

Summary Of Mitigation Evidence And Departure/Variance Grounds

“Our Nation has a long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines as [petitioner] did. Moreover, the relevance of [petitioner’s] extensive combat experience is not only that he served honorably under extreme hardship and gruesome conditions, but also that the jury might find mitigating the intense stress and mental and emotional toll that combat took on [petitioner].”

Porter v. McCollum, 558 US 30, 130 S Ct 447, 456 (2009) (internal citations omitted).

Mr. Smith repeatedly risked his life for our country in the aftermath of 9-11, serving two tours of duty in Iraq before his honorable discharge at the rank of Marine Staff Sergeant. Until this case, his record was impeccable: No prior arrests, convictions, or disciplinary actions, but rather a host of awards, decorations and commendations from his 11 years of military service.

Military records document that on his first tour in 200X, with the II Marine Expeditionary Force in support of Operation Iraqi Freedom, Mr. Smith’s platoon completed over 60 convoy escort missions that totaled over 30,000 miles, often exposing him to IEDs (improvised explosive device) attacks, RPG (rocket propelled grenade) ambushes, as well as gunfire exchanges with insurgents. As a Lance Corporal, his primary duty was serving as a machine gunner during convoy security operations, based in Ar Ramadi. He also participated in searching and clearing homes. Ar Ramadi was a hotbed of violence after the battle of Fallujah had driven the insurgency there. Mr. Smith personally killed and participated in the killing of insurgents; he witnessed grievous injuries to and deaths of his fellow soldiers; and saw Iraqi civilian casualties, including children. He was 21-years-old.

During his second tour in 200X, with the Marines 4th Tank Battalion, he conducted over 160 resupply convoys as a MRAP (Mine Resistant Ambush Protected vehicle) driver, among other combat support duties, and received a field promotion to Sergeant. He knew of enemy and

civilian casualties, as well as American soldiers who were injured or killed, although his unit was “lucky” this time.

Veterans Administration (VA) records attest that Mr. Smith also sustained combat-related injuries from his two tours in Iraq: REDACTED, all secondary to the 200X Humvee accident, that still cause him pain and varying degrees of disability; and psychic injuries far more devastating, that continue to plague his daily life, diagnosed as moderately severe Posttraumatic Stress Disorder (PTSD), Depression, and Moral Injury.

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).

The defense mitigation evidence proves Mr. Smith’s exemplary military service and combat-related injuries substantially contributed to his commission of the offense: He spent most of his adult life in the Marines, from age 20 to nearly 31. Over those formative years, his highly successful indoctrination into military culture and values—measured objectively by his rise in rank, performance evaluations, and commendations—dramatically shaped his behavior and beliefs, and continued to govern his conduct upon his ejection into civilian culture.¹ Our government recognizes this impact of military service on human behavior, and expends resources to train civilian mental health providers to become competent in military culture so that

¹ The VA recognizes “The Military has a rich and distinct culture, made up of unique values, symbols, and a shared history. . . . As in other cultural contexts, service in the military can influence a person’s values, beliefs, expectations and behaviors.” www.mentalhealth.va.gov/communityproviders/military.asp .

they can better understand and treat service members.² Like many veterans, Mr. Smith struggled to “return to normal” back in civilian culture, but the military has not prepared them to do so.

Honorably discharged in 20XX, it should not be surprising that his military-ingrained behavior and beliefs remained in control of his conduct starting in 20XX. Furthermore, his combat-related injuries of PTSD, Depression and Moral Injury are “mental and emotional conditions” with a well-documented correlation to risk-taking behaviors and law violations when left untreated.³ VA records show Mr. Smith was not actively engaged in treatment REDACTED during the months leading up to and during his participation in the crime.⁴ In addition, his combat-related mild Traumatic Brain Injury (mTBI) has substantial symptom overlap with PTSD; and chronic PTSD, with its stress-induced changes to a person’s neurobiological systems, can impede recovery from mTBI.⁵ Thus, there was an untreated, organic component impacting Mr. Smith’s behavior.

² *Id.* (“Community Provider Toolkit” webpages); see also, the Department of Defense “After Deployment” website, <http://afterdeployment.dcoe.mil/home>, with resources including “Free Military Culture Training for Educators”.

³ 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, TBI, 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”).

⁴ 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 Veterans: What’s Working, What’s New, and What’s Next*, Miriam Resiman, P&T, Vol. 41 No. 10 (October 2016), copy attached as Exhibit 101.

⁵ *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.

Collectively, PTSD, mTBI and Moral Injury are often referred to as “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.⁶ 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.⁷

The advisory guidelines encourage a downward departure in cases such as Mr. Smith’s, 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 mitigation evidence proves Mr. Smith 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. The direct correlation between his military service, invisible injuries and offense conduct make his case exceptional and deserving of leniency. *See, Porter v. McCollum, supra.*

The defense mitigation evidence further proves that Mr. Smith has engaged in extraordinary post-offense rehabilitation efforts, which combined with other factors detailed

⁶ *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.”).

⁷ *E.g., Returning Home from Iraq and Afghanistan, supra* n.9.

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 the offense, and even a year after that. Additional incarceration is not necessary to protect society. His efforts include on-going treatment, and related pro-social reintegration into civilian culture, that would be undermined by incarceration.⁸ 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. Smith's meritorious military service, combat-related mental and emotional conditions, and physical injuries resulting in 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), even should the Court determine that none of these factors are "present to an unusual degree" or make his case "extraordinary" for purposes of a downward departure.

Finally, as a first offender convicted of a non-violent crime that carries a maximum XX years imprisonment, Mr. Smith fits squarely within the category of offenders that Congress directed should ordinarily be spared a prison sentence, apart from other mitigation factors. 28 USC §994(j) ("The Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant

⁸ See, e.g., Quil 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).

is a first offender who has not been convicted of a crime of violence or an otherwise serious offense”).

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. Smith not be sent to prison. As a less-favored alternative, should the Court decide that some additional incarceration is warranted, the defense recommends a term not exceeding six months, to be served in a Residential Re-entry Center, as an additional condition of supervised release.

I. Mr. Smith’s Military Service And Combat-Related Injuries Contributed Substantially To His Commission Of The Offense.

“There is disconnection between everything human and what has to be done in combat. Imagine being in an unimaginable situation and having to do the unthinkable.”⁹

PERSONAL HISTORY REDACTED. He went through Boot Camp where he was indoctrinated by drill instructors to defend the Constitution, obey all orders, kill the enemy, and embrace his rifle as his closest, most intimate friend—primarily for the safety and security of him and his Marine “buddies”—all without question or hesitation. As part of that indoctrination, he memorized, repeated over and over, and soon believed to his core the Marine Corps Rifleman’s Creed:

This is my rifle. There are many like it, but this one is mine. It is my life. I must master it as I must master my life. Without me my rifle is useless. Without my rifle, I am useless. I must fire my rifle true. I must shoot straighter than the enemy who is trying to kill me. I must shoot him before he shoots me. I will. My rifle and I know that what counts in war is not the rounds we fire, the noise of our

⁹ Scott Lee, PTSD: A Soldier’s Perspective, <http://ptsdasoldiersperspective.blogspot.com/2009/02/quotes-from-within.html>. (blog cited in *Bringing Baghdad into the Courtroom*, 24 Crim. Just. 4 (Summer 2009)).

burst, or the smoke we make. We know that it is the hits that count. We will hit. My rifle is human, even as I am human, because it is my life. Thus, I will learn it as a brother. I will learn its weaknesses, its strengths, its parts, its accessories, its sights and its barrel. I will keep my rifle clean and ready, even as I am clean and ready. We will become part of each other. Before God I swear this creed. My rifle and I are the defenders of my country. We are the masters of our enemy. We are the saviors of my life. So be it, until victory is America's and there is no enemy.

After successfully completing Boot Camp, Mr. Smith went through Marine Combat Training, a basic infantry program focused on tactical as well as the technical aspects of weaponry, followed by Advanced Individual, where he began his military occupation training. While the primary focus of these trainings was technical, instructors continued the indoctrination of Boot Camp values to develop Mr. Smith's ability to kill the enemy, and further instill the obligation to protect one's "buddies" at all costs, including self-sacrifice.¹⁰ Following graduation from advanced training, Mr. Smith reported for duty with the 4th Tank Battalion, as a motor truck operator. He left that unit for further training for his 200X combat deployment to Iraq. In his own words:

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According to a New York Times article published in 2013, "Less than 0.5 percent of the [American] population serves in the armed forces, compared with more than 12 percent during

¹⁰ "Over the years since WW II, the military has improved its combat training methods to produce troops who will kill the enemy without hesitation: from an average of only 15-20 % of soldiers in WW II who would fire at the enemy, to 95% who would do so by the time of Vietnam. Modern training methods include simulated combat calculated to cause severe stress and thereby train the recruit to fight as the instinctive reaction, versus flight or freeze. Marching cadences resound with *kill, kill, kill* and *blood will spill*." 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) (frequently citing Dave Grossman, *On Killing* 3 (1st Paperback Ed., Back Bay Books, 1995), available for free download at https://archive.org/details/On_Killing (last accessed 4/1/17)). Success in military culture is largely measured by one's proficiency in mortal combat.

