Battle Scars: Military Veterans and the Death Penalty

A Report by
the Death Penalty Information Center

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A Death Penalty Information Center Report
by Richard C. Dieter

Washington, D.C.

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Executive Summary

In many respects, veterans in the United States are again receiving the respect and gratitude they deserve for having risked their lives and served their country. Wounded soldiers are welcomed home, and their courage in starting a new and difficult journey in civilian life is rightly applauded. But some veterans with debilitating scars from their time in combat have received a very different reception. They have been judged to be the "worst of the worst" criminals, deprived of mercy, sentenced to death, and executed by the government they served.

Veterans with Post-Traumatic Stress Disorder (PTSD) who have committed heinous crimes present hard cases for our system of justice. The violence that occasionally erupts into murder can easily overcome the special respect that is afforded most veterans. However, looking away and ignoring this issue serves neither veterans nor victims.

PTSD has affected an enormous number of veterans returning from combat zones. Over 800,000 Vietnam veterans suffered from PTSD. At least 175,000 veterans of Operation Desert Storm were affected by "Gulf War Illness," which has been linked to brain cancer and other mental deficits. Over 300,000 veterans from the Afghanistan and Iraq conflicts have PTSD. In one study, only about half had received treatment in the prior year.

Even with these mental wounds and lifetime disabilities, the overwhelming majority of veterans do not commit violent crime. Many have been helped, and PTSD is now formally recognized in the medical community as a serious illness. But for those who have crossed an indefinable line and have been charged with capital murder, compassion and understanding seem to disappear. Although a definitive count has yet to be made, approximately 300 veterans are on death row today, and many others have already been executed.

Perhaps even more surprising, when many of these veterans faced death penalty trials, their service and related illnesses were barely touched on as their lives were being weighed by judges and juries. Defense attorneys failed to investigate this critical area of mitigation; prosecutors dismissed, or even belittled, their claims of mental trauma from the war; judges discounted such evidence on appeal; and governors passed on their opportunity to bestow the country's mercy. In older cases, some of that dismissiveness might be attributed to ignorance about PTSD and related problems. But many of those death sentences still stand today when the country knows better.

Unfortunately, the plight of veterans facing execution is not of another era. The first person executed in 2015, Andrew Brannan, was a decorated Vietnam veteran with a diagnosis of PTSD and other forms of mental illness. Despite being given 100% mental

The Death Penalty Information Center is a non-profit organization serving the media and the public with analysis and information on issues concerning capital punishment. The Center provides in-depth reports, issues press releases, conducts briefings for journalists, and serves as a resource to those working on this issue. The Center is funded through the generosity of individual donors and foundations, including the Roderick MacArthur Foundation, the Open Society Foundations, the Atlantic Philanthropies, and the Proteus Action League.

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disability by the Veterans Administration after returning from the war, Georgia sought and won a death sentence because he bizarrely killed a police officer after a traffic stop. The Pardons Board refused him clemency. Others, like Courtney Lockhart in Alabama, returned more recently with PTSD from service in Iraq. He was sentenced to death by a judge, even though the jury recommended life. The U.S. Supreme Court turned down a request to review his case this year.

This report is not a definitive study of all the veterans who have been sentenced to death in the modern era of capital punishment. Rather, it is a wake-up call to the justice system and the public at large: As the death penalty is being questioned in many areas, it should certainly be more closely scrutinized when used against veterans with PTSD and other mental disabilities stemming from their service. Recognizing the difficult challenges many veterans face after their service should warrant a close examination of the punishment of death for those wounded warriors who have committed capital crimes. Moreover, a better understanding of the disabilities some veterans face could lead to a broader conversation about the wide use of the death penalty for others suffering from severe mental illness.

I. Introduction

> *Our Nation has a long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines as Porter did.*
>
> **-Porter v. McCollum, U.S. Supreme Court (2009)**

In many sectors of society, U.S. military veterans are finally receiving the respect and assistance they earned by their years of service to the country. Almost every professional sports event begins with a tribute to those currently or formerly in the military. The national and local media frequently highlight the struggles and courageous rehabilitation efforts of veterans from recent conflicts who have come back disfigured or missing a limb.

However, another group of veterans has returned from combat zones with other kinds of wounds. Hundreds of thousands of these veterans are suffering from Post-Traumatic Stress Disorder, from addictions related to physical injuries, or from other disabilities that cannot be helped with a prosthetic. Some of these veterans had mental problems before joining the military, but their condition became worse during their service, as they endured life-threatening experiences. A few of these returning soldiers have committed heinous crimes, causing some public officials to abandon their special respect for veterans and allow the imposition of the nation's worst punishment: the death penalty.

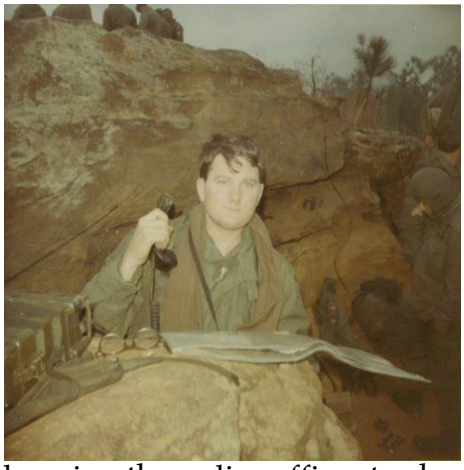
The precise number of veterans who have been sentenced to death is unknown. Estimates from a variety of sources indicate that at least 10% of the current death row–that is, over 300 inmates—are military veterans. Many others have already been executed.

There are two reasons to reconsider imposing a punishment on veterans that is supposed to be reserved for the very worst offenders: *First*, veterans have made a vital contribution to the safety of our country. *Second*, many have experienced trauma that few others in society have ever encountered—trauma that may have played a role in their committing serious crimes. These considerations do not justify ignoring offenses committed by veterans, but should challenge the practice of sentencing veterans—

particularly those with disabilities—to the traumatic conditions of death row followed by execution at the hands of the government they had served.

The use of the death penalty in America has shrunk substantially over the past 15 years. Death sentences in leading capital punishment states like Texas and Virginia have declined by over 80%. Executions will likely decrease in 2015, and last year's total was already a 20-year low.[1]

With capital punishment in decline, and with a growing understanding of the psychological trauma that can be caused by military combat, it might be assumed that few, if any, veterans would be facing execution today. Such is not the case. Hundreds of veterans, including many who suffered severe trauma during their tour of duty, languish on death row.



Item: The first person executed in 2015 was **Andrew Brannan**, a decorated combat veteran from the Vietnam War with no prior criminal record. He qualified for 100% disability from the Veterans Administration because of his Post-Traumatic Stress Disorder (PTSD) and bi-polar mental illness. He was stopped in Georgia for speeding. After being told to get out of his truck, he started acting bizarrely, begging the police officer to shoot him. He then retrieved a rifle from his truck and fired nine shots, killing a young deputy sheriff. The defense made little mention of his military experience, and the prosecution mocked his claim of PTSD ("everybody's got a little bit of PTSD"), implying he was malingering.[2] The Georgia Board of Pardons and Paroles denied him clemency.[3]

Item: In July 2015, the California Supreme Court unanimously upheld the death sentence of **John Cunningham**, also a Vietnam combat veteran, who was seriously abused as a child. He was convicted of killing three people at a place of work owned by

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1 . *See* Death Penalty Information Center (DPIC), *2014 Year End Report* (2014), available at http://www.deathpenaltyinfo.org/documents/2014YrEnd.pdf.
2 . Clemency Petition to the Georgia Board of Pardons and Paroles on behalf of Andrew Brannan, at 13 (Jan. 7, 2015) (on file with DPIC); picture of Lt. Brannan in Vietnam from Petition for Habeas Corpus, Sup. Ct. of Butts Cty. GA (Jan. 12, 2015) (on file with DPIC).
3 . T. Barnes, "A Vietnam Veteran With PTSD Is The First Us Execution Of 2015," The Intercept, Jan. 14, 2015.

his previous employer. He confessed to the crime, making references to dreams and experiences in Vietnam and expressing relief at being caught. He put on no defense at his trial. Extensive evidence of his PTSD was presented at his sentencing phase, but the prosecution countered by noting that other veterans with similar experiences had not committed felonies. He remains on death row.[4]

Item: Courtney Lockhart from Alabama spent 16 months in Ramadi, Iraq, a region known as the deadliest part of the country. Sixty-four members of his brigade died while in Iraq. Of those who survived, many suffered from PTSD, including Lockhart. At least 12 soldiers from the brigade have been arrested for murder or attempted murder. Unfortunately, his trial attorneys did little to investigate or portray this military background.[5] Lockhart was convicted of murdering a young student at Auburn University. He confessed to killing the victim, but said it was an accident. The jury unanimously voted against a death sentence, recommending life in prison instead. However, Alabama is one of a very few states that allows the judge to override the jury, and Lockhart was sentenced to death by the presiding judge. In 2015, the U.S. Supreme Court considered taking his case for review—probably on the issue of judges overriding jury recommendations for life—but ultimately denied Lockhart's petition. He remains on death row.[6]

The death penalty in the U.S. has been significantly restricted by the Supreme Court in recent decades. By interpreting the country's standards of decency as evidenced through legislation and jury decisions, the Court has limited the death penalty to first-degree murder and has exempted juvenile offenders, the intellectually disabled, and the insane. However, that leaves a broad swath of offenders with severe mental illness vulnerable to an unpredictable sentencing process that tries to strike an impossible balance between horrendous crimes and the effects of mental illness on human behavior. The facts of the crimes presented can often block out consideration of a sentence less than death. Veterans with PTSD and other mental problems related to

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4 . "S.C. Upholds Death Sentence for Veteran Who Claimed PTSD," Metropolitan News Company, July 6, 2015.
5 . *See* Rule 32 Petition, Lockhart v. Alabama, No. CC-2008-000197.60 (Cir. Ct. of Lee Cty. Sept. 18, 2015) (on file with DPIC).
6 . R. Buckwalter-Poza, "With Judges Overriding Death Penalty Cases, Alabama Is An Outlier," NPR.org, July 27, 2014; K. Falk, "U.S. Supreme Court refuses to hear death row inmates' appeals in Auburn and Franklin County cases," Al.com, April 20, 2015.

their military service are among those left exposed.

