

## NOTES

### POST-TRAUMATIC STRESS DISORDER AS AN INSANITY DEFENSE IN VERMONT

#### INTRODUCTION

Vietnam is a war most Americans would like to forget. Yet the effects of America's longest war<sup>1</sup> keep coming back to haunt us in strange and unpredictable ways. An estimated 500,000 to 1,500,000 Vietnam veterans are in need of some kind of psychiatric help.<sup>2</sup> Recently, the psychiatric community has identified post-traumatic stress disorder (hereinafter PTSD) as one of the major psychiatric problems arising in Vietnam veterans, leaving an individual with such stress related symptoms as flashbacks, nightmares, feelings of helplessness, and guilt.<sup>3</sup> Although this illness is not limited to war related trauma<sup>4</sup> and has been recognized as occurring in veterans of other wars,<sup>5</sup> the Vietnam war appears to have been particularly conducive to this illness.<sup>6</sup> Several authors suggest that the preva-

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1. The United States was directly involved in the Vietnam War from 1961 to 1972. The NEW COLUMBIA ENCYCLOPEDIA 2891 (4th ed. 1975).

2. Buck, *Post-Traumatic Stress Disorder in Vietnam Veterans: A Review*, 75 S. MED. J. 704, 704 (1982).

3. See *infra* notes 70-76 and accompanying text.

4. THE AMERICAN PSYCHIATRIC ASSOCIATION DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS 236 (3rd ed. 1980) states that "[s]tressors producing this disorder include natural disasters (floods, earthquakes), accidental man-made disasters (car accidents with serious physical injury, airplane crashes, large fires), or deliberate man-made disasters (bombing, torture, death camps)." *Id.* at 236. The manual further states that the disorder is more severe and longer lasting when the traumatic event is of human design.

5. In Note, *Post-Traumatic Stress Disorder—Opening Pandora's Box?* 17 NEW ENG. L. REV. 91 (1981), the author provides an extensive review of combat related mental disorders. *Id.* at 92-100.

A fundamental difference between PTSD and war neurosis is that the concept of war neurosis evolved around the theory that some combatants were more predisposed to the illness due to their personalities and perceptions of the traumatic event. PTSD places more emphasis on the intensity, duration, and severity of the event which are said to be better pieces of diagnostic information than are past histories of the combatants. See Friedman, *Post-Vietnam Syndrome: Recognition and Management*, 22 PSYCHOSOMATICS 931, 933 (1981). However, there is still substantial disagreement concerning this matter. See *infra* text accompanying notes 98-106.

6. Goodwin, *The Etiology of Combat-Related Post-Traumatic Stress Disorders*, in *TRAUMATIC STRESS DISORDERS OF THE VIETNAM VETERAN* 6-11 (1980) [hereinafter cited as Goodwin]. In terms of psychiatric casualties, the Vietnam War started on an optimistic note. Pessimistic predictions were made based on statistics of other wars, but as the war

lence of the illness among Vietnam veterans could be because of the less than enthusiastic reception the veterans received upon their return to the United States.<sup>7</sup> This hostility did not permit the veteran to rationalize his Vietnam experiences. As President Carter noted in a speech he delivered to Congress on October 10, 1978, "[m]any civilians came to confuse their view of the war with those who were called upon to fight it. They confused the war with the warrior."<sup>8</sup>

Whatever the reason, many Vietnam veterans are experiencing PTSD and its symptoms. Some afflicted veterans have committed crimes while experiencing flashbacks characteristic of PTSD. This raises the potential of using PTSD for an acquittal through insanity, a lesser included offense through diminished capacity, or a reduced sentence by raising PTSD as a mitigating factor. These uses of the PTSD defense have been successful in some jurisdictions<sup>9</sup> and are currently being used in Vermont courts.<sup>10</sup> The grow-

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progressed, it became clear that the psychiatric casualty rate was significantly lower than forecast. Kormos, *The Nature of Combat Stress*, in *STRESS DISORDERS AMONG VIETNAM VETERANS: THEORY, RESEARCH, AND TREATMENT* 15-16 (1978). The major factor in this low rate is thought to be the rotation system that was in place in Vietnam, DEROS (Date Expected to Return From Overseas), which insured that no one would serve more than a specified amount of time. *Id.* at 17.

It was not until after the war that the delayed symptoms of PTSD surfaced and the true magnitude of the psychiatric problem became known. Goodwin explains the reasons why the Vietnam War was so conducive to the onset of PTSD: 1) While DEROS provided a prophylactic against the onset of psychological problems during the twelve month active tour of duty, it meant that the war became a highly individualized experience where the combatant came to Vietnam alone, became a member of a constantly shifting battle unit, and then returned to the United States alone. No sense of solidarity within the battle unit could ever be firmly established and one's only allegiance was to himself which left the veteran without the added strength which could be derived from a unit. Goodwin, at 7-8. 2) Unlike previous wars where it was easy to grasp the ideological purpose behind the act of killing, our involvement in Vietnam was far less understandable and acceptable to the American public. *Id.* at 8. 3) The Vietnam War was America's first teenage war, a period of development which is said to be an important time in the establishment of one's identity. *Id.* 4) Drug consumption served as a buffer against stress and submerged symptoms which otherwise might have surfaced during active duty. *Id.* at 9. 5) The Vietnam veterans were shipped home one by one and arrived home within a week of departure from Vietnam. They had no time to adjust or discuss their experiences with anyone who could comprehend their experience. In addition, the Vietnam veterans returned to a welcome which was less than enthusiastic.

7. Goodwin, *supra* note 6, at 8-10. Defacio, *Dynamic Perspectives on the Nature and Effect of Combat Stress*, in *STRESS DISORDERS AMONG VIETNAM VETERANS: THEORY, RESEARCH, AND TREATMENT* 31-32 (1978).

8. Jimmy Carter's Message to Congress on Vietnam Era Veterans, II PUB. PAPERS 1737, 1737 (Oct. 10, 1978).

9. *United States v. Tindall*, No. 79-376 (D. Mass. Sept. 19, 1980); *People v. Pettibone*, No. 9632c (Sonoma Super. Ct., Cal. Feb. 29, 1980); *State v. Heads*, No. 106,126 (1st Jud. D.

ing acceptance of PTSD as a bona fide mental disorder by the medical community<sup>11</sup> and the frequency of its occurrence in Vietnam veterans are sure to result in a greater number of defendants using this unique defense.<sup>12</sup>

PTSD presents legal and psychiatric problems of great magnitude. This note will discuss these problems by identifying legal problems commonly encountered in PTSD litigation, and by questioning whether the PTSD defense should be limited in its use as a defense to either a mitigating circumstance in sentencing<sup>13</sup> or as a

Ct., Caddo Parish, La. Oct. 10, 1981); *State v. Pard*, No. 25975 (Deschutes County Cir. Ct., Or. March 18, 1980).

10. *State v. Maguire*, No. 1552-11-81 RCR (Rutland D. Ct., Vt. July 2, 1982), *appeal docketed*, No. 82-450 (Vt. S. Ct., Sept. 27, 1982); *State v. Percy*, No. 1059-7-81 WRCr (Windsor D. Ct., Vt. Nov. 6, 1981), *appeal docketed*, No. 82-011 (Vt. S. Ct., Jan. 21, 1982), *State v. Percy*, No. 350-7-82 (Lamoille D. Ct., Vt. Dec. 29, 1982), *appeal docketed*, No. 83-179 (Vt. S. Ct., March 11, 1983).

11. PTSD has been diagnosed for at least the last ten years but has just recently gained its established acceptance by being included in the AMERICAN PSYCHIATRIC ASSOCIATION DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS 236 (3rd ed. 1980).

12. Although this note will not address the many problems which might result from PTSD both to veterans and society as a whole, it is worth noting that Congress has recognized the extent of these problems and its obligation to help veterans overcome them. See generally *Hearing to Receive Testimony on Pending Legislation, H.R. 1608, H.R. 2232, H.R. 2233, and H.R. 2234 Before the Subcomm. on Medical Facilities and Benefits of the House Comm. on Veterans' Affairs, 96th Cong., 1st Sess. 761-823 (1979)*.

13. This note is primarily concerned with PTSD in the context of the defense of insanity. It should be noted that the existence of PTSD in a defendant is also relevant on the question of mitigation, and a lawyer should be prepared to utilize the illness during sentencing. Vermont's sentencing statutes provide an opportunity to present evidence of PTSD to the judge before he determines the sentence:

Before imposing sentence the court shall afford counsel an opportunity to speak on behalf of the defendant and shall address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information relevant to sentencing. The attorney for the state shall have an equivalent opportunity to speak to the court and to present any information relevant to sentencing.

Vt. R. CRIM. P. 32(a)(1). In addition, Vermont's statute on the presentence investigation report states that the report:

shall contain . . . such information on his characteristics, his financial condition, and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in correctional treatment of the defendant, and such other information as may be required by the court.

Vt. R. CRIM. P. 32(c)(2).

No Vermont cases exist which define the scope of what may be considered as being "information relevant to sentencing" or as being "helpful in imposing sentence." Federal cases help to determine the permissible extent of judicial discretion because the Vermont sentencing statutes are based on the federal statutes. See Vt. R. CRIM. P. 32 (reporter's notes at 147). The United States Supreme Court has held that:

It is surely true . . . that a trial judge in the federal judicial system generally has wide discretion in determining what sentence to impose. It is also true

partial defense of diminished capacity.<sup>14</sup>

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that before making that determination, a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come.

United States v. Tucker, 404 U.S. 433, 446 (1972). Reports from psychiatrists who examined the accused can be considered in sentencing. United States *ex rel.* Vivian v. Bookbinder, 403 F.2d 156, 157 (3rd Cir. 1968), *cert. denied*, 394 U.S. 911 (1969). The only real limitations on what a judge may consider before sentencing are: 1) false information, Townsend v. Burke, 334 U.S. 736 (1948), and 2) prior convictions obtained unconstitutionally, United States v. Tucker, 404 U.S. 433 (1972). The trial judge is also limited by the maximum and minimum sentences enumerated in the relevant statute. 3 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 525 (1982). In ADVISORY COUNCIL OF JUDGES, NATIONAL COUNCIL ON CRIME AND DELINQUENCY, GUIDES FOR SENTENCING (1957), the authors state that factors which should affect the disposition of a sentence are the physical, emotional, and mental conditions of the offender. *Id.* at 44.

