	)	IN THE COURT OF MILITARY
	)	COMMISSION REVIEW
DAVID M. HICKS,	)	
	)	**BRIEF OF THE UNITED STATES ON THE**
Appellant,	)	**COURT'S LACK OF AUTHORITY TO**
	)	**HEAR THIS CASE**
	)	
v.	)	CMCR Case No. 13-004
	)	
	)	Tried at Guantánamo Bay, Cuba
UNITED STATES OF AMERICA,	)	on 26 & 30 March 2007
	)	before a Military Commission
Appellee.	)	convened by Hon. Susan J. Crawford
	)	
	)	Presiding Military Judge
	)	Colonel Ralph H. Kohlmann, USMC

TO THE HONORABLE, THE JUDGES OF THE COURT OF MILITARY COMMISSION REVIEW

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December 19, 2013

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ISSUES PRESENTED AND BRIEF ANSWERS

The Court has directed the parties to:

1. *[F]ile briefs with supporting documentation which address only matters relevant to this Court's authority to hear this case including, but not limited to:*

   a. *Statutory and other authority relevant to determining "whether the case [is] properly before [this Court]." United States v. Shipp, 203 U.S. 563, 573 (1906).*

   This case is not properly before the Court because (1) Hicks knowingly, intelligently, and voluntarily waived appeal, *see* Part I.A; Part II, and (2) the Convening Authority has not referred the case for appeal or forwarded the record for review, *see* Part I.B.

   b. *Whether the convening authority complied with the "automatic referral for appellate review" requirements of 10 U.S.C. § 950c(a) and R.M.C. 1111?*

   Yes, the Convening Authority complied with 10 U.S.C. § 950c(a) and R.M.C. 1111. By their plain text, they apply only where an accused has not waived appellate review. Where, as here, an accused has waived appeal, that waiver "bars review" under 10 U.S.C. § 950c(d). *See* Part I.

   c. *When were the accused and defense counsel served with the convening authority's action? See 10 U.S.C. § 950c(b)(3); Manual for Military Commissions, Rules for Military Commissions 1107(h) and 1110(f)(1); and Regulation for Trial by Military Commission (RTMC), paragraphs 23-10 and 24-2.b.*

   The accused was served with the Convening Authority's Action on May 2, 2007. *See* A302.[1]

   d. *Whether the accused "file[d] with the convening authority a statement expressly waiving [his] right" to review by this Court? 10 U.S.C. § 950c.*

   Although Hicks did not file a waiver of appeal directly with the Convening Authority, he did submit a waiver to the Military Judge just before trial proceedings adjourned on March 30, 2007. That waiver was marked AE 33 and filed in the record, putting the parties and the Convening Authority on notice that Hicks had waived appeal. *See* App. 1;[2] A296-A297 (Tr. 248:21-249:21).

   Hicks' premature filing of the waiver with the Convening Authority does not render his waiver invalid. *See* Part III.

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[1] All references to "A__" refer to the Appendix to Brief of Appellant David M. Hicks, filed on November 5, 2013.

[2] All references to "App. __" refer to the Appendix filed herewith.

(1) Was any such waiver of review by this Court: "signed by both the accused and a defense counsel?" 10 U.S.C. § 950c(b)(2).

Yes. Both Hicks and his defense counsel, Major Michael D. Mori, USMC, signed the waiver as required by 10 U.S.C. § 950c(b)(2). *See* App. 1.

(2) Was any such waiver of review by this Court "filed . . . within 10 days after notice of the [convening authority's] action [was] served on the accused or on defense counsel[,]" or filed after the "period for such filing" was extended by the convening authority? 10 U.S.C. § 950c(b)(3).

No. Hicks did not re-file his waiver form with the Convening Authority within ten days after Notice of the Action was served on Hicks on May 2, 2007. However, the Convening Authority gave Hicks notice within that ten-day period that she was relying upon Hicks' previously-filed waiver of appeal. A301; A302; A306. Hicks' failure to affirmatively re-file his waiver within the ten-day period does not render the waiver invalid. The Court should treat Hicks' waiver as filed on the date of (and after) service of the Action because, under the circumstances of the case, the Action could have no effect on the voluntariness of the waiver. *See* Part III.

In the alternative, the Court should enforce specific performance of the Pretrial Agreement, by holding Hicks to have validly waived appellate review and dismissing this action as if it had never been filed. *See* Part IV.

(3) Was any such waiver of review by this Court the subject of discussion, on the record, between the Appellant and the military commission judge?

Yes. The Military Judge discussed Hicks' obligation to waive appeal, as set forth in the Pretrial Agreement ("PTA"), with Hicks and his defense counsel during the inquiry into the providence of Hicks' guilty plea. *See* A188-A190 (Tr. 140:16-142:11). The Military Judge also discussed Hicks' written waiver of appeal, which was signed by both Hicks and his defense counsel, just before the commission adjourned. *See* A296-A297 (Tr. 248:21-249:21). Both of these exchanges, which are reproduced in the Statement of Facts below, establish that Hicks knowingly, voluntarily, and intelligently waived appeal.

(4) What effect, if any, does a negative response to any question posed in 1(d)(1)-(3) have upon the legal sufficiency of any such waiver?

See above.

e. Whether "[t]he Legal Advisor to the Convening Authority . . . review[ed] any waivers [of review by this Court] submitted to the Convening Authority for completeness" and the result of any such review? RTMC, paragraph 24-2.b.5 (2011).

Although the current Regulation for Trial by Military Commission requires the Legal Advisor to review a waiver of appeal for completeness, there was no Regulation for Trial by

Military Commission in effect when the Legal Advisor made his Recommendation in this case, so he had no obligation to conduct such a review. *See infra* 10 n.6.

f. What effect, if any, does the statement in the RTMC that "[t]he U.S.C.M.C.R. should decide the legal sufficiency of waivers" have upon our authority to hear this case? RTMC paragraph § 24-2.b.5 (2011).

None. This Court lacks subject matter jurisdiction over this action because Hicks' waiver "bars review" and because the Convening Authority has not referred the case for review or forwarded the record. 10 U.S.C. §§ 950c(d), 950f(c). The R.T.M.C. cannot expand the Court's jurisdiction beyond the scope set by Congress in the Military Commissions Act ("M.C.A."). *See* Part I. At most, this statement authorizes the Court to review the record, including the providence inquiry and waiver form signed by the accused and his counsel, to determine whether the plea colloquy and waiver comply with the basic requirements of the M.C.A. and the R.M.C. (which they do). *See* Part II.A.

STATEMENT OF STATUTORY JURISDICTION

For all the reasons discussed herein, the Court lacks jurisdiction over this action.

STATEMENT OF FACTS

A. Hicks and His Defense Counsel Knowingly and Voluntarily Offered and Agreed to Waive Appellate Review

On March 26, 2007, David M. Hicks, his defense counsel, and the Convening Authority each signed the Pretrial Agreement ("PTA"). A29-A30. In the PTA Hicks "freely and voluntarily" offered to plead guilty "because I am guilty."[3] A26. Hicks offered, among other things, to plead guilty to the charge and specification and not to "make, participate in, or support any claim . . . in any forum against the United States . . . with regard to my capture, treatment, detention, or prosecution." A29; A188-189 (Tr. 140:22-141:5).

[3] Hicks argues that he was willing to plead guilty "especially since he did not have to admit to having committed a crime." Hicks Br. 11; *see id.* 5 & n.5. Hicks and his attorney Joshua Dratel both assert in affidavits that Hicks entered "an Alford plea," which "involved pleading guilty but without admitting that I was in fact guilty." Hicks Aff. ¶ 270. While not central to this appeal, Hicks and his attorneys are wrong.

Hicks admitted he was in fact guilty of the charged offense. In the PTA, Hicks stated: "I assert that I am, in fact, guilty of the offense to which I am offering to plead guilty." A26. The Military Judge asked if Hicks understood that, by accepting the PTA, "you assert that you are in fact guilty of the offense to which you are pleading guilty," and Hicks responded, "Yes, sir." A175 (Tr. 127:1-14). A typical *Alford* plea involves a defendant who maintains his innocence but admits the government could prove its case beyond a reasonable doubt. *See North Carolina v. Alford*, 400 U.S. 25, 37-38 (1970). While there are some similarities between Hicks' plea and an *Alford* plea, Hicks did not maintain his innocence and admitted he was, in fact, guilty.

Both in the PTA and during his plea colloquy, Hicks agreed to "voluntarily and expressly waive all rights to appeal or collaterally attack [the] conviction, sentence, or any other matter relating to this prosecution whether such a right to appeal or collateral attack arises under the Military Commissions Act of 2006, or any other provision of United States or Australian law." A29; *see* A188-A189 (Tr. 140:16-141:16). Hicks' offer to plead guilty and waive appeal was "a free and voluntary decision on [his] part made with full knowledge of its meaning and effect," and he stated that "[n]o person or persons have made any attempt to force or coerce me into making this offer or to plead guilty." A28; *see* A182 (Tr. 134:15-20). Hicks agreed to enter into a "reasonable stipulation of fact with the United States to support the elements of the offenses to which I am pleading guilty." A26.

Hicks stated in the PTA that he was "satisfied" with his counsel, Major Mori and Mr. Joshua L. Dratel, "who have advised me with respect to this offer," stated he "consider[ed] them competent to represent me in this military commission" and "agree[d] that they ha[d] provided me effective assistance of counsel." A27; *see* A182 (Tr. 134:7-14). Hicks stated his counsel had "fully advised me of the nature of the charge and specifications against me, the possibility of my defending against them, any defense that might apply, and the effect of the guilty plea that I am offering to make," A28; *see* A182-A183 (Tr. 134:21-135:8), and stated: "I fully understand the advice of my defense counsel and the meaning, effect, and consequences of this plea." A28.

