

Equal Justice Foundation **Violence And Veteran Courts**

CATCH, CONVICT, AND RELEASE

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If you were to trap a wolf who was foaming at the mouth and charging blindly, hit him with a big stick, then release the wolf without testing or treatment, you would be regarded as a madman and a danger to public safety. Yet that is a very close analogy to the present “*catch, convict, and release*” policy district attorneys and judges typically follow with veterans suffering from post traumatic stress disorder (PTSD) and traumatic brain injuries (TBI).

Driven by irrational anger and thoughts of suicide, unable to sleep and self medicating with alcohol or other drugs, haunted by nightmares and flashbacks, hypervigilant after too many patrols and too many IEDs, driving like one possessed, impotent so they seek their endorphin rush from other outlets than the loving they were looking forward to, afraid to go into crowded locations, and reacting violently to every loud noise or sudden awakening, there is very little surficial difference between a rabid wolf and a veteran suffering from a severe PTSD episode. And to have the police catch these veterans, often at great danger, beat them with a conviction for some crime of which they may or may not be guilty, and then turn them out on the street without testing or treatment, as is common practice now, is insane.

Yet because these men and, today, often women commit violent crimes they are considered beyond the pale for consideration by most of the 39 known veteran courts that supposedly exist to insure disabled veterans receive treatment rather than mindless convictions. This bigotry is particularly common if the offense is considered “*domestic violence*” (DV). Ideologues are loathe to admit that virtually every manifestation of PTSD that occurs while a combat veteran is in a relationship appears to be “*domestic violence*” or “*abuse*” under current law.

COLORADO SPRINGS AND A VETERAN COURT

Colorado Springs, in El Paso County, Colorado, is the center of a hub of five large military bases and veterans often stay or retire here in the shadow of Pikes Peak. There is no question that we also have thousands of combat veterans here returning after multiple combat tours in Iraq and Afghanistan with PTSD and TBI, as well as many veterans from previous conflicts.

After articles in Rolling Stone about the Fort Carson Murder Spree, the PBS documentary on The Wounded Platoon, and many other stories about veteran issues, Fort Carson is often referred to as the epicenter of these problems. But the same problems exist around any large military base today. Camp Lejeune and Camp Pendleton for Marines. Fort Bragg, Fort Hood, Fort Riley, Fort Leonard Wood, Fort Stewart, and all other Army bases where large infantry and armored units are stationed. Many Air Force bases where combat units are located, also have similar problems. But I’m most familiar with the problems and developments in Colorado Springs.

We also know that veterans frequently deny they have a problem and self-medicate with alcohol and other drugs. And 70% of active-duty military stationed in bases around Colorado Springs live off base. So it is long odds that when the nightmares, terrors, flashbacks, sleeplessness, irrational anger, and associated substance abuse lead them into trouble that they will end up in civilian courts. These are men and women trained and honed in combat and they are dangerous.

But does that mean civilian district attorneys and judges should treat veterans worse than wild animals?

How large is the problem?

Preliminary data indicate that between **75 and 85 active-duty military personnel are booked into the El Paso County jail every month**, as well as **175 to 185 discharged veterans**, for a total of **250 to 270 veterans per month**. Veterans comprise just over 10% of all arrests in El Paso County. Today probably

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half of the veterans arrested here suffer from moderate to severe PTSD and around 20% have TBI in addition.

Travis County (Austin), Texas, is also concerned about veteran incarcerations and in a study published in July 2009 found their jail had an average of 150 veterans per month over the 90 day study period. Emphasizing the tendency for veterans to reoffend, 32% of the veterans were arrested two or more times during the 90 day survey period. Of those with more than one, the average was 2.7 arrests. And often the veterans were charged with serious crimes, in 27% of cases were felony charges in Travis County, Texas.

In El Paso County, Colorado, at least 29% of the charges were for felonies in the preliminary data.

