5 January 2016

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Appellee,*	)	UNITED STATES' BRIEF ON SPECIFIED ISSUE
v.	)	
Senior Airman (E-4) ANDREW PAUL WITT USAF, *Appellant*.	)	Crim. App. No. 36785
	)	USCA Dkt. No. 15-0260/AF

UNITED STATES' BRIEF ON SPECIFIED ISSUES

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INDEX

TABLE OF AUTHORITIES

Page(s)

SUPREME COURT CASES

COURT OF APPEALS FOR THE ARMED FORCES

COURTS OF CRIMINAL APPEALS

STATUTES

OTHER AUTHORITIES

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Appellee,	)	ON SPECIFIED ISSUES
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Senior Airman (E-4),	)	Dkt. No. 15-0260/AF
ANDREW PAUL WITT, USAF,	)	ACM 36785
Appellant.	)	

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

ISSUES SPECIFIED

I.

WHETHER A COURT OF CRIMINAL APPEALS SITTING EN BANC CAN RECONSIDER A PREVIOUS EN BANC DECISION OF THAT COURT PURSUANT TO STATUTORY AUTHORITY, APPLICABLE PRECEDENT, OR INHERENT AUTHORITY?

II.

WHETHER A DECISION OF A COURT OF CRIMINAL APPEALS SITTING EN BANC CAN BE RECONSIDERED EN BANC WHEN THE COMPOSITION OF THE EN BANC COURT HAS CHANGED?

STATEMENT OF STATUTORY JURISDICTION

This is a mandatory review case under Article 67(a)(1), UCMJ.

STATEMENT OF THE CASE

The Air Force Court's first decision was not conducted en banc as suggested in the specified issues; it was in fact only a panel decision of the Court. On 21 April 2010, the Air Force Court granted the United States' 1 February 2008 motion for en banc consideration, but the Court's original decision was in

fact not considered en banc. The final and official reported decision itself is not labeled as an en banc decision; United States v. Witt, 72 M.J. 727 (A.F. Ct. Crim. App. 2013).[1] Footnote 17 of the opinion confirms the panel composition as it details the Air Force Court judges who did not participate in the first decision either because of a conflict of interest or retirement but notes: "The remaining judges each chose not to participate given their recent assignments to the Court." Witt, 72 M.J. at 776. Because the remaining available judges "chose" not to participate even though they were "present for duty," it was not an en banc decision. On 3 September 2013, the United States filed a timely motion to vacate the Court's original decision because it was not considered en banc as required by the Court's own order. (J.A. at 247-59.)[2] The United States also filed a timely motion for reconsideration and reconsideration en banc of the original decision. (J.A. at 260-

[1] Appellant's reliance in his reply brief upon a temporary and incorrect notation on the slip opinion indicating the Air Force Court's original decision was issued en banc is misplaced. (App. Rep. at 3.) Again, it is beyond dispute that the final and official version of the reported decision reflects on its face that it was not an en banc decision, and Footnote 17 confirms this fact. Appellant also fails to note that the unofficial slip opinion he relies upon also states on page one that "This opinion is subject to editorial correction before final publication." Clearly, editorial correction included changing the final and official reported decision to one not issued en banc.

[2] Appellant also mistakenly asserted in his reply brief that the United States "now argues for the first time" that the Air Force Court's original decision was not issued en banc. (App. Rep. at 4.) To the contrary, the United States immediately recognized and asserted this error to the Air Force Court almost 2 and 1/2 years ago. (J.A. at 247-59.) Appellant also confuses and commingles the concept of recused or disqualified judges from judges "present for duty" who simply and incorrectly "chose" not to participate because of their recent assignment to the Court. (App. Rep. at 4.)

328.) The Court granted reconsideration and reconsideration en banc, and the Court, actually sitting en banc this time, reversed the Court's original decision. United States v. Witt, 73 M.J. 738 (A.F. Ct. Crim. App. 2014). The second decision is clearly reported and officially labeled en banc and was considered by en banc composition of the Court. The United States' motion to vacate became moot by the Court's grant of reconsideration and reconsideration en banc.

STATEMENT OF FACTS

The facts necessary to resolve the specified issues are set forth in the Argument section below.

SUMMARY OF THE ARGUMENT

The original decision of the Air Force Court of Criminal Appeals was not an en banc decision; it was a decision issued by a panel of five appellate judges. The Air Force Court's reconsideration decision sitting en banc was conducted with statutory and inherent authority as reflected in this Court's precedent.

