

# Veterans and Military Service

This page addresses the particular demands and legal options--including special legal provisions--in the representation of defendants whose cases present factual and legal issues based on veteran status and military service. It was first created by Jesse Wm. Barton (jessembarton@gmail.com) in May, 2012, and since then has been and will continue to be periodically updated.

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## Constitutional Considerations

Despite the veterans-advocacy community's broad recognition of the need to provide veteran-defendants legal treatment that is available exclusively to the veterans community, efforts to enact such laws do not go unchallenged. *See, e.g.*, Paul Elias, [Veterans Increasingly Find Service Helps in Court](#), Associated Press, May 23, 2010 (explaining that in 2009, the American Civil Liberties Union of Nevada opposed legislation that would have authorized veterans courts). Typically these challenges are grounded on equal protection theories. Case law establishes that these challenges fail.

For example, [Regan v. Taxation with Representation](#), 461 US 540, 103 S Ct 1997, 76 L Ed 2d 129 (1983), involved an IRS denial of a corporation's application for 26 USC § 501(c)(3) status on the ground that "it appeared that a substantial part of [the corporation's] activities would consist of attempting to influence legislation, which is not permitted by § 501(c)(3)." 461 US at 542. The corporation asserted that this denial was discriminatory, because veterans organizations that obtain tax-exempt status under § 501(c)(19) are permitted to engage in political activities. The Court rejected this claim of impermissible discrimination. It 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." 461 US at 550-51 (emphasis added; internal quotations, citations, and footnote omitted).

The Oregon Supreme Court echoed this view in [MacPherson v. Dept. of Admin. Services](#), 340 Or 117, 130 P3d 308 (2006). There, the plaintiffs claimed that a property rights ballot measure was unconstitutionally discriminatory, because it benefited some property owners but not others (depending on when they acquired their property). In its “refutation of [the] plaintiff’s theory” of impermissible discrimination, the court explained that the “plaintiffs’ theory would mean that the legislature would be precluded from enacting a law benefitting, for example, Vietnam veterans or Gulf War veterans[.]” 340 Or at 131.

## **Military Concepts & Terminology**

A predictable consequence of the fact that [only about 1% of the U.S. population has served in the military](#) is that the vast majority of the U.S. public knows so little about the military, that military concepts and terminology are part of a foreign language and culture. This creates a communication barrier that may disrupt the attorney-client relationship and lead to claims of inadequate and ineffective assistance of counsel. See [Lichau v. Baldwin](#), 333 Or 350, 359-61, 39 P3d 851 (2002) (counsel’s erroneous withdrawal of alibi defense owing to his misunderstanding of military terminology constituted inadequate assistance). See also [Porter v. McCollum](#), 558 US 30, 130 S Ct 447, 175 L Ed 2d 398 (2009) (holding that trial counsel provided ineffective assistance in client’s capital trial by failing to present mitigating evidence grounded on client’s military service).

For example, consider a veteran-defendant who tells his lawyer that he “was deployed to the OEF,” or whose military records say that his “MOS” was “13-B” and his rank was “E-4.” The lawyer most likely would be clueless about the meaning of those terms.

For help with deciphering military jargon and the military culture generally, defense counsel could start with [About.com:US Military](#). It provides basic information about military concepts, including military terminology. Another and even more comprehensive resource is [VeteranSpeak](#), authored by [Paul Evans](#). Evans is a 20-year veteran who served in Iraq and Afghanistan and as a senior aid to former Gov. Ted Kulongoski, and who currently teaches veterans’ issues at several Oregon universities. As Amazon explains, Evans’s book, *VeteranSpeak*, “explores the history of post war military reintegration. It provides perspective and insight into military skills, training and the values that are central to all veterans. Exploring the past will help employers, employees and everyday citizens to understand current challenges and help veterans achieve their full value in today’s workplace.”