CONVICTING A VETERAN OF A CRIME

For five centuries English and, later, American law has required that to convict in a criminal trial prosecutors must prove to a jury beyond a reasonable doubt that the defendant acted willfully, knowingly, intentionally, or recklessly (*mens rea*) and that a criminal act was voluntarily committed (*actus reus*). Common sense tells us that accidents, nightmares, play, and similar actions are not criminal. The model penal code specifically describes what are considered involuntary acts and thus not criminal: (1) a reflex or convulsion; (2) a bodily movement during unconsciousness or sleep; (3) conduct during hypnosis or resulting from hypnotic suggestion; (4) a bodily movement that otherwise is not a product of the effort or the determination of the actor, either conscious or habitual.

Clearly prosecutors are often hard pressed to demonstrate to a jury that a veteran undergoing a flashback, lashing out in their sleep during a nightmare, coming up fighting when startled, or exhibiting other manifestations of PTSD, TBI, or other mental disorientation or dissociation, voluntarily or knowingly committed a crime beyond a reasonable doubt. If the veteran has a competent criminal defense attorney a common outcome is for the DA to simply dismiss the case after several months of expensive hell for the veteran without an evaluation or treatment.

The criminal “*justice*” system is ill-prepared to deal with the complications of problems characteristic of PTSD and TBI except by traditional methods of “*catch, convict, and release.*”

Some progress — one step forward

In June 2010 the 4th Judicial District Attorney (includes Colorado Springs and covers El Paso and Teller counties) finally put an end to the practice of railroading veterans and others in DV cases with a practice known as Fast Track. Under Fast Track anyone charged with domestic violence was required to enter a plea before ever being allowed to speak with a defense attorney or public defender.

Ending that barbaric practice is one step forward. Now defendants are given a video hearing before a magistrate and allowed to bond out after accepting a restraining order barring them from returning home. They are then due back in court after seven days to enter a plea after being given a chance to seek counsel.

But a step back is on the ballot

Demagogues financed by bail bondsmen have succeeded in putting on the November 2010 ballot a measure that would bar judges from giving defendants a personal recognizance bond in any violent crime. This measure has apparently been introduced in a number of states and in Colorado it is Proposition 102.

So any veteran unable to post bail, and there are many, would be kept in jail if this measure passes. Also, prosecutors in what is known as the Filthy Fourth (Colorado Springs) are noted for adding additional criminal charges in order to coerce frightened and innocent defendants into taking a plea bargain. A number of soldiers have told us that they were threatened with being kept in jail until trial 3-6 months later if they pled not guilty and demanded a jury trial.

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Where is the justice?

For far too many prosecutors justice isn't a consideration. They are paid to get convictions and to do that the last thing they usually want is a jury trial. What we find then is that they stack on charges in order to coerce a plea bargain from the defendant.

Consider the recent case of Army combat medic Thomas Delgado. After he repeatedly sought help for his PTSD he attempted to commit suicide. His wife did her best to stop him after finding him in the bathtub with a gun in his mouth. She ripped the gun away and in the ensuing scuffle she suffered a broken nose and other injuries. Obviously she needed help but when police arrived he was arrested and charged with first-degree attempted murder after deliberation, second-degree attempted murder, committing a violent crime while using a weapon, committing a violent crime that resulted in death or injury, felony menacing, second-degree assault (all felonies), as well as misdemeanor third-degree assault and criminal mischief with damages of less than \$500.

How did it come to this — a decorated war veteran who sought help, as did his wife, is now charged with trying to kill her after she stops him from committing suicide?

After a year-and-a-half of fighting with the civilian courts and being medically discharged from the Army in March 2010, Delgado accepted a plea bargain for second-degree assault involving domestic violence, a felony, and misdemeanor criminal mischief. He was given a four-year deferred sentence, four years probation, a \$2,400 fine, ordered to pay \$3,217.32 restitution, and placed under a mandatory restraining order. He was never formally charged with first-degree murder and all the other charges were dismissed.

As an external observer it seems obvious to me that the major charges were made simply to coerce a plea bargain. I had the opportunity to hear his wife's testimony first-hand and she would have made an excellent witness for the defense, as many women in these cases do. Read Delgado's story at ejfi.org/DV/dv-41.htm and ask yourself if you sat on a jury for this veteran whether you would vote to convict?

Catch, convict, and release. Another veterans's life ruined!

Does catch, convict, and release promote public safety?

