	)	IN THE UNITED STATES COURT OF
	)	MILITARY COMMISSION REVIEW
DAVID M. HICKS,	)	
	)	**BRIEF OF THE UNITED STATES ON**
Appellant,	)	**THE ISSUE SPECIFIED BY THE COURT**
	)	**IN ITS NOVEMBER 20, 2014 ORDER**
	)	
v.	)	U.S.C.M.C.R. Case No. 13-004
	)	
	)	Tried at Guantánamo Bay, Cuba
UNITED STATES OF AMERICA,	)	on 26 and 30 March 2007
	)	before a Military Commission
Appellee.	)	convened by Hon. Susan J. Crawford
	)	
	)	Presiding Military Judge
	)	Colonel Ralph H. Kohlmann, USMC

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

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January 16, 2015

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On November 20, 2014, the Court issued an Order specifying the following issue: "Applying the 10 U.S.C. § 950f(d) (2009) standard of review, should our Court affirm Appellant's finding of guilty of providing material support to terrorism, in violation of 10 U.S.C. § 950v(b)(25) (2006), in light of *United States v. Bahlul*, 767 F.3d 1 (D.C. Cir. 2014)?" Order on Specified Issue (Nov. 20, 2014). In accordance with that Order, Appellee United States timely files this Brief maintaining that the Court should dismiss the case by holding it lacks subject-matter jurisdiction or, in the alternative, enforcing specific performance of Appellant David Hicks's promise to waive appeal in the Pretrial Agreement. Appellee Br. on the Ct.'s Lack of Authority To Hear This Case 12-35 (Dec. 19, 2013) ("Dec. 19 Appellee Br."); Appellee Answer on the Ct.'s Lack of Authority To Hear This Case 2-9 (Jan. 10, 2014) ("Jan. 10 Appellee Br."). Only if the Court declines to dismiss the action and proceeds to review the merits may it reach the Specified Issue. If the Court so reaches the Specified Issue, then the Court should decline to affirm Hicks's material-support conviction in light of *Bahlul*.

I. THE COURT SHOULD DISMISS THIS CASE

A. The Court Should Dismiss the Case Because the Court Lacks Subject-Matter Jurisdiction

Hicks incorrectly asserts that the Court may side-step "the waiver issue" and proceed directly to reviewing his conviction. *See* Hicks's Resp. to Ct.'s Nov. 20, 2014 Order 2. Before the Court can consider the Specified Issue, it must first determine whether Hicks waived appellate review. The Court must do so because, under 10 U.S.C. § 950c(d) (2009), his waiver constitutes a jurisdictional bar prohibiting the Court from reviewing *all* the claims he raises on appeal—including his principal claim that the Military Commission lacked subject-matter jurisdiction to try him. *Compare* Hicks's Resp. to Ct.'s Nov. 20, 2014 Order 3-4, *with* 10 U.S.C. § 950c(d) ("A waiver of the right to appellate review or the withdrawal of an appeal under this section bars review under section 950f of this title."); Dec. 19 Appellee Br. 12-33; Jan. 10 Appellee Br. 2-9; Resp. to Appellant's Mot. To Lift Stay 2 (Aug. 25, 2014). As the U.S. Court

of Appeals for the District of Columbia Circuit has held in *Bahlul*, the *ex post facto* argument upon which Hicks principally relies is a constitutional—not jurisdictional—one that is forfeitable (and, by extension, waivable). *See* Resp. to Appellant's Mot. To Lift Stay 2 (citing *Bahlul*, 767 F.3d at 10 n.6). Having waived appeal, Hicks has intentionally relinquished all the arguments he now seeks to raise on appeal. His waiver forecloses this Court's review.

"'On every writ of error or appeal, the first and fundamental question is that of jurisdiction, *first, of this court*, and then of the court from which the record comes.'" *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (emphasis added) (quoting *Great S. Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 453 (1900)). Contrary to Hicks's argument (reiterated at 3), the Court must first conclude it has jurisdiction before it can consider whether his conviction is valid, even where the basis for the purported invalidity was that the court below lacked jurisdiction to try him. "The requirement that jurisdiction be established as a threshold matter 'spring[s] from the nature and limits of the judicial power of the United States' and is 'inflexible and *without exception*.'" *Id.* at 94-95 (alteration in original) (emphasis added) (quoting *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884)). "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1869). Because the Court lacks the power to review his claims and set aside his conviction, it may do no more than dismiss this case. *See* Dec. 19 Appellee Br. 12-33; Jan. 10 Appellee Br. 2-10.

