

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

PLAINTIFF-APPELLEE,

V.

JEFFREY BELEW,

DEFENDANT-APPELLANT

CASE NO. 2013-0711

ON DISCRETIONARY APPEAL FROM  
THE LUCAS COUNTY COURT OF  
APPEALS, SIXTH APPELLATE  
DISTRICT,

CASE NO. L-11-1279

MERIT BRIEF OF AMICUS CURIAE THE ARMS FORCES  
IN SUPPORT OF APPELLANT BELEW

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## I. STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus Curiae, The Arms Forces, an Ohio not for profit corporation, was founded in 2009 by Pam Hays, with the mission of serving military veterans with Post Traumatic Stress Disorder, now known by the more preferred term Post Traumatic Stress (PTS), and Traumatic Brain Injury (TBI) (PTS and TBI are referred to as Invisible Wounds). Ms. Hays is President of the corporation and a survivor of TBI. Currently, Ms. Hays serves on The Toledo Veterans Court Initiative, The Veterans Integrated Service Network (VISN 11), The Management Assistance Council, The Student Veterans Committee, The Toledo Lucas County Military Affairs Committee, The Ohio National Guard OHIOCARES, and The Attorney General's Task Force for Mental Health and Criminal Justice. In these capacities, Ms. Hays's goal is to assist, advocate and educate on Invisible Wounds so the needs of veterans are more clearly understood. The Arms Forces supports the families of veterans trying to assist their loved ones with PTS and TBI.

The mission of The Arms Forces is focused on life navigation coaching for persons who have cognitive challenges as a result of Invisible Wounds. For veterans with Invisible Wounds, the existing systems of assistance are limited, with the access to the services cumbersome. It is difficult for many veterans to locate and access these service providers due to their Invisible Wounds. Additionally, service providers need further education on the signs and symptoms of PTS and TBI, to allow them to better diagnose veterans. Because many Invisible Wounds are missed in diagnosis while on active duty, it is important that the veterans have the ability, once they return home, to access critical medical and physiological testing. The Arms Forces serves hundreds of military veterans across the country suffering from PTS and TBI. These veterans have encountered similar patterns of difficulty receiving proper diagnosis and obtaining treatment of Invisible Wounds.

Part of the reason for the creation of The Arms Forces was to address the number of veterans with both honorable and dishonorable discharges who have Invisible Wounds which were not diagnosed. The number of wounded veterans contacting The Arms Forces confirmed what has become a well-known problem: that many of the veterans are told by the military, the Veterans Administration and other service providers, that their PTS and TBI are “personal issues” not caused by the service to their country or that they are “faking it.” The goal of The Arms Forces is to insure each veteran receives recognition of their Invisible Wounds, proper treatment, and acknowledgement that the Invisible Wounds were caused in defense of their country. Recognition and proper treatment of Invisible Wounds greatly improves the chances of success in veterans’ lives. The Arms Forces speaks up, with tenacity, for the veterans’ rights and dignity when no one else will.

The Arms Forces was made aware of Jeffrey Belew’s situation by a letter to the members of The Military Affairs and Criminal Justice Committee. Once aware of Mr. Belew’s specific concerns about his discharge and inability to receive treatment, Ms. Hays reviewed his military records and the transcripts and pleadings of the lower courts decisions regarding his criminal conviction. Ms. Hays’s background in reviewing veterans’ medical records for failure to diagnose and improper diagnoses was requested in Mr. Belew’s case and resulted in the request to provide this Amicus Brief.

## II. STATEMENT OF THE CASE AND THE FACTS

The Arms Forces adopts the specifics of Mr. Belew’s case and facts as they are covered in the MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT JEFFREY BELEW filed before this Court.

In this brief, The Arms Forces will identify several significant facts which should have been considered by the Court in sentencing. The Arms Forces brings to the Court's attention that, in 2012, the Ohio Department of Veterans Services successfully supported passage of HB 197, which amended Ohio Revised Code Sections 2929.12 and 2929.22, and which became effective March 22, 2013. These amendments require sentencing courts to consider an offender's military service and the possibility that a veteran may have an emotional, mental or physical condition traceable to their service which may be a contributing factor in their crime. Also, the U.S. Supreme Court in *Porter v. McCollum* (2009) 558, U.S. 30, 130 S. Ct. 447 required that such conditions stemming from military service be considered mitigating factors.

