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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA, PLAINTIFF, -VS- DW, DEFENDANT	Case No. 6:18-cr-XXX DEFENDANT'S SENTENCING MEMORANDUM

Summary of Mitigation Evidence And Defense Sentencing Recommendation

> *Nobody who deploys to a combat zone is ever quite the same afterwards. . . . There are, of course, those who suffer, from shot and shrapnel, bomb burst and booby trap, the physical wounds of war. There are as well many who are afflicted with so-called invisible wounds of war, the not so obvious wounds that invade a veteran's consciousness, ripping away peace of mind, infusing nights and days with the lingering legacy of his — and as more and more women troops experience combat, her — often haunting experiences.*
> Department of Justice, National Institute of Corrections, *Veterans Treatment Courts: A Second Chance For Vets Who Have Lost Their Way* (May 2016).

DW served honorably in the U.S. Navy aboard a warship during the Vietnam War, at a very young age. He experienced combat at sea, and near-death at the hands of a fellow sailor gone berserk on drugs. Although he escaped serious physical injury, he returned to our country afflicted by Post Traumatic Stress Disorder (PTSD). This "invisible injury" of war had yet to be named—and the military did not recognize it, much less treat it.[1] That was 1975.

Collectively, mental disorders and Moral Injury are often referred to as the "invisible injuries" of war. We as a society have proven both generally ignorant and miserly in responding: We see a veteran who has lost an arm or a leg, and respond appropriately; the opposite frequently occurs in society's response to a veteran with invisible injuries.[2] It is also well-documented that veterans themselves are loath to acknowledge experiencing these debilitating mental and emotional conditions—viewed as a sign of weakness and thus contrary to core military values—resulting in them not seeking or dropping out of treatment.[3]

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[1] The military's response to PTSD has slowly improved, but remains subject to criticism. *See, e.g.,* Madeline McGrane, *Post-Traumatic Stress Disorder in the Military: The Need for Legislative Improvement of Mental Health Care for Veterans of Operation Iraqi Freedom and Operation Enduring Freedom*, 24 J.L. & Health 183, 191 (2010)("Within the military, PTSD is often 'equated with cowardice or lack of resilience or, even worse, with malingering to escape service or to receive unmerited compensation.").

[2] *See, e.g., Invisible Wounds of War: Psychological and Cognitive Injuries, Their Consequences, and Service to Assist Recovery,* T. Tanielian & L. Jaycox, editors (Rand Corporation, 2008), available at www.rand.org/content/dam/rand/pubs/monographs/2008/RAND_MG720.pdf ; *Understanding the Context of Military Culture in Treating the Veteran with PTSD,* Dr. Patricia Wilson, U.S. Dept. of Veterans Affairs, National Center for PTSD (2017)("Studies show that because of the lack of cultural competence among providers, service members and veterans may drop out of care, are misdiagnosed, or see care only when their illness is at an advanced stage.").

[3] *E.g., Returning Home from Iraq and Afghanistan: Assessment of Readjustment Needs of Veterans, Service Members, and Their Families,* Institute of Medicine, National Academy of Science (2013), available at www.nap.edu/read/13499/chapter/1 (hereafter referred to as *Returning Home from Iraq and Afghanistan*).

Fast-forward more than 40 years to August 16, 2018. DW, then an unemployed, homeless, heroin-addicted veteran, still afflicted with untreated PTSD, suddenly in federal custody, admits to having sold 4 handguns that he stole from a second-hand shop to a known heroin/methamphetamine trafficker. Incarceration means "cold turkey" withdrawal from the opiates he's used one way or another since 2008. He's confessed to a federal felony, meaning prison could be his fate.[4] That was DW hitting rock bottom.

But DW's post-arrest saga is one of heroic redemption. Following release on August XX, coincidentally his 63rd birthday, he finished withdrawal, maintained sobriety, and engaged in substance abuse treatment. He actively participated in Department of Veterans Affairs (VA) group outpatient counseling for PTSD, accomplishing these milestones during his first few months, while living out of his car or tent camping at Armitage park. As winter loomed he succeeded in getting a studio apartment under Section 8 housing. He eventually gained access to intensive, individual, out-patient counseling services from the VA for PTSD. He stuck with it, first completing a 3-month course of Cognitive Processing Therapy. He is on track to complete 3 months of EMDR therapy around the time of his August sentencing date. He hopes to enter

[4] See, e.g., Evan R. Seamone, *Attorneys as First Responders: Recognizing the Destructive Nature of Posttraumatic Stress Disorder on the Combat Veteran's Legal Decision-Making Process*, 22 Military Law Review 144, 153 (2009)("When left untreated, PTSD can lead veterans to behave irresponsibly, impulsively, violently, and self-destructively, which has created significant concern for their own well-being and the well-being of others."); Department of Justice, National Institute of Corrections, *Justice-Involved Veterans*, nicic.gov/veterans (noting many veterans suffer from combat-related PTSD, depression and anxiety, and that "on any given day, veterans account for nine of every hundred individuals in U.S. jails and prisons" despite that "most combat veterans had no involvement in the criminal justice system before their engagement in military service")(last accessed 2017).

intensive, in-patient treatment through the VA at a facility in Washington, and now has priority for placement with his service-connection for PTSD finally officially recognized on May XX, 2019.

The advisory guidelines encourage a downward departure in cases such as Mr. DW', where mental and emotional conditions contributed substantially to the commission of the offense, based on diminished capacity. USSG §5K2.13.

The advisory guidelines also note a downward departure may be warranted based on military service, USSG §5H1.11, as well as on mental and emotional conditions, USSG §5H.13, if present to an unusual degree that takes the case outside the heartland. The Presentence Report (PSR), as well as military and VA records obtained by the defense, document Mr. DW had no pre-service mental health disorders (including no drug or alcohol abuse), nor any propensity to break the law before or during his military service, until he began experiencing severe PTSD. The direct correlation between his military service, invisible injuries and offense conduct make his case deserving of leniency.

The defense mitigation evidence further proves that Mr. DW has engaged in extraordinary post-offense rehabilitation efforts, which combined with other factors detailed below, place him at a very low risk of recidivism. Simply put, he is now a much-changed man from who he was at the time of his arrest last August. Additional incarceration is not necessary to protect society. His efforts include intensive, on-going mental health treatment, and related pro-social reintegration into civilian culture, that would be undermined by incarceration. A downward departure is supported under Ninth Circuit case law based on extraordinary post-offense rehabilitation, as well as to accomplish a specific treatment purpose, USSG §5C1.1, Application Note 6.

Clearly, Mr. DW' meritorious military service, combat-related mental and emotional conditions, and post-military physical injuries resulting in permanent disability and chronic pain, as well as his post-offense rehabilitation and low risk of recidivism, are all relevant offender characteristics for purposes of variance under 18 USC §3553(a), given the advisory guidelines' recognition of these factors as departure grounds. The defense is seeking a downward variance, rather than moving for a downward departure, so the Court need not determine whether these factors are "present to an unusual degree" or make his case "extraordinary" for purposes of a downward departure.

This memorandum will both explain and summarize the mitigating evidence, before further discussing the law and additional public policy grounds that support the defense recommendation that Mr. DW not be sent to prison. The defense seeks a variance from the advisory guideline range to a sentence of three-years probation, and is agreeable to the special conditions of supervision recommended by the PSR.

I. Mr. DW' Military Service And "Invisible Injuries" Contributed Substantially To His Commission Of The Offense.

> *But I fear they do not know us. I fear they do not comprehend the full weight of the burden we carry or the price we pay when we return from battle. This is important, because a people uninformed about what they are asking the military to endure is a people inevitably unable to fully grasp the scope of the responsibilities our Constitution levies upon them.*
> — Admiral Michael Mullen, (then) Chairman of the Joint Chiefs of Staff, United States Military Academy, West Point, NY (May 21, 2011).

First enlistment and deployment to Vietnam

DW turned 17 in August, 1972. On September 29th, after two weeks of 12th grade, he enlisted with parental consent in the United States Navy. He could swim and liked the ocean,

heard the Vietnam War was all but over, and figured this would be a good way to tour far away places, acquire job skills, and other benefits: "I thought of it like going on a world cruise."

The Navy first sent him to California for boot camp, followed by 2-weeks in Fireman Apprenticeship Training. The primary danger Naval recruits trained to combat was a fire aboard ship—not enemy soldiers—whether from accidental ignition or enemy fire. On warships, the presence of explosive weapons, ammunition, and aircraft fuel heightened the potential loss of life should fire break out, and the engine turbines were powered by boiler rooms generating extreme heat.

DW's "continuous tour of sea duty" commenced January 1, 1973, aboard the USS Anchorage (LSD-36). The Navy designed the 553-foot length, 85-foot beam Anchorage to transport and launch at sea amphibious craft and vehicles to bring a landing force of armed troops ashore to accomplish a mission, i.e., to conduct "amphibious assault operations." To carry out that purpose, the ship was built to house 18 officers, 340 enlisted sailors to run the ship, and a Marine Detachment of 330 men to conduct the combat operations. It was equipped with a flight deck for helicopter assaults and logistic operations in support of the landing force, and armed with four 50 caliber twin barrel guns, two MK 38 Machine Guns, and two MK 15 Phalanx Close-In Weapons Systems (CIWS). See https://fas.org/man/dod-101/sys/ship/lsd-36.htm (last accessed July 24, 2019).

On January 27, 1973, the United States, North and South Vietnam and the Vietcong signed the peace accord in Paris that purported to end direct U.S. military involvement in the war. The last American troops reportedly departed on March 29th. By then the communists had already violated the cease-fire, and by early 1974 full-scale war between the Vietnamese people had

resumed. Official descriptions of the USS Anchorage's activities during that period omit reference to Vietnam until April 30, 1975, when the Anchorage participated in Operation "Frequent Wind" by "providing material support" to ships evacuating Vietnamese refugees during the fall of Saigon. See https://www.history.navy.mil/research/histories/ship-histories/danfs/a/anchorage-i.html (last accessed July 22, 2019).

DW's first enlistment ended on December 18, 1975, and his DD-214 documents 2-years, 11-months, and 18 days of "foreign and/or sea service" during this 3-year enlistment term. Missing from his military records file is any documentation detailing what happened during that time.[5] Given this lack of information, suggestive of a militarily uneventful nearly 3 years at sea—and the official end of U.S. involvement in the Vietnam War within a few months of him shipping out on the Anchorage—one might conclude that young DW's plan to join the Navy and cruise the world without risk of combat came true. It did not.

DW chose the job assignment of welder/hull technician on the Anchorage. That job put him on the flight deck in harm's way, whenever there was potential risk of damage to the hull, armory, or the helicopters on board this amphibious warfare ship. DW learned those risks included enemy submarines, mines, aircraft and machine gun fire from hostile forces on shore. Boot camp had not prepared him for the life-threatening reality of service aboard the Anchorage. Boot camp included minimal instruction in hand-to-hand combat and a "weapons familiarization course," too basic and brief to give a young 17-year-old cause to contemplate mortality.

[5] The defense requested his Official Military Personnel File, and received a total of 34 pages of records.

DW recalls that the Anchorage housed a squadron of Marines in separate quarters from the sailors. There were strict rules against having any social interaction "because we weren't supposed to know what they were doing." DW eventually surmised the Marines were on board to conduct special operations on enemy territory, even though the United States had declared peace and announced the completed withdrawal of all ground troops. The Anchorage would stop a few miles offshore, the Marines would disembark in landing craft, and the ship would standby until they made shore, and return fire if the Marines came under fire while landing and radioed enemy coordinates to fire upon. The Anchorage would return at a designated time for the Marines to re-embark. All of the missions occurred in the dead of night, and all that DW and the other sailors were told was the ship was "patrolling." DW would be on the flight deck during these maneuvers and recalls hearing the whizzing of enemy shells. He would help cart ammo to the ship's guns, and felt very exposed. "Every time we were under fire, you knew you were close enough to be killed. And we had no protective armor, just life jackets."[6]

Fortunately, none of the sailors on the ship were ever wounded by enemy fire. DW recalls participating in 7 or 8 of these "patrols" during this enlistment. "They never told us in advance when they would happen. We never knew until the sirens went off." Where the Marines went or what they did remained closely guarded secrets. "We were never told where we were at—just told we were on a mission, patrolling. . . . They say we were never in Vietnam. Right!"

[6] Due to the lack of military records to corroborate Mr. DW' recollections, defense counsel consulted with Dr. William B. Brown, a sociologist and nationally-recognized expert who has researched and published extensively on veterans' issues, and is himself a Vietnam Army combat veteran. Dr. Brown has interviewed hundreds of veterans over the course of his career, and advised that he has heard similar accounts and was not surprised about there being no official records.

