

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,)	Yamhill County Circuit Court
)	No. CR060548
Plaintiff-Respondent,)	
Respondent on Review)	Court of Appeals
)	No. A138184
vs.)	
)	Supreme Court
JAMES ANTHONY HARRELL,)	No. S059513
)	
Defendant-Appellant,)	
Petitioner on Review.)	

BRIEF OF *AMICUS CURIAE*

Review of the Decision of the Court of Appeals on Appeal from a Judgment of the Circuit Court for Yamhill County, the Hon. John L. Collins, Judge

Opinion filed: February 23, 2011

Author of opinion: Sercombe, Judge

Concurring: Ortega, Presiding Judge; and Landau, Judge Pro Tempore

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BRIEF OF *AMICUS CURIAE*

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BRIEF OF *AMICUS CURIAE*

SUPPLEMENTAL STATEMENT OF THE CASE

Undersigned counsel files this Brief of *Amicus Curiae* on behalf of The Bunker Project—an entity whose primary goal is assisting veterans, veterans’ families, and legal practitioners who represent veterans and their families to achieve the best possible results in judicial and other legal proceedings. As explained in its motion to appear, The Bunker Project is aligned with the interests of defendant James Anthony Harrell.

ARGUMENT OF *AMICUS CURIAE*

“All too often we read about returning Iraq and Afghanistan war veterans facing criminal charges for offenses, the origin of which may well be related to their military training, experience or battle trauma. Sadly, the first time the veteran is forced to confront his or her problem(s) often is when he or she is already caught up in the criminal justice system.”

Katrina J. Eagle & Steve R. Binder, *Veterans Facing Criminal Charges: How a Community of Professionals Can Serve Those Who Served Our Country*, Nevada Lawyer 16 (Nov. 2008).¹

Defendant Harrell’s case presents what may be this court’s first of the type that Eagle and Binder described—one involving a veteran of the Global

¹ See also Barry Levin & David Ferrier, *Defending the Vietnam Combat Veteran: Recognition & Representation of the Military History & Background of the Combat Veteran Legal Client* (1989).

War on Terror, who is facing criminal charges for offenses whose origin is related to his military training and experience.

Harrell is from a military family (both his parents served in the United States Army). During the three-year period after his high school graduation in 1999, Harrell served on active duty, including with the Army's 3rd Infantry Division. Immediately after his honorable discharge in 2002, Harrell enlisted in the Oregon Army National Guard. In late 2004, his prior unit, the 1-82 Cavalry Regiment, was called onto active duty for deployment to Iraq. Although Harrell's primary military occupational specialty (MOS) is as an armor (tank) crewman, in Iraq he served as an infantryman. After the 1-82 completed its deployment in February 2006, Harrell again was honorably discharged from active duty. He now serves as an infantry sergeant with the 3-116 Cavalry Regiment.

But Sgt. Harrell also faces a judgment of conviction and sentence that would imprison him for 70 months. The judgment results from an incident in McMinnville in September 2006, when Sgt. Harrell used a small folding knife to injure an intoxicated man who picked a fight with Sgt. Harrell and threatened Harrell's friends. The man later forgave Sgt. Harrell and testified for the prosecution only because he was subpoenaed.

Sgt. Harrell grounded his self-defense claim on his military training and experience. He testified that in the face of his adversary's provocation, he

“defend[ed] himself as he had been trained to do in Iraq.” App Br at 10 (citing Tr 412-13). The issue on appeal is whether, after the jury expressed confusion with Sgt. Harrell’s self-defense claim, the trial court erred in denying his jury waiver, and then declined to effectuate its own (provisional) verdict of not guilty on all counts.²

The pertinent self-defense statute provides in relevant part:

“Except as provided in ORS 161.215 and 161.219, a person is justified in using physical force upon another person for self-defense * * * from what **the person** reasonably believes to be the use or imminent use of unlawful physical force, and the person may use a degree of force which the person reasonably believes to be necessary for the purpose.”

ORS 161.209 (emphasis added).

