IN THE UNITED STATES COURT OF MILITARY COMMISSION REVIEW
[Panel Not Yet Assigned]

DAVID M. HICKS,	)	BRIEF ON BEHALF OF APPELLANT
	)	
Appellant,	)	CMCR Case No. _____
	)	
v.	)	Tried at Guantánamo Bay, Cuba,
	)	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

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David M. Hicks, by and through his undersigned counsel, appeals from his conviction before a military commission at Guantánamo Bay for providing material support for terrorism.

ISSUES PRESENTED

(1) WHETHER THE MILITARY COMMISSION MAY CONVICT AND SENTENCE MR. HICKS FOR CONDUCT THAT IS NOT A CRIME;

(2) WHETHER MR. HICKS'S CONVICTION FOR PROVIDING MATERIAL SUPPORT FOR TERRORISM MUST BE SET ASIDE BASED ON THE SUBSEQUENT DECISION OF THE D.C. CIRCUIT THAT MATERIAL SUPPORT FOR TERRORISM IS NOT A WAR CRIME. *SEE HAMDAN V. UNITED STATES*, 696 F.3D 1238 (D.C. CIR. 2012) ("*HAMDAN II*");

(3) WHETHER A SUMMARY ORDER VACATING MR. HICKS'S CONVICTION IS APPROPRIATE TO ENFORCE COMPLIANCE WITH *HAMDAN II*;

(4) WHETHER MR. HICKS'S CONVICTION MUST BE SET ASIDE BECAUSE HIS GUILTY PLEA WAS UNKNOWING, UNINTELLIGENT, AND INVOLUNTARY.

STATEMENT OF STATUTORY JURISDICTION

The Court has jurisdiction to review all final judgments rendered by a military commission. 10 U.S.C. §§ 950c(a), 950f(c). This appeal raises only questions of law, which the Court reviews *de novo*. *Defenders of Wildlife v. Gutierrez*, 532 F.3d 913, 919 (D.C. Cir. 2008); *United States v. Khadr*, 717 F. Supp. 2d 1215, 1220 (C.M.C.R. 2007) ("Regarding all matters of law, we review the military judge's findings and conclusions *de novo*.") (citations omitted).

STATEMENT OF THE CASE

In March 2007, in a desperate attempt to secure his release from Guantánamo Bay after more than five years of detention, Mr. Hicks pled guilty to an offense that was not within the jurisdiction of the tribunal that accepted the plea: providing material support for terrorism. The Convening Authority acted on Mr. Hicks's plea on May 1, 2007, suspending all but nine months

of his seven-year sentence. Roughly two months later, the United States transferred Mr. Hicks to Australia, where he was imprisoned until December 29, 2007. As of this writing, he remains under the suspended portion of his sentence.

In October 2012, the D.C. Circuit held in *Hamdan II* that providing material support for terrorism is not, and was not at the time of Mr. Hicks's alleged offense, a war crime. The Court vacated the conviction of former Guantánamo detainee Salim Hamdan for material support on the grounds that the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (Oct. 17, 2006) ("MCA"), did not authorize military commissions to punish people retroactively for conduct that was not a war crime at the time of the offense. 696 F.3d at 1241, 1253. Because the conduct and conviction in this case are indistinguishable from that in *Hamdan II*, Mr. Hicks's conviction must be vacated.[1]

STATEMENT OF FACTS

A complete recitation of the facts underlying Mr. Hicks's conviction is unnecessary for the Court to adjudicate the issues in this appeal.[2] The following allegations, drawn from the publicly-available record, place the case in context.

[1] The government has all but conceded this point. *See* Pet'n 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) ("[T]he reasoning of Hamdan II eliminates military commission jurisdiction over conspiracy or material support charges brought in all of the military commission cases to date that have resulted in convictions."); *Al Bahlul v. United States*, No. 11-1324, 2013 U.S. App. LEXIS 1820 (D.C. Cir. Jan. 25, 2013), *en banc rev. granted and panel order vacated, Al Bahlul v. United States*, No. 11-1324, 2013 U.S. App. LEXIS 8210 (D.C. Cir. Apr. 23, 2013).

[2] Mr. Hicks disputes the relevance and veracity of many assertions attributed to him, and reserves the right to contest their voluntariness. All references are to pertinent portions of the publicly-available record and other supporting documents, found at the indicated page numbers in the Appendix (referenced herein as "A___") and the concurrently-filed Motion to Attach.

