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PTSD IS A LIMITED DEFENSE IN FEDERAL COURT:

DEFENDANTS WITH PTSD GENERALLY FAIL IN ASSERTING THE AFFIRMATIVE INSANITY DEFENSE, AND THE DIMINISHED CAPACITY FAILURE OF PROOF DEFENSE IS ONLY APPLICABLE IN LIMITED INSTANCES

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I. INTRODUCTION

Throughout American history there has been a lack of understanding mental illness within the criminal justice system. However, largely beginning in the twentieth century, mental health, in general, and the role it plays in the criminal justice system, evolved drastically. Specifically, the first official diagnosis of Post-Traumatic Stress Disorder ("PTSD") was during the Vietnam War.[1] In the years since then, the effects of PTSD have become more widely understood. Although PTSD is now better understood, the issue of how PTSD affects a defendant's criminal liability is still unclear. Particularly, it has not been precisely answered what role PTSD plays in a federal criminal defense.

Generally, there are two defensive avenues that a defendant can take when asserting a mental disease or defect as a defense against a crime in federal court: (1) the affirmative insanity defense,[2] and (2) the failure of proof diminished capacity defense.[3] Moreover, there is growing conflict as to whether PTSD is covered by the insanity defense, the diminished capacity defense, or whether PTSD is appropriately covered at all.

The concept of the insanity defense is commonly known by the general public, though it is not always accurately understood. The insanity defense test applied in federal court is narrow and extremely difficult to prove. Nonetheless, this defense is appealing to defendants with PTSD because if the defendant prevails, he will be excused of the crime. However, it is risky because if the defense fails, the defendant will be convicted of the crime charged, despite the fact that he suffered from PTSD. While in very limited instances a defendant may succeed by asserting PTSD as a basis for the insanity defense in federal court, it is much

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[1] Matthew Tull, *The Rates of PTSD in Military Veterans*, VERYWELLMIND, (Sept. 30, 2020, 3:00 PM) https://www.verywellmind.com/rates-of-ptsd-in-veterans-2797430#citation-1.

[2] *See* 18 U.S.C. § 17.

[3] *See* Univ. of Minn. Libraries Publ'g, Criminal Law, Ch. 5.1: Criminal Defenses (2012).

more common that the defense will fail.[4] Thus, PTSD so rarely employs a defendant with the ability to assert a successful claim of the affirmative insanity defense, a defendant with PTSD is not generally covered by the insanity defense in federal court.[5]

The diminished capacity failure of proof defense may appear to be the better defensive argument because it is seemingly easier to prove than the affirmative insanity defense. However, this defense is limited and more difficult to prove than one would generally expect.[6] This defense places an emphasis on the required mental state articulated in the crime's statute and allows for a defendant to be acquitted if he lacks the requisite state of mind. Yet, the defendant will generally be found guilty of a lesser crime.[7] Furthermore, the diminished capacity defense is only applicable where the defendant meets specific requirements. Particularly, if a defendant has been charged with a specific intent crime, was suffering from PTSD at the time of committing the crime, and his PTSD directly negates the required mental state of that crime, the diminished capacity defense is almost certain to succeed. However, this defense is limited, therefore, only available to a handful of defendants that suffer from PTSD.

Accordingly, PTSD as the basis of a defense currently provides limited protection to defendant's suffering from PTSD. Although defendants with PTSD may successfully assert insanity in very rare instances and defendants may successfully assert the diminished capacity defense where very specific requirements are met, many defendants with PTSD will not successfully assert either of these defenses. Thus, the current implementation of the insanity defense and the diminished capacity defense at the federal level

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[4] Brooke Borders, *Veterans Imprisoned by the Violent Shadows of Military War Time: The Expansion of the Insanity Defense to Include Post-Traumatic Stress Disorder*, 36 J. LEGAL MED. 73, 84-5 (2015).
[5] *Id.* at 85.
[6] The Supreme Court has determined that defendants asserting the diminished capacity defense face an additional evidentiary bar when trying to introduce expert testimony of his or her mental disease or defect.
[7] State v. Lowe, 318 S.W.3d 812, 819 (Mo. Ct. App. 2010).

leaves many cracks in the criminal justice system for defendants with PTSD to fall through.

II. PTSD GENERALLY

The information regarding PTSD and the effect it commonly has on those who suffer from it has expanded drastically in recent years. With this expansion, what PTSD is, who can have PTSD, and how PTSD is triggered has become better understood and more accepted in the criminal justice system. Specifically, it is now evident that PTSD may reduce a defendant's criminal culpability.

A. PTSD DEFINED

PTSD is a psychiatric disorder that begins after a traumatic event,[8] and causes a "lasting consequence of traumatic ordeals that cause intense fear, hopelessness, or horror."[9] Specifically, PTSD "may occur in people who have experienced or witnessed a traumatic event such as a natural disaster, a serious accident, a terrorist act, war/combat, or rape or who have been threatened with death, sexual violence or serious injury."[10]

B. ANY PERSON CAN HAVE PTSD

Any person, regardless of age, gender, or profession, may suffer from PTSD if that person has "experienced an emotional or physical trauma of the highest magnitude."[11] Accordingly, trauma of the highest magnitude generally refers to traumatic experiences including "war, rape, assault,

[8] *What is Posttraumatic Stress Disorder (PTSD),* AM. PSYCHIATRIC ASS'N, https://www.psychiatry.org/patients-families/ptsd/what-is-ptsd (last visited Sept. 1, 2020).
[9] *Posttraumatic Stress Disorder (PTSD),* WEDMD, https://www.webmd.com/mental-health/post-traumatic-stress-disorder#1 (last visited Sept. 1, 2020).
[10] AM. PSYCH. ASS'N*, supra* note 8.
[11] Marjorie A. Shields, Annotation, *Posttraumatic Stress Disorder (PTSD) as a Defense to Murder, Assault, or other Violent Crime*, 4 A.L.R. 7th 5 (2020).

accidents, fires, and natural disasters," which are stressors that commonly lead to PTSD.[12]

