IN THE UNITED STATES COURT OF MILITARY COMMISSION REVIEW
[Assigned to Panel 2]

DAVID M. HICKS,	)	CMCR Case No. 13-004
	)	
Appellant,	)	Tried at Guantánamo Bay, Cuba,
v.	)	on 26 & 30 March 2007, before a
	)	Military Commission convened by
UNITED STATES OF AMERICA,	)	Hon. Susan J. Crawford
	)	
Appellee.	)	Presiding Military Judge
	)	Colonel Ralph H. Kohlmann, USMC

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

APPELLANT'S ANSWER TO THE GOVERNMENT'S RESPONSE TO THE COURT'S DECEMBER 4, 2013 ORDER REGARDING JURISDICTION

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Appellant David M. Hicks, by and through his undersigned counsel, respectfully submits this answer to the government's response to the Court's December 4, 2013 order.

PRELIMINARY STATEMENT

In his opening brief, Mr. Hicks established that the Court has jurisdiction to decide the merits of this appeal because he did not waive his appeal rights. He did not file a waiver within ten days after the Convening Authority's action on his sentence, which triggered this Court's automatic, mandatory obligation to review his conviction pursuant to the MCA. The Convening Authority noted in its final action that Mr. Hicks would waive his appeal rights after final action, but ultimately did not insist on such a waiver and transferred Mr. Hicks to Australia after the expiration of the statutory ten-day period without seeking to enforce the waiver or withdraw from the pretrial agreement, which was a decision within its sole discretion. Mr. Hicks also demonstrated the Court's authority to decide the merits of this appeal regardless of whether he waived his appeal rights because the military commission that heard his guilty plea (including any purported waiver) lacked subject-matter jurisdiction to accept it, which is an issue that cannot be waived. Mr. Hicks likewise showed that his guilty plea was void because it was not knowing and voluntary, which cannot be waived.

Far from offering any persuasive opposition to these points, the government resorts to obfuscation to try and avoid the result plainly required by statute, military commission rules and regulations, analogous rules of courts-martial practice, and on-point judicial decisions: an order vacating Mr. Hicks's conviction for a single purported offense that is not and was not at the time of his alleged conduct a war crime. But notwithstanding its attempt to create ambiguity where plainly none exists, the government concedes the essential elements confirming this Court's jurisdiction over this appeal. Buried deep within its lengthy brief, the government concedes that

Mr. Hicks did not waive his appeal rights pursuant to the MCA. Gvt. Br. at 1-2, 26-29. The government also concedes that the Court has some authority to review the record of trial to determine whether Mr. Hicks's plea and purported waiver complied with the requirements of the MCA and corresponding rules and regulations. *Id.* at 3. In addition, the government concedes that an accused cannot waive subject-matter jurisdiction. *Id.* at 12-13. Finally, the government does not seriously dispute that an unknowing or involuntary plea is void, or that an appeal waiver provision is not valid if the underlying plea agreement is unenforceable. *Id.* at 15 n.10.

These admissions are fatal to the government's principal claim that the Court lacks jurisdiction over this appeal because Mr. Hicks waived his appeal rights. Indeed, the government's waiver arguments are almost entirely circular, amounting in each instance to a claim that the Court lacks jurisdiction to determine the validity of Mr. Hicks's appeal waiver (and by extension to vacate his conviction) because he validly waived his appeal rights.

The government's additional arguments are also baseless and should be rejected.

ARGUMENT

As explained in Mr. Hicks's opening brief, this Court has jurisdiction to hear this case pursuant to 10 U.S.C. §§ 950c(a) and 950f(c) regardless of whether Mr. Hicks validly waived his appeal rights. As the government has previously conceded, and does not dispute in its opening brief on jurisdiction, the D.C. Circuit's decision in *Hamdan II* "eliminates military commission jurisdiction over . . . material support charges brought in *all of the military commission cases to date* that have resulted in convictions," including this case. Pet. of the United States for Reh'g En Banc at 2, 14, *Al Bahlul v. United States*, No. 11-1324 (D.C. Cir. Mar. 5, 2013) (emphasis added). Because the military commission lacked jurisdiction to convict Mr. Hicks for providing material support for terrorism, it had no authority in the first instance to accept his guilty plea,

including the pretrial agreement and purported waiver, and his conviction must be vacated as a matter of law. *See Menna v. New York*, 423 U.S. 61, 62 (1975); *see also Blackledge v. Perry*, 417 U.S. 21, 30-31 (1974) (despite defendant's guilty plea, "the right that he asserts and that we today accept is the right not to be haled into court at all upon the felony charge. The very initiation of the proceedings against him in the [lower] Court thus operated to deny him due process of law"). The validity of Mr. Hicks's purported appeal waiver and whatever else may or may not have occurred prior to, during or after the time of the plea proceedings are irrelevant because there was simply no basis to hale him before a military commission.[1]

Yet the Court indisputably has jurisdiction to determine the validity of Mr. Hicks's waiver to the extent it determines that resolution of that issue is relevant to its jurisdiction over this case, and should conclude that the waiver is invalid for failure to comply with the MCA.

