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 MOTION FOR RECONSIDERATION AND SUGGESTION FOR *EN BANC* CONSIDERATION** **Oral Argument Requested** 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.

COMES NOW Appellant who, pursuant to Rule 31of this Court's rules of practice and procedure, respectfully requests reconsideration and suggests *en banc* consideration of Panel 3's 10 May 2019 decision which denied all six of Appellant's assignments of error, to include those claiming constitutional and statutory deprivations.

JURISDICTION

This Court possesses jurisdiction pursuant to Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 as Major Gurfein has not petitioned the

United States Court of Appeals for the Armed Forces (CAAF) for a grant of review pursuant to Article 67, UCMJ, 10 U.S.C. § 867, and, this request is filed within 30 days of Panel 3's issuance of its decision. No other Court has acquired jurisdiction to entertain this matter.

SUPPORT FOR RECONSIDERATION

Major Gurfein presents three main reasons justifying his request for reconsideration of each of his assignments of error.

First, the military judge dismissed the Article 120c, UCMJ, 10 U.S.C. § 920c offense. However, the finding of guilty still appears as a conviction. Major Gurfein respectfully requests that this Court disapprove the finding, set aside the conviction, and update the records to reflect that the Article 120c UCMJ offense was dismissed. *United States v. Gurfein*, No. 201700345.

Second, Panel 3 made at least 20 material findings that are decidedly contrary to the evidence of record, which must be misapplications of the Court's Article 66, UCMJ, 10 U.S.C. § 866 plenary jurisdictions and authority.

Third, Panel 3 failed to fully and fairly follow prevailing precedent when it comes to a prosecutor's Due Process obligations, discovery duties, candor, obedience to the Court, and permissible commentary before the jury.

SUPPORT FOR *EN BANC* CONSIDERATION

Major Gurfein notes that Panel 3's decision departs from the CAAF's and this Court's precedents concerning (1) relevance, (2) factual sufficiency, (3) legal sufficiency, (4) probative force of physical evidence, (5) lack of probative force of circumstantial evidence, (6) a prosecutor's obligations under the Fifth Amendment as well as Rules for Courts-Martial (RCM) 701(a)(6) and (a)(2), (7) prosecutorial misconduct, (8) the cumulative effects of constitutional and statutory errors, (9) attaching after-acquired sworn expert affidavits to the appellate record to test for "materiality" and "unfair prejudice" of undisclosed and unproduced evidence favorable to the defense, and (10) the Article 66, 10 U.S.C. § 866 mandate for objective, full, fair, and jurisprudential review of both an Appellant's claims and the Appellee's post-trial appellate litigation narrative.

Additionally, Panel 3's decision, with respect, is contrary to the holdings and rationales in the following Supreme Court precedents interpreting the Constitution, each of which was briefed to Panel 3 but went unapplied or misapplied.

> (a) *Berger v. United States*, 295 U.S. 78 (1935) (prosecutor must find truth not just fix guilt).
>
> (b) *Brady v. Maryland*, 373 U.S. 83 (1963) (prosecutor must disclose material exonerating or mitigating evidence).
>
> (c) *Burns v. Wilson*, 346 U.S. 137 (1953) (military must give full and fair consideration to appellant's

constitutional claims).

(d) *Giglio v. United States,* 405 U.S. 150 (1972) (Evidence that could be used at trial to impeach witnesses is subject to discovery).

(e) *Jackson v. Virginia*, 443 U.S. 307 (1979) (constitutional sufficiency of evidence).

(f) *Kyles v. Whitley*, 514 U.S. 419 (1995) (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).

(g) *Oregon v. Kennedy*, 456 U.S. 667 (1982) (mistrial was proper where the prosecutor merely asked an expert witness if the accused "was a crook.").

To ensure uniformity with this Court's decisions, adherence to Supreme Court and CAAF precedent, and to address the exceptional constitutional and statutory claims in this case (novel issues of cell tower/phone time and location data, Government-encrypted Blackberry time and location data, and personally-owned vehicle (POV) GPS time and location data), *en banc* consideration is altogether fitting and proper to ensure the Court's decision is reliable, grounded, the result of a fair-minded probing review, and correct in law and fact. *See* Article 66, UCMJ.

I. FACTUAL BACKGROUND OF THE COURT-MARTIAL

This court-martial involved two 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, made reports dating in 2014, and the panel acquitted Major Gurfein of Article 120 offenses relating to her. (R. at 11). The second young girl is L.S., whose reports date to 2016, but the panel convicted Major Gurfein of Article 120 offenses relating to her. (R. Report of Result of Trial).

II. PANEL 3'S ERRONEOUS FINDINGS AND MISSTATEMENTS

For ease of reference, Major Gurfein reproduces each of Panel 3's erroneous findings, then refers to the correct undisputed facts of record, demonstrating the need for reconsideration *en banc* and corrective action.

A. Discussion of Conduct of Which the Jury Found Major Gurfein Not-Guilty

As a preliminary matter, Panel 3 engages in a lengthy recitation of allegations of an incident that purportedly occurred in 2014. However, the jury returned findings of not guilty for those offenses. Panel 3's discussion is gratuitous, misplaced, and unfairly attributes criminal conduct to Major Gurfein that the jury flatly rejected. The discussion of these allegations as "facts" leads one to conclude that Panel 3's approach to its review of this case has been to endorse the prosecution's arguments rather than conduct the type of searching, probing, and objective review appellate courts are dutybound to provide.

Moreover, the mere recitation of these points, for which Major Gurfein was

acquitted, unfairly colors him as having engaged in more severe and pervasive criminality than the trial court found. Inclusion of matters the jury rejected to paint Major Gurfein as something more nefarious is inconsistent with fundamental principles of objective appellate jurisprudence, suggests *post-hoc* rationalization, and runs contrary to Article 66, UCMJ's mandate.

B. Findings Inconsistent with Physical Evidence, Testimony, and Undisputed Facts

The sheer number of factual misstatements, logical errors, and large-scale adoption of the Government's appellate litigation narrative to the exclusion of Major Gurfein's evidentiary showings reasonably leads one to question whether the decision as a whole is truly the product of an analytical review to determine if the findings and the sentence were correct in law and fact. *See* Article 66, UCMJ.