1. COMBAT VETERANS

A significant amount of combat veterans—regardless of the war they fought in—have suffered from PTSD.[13] During the Vietnam War, it became evident that exposure to combat situations negatively affected the mental health of those involved.[14] However, the magnitude of the effect on a soldier's mental health varies depending on other factors in a combat situation including what a soldier's specific duty was during the war, the politics surrounding the war, where the war was fought, and the type of enemy faced.[15]

The first diagnoses of PTSD (at the time it was referred to as combat fatigue, shell shock, or war neurosis) originated from observations of the effect of combat on soldiers that fought in Vietnam.[16] Since then, PTSD in combat veterans has been researched, studied, and has become better understood. Specifically, it has been found that the statistics regarding PTSD diagnoses in combat veterans vary depending on the war in which he or she fought.[17] Initially, 15% of Vietnam Veterans were diagnosed with PTSD; however, a more recent study estimated that approximately 30% of Vietnam Veterans suffered from PTSD in their lifetime.[18] Approximately 12% of Gulf War Veterans and approximately 11-20% of Veterans who served in Iraq or Afghanistan have PTSD in a given year.[19]

Thus, there is an abundance of evidence to show that combat veterans are common victims of PTSD. Furthermore, PTSD in combat veterans has overwhelmingly been accepted

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[12] *Id.*
[13] PTSD: National Center for PTSD, *How Common is PTSD in Veterans?,* U.S. DEP'T OF VETERANS AFFAIRS, https://www.ptsd.va.gov/understand/common/common_veterans.asp (last visited Sept. 30, 2020).
[14] Tull, *supra* note 1.
[15] U.S. DEP'T OF VETERANS AFFAIRS*, supra* note 13.
[16] Tull, *supra* note 1.
[17] U.S. DEP'T OF VETERANS AFFAIRS*, supra* note 13.
[18] *Id.*
[19] *Id.*

because the first PTSD diagnoses involved combat veterans and the trauma of war is rarely minimized. However, PTSD does not affect combat veterans alone.

2. WOMEN ASSAULT VICTIMS

Even though the earliest studies of PTSD were based on male combat veterans,[20] researchers eventually began to make connections between the trauma of male combat veterans and the trauma of female sexual assault victims.[21] This research ultimately led to the finding that a victim's sexual assault can lead to PTSD similar to that of a combat veteran, which then "led to more research on women's exposure to trauma and PTSD."[22] "The National Women's Study reported that almost one-third of all rape victims develop PTSD sometime during their lives and 11% of rape victims currently suffer from [PTSD]."[23] Additionally, Battered Women Syndrome or Battered Wife Syndrome has been identified, and overwhelmingly accepted, as a subcategory of PTSD.[24]

3. CHILDREN

Similarly, researchers have found that children and teens may develop PTSD where they have lived through a trauma that could have caused them or someone else to be killed or severely injured.[25] In fact, children may be at an

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[20] PTSD: National Center for PTSD*, How Common is PTSD in Women?,* U.S. DEP'T OF VETERANS AFFAIRS, https://www.ptsd.va.gov/understand/common/common_women.asp (last visited Sept. 2 2020).
[21] *Id.*
[22] *Id.*
[23] PTSD: National Center for PTSD, *Sexual Assault Against Females*, U.S. DEP'T OF VETERANS AFFAIRS, https://www.ptsd.va.gov/professional/treat/type/sexual_assault_female.asp#three (last visited Sept. 10, 2020).
[24] LENORE E. A. WALKER, THE BATTERED WOMAN SYNDROME, (3d ed. 2009).
[25]PTSD: National Center for PTSD, *How Common is PTSD in Children and Teens?,* U.S. DEP'T OF VETERANS AFFAIRS, https://www.ptsd.va.gov/understand/common/common_children_teens.asp (last visited Mar. 10, 2020).

even higher risk of developing PTSD or a related anxiety disorder, because children lack the experience and maturity to process traumatic events on their own.[26]

4. VICTIMS OF NATURAL DISASTERS

Another common cause of PTSD is a natural disaster, which can affect men, women, and children alike. Up to 25% of those who are impacted—directly or indirectly—by a natural disaster, such as a hurricane, tornado, earthquake, etc., may be diagnosed with PTSD.[27] The mental health effects of a natural disaster, which are risk factors for developing PTSD, arise from displacement, relocation, property loss, and personal financial loss.[28]

5. COVID-19

Due to the global pandemic that surfaced in the United States in early 2020, there are growing concerns about the increased risk of COVID-19 patients and healthcare workers developing PTSD. Specifically, "COVID-19 has quickly become a global health emergency resulting in not only physical health concerns but also psychological concerns as people are exposed to unexpected deaths or threats of death."[29] Particularly, "healthcare workers who have close contact with COVID patients are not only exposed to the virus on a regular basis, but they may also be witnessing increased illnesses, deaths, and supply shortages."[30] Furthermore, "patients admitted to the hospital with COVID-19 experience social isolation, physical

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[26] *PTSD: The Emotional Damage of Natural Disasters*, SUNRISE HOUSE TREATMENT CTR., https://sunrisehouse.com/ptsd/ptsd-natural-disasters/ (last visited Feb. 6, 2021).
[27] *Id.*
[28] Yuval Neria, et al., *Post-Traumatic Stress Disorder Following Disasters: A Systematic Review*, 38(4) PSYCHOL. MED. 467 (2008).
[29] *Posttraumatic Stress Disorder during COVID-19*, MICH. MED., https://medicine.umich.edu/dept/psychiatry/michigan-psychiatry-resources-covid-19/specific-mental-health-conditions/posttraumatic-stress-disorder-during-covid-19 (last visited Feb. 6, 2021).
[30] *Id.*

discomfort, and fear for survival. These exposures increase the risk of developing PTSD."[31] Additionally, the risk of developing PTSD from this "may further be enhanced during the subsequent weeks when these individuals may lack immediate social support due to the need to self-quarantine."[32] While the physical stress of the infection may come to an end, "COVID-19 patients can carry emotional scars from the experience for months and years, often in the form of [PTSD]."[33] Thus, even after one has recovered, he or she may experience lingering affects due to a fear of dying, social isolation from the time spent hospitalized or in quarantine, anxiety at the thought of getting sick again, and guilt over infecting or harming others.[34] Specifically, "Chinese researchers polled patients who had been discharged from quarantine facilities and found that 96.2 percent were experiencing symptoms of PTSD. In many cases, the symptoms started before they were even released from quarantine." [35]

Accordingly, PTSD is nondiscriminatory. It affects men, women, and children, and does not limit itself to specific traumatic experiences. Rather, the only prerequisite for PTSD is that an individual face an "emotional or physical trauma of the highest magnitude."[36] Thus, any person that faces such trauma is at a risk of suffering from PTSD.