I. THE GOVERNMENT CONCEDES THAT MR. HICKS DID NOT WAIVE HIS APPEAL RIGHTS AS REQUIRED BY THE PLAIN LANGUAGE OF THE MCA, WHICH VESTED THIS COURT WITH ACTUAL APPELLATE JURISDICTION

The government concedes that "[t]he plain text of the M.C.A. require[d] Hicks to file [any] waiver [of appeal rights] after he receive[d] notice of the Convening Authority's action," and that he did not do so within ten days after the Convening Authority's action on his sentence as required by 10 U.S.C. § 950c(b)(3). Gvt. Br. at 2, 27. The government argues that Mr.

[1] The government's brief does not address the fundamental jurisdictional implications of *Hamdan II* or Mr. Hicks's right not to be haled before a commission at all despite his guilty plea. The government only attempts to distinguish cases cited in Mr. Hicks's opening merits brief (at pp.7-8), which stand for the uncontroversial proposition that a court always retains authority to void a plea agreement in order to remedy jurisdictional defects. The government argues that regardless of whether the commission had jurisdiction, this Court is powerless to vacate Mr. Hicks's conviction and correct a miscarriage of justice because he waived his appeal rights and the Convening Authority has not forwarded the record of trial to this Court, which deprives the Court of statutory authority to review the content of any issues on appeal. Gvt. Br. at 13-16 & nn.7-11. This argument is not only circular, but at a minimum ignores the Court's authority to determine its own jurisdiction and test the validity of the waiver. *See infra* p.10 & note 4.

Hicks's purported waiver prior to the conclusion of his guilty plea proceedings is nonetheless valid, and that the premature waiver should be treated as if it were filed after the Convening Authority's action. *Id.* at 26-29. The government cites no authority supporting its argument, which is wrong both as a matter of law and undisputed fact, and has been squarely rejected.

As set forth in detail in Mr. Hicks's opening brief, the MCA provides that the Convening Authority "shall" automatically forward to this Court for mandatory review each case in which the final decision of a military commission "as approved by the convening authority" includes a finding of guilty, "[e]xcept as provided in subsection (b)." 10 U.S.C. § 950c(a). Subsection (b) specifies that any waiver of appellate review by this Court must be filed with the Convening Authority within ten days after final action on the sentence. *Id.* §§ 950c(b)(1), (3). These waiver requirements are narrow and exclusive, which is further established by corresponding military commission rules and regulations. *See* R.M.C. 1110(e)(1); R.M.C. 1110(f)(1); R.M.C. 1111; R.T.M.C. ¶¶ 24-2.a, 2.b.1. Moreover, the MCA's waiver provision is substantively identical to, and derived from, the longstanding waiver rule applicable to courts-martial, 10 U.S.C. § 861(a), which the government concedes prohibits appeal waivers filed prior to the convening authority's action. Gvt. Br. at 27; *see also United States v. Hernandez*, 33 M.J. 145, 145 (C.M.A. 1991) (waiver executed "prior to the convening authority's action" has "no legal effect"); *United States v. Miller*, 62 M.J. 471, 474 (C.A.A.F. 2006) (waiver valid only where "record demonstrates a serious, rational, and informed discussion between the accused and defense counsel after the convening authority's action"). The MCA further provides that post-trial procedures applicable in courts-martial "shall apply in trials by military commission" unless specifically exempted pursuant to the MCA or the UCMJ, which is not the case here. 10 U.S.C. § 949a(a).

The government's brief does not dispute the plain text of the MCA's strict waiver requirements or address military rules and regulations governing the requirements for a valid waiver. The government notably all but ignores 10 U.S.C. § 950c(b)(3), R.M.C. 1110(f)(1), and R.T.M.C. ¶ 24-2. The government also dismisses the relevance of courts-martial practice in conclusory fashion on the ground that the UCMJ is not binding in commissions. Gvt. Br. at 27. Yet the government concedes, as it must, that courts-martial rules are persuasive in commissions, particularly where, as here, they deal with provisions that are substantively identical to those at issue in the commissions. *Id.*; *United States v. Khadr*, 753 F. Supp. 2d 1178, 1182 (CMCR 2008); *see also* 10 U.S.C. §§ 948b(c), 949a(a); *United States v. Khadr*, 717 F. Supp. 2d 1215, 1236 & n.35 (CMCR 2007) (Congress intended "that military commissions mirror [ ] firmly rooted [historical courts-martial] practice to the maximum extent practicable"); *United States v. Hamdan*, 801 F. Supp. 2d 1247 (CMCR 2011) (en banc) (relying heavily on comparisons to courts-martial practice), *vacated on other grounds*, 696 F.3d 1238 (D.C. Cir. 2012).

