No. 20-3055

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CLINT A. LORANCE,

Plaintiff-Appellant,

v.

COMMANDANT, UNITED STATES DISCIPLINARY BARRACKS, FORT LEAVENWORTH, KANSAS,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS (TOPEKA)
HONORABLE JOHN W. LUNGSTRUM
NO. 5:19 CV-03232-JWL

APPELLANT'S OPENING BRIEF

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Oral Argument Requested

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. The district judge erred in finding that Lorance's acceptance of the President's full and unconditional pardon waived his constitutional access to the courts and statutory rights to vindicate his record of conviction and dismissal from the Army through the Article III court's authorities to reverse, vacate, and set aside the Article I military convictions and sentence. *See, e.g.*, U.S. Const. art. III; 28 USC. § 2241 (federal habeas for military petitioners) and 28 U.S.C. § 2243 ("the court shall . . . dispose of the matter as law and justice require.").

2. The lower court erred when it concluded that Lorance's acceptance of the President's Article II pardon rendered his Article III request to reverse, vacate, and set aside his Article I convictions and sentence moot, when Lorance continues to this day to suffer actual injury traceable to appellee in the form of a dismissal from the Army (equivalent of a dishonorable discharge), record of convictions, and potential obstacles to the admission to practice law as an attorney.

3. The district judge violated separation of powers by imposing *post hoc* Article III judicial conditions on the President's Article II pardon requiring Lorance to forfeit his constitutional access to the courts and his statutory rights (28 U.S.C. §§ 2241 and 2243) to seek vindication for the substantial constitutional deprivations that pervaded his Article I trial and direct appeal and resulted in six

years, three months, and 15 days of unlawful incarceration of an American officer (repeated *Brady* and *Strickland* violations).[1]

PRELIMINARY STATEMENT OF JURISDICTION

The district judge possessed jurisdiction to entertain Lorance's Article III challenges to Article I military tribunals' constitutional errors pursuant to 28 U.S.C. § 2241 (federal habeas corpus for military petitioners), 28 U.S.C. § 2243 (Article III court may enter orders to serve the law and justice), and 28 U.S.C. § 1331 (Federal question jurisdiction).

On November 15, 2019, while Lorance's constitutional claims were pending before the district judge, the President of the United States issued a full and unconditional pardon for each of the offenses comprising the basis of Lorance's request for the Article III district court to check the constitutional errors committed by Article I military tribunals. On January 24, 2020, the district judge granted appellee's motion to dismiss having determined that the pardon rendered Lorance's request of the court to reverse, vacate, and set aside the convictions and sentence as a waiver of collateral review which mooted Lorance's claims.

[1] *Brady v. Maryland*, 373 U.S. 83 (1963) (The prosecution's withholding of evidence that is material to the determination of either guilt or punishment of a criminal defendant violates the defendant's constitutional right to due process. *Strickland v. Washington*, 466 U.S. 668 (1984) (ineffective assistance of counsel where defense was objectively deficient and competent counsel probably would have produced a different outcome).

On March 23, 2020, Lorance timely filed a Notice of Appeal, which was docketed before this Court the same day. Fed. R. App. P. 4(a)(1)(B). This Court possesses jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE CASE

Having exhausted his Article I direct appellate options, Lorance brought the instant civil case to seek Article III collateral review of Article I tribunals' unconstitutional rulings that so contaminated his investigation, court-martial, and appeal to render the convictions and sentence unlawful. *See, e.g.*, *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 14 (1992) (habeas corpus is not an appellate proceeding, rather, an original civil action in a federal civil court).

By way of background, on August 1, 2013, a military jury convicted Lorance, contrary to his pleas, of attempted murder, two counts of unpremeditated murder of "male[s] of apparent Afghan descent," and five counts of conduct prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces in violation of 10 U.S.C. §§ 880, 918, and 934. *United States v. Lorance*, Army 20130679.

The jury acquitted him of one charge: Lorance had been accused of telling his Platoon that the rules of engagement (ROE) had changed to authorize the use of deadly force against any motorcycle on sight in violation of 10 U.S.C. § 907.

The jury sentenced Lorance to confinement for 20 years, forfeiture of all pay and allowances, and a dismissal from the Army, which is the equivalent of a Dishonorable Discharge for commissioned officers. Army authorities subsequently approved 19 years confinement.

Lorance brought a direct appeal to the U.S. Army Court of Criminal Appeals, which denied his petition for a new trial, denied his constitutional assignments of error, and affirmed the convictions and the sentence. *United States v. Lorance*, No. ARMY 20130679, 2017 CCA LEXIS 429 (A. Ct. Crim. App. June 27, 2017).

The U.S. Court of Appeals for the Armed Forces (CAAF) denied review. *United States v. Lorance*, 77 M.J. 136 (C.A.A.F. 2017). Because the CAAF declined to grant review, certiorari to the U.S. Supreme Court was not authorized. 28 U.S.C. § 1259 (the U.S. Supreme Court has jurisdiction to grant certiorari in four specific circumstances. . . . cases in which the CAAF granted a petition for review).[2]

[2] The first level of appeal in the military process involves the Court of Criminal Appeals for the servicemember's branch, for example, the Army Court of Criminal Appeals (Army Court). 10 U.S.C. § 866 (2012). This court consists of uniformed Judge Advocates appointed by The Judge Advocate General. *Id.* Review at the first level is mandatory for sentences involving death, confinement in excess of one year, dismissal of an officer, or a punitive discharge (bad conduct discharge or dishonorable discharge) for an enlisted servicemember where the right to appellate review has not been waived. *Id.* The second level of appeal involves the Court of Appeals for the Armed Forces (CAAF), consisting of five civilian judges appointed by the President. 10 U.S.C. § 867. Review at the second level is largely discretionary. 10 U.S.C. § 867 (2012). If the CAAF denies review, the military appellate process is concluded and access to the United States Supreme

With no direct appeals remaining, Lorance filed an initial petition with the U.S. District Court for the District of Kansas (the "district judge" or "lower court") on December 18, 2018, alleging constitutional errors throughout the investigation, trial, and appeal process. On November 8, 2019, the district judge dismissed all of his claims. *Lorance v. Commandant, United States Disciplinary Barracks*, No. 18-3297-JWL, 2019 U.S. Dist. LEXIS 194827 (D. Kan. Nov. 8, 2019).

The district judge essentially reasoned that because Lorance had not specifically styled his due process claims as prosecutorial misconduct claims during direct appeal, he failed to exhaust that claim, thereby justifying dismissal of the entire lawsuit, even though much of the evidence supporting the prosecutorial misconduct claim arose after the direct appeal process concluded, as discussed more fully below.

Four days later, on November 12, 2019, Lorance re-filed his petition alleging the same constitutional problems but followed the district judge's ruling and simply renamed the "prosecutorial misconduct claim" as part of Lorance's due process claims.

On November 15, 2019, the President issued full and unconditional pardon to Lorance for the convictions and sentence described *supra*. Three days later,

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Court is not available. *Id.* If the CAAF grants review, appeal of its decision can be pursued before the United States Supreme Court. 28 U.S.C. § 1259 (2012).

appellee again moved to dismiss Lorance's habeas petition, this time claiming it was moot in light of the President's pardon.

Lorance opposed. Although the Presidential pardon restored Lorance's physical liberty and relieved Lorance of some of the punishments the result of the convictions, the case remained ripe and justiciable because the pardon did not remove the ineradicable stigma of his dishonorable separation (dismissal) from the Army, the record of the dismissal, restore the office he forfeited (his commission), extinguish the record of convictions, credit the six years and four months of confinement toward a military retirement, provide for back pay and missed promotions, or reinstate eligibility for federal and state veterans' benefits, all of which remain obstacles in Lorance's civilian life as he today progresses through law school as a full-time student with a view toward admission to the bar upon graduation.

Lorance noted that the district judge could have provided relief by granting Lorance's prayer to reverse, vacate, and set aside his convictions and sentence as authorized by the statutes on which Lorance proceeded. But, on January 24, 2020, the district judge again dismissed his entire lawsuit, this time determining that the court could not provide any relief because acceptance of the President's pardon constituted waiver which mooted the civil lawsuit, and, the district judge was limited only to ordering a new military trial. *Lorance v. Commandant, United*

States Disciplinary Barracks, 435 F. Supp. 3d 1169 (D. Kan. 2020) (Attachment 1).