Hicks' defense counsel certified in writing that they "explained to [Hicks] the elements of the offenses to which he is pleading guilty, and that he has voluntarily signed this offer for pretrial agreement." A30. Hicks further agreed in the PTA that "I have never been illegally treated by any person or person while in the custody and control of the United States." A28; *see* A186-A187 (Tr. 138:21-139:14). Aware that he was entering into a binding agreement, Hicks stated "I understand that the signature of the Convening Authority to this offer and to Appendix A . . . which I also sign, will transform this offer into an agreement binding upon me and the United States." A28; *see* A183 (Tr. 135:9-19).

In exchange for Hicks waiving his appellate and other rights and pleading guilty, the Convening Authority agreed, among other things, (1) that she would approve a sentence of no greater than seven years, (2) "to suspend any portion of a sentence to confinement in excess of nine months," and (3) to "transfer custody and control of the Accused to the Government of Australia by not later than sixty (60) days from the date upon which the sentence is announced." A31.[4] Hicks acknowledged in the PTA that "it will be in my best interest that the Convening Authority grant me the relief" described in this paragraph, which is set forth in Appendix A of the PTA. A26; *see* A31. Each of these was done.

B. Hicks Knowingly and Voluntarily Entered Into a Stipulation of Fact

On March 29, 2007, Hicks and his defense counsel Major Mori both signed a Stipulation of Fact, previously signed by the prosecution. Hicks stated that the "stipulation of fact is entered into by the Prosecution and Defense knowingly and voluntarily" and that "the following facts are true." A1. Hicks admitted that he "joined a terrorist organization known as Lashkar-e Tayyiba (LET)" in November 1999, A1, trained at an LET training camp in "weapons familiarization and firing, map reading, land navigation, and troop movement," A2, and then traveled to Afghanistan and participated in al Qaeda's "eight week basic training course" at the al Farouq camp, which included "weapons familiarization and firing, land mines, tactics, topography, small unit fire, maneuver tactics, field movements, and other areas." A3. He later trained in al Qaeda's seven-week "guerilla warfare and mountain tactics" course, which included "marksmanship, small team tactics, ambush, camouflage, rendezvous techniques, and techniques to pass intelligence and supplies to al Qaeda operatives." A3-A4. While at al Farouq, Hicks sat with Usama bin Laden and asked him why there were no training materials provided in English. A4. Hicks was later "summoned and interviewed" by Muhammad Atef, then Al Qaeda's military commander, about "his knowledge of Usama bin Laden; al Qaeda; [and] his ability to travel around the

[4] The Convening Authority further agreed to (and did) dismiss Specification 2 of the Charge with prejudice; that the Military Judge would instruct the commission members regarding the limits on their discretion; and that the prosecution would not present evidence in aggravation during sentencing. A31.

world," among other things. A4. Hicks attended al Qaeda's urban tactics course at Tarnak Farm, followed by a four-week course on "information collection and surveillance" in Kabul. A4.

On or about September 9, 2001, Hicks traveled to Pakistan to visit a friend. While at this friend's house, Hicks "watched television footage of the September 11, 2001 attacks on the United States, and the friend had said he interpreted [Hicks'] gestures as approval of the attacks." A4. On or about September 12, 2001, Hicks returned to Afghanistan to join with al Qaeda. A4. He chose to join a group of al Qaeda and Taliban fighters near the Kandahar Airport. A5. He was issued an AK-47 automatic rifle, and also "on his own . . . armed himself with six (6) ammunition magazines, approximately 300 rounds of ammunition, and three (3) grenades to use in fighting the United States, Northern Alliance, and other Coalition forces." A5. Hicks guarded a Taliban tank, A5, and "implemented the tactics that he had learned with al Qaeda and attempted to train some of the others positioned with him at Kandahar." A5. Hicks then "decided to look for another opportunity to fight in Kabul" where he met a friend from LET. A5. Hicks and his LET friend traveled to the "front lines" in Konduz, where Hicks "spent two hours on the frontline before it collapsed and he was forced to flee." A5.[5]

The Military Judge asked Hicks, with respect to the Stipulation of Fact, "Is there anything in here that you disagree with or feel is untrue?" A137 (Tr. 89:14-15). Hicks responded, "No." A137 (Tr. 89:16); *see* A133 (Tr. 85:17-22).

C. Hicks Pleaded Guilty and Swore Under Oath in an Extensive Providence Inquiry That His Plea Was Voluntary, Not Coerced, and That He Had Waived His Right to Appeal

On March 26, 2007, Hicks pleaded guilty to one specification of providing material support for terrorism, 10 U.S.C. § 950v(b)(25) (2006). A122 (Tr. 74:1-7). Three days later, on March 29, 2007, Hicks "knowingly and voluntarily" agreed that the facts supporting the charge

[5] Hicks further acknowledged in the Stipulation that "he has never been the victim of any illegal treatment at the hands of any personnel while in the custody or control of the United States." A6.

and specification against him were true. A1, A6. On March 30, 2007, Hicks pled guilty to a revised version of that same specification. A129 (Tr. 81:4-26). After conducting an extensive providence inquiry, the Military Judge found Hicks guilty. A205 (Tr. 157:1-11).

During that lengthy providence inquiry, Hicks stated under oath that he had discussed the contents of the Stipulation of Fact with his counsel before signing it, A136 (Tr. 88:3-5), and he agreed to the contents of each paragraph, A135-A137 (Tr. 87:12-89:16). Hicks stated under oath that he had read the PTA "completely," discussed it with his counsel, and understood it. A169 (Tr. 121:18-20). The Military Judge asked Hicks "Did anyone force you to enter into this pretrial agreement?" and Hicks responded, "No, sir." A170 (Tr. 122:1-2). The Military Judge then went through the PTA with Hicks "essentially paragraph by paragraph." A173 (Tr. 125:12-13). Hicks agreed that he understood the PTA would "constitute a binding agreement," that Hicks was "in fact guilty of the offense to which [he was] pleading guilty," and that Hicks was "offering to plead guilty freely and voluntarily because [he was] guilty and because it would be in [his] best interest that the convening authority grant [him] the relief set forth in Appendix A." A175 (Tr. 127:1-14). Hicks acknowledged that the PTA, and his paragraph-by-paragraph discussion of it with the Military Judge, was "a correct statement of what [Hicks] understands [he] and the convening authority have agreed to." A200 (Tr. 152:6-10). And Hicks attested that he "had enough time to discuss [the Pretrial] agreement with [his] defense counsel." A200 (Tr. 152:11-13).

The Military Judge referred Hicks to the portion of the PTA regarding his waiver of appeal and engaged in the following exchange with Hicks:

> MJ: In paragraph 4 it states that in exchange for the undertakings made by the United States in entering this pretrial agreement you voluntarily and expressly waive all rights to appeal or collaterally attack your conviction, sentence, or other matters relating to this prosecution whether such a right to appeal or collateral attack arises under the Military Commissions Act of 2006, or any other provision of United States or Australian law. In addition herein it states that you voluntarily and expressly agree not to make, participate in, or support any claim, and not to undertake or participate in, or support any litigation, in any forum against the United States or any of its officials whether uniformed or civilian in their personal or official capacities with regard to your capture, treatment, detention, or prosecution.

> In our conference the parties agree that this preceding paragraph is intended to be read in a matter [sic] consistent with Rule for Military Commission 1110 such that the accused agrees to waive appellate review of his conviction in this case at the earliest time allowed under that rule, which would be immediately after the time sentence is announced in this case.
>
> Have you talked about that provision with your counsel as well, Mr. Hicks?
>
> ACC: Yes, I have.
>
> MJ: Do you understand and agree to that?
>
> ACC: Yes, sir.

A188-A190 (Tr. 140:16-141:16).

After discussing the rest of the PTA with the Military Judge, Hicks re-confirmed he was "satisfied with [his] defense counsel's advice," A200 (Tr. 152:14-16), that he had "enter[ed] this agreement of [his] own free will," and that no one had "tried to force [him] into making this pretrial agreement." A200 (Tr. 152:17-21). Hicks confirmed he had no questions about any provision in the PTA and fully understood all of its terms and "how they will affect [his] case." A 201 (Tr. 153:1-6). The Military Judge then asked counsel for both sides whether they agreed "completely" with his interpretation of the PTA, and both responded, "Yes." A201 (Tr. 153:13-16).

Both Hicks and his counsel re-confirmed they had had enough time to discuss the case, A201 (Tr. 153:17-22), and Hicks reiterated that he was satisfied with his defense counsel and that their advice was in his best interest. A202 (Tr. 154:1-9). Hicks further stated under oath: no one had made any threat or "in any way tried to force" him to plead guilty; he had no questions as to the "meaning and effect" of his plea of guilty; he "fully underst[ood] the meaning and effect of [his] plea of guilty;" and he still wanted to plead guilty. A202 (Tr. 154:13-23).

After this extensive inquiry, the Military Judge found Hicks had knowingly, intelligently, and voluntarily pleaded guilty. A203 (Tr. 155:1-7); A205 (157:1-12). A panel of officers then sentenced Hicks "to be confined for seven (7) years." A293 (Tr. 245:7-8); A298.

D. Hicks Signed a Written Waiver of His Right to Appellate Review, Which the Military Judge Accepted on the Record

That same day, Hicks signed a written waiver of appellate review, consistent with the requirements of R.M.C. 1110(d), confirming he had "voluntarily" waived appellate review, had "discussed [his] right to appellate review and the effect of waiver of appellate review" with Major Mori, his defense counsel, and "underst[ood] these matters." App. 1. Hicks also waived, in writing, his right to submit matters to the Convening Authority pursuant to R.M.C. 1105(d)(3) (2007). A308. Hicks' signed waiver of appellate review was made a part of the record of trial in his case that same day, March 30, 2007, pursuant to the following exchange with the Military Judge:

> MJ: Now Mr. Hicks, as we discussed while going over the pretrial agreement earlier, one of the conditions of the agreement was that you waive your appellate rights as provided for—and I mean the waiver of appellate rights provided for in Rule for Military Commission 1110. Major Mori, do you have a waiver of appellate rights in accordance with Rule for Military Commission 1110 before you?
>
> DDC: Yes, sir.
>
> MJ: Is it signed?
>
> DDC: Yes, sir.
>
> MJ: Bailiff, please recover that from the defense counsel. Please show it to the government counsel.
>
> [The bailiff did as directed.]
>
> MJ: Trial counsel, does this satisfy the accused's requirements with regard to the R.M.C. 1110 provision?
>
> PROS: Yes, sir.
>
> MJ: If I could have that marked as the appellate exhibit next—Appellate Exhibit 33, I believe.
>
> [The bailiff handed the document to the court reporter who had it marked.]