(1) For example, Panel 3 reasoned:

> Most significantly, at 1901 L.S.'s father photographed the appellant in his car close to the site of the exposure, which was within minutes of the exposure. ***On that evidence alone*** a reasonable factfinder could have determined that appellant had sufficient time to drive from his office to the scene of the indecent exposure.

Id. at 7 (emphasis added).

Panel 3's logic is fundamentally and fatally flawed, demonstrated by a straightforward example. Consider: if one stood at the side of the road at 1901 and took a digital image of every car that passed during that time frame, according to

Panel 3, that is enough evidence to convict each driver and send them to prison. In other words, during after-work rush hour traffic in suburban Stuttgart near the Autobahn, if 20 cars drove by the location where Major Gurfein was driving at 1901, a digital image of those cars is factually and legally sufficient to convict all 20 drivers of flashing L.S. No appellate court could sustain a conviction on this faulty premise.

Panel 3's unsound reasoning on this point is further exposed by noting (a) the time of the offense (1849 or 1850), (b) the time that elapsed between the offense and L.S.'s father having taken the digital image of Major Gurfein's car at 1901 (11-12 minutes), and (c) the distance between the scene of the offense and Major Gurfein's car at 1901 (approximately 600 meters).

The record confirms the time of the offense as "1849 or 1850 (R. 2110). L.S.'s father took the digital image of Major Gurfein's car at 1901, that is, 11-12 minutes after the offense occurred. The distance between the base of the hill, the scene of the offense, and Major Gurfein's location at 1901, was approximately 600 meters.

To follow Panel 3's irrational way of thinking, that means that Major Gurfein traveled only 600 meters in 11-12 minutes after having committed a lewd act in broad daylight in a crowded neighborhood, facts which cut against Panel 3's portrayal of Major Gurfein as seeking to escape and evade detection. Panel 3's logic collapses on itself, leaving no reliable probative value in its analysis.

(2) Panel 3 found that the victim "ran with her bike the rest of the short distance up a hill to her house and ***immediately*** told her parents." *Id*. (emphasis added). However, Panel 3 ignored that the assailant was at the base of the hill at "1849 or 1850" (R. 2110) and that L.S.'s mother testified that L.S. and her father got into their family van at "1856 or 1857 or 1859" and sought to drive after the assailant. (R. at 1051).

This means that positive eyewitness identification of the actual assailant was lost at 1849 or 1850 when L.S. left the scene and climbed the hill to her home, a critical evidentiary point Panel 3 did not address. That the loss of positive identification by the only eyewitness is not part of Panel 3's appellate review is puzzling, unexplained, and unjustifiable.

Moreover, L.S. and her mother's testimony significantly degrades Panel 3's finding of ***immediacy***, something the Government sought to prop up as part of a litigation construct seeking to make the timeline stronger than it really is to justify the findings on appeal.

(3) Nowhere does Panel 3 evaluate Major Gurfein's legitimate evidentiary point that there was no fresh pursuit, as Panel 3 mistakenly insinuates citing a leap of logic. Any and all visibility of the actual assailant and his car had been lost by the time L.S. reached her family home, reported to her parents, and then she and her father came upon the first black BMW sports car they saw. The only time there was

an unbroken visual identification is from the time the mother and daughter saw the car at the bottom of the hill until the incident occurred, and the girl ran home. However, Panel 3 ignored this seemingly crucial testimony and break in the evidentiary chain.

(4) Panel 3 noted that "L.S. said it was the car," presumably referring to Major Gurfein's vehicle. This is not true. L.S. ***never*** testified that "it was the car." Panel 3 misstates the trial testimony, ostensibly to re-link the broken chain of "fresh pursuit." Major Gurfein cited the following excerpt showing that L.S.'s identification of the car was neither confident nor firm, and she never testified that "it was the car."

> Q. You said you were driving about two minutes before you saw the car?
>
> Father. Yes, I did.
>
> Q. All right. You saw the car that ***you thought*** matched the description your daughter had given you, correct?
>
> Father. Yes.
>
> Q. And as soon as you saw ***the first black car you came upon***, you turned around and asked your daughter, "***Could*** this be the car?"
>
> Father. 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."

Father. Correct.

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

Father. Yes.

(R. at 1011) (emphasis added).

L.S.'s Father's testimony is flatly against Panel 3's finding that "L.S. said it was the car," a critical evidentiary point that was improperly assessed against Major Gurfein and for the prosecution.

(5) Another troublesome mischaracterization is Panel 3's having cited evidence the trial judge ruled inadmissible. Panel 3 wrote, "[a]t a German police photo lineup, Mr. S. identified the appellant's photo as the man he saw driving the BMW Z4 on 20 September 2016." *Id*. at 4. Because the pretrial line-up was overly suggestive, biased against Major Gurfein, and hence unlawful, the military judge did not authorize the prosecution to mention it in court. (R. App. Ex. LXVI).

Panel 3's mention of the inadmissible identification now on appeal departs from judicial norms, principles of fundamental fairness, and demonstrates that Panel 3 took on the role of the Government's advocate, seeking to bolster the prosecution's evidence as opposed to engaging in even-handed judicial decision-making by portraying the prosecution's evidence against Major Gurfein to be stronger than it really is.

If Panel 3 were appropriately and judicially analyzing the facts to determine the issues on appeal, it surely would have also addressed the point that despite the photo lineup being biased and unlawful, the only eyewitness was still unable to pick Major Gurfein from the photo lineup. Panel 3 failed to do so.

(6) Panel 3 next erroneously found that Major Gurfein "admitted to being in the proximity of L.S.'s house on 20 September 2016 as he was returning home from work." *Id*. at 4. This finding has no support whatsoever. Again, Panel 3 overstates the evidence. As clearly pointed out during his CID interrogation, his testimony at trial, and in his papers before this Court, Major Gurfein had no idea at all where L.S. lived or where her house was located on the night in question.