STATEMENT OF FACTS

On July 2, 2012, Lorance was a Platoon Leader with the 82nd Airborne Division serving a combat assignment in Kandahar, Afghanistan, the ancestral home of the Taliban. (Doc. 1). The native of Oklahoma who grew up in Texas had already served ten years as a junior enlisted soldier and then non-commissioned officer whose record and potential were so good that the Army selected him for the highly competitive "Green-to-Gold" program. *Id*. Rather than report for continued duty as a military police officer, Lorance's place of duty was college, at the Army's expense, so that he could earn his bachelor's degree while studying in the Reserve Officers' Training Corps (ROTC) Program.

Already a paratrooper and veteran of the war in Iraq with service in South Korea and Alaska, Lorance excelled at his military science studies, graduated in two years, and commissioned into the Army as a Second Lieutenant, Infantry. His performance at the Infantry Basic Officer Leader's Course (BOLC) was "outstanding." As he readied to report for combat duty in Afghanistan, he already had been awarded three Army Commendation Medals, six Army Achievement Medals, the Good Conduct Medal, and was awarded Parachutist Wings and the Air Assault badge.

Upon arrival in Afghanistan, he was assigned to the brigade's tactical operations center (TOC) as an action officer. *Id.* The Platoon that Lorance would eventually lead engaged in combat operations nearly every time it went on patrol, which was daily in a highly kinetic area. *Id.* The Platoon has lost four paratroopers to enemy fires and improvised explosive devices (IEDs). *Id.* Lorance replaced a Platoon Leader who was medically evacuated from the same battlefield on which Lorance would lead his patrol giving rise to this case, who suffered peppering shrapnel wounds to the face, eyes, and abdomen. *Id.* There were several available Lieutenants to replace the wounded Platoon Leader, but the Army selected Lorance above them all.

July 2, 2012 was his second day as a combat Platoon Leader. Lorance and his paratroopers began their combat patrol from their remote outpost (shaped in a triangle and referred to as a "Dorito") early in the morning, in single file route of march behind a minesweeper. (Doc. 1). The mission was to demonstrate presence and deny the enemy sanctuary in the nearby modest village of earthen mud huts and a dirt road. *Id.* To get to the village, the American paratroopers had to scale up and down 6 – 8 foot earthen berms, which made visibility a challenge. The patrol was treacherous because at night, the Taliban and insurgent fighters would sneak out in the dark and move the bombs, landmines, and IEDs they had planted previously to increase the odds of killing or maiming American Infantrymen. *Id.*

Lorance was directly behind a junior soldier named Skelton who had just scaled a berm. Skelton, although a junior soldier, was a bit older and was a former North Carolina police officer before joining the Army.

Lorance was directly below the berm. Skelton identified three fighting aged males riding on a single motorcycle at an excessive rate of speed toward the Platoon, approaching from the north and the east. Skelton's sworn statement and his testimony were that he perceived them as a threat, thought they could do a "drive by," a "grenade toss," or explode amidst the Platoon as a vehicle borne IED (VBIED), *e.g.*, C-4 under the gas tank. He testified that under the ROE, he could use deadly force to protect himself and his unit. He called out the threat and Lorance gave the order to fire. Skelton fired, but missed. *Id.*

Two other paratroopers were at the head of the patrol near the Afghan National Army (ANA) that was also on the patrol with American paratroopers that morning. Their names are Leon and Thomas. They swore that the ANA fired on the motorcycle as well, perceiving it as a deadly threat.

Lorance radioed a "gun truck," *i.e.* an armored vehicle with larger weapons systems, that he had positioned to provide overwatch protection for the Platoon for this very type of anticipated threat from historical avenues of approach and firing positions, and ordered its crew to fire on the motorcycle. (Doc. 1). Lorance's paratroopers engaged. Two riders were killed and a third fled unharmed. Five

witnesses testified that the time between Skelton's initial volley that missed and the fatal rounds striking the motorcycle riders was between two and 15 seconds. *Id.*

The Platoon continued its patrol and the weapons squad took up overwatch positions on the western-most mud structure's roof, looking to the north. Having spotted three additional fighting aged males bobbing suspiciously to the north and using ICOM, two-way radios, they did not call out the threat to Lorance, but instead, opened fire, killing one and wounding another with a gunshot wound to the arm. The man who had been shot in the arm was taken into custody and tested positive for homemade explosive residue (HME) on his hands. *Id.*

Shortly thereafter, on the road directly west of the village, a lone motorcycle rider approached from the north. American forces intercepted him and he too tested positive for HME on his hands. *Id.*

Accordingly, the Platoon encountered threats from the east, north, and west – from three sides in a geographic area where enemy contact occurred with every previous patrol.

As the Platoon returned to their "Dorito" or patrol base, one paratrooper thought one of the deceased motorcycle riders looked like a village elder and made that report. The seeming combat engagements where then characterized as "CIVCAS," *i.e.*, they were described as resulting in "civilian casualties." *Id.*

One month prior, Afghan President Hamid Kharizai had visited the area to protest an American soldier's having shot and killed a man and his child, two CIVCASs.

Two months prior, Staff Sergeant Robert Bales shot and killed 16 Afghans in the neighboring district of Panjewai, also in Kandahar, Afghanistan, resulting in international outrage at CIVCAS at the hands of American forces. (Doc. 1).

Lorance, on his second day of combat, was separated from the Platoon. The Platoon was placed in a large tent, informed that they were all "going down" for murder, and ordered to provide sworn statements. Although accused of murder, none were administered the military equivalent of *Miranda* warnings (Article 31(b), Uniform Code of Military Justice (UCMJ) rights). *Id.*

Later, the Platoon was issued "cleansing statements." Some paratroopers waived their rights to counsel and to remain silent, while others invoked those rights. *Id.*

Although Lorance never fired his rifle or his pistol, the command took his weapons away from him and he had no job for the balance of the deployment to Afghanistan. Nor could he eat in the dining facility, because one could not enter the facility without a weapon, for fear of insider, or "green on blue" attacks (with the term "blue" being friendly forces and "green" being enemies posing as friendly Afghans). For months, Lorance had no weapon in a combat zone, could not eat in

the dining facility, had to purchase snacks from the snack shop, and was ostracized from the rest of the soldiers. *Id.*

Preparing to board the aircraft back to the United States in September 2012, in front of the entire battalion of paratroopers, the battalion commander, Lieutenant Colonel Jeffrey Howard, stopped Lorance and said in front of all within ear shot, "you are not riding on my plane. Find your own fucking way home!"

Approximately one year later, in August 2013, Lorance's trial began on Fort Bragg, North Carolina. He retained civilian defense counsel, who arrived from out of town the night before the fully contested double murder and attempted murder jury trial, from another trial. It was the second time he met Lorance in person. He interviewed no American witnesses. He interviewed no Afghan witnesses, although the Army's Criminal Investigation Command did, and their names and contact information were contained in the investigatory file. He filed no motions to compel production of evidence. *Id.*

On the morning of trial, a U.S. Army Captain approached Lorance and asked for the sizes for his physical training or "PT" uniform. Lorance was confused and asked why. The Captain responded that "when you are transported after trial to Leavenworth, the command wants in you PT uniform." The trial had not yet begun.

At trial, defense counsel did not call Leon and Thomas for their testimony that the ANA perceived the motorcycle and its riders as a deadly threat and fired on it. This testimony not only spoke to the reasonableness and thus the lawfulness of Lorance's order to fire, but also was a complete defense if the ANA's bullets killed the riders. Defense counsel did not call these witnesses because he did not interview them before trial.

Also at trial, defense counsel did not cross-examine those paratroopers who testified against Lorance that they were accused of murder, granted immunity, and ordered by the commanding officer to testify and cooperate. The jury never knew the full array of reasons why these paratroopers would take the stand against their Lieutenant.

Nor did defense counsel request jury instructions on five affirmative defenses available to Lorance. He also declined to request instructions on lesser included offenses.

Noteworthy is that during the investigation leading up to the trial, in August 2012, the previous Platoon Leader who was wounded in action, whom Lorance replaced, made a written statement to CID agents. In it, he wrote that during his service, he would never let a motorcycle get near his unit (now Lorance's unit) for fear of the deadly danger it posed. Of this three-page, single-spaced type-written

statement, only that sentence is struck out with a line, and his initials, indicating he had made the change.

Defense counsel neither interviewed him nor called him to testify for the defense as to why he would never let a motorcycle near his platoon, or why he had struck out the sentence; these lines of questioning could have illustrated the reasonableness -- and hence the lawfulness -- of Lorance's order to fire.

When the former Platoon Leader was contacted years after the trial and after he left active duty to discuss the circumstances surrounding the statement and the reasons why he lined through the main sentence that favored Lorance and disfavored the prosecution, he refused to speak unless subpoenaed.

