

No. 11-1237

IN THE
Supreme Court of the United States

OSBORN N. MIRANDA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Armed Forces

**BRIEF FOR THE NATIONAL VETERANS
FOUNDATION AS *AMICI CURIAE* IN SUPPORT
OF THE PETITIONERS AT PETITION STAGE**

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INTEREST OF THE AMICI¹

The Amici Curiae, National Veterans Foundation (NVF), was founded as The Vietnam Veterans Aid Foundation, a non-profit, 501-(C)(3) human service organization in 1986. That organization was at the forefront of assisting Vietnam veterans with reintegration, chemical dependency, homelessness, service-related mental health disorders, and criminal justice matters, including the establishment of a trial team and the publication of *Defending the Vietnam Combat Veteran* in 1989.

Today, under the name National Veterans Foundation, that same organization serves all veterans from both past and current conflicts in the same areas effecting combat veterans. In June 2012, the NVF will publish *The Attorney's Guide to Defending Veterans in Criminal Court*, which brings together medical expertise on service-related mental and physical illness, cultural considerations in dealing with veteran-clients, and legal expertise on techniques to most effectively advocate for the veteran-defendant. The authors of this Brief are also authors and editors of that book, and thus share the NVF's distinct interest in the treatment of military personnel in the criminal justice system.

¹ The parties have consented to the filing of this brief in letters of consent on file with the Clerk. No counsel for any party had any role in authoring the substance of this brief, and no one other than the *amici curiae* provided any monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

The Court of Appeals for the Armed Forces has upheld a military judge's disregard of a servicemember's evidence of Posttraumatic Stress Disorder despite the fact that such evidence could negate that servicemember's voluntary guilty-plea. This precedent negates a positive trend on the issue of PTSD, particularly the recent legal and societal recognition of servicemembers who suffer from its terrible effects. The precedent set by CAAF, which will control how the military justice system will explore issues of PTSD at a guilty-plea, should be reviewed by this Court.

As long as there have been wars, veterans of those wars have returned to society with service-related disorders that led to aberrant or even criminal behavior. In the past, the western approach to such behavior was punitive in the hopes that these veterans could be conditioned out of their disorders. This punitive approach has been magnified within the military due to a severe stigma against posttraumatic stress disorder (PTSD) as a weakness in a warrior culture that demands strength and, as a result, often ignores such disorders. The current generation of combat veterans presents an opportunity to repent for our mistakes of the past and ensure that these veterans are rehabilitated and reintegrated with civil society. To this end, there is a growing legal trend in civilian courts towards rehabilitative treatment and social services over incarceration, as evidenced by *Porter v. McCollum*,²

² *Porter v. McCollum*, 130 S. Ct. 447 (2009).

the many veterans treatment courts across the nation, and statutory and guideline provisions giving judges the power to depart based on such needs. Finally, veterans' service-related disorders have repeatedly been held relevant and even dispositive in criminal cases across the country. No Court should be allowed to fail to recognize the importance and relevance of these disorders at any point in a criminal proceeding.

For all of these reasons, this Court should grant certiorari and reverse the Court of Appeals for the Armed Forces.

ARGUMENT

I. THE HISTORY OF CRIMINALLY INVOLVED VETERANS REVEALS THE INJUSTICE THAT OCCURS WHEN SERVICE-RELATED DISORDERS ARE NOT CONSIDERED IN CRIMINAL PROCEEDINGS

History shows that veterans from every conflict have returned home with service-related disorders and that, as a result, they committed disproportionate levels of criminal offenses. Rather than addressing the underlying disorder, our Nation's past approach has often been to brutally punish these veterans in hopes of preventing future aberrant behavior. This failed. Rather, generations of veterans were pushed out of civil society, leading to greater criminal problems such as motorcycle gangs and unchecked substance abuse. With the current generation of combat veterans, we have the

opportunity to use a criminal offense as an intervention point at which we can ensure treatment of the underlying service-related disorder and better reintegration with the civil society on whose behalf the veteran gave so much. For this model to be effective, these disorders must be recognized at all stages of a criminal proceeding, especially at early stages such as a guilty plea. Yet the Judge in the present case simply ignored the relevance and importance of the Defendant's service-related mental health problems.