Indeed, such mental health issues—although properly to be considered only as factors *against* the death penalty—are sometimes considered as reasons to *impose* the death penalty, and thus are often not presented to the jury by defense counsel. In 2009 in its review of the case of George Porter, a Korean War veteran with PTSD, the Supreme Court noted: "The judge and jury at Porter's original sentencing heard almost nothing that would humanize Porter or allow them to accurately gauge his moral culpability."[7] A reconsideration of the death penalty for the severely mentally ill[8] could begin with a special examination of the death penalty imposed on U.S. veterans.

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7 . Porter v. McCollum, 130 S.Ct. 447, 454 (2009) (per curiam). In a more recent federal death penalty case, the prosecutors cited the defendant's military service as an additional reason why he *should* be sentenced to death: "[T]here is one mitigating factor that says the defendant served in the United States Army, and he was honorably discharged. Well, that doesn't mitigate against the imposition of the death penalty, ladies and gentlemen. In fact, it's the opposite. It is the training that he received in the military, in these other jobs that he has had, that allowed him to commit this crime." Defendant's Brief, *U.S. v. David Anthony Runyon*, No. 09-11 (4th Cir. Feb. 29, 2012) (available from DPIC) (Runyon remains on the federal death row).

8 . The American Bar Association has called for an exemption from the death penalty for defendants with severe mental illness. *See* http://www.americanbar.org/groups/crsj/projects/death_penalty_due_process_review_project/serious-mental-illness-initiative-.html.

II. Scope of the Problem

> *A large majority of Vietnam Veterans struggled with chronic PTSD symptoms, with four out of five reporting recent symptoms when interviewed 20-25 years after Vietnam.*
> **-National Vietnam Veterans Readjustment Study**

A. Veterans Sentenced to Death

Thousands of people have been sentenced to death in the modern era of the death penalty, but states do not uniformly include military status among the information on death row inmates.[9] The military also does not have a count of the number of veterans on death row or the number executed.

Immediately after the U.S. Supreme Court struck down the existing death penalty in 1972,[10] states began passing new capital punishment laws and sentencing individuals to death under those laws. This coincided with the post-Vietnam era, when many soldiers returned to their communities disillusioned, disrespected, and traumatized by their experience. As this report shows, many veterans ended up in prison and some were sent to death row and were executed. Following the Vietnam era, veterans constituted about 20% of the prison population.[11] Although many of the Vietnam veterans who went to prison were eventually released, those sentenced to death may have now been executed and many remain on death row.

A more recent count of veterans in prison was published in 2007 and found that about 10% of state prisoners were veterans.[12] Although that was a decline from the Vietnam era, it did not include the likely upsurge due to the wars in Afghanistan and Iraq.[13]

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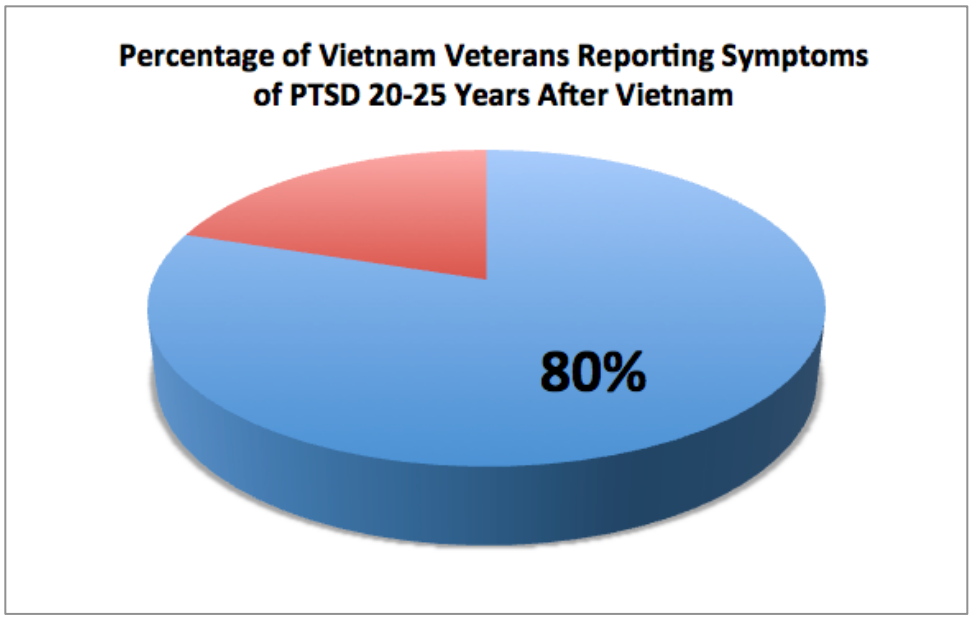
9 . *See, e.g.*, Texas Dept. of Criminal Justice, Offenders on Death Row, available at <https://www.tdcj.state.tx.us/death_row/dr_offenders_on_dr.html>, with information on each inmate (no veteran status).
10 . *See* Furman v. Georgia, 408 U.S. 238 (1972).
11 . C. Mumola, & M. Noonan, "Veterans in State and Federal Prison, 2004," Bureau of Justice Statistics, U.S. Dept. of Justice, April 29, 2007.
12 . *Id.* at 1.
13 . *Id.* Only 3.7% of the imprisoned veterans in this 2004 study were from the Afghan and Iraq conflicts that have dominated the most recent decade.



The percentage of prisoners who are veterans—10%—can serve as an approximation of the percentage of those on death row who are veterans. In fact, among those in prison, veterans were more likely to be there for homicide than non-veterans, and homicide is the crime for which defendants can receive the death penalty.[14]

Further evidence supporting an estimate of 10% for the number of death row inmates who are veterans was obtained by contacting litigators in large death penalty states. Responses from states that represent about half of the entire death row in the U.S. indicate that about 11% of the inmates are veterans.[15] (Even that figure may be low because litigators can only report on clients they know to be veterans. Defendants who withhold that information or where veteran status has never been investigated would be left out of this count.)

Thus, hundreds of veterans have likely been sentenced to death in the modern era of the death penalty, and approximately 300 remain on death row. This is a much larger cohort of

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14 . For those imprisoned for homicide, veterans represented a higher proportion of the population (15%) than the proportion of non-veterans in prison for homicide (12%). *Id.* at Appendix table 4. The BJS report went further and determined that 13.2% of the veterans in state prison in 2004 were either serving life or were on death row. (Appendix table 8). That represents approximately 16,400 veterans.

15 . Data on death row were reported to DPIC from California, Arizona, Florida, Nevada, and North Carolina. These states represent 1,506 of the 3,002 inmates on death row in 2015.

defendants than those implicated in the Supreme Court's decisions to exempt juveniles, the intellectually disabled, and the insane from the death penalty.

The number of veterans on death row is only part of the concern. Being a veteran in times of war exposes individuals to another world that is alien to the common experience. Young military recruits go from their adolescent lives to places where death is a daily and extremely brutal occurrence. Enemies are blown up before their eyes, sometimes at the young recruits' own hands. Their friends and fellow service members are killed and maimed in numbers hardly anyone outside of a combat zone has witnessed—often leaving veterans feeling guilty about having survived.

Item: One soldier described a few hours of this experience during the Iraq conflict:

> First there's a blinding flash, then a deafening sound as my Humvee lurches into the air. My heart jumps to my throat, and in that split-second I know: A roadside bomb. A pressure-plated IED that, somehow, four vehicles passed without detonating. Vehicle Five, about 15 feet behind us, is hit hard, its entire front end gone.
>
> I scramble out of my Humvee, and enter a nightmare. Gunny, our platoon sergeant, lies in a crater the size of a Volkswagen, his legs blown apart.
>
> Flesh and blood are scattered across the road and paint the inside of the wrecked vehicle. Dazed Marines stumble through the smoke and dust, unsure if they're hit. Doc, our corpsman, is tying tourniquets to Gunny's mangled legs as the ground around them turns darker. I run my team's trauma pack to Doc and hear Gunny, his face twisted in unimaginable pain, ask Doc to kill him.
>
> In a rational world, there would be shock and emotion. I am staring at a man near death, the corpsman who tends him kneels on a gruesome composite of turned earth and flesh. No mind should take in such horror. But in war, cruelty is

> commonplace. So there is calmness in our movements. We have to focus on staying alive.[16]

Such violence can leave a permanent residue of shock and disconnect from daily life back in the states. Most people who have served in combat areas thankfully return to their civilian lives and carry on without killing anybody or committing other violent crime. In many ways, they are the lucky ones. But the overwhelming conclusion of years of medical and psychological research on veterans is now clear: PTSD is a real mental illness; it is common among those who have served in war zones; it can result in violent outbreaks in otherwise nonviolent individuals; and it can simmer for years before it manifests itself in unpredictable ways.

