

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,
Petitioner

v.

Lieutenant Colonel (O-5)
MARCEE, Joseph T.
Military Judge,
Respondent

Private (E-1),
ROEL, Richard A.,
United States Army,
Real Party in Interest

) REPLY BRIEF TO RESPONSE TO
) PETITION FOR EXTRAORDINARY
) RELIEF IN THE FORM OF A WRIT
) OF MANDAMUS
)
) Docket No. ARMY Misc. 20210550
)
) Tried at Fort Hood, Texas, on 15 March,
) 15 June, and 22 September 2021, before
) a general court-martial, convened by the
) Commander, 1st Cavalry Division,
) Colonel Lanny J. Acosta, Jr., and
) Lieutenant Colonel Joseph T. Marcee,
) military judges, presiding.
)
)
)

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

Specified Issue

**WHETHER THIS COURT HAS JURISDICTION
OVER THE GOVERNMENT'S PETITION FOR
EXTRAORDINARY RELIEF, AND, IF SO,
WHETHER THIS COURT SHOULD ORDER THE
MILITARY JUDGE TO WITHDRAW HIS
FINDINGS OF NOT GUILTY.**

Statements of Facts and Statutory Jurisdiction

The government hereby incorporates the statements of fact and arguments for statutory jurisdiction from its brief, filed on 12 October 2021, in support of this petition for extraordinary relief in the form of a writ of mandamus.

A. This court has jurisdiction over the government’s petition for extraordinary relief.

Law and Argument

Contrary to the real party in interest’s arguments averring this court lacks jurisdiction to review the writ, (Real Party in Interest’s Br. 8–10), the government, by asking this court to order the military judge to withdraw his findings of not guilty to Specification 1 of Charge I and the Specification of Charge II, is not seeking that this court impermissibly expand its jurisdiction or provide relief in a situation where it would be jurisdictionally barred in the first place. The real party in interest’s reliance on *United States v. Smith*, 39 M.J. 448 (C.A.A.F. 1994), and *United States v. Brown*, 81 M.J. 1 (C.A.A.F. 2021), to argue that jurisdiction is barred because of the not guilty finding is unpersuasive. (Real Party in Interest’s Br. 7–9).

In *Smith*, the Court of Appeals for the Armed Forces (CAAF) found that appellate courts may not make “findings of fact contradicting findings of not guilty reached by a factfinder.” *Id.* at 451–52. The government is not asking this court to contradict any factual findings of not guilty or even review a finding of not guilty.

By the very nature of the plea agreement, there were no facts for the military judge to base his finding of not guilty on. (App. Ex. III). Rather, the government seeks this court to review the military judge's authority to withdraw the findings of not guilty based upon the accused's withdrawal from the plea agreement.

Similarly, the real party in interest misapplies *Brown*. (Real Party in Interest's Br. 8–9). In *Brown*, the CAAF re-affirmed that the authority to entertain a writ under the All Writs Act extends to cases of potential jurisdiction, “‘allow[ing] appellate courts to issue opinions in matters that may reach the actual jurisdiction of the court.’” 81 M.J. at 5 (quoting *Howell v. United States*, 75 M.J. 386, 390 n.4 (C.A.A.F. 2016)). “Our jurisprudence has recognized that potential jurisdiction includes circumstances in which the lower court's statutory jurisdiction is attenuated and dependent upon the discretionary acts of others who exercise authority in the military justice system.” *Brown*, 81 M.J. at 5. Moreover, “[j]urisdiction under the All Writs Act is [] limited to matters that ‘ha[ve] the potential to directly affect the findings and sentence.’” *Howell*, 75 M.J. at 390 (quoting *Ctr. For Constitutional Rights v. United States*, 72 M.J. 126, 129 (C.A.A.F. 2013)) (citations omitted). Undoubtedly, the government's complaint regarding the enforcement of the withdrawal provision in parties' plea agreement—vis-à-vis the military judge's authority to withdraw the findings of not guilty—has the “potential to directly affect the findings and sentence,” *Howell*, 75

M.J. at 390, and the accused's punitive exposure—both contemplated within the sentencing parameters of the plea agreement or without—places his case within this court's potential jurisdiction.

