IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES Appellee v. Cadet **JORGE A. HURTADO** United States Army Appellant	SUPPLEMENT TO PETITION FOR GRANT OF REVIEW Crim. App. Dkt. No. 20240609 USCA Dkt. No. 25-0212/AR

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APPENDIX A: ARMY COURT DECISION

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

Issues Presented

WHETHER THE MILITARY JUDGE'S RULING WAS NOT AN ABUSE OF DISCRETION.

WHETHER THE MILITARY JUDGE MADE CLEARLY ERRONEOUS FACTUAL FINDINGS AND THE ARMY COURT'S "MERE DISAGREEMENTS" JUSTIFY DEVIATING FROM THE STANDARD THIS COURT MANDATES UNDER ARTICLE 62.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 62(a)(1)(B), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 862(a)(1)(B) (2017). This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2021).

Statement of the Case

Cadet Hurtado is charged with multiple allegations of sexual misconduct. (Charge Sheet). On November 11, 2024, the military judge granted the defense motion to suppress Cadet Hurtado's statement to Special Agent Nicole Lucas with the Criminal Investigation Division (CID) on the basis that he had invoked his right to counsel prior to questioning. (App. Ex. XXX).

On November 13, 2024, the Government provided formal notice of its intent to appeal the military judge's ruling under Article 62, UCMJ. (R.C.M. 908 Notice). On January 7, 2025, the Government filed its brief. On January 27, 2025, Cadet Hurtado filed his answer. On February 3, 2025, the Government filed its reply brief.

On March 25, 2025, the Army Court issued a summary disposition, granting the Government appeal and vacating the military judge's ruling. *United States v. Hurtado*, ARMY 20240609, 2024 CCA LEXIS 136 (Army Ct. Crim. App. March 25, 2025) (contained in App'x A). On April 24, 2025, Cadet Hurtado filed a motion for reconsideration by the Army Court *en banc*. On May 2, 2025, the Government filed its opposition to the motion for reconsideration. On May 13, 2025, the Army Court denied Cadet Hurtado's motion for reconsideration.

Reasons to Grant Review

As to the ultimate conclusion of law of whether Cadet Hurtado's invocation of his right to counsel was unambiguous and unequivocal, the Army Court failed to consider the totality of his statement. The Army Court stopped its analysis at the word "but," finding that "but" is used to introduce a clause "contrasting with what has already been mentioned" and that it plainly inserted doubt as to Cadet Hurtado's intent. *Hurtado*, 2024 CCA LEXIS 136, at *6. The Army Court should not have stopped at the word "but" in analyzing ambiguity. The Army Court failed to consider the words following "but," which did not demonstrate a contrary intent. The Army Court erred in finding the plain language of the word "but" is inherently equivocal.

In giving the military judge "less deference," the Army Court failed to view evidence in the light most favorable to the prevailing party, Cadet Hurtado, which is the standard for Article 62 cases. Instead, it focused on facts and its interpretations of those facts it believed should warrant more emphasis. *Hurtado*, 2024 CCA LEXIS 136, at *6.

Standard of Review

"In an Article 62, UCMJ, appeal, [this Court] reviews the military judge's decision directly and reviews the evidence in the light most favorable to the party which prevailed at trial." *United States v. Henry*, 81 M.J. 91, 95 (C.A.A.F. 2021).

A court is "bound by the military judge's factual determinations unless they are unsupported by the record or clearly erroneous." *United States v. Becker*, 81 M.J. 483, 489 (C.A.A.F. 2021) (citations omitted).

When reviewing matters under Article 62, a court may act only with respect to matters of law. *United States v. Gore*, 60 M.J. 178, 185 (C.A.A.F. 2004); *Becker*, 81 M.J. at 489 (internal citations omitted) ("A reviewing court may not "find its own facts or substitute its own interpretation of the facts."). "When a court is limited to reviewing matters of law, the question is not whether a reviewing court might disagree with the trial court's findings, but whether those findings are 'fairly supported by the record.'" *Gore*, 60 M.J. at 185. (quoting *United States v. Burris*, 21 M.J. 140, 144 (C.M.A. 1985)).

