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.

REPLY BRIEF OF DEFENDANT-APPELLANT

CPT DECLAN J. BINNINGER, JA
412th Senior Trial Defense Team
Illinois Army National Guard
Attorney for Jesse T. Riemer

State Bar No. 1100261

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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 persists in seeking oral argument on the issues presented. The parties agree that this Court has never addressed sentencing at a court-martial convened pursuant to the Wisconsin Code of Military Justice ("WCMJ"). Riemer also has no objection to publication.

INTRODUCTION

In the Respondent's Brief-in-Chief[1], the State's argument for upholding the sentence entered by Lieutenant Colonel ("LTC") Klauser rests mainly on two bases: 1) an urging that this Court eschew the de novo review afforded to all active-duty and reserve members of the United States Armed Forces as well as to similarly situated National Guard personnel regarding a challenge to a sentence imposed by a military judge; and 2) an inappropriate reliance on unintroduced and inadmissible testimony obtained at an Article 32 investigative hearing.

The majority of the remainder of the State's Brief focuses on the agreed-upon fact that Riemer was charged and convicted under the WCMJ and not the Uniform Code of Military Justice ("UCMJ"). Riemer is not seeking that this Court abandon the WCMJ in favor of the UCMJ, only that it look for guidance to the UCMJ and the well-settled case law interpreting it in reaching its own decisions, as was intended by the Wisconsin legislature when it passed the WCMJ.

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[1] The cover page of Respondent's Brief-in-Chief incorrectly implies that Major General ("Maj. Gen.") Donald P. Dunbar presided over the court-martial. In fact, LTC David Klauser presided over the court-martial while Maj. Gen. Dunbar was the convening authority.

ARGUMENT

I. The Court should adopt a hybrid approach of applying Wisconsin law in a manner consistent with the UCMJ.

The State is correct in pointing out that this case is a novel one. In its Brief, the State even admits that "[m]ost appeals don't involve courts-martial convened under the Wisconsin Code of Military Justice." In fact, this is the first such case in the history of the Wisconsin Court of Appeals. As such, it is incumbent upon this Court to determine the standard of review for all issues raised in Riemer's appeal and to give instruction to all other appeals arising out of the WCMJ. In making this determination, this Court should adopt the federal standard of review afforded all active-duty, reserve and similarly situated National Guard service-members convicted of a military crime.

A. While the legislature was silent on the issue of appellate review, its intention was for the WCMJ to conform to its federal counterpart.

As the State points out, when the legislature enacted the WCMJ, it made clear that the statute "shall be so construed as to effectuate its general purpose to make it uniform, so far as practical, with [the UCMJ]". Wis. Stat. Sec. 322.143; Respondent's Br. 6.

The State then goes on to argue that since the legislature did not specifically clarify that it intended this guideline to be extended to appellate review, no reason exists to do so now. In support of its position, the State argues that it would be impractical to do so and inserts its own belief that, notwithstanding the cited section of the WCMJ above, the

legislature intended for far more deferential appellate review of court-martial sentences. Respondent's Br. 13.

The WCMJ was first enacted in 2008 and in the eight years since, there has been but one instance where the Wisconsin National Guard exercised its ability to try one of its service-members by court-martial—the present one. If this trend is any indication, this Court could expect to see up to one court-martial appeal every eight years. Given the absolute dearth of convictions pursuant to court-martial, it is hardly foreseeable that adoption of the de novo review of court-martial sentences that Reimer is proposing would create such a challenge for the learned judiciary of the Wisconsin Court of Appeals to be considered impractical.

Further, it cannot be overstated that the clearly identified intent of the legislature was for the WCMJ to comport to its federal counterpart, the UCMJ. On the issue of sentencing review, the body of case law interpreting the relevant section of the UCMJ (Article 66(c)) is equally as clear as the WCMJ is on its intent to conform to the federal standard:

> Before it may affirm [a court-martial sentence], the court must be satisfied that the findings and sentence are (1) correct in law, and (2) correct in fact. Even if these first two prongs are satisfied, the court may affirm only so much of the findings and sentence as it determines, on the basis of the entire record, should be approved.