Furthermore, the government should not be precluded from seeking extraordinary relief merely because it has also filed an appeal under Article 62, UCMJ. (Real Party in Interest's Br. 9, 12). This petition is aimed at a distinctly separate question: whether the military judge had the authority to withdraw the findings of not guilty. Essentially, this is a question of whether the military judge's declination to do so was a "judicial usurpation of power." *United States v. Labella*, 15 M.J. 228, 229 (C.A.A.F. 1983). The Article 62, UCMJ, appeal is aimed at whether the government is barred from prosecuting the accused by the Double Jeopardy Clause. The former is concerned with the power of the lower court, the proper inquiry of a writ petition; the latter is a legal question concerned with the termination of prosecution for two specifications against the accused, which is a proper inquiry for an Article 62, UCMJ, appeal. *See Will v. United States*, 389 U.S. 90, 104 (1967) (noting that unlike an ordinary appeal, a writ is used "not to control the decision of the trial court, but rather merely to confine the lower court to the sphere of its discretionary power").

B. Principles of contract law do—and should—govern the actions of the parties and the military judge in this case, and the issuance of the writ does not violate the accused's constitutional protection against Double Jeopardy.

Because the plea agreement between the accused and the convening authority is a contract, the principles of contract law are not only illustrative but provide the proper framework to examine the consequences of the accused's withdrawal from the agreement. *United States v. Acevedo*, 50 M.J. 169, 172 (C.A.A.F. 1999) (noting that courts “look to the basic principles of contract law when interpreting pretrial agreements”). While *United States v. Podde* examined the withdrawal from a guilty plea through the lens of mistrial, this does not mean that it is any less useful. 105 F.3d 813, 816 (2d Cir. 1997). The real party in interest is correct that a mistrial is governed by Rule for Court Martial [R.C.M.] 915 and withdrawal is governed by R.C.M. 910, (Real Party in Interest's Br. 15), but this does not foreclose the application of general contract principles in this case. The respondent claims both *Podde* and *Currier v. Virginia* are inapplicable by selectively choosing specific lines from each case and ignoring the central ideas. (Real Party in Interest's Br. 15–16). Both cases are clear—the Double Jeopardy Clause does not stand as an obstacle to further prosecution where an accused voluntarily withdraws from a plea agreement. *See Currier v. Virginia*, 138 S. Ct. 2144, 2149 (2018); *Podde*, 105 F.3d at 818.

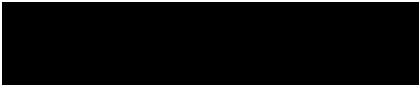
Here, the terms of the plea agreement are clear that the accused was pleading guilty to receive the benefit of the government presenting no evidence on Specification 1 of Charge I and the Specification of Charge II. (App. Ex. III).

Notwithstanding the fact that jeopardy did not attach to those specifications,¹ the accused's voluntary choice to withdraw from his side of the bargain—and not plead guilty—“releases the government from its obligation not to prosecute and there is no double jeopardy bar to retrying him on the charges in the original indictment.” *Podde*, 105 F.3d at 818. Thus, the accused should again be subjected to the original charge sheet. In failing to withdraw the findings of not guilty and preventing the government from moving forward on all charges and specifications, the military judge usurped his authority and failed to place the parties in their original positions as contemplated by precedent and the withdrawal provision of the plea agreement.


¹ Under the Double Jeopardy Clause, “once a defendant is placed in jeopardy for an offense, and jeopardy terminates with respect to that offense, the defendant may neither be tried nor punished a second time for the same offense.” *Sattazahn v. Pennsylvania*, 537 U.S. 101, 106 (2003) (citing *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969)). In a court-martial tried by military judge alone, jeopardy attaches only “after the introduction of evidence.” UCMJ art. 44(c)(1); *Serfass v. United States*, 420 U.S. 377, 388 (1975) (“In a nonjury trial, jeopardy attaches when the court begins to hear evidence.”). In this case, jeopardy never attached to Specification 1 of Charge I and The Specification of Charge II because the government—in accordance with the plea agreement—never introduced evidence as to those specifications. (App. Ex. III).

Conclusion

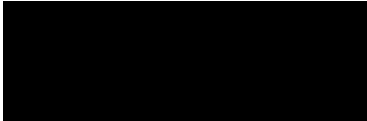
WHEREFORE, the government respectfully requests this court grant this petition and issue a writ of mandamus to correct the military judge's error in failing to withdraw his findings of not guilty to Specification 1 of Charge I and the Specification of Charge II and permit the government to try the accused on those charges and specifications.



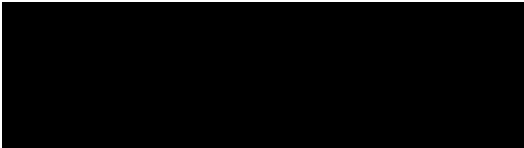
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**CERTIFICATE OF SERVICE, U.S. v. ROEL, Real Party in
Interest (Misc 20210550)**

I certify that a copy of the foregoing was sent via electronic submission to the
Defense Appellate Division at [REDACTED]
[REDACTED] on the 15th day of November, 2021.

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