STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT 4

Case No. 2016 AP 398

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JESSE T. RIEMER,

Defendant-Appellant.

ON REVIEW OF SENTENCING SUBSEQUENT TO DEFENDANT-APPELLANT'S PLEA OF GUILTY ON JULY 30, 2015, MILITARY JUDGE DAVID KLAUSER PRESIDING IN A COURT-MARTIAL CONVENED PURSUANT TO THE WISCONSIN CODE OF MILITARY JUSTICE.

BRIEF OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATUTES

Federal Statutes

Wisconsin Statutes

OTHER AUTHORITIES

ISSUES PRESENTED

1. Is Riemer's sentence following a guilty plea at a court-martial unduly harsh given the evidence and mitigating factors presented to the presiding authority?

   General Court Martial Convening Authority Response: No.

2. Did the military judge violate Riemer's right to due process by evidencing his bias during sentencing?

   General Court Martial Convening Authority Response: N/A

3. Did the military judge violate Riemer's right to due process by sentencing him based on evidence that was not presented and failing to fully review the mitigating evidence presented?

   General Court Martial Convening Authority Response: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Riemer is seeking oral argument on the issues presented as this Court has not yet addressed sentencing at a court-martial convened pursuant to the Wisconsin Code of Military Justice and has no objection to publication.

STATEMENT OF THE CASE AND FACTS

This case is borne out of a consensual sexual relationship between two members of different ranks of the Wisconsin Army National Guard as well as claims of sexual harassment made by five enlisted female Soldiers against Sergeant First Class ("SFC") Jesse T. Riemer, a male non-commissioned officer and recruiter serving with the Wisconsin Army National Guard, over the course of two years, the latest alleged offense ending in 2014.

On July 30, 2015, SFC Jesse T. Riemer, pled guilty to six specifications and described the facts and circumstances that led to him being charged and ultimately pleading guilty to all six specifications.

First, he established that throughout the course of 2012 he engaged in a text message exchange with Private First Class ("PFC") A.P. during which he discussed a number of topics, one of which was the possibility of a three-way sexual encounter consisting of himself, PFC A.P. and PFC B.J.H. (14: 5-14). Based on this text message exchange, SFC Riemer was charged with violating Article 92 of the

Wisconsin Code of Military Justice, Wis. Stat. § 322.092 (violating a general order or regulation). Plea: 12.

Next, SFC Riemer explained that between 2012 and 2014, he and PFC R.R. engaged in a two-year long consensual sexual relationship and that in January of 2012 R.R. jokingly brought up the topic of a three-person sexual encounter between himself, R.R. and T.M. Plea: 18-19. Shortly after engaging in this text message exchange with R.R., SFC Riemer called T.M. to explain that R.R. had consumed too much alcohol and that she, T.M., should disregard anything that R.R. brought up regarding a three-way sexual encounter involving all three of them. Plea:20. It is important to note that no sexual encounter between Riemer, R.R. and T.M. ever took place. (20: 16-18).

Based on the above-described conduct, Riemer acknowledged that his actions could be consistent with violations of Articles 92 and 93 of the Wisconsin Code of Military Justice, Wis. Stat. §§ 322.092; 322.093 (violation of a lawful general order and maltreatment of a subordinate, respectively). Plea: 15; 16-22; 25.

Continuing in his allocution, Riemer went on to describe how, in May of 2012, he was processing a new recruit, B.D., into the Wisconsin Army National Guard and that while processing her recruitment packet he asked her if she had any tattoos, as the Army enacted a tattoo policy in 2009 that could bar recruitment based on the size, number and/or location of a potential recruit's tattoo(s). Plea: 29, 30. B.D. responded that she had a tattoo on her buttocks of the word "DANGER." Plea: 30.

