the distinct change in his personality and mental state that occurred when he entered combat. For instance, Bratcher's grandfather, who raised Bratcher when his father left and his mother was not able to care for him, described how he often tried to take Bratcher hunting as he was growing up. However, Bratcher never wanted to hunt and refused to fire a weapon, maintaining that killing even animals was wrong.

Bratcher's squad leader and platoon sergeant echoed and supported this account of Bratcher's peaceful personality and his distaste for violence. They testified about how Bratcher

⁶⁰ Id.

⁶¹ Id.

⁶² Murphy, *supra* note 53.

was cheerful and friendly when he first arrived in Iraq, and how in one instance he took criticism from his fellow troops for refusing to fire on an unknown target. The incident demonstrated his aversion to violence and his moral character. It also highlighted one of the reasons that he felt particularly at risk in combat, because after this he didn't know if he could trust some of his fellow soldiers to have his back. His sergeant testified that Bratcher requested a transfer, but that even though he reassured Bratcher he would protect him, Bratcher became more withdrawn. His fellow guard members also testified that after the initial rocket attacks, Bratcher became noticeably more fearful and withdrawn and after seeing his close friend die, he became an entirely different person from the man who had initially refused to take fire on a target, to the point where he was once heard saying, "I'll shoot 'em. I'll kill 'em."⁶³ His platoon sergeant reported that he developed the attitude that "we die, we die."⁶⁴

This stark contrast in Bratcher's personality was very apparent to people who knew him when he returned. As his grandfather said, "When my boy come back, he really come back as a different boy," Baughman said. "I couldn't talk to him hardly at all anymore. At night sometimes he'd jump out of bed real fast, and he'd holler. He just had things on his mind, deep things, that I guess he probably couldn't explain to anybody, really."⁶⁵ He started living with his grandfather again and got a job as a supermarket clerk, but he got angry with customers and lost his job and he fought with his grandfather and moved out. For a time, Bratcher slept in the woods where he lived like he was still in the military, setting up perimeters and patrolling them with his assault rifles—a far cry from the boy who had refused to pick up a gun to hunt animals.⁶⁶

⁶³ Murphy, *supra* note 62.

⁶⁴ Id.

⁶⁵ Id.

⁶⁶ Id.

Finally, when Bratcher's fiancé revealed to him that she had been raped and that her baby might not be his, as he had assumed, Bratcher visibly snapped. He put the barrel of a gun in his mouth and sat down.⁶⁷ Then he grabbed a scissors and cut off his fiancé's hair. Then he asked her whether they should go to the police, or go find the man.⁶⁸ They went to the police station, but it was closed and locked because it was a Saturday.⁶⁹ Then, they went to confront the alleged rapist, who denied knowing his fiancé, then admitted to having sex with her, but denied the rape, and then offered to take care of the baby. Bratcher responded by shooting him six times.

The prosecution responded to Bratcher's insanity defense by arguing that this was simply an excuse for his actions. He presented evidence that Bratcher had "not seen that many dead bodies in Iraq." Similarly the prosecutor argued that although one of the state's experts had confirmed a diagnosis of a stress disorder, another psychologist had said that the results of evaluations of Bratcher were "so extreme that Bratcher could be faking it."

Fortunately for Bratcher, jurors were not swayed by any of these arguments from the prosecution, and they produced a verdict of not guilty by reason of insanity. In addition to deciding not to convict on the first-degree murder charges, jurors also had the option to convict Bratcher of manslaughter if they found that he was acting in a moment of passion. However, the jurors absolved him of guilt and as a result, Bratcher is serving in a mental hospital until the time at which doctors decide that he will not pose a safety risk if he is released for monitoring in the community.⁷⁰ This is the first known murder trial of a veteran who presented a successful PTSD

⁶⁷ Murphy, *supra* note 31.

⁶⁸ Id.

⁶⁹ Id.

