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 MOTION TO LIFT STAY AND VACATE CONVICTION

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Appellant David M. Hicks, by and through his undersigned counsel, respectfully moves to lift the stay entered in this case on March 7, 2014, and summarily vacate his conviction. The parties have conferred and the government objects. The motion should be granted.

ARGUMENT

Mr. Hicks's material support conviction must be vacated based on the D.C. Circuit's *en banc* decision in *Bahlul v. United States*, which holds unanimously that it is plain error to try a defendant by military commission for that offense based on his pre-2006 conduct. There is no serious dispute that this Court has jurisdiction to decide the merits of Mr. Hicks's appeal and vacate his conviction notwithstanding his guilty plea. There is also no basis for further delay.

I. *Bahlul* Confirms Unanimously that Mr. Hicks Was Convicted of a Non-Offense, and His Conviction Must Be Vacated

On July 14, 2014, the D.C. Circuit issued its long-awaited *en banc* decision in *Bahlul v. United States*, No. 11-1324, 2014 U.S. App. LEXIS 13287 (D.C. Cir. July 14, 2014) ("*Bahlul*"), consisting of five separate opinions totaling 150 pages, which were entirely clear on one point: all seven judges agreed that providing material support for terrorism is not a war crime triable by military commission based on conduct occurring prior to 2006, even for a defendant who gave up that argument at trial. *Id.* at *68-77. In reaching this conclusion, the court overruled the statutory holding of *Hamdan v. United States*, 696 F.3d 1238, 1241 (D.C. Cir. 2012) ("*Hamdan II*"), which concluded in part that "consistent with Congress's stated intent and so as to avoid a serious Ex Post Facto Clause issue, we interpret the Military Commissions Act of 2006 not to authorize *retroactive* prosecution of crimes that were not prohibited as war crimes triable by military commission under U.S. law at the time the conduct occurred." The *Bahlul* court held that the 2006 Act authorized retroactive prosecution of crimes enumerated in the statute regardless of their pre-existing law of war status. *Bahlul* at *22. However, the court held

unanimously that material support is not an international war crime, or an offense historically triable by military commission under domestic precedent, and thus "was a plain *ex post facto* violation" as applied to conduct that occurred prior to enactment of the 2006 Act. *Id.* at *75. The court vacated Mr. Bahlul's material support conviction accordingly.

Bahlul is dispositive and requires vacatur of Mr. Hicks's conviction on a single charge and specification of providing material support for terrorism based on his alleged conduct occurring several years before enactment of the 2006 Act. The fact that *Bahlul* overruled *Hamdan II*, which Mr. Hicks cites in his prior submissions, is irrelevant. As summarized by Judge Kavanaugh in his opinion concurring in the judgment vacating Mr. Bahlul's material support conviction: "all seven judges reach the same bottom-line result that the Court reached in *Hamdan II* (here, by virtue of the Ex Post Facto Clause; there, by virtue of the 2006 Act as informed by the Ex Post Facto Clause): A military commission may not try the offense of material support for terrorism for conduct that occurred before enactment of the 2006 Act." *Bahlul* at *176. Whether based on lack of jurisdiction (*Hamdan II*) or plain error (*Bahlul*), it is beyond dispute that Mr. Hicks was convicted of an offense that was not actually a crime at the time of his alleged conduct. The substantive basis for his conviction no longer applies, and his conviction must be vacated accordingly. *See Rivers v. Roadway Express*, 511 U.S. 298, 312-13 (1994) ("A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction."); *id.* at 313 n.12 ("[W]hen this Court construes a statute, it is explaining its understanding of what the statute has meant continuously since the date when it became law.").

II. This Court Has Jurisdiction to Decide the Merits of Mr. Hicks's Appeal and Vacate His Conviction for Several Reasons

There is no serious dispute that this Court has jurisdiction to decide the merits of Mr. Hicks's direct appeal and vacate his conviction despite his guilty plea. As established in his opening appeal brief and his briefs responding to the Court's December 4, 2013 order regarding its authority to hear the merits of this appeal, the Court has jurisdiction in several respects.