A296-A297 (Tr. 248:21-249:21).

E. The Convening Authority Approved and Accepted the Plea Offer, Took Action, and Gave Hicks Notice She Was Relying Upon His Waiver of Appeal

On April 19, 2007, the Legal Advisor to the Convening Authority recommended that the Convening Authority approve the findings and sentence, in accordance with the terms of the PTA. A305. In that Recommendation, the Legal Advisor stated that the "accused waived" appellate review, citing the written waiver form.[6] A305. On April 25, 2007, a copy of the Recommendation and the record of trial—including the waiver form itself and the statement in the Recommendation that Hicks had waived appeal—were served on Hicks. A303. On May 1, 2007, the Convening Authority acted on the findings and sentence, in accordance with the PTA. A307.

The Convening Authority took Action on May 1, 2007, fulfilling her obligations under the PTA by approving the sentence of seven years confinement and suspending "that part of the sentence extending to confinement in excess of nine months." A300; *see* A31. Notice of the Action was served on the accused on May 2, 2007. A302. That Notice reiterated Hicks' waiver of appeal. A301; A302; A306. While Hicks did not re-file his waiver form with the Convening Authority during the ten-day period after he was served with notice of the Action, the Convening Authority gave Hicks notice, within that ten-day period, that she was relying upon Hicks' previously-filed waiver. A301; A302; A306.

F. Hicks Was Transferred to Australia and Released From Custody

Relying upon Hicks' guilty plea and waiver of appeal, the United States then promptly transferred Hicks to Australia on May 20, 2007, in accordance with the PTA. *See* A31. Hicks

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[6] While this statement in the Recommendation suggests that the Legal Advisor reviewed the waiver for completeness, there is no affirmative statement in the record that he did so. There was no Regulation for Trial by Military Commission in effect when the Legal Advisor issued his Recommendation, however, so he had no obligation to conduct such a review.

The trial proceedings in this military commission adjourned on March 30, 2007. A297 (Tr. 249:21-22). The Legal Advisor issued his Recommendation to the Convening authority on April 19, 2007. A304. The first edition of the R.T.M.C. was issued eight days later, on April 27, 2007. The 2007 R.T.M.C. contained no requirement that the Legal Advisor to the Convening Authority review waivers of appeal for completeness. That provision was first added in the 2011 R.T.M.C.

was released from custody by Australian authorities nine months after his guilty plea, again in accordance with his PTA. Although no longer in custody, Hicks remains under the suspended portion of his seven-year sentence.

So things stood, until nearly six years later. On November 5, 2013, Hicks breached his PTA by purporting to file a direct appeal of his conviction and sentence to this Court.

STATEMENT OF THE CASE

Hicks knowingly, voluntarily, and intelligently entered into a binding Pretrial Agreement with the Convening Authority. He agreed to plead guilty to the charged offenses, waive appellate review, and not initiate any litigation against the United States regarding his capture, detention, or prosecution. In exchange, the Convening Authority agreed not to approve a sentence of confinement greater than seven years, to suspend all but nine months of the sentence, and to transfer Hicks to Australia. The Convening Authority fulfilled all her obligations under the PTA.

Hicks did not. Nearly six years after his release from custody in Australia, after transfer outside the United States, Hicks filed this action with the Court, in violation of his PTA. Having received the benefit of his bargain, Hicks now claims (1) he failed to file his waiver form within ten days after being served with notice of the Convening Authority's Action, (2) his guilty plea and waiver were not voluntary and knowing because of coercive conditions of confinement, and (3) the military commission lacked subject-matter jurisdiction, based on *Hamdan v. United States*, 696 F.3d 1238 (D.C. Cir. 2012) ("*Hamdan II*"), whose holding is under review by *Bahlul v. United States*, No. 11-1324 (D.C. Cir., argued Sept. 30, 2013) (*en banc*).

The Court should dismiss the action because the Court lacks authority to hear it. Under 10 U.S.C. § 950c(d), Hicks' waiver of appeal "bars review" of his claims. Hicks' failure to file the waiver form with the Convening Authority within ten days after being served with notice of the Action does not invalidate his waiver. And under 10 U.S.C. § 950f, Congress limited the Court's jurisdiction to interlocutory appeals by the United States and cases that have been

referred to it by the Convening Authority. Because this action is neither of those, the Court lacks authority to hear the action.

Hicks' guilty plea and waiver of appeal were knowing, voluntary, and intelligent based on the language of the PTA, the written waiver Hicks signed, and extensive colloquies with the Military Judge. Claims of coercive conditions of confinement or prior mistreatment known to the defendant at the time of his guilty plea and waiver of appeal can be (and here have been) overcome by a detailed plea colloquy. *See* Part II.B. The claim that a defendant pleaded guilty only to avoid a lengthy period of incarceration—or even the death penalty—can be (and has been) similarly overcome. *See* Part II.C. And even if the Court concludes that Hicks' waiver was invalid, the Court should compel Hicks' specific performance of his obligations under the Pretrial Agreement by holding Hicks to have validly waived appellate review, and dismissing the case for lack of jurisdiction. *See* Part IV.

ARGUMENT

I. THE COURT SHOULD DISMISS THIS ACTION FOR LACK OF JURISDICTION

As a court created by statute, U.S.C.M.C.R. is a court of limited jurisdiction. *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 818 (1988). The Court has the power to hear a case only if that power has been granted to it by Congress. *Id.* ("'Courts created by statute can have no jurisdiction but such as the statute confers.'" (quoting *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850))). If the Court lacks jurisdiction, then it may go no further; the Court must dismiss the case. *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868). As the party claiming subject-matter jurisdiction over this action, Hicks "has the burden to demonstrate that it exists." *Khadr v. United States*, 529 F.3d 1112, 1115 (D.C. Cir. 2008).

A. The Court Lacks Jurisdiction Because Hicks Has Waived Appeal

The United States acknowledges that an accused does not waive challenges to a trial court's subject-matter jurisdiction even if he pleads guilty and promises to waive appeal.

Subject-matter jurisdiction is non-waivable.[7] But that does not mean Hicks may raise his jurisdictional claim in whatever forum he chooses. Although the *argument* that a court lacks subject-matter jurisdiction is not waivable, the *procedural right* to lodge that argument in a direct appeal *is* waivable. If an accused waives the procedural right to appeal, his waiver bars the Court from reviewing his case in its entirety, including the argument that the military commission lacked subject-matter jurisdiction. Here, Hicks' waiver "bars review" by the Court of Military Commissions Review. 10 U.S.C. § 950c(d). The natural reading of this language is that the waiver is itself jurisdictional. Waiver, once executed in legally sufficient form in compliance with the M.C.A. and R.M.C., deprives the Court of jurisdiction to hear this action in its entirety, regardless of the content of Hicks' claims.[8]

Hicks' central argument is a challenge to the jurisdiction of the military commission based on *Hamdan II*. Before any appellate court could consider that argument, however, it must first satisfy itself that it has jurisdiction over the appeal. Only then can the appellate court consider whether the trial court had jurisdiction. *See Steel Co. v. Citizens for Better Env't*, 523

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[7] Hicks (at 7) cites *United States v. Corrick*, 298 U.S. 435, 440 (1936), *United States v. Cotton*, 535 U.S. 625, 630 (2002), and *United States v. Alexander*, 61 M.J. 266, 269 (C.A.A.F. 2005) in support of this proposition, but in those cases, unlike here, there was no challenge to the appellate court's jurisdiction over the case—only the trial court's jurisdiction was at issue.

Hicks (at 8) cites *United States v. Peter*, 310 F.3d 709, 715 (11th Cir. 2002) for essentially the same the proposition, but in that case the parties agreed the district court had subject matter jurisdiction over the defendant's writ petition, and the appellate court had jurisdiction over the writ appeal. Here, by contrast, the U.S.C.M.C.R. *does not* have jurisdiction over petitions for extraordinary writs of the type at issue in *Peter*. *See* Part V, *infra*. Moreover, *Peter* is wrongly decided, as two other circuits have recently held. *See United States v. Scruggs*, 714 F.3d 258, 263-64 & n.26 (5th Cir. 2013); *United States v. De Vaughn*, 694 F.3d 1141, 1148-49 (10th Cir. 2012). Significantly, *Scruggs* abrogates and essentially overrules another case cited by Hicks (at 8), *United States v. Meacham*, 626 F.2d 503, 510 (5th Cir. 1980).

[8] Hicks (at 7) cites *United States v. Daly*, 69 M.J. 485, 486 (C.A.A.F. 2011), but that case supports the conclusion that this Court lacks jurisdiction. *Daly* held that the appellate court did not have jurisdiction because the United States had failed to file notice of appeal within 72 hours after the trial court's decision, as required by statute. *See* 10 U.S.C. § 862(a)(2). *Daly* held the 72-hour period was jurisdictional and dismissed the case. Applying *Daly* here, Hicks' waiver of appeal is jurisdictional. That the Convening Authority did not refer the case or forward the record are both jurisdictional. Those facts are analogous to the United States' failure to timely file a notice of appeal in *Daly*, because each deprives the reviewing court of jurisdiction under the relevant statutes.