As noted above, the government cites no authority in support of its assertion that a purported waiver that fails to comply with the MCA's strict waiver requirements is nonetheless valid. Nor does the government cite any authority that would authorize the Court to deem a premature waiver to be filed after the Convening Authority's action (or at any other time). The government instead makes a policy argument about what the waiver rule in military commissions ought to be. In essence, it argues that because an accused in a military commission may waive his appeal rights in exchange for concessions in a pretrial agreement, the statutory rule requiring that he wait until after the Convening Authority acts on his sentence before filing a waiver is unnecessary. This argument rests on the premise that there is no reason to require an accused to wait until after the Convening Authority's action to file a waiver because that action could have

no effect on the voluntariness of an earlier-filed waiver. But that assumption is easily refuted by the indisputable fact that an accused cannot know what he is waiving until after the Convening Authority acts. Even if an accused in a military commission may bargain away his appeal rights in return for greater concessions pursuant to a pretrial agreement, there is no way to ensure that he will receive those concessions or that the Convening Authority will approve a conviction and sentence in conformity with the pretrial agreement (or applicable law) until it has acted.[2] Moreover, the ability of an accused to waive his appeal rights in a pretrial agreement pursuant to R.M.C. 705(c)(2)(E) simply does not answer the question of whether he has in fact done so pursuant to congressionally mandated requirements. Nor could a military commission rule promulgated by the Secretary of Defense trump the clear language of a statute that is itself more protective of an accused. Hicks Br. at 9 n.5.

The government's argument also defies common sense as well as ordinary canons of statutory construction because it would render 10 U.S.C. § 950c(b), as well as R.M.C. 1110(f), R.T.M.C. ¶ 24-2.b.1 and other similar provisions, utterly meaningless. *See Corley v. United States*, 556 U.S. 303, 314 (2009) ("The Government's reading is thus at odds with one of the most basic interpretive canons, that '[a] statute should be construed so that effect is given to all

[2] In order to preserve his rights, Mr. Hicks contends that the blanket waiver in his pretrial agreement was unlawful because it is so broad and unqualified that it purports to bar appellate review under any circumstances. Hicks Br. at 9 n.4. He also notes by comparison that the waiver term in every subsequent military commission pretrial agreement is more nuanced and qualified, and specifically allows for review in situations where the sentence imposed exceeds the statutory maximum or violates the pretrial agreement. *See* App. to Br. in Supp. of Pet. for Extraordinary Relief in the Nature of Writs of Mandamus and Prohibition at 42-68, *United States v. Al Qosi*, CMCR Case No. 13-001 (Jan. 4, 2013) (compiling pretrial agreements in *Hicks*, *Khadr*, *Muhammed* and *Khan* cases); Resp. on Behalf of Resp'ts at 21, *id.* (Jan. 17, 2013) (quoting pretrial agreement and citing Mr. Al Qosi's express ability to seek review of an unlawful sentence as a basis to uphold his premature appeal waiver). Nor did Mr. Hicks execute the same MC Form 2330 as other commission accused who have been sentenced.

its provisions, so that no part will be inoperative or superfluous, void or insignificant.'") (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)).[3]

Indeed, in the courts-martial context military courts have already rejected the government's argument on the basis of clear statutory language in the UCMJ that is substantively identical to the MCA waiver provision. In *United States v. Hernandez*, 33 M.J. 145 (C.M.A. 1991), the Court of Military Appeals overturned a ruling by the intermediate appeals court that a premature waiver may be "deemed filed as of the day on which the accused or defense counsel is served with a copy of the initial action," and is valid and effective if otherwise properly executed. The Court specifically rejected the argument – resurrected by the government here – that the statutory requirement that an appeal waiver be filed within ten days after final action serves only as a matter of administrative convenience. *Id.* at 147; Gvt. Br. at 26-27 (alleging post-action filing requirement is "ministerial"). In reaching this conclusion, the Court rejected policy arguments like those asserted by the government in this case. The Court held that the statutory waiver language of 10 U.S.C. § 861(a) – which again is substantively identical the MCA waiver language – is "perfectly clear" and requires compliance with the ten-day post-action filing rule regardless of underlying policy considerations. The Court further concluded