DW never saw injured Vietnamese until the Anchorage "provided material support" during the 1975 evacuation of Saigon. During those few days, the Marines took over the flight deck and he along with other sailors essential to hull security were ordered to remain on the level below, to be summoned if needed. They still had a few vantage points to observe above deck. DW watched the Marines intercept North Vietnamese boats, engage in firefights, bring scores of prisoners including women aboard the flight deck, and then sink their boats. He saw badly injured men and women corralled on deck without food, water or medical attention, from time of capture for many hours until transport to an island where they were off-loaded. "We weren't supposed to be engaged (with the enemy). They were being treated like animals. I got really pissed off. And I've been one angry son of a bitch ever since."

Towards the end of this enlistment, a drug-crazed sailor assaulted DW while he was standing night watch, and threw him over the side of the ship. DW managed to grab the railing and clamber back on deck. He truly feared plunging into the deep ocean and drowning. This event apparently did get documented in the offending sailor's records, and many decades later established the necessary service-connection for his Post Traumatic Stress Disorder (PTSD) for him to obtain veterans benefits this May.

While returning to port in San Diego in December 1975, recruiters solicited DW to immediately re-enlist at the end of his first tour, promising a large sign-up bonus that would be paid out over the next four-year enlistment period. So he did. But not long after being granted shore leave, DW started experiencing extreme anxiety and other disturbing behaviors symptomatic of PTSD. He didn't know what was happening to him. That was about five years before PTSD was formally recognized as a mental disorder in America; i.e., before it was named,

categorized, and criteria established for diagnostic purposes in 1980. The Navy told him he had high blood pressure, and suggested he try to relax by drinking more beer. DW increased his drinking, but it wasn't enough. He asked for help or to be discharged as he desperately feared being sent back to sea.

To understand the next chapter of DW's life, one must have a working knowledge of combat-related PTSD.

> *"Combat alters the way we think about ourselves. . . . It challenges our common assumptions about who we are and what we and others are capable of. The illusions of safety, civility, and civilization are forever shattered in those who have witnessed otherwise. After going through such experiences, the world does not feel the same and many veterans feel unable to rejoin the mainstream of society and put their experiences behind them. As one combat veteran sagely noted, 'My wife and friends tell me to let it go . . . it all happened so long ago. I get that. It was only 30 minutes out of my entire life. But, for me, those thirty minutes have cast a shadow thirty years long.'"*[7]

Combat-related PTSD

> *"PTSD is a major life-threatening mental illness that can stem from any type of traumatic experience. Much of our current knowledge about PTSD comes from the military for the obvious reason: War causes trauma on a massive scale."*[8]

PTSD is the result of exposure to severe trauma(s) that leads to intrusive re-living of the trauma and flashbacks, coupled with debilitating avoidance symptoms that occur to prevent intrusive re-living of the traumatic event. Combat veterans who, like DW DW, have been

[7] Daniel Dossa & Ernest Boswell, *Post-Traumatic Stress Disorder: A Brief Overview*, Chpt. 6, p. 163-64, (hereafter referred to as Dossa & Boswell), published in Hunter & Else, Defending Veterans, Brockton Hunter & Ryan Else, The Attorney's Guide To Defending Veterans In Criminal Court, at 473-76 (2014 Veterans Defense Project)(hereafter referred to as Hunter & Else, Defending Veterans).

[8] Thomas J. Berger, Executive Director of the Veterans Health Counsel, U.S. Dept. of Justice, National Institute of Corrections, *Veterans Treatment Courts: A Second Chance For Vets Who Have Lost Their Way,* Section 3 (May 2016)(available at https://info.nicic.gov/jiv/sites/info.nicic.gov.jiv/files/030018.pdf)

viscerally exposed to the devastation and degradation of warfare, including multiple incidents where their lives were in grave danger, sustain repeated exposures to severe trauma.[9]

People with PTSD "can suffer from a wide array of symptoms, including intrusive memories, flashbacks, hyper-vigilance, sleep disturbance, avoidance of traumatic stimuli, numbing of emotions, social dysfunction, and physiological hyper-responsivity," and "[t]hese symptoms are believed to reflect stress-induced changes in neurobiological systems".[10] While some individuals exposed to a traumatic event do not develop PTSD, others manifest all of its symptoms, or some combination of them. A significant number do not immediately manifest symptoms of PTSD, instead demonstrating a "progressive escalation of distress or a later emergence of [the] symptoms."[11] Regarding the course of PTSD, the DSM-5 text summarizes available evidence stating that symptoms vary over time, with "recurrence and intensification . . . in response to reminders of the original trauma, ongoing life stressors, or newly experienced traumatic events." (*Development and Course,* p. 277). Simply put, PTSD is a chronic condition that waxes and wanes, and some individuals remain symptomatic for more than 50 years. *Id.*

Vietnam War veterans formed the nationwide study group for two landmark research projects focused on PTSD and related problems. The first study, published in 1998—more than two decades after the fall of Saigon—found 15.2 percent of all male Vietnam theater veterans were current cases of PTSD, representing about 479,000 of the estimated 3.14 million men who served there, with lifetime (i.e., at some time in their life) prevalence of PTSD reaching 30.6

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[9] *Id.*

[10] Betsy Gray, *Neuroscience, PTSD, and Sentencing Mitigation,* 34 Cardozo L.Rev. 53 (Oct. 2012)(hereafter referenced as Gray, *Neuroscience*). Gray is a law professor and faculty fellow at the Center for Law, Science & Innovation, Sandra Day O'Connor College of Law, ASU.

[11] *Id.*

percent (over 960,000 men). Thus, about one-half of those veterans who ever had PTSD still had it decades later. "These findings are consistent with the conceptualization of PTSD as a chronic, rather than acute, disorder." National Vietnam Veterans Readjustment Study (NVVRS)(1998).[12] The study defined "Vietnam theater veterans" as ""persons who served on active duty in the U.S. Armed Forces during the Vietnam era (August 5,1964, through May 7, 1975) in Vietnam, Laos, Cambodia, or in the surrounding waters or airspace of one of these three countries". DW DW fits that criteria.

The National Vietnam Veterans Longitudinal Study (NVVLS) (December 2014), the second congressionally-mandated assessment of the same population that was initially assessed for PTSD in the NVVRS, 25 years earlier, estimated the prevalence rate for current war-zone PTSD among living Vietnam theater veterans to be 11.2%, while 14% met the criteria for either full or subthreshold PTSD, then 40 or more years after the war.[13] The study also found that "An important minority of Vietnam veterans are symptomatic after 4 decades, with more than twice as many deteriorating as improving." *Id.*

Both studies found significant co-morbidity of PTSD with other disorders, and particularly Major Depressive Disorder and substance abuse disorders. "NVVRS findings also indicate a strong relationship between PTSD and other postwar readjustment problems: having PTSD increases the likelihood of having other specific psychiatric disorders and a wide variety of other postwar

[12] Hereafter referred to as NVVRS, available at https://www.ptsd.va.gov/professional/articles/article-pdf/nvvrs_vol1.pdf (last accessed August 5, 2019)

[13] Hereafter referred to as NVVLS, Executive Summary available at https://www.seattle.eric.research.va.gov/VETR/NVVLSR/PDFs/NVVLS-Executive-Summary.pdf (last accessed August 5, 2019).

readjustment problems. These findings confirm that, in addition to the painful symptoms of PTSD itself, the lives of Vietnam veterans with PTSD are profoundly disrupted, in that they experience problems in virtually every domain of their lives." The NVVRS found nearly 40 percent of male theatre veterans had experienced alcohol abuse or disorder.[14] The NVVLS found that "Four decades or longer since their deployments, Vietnam theater Veterans with current PTSD continue to experience high levels of comorbid psychiatric disorders. Most notably, rates of comorbid depression are more than 50 times greater in theater Veterans with current PTSD compared to those who are PTSD negative."

Since 2002, the number of U.S. veterans suffering from opioid addiction has more than doubled based on statistics from the VA. *VA's Drug Abuse Stats Are Sobering,* VFW (Feb. 19, 2019)(VA tracking more than 64,000 veterans with opioid disorders, and most veterans who meet the criteria for opioid use disorder do not get treated). In the Vietnam era, the vast majority of veterans with PTSD reported chronic pain, and were the most likely VA patients to receive prescription opioids for pain complaints; furthermore, they tend to have the greatest risk for

[14] Other studies have found PTSD is commonly associated with substance abuse and hazardous use of alcohol. See, e.g., Institute of Medicine of the National Academies, *Treatment for Posttraumatic Stress Disorder in Military and Veteran Populations: Initial Assessment*, 322 (2012), available for free download at http://www.nap.edu/catalog/13364/treatment-for-posttraumatic-stress-disorder-in-military-and-veteran-populations (last accessed 4/2/17). High levels of stress resulting from PTSD can make it more likely for a person to turn to drugs or alcohol as a means of escape, i.e., "self-medication"—to increase feelings of pleasure, decrease anxiety and provide a distraction from difficult emotions. Drugs can stimulate the production of GABA, a kind of natural tranquilizer produced by the brain, which is lowered by stress reactions; drugs also increase the presence of dopamine, which causes feelings of happiness. Drug addiction interferes with some of the same brain regions and chemicals that PTSD does, but drugs provide only a temporary respite and as the drugs wear off, PTSD symptoms often worsen. *PTSD and Addiction: The Connection Between Trauma and Drug Addiction,* American Addiction Centers (July 22, 2019)(available at https://americanaddictioncenters.org/ptsd).

prescription opioid abuse. *Opioids in Chronic Pain and PTSD: Liability or Potential Therapy* (last accessed on 8/1/2019 and available at www.hsrd.research.va.gov/for_researchers/cyber_seminars/catalog/transcripts/791.doc)(here after cited as *Opioids in Chronic Pain and PTSD*).

Combat-related PTSD and co-morbid disorders play a causative role in how veterans perceive and respond to the world around them. Specific to Vietnam theater veterans:

> Veterans with PTSD are five times more likely that those without to be unemployed, and one in five has a history of extreme occupational instability post-military. Almost one-fourth are currently separated or living with someone as though they were married, 70 percent have been divorced, 49 percent have high levels of marital or relationship problems, and half report poor levels of overall family functioning. One in four is very unhappy or dissatisfied with his life, almost half report extreme levels of isolation from other people, and 34.8 percent have been homeless or vagrant at one time or another. Four in ten also report high levels of actively expressed hostility, and 36.8 percent had committed six or more acts of violence during the past year. Almost half had been arrested or in jail at least once—34.2 percent more than once—and 11.5 percent had been convicted of a felony. In every instance these rates for Vietnam veterans with PTSD are at least twice the rate of men not currently suffering from the disorder, and often the ratio is considerably higher.
> NVVRS, Executive Summary (emphasis original).

Both of the nationwide Vietnam veteran studies found enlistment at a young age to be among the statistically significant risk factors for developing PTSD. The NVVRS found age at entry to Vietnam to be strongly related to current rates of PTSD for male theater veterans. "Those who were 17-19 years of age when they first entered Vietnam are much more likely to have current PTSD (25.2 percent) than those who were older at time of entry. Those who served in Vietnam 13 months or longer are also more likely to meet criteria for current PTSD (19-20 percent) than those who served 12 months or less (12.7-15.3 percent). . . . The rate of disorder is also higher among those who never finished high school (28.7 percent)." Id. The NVVLS found the ratio of

those veterans with PTSD whose symptoms increased versus decreased over the 25-year study interval was over 4:1 among those who were aged 17-19 when first exposed to combat, i.e., deployment to the war zone.

DW has been diagnosed with Major Depressive Disorder, Alcohol Use Disorder (in full remission), and Opioid Use Disorder, as well as PTSD. The documented prevalence of these co-morbid disorders in combat veterans strongly suggests a "service-connection" for those as well. The U.S. Navy's response to DW's pleas for help in 1975—have a drink and relax—set his course towards addiction. In addition, he commenced his first tour of active duty at age 17, as a high school drop-out, and served nearly 3 years of "continuous sea duty," placing him statistically at greater risk for sustaining these "invisible injuries" of war and for increasing severity of symptoms over the ensuing decades.

A. The Physiological Basis of PTSD

PTSD symptoms in veterans start as an adaptive neurobiological response to combat: Hyper-arousal and hyper-vigilance are adaptive in combat, but these responses are not adaptive in non-combat, civilian situations. PTSD also changes the structure and function of brain and the autonomic nervous system of those affected, to include chronic hyperarousal of the "fight or flight" functions of the brain.

Key structures of our brains operate when trauma and stress are experienced, acting either to stimulate the "arousal system" or keep our emotions in check. When the brain is functioning properly, new neuron connections are created that override the traumatic memory, a process known as "extinction." When this system becomes maladaptive, the retention of traumatic material in the brain can result in emotional disorders, including PTSD. Properly

functioning brains have biological processes that allow an individual to adapt and overcome traumatic events, while brains affected by PTSD or similar disorders do not, causing previously neutral stimuli in the environment, such as sights, sounds, and smells, to become linked with the traumatic event.[15] Thus, the traumatic event(s) remain in their perceptions as an active, not past, event. Simply put, PTSD literally "rewires" the brain.

