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 BRIEF AND ASSIGNMENTS OF ERROR CORRECTED COPY** 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

COMES NOW Appellant by and through civilian and military appellate defense counsel and pursuant to Rule 15 of this Court's Rules of Practice and Procedure, respectfully submits this Brief and Assignments of Error.

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ISSUES PRESENTED[1]

I.

WHETHER THE EVIDENCE IS FACTUALLY AND LEGALLY SUFFICIENT TO SUSTAIN THE FINDINGS AND THE SENTENCE BECAUSE IT WAS IMPOSSIBLE FOR MAJOR GURFEIN TO BE AT THE SCENE OF THE CRIME AT THE TIME THE PROSECUTION PRESCRIBED.

II.

WHETHER THE PROSECUTION'S FAILURE TO PRODUCE EVIDENCE WITHIN ITS POSSESSION THAT WAS MATERIAL TO THE PREPARATION OF THE DEFENSE IN RESPONSE TO SPECIFIC WRITTEN REQUUESTS IS HARMLESS BEYOND A REASONABLE DOUBT.

III.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DENIED THE DEFENSE'S MOTION TO PRODUCE CELL TOWER RECORDS FOR MAJOR GURFEIN'S GOVERNMENT-ISSUED BLACKBERRY.

IV.

WHETHER THE PROSECUTOR MADE IMPROPER COMMENTS AND ARGUMENT THAT UNFAIRLY PREJUDICED MAJOR GURFEIN'S RIGHT TO A FAIR TRIAL WHEN HE INJECTED THE "DARK WEB" AND "CHILD PORNOGRAPHY" INTO THE CASE BEFORE THE MEMBERS, AND, AFTER THE MILITARY JUDGE DIRECTED NO FURTHER COMMENT, HE DISOBEYED THE MILITARY

[1] Appendix 1 to Appellant's Brief are matters Major Gurfein raises personally pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

JUDGE AND AGAIN REPEATEDLY MENTIONED THE DARK WEB AND CHILD PORNOGRAPHY DURING HIS CLOSING REBUTTAL ARGUMENT.

V.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE FAILED TO GRANT THE DEFENSE MOTION TO SEVER THE ARTICLE 120b AND 120c SPECIFICATIONS INVOLVING TWO SEPARATE VICTIMS, SEPARATED BY TWO YEARS AND TWO DIFFERENT LOCATIONS, WHERE THE PROSECUTION ADMITTED THAT IT JOINED THE TANGENTIALLY-RELATED SPECIFICATIONS TO BOLSTER THE EVIDENCE OF EACH OFFENSE WITH THE OTHER.

VI.

WHETHER THE CUMULATIVE EFFECTS OF THESE SIGNIFICANT ERRORS REVEALS THAT THIS COURT-MARTIAL IS NOT CORRECT IN "LAW AND FACT"

STATEMENT OF STATUTORY JURISDICTION

This Court possesses jurisdiction pursuant to Article 66, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. § 866. The approved sentence includes dismissal of a commissioned officer and confinement in excess of one year.

STATEMENT OF THE CASE

Contrary to his pleas, an officer panel convicted United States Marine Corps Major Jonathan D. Gurfein (Maj. Gurfein) of one specification of committing a

lewd act against a child in violation of Article 120b, UCMJ, 10 U.S.C. § 920b (2014), one specification of indecent exposure to a child in violation of Article 120c, UCMJ; 10 U.S.C. § 920c (2012), and one specification of false official statement in violation of Article 107, UCMJ; 10 U.S.C. § 907 (2014).

Consistent with his pleas, the officer panel found Maj. Gurfein not guilty of the same specifications, Articles 120b and 120c, in connection with a different alleged victim.[2]

The convening authority approved the adjudged sentence of confinement for two years, forfeiture of all pay and allowances, and dismissal from the military.

The convening authority, however, denied Maj. Gurfein's request to waive automatic and adjudged forfeitures for six months to support his spouse and three minor children.

He remains confined at the Naval Brig aboard Camp Pendleton, California.

STATEMENT OF FACTS

Lieutenant Colonel (Lt. Col.) Daniel Snyder testified that he has known Maj. Gurfein since 2006, served with him in combat, lived in the same German village outside Stuttgart called Dettenhausen, and when asked about Maj. Gurfein's character for truthfulness, he responded:

[2] "With respect to the child sexual abuse charge and specification and the indecent exposure specification, and -- the Court dismisses the indecent exposure charge and specification conditionally upon appellate review." (R. at 2226).

> I can think of several occasions when Jon Gurfein has held my life in his hands, just by virtue of the ground situation that we were in. And if somebody is saying that this man is not being truthful about something, then you're going to have to convince me because, otherwise, I won't believe, because I've seen too much with him.

(R. at 65).

Beginning in March 2015 and for the next 18 months, Maj. Gurfein served as Aide-de-Camp to the commander of Special Operations Forces – Africa (SOFAFRICA), Brigadier General (BG) Donald C. Buldoc. (R. at 1540). During this prestigious assignment for a Field Grade Marine Infantry Officer, Maj. Gurfein deployed in support of various classified special operations throughout Africa, Europe, the Middle East, and the United States. (R. at Def. Ex. HH).

The countries in which he served included: Somalia, Libya, Mali, Nigeria, Kenya, Djibouti, Ethiopia, Uganda, Central African Republic, Democratic Republic of Congo, South Sudan, the disputed area between Sudan and South Sudan, Tunisia, Morocco, Niger, Nigeria, Cameroon, Chad, Mauritania, Senegal, Egypt, Jordan, Spain, France, and Italy. *Id*.

Before becoming BG Buldoc's Aide, Maj. Gurfein served in the SOCAFRICA Operations section where he was a liaison between Special Operations in Central Africa and its larger command in Stuttgart, Germany. *Id*. During this assignment, he deployed to Djibouti, Ethiopia, Uganda, Central

African Republic, Democratic Republic of Congo, South Sudan, and the disputed area between Sudan and South Sudan. *Id*.

Additionally, Maj. Gurfein's U.S. Marine Corps service includes four combat tours, two in Iraq and two in Afghanistan. *Id*. During his first combat deployment to Iraq, he served in Anbar Province as both the Weapons Platoon Commander and Fire Support Team Leader for Lima Company, 3rd Battalion, Sixth Marines. *Id*. There, he conducted multiple clearing operations and engaged the enemy on a regular basis, where, regrettably, Marines were wounded and killed-in-action. In his second combat tour to Iraq, Maj. Gurfein served as a mortar platoon commander in Fallujah. *Id*.

On his first combat deployment to Afghanistan, he served as a rifle Company Commander in Helmand Province in the southern portion of Marjah. *Id*. His responsibilities included not only his Marine rifle Company, but also an Afghan National Army (ANA) Company, an Afghan National Civil Order Police (ANCOP) company, and a local police station - roughly the equivalent of a battalion-sized element overall. *Id*. There, he led multiple combat operations in conjunction with the Afghan Military and Police Forces. *Id*.

On his second combat deployment to Afghanistan, he served with an ANA Advisor Team in Northern Helmand Province. *Id*. There, Maj. Gurfein spent time

in Sangin and Kajaki. This particular deployment involved many combat operations. *Id*.

Prior to the U.S. Marine Corps and before graduating *summa cum laude* from college in New York, Maj. Gurfein served with a Special Operations unit in the Israeli Defense Force (IDF) called the *Sayeret Golani* from 1997 – 2001. *Id*. During his service with this elite Israeli military unit, he served on multiple combat deployments, to include into South Lebanon. He engaged in multiple firefights, and endured mortar and rocket attacks as well as IED explosions (where he was slightly injured once). Discharged in 2001 with the equivalent rank of Staff Sergeant (E-6) or *Samal Rishun*, he was awarded a Combat Action Medal for combat actions in Southern Lebanon. *Id*.

Major Gurfein's U.S. awards and decorations include: four (4) Navy and Marine Corps Commendation Medals with "V" for valor; two (2) Combat Action Ribbons; two (2) Afghanistan Campaign Medals; two (2) Iraq Campaign Medals; six (6) Sea Service Deployment Ribbons; and the U.S. Parachutist Badge. (R. at Def. Ex. HH). His Israeli awards and decorations include not only the Combat Action Medal, but also the Israeli Parachutist Badge.

He is a *summa cum laude* graduate of Stoney Brook University with a double major in political science and philosophy. During college, he was Captain of the men's crew team and coached the women's crew team. His military

schooling includes graduating from the Expeditionary Warfare School with honors, the US Army Maneuver Captain's Career Course in the top 10%, the U.S. Marine Corps Command and Staff College, and U.S. Army Airborne School.

The married father of three school-aged children, Maj. Gurfein's service, combat, and academic records are by most measures, outstanding.

Factual Background of the Court-Martial

This court-martial involved two young German girls who alleged that a man drove up to them, parked his car such that he blocked their path, and when they moved around the car, he drove up to again block their path, then after having called out to them, showed them his penis. The first young girl is EP, her reports date to 2014, and the panel acquitted Maj. Gurfein of Article 120 offenses relating to her. (R. at 11). The second young girl is LS, her reports date to 2016, but the panel convicted Maj. Gurfein of Article 120 offenses relating to her. (R. Report of Result of Trial).

SUMMARY OF ARGUMENTS

A Field Grade Marine Officer with a stellar record of combat service in the Infantry and father of three school-aged children defended himself at trial and demonstrated that on 20 September 2016, it was not possible for him to have been at the scene of the crime at the time the prosecution prescribed.

The prosecution claimed the offense against LS occurred "at 1849 or 1850." Major Gurfein used his Common Access Card (CAC) to swipe out of his secure workspace at 1834, 15 minutes prior to the alleged offense. The US Army Criminal Investigative Command (CID) Special Agent who repeatedly drove the route between Maj. Gurfein's office and the scene of the crime testified that it took "22 – 24" minutes. Consequently, the "flashing," occurred prior to Maj. Gurfein being anywhere near the crime scene.

Ordinarily, an alibi defense supported by the facts results in reasonable doubt and requires an acquittal because the evidence is factually and legally insufficient.

Cell Tower, Blackberry, and GPS Data Not Produced

The prosecution, however, had in its possession, three types of evidence that could have proven the case "beyond all doubt," either totally guilty or totally exonerated. These included cell tower data for Maj. Gurfein's government-issued Blackberry, data from the Blackberry itself, and GPS data from Maj. Gurfein's car.

However, none of this evidence made it to the courtroom notwithstanding the defense's having requested it and moved for its production. Instead, the military judge denied the defense request for the cell tower records and the prosecution claimed that its forensic experts were unable to access data on Maj. Gurfein's Blackberry or GPS data from his car.