U.S. 83, 94 (1998) ("On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes." (internal quotation marks omitted)). A court that lacks subject-matter jurisdiction over an accused's case cannot consider whether another court lacked subject-matter jurisdiction. Hicks' waiver removes jurisdiction from this Court to hear this action, as does the absence of referral and forwarding of the record by the Convening Authority. This Court is simply without power to consider whether the military commission had jurisdiction in the first instance.[9]

United States v. Bright, 60 M.J. 936 (A. Ct. Crim. App. 2005), supports the view that Hicks' waiver of appeal is jurisdictional. There, the Army Court of Criminal Appeals held that the similar waiver/withdrawal provisions in the Uniform Code of Military Justice ("U.C.M.J.") do not permit a defendant to withdraw some claims but not others; rather, waiving appellate review is "an all-or-nothing decision." *Id.* at 939. The *Bright* court concluded that, where an appellant withdraws his appeal, appellate review simply "never occurs." Similarly, where an appellant waives his appeal, appellate review simply never occurs, under the plain text of the M.C.A., regardless of the content of the arguments raised, and even if they are non-waivable.

The same is true of this Court's review under 10 U.S.C. § 950f, where an accused waives appellate review. Like Article 66 of the U.C.M.J., section 950f authorizes the Court to review the entire record of trial "in each case that is referred to the Court by the convening authority under section 950c of this title." Also like Article 61 of the U.C.M.J., § 950c allows an accused to avoid this comprehensive review by waiving appellate review. And as in Article 61, section 950c(d) provides, "[a] waiver of the right to appellate review or the withdrawal of an appeal under this section bars review under section 950f of this title." This language, when construed as in *Bright*, shows that Congress made no provision for a partial waiver of appellate review. Either

[9] Hicks (at 7) cites *Gonzalez v. Thaler*, 132 S. Ct. 641, 648 (2012), but that case held that the court of appeals *did* have jurisdiction over the case, because it had issued a certificate of appealability, as required by 28 U.S.C. § 2253(c). Here, the waiver of appeal and the failure to forward the record deprive this Court of jurisdiction. And in any event, the defendant in *Gonzalez* did not plead guilty or waive appeal, so the case is distinguishable.

the accused waives appellate review or he does not. If the accused waives appellate review, appellate review "never occurs." *Bright*, 60 M.J. at 939. Because (as demonstrated below) Hicks waived appellate review, his waiver bars the Court from reviewing his entire case, including whether the military commission that tried him had jurisdiction to do so.[10]

Hicks' own cases foreclose review of his arguments. For example, Hicks (at 7) cites *United States v. Sakellarion*, 649 F.3d 634, 636 (7th Cir. 2011), but in that case the court held it could not review the appeal because the defendant had waived appeal. *Id.* ("Because Sakellarion never sought to withdraw her plea of guilty entered under that agreement, we have nothing to review. We must enforce the plea agreement's appellate waiver and dismiss Sakellarion's appeal."). While *Sakellarion* acknowledged the possibility that a "material breach by the government" or an involuntary plea might invalidate a guilty plea and waiver of appeal, there was no argument by the defendant that her plea was involuntary, so the court's discussion of that issue is *dicta*. *Id.* at 639.[11]

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[10] Hicks argues (at 7) that appellate courts "always retain[] the power to void the plea agreement for lack of jurisdiction," citing *United States v. Hahn*, 359 F.3d 1315, 1323 (10th Cir. 2004) (en banc). *Hahn* is distinguishable. There, the court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291, which gives the federal courts of appeals jurisdiction over the "final decisions of the district courts of the United States." The analogous provision in the M.C.A. gives the U.S.C.M.C.R. jurisdiction over "the final decision of a military commission" "[e]xcept" where appeal has been waived, as is the case here. 10 U.S.C. § 950c(a). And the court in *Hahn* enforced the validity of the waiver of appeal, concluding that it was knowing and voluntary, based on the text of the plea agreement and the colloquy with the trial judge. Hicks' PTA and providence inquiry are just as, if not more detailed than the agreement and inquiry in *Hahn*. And *United States v. Castillo*, 496 F.3d 947, 956-57 (9th Cir. 2007), like *Hahn*, is predicated upon 28 U.S.C. § 1291 and is distinguishable on the same basis.

Hicks (at 7) cites *United States v. Kilcrease*, 665 F.3d 924, 927 (7th Cir. 2012) for the proposition that an appeal waiver is "not valid if the underlying plea agreement is unenforceable," but in *Kilcrease* the court held that the accused's guilty plea and broad waiver of appeal were valid and enforceable, based on its review of the plea colloquy, and dismissed the appeal.

[11] Similarly, in *United States v. Calderon*, 243 F.3d 587 (2d Cir. 2001), the court *upheld* the validity of the waiver of appeal, based upon the record. *Id.* at 589 ("We conclude that the plea was knowing and had an adequate factual basis. Because Calderon entered a valid plea, we further conclude that any objection he had as to venue was thereby waived, and we decline to otherwise address the merits of his venue objection.").

B. The Court Lacks Jurisdiction Because the Convening Authority Has Not Referred This Case for Appeal and Has Not Forwarded the Record

In the M.C.A., Congress granted to the U.S.C.M.C.R. the power to (1) hear interlocutory appeals by the United States, 10 U.S.C. § 950d, and (2) review the findings and sentences of military commissions that have been referred to it by the Convening Authority, 10 U.S.C. §§ 950f(c)-(d). This case is neither. Congress required that review must be based on the record of trial, and that the Convening Authority has actually referred the record to U.S.C.M.C.R. for appellate review. *See* 10 U.S.C. § 950f(d) (review must be "on the basis of the entire record"); 10 U.S.C. § 950f(c) ("The Court shall . . . review the record in each case that is referred to the Court by the convening authority under section 950c of this title with respect to any matter properly raised by the accused."); 10 U.S.C. § 950c(a) (the Convening Authority "shall refer" the "final decision of a military commission under this chapter" to the U.S.C.M.C.R., except where the accused has waived appeal). Where, as here, the Convening Authority has not referred a military commission for appellate review, and has not forwarded the record, the U.S.C.M.C.R. simply has no case to review. *See* 10 U.S.C. §§ 950c(b), 950f(c)-(d).

The U.S.C.M.C.R.'s own rules embody the limited jurisdictional scope established by Congress. "The C.M.C.R.'s authority is limited to interlocutory appeals by the United States under MCA § 950d and RMC 908, cases referred to it pursuant to MCA § 950f and RMC 1111, and petitions for new trial referred to it pursuant to RMC 1210." U.S.C.M.C.R. Rule of Practice 21(b); *accord* 10 U.S.C. §§ 950d, 950f(d), 950c(d). Because this appeal is not an interlocutory appeal by the United States, a case referred to the Court, or a petition for a new trial referred to the Court, the Court lacks jurisdiction. No rule or regulation can expand the limits or alter the statutory preconditions to the Court's jurisdiction, "even in the interest of justice." *Christianson*, 486 U.S. at 818; *Khadr*, 529 F.3d at 1117.

II. THE COURT LACKS JURISDICTION OVER THE CASE BECAUSE HICKS KNOWINGLY, VOLUNTARILY, AND INTELLIGENTLY WAIVED HIS RIGHT TO APPEAL

A. The Record of Trial Unequivocally Establishes That Hicks' Guilty Plea and Waiver of Appeal Were Knowing, Voluntary, and Intelligent

The record is replete with evidence that Hicks waived his appellate rights knowingly, voluntarily, and intelligently, including repeated statements under oath by Hicks that his decision to plead guilty and waive appellate review was free and voluntary, A26; A28; A188-A189 (Tr. 140:16-141:16), A182 (Tr. 134:15-20), and that no one coerced or forced him into making his offer to plead guilty and waive appellate review, A28; A170 (Tr. 122:1-2); A200 (Tr. 152:17-21); A202 (Tr. 154:13-21). Hicks repeatedly denied he was subjected to any illegal treatment while in U.S. custody. A6; A28; A186-A187 (Tr. 138:21-139:14). Hicks waived appeal only after an extensive colloquy with the Military Judge. A121-A205 (Tr. 73:18-157:12). Hicks executed a written waiver of appeal with the advice of counsel, who also signed it. *See* App. 1. Hicks—and his defense counsel—believed that the generous bargain struck with the Convening Authority served Hicks' best interests. A26; A175 (Tr. 127:1-14).

Hicks "was fully aware of the likely consequences when he pleaded guilty; it is not unfair to expect him to live with those consequences now." *Mabry v. Johnson*, 467 U.S. 504, 511 (1984). The Court should place great weight on the text of the PTA and the providence inquiry with the Military Judge. *Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977) (representations of accused and counsel at plea hearing, and findings by judge accepting the pleas, "constitute a formidable barrier in any subsequent collateral proceeding. Solemn declarations in open court carry a strong presumption of verity."); *United States v. Ginn*, 47 M.J. 236, 244 (C.A.A.F. 1997) ("A guilty-plea record contains factual admissions with respect to guilt and additional concessions as to the satisfactory performance of counsel which cannot be ignored by the appellate court."). Hicks bears the burden "to present evidence from the record establishing that he did not understand the waiver." *United States v. Leon*, 476 F.3d 829, 834 (10th Cir. 2007) (internal quotation marks omitted).

The PTA was not ambiguous, and the plea colloquy met all the requirements of R.M.C. 910(c)-(h). Based on that record evidence, the Court should conclude that the waiver of appeal was legally sufficient and therefore knowingly and voluntarily made. *Id.* ("In making the determination of whether defendant's waiver of his right to appeal his conviction was knowingly and voluntarily made, we consider whether the language of the plea agreement states that the defendant entered the agreement knowingly and voluntarily and whether there was an adequate . . . colloquy." (internal quotation marks omitted)).