For more information on this subject see generally, 3 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 526 (1982); A. CAMPBELL, LAW OF SENTENCING §§ 85-90 (1978 & Supp. 1982); ADVISORY COUNCIL OF JUDGES, NATIONAL COUNCIL ON CRIME AND DELINQUENCY, GUIDES FOR SENTENCING (1957); R. DAWSON, SENTENCING: THE DECISION AS TO TYPE, LENGTH AND CONDITIONS OF SENTENCE (1969).

14. While this paper deals primarily with PTSD in the context of the insanity defense, the partial defense of diminished capacity can be invoked in PTSD cases to reduce the conviction to a lesser included offense. Under this theory "evidence concerning the defendant's mental condition is admissible on the question of whether the defendant had the mental state which is an element of the offense with which he is charged." W. LAFAVE, CRIMINAL LAW § 42.326 (1972). Diminished capacity is asserted frequently to challenge the premeditation or deliberation elements in first degree murder or the malice aforethought element which, in most states, differentiates murder from manslaughter. *Id.* at 327.

In State v. Smith, 136 Vt. 520, 396 A.2d 126 (1978), the Vermont Supreme Court discussed the distinction between the insanity defense and the diminished capacity doctrine.

The distinction is that diminished capacity is legally applicable to disabilities not amounting to insanity, and its consequences, in homicide cases, operate to reduce the degree of the crime rather than to excuse its commission. Evidence offered under this rubric is relevant to prove the existence of a mental defect or obstacle to the presence of a state of mind which is an element of the crime, for example: premeditation or deliberation.

*Id.* at 527-28, 396 A.2d at 130. The major distinctions are that: 1) insanity is a total defense resulting in a judgment of not guilty whereas diminished capacity results in a judgment of guilty to a less serious offense, and 2) the test of insanity speaks to the defendant's general sanity and ability to appreciate and conform his conduct while diminished capacity speaks to the defendant's mental capabilities affecting his ability to premeditate, deliberate, or harbor malice. LAFAVE, CRIMINAL LAW § 42, at 326-27 (1972).

In a case of PTSD a jury could find that while a veteran was aware of what he was doing the various symptoms of PTSD left him in such a state that he could not form a plan or harbor malice. In Vermont this could only be raised in cases where there is a lesser included offense the elements of which "must necessarily be included within the greater offense." State v. Hanson, 141 Vt. 228, 231, 446 A.2d 372, 374 (1982). This means that the statutory offenses must be identical except that the greater offense contains an element lacking in the lesser offense. It is not enough that the mental intent required of the lesser charge is different from that of the greater charge. *Id.* at 233, 446 A.2d at 375.

The Vermont Supreme Court clearly recognizes that this defense can be brought in conjunction with an insanity defense, and where both issues have been raised at trial, the judge should instruct the jury on both defenses. State v. Smith, 136 Vt. 520, 527-28, 396 A.

Part I of this note discusses factual patterns in PTSD litigation in jurisdictions other than Vermont. Part II discusses two recent Vermont cases in which PTSD has been used as an insanity defense. In part III the medical aspects of PTSD are addressed. Part IV discusses Vermont's current law on insanity; particularly those areas which could potentially arise in a PTSD insanity defense. This note concludes that PTSD should be treated by the courts similarly to other traditionally valid insanity defenses.<sup>15</sup>

### I. THE USE OF THE PTSD DEFENSE

A growing number of cases involve attempts to use PTSD as a defense to criminal charges.<sup>16</sup> To date, no opinion has explicitly dealt with the viability of PTSD as an insanity defense.<sup>17</sup> Thus far

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2d 126, 130 (1978). In *State v. Maguire*, No. 1552-11-81 RCR (Rutland Cir. Ct., Vt. July 2, 1982), *appeal docketed*, No. 82-011 (Vt. S. Ct., Sept. 27, 1982), the defendant claimed that he was suffering from PTSD when he attacked a police officer and could therefore not entertain the requisite intent required by the charge of aggravated assault on a police officer. He was convicted as charged by the jury.

Another area of the law which can be used to defend a PTSD victim is automatism or unconsciousness. For a discussion of this doctrine see W. LAFAVE, *Criminal Law* § 44 (1972). For a PTSD case which utilizes this defense see *People v. Pettibone*, No. 9632c (Sonoma Super. Ct., Cal. Feb. 29, 1980) discussed *infra* at notes 24-26 and accompanying text.

15. It should be noted that this area of the law has been criticized by both the public and the legal profession. See Houts, *Let's Abolish the Insanity Plea Now*, 24 *TRAUMA* 1 (1982); Clanon, *Less Insanity In the Courts*, 68 *A.B.A.J.* 824 (1982); Gallo, *The Insanity of the Insanity Defense*, 16 *PROS. J. NAT'L DIS. ATT'Y A.* 6 (1982); Goldstein & Katz, *Abolish the "Insanity Defense"—Why Not?*, 72 *YALE L.J.* 853 (1963).

16. *United States v. Krutschewski*, 509 F. Supp. 1186 (D. Mass. 1981); *United States v. Tindall*, Cr. No. 79-376 (D. Mass. Sept. 19, 1980); *People v. Pettibone*, No. 9632c (Sonoma Super. Ct., Cal. Feb. 29, 1980); *Commonwealth v. Nichols*, No. 79CR 0962 (Louisville D. Ct., Ky. July 21, 1980); *State v. Felde*, No. 196,240 (9th Jud. D. Ct., Parish of Rapides, La. Feb. 13, 1981); *State v. Heads*, No. 106,126 (1st Jud. D. Ct., Caddo Parish, La. June 16, 1978), *rev'd per curiam on other grounds*, 444 U.S. 1008 (1980), *retrial resulting in acquittal*, No. 106,126 (1st Jud. D. Ct., Caddo Parish, La. Oct. 10, 1981); *State v. Hardimon*, 310 N.W.2d 564 (Minn. 1981); *State v. Gossell*, Case No. 81L14749 (Licking County C. P., Ohio Feb. 5, 1981); *State v. Leach*, Cr. No. 27672 (Cleveland Ct. C. P., Ohio April 4, 1977), *aff'd* Cr. No. 37686 (Cleveland Ct. App., Ohio Dec. 7, 1978); *State v. Pard*, No. 25975 (Deschutes County Cir. Ct., Or. March 18, 1980); *Commonwealth v. Mulcahy*, Cr. No. 460-464 (Philadelphia Ct. C. P., Crim. Trial Div., Pa. Dec.\_\_\_\_, 1978); *State v. Maguire*, No. 1552-11-81 RCR (Rutland D. Ct., Vt. July 2, 1982), *appeal docketed*, No. 82-450 (Vt. S. Ct., Sept. 27, 1982); *State v. Percy*, No. 1059-7-81 WRcr (Windsor D. Ct., Vt. Nov. 6, 1981), *appeal docketed*, No. 82-011 (Vt. S. Ct., Jan. 21, 1982); *State v. Percy*, No. 350-7-82 (Lamoille D. Ct., Vt. Dec. 29, 1982), *appeal docketed*, 83-179 (Vt. S. Ct., March 11, 1983); *State v. Mann*, Cr. 80-F-75 (Kanawha County Ct., Charleston, W. Va. April 2, 1981). This is only a partial listing of the cases which have used this defense.

17. A few of the cases have been appealed on other issues. *United States v. Krutschewski*, 509 F. Supp. 1186 (D. Mass. 1981); *State v. Heads*, 385 So. 2d 230 (La. 1980); *State v. Hardimon*, 310 N.W.2d 564 (Minn. 1981). In *Hardimon*, the issue of insanity was improperly

there is no indication that PTSD has been rejected as raising the issue of insanity. The following cases serve to illustrate the recurrent factual situations these cases present.

In the first trial of Charles Gene Heads in Louisiana, the jury returned a verdict of guilty on a charge of first degree murder.<sup>18</sup> Charles Heads spent time in Vietnam as a Marine and was sent home after he was shot twice in the stomach when his battalion was ambushed while on patrol.<sup>19</sup> After seven years of recurrent nightmares, Heads reached the breaking point. On August 22, 1977, Heads had a particularly severe nightmare which frightened his wife so much that she took their children and left the house. Four days later Heads appeared at his sister-in-law's house demanding to see his wife. When he was refused entrance to the house he kicked open a carport door only to face his sister-in-law's husband, the victim, standing in the hallway with a gun. Heads then began to fire with a .22 caliber pistol. When this was empty he opened fire with an automatic rifle, killing the victim.

Head's attorneys appealed his first conviction on twenty-three assignments of error. In *State v. Heads*,<sup>20</sup> the Supreme Court of Louisiana found that none of the assignments of error warranted reversal. However, in *Heads v. Louisiana*<sup>21</sup> the United States Supreme Court vacated and remanded the decision for further consideration. On remand,<sup>22</sup> Heads was granted a new trial at which his attorneys succeeded in proving to the jury that Heads was suffering from PTSD at the time of the shooting and was therefore insane.<sup>23</sup>

In *People v. Pettibone*,<sup>24</sup> the defendant raised a PTSD insanity defense. Pettibone held a guard hostage at knifepoint for over two hours in the office of Congressman Clausen in Santa Rosa, California. He was diagnosed as having PTSD<sup>25</sup> and was sub-

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raised at trial. Accordingly, the appeals court refused to deal with the issue.

18. *State v. Heads*, No. 106,126 (First Jud. D. Ct., Caddo Parish, La. June 16, 1978).

19. *State v. Heads*, 385 So. 2d 230 (La. 1980).

20. 370 So. 2d 564 (La. 1979).

21. 444 U.S. 1008 (1980).

22. 385 So. 2d 230 (La. 1980). The issue on remand was whether the instructions had erroneously shifted the burden of proving knowledge or intent to the defendant. *Id.* at 231. The Louisiana Supreme Court found that it had and that the defendant was harmed thereby and so they remanded to district court for further proceedings. *Id.*

23. *State v. Heads*, No. 106,126 (First Jud. D. Ct., Caddo Parish, La. Oct. 10, 1981).