This statute’s focus on the reasonable belief of “the person” who used physical force “establishes that, in general, a person’s right to use force in self-defense depends on the person’s **own** reasonable belief in the necessity for such action[.]” *State v. Oliphant*, 347 Or 175, 191, 218 P3d 1281 (2009) (court’s emphasis). As the Washington Supreme Court has explained, this type of self-defense statute requires presenting the jury

“facts and circumstances * * * to the end that they could put themselves in the place of the appellant, get the point of view which he had at the time of the tragedy, and view the conduct of

² Although Sgt. Harrell grounded his self-defense claim on his military training and experience, the Court of Appeals opinion does not mention his military background. The opinion thus overlooks a crucial factual aspect of the case.

the [deceased] with all its pertinent sidelights as the appellant was warranted in viewing it. In no other way could the jury safely say what a reasonably prudent man similarly situated would have done.”

State v. Wanrow, 88 Wash 2d 221, 235-36, 559 P2d 548 (1977) (internal quotations omitted). *Accord State v. Wheeler*, 43 Or App 875, 879, 604 P2d 449 (1979) (where defendant claimed defense of another, trial court erred in excluding testimony about his awareness of a husband’s violent temper and previous violence against his wife; such evidence was relevant to whether the defendant could have reasonably believed that the husband was about to assault his wife). *Cf. State v. Whitney-Biggs*, 147 Or App 509, 528, 936 P2d 1047, *rev den*, 326 Or 43, 58 (1997) (specific acts of violence by victim, which were unknown to defendant at time of his crime, were not admissible to bolster self-defense claim).

Because the jury views the facts from the defendant’s “own” “point of view,” the defendant may present facts particular to him or herself. For example, the defendant may present facts that he or she suffers from battered-child syndrome, or from battered-spouse syndrome, to establish that his or her use of force was reasonable. *See, e.g., State v. Janes*, 121 Wash 2d 220, 850 P2d 495 (1993); *State v. Allery*, 101 Wash 2d 591, 594, 682 P2d 312 (1984).

Sgt. Harrell’s own point of view is that of a soldier trained for and tried in the crucible of combat. This implicates the admonitions of Eagle and Binder, and of The Bunker Project’s executive director, Prof. William B. Brown³:

“[C]riminal justice systems must understand that veteran defendants are distinct from non-veteran defendants. * * * [P]rosecutors, in their rhetoric about supporting veterans must desist ignoring [post-traumatic stress disorder (PTSD)] and the ramifications accompanying that psychological disorder. * * * [Defense] attorneys must learn more about the influence **the military total institution** has had on their veteran clients. * * * [J]udges must develop a comprehensive understanding of veteran defendants and consider alternatives for treatment as opposed to punishment.”

William B. Brown, *War, Veterans & Crime*, in *Transnational Criminology* 614 (Prof. Martine Herzog-Evans, Univ. of Reims, France, ed. 2010) (emphasis added).

The phrase emphasized in Brown’s admonition—“the military total institution”—is key to understanding Sgt. Harrell’s self-defense claim. Much has been written about how service-connected PTSD so “often leads [veteran-defendants] to * * * criminal behavior.” Evan R. Seamone, *Attorneys as First-Responder: Recognizing the Destructive Nature of Posttraumatic Stress Disorder on the Combat Veteran’s Legal Decision-Making Process*, 202 *Mil L*

³ In his Motion—Appear *Amicus Curiae*, undersigned counsel summarizes Brown’s qualifications for involvement in veteran-defendant cases such as this one.

Rev 144, 155 (2009).⁴ See also Melody Finnemore, *Firestorm on the Horizon: Specialists Say Legal Professionals Ill-prepared to Help Growing Populations of U.S. Military Members with Post-Traumatic Stress Disorder*, Oregon State Bar Bulletin (Apr. 2010).⁵ Indeed, for decades even popular culture has explored the challenges that veterans suffering from service-connected PTSD so frequently face when they reenter civilian society.⁶

But outside of Brown's work, far less has been said "about the influence [that] the **military total institution**" has on veterans when they reenter civilian society.⁷ *War, Veterans & Crime* at 614 (emphasis added). Brown's seminal work on the subject is William B. Brown, *Another Emerging "Storm": Iraq &*

⁴ Discussions of service-connected PTSD typically focus on combat veterans, see, e.g., Seamone, 202 Mil L Rev at 154, but other veterans suffer from it, too. Consider, for example, a female veteran who was a victim of military sexual assault while serving stateside. She is not a combat veteran, but she very well may suffer from the version of service-connected PTSD called "military sexual trauma."

⁵ Available at www.osbar.org/publications/bulletin/10apr/firestorm.-html.