C. PTSD TRIGGERS

When someone suffers from PTSD, certain triggers—such as sights, sounds, smells, or tastes[37]—may cause that individual to act irrationally. When triggered, an individual with PTSD may act as if he or she were re-living the initial

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[31] *Id.*
[32] *Id.*
[33] *PTSD from COVID-19? Here Are Four Signs.*, HARTFORD HEALTHCARE (Sept. 17, 2020) https://hartfordhealthcare.org/about-us/news-press/news-detail?articleId=28679&publicid=395.
[34] *Id.*
[35] *Id.*
[36] Shields*, supra* note 11.
[37] Arlin Cuncic, *What Does it Mean to Be 'Triggered'*, VERYWELLMIND, https://www.verywellmind.com/what-does-it-mean-to-be-triggered-4175432 (last updated Dec. 3, 2020).

traumatic event, causing the victim to react to that trigger without realizing exactly what he or she is doing.[38] Specifically, "being 'triggered' more narrowly refers to the experience of people with [PTSD] re-experiencing symptoms of a traumatic event (such as exposure to actual or threatened death, serious injury, or sexual violation) after being exposed to a trigger that is a catalyst or reminder."[39]

As indicated above, triggers commonly "have a strong sensory connection."[40] Thus, combat veterans with PTSD are commonly triggered by the sound of helicopters or loud bangs, and sexual assault victims with PTSD are commonly triggered by circumstances that reminds the victim of the initial assault.[41] Triggers are sometimes thought to be "connected in some way to a deeply ingrained habit," which is often called "traumatic coupling."[42] This is "where a trigger is connected to a traumatic experience, causing [an individual] to relive symptoms."[43] "[F]or example, a recovering alcoholic who associates a particular activity with drinking."[44]

Although it has not been determined exactly how PTSD triggers are formed, it is known "that triggers can cause an emotional reaction before a person realizes why they have become upset."[45] Thus, any person with PTSD, when triggered, may act without understanding the magnitude of those actions.

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[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] Heather Mayer Irvine, *The Most Common PTSD Triggers—and How to Manage Them*, HEALTH (Sept. 1, 2020, 9:50 AM), https://www.health.com/condition/ptsd/ptsd-triggers.
[42] *Id.*
[43] Cuncic, *supra* note 37.
[44] *Id.*
[45] *Id.*

D. DIAGNOSING PTSD

It is natural to feel afraid during and after a traumatic event.[46] Such fear will generally trigger the typical "fight-or-flight" response, a reaction that helps a person defend against danger.[47] Nearly everyone who experiences trauma will also experience a range of reactions that are common symptoms of PTSD, but most people will recover from these symptoms naturally.[48] However, those people who continue to feel stressed or frightened when they are no longer in danger may be diagnosed with PTSD.[49]

To diagnose PTSD, a mental health care physician (such as a psychiatrist or psychologist) must determine that eight specific criteria set out in the DSM (The Diagnostic and Statistical Manual of Mental Disorders) are present, and establish the existence of specific symptoms.[50] The DSM criteria looks to the existence of a stressor, intrusion symptoms, avoidance of trauma-related stimuli after the trauma, negative alterations in cognition and mood, trauma-related arousal and reactivity, the duration of symptoms, distress or functional impairment, and the absence of any other causes.[51]

Furthermore, to be diagnosed with PTSD, an individual must experience each of these symptoms for at least one month: at least one re-experiencing symptom, at least one avoidance symptom, at least two arousal and reactivity symptoms, and at least two cognition and mood symptoms.[52] Re-experiencing symptoms refer to flashbacks, bad dreams, and frightening thoughts, and may cause problems in a person's daily routine.[53] Avoidance symptoms commonly cause a person to change his or her personal

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[46] *Post-Traumatic Stress Disorder*, NAT'L INST. OF MENTAL HEALTH, https://www.nimh.nih.gov/health/topics/post-traumatic-stress-disorder-ptsd/index.shtml (last visited Feb. 6, 2021).
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.*; *DSM-5 Criteria for PTSD*, BRAINLINE, https://www.brainline.org/article/dsm-5-criteria-ptsd (last visited Feb. 6, 2021).
[51] BRAINLINE, *supra* note 50.
[52] NAT'L INST. OF MENTAL HEALTH, *supra* note 46.
[53] *Id.*

routine, and includes a person avoiding thoughts and feelings related to the traumatic event and avoiding places, event, or objects that serve as a reminder of the traumatic experience.[54] Arousal and reactivity symptoms are constant symptoms and refer to a person being easily startled, feeling tense, struggling to sleep, and having angry outbursts.[55] Cognition and mood symptoms can begin or worsen after a traumatic event, and include trouble remembering key features of the traumatic events, having negative thoughts about the world or oneself, distorted feelings like guilt or blame, and loss of interest in enjoyable activities.[56]

Notably, diagnosing PTSD in older children and teens is relatively the same as diagnosing PTSD in adults, which is described above.[57] That said, when diagnosing PTSD in children less than six-years-old, a mental health care physician will look for specific symptoms including: bed wetting, inability to talk, acting out the traumatic event while playing, and clinginess to parents or other adults.[58]

III. THE INSANITY DEFENSE

Although the insanity defense is what one first thinks of when addressing mental diseases or defects in the legal system, PTSD is not best described as a basis for the insanity defense. Even though a defendant's PTSD reduces his criminal culpability, his PTSD may not rise to the level of defect required because the modern insanity defense is so narrow and hard to prove. While in few cases PTSD has been successfully asserted as grounds for the insanity defense, these cases are not the norm.[59] "Generally, attempts to employ the insanity defense [for PTSD] fail."[60]

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[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] Borders, *supra* note 4.
[60] *Id.* at 85.