World War II.”¹¹ Unless you have served or have otherwise acquired specialized knowledge of military culture, to fairly evaluate the mitigating evidence in Mr. Smith’s case will require becoming competent in that culture’s values and its indoctrination processes: To understand at least the basics of how military culture shapes and defines human behavior; and the stark differences between military and civilian culture in modern America. Those cultural conflicts—as well as the invisible injuries from military service that manifest in symptoms of PTSD and other maladies of the psyche—make post-service reintegration difficult for many veterans, including Mr. Smith, and have caused more than a few to run afoul of the law.¹²

A working knowledge of military culture is fundamental to analyzing Mr. Smith’s culpability under the law for sentencing purposes. Basic information is summarized below, and treated in greater depth in Dr. William Brown’s report. Dr. Brown is a sociologist and nationally-recognized expert who has researched and published extensively on veterans’ issues, including the role of military culture in shaping veterans’ behaviors and beliefs. A Vietnam combat veteran, Dr. Brown later served as a Drill Sergeant, and as a Platoon Leader in B Company 75th Rangers. His sociological evaluation of Mr. Smith focused “on the influence of the Military Total Institution, also referred to as military culture, on Mr. Smith’s post-military behavior.”¹³

¹¹ Available at http://www.nytimes.com/2013/05/27/opinion/americans-and-their-military-drifting-apart.html?_r=0

¹² See, e.g., Brock Hunter, *Echoes of War: The Combat Veteran in Criminal Court*, Exhibit 106. See also, Alyson Sincavage, *The War Comes Home: How Congress’ Failure to Address Veterans’ Mental Health Has Led to Violence in America*, 33 *Nova. L. Rev.* 481 (2009), <http://nsuworks.nova.edu/cgi/viewcontent.cgi?article=1144&context=nlr> (last accessed 4/3/17).

¹³ The VA recognizes “Even after separation from the military service, military ideals and values often continue to be deeply held by Veterans,” and offers a host of on-line “Military Culture Resources” to assist civilian mental health providers to better understand and work with service members. www.mentalhealth.va.gov/communityproviders/military_resources.asp .

A. Mr. Smith's Behavior Is A Product Of Military Culture.

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).

Mr. Smith's behaviors and beliefs relevant to this criminal case are largely a product of "his complete and highly successful indoctrination into military culture, and as shaped by his military service," according to the comprehensive evaluation conducted by Dr. Brown. "Highly successful indoctrination" is documented by his military service and performance records analyzed in Brown's report, as well as many hours of structured interviews of Mr. Smith summarized in the report: He rose in rank to Staff Sergeant XX, and his Performance Evaluations show high marks. His numerous awards, decorations, commendations, and certificates further demonstrate that he was an exceptional Marine. Interviews with fellow service members conducted by Dr. Brown, as well as later interviews by the defense, supply corroboration beyond the military records of Mr. Smith's dedication to Marine Corps values.

A brief overview of the influence of military culture on the conduct of veteran defendants, condensed but taken mostly verbatim from Dr. Brown's report, is included here to assist in better understanding the mitigating evidence summarized in this memorandum.¹⁴

Brief Overview of the Military Total Institution And Marine Corps Values

The basic characteristics germane to any total institution include:

- All components of an individual's life occur in the same place or setting.

¹⁴ Additional resources for becoming competent in military culture are cited in Dr. Brown's report, and others are accessible through the Center for Deployment Psychology, <http://deploymentpsych.org/military-culture>.

- Large numbers of people are treated nearly or exactly the same.
- All stages of the individual's day and night are tightly scheduled and monitored.
- All participants are required to accept and adapt to the total institutions' cultural expectations and standards.¹⁵

These characteristics are prevalent in all military institutions throughout the world. Military Total Institutions require complete control of the recruit's entire being, and replacement of the recruit's civilian cultural beliefs and responses with those of the military. The recruit is first stripped of civilian values and habits, and through rigorous training, ingrained in military values and routines. This is necessary to produce soldiers who will respond to orders without question, carry out the mission, and kill the enemy.¹⁶ Recruits are placed in stressful situations where they are forced to make decisions. The punishment is generally more severe for those recruits who cannot or will not make a decision. The logic is that a bad decision is better than no decision. In other words, a trainee is likely to be punished more severely for not reacting instantaneously as opposed to making a bad decision but reacting instantly. Trainees are conditioned to select the fight option, as opposed to the flight option, when confronted with dangerous or stressful circumstances. Recruits are trained to respond instantaneously and aggressively to any and all perceived or real dangerous circumstances or confrontations without hesitation. Failure to comply typically results in punishment ranging from individual humiliation

¹⁵ Criminal justice system players are familiar with "prison culture" and how defendants who have spent significant time in prisons become indoctrinated to that value system and find it difficult to reintegrate to civilian culture. While military culture is clearly distinct, the similarity is that both share the defining attributes of a "total institution".

¹⁶ See, e.g., Zurcher, L.A., *The Naval Recruit Training Center: A Study of Role Assimilation in a Total Institution*, *Sociological Inquiry*, 1967, 37:1: 85-98 ("The day-to-day conduct of a civilian, guided as it is by relative freedom of decision, cannot be tolerated in a total institution if it is to remain total. Therefore, the first and major task of the training center [also known as "Boot Camp"] is to 'de-civilianize', to role-dispossess, the entering individual.").

to physical exploitation. Hesitation in firing a weapon or responding physically to a threat, real or perceived, can result in the loss of life and the demise of the MTI's reason for existence—to defeat the enemy.¹⁷

The military operates on a completely different set of expectations than civilian culture, and subscribes to a different set of values and morals. Furthermore, part of the process for stripping the recruit of his civilian values and habits is to disparage civilians: Recruits are taught that civilians are lazy, uncaring, unconcerned, undisciplined, undependable, and unwilling to exercise their responsibility to protect their freedom and democracy. Many veterans have little respect for civilians due to the differences in military versus civilian cultural values. For many veterans, their military culture indoctrination will contaminate their return to civilian culture: Veterans will be forced to make daily decisions. Which software program will they rely on to make their decisions? The military software program provides a particular set of options, while their displaced civilian software program provides a completely different set of options, and they are frequently in conflict.¹⁸

¹⁷ See, e.g., Joseph Collins, Thomas Jacobs, Walter Ulmer, *American Military Culture in the Twenty-first Century: A Report of the CSIS*, Introduction at 3 (“A direct link exists between military culture and effectiveness. The underlying culture of U.S. military forces is the foundation from which arise standards of behavior such as discipline, teamwork, loyalty, and selfless duty.”)(hereafter referred to as *CSIS Report*), available at csis-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/publication/121022_Collins_AmericanMilCulture_Web.pdf.

¹⁸ For a more comprehensive discussion of military culture and its significance to veterans entangled in our criminal justice system, see William Brown, Robert Stanulis, Misty Weitzel and Kyle Rodgers, *You probably don't know who are what you are talking about: Cultural and Moral Incompetence in Evaluating the Veteran in the Criminal Justice System*, Justice Policy Journal, Volume 12:1 (Spring 2015)(hereafter referred to as *Cultural Incompetence*), available at http://www.cjcrj.org/uploads/cjcrj/documents/jpj_brown_et_al_spring_2015.pdf.

Four core values ingrained in military culture are obedience, discipline, survival, and sacrifice. Deployment, particularly to combat zones, further ingrains the core values which are then put to practice in real life, not training exercises.

Those four indispensable factors—obedience, discipline, survival, and sacrifice—maintain the foundation of the MTI:

(1) Obedience requires military personnel to accept the command of authority without hesitation or question.

(2) Discipline is crucial to the perfection of the recruit's mental faculties and moral character. High levels of discipline are obtained through repetitive training whereby the trainee's reaction to situations becomes second nature.

(3) Survival is the means and individual commitment to insure the continuation of life—for fellow soldiers as well as self—to carry out the mission.

(4) Finally, there is sacrifice, which requires the soldier to surrender something of value to ensure that something else of value is maintained or secured.¹⁹ As recruits are integrated into the MTI, they are required to sacrifice their own individuality. During the training process, sacrificing one's own life is portrayed as an honorable act. This segment of training and indoctrination prepares soldiers, who may later be confronted with life or death situations, to willingly make this ultimate sacrifice.

¹⁹ “Numerous studies have concluded that men in combat are usually motivated to fight not by ideology or hate or fear, but by group pressures and processes involving (1) regard for their comrades, (2) respect for their leaders, (3) concern for their own reputation with both, and (4) an urge to contribute to the success of the group.” Grossman, *On Killing*, *supra* n.15, at 89-90.

The U.S. Marine Corps specifically emphasizes the values Honor, Courage, and Commitment when conducting performance evaluations²⁰:

(1) Honor is perceived as the bedrock of a Marine's character, and demands ethical and moral behavior. It includes honesty, an uncompromising code of integrity, respect for human dignity, and respect and concern for each other.

(2) Courage is viewed as the heart of the Marine Corps' core values. Courage is perceived as the mental, moral, and physical strength that allows Marines to confront the challenges of combat and control of fear. Courage also allows Marines to do that which is right, adhere to a higher standard of conduct, make difficult decisions, and lead by example.

(3) Commitment is depicted as the essence of determination and dedication among members of the Marine Corps. Commitment enhances professionalism, learning the "Art of War," and discipline for both self and unit.

For many veterans, particularly those veterans who have participated in combat, their MTI experiences are embedded for life.²¹ The experiences become part of the "baggage"²² many veterans carry as they navigate through their transition process back into the civilian culture. Many veterans are not aware of that baggage until they become homeless, involved in a domestic violence situation at home, or a defendant in the criminal justice system.