Lorance is an educated, intelligent, well-spoken mature person. Defense counsel did not prepare him to testify in his own defense in a case where the jury most assuredly wanted to hear from the Platoon Leader himself as to why he gave the order to fire.

During a hearing outside the presence of the jury, the Article I judge asked the prosecution how much longer the case would take, as she had to attend one of her children's soccer matches. Lorance was facing life in prison.

After trial, Lorance retained a new defense team to assist with his appeals. Post-trial appellate investigation revealed that the prosecution withheld a Significant Activity Report dated August 2, 2012, in which the Army concluded

that Lorance's Platoon was being scouted for an impending attack or ambush and that at least one enemy insurgent was killed.

The prosecution also failed to disclose an aerostat (*i.e.*, a blimp) operator's camera footage of three fighting aged males scouting Lorance's platoon while armed with AK-47 assault rifles and communicating with radios. The prosecution withheld the aerostat operator's written report reflecting this. *Id.*

The prosecution also withheld fingerprint and DNA evidence that fighting aged males on the field that day left their prints and skin on bombs, making them enemy combatants which would have entitled Lorance to a jury instruction under Rule for Courts-Martial 916. ("Killing an enemy combatant in battle is justified"). That the fighting aged males were terrorist bombmakers classifies them under international law as combatants and at no point has the United States challenged the accuracy of the after-acquired fingerprint and DNA evidence.

The prosecution lined out the names of the fighting aged males killed that day on the charging instrument. This atypical action has yet to be explained but suggests that had the names been left in the charging documents, the defense would have been alerted that they were not civilians, but enemy combatants.

The prosecution withheld the testimony of Command Sergeant Major Daniel Gustafson, the senior-most enlisted paratrooper, who swore under oath that

Lorance's order to fire was lawful and correct given the unforgiving circumstances of combat in the ancestral home of the Taliban.

Defense counsel neither secured nor developed any of the evidence noted above, which stood to dramatically change the landscape of the case.

The jury never heard any of these evidentiary points. Before the district judge, Lorance presented that his order was lawful, not only because it was reasonable under the circumstances given the ANA's having fired and Skelton's perception of the threat to U.S. forces and asking permission to fire, but also for another significant evidentiary reason: compliance with the ROE per the ANA's firing and Skelton's firing at fighting aged males demonstrating "hostile intent" and "hostile acts" is a justified, lawful combat engagement where the killing is not murder. RCM 916. On that basis alone, Lorance noted to the district judge, there can be no murder or attempted murder.

Lorance asked the district judge to factor in that those killed were combatant bombmakers (admittedly Lorance did not know that at the time, but surely this evidence was favorable to the defense and should have been disclosed in the context of *Brady* for use in the defense case or as mitigation during sentencing), and the landscape changes dramatically in favor of Lorance and against the prosecution.

Lorance urged the district judge to consider the other evidence the prosecution withheld, to include the aerostat footage of fighting aged males armed with AK-47 assault rifles and radios scouting Lorance's platoon, the aerostat operator's written report, the SIGACT that Lorance's platoon was being scouted for an impending attack or ambush and that at least one enemy terrorist was killed, Gustafson's declaration that the order to fire was reasonable and necessary, Latino's questionable sworn statement as to why he lined out the portion favorable to Lorance about never letting a motorcycle get near his unit, that the prosecution lined out the names of the purported CIVCAS on the Charge Sheet, coupled with the Army's charging the platoon with murder, then granting immunity and orders to testify (that the jury never heard), and that the ANA's rounds may have impacted the motorcycle riders (no ballistics performed), and Lorance's trial is revealed as unconstitutional.

Still, Lorance pled to the district judge additional constitutional errors degrading any semblance of an American trial where the Constitution was observed.

The evidence at trial reasonably raised the following recognized affirmative defenses, for which the trial judge provided no instructions to the jury: 1) Justification, "[a] death, injury, or other act caused or done in proper performance of a legal duty is justified and not unlawful"; 2) Obedience to Orders, "[i]t is a

defense to any offense that the accused was acting pursuant to orders"; 3) Duress, "[i]t is a defense that the accused's participation in the offense was caused by a reasonable apprehension that the accused or another innocent person would be immediately killed"; and 4) Ignorance or mistake of fact, "[i]t is a defense to an offense that the accused held, as a result of ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would be not guilty of the offense."

Lorance implored the district judge to embrace the misconduct of the Chief Judge of the Army Court as an abuse of office infecting Lorance's direct appeal. While Lorance's case was still on direct appeal, the Chief Judge made public comments calling Lorance a "bad apple" who wanted to fight the war his own way, and likened Lorance to First Lieutenant William Calley of the *My Lai* Case Massacre (although, unlike Lorance, Calley actually fired his rifle, and he and his unit killed over 200 women, children, and elderly villagers). Specifically, the Chief Judge misinformed the audience at the Center for Strategic and International Studies, a Washington DC think-tank, of the following:

> Clint Lorance was a very aggressive Lieutenant, who had his own ideas about how the war in Afghanistan should be being fought. Those ideas were not in align with the rules of engagement. And that's the fundamental fact that starts us off the trail here. And off the rails. Lorance gives his Soldiers guidance that is not in accordance with the ROE. Motorcycles are allowed to be engaged on sight - that's the guidance given. Not a lawful order, but his Soldiers don't

> necessarily know that, because a change to the ROE would logically come through the chain of command.[3]

Lorance was acquitted of this offense. By publicly misstating the facts, and by adopting an adversarial advocate's position as opposed to safeguarding the integrity of the legal process, the Chief Judge appears to have violated Canons One and Two of the *Code of Judicial Conduct for Army Trial and Appellate Judges*, May 16, 2018, and the prohibitions against Army attorneys making extrajudicial comments that tend to heighten public condemnation of an accused, implicating Army Regulation 27-26, *Rules of Professional Conduct for Lawyers*, June 28, 2018, ¶ 3.8(f) (providing that Army attorneys will refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused). And, the Chief Judge was shaping a false narrative under the color of his authority and office to malign Lorance as a bad person while he attempted to celebrate the prosecution's decisive action to make Lorance pay for the Army's failures to secure convictions in *My Lai*.

Lorance's defense team brought these matters directly to the Chief Judge, who initially granted a meeting to discuss corrective action. That meeting, however, was postponed until it finally was never scheduled, never took place, and

[3] The Chief Judge's comments can be seen and heard at https://www.csis.org/events/my-lai-massacre-history-lessonsand-legacy (last viewed August 16, 2020) 1:34; *see also* https://www.youtube.com/watch?v=Nu8ODkvwZpg (last viewed August 16, 2020) 1:34.

no corrective action with the imprimatur of General Officers and the Army Court was forthcoming.

Months later, the Judge Advocate General of the Army himself, Lieutenant General Charles Pede, echoed the same inaccurate comments the Army Court Chief Judge had publicly made on March 15, 2018, to at least one Member of the United States House of Representatives and his legislative assistant.[4]

On June 14, 2018, the Secretary of the Army's designee took final action on Lorance's case, taking no favorable action and ordering Lorance dismissed from the Army.

While Lorance's case was awaiting action by the Secretary of the Army as required by law, approximately 72,000 concerned Americans who had learned of the constitutional problems in his case and knew that he was a man of courage with the mettle to voluntarily walk into combat and meet a hardened enemy bent on killing Americans, had signed and sent written petitions urging the Secretary of the Army and the President to disapprove the findings and the sentence as secured without the presence of the Constitution Lorance swore to protect and defend.[5]

[4] Telephone call between Congressman Garrett Graves (R. La.), his legislative liaison, and Lieutenant General Charles Pede.

[5] These written petitions are in addition to the over 100,000 electronic petitions submitted directly to the White House via its website.

Representatives of the Army Judge Advocate General's Corps informed Lorance that if he did not coordinate removal of the dozens of bankers' boxes containing the petitions from the halls of the Pentagon near the Secretary of the Army's office, they would be thrown in the garbage.

> The Office of the Judge Advocate General Criminal Law Division received approximately 55 boxes of petitions in support of a presidential pardon. A representative copy of the petition is attached. They do not have space to store these boxes. If you want these petitions, please contact MAJ [ ] at 571-xxx-xxxx (office) to make arrangement for pickup. If they don't receive an answer by the end of the week (May 19, 2017), they will assume the petitions are not wanted and shred them.