B. Prevalence of PTSD and Other Disorders

> *There was a strong reported relation between combat experiences, such as being shot at, handling dead bodies, knowing someone who was killed, or killing enemy combatants, and the prevalence of PTSD.*
>
> **-New England Journal of Medicine (2004)**

The fact that hundreds of thousands of veterans have PTSD and other debilitating disorders,[17] such as depression, anxiety, and alcohol abuse, represents a major challenge, not only for returning veterans, but also for the families and communities in which they will live. The effects of PTSD remain for years, and sometimes decades, after the soldier returns home. The *National Alliance on Mental Illness* provides a description of the disorder in plain terms:

> Traumatic events, such as military combat, assault, an accident or a natural disaster, can have long-lasting negative effects. Sometimes our biological responses and instincts, which can be life-saving during a crisis, leave people with ongoing psychological symptoms because they are not integrated into consciousness.
>
> Because the body is busy increasing the heart rate, pumping blood to muscles for movement and

16 . C. Clark, "Nightmare at a Bend in the Road," New America Media, Feb. 6, 2010, available at <http://newamericamedia.org/2010/02/nightmare-at-a-bend-in-the-road.php>.
17 . *See* studies cited in this section.

> preparing the body to fight off infection and bleeding in case of a wound, all bodily resources and energy get focused on physically getting out of harm's way. This resulting damage to the brain's response system is called posttraumatic stress response or disorder, also known as PTSD.
> …
>
> The symptoms of PTSD fall into the following categories.
>
> - *Intrusive Memories*, which can include flashbacks of reliving the moment of trauma, bad dreams and scary thoughts.
> - *Avoidance*, which can include staying away from certain places or objects that are reminders of the traumatic event. A person may also feel numb, guilty, worried or depressed or having trouble remembering the traumatic event.
> - *Dissociation*, which can include out-of-body experiences or feeling that the world is "not real" (derealization).
> - *Hypervigilance*, which can include being startled very easily, feeling tense, trouble sleeping or outbursts of anger.[18]

Item: One of the most comprehensive studies of PTSD in combat veterans was conducted after the Vietnam War. The Congressionally mandated *National Vietnam Veterans Readjustment Study* (NVVRS) found that the majority of veterans readjusted successfully to civilian life. However, a substantial minority of those who had served in Vietnam was experiencing psychological problems. Over 800,000 vets had symptoms and impairment related to PTSD. Disturbingly, 15% of male veterans still suffered from severe PTSD more than 10 years after the war ended.

Other results from this study included:

> Rates of PTSD were consistently higher for Vietnam theater Veterans than for [other] Vietnam era Veterans and civilians. … Overall, the NVVRS found that at the time of the study approximately 830,000 male and female Vietnam theater Veterans (26%) had

18 . National Alliance on Mental Illness, "Posttraumatic Stress Disorder," available at <https://www.nami.org/Learn-More/Mental-Health-Conditions/Posttraumatic-Stress-Disorder>, visited Sept. 3, 2015.

> symptoms and related functional impairment associated with PTSD. …
>
> [A] large majority of Vietnam Veterans struggled with chronic PTSD symptoms, with four out of five reporting recent symptoms when interviewed 20-25 years after Vietnam.[19]

Item: During the Gulf War (1990-91), returning veterans not only experienced PTSD from combat, but also many were exposed to dangerous chemicals with long-term physical and mental effects known as "Gulf War Illness." A Congressionally mandated study of this phenomenon was released in 2008 and updated in 2014, concluding that the illness was quite real, extensive among veterans who had served, and devastating in its symptoms, which included "memory problems" and "psychological problems." Among the conclusions of the latter report were:

> Studies reviewed in this report show that Gulf War veterans who were most exposed to the release of nerve gas by the destruction of the Khamisiyah Iraqi arms depot have significantly elevated rates of death due to brain cancer. Veterans who were exposed to the highest level of contaminants from oil well fires also have increased rates of brain cancer deaths.
> …
>
> Hazardous exposures in theater are also related to certain other health problems seen in Gulf War veterans. Exposure to the nerve gas agents sarin and cyclosarin has been linked in two more studies to changes in structural magnetic resonance brain imaging that are associated with cognitive decrements, further supporting findings on the nervous system effects of these agents reported in the 2008 report. New evidence has emerged suggesting that oil well fire exposures may be important in the development of Gulf War illness and brain cancer.[20]

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19 . J. Price, "Findings from the National Vietnam Veterans' Readjustment Study," U.S. Dept. of Veterans Affairs, last updated Aug. 17, 2015, available at http://www.ptsd.va.gov/professional/research-bio/research/vietnam-vets-study.asp (citations omitted).

20 . Research Advisory Committee on Gulf War Veterans' Illnesses, *Gulf War Illness and the Health of Gulf War Veterans: Research Update and Recommendations, 2009-2013*, at 2-3, U.S. Dept. of Veterans Affairs (2014).

Research on the effects of Gulf War Illness is continuing. A recent study at the Georgetown University Medical Center compared some of the brain damage in Gulf War veterans to that in Alzheimer's disease: "The use of other brain areas to compensate for a damaged area is seen in other disorders, such as Alzheimer's disease, which is why we believe our data show that these veterans are suffering from central nervous system dysfunction."[21]

Veterans returning from more recent conflicts in Iraq and Afghanistan have a high prevalence of PTSD, especially among those who had been in combat zones:

Item: A study of thousands of veterans before and after deployment in Iraq and Afghanistan was published in the *New England Journal of Medicine* in 2004. The study found a substantial prevalence of PTSD among vets who had experienced extensive combat:

> Rates of PTSD were significantly higher after combat duty in Iraq than before deployment, with similar odds ratios for the Army and Marine samples. Significant associations were observed for major depression and the misuse of alcohol. Most of these associations remained significant after control for demographic factors ….
>
> For all groups responding after deployment, there was a strong reported relation between combat experiences, such as being shot at, handling dead bodies, knowing someone who was killed, or killing enemy combatants, and the prevalence of PTSD.… The rates of PTSD were significantly associated with having been wounded or injured ….[22]

All war is extremely violent and has always taken a psychological toll on those who have fought.[23] The conflicts in Iraq and Afghanistan are no exception. A study of veterans from those conflicts found a very high exposure to just the kind of experiences that can result in PTSD:

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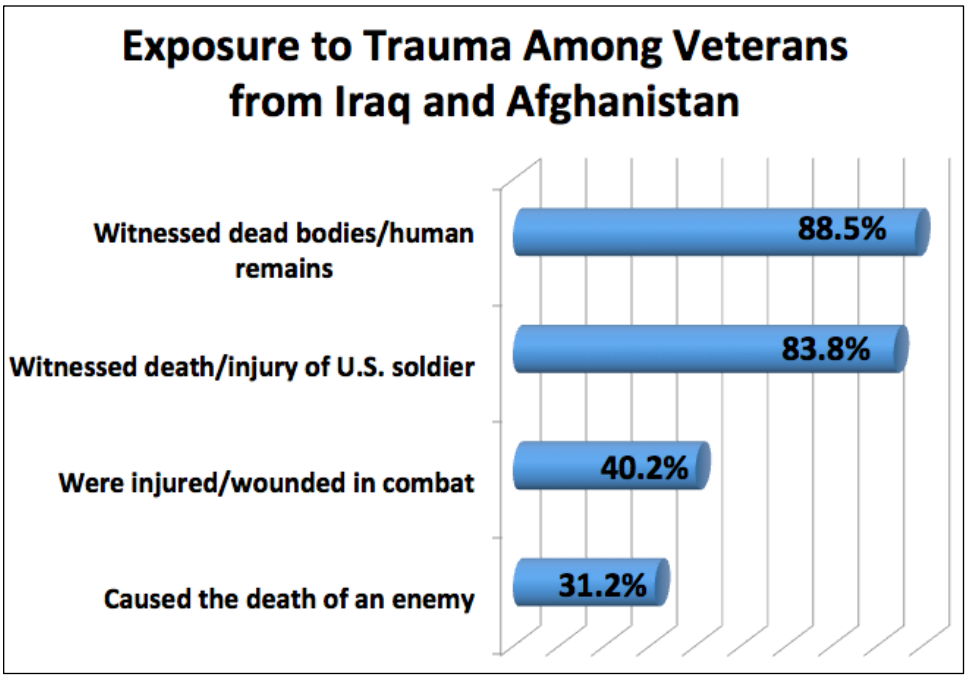
21 . J. Wood, "New Study Pinpoints Two Distinct Forms of Gulf War Illness" *Psych Central*. (2013). Retrieved on October 22, 2015, from http://psychcentral.com/news/2013/06/15/new-study-pinpoints-two-distinct-forms-of-gulf-war-illness/56066.html.

22 . C. Hoge et al., *Combat Duty in Iraq and Afghanistan, Mental Health Problems, and Barriers to Care*, 351 N. Engl. J. Med. 13-22 (2004).