Courts review a judge's decision to suppress evidence for an abuse of discretion. *United States v. Keefauver*, 74 M.J. 230, 233 (C.A.A.F. 2015). In reviewing a judge's ruling on a motion to suppress, this Court reviews "factfinding under the clearly erroneous standard and conclusions of law under the de novo standard." *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995). The abuse of discretion standard calls "for more than a mere difference of opinion." *United States v. Jones*, 73 M.J. 357, 360 (C.A.A.F. 2014). A military judge abuses his or her discretion when he or she (1) "predicates a ruling on findings or fact that are not supported by the evidence of record," (2) "uses incorrect legal principles," (3)

applies correct legal principles to the facts in a way that is clearly unreasonable," or (4) "fails to consider important facts." *United States v. Rudometkin*, 82 M.J. 396, 401 (C.A.A.F. 2022).

This Court reviews whether the Army Court properly utilized the appropriate standard of review de novo. *See United States v. Harvey*, 85 M.J. 127 (C.A.A.F. 2024).

Facts, Law, and Argument

A. The Military Judge did not abuse his discretion.

When Cadet Hurtado was asked if he wanted a lawyer, he responded, "Like, I would like to speak to a lawyer, but um, yeah." (App. Ex. VII-B, 30:13-30:18). The military judge reasonably found Cadet Hurtado unambiguously invoked his right to counsel and given the totality of the circumstances, the interview should have stopped until he was provided an opportunity to speak with counsel. (App. Ex. XXX). However, the Army Court disagreed with the judge's interpretation and found the word "but" inherently equivocal. *Hurtado*, 2024 CCA LEXIS 136, at *6. The Army Court stated, "without the word 'but,' the ambiguity in [Cadet Hurtado's] statement dissipates. With the word 'but,' [Cadet Hurtado's] statement is anything except clear and unequivocal." *Id. at* *7.

The Army Court failed to consider the words immediately following the word "but," which demonstrate Cadet Hurtado was not contradicting anything. A

case out of Ohio, *State v. Howard,* 2014 Ohio App. LEXIS 662 (1st Dis. Ohio Ct. App. Feb. 26, 2014), shows what an equivocal request looks like. In *Howard,* Howard stated, "I would like to talk to a lawyer, I also want to talk to you, but like you say, I'm first. Always good to be first." *Howard,* 2014 Ohio App. LEXIS 662, at *14. Howard then said, "If I did want a lawyer, I mean I do, but I don't want- I guess I want an opportunity to be first." *Id*. Howard's statements were ambiguous because he indicated he wanted to talk to the police at the same time, indeed in the same sentence, as he was asking for a lawyer. *Id*. The court found "Howard's statements to police indicated that, although Howard wanted a lawyer, his opportunity to be first to talk to officers trumped his interest in having a lawyer present at the moment." *Id*.

Unlike in *Howard*, Cadet Hurtado unambiguously invoked his right to counsel in one sentence. Unlike *Howard*, Cadet Hurtado did not utter any contingencies or statements of self-interest. Instead, Cadet Hurtado uttered, "um yeah" which demonstrates no contrasting statement. For the Army Court to focus only on the word "but" and declare the use of that word made Cadet Hurtado's invocation to be anything except clear and unequivocal fails to consider the totality of the invocation.

The military judge based his conclusion of law upon Special Agent Nicole Lucas "first acknowledging Cadet Hurtado's answer, stating: "that's okay," and

then, recognizing Cadet Hurtado had requested counsel, re-asking Cadet Hurtado "so you want a lawyer at this time?" (App. Ex. VII-B, 30:20). The military judge found, that given that the totality of the circumstances, the interview should have stopped, and Cadet Hurtado should have been provided counsel. (App. Ex. XXX). The military judge went on, "Courts may consider the circumstances preceding, as well as concurrent with, the invocation in the course of addressing the issues of ambiguity. . . however, in evaluating ambiguity, courts may not consider subsequent responses. *See United States v. Herman*, 2023 CCA Lexis 7 (Army Ct. Crim. App. 2023) (App. Ex. XXX). There was no ambiguity and therefore no need for Special Agent Nicole Lucas to re-ask the question, "so you want a lawyer at this time" (App. Ex. VII-B, 30:20). Further, the Army Court ignores the statement from Special Agent Nicole Lucas prior to asking the follow-up question in their analysis. Special Agent Nicole Lucas stated "that's okay" affirming her acknowledgement and understanding of Cadet Hurtado's intent. (App. Ex. VII-B, 30:20).

