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Diversionary Tactics: Alternative Procedures for the Prosecution of Military Veterans

Honorable Michael E. McCarthy*

In the broader context of examining the withering emotional consequences of extended deployments of U.S. military personnel to Middle East war zones over the past decade, Paul D. Walker, a military historian who himself commanded units in intense combat, recounts the deterioration of a single squadron, the 3rd Squadron of the 7th Cavalry Regiment ("3rd Squadron"), in the more compact time frame of the opening days of Operation Iraqi Freedom.1 The squadron was deployed to a mission that was to encounter little enemy resistance and, in any event, was to be provided significant air and artillery support if needed.2 Neither assurance proved true; the squadron immediately encountered intense adversity and, over days, remained engaged in around-the-clock combat until receiving some support and extracting itself.3

The extraordinary, initial efficiencies of the squadron in adapting to the flawed intelligence and gross under-manning of their mission caused them to be immediately deployed to assist in another mission.4 Walker describes the subtle, early manifestations of battle fatigue as the squadron, exhausted and sleep-deprived, disastrously errs in its preparations for the mission, which goes poorly.5 As the squadron regroups from that mission, it is again called upon and immediately committed to two more days of intense combat, its function being essentially to draw enemy fire away from a unit that had been surrounded.6

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* Judge, Allegheny County Court of Common Pleas.
2. Id. at 2.
3. Id.
4. Id.
5. Id. The consequences were so disastrous that one platoon, after emerging with heavy casualties from an ambush, discovered that it had been separated from the rest of the squadron and determined that it had no option but to "turn around in place . . . and simply charge through the ambush site with all guns blazing and just hope for the best." Id. at 3.
6. WALKER, supra note 1, at 4.
The 3rd Squadron experience is emblematic of both the cause and effect of battle fatigue. The condition results primarily from involvement in or witnessing a traumatic event over which the individual has little control.\(^7\) For example, combat troops in trench warfare, subjected to a sustained bombardment which they can neither repel nor flee from, but must merely endure as those around them are killed, injured, and maimed, have been diagnosed with "shell shock," a sometimes dismissive pejorative that belittles both the victim and the intensity of the events he had witnessed and experienced. The effect of the condition is intensified by lack of sleep or rest, and the consequence is a diminished capacity to respond appropriately or effectively to challenging conditions.\(^8\) Thus, the 3rd Squadron, a high-functioning unit withered by initial circumstances to which it could not have effectively responded regardless of effort, did not respond as well to a second challenge. Presumably, that impairment would be aggravated by the immediate third engagement and would extend even to members of the squadron who had not been significantly affected. Walker opined that the immediate third engagement of the members of the 3rd Squadron, even if not uncommon, "exposed them all to the very likely possibility of becoming battle fatigue casualties."\(^9\)

The dysfunctions brought about by experiences, such as those of the 3rd Squadron, are not necessarily either transient or confined to a soldier's ability to respond efficiently to the challenges of the next battle; the effects may persist into civilian life.\(^10\) Many of us know that fact observationally, having seen a war veteran who has been unable to reintegrate successfully or fully to civilian life. But of course, there is ample, exacting research data that reliably establish the lingering symptoms of the stresses of battle.\(^11\) The point is so broadly accepted that it forms the premise of an April

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7. Id.
8. Id.
9. Id.
2006 article by Professor Edgar Jones of the Institute of Psychiatry, Center for Military Health and Research:

Almost every major war in the last century involving western nations has seen combatants diagnosed with a form of post-combat disorder. Some took a psychological form (exhaustion, combat fatigue, combat stress reaction and post-traumatic stress disorder), while others were characterized by medically unexplained symptoms (soldier's heart, effort syndrome, shell shock, non-ulcer dyspepsia, effects of Agent Orange and Gulf War Syndrome). Although many of these disorders have common symptoms, the explanations attached to them showed considerable diversity often reflected in the labels themselves. These causal hypotheses ranged from the effects of climate, compressive forces released by shell explosions, side effects of vaccinations, changes in diet, toxic effects of organophosphates, oil-well fires or depleted-uranium munitions.12

The distinction between the observations of Jones and past perceptions is that Jones accepts that all members of a squadron may suffer the effects of battle fatigue,13 whereas a prior view had been that the challenges of war merely rendered symptomatic frailties that had already been present in a soldier's character14 or, worse, that the condition was the ploy of a malingerer.15 Such a view was infamously exhibited in General George Patton's encounter with an apparently uninjured but despondent infantryman at a hospital ward filled with injured soldiers:

During the action in Sicily, General Patton visited an evacuation hospital. He was conducted to the receiving tent, where 15 casualties had just come in from the front.


13. Jones, supra note 12, at 541. Jones, noting that even soldiers deployed to rear areas may experience the symptoms, does not isolate the condition to combat veterans and suggests that the term "war syndrome" may be more accurate than "post-combat disorder." Id. at 533.

14. Vietnam veterans treated for the disorder were sometimes told the condition was "pre-existing," and the problem was not service connected. See PATIENCE MASON, RECOVERING FROM THE WAR: A WOMAN'S GUIDE TO HELPING YOUR VIETNAM VETERAN, YOUR FAMILY, AND YOURSELF (1990).