Upon hearing of the description of the tattoo, Riemer laughed and then called another recruiter in his command as the Army also has a policy of documenting pre-existing

tattoos and he was not sure what procedure should be followed given the location of B.D.'s tattoo; the recruiter he called also laughed and then instructed Riemer that he did not need to take a picture to document the tattoo, and that a written description would suffice. Plea: 30-31. Riemer then completed the remainder of the recruitment paperwork and processed B.D. into the Wisconsin Army National Guard, where she was serving as a sergeant as of the date of the court-martial. Plea: 26; 31-32. Based on this conduct, Riemer was charged with a violation of Article 134 of the Wisconsin Code of Military Justice, Wis. Stat. § 322.134 (an offense that prejudices good order and discipline or brings discredit upon the armed forces). Plea: 26.

After that, Riemer explained that while at a recruiting booth at a school fair, he met B.J.H. and began talking to her about the Wisconsin Army National Guard. Plea: 35. He followed up with her a few more times, which prompted her eventual enlistment. Plea: 35-36. After she joined the Wisconsin Army National Guard, B.J.H. would occasionally work as a recruiter at events with Riemer and as a result of their working relationship, she "opened up to [Riemer] about a lot of things" and the two became close. Plea: 36. The two also began texting regularly and at some point during these text exchanges B.J.H. started discussing her sexuality. Plea: 37. During one such text exchange, Riemer brought up the topic of a three-way sexual encounter consisting of himself, B.J.H. and A.P., which never occurred. Plea: 37. Riemer further testified that those discussions did not strain their professional relationship and that at some point following those exchanges B.J.H. sought advice from Riemer regarding securing a full-time position with the Wisconsin Army National Guard. Plea: 37. Based on the above text exchange, Riemer was charged with violating Article 134 of the Wisconsin Code of Military Justice, Wis. Stat. § 322.134 (an

offense that prejudices good order and discipline or brings discredit upon the armed forces).

Finally, Riemer described the events and circumstances that led to the final charge to which he pled guilty—another violation of Article 134 of the Wisconsin Code of Military Justice, Wis. Stat. § 322.134 (an offense that prejudices good order and discipline or brings discredit upon the armed forces). He testified that in November of 2012 he started teaching a one-credit self-defense class at the University of Stout and that through this class he met R.H., with whom he discussed the benefits of joining the Wisconsin Army National Guard. Plea: 40. Months later, he met with her again after she had been processed into the Wisconsin Army National Guard and offered to take her out for dinner and drinks. Plea: 41-42. Based on this invitation, LTC Klauser found that providency existed to find that Riemer violated Article 134 of the Wisconsin Code of Military Justice, Wis. Stat. § 322.134. Plea: 81-82.

At the sentencing hearing, it was also demonstrated via sworn testimony that throughout his time in the Wisconsin Army National Guard, SFC Riemer set himself apart from other service members and that he was used as a yardstick against which other people were measured. Plea: 100; 106. Further, the military judge heard testimony that: SFC Riemer performed the high-stress, round-the-clock duties of a recruiter so well that he was recognized the best recruiter in the State where he was serving on two different occasions; that he deployed twice with the Wisconsin Army National Guard; that during those deployments he, an enlisted National Guard Soldier, was entrusted to interface with the highest levels of leadership in the U.S. Army including then-Chief of Staff General Raymond Odierno and was personally decorated for his efforts. Plea: 126; 130-132.

Counsels for the government and the defense also moved documentary exhibits into evidence before the close of their respective cases consisting of, from the government, SFC Riemer's enlisted record brief and his military personnel file. Plea: 88-89. A review of these exhibits shows they are 458 pages in length. The defense, likewise, moved to introduce documentary exhibits into evidence, a review of which indicates a total of 89 pages in all. Plea: 139; 146. The only times that Lieutenant Colonel ("LTC") David Klauser had to review these exhibits were the ninety-minute lunch recess that he took subsequent to the government's introduction of its documentary evidence but before the defenses' introduction of its own evidence and the ninety-five total minutes of recess and deliberations during which the defense exhibits were available to him. Plea: 94; 121-22; 171; 177-78.