The military judge did not predicate a ruling on findings of fact that are not supported by evidence in the record, nor did he use incorrect legal principles, nor did he apply correct legal principles to the facts in a way that is clearly unreasonable, nor did he fail to consider important facts. *Rudometkin,* 82 M.J at 401. Therefore, the very high standard of abuse of discretion has not been met.

B. The military judge did not make clearly erroneous factual findings and the Army Court's "mere disagreements" do not justify deviating from the standard this Court mandates under Article 62.

The authority the Army Court cited in providing "less deference" is derived from Article 66 cases. *Hurtado*, 2024 CCA LEXIS 136, at *6 (citing *United States v. Finch*, 78 M.J. 389, 397 (C.A.A.F. 2020)). In *Finch*, the military judge's ruling stated, "I find it admissible under M.R.E. 801." *Finch*, 79 M.J. at 397. But the judge in *Finch* provided no analysis to the appellate court. This Court noted that "'where the military judge places on the record his analysis and application of the law to the facts, deference is clearly warranted.' On the contrary, 'if the military judge fails to place his findings and analysis on the record, less deference will be accorded.'" *Id*. (quoting *United States v. Flesher*, 73 M.J. 303, 312 (C.A.A.F. 2014)). This Court in *Finch* noted less deference is appropriate when "we do not have the benefit of the military judge's analysis of the facts before him." *Id.* (quoting *United States v. Benton,* 54 M.J. 717, 725 (Army Ct. Crim. App. 2001)).

But here, the military judge wrote a four-page ruling which consisted of his findings of fact, citations to the appropriate case law, and a robust analysis. This is not a case where the Court "'do[es] not have the benefit of the military judge's analysis of the facts.'" *Id.* (quoting *Benton,* 54 M.J. at 725). For the Army Court to find that a four-page ruling is the equivalent of "fail[ing] to place his findings and analysis on the record" would allow appellate courts to simply substitute the

military judge's decision with its own because it disagrees with the military judge's ultimate conclusion. *Id.* This Court has admonished military judges that they must show their work. *See, e.g.*, *United States v. Keago,* 84 M.J. 367 (C.A.A.F. May 9, 2024). Here, the military judge did just that and should be provided deference.

The Army Court wrote that the military judge failed to consider key facts: "the rising pitch of [Cadet Hurtado's] response, indicating a question in his reply, as well as [Cadet Hurtado's] simultaneous gestures." *Hurtado*, 2024 LEXIS 136, at *6. But nothing in the military judge's ruling indicates he failed to consider those facts. (App. Ex. XXX). The military judge watched the same video as the Army Court and identified time hacks from Cadet Hurtado's interview that correspond to the very same pitch and gestures the Army Court is referencing. (App. Ex. XXX). The Army Court's finding that Special Agent Nicole Lucas "interjected" to further explain appellee's right is not supported by the record and was a clearly erroneous finding. *Hurtado*, 2024 LEXIS 136, at *5.

Overturning a finding of fact as clearly erroneous is a very high bar to meet. To be "'clearly erroneous" a finding of fact "must be more than just maybe or probably wrong; it must . . . strike us as wrong with the force of a five-week-old unrefrigerated dead fish.'" *United States v. French*, 38 M.J. 420, 425 (C.M.A.

1993) (quoting *Parts and Electric Motors Inc. v. Sterling Electric, Inc.*, 866 F.2d 228, 233 (7th Cir. 1988)).