(7) In still another misstatement, Panel 3 mischaracterized Major Gurfein's main appellate position as "[h]e challenges L.S.'s and her father's identification of him as L.S.'s offender." *Id*. at 6. Nowhere in the record, however, does L.S. identify Major Gurfein as the man who exposed his penis to her. Nowhere in the record does L.S.'s father identify him as the offender. Beyond any doubt, L.S.'s father was not at the scene and therefore would not have been able to identify the actual flasher.

All he identified was that Major Gurfein was the man he followed when looking for the man who exposed himself to his daughter. This after the military judge already ruled the photo lineup was so biased that it prevented the daughter from identifying Major Gurfein as her assaulter, in-court. Panel 3 appears to be

advocating for the prosecution and abandoning its objective role as an appellate court.

(8) Panel 3 next extrapolated that "L.S. had a good opportunity to observe the man who exposed himself to her and the vehicle he was driving." *Id*. at 6. What Panel 3 totally ignored, however, was evidence degrading the reliability of L.S.'s testimony, which was not made a part of Panel 3's review.

> a) LS inconclusively identified Major Gurfein's car after her father asked, "***could*** this be the car?" (R. at 1011) (emphasis added).
>
> b) LS inconclusively 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), showing a highly suggestive situation between parent and child.
>
> c) LS testified that "the [assailant's] car has five seats," when Major Gurfein's has only two seats. (*Compare* R. at 1067 *with* R. at Pros. Ex. 42).
>
> d) LS described the assailant's hair as blonde; however, Major Gurfein has, by all accounts, decidedly fire engine red hair. (*Compare* R. at 1069 *with* Def. Ex. HH).
>
> e) Prior to trial, LS stated the assailant's pants "were all the way up," but at trial, she testified that, "[h]e was wearing pants and he had pulled them down to his knees. (*Compare* R. at App. Ex. VII, 24 of 43 *with* R. at 1071).
>
> f) LS testified that "[t]he man's window was down and our window, I believe, was also down," but LS's father testified that the family van's tinted windows were closed, as were those in Major Gurfein's car. (*Compare* R. at 1080 *with* R. at 982).

> g) LS was seated in the back behind the driver's seat of the van with tinted windows while Major Gurfein's car was on the Passenger's side. (R. at 1011).

These inconsistencies show that L.S.'s recollection of the event is not sufficiently reliable and trustworthy to convict Major Gurfein. Panel 3 wholly ignored that L.S. was the only eyewitness to the alleged flashing; it was not the German police, not her father, not her mother, not the CID, and not the prosecution. That L.S.'s weak testimony regarding her recollection of the perpetrator that was the linchpin supporting Major Gurfein's conviction fatally undermines the foundation of his convictions. Not only did the prosecution fail to prove he was at the location at the time prescribed, but the only eyewitness could not dependably identify him. Yet, Panel 3 mischaracterized L.S.'s testimony as stronger than it was in the face of significant and numerous deficiencies.

(9) Panel 3 next erroneously concluded that "at 1901 L.S.'s father photographed the appellant in his car close to the site of the exposure, which was within minutes of the exposure." *Id*. at 7. But this finding is problematic when viewed in the appropriate factual context. The prosecution placed the perpetrator at the scene at "1849 or 1850." To an arithmetic certainty, the photograph was taken 11-12 minutes later, at 1901, surely not "within minutes of the exposure," and ample time for the real perpetrator to be on his way, free. Panel 3 is again advocating for

the prosecution, making the evidence that Major Gurfein was the correct assailant appear stronger than the record reflects.

(10) In what can be fairly seen as "cherry-picking," Panel 3 selectively cited points from the Government's brief to make it appear Major Gurfein had a guilty mindset while L.S.'s father was following his vehicle by taking evasive maneuvers, the implication being that an innocent person does not flee.

> Mr. S and L.S. followed the vehicle, which appellant subsequently admitted he was driving, through two traffic circles before the appellant ***abruptly made a U-turn*** and went back in the direction they had come from.

Id. at 4 (emphasis added)

According to all trial records, however, to include L.S.'s father's testimony and Major Gurfein's testimony, Major Gurfein was driving in accordance with the speed limit (which was under 30 kph) until he reached on the on-ramp to the Autobahn where he understandably sped up.

At no point prior to the Autobahn did Major Gurfein drive "abruptly" as Panel 3 took the liberty of injecting. What Panel 3 did not evaluate at all, was the point that a guilty assailant bent on escape does not, it stands to reason, drive within the speed limit. Further cutting against Panel 3's unfounded implication that Major Gurfein was fleeing are the uncontroverted facts that Major Gurfein was only 600 meters away from the scene of the assault 11-12 minutes after it occurred, on a route

between his workplace and his home. Furthermore, L.S.'s Father testified that when he initially came upon Maj Gurfein's vehicle, Maj Gurfein did not suddenly attempt to evade or escape but casually drove off with the flow of traffic.