For this appeal, Maj. Gurfein retained a retired US Army CID Agent who spent years serving in Germany and is a forensic specialist who consults on cyber security for a Fortune 100 company. He reviewed the record of trial and concluded that the cell records ought to have been part of the investigation as a matter of course and that the capability to access the Blackberry's location and time data, as well as the GPS location and time data, were available at the time of trial, notwithstanding the prosecution's protestations to the contrary.

At this point, the government cannot prove that these non-productions of evidence material to the preparation of the defense are harmless beyond a reasonable doubt, especially given that Maj. Gurfein took the stand and denied the offense, the prosecution's timeline shows that he was not at the scene of the crime at the time the prosecution prescribed, and the balance of the prosecution's remaining circumstantial evidence does not come anywhere near proof beyond a reasonable doubt.

Military Judge Should Have Ordered Production of Cell Tower Records

The military judge abused his discretion when he denied the defense's motion to produce the cell tower records because they were readily available, notwithstanding the prosecution's comments in open court that they were beyond the reach of the United States, who not only pays for the cell tower service, but also was working jointly with German law enforcement authorities on this case.

Consequently, Maj. Gurfein was not able to use this evidence to corroborate his sworn testimony on the merits, or to further strengthen his alibi defense and degrade the prosecution's circumstantial case with reliable scientific information proving his physical location at critical times on the night in question.

Inflammatory Comments, Disobedience, and Mischaracterization of Evidence

Exceedingly troubling is the lead prosecutor's conduct during cross-examination of a defense expert on the merits and during rebuttal closing argument. The lead prosecutor used the term "***dark web***" six (6) times and ***"child pornography"*** three (3) times, even though no such evidence was introduced.

The prosecutor's comments occurred in front of the jury. When the defense objected and stated "[n]o child pornography was found anywhere on any of Major Gurfein's electronics," the prosecutor replied, ***"[t]hat is not entirely accurate***," thereby testifying himself and buttressing his own salacious and inflammatory comments. (R. at 1917-18). As the entire record of trial makes clear, there is undeniably zero evidence of child pornography, and zero evidence of the dark web. Thus, defense counsel's objection was entirely accurate while the lead prosecutor's comment was misleading - right in front of the jury.

In response, the military judge admonished the prosecutor not to go down that "rabbit hole." But, during rebuttal argument on findings, the lead prosecutor

did just that. He used "***dark web"*** another four (4) times and "***child pornography"*** another time before the defense lodged its second objection on the subject.

Not only did the prosecutor consciously disobey the military judge's order at the expense of Maj. Gurfein's right to a fair trial, he misrepresented evidence of child pornography and the dark web. He also struck other foul blows designed to secure unfair convictions by inflaming passions and having the jury take their eye off the evidence and instead vote their emotions. These actions are arguably violative of several canons of prosecutorial conduct, as discussed more fully *infra*.

Motion to Sever Wrongly Denied

The military judge abused his discretion by overlooking ten (10) relevant and important points on the question of whether to grant the defense's motion to sever Article 120 specifications loosely related to one another.

He denied the defense request to sever but missed the critical looming manifest injustice: that the prosecution sought not to introduce otherwise inadmissible propensity evidence for the limited purpose of identity, but truly to, as the prosecution admitted, bolster weak evidence relating to one alleged victim with weak evidence related to another victim in the pursuit of convictions rather than justice. *United States v. Hills*, 75 M.J. 350 (C.A.A.F. 2016). Offered for the singular and limited purpose of identity only, the prosecution nevertheless used it for the unauthorized purpose of rank propensity evidence.

Failing to see through to the prosecutor's real motive and intended use set conditions for the jury to "split-the-baby" in a compromise vote between two victims whose offenses were separated by two years and who provided unreliable descriptions of their assailant and his car.

Cumulative Effects of These Substantial Errors

As a whole, that material evidence favorable to the defense was within the prosecution's actual possession but went unexamined and thus not produced to the defense, that the prosecution recommended charges without having examined potentially exculpatory evidence (cell tower, Blackberry, GPS), that the military judge did not order production of cell tower records from the service provider to the United States, and then the lead prosecutor repeatedly injected the "***dark web"*** and "***child pornography***," even after the military judge's direction not to, suggests not only prosecutorial misconduct, but also the jury did not convict Maj. Gurfein on the evidence, but based upon emotion.

Finally, the cumulative effects of these unfairly prejudicial errors reveal that neither the process nor the result of this court-martial is correct in law and fact. For these reasons, as discussed more fully below, Maj. Gurfein respectfully requests that the Court disapprove the findings and the sentence, with prejudice.

ASSIGNMENTS OF ERROR

I.

WHETHER THE EVIDENCE IS FACTUALLY AND LEGALLY SUFFICIENT TO SUSTAIN THE FINDINGS AND THE SENTENCE BECAUSE IT WAS IMPOSSIBLE FOR MAJOR GURFEIN TO BE AT THE SCENE OF THE CRIME AT THE TIME THE PROSECUTION PRESCRIBED.

Law

This court is empowered to affirm only those findings of guilty that it finds, upon appellate review, to be correct in law and fact. Article 66(c), UCMJ. The test for factual sufficiency is whether, after weighing the evidence of record and making allowances for not having personally observed the witnesses, this court is convinced of appellant's guilt beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the government, a rational fact finder could have found all the essential elements of the offense beyond a reasonable doubt. *United States v. Brooks*, 60 M.J. 495, 497 (C.A.A.F. 2005) (citing *Jackson v. Virginia,* 443 U.S. 307, 318-19 (1979)). When applying this test, this court is bound to draw every reasonable inference from the record in favor of the prosecution. *United States v. Blocker,* 32 M.J. 281, 284 (C.M.A. 1991).

LS, Her Mother, Her Father, And the German Police

On the evening of 20 September 2016, as LS's mother drove up the steep hill leading to her home, she had to wait for a minute or two because a car was blocking access such that two other cars were ahead of her already. (R.at 1035). She saw her daughter LS walking her bicycle as she drove by. *Id*. LS later reported to the German police, in the presence of her parents that "[a]bout 1840 [mother] asked me to drive home with my bicycle before it turned dark," and that it took "about 20-25 minutes" for her to get home. (R. at App. Ex. VII, 22 of 43).

At 1845, LS's father arrived at their family home. (R. at 971). He went to the basement, where he was taking his shoes off and washing up after his day at work. (R. at 971-72).

LS arrived home and described to her parents how a man in a car stopped her at the base of the hill leading up to her house, when she went around, he drove up again, called out to her through the open window, and showed her his penis before she left to finish the climb up the steep hill to her home and reported the incident to her parents. (R. at App. Ex. VII, 23 of 43).

After having reported the incident to her parents, 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). The family van had tinted windows. (R. at 982). At the same time, LS's mother placed the first of two calls to

the German Police. "Although I let it ring for quite some time, the police did not answer." (R. at 1028). The second call connected at 1900. (R. at Pros. Ex. 47).

At approximately the same time as LS's mother reached the German police on the telephone, LS and her father came upon Maj. Gurfein's car. (R. at 1011). LS identified Maj. Gurfein's car from the back-passenger seat of the van after her father asked "could this be the car?" *Id*. The family van's tinted windows were closed, as were those in Maj. Gurfein's car. (R. at 982).

At 1901, LS's father took a digital image of Maj. Gurfein's car depicting his rear license plate. (R. at 985). At 1903, LS texted the license plate number to her mother. (R. at 983). The rear license plate matched the car belonging to Maj. Gurfein who later told CID that he was in the area on his way home after work.

When the German police asked LS to identify the car, she replied, "[i]t was a black BMW Z4. I know that from my dad." (R. at App. Ex. VII, 25 of 43).

Major Gurfein's Drive Home from Work on 20 September 2016

On 20 September 2016, the same day that LS was "flashed," Maj. Gurfein left his secure workspace on Kelly Barracks at 1834 to drive to his home in Dettenhausen, a suburb of Stuttgart, Germany. (R. at Pros. Ex. 27). This is proven by his CAC swipe out of his secure workspace on the second floor. Eight minutes later, at 1842, phone records show that he called his wife's number, it connected,

and that the call lasted three minutes and 58 seconds (3:58). (R. at Pros. Ex. 22, page 3 of 8).

One minute later, at 1847, phone records show that he made a second call to his uncle, retired Marine Lt. Col. David Gurfein. The call did not connect. (*Id*. at pages 3 and 4). At trial, the prosecution conceded 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 [crime scene] at 1849 or 1850." (R. at 2110).

Following the prosecution's evidence – the CAC swipe, the phone records, and the time the prosecution claimed the assault occurred, it took Maj. Gurfein 15 minutes from his CAC card swipe leaving his second-floor office on Kelly Barracks to be at the scene of the crime, if he were there at all. (1834 + 15 = 1849).

Argument

The critical legal problem, though, is that the prosecution's US Army CID Agent Carter, who investigated the driving routes, 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). Agent Carter, who lived and served in the Stuttgart location for the nine years prior to trial, testified that he also was "very familiar with the traffic patterns." (R. at 1329-30).

During his testimony, he provided three different times to drive the distance between Maj. Gurfein's office on Kelly Barracks and the scene of the crime at the time of day the prosecution claimed the offense occurred.

First, he testified that when he drove from Maj. Gurfein's office to the "base of the hill," it took him "22 – 24 minutes."

> Q. When you were first investigating this incident, did you calculate how long it would take to get from the 2016 incident to -- or excuse me -- from Kelly Barracks to the 2016 incident?
>
> A. Yes, ma'am, I did.
>
> Q. And do you remember how long it took you? Twenty-two to twenty-four minutes, depending upon traffic, ma'am.
>
> Q. And does that include from changing -- or going from the accused's workspace to his car –
>
> A. Yes, ma'am, it does.

(R. at 1353).

Second, Agent Carter testified that it could take, in his estimation, "30 – 35 minutes depending on traffic." (R. at 1363).

Third, on the night before his testimony during the prosecution's case-in-chief, Agent Carter again drove the route from Maj. Gurfein's office to the base of the hill. It took him 24 minutes. (R. at 1399).

