STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Case No. 2016AP398

IN THE GENERAL COURT-MARTIAL CASE OF SERGEANT FIRST CLASS JESSE T. RIEMER, WISCONSIN ARMY NATIONAL GUARD, RECRUITING AND RETENTION BATTALION, MADISON, WISCONSIN:

STATE OF WISCONSIN,
Respondent,

v.

JESSE T. RIEMER,
Appellant.

ON APPEAL FROM THE CONVICTIONS AND SENTENCE RENDERED BY A GENERAL COURT-MARTIAL AND APPROVED BY THE CONVENING AUTHORITY UNDER THE WISCONSIN CODE OF MILITARY JUSTICE, THE HONORABLE LT. COLONEL DAVID KLAUSER AND THE HONORABLE MAJOR GENERAL DONALD P. DUNBAR, PRESIDING

RESPONDENT'S BRIEF-IN-CHIEF

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State doesn't request oral argument. The opening briefs fully address the issues on appeal and develop the relevant theories and legal authorities.

Because this appeal is the only one taken thus far from a court-martial and sentence under the Wisconsin Code of Military Justice, ch. 322, Stats., publication doesn't appear necessary. The issues involve choice of law, review of sentences, and claims of judicial bias. Wisconsin has well-established case law in each area.

ISSUES PRESENTED FOR REVIEW

Issue One. Wisconsin Stat. § 322.0675[1] gives this Court jurisdiction over appeals from courts-martial convened under the Wisconsin Code of Military Justice. But the statute doesn't specify the appropriate standards of appellate review or the controlling case law.

Should this Court apply the standards and case law developed by Wisconsin's appellate courts, or the standard of appellate review and controlling case law developed by military appellate courts?

Issue Two. Is Jesse T. Riemer's sentence unduly harsh?

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[1] The statute provides as follows:

> Decisions of a court-martial are from a court with jurisdiction to issue felony convictions, and appeals are to the Wisconsin court of appeals, District IV and, if necessary, to the Wisconsin Supreme Court. The appellate procedures to be followed shall be those provided under ch. 809.

Issue Three. Did the military judge's sentencing comments reflect objective bias, and so violate due process?

Issue Four. Did the military judge improperly fail to fully consider all the evidence presented to him in mitigation of sentence, and improperly rely on unproven facts in aggravation of sentence, and so violate due process?

Issue One is presented for the first time in this Court. By upholding his sentence, the convening authority[2] decided the other three issues against Riemer.

INTRODUCTION

A military judge sitting as a general court-martial convicted Riemer, upon his guilty pleas, of six different specifications[3]:

- Two violations of Wis. Stat. § 322.092 (Article 92—Failure to obey order or regulation). Riemer was accused of violating Army Regulation 600-20 (March 18, 2008), pertaining to relationships between soldiers of different ranks. *See* http://www.ncohistory.com/documents/AR_600_20Nov2008.pdf (last accessed October 25, 2016).

- One violation of Wis. Stat. § 322.093 (Article 93—Cruelty and maltreatment).

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[2] *See* Wis. Stat. § 322.022 (Article 22—Who may convene general courts-martial). Major General Donald P. Dunbar is the convening authority in this proceeding.

[3] See Wis. Stat. § 322.030 (Article 30—Charges and specifications).

- Three violations of Wis. Stat. § 322.134 (Article 134—General section). This statute authorizes punishment of "all disorders and neglects to the prejudice of good order and discipline in the state military forces and all conduct of a nature to bring discredit upon the state military forces[.]"

(1.)

Riemer, a Sergeant First Class and recruiter for the Wisconsin Army National Guard, admitted violating the Wisconsin Code of Military Justice by improperly pursuing sexual activity with junior female soldiers, by improperly commenting on a female soldier's tattoo—located on her buttock—and by attempting to establish an inappropriate relationship with another female soldier by wrongfully and repeatedly inviting her to join him for drinks. (5:1-2.)[4]

This conduct isn't trivial. It poses significant problems for the military and, by extension, for those it protects:

> The need for special regulations in relation to military discipline, and the consequent need and justification for a special and exclusive system of military justice, is too obvious to require extensive discussion; no military organization can function without strict discipline and regulation that would be unacceptable in a civilian setting.

[4] All of Riemer's accusers testified at a two-day Article 32 investigative hearing. The transcripts appear in the appellate record. (Vol. 5, Tabs. 12, 13.) Their testimony—discussed in § II of this brief, *infra*—provides a more complete picture of Riemer's course of conduct.

Chappell v. Wallace, 462 U.S. 296, 300 (1983). "To prepare for and perform its vital role, the military must insist upon a respect for duty and discipline without counterpart in civilian life." *Schlesinger v. Councilman,* 420 U.S. 738, 757 (1975).

Riemer's court-martial conviction and sentence constitute a Wisconsin felony conviction and sentence. *See* Wis. Stat. § 322.056(2).

The military judge—Lieutenant Colonel David Klauser—exercised his discretion and sentenced Riemer in pertinent part to 30 days of confinement and a bad conduct discharge. (Vol. 1 178-180.) *See Rules for Courts-Martial* 1002 (Sentence determination), in the *Manual for Courts-Martial United States* (2012) (with exceptions not applicable here, imposition of sentence at a court-martial "is a matter within the discretion of the court-martial").

Major General Donald P. Dunbar approved the 30-day confinement and bad conduct discharge. (6:3.) *See* Wis. Stat. § 322.064(3) (describing review process by adjutant general).

Riemer appeals, and asks this Court to set aside or reduce his sentence. (Riemer's Br. 20.) No reason exists for this Court to do so.

ARGUMENT

I. This Court should apply Wisconsin's standards of appellate review and controlling case law to the issues Riemer raises on appeal.

A. A question exists about the standards of appellate review and controlling case law to apply in appeals brought under Wis. Stat. § 322.0675.

Riemer challenges his sentence as unduly harsh and unreasonable. He claims a constitutional due process violation based on allegations of objective bias on the part of the military judge. And he claims a second constitutional due process violation based on allegations that the military judge didn't fully consider evidence presented in mitigation of sentence, and impermissibly considered evidence not properly presented in aggravation of sentence. (Riemer's Br. 1.)

"The first task of an appellate court when considering an issue is deciding which standard of review it will apply. The standard of review often determines the outcome on appeal." Hon. Kitty Brennan, *Standards of Appellate Review,* in Michael S. Heffernan, *Appellate Practice and Procedure in Wisconsin,* App. C at 8 (6th ed. 2014).

An appellate court must also decide which case law governs the issues on appeal. In Wisconsin, cases from jurisdictions other than Wisconsin and the United States Supreme Court may inform—but can't compel—a particular decision by a Wisconsin appellate court. "Although a Wisconsin court may consider case law from such other jurisdictions, obviously such case law is not binding precedent in Wisconsin, and a Wisconsin court is not

required to follow it." *State v. Muckerheide,* 2007 WI 5, ¶ 7, 298 Wis. 2d 553, 725 N.W.2d 930.