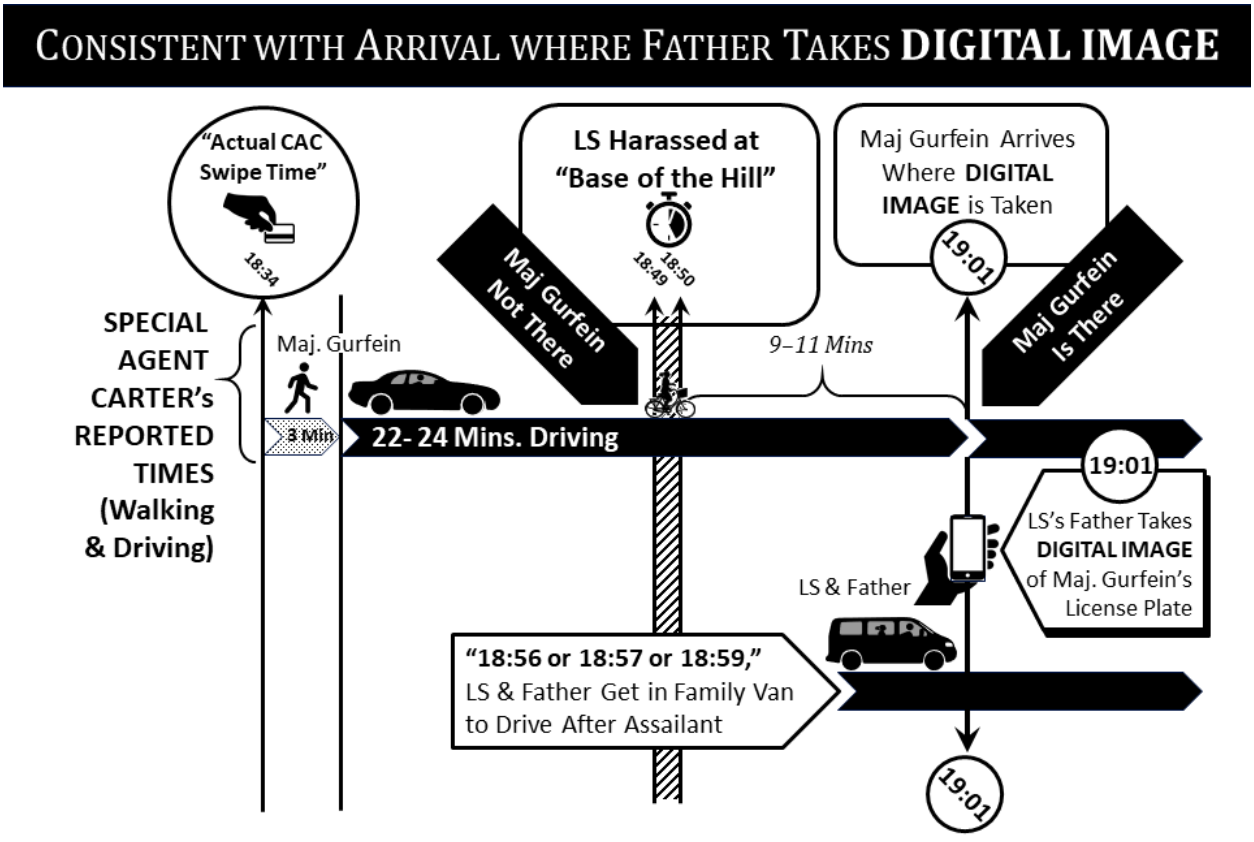
What is more, the "U-turn" was made in the second traffic round-about, not as Panel 3 misstates, after having left two traffic circles. Indeed, the Government argued this very point in its papers, which Panel 3 apparently adopted without verifying the record.

(11) Panel 3 again unfairly enlarged the specter of Major Gurfein's criminality when it wrote that he was charged with making false official statements about the 2014 and 2016 incidents. *Id*. That is not true. Panel 3 overstated and mischaracterized the charges. He was charged with making a false official statement ***only*** concerning the 2016 allegations. This misstatement, along with the others, highlights how Panel 3 unfairly painted Major Gurfein in an unfairly and inaccurately negative light. Not only was Major Gurfein not charged with making a false official statement for 2014, but he was also wholly acquitted of the 2014 underlying sexual offenses.

(12) Panel 3 conflated Major Gurfein's physical presence at 1901 between his workplace on Kelly Barracks and his home in Dettenhausen as evidence that he was near the scene of the crime. Although that is admittedly true, an equal if not stronger inference, however, is that the very same evidence, offered by the

prosecution, places Major Gurfein at a time and location where he reasonably should have been while driving home from Kelly Barracks to Dettenhausen when L.S. and her father first saw his car.

Having used his CAC card to "swipe out" at 1833:56 and having driven 22 – 24 minutes towards his home in Dettenhausen placed Major Gurfein in the general vicinity of where LS's father first saw Major Gurfein's car. L.S. and her father got into their family van at "1856 or 1857 or 1859" per LS's mother's testimony and sought to drive after the assailant. (R. at 1051). LS's father took a digital image of Maj. Gurfein's license plate at 1901. (R. at 985). Please refer to Graphic 1, below.



Graphic 1.

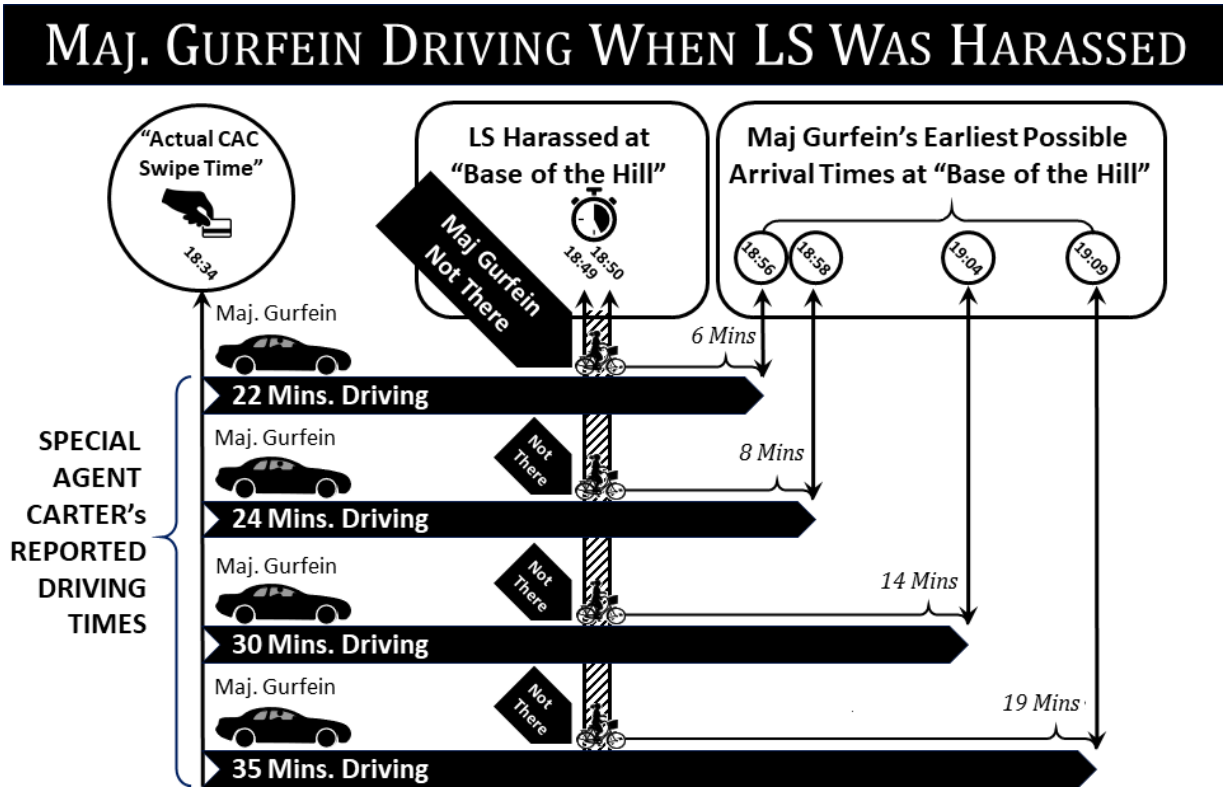
Consequently, the prosecution's timeline proves that Major Gurfein was between Kelly Barracks and his home in Dettenhausen, ***where he was supposed to be***, according to LS's father's testimony and the digital image of his license plate taken at 1901. But, Panel 3 failed to consider these important defense points while favoring the prosecution's lesser reliable version.

