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Tenth Circuit

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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

CLINT A. LORANCE,

Petitioner - Appellant,

v.

COMMANDANT, U.S. Disciplinary Barracks, Fort Leavenworth, Kansas,

Respondent - Appellee.

No. 20-3055

Appeal from the United States District Court
for the District of Kansas
(D.C. No. 5:19-CV-03232-JWL)

John N. Maher (Kevin J. Mikolashek with him on the briefs), Maher Legal Services PC, Geneva, Illinois, for Petitioner-Appellant.

Jared S. Maag, Assistant United States Attorney (Stephen R. McAllister, United States Attorney; James A. Brown, Assistant United States Attorney, with him on the brief), United States Department of Justice, Topeka, Kansas, for Respondent-Appellee.

Before **BACHARACH**, **EBEL**, and **PHILLIPS**, Circuit Judges.

EBEL, Circuit Judge.

A United States military court-martial convicted Petitioner-Appellant Clint A. Lorance of murder (and a variety of lesser offenses) for actions he took while leading a platoon of soldiers in Afghanistan. After exhausting his direct appeals, Lorance

filed a federal habeas petition challenging his convictions. Lorance now appeals the district court's dismissal of that petition. The sole issue presented in this appeal is whether Lorance's acceptance of a full and unconditional presidential pardon constitutes a legal confession of guilt and a waiver of his habeas rights, thus rendering his case moot. This is an issue of first impression in this Court.

We conclude that Lorance's acceptance of the pardon did not have the legal effect of a confession of guilt and did not constitute a waiver of his habeas rights. Despite Lorance's release from custody pursuant to the pardon, he sufficiently alleges ongoing collateral consequences from his convictions, creating a genuine case or controversy and rendering his habeas petition not moot. Accordingly, exercising jurisdiction under 28 U.S.C. § 1291, we reverse and remand for further proceedings.

I. BACKGROUND

Only days after assuming command of an Army platoon in Afghanistan, then-First Lieutenant Lorance ordered his platoon to fire upon three Afghans, killing two of them. The details of the killings are not relevant to this appeal,[1] but the incident resulted in Lorance's court-martial. United States v. Lorance, ARMY 20130679, 2017 WL 2819756, at *1 (A. Ct. Crim. App. June 27, 2017) (unreported). At the court-martial, Lorance pled not guilty, but a military jury convicted him of murder, attempted murder, wrongfully communicating a threat, reckless endangerment,

[1] Lorance spends much of his opening brief describing the killing, the court-martial, and his direct appeal through the military courts. However, this appeal presents a pure legal issue.

soliciting a false statement, and obstructing justice. After the trial, the convening authority approved a sentence of confinement for nineteen years, forfeiture of all pay and allowances, and dismissal from the military.

Lorance appealed, and the U.S. Army Court of Criminal Appeals affirmed his convictions and resulting sentence. Id. at *7. Lorance then petitioned the U.S. Court of Appeals for the Armed Forces, which denied review. United States v. Lorance, 77 M.J. 136 (C.A.A.F. 2017). Because that court denied review, Lorance was precluded from seeking certiorari to the Supreme Court. 10 U.S.C. § 867a ("The Supreme Court may not review by a writ of certiorari under this section any action of the United States Court of Appeals for the Armed Forces in refusing to grant a petition for review."). Having exhausted his direct appeals, Lorance filed for post-conviction relief from his court-martial convictions in federal district court pursuant to 28 U.S.C. § 2241.

Three days after Lorance filed for habeas relief, the President of the United States issued a full and unconditional pardon to Lorance. Lorance accepted the pardon, resulting in his release from custody. Following the pardon, the U.S. government[2] moved to dismiss Lorance's motion for post-conviction relief, arguing, among other things, that Lorance's release from custody mooted his habeas petition. Lorance responded that his petition was not moot because he continued to suffer collateral consequences from his convictions. The district court agreed that Lorance

[2] Respondent-Appellee is the commandant of the United States Disciplinary Barracks at Fort Leavenworth, Kansas.

continued to suffer collateral consequences but deemed the habeas petition moot nonetheless, concluding that Lorance's acceptance of the presidential pardon constituted a legal confession of guilt and thus a waiver of his habeas rights. The court granted the government's motion to dismiss, and this appeal followed.

II. STANDARD OF REVIEW

This Court reviews de novo the district court's dismissal of Lorance's habeas petition as moot. Fricke v. Sec'y of Navy, 509 F.3d 1287, 1289 (10th Cir. 2007) (denial of habeas relief); Marks v. Colo. Dep't of Corr., 976 F.3d 1087, 1093 (10th Cir. 2020) (mootness).

III. DISCUSSION

Lorance challenges the district court's determination that his acceptance of the presidential pardon constituted a legal confession of guilt and a waiver of habeas rights, rendering his habeas petition moot for lack of a case or controversy. Ultimately, we conclude that the district court erred by dismissing Lorance's habeas petition as moot. We reverse the district court's judgment and remand.[3]

In reaching our conclusion, we address: (A) the impact of Lorance's release from custody on his habeas petition; (B) acceptance of the pardon as a potential legal confession of guilt; (C) acceptance of the pardon as a potential habeas waiver; and (D) the viability of allowing Lorance's habeas case to proceed despite the pardon.

[3] Lorance additionally asks this Court to grant his habeas petition and vacate his convictions. But the merits of Lorance's habeas petition are not before us.