### III. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

#### Proposition of Law No.1:

Courts must consider relevant issues of Post Traumatic Stress and Traumatic Brain Injury as mitigating factors when sentencing combat veterans who commit crimes.

Since the start of the Global War on Terrorism (GWOT), more than two million men and women have served in Iraq and Afghanistan.<sup>1</sup> Between 11 and 20 percent of them have experienced PTS. Among Vietnam-era veterans, the number may be as high as 30 percent.<sup>2</sup>

The link between PTS and other mental health issues, including depression and substance abuse, is well-documented. The symptoms of PTS typically include hyperarousal, nightmares, flashbacks, and insomnia. For many sufferers, especially those whose PTS has gone undiagnosed and untreated, self-medication with alcohol or other drugs is common. There are also

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<sup>1</sup> See Millions Went to War in Iraq, Afghanistan, Leaving Many with Lifelong Scars (March 14, 2013), available at <http://www.mcclatchydc.com/2013/03/14/185880/millions-went-to-war-in-iraq-afghanistan.html>.

<sup>2</sup> See <http://www.ptsd.va.gov/public/pages/how-common-is-ptsd.asp>.

well-established links between PTS and crime, and between PTS and suicide. In the interest of conserving the resources of the Court, The Arms Forces will not discuss those links at length in this brief, and adopts the thorough discussions in the Merit Brief of Amicus Curiae Ohio Suicide Prevention Foundation, Disability Rights Ohio, National Disability Rights Network, National Alliance on Mental Illness of Ohio, and the Ohio Empowerment Coalition in Support of Appellant.

According to several recent studies and reports, including the Government Accountability Office Report to the Ranking Member, Committee on Veterans' Affairs, House of Representatives (GOA 12-12), many veterans experiencing PTS during active duty are not properly diagnosed and treated. Worse, many of them are discharged under conditions that allow the military to escape the responsibility of caring for them later. For example, many veterans suffering from PTS are discharged under less than honorable conditions because of substance abuse related to their PTS. These discharges preclude them from receiving health care through the Veterans Health Administration, which reduces the likelihood that they will receive appropriate treatment for their PTS. Another common tactic is to diagnose a veteran with a personality disorder rather than PTS. A personality disorder would not be related to a veteran's military service, and thus not entitle him to the disability benefits he could otherwise receive. This systemic failure to diagnose and treat servicemembers and veterans for PTS means thousands of traumatized veterans find themselves suffering from PTS and related mental health conditions with virtually no support network.

This is the case for Mr. Belew. A review of his military records shows that he spent one year on active duty in Iraq serving as an Infantry First Responder. His job entailed being the first to approach, handle, clean and remove from the field injured Marines, other servicemen and civilians, and the deceased bodies and/or body parts of his comrades. His job further entailed

handling deceased Marines and preparing their bodies for shipment. It appears from Mr. Belew's records that this was his only job throughout his entire year-long deployment.

While the daily reports of Mr. Belew's unit recite cold statistics like the specific number of Marines injured and killed on a given date and time, they scarcely capture the emotional reality of daily life as a first responder: the screams of the injured, the looks and fear of constant terror, the smell of burned flesh and the feel of warm blood from a dying or deceased comrade. All first responders receive training, but no training can prepare a person for the actual events that take place on the battlefield, the emotional upheaval of constant proximity to death over a long period of time, and the cumulative effects of repeated exposure to injury and death.

Mr. Belew showed signs that he was suffering from PTS while he was in Iraq. His superiors noted personality changes and other signs that he was having difficulty coping with the stress of the battlefield. His medical records suggest that he sought to deal with the daily possibility of being killed with alcohol. It appears, however, that no one did anything to help him. Mr. Belew may also have been suffering from a TBI inflicted by an improvised explosive device (IED). Although he was close enough to the IED explosion to have been subject to a mandatory period of 24 hours' sick-in-quarters status and referral for a medical evaluation, his superiors did follow procedure and no one ever tested Mr. Belew for TBI.