The basic purpose of convicting a criminal of a crime is to deter them from committing further crimes and to provide for the public safety. Unfortunately, the "justice" system in these cases does just the opposite on the whole. The present policy of "catch, convict, and release" virtually ensures the veteran will reoffend, often with even more violent crimes.

Preliminary data show that 27% of veterans arrested in El Paso County have been arrested two or more times. And many leave the county after their lives are ruined by specious convictions here so we are exporting the problems to their hometowns.

In Thomas Delgado's case, since his conviction he has been charged on four separate occasions in Douglas and Jefferson counties with offenses ranging from speeding, DUI, driving without a license, careless driving resulting in death or injury, and leaving the scene of an accident. Clearly his conviction has not deterred him from committing further crimes and he is a danger to public safety.

Surely we can do better by our veterans still suffering from the horrors of war!

ALTERNATIVE SENTENCING IN COLORADO

In 2002 the Colorado legislature provided for alternative sentencing for defendants. They provided two clear options that frequently apply when veterans are charged.

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Deferred prosecution

The first is deferred prosecution as defined under C.R.S. § 18-1.3-101. That statute provides that a court may, prior to trial or entry of a plea of guilty and with the consent of the defendant and the prosecution, order the prosecution of the offense to be deferred for a period not to exceed two years. During that time, the court may place the defendant under the supervision of the probation department and may require the defendant to undergo counseling or treatment for the defendant's mental condition, or for alcohol or drug abuse, or for both such conditions.

The obvious legislative intent in passing the deferred prosecution statute was to delay prosecution for a probationary period that, if completed satisfactorily, would require that the charge against a defendant be dismissed with prejudice by the trial court. While not every veteran arrested would qualify for deferred judgement, surely judgement could be deferred while the veteran's condition is evaluated?

This statute sounds like it is made to order for dealing with many cases of veterans found to be suffering from PTSD or TBI. It would get the defendant into the treatment they need, it gives the veteran great incentive to remain law abiding, and complete the treatment in order to avoid a conviction that could well destroy their lives and careers.

If successful the only thing that shows on a veteran's record is that they were arrested but the case was dismissed. Conversely, if the veteran is unsuccessful or commits another crime the prosecutor can easily bring the original case to trial with the same, or greater probability of prevailing as if judgement had not been deferred.

Unfortunately, I have never seen a case where deferred prosecution was allowed by the district attorney for a veteran. As it presently stands the veteran and other civilian courts here require a guilty plea before the veteran is offered treatment.

Deferred sentencing

Prosecutors are paid to get convictions and, typically, to hell with justice. Now a baby DA just out of law school isn't going to make brownie points by letting some dirtbag veteran accused of beating his wife off with treatment, no matter how badly the veteran needs it, or how loudly the wife hollers about what really happened. Of course in most of these cases that I've seen go to trial by jury, the baby DA typically has about a snowball's chance in hell of getting a conviction if the veteran can afford a competent criminal defense attorney and the "victim" testifies on the veteran's behalf. And unless the veteran takes a plea bargain there is better than a 90% chance a domestic violence (DV) case will be dismissed regardless.

Therefore, what happens in practice is the DA stacks on multiple charges, as in the Thomas Delgado case, until the veteran looks like a clone of Jack the Ripper to the public. Then they offer a plea bargain so they get the brownie points of a conviction without having to prove their case.

To sweeten the deal the prosecutor will also offer a "deferred sentence." At the same time the Colorado legislature provided for deferred prosecution they also revised the deferred sentencing statute. C.R.S. § 18-1.3-102 provides that In any case in which the defendant **agrees to plead guilty** the court has the power with the written consent of the defendant and his or her attorney and the district attorney, to continue the case for a period not to exceed four years from the date of entry of a guilty plea to a felony or two years from the date of entry of a plea to a misdemeanor for the purpose of entering judgment and sentence.

During that time the court may place the defendant under the supervision of the probation department and require that they perform community service, make restitution, make cash donations to a charity, or such other conditions as the judge feels are warranted. For example, if the charge involves domestic violence the defendant will typically be barred from returning home and the mandatory restraining order continued.