24. No. 9632c (Sonoma Super. Ct., Cal. Feb. 29, 1980).

25. The factual account is taken from Apostle, *The Unconsciousness Defense as Ap-*

sequently acquitted by the jury. The event itself took place after Pettibone had received news that his wife had divorced him and that he would not be able to have his children visit him unless he found suitable living quarters. A short time later he went to the offices of Congressman Clausen in an effort to procure 100% disability payments. Upon learning that the congressman was not in his office, he went into a rage, seizing a guard and holding the office under seige. A successful unconsciousness defense was raised by proving that the defendant's actions were involuntary and automatic.<sup>26</sup>

In an Oregon case, *State v. Pard*,<sup>27</sup> the jury found the defendant not guilty by reason of insanity. Pard was on probation for violation of a court order and part of his probation agreement required him to see a doctor for psychiatric help.<sup>28</sup> Pard's former wife notified the police that this part of the agreement was being violated. When he received a copy of a warrant for his arrest Pard went into a frenzy. After locating his ex-wife at her boyfriend's house, Pard began to shoot at the fleeing couple and a forty-five minute auto chase ensued. The police then chased Pard for five minutes and wounded him in the leg before subduing him. throughout this entire sequence of events, Pard was the only one injured.

Counsel for Pard pinpointed several factors which he believed led to a successful defense: 1) The defendant suffered the only injury; 2) although Oregon does not require that instructions be given on the consequences of a finding of not guilty by reason of insanity, defense counsel and the prosecution stipulated to having these instructions read to the jury; and 3) defense counsel introduced a videotape at trial which displayed Pard's reactions to Vietnam during an interview with a psychiatrist.<sup>29</sup>

In two federal cases which arose from a single factual circum-

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plied to Post Traumatic Stress Disorder in a Vietnam Veteran, 8 BULL. AM. ACAD. PSYCHIATRY & L. 426, 429 (1980). One commentator, Dr. Apostle, believes this case warranted such a finding.

26. "I feel this defense is most appropriate in those cases where brief (minutes or hours), repetitive, stereotyped behavior occurs, directly stimulated by either the emotions or environmental characteristics similar to those that the warrior had in Vietnam, with evidence of lack of awareness." *Id.*

27. No. 25975 (Deschutes County Cir. Ct., Or. March 18, 1980).

28. Telephone interview with James VanVoorheaf, Esq., counsel for the defense in *Pard*, (Feb. 10, 1983).

29. *Id.*

stance, one of the defendants was acquitted after raising a successful PTSD defense<sup>30</sup> while the other defendant was convicted after raising the same defense.<sup>31</sup> Defendant Tindall was asked by defendant Krutschewski to join him in a conspiracy to import hashish which Krutschewski agreed to fund. Tindall's attorneys introduced evidence which substantiated the claim that Vietnam had made him an "action junkie" always seeking another thrill. In addition, Tindall presented an expert witness who testified that when the defendant's application for an air charter certificate from the FAA was denied, the defendant's drive for action and adventure was triggered. This drive then led him to join the hashish conspiracy.<sup>32</sup>

Krutschewski failed to convince the jury that he also suffered from PTSD although he was stationed with Tindall in Vietnam and was involved with the same conspiracy.<sup>33</sup> It is possible that the defendant's wealth, abilities (Krutschewski was the most highly decorated pilot in the Vietnam War), and prominent role in the conspiracy were factors the jury considered and weighed against him.

These are a representative sample of cases which involved the PTSD defense. As will be seen in the next section, this defense has been raised in Vermont on two occasions, both of which involve the same defendant.

## II. PTSD IN VERMONT: THE PERCY TRIALS

In two recent Vermont cases,<sup>34</sup> a PTSD defense has been raised at trial. The defense was raised against charges of sexual assault and kidnapping and both cases have resulted in guilty verdicts. Both cases are on appeal to the Vermont Supreme Court.

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30. *United States v. Tindall*, Cr. No. 79-376 (D. Mass. Sept. 19, 1980).

31. *United States v. Krutschewski*, Cr. No. 79-376 (D. Mass. Oct. 9, 1980) *motion for reduction of sentence denied*, 509 F. Supp. 1186, 1191 (D. Mass. 1981).

32. Note, *Post-Traumatic Stress Disorder—Opening Pandora's Box?*, 17 *NEW ENG. L. REV.* 91, 112-13 (1981).

33. *Krutschewski*, 509 F. Supp. at 1187.

34. *State v. Percy*, No. 1059-7-81 WrCr (Windsor D. Ct., Vt. Nov. 6, 1981), *appeal docketed*, No. 82-011 (Vt. S. Ct., Jan. 21, 1982); *State v. Percy*, No. 350-7-82 (Lafayette D. Ct., Vt. Dec. 29, 1982), *appeal docketed*, No. 83-179 (Vt. S. Ct., March 11, 1983).

### A. *The First Percy Trial*

Robert Percy had a troubled childhood.<sup>35</sup> Repeated problems with the law eventually led to his being sent to the Weeks School in Vergennes, Vermont, a state school for "delinquent" children.<sup>36</sup> Soon after, Percy entered the army and was sent to Vietnam for his tour of duty. It was during this tour of duty that Percy experienced the "traumatic event" which led to PTSD.<sup>37</sup>

According to his trial testimony,<sup>38</sup> Percy was stationed in Dao Teh Yang where he became friends with a man named Fitzgibbons with whom he often shared his heroin. In camp there was a Vietnamese woman, Ming, who often cleaned Percy's hut and laundry and on occasion Percy would have sex with her. In return, Percy supplied Ming's family with food and provisions.

One night Fitzgibbons came by Percy's hut to get a "hit" of heroin, after which he went on perimeter guard duty. It wasn't long before Percy heard gunfire on the perimeter of the camp. Percy grabbed his rifle and headed in the direction of the gunfire. Upon arrival at the perimeter, he could see by the flashes of the mortar fire that Ming was attempting to cut through the protective fencing which surrounded the camp. Percy then witnessed Ming raise her rifle and fire at Fitzgibbons who was standing a short distance away. Fitzgibbons fell to the ground at which point Percy shot Ming. Immediately after this happened, both Fitzgibbon's and Ming's bodies took direct mortar hits.

The next morning, Percy had the responsibility of placing both of these bodies in bags. Percy then remembered that Ming had a sister, Ko, and also recalled that he had witnessed Ko pacing the perimeter of the camp. He now realized that Ko had been locating the protective mines that were placed around the camp to prevent attacks. Percy apprehended Ko and began to take her to a prison camp run by the Vietnamese. Along the way Ko escaped by telling Percy she had to go to the bathroom, at which point she escaped into a nearby village. Percy's psychiatrists believe that the event at Dao Teh Yang led to the onset of PTSD.<sup>39</sup>

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35. Oct. 29, 1981 transcript at 113-20, *State v. Percy*, No. 1059-7-81 WrCr (Windsor D. Ct., Vt. Nov. 6, 1981).

36. *Id.*

37. Nov. 4, 1981 *Percy* transcript at 127.

38. *Id.* at 127-30; Nov. 6, 1981 transcript at 7-14.

39. Nov. 4, 1981 *Percy* transcript at 130.

Percy further testified that on December 7, 1980, he left his parent's home to jog to his sister's house. At around 7:15 p.m. he opened the door and stepped out onto the porch. He looked up at some evergreens and saw what he believed to be a starlight scope, a device used in Vietnam for night firing. Percy dove behind a truck in the driveway to avoid the imagined sniper fire. He then remembered standing by a graveyard which is near to the house. His next recollection was entering his sister's house at 8:10 p.m.<sup>40</sup>

At the Percy trial the victim recounted a different sequence of events.<sup>41</sup> On the evening of December 7, 1980 at 7:15 p.m., the victim left the store where she worked and began the twenty to thirty minute drive home. A freezing rain was falling so she was driving slowly to compensate for the poor conditions. Suddenly, a man jumped in front of her car, forcing her to come to a stop. The next thing the victim knew, the man was entering the vehicle by the passenger door. He then directed her to make several turns up dirt roads and to park her car in a small clearing. The victim then testified that the man raped her.

Percy's defense was that at the time of the rape he was suffering a PTSD flashback and could not control his actions.<sup>42</sup> Both the prosecution and the defense attorneys presented extensive expert testimony on the question of whether Percy was experiencing a flashback during the time in question. During the trial, the defense lawyers attempted to introduce video tapes into evidence which showed the defendant being interviewed by psychiatrists while under the influence of hypnosis and sodium amytal.<sup>43</sup> The purpose of introducing the tapes was to show the basis of the expert's opinions regarding the PTSD diagnosis. However, the judge excluded the tapes themselves because "nothing I told [the jury] in terms of a cautionary instruction could possibly make them understand and live with the notion of limiting the use of those tapes to the data base for the scientific or psychiatric opinion."<sup>44</sup> Instead, the judge thought "that the jury would use the statements as substantive evidence."<sup>45</sup> Consequently, the jury could not view the tapes but the expert witnesses could use the information gained from the inter-

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40. Nov. 6, 1981 *Percy* transcript at 5-6.

41. Oct. 30, 1981 *Percy* transcript at 78-91.

42. Oct. 29, 1981 *Percy* transcript at 113-20.

43. Oct. 29, 1981 *Percy* transcript at 128; Nov. 2, 1981 *Percy* transcript at 11-17.

44. Nov. 3, 1981 *Percy* transcript at 12.

45. *Id.* at 13.

views as a basis for their opinions.<sup>46</sup>

### B. *The Second Percy Trial*

Robert Percy was arrested for the Elmore incident on December 30, 1980 and was subsequently released on bail. He then returned to work at the Mt. Mansfield Garage in Stowe, Vermont, where he worked until January 16, 1981, the evening of the second incident.<sup>47</sup> Percy had indicated to two people that he had plans for fleeing the state in order to avoid prosecution. On the evening of January 16, 1981 at around 5:00 p.m., he turned down his usual ride home.<sup>48</sup> Around 5:30 p.m. the victim drove into the gas station and began to fill her car with gas. The defendant told the victim that her rear tire was low on air and directed her to a darkened area of the station where the air pump was located. The defendant then jumped into the passenger side of the car and directed her to drive her car down a dirt road. The defendant then raped the victim.<sup>49</sup> The defendant then assumed control of the car and proceeded to drive first north and then eventually drove south into Connecticut. While still in Vermont the defendant robbed the victim of approximately \$130.00 at gunpoint.<sup>50</sup> In Connecticut, the defendant raped the victim a second time at gunpoint.<sup>51</sup> Shortly thereafter the victim escaped from the car when she saw a police vehicle parked at an intersection. A high speed vehicle and foot chase ensued, after which the defendant was apprehended and arrested.<sup>52</sup>

After being searched and handcuffed, the defendant was placed in a police cruiser and read his *Miranda* rights. No questions were asked of the defendant nor was any information volunteered. The defendant was again read his *Miranda* rights and placed in a processing cell. The defendant identified himself and signed a fingerprint card under a fictitious name. A search of the defendant's wallet revealed the following articles: \$855.00 in cash, several credit cards (none of which were his), identification cards of both the defendant's fictitious and real names, and a map of the

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46. *Id.* at 14.