A. HISTORY OF THE INSANITY DEFENSE

The insanity defense tests vary among jurisdictions, and the inconsistent definitions of the insanity defense derive from the defense's evolution over time. The applicable insanity defense test at common law, the M'Naughten Test, focused solely on a defendant's cognitive impairments.[61] As this was considered outdated language, in the 1970s the American Law Institute (ALI) established a broader test that focused on a defendant's cognitive and volitational impairments, known as the Model Penal Code (MPC) Test.[62] However, the MPC test began to be rejected when a jury acquitted John W. Hinckley, Jr. on the basis of insanity under the MPC test for the attempted assassination of President Ronald Reagan in 1981.[63] As a result, "the insanity defense underwent sweeping reforms in both the federal system and in many states."[64] Eventually, Congress enacted the Insanity Defense Reform Act of 1984, which established an affirmative defense that largely resembles the common law test that focuses on a defendant's cognitive impairments alone.[65] The Insanity Defense Reform Act of 1984 is now codified and is the current insanity defense test in the federal system. Accordingly, when a defendant asserts an insanity defense in federal court, he is asserting an affirmative defense that requires the defendant to have a severe mental disease or defect the causes him to be unable to appreciate the wrongfulness of his conduct.[66]

B. THE FEDERAL INSANITY DEFENSE IS AN AFFIRMATIVE DEFENSE

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[61] W. Chris Jordan, *Conditioned to Kill: Volition, Combat Related PTSD, and the Insanity Defense—Providing a Uniform Test for Uniformed Trauma*, 16 RUTGERS J.L. & PUB. POL'Y 22, 35-37 (2019).
[62] *Id.* at 37-39.
[63] *Id.* at 39-40.
[64] Henry F. Fradella, *From Insanity to Beyond Diminished Capacity: Mental Illness and Criminal Excuse in the Post-Clark Era*, 18 U. FLA. J.L. & PUB. POL'Y 7, 25 (2007).
[65] Insanity Defense Reform Act, Ch. IV, Pub. L. No. 98-473, 98 Stat. 2057 (1984).
[66] 18 U.S.C. § 17.

An affirmative defense "is a defense in which the defendant introduces evidence, which, if found credible, will negate criminal liability . . . even if it is proven that the defendant committed the alleged acts."[67] Furthermore, "an affirmative defense is not connected to the prosecution's burden of proof."[68] Therefore, "[w]hen the defendant asserts an affirmative defense, the defendant raises a new issue that must be proven to a certain evidentiary standard."[69] Additionally, "statutes often specify whether a defense is affirmative."[70]

Accordingly, 18 U.S.C. § 17, which is the codified version of the Insanity Defense Reform Act, specifies that this insanity defense is an affirmative defense:

> It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.[71]

Thus, when a defendant asserts PTSD as the basis for the insanity defense, the defendant is raising a new issue that is separate from the prosecution, and the burden shifts to the defendant. Therefore, the defendant must prove by clear and convincing evidence that at the time of committing the offense, the defendant was unable to appreciate the nature and quality, or the wrongfulness of the acts committed due to the defendant's PTSD.[72]

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[67] *Affirmative Defense*, LEGAL INFO. INST. (2020).
[68] Univ. of Minn. Libraries Publ'g, *supra* note 3.
[69] *Id.*
[70] *Id.*
[71] 18 U.S.C. § 17.
[72] *Id.*

C. THE INSANITY DEFENSE IS APPEALING

Asserting the insanity defense generally comes with the potential for high reward as well as significant risks. In other words, asserting the insanity defense is declaring an all-or-nothing proposition. This insanity defense essentially offers the best outcome to the defendant if the defense succeeds. Where a defendant successfully asserts the insanity defense the offense is excused on the basis of insanity, and the defendant receives a not guilty verdict. Conversely, if the insanity defense fails, the defendant will be guilty of the crime committed even if the defendant's PTSD reduced his or her criminal culpability. While this potential excusing outcome is extremely appealing to defendants, the likelihood of a defendant with PTSD being excused of their actions is nearly unheard of because the insanity defense is so difficult to prove.

D. THE INSANITY DEFENSE IS DIFFICULT TO PROVE

As stated above, for a defendant's PTSD to excuse him from criminal liability, the defendant must prove by clear and convincing evidence two particular elements: (1) that his PTSD was a severe mental disease or defect and (2) as a result of his PTSD, the defendant was unable to appreciate the nature and quality or wrongfulness of his acts.[73] First, the insanity defense is difficult to prove because what constitutes a mental disease or defect is not defined in the statute. "Courts have consistently refused to precisely define the term 'mental disease or defect.' Instead, they have held that the issue of whether a person is suffering from a mental disease is a question of fact to be decided at trial."[74] Specifically, when determining whether a defendant's mental illness will qualify as a basis for an insanity plea, courts look to medical categories of mental illness defined in the DSM.[75] However, courts do not rely on the DSM alone and do not recognize every mental illness in the DSM as a severe mental disease or defect.[76] Nonetheless, a bona fide

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[73] *Id.*
[74] Fradella, *supra* note 64.
[75] *Id.*
[76] *Id.*

psychiatric diagnosis is almost always required for courts to allow a defendant to plead insane.[77]

PTSD was first added to the third edition of the DSM in 1980,[78] and the criteria for diagnosing PTSD was revised in the fifth edition of the DSM.[79] Accordingly, so long as a defendant's PTSD is diagnosed according to the criteria described in the DSM and the court believes that the defendant's PTSD is severe enough to be meet the muddy definition of mental disease or defect, it is likely that a court would determine PTSD to be a mental disease or defect under the insanity defense. Further, despite the lack of clarity in the court's description of what a severe mental disease or defect is, this is considered to be the easier prong of the insanity defense to prove.