## **Developing a Veteran-Defendant’s Case for Pretrial Negotiations, Trial, & Sentencing**

Ensuring effective representation of veterans charged with criminal offenses starts at the intake stage. All clients should be screened to determine whether they in fact are veterans. A simple question in a case intake form—*e.g.*, “Please describe your military service, if any”—should suffice initially. Clients who report current or prior military service should be further screened. A form called [Initial Screening for Active Duty/Veteran Status](#) will meet that purpose.

But self-reports of military service must be corroborated. At least initially, law firms should require clients to document their self-reports of current or prior military service. Persons presently on active duty or in the National Guard or reserves can document their service by providing copies of their current orders. Persons with prior, active-duty service—veterans—will have been issued a discharge document called a DD-214. The same is true for persons who served in the National Guard or reserves but at some point were called onto active duty status (called "Title 10" status, named for Title 10 of the US Code, which applies to active-duty military service). After the conclusion of their active-duty service, National Guard and reserve personnel are issued a DD-214. Finally, persons who have completed and have been discharged from service with the National Guard are issued a document called an NGB Form 22 (rather than a DD-214).

Thus, clients who report current or prior military service would document their service by providing copies of their current orders, their DD-214s, or their NGB Forms 22. If a client documents military service, the document will (if it can) corroborate much of the information the client self-reports during intake. The client's military records should (if they can) complete the corroboration. A form called [Obtaining Military Personnel Records](#) explains how to obtain military records.

Any hope of success in securing favorable treatment for a veteran client will hinge on convincing the trier of fact—be it the DA during pretrial negotiations, the jury or the judge during trial, or the judge during sentencing—of the legitimacy of the claim for special consideration for the veteran-defendant client. Typically this effort will be grounded on the client's affliction with service-connected post-traumatic stress disorder (PTSD)—including its more recently diagnosed variant, Military Sexual Trauma—or on traumatic brain injury (TBI) or, in the worst-case scenario, on both PTSD and TBI. (Many veterans suffer from both.) Two screening tools—the [PTSD Screening Checklist \(PCL\)](#) prepared by the federal Department of Veteran Affairs, and [Screening Questionnaire: Readjustment Counseling Service: Pacific Western Region Traumatic Brain Injury](#)—are available for initial assessments to determine whether individual clients should be evaluated by medical professionals.

If the client reports having sought medical care from the federal Department of Veterans Affairs (VA), a form called [Request for and Authorization to Release Medical Records or Health Information](#) can be used to obtain copies of the client's VA records. A military or VA medical professional of PTSD or TBI will be greatly helpful. But if a military or VA medical professional already has concluded that a client does not suffer from PTSD and/or TBI, and that conclusion conflicts with the results of the client's intake-stage screening for PTSD and TBI, defense counsel need not treat the negative conclusion as final (any more than a DA must treat a positive conclusion as final). In an effort to confirm the results of the client's intake-stage screening, defense counsel is free to seek an independent examination by medical professionals. If the client cannot afford the costs of such examinations, counsel may request indigent-based funding by filing a [non-routine expense request](#) with the Contract & Business Services Division of the state Office of Public Defense Services (OPDS).

Most critically, an effort to convince the trier of fact of the legitimacy of a claim for special consideration should not stop with an examination for such things as PTSD and TBI. Defense

counsel also must understand and explain how the client's military service—in particular, how his or her assimilation into the “military total institution”—is causally related to the client's behavior in civilian society. See William B. Brown, PhD, [Another Emerging “Storm”](#): Iraq and Afghanistan Veterans with PTSD in the Criminal Justice System, Justice Policy Journal (Fall 2008). Training for and service in the military total institution can profoundly affect a veteran's behavior after discharge and reentry into civilian society. By itself that training and service may contribute to what civilian society, but not military society, would consider anti-social and even criminal behavior. When the training and service is combined with PTSD or TBI or both, the chances of a veteran engaging in what civilian society considers anti-social or criminal behavior reach a depressingly high level.