Even assuming arguendo the original decision was issued en banc, the Air Force Court had similar lawful authority to reconsider the original decision sitting en banc even after a change in composition of the Court.

ARGUMENT

SPECIFIED ISSUE I

THE FIRST DECISION OF THE COURT OF CRIMINAL APPEALS WAS A PANEL DECISION, NOT EN BANC. THE COURT OF CRIMINAL APPEALS PROPERLY RECONSIDERED AND RECONSIDERED EN BANC THE FIRST DECISION. EVEN SO, A COURT OF CRIMINAL APPEALS SITTING EN BANC HAS AUTHORITY TO RECONSIDER A PRIOR EN BANC DECISION OF THAT COURT.

Standard of Review

Jurisdiction is a question of law that this Court reviews de novo. United States v. Daly, 69 M.J. 485, 486 (C.A.A.F. 2011).

Law and Analysis

The Air Force Court of Criminal Appeals' discretionary reconsideration decision in Appellant's case was properly conducted pursuant to statutory authority and as implemented by statutorily required rules of practice and procedure. The Air Force Court's discretionary reconsideration decision is also supported by precedent of this Court demonstrating the statutory and inherent authority of an appellate court to conduct such reconsideration. These specified issues must be resolved adversely to Appellant.

Article 66(a), UCMJ, provides three key statutory provisions germane to resolving these specified issues:

> Each Judge Advocate General shall establish a Court of Criminal appeals which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate judges.
>
> For the purpose of reviewing court-martial cases, the court may sit in panels or as a whole in accordance with rules prescribed under subsection (f).
>
> Any decision of a panel may be reconsidered by the court sitting as a whole in accordance with such rules.

Article 66(f), UCMJ, requires the creation of uniform rules of practice and procedure before military courts of criminal appeals:

> The Judge Advocates General shall prescribe uniform rules of procedure for Courts of Criminal Appeals and shall meet periodically to formulate policies and procedures in regard to review of court-martial cases in the office of the Judge Advocates General and by Courts of Criminal Appeals.

Rule 19(a) of the Joint Courts of Criminal Appeals Rules of Practice and Procedure[3] gives the Air Force Court of Criminal Appeals authority and discretion to reconsider any decision or order on its own motion:

> The Court may, in its discretion and on its own motion, enter an order announcing its intent to reconsider its decision or order in any case not

[3] An extract of the applicable portions of the Air Force Court of Criminal Appeals Rules of Practice and Procedure, Effective 11 October 2010 and Amended 12 April 2013, are attached to this brief. This version of the lower Court's rules was in effect when the Court granted the United States' Motion for Reconsideration and Reconsideration En Banc on 21 October 2013. A new version of the rules has since been implemented but is substantially the same for purposes of these specified issues.

> later than 30 days after service of such decision or order on the appellate defense counsel or on the appellant. . . .

As germane to Appellant's case, Rule 19(b) of the Joint Courts of Criminal Appeals Rules of Practice and Procedure gives the Air Force Court authority and discretion to reconsider any decision or order upon motion of a party:

> . . . the Court may, in its discretion, reconsider its decision or order in any case upon motion filed by either:
>
> . . . .
>
> (2) By appellate government counsel within 30 days after the decision is received by counsel.

Rule 19.2. generally governs motions to reconsider decisions by the Air Force Court:

> *In General.* Upon its own motion and within 30 days of its decision or order, or upon motion by the government or the appellant within 30 days after delivery of the decision to the respective appellate divisions . . . , the Court may reconsider a decision or order terminating the case previously rendered by it, provided jurisdiction of the case has not been obtained by CAAF. . . .

Rule 19.2.(d) governs panel reconsideration:

> A motion for reconsideration of a panel decision shall, when practical, be referred to the same numerically designated panel that originally decided the case. If the composition of the panel has changed since issuance of the decision, the Chief Appellate Judge shall appoint a special panel consisting of those members of the initial panel still available to serve. When any appellate judge who participated in the decision is unavailable due

> to reassignment, lengthy absence, or death, the Chief Appellate Judge shall appoint a substitute judge. Reconsideration shall only be granted upon concurrence of a majority of the panel.

