

**Testimony of Jesse Wm. Barton**  
**House Judiciary Committee**  
**Senate Bill 124**

May 14, 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. *See William B. Brown, From War Zones to Jail: Veteran Reintegration Problems, Justice Policy Journal, Spring 2011.* SB 124 is part of a multi-faceted effort to ensure proper representation in the disposition of servicemember-defendant cases.

SB 124 would clarify “servicemember” status, as defined in ORS 135.881, as a “mitigating factor.” This factor could serve as the foundation for a sentencing judge’s decision to impose a mitigated sentence, e.g., probation instead of incarceration. The proposed “-1” amendments would clarify that use of the mitigating factor is discretionary with the sentencing court.

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.” *Regan v. Taxation With Representation*, 461 US 540, 550-51 (1983) (emphasis added; internal quotations, citations, and footnote omitted). *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).

Servicemember status by itself is not enough. For example, in a felony case the defense must establish that owing to the consequences of military service, such as PTSD or TBI, the mitigating factor **substantially and compellingly** supports mitigation. ORS 137.671(1); OAR 213-008-0001.

Defense attorneys are key in the application of this mitigating factor. Various state agencies and non-governmental organizations are taking or have taken steps to ensure proper representation in servicemember-defendant cases; including:

- The Veterans Justice Outreach Program. Established by Congress a few years ago, this program created the position of Veterans' Justice Outreach Specialists and charges them with assisting veterans facing criminal charges. (This program also facilitates the establishment of a system of specialized courts, called "veterans courts" – including the one that retired Klamath County district attorney Ed Caleb was instrumental in starting in 2011.)
- 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 about the proper representation of servicemember-defendants.
- 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.