Second, the insanity defense is difficult to prove because the existence of a mental disease or defect does not necessarily mean that such existence caused the defendant to be unable to appreciate the nature and quality or wrongfulness of what he was doing. For example "proof of involuntary intoxication together with schizophrenia did not prove that the defendant's mental disease or defect necessarily prevented him from appreciating the nature and quality or wrongfulness of his actions under the second requirement of [the insanity defense]."[80] Thus, just because a court determines that a defendant's PTSD constitutes a severe mental disease or defect does not mean PTSD caused the defendant to be able to know and understand that what he was doing was in fact wrong. This prong is significantly more difficult to prove than the first prong.

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[77] *Id.*

[78] PTSD: National Center for PTSD*, PTSD History and Overview*, U.S. DEP'T OF VETERANS AFFAIRS, https://www.ptsd.va.gov/professional/treat/essentials/history_ptsd.asp#:~:text=In%201980%2C%20the%20American%20Psychiatric,in%20psychiatric%20theory%20and%20practice (last visited Feb. 6, 2021).

[79] BRANILINE*, supra* note 50.

[80] Jay M. Zitter, J.D., *Construction and application of 18 U.S.C.A § 17, providing for insanity defense in federal criminal prosecutions,* 118 A.L.R. FED. 265 (1994) (discussing United States v. Knott, 894 F.2d 1119 (9th Cir. 1990).

Accordingly, for a defendant to be able to successfully assert the insanity defense based on his PTSD, the PTSD must first be deemed a severe mental disease or defect. It must then be determined that the defendant's PTSD led to his inability to appreciate the nature and quality or wrongfulness of the act committed. Because this is difficult, a defendant with a reduced criminal culpability may very well end up being held accountable for the crime committed regardless of the asserted PTSD.

Even though being excused of a crime is appealing to defendants, asserting PTSD as a basis for the insanity defense is extremely difficult. Thus, the high-reward verses high-risk concept usually works to the detriment of the defendant. The modern insanity defense applied in the federal system is narrow and thus difficult to prove because the basis for the defense must be a severe mental disease or defect, which courts have yet to specifically define, and because such a mental disease or defect must result in the defendant's inability to understand the magnitude of his actions. Accordingly, PTSD is not appropriately covered by the insanity defense because it is narrow, difficult to prove, and risky. While it is not impossible for a defendant with PTSD to be excused of his crime on the basis of insanity, such an argument almost never succeeds.[81]

IV. FAILURE OF PROOF DEFENSE

Different from an affirmative defense, when a defendant raises a new issue, a failure of proof defense "focuses on the elements of the crime and prevents the prosecution from meeting its burden of proof."[82] Generally, "[t]o be held liable for a crime, one must have committed the physical components (actus [reus]) combined with the particular state of mind required for the wrongful act (mens rea)."[83] Though a failure of proof defense can be asserted to negate any element of a crime, it is commonly used to assert

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[81] *See* Borders, *supra* note 4.

[82] Univ. of Minn. Libraries Publ'g, *supra* note 3.

[83] David Dailey, *Searching for Culpability, Punishing the Guilty, and Protecting the Innocent: Should Congress Look to the Model Penal Code to Stem the Tide of Federal Overcriminalization?*, 63 CATH. U. L. REV. 997, 1000 (2014).

that a defendant's mental capacity was so diminished holding him criminally liable for that crime would be unjust. Thus, when a defendant claims that the prosecution cannot meet its burden because the defendant lacked the required mental state for the crime with which he has been charged, the defendant is asserting what is commonly known as the diminished capacity defense.[84] Also different from an affirmative defense, merely negating an element to a crime does not result in the defendant being excused of his conduct.[85] Rather, when the mens rea is negated, the defendant is generally found guilty of a lesser crime.[86] Even though the defendant is not excused of his criminal conduct altogether, the diminished capacity defense ensures that his mental culpability or lack thereof is appropriately reflected in the defendant's criminal charge or conviction.

This defense is seemingly less complex than the affirmative insanity defense. Yet the diminished capacity defense is only applicable in limited scenarios. Therefore, asserting PTSD as the basis of a diminished capacity defense provides some defendants—though not all—with a more fair and just option of defending his or her actions.

A. The Insanity Defense Reform Act Did Not Abolish The Diminished Capacity Defense

Initially courts opined that the Insanity Defense Reform Act of 1984 intended to abolish the diminished capacity or diminished responsibility defense by not allowing affirmative defenses on the basis of mental disease or defect, other than insanity, to excuse conduct.[87] However, through analyzing legislative history and intent, the Ninth Circuit later determined that the enactment of the Insanity Defense

[84] Diminished capacity or responsibility; mental impairment 22 C.J.S. Criminal Law: Substantive Principles § 128 (updated Sep. 2020).
[85] *Id.*
[86] *Lowe*, 318 S.W.3d at 819.
[87] Judi S. Greenberg, *Criminal Law and Evidence—Using Psychiatric Testimony to Negate Mens Rea Under the Insanity Defense Reform Act—United States v. Pohlot, 827 F.2d 899 (3d Cir. 1987), Cert. Denied, 108 S. Ct. 710 (1988.,* 61 TEMP. L. REV. 955 (Fall 1998).

Reform Act did not abolish the diminished capacity defense.[88] Nonetheless, when properly understood, the diminished capacity defense is "not a defense at all but merely a rule of evidence."[89]

B. ESTABLISHING THE DIMINISHED CAPACITY DEFENSE

In order to assert the diminished capacity defense, the defendant must establish reasonable doubt as to whether the defendant possessed the requisite mental state articulated in the language of the statute defining the crime for which the defendant has been charged.

