

1 IN THE CIRCUIT COURT OF THE STATE OF OREGON
2 FOR THE COUNTY OF ____

3 STATE OF OREGON,)
4)
5 Plaintiff,) Case No. ____
6 vs.)
7) MOTION TO ADMIT EXPERT TESTIMONY
8) ON MILITARY CULTURE & TOTAL
9) INSTITUTION
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Defendant intends to call William B. Brown, PhD, as an expert witness on military culture and the military total institution, to assist the jury in understanding those concepts, and how defendant's training and experience within that culture and institution, affected his behavior that now is the subject of his prosecution.

Dr. Brown's testimony is admissible under OEC 702, which provides:

"If scientific, **technical or other specialized knowledge will** assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise."

(Emphasis added.)

As seen, in addition to admitting expert testimony that addresses "scientific" matters, OEC 702 also admits expert testimony that addresses "technical or other specialized knowledge[.]" Indeed, the official legislative commentary to OEC 702 states:

"The rule is broadly defined. The fields of knowledge which may be drawn upon are not limited merely to the 'scientific' and 'technical' but extend to all 'specialized' knowledge. Similarly the expert is viewed not in a narrow sense, but as a person qualified by 'knowledge, skill, experience, training or education.' Thus, within the scope of the rule are not only experts in the strictest sense of the word, *e.g.*, physicians, physicists and architects, but also the group sometimes called 'skilled' witnesses, such as bankers or landowners testifying to land values."

1981 Conference Comm. Commentary, OEC 702.

1 Under OEC 702, the admissibility of Dr. Brown’s testimony depends on two
2 considerations:

- 3 1. Whether it would be helpful or of assistance to defendant’s jury in deciding whether
4 the prosecution proved beyond a reasonable doubt the elements and requirements for
5 criminal liability, *State v. Stringer*, 292 Or 388, 391, 639 P2d 1264 (1982) (“whether
6 the expert’s testimony, if believed, will be of help or assistance to the jury”); and
- 7 2. Whether Dr. Brown is qualified to testify in his field. *See Yundt v. D & D Bowl, Inc.*,
8 259 Or 247, 356, 486 P2d 553 (1971).

9 Proper representation of a veteran-defendant client in a case such as this requires
10 assembling a culturally competent, multi-disciplinary team. William B. Brown, *et al.*, *The*
11 *Perfect Storm: Veterans, Culture & the Criminal Justice System*, 10 Justice Policy Journal
12 (2013), at 11. For example, in the prosecution of veteran Robert Helmick for domestic-violence
13 charges, Helmick substituted his first lawyer with one who concluded it would be proper to make
14 use of his client’s military service. *See Jesse Wm. Barton, Home Free: Combatting Veteran*
15 *Prosecution & Incarceration*, 11 Justice Policy Journal (Fall 2014) at 16-17. After substitute
16 defense counsel presented a diminished-capacity defense, grounded on assistance from a multi-
17 disciplinary team comprised of experts in forensic psychology, psychopharmacology, **and** the
18 military culture and total institution, the case ended in full acquittals. *See Susan Elizabeth Reese,*
19 *Beautiful Words: State v. Robert Helmick*, The Oregon Defense Attorney, Sept./Oct. 2011, at 8.

20 Courts have regularly admitted qualified expert testimony about other cultures that was
21 relevant to a material matter, and helpful to the trier of fact. *See, e.g., United States v. Hayat*, 710
22 F3d 875 (9th Cir 2013) (dueling witnesses allowed to testify about cultural meaning of note
23 carried by Pakistani defendant; scope of testimony permitted depends on expertise of witness);
24 *State v. Miglavs*, 337 Or 1, 90 P3d 607 (2004) (officers testified about “Latino gang culture” of
25 specific local gang to justify detention and pat-down of suspicious young men); *State v. Lay*, 242
Or App 38, 46, 252 P3d 850 (2011) (testimony of undercover officer whose job demanded that
he “immerse” himself in the “culture” of drug users “sufficiently establishes the persuasive