⁷⁰ Id.

defense that succeeded in producing a verdict of not guilty by reason of insanity in addition to avoiding the death penalty.⁷¹

c. Manuel Babbitt

Manuel (“Manny”) Pina Babbitt suffered from mental deficiencies apart from his PTSD that set him apart from Stepp and Bratcher. As a child, Babbitt was hit by a car while riding his bike, and the resulting head injury left him markedly changed as noted by many of his family members.⁷² Despite this, Manny Babbitt was intent on joining the Marine Corps and serving in Vietnam. When he failed the minimum intelligence test due to the fact that he was both illiterate and “slow,” the military recruiter let him take the test again and coached him through the answers.⁷³ Like Stepp and Bratcher, once he began his service he also underwent more significant changes as the trauma that he witnessed in Vietnam permanently altered his psyche and left him with a particularly intense form of PTSD.

Upon arriving in Vietnam, Babbitt was immediately thrown into combat and after only 30 days he was found wandering around alone with amnesia that lasted for 20 hours.⁷⁴ This turned out to be the least of his troubles. Babbitt later endured the notorious Khe Sanh siege, an attack that lasted 24-hours a day for at least 77 days and resulted in 737 American deaths and wounded more than 2,500.⁷⁵ As one fellow servicemen shared, “We were more scared of being wounded than of dying. The greatest fear was that we would lose our eyesight or our genitals. We would

⁷¹ *Id.*

⁷² *In re Manuel P. Babbitt*, Clemency Petition, (March 31, 1999), 9.

⁷³ *Id.*

⁷⁴ *Id.* at 11.

⁷⁵ Karl Keys & Bill Pelke, Purple Hearts on Death Row: War Damaged Vets Should Not Be Executed by the State, Alternet, (Dec. 4, 2009), http://www.alternet.org/rights/144370/purple_hearts_on_death_row%3A_war_damaged_vets_should_not_be_executed_by_the_state/?page=1.

watch the artillery guys, who were most likely to be hit, climb on boxes of ammunition so that they would die quickly rather than be wounded. We would watch them be blown to bits.”⁷⁶ On March 17, 1968 Babbitt suffered a head injury from an incoming rocket and crawled to safety before falling unconscious.⁷⁷ However, when his body was discovered, he was loaded onto a truck carrying the bodies of the other dead Marines, and he later awoke in the middle of a pile of dead fellow troops. He lost all memory of the week after he was injured.⁷⁸ Babbitt was awarded the Purple Heart for his courage under fire and his valiant efforts to save one fellow Marine’s life.⁷⁹

When Babbitt returned home after significant time in Vietnam, his condition began to deteriorate. He was honorably discharged from the Marines after repeatedly being absent.⁸⁰ He often would wander off at night, and be found by his wife or father on the highway walking around and talking to himself. He was also observed “prowling and taking cover” as if he were in combat.⁸¹

In 1980, after leaving a bar, Babbitt remembered walking into the fog and seeing headlights move towards him in a way that reminded him of aircraft landing in Khe Sanh.⁸² He did not remember anything else. He woke up under a bush clutching a lighter and several other small possessions from the apartment of Leah Shendel, and elderly woman who was found beaten and then later died of a heart attack.⁸³

⁷⁶ Clemency Petition at 15.

⁷⁷ Id.

⁷⁸ Id. at 16.

⁷⁹ Id. at 18.

⁸⁰ Id.

⁸¹ Id. at 27.

⁸² Id.

⁸³ Id.

Despite Babbitt's PTSD diagnosis and the clear evidence that he experienced a flashback the night that he killed Shendel, PTSD was not raised as a defense at trial.⁸⁴ Similarly, his military service and veteran status was only briefly mentioned.⁸⁵ Instead, in what Charles Patterson, a fellow Vietnam veteran who also served at Khe Sanh and who represented Babbitt in his appeals and clemency petition, called "a bad case of ineffective assistance of counsel," Babbitt's trial counsel only presented "ill-chosen" psychiatric evidence by different psychologists who contradicted each other.⁸⁶ Although PTSD would have provided an affirmative legal defense to the first degree murder charges that Babbitt faced, and would have put his seemingly senseless crime into context for jurors once they understood about flashbacks and Babbitt's the multiple month-long siege that he miraculously survived only to wake up surrounded by death, trial counsel chose to focus on other mental diagnoses that were too hard to prove and for jurors to understand.