Note that these conditions, and any treatment for the veteran, are only put in place at the sentencing

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hearing. In our judicial district those hearings usually occur 3 to 6 months after a plea is entered. Even if a plea of guilty is entered at the defendant's first hearing it will be upwards of six months or more before any treatment will be ordered and begun. Note that in the Thomas Delgado case sentencing didn't occur for over a year after he was charged. Everything we know about PTSD and TBI indicates that, to be effective, treatment must be started as early after symptoms are recognized as possible, not six months to a year later after the veteran has been traumatized by their experience within the bowels of the "justice" system and their lives destroyed.

If, and only if, the defendant complies fully with all conditions imposed by the court the guilty plea will be withdrawn and the charges against the defendant dismissed with prejudice at the end of the sentence. However, at any time during the probation the district attorney or probation officer may claim the defendant violated the conditions of the sentence and revoke the deferred sentence. The defendant has no right to a jury trial for such revocation and the prosecution need only show a preponderance of evidence that the conditions of the sentence were violated. And by accepting a plea bargain the veteran surrenders any rights to an appeal of their conviction.

Even if the veteran successfully completes the deferred sentence and the charges are dismissed their public record will still show they pled guilty to the crime.

If you plead guilty to a crime, no matter what smoke screen it hides behind, the public is entitled to believe and treat you as though you are, in fact, guilty.

Why shouldn't they be treated as a convicted criminal? They said they were guilty and the prosecutor gets yet another brownie point for being "tough on crime" and getting a conviction.

I wonder how the mothers and fathers, sisters and brothers, wives and girlfriends, and other relatives feel about their sons and daughters, who valiantly fought for their country, being sacrificed so that some district attorney can rack up brownie points? And it is worth noting that it is extremely rare to find a prosecutor who is a veteran.

Sealing criminal records

Another lie told to veterans is that after they plead guilty and complete their deferred sentence that their records can be sealed. First, in the present age of databases and data harvesting by numerous companies it is virtually impossible to hide one's background. Second, it is the declared policy of the State that all criminal records are public records and that is necessary and essential for the public safety.

In 2008 the Colorado legislature looked at the issue of allowing convicted criminals to "seal" their records and defined the conditions in C.R.S. § 24-72-308.5. In order to "seal" a criminal record a petition cannot be filed until ten or more years after the date of the final disposition of all criminal proceedings against the defendant or the release of the defendant from supervision concerning a criminal conviction, whichever is later. Additionally, the individual cannot have been charged or convicted of any criminal offense in the ten or more years since the date of the final disposition of all criminal proceedings or sentences.

So a veteran suffering from PTSD, TBI, wounds, diseases, or other mental trauma from combat must be a perfect angel for 12 to 14 years minimum in order to have their record sealed by the court after pleading guilty, even if given a deferred sentence. But in the interim they probably won't be able to get a job, security clearance, etc., because their record shows they pled guilty to a heinous crime.

Lacking employment, often homeless as a result, it seems extremely likely that they will turn to criminal activities, and statistics bear that out. How can we expect anything but these veterans turning up in jail again and again? And it was after observing veterans sinking ever deeper into the morass of the "justice" system that Judge Robert Russell established the first veterans court in January 2008.

But if a deferred sentence and a lie that the veteran's record will be sealed is the best a veteran court

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can do, and that, in the main, is what they do now, then we are wasting time, money, and the lives of these valiant men and women who have sacrificed so much for their country.

*Remember that the fundamental objective of any court is to promote public safety.
Veteran courts, as presently constituted, appear to be doing exactly the opposite!*

WHAT A VETERAN COURT MUST DO TO HELP VETERANS AND PROMOTE PUBLIC SAFETY

The concept of a veteran court originated with Judge Robert Russell in Buffalo, New York, and after a year of planning the court became reality in January 2008. I have documented the efforts to open a veteran court in Colorado Springs beginning in July 2008. In *The War Against Veterans* I've pointed out why a special court is needed. Then in March 2010 I reviewed what's gone right and what's gone wrong with the Colorado Springs veteran court. These articles are available at ejfi.org/Press_releases.htm.