Mr. Hicks was born and raised in Australia. A1. According to the government, in mid-2000, he attended a paramilitary training camp in Pakistan operated by a group that had not been designated as a foreign terrorist organization by the United States. A1. The government also alleges that he attended paramilitary training camps in 2001 that were operated by al Qaeda. A3-4. But Mr. Hicks never saw any evidence of terrorism-related activity at the training camps he attended, and it has never been proven that they were affiliated with al-Qaeda. Aff. David Matthew Hicks ¶ 99 (Jan. 23, 2012), *Director of Public Prosecutions v. David Matthew Hicks* (2011) N.S.W.S. Ct. Case 233139 (Austl.)) [hereinafter Hicks Affidavit or Hicks Aff.].[3] The government acknowledges that he had no advanced knowledge of the September 11 attacks. A4.

In October 2001, Mr. Hicks allegedly joined a group of al Qaeda and Taliban fighters near the Kandahar Airport in anticipation of a ground assault by the Northern Alliance or other Coalition forces. A5. Although he was given a rifle, no assault took place and Mr. Hicks did not fire the weapon at anyone. A5. Two weeks later, he was allegedly reassigned to guard duty at a location outside the airport. A5. He abandoned his post after two weeks and left to meet up with a friend in Kabul. A5. In early November, he and his friend traveled to Mazar-e-Sharif, but were forced to flee after two hours when Taliban forces were overrun by the Northern Alliance and U.S. forces. A5. At no time did Mr. Hicks engage in hostilities against U.S. or Coalition forces.

After making his way back to Konduz on foot, Mr. Hicks attempted to return to Australia. He sold his rifle to pay for cab fare to Pakistan. In December 2001, he was captured, unarmed, by the Northern Alliance while attempting to leave Afghanistan. A6. Shortly thereafter, he was

[3] The Hicks Affidavit is included in the Motion to Attach filed concurrently herewith.

turned over to the United States and, in January 2002, was among the first group of detainees sent to the U.S. Naval Station at Guantánamo Bay, Cuba.

Based on these allegations, in June 2004, Mr. Hicks was charged in the first iteration of post-9/11 military commissions authorized by the President's Military Order of November 13, 2001,[4] with three purported violations of the law of war: conspiracy, attempted murder by an unprivileged belligerent, and aiding the enemy. A7-11. Those charges were dismissed after the Supreme Court's decision in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), which held that the military commission procedures established by the President's order violated the Uniform Code of Military Justice and Common Article 3 of the Geneva Conventions. *Id*. at 613-35.

In February 2007, the government swore new charges against Mr. Hicks based on the same underlying allegations, pursuant to the newly-minted MCA, including providing material support for terrorism and attempted murder in violation of the law of war. A12-13. However, the Legal Advisor to the Convening Authority concluded there was insufficient evidence to support the attempted murder charge and that it should not be referred for trial. A14-15. Indeed, there was no evidence that Mr. Hicks had attempted to engage in any act of violence. The Convening Authority concurred, and on March 1, 2007, referred for trial only the single charge of providing material support for terrorism. A18.

In this charge, the government alleged that Mr. Hicks had provided material support to a terrorist organization (al Qaeda), and that he had provided material support to be used in carrying out an unspecified act of terrorism. A25. On March 26, Mr. Hicks agreed to plead guilty to the first of these allegations. A26. Four days later, the military commission judge accepted his plea.

[4] Military Order of November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 16, 2001).

A129, A203-05.[5] The commission members then sentenced Mr. Hicks to seven years of imprisonment. A291-95, A298. The commission then adjourned.

On May 1, 2007, the Convening Authority approved the sentence. Pursuant to the pretrial agreement, the portion of the sentence in excess of nine months was suspended, subject to various conditions. A300. The Convening Authority's action was served on Mr. Hicks the following day. A302. Mr. Hicks did not, however, file a valid waiver of his appellate rights, nor is such a waiver in the record.[6] On May 19, 2007, Mr. Hicks was transferred to the custody of

[5] The deal was reportedly orchestrated by Vice President Richard B. Cheney as a political favor to Australian Prime Minister John Howard, who was in the midst of a hotly-contested reelection campaign in which Mr. Hicks's continued detention had become controversial. A33-34. In addition, Mr. Hicks did not concede that he was criminally responsible for a war crime. He merely affirmed that there was sufficient evidence from which "the government could prove its case against [him]." A142-43. The military judge followed the same procedure with respect to the underlying factual allegations. A143-65. Mr. Hicks understood that the offer extended by the Convening Authority "involved pleading guilty but without admitting that [he] was in fact guilty." Hicks's Aff. ¶ 270; *see also* Aff. Joshua Lewis Dratel ¶ 110 (Jan. 27, 2012), *Director of Public Prosecutions v. David Matthew Hicks* (2011) N.S.W.S. Ct. Case 233139 (Austl.) [hereinafter Dratel Affidavit or Dratel Aff.]. The Dratel Affidavit is included in the Motion to Attach filed concurrently herewith.