The military continued to ignore the signs of Mr. Belew's PTS and potential TBI after he returned home from Iraq. In fact, rather than supporting Mr. Belew by diagnosing and treating him, the Marine Corps took the opposite approach of ejecting him from the service with a bad conduct discharge that all but guaranteed he would not receive treatment for his Invisible Wounds after he returned to civilian life.

Had the military diagnosed and treated Mr. Belew's Invisible Wounds during his service, his self-destructive behavior may never have escalated to the point where he received a bad conduct discharge. With an honorable discharge, Mr. Belew would have been eligible for mental health and other medical care through the Veterans Health Administration. He likely would have received a disability rating that would have entitled him to compensation. He would have had access to his local VA Justice Outreach Coordinator and a whole host of benefits from private organizations that provide assistance to veterans. He may never have tried to commit suicide by engaging in the conduct that led to his conviction for this crime.

With no ability to access any of the resources typically available to veterans, including the VA Justice Outreach Coordinator, Mr. Belew and his counsel had no idea that his Invisible Wounds were impacting his ability to function in society and to make rational decisions. He was not permitted to receive services from VFW, and he did not even know that he had the right to challenge the decisions made about his discharge.

#### A. Felony Sentencing Law in Ohio

##### 1. Purpose of Sentencing and Consideration of Mitigating Factors

“The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender using the *minimum* sanctions that the court determines accomplish those purposes . . . .” R.C. 2929.11(A) (emphasis added). While a sentencing court has broad discretion to determine the best way to achieve those purposes, it is required to consider certain factors relating to the seriousness of the crime, the likelihood of the offender's recidivism, and, as of March 22, 2013, the offender's military service. Beyond that, the

court “may consider any other factors that are relevant to achieving those purposes and principles of sentencing.” R.C. 2929.12(A).

One key consideration is the presence of mitigating circumstances that, while insufficient to constitute a defense, nonetheless weigh in favor of ordering a lighter sentence. The consideration of mitigating evidence is critical to a court's ability to craft a sentence that is just, fair, and no harsher than necessary to achieve the purposes of sentencing.

## 2. Sentencing Factors in Ohio

A sentencing court in Ohio is required to consider several factors pertaining to the seriousness of an offense. R.C. 2929.12(B), (C). The Ohio Revised Code enumerates several factors that would indicate an offender's conduct was “more serious than conduct normally constituting the offense.” R.C. 2929.12(B) These factors include whether the injury of the victim was exacerbated because of the victim's age or mental capacity, whether the offender held a position of public trust, or whether the offense was related to organized crime activity. R.C. 2929.12(B). Other factors indicate that an offender's conduct should be regarded as “less serious than conduct normally constituting the offense.” R.C. 2929.12(C). One of these factors requires a court to consider whether there were “substantial grounds to mitigate the offender's conduct, although the grounds [were] not enough to constitute a defense.” R.C. 2929.12(C)(4).

A sentencing court in Ohio is also required to consider several factors pertaining to an offender's likelihood of recidivism. Those factors indicating a greater likelihood of recidivism include a history of criminal convictions, a history of substance abuse where the offender refuses to acknowledge or accept treatment, and an apparent lack of remorse. R.C. 2929.12(D). Other factors indicate a lesser likelihood of recidivism, including the lack of a prior criminal record, evidence

that the circumstances of the offense are unlikely to occur again, and genuine remorse. R.C. 2929.12(E).

Finally, sentencing courts in Ohio may consider “any other factors that are relevant to achieving those purposes and principles of sentencing.” R.C. 2929.12(A).

B. Evidence of Combat-Related PTS or TBI Is a Relevant Sentencing Factor Regardless of Whether an Offender Was Sentenced Prior to Its March 22, 2013 Enumeration as a Factor.

Evidence of PTS or TBI in a combat veteran is highly relevant to an analysis of the sentencing purposes and factors contained in R.C. 2929.11 and R.C. 2929.12, regardless of whether the amendment expressly requiring its consideration was in effect at the time of sentencing. As an initial matter, the sacrifice a combat veteran made in serving our country should not be overlooked. Even where a veteran is separated from the military under less than honorable circumstances, the nature of one's discharge does not tell the whole story of the character of one's service, especially when PTS or TBI may have caused the behavior that resulted in the discharge.