For an examination of how training and experience in the military total institution actually factored into a veteran's civilian conduct that led to criminal charges, see [Brief of Amicus Curiae, State v. James Anthony Harrell](#).

The author of *Another Emerging “Storm”*, Dr. William B. Brown, is one of the few persons, and may be the only person in the nation who is qualified to provide expert services on the military total institution. Dr. Brown lives in Oregon and is executive director of [The Bunker Project](#)—an organization whose primary goal is to assist veterans, veterans' families, and legal practitioners who represent veterans and their families, to achieve the best possible results in judicial and other legal proceedings. Dr. Brown is available, by private retainer or by OPDS funding, to assist in all facets of criminal prosecutions of veteran-defendants, including in the development of “dynamic risk management plans.” These are designed to facilitate a veteran-defendant's successful re-assimilation into civil society. For an introduction to Dr. Brown's experience and qualifications, see [Motion—Appear Amicus Curiae \(State v. James Anthony Harrell\)](#).

For veteran-defendants who currently are in the military (be it active duty, the National Guard, or the reserves), there is one last component in an effort to convince the trier of fact of the legitimacy of a claim for special consideration. Defense counsel should contact the veteran-defendant's military superiors to determine whether they are willing to vouch for the veteran-defendant. Bear in mind that they will not always be willing. But learning from the client's military superiors that they are **not** willing to vouch for the client is far better than learning it from, for example, the prosecutor with whom counsel is engaged in pretrial negotiations.

A final consideration also applies in cases involving veteran-defendants who currently are in the military. Just as defense counsel must make an adequate and effective effort to protect defendant-clients from the immigration consequence of deportation, see [Padilla v. Kentucky](#), \_\_\_ US \_\_\_, 130 S Ct 1473, 176 L Ed 2d 284 (2010), counsel must make an adequate and effective effort to protect veteran-defendant clients from negative consequences to their military careers. For example, unless properly handled, a domestic-violence charge may result in a client's forfeiture of the right to possess firearms, and likely would end the career of a client who currently is in the military. See Velda Rogers, [Parting Thoughts: Unintended Consequences](#), Oregon State Bar Bulletin, July 2006 (discussing the federal [Lautenberg Act](#)). See also ORS 135.385(2)(f) (requiring trial courts that before they may accept a guilty or no-contest plea to a domestic violence charge, they must inform the defendant “that the conviction may negatively affect the defendant's ability to serve in the Armed Forces of the United States”). The best

resource for obtaining information about how to address clients' potential consequences to their military careers is staff with the Oregon Military Department's [Army National Guard 4133 Regional Trial Defense Team](#) (RTDT). Counsel may call the RTDT at 503-584-3571, or toll free at 800-452-7500.

## Military Service as a Mitigating Factor

Although the guidelines do not enumerate military service as a mitigating factor, trial courts have a delegated authority to create additional mitigating factors, called "nonenumerated factors." See [State v. Orsi](#), 108 Or App 176, 180, 813 P2d 82 (1991)180 (“[t]he sentencing court has the discretion to decide to depart on the basis of mitigating or aggravating factors other than those set out in OAR [213-008-0002]”). This delegated authority is constitutional. See [State v. Speedis](#), 350 Or 424, 432-33, 256 P3d 1061 (2011) (state constitution’s separation of powers does not prohibit guidelines delegation of authority to create nonenumerated departure factors). Case law establishes that under proper circumstances, trial courts may exercise this delegated authority by fashioning a nonenumerated mitigating factor based on the defendant's military service. See, e.g., [United States v. Canova](#), 412 F3d 331 (2d Cir 2005) (defendant convicted of offenses involving multi-million-dollar Medicare fraud; imposition of downward departure sentence based, in part, on six-year military service not error); [United States v. Pipich](#), 688 F Supp 191 (D Md 1988) (where defendant was convicted of mail theft, his extraordinary military record warranted departure to probation). See also [United States v. McCaleb](#), 908 F2d 176 (7th Cir 1990) (departure for military service might be warranted under some circumstances); [United States v. Neil](#), 903 F2d 564 (8th Cir 1990) (same). See generally Ken Strutin, [Veterans in the Criminal Justice System: Defending Conditions of the Mind](#) (Apr. 20, 2012); [“Case Annotations and Resources: Military Service: USSG §5H1.11 Departures and Booker Variances.”](#)