⁶ Examples include the characters of Emmett Smith (Bruce Willis) in the Norman Jewison film, *In Country* (Warner Bros. 1989); Tom Rath (Gregory Peck) in the Nunnally Johnson film, *The Man in the Gray Flannel Suit* (20th Century Fox 1955); and Fred Derry (Dana Andrews) in the William Wyler film, *The Best Years of Our Lives* (Samuel Goldwyn Co. 1946).

⁷ The Kathryn Bigelow film, *The Hurt Locker* (Voltage Pictures 2008), explores this topic a bit. But the film's catchphrase, "war is a drug," clarifies that its focus is on war's addictive quality. *Shepherds of Helmand* (Lucky Forward Films 2010) also explores the topic. But that documentary mostly is limited to examining the efforts of 17 soldiers from Oregon's 2-162 Infantry Regiment to train Afghan soldiers in the military total institution.

Afghanistan Veterans with PTSD in the Criminal Justice System, Justice Policy Journal, Fall 2008, which was published after Sgt. Harrell's 2007 trial.⁸

Brown explains the "total institution" concept generally:

"A total institution is a place of residence and work where significant numbers of like-situated individuals, who are isolated from the wider society for a substantial period of time, together lead an enclosed, formally administered life. The basic characteristics germane to any total institution include: (1) all components of an individual's life occur in the same place or setting; (2) large numbers of people are treated nearly or exactly the same; (3) all stages of the individual's day and night are tightly scheduled and monitored; and (4) all participants are required to accept and adapt to the total institution's cultural expectations and standards."

Brown, *War, Veterans & Crime* at 608 (citing Erving Goffman, *Asylums: Essays on the Social Situation of Mental Patients & Other Inmates* (1961)).

Brown then applies the total institution concept to the military specifically. Total institution "characteristics," Brown explains, "are prevalent in all military institutions throughout the world." *Id.* Military institutions

"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

⁸ Available at: http://www.cjcj.org/files/another_emerging.pdf.

soldier's principles, which are artefacts of the military total institution, are not always favourable to the civilian environment.”⁹

Id. at 609 (citing Brown, *Another Emerging “Storm”*).

Brown further explains,

“Four indispensable factors—obedience, discipline, survival, and sacrifice—sustain the foundation of the Military Total Institution. * * *

“Recruits are placed in stressful situations where they are forced to make decisions. The punishment is generally more severe for those recruits who cannot or will not make a decision. The logic is that a bad decision is better than no decision.”

Id. at 610.

In the context of Sgt. Harrell's situation, this leads to the military total institution's most significant feature:

“Trainees [recruits] are conditioned to select the **fight** option, as opposed to the **flight** option, when confronted with dangerous or stressful circumstances. Recruits are trained to respond instantaneously and aggressively to any and all perceived or real dangerous circumstances or confrontations without hesitation. Failure to comply typically results in punishment ranging from individual humiliation to physical exploitation. * * *

“Weapons training, with the emphasis on defensive and offensive responses, is a primary function of military training. For those trained extensively in the use of weapons, the more likely the weapon will be used instantaneously in a time of threat. For many military personnel, resorting to the use of a weapon is similar to a professional table tennis player who automatically reacts when an opponent hits the ball. * * * Recruits trained in combat arms MOS classifications must demonstrate high levels of obedience and

⁹ 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.

discipline, they must develop skills to insure their own survival and the survival of others in their units, and recognize the importance and develop their willingness to make sacrifices in order to insure that the goals and mission of the military total institution are met—defeat the enemy.^[10]

“For many veterans, particularly those veterans who have participated in combat, their military total institution experiences are embedded for life. Similar to PTSD, for which there is no cure, the experiences acquired in the military total institution become[] part of the baggage that many veterans will carry as they navigate through their reintegration process back into the civilian culture. Many veterans are not aware of that baggage until they become homeless, involved in a domestic violence situation, **or a defendant in the criminal justice system.**”

Id. at 610-11 (emphasis added; citing Dave Grossman, *On Killing: The Psychological Cost of Learning to Kill in War & Society* (1995)).