47. *State v. Percy*, No. 350-7-82 slip op. (Lamoille D. Ct., Vt. Dec. 29, 1982).

48. *Id.* at 4-5.

49. *Id.* at 7-8.

50. *Id.* at 10.

51. *Id.* at 13.

52. *Id.* at 15-17.

State of New York.<sup>53</sup> The defendant's lawyers sought to suppress the evidence as being the fruits of an illegal search and seizure.<sup>54</sup> The defendant's motion to suppress the evidence was denied.<sup>55</sup>

The defendant argued at trial that during the time in question he was experiencing an unconscious flashback as a manifestation of PTSD. The flashback was triggered by a flash of light in the trees which reminded him of snipers in Vietnam.<sup>56</sup> The defense maintained that the time spent with the victim was a "continuing triggering mechanism"<sup>57</sup> which continually imposed the flashback on the defendant for the time that he was with her. The prosecution acknowledged that the defendant suffers from PTSD but the state's expert witnesses maintained that, during the time in question, the defendant was fully capable of conforming his conduct to the requirements of the law.<sup>58</sup> The prosecutor argued that there was evidence which showed a careful plan of escape from a pending criminal prosecution.<sup>59</sup>

At this trial the judge allowed the video tapes to be introduced, but only as evidence supporting the psychiatric opinion.<sup>60</sup> This is possibly because the second Percy trial was conducted without a jury and the judge acted as the trier of fact. Both trials resulted in convictions.<sup>61</sup>

### III. MEDICAL ASPECTS OF PTSD

In 1980 PTSD was included in the American Psychiatric Association Diagnostic and Statistical Manual of Mental Disorders (hereinafter DSM-III).<sup>62</sup> The inclusion of a mental disorder in this manual is widely recognized as a sign that the mental health community recognizes the disorder and is seeking a uniform system of diagnosis and treatment.<sup>63</sup>

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53. *Id.* at 18.

54. *Id.* at 19.

55. *Id.*

56. *Id.* at 24.

57. *Id.* at 25.

58. *Id.* at 41.

59. *Id.* at 26.

60. *Id.* at 30-31.

61. See Nov. 6, 1981 Percy transcript at 97; State v. Percy, No. 350-7-82 slip op. at 53-54 (Lamoille D. Ct., Vt. Dec. 29, 1982).

62. THE AMERICAN PSYCHIATRIC ASSOCIATION DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS, 236, 237 (3d ed. 1980) [hereinafter cited as DSM-III].

63. Interview with Dr. Matthew Friedman, Chief of the Psychiatry Service at the Vet-

PTSD is categorized in either of two subtypes—chronic or acute.<sup>64</sup> Acute PTSD appears within six months of the traumatic event and the symptoms last no longer than six months from their first appearance.<sup>65</sup> In these cases the prognosis for recovery is good.<sup>66</sup> The chronic subtype is diagnosed when the symptoms develop six months after the traumatic event or the symptoms last longer than six months.<sup>67</sup>

The diagnosis of PTSD begins with identifying a stressor: a traumatic event that could lead to the onset of PTSD symptoms. The traumatic event is one which would “evoke significant symptoms of distress in most people, and is generally outside the range of such common experiences as simple bereavement, chronic illness, business losses, or marital conflict.”<sup>68</sup> The traumatic event can occur naturally, as in an earthquake, flood or volcano, or it can be man-made, as in a plane accident or war. “The disorder is apparently more severe and longer lasting when the stressor is of human design.”<sup>69</sup>

The symptoms of PTSD vary in both type and intensity according to the severity of the illness. Commonly, the individual re-experiences the traumatic event through intrusive recollections or nightmares.<sup>70</sup> This leads to “psychic numbing” which is a “[d]iminished responsiveness to the external world.”<sup>71</sup> The individual complains of loss of interest in activities he previously enjoyed or an inability to feel any emotions whatsoever. In addition, an individual may develop hyperalertness or an exaggerated startle response and may have difficulties falling asleep.<sup>72</sup>

A symptom which commonly leads to legal difficulties occurs when an individual relives the event and “behaves as though ex-

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eran's Administration Hospital, White River Junction, Vermont and Associate Professor of Psychiatry and Pharmacology at the Dartmouth Medical School, Hanover, New Hampshire (Jan. 25, 1983). Dr. Friedman stated that the DSM-III constitutes the authoritative diagnostic manual on current psychiatric disorders. It is a compilation of illnesses recognized by the American Psychiatric Association and the proper diagnoses and treatment of those illnesses.

64. DSM-III, *supra* note 63, at 237.

65. *Id.*

66. *Id.*

67. *Id.* at 237.

68. *Id.* at 236.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

periencing the event at that moment."<sup>73</sup> Fear of triggering a flashback has led many individuals suffering from PTSD to avoid any activity or situation which is similar to the traumatic event.<sup>74</sup> This symptom is said to occur only in the most severe cases, and is often associated with combat veterans.<sup>75</sup> Dr. Matthew Friedman has described a flashback as

a sudden intrusion into consciousness of war experiences and related effects, so that an individual who is in Vermont suddenly feels and finds himself back in Vietnam. . . . [It is] a hallucinatory type of experience in which the individual's state of consciousness is altered and he or she feels that they are back in another episode, a traumatic episode.<sup>76</sup>

A peculiar problem raised in diagnosing PTSD after a flashback is that the individual could also be afflicted with psychogenic amnesia, a side effect of PTSD recognized in the DSM-III.<sup>77</sup> The most common form of psychogenic amnesia is called "localized" or "circumscribed" where "there is a failure to recall all events occurring during a circumscribed period of time . . . following a profoundly disturbing event."<sup>78</sup>

Persons in these dissociative states frequently know who they are and are aware of what they are doing at the moment, but usually appear dazed, absentminded or entranced, "do things about which they have no recollection" and with "a discernible alteration in a person's thoughts, feelings, or actions so that for a period of time certain information is not associated or integrated with other information as it normally or logically would be."<sup>79</sup>

The DSM-III plainly indicates that an associated feature of

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73. *Id.* "In rare instances there are dissociativelike states, lasting from a few minutes to several hours or even days, during which components of the event are relived and the individual behaves as though experiencing the event at that moment." *Id.* Typically these symptoms occur when the individual is exposed to events which resemble or symbolize the original trauma. Apostle, *The Unconsciousness Defense as Applied to Post Traumatic Stress Disorder in a Vietnam Veteran*, 18 BULL. AM. ACAD. PSYCHIATRY & L. 426, 426 (1980).

74. DSM-III, *supra* note 63, at 237.

75. *Id.* at 236.

76. Nov. 4, 1981 transcript at 113, *State v. Percy*, No. 1059-7-81 WrCr (Windsor D. Ct., Vt. Sept. 27, 1982) (testimony of Dr. Matthew Friedman).

77. DSM-III, *supra* note 63, at 253.

78. *Id.*

79. MacHovec, *Hypnosis to Facilitate Recall in Psychogenic Amnesia and Fugue States: Treatment Variables*, 24 AM. J. OF CLINICAL HYPNOSIS 7, 7 (1981).

psychogenic amnesia is PTSD<sup>80</sup> and that the amnesia "begins suddenly, usually following severe psychosocial stress . . . often involv[ing] a threat of physical injury or death."<sup>81</sup> Psychogenic amnesia complicates the diagnosis of PTSD since the individual may be unable to recall either the original traumatic event or the flashback experience.

An additional complication is presented by the possibility of malingering. Malingering is defined as "the voluntary production and presentation of false or grossly exaggerated physical or psychological symptoms . . . produced in pursuit of a goal that is obviously recognizable with an understanding of the individual's circumstances rather than of his or her individual psychology."<sup>82</sup> The DSM-III further states that one of the obviously recognizable goals is "to evade criminal prosecution."<sup>83</sup>

Malingering "involving simulated amnesia presents a particularly difficult diagnostic dilemma. Attention to the possibility that the amnesia is feigned plus careful questioning under hypnosis or during an amytal interview should help to resolve the dilemma."<sup>84</sup> Sodium amytal and other barbiturates<sup>85</sup> are used for the purpose of narcoanalysis which is the process of administering an intravenous drug to elicit material which will help to: 1) identify the stressing event, and 2) integrate the event in the personality of the individual.<sup>86</sup>

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80. DSM-III, *supra* note 63, at 254.

81. *Id.*

82. *Id.* at 331. For a further understanding of the definitions of malingering and how it interacts with legal principles see Gorman, *Defining Malingering*, 27 J. OF FORENSIC SCI. 401 (1982).

83. DSM-III, *supra* note 63, at 331.

A high index of suspicion of Malingering should be aroused if any combination of the following is noted:

- (1) medicolegal context of presentation, e.g., the person's being referred by his attorney to the physician for examination;
- (2) marked discrepancy between the person's claimed distress or disability and the objective findings;
- (3) lack of cooperation with the diagnostic evaluation and prescribed treatment regimen;
- (4) the presence of Antisocial Personality Disorder.

*Id.*

84. *Id.* at 255.

85. See 2 A. FREEDMAN, H. KAPLAN & B. SADOCK, *COMPREHENSIVE TEXTBOOK OF PSYCHIATRY-II* 1962 (2d ed. 1975), in which the authors define the different categories within which these drugs are classified.

86. *Id.* at 1968.

However, several controlled studies have found that the use of barbiturates for therapeutic and recall purposes either have limited effect,<sup>87</sup> or the influence of the examiner outweighs the beneficial effects of the drugs.<sup>88</sup> Nonetheless, one case study indicates that amytal is remarkably therapeutic<sup>89</sup> and yet another found that sodium amytal cured psychogenic amnesia in some cases.<sup>90</sup>

Some studies have attempted to resolve the question of whether amytal interviewing is effective in the detection or prevention of malingering,<sup>91</sup> but these studies are both inconclusive and contradictory in their findings. They indicate that amytal interviewing is widely practiced and helpful in certain amnesic situations, but that there is no guarantee that the drug will inhibit malingering or that individuals are incapable of lying with conviction while under the drug's influence.<sup>92</sup> For these reasons courts have had difficulty in determining whether to admit testimony based on, or resulting from, narcoanalysis.<sup>93</sup>

Although the symptoms of PTSD appear to be straightforward and understandable, detection of PTSD can be difficult. In large part this is due to similarities in symptoms between different mental disorders. One author, Dr. Walker, found it difficult to differentiate between anti-social personality disorder and PTSD:

Because of [a] combat veteran's hostile attitude, tendency to

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87. See Hain, *Effectiveness and Processes of Interviewing With Drugs*, 4 J. PSYCHIATRIC RESEARCH 95 (1966); Hain, *Controlled Interviews Using Drugs*, 22 ARCHIVES GEN. PSYCHIATRY 2 (1970).