(13) Further showing the factually and legally insufficiency of Panel 3's findings is the total absence of any analysis of Special Agent Carter's testimony (the lead prosecution witness) that it was physically impossible, given Major Gurfein's CAC card swipe and several re-created drives at the same time of day, to be at the scene at the time the prosecution urged the jury.

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

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

A review of the prosecution's evidence establishes that Major Gurfein was not at the scene of the crime on the night in question at the time prescribed. Graphic 2 below summarizes the prosecution's evidence:



Graphic 2.

That Major Gurfein was driving at the time L.S. was assaulted is an alternative demonstration of facts, introduced by the prosecution, supported by physical evidence, and is therefore, reasonable doubt. Panel 3 failed to address this compelling evidentiary showing.

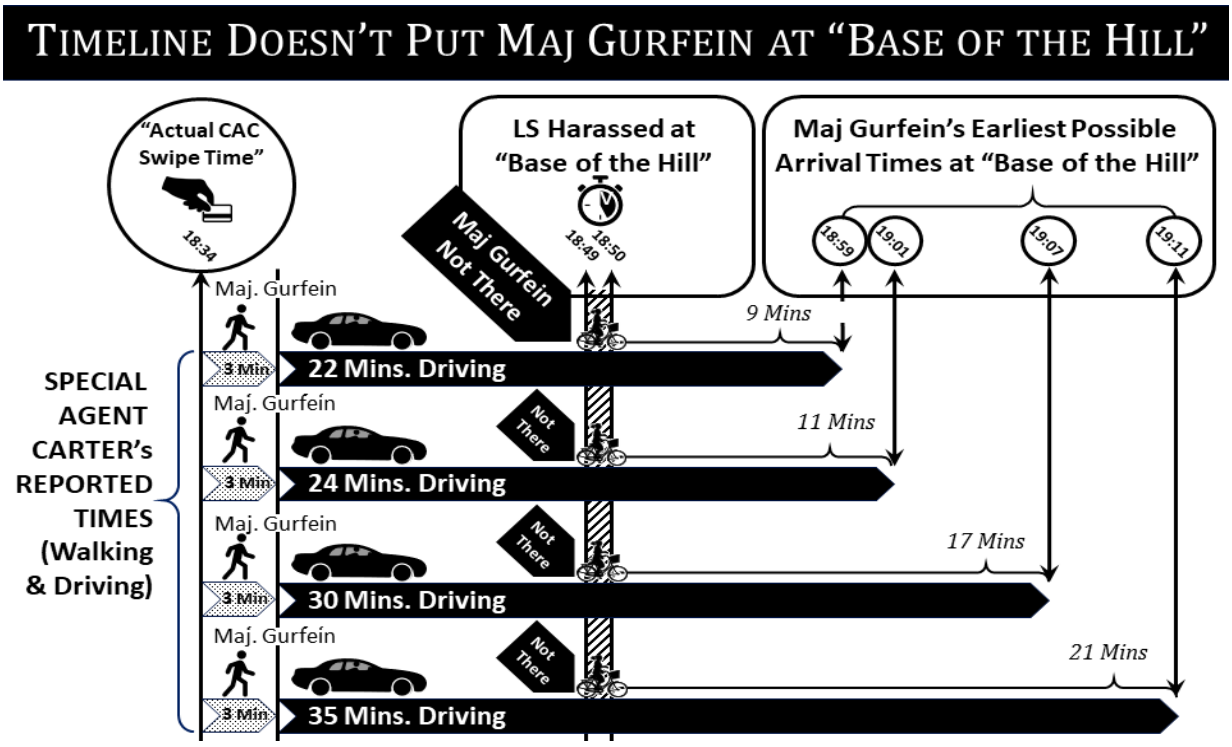
(14) Further illuminating the factual and legal insufficiency of Panel 3's findings is Special Agent Carter's testimony that it took three minutes to walk from

the front door of Major Gurfein's office building on Kelly Barracks to the closest parking lot behind the gym to get into his car and begin the drive toward his home in Dettenhausen:

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

(R. at 1348).

Unmentioned by Panel 3 is that if one begins the timeline from where Agent Carter *approximated* Major Gurfein's car to have been parked, to include the three-minute walk from the CAC swipe location to the parking space, one finds that even more time has elapsed between Major Gurfein's departure time and the time of the crime. Adding in this additional time makes the possibility that Major Gurfein could have arrived at the "base of the hill" at "1849 or 1850" impossible. The impact of adding these three minutes is summarized in Graphic 3.



Graphic 3.

That Major Gurfein was driving at the time L.S. was assaulted is an alternative demonstration of facts, supported by physical evidence, and is therefore, reasonable doubt. Panel 3 did not evaluate this weighty evidentiary showing of reasonable doubt.