United States v. Tardif, 57 M.J. 219, 224 (C.A.A.F. 2002) (internal citations omitted). The State even notes that where this exact issue was addressed in another state (Florida), a hybrid approach was adopted—one that would allow National Guard service-members their right to an appeal in state court while maintaining the character and

integrity of the military justice process. *Waterman v. State*, 654 So. 2d 150, 152 (Fla. Dist. Ct. App. 1995).

Riemer is not arguing for this Court to abandon the State's existing body of criminal case law, only to recognize that since he was convicted under a statute that had never before been employed that it is necessary to add to that existing body of case law. Consistent with the intent of the statute pursuant to which Riemer was convicted, doing so requires de novo review of his sentence.

B. The State's position is impractical and therefore contrary to the WCMJ.

The State wants members of the Wisconsin National Guard to adopt a different operating procedure than that of their active-duty, reserve and similarly situated National Guard counterparts. Implementing the State's preferred standard would require, at the very least, retraining of all Wisconsin National Guard judge advocates who, by virtue of their military occupational specialty, the WCMJ and the Wisconsin Manual for Courts-Martial, are required to be the practitioners of criminal law under the WCMJ. Wis. Stat. Sec. 322.038; MCM WI Sec. 7-3.

While members of the Wisconsin National Guard serve locally, they receive the same training that their active-duty and reserve counterparts do. *See, e.g.*, TRADOC Regulation 350-6 at p.1 (all Army National Guard initial entry training is governed by the United States Army Training and Doctrine Command). The reason for unified training, from boot camp all the way through command and general staff college, is to ensure that any member of the United States military can serve alongside any other member on any task required of him or her. This compatibility is essential to

make certain that the military as a whole can fulfill its mission while keeping intra-service bickering at a minimum.

For example, all newly commissioned officers of the Army's Judge Advocate General's Corps must attend unified training as directed by The Judge Advocate General of the United States Army ("TJAG"). AR 350-1, Sec. 2-16. That training is conducted at The Judge Advocate General's Legal Center and School which was established in 1955 in order to "[d]evelop, provide, and conduct resident instruction, training, and education in military law for officers of The Judge Advocate General's Corps[.]" AR 350-115 (28 NOV 55). As required, an emphasis in the curriculum that TJAG developed is an in-depth analysis and application of the UCMJ. *Id*.

All Army lawyers receive this training, including those who took part in Riemer's court-martial. Necessarily, they all studied the UCMJ and its Article 66(c), which as previously discussed clearly states that only so much of the findings and sentence that a reviewing court determines to be proper should be approved. 10 USCS § 866 (c).

Thus, the attorneys who prosecuted and defended SFC Riemer as well as the military judge who presided over the case were all ostensibly operating under the assumption that their actions, in the event of an appeal, would be reviewed by a court in accordance with the statutes that they all studied. In other words, they likely anticipated de novo review of a military judge's sentence.

Moreover, it stands to reason that diverging from the standard to which all military lawyers are trained would require all of the attorneys of the Wisconsin National Guard to undergo additional education on this issue in order to ensure they provide effective representation and do not

commit misconduct at any future courts-martial. Such a requirement is wildly impractical and therefore inconsistent with the plain language of the WCMJ.

II. The State's reliance on inadmissible testimony from an Article 32 investigative hearing is wholly inappropriate.

In its Brief, the State argues that an Article 32 investigative hearing is the military's version of a grand jury (Respondent's Br. 42). This used to be the case and the cite that the State relies on for its understanding was accurate at the time it was written in 2012. However, in 2015 the United States Congress altered Article 32 of the UCMJ in such a way as to produce a more focused hearing. 80 FR 35783, 35786. Now, an Article 32 investigative hearing is the military equivalent of a preliminary hearing, which, unless waived, must be convened before charges can be referred to a court-martial. *Id*.; *United States v. Mercier*, 75 M.J. 643, 645 (C.G.C.C.A. 2016). That the Wisconsin Manual for Court Martial adopted this change is reflected in Section 6-3 of its Manual for Court Martial which defers to Article 32 of the UCMJ. MCM WI Art. 32.