Rule 19.2.(e) governs en banc reconsideration:

> *Motion to Reconsider En Banc and Reconsideration of En Banc Decision.* Reconsideration shall only be granted with the concurrence of a majority of the judges present for duty and available to sit on the case. Reconsideration of an en banc decision will not be held unless at least one member of the original majority concurs in the vote.

Rule 17 of the lower Court rules governs en banc proceedings. In particular, Rule 17(a) covers consideration and reconsideration of en banc review of a case:

> A party may suggest the appropriateness of consideration or reconsideration by the Court as a whole. Such consideration or reconsideration ordinarily will not be ordered except . . . (2) when the proceedings involve a question of exceptional importance, or (3) when a sentence being reviewed pursuant to Article 66 extends to death. . . .

Rule 17(b) governs composition of the en banc court:

> The suggestion of a party for consideration or reconsideration by the Court as a whole shall be transmitted to each judge of the Court who is present for duty. . . .

Rule 17(c) covers voting procedures employed for en banc proceedings:

> A majority of the judges present for duty may order that any appeal or other proceeding be considered or reconsidered by the Court sitting as a whole. However, en banc reconsideration of an en banc decision will not be held unless at

> least one member of the original majority concurs in a vote for reconsideration.

Rule 17(d) further reflects the Air Force Court's inherent authority to reconsider en banc any case:

> This rule does not affect the power of the Court *sua sponte* to consider or reconsider any case sitting as a whole.

Finally, Rule 17.1. defines "present for duty" for purposes of conducting en banc proceedings before the Air Force Court:

> . . . . For purposes of this rule, "present for duty" means the judge is physically present in a duty status at the location at which the Court will sit as a whole and is not otherwise conflicted from participation in the case.

1. The original Air Force Court of Criminal Appeals' decision was a panel decision, not an en banc decision, and it was conducted with both statutory and inherent authority as reflected in this Court's precedent.

As noted by the references provided above, the final, corrected, official, and reported original decision of the Air Force Court issued on 9 August 2013 was not an en banc decision of the Court. It was a decision issued by a panel of five appellate judges. Therefore, under the express authority of Article 66(a), the Air Force Court's reconsideration and reconsideration en banc granted on 21 October 2013 was conducted with statutory authority: "Any decision of a panel may be reconsidered by the court sitting as a whole in accordance with such rules."

Clearly, the Air Force Court's order dated 21 April 2010 required en banc consideration, but it is equally clear that qualified members who were "present for duty" mistakenly "chose" to not participate in the original decision. United States v. Witt, 72 M.J. at 776, n.17. The Air Force Court exercised appropriate discretion provided by statute and the rules required by the statute when the Court corrected this mistake by granting reconsideration and reconsideration en banc. The United States identified this error in the lower Court's original decision and has steadfastly asserted it at all times.

This Court recognized such statutory and inherent reconsideration authority in United States v. Henderson, 52 M.J. 14 (C.A.A.F. 1999). In Henderson, a panel of the Army Court of Criminal Appeals reconsidered the panel's prior decision that had reduced a finding of guilty of unpremeditated murder to voluntary manslaughter. On appeal to this Court, the appellant claimed that a panel cannot conduct reconsideration because Article 66(a) only provides that "Any decision of a panel may be reconsidered by the court sitting as a whole in accordance with such rules." Henderson claimed that panel's original decision must stand because he believed only the en banc court could conduct reconsideration of the panel's original decision. Even though Article 66 does not expressly state that a panel can conduct reconsideration of a panel decision, this Court easily

rejected Henderson's assertion and reaffirmed both the statutory and inherent authority of an appellate court to conduct reconsideration:

> ***The plain language of the statute provides that "[a]ny decision of a panel may be considered by the court sitting as a whole. . . ." (Emphasis added.) It does not state that any decision of a panel must be reconsidered by the court sitting as a whole.*** We presume that Congress is capable of saying what it means, and additional interpretation on our part, as least in this matter is unnecessary. . . .
>
> In addition, ***subsections (a) and (f) of Article 66 expressly authorize*** the uniform rules of procedure prescribed by the Judge Advocates General. . . . ***Reconsideration of a decision by a Court of Criminal Appeals is provided for without regard to whether it is sitting as a panel or as a whole.***

(Emphasis added.) United States v. Henderson, 52 M.J. at 19-20.