[3] The government's reading would also be contrary to the legislative history of the 2009 amendments to the MCA, which confirms that the changes were intended in part to create a more robust system of appellate review in the military commissions. *See Hearing on Prosecuting Law of War Violations: Reforming the Military Commissions Act of 2006 Before the H. Armed Serv. Comm.*, 111th Cong. 42 (2009) (statement of LTG Scott C. Black, J. Advocate Gen. of the U.S. Army) ("The nature of this armed conflict does not require departure from the uniformity principle addressed by the Supreme Court in *Hamdan*, as applied to appellate review, but rather, warrants adoption of an appellate system that more closely resembles that mandated by the UCMJ."); *id.* at 47 (statement of VADM Bruce MacDonald, J. Advocate Gen. of the Navy and later Convening Authority for military commissions) (stating that one of the "shortcomings" of the 2006 MCA was that "[a]ppellate review is not sufficiently robust").

that it had no authority to ignore or undercut Congress's legislative determination to impose such limitations on the waiver of appeal rights. 33 M.J. at 148-49.

Accordingly, because the relevant statutory language is clear, and because the government can provide no colorable basis for this Court to depart unilaterally from Congress's legislative determination, the Court should apply the MCA waiver provision as written and conclude that Mr. Hicks did not waive his appeal rights. *See Khadr*, 753 F. Supp. 2d at 1180 (commission rules "cannot trump the time limitations expressed by Congress"); *see also United States v. Locke*, 471 U.S. 84, 93 (1985) ("To attempt to decide whether some date other than the one set out in the statute is the date actually 'intended' by Congress is to set sail on an aimless journey, for the purpose of a filing deadline would be just as well served by nearly any date a court might choose as by the date Congress has in fact set out in the statute.").

II. THE COURT HAS JURISDICTION TO REVIEW THIS CASE NOTWITHSTANDING THE CONVENING AUTHORITY'S FAILURE AND REFUSAL TO FORWARD THE RECORD OF TRIAL

In contrast to the government's invitation for this Court to disregard the plain language of the MCA and adopt a broad reading of the statutory waiver provisions such that the ten-day post-action filing requirement may be ignored as ministerial, the government urges the Court to adopt an exceedingly narrow interpretation of the MCA as it relates to the Convening Authority's obligation to forward the record of trial to the Court for review. The government argues that because the Convening Authority has not referred this case to the Court for review, the Court's appellate jurisdiction has not attached and there is nothing for this Court to review. Gvt. Br. at 16 (citing 10 U.S.C. § 950f(c)). The government is wrong for several reasons.

As discussed in Mr. Hicks's opening brief, the expiration of the ten-day waiver period vests this Court with actual, rather than merely potential, appellate jurisdiction over the case that

cannot be divested by the subsequent action (or inaction) of the Convening Authority. That is so because once a convening authority's post-trial action is served on an accused or his counsel, the convening authority may not take any further substantive action in the case. Hicks Br. at 14-15 (citing cases); *see also*, *e.g.*, *United States v. Montesinos*, 28 M.J. 38, 42 (C.M.A. 1989) (jurisdiction transfers from convening authority to appellate court once final action is served).

The government also misconstrues the Convening Authority's mandatory obligation to forward the record of trial to this Court. Again, 10 U.S.C. § 950c(a) provides that the Convening Authority "shall" refer the case for review "[e]xcept as provided in subsection [950c](b)," the requirements of which the government concedes are not met here. Section 950f(c), cited by the government, also provides that the Court "shall, in accordance with procedures prescribed under regulations of the Secretary, 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." The referenced regulations further specify the Convening Authority's obligation to refer the case unless review has been waived pursuant to R.M.C. 1110, which in turn incorporates the post-action filing requirement. *See* R.M.C. 1110(f)(1); *see also* R.M.C. 1111; R.T.M.C. ¶ 24-2.b.1. But nothing about those provisions bars the Court from addressing the Convening Authority's failure to forward the record. To the contrary, by specifically incorporating section 950c, section 950f(c) plainly authorizes the Court to determine whether the requirements of section 950c have been satisfied, including with respect to the waiver.

In addition, to the extent the government contends that the Convening Authority's referral of the case for review is jurisdictional, in the sense that forwarding the record is what vests the Court with actual appellate jurisdiction, *see* Gvt. Br. at 11-12, 13 n.8, 14, 16, that argument, even if true, would not bar this Court from reviewing the propriety of the Convening

Authority's conduct or the validity of Mr. Hicks's purported waiver (which the government appears to contend justified that conduct). This Court, like all federal courts, "always has jurisdiction to determine its own jurisdiction." *United States v. Khadr*, 717 F. Supp. 2d 1215, 1234 (CMCR 2007) (citing cases); R.M.C. 201(b)(3) ("A military commission always has jurisdiction to determine whether it has jurisdiction."); R.T.M.C. ¶ 24-2.b.5. As noted above, the government largely concedes this point in its brief. Gvt. Br. at 3.[4]