In the D.C. Circuit, "a good deal of weight must be placed on the contemporaneous interpretation of" defense counsel at trial. *United States v. Pollard*, 959 F.2d 1011, 1027-28 (D.C. Cir. 1992). Defense counsel agreed that the bargain struck with the Convening Authority served Hicks' best interests. A26; A175 (Tr. 127:1-14). If it did not, defense counsel would have been obligated not to misrepresent to the court that it did. If the bargain served Hicks' best interests, it can reasonably be inferred that the plea and waiver of appeal were knowing, voluntary, and intelligent. *See Alford*, 400 U.S. at 31 (holding plea was knowing and voluntary where "defendant was represented by competent counsel whose advice was that the plea would be to the defendant's advantage").

B. Hicks Had Actual Notice of Potentially Viable Legal Challenges, But Deliberately Chose to Forego Them

The affidavits of Hicks and his civilian defense counsel *support* the view that Hicks and his attorneys were aware of possible challenges to the M.C.A., but made a knowing, voluntary, and intelligent decision to plead guilty, in order to secure the significant benefits of the PTA. The affidavits show that Hicks' decision to plead guilty was a rational decision, supported by his attorneys, that was the best path to obtain his prompt release from custody.

Hicks attested that his attorney Major Mori told him the PTA was "in [Hicks'] best interests" because "this deal is the quickest, most realistic way to get off the island, and seven months in an Australian prison will not be difficult to endure." Hicks Aff. ¶¶ 267-268.[12] Hicks

[12] The Affidavits are attached to Appellant's Motion to Attach (Nov. 5, 2013).

stated that he "did not make a decision straight away" and instead thought through the plea with his family and defense team. Hicks Aff. ¶ 269. Dratel stated that the Chief Prosecutor first offered Hicks a sentence of "20 years" and that Dratel's response was "[s]ee you at trial." Dratel Aff. ¶ 86. Later, the Legal Advisor to the Convening Authority suggested to Major Mori that "a deal where David [Hicks] served an additional 30 days would be something that was doable." *Id.* ¶ 87. When Major Mori told Dratel about this possible deal, and the dramatically lower sentence that Hicks would face, Dratel's response was "Where do we sign?" *Id.*

Significantly, Dratel told Hicks that he might have successful legal challenges on habeas review, but that he should plead guilty anyway. Dratel told Hicks "We could win the federal court challenge at the end of the day. We could win and have the commissions declared invalid. We should win. But . . . . [w]e're concerned about getting you out of here and we think this [plea deal] is the best path to get you out of here and put this behind you . . . ." *Id.* ¶ 93. Dratel believed there were viable legal challenges, and he told Hicks so. Hicks and his defense team thoughtfully considered them, and ultimately decided not to pursue them. Hicks' decision to plead guilty and waive appeal was an intentional decision to "put this behind [him]." *Id.*

C. Allegations of Prior Governmental Misconduct Known to an Accused at the Time of His Guilty Plea and Waiver, But Not Raised Until Years Later, Can Be Overcome By a Detailed Plea Colloquy

Allegations of prior governmental misconduct known to an accused at the time of his guilty plea and waiver of appeal, but not raised until years later, can be overcome by a plea colloquy that establishes the voluntariness of the plea. *United States v. Wright*, 43 F.3d 491, 494 (10th Cir. 1994). Hicks does not allege he has learned anything new about his treatment since he pleaded guilty. Just as in *Wright*, Hicks "was fully cognizant of the alleged governmental misconduct when he entered his plea. Instead of pursuing these claims further, he decided to accept the prosecution's plea bargain. By doing so, appellant waived" his argument on appeal. *Id.* at 494.[13]

[13] The defendant in *Wright* pleaded guilty, served his two-year sentence, and after release on parole, filed an action that the district court treated as a habeas petition. Even the defendant in

Hicks' allegations—even if taken as true[14]—do not support a finding that he was coerced into pleading guilty due to fear of future mistreatment, because the alleged mistreatment ended significantly before he pleaded guilty. In *Wright*, the defendant argued that the "prosecution coerced him into pleading guilty by threatening to indict members of his family," and that the threat took place "on the morning his trial was to begin," which prompted the defendant to enter into a plea agreement that same morning. 43 F.3d at 497; *see also id.* at 493. Moreover, the defendant "offered evidence plausibly showing that the prosecution never had the requisite probable cause" to indict the defendant's family members. *Id.* at 499. The Tenth Circuit remanded the case for another evidentiary hearing, to determine whether the prosecutor did, in fact, make such threats, and if so, whether he nevertheless acted in good faith because he had probable cause. *Id.* at 500.

The mistreatment alleged by Hicks is far less coercive with respect to the voluntariness of his guilty plea than the threats against the defendant's family members were in *Wright*. The threats in *Wright* were made on the morning the defendant's trial was to take place. And they related to *future* harm to Wright's family if he did not plead guilty. Hicks does not argue that any alleged threats or mistreatment took place immediately before he pleaded guilty. The bulk of his alleged mistreatment took place years before his guilty plea on March 30, 2007, and the last act of mistreatment is alleged to have taken place in late 2006, significantly before Hicks' plea. *See* Hicks Aff. ¶¶ 249, 251. Unlike in *Wright*, Hicks does not allege any threats of future harm caused him to plead guilty, apart from his detention itself.[15] Nor does he argue that the

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Wright did not purport to raise any arguments on direct appeal, as Hicks has done here. That is because appeal had been waived.

[14] Hicks' allegations should not be credited, because they are inconsistent with his statement in August 2004 that he had not been physically mistreated since arriving in Cuba in January 2002. *See* Conditional Motion to Attach (Dec. 19, 2013).

[15] A judicial holding that being held in potentially indefinite law of war detention, standing alone, renders any subsequent guilty plea involuntary, would have severe negative consequences. Such a holding would prevent any current detainee from being able to voluntarily plead guilty, or enter into other settlement agreements with the United States, and may upset such negotiations currently taking place. The ability to plead guilty permits the United States to avoid a costly and

alleged coercion was directed at causing him to plead guilty.[16] The Court should therefore deny Hicks' voluntariness challenge.[17]

Moreover, the court should not credit Hicks' allegations of mistreatment, because they could have been raised at any point since his release nearly six years ago. The "particular importance of finality of guilty pleas" is "indispensable in the operation of the modern criminal justice system." *United States v. Dominguez Benitez*, 542 U.S. 74, 82-83 (2004). Hicks could have raised his allegations at or before his guilty plea, during his criminal incarceration, or at any point after he was released in Australia six years ago. Instead, he made the tactical decision to plead guilty to secure the benefit of his PTA, which he has received. And by waiting until nearly six years after his release to raise his allegations of mistreatment, Hicks has made it all but impossible for the Government to gather the facts necessary to challenge his assertions. The Court should therefore disregard his late-filed allegations.

D. Allegations of Coercive Conditions of Confinement, Lengthy Detention, and Suicidal Thoughts Can Be Overcome By a Detailed Plea Colloquy

Hicks argues (at 10) that his guilty plea and waiver of appeal "was the unlawful product of the coercive conditions at Guantanamo Bay." He alleges his conditions of confinement were coercive due to (1) physical mistreatment, and (2) the prospect of lengthy or indefinite detention,

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lengthy trial, gives the accused bargaining power to negotiate a reduced sentence, and gives the United States bargaining power to incentivize cooperation.

[16] Hicks (at 11) cites *Ridge v. Turner*, 444 F.2d 3, 4 (10th Cir. 1971), but that case involved coercion that was more temporally and causally connected to the defendant's guilty plea than Hicks' allegations. In order for the beatings to stop, the defendant in *Ridge* had to plead guilty. Similarly, in *Milligan v. Rundle*, 261 F. Supp. 275, 276-78 (E.D. Pa. 1966), the defendant had to confess in order for the mistreatment to stop. Hicks, by contrast, does not allege that he was faced with a choice between ongoing physical mistreatment and a guilty plea.

[17] Hicks (at 10 n.9) cites *McCarthy v. United States*, 394 U.S. 459, 466 (1969) and *Machibroda v. United States*, 368 U.S. 487, 493 (1962) for the proposition that the voluntariness of a guilty plea is not waivable. Neither case reaches such a holding. In *Machibroda*, the defendant argued that the prosecutor had failed to keep his promise that he would not be sentenced to more than 20 years, which had induced him to plead guilty. 368 U.S. at 493-95. Here, by contrast, the government has kept every promise made to Hicks. And in *McCarthy*, the district judge failed to conduct a proper Fed. R. Crim. P. 11 colloquy when accepting the defendant's guilty plea. 394 U.S. at 466. Such is not the case here, and Hicks does not even argue that the Military Judge's providence inquiry was deficient.

which (3) made him despondent and suicidal. In light of the detailed plea colloquy, none of these renders Hicks' guilty plea and waiver of appeal involuntary.[18]

In the D.C. Circuit, allegations of coercive conditions of confinement can be overcome by a plea colloquy that shows the defendant's plea was voluntary. In *In re Sealed Case*, 670 F.3d 1296 (D.C. Cir. 2011), the defendant pleaded guilty and waived appeal. As here, the defendant nevertheless filed an appeal, in which he argued his guilty plea and waiver had not been knowing and intelligent because, among other reasons, he "was under the duress and coercive effect of being housed in a detention facility where he had suffered a knife attack" described as an "assassination attempt," "knowing that as soon as he pleaded guilty he would be moved out of the facility." *Id.* at 1302. The D.C. Circuit was not persuaded by this argument, and affirmed the conviction and sentence, reasoning that the defendant had not alleged that he would not have pleaded guilty but for the coercion. Hicks, too, argues (at 10) that "coercive conditions" caused him to plead guilty, but does not allege that he would have rejected the plea deal offered by the Convening Authority, even absent the alleged physical mistreatment. His arguments should therefore be rejected. *See* 10 U.S.C. § 950a ("A finding or sentence of a military commission under this chapter may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused.")