Applying the first timeframe, "22-24 minutes," that places Maj. Gurfein at the scene between 1856 – 1858 (1834 CAC swipe + 22 = 1856; 1834 CAC swipe + 24 = 1858). The second time frame, "30 – 35 minutes," places Maj. Gurfein at the scene between 1904 – 1909 (1834 CAC swipe + 30 = 1904; 1834 CAC swipe + 35 = 1909). The third timeframe, "24 minutes," puts Maj. Gurfein at the scene at 1858 (1834 CAC swipe + 24 = 1858). Table 1 below summarizes:

Time Comparison

CAC Swipe (18:34)	**Agent Carter's Times (Minutes)**	**Hypothetical Arrival (Time)**	**Comparison to Time of Crime (18:49 or 18:50)**
18:34	0:22 Minutes	18:56	7 or 8 Mins After
18:34	0:24 Minutes	18:58	9 or 10 Mins After
18:34	0:30 Minutes	19:04	15 or 16 Mins After
18:34	0:35 Minutes	19:09	20 or 21 Mins After

Table 1.

Under any of the varying and imprecise theories the prosecution offered, Maj. Gurfein could not have been at the scene at the time prescribed: "1849 or 1850." That is, the offense had already occurred before Maj. Gurfein could have been at the location.[3]

[3] Exhibit 2 to Appellant's Brief is a timeline showing that Maj. Gurfein, by the prosecution's evidence, was somewhere else when LS was assailed.

With Maj. Gurfein arriving at these times, that means that LS and her father are already out driving and searching for somebody other than Maj. Gurfein because the assault already occurred, that is, Maj. Gurfein arrived after the incident. The same is true concerning LS's mother. With these times, she is on the telephone reporting an offense to the German police that already occurred before Maj. Gurfein could have arrived.

Significantly corroborating that the offense had already occurred and that Maj. Gurfein is not the correct assailant are the conflicting reports and testimony LS provided. For example:

> 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);
>
> 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); and

> 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).

Although these variances cast doubt as the validity of Maj. Gurfein as the assailant, they are understandable. LS was very likely under pressure to please her father, who understandably, wanted to protect his young daughter. These variances also emphasize the critical need for a forensic interview by the American authorities to have been conducted before Charges were brought. A forensic interview is standard protocol for child victims, to ensure their responses are from memory, and not from well-intentioned influences from parents, teachers, counselors, and other adults a child seeks to please. For unexplained reasons, no forensic interview by the American authorities was conducted in this case.

Further dwindling the prosecution's evidence is 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: "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).

Beginning the timeline from where Agent Carter ***approximated*** Maj. Gurfein's car to have been parked substantially degrades the prosecution's placing

Maj. Gurfein at the scene at the time prescribed. The arrival times the government originally offered, now adjust to the following with the addition of the three minutes, as summarized in Table 2 below:

Time Comparison Including 3 Minutes from Work to Car

CAC Swipe (18:34)	Agent Carter's Times (Minutes)	From Work to Car	Hypothetical Arrival (Time)	Comparison to Time of Crime (18:49 or 18:50)
18:34	0:22 Minutes	+0:03	18:59	10 or 11 Mins After
18:34	0:24 Minutes	+0:03	19:01	12 or 13 Mins After
18:34	0:30 Minutes	+0:03	19:07	18 or 19 Mins After
18:34	0:35 Minutes	+0:03	19:012	23 or 24 Mins After

Table 2.

Another important point undermining the prosecution's case - the prosecution's timeline actually places Maj. Gurfein at the location where LS's father first saw his car. Having swiped out at 1834 and having driven 22 – 24 minutes towards his home in Dettenhausen puts Maj. Gurfein in the general vicinity of where LS's father first saw Maj. Gurfein's car between 1856 – 1858. LS's mother testified that her husband and LS left to drive after the assailant at "1856 or 1857 or 1859." LS's father testified that it took about "two minutes" to drive from their home to the first location where he saw Maj. Gurfein's car. (R. at

981). LS's father took the digital image of Maj. Gurfein's car and license plate at 1901. (R. at Pros. Ex. 47). Consequently, the prosecution's timeline shows that:

> a) Maj. Gurfein could NOT have been at the scene of the crime at the time prescribed; and
>
> b) He was where he was supposed to be according to LS's father's testimony and the digital image of his car.

This is entirely consistent with what Maj. Gurfein told CID when questioned. It is also entirely consistent with Maj. Gurfein's testimony at trial.

Stated differently, although the prosecution's evidence does not place Maj. Gurfein at the scene of the crime at the time prescribed, it nevertheless places him where LS's father first came upon him while driving.

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).

It also appears that a fundamental investigative technique was not used in this case. A fair reading of the record of trial reveals no indication that the investigating agencies, the CID and the German Police, conducted canvass interviews of the area at the "base of the hill" on the night in question or in the hours and days following the event. (Def. App. Ex. B, Declaration of Mr. Hardy Hay ¶ 12; 14).[4]

[4] Appellant Maj. Gurfein moved to attach Defense Appellate Exhibit B simultaneously with the filing of Appellant's Brief, which is the sworn Declaration of Mr. Hardy Hay, a homicide

Canvass interviews are mandatory for CID Agents pursuant to the CID's "Three T's" of Timeliness, Thoroughness, and Timely Reporting, and stood to help establish stronger information about the alleged assailant.

What all but cements reasonable doubt in favor of Maj. Gurfein, and what the prosecution did not reveal, is that all of the aforementioned occurred among at least 74 other incidents of indecent exposure to young girls in the area by men in cars during the 3 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. (Def. App. Ex. B, Declaration of Mr. Hardy Hay ¶¶ 10, 11, and 13).

In the context of the other 74 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.

investigator for the Houston Police Department who served as a defense investigator during the proceedings before the trial court in this court-martial.

> 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).

Ordinarily, a "fresh pursuit" theory of prosecution can lead to reliable results. However, that is not the case here. Any and all visibility from the actual assailant's 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 sports car they saw. (Def. App. Ex. B, Declaration of Mr. Hardy Hay ¶ 12).

In the end, Major Gurfein was on the way home to Dettenhausen, as he told the CID and has he testified at trial. Even when CID purposefully lied to him during custodial investigation, and even under an intense cross-examination at trial, he did not waiver from testimony consistent with the prosecution's timeline, which not only places him where LS and her father first saw him, but also shows

that it was ***not*** possible for him to have been at the scene of the crime at the time the prosecution prescribed.

As it turns out, Lt. Col. Snyder's measure of Maj. Gurfein's character for truthfulness checks out with the prosecution's evidence:

> I can think of several occasions when Jon Gurfein has held my life in his hands, just by virtue of the ground situation that we were in. And if somebody is saying that this man is not being truthful about something, then you're going to have to convince me because, otherwise, I won't believe, because I've seen too much with him.

(R. at 65).

After weighing the evidence of record and making allowances for not having personally observed the witnesses, the proof of identity, location, and timing is too weak and speculative to support the findings of guilty. Indeed, 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, this Court cannot be convinced of Maj. Gurfein's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325.

Likewise, 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. The evidence offered to prove location, identity, and time is no more than a circumstantial scintilla. Actually, the evidence

establishes the opposite of the prosecution's claim: Maj. Gurfein was ***not*** at the scene at the time prescribed. *Brooks*, 60 M.J. at 497.

Accordingly, if the convictions for the Article 120 offenses relating to LS are factually and legally insufficient, so too must the Article 107 conviction for Maj. Gurfein's having denied the allegations in the first place.

In the face of factually and legally insufficient evidence on the Article 120b and 120c offenses, the panel nevertheless returned findings of guilty. Then again, that was likely to happen because the prosecution denied production of significant scientific evidence that was material to the preparation of the defense, to include cell tower records, Blackberry records, and GPS data – each of which could have provided corroborating evidence of times, locations, and identity.

II.

WHETHER THE PROSECUTION'S FAILURE TO PRODUCE EVIDENCE WITHIN ITS POSSESSION THAT WAS MATERIAL TO THE PREPARATION OF THE DEFENSE IN RESPONSE TO SPECIFIC WRITTEN REQUUESTS IS HARMLESS BEYOND A REASONABLE DOUBT.

Law

The government bears the burden of proving, as a matter of law, that a nonproduction in response to a specific defense request is harmless beyond a reasonable doubt. *United States v. Roberts*, 59 M.J. 323 (C.A.A.F. 2004);

see also 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").

The source of the "harmless beyond a reasonable doubt" standard is Article 46, UCMJ; 10 U.S.C. § 846 and RCM 701, not *Brady v. Maryland*, 363 U.S. 83 (1963) (prosecutor's disclosure obligations in the absence of defense requests); *United States v. Eshalomi*, 23 M.J. 12 (C.M.A. 1986).

Pursuant to RCM 701(a)(2), the prosecutor must search what is within the "possession, custody, or control of military authorities," which includes non-law-enforcement authorities. Where the defense makes a specific discovery request pursuant to RCM 701(a)(2), the government must provide the information if, among other things, it is *material to the preparation of the defense*. *See United States v. Adens*, 56 M.J. 724 (Army Ct. Crim. App. 2002) (emphasis added).

The definition of "material" in Black's Law Dictionary includes matter that is of "such a nature that knowledge of the item would affect a person's decision-making process." Black's Law Dictionary 1066 (9th ed. 2009). 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).

The prosecution must make good faith efforts to comply with the 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); *see also United States v. Stellato*, 47 M.J. 473 (C.A.A.F. 2015).

Argument

In this court-martial, the defense specifically requested the following evidence in the possession of the prosecution, designed to corroborate Maj. Gurfein's testimony with physical location and timing evidence on the dates of the charged offenses:

> 1) Cell tower records for Maj. Gurfein's government-issued Blackberry;
>
> 2) Blackberry data from the actual device; and
>
> 3) GPS data from Maj. Gurfein's 2011 BMW in the custody of the CID.

(R. at 218; 277).

The prosecution denied these requests, necessitating litigation before the military judge to compel the 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. None of the evidence requested, however, was forthcoming.

The government must now, on appeal, prove that as a matter of law, these non-disclosures were harmless beyond a reasonable doubt. *Roberts*, 59 M.J. at 327; *Hart*, 29 M.J. at 410. The government cannot meet this high burden. The information sought by each request noted above existed at the time of the pretrial investigation and pretrial proceedings. There is no dispute that the German authorities were working together with the American authorities on this case in a "joint investigation." 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 and EP.

Blackberry Cell tower Data from US Government Service Provider

At hearing on the defense's motion to produce the Blackberry cell tower records, defense counsel explained to the military judge:

> [T]he cellular provider can provide data that shows when the calls were made by a certain BlackBerry and which cellphone towers on their grid were activated or pinged, for a colloquialism, when that call was made. And that can somehow indicate the position of the car when that phone call was made . . .