1. REQUIRED MENTAL STATE

It is important to note a diminished capacity defense is only a potential defense for specific intent crimes.[90] Specifically, this defense is only applicable when specific intent is at issue because the concept of diminished capacity is "concerned with whether the defendant possessed the ability to attain the culpable state of mind which defines the crime."[91] Thus, diminished capacity is a failure of proof defense that negates the mens rea element of a crime.[92] Mens rea has been defined as "guilty mind"[93] or "evil mind,"[94] and

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[88] United States v. Twine, 853 F.2d 676, 679 (9th Cir. 1988) (upholding the ruling in United States v. Erskine that a defendant has the ability to present a diminished capacity defense where the defendant can show that "he suffered from some . . . mental or physiological condition which blocked formation of the requisite intent").
[89] Greenburg, *supra* note 87 (citing United States v. Pohlot, 827 F.2d 899, 905-06 (3d Cir. 1987).
[90] United States v. Kimes, 246 F.3d 800, 809 (6th Cir. 2001).
[91] *Twine*, 853 F.2d at 678-79.
[92] Mental disease or defect negating an offense element, 1 Crim. L. Def. § 64 (updated July 2020).
[93] *Mens rea*, BLACK'S LAW DICTIONARY (5th ed. 1979).
[94] Jeremy M. Miller, *Mens Rea Quagmire: The Conscience or Consciousness of the Criminal Law?*, 29 W. ST. U. L. REV. 21 (Fall 2001).

the rationale behind requiring mens rea is "to limit responsibility to those people who choose to do wrong."[95]

2. DEFENDANT MUST ESTABLISH REASONABLE DOUBT

Furthermore, the burden is on the defendant to show that there is reasonable doubt as to whether the defendant actually had the required mental state when committing the crime. Unlike with the insanity defense, for diminished capacity the burden of persuasion does not shift to the defendant.[96] Rather, the burden to prove that the defendant obtained the required mental state remains with the prosecution and that burden is proof beyond a reasonable doubt.[97] Therefore, the defendant merely needs to raise reasonable doubt that he possessed the required mental state for the diminished capacity defense to succeed.

Accordingly, when a defendant seeks the diminished capacity defense by claiming that his PTSD reduced his criminal culpability to the point that he did not possess the requisite mental state, he must merely show that there is reasonable doubt as to whether he actually did have the required mental state because of his PTSD. On the surface this defense appears to be an easier defense to establish than the insanity defense; however, introducing evidence to establish such reasonable doubt is more difficult than one would expect.

3. INTRODUCING EVIDENCE TO ESTABLISH REASONABLE DOUBT

In order to show such reasonable doubt, the defendant must introduce evidence to show that the

[95] Erica Beecher-Monas & Edgar Garcia-Rill, *Actus Reus, Mens Rea, and Brain Science: What do Volition and Intent Really Mean?* 106 KY. L.J. 265, 267 (2017-18).
[96] Tyler Ellis, *Mental Illness, Legal Culpability, & Due Process: Why the Fourteenth Amendment Allows States to Choose a Mens Rea Insanity Defense over a M'Naghten Approach*, 84 MISS. L.J. 215, 239 (2014).
[97] *Id.*

defendant did not have the required state of mind. Thus, "[e]vidence that the defendant suffered from diminished mental capacity at the time of the offense, if believed by the fact finder, serves to negate the mens rea element of the crime."[98] In providing such evidence, a defendant is allowed to present evidence of his mental health that falls short of establishing an insanity defense.[99] It is common for a defendant to have an expert witness testify as to the defendant's mental disease or defect. However, whether an expert's testimony of the defendant's mental state is relevant—thus admissible—is still somewhat confusing.[100] It is a fairly simple process for a defendant to introduce evidence of PTSD into a federal case unless that PTSD is being introduced to establish the diminished capacity defense. Courts have determined that when a defendant seeks to introduce expert testimony evidence for establishing diminished capacity, there is an additional evidentiary bar, which is only at issue when a defendant is seeking to introduce expert testimony evidence for the purpose of establishing a diminished capacity defense. Accordingly, introducing expert testimony about PTSD for the purpose of the diminished capacity defense is very different from introducing expert testimony to simply show that a defendant has PTSD.

Normally, for a defendant to introduce evidence of his or her PTSD it must merely be appropriately diagnosed and meet the legal standard. Specifically, the PTSD must be diagnosed by a mental health care physician, then it must be determined that the diagnosis is admissible according to the Federal Rules of Evidence. The Federal Rules of Evidence require that the diagnosing mental health care physician testify and qualify as a credible and reliable expert witness in order for the PTSD diagnosis to be considered valid according to the legal standard. Specifically, Federal Rule of Evidence 702 states:

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[98] Diminished capacity negating specific intent, 11A Cyc. Of Federal Pro. § 47.131 (3d ed.) (updated July 2020).
[99] *Id.*
[100] Jennifer Kunk Compton, Note, *Expert Witness Testimony and The Diminished Capacity Defense*, 20 AM. J. TRIAL ADVOC. 381 (Winter 1996-97).

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.[101]

In efforts to better explain the process of determining whether an expert witness's reasoning and methodology is reliable, the Supreme Court enumerated a list of nonexclusive factors that a trial court may consider: (1) whether the theory or technique has been or could be tested; (2) whether the theory or technique has been subject to peer review and publication; (3) what the rate of error of the technique or theory was when applied; (4) the existence and maintenance of standards controlling the technique's operation; and (5) whether the theory or technique has been generally accepted in the scientific community.[102]

Accordingly, when seeking to introduce a defendant's PTSD as mere evidence in a federal case, the defendant's PTSD should be deemed admissible where the diagnosing mental health care physician has appropriately reached an official medical PTSD diagnosis based on the specific criteria required and testifies and qualifies as a credible and reliable expert witness according to Federal Rule of Evidence 702.