The Supreme Court has repeatedly held that a guilty plea is not rendered involuntary simply because a defendant later claims that he pleaded guilty only in order to avoid the death penalty, provided that "the defendant was represented by competent counsel whose advice was that the plea would be to the defendant's advantage." *Alford*, 400 U.S. at 31 (citations omitted);

[18] Hicks (at 11) challenges this alleged misconduct by citing *Vance v. Rumsfield*, 694 F. Supp. 2d 957, 967, 970-71 (N.D. Ill. 2010), but that decision was reversed by *Vance v. Rumsfeld*, 701 F.3d 193, 205 (7th Cir. 2012) (en banc), which explicitly "d[id] not address" the classification of the alleged mistreatment. And *Mohammed v. Obama*, 704 F. Supp. 2d 1, 25 (D.D.C. 2009) is distinguishable because it is a habeas case dealing with the trustworthiness of a statement used as evidence in support of law-of-war detention, in which the court acknowledged that "[t]he effects of the initial coercion may be found to have dissipated to the point where the subsequent confessions can be considered voluntary." *Id.* Hicks' alleged mistreatment—which, unlike the mistreatment in *Mohammed*, was not directly targeted at causing Hicks to plead guilty—ended significantly before his guilty plea.

accord Brady v. United States, 397 U.S. 742, 754 (1970).[19] If a guilty plea is not involuntary even if made only to avoid the death penalty, it follows logically that a guilty plea is not involuntary even if made only to avoid a lengthy or indefinite period of detention. Here, as in *Brady*, Hicks was "advised by competent counsel, he was made aware of the nature of the charge against him, and there was nothing to indicate he was incompetent or otherwise not in control of his mental faculties." *Id.* at 756. And as in *Alford*, Hicks' counsel advised him that his plea would be to his advantage. 400 U.S. at 31; *see* Part II.D. Accordingly, his plea was voluntary.

Hicks (at 10) relies upon *Pollard*, but that case rejected the very argument he raises: that facing a lengthy period of incarceration (or even death) can render a guilty plea involuntary. In *Pollard*, the D.C. Circuit concluded that "[e]ven where the defendant continues to maintain his innocence, having to face the death penalty as the price of trial does not invalidate a guilty plea," and that "[n]o constitutionally impermissible compulsion arises . . . when a defendant is forced to choose between the possibility of a mandatory minimum sentence of ten years in prison if he goes to trial or a suspended sentence on a reduced charge if he pleads." 959 F.2d at 1021 (citing *Alford*, 400 U.S. at 37-38).[20]

Suicidal thoughts do not render a guilty plea and waiver of appeal involuntary. In *Leon*, the defendant argued that he pleaded guilty only because he was "so despondent that he wished to die." 476 F.3d at 832. The accused later attempted suicide. The Tenth Circuit held that his plea and wavier were nevertheless knowing and voluntary, citing the "detailed plea colloquy"

[19] In *Brady*, the defendant argued his guilty plea was involuntary because he pleaded guilty only to avoid the death penalty. The Supreme Court held that "Brady's plea was not compelled" and that "even if we assume that Brady would not have pleaded guilty except for the death penalty provision" this "does not necessarily prove that the plea was coerced and invalid as an involuntary act." 397 U.S. at 749-50. The Court went on to conclude the plea was voluntary and intelligently made, based on the record.

[20] The D.C. Circuit is generally suspicious of claims of coercion by defendants who have pleaded guilty. In *United States v. Robinson*, 587 F.3d 1122, 1127-28 (D.C. Cir 2009), the defendants "faced life sentences" and elected to plead guilty rather than proceed to trial. On appeal, the defendants argued they were "coerced into accepting wired plea agreement offers [i.e., mutually contingent on the plea of the other co-defendants] with short shelf lives while they were all confined in a holding cell." *Id.* The D.C. Circuit rejected this argument.

with the judge, and the statement in the plea agreement—repeated during the plea colloquy—that the defendant "agreed it was not entered into as a result of threat, duress, or coercion, and that he was entering into the agreement freely, voluntarily, and because he was guilty." *Id.* at 833. The PTA and providence inquiry in this case contain essentially the same language.

E. That Hicks Did Not Anticipate the Future Holding of *Hamdan II* and Chose to Enter an Unconditional Guilty Plea Does Not Render His Guilty Plea and Waiver Involuntary

That Hicks did not anticipate "later judicial decisions" did not render his guilty plea involuntary. *Brady*, 397 U.S. at 757 ("[A] voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise. . . . The fact that Brady did not anticipate *United States v. Jackson*, [390 U.S. 570 (1968)], does not impugn the truth or reliability of his plea."). Hicks could have entered into a conditional guilty plea pursuant to R.M.C. 910(a)(2), preserving his ability to challenge on appeal the jurisdiction of the military commission over the offense to which he pleaded guilty. Or he could have proceeded to trial and raised on automatic appeal the same challenges raised by Hamdan and Bahlul. Instead, Hicks chose to unconditionally plead guilty and waive appeal, with the advice of able counsel, to secure the significant benefits of his plea bargain.[21]

Under analogous circumstances where a defendant fails to raise an argument at trial, the argument is deemed waived on appeal unless "a supervening decision has changed the law in appellant's favor and the law was so well-settled at the time of trial that any attempt to challenge it would have appeared pointless." *United States v. Washington*, 12 F.3d 1128, 1138-39 (D.C. Cir. 1994). Hicks' argument is, essentially, that *Hamdan II* is a "supervening decision" that changed the law in his favor, so he should be permitted to back out of his plea agreement. But

[21] Hicks does not argue that his attorney's decision to advise him to plead guilty unconditionally, and forego the arguments advanced by Hamdan and Bahlul, constitutes ineffective assistance of counsel. This is because it was sound advice. Even if his attorneys had anticipated that *Hamdan II* would be decided in 2012 (which they may very well have), advising Hicks to plead guilty in order to secure his release in 2006 would have been sound advice.

that argument has traction, if at all, only where the law was "so well-settled at the time" of his guilty plea that "any attempt to challenge it would have appeared pointless." *Id.* At the time of Hicks' plea on March 29, 2006, no court had addressed the viability of the statutory material support for terrorism offense in the 2006 M.C.A., and four justices had concluded that conspiracy was not a violation of the law of war in *Hamdan v. Rumsfeld*, 548 U.S. 557, 609 (2006). The law was therefore not so "well-settled" that it would have been "pointless" for Hicks to challenge the viability of material support for terrorism on similar grounds. *Washington*, 12 F.3d at 1138-39 (concluding that the constitutionality of a jury instruction was not "well-established" at the time of trial because "[n]o court of appeals had upheld" it).

Hicks argues that his plea was not intelligently and voluntarily given, because he was "erroneously advised by both the court and his counsel that material support for terrorism was a war crime." Hicks Br. 9. Hicks relies upon *Bousley v. United States*, 523 U.S. 614 (1998). Unlike in *Bousley*, Hicks had actual notice that there were potentially viable legal challenges to the charges against him, but he deliberately chose to forego those challenges in order to obtain the benefits of the plea. The issue in *Bousley* was whether the district court had "misinformed him as to the elements of" the charged offense before he pleaded guilty, such that he did not receive "real notice" of the charge against him. *Id.* at 618-19. Here, by contrast, Hicks does not dispute that he received notice of the elements of the offense.[22]

At the time of Hicks' guilty plea, material support for terrorism was a valid offense under the M.C.A. His decision not to challenge it was purely tactical, to gain the benefits of the PTA, which were in his interest. By pleading guilty and waiving appeal, he accepted the risk that a future court decision might make his case stronger.

[22] Hicks also cites *United States v. Fisher*, 711 F.3d 460, 462 (4th Cir. 2013), but that case involved a law enforcement officer who pleaded guilty to defrauding the criminal justice system by "having lied in his sworn affidavit that underpinned the search warrant" that produced the evidence that "formed the basis of the charge to which the defendant pleaded guilty." *Id.* Here, by contrast, no one made any "affirmative misrepresentation." *Id.* To the contrary, Hicks and his counsel believed their challenges to the M.C.A. might be successful, but they chose not to pursue them, in order to secure Hicks' transfer to Australia and prompt release.

III. HICKS' PREMATURE FILING OF HIS WAIVER FORM WITH THE CONVENING AUTHORITY DOES NOT RENDER HIS WAIVER OF APPEAL INVALID

Having received the benefit of his bargain, Hicks now argues the Court should disregard his voluntary, knowing, and intelligent waiver because he failed to perform the ministerial task of affirmatively filing the waiver form inside the ten-day period after the Convening Authority's Action was served on him. Hicks Br. 5 & n.6. Hicks' premature filing of the waiver form before that 10-day window does not render his waiver invalid.

Unlike the R.M.C., the R.C.M. prohibit an accused from bargaining away his appellate rights in exchange for greater concessions in a PTA. *Compare* R.C.M. 705(c)(1)(B) ("A term or condition in a pretrial agreement shall not be enforced if it deprives the accused of . . . effective exercise of post-trial and appellate rights.") *with* R.M.C. 705(c)(1)(B) (containing no similar prohibition against waiver of appeal) *and* R.M.C. 705(c)(2)(E) (providing that rule prohibiting certain terms or conditions in PTAs "does not prohibit either party from proposing . . . [a] promise to waive appellate review"); *with* R.C.M. 705(c)(2) (containing no similar provision authorizing waivers of appeal in PTAs). To enforce this prohibition, the Rules for Courts-Martial require an accused to wait until after the convening authority takes action to waive appellate rights. Rule for Courts-Martial 1110(f) accomplishes this objective by requiring appellate waivers to be filed with the convening authority "within 10 days after" the action is served on the accused or defense counsel. R.C.M. 1110(f). Interpreting Rule for Courts-Martial 1110(f), the Court of Military Appeals ("C.M.A.") has held that appellate waivers executed in courts-martial are invalid when the waiver is filed before notice of the convening authority's action is served on the accused or defense counsel. *United States v. Hernandez*, 33 M.J. 145, 148 (C.M.A. 1991); *see United States v. Miller*, 62 M.J. 471, 474 (C.A.A.F. 2006) (applying *Hernandez* but concluding that waiver signed before convening authority's action was nevertheless valid based on the record). *Hernandez* does not apply here, because this is a military commission, not a court-martial.