88. See Buckman, *Controlled Interviews Using Drugs II*, 29 ARCHIVES OF GEN. PSYCHIATRY 623 (1973).

89. See Kraines, *Sodium Amytal, Hypnosis, and Psychotherapy*, 3 INT. J. NEUROPSYCHIATRY 248, 255-56 (1967).

90. See Herman, *The Use of Intravenous Sodium Amytal in Psychogenic Amnesic States*, 12 PSYCHIATRIC Q. 738, 740-41 (1983).

91. See Redlich, *Narcoanalysis and Truth*, 107 AM. J. PSYCHIATRY 586 (1951); Adatto, *Observations on Criminal Patients During Narcoanalysis*, 62 ARCHIVES NEUROLOGY & PSYCHIATRY 82 (1947); Brunn, *Retrograde Amnesia in a Murder Suspect*, 10 AM. J. CLINICAL HYPNOSIS 209, 213 (1968); Scott, *Hypnosis With an Alleged Blackout*, 20 AM. J. CLINICAL HYPNOSIS 209 (1978).

92. Redlich, *Narcoanalysis and Truth*, 107 AM. J. PSYCHIATRY 586, 589-90 (1951); Adatto, *Observations on Criminal Patients During Narcoanalysis*, 62 ARCHIVES NEUROLOGY & PSYCHIATRY 82, 90-91 (1947).

93. See *infra* notes 165-76 and accompanying text. Courts have also been skeptical of the use of hypnosis for the same reasons. In MacHovec, *Hypnosis to Facilitate Recall in Psychogenic Amnesia and Fugue States: Treatment Variables*, 24 AM. J. CLINICAL HYPNOSIS 7 (1981), the author suggests that biofeedback equipment designed "to provide external source data to quantify the existence of hypnosis," *id.* at 13, might help to "enhance the acceptability of hypnosis in the court." *Id.*

have difficulty with authority figures, history of drug or alcohol abuse, and frequent difficulty with the law, the erroneous diagnosis of antisocial personality disorder is often made. On the other hand, individuals with an antisocial personality disorder may mimic the signs and symptoms of post traumatic stress disorder as their defense against legal charges. It can be extremely difficult to separate these two conditions, and, unfortunately, psychiatrists are increasingly called upon to differentiate the conditions in the courtroom.<sup>94</sup>

Dr. Walker found that the major distinction between the two illnesses is the existence of maladaptive behavior prior to the age of fifteen in people suffering from anti-social personality disorder.<sup>95</sup>

This problem in diagnosis leaves the expert witness open to questions regarding the distinctions between the two illnesses. This is especially true when an individual diagnosed as having PTSD has had behavioral problems before the age of fifteen.<sup>96</sup> Dr. Walker further states that symptoms present in PTSD which are not usually found in an anti-social personality disorder include feelings of guilt and anxiety, a non-exploitive demeanor, good response to therapy sessions and peer support counseling, and the capability to experience genuine emotional feelings.<sup>97</sup>

To facilitate better treatment, the psychiatric community is presently conducting studies to determine what factors are most significant in causing PTSD. One study indicates that those veterans who saw combat have greater difficulties in adjusting to civilian life than those who did not.<sup>98</sup> This study hypothesizes that

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94. Walker, *Viet Nam Combat Veterans with Legal Difficulties: A Psychiatric Problem?* 138 AM. J. PSYCHIATRY 1384, 1385 (1981).

95. *Id.* The DSM-III defines the essential feature of an anti-social personality disorder as being "a history of continuous and chronic antisocial behavior in which the rights of others are violated, persistence into adult life of a pattern of antisocial behavior that began before the age of 15, and failure to sustain good job performance over a period of several years. . . ." DSM-III, *supra* note 63, at 317-18. This diagnosis applies to individuals over the age of eighteen, whereas someone who shows the same symptoms under the age of eighteen is diagnosed as having conduct disorder. *Id.* at 319.

96. If the symptoms are not present prior to the age of fifteen, the same symptoms could lead to a diagnosis of adult antisocial behavior which is not considered a mental disorder. *Id.* at 332.

97. Walker, *Viet Nam Combat Veterans with Legal Difficulties: A Psychiatric Problem?* 138 AM. J. PSYCHIATRY 1384, 1385 (1981).

98. Figley, *Symptoms of Delayed Combat Stress Among a College Sample of Vietnam Veterans*, 143 MILITARY MEDICINE 107 (1978). Figley sent a questionnaire to a group of veterans at two colleges. Out of the total who responded, 38.6% actually served in combat. All other background data was surprisingly similar. The author then compared answers between

these veterans continue to feel the effects of delayed stress many years after returning to civilian life. This raises a point of continued dispute among psychiatrists: whether the severity of the traumatic event experienced during combat or the predispositional personality of the individual is a more important factor in the development of PTSD.<sup>99</sup> The DSM-III definition of a stressor which "evoke[s] significant symptoms of distress in most people"<sup>100</sup> and is "outside the range of common experiences"<sup>101</sup> indicates that the event itself is the more important factor tending to downplay predispositional factors.<sup>102</sup> One authority has gone so far as to suggest that the combat experience alone causes PTSD in otherwise stable individuals; the longer the individual is exposed to such combat conditions the worse the symptoms become.<sup>103</sup>

Another authority, Dr. Straker, sees predispositional factors as the more important indicator. He concludes that "active military duty may exacerbate symptoms, but cannot be blamed for the origin of the illness."<sup>104</sup> He believes that most people who suffer from the illness have a significantly higher incidence of developmental deprivations and disturbed home settings.<sup>105</sup> This indicates that some people are more susceptible to the illness than others and that the length of exposure to the traumatic event is not nearly as important as the background of the individual. Another study indicates that "the response to traumatic stress depends on the meaning of the experience to the individual and the protective/adaptive mechanisms he or she uses to cope with it."<sup>106</sup> Under this analysis the event takes on a specific meaning to each individual which means that a small traumatic event could lead to a PTSD reaction in a person who is already unstable at the time of the

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the combatant and non-combatant groups which dealt with each veteran's ability to adjust to civilian life. The scores for those who did not see combat indicated a far greater ability to relate to family and friends and adjust to civilian life. This was true not only of the year following service, but was also true a year prior to the actual survey.

99. See *supra* note 5.

100. DSM-III, *supra* note 63, at 236.

101. *Id.*

102. Friedman, *Post-Vietnam Syndrome: Recognition and Management*, 22 *PSYCHOSOMATICS* 931, 933 (1981).

103. See Shatan, *The Grief of Soldiers, Vietnam Combat Veterans' Self-Help Movement*, 43 *AM. J. ORTHOPSYCHIATRY* 4 (1973).

104. Straker, *The Vietnam Veteran: The Task is Re-Integration*, 37 *DISEASES OF THE NERVOUS SYSTEM* 75, 75 (1976).

105. *Id.*

106. Hendin, *Meanings of Combat and the Development of Posttraumatic Stress Disorder*, 138 *AM. J. PSYCHIATRY* 1490 (1981).

event. Such a reaction is not contemplated by the DSM-III definition which requires that the event be outside the range of common experiences.

This dispute is unsettled in the medical community. Other variables play at least a minor role in causing PTSD: 1) the perceived helpfulness of the veteran's family upon his return home and their ability to communicate with the veteran concerning his experiences, 2) the length of time before release from the service after the veteran's return from combat, 3) the veteran's perceived ability to control events around him, and 4) the veteran's attitude toward the Vietnam War before he entered the service.<sup>107</sup>

It is important to note that PTSD can be treated.<sup>108</sup> Many psychiatrists feel that the best treatment of PTSD involves group and individual therapy sessions in which veterans have an opportunity to identify and verbalize the events which led to the PTSD reaction.<sup>109</sup> Hypnosis has been suggested by several authorities as a means of "enhanc[ing] [the individual's] ability to remember, repeat, and work through tragic experiences."<sup>110</sup>

There is not much literature which documents the rate of successful treatment of PTSD. Treatment in most cases reduces the symptoms of PTSD to a manageable level of intensity and recurrence which allows the individual to deal with, and accept his problem on a daily basis:

I am not as optimistic as I was . . . about the prospect of

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107. Frye, *Discriminant Analysis of Posttraumatic Stress Disorder Among a Group of Viet Nam Veterans*, 139 AM. J. PSYCHIATRY 52, 55-56 (1982).

108. It is questionable whether this information can be introduced at trial. In *State v. Hood*, 123 Vt. 273, 187 A.2d 499 (1963), the Vermont Supreme Court sustained a refusal by a lower court to instruct the jury on the probable consequences of a finding of not guilty by reason of insanity; namely, the probable institutionalization of the defendant. *Id.* at 276-77, 187 A.2d at 501. However, the court hesitantly stated that a trial court could instruct the jury on the probable consequences provided the judge presented a complete picture. *Id.* This limited discretion was retracted in *State v. Smith*, 136 Vt. 520, 396 A.2d 126 (1978), which held that "the disposition after verdict is for the court, and is not to be charged to the jury." *Id.* at 526, 396 A.2d at 129.

109. See generally Williams, *Therapeutic Alliance and Goal Setting in the Treatment of Vietnam Veterans*, in *TRAUMATIC STRESS DISORDERS IN VIETNAM VETERANS* 25 (1980); Marafiotte, *Behavioral Group Treatment of Vietnam Veterans*, in *TRAUMATIC STRESS DISORDERS IN VIETNAM VETERANS*, 49 (1983); Brende, *Combined Individual and Group Therapy for Vietnam Veterans*, 31 INT. J. GROUP PSYCHOTHERAPY 367 (1981).

