

In The
Supreme Court of the United States

IN RE: JOSEPH M. ARPAIO,
Petitioner,

On Petition for Writ of Mandamus
to the Arizona District Court

**REPLY IN SUPPORT OF
PETITION FOR WRIT OF MANDAMUS**

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REPLY BRIEF FOR PETITIONER

ARGUMENT

Petitioner Joseph M. Arpaio (“Petitioner,” “Defendant” or “Mr. Arpaio”), hereby files his Reply Brief in support of Petition for Mandamus, and responds to the Brief in Opposition (“BIO”) filed by Respondent United States of America (“Respondent”).

As of this filing, the prosecution and defense have rested their cases and given closing arguments, but the trial remains “ongoing” because the district court judge has yet to rule.

In the (perhaps unlikely) event that the district court judge has not ruled by the time of this Court’s (September 25) conference at which this Petition will be considered, then the Petition clearly will not be moot.

If the district court judge has ruled by the September conference, and Mr. Arpaio is acquitted, then Defendant concedes that the Petition will be moot.

If the Judge rules and convicts Mr. Arpaio, then the Petition is not moot, under the doctrines of collateral consequences and/or “capable of repetition but evading review.” “[A] criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction,” or in this case the challenged action. *Sibron v. N.Y.*, 392 U.S. 40, 55 (1968). Here,

Petitioner appeals from the district court's refusal to grant him a jury trial—which, if the district court convicted him, would have the obvious “collateral consequence” of a verdict by the court against him. In other words, in the event of a conviction, this Petition is not moot because the Court of Appeals' refusal to grant him mandamus caused the conviction.¹ This Court has previously recognized that even collateral consequences that are “remote” or “unlikely”—or by extension, collateral consequences whose causation is indirect or “remote”—is “enough to preserve a criminal case from ending ‘ignominiously in the limbo of mootness.’” *Id.* at 55; *Spencer v. Kemna*, 523 U.S. 1, 8 (1998)(describing *Sibron*). There is little gained by sending this case back through the “direct appeal” process, merely to have the same issue wind up on appellate review again. Because the Defendant is (now) eighty-five years old, there remains the possibility that he may die during

¹ In turn, his conviction clearly would have collateral consequences that would render it justiciable. “Without pausing to canvass the possibilities in detail” (but just tracking the decision in *Sibron*), Petitioner notes that his conviction could be used to impeach his character should he choose to put it at issue in any future trial (Ariz.R.Evid. 404), and it can cause more severe sentencing should he again be convicted of a crime (*see e.g.* A.R.S. § 13-707(B)), *inter alia*. This Court has “acknowledged the obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences.” