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 OPENING BRIEF IN 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 memorandum in response to the Court's December 4, 2013 order concerning its authority to hear this case. The Court has jurisdiction to decide the merits of this appeal and should enter a summary order vacating Mr. Hicks's material support conviction pursuant to binding precedent.

PRELIMINARY STATEMENT

As set forth in Mr. Hicks's prior submissions, this is not a complicated appeal. He pled guilty before a military commission to a single charge of providing material support for terrorism and his sentence has not expired. Although he entered into a pretrial agreement that included a blanket, one-sentence appeal waiver, and signed a perfunctory waiver form at the time of his sentencing, it is indisputable that he did not waive his appellate rights "within 10 days after" the Convening Authority's action on his sentence – a statutory requirement necessary to divest this Court of appellate jurisdiction under the Military Commissions Act ("MCA"), 10 U.S.C. § 950c(b)(3). The expiration of the 10-day period following the Convening Authority's action triggered this Court's automatic, mandatory review of his conviction. 10 U.S.C. §§ 950c(a), 950f(c). This Court plainly has jurisdiction over this case on that basis.

It also bears emphasis that although the Convening Authority noted in its final action that Mr. Hicks would waive his appeal rights in the future, it did not seek to enforce the waiver at any time after acting on his sentence, nor did it seek to invalidate the pretrial agreement based on his failure to file the necessary waiver after taking action. The Convening Authority did not insist on compliance with the waiver, as was within its sole discretion, and Mr. Hicks was transferred to Australia. The Convening Authority nonetheless failed to refer the case to this Court for appellate review. Its continuing refusal to carry out this ministerial, non-discretionary act is

burdensome to the Court and the parties, but does not divest the Court of its statutory jurisdiction, including its exclusive authority to determine the validity of appeal waivers.

Even if this Court were to conclude that Mr. Hicks had validly waived his appeal rights, it would still have jurisdiction to decide the merits of this appeal because the military commission that heard his guilty plea (including the purported waiver) lacked subject-matter jurisdiction to accept it, which is an issue that cannot be waived by the parties. Mr. Hicks likewise contends that his plea was not knowing and voluntary, and therefore void, which cannot be waived.

Accordingly, because this Court's jurisdiction is indisputable, there is nothing left to do but vacate Mr. Hicks's conviction.

FACTUAL BACKGROUND

As set forth in his opening appeal brief, Mr. Hicks entered into a pretrial agreement dated March 26, 2007. A26-32.[1] It contained an appeal waiver provision that stated in full:

> In exchange for the undertakings made by the United States in entering this Pretrial Agreement, I voluntarily and expressly waive all rights to appeal or collaterally attack my 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, ¶ 4. This provision was so broad and unqualified as to purport to preclude appellate review in any event, including a violation of the MCA or the U.S. Constitution. A189-90.

Mr. Hicks pled guilty pursuant to the pretrial agreement on March 30, 2007. A129. During the providency inquiry, the military judge and the parties agreed that the appeal waiver provision in the pretrial agreement was "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

[1] "A___" refers to Appendix to Appellant's Brief, filed November 5, 2013.

after the time sentence is announced in this case." A189-90; *see also* AE30, at 6 (commission judge's mark-up of pretrial agreement).[2]

The judge accepted Mr. Hicks's guilty plea and his sentencing proceedings then commenced. A203-05. The commission members sentenced Mr. Hicks to seven years of imprisonment, the maximum allowed under the pretrial agreement. A291-95, A298.

On the same day, Mr. Hicks and his counsel executed a document entitled "Waiver of Appellate Review." AE33. The form was signed by Mr. Hicks and his counsel, and stated that he "waive[d] appellate review"; that he had discussed the waiver with his counsel and understood it; and that it was voluntary. *Id.* But it plainly did not comply with the requirements of Regulation for Trial by Military Commission figure 24.1 (MC Form 2330). At the conclusion of the sentencing hearing, Mr. Hicks's counsel submitted the document to the judge, who made it part of the record of trial. A296-97. The judge and the prosecution agreed that the document "satisf[ied] the accused's requirements with regard to the R.M.C. 1110 provision." A297. The commission then adjourned.

On April 25, 2007, Mr. Hicks was served with the record of trial and the recommendation of the Legal Advisor to the Convening Authority. A303. The only reference to an appeal waiver in the Legal Advisor's recommendation was a brief notation about the pretrial agreement that stated in full: "Appellate Review: accused waived (Appellate Exhibit 33)." A305.

On May 1, 2007, the Convening Authority approved the adjudged sentence. A300. Pursuant to the pretrial agreement, the portion of the sentence in excess of nine months was suspended from the date the findings were announced, March 30, 2007, subject to various conditions that could result in revocation of the suspension if violated including a provision

[2] "AE" documents are available at http://www.mc.mil/CASES/ MilitaryCommissions.aspx.

stating that Mr. Hicks "will waive all rights to appeal or collaterally attack his conviction, sentence or any other matter relating to his prosecution." A301. The Convening Authority's action was served on Mr. Hicks on May 2, 2007. A302.

Neither Mr. Hicks nor his detailed defense counsel, Major Mori, filed any further documents (or, to our knowledge, had any further communication) with the Convening Authority concerning a waiver of appellate rights. Mr. Hicks was transferred to Australia on May 19, 2007, more than 10 days after being served with the Convening Authority's action. A311.

The Convening Authority thereafter did not comply with the requirement for automatic referral of the case for mandatory appellate review. Instead, upon inquiry by detailed appellate counsel for Mr. Hicks, the Legal Advisor to the Convening Authority stated that Mr. Hicks had waived his appeal rights and "[a]s a result, there is no appeal in the *Hicks* case." A323, A326. In response to counsel's explanation that Mr. Hicks did not waive his appellate rights as required by 10 U.S.C. § 950c(b)(3), and that disputes about the validity of appeal waivers should be decided by this Court pursuant to Regulation for Trial by Military Commission ¶ 24-2.b.5, the Convening Authority stated: "The issue as to the validity of an appellate waiver, which was executed before the Convening Authority took action on a case, and was not filed with the Convening Authority after such action, is currently pending before the USCMCR in *U.S. v. Al Qosi*. Accordingly, I will not take action on your request until the USCMCR rules upon this issue." A332.[3]

ARGUMEMT

The law is well-settled that a military accused cannot and does not waive his appeal rights unless done in strict conformity with statutory requirements after the convening authority's

[3] *Al Qosi* involves a petition for extraordinary relief in the nature of mandamus and prohibition, which concerns expenditure requests for appellate defense counsel, extension of a deadline for filing a new trial petition, and, if necessary to the resolution of those issues, a writ to compel the Convening Authority to forward the trial record to this Court – none of which is at issue here.

action. In this case, the Convening Authority did not insist on compliance with the statutory requirements, for reasons known only to the Convening Authority, and thus there was no waiver by Mr. Hicks.

In addition, as noted above, this Court has jurisdiction to hear this case pursuant to 10 U.S.C. §§ 950c(a) and 950f(c) regardless of whether Mr. Hicks filed a valid waiver of his appellate rights. Mr. Hicks relies on the arguments and authorities in his opening appeal brief, which he incorporates herein by reference, concerning the non-waivablilty of his jurisdictional and voluntariness arguments. *See* Brief on Behalf of Appellant at 7-12, *Hicks v. United States*, CMCR Case No. 13-004 (filed Nov. 5, 2013) (citing cases); *see also* R.M.C. 201, Discussion ("The judgment of a military commission without jurisdiction is void and is entitled to no legal effect."); R.M.C. 907(b)(1)(A) (lack of military commission jurisdiction to try accused for offense is non-waivable at any stage of proceedings); *United States v. Pieper*, 2012 CCA LEXIS 169, at *13 n.17 (N-M. Ct. Crim. App. 2012) (Payton-O'Brien, Maksym, Ward, JJ.) ("Lack of jurisdiction may not be waived."). However, Mr. Hicks reserves the right to address those arguments further in his responsive brief, if necessary.

In addition, this Court indisputably has jurisdiction to determine the validity of Mr. Hicks's appeal waiver to the extent it concludes that resolution of that issue is relevant to its jurisdiction over this case. R.T.M.C. ¶ 24-2.b.5 ("The USCMCR should decide the legal sufficiency of waivers."); *see United States v. Rimando*, 51 M.J. 553, 554 (C.G. Ct. Crim. App. 1999) ("waiver statement is filed with the convening authority as a matter of administrative convenience, not for his review") (internal quotation marks omitted). Indeed, it is the routine practice of military courts to review appeal waivers that have been accepted by the convening authority in order to determine whether the court has power to review the correctness of a

conviction and sentence. *See, e.g.*, *United States v. Miller*, 62 M.J. 471, 473 (C.A.A.F. 2006) (reviewing and upholding waiver filed by defense counsel with convening authority within 10-day waiver period, and remanding for final disposition); *United States v. Hernandez*, 33 M.J. 145, 146-47 (C.M.A. 1991) (reviewing and invalidating waiver approved by convening authority, and remanding for further appellate review). Accordingly, Mr. Hicks addresses the waiver issues here.

I. THE MCA PROVIDES FOR AUTOMATIC REVIEW BY THIS COURT EXCEPT IN VERY NARROW CIRCUMSTANCES NOT APPLICABLE IN THIS CASE

The MCA establishes the appellate review process for military commissions at Guantánamo Bay, including this Court's subject-matter jurisdiction. The statute requires the Convening Authority automatically to forward to this Court the record of trial in each military commission case in which there is an approved finding of guilty, unless an accused files a waiver of his appeal rights with the Convening Authority after final action, or unless he subsequently withdraws his appeal rights. Neither has occurred here.

Section 950c(a) of the MCA provides that direct appellate review by this Court is both presumptive and automatic:

> *Except as provided in subsection (b)*, in each case in which the final decision of a military commission under this chapter (as approved by the convening authority) includes a finding of guilty, the *convening authority shall refer the case to the United States Court of Military Commission Review*. Any such referral shall be made in accordance with procedures prescribed under regulations of the Secretary.

10 U.S.C. § 950c(a) (emphasis added). Subsection (b) specifies that any waiver of appellate review by this Court (in a non-capital case) must be filed with the Convening Authority rather than the military commission judge at trial:

> Except in a case in which the sentence as approved under section 950b of this title extends to death, an *accused may file with the convening authority a statement*

> *expressly waiving the right of the accused to appellate review* by the United States Court of Military Commission Review under section 950f of this title of the final decision of the military commission under this chapter.

Id. § 950c(b)(1) (emphasis added); R.M.C. 1110(e)(1) (waiver "shall be filed with the convening authority").

The requirements for a valid waiver under subsection (b) are narrow and exclusive. An appeal waiver under subsection (b) must "be signed by both the accused and a defense counsel," and "*must be filed*, if at all, *within 10 days after notice of the action is served* on the accused or on defense counsel under section 950b(c)(4) of this title." 10 U.S.C. § 950c(b)(2), (3) (emphasis added); R.M.C. 1110(b)(1), (d)(1), (d)(2), (f)(1); R.T.M.C. ¶ 24-2.b.1. Section 950b(c)(4) further specifies that service of such notice must be made by the Convening Authority after final action is taken by the Convening Authority.

In addition, of particular importance in this case, the Convening Authority has no discretion to depart from these requirements, except to the extent that it may extend the period for such filing by not more than 30 days, which did not occur in this case. 10 U.S.C. §§ 950c(a), (b)(3); R.M.C. 1111 (unless appellate review is waived pursuant to R.M.C. 1110, the convening authority "shall" refer the case to this Court); R.T.M.C. ¶ 24-2.a (in cases resulting in guilty findings, the convening authority "will" forward the record to this Court). The Convening Authority must transfer the case to this Court, which "may act only with respect to the findings and sentence as approved by the convening authority," and "may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved." 10 U.S.C. § 950f(d). Finally, if the accused fails to file a timely waiver, he may seek to "withdraw an

appeal at any time" after the appeal process has begun. 10 U.S.C. § 950c(c); *United States v. Hernandez*, 33 M.J. 145, 149 (C.M.A. 1991); R.T.M.C. ¶ 24-2.b.2.

Here, there is no waiver. It is indisputable that Mr. Hicks did not execute an appeal waiver in conformity with the strict requirements of the MCA. He simply did not sign or file a waiver of his appellate rights with the Convening Authority within 10 days after final action. As a matter of law, this deficiency automatically triggered his right of direct appellate review by this Court. As addressed below, however, it is also indisputable that the Convening Authority has unilaterally obstructed that review by failing and refusing to carry out its nondiscretionary, ministerial duty to transfer the case to this Court.

II. MR. HICKS'S PREMATURE WAIVER OF APPELLATE RIGHTS IS INEFFECTIVE

The Convening Authority has indicated that it need not transfer this case to the Court because Mr. Hicks waived his appeal rights pursuant to 10 U.S.C. § 950c(b). The Convening Authority is wrong as a matter of law. Although Mr. Hicks entered into a pretrial agreement that contained a blanket appeal waiver provision, and signed a perfunctory waiver of appellate rights at the time of his sentencing, his purported waiver was premature and ineffective because it did not comply with the stringent requirements of the MCA. The Convening Authority also failed to enforce the waiver following its action on Mr. Hicks's sentence but prior to transferring him, which was within the Convening Authority's sole discretion.

A. The MCA and Military Commission Rules Confirm the Ineffectiveness of Mr. Hicks's Appeal Waiver

As set forth above, the MCA requires waivers to be filed with Convening Authority after the Convening Authority takes final action. The rules for military commissions promulgated by the Secretary of Defense confirm this requirement for legally valid, effective waivers. Although

R.M.C. 1110(c) provides that no person may be compelled, coerced or induced to waive his or her appellate rights, R.M.C. 705(c)(2)(E) expressly permits an accused to include in a pretrial agreement a promise to waive his appeal rights.[4] R.M.C. 1110(f)(1) also permits an accused to "sign a waiver of appellate review at any time after the sentence is announced." But nothing in those rules purports to alter the exclusive, narrow statutorily-prescribed method for perfecting a valid waiver of appeal rights described above.[5] Indeed, R.M.C. 1110(f)(1) incorporates the language of the statutory requirement that appeal waivers be filed with the Convening Authority within 10 days after final action. Accordingly, given the plain language of the MCA, even if military commission rules permit an accused to promise to waive his appeal rights in a pretrial agreement, or sign an appeal waiver before final action as was done in Mr. Hicks's case, such a waiver does not become operative unless or until it is later ratified and filed with the Convening Authority after final action.

[4] R.M.C. 705(c)(2)(E) differs from courts-martial practice, which prohibits appeal waiver provisions in pretrial agreements and deems such provisions unenforceable. *See* R.C.M. 705(c)(1)(B). The distinction is irrelevant in this case because regardless of whether Mr. Hicks's pretrial agreement properly included a waiver provision, he never filed a valid waiver after final action. However, in order to preserve his rights Mr. Hicks contends that the specific waiver at issue in his case was so broad and unqualified as to constitute an unlawful term that must be excised from his pretrial agreement. *See United States v. Hernandez*, 33 M.J. 145 (C.M.A. 1991); *United States v. Tate*, 64 M.J. 269, 272 (C.A.A.F. 2007) (excising waiver of post-trial rights and appellate rights provision from pretrial agreement).

[5] Nor could those rules alter the statutory waiver requirements. *See United States v. Lopez*, 35 M.J. 35, 39 (C.M.A. 1992) (sources of authority, in order of hierarchy, "are the Constitution of the United States; Federal Statutes, including the Uniform Code of Military Justice; Executive Orders containing the Military Rules of Evidence; Department of Defense Directives; service directives; and Federal common law. . . . Normal rules of statutory construction provide that the highest source authority will be paramount, unless a lower source creates rules that are constitutional and provide greater rights for the individual").

B. Rules of Courts-Martial Practice Confirm the Ineffectiveness of Mr. Hicks's Appeal Waiver

This result is entirely consistent with the longstanding rule in courts-martial that an appeal waiver only becomes effective upon filing with the convening authority after final action because "there is nothing to waive until the convening authority has acted." *United States v. Hernandez*, 33 M.J. 145, 150 (C.M.A. 1991) (Cox, J., concurring). Indeed, the ineffectiveness of Mr. Hicks's appeal waiver in this case is reaffirmed by the fact that the MCA's waiver provision is substantively identical to, and derived from, the longstanding waiver rule applicable to courts-martial, which dates from 1983. *Compare* 10 U.S.C. § 861(a), *with id.* § 950c(b)(3). The only relevant textual difference between these two provisions is the addition of the phrase "if at all" in the MCA's version of the rule, which only reinforces the categorical nature of the waiver period.

There are two principal courts-martial cases directly on point.[6] In *United States v. Hernandez*, the accused was convicted pursuant to a pretrial agreement, and submitted an appeal waiver to the military judge at his sentencing, several months prior to the convening authority's action. 33 M.J. 145, 146 (C.M.A. 1991). As in Mr. Hicks's case, the convening authority in *Hernandez* did not object to the premature waiver. But unlike this case, the record of trial in *Hernandez* was forwarded to the Navy-Marine Corps Court of Military Review, which approved the findings and sentence. Applying Rule for Courts-Martial 1110(f), the Court of Military Review upheld the accused's appellate waiver on the grounds that "any waiver of appellate review filed before the accused or defense counsel is served with a copy of the initial action is

[6] Although "decisions of the service courts of criminal appeals in construing provisions of the U.C.M.J. are not binding" precedent in a military commission, *see* 10 U.S.C. § 948b(c), they are persuasive authority, "particularly [when they deal] with . . . provisions that are very similar, if not identical, to those at issue in the instant case." *United States v. Khadr*, 753 F. Supp. 2d 1178 (CMCR 2008).

deemed filed as of the day on which the accused or defense counsel is served with a copy of the initial action, and that such a waiver, if otherwise properly executed and filed, is valid and effective." *Id.* at 147. The court reasoned that R.C.M. 1110(f) merely created an end date to the waiver period "for administrative purposes to allow cases to be forwarded by convening authorities within a reasonable time." *Id.*

The Court of Military Appeals reversed, holding that the language of R.C.M. 1110(f) is consistent with the plain meaning of Article 61 of the UCMJ, 10 U.S.C. § 861, which controls in any event. "The statutory language seems perfectly clear and, given its most obvious reading, would seem to mean that a waiver must be filed only within a 10-day period after the convening authority has acted and this action has been served upon the accused or on defense counsel." *Id.* at 148. The Court concluded that "Congress decided to impose limitations on the waiver of appellate rights," and "[t]his legislative decision having been made, [no Article I court] is empowered to ignore or undercut it." *Id.* at 149. The Court thus reached the conclusion that a prematurely filed waiver is legally invalid and appellate review must proceed automatically.

In *United States v. Miller*, the Court of Appeals for the Armed Forces ("CAAF") reached a similar conclusion. 62 M.J. 471 (C.A.A.F. 2006). There, the accused was convicted based on his pleas, and executed a waiver of appeal rights several months after he was sentenced but prior to the convening authority taking action on the case. The day after the convening authority took action, counsel for the accused resubmitted the previously signed appeal waiver with a statement noting that the accused had been advised of his appellate rights and the effect of a waiver, and that the accused reiterated his desire to waive his appeal rights. *Id.* at 473. The convening authority accepted the waiver, but again, unlike Mr. Hicks's case, the matter was referred to the intermediate court for review. *Id.*

The intermediate court issued two opinions. Applying *Hernandez*, the majority concluded that the appeal waiver was invalid because it was signed before final action, even though it was subsequently filed during the appropriate time period. *Id.* at 474. The minority concluded that a

> waiver document may be signed before the convening authority's action so long as the providency of the waiver is demonstrated by a serious, rational, and informed discussion between the accused and his or her defense counsel after the convening authority's action, but before filing the waiver. This informed discussion, of course, must be documented in the record.

Id. (internal quotation marks and alterations omitted).

CAAF subsequently agreed with the minority analysis, holding that although

> [t]he preferred method of demonstrating a provident waiver is a document signed after the convening authority's action, [ ] *a document signed beforehand may be used so long as 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*.

Id. at 474 (emphasis added). The Court further concluded that "the text of Article 61 [of the UCMJ] does not preclude signing a *waiver at any time so long as* there is a *provident* waiver decision *after* the convening authority's action." *Id.* at 475 (emphasis added). Accordingly, the Court upheld the prematurely signed waiver because it had been subsequently ratified and filed in conformity with the statute.[7]

In this case, again, it is indisputable that Mr. Hicks did not waive his appeal rights. He did not file a waiver in compliance with the requirements of 10 U.S.C. § 950c(b)(3), which the Convening Authority excused. While he and his counsel signed the pretrial agreement and the

[7] *See also, e.g.*, *United States v. Greening*, 54 M.J. 831, 833 (C.G. Ct. Crim. App. 2001); *United States v. Haynes*, 53 M.J. 738, 739 (C.G. Ct. Crim. App. 2000); *United States v. Smith*, 44 M.J. 387, 391 (C.A.A.F. 1996); *United States v. Walker*, 34 M.J. 317, 318 (C.M.A. 1992); *United States v. Almy*, 34 M.J. 1082 (C.G.C.M.R. 1992); *United States v. Brumfield*, 2005 CCA LEXIS 321, at *5 (N.M. Ct. Crim. App. Oct. 12, 2005); *United States v. Kendall*, 1997 CCA LEXIS 354, at *3 (N.M. Ct. Crim. App. Jan. 14, 1997).

separate waiver statement, those documents were provided to the military judge at the time of the guilty plea proceedings and the conclusion of the sentencing hearing, more than a month before the Convening Authority took post-trial action. There is no evidence that Mr. Hicks and his counsel discussed, signed or filed a further waiver statement with the Convening Authority, or otherwise ratified the prior statements, within the statutorily required 10-day window after service of the Convening Authority's action. Mr. Hicks's submission of a premature waiver to the military judge was thus a "feckless act" that did not waive his statutory right to direct appellate review by this Court. *Greening*, 54 M.J. at 833.

As a result, when the 10-day waiver period expired, the Convening Authority was divested of jurisdiction to take any further substantive action in the case, which, in turn, triggered the Court's automatic obligation to review the case. *United States v. Bright*, 60 M.J. 936, 939 (Army Ct. Crim. App. 2005) (once appellate jurisdiction attaches, "Congress having mandated the scope of our review, we are constrained from ignoring our statutory duty").