There are biochemical processes associated with PTSD. Our brains are flooded with stress hormones during and after a stressful event, to facilitate fear processing. Traumatic stress can induce fear, which triggers an alarm system known as the "fight or flight" response in our neurocircuitry. PTSD involves the dysregulation of several neurotransmitter and hormonal systems, that lead to changes in the structure and function of the brain. Persons with PTSD experience increased levels of cortisol and adrenaline, which further activate fear responses. Prolonged release of these hormones can enhance the functioning of the amygdala and impair the cognitive function of the medial prefrontal cortex; prolonged release of cortisol causes long-lasting neurological changes in the hippocampus, associated with the intrusive memories of PTSD.[16]

The amygdala is integral to the generation and maintenance of emotional responses, including fear and threat assessment. The medial prefrontal cortex is largely responsible for judgment, cognition, behavior, personality expression, and decision-making. In persons with

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[15] Gray, *Neuroscience*, *supra n. 10,* at 87.

[16] *Id.,* at 89-90. In addition, persons with PTSD display "abnormal regulation of catecholamine, serotonin, amino acid, peptide, and opioid neurotransmitters, each of which is found in brain circuits that regulate/integrate stress and fear responses." Sherin & Nemeroff, *Post-traumatic stress disorder: the neurobiological impact of psychological trauma,* Dialogues in Clin. Neurosci. 13(3): 263-78 (2011), available at www.ncbi.nlm.nih.gov/pmc/articles/PMC3182008/ .

PTSD, the amygdala is hyperactive while the controlling mechanisms in the prefrontal cortex fail to dampen fear arousal, and the prefrontal cortex may sustain reduced volume and interconnections with other brain regions. This malfunction leads to hyperarousal, distress, and avoidance behaviors to stimuli that objectively would be seen as neutral or only mildly stressful or threatening. The hippocampus plays a central role in learning and the formation of episodic, declarative, and working memory. Several structural MRI studies have reported decreased hippocampus volumes in individuals with PTSD. A deficit in the hippocampus may "impair the individual's appreciation of safety cues and is partly responsible for an inappropriate physiological response to stress." Because of this deficit, the "fear response" may fail to turn off.[17] To simplify, persons with PTSD cannot inhibit a fear response when exposed to reminders of traumatic events; the autonomic nervous system hyperactively responds.[18]

Studies have found shared brain regions for pain and fear response—the hallmark of PTSD; and that pain exacerbates the symptoms of PTSD while the physiological effects of PTSD result in increased pain. Those effects include lower circulation levels of cortisol linked to inflammatory conditions resulting in pain; and dysregulation of the autonomic nervous system, the endogenous opioid and serotonergic systems, resulting in lower levels of neuropeptides and neurologic hormones that help control pain. *Opioids in Chronic Pain and PTSD, supra.* Opioid addiction can further negatively impact the body's own pain regulation chemicals. *Id.* Thus, the aftermaths of DW' 2008 workplace accident—permanent disability, chronic pain and ultimately opioid addiction—worked in cataclysmic synergy with his PTSD.

[17] Gray, *Neuroscience, supra n.10,* at 88-89 (citations omitted).
[18] *Id.,* at 90.

B. The Diagnostic Symptoms of PTSD

The *Diagnostic and Statistical Manual of Mental Disorders* (DSM-V) categorizes the symptoms that accompany PTSD into four "clusters":

- Intrusion—spontaneous memories of the traumatic event, recurrent dreams related to it, flashbacks, other intense or prolonged psychological distress upon exposure to internal or external clues that symbolize or resemble an aspect of the traumatic event, or marked physiological reactions to such clues.
- Avoidance—avoidance or efforts to avoid distressing memories, thoughts, feelings, or external reminders of the event.
- Negative Cognitions and Mood—myriad feelings including a distorted sense of blame of self or others for the cause or consequences of the traumatic event; persistent negative emotions (e.g., fear, anger guilt, shame), feelings of detachment or alienation, or persistent inability to experience positive emotions (e.g., happiness, satisfaction, love).
- Arousal—irritable behavior and angry outbursts with little or no provocation, reckless or self-destructive behavior, problems with concentration, sleep disturbances, hypervigilance or exaggerated startle response.

The phenomenon of "reckless or self-destructive behavior," in the marked alterations in the Arousal cluster of symptoms, was first included as a PTSD symptom in the DSM-V (2013), and "reflects the tendency of those with PTSD to engage in risky behaviors that give them a "rush," thereby serving as a means of adaptation to a disturbed and unmodulated [neurophysiological]

arousal system."[19] Moreover, research has shown that veterans with PTSD are more likely to engage in risky and impulsive behaviors when in a depressed state; and that veterans suffering from a combination of PTSD and depression—like DW DW—may experience an intensification of anger.[20]

A PTSD diagnosis requires identification of one or more symptoms of Intrusion and Avoidance, and two or more symptoms of Negative Cognitions and Mood, and Arousal; duration of the symptoms for more than one month; and resulting causation of clinically significant distress or impairment in social, occupational or other important areas of functioning.

> Numerous psychosocial conditions have been found to be associated with PTSD, for example, violence and aggression, relationship problems, decreased quality of life, legal problems, and homelessness. Research demonstrates that PTSD can cause substantial distress and functional impairment. The various effects and the interconnections of PTSD with other physical, mental, and social outcomes can interfere with readjustment into one's previous life.[21]

Many veterans, including Mr. DW, experience a pervasive sense of guilt, shame, and self-blame. While PTSD is most often perceived as a fear-based condition arising from a life-threatening event, it may also develop in reaction to traumatic events for which the veteran feels responsible.[22] "Because guilt reactions negatively impact mood, veterans with PTSD are at

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[19] Suzzane Best, *Impact of Warzone Deployment,* Chapter 7, p. 7-2, (hereafter referred to as Best (2017)), published in Still at War A guide for defenders, prosecutors & judges dealing with Oregon's Veteran Defendant Crisis (2017 OCDLA)(hereafter Still at War). Dr. Best is a clinical psychologist specializing in evaluation and treatment of PTSD and trauma-related conditions, and co-author of Courage After Fire: Coping Strategies for Returning Iraq and Afghanistan Veterans and Their Families.

[20] *Id.,* at 7-3.

[21] *Returning Home from Iraq and Afghanistan, supra n.3*.

[22] Best (2017), *supra* n. 19*,* p. 7-3. As noted, DW DW crewed on the USS Anchorage, supporting the Marines who he watched badly mistreat the Vietnamese prisoners, as well as conduct secret combat missions after the official end of America's involvement in the war.

significant risk for associated major depression, a combination which results in more severe symptoms and resistance to treatment."[23]

The symptoms of PTSD have been categorized into three typologies: dissociative reactions, sensation-seeking syndrome, and depression-suicidal syndrome. Not all individuals with PTSD experience all three typologies. A dissociative reaction includes altered states of consciousness or flashbacks, in which a veteran may regress into "survival mode" and commit an act responsive to reliving a past traumatic event. Manifestations of the sensation-seeking syndrome include seeking out dangerous activities to recreate the excitement of combat. This may be an attempt to feel alive again, rather than "numb," in civilian life; or an unconscious attempt to relive and control the trauma experienced in combat. The depression-suicide syndrome includes intense feelings of guilt, hopelessness, betrayal, and deep depression. Combat veterans may feel hopelessness when unable to reintegrate to civilian life, or betrayed by the government that sent them to fight a controversial war. These individuals may commit suicide, subconsciously act out their anger through criminal acts, or commit criminal acts with the goal of "passive" suicide or "suicide by cop."[24]

Dissertion, Discharge, and Down the Rabbit Hole

At the start of his re-enlistment, in January 1976, DW was reassigned to the USS Orleck based in Tacoma, WA. His DD-214 reflects a total of 2 months, 27 days of sea service. He first went AWOL for a couple of months starting in April 1976, and continued that pattern for the next

[23] *Id.*

[24] Daniel Burgess, Nicole Stockey & Kara Coen, *Reviving the "Vietnam Defense": Post-Traumatic Stress Disorder and Criminal Responsibility in a Post-Iraq/Afghanistan World,* 29 Dev. Mental Health L. 59, 65-68 (2010).

couple of years. He renewed his requests for help or discharge, but was sent back to active duty. He took unauthorized absence on June 19, 1978, and this time he remained AWOL until apprehended in February 1983. While AWOL he was "drinking like a fish," living on the streets of Portland, and getting by on odd jobs with his welding skills. The Navy booted DW out on October 24, 1983.

In the years since returning to U.S. soil in December 1975, DW struggled with the myriad of disabling symptoms of untreated PTSD. After discharge from the Navy in late 1983, he became a "flaming alcoholic," usually unemployed and mostly homeless for over a decade.[25] Then DW accidentally went to his first AA meeting, bravely came back for his second, and continued to return, regaining sobriety in 1995-96. He was fearful about stopping drinking, but felt safe there. He was so weary of the life he'd been living. At this second meeting the group welcomed DW and he soon had offers of places to stay, meals, and job opportunities, all from maintaining sobriety.

Recovery, PTSD Diagnosis, Dodging Treatment

DW spent his next two decades gainfully employed or involved in higher education for a new career, and abstained from alcohol, but he never escaped the torments of PTSD. Largely because, like most veterans, he did not engage in meaningful treatment.[26] He lived in the Klamath

[25] A study of Vietnam veterans receiving VA care for PTSD in the mid-1980s found that almost half had been arrested or in jail at least once, 34% more than once, and 11.5% convicted of a felony. Hunter & Else, Defending Veterans *supra* n. 7*,* at 27.

[26] Given that PTSD is an avoidance-based disorder, and most treatment involves repeated exposure and discussion of the traumatic events and resulting distress, it is common for veterans who start treatment to drop out. Studies document that of veterans who sought any psychological and/or pharmacotherapy treatment for PTSD, 24% had dropped out of care within the first 6 months, 22% had only one visit in 6 months, and only 52% had "minimally adequate care," defined as 4 or more visits in 6 months. L. Najavits, *The problem of dropout from "gold standard" PTSD therapies,* (2015; National Library of Medicine).

Falls area and worked as a welder at the same company from 1996 until he was badly injured on the job in 2008.

Starting in mid-2001, DW made a number of failed attempts to get PTSD treatment through the VA. The 1998 NVVR study found that only "3.6 percent [of Vietnam veterans] with PTSD had ever sought help from a Vet Center specifically for their mental health problems." Simply acknowledging invisible injuries is difficult for most veterans, much less expending the time and energy to embrace the stigma of mental health treatment. A 2014 RAND National Defense Research Institute report, *Mental Health Stigma in the Military,* noted "Despite the efforts of both the U.S. Department of Defense and the Veterans Health Administration to enhance mental health services, many service members are not regularly seeking needed care when they have mental health symptoms or disorders". Available at www.rand.org/content/dam/rand/pubs/research_reports/RR400/RR426/RAND_RR426.pdf .

Barriers to necessary treatment have been a long-standing, widespread problem for veterans with PTSD, due to a chronic combination of lack of VA and community-based resources as well as the stigma military culture assigns to any perceived weakness that encourages veterans to resist help. *PTSD Treatment for Verterans: What's Working, What's New, and What's Next,* Miriam Resiman, P&T, Vol. 41 No. 10 (October 2016).

His attempts to get treatment stalled with his traumatic injury while at work in 2008. A 20-foot long, large diameter steel pipe fell on his right shoulder. He was hospitalized for one week, and between 2008 and 2014 underwent a series of surgeries related to this injury. He was prescribed opiates for the surgeries and later for chronic pain relief, and eventually became addicted to the narcotics.

DW had recurrent spikes in his PTSD symptom. He believed the assault where he was thrown overboard the USS Anchorage was the genesis of this malady, the start of him feeling anxious and fearful, especially about being on a boat or in water. In 2009 he was diagnosed with "PTSD, Chronic Type, Moderate Severity." He still did not engage in treatment.[27]

The 2008 workplace injury ended his welding career, and with a cash settlement and disability payments, DW started community college in 2009, with the goal of becoming a counselor. He obtained an associate degree in psychology. He interned with Best Care Treatment Services in Klamath Falls in 2010, earned certifications as an Alcohol and Drug Counselor, and Gambling Addiction Counselor, and gained employment with Best Care as a counselor. His PTSD symptoms became severe again after an incident in 2012, but he only sought medications from the VA to manage the symptoms, rather than engage in therapy to treat the cause of those symptoms.

DW did continue working at Best Care from 2013-2015. He also continued taking Oxycodone prescribed by the VA, building a tolerance that decreased its effectiveness in controlling pain. He moved to the Oregon Coast in 2015 and worked part-time for most of a year at another counseling facility in Lincoln City.