Most appeals in this Court don't present serious disagreements regarding the appropriate standard of appellate review, or the controlling case law. Standard and law are both well-established. In the typical appellate case, the parties and this Court don't write on a blank slate.

This case is atypical. Most appeals don't involve courts-martial convened under the Wisconsin Code of Military Justice.

While Wis. Stat. § 322.0675 gives this Court and the Wisconsin Supreme Court jurisdiction over appeals arising under the Wisconsin Code of Military Justice—and directs the courts to follow the procedures under Wis. Stat. ch. 809—it says nothing about which standards of appellate review to apply, and which body of case law controls.

Wisconsin Stat. § 322.143 (Article 143—Uniformity of interpretation) provides that "[t]his code shall be so construed as to effectuate its general purpose to make it uniform, so far as practical, with 10 USC ch. 47." 10 U.S.C. ch. 47 is the Uniform Code of Military Justice.

Using the Uniform Code to interpret most provisions of the Wisconsin Code poses no problem. But 10 U.S. Code § 866 vests appellate jurisdiction in a specially constituted federal military court, and specifies a federal standard of review for that court to follow. This appeal isn't in federal court; it's in state court. Section 866 doesn't apply here, and Wis. Stat. § 322.0675 doesn't contain the language that parallels § 866. And as the State will show below, it's neither practical nor desirable to engraft the federal standard and

controlling case law onto this Court's decision-making under Wis. Stat. § 322.0675.

Here, the parties and this Court face a blank slate. *Tabula rasa.*

B. The parties agree on the standards and case law that govern Riemer's constitutional due process challenges.

Riemer's constitutional due process claims present no appellate problem. In Wisconsin, due process issues in criminal cases raise questions of law decided de novo on appeal. *State v. Aufderhaar,* 2005 WI 108, ¶ 10, 283 Wis. 2d 336, 700 N.W.2d 4. Riemer and the State agree on this standard, and Riemer relies primarily on Wisconsin cases to support his due process challenges. (Riemer's Br. 14-19.) The State will respond accordingly in §§ III and IV, *infra.*

C. The parties disagree over the standards and case law that govern Riemer's challenge to the military judge's exercise of sentencing discretion.

In Wisconsin, this Court will normally review a sentence solely for an erroneous exercise of discretion, mindful of "a consistent and strong policy against interference with the discretion of the trial court in passing sentence." *State v. Gallion,* 2004 WI 42, ¶¶ 17, 18, 270 Wis. 2d 535, 678 N.W.2d 197 (citations omitted).

That deference is justified. The sentencing court "is best suited to consider the relevant factors and demeanor of the convicted defendant." *Id.* ¶ 18 (citations omitted).

The State believes this Court should apply this well-established, deferential standard of review and the Wisconsin cases that support it. *See* § II, *infra.*

In contrast, Riemer asks this Court to review his sentence using federal military law that applies only to active duty servicemembers court-martialed under the federal Uniform Code of Military Justice. (Riemer's Br. 8, 10-11.)[5] He says this would "maintain consistency with federal case law." *Id.* at 8. He doesn't develop his rationale for reliance on federal military law beyond this single-sentence assertion.

Consistency is a fine proposition in the abstract. But consistency isn't Riemer's real concern. He really wants this Court to employ the active duty, federal law standard because it would require this Court to conduct a de novo review of his sentence. And de novo review would favor him.

At the time he committed the acts at issue in this appeal, Riemer wasn't an active duty member of the United States Army. He was a member of the Wisconsin Army National Guard. And he wasn't court-martialed under the Uniform Code of Military Justice. He was court-martialed under the Wisconsin Code of Military Justice. (1; 5; 6.)

Those differences matter for purposes of military law:

> Members of the U.S. Armed Forces are subject to the Uniform Code of Military Justice (UCMJ) at all times while serving on active-duty in the military. Similarly, servicemembers in the organized reserves of the Army, Navy, Marine Corps, Air Force, and Coast Guard are also subject to the UCMJ, while serving in an active military status.
>
> An exception to this jurisdictional principle regarding the UCMJ is the applicability to Soldiers

[5] He also challenges his sentence under Wisconsin law. The State addresses both challenges in § II, *infra*.

> and Airmen serving in the Army and Air National Guards of the individual states. Unless serving in a federal active-duty status under Title 10 of the United States Code, members of the National Guard are not subject to the UCMJ and military justice action or disciplinary measures must be taken by the individual states.

Major Robert L. Martin, *Military Justice in the National Guard: A Survey of the Laws and Procedures of the States, Territories, and the District of Columbia,* The Army Lawyer, December, 2007 at 30 (footnotes omitted) (hereafter, *Military Justice in the National Guard*).

If Riemer had been an active duty member of the United States Army, subject to and court-martialed under the Uniform Code of Military Justice, he could've received appellate review from a military court:

> Prior to the 1950 enactment of the UCMJ, the only means of obtaining judicial review of a court-martial conviction was through a collateral proceeding (usually habeas) in the civilian courts--and even then, the only issue that could be challenged was whether the military court properly exercised jurisdiction. One of the UCMJ's central innovations was the formalization of an appellate structure within the military justice system, which today features Courts of Criminal Appeals (CCAs) established by the Judge Advocate General of each service branch to hear appeals from general (and some special) courts-martial, and a civilian Court of Appeals for the Armed Forces (CAAF) with largely discretionary jurisdiction over the four service-branch CCAs.

Stephen I. Vladeck, *Military Courts and Article III,* 103 Geo. L. J. 933, 943 (April, 2015) (footnotes omitted).

And that military appellate court would've had broad authority to review the appropriateness of Riemer's sentence. 10 U.S.C. § 866(c)—Article 66(c) of the Uniform Code of Military Justice provides that:

> In a case referred to it, the Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty, and the 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. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

The phrase *broad authority* understates a military appellate court's authority to revise a sentence imposed under the Uniform Code of Military Justice:

> For nearly fifty years, our superior court has consistently interpreted our sentence appropriateness responsibility as a sweeping Congressional mandate to ensure a fair and just punishment for every accused. Under Article 66(c), UCMJ, we can, in the interests of justice, substantially lessen the rigor of a legal sentence. We have the power of the proverbial 800–pound gorilla when it comes to our ability to protect an accused.

United States v. Bauerbach, 55 M.J. 501, 504-05 (2001) (citations, internal quotation marks, and parenthetical correction omitted).

Even though Riemer was court-martialed and sentenced under Wisconsin law, he wants this Court to apply federal military standards and law to his appeal. This Court shouldn't do it.

D. This Court should adhere to Wisconsin's deferential standard of appellate review regarding sentences, and the case law that applies it.

1. The Wisconsin Code of Military Justice is a state-law construct, not a creation of federal law. The doctrine of stare decisis applies, and supports application of existing state-law standards of review and case law.

Court-martial convictions and sentences imposed under the Wisconsin Code of Military Justice constitute state law actions, conducted under Chapter 322 of the Wisconsin Statutes as enacted by the Legislature. Appellate jurisdiction lies with this Court and the Wisconsin Supreme Court, not with a military court. Wis. Stat. § 322.0675. "As purely state-law actions, there is no jurisdiction for the federal military courts of criminal appeal to hear appeals from National Guard court-martial convictions." Martin, *Military Justice in the National Guard* at 49.

