VETERANS DEFENSE HANDOUT

This article addresses the particular demands and legal options an attorney should consider when representing a veteran charge with criminal misconduct.

1. Creating a Veteran Defense for Pretrial, Trial, & Sentencing

a. **Determine the Nature and Extent of Military Service**:

All clients should be screened to determine whether they in fact are veterans. Once their veteran status is determined further clarification on the extent of their military services should be determined. Please see enclosure ***Veteran Intake Form*** as an example.

b. **Military Concepts & Terminology**

The majority of attorneys know little about the military and many military concepts and terminology seem to be 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).

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 should email the Veterans Defense Resource Center. We will provide basic information about military concepts, including military terminology.

c. **Service Records**:

Discharge: All military service should be corroborated. If the client is presently on active duty, in the reserves or National Guard this can be documented with a current copy of their military orders. Clients with prior active duty service will have been issued a discharge document called a DD-214. This will be true even for those who served on active duty in the National Guard or Reserves. For clients with prior reserve service in the National Guard they will be issued a NGB Form 22 (instead of a DD-214). Therefore the initial documents to obtain are: current military orders, DD-214, or NGB Form 22. The client's military records should be all the corroboration needed for his or her service.

Other Records: Other military records can be very helpful in determining the witnesses you need and sentencing material. Any awards certificates, badges, and evaluation reports are instrumental. Typically listed on any award or evaluation report are specific details of your client's meritorious services and potential witnesses to the events and/or good military character.

Obtaining the Records: If your client is still on active duty or in the National Guard or Reserve these records can easily be obtain by downloading them from the Servicemembers Official Military File Online (often called the "OMPF" or "AMMHR"). If your client has prior service, hopefully they have their records. If not, a letter or Standard Form (SF) 180, request military records must be sent via fax, mail, or online at http://www.archives.gov/veterans/military-service-records/ in order to obtain the client's military service records. Emergency and expedited requests can be made; however, the standard process usually takes 6 months or more. Please see enclosure ***SF 180*** for more details.

d. **PTSD, TBI, or other service connected disabilities**

A veteran client's affliction with Post-Traumatic Stress Disorder (PTSD), Military Sexual Trauma (MST), Traumatic Brain Injury (TBI), or other service-connected disabilities will support your defense case substantially. If your client's diagnoses is not readily apparent from his or her medical records 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 in assessments. It is common for combat veterans to not disclosure the nature of the injuries while on active duty. Unfortunately, the military has created a culture where injury is seen as weakness. These PTSD and TBI assessments will assist in determine whether 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 VA Form 5345, Request for and Authorization to Release Medical Records or Health Information can be used to obtain copies of the client's VA records. The VA Form 5345 must be sent to client's treatment facility. The list and contact information of Oregon treatment facilities can be found at http://www.va.gov/directory. Please see enclosed VA Form 5345 for more details. A military or VA medical professional of PTSD or TBI will be greatly helpful. However, 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. Defense counsel should 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. There are many other service related diagnosis.

e. **Military Total Institution, Psychological Conditioning, or Moral Injury**

Defense counsel must also understand and explain how the client's individual military service affected his criminal behavior. In particular, how his or her incorporation into the "military total institution," psychological conditioning, or moral injury related to the client's behavior in civil society. 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 training and service will 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*, The Bunker Project, *State v. James Anthony Harrell*, 353 Or 247 (2013). Also enclosed is an example of Motion to Admit Expert Testimony on Military Culture & Total Institution.

The author of *Another Emerging "Storm" and Moral Injury As a Collateral Damage Artifact of War in American Society: Serving War to Serving Time in Jail & Prison*, 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 and moral injury. 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).

f. **Good Soldier Witnesses**

For veteran-defendants who recently served or 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 or collogues to determine whether they are willing to vouch for the veteran- defendant. Bear in mind that they will not always be willing given the nature of the charge and the individual defendant.

2. **Military Service as a Mitigating Factor**

Senate Bill 124 (2013) created ORS 137.090(2) enumerating military service as a mitigating factor and eligibility for downward departures. Please keep in mind that ORS 137.090(2) also applies to misdemeanor cases too.

Even before the enactment of ORS 137.090(2) trial courts 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).

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.

For example, 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, consider 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).

(J) Military service (ORS 135.881; ORS 137.090(2))."

3. **District Attorney Diversion Authority**

In February 2010, the legislature passed Senate Bill 999 (enrolled as Oregon Laws 2010, chapter 25). This legislation enhanced the district attorney authority to divert servicemembers' cases from criminal prosecution. See ORS 135.881 and 135.886.

ORS 135.881(4) broadly defines "servicemembers" as current or past members of the active duty service, reserves, and the National Guard who received an (1) honorable, (2) general under honorable conditions, or (3) under other than honorable discharge (order of hierarchy). Military discharges of bad conduct or dishonorable are not eligible for DA diversion.

ORS 135.886(2) specifies that a servicemember-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, and all of the following special conditions are met:

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. Domestic-violence charges are the only ones to which state law expressly requires a guilty or no- contest plea for a DA's diversion, and 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 alleges a non-domestic violence crime, it does not require the veteran- defendant to plead guilty or no contest to that charge. ORS 135.898.

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. *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”).

4. **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. 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).

5. **Other Considerations**

a. **Current Service Members**

Special attention should be made to 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*, 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). Please see www.oregon.gov/OMD/JAG/pages/index.aspx. Counsel may also call the RTDT at 503-584-3571, or toll free at 800-452-7500.

Resources:

An expanding number of organizations, expert consultants, and expert witnesses can be found on our website at _____.

Contact:

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