Recovery Derailed by Opiate Addiction . . . Back down the Rabbit Hole

[27] According to Dr. Brown, *supra* n.6, "It is not uncommon for veterans to ignore PTSD until they find themselves risking family relationships or becoming entangled in the criminal justice system. Many veterans resist allowing any form of mental health diagnosis to be conducted. Today, for example, if one looks inside the mental health section of the Veterans Hospital in Portland, Oregon, they will find veterans from the Vietnam War to the current generation of new veterans. There is considerable research to validate this claim."

Narcotics prescribed for a long series of surgeries starting in 2008 for DW's workplace injury, permanent disability, and chronic pain eventually led to prescription opiate addiction and abuse. By 2016 he was also using heroin. He stopped working. The VA cut him off from Oxycodone. He continued to get social security disability payments, but the money went for drugs and he lived mostly out of his car. DW had spiraled downward to again become the unemployed, homeless, full-blown addict that he'd left behind in 1996. Still he remained the veteran haunted by demons spawned more than 40 years earlier in Vietnam, who never let him go. That lifestyle came to an abrupt but truly fortuitous end with his arrest in 2018 for possession of stolen firearm.

Redemption

DW spent about a week in jail before being released on conditions. He started off living at the Eugene Mission, but did not get along well with others there due to his untreated PTSD, and after a few weeks ended up living out of his car again while pursuing his Section 8 housing option. He was still living out of his car on October 19, 2018, when he underwent a VA Substance Abuse Treatment Program Assessment. Prior to that time he had detoxed himself from street drugs ("I quit cold turkey and I was sick for a month"), remarkably remained clean, re-engaged with AA/NA, and participated in walk-in, group counseling services at the VA in Eugene. He wanted treatment because "After 20 years (of sobriety) and I go out again. There's a problem there. I believe it's because of my PTSD. Substance abuse and mental health."

DW was assigned to start twice-weekly, group out-patient substance abuse treatment through the VA, and to continue his NA meetings, be evaluated for weekly PTSD individual psychotherapy on November 21, 2018, and attend weekly VA counseling groups for "Living in

Balance," and "Relapse Prevention." This time, DW followed through with all recommended treatment components. This alone is a remarkable accomplishment—and nothing happened fast at the VA.[28] He started individual PTSD-specific treatment in March 2019. DW successfully completed the Substance Abuse Treatment Program on May 20, 2019.

DW expects to complete EMDR therapy near the current sentencing date of August 12th, and press for admission to the VA's intensive in-patient PTSD treatment program. That program runs 30-90+ days, depending on the veteran's progress in treatment. It also offers therapy for Moral Injury, another of the "invisible injuries" of sustained by veterans, with symptoms consistent with those documented for DW. The Eugene VA does not offer therapy specific for Moral Injury.

Moral Injury

> *The evidence for the existence of moral injury is overwhelming. Moral injury causes mental torture to the very troops whose case is entrusted to American leaders. It leads soldiers to try to drown their sorrows in alcohol or the euphoria of drugs, to be involuntarily separated from the service due to disciplinary action, or to voluntarily leave the service—or the world, by killing themselves—because they feel they cannot cope anymore.*
> --Judge Advocate Major Erik Masick, United States Army

Clinical research on Moral Injury is in its early stages, first given a working definition for mental health research purposes in 2009, as "perpetrating, failing to prevent, bearing witness to,

[28] The Institute of Medicine, National Academies, *Returning Home from Iraq and Afghanistan, supra n.3*, noted "serious concerns about inadequate and untimely clinical followup and low rates of delivery of evidence-based treatments, particularly psychotherapies to treat PTSD and depression. . . . Unwarranted variability in clinical practices and deviations from the evidence base present threats to high-quality patient care. . . ." Also noted was "excessive wait time" and "poor availability and misdistribution of mental-health specializes in many parts of the United States". *Id.*

or learning about acts that transgress deeply held moral beliefs and expectations."[29] Moral Injury is not the traumatic event, but the resulting loss of trust in self and others, and diminished capacity for effective living; i.e., the "disruption in an individual's confidence and expectations about their own or others' motivation to behave in a just and ethical manner," brought about by perpetrating, failing to prevent or bearing witness to the immoral act.[30] Moral Injury has been described as "the complex effects from moral reasoning processes that gnaw the heart, and darken the soul of combat veterans."[31] Although a recent phenomenon for clinical research purposes, the notion that trauma can manifest in a soldier from transgressed ethics and morals is far from new.[32]

In veterans, "moral injuries may stem from direct participation in combat, such as killing or harming others, or indirect acts, such as witnessing death or dying, failing to prevent immoral acts of others, or giving or receiving orders that are perceived as gross moral violations."[33]

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[29] Litz, B.T., Stein, N., Delaney, E., Lebowitz, L., Nash, W.P., Silva, C., & Maguen, S., *Moral injury and moral repair in war veterans: A preliminary model and intervention strategy,* Clinical Psychology Review, 29, 695-706 (2009)(hereafter referred to as Litz et al.(2009)) available at https://msrc.fsu.edu/system/files/Litz%20et%20al%202009%20Moral%20injury%20and%20moral%20repair%20in%20war%20veterans--%20a%20preliminary%20model%20and%20intervention%20strategy.pdf .

[30] Jaimie Lusk, *The Relevance and Influence of Moral Injury,* Chapter 8, p. 8-2 (citation omitted) (referred to hereafter as Lusk (2017)), published in Still at War (2017 OCDLA), *supra n.19*. She is a clinical psychologist and former Marine who deployed during Operation Iraqi Freedom; she treats Moral Injury at the VA in Portland.

[31] Jeff Zust (2015), *The Two-Mirrors of Moral Injury: A Concept for Interpreting the Effects of Moral Injury* 1, Comm. and Gen. Staff College Found., http://www.cgscfoundation.org/wp-content/uploads/2015/06/Zust-TwoMirrorModel-final.pdf .

[32] *See, e.g.,* Masick, E.D., *Moral Injury and Preventative Law: A framework for the future*, 224 Mil. L. Review 223, 225-230 (2016).

[33] *Moral Injury in the Context of War,* S. Maguen & B. Litz, National Center for PTSD (2016), copy attached as Exhibit 109.

Veterans from the Vietnam area forward have engaged in a different type of warfare—that makes them particularly vulnerable to Moral Injury—characterized by "ambiguous, inconsistent or unacceptable rules of engagement, lack of clarity about the goals of the mission itself, a civilian population of combatants, and inherently contradictory experiences of the mission as both humanitarian and dangerous."[34]

Although Moral Injury is not a DSM-V diagnosis, it is increasingly recognized by mental health providers working with veterans as a substantial issue that requires specialized treatment. It is part of the in-patient PTSD program that DW is waiting to start. Moral Injury is an interdisciplinary construct that has been used to identify, explain and treat dysfunctional behaviors in veterans.[35] "Diagnostically, post-traumatic stress disorder involves experiencing or witnessing a traumatic event. Events resulting in moral injury may fit this criteria, but more specifically involve acts of perpetration or betrayal."[36] Veterans are indoctrinated during military training that troops will be deployed to defend democracy, kill the enemy, and protect civilians in the combat area of operation. Many veterans, in the aftermath of their deployment experiences, come to believe that this was not truthful, and their sense of betrayal often runs deep and lasting.[37] DW anger at the Marines who he saw treat prisoners like animals aboard ship has, he says, haunts him to this day. And he understandably felt betrayed when the Navy ignored

[34] Lusk (2017), *supra* n.31*,* at 8-4 (quoting D. Wood, What have we done: The moral injury of our longest wars (2016 Boston, Little, Brown & Company); see also, Litz et al. (2009) at 696-97.
[35] *See, e.g.,* Masick, E.D., *Moral Injury and Preventative Law, supra n.100,* at 225 (2016).
[36] Lusk (2017) *supra n.98*, at 8-2.
[37] *See, e.g., Moral Injury Is The 'Signature Wound' of Today's Veterans*, NPR (Nov. 11, 2014), available at http://www.npr.org/2014/11/11/363288341/moral-injury-is-the-signature-wound-of-today-s-veterans.

his repeated pleas for help, and instead put him in jail, then finally booted him out with a bad conduct discharge.

PTSD is generally recognized as a fear-based response to traumatic events, whereas Moral Injury can be seen as an anger-based response:

> Whereas Posttraumatic Stress Disorder (PTSD) is typically associated with one's reaction to fear, MI is best viewed as a wound resulting from the violation of one's code of right and wrong, which by definition, meets the eligibility description of an invisible wound. However, just as there is no universal soldier, neither is there a universal type of MI. MI can be a violation of one's core cultural or spiritual values. MI can also be a violation of the soul.[38]

PTSD does not "sufficiently capture the moral injury, or the shame, guilt, and self–handicapping behaviors that often accompany moral injury." (PTSD Research Quarterly Volume 23/NO.1 2012). "Guilt is a painful and motivating cognitive and emotional experience tied to specific acts of transgression of a personal or shared moral code or expectation." In contrast, "Shame involves global evaluations of the self, along with behavioral tendencies to avoid and withdraw."[39]

Features of Moral Injury in veterans identified through research that are not generally associated with PTSD include moral/spiritual conflict, self-condemnation, self-sabotage, low enjoyment (Anhedonia), purposelessness (Anomie), and social alienation. Shared features include depression, emotional numbing, avoidance (including isolation, aggression, self-harm behaviors, substance abuse, somatic complaints), and loss/grief.[40] Dr. Lusk notes many scholars believe that Moral Injury is critical in the explanation of criminal behavior by veterans. Moral Injury can result in diminished capacity or unwillingness to adhere to laws or values, and can

[38] *Id.,* at 15.
[39] *Id.*
[40] Lusk (2017), *supra n.31,* at 8-3.

result in behavior that is simultaneously symptomatic and criminal.[41] Moral Injury is relevant to understanding DW DW's confused moral compass guiding his conduct in this case.

II. Legal And Policy Grounds Supporting Downward Departure Or Variance.

The Supreme Court in *Porter v. McCollum,* 558 US 30, 130 SCt 447 (2009), made clear that military service and combat-related "invisible injuries" could mitigate culpability for sentencing purposes. The Court also rejected the notion that veterans who reacted to the trauma of war by going AWOL were unworthy of such consideration. 558 US at 44 ("evidence that he was AWOL is consistent with this theory of mitigation and does not impeach or diminish the evidence of his service."). When men and women of good character have risked their lives to fight as our proxies, and return home with injuries that lead them afoul of the law, there arises a moral duty to do them no more harm than is necessary to protect the public. They deserve restorative justice:

> The breadth and depth of the challenges faced by military service members and veterans . . . result from the complex interaction of issues that must be addressed by primary prevention, diagnostics, treatment, rehabilitation, education and outreach, and community support programs if readjustment after combat service is to be successful.[42]

Military Service As A Departure/Variance Ground

> *There is widespread public acceptance of the notion that military veterans should be treated differently in many respects from their civilian counterparts. As a consequence, veterans receive medical care, educational support, and employment preferences not available to their civilian counterparts. This acceptance may be attributable to a general respect for the sacrifice of members of an all-volunteer force and the knowledge that today's veteran may have been*

[41] *Id*.
[42] *Returning Home from Iraq and Afghanistan, supra n.3*.

> *subjected, even repeatedly subjected, to life-threatening events the general public may never know.* [43]

In *Porter v. McCollum,* the Supreme Court identified two separate bases for leniency that, depending on the individual veteran, could exist either singularly or combined: (1) our social contract with service members who have signed up to risk their lives for ours, i.e., "in recognition of their service"; and (2) the impact of military service when it makes veterans "traumatized [and] changed", "declared relevant to assessing a defendant's moral culpability" for his crime. 130 S.Ct. at 448 & 454. Although *Porter* concerned military service as mitigation in a death penalty case, its dicta regarding military service as mitigation has been widely cited in non-capital cases. Moreover, the Guidelines Commission cited *Porter* as its primary support for changing its view on military service as a ground for downward departure. U.S.S.G. §5H1.11, Military Service, deals specifically with only the first basis for leniency identified by *Porter*, "in recognition of their service."

The Guidelines Commission amended §5H1.11 specifically to make military service a relevant circumstance for downward departures, where it had previously been listed along with public service and similar good works as ordinarily not relevant. "The Commission determined that applying this departure standard to consideration of military service is appropriate because such service has been recognized as a traditional mitigating factor at sentencing." Historical Notes, 2010 Amendments. This policy statement provides:

> Military service may be relevant in determining whether a departure is warranted, if the military service, individually or in combination with other offender

[43] Judge Michael Daly Hawkins, *Coming Home: Accommodating the Special Needs of Military Veterans to the Criminal Justice System,* Ohio State Journal Of Criminal Law, Vol, 7:563 at 569 (2010).

> characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines.
> Civic, charitable, or public service; employment-related contributions; and similar prior good works are not ordinarily relevant in determining whether a departure is warranted.