The Judge Advocate General did not consider these petitions when he prepared his recommendation to the Secretary's designee. Additionally, they were not mentioned or shown to the Secretary's designee in June 2018 when he declined Lorance's request for favorable action to disapprove the convictions and the sentence, and instead approved the sentence. By then, the petitions had been retrieved by Lorance who sent a private shipping company to the Pentagon to pick them up and transported them to a storage facility.

The Secretary of the Army had the authority to disapprove the findings and the sentence.

No other officer in Lorance's chain-of-command suffered a negative consequence for the "CIVCAS" incident that occurred on July 2, 2012. The

Company, Battalion, Brigade, and Division Commanders all went on to other assignments, promotions, and career trajectories.

Lorance went to prison.

While pursuing collateral review in district court of the serious constitutional issues noted above, Lorance also sought relief from the President. Lorance pled not guilty, faced the jury, and at no time has he ever admitted guilt. By contrast, he has often repeated, that if he did not give the order to fire that day, and his men were killed or injured, he would be in a different kind of prison for the rest of his natural life. In his papers to the President, he outlined the constitutional problems, *supra*, that Article I tribunals refused to entertain and on these bases – he requested executive clemency.

On November 15, 2019, at approximately 3:30 p.m. central time, the President and the Vice President of the United States called Lorance at the United States Disciplinary Barracks on Fort Leavenworth, Kansas. *Id.* Among other things, the President stated to Lorance, "I am pardoning you and sending you home because I think you got a raw deal" or words to that effect. *Id.*

Later that night, at approximately 10:30 p.m., appellee released Lorance from confinement pursuant to the President's order. His family and close friends were there to embrace him and welcome him home. *Id.*

Today, Lorance is in his first year of law school pursuing his desire to formally study the law, be admitted to the bar, and protect and defend others from constitutional deprivations. *Id.*

Before the district judge, his prayer for relief included a request to reverse, vacate, and set aside the convictions and sentence, well within the statutory power Congress vested in district courts pursuant to 28 U.S.C. §§ 2241 and 2243 in addition to Article III of the Constitution. (Doc. 1).

Although the Presidential pardon forgives the punishment associated with the convictions, state bar examiners and licensing authorities remain able to review underlying conduct to determine character and fitness for admission to practice law. *See In re Abrams*, 689 A.2d 6 (D.C. 1997) (pardoned attorney still subject to professional discipline for lying to Congress).

Lorance pled to the district judge that the effect of the President's pardon did not remove Lorance's dismissal from the Army (equivalent of a dishonorable discharge), which continues to follow him in civilian life. Lorance continues to labor under the collateral consequences of his unconstitutional convictions, which are concrete and ongoing. The district judge had the authority to grant the relief requested, which remained ripe after the pardon issued and would have returned Lorance to the *status quo ante* by blotting out the underlying conduct and restoring him to the man of honor and good character he is.

Notwithstanding all the *Brady* and *Strickland* violations coupled with the senior most legal officers of the Army misleading the public and at least one Member of the Congress, the district judge shuttered the federal courthouse doors to this young American combat officer with no prior criminal history rather a record of excellence and bravery in service of our nation. Lorance's habeas petition sought to clean up what was left after the President's pardon, to clear the way for Lorance to be admitted to the bar. But the district judge wrote:

> Petitioner's knowing and voluntary acceptance of the full and unconditional Presidential Pardon waives his right to collaterally attack his conviction through his habeas petition, thus rendering this matter moot and subject to dismissal.

(Mem. Op. at 12).

SUMMARY OF THE ARGUMENTS

First, the district judge's opinion dismissing this habeas petition displays a fundamental misunderstanding of a pardon issued by the President of the United States, and the impact the pardon issued with respect to the 82nd Airborne American officer before the court.

When the district judge concluded that acceptance of the pardon is an admission of guilt and a waiver of all appeals, he got it flat wrong. Reaching this erroneous conclusion required his relying on inapposite state law cases involving

guilty pleas, plea agreements, and waivers as conditions of favorable governmental treatment.

The federal law informs that a pardon is of course an act of grace conferred on an individual, but it is also part of the American constitutional scheme wherein its grant is on behalf of the public welfare. Pardons are not dispensed only to forgive; they are conferred to correct injustice and exonerate those wrongly convicted. That is what occurred here.

And if the pardon is issued because the President views the proceedings leading to the conviction as unconstitutional, acceptance of the pardon cannot be used to establish guilt, and it does not result in a waiver of access to the courts to seek ultimate vindication and justice.

Second, the district court erred in holding that there was no more vindication and justice for Lorance to seek. That is, the district judge got it wrong in viewing the habeas proceedings as moot, as stripping the Article III courts of the jurisdiction to continue to hear Lorance's very real constitutional claims because there was no further relief to be had.

Once again, this conclusion rested on a misapprehension of the law and facts. As the many cases discussed below make clear, a pardon does not return its recipient to the same position as an innocent person, that is, to pretend that his pardoned wrongdoing never happened. Indeed, the Presidential pardon freed

Lorance from incarceration, forgave the criminality associated with his convictions, and restored basic civil liberties. But the pardon did not remove the ineradicable stigma of his dishonorable "dismissal" from the Army, which still carries tangible consequences, or return his commission as an Army officer, in the words of the caselaw, an office he forfeited.

The pardon did not credit the over six years of confinement toward a military retirement, provide for back pay and missed promotions, or reinstate eligibility for federal and state veterans' benefits. The Article III courts, should they address the constitutional errors that led to Lorance's Article I convictions, can order these remedies in the form of setting aside the convictions. The district judge erred in ignoring this path to vindication.

Third and finally, the district judge violated the Separation of Powers doctrine by imposing conditions on the pardon the President issued: that to benefit from it, Lorance must waive all the rights to seek judicial review of his Article I convictions. This is, quite simply, an impermissible interjection of the judiciary into a matter that is clearly and squarely within the purview of the executive.

Yet the district court did not discuss this issue, nor did it discuss the statutory framework that provides the district courts with extremely broad authority to grant relief for constitutional errors that have led to convictions – a

statutory framework that contains no provision whatsoever excepting out one who has received a Presidential pardon.

ARGUMENTS

I. Lorance's Acceptance of a Full and Unconditional Pardon from the President of the United States does not Constitute Waiver of the Actual Case-and-Controversy he Presented to the District Judge to Blot Out His Record of Conviction and Dismissal from the Army.

A. *De Novo* Standard of Review.

This Court reviews questions of law *de novo*. *United States v. Smart*, 278 F.3d 1168, 1172 (10th Cir. 2002).

B. The President's Pardon Power.

The Constitution gives the President the power to "grant reprieves and pardons for offenses against the United States." U.S. Const. art. II, Section 2, Clause 1. The plenary power of federal executive clemency is intended to help bring the United States as close as possible to "equal justice under law." *Hoffa v. Saxbe*, 37 F. Supp. 1221, 1244 (D.D.C. 1974). "The President may exercise his discretion under the Reprieves and Pardons Clause for whatever reason he deems appropriate and it is not for the courts to inquire into the rationale of his decision." *See Ex parte Grossman*, 267 U.S. 87 (1925); *see also Ex parte Wells*, 59 U.S. (18 How.) 307 (1856) (inherently broad scope of pardoning power).

In *United States v. Wilson*, 32 U.S. 150 (1833), the Court attempted to define a pardon issued pursuant to Article II. The Court was faced with the question of

whether a presidential pardon was judicially noticeable or had to be specially pleaded. The Court based its holding that the pardon had to be pleaded on the finding that a pardon was in the nature of a private deed requiring delivery and acceptance. Chief Justice John Marshall wrote:

> A pardon is a deed, to the validity of which, delivery is essential, and delivery is not complete, without acceptance. It may then be rejected by the person to whom it is tendered; and if it be rejected, we have discovered no power in a court to force it on him.
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> A pardon is an act of grace, proceeding from the power instrusted [sic] 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. It is the private, though official, act of the executive magistrate, delivered to the individual for whose benefit it is intended, and not communicated officially to the court.

Id. at 160-161.

In *Wilson*, the key point was the fact that the recipient, George Wilson had refused to produce a pardon for the Court's notice. *Id*. at 163. Thus, the justices did not consider the pardon in his case, but the definition is often cited.

Nearly a century later, the Court apparently contradicted *Wilson's* requirement that executive clemency be "accepted" by its recipient in *Biddle v. Perovich*, 274 U.S. 480 (1927). President William Howard Taft commuted Perovich's death sentence for first-degree murder to life imprisonment, but

Perovich refused to accept the commutation. *Biddle*, 274 U.S. at 485. Justice Oliver Wendell Holmes, writing for the unanimous Supreme Court, declined to extend the "act of grace" rationale in *Wilson* to *Biddle* and instead focused on the pardon as part of the American constitutional scheme wherein its grant is on behalf of the public welfare.

