

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 NOTICE IN FURTHER RESPONSE TO THE
COURT'S DECEMBER 4, 2013 ORDER REGARDING JURISDICTION

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- and -

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Detailed Defense Counsel

Counsel for Appellant David M. Hicks

Appellant David M. Hicks, by and through his undersigned counsel, respectfully submits this notice in further response to the Court's December 4, 2013 order regarding its jurisdiction.

On February 20, 2014, detainee Ahmed Al Darbi pled guilty to certain offenses before a military commission at Guantánamo Bay, Cuba, pursuant to a pretrial agreement. The agreement contained a waiver of appeal rights stating, in part, the following:

I knowingly, voluntarily, and expressly waive all rights to appeal my conviction, sentence, and confinement except as provided in this paragraph. *In particular, and without limitation, I may bring a post-conviction claim if any sentence is imposed in violation of the sentencing limitation provisions contained in this agreement and Appendix A. . . .* I shall execute whatever documents may be necessary to implement this paragraph and any other provision of this agreement and Appendix A, including Military Commissions Form 2330 and any appellate rights statements. I shall sign Military Commissions Form 2330 immediately after the sentence is announced, and then I shall immediately file the signed Military Commissions Form 2330 with the Government. *I shall also file the signed Military Commissions Form 2330 with the Convening Authority within 10 days after notice of the action is served on me or my counsel under 10 U.S.C. § 950b(c)(4).* I further agree that should I or my counsel fail to sign or file such documents in a timely way and in accordance with 10 U.S.C. § 950c(b), I will not seek to appeal any part of my conviction or sentence or petition for a new trial.

United States v. Al Darbi, Offer for Pretrial Agreement ¶ 9 (Dec. 20, 2013) (AE10) (emphasis added) (attached).

This waiver provision underscores the Court's authority to hear Mr. Hicks's appeal in two respects. First, by virtue of this agreement the government concedes that an appeal waiver must be filed with the Convening Authority within 10 days after final action on the sentence. If it did not recognize in the wake of Mr. Hicks's case that this is the narrow and exclusive method to waive appeal, the government surely would not have included the post-action filing language in the *Al Darbi* pretrial agreement for the first time in any military commission guilty plea proceeding. Second, as Mr. Hicks addressed in his January 10, 2014 answer brief regarding jurisdiction (at p.6 n.2), the waiver in *Al Darbi* is more nuanced and qualified, and specifically

allows for appellate review in situations where the sentence imposed is unlawful, than the blanket waiver provision in Mr. Hicks's pretrial agreement, which is so broad that it purports to bar appellate review under any circumstances and is consequently an unlawful term.

Accordingly, 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 summarily vacate his conviction.

Dated: February 25, 2014
New York, New York

Respectfully submitted,

//s// J. Wells Dixon
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Detailed Defense Counsel

Counsel for Appellant David M. Hicks

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 25th day of February 2014.

//s// J. Wells Dixon

J. Wells Dixon

Senior Staff Attorney

Center for Constitutional Rights

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Counsel for Appellant David M. Hicks

ATTACHMENT

UNITED STATES)

v.)

AHMED MOHAMMED AHMED HAZA)
AL DARBI)
ISN 00768)

) U.S. NAVAL STATION
) GUANTANAMO BAY, CUBA

) December 20, 2013

OFFER FOR PRETRIAL AGREEMENT

I, AHMED MOHAMMED AHMED HAZA AL DARBI, ISN 00768, am presently the Accused under Military Commission charges, dated December 16, 2013. I have read the charges and specifications alleged against me, and they have been explained to me by my defense counsel, Prof. Ramzi Kassem and Lieutenant Theresa Champ, JAGC, U.S. Navy. I understand the charges and specifications against me, and am aware I have a legal and moral right to plead not guilty and to leave the Government with the burden of proving my guilt beyond a reasonable doubt by legal and competent evidence.

Understanding the above, and under the conditions set forth below, and in consideration of the agreement by the Convening Authority to approve a sentence in accord with the limitations set forth in Appendix A, I offer to plead guilty to all charges and specifications. The term "Convening Authority" as used throughout this agreement includes any current or future official so designated by the Secretary of Defense.