(15) Panel 3 again applied illogical and thus incorrect reasoning that flies in the face of physical proof when it cited evidence of Major Gurfein's being a fast driver in order to place him at the scene of the offense at the time the prosecution prescribed.

> Furthermore, the appellant introduced substantial evidence to prove that he was a fast driver and regularly drove much faster than other drivers. This fact

> substantially undercuts the multiple estimates that the defense introduced regarding how long it would typically take a driver to travel from the appellant's office to the scene of the incident.

United States v. Gurfein, No. 201700345 at 7.

First, the ***prosecution***, not the defense as Panel 3 wrongly noted above, introduced the multiple estimates regarding how long it would typically take a driver to travel from the appellant's office to the scene of the incident.

Second, Special Agent Carter, who testified that he lived in Stuttgart for most of his career in the Army and for large part of his life growing up as a military "brat" in Germany, swore that the fastest time between Kelly Barracks and the base of the hill was 22 minutes (25 with the additional 3 minutes to walk from the CAC swipe location to Major Gurfein's parked car on Kelly Barracks).

Panel 3 concluded that because Major Gurfein was a "fast driver," he was somehow able to be at the scene of the crime 10-12 minutes before the lead CID investigator was able to do it, after multiple attempts, under similar conditions at the same time of day.

Stated differently, Panel 3 appears to believe that Major Gurfein could have made it to the scene 12 minutes after having left work, in rush hour traffic in suburban Stuttgart. If Panel 3's reasoning is sound, that means Major Gurfein had to

be driving an average of 220km/hr or 137mph the entire time to cover the distance and be at the scene at the time prescribed, which is entirely unrealistic.

Fourth, Panel 3's logic is inherently contradictory. On the one hand, Panel 3 claims Major Gurfein drove over 220km/hour or 137mph/hr to get at the scene at the time prescribed, but on the other hand, Panel 3 notes that in the 11-12 minutes after the offense, Major Gurfein drove only 600 meters away.

Panel 3's faulty position is fairly seen as loose conjecture and sheer speculation, stretching credulity in order to "shore up" gaps in the trial evidence. To offer errant and illogical reasoning, in the face of undisputed exonerating evidence, indicates a desire to advocate for the prosecution and disfavor Major Gurfein.

(16) Panel 3 again used faulty reasoning when it rejected Major Gurfein's showing that it was against the principles of time and space for him to have been at the scene of the crime at 1849 or 1850. Panel 3 wrote, "the fault with this theory is that we know precisely where the appellant was located within a few minutes of the exposure because he was photographed by the victim's father at 1901."

The legal and logical problem, though, is that where Major Gurfein was 11-12 minutes after the assault does not prove where he was ***at the time of the assault***. There is substantial evidence of record proving he was elsewhere and that is was physically impossible for him to be at the scene of the crime at the time the prosecution prescribed, which is reasonable doubt. Moreover, Panel 3' use of

"within a few minutes of the exposure" overstates the undisputed timeline evidence that the 1901 image was taken 11-12 minutes after the time of the assault at 1849 or 1850.

(17) Panel 3 again erred by stretching to place Major Gurfein at the scene of the crime when it ignored evidence adduced at trial that a set of stairs was present at the location where L.S. and her Father came upon Major Gurfein at 1901. Instead, Panel 3 relied heavily on evidence that another stairwell was at the scene of the offense.

> The appellant's argument that it was physically impossible for him to have been at the location where the exposure occurred at the time alleged is substantially undermined by the appellant's own evidence. The appellant used his identification card to "swipe out" of his office shortly before 1834 on 20 September 2016. When interrogated by CID, the appellant stated that he stopped to make a cell phone call about 5 to 10 minutes after leaving his base. ***He did not recall the street he stopped on to make the call, but he remembered that there were some stairs next to the road where he stopped***.
>
> Mrs. S. testified that when she was driving home from the stables she saw a vehicle matching the appellant's vehicle stopped in the road down the street from her home. ***There were stairs near the road where Mrs. S saw the car stopped***.

Id. at 6 – 7 (emphasis added).

Absent from Panel 3's analysis, however, is the evidence the defense tendered at trial that there is a large set of steps at the intersection where L.S. and her Father

started following Major Gurfein. Moreover, suburban Stuttgart is a highly populated area with many villages containing myriad sets of steps. Attempting to link one set of steps to another set of steps at the base of the hill for proof that Major Gurfein defied the physics of time and space (by driving a distance in heavy traffic faster than physically possible) is untenable.

(18) Panel 3 cobbled together unrelated facts and mischaracterized Major Gurfein's statement to CID two weeks after the incident that he made a call about 5 to 10 minutes after leaving work next to a set of stairs, and then remembered being followed, as solid and reliable evidence that Major Gurfein was at the base of the hill five to ten minutes after having left work. *Id*. at 6-7. Panel 3 overreached in its assessment, which is belied by the undisputed evidence of record.

First, Major Gurfein's recollection of when he made the calls turns out to be accurate as evident by the time he swiped out of the office (1833:56) and the time of the first call (18:42) which was around nine minutes.

Second, his location at the time of the calls is obviously not the base of the hill (scene of the crime) because it is scientifically impossible to have driven that distance in nine minutes, as testified to by the prosecution's lead CID agent, Special Agent Carter, which also makes the relevance and importance of the cell tower and phone records so much more vital to this case, as discuss. Being able to prove the exact location of Major Gurfein during this call to his wife would dismantle the

whole case against him. Surely the prosecution and Panel 3 were aware of this, but each turned a blind eye in favor of affixing and affirming guilt.

Third, Panel 3 contradicts itself by finding that Major Gurfein's testimony to the investigator proves that he was at the base of the hill. Major Gurfein told SA Carter that he recalled being followed after making the calls. Major Gurfein was never followed from the base of the hill. Major Gurfein was followed according to his testimony and L.S.'s Father's testimony from the other side of the village along the main route approximately 600 meters away from the base of the hill.

Indeed, L.S.'s Father testified about the elaborate route he took from his home, past a school, and other areas until he first saw Major Gurfein's car and only then started following it.