The defense has been unable to find case law addressing a downward departure based on military service under the amended guideline. This is likely due to courts utilizing downward variances as opposed to departures *post-Booker,* and the limited number of veteran defendants whose cases result in appeals, given that most federal cases are resolved by plea agreements and the prevalence of appellate waivers. However, this revised recognition of military service as an encouraged versus discouraged ground for departure denotes military service as an important consideration for mitigation based on the "history and characteristics of the defendant" under 18 U.S.C §3553(a).

Moreover, there is case law approving downward departures for military service—and in the absence of PTSD or other invisible injuries—prior to the 2010 amendment of §5H1.11. One district judge carefully explained the rationale in finding that a defendant's exceptional military record was a factor that warranted departure to straight probation, without any community confinement:

> This Court is of the opinion that a person's military record is a relevant factor to be considered at sentencing, because it reflects the nature and extent of that person's performance of one of the highest duties of citizenship. An exemplary military record, such as that possessed by this defendant, demonstrates that the person has displayed attributes of courage, loyalty, and personal sacrifice that others in society have not. Americans have historically held a veteran with a distinguished record of military service in high esteem. This is part of the American tradition of respect for the citizen-soldier, going back to the War of Independence. In ignoring a defendant's military service record, the Commission has done a disservice (albeit unintentional) to those ex-service men and women who have served their country faithfully in time of war or other need, and who later find themselves brought before a federal court on criminal charges.

United States v. Pipich, 688 F.Supp. 191, 192-93 (D. Md. 1988)(involving theft of mail by postal employee). The Fifth Circuit upheld the district court's downward departure in an armed bank robbery case based solely on "extended, exemplary military record [including "time in a combat theater", that] reflects a positive contribution to society." *United States v. Henley*, 50 F.3d 1032, 1995 WL 1032 (5th Cir. 1995)(not selected for publication).

The Second Circuit approved a downward departure under the guidelines based on the defendant's military service along with other personal characteristics. *United States v. Canova,* 412 F.3d 331, 358-59 (2d Cir. 2005)(affirming 6-level downward departure to one year probation in multi-million dollar Medicare fraud case, based on extraordinary public service and good works where defendant, more than twenty years before sentencing, served in Marine Corps' active reserves for six years, and as a volunteer firefighter, and more recently had acted as Good Samaritan demonstrating his commitment to helping persons in distress was an instinctive part of his character.).

More courts have granted downward variances in recognition of a defendant's military service. There is Ninth Circuit case law, as well as opinions from other circuits, recognizing a downward variance is warranted based on military service in combination with other factors—and in the absence of "invisible injuries" that would reduce moral culpability for the crime. *See, e.g., United States v. Carper*, 659 F3d 923 (9th Cir. 2011)(variance affirmed where the defendant, a Marine, violated the Arms Export Control Act; the sentencing court granted the variance based on Carper's military service and little to no likelihood of recidivism)[44]; *United States v. Chase*, 560

[44] The Ninth Circuit's decision does not recite all of these facts, which are taken from *Case Annotations and Resources: Military Service USSG §5H1.11 Departures and Booker Variances,*

F.3d 828 (8th Cir. 2009)(finding defendant's prior military service, advanced age and health issues, and lack of prior record could support downward variance even if it didn't support formal departure); *United States v. Baird*, 2008 WL 151258 (D. Neb. Jan. 11, 2008) (The district court considered the defendant's 15-year military career, low risk of recidivism, and lack of criminal history as factors for a variance from 63 months to 24 months prison in child pornography case).

In *United States v. Howe,* 543 F.3d 128 (3d Cir. 2008), the Court affirmed the district judge's variance from the guidelines' 18-24 month range to probation with 3-months home confinement in a wire fraud case—characterized by the Government as "a two-year campaign to cover up a six-figure fraud on the Air Force." The district court found the crime to be an "isolated mistake" in the context of Howe's entire life, which was otherwise upstanding and included 20 years of military service in the Air Force, devotion to family, community, and church. The Government appealed. The Third Circuit specifically addressed Howe's military service as a ground for variance:

> Another justification was Howe's twenty years of military service followed by honorable discharge. The Government brushes that justification aside with the conclusory averment that this factor does "not meaningfully distinguish Howe from other defendants. . . ." But the Government cites no evidence that most defendants, white-collar or otherwise, in fact have lengthy and positive records of past military service, whereas it is the Government as appellant whose burden it is to establish that a sentencing factor is unreasonable. Further, the argument that any military service must be "exceptional" is not suitable to our review of a district court's analysis under §3553(a).
>
> Indeed, the Supreme Court included military service as a reason to affirm the district court's below-Guidelines sentence in *Kimbrough v. United States,* 128 S.Ct. 558, 575, 169 L.Ed.2d 481 (2007) ("he had served in combat during Operation Desert Storm and received an honorable discharge from the Marine Corps, and

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prepared by The Office of General Counsel, U.S. Sentencing Commission (Jan. 2012), referred to as *Case Annotations §5H1.11*).

> that he had a steady history of employment"). While this consideration alone might not be enough to warrant the downward variance to probation in this case, *Kimbrough* makes clear that it may be considered as one of the factors.

543 F.3d at 139.

Although courts must give consideration to military service when called upon to do so, either for downward departure or, as in Mr. DW' case, for purposes of downward variance, imposing a lower sentence on that ground remains discretionary. As demonstrated by case law cited above, courts have substantially reduced sentences below the advisory guideline range—going from prison to probation—when the defendant was convicted of a non-violent offense and had demonstrated exemplary military service. *Pipich, supra; Canova, supra*; *Cooper, supra; Howe, supra*. Mr. DW' case falls in that category, during his first enlistment at age 17, with deployment in the war zone for the better part of 3 years, exposed to enemy fire on the flight deck, for which he was awarded the National Defense Service Medal and an Honorable Discharge before immediate re-enlistment. Most commonly, courts have declined to reduce sentence when the defendant was convicted of a crime of violence or other serious offense, had prior criminal history, or had not served courageously in combat.[45]

Thus, Mr. DW' military service should serve to reduce his sentence from the advisory guideline range, regardless of whether his service-connected "invisible injuries" contributed to his criminal conduct. Simply put, leniency is warranted in recognition of his personal sacrifice on behalf of us all, *Porter v. McCollum, supra,* particularly given the absence of aggravating factors that have led courts to not grant leniency for such service.

[45] See *Case Annotations §5H1.11, supra.*

Mental And Emotional Conditions As A Departure/Variance Ground

> *To deny the frequent connection between combat trauma and subsequent criminal behavior is to deny one of the direct societal costs of war and to discard another generation of troubled heroes.*
>
> * * * *
>
> *For soldiers, mental trauma and debilitating stress are part of the job description. When veterans go astray, they deserve every reasonable effort to get them back where they began: clean, sober and on the right side of the law.*[46]

"'PTSD is the only [mental] illness [that has] a clear etiologic[al] relationship to military service' and it has been demonstrated that being exposed to war-zone stress can lead to life-lasting impairment."[47] No doubt those facts have contributed to the courts' increasing receptiveness to combat-related trauma for mitigation of sentence.[48] Senior U.S. District Judge John L. Kane, who has encouraged reforms to confront the problem of sentencing veterans with untreated mental conditions, noted: "We dump all kinds of money to get soldiers over there and train them to kill, but we don't do anything to reintegrate them into our society."[49] When returning veterans with no prior criminal history run afoul of the law, federal judges have the power pursuant to 18 U.S.C. §3553(a) to structure sentences that facilitate rehabilitation and

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[46] National District Attorney's Association Resolution 26b (2010), *available at* http:// www.nadcp.org/sites/default/files/nadcp/NDAA%20Endorsement_0.pdf . The first paragraph of this bi-part quotation are words of a defense attorney, excerpted from another article.

[47] Robert Rosenheck & Alan Fontana, *Changing Patterns of Care for War-Related Post-Traumatic Stress Disorder at Department of Veterans Affairs Medical Centers: The Use of Performance Data to Guide Program Development*, 164 MILITARY MED. 795, 795 (1999).

[48] *See, e.g.,* F. Don Nidiffer & Spencer Leach, *To Hell and Back: Evolution of Combat-Related Post Traumatic Stress Disorder*, 29 Dev. Mental Health L. 1, 16 (2010) ("[The] legal system has begun to view combat-related PTSD as an important mitigating factor when assessing culpability, as well as the growing acceptance within the legal system and society of this diagnosis and its impact."); Amir Efrati, *Judges Consider a New Factor at Sentencing: Military Service*, Wall St. J. (Dec. 31, 2009) at A14; Debra Cassens Weiss, *Judges Cite Wartime Stress in Granting Leniency to Veterans*, A.B.A.J.(Mar.17,2010),www.abajournal.com/news/article/judges_cite_wartime_stress_in_granting_leniency_to_veterans.

[49] Amir Efrati, , *supra n.49.*

reintegration. *E.g., United States v. Brownfield,* Case No. 08-cr-00452-JLK (D. CO.)(Memorandum Opinion and Order on Sentencing, Dec. 18, 2009)(Kane, J., noting "this case involves issues the Sentencing Guidelines do not address regarding the criminal justice system's treatment of returning veterans who have served in Afghanistan and Iraq."); *United States v. Jonathan Courtney*, Case No. 3:15-CR-00360-1-JO (U.S. District Court, District of Oregon).[50]

In late January 2017, the Hon. Robert E. Jones heard testimony from psychologist Suzanne Best that Courtney, a former Army Ranger and highly-decorated Iraq War veteran with PTSD, engaged in criminal conduct driven by the symptom of survivor's guilt, when he was involved in an armed standoff with police while highly intoxicated. Courtney pled guilty to 2 counts of Assault on a Federal Officer, crimes with a maximum of 20 years imprisonment. His advisory guideline range was 51 to 63 months, but the Government agreed to recommend an 8-level downward variance, resulting in a 21-month prison sentence. In its sentencing memorandum, the Government explained the 8-level variance was due to Courtney's exemplary military service as a decorated combat veteran; that the standoff reflected "an aberration from the law-abiding conduct that has characterized most of his life"; his post-military employment characterized as service to his community; that his "offense conduct also appears to have been fueled by alcoholism and untreated PTSD," and military experiences that caused him to suffer from

[50] Judge Kane varied downward from a jointly-recommended prison sentence to probation for a veteran with PTSD due to events witnessed in combat zones, explained in his 30-page opinion. The opinion is available at http://graphics8.nytimes.com/packages/pdf/us/20100303brownfield-opinion-order.pdf .

survivor's guilt; and his "exceptional post-offense rehabilitation" including VA in-patient treatment and subsequently maintaining steady employment. [51]

Courtney's defense counsel sought a variance down to probation, contending Courtney's conduct in 2015 was driven by his PTSD, and that his symptoms—under control by time of sentencing in 2017—would be exacerbated by imprisonment. Judge Jones agreed that the isolation and inactivity of prison would jeopardize Courtney's recovery from PTSD, and imposed a 5-year probationary sentence.

Given the authorities cited earlier in this memorandum, it does not require expert testimony for this Court to reasonably conclude that Mr. DW' non-violent offense conduct appears to have been fueled by drug addiction with a clear nexus to his untreated PTSD.

The Ninth Circuit recognized that combat-related PTSD suffered by a Vietnam veteran was the type of "mental condition" that would qualify a defendant for a downward departure for "diminished capacity" under U.S.S.G. §5K2.13. *United States v. Cantu*, 12 F.3d 1506 (9th Cir. 1993).[52] "The court's inquiry into the defendant's mental condition and the circumstances of the offense must be undertaken 'with a view to lenity, as section 5K2.13 implicitly recommends.'" *Id.,* at 1511 (citation omitted). "Lenity is appropriate because the purpose of §5K2.13 is to treat with some compassion those in whom a reduced mental capacity has contributed to the

[51] Facts are as reported by news articles and Best (2017)*, supra n.19,* at 7-6 through 7-8, and court records available through PACER.

[52] *Cantu* continued to be cited by courts and secondary sources to support downward departures and variances based on PTSD. *E.g.*, *United States v. Menyweather*, 447 F.3d 625 (9th Cir. 2006)(in embezzlement case, finding no abuse of discretion in district court's downward departure of 8 levels to probation under §5K2.13 in part due to defendant's (civilian-based)PTSD, where psychologist's testimony was not rebutted, other than by the prosecutor's arguments); Natalie Hinton, Comment, *Curing the BOP Plague with* Booker*: Addressing Inadequate Medical Treatment in the Bureau of Prisons*, 41 J. MARSHALL L. REV. 219, 228 (2007).

commission of a crime." *Id.; accord, Porter v. McCullum, supra.* That Mr. DW did not pursue a mental defense to the charge based on his invisible injuries does not decide the issue of whether his criminal conduct would not have occurred in the absence of those injuries. His PTSD, Major Depressive Disorder, Opioid Use Disorder and likely Moral Injury unquestionably cause problems in maintaining self-control and impair cognitive functions; Moral Injury, in particular, is described as creating a "broken moral compass" that diminishes capacity to understand the wrongfulness of one's conduct.

