ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	CASE NO. 2013-0711
PLAINTIFF-APPELLEE,	:	
	:	ON DISCRETIONARY APPEAL FROM THE LUCAS COUNTY COURT OF APPEALS, SIXTH APPELLATE DISTRICT, CASE NO. L-11-1279
v.	:	
JEFFERY BELEW,	:	
DEFENDANT-APPELLANT.	:	

MOTION FOR RECONSIDERATION OF APPELLANT JEFFERY BELEW

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MOTION FOR RECONSIDERATION OF APPELLANT JEFFREY BELEW

I. Introduction

> 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[.]

Porter v. McCollum, 558 U.S. 30, 43, 130 S.Ct. 447, 175 L.Ed. 2d 398 (2009) (unanimous, per curium decision).

* * *

This Court should reconsider its decision to dismiss Jeffery Belew's appeal because this case provides the much-needed opportunity to give both trial and appellate courts guidance about how to impose and review criminal sentences, especially those involving veterans, police officers, and others who acquired post-traumatic stress disorder ("PTSD") while serving their country or community. Trial courts need guidance as to how to weigh the effects PTSD as mitigation when veterans or first responders commit crimes. The issue has also arisen in child custody and attorney disciplinary cases. Appellate courts need guidance about whether they should do anything beyond what the State supports—review sentences to determine only whether the trial court uttered and wrote the required magic words. Oral Arg., 33:00. (The trial judge "said she considered these factors. . . . What else can we do but believe her?. . . We have to assume that she did.")

Finally, this Court should reconsider its decision not to hear this case because the trial court's reasoning was objectively wrong and did not properly, logically, or fairly consider how injuries former Marine Jeffrey Belew incurred while serving his country in combat contributed to his offense--shooting at police officers, hoping to die. The trial judge's error is clear from the record—she rejected the *mitigation* evidence because she treated it as a claimed *excuse*. It is not too much for an injured combat veteran to ask for one hearing at which his mitigation evidence is considered as mitigation.

II. Standard of review

Under S.Ct.Prac.R. 18.02, this Court grants reconsideration "to 'correct decisions which, upon reflection, are deemed to have been made in error.'" *Dublin City Schs. Bd. of Educ. v. Franklin County Bd. of Revision*, 139 Ohio St.3d 212, 2014-Ohio-1940, __ N.E.3d __, ¶ 9, quoting, *State ex rel. Huebner v. W. Jefferson Village Council*, 75 Ohio St.3d 381, 383, 662 N.E.2d 339 (1995).

III. Discussion

A. This case presents a strong factual record, compelling facts on both sides, and no issue of waiver, forfeiture or other procedural default.

Both factually and procedurally, this case is a good vehicle to provide the guidance trial and appellate courts need when reviewing litigants who have acquired PTSD as a service-related disability.

1. This is a factually compelling case.

The Chief Justice was correct when she suggested at oral argument that "the record is pretty compelling in both directions." Oral Arg., 12:30. On one side, Mr. Belew fired shots at two police officers, which is a very serious offense that justifiably carries a ten-year minimum sentence. On the other, unrebutted testimony at sentence from a psychologist chosen by the trial judge showed that Mr. Belew fired those shots in an attempt to commit suicide-by-cop to relieve himself from the burdens of the PTSD that resulted from his combat service as a United States Marine. And unlike its position at sentencing (where the State argued that it was "insulting" for a combat veteran to explain how PTSD affected his crime), at oral argument, the State no longer asserted that the trial court had found not credible that Mr. Belew had service-related PTSD. *Compare* Oral Arg. 25:50, *with* T.p. 24 (sentencing) (trial prosecutor calling Mr. Belew's PTSD mitigation evidence "insulting" to other veterans). The State also conceded that Mr. Belew's service in Iraq exacerbated the problems Mr. Belew had when he joined the Marines. *Id.* at 29:11. Accordingly, there is no longer a factual dispute over the unrebutted testimony that Mr. Belew suffered from PTSD, and whether his military service contributed to his offense in this case.

The underlying facts in this case are also compelling. Among other duties, Mr. Belew protected convoys in Iraq and served on a team that responded when other Americans were attacked. Part of this duty also involved caring for the bodies after a

firefight. Graves Report at 4-5. When he returned, he didn't feel safe without a gun, so he slept with it. T.p. 11. Nightmares of attacks or dangerous places he had been caused "ass-puckering fear" and made it difficult to sleep at night. Graves at 5. If someone woke him up, he would startle and point the gun. T.p. 11, 13. Hearing foreign languages brought back the fear of attack, as would crowds or when someone would drive near him. Graves at 5. That fits precisely the definition of post-traumatic stress disorder as explained by Dr. Graves, the psychologist chosen by the trial judge.