²⁰ "The Marine Corps is a unique service and marines have the strongest service culture." *CSIS Report, supra n. 32*, p. 13.

²¹ See, e.g., R.J. Westphal, Sean P. Convoy, (January 31, 2015), *Military Culture Implications for Mental Health and Nursing Care*, OJIN, Vol. 20, No. 1 (Military culture "reinforces and rewards selflessness, courage, loyalty, stoicism, and commitments to moral excellence, living by a moral code, and defending the social order. For some service members, the military and warrior ethos becomes a permanent part of their self-identity and worldview."), available at nursingworld.org/MainMenuCategories/ANAMarketplace/ANAPeriodicals/OJIN/TableofContents/Vol-20-2015/No1-Jan-2015/Military-Culture-Implications.html.

²² Artifacts from military culture and the recollection of experiences acquired while serving.

Indoctrination into military culture not only changes the veteran’s behavior because it changes the beliefs and values that motivate behavior; it also changes behavior through conditioned responses to situations the veteran is likely to encounter during service. For example, veterans are conditioned through repetitive drills and exercises—as well as psychological indoctrination—to react immediately to any perceived threat by eliminating the threat. They are conditioned to be expendable in pursuit of the mission. This phenomenon is oft referred to as “muscle memory.”²³ Veterans are also conditioned to remain externally calm and regimented in the face of danger, by controlling strong natural emotions of fear and distress; but suppression of emotions does not eliminate the internal psychological force of those emotions on the individual’s physical and mental health.

Following release from the military the veteran does not experience extraction or deprogramming of the military-installed “mental software.” Some veterans are successful in deprogramming and re-integration to civilian culture. Others are not so successful.

Mr. Smith’s Post-Deployment and Post-Discharge Reintegration Efforts.

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B. The Influence Of Combat-Related PTSD, mTBI And Moral Injury On Mr. Smith’s Behavior.

For too many soldiers, after a year away from home, consumed by the grit of combat duty, adjusting to family and garrison duty is much too hard. . . . These soldiers say that they are just not the same. They don’t know why, but they feel changed, and the important stuff around them has changed. Combat will do that to almost anyone—everyone is changed, for better or worse, and sometimes both better and worse. These are not the great traumas of the war, but much more

²³ See, e.g., *Muscle Memory helps corpsmen save lives*, available at <https://health.mil/News/Articles/2015/11/12/Muscle-memory-helps-corpsmen-save-lives>.

*corrosive micro-traumas: an inability to relate in comforting and familiar ways and the tendency to feel like an alien when doing the most ordinary things.*²⁴

Dr. Brown's report traced Mr. Smith's progression of generally unsuccessful attempts to reintegrate into civilian culture culminating with his arrest.²⁵ The later psychological evaluation conducted by Dr. Robert Stanulis provides crucial insights about that time period in Mr. Smith's life. His efforts to reintegrate were undertaken while suffering from the disabling, combined effects of PTSD, mTBI, and Moral Injury, all largely untreated. Dr. Stanulis, a forensic neuropsychologist with extensive experience working with veterans, conducted an evaluation of Mr. Smith. Before discussing his findings, further explanation of these invisible injuries, taken from Dr. Stanulis' report and additional authorities, along with a summary of Mr. Smith's VA records pre-dating his offense, provide necessary context.

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."*²⁶

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

²⁴ S. Xenakis, *PBS's This Emotional Life: What the Hurt Locker Got Right*, www.huffingtonpost.com/brigadier-general-stephen-n-xenakis-md/pbss-this-emotional-life_b_491853.html

²⁵ A 2011 Pew Center Research study of 1,853 veterans found 44% of those who served after 9/11 reported a difficult time re-entering civilian life. Military experiences with adverse impact on reintegration included experiencing a traumatic event, serving in a combat zone, and serving with someone who was killed or injured. Mr. Smith experienced all of those factors, and none of the factors identified as making re-entry less difficult, e.g., being a college graduate, commissioned officer, or devoutly religious before the trauma. (*The Difficult Transition from Military to Civilian Life*).

²⁶ 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 nicic.gov/veterans).

exposed to the devastation and degradation of warfare, the blood and gore and death, the incessant, wrenching fear wrought by the agencies of combat,” sustain repeated exposures to severe trauma.²⁷

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”.²⁸ 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.”²⁹ 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.*

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

²⁷ *Id.*

²⁸ 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.

²⁹ *Id.*

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.³⁰ 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-

³⁰ Gray, *Neuroscience, supra n. 61*, at 87.

lasting neurological changes in the hippocampus, associated with the intrusive memories of PTSD.³¹

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 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.³² To simplify, persons with PTSD cannot inhibit a fear response when exposed to reminders of traumatic events; the autonomic nervous system hyperactively responds.³³

³¹ *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,” and some of these core neurochemical dysregulation is also found in persons with TBI, “presumably the result of diffuse axonal injury.” 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/.

³² Gray, *Neuroscience, supra n.61*, at 88-89 (citations omitted).

³³ *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.”³⁴ Moreover, research has shown that veterans with PTSD

³⁴ 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

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 may experience an intensification of anger.³⁵

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.

Military culture shapes the symptoms of PTSD in veterans. Combat-related PTSD is tilted strongly towards symptoms of avoidance, isolation and denial. Ownership and proximity to weapons become an effective means to lower anxiety. Clearly, PTSD can adversely impact veterans' reintegration to civilian culture:

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.³⁶

"Moreover, after repeatedly responding to and, at times, themselves giving orders carrying life or death consequences, veterans may have difficulty adhering to what they see as meaningless laws or respecting local representatives of domestic authority who they deem weak and even contemptible."³⁷

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. Dr. Best notes that TBI "also can lead to impulsivity, aggression, and impaired decision making." *Id.*

³⁵ *Id.*, at 7-3. As previously noted, VA records include a diagnosis of Depression for Mr. Smith.

³⁶ *Returning Home from Iraq and Afghanistan, supra n.9.*

³⁷ Best (2017), *supra n. 67*, p. 7-1.

Many veterans, including Mr. Smith, 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.³⁸ In the later instance, the military cultural values of self-sacrifice without hesitation to protect ones “buddies”, and drive to successfully complete all missions, would necessarily heighten feelings guilt, shame and self-blame. “Because guilt reactions negatively impact mood, veterans with PTSD are at significant risk for associated major depression, a combination which results in more severe symptoms and resistance to treatment.”³⁹

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 often feel survivors’ guilt and experience depression; they 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

³⁸ *Id.*, p. 7-3

³⁹ *Id.* In that article, Dr. Best discussed one client, an Army Ranger officer who endured many life-threatening experiences in combat that were highly distressing to him, but reported his most traumatic experience was when he sent a platoon on a mission where eight were killed, and he was not with them. *Compare*, Mr. Smith’s extreme distress over not redeploying with his unit in 200X, thus not being able to protect them from injury or death.

through criminal acts, or commit criminal acts with the goal of “passive” suicide or “suicide by cop.”⁴⁰

C. Mr. Smith’s Experience with PTSD leading up to the Offense.

“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.’”⁴¹

Mr. Smith served as a gunner on convoys during his first deployment to Iraq, and described many experiences that are known to give rise to PTSD. These included being attacked and ambushed, being responsible for the death of the enemy, witnessing dead bodies and human remains, seeing dead and seriously injured American troops, knowing personally an American who was killed, having close calls where protective gear prevented death or injury, and clearing homes in combat areas. REDACTED

According to Dr. Stanulis, one of the most important psychological aspects of Mr. Smith’s military experience occurred when, REDACTED, he was not allowed to re-deploy with his unit. To the civilian eye, not being deployed to a combat zone would appear less stressful than being deployed. However, the opposite holds true within military culture where soldiers are indoctrinated to complete the mission to kill the enemy at all costs, with sacrifice of one’s life in that pursuit portrayed as the ultimate heroic act. This failure to be fit to deploy is far more

⁴⁰ 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).

⁴¹ Dossa & Boswell, *Post-Traumatic Stress Disorder: A Brief Overview*, at 163-64, *supra* n. 23.

stressful to combat veterans, and it affected Mr. Smith in a very profound and negative manner.

REDACTED.

Combat-related mild Traumatic Brain Injury (mTBI)

Despite their frequency, the acute and long-term effects of mTBI have been a relatively unexplored area of medical inquiry until very recently. Undoubtedly, the “invisible” nature of mTBI, notably the lack of any external physical evidence of damage to the head or brain, has been a major factor contributing to the impression of inconsequentiality. However, there is accumulating evidence that some individuals develop persistent cognitive and behavioral changes after mild neurotrauma.⁴²

Mild Traumatic Brain Injury (mTBI) has become known as the “signature injury” of veterans who fought in the Iraq and Afghanistan wars, primarily caused by exposure to IED blasts. Although resolution of symptoms often occurs within 3 months, as many as 25 percent of veterans with mTBI experience chronic physical, cognitive and behavioral changes.⁴³ Veterans who have sustained a mTBI are also at increased risk of comorbid psychiatric disorders including PTSD, and occupational impairment.⁴⁴ Standard CT scans or MRI procedures will not detect mTBI. “The new gold standard is diffusion tensor imaging (DTI), a superior type of MRI whereby actual nerve tracks are visualized, along with areas of injury and areas where new nerve

⁴² Ann C. McKee, Meghan E. Robinson, *Military-related traumatic brain injury and neurodegeneration*, *Alzheimers Dement* (2014 June), available at www.ncbi.nlm.nih.gov/pmc/articles/PMC4255273/ (hereafter McKee & Robinson (2014)) Experts have concluded that any soldier who was within 50 meters of a blast or who was in a vehicle behind or ahead of one struck by a blast is at risk for TBI. Robert Worth, *What if PTSD Is More Physical Than Psychological*, *The New York Times Magazine* (June 10, 2016), available at mobile.nytimes.com/2016/06/12/magazine/what-if-ptsd-is-more-physical-than-psychological.html (last accessed 10-25-2017).

