

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES

Appellee

v.

APPELLANT’S MOTION TO  
RECONSIDER *EN BANC*

Docket No. ARMY 20220245

Specialist (E-4)

**ETHAN H. KIBLER**

United States Army

Appellant

Tried at Vilseck, Germany, on 13 May 2022, before a general court-martial appointed by the Commander, Seventh Army Training Command, Lieutenant Colonel Thomas P. Hynes, military judge, presiding.

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

COME NOW the undersigned appellate defense counsel, under Rules 23, 27, and 31 of the Rules of Appellate Procedure, and move for reconsideration and reconsideration by the court *en banc* of this court’s 31 October 2023 memorandum opinion.

Appellant requests this court reconsider its decision *en banc* because this is a novel question of law that will likely reappear in every guilty plea case where a specification is held improvident on appellate review.

**Grounds for Reconsideration and Reconsideration *En Banc***

This court must reevaluate its decision to allow the convening authority the opportunity to withdraw from the plea agreement because the plain language of the agreement only permits the convening authority to withdraw if *all* findings of guilt

do not survive appellate review. This court only found a single specification improvident, and therefore, the convening authority has no right to withdraw.

Separately, this court must reevaluate how it receives responses from the government. Rather than order what was formerly referred to as a *Dubay* hearing to answer the single question, this court should simply ask the Government Appellate Division as the representative of the United States before the court.

### **Argument**

#### **A. The Plain Language of the Plea Agreement Does Not Permit the Convening Authority to Withdraw**

Paragraph 5 of appellant's plea agreement reads in pertinent part as follows:

I understand the convening authority may withdraw from my plea agreement:

- (a.) at any time before my substantial performance of promises contained in this agreement;
- (b.) upon my failure to fulfill any material promise or condition in the agreement;
- (c.) when inquiry *by the military judge* discloses a disagreement as to a material term in the agreement;
- (d.) if the military judge refuses to accept *any portion* of my pleas of guilty;
- (e.) *if findings* are set aside because my plea of guilty pursuant to the agreement was held improvident on appellate review;
- (f.) if I commit any serious misconduct . . . (Plea Agreement) (emphasis added).

At trial, all parties and the military judge agreed that by entering into the stipulation of fact appellant substantially performed his promises. Further, it was agreed that appellant fulfilled all material promises of the agreement. (R. at 131-

32). Additionally, the military judge identified no discrepancies between the parties understanding of any material term. (R. at 138). Appellant did not commit any other serious misconduct. (R. at 132-33). Thus, the convening authority has no right to withdraw from this agreement under clauses (a), (b), (c), or (f) of paragraph 5.

Nor can the convening authority withdraw under clause (d). The military judge accepted *all* portions of his pleas of guilty—the military judge found appellant provident and subsequently guilty of all Charges and Specifications to which he pled guilty. (R. at 139).

At issue before this court, is the meaning of clause (e). “[I]f findings are set aside because my plea of guilty pursuant to the agreement was held improvident on appellate review.” This court erred in interpreting “findings” to allow for the convening authority to withdraw if *any* finding is held improvident on appellate review. This is wrong for three reasons.

First, the word “findings” is plural—it means “more than one.” *See*, Merriam-Webster Dictionary November 2023. The natural reading of *findings* allows for withdrawal by the convening authority only if *multiple* specifications are held improvident. Here, this court has found only Specification 2 of Charge V improvident. As this court made clear, no other specification has been touched.

(United States v. Kibler, ARMY 20220245 Army Ct. Crim. App. 31 October 2023 Pg. 9).

Second, when clause (e) is read in conjunction with clause (d) it becomes apparent that clause (e) requires not just multiple, but *all* findings to be set aside as improvident to permit convening authority withdrawal.

The basic principles of contract law apply when interpreting a plea agreement. *See United States v. Acevedo*, 50 M.J. 169, 172 (C.A.A.F. 1999). One of those principles requires when parties to the same contract use . . . different language to address parallel issues . . . , it is reasonable to infer that they intend this language to mean different things." *Taracorp, Inc. v. NL Indus., Inc.*, 73 F.3d 738, 744 (7th Cir. 1996). Here, the parties used different terms in clause (d) and (e). Therefore, it is reasonable to assume the terms meant different things.

If the convening authority can withdraw if the military judge refuses to accept *any portion* of appellant's pleas of guilty in clause (d), then an appellate court determining "findings" are improvident in clause (e) must mean something different. If the convening authority could withdraw because providence failed on appellate review for *any* specification, then the principles of contract construction require clause (d) and clause (e) to be written the same. Because they are different, clause (d) must be read to allow for withdrawal if *any* portion is not accepted,

while findings in clause (e) must refer to *every* portion of appellant’s pleas of guilt—all of the findings.