23 . *See* J. London, *Why Are We Killing Veterans? The Repugnance And Incongruity Of The U.S. Government Executing Psychologically Wounded Veterans*, 11 U. St. Thomas L.J. 274, 276-77 (2014)

- 88.5% of the veterans witnessed dead bodies or human remains
- 83.8% witnessed the death or serious injury of an American soldier
- 40.2% were themselves injured or wounded in combat
- 31.2% directly caused the death of an enemy combatant
- 21.4% participated in handling or uncovering human remains
- 20.9% directly caused the death of a civilian
- 12.8% were directly responsible for the death of a child.[24]



A 2008 study by the RAND Corporation estimated that about 300,000 (18%) of the 1.64 million military members deployed to Iraq and Afghanistan had PTSD. Among veterans diagnosed with PTSD or major depression, only about half had received treatment in the previous 12 months.[25]

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24 . W. Brown, "Spinning the Bottle: A Comparative Analysis of Veteran-Defendants and Veterans Not Entangled in Criminal Justice," in *The Attorney's Guide to Defending Veterans in Criminal Court* 128-30 (B. Hunter and R. Else eds. 2014).

25 . RAND Corporation, "Invisible Wounds: Mental Health and Cognitive Care Needs of America's Returning Veterans," at 2-3 (2008).

The outbreak of violence in the lives of veterans can be hard for an overwhelmingly non-veteran public to understand. The victims are often loved ones and even fellow soldiers. Researchers at the *New York Times* noted a significant uptick in violence among veterans once they began returning from Iraq and Afghanistan. The *Times* found an 89% increase in homicides among active-duty military personnel and new veterans compared to the six years before the invasion of Afghanistan. The study reviewed 121 cases in which veterans of Iraq and Afghanistan committed or were charged with murder after their return from war. Among the findings:

> Three-quarters of these veterans were still in the military at the time of the killing. More than half the killings involved guns, and the rest were stabbings, beatings, strangulations and bathtub drownings. Twenty-five offenders faced murder, manslaughter or homicide charges for fatal car crashes resulting from drunken, reckless or suicidal driving.
>
> About a third of the victims were spouses, girlfriends, children or other relatives ….
>
> A quarter of the victims were fellow service members, including Specialist Richard Davis of the Army, who was stabbed repeatedly and then set ablaze, his body hidden in the woods by fellow soldiers a day after they all returned from Iraq.[26]

26 . D. Sontag et al., "Across America, Deadly Echoes of Foreign Battles," N.Y. Times, Jan. 13, 2008.

C. Mental Illness, PTSD, and the Death Penalty

> *The tragedy of the wounded combat veteran who faces execution by the nation he has served seems to be an avoidable one, and we, as a society, should take action to ensure that it does not happen.*
>
> **-Dr. Hal Wortzel, Professor of psychiatry, University of Colorado[27]**

The understanding of the relation between mental problems and wartime trauma has expanded greatly in recent years. PTSD is now included among the mental disorders in the practitioner's manual of the American Psychiatric Association.[28] But the symptoms of PTSD do not always manifest themselves immediately after a veteran returns from war.

Crimes committed by people with PTSD can appear to spring out of nowhere. When a sound, a smell, or personal interaction connects with a repressed memory of a terrifying experience, the mind and body can react in violent ways—perhaps helpful towards survival in a military theater—but inappropriate, illegal, and extremely dangerous in a civilian setting. To an ordinary observer not familiar with PTSD, a sudden reaction to a seemingly minor disturbance is very frightening.

Many of the crimes committed by former soldiers with PTSD were directed at people they had a close relationship with. In the *New York Times* study cited above, one-third of the homicide victims killed by those returning from Iraq and Afghanistan were family members or girlfriends. Another one-quarter were fellow service members.[29] The violence is erratic, generally not triggered by any real threat from the victim. When it is over, there is often deep remorse, admission of guilt, and the danger of suicide.

If the death penalty is sought and mental problems are introduced at the trial, this forces the decision-makers at sentencing to weigh two strongly competing factors—the heinousness of the

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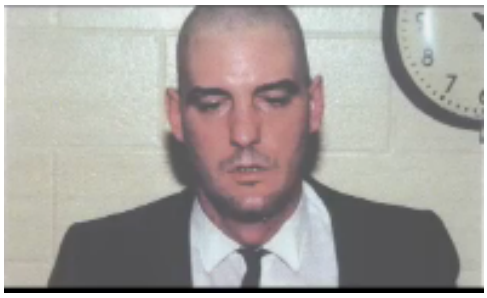
27 . Dr. Hal Wortzel and Dr. David B. Arciniegas, *Combat Veterans and the Death Penalty: A Forensic Neuropsychiatric Perspective*, 38 Journal of the American Academy of Psychiatry and the Law 407-14 (2010) (Conclusion).
28 . American Psychiatric Association. *American Psychiatric Association: Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition* 271-72 (2013) (DSM-5).
29 . See Sontag, note 26 above.

crime versus the influence of mental illness on the actions of the defendant—and then to choose between two hugely disparate outcomes: life or death. There is no formula for such choices; neither psychiatrists nor judges are prepared for such a decision, much less ordinary jurors.

If a veteran's PTSD was preceded by other forms of mental illness, childhood abuse, or other disabilities, the problems for the justice system are compounded.



Item: Scott Panetti had been in the Navy before his downward spiral into mental illness led him to shave his head, put on combat fatigues, and kill his in-laws in Texas in 1992. Prior to the murder, he was treated and often given medications at mental hospitals, including VA facilities in Texas.[30] At his death penalty trial he called himself "sarge" and was allowed to defend himself dressed in an old-time cowboy suit. During the trial, he told irrelevant stories from his time in the Navy and subpoenaed Jesus Christ as a witness. Despite a farcical legal process, he was convicted, sentenced to death, and remains on death row today. He was in the care of the VA after his service and perhaps more could have been done by officials to treat Panetti earlier, to dissuade the court from allowing him to represent himself in a capital trial, or to convince the state that he should be spared execution.

Panetti's case stands today at the forefront of the debate about executing people with severe mental illness. The Supreme Court has barred the execution of the insane, but was vague about the definition of insanity.[31] Texas insists that Panetti has some understanding of the fact that he is being punished for his crime and hence is not insane. The U.S. Supreme Court sent Panetti's case back to Texas to reconsider his mental competency in light of his history of mental illness,[32] but has not said that the severely mentally ill should be exempt from the death penalty.

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30 . J. Silver, "Panetti Case Argued Again Before 5th Circuit," Texas Tribune, Sept. 23, 2015.
31 . *See* Ford v. Wainwright, 477 U.S. 399, 421-22 (1986) (Powell, J., concurring in part).
32 . Panetti v. Quarterman, 551 U.S. 930 (2007); *see also* Silver, note 30 above (recent 5th Cir. review).

III. Areas of Concern in Capital Cases

All of the veterans who have faced the death penalty since 1973 fall into three categories: Some have already been executed; some are still on death row or had their death sentence reduced; and some have not yet been sentenced to death.

There are lessons to be learned from cases in each category that could prevent injustices in the treatment of veterans facing capital prosecution. For veterans on death row or facing trial, intervention may save their lives. As a start, all persons on death row who are veterans should be identified. Where appropriate, information about PTSD and other debilitating problems related to military service could be shared with prosecutors, defense attorneys, courts, governors, and legislators, with an emphasis on the mitigating value of such information.

A. Veterans Already Executed

Over 1,400 people have been executed in the U.S. since the death penalty was reinstated in 1976. Many of them were veterans. Some received significant media attention as protests arose close to their execution, but in other cases the military service of the inmate, along with any debilitating effects, may never have been raised. Identifying all the executions of veterans and finding out whether PTSD existed and whether it was raised in legal proceedings would be very instructive in addressing such cases in the future.

In the post-Vietnam era, there was significant resistance to recognizing PTSD as a legitimate mental illness and as a critical mitigating factor in capital sentencing.[33] The Vietnam War was very unpopular and returning vets bore the brunt of disrespect for the military generally, which overflowed into disrespect even towards individual soldiers. This may not have been a majority view, but the difference between the outward deference and respect for returning soldiers now, compared to the early 1970s, is quite stark.

Returning vets not only received little support, but they also found themselves in the midst of a conservative backlash against the rising crime rates that accompanied the late- and post-Vietnam eras. President Richard Nixon strongly supported the death penalty in his re-election bid in 1972, and a crackdown on crime and drugs was a typical part of political campaigns. By 1976, 35 states had quickly passed new death penalty statutes in response to a U.S.

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33 . *See* London, note 23 above, at 277 (PTSD not formally recognized until 1980).

Supreme Court ruling that temporarily halted executions.[34] The confluence of those societal pressures was apparent in the California case of Manuel Babbitt.

Manny Babbitt

> *The cops promised me they would give him the help he needed.*
>
> **-Bill Babbitt, after turning in his mentally ill brother, who was executed in 1999**

Over the course of 40 years in the modern era of the death penalty, California has executed 13 inmates, while over 750 remain on death row. Manny Babbitt was hardly the "worst of the worst" of criminal defendants in the state during that time. After being released from a mental institution, Manny lived with his brother, Bill. He had been suffering from PTSD ever since he returned from Vietnam in 1969. During the 77-day siege at Khe Sanh, he had picked up pieces of the bodies of his fellow soldiers. When he was wounded, he was evacuated in a helicopter on a pile of dead bodies.