(R. at 220). ###

> So, what we have is his -- see his BlackBerry making a call to his wife's phone number, the BlackBerry that is government produced that we know who the telecom

> provider is. And that telecom provider is going to have cell phone tower data – so when you turn on your phone, when you turn on a smartphone, that is going to automatically ping the phone. That's how you get your updates, emails, things along those lines. And then, we have the phone call.

(R. at 230).

Further urging the trial court to embrace how important the evidence was to the preparation of the defense – evidence the prosecution had but refused to tender - counsel implored:

> Yes, Your Honor. I would just respectfully submit to the Court, again, this is a German contract, Deutsch, Germany, telecom that is doing business with the American government, and the American government is a client of this German contract. And I refuse to believe that the client -- the customer, the American government, cannot get these records from this contractor. So, I would state that this is not in the hands of the German government, but this is definitely possessed by this by the American government for the reason mentioned, Your Honor.

(R. at 233).

Apparently underappreciating the significant relevance and substantial evidentiary value the Blackberry records had to the preparation of the defense, and the ease with which the records could be secured, the military judge denied the motion to produce, and placed the following on the record:

> Well, I'm not going to order the government to do anything beyond what they said they were going to do. Based on what's been presented to me, I don't think that this meets your burden either, in terms of convincing me, this is a

> phone call made from the accused's phone in a relevant place, making the phone calls -- the call logs and cell tower data necessary to be produced by a court order at this time.

(R. at 235). ###

> Well, that -- all this sounds like something that can be locked down, and if necessary provided to me in testimony, one way or the other. So, I'm not guessing on what he means in this e-mail about what can be provided and what can't and what was requested and what wasn't. All right. Let's move on to the next issue. ***I'm denying that motion to compel the cell tower data.***

(R. at 238) (emphasis added).

The military judge erred. By this error, the trial court ratified the prosecution's error of declining to produce the requested evidence, evidence that the prosecution should have reviewed in the first place before ever recommending Charges.

Although Maj. Gurfein relies mainly on RCM 701(a)(2) and the applicable caselaw for this Assignment of Error, he respectfully notes that the cell tower data, the Blackberry data, and the GPS data should have been a part of the prosecutor's pretrial investigation, such that even if Charges resulted, the information would have fallen under the rubric of R.C.M. 701(a)(6).

This rubric requires the prosecution, even in the absence of a defense request, to disclose as soon as is practicable, evidence that reasonably tends to negate guilt, reduce guilt, or mitigate punishment. *United States v. Williams,* 50 M.J. 436, 440 (C.A.A.F. 1999) (noting that R.C.M. 701(a)(6) implements the

disclosure requirements of *Brady v. Maryland,* 373 U.S. 83 (1963)). Evidence that could be used at trial to impeach witnesses is subject to discovery under these provisions, *see United States v. Watson,* 31 M.J. 49, 54 (C.M.A. 1990) (citing *Giglio v. United States,* 405 U.S. 150 (1972)), and, "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).

Upon appeal, Maj. Gurfein retained retired US Army CID Agent Charles A. Dodrill, whose expert declaration as a forensics examiner in both the US Army and now for a Fortune 100 company, was filed contemporaneously as Appellant's Motion to Attach Defense Appellate Exhibit A.

Major Gurfein respectfully tenders this expert declaration pursuant to RCM 702, because Mr. Dodrill possesses decades of specialized knowledge based on sufficient and reliable information which will help the Court understand the relationship between German and American law enforcement authorities working on a joint investigation as well as the technology available to CID forensic technicians to extract Blackberry data and GPS data from cars in 2011.

In his sworn declaration, after having reviewed the record of trial, Mr. Dodrill declares the following:

> A review of the court testimony revealed that the German Polizei, one of the agencies listed on the joint

> investigation, did not consider Maj. Gurfein's alleged crimes a major offense, which would automatically trigger them to request cell phone tower records. Because they did not consider the matter a serious offense, the otherwise automatic request for cell tower records was not made.
>
> The CID and the German Polizei were authorized to request and secure these readily available records as the legal investigating agencies. In my experience as a special agent, and a special agent-in-charge of criminal investigations offices, on many joint investigations, it was one of CID's investigative standards to pursue all relevant leads, and if an outside joint agency did not conduct that lead, the CID agency would. This falls under CID's three T(s) of investigative standards Timeliness, Thoroughness, and Timely Reporting. These investigative standards are so important that CID regularly schedules Staff Assisted Inspections, and reviews the cases of each office, to ensure they are being followed.

(Def. App. Ex. A, Declaration of Mr. Charles A. Dodrill, ¶¶ 9-10).

Likewise, German witnesses who testified at trial did so pursuant to subpoena coordinated with the German authorities. Consequently, the cell tower records for Maj. Gurfein's government-issued Blackberry were within the direct possession of the prosecution, were specifically requested by the defense, and were not produced. The records were material to the preparation of the defense. According to the rationales in *Roberts* and *Hart, supra*, the government cannot prove the non-disclosures harmless beyond a reasonable doubt.

Records From Maj. Gurfein's Government-Issued Blackberry

At hearing on the defense's motion to produce data stored on Maj. Gurfein's government-issued Blackberry device bearing on time and physical location on the night in question, the prosecution informed that its technical expert could not access the data, even though Maj. Gurfein provided the passwords.

In an email, the CID forensic expert 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 forensic examiner 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*.

Mr. Dodrill, the forensic expert retained to assist with the preparation of Maj. Gurfein's Article 66 appeal, also examined this issue, and declared the following under oath:

> A review of the processes conducted for examination of the Blackberry device, by the government, revealed that several steps to decrypt the device were not executed.
>
> The government's forensics examiner should have followed the following procedures to decrypt the phone and reveal all data.
>
> The government's forensic examiner fell into the trap of assuming there was nothing he could do to obtain the data, since it was encrypted. He made no effort to submit a subpoena or search warrant to the Blackberry Corporation for the decryption key, nor did he attempt to have Government IT, which issued the phone, attempt to find

> the decryption key, by either searching for it by phone number, or the IMEI number which is a unique 15-digit code, called an IMEI number on every mobile device that you might need if you want to unlock your device to use with other networks.

(R. at Def. App. Ex. A, Declaration of Mr. Charles A. Dodrill, ¶¶ 11-13).

Mr. Dodrill further explains in his sworn declaration, and provides graphical depictions, of how the extracted Blackberry data could have pin-pointed Maj. Gurfein's physical location at certain times. *Id*. at ¶ 25.

Consequently, the means of extraction and thus the data from Maj. Gurfein's government-issued Blackberry were within the direct possession of the prosecution, were specifically requested by the defense, and were not produced. The records were material to the preparation of the defense. According to the rationales in *Roberts* and *Hart, supra*, the government cannot prove the non-disclosures harmless beyond a reasonable doubt.

GPS Data From Maj. Gurfein's Car

The prosecution presented forensic information attempting to show that no GPS location data could be extracted from Maj. Gurfein's vehicle even though CID forensic examiners tried.

> A. This is the IVE report pertaining to a 2011 BMW z4.
>
> Q. What is an IVE report?
>
> A. The IVE is the vehicle forensics tool that one of our examiners used to conduct an extraction of this particular

> vehicle.
>
> Q. And what did the extraction reveal about the days and times of the incidents?
>
> A. The extraction revealed that there was, according to the notes and report from the examiner who did it, that there was no location data found pertaining to the investigation.

(R. at 1204).

Mr. Dodrill, an appellate defense forensics expert, reviewed this issue as well. In his sworn declaration, he explained:

> A review of the court testimony revealed that the examiner who used the Berla's IVE forensic tool for vehicle forensics did not testify in court. Special Agent Landrigran stated several times that he was not trained in the software, did not do the examination, but might be able to speak to the results in the other examiner's report.
>
> It is concerning that the prosecution did not call the actual examiner to testify, because he was the one who conducted the examination.
>
> This left an unclear picture of what was actually in the report and set the stage for misunderstanding and incompleteness.
>
> Research on the tool suggests that a properly executed examination with the Berla IVE tool would have produced the following artifacts for forensic analysis.
>
> Under Berla's list of data that IVE can acquire, the subheading "Navigation" includes four sets of data that can be extracted: a) Tracklogs and Trackpoints; b) Saved Locations; c) Previous Destinations; and d) Active and Inactive Routes.

> The subheading "Events" lists "GPS Time Syncs." These five components, when cross-referenced, should provide adequate clues as to why certain dates did not contain GPS data.
>
> Berla (the manufacturer of iVE), states, that "iVE…can acquire a full or partial binary image and decode the data. It can recover deleted information from either image type."
>
> If there is NO activity data of any kind, the vehicle user might have attempted a factory reset. Since we had data this would suggest a user did not attempt a factory reset.
>
> The 2011 BMW Z4 VIN (WBALM5C58BE379239) is supported by the Berla iVE tool, and provides a list of the following artifacts, ***which include location data, which can be retrieved***.

(R. at Def. App. Ex. A, Declaration of Mr. Charles A. Dodrill, ¶¶ 26-34).

Mr. Dodrill further provides graphical depictions of how the GPS data from Maj. Gurfein's car could have, and should have, been used to determine his physical location. Accordingly, the means of extraction and thus the data from Maj. Gurfein's car were within the direct possession of the prosecution, was specifically requested by the defense, and was not produced. The data was material to the preparation of the defense.

According to the rationales in *Roberts* and *Hart, supra*, the government cannot prove these three significant non-disclosures bearing directly on the most critical issues of the trial, location, identity, and timing harmless beyond a reasonable doubt. *See Maxwell v. Roe*, 628 F.3d 486 (9th Cir. 2010) (federal habeas granted where

prosecution failed to disclose multiple pieces of critical impeachment information that could have been used to undermine central witness against accused); *D'Ambrosio v. Bagley*, 527 F.3d 489 (6th Cir. 2008) (prosecution failed to disclose evidence that would have contradicted or weakened the testimony of the only eyewitness).

"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). Applied here, the undisclosed evidence might have affected the outcome of the trial, per the rationale in *Coleman*.

III.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DENIED THE DEFENSE'S MOTION TO PRODUCE CELL TOWER RECORDS FOR MAJOR GURFEIN'S GOVERNMENT-ISSUED BLACKBERRY.

Law

For purposes of this Assignment of Error, Maj. Gurfein respectfully relies largely on the facts and analysis discussed more fully above in Assignment of Error II and respectfully offers the following in addition.

The standard of review for the denial of a request for production is abuse of discretion. *United States v. Powell*, 49 M.J. 220, 225 (C.A.A.F. 1998); *United*

States v. Mosley, 42 M.J. 300, 303 (C.A.A.F. 1995). If the military judge abused his discretion, then the test for prejudice is harmless beyond a reasonable doubt. *Powell*, 49 M.J. at 225.