2. This is a procedurally compelling case.

Procedurally, both trial and appellate counsel argued the issues vigorously based on a strong record, and helpful amici have given this Court all the information it needs to issue a well-informed opinion. And unlike many cases, this case contains no question of waiver, forfeiture, or other procedural default.

B. Lower courts need this Court's guidance

1. Trial and appellate courts need guidance as to how to weigh PTSD as mitigation when a combat veteran, first responder, or crime victim commits a crime.

In both civil and criminal cases, lower courts have struggled with how to deal with combat-induced psychological injuries. For example, the Fifth District affirmed a trial court's decision to prohibit a defendant from introducing papers stating that his discharge was related to post-traumatic stress disorder, but permitted documents that the discharge was due to a positive marijuana test (the defendant argued that he was

self-medicating). *State v. Sellers*, 5th Dist. Delaware No. 12CAA020012, 2012-Ohio-5546, ¶ 44-52. Lower courts have affirmed the permanent removal of children from veterans suffering from traumatic brain injury and post-traumatic stress disorder. *In re C.C.*, 12th Dist. Warren Nos. CA2011-11-113 and CA2011-11-127, 2012-Ohio-1291; *In re Macey R.*, 6th Dist. Lucas No. L-08-1113, 2008-Ohio-4916; *In re Adoption of M.E.*, 6th Dist. Erie No. E-08-081, 2009-Ohio-2604. And this Court has noted that service-related depression, traumatic brain injury, and post-traumatic stress disorder can mitigate attorney misconduct. *Butler County Bar Ass'n v. Minamyer*, 129 Ohio St.3d 433, 2011-Ohio-3642, 953 N.E.2d 315, ¶ 24.

Mr. Belew, like many other veterans before Ohio courts, does not seek to excuse his criminal conduct. He wants only a fair sentencing hearing. Lower courts need this Court's guidance about how to punish veterans for their criminal conduct while properly considering how military service affected veterans' ability to cope with civilian life.

2. Appeals courts need guidance as to the standard of review

The Eighth, Tenth, and Twelfth Districts no longer follow the two-step process outlined in the lead opinion of *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124. Those districts correctly hold that House Bill 86 revived the clear and convincing standard in R.C. 2953.08(G)(2):

> [T]he "post-Foster era ended with the enactment of [2011 Am.Sub.H.B. No. 86, effective September 30, 2011,] and the revival of statutory findings

> necessary for imposing consecutive sentences under R.C. 2929.14(C)(4)." Id. Therefore, from this day forward, rather than continue to apply the two-step approach as provided by *Kalish*, we find "the standard of review set forth in R.C. 2953.08(G)(2) shall govern all felony sentences." *State v. A.H.*, 8th Dist. Cuyahoga No. 98622, 2013-Ohio-2525, ¶ 7; *see also State v. Cochran*, 10th Dist. Franklin No. 11AP-408, 2012-Ohio-5899, ¶ 52, 983 N.E.2d 903; *State v. Martin*, 11th Dist. Portage No. 2012-P-0114, 2013-Ohio-2833, ¶ 31 (OToole, J., dissenting); *see, e.g., State v. May*, 8th Dist. Cuyahoga No. 99064, 2013-Ohio-2697, ¶ 20 (applying the standard outlined in R.C. 2953.08(G)(2) in reviewing the imposition of a maximum sentence).

State v. Crawford, 12th Dist. Clermont No. CA2012-12-088, 2013-Ohio-3315, ¶ 6.

C. Merits

1. The *Kalish* dissenting opinion states that a sentence is contrary to law if the trial court does not *properly* weigh factors in R.C. 2929.12.

At oral argument, at least one justice suggested that trial courts need not properly weigh the factors in R.C. 2929.12. Oral Arg. 17:12. But simply weighing the factors, however wrongly, does not insulate counter-factual reasoning from appellate review. As the three-vote dissent in *Kalish* explained, under the R.C. 2953.08(G) standard, a court of appeals, in deciding whether a sentence was clearly and convincingly contrary to law under R.C. 2953.08(G)(2)(b), must "look to the record to determine whether the sentencing court considered and *properly* applied the [non-excised] statutory guidelines and whether the sentence is otherwise contrary to law." (Brackets sic, emphasis added.) *Kalish* at ¶ 65 (Lanzinger, J., dissenting); *quoting State v.*

Burton, 10th Dist. Franklin No. 06AP-690, 2007-Ohio-1941, ¶ 19, *quoting State v. Vickroy*, 4th Dist. Hocking No. 06CA4, 2006-Ohio-5461, ¶ 16.[1]

The *Kalish* dissent is correct. Any other rule would have the absurd result that a trial court that considered a factor, but made a clear mistake, could insulate that error from review by speaking or writing the magic words that it considered the factors in R.C. 2929.12. For example, if a trial court "considered" a defendants criminal record, but got that record wrong (a mistake which could inure to the benefit of either side), the appeals court would be powerless to act. Or if a trial court, as it did in *State v. Stroud*, 7th Dist. Mahoning No. 07 MA 91, 2008-Ohio-3187, cited with approval in *Kalish* at ¶ 17, treated an element as an aggravating factor to give a maximum sentence to a crime victim who killed her assailant.