Following his allocution to the above-facts, the testimony of character witnesses and SFC Riemer himself, closing arguments from the government during which government counsel observed that SFC Riemer's crimes would not constitute criminal conduct in a civilian jurisdiction, defense counsel's closing argument and a fifty-three minute recess for deliberations, LTC Klauser sentenced SFC Riemer to thirty days of confinement, reduction in rank to Private (E1), a forfeiture of pay during the period of confinement and a bad conduct discharge. Plea: 149; 177-79.

In support of his sentence, LTC Klauser cited the fact that Riemer did not apologize to those he harmed as well as the impact that his "predatory" and "inappropriate" actions had on at least six service members. Plea: 179. He also made mention of the fact that he believed Riemer failed in his responsibility to present himself as the "epitome of what it means to be a soldier" and that Riemer's actions demonstrate

the need to continue to hold trainings on the importance of preventing sexual harassment and assault, which he acknowledges many service members are tired of attending as they take more time "than we spend with our warrior tasks." Plea: 178-79. He went on to acknowledge that these trainings are referred to as "the worst part of serving." Plea: 179.

Following LTC Klauser's ruling, Riemer sought post-conviction relief from the General Court Martial Convening Authority, Major General Donald Dunbar, pointing out that he expressed remorse throughout the sentencing proceedings; arguing that the sentence imposed is excessive; alleging that LTC Klauser did not give due consideration to the mitigation and extenuation evidence submitted by defense counsel; pointing out that victim impact evidence was never offered into evidence at any point during the court-martial proceedings; and offering up three clemency requests for the convening authority's consideration. Post-trial Submission: 1-7.

This appeal follows the General Court Martial Convening Authority's denial of Riemer's post-conviction relief. Post-trial Response: 1-3

LEGAL PRINCIPLES

Per Wisconsin Statute 322.056 (2), "a conviction by a general court-martial of any military offense for which an accused may receive a sentence of confinement for more than 1 year is a felony offense." The Wisconsin Manual for Courts-Martial, which was incorporated via Executive Order 2008-244, indicates that the maximum punishment for a violation of Article 92 is two years of confinement. WI Exec. Ord. 2008-244; MCM WI Art. 92, (e)(1) (incorporating MCM US Art. 92(e)(1)). The other charges that SFC Riemer pled guilty to carry equally felonious consequences as the

maximum confinement allowable under the MCM for a conviction based on a violation of Article 93 is one year and under Article 134 (fraternization) the maximum confinement allowed is two years. MCM WI Art. 93 (e); MCM WI Art 134 (fraternization) (e) (incorporating MCM US Art. 93(e); MCM US Art 134 (fraternization)). While a court-martial conviction would typically be appealed to the Court of Military Review or Court of Military Appeals, (10 U.S.C. 866; 10 U.S.C. 867) since SFC Riemer was convicted under the Wisconsin Code of Military Justice ("WCMJ"), his only appellate remedy is to address his plea for recourse to "the Wisconsin Court of Appeals and, if necessary, to the Wisconsin Supreme Court." Wisconsin Statute 322.0675.

As an appeal under the WCMJ is a case of first impression in the Wisconsin Court of Appeals, there has not yet been a determination whether military law or Wisconsin state law should govern. While SFC Riemer concedes it would be consistent with the WCMJ to apply Wisconsin state case law regarding the analysis of the issues, procedurally this court should adopt the military standard of de novo review so as to maintain consistency with federal case law. Accordingly, both military legal decisions and Wisconsin state ones will be included in the analysis as full understanding of the issues in this case requires application of both sources of law.

ARGUMENT

In the present case, LTC Klauser handed down a felony conviction for what the government counsel admitted would not have constituted any crime at all had SFC Riemer pursued another line of work. While his employment admittedly subjected him to another code of conduct that has no jurisdiction over the vast majority of Wisconsinites, that

does not mean that, absent a legally recognized special relationship, a military judge is entitled to hand down a decision that is any more severe than his civilian counterparts throughout the State are.

It goes unsaid that military service members are held to a higher standard and that part of that standard requires them to be ever-vigilant of the impact their actions could have on those around them—specifically those who are ordered to look to them for guidance.