C. Mr. Hicks Is Not Responsible for the Lack of Waiver

The Convening Authority has "sole discretion and prerogative" to modify the findings and sentence of a military commission, or to take no action at all, including with respect to the terms in a pretrial agreement, where that action (or inaction) is beneficial to the accused. 10 U.S.C. § 950b(c). Here, of course, that is precisely what happened – the Convening Authority had the opportunity to require Mr. Hicks to file a valid waiver post-action, or to try to set aside the pretrial agreement for failure to file such a waiver, but it did not do so and instead transferred Mr. Hicks to Australia. Why the Convening Authority exercised its exclusive discretion in this fashion is not a matter for this Court to address or second-guess.

It is also clear that the military judge in this case misconstrued the strict legal requirements for a valid appeal waiver under the MCA. As outlined above, during the guilty plea proceedings, the judge stated on the record that the appeal waiver provision in Mr. Hicks's pretrial agreement and his separate waiver of appeal rights document would be construed consistent with the requirements of R.M.C. 1110(c) such that Mr. Hicks agreed to waive his appeal rights at the earliest possible time permitted by that rule. The judge further instructed Mr. Hicks that the earliest possible time was "immediately after the time sentence is announced in this case." The prosecution notably agreed with the military judge. A189-90, A297. As *Miller* squarely holds, however, that was not a correct statement of the law at the time of the proceedings; although the military judge was arguably correct that an appeal waiver may be signed at any time after sentencing, he was wrong to suggest that the waiver would be operative without subsequent ratification and filing after the Convening Authority took action on the case. The military judge – with the prosecution's concurrence – instructed Mr. Hicks incorrectly on a material point of law during the proceedings.[8]

The Convening Authority compounded the judge's legal error by failing and refusing to refer the case to this Court for review, but that inaction does not cast doubt on the Court's subject-matter jurisdiction. In this case, the expiration of the 10-day period without the filing of a waiver statement that complied with the requirements of 10 U.S.C. § 950c(b)(3) was the final event that triggered this Court's statutory obligation to review Mr. Hicks's conviction. When

[8] Mr. Hicks, who is neither a U.S. citizen nor a lawyer, and whose detailed defense counsel was reassigned from the Office of the Chief Defense Counsel to a new command immediately upon Mr. Hicks's transfer, A315, thereby severing the attorney-client relationship, certainly was in no position to know that he had been improperly instructed on a material point of law – particularly after enduring five years of indefinite detention and other abuse.

that occurred, the Court acquired actual, not merely potential, appellate jurisdiction over the case that cannot be divested by the subsequent action (or inaction) of the Convening Authority. *United States v. Diaz*, 40 M.J. 335, 344 (C.M.A. 1994); *United States v. Bullington*, 13 M.J. 184, 186 (C.M.A. 1982). In military practice, a convening authority's preparation and forwarding of the record of trial to the appropriate appellate review authority is a "routine, nondiscretionary, ministerial task." *United States v. Oestmann*, 61 M.J. 103, 104 (C.A.A.F. 2005); *see also Diaz*, 40 M.J. at 345 (after convening authority's post-trial action is served on accused, the convening authority may not take any further substantive action in the case, although he may take any administrative or ministerial act that is appropriate).

A contrary conclusion would essentially authorize the Convening Authority to act as gatekeeper for this Court's jurisdiction, and thus subject this Court's statutory authority to the whim of the very charging official whose final actions this Court was created to review. To allow the Convening Authority to thwart the Court's jurisdiction in this manner would surely undermine the integrity of the Court as an independent decision maker, and erase any remaining notion that the military commission system at Guantánamo Bay is fair, affords basic due process, or satisfies the Common Article 3 standard of a "regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples."

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Mr. Hicks's prior submissions, the Court has jurisdiction to decide the merits of this appeal and should enter a summary order vacating Mr. Hicks's material support conviction pursuant to binding precedent.

Dated: December 19, 2013
New York, New York

Respectfully submitted,

//s// J. Wells Dixon

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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 19th day of December 2013.

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