In 1980, he broke into the home of an elderly woman and beat her. She died of a heart attack. After Bill read about the case in the newspaper, he found a cigarette lighter and some money that Manny newly possessed. He decided to turn Manny over to authorities, expecting his war-hero brother to receive the medical attention he needed. Manny did not deny his role in the murder, but said he did not remember it. Manny, who was black, was tried by an all-white jury, sentenced to death, and executed in the gas chamber in 1999, shortly after receiving the Purple Heart in prison.[35] He was the first black person executed in California in the modern era.[36]

In an interview for the *New York Times Magazine* after the execution, Bill described the changes that had come over his brother after he left the mental institution and moved in with Bill's family:

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34 . *See* Gregg v. Georgia, 428 U.S. 153 (1976).
35 . "Should Manny Babbitt Die?" SF Gate, April 5, 1999.
36 . J. Doyle et al., "Vietnam Vet Babbitt Executed," SF Gate, May 4, 1999.

> We gave him money and tried to help him get work. But when I let him go out on his own, he acted strange. I didn't want to use the word "crazy." But he was bathing less, and his dress was bizarre. I was worried. I had let Manny get away from me and spend too much time by himself. His demons started coming to the surface.

Bill described the guilt he felt in surrendering his brother to the police as a suspect in a murder:

> I felt guilty, and ashamed of him. On his last day of freedom, I betrayed him. It was terrible. But I felt I had to do what I did. During his interrogation, an officer told Manny, "You're not going to go to the gas chamber or anything like that." The cops promised me they would give him the help he needed.[37]

Manny declined his final meal and requested that the $50 allotted be given to homeless Vietnam veterans.[38] Although little was made of his PTSD at his 1982 trial, his appellate lawyers raised the issue repeatedly. Ultimately, Gov. Gray Davis, himself a Vietnam vet, declined clemency, saying:

> Countless people have suffered the ravages of war, persecution, starvation, natural disasters, personal calamities and the like. But such experiences cannot justify or mitigate the savage beating and killing of defenseless, law-abiding citizens.[39]

The governor mistakenly equated the physical suffering from natural calamities with the mental scars of combat soldiers, and failed to distinguish between crimes that cannot be mitigated and the mentally ill criminal, whose responsibility was diminished by such trauma.

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37 . B. Babbitt, "My Brother's Guilt Became My Own," N.Y. Times Magazine, Jan. 14, 2001 (as told to Gabrielle Banks) (picture of M. Babbitt with permission of family).
38 . *See* Doyle, note 36 above.
39 . *Id*.

Louis Jones, Jr.

By 2003, the country had learned more about PTSD and other military-related illnesses, and the attitude towards those who had served their country in the military had changed considerably.[40] Therefore, it might seem surprising that Louis Jones, a decorated Gulf War veteran with no prior criminal record, was executed that year by the federal government, despite clear signs of mental illness following his service in the war.

As with many crimes committed by those with PTSD, the series of events surrounding Jones's offense made little sense. In 1995, he entered Goodfellow Air Force Base in Texas, where he was a civilian employee, and where his ex-wife worked. He kidnapped a total stranger, Pvt. Tracie McBride. He brought her to his apartment, raped her, and then brought her to a bridge where he killed her with a tire iron. Jones confessed to the crime and led police to the body. His ex-wife testified at Jones's trial that he had assaulted her at his apartment 2 days before he kidnapped McBride. She said he was acting "very crazed," "panicked," and was "spinning out of control."[41]

His attorneys claimed that his exposure to nerve gas in Iraq and post-traumatic stress from his combat tours contributed to his murder of McBride. At his trial, at least some jurors found the existence of important mitigating factors in Jones's favor but nevertheless unanimously sentenced him to death. A single juror voting for a life sentence would have meant no death penalty. Some of the jurors found:

- Jones committed the offense under severe mental or emotional disturbance
- He was subjected to physical, sexual, and emotional abuse as a child and was deprived of sufficient parental protection that he needed
- He served his country well in Desert Storm, Grenada, and for 22 years in the United States Army
- He is likely to be a well-behaved inmate
- He is remorseful for the crime he committed

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40 . *See, e.g.*, A. Giardino, "Combat Veterans, Mental Health Issues, and the Death Penalty: Addressing the Impact of Post-Traumatic Stress Disorder and Traumatic Brain Injury," 77 Fordham Law Rev. 2955, 2989-91 (2009) (citing changes in contemporary attitudes).

41 . R. Serrano, "A War Hero, a Condemned Killer," Los Angeles Times, January 14, 2003.

- He suffered from numerous neurological or psychological disorders at the time of the offense.[42]

In 2000, while Jones was on death row, the Pentagon sent him a letter revealing that he had been exposed to chemical agents when the Army demolished a munitions plant in Khamisiyah, Iraq.[43] During Operation Desert Storm, Jones drove through burning oil fields in an area permeated with land mines.[44]

Nevertheless, Jones was executed on March 18, 2003, at the Federal Penitentiary in Terre Haute, Indiana. President George W. Bush refused Jones's clemency request, while at the same time preparing the country for the start of the Iraq War. Assistant U.S. Attorney Tanya Pierce, who prosecuted Jones, discounted his plea for mercy, asserting that if some soldiers had been able to integrate back into civilian life after the Gulf War, so should all of them: "It is an insult to the thousands and thousands of people who went over there and did their patriotic duty, came back and are law-abiding citizens."[45] Jones was barred from burial in a military cemetery.

John Allen Muhammad

In capital cases, the facts of the crime are often so disturbing and frightening that jurors may have difficulty hearing important mitigating evidence put forward by the defendant. This was likely the case after John Allen Muhammad was convicted of being one of the two "Beltway Snipers," responsible for 10 deaths in the Washington, D.C., area in 2002. Virginia's governor, Tim Kaine, who had experience as a capital defense attorney, denied Muhammad clemency, resulting in his execution in 2009. Muhammad's case was not helped by the fact that he was allowed to initially defend himself and that he made delusional claims of innocence.

Like Louis Jones, Muhammad was a Gulf War combat veteran. He, too, had been stationed in Khamisiyah, Iraq, where the destruction of a huge arms depot exposed thousands to poisonous chemicals. He served many years in the military, including three months as part of Operation Desert Storm, for which he received a Kuwait Liberation Medal. He was honorably discharged in 1994.[46]

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42 . Jones v. United States, 527 U.S. 373 (1999), at footnote 4 (aff'g lower court's denial of relief on grounds unrelated to military service).
43 . S. Tan, "A Hymn on His Lips, Veteran is Executed; Gulf soldier ignores his victim's relatives as they watch him die," Indianapolis Star, March 19, 2003.
44 . "Gulf War Veteran is Executed," Indianapolis Star, March 18, 2003.
45 . S. Tan, note 43 above.
46 . "John Allen Muhammad: How decorated Gulf War veteran became subject of manhunt," Seattle Times (staff reporters), Oct. 25, 2002.

Muhammad's ex-wife, Mildred Muhammad, described John as a changed man after his return from Saudi Arabia. "Before going to Saudi he was the life of the party," she said. "Everyone wanted to be around him. He came back confused, moody … and was diagnosed with PTSD. He was a proud man -- not one to say, 'I need help.'"[47]

By the time of his trial, he certainly needed help. Some of his mental problems were summed up by his attorneys in a final petition to the U.S. Supreme Court prior to his execution. Evidence offered included:

- A psychiatrist, Dr. Dorothy Lewis, found Muhammad lacked rational understanding and was incompetent to represent himself
- A neurologist, Dr. Jonathan Pincus, found three serious abnormalities in his MRI brain scan, perhaps due in part to severe physical abuse suffered as a child
- Muhammad repeatedly made delusional statements, including his claim to being present at the falling of the Berlin Wall, and believing he "might be on another planet."
- He was convinced he was a prophet and that his co-defendant, John Malvo, had concocted a cure for AIDS.[48]

Whether Muhammad's mental problems were pre-existing, caused by childhood abuse, exacerbated during his military service, or some combination of these factors is impossible to know at this point. In any case, mental illness is not a bar to the death penalty. It is supposed to act as a mitigating factor in the jury's deliberations, but a defendant would have to be insane to be completely exempt from the death penalty.[49] Muhammad was executed on the eve of Veterans' Day in 2009.

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47 . M. Norris, "Ex-wife of D.C. sniper speaks out on domestic violence," www.army.mil, Oct. 12, 2012.
48 . Muhammad v. Kelly, cert. pet. to U.S. Supreme Court (2009), at pp.4-7 (on file with DPIC).
49 . Ford v. Wainwright, 477 U.S. 399 (1986).

Andrew Brannan

> *I am proud to have been able to walk point for my comrades, and pray that the same thing does not happen to any of them.*
>
> **-Andrew Brannan, Vietnam Vet, before his execution in 2015, on raising the public awareness of PTSD**

Andrew Brannan's case was mentioned in this report's *Introduction* as evidence that the crisis of veterans on death row has not been resolved by passage of time. Brannan was the first person executed in 2015, and his case fits the characteristics of many other veterans who have been sentenced to death: evidence of mental illness, probably caused by or exacerbated by PTSD or other military-related trauma; a bizarre and horrendous crime, followed by the vet's fatalistic admittance of what he did; and finally, a harsh denial of mercy, despite the mitigating evidence of military service and the toll that it might have taken.