A. Lorance's release from custody did not in itself moot his habeas petition.

Acceptance of the presidential pardon freed Lorance from custody, so we first review how, despite being out of custody, he could still present a live case or controversy in his habeas petition. The district court agreed with Lorance that his release alone did not moot his petition, and the government does not expressly challenge that conclusion on appeal, so this is not currently at issue. Still, we think it worth reviewing because it establishes the baseline—that but for the district court's novel waiver theory, Lorance has a live case or controversy.

We start with the relevant statute, which generally provides that "[t]he writ of habeas corpus shall not extend to a prisoner unless" the prisoner is "in custody." 28 U.S.C. § 2241(c). Notwithstanding that provision, a petitioner's release from custody does not automatically moot a habeas petition. Carafas v. LaVallee, 391 U.S. 234, 237–38 (1968). Instead, a habeas petitioner can maintain his habeas action following his release from custody if he can identify "collateral consequences" constituting "disabilities or burdens [which] may flow from petitioner's conviction." Id. (quotations omitted).

Here, Lorance alleged serious collateral consequences stemming from his convictions and subsequent dismissal from the military. Specifically, the pardon did not restore Lorance's back pay, rank, or Veterans Administration benefits, nor did it credit his years of confinement toward active-duty retirement. The pardon additionally did not erase or expunge Lorance's record of convictions. On appeal,

Lorance further argues that his convictions may preclude him from becoming an attorney due to character and fitness concerns (Lorance is currently in law school).[4]

The district court held that these collateral consequences were sufficient to prevent Lorance's habeas petition from becoming moot. The court continued, however, to conclude that Lorance's acceptance of the pardon had a separate effect of mooting the case, apart from Lorance's release from custody.

The court's logic appears to flow as follows: (1) Lorance accepted an "ordinary pardon," (App. 86), as opposed to one based on innocence, thus implying a recognition of guilt; (2) because Lorance's acceptance was an admission of guilt, it constituted a waiver of appellate and habeas rights; (3) because the court does not have the power to void the pardon, the associated waiver of appellate and habeas rights precludes Lorance's habeas petition; and (4) allowing the case to proceed despite the pardon could lead to an untenable result based on the government's inability to retry him.

The district court resolved this issue of first impression by relying upon questionable inferential leaps. Lorance challenges the court's reasoning, though his arguments are disjointed and often miss the mark. Nonetheless, we agree that the

[4] Lorance also argued that the pardon did not restore his right to vote or sit on a jury. Caselaw suggests otherwise. See Robertson v. Gibson, 759 F.3d 1351, 1353–54 (Fed. Cir. 2014); Bjerkan v. United States, 529 F.2d 125, 129 (7th Cir. 1975); see also Frequently Asked Questions, Off. of Pardon Att'y, Dep't of Just. (May 20, 2021), https://www.justice.gov/pardon/frequently-asked-questions ("[A pardon] remove[s] . . . restrictions on the right to vote . . . or sit on a jury . . . .").

district court's reasoning is flawed and that the court reached the incorrect result. The following sections address the key points in the district court's analysis.

B. Lorance's acceptance of the presidential pardon did not constitute a legal confession of guilt.

We consider this the key issue in this appeal because the rest of the district court's analysis rested upon the premise that Lorance's acceptance of the presidential pardon constituted a legal confession of guilt, similar to a guilty plea. Specifically, the district court ruled that acceptance of a presidential pardon waives appellate and habeas rights because acceptance has the legal effect of an admission of guilt. The district court appears to have been the first federal court to make that determination.

Ultimately, we conclude that Lorance's acceptance of the presidential pardon does not have the legal effect of a confession of guilt. To reach that conclusion, we first consider the relevant background and history of the presidential pardon power, then apply those considerations to the facts of this case.

(1) The Pardon Power Generally

The Constitution empowers the President "to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment." U.S. Const. art. II, § 2, cl. 1. This plenary power allows the President to "reprieve or pardon all offenses after their commission, either before trial, during trial or after trial, by individuals, or by classes, conditionally or absolutely, and this without modification or regulation by Congress." Ex parte Grossman, 267 U.S. 87, 120 (1925). The case before us does not address the scope of the President's pardon power, but instead the

legal effect that accepting a pardon has on subsequent judicial proceedings. Like much of pardon law, this is an undeveloped area of caselaw.

The text of the Pardon Clause speaks to "Pardons" for "Offences against the United States." U.S. Const. art. II, § 2, cl. 1. A pardon is the "act . . . of officially nullifying punishment or other legal consequences of a crime." Pardon, Black's Law Dictionary (11th ed. 2019). Thus, a President may "legally absolve a person of a crime that he or she has committed, regardless of whether the person has been convicted." Pardon Clause, Black's Law Dictionary. This comports with the modern common meaning of "pardon." See Pardon, Webster's Third New International Dictionary (1986) ("[T]o absolve from the consequences of a fault or the punishment of crime [or] to remit the penalty of (an offense) . . . .").

The historical record sheds little light on the Pardon Clause. The Constitutional Convention engaged in "little discussion or debate" regarding the pardon power. Schick v. Reed, 419 U.S. 256, 262 (1974). In the Federalist Papers, Hamilton described the necessity of the executive clemency authority: "The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel." Id. at 263 n.6 (quoting The Federalist No. 74, at 500–01). Hamilton also wrote that the presidential pardon power was intended to "resembl[e] equally that of the King of Great-Britain and the Governor of New York." Id. at 263 (quoting The Federalist No. 69, at 464).

Supreme Court caselaw on presidential pardons is also fairly sparse.[5] The Court first addressed the pardon power in 1833, describing a pardon as "an act of grace, proceeding from the power intrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed." United States v. Wilson, 32 U.S. (7 Pet.) 150, 160 (1833) (emphasis added). That, at least, could suggest that accepting a pardon is an acknowledgement of guilt for a crime the pardonee has actually committed.