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." This rule is based on Article 46, UCMJ and implements an accused's Sixth Amendment right to compulsory process. Each party is entitled to production of evidence that is relevant and necessary. RCM 703(f)(1).

The test pursuant to Mil. R. Evid. 401 for relevance is whether the item of evidence has *any tendency whatsoever* to affect the balance of probabilities of the existence of a fact of consequence and is a very low threshold. *United States v. White*, 69 M.J. 236 (2010); *see also*, *United States v. Tomlinson*, 20 M.J. 897 (A.C.M.R. 1985) (Rule 401 was "intended to broaden the admissibility" of most evidence).

Necessary means the evidence is not cumulative and would contribute to a party's presentation of the case in some positive way on a matter in issue. RCM 703(f)(1), Discussion. If, like here, the prosecutor contends that the defense requests for production are not required by the rules, then the defense may file a motion for production. RCM 703(c)(2)(D); RCM 906(b)(7).

Argument

The defense reasonably demonstrated that the evidence was within the possession of the prosecution and other law enforcement agencies working with the prosecution (German authorities), that the information was relevant, necessary, and material to the preparation of the defense. RCM 701(a)(2); 703(f)(1).

The defense also demonstrated that the cell tower records would contribute to the defense's presentation of the case in a very positive way on the most important matters in issue: identity, location, and timing. *Id*.

The military judge had before him undisputed evidence that:

> a) The prosecution was working jointly with the German law enforcement authorities on this case, and thus, the cell tower records were within military control;
>
> b) Major Gurfein made phone calls using his government issued Blackberry on the night in question;
>
> c) The two phone calls were made at relevant times on the night in question;
>
> d) That the United States pays for the cell tower service for its Blackberries; and
>
> e) That time, physical location, and alibi were the main issues in the case.

A fair reading of the trial transcript suggests that the military judge did not recognize he possessed the authority to order the prosecutor to secure the cell tower records. *See e.g*., RCM 703. Apparently, the military judge understood that

the Status of Forces Agreement or some other international mechanism controlled such matters. By applying the incorrect standard, the military judge abused his discretion to the material prejudice of Maj. Gurfein's substantial rights. *See* Article 59(a), UCMJ.

Mr. Dodrill, a retired US Army CID special agent, and former special agent-in-charge with years of active duty service in Germany wrote in his sworn declaration:

> A review the court testimony revealed that the German Polizei, one of the agencies listed on the joint investigation, did not consider Maj. Gurfein's alleged crimes a major offense, which would automatically trigger them to request cell phone tower records. Because they did not consider the matter a serious offense, the otherwise automatic request for cell tower records was not made.
>
> The CID and the German Polizei were authorized to request and secure these readily available records as the legal investigating agencies. In my experience as a special agent, and a special agent-in-charge of criminal investigations offices, on many joint investigations, it was one of CID's investigative standards to pursue all relevant leads, and if an outside joint agency did not conduct that lead, the CID agency would.

(Def. App. Ex. A, Declaration of Mr. Charles A. Dodrill, ¶¶ 9-10).

The prosecution spent many pages of the trial transcript seeking to convince the military judge that these readily available records were beyond its reach due to nuances of international law.

As it turns out, the prosecution and the military judge were not correct. Because the military judge applied the incorrect legal standard, discounted the ease with which these records were available, and decided the question in a way that fails to embrace the direct relevance, necessity, and usefulness to the defense, there must be an abuse of discretion, which, upon appeal of these facts, cannot be harmless beyond a reasonable doubt. *Powell*, 49 M.J. at 225.

IV.

WHETHER THE PROSECUTOR MADE IMPROPER COMMENTS AND ARGUMENT THAT UNFAIRLY PREJUDICED MAJOR GURFEIN'S RIGHT TO A FAIR TRIAL WHEN HE INJECTED THE "DARK WEB" AND "CHILD PORNOGRAPHY" INTO THE CASE BEFORE THE MEMBERS, AND, AFTER THE MILITARY JUDGE DIRECTED NO FURTHER COMMENT, HE DISOBEYED THE MILITARY JUDGE AND AGAIN MENTIONED THE DARK WEB AND CHILD PORNOGRAPHY DURING HIS CLOSING REBUTTAL ARGUMENT.

Law

"Improper argument involves a question of law that reviewed *de novo*." *United States v. Frey*, 73 M.J. 245, 248 (C.A.A.F. 2014) (citing *United States v. Marsh*, 70 M.J. 101, 106 (C.A.A.F. 2011). Prosecutorial misconduct is "action or inaction by a prosecutor in violation of some legal norm or standard, *e.g*., a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon." *United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996).

The standard was set by the Supreme Court in *Berger v. United States*, 295 U.S. 78 (1935), where the High Court described prosecutorial misconduct as behavior by the prosecuting attorney that "overstep[s] the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense." *Berger*, 295 U.S. at 84.

The Supreme Court stated that the prosecutor "may prosecute with earnestness and vigor…. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his 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." *Id*. at 88.

A prosecutor may properly "argue the evidence of record, as well as all reasonable inferences fairly derived from such evidence." *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000). A prosecutor may not inject his personal opinion into the panel's deliberations, inflame the members' passions or prejudices, or ask them to convict the accused on the basis of criminal predisposition. *See United States v. Burton*, 67 M.J. 150, 153 (C.A.A.F. 2009).

Reversal is warranted "when the trial counsel's comments, taken as a whole, were so damaging that we cannot be confident that the members convicted the appellant on the basis of the evidence alone." *United States v. Hornback*, 73 M.J. 155, 160 (C.A.A.F. 2014). Defying a military judge's ruling not to bring up the

topic before the members, is an altogether more serious degree of wrongdoing. *See United States v. Sewell*, 74 M.J. 14 (C.A.A.F. 2016).

Argument

During the defense case, Dr. Clark Clipson testified that he administered various tests to Maj. Gurfein, that the results were valid, indicating that Maj. Gurfein was open and honest, and, that there was no evidence of any type of sexual deviance, maladaptive personality traits, mood disorder, or other psychopathology of the type associated with individuals who commit sexual offenses. (R. at 1458-1463).

During the prosecutor's cross-examination of Dr. Clipson, and ostensibly trying to impeach the validity of the tests Dr. Clipson administered to reach his conclusions that Maj. Gurfein was honest and did not possess the psychopathology of the type associated with sexual offenders, the following occurred:

> Q. Have you reviewed the ***dark web***?
>
> A. I have never been on the ***dark web***. I read about it.
>
> Q. You are aware there is ***child pornography on the dark web***?
>
> A. Very much so.
>
> Q. You're aware that ***people trade child pornography on the dark web***?
>
> A. Yes.

> Q. So you are aware that is a resource -- ***you are aware that there is a -- that there are child pornography communities on the dark web?***
>
> DC: Objection, Your Honor. No child pornography was found anywhere on any of Major Gurfein's electronics.
>
> TC: ***That's not entirely accurate.***
>
> DC: The electronics were with CID and no child pornography was found during their search.
>
> MJ: Response?
>
> TC: For one, that's not an accurate statement. But for another, ***I am just establishing that there would be such things on the dark web***. That's all I was going to do.
>
> MJ: Well, all right. Let's –
>
> DC: Your Honor, let's go to 39(a), please.

(R. at 1917-18).

During the Article 39(a) session outside the presence of the members, defense counsel articulated his concerns about the prosecutor's comments before the members:

> [H]ere is my biggest problem with all of this. These first -- the first time these members ever heard the words "child pornography," came from the government counsel's mouth. On my direct examination of Dr. Clipson, we specifically did not talk about how he made the assumption that there was no child pornography present. Child pornography did not come from the witness at all on direct examination. So now we got the government injecting child pornography for the first time in this case.

(R. at 1923).

> MJ: And how far -- how much further do you want to go with the issue?
>
> TC: ***Well, my understanding was that I wasn't even allowed to ask any questions anyway***. So, I'm not sure that --
> MJ: I mean, that – MJ: I am still not inclined to let the government go any further on this issue. I feel like this is not an issue in the minds of the members that they need to be disabused of. I don't believe anybody listening to the testimony of this witness reasonably believes that he has reviewed child pornography in association with this case. And so, I'm going to limit the government's questions in that regard. All right.

(R. at 1925) (emphasis added).

> DC: There has been no evidence of Major Gurfein going on the dark web, Your Honor.
>
> MJ: Yes.
>
> DC: There is no good-faith basis to ask that question.
>
> MJ: Yeah. I think the issues -- I don't want to go further down this rabbit hole.

(R. at 1925-26).

Later, during rebuttal argument on findings, the prosecutor, notwithstanding the military judge's order not to mention the ***dark web*** or ***child pornography***, stated to the members:

> TC: Well, Dr. Clipson testified that he has never checked the ***dark Web*** or checked any studies of the ***dark Web***, to see what is available on there regarding that. There is some

> contention around that area. So, I only go as far as to say there is lots of criminal -- it is fair to conclude that there is ***criminal activity on the dark Web*** where individuals could potentially get such tests.
>
> DC: Your, Honor. I am going to object to this argument.
>
> MJ: What is your response to that? Is that in the evidence?
>
> TC: Your Honor, the witness testified he had not searched the ***dark Web***.
>
> MJ: Okay.
>
> TC: And I laid the foundation that he was aware there is ***child pornography traded on the dark Web***. I think he said, "Yes" to that question.
>
> MJ: All right. Members, again it is your recollection of what is in evidence that controls. That last statement about a general amount of criminal activity revolving around -- trying to ascertain the content of tests and that stuff on the ***dark Web*** -- it is your memory that controls whether that is actually in evidence through that witness as opposed to the argument of counsel, which is just that, argument of counsel.

(R. at 2172-73).

At another Article 39(a) session outside the presence of the members, the topic of which was the findings instructions the military judge was about to deliver to the panel, the following occurred:

> MJ: Defense, what is your objection and what do you believe, if there was an issue with it, should be the appropriate remedy?

