IN THE UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

Before Panel No. 3

UNITED STATES,

Appellee,

v.

Jonathan D. GURFEIN,
Major,
United States Marine Corps,

Appellant

APPELLANT'S REPLY BRIEF (Corrected)

Case No. 201700345

Tried at Marine Corps Base Quantico, Virginia and Stuttgart, Germany on 13 March; 19 and 26 April; 25 May; 5, 23, 26-30 June; and 1-2 July 2017, by a General Court-Martial convened by the Commanding Officer, United States Forces Europe & Africa.

TO THE HONORABLE JUDGES OF THE UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

JOHN N. MAHER
KEVIN J. MIKOLASHEK
DAVID BOLGIANO
Civilian Appellate Defense Counsel
MAHER LEGAL SERVICES PC
7 East Main Street, Number 1053
St. Charles, Illinois 60174
Tel: (708) 468-8155
johnmaher@maherlegalservices.com

WILLIAM L. GERATY
LCDR, JAGC, USN
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street SE
Bldg. 58, Ste. 100
Washington Navy Yard, D.C. 20374
Tel: (202) 685-8502
william.geraty@navy.mil

INDEX OF REPLY BRIEF

TABLE OF CASES, STATUTES, AND OTHER AUTHORITES

SUPREME COURT OF THE UNITED STATES

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES COURT OF MILITARY APPEALS CASES

UNITED STATES ARMY COURT OF CRIMINAL APPEALS CASES

STATUTES

RULES FOR COURTS-MARTIAL

DISCUSSION

I. The Prosecution Did Not Prove Major Gurfein "Flashed" LS

In its Brief on Behalf of Appellee, the Government claims there is no validity to any of the six assignments of error Maj. Gurfein raised in his Appellant's Brief, to include his presentation that the evidence is factually and legally insufficient to sustain the findings and the sentence. On appeal, the Government informs the Court "the United States presented overwhelming evidence of guilt." Appellee's Br. at 49.

The Government's claim is not only unsupported by the evidence of record, but also contradicted by the evidence of record. Nor are Maj. Gurfein's convictions supported by overwhelming -- let alone factually and legally sufficient -- evidence. At trial, Maj. Gurfein, a Field Grade Marine Officer with a *summa cum laude* bachelor's degree, a stellar record of combat service in the Infantry in Iraq and Afghanistan, faithful service in nations across the African continent and Europe, who is father of three school-aged children, and former Israeli Defense Force special operations soldier with no previous record of discipline, took the stand and defended himself against Charges that he "flashed" two German girls: one in 2014 and the other in 2016.

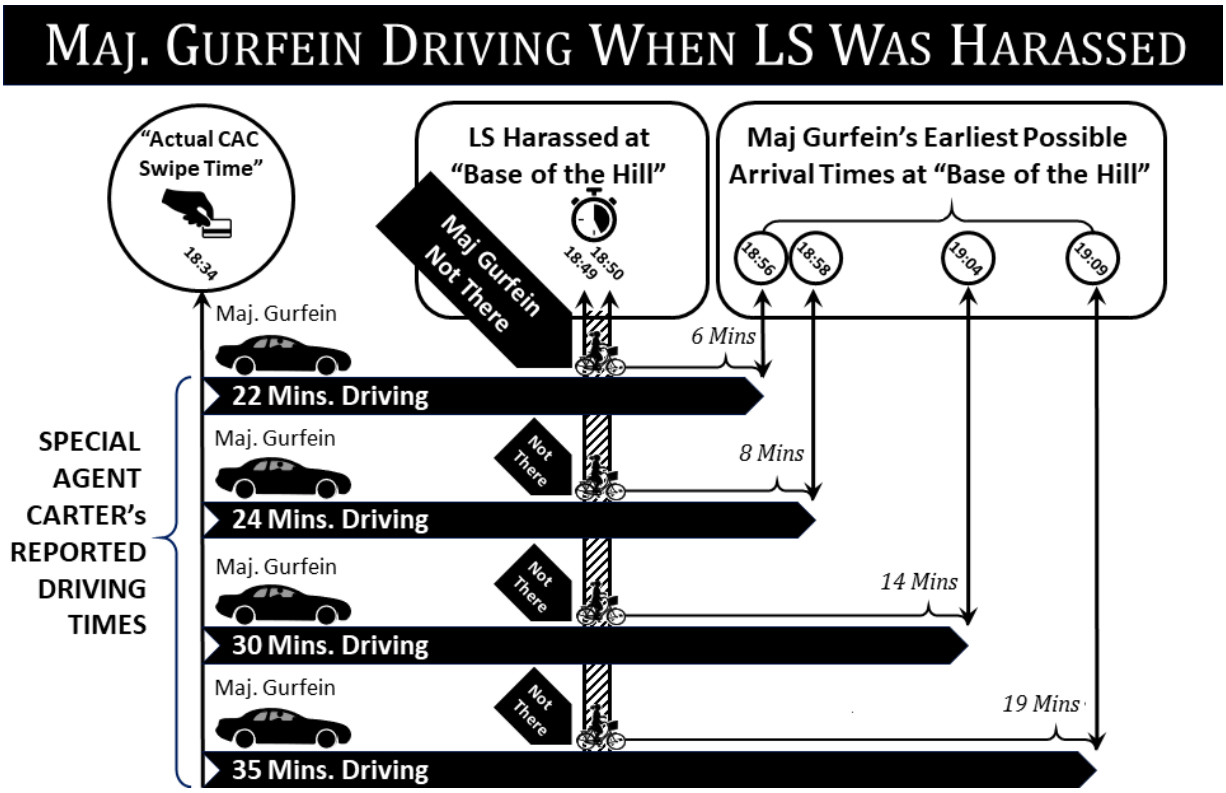
Found not guilty in connection with the 2014 Charges, the jury convicted him of flashing LS at 1849 or 1850 hours on 20 September 2016, near her home between Kelly Barracks in Stuttgart, Germany and Dettenhausen, Germany (where Maj.

Gurfein lived with his family) even though the prosecution did not, and cannot, prove that Maj. Gurfein was at the scene of the crime at the time prescribed. Indeed, the factual and legal evidence at trial established a physical impossibility for Maj. Gurfein to have been at the location at the time the prosecution claimed.

Data from Maj. Gurfein's Common Access Card (CAC) proved that he left his secure workspace on Kelly Barracks in Stuttgart on the night in question at 1833:56. At trial, the prosecution argued that LS's assailant was at the scene of the crime, "the base of the hill" leading to LS's home, at 1849 or 1850. "That means Major Gurfein is at the base of that hill at 1849 or 1850." (R. at 2110).

The prosecution's main Criminal Investigation Command (CID) witness, Special Agent Carter, drove the route from Maj. Gurfein's office to the "base of the hill" at least three times. He testified that it takes "22 – 24 minutes," "30 – 35 minutes depending upon traffic," and "24 minutes" to drive from Maj. Gurfein's workspace to the base of the hill. (R. at 1353; 1363; 1399).

A review of the prosecution's evidence establishes that Maj. Gurfein was not at the scene of the crime on the night in question at the time prescribed. Graphic 1 below summarizes the prosecution's evidence:



Graphic 1.

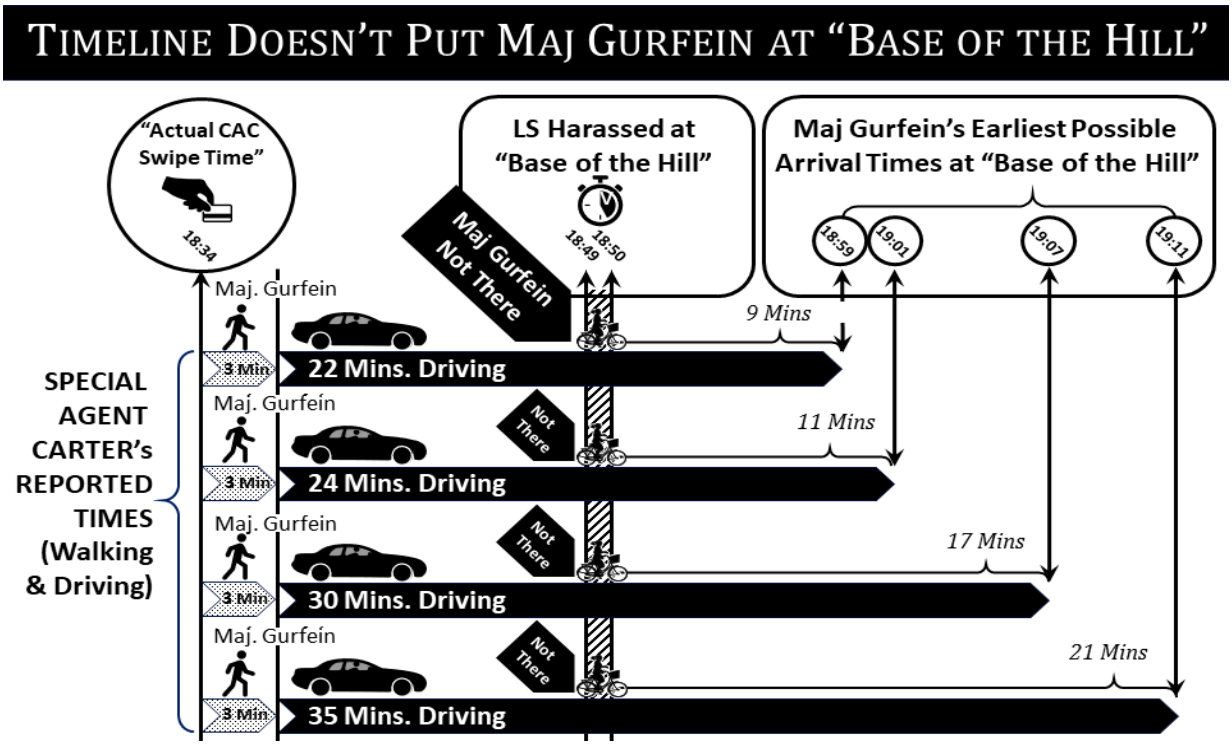
To summarize, not only is there a paucity of evidence tending to show that Maj. Gurfein was present when and where the prosecution claimed he was; there is, in fact, substantial evidence that he was *not* there and *could not* have been there. In light of this evidence, the convictions are unsustainable, are fundamentally unfair, and unjust.