**A. Post-War Crime Waves Involving Combat Veterans Following Every Major Conflict
Evidence the Inherent Link between
Combat Trauma and Criminal Behavior**

Historical research reveals a pattern of veteran-committed crime waves following every major conflict. Following the American Revolutionary War, a marked increase in crime caused many states to institute new laws and penalties in response.³

Following the Civil War, a great wave in crime and disorder was documented.⁴ In 1866, two-thirds of all commitments to state prisons in northern states were men who had seen service in the war.⁵

³ ALLAN NEVINS, *THE AMERICAN STATES DURING AND AFTER THE REVOLUTION 1775–1789* 454 (1924).

⁴ Edith Abbott, *Crime and the War*, 9 J. AM. INST. CRIM. L. & CRIMINOLOGY 33, 41 (1918).

⁵ E.C. Wines & Theodore Dwight, *The Reformation of Prison Discipline*, N. AM. REV., Vol. CV, 580–81 (1867).

Following WWI, veteran-committed crimes were also a cause for grave concern.⁶ A study of prison admissions in the three years following WWII found that fully one-third were veterans.⁷

Similarly, a study of Vietnam veterans receiving care for PTSD in the VA system during the mid-1980's found that almost half had been arrested at least once, 34.2 % more than once, and 11.5 % reported being convicted of a felony.⁸

The most recent and definitive tie between combat trauma and criminal behavior comes from the military, itself. In 2009, following a highly-publicized wave of homicides and other violent crimes committed by recently-returning combat soldiers on and around Fort Carson, Colorado, the Army commissioned a study called the Epidemiological Consultation, or EPICON for short.⁹

⁶ Betty Rosenbaum, *The Relationship Between War and Crime in the United States*, 30 J. CRIM. L. & CRIMINOLOGY 722, 730 (1940) (citing Hugo Pam, *Annual Address of the President of the Institute of Criminology*, 10 J. AM. INST. CRIM. L. & CRIMINOLOGY 327, 327 (1919)).

⁷ Walter A. Lunden, *Military Service and Criminality*, 42 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 766, 766 (1952).

⁸ RICHARD KULKA ET AL., THE NATIONAL VIETNAM VETERANS READJUSTMENT STUDY (1990).

⁹ U.S. ARMY CENTER FOR HEALTH PROMOTION AND PREVENTIVE MEDICINE, EPIDEMIOLOGIC CONSULTATION NO. 14-HK-OB1U-09: INVESTIGATION OF HOMICIDES AT FORT CARSON, COLORADO NOVEMBER 2008–MAY 2009, ES-1 (July, 2009).

In the end, the EPICON team found two major factors contributed to post-deployment violent behavior: (1) repeated deployments and (2) the intensity of combat in those deployments. The study confirms what civilian sociologists had long believed: combat contributes to crime. By sending young men and women to war, a country is unintentionally bringing violence back on itself.

B. PTSD's Stigma Has Led to Aggressive Punishment of Veterans with Service-Related Disorders

Though PTSD has been informally recognized for millennia, approaches to dealing with it have varied widely. After battle, many Native American and other tribal societies segregated their warriors from the rest of the tribe, where they were spiritually cleansed of their traumatic experiences. Only when the warrior was ready to reunite with the tribe, and the tribe with the warrior, did the reunion occur.¹⁰

Industrialized nations and their militaries have historically taken a tougher approach with the psychologically-injured. Soldiers suffering psychological injuries have often been stigmatized and even punished. During WWII, General George Patton famously struck at least two psychologically-

¹⁰ EDWARD TICK, WAR AND THE SOUL, HEALING OUR NATION'S VETERANS FROM POSTTRAUMATIC STRESS DISORDER, 209-216 (2005).

injured soldiers he came across in Army hospitals, calling them cowards and malingerers.¹¹

Though today's military is making progress in removing the stigma, it still has a long way to go. In 2007, a series of media reports found systemic failures in mental health treatment of psychologically injured troops at Fort Carson, Colorado.¹² The reports found a pattern by leadership of denying their troops' requests for treatment, stigmatizing those who were getting help, and even kicking some out of the military.