It is this voluntary assumption of great responsibility that prompts the immediate and deep-seated respect that Americans have for those serving in uniform. However, it is equally important to remember that one of the aspects of the United States military that sets it apart from its international peers is its insistence on civilian oversight. Since our country's inception, the highest ranking member of the armed services has not worn a uniform; rather he command has the military at the will of the citizens of the United States who elected him to the office of the President. This point is significant as it drives home the fact that our fighting forces, ultimately rely on civilians for guidance and direction on how to perform their mission.

Consistent with this theme, the WCMJ appointed the Wisconsin Court System as the final referee of the Wisconsin National Guard's actions. Accordingly, SFC Riemer should be sentenced as any other defendant in Wisconsin would; and based on that standard, LTC Klauser's sentence is inappropriate and should either be reduced or set aside.

I. The military judge exceeded his discretion in imposing an unduly harsh and unreasonable sentence on SFC Riemer.

The above facts constitute the entirety of those presented to the military judge and when evaluated in their totality they do not support his decision to impose what amounts to a felony conviction and a month-long jail sentence.

No matter the jurisdiction, in order for a sentence handed down to be appropriate, it must balance retribution with rehabilitation, ever taking into consideration the likelihood of recidivism and any danger that an offender may pose to the public at large. Judged against this well-settled standard, the sentence that LTC Klauser imposed and that the convening authority approved is clearly harsh and excessive and should be reduced.

A. Military Law Analysis

A military court of criminal appeals may affirm only a sentence or such part or amount of the sentence as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. 10 U.S.C. 866(c). This required inquiry is supported by a "highly discretionary power to determine whether a sentence should be approved." *United States v. Lacy*, 50 M.J. 286, 287 (C.A.A.F. 1999). As such, a military court of criminal appeals may only affirm a sentence it independently determines is appropriate. *United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005).

Sentence appropriateness should be "evaluated through individualized consideration of the particular accused on the basis of the nature and seriousness of the offense and the character of the offender." *United States v. Roukis*, 60 M.J. 925, 930 (Army Ct. Crim. App. 2005) (quoting *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982)). Therefore, a soldier should not receive a more severe sentence than otherwise generally warranted by the offense, the

circumstances surrounding the offense, his acceptance or lack of acceptance of responsibility for his offense, and his prior record. Id. (quoting *United States v. Aurich*, 31 M.J. 95, 97 (C.M.A. 1990).

Judged by this standard, SFC Riemer acted as was to be expected of a military service member pleading guilty in a court-martial. As LTC Klauser admitted, Riemer accepted responsibility for his actions (Plea: 178) and has no prior record of criminal history. As such, this court should only affirm as much of the sentence as is appropriate.

In this case, the military judge had the discretion to administer punishment ranging from non-judicial (e.g., reprimand, fine, reduction in rank) to a maximum number of years of confinement and a dishonorable discharge. Plea: 50; See MCM WI, Article 58a (incorporating 10 U.S.C. 58a and R.C.M. 1002). In spite of this wide latitude available to him in sentencing, the military judge decided to impose what amounted to a felony conviction.

Similar to the military judge's authority, this court can now exercise the discretion that was originally available to LTC Klauser and find that based on SFC Riemer's lengthy and stellar service record, his decision to take responsibility for his actions and the nature of the crimes at issue, that the very convening of the General Court Martial is punishment enough.

Should this court seek to impose further punishment than that, nothing more than reduction in rank is appropriate. Such a disposition accomplishes the goal set out by the government and acknowledged by the military judge—to punish SFC Riemer for his actions; however, it also allows him the possibility of rehabilitation, which was specifically foreclosed to him by the military judge's sentence.