We learn at least three key points from this Court in Henderson. First, a panel clearly has statutory authority to conduct reconsideration. Appellant's original decision was a panel decision, so there is clear authority for the reconsideration of the panel decision conducted here. Second, even assuming arguendo the original decision was conducted en banc, it does not matter because this Court recognized the statutorily required Court rules provide for reconsideration whether the original decision was a panel decision or en banc. It simply does not matter. Third, this Court noted that Article 66(a) was amended in 1983 to overrule this Court's prior

decision in United States v. Chilcote, 43 C.M.R. 123, 126 (C.M.A. 1971), but Congress did not overrule this "Court's earlier decisions recognizing a panel's inherent authority to reconsider its own decisions." Henderson, 52 M.J. at 20.

2. Assuming arguendo the original Air Force Court of Criminal Appeals decision was an en banc decision, not a panel decision, it was also conducted with both statutory and inherent authority as reflected in this Court's precedent.

Without conceding that the original decision was conducted en banc, the United States asserts that it does not matter whether it was a panel decision or an en banc decision because the Air Force Court had statutory and inherent authority to conduct reconsideration as reflected in this Court's precedent.

Article 66(a) expressly provides that the Air Force Court "may sit in panels or as a whole in accordance with rules prescribed under subsection (f)." Article 66(f) requires the Judge Advocates General to prescribe uniform rules of procedure for Courts of Criminal Appeals, and as extensively quoted above, such rules were in fact promulgated and followed in Appellant's case. As such, the Air Force Court properly acted with statutory authority whether this Court deems the original decision to be a panel decision or an en banc decision.

Rule 19(a) provides the Air Force Court has the discretion on its own motion to reconsider ***any decision*** of the Court. Likewise, Rule 19(b) gives the Air Force Court the discretion to

reconsider upon motion of a party ***any decision*** of the Court. Rule 19.2 confirms this statutorily derived authority by confirming that the Court may reconsider upon its own motion or motion of a party ***a decision*** of the Court. Rule 19.2.(d) provides statutorily derived authority for a panel to reconsider a decision and provides procedures to follow if composition of the Court has changed.

Rule 17(a) provides that appropriate reasons for initial consideration or reconsideration en banc include "questions of exceptional importance" and "when a sentence being reviewed pursuant to Article 66 extends to death." Both predicates apply to Appellant's case, which is precisely why the United States moved for consideration en banc in 2008 and why the United States moved for reconsideration en banc in 2013.

Both Rule 17(b) and 17(c) govern en banc proceedings and call for those judges "present for duty" to participate and require at least one member of the original majority to concur in a vote for reconsideration. Rule 17.1. defines "present for duty" as a judge who is physically present and not disqualified from participating, which is why the original decision of the Air Force Court failed to comply with the rules and had to be corrected.

Finally, Rule 17(d), although statutorily derived, also confirms the inherent authority and "power of the Court to *sua*

sponte consider or reconsider any case sitting as a whole." Again, this Court's decision in Henderson described above makes clear that whether the Air Force Court's original decision was a panel decision or an en banc decision does not matter as either was conducted with statutory and inherent authority.

In sum, the Air Force Court's grant of reconsideration and reconsideration en banc of the Court's original decision was statutorily authorized, inherent in the Court's power, and supported by this Court's precedent. There is no basis to disturb it.

SPECIFIED ISSUE II

THE FIRST DECISION OF THE COURT OF CRIMINAL APPEALS WAS A PANEL DECISION, NOT EN BANC. THEREFORE, THE COURT OF CRIMINAL APPEALS PROPERLY RECONSIDERED AND RECONSIDERED EN BANC THE FIRST DECISION. EVEN SO, A COURT OF CRIMINAL APPEALS SITTING EN BANC HAS AUTHORITY TO RECONSIDER A PRIOR EN BANC DECISION OF THAT COURT EVEN WHEN THE COMPOSITION OF THE COURT HAS CHANGED.

Standard of Review

Jurisdiction is a question of law that this Court reviews de novo. United States v. Daly, 69 M.J. 485, 486 (C.A.A.F. 2011).

Law and Analysis

The United States will not belabor the point but simply reasserts as noted above the predicate of this specified issue mistakenly suggests the original decision of the Air Force Court

was conducted en banc. It was in fact a panel decision issued by five appellate judges, not an en banc decision.

Also, as noted above, the statute, the rules of procedure, and this Court's precedent make clear that it is immaterial whether the original decision was a panel decision or an en banc decision. As noted in Henderson, the statute and the statutorily authorized rules of procedure fully support the lawfully issued en banc reconsideration in Appellant's case.