[6] Although Mr. Hicks signed a waiver form at the time of his sentencing, it was never filed after the Convening Authority's action and is therefore irrelevant as a matter of law. 10 U.S.C. § 950c(b)(3) (waiver "must be filed, if at all, within 10 days after notice of the [convening authority's] action is served on the accused or on defense counsel"); *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 signed before convening authority's action is valid only where subsequently ratified and filed in conformity with statute, *i.e.*, where "the record demonstrates a serious, rational, and informed discussion between the accused and defense counsel after the convening authority's action, but before the filing of the waiver").

Australian law enforcement authorities, who released him roughly seven months later. A311; A312-14. Mr. Hicks remains under the suspended portion of his seven-year sentence.[7]

On September 12, 2012, the Chief Defense Counsel detailed the undersigned appellate defense counsel to the case. A316. On September 25, counsel tried to obtain a copy of the unredacted record of trial from the Chief of the Office of Court Administration "in order to give Mr. Hicks fully informed and effective advice about his appellate rights." A317-20. The Legal Advisor to the Convening Authority did not approve the request. On October 1, 2012, detailed appellate counsel submitted a request to travel to Australia for the same purpose. The trip was approved by the Chief Defense Counsel but denied by the Convening Authority. A321-27.

On November 9, 2012, detailed appellate counsel renewed his requests for access to the unredacted record of trial and the disbursement of travel funds. A328-29. On December 6, 2012, the Legal Advisor again denied counsel's requests. A330. On April 25, 2013, counsel renewed his request for the Convening Authority to forward Mr. Hicks's case to this Court for direct appellate review. A331. The Convening Authority again refused to act. A332.[8]

In the meantime, shortly after the *Hamdan II* decision, Mr. Hicks retained undersigned civilian defense counsel to represent him in this matter. On August 7, 2013, the Chief Defense Counsel detailed the undersigned military defense counsel to the case. A333.

This appeal followed, based on direct authorization by Mr. Hicks.

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[7] When Mr. Hicks was transferred to Australia, his military lawyer was reassigned to a new command, thereby severing the attorney-client relationship. A315. Mr. Hicks was then without legal representation in the United States.

[8] The Convening Authority's persistent refusal to forward the record only delays the appeal and burdens the Court. *United States v. Oestmann*, 61 M.J. 103, 104 (C.A.A.F. 2005) (convening authority's preparation and forwarding of the record of trial to the appropriate appellate review authority is a "routine, nondiscretionary, ministerial task"). The Court must now order the Convening Authority to forward the record.

ERRORS AND ARGUMENT

Pursuant to the D.C. Circuit's decision in *Hamdan II*, the military commission lacked jurisdiction to try, convict, or sentence Mr. Hicks for his alleged conduct. Given the dispositive, controlling nature of that holding, the Court should issue a summary order vacating Mr. Hicks's conviction; his conviction is invalid as a matter of law and further proceedings are unnecessary. In addition, Mr. Hicks's conviction should be vacated because his guilty plea was involuntary in at least two respects. He did not understand the true nature of the material support offense, and his guilty plea was the result of his indefinite detention, torture, and abuse at Guantánamo.

I. MR. HICKS'S CONVICTION MUST BE SET ASIDE BECAUSE THE MILITARY COMMISSION HAD NO JURISDICTION

The decision by the D.C. Circuit in *Hamdan II* is the beginning and end of this appeal. Under *Hamdan II*, the tribunal which heard Mr. Hicks's plea had no jurisdiction to accept it. The commission simply lacked authority to proceed and the plea must be set aside. 696 F.3d 1238, 1246-47 (D.C. Cir. 2012).

It is of course irrelevant that Mr. Hicks pled guilty. "[L]ack of jurisdiction of a federal court touching the subject-matter of the litigation cannot be waived by the parties." *United States v. Corrick*, 298 U.S. 435, 440 (1936); *Gonzalez v. Thaler*, 132 S. Ct. 641, 648 (2012); *United States v. Cotton*, 535 U.S. 625, 630 (2002); *United States v. Daly*, 69 M.J. 485, 486 (C.A.A.F. 2011); *United States v. Alexander*, 61 M.J. 266, 269 (C.A.A.F. 2005). Even where the accused has pled guilty, the Court always retains the power to void the plea agreement for lack of jurisdiction. *See United States v. Hahn*, 359 F.3d 1315, 1323 (10th Cir. 2004) (en banc); *see also United States v. Kilcrease*, 665 F.3d 924, 927 (7th Cir. 2012) (appeal waiver not valid if underlying plea agreement is unenforceable); *United States v. Sakellarion*, 649 F.3d 634, 639 (7th Cir. 2011); *United States v. Castillo*, 496 F.3d 947, 956-57 (9th Cir. 2007) (citing cases).

