

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

March 6, 2013

Senate Bill 124's concept comes to this committee after a May 22, 2012 informational hearing, and a February 22, 2013 work session, in the Senate Committee on Veterans & Emergency Preparedness.

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

SB 124 is an offshoot of House Bill 3396 (2009), which died in committee. HB 3396 had two features. The first was to expand district attorney authority to divert certain servicemember-defendants from criminal prosecution. The 2010 Legislature passed Senate Bill 999, which essentially embraced this DA-diversion feature of HB 3396.

HB 3399's second feature was to clarify circumstances in which judges may mitigate servicemember-defendants' sentences, by imposing probation instead of incarceration. SB 124 would create a modified version of this mitigation feature. SB 124 would clarify that a defendant being a "servicemember," as defined in ORS 135.881, qualifies as a "mitigating factor." This factor would serve as the foundational basis for a sentencing judge's decision to impose some form of lenient sentence, e.g., probation instead of incarceration.

But servicemember status alone is not enough to authorize this leniency. The judge must further conclude—and must explain on the record the reasons for the conclusion—that the mitigating factor is "substantial and compelling," ORS 137.671(1); OAR 213-008-0001, i.e., that the factor substantially and compellingly supports imposition of the lenient sentence that the judge would impose.

The burden of proving both the mitigating factor, and that it substantially and compellingly supports leniency, would fall on the servicemember-defendant; hence, on his or her attorney. Toward that end, various state agencies and non-governmental organizations are taking or have taken steps to ensure proper representation in servicemember-defendant cases. These include:

- 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 adopted the bar's *Specific Standards*, and has made them applicable to all attorneys and firms who provide indigent-defense services 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. (Previously, the bar integrated the contents of this wiki page into the bar's website.)

The Oregon State Bar urges your support for SB 124.