Brannan had taken to living in a squalid shack in the woods before his crime. Taylor Barnes, a freelance journalist in Georgia, summarized Brannan's downward spiral of mental illness:

> Brannan volunteered for the Army in 1968 and was trained as a parachutist. He served in Vietnam from 1970 to 71, and saw extensive combat. Twice he took charge of his unit after his commanding officers were killed. He would later recount to his psychiatrist several situations of how he narrowly escaped death during the war.
>
> Brannan was honorably discharged in 1971. He received the Bronze Star and two Army Commendation medals for his service.
>
> But as he returned to civilian life, deep psychological and personal problems emerged in Brannan's life. His lawyer said he could not hold down a job and his marriage fell apart. One of Brannan's brothers was killed in active duty and another committed suicide. In 1984, he was granted partial disability for service-connected Post Traumatic Stress Disorder (PTSD). By 1991, the Department of Veterans Affairs determined Brannan to be 100 percent disabled due to PTSD, a

> severe diagnosis that means one's symptoms show "total occupation and social impairment."
>
> In 1996, his VA psychiatrist would further diagnos[e] him as bipolar. Brannan was hospitalized at least twice for mental illness.
> …
>
> Brannan's lawyer called him hours before his execution and told him that his case had raised public awareness about the impact of PTSD on veterans. Brannan responded, "I am proud to have been able to walk point for my comrades, and pray that the same thing does not happen to any of them."[50]

Brannan's crime was irrational. He killed a police officer who was making a routine traffic stop for speeding. After initially exchanging pleasantries with the officer, he became hysterical, begging the officer to shoot him. The likely explanation for such behavior is mental illness, and in Brannan's case, that illness was accompanied by PTSD from his service in Vietnam. In the end, Georgia executed a severely mentally ill inmate at age 66 for a crime committed many years ago.

Leonel Herrera and the Possibility of Innocence

One of the risks with any use of the death penalty is the possibility of executing an innocent person. In the cases of veterans, if a defendant's primary defense is that he did not commit the murder he was charged with, the jury might not hear of his military service and PTSD. One of the military veterans executed in Texas became far better known for bringing the issue of innocence to the Supreme Court than for his military service.

Leonel Herrera was charged with killing a police officer. Leonel's primary defense was that his brother Raul, a known drug dealer, had committed the murder, and the officer-victim was himself involved in dealing drugs. Leonel's case made headlines because the U.S. Supreme Court chose it as a vehicle to consider whether a claim of innocence arises to a federal constitutional issue requiring additional review. Ultimately, the Court (6-3) elected not to resolve this issue, but instead assumed it was unconstitutional to execute someone with extraordinary evidence of innocence, but

50 . *See* Barnes, note 3 above.

nevertheless allowed Herrera to be killed in 1993 because it did not find his exculpatory evidence convincing enough to even merit a hearing.[51]

Herrera's hope for mercy from the Texas Board of Pardons and Paroles or the governor rested on the doubts he had raised about the integrity of his conviction. But he was also a decorated Vietnam veteran, who suffered from PTSD, though his service did not receive a lot of attention. His mother described Leonel's early life as one marred by extreme poverty, physical abuse, and efforts to escape that world by joining the military. When he came back to south Texas with his additional scars after his service, he turned to drug use and drug trafficking, leading eventually to his arrest for murder.[52] If Herrera's case had been diverted away from the death penalty in the first place because of his service and symptoms of PTSD, this would have been a very different story.

At least four other honorable veterans who faced execution were exonerated and freed from death row. The same year that Herrera was executed, **Kirk Bloodsworth** became the first death row inmate to be freed through DNA testing. Bloodsworth had been convicted and sentenced to death in Maryland for the assault and murder of a nine-year-old girl. His military service in the Marines and his honorable discharge (and clean criminal record) were no match for the horror of the crime in the jury's mind. People attending his trial applauded when he was sentenced to death, not knowing that a grievous mistake had been made.[53]

Charles Fain was a Vietnam veteran sentenced to death for a crime similar to Bloodsworth's: the assault and murder of a nine-year-old girl in Idaho. He was convicted on the basis of a jail-house snitch and faulty hair-comparison evidence provided by the FBI. He was exonerated by DNA testing in 2001.[54]

Ray Krone was an honorably discharged Air Force veteran, who was sentenced to death in Arizona for the murder of a woman who worked in a neighborhood bar. Because of the emergence of DNA testing and dedicated supporters, he was exonerated in 2002.[55]

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51 . Herrera v. Collins, 506 U.S. 390 (1993).
52 . *See* N. Herrera, *Last Words from Death Row* 197 (Nightengale Press 2007) (author is mother of Leonel Herrera).
53 . *See generally* T. Junkin, *Bloodsworth: The True Story of the First Death Row Inmate Exonerated by DNA* (Algonquin Books 2004).
54 . *See* H. Weinstein, "Condemned Man Could Go Free After DNA Testing," L.A. Times, Aug. 19, 2001.
55 . *See generally*, J. Rix, *Jingle Jangle* (Broken Bench Press 2007).

Joe D'Ambrosio was charged with murder in Ohio four years after his honorable discharge from the Army. Prosecutors withheld so much information from the defense that the courts not only overturned his conviction, but also prohibited a retrial, and he was freed in 2012.[56]

These wrongful convictions demonstrate that veterans' cases are subject to all the vicissitudes of the capital punishment system, including the risk of executing the innocent.

Other Executed Veterans

Many other veterans have been executed in the modern era of the death penalty. Their cases span the various conflicts that the U.S. was engaged in over the past decades. Many involved defendants with PTSD that was not sufficiently raised at trial.

David Funchess was among the first veterans executed in the modern era when he was electrocuted in Florida in 1986. He was diagnosed with PTSD and had been wounded while serving in Vietnam as a Marine. He had no criminal record and had graduated in the top third of his high school class. He was drafted in 1967 and served three months in Vietnam, receiving five decorations, including a Purple Heart. He was wounded by a land mine and then discharged. He was also exposed to Agent Orange, which causes neuropsychological damage. The medication he received for his wounds may have contributed to his eventual heroin habit. He was convicted of killing two bar employees in 1974.[57] At the time of his trial in 1975, PTSD was little understood. Prior to his execution, his fellow Vietnam vets kept around-the-clock vigil at Florida's Vietnam War Memorial.[58]

Wayne Robert Felde was electrocuted in Louisiana in 1988, after asking his trial jury to sentence him to death. He shot a policeman while handcuffed and on his way to jail for drunkenness. Felde had served in Vietnam and was the first person in the state to use his Vietnam experience as the basis for an insanity plea.[59]

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56 . P. Krouse, "Judge bars re-prosecution of Joe D'Ambrosio, slams prosecutors," Plain Dealer, March 3, 2010. Michael McCormick, who was exonerated from death row in Tennessee in 2007, may also have been a veteran.
57 . Associated Press, "Vietnam Veteran Is Put To Death In Florida," N.Y. Times, April 23, 1986.
58 . M. Mello, "Flashbacks, Vietnam, and Capital Punishment," Rutland Herald, Dec. 7, 2005.
59 . Associated Press, "A Vietnam Veteran Who Said He'd Kill Again Is Executed," N.Y. Times, Mar. 15, 1988.

Herbert Lee Richardson was put to death in the electric chair in Alabama in 1989. He had served for three years as a military technician in a forward area in Vietnam. He was described as emotionally disturbed by his war experience. He placed a bomb on the porch of a woman with whom he had been in a close relationship, causing one death.[60]

Robert Black, a Vietnam vet, was executed in Texas in 1992 for the murder of his wife. His case illustrates the danger that PTSD can be mistakenly perceived as aggravating evidence rather than helpful mitigating evidence. According to a federal appellate court that denied him relief, Black's trial attorneys did not raise his war-related PTSD because they feared it would show him to be a future danger to society. The court deemed that a strategic choice, rather than attorney ineffectiveness, which might have resulted in a new sentence.[61]

Larry Joe Johnson was electrocuted by the state of Florida in 1993, despite a diagnosis of PTSD. Johnson served in Vietnam and was honorably discharged. He joined the Kentucky National Guard and was hit by a smoke grenade during a training exercise, causing brain damage and hospitalization in a military psychiatric ward.[62] He killed a gas station owner.

Terry Dennis was executed in Nevada in 2004, after giving up his appeals. Dennis had served in the Air Force in Vietnam and suffered from alcoholism and drug use after the war. He killed a woman with a belt during a drinking binge.[63]

Kenneth Lee Boyd was executed in North Carolina in 2005, the 1,000th execution in the modern era. He, too, was a Vietnam veteran, having operated bulldozers while being shot at by snipers. Boyd admitted to killing his estranged wife and father-in-law.[64]

Timothy Adams was executed in Texas in 2011. He had an exemplary service record in the military, serving in Germany, and no criminal record. When his wife threatened to leave him, he

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60 . Associated Press, "Alabama Man, 43, Is Executed For Killing Girl With Pipe Bomb," N.Y. Times, Aug. 19, 1989.
61 . *See* Black v. Collins, 962 F.2d 394 (5th Cir. 1992). Black's appellate attorneys said the trial attorneys failed to fully investigate this issue.
62 . "Florida Electrocutes a Vietnam Veteran for a 1979 Murder," N.Y. Times, May 5, 1993.
63 . "Nevada puts killer to death," Las Vegas Sun, Aug. 13, 2004.
64 . Associated Press, "N.C. Carries out Nation's 1,000th Execution," Dec. 2, 2005.

snapped, contemplating suicide and shooting his young son after a standoff in the family's apartment.[65]

Cleve Foster served in the military for two decades, including working as an Army recruiter. He was executed in Texas in 2012 for rape and murder.[66] His appellate attorneys argued that his trial attorneys should have investigated his military background, pointing to a subsequent diagnosis of PTSD and trauma experienced while serving.[67]

Further research would be needed to discover all of the veterans executed since the death penalty was reinstated in 1976.[68] There may be numerous cases where the veteran's service was never identified, never investigated, or never presented to the jury or the governor prior to execution.