More importantly, evidence that a combat veteran is suffering from PTS or TBI strongly suggests that the veteran's inability to conform his behavior to the law is related to neurological or mental health problems that are beyond his control. While these problems may not rise to the level of a defense, they are certainly mitigating circumstances that should be considered when analyzing the seriousness of an offense under R.C. 2929.12(C)(4).

Above all, one cannot forget that the purpose of sentencing is to protect the public and punish the offender with the minimum sanctions necessary. Imposing an unduly harsh prison sentence on a veteran who is already suffering neurological and mental health problems is neither just nor in the public interest. Veterans with these conditions should be held accountable for the

crimes they commit but, to the extent that their actions are a result of these conditions, they are not as morally culpable as offenders with uninjured brains or non-traumatized minds. These veterans need treatment and the support of their communities, not imprisonment in a hostile environment that will only isolate them further from society. If courts are genuinely concerned with preventing recidivism, they will impose sentences that facilitate veterans' recovery rather than exacerbate the conditions that led to their offenses.

### C. Mr. Belew's Case

The evidence of Mr. Belew's Invisible Wounds and the role they played in the conduct that resulted in his conviction has been thoroughly discussed in the Merit Brief of Appellant Jeffrey Belew. The Arms Forces adopts the discussion in Mr. Belew's brief and will not repeat its contents here.

At Mr. Belew's sentencing hearing, the judge asserted that Mr. Belew had offered evidence that he suffers from PTS as an "excuse." She also remarked that Mr. Belew "intended to kill" the officers when he fired his weapon at their car.

The trial court sentenced Mr. Belew to nine years' imprisonment for each of his two convictions for felonious assault, and seven years' imprisonment for each firearm specification. The court ordered Mr. Belew to serve the sentences for the gun specification concurrently with one another but, as required by law, consecutively to the sentences for the underlying felonies. The court ordered Mr. Belew to serve the sentences for the underlying felonies consecutively. This resulted in a sentence of 27 years' imprisonment.

The trial court was required to consider several factors pertaining to the seriousness of Mr. Belew's crime. R.C. 2929.12(B), (C). Of those factors that would allow the court to conclude that Mr. Belew's conduct was "more serious than conduct normally constituting the offense," none

appear to have been at issue in this case. R.C. 2929.12(B). Of those factors that would allow the court to conclude that Mr. Belew's conduct was "less serious than conduct normally constituting the offense," one required the court to consider whether there were "substantial grounds to mitigate the offender's conduct, although the grounds [were] not enough to constitute a defense." R.C. 2929.12(C)(4).

Mr. Belew presented ample evidence of the role PTS played in his crime. Again, The Arms Forces will not duplicate discussions of that evidence here. What is important is that, at best, the trial court disregarded Mr. Belew's evidence or misunderstood its significance. At worst, the court mischaracterized it as an "excuse" and held it against him as an aggravating factor.

Regarding the likelihood of Mr. Belew's recidivism, the trial court was required to consider a number of factors relating to his likelihood to commit further crimes. None of the factors that would indicate a greater likelihood of recidivism appear to be present in Mr. Belew's case. While one factor relates to an offender's history of substance abuse, it is limited to those circumstances in which an offender refuses to acknowledge or accept treatment for such abuse. R.C. 2929.12(D)(4). There is no such evidence in Mr. Belew's case. Similarly, another factor applies to an offender who shows no remorse for his actions. R.C. 2929.12(D)(5). Not only is there no such evidence in Mr. Belew's case, Mr. Belew's only remarks at his sentencing hearing consisted of an apology to the officers who were involved in his case.

Of the factors that would indicate a lesser likelihood of recidivism, three relate to an offender's lack of a prior criminal record. The trial court acknowledged that Mr. Belew's prior criminal record was minimal. A fourth factor applies in cases where the circumstances of the offense are unlikely to occur again. There is no reason to believe that, with treatment for his underlying mental health issues, the circumstances of Mr. Belew's offense would be repeated. The

final factor applies to offenders who, like Mr. Belew, have expressed genuine remorse for their actions.