I understand that this Offer, if accepted by the Convening Authority, constitutes a binding agreement. I assert that I am, in fact, guilty of the offenses to which I am offering to plead guilty. I understand this agreement permits the Government to avoid presentation in a Military Commission of sufficient evidence to prove my guilt. I offer to plead guilty because it will be in my best interest that the Convening Authority grant me the relief set forth above and in Appendix A. I understand that I waive my right to a trial of the facts and to be confronted by the witnesses against me, and my right to avoid self-incrimination insofar as a plea of guilty will incriminate me. In making this offer, I state that:

1. I am satisfied with my defense counsel, who have advised me with respect to this Offer, and consider them competent to represent me in this Military Commission.
2. No person has made any attempt to force or coerce me to make this Offer or to plead guilty.
3. My counsel has fully advised me of the nature of the charges against me, my right to defend against them, any defense which might apply, and the effect of the guilty plea that I am offering to make. I fully understand their advice and the meaning, effect, and consequences of this plea.

A.D
RK TJC

4. I understand that the Convening Authority's acceptance of this Offer, including Appendix A, will transform this Offer into an agreement binding upon me and the Convening Authority.
5. I understand that I may withdraw my guilty plea at any time before sentence is announced by the Military Commission but not after, and that, if I do withdraw my plea of guilty, the agreement that may result from this Offer is canceled. Any such agreement will also be canceled if any of the following occurs:
- a. The Military Commission refuses to accept my guilty plea, as set forth above, or either I modify or the Military Commission modifies my plea to not guilty, or to a lesser degree of guilt during the trial.
 - b. Either party to the agreement withdraws from the agreement before my guilty plea is accepted by the Military Judge.
 - c. My failure to agree with the Government on a stipulation of fact as discussed in paragraphs 16 and 17 below.
 - d. The Military Judge fails or refuses to delay the sentencing proceedings in this case until 3 years and 6 months from the date the Military Judge accepts my guilty plea, as set forth in the procedures described in paragraphs 19 and 20 below.
 - e. The Military Judge fails or refuses to instruct the members that the sentence to confinement adjudged for me shall be no less than 13 years and no more than 15 years, as discussed in paragraph 8 below.
6. I understand the Convening Authority is released from the obligation to approve a punishment as provided in Appendix A to this agreement if, between the announcement of sentence and the Convening Authority's approval of any sentence, I commit any offense under the M.C.A., or engage in any conduct that, if committed by a member of the U.S. armed forces, would be an offense under Sections 877 through 934 of Title 10, United States Code. I understand that this paragraph is subject to the terms of paragraph 15 of this Offer.
7. I understand the Convening Authority has no power to affect my status as an alien unprivileged enemy belligerent, and does not purport to do so by the terms of this agreement.
8. To give effect to my agreement to confinement, and after full and satisfactory consultation with my defense counsel, I agree that, in accordance with R.M.C. 705(b)(1), 705(b)(2)(F), and 1005(e)(1), the Government and I shall jointly request the Military Judge to instruct the members, prior to deliberation, that the sentence to confinement must be at least 13 years and may not exceed 15 years, consistent with the consideration contained in Appendix A. I fully understand that without such instruction by the Military Judge, the Military Commission members, per R.M.C. 1005(e)(3), could select a sentence that is greater or less than the agreed upon range. The period of any approved sentence to confinement shall run from the date that the Military Judge accepts my guilty plea.

9. I have been informed by my counsel of all my post-trial and appellate rights and fully understand those rights. I knowingly, voluntarily, and expressly waive all rights to appeal my conviction, sentence, and confinement except as provided in this paragraph. In particular, and without limitation, I may bring a post-conviction claim if any sentence is imposed in violation of the sentencing limitation provisions contained in this agreement and Appendix A. I knowingly, voluntarily, and expressly waive any right to petition the Convening Authority for a new trial under R.M.C. 1210. I shall execute whatever documents may be necessary to implement this paragraph and any other provision of this agreement and Appendix A, including Military Commissions Form 2330 and any appellate rights statements. I shall sign Military Commissions Form 2330 immediately after the sentence is announced, and then I shall immediately file the signed Military Commissions Form 2330 with the Government. I shall also file the signed Military Commissions Form 2330 with the Convening Authority within 10 days after notice of the action is served on me or my counsel under 10 U.S.C. § 950b(c)(4). I further agree that should I or my counsel fail to sign or file such documents in a timely way and in accordance with 10 U.S.C. § 950c(b), I will not seek to appeal any part of my conviction or sentence or petition for a new trial.