First, it is undisputed that Mr. Hicks did not waive his right to appeal as required by statute. Any premature waiver was ineffective as a matter of law. The blanket waiver in his pretrial agreement was also unlawful because it was so broad and unqualified that it purports to bar appellate review under any circumstances.

Second, even if Mr. Hicks had waived his right to appeal the Court would have jurisdiction to void his plea agreement and set aside his guilty plea (including any waiver) because it was not knowing and voluntary. It is undisputed that Mr. Hicks was not properly advised about the nature of the material support charge or that (as he had argued under *Hamdan II* and *Bahlul* now confirms) he was pleading guilty to something that was not a crime. *See*, *e.g.*, *Bousley v. United States*, 523 U.S. 614 (1998) (granting relief eight years after guilty plea based on subsequent judicial decision); *United States v. Fisher*, 711 F.3d 460, 462 (4th Cir. 2013) ("It is axiomatic that, to be constitutionally valid, a plea of guilty must be knowingly and voluntarily made. And a guilty plea is not knowingly and voluntarily made when the defendant has been misinformed as to a crucial aspect of his case.") (citation and internal quotation marks omitted). His guilty plea was also the product of torture and other unlawful coercion. *See*, *e.g.*, *United States v. Pollard*, 959 F.2d 1011, 1021 (D.C. Cir. 1992). These challenges to Mr. Hicks's conviction are non-waivable.

In addition, although *Bahlul* arguably forecloses Mr. Hicks's argument that the military commission lacked jurisdiction to accept his guilty plea (based on *Hamdan II*'s conclusion that the 2006 Act does not apply retroactively), which is also non-waivable,[1] the fact remains that under *Bahlul* he could not be tried and convicted before a military commission of providing material support for terrorism under any circumstances. The prosecution was barred *ab initio*.

Even if the 2006 Act retroactively established military commission jurisdiction over material support, under *Bahlul* Mr. Hicks could not be haled into court upon that charge because it was not an offense triable by military commission at the time of his alleged conduct. The practical result dictated by the Ex Post Facto Clause in this case is that the prosecution simply could not permissibly require Mr. Hicks to answer to the material support charge, and consequently his guilty plea does not foreclose him from attacking his conviction now. *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."); *Menna v. New York*, 423 U.S. 61, 62 n.2 (1975) (per curiam) ("We simply hold that a plea of guilty to a charge does not waive a claim that – judged on its face – the charge is one which the State may not constitutionally prosecute."); *cf. United States v. Broce*, 488 U.S. 563, 575 (1989) (distinguishing cases where defendants who pled guilty to indictments cannot prove their claim by relying on the face of those indictments and the existing record, from those where "the concessions implicit in the defendant's guilty plea were simply

[1] R.M.C. 905 and 907 notably provide that dismissal of a charge or specification for lack of jurisdiction is non-waviable. The rules also provide that dismissal for failure to state an offense is non-waivable, even if subject to forfeiture and plain error review. *Cf. Bahlul* at *19 n.6.

irrelevant, because the constitutional infirmity in the proceedings lay in the State's power to bring any indictment at all").[2]

Mr. Hicks's right not to be tried at all for a non-offense like material support is further reinforced by the fact that the Ex Post Facto Clause is rooted in the separation of powers and provides a structural limitation on the power of the U.S. government to proscribe certain conduct and apply penal law that did not exist at the time of the alleged conduct. *See Weaver v. Graham*, 450 U.S. 24, 29 n.10 (1981) ("The *ex post facto* prohibition [ ] upholds the separation of powers by confining the legislature to penal decisions with prospective effect and the judiciary and executive to applications of existing penal law."); *Downes v. Bidwell*, 182 U.S. 244, 277 (1901) (opinion of Brown, J.) (Ex Post Facto Clause is a structural limitation on power of government to act at all); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 138 (1810) ("[L]egislatures can pass no ex post facto law."). Indeed, by forcing a defendant like Mr. Hicks to proceed to trial on a non-offense, even if later declared invalid, would undermine the obvious purpose of the Ex Post Facto Clause, *i.e.*, to ensure that individuals who had no fair warning or opportunity to conform their conduct to the law will not be forced to endure the personal strain and public embarrassment of a criminal trial, and will not be subject to arbitrary and potentially vindictive prosecutions or other retribution in response to political or diplomatic pressures, for conduct that was not unlawful at the time it occurred. *See Weaver*, 450 U.S. at 28-29 (Ex Post Facto Clause is designed both "to assure that legislative Acts give fair warning of their effect" and to "restrain[] arbitrary and potentially vindictive legislation"); *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266