Third, because a “defendant's fundamental and constitutional rights are implicated when he is induced to plead guilty by reason of a plea agreement, we analyze a plea agreement with greater scrutiny than we would apply to a commercial contract. We thus hold the Government to a greater degree of responsibility than the defendant for imprecisions or ambiguities in plea agreements.” *United States v. Squirrel*, 588 F.3d 207, 217 (4th Cir. 2009). Any imprecisions in drafting should fall at the feet of the government. Appellant completely performed his end of the bargain by pleading guilty, and thus must receive the benefit of his deal. As such, the convening authority is not permitted to withdraw.

#### **B. This Court’s reliance on *Cook* and *Stout* is Inapposite**

To determine the convening authority had the right to withdraw, this court first looked to CAAF’s decision in *Cook*, describing that case as “directly on point.” *Kibler*, ARMY 20220245 Army Ct. Crim App. 31 October 2023 Pg. 9 citing *United States v. Cook*, 12 M.J. 448, 452 (C.M.A. 1982).

Crucially, in *Cook*, *no portion* of the offer to plead guilty addressed what would happen in the event a specification was held improvident—the contract was silent. Indeed, this was the very first caveat the CAAF gave to the field when

accessing the precedential value of that opinion. “We begin by observing that no provision in the pretrial agreement expressly addressed what would happen if appellee's accepted pleas of guilty were found improvident on appeal.” *Cook*, 12 M.J. at 452. Here, appellant’s plea agreement contained a provision regarding this contingency and thus *Cook* can provide no guidance to this case.

Likewise, reliance on *United States v. Von Bergen* is similarly misplaced for the same reason. “[I]mprovidence of the plea upon appellate review was not an express basis for cancellation in the pretrial agreement. . . .” *United States v. Von Bergen*, 67 M.J. 290, 294 (C.A.A.F. 2009). The CAAF seems to have adopted a rule that in the *absence* of a term concerning providence surviving appellate review, the failure of providence to any specification will be viewed as allowing the convening authority to withdraw. *Id.*

This instant case is different. Unlike *Cook* or *Von Bergen*, the express term contained in paragraph 5 (e) explained the contingency of providence failing appellate review. Those cases are inapplicable.

Next, this court looks to its previous opinion in *Stout*—however that case is similarly distinguishable, and supports appellant’s request for reconsideration. In *Stout*, pursuant to a pretrial agreement, Stout pled guilty to one specification of abusive sexual contact with a child, one specification of indecent liberties with a child and one specification of possession of child pornography. In *Stout*, unlike

here, *all three* of the specifications were found improvident. *United States v. Stout*, No. ARMY 20120592, 2014 CCA LEXIS 469, at \*19-20 (Army. Ct. Crim. App. July 25, 2014). This court correctly found the language in the agreement a restatement of Rule for Court-Martial 705(e)(4)(B). However, this court misinterpreted that rule to allow for withdrawal erroneously finding if *any* specification is held improvident, when, in actuality, under *Stout*, *all* must be.

**C. In the Interest of Judicial Economy the Court Should Ask Government Appellate Division for the position of the United States**

Should the court disagree, and find only a single specification failing providence is sufficient to permit the government to withdraw, the Government Appellate Division should announce the government's position.

In this opinion, the court determined it would be unnecessary to remand the case for the sole purpose of announcing findings of not guilty, the court determined the interests of judicial economy permitted the court to simply announce the specifications as dismissed with prejudice. *Kibler*, ARMY 20220245 pg. 11

Those same interests should advise the plan to seek the convening authority's desires on withdrawing from the plea. Rather than hold a costly and time-consuming additional hearing (formerly a *Dubay* hearing) to get "the answer to one question. . ." *Kibler*, ARMY 20220245 pg 11, the Government Appellate Division can and should supply the court and appellant with that answer.

### Conclusion

This court should evaluate the remaining specifications and complete its Article 66, UCMJ review, and adhere to longstanding practice of doing so without sending it back to the convening authority.

PANEL NO. 3

MOTION FOR  
RECONSIDERATION

GRANTED: \_\_\_\_\_

DENIED: \_\_\_\_\_

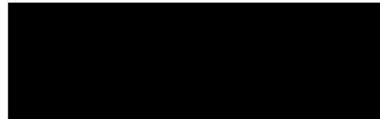
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MOTION FOR RECONSIDERATION  
BY THE COURT *EN BANC*

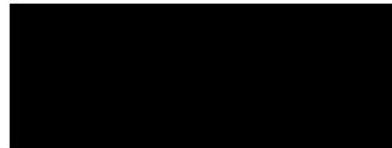
GRANTED: \_\_\_\_\_

DENIED: \_\_\_\_\_

DATE: 12 December 2023




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**Certificate of Filing and Service**

I certify that a copy of the foregoing was electronically submitted to Army  
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