10. I also understand that I may have a right to attack the conviction and/or sentence imposed collaterally on the grounds that it was imposed in violation of the Constitution or laws of the United States, that I received ineffective assistance from my counsel, that the Court was without proper jurisdiction, or that the conviction and/or sentence was otherwise subject to collateral attack. I understand such an attack is usually brought through a motion pursuant to Title 28, United States Code, Section 2255. I have reviewed Section 2255 with my counsel, and understand my rights under the statute. Understanding those rights, and having thoroughly discussed those rights with my counsel, I knowingly and voluntarily waive my right to collaterally attack my conviction and/or sentence, except as provided in this agreement.

11. Once my guilty plea is accepted by the Military Commission, I will not initiate any legal claims against the United States Government, any United States Government Agency or official, or any civilian or civilian agency regarding my capture, detention, or confinement conditions prior to my plea. I further agree to withdraw or dismiss without prejudice any pending litigation regarding my capture, detention, confinement conditions, or alien unlawful enemy combatant or alien unlawful enemy belligerent status. Notwithstanding the foregoing or any other provision of this Offer or Appendix A, after I have served any unsuspended portion of an approved sentence to confinement, I retain the right to seek release from the appropriate United States authorities by challenging my continued detention, if any, through a petition for a writ of habeas corpus or other available remedies.

12. I waive my right to any discovery beyond what the Government is obligated to provide pursuant to R.M.C. 701(b)(1) and 701(d). I additionally waive any request for forensic or scientific testing of any physical evidence in the Government's possession. The Government may dispose of any physical evidence upon completion of any habeas corpus proceedings or appellate processes not waived by this agreement or otherwise available to me.

13. I agree to cooperate fully and truthfully with the Government. This cooperation includes, but is not limited to, providing complete and accurate information in interviews, depositions, and testimony wherever and whenever requested by prosecutors from the Office of Military Commissions and the United States Department of Justice, and representatives from United States law enforcement agencies, the military, and intelligence agencies while I remain in United States custody. I agree that the Government may interview me without the presence of my counsel, provided that my defense counsel has received reasonable notice of the intent of the Government to interview me, the opportunity to be present for such an interview, and my defense counsel consents to not being present. The Government will provide my counsel with reasonable notice of, and the opportunity to be present for, any testimony by me under oath.

14. I agree not to engage in, or materially support, directly or indirectly, hostilities against the United States or its coalition partners as defined in R.M.C. 103(8), or any other organization that I know engages in hostilities against the United States or its coalition partners.

15. Should I commit any additional offenses, before or after the acceptance of my guilty plea, I will be subject to prosecution for those offenses before any court or commission having jurisdiction over me.

16. I have entered into a stipulation of fact, including attachments, with the Government (Attachment A). I understand that I have an absolute right to refuse to enter into this stipulation of fact; however, I knowingly and voluntarily agree to enter into this stipulation of fact. I understand that I may not ordinarily attack, contradict, or otherwise challenge the stipulation of fact. If I do so, on my own or through counsel, the Convening Authority may withdraw from this agreement. I have discussed this decision with my counsel and believe it is in my best interest to enter into this stipulation of fact.

17. I agree that the stipulation of fact and its attachments will be used to determine my guilt and to assist in determining my sentence. I have read and fully understand the stipulation of fact and have discussed it with my counsel. This stipulation of fact and its attachments are a fair and accurate summary of the facts supporting all charges and specifications to which I am pleading guilty. The facts to which I am stipulating, but of which I do not have firsthand knowledge, are a fair and accurate summary of those facts to the best of my knowledge, and I acknowledge the Government could prove those facts beyond a reasonable doubt. The Military Commission may rely on this document to determine my guilt and to determine an appropriate sentence, together with all matters presented during the pre-sentencing hearing in this case. The Government and I (through counsel) will offer the stipulation of fact and its attachments, unopposed, to the Military Commission.