The "warrior" mindset becomes deeply ingrained and many psychologically-injured warriors deny they have a problem, even to themselves. A 2008 RAND Corporation study found that, of the 1.7 million who had served in the Iraq and Afghanistan war zones, over 300,000 were suffering from PTSD, and another 320,000 from Traumatic Brain Injury (TBI).¹³ Only

¹¹ *Private Wrote Family About Being Cuffed*, PORT ARTHUR NEWS (Nov. 24, 1943, at 6); *Reprimand for Patton is Denied*, FRESNO BEE (Nov. 22, 1943, at 1); *Patton Regrets Slapping Soldier*, San Antonio Light (Nov. 23, 1943, at 1); *Gen. Patton Slap Haunts Former GI*, CHARLESTON DAILY MAIL (Mar. 25, 1970, at 12); and *GI Slapped by Gen. Patton in Sicily Is Dead*, CEDAR RAPIDS GAZETTE (Feb. 2, 1971, at 7).

¹² Daniel Zwerdling, *Gaps in Mental Care Persist for Fort Carson Soldiers*, NAT'L PUB. RADIO, May 24, 2007.

¹³ T. TANIELIAN, L.H. JAYCOX, T.L. SCHELL, G.N. MARSHALL, M.A. BURNAM, C. EIBNER, B.R. KARNEY, L.S. MEREDITH, J.S. RINGEL, M.E. VAIANA, AND THE INVISIBLE WOUNDS STUDY TEAM, RAND CORP., MG-720/1-CCF, INVISIBLE WOUNDS OF WAR: SUMMARY AND RECOMMENDATIONS FOR ADDRESSING PSYCHOLOGICAL AND COGNITIVE INJURIES, 64 (2008).

about half of these troops, it found, had reported or sought help for their condition.¹⁴ Of course, the military culture that trained these troops to ignore their own mental health problems is guided by superior officers that seek to ignore these conditions and the problems they create. Many veterans carry this value system with them even after they leave the military and come home.

C. Iraq and Afghan Veterans Present an Opportunity to Correct Past Mistakes

The RAND study cited above is so troubling because it shows that the same problems seen in past conflicts are prevalent in the current generation of veterans.¹⁵ In some ways, those problems may be worse. While the vast majority of Vietnam veterans served a single twelve month tour in-country, many veterans of Iraq/Afghanistan will have served multiple tours. “People aren’t designed to be exposed to the horrors of combat repeatedly. And it wears on them,” General George Casey, Army Chief of Staff, stated in a 2008 press conference.¹⁶ General Casey was announcing the results of a recent Army study which found that levels of PTSD climb significantly with repeated combat deployments.¹⁷ Many of today’s troops have served two, three, four or more tours.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Greg Zoroya, *Findings of Army Health Study, Fifth of Soldiers at PTSD Risk*, USA TODAY, Mar. 6, 2008.

¹⁷ *Id.*

II. CRIMINAL JUSTICE TRENDS AND PRECEDENT FAVOR CONSIDERATION OF SERVICE-RELATED DISORDERS AT ALL STAGES OF A CRIMINAL PROCEEDING

The American criminal justice system also seems to be coming to the understanding that we cannot discard this generation of criminally-involved veterans in the same way we did in the past. Evidence abounds that there is a definite legal trend that favors treatment and reintegration over incarceration. This is largely based on a wide recognition that we failed our veterans in past generations by focusing too narrowly on punishment, as discussed in Section I. Further, given the advanced medical knowledge of service-related disorders, these disorders are increasingly relevant to the veteran-defendant's mental capacity at every stage of a criminal proceeding, especially in determining guilt or innocence.

A. Current Legal Trends Favor a Rehabilitative Approach to Crimes Stemming from Service-Related Disorders

In *Porter v. McCollum*,¹⁸ this Court reversed both the Florida Supreme Court and the 11th Circuit Court of Appeals to save Mr. Porter's life, holding that a defense attorney's failure to present a defendant's combat service and related trauma as a mitigating factor at sentencing in a capital case is

¹⁸ Porter, 130 S.Ct. 447.

proper grounds for a *Strickland*¹⁹ claim of prejudicially ineffective assistance of counsel.²⁰ However, even prior to this landmark decision, courts around the country were finding ways to use the criminal justice system to promote rehabilitation and reintegration of these veterans.