Moreover, there can be no serious dispute that this Court has jurisdiction to order the Convening Authority to forward the record of trial for review so the Court may determine the validity of the appeal waiver. In *United States v. Al Qosi*, this Court entered an order requiring the government to "produce an unclassified, electronic copy of the authenticated Record of Trial" within one week so that the Court could address "[a]ny waiver or withdrawal of appellate review including . . . proof that any such waiver document was filed with the convening authority . . . and the date any such waiver/withdrawal was filed." Order at 2-3, *United States v. Al Qosi*, CMCR Case No. 13-001 (Feb. 12, 2013) (attached hereto). Indeed, not only did the Court order production of the trial record notwithstanding the parties' dispute about the validity of Mr. Al Qosi's appeal waiver, it also ordered the government to produce any information outside the record bearing on the waiver issue and the Court's jurisdiction. *Id.* at 3 ("[T]he Government shall produce copies of any communications . . . regarding waiver or withdrawal of appellate review, not otherwise included in the authenticated Record of Trial."). Here, of course,

[4] The government also claims throughout its brief that Mr. Hicks's waiver of appeal rights is jurisdictional, and once executed deprives the Court of jurisdiction to hear this action regardless of the merits of his arguments on appeal. Gvt. Br. at 12-15. As noted above, that argument is entirely circular because it assumes in the first instance that there was jurisdiction to hale Mr. Hicks before the commission at all, and that his waiver is valid. But in any event, waivers entered pursuant to plea agreements are not jurisdictional; they are merely preclusive. *See*, *e.g.*, *United States v. Castillo*, 496 F.3d 947, 949-50, 956-57 (9th Cir. 2007) (en banc) ("We now hold that a valid guilty plea does not deprive the court of jurisdiction and remand.").

Mr. Hicks is proceeding on direct appeal and there are no factual disputes concerning his purported waiver, but the point stands that this Court has already concluded that it has authority to enter an order compelling the record of trial before a military commission to be forwarded for its review.[5] Nothing more is required here.

III. THE GOVERNMENT DOES NOT DISPUTE THE COURT'S JURISDICTION TO REVIEW THE NON-WAIVABLE CLAIM THAT MR. HICKS'S GUILTY PLEA WAS UNKNOWING, UNINTELLIGENT AND INVOLUNTARY

The bulk of the government's brief concerns Mr. Hicks's contention that his guilty plea is void because it was not knowing and voluntary. Gvt. Br. at 3-9, 12, 17-25. Mr. Hicks specifically contends in his opening merits brief (at pp.9-12) that he was erroneously advised by his counsel and the court that providing material support for terrorism was a war crime, and he was ignorant of the fact that he was pleading guilty to a non-offense. He also contends he is entitled to relief because his guilty plea was the unlawful product of violence, threats and improper promises.[6] These issues are not waivable, which the government does not dispute.

The government instead argues at length that the Court should reject the *merits* of Mr. Hicks's claims based on the trial record and additional evidence provided by the government in its Conditional Motion to Attach, filed concurrently with its jurisdictional brief. Although the

[5] Because neither party seeks to convert this action into a petition for an extraordinary writ, the Court need not address that issue. Gvt. Br. at 33-35. However, Mr. Hicks notes the government's prior admission that this Court would have jurisdiction to address a purported waiver filed out of compliance with 10 U.S.C. § 950c(b) in the context of a directly authorized petition. *See* Resp. on Behalf of Resp'ts at 2-3, *United States v. Al Qosi*, CMCR Case No. 13-001 (Jan. 17, 2013) ("If [accused] were to authorize [counsel] to represent him in challenging the validity of his waiver of appellate review, then perhaps it would be appropriate to bring that challenge via an extraordinary writ petition."); *id.* at 17 n.7 (recognizing that subject-matter jurisdiction may not be waived and "avenues of collateral attack on such grounds may exist").

[6] Contrary to the government's suggestion, Mr. Hicks does not argue that "potentially indefinite law of war detention, standing alone, renders any subsequent guilty plea involuntary." Gvt. Br. at 20 n.15. Mr. Hicks's arguments are specific to the facts and circumstances of his case.

government does not specifically address or dispute a single one of Mr. Hicks's many detailed allegations of abuse during or prior to his detention Guantánamo (including that he was drugged when charges were sworn against him in February 2007, Hicks Aff. ¶¶ 257-59),[7] and does not dispute that he was improperly advised that providing material support for terrorism was a war crime, the government argues that the record of trial, including in particular Mr. Hicks's guilty plea colloquy, shows that his plea was knowing and voluntary.[8] The government variously argues that Mr. Hicks was properly advised and understood what he was doing, that any taint from his torture and abuse had dissipated by the passage of time prior to his guilty plea,[9] and that

[7] The government argues that Mr. Hicks's allegations of abuse should not be credited because he reportedly stated in an August 2004 NCIS report that he was not subject to physical abuse at Guantánamo. Gvt. Br. at 20 n.14. Far from undermining Mr. Hicks's allegations of abuse, the report corroborates many detailed facts in his sworn affidavit. The report also does not purport to address Mr. Hicks's psychological abuse at Guantánamo, physical abuse occurring after August 2004, or the lasting effects of earlier physical and psychological abuse. Even if true it is entirely reasonable to conclude Mr. Hicks did not cite his physical abuse at Guantánamo for fear of retribution as he remained under the complete control of his jailers. *See also infra* note 9.