⁴³ Jeffrey B. Ware, MD, Rosette C. Biester, PhD, Elizabeth Whipple, MS, Keith M. Robinson, MD, Richard J. Ross, MD, PhD, Paolo G. Nucifora, MD, PhD, *Combat-related Mild Traumatic Brain Injury: Association between Baseline Diffusion-Tensor Imaging Findings and Long-term Outcomes* (July 2016), available at <http://pubs.rsna.org/doi/full/10.1148/radiol.2016151013>.

⁴⁴ *Id.*

growth has occurred,” but DTI was not routinely available within the VA system as of 2013.⁴⁵

REDACTED.

Repetitive mTBIs can provoke the development of chronic traumatic encephalopathy (CTE). CTE is clinically characterized by mood and behavioral disturbances, progressive decline of memory and executive functioning, and cognitive deficits that eventually progress to dementia over the course of several decades. Mood and behavioral disturbances typically include depression, apathy, impulsivity, anger, aggression, irritability, and suicidal behavior. CTE has been documented in boxers, football players, and other contact-sports participants, as well as combat veterans from World War II forward. As with many neurodegenerative diseases, CTE can only be diagnosed definitively through postmortem examination.⁴⁶ Unlike mTBI from conventional sports, military-related mTBI occurs in a myriad of ways, including during physical training, falls, and vehicle accidents, as well as blast exposure. Injury from blast exposure varies based on external factors (e.g., strength, proximity, location), and an individual’s combined exposure to blasts and impacts.⁴⁷

There is increasing recognition and on-going studies of the frequent association of mTBI and PTSD in combat veterans from our recent military conflicts in the Middle East. One study of 2525 U.S. Army infantry soldiers surveyed after deployment to Iraq for 1 year, 44% of the

⁴⁵ Dr. Chrisanne Gordon, M.D., and Dr. Ronald Glasser, M.D., *Traumatic Brain Injury—The Invisible Injury*, 212-13, (hereafter referred to as Gordon & Glasser, *Traumatic Brain Injury*), published in Hunter & Else, *Defending Veterans*, *supra n. 15*.

⁴⁶ However, science continues to progress on methods to diagnose CTE in the living, through identification of protein biomarkers associated with the disease. See, e.g., Nadia Kounang, *Researchers identify CTE biomarker that may lead to diagnosis while alive* (Sept. 27, 2017), available at <http://www.cnn.com/2017/09/26/health/researchers-identify-cte-biomarker-that-may-lead-to-diagnosis-while-alive/index.html> .

⁴⁷ McKee & Robinson (2014), *supra n. 78*.

soldiers with mTBI and subsequent loss of consciousness met criteria for PTSD.⁴⁸ There is also considerable symptom overlap between mTBI, PTSD, and early stage CTE.⁴⁹ An accurate diagnosis is necessary to determine the most effective course of treatment. Unfortunately, the VA system has been skewed toward a PTSD-centric focus because of its established treatment pipeline for PTSD, and nearly non-existent mTBI detection and treatment resources.⁵⁰ However, in February 2016, the Veterans Affairs and Defense Departments' Evidence-Based Practice Working Group published the second, updated version of its "Clinical Practice Guideline for the Management of Concussion-Mild Traumatic Brain Injury," first published in 2009, which may lead the way to improved services for diagnosis, assessment and treatment of mTBI.⁵¹

A. The Mechanics of mTBI.

Shock waves from explosive blasts damage the brain much like concussive impact to the head by a solid object. This is why:

The different layers of brain tissue have the consistency of differing layers of Jell-O. It is these different layers of densities that make the brain so exquisitely sensitive to any abnormal motion, whether from a blow to the head or a jarring blast wave from a roadside bomb or suicide bomber. These different layers of the brain with their different masses move at different speeds when set into motion. It is the different speeds at which these 'Jell-O' like layers move that generates internal shearing forces between layers and tear the bridging arteries, veins,

⁴⁸ Hoge CW, McGurk D, Thomas JL, Cox AL, Engel CC, Castro CA., *Mild traumatic brain injury in U.S. Soldiers returning from Iraq*, N Engl J Med. 2008; 358:453–63.

⁴⁹ McKee & Robinson (2014), *supra n.78*.

⁵⁰ Gordon & Glasser, *Traumatic Brain Injury, supra n.81*, at 209; Worth, *What if PTSD Is More Physical Than Psychological, supra n.78*, noting great reluctance by the military to accept that blast exposure caused physical injury: "As late as 2008, researchers at the Walter Reed Army Institute of Research published a paper suggesting that the symptoms of traumatic brain injury could be caused in large part by PTSD and brushing off 'theoretical concern' about neurological effects of the blast wave."

⁵¹ Available at:

<https://www.healthquality.va.gov/guidelines/Rehab/mtbi/mTBICPGFullCPG50821816.pdf>. The Guidelines do not recommend DTI imaging for diagnostic purposes, concluding its "sensitivity inadequate for routine use at this time," p.24. The extent to which that conclusion is related to the VA's lack of DTI imaging facilities is unknown.

connective tissues and nerve fibers. . . A brain set in motion by a passing [blast] wavefront is like a layer cake suddenly placed on the top of a jackhammer. . . . A more than one neurosurgeon has pointed out, the damage from that shaking of the brain can be more widespread and more neurologically disabling to a patient than a penetrating head wound where the damage is only along the track of the bullet. With a shaken brain, the damage will be everywhere and anywhere.⁵²

As we know from recent news accounts involving NFL players, repeated exposure to concussive forces increases the extent of brain injury. “Consider a blast injury, which can be 100 times more forceful than a hit from a 300-pound NFL lineman. Then consider that a soldier may suffer several blast injuries in a tour of duty,” as well as repeated tours over the course of a few years. “The significance here is that *brain injuries are additive* and, the closer together they occur, the worse the outcome.”⁵³ Scientific studies also suggest that brain cells functioning at the time of the blast injury are most vulnerable to damage, such that hypervigilant combat troops with their “high alert” brain functioning may exacerbate the injury. Lack of sleep, another common experience for combat troops, may also make the brain more susceptible to injuries.⁵⁴

B. The symptoms of combat mTBI.

The primary causes of TBI in Veterans of Iraq and Afghanistan are blasts, blast plus motor vehicle accidents (MVA's), MVA's alone, and gunshot wounds. Exposure to blasts is unlike other causes of mTBI (mild TBI), and may produce different symptoms and natural history. For example, Veterans seem to experience the post-concussive symptoms described [below] for longer than the civilian population; some studies show most will still have residual symptoms 18-24 months after the injury. . . . However, some 10% to 15% of patients may go on to develop chronic post-concussive symptoms. These symptoms can be grouped into three categories: somatic (headache, tinnitus, insomnia, etc.), cognitive (memory, attention and concentration difficulties) and emotional/behavioral (irritability, depression, anxiety, behavioral dyscontrol). Patients who have experienced mTBI are also at increased risk for psychiatric disorders compared to the general population, including depression and PTSD. . . . [M]any Veterans have multiple medical problems. The comorbidity of PTSD, history of mild TBI, chronic pain and

⁵² Gordon & Glasser, *Traumatic Brain Injury*, *supra* n.81, at 202, 204.

⁵³ *Id.*, at 204.

⁵⁴ *Id.*, at 205.

substance abuse is common and may complicate recovery from any single diagnosis.

PTSD and Brain Injury, National Center for PTSD, Department of Veterans Affairs, available online).

Mr. Smith is service-connected for mTBI. REDACTED. The degree of symptom overlap between PTSD and TBI is substantial.⁵⁵ Symptom overlap with PTSD consists of depression/anxiety, insomnia, irritability/anger, trouble concentrating, fatigue, hyperarousal and avoidance.

The areas of brain that are affected by PTSD are also vulnerable to concussion and blast injuries. Numerous studies have shown that Middle East war veterans who had diagnoses of mTBI had symptoms of PTSD at much higher rates than non-TBI injured soldiers.⁵⁶ The co-occurrence of PTSD, TBI, and chronic pain that characterizes Mr. Smith's combat injuries, is common in this generation of veterans because of the frequency of concussive and blast injuries that can produce all three health issues. A recent review by the Institute of Medicine, National Academy of Science, concluded that TBI can have adverse effects on all aspects of social functioning, including employment, social relationships, independent living, functional status, and leisure activities.⁵⁷

⁵⁵ "Evaluating the TBI patient is complicated by anosognosia, the patient's inability to recognize physical or mental dysfunction." Dr. Peter Breggin, M.D., *TBI, PTSD, and Psychiatric Drugs; A Perfect Storm for Causing Abnormal Mental States and Aberrant Behavior*, Chapter 10, p. 255, Hunter & Else, Defending Veterans, *supra n.15*. As Dr. Stanulis explains, the cognitive impairments of mTBI are somewhat similar to the "brain fog" experienced from a cold or flu, and become "the new normal" when experienced as a chronic condition.