And this Court has consistently provided deferential review of state-court sentences.

This is the law of Wisconsin, and "'[s]tare decisis is the motto of courts of justice.'" *Ableman v. Booth,* 11 Wis. (*498) 517, (*522) 541 (1859). Courts follow their own precedent, in part to signal that they're applying principles founded in law, rather than the individual proclivities of judges and justices. *See Progressive Northern Ins. Co. v. Romanshek,* 2005 WI 67, ¶ 42, 281 Wis. 2d 300, 697 N.W.2d 417. Riemer's request for de novo review serves as an open invitation for this Court to substitute its judgment for that of the military judge.

If Riemer really values consistency, "[s]tare decisis is the preferred course of judicial action because it promotes evenhanded, predictable, and consistent development of legal principles . . . and contributes to the actual and perceived integrity of the judicial process." *Id.* ¶ 43 (citations and internal quotation marks omitted).

In Wisconsin, sentences receive deferential appellate review. Since court-martial convictions and sentences under Chapter 322 are Wisconsin state-law actions, Wisconsin standards of appellate review and controlling case law should apply, period.

2. The Legislature's failure to specify a standard of review or the controlling case law in Wis. Stat. § 322.0675 isn't an invitation for this Court to adopt a de novo standard.

Nature abhors a vacuum. So does the law. But the Legislature's failure to specify a standard of review or body of controlling case law in Wis. Stat. § 322.0675, shouldn't prompt this Court to adopt the federal standards and cases favored by Riemer.

When the Legislature amends a statute, it's presumed to know the case law in existence at the time. *Kenosha Cnty. v. Frett,* 2014 WI App 127, ¶ 11, 359 Wis. 2d 246, 858 N.W.2d 397 (citation omitted). That presumption should also apply when the Legislature first enacts a statute.

And when it enacted the Wisconsin Code of Military Justice and Wis. Stat. § 322.0675, Wisconsin case law required deferential appellate review of sentences for erroneous exercises of discretion. *Gallion,* 270 Wis. 2d 535, ¶¶ 17-18.

If the Legislature intended this Court to apply federal military standards and case law when it reviews Wisconsin courts-martial and sentences, it would have "demonstrated that intent with plain language to accomplish that objective." *Frett*, 359 Wis. 2d 246, ¶ 11.

It could have written a statute that explicitly required this Court to follow the same appellate standard as the Uniform Code of Military Justice. That's what Kansas did. *See* K.S.A. 48-2923(c) (KCMJ Art. 67) (West, 2016).

Perhaps it should have created an appellate military tribunal—a state court of military appeals—staffed by experienced Judge Advocates and given broad authority to review findings and sentences imposed via state court-martial. That's what Arizona did. *See* A.R.S. § 26-1067 (West, 2016).

Instead, the Legislature gave this Court and the Wisconsin Supreme Court jurisdiction over review of courts-martial imposed in accordance with Chapter 322. It knew those courts had developed a consistent and uniform body of case law governing review of circuit court sentencing discretion. The Legislature intended Wisconsin appellate courts to apply their own well-established standards of appellate review and case law in Wis. Stat. § 322.0675 appeals.

3. Choice of law jurisprudence also supports maintaining a deferential standard of appellate review when considering sentences imposed under the Wisconsin Code of Military Justice.

Choice of law jurisprudence arising out of civil litigation—property law, contracts, torts—also provides

philosophical and practical reasons for this Court to apply existing state standards of appellate review and Wisconsin case law.

In *Heath v. Zellmer*, a tort case, the Wisconsin Supreme Court identified five considerations for use in deciding choice-of-law questions:

- Predictability of results.
- Maintenance of interstate and international order.
- Simplification of the judicial task.
- Advancement of the forum's governmental interests.
- Application of the better rule of law.

35 Wis. 2d 578, 595-97, 151 N.W.2d 664 (1967) (citing Robert A. Leflar, *Choice-Influencing Considerations in Contract Law,* 41 N.Y.U. L. Rev. 267, 282 (1966)).

These considerations support reliance on Wisconsin standards of appellate review and controlling case law. By following existing Wisconsin law:

- Future litigants may accurately predict their likelihood of success in a prospective appeal. Applying a single, well-established set of standards will also serve principles of judicial efficiency.
- Maintaining the status quo will promote order. Wisconsin owes no deference to the military appellate standards of review and body of case

law governing active-duty servicemen and women.

- It will be far simpler for this Court to apply its own, well-worn standards of review and controlling cases than it would be for it to delve into military jurisprudence.

- Applying Wisconsin law advances Wisconsin's governmental and judicial interests in overseeing judicial review of state law convictions under Chapter 322. State law questions deserve answers from state appellate courts.

And the State respectfully submits that deferential review of sentencing decisions on appeal is the better rule of law because it takes advantage of the sentencing court's first-hand observations and consideration of the relevant facts, the defendant's demeanor, and issues of credibility. *See Gallion*, 270 Wis. 2d 535, ¶ 18.

4. *Waterman v. State* doesn't compel a different conclusion.

The State's research yielded a single opinion from another jurisdiction addressing standards of review under a state code of military justice—*Waterman v. State,* 654 So. 2d 150 (Fla. Dist. Ct. App. 1995).

In *Waterman*, the Florida court concluded that:

- Even though the Florida Code of Military Justice contained a jurisdictional statute similar to Wis. Stat. § 322.0675, it derived appellate jurisdiction over a finding of guilt and sentence imposed at a court-martial under the Florida Code of Military

Justice "as an administrative matter, because the approval of such finding and sentence constitutes a final order of the Florida Department of Military Affairs, an executive agency established by section 250.05, Florida Statutes."

- The court was obliged to follow the standard of review specified in the Uniform Code of Military Justice because the legislature "could have, but did not, adopt [an administrative] standard of review" and instead "adopted the UCMJ and the 1984 Manual for Courts-Martial, as amended to January 1, 1992, for use by the . . . Florida National Guard 'except as otherwise provided by this chapter.' § 250.35(1), Fla. Stat. (1991). Because chapter 250 provides no standard of appellate review, we must determine the proper standard under the UCMJ."

Waterman, 654 So. 2d at 152.

This Court need not follow *Waterman*. *See Muckerheide,* 298 Wis. 2d 553, ¶ 7. Nor should it. The State has presented a persuasive case for reliance on Wisconsin's existing standards of appellate review and controlling case law.

Waterman's reference to administrative law may turn this Court's attention to Wis. Stat. § 321.36 (Rules of discipline). Chapter 321 establishes the structure and procedures for the Wisconsin Department of Military Affairs. Wisconsin Stat. § 321.36 provides in pertinent part that "[t]he rules and uniform code of military justice established by Congress and the U.S. department of defense for the armed forces shall be adopted so far as they are applicable

and consistent with the Wisconsin code of military justice for the government of the national guard."

The State has already shown that, with respect to the Wisconsin Code of Military Justice, the active duty, federal military law requirements regarding appellate review don't apply.