Further illuminating the wide gaps in the prosecution's evidence is Special Agent Carter's testimony that it took three minutes to walk from the front door of Maj. Gurfein's office building on Kelly Barracks to the closest parking lot behind the gym to get into his car and begin the drive toward his home in Dettenhausen:

> Yes, ma'am. This is building 3304, where on all the UPCs we had -- said that he had -- he was working, ma'am. His vehicle was located behind the gym, which is approximately a three-minute walk.

(R. at 1348).

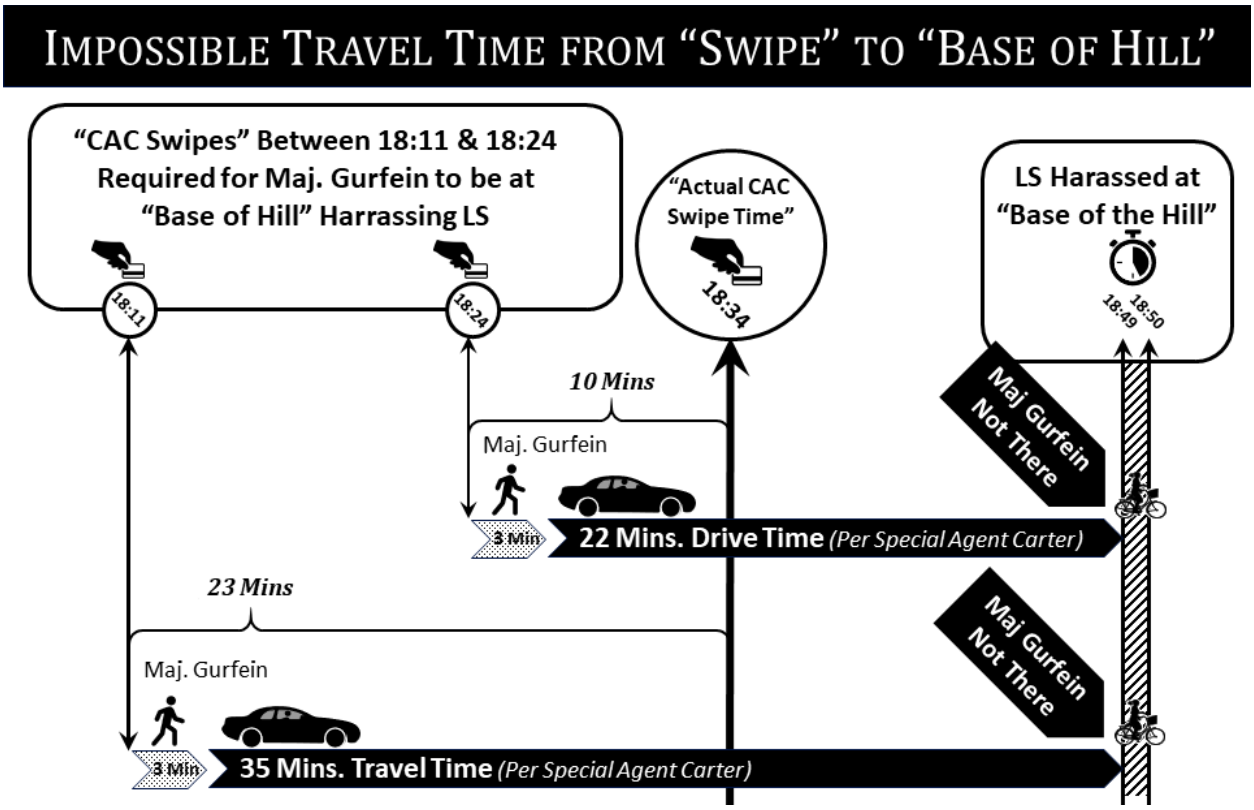
In calculating whether it could have been possible for Maj. Gurfein to be at the scene at the time alleged, if one begins the timeline from where Agent Carter *approximated* Maj. Gurfein's car to have been parked, to include the three-minute walk from the CAC swipe location to the parking space, one finds that even more time has elapsed between Maj. Gurfein's departure time and the time of the crime. Adding in this additional time makes the possibility that Maj. Gurfein could have arrived at the "base of the hill" even more remote. The impact of adding these three minutes is summarized in Graphic 2.



Graphic 2.

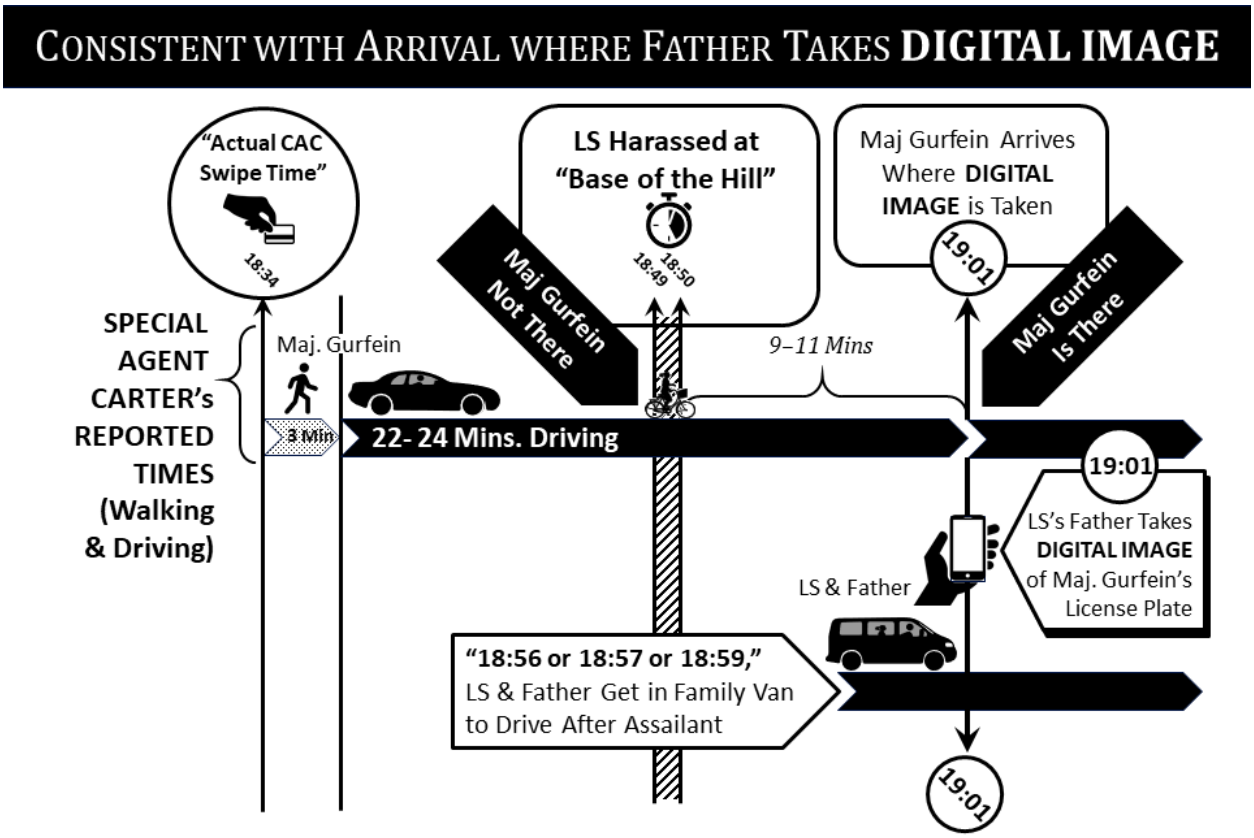
Common sense and the Court's knowledge of human nature and the ways of the world demonstrate that the prosecution did not prove beyond a reasonable doubt that Maj. Gurfein was at the scene at the time prescribed. Reasonable minds cannot differ from the conclusion that the evidence lacks probative force on a critical and required evidentiary point, and accordingly, is insufficient to sustain findings of guilty. Nothing in the Government's Brief dispels this unchallenged evidence that establishes the inherent improbability that Maj. Gurfein is the correct assailant. The prosecution's evidence is absent on this critical point, and thus, factually and legally insufficient.

Lending additional certainty that Maj. Gurfein is not the correct assailant is the time his CAC was swiped. For the prosecution's timeline to place Maj. Gurfein at the crime scene at the time of the crime, Maj. Gurfein would have had to have swiped his CAC 10 to 23 minutes prior to the actual time he swiped it. Pease refer to Graphic 3, below.



Graphic 3.

The prosecution's evidence does, however, place Maj. Gurfein at a time and location where he reasonably should have been while driving home from Kelly Barracks to Dettenhausen when LS and her father first saw his car. Having used his CAC card to "swipe out" at 1833:56 and having driven 22 – 24 minutes towards his home in Dettenhausen placed Maj. Gurfein in the general vicinity of where LS's father first saw Maj. Gurfein's car. LS and her father got into their family van at "1856 or 1857 or 1859" per LS's mother's testimony and sought to drive after the assailant. (R. at 1051). LS's father took a digital image of Maj. Gurfein's license plate at 1901. (R. at 985). Please refer to Graphic 4, below.



Graphic 4.

Consequently, the prosecution's timeline simultaneously shows that:

> a) Major Gurfein could NOT have been at the scene of the crime at the time prescribed; and
>
> b) Major Gurfein was between Kelly Barracks and his home in Dettenhausen, where he was supposed to be, according to LS's father's testimony and the digital image of his license plate taken at 1901.