2. R.C. 2953.08 is not the sole basis for review.

Even if this Court holds that a sentence is not contrary to law unless it is outside the statutory range (and thereby merging the concepts of voidness and contrary to law), another section authorizes appellate courts to review all sentences for an abuse of discretion. The first eight words of R.C. 2953.08 are, "In addition to any other right to appeal. . . ." So, by its own terms, the section is creating a right to appeal that *supplements*, not replaces, other statutory rights to appeal. Because R.C. 2953.08(G)(2)

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[1] Because plurality opinions don't create binding law for anyone except the parties, the three-vote dissenting opinion carries as much persuasive authority as the three-vote lead opinion. *See, e.g., Kraly v. Vannewkirk*, 69 Ohio St.3d 627, 633, 635 N.E.2d 323 (1994).

renounces the abuse of discretion standard only for arguments *made under that section,* such sentences can be appealed pursuant to *any other section* of the Ohio Revised Code.

Ohio Revised Code Sections 2505.02 and 2505.03 provide that "other right to appeal" because they permit the appeal of any final order. Mr. Belew asked for the correct relief because, in addition to citing R.C. 2953.08(G), he asked for review under the general abuse of discretion standard, which applies to all discretionary trial court decision.

Failing to permit defendants (or the State) from appealing sentences for an abuse of discretion would turn the first eight words of R.C. 2953.08 into surplusage, which violates the rule that courts "should construe statutes to give effect to all the enacted language." *Ceccarelli v. Levin*, 127 Ohio St.3d 231, 2010-Ohio-5681, ¶ 20, quoting *Church of God in N. Ohio v. Levin*, 124 Ohio St.3d 36, 2009-Ohio-5939, ¶ 30, citing *State ex rel. Bohan v. Indus. Comm.*, 147 Ohio St. 249, 251 (1946) ("courts should accord meaning to each word of a legislative enactment if it is reasonably possible to do so").

3. Ohio's sentencing system depends on appellate review.

In his briefs, Mr. Belew explained how the General Assembly relied on vigorous appellate review to temper the power of trial judges to impose sentences that can quickly add up to life without parole, so he will not repeat those arguments here. *See* Reply Brief at 4-6. But a Seventh District case cited with approval by the lead opinion in *Kalish* demonstrates why that review is critical.

In *State v. Stroud*, 7th Dist. Mahoning No. 07 MA 91, 2008-Ohio-3187, cited in *Kalish* at ¶ 17, the trial judge imposed a maximum prison term for manslaughter while stating that she properly considered the factors set forth in R.C. 2929.11 and 2929.12. *State v. Stroud*, Mahoning CP No. 2005-CR-238 (Judgment Entry of [Post-*Foster*] Resentencing); T.p. 14 (Apr. 9, 2007).[2] But even though the sentence was within the statutory range, the trial court's reasoning was obviously flawed—she said she imposed the maximum sentence because "a life was lost." *Id.* at 15.

Harm to the victim is a statutory factor, so she had properly enunciated the necessary magic words. R.C. 2929.12(B)(2). But the trial court's reasoning for choosing a sentence within that range was obviously wrong. So the lead opinion in *Kalish* correctly approved the reversal of her sentence. *Kalish* at ¶ 17.

The subsequent history of *Stroud* shows both the wisdom of *Kalish's* approval and the need for appellate review. On remand after the opinion cited in *Kalish*, the trial court reconsidered evidence that the victim had repeatedly beaten Ms. Stroud, and, shortly before his death, had threatened to kill Ms. Stroud with a knife if she left him. T.p. (Mar. 7, 2007), 9-10; Presentence Investigation Report ("PSI"). She suffered from multiple mental illnesses, including cocaine addiction and post-traumatic stress disorder related to frequent domestic violence, being raped at age 12, and the

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[2] Copies of all cited documents, except the presentence investigation report, from the *Stroud* case are on file in Counsel's office and are available upon request.

murder of her four-year-old son. PSI; Report of Dr. Kenneth Greunfeld (Oct. 8, 2008). Instead of a maximum prison term, the trial court imposed community control with in-patient treatment. *State v. Stroud,* Mahoning CP No. 2005-CR-238 (Judgment Entry of Resentencing, Feb. 11, 2009). Ms. Stroud successfully completed the treatment and adjusted well to life after treatment, so the trial court released her early from her community control. *Id.* (Judgment Entry, Apr. 21, 2011).