Applying federally dictated standards of military appellate review would also be inconsistent with the Wisconsin Code of Military Justice. The state Code is a *state*-law construct, enacted by a Legislature charged with knowing the standards and law under which this Court and the Wisconsin Supreme Court review criminal and quasi-criminal convictions and punishments. The state Code performs a *state*-law function and should reflect, as much as possible, standards and principles enunciated in *state* appellate law.

This Court should apply the standards of appellate review and Wisconsin's controlling case law to resolve Riemer's appellate claims.

II. Riemer's sentence isn't unduly harsh. It reflects an appropriate exercise of discretion.

A. Introduction.

Riemer faced a maximum punishment of five years and three months of confinement, total forfeiture of pay, and a dishonorable discharge. (Vol. 1 50.)

The military judge sentenced Riemer to 30 days of confinement and a bad conduct discharge.[6] (*Id.* 180.) The convening authority approved that portion of the sentence. (6:3.)

In his alternative state law argument, Riemer claims his sentence is unduly harsh under *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). (Riemer's Br. 12.)

Not so. Riemer's sentence is far from harsh.

B. The standard of review and the controlling principles law.

> When a defendant argues that his or her sentence is excessive or unduly harsh, a court may find an erroneous exercise of sentencing discretion only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances. However, a sentence well within the limits of the maximum sentence is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances. A sentence well within the limits of the maximum

[6] "A bad-conduct discharge is less severe than a dishonorable discharge and is designed as a punishment for bad-conduct rather than a punishment for serious offense of either a civilian or military nature. It is also appropriate for an accused who has been convicted repeatedly of minor offenses and whose punitive separation appears to be necessary." Umar Mounta-Ali & Sidath Viranga Panangala, *Veteran's Benefits: The Impact of Military Discharges on Basic Eligibility* at 18 (Congressional Research Service, March 6, 2015), available online at http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=2408&context=key_workplace (last visited October 25, 2016).

> sentence is unlikely to be unduly harsh or unconscionable.

State v. Grindemann, 2002 WI App 106, ¶ 31, 255 Wis. 2d 632, 648 N.W.2d 507 (citations, brackets, and internal quotation marks omitted). A sentence well within maximum limits "is presumptively *not* unduly harsh or unconscionable." *Id.* ¶ 32 (citation omitted).

Because Riemer's sentence falls well within the maximum limits, this Court presumes reasonableness. *Id.* ¶ 32.

The presumption doesn't automatically validate Riemer's sentence. *State v. Harris,* 75 Wis. 2d 513, 521, 250 N.W.2d 7 (1977). But the record does.

A sentencing court must consider the gravity of the offenses, the offender's character, and the public's need for protection. *State v. Thompson*, 172 Wis. 2d 257, 264, 493 N.W.2d 729 (Ct. App. 1992). The sentencing court determines and weighs the sentencing factors relevant to the defendant and the case. *State v. Stenzel,* 2004 WI App 181, ¶ 16, 276 Wis. 2d 224, 688 N.W.2d 20.

This Court maintains a consistent, strong policy against interference with sentencing discretion. *Gallion,* 270 Wis. 2d 535, ¶ 18. It asks whether the sentencing court took the relevant facts and logically reasoned its way to a conclusion based on proper legal standards. *McCleary v. State,* 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971).

If necessary, this Court will independently review the record in search of a reasonable basis upon which to sustain a poorly explained sentence. *State v. Hall,* 2002 WI App 108,

¶ 19, 255 Wis. 2d 662, 648 N.W.2d 41, citing *McCleary,* 49 Wis. 2d at 282.

It's not enough for Riemer to propose and defend a lesser sentence. "[D]iscretion by its very nature permits different judges to reach different—but reasonable—conclusions on the same set of facts." *Bracey v. Grondin,* 712 F.3d 1012, 1020 (7th Cir. 2013); *accord United States v. Bell,* 819 F.3d 310, 322 (7th Cir. 2016).

Riemer's status as a recruiter for the Wisconsin Army National Guard also matters for sentencing purposes. "The sentencing court must assess the crime, the criminal, and the community, and no two cases will present identical factors." *In re Felony Sentencing Guidelines*, 120 Wis. 2d 198, 201, 353 N.W.2d 793 (1984). Riemer's chosen profession required him to maintain certain standards of conduct. He violated those standards, and the military judge could sentence him accordingly. *See, e.g., Thompson*, 171 Wis. 2d at 265-66.

C. The true nature and impact of Riemer's conduct.

This is the essence of Riemer's merits argument:

> 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 Br. 12-13.)

That statement grossly minimizes the true nature and impact of Riemer's conduct.

The State invites this Court to review the sworn, cross-examined testimony of Riemer's accusers at the two-day Article 32 hearing. (Vol. 5, Tabs 12, 15.)

The State refers to Riemer's *accusers* for a reason. The witnesses at the Article 32 hearing included women Riemer pursued sexually, but who weren't named in the specifications to which Riemer pled. Some of his victims also testified to reprehensible conduct by Riemer not reflected in the specifications. All their testimony establishes "a pattern of behavior which is an index of the defendant's character, a critical factor in sentencing." *State v. Damaske,* 212 Wis. 2d 169, 196, 567 N.W.2d 905 (Ct. App. 1997) (citations omitted). This Court may properly consider it when evaluating the military judge's exercise of sentencing discretion. *Hall,* 255 Wis. 2d 662, ¶ 19.

Riemer's relevant course of conduct began in 2012 and ended in 2014. (Vol. 5, Tab 12: 56, 211-212; Tab 15: 504-510.) The State identifies his accusers by initials, in accordance with Wis. Stat. § (Rule) 809.86(4).

Specialist E4 BNJ-H (Vol. 5, Tab 12: 83-140.)

BNJ-H admitted being nervous and fearful during her testimony. (*Id.* 83.)

Riemer recruited BNJ-H into the Wisconsin Army National Guard after she finished high school. (*Id.* 84-86.) Before she enlisted, Riemer showed her sexually explicit photos of women, including a girl with whom she'd attended high school, and suggested the three of them have sex together. (*Id.* 87-88, 94, 109, 131-35.)

After BNJ-H enlisted, Riemer invited her to his motel room, where he sexually propositioned her, masturbated in

her presence, and ejaculated. (*Id.* 88-92, 129, 130.) The combination of his conduct, the fact he was her recruiter, and his physical size all scared her. (*Id.* 125-27.) She feared professional consequences and possible retaliation if she left his room. (*Id.* 126.)

Riemer showed consciousness of guilt. After the masturbation incident, he told BNJ-H if she told anybody about the encounter, "'I could lose my job.'" (*Id.* 92.)

ROTC Cadet BD (Vol. 5, Tab 12: 141-161.)

Riemer recruited BD for enlistment. (*Id.* 142-44.) While driving alone with her in a government vehicle, Riemer commented about photographing young women in swimsuits. (*Id.* 144-46.) Riemer's comments bothered BD: "I'm a girl who's their age and that I was just alone in a vehicle with him so I didn't know if he was having similar thoughts about me." (*Id.* 146.)