The prosecution's timeline evidence is also consistent with Maj. Gurfein's interview answers provided to CID when questioned, that he was on his way home to Dettenhausen. The prosecution's timeline is consistent with Maj. Gurfein's testimony at trial. Major Gurfein's trial and appellate presentation of the evidence

are an alternative to the prosecution's theory and consist of a series of events, unchallenged facts, the prosecution's timeline, CAC evidence, and digital image evidence, which are credible, closer to the truth, and must therefore constitute reasonable doubt. Like defense counsel said during opening statements, "the only thing the government has that ties Major Gurfein to this case is "SIR" in the [license] plates." (R. at 960).

An important point in all criminal prosecutions is the mindset of an accused. However, Maj. Gurfein's mindset went unaddressed in the Government's brief. But the undisputed timeline evidence applied to Maj. Gurfein's state-of-mind shows the inherent implausibility that Maj. Gurfein is the right assailant. Consider the following:

1) At 1834, Maj. Gurfein swipes his CAC card when leaving the office;

2) He drives from Kelly Barracks toward Dettenhausen in after work traffic;

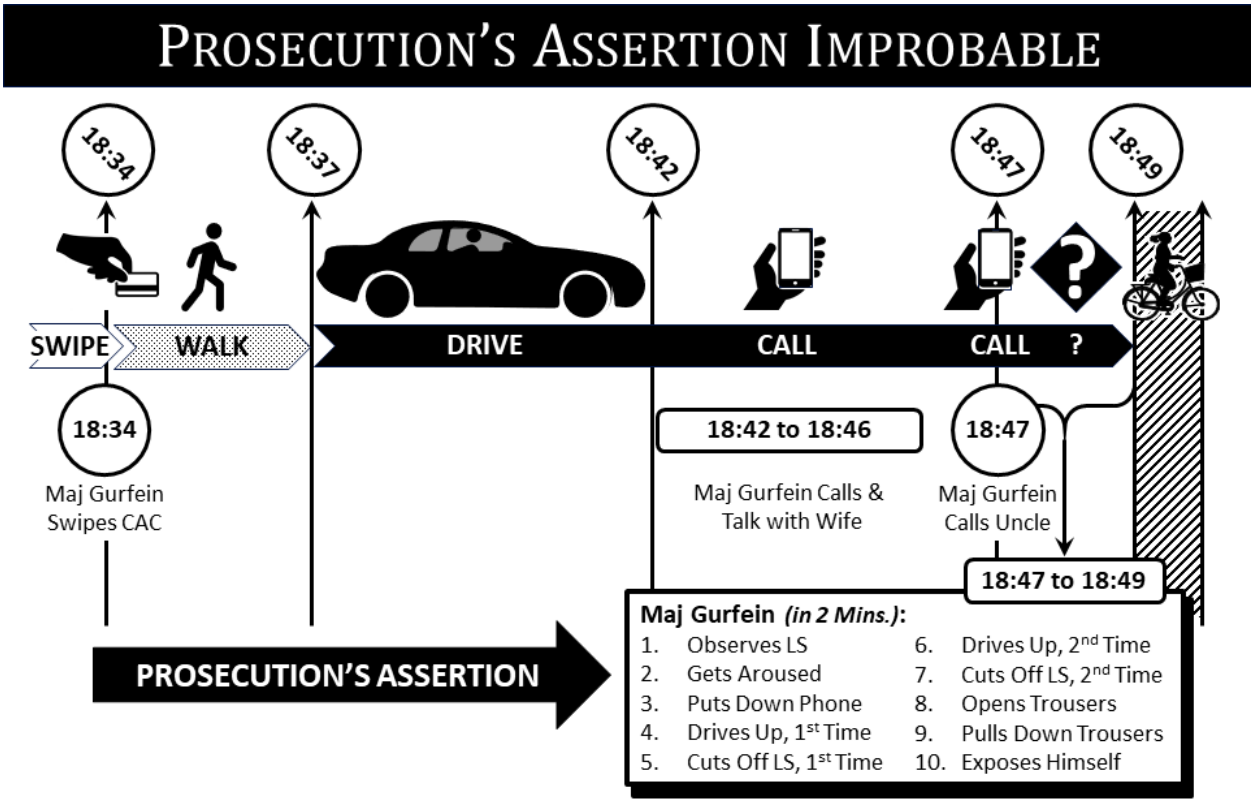
3) At 1842, he calls his wife, and the call lasts nearly four minutes;

4) At 1847, he phones his uncle, in a call that lasts approximately 25 seconds while ringing, but does not connect; and yet, according to the prosecution,

5) Between 1849 and 1850, he flashes a girl at the base of the hill.

The first four steps in the timeline, which are undisputed, make perfect sense; the final step in the prosecution's version, however, is not plausible in the least. To believe this version of events, one must accept that in less than two minutes, Maj.

Gurfein put down his phone, saw LS, cut her off once with his car as she was walking with her bike, she passes, he drives up again, cuts her off a second time, she tries to depart, and the "flash" occurs while he is shaking his penis while mumbling something to her. The point: in less than two minutes, after talking with his wife, trying to call his uncle, driving in after work traffic, and driving his car in a tight, curvy street in a German neighborhood, Maj. Gurfein's mind had to turn from a potential conversation with his uncle to lust, determining to unbuckle his belt, unbutton his trousers, pull down his pants, all while driving, achieving sexual excitement, and all within two minutes. Graphic 5 summarizes.



Graphic 5.

Further cementing reasonable doubt in Maj. Gurfein's favor is that all of the aforementioned occurred among at least 74 other unsolved incidents of indecent exposure to young girls in the area by men in cars during the three years leading up to the night in question, according to German police records that the prosecution initially declined to produce in response to defense requests, but were ultimately turned over by order of the military judge (R. at 964).

In the context of the other 74 unsolved incidents, a fair reading of the record of trial reveals that the entirety of the evidentiary value of the prosecution's case in connection with LS hinges on the following testimony of her father, as he described coming upon the first black sports car he saw:

> Q. You said you were driving about two minutes before you saw the car?
>
> A. Yes, I did.
>
> Q. All right. You saw the car that ***you thought*** matched the description your daughter had given you, correct?
>
> A. Yes.
>
> Q. And as soon as you saw ***the first black car you came upon***, you turned around and asked your daughter, "***Could*** this be the car?"
>
> A. I asked whether it ***could*** be that one.
>
> Q. So you are driving along, and this is ***the first black car you see***, and you ask "***Could*** this be the car?" and LS said, "Yes."

A. Correct.

Q. And so at that point in time, you decided to pursue that car, correct?

A. Yes.

(R. at 1011). Appellate Exhibit XXII is a German police report indicating that 83 vehicles in the area had the license plate prefix *SIR*.

For these reasons, the Government's assertion that, "[a]ll the surrounding evidence corroborate [LS and her father] identification," cannot be accurate. Appellee's Br. at 23.

After weighing the evidence of record and making allowances for not having personally observed the witnesses, the proof of identity, location, and timing, the Court must conclude that the evidence is too weak and speculative to support the findings of guilty. Rather, the weight of the evidence supports the finding that Maj. Gurfein was not at the location at the time prescribed, especially where he took the stand, denied the specifications, and testified consistently with the prosecution's timeline. Accordingly, the Court cannot be personally convinced of Maj. Gurfein's guilt beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325 (CMA 1987).

Likewise, even considering the evidence in the light most favorable to the Government, a rational fact finder could not have found all the essential elements of the offense beyond a reasonable doubt. This is especially true where the evidence

establishes the opposite of the prosecution's claim: Maj. Gurfein was ***not*** at the scene at the time prescribed. *United States v. Brooks*, 60 M.J. 495, 497 (C.A.A.F. 2005); *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979).

In taking a fresh, impartial look at the evidence, *de novo*, applying neither a presumption of innocence nor a presumption of guilt, the evidence does not constitute proof of each required element beyond a reasonable doubt. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). Accordingly, if the convictions for the Article 120 offenses relating to LS are factually and legally insufficient, so too is the Article 107 conviction for Maj. Gurfein's having denied the allegations in the first place.

II. The Government's Opposition to Proof of Factual and Legal Insufficiency

In opposing Maj. Gurfein's factual and legal sufficiency challenges to the findings and the sentence in the Appellee's Brief, the Government made no fewer than 22 misdescriptions, inaccuracies, omissions, and distortions of the evidence, discussed more fully below, which suggest *post hoc* attempts to strengthen otherwise insufficient evidence.

A. The Government Misdescribes Major Gurfein's Assignment of Error

The Government misrepresents the actual scope of Maj. Gurfein's factual and legal insufficiency assignment of error. "Appellant only disputes his identification as the perpetrator." Appellee's Br. at 18.

This is false. In fact, Maj. Gurfein denies, and has consistently denied throughout these proceedings, any wrongdoing whatsoever, denies even being present when the incident occurred, and moreover, has demonstrated that he could not have been present. In characterizing Maj. Gurfein's assignment of error as the Government has in its brief, the Government has built a strawman, which the Appellee's Brief attempts to dismantle in an effort to misdirect the Court's attention from the serious defects in the convictions.

The Government's misdescription wrongly excludes the most important basis of Maj. Gurfein's legal and factual sufficiency assignment of error -- that the prosecution did not prove that he was at the scene of the crime at the time prescribed. Nowhere in the Appellee's Brief does the Government challenge head-on Maj. Gurfein's showing that the timeline, eyewitness, and supporting evidence does not add up. Instead, the Government seeks to deflect the Court away from the timeframe evidence to another issue.