As Wisconsin law has long held, "at a preliminary hearing, a court is concerned with the practical and nontechnical probabilities of everyday life in determining whether there is a substantial basis for bringing the prosecution and further denying the accused his right to liberty." *State ex rel. Huser v. Rasmussen*, 84 Wis. 2d 600, 605-606 (Wis. 1978). In other words, "the purpose of a preliminary examination is to test the plausibility of the State's case against the defendant, not to measure the strength of that case nor provide for pretrial discovery[.]" *State v. O'Brien*, 2013 WI App 97, P2 (Wis. Ct. App. 2013). Further,

testimony from a preliminary hearing is only admissible at trial pursuant to the evidentiary hearsay rule "if the declarant is 'unavailable as a witness.'" *State v. Sorenson*, 152 Wis. 2d 471, 485 (Wis. Ct. App. 1989).

Similarly, military courts have consistently held that "former testimony may be received in evidence against a defendant if the witness is deceased or otherwise 'unavailable,' whether the testimony was given at a former trial of the same case or at a preliminary examination." *United States v. Connor*, 27 M.J. 378, 382 (C.M.A. 1989).

The reason for the agreement on this issue is simple—the Sixth Amendment of the United States Constitution demands that an accused be afforded the right to confront his accusers. USCS Const. Amend. 6. Its corollary, the evidentiary hearsay, rule "stem[s] from the same root" and requires that the declarant be unavailable in the event that former testimony is offered into evidence. *Dutton v. Evans*, 400 U.S. 74, 86 (U.S. 1970); *La Barge v. State*, 74 Wis. 2d 327, 335 (Wis. 1976).

Thus, any testimony elicited from Riemer's accusers at the Article 32 investigative hearing would have been inadmissible at Riemer's court-martial had his accusers been available. As is evidenced from the record, Riemer's accusers attended his sentencing hearing (Plea: 90, 179), which makes it plain that they were not unavailable to testify had trial counsel wanted to call them. It further demonstrates that Riemer's accusers' former testimony could not have been considered by the military judge in arriving at his sentence.

In order to cure the military judge's woefully incomplete and insufficiently explained basis offered for the

sentence imposed[2], the State is now seeking to have it both ways (*i.e.*, to not call Riemer's accusers to testify at the court-martial and then rely on their former testimony to support the military judge's decision). Allowing this argument is a plain and direct attack on the evidentiary hearsay rule and Riemer's rights as guaranteed by the Sixth Amendment to the United States Constitution.

(CONCLUSION FOLLOWS ON NEXT PAGE)

[2] The specific deficiencies of the military judge's sentence are discussed in detail in the Parties' briefs and will not be addressed here for the sake of efficiency.

CONCLUSION

SFC Riemer is not asking this Court to forsake its own judgment for that of the military courts of appeals. Instead, Reimer is seeking the same protection and process afforded every active-duty, reserve and similarly situated National Guard Soldier who finds himself or herself convicted of a crime pursuant to a court-martial.

When viewing the sentence imposed through this lens, it becomes clear that because the military judge: 1) did not provide a sufficient basis for his decision; 2) demonstrated a bias toward SFC Riemer; and 3) failed to give appropriate weight to the mitigating evidence submitted; the sentence is unduly harsh and violates Riemer's due process rights.

As such, Riemer should either be granted a new trial or, alternatively, only so much of his sentence as is supported by the evidence actually presented should be upheld.

Dated this 30th day of November, 2016.

Respectfully submitted,

CPT DECLAN J. BINNINGER, JA
412th Senior Trial Defense Team
Illinois Army National Guard
Attorney for Jesse T. Riemer

State Bar No. 1100261
3309 Robbins Road, #162
Springfield, IL 62704
(708) 414-6550

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 2,193 words.

Dated this 30th day of November, 2016.

Signed:

CPT DECLAN J. BINNINGER, JA
412th Senior Trial Defense Team
Illinois Army National Guard
Attorney for Jesse T. Riemer

State Bar No. 1100261
3309 Robbins Road, #162
Springfield, IL 62704
(708) 414-6550

Attorney for Jesse T. Riemer

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 30th day of November, 2016.

Signed:

CPT DECLAN J. BINNINGER, JA
412th Senior Trial Defense Team
Illinois Army National Guard
Attorney for Jesse T. Riemer

State Bar No. 1100261
3309 Robbins Road, #162
Springfield, IL 62704
(708) 414-6550

Attorney for Jesse T. Riemer