

Testimony of Jesse Wm. Barton
House Committee on Veterans' Services & Emergency Preparedness
Senate Bill 124

April 9, 2013

Senate Bill 124 recognizes that certain consequences of military service, such as post-traumatic stress disorder (PTSD) and traumatic brain injury (TBI), may affect the behavior of servicemembers in unpredictable ways, including otherwise out-of-character criminal conduct. SB 124 is part of a multi-faceted effort to ensure proper representation in the disposition of servicemember-defendant cases.

SB 124 would clarify that a defendant being a “servicemember,” as defined in ORS 135.881, qualifies as a “mitigating factor.” This factor could—but not necessarily would—serve as the foundation for a sentencing judge’s decision to impose a mitigated sentence, e.g., probation instead of incarceration, on a servicemember-defendant who stands convicted of a crime.

This specialized treatment is constitutionally sound. For example, in rejecting a claim that providing a legal advantage solely to veterans was impermissible discrimination, the U.S. Supreme Court explained:

“Veterans have been obliged to drop their own affairs to take up the burdens of the nation, subjecting themselves to the mental and physical hazards as well as the economic and family detriments which are peculiar to military service and which do not exist in normal civil life. Our country has a longstanding policy of compensating veterans for their past contributions by providing them with numerous advantages. This policy has always been deemed to be legitimate.” *See also MacPherson v. Dept. of Admin. Services*, 340 Or 117, 131 (2006) (in its “refutation of [the] plaintiff’s theory” of impermissible discrimination, the court explained that the “theory would mean that the legislature would be precluded from enacting a law benefitting, for example, Vietnam veterans of Gulf War veterans”).

In fact, ensuring this specialized treatment in appropriate cases may be a constitutional imperative. *See Porter v. McCollum*, 130 S Ct 447 (2009) (defense counsel’s failure to present mitigation evidence (of the sort that SB 124 contemplates) was constitutionally deficient representation); *Lichau v. Baldwin*, 333 Or 350, 359-61 (2002) (defense counsel’s erroneous withdrawal of client’s alibi defense, owing to his misunderstanding of military terminology, was constitutionally deficient representation).

But servicemember status alone is not enough to authorize **the application** of SB 124’s mitigating factor. In felony cases, for example, defense counsel must present evidence establishing that the mitigating factor substantially and compellingly supports mitigation. ORS 137.671(1); OAR 213-008-0001. For example, if, based on defense evidence, a judge concludes that the servicemember-defendant’s criminal conduct is attributed to service-connected PTSD and/or TBI, and that treatment for those afflictions as part of a probationary sentence is appropriate, the judge could impose probation instead of incarceration.

Proper representation by defense attorneys is key in the proper disposition of servicemember-defendant cases. Various state agencies and non-governmental organizations are taking or have taken steps to ensure this proper representation, including:

- Congress, which a few years ago established the Veterans Justice Outreach Program. This program is designed to minimize the incarceration of veterans in various ways, by creating the position of Veterans' Justice Outreach Specialist, and charging them to assist veterans facing criminal charges. (This program also facilitates the establishment of a system of specialized courts, called "veterans courts" – including the one started a few years ago in Klamath County.)
- The Oregon State Bar, which has sponsored or co-sponsored multiple seminars to train practitioners on the proper representation of servicemember-defendants. (This form of training will be continued through the auspices of the bar's Military & Veterans Law Section.) Moreover, the bar currently is in the process of amending its *Specific Standards for Representation in Criminal & Juvenile Delinquency Cases* to establish the proper representation of servicemember-defendants as a requisite to "provid[ing] competent representation[.]"
- The Public Defense Services Commission has made the bar's *Specific Standards* applicable to all attorneys and firms who are funded through the Public Defense Services Account. Upon the bar's amendments to the *Specific Standards*, those amended standards will automatically apply to the state's numerous, indigent-defense providers.
- Like the bar, the Oregon Criminal Defense Lawyers Association (OCDLA) has sponsored or co-sponsored numerous seminars to train practitioners on the proper representation of servicemember-defendants. Moreover, OCDLA's on-line *Library of Defense* contains a "wiki page" that provides association members basic information, including several resources, about the proper representation of servicemember-defendants (which the bar previously integrated into the bar's website.)
- Pacific Sentencing Initiative, a Salem-based not-for-profit entity, which assists veterans, veterans' families, and legal practitioners who represent veterans and their families, to achieve the best possible results in judicial and other legal proceedings.

The Oregon State Bar urges your support for SB 124.