Another nonenumerated mitigating factor—which actually is as a variation of the nonenumerated factor described above—would apply in cases involving active-duty servicemembers. For example, consider a non-commissioned officer (NCO) who is assigned to a unit that is scheduled for deployment to a combat zone, and who is facing criminal prosecution that would bar deployment. Further assume that the NCO’s superiors attest that his deployment is critical to his unit’s cohesion and performance, and that by preventing the NCO’s deployment, the prosecution could cause the unit to fail in its mission—including by suffering otherwise avoidable casualties. By analogy, the following case law supports mitigation in this sort of situation: [United States v. Milikowsky](#), 65 F3d 4, 8 (2d Cir 1995) (“[a]mong the permissible justifications for downward departure \* \* \* is the need, given appropriate circumstances, to reduce the destructive effects that incarceration of a defendant may have on innocent third parties”); [United States v. Kloda](#), 133 F Supp2d 345 (SDNY 2001) (in business tax fraud case, mitigated departure granted in part because of “the needs of [defendant’s] business and employees”).

Under appropriate circumstances, certain of the guidelines' enumerated factors independently or, preferably, in conjunction with the nonenumerated factors discussed above, could authorize basing a mitigated departure on military service. In [Porter v. McCollum](#), 558 US \_\_\_, 130 S Ct 447, 175 L Ed 2d 398 (2009), the Supreme Court concluded that trial counsel provided ineffective assistance of counsel in his client’s capital trial by failing to present mitigating evidence grounded on his military service. The Court explained:

“Our Nation has a long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines as [petitioner] did. Moreover, the relevance of [petitioner’s] extensive combat experience is not only that he served honorably under extreme hardship and gruesome conditions, but also that the jury might find mitigating the intense stress and mental and emotional toll that combat took on [petitioner].” 130 S Ct at 456 (internal citations omitted).

In light of *Porter*, consider a veteran-defendant whose ostensibly criminal conduct could be explained as a by-product of his suffering from service-connected post-traumatic stress disorder, or traumatic brain injury, or both. For that veteran-defendant, *Porter* would support using the following enumerated factors to seek mitigation:

“(B) The defendant acted under duress or compulsion (not sufficient as a complete defense).

“(C) The defendant’s mental capacity was diminished (excluding diminished capacity due to voluntary drug or alcohol abuse).

“ \* \* \* \* \*

“(I) The offender is amenable to treatment and an appropriate treatment program is available to which the offender can be admitted within a reasonable period of time; the treatment program is likely to be more effective than the presumptive prison term in reducing the risk of offender recidivism; and the probation sentence will serve community safety interests by promoting offender reformation.” OAR 213-008-0002(1)(a).

Finally, the Oregon State Bar's Lawyers for Veterans Steering Committee is pursuing legislation that would create a new mitigating factor that would explicitly authorize courts at sentencing to consider [military service as a mitigating factor](#). On May 22, 2012, the Senate Committee on Veterans and Military Affairs held a public hearing to gather information about the steering committee's work, including its proposed mitigating factor. The 2013 Legislature will consider this mitigating factor concept.

## **District Attorney Diversion Authority**

In February 2010, the legislature passed Senate Bill 999 (enrolled as Oregon Laws 2010, chapter 25). This legislation enhances district attorney authority to divert cases from criminal prosecution.

The bill’s amendments took “effect on its passage,” which was when the Governor signed it on March 4, 2010. Or Laws 2010, ch 25, § 7. The amendments “apply to offenses for which there has not been an adjudication of guilt on or before the [Act’s] effective date[.]” Or Laws 2010, ch 25, § 6.