110. Spiegel, *Vietnam Grief Work Using Hypnosis*, 24 AM. J. CLINICAL HYPNOSIS 33, 39 (1981); see also Brende, *The Vietnam Combat Delayed Stress Response Syndrome: Hypnotherapy of "Dissociative Symptoms"*, 23 AM. J. CLINICAL HYPNOSIS 34 (1980).

entirely eliminating the anxiety with which these men live. Although they appear to get better quickly, the repetitive and cyclical nature of this syndrome . . . often causes further anguish. Nightmares, hyperalertness, and depression seem to resurface—but now at manageable, though still uncomfortable levels.<sup>111</sup>

The diagnosis of PTSD becomes complicated given the variables and lack of common understanding of the importance of individual factors involved. Psychiatrists tend to rely on the symptoms of an individual to diagnose PTSD. The more pronounced the symptoms, the easier this diagnosis becomes. However, one of the consistencies of psychiatry is that experts are sure to disagree on any single diagnosis especially where the diagnosis is of a mental illness as complex as PTSD.

#### IV. THE LAW ON INSANITY IN VERMONT

Vermont has adopted the American Law Institute's test for insanity in criminal trials.<sup>112</sup> Title 13, section 4801(a) of Vermont Statutes Annotated reads in part, as follows:

(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks adequate capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

(2) The terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct. The terms "mental disease or defect" shall include congenital and traumatic mental conditions as well as disease.<sup>113</sup>

This test was adopted in 1969 after almost 100 years of using the M'Naghten and irresistible impulse test.<sup>114</sup>

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111. Williams, *A Preferred Model for Development of Interventions for Psychological Readjustment of Vietnam Veterans: Group Treatment*, in *TRAUMATIC STRESS DISORDERS IN VIETNAM VETERANS* 37, 45-56 (1980).

112. Vermont's test is based upon the American Law Institute's test as presented in the *MODEL PENAL CODE* § 4.01 (Tent. Draft No. 4, 1955).

113. *VT. STAT. ANN.* tit. 13, § 4801(a) (Cum. Supp. 1983).

114. Vermont first applied these tests in 1875 in a case called *Hathaway's Admr. v. National Life Ins. Co.*, 48 Vt. 335 (1875). This case involved a claim on an insurance policy where the owner of the policy committed suicide. Whether the benefactor recovered on the policy depended upon whether the owner was insane at the time he committed suicide. This

### A. Raising the Defense—The Presumption of Sanity

Traditionally, the defendant was required to make a special plea of not guilty by reason of insanity at an omnibus hearing prior to trial.<sup>115</sup> Since 1974, the defendant must inform the prosecutor in writing of any intent to raise an insanity defense and disclose all witnesses the defendant will call to establish the defense.<sup>116</sup> The defendant must inform the prosecutor either at the pre-trial hearing or at least ten days prior to trial.<sup>117</sup>

The Vermont courts have strictly enforced notice requirements and have invoked the sanctions codified by rule 12.1(e) of the Vermont Rules of Criminal Procedure<sup>118</sup> which disallow any testimony relating to insanity when the necessary notice has not been given "except for good cause."<sup>119</sup> In *State v. LaGoy*,<sup>120</sup> the Vermont Supreme Court stated that "an accused who failed to give notice at the time required had no absolute right to avail himself of the insanity defense, although the court in its discretion might permit him to do so."<sup>121</sup> The court indicated that it will not reverse a lower court on this issue unless there has been an abuse of discretion which is clearly unreasonable.<sup>122</sup>

Another obstacle encountered by the defendant when initially raising the insanity defense is presenting sufficient evidence to meet the defendant's burden of proof. In Vermont, the defendant is presumed to be sane until he or she comes forward with evidence to the contrary.<sup>123</sup>

Sanity is the normal condition of the human mind. Consequently, the law, in reliance upon this self proving assertion, presumes at the outset of the trial, that the respondent in any given case possesses the requisite degree of mental capacity to

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test is also known as the right and wrong irresistible impulse test.

115. VT. R. CRIM. P. 11(a), 12(a).

116. The rules pertaining to notification are contained in VT. R. CRIM. P. 12.1(a) and (b).

117. *Id.*

118. The relevant text of VT. R. CRIM. P. 12.1(e) is as follows:

Sanctions. Upon the failure of either party to comply with the requirements of this rule, the court, except for good cause shown, shall exclude the testimony of any witness offered by such party as to the issue in question.

119. *See id.*

120. 136 Vt. 39, 383 A.2d 604 (1978).

121. *Id.* at 41, 383 A.2d at 606.

122. *Id.*

123. *State v. Warner*, 91 Vt. 391, 393, 101 A. 149, 150 (1917).

make him criminally responsible. And this presumption answers the administrative requirements of the law until evidence comes into the case from some source tending to show otherwise.<sup>124</sup>

However, the recent adoption of title 13, section 4801(b) of the Vermont Statutes Annotated has raised doubts as to the extent of the defendant's burden.

Section 4801(b) states that "[t]he defendant shall have the burden of proof in establishing insanity as an affirmative defense by a preponderance of the evidence."<sup>125</sup> This statute changed pre-existing case law which held that "[w]hen evidence appears in a criminal prosecution to indicate the [defendant] did not possess the requisite mental capacity to make him criminally responsible, it becomes the duty of the prosecution to establish, beyond a reasonable doubt, the [defendant's] sanity as an essential ingredient of the crime."<sup>126</sup>

As a result of this change, Vermont has joined those states which hold that the defendant has the burden of persuasion by a preponderance of the evidence as well as the burden of going forward.<sup>127</sup> The Vermont courts have not yet construed this legislative change<sup>128</sup> but it is clear that the intent of the legislature is to place the burden of proving insanity squarely on the defendant's shoulders.<sup>129</sup> This will force Vermont courts to determine whether the shift in the burden of proving insanity to the defendant violates the due process clause of the United States Constitution.<sup>130</sup>

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124. *Id.* at 393-94, 101 A. at 150.

125. VT. STAT. ANN. tit. 13, § 4801(b) (Cum. Supp. 1983).

126. *State v. Bishop*, 128 Vt. 221, 227, 260 A.2d 393, 398 (1969). The determination of whether or not the presumption of sanity had been removed was a question of law which was determined by the judge. *State v. Gokey*, 136 Vt. 33, 38, 383 A.2d 601, 603 (1978). If the judge determined that the issue was not raised by the evidence, the jury never received it. If the judge determined that the issue was raised by the evidence, the presumption disappeared and the jury never heard of it. *Id.*

127. See Note, *Allocating the Burden of Proof of Insanity*, 56 B.U.L. Rev. 499, 503 (1976).

128. However, in *State v. Harvey*, No. 1578-10-83 Rcr (Rut. D. Ct., Vt. Oct. 24, 1983) the defendant has raised an insanity defense which will force the courts to deal with the statute.

129. *Hearings on S. 28 Before the Vermont Senate Judiciary Comm.*, Bien. Sess., March 8, 1983, at 1-4 (testimony of John Easton, Attorney General of Vermont).

130. The constitutionality of title 13, section 4801(b) is beyond the scope of this note. For a good discussion on whether the shift in the burden of proving insanity to the defendant is constitutional see Note, *Allocating the Burden of Proof of Insanity*, 67 B.U.L. Rev. 499, 510-13 (1976). See also *Leland v. Oregon*, 343 U.S. 790 (1952); *In re Winship*, 397 U.S.

### B. Opinion Testimony

Once the issue of sanity is properly raised before the court,<sup>131</sup> either party may attempt to prove or disprove the defendant's mental state by introducing opinion testimony from either expert or lay witnesses.<sup>132</sup> In the case of expert testimony, the court must "in the first instance, [judge] whether witnesses introduced as experts possess sufficient skill to entitle them to give an opinion, it is for the jury to determine from the testimony whether such experts have sufficient skill to render their opinion of any importance."<sup>133</sup>

The judge's preliminary determination under rule 104(a) of the Vermont Rules of Evidence,<sup>134</sup> is made before the expert's testimony is received into evidence.<sup>135</sup> "The usual manner of presenting the qualifications of an expert is by preliminary examination and cross-examination in which the specific knowledge, training, or experience which he possesses is demonstrated and tested."<sup>136</sup>

The competency of an expert witness involves three questions: 1) whether the "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue";<sup>137</sup> 2) whether the expert "in lieu of, or in addition to, direct perception, [is] qualified by knowledge, experience, or training on the subject as to which he will testify";<sup>138</sup> and 3) whether the basis of the expert's opinion is one "reasonably relied upon by experts in the particular field in forming opinions or

358 (1970); *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *Patterson v. New York*, 432 U.S. 197 (1977).

131. See *supra* notes 115-22 and accompanying text.

132. Vermont allows for expert testimony by statute. VT. STAT. ANN. tit. 12, § 1643 (1973). The text reads as follows:

An expert witness may be asked to state his opinion based on the witness' personal observation, or on evidence introduced at the trial and seen or heard by the witness, or on his technical knowledge of the subject, without first specifying hypothetically in the question the data on which this opinion is based. On direct or cross-examination, such expert witness may be required to specify the date on which his opinion is based.

This statute allows the proponent of evidence to forego the necessity of using hypothetical questions to elicit expert testimony, although the proponent may still do so if he desires. *Tinney v. Crosby*, 112 Vt. 95, 99, 22 A.2d 145, 147 (1941).

133. *State v. Bishop*, 128 Vt. 221, 228, 260 A.2d 393, 398 (1969).

134. VT. R. EVID. 104(a). Rule 104(c) provides for these hearings to be conducted outside the presence of the jury "when the interests of justice require." *Id.* at 104(c).

135. *State v. Stevens*, 137 Vt. 473, 476, 408 A.2d 622, 624 (1979).

136. VT. R. EVID. 702 (reporter's notes at 389-99).

137. VT. R. EVID. 702.

138. *Id.*

inferences upon the subject . . . ."<sup>139</sup> Trial judges have broad discretion in making these determinations<sup>140</sup> and they will not be reversed unless their ruling is erroneous or is founded upon an error of law.<sup>141</sup>

The first question is one which is easily answered and involves the simple determination of whether the expert testimony will be helpful to the jury.<sup>142</sup> The second question requires proof of an expert's qualifications. This proof is not limited to the educational expertise of the witness but may be satisfied by his or her experience or training<sup>143</sup> or through a "peculiar skill and knowledge of the subject-matter that he is required to give an opinion upon."<sup>144</sup>

The judge's final determination requires a finding that the basis of an expert's opinion is one which is "sufficiently established to have gained general acceptance in the particular field in which it belongs."<sup>145</sup> Rule 703 of the Vermont Rules of Evidence calls for a similar analysis.<sup>146</sup> The case law in Vermont has not directly addressed this issue,<sup>147</sup> but it is probable that an analysis similar to that used in *United States v. Frye*<sup>148</sup> would be used.<sup>149</sup>

Lay opinion testimony<sup>150</sup> is usually admissible when it relates

139. Vt. R. EVID. 703.

140. *O'Bryan Constr. Co. v. Boise Cascade Corp.*, 139 Vt. 81, 89-90, 424 A.2d 244, 248 (1980).