1 weight of his experience and what it taught him: that defendant was likely to have drugs on his
2 person or in the van”); *State v. Taylor*, 133 Or App 503, 505, 892 P2d 697 (1995) (summarizing
3 with approval testimony from two expert witnesses explaining gang culture as “necessary * * *
4 [t]o fully understand the facts” of the case). *See also Scott v. Ross*, 140 F3d 1275, 1286 (9th Cir
5 1998); *Vang v. Xiong*, 944 F2d 476, 481-82 & n 3 (9th Cir 1991); *State v. Haque*, 726 A2d 205,
6 208 (Me 1999). As seen, there is nothing remarkable about expert testimony addressing other
7 cultures, when it is relevant to a material matter.

8 Given that, there should be no principled reason to treat military culture differently.
9 Indeed, the legislature itself has decreed that the criminal-justice should afford certain legal
10 accommodations to “servicemembers”¹ facing prosecution. *See SB 124* (2013) (enrolled as
11 Oregon Laws 2013, chapter 331) (establishing servicemember status as an express mitigating
12 factor for sentencing purposes); *HB 2702* (2011) (enrolled as Oregon Laws 2011, chapter 197)
13 (accommodating servicemembers’ active-duty service to ensure they are afforded the same
14 opportunities as civilians to complete DUII diversion programs); *SB 999* (2010) (enrolled as
15 Oregon Laws 2010, chapter 25) (enlarging district attorney authority to divert from prosecution
16 cases involving servicemember-defendants). These legislative judgments serve as context in
17 support of a conclusion that relevant expert testimony about the military culture is admissible
18 under OEC 702.

19 Moreover, the “military total institution” concept is inextricably linked to military
20 culture. But understanding that concept first requires grounding in “total institutions” generally.

21 Sociologist Erving Goffman developed the concept more than half a century ago. He
22 explained:

23 ¹ Under ORS 135.881(4), “servicemember” means a person who currently is serving in the active-
24 duty military, the reserves, or the National Guard; or a person who previously served (a veteran) and who
25 received an honorable discharge, a general discharge under honorable conditions, or a discharge under
other than honorable conditions. It does not include a veteran who received a bad conduct or a
dishonorable discharge (either of which requires a courts-martial conviction).

1 “The central feature of total institutions can be described as a breakdown
2 of the barriers ordinarily separating these three spheres of life.

3 “• First, all aspects of life are conducted in the same place and under the
4 same central authority.

5 “• Second, each phase of the member’s daily activity is carried on in the
6 immediate company of a large batch of others, all of whom are treated alike and
7 required to do the same thing together.

8 “• Third, all phases of the day’s activities are tightly scheduled, with one
9 activity leading at prearranged time into the next, the whole sequence of activities
10 being imposed from above by a system of explicit formal rulings and a body of
11 officials.

12 “• Finally, the various enforced activities are brought together into a single
13 rational plan purportedly designed to fulfil the official aims of the institution.”

14 Erving Goffman, *On the Characteristics of Total Institutions* 17 (1961). Moreover, “historians
15 have confirmed the validity of Goffman’s concept of ‘total institutions’ which minimizes the
16 differences in formal mission to establish a unity of design and structure.” David Rothman, *The
17 Discovery of the Asylum: Social Order & Disorder in the New Republic* xxix (2002). See also
18 James Chriss, *Counseling & the Therapeutic Stale* 101 (1999).

19 Goffman himself recognized that “army barracks,” among several other venues, meet the
20 total institution definition. See Goffman at 15-16. Dr. Brown later expanded on Goffman’s
21 recognition and brought full force to the concept of a **military** total institution. As Brown has
22 explained, total institution “characteristics are prevalent in all military institutions throughout the
23 world.” William B. Brown, *War, Veterans & Crime*, in *Transnational Criminology* 608 (Prof.
24 Martine Herzog-Evans, Univ. of Reims, France, ed. 2010). Military institutions

25 “require complete control of the [military] recruit’s entire being, and replacement
of the recruit’s civilian cultural beliefs and responses. * * * The military total
institution requires the modification of the thought processes of its civilian
inductees to meet the needs and the goals of the military. Principles and values
acceptable within the civilian environment are generally not beneficial to the
military milieu. On the other hand, a good soldier’s principles, which are artefacts
of the military total institution, are not always favourable to the civilian
environment.”