Especially in a military appellate system where nearly all appellate judges on the courts of criminal appeals are subject to military reassignment or retirement at some point in their careers, it is not surprising that the statutorily authorized rules make provision for conducting reconsideration when the composition of the court has changed. Rule 17(b) provides that motions for en banc reconsideration shall be transmitted to each judge of the Court who is "present for duty." Rule 17(c) provides that a majority of the judges "present for duty" may order any appeal to be reconsidered en banc. And Rule 17.1. defines "present for duty" as a judge who is "physically present in a duty status" and not otherwise conflicted from participation in the case. Rule 19.2.(d) on panel reconsideration provides that "[w[hen any appellate judge who participated in the decision is unavailable due to reassignment, lengthy absence, or death, the Chief Appellate Judge shall

appoint a substitute." Clearly, the statutorily derived rules anticipate and provide for changes in composition of the Court. Military justice at the appellate level could come to a halt without such statutorily derived rules of procedure to account for changes in composition in the Court. Military appellate judges do not possess fixed terms of office, which does not violate the Fifth Amendment due process clause, but does result in regular changes in composition of the military appellate courts accounted for in the rules of procedure. *See* Weiss v. United States, 510 U.S. 163 (1994).

By analogy, this Court's own practice and precedent regarding reconsideration provides further authority for the proposition that the reconsideration granted in Appellant's case was with lawful inherent authority and should in no way be disturbed by this Court.

Article 67, UCMJ, is silent on this Court's authority to conduct reconsideration of its own decisions. However, such absence of statutory authority does not negate this Court's inherent authority to conduct reconsideration.

In United States v. Curtis, 44 M.J. 106 (C.A.A.F. 1996), this Court initially affirmed the death sentence and in particular, rejected claims of ineffective assistance of counsel. Judge Crawford wrote the majority opinion and was joined by Chief Judge Cox. Id. at 167. Judge Sullivan

concurred, Id. at 169-71. Judge Gierke concurred in part and dissented in part. Id. at 171-73. Judge Wiss sat for oral argument in Curtis but did not vote on the opinion. Id. at 167.

As noted above, it does not matter for purposes of reconsideration whether a panel decision or an en banc decision of a court of criminal appeals is reconsidered en banc. But, this Court has no such distinction as this Court does not sit in panels but always sits as a whole when conducting its Article 67 review.

Upon motion for reconsideration by the appellant in Curtis, in a per curiam opinion issued after Judge Effron joined the Court, this Court granted reconsideration in Curtis and reversed his death sentence on grounds of ineffective assistance of counsel. United States v. Curtis, 46 M.J. 129 (C.A.A.F. 1997). Judge Crawford and Judge Sullivan dissented in the reconsideration. Id. at 130-31. Clearly, Article 67 does not expressly authorize reconsideration, and there was a change in the composition of the Court in Curtis. However, there can be no doubt as to this Court's inherent authority to conduct reconsideration following a change in composition of the Court. The same principle and inherent authority must apply with equal force to a court of criminal appeal's authority to conduct reconsideration following a change in composition of the Court.

For all the reasons stated above, the Air Force Court of Criminal Appeals acted with statutory, inherent, and precedential authority in the manner in which it granted reconsideration and reconsideration en banc in Appellants' case.

WHEREFORE, the United States respectfully requests this Honorable Court affirm Appellant's findings and sentence.

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APPENDIX

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

RULES OF PRACTICE AND PROCEDURE

Effective 11 October 2010
Amended 12 April 2013

Available online at ***http://afcca.law.af.mil***

Published Together with the Joint Courts of Criminal Appeals Rules of Practice and Procedure

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS
RULES OF PRACTICE AND PROCEDURE

Together with Joint Courts of Criminal Appeals
Rules of Practice and Procedure (CCA) (in **Bold Type**)

TABLE OF RULES

Rule

Rule 1. NAME AND SEAL

(a) The titles of the Courts of Criminal Appeals of the respective services are:

(1) "United States Army Court of Criminal Appeals."

(2) "United States Navy-Marine Corps Court of Criminal Appeals."

(3) "United States Air Force Court of Criminal Appeals."

(4) "United States Coast Guard Court of Criminal Appeals."

(b) Each Court is authorized a seal in the discretion of the Judge Advocate General concerned. The design of such seal shall include the title of the Court.