1. Wisconsin State Law Analysis

"It is a well-settled principle of law that a circuit court exercises discretion at sentencing." *State v. Gallion*, 2004 WI 42, p. 17, 270 Wis. 2d 535, 678 N.W.2d 197. In fact, a circuit court has the discretion to impose a sentence of any length within the range set by statute. *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (Wis. 1975). However, "[discretion] contemplates a process of reasoning. This process must depend on facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper legal standards." *McCleary v. State*, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (Wis. 1971). A court goes beyond discretion in sentencing when it imposes a sentence which is "so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment." *Ocanas*, 70 Wis. 2d 179 at 185.

Moreover, while the trial court has great latitude in passing sentence, "[t]he exercise of sentencing discretion must be set forth on the record." *Gallion*, 2004 WI 42 at p. 4. Specifically, "[c]ircuit courts are required to specify the objectives of the sentence on the record. These objectives include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others." *Id*. at p. 40.

With these factors in mind, the sentence imposed by the court must call for the minimum amount of custody or confinement necessary to protect the public and address the gravity of the offense and rehabilitative needs of the defendant. *Id*. at p. 44.

In this case, there is little doubt that sentencing an individual to a felony conviction and thirty days in jail for

sending illicit text messages and unprofessional conduct would shock public sentiment and would invariably call into question whether it was the right action given the circumstances. Riemer's defense counsel argued this to LTC Klauser during his closing argument, pointing out that the exact sentence that Klauser eventually imposed was unnecessary and therefore unlawful, instead requesting a reduction in rank in the event that the military judge wanted to impose a sentence. Plea: 165-66.

After applying the above-enumerated factors (i.e., the protection of the community, punishment and rehabilitation of the defendant and deterrence to others), which must be discussed on the record in order for a sentence to be proper, LTC Klauser's imposition of a felony conviction and a month-long jail sentence does not comport with Wisconsin state law.

In his sentencing decision, LTC Klauser records his belief regarding the impact Riemer's actions had on the alleged victims and laments the fact that he believes there is a need for further sexual harassment, assault, response and prevention ("SHARP") training before citing Riemer's lack of a direct apology to the alleged victims during his unsworn testimony. Plea: 179-80

LTC Klauser's basis thus addresses the punishment he feels is necessary as well as the protection he believes this sentence will afford the community. He does not, however, speak to any deterrent effect the sentence could have, nor does he address what, if any, rehabilitative effect this sentence will have on Riemer.

Simply, his rationale, while impassioned, is incomplete and insufficient to justify the sentence imposed. Further, the sentence shocks the public conscience as it hands down a

felony conviction and time in jail for an inappropriate relationship between two consenting adults, a series of text exchanges, a dinner invitation and laughter in an awkward situation.

II. LTC Klauser's statements during sentencing evidenced objective bias and violated SFC Riemer's right to due process.

In his sentencing decision, LTC Klauser noted his exasperation that SFC Riemer's actions, in his eyes, demonstrated the need for further SHARP training. He also expressed his anger that SFC Riemer, who was a recruiter at the time of the offenses, failed to live up to the responsibility that LTC Klauser feels recruiters should be held to as he considers them "the epitome of what it means to be a soldier." Plea: 179-80.

In recording these beliefs, LTC Klauser demonstrated clear objective bias and failed his duty to sentence SFC Riemer impartially. As such, the sentence he imposed is inherently flawed and must be set aside.

A. Legal Analysis

Among the most essential and fundamental rights an accused is afforded in our adversarial system is the right to a fair trial by an impartial tribunal. See *Franklin v McCaughtry*, 398 F.3d 955, 959 (7 Cir. 2005); *State v. Washington*, 83 Wis. 2d 808, 833, 266 N.W.2d 597 (1978). "[W]hen the appellate court is satisfied from the record that the trial judge prejudged the case before hearing all the evidence" a reversal of the lower court's decision is required. *United States v. Cassiagnol*, 420 F.2d 868, 878 (4 Cir. 1970).

While appellate courts presume a judge has acted fairly, impartially, and without bias; this presumption is rebuttable. *State v. Gudgeon*, 2006 WI App 143, p. 20, 295 Wis. 2d 189, 720 N.W.2d 114. When evaluating whether a defendant has rebutted the presumption in favor of the judge's impartiality, reviewing courts generally apply two tests, one subjective and one objective. *State v. Rochelt*, 165 Wis. 2d 373, 378, 477 N.W.2d 659 (Ct. App. 1991). In this case, LTC Klauser's words evidence his objective bias.