As the Supreme Court has explained, "[w]here the State is precluded by the United States Constitution from haling a defendant into court on a charge, federal law requires that a conviction on that charge be set aside even if the conviction was entered pursuant to a counseled plea of guilty." *Menna v. New York*, 423 U.S. 61, 62 (1975); *see also United States v. Peter*, 310 F.3d 709, 715 (11th Cir. 2002) (court lacks "jurisdiction to accept a plea to conduct that does not constitute [a crime]"); *United States v. Calderon*, 243 F.3d 587, 590 (2d Cir. 2001) ("jurisdictional errors are not waived [by a plea agreement], because they affect the basic authority of the court to hear and decide a case"); *United States v. Meacham*, 626 F.2d 503, 510 (5th Cir. 1980) (court is without jurisdiction to accept a guilty plea to non-offense). In this situation, Mr. Hicks's conviction cannot be "correct in law" and must be set aside by the Court. 10 U.S.C. § 950f(d); *cf. United States v. Spinner*, 152 F.3d 950, 956 (D.C. Cir. 1998) (conviction must be reversed where "record is devoid of evidence pointing to guilt" on element of crime) (citation and internal quotation marks omitted).

II. BECAUSE MR. HICKS'S CLAIM TO RELIEF IS CLEAR BEYOND CAVIL, THE COURT SHOULD ACT SUMMARILY, WITHOUT FURTHER BRIEFING OR ARGUMENT

Summary disposition is appropriate when it is obvious that a party is entitled to relief. *E.g.*, *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297-98 (D.C. Cir. 1987) (per curiam). Here, because *Hamdan II* is conclusive and binding, and because the government has conceded that *Hamdan II* reaches the material support charges "in all of the military commission cases to date that have resulted in convictions," Mr. Hicks is plainly entitled to relief. *See supra* note 1.

The D.C. Circuit's recent grant of *en banc* review in *Al Bahlul v. United States*, No. 11-1324, 2013 U.S. App. LEXIS 8120 (D.C. Cir. Apr. 23, 2013), does not change this analysis. This Court may not disregard *Hamdan II* merely because some other court may later change the

legal landscape. *Hamdan II* is final, the mandate has issued, and the time period to petition for a writ of certiorari has expired. The Court must therefore vacate Mr. Hicks's conviction, and the government may seek further review as it deems appropriate. *See Maxwell v. Snow*, 409 F.3d 354, 358 (D.C. Cir. 2005) ("[T]his Court is bound to follow circuit precedent until it is overruled either by an *en banc* court or the Supreme Court."); *Ayuda v. Thornburgh*, 919 F.2d 153, 154 (D.C. Cir. 1990) (Henderson, J., concurring).

III. MR. HICKS'S CONVICTION SHOULD BE SET ASIDE BECAUSE HIS GUILTY PLEA WAS NOT INTELLIGENTLY AND VOLUNTARILY GIVEN

The intervening decision in *Hamdan II* compels the conclusion that the lower court acted beyond its jurisdiction. But *Hamdan II* requires relief for another reason as well. In the court below, Mr. Hicks was erroneously advised by both the court and counsel that material support for terrorism was a war crime. Neither the lower court nor his counsel, in other words, advised him that he was pleading guilty to conduct that was not an offense. The law is abundantly clear that any plea which proceeds from such a condition of ignorance is not voluntarily or intelligently given, and is therefore invalid. *See, e.g.*, *Bousley v. United States*, 523 U.S. 614 (1998); *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).

In *Bousley*, the defendant had pled guilty to "using" a firearm unlawfully, within the meaning of a federal statute. Subsequently, the Court held in *Bailey v. United States* that "use" under the statute required "active employment of the firearm." 516 U.S. 137, 144 (1995). Bousley then sought relief under the federal habeas statute, arguing that he had not made a knowing and intelligent guilty plea since neither the district court nor his counsel had properly

advised him of the true nature of the offense for which he had been charged. The Court agreed that these allegations, if proven, entitled Bousley to relief. *Bousley*, 523 U.S. at 618-19.

