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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

United States of America,

Plaintiff,

v.

Joseph M. Arpaio,

Defendant.

Case No.: 2:16-cr-01012-SRB-1

**DEFENDANT’S MOTION FOR
VACATUR AND DISMISSAL WITH
PREJUDICE**

(Oral Argument Requested)

**(Assigned to the
Honorable Susan R. Bolton)**

Pursuant to Fed.R.Crim.P. 48 *inter alia*, Defendant Joseph M. Arpaio (“Defendant”) respectfully moves to vacate the verdict and all other orders in this matter, as well as the

1 Sentencing on October 5th, and to dismiss this matter with prejudice. This Motion is made on
2 the grounds that on August 25th, 2017, the President of the United States of America issued a
3 full and unconditional pardon of Defendant. A copy of the Executive Grant of Clemency is
4 submitted to the Court as Exhibit “A” hereto, and incorporated as if set forth herein. The
5 President’s pardon moots the case, and it warrants an automatic vacatur of all opinions,
6 judgments, and verdicts related to the criminal charge. This Motion is supported by the
7 following Memorandum of Points and Authorities, and a proposed form of Order is submitted
8 herewith.

9 Defendant respectfully requests that the Court rule on the instant Motion promptly, in
10 order to enable the Defendant to update the United States Supreme Court as to the “final” status
11 of this case before its scheduled conference on September 25th, 2017 (and/or to take action to
12 withdraw the Petition to that Court, as appropriate).

13 **RESPECTFULLY SUBMITTED** August 28, 2017.

14 **WILENCHIK & BARTNESS, P.C.**

GOLDMAN & ZWILLINGER PLLC

15 /s/ Dennis and Jack Wilenchik

/s/ Mark D. Goldman

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19 *Attorneys for Defendant Joseph M. Arpaio*

20 **MEMORANDUM OF POINTS AND AUTHORITIES**

21 “[T]he vacatur of all opinions, judgments, and verdicts related to a criminal charge
22 against the defendant is appropriate when the presidential pardon is granted during the
23 pendency of the appeals process, which has the effect of rendering moot all the ongoing
24 appeals; the efficacy of the verdict finding the defendant guilty of the charge is lost to the same
25 mootness.” 67A C.J.S. Pardon & Parole § 33; *citing U.S. v. Schaffer*, 240 F.3d 35 (D.C. Cir.
26 2001)(vacating guilty verdict where pardon was issued before conclusion of appeals). In

1 *Schaffer*, the defendant (Schaffer) was pardoned while his appeal of the conviction was still
2 pending. *Id.* Schaffer filed a motion to dismiss, which was unopposed; but “the prosecutor
3 advance[d] the odd suggestion that Schaffer’s conviction is established as a matter of law.”
4 *Schaffer*, 240 F.3d at 38. The D.C. Circuit Court disagreed and held that because “[f]inal
5 judgment never ha[d] been reached,” and “the appeals process was terminated prematurely,”
6 then “[f]inality was never reached on the *legal question* of Schaffer’s guilt.” *Id.* (emphasis
7 original). “When a case becomes moot on appeal...this court generally vacates the District
8 Court’s judgment, vacates any outstanding panel decisions, and remands to the District Court
9 with direction to dismiss.” *Id.* “Because the present mootness results not from any voluntary
10 acts of settlement or withdrawal by Schaffer, but from the unpredictable grace of a presidential
11 pardon, vacatur is here just and appropriate.” *Id.* The D.C. Circuit then vacated “all opinions,
12 judgment, and verdicts” of the district court (on the grounds that the defendant’s claim of
13 innocence “will never again be tried”), and it remanded the case to the district court, with
14 directions to dismiss the case as moot. *Id.* The Ninth Circuit also has a clearly “established
15 practice” of vacatur whenever mootness prevents appellate review. *See Dilley v. Gunn*, 64 F.3d
16 1365, 1369 (9th Cir. 1995)(Section “IV,” subsection “A” of the Opinion). The only exception
17 (which was also addressed in *Schaffer*) is when the defendant has caused the mootness that
18 results in dismissal by “his own voluntary act,” e.g. by entering into a plea agreement, or
19 voluntarily ceasing the conduct that forms the basis for litigation. *See id.* (finding that rule of
20 automatic vacatur is “inapplicable” if mootness results from the parties’ voluntary settlement of
21 the case, because in such event “the judgment is not unreviewable, but simply unreviewed by
22 the appellant’s own choice”)(internal bracketing omitted). But as the D.C. Circuit Court found
23 in *Schaffer, supra*, “the unpredictable grace of a presidential pardon” does not fall into such a
24 category of “voluntary act[s].” *Schaffer*, 240 F.3d at 38. This is strikingly true for the case at
25 bar in which the Defendant did not even ask the President for a pardon before it was granted.

26 . . .