18. I knowingly and voluntarily waive the time periods enumerated in R.M.C. 707(a).

19. I shall join the Government in requesting that the Military Judge delay the sentencing proceedings in my case until 3 years and 6 months from the date the Military Judge accepts my guilty plea, in order to allow me to cooperate with the Government.

20. The Government, in its discretion, may request that the Military Judge schedule my sentencing proceedings for a date sooner than 3 years and 6 months from the date the Military Judge accepts my guilty plea. Should the Government seek to accelerate the date of my sentencing proceedings in this manner, the Government will notify my counsel at least 90 days in advance of the proposed date for the pre-sentencing proceeding.

21. I understand that the panel of members of the Military Commission, and not the Convening Authority, will determine the sentence in accordance with paragraph 8. I also understand that the offenses to which I am pleading guilty carry the following maximum penalties, in the absence of this agreement:

- Charge I: Confinement for life;
- Charge II: Confinement for 20 years;
- Charge III: Confinement for life;
- Charge IV: Confinement for life;
- Charge V: Confinement for 20 years per specification.

22. At the pre-sentencing proceedings, both the Government and the defense may call live witnesses and present evidence, subject to any rulings by the Military Judge, regarding matters in aggravation and in extenuation and mitigation.

23. I agree not to offer the live testimony of any detainee held at United States Naval Station, Guantanamo Bay, Cuba, and understand that the Government will similarly not offer such live testimony.

24. I agree not to seek to retain or present at a pre-sentencing hearing more than two expert consultants or witnesses at Government expense, a limitation that will also bind the Government. The Convening Authority will consider any request by me for an expert consultant or witness in accordance with the Rules for Military Commissions.

25. At the pre-sentencing hearing, I may submit a statement, sworn or unsworn, orally or in writing, or in some combination thereof.

26. Should I or the Government seek to introduce classified evidence during my pre-sentencing hearing, M.C.R.E. 505 and 506 will apply.

27. Once this Offer is accepted, and as a continuing obligation after the Military Judge accepts my guilty plea, I agree that I will not disclose, in any form, in any manner, or by any means, any information that I am reasonably on notice as being classified United States Government

information, except to my cleared defense counsel during the course of their representation of me, or to the Military Commission as information in mitigation at sentencing as provided in paragraphs 22 and 25 above. I further understand and acknowledge that if I do make any such disclosure, it will constitute a material breach of the conditions of the plea agreement and the Convening Authority will be free to pursue the remedies for such breach as set forth in this agreement.

28. Pursuant to the Regulation for Trial by Military Commission, Chapter 12, Section 12-7(c), the Convening Authority agrees to recommend to the Commander, Joint Task Force, Guantanamo Bay (JTF-GTMO) that, between the time that I plead guilty and the time that I am sentenced and for as long as I am fully and truthfully cooperating with the Government as required by this agreement, as determined by the Convening Authority, I continue to be detained under conditions appropriate for law of war detainees and no more austere than the conditions under which I am presently held. The failure of Commander, JTF-GTMO to act in accordance with this recommendation will not render the pre-trial agreement voidable and is not grounds for me to withdraw from the pre-trial agreement; the Convening Authority will have fulfilled his obligation under this provision by making the request to Commander, JTF-GTMO. I understand that the Convening Authority has no power to control the location or conditions of my detention or confinement, to release me from military or civilian detention or confinement, or to compel the United States Government to release me from detention as an alien unprivileged enemy belligerent.

29. As a condition precedent to my entry of a plea at my arraignment, the United States will have provided me a copy of the diplomatic notes exchanged between the United States and the Kingdom of Saudi Arabia. These notes constitute a written agreement between the United States and the Kingdom of Saudi Arabia concerning the support of both Governments for my transfer to Saudi Arabia to serve the remainder of my approved sentence if I comply with the terms of this agreement and I request such transfer effective after completing four years in United States custody following the acceptance of my plea. I understand that my transfer to Saudi Arabia is contingent upon the consent of the Kingdom of Saudi Arabia and that this plea agreement does not and cannot bind the Kingdom of Saudi Arabia to consent to my prisoner transfer request. I further understand that any prisoner transfer request may not be acted upon until I actually submit such a request, and any prisoner transfer request is completely separate from this pre-trial agreement that I am entering into with the Convening Authority. I understand that, if the Kingdom of Saudi Arabia ultimately denies my prisoner transfer request, that denial would have no impact on this agreement, and I would remain bound by this agreement. I understand that the continued service of my sentence will be under the conditions, laws and procedures as established by the Kingdom of Saudi Arabia. No other inducements have been made by the Convening Authority, or any other person, which affect my offer to plead guilty.