Although the M.C.A. also requires an accused to file an appellate waiver "within 10 days" after notice of the action is served on the accused or defense counsel, an appellate waiver filed before service does not render a voluntary, knowing, and intelligent waiver invalid in military commissions. This is because, unlike the accused in a court-martial, the accused in a military commission may bargain away his appellate rights in return for greater concessions pursuant to a PTA. *Compare* R.M.C. 705(c)(2), *with* R.C.M. 705(c)(2). Accused in courts-martial, by contrast, are prohibited from bargaining away their appellate rights. R.C.M. 705(c)(1)(B). Rule for Courts-Martial 1110(f) exists to enforce that prohibition by forcing an accused to wait until after the convening authority takes action—when the accused cannot receive anything in return for an appellate waiver. *See* Cory Wielert, *Affecting the Bargaining Process in PTAs: Waiving Appellate Rights in the Military Justice System*, 79 UMKC L. Rev. 237, 262 (2010). Because the accused in military commissions may receive concessions in return for appellate waivers, the rationale for requiring an accused to wait to file the waiver does not exist in military commissions. As Congress explicitly provided in the M.C.A., the judicial construction and application of the U.C.M.J., while instructive, are not of their own force binding on military commissions. 10 U.S.C. § 948b(c). Here, the act of filing the already-executed waiver form with the convening authority is ministerial. In a court-martial, it is not merely ministerial, because the accused must be able to assess the waiver afresh after the Convening Authority has taken action, when he cannot receive anything in return for the waiver.

The plain text of the M.C.A. requires Hicks to file the waiver after he receives notice of the Convening Authority's action. *See* 10 U.S.C. § 950c(b)(3). However, a voluntary waiver filed before notice of the Convening Authority's action should be treated as if it were filed on the date of (and after) service of the CA's action, when the circumstances show that the Convening Authority's action could have no effect on the voluntariness of the waiver. In *United States v. Hashagen*, 816 F.2d 899, 902-03 (3d Cir. 1987), the court concluded that a notice of appeal filed prematurely—*i.e.*, before the ten-day statutory period that begins upon entry of the court's judgment—should be treated as timely filed, because doing so would not "interfere with the

independent functioning of the district court" and would enforce "fundamental notions of fair play" because the relevant party had received actual notice. *Id.* That is the case here, where Hicks agreed to waive appeal in exchange for receiving substantial benefits from the Convening Authority's Action, including a significantly reduced sentence and repatriation to Australia. Hicks' waiver was made a part of the record and transmitted to the Convening Authority and her Legal Advisor, who were fully aware of its terms when the Convening Authority took Action. And Hicks was provided actual notice—within the ten-day time period—that the Convening Authority was relying upon his previously-filed waiver. A301; A302; A306. It would elevate form over substance to disregard the waiver simply because Hicks did not affirmatively re-file it after service of the Action on him, a sequence that makes absolutely no sense when the Convening Authority's action is contingent on the accused's antecedent waiver of appeal.

The policy reasons underlying the C.M.A.'s holding in *Hernandez* do not apply here. The C.M.A. cited three policy reasons in holding the accused's waiver invalid. According to the C.M.A., waiting to file the waiver (1) gives the accused an opportunity "to reflect calmly on the potential adverse effects of the conviction and sentence and to decide whether to proceed with an appeal"; (2) prevents the accused from waiving his appellate rights "too easily and without full consideration . . . of the consequences"; and (3) permits the accused to assess grounds for appeal if the convening authority's action surprises the accused and presents unanticipated grounds for appeal. *Hernandez*, 33 M.J. at 148-49. All three reasons were fueled by the C.M.A.'s fear that an accused would waive his appellate rights without fully considering the consequences. *See id.*

None of these policy reasons justifies invalidating Hicks' waiver. Because Hicks entered into a binding Pre-Trial Agreement with the Convening Authority, he knew what the Convening Authority's obligations were before the Action was served upon him. The only way the Convening Authority could surprise Hicks was by violating the PTA, which the Convening Authority did not do.

The robust procedural protections afforded the accused in military commissions ensure waiver is rational, informed, considered, and provident. In accordance with those procedural

protections, Hicks exercised his right to consult with defense counsel before executing the Pre-Trial Agreement and waiving appeal. A27, A30; A200 (Tr. 152:11-13); A133 (Tr. 85:3-4); A169 (Tr. 121:18-20); *see* R.M.C. 1110(b); *see also* R.M.C. 502; R.M.C. 502(d)(6) Discussion (2007). Before finding that Hicks pleaded guilty and waived his appellate rights, the Military Judge conducted an extensive inquiry with Hicks, confirming that the plea and waiver were provident. A203 (Tr. 155:1-7); A205 (Tr. 157:1-12); *see* R.M.C. 910(d)-(h) (requiring the Military Judge to inquire to ensure the accused understands the plea agreement and the parties agree to the terms of the plea agreement); R.M.C. 1110(d) (requiring written waiver signed by the accused and defense counsel). Hicks fully understood the consequences of waiving appeal and was satisfied with his counsel's advice. A182 (Tr. 134:7-14); A200 (Tr. 152:17-21); A202 (Tr. 154:1-9); App. 1. Hicks' waiver is therefore valid, and the Court should enforce it.

IV. IN THE ALTERNATIVE, THE COURT SHOULD ENFORCE SPECIFIC PERFORMANCE OF HICKS' PROMISE TO WAIVE APPEAL IN THE PRETRIAL AGREEMENT AND DISMISS THIS ACTION

If the Court concludes that it has jurisdiction, it should nevertheless dismiss this action, in order to enforce Hicks' promise to waive appeal in the PTA. A pretrial agreement is a contract, to which contract law principles apply. *United States v. Ahn*, 231 F.3d 26, 35 (D.C. Cir. 2000) ("In considering whether a plea agreement has been breached, we look to principles of contract law." (citing *United States v. Jones*, 58 F.3d 688, 691 (D.C. Cir. 1995))). Applying contract law, courts have concluded that once the parties enter into a plea agreement, the agreement is binding, and both parties must fulfill the promises they made in it. *United States v. Carrara*, 49 F.3d 105, 107 (3d Cir. 1995).

In the D.C. Circuit, when the government breaches a pretrial agreement, that breach "entitles the defendant on direct review either to specific performance and resentencing before a different judge or to withdrawal of the guilty plea, as the court deems appropriate." *Pollard*, 959 F.2d at 1028. The same principles apply where the defendant breaches a plea agreement. When a defendant breaches a plea agreement, the court has discretion to order specific performance. In

United States v. Alexander, 869 F.2d 91, 92 (2d Cir. 1989), the government argued that a defendant who had promised to forfeit certain property in his plea agreement should be ordered to actually forfeit the property. The *Alexander* court held that specific performance was an appropriate remedy. *See id.*; *accord United States v. Cimino*, 381 F.3d 124, 127 (2d Cir. 2004) ("[W]hen the defendant is the party in breach, the Government is at least entitled to specific performance of the plea agreement . . . ."); *United States v. Skidmore*, 998 F.2d 372, 376 (6th Cir. 1993) (ordering defendant to specifically perform promise in plea agreement to forfeit property); 5 Wayne R. LaFave et al., *Criminal Procedure* § 21.2(e), at 60 (2d ed. Supp. 2007) ("[I]t is generally accepted that when a defendant breaches his plea agreement, the government has the option to either seek specific performance of the agreement or treat it as unenforceable (at least absent language in the plea agreement specifying fewer or other remedies.") (internal quotation marks and citations omitted). "A defendant should not be permitted to get the benefits of [his] plea bargain, while evading the costs . . . ." *United States v. Williams*, 510 F.3d 416, 427 (3d Cir. 2007) (internal quotation marks omitted).

Hicks voluntarily entered into a contract with the Government when he signed the PTA. Under that contract, he is obligated to waive appellate review. To the extent he has not effectively done so (though it is the United States' position that he has), he is in breach of his PTA. The proper remedy for that breach is to enforce specific performance of his promise not to file an appeal, by treating Hicks as if he had never filed an appeal. Should the Court conclude Hicks' waiver is invalid because he failed to file it with the Convening Authority within the ten days after notice of the Action was served on him, the court should: (1) construe the PTA as a contract, (2) hold Hicks in breach of that contract, (3) enforce specific performance of the PTA by holding Hicks to have waived his ability to appeal, and (4) dismiss this action.[23]

[23] The court can enforce specific performance simply by dismissing this case, without ordering Hicks or another court to take any action. Dismissing this case is within the power of the Court, and would have the same legal effect as if Hicks had filed his waiver within the ten-day period and not filed an appeal in the first place.

Hicks bargained for a particular plea and sentence, to avoid serving a longer sentence and to secure his transfer to Australia. He offered and promised, among other things, to plead guilty; not to initiate litigation against the United States with regard to his capture, detention, or prosecution; and to "waive all rights to appeal." A29. The parties' clear and unambiguous intent was that Hicks would validly waive his right to appellate review. *See* 11 *Williston on Contracts* § 32:2 (2013) (the judicial task in construing a contract is to give effect to the mutual intentions of the parties); *Restatement (Second) of Contracts* § 357 cmt. a. (1981) ("An order of specific performance is intended to produce as nearly as practicable the same effect that the performance due under a contract would have produced."). As consideration for this and other promises, the Convening Authority promised not to approve a sentence of confinement greater than seven years; to suspend all but seven months of that sentence; and to transfer Hicks to Australia. A31. A critical benefit for which the Convening Authority bargained was the certainty and finality of Hicks' conviction. It strains credulity to suggest that the Convening Authority would have offered such significant consideration in exchange for (among other promises) a promise *to intend* to waive appellate review, rather than a promise to *actually* waive appellate review.