141. *State v. Beshaw*, 134 Vt. 347, 349-50, 359 A.2d 654, 656 (1976); *State v. Stevens*, 137 Vt. 473, 477, 408 A.2d 622, 624 (1979).

142. See generally II WEINSTEIN & BERGER, EVIDENCE ¶ 702[02] (1981).

143. *In re New England Tel. & Tel.*, 134 Vt. 527, 536, 382 A.2d 826, 833 (1978).

144. *State v. Stevens*, 137 Vt. 473, 477, 408 A.2d 622, 624 (1979) (quoting *State v. Phair*, 48 Vt. 366, 377 (1875)).

145. *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).

146. See *supra* text accompanying note 139.

147. See, however, *Cadel v. Sherburne Corp.*, 139 Vt. 134, 425 A.2d 92 (1980), in which the Vermont Supreme Court held that a statement made by an expert which indicated that no experts in the field of ski binding safety disagreed with his analysis, was inadmissible as hearsay. *Id.* at 136, 425 A.2d at 547. This holding does not involve the question of whether the expert's opinion was based on a generally accepted practice.

See also *Dufresne-Henry Eng'g Corp. v. Gilcris Enter., Inc.*, 136 Vt. 274, 388 A.2d 416 (1978) in which the Vermont Supreme Court disallowed expert testimony because there was no basis for an opinion, *id.* at 277, 388 A.2d at 418, not because the expert's opinion was based on unaccepted practices.

148. 293 F. 1013, 1014 (D.C. Cir. 1923).

149. But see *United States v. Williams*, 583 F.2d 1194 (2d Cir. 1978) where the court rejected the *Frye* test in favor of a weighing process. The court balanced the probativeness, materiality, and reliability of the expert testimony against the tendency of such evidence to mislead, prejudice, or confuse the jury. *Id.* at 1198.

150. Vt. R. EVID. 701 states:

to the defendant's mental state at the time of the crime and the lay witness has personal knowledge from observation of, or conversation with, the defendant.<sup>161</sup> However, in *State v. Lapham*,<sup>163</sup> the Vermont Supreme Court acknowledged the traditional danger<sup>162</sup> inherent in opinion testimony when it relates to the issue of insanity. To safeguard against this abuse, the court required that "there must be some prior acquaintanceship or contacts between the lay witness and the defendant which forms a reasonable basis to justify the opinion sought to be introduced concerning insanity."<sup>164</sup>

It is generally accepted in Vermont that once the defendant has raised the question of insanity by introducing opinion testimony which speaks to the defendant's mental state, the prosecutor may cross-examine the lay or expert witness on any and all issues which bear on the mental state of the defendant.<sup>165</sup> In an early Vermont Supreme Court case, *State v. Warner*,<sup>166</sup> the court stated:

When a respondent puts his mental condition in issue by the introduction of evidence tending to show his insanity, he opens an inquiry that may take a very wide range; how wide, depends upon the circumstances of the case in hand. . . . Broadly speaking, his whole life may be canvassed for evidence bearing upon the question; and his ancestry and family

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If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

151. A non-expert witness may give his opinion as to the sanity or insanity of another, when based upon conversations or dealings which he has had with such person, or upon his appearance, or upon any fact bearing upon his mental condition with the witness' own knowledge and observation, he having first testified to such conversations, dealings, appearance or other observed facts, as the basis for his opinion.

*State v. Bishop*, 128 Vt. 221, 228, 260 A.2d 393, 398 (1969). Another Vermont case, *State v. Smith*, 136 Vt. 520, 396 A.2d 126 (1978), firmly endorsed this by saying "[c]ertainly it has always been the law in this state that where relevant and based upon appropriate knowledge and observation, lay testimony as to the sanity or insanity is fully admissible." *Id.* at 525, 396 A.2d at 129.

152. 135 Vt. 393, 377 A.2d 249 (1977).

153. One of the traditional problems with such testimony is the concern that it usurps the function of the jury, which is to draw inferences from the facts. The danger is that the jury will not exercise independent judgement but will instead adopt the opinion of the witness. *McCORMICK ON EVIDENCE* § 12 (1972 & Supp. 1978).

154. *Lapham*, 135 Vt. at 402, 377 A.2d at 254.

155. See *State v. Kelsie*, 93 Vt. 450, 453, 108 A. 391, 392 (1919); *State v. Warner*, 91 Vt. 391, 392, 101 A. 149, 150 (1917).

156. 91 Vt. 391, 101 A. 149 (1917).

history may be investigated.<sup>157</sup>

When a trial court rules on the extent of cross-examination, the Vermont Supreme Court hesitates to reverse the decision in the absence of a clear abuse of the lower court's discretion.<sup>158</sup>

### C. Doctor-Patient Privilege

To what extent can counsel cross-examine a court ordered psychiatrist on conversations he or she had with the defendant? In *State v. Oakes*,<sup>159</sup> this question was addressed after the defendant had raised the issue of insanity. The Vermont Supreme Court determined that the defendant's physician-patient privilege was not applicable when the examination was given at the request of the state,<sup>160</sup> and was for the purpose of enabling an expert witness to testify at trial on the defendant's mental condition.<sup>161</sup> The court held that it was permissible for the prosecutor on direct examination to request the doctor to testify as to what the defendant said during the interview. However, in *State v. Lapham*,<sup>162</sup> also an insanity case, the court confined its prior holding in *Oakes* to court ordered examinations<sup>163</sup> and held that title 12, section 1612 of the Vermont Statutes Annotated extended the physician-patient privilege to all other situations where a doctor has interviewed a defendant-patient. Apparently the court will continue to allow a psychiatrist to testify as to what was said during an interview, as long as the psychiatrist is court-appointed despite the contrary language in title 13, section 4816(c) of the Vermont Statutes Annotated.<sup>164</sup>

157. *Id.* at 392, 101 A. at 150.

158. *State v. Blair*, 118 Vt. 81, 96, 99 A.2d 677, 684 (1953).

159. 129 Vt. 241, 276 A.2d 18 (1971).

160. VT. STAT. ANN. tit. 13, § 4814 (1974) provides for court-ordered examinations.

161. *Oakes*, 129 Vt. at 256-57, 276 A.2d at 28.

162. 135 Vt. 393, 377 A.2d 249 (1977).

163. *Id.* at 403, 377 A.2d at 255.

164. This holding is interesting when viewed in light of VT. STAT. ANN. tit. 13, § 4816(c) (1974) which states that

[n]o statement made in the course of the examination by the person examined, whether or not he has consented to the examination, shall be admitted as evidence in any criminal proceeding for the purpose of proving the commission of a criminal offense or for the purpose of impeaching testimony of the person examined.

*Id.* Although the *Lapham* court acknowledged that "[r]ead as a whole, it is clear that the prohibition is directed at court-appointed examinations," *Lapham*, 135 Vt. at 402-03, 376 A.2d at 255, they refused to overrule *Oakes* and instead distinguished the two cases.

For a full discussion of the *Lapham* case and the current status of this area of the law in Vermont see Note, *Cross-Examination of Psychiatric Witnesses Under the Vermont Pa-*

## D. Admissibility of Narcoanalysis

The admissibility of narcoanalysis is an involved and complicated evidentiary issue. The issue has great potential for arising in PTSD cases<sup>165</sup> when the defendant has been interviewed by a psychiatrist while under the influence of a hypnotic drug, such as sodium amytal, or while under the influence of hypnosis.<sup>166</sup> For evidentiary purposes, hypnosis and sodium amytal are viewed in a similar manner.<sup>167</sup>

Information gained by a psychiatrist during a narcoanalytic interview may be introduced in one of three forms: 1) The proponent's expert witness bases his or her opinion as to the sanity of the defendant on information gained through the interviews and the proponent seeks to introduce this opinion into evidence. 2) The proponent seeks to introduce expert opinion based on narcoanalysis and in addition seeks to introduce statements made by the defendant while under the influence of the drugs or hypnosis. These statements are introduced *only* to demonstrate the basis of the expert's opinion. The proponent seeks to introduce this evidence through either the expert, while on the stand, or through video recordings of the interviews.<sup>168</sup> 3) The proponent seeks to introduce statements made by the defendant while under the influence of narcoanalysis as proof of the matter asserted.

The Vermont Supreme Court has not yet faced the admissibility of narcoanalysis. However, the issue was clearly presented in both *Percy* trials. In the first *Percy* trial, the court allowed the experts to give their opinions based upon narcoanalysis and, in addition, allowed the experts to testify on what they had observed during the course of the interviews. The court refused to allow videotapes of the interviews into evidence.<sup>169</sup> In the second *Percy* trial, the court admitted into evidence the same videotapes which were in dispute during the first trial, but only to establish the basis of the expert's opinions.<sup>170</sup> The critical difference between the two

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*tient Privilege When the Issue of Insanity is Raised*, 3 Vt. L. Rev. 191 (1978).

165. See *supra* notes 43-56, 60 and accompanying text.

166. See *supra* notes 85-93 and accompanying text.

167. McCORMICK ON EVIDENCE § 208 at 510 (1972).

168. For a general discussion on the problems of introducing and showing video tapes at trial, see V WEINSTEIN & BERGER, EVIDENCE ¶ 1001(2)[03] (1981).

169. Nov. 3, 1981 transcript at 14, *State v. Percy*, No. 1059-7-81 WrCr (Windsor D. Ct., Vt. Nov. 6, 1981).

170. *State v. Percy*, No. 350-7-82, slip op. at 30-31 (Lamoille D. Ct., Vt. Dec. 29, 1982).

cases was that in the second *Percy* trial, the judge was the trier of fact.