However, the Supreme Court later retreated from that definition, rejecting that "the sense or meaning of the word [pardon]" "exclusively . . . refer[s] to an absolute pardon, exempting a criminal from the punishment which the law inflicts for a crime he has committed." Ex parte Wells, 59 U.S. (18 How.) 307, 309 (1855). Instead, the Court thought "pardon" simply meant "forgiveness, release, remission," including "[f]orgiveness for an offence, whether it be one for which the person committing it is liable in law or otherwise." Id. Thus, the Court recognized that "the [pardon] power was to be used according to law . . . , particularly when the circumstances of any case disclosed such uncertainties as made it doubtful if there should have been a

[5] Further complicating things, the Supreme Court has taken inconsistent positions in addressing the pardon power. Initially, the Court suggested that a pardon "blots out of existence the guilt [of the offender], so that in the eye of the law the offender is as innocent as if he had never committed the offence." Ex parte Garland, 71 U.S. (4 Wall.) 333, 381 (1866). Since then, however, subsequent Supreme Court cases have at least implicitly rejected that notion, such that federal courts now agree that a pardon does not "blot out guilt or expunge a judgment of conviction." In re North, 62 F.3d 1434, 1437 (D.C. Cir. 1994); accord Nixon v. United States, 506 U.S. 224, 232 (1993); Bjerkan, 529 F.2d at 128 n.2.

conviction of the criminal." Id. at 310 (emphasis added). This means that presidential pardons are not reserved solely for the rightfully convicted—an innocent person, or even a guilty one, unjustly convicted, might warrant pardon as well.

Despite this recognition, the Court's dicta in a later case, Burdick v. United States, 236 U.S. 79 (1915), has been interpreted to suggest that a pardon "carries an imputation of guilt; acceptance a confession of it." Id. at 94; accord United States v. Schaffer, 240 F.3d 35, 38 (D.C. Cir. 2001) ("[A] pardon does not, standing alone, render Schaffer innocent . . . . In fact, acceptance of a pardon may imply a confession of guilt."). Here, the district court relied on this Burdick's dicta in concluding that Lorance's acceptance of the presidential pardon had the legal effect of a confession of guilt. On appeal, the government likewise mainly points to Burdick and its dicta. Yet we do not think Burdick means what the district court read it to mean.

Although no one disputes that Burdick's statement that a pardon "carries an imputation of guilt; acceptance a confession of it," was dictum, that does not alone render it unreliable. 236 U.S. at 94. See Gaylor v. United States, 74 F.3d 214, 217 (10th Cir. 1996) ("[T]his court considers itself bound by Supreme Court dicta almost as firmly as by the Court's outright holdings . . . ."). Instead, the problem with the district court's reliance on Burdick is that the district court appears to have taken the Court's statement out of context, giving it legal effect that ignores the context of that statement. For this reason, as explained below, we conclude that Burdick does not

support the district court's determination that Lorance's acceptance of the pardon had the legal effect of a confession of guilt.

In Burdick, a newspaper editor refused to divulge his sources of information to a grand jury, claiming that his answers might tend to incriminate him in connection with the unlawful disclosure of confidential information by public officials. 236 U.S. at 85–86. To eliminate that defense to testifying, the President issued a pardon to the editor "for all offenses . . . which he . . . has committed or may have committed" in obtaining the confidential information. Id. at 86. When the editor rejected the pardon and continued to refuse to testify, the court charged him with contempt. Id. The question presented to the Supreme Court regarded "the effect of the unaccepted pardon," specifically, whether it "removed from [the editor] all danger of accusation or conviction of crime," thus allaying the risk of self-incrimination. Id. at 87.

The Court answered that question by referring to United States v. Wilson, 32 U.S. (7 Pet.) 150 (1833), which held that a pardon had no effect unless accepted by the pardonee. Burdick, 236 U.S. at 90–94. The Burdick Court concluded that the editor had the right to refuse the pardon and to continue to decline to testify. Id.

In reaching the latter conclusion, the Court rejected the government's argument that a pardon was analogous to legislative immunity. It is in that context that the relevant dictum arose:

> This brings us to the differences between legislative immunity and a pardon. They are substantial. The latter carries an imputation of guilt; acceptance a confession of it. The former has no such imputation or confession. It is tantamount to the silence of the witness. It is noncommittal.

> It is the unobtrusive act of the law given protection against a sinister use of his testimony, not like a pardon, requiring him to confess his guilt in order to avoid a conviction of it.

Id. Given the unique character of a pardon, the Court thought it relevant to consider why the editor refused the pardon. Specifically, the Court noted that the editor's "reasons for [refusing the pardon] were personal," and that even if they stemmed from the editor's "sensitiveness," "the personal disgrace or opprobrium attaching to the exposure of crime" was a "consideration . . . not out of place in the case at bar." Id. (quotation omitted). The Court acknowledged that "such consequence may influence the assertion or relinquishment of a right," and contrasted these "personal" consequences with "penal consequences." (Emphasis added.) Id.

In this context, "such consequences" undeniably referred to the personal feelings or the public disgrace that accepting a pardon might bring. The Court was addressing personal consideration that might persuade someone to reject a pardon. The Court was not referring to the legal consequences such as the loss of a legal right collaterally to challenge a defective conviction when it used that language. Indeed, potential legal consequences of loss of the ability to challenge the legality of a pardoned conviction was not even an issue in that case.