Both Minnesota²¹ and California²² have passed laws designed to ensure that mental health diagnoses and available treatment options are taken into account in sentencing a veteran whose combat trauma played a role in his or her criminal offense. The law gives the judge the tools to make an informed decision, recognizing that probationary treatment is often preferable to a single stint of incarceration in getting to the root of the problem and ensuring long-term public safety. Completion of treatment is a condition of probation and failure to follow through can result in execution of a jail or prison sentence.

United States Sentencing Guidelines § 5H1.11, as revised in 2010, also made a veteran's service relevant at sentencing, "Military service may be relevant in determining whether a departure is warranted, if the military service, individually or in combination with other offender characteristics, is present to an unusual degree and distinguishes the

¹⁹ *Strickland v. Washington*, 466 U.S. 668 (1984).

²⁰ *Porter*, 130 S.Ct. at 455.

²¹ Minn. Stat § 609.115 Subd 10.

²² Cal. Penal Code § 1170.9.

case from the typical cases covered by the guidelines.”²³

Veterans treatment courts, modeled after drug and mental health specialty courts, are further evidence of this trend in changing policy interests and show that this trend is not limited to the legislative branch. As of June 2, 2011, there were at least 62 county veterans courts in 26 different states.²⁴ By December 2011, *The Atlantic*, reported that “Nearly 80 veterans courts have sprung up across the country over the past four years, and 20 more are expected to open by the end of this year,”²⁵ showing a rapid growth of these courts across the country that signals a national acceptance of their underlying principles.

B. Service-Related Disorders Are Relevant to a Defendant’s Capacity throughout a Criminal Proceeding

In cases of extreme service-related disorders, the veteran’s service may be relevant to the determination of guilt or innocence because the

²³ U.S. Sentencing Guidelines Manual, § 5h1.11 (2010).

²⁴ National Association of Drug Court Professionals, “Justice for Vets: The National Clearinghouse for Veterans Treatment Courts,” accessed on June 1 2011, <http://www.nadcp.org/JusticeForVets>.

²⁵ Kristina Shevory, *Why Veterans Should Get Their Own Courts: As Troops Surge Back Into Domestic Life, Incarceration Isn’t Always the Answer*, ATLANTIC, Dec. 2011.

disorder may negate the requisite intent of the crime or mitigate the veteran's culpability. PTSD meets the scientific criteria of admissibility requirements laid down in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993) and Federal Rules of Evidence 702 because,

Applying the *Daubert* factors, we have a falsifiable hypothesis and data that has been tested to support the theory. PTSD studies have been published in peer-reviewed journals and the diagnostic features are accepted in the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV), so it fits well within the scope of general consensus.²⁶

Defenses based on service-related disorders fall into four categories: (1) insanity defenses, negating all culpability; (2) self-defense defenses based on the veteran's altered belief of the amount of force necessary to protect himself or herself; (3) an automatism defense when the veteran is acting out of reflex, sleep-walking, or conditioned stimulus response; and (4) *mens rea* defenses other than insanity defenses, mitigating the veteran's

²⁶ Edgar Garcia-Rill & Erica Beecher-Monas, *Gatekeeping Stress: The Science and Admissibility Of Post-Traumatic Stress Disorder*, 24 U. ARK. LITTLE ROCK L. REV. 9, 30 (2001).

culpability in order to reach a lesser-included-offense.²⁷

²⁷ Thomas Hafemeister & Nicole Stockey, *Last Stand? The Criminal Responsibility of War Veterans Returning From Iraq and Afghanistan With Posttraumatic Stress Disorder*, IND. L.J. 87, 107-132 (2010); see also Daniel Burgess, Kara Coen & Nicole Stockey, *Reviving the "Vietnam Defense:" Post-Traumatic Stress Disorder and Criminal Responsibility In a Post-Iraq/Afghanistan World*, 29 DEV. MENTAL HEALTH L. 59, Jan. (2010); and Alyson Sincavage, *The War Comes Home: How Congress' failure to Address Veterans' Mental Health Has Led to Violence In America*, 33 NOV. L. REV. 481, 496 (2010).

CONCLUSION

For the foregoing reasons, this Court should grant certiorari and reverse the judgment of the Court of Appeals for the Armed Forces.

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