Patterson made Babbitt's clear PTSD a main focus of his appeal. However, at the habeas level, these arguments failed.⁸⁷ Patterson observed that the magistrate judge who heard the habeas simply did not believe that a veteran could ever kill an older woman.⁸⁸ Babbitt lost his appeals, habeas case and clemency petition, and he was executed in San Quentin just after his 50th birthday, soon after being awarded his Purple Heart in prison.⁸⁹ Patterson shared that on the day of his execution Babbitt had no memory of ever committing the crime that he was sentenced

⁸⁴ Wortzel & Arcineigas, *supra* at note 3, at 407-8; Telephone Interview With Charles Patterson, Attorney, Morrison and Foerster Law Firm (May 1, 2012).

⁸⁵ Telephone Interview With Charles Patterson, Attorney, Morrison and Foerster Law Firm (Nov. 15, 2011).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Keys & Pelke, *supra* note 39.

to die for.⁹⁰ Babbitt expressed that he did not want his last meal, and instead wanted the money to be donated to a fund for veterans.⁹¹

d. *James Floyd Davis*

James Floyd Davis is a veteran who served two tours of duty in Vietnam, volunteering for the second one after he had returned from the first. Like Stepp, Bratcher and Babbitt, Davis had a good record of military service, and had been awarded a Good Conduct medal in addition to a Purple Heart. After he returned from Vietnam, he suffered from what was then deemed shell-shock (PTSD was not adopted as the name of this disorder until 1980). Davis was hospitalized at the VA for a variety of symptoms that included anxiety, depression, and thoughts of killing his wife and coworkers, and was diagnosed with schizophrenia and paranoid ideation.⁹² Davis was released after 3 months and was given no further psychiatric treatment until 1995 when he began having auditory hallucinations.⁹³ He was again hospitalized for anxiety, hallucinations, and disassociation in 1996, and was diagnosed with schizophrenia and a personality disorder.⁹⁴

Years after his initial hospitalization, after attempting suicide, Davis was also diagnosed with PTSD. This diagnosis was confirmed by the court-appointed psychiatrist who was charged with determining whether Davis was competent to stand trial. Although Davis was judged incompetent to stand trial, after a three-month course of medication that included anti-psychotics and numerous other prescription drugs, he was ruled competent.

⁹⁰ Interview with Charles Patterson, *supra* note 44.

⁹¹ *Id.*

⁹² Trial Tr. vol. 6, 2326, Sept. 30, 1996.

⁹³ *Id.* at 2327.

⁹⁴ *Id.* at 2328.

Davis was charged with three counts of first-degree murder and two counts of assault, after he killed three men at his former place of work and wounded two others.⁹⁵ Davis worked at a tool-making company in Asheville, North Carolina, and after returning to work from being suspended for his involvement in a scuffle (along with the other man that he fought with), he alone was fired. Upon being informed of this, Davis went home. However, two days later he returned with guns that he had bought at a nearby pawnshop and opened fire throughout the company factory.⁹⁶ The prosecution argued that Davis targeted two of the three men that he killed as well as others that he wounded, and indeed, after he was arrested and confronted with a list of the men who died, Davis responded to one name saying, “That’s the son of a bitch that fired me.”⁹⁷

At Davis’s trial, his attorneys presented an insanity defense on his behalf. They laid the groundwork for this defense beginning with jury selection, where the attorneys included familiarity with mental health disorders and a willingness to consider those as a main portion of their voir dire.

However, during the guilt-phase of the trial, although Davis’s attorneys called expert psychologists to testify that Davis was insane at the time of the killings, there was no testimony or evidence submitted regarding Davis’s PTSD or his service in Vietnam.⁹⁸ In contrast to the defenses presented on behalf of Stepp and Bratcher in which their military service and their PTSD suffering played a starring role in the trial, Davis’s PTSD and his military service were

⁹⁵ Trial Tr. vol. 5, 2198, Sept. 30, 1996.

⁹⁶ Id. at 1790-2198.

⁹⁷ Id.