[8] The government also argues that based on the trial record Mr. Hicks's waiver of appeal was legally sufficient, and knowing and voluntary. Gvt. Br. at 17-18. The legal sufficiency of the waiver is addressed throughout this brief, but it bears emphasis that the waiver was not knowing and voluntary because Mr. Hicks was instructed by the military judge incorrectly on material points of law, including the nature of the offense, which is a jurisdictional defect not subject to harmless error review. Hicks Br. at 14.

[9] The passage of time is only one of many factors used to determine whether statements are tainted by prior coercion. *See United States v. Karake*, 443 F. Supp. 2d 8, 52 (D.D.C. 2006) (stating that "for purposes of assessing the voluntariness of a statement under principles of due process . . . a court must consider the circumstances surrounding the interrogation, as well as the length of the detention and the conditions of confinement," and citing long line of cases finding statements involuntary because defendant was subject to psychological torture or held in "oppressive" or "subhuman" conditions); *see also Oregon v. Elstad*, 470 U.S. 298, 310 (1985) ("When a prior statement is actually coerced, the time that passes between confessions, the change in place of interrogations, and the change in identity of the interrogators all bear on whether that coercion has carried over into the second confession."); *Brooks v. Florida*, 389 U.S. 413, 414-15 (1967) (finding defendant's confession involuntary when still "completely under the control and domination of his jailers"). The government does not address these other factors.

his failure to anticipate *Hamdan II* does not render his plea unknowing or involuntary.

It suffices to say that Mr. Hicks disputes each of these claims, but they are more properly resolved via full briefing on the merits of the appeal (if necessary despite the final decision in *Hamdan II*) than in the limited context of the Court's order to brief "only matters relevant to [its] authority to hear this case." It is enough for present purposes that the government does not dispute the Court's jurisdiction to address these issues on the merits, based on the record at trial and additional documentary evidence submitted by the parties in their motions to attach.

IV. THE GOVERNMENT'S REMAINING ARGUMENTS ARE BASELESS

Throughout the government's brief, it suggests that Mr. Hicks somehow duped the Convening Authority and breached his plea agreement by pursuing this appeal. The government necessarily assumes that the Convening Authority was not aware of the strict statutory waiver requirements, or was somehow misled or induced not to seek enforcement of the waiver provision in Mr. Hicks's pretrial agreement. The government is wrong in each respect.

Contrary to the government's claim that the Convening Authority gave notice that it was "relying upon [Mr. Hicks's] previously-filed waiver," Gvt. Br. at 10, 28, the Convening Authority's final action memorandum expressly recognized that Mr. Hicks's promise to waive his appeal rights was prospective. A301 (noting Mr. Hicks "will" waive appeal and undertake other future actions). It is also entirely reasonable to conclude that the Convening Authority was aware that Mr. Hicks could not waive his appeal rights as a matter of law until after final action because the Convening Authority, Hon. Susan J. Crawford, had served as a judge on the Court of Appeals for the Armed Forces and was one of the judges who decided *United States v. Miller*, 62 M.J. 471, 474-75 (C.A.A.F. 2006), which held that a premature waiver must be ratified and filed in conformity with statutory waiver requirements after final action.

Mr. Hicks's failure to waive his appeal rights after the Convening Authority's action also does not establish that he breached his pretrial agreement. *See* Gvt. Br. at 11, 29-33. As an initial matter, there was no binding agreement because the commission lacked jurisdiction to accept his guilty plea. The Convening Authority also had the opportunity to enforce the waiver provision or seek to invalidate the pretrial agreement for failure to file a waiver after final action and before transferring Mr. Hicks, but it did not do so for reasons known only to the Convening Authority, as was well within its sole discretion to do. Under those circumstances, Mr. Hicks neither violated the pretrial agreement by failing to waive his rights nor by pursing this appeal.