⁵⁶ *Returning Home from Iraq and Afghanistan*, *supra n.9*. One study showed the highest rate of PTSD among veterans whose injury involved loss of consciousness.

⁵⁷ *Gulf War and Health, Volume 7: Long-Term Consequences of Traumatic Brain Injury*, Institute of Medicine, National Academy of Science (2009).

C. Distinguishing mTBI from PTSD

Dr. Stanulis administered testing related to mTBI. This included the TBI checklist from the VA. REDACTED Additionally, “feeling easily overwhelmed” may be attributed to TBI, as those individuals “cannot filter stimuli well and are therefore overwhelmed by the activity at a major sports event or the selection of cereals in the aisle of a grand grocery store. Too much input is the hallmark of TBI, not PTSD.”⁵⁸

Dr. Stanulis also performed neuropsychological screening, which is now recommended by the VA’s revised Clinical Treatment Guidelines for mTBI for veterans with persistent cognitive symptoms that have not resolved through other treatment modalities.⁵⁹ Neuropsychological testing includes specifically-designed tasks meant to correlate to certain areas of the brain responsible for that task or function. REDACTED. According to Dr. Stanulis, tests measuring attention and concentration are associated with frontal lobe function, the part of the brain that exercises judgment and controls impulsivity; attention and concentration are the precursors for memory, i.e., memories are only formed of events or information that is first noticed. The frontal lobe is the region most susceptible to blast mTBI. REDACTED.

Combat-related Moral Injury

[O]ne who has never been to war clearly cannot appreciate or understand what war actually is or what injuring or killing other human beings can do to a soldier or Marine who inflicts those injuries or deaths. There is a significant distinction between the thoughts and/or the fantasies of killing and the actual killing of another person, which is why the military invests significant amounts of resources specifically directed to condition the inducted service member to be able to kill another person without hesitation and without any immediate feelings of remorse. Many join the military in pursuit of a definition of self or for patriotic reasons.

⁵⁸ Gordon & Glasser, *Traumatic Brain Injury*, *supra* n.78, at 210.

⁵⁹ Recommendation 17, p. 36.

*Ultimately, they are expected to put aside their moral values that were acquired during childhood and go to war.*⁶⁰

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, or learning about acts that transgress deeply held moral beliefs and expectations.”⁶¹ 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.⁶² Moral Injury has been described as “the complex effects from moral reasoning processes that gnaw the heart, and darken the soul of combat veterans.”⁶³ 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.⁶⁴

⁶⁰ Brown, W.B., Stanulis, R., & McElroy, G., *Moral Injury as a collateral damage artifact of war in American Society: Serving in war to serving time in jail and prison*. Justice Policy Journal, 13(1), 1-41(2016), available at http://www.cjcj.org/uploads/cjcj/documents/jpj_moral_injury.pdf (referenced hereafter as Brown et al., *Moral Injury*).

⁶¹ 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> .

⁶² 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.67*. She is a clinical psychologist and former Marine who deployed during Operation Iraqi Freedom; she treats Moral Injury at the VA in Portland.

⁶³ Jeff Züst (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> .

⁶⁴ See, e.g., Masick, E.D., *Moral Injury and Preventative Law: A framework for the future*, 224 Mil. L. Review 223, 225-230 (2016).

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.”⁶⁵ REDACTED. Dr. Stanulis opines that these feelings and events are part of the cause of both his PTSD and Moral Injury.⁶⁶

Military Culture plays a key role in understanding Moral Injury. The same actions that draw praise and commendations in military culture—killing, “acquiring” (stealing) resources and using aggression as a problem-solving strategy—are considered immoral and shameful in civilian culture, creating psychological turmoil. The military also does not prepare members to

⁶⁵ *Moral Injury in the Context of War*, S. Maguen & B. Litz, National Center for PTSD (2016), copy attached as Exhibit 109.

⁶⁶ For a less clinical explanation of Moral Injury, see David Wood, *Moral Injury*, (April 9, 2015) a three-part series originally published in the Huffington Post in March 2014, available at the Dart Center For Journalism & Trauma, <https://dartcenter.org/content/moral-injury>. Wood writes:

“We have come back, we have had brothers die in our arms, we’ve picked up parts of other people,” 28-year-old Marine Sgt. Sendio Martz told me. . . . He spoke haltingly, searching for words. “And you are completely angry at the situation you were put into . . . not angry because you signed up but what happened you weren’t fully prepared for.” . . . The only way to absorb such experiences [Iraqi casualties], Marine Sgt. Clint Van Winkle writes, was to “make it impersonal and tell yourself you didn’t give a shit one way or another, even though you really did. It would eventually catch up to you. Sooner or later you’d have to contend with those sights and sounds, the blood and the flies, but that wasn’t the place for remorse. There was too much war left. We still had a lot of killing to do.” . . . Marine Staff Sgt. Felipe Tremillo also is struggling with guilt. Two years after he came home from his second combat tour, Tremillo is still haunted by images of the women and children he saw suffer from the violence and destruction of war in Afghanistan. “Terrible things happened to the people we are supposed to be helping,” he said. “We’d do raids, going in people’s homes and people would get hurt.” . . . American soldiers had to act that way, Tremillo recognizes, “in order to stay safe.” But the moral compromise, the willful casting aside of his own values, broke something inside him, changing him into someone he hardly recognizes, or admires.

cope with feelings of sadness, guilt or shame. Furthermore, military culture promotes “an unambiguous sense of right and wrong, clear rules for living, closeness with like-minded individuals, and a distinctive identity—all strong advantages at war,” but which contribute to difficulties recovering from Moral Injury as veterans struggle to find who they have become.⁶⁷

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.”⁶⁸ REDACTED.

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. REDACTED. Moral Injury is an interdisciplinary construct that has been used to identify, explain and treat dysfunctional behaviors in veterans.⁶⁹ “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.”⁷⁰ 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. For those veterans who have taken human life, sustained injury themselves, or witnessed injury or death of their fellow Americans—for what they come to see as a false purpose—the sense of

⁶⁷Lusk (2017), *supra n.98*, at 8-5; see also, Brown et al., *Moral Injury*, *supra n.96*, at 15; Litz et al. (2009), *supra n. 97*, at 695-706.

⁶⁸ Lusk (2017), *supra*, 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.

⁶⁹ See, e.g., Masick, E.D., *Moral Injury and Preventative Law*, *supra n.100*, at 225 (2016).

⁷⁰ Lusk (2017) *supra n.98*, at 8-2.

betrayal often runs deep and lasting.⁷¹ This collective sense of betrayal is a hallmark of Moral Injury:

Some veterans return home only to find that the [civilian] moral values they previously set aside have become leviathans, which subsequently plague the soldier or Marine for much of the rest of their lives. The motivation for setting aside one's morals, when he or she decides to join the military, is often affiliated with the political rhetoric and ideological promotion of a just war, such as to defend against the presence of weapons of mass destruction. However, some veterans develop a sense of betrayal when they discover there were no weapons of mass destruction. It was all a lie. The war was a lie.⁷²

REDACTED.

Before the DSM-V (2013), the PTSD diagnosis did not include guilt or shame as a symptom; with that inclusion, the overlap between PTSD and Moral Injury is greater. 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.⁷³

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

⁷¹ 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>.

⁷² Brown et al., *Moral Injury*, *supra* n.96, at 17.

⁷³ *Id.*, at 15.

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.”⁷⁴

REDACTED.

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.⁷⁵

Dr. Lusk notes many scholars believe that Moral Injury is critical in the explanation of criminal behavior by veterans. She quotes Dr. Nash, who works for the Department of Defense (DOD) and VA, as stating that “if research were available, it would reveal that moral injury underlies veteran suicide, homelessness and criminal behavior.”⁷⁶ Dr. Litz is quoted as saying that “all potentially morally injurious experiences create risk for demoralization and alienation, as well as altered moral expectations (informally termed a ‘broken moral compass’).” Research shows that Moral Injury is also related to suicide, post-deployment risk taking, difficulty with self-forgiveness, anger and relationship problems, and increased substance abuse. Thus, Moral Injury can result in diminished capacity or unwillingness to adhere to laws or values, and can result in behavior that is simultaneously symptomatic and criminal.⁷⁷ Moral Injury is relevant to understanding Mr. Smith’s confused moral compass in this case.

REDACTED.

⁷⁴ *Id.*

⁷⁵ Lusk (2017), *supra n.98*, at 8-3.

⁷⁶ *Id.*, at 8-6, 8-7.

⁷⁷ *Id.*

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

REDACTED. Dr. Brown noted:

Many of the veterans I have interviewed have expressed a sense of betrayal. Many experience difficulty securing gainful employment. They find that they do not fit in a university classroom. Parades, support the troops bumper stickers, and Memorial Day picnics are not sufficient recognition for these veterans who have been deployed to combat zones. One reaction to betrayal is suicide. The most recent data indicate that at least 22 veterans commit suicide each day. That equals out to about 8,030 veterans who take their own life each year.

As previously observed, this sense of betrayal which Mr. Smith endorsed is a defining feature of Moral Injury. “Moral Injury is not just psychological, and may involve healing in a broader sense. . . . [M]oral injury-specific treatments . . . attempt to address ‘moral repair’ through acceptance, making amends, forgiveness, self-compassion, and reparative behaviors.”⁷⁸

REDACTED. out-patient VA treatment modalities specific to Moral Injury.⁷⁹ Much healing remains to be accomplished.