For speaking truth in the PBS special *The Wounded Platoon*, and other stories, former Marine and veteran-court pioneer Robert Alvarez was dismissed from his position as a leading advocate for veterans with the National Organization on Disability Army Wounded Warrior program.

On the plus side the El Paso County sheriff has made jail data available daily on active-duty military and veterans booked into the county jail and tabulating that data is now moving ahead. So the basic problems of how many veterans, and what crimes the veterans court must deal with is now being documented.

In the 2010 session the Colorado legislature passed enabling legislation for veteran courts thanks to Rep. Marsha Looper.

The pilot veteran court in Colorado Springs was formally stood up in February 2010 and meets Thursday afternoons in Judge Crowders courtroom at 1430 hours and, unlike most veteran courts, some violent cases are being admitted. However, at present only felony crimes are considered and admittance is dependent on first pleading guilty to the charges. Unless a veteran is quite obviously guilty they are better off avoiding the veteran court and going to a jury trial. About half of the candidates apparently turn the opportunity of proceeding in veteran court down.

Rumor has it that the peer specialist/mentor program has received a number of volunteers but that they are not yet trained and linking up with offenders in the veteran court as desired.

However, program management has seemingly collapsed. There have been no meetings or communications by the coordinator or program manager with the advisory board for months now.

Guy Gambill continues his efforts to coordinate veteran courts across the country and, at last report, there are now 39 veteran courts. However, all of them that I know about operate on a drug-model and require a guilty plea first for admittance. Nor do they deal with veterans who have committed violent crimes. In the Travis County survey at least 37% of offenses were for violent crimes. In El Paso County preliminary data suggest violent crimes are close to half and 28% of the arrests so far are active-duty military. So, as currently constituted, veteran courts are not a solution to the problems and, in many cases, hurt veterans who would be infinitely better off without a conviction.

Key components of a veteran court

In establishing his veteran court Judge Russell set forth a number of key components for such courts and they are worth restating:

(1) Veteran Courts integrate alcohol, drug treatment, and mental health services with justice system case processing.

This requires a team approach and requires the cooperation and collaboration of the traditional partners found in drug- and mental-health treatment courts with the addition of the VA, veterans and veterans family support organizations, and volunteer veteran mentors.

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(2) Using a nonadversarial approach, prosecution and defense counsel promote public safety while protecting participants' due process rights.

(3) Eligible participants are identified early and promptly placed in the Veteran Court program.

Early identification of veterans entering the criminal justice system is an essential component of a veteran court. Likely the trauma of the events combined with the arrest will act to worsen the veteran's condition. The Travis County study (p. 10) presents the interesting idea of making evaluation and treatment a condition of bond.

(4) Veteran Courts provide access to a continuum of alcohol, drug, mental health and other related treatment and rehabilitation services.

While primarily concerned with criminal activity, substance abuse, and mental illness, the Veterans Court team also consider co-occurring problems such as primary medical problems, transmittable diseases, homelessness, basic educational deficits, unemployment and poor job preparation, spouse and family troubles—especially domestic violence—and the ongoing effects of war-time trauma.

Veteran peer mentors are essential to the Veterans Court team. Veteran peer mentors interaction with the defendants is essential throughout treatment and greatly increases the likelihood that a veteran will remain in the program and improves the veteran's chances for sobriety and law-abiding behavior.

(5) Abstinence is monitored by frequent alcohol and other drug testing.

(6) A coordinated strategy governs Veterans Court responses to participants' compliance.

There must be both a carrot for compliance with the treatment and a stick to punish unacceptable behavior by veterans in the program.

(7) Ongoing judicial interaction with each veteran is essential.

Once a veteran is admitted to the veteran court by the district attorney, the judge is the leader of the Veterans Court team. Ongoing judicial supervision also communicates to veterans that someone in authority cares about them and is closely watching what they do.

(8) Monitoring and evaluation measure the achievement of program goals and gauge effectiveness.

Management and monitoring systems to provide timely and accurate information about program progress are essential.

(9) Continuing interdisciplinary education promotes effective Veterans Court planning, implementation, and operations.