Even if Mr. Hicks had breached the pretrial agreement, there would be no basis for this Court to order specific performance of the waiver provision. A court cannot order specific performance of an illegal contract term; the provision here is illegal because it purports to waive jurisdictional issues, which the government concedes are non-waivable. *See also* R.M.C. 705(c)(1)(B) (pretrial agreement term not enforceable if it deprives accused of "indispensable judicial guarantees"). Specific performance is also an equitable remedy, and the government cites no legal authority (and we are aware of none) that would permit this Court to order such a drastic remedy pursuant to its statutory jurisdiction, particularly given the Court's obligation to ensure that the findings and sentence approved by the Convening Authority are "correct in law and fact" and should be approved "on the basis of the entire record."[10] 10 U.S.C. § 950f(d); *see Haffner v. Dobrinski*, 215 U.S. 446, 450 (1910) ("Specific performance is never demandable as a matter of absolute right, but as one which rests entirely in judicial discretion, to be exercised . . . according to the settled principles of equity."). The prosecution also lacks standing to seek

[10] The government's request for the Court to order a specific performance remedy stands in striking contrast to its claim that the Court's jurisdiction is so narrow and limited that it cannot order the Convening Authority to undertake even a ministerial act such as forwarding the record of trial. These views of the Court's jurisdiction are simply not reconcilable.

specific performance because it is not a party to or clear beneficiary of the pretrial agreement.[11] *See* John Norton Pomeroy, *A Treatise on the Specific Performance of Contracts: As It Is Enforced by Courts of Equitable Jurisdiction, in the United States of America* 1 (Banks & Brothers 1879) ("The Specific Performance of Contracts is purely a remedy administered by courts having equitable jurisdiction, and the right to it, held and enforced *by a contracting party*, is purely a remedial right.") (emphasis added). In addition, specific performance is not permissible because it is not contemplated by the pretrial agreement itself and the government has not otherwise demonstrated that it is appropriate relative to other possible remedies; indeed, the only remedy for a breach of the pretrial agreement is for the Convening Authority to seek to invalidate it. *See*, *e.g.*, *Texas v. New Mexico*, 482 U.S. 124, 131 (1987) (noting specific performance is "an equitable remedy that requires some attention to the relative benefits and burdens that the parties may enjoy or suffer as compared with a legal remedy in damages"); *see also* R.M.C. 705(d)(4)(B) (convening authority may seek to withdraw from pretrial agreement "upon the failure by the accused to fulfill any material promise or condition . . . , or if . . . a plea of guilty entered pursuant to the agreement is held improvident on appellate review").

CONCLUSION

All applicable legal authority confirms this Court's jurisdiction. Yet the government urges the Court to devise some novel, unprecedented procedural basis to avoid the merits of the appeal and thereby salvage a conviction for an offense that a higher court has held is not and was not at the time of the alleged conduct a war crime. The Court should reject that invitation, exercise its jurisdiction and vacate Mr. Hicks's conviction to prevent a miscarriage of justice.

[11] As the government itself has previously argued, the Convening Authority is separate from the prosecution in a military commission. *See* Resp. on Behalf of Resp'ts at 7-8, *United States v. Al Qosi*, CMCR Case No. 13-001 (Jan. 17, 2013) ("[T]he Convening Authority is neutral based on objective and reasonable perception. . . . [it is] neither prosecutor nor judge.").

Dated: January 10, 2014
New York, New York

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was sent via e-mail to counsel for Appellee, including BG Mark S. Martins, USA, and CAPT Edward S. White, JAGC, USN, at the Office of the Chief Prosecutor, on the 10th day of January 2014.

//s// J. Wells Dixon
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ATTACHMENT

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UNITED STATES
COURT OF MILITARY COMMISSION REVIEW

IBRAHIM AHMED MAHMOUD AL QOSI,	)	ORDER
Petitioner	)	WRITS OF
v.	)	PROHIBITION AND
BRUCE MACDONALD, CONVENING AUTHORITY, MILITARY COMMISSIONS, and	)	MANDAMUS
PAUL S. KOFFSKY, DEPUTY GENERAL COUNSEL FOR PERSONNEL AND HEALTH POLICY, DEPARTMENT OF DEFENSE,	)	CMCR CASE NO. 13-001
	)	February 12, 2013
Respondents	)	

BEFORE:

PRICE, Chief Judge
ALDYKIEWICZ, HARNEY, WARD, POLLARD, Judges

On behalf of Ibrahim Ahmed Mahmoud al Qosi (Petitioner), Captain Mary R. McCormick, JAGC, U.S. Navy (Appellate Defense Counsel) submitted a Petition for Extraordinary Relief in the Nature of Writs of Prohibition and Mandamus.

The cited basis for the Petition was "[i]n order to provide [Petitioner] with effective assistance of counsel and to safeguard his right to seek post-trial and appellate review until he has had a meaningful opportunity to decide whether to exercise those rights . . . . [Appellate Defense Counsel requests extraordinary relief] seeking funding for appellate counsel and an interpreter to travel to Sudan to consult with [Petitioner], and other appropriate relief." Petition for Extraordinary Relief.