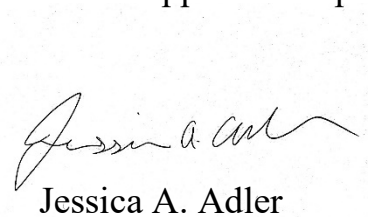
Although the Army Court stated it could not make its own findings of fact or insert new facts into its legal analysis, that is exactly what it did. *Hurtado*, 2024 LEXIS 136, *6. The Army Court noted that "after asking [Cadet Hurtado] if he wanted an attorney a second time, Special Agent Nicole Lucas waited for [Cadet Hurtado's] response. It was not until after [Cadet Hurtado] shrugged and said, "I just . . . I don't . . . I don't . . . " and trailed off, not finishing his sentence, that Special Agent Nicole Lucas then explained the process of exercising his right to counsel in more detail. *Hurtado*, 2024 LEXIS 136, at *6. But as the military judge reasonably found, there shouldn't have been a second time. The military judge found that "after [Cadet Hurtado] responded, Special Agent Nicole Lucas stated in response, "that's okay," and re-asked the question a second time; "so you want a lawyer at this time?" (App. Ex. XXX). The interview should have been terminated upon Cadet Hurtado's invocation as Special Agent Nicole Lucas recognized Cadet Hurtado's clear invocation with her immediate response of "that's okay." (App. Ex. XXX). The Army Court did not find that fact to be clearly erroneous so any factual finding after that is past the invocation and not dispositive of the outcome because, when evaluating ambiguity, courts may not consider subsequent responses. *Smith v. Illinois,* 469 U.S. 91, 98-99 (1984).

Courts may only consider the events immediately preceding and concurrent with the invocation and "nuances inherent in the request itself" when analyzing whether a statement was equivocal or ambiguous. *United States v. Delarosa*, 67 M.J. 318 (C.A.A.F. 2009) (quoting *Smith*, 469 U.S. at 99-100) (citations omitted). Special Agent Nicole Lucas recognized Cadet Hurtado's unambiguous invocation of his right to counsel by immediately responding with "that's okay," as the military judge found as fact in his ruling. (App. Ex. XXX). Therefore, the Army Court's reference to the words that came after the invocation was error.

The Army Court failed to view the evidence in the light most favorable to Cadet Hurtado, demonstrating it afforded the military judge no deference. It also erred in considering Cadet Hurtado's statement after the invocation.

Conclusion

Appellant respectfully requests this Court grant his petition for review.



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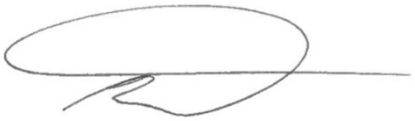

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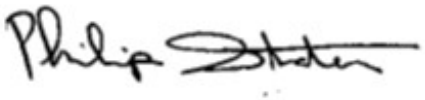

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APPENDIX A

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
POND, MORRIS, and JUETTEN
Appellate Military Judges

UNITED STATES, Appellant
v.
Cadet JORGE A. HURTADO
United States Army, Appellee

ARMY MISC 20240609

Headquarters, U.S. Military Academy
William C. Ramsey, Military Judge
Lieutenant Colonel Jeffrey A. Gilberg, Special Trial Counsel

For Appellant: Colonel Richard E. Gorini, JA; Captain Anthony J. Scarpati, JA; Captain Stewart A. Miller, JA (on brief and reply brief).

For Appellee: Colonel Philip M. Staten, JA; Lieutenant Colonel Autumn R. Porter, JA; Major Robert W. Rodriguez, JA; Captain Jessica A. Adler, JA (on brief).

25 March 2025

SUMMARY DISPOSITION AND ACTION ON APPEAL
BY THE UNITED STATES FILED PURSUANT TO
ARTICLE 62, UNIFORM CODE OF MILITARY JUSTICE

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

POND, Chief Judge:

This case is before us as an interlocutory appeal under Article 62, Uniform Code of Military Justice, 10 U.S.C. § 862 [UCMJ]. Appellant contends the military judge abused his discretion when he suppressed appellee's statement to agents from the Criminal Investigation Division (CID) because, contrary to the military judge's findings, appellee's invocation of his right to counsel was equivocal and ambiguous. For the reasons set forth below, we agree and grant the government's appeal.

