

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,

Appellant

**OPPOSITION TO APPELLEE’S
MOTION FOR
RECONSIDERATION**

v.

Docket No. ARMY MISC 20240609

Cadet (CDT)

JORGE A. HURTADO,

United States Army,

Appellee

Tried at the United States Military Academy, West Point, New York, on 27 September and 17 October 2024 before a general court-martial, convened by the Superintendent, United States Military Academy, Lieutenant Colonel William C. Ramsey, Military Judge, presiding.

**TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES ARMY COURT OF CRIMINAL APPEALS**

COME NOW, the undersigned appellate government counsel, pursuant to Rule 27.3 of this court’s Rules of Appellate Procedure and provide their response in opposition to appellee’s motion for reconsideration and suggestion for reconsideration en banc.

“Rule 27 could not be clearer . . . en banc reconsideration is not favored.” *United States v. Johnson*, 84 M.J. 507, 508 (N.M. Ct. Crim. App. 2024). Army Court of Criminal Appeals Rule of Practice and Procedure [A.C.C.A. R.] 27.2(b) establishes the burden for reconsideration en banc. In relevant part, it states: “The party suggesting the Court sit en banc to reconsider a decision by a panel must demonstrate reconsideration is appropriate because: (1) Consideration by the full

Court is necessary to secure or maintain uniformity of decision . . . and (2) . . . the decision conflicts with a decision of . . . this Court.” A.C.C.A. R. 27.2(b).

A. This Court should deny Appellee’s request for reconsideration.

Appellee’s disappointment with the result does not warrant this Court’s reconsideration. Rule 31.2(b) makes clear the reasons for which this Court will grant a request for reconsideration of a decision:

Ordinarily, reconsideration will not be granted without a showing that one of the following grounds exist:

- (1) A material legal or factual matter was overlooked or misapplied in the decision;
- (2) A change in the law occurred after the case was submitted and was overlooked or misapplied by the Court;
- (3) The decision conflicts with a decision of the Supreme Court of the United States, the Court of Appeals for the Armed Forces, or another service court of criminal appeals, or this Court; or
- (4) New information is received that raises a substantial issue as to the mental responsibility of the accused at the time of the offense or the accused’s mental capacity to stand trial.

A.C.C.A. R. 31.2(b). Appellee does not cite which of the specifically enumerated reasons for reconsideration are applicable here; however, the Government assesses all of the arguments made would be captured under Rule 31.2(b)(1).

Appellee argues reconsideration is necessary “because (1) the panel found its own facts and did not give appropriate deference to the military judge; and (2) the panel did not consider the entirety of appellee’s invocation in its legal

analysis.” (Appellee’s Motion for Reconsideration En Banc, p. 2). Appellee claims, “[t]he panel misperceived *de novo* review to mean it has carte blanche to find its own facts and weigh those facts.” (Appellee’s Motion for Reconsideration En Banc, p. 5). The Government disagrees.

This Court clearly cited and followed the correct standard of review. *United States v. Hurtado*, 2025 CCA LEXIS 136, at *3-4 (Army Ct. Crim. App. 25 Mar. 2025). This Court, in its reasoning, then explained why the military judge’s ruling was entitled to *less* deference where important facts were omitted from his findings. *Id.* at *6. This Court further highlighted, “[w]e are mindful that we cannot make our own findings of fact and do not adopt or insert these facts into our legal analysis. But we merely note them to reflect a finding which is clearly erroneous.” *Id.* at *6. The Court’s decision here does not run afoul of those in *United States v. Gilkey* or *United States v. Lowery*. 2025 CCA LEXIS 86 (Army Ct. Crim. App. 4 Mar. 2025) ([mem. op.](#)); 2024 CCA LEXIS 540 (Army Ct. Crim. App. 18 Dec. 2024) ([mem. op.](#)).

This Court’s decision affirmatively dispels the errors Appellee claims exist. This Court applied the correct law, acknowledged the correct standard of review, acknowledged the requirement that deference be afforded to the military judge, and then explained why the deference afforded the military judge here was not absolute. Appellee fails to demonstrate where a “material legal or factual matter

was overlooked or misapplied in the decision;” as such, this Court should find there is no basis pursuant to Rule 31.2(b)(1) to grant the request for reconsideration.

B. This Court should reject Appellee’s suggestion for reconsideration *en banc*.

Hoping for a more favorable outcome is not sufficient justification for this Court to reconsider Appellee’s case *en banc*—especially when such an action is unquestionably “not favored.” A.C.C.A. R. 27.2(b). In order to satisfy the requirements for reconsideration *en banc*, the moving party must show:

- (1) Consideration by the full Court is necessary to secure or maintain uniformity of decision; the proceedings involve a question of exceptional importance; or a sentence being reviewed pursuant to Article 66 extends to death; and
- (2) A material legal or factual matter was overlooked or misapplied in the decision; or a change in the law occurred after the case was submitted and was overlooked or misapplied by the Court; or the decision conflicts with a decision of the Supreme Court of the United States, the Court of Appeals for the Armed Forces, or another service court of criminal appeals, or this Court.

A.C.C.A. R. 27.2(b)(1–2). Appellee makes no compelling arguments in support of the first prong, and the second prong is a near verbatim recitation of the requirements for reconsideration generally from A.C.C.A. R. 31.2(b). As such, Appellee has failed to demonstrate the necessity for reconsideration, and reconsideration *en banc*, entirely.

WHEREFORE, the United States prays this honorable court deny
appellant's motion for reconsideration.



CPT, JA
Appellate Attorney,
Government Appellate Division



ANTHONY J. SCARPATI
CPT, JA
Branch Chief,
Government Appellate Division



RICHARD E. GORINI
COL, JA
Chief, Government
Appellate Division

CERTIFICATE OF SERVICE, U.S. v. HURTADO (Minsc 20240609)

I certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at *usarmy.pentagon.hqda-otjag.mbx.dad-accaservice@mail.mil* on the 2nd day of May, 2025.



Senior Paralegal Specialist
Government Appellate Division
9275 Gunston Road
Fort Belvoir, VA 22060-5546