Riemer later questioned BD about a tattoo on her buttock, and said "we should take a picture of it." (*Id.* 148.) The tattoo had already been documented for military purposes. (*Id.*) Riemer's comments made BD uncomfortable because the tattoo appeared on a part of her body "that's not normally exposed." (*Id.*)

BD actually had two tattoos; Riemer knew about both. (*Id.* 150-51.)

Former Wisconsin National Guard member AA (Vol. 5, Tab 12: 165-210.)

Riemer recruited AA. (*Id.* 168.) Shortly before she enlisted, Riemer met her late in the evening at his office. (*Id.*) He persuaded her to play a sexualized game of "Truth-

or-Dare," daring her—successfully—to run on a treadmill wearing only her underwear. (*Id.* 169, 183-85, 195.) AA eventually gave Riemer a lap dance, drove with him while both were naked, and allowed him to fondle her breast. (*Id.* 170-71, 201.) She also masturbated him, hand-to-penis. (*Id.* 171-75.)

Riemer's physical size and the possibility of being hurt by him scared AA. (*Id.* 173-74.) She feared rape. (*Id.* at 175.) She didn't want to play Riemer's game. (*Id.* 176-77.) She testified Riemer "tried to make me feel small because he said he'd done so much work to try and get me in." (*Id.* 177.)

Riemer again showed consciousness of guilt. He told AA not to tell anyone: "He had begged and pleaded with me about it because it would put his job in danger and I would have to go through all of this stuff that I'm going through right now with this trial." (*Id.* 194.)

Private First Class RPH (Vol. 5, Tab 12: 217-260.)

RPH met Riemer during her recruitment process. (*Id.* 218.) After she enlisted, Riemer questioned her about her sexual orientation, invited her to drink with him (she was underage), propositioned her sexually, and suggested she participate in a sexual threesome, with the communications occurring via text message. (Id. 219-226, 258.) The messages included a photo of his genitals. (*Id.* 225.)

Specialist AP (Vol. 5, Tab 12: 269-299.)

AP met Riemer at a country music festival. (*Id.* 270-72.) He later invited her to his home, gave her alcohol (she was underage), propositioned her sexually, touched her, and had sex with her. (*Id.* 272-78.) He recorded their sexual activity and broadcasted it over the Internet. (*Id.* 278-79.)

When Riemer sought three-way sex with BNJ-H and another woman, AP was the other woman. (*Id.* 284-86.)

AP felt physically intimidated by Riemer's size and by his specialized "Combatives" military training. (*Id*. 279-280.)

Specialist JKR (Vol. 5, Tab 15: 346-374.)

Riemer recruited JKR. (*Id*. 347.) He invited her to his home. (Id. 355.) During another Truth-or-Dare session initiated by Riemer, he dared her to "try and turn him on." (*Id.* 350.) They each removed clothing. (*Id.*) Riemer then "stuck his face in my breasts, and then later he masturbated in front of me." (*Id.* 350.)

ROTC Cadet TLM (Vol. 5, Tab. 15: 375-421.)

Riemer recruited TLM. (*Id.* 376-77.) He sexually propositioned TLM while she lived with another ROTC Cadet, RFR, with whom Riemer maintained a physical relationship. (*Id.* 377-386.) When Riemer came under investigation for his conduct, he told TLM and RFR that he was "in deep shit," and that he would be "so pissed" if they told anyone about his conduct. (*Id.* 383-84.)

TLM was upset at being propositioned, felt threatened by Riemer, and feared for her safety and career. (*Id.* 384, 388-89, 394-95, 405-06, 409-10, 419.)

ROTC Cadet RFR (Vol. 5 Tab 15: 421-515.)

Riemer recruited RFR. (*Id.* 426.) He again proposed and played his sexual version of Truth-or-Dare, which led to sex and a long-term sexual relationship. (*Id.* 426-440, 494-515.)

RFR testified that Riemer continued his sexual relationship with her well into 2014, after his marriage to another person, and tried to persuade RFR to "make money by prostitution," going so far as having her create an online account with a false persona. (*Id.* 503-06.) Riemer also made it "very clear" to RFR and TLM that, with respect to the investigation, "we were to lie and that we were to cover up everything about the improper relationship that had formed." (*Id.* 510.)

The total picture is clear, and disturbing.

For two years, Riemer engaged in alarmingly repetitive, inappropriate sexualized behavior and relationships with young, subordinate female soldiers. Some of his conduct violated the Wisconsin Code of Military Justice. All of it proved his low character and predatory nature. He knew it was wrong, and he did it anyway. For this, he received a scant 30 days of confinement, and lost the employer and job he used to access his victims.

D. The military judge properly exercised his sentencing discretion.

The military judge's sentencing comments, while brief, reflect an appropriate exercise of discretion.

The judge considered the offenses grave, particularly in light of Riemer's previous good conduct and his status as a recruiter:

> The record, as evidenced by the many exhibits that I did review, is that you are a good soldier, above average even. However, your conduct outlined in these proceedings, which you've admitted to and accepted responsibility for, is a criminal military offense. The behavior is prejudicial to good order and

> discipline as well as discrediting to the Wisconsin National Guard and to the military.
>
> Your duties as a recruiter put you out to the public as the epitome of what it means to be a soldier, to serve, and to be a member of the Wisconsin National Guard, and you failed. You were given a responsibility that places you in the classrooms of our youth and puts you in contact with young people that often were still seeking an identity and confidence in themselves, and you took advantage of that. By my count, there are at least six service members that you have adversely impacted by your actions, and they should have been protected against your actions, which were inappropriate and predatory in nature.

(Vol. 1 178-79.)

The military judge's observations were apt. "The ARNG [Army National Guard] primarily relies upon recruiters dispersed at the state-level to conduct its recruiting process. Recruiters are often referred to as the 'face' of their respective military component, and any type of recruiter misconduct could have significant implications for DOD [the Department of Defense." *Military Recruiting: Army National Guard Needs to Continue Monitoring, Collect Better Data, and Assess Incentives Programs,* at 1 (United States Government Accountability Office, November 17, 2015), available online at http://www.gao.gov/assets/680/673689.pdf (last viewed October 25, 2016).

The military judge then considered Riemer's conduct in light of ongoing internal efforts to combat sexual harassment in the military:

> The military and the Wisconsin National Guard must do even more to prevent this from

> happening in the future. As you are—as you are aware, many of your fellow service members are getting tired of SHARP[7] training and suicide prevention and anti-terrorism training and all other kinds of training that we go through, seems like, more time than we spend with our warrior tasks. And some say it's the worst part of serving, but your actions make clear that we must do a better job to get our ranks to hear the message and to take it to heart.

(Vol. 1 179.) The judge felt Riemer's conduct illustrated the need for more, possibly better training. Those considerations go to the need for public protection and the public's right to military organizations as free as possible from sexual harassment. *See Thompson*, 172 Wis. 2d at 265.