However, the test for introducing expert testimony evidence for the purpose of the diminished capacity defense differs drastically; it is much more confusing and limited. In fact, "[t]he greatest hurdle of [the diminished capacity] defense is the testimony restriction placed on the evidence presented."[103] Nonetheless, courts "have held that evidence of a mental abnormality is admissible to negate the required

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[101] Fed. R. Evid. 702 (2020).
[102] Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 593-94 (1993).
[103] Borders, *supra* note 4, at 73-99.

state of mind under the offense charged."[104] The leading case discussing this issue is United States v. Pohlot, in which the court determined "that a defendant may only introduce evidence of a mental abnormality when it is relevant to proving the absence or presence of the requisite state of mind"[105] and directed district courts to "admit evidence of a mental abnormality only in instances where, if believed by the jury, it would support a legally acceptable theory of lack of mens rea."[106] Furthermore, the court specified that when properly understood, the diminished capacity defense was a rule of evidence rather than a defense to the crime committed.[107] Specifically, relevant evidence is admissible, and evidence of a mental disease or defect is relevant to establishing diminished capacity if it goes to establishing a defendant's required state of mind.[108] Nonetheless, in practice this is narrow. The evidence is admissible only if the defendant's expert testimony establishes that the defendant has PTSD and that his PTSD negates the mens rea of the crime for which he has been charged.

a. INADMISSIBLE EXPERT TESTIMONY

In Pohlot, the defendant plotted to have his wife killed by a hitman.[109] As part of his defense, Pohlot sought to introduce expert testimony as evidence that "his mental illness created in him the expectation that his plan to have his wife killed would not succeed and that, as a result, the defendant lacked the mens rea to kill his wife."[110] The District Court excluded the expert testimony, and the Third Circuit upheld this decision "because [the testimony] did not show that the defendant acted without the purpose [of] having his wife killed."[111]

Similarly, in United States v. Baxt, the expert testimony was deemed "inadmissible because it fail[ed] to

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[104] Kunk, *supra* note 100.
[105] Greenburg, *supra* note 87 (citing *Pohlot*, 827 F.2d at 904).
[106] *Id.* (*citing Pohlot*, 827 F.2d at 905-06).
[107] *Id.*
[108] *Id.*
[109] *See Pohlot*, 827 F.2d at 891-92.
[110] United States v. Baxt, 74 F.Supp.2d 436, 442 (D. N.J. 1999) (referencing *Pohlot*, 827 F.2d at 893).
[111] *Id.* (referencing *Pohlot*, 827 F.2d at 906).

address the only question it can be supplied to answer, i.e., whether Baxt acted with [the requisite purpose]."[112] Here, Baxt "was indicted for misrepresenting his financial assets on loan applications."[113] Baxt claimed "that when he filed the false financial statements, he suffered from Bipolar Disorder and Multiple Sclerosis—a combination of brain dysfunctions that resulted in his making grandiose representations about his financial worth."[114] Accordingly, Baxt wanted to introduce expert testimonies that established that due to his Bipolar Disorder and Multiple Sclerosis, his ability to think logically, problem solve, and reason was degraded.[115] However, the court stated that expert testimony that merely supports a defense of justification or excuse will not be admissible because "[d]efenses of justification and excuse . . . are not acceptable theories of lack of mens rea."[116] Thus, the court found that these testimonies suggested that Baxt's behavior was excusable by his mental illness and therefore, they did not satisfy the standard for admissibility established in Pohlot.[117]

b. ADMISSIBLE EXPERT TESTIMONY

However, in United States v. Goldstein the court ruled that Goldstein was permitted to introduce expert testimony and other evidence of insanity or mental defect subject to limitations.[118] The Government argued that the diminished capacity evidence should be excluded because the evidence that Goldstein presented was "not probative of Goldstein's specific intent."[119] Goldstein contended that, "because he [was] charged with specific-intent crimes and diminished capacity can negate specific-intent, he should be permitted to present evidence regarding his capacity."[120] The

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[112] *Id.*
[113] *Id.* at 438.
[114] *Id.*
[115] *Id.* at 439.
[116] *Id.* at 440.
[117] *Id.* at 441.
[118] United States v. Goldstein, No. 2:10-cr-00525-JAD-PAL, 2014 WL 1168969, at *1 (D. Nev. Mar. 21, 2014).
[119] *Id.* at *2.
[120] *Id.* at *4.

court agreed with Goldstein, stating that the "diminished-capacity evidence is admissible because, 'while the competence and persuasiveness of the offered testimony can be questioned, the relevance of the subject matter cannot be.'"[121] The court further stated, "[i]n this circuit, district courts determine specific intent through 'all the facts and circumstances surrounding the case.'"[122] While the court did find the diminished capacity evidence admissible, the court also found that this evidence was "subject to a pretrial conference regarding the limitations of such evidence and subject to the objections the Government may make at trial."[123]

To date there has yet to be a reported federal case explicitly discussing the admissibility of an expert's testimony to establish that a defendant's PTSD serves to negate mens rea and establish the diminished capacity defense. This has, however, been addressed in a state court that applies a diminished capacity defense that echoes the federal diminished capacity defense. In State v. Bottrell, Teresa Bottrell was charged and convicted of first-degree felony murder and second-degree murder.[124] On the night of the murder, Bottrell went to the victim's home to have sex in exchange for money.[125] Bottrell said that the victim wanted her to tie him up using duct tape, but became violent when she refused.[126] The two fought and struggled, and Bottrell ended up strangling the victim with a piece of cut phone cord.[127] Bottrell claimed that she remembered the victim hitting her and that she next remembered looking down at the victim realizing he was dead.[128] She "testified that during the struggle . . . she thought about past events in her life," recalling "an incident where her mother tried to run over her father with the car . . . her father's alcoholism and him beating her as a child," and "a man who has almost killed her