Citing *Bousley v. United States*, 523 U.S. 614 (1998), and *United States v. Fisher*, 711 F.3d 460 (4th Cir. 2013), Hicks argues that even if he had waived appellate review, the Court would still have the "power to void the plea agreement and set aside his guilty plea (including any waiver) because it was not knowing and voluntary." *See* Hicks's Resp. to Ct.'s Nov. 20, 2014 Order 2. Hicks is incorrect because under 10 U.S.C. § 950c(d), the waiver constitutes a jurisdictional bar prohibiting the Court from reviewing his case. *See* Dec. 19 Appellee Br. 12-16; Jan. 10 Appellee Br. 2-9. Neither *Bousley* nor *Fisher*—nor any other case Hicks cites—

supports the proposition that a court lacking jurisdiction may review, much less set aside, a conviction. The authorities cited by Hicks also fail to support his proposition (at 3) that a court may bypass the jurisdictional question by invoking "due process" or to prevent a "miscarriage of justice." Rather, in those cases, the courts had jurisdiction to review the defendants' convictions. *See Bousley*, 523 U.S. at 623 (remanding the case for a determination on whether the petitioner-appellant was actually innocent); *Fisher*, 711 F.3d at 464 (noting 28 U.S.C. § 2255 authorizes that court to review the guilty plea); *see also Fiore v. White*, 531 U.S. 225 (2001); *Davis v. United States*, 417 U.S. 333 (1974). This Court does not.

Appellee maintains that the Court does not have subject-matter jurisdiction to hear this case because Hicks has validly waived his right to appellate review under 10 U.S.C. § 950c(d) and because the Convening Authority has not referred the case for appeal or forwarded the record to the Court for review under 10 U.S.C. § 950f. Dec. 19 Appellee Br. 12-29; Jan. 10 Appellee Br. 2-15; *see also* Resp. to Appellant's Mot. To Lift Stay 2-9. To the extent Hicks reprises his arguments that he did not waive his right to appellate review and that his waiver is invalid (at 2-4), the Court should deny those arguments for the reasons detailed by Appellee in its Briefs on the Court's lack of authority to hear this case. Dec. 19 Appellee Br. 12-29; Jan. 10 Appellee Br. 2-15; *see also* Resp. to Appellant's Mot. To Lift Stay 2-9. Because the Court lacks subject-matter jurisdiction, it lacks authority to consider the Specified Issue and should dismiss the case.

B. In the Alternative, the Court Should Dismiss the Case Because Appellee Is Entitled to Specific Performance of Hicks's Promise To Waive Appeal

Appellee further maintains that even if the Court concludes Hicks failed to validly waive appeal and the Court has jurisdiction, it should still dismiss the case because Appellee is entitled to specific performance of Hicks's promise to validly waive appeal in his Pretrial Agreement with the Convening Authority. Dec. 19 Appellee Br. 29-33. In the Pretrial Agreement, Hicks negotiated a particular plea to avoid serving a sentence greater than he would otherwise serve and to secure the Convening Authority's support for his transfer to Australia to serve the

majority of his sentence. Dec. 19 Appellee Br. 29-33; Jan. 10 Appellee Br. 13-14. The parties' clear and unambiguous intent was that Hicks would validly waive his right to appeal as part of the bargained-for exchange in the Pretrial Agreement. Dec. 19 Appellee Br. 29-33; Jan. 10 Appellee Br. 13-14. The Convening Authority relied to her detriment on Hicks's promises, performing all her obligations under the Pretrial Agreement, while Hicks did not. Dec. 19 Appellee Br. 29-33; Jan. 10 Appellee Br. 13-14. The Court must consider whether Appellee is entitled to specific performance for Hicks's material breach of the Pretrial Agreement before considering the Specified Issue because, as Appellee previously demonstrated, dismissal is the only adequate remedy available now that Hicks is seeking to benefit from his own breach while outside U.S. custody. Dec. 19 Appellee Br. 29-33; Jan. 10 Appellee Br. 13-14.

A recent decision by the United States Court of Appeals for the Third Circuit supports enforcing the waiver here. *United States v. Erwin*, 765 F.3d 219 (3d Cir. 2014).[1] Christopher Erwin pleaded guilty to conspiracy to distribute and possess with intent to distribute oxycodone pursuant to a pretrial agreement in which he agreed to waive appeal. According to the court, his "plea agreement constituted a classic bargained-for exchange." *Id.* at 230.