The Ninth Circuit had little difficulty concluding that PTSD is a qualifying disorder for "diminished capacity":

> Cantu's post-traumatic stress disorder is a grave affliction. Its effect on his mental processes is undisputed. He has flashbacks to scenes of combat. He suffers nightmares, "intrusive thoughts[,] and intrusive images." He is anxious, depressed, full of rage, "markedly paranoid," and "explosive at times." . . . . Cantu's impairment is more than sufficient to make him eligible for a reduction in sentence under §5K2.13.[53]

12 F.3d at 1513. DW DW' documented PTSD symptoms mirror those of Cantu. The Court went on to explain that "the disorder need be only a contributing cause, not a but-for cause or a sole cause of the offense." *Id.* at 1515.

The Ninth Circuit in *Cantu,* at 1514, recognized that veterans with PTSD who self-medicate with drugs or alcohol would not be disqualified from this departure ground:

> Alcoholics and other drug abusers are not categorically disqualified from this departure. Under the plain language of the guideline, they are disqualified only if their *voluntary alcohol or drug use caused their reduced mental capacity.* U.S.S.G.

[53] Other courts have reached the same conclusion. See, e.g., *United States v. Eric Shawn Perry*, 1995 WL 137294 (D. Neb. March 27, 1995)(PTSD and related sleep disorders significantly reduce the ability to reason; "[i]t does not require a degree in psychiatry or psychology to conclude that chronic intentional sleep deprivation, to avoid remembering the horrors of war, will significantly impair the ability to reason.").

> § 5K2.13. *See United States v. Lewinson,* 988 F.2d at 1006 (adhering to the plain language of the guideline). If the reduced mental capacity was caused by another factor, or if it, in turn, causes the defendant to use alcohol or another drug, the defendant is eligible for the departure. Moreover, a defendant whose reduced capacity was caused *in part* by voluntary drug or alcohol use is not disqualified from departure. It is not always possible to determine with certainty the cause of a mental or emotional ailment, and such illnesses do not often have a sole cause.

Policy statement §5K2.13, since amended, now requires the disorder "substantially contribute" to defendant's commission of the offense:

> A downward departure may be warranted if (1) the defendant committed the offense while suffering from a significantly reduced mental capacity; and (2) the significantly reduced mental capacity contributed substantially to the commission of the offense. Similarly, if a departure is warranted under this policy statement, the extent of the departure should reflect the extent to which the reduced mental capacity contributed to the commission of the offense.
>
> However, the court may not depart below the applicable guideline range if (1) the significantly reduced mental capacity was caused by the voluntary use of drugs or other intoxicants; (2) the facts and circumstances of the defendant's offense indicate a need to protect the public because the offense involved actual violence or a serious threat of violence; (3) the defendant's criminal history indicates a need to incarcerate the defendant to protect the public; or (4) the defendant has been convicted of an offense under chapter 71, 109A, 110, or 117, of title 18, United States Code.

There is only one Application Note, which defines "significantly reduced mental capacity" to mean "the defendant, although convicted, has a significantly impaired ability to (A) understand the wrongfulness of the behavior comprising the offense or to exercise the power of reason; or (B) control behavior that the defendant knows is wrongful." These two alternatives have been characterized as the "cognitive prong," and the "separate volitional capacity prong," i.e., "the power to control [one's] behavior or conform it to law," as discussed at length by Judge Ferguson in his concurring opinion in *United States v. Schneider*, 429 F.3d 888, 891-94 (9th Cir. 2005)(criticizing the district court for ignoring the volitional prong once determining the

defendant's conduct demonstrated he knew "exactly what he [was] doing" and acted out of greed).

§5K2.13 currently does not define or illustrate what "contributed *substantially* to the commission of the offense" means, nor has the defense found case law interpreting that provision to provide a standard. However, this Court need not wade into uncharted territory on the meaning of "contributed substantially," as Mr. DW does not move for a downward departure but rather argues that a commensurate downward variance is warranted for the substantial role played by his PTSD and co-morbid disorders in his commission of the offense, particularly in combination with the other factors asserted in this memorandum, including his need for on-going mental health treatment available through the VA.

Based on similar factors, the Court in *United States v. Oldani,* 2009 WL 1770116 (S.D.W.Va. 2009), varied downward from a guideline range of 30-37 months to a sentence of five months imprisonment followed by eight months community confinement. Oldani served honorably in the Marines and was diagnosed with PTSD after his first tour of combat duty to Iraq in 2005. He sought and received an honorable discharge in 2007. He was also diagnosed with mTBI (mild Traumatic Brain Injury). Over the course of many months, Oldani sold night-vision rifle scopes, stolen by his brother from Marine Corps barracks, on E-bay, and took "a large share in the more than $50,000 of profits he helped generate." *Id.,* at *1-*2. The Court based its variance on Oldani's exemplary military history, and corresponding low risk of recidivism; combat-related PTSD and mTBI that caused him to "exhibit poor judgment," and which the VA was effectively treating, unlike the less-satisfactory care he would receive from the BOP; and his progress at

reintegrating, including pursuing a degree, becoming engaged, and "strong support from his church and his family." *Id.,* at *6-*8.

In 2010 the Guidelines Commission also amended U.S.S.G. §5H1.3, Mental and Emotional Conditions, noting such conditions "may be relevant in determining whether a departure is warranted" either "individually or in combination with other offender characteristics," where previously these conditions were "not ordinarily relevant." The 2010 Amendment also added a cross reference to §5C1.1, Application Note 6, stating "In certain cases a downward departure may be relevant to accomplish a specific treatment purpose." §5H1.3 provides:

> Mental and emotional conditions may be relevant in determining whether a departure is warranted, if such conditions, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines. See also Chapter Five, Part K, Subpart 2 (Other Grounds for Departure).
> In certain cases a downward departure may be appropriate to accomplish a specific treatment purpose. See § 5C1.1, Application Note 6.
> Mental and emotional conditions may be relevant in determining the conditions of probation or supervised release; e.g., participation in a mental health program (see §§ 5B1.3(d)(5) and 5D1.3(d)(5)).

United States v. Ferguson, 942 F.Supp.2d 1186, 1191-92 (M.D. Ala. 2013) traced the history of these amendments:

> In 2010, the Sentencing Commission amended its recommendations for sentencing mentally ill defendants in response to the Commission's "multi-year study of alternatives to incarceration." As part of the study, it "reviewed federal sentencing data, public comment and testimony, recent scholarly literature, current federal and state practices, and feedback in various forms from federal judges." The resulting amendment . . . includes an application note that, for the first time, authorizes departure from "Zone C" of the sentencing table (which requires prison for at least half the minimum term) to "Zone B" (which does not require prison) in order to achieve a "specific treatment purpose." (codified at USSG § 5C1.1, comment. (n.6)). Such a departure is appropriate in cases where the defendant "suffers from a significant mental illness, and the defendant's criminality is related to [that illness]," though courts must additionally consider

> the likelihood that treatment will address the defendant's mental illness as well as the risk to the public absent incarceration.
>
> Also in 2010, the Sentencing Commission amended the status of mental and emotional conditions from a specific offender characteristic that is "not ordinarily relevant" to one that "may be relevant." . . . A specific offender characteristic identified in Chapter Five, Part H, as "not ordinarily relevant" must be present to an "exceptional degree" to warrant departure. USSG § 5K2.0(a)(4). As amended, the . . . policy statement instructs that mental and emotional conditions may be relevant in setting a lower sentence where the conditions are "present to an unusual degree" that "distinguish[es] the case from the typical cases covered by the guidelines." This is a less demanding standard than the "exceptional" standard.

Ferguson reasoned that while the amended policy statement speaks only to downward departures, it reflects careful study and empirical evidence of factors that would also warrant a downward variance. 942 F.Supp.2d at 1194. The court noted the amended guidelines reflect the principle that "punishment should be directly related to the personal culpability of the criminal defendant," *id.*, at 1192; and "the growing recognition that treating mentally ill criminal defendants rather than imprisoning them better serves both the defendants and society," *id.*, at 1193.

When mental or emotional disorders are shown to be a factor that reduces a defendant's moral culpability for his crime, a downward variance or departure is justified. *See, United States v. Schneider*, 429 F.3d 888, 891-94 (9th Cir. 2005)(Ferguson, J., concurring); *United States v. Stange,* 225 Fed. Appx. 618 (9th Cir. 2007)(Court agreed with defendant that post-service PTSD could support a shorter sentence, but affirmed within-range sentence for armed bank robbery, in deference to district court's discretion); *United States v. Risse*, 83 F.3d 212 (8th Cir. 1996)(in a case involving drug trafficking and firearm possession, court affirmed a downward departure from 57-71 months to 18 months based on the defendant's service-related PTSD and overstated

criminal history score); *Cantu, supra; United States v. Courtney, supra; United States v. Brownfield, supra; United States v. Perry, supra.* Mr. DW has made that showing.

Extraordinary Post-Offense Rehabilitation

As discussed earlier in this memorandum, DW has accomplished what far too few veterans with the same invisible injuries have done—sought and successfully completed intensive treatment—and remains invested in on-going treatment through the VA. To do so, he had to overcome the stigma attached to acknowledging these disorders, particularly within the military culture but present as well in civilian culture;[54] and to relive his traumas during therapy.

Through treatment, Mr. DW has gained insight and tools that have allowed him to improve his relationships with others and become more pro-social. The severity of his symptoms has decreased. He has maintained sobriety, obtained housing, and supplemental income through the VA. He is actively pursuing re-certification to be a licensed counselor, and volunteering as a mentor at XX County's Veterans Treatment Court. His significant other, NY, confirms the progress DW has made post-arrest. "The health and fitness of warriors is influenced by social factors like jobs and family, that give meaning to their lives and get them through hard times. . . . [T]he best help that we can give may be sticking to the basics for a productive and gratifying life 'at home.'"[55]

The Ninth Circuit has recognized that post-offense rehabilitation efforts may support a departure. *See, United States v. Green,* 152 F.3d 1202, 1207-08 (9th Cir. 1998); *United States v.*

[54] *See, e.g.,* Michael Friedman, *The Stigma of Mental Illness Is Making Us Sicker,* Psychology Today (May 13, 2014)(discussing negative attitudes of the majority of people in research studies hold towards people with mental illness, as well as self-stigma) available at www.psychologytoday.com/blog/brick-brick/201405/the-stigma-mental-illness-is-making-us-sicker .

[55] Xenakis, *Combat Trauma*, Hunter & Else Defending Veterans*, supra.*

Thompson, 315 F.3d 1071, 1077-78 (9th Cir.2002)(Berzon, J., concurring)("Post-offense rehabilitation—as distinguished from post-sentencing rehabilitation—can be a basis for downward departure. . . . A relevant consideration under the rubric of post-offense rehabilitation is continuity of needed treatment"). It can also support a variance without necessarily reaching the level of "extraordinary." *E.g., United States v. Courtney, supra; see, United States v. Howe, supra* (noting military service need not be extraordinary to support a variance under §3553(a)). Mr. DW steps toward successful reintegration during the last year have been extraordinary in light of his mental and emotional impediments symptomatic of combat-related invisible injuries, his long-term opioid addiction and homelessness, and of his perseverance in seeking and completing intensive treatment.

Departure Or Variance To Provide Effective Rehabilitation

As previously noted, §5C1.1, Application Note 6, authorizes a downward departure from Zone C (split sentence) to Zone (B) probation, when "appropriate to accomplish a specific treatment objective." This guideline embraces a policy of imposing a non-prison sentence, in lieu of a relatively short prison sentence, for the pragmatic purpose of rehabilitative treatment, signifying the same rationale is a reasonable ground for a downward variance. Probation is a statutory sentencing option for Mr. DW' offense; community supervision could likewise be achieved through a term of supervised release without additional imprisonment.

In *United States v. Autery,* 555 F.3d 864 (9th Cir. 2009) the district court relied on the need for the sentence imposed to provide the defendant with rehabilitative treatment in the most effective manner, 18 USC §3553(a)2)(D), as one ground for its variance from prison to a probationary sentence. On appeal, the government contended reliance on that factor was

erroneous, because the defendant could have been ordered to undergo treatment in prison. The Ninth Circuit noted the district court's finding that incarceration would likely create "a much more disruptive situation and, actually, could be more damaging" than ordering mental health and other appropriate treatment as conditions of probation, in upholding the variance. 555 F.3d at 876-77. The Court went on to note that "'imprisonment is not an appropriate means of promoting correction and rehabilitation' ." *Id.,* at 877 (citation omitted).

When it comes to the invisible injuries of war, district court judges have repeatedly recognized that treatment available through the VA is superior to anything available in the BOP, and the government has taken no appeal from those sentencing decisions. In *United States v. Oldani, supra,* the court found:

> The BOP is not uniquely situated, as is the VA, to treat the signature injuries from the United States's current military engagements. Counselors at the BOP would be less likely to have received specific training to treat veterans and deal, for example, with the type of events that brought on a soldier's PTSD. Finally, group sessions conducted by the BOP would likely be available to the entire prison population (at least those subject to a specific disability) rather than being limited to veterans.

