

PENAL CODE SECTION 1170.9

PROVIDES CRUCIAL OPTIONS TO VETERANS AND MEMBERS OF THE MILITARY

by JUSTICE EILEEN C. MOORE and ANTOINETTE BALTA

We have all encountered those less fortunate living on the streets, many of whom risked their lives while serving our country. What leads honorable military veterans to live in poverty? What causes them to fall into a vicious cycle of homelessness and incarceration? Veterans returning from the Vietnam War were met with an overall lack of appreciation, and sometimes resentment, from their fellow Americans. Our country did not provide them with necessary social and mental health services. That mistake taught us an important lesson: it's okay to love our warriors, even when we hate a war. In order to best serve those who served, the United States sought a deeper understanding of the psychological issues faced by combat veterans. No longer do we stamp our returning veterans with a broad "personality disorder" label for displaying unorthodox behavior. We have learned about the significance and rampant occurrence of military sexual trauma (MST), traumatic brain injury (TBI), post-traumatic stress disorder (PTSD), substance abuse, and mental health disorders that can occur as a result of military service.

In response to concerns about the overall well being of our nation's veterans as they reintegrate into civilian

society, the California Legislature has stepped up to the plate. Veterans who find themselves sideways with the law have options not previously available to criminal defendants. Under Penal Code section 1170.9, a person "convicted of a criminal offense" who is a present or former member of the military and

suffers from MST, TBI, PTSD, substance abuse, or mental health disorders as a result of service may be ordered into treatment instead of incarceration. If the defendant does what is required under the statute, the court may restore the veteran "to the community of law abiding citizens."

FACTS ABOUT VETERANS IN PRISON

- There are an estimated 140,000 veterans held in state and federal prisons. State prisons hold 127,500 of these veterans, and federal prisons hold 12,500.
- The median age (forty-five) of veterans in state prison is twelve years older than that of non-veterans (thirty-three). Non-veteran inmates (55%) are nearly four times more likely than veterans (14%) to be under the age of thirty-five.
- Veterans are much better educated than other prisoners. Nearly all veterans in state prison (91%) report at least a high school diploma or GED, while an estimated 40% of non-veterans lacked either.
- Most state prison veterans (54%) report service during a wartime era, while 20% saw combat duty. In federal prison two-thirds of veterans served during wartime, and one quarter had seen combat.
- Six in ten incarcerated veterans received an honorable discharge.
- Veterans are less likely than non-veteran prisoners to have used drugs. Forty-two percent of veterans used drugs in the month before their offense compared to 58% of non-veterans.
- Veterans have shorter criminal histories than non-veterans in state prison.
- Veterans report longer average sentences than non-veterans, regardless of offense type.
- Nearly one in four veterans in state prison are sex offenders, compared to one in ten non-veterans.

Source: *Veterans in State and Federal Prison, 2004*, Bureau of Justice Statistics (May 2007), <http://www.bjs.gov/content/pub/pdf/vsfp04.pdf>.

Two basic ideas are embodied in this statute. One is that those who served in the military may need some time to rid themselves of their torments. The other is the notion, advanced by many experts, that rehabilitation is exponentially more effective than incarceration. Section 1170.9 incorporates both aims. Veterans are given a break, and are offered treatment instead of jail. In enacting this statute, the legislature has created an enlightened alternative option for criminal defense lawyers to consider when advising their clients.

Despite having a criminal conviction, veterans can still achieve the American Dream, whether or not their cases are handled in veterans' courts. Apart from saluting veterans and keeping them out of jail, Penal Code section 1170.9 makes common sense. Studies show that the men and women who have served in our armed forces, and end up in prison, are typically better educated and possess shorter criminal histories than non-veteran criminals. Quite simply, it is easier for the criminal justice

system to take a chance with veterans because it is likely that there are issues developed during combat underlying their crimes, and that these issues can be resolved with mental health treatment rather than incarceration.

One might ask why we need Penal Code section 1170.9 when we already have the expungement provisions within Penal Code section 1203.4 which permit a defendant, under certain circumstances, to withdraw a guilty plea. But a section 1203.4 plea withdrawal has certain limitations. Specifically, section 1203.4 does not relieve the person from the obligation to disclose a conviction in response to any direct question contained in any questionnaire or application for public office, for licensure by any state or local agency, or for contracting with the California State Lottery Commission. Penal Code section 1203.4 does not provide a remedy for the problem of when a conviction becomes a barrier to employment.

Section 1170.9, on the other hand, provides much more to the veteran or service-member:

The defendant is not obligated to disclose the arrest on the dismissed action, the dismissed action, or the conviction that was set aside when information concerning prior arrests or convictions is requested to be given under oath, affirmation, or otherwise. The defendant may indicate that he or she has not been arrested when his or her only arrest concerns the dismissed action, except when the defendant is required to disclose the arrest, the conviction that was set aside, and the dismissed action in response to any direct question contained in any questionnaire or application for any law enforcement position.

Cal. Pen. Code § 1170.9(h)(4)(C) (West 2012). Section 1170.9 also gives a judge authority to end the veteran's probation early; cancel any fines, fees, and assessments, other than restitution; reduce a felony to a misdemeanor in some cases; and order the sealing of police and court arrest records, rendering them reviewable only by court order.

What does the difference in these

two statutes have to do with a veteran's future? Avoiding incarceration and removing barriers to employment created by a criminal record can essentially change the course of a veteran's life. For example, a veteran who aspires to become a lawyer or a real estate broker, or does not want to risk losing a job opportunity by disclosing an arrest on a job application would benefit from the restorative opportunities available under section 1170.9.

Some incarcerated veterans at the Theo Lacy Facility in Orange have indicated that section 1170.9 is not common knowledge among veteran inmates.

Never again will one generation of veterans abandon another.

They said that if they had been given the opportunity to forego incarceration, they would have done so and opted for treatment, which would have allowed them to continue working, be closer to their families, and feel integrated in civilian society. Most importantly, these jailed veterans said treatment would have addressed the underlying cause of their unlawful behavior. Instead of benefiting from the statute, they were incarcerated, received few or no services, and undoubtedly had or will have more difficulty reentering civilian society.

When representing a client who is facing a criminal complaint and potential incarceration, some lawyers perceive the section 1170.9 route as a less desirable resolution, preferring an outcome involving no jail time and no program. In the short run, this makes sense. In the long run, however, the sky is the limit for a veteran without a criminal record.

While section 1170.9 operates after a conviction, it might still play an important part in the plea bargaining process before trial, especially if relatively minor criminal offenses are charged. Subdivision (a) of the statute is mandatory—the court “shall” before

sentencing determine if the veteran suffers from the listed military-related disabilities—while subdivision (b) states the court “may” order the veteran into a treatment plan. A prosecutor is likely to be agreeable to a plea, say probation with treatment, and avoid trial.

As a country, we overlooked our Vietnam veterans by not understanding or assisting them in coping with common mental health issues such as PTSD. As a result of failing to understand their needs, American society has witnessed disproportional veteran incarceration and homelessness. The motto of Vietnam Veterans of America is: “Never again will one generation of veterans abandon another.” The California Legislature has demonstrated the same sentiment in giving veterans Penal Code section 1170.9, likely to both thank our veterans and to prevent sending any more of our heroes to prison unnecessarily.

If you are interested in assisting one of PLC's veteran clients, particularly a homeless or at-risk of being homeless veteran, please contact Antoinette Balta at PLC.



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