Invoking the All Writs Act, 28 U.S.C. § 1651, the 2009 Military Commissions Act, 10 U.S.C. §§ 950c and 950f(c); and other sources, Petitioner asks this Court, *inter alia*, to issue one writ of prohibition, prohibiting the convening authority from exerting authority over Appellate Defense Counsel's

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request for travel funding to consult with Petitioner; and to issue three writs of mandamus:[1] (1) compelling the Department of Defense ("DOD") Deputy General Counsel ("DGC") for Personnel and Health Policy to approve Counsel for Petitioner's request for travel funding to consult with Petitioner or, alternatively, compelling DOD, DGC Personnel and Health Policy to provide resource funding authority to the Chief Defense Counsel; (2) alternatively to the first and second requests for relief, compelling the convening authority to approve funding for Appellate Defense Counsel and an interpreter for travel to consult with Petitioner; and (3) compelling the convening authority pursuant to 10 U.S.C. § 950c(a) to forward Petitioner's case to this Court for automatic review.

Upon consideration of the matters submitted by the parties,[2] it is,

ORDERED:

1. That the United States be substituted as the responding party to this Writ.

2. That the Government shall produce an unclassified, electronic copy of the authenticated Record of Trial in the case of *United States v. al Qosi* on or before February 19, 2013. *See* 10 U.S.C. § 949o; Rules for Military Commissions (R.M.C.) 1103 and 1104. The Record shall include:

(a) Proof of service of a copy of the authenticated record of proceedings on the accused and/or defense counsel;

(b) Explanation for any failure to serve the record of trial on the accused under R.M.C. 1104;

(c) Explanation for any substitute authentication under R.M.C. 1104;

(d) Any matters submitted by the accused to the convening authority for consideration prior to the convening authority's action on the findings and sentence of the military commission under 10 U.S.C. § 950b, or any written waiver of the right to submit such matter, *see also* R.M.C. 1105;

(e) Recommendations and other matters relative to clemency;

(f) The post-trial recommendation of the legal advisor and proof of service on defense counsel and/or the accused in accordance with R.M.C. 1106;

[1] This Court denied the Petitioner's request that we issue a fourth "writ of mandamus ordering the convening authority to extend the deadline for filing a petition for new trial by six months until August 3, 2013." USCMCR Order 13-001 of February 1, 2013.

[2] We have considered: (1) the Petition for Extraordinary Relief and Brief in Support of that Petition, and Petitioner's Appendix, received on January 4, 2013; (2) the Response on Behalf of Respondents and Appendix, received on January 17, 2013; and (3) Petitioner's Reply to Response on Behalf of Respondents and Appendix, received on January 22, 2013.

(g) Any comments submitted by defense counsel in response to the legal advisor's recommendation in accordance with R.M.C. 1106;

(h) A copy of the promulgating order and action signed by the convening authority and proof of service including the date, if any, on the accused and/or defense counsel;

(i) Any waiver or withdrawal of appellate review including any signed MC Form 2330, Feb 07 and proof that any such waiver document was filed with the convening authority/Office of Military Commissions and the date any such waiver/withdrawal was filed. *See* 10 U.S.C. § 950c(b); R.M.C. 1110; Regulation for Trial by Military Commission (Regulation) § 24-3 (2007) and Regulation § 24-2 (2011);

(j) Conditions of suspension, if any, and proof of service on probationer under R.M.C. 1108;

(k) Records of any proceedings in connection with vacation of suspension under R.M.C. 1109;

(l) Copies of any appellate rights statement(s) signed by the Petitioner and in the possession of the Government; and

(m) Unclassified summary of any classified items relevant to paragraphs 2(a) to 2(l), *supra*.

3. That the Government shall produce copies of any communications, or records thereof, between the Government, and the Petitioner or any member of the Petitioner's trial defense team or Appellate Defense Counsel regarding waiver or withdrawal of appellate review, not otherwise included in the authenticated Record of Trial, on or before February 19, 2013. Relevant documents include any communications or records relevant to the filing, or attempted filing of any such waiver/withdrawal with the convening authority/Office of Military Commissions. *See* 10 U.S.C. §§ 950c(b), R.M.C. 1110, Regulation § 24-3 (2007), and Regulation § 24-2 (2011).

4. That the Government shall produce any document or other record in the possession of the Government indicating excusal, change or withdrawal of Defense Counsel during the period August 10, 2010 through February 12, 2013. *See* R.M.C. 502, 503, 505, 506.

FOR THE COURT:

Mark Harvey
Clerk of Court, U.S. Court of Military Commission Review