> DC: Your Honor, I believe there was an issue. We discussed this earlier in the court-martial, specifically, as it pertains to the Dark Web and child pornography. My recollection is the military judge specifically said that he did not want to instruct -- to do a curative instruction on that, specifically, because he did not want to draw more attention to those terms. I agreed with the -- with that assumption -- with that decision at that point in time. I do not think -- I just do not think there is a good faith basis to bring it up in closing arguments. Again, there is no evidence that Major Gurfein was ever on the Dark Web. There is no evidence of any kind of child pornography on his computer. Moreover, any -- to the extent that the Dark Web would have been relevant for the government counsel's stated purpose, certainly, that would not extend to child pornography as it pertains more to whether this questionnaire could have been received on the Dark Web, and that has nothing to do with child pornography. As much as child pornography would be germane to Dr. Clipson's analysis and his decision as it pertains to any psychopathology for pedophilia for Major Gurfein, I would say that, you know, defense counsel, specifically, stayed away from the fact that he considered the fact that there was, you know, the government seized his computers. And he received no information or notice of any child pornography whatsoever. And so, I could have gotten that from him, but I did not for a specific purpose of staying away from all of this. So now, I am prejudiced because I stayed away from that because I did not want this specific thing to happen. So now, unfortunately for Major Gurfein, this specific thing happened, and I was not able to get it out from Dr. Clipson that he had considered the fact that the government had all the computers and there was no child pornography on there. ***So, you know, therein lies the prejudice***.

(R. at 2184-85) (emphasis added).

The prosecutor used the term ***dark web*** six (6) times and the term ***child pornography*** three (3) times for a total of nine (9) unfair comments before the defense could voice its objection. There is no evidence of record that Maj. Gurfein accessed the 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.

The only relevant reason to make these comments, albeit under the guise of legitimate cross-examination, was to plant in the minds of the jury that Maj. Gurfein was into child pornography on the ***dark web***. The comments are wholly irrelevant, have no probative value, are actually prejudicial, confused the issues, and misled the jury.

The problem does not end there. After having been directly instructed by the military judge not to go down that rabbit hole again, the prosecutor disobeyed the military judge during closing rebuttal argument, used the terms dark web another four (4) times and child pornography another one (1) time for a total of five (5) comments in direct violation of the military judge's order. Upon objection, the prosecutor was able to articulate in front of the jury that he elicited testimony from the defense expert that the expert was aware of the dark web, thereby making an unauthorized speaking objection to drive home his points by his own testimony to the jury. (R. at 2172-73).

At this point, with inflammatory and irrelevant evidence planted and reinforced in the jury's ears and minds, the military judge appears to have legitimized the prosecutor's foul tactics by failing to stop the prosecutor, direct an Article 39(a) outside the presence of the members, consider contempt for disobedience, or craft a curative instruction along the lines of "members, there is zero evidence of any child pornography in this case. There is zero evidence of the dark web in this case. What the prosecution said must be disregarded."

On these facts, a mistrial was surely justified, especially given the weakness of the prosecution's evidence, which likely explains why the prosecutor made and then repeated in defiance his salacious and inflammatory comments. In effect, the prosecutor poured gasoline on smoldering embers, and the military judge let the case go to deliberations.

In all, the prosecutor used these inflammatory and wholly irrelevant terms fourteen (14) times, five (5) of which were in direction violation of the military judge's order. From this, there are several reasonable conclusions.

First, the prosecutor committed misconduct because he not only violated several professional standards and struck "foul blows," but he also violated the military judge's order to refrain from commenting about the dark web and/or child pornography to the unfair prejudice of Maj. Gurfein's right to a fair trial. *United*

States v. Diangelo, 31 M.J. 135 (C.M.A. 1990) (Intentional prosecution misconduct induces mistrial).

Second, the prosecutor's argument was calculated to inflame the passions and prejudices of the members, in violation of ABA Standard 3-6.8c. (The prosecutor should not make arguments calculated to appeal to the prejudices of the jury); *see also United States v. Diffoot*, 54 M.J. 149 (C.A.A.F. 2000) (comments made by the trial counsel during closing argument regarding accused's ethnicity and urging a conviction based on guilt by association amounted to plain error and materially prejudiced appellant's substantial rights).

Third, the prosecutor's argument diverted the jury from its duty to decide the case on the evidence, in violation of ABA Standard 3-6.8.d. (The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence).

Fourth, he ran afoul of ABA Standard 3-6.9. (The prosecutor should not intentionally refer to or argue on the basis of facts outside the record). Here, the parties and the military judge were on actual notice that in the course of the entire investigation, no evidence of the dark web or child pornography attributable to Maj. Gurfein arose. Had there been evidence, it stands to reason that additional Charges would have been forthcoming.

In *Oregon v. Kennedy*, 456 U.S. 667 (1982), a mistrial was proper where the prosecutor merely asked an expert witness if the accused "was a crook." Here, the prosecutor, while examining an expert witness, suggested a far more severe degree of criminality than that reflected in the Charges at issue, painting Maj. Gurfein as a purveyor of child pornography on a stealthy area of the Internet that law-abiding people do not even know how to access.

Even the term ***dark web*** on its own, sounds bad. Put ***dark web*** together with child pornography repeatedly coming from the ostensible legitimacy of the prosecutor's podium, and contemptuous visual images and disdainful and judgmental reactions are bound to result, which is the reason why the lead prosecutor refused to abide by the military judge's order.

The prosecutor's remarks and argument were a game-changer. Major Gurfein went from being a possible flasher to a sneaky internet pedophile with the repeated mention of what *might* have been on his computer and what he *might* have done.

Surely, injecting dark web and child pornography into a case where Maj. Gurfein stood accused of "flashing" two school-aged girls had an unfair impact on the jury. One of the last provocative images the prosecution left with the members as they retired to the deliberation room on findings is a tremendously damaging

image of Maj. Gurfein watching child pornography on the dark web – which had nothing to do with the charges and specifications whatsoever.

The error is fairly seen as clear and obvious, and on these facts, the members were not able to put aside the salacious commentary and argument, as it directly appealed to their emotions and duties as parents and Marine officers to protect and defend those in need, especially children. *See, e.g., United States v. Knapp*, 73 M.J. 33, 36 (C.A.A.F. 2014).

Given these undisputed facts, the lead prosecutor's actions cannot be regarded as within the "bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense." *Berger*, 295 U.S. at 84.

For these reasons, the prosecutor's conduct here must constitute "the improper methods calculated to produce a wrongful conviction" the United States Supreme Court has long forbade. *Id*.

The evidence underlying Maj. Gurfein's convictions was so scant that it is clear that the members did not convict him on the evidence alone. *United States v. Fletcher*, 62 M.J. 175, 184 (C.A.A.F. 2005). After all, the military judge's direction not to bring up the dark web or child pornography shows that he too was certainly mindful of the contaminating effects of the prosecutor's words.

V.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE FAILED TO GRANT THE DEFENSE MOTION TO SEVER THE ARTICLE 120b AND 120c SPECIFICATIONS INVOLVING TWO SEPARATE VICTIMS, SEPARATED BY TWO YEARS AND TWO DIFFERENT LOCATIONS, WHERE THE PROSECUTION ADMITTED THAT IT JOINED THE TANGENTIALLY-RELATED SPECIFICATIONS TO BOLSTER THE EVIDENCE OF EACH OFFENSE WITH THE OTHER.

A military judge's decision to deny an accused's motion to sever offenses is reviewed for an abuse of discretion. *United States v. Duncan*, 53 M.J. 494, 497-98 (C.A.A.F. 2000). A military judge abuses his discretion when: (1) he predicates his ruling on findings of fact that are not supported by the evidence of record; (2) he uses incorrect legal principles; (3) he applies correct legal principles to the facts in a way that is clearly unreasonable; or (4) he fails to consider important facts. *See United States v. Solomon*, 72 M.J. 176, 180–81 (C.A.A.F. 2013).

This assignment of error demonstrates that the military judge applied correct legal principles in a way that is unreasonable because he failed to consider important facts relevant to the question whether Maj. Gurfein had valid bases for severance of the Article 120 specifications.

The defense moved to sever pursuant to R.C.M. 906(b)(10), made a showing pursuant to the leading case addressing the question, *United States v. Giles*, 59 M.J. 374 (2004) (military judge abused his discretion at rehearing by denying the accused's motion to sever unrelated charges), the government opposed, and the

military judge denied the defense motion. (R. at App. Exs. IX, X, LXIII). In his ruling, the military judge reasoned:

> Here, the defense has not shown that severance is necessary to prevent a manifest injustice. First, as discussed in the court's separate ruling on the matter, evidence of the offenses involving each alleged victim would be admissible under M.R.E. 404(b) in the trial of the charged offenses involving the other alleged victim. *See* Ruling on the Defense Motion in Limine to Exclude Argument Under M.R.E. 403, 404(b), and 414. Thus, because it would not alter what evidence could be presented at either trial, all severance would essentially accomplish in this case is to convert one trial into two with the same evidence.
>
> Second, in order to keep the evidence of the offenses separate and prevent impermissible spillover, the court intends to give proper limiting instructions, which considerably reduce[s] the danger of prejudice. *See United States v. Duncan,* 53 M.J. 494, 498 (C.A.A.F. 2000); *United States v. Haye,* 29 M.J. 213, 215 (C.M.A. 1989); *United States v. Hogan,* 20 M.J. 71, 73 (C.M.A. 1985). In this regard, the court intends to give both a spillover instruction and a limiting instruction regarding the use of evidence under M.R.E. 404(b).
>
> Third, the defense has not shown that the findings will reflect an impermissible crossover of evidence.

(R. at App. Ex. LXIII at 4).

Argument

In his decision, the military judge overlooked no fewer than 10 points demonstrating that "manifest injustice" could not be avoided without severance.

First, 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.

As demonstrated more fully above in the First Assignment of Error, the evidence of both Article 120 offenses pertaining to each alleged victim was weak, so weak that its probative value is altogether diminished when evaluated even against the comparatively lower standard for probable cause, let alone the higher standard of beyond a reasonable doubt. The manifest injustice the military judge neither considered nor prevented is precisely what happened here: the weak evidence relating to EP and the weak evidence relating to LS were joined to set the table for a compromise vote.

Indeed, the prosecution even acknowledged that there would be crossover with the introduction of the Article 120 evidence pertaining to each purported victim. In its written opposition to the defense motion to sever, the prosecution wrote, "there *will* be crossover, but this crossover, pursuant to M.R.E. 404 and 414 is *permissible.*" (R. at App. Ex. X) (emphasis in original).

The defense however, placed the prosecution's position into the context of the prosecution's true and overreaching motives when it informed the military

judge, "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.[5]

The military judge's analysis shows that he neglected to consider facts that should have been weighed heavily in resolving the impact this prosecutorial trial tactic would have when evaluating it against the relevant legal authorities. The prosecution's joinder to specifically and admittedly bolster porous evidence, under the guise of legitimate 404(b) identity evidence, led to the impermissible crossover in the form of a "split-the-baby" vote on findings which must be a "manifest injustice."