Rule 1.1. *The United States Air Force Court of Criminal Appeals.* The Judge Advocate General of the Air Force (hereinafter TJAG) established the United States Air Force Court of Military Review in JAGO No. 44, ¶ 1 (1 August 1969). Effective 5 October 1994, this Court was renamed the United States Air Force Court of Criminal Appeals, pursuant to the authority of Pub. L. 103-337, 108 Stat. 2663 (1994) and Article 66(a), UCMJ.

Rule 1.2. *Seal of the Court.* The official seal of the Court is used on decisions and orders of the Court and on other official documents and records that are executed and issued by the Clerk of the Court. The seal operates to authenticate documents as official documents of the United States Air Force Court of Criminal Appeals. The Clerk of the Court is the custodian of the Seal.

Rule 1.3. *Scope and Application of Rules.*

(a) *Scope and Application.* The procedures contained within the Air Force Court of Criminal Appeals (AFCCA) rules apply to all persons assigned to the court, persons having pleas to enter, and persons having business before the Court. The AFCCA rules are promulgated by the Chief Appellate Judge and may be waived at the Chief Appellate Judge's discretion.

(b) *Questions and General Waiver Requests.* Questions regarding the AFCCA Rules of Practice and Procedure or request for a general waiver of any provision of these rules shall be directed to the Clerk of the Court. A general waiver of any provision of these rules may be granted by the Chief Appellate Judge.

Rule 1.4. *Chief Appellate Judge; Senior Appellate Judge; and Appellate Judges.*

argument with sufficient copies for each judge and honors law clerk involved in the oral argument. Within 7 calendar days following oral argument, counsel may submit a motion for leave to file a memorandum of argument or motion for leave to file a supplemental citation of authority for any argument or citation made during the hearing that was not set forth in the brief filed prior to argument.

Rule 16.3. *Argument by Amicus Curiae or Appellant Pro Se.* The Court, at its discretion, may grant a motion by *amicus curiae* counsel or by appellant *pro se* for leave to participate in oral argument.

Rule 16.4. *Failure to Appear.* The Court may regard the failure of appellate counsel to appear at the time and place set for oral argument as a waiver of argument. The Court may proceed without argument or continue the case until a later date. At its discretion, the Court may issue a Show Cause Order requiring counsel to provide a written explanation for the failure to appear.

Rule 17. EN BANC PROCEEDINGS

(a) A party may suggest the appropriateness of consideration or reconsideration by the Court as a whole. Such consideration or reconsideration ordinarily will not be ordered except (1) when consideration by the full Court is necessary to secure or maintain uniformity of decision, or (2) when the proceedings involve a question of exceptional importance, or (3) when a sentence being reviewed pursuant to Article 66 extends to death. In cases being reviewed pursuant to Article 66, a party's suggestion that a matter be considered initially by the Court as a whole must be filed with the Court within 7 days after the government files its answer to the assignment of errors, or the appellant files a reply under Rule 15(b). In other proceedings, the suggestion must be filed with the party's initial petition or other initial pleading, or within 7 days after the response thereto is filed. A suggestion for reconsideration by the Court as a whole must be made within the time prescribed by Rule 19 for filing a motion for reconsideration.
No response to a suggestion for consideration or reconsideration by the Court as a whole may be filed unless the Court shall so order.

(b) The suggestion of a party for consideration or reconsideration by the Court as a whole shall be transmitted to each judge of the Court who is present for duty, but a vote need not be taken to determine whether the cause shall be considered or reconsidered by the Court as a whole on such a suggestion made by a party unless a judge requests a vote.

(c) A majority of the judges present for duty may order that any appeal or

other proceeding be considered or reconsidered by the Court sitting as a whole. However, en banc reconsideration of an en banc decision will not be held unless a**t least one member of the original majority concurs in a vote for reconsideration.**

(d) This rule does not affect the power of the Court *sua sponte* to consider or reconsider any case sitting as a whole.

Rule 17.1. *Definitions.* Within the meaning of CCA Rule 17(a), "uniformity of decision" refers to panels of this Court and of the other service courts of criminal appeals. A "question of exceptional importance" includes a novel question of law not previously considered by a military appellate court and argument that existing case law should be overruled or modified. For purposes of this rule, "present for duty" means the judge is physically present in a duty status at the location at which the Court will sit as a whole and is not otherwise conflicted from participation in the case. Reserve appellate judges recalled to active duty, or otherwise serving on extended active duty, will ordinarily be counted in determining quorum and participation in an *en banc* decision. Reserve appellate judges serving on active duty for training will ordinarily not be counted as participating in a decision due to the limited period of active duty. When eligible to participate in *en banc* consideration of a case, reserve appellate judges must be cognizant of the time required for their participation and their time remaining on active duty, exercising sound judgment in recusing themselves under circumstances that they consider appropriate in the interest of justice.