1 *Id.* at 609 (citing Erving Goffman, *Asylums: Essays on the Social Situation of Mental Patients &*
2 *Other Inmates* (1961)).² See also Louis A. Zurcher, Jr., *The Naval Recruit Training Center: A*
3 *Study of Role Assimilation in a Total Institution*, *Sociological Inquiry* 85 (2007); Peter Bamburger
4 & Alon Hasgall, *Instructor Role in Educational Organizations having the Characteristics of*
5 *Total institutions*, 33 *Journal of Educational Administration* 68 (1995).

6 For a variety of reasons, very few people in modern American society—so very few
7 potential jurors—have any training and experience in the military culture and total institution.
8 Principal among these reasons is that more than 40 years ago, the nation committed to relying on
9 a volunteer military force, rather than conscription, to meet the military’s manpower needs.
10 Barton, *Home Free* at 5. The nation has steadfastly maintained this commitment,
11 notwithstanding its on-going prosecution of the Global War on Terror (GWOT), which began on
12 September 14, 2001. *Id.* at 3. This commitment has forced the nation to rely on a “backdoor
13 draft”—“stop loss”³ and repeated deployments, which so far during the GWOT have affected
14 around one million servicemembers—to meet the war’s manpower needs. *Id.* at 7. As a result,
15 “less than 1% of the American public” have been involved in the nation’s lengthy war effort.⁴ *Id.*
16 at 5. This produced “[t]he most significant development in the conduct of war in the twentieth
17 century”—“the [near total] elimination of the American people from the conduct of the wars of
18 the United States.” Adrian R. Lewis, *The American Culture of War* 486 (2d ed. 2012).

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21 ² The reason some of the words are spelled in an odd fashion—*e.g.*, “artefacts” and
“favourable”—is that the publisher of *War, Veterans & Crime* is European.

22 ³ “Stop loss” is a feature of Title 10, section 12305(a) of the United States Code and of Paragraph
23 10(c) of the Armed Forces Enlistment Contract, which authorize retaining military personnel beyond the
lengths of their enlistments. Barton, *Home Free* at 7. For example, Paragraph 10(c) states: “In the event of
24 war, my enlistment in the Armed Forces continues until six (6) months after the war ends, unless the
enlistment is ended sooner by the President of the United States.” See also *Stop Loss* (MTV Films 2008).

25 ⁴ By comparison, during World War II, “500 major leaguers left their ball clubs to serve in the
military.” *Id.* at 6-7.

1 Or put a bit differently, the nation’s decision to “[i]mpress[] military service on the 1%
2 freed the other 99% of Americans to lead peace-time lives when their nation [is] in a global
3 war.” Barton, *Home Free* at 3.

4 As a consequence, the general public knows very little about the realities of the military
5 culture and total institution, so training and experience in those realities could be relevant to
6 material issues in prosecutions. See Barton, *Home Free* at 12-18. Understanding those realities
7 would help defendant’s jury in understanding key issues in his case. As practical matter,
8 assistance from a witness who is an expert in the military culture and total institution is critical to
9 a jury’s understanding of those realities.

10 Moreover, Dr. Brown is qualified to testify about total institutions generally. The total-
11 institution concept is part of the sociology discipline. Brown is a sociologist, having taken his
12 MA in sociology in 1988, and his PhD in sociology in 1992, both from the University of Nevada,
13 Las Vegas. He is a full professor of Criminal Justice at Western Oregon University.⁵

