No. 23-720

In the Supreme Court of the United States

OMAR AHMED KHADR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF

T. Barry Kingham
Sylvi Sareva
Joseph Muschitiello
Steven Thomas
CURTIS, MALLET-PREVOST, COLT & MOSLE LLP
101 Park Avenue
New York, NY 10178

Samuel Morison
MILITARY COMMISSION DEFENSE ORGANIZATION
1620 Defense Pentagon
Appellate Defense Division
Washington, DC 20301

Juan O. Perla
Counsel of Record
CURTIS, MALLET-PREVOST, COLT & MOSLE LLP
1717 Pennsylvania Ave NW
Suite 1300
Washington, DC 20006
(202) 452-7373
jperla@curtis.com

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Treaties

Other Authorities

INTRODUCTION

The circuits are deeply divided over whether waivers of appellate rights categorically bar otherwise timely direct appeals that challenge the validity of the underlying guilty pleas in federal criminal cases. The Second, Third, and Fourth Circuits hold that they do not. The Seventh, Ninth, and D.C. Circuits hold that they do. The importance of this question requires a consistent answer to the question presented across the federal judicial system.

The opinion below has already been relied upon by lower courts and respondent in diverse federal cases, deepening a circuit split that is now a decade old. And respondent all but concedes that petitioner's case would have come out differently in the Fourth Circuit. Certiorari is therefore warranted because such a fundamental rule of federal criminal procedure should not depend upon which side of the Potomac a defendant's case is heard.

I. The circuits are deeply split on the question presented.

Respondent does not address the question presented until page nineteen of its twenty-two-page brief. There, it boldly denies the existence of a circuit split, while nevertheless acknowledging that the Second, Third, and Fourth Circuits refuse to enforce appellate waivers where defendants claim they pleaded guilty to conduct that was not, in fact, a crime. U.S. Br. 19–21.

The Fourth Circuit, for its part, has a decade of precedent on point and respondent does not dispute that it is all in petitioner's favor. *United States* v. *McKinney*, 60 F.4th 188, 192 (4th Cir. 2023); *United States* v. *McCoy*, 895 F.3d 358, 364 (4th Cir 2018);

United States v. *Sweeney*, 833 F. App'x 395 (4th Cir. 2021); *United States* v. *Adams*, 814 F.3d 178 (4th Cir. 2016).

Instead, respondent puts heavy emphasis on the military commission context in which the plea in this case arose. But the military commission context was irrelevant to the decision below, which has already been relied on by two federal courts in ordinary criminal cases. *See United States* v. *Trujillio*, No. 23-2080, 2023 U.S. App. LEXIS 20661 (10th Cir. Aug. 9, 2023); *Contreras* v. *United States*, No. CR-19-55-MWF, 2023 U.S. Dist. LEXIS 113743 (C.D. Cal. June 29, 2023). Indeed, respondent itself has cited the decision below to defeat review in at least two ordinary federal appeals. *United States* v. *Kerrick*, Gov't C.A. Br., No. 22-3014, at *12 n.5 (D.C. Cir. Filed June 23, 2023); *see also Young* v. *EPA*, Gov't C.A. Supp. Br., No. 1:21-cv-02623-TJK, at *12 (D.C. Cir. Sept. 22, 2023).

Respondent's efforts to explain away the split with the Second and Third Circuits equally lack merit. In *United States* v. *Castro*, 704 F.3d 125 (3rd Cir. 2013), the Third Circuit held that enforcing a plea agreement based upon non-criminal conduct "would seriously impugn the fairness, integrity, and public reputation of our courts." *Id.* at 139. Respondent there made the same argument that it advances here, insisting that an appellate waiver should nevertheless be enforced because there was "nothing unfair in [the defendant's] conviction." *Ibid.* The Third Circuit rejected this argument, explaining that if someone is "to be convicted, it is for specific crimes, and the government here undertook the burden of proving … each element of the specific crime[.] It failed to do that." *Id.* at 140.

Similarly, in *United States* v. *Balde*, 943 F.3d 73 (2d Cir. 2019), the Second Circuit refused to enforce an appellate waiver where, as here, the interpretation of the relevant law had changed while the case was on direct appeal. This result, the Second Circuit held, followed from this Court's opinion in *Bousley* v. *United States*, 523 U.S. 614 (1998), since an agreement to plead guilty to non-crimes cannot be "knowing and intelligent." Respondent's only response to *Balde* is, again, a blanket statement that the Second Circuit might have come to a different conclusion based upon the facts of petitioner's case. But it provides no legal distinction, since petitioner pled guilty to conduct in 2010 that was revealed to be non-criminal in 2014, while petitioner's direct appeal was pending.