BACKGROUND

Appellee, a former cadet at the United States Military Academy (USMA), is charged with allegations of sexual misconduct against four fellow cadets. As part of CID's investigation, appellee was escorted by his chain of command to the local CID field office for questioning and gave a statement. At trial, defense moved to suppress this statement on the basis appellee had invoked his right to counsel prior to questioning. The military judge agreed and granted defense's motion to suppress the statement.

In making his ruling, the military judge made the following factual findings and conclusions of law:

- CID opened an investigation and arranged to have appellee brought to their office for an interview on 23 January 2024. Special Agent (SA) NL conducted the majority of appellee's interview.

- Prior to questioning, SA NL advised appellee of his rights, to include appellee's right to have a lawyer present. Appellee acknowledged he understood his rights to remain silent and the right to have an attorney present.

- After advising appellee of his rights, SA Lucas asked appellee: "Do you want a lawyer at this time?" CDT Hurtado responded, stating: "I mean, I would like to speak to a lawyer, but um, yeah."

- SA Lucas then stated, in response, "That's okay," and re-asked the question a second time: "So you want a lawyer at this time?" SA Lucas then interjected to explain to appellee what the process would be if he decided to ask for a lawyer.

- The military judge found appellee invoked his right to counsel when he stated, "I mean, I would like to speak to a lawyer, but um, yeah." Given the totality of the circumstances, the military judge found the interview should have stopped at that point and until appellee was provided with an opportunity to speak with counsel.

LAW AND DISCUSSION

Standard of Review and Applicable Law

In an Article 62, UCMJ, appeal, we review the evidence in the light most favorable to the prevailing party at trial. *United States v. Pugh*, 77 M.J. 1, 5 (C.A.A.F. 2017). Article 62, UCMJ, limits this court's authority to "act only with

respect to matters of law." UCMJ art. 62(b). Thus, we are "bound by the military judge's factual determinations unless they are unsupported by the record or clearly erroneous," *Pugh*, 77 M.J. at 3, and "may not 'find [our] own facts or substitute [our] own interpretation of the facts.'" *United States v. Becker*, 81 M.J. 483, 489 (C.A.A.F. 2021) (quoting *United States v. Cossio*, 64 M.J. 254, 256 (C.A.A.F. 2007)). However, we review questions of law, such as whether an accused has invoked his right to counsel, de novo. *United States v. Davis*, 36 M.J. 337, 341 (C.A.A.F. 1993).

"We review a military judge's ruling on a motion to suppress evidence for an abuse of discretion." *United States v. Flanner*, 2024 CAAF LEXIS 578, at *11 (C.A.A.F. Sep. 30, 2024) (citation omitted). "In reviewing a military judge's ruling on a motion to suppress, we review factfinding under the clearly-erroneous standard and conclusions of law under the de novo standard." *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995). Thus, "a military judge abuses his discretion when his findings of fact are clearly erroneous or his conclusions of law are incorrect." *Id.* Whether an accused has invoked his right to counsel is a question of law which we review de novo. *United States v. Davis*, 36 M.J. 337, 341 (C.A.A.F. 1993).

"Prior to initiating interrogation, law enforcement officials must provide rights warnings to a person in custody," including the right to consult with counsel and have counsel present during questioning. *United States v. Delarosa*, 67 M.J. 318, 320 (C.A.A.F. 2009) (citing *Miranda v. Arizona*, 384 U.S. 436, 445, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)). If, after given *Miranda* rights, "a suspect provides an ambiguous statement regarding invocation of rights," then "law enforcement officials are not obligated to cease interrogation." *Id.* (citing *Davis v. United States*, 512 U.S. 452, 461-62 (1994)). In that case, "law enforcement officials may attempt to clarify the issue of rights invocation, but they are not required to do so." *Id.* Asking clarifying questions, however, "will often be good police practice." *Davis,* 512 U.S. at 461 (noting asking such questions protects suspect rights while minimizing judicial second-guessing as to what a suspect's statement about his rights meant). *Id.*