> Erwin agreed to plead guilty and to assist the Government in obtaining guilty pleas from his codefendants, conserving Government resources that would otherwise have been expended on his prosecution and those of his coconspirators. To ensure that prosecutorial resources would not be expended on him in the future, Erwin relinquished his right to appeal most aspects of his sentence. In return, the Government promised not to initiate additional criminal charges against Erwin for his role in the conspiracy, and it agreed to seek a [substantial-assistance downward] departure [at sentencing] if Erwin cooperated. Erwin received the full benefit of his bargain because the court accepted his guilty plea (resulting in the speedy disposition of his case) and granted the Government's request for a downward departure (yielding a sentence more than four years below the statutory maximum).

Id. Unlike Erwin,

> who fully benefitted from the plea agreement, the Government devoted valuable resources to litigating an appeal that should never have been filed in the first place. "Empty promises are worthless promises; if defendants could retract their waivers . . . then they could not obtain concessions by promising not to appeal.

[1] This decision was published after Appellee filed its Briefs on the Court's lack of authority to hear this case on December 19, 2013 and January 10, 2014.

> Although any given defendant would like to obtain the concession and exercise the right as well, prosecutors cannot be fooled in the long run." *United States v. Wenger*, 58 F.3d 280, 282 (7th Cir. 1995). Erwin is no exception. He purposely exchanged the right to appeal for items that were, to him, of equal or greater value. Having reaped the benefits of his plea agreement, he cannot avoid its principal detriment—to put it colloquially, he cannot "have his cake and eat it too." *Id.* at 282. Under basic principles of contract law, "[d]efendants must take the bitter with the sweet." *Id.* at 283; *see also United States v. Cianci*, 154 F.3d 106, 110 (3d Cir. 1998) ("Under the law of this circuit, [a defendant] cannot renege on his agreement.").

Id. at 231 (alterations in original). Concluding Erwin breached the pretrial agreement by appealing his sentence and depriving the government the benefit of its bargain, the Third Circuit granted the government specific performance. *Id.* at 231-32 (remanding the case for resentencing where the government was excused from its obligation to move for the downward departure). This Court should likewise grant Appellee specific performance here and dismiss the case where Hicks, like Erwin, received the full benefit of his bargain and, in appealing his conviction, breached the Pretrial Agreement and deprived Appellee of the benefit of its bargain.

II. IF THE COURT FIRST CONCLUDES IT HAS JURISDICTION AND DENIES APPELLEE SPECIFIC PERFORMANCE, THEN THE COURT MAY REVIEW THE MERITS OF THE CASE AND SHOULD DECLINE TO AFFIRM HICKS'S MATERIAL-SUPPORT CONVICTION UNDER *UNITED STATES V. BAHLUL*

Only if the Court first concludes it has jurisdiction to review the conviction and denies Appellee specific performance may the Court reach the merits of this case and consider the Specified Issue. If the Court so reaches the merits, then it should decline to affirm Hicks's material-support conviction under *Bahlul*. In *Bahlul*, the D.C. Circuit—assuming without deciding that the Ex Post Facto Clause applies at Guantánamo Bay, Cuba—concluded "it was a plain *ex post facto* violation" to try Ali Hamza Ahmad Suliman Al Bahlul by military commission for providing material support to terrorism, in violation of 10 U.S.C. § 950v(b)(25) (2006), for conduct he committed before the Military Commissions Act of 2006 ("2006 M.C.A.") was enacted. *Bahlul*, 767 F.3d at 29. The D.C. Circuit further concluded the error was prejudicial and exercised its discretion to correct the error by vacating Bahlul's material-support conviction. *Id.* Because Hicks was also tried by military commission for violating Section 950v(b)(25) of the 2006 M.C.A. for conduct he too committed before the statute was enacted, the

Court should decline to affirm Hicks's material-support conviction under *Bahlul*—but only if the Court first concludes it has jurisdiction to review the conviction and denies Appellee specific performance.

CONCLUSION

The Court should dismiss the case for lack of subject-matter jurisdiction. In the alternative, the Court should enforce specific performance of Hicks's promise to waive appeal and dismiss the action. If the Court nonetheless concludes it has jurisdiction over the action and denies Appellee specific performance, then the Court should decline to affirm Hicks's material-support conviction under *Bahlul*.

Dated: January 16, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 14(i)

1. This Brief complies with the type-volume limitation of Rule 14(i) because it contains 2,140 words.

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

Dated: January 16, 2015

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was sent by electronic mail to counsel for David Hicks—J. Wells Dixon, Baher Azmy, Shayana Kadidal, Joseph Margulies, Samuel Morison, and Justin Swick—on this 16th day of January 2015.

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