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[121] *Id.* (quoting United States v. Erskine, 588 F.2d 721, 723 (9th Cir. 1978)).
[122] *Id.* (quoting United States v. Sirhan, 504 F.2d 818, 819 n.2 (9th Cir. 1974)).
[123] *Id.* at *5.
[124] State v. Bottrell, 14 P.3d 164, 165 (Wash. Ct. App. 2000).
[125] *Id.* at 166.
[126] *Id.*
[127] *Id.*
[128] *Id.*

when she was hitchhiking."[129] Accordingly, during her trial she tried to introduce medical testimony that she suffered from PTSD and that she might have experienced a PTSD flashback at the time of the murder.[130] The trial court excluded the evidence, but the appellate court reversed and remanded the case based on the finding that the trial court "erred in failing to allow the testimony regarding PTSD because it may have negated the intent necessary for this crime and the lesser included offense of second degree murder."[131]

c. GOVERNMENT EXPERT TESTIMONY REBUTTING DEFENDANT'S ADMISSIBLE EXPERT TESTIMONY

While a defendant's PTSD can serve to negate the mens rea element of a crime, which under the right circumstances requires the PTSD to be admissible, the Government will generally introduce their own expert testimony that will rebut whether the defendant's PTSD truly negates the mens rea. The issue that arises from this is that it is common for the Government's rebutting testimony to prevail. In U.S.A. v. Jackson the defendant had been charged with "conspiracy to defraud the United States with respect to claims through the submission of fraudulent travel reimbursement claims . . . and . . . eleven counts of aiding and abetting the presentation of false, fictitious, or fraudulent claims."[132] "Jackson, a Marine deployed in Iraq, suffered a traumatic brain injury ("TBI") after being shot in the head, losing consciousness, and falling from atop a wall."[133] Jackson remained a reservist in the Marine Corps, and was later diagnosed with PTSD and was permitted to travel for his medical care.[134] Marines that are permitted to travel for such medical care are able to seek reimbursement for certain travel related expenses.[135] Evidence that was

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[129] *Id.*
[130] *Id.* at 165.
[131] *Id* at 166.
[132] U.S.A. v. Jackson, No. 2:13-cr-00674-CAS, 2016 WL 6998557, at *1 (D. Cal. Nov. 28, 2016).
[133] *Id.*
[134] *Id.*
[135] *Id.*

presented during Jackson's trial indicated that a third party submitted falsified travel reimbursement vouchers with Jackson's name.[136] Jackson defended on the basis that he was unaware that such fraud was taking place.[137] Specifically, he "argued that he was unaware that [a third party] was submitting false travel vouchers on his behalf and that he suffered from diminished capacity arising out of his TBI and PTSD."[138] He offered expert testimony regarding the effects of TBI and PTSD.[139] The Government attempted to have this expert testimony excluded and instead subject Jackson to a mental health evaluation from the Government's expert.[140] The court denied the Government's motion to exclude the expert testimony, but ordered Jackson to also submit to an evaluation by the Government's expert.[141] As expected, both experts testified at Jackson's trial—Jackson's expert testified that his TBI and PTSD did negate mens rea, while the Government's expert testified that Jackson's TBI and PTSD did not negate mens rea.[142] Nonetheless, Jackson was convicted.[143] The court found that the evidence established that Jackson—despite his TBI and PTSD—still had the specific intent necessary for a conviction.[144] Jackson attempted to argue that the Government's rebutting expert was a violation of due process, but the court disagreed.[145]

Accordingly, even when the defendant is able introduce expert testimony to establish diminished capacity, the Government will generally introduce expert testimony to rebut the defendants' expert testimony, which can sometimes undermine the defendant's diminished capacity defense.

Thus, to assert the diminished capacity defense, the defendant must be able to introduce expert testimony supporting that the defendant was suffering from PTSD at

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[136] *Id.*
[137] *Id.*
[138] *Id.* at *2.
[139] *Id.*
[140] *Id.* at *4.
[141] *Id.*
[142] *Id.*
[143] *Id.* at *1.
[144] *Id.* at *3.
[145] *Id.* at *5.

the time of the crime and that the PTSD served to negate the crime's mens rea. Specifically, expert testimony describing the defendant's state of mind—but not the expert's opinions—must be admitted and reviewed by the fact finder. If the fact finder then has reasonable doubt as to whether the defendant had the requisite mental state, the mens rea element of the crime has not established and the prosecution has failed to prove each element of the crime beyond a reasonable doubt.

Therefore, PTSD—a recognized mental defect—may be used to negate the defendant's mens rea when the defendant has been charged with a specific intent crime and the defendant's PTSD serves to directly negate the mens rea element of that crime. Thus, this is an appropriate avenue for the defense to take when the defendant was suffering from PTSD at the time of committing the crime and has been charged with a specific intent crime. However, this defense is clearly inapplicable in all other scenarios. Accordingly, only a small pool of defendant's suffering from PTSD are covered by the diminished capacity defense.

V. CONCLUSION

Even though the increase in PTSD diagnoses across America in recent years has led to PTSD being better understood, it has yet to be formally addressed where PTSD fits in a defensive argument. Therefore, there is growing controversy about whether defendants with PTSD are appropriately protected in the criminal justice system. One common argument is that PTSD can be asserted as a basis for the insanity defense. However, defendants with PTSD are not normally covered by the insanity defense in federal court.[146] The affirmative insanity defense is extremely narrow and difficult to prove. While the insanity defense has been successfully asserted in rare instances, assertions of the affirmative insanity defense generally fail.[147]

Furthermore, while the diminished capacity defense is limited—and only applicable in specific situations—it does not seem to be as difficult to prove as the insanity defense.

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[146] *See* Borders, *supra* note 4.
[147] *Id.*

The most difficult and controversial aspect of asserting the diminished capacity defense is the evidentiary limitations on expert testimony.[148] Unlike when asserting the insanity defense, courts commonly agree that expert testimony regarding a defendant's PTSD will be admissible if it directly negates the mens rea element of the crime charged.[149] Thus, a defendant who has been charged with a specific intent crime and whose PTSD directly negates the mens rea element of that crime falls squarely within the realms of the diminished capacity defense. However, while the diminished capacity defenses will generally apply in this scenario, defendants that have been charged with general intent crimes and defendants who suffer from PTSD that is too mild to directly negate mens rea fall through the cracks of the of the criminal justice system.

Accordingly, the majority of defendants with PTSD walk into a federal court without a viable defense, and commonly find themselves serving sentences in jails or prisons despite the fact that they lacked criminal culpability due to PTSD.

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[148] *Id*. at 73-99.

[149] *See Pohlot*, 827 F.2d 899; *see also Baxt*, 74 F.Supp.2d 436; *Goldstein*, No. 2:10-cr-00525-JAD-PAL, 2014 WL 1168969; *Bottrell*, 14 P.3d 164.