> A pardon in our days is not a private act of grace from an individual happening to possess power. It is part of the Constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed [citation omitted]. Just as the original punishment would be imposed without regard to the prisoner's consent and in the teeth of his will, whether he liked it or not, the public welfare, not his consent, determines what shall be done.

274 U.S. at 486.

Biddle raised the issue of a prisoner's acceptance of the life imprisonment condition. The Court ruled that in death sentence cases the convict's consent to the commutation is unnecessary because the President, in granting the commutation, had in effect determined that execution of the death sentence was not in the public interest and the prisoner "could not have got himself hanged against the Executive order." 274 U.S. at 487.

That *Biddle's* rationale, *i.e.*, that a decision by the President to grant executive clemency is not only for the benefit of the individual upon whom it is bestowed but also the public good, has been understood to be read together with

Wilson's "delivery and acceptance" reasoning can be seen in President Taft's comments on the exercise of the pardon power, which "is a most difficult one to perform. . . .The only rule [the President] can follow is that he shall not exercise it against the public interest." William Howard Taft, *Our Chief Magistrate and His Powers* (New York: Columbia University Press, 1925), 121.

Accordingly, exercise of the Article II pardon power is rightly viewed as an act of executive mercy affecting the individual recipient done in the interest of the public good. The effect of accepting a Presidential pardon is a different question and depends upon the circumstances of each case.

C. The District Judge Erred by Finding Acceptance of a Presidential Pardon is a Waiver of Fundamental Access to the Courts.

In *Ex Parte Garland*, 71 U.S. 333 (1866), Justice Stephen Field explained:

> A pardon reaches both the punishment prescribed for the offence [sic] and the guilt of the offender; and when the pardon is full, it releases the punishment and ***blots out the existence of guilt***, so that in the eye of the law the offender is as innocent as if he had never committed the offence. If granted before conviction, it removes the penalties and disabilities consequent from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity. There is only this limitation to its operation; ***it does not restore offices forfeited***, or property or interests vested in others in consequence of the conviction and judgment.

Garland, 71 U.S. at 380-381 (emphasis added).

According to *Garland*, the effect of a pardon is almost complete restoration, except for offices forfeited or interests vested in others due to the conviction. *Id.*, *see also United States v. Klein*, 80 U.S. (13 Wall.) 128, 147, 20 L. Ed. 519 (1871); *United States v. Padelford*, 76 U.S. (9 Wall.) 531, 543, 19 L. Ed. 788 (1869).

But, cases since *Garland* have made it clear that a pardon does not return its recipient to the same position as an innocent person, that is, to pretend that his pardoned wrongdoing never happened.

For example, in *Carlesi v. New York*, 233 U.S. 51 (1914), the Court recognized that the effect of a pardon was not really to blot out existence of guilt, so that in the eye of the law the offender is an innocent as if he had never committed the offence, such that a pardoned federal offense could still be considered by a state when that state was punishing the offender for a state offense.

A New York state court found Carlesi guilty of forgery under state law. Previously, a United States district court convicted him of selling and possession of counterfeit currency, for which the President pardoned him. Notwithstanding the pardon, the judge in the state court forgery case treated the pardoned offense as a prior conviction for purposes of sentencing. *Carlesi*, 233 U.S. at 53.

The Supreme Court agreed, noting that New York's use of the pardoned federal conviction to enhance Carlesi's sentence as a second-offender for the forgery did not constitute punishment for the earlier pardoned offense because the

pardon did not "obliterate" the first offense, only punishment for it. *Id*. at 59; *see also, Nixon v. United States*, 506 U.S. 224, 232 (1993) ("the granting of a pardon is in no sense an overturning of a judgment of conviction by some other tribunal; it is [a]n executive action that mitigates or sets aside *punishment* for a crime."). (Emphasis in original) (quoting BLACK'S LAW DICTIONARY 1113 (6th ed. 1990)); *United States v. Swift*, 186 F. 1002, 1017 (N.D. Ill. 1911) (the post-Civil War cases "dispel the idea that the acts themselves, as distinguished from their penal consequences, were obliterated by pardon or amnesty. . . . A pardon or amnesty . . . involves forgiveness, not forgetfulness.").

With similar views, Professor Samuel Williston, in his article *Does a Pardon Blot Out Guilt?*, 28 HARV. L. REV. 647 (1915), elaborated:

> A pardon is an act of grace, proceeding from the power entrusted 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.*
>
> * * * * *
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> The true line of distinction seems to be this: The pardon removes all legal punishment for the offence. Therefore if the mere conviction involves certain disqualifications which would not follow from the commission of the crime without conviction, the pardon removes such disqualifications. *On the other hand, if character is a necessary qualification and the commission of a crime would disqualify even though there had been no criminal prosecution for the crime, the fact that the criminal has been convicted and pardoned does not make him any more eligible.*

Id. at 653 (emphasis added).

The Supreme Court further refined *Wilson* and *Garland* in *Burdick v. United States*, 236 U.S. 79 (1915). President Wilson offered a pardon to the petitioner which would have had the effect of immunizing him from any liability for incriminating statements made in the course of testifying before a federal grand jury. The petitioner had previously refused to testify concerning alleged custom fraud violations, claiming his Fifth Amendment right. After tender of the prospective pardon, Burdick still refused to testify and was held in contempt. Upon a writ of habeas corpus, the Supreme Court reversed the contempt conviction, finding that the petitioner had, in effect and consistent with the "deed analogy," rejected the offered pardon.

> Granting, then, that the pardon was legally issued and was sufficient for immunity, it was Burdick's right to refuse it, as we have seen; and it, therefore, not becoming effective, his right under the Constitution to decline to testify remained to be asserted. and the reasons for his action were personal. It is true we have said (*Brown v. Walker*, 161 U.S. 591, 605) that the law regards only mere penal consequences and not "the personal disgrace or opprobrium attaching to the exposure" of crime, but certainly such consequence may influence the assertion or relinquishment of a right. This consideration is not out of place in the case at bar. ***If it be objected that the sensitiveness of Burdick was extreme because his refusal to answer was itself an implication of crime, we answer, not necessarily in fact, not at all in theory of law. It supposed only a possibility of a charge of crime and interposed protection against the charge, and, reaching***

> ***beyond it, against furnishing what might be urged or used as evidence to support it.***

236 U.S. at 94 (emphasis added).

In *Burdick*, the Court explicitly rejected the government's principal argument: "[t]hat a pardon by its mere issue has automatic effect resistless by him to whom it is tendered. . . ." *Id*. at 90. The pardon could be rejected because it might involve "consequences of even greater disgrace than those from which it purports to relieve." *Id.*

The Court further elaborated:

> Circumstances may be made to bring innocence under the penalties of the law. If so brought, escape by confession of guilt implied in the acceptance of a pardon may be rejected, -- preferring to be the victim of the law rather than its acknowledged transgressor -- preferring death even to such certain infamy.

Id. at 90-91.

From *Burdick's dicta*, it has been proffered that acceptance of an executive pardon ***may imply*** a confession of guilt. *See, e.g.*, Laurence H. Tribe, *American Constitutional Law*, at 256, n. 10 (2nd 1988). ("Indeed, far from wiping out guilt, the acceptance of an executive pardon may imply a confession of guilt").

"May" is permissive, however; it is not directive, as in the words "shall" or "does." It expresses possibility.

"Imply" is a suggestion, not establishing or confirming as evident. Placing the two words together as in "may imply" further dilutes the attenuation from a sincere and genuine confession of guilt. The canon of plain meaning applies demonstrating that the acceptance of a pardon is not, as the district judge wrongly found, a confession of guilt, in this case.

Indeed, it has been argued that an acceptance of a pardon may be to avoid the expense, trauma, and other collateral effects of a criminal proceeding so that its acceptance is not inconsistent with a position of innocence.

But *Burdick* was about a different issue: the ability to turn down a pardon. The language about imputing and confessing guilt was just an aside — *dicta*. The court meant that, as a practical matter, because pardons make people look guilty, a recipient might not want to accept one. But pardons have no formal, legal effect of declaring guilt, as the district judge below wrongly concluded.