Objective bias can be demonstrated in two ways, the first is the appearance of bias. *Gudgeon*, 295 Wis. 2d 189, at pp. 23-24. "[T]he appearance of bias offends constitutional due process principles whenever a reasonable person–taking into consideration human psychological tendencies and weaknesses–concludes that the average judge could not be trusted to 'hold the balance nice, clear and true' under all the circumstances." *Id*. at p. 24 (citation omitted). Thus, the appearance of partiality constitutes objective bias when a reasonable person could question the judge's impartiality based on the judge's statements. *Id*. at p. 26. The second type of objective bias presents where there are objective facts demonstrating the trial judge in fact treated the defendant unfairly. *State v. McBride*, 187 Wis. 2d 409, 416, 523 N.W.2d 106 (Ct. App. 1994).

In his decision, the military judge's statements on the record indicates both types of objective bias. He notes that Riemer was a recruiter and was the public face of the Guard. Plea 178-79. By doing so, LTC Klauser implied that he holds Riemer to a higher standard than many members of the Wisconsin Army National Guard because of the public nature of his duties. He also laments that Riemer's actions have demonstrated the need for continued sexual assault and

prevention training sessions to be held throughout the Wisconsin National Guard. Plea: 179-80.

On this last point, he even goes so far as to note the sentiment, which he doesn't dismiss, that the mandatory SHARP courses are the worst part of serving as they take away from time that could be spent on warrior tasks. Plea: 179.

These sentiments demonstrate nothing less than an intent to treat SFC Riemer differently than other soldiers, and therefore unfairly. They also demonstrate LTC Klauser's desire to impose punishment on SFC Riemer as he believes Riemer's actions will lead to more mandatory training requirements that the military judge deems unnecessary. Simply, LTC Klauser's statements during sentencing entitle Riemer to a re-sentencing hearing before a truly impartial judge.

III. LTC Klauser violated SFC Riemer's right to due process by failing to fully consider all of the evidence presented to him and by relying on evidence that was not presented in arriving at his sentencing recommendation.

In sentencing SFC Riemer to thirty days of confinement, reduction in rank to Private, forefeiture of pay and allowances during the period of confinement and a bad conduct discharge, LTC Klauser made it clear that he was doing so based on the effect that Riemer's actions had on six service members, Klauser's exasperation at the prospect of having to endure further SHARP trainings and SFC Riemer's lack of an apology in open court directed to the six service members referenced above. Plea: 178-80.

Surprisingly, LTC Klauser made only passing mention of the voluminous military personnel file and significant mitigating evidence presented by noting that based on the documents he reviewed he believed SFC was an "above average Soldier." Plea: 178. While he did not elaborate on exactly which documents he reviewed, it is uncontroverted that he allotted at the very most three total hours not only to review the hundreds of pages of documentary evidence presented to him but also to record and prepare his findings.

This is troubling as it evidences that LTC Klauser failed to fully evaluate the materials presented to him in mitigation. Further, his decision rests on an unsubstantiated inference that the six service members he referenced in his decision were in fact adversely affected by SFC Riemer's actions as no evidence was introduced to support that conclusion.

A. Legal Analysis

Whether a defendant has been denied due process is a constitutional issue which this Court is to decide independently and based on its own analysis. *State v. Travis*, 2013 WI 38, p. 20, 347 Wis. 2d 142, 832 N.W.2d 491. Specifically, whether a defendant was denied his or her due process right to be sentenced upon accurate information "is a constitutional issue that an appellate court reviews de novo" as every criminal defendant has a due process right to be sentenced based upon accurate information. *State v. Tiepelman*, 2006 WI 66, p. 9, 291 Wis. 2d 179, 717 N.W.2d 1. To establish a due process violation, "a defendant must establish that there was information before the sentencing court that was inaccurate, and that the circuit court actually relied on the inaccurate information." *Id.* at p. 31. Once reliance on inaccurate information is shown, the burden shifts

to the State to prove that the error was harmless. *Id*. On this point, the Wisconsin Supreme Court has elaborated:

> When a circuit court relies on inaccurate information, we are dealing "not with a sentence imposed in the informed discretion of a trial judge, but with a sentence founded at least in part upon misinformation of constitutional magnitude." A criminal sentence based upon materially untrue information, whether caused by carelessness or design, is inconsistent with due process of law and cannot stand.