In his earlier work, Brown addressed these features of military training in colloquial terms—as a “reprogramming” of recruits, from civilian to soldier—that largely is not followed by a “deprogramming”—from soldier back to civilian after the individual leaves the military. Brown explains:

“Following release from military service many veterans experience a ‘software’ problem—the ‘software’ that was installed while they were in the military often does not work in a civilian landscape. Human beings develop a mental process that assists them in making decisions that typically result in responses to a variety of social stimuli. This process is constructed as they learn social customs, values, and beliefs. Killing another human being, for

¹⁰ This parallels von Clausewitz’s statement: “The end for which a soldier is recruited, clothed, armed, and trained, the whole object of his sleeping, eating, drinking, and marching, is simply that he should fight at the right place and the right time.” *On War* 95 (Michael Howard & Peter Paret, ed. 1976).

example, is considered an unnatural act in the civilian environment. In the military, killing is viewed differently—killing becomes a more natural act that enhances the likelihood of survival and advances the probability that the military will succeed in its mission. When civilians are inducted into the military it is imperative that their thought processes be converted to facilitate the needs of the military. Acceptable civilian principles are not necessarily beneficial to the military. Conversely, a good soldier’s principles, created in the military total institution, are not necessarily acceptable or advantageous in mainstream society.”

Brown, *Another Emerging “Storm”* at 18.

Applying these concepts to the present situation, Brown explains that Sgt.

Harrell’s primary MOS was tank crewman, but that

“while serving in Iraq his primary role was * * * Infantryman. Both of these MOS classifications are components of the combat arms branch of the military. Veterans [such as Sgt. Harrell] who have earned either of these MOS classifications are more likely to experience civilian reintegration problems—particularly when they have been exposed to combat situations. They are more likely to experience hyper vigilance, and be aware of perceived threats or hazards. Moreover, they are more likely to respond instantaneously to perceived threats or hazards. They were trained and conditioned to understand that hesitation is much more serious than making a wrong decision. This is particularly true when another soldier or anyone they know or feel responsible for is confronted with a threat or hazard.”¹¹

This paragraph shows that Sgt. Harrell’s situation essentially “fits to a tee” the veteran that Brown describes in *War, Veterans & Crime* and in *Another*

¹¹ The Bunker Project’s Motion—Appear *Amicus Curiae* explains that about two years ago, Sgt. Harrell’s appellate counsel, Anne Fujita Munsey, retained Brown for expert-consultant services in her then on-going effort to move this case into the Appellate Settlement Conference. The preceding paragraph is a summary of the social history of Sgt. Harrell that Brown prepared for Munsey. Amicus includes the summary with permission from Munsey.

Emerging “Storm”. Sgt. Harrell functions in two parts of the Army’s combat arms branch (armor and infantry). Those functions demand of him a high competence with and the capacity to use weapons. Sgt. Harrell was deployed with the 1-82 Cavalry to a combat zone (Iraq). Not long after his honorable discharge following combat deployment, Sgt. Harrell found himself and persons he felt “responsible for confronted with a threat or hazard.” He “defend[ed] himself as he had been trained to do in Iraq.” App Br at 10 (citing Tr 412-13). *Cf. Tush v. Palmateer*, 179 Or App 434, 441-42, 39 P3d 943 (2002) (in absence of evidence that petitioner suffered from PTSD, testimony regarding the effects of such disorder would have been irrelevant in his criminal prosecution).

It bears mentioning that during the seven-month interval between his combat deployment in Iraq and his combat in McMinnville, Sgt. Harrell could not and should not have shed the “baggage” from his training and experience in the military total institution. When he came off active duty, Sgt. Harrell did **not** become a civilian. Instead, he remained a tank crewman/infantryman with the 1-82 Cavalry at a time when his unit could be redeployed to Iraq or Afghanistan.¹² To be sure, the “good soldier’s principles” and “artefacts” that Sgt. Harrell previously had embraced were not “favourable to the civilian environment” in which he found himself. Brown, *War, Veterans & Crime* at

¹² As part of Oregon’s 41st Infantry Brigade Combat Team, the 1-82 participated in the 41st IBCCT’s spring 2009 deployment to Iraq (which was the state’s single largest deployment since World War II). See www.oregonlive.com/news/index.ssf/2009/04/oregon_guard_schedules_may_mob.html.

609. But he could not **and should not** have shed those principles and artefacts, because as a combat-arms soldier with the 1-82 Cavalry, he **still** was part of the military total institution. Had he shed those principles and artefacts, he would have risked his “own survival and the survival of others in” any future redeployment, thus detracting from his duties as a soldier “to insure that the goals and mission of the military total institution [would be] met—defeat the enemy.” *Id.* at 611.