Finally, the military judge rebuked Riemer for not directly apologizing to his victims. (Vol. 1 179-180.) The judge considered this a lost opportunity to demonstrate remorse or contrition, factors certainly relevant with respect to Riemer's character, his recognition of wrongdoing, and the likelihood of rehabilitation. Again, those are legitimate sentencing considerations. *Thompson,* 172 Wis. 2d at 265.

It bears repeating: For two years, Riemer engaged in alarmingly repetitive, inappropriate sexualized behavior and relationships with young, subordinate female soldiers. He knew it fell far outside the boundaries of acceptable military conduct. He did it anyway, and later pleaded with some of the women not to tell on him, and to lie on his behalf in an effort to avoid punishment.

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[7] The SHARP program—Sexual Harassment/Assault Response and Prevention—targets military sexual misconduct. <http://www.sexualassault.army.mil/Template-preventionAndTran.cfm?page=prevention_overview.cfm> (last accessed October 25, 2016).

Factfinders may infer intent from words and conduct. *State v. Hess,* 99 Wis. 2d 22, 29, 298 N.W.2d 111 (Ct. App. 1980). Riemer intentionally targeted young, subordinate female soldiers and used them—despite military rules and regulations—to satisfy his sexual desires. That misconduct warranted the punishment imposed.

Riemer's two-year course of abhorrent conduct exposed him to a possible five years and three months of confinement for it. Thirty *days* of confinement in response doesn't shock the conscience because of excessive length. If anything, it shocks the conscience because, in light of what he did, it's a relatively short period of confinement.

And the bad conduct discharge isn't a disproportionate response. Riemer's employer investigated the allegations against him and fired him. That's the same response a civilian employer might reasonably take with an employee who behaved toward co-workers as Riemer did.

Riemer's appellate argument doesn't bring the appropriateness of his sentence into question.

He asserts 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 Br. 12-13 (emphasis added).)

By using the word *individual*, Riemer tries to divert attention from the fact that he committed his offenses while serving as a soldier and recruiter of other soldiers. He tries to suggest his conduct "would not have constituted any crime at all had [he] pursued another line of work." (Riemer's Br. 8.)

He glosses over the fact that, as a volunteer soldier, he chose to accept limitations on his conduct—and certain sanctions for violations—that civilians don't have to accept. He also glosses over the fact that the Wisconsin Code of Military Justice, like other military codes, prohibits and punishes behavior civilians might engage in without criminal consequences.

Military law exists "to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States." *Manual for Courts-Martial, United States*, Part I (Preamble) at I-1 (2012). Riemer fails to explain precisely why his sentence would shock the public conscience when considered as a matter of military discipline—a response to behavior that harmed not only his victims, but also jeopardized the Wisconsin Army National Guard's ability to protect the State and, if need be, the United States. His behavior threatened public safety.

Riemer believes the military judge didn't adequately explain how his sentence serves principles of deterrence and rehabilitation. (Riemer's Br. 13.)

In Wisconsin, sentencing courts determine the factors relevant to the defendant and the case, and the weight each factor receives. *Stenzel,* 276 Wis. 2d 224, ¶ 16. The State has shown the military judge adequately explained his sentence.

While the judge didn't explicitly discuss general deterrence, Riemer's sentence promotes it. The possibility of 30 days confinement and a bad conduct discharge—or worse—will deter other members of the Wisconsin Army National Guard from engaging in behavior like Riemer's.

The prosecutor made that argument at sentencing (Vol. 1 152), and the judge apparently took it to heart.

The military judge didn't explicitly discuss Riemer's prospects for rehabilitation, either. But that doesn't require this Court to set aside or modify the sentence.

By discharging Riemer, the military judge implicitly concluded he wasn't a good candidate for rehabilitation. Not all defendants are, and the evidence suggests Riemer falls squarely into that category. If Riemer's status as a stellar soldier didn't deter him from committing his offenses in the first place, it's hard to understand why those accomplishments would give the judge any confidence that the Wisconsin Army National Guard could rehabilitate Riemer.

It ill-serves the public interest to retain a soldier who engaged in inappropriate sexualized conduct for two years and who—despite knowing his conduct was bad and wrong—kept right on going. Removing Riemer from the military environment served the public by punishing his wrongdoing and removing him from a "'target-rich environment'" of young female subordinates. Nadia Klarr, *Zero Tolerance or Zero Accountability? An Examination of Command Discretion and the Need for an Independent Prosecutorial Authority in Military Sexual Assault Cases,* 41 U. Dayton L. Rev. 89, 93 (2016) ("Brigadier General Loree Sutton, a psychiatrist in the U.S. Army, indicates that because the military is a relatively closed system, the military is a prime 'target-rich environment' for a sexual predator").

In Riemer's case, the price of failed rehabilitation was too high to pay.

Riemer also suggests his resulting status as a felon should somehow shock the conscience. (Riemer's Br. 13-14.)

That complaint implicates matters of public policy and legislative decision-making, not sentencing discretion.

> It is within the legislature's prerogative to decide which crimes are serious and to fashion an appropriate sentence. The task of defining criminal conduct is entirely within the legislative domain and, within constitutional limitations, the legislature possesses the inherent power to prohibit and punish any act as a crime.

State v. Heidke, 2016 WI App 55, ¶ 17, 370 Wis. 2d 771, 883 N.W.2d 162 (citation, ellipses, and internal quotation marks omitted).

Riemer disagrees with the Legislature's decision to give his convictions at court-martial felony status. His complaint is with that body; his remedy, an executive pardon. Wis. Const. art. V, § 6.

And finally, even if this Court adopts and applies the federal standards that govern active duty servicemembers, Riemer's sentence remains reasonable.

Under those standards, this Court should affirm "only such findings of guilty and the 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." UCMJ art. 66(c). This Court should assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offenses, the appellant's record of service, and all matters contained in the record of trial. *United States v. Healy,* 26 M.J. 394, 395–

96 (C.M.A. 1988); *United States v. Snelling,* 14 M.J. 267, 268 (C.M.A. 1982).

Although this Court would possess great discretion in deciding whether Riemer received an appropriate sentence, it would lack the authority to exercise clemency. *United States v. Nerad,* 69 M.J. 138, 146 (C.A.A.F. 2010). "Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves. Clemency involves bestowing mercy—treating an accused with less rigor than he deserves." *Healy,* 26 M.J. at 395.

The State has already proven the appropriateness of Riemer's sentence, one he richly deserved. Justice has been done. All that's left to Riemer now is his hope that this Court may show him clemency or mercy.

Even if military law applies, he's entitled to neither. *Healy*, 26 M.J. at 395.

His sentence should stand.

III. The military judge didn't demonstrate objective bias at sentencing.

Riemer claims two comments made by the military judge at sentencing demonstrate objective bias:

- The judge's reference to recruiters as "the epitome of what it means to be a soldier, to serve, and to be a member of the Wisconsin National Guard." (Vol. 1 178.)

Riemer says this implies the military judge held him "to a higher standard than many members of the Wisconsin Army

National Guard because of the public nature of his duties." (Riemer's Br. 15.)