This comports with the Court's suggestion elsewhere in Burdick that a pardon could have "consequences of even greater disgrace than those from which it purports to relieve." Id. at 90. The Court noted that a wrongfully convicted person might reject a pardon to avoid the "confession of guilt implied in the acceptance of a

pardon," "preferring to be the victim of the law rather than its acknowledged transgressor, –preferring death even to such certain infamy." Id. at 90–91.

The way the district court read that language was to mean that an acceptance of a pardon is a literal confession of guilt, with all corresponding legal consequences. But a far more plausible reading is to read Burdick to mean that acceptance of a pardon only makes the pardonee look guilty by implying or imputing that he needs the pardon. This reading, focusing on public opinion of the pardonee, lines up with the Court's references to sensitiveness, personal disgrace, opprobrium, and infamy, and its distinction between personal consequences and penal ones.

Although various federal courts have parroted Burdick's statement that "acceptance of a pardon may imply a confession of guilt" (or some variation to that effect), see, e.g., Schaffer, 240 F.3d at 38, none have given formal, legal effect to such an implied confession. Instead, they generally cite Burdick to support the proposition that acceptance of a pardon does not erase guilt. See, e.g., Hirschberg v. CFTC, 414 F.3d 679, 682 (7th Cir. 2005) ("A pardon in no way reverses the legal conclusion of the courts . . . ." (citing Burdick, 236 U.S. at 94)). Neither the district court below nor the government on appeal identify a single case in which a federal court has applied Burdick to hold that acceptance of a presidential pardon constitutes a legal confession of guilt and a consequential waiver of habeas rights.

We reject that draconian reading of Burdick. Nothing in the Court's opinion purports to establish that acceptance of a pardon is the legal equivalent of a confession of guilt, with all accordant legal consequences. We think that is too much

baggage to tie to Burdick's dicta, which arose in the context of discussing personal motivations behind refusing a pardon, and, specifically, the public perception associated with acceptance. If the Court had meant to impute other, legal consequences to the acceptance of a presidential pardon, it surely would have said so explicitly.

Moreover, even the government's reading of this dictum in Burdick cannot be taken literally. As both parties acknowledge, not all pardons constitute a confession of guilt. For example, a president can issue a posthumous pardon, and a deceased individual cannot confess his guilt. See generally Darryl W. Jackson et al., Bending Toward Justice: The Posthumous Pardon of Lieutenant Henry Ossian Flipper, 74 Ind. L.J. 1251 (1999) (first posthumous pardon). A president may also expressly base a pardon on the belief that the pardonee is innocent of the crime for which he was convicted. See, e.g., Richards v. United States, 192 F.2d 602, 606 (D.C. Cir. 1951) (referring to a pardon "granted by the Executive on the express ground that the convicted man's innocence had been established, and that therefore his previous conviction was a miscarriage of justice"). Presidents have also issued pardons to individuals not yet convicted. See United States v. Arpaio, No. CR-16-01012-001-PHX-SRB, 2017 WL 4839072, at *2 (D. Ariz. Oct. 19, 2017) (unreported) (acceptance of pardon after the court found pardonee guilty but before the court entered judgment of conviction); Morgan Chalfont, Trump Defends Intervening In War-Crimes Cases, The Hill (Nov. 25, 2019), 2019 WL 6310696 (pardonee pleaded not guilty to murder and was facing trial at the time of the pardon).

Federal regulations and statutes also recognize that not all pardons imply an admission of guilt. The Department of Justice's Standards for Considering Pardon Petitions addresses "[p]ersons seeking a pardon on grounds of innocence or miscarriage of justice." § 9-140.112(C), https://www.justice.gov/pardon/about-office-0 (emphasis added). Additionally, the federal statute addressing claims for damages for unjust conviction and imprisonment against the United States allows a plaintiff to prove his unjust conviction by showing that "he has been pardoned upon the stated ground of innocence and unjust conviction." 28 U.S.C. § 2513(a)(1).

All this confirms that not every acceptance of a pardon constitutes a confession of guilt and the government's broad reading of the Burdick dictum simply cannot be correct. That means we must look at the particular circumstances of Lorance's pardon.

(2) The Pardon in This Case

The events underlying Lorance's court-martial took place in 2012. In the ensuing nine years, Lorance never once expressly acknowledged guilt. In the court-martial, Lorance pled not guilty to all charges. Following his conviction, Lorance exhausted his direct appeals through the military courts, claiming unjust conviction. Lorance then filed this habeas action, again claiming unjust conviction. Throughout the entire process, Lorance has maintained his innocence.

In addition to his efforts to obtain judicial relief, Lorance petitioned for executive clemency, writing to the Secretary of the Army, the Pardon Attorney, and the President. In those letters, Lorance again asserted his innocence and unjust

conviction. (Supp. App. 71–78 ("Lorance's order . . . was given not to murder, but to protect his Platoon. Thus, rules of engagement compliance is not double murder or attempted murder . . . .").)

In response to those letters, the President pardoned Lorance. The pardon stated that the President had exercised his constitutional powers to grant Lorance "a full and unconditional pardon for his conviction while serving as a commissioned officer in the United States Army," listing each offense of conviction. (Id. at 82.) The pardon thus does not expressly state—let alone require Lorance to admit—that Lorance committed those offenses, only that he was convicted of them. Nothing else in the pardon's text purports to address Lorance's guilt or innocence,[6] nor does the pardon expressly condition acceptance on a confession of guilt and a waiver of habeas rights.