State v. Travis, 2013 WI 38, p. 17, 347 Wis. 2d 142, 832 N.W.2d 491. Once a defendant has established that some information presented to the court was inaccurate, he must prove by clear and convincing evidence that the court actually relied upon that information. *Id*. at p. 22.

According to case law, whether the circuit court "actually relied" on the incorrect information at sentencing "turns on whether the circuit court gave 'explicit attention' or 'specific consideration' to the inaccurate information, so that the inaccurate information 'formed part of the basis for the sentence.'" *Id*. at p. 28. Further, "a circuit court's 'explicit attention to the misinformation demonstrates [a court's] reliance on that misinformation in passing sentence'." *Id*. at p. 46. Whether the sentence might have been justified by information independent of the inaccurate information is irrelevant when the inaccurate information formed part of the basis of the sentence. *Id*. at p. 47.

LTC Klauser's reliance upon the impact that Riemer's actions had on the alleged victims in imposing sentence cannot be ignored. Indeed, the military judge specifically comments on the adverse impact he believes Riemer's actions had on six service members. Plea: 179. However, a review of all of the evidence produced indicates that at no point did

any alleged victim testify, offer a written statement or otherwise indicate to the military judge that they were in fact adversely affected by Reimer's conduct.

In doing so, the military judge essentially created evidence out of thin air and then used it to justify the sentence he ultimately imposed. This fact alone demands that Riemer's sentence is improper and that a new hearing should be held on the issue.

No less troubling is the short shrift that the military judge gave to the documentary evidence presented to him. If reliance upon inaccurate information demands a new sentencing hearing, then so too should a failure to fully consider all the matters before the court.

In this case, counsels for the government and defense submitted a combined 547 pages of documentary evidence that LTC Klauser only had in his possession for approximately three total hours. Plea: 88-89; 94; 121-22; 171; 177-78. During that same three hours, LTC Klauser also managed to take a lunch break, address off-the-record concerns of the parties and deliberate and prepare his findings. It is highly implausible, if not impossible to believe that in the relatively short amount of time given that the military judge evaluated, much less even touched, every piece of paper that was submitted to him for review. As such, his sentencing decision is inherently flawed as it was made based on an incomplete review of the record and should be set aside.

CONCLUSION

Of the many reasons this case is unique, one is certainly the fact that the prosecutor believes that defendant's

offenses are not recognized as criminal offenses in in a civilian court, rather they are only prosecuted by the military.

However, these are not offenses that one typically thinks of as military-specific ones; instead they are military-specific in that the Wisconsin Army National Guard is the only entity in the entire State that would see fit to so severely punish an individual for illicit text messages, laughter, an invitation to dinner and unprofessional conduct.

Further, LTC Klauser's comments clearly indicated an objective bias against SFC Riemer thereby denying him the right to a fundamental principle of the justice system—an impartial tribunal.

Finally, the military judge that imposed this inappropriate sentence did so in reliance on evidence that simply does not exist. Accordingly, the sentence should be set aside or, at the very least, reduced to one that does not amount to a felony conviction.

Dated this 22nd day of August, 2016.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 5,116 words.

Dated this 22nd day of August, 2016.

Signed:

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CPT DECLAN J. BINNINGER, JA

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 22nd day of August, 2016.

Signed:

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CPT DECLAN J. BINNINGER, JA

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 22nd day of August, 2016.

Signed:

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CPT DECLAN J. BINNINGER, JA