Indeed, in some cases pardons are used to exonerate people. This was President Trump's rationale for posthumously pardoning boxer Jack Johnson, the victim of a racially based conviction in 1913 for transporting a white woman across state lines. Mr. Johnson served 10 months in federal prison, as the President stated, "for what many view as a racially motivated injustice." Eric Herschthal, *Why Trump Could Pardon Jack Johnson When Obama Wouldn't,* THE NEW YORK

TIMES (July 18, 2018), https://www.nybooks.com/daily/2018/06/13/why-trump-could-pardon-jack-johnson-when-obama-wouldnt/

Intuitively, if the President pardons a convicted person because he views the proceedings leading to the conviction as unconstitutional, or that the petitioner is actually innocent, acceptance cannot establish guilt as would a legally competent confession. As the Supreme Court noted in *Ohio Bell Tel. Co*. v. *Public Utilities Comm'n*, 301 U.S. 292, 307 (1937), "we do not presume acquiescence in the loss of fundamental rights," which is largely just what the district judge did.

But, the Supreme Court consistently seeks to minimize the possibility of any waiver that is not knowing and voluntary by declaring that courts must "indulge every reasonable presumption against waiver." *Aetna Insurance Co. v. Kennedy*, 301 U.S. 389, 393 (1971) (context of waiver of jury trial). The Court has presumed that the standard for waiver in noncriminal proceedings "is the same standard applicable to waivers of constitutional rights in a criminal proceeding," *D.H. Overmyer Co., Inc. v. Frick Co*., 405 U.S. 174, 185 (1972), namely, that it "not only must be voluntary, but must be knowing, intelligent [and] done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748 (1970).

While waiver is a high bar, it is also well-settled that access to the courts for redress, especially against the government, is one of the highest and most

fundamental privileges of citizenship. *Chambers v. Baltimore & O.R.R.*, 207 U.S. 142, 148 (1907); *McKnett v. St. Louis & S.F. Ry.*, 292 U.S. 230, 233 (1934); *Bounds v. Smith*, 430 U.S. 817, 828 (1977) ("the fundamental constitutional right of access to the courts. . . ." requires prison officials to provide law libraries and persons trained in the law); *Boddie v. Connecticut*, 401 U.S. 371 (1971) (describing general right of unimpeded access to civil courts); *accord NAACP v. Button*, 371 U.S. 415 (1983); *Hoffa*, 37 F. Supp. at 1236 ("pardon cannot require recipient to forfeit his constitutional rights unreasonably").

Against these authorities, and without citing them or discussing them, the district judge determined Lorance's acceptance of the pardon constituted a knowing relinquishment of his fundamental right to redress in the courts, which is error. Lorance never viewed acceptance of the President's pardon as an admission of guilt. Nor does the law impose that condition. The district judge had this information before the court, but chose not to apply it.

Rather than evaluate the law of federal waiver and access to the courts, the district judge resorted to inapposite state law cases involving guilty pleas, plea agreements, and waivers as conditions of favorable governmental treatment, which is also error.

D. The District Judge Errantly Relied on State Cases, Reached a Faulty Finding Based on Misapprehension of the Record, and Arrived at an Incorrect Inferential Waiver Decision.

As a preliminary matter, the district judge mentioned *Wilson* and *Burdick* only in passing. When the lower court mentioned these pivotal cases, it omitted reference to the salient points discussed *supra*. The failure to apply the relevant Supreme Court and related precedents must be reversible error, or at very least an indicator that the rest of the district judge's decision bears great scrutiny.

Additionally, the district judge relied on a series of state law cases involving the effect of gubernatorial pardons granted to state prisoners which held that the executive grant waived direct appeals. "Several cases dealing with state pardons have held that the acceptance of a pardon amounts to a waiver of an accused's rights on appeal." (Mem. Op. at 7).

None of these authorities involved the effect of accepting a full and unconditional pardon from the President of the United States. None of them involved a military petitioner, Article II of the Constitution, or the premise that the grantor believed the grantee "got a raw deal" given the widespread constitutional deprivations pervading Lorance's Article I trial and direct appeal.

Nor do these cases involve federal statutes Congress designed for habeas corpus and collateral review (28 U.S.C. §§ 2241 and 2243), but rather state laws under direct appeal. The district judge's reliance on these authorities is misplaced.

In fact, Lorance never legally or publicly or overtly admitted guilt or confessed. Rather, he sought Article II executive relief while pursuing Article III review – two available and legitimate courses of action. Against this backdrop, the district judge found waiver based on a faulty premise coupled with unsupported assumptions.

> Petitioner in the instant case attempted to go the route of receiving relief from the President based on innocence, but was unsuccessful. Ultimately, he accepted the Pardon that expressly "does not indicate innocence.

(Mem. Op. at 10).

The district judge misinterpreted the plain language of Lorance's efforts before the President. Lorance tailored his requests to the President, the Pardon Attorney, and the Secretary of the Army to draw upon statutory bases in addition to the President's Article II pardon power. Lorance's requests were always based on his proof that Article I military tribunals failed to properly ensure compliance with the Constitution, that is, that the sheer number and severity of the *Brady* and *Strickland* violations discussed more fully, *supra*, demonstrated a fundamentally flawed process which produced untrustworthy and unconstitutional results.

The first request to the President was to grant a full and unconditional pardon on the basis of the unconstitutional investigation, trial, and appeal undertaken by Article I authorities. Acceptance of this relief on this basis is neither an admission of guilt nor confession of it.

Second, Lorance tailored a statutory request, as opposed to a request under Article II of the Constitution, designed to "wipe the slate" clean by "disapproving the findings and the sentence." Congress vested statutory power in the President to serve as a general court-martial convening authority pursuant to 10 U.S.C. § 822 (2012) (describing the President of the United States as a general court-martial convening authority).

As a general court-martial convening authority, the President possessed those statutory powers all such authorities have, to include disapproving the findings and the sentence pursuant to 10 U.S.C. § 860 (2012) (convening authority may disapprove the findings and the sentence).

Accordingly, Lorance sought executive relief in the form of a pardon knowing that its effect would not extinguish his record of conviction or his dismissal from the Army as substantial collateral consequences following him into civilian life. *United States v. Noonan*, 906 F.2d 952 (3rd Cir. 1990) (Presidential action does not expunge record of conviction). Mindful of these effects, he also provided the President with a statutory basis that mirrored the relief he sought before the district judge.

Were the President to disapprove the findings and the sentence under statutory authorities, the effect would have been to blot out the record of conviction and the sentence, and restore Lorance to the *status quo ante*, likely with

back pay, promotion, and credit towards retirement for time served in confinement. *See* 10 U.S.C. § 875 (restoration). Had the President proceeded in this manner and drawn upon his statutory authorities to disapprove the findings and the sentence, the effect would have been to extinguish Lorance's convictions and sentence. The district judge appears to have missed this pivotal point.

Likewise, the relief for which Lorance prayed before the district judge was also designed to restore Lorance to the *status quo ante* – to reverse, vacate, and set aside the convictions and the sentence.

These simultaneous Article II and Article III efforts were pursued to extinguish Lorance's record of conviction and his dismissal from the Army with the overall objective to remove potential obstacles during his character and fitness investigation when applying for admission to the bar to practice law.

The district judge's view that Lorance "attempted to go the route of receiving relief from the President based on innocence" is incorrect, support for which can be found nowhere in the record or the papers Lorance presented to the President, the Pardon Attorney, the Secretary of the Army, or the law.

There is indeed a line of authority standing for the general principle that acceptance of a Presidential pardon "may imply" guilt, which probably explains why the Pardon attorney declined to use those words and instead chose the equivocal language that a pardon "does not indicate innocence."

In any event, Lorance is aware of no authority holding that in every case, acceptance of a pardon is a legally cognizable confession of guilt so clear and informed to rise to the level of a knowing, intelligent, and voluntary relinquishment of statutory and constitutional review of Article I errors in Article III courts. *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938) (describing waiver as "an intentional relinquishment or abandonment of a known right or privilege.").

Lorance accepted the pardon to not only secure his physical liberty from unconstitutional incarceration, but also with faith that his Fifth and Sixth Amendment claims proving his unlawful trial and appeal were finally before the expertise of a constitutional court of the United States – reassured in his fundamental right of access to the courts of his country for the redress of harms inflicted by his government – vested with the power to reverse, vacate, and set aside his convictions and sentence, the effect of which would thereby clean the slate, fully.

Each course of action, pursuit of Article II relief and simultaneous pursuit of Article III relief, is specifically authorized by the Constitution and applicable statutes. Lorance is aware of no authority that these courses of action are mutually exclusive, especially when a pardon only goes so far whereas the district judge was empowered to go all the way. By contrast, as discussed more fully below, there is

widespread authority that acceptance of a pardon does not moot ongoing federal habeas proceedings.