The impact of PTSD, Moral Injury and mTBI on Mr. Smith’s Offense Behavior

An undeniable nexus exists between Mr. Smith’s military service, invisible injuries and offense conduct, demonstrated not only by the defense experts’ evaluations and opinions: REDACTED.

⁷⁸ Lusk (2017), *supra n.98*, at 8-8.

⁷⁹ Dr. Lusk notes four distinct treatments specific for Moral Injury that are available through the VA in some locations: Adaptive Disclosure; Impact of Killing in War; Trauma-Informed Guilt Reduction and Acceptance and Commitment Therapy. *Id.*

C. Mr. Smith’s Offense Behavior Is Not Attributable To His Pre-Military History, Pre-Existing Conditions, Or Substance Abuse.

This strong causal link between Mr. Smith’s combat-related “invisible injuries” and his offense conduct is further established by his pre-military history. Furthermore, his post-deployment history leading up to the offense is one of continuing difficulties at reintegration to civilian culture; the only identifiable source for those difficulties is his military “baggage”—ingrained behaviors and values—coupled with his invisible injuries. REDACTED

In addition, obtaining adequate mental health treatment from the VA has historically been difficult due to lack of culturally-competent providers and resources, as documented earlier, although more recent articles attest to additional appropriations and efforts to improve the system.⁸⁰

Finally, 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. In the largest study to date of veterans involved in the specific, intensive out-patient treatment REDACTED, “Prolonged Exposure Therapy,” only

⁸⁰ The Institute of Medicine, National Academies, *Returning Home from Iraq and Afghanistan*, *supra* n.9, 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.*

2% of participants completed the minimum number of sessions considered necessary for “adequate care.”⁸¹

Mr. Smith’s Post-Plea Treatment Progress

REDACTED.

Mr. Smith’s Strong Support Network Of Family And Friends

REDACTED.

Mr. Smith’s Efforts To Become Self-Sufficient And Contribute To His Community

REDACTED.

Mr. Smith’s Pre-Approval To Enter The Veteran’s Program

REDACTED. The treatment program’s structure and design is similar to the Re-entry Court program in Oregon, and it meets monthly under the supervision of a district court judge. Veterans’ court programs operate in various jurisdictions, state and federal, around the nation (including in some Oregon circuit courts), and are generically called “veteran treatment courts” (VTC). These programs “are one solution to the growing problem of the ‘justice-involved vet,’ that is, a veteran who finds him- or herself involved in the civilian criminal justice system after getting discharged from the military.” VTCs recognize that veterans “are a unique subpopulation of defendants who could benefit from a specialized problem-solving court tailored to their unique needs and common culture.”⁸²

Ninth Circuit Judge Michael Daly Hawkins, a former U.S. Attorney and Captain in the Marine Corps, advocates for increasing access to VTCs, observing:

⁸¹ L. Najavits, *The problem of dropout from “gold standard” PTSD therapies*, (2015; National Library of Medicine), copy attached as Exhibit 112.

⁸² K. Huskey, *Reconceptualizing ‘the Crime’ in Veterans Treatment Courts*, Federal Sentencing Reporter (2015).

The focus is on treatment, not punishment, and on getting at the root cause of anti-social behavior. For veterans, it is the cycle of their experience from civilian life, to the regimentation of military life with all its attendant support, to the intensity of life in a combat zone, then to what may be a rather swift and unsupported return to civilian life. Similarly, the veterans court concept begins with an understanding that routine criminal punishment will not address the participant's underlying problem and that early intervention and intensive supervision is essential to long-term success. The veterans concept adds an importantly tailored element: that those who have a shared experience, other veterans, offer the most easily accepted and effective "tough love" support. Then there is the very serious cost of doing nothing. Suicide rates among returning veterans are alarmingly high and increasing every year. A returning veteran's deployment experience can cause domestic difficulty to spiral into violence and minor brushes with law enforcement into deadly clashes.⁸³

REDACTED.

Mr. Smith's Extraordinary Post-Offense Rehabilitation Efforts And Other Factors Establish A Low Risk Of Recidivism

The following factors combine to demonstrate that additional incarceration is not necessary to protect the public, due to Mr. Smith's very low risk of recidivism: REDACTED.

- Mr. Smith has no prior nor post-offense history of law violations, nor any pre-existing mental or emotional conditions associated with criminal behavior.⁸⁴
- He has never abused illegal drugs nor prescribed pain medication.⁸⁵ Substance abuse disorders can contribute to criminal conduct and make treatment more difficult. Mr. Smith has a clear advantage due to not being so afflicted.

⁸³ Michael Daly Hawkins, *Coming Home: Accommodating The Special Needs of Military Veterans To The Criminal Justice System*, 7 Ohio St. J. Crim. L. 563, 570 (Spring, 2010)(hereafter referred to as Hawkins, *Coming Home*), copy attached as Exhibit 117.

⁸⁴ Considerable research shows a statistically low risk of recidivism for "true first offenders" like Mr. Smith. See U.S. Sentencing Commission, Recidivism and the "First Offender", May 2004 available at http://www.ussc.gov/publicat/recidivism_firstoffender.pdf. Based on empirical research, the commission found that a defendant with no prior arrests nor criminal history has only a 6.8 percent chance of recidivism. *Id.* This was the lowest rate of recidivism of any group in the study and sharply lower than the rate of those defendants with prior arrests but no convictions (17.2 percent) or defendants with one criminal history point (22.6 percent).

- Mr. Smith has done what far too few veterans with his invisible injuries have done, by seeking and completing all treatment opportunities post-offense.⁸⁶ REDACTED. Because of the direct correlation between his offense conduct and his military service and resulting invisible injuries, successful completion of treatment—undisrupted by incarceration—is of much greater consequence to decreased risk of recidivism than for offenders with treatment needs lacking as clear a connection to their criminal conduct.
- Mr. Smith’s post-plea efforts over the past XX to reintegrate into civilian culture have been substantial and successful; i.e., he is clearly on the right track. REDACTED.
- Mr. Smith’s promotions in military rank recognized his increasing degrees of responsibility and teamwork in stressful situations. He has no history of violence apart from his military service. He is dependable and pro-social by history and nature. He is a trustworthy, disciplined person, as attested to in defense interviews and letters to the Court from those who have known him in all walks of life. He will comply with all terms of supervision when sentenced, just as he has done pretrial.
- Mr. Smith enlisted in the aftermath of 9/11, voluntarily heading into harm’s way to defend his country. He chose a path that few of his fellow citizens chose in response to

⁸⁵ PTSD is commonly associated with substance abuse and hazardous use of alcohol. 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).

⁸⁶ 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,” and discussing military task force recommendations for stigma-reduction efforts as “a primary strategy for DoD to increase help-seeking of service members,” with the “longer-term goal of promoting quality of life and well-being among service members.” Available at www.rand.org/content/dam/rand/pubs/research_reports/RR400/RR426/RAND_RR426.pdf.

this foreign terrorist attack on America soil. He is a patriot. Post-discharge he has continued to act honorably and has accepted responsibility for his offense conduct.

Dr. Stanulis opines that incarceration would interfere with treatment, noting there are no combat-related PTSD or Moral Injury treatment programs in BOP facilities; and that treatment is the key element in assisting Mr. Smith's re-acculturation into the civilian world and preventing recidivism. REDACTED.

Furthermore, both anecdotal reports and research show that incarceration exacerbates the symptoms of PTSD.⁸⁷ 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.⁸⁸

REDACTED. There are other, safer and smarter ways to hold him accountable for his criminal conduct, as discussed below.

⁸⁷ 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).

⁸⁸ *E.g.*, Joshua Manson, "New Report Documents Devastating Effects of Solitary Confinement on Mental Illness," Solitary Watch website (September 2016)(with links to report and related articles), <http://solitarywatch.com/2016/09/09/new-report-documents-devastating-effects-of-solitary-confinement-on-mental-illness/> (last accessed 3/31/17).

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

The Supreme Court in *Porter v. McCollum*, *supra*, made clear that military service and combat-related injuries could mitigate culpability for sentencing purposes. 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 who served in Iraq and Afghanistan 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.⁸⁹

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 subjected, even repeatedly subjected, to life-threatening events the general public may never know.*⁹⁰

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-

⁸⁹ *Returning Home from Iraq and Afghanistan*, *supra* n.9.

⁹⁰ Hawkins, *Coming Home*, Exhibit 117 at 569.

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 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 Eight Circuit suggested that a downward departure for military service under the earlier policy statement required exemplary military service in combat, rather than merely commendable military service that did not demand great personal sacrifice. *United States v. Neil*, 903 F.2d 564, 566 (8th Cir. 1990)(while military service could constitute grounds for downward departure in an unusual case, military service consisting of 11 years of duty in the U.S., mainly as a recruiter, is not meaningfully distinguishable from persons holding responsible positions in

the civilian work force).⁹¹ Mr. Smith's military service would meet the Eighth Circuit's test in *Neil*, as his two tours of combat duty demanded great personal sacrifice, not only by risking his life, but also continuing sacrifice from sustaining chronic physical and psychological injuries REDACTED.