Other jurisdictions have considered this issue with varying results. The recent trend has been to allow expert opinion based on the results of narcoanalysis<sup>171</sup> but not to allow the introduction of statements made under the influence of hypnotic drugs as to the truth of the matter asserted.<sup>172</sup> Courts have split on whether statements made during an interview can be introduced to demonstrate the basis of an expert's opinion.<sup>173</sup>

One could argue that the introduction of these statements constitutes hearsay. However, while these statements may be subject to improper use by the jury, and thus excludible under rule 403 of the Vermont Rules of Evidence, they are not hearsay since they are being introduced merely as a basis of an opinion, not as substantive evidence.<sup>174</sup>

One author has proposed guidelines for assuring the reliability of these statements.<sup>175</sup> These guidelines focus on maintaining a minimum level of reliability while attempting to remove some of the hearsay dangers which exist in the introduction of such statements. While these guidelines will not provide a panacea, they will at least minimize the dangers while allowing the jury access to more information.<sup>176</sup>

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171. MCCORMICK ON EVIDENCE § 208, at 509-10 (1972).

172. "It appears to be the rule in all jurisdictions in which the matter has been considered that statements made under hypnosis may not be introduced to prove the truth of the matter asserted because the reliability of such statements is questionable." *People v. Shirley*, 31 Cal. 3d 18,33, 641 P.2d 775, 783 (1982) (emphasis in original).

173. The California rule is that such statements are admissible to show the basis of an expert's opinion. *People v. Blair*, 25 Cal. 3d 640, 665, 602 P.2d 738, 754 (1979). Arkansas does not allow such statements to be introduced on direct examination but allows reference to the interview during cross-examination to test the basis of the expert's opinion. *Parker v. State*, 270 Ark. 897, 606 S.W.2d 746, 748 (1980). The Illinois Supreme Court has held that answers given at the interview could not be admitted even on cross-examination. *People v. Myers*, 35 Ill. 2d 311, 220 N.E.2d 297, 305 (1966).

174. VT. R. EVID. 801(c) defines hearsay as: "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

175. J. Bugbee, *Developing Standards for the Admissibility of the Results of Narcoanalysis* (December 20, 1982) (unpublished manuscript available at the *Vermont Law Review*).

176. See *id.*

### E. Jury Instructions

Defendants' appeals after unfavorable verdicts are often brought on the grounds of improper jury instructions. The Vermont Supreme Court reads jury instructions as a whole to determine their validity.<sup>177</sup> "If the charge, taken as a whole and not piecemeal, breathes the true spirit of the law, and if there is no fair ground to say that the jury has been misled, then it ought to stand."<sup>178</sup>

The Vermont Supreme Court held in *State v. Smith*<sup>179</sup> that, where relevant, a judge should instruct the jury on diminished capacity and insanity when both instructions arise out of the same body of facts which relate to the defendant's mental capacity.<sup>180</sup> This court has also provided some specific guidance concerning instructions on the so-called "caveat paragraph."<sup>181</sup> In *State v. Hanson*,<sup>182</sup> the court found an instruction misleading which omitted the word "only" from an otherwise verbatim reading of title 13, section 4801(2) of the Vermont Statutes Annotated.<sup>183</sup> The court reasoned that this omission would lead a jury to consider the defendant's anti-social behavior as negating insanity even where it played only a small part in the defendant's overall mental state. However, a proper instruction on the "caveat paragraph" has been found to be valid, where it was not presented in such a way as to be "so complicated as to deprive [the] defendant of a fair trial."<sup>184</sup>

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177. *State v. Blair*, 118 Vt. 81, 97, 99 A.2d 677, 687 (1953). "Error is not to be read into the charge of the trial judge by isolating small segments of it. It is not to be considered piecemeal, but with an eye on its general content." *State v. Bishop*, 128 Vt. 221, 230, 260 A.2d 393, 399 (1969).

178. *State v. Gokey*, 136 Vt. 33, 36, 383 A.2d 601, 602 (1978). The Vermont Supreme Court reversed a lower court conviction on the ground that a jury instruction which instructed the jury on the presumption of sanity was misleading.

179. 136 Vt. 520, 396 A.2d 126 (1978).

180. *Id.* at 527-28, 396 A.2d at 130.

181. The term "caveat paragraph" was used in *State v. Smith*, 140 Vt. 247, 258, 437 A.2d 1093, 1098 (1981). This term refers to VT. STAT. ANN. tit. 13, § 4801 (2), which defines the terms "mental disease or defect." See *supra* text accompanying note 113.

182. 134 Vt. 227, 356 A.2d 517 (1976).

183. *Id.* at 232-33, 356 A.2d at 520.

184. *State v. Smith*, 140 Vt. 247, 259, 437 A.2d 1093, 1099 (1981). It should be noted that in this case the court allowed the instruction on the "caveat paragraph" because evidence had been introduced at trial on the defendant's past anti-social behavior. However, the court noted that "[h]ad no evidence been introduced concerning defendant's past delinquencies, our decision might be different. In that situation, reading the entire statute might have caused such confusion as to deprive defendant of his rights." *Id.*

### F. Appeals

Frequent attempts have been made in Vermont to reverse lower court convictions in insanity trials based on the lower court's denial of the defendant's request for a directed verdict, a judgment notwithstanding the verdict, or a new trial.<sup>185</sup> Appellate courts are reluctant to do so without a showing that the court below has committed an "error as a matter of law or a clear abuse of discretion."<sup>186</sup> In *State v. Bishop*,<sup>187</sup> the Vermont Supreme Court clearly indicated that in reviewing a defendant's appeal from a criminal conviction, the evidence below would be construed in the light most favorable to the non-moving party.<sup>188</sup> In addition, the court stated that "[t]he test laid down in passing upon these motions is whether the State introduced evidence fairly and reasonably tending to show respondent's guilt, or, in other words, whether the jury on the evidence was justified in finding the respondent guilty beyond a reasonable doubt."<sup>189</sup> Thus, a verdict will be upheld where any reasonable evidence of sanity exists, even though substantial evidence of insanity has been introduced at trial.<sup>190</sup> This is consistent with the understanding that the jury is the trier of fact and is charged with allocating the weight of the evidence.<sup>191</sup> A litigant will not win simply because he has presented a larger volume of evidence to the jury.

### CONCLUSION

The *Percy* trials<sup>192</sup> are excellent examples of the difficulty encountered in convincing a finder of fact of the genuineness of a PTSD insanity defense. Neither trial presented the kind of factual situation best suited to this defense, namely, a situation where the defendant suddenly explodes into violent behavior. In both trials the finder of fact was justified in finding that the evidence of plan-

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185. See *State v. Smith*, 140 Vt. 247, 427 A.2d 1093 (1978); *State v. Hanson*, 134 Vt. 222, 356 A.2d 517 (1976); *State v. Bishop*, 128 Vt. 221, 260 A.2d 393 (1969); *State v. Blair*, 118 Vt. 81, 99 A.2d 677 (1953); *State v. O'Connell*, 118 Vt. 55, 99 A.2d 705 (1953).

186. *State v. Hanson*, 134 Vt. 227, 230, 356 A.2d 517, 519 (1979) (citing WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL, § 551 (1969)).

187. 128 Vt. 221, 260 A.2d 393 (1969).

188. *Id.* at 227, 260 A.2d at 397.

189. *Id.*

190. *State v. Smith*, 140 Vt. 247, 258, 437 A.2d 1093, 1098 (1981).

191. LILLY, EVIDENCE § 95, at 363 (1978).

192. See *supra* notes 34-61 and accompanying text.

ning<sup>193</sup> and the extended period of time involved in the crimes<sup>194</sup> indicated a mental competency and awareness on the part of the defendant. It does not appear that the finder of fact was improperly swayed or confused by the extensive medical testimony involved in the *Percy* trials. Consequently, it is not enough to condemn the PTSD defense because it requires the use of extensive expert testimony.<sup>195</sup> This does no more than raise a problem common to all insanity pleas.<sup>196</sup>

No tenable reason exists for limiting a PTSD defense to mitigation or diminished capacity<sup>197</sup> when the defendant is truly overcome by a flashback at the moment of the offense. When a person reverts to a moment of traumatic upheaval, such a person can neither "appreciate the criminality of his conduct [n]or . . . conform his conduct to the requirements of law."<sup>198</sup> The flashback experience described by Dr. Friedman as an altered state of consciousness in which the individual is actually reliving a past traumatic experience<sup>199</sup> would certainly render an individual unable to conform his conduct to the requirements of the law. Moreover, the DSM-III lists PTSD as a personality disorder. Certainly this qualifies PTSD as a "mental disease or defect."<sup>200</sup>

To be sure, the severity of the PTSD symptoms and the causal link between the illness and the crime will have a bearing on whether the criminal defendant will be acquitted. These are problems of proof which have plagued courts and juries since Daniel M'Naghten attempted to assassinate the British Prime Minister.<sup>201</sup> These problems, however, are in no way unique to the PTSD insanity defense.

This country's system of criminal justice is premised on the

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193. See *supra* notes 41 and 59 and accompanying text.

194. See *supra* notes 41 and 49-52 and accompanying text.

195. Note, *Post-Traumatic Stress Disorder—Opening Pandora's Box?*, 17 *NEW ENG. L. REV.* 91, 114 (1981).

196. See 2 J. STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 127-28 (1883); R. ARENS, *INSANITY DEFENSE* 67-75 (1974); Bazelon, *New Gods for Old: Efficient Courts in a Democratic Society*, 46 *N.Y.U. L. REV.* 653, 658-60 (1971); *United States v. Brawner*, 471 F.2d 969, 1003-06 (D.C. Cir. 1972).

197. See *supra* note 195 in which the author contends that the PTSD defense should be permitted only to show diminished capacity or sentence mitigation.

198. *VT. STAT. ANN.* tit. 13, § 4801(a)(1) (Cum. Supp. 1983).

199. See *supra* text accompanying note 76.

200. *VT. STAT. ANN.* tit. 13, § 4801(a)(2) (Cum. Supp. 1983).

201. *M'Naghten's Case*, 10 *CL. & FIN.* 200, 8 *Eng. Rep.* 718 (1843).

principle that some people are more blameworthy than others.<sup>202</sup> Truly insane people are better off receiving hospitalization and treatment rather than imprisonment, and the victim of a PTSD flashback is no exception to this rule.

*James Carroll*

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202. See A. GOLDSTEIN, *THE INSANITY DEFENSE* 9-22 (1967); 4 BLACKSTONE'S COMMENTARIES 21, 27 (1790); *United States v. Brawner*, 471 F.2d 969, 985-86 (D.C. Cir. 1972); *Morisette v. United States*, 342 U.S. 246, 250-52 (1952).