2009 WL 1770116, at *7; *accord, United States v. Courtney, supra.*

Judge Kane, in his *Brownfield* opinion, *supra* at p. 27, determined:

> Given the paucity of prison programs available to those serving one year or less and the relative lack of expertise compared with the Veterans Administration in treating war-zone related illnesses, corrective treatment will be more readily realized by a lengthy sentence to probation rather than a comparatively abbreviated one to prison. In the circumstances of this case I find that a sentence to prison is inappropriate for achieving Section 3553(a)'s purposes.

In *United States v. Kevin John Erickson,* Case No. 3:10-CR-006 (E.D. VA., Richmond Division), the district court varied downward from an advisory guideline range of 46-57 months, to a probationary sentence due to lack of veteran-specific treatment from the BOP. Erickson had

found employment post-discharge with the BOP as a prison guard, and was convicted of smuggling contraband as well as soliciting a crime of violence—a course of conduct that took place over several years, according to court filings. In the course of sentencing proceedings, the court received testimony from the head of psychiatry for the Bureau of Prisons concerning the availability of psychotropic medications as well as therapy for combat-veteran defendants with PTSD. The April 1, 2011, sentencing transcript (p. 125), available through PACER, contains the Government's acknowledgment that "the record forecloses a finding that [the defendant's] going to receive veteran-specific posttraumatic stress disorder treatment; however, he's not going to go wholly without treatment." The court, in support of its downward variance to probation, found:

> "[T]here's nothing in the record that the Bureau of Prisons has any way of treating posttraumatic stress syndrome of veterans, and the fact of the matter is, when people make sacrifices for this county and when they experience what is now recognized as very real consequences, then it's up to the country, even when they commit crimes, and that's evidence by section 3553(a) and the last factor, to make sure they get the treatment that they're required to get," *id.,* at p. 135.

Given the reported information concerning Judge Jones' reasons for variance in *Courtney* this year, as well as all other information the defense has been able to find, nothing has changed at the BOP since *Erickson* was decided in 2011, and 2019. If anything, the provision of health care, including mental health services, at the BOP may well have declined.[56]

[56] A recent DOJ study concluded the BOP systemically lacks sufficient numbers of medical professionals to provide all inmates with medically necessary healthcare, resulting in limited access to medical care and an increased need to send inmates outside the prisons for medical care. Office of Inspector General, U.S. Department of Justice, *Review of the Federal Bureau of Prisons' Medical Staffing Challenges*, Executive Summary (March 2016)(available on-line). Nationwide, staffing was at 83 percent of needed medical professionals; about 10 percent of the facilities were staffed at 71 percent or below, described as "crisis level." Id., at n. 9. Another OIG report, *Review of Federal Bureau of Prisons' Use of Restrictive Housing for Inmates with Mental*

Ongoing VA treatment for Mr. DW is vital to his continuing rehabilitation. As noted by authorities cited earlier in this memorandum, PTSD is a chronic disorder that requires constant attention to manage and keep symptoms under control: One way to think about PTSD is to see it as analogous to diabetes. If one adopts the proper life style, nutrition and treatment regimen with diabetes, the symptoms can be managed well. If, however, one does not maintain the treatment regimen on a daily basis, it can again spiral out of control. This is true also of PTSD.

> One noteworthy problem associated with PTSD is the fact that it is often like a light switch. At times it seems as though the veteran is well on the way to resolving her or his problem, but a single incident or event can take the individual back to the point of origin. . . . Current Images and reports from Afghanistan and Iraq serves as a trigger for many older veterans (WWII, Korea, Vietnam, Gulf War I) to experience recurring PTSD symptoms from their own combat experiences (Brown 2005; Schroder and Dawe 2007).[57]

A prison sentence would not only place Mr. DW at risk of relapse by interrupting his treatment regimen, but would also increase the severity of his symptoms. Exacerbation of mental disorders, including PTSD, for anyone being sent to prison for the first time is documented in the literature.[58] Prison is particularly difficult for combat-veteran defendants:

Illness (July 2017)(available online), found "the BOP does not sufficiently track or monitor inmates with mental illness," and although the BOP issued a policy in 2014 to enhance mental health treatment, "To the contrary, after the new policy was issued, BOP mental health staff reduced the number of inmates required to receive regular mental health treatment by approximately 30 percent." Furthermore, BOP data from 2015 showed that only 3% of the inmate population was being treated regularly for mental illness, yet a 2016 internal study estimated 19 percent had a history of mental illness.

[57] Dr. William B. Brown, *Another Emerging "Storm": Iraq and Afghanistan Veterans with PTSD in the Criminal Justice System*, 5 Just. Pol'y J.. 1, 12 (2008)

[58] Not only is "being sent to prison" considered a traumatic event, the magnitude of this trauma is comparable to "rape," "acts of terrorism," and "being held hostage." Diana Sullivan Everstine & Louis Everstine, Strategic Interventions for People in Crisis, Trauma, and Disaster, at xiv (2006 rev. ed.). *See also* H. Richard Lamb, *Reversing Criminalization*, 166 Am. J. Psychiatry 8, 8 (2009) (observing that "[i]ncarceration poses a number of important problems and obstacles to treatment and rehabilitation" for the mentally ill).

> However, when a veteran is sent to prison, he finds himself in a setting that creates a "survivor mode" environment that might exacerbate PTSD symptoms. The initial traumatic experience(s) that caused the veteran's PTSD may be relived by the social stimuli found in prison, and the veteran may revert back to "combat mode" to handle prison life.[59]

IV. A Sentence Of Continued Community Supervision Is "Sufficient But Not Greater Than Necessary" To Achieve Justice In Mr. DW' Case.

> *"It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." Underlying this tradition is the principle that "the punishment should fit the offender and not merely the crime." Pepper v. United States*, *562 U.S. 476, 487–88 (2011)(citations omitted)*.

As this Court well knows, 18 U.S.C. §3553(a) provides the framework that guides its sentencing discretion. Section 3553(a) lists seven factors that a sentencing court must consider. The first factor is a broad command to consider "the nature and circumstances of the offense and the history and characteristics of the defendant." 18 U.S.C. §3553(a)(1). This memorandum has fully addressed all of those.[60] The second factor requires the consideration of the general purposes of sentencing, including:

> "the need for the sentence imposed—
> "(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> "(B) to afford adequate deterrence to criminal conduct;
> "(C) to protect the public from further crimes of the defendant; and
> "(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner."

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[59] Beth Totman, *Seeing the Justice System Through A Soldier's Eyes*, 16 J. Health Care L. & Pol'y 431, 444-45(2013)(citing Chester Sigafoos, *A PTSD Treatment Program for Combat (Vietnam) Veterans in Prison*, 38 Int. J. Offender Therapy & Comp. Criminology 117, 118 & 121 (1994).

[60] The Supreme Court has recognized the vital need for the depth of information presented in this memorandum: "[W]e have emphasized that '[h]ighly relevant—if not essential—to [the] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics.' *Pepper, supra,* 562 US at 488.

18 U.S.C. §3553(a)(2).

Stated in summary fashion as (A) retribution, (B) deterrence, (C) incapacitation, and (D) rehabilitation, those issues will be further briefed below.

The third factor pertains to "the kinds of sentences available," §3553(a)(3); the fourth to the Sentencing Guidelines; the fifth to any relevant policy statement issued by the Sentencing Commission; the sixth to "the need to avoid unwarranted sentence disparities," §3553(a)(6); and the seventh to "the need to provide restitution to any victim," §3553(a)(7). Preceding this list is the general directive to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes" of sentencing described in the second factor. §3553(a). Factors 3 through 7 will be briefly discussed, prior to focusing on how the purposes of sentencing under the second factor can be met without the need to send Mr. DW to prison.

The Kinds Of Sentences Available

Congress has authorized judges to impose probation for most offenses, i.e., any offense with a statutory maximum below 25 years (excluding only Class A and B felonies), unless expressly precluded for the offense. See 18 U.S.C. §3561(a), §3559(a). Mr. DW is convicted by plea of a Class C felony, carrying a maximum term of 10-years prison, followed by up to a 3-year term of supervised release, and is eligible for a sentence of up to 5-years probation. 18 U.S.C. §3561(c)(1). His advisory guideline range as calculated by the PSR and undisputed by the parties is 10-16 months prison, prior to any downward departures or variances. Thus, the Court has the option as recommended by the defense to grant a downward variance under the §3553(a) statutory sentencing scheme, and sentence him to probation. In arriving at the appropriate length of community supervision, the defense asks the Court to consider Mr. DW has been

supervised successfully in the community by Pretrial Services for nearly a year this August, as well as Probation's assessment that 3 years of supervision would suffice.

The United States Sentencing Commission has recognized:

> Effective alternative sanctions are important options for federal, state, and local criminal justice systems. For the appropriate offenders, alternatives to incarceration can provide a substitute for costly incarceration. Ideally, alternatives also provide those offenders opportunities by diverting them from prison (or reducing time spent in prison) and into programs providing the life skills and treatment necessary to become law-abiding and productive members of society.[61]

The Advisory Sentencing Guidelines Range

Mr. DW does not dispute the guideline range calculated by US Probation, but that does not limit his ability to make arguments regarding the amount of deference this Court should give to this §3553(a)(4) factor. There are strong arguments that the Guidelines in general deserve less weight in determining the sentence for individuals with no or de minimus criminal histories, convicted of non-violent crimes, like Mr. DW.

In enacting the Sentencing Reform Act of 1984, Congress intended that "prison resources [would be], first and foremost, reserved for those violent and serious criminal offenders who pose the most dangerous threat to society," and that "in cases of nonviolent and nonserious offenders, the interests of society as a whole as well as individual victims of crime can continue to be served through the imposition of alternative sentences, such as restitution and community service."[62] Congress thus instructed the Commission to ensure "that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise

[61] USSC, *Alternative Sentencing in the Federal Criminal Justice System*, at 20 (Jan. 2009).
[62] See Pub. L. No. 98-473, §§ 217(a), 239, 98 Stat. 1987, 2039 (1984).

serious offense," 28 U.S.C. §994(j). Although Mr. DW has two ancient misdemeanors, his criminal history score is 0, the same as a first offender.

Congress also intended that probation and intermediate sanctions would be used more often than they had been before the guidelines,[63] when about 38% of offenders were sentenced to probation.[64] However, the Commission has acknowledged that the first offender directive in §994(j) was not implemented,[65] and that the guidelines' requirement of prison in nearly every case was still being followed by many courts, despite more recent guideline reforms to increase the availability of community supervision and split sentences for lower level offenders.[66] Thus, it is important to consider the congressional directive of §994(j), and the admitted failure of the guidelines to implement that directive, in determining the weight to give this fourth factor in sentencing Mr. DW.

Relevant Policy Statements By The Guidelines Commission

This memorandum has previously discussed relevant Policy Statements by the Guidelines Commission concerning downward departures for Military Service, Diminished Capacity, Mental and Emotional Conditions, and limited departures to accomplish a specific treatment purpose; and asserted the Commission's studied recognition of those factors as mitigating would support a downward variance without necessitating a determination of whether any factor is "present to an unusual degree," and makes the case atypical. One additional Policy Statement, U.S.S.G.

[63] See S. Rep. No. 98-225, at 67, 172-76 & nn.531-32 (1983).
[64] U.S. Sentencing Commission (U.S.S.C.), *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 43 (2004).
[65] U.S.S.C., *Recidivism and the First Offender*, at 3 (May 2004)
[66] U.S.S.C., *Alternative Sentencing in the Federal Criminal Justice System,* at 1-2 (2015).

§5H114 (Physical Condition) mirrors the language in §5H1.3 (Mental and Emotional Conditions). As noted earlier, Mr. DW continues to suffer from the debilitating injury to his right arm, and is under medical care for numerous other physical ailments documented in the PSR, some or most of which are unlikely to be adequately treated by the BOP, resulting in increased suffering.

The Need To Avoid Unwarranted Sentence Disparities

Section 3553(a)(6) requires the judge to "avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." Defendants with similar records convicted of similar conduct vary widely in their culpability, risk of recidivism, dangerousness, and rehabilitation needs. Judges must now take account of these variations, and uniformity for its own sake is no longer the goal of the sentencing system. *See United States v. Kimbrough*, 128 S. Ct. 558, 574(2007) ("some departures from uniformity were a necessary cost of the remedy we adopted").

The Need To Provide Restitution To Any Victim

Mr. DW is not statutorily required to make restitution. However, through defense counsel he has notified the Government that he is prepared to make restitution to the shop owner whose guns he stole *See generally, Paroline v. United States,* 134 S.Ct. 1710, 1726 (2014)(noting the primary goal is remedial, but restitution also serves "to mete out appropriate criminal punishment")(citation omitted).