If appellate courts reviewed sentences only for magic words, as the State asks and the Sixth District held, the trial court in *Stroud* never would have had the chance to correct its misguided sentence, a lift a cocaine-addicted rape and murder survivor out of her addiction and into a productive life.

As the *Stroud case* shows, trial judges are human. And as humans they sometimes weigh the statutory factors in a clearly unfair or illogical way. In addition, as one justice of this Court suggested at oral argument, a few judges might even impose long sentences because they "seem[] to enjoy dramatic headlines[.]" Oral Arg., 5:45. But even though such judges are few in number, even the best judges have bad days. And all judges sometimes make decision that, in hindsight, are demonstrably wrong. That's what happened in *Stroud*. And that's what happened in this case. Appellate judges are not supposed to correct every perceived error, but the General Assembly has empowered, and, in fact, required, appellate courts to correct the most unreasonable, arbitrary, and unconscionable ones.

4. This case affects crime victims and all those who serve in positions where PTSD is widespread, especially among first responders such as police officers and firefighters.

Post-traumatic stress disorder does not only affect people who, like Mr. Belew, serve their country in war zones. It affects police officers, firefighters, and other first responders who serve their community in dangerous and stressful situations.[3] And it also affects crime victims like the one in *Stroud*.

The next person whose PTSD could be misunderstood by a trial court could be a police officer, firefighter, or rape victim. Of course, PTSD would not *excuse* a crime committed by a PTSD sufferer, but it could provide substantial mitigation if the illness contributed to the crime. And because the recently-enacted R.C. 2929.12(F) applies only to military veterans, those police officers, first responders, and crime victims would be in the same situation Mr. Belew was in this case—relying solely on R.C. 2929.12(C)(4) ("substantial grounds to mitigate the offender's conduct, although the grounds are not enough to constitute a defense").

The standard employed by the Sixth District in this case would require appellate courts to defer to a trial court that clearly did not understand the evidence presented, and which rejected the defendant's perceived "excuse" for committing the offense. Of

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[3] *See, e.g.,* Charles R. Marmar, et. al, Predictors of Posttraumatic Stress in Police and Other First Responders, Ann. N.Y. Acad. Sci. 1071: 1–18 (1996), available at http://deepblue.lib.umich.edu/bitstream/handle/2027.42/74485/annals.1364.001.pdf?sequence=1 (2006) (accessed July 18, 2014).

course, PTSD would not excuse a crime committed by a crime victim or first responder, but PTSD is strong mitigation in many cases. And veterans, police officers, and firefighters have earned the right to have service-related PTSD *properly* considered as mitigation at sentencing.

IV. Conclusion

Here, all three justices who wrote opinions questioned the correctness of the trial court's sentence. Justice O'Neill explained that the trial judge "simply do[es] not get it. PTSD is not an excuse. It is an explanation." *State v. Belew*, Slip Op. No. 2014-Ohio-2964, ¶ 32. And Chief Justice O'Connor and Justice Lanzinger, who would have affirmed, acknowledged that "different judges may have weighed the statutory factors at issue here differently[.]" *Id.* at ¶ 24.

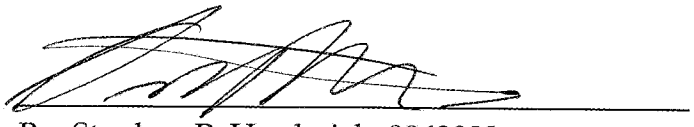
The United States Supreme Court unanimously held that, "Our Nation has a long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines[.]" *Porter v. McCollum*, 558 U.S. 30, 43, 130 S.Ct. 447, 175 L.Ed. 2d 398 (2009).

Jeffrey Belew has not asked and does not ask to be excused for his crime. Since his first psychological interview, he has acknowledged that what he did was wrong. And the General Assembly properly set the minimum prison term for his offense at 10 years in prison. But the trial court erroneously considered his mitigating evidence as a claimed excuse, which means it did not consider the evidence as mitigation.

Jeffrey Belew asks this Court for one chance to have a trial court consider how the psychological wounds he suffered in Iraq contributed to his attempt to commit suicide-by-cop.

Respectfully submitted,

Office of the Ohio Public Defender



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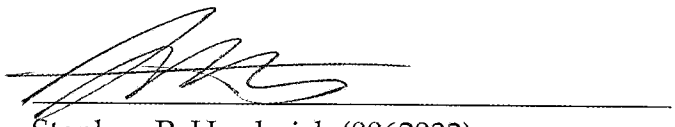
Certificate of Service

I hereby certify that a true copy of the foregoing was forwarded by electronic mail to, Assistant Prosecuting Attorney David Cooper, dcooper@co.lucas.oh.us, on this 21st of July, 2014.



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