Rule 17.2. *Requests for En Banc Consideration*. A copy of the pleadings and briefs in the case shall be appended to a request for *en banc* consideration.

Rule 17.3. *Oral Arguments*. At the discretion of the Court, oral arguments may be heard on the merits of a case designated for *en banc* consideration upon order of the Court or motion by a party.

Rule 18. ORDERS AND DECISIONS OF THE COURT

The Court shall give notice of its orders and decisions by immediately serving them, when rendered, on appellate defense counsel, including civilian counsel, if any, government counsel and the Judge Advocate General, or designee, as appropriate.

Rule 18.1. *Orders of the Court.*

(a) *Interlocutory or Final Order.* An order of the Court is a command or directive issued by the Court and may be either interlocutory or final in nature. An

appellant's right to petition for a new trial under Article 73, UCMJ.

(3) *Extraordinary Writs*. The Court shall act expeditiously on all requests for extraordinary relief. TJAG will appoint counsel to represent the petitioner, if such a request is included in the petition. If no request for appointment of counsel has been included in the petition, the record will be forwarded directly to the Court. The Court will review the merits of the petition and may dismiss, grant, or deny the writ. A written order may be prepared when the Court determines that a discussion of the issues is warranted.

(4) *Miscellaneous Orders of the Court*. The Court may issue any further orders necessary for the resolution of an issue.

Rule 18.2. *Effective Date of Decision.* Decisions of this Court are not self-executing. Normally, decisions of this Court become final when the time period for requesting reconsideration has expired and neither of the parties have timely filed to have the issue heard by CAAF.

Rule 18.3. *Publication of Opinions.*

(a) *Published Opinions*. The Court causes an opinion to be reported (published) in WEST'S MILITARY JUSTICE REPORTER at its discretion. Published opinions are those that call attention to a rule of law or procedure that appears to be currently overlooked, misinterpreted, or which constitutes a significant contribution to Air Force jurisprudence. Published opinions serve as precedent, providing the rationale of the Court's decision to the public, the parties, military practitioners, and judicial authorities.

(b) *Requests for Publication.* The Court may authorize publication of a previously unpublished opinion upon written request to the Clerk of the Court.

(c) *Forwarding of Opinions*. The Clerk of the Court shall forward a copy of each of the Court's published opinions to West Publishing Company for inclusion in the MILITARY JUSTICE REPORTER and the WESTLAW electronic research database during the week in which the opinion is released. Opinions provided to West Publishing Company shall also be forwarded for inclusion in the LEXIS electronic research database.

Rule 19. RECONSIDERATION

(a) The Court may, in its discretion and on its own motion, enter an order announcing its intent to reconsider its decision or order in any case not later than 30 days after service of such decision or order on the appellate defense counsel or on the appellant, if the appellant is not represented by counsel, provided a petition for grant of review or certificate for review has not been filed with the United States Court of Appeals for the Armed Forces, or a record of trial for review under Article 67(b) has not been received by that Court. No briefs or arguments shall be received unless the order so directs.

(b) Provided a petition for grant of review or certificate for review has not been filed with the United States Court of Appeals for the Armed Forces, or a record of trial for review under Article 67(b) or writ appeal has not been received by the United States Court of Appeals for the Armed Forces, the Court may, in its discretion, reconsider its decision or order in any case upon motion filed either:

(1) By appellate defense counsel within 30 days after receipt by counsel, or by the appellant if the appellant is not represented by counsel, of a decision or order, or

(2) By appellate government counsel within 30 days after the decision is received by counsel.

(c) A motion for reconsideration shall briefly and directly state the grounds for reconsideration, including a statement of facts showing jurisdiction in the Court. A reply to the motion for reconsideration will be received by the Court only if filed within 7 days of receipt of a copy of the motion. Oral arguments shall not be heard on a motion for reconsideration unless ordered by the Court. The original of the motion filed with the Court shall indicate the date of receipt of a copy of the same by opposing counsel.