Fourth, the reliable evidentiary answer to all of this, as presented by the defense, and corroborated by phone records, is that Major Gurfein left his office at 1833:56 and nine minutes later made a phone call to his wife for nearly four minutes. After that phone call, he attempted to reach his Uncle. Then at around 1901, he was at the end of L.S.'s village (between Kelly Barracks and his home in Dettenhausen) near a large set of steps when L.S.'s Father spotted the vehicle and mistakenly followed the wrong vehicle. Panel 3's choice of facts and interpretation of them is not consistent with the undisputed facts of record.

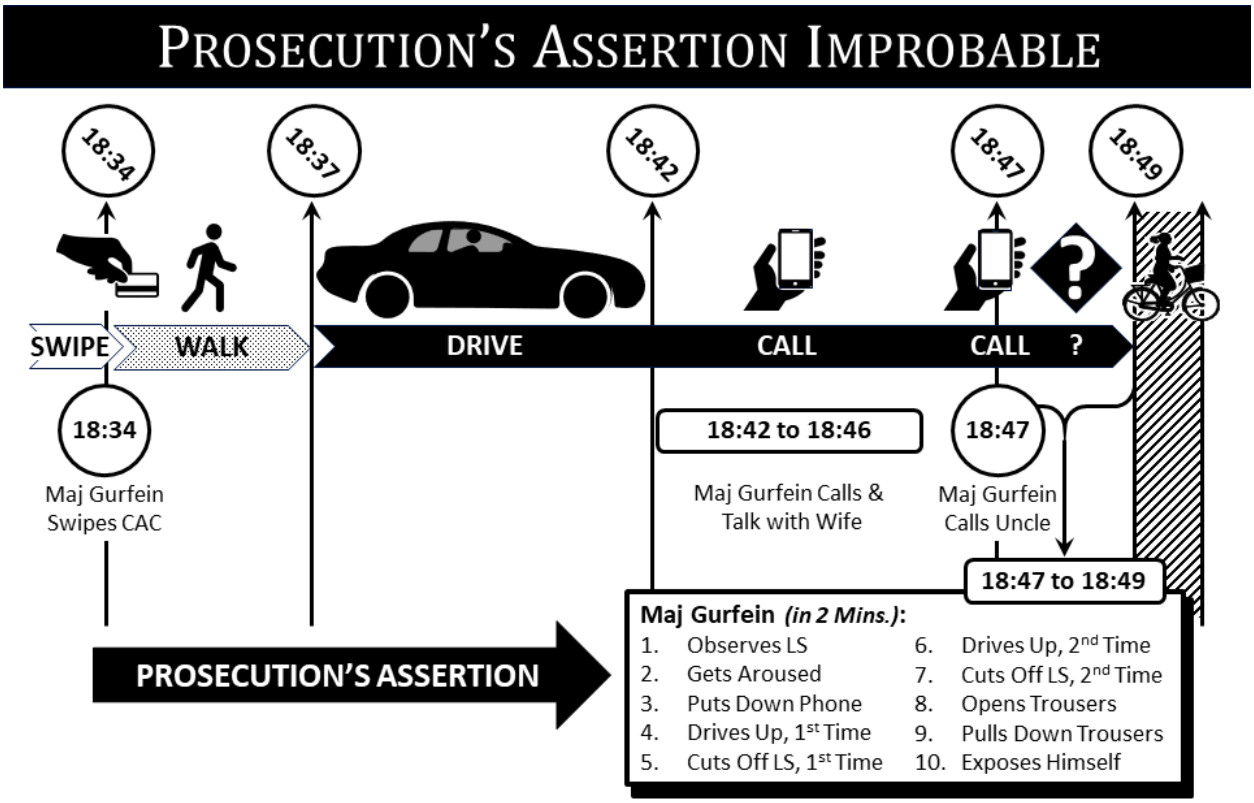
(19) Panel 3 did not address Major Gurfein's mindset. The undisputed evidence that is relevant to Major Gurfein's state-of-mind shows the inherent inconceivableness that Major Gurfein was the actual assailant. Consider the following:

> (a) At 1834, Major Gurfein swipes his CAC card when leaving the office.
>
> (b) He drives from Kelly Barracks toward Dettenhausen in after-work traffic.
>
> (c) At 1842, he calls his wife, and the call lasts nearly four minutes.
>
> (d) At 1847, he phones his uncle, in a call that lasts approximately 25 seconds while ringing, but does not connect; and yet, according to Panel 3…
>
> (e) Only two minutes later, at 1849 and 1850, he flashes a girl at the base of the hill.

To believe this version of events as Panel 3 apparently did, one must suspend criticality and accept that in less than two minutes, Major Gurfein put down his phone, saw LS, cut her off once with his car as she was walking with her bike, she passes, he drives up again, cuts her off a second time, she tries to depart, and the "flash" occurs while he is shaking his penis while mumbling something to her.

The takeaway: in less than two minutes, after talking with his wife, trying to call his uncle, driving in after-work traffic, and driving his car in a tight, curvy street in a German neighborhood, Major Gurfein's mind had to turn from a potential

conversation with his uncle (a retired Marine Lieutenant Colonel with whom he often had serious discussions about tactics, career progression, and military history) to lust for a young girl, determining to unbuckle his belt, unbutton his trousers, pull down his pants, all while driving, achieving sexual excitement, and all within two minutes. Graphic 4 summarizes these implausibilities.



Graphic 4.

(20) Cementing reasonable doubt is that all of the aforementioned occurred among at least 74 other unsolved incidents of indecent exposure to young girls in the area by men in cars during the three years leading up to the night in question. (R. at

964). Panel 3, however, made no comment about this substantial fact bearing on guilty or not guilty.

In all, Panel 3 ignored substantial and exonerating physical, testimonial, and inferential evidence on the most important issues in the case, questions that suggest that the trial and appellate review were not fully and fairly considered, nor are they correct in law or fact. *See*, Article 66, UCMJ.

III. FAILURE TO ADHERE TO PREVAILING LEGAL PRECEDENT

With regard to the prosecution's failure to disclose and produce the cell phone tower records which stood to contain time and location data, Panel 3 ignored Major Gurfein's showings that simple coordination with the American contracting office, or simply asking the German cell phone company, or simply asking the German Police who were partnered with the investigators to ask, would have produced records of German telephone service to American forces under an American government contract. These records were material to the preparation of the defense. *See* Rule for Courts-Martial (RCM) 701.