1 Because the President issued a pardon before sentencing and judgment—and clearly,
2 before the conclusion of any appeals—the Court is obligated to vacate its verdict and all other
3 orders in this matter, and to dismiss the case with prejudice. Because Defendant will never have
4 the benefit or opportunity to seek a reversal of the court’s verdict through appeal (and a re-trial
5 by jury), it is only fair that the Court vacate its verdict and all other rulings in the case. Further,
6 as a practical matter, if the Court does not vacate its orders then it will have the certain effect of
7 causing Defendant to maintain his appeal to the United States Supreme Court for a trial by jury,
8 and to pursue a direct appeal, because of the collateral consequences of a standing conviction.
9 Vacating the verdict would therefore achieve judicial economy, and save taxpayer expense.

10 In *Robson v. United States*, 526 F.2d 1145 (1st Cir. 1975), the defendant received an
11 unconditional pardon from the President soon after his conviction; but when the defendant filed
12 a Motion to Vacate the sentence, the district court denied the Motion and the defendant
13 appealed. *Id.* at 1146, 1147, n.2. The First Circuit held that because the district court declined to
14 vacate the sentence, then the appeal was not moot, because “the fact that petitioner has been
15 pardoned does not relieve him from all the disabilities of a conviction. His conviction may be
16 considered at sentencing in any subsequent criminal proceeding,¹ and may result in heavier
17 penalties,² or may be introduced to impeach credibility.³ In light of these adverse collateral
18 consequences, the termination of petitioner’s custody does not moot an action to review the
19 validity of his criminal conviction.”⁴ *Id.* (internal citations omitted for readability, see
20 footnotes). Accordingly, the First Circuit proceeded to review the case, and it reversed the

21
22 ¹ Citing *Carlesi v. New York*, 233 U.S. 51, 34 S.Ct. 576, 58 L.Ed. 843 (1914).

23 ² Citing *United States v. Morgan*, 346 U.S. 502, 512-13, 74 S.Ct. 247, 98 L.Ed. 248 (1954).

24 ³ Citing *Richards v. United States*, 89 U.S.App.D.C. 354, 192 F.2d 602 (1951), *cert. denied*, 342 U.S.
25 946, 72 S.Ct. 560, 96 L.Ed. 703, *rehearing denied*, 343 U.S. 921, 72 S.Ct. 676, 96 L.Ed. 1334 (1952).

26 ⁴ Citing *Carafas v. LaBallee*, 391 U.S. 234, 237-38, 88 S.Ct. 1556, 20 L.Ed.2d 554 (1968); *see also*
Gosa v. Mayden, 413 U.S. 665, 670 n. 3, 93 S.Ct. 2926, 37 L.Ed.2d 873 (1973).

1 district court's order and remanded. *Id. See also People v. Chiappa*, 53 Ill. App. 3d 639, 368
2 N.E.2d 925 (1977)(finding that governor's pardon of police officer did not render case moot,
3 where trial court apparently did not vacate the conviction). Likewise, if the Court does not
4 vacate the Defendant's conviction, then Defendant will certainly pursue his appeals to achieve
5 that, which would be—to put it bluntly—a waste of everyone's time and money, and patently
6 contrary to the rule of automatic vacatur that applies in these situations. Further, the appellate
7 courts would reverse the conviction on the grounds that Defendant was clearly entitled to a trial
8 by jury under 18 U.S.C. § 402, ending the case in more needless effort and a reversal.

9 **CONCLUSION**

10 For the foregoing reasons, Defendant moves the Court to vacate its verdict and other
11 orders in this matter, including the order setting a hearing for sentencing, and to dismiss the
12 case with prejudice. A proposed form of Order is submitted herewith.

13 **RESPECTFULLY SUBMITTED** August 28, 2017.

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/s/ Mark D. Goldman

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20
21 **CERTIFICATE OF SERVICE**

22 I hereby certify that on August 28, 2017, I electronically transmitted the foregoing
23 Notice to the Clerk of the Court through the CM/ECF system, which will send a Notice of
24 Electronic Filing to all CM/ECF registrants for this matter.

25
26 /s/Wendy L. Echols

EXHIBIT A



EXECUTIVE GRANT OF CLEMENCY

DONALD J. TRUMP

President of the United States of America

TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETING:

BE IT KNOWN, THAT THIS DAY, I, DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, PURSUANT TO MY POWERS UNDER ARTICLE II, SECTION 2, CLAUSE 1, OF THE CONSTITUTION, HAVE GRANTED UNTO

JOSEPH M. ARPAIO

A FULL AND UNCONDITIONAL PARDON

FOR HIS CONVICTION of Section 401(3), Title 18, United States Code (Docket No. 2:16-CR-01012-SRB) in the United States District Court for the District of Arizona, of which he was convicted on July 31, 2017, and for which sentencing is currently set for October 5, 2017; and

FOR ANY OTHER OFFENSES under Chapter 21 of Title 18, United States Code that might arise, or be charged, in connection with *Melendres v. Arpaio* (Docket No. 2:07-CV-02513-GMS) in the United States District Court for the District of Arizona.

IN TESTIMONY WHEREOF, I have hereunto signed my name and caused the seal of the Department of Justice to be affixed.



Done at the City of Washington this twenty-fifth day of August, in the year of our Lord two thousand and seventeen and of the Independence of the United States of America the two hundred and forty-second.

A large, stylized handwritten signature in black ink, appearing to read "Donald Trump".

DONALD J. TRUMP
PRESIDENT