Interestingly, the criminal code itself recognizes that if the man Sgt. Harrell faced in McMinnville had been an enemy combatant, Sgt. Harrell would have had a complete defense to criminal prosecution. *See* ORS 161.195(1) (“conduct which would otherwise constitute an offense is justifiable and not criminal when it is required or authorized by * * * [(2)](d) [l]aws governing the military services and conduct of war”). But because Sgt. Harrell faced a civilian, rather than an enemy combatant, he was prosecuted and convicted, and now faces extended imprisonment. By comparison, if Sgt. Harrell’s jury had comprehended his self-defense claim, based as it was on the “good soldier’s principles”—those “artefacts of the military total institution,” Brown, *War, Veterans & Crime* at 609, that Sgt. Harrell first embraced in 1999 (and still embraces today)—his jury might very well have given him the same sort of consideration found in ORS 161.195(1) and (2)(d).

To be fair, the jury's lack of comprehension is understandable. Observers have long recognized that owing to the nation's decades-old commitment to an all-volunteer force (AVF), the military largely has become "a self-contained society, one with its own solemn rituals, its own language, its own system of justice, and even its own system of keeping time." David Wood, *Duty, Honor, Isolation: Military More & More a Force Unto Itself*, The Star Ledger (Newark, NJ), April 21, 1991, at 1. Simultaneously, the AVF has permitted virtually the entirety of American society to avoid military service. For example, a scant .006 percent of the nation's population has fought its nearly decade-old Global War on Terror. See William B. Brown, *From War Zones to Jail: Veteran Reintegration Problems*, Justice Policy Journal, Spring 2011,¹³ at 38 (citing *Returning Home from Iraq & Afghanistan: Preliminary Readjustment Needs of Veterans, Service Members, & Their Families*, Institute of Medicine (2010)). Owing to its reliance on such a tiny sliver of the population to fight such an extended war, the nation has adopted the so-called "backdoor draft"—*i.e.*, "stop-loss policies or an endless cycle of year-on, year-off deployments of overstressed and exhausted forces." Paul Yingling, *The Founders' Wisdom*, Armed Forces Journal, Feb. 2010.¹⁴

¹³ Available at http://www.cjcj.org/files/From_war.pdf.

¹⁴ Available at <http://armedforcesjournal.com/2010/02/4384885/>.

Thus, modern American society is almost wholly detached from direct military experience. As a consequence, it is understandable that the jury failed to comprehend (i) how “the effect of social experiences and influences acquired within the” military total institution affected Sgt. Harrell’s own “behavior and/or state of mind at the time of the alleged crime,” Brown, *From War Zones to Jail* at 7; and (ii) how to take those experiences and influences into account “when determining [Sgt. Harrell’s] guilt or innocence.” *Id.*

Since 1999, Sgt. Harrell has been always ready to meet his duty to answer his nation’s call to “fight at the right place and the right time.” *On War* 95 (Michael Howard & Peter Paret, ed. 1976) . The jury’s confusion over his service-connected self-defense claim informed the trial court of its own duty—*i.e.*, to accept his jury waiver and to effectuate its (provisional) verdicts of not guilty. The court erred when it declined to do so.

CONCLUSION

For the reasons set forth above, *amicus curiae* The Bunker Project asks that the court allow review of Sgt. Harrell’s petition for review, and that the court order the relief that Sgt. Harrell seeks in his petition.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on June 15, 2011, I filed this Brief of *Amicus Curiae* with the Appellate Court Administrator, Appellate Court Records Section, by using the court's electronic filing system.

I further certify that on June 15, 2011, I served copies of this Brief of *Amicus Curiae* on Anna M. Joyce, attorney for respondent State of Oregon, and on Anne Fujita Munsey, attorney for appellant James Anthony Harrell, by using the court's electronic filing system.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the word-count limitation of ORAP 8.15(3) and ORAP 5.05(2)(b)(ii), and that, as described in ORAP 5.05(2)(b)(ii), the word count of this brief is 3,589 words.

I further certify that the size of the type in this brief is not smaller than 14-point for both the text of the brief and footnotes as required by ORAP 8.15(3) and ORAP 5.05(4)(f).

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