Although briefed, Panel 3 nowhere applies the Supreme Court's leading case concerning a prosecutor's obligations to learn of any favorable evidence known to others acting on the government's behalf in the case, *Kyles v. Whitley*, 514 U.S. 419 (1995). The failure to apply Supreme Court precedent to Major Gurfein's claim that the prosecutor had a constitutional obligation to secure records from the German

authorities working on the case with the American authorities is a substantial appellate error.

Nor in Panel 3's decision is there evidence of the prosecutor's ever asking for the cell phone tower records, whereas the prosecutor said he would do so during a pretrial motion hearing. One possibility is that the prosecutor never made the request and misled the judge; or perhaps the prosecution did make the request, and did not like the answer the prosecution received. Either way, there is a fundamental error that calls into question the integrity of the findings and the sentence.

Panel 3 expressed skepticism about whether the phone records even existed in the first place, assigning no fault to the prosecutor for not having them as part of a professional investigation, when it wrote, "appellant failed to establish that the data even existed." *United States v. Gurfein*, No. 201700345 at 9. The problem, though, is that Panel 3 wholly ignored Major Gurfein's showing that the use of cell phone technology in criminal prosecutions has become so routine and commonplace that it has been referred to as "a staple of everyday policing."[1]

In connection with the prosecution's failure to disclose and produce evidence associated with the encrypted Blackberry, which also contained time and location data, it stands to reason that if Federal Government personnel installed the

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

encryption, they could also uninstall it. Indeed, the Panel's reliance on phone records in its opinion proves just how material and crucial that evidence stood to be in affecting the outcome of the trial.

Concerning the prosecution's failure to disclose or produce Major Gurfein's GPS records from his car, which contained time and location data, Panel 3 twice rejected the sworn affidavits of Major Gurfein's forensic expert and refused to attach them to the record for consideration on appeal. Such repeated judicial reluctance to receive and consider reliable evidence bearing on the truth suggests a "don't bother me with the truth, my mind is made up" myopic and inflexible approach to Article 66, UCMJ authority.

Had Panel 3 adequately considered the expert evidence, it would have learned, based on three decades of CID experience, many in Germany, that the cell tower and phone records were available, that the technology exists to extract the Blackberry data, and the technology exists to extract the GPS time and location data, but the prosecution called a CID agent with no training in that technology, who admitted as much on the stand.

When testing for whether a non-disclosure or non-production was harmful or not on appeal, having the withheld evidence available would have served the truth and justice. But, Panel 3 repeatedly and without explanation refused to accept Major

Gurfein's relevant and expert post-trial affidavits bearing on these constitutional and statutory questions.

For these reasons, and those discussed more fully in Major Gurfein's opening and reply briefs, the Panel did not adhere to prevailing legal standards in its analysis of Major Gurfein's Due Process claims that he was deprived of a trial of all the facts.

IV. PROSECUTORIAL MISCONDUCT

Major Gurfein relies on his opening and reply briefs and respectfully requests reconsideration of the entirety of the prosecutorial misconduct running from stem to stern in this court-martial.

CONCLUSION

Panel 3 unfairly incorporated conduct for which the jury acquitted Major Gurfein for the inference that his criminality extended back years and to more than one victim. Panel 3 included identification evidence ruled inadmissible at trial in an attempt to create an eyewitness identification that simply does not exist. Panel 3 adopted the Government's *post-hoc* appellate litigation positions, largely if not totally based on inference, while at the same time, Panel 3 ignored Major Gurfein's undisputed factual showings corroborated by physical evidence (CAC card, phone records, CID Agent testimony).

Indeed, a side-by-side comparison of the Government's briefs and the language Panel 3 chose to use in its opinion reveals a disturbing one-sidedness in

favor of the prosecution wholly inconsistent with full and fair consideration.[2] Put differently, a reasonably informed observer can understandably conclude that Panel 3 decided Major Gurfein's guilt, and only then sought evidence to support that pre-determined result, which surely puts an impermissible strain on the public's confidence in the prosecution, this Court, and the military justice system.

With respect, the product of Panel 3's review is not so much a reliable and trustworthy judicial opinion, but more of a storyline engineered to support shaky convictions. Reconsideration *en banc*, supplemental briefings, and a hearing are therefore altogether proper and warranted to discharge this Court's solemn duty as jurists, officers, and attorneys sworn to faithfully apply the law.

The Supreme Court observed in *Burns v. Wilson*, 346 U.S. 137 (1953),

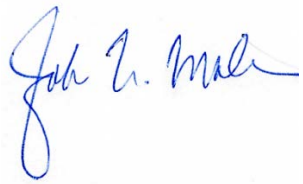
> The constitutional guarantee of due process is meaningful enough, and sufficiently adaptable, to protect soldiers – as well as civilians – from the crude injustices of a trial so conducted that it becomes bent on fixing guilt by dispensing with rudimentary fairness rather than finding truth through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

Burns, 346 U.S. at 142.

[2] Should the Court grant reconsideration *en banc*, Major Gurfein stands ready to provide the Court with a side-by-side comparison of portions of the Government's appellate papers and the language Panel 3 adopted, to show what can be reasonably and fairly seen as a "cut and paste."

For these reasons, and those discussed more fully in his opening and reply briefs, Major Gurfein respectfully requests that the Court reconsider its 10 May 2019, decision *en banc*, order supplemental briefing, and grant a hearing.

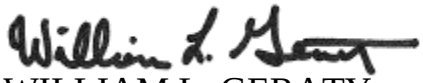
Respectfully submitted,



JOHN N. MAHER
KEVIN J. MIKOLASHEK
DAVID BOLGIANO
Civilian Defense Counsel
MAHER LEGAL SERVICES PC
26 South 3rd Street, Number 68
Geneva, Illinois 60134
johnmaher@maherlegalservices.com
Tel: (708) 468-8155

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 10 June 2019.



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