All Veterans Court staff, affiliated programs, and volunteers should be involved in education and training. Education and training programs help maintain a high level of professionalism, provide a forum for solidifying relationships among criminal justice, Veteran Administration, veteran volunteer mentors, and treatment personnel, and promote a spirit of commitment and collaboration.

(10) Forging partnerships among Veteran Courts, Veteran Administration, public agencies, and community-based organizations generates local support and enhances Veteran Court effectiveness.

Because of its unique position in the criminal justice system, Veteran Courts are well suited to develop coalitions among private community-based organizations, public criminal justice agencies, the VA, veterans and veteran's families, support organizations, and mental health treatment providers.

Forming such coalitions expands the continuum of services available to Veteran Courts participants and informs the community about Veteran Court's concepts. The Veterans Court fosters system-wide involvement through its commitment to restorative rather than blind punitive justice, shares responsibility and participation of program partners and thereby greatly enhances public safety.

Why the Colorado Springs veteran court is failing

When I note that the funding for the Colorado Springs veteran court was given to the Colorado Department of Human Services, those of you who have dealt with child protective service (CPS) or child support enforcement (CSE) will understand why so few of Judge Russell's key components for a veterans court have been implemented two years after we began.

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CONCLUSIONS

All available evidence shows that if treatment for PTSD is to be effective it should begin as soon after the condition is recognized as possible. Combat-tested veterans are tough and proud and reluctant to admit they have any weakness. So the first time they may admit they have a problem is when they get booked into jail.

PTSD and TBI are not hard to recognize in most cases and the Travis County, Texas, suggestion that a condition of bond for every veteran who ends up in jail is an evaluation for PTSD, TBI, and other combat-related disabilities has merit. This is certainly within the bounds of judicial discretion. That would ensure early recognition and provide a large step forward for determining which veterans should be admitted to veteran court very quickly. And it would get those who need it into treatment almost immediately, an essential component for success of a veteran court. And evaluation is certain to be cheaper and more effective than keeping poor and homeless veterans in jail if they can't raise a cash bond as Proposition 102 proposes here and elsewhere, or as our prosecutors are prone to do in any case.

It is clear that once a conviction is entered on a veteran's record they have little incentive to comply with any treatment program and calling the conviction a "*deferred sentence*" in no way lightens the lifetime burden or penalties. Nor do such faux convictions serve to protect public safety.

Experience in cases like Thomas Delgado's clearly show that stacking the charges and then giving the veteran a plea bargain does not make law abiding citizens of them or provide safety for the public. And lying to these veterans, telling them that after they complete the "*deferred sentence*" their records can be sealed and no one will know they pled guilty to a heinous crime simply adds insult to injury.

Catch, convict, and release to the detriment of public safety

With the current practice of "*catch, convict, release*" available data show many veterans will be back in jail in short order, often for an even more violent crimes as is quite evident in the Rolling Stone article on The Fort Carson Murder Spree. In Travis County, Texas, 32% of the veterans were rearrested within 90 days. In El Paso County, Colorado, preliminary data show about the same rate of rearrest even though many of the active-duty military who are convicted are chaptered out and move away within months.

Perhaps someone could explain how the present policy of "*catch, convict, and release*" deters crime and protects the public?

Restorative rather than punitive justice

Colorado law explicitly provides for deferred prosecution. The obvious legislative intent in passing the deferred prosecution statute was to delay prosecution for a probationary period that, if completed satisfactorily, would require that the charge against a defendant be dismissed with prejudice by the trial court.

Obviously not all criminal cases are suitable for deferred prosecution but there seems to be no reason why prosecution can't be deferred long enough to evaluate veterans for combat-related disabilities in most cases and treat rather than convict when appropriate.

Other than some sadistic DA wanting to build their conviction statistics, as one battalion commander at Fort Carson stated to me, there is no conceivable reason many veterans couldn't be offered deferred prosecution while they were treated. That would give them great incentive to complete the treatment, remain law abiding while doing so, and add immeasurably to public safety.

Further, selective use of deferred prosecution would allow veterans to keep their jobs, their security clearances, possibly their families, and go on with their lives as law abiding citizens after, hopefully, learning a valuable lesson and being treated for their combat-related problems by a compassionate court and a society that cares deeply about the welfare of its military veterans.