30. I have taken into account that other U.S. Government agencies have indicated willingness to positively endorse a request by me, through the Office of the Chief Prosecutor, for repatriation to Saudi Arabia after I have served four years of confinement in United States custody from the date the Military Judge accepts my guilty plea, if I have met all the conditions herein and the Convening Authority has approved my sentence. However, I recognize that the decision to

accept my transfer is ultimately made by the Kingdom of Saudi Arabia, and this agreement cannot and does not obligate the Kingdom of Saudi Arabia to grant my request for transfer. No other inducements have been made by the Convening Authority, or any other person, which affect my offer to plead guilty.

31. In further consideration for the benefit that I am receiving under this pretrial agreement, I also agree, after I am transferred to Saudi Arabian custody, never to enter the United States of America, her territories, possessions, military installations, airspace, consulates, or embassies. If I enter into any such area, the remaining portion of any approved sentence, if any, shall be carried out in United States custody, explicitly revoking the provisions of paragraph 28 and Appendix A of this agreement. I understand and agree that I will also waive any legal actions that may be brought at that time, in any forum, as a result of my violation of this agreement.

32. If this Offer is not accepted by the Convening Authority, if the Convening Authority or I withdraw from this agreement, or if the Convening Authority terminates this agreement, then this Offer, the Appendix thereto, the stipulation of fact, and my providence inquiry cannot be used to establish my guilt concerning any of the offenses with which I have been charged in this case.

33. Before the Military Judge accepts my guilty plea, I may change or withdraw that plea for any reason. After the Military Judge accepts my guilty plea, but before sentence is announced, I may seek permission from the Military Judge to change or withdraw any portion of my plea, and the Military Judge, in his or her discretion, may permit me to do so. If I change or withdraw my guilty plea, the Convening Authority may terminate this agreement.

34. The statements contained in this Offer and Appendix A contain all the terms, conditions, and other provisions of my Offer and represent the entire agreement with the Convening Authority. There are no other inducements that are not expressly contained in this agreement that affect my offer to plead guilty. Any modification of this agreement shall be effective only if made in writing and signed by the Convening Authority and me.

35. The Government agrees that, after the announcement of my sentence by the Military Commission, no further criminal charges will be brought against me pursuant to the Military Commissions Act of 2009 for my conduct in the offenses described in the stipulation of fact that I have entered into with the Government (Attachment A).

36. I understand that, if any agreement resulting from this Offer is canceled for any reason stated above, then this Offer, the Appendix thereto, the stipulation of fact, and my providence inquiry cannot be used to establish my guilt concerning any of the offenses with which I have been charged in this case.

RK

AD

TJC

This document and Appendix A include all of the terms of this offer to plead guilty and no other inducements have been made by the Convening Authority or any other person that affect my offer to plead guilty.

Dec 20, 2013

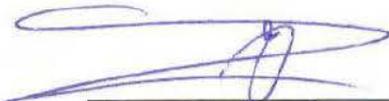
Date


AHMED MOHAMMED AHMED HAZA
AL DARBI

We certify we gave the accused the advice referred to above, we explained to him the elements of the offense(s), and we witnessed his voluntary signature to this offer for a pretrial agreement.

20 Dec. 2013

Date


Prof. Ramzi Kassem
Member of the Bar of the State of New York

20 DEC 13

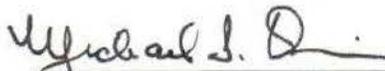
Date


LT Theresa Champ, JAGC, USN
Certified under Article 27(b) UCMJ 7

I recommend (acceptance) (~~rejection~~) of this offer.

4 FEB 14

Date


Michael I. Quinn
Legal Advisor to the
Convening Authority

The foregoing instrument, including Appendix A, dated December 20, 2013, is (accepted) (~~rejected~~):

FEB 05 2014

Date


Paul L. Oostburg Sanz
Convening Authority