The U.S. Pardon Attorney included a letter to Lorance with the presidential pardon. Among other things, the letter informed Lorance, "A presidential pardon is a sign of forgiveness. It does not erase or expunge the record of conviction and does not indicate innocence." (Id. at 80 (emphasis added).) The letter does not state that acceptance of the pardon is a confession of guilt or a waiver of habeas rights.

[6] The President's public comments regarding the pardon indicated that he had issued the pardon because he thought that Lorance "got a raw deal" and had been "treated very unfairly." (Reply Br. 8 (quoting news sources).) To the extent we consider those comments, they do not support that Lorance admitted guilt by accepting such a pardon.

We see nothing in these circumstances to suggest that Lorance's acceptance of the pardon constitutes a legal confession of guilt. Throughout nine years of legal proceedings, Lorance has consistently fought the charges and subsequent convictions to every extent possible and has steadfastly maintained that he was innocent and unjustly convicted. Lorance was never informed that acceptance of the pardon would constitute a confession of guilt, and nothing in the text of the pardon purported to establish that guilt or require such a confession. Addressing a similar pardon, the D.C. Circuit has said that although "acceptance of a pardon may imply a confession of guilt," a pardon such as Lorance's "acts on [the] supposed conviction, without purporting to address [the pardonee's] innocence or guilt." Schaffer, 240 F.3d at 38 (emphasis added).

We reach this conclusion on the facts of this case and the specific pardon at issue. We do not suggest that the President could not have chosen to condition Lorance's pardon on a confession of guilt, only that he chose not to do so here, instead granting a pardon that did not purport to address Lorance's innocence or guilt. We reject the district court's suggestion that every presidential pardon constitutes a legal confession of guilt unless expressly grounded on a presidential finding of innocence. Although acceptance of a pardon may imply a public perception of guilt, it does not have the legal effect of doing so where the pardon is not expressly conditioned on such a confession.

In reaching its contrary conclusion, the district court thought it pertinent that, in addition to petitioning for a presidential pardon, Lorance had asked the President

to exercise his Commander-in-Chief powers to disapprove of the findings and sentence of Lorance's court-martial. The court thought that this was an effort to obtain relief based on innocence, and that because this attempt failed and Lorance accepted the pardon that expressly said it did "not indicate innocence," Lorance had confessed his guilt. The government likewise relies on this reasoning to support the district court's judgment, arguing that Lorance must have sought the alternative grounds for relief because he knew that accepting a pardon constituted an admission of guilt.

We find this reasoning unpersuasive. Lorance indeed pursued parallel avenues of relief, but in each case he pursued relief on the same grounds: that he was innocent of the offenses charged and had been unjustly convicted based on a trial and appeal process rife with constitutional infirmities. Lorance rebuts the government's argument by explaining that he sought the alternative form of relief because it, unlike a pardon, would erase his convictions, alleviating the collateral consequences and providing broader relief. The district court is thus correct that Lorance "knew the difference between a pardon" and the alternative relief he was seeking, (App. 82), but the difference was that the pardon provided incomplete relief, not that it constituted a confession of guilt. The pardon was instead merely agnostic as to Lorance's guilt, not purporting to speak to guilt or innocence.

Arguing in support of the district court's order, the government suggests that acceptance of a pardon must constitute an admission of guilt, because "if acceptance did not equate to an admission of guilt, there would be no need to reject the

presidential act of grace under any scenario." (Aple. Br. 13.) But the very case the government bases its position on—Burdick—belies the government's argument. There, the newspaper editor rejected the pardon because he did not want to divulge his confidential sources to the grand jury, regardless of whether he was pardoned for any offenses he might testify about. 236 U.S. at 85. Rejecting the pardon allowed the editor to protect his sources. Id. at 87.

In other scenarios, we can imagine potential pardonees rejecting pardons to avoid the "personal disgrace," "infamy," and "opprobrium" imputed in the public's perception by the acceptance of a pardon, Burdick, 236 U.S. at 91, 94, and choosing instead to try their luck in court. See Wilson, 32 U.S. at 154–55 (defendant pled guilty and refused to avail himself of a presidential pardon at sentencing). After all, should they fare poorly in court, they could still pursue another pardon.

The government additionally argues that Lorance's guilt is established because his convictions are presumed "rightfully done" after the pardon, citing Knote v. United States, 95 U.S. 149, 154 (1877). But what Knote actually says is that once a person is convicted of an offense, regardless of a later pardon, "[t]he offence being established by judicial proceedings, that which has been done or suffered while they were in force is presumed to have been rightfully done and justly suffered, and no satisfaction for it can be required." Id. Thus, the "rightfully done" language refers to "that which has been done or suffered while [the judicial proceedings] were in force," not to the judicial proceedings themselves. This means that a pardon "affords no relief for what has been suffered by the offender in his person by imprisonment,

forced labor, or otherwise; it does not give compensation for what has been done or suffered, nor does it impose upon the government any obligation to give it." Id. at 153–54. It does not mean that Knote creates an irrebuttable presumption that Lorance's convictions were "rightfully done."

The government further complains that Lorance would turn a presidential pardon into an Alford plea, in which a defendant asserts his innocence but pleads guilty on the basis that sufficient evidence exists to convict him of the crime. We find this comparison unpersuasive, but regardless, the President has discretion as to who he pardons and on what terms. If the President wishes to condition a pardon upon an admission of guilt, he may do so; if the President wishes to withhold a pardon from one who continues to proclaim his innocence, he may do so. We simply decline to read into Lorance's pardon a condition that the President in this case chose not to include.