The circuit split here is clear and deep. In the Second, Third and Fourth Circuits, appellate waivers stand or fall with the validity of the underlying plea. In the Seventh, Ninth, and now D.C. Circuits, an appellate waiver makes a plea agreement inviolable even if the underlying plea was to a charge that was revealed not to be a crime while the case was still subject to direct review. For the reasons explained in the amicus brief filed by the National Association of Criminal Defense Lawyers ("NACDL"), that split is important given the federal criminal justice system's reliance on plea bargaining. And perpetuation of that split "violates the basic principle of justice that like cases should be decided alike." *See* Amicus Brief of National Association of Criminal Defense Lawyers ("NACDL Amicus Br."), at 14 (cleaned up).

II. The decision below is wrong.

The D.C. Circuit is on the wrong side of this circuit split. Respondent offers no justification for why the government can punish an individual "for conduct

that its criminal statute, as properly interpreted, does not prohibit." *Fiore* v. *White*, 531 U.S. 225, 228 (2001); *see also Class* v. *United States*, 583 U.S. 174, 181-182 (2018); *Bousley*, 523 U.S. at 619. A guilty plea does not alter that result. *Class*, 583 U.S. at 181–182. Nor does an appellate waiver, as the Second, Third and Fourth Circuits have correctly concluded.

"[N]o appeal waiver serves as an absolute bar to all appellate claims." *Garza* v. *Idaho*, 139 S. Ct. 738, 744–745 (2019). While a guilty plea implicitly waives the right to challenge *procedural* defects leading to a conviction, a claim that "on the face of the record the court had no power to enter the conviction or impose the sentence" is different in kind from other defects. *Class*, 583 U.S. at 181. If the charges to which the defendant pleaded are later shown not to be crimes, then the plea itself is invalid, the implicit waiver of review is voidable, and the conviction can be challenged on direct appeal. *Id*. at 182.

Respondent contends that courts should reach the opposite result if a plea agreement contains an explicit appellate waiver, even where a change in law subsequently renders the defendant's conduct non-criminal, because rights can be generally waived. According to respondent, a "voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise." U.S. Br. 17 (cleaned up). This Court, however, rejected the *identical* argument in *Bousley*, predicated on many of the same cases respondent cites here, because all of "those cases involved a criminal defendant who pleaded guilty after being correctly informed as to the essential nature of the charge against him." 523 U.S. at 6199.

Petitioner does not contest the facts alleged, the admissibility of evidence, or any other procedural defect that led to his guilty plea. Instead, as in *Bousley*, he asserts that the facts alleged can no longer support his conviction on *any* of the crimes to which he pleaded guilty.[1] And with respect to at least one of those charges – the material support charge – the invalidity of his plea is undisputed. *See Al Bahlul* v. *United States*, 767 F.3d 1, 27–29 (D.C. Cir. 2014) ("*Al Bahlul I*"); U.S. Br. at 17.

In short, petitioner "contends that the record reveals that neither he, nor his counsel, nor the court correctly understood the essential elements of the crime[s] with which he was charged." *Bousley*, 523 U.S. at 618. If he is correct, then his plea is invalid. *Ibid*. Respondent offers no sound reason why appellate waivers should become privileged terms in plea agreements that are otherwise unenforceable.

---

[1] Respondent spends much of its brief arguing why the other charges to which petitioner pleaded guilty might still be valid. For this Court's purposes, these arguments are irrelevant. And, crucially, petitioner strongly disagrees with them. With respect to petitioner's conviction for conspiracy, respondent concedes that its validity remains unresolved. U.S. Br. at 26–27; *Al Bahlul* v. *United States*, 840 F.3d 757, 760 n.1 (D.C. Cir. 2016) (Kavanaugh, J., concurring). And because petitioner did not forfeit the issue, as the defendant in *Al Bahlul* did, he is entitled to de novo review, which makes him likely to prevail. *See id*. at 789-93 (Millett, J., concurring); *Id*. at 801–04 (Wilkins, J., concurring); *see also Al Bahlul* v. *United States*, 792 F.3d 1, 23 (D.C. Cir. 2015) (Tatel, J.); *Hamdan* v. *Rumsfeld,* 548 U.S. 557, 606-07 (2006) (plurality). Petitioner is also likely to prevail against his remaining charges because the only authorities respondent has ever mustered to defend against them are antiquated military records ("field orders") of the sort that *Al Bahlul* rejected. 767 F.3d at 28.