The trial court's mischaracterization of Mr. Belew's evidence of Invisible wounds as an "excuse" demonstrates a general misunderstanding of the purposes of sentencing and consideration of mitigating circumstances. Mr. Belew never meant to suggest that his Invisible Wounds excused his actions. Rather, his counsel presented highly relevant evidence that the conduct that led to Mr. Belew's conviction was at least partly attributable to untreated mental health and neurological problems.

The trial court's mischaracterization of Mr. Belew's evidence also demonstrates a specific misunderstanding of the role Mr. Belew's played in his offense, which occurred in the context of an attempt to commit suicide by cop. When the trial court remarked that Mr. Belew "intended to kill" the officers who were present at the scene of his offense, it articulated a conclusion that was completely unsupported by the record and well outside the scope of Mr. Belew's conviction for felonious assault, which requires only that he knowingly caused or attempted to cause physical harm. The evidence in the record suggests that Mr. Belew's intent was not to kill anyone, but to provoke the officers into killing *him*.

In Lucas County, imposing concurrent sentences for multiple felonious assault charges stemming from the same incident does not appear to be the norm. In State of Ohio v. Hoskinson (Lucas Cty. Common Pleas 200203434), the defendant was convicted of one count of involuntary manslaughter and four counts of second degree felonious assault for shaking a 15-month-old baby to death. He was sentenced to eight years for the involuntary manslaughter charge, and five years for each felonious assault charge. All of those terms were to run concurrently, resulting in a total of 8 years' imprisonment.

In State of Ohio v. Robbins (Lucas Cty. Common Pleas 201002035), the defendant was convicted of two second degree felonious assault charges with a firearm specification for firing a weapon approximately 20 times into a crowded bar. He was sentenced to four years for each felonious assault charge, and three years for the firearm specification. The term for the firearm specification was to run consecutively to the terms for the underlying charges, which were to run concurrently, resulting in a total of seven years' imprisonment.

In State of Ohio v. Saenz, (Lucas Cty. Common Pleas 200902255) the defendant was convicted of one count of improperly discharging a firearm into a habitation with a firearm specification, and two counts of second degree felonious assault, one of which included a firearm specification, for chasing down and shooting at his estranged wife. He was sentenced to five years' imprisonment for each underlying offense, along with the mandatory one and three years' imprisonment for the firearms specifications. The terms for the gun specifications were to run consecutively to the three underlying offenses, which were to run concurrently, resulting in a total of nine years' imprisonment.

The fact that the trial court took the unusual step of ordering the terms for Mr. Belew's underlying felonious assault charges to run consecutively, rather than concurrently, suggests it either disregarded or mischaracterized his evidence of mitigating circumstances. It would defy logic to routinely sentence defendants whose actions result in serious injury or death to shorter terms of imprisonment than a defendant whose actions resulted in physical harm to no one but himself.

#### IV. CONCLUSION

Courts must consider relevant issues of Post Traumatic Stress and Traumatic Brain Injury as mitigating factors when sentencing combat veterans who commit crimes. The trial court's mischaracterization of Mr. Belew's evidence as an "excuse," its inappropriate and unsupported conclusion that Mr. Belew had intent to kill, and its decision to take the unusual step of ordering Mr. Belew's felonious assault sentences to run concurrently all show that it did not do so in Mr. Belew's case. Thus Mr. Belew's case should be remanded.

Respectfully submitted,

The Arms Forces, an Ohio  
not for profit corporation

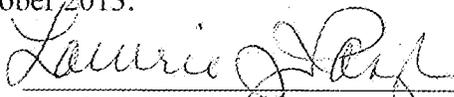


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#### Certificate of Service

I hereby certify that a true copy of the foregoing was forwarded by regular U.S. Mail, postage pre-paid to the office of Stephen P. Hardwick, Assistant Public Defender, Ohio Public Defender's Office, 250 E. Broad Street, Suite 1400, Columbus, OH 43215, Attorney for Appellant and Julia R. Bates, County Prosecuting Attorney, Michael D. Bahner, Assistant Prosecuting Attorney, Lucas County Court House, 700 Adams Street, Suite 250, Toledo, OH 43604, Attorney for Appellee, on this 7th day of October 2013.

  
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