B. Condemned Veterans – Not Executed

Many veterans still face execution, but could be spared if their cases are reviewed in light of the service they rendered to the country and any trauma they may have experienced in the military. Others have been removed from death row, and their cases may be equally instructive.

The accounts of **Courtney Lockhart** in Alabama and **John Cunningham** in California were told briefly in this report's *Introduction*. Both suffer from PTSD—Lockhart from his service in Iraq and Cunningham from Vietnam. Both remain on death row after years of unsuccessful appeals.

George Porter and the Supreme Court

In 2009, the U.S. Supreme Court significantly raised the profile of veterans on death row when they decided *Porter v. McCollum*. Death penalty cases often evoke a sharp division among the Justices, with key

65 . M. Graczyk, "Man who killed toddler son to be executed today," Associated Press, Huntsville Item, Feb. 22, 2011.
66 . C. Stark "Ex-Army recruiter executed after three previous stays," Huntsville Item, September 26, 2012.
67 . Memorandum in support of petition for habeas corpus, Foster v. Quarterman, No. 4:07-CV-210 (U.S.D.C. Northern Dist. of Tex. Mar. 20, 2008), at 36-37 (on file with DPIC).
68 . In addition to those mentioned in this report, other known veterans who have been executed include: Joseph Wood (2014 AZ), Arthur Rutherford (FL), Chadwick Banks (FL), Manuel Pardo Jr. (FL), Oba Chandler (FL), Paul Howell (FL), Harvey Green (NC), Earl Richmond (NC), William Powell (NC), Kenneth Boyd (NC), John Rose (NC), Daryl Holton (TN), and Timothy McVeigh (Fed).

cases being decided by the narrowest of margins. The *Porter* case, however, was decided without oral argument and without dissent. The Court overturned George Porter's death sentence in Florida, finding his attorney negligent in not investigating Porter's military service and expressing strong confidence that, had evidence of his combat experience and subsequent mental problems been presented, a different sentence would likely have been rendered.

To emphasize its point, the Court described in great detail the battles that Porter had taken part in during the Korean War, the trauma he experienced, and the aftereffects when he returned home:

> Petitioner George Porter is a veteran who was both wounded and decorated for his active participation in two major engagements during the Korean War; his combat service unfortunately left him a traumatized, changed man. His commanding officer's moving description of those two battles was only a fraction of the mitigating evidence that his counsel failed to discover or present during the penalty phase of his trial in 1988.[69]

The neuropsychologist who testified at Porter's post-conviction hearing "concluded that Porter suffered from brain damage that could manifest in impulsive, violent behavior. … [and that] Porter was substantially impaired in his ability to conform his conduct to the law and suffered from an extreme mental or emotional disturbance…."[70] The court that decided Porter's sentence heard none of this and found no mitigating evidence in his favor.

The Court criticized the lower courts for dismissing the impact that such evidence could have had and for "fail[ing] to engage with what Porter actually went through in Korea."[71] The Justices concluded by reminding the nation that a special debt is owed those who have served in the military, and this applies especially in capital cases, where even a modicum of mercy can mean the difference between life and death: "Our Nation has a long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines as Porter did."[72]

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69 . Porter v. McCollum, 130 S.Ct. 447, 448 (2009) (per curiam).
70 . *Id*. at 451.
71 . *Id.* at 455.
72 . *Id*.

After the case was sent back to Florida for reconsideration, prosecutors elected not to seek the death penalty for Porter, who was 78.[73] He had killed his ex-girlfriend and her boyfriend.

James Floyd Davis: Received His Medals on Death Row

Davis is a Vietnam veteran from North Carolina, who was wounded during one of his two tours of duty. Twenty years ago he lashed out with a burst of violence, killing three people including his employer, who had fired him a few days earlier. At age 68, he suffers from mental illness and PTSD. He was also a victim of child abuse. Through the intervention of Jim Johnson, a therapist who also served in Vietnam, it was learned that Davis was entitled to a Purple Heart and other medals earned during his service. The Army agreed to award him the medals and the prison eventually agreed to let him receive them. A brief description of the presentation appeared in the *Fayetteville Observer*:

> On July 29, James Davis was unshackled and escorted into a small hearing room just off death row…. Johnson, at 6-foot-6, towered over the slouched prisoner standing before him. "But when I prepared to pin his medals on, he stood straight up, hands cupped to the side," he recalled.
>
> Johnson pinned on two of the medals: the Purple Heart and the Good Conduct award. He stepped back and saluted. Davis replied with a textbook-sharp salute. For a moment, it seemed he wasn't a prisoner. Forty years later, he was a soldier again.[74]

Davis was not allowed to keep his medals. According to his lawyer, Ken Rose, he remains on death row today, steeped in his mental illness and intent on giving up his appeals.

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73 . See K. Basu, "Aging killer may get reprieve from death row," Florida Today, July 21, 2010 (announcement to not seek death).
74 . C. Jacobs, "N.C. death row inmate receives medals earned in Vietnam," Fayetteville Observer, Sept. 5, 2009.

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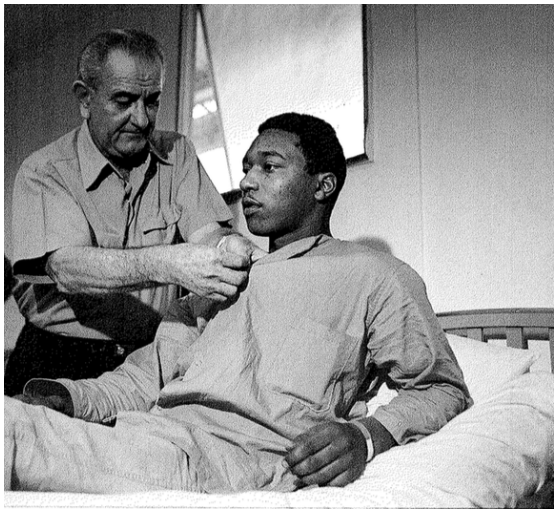

Robert Fisher – Hearing Only Part of the Story

In the picture at the left, a young Robert Fisher, wounded in Vietnam in 1967, is receiving a Purple Heart medal from President Lyndon Johnson. Today, Fisher is in his late sixties, still on Pennsylvania's death row, a victim of PTSD and other mental problems. At his trial for murdering his girlfriend, Fisher's lawyer had him tell the jury about his military service and his medal. But no mental health expert testified at sentencing to explain Fisher's brain damage and the psychological aftereffects of intense combat, including the addictions that sometimes follow. There were no medical experts testifying for Fisher because his attorney had not investigated these problems. He also failed to rebut the prosecution's portrayal of Fisher as simply a bad soldier. If Fisher were tried today, there would be volumes of mitigating evidence to present on his behalf and numerous experts that could help a jury better understand his tragic life.[75] However, overturning a death sentence once it has been imposed is often more difficult than preventing it in the first place.

Gary Cone – Drug Addiction Related to Combat

Drug abuse by returning veterans can be a form of self-medication to deal with PTSD or other disabilities experienced during combat. Gary Cone is a Vietnam veteran who was

75 . *See* Habeas Corpus Petition, Fisher v. Beard, No. 03-788 (U.S. Dist. Ct. for Eastern Dist. of Pa., Dec. 2, 2003) (available from DPIC) (picture from trial exhibit).

sentenced to death in 1984 for murder during a bizarre crime spree. He offered an insanity defense, arguing that psychosis induced by his drug use negated his guilt. He said his drug addiction was attributable to the trauma he had experienced during the war, which included handling the bodies of dead soldiers. The prosecution denied there was any evidence of Cone's drug problem and referred to his defense as "baloney." However, police reports, FBI files and witness statements discovered in the district attorney's files 10 years later confirmed Cone's extensive drug abuse. The U.S. Supreme Court overturned the lower court's denial of relief and remanded his case for reconsideration of his death sentence in light of the evidence that was withheld, a process that is still under way.[76] He has now been on Tennessee's death row for 30 years and is currently in a special needs unit, as his appellate attorneys continue to fight both his sentence and conviction.

John Thuesen – A New Awareness

John Thuesen is a current example of the problem identified by the Supreme Court in *Porter v. McCollum*. After the terror attack of 9/11, Thuesen volunteered for the military and served as a Marine during the height of the Iraq war, experiencing extreme violence in many forms. When he came home, his family noted how the former football standout had changed, how he had turned to drinking and was heard sobbing. In 2008, he checked himself into a Veteran's hospital, but was released after four days with a prescription for medication and therapy.[77] He was later convicted of murdering his ex-girlfriend and her brother and sentenced to death in 2010. He had called the police and confessed to the crime.