⁹⁸ Id.

virtually unmentioned.⁹⁹ Instead, the defense presented testimony such as that as a child, he had suffered abuse at the hands of his father as well as testimony such as that of Geoffrey McKee that Davis suffered from schizophrenia and delusions of persecution.¹⁰⁰ The information given to the jury regarding these diagnoses differed drastically from the information that was submitted to jurors regarding PTSD in Stepp's and Bratcher's trials. Most significantly, in those trials jurors were confronted with the most horrific of the trauma experienced by soldiers in combat as well as the evidence that their fellow soldiers suffered from PTSD as a result of the same traumas. Jurors would have been hard-pressed to believe that a personal deficiency in either of the defendants was responsible for them coming out of these experiences of trauma with PTSD. In Davis's case, however, jurors were given no explanation from the defense about what could have prompted Davis to suffer from his scary-sounding schizophrenia symptoms, such as hearing voices that told him to kill people or laughing when discussing tragic topics, and his delusions that people were "out to get him."

While it is true that Davis clearly had additional mental illnesses in addition to the PTSD that he, Stepp and Bratcher were diagnosed with that played a role in his crime, the defense could have presented the jury with evidence related to PTSD in addition to the evidence of schizophrenia and delusions that may be associated with more stigma. Importantly, many of Davis's symptoms referenced at trial in explanation of his actions, such as his anxiety, inability to form relationships, withdrawal from other people and reality, and his fear that people were out to get him were also consistent with his PTSD diagnosis, which may have been easier for jurors

⁹⁹ The fact that Davis served in Vietnam was mentioned in passing by one psychologist solely as explanation for why Davis was hospitalized at a VA hospital. Tr. Transcript, 2326.

¹⁰⁰ Trial Tr. at 2331.

to understand, relate to, and respect (given that he suffered from PTSD as a result of his commended military service) compared to diagnoses of schizophrenia and delusions.

Additionally, the prosecution was able to successfully cross-examine Dr. Geoffrey McKee, the lead psychologist presented by the defense, and to discredit his support of Davis's insanity plea. Notably, the prosecutor drew out that McKee had written a book titled, "Insanity and Adultery: Forensic Implications After a Divorce Case," in which the prosecutor accused McKee of recommending that after cheating on one's husband, a woman could plead insanity to escape legal consequences related to the divorce.¹⁰¹ The prosecutor also asserted that included in his book, was the suggestion that forensic psychologists could make money in divorce cases by testifying that a woman cheated due to insanity.¹⁰²

Further, because PTSD was not a focus of the defense, Davis's veteran status was not focused on at the guilt-stage of trial. Whereas testimony from fellow officers in Stepp's and Bratcher's cases gave background to their PTSD diagnoses and served to provide evidence of good moral character and mitigation during the guilt-phase, jurors in Davis's case were never forced to confront the fact that this man who had allegedly killed in cold blood, had also previously served in Vietnam and then volunteered to return for a second tour of duty in which he earned a Purple Heart for his sacrifice. Considering this information at the guilt phase could have given jurors a better understanding of why Davis had a diminished mental state, that it was no fault of his own, and that he had previously had redeeming moral qualities. The fact that Davis served in Vietnam was considered at the penalty phase of the trial, and the jury did find that it was a mitigating circumstance. However, in light of the aggravating circumstances the jury considered (e.g., that Davis murdered person(s) and that he engaged in a course of conduct that

¹⁰¹ Tr. Transcript at 2338.

¹⁰² Id.

included other crimes of violence), the jury held that mitigating circumstances such as Davis's service in Vietnam were outweighed, necessitating a sentence of death.

Davis's case is currently being appealed by Ken Rose at North Carolina's Center for Death Penalty Litigation. Trial counsel's ineffectiveness in failing to present evidence relating to PTSD at both the guilt and penalty phases is a central issue in the appeal. Ken Rose also campaigned to have Davis awarded his purple heart and good conduct medals, neither of which he had previously physically received. In a special ceremony that took place on death row, Davis was officially awarded his purple heart and good conduct medal. Although he was not allowed to keep the medals themselves, he has the following pictures of himself receiving them.





IV. Findings

Although these four cases had factual and legal differences that could have contributed to the varying degrees of success or failure the attorneys achieved on the veterans' behalf, the pattern of avoiding life sentences where certain legal strategies are employed is significant. Most notably, where PTSD was highlighted at trial and presented as a legal defense, Stepp and Bratcher were able to avoid sentences of death.