Here, of course, the claim for relief is even more compelling. In *Bailey*, the Court did not strike down the underlying federal statute. Instead, it merely interpreted the law to exclude certain conduct from its reach. *Bailey*, 516 U.S. at 150. Here, by contrast, the D.C. Circuit has concluded that material support for terrorism is not a crime for which a defendant can be convicted in the military commission system. Mr. Hicks's claim, therefore, is even more compelling than that of the defendant in *Bousley*.[9]

Finally, Mr. Hicks is entitled to relief because his guilty plea was the unlawful product of the coercive conditions at Guantánamo Bay. A guilty plea induced by the unholy trinity of violence, threats, and improper promises cannot be allowed to stand. *See, e.g., United States v. Pollard*, 959 F.2d 1011, 1021 (D.C. Cir. 1992). Conduct of this sort is not merely reprehensible and contemptible. As the D.C. Circuit has long understood, it also "creates improper pressure that would be likely to overbear the will of some innocent persons and cause them to plead guilty." *Id*.

If any case satisfies this standard, it is this one. Over the course of more than five years, Mr. Hicks was repeatedly beaten, sexually assaulted, threatened with deadly violence, injected with unknown substances, and subjected to an entire arsenal of psychological gambits, ploys and subterfuges that had as their aim the destruction of his personality. He was stripped naked, deprived of sleep for extended periods, cast into solitary confinement, contorted into shapes that no human body should be forced to assume, and told that he would never again set foot on his

[9] As with subject-matter jurisdiction, the voluntariness of a plea agreement cannot be waived. *McCarthy v. United States*, 394 U.S. 459, 466 (1969) (involuntary guilty plea is void); *Machibroda v. United States*, 368 U.S. 487, 493 (1962) ("A guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void.").

native soil. Hicks Aff. Unless the word has simply lost its meaning in this new day, the abuse he endured constitutes torture. *See, e.g.*, *Vance v. Rumsfeld*, 694 F. Supp. 2d 957, 967, 970-71 (N.D. Ill. 2010) (threats of violence and actual violence, sleep deprivation, extremes of temperature and sound, light manipulation, threats of indefinite detention, yelling, prolonged solitary confinement, and incommunicado detention constitute torture), *rev'd on other grounds*, 701 F.3d 193 (7th Cir. 2012) (en banc); *Mohammed v. Obama*, 704 F. Supp. 2d 1, 26-27 (D.D.C. 2009) (petitioner, who was regularly beaten, held in stress positions for days at a time, kept in darkness, subjected to loud noises, and forced to inculpate himself during interrogations, was physically and psychologically tortured).

To no one's surprise, Mr. Hicks declined under these conditions, becoming despondent and suicidal. Dratel Aff. ¶¶ 30-32; Hicks Aff. ¶¶ 101, 136, 148, 152, 218, 221-23, 235, 260-65. In this condition, when the government dangled the prospect of freedom before him, he was finally willing to drink from the poisoned chalice, especially since he did not have to admit to having committed a crime. "I was broken and defeated," he later recalled, "and could not go on. I was left with life in Guantánamo, death or plead guilty. Pleading guilty became my only feasible option. No other option existed by this point, nor did my strength to continue fighting." Hicks Aff. ¶ 245; *see also id.* ¶ 271 ("I felt I had two choices: take the plea deal . . . or return to my cell, resign myself to hopelessness and follow through with my suicide plan.").

Under these conditions, his decision to plead guilty was plainly involuntary. *See*, *e.g.*, *Brady v. United States*, 397 U.S. 742, 750 (1970) ("State may not produce a plea by actual or threatened physical harm or by mental coercion overbearing the will of the defendant."); *see also, e.g.*, *Ridge v. Turner*, 444 F.2d 3, 4 (10th Cir. 1971) (defendant's plea was coerced where he changed his plea to guilty "in order to be removed from the 'hole' and avoid further beatings"

by the police); *Ligan v. Rundle*, 261 F. Supp. 275, 276-78 (E.D. Pa. 1966) (defendant's plea was coerced where shots had been fired in his direction when he refused to confess, he had been prevented from sleeping, and he had been kicked and beaten prior to confessing). Because his guilty plea was involuntary, Mr. Hicks's conviction must be set aside.

CONCLUSION

For all of the foregoing reasons, the Court should issue a summary order vacating Mr. Hicks's conviction.

Dated: November 5, 2013
New York, New York

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 14(I)

I hereby certify on November 5, 2013, that:

1. This brief complies with the type-volume limitation of Rule 14(i) because it contains 3,857 words; and

2. This brief complies with the typeface and style requirements of Rule 14(e) and (i) because it has been prepared in monospaced typeface using Microsoft Word Version 2003, with 12-point font and Times New Roman style.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was sent via e-mail to BG Mark S. Martins, USA, and CAPT Edward S. White, JAGC, USN, at the Office of the Chief Prosecutor, on the 5th day of November 2013.

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