“Where Were You Hurt?” The General went down the line, asking each patient where he had been hurt. On the edge of the fourth bed sat a soldier with no visible wounds. He had been sent back by his divisional medical officer, tentatively diagnosed as a severe case of psychoneurosis. He was still in battle dress.

The General asked him the routine question. The soldier answered: “It's my nerves. I can hear the shells come over but I can't hear them burst.”

Patton turned to the medical officer and asked, “What's this man talking about? What's wrong with him—if anything?” Patton began to shout at the man. His high voice rose to a scream, in such language as: “You dirty no-good — — —! You cowardly —! You're a disgrace to the Army and you're going right back to the front to fight, although that's too good for you. . . .” Patton reached for his white-handled single-action Colt.

The man sat quivering on his cot. Patton slapped him sharply across the face, turned to the commanding medical officer who had come in when he heard Patton's high-pitched imprecations. “I want you to get that man out of here right away. I won't have these other brave boys seeing such a bastard babied.”16

Perceptions that “battle fatigue” or “shell shock” might be something more pernicious than an exposed character flaw or a case of bad nerves that would likely resolve with a return to civilian life grew during and following the Vietnam War.17 Presently, the Diagnostic and Statistical Manual of Mental Disorders (“DSM”), an American Psychiatric Association publication, classifies Posttraumatic Stress Disorder (“PTSD”) as an “anxiety disorder”18 that is characterized by exposure to an extreme, traumatic event and a response of “intense fear, helplessness, or horror . . . .”19

16. Id.
19. Id. at 463.
Thus, PTSD is a recognized mental disorder that warrants application of treatment procedures and modalities.\textsuperscript{20} That development provided an essential underpinning to the establishment of alternative disposition procedures for PTSD-afflicted veterans facing prosecution for non-violent\textsuperscript{21} crimes; it reinforced the advisability of a referral for counseling and treatment rather than incarceration. Given the raw data of PTSD-afflicted veterans, the statistical likelihood that the appropriate court disposition of a veteran facing criminal charges should involve PTSD-specific treatment is significant:

A sizable fraction of service members returning from Iraq and Afghanistan suffer from PTSD. Best estimates are that PTSD of varying degrees of severity affects 12 to 20 percent of returnees from Iraq and 6 to 11 percent of returnees from Afghanistan. To date, 52,375 returnees have been seen in the VA for PTSD symptoms . . . . Multiple deployments increase the risk.\textsuperscript{22}

Veterans treatment courts draw upon the model of drug courts and mental health courts begun in the 1990s.\textsuperscript{23} As in those predecessor alternative disposition programs, the goal of veterans

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\item\textsuperscript{21} The Orange County California court system accepts defendants charged with violent crimes into its veterans court program. See Megan McCloskey, Veterans Court Takes a Chance on Violent Offenders, STARS AND STRIPES, Sept. 14, 2010, http://www.stripes.com/veterans-court-takes-a-chance-on-violent-offenders-1.118182. Among the unfortunate, significant sub-categories of PTSD manifestations among veterans are domestic violence and murder-suicides. See generally John L. Pilgrim, The Effects of GWOT and Deployment Intensity on the Propensity to Develop Post Traumatic Stress Disorder (PTSD) Among Navy Personnel (Mar. 2008) (unpublished thesis, Naval Postgraduate School of Monterey, California) (available at http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA479887). PTSD-diagnosed veterans perpetrated more violence than did other groups. Id. The Orange County program is restricted to combat veterans, however, and eligibility for violent offenders is dependent on a showing that the criminal behavior is rooted in service-related PTSD or traumatic brain injury. See McCloskey, supra.
\item\textsuperscript{23} JUSTICE POLICY INST., ADDICTED TO COURTS 19 (2011).
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courts is to keep those with mental health issues out of the traditional justice system and, instead, to provide a treatment mechanism for the illness that sometimes manifests itself in criminal misconduct.\textsuperscript{24} Toward that end, veterans' treatment courts may link with existing benefit systems, such as local Veterans Administrations counseling programs, or may draw upon veterans organizations for mentors whose own military service will render them more creditable to a troubled veteran.\textsuperscript{25} The first veterans treatment court began in 2008.\textsuperscript{26} By August 2010, there were forty-one such courts in the United States.\textsuperscript{27} The high recidivism rate of veterans processed through traditional criminal court procedures suggests that the proliferation of alternative, veteran-specific programs is as much a matter of pragmatism as it is humanitarianism.\textsuperscript{28} This can be seen through the success of the veterans court established in Buffalo:

Unemployment among veterans who have served since 2001 is higher than for non-veterans. Veterans make up 20% of all suicides. Nearly a fifth of the homeless population in the United States are veterans. Substance abuse is pervasive. Many more have mental-health problems, which often lead to criminal behaviour. Robert Russell, a judge in Buffalo, New York, after noticing an increasing number of veterans on his docket, in 2008 created the first court specialised and adapted to meet the needs of veterans.