II. The District Judge Erred by Dismissing Lorance's Section 2241 Claims as Moot because even after the Presidential Pardon, Lorance Continues to Suffer actual, ongoing Injuries.

This Court engages in *de novo* review of the district judge's decision to dismiss the entire habeas corpus action based on mootness. *Teets v. Great-West Life & Annuity Ins. Co.*, 921 F.3d 1200, 1211 (10th Cir. 2019); *Brown v. Buhman*, 822 F.3d 1151, 1168 (10th Cir. 2016) (explaining this Court reviews questions of mootness *de novo* "squarely [as] a legal determination.").

Article III of the Constitution permits federal courts to decide only "Cases" or "Controversies." U.S. Const. art. III, § 2; *see Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013). "This case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate." *Spencer v. Kemna*, 523 U.S. 1, 7, (1998). It "requires a party seeking relief to have suffered, or be threatened with, an actual injury traceable to the appellee and likely to be redressed by a favorable judicial decision by the appeals court." *United States v. Vera-Flores*, 496 F.3d 1177, 1180 (10th Cir. 2007).

Mootness is "standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Id.* (quotations omitted).

"The crucial question is whether granting a *present* determination of the issues offered will have some effect in the real world." *Brown*, 822 F.3d at 1165-66; *see Wyo. v. U.S. Dep't of Agric.*, 414 F.3d 1207, 1212 (10th Cir. 2005) (finding case mooted by defendant's new rule, which rescinded portions of prior rule challenged by plaintiff).

An action becomes moot "[i]f an intervening circumstance deprives the plaintiff of a personal stake . . . at any point." *Brown*, 822 F.3d at 1165. In a moot case, a plaintiff no longer suffers a redressable "actual injury." *Ind v. Colo. Dep't of Corr.*, 801 F.3d 1209, 1213 (10th Cir. 2015). "[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969).

But an action is not moot if a plaintiff has a "concrete interest, however small, in the outcome." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307-08 (2012). The court must decide whether a case is moot as to "each form of relief sought." *Collins v. Daniels*, 916 F.3d 1302, 1314 (10th Cir. 2019) (explaining the plaintiff's "burden to demonstrate standing for each form of relief sought . . . exists at all times throughout the litigation.").

"The mootness doctrine . . . constitutes a relatively weak constraint on federal judicial power: 'A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party.'" *Knox v*, 567 U.S. at 308.

Demonstrating mootness is a "heavy" burden, *Cnty. of L.A. v. Davis*, 440 U.S. 625, 631 (1979), and that burden "lies with the party asserting mootness." *Finstuen v. Crutcher*, 496 F.3d 1139, 1150 (10th Cir. 2007).

In the context of confined petitioners, the Supreme Court explained:

> An incarcerated convict's . . . challenge to the validity of his conviction always satisfies the case-or-controversy requirement, because the incarceration constitutes a concrete injury, caused by the conviction and redressable by invalidation of the conviction.

Spencer, 523 U.S. at 7.

Moreover, for prisoners released from incarceration, the underlying conduct which gave rise to the conviction which was pardoned may be considered at sentencing in any subsequent criminal proceeding, *Carlesi*, 233, U.S. at 58, may result in stiffer penalties, *United States v. Morgan*, 346 U.S. 502, 512-13 (1954), or may be introduced to impeach credibility. *Robinson v. United States*, 526 F.2d 1145, 1147 (1st Cir. 1975); *see also Gosa v. Mayden*, 413 U.S. 665, 670 n. 3 (1973).

In similar fashion, the Office of the Pardon Attorney, United States Department of Justice, informed Lorance on November 19, 2019, that a pardon "does not erase or expunge a record of conviction and does not indicate innocence." (Doc. 13 at 3).

The Supreme Court determined long ago that acceptance of a pardon does not restore offices forfeited as a result of conviction. *Garland*, 71 U.S. at 380-81 ("There

is only this limitation to [pardon's] operation; it does not restore offices forfeited. . . .").

Consistent with these authorities, on May 23, 2019, the U.S. Army's Chief of Criminal Law, Colonel William D. Smoot, informed Lorance about the effect of a Presidential pardon:

> I want to ensure that you know that a pardon will not result in a disapproval of the conviction itself, as you request in your cover letter and in the application itself. A pardon is an expression of the President's forgiveness, and it does remove civil disabilities like voting and weapons disqualifiers. However, it does not remove the conviction itself. While the conviction itself is retained, administratively, the impact is that the crime record is separated in the system from pardon records. If you would like additional information on the effect of a pardon, you can visit the Pardon Attorney's website at https://www.justice.gov/pardon.

Application of these authorities demonstrates that Presidential pardon freed Lorance from incarceration, forgave the criminality associated with his convictions, and restored basic civil liberties. But, the pardon did not remove the ineradicable stigma of his dishonorable separation (dismissal) from the Army, that is, restore the office he forfeited (his commission), credit the six years, three months and 15 days of unlawful confinement toward a military retirement, provide for back pay and missed promotions, or reinstate eligibility for federal and state veterans' benefits.

These tangible "collateral consequences" continue to follow Lorance after the pardon and present potential and significant obstacles to his licensure to practice

law. *Carafas v. LaVallee*, 391 U.S. 234, 237 (1968) (holding that habeas petition is not moot as long as petitioner suffers "collateral consequence").

The court below possessed the authority to fashion an order to see that the law and justice were served. 28 U.S.C. § 2243. That redress could have included vacating and setting aside Lorance's conviction and sentence, thereby relieving and vindicating Lorance, and returning him to the position he occupied before his unconstitutional Article I investigation, trial, and appeal. Lorance continues to have a personal stake in the outcome of this live case and controversy. The district judge erred in dismissing his claims as moot, for they linger and hinder. "A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *United States v. Springer*, 715 F.3d 535, 540 (4th Cir. 2013).

In analogous circumstances, Circuit Courts of Appeal have held that the President's exercise of his pardon power does not preclude the beneficiary from pursuing collateral attack against his underlying conviction. In *United States v. Hearst*, 638 F.2d 1190 (9th Cir. 1980), the petitioner filed a habeas petition challenging her conviction for bank robbery on grounds that she was denied effective assistance of counsel and due process of law. *Hearst*, 638 F.2d at 1193. While the petition was pending, the President commuted the petitioner's sentence and she was released. *Id.* at 1192 & n.1. Nonetheless, the Ninth Circuit held that the commutation of the petitioner's sentence did not render her habeas action moot and remanded it

to the district court. *Id.* ("Although [the petitioner] is no longer in federal custody, this case is not moot. The district court on remand will have the power under § 2255 to vacate [her] conviction, if it finds such relief appropriate.").

Likewise, the First Circuit held that a Presidential pardon granted after a petitioner filed for relief from his conviction under Section 2255 does not moot the collateral challenge because a "pardon [ ] does not relieve [the petitioner] from all the disabilities of a conviction." *Robson v. United States*, 526 F.2d 1145, 1147 (1st Cir. 1975).

And, the Seventh Circuit has recognized that a petitioner may proceed with collaterally challenging a sentence commuted while habeas was pending where the commuted sentence exceeds the mandatory minimum for the offense. *See, e.g.*, *Simpson v. Battaglia*, 458 F. 3d 585, 595 (7th Cir. 2006) (still possible to obtain relief after commutation from death to life where collateral attack could have resulted in a term of 20 years, far less than life); *Madej v. Briley*, 371 F.3d 898, 899 (7th Cir. 2004) (claim not moot on collateral attack seeking lower sentence than that provide by executive clemency).

Collateral review in this case was entirely appropriate. The district judge was empowered to grant relief and vacate Lorance's conviction and sentence. The case and controversy are quite live, and not moot, as the district court suggests.

In fact, the district judge incorrectly relied on inapposite caselaw concerning the effect guilty pleas had on a petitioner's right to pursue habeas relief. "In cases dealing with the waiver of appellate rights pursuant to a plea agreement, the argument has been made that a valid waiver of appellate rights deprives the court of constitutional subject matter jurisdiction." (Mem. Op. at 11). On this score, the district judge is accurate.