Finally, the government argues that Lorance acknowledged his understanding that a pardon is a confession of guilt by stating below, in his response to the government's motion to dismiss Lorance's habeas petition, that "a presidential pardon is a recognition of guilt." (Supp. App. 16.) The government argues that Lorance cannot backtrack from this concession and "change horses mid-race." (Aple. Br. 18 n.11.) Lorance indeed stated this in the introductory paragraph of his

response, in which he argued that he continued to suffer collateral consequences from his convictions despite the pardon.[7]

We decline to reject Lorance's argument based solely on this one statement. The argument at issue in the motion to dismiss and response was whether Lorance still suffered collateral consequences from his convictions, not whether acceptance of a pardon constitutes an admission of guilt. Acknowledging that accepting a pardon "is a recognition of guilt" is not necessarily the same thing as conceding that it has the legal effect of a formal confession. Lorance's statement was an aside, meant to support his argument that the pardon did not blot out the guilt associated with his convictions or erase the convictions' collateral consequences. This was a direct response to the government's argument in its motion to dismiss that the pardon blotted out the existence of Lorance's guilt. The government did not raise its concession-of-guilt argument until its reply brief below.

Lorance has thus championed the same horse throughout these proceedings, consistently arguing that he suffers from ongoing collateral consequences from his convictions despite the pardon, that he was unjustly convicted, and that his habeas petition is not moot.

* * *

[7] Regardless, the government does not argue that any error made by the district court below in holding that acceptance of a pardon was an admission of guilt was invited error based on this single statement in Lorance's response to the government's motion to dismiss. Thus, invited error is not before us.

In sum, we reject the government's reading of the dicta in Burdick to mean that accepting a pardon had the legal effect of a confession of guilt in this case where Lorance has maintained his innocence and unjust conviction throughout all proceedings and based his pardon petition on those grounds, and where the pardon did not purport to address Lorance's innocence or guilt and did not condition acceptance on a confession of guilt. Accordingly, we hold that the district court erred by relying upon Burdick's dictum to find that Lorance's pardon acceptance had the legal effect of confessing his guilt.

This conclusion alone warrants reversal, because the district court based its mootness determination on the proposition that Lorance's pardon acceptance constituted an admission of guilt, which in turn constituted a waiver of his appellate and habeas rights, rendering his petition moot.[8] But we also independently reject the district court's mootness and waiver analysis for a further reason, as we explain in the next section.

C. Lorance's acceptance of the presidential pardon did not constitute a waiver of habeas rights.

In reaching its habeas-waiver determination, the district court also relied upon (1) state court cases holding that acceptance of a gubernatorial pardon constitutes a waiver of appellate rights, and (2) federal cases dealing with plea agreement appeal

[8] The district court did not rule on Lorance's habeas petition on the merits. (App. 87). The sole issue before us is whether Lorance's acceptance of the pardon renders his habeas petition moot. We do not address the merits of Lorance's habeas petition.

waivers. We disagree with the district court's waiver analysis on these grounds, concluding that even if acceptance of a pardon constitutes a legal confession of guilt (a proposition we previously rejected), it does not constitute a waiver of habeas rights.

As an initial matter, we decline to follow the state court cases addressing gubernatorial pardons. Those cases provide little guidance as to the impact of the acceptance of a presidential pardon on federal habeas rights. Additionally, because we conclude above that Lorance's acceptance of the presidential pardon did not constitute a confession of guilt, we reject the district court's waiver conclusion to the extent it is based on that premise.

For that reason, the district court's reliance on United States v. Hahn, 359 F.3d 1315 (10th Cir. 2004) (en banc) (per curiam), and United States v. Cockerham, 237 F.3d 1179 (10th Cir. 2001), was misplaced. Those cases involve the waiver of appellate rights and habeas rights pursuant to a plea agreement, and the district court apparently deemed Lorance's acceptance of the pardon the legal equivalent of a plea agreement.

In plea agreements, defendants sometimes waive their appellate and collateral rights. Here, Lorance never pled guilty and never expressly agreed to waive his appellate or habeas rights, regardless of whether his acceptance of the pardon implied guilt. A misplaced analogy to a plea agreement cannot establish that Lorance knowingly and voluntarily waived his habeas rights by accepting the pardon while still professing his innocence and unjust conviction.

And, further, even if Lorance's acceptance of the pardon could imply a confession of guilt (again, which we have previously rejected in this opinion), that does not mean that he consequently waived his habeas rights. Even a guilty person can collaterally challenge his conviction, if not on grounds of innocence—after all, habeas petitions are not limited to claims of actual innocence. Thus, federal law and the Constitution protect the rights of the guilty as well as the innocent, and indisputably guilty people challenge the procedural lawfulness of their arrest and conviction every day.[9]

Neither the district court below nor the parties on appeal identify any other federal court that has directly ruled on whether acceptance of a presidential pardon constitutes a legal confession of guilt and a waiver of appellate and habeas rights. But the few cases that do touch on mootness in light of a pardon support our analysis, because they reject the general notion that a presidential pardon automatically moots a habeas petition.

For example, in United States v. Schaffer, 240 F.3d 35 (D.C. Cir. 2001), the defendant was convicted of bribing public officials but accepted a presidential pardon while his appeal was pending before the D.C. Circuit.[10] Id. at 36–37. If Schaffer's

[9] When defendants knowingly and voluntarily plead guilty, the pleas generally prevent the defendants from pursuing habeas relief—not because they're guilty but because their guilty pleas break the chain of causation. *Tollett v. Henderson*, 411 U.S. 258, 267 (1973). Lorance's guilty plea could not have broken the chain of causation because his conviction preceded the pardon.