B. The Government Misstates Eyewitness Identification Evidence

The Government also states in its Brief that "[t]he victim and the Victim's Father identified Appellant, shortly after and in close proximity to the crime, as the man who exposed his penis to her." *Id*. "At trial, the United States called the Victim and her Father who identified Appellant as the man who exposed his genitalia to the Victim." Appellee's Br. at ii.

These two statements are incorrect. Nowhere in the record does the daughter identify Maj. Gurfein as the man who exposed his penis to her. Because of a pretrial line-up that was overly suggestive and hence unlawful, the military judge did not authorize the prosecution to elicit in-court identification testimony from LS. (R. App. Ex. LXVI).

Likewise, LS's father was not able, as the Government misleadingly claims, to identify Maj. Gurfein as the man who flashed his daughter. There is no evidence of record to support the Government's representation. Beyond any doubt, LS's father was not at the scene and therefore, totally unable to identify the actual flasher.

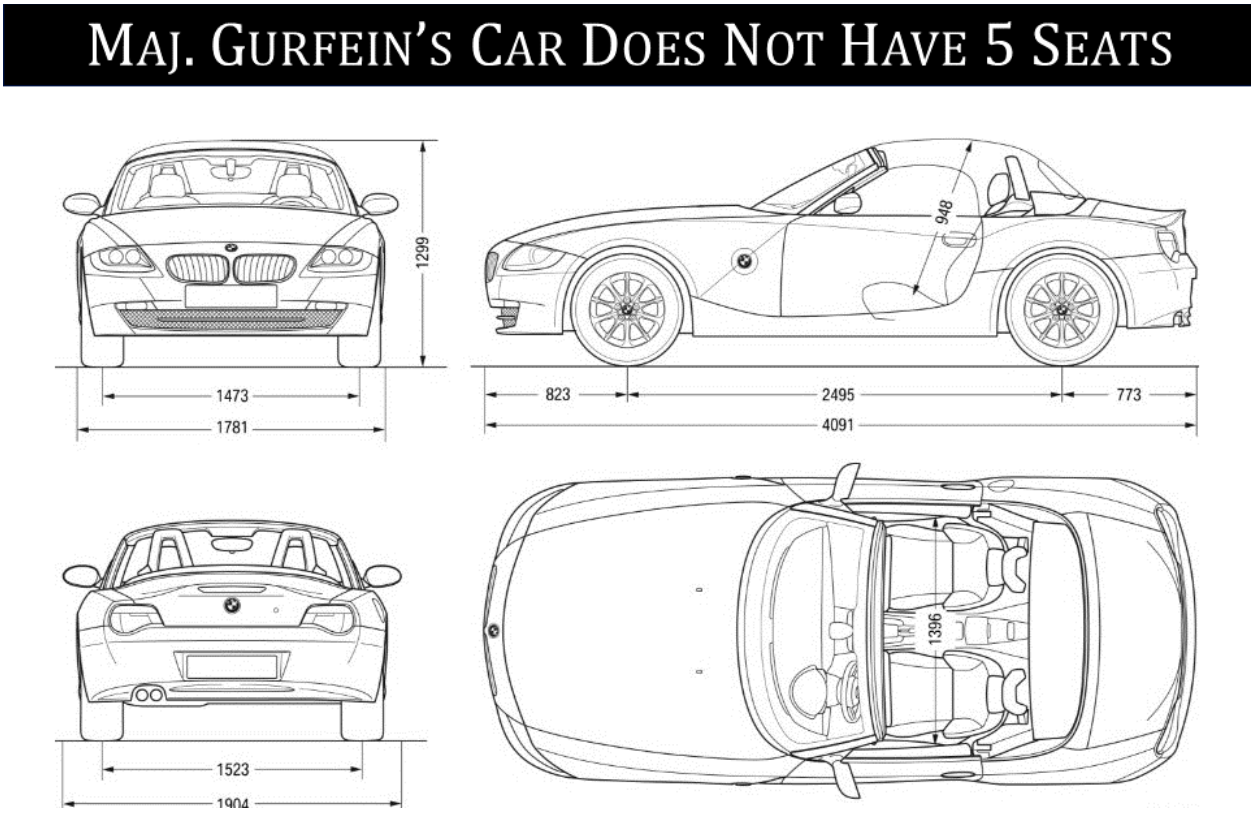
C. The Government Distorts LS's Testimony

In commenting upon LS and her father approaching Maj. Gurfein's car in their family van, the Government informs the Court, "…after getting a clear look at his face, she identified Appellant as the perpetrator in his car." *Id*. Yet despite the Government's contention, there is no evidence of record to support LS's having seen Maj. Gurfein's face. Nor is there any evidence of record that LS "identified Appellant as the perpetrator in his car."

The Government further represents to the Court that LS "made clear in her testimony that she was confident in her identification of both the car and the Appellant." Appellee's Br. at 18-19. The Government overstates LS's testimony and

in making that representation to the Court did not address the inconsistencies in LS's recollection of the night in question bearing on the most important issues in the case:

> a) LS identified Maj. Gurfein's car after her father asked, "***could*** this be the car?" (R. at 1011) (emphasis added);
>
> b) LS identified the assailant's car as, "[i]t was a black BMW Z4. ***I know that from my dad***." (R. at App. Ex. VII, 25 of 43) (emphasis added);
>
> c) LS testified that "the [assailant's] car has ***five*** seats," when Maj. Gurfein's has only ***two*** seats. (*Compare* R. at 1067 *with* R. at Pros. Ex. 42); Please see Graphic 6, below.



Graphic 6.

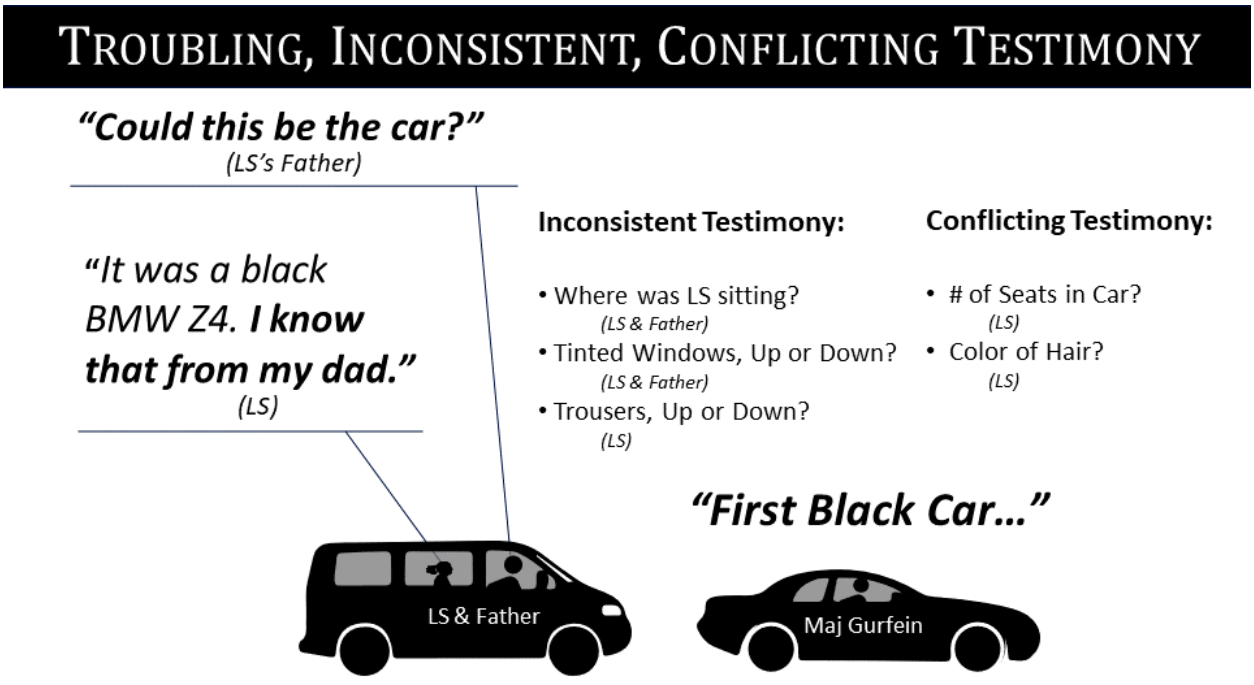
> d) LS described the assailant's hair as blond, however, Maj. Gurfein has by all accounts, very red hair. (*Compare* R. at 1069 *with* Def. Ex. HH);

e) Prior to trial, LS stated the assailant's pants "were all the way up," but at trial, she testified that, "[h]e was wearing pants and he had pulled them down to his knees. (*Compare* R. at App. Ex. VII, 24 of 43 *with* R. at 1071);

f) LS testified that "[t]he man's window was down and our window, I believe, was also down," but LS's father testified that the family van's tinted windows were closed, as were those in Maj. Gurfein's car. (*Compare* R. at 1080 *with* R. at 982); and

g) LS was seated in the backseat on the driver's side of the van with tinted windows while Maj. Gurfein's car was on the passenger side of the van. (R. at 1010; 1015). LS's father later testified that LS was on the passenger side of the van (R. at 1017).

Graphic 7, summarizes these points.



Graphic 7.

These inconsistencies and conflicting observations show that LS's recollection of the event is not sufficiently reliable and trustworthy to convict Maj. Gurfein. After all, LS was the only eye-witness to the alleged flashing. Not the German police, not her father, not her mother, not the CID, and not the prosecution. Meaningfully, LS's faulty and jumbly recollection concerning Maj. Gurfein validates that Maj. Gurfein is not the correct assailant. Not only did the prosecution fail to prove he was at the location at the time prescribed, but the only eyewitness could not dependably identify him.

D. The Government Misstated CAC and Drive Time Evidence

In the Appellee's Brief, the Government made it seem like Maj. Gurfein left his office one minute earlier than his actual departure. The Government also offered to the Court an irrelevant driving route for the proposition that that route could place Maj. Gurfein at the location at the time prescribed.