14 Furthermore, as shown on Dr. Brown’s *curriculum vitae* (attached), he has published
15 numerous, peer-reviewed articles addressing the **military** total institution, with his seminal work
16 being William B. Brown, *Another Emerging Storm: Iraq & Afghanistan Veterans with PTSD in*
17 *the Criminal Justice System*, 5 Justice Policy Journal (Fall 2008)). His work has been cited in
18 other publications and court filings. See Brockton Hunter, *Echoes of War: The Combat Veteran*
19 *in Criminal Court* 16-17 (2013) (citing William B. Brown, *Spinning the Bottle: A Comparative*
20 *Analysis of Veteran-Defendants & Veterans Not Entangled in Criminal Justice*, The Attorney’s
21 Guide to Defending Veterans in Criminal Court (Brockton Hunter ed., 2012)); Evan R. Seamone,
22 *Reclaiming the Rehabilitative Ethic in Military Justice: The Suspended Punitive Discharge as a*

23 ⁵ The criminal justice field relates to the study of such things as policing and courts, whereas
24 criminology, which is a subset of sociology, is a social or behavioral science that deals with criminal
25 behavior. Consistent with other institutions’ programs, the curriculum of Western Oregon’s Criminal
Justice Department's incorporates criminological coursework. See *Western Oregon University 2014-15*
Course Catalog at 55-56.

1 *Method to Treat Military Offenders with PTSD & TBI & Reduce Recidivism*, 208 Military L Rev
2 20, 120, 130 (2011); Brief of *Amicus Curiae*, *State v. James Anthony Harrell*, 353 Or 247, 297
3 P3d 461 (2013) (SC No. S059513), at 5-14; Melissa Hamilton, *Reinvigorating Actus Reus: The*
4 *case for Involuntary Actions by Veterans with Post-Traumatic Stress Disorder*, 16 Berkeley J of
5 Crim Law 340, 371 n 170, 380 n 220 (2011).

6 Coupled with Dr. Brown’s academic and scholarly background in the sociology
7 discipline is his military record. Brown

8 “served two combat tours in Vietnam as an infantryman with the United States
9 Army’s 173rd Airborne Brigade. Between his combat tours Brown completed the
10 Army Ranger School. After his second combat tour he served as a drill sergeant at
11 the Army’s basic infantry training school at Ft. Lewis, Washington. Subsequently,
Brown was leadership honor graduate from the Officer Candidate School at Ft.
Benning, Georgia. He then served as an instructor at the Army Ranger School,
and finally as a platoon leader in the 75th Ranger Regiment.”

12 Motion—Appear *Amicus Curiae*, *State v. James Anthony Harrell*, 353 Or 247, 297 P3d 461
13 (2013) (SC No. SC S059513), at 3.

14 Thus, Dr. Brown is eminently qualified to provide expert testimony about the military
15 culture and military total institution. Indeed, the Office of Public Defense Services' Business &
16 Contract Services Division has approved non-routine expense requests for Brown’s services in
17 numerous prosecutions of servicemember-defendants’ prosecutions. Moreover, Brown
18 previously has been qualified to provide expert testimony in prior cases, including:

- 19 • *State v. Jessie Bratcher*, Grant County Case No. 0808219CR (murder prosecution).
- 20 • *State v. Tyke Thomas Supanchick*, Lane County Case No. 200525537 (aggravated-
21 murder prosecution).
- 22 • *People v. Dejon Baskin*, Fresno County Case No. S09904123 (attempted murder
23 prosecution).

24 In sum, courts regularly have allowed experts to testify about relevant aspects of discrete
25 cultures. The military culture should be treated no differently. Moreover, the total institution

1 generally, and the military total institution specifically, are verifiable concepts accepted within
2 the sociology discipline. Owing to “the [near total] elimination of the American people from the
3 conduct of the wars of the United States,” Lewis, *The American Culture of War* at 486, the
4 general public, including defendant’s jury, should not be expected to understand the military
5 culture and total institution any more than they should be expected to understand such things as
6 banking principles or real estate values. Understanding the military culture and total institution,
7 and defendant’s training and experience in them, would be helpful to the jury in determining
8 whether the prosecution has proved beyond a reasonable doubt the elements and requirements
9 for criminal liability of the charges defendant faces. *Stringer*, 292 Or at 391. Dr. Brown is
10 qualified to provide expert testimony on the subject. *Yundt*, 259 Or at 356. His testimony is
11 admissible. OEC 702.

12 DATED this ___ day of ___.

13 Respectfully submitted,
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