The benefits of the PTA for Hicks are substantial. Relying on Hicks' guilty pleas and his promises (among others) to not initiate litigation against the United States and to waive appellate review, the Convening Authority suspended more than *six years* of Hicks' seven-year sentence of confinement. A31. She also took all appropriate actions to support Hicks' transfer to Australia. The Convening Authority upheld her obligations under the PTA. Hicks is, therefore, obligated to follow through and do what he promised to do: waive appeal.

Specific performance is particularly appropriate where, as here, the defendant is no longer in U.S. custody, and therefore cannot be resentenced. In such a case, specific performance is the only remedy available to the government. Withdrawing the PTA so that the Government may retry Hicks would be an "empty remedy," because Hicks has already served the non-suspended portion of his sentence and is in Australia, outside United States custody. *United States v. Badaracco*, 954 F.2d 928, 941 (3d Cir. 1992).

Williams applied *Badaracco* to the breach of a plea agreement by a defendant, reasoning that the "manner in which we have applied the general rule to a government's breach is instructive in fashioning an appropriate rule for application to a defendant's breach of a plea agreement." *Williams* ordered specific performance by remanding the case for re-sentencing and ordering the defendant to adhere to the plea agreement, which required him not to argue for any departures. 510 F.3d at 427. Just as in *Williams*, specific performance—in the form of dismissing this appeal—is the only "adequate remedy" because it is the only remedy available to the United States, now that Hicks is outside United States custody. *Id.* (citing *Badaracco*, 954 F.2d at 928).[24]

Having breached the PTA, Hicks cannot now come before the Court with unclean hands and ask it to compel the Convening Authority—who fulfilled her obligations under the PTA—to refer the case for appeal. Holding otherwise would reward Hicks for repudiating the obligations he knowingly and voluntarily assumed, shift the consequences of Hicks' repudiation to the Convening Authority by depriving the Convening Authority the benefit of the bargain, and create perverse incentives for an accused to apply wait-and-see litigation tactics to waiving appellate review. Contract law does not support such a result. *See Williams*, 510 F.3d at 427 ("[A] defendant should not be permitted to get the benefits of [his] plea bargain, while evading the costs . . . and contract law would not support such a result." (internal quotation marks omitted). Such a result would also defeat the policies undergirding plea agreements. As the Supreme Court has recognized, plea negotiations are an essential and desirable part of the modern criminal justice system. *Santobello v. New York*, 404 U.S. 257, 261 (1971). Parties to these negotiations

[24] No remand is necessary here because this case falls within the exception recognized by *Williams* to the "general rule," when a defendant breaches a plea agreement, "to remand the case . . . or treat [the agreement] as unenforceable." 510 F.3d at 427. *Williams* explicitly concluded "there are instances when remand is not necessary and the appellate court should determine the remedy" *e.g.*, "when there is only one appropriate remedy." *Id.* This is precisely such an instance, because the Court can fully effectuate the only appropriate remedy by dismissing this action as if it had never been filed. No further action by Hicks or another court is necessary, and there is no other possible remedy.

must be able to bargain in good faith and with the knowledge that courts will protect their reasonable expectations. The Court should protect the parties' reasonable expectations here by enforcing the PTA and compelling Hicks' specific performance of his promise to waive appeal, by dismissing the case.

Even if the Court has jurisdiction, the terms of the PTA should nevertheless be enforced, because Hicks induced the United States to detrimentally rely upon it, and it did so. *United States v. Savage*, 978 F.2d 1136, 1138 (9th Cir. 1992); *United States v. McGovern*, 822 F.2d 739, 746 (8th Cir. 1987); *Government of Virgin Islands v. Scotland*, 614 F.2d 360, 365 (3d Cir. 1980); *United States v. Brizendine*, 659 F.2d 215, 228 (D.C. Cir. 1981); *see United States v. Branston*, No. 99-1582, 2000 U.S. App. LEXIS 15076, at *4-*5 (2d Cir. June 26, 2000) (unpublished).

V. THE COURT SHOULD NOT CONSTRUE THIS ACTION AS A PETITION FOR A WRIT OF MANDAMUS OR OTHER EXTRAORDINARY RELIEF

This action is styled as a direct appeal. The Court should treat it as a direct appeal, and dismiss it for lack of jurisdiction. The Court should not construe this action as a petition for a writ of mandamus, or other extraordinary relief, to compel the Convening Authority to refer the case to the Court, because Hicks has not addressed, much less satisfied, the "extremely heavy burden" of showing the writ may issue. *Dew v. United States*, 48 M.J. 639, 648 (A. Ct. Crim. App. 1998) (citing *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 384 (1953)). Mandamus is a "drastic and extraordinary" remedy that is "reserved for really extraordinary causes." *Ex parte Fahey*, 332 U.S. 258, 259-60 (1947). "As the writ is one of the most potent weapons in the judicial arsenal, three conditions must be satisfied before it may issue:" the petitioner must show that (1) he has no other adequate means of attaining the relief requested, (2) his right to issuance of the writ is "clear and indisputable," and (3) issuing the writ is appropriate under the circumstances. *Id.* at 380-81 (citations omitted). Because Hicks has neither addressed nor met these necessary conditions, the Court should decline to construe the appeal as a petition for a writ of mandamus.

Even if the Court were to construe the appeal as a petition for a writ of mandamus, the Court should dismiss it for lack of jurisdiction. In 28 U.S.C. § 2241(e)(2), Congress "explicitly stripped [the] Court" of jurisdiction over petitions for a writ of mandamus relating to the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant, or is awaiting such determination. Order at 5, *ACLU v. United States*, No. 13-003 (C.M.C.R. Mar. 27, 2013) (Silliman, J., concurring); *see also Al-Zahrani v. Rodriguez*, 669 F.3d 315, 319 (D.C. Cir. 2012) (section 2241(e)(2) "retains vitality"). Hicks argues that the "Convening Authority's persistent refusal to forward the record only delays the appeal and burdens the Court" and that the "Court must now order the Convening Authority to forward the record." Hicks Br. 6 & n.8. But the Court has no authority to issue such an order, because such an order would amount to the issuance of a writ of mandamus, which in turn constitutes an action "against the United States . . . relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement" of Hicks, over which Congress has deprived the Court of jurisdiction. 28 U.S.C. § 2241(e)(2).[25]

Moreover, even if the Court were to treat this action as a petition for extraordinary relief and exercise subject matter jurisdiction over it, the Court should "summarily den[y]" the Petition, because Hicks validly waived appellate review. U.S.C.M.C.R. Rule of Practice 21(b)

[25] Hicks cites *United States v. Oestmann*, 61 M.J. 103, 104 (C.A.A.F. 2005) for the proposition that forwarding the record of trial is a "routine, nondiscretionary, ministerial task," but that case involved a court-martial in which appellate review was automatic, and the accused had not waived appellate review. As a consequence, the "unexplained" 511-day delay in the forwarding of the record was indeed merely a ministerial error, because "the only task required to get the record to the appellate review activity was the ministerial act of boxing it up and mailing it." *Id.* at 104. Here, by contrast, appellate review is explicitly prohibited by statute, because the accused waived it. Moreover, the delay is not "unexplained;" rather, it is due to inaction by Hicks. Hicks could have, but chose not to, raise his treatment-based challenge to the voluntariness of his waiver at any point after his release from custody six years ago. And service courts have the power to issue extraordinary writs in cases arising under the U.C.M.J, whereas the U.S.C.M.C.R. does not have such power over military commission cases.

("Petitions for extraordinary relief will be summarily denied, unless they pertain to a case in which there is an approved finding of guilty and appellate review has not been waived.").

CONCLUSION

For the foregoing reasons, the Court lacks subject matter jurisdiction, and in the alternative, it should enforce the Pretrial Agreement and dismiss this action.

Dated: December 19, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 14(i)

1. This brief complies with the type-volume limitation of Rule 14(i) because it contains 13,879 words.

2. This brief complies with the typeface and type style requirements of Rule 14(e) because it has been prepared in a monospaced typeface using Microsoft Word Version 2010 with 12 characters per inch and Time New Roman font.

Dated: December 19, 2013

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was sent by electronic mail to Baher Azmy, J. Wells Dixon, Shayana D. Kadidal, Susan Hu, and Joseph Margulies, civilian appellate defense counsel, and Samuel T. Morison and Capt Justin Swick, detailed appellate defense counsel, on December 19, 2013.

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	)	IN THE COURT OF MILITARY
	)	COMMISSION REVIEW
DAVID M. HICKS,	)	
	)	**APPENDIX TO BRIEF OF**
	)	**THE UNITED STATES ON THE**
Appellant,	)	**COURT'S LACK OF AUTHORITY TO**
	)	**HEAR THIS CASE**
	)	
v.	)	CMCR Case No. 13-004
	)	
	)	Tried at Guantánamo Bay, Cuba
UNITED STATES OF AMERICA,	)	on 26 & 30 March 2007
	)	before a Military Commission
Appellee.	)	convened by Hon. Susan J. Crawford
	)	
	)	Presiding Military Judge
	)	Colonel Ralph H. Kohlmann, USMC

TO THE HONORABLE, THE JUDGES OF THE COURT OF MILITARY COMMISSION REVIEW

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December 19, 2013

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EXHIBIT 1

UNITED STATES OF AMERICA	)	Waiver of Appellate Review
v.	)	Military Commission Guantanamo Bay, Cuba
DAVID HICKS	)	

1. I, David Hicks, waive appellate review of my military commission.

2. I, David Hicks, have discussed my right to appellate review and the effect of waiver of appellate review with my Detailed Military Counsel, Major Michael D. Mori. I understand these matters.

3. This waiver is submitted voluntarily.

Signed: _____
David Hicks

Date: 30/3/7

Signed: _____
M.D. Mori
Major, U.S. Marine Corps
Detailed Defense Counsel

Date: 30 MAR 07

AE 33 (Hicks)
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