> Based on Appellant's work building access logs, he left work on September 20, 2016 at 1833. The Special Agent leading the investigation calculated the tie to get from Appellant's work to the location of his crime: "using just the backroads took me approximately 22 minutes. The outside route, taking B-27 [the highway], took me 9 minutes and 30 seconds.

Appellee's Br. at 10.

These representations are misleading. First, Maj. Gurfein's CAC card swipe leaving his office was "1833:56" not "1833." From the start and to this stage of the

case, the prosecution has not been able to put Maj. Gurfein at the scene of the flashing at the time the prosecution prescribed. Adding nearly one minute from the CAC swipe is a consequential mischaracterization and revels the Government's attempt to revise the evidence to its favor and Maj. Gurfein's detriment.

Second, the Government suggests the 9-minute, 30-second drive time is reliable evidence placing Maj. Gurfein at the scene. This view misstates the evidence. The reference to 9 minutes and 30 seconds concerns Special Agent Carter's return drive from LS's home to Kelly Barracks later in the evening than the time of the offense.

Put differently, Special Agent Carter was driving in the opposite direction, in the opposite lane of traffic, against the flow of rush hour traffic, at an irrelevant time of day, and under different traffic conditions, yet the Government did not make these clarifying points when urging the Court to believe that Maj. Gurfein could be at the location at the time prescribed using the 9-minute, 30-second calculation.

E. The Government Conflates Important Drive-Time Evidence

The Government errantly contends that 5-10 minutes was sufficient time for Maj. Gurfein to leave his office and be at the scent of the crime:

> Appellant acknowledged, in his interrogation and on the stand at trial, that the Victim's father took a picture of his car at 1901 on the date of the charged offense. Appellant also admitted, in his interrogation, that he stopped for the two phone calls he made that day, about maybe 5-10 minutes away from his work. That statement puts him at

> the scene of the crime. And his testimony at trial – I do not recall for a fact why I was there – is unconvincing at best, inconsistent with his interrogation statement, and indicative of consciousness of guilt.

Appellee's Br. at 34 (internal quotations omitted).

The Government misstates the evidence of record. The prosecution's main CID witness in its case-in-chief testified that at the same time of day, when he drove from Maj. Gurfein's office to the "base of the hill," it took him "22 – 24 minutes," "30 – 35 minutes depending on traffic," and "24 minutes" the night before his trial testimony. (R. at 1353, 1363, 1399).

The Government apparently would have the Court believe that 5-10 minutes after having CAC-swiped out of his office, Maj. Gurfein could be at the base of the hill, the scene of the purported flashing, without bringing to the Court's attention the entirety of Special Agent Carter's three drives in the correct direction, in the correct lane, at the same time of day.

The Government's commentary about Maj. Gurfein's testimony is also misplaced. The Government wrote "[he] did not recall for a fact why [he] was there." Appellee's Br. at 34. However, Maj. Gurfein's testimony about his recollection was in reference to his having stopped at the intersection where LS and her father initially saw his vehicle, not the crime scene as the Government errantly claims on appeal.

Rhetoric like "unconvincing," "inconsistent," and "indicative of consciousness of guilt," offered under the guise of appellate legal argument appears

to be irrelevant *ad hominem* displacing logical argumentation with personal attack-language that, quite frankly, undermines the credibility of the Government's argument. This is especially true when the flourish is offered as part of a flawed argument, which is based on faulty premises. For example, following the Government's logic concerning consciousness of guilt, it stands to reason that a perpetrator conscious of guilt would not stop on the side of the road near the scene of the crime and risk being arrested.

F. The Government Misstates The Distance Up The Hill

The distance from the base of the hill where the flashing allegedly occurred to LS's residence bears on the question of how much time went by between the flash and LS and her father coming upon Maj. Gurfein's car. On this point, the Government informed the Court, "[t]he crime occurred only '40-50 meters' from the Victim's house…" Appellee's Br. at 18.

The Government is mistaken. The Government did not inform the Court that neither the German police, the CID, nor the prosecution actually measured the distance from the alleged scene of the crime to LS's home, which must be a significant investigatory error. However, the defense did measure the distance using a measuring wheel. Appellate Exhibit XCI, a Stipulation of Expected Testimony, shows the distance from the base of the hill to LS's residence is 313 meters. The

distance from the flashing to LS's driveway is 96 meters, twice the distance the Government errantly stated in its Brief.

Now, after the fact, the Government apparently seeks to reduce the distance and thereby reduce the time for LS to get up the hill from the flashing to her residence in order to close the significant evidentiary and factual gaps actually contained in the record showing reasonable doubt.

G. The Government Conflates Two Aspects of the Timeline

Concerning the prosecution's timeline offered at trial, the Government on appeal appears to conflate two vital evidentiary points: the amount of time that went by between the incident and LS walking her bike up the hill on one hand; and the amount of time that went by between she and her father getting into the family van and driving after the assailant's black sports car and coming upon Maj. Gurfein on the other. As the Government represented to the Court: "She identified Appellant's car 'two minutes' after leaving the house with her father." *Id*. At the same time, however, the Government states, "[t]he Victim's father photographed Appellant's car less than two minutes after Appellant exposed himself to the Victim." Appellee's Br. at 7.

The Government is mistaken on both evidentiary points. First, LS did not identify Maj. Gurfein's car with reliable certitude as the Government suggests. Instead, the record reflects that LS's father was the first person to have seen Maj.

Gurfein's car. He asked LS if it were the correct car. She replied, "it could be." (R. at 981, 1078, 1080).

Second, Major Gurfein's car is a black BMW sports car, a type of car that is very common in Stuttgart, Germany.

Third, the Government's timeline representations to the Court are not accurate. The record indicates that LS and her father got into their family van at "1856 or 1857 or 1859" per LS's mother's testimony and sought to drive after the alleged assailant. (R. at 1051). At 1901, LS's father took a digital image of Maj. Gurfein's car depicting his rear license plate. (R. at 985).

Accordingly, the record supports the conclusion that LS's father took the picture approximately two minutes *after having left their home to search for the assailant*, not "less than two minutes after Appellant exposed himself to the Victim," as the Government mistakenly claims. Appellee's Br. at 7. There is a drastic difference between the Government's misstatement of the facts, which characterizes the photo of Maj. Gurfein's vehicle as a veritable "hot pursuit" of an assailant, and what actually occurred. In fact, there were several more intervening events, and much more time elapsed, between the flashing incident and the photo of Maj. Gurfein's license plate.

The Government's characterization leaves out the time it took LS to get herself and her bike from the base of the hill, up the 96 meters uphill to her residence,

report the incident to her parents, get into the van, get out of the driveway, begin driving, and come upon a black BMW in southern Germany. The reason for the Government's bold omission of these parts of the timeline is obvious: it does not fit into their narrative that the photo was taken within moments of the incident. The facts conveniently ignored by the Government are, in fact, aligned with what actually occurred: that LS's father took the picture of the wrong license plate.

Even if the Government's claim were physically possible, there would still be no fresh pursuit. Any and all visibility from the actual assailant and his car had been lost by the time LS reached her family home, reported to her parents, and then she and her father came upon the first black BMW sports car they saw.

H. The Government Cites Evidence On Appeal Ruled Inadmissible At Trial

In its Brief, the Government has also presented a revised version of the trial evidence of record when it writes:

> The Victim and her father immediately got in their car, drove and found the vehicle matching her description and took a picture of the license plate. The license plate matched Appellant's car and the father later identified Appellant in a photo lineup as the man driving the car they followed.

Appellee's Br. at 5.

There are three problems with the Government's representation to the Court. First, as written, a reasonable but incorrect inference is that directly after the flashing, LS and her father drove off after the assailant. That is not the case. LS has

to walk herself and her bike up a 96-meter hill to her residence. Once there, she reported the incident to her mother, to her father after he walked out of the house, get their directions, get into the family vehicle, get out of the driveway, and then proceed to search for the black sports car. Thus, there was no "immediate" pursuit as the Government alleged.

Second, LS and her father did not get into their car as the Government represented to the Court. Rather, they got into a family van with tinted windows, and LS had to climb into the rear passenger seat. Thus, the trip took longer than the Government would like the Court to believe, and the ability of LS to see and identify the vehicle as the one being driven by the man who exposed himself was not as strong as the Government would have the Court believe.

Third, the military judge ruled that LS's father could identify Maj. Gurfein in court based on his direct observation when he took the digital image of Maj. Gurfein's license plate. There was, however, no mention of any previous photo lineup during LS's father's testimony before the jury as the Government represented to the Court. (R. 998-99; 1001). Accordingly, the photo lineup evidence was not before the Panel -- a significant point that goes unmentioned in the Government's Brief. It should certainly not now be used offensively against Maj. Gurfein.

I. The Government Misstates Foreign Language Evidence

The Government suggests that LS testified with exactitude and confidence that the assailant spoke to her in English: "The car drove up next to her, rolled down the window, and the driver was 'shaking his penis' as he said something in English." Appellee's Br. at 8.

This is does not provide the Court with the complete picture. When the German police interviewed LS on the night in question, she stated that the flasher spoke in a "foreign language." (R. at Appellate Ex. LXIII). The report does not indicate English, *Id.*, only a language different from German. Approximately one year later, at trial, the following colloquy occurred between the prosecutor and LS:

> A. Yes. When he shortly talked to me, but I did not understand what he -- but I did not, I guess, I did not understand what he was saying to me.
>
> Q. Why didn't you understand what he was saying?
>
> A. I just heard him mumbling.
>
> Q. Did you know what language he was speaking?
>
> A. English.
>
> Q. Are you a 100 percent sure or was it just sounding like English?
>
> A. You couldn't really understand, but it sounded like English.

(R. at 1070-71).