The "manifest injustice" is further brought to light when considering the appropriate use of the EP and LS evidence in separate trials. At separate trials for each alleged victim, the evidence would no longer be as it was in the case below, "charged misconduct to show propensity of guilt for other charged misconduct."

Rather, the evidence would have been "uncharged misconduct to show propensity for charged misconduct." The point: in separate trials, the introduction of uncharged misconduct could not have resulted in the conditions for a compromise or "split-the-baby" vote that was the "manifest injustice" created by

[5] Prosecutorial principles suggest that the offenses should have been tried separately from the get-go, not only for the reasons discussed in this Assignment of Error, but also because the prosecution, as discussed more fully in the next Assignment of Error, did not pursue, analyze, or produce to the defense significant evidence weighing against bringing charges at all, to include readily available cell tower records for Maj. Gurfein's government-issued Blackberry, data from the Blackberry device itself, as well as GPS location data readily available for extraction from Maj. Gurfein's car.

the joinder of these distinct offenses. The military judge was partially aware of this point as indicated in a footnote to his ruling, where he wrote:

> Of additional note, while it would require a separate analysis unnecessary here in light of the court' s ruling under M.R.E. 404(b), if the offenses were severed, the prohibition against using evidence involving one alleged victim as propensity evidence under M. R.E. 414 to prove the charged offenses involving the other alleged victim would no longer apply. *See United States v. Hukill,* 2017 CAAF LEXIS 305 (C.A.A.F. 2017); *United States v. Hills,* 75 M.J. 350 (C.A.A.F. 2016).

(R. at App. Ex. LXIII at 4).

The military judge's reasoning, with respect, does not go far enough. Evidence of uncharged misconduct in separate trials could not have resulted in the compromise or the "split-the-baby" vote between alleged victims which was the "manifest injustice" created by the joinder of these loosely-related offenses between EP and LS; joined for the prosecutorial purpose of tactical trial advantage of bolstering weak crossover evidence in the quest for convictions rather than the pursuit of justice.

Second, the military judge appears to have given significant but arguably unrealistic weight to the corrective value of a limiting/spillover instruction, in this case. As the defense noted in its pretrial written motion to sever:

> There is a substantial danger that members will ignore a spillover or limiting instruction by the Court and convict Major Gurfein merely because of the number of allegations. ***The fact that the Government already stated***

> ***during the Article 32 proceedings that they will use each allegation as evidence of modus operandi for the other case indicates their intention to convince the panel on the merits of the guilt of Major Gurfein based vague similarities and the number of alleged of the incidents.*** This poses a serious risk that any spillover or limiting instruction will be ignored, whether explicitly or out of simple human nature. Due to the somewhat similar nature of the incidents any limiting instruction will be very difficult to craft and impossible to enforce making severance the only option to ensure Major Gurfein does not suffer the manifest injustice *Giles* warns of.

(R. App. Ex. IX) (emphasis added).

The military judge underappreciated the significant challenge the panel faced in not only understanding, but also applying a limiting instruction (404(b)) and a spillover instruction, especially when those instructions are given amid the numerous "receiving end of a firehose" other instructions on the law. Indeed, trained and experienced legal counsel find spillover and related instructions challenging to understand and apply. *See, e.g.*, *ABA Standards for Criminal Justice:* Standard 13-3.1(c). Severance of Offenses (2nd ed. 1980).[6]

The prosecution's intent to bolster the otherwise scant evidence was made on the assumption that the panel would not be able to distinguish the evidence and

[6] When evaluating whether severance is "appropriate to promote" or "necessary to achieve" a fair determination of the defendant's guilt or innocence for each offense, the court should consider among other factors whether, in view of the number of offenses charged and the complexity of the evidence to be offered, the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense.

apply the law as to each offense. The military judge appears to have under-appreciated that it is altogether natural for the members to make their own "propensity-like" assumptions and equate guilt of “something” based on the number of incidents rather than the weight of the evidence. *United States v. Haye*, 29 M.J. 213 (C.M.A. 1989) (conviction reversed not because the military judge's instructions were inadequate, but also because "the evidence presented by the Government . . . was so merged into one that it [was] difficult to distinguish its intended purpose." *Id.* at 215; *see also United States v. Kerr*, 51 M.J. 401, 406-07 (C.A.A.F. 1999) (appellate court reviews the entire record in evaluating a military judge's ruling on spillover).

Additionally, the military judge did not bifurcate the presentation of evidence and argument to limit the spill over, especially where, like here, there are interlocking evidentiary requirements applicable to comparatively weak specifications when considered individually rather than jointly.

Third, the military judge failed to consider important facts indicating weighing in favor of severance. Instead, he incorrectly focused only on the similarities of the conduct alleged for each specification. These facts in favor of severance include but are not limited to a) two different victims; b) at two different developmental and emotional levels; c) with two different versions of the events; d) who identified a different car; e) from separate geographic locations; f) involving

different social workers; h) different parents; i) different German authorities; j) varying degrees of parental involvement in children's answers to investigator's questions; k) without the customary forensic interview of child victims to ensure reports are not influenced by well-meaning parents; l) with the events alleged separated by two years; m) occurring amid at least 74 reports of "flashing" events in the area during the three years leading up to the night in question.[7]

Fourth, the military judge failed to reasonably evaluate the degrading effects time has on the developing mind of school-aged children on the all-important question of memory, ability to recall pertaining to identification, and the influence of caring parents, especially where no forensic child interviews were conducted to mitigate parental or other suggestive influences. Indeed, Dr. Fraser had already testified to these issues with child suggestibility during a pretrial hearing before the military judge. The alleged victim EP rendered a questionable identification of her assailant and his car, and surely the passage of two years as she was maturing had some impact. The same can be said for LS, who also provided an untrustworthy identification of her assailant and his car.

Fifth, the military judge's Mil. R. Evid. 403 balancing-test does not capture the compelling factors in favor of severance, and instead sides noticeably with only

[7] Exhibit 3 to Appellant's Brief is a graphical depiction of those important facts favoring severance the military judge incorrectly failed to consider.

those factors suggesting joinder. Accordingly, the analysis is not complete. The result of the Mil. R. Evid. 403 balancing analysis, when the facts in favor of severance are rightly considered, should have been that any value of joinder was substantially outweighed by the danger of unfair prejudice, confusing the issues, and misleading the jury, which appears to have occurred here, given the overall weakness of the prosecution's case.

Sixth, the panel returned findings of not guilty for the 120 offenses naming EP as the victim, but guilty for the same 120 offenses naming LS as a victim, that is, the "split-the-baby" vote. The military judge merged the two Article 120 specifications pertaining to LS for purposes of sentencing, and thereby connoted some recognition, albeit after having decided to deny the defense severance motion, that the number of specifications for the same act suggested some judicial intervention to guard against and correct for unfair prejudice to Maj. Gurfein.

Admittedly the military judge's merger was for purposes of sentencing, a different legal question and analysis than severance, however, his willingness to do so evidences an acknowledgment that judicial adjustment of the specifications was required. That judicial intervention should have extended not only to merging the 120 specifications relating to LS for the same single act, but also severing the joined specifications for separate trials to guard against the "manifest injustice" of a compromise panel vote for purposes of findings.

Seventh, practicality and efficiency cannot outweigh an accused's right to a fair trial. *State v. Vazquez*, 419 So. 2d 1088 (Fla. 1982).

Eighth, doubt as to the propriety of severance should equitably be resolved in favor of an accused, because separate trials could be held without harm to the interests of justice and, in turn, increase the likelihood of a fair and error-free-trials.

Ninth, Rule 14 of the Federal Rules of Criminal Procedure provides that if joinder "appears to prejudice a defendant . . . the court may order separate trials of counts, . . . or provide any other relief that justice requires." *United States v. Bennett*, 368 F.3d 1343, 1351 (11th Cir. 2004); s*ee also Barton v. United States*, 263 F.2d 894 (5th Cir. 1959) (reversal of district court's denial of motion for severance); *Schaffer v. United States*, 221 F.2d 17 (5th Cir. 1955) (reversal of district court's denial of motion for severance).

Tenth, although occurring after his ruling to deny the defense motion to sever, the military judge, as the gatekeeper, probably should have seen another issue bearing on separate trials. The senior member of the panel stated during *voir dire* that he worked directly for the General Court-Martial Convening Authority (GCMCA) as a primary staff member, and, that the GCMCA directly rated him. (R. at 839).

During the military judge's *voir dire* of the panel, the senior member and holder of a degree in criminal justice, Colonel (Col.) Meade, stated that he rated another member, Lt. Col. Acosta. (R. at 813). Later during *voir dire*, Col. Meade remarked before the entire panel, to include Lt. Col. Acosta, ***that Maj. Gurfein must have done something wrong or that he would not be on trial***:

> DC: Does any member think that Major Gurfein must have done something wrong, even if it is not a crime, or he would not be here today? That's a negative response from all members. And, members, some of these questions may be a little convoluted and tough to understand. If you're not understanding it, I get it. The military judge didn't understand some of these the first time he read it as well. Please, let me know and I'll do my best to try to clear up any confusion.
>
> MJ: Won't you ask that -- ask that question one more time.
>
> DC: Yes, Your Honor.
>
> DC: ***Does any member think that Major Gurfein must have done something wrong even if it's not necessarily a crime, or else he would not be here today? I'm getting some confused -- here -- let me clear up the question.***
>
> MJ: ***So, Colonel Meade raised an eyebrow. Is that an affirmative response that we'll ask you about later?***
>
> MBR: (Col Meade): ***Yes, sir. I would say, yes.***
>
> MJ: Okay.

(R. at 822) (emphasis added).

Before conducting individual *voir dire*, all members responded in the affirmative that they knew the General Court-Martial Convening Authority. (R. at 827). Both Col. Meade and Lt. Col. Acosta were eventually struck from the panel. Still, Col. Meade's response, the response from a direct report to the GCMCA, before all the members who eventually sat in judgment of Maj. Gurfein, that Maj. Gurfein "must have done something wrong even if it's not necessarily a crime, or else he would not be here today," signaled the expectation to other members of some finding of guilty.

With the prosecution's joinder of the 120 offenses to bolster weak evidence among two alleged victims, and the military judge's declination to sever despite the compelling reasons discussed more fully above, Col. Meade's comments conveyed an expectation that Maj. Gurfein is guilty of something, which further demonstrates that severance was needed to protect against the manifest injustice of a "split-the-baby" vote finding Maj. Gurfein guilty of "something."