In both Stepp's and Bratcher's cases, the defense also followed a similar pattern of presenting evidence for their diminished capacity and insanity defenses to first-degree intentional murder charges.¹⁰³ First, noted experts in forensic psychology with a focus in PTSD provided testimony in both cases. Manning, Stepp's attorney, emphasized that having an expert who is respected in the field of PTSD in veterans is invaluable, and it helps if they are local.¹⁰⁴ Second, both Manning and Sario presented Stepp's and Bratcher's treatment records that substantiated their experts' diagnoses of PTSD. Third, in both cases, other sources of head trauma as well as psychological stressors such as childhood abuse were presented to the jury in the context of contributing to a fragile mental state. Fourth, veterans who had served in combat with the defendants testified in both Stepp's and Bratcher's trial. As jurors noted to Manning after the trial, the testimony of these fellow veterans served to substantiate the defendants' accounts of the wartime trauma they experienced, to highlight the defendants' good moral character by speaking to their honorable military service, and to show jurors that the defendants' PTSD was not fake and was not their fault by sharing about their own experiences suffering from PTSD as a result of the same military service. Fifth, the defense teams in both cases were also able to present strong

¹⁰³ Note that felony murder charges do not have intent as an element of the crime and thus cannot be defended against by disputing intent, premeditation and sanity with PTSD evidence.

¹⁰⁴ Interview with Thomas Manning, *supra* note 25.

evidence of a distinct change in Stepp and Bratcher after their military service. The testimony from family members and fellow troops noting the dramatic change that combat had on Stepp and Bratcher served to highlight that both men were formerly “normal” and were never “bad seeds” and to clearly show that their mental health problems were a result of their service and sacrifice.

In contrast, none of these tactics were employed at the trial level in Babbitt’s or Davis’s case. Both men had additional mental health issues, such as the fact that Babbitt was intellectually challenged and that Davis had a host of diagnoses including Schizophrenia. However, the evidence of PTSD, which both Babbitt and Davis were diagnosed with, could easily have been presented alongside the evidence of their other mental issues at trial. The defense teams in Babbitt’s and Davis’s cases also failed to select experts that specialized in PTSD or veteran’s affairs, leading to damaging cross-examination such as that in Davis’s case that the psychologist had suggested using insanity pleas to escape legal culpability in affairs after one party has cheated. Finally, neither Davis nor Babbitt’s fellow veterans testified at their trial and consequently, there was no opportunity for jurors to put the defendants’ diminished mental states in context and understand what could have caused them to snap and also to understand that these men had once been honorable and upstanding citizens whose sacrifice for their country had led to them being reduced to their current state.

V. Conclusion

As men and women continue to return home after serving and sacrificing in combat abroad, the incidence of PTSD will continue to rise and with it will come collateral consequences. It is now more important than ever that veterans be provided with PTSD treatment to address the lasting

mental damage that so many of them endure. Where the government has failed to provide adequate treatment, tragic consequences result such as in these four cases. It is equally important to put crimes like these into the context of the sacrifice of these veterans, and understand that they would not have committed these crimes and had their lives placed at the mercy of 12 jurors if they had not gone to war for the United States. From these four cases, it seems clear that the best way to communicate to jurors that we as a country are responsible for these men's suffering and for their resulting criminal action by presenting a comprehensive legal defense centering on the PTSD that these men suffer from as a result of their military service. This defense is only available to those defendants who have been charged with intentional first-degree murder as opposed to homicide charges where specific intent is not an element. However for the veterans who face these charges and face the death penalty, drawing from past cases to craft comprehensive PTSD-based defenses may save their lives.

It is our responsibility as a nation to provide mental health services to the troops who have put their lives on the line for our country and to ensure that when these mental health services fail, that we do not hold our veterans accountable for the wrongs that they commit as a result of the mental damage that they incurred on our behalf. To this end, a greater focus on PTSD at trial to humanize and explain the crimes of veterans is necessary, and both defense attorneys, prosecutors and judges should familiarize themselves with the legal defenses based on PTSD so that they can effectively engage with these defenses at trial in a way that respects the lives and sacrifices of our veterans.