Against this, respondent asserts that a rule rendering appellate waivers voidable in such cases "would not advance the interests of defendants generally." U.S. Br. 15. But the NACDL, which more credibly represents the interests of "defendants generally," believes that enforcing appellate waivers in cases like this one is in no one's interest because "[i]mprisonment for non-criminal conduct is unjust." NACDL Amicus Br. 11.

Respondent suggests that it has an interest in preserving Petitioner's conviction because his past conduct was wrongful, even if not criminal. But as the Third Circuit explained in *Castro*, "[o]ur legal system does not convict people of being bad." 704 F.3d at 140. If Petitioner's conduct does not constitute "specific crimes," then respondent has no legitimate interest in punishing him. *Ibid.*

Respondent has no legitimate interest in a rule that forecloses review in non-final cases for which direct review is still available, such as this one, where a defendant asserts that he mistakenly pleaded guilty to conduct that is not criminal. In fact, Respondent represented to this Court that it has no interest even in preserving final judgments in such cases. *See Grzegorczyk* v. *United States*, No. 21-5967, U.S. Br. at 11 (U.S., Mar. 11, 2022).

The only interest that respondent obliquely suggests it is being deprived of is its plea-agreement "bargain." *See* U.S. Br. at 14–15, 22. But respondent never identifies the "critical benefit" it fears losing. U.S. Br. at 22. And the contract principles it invokes do not bear the weight respondent places upon them. Contract law has long recognized that bargains become voidable due to "supervening illegality," RESTATEMENT (SECOND) OF CONTRACTS § 264 (1981),

and mistakes of law, *id*. at § 152. Respondent offers no reason why an appellate waiver that is premised on the mistaken belief that the facts alleged constitute a crime is enforceable, when its only purpose is to preserve an underlying plea that is not enforceable under *Class*, *Bousley*, *Fiore*, and basic notions of fairness.

III. This case is an ideal vehicle to resolve the question presented.

This case squarely presents an important issue that has divided the circuits after percolating for nearly a decade. Respondent's contrary vehicle arguments all rest either on erroneous premises, or on contested facts and legal issues that are immaterial to the question presented.

1. Principally, respondent relies upon the claim that military commission procedures differ from ordinary federal prosecutions. But respondent fails to identify any differences that affected the D.C. Circuit's holding on the question presented below. Nor could it. There are no meaningful differences.

The relevant military commission statutes governing plea agreements are drawn from the Federal Rules of Criminal Procedure. *Compare* 10 U.S.C. § 949i(a), *with* FED. R. CRIM. P. 11; *cf*. *United States* v. *Negron*, 60 M.J. 136, 141–42 (C.A.A.F. 2004); *Class*, 583 U.S. at 180–81. In its briefing in this Court and below, respondent has relied on ordinary federal criminal cases in support of its arguments. The D.C. Circuit relied upon ordinary federal criminal cases in its decision. And, as noted above, the decision below has already been relied upon by both lower courts and respondent in ordinary criminal cases.

2. Respondent also claims that petitioner would have lost his appeal on the merits, even had the D.C. Circuit adopted the rule applied in the Second, Third, and Fourth Circuits. But this argument is irrelevant.

While the existence of alternative grounds to affirm may make a case a poor vehicle in certain circumstances, the decision below neither articulated nor rested upon any alternative bases to affirm. Moreover, the question presented here asks only whether petitioner is entitled to make his merits arguments in the first place. Of course, petitioner is confident he will prevail. But even if his odds are less than certain, this Court routinely decides important questions of criminal procedure whose resolution leaves open the ultimate outcome on the merits for remand. *See*, *e.g.*, *Fischer* v. *United States*, 144 S. Ct. 537 (2023) (granting cert) (argued Apr. 16, 2024). To the extent respondent believes it will prevail on the merits, reversing the decision below will give it that opportunity.

3. Respondent invokes the fugitive disentitlement doctrine as a reason to deny certiorari. But, as respondent concedes, petitioner has never been a "fugitive" in any sense. He has never attempted escape or "flout[ed] the authority of the court[s]." *Ortega-Rodriguez* v. *United States*, 507 U.S. 234, 245 (1993). Nor has he "fled from the restraints imposed … pursuant to his conviction." *United States* v. *Campos-Serrano*, 404 U.S. 293, 294, n.2 (1971); *see also Degan* v. *United States*, 517 U.S. 820, 829 (1996).