- The judge's reference to Riemer's conduct demonstrating the need for continued sexual misconduct prevention ("SHARP") training in the Wisconsin Army National Guard, and the sentiment among "many" servicemembers that such training diverts attention from "our warrior tasks," and is "the worst part of serving." (Vol. 1 179.)

Riemer says this implies the military judge punished him because his conduct "will lead to more mandatory requirements that the military judge deems unnecessary." (Riemer's Br. 16.)

His claims don't withstand scrutiny.

Those charged with criminal offenses are entitled to "an impartial and unbiased judge." *State v. Bell,* 62 Wis. 2d 534, 536, 215 N.W.2d 535 (1974). The existence of judicial bias presents a question of constitutional fact reviewed de novo. *State v. Neuaone,* 2005 WI App 124, ¶ 16, 284 Wis. 2d 473, 700 N.W.2d 298.

Reviewing courts presume judges act fairly, impartially, and without bias. *State v. Gudgeon,* 2006 WI App 143, ¶ 20, 295 Wis. 2d 189, 720 N.W.2d 114. Riemer must demonstrate bias by a preponderance of the evidence. *Neuaone,* 284 Wis. 2d 473, ¶ 16.

Either subjective or objective bias "can violate a defendant's due process right to an impartial judge." *Gudgeon,* 295 Wis. 2d 189, ¶ 20. Riemer alleges only objective bias.

Objective bias can exist in two situations. Traditionally, courts consider whether "'there are objective facts demonstrating . . . the trial judge in fact treated [the defendant] unfairly.'" *State v. Herrmann*, 2015 WI 84, ¶ 27, 364 Wis. 2d 336, 867 N.W.2d 772 (citations omitted).

Also, "[t]he right to an impartial decisionmaker stretches beyond the absence of actual bias to encompass the appearance of bias as well." *Id.* ¶ 30. "When the appearance of bias reveals a great risk of actual bias, the presumption of impartiality is rebutted, and a due process violation occurs." *Id.* ¶ 46.

Judicial comments that reflect personal feelings don't automatically establish objective bias. In *Hermann*, the judge made personal comments about her sister being killed by a drunk driver while sentencing the defendant for homicide by intoxicated use of a vehicle. The Wisconsin Supreme Court concluded the judge made those statements "to illustrate the seriousness of the crime and the need to deter drunk driving in our society" and didn't express bias against Hermann. *Id.* ¶ 60. Hermann failed to rebut the presumption of impartiality because the statements, viewed in context, didn't reveal a great risk of actual bias. *Id.* ¶ 68.

Riemer's two examples—the military judge's reference to Riemer's recruiter status and the need for additional SHARP training—don't prove or suggest actual bias.

The military judge could reasonably consider Riemer's status as a recruiter when imposing sentence. *Thompson*, 172 Wis. 2d at 265-66. As such, he served as the public face of the Wisconsin Army National Guard. Prospective and new servicemembers would look to him for guidance. Regrettably, some became his victims. The judge's comments reflected a proper sentencing consideration, not bias.

And the military judge's remarks about SHARP training don't prove or suggest actual bias. In context, they reflect legitimate judicial concern about the appropriate sentence for a defendant who, in spite of the Wisconsin Army National Guard's efforts to combat sexual misconduct, still behaved disgracefully toward young female subordinates.

They also reflect legitimate judicial concern about the broader consequences of Riemer's conduct. The judge believed that conduct demonstrated the need for and would lead to the imposition of more and/or better SHARP training. SHARP training that, while vitally necessary, didn't directly involve the primary fighting tasks performed by servicemembers, and is considered an unwelcome burden by some servicemembers.

The comments don't demonstrate bias. They demonstrate the military judge's belief that, when it comes to combating sexual misconduct in the Wisconsin Army National Guard, more needs to be done.

But even if this Court considers the military judge's statements as expressions of his personal irritation with Riemer for bringing more SHARP training down upon him, that doesn't establish bias. "[A] judge's negative comments do not automatically equal bias[.]" *State v. Pirtle,* 2011 WI App 89, ¶ 34, 334 Wis. 2d 211, 799 N.W.2d 492.

"[J]udicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge[.]" *Liteky v. United States,* 510 U.S. 540, 555 (1994). Neither do "expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women . . . sometimes display." *Id.* at 555, 556. Rather, the challenged remark

must "reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." *Id.* at 555.

The most Riemer can say is the military judge didn't relish the prospect of additional SHARP training, and other servicemembers might not either. That doesn't mean he harbored antagonism toward Riemer that made fairness impossible. If the judge possessed such a high degree of antagonism toward Riemer, why did he refer to him as a "good soldier" when considering his character? (Vol. 1 178.) Why did he impose a term of confinement measured in days, rather than years? Why didn't he impose a dishonorable discharge?

Riemer hasn't overcome the presumption of fairness and impartiality.

Nor has Riemer proven that the military judge had a preconceived, inflexible sentencing policy involving court-martialed National Guard recruiters, or servicemembers court-martialed for conduct similar to Riemer's. *See State v. Ogden,* 199 Wis. 2d 566, 571, 544 N.W.2d 574 (1996). The judge never said or implied that in such situations, he believed mitigation was impossible. He never said or implied that he always imposed, at minimum, a term of confinement and a bad conduct discharge in such situations. Again, the significant disparity between the maximum possible sentence and the sentence imposed suggests the judge did consider factors in mitigation, though not giving them as much weight as Riemer would have preferred.

The record doesn't demonstrate bias or a preconceived, inflexible approach to sentencing.

IV. The military judge's treatment of evidence presented in mitigation and his comments regarding victim impact didn't violate Riemer's right to due process.

In addition to the due process right to an unbiased judge—which applies to all stages of his proceeding—Riemer has three due process rights specifically related to sentencing: (1) presence and allocution; (2) representation by counsel; and (3) a sentence based on true and correct information. *Bruneau v. State,* 77 Wis. 2d 166, 174-75, 252 N.W.2d 347 (1977).

In his final argument, Riemer claims the military judge violated due process by failing to consider all the evidence presented in mitigation, and by making unproven assumptions regarding the negative effect his conduct had upon his victims. (Riemer's Br. 16-19.) Riemer believes that, given the many pages of documentary evidence he submitted and the amount of time the military judge had it before sentencing, the judge probably didn't read it all. (Riemer's Br. 17.)

The State has several responses.

First, Riemer cites no authority supporting the proposition that due process requires a sentencing court to consider every piece of evidence a defendant offers in mitigation. This Court shouldn't abandon its neutrality to develop a proper argument for Carter. *See Indus. Risk Insurers v. American Eng'g Testing, Inc.,* 2009 WI App 62, ¶ 25, 318 Wis. 2d 148, 769 N.W.2d 82; *State v. Pettit,* 171 Wis. 2d 627, 646–47, 492 N.W.2d 633 (Ct. App. 1992).

And it's a dubious proposition. A defendant has no right, constitutional or otherwise, to "present any and all evidence he or she wishes to present" at sentencing. *See*

State v. Robinson, 2001 WI App 127, ¶ 22, 246 Wis. 2d 180, 629 N.W.2d 810. The reason is obvious. A defendant can't inundate a sentencing court with paper, and later seek a new sentence because the judge didn't read it all.