The best means for ensuring Mr. DW pays restitution is through a sentence of continued community supervision, as incarceration will result in his loss of housing and disability benefits.

The Goals Of Sentencing

A sentence that continues Mr. DW on community supervision with special conditions, including payment of restitution, will serve the purposes of sentencing identified in §3553(a), making prison a "greater than necessary" alternative.

A. Retribution

It is necessary to impose a punishment that adequately reflects the seriousness of Mr. DW' crime. As noted by Judge Kane, "Imprisonment, however, is not the only means of punishment, and, throughout the history of civilization, punishment has been curtailed because of the frailty of the defendant and his or her need for treatment." *Brownfield, supra,* at 24. As *Brownfield* and other cases cited earlier in this memo illustrate, courts have found sentences of community supervision to adequately reflect the seriousness of crimes committed by traumatized combat veterans in need of treatment—and in cases involving crimes arguably more serious than Mr. DW' offense, e.g., assaulting federal officers with a firearm (*Courtney*); selling stolen military equipment sought by hostile foreign forces for use against US troops, on e-bay (*Oldani*); smuggling contraband in a federal prison that threatened institutional security (*Brownfield*); soliciting aggravated assault to cover up other crimes (*Erickson*).

The Supreme Court has recognized probation is punishment with significant penal aspects:

> We recognize that custodial sentences are qualitatively more severe than probationary sentences of equivalent terms. Offenders on probation are nonetheless subject to several standard conditions that substantially restrict their liberty. See *United States v. Knights,* 534 U.S. 112, 119, 122 S.Ct. 587, 151 L.Ed.2d 497 (2001) ("Inherent in the very nature of probation is that probationers 'do not enjoy the absolute liberty to which every citizen is entitled'" (quoting *Griffin v. Wisconsin,* 483 U.S. 868, 874, 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987); internal quotation marks omitted)). Probationers may not leave the judicial district, move,

> or change jobs without notifying, and in some cases receiving permission from, their probation officer or the court. They must report regularly to their probation officer, permit unannounced visits to their homes, refrain from associating with any person convicted of a felony, and refrain from excessive drinking. USSG §5B1.3. Most probationers are also subject to individual "special conditions" imposed by the court.

Gall v. United States, 552 U.S. 38, 48–49 (2007). The Court referenced the Advisory Council of Judges of National Council on Crime and Delinquency, Guides for Sentencing 13–14 (1957) ("Probation is not granted out of a spirit of leniency . . . . As the Wickersham Commission said, probation is not merely 'letting an offender off easily' "). *Id.,* at 49, n.4. Home detention may also be imposed as a condition of community supervision, as a substitute for imprisonment. U.S.S.G. §5F1.2.

In addition, evidence-based practices suggest that superior and cost-effective results can be achieved by sentencing low-risk individuals to probation, and that imprisonment would be wasteful and counterproductive. See, Francis T. Cullen et al., *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, 91 Prison J. 485, 505 (2011)("[H]aving pulled together the best available evidence, we have been persuaded that prisons do not reduce recidivism more than noncustodial sanctions.").

The principle of retribution, also discussed in terms of blameworthiness or "just desert" for the offender, is related to an assessment of the individual's moral culpability, such that less harsh sentences are "just" for offenders who have, e.g., acted under compulsion or duress not constituting a defense, or from unselfish motives, or as recognized by the Ninth Circuit in *Cantu, supra,* have a reduced mental capacity related to their criminal conduct: "Desert (blameworthiness) loses some bite because those with reduced ability to reason, or to control

their impulses, are less deserving of punishment than those who act out of viciousness or greed." 12 F3d at 1506. By all available evidence, Mr. DW clearly falls within this class of defendants.

Furthermore, both anecdotal reports and research show that incarceration exacerbates the symptoms of PTSD.[67] A veteran defendant with PTSD may request solitary confinement to avoid interaction with other inmates, knowing extended contact could trigger anger outbursts, or increased anxiety and hypervigilance resulting in greater stress and worse insomnia. However, it is well-established that solitary confinement can both cause mental illness, and exacerbate pre-existing mental health conditions.

Thus, incarceration would likely return Mr. DW to society far more damaged than now, with more severe PTSD. His section 8 housing would be lost, and his VA disability payments would be suspended. His successful steps towards reintegration would be severely damaged or destroyed. There are other, safer and smarter ways to hold him accountable for his criminal conduct, as discussed below.

B. Deterrence

Two of the four purposes of sentencing, deterrence and incapacitation to protect the public, that could otherwise justify a prison sentence, are counterbalanced by evidence of low risk of recidivism. A defendant who has been successfully rehabilitated does not need imprisonment to be deterred from re-offending, nor locked up to protect the public.

[67] See, e.g., Quill Lawrence, NPR, "Behind Bars, Vets With PTSD Face A New War Zone, With Little Support" (11/5/2015), available at http://www.npr.org/2015/11/05/454292031/behind-bars-vets-with-ptsd-face-a-new-war-zone-with-little-support (last accessed 3/31/17); Saxon, Davis, Sloan, McKnight, McFall & Kivlahan, "Trauma, Symptoms of Posttraumatic Stress Disorder, and Associated Problems Among Incarcerated Veterans," Psychiatry Online (July 2001), available at http://ps.psychiatryonline.org/doi/abs/10.1176/appi.ps.52.7.959 (last accessed 3/31/17).

Furthermore, the Ninth Circuit has held that the Section 3553(a) goal of general deterrence need not "be met through a period of incarceration," rather than community supervision. *United States v. Edwards*, 595 F.3d 1004, 1016 & n.16 (9th Cir. 2010). In addition, studies have shown "confinement or increased length of incarceration serve[s] the crime control purpose of incapacitation, but ha[s] little or no effect as a 'treatment' with rehabilitative or specific deterrent effects."[68] A 20-year study of 962 felony offenders found "no evidence to justify the belief that the addition of jail time to a probation sentence has a specific deterrent effect."[69]

Mr. DW' post offense rehabilitation also evidences that prison is not necessary as a specific deterrent. *Gall,* 552 U.S., at 59, 128 S.Ct. 586 ("Gall's self-motivated rehabilitation . . . lends strong support to the conclusion that imprisonment was not necessary to deter Gall from engaging in future criminal conduct or to protect the public from his future criminal acts" (citing §§ 3553(a)(2)(B)-(C))).

Judge Kane reflected, "The driving force of general deterrence is certainty, not severity or length, of punishment." *Brownfield, supra* at 26.

> The general research finding is that "deterrence works," in the sense that there is less crime with a criminal justice system than there would be without one. But the question for the judge is "marginal deterrence," i.e., whether any particular quantum of punishment results in increased deterrence and thus decreased crime. Here the findings are uniformly negative: there is no evidence that increases in sentence length reduce crime through deterrence. Current empirical research on general deterrence shows that while certainty of punishment has a deterrent effect, "increases in severity of punishments do not yield significant (if any) marginal deterrent effects. . . . Three National Academy of Science panels, all

[68] Don M. Gottfredson, National Institute of Justice, *Effects of Judges' Sentencing Decisions on Criminal Cases, Research in Brief* (1999), at 8, available at http://www.ncjrs.gov/pdffiles1/nij/178889.pdf).

[69] Gottfredson, *supra*, at 8-9.

appointed by Republican presidents, reached that conclusion, as has every major survey of the evidence.[70]

C. Incapacitation

Judge Wendy Lindley poses this question, "Are we safer as a community if we simply process these human beings through the system and send them off to prison and have them come back into our community? Because they will come back to our community, and if they come back and their PTSD has not been treated, what is the likelihood that they're going to have another violent act in our community?" The Situation Room (CNN television broadcast Oct. 28, 2010).[71]

Of all of the purposes of sentencing, the need to protect the public from further crimes of the defendant is the one of greatest practical concern, and also the most capable of being measured. Many facts demonstrating that Mr. DW has a low risk of recidivism, that will be further lowered through continued VA treatment and community supervision, have been discussed earlier in this memorandum, including his complete lack of criminal history prior to discharge, and approximately 20-year stint of sobriety and good citizenship prior to his relatively recent relapse. The defense does not anticipate the Government will argue that a prison sentence is needed to protect the public from Mr. DW, so long as he stays on his current course of successful reintegration.

D. Rehabilitation

The Supreme Court has noted that post-offense conduct "may be taken as the most accurate indicator of his present purposes and tendencies and significantly to suggest the period of restraint and the kind of discipline that ought to be imposed upon him." *Pepper v. United*

[70] Michael Tonry, *Purposes and Functions of Sentencing*, 34 Crime and Justice: A Review of Research 28-29 (2006).

[71] Major Evan R. Seamone, *Reclaiming The Rehabilitative Ethic in Military Justice*, 208 Mil. L. Rev. 1, 212, n. 83.

States, supra, 562 U.S. at 492-93. The Court held that evidence of post-offense rehabilitation, including post-sentencing rehabilitation, "bears directly on the District Court's overarching duty to 'impose a sentence sufficient, but not greater than necessary' to serve the purposes of sentencing. §3553(a)." *Id.* Mr. DW' post-offense rehabilitation has been discussed at length in this memorandum. There is ample evidence to demonstrate he is a much-changed man since his arrest last August.

The case law discussed in support of downward variance based on Military Service and Mental and Emotional Conditions, relied heavily on this last purpose of sentencing: "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." §3553(a)(2). Those courts found that veteran defendants suffering from combat-related PTSD could best and most effectively be provided treatment through the VA in a community setting, and that prison would be counter-productive to protecting society as well as injurious to the defendant. *E.g., Courtney, supra; Brownfield, supra; Oldani, supra.* Mr. DW has tendered the same evidence.[72] He also has medical needs unlikely to be met in a prison setting, given the well-known health care deficiencies at the BOP.

Finally, the findings of the Charles Colson Task Force on Federal Corrections (2016) underscore the importance of alternative sentences that foster rehabilitation as a goal of sentencing, in bringing about needed criminal justice reforms:

[72] Mr. DW has provided the Court with the information the Ninth Circuit instructs is necessary for "[t]he court's decision [to] be precise and fact-specific, and must take into account any treatment the defendant is receiving or will receive while under sentence, the likelihood that such treatment will prevent the defendant from committing further crimes, the defendant's likely circumstances upon release from custody or its alternatives, the defendant's overall record, and the nature and circumstances of the offense that brings the defendant before the sentencing court." *Cantu, supra*, 12 F.3d at 1516.

> After decades of unbridled growth in its prison population, the United States faces a defining moment. There is broad, bipartisan agreement that the costs of incarceration have far outweighed the benefits, and that our country has largely failed to meet the goals of a well-functioning justice system: to enhance public safety, to prevent future victimization, and to rehabilitate those who have engaged in criminal acts. Indeed, a growing body of evidence suggests that our over-reliance on incarceration may in fact undermine efforts to keep the public safe. Momentum is strong for a new direction, for a criminal justice system guided by proven, cost-effective strategies that reduce crime and restore lives. But translating this impulse for reform into lasting change is no small challenge.[73]

Conclusion

> *[Exacerbating] the problems confronting . . . veterans today is the absence of a comprehensive understanding of the impact of war on those who have served in war zones. This lack of understanding seems to exist throughout much of America—even though we have volumes of research and personal accountings in the aftermath of the Vietnam War. This is particularly true in the case of the American criminal justice system.*[74]

The defense has sought throughout this memorandum to provide the Court with the necessary comprehensive understanding of combat-related invisible injuries to fully make sense of Mr. DW' mitigating evidence. That evidence, and the legal framework for determining sentence, unite in support of the defense recommendation for a sentence other than prison. The defense requests a sentence of probation—rather than time-served followed by supervised release—because probation connotes the privilege of redemption, rather than the need for supervision following imprisonment. The defense has no objection to any of the special conditions of supervision recommended by the PSR. In addition to however many more years of

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[73] "Transforming Prisons, Restoring Lives: Final Recommendations of the Charles Colson Task Force on Federal Corrections," p. ix (January 2016) (last accessed 10-25-2016 at http://www.urban.org/sites/default/files/alfresco/publication-pdfs/2000589-Transforming-Prisons-Restoring-Lives.pdf).

[74] William B. Brown, *Another Emerging "Storm" supra* n.59, at 11.

active supervision, and such special conditions as the Court deems necessary to impose, Mr. DW will sustain the punitive impacts of a life-long felony conviction, including the permanent loss of Second Amendment rights.

With his arrest last August, DW confronted the truth that he was a wounded warrior, still at war. He has since fought a different but very hard battle—one spawned by his combat experiences, exacerbated by chronic pain and addiction, and deeply imbedded within himself—to find his way home. May this Court, as a representative of the judicial branch of his government, find its way to welcome him back.

RESPECTFULLY SUBMITTED this 7th day of August, 2019.

/s/ Terri Wood
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