To the contrary, petitioner was detained as a juvenile, served eight years in pre-trial confinement, served another two years in Guantanamo before being transferred to a maximum-security prison in Canada, and then served six more years in custody until his

sentence expired. In that time, courts judged his personal conduct on supervised release "exemplary." *Khadr* v. *Bowden Institution*, 2019 ABQB 207, ¶ 41 (Court of Queen's Bench of Alberta, Mar. 25, 2019).

Respondent raises the specter that should petitioner prevail on the merits, secure the vacatur of his conviction, and should respondent then seek his arrest on different charges, that petitioner *might* then seek to evade a legal restraint. There is no factual basis or legal authority for this speculative proposition. Petitioner continues to live openly in Canada. *See Sarland* v. *Anderson*, 205 F.3d 973, 974–75 (7th Cir. 2000) (Posner, J.). And should respondent wish to prosecute him again, it may seek his extradition from the country's closest neighbor and largest trading partner. Treaty on Extradition between the United States and Canada, Can.-U.S., Dec. 3, 1971, 27 U.S.T. 983; Extradition Act of 1999, S.C. 1999, c 18 (Can.) (as amended July 2005).

4. Finally, respondent insinuates that granting certiorari would reward petitioner for strategically delaying the filing of his appeal. This argument mispresents the relevant procedural history.

Under the MCA, an accused does not "file an appeal" with the Court of Military Commission Review ("CMCR"). Rather, the CMCR's review is automatic unless the accused files a waiver, which no one claims was filed here. *See United States* v. *Khadr*, 568 F. Supp. 3d 1266, 1270 (C.M.C.R. 2021). With his case pending in the CMCR, petitioner moved to vacate his convictions once the invalidity of his plea became apparent following the D.C. Circuit's decision in *Hamdan* v. *United States*, 696 F.3d 1238 (D.C. Cir. 2012). The CMCR, in turn, stayed petitioner's case

pending the outcome of related litigation that was ongoing in the D.C. Circuit.[2]

The record also belies respondent's suggestion that petitioner acted in bad faith by asserting his appellate rights after he had received the "benefit" of repatriation to Canada. Petitioner's transfer to a maximum-security prison in Canada benefitted both parties. At the time of petitioner's plea agreement, the Obama administration had adopted a policy of "closing Guantanamo" and using military commission plea agreements to achieve that goal. Exec. Order. No. 13492, 74 Fed. Reg. 4897 (Jan. 22, 2009); Paul Koring, *U.S. presses for Omar Khadr's long-delayed transfer to Canada*, THE GLOBE AND MAIL (Mar. 27, 2012); Peter Finn, *Plea deal in terror suspect's military trial sparks debate,* THE WASHINGTON POST (Mar. 1, 2012). It is therefore, at the very least, disingenuous for respondent to suggest otherwise to this Court.

Petitioner has yielded to the jurisdiction of this country's courts and dutifully asserted every right afforded to him under our laws.[3] At every turn, he has

---

[2] Contrary to respondent's suggestion that petitioner behaved in an unusual or improper way, another military commission defendant, who had pleaded guilty and was repatriated to Australia in 2007, also moved to vacate his conviction at this time. The CMCR then vacated that detainee's conviction on the very grounds that petitioner asserted below. *Hicks* v. *United States*, 94 F. Supp. 3d 1241, 1247–48 (C.M.C.R. 2015). The only reason a different outcome was reached here is that the CMCR panel stayed petitioner's case, whereas the panel in this other detainee's case did not.

[3] Respondent also faults petitioner for failing to "petition the CMCR for mandamus to compel the referral of his case for appellate review (as the CMCR had contemplated)." U.S. Br. 10. But respondent fails to disclose that petitioner moved the D.C. Circuit to stay his case, so that he could avail himself of the CMCR's invitation and thereby potentially moot his appeal.

confronted legal uncertainty and delays wholly out of his control. After two decades, his case has reached this Court on a single issue of national importance that has divided the circuits and was dispositive to the decision below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

T. Barry Kingham
Sylvi Sareva
Joseph Muschitiello
Steven Thomas
Curtis, Mallet-Prevost, Colt & Mosle LLP
101 Park Avenue
New York, NY 10178

Samuel Morison
Military Commission Defense Organization
1620 Defense Pentagon
Appellate Defense Division
Washington, DC 20301

Juan O. Perla
Counsel of Record
Curtis, Mallet-Prevost, Colt & Mosle LLP
1717 Pennsylvania Ave NW Suite 1300
Washington, DC 20006
(202) 452-7373
jperla@curtis.com

Counsel for Petitioner

April 29, 2024

Respondent opposed that motion, however, and the D.C. Circuit denied it.