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. One district court judge discussed the amended §5H1.11, and found that while the defendant's exemplary military service did not support a downward departure,⁹² it did support a substantial variance—from 78 to 46 months imprisonment in a child pornography case:

While Jager does not fall outside of the heartland of cases, his military service is relevant to granting him a variance. His service, with the exception of this crime, has been superior and uniformly outstanding. In his military service, Jager

⁹¹ *Cf.*, *United States v. Cooper*, 394 F.3d 172 (3d Cir. 2005) (affirming 4-level departure to probation in securities fraud and tax evasion case based on defendant's good works where defendant did not simply donate money to charity but organized and ran youth football team in depressed area and helped members attend better schools which qualified as exceptional because they entail "hands on personal sacrifices which have a dramatic and positive impact on the lives of others.").

⁹² The court reasoned (1) that "Jager's military service, while exemplary, is not one of intense combat," (only once under fire; served in support roles); and (2) that he was like many child pornography offenders who "are outstanding members of our society, but they live a secret life." *U.S. v. Jager* at *11.

appears to have been trustworthy, and dedicated, and he served with distinction. His colleagues and commanders wrote on his behalf, commenting on his integrity and good work ethic. He made a career of the military, rather than serving one or two terms. These considerations counsel the Court to vary downward. The Court realizes he has brought shame upon the military with his crime, but with the exception of his crime, he has served with honor, and the Court thinks his service justifies a considerable variance from the guideline sentence.

U.S. v. Jager, 2011 WL 831279, at *14 (D.N.M. 2011).

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 F.3d 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)⁹³; *United States v. Chase*, 560 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

⁹³ 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*, prepared by The Office of General Counsel, U.S. Sentencing Commission (Jan. 2012), copy attached as Exhibit 118 (hereafter referred to as *Case Annotations §5H1.11*).

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 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. Smith’s 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. Smith’s case falls squarely in that category. 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.⁹⁴

Thus, Mr. Smith's exemplary military service at great personal sacrifice should serve to substantially reduce his sentence from the advisory guideline range, regardless of whether his combat-related injuries also contributed to his criminal conduct. Simply put: his distinguished service, especially his 14 months on the ground in combat zones with much of that time spent "outside the wire"⁹⁵, warrants leniency 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.

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.*⁹⁶

"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."⁹⁷ No doubt those facts have contributed to the courts' increasing

⁹⁴ See *Case Annotations §5H1.11, supra*.

⁹⁵ Iraq combat veterans, including Mr. Smith, experienced "130 degree temperatures, unrelenting noise, lack of privacy, and the constant threat of being attacked by mortar rounds, rocket propelled grenades, or biological and chemical agents," blinding sand storms and other unsanitary living conditions. *Id.*, at 4.

⁹⁶ 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.

⁹⁷ 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).

receptiveness to combat-related trauma for mitigation of sentence.⁹⁸ 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.”⁹⁹ 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 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.”).¹⁰⁰

More than a decade earlier, the Ninth Circuit held that combat-related PTSD 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).¹⁰¹ “The

⁹⁸ 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.

⁹⁹ Amir Efrati, *supra* n.152.

¹⁰⁰ 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>.

¹⁰¹ *Cantu* continues 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*

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 commission of a crime." *Id.*; accord, *Porter v. McCullum*, *supra*. REDACTED. 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." . . . [The psychologist's] report shows that Cantu's condition interfered substantially with his ability to make reasoned decisions, causing him to fixate on weapons and rely on them for feelings of personal safety and security. Cantu's impairment is more than sufficient to make him eligible for a reduction in sentence under §5K2.13.¹⁰²

12 F.3d at 1513. 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. This policy statement, since amended, now requires the disorder "substantially contribute" to defendant's commission of the offense. §5K2.13 provides:

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,

Inadequate Medical Treatment in the Bureau of Prisons, 41 J. MARSHALL L. REV. 219, 228 (2007).

¹⁰² 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.").

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; and noting the Government had not offered any expert opinion contrary to the defense expert’s).

REDACTED and not related to “criminal thinking”.¹⁰³ In addition, he has no other signs suggestive of criminality. REDACTED.

¹⁰³ “PTSD may explain nonviolent criminal behavior because the veteran either seeks the sensations of combat or is acting out of guilt [by engaging in risk-taking behavior],” and this “lack of control defense” has been used successfully to support an insanity defense in *United States v. Tindall*, No. 79-376-T 07 (D. Mass. 1980). There, the defendant who was charged with drug smuggling by helicopter, contended he was seeking the sensation of danger he felt as a helicopter pilot in Vietnam, because the horrors of war had left him dependent on stressful situations to cope with his PTSD. Hunter & Else, *Defending Veterans*, *supra n.15*, at 418-419.

Mr. Smith's offense conduct falls within a pattern of conduct well-established as resulting from combat-related PTSD:

A veteran who is compelled to seek danger and heightened sensation may engage in activities that are both risky and have criminal consequences. . . . [T]his sensation seeking may compel veterans to repeatedly engage in quasi-military, sensation-fraught criminal conduct. A self-destructive, survivor guilt response, for example, may explain the apparent tendency of some veterans to undertake criminal activity that has little chance of success.¹⁰⁴

In late January 2017, the Hon. Robert E. Jones heard testimony from psychologist Suzanne Best that 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.¹⁰⁵ *United States v. Jonathan Courtney*, Case No. 3:15-CR-00360-1-JO. According to the Government's sentencing memorandum, Mr. Courtney became intoxicated and fired shots inside his home. When police responded, Courtney pointed a loaded, semiautomatic Glock 9 mm. pistol straight at the police chief and began counting down from three as if to shoot him; when the chief ran, Courtney went back inside his house. Several minutes later he emerged again with the gun, and responded to another officer's command to put the gun down by assuming a ready-to-shoot stance and aiming straight at that officer. Over the course of the 7-hour standoff, Courtney went in and out of his house more than a few times, waving the gun around, pointing it toward the officers and yelling at the police to shoot him. At one point he fired a shot in the general direction of the police from his front porch, and his neighbor tried to wrestle the gun away; the neighbor was shot in the leg during the struggle, and then was dragged inside by Courtney. Once the neighbor notified police that Courtney had passed out, he was captured by an FBI SWAT team.

¹⁰⁴ *Id.*, at 419 (citations omitted).

¹⁰⁵ Facts are as reported by news articles and Best (2017), *supra* n.67, at 7-6 through 7-8, and court records available through PACER.

Pursuant to negotiations, 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 survivor’s guilt; and his “exceptional post-offense rehabilitation” including VA in-patient treatment and subsequently maintaining steady employment.

Courtney’s defense counsel sought a variance down to probation, presenting testimony by Dr. Best that Courtney’s offense 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. The circumstances in Courtney’s case are quite similar to those in Mr. Smith’s case—except that his is not a crime of violence and he never threatened to shoot law enforcement officers, much less pointed a loaded firearm at anyone. Yet, the Government has thus far been resistant to seeking much less than a 30-month prison sentence for Mr. Smith.

§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, the guideline further notes that, if a departure is warranted, “the

extent of the departure should reflect the extent to which the reduced mental capacity contributed to the commission of the offense.” This suggests that “substantial” in this context means a non-illusory and more than negligible contribution, but need not be a major nor the primary cause. The preceding pages of this memorandum have summarized defense evidence and numerous authorities demonstrating strong causation between Mr. Smith’s diminished capacity and offense conduct. The guideline also specifies factors that disqualify defendants from a departure for diminished capacity, but none of those apply to Mr. Smith.

However, this Court need not wade into uncharted territory on the meaning of “contributed substantially,” as Mr. Smith does not move for a downward departure but rather argues that a commensurate downward variance is warranted for the significant role played by his PTSD, mTBI and Moral Injury in his commission of the offense, particularly in combination with the other factors asserted in this memorandum. In the *Courtney* case, Judge Jones would have had to vary downward an additional 8 levels from the 21-month prison sentence sought by the Government (after its recommended 8-level variance), to impose the straight sentence of probation set forth in the judgment.

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. He was engaged in treatment with the VA. 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. Smith has made that showing.

Extraordinary Post-Offense Rehabilitation

As discussed earlier in this memorandum, Mr. Smith has accomplished what far too few veterans with the same invisible injuries have done—sought and successfully completed intensive treatment REDACTED. 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;¹⁰⁶ and to relive his traumas during in-patient therapy and out-patient Prolonged Exposure Therapy. Dr. Stanulis noted, “It requires a great deal of discipline and courage to confront these traumas.”¹⁰⁷

REDACTED. “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.’”¹⁰⁸

The Ninth Circuit has recognized that post-offense rehabilitation efforts may support a

¹⁰⁶ 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.

¹⁰⁷ “Iraq and Afghanistan veterans have higher levels of acute PTSD symptoms and anger-related problems than veterans from other eras at time of admission to residential programs (Fontana & Rosenheck, 2008). In addition, they have shorter lengths of stay in and lower treatment satisfaction as well as lower levels of treatment engagement and adherence in treatment generally (Erbes, Curry & Leskela, 2009). These problems are likely in part derivatives of the distinct characteristics of these most recent military conflicts (e.g., extended tours, multiple deployments, increased likelihood of redeployment) (Hoge et al., 2004).” Joan Cook et. al., *Iraq and Afghanistan Veteran: National Findings from VA Residential Treatment Programs*, Psychiatry (2013 Spring); 76(1): 18-31.