In conclusion, the prosecution's joinder and the military judge's declination to sever unduly prejudiced Maj. Gurfein's ability to defend himself. The military judge's ruling caused actual prejudice to Maj. Gurfein and prevented a fair trial. The prosecution's admitted use of evidence relating to EP to bolster the evidence relating to LS, and not solely for the limited purpose of identity evidence, cannot be correct in law and fact. Justice required that the military judge guard against an

impermissible cross-over of evidence from one alleged victim to the other which set conditions for a "split-the-baby" vote, convictions, and subsequent sentence. What is more, the military judge failed to consider the cumulative effect of the 10 points discussed *supra*, which must be an abuse of discretion. *Solomon*, 72 M.J. at 180–81.

VI.

WHETHER THE CUMULATIVE EFFECTS OF THESE SIGNIFICANT ERRORS REVEALS THAT THIS COURT-MARTIAL IS NOT CORRECT IN "LAW AND FACT"

In *United States v. Pope*, 69 M.J. 328, 335 (C.A.A.F. 2011), the Court noted that, "a number of errors, no one perhaps sufficient to merit reversal, in combination [may] necessitate the disapproval of a finding." The combined effects of the errors assigned *supra* prove that this trial is not correct in law and fact and that Maj. Gurfein suffered prejudice to his substantial rights. *See* Article 59, UCMJ.

CONCLUSION

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

Respectfully submitted,

JOHN N. MAHER
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 22 June 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

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), Appellant, Major Jonathan D. Gurfein, personally requests the court to consider the following assignments of error.

I.

WHETHER IT WAS PLAIN ERROR FOR THE MILTARY JUDGE'S FAILURE TO, SUA SPONTE, ORDER A MISTRIAL AFTER THE PROSECUTOR DISOBEYED HIS ORDER TO REFRAIN FROM MENTIONING THE DARK WEB AND/OR CHILD PORNOGRAPHY.

A military judge "may, as a matter of discretion, declare a mistrial when such action is manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings." R.C.M. 915(a).

The Discussion to R.C.M. 915(a) cautions that "[t]he power to grant a mistrial should be used with great caution, under urgent circumstances, and for plain and obvious reasons," including times "when inadmissible matters so prejudicial that a curative instruction would be inadequate are brought to the attention of the members." The court reviews a military judge's decision to deny a mistrial for an abuse of discretion. *Coleman*, 72 M.J. at 186.

It is true that a military judge should declare a mistrial only when "manifestly necessary in the interest of justice" due to circumstances which "cast

substantial doubt upon the fairness or impartiality of the trial." *United States v. Waldron*, 36 C.M.R. 126, 129 (C.M.A. 1966).

But here, measures short of a mistrial could not have cured the unfairly prejudicial and irrevocable effects of the prosecutors having mentioned the dark web six times and child pornography three times before the panel. Then, after the military judge directed the prosecutor not to mention those topics again, the prosecutor, in his rebuttal argument during findings, mentioned the dark web another four times and child pornography one additional time. In all, the prosecutor put 10 instances of the dark web and four instances of child pornography before the panel.

Nothing short of a mistral could have cured the inflamed emotions, misleading comments about issues not involved in the trial, and confusion permeating throughout the panel. The severity of the errors required a mistrial.

In *United States v. Donley*, 30 M.J. 973 (A.C.M.R. 1990), the military judge erred by not declaring a mistrial when a court member disclosed that he had heard counsel and the judge discussing inadmissible hearsay statements implicating the defendant in other offenses. Here, not just one member, but all court members heard the prosecutor utter dark web 10 times and child pornography four times, incredibly prejudicial comments having no place in the trial. *See also United States v. Rebuck*, 16 M.J. 555 (A.F.C.M.R. 1983) (military judge abused discretion in not

granting mistrial where court member's comments could have affected deliberations on verdict).

II.

ACCUSATIVE AND ADJUDICATIVE UNLAWFUL COMMAND INFLUENCE PERMEATED NEARLY EACH PHASE OF THIS COURT-MARTIAL, RENDERING THE PROCESS AND THE RESULT UNRELAIABLE

Unlawful command influence (UCI) is the improper use, or perception of use, of superior authority to interfere with the court-martial process. *See* Gilligan and Lederer, Court-Martial Procedure § 18-28.00 (4th ed. 2015). The CAAF's predecessor Court held over 60 years ago, "that any circumstance which gives even the appearance of improperly influencing the court-martial proceedings against the accused must be condemned." *United States v. Hawthorne*, 22 C.M.R. 83, 87 (C.M.A. 1956).

Accusatory UCI includes issues related to preferral, forwarding, and referral of charges. Adjudicative UCI relates to interference with witnesses, judges, members, and counsel. *United States v. Weasler*, 43 M.J. 15 (C.A.A.F. 1995). Anyone subject to the code is prohibited from attempting to coerce or improperly influence the court-martial or the members, or a convening, reviewing, or approving authority in respect to his judicial acts. Art. 37(a); R.C.M. 104(a)(2).

In this case, there are many instances of how the charges were investigated, preferred, and referred which give the appearance of improperly influencing the proceedings against Maj. Gurfein. These include but are not limited to: a) joinder of offenses involving different victims separated by two years to bolster evidence in contravention of CAAF's guidance in *Hills* and its trailer cases and Mil. R. Evid 413 and 414; b) declination to produce cell tower GPS data bearing on time and location; c) declinations to produce BMW GPS data on the same; 4) refusal to tender German Police interview notes; and 5) refusal to break the encryption of Maj. Gurfein's Blackberry to access call logs, texts, emails, and other data bearing on time and location.

Likewise, there are several concerning facts surrounding the GCMCA's transfer of Maj. Gurfein and selection of the panel members. None of the members were from outside of MARFOREUR proper. The command is very small - less than 250 Marines 1/3 enlisted. Of the remaining 2/3, a significant number were mobilized reservists. As a result, the five officers who sat on the panel were either careerists with further service ahead of them and thus an interest in pleasing the CA (the command so small that the CA and/or COS was involved in their Fitness Reports). or if they were reservists knew that the ability to stay on orders, gain pay and possibly return to active duty was contingent on positive Fitness Reports- either evaluated by another member, the COS or the CA.

Moreover, none of these members were stationed outside Panzer Barracks. The defense disclosed its intent to introduce alibi evidence in accordance with pretrial milestone. Accordingly, the prosecution was on actual notice that time and location would be material issues. Panzer has housing attached to it. In order to live off base in Stuttgart, you must have O-6 approval. The reservists on the panel lived on base at Panzer- the Panzer hotel. With traffic and commuting an issue this unfairly prejudiced Maj. Gurfein because the members had little, if any, experience in the relevant traffic, let alone with taking side roads, in-and-around Kelly Barracks. Consequently, the prosecution's argument - that appears to have been somewhat effective – that Maj. Gurfein had no reason to be on the roads he was on at the times prescribed, was likely to resonate much more deeply with the members outside Marine Corps Forces Europe/Africa, unfamiliar with the traffic and location, than with those selected from within Marine Corps Forces Europe/Africa, familiar with the traffic and location. As it turned out, time, location, and traffic were critical issues at trial.

The position that the MARFOREUR CG does not have the ability to select members from outside his staff, fails because after all, that very officer exercised jurisdiction over Maj. Gurfein.

There is also the issue of the two members that were excused. The defense received no explanation. Additionally, *voir dire* began on Friday afternoon instead

of the morning because a member of the panel was briefing the Commandant of the Marine Corps that day and had a conflict.

The defense sought to introduce Brigadier General (BG) Boldoc's testimony as to Maj. Gurfein's character for law-abidingness and good military character, given the numerous travels to Africa during which Maj. Gurfein would ostensibly have easy access to flash underage girls, but did not do so.

First, having a Green Beret General Officer who worked daily, hand-in-glove with Maj. Gurfein would have been compelling before the field grade officer panel.

Second, the defense sought to paint a picture of Maj. Gurfein's non-lewd sexual interests by presenting evidence through expert testimony that sexual attraction to children does not develop randomly, that in expert opinion, Maj. Gurfein did not have that character, and then through personal opinion show his non-lewd sexual interests. Major Mastin Robeson, MSG Hay, Lt. Col. Gurfein, all were able to do that. But, what would have been critical through BG Buldoc's testimony that through Maj. Gurfein's many travels with him and the major concern of child sexual exploitation by military members/UN/aid workers in third-world countries, that BG Bolduc was essentially with him 24x7 and there was never a thought about that, let alone a valid concern.

The Article 37 and 46 issue, however, is that BG Buldoc's staff judge

advocate advised him not to get involved to defend Maj. Gurfein. SJAs can commit UCI especially where they are advising senior leaders not to participate in a general court-martial and come to the assistance of a former *aide-de-camp*. *United States v. Hamilton*, 41 M.J. 32 (C.M.A. 1994).

The same is true with the Command Master Chief, whom the staff judge advocate advised not to testify in support of Maj. Gurfein. Indeed, the specific legal officer had been involved in the case, advising senior leaders, in connection to discovery like Maj. Gurfein's NIPR computer and building access.

There is also a chilling effect on the members who were working in sections like Current Operations and Plans and with access to daily SitReps from in country, they would have known about the incident and how it affected their opinion of SOCAF at large.

MARFOREUR pulled Maj. Gurfein from SOCAF, SOCAF didn't kick him out. So, for nine months Maj. Gurfein is aboard MARFOREUR/A, a small command, having to be escorted around whenever he goes in to the command building, and is working alongside another Major (Paul Duncan) who was under investigation for a well-known TAD entitlements allegation. Maj. Gurfein was stashed in the company office because his clearance was suspended.

Finally, pulling a small number of Marines from MARFOREUR instead of from outside commands such as Special Operations Command, Europe, European

Command, etc, reinforced a rift that exists between some Marines and the Special Operations community. The Marine Corps stood up its Special Operations Command in 2003 after 20 years of refusal to do so. The Marine Corps had said "every Marine is special, we don't need special operators" and the like. Many Marines got "grandfathered" in to the SOC community - they essentially were around when MARSOC got stood up and are now SOF. The ones that didn't have a bad taste in their mouth. And it's SOCAF that is doing the actual work in Africa. The Marine Corps is generally on the sidelines. There is a real and palpable envy that could be considered bias against Maj. Gurfein.

Although surely within the discretion of the convening authority, that he denied Maj. Gurfein's request to waive automatic and adjudged forfeitures for six months to support his spouse and three minor children, can be fairly viewed, in this case, as evidence of UCI against Maj. Gurfein.

CONCLUSION

For these reasons raised personally and those discussed more fully in the Assignments of Error, I respectfully request that the Court disapprove the findings and the sentence, with prejudice.