Between the night in question when LS informed that the assailant spoke a foreign language and the trial, her recollection nearly a year later morphed to English. And, a fair reading of the transcript suggests that LS was not that sure it was English evidenced by "mumbling," "couldn't really understand, but it sounded like English." The record reflects that LS did not testify confidently that her assailant mumbled in English.

J. The Government Misrepresents Maj. Gurfein's Testimony

"Appellant admitted to stopping on the side of the road near the Victim's house…." Appellee's Br. at 10. This is factually inaccurate. There is no evidence of record whatsoever to support this representation to the Court that Maj. Gurfein had any knowledge of where LS's house was until the CID informed him, two weeks after the night in question during his CID interview, in which he voluntarily cooperated.

For these reasons, nothing in the Appellee's Brief changes the strong evidence of reasonable doubt leading to factual and legal sufficiency pursuant to Article 66, UCMJ; 10 U.S.C. § 866 (2014), and the material prejudice of Maj. Gurfein's substantial rights. Article 59(a), UCMJ; 10 U.S.C. § 859(a) (2014).

II. Evidence Material to the Preparation of the Defense Was Not Produced

The absence of convincing evidence that an accused was at the scene at the time prescribed ordinarily results in an acquittal. The Government's 22

misrepresentations of the evidence described above reveals a tacit acknowledgement that the evidence supporting the convictions was weak. Maj. Gurfein was convicted nonetheless. Perhaps he may not have been, however, but for the cumulative effect of a series of unfairly prejudicial legal errors involving significant physical, scientific, and reliable corroborating evidence that never made it to the defense, the chain-of-command upon preferral and referral, the courtroom, the military judge's chambers, or the deliberation room. Missing from the trial, even though requested by the defense and within the Government's possession were:

1) Cell tower phone/ping records for Maj. Gurfein's US Government-issued Blackberry that stood to strengthen his alibi defense by providing reliable data as to his location at various times on the night in question;

2) Data from Maj. Gurfein's Blackberry device itself that the prosecution's forensic expert was not able access even though within the CID's resources were the tools to access the data; and

3) GPS data from Maj. Gurfein's car itself, also that the prosecution's forensic expert was not able to access because he used the wrong technology. (R. at 218; 277).

It stands to reason that any Sailor, Marine, or Officer standing trial would like to be able use this readily available evidence to defend themselves. *United States v. Guthrie*, 53 M.J. 103, 105 (2000) ("Discovery in military practice is open, broad,

liberal, and generous."). The prosecution, however, denied Maj. Gurfein's requests, necessitating litigation before the military judge to compel production. The defense explained to the military judge that evidence was relevant, necessary, and material to the preparation of the main trial defense strategy: that Maj. Gurfein was not at the location at the time the prosecution prescribed. *See* RCM 703(f)(1) ("Each party is entitled to production of evidence that is relevant and necessary.").

The information sought by each request existed at the time of the pretrial investigation and pretrial proceedings and was in the possession, custody, and control of the United States. There is no dispute that the German authorities were working together with the American authorities on this case in a "joint investigation." As the military judge specifically found, "[t]he ensuing investigation was a joint endeavor by German police and U.S. military law enforcement." (R at. App. Ex. LXVI, p. 3). Each request sought information that *was material to the preparation of the defense* designed to strengthen the alibi defense and weaken the prosecution's reliance on the testimony of LS. None of the evidence requested, however, was forthcoming.

The Government must now, on appeal, prove that as a matter of law, these refusals to produce were harmless beyond a reasonable doubt. *United States v. Roberts*, 59 M.J. 323 (C.A.A.F. 2004); *United States v. Hart*, 29 M.J. 407 (C.M.A. 1990) ("[w]here an appellant demonstrates that the Government failed to disclose

discoverable evidence in response to a specific request or as a result of prosecutorial misconduct, the appellant will be entitled to relief unless the Government can show that nondisclosure was harmless beyond a reasonable doubt"); *see also United States v. Eshalomi*, 23 M.J. 12 (C.M.A. 1986). Appellee's Brief fails to meet that requirement.

A. Cell Tower/Phone Records

Opposing the motion to produce the phone records, the prosecution informed the military judge they were not able to access German telephone company records, "because they are not subject to compulsory process," even though the records are for an American contract for American telephone services for the United States military who was working a joint investigation with the German police. Appellee's Br. at 23.

The military judge errantly agreed with the prosecution's representations to deny Maj. Gurfein's motion to compel production of the cell tower/phone records – production that could have been accomplished as easily as it was for the American prosecution to produce German witnesses in court to testify against Maj. Gurfein.

The prosecution was obligated to search for and produce the requested records and the military judge denied their production without fully considering or pursuing the means available to the prosecution and the trial court. There is no evidence that the prosecution, before denying the defense RCM 701(a)(2) request, issued a

subpoena pursuant to RCM 703 to the German police officers working jointly on the case to secure the cell tower/phone records. “The individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police.” *Kyles v. Whitley*, 514 U.S. 419, 437 (1995).

Nor did the military judge realize that he could order the prosecution to subpoena the records from the German Police, the telephone company, or the American contracting command. And, the military judge could have directed the prosecution to coordinate with the American Contracting Officer (KO) to determine if the United States already possessed the requested records as part of the ordinary billing, invoicing, and payment cycle for the Blackberry cell tower service. The military judge could have instructed the prosecution to pursue these reasonable avenues and report back with actual results.

These reasonable courses of action do not involve compulsory process nor the Status of Forces Agreement. Accordingly, the court's decision was influenced by an erroneous view of the law and the military judge had reasonable yet unexplored choices other than denial. *United States v. Miller,* 66 M.J. 306, 307 (C.A.A.F. 2008).

The prosecution must make good faith efforts to comply with defense requests. *United States v. Williams,* 50 M.J. 436, 441 (C.A.A.F. 1999). “The government cannot intentionally remain ignorant and then claim it exercised due diligence.” *United States v. Trigueros,* 69 M.J. 604, 611 (A. Ct. Crim. App. 2010).

In *United States v. Stellato*, 47 M.J. 473 (C.A.A.F. 2015), the CAAF provided the following guidance:

> . . . a trial counsel cannot avoid discovery obligations by remaining willfully ignorant of evidence that reasonably tends to be exculpatory, even if that evidence is in the hands of a government witness instead of the government; this prohibition against willful ignorance has special force in the military justice system, which mandates that an accused be afforded the equal opportunity to inspect evidence.

Stellato, 47 M.J. at 487.

The prosecution's denial and the military judge's ruling did not afford Maj. Gurfein the equal opportunity to inspect evidence critical to the preparation of the defense. The military judge erred to the material prejudice of Maj. Gurfein's substantial right to develop and present the affirmative defense of alibi, corroborate the prosecution's timeline, and validate his own trial testimony.

Armed with powerful cell phone/tower records proving that he was elsewhere when the offense was committed, the jury would have acquitted Maj. Gurfein. Consequently, the Government has not, and cannot prove, that the non-production of the cell tower/phone records was harmless beyond a reasonable doubt, as is their burden on appeal. *Roberts*, 59 M.J. at 324; *Hart*, 29 M.J. at 408.

"Failing to disclose requested material favorable to the defense is ***not*** harmless beyond a reasonable doubt if the undisclosed evidence might have affected the

outcome of the trial." *United States v. Coleman*, 72 M.J. 184, 187 (C.A.A.F. 2013) (emphasis added).

B. Blackberry Time and Location Data

Prior to trial, the defense made a specific discovery request pursuant to RCM 701(a)(2) noting that the evidence sought was material to the preparation of the defense because it stood to provide completely exculpatory evidence, through technology and verifiable data, that conclusively proved that Maj. Gurfein was elsewhere when LS was "flashed."

In his opening brief on appeal, Maj. Gurfein suggested to the Court that the information should have already been secured and assessed by the prosecution before bringing Charges to ensure whether or not Maj. Gurfein was the correct assailant. That the evidence was not a part of the prosecutor's files is evidence of an incomplete investigation. However, RCM 701(a)(2) required the prosecutor to search that which is within the "possession, custody, or control of military authorities," which includes non-law-enforcement authorities, especially when the defense describes the evidence sought and where it can be obtained.

Major Gurfein's Government-issued Blackberry was in the direct control of the prosecution. The prosecution elicited testimony that the Blackberry data could not be extracted, even though Maj. Gurfein provided the prosecution with the PIN. (R. at 1405). In an email, a CID Agent wrote that he could not "decrypt the

BlackBerry backup that was made by the Cellebrite." (R. at App. Ex. XX). However, upon cross-examination, the CID Agent testified that if the device were not encrypted, it was possible to access location data when phone calls were made. (R. at 282-83). He also stated that cell tower information was possibly available on the device. *Id*.

The military judge denied Maj. Gurfein's request for the Blackberry time and location data, which is an unfairly prejudicial abuse of discretion.

> I don't have -- I don't have -- this does not tell me relevant place. It doesn't tell me who the phone call is actually coming from. It doesn't tell me who the phone call is going to. I don't have any evidence in front of me to link this to the accused or his BlackBerry or a location that would then suggests an alibi. So if you can meet that burden somewhat -- somewhere downstream and connect this into an alibi defense that would make all of that then relevant and necessary with respect to the cell tower data to triangulate a location, I invite you to do that downstream.

(R. at 235-36).

With respect, the military judge misapplied the law. The defense met its burdens. The use of cell phone technology in criminal prosecutions has become so routine and commonplace that it has been referred to as "a staple of everyday policing."[1] The defense proved that Maj. Gurfein had the Blackberry in his

[1] Heath, Brad, *Police Secretly Track Cell Phones To Solve Routine Crimes*, USA Today, August 23, 2015, *available at* https://www.usatoday.com/story/news/2015/08/23/baltimore-police-stingray-cell-surveillance/31994181/(last visited 4 December 2018).

possession in his car with him on the night in question and used it to make at least two phone calls somewhere between Kelly Barracks and Dettenhausen, seven minutes, and two minutes, before the alleged flashing. The CID Agent testified that without encryption that the United States put into the Blackberry, time, location, and cell tower pings could be accessed. The defense urged the military judge to recognize that the time, location, and cell tower data on the Blackberry were needed to develop the alibi defense – material to the preparation of the defense - that Maj. Gurfein was not at the location at the time prescribed.