In determining whether the invocation of the right to counsel is unambiguous, "the Supreme Court has stated that the invocation must be 'sufficiently clear[] that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.'" *Delarosa*, 67 M.J. at 324 (quoting *Davis* 512 U.S. at 459). In conducting our analysis, we look to "events immediately preceding, as well as concurrent with, the invocation in the course of addressing the issue of ambiguity." *Id.*

Discussion

Applying a clearly erroneous standard, most of the military judge's findings of fact are supported by the record. The parties argue whether appellee said "I

mean" at the beginning of his initial statement. Both parties at trial, however, appear to have agreed that appellee prefaced his reply with the words, "I mean" as adopted in the military judge's findings of fact. Regardless, the words "I mean" are not dispositive to our analysis. But the military judge's finding that SA Lucas "interjected" to further explain appellee's right is not supported by the record. Interjecting infers that SA Lucas interrupted appellee. However, after asking appellee if he wanted an attorney a second time, SA Lucas waited for appellee's response. It was not until after appellee shrugged and said, "I just...I don't....I don't..." and then trailed off, not finishing his sentence, that SA Lucas then explained the process of exercising his right to counsel in more detail. We 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.

We also note the military judge failed to consider key facts in making his ruling. We note the military judge failed to consider the rising pitch of appellee's response, indicating a question in his reply, as well as appellee's simultaneous gestures. The omission of and failure to consider key and competing facts afford a military judge's ruling less deference. *See United States v. Finch*, 79 M.J. 389, 397-98 (C.A.A.F. 2020).

Under a de novo review, the plain language of the word "but" at the end of appellee's statement is inherently equivocal. The word "but" is a phrase used to introduce a phrase or clause contrasting with what has already been mentioned. *See Merriam-Webster, But*, https://www.merriam-webster.com/dictionary/but (last visited Mar. 19, 2025) (defining "but" as "except for the fact"). Here, appellee stated he would like to speak to a lawyer, followed immediately by the word "but," which by its plain language, introduces a different and opposite intent. The word "but" inserts doubt as to what appellee intended. Without the word "but," the ambiguity in appellee's statement dissipates. With the word "but," appellee's statement is anything except clear and unequivocal.

Faced with this ambiguity, SA Lucas re-asked the question to clarify appellee's intent: "So you want a lawyer at this time?" This served the legitimate law enforcement function of dispelling the ambiguity and clarifying whether appellee was indeed invoking his rights. Though such questions are not required, they are encouraged because, as the Supreme Court stated, asking these types of clarifying questions serves the dual purpose of protecting a suspect's rights while minimizing judicial second-guessing of what an accused intended by a statement which is ambiguous and unclear. *Davis,* 512 U.S. at 461.

For the foregoing reasons, under a de novo review, we conclude appellee did not unequivocally invoke his right to counsel.

CONCLUSION

The government appeal is GRANTED and the military judge's ruling is VACATED. We return the record of trial to the military judge for action consistent with this opinion.

Judge MORRIS and Judge JUETTEN concur.

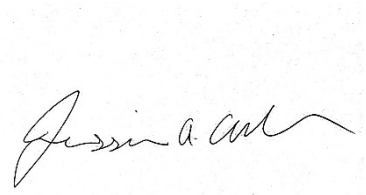
FOR THE COURT:

STEVEN P. HAIGHT
Acting Clerk of Court

CERTIFICATE OF COMPLIANCE WITH RULE 21

1. This brief complies with the type-volume limitation of Rule 21(b) because it contains 2974 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in Times New Roman font, using 14-point type with one-inch margins.



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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of United States v. Hurtado, Crim. App. Dkt. No. 20240609, USCA Dkt. No. 25-0212/AR was electronically filed with the Court and Government Appellate Division on July 21, 2025.

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