[2] Like claims of involuntariness or lack of jurisdiction, the *Blackledge/Menna* rule is a well-established exception to the general principle articulated in *Tollett v. Henderson*, 411 U.S. 258, 267 (1973), that "a guilty plea represents a break in the chain of events which has preceded it in the criminal process" and limits a defendant's ability to "raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea."

(1994) (Ex Post Facto Clause addresses the risk that, in response to political pressures, the legislature "may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals"); *see also Bahlul* at *137 (Rogers, J., concurring in the judgment vacating material support conviction) ("The retroactive expansion of the jurisdiction of Article I law-of-war military commissions to include offenses that 'have [not] traditionally been triable by military commissions,' [ ] contravenes the structural limitations embodied in the *Ex Post Facto* Clause.").

No matter how the issues in this case are framed, Mr. Hicks is entitled to relief as a matter of law because he is actually innocent of the material support charge in the sense that he could not be convicted of an offense that was beyond the power of the government to proscribe at the time of his alleged conduct. To uphold his conviction would violate due process and result in a miscarriage of justice, particularly given the extraordinary circumstances – indeed, horror – of his prior detention and prosecution at Guantánamo. *See Fiori v. White*, 531 U.S. 225, 228-29 (2001) (holding in context of subsequent judicial decision that it violates due process to convict a defendant for conduct that a "criminal statute, as properly interpreted, does not prohibit"); *Davis v. United States*, 417 U.S. 333, 346-47 (1974) (holding in context of subsequent judicial decision that where a defendant is convicted "for an act that the law does not make criminal[ ] [t]here can be no room for doubt that such a circumstance 'inherently results in a complete miscarriage of justice' and 'present[s] exceptional circumstances' that justify" relief); *cf. United States v. Olano*, 507 U.S. 725, 732 (1993) (explaining that "rules of fundamental justice" preclude a "rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged").

III. Given *Bahlul*'s Dispositive Holding, There Is No Basis to Continue the Stay

Mr. Hicks's "guilt" is illusory because it is clear that the government simply had no constitutional authority to prosecute him. Because the *en banc* court in *Bahlul* has held unanimously that material support is not an offense triable by military commission based on conduct occurring prior to 2006, vacating Mr. Hicks conviction "does not present the United States with the arduous task of attempting, years after the trial would originally have taken place, to piece together a case for the prosecution." *United States v. Sams*, 521 F.2d 421, 426 (3d Cir. 1975) (expunging conviction twelve years after guilty plea in context of subsequent judicial decisions that undermine integrity of conviction and establish that conduct in question was not constitutionally punishable). There is no "legitimate societal goal" in continuing to punish him for a non-offense. *Id.* "[I]n substance, his guilty plea achieved nothing" because he could not be prosecuted at all for material support. *United States v. Bluso*, 519 F.2d 473, 474-75 (4th Cir. 1975) (expunging conviction eleven years after guilty plea).

This Court should lift the stay and vacate his conviction accordingly because there is no point in further delaying this inevitable result. Material support issues will not be addressed on remand in *Bahlul*, except to determine any effect of vacatur on sentencing, *see Bahlul* at *81, and there are no conflicting decisions or other compelling reasons for the Supreme Court to grant further review in *Bahlul*, at least with respect to material support, if such review is sought in that case. *See* Sup. Ct. R. 10 (addressing considerations governing review on certiorari). There is nothing further for this Court to do but grant the requested relief.

CONCLUSION

This motion should be granted and Mr. Hicks's conviction should be vacated.

Dated: August 20, 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 Marc A. Wallenstein, at the Office of the Chief Prosecutor, on the 20th day of August 2014.

//s// J. Wells Dixon
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