Major Gurfein met the burden pursuant to RCM 701(a)(2) where the prosecution is obligated to provide information if, among other things, it is *material to the preparation of the defense*. *United States v. Adens*, 56 M.J. 724 (A. Ct. Crim. App. 2002) (emphasis added). Evidence is material to the preparation of the defense, if, for example, it informs the pursuit of certain lines of investigation, suggests defenses, or evokes trial strategies. *United States v. Webb*, 66 M.J. 89 (C.A.A.F. 2008). Surely an alibi defense using cell tower, Blackberry, and GPS technology falls within the ambit of RCM 701(a)(2). Accordingly, the military judge abused his discretion by denying production of this information to the material prejudice of Maj. Gurfein's substantial right to develop and present the affirmative defense of alibi.

In opposition, the Government states:

> It is just as likely, given the positive identification by the Victim and her father, and Appellant's own statements, that any location data would have shown he was present at the scene of the crime. He fails to show prejudice.

Appellee's Br. at 31.

The Government's position underscores how significant the time and location data was to the preparation of the defense. Use of the cell phone/tower data, the Blackberry device data, or the GPS car data could have conclusively decided the matter. For reasons unknown, however, none of these seemingly important evidentiary leads was pursued by the prosecution before bringing Charges, necessitating Maj. Gurfein's requests for production.

In its Brief, the Government claims that Maj. Gurfein did not show that the evidence sought would have been "favorable" to his case. Appellee's Br. at 23; 30. The Government misstates the applicable law. Because Maj. Gurfein tendered his discovery requests pursuant to RCM 701(a)(2), the law does not require a showing that the evidence is *favorable*, only that it be *material* to the preparation of the defense. Unlike RCM 701(a)(6) and *Brady* in the context of disclosure obligations, there is no requirement that the information be favorable when the defense requests production. The information can be unfavorable and still be material to the preparation of the defense. *See Adens* and *Webb*, *supra*.

The Government avers that Major Gurfein waived appellate review of the prosecution's production denials and military judge's denials. Appellee's Br. at 23.

However, there can be no waiver where the defense properly tendered written requests for specific evidence within the prosecution's possession pursuant to RCM 701(a)(2), the prosecution denied the requests, the defense moved the court for production, and the military judge denied the requests.

The Government also suggests that the prosecution has no obligation to produce anything in response to a defense RCM 701(a)(2) request that is not subject to compulsory process. Appellee's Br. at 23-34. The Government's position misstates the law. Rule for Courts-Martial 703 provides that "[t]he prosecution and defense and the court-martial shall have equal opportunity to obtain witnesses and evidence, *including* the benefit of compulsory process." (emphasis added). Although compulsory process is one means of securing evidence, it is not the exclusive means of securing evidence. Consider: had the prosecution sought cell phone/tower records for its own use in the case, it stands to reason that the German police, working together with the American authorities on this case, would have secured the records. Or, American contracting officials who service the cell phone/tower contract would not require a subpoena to provide records responsive to the defense's production request.

What is more, the Government has not, and cannot, prove that the non-production of the cell phone/tower, Blackberry time, location, and GPS data was harmless beyond a reasonable doubt under *Roberts* and *Hart, supra*. Armed with

powerful corroborating evidence that he was elsewhere at the time of the offense, the prosecution's case is degraded and Maj. Gurfein's case made stronger. Substantially the same reasons and rationales apply to the prosecution's failure to produce, and the military judge's failure to order, testing of Maj. Gurfein's GPS system in his car using the correct extraction technology.[2]

Upon filing his Appellant's Brief, Maj. Gurfein moved to attach the sworn declaration of a civilian forensics expert and retired Army CID Agent with direct experience working military criminal investigations in Germany with the German police. He opined that the cell tower records were available, the Blackberry data could be accessed with technology available to the CID, and the GPS data in Maj. Gurfein's car could also be accessed using the correct technology.

Major Gurfein had two intentions in seeking to attach the forensic expert's sworn declaration. The first was to provide the Court with helpful information to assess how Maj. Gurfein's trial may have been different with the production of evidence material to the preparation of the defense and to evaluate the extent of the material prejudice to Maj. Gurfein's substantial rights in light of the non-disclosures and non-productions.

[2] After filing his Appellant's Brief, Maj. Gurfein contacted the evidence custodian and requested access to the Blackberry, which was denied. Major Gurfein sought to have his retained forensic expert use the correct extraction tool to access the time, location, and cell tower ping data to develop a possible petition for a new trial pursuant to Article 73, UCMJ; 10 U.S.C. § 873 (2014) and RCM 1210. However, the United States denied access, which appears to be working a material prejudice to Maj. Gurfein's substantial rights pursuant to Articles 46 and 73 and RCM 1210.

The second intention behind the motions to attach was to provide the Court with sworn evidence from forensic and law enforcement professionals to support Maj. Gurfein's request that the Court order a *DuBay* hearing where a military judge could receive evidence on the cell tower, Blackberry, and GPS car evidence, make findings and recommendations, and position the Court with actual evidence to determine whether the prosecution's failure to disclose under RCM 701(a)(6) and produce in response to the defense requests under RCM 701(a)(2) was harmful beyond a reasonable doubt, whether the military judge abused his discretion by his denials to the material prejudice of Maj. Gurfein's substantial right to defend himself, and whether the findings and the sentence are correct in law and fact pursuant to Article 66, UCMJ; 10 U.S.C. § 866 (2014).

Now that the Government has filed its Brief and maintained its position that the non-productions were lawful, proper, and that the court-martial is free from any material prejudice to Maj. Gurfein's substantial rights, the relevance and significance of Maj. Gurfein's motions to attach are arguably clearer. The Government relies on *United States v. Khoi Pham* No. 201600313, 2018 CCA LEXIS 117, at * 16-17 (N-M. Ct. Crim. App. Mar. 8, 2018) as support that the military judge in this case properly denied Maj. Gurfein's motion to compel production. In *Khoi Pham*, the military judge did not abuse his discretion in denying

production of cell phone data because "the agent's testimony that an extraction could not be performed was 'credible and unrebutted.'" Appellee's Br. at 28.

An unpublished, non-precedential decision, *Khoi Pham* is inapposite. The case involved a Japanese civilian complainant's *Galaxy S-IV* cell phone, not an American Marine Officer accused's US Government-issued Blackberry where the encryption security was installed by the United States to protect military communications for a Field-Grade Marine Officer serving as a General's Aide-de-Camp with responsibility for real world missions on the African continent.

Because the United States installed the encryption technology, it stands to reason that the United States can uninstall it. Major Gurfein provided his PIN. (R. at 1405). A logical inference to reach this conclusion is unnecessary. On appeal, Maj. Gurfein retained a forensic expert for a Fortune 100 company who retired from the CID and has direct and extensive experience with combined investigations with the German police in Germany. He provided a sworn declaration that the de-encryption tools and technology exist and were available to the CID.

In *Khoi Pham*, the civilian *Galaxy S-IV* cell phone was not in the prosecution's custody and was in fact, destroyed. By contrast, Maj. Gurfein's military encrypted Blackberry was at all times in the prosecution's possession and remains to this day with the CID evidence custodian.

Worth mentioning, the Government did not share in its Brief that the Court in *Khoi Pham* granted motions to attach appellate exhibits to the record.

For these reasons, Maj. Gurfein respectfully requests that the Court reconsider its initial denials of his motions to attach Defense Appellate Exhibits A and B, grant them, and consider the sworn evidence as part of the Court's review of Maj. Gurfein's assignments of error and whether or not a *DuBay* hearing is better suited to resolve factual questions concerning the availability of exculpatory or mitigating evidence within the prosecution's possession, custody, or control.

In sum, due process requires disclosure of any evidence that provides grounds for the defense to attack the reliability, thoroughness, and good faith of the police investigation, to impeach the credibility of the prosecution's witnesses, or to bolster the defense case against prosecutorial attacks. *Kyles*, 514 U.S. at 442 n.134; 445-451. That did not happen in this case despite the defense counsel's due diligence, repeated requests of the prosecution to produce which went denied, and litigation before the military judge.

III. Prosecutorial Misconduct

In his opening Brief, Maj. Gurfein established the prosecutor used the term "dark web" six times and the term "child pornography" three times -- for a total of nine unfair comments during cross-examination of a defense expert witness before the defense could voice its objection.

To be sure, there is no evidence that Maj. Gurfein accessed the so-called "dark web." The prosecutor knew that. There is also no evidence that the prosecution uncovered any evidence whatsoever that Maj. Gurfein ever accessed child pornography. The prosecutor knew that. Yet in all, the prosecutor used the terms "dark web" and "child pornography" repeatedly during the course of the trial in front of the jury – gratuitous, unfounded comments that could only serve to incite the passion and fears of the panel members, to Maj. Gurfein's obvious detriment.

On appeal, the Government claims that Maj. Gurfein invited these comments. Appellee's Br. at 35. This position is misplaced. Even if the prosecutor's use of "dark web" were somehow appropriate as proper cross-examination of the defense expert, there is no invitation to inject child pornography four times into the proceedings. That is clearly a "bridge too far."

After the ninth comment has been lodged before the jury, the military judge made it clear that no additional references to the "dark web" or "child pornography" were authorized. (R. 1925-26). Notwithstanding the military judge's instruction and the prosecutor's solemn obligation to do justice not just win, he uttered "dark web" another five times and "child pornography" another time in his closing rebuttal argument to the jury. That is, even though the military judge disallowed any further references, the prosecutor still used "dark web" five times and "child pornography" another time, necessitating another defense objection, for a total of six disobediences

of the military judge's order to the material prejudice of Maj. Gurfein's right to a fair trial.