(d) The time limitations prescribed by this rule shall not be extended under the authority of Rule 24 or Rule 25 beyond the expiration of the time for filing a petition for review or writ appeal with the United States Court of Appeals for the Armed Forces, except that the time for filing briefs by either party may be extended for good cause.

Rule 19.1. *Motion to Reconsider Interlocutory Orders*. Upon motion by a party or on its own motion, the Court may reconsider an interlocutory order previously rendered by it, provided that jurisdiction of the case has not been obtained by CAAF. Jurisdiction vests with CAAF when a petition or certificate has been filed with that Court. A motion for

reconsideration must state with particularity the interlocutory order the moving party seeks to have reconsidered and whether any other court has acquired jurisdiction over the case. For example, a party may move for reconsideration of an order to conduct oral argument, an order to compel production of documents, or an order to conduct a hearing under *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967). Such a motion must provide a showing of good cause before the Court will reconsider a court order.

Rule 19.2. *Motion to Reconsider Decisions or Orders Terminating Cases.*

(a) *In General*. Upon its own motion and within 30 days of its decision or order, or upon motion by the government or the appellant within 30 days after delivery of the decision to the respective appellate divisions or to the place of business of civilian appellate defense counsel, the Court may reconsider a decision or order terminating the case previously rendered by it, provided that jurisdiction of the case has not been obtained by CAAF. Jurisdiction vests with CAAF when a petition or certificate has been filed with that Court. A motion for reconsideration must state the date on which the appellate division or civilian counsel received a copy of the Court's prior decision, which portions of the decision the moving party seeks to have reconsidered, the basis for reconsideration, and whether any other court has acquired jurisdiction over the case. In addition to serving the opposing party, the moving party must also serve a copy of the motion on the Chief, Appellate Records Branch of AFLOA/JAJM.

(b) *Determination of Reconsideration.* Ordinarily, reconsideration will not be granted without a showing that one of the following grounds exists:

(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, CAAF, another service court of criminal appeals, or this Court; or

(4) New information is received which 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.

(c) *Order Granting Reconsideration.* Unless otherwise announced, an order granting reconsideration vacates the decision to be reconsidered.

(d) *Panel Reconsideration.* A motion for reconsideration of a panel decision shall, when practical, be referred to the same numerically designated panel that originally decided the case. If the composition of the panel has changed since issuance of the decision, the Chief Appellate Judge shall appoint a special panel consisting of those members of the initial panel still available to serve. When any appellate judge who participated in the decision is unavailable due to reassignment, lengthy absence, or death, the Chief Appellate Judge shall appoint a substitute judge. Reconsideration shall only be granted upon concurrence of a majority of the panel.

(e) *Motion to Reconsider En Banc and Reconsideration of En Banc Decision*. Reconsideration shall only be granted with the concurrence of a majority of the judges present for duty and available to sit on the case. Reconsideration of an *en banc* decision will not be held unless at least one member of the original majority concurs in the vote.

Rule 20. PETITIONS FOR EXTRAORDINARY RELIEF, ANSWER, AND REPLY

(a) Petition for Extraordinary Relief. A petition for extraordinary relief in the number of copies required by the Court shall be accompanied by proof of service on each party respondent and will contain:

(1) A previous history of the case including whether prior actions have been filed or are pending for the same relief in this or any other court and the disposition or status of such actions;

(2) A concise and objective statement of all facts relevant to the issue presented and of any pertinent opinion, order or ruling;

(3) A copy of any pertinent parts of the record and all exhibits related to the petition if reasonably available and transmittable at or near the time the petition is filed;

(4) A statement of the issue;

(5) The specific relief sought;

(6) Reasons for granting the writ;

(7) The jurisdictional basis for relief sought and the reasons why the relief sought cannot be obtained during the ordinary course of appellate

Rule 28.1. *Questions, General Waiver Requests, and Suggested Amendments.* Questions regarding the AFCCA Rules of Practice and Procedure shall be addressed to the Clerk of the Court. Requests for a general waiver of any provision and suggested amendment to these rules shall be forwarded to the Chief Appellate Judge via the Clerk of the Court.

Holly M. Stone

HOLLY M. STONE, Colonel, USAF
Chief Appellate Judge

FOR THE COURT

STEVEN LUCAS
Clerk of the Court

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically delivered to the Court and to the Air Force Appellate Defense Division on 5 January 2016.

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