[10] The precise procedural history of Schaffer is quite convoluted. The district court sentenced Schaffer to a term of imprisonment after a panel of the D.C. Circuit (continued)

acceptance of the pardon had constituted a waiver of appellate and habeas rights, the D.C. Circuit would have had to dismiss the pending appeal as moot, leaving Schaffer's conviction in place. But the Schaffer court rejected the government's argument that the defendant's conviction became final as a result of his acceptance of the pardon. Id. Instead, because of "the unpredictable grace of a presidential pardon," the court concluded that vacating the conviction was "just and appropriate." Id. at 38. The court reached this conclusion despite acknowledging Burdick's suggestion that "acceptance of a pardon may imply a confession of guilt," because it emphasized that "the pardon acts on Schaffer's supposed conviction, without purporting to address Schaffer's innocence or guilt." Id.

Because the D.C. Circuit vacated Schaffer's conviction instead of leaving it in place, the court necessarily did not associate pardon acceptance with any legal consequences such as a waiver of appellate rights. Schaffer thus supports the proposition that acceptance of a pardon does not constitute a waiver of appellate rights where the pardon does not purport to address the pardonee's innocence or guilt. We see no reason why that result should be different in the context of habeas rights. Here, that means that Lorance's acceptance of the presidential pardon, which

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denied his appeal and remanded for sentencing. After sentencing, however, the en banc court granted Schaffer's petition for rehearing, vacated the panel's decision, and scheduled oral argument. It was at this juncture that Schaffer accepted a presidential pardon. For the purposes of our analysis, the point is that the defendant accepted a pardon while his appeal of his conviction was pending. Cf. Arpaio, 2017 WL 4839072, at *2 (declining to vacate a conviction where the defendant accepted a pardon after conviction but before sentencing and entry of judgment and no appeal was pending).

did not purport to address Lorance's innocence or guilt, would not constitute a waiver of his appellate and habeas rights.

Two other cases cited by the parties further support Lorance. In the first, Robson v. United States, 526 F.2d 1145 (1st Cir. 1975), the First Circuit rejected the argument that acceptance of a pardon mooted a habeas petition, reasoning that the petitioner still faced collateral consequences and thus could still bring "an action to review the validity of his criminal conviction." Id. at 1147. The court continued on to the merits of the habeas petition despite the petitioner's acceptance of the pardon. Id. This supports Lorance's argument that acceptance of a pardon does not constitute a waiver of habeas rights and that Lorance's habeas petition is not moot because Lorance remains subject to the collateral consequences of his convictions.

The district court below rejected Lorance's reliance on Robson, stating that "Robson did not address whether the defendant accepted the pardon and what effect such an acceptance would have." (App. 83.) We find this unpersuasive. To start, there is no suggestion in Robson that the petitioner refused the pardon, and acceptance of the pardon is implied in the opinion. See 526 F.2d at 1147 ("[Petitioner] has been released from the effect of the sentence by a presidential pardon."). Moreover, the Robson court did specifically address "what effect such an acceptance would have," (App. 83), when it rejected the government's argument that

the pardon rendered the habeas petition moot and continued on to consider the merits of the petition.[11]

The government responds by pointing to Bjerkan v. United States, 529 F.2d 125 (7th Cir. 1975), in which the Seventh Circuit concluded that a presidential pardon did moot a pending habeas petition. Id. at 126–29. But unlike the district court here, the Bjerkan court did not conclude that the habeas petition was moot on the basis that acceptance of a pardon constitutes a confession of guilt and waiver of habeas rights. Instead, the court deemed the habeas petition moot solely because the petitioner faced no collateral consequences stemming from his conviction. Id. at 129.

In fact, Bjerkan actually hurts the government's case and supports Lorance's, because it suggested that if "serious collateral consequences" remain despite acceptance of a pardon, the pardonee's habeas case "would continue to be viable." Id. at 127. Because Lorance continues to face such collateral consequences, Bjerkan suggests that his habeas action "continue[s] to be viable" despite the pardon. Id.

In all, the government cites only one case that directly supports its position, and that only in dicta. In that case, Marino v. INS, 537 F.2d 686 (2d Cir. 1976), the

[11] Lorance also cites several cases concluding that a sentence commutation does not moot a habeas petition. See United States v. Hearst, 638 F.2d 1190, 1192 n.1 (9th Cir. 1980); Madej v. Briley, 371 F.3d 898, 899 (7th Cir. 2004); Simpson v. Battaglia, 458 F.3d 585, 595 (7th Cir. 2006). We cannot rely on those cases, however, because commutations differ from pardons in that a commutation has effect even if not accepted by the recipient. Biddle v. Perovich, 274 U.S. 480, 486–88 (1927). That means a (non-conditional) commutation could never imply a confession of guilt or a waiver of habeas rights, because the recipient has no choice.

Second Circuit considered whether an alien was subject to deportation for having been convicted of a crime of moral turpitude, where the alien had been convicted in a foreign court but pardoned while his appeal was pending. Id. at 688. Because the foreign court had dismissed the alien's appeal due to the issuance of the pardon, the Second Circuit considered the alien's conviction not final. Id. at 692. The court held that the alien had not waived his direct appeal rights because he had not solicited the executive amnesty and had not accepted it, instead trying to pursue his appeal despite the amnesty (the foreign court apparently deemed the pardon effective nonetheless). Id. After reaching this conclusion, the court suggested that acceptance of an executive pardon would have "operate[d] as a waiver of [the alien's] right to contest his guilt." Id. (citing Wilson, 32 U.S. at 161; Burdick, 236 U.S. at 91).