For these reasons, the Government's representation to the Court that the prosecutor "adhered to the Military Judge's ruling to stop questions related to the "dark web" cannot be correct. Appellee's Br. at 40. Indeed, if the prosecutor determined "dark web" and "child pornography" were needed to be a part of his rebuttal closing argument, available to him was an Article 39(a), UCMJ; 10 U.S.C. § 839(a) session outside the presence of the members to ask the military judge to reconsider his ruling or work with the defense and the military judge to fashion appropriate rebuttal commentary that did not contain salacious, inflammatory, unfairly prejudicial comments, and terms the military judge prohibited.

Applying the factors set forth in *United States v. Fletcher*, 62 M.J. 175, 184 (C.A.A.F. 2005), the material prejudice to Maj. Gurfein's right to a fair trial becomes clear. First, the prosecutor's misconduct is severe, not only by injecting dark web six times under the guise of legitimate cross-examination, but also using child pornography three times. The military judge, in working with counsel for the parties, adopted a curative approach, that being his direction to the prosecutor not to go down that rabbit hole again. (R. 1925-26).

But the prosecutor waited until rebuttal argument on closing to use dark web another five times and child pornography another time. As demonstrated more fully

above, there is no weight supporting the convictions, and, that the panel arrived at findings of guilty can be attributed to the prosecutor's unfairly prejudicial misconduct before the members during trial and during argument. It falsely tainted them with a notion that Maj. Gurfein frequented child pornography sites on the dark web, an area of the Internet law-abiding citizens do not even know exists, let alone access.

What can likely never be dispelled from the panel members' minds is the prosecutor stating the following from the prosecutor's podium:

> DC: Objection, Your Honor. No child pornography was found anywhere on any of Maj. Gurfein's electronics.
>
> TC: ***That's not entirely accurate.***

(R. 1917).

In actuality, there was no evidence of child pornography on any of Maj. Gurfein's electronics. Had there been, surely Charges would have been forthcoming. What is equally unfairly prejudicial is that possession of child pornography, as the prosecutor repeatedly injected without a good faith basis and in violation of the military judge's ruling, is uncharged misconduct used unfairly against Maj. Gurfein violative of the Sixth Amendment's right to confront the evidence and to a fair trial, and violative of the Fifth Amendment's guaranty of notice and an opportunity to be heard.

And, taking the prosecutor's actions as a whole, *United States v. Meek*, 44 M.J. 1, 6 (CMA 1996), the cell phone/tower records, the Blackberry time, location, and date data, as well as the GPS data from Maj. Gurfein's car reasonably should have been investigated as part this case, especially where the evidence that was used does not place Maj. Gurfein at the scene and the sole eyewitness could not identify him, both strong indicators that he was not the correct assailant.

Instead, faced with these significant evidentiary weaknesses, which reasonably suggested additional investigation to identify the correct assailant, the prosecutor denied production upon defense request, there is no evidence of subpoenas to the German police, German phone company, or coordination with American contracting officers or officials to determine if the United States already possessed the cell tower/phone records as part of the ordinary course of billing and payment. The prosecution did not ensure that CID forensic experts used the existing and available technology to extract Maj. Gurfein's Blackberry device data and GPS data from his car.

Had the prosecution reasonably ensured the CID pursued all investigatory leads, pursuant to the American Bar Association Prosecutorial Function Standards discussed more fully in Maj. Gurfein's opening brief, the results would have to have been disclosed to the defense no matter what the result pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963) and RCM 701(a)(6) as inculpatory, exculpatory,

mitigating, or unavailable despite a professional effort with the correct technology. The leads reasonably should have been pursued and the results made part of the prosecutor's and the chain-of-command's assessments as to the appropriate disposition of LS's report.

The prosecutor's decision to join the 2014 offense with the 2016 offense can be seen as a reasonable exercise of prosecutorial discretion when taken at face value. However, in the context of this investigation and trial, and in taking the prosecutor's actions on the whole, motives and actions to win rather than do justice become apparent.

Mindful that the 2016 offenses involving LS would be hard to prove, and mindful that the 2014 offenses would be hard to prove, the prosecutor nevertheless joined them and opposed Maj. Gurfein's motion to sever to gain impermissible tactical advantages. The proof of this effort does not require an inference because the prosecutor directly admitted it. Consider: "the fact the government has argued in the Article 32 hearing that ***they will use each incident to bolster the other*** is a clear indication of the need to sever these two charges." (R. at App. Ex. IX) (emphasis added). And the prosecution did just that, driving home the bolstering spillover during its closing statement on findings:

> Now, when you answer that question, turn to 2016, with all that evidence and determine beyond a reasonable doubt if you believe that crime occurred. The evidence is there. And if you determine beyond a reasonable doubt that that

> crime occurred in 2016, and you believe Major Gurfein did those things, which he did, then apply what you have from that to the 2014 facts.

(R. at 2115-16).

Which reveals the real and impermissible use for which the prosecution joined the offenses: for the tactical trial advantage of bolstering weak evidence relating to one victim with the weak evidence relating to the second victim hoping to secure a conviction that otherwise would not be achievable if the Article 120 offenses were severed and tried separately.

Stated differently, the prosecution "began with the end in mind," justified joinder for the limited use of introducing identity evidence, but its true purpose was to use the evidence not for the limited purpose of identity pursuant to Mil. R. Evid. 404(b), but to bolster weak evidence with vaguely-related weak evidence. As Maj. Gurfein noted in his opening brief, "the military judge unreasonably failed to consider how the tangentially-related Article 120 specifications involving different victims separated by two years with weak identifications of their assailant and weak identifications of his car – now joined for trial – set conditions for a "compromise" or "split-the-baby" vote among the panel during deliberations." Appellant's Br. at 56.

Also in the mindset of winning over doing justice, the prosecution opposed Maj. Gurfein's request for German police reports showing that at least 74 incidents

occurred with similar *modus operendi* in the three years leading up to the case which remained unsolved. The military judge ordered the reports produced.

Further, the United States opposed Maj. Gurfein's motions to attach sworn declarations to the record as part of this appeal from a forensic expert and civilian law enforcement officer who worked closely with the German police on this case. These professionals, skilled in forensics, investigations, and joint German-American military criminal investigations, opined that the cell phone/tower records were available, that CID has the tools to extract the Blackberry data as well as the tools to access the GPS data on Maj. Gurfein's car. When the undersigned sought to secure the Blackberry as part of this appeal for testing, the United States opposed that request, as well as a request to produce the final CID report in this case.

The prosecution declined the CID's recommendation to conduct a forensic interview of LS given concerns over her suggestibility, did not measure the distance from the base of the hill to LS's residence, and did not conduct a standard canvass interviews of neighbors near the crime scene.

All of this to say, taken as a whole, the prosecutor's actions were so damaging that the Court cannot be confident that the members, who deliberated for over eight hours, convicted Maj. Gurfein on the evidence alone. *Meek*, 44 M.J. at 6. Given the factual and legal insufficiency of the convictions regarding LS, coupled with the joinder of unrelated offenses for tactical advantage, non-production of the cell

tower/phone records, Blackberry data, GPS data, and repeatedly injecting "dark web" and "child pornography" into the case, it becomes clear that the jury would not have convicted but for the prosecutor's joinder decision, intolerant and "close-hold" discovery practice, failure to pursue evidentiary leads to material evidence, overreaching, and misconduct at trial before the members.

As the Court of Appeals for the Armed Forces noted in *United States v. Andrews*, 77 M.J. 393 (C.A.A.F. 2018):

> Finally, we remind trial counsel they are: representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, [they are] in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer…. It is as much [their] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. Every attorney in a court-martial has a duty to uphold the integrity of the military justice system.

Andrews, 77 M.J. at 404 (internal citation omitted).

The facts of record reasonably demonstrate the prosecution went beyond the bounds of fair client advocacy and into the improper realm of fixing guilt rather than finding truth. *Berger v. United States*, 295 U.S. 78 (1935). As the Supreme Court noted in *Burns v. Wilson*, 346 U.S. 137 (1953):

> The constitutional guarantee of due process is meaningful enough, and sufficiently adaptable, to protect soldiers – as well as civilians – from the crude injustices of a trial so conducted that it becomes bent on fixing guilt by dispending with rudimentary fairness rather than finding truth through adherence to those basic guarantees which have long been recognized and honored by the military courts as well as the civilian courts.

Burns, 346 U.S. at 142.

CONCLUSION

For these reasons, Maj. Gurfein respectfully requests that the Court disapprove the findings and the sentence, with prejudice.

Respectfully submitted,

 FOR

JOHN N. MAHER
KEVIN J. MIKOLASHEK
DAVID BOLGIANO
Civilian Defense Counsel
MAHER LEGAL SERVICES PC
7 East Main Street, Number 1053
St. Charles, Illinois 60174
johnmaher@maherlegalservices.com
Tel: (708) 468-8155

WILLIAM L. GERATY
LCDR, JAGC, USN
Appellate Defense Counsel
Navy-Marine Corps Appellate
Review Activity
1254 Charles Morris Street SE
Bldg. 58, Ste. 100

Washington Navy Yard, D.C. 20374
Tel: (202) 685-8502
william.geraty@navy.mil

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and Deputy Director of Appellate Government Division on 06 December 2018.

WILLIAM L. GERATY
LCDR, JAGC, USN
Appellate Defense Counsel
Navy-Marine Corps Appellate
Review Activity
1254 Charles Morris Street SE
Bldg. 58, Ste. 100
Washington Navy Yard, D.C. 20374
Tel: (202) 685-8502
william.geraty@navy.mil