Every Tuesday, Mr. Russell presides over "Veterans Treatment Court", a hybrid of drug and mental-health courts. It aims to divert people from the traditional criminal system. It provides veterans suffering from substance abuse, alcoholism and mental-health issues, with treatment, support, training and housing.

Each veteran is assigned a mentor, also a veteran from the same service, who acts as a coach and, if need be, an "as-
kicker”. If the veterans follow the programme’s regimen, which involves regular court appearances, mandatory drug treatment and testing, they could see their charges reduced or dismissed and they could stay out of jail.

Military folk like structure and will follow a good commanding officer anywhere. The troubled veterans seem to want to make the paternal Mr. Russell, who never served in the military, proud of them . . . .

To date there has been no recidivism among those who have completed the Buffalo programme. Other jurisdictions are taking notice. Since Buffalo’s veterans court began in January 2008, 70 other courts have launched across the country. A dozen more are in the works . . . .

In Pennsylvania, the Philadelphia Veterans Court directs participants to representatives of the Veterans Administration (“VA”), who are waiting in one of the courtrooms. The VA staff schedules an assessment, which determines whether an array of VA support and treatment programs are appropriate. After consulting with defense counsel, an eligible veteran who elects to participate in this voluntary program is assigned a mentor. In most key aspects, the Philadelphia program parallels the program in Allegheny County, which assures the availability of medical services, addiction services, and legal assistance to veterans who have entered the justice system.

The Allegheny County Veteran’s Court (“Veterans Court”) is one aspect of a broader Veterans Project, which identified the following four general goals in the early stages of that project:

To support prevention, early intervention, and education that will reduce the negative impact of combat experiences on veterans and their families.

31. Id.
32. Id.
To assist the military and the Veterans Administration in providing transition assistance.

To establish an intervention and support “Network” that would ensure expeditious access to services.

To establish a Veterans Court for the purpose of diverting qualifying veterans charged with criminal offenses into a system of treatment, rehabilitation and monitoring, whenever possible.\textsuperscript{34}

In developing the Veterans Court prong of that overall project, the community Veterans Administration system, local behavioral health providers, veterans groups, police forces, and courts proceeded on a shared understanding of the particular needs of combat veterans and of the resources necessary to meet those needs.\textsuperscript{35} Veterans who, through specialized screening and assessments, are deemed preliminarily eligible may then voluntarily participate in a judicially supervised plan developed by a group of court staff, health care professionals, and peer mentors.\textsuperscript{36} After the defendant’s entrance to the Veterans Court system, the court staff and mentors help the veteran with a host of other services, including emergency financial aid, mental health/trauma supervision, employment and skills education, temporary lodging, advocacy, and other services.\textsuperscript{37}

In the course of establishing the Allegheny County Veterans Court, we were insistent upon an assurance of the availability of experienced defense counsel for every program candidate, in order that the defendant may recognize and adequately articulate any defenses and ultimately make informed decisions as to any disposition options that might be proffered. We did not want to lose sight of the very fundamental fact that these individuals had been criminally charged.

Viewed from a different aspect that considers the Veterans Court to be an avenue to assisted readjustment from patterns of dysfunction, depression, alcoholism, drug abuse, and violence, it appears, at least anecdotally, that an indispensable component of an efficacious Veterans Court is a mentoring corps comprised of

\textsuperscript{34} Id.
\textsuperscript{35} Id.
\textsuperscript{36} Id.
\textsuperscript{37} Id.
military veterans. The mentorship portion of the Allegheny County program utilizes the Veterans Leadership Program. The near constant accessibility of the mentors and their own credentials as veterans propel the success of the program.

Several states have legislated tailored sentencing procedures for stress-affected veterans who have been convicted of a crime. That fact is noted in Porter v. McCollum, a 2009 U.S. Supreme Court decision in which a Korean War veteran who had been convicted of two counts of first-degree murder and sentenced to death on the first count, successfully argued that his lawyer's failure to adduce or present evidence of brain damage incurred during his military service had denied him his Sixth Amendment entitlement to effective assistance of counsel. The Court noted that the fact that an offender is substantially impaired in his ability to conform his conduct to the law and has an extreme mental or emotional impairment are among the mitigating circumstances recognized under Florida law. The Court reasoned that:

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

Federal recognition of the appropriateness of consideration by criminal courts of the debilities visited by traumatic or grossly extended military service is also apparent in legislative efforts. Currently pending federal legislation proposes funding, through grants administered by the Attorney General's Office, programs developed by state and local agencies and state and local courts for purposes of establishing or enhancing veterans treatment court programs or expanding operational drug courts to serve veter-

39. Id.
40. Id.
41. E.g., CAL PENAL CODE § 1170.9(a) (West 2009); MINN. STAT. § 609.115 (2008).
42. 130 S. Ct. 447, 448, 452-54 (2009).
43. Porter, 130 S. Ct. at 455.
Of course, such legislation would merely represent a further, specific application of federal support of the philosophy underlying community justice programs that identify and serve the need to construct procedures outside the traditional criminal justice system to assist those who, with the benefit of such alternative procedures, are substantially likely to refrain from future criminal misconduct.

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