Marino's dicta thus supports the district court's conclusion that acceptance of a presidential pardon constitutes an admission of guilt that waives appellate rights. Marino made this suggestion, however, with no more analysis than a cite to Burdick, much as the district court did here. Because we read Burdick differently, we decline to follow Marino's dicta.

Instead, we follow the lead of a recent Sixth Circuit case, Dennis v. Terris, 927 F.3d 955 (6th Cir. 2019). There, the court considered whether a habeas petitioner's acceptance of a conditional presidential commutation mooted the petitioner's collateral challenge to his sentence. Id. at 957. The Sixth Circuit concluded that it did not. Id. at 960. In doing so, the court relied on the express language of the commutation, which required the habeas petitioner to (1) return a

signed acceptance of the commutation, and (2) enroll in a residential drug abuse program. Id. at 957. The court declined to read into the commutation the additional condition that the petitioner waive his habeas rights:

> In accepting his commutation, Dennis did not give up any rights to attack his sentence collaterally. He met the two conditions the President imposed. And the President did not add any others, such as a requirement that he abandon further attacks on the original conviction or sentence.

Id. at 960.

The same is true here: Lorance's presidential pardon did not condition acceptance of the pardon on an admission of guilt or on a waiver of habeas rights. Indeed, the pardon did not purport to resolve Lorance's guilt or innocence. See Schaffer, 240 F.3d at 38. Again, under these circumstances, we decline to read into Lorance's pardon a condition that the President chose not to include.

We thus reject the district court's conclusion that Lorance's acceptance of the pardon constituted a legal confession of guilt and a waiver of habeas rights. That leaves one final aspect of the district court's opinion to address—that allowing the case to proceed despite the pardon could lead to an untenable result.

D. This case is not moot because the district court can grant the relief Lorance seeks.

After concluding that Lorance's habeas petition was moot because he had waived his habeas rights by accepting the pardon, the district court reinforced its mootness determination on another ground:

> Allowing this case to proceed despite the Pardon could lead to an untenable result. Even if the Court determined that

> acceptance of the Pardon is not a bar but found that a new trial in the military courts [was] warranted, it would be unable to grant such relief due to the Pardon. To find that a judicial process may proceed under these circumstances does not reflect the concept of a live case or controversy.

(App. 88.) The court cited no authority to support mooting a case on these grounds.

The district court misapplied the mootness doctrine in reaching this conclusion. Although the court would be unable to grant relief in the form of a new trial, "[a] case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." Knox v. Serv. Emps. Int'l Union, 567 U.S. 298, 307 (2012) (emphasis added) (quotation marks omitted) (quoting Erie v. Pap's A.M., 529 U.S. 277, 287 (2000)). Here, the district court was not limited to granting relief in the form of a new trial, because the court had the authority to resolve Lorance's habeas petition by vacating his conviction. See Hearst, 638 F.2d at 1192 n.1 (habeas petition not moot following commutation because "[t]he district court on remand will have the power under [28 U.S.C. §] 2255 to vacate [the petitioner's] conviction, if it finds such relief appropriate").

The district court's concern—that it might determine that a new trial is warranted but be unable to grant that relief due to the pardon—does not render Lorance's habeas case moot now, but instead only raises the possibility that the case could become moot at a later time, if the court vacates the conviction but determines that a new trial is warranted. In that scenario, the case really would become moot at that time because the court would be unable to grant any further relief. See Schaffer, 240 F.3d at 38 (where direct appeal becomes moot due to pardon, both the "efficacy

of the jury verdict" against the defendant and the defendant's "claim of innocence" "remain[] only an unanswered question lost to . . . mootness"). But that would provide Lorance with at least part of the relief he seeks, because vacating the convictions would alleviate some of their collateral consequences. Specifically, it would impact Lorance's criminal history, ability to obtain military benefits, and likelihood of passing a bar character and fitness investigation.

In response, the government complains that it is unfair that Lorance can "tak[e] advantage of the President's grace" by accepting the pardon while still challenging his convictions, thus forcing the Executive to continue to litigate Lorance's guilt after pardoning him. (Aple. Br. 27–28.) But that is the result of the government's own action in extending a pardon to Lorance that did not condition acceptance on a waiver of his collateral challenge, and the government cannot complain of that now. What future remedies the government may have is irrelevant, so long as the district court can grant Lorance some form of relief now (which it can).

For these reasons, Lorance still has a live interest in having the district court consider the merits of his habeas petition to determine whether Lorance was convicted in violation of the Constitution. Even though Lorance can never be retried because of the pardon, the district court could vacate Lorance's convictions. That would confirm Lorance's position that he was unconstitutionally convicted and give Lorance real benefits. Thus, contrary to the government's arguments, Lorance's interest is not theoretical.

Accordingly, Lorance's case is not moot because the district court is able to grant him the relief that he seeks.

IV. CONCLUSION

For the reasons provided above, we hold that Lorance's acceptance of the presidential pardon did not constitute a legal confession of guilt or a waiver of his habeas rights, nor did it leave the court without a live case or controversy.[12] The Court reverses the district court's dismissal of Lorance's habeas petition and remands for further proceedings.

[12] Lorance also argues that the district court (1) violated the separation-of-powers doctrine by making waiver of habeas rights a condition of accepting the pardon, and (2) imposed an unconstitutional condition on a presidential pardon under Hoffa v. Saxbe, 378 F. Supp. 1221 (D.D.C. 1974). Because we hold that the district court erred for the reasons state above, we need not address these arguments.