¹⁰⁸ Xenakis, *Combat Trauma*, Hunter & Else Defending Veterans, *supra*.

departure. *See, United States v. Green*, 152 F.3d 1202, 1207-08 (9th Cir. 1998); *United States v. 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. Smith’s steps toward successful reintegration during the last XX have been extraordinary in light of his combat-related invisible injuries, 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. Smith’s 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 country 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 2017. If anything, the provision of health care, including mental health services, at the BOP may well have declined.¹⁰⁹

¹⁰⁹ 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. At the same time, BOP's institutions remained 16 percent above rated inmate capacity as of September 2016, and continued to grapple with that crisis coupled with the need to control spending while meeting increasing resource needs of inmates. Reducing inmate medical costs is a priority. Office of Inspector General, *Top Management and Performance Challenges Facing the Department of Justice—2016*, III-12 (available at oig.justice.gov/challenges/2016.pdf). The federal inmate population is expected to increase by more than 4000 next year under the Trump administration, according to a recent Wall Street Journal article.

REDACTED. As explained by Dr. Stanulis, and consistent with 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). Shad Meshad, Executive Director of the National Veterans Foundation (NVF) in Los Angeles, California, indicates that veterans from past wars are experiencing significant increases in stress as images and information of the ongoing wars in Afghanistan and Iraq is injected into mainstream America. Following the release of the film “Saving Private Ryan,” telephone calls from World War II veterans flooded the suicide toll-free phone banks at the NVF, revealing that the first few minutes of the film brought back horrific memories of their previous combat experiences (Shad Meshad interview 2008).¹¹⁰

REDACTED. Exacerbation of mental disorders, including PTSD, for anyone being sent to prison for the first time is documented in the literature.¹¹¹ Prison is particularly difficult for combat-veteran defendants:

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 relieved

¹¹⁰ 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)

¹¹¹ 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).

by the social stimuli found in prison, and the veteran may revert back to “combat mode” to handle prison life.¹¹²

A non-prison sentence would also expedite Mr. Smith’s participation in the veteran’s treatment court, which as previously described, is uniquely designed to rehabilitate veterans, and thereby protect society.

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).¹¹³

IV. A Sentence Of Continued Community Supervision Is “Sufficient But Not Greater Than Necessary” To Achieve Justice In Mr. Smith’s 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.¹¹⁴ The second factor requires the consideration of the general purposes of sentencing, including:

¹¹² Beth Totman, *Seeing the Justice System Through A Soldier’s Eyes*, 16 J. Health Care L. & Pol’y 431, 444-45(2013)(citing Chester Sigafos, *A PTSD Treatment Program for Combat (Vietnam) Veterans in Prison*, 38 Int. J. Offender Therapy & Comp. Criminology 117, 118 & 121 (1994).

¹¹³ Major Evan R. Seamone, *Reclaiming The Rehabilitative Ethic in Military Justice*, 208 Mil. L. Rev. 1, 212, n. 83.

¹¹⁴ 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]

“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.”
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. Smith 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. Smith is convicted by plea of a Class D felony, and is eligible for a sentence of up to 5-years probation. 18 U.S.C. §3561(c)(1). His advisory guideline range if calculated as agreed to by the parties is 30-37 months prison, prior to any downward departures or variances. Thus, the Court has the option as

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.

recommended by the defense to grant a downward variance under the §3553(a) statutory sentencing scheme, and sentence him to time served, followed by a 3-year term of community supervision. Another option consistent with the defense recommendation would be for the Court to impose up to 5-years probation, if it determines that a more punitive sanction is required, or that a longer period of community supervision would serve other purposes of sentencing apart from “just punishment” for his conduct. In arriving at the appropriate length of community supervision, the defense asks the Court to consider Mr. Smith has been supervised successfully in the community by Pretrial Services REDACTED.

Community service is a punitive condition, i.e., one through which a defendant may make retribution, that is an available option as a condition of community supervision. A period of house arrest is also available as a punitive condition of either probation or supervised release. REDACTED.

Finally, a much less-favored, punitive condition of either probation or supervised release would be a period of community confinement at a Residential Reentry Center (RRC). REDACTED.

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.¹¹⁵

A sentence of community supervision without additional incarceration at an RRC would be most effective in continuing his rehabilitation REDACTED.

¹¹⁵ USSC, *Alternative Sentencing in the Federal Criminal Justice System*, at 20 (Jan. 2009).

The Advisory Sentencing Guidelines Range

Mr. Smith has agreed to his advisory guideline range as part of his negotiated resolution of this case. However, his plea agreement 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, as well as those at play in his case, deserve less weight in determining the sentence for first offenders convicted of non-violent crimes, like Mr. Smith.

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.”¹¹⁶ 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 serious offense,” 28 U.S.C. §994(j). Congress indicated its view of a crime of violence for which prison would be warranted as one “that results in serious bodily injury.” 28 U.S.C. §994(j).

Congress also intended that probation and intermediate sanctions would be used more often than they had been before the guidelines,¹¹⁷ when about 38% of offenders were sentenced to probation.¹¹⁸ However, the Commission has acknowledged that the first offender directive in

¹¹⁶ See Pub. L. No. 98-473, §§ 217(a), 239, 98 Stat. 1987, 2039 (1984).

¹¹⁷ See S. Rep. No. 98-225, at 67, 172-76 & nn.531-32 (1983).

¹¹⁸ 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).

§994(j) was not implemented,¹¹⁹ 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.¹²⁰ 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. Smith.

Further consideration is due to the method used by the Government in arriving at Mr. Smith's advisory guideline range. REDACTED.

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, 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. §5H114 (Physical Condition) mirrors the language in §5H1.3 (Mental and Emotional Conditions). As noted earlier, mTBI is an "invisible" physical (organic) condition that manifests in cognitive as well as emotional and volitional impairments. Also, Mr. Smith continues to suffer from combat-related physical conditions, some or most of which are unlikely to be adequately treated by the BOP, resulting in increased suffering.

¹¹⁹ U.S.S.C., *Recidivism and the First Offender*, at 3 (May 2004)

¹²⁰ U.S.S.C., *Alternative Sentencing in the Federal Criminal Justice System*, at 1-2 (2015).

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.”). “Perfect parity among the sentences imposed on the various members of a criminal conspiracy is no doubt impossible to achieve, given the complexity of the task.” *United States v. Lazenby*, 439 F. 928, 934 (8th Cir. 2006). However, extreme disparity of sentences for co-defendants “suggests an arbitrary level of decision-making that fails to ‘promote respect for the law,’” *id.*

Disparities in the penal consequences bestowed upon co-defendants in this case thus far have been stark and wide—but not due to the exercise of judicial discretion. Nonetheless, extreme disparities regardless of cause may yet fail to promote public respect for the law. REDACTED.

The Need To Provide Restitution To Any Victim

REDACTED

The Goals Of Sentencing

A sentence that continues Mr. Smith on community supervision with special conditions, including payment of restitution, will serve the purposes of sentencing identified in §3553(a), making prison as proposed by the Government a “greater than necessary” alternative.

A. Retribution

It is necessary to impose a punishment that adequately reflects the seriousness of Mr. Smith's 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. Smith's 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. REDACTED.

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. 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.”¹²¹ 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.”¹²²

Mr. Smith’s 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 appointed by Republican presidents, reached that conclusion, as has every major survey of the evidence.”¹²³

¹²¹ 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>.

¹²² Gottfredson, *supra*, at 8-9.

¹²³ Michael Tonry, *Purposes and Functions of Sentencing*, 34 *Crime and Justice: A Review of Research* 28-29 (2006).

REDACTED.

C. Incapacitation

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. REDACTED. The defense does not anticipate the Government will argue that a prison sentence is needed to protect the public from Mr. Smith, 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 States, supra*, at 1242-43. 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. Smith’s post-offense rehabilitation has been discussed at length in this memorandum, see, e.g., Section II, *supra*. There is ample evidence—apart from his VA records and Dr. Stanulis’ opinions—from the statements of individuals who have witnessed his transformation and who interact with him on a routine basis, REDACTED, and maintaining compliance with pretrial supervision, to demonstrate he is a much-changed man.

The case law discussed in support of downward variance based on Military Service and Mental and Emotional Conditions, section III, *supra*, 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. Smith has tendered the same evidence.¹²⁴ He also has medical needs unlikely to be met in a prison setting, to be addressed in a supplemental submission.

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:

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.¹²⁵

¹²⁴ Mr. Smith 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.

¹²⁵ “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>).

Conclusion

*[Exacerbating] the problems confronting young 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. American history seems to be positioning itself for a replication of the imprudent responses to veterans' experiences and needs practiced for at least the past several decades.*¹²⁶

The defense has sought throughout this memorandum to provide the Court with the necessary comprehensive understanding of military culture and combat-related invisible injuries, to fully make sense of Mr. Smith's mitigating evidence. That evidence, and the legal framework for determining sentence, unite in support of the defense recommendation for a sentence other than prison. In addition to however many more years of active supervision, and such restrictive conditions as the Court deems necessary to impose, Mr. Smith will sustain the punitive impacts of a life-long felony conviction, a debt of \$XX restitution, permanent loss of Second Amendment rights, and REDACTED.

At the time of his offense, Mr. Smith was a wounded warrior, still at war. He has since fought a different but very hard battle—one caused by his combat experiences, 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 day of November, 20XX.

/s/ Terri Wood

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¹²⁶ William B. Brown, *Another Emerging "Storm": Iraq and Afghanistan Veterans with PTSD in the Criminal Justice System*, 5 Just. Pol'y J.. 1, 11 (2008).