Second, the cases cited by Riemer regarding his right to a sentence based on true and correct information have little applicability here. (Riemer's Br. 18-19.) He points to no factually incorrect evidence considered by the military judge in imposing sentence, such as a presentence investigation report that inaccurately lists the number of a defendant's prior convictions. *State v. Lechner,* 217 Wis. 2d 392, 419-420, 576 N.W.2d 912 (1998).

The best Riemer can do is assert that, because the military judge didn't look at every piece of paper he presented, the judge may have had a mistaken belief regarding the amount of evidence in mitigation. That doesn't establish a constitutional violation. "The Supreme Court has never vacated a sentence (other than a capital sentence) because of reliance on mistaken beliefs about the facts, unless there was an independent constitutional reason why this kind of fact was a sort of thing that could not be relied upon." *United States v. Turner,* 864 F.2d 1394, 1400 (7th Cir. 1989).

Third, the military judge had an ample evidentiary basis upon which to mitigate Riemer's sentence. He heard Riemer's allocution and the testimony of two other witnesses in mitigation of sentence. (Vol. 1 96-138.) In particular, Riemer's allocution focused on the laudable aspects of his military service. (Vol. 1 124-138.) And given the large disparity between the potential maximum sentence and the sentence imposed, it's fair to assume the judge *did* mitigate the sentence. The most Riemer can say is the judge didn't give his evidence "the overriding and mitigating significance

that he would have preferred." *Stenzel,* 276 Wis. 2d 224, ¶ 16.

Finally, the military judge's reference to adverse victim impact doesn't justify sentence modification. Any error was harmless because the appellate record fully demonstrates the adverse impact Riemer's conduct had on his victims.

Riemer believes the italicized statement by the military judge lacks evidentiary support:

> By my count, there are at least six [servicemembers] *that you have adversely impacted by your actions,* and they should have been protected against your actions, which were inappropriate and predatory in nature.

(Vol. 1 179, *cited in* Riemer's Br. 1-19.)

While the prosecution presented no affirmative evidence of adverse victim impact at sentencing, the record leaves no doubt Riemer's conduct "adversely impacted" his victims.

Harmless error analysis applies to nonstructural sentencing errors. *State v. Travis,* 2013 WI 38, ¶¶ 51-73, 347 Wis. 2d 142, 832 N.W.2d 491. An error is harmless if it doesn't affect the defendant's substantial rights. Wis. Stat. § 805.18. That standard applies whether the error is constitutional, statutory, or otherwise. *State v. Harvey,* 2002 WI 93, ¶ 40, 254 Wis. 2d 442, 647 N.W.2d 189.

"The State can meet its burden to prove harmless error by demonstrating that the sentencing court would have imposed the same sentence absent the error." *Travis,* 347 Wis. 2d 142, ¶ 73. The State can't speculate about what a

hypothetical court would do at a future sentencing, and it can't rely on any post-sentencing assurances by the judge that, if he got the case again, he'd impose the same sentence. *Id.* The military judge gave no such assurances here.

And the State doesn't have to speculate. We know the military judge would've imposed the same sentence because the necessary evidence of adverse victim impact is in the record. The sworn testimony of Riemer's victims at the Article 32 hearing conclusively establishes that each victim suffered adverse impacts from Riemer's conduct. *Cf. Hall,* 255 Wis. 2d 662, ¶ 19 (reviewing court's responsibility to independently review the record for basis to sustain exercise of sentencing discretion).

The first specification identified BJ-H and AP. (5:2.) BJ-H testified that the combination of Riemer's conduct, the fact he was her recruiter, and his physical size all scared her. (Vol. 5, Tab 12: 125-27.) She feared professional consequences and possible retaliation if she left his room. (*Id.* 126.) AP testified that Riemer's physical size and specialized combat training intimidated her. (*Id.* 279-280.)

The second specification identified RFR and TLM. (5:2.) RFR testified that Riemer's initial sexual propositions made her "really uncomfortable" and "flushed." (Vol. 5, Tab 15: 432.) At one point, she "started to realize what a mistake the entire thing had been and that I shouldn't have done any of it." (*Id.* 439.) RFR cried during her testimony. (*Id.* 440.) She testified that Riemer did things "that made me feel really bad about myself as a person. He would—he would victimize me at times; but while I was going through it, I honestly wanted to be with him." (*Id.* 441.) She thought refusing Riemer's sexual advances "would be awkward, and I didn't know what would happen to me if I refused him, if he could hold that against me." (*Id.*)

TLM testified she was upset at being propositioned, felt threatened by Riemer, and feared for both her safety and career. (*Id.* 384, 388-89, 394-95, 405-06, 409-10, 419.)

The third specification also involved TLM. (5:2.)

The fourth specification involved BD. (5:2.) Riemer's comments to her about photographing young women in swimsuits bothered BD: "I'm a girl who's their age and that I was just alone in a vehicle with him so I didn't know if he was having similar thoughts about me." (Vol. 5, Tab 12: 146.) Riemer's comments made BD uncomfortable because the tattoo appeared on a part of her body "that's not normally exposed." (*Id.*)

The fifth specification also involved BJ-H and AP. (5:2.)

The sixth specification involved RPH. (5:2.) Riemer's sexual questioning "got to the point where I felt uncomfortable and I didn't think it was professional." (Vol. 5, Tab 12 221.) She considered his texting a picture of his genitals a "weird scenario" that made her uncomfortable. (*Id.* 222, 225.) She started to hear rumors about Riemer, and began feeling nervous and stupid. (*Id.* 224.)

This testimony fully supports the military judge's conclusion that Riemer adversely impacted his victims by his actions.

Additionally, the military investigative and disciplinary processes may add to the adverse impact experienced by the victim. *See, e.g.*, Klarr, *Zero Tolerance* 105-06 (collecting cases); *see also* Gerald B. Lefcourt, *High Time for a Bill of Rights for the Grand Jury*, 22-APR Champion 12 (April, 1998) (discussing the "[i]nherent

pressures and accompanying nervousness" associated with grand jury testimony). An Article 32 investigation "is the military's counterpart to the civilian grand jury." David A. Schlueter, *Military Criminal Justice: Practice and Procedure,* § 7-2(A) at 420 (8th ed. 2012), and gives rise to the same inherent pressures and nervousness on the part of the witnesses. These, too, are adverse victim impacts attributable to Riemer's conduct. Recall Riemer warned AA—if she told anyone about his behavior, "I would have to go through all of this stuff that I'm going through right now with this trial." (Vol. 5, Tab: 12 194.)

CONCLUSION

For two years, Riemer engaged in inappropriate, sexualized behavior with young female subordinates. He violated the Wisconsin Code of Military Justice six times in the process. He admitted it. The military judge imposed punishment commensurate with the offenses, and in full conformity with Wisconsin law.

Riemer doesn't prove otherwise. This Court should affirm his convictions and sentence.

Dated: October 26, 2016.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 9,965 words.

_____
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I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of 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: October 26, 2016.

_____
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