Thuesen's trial lawyers mentioned his military service but did little to convey the prevalence and severity of PTSD experienced by Thuesen and many other veterans. Recently, a Texas District Court judge recommended that his death sentence be overturned and that he be given a new sentencing hearing. The judge said the defense attorneys did not do enough in terms of explaining PTSD to the jury. He also noted that Thuesen was never properly diagnosed or treated for PTSD and this should have been presented to the jury. The Texas Court of Criminal Appeals is weighing the judge's recommendation.[78]

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76 . *See generally*, Cone v. Bell, 556 U.S. 449 (2009); see also Associated Press, Court rules for Tenn. death-row inmate, April 28, 2009.
77 . B. Grissom, "Considering the Toll of War in a Death Penalty Debate," Texas Tribune, Dec. 27, 2013.
78 . J. Walker, "Judge recommends overturning death sentence in capital murder case," The Eagle, July 21, 2015.

Identifying all the veterans who remain on death row, especially those with PTSD and other serious mental illness, should be an imperative. Their cases might reveal critical information that could result in their lives being spared.

C. Future Cases

Many other accounts could be offered about veterans still on death row.[79] Their life stories are often sad and familiar. However, few veterans have been spared in the appellate stage of the legal process because of revelations about their military service.[80] Courts of appeal must find a legal error in the process; they cannot simply extend mercy because someone is a veteran. That is the role of the executive branch. However, a review of all the clemencies issued by governors or pardons boards in capital cases in the modern era does not reveal a single case where military service served as a key ground for the commutation.[81] While governors do not always say why they are commuting a death sentence, it seems that reasons related to a person's service to his country would be highly relevant in a public announcement.

The Supreme Court's decision in *Porter* may have raised public consciousness about veterans facing execution, but so far there has been no official effort to identify all of the veterans on death row or to spare them from the death penalty. The best time to avoid the possibility of executing a veteran is before a capital case comes to trial. No chief prosecutor is obligated to seek the death penalty in a particular case. If a defendant's military service is brought forward early, especially if accompanied by evidence of trauma, drug dependency, or other disabilities experienced during service, a decision could be made to seek a different sentence. However, for that alternative to work, all parties need to be aware not only of the defendant's military status, but also of conditions like PTSD that could make a difference in the ultimate punishment applied.

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79 . Of course, all those under a military death sentence served in the armed forces. The military has shown particular caution in such cases, with no executions in almost 55 years. See DPIC, "U.S. Military Death Penalty" at <http://www.deathpenaltyinfo.org/us-military-death-penalty>.

80 . Recently, the Florida Supreme Court reduced the death sentence of Humberto Delgado to life imprisonment because it found his original sentence disproportionate in light of his severe mental illness, which had manifested itself before he joined the military. When he was stopped by a police officer–whom he eventually killed–he was a homeless veteran, pushing a shopping cart along the roadway. See Delgado v. Florida, 162 So. 3d 971 (2015).

81 . See DPIC, Clemency http://www.deathpenaltyinfo.org/clemency.

What Can Be Done

Although veterans continue to be sentenced to death[82] and even executed, a recent Texas case that garnered significant public attention illustrates a different approach. Prosecutors declined to seek the death penalty against Eddie Ray Routh who was charged with killing Chris Kyle—of "American Sniper" fame—and Kyle's friend, Chad Littlefield. Routh had been a Marine and had fought in Iraq, returning home with PTSD. Prior to the shootings, he had been hospitalized four times because of his mental problems. Routh was sentenced to life without parole.[83] Kyle had been trying to help Routh as part of his work with returning veterans suffering from PTSD.

For a case to be diverted out of the capital punishment system, it is important that a defendant's military status be known from the outset. Almost all states have now passed legislation to allow drivers to have a veteran designation on their licenses.[84] If a veteran is arrested, this designation gives immediate recognition of his or her military service. Prosecutors and defense attorneys can be encouraged to ask defendants about their military background. Training in how this information can be relevant in a criminal case is also essential.

In a parallel situation, Mexico had been very concerned about the number of its citizens facing execution in the U.S. Although the U.N.'s Vienna Convention on Consular Relations requires the U.S. to inform arrestees of their right to contact the Mexican consulate,[85] that right was often ignored. By the time the defendant had been sentenced to death and faced an execution warrant, it was too late to make a difference. Mexico implemented a plan of closely monitoring potentially capital cases involving its citizens in the U.S. Immediate legal and interpretive assistance is offered, thereby averting many death sentences in the earliest stages of the case.[86] The Veterans Administration could similarly intervene in cases involving former service members.

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82 . Kesaun Sykes was sentenced to death in 2014, along with two his co-defendants, Emrys John and Tyrone Miller, who were sentenced in 2013. All of the defendants were members of the military at the time of the crime, though PTSD did not appear to be a factor. See L. Juarez, "Ex-Marine sentenced to death for murders," ABC7 Eyewitness News (KABC-TV Los Angeles), Nov. 7, 2014.
83 . *See* R. Jervis, "'American Sniper' killer found guilty in murders," USA Today, Feb. 25, 2015.
84 . *See* Military Benefits < http://militarybenefits.info/veterans-id-on-drivers-license-id-card-by-state/>, visited Sept. 1, 2015.
85 . Vienna Convention on Consular Relations, 596 U.N.T.S. 261, Art. 36, April 24, 1967. Mexico was unsuccessful in trying to have the U.S. Supreme Court require adherence to the treaty. See Medellin v. Texas, 552 U.S. 491 (2008).
86 . C. Soohoo et al., *Bringing Human Rights Home* 107 (2008).

The VA does become involved in many criminal cases outside of the death penalty context. There are now over 200 Veterans Treatment Courts,[87] assisting mainly non-violent offenders. The judges in these courts are aware of the problems facing veterans, and peer mentoring and treatment options are offered to help avoid incarceration. The courts are not funded by the VA, but Veterans Justice Outreach representatives from the VA participate in the process. These courts do not require that the vets had been involved in combat or have identified mental health issues. They are open to all vets.

The motivation and ideas behind Veterans Courts could be applied in death penalty cases. Early intervention, peer assistance from veterans, and involvement of veteran officials with prosecutors, defense attorneys, and judges could all be instrumental in steering a case away from the death penalty. Challenging legislators and governors to fashion ways to better address the special circumstances of veterans who have committed murder is also needed.

Comprehensive solutions to the unique problems veterans face in capital cases are beyond the scope of this report. Some commentators have recommended a complete exemption from the death penalty for combat veterans suffering from mental problems at the time of their offense.[88] In the interim, experts familiar with this area of the law[89] have offered other recommendations, including: mental health assessments for capitally charged veterans by professionals with experience in military health issues; mandatory training and assistance for defense teams handling such litigation from military experts;[90] education about PTSD and related matters for prosecutors, judges, and defense attorneys who may be involved in such cases; allowance of mitigation testimony regarding military culture at capital trials; questioning of potential

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87 . *See Justice for Vets, History of Veterans Treatment Courts*, at <http://justiceforvets.org/vtc-history>.

88 . *See* Giardino, note 40 above at 2988; see also London, note 23 above, at 299 ("categorical death penalty exclusion for service members and veterans suffering from a service-related mental injury when they commit the underlying capital offense").

89 . Special thanks to Art Cody (Captain USN (Ret), Legal Director Veterans Defense Program, New York State Defenders Association); Anthony Giardino (Attorney and Lieutenant Colonel, U.S. Marine Corps Reserve); Brockton Hunter (former Army Scout; Principal, Law Offices of Brockton D. Hunter, Minneapolis; Co-Founder/President, Veterans Defense Project; and Co-Author and Editor, Defending Veterans in Criminal Court, available at veteransdefenseproject.org).

90 . *See, e.g.*, the New York State Defenders Association's Veteran Defense Program, at http://www.nysda.org/VeteransDefenseProg.html.

jurors regarding their views about the military; and allowing VA therapists to testify in capital cases.

Conclusion

> *In a rational world, there would be shock and emotion. I am staring at a man near death, the corpsman who tends him kneels on a gruesome composite of turned earth and flesh. No mind should take in such horror. But in war, cruelty is commonplace. So there is calmness in our movements. We have to focus on staying alive.*
> **-Chris Clark, diary from Iraq (2010)**

Hundreds of thousands of military veterans have returned home after fighting in Vietnam, the Gulf War, Afghanistan, and Iraq suffering from Post-Traumatic Stress Disorder and other mental disabilities and addictions related to their service. A relatively small but significant number of these veterans committed heinous murders and received the nation's worst punishment—the death penalty. Many have already been executed, but hundreds remain on death row, while others are facing a possible death sentence.

In a country that is proud of its renewed respect for veterans, and that is using the death penalty for a dwindling number of offenders, capital punishment stands out as a questionable punishment for those who have served in the military. Even today, there are veterans on death row with PTSD that was unexplored at their trial or undervalued for its pernicious effects.

The country owes its veterans a thorough examination of the use of the death penalty in their cases, even when their offenses are especially grievous. Interim steps could be taken to ensure that key decision-makers in the legal process are aware of a veteran's military background as soon as capital charges become possible, and that they are informed about the gravity of mental problems that can be traced back to the extremes of combat and training. A broader understanding of the interaction between jarring trauma and the later eruption of violence could pave the way for a thorough re-evaluation of society's approach to violence and mental illness, perhaps improving prevention and fashioning an appropriate response when prevention fails.

The Death Penalty Information Center is a non-profit organization serving the media and the public with analysis and information on issues concerning capital punishment. The Center provides in-depth reports, issues press releases, conducts briefings for journalists, and serves as a resource to those working on this issue. The Center is funded through the generosity of individual donors and foundations, including the Roderick MacArthur Foundation, the Open Society Foundations, the Atlantic Philanthropies, and the Proteus Action League.

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