However, Lorance pled not guilty, did not enter into a plea agreement, and has consistently declined to admit guilt or confess guilt. The district judge's reliance on *United States v. Hahn*, 359 F.3d 1315 (10th Cir. 2004) and *United States v. Cockerham*, 237 F.3d 1179 (10th Cir. 2001) is misplaced and not relevant to the issues presented in this case. *Hahn* involved a New Mexico case where the defendant was convicted of drug violations and a gun charge, and in a second prosecution, he pled guilty to sexual exploitation offenses and agreed to waive his appellate rights in exchange. 359 F.3d at 1317. *Cockerham* involved a defendant's plea of guilty in Oklahoma to narcotics charges and a term of his agreement involved waiver of direct appeal. 237 F.3d at 1180. These cases have no value to the determination before the district judge and the lower court's reliance on them is erroneous.

The district judge wrote further that:

> 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 were 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.

(Mem. Op. at 12).

The district judge's reasoning fails to appreciate the broad powers Congress vested in Article III jurists to fashion an order that goes well beyond releasing the petitioner from confinement pursuant to Section 2241. The lower court was not limited to granting a new trial, as it incorrectly reasoned. Indeed, Section 2243 authorizes the court to grant relief "as law and justice require," which assuredly includes reversing, vacating, and setting aside Lorance's convictions and sentence.

Because of the "disabilities or burdens [which] may flow from" petitioner's conviction, he has "a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him." *Fiswick* v. *United States*, 329 U.S. 211, 222 (1946); *see also In re North*, 62 F.3d 1434, 1437 (D.C. Cir. 1994) ("because a pardon does not expunge a judgment of conviction….").

Finally, the district judge erred by finding *Robson*, *supra*, unpersuasive and thus, irrelevant to the lower court's analysis.

> Petitioner cites *Robson v. U.S.*, 526 F.2d 1145 (1st Cir. 1975), for the proposition that an unconditional pardon does not moot an action to review the validity of the underlying criminal case. In that case, the defendant was out of custody when he was granted a pardon. Because Robson did not address whether the defendant accepted

> the pardon and what effect such an acceptance would have, the Court finds it unpersuasive.

(Mem. Op. at 7, n.1).

The district judge erred because *Robson* was decided squarely on the point that defendant accepted the pardon. In urging the First Circuit that the case was moot, the government contended, "[Robson] has been released from the effect of the sentence by a presidential pardon." *Robson*, 526 F.2d at 1147. As discussed in *Wilson*, *supra*, and noted by the district judge in the lower court's memorandum opinion, to be effective, the pardon had to be accepted pursuant to the "deed theory." If it were not accepted, the government surely would not have proceeded to seek dismissal of Robson's case as moot.

The district judge erred again by concluding *Robson* did not involve "what effect such an acceptance [of a Presidential pardon] would have. . ." (Mem Op. at 7, n.1). But, the First Circuit addressed head-on the effect Robson's acceptance had on his pending habeas claims: "the fact that petitioner has been pardoned does not relieve him from all the disabilities of a conviction," and on that determination, reversed the district court's mootness dismissal. *Robson*, 526 F.2d at 1147; 1149.

The main point: the district judge should have adopted *Robson* to support the correct legal outcome that Lorance's case remains an Article III case and controversy. The fact that Lorance has been pardoned does not relieve him from all the disabilities of a conviction. *Id*.

In *Robson*, Article II, the law, the facts, habeas collateral attack, and the mootness doctrine are all on point with this case and counseled against dismissing Lorance's claims, but the district judge instead resorted to guilty pleas, plea agreements, concepts of waiver as part of plea agreements, and inapposite state law cases to seek support for the errant dismissal, when federal Circuit Court of Appeals precedents informed otherwise. What is more, Lorance is aware of no federal authorities which even remotely discuss the concept of waiver when the facts and the law come together and involve a habeas collateral attack pending in a United States district court when the President pardons the offenses.

III. The District Judge Violated Separation of Powers by Imposing *post hoc* Article III Judicial Conditions on the President's Article II Pardon, Requiring Lorance to Forfeit his Statutory Rights to Collateral Review and Fundamental Right of Access to the Courts.

The President may attach a condition on his grant of a pardon. *Schick v. Reed*, 419 U.S. 256, 258-259 (1974) (President Eisenhower commuted Schick's 1954 death sentence to life with the condition that Schick never be eligible for parole); *see also Wilson*, 32 U.S. at 161 ("a pardon may be conditional. . . . It may be absolute or conditional."). Those conditions in "a pardon cannot require a prisoner to forfeit his constitutional rights unreasonably." *Hoffa*, 37 F. Supp. at 1236. But this is precisely what the district judge did.

By dismissing Lorance's petition as waived and moot because he accepted the presidential pardon, the district judge injected otherwise non-existent conditions into

the equation: that Lorance forever waive his Fifth and Sixth Amendment challenges to Article I errors and forfeit the right to have Article III jurists check the constitutional decisions of Article I military tribunals which resulted in his unconstitutional convictions and sentence and the loss of six years and four months of liberty.

Clearly a violation of separation of powers, the district judge's imposition of a condition on a Presidential pardon also violates the test of whether a condition the President includes is itself unconstitutional. The Court in *Hoffa* explained,

> Based on our study of the precedents, we therefore arrive at a two-pronged test of reasonableness in determining the lawfulness of a condition: first, that the condition be directly related to the public interest; and second, that the condition not unreasonably infringe on the individual commutee's constitutional freedoms.

Id.

But the district judge's findings have created a constitutional question of judicial overreach by the imposition of an executive condition that Lorance waive his statutory habeas claims and further waive his right to seek Article III redress of constitutional deprivations imposed by Article I legislative tribunals.

Additionally, the district judge evaluated none of the federal statutes Lorance invoked. None of them removed habeas corpus for military petitioners from the court's purview. Nor do the statutes anywhere mention that a full and unconditional

pardon eliminates an Article III court's statutory jurisdiction to entertain Section 2241 petitions.

Nowhere within this statutory framework did Congress identify a full and unconditional executive pardon as somehow severing these jurisdictional authorities. Indeed, the plain language of Section 2243 indicates that Congress did not limit the district judge to issuing an order to release Lorance from unconstitutional confinement by federal officials. Nor did Congress confine the district judge to ordering a new military trial.

Rather, Congress vested the district court with far broader powers to fashion orders to "dispose of the matter as law and justice require." *Id.* Lorance not only sought release from incarceration before the district judge, he also requested that the district judge adjudicate the merits of his claims that Article I military tribunals failed to abide by Article III precedents (checks and balances) and vacate and set aside the findings and the sentence. (Doc. 1). Nowhere in the district judge's Memorandum and order did the district court discuss these authorities, which is error.

CONCLUSION

For these reasons, Lorance respectfully requests this Court to grant his Section 2241 Petition and reverse, vacate, and set aside his Article I convictions and sentence. Alternatively, Lorance respectfully requests this Court to reverse the district judge, remand the matter to the district court, with an instruction that the

district reach the merits of Lorance's constitutional claims and adjudicate them. *Burns v. Wilson*, 346 U.S. 137, 142 (1953) ("The constitutional guarantee of due process is meaningful enough, and sufficiently adaptable, to protect Soldiers – as well as civilians – from the crude injustices of a trial so conducted that it becomes bent on fixing guilt by dispending with rudimentary fairness rather than finding truth through adherence to those basic guarantees which have long been recognized and honored by the military courts as well as the civilian courts.").

Date: August 19, 2020

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Appellant Clint A. Lorance is aware of no other related cases in this Court.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Appellant respectfully requests oral argument to assist the Court in reaching a just decision. Oral argument stands to be helpful for any number of reasons, perhaps the most important being the need to clearly establish and define that the President of the United States' pardon does not restore petitioner to the *status quo ante*. Admittedly a favorable action, a Presidential pardon only goes so far and leaves an actual case and controversy before district courts in the Tenth Circuit requiring Article III judges to determine if Article I tribunals honored the Constitution, not involving what some may refer to as common criminals, but an American combat officer with a sterling record who has been mistreated by his country.

The district judge twice threw him out of the constitutional courts of the United States where he turned to his countrymen for redress and the protections our Constitution affords him – each time, on bases for dismissals, in fairness, were stretches. This Court is able to send a clear message that district judges in this Circuit interpret the Constitution consistent with federal law, rather than inapposite state cases. And, the courts of the United States remain open to her citizens for redress against mistreatment at the hands of our federal government.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12, 972 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Times New Roman 14-point font.

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SEPARATE CERTIFICATIONS

I hereby certify that (1) all required privacy redactions have been made pursuant to Tenth Circuit R. 25.5; (2) that the hard copies to be submitted to the court are exact copies of the version submitted electronically; and (3) that the electronic submission was scanned for viruses with the most recent version of a commercial virus scanning program, and is free of viruses.

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CERTIFICATE OF SERVICE

I hereby certify that on August 19, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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