The bill broadly defines “servicemembers” as past and current members of the active duty service, reserves, and the National Guard. It specifies that a veteran-defendant is diversion eligible for other than a driving under the influence charge so long as he or she has not



previously participated in a DA diversion, ORS 135.886(2)(c), and all of the following special conditions are met:

- Military discharges come in the following, hierarchical order: (1) honorable, (2) general under honorable conditions, (3) under other than honorable conditions, (4) bad conduct, and (5) dishonorable. For DA diversion eligibility, the veteran-defendant must have received a discharge of “under other than honorable conditions” or better (*i.e.*, did not receive a “bad conduct” or “dishonorable” discharge, either of which requires a courts-martial conviction). ORS 135.881(4).
- The veteran-defendant is not charged with first-degree sexual abuse, or with first- or second-degree rape, sodomy, or sexual penetration. ORS 135.886(3)(c).
- The veteran-defendant is not charged with a Class A or B felony involving “physical injury,” or with any crime involving “serious physical injury.” ORS 135.886(3)(a)-(b).
- The veteran-defendant is not charged with a “domestic violence” crime involving an alleged victim who, at the time of the alleged crime, had a pending protective order against the veteran-defendant. ORS 135.886(3)(d).

In the last situation enumerated above, a veteran-defendant who is charged with a “domestic violence” crime is diversion eligible if the alleged victim did **not** have a pending protective order against the veteran-defendant at the time of the alleged crime. But in such situations, SB 999 requires the veteran-defendant to plead guilty or no contest to the domestic-violence charge, and that instead of the otherwise standard 180- or 270-day diversion period, ORS 135.896, the veteran-defendant must enter a two-year diversion period. ORS 135.898. If the charging instrument also alleges a non-domestic violence crime, SB 999 does **not** require the veteran-defendant to plead guilty or no contest to that charge. ORS 135.898.

Domestic-violence charges are the only ones to which state law expressly requires a guilty or no-contest plea for a DA's diversion. This could establish that under the maxim of construction *expressio unius est exclusio alterius*, see [Waddill v. Anchor Hocking, Inc.](#), 330 Or 376, 382, 8 P3d 200 (2000); see also ORS 174.010, domestic-violence charges are the **only** charges where the DA may require guilty or no-contest pleas.

The diversion statutes direct DAs to consider several factors in determining whether to offer diversion. One factor is “[t]he impact of diversion upon the community[.]” ORS 135.886(2)(f). The statute does not define “community,” but nothing would prohibit, and logic would support, defining it to include the defendant's **military** community. For example, suppose a non-commissioned officer (NCO) is assigned to a unit that is scheduled for deployment to a combat zone, but the NCO is facing criminal prosecution that would bar deployment with his unit. Further assume that the NCO's superiors attest that his deployment is critical to his unit's cohesion and performance, and that by preventing the NCO's deployment, the prosecution could cause the unit to fail in its mission—including by suffering otherwise avoidable casualties. The DA should consider these military-community matters in deciding whether to offer diversion. *Cf.* [United States v. Milikowsky](#), 65 F3d 4, 8 (2d Cir 1995) (“[a]mong the permissible justifications

for downward departure \* \* \* is the need, given appropriate circumstances, to reduce the destructive effects that incarceration of a defendant may have on innocent third parties”).

## DUII Diversion Authority

Defendants charged with their first offense of driving under the influence of intoxicants (DUII) may have their cases diverted from prosecution. ORS 813.200, *et seq.* The statutes allow defendants one year, ORS 813.230(3), with a single extension period of up to 180 days, ORS 813.225(5), to complete diversion. See *State v. Maul*, 205 Or App 14, 19, 132 P3d 565 (2006) (ORS 813.225(5)’s limited extension authority “is unequivocal and, frankly, inflexible”).

In late 2010, veteran advocates learned that otherwise diversion-eligible servicemembers found that owing to their active-duty obligations, ORS 813.225(5)’s inflexible extension period (inadvertently) discriminated against them by prohibiting them from completing DUII diversion programs within the time allowed. As a result, the statutory scheme denied some servicemembers the opportunity for diversion they would have had **but for** their active-duty service.

To eliminate this inadvertent discrimination, the 2011 Legislature passed House Bill 2702 (enrolled as Oregon Laws 2011, chapter 197). The bill:

- Specifies as state policy the principle that courts are prohibited from denying DUII diversion solely because active-duty military service would impair the defendant’s ability to complete the conditions of the diversion agreement. ORS 813.220(12).
- Grants courts discretion to allow a servicemember-defendant however many extensions of time of whatever length are required to complete a DUII diversion agreement, if the servicemember-defendant shows that his or her current or impending active-duty service would prohibit completing a diversion agreement within the time allowed by ORS 813.230(3) and (5). ORS 813.225(7).
- Authorizes courts to allow servicemembers serving outside the State of Oregon to complete the conditions of a DUII diversion agreement in comparable treatment programs conducted by or authorized by a government entity outside of Oregon. ORS 813.233.

Moreover, in the event the prosecution moves to terminate an active-duty servicemember’s DUII diversion agreement, HB 2702 grants courts discretion:

- To allow the servicemember's attorney to appear at the termination hearing on the servicemember-defendant’s behalf, if military service prevents the servicemember's personal appearance. ORS 813.225(4)(b).
- To allow the servicemember to appear at the termination hearing by telephone or other communication device approved by the court, if the servicemember's military service prevents a personal appearance, and appearance by telephone or other communication device can be arranged. ORS 813.225(4)(a).



- Stay the termination proceeding if the servicemember's military service prohibits appearance by telephone or other communication device, and prohibits the servicemember from aiding and assisting his or her attorney. ORS 813.225(4)(b).

Owing to HB 2702's emergency clause, *see* Or Laws 2011, ch 197, § 7, the bill took effect immediately upon passage, so when the Governor signed it on June 1, 2011. The bill applies to petitions for DUII diversion agreements filed before, on, or after its effective date. Or Laws 2011, ch 197, § 6.

## **Additional Resources for Assistance**

An expanding number of organizations provide listings of various organizational and informational resources to aid in the effective representation of veterans and servicemembers facing criminal prosecution. [Organizations and Other Resources Available for Assistance in the Representation of Veteran-Defendants](#) provides a brief list of such organizations. A more extensive list is [Veterans - Active Duty Personal and Families Telephone and Contact Directory](#), prepared by American Legion Service Officer Peter Aamodt. Also, the Oregon Department of Veterans Affairs's website, through its [Criminal Justice Portal](#), provides information about resources for incarcerated veterans.

A very good resource for legal practitioners is [Veterans in the Criminal Justice System: Defending Conditions of the Mind](#). Prepared by law librarian and criminal-defense attorney Ken Strutin, it providing a listing of various organizational resources, and a bibliography of cases, case studies, and criminal defense-oriented literature addressing veteran-defendant prosecutions.

Occasionally, criminal-defense practitioners may find themselves in a position of needing to know at least the rudiments of the law regulating veterans benefits. For that, a good resource is the [Veterans Law Library](#). It provides a comprehensive collection of materials relating to the veterans benefits adjudication process. Moreover, [Veterans Benefit Resource Organizations](#) provides a listing of various organizations dedicated to assisting veterans and veterans advocates with their claims for VA benefits, from whom practitioners may seek advice and assistance.

Finally, criminal-defense practitioners should feel free to contact Salem attorney Jesse Wm. Barton ([jessewmbarton@gmail.com](mailto:jessewmbarton@gmail.com)) for assistance with their veteran-defendant cases. Also, Barton maintains an email listserve to which he regularly posts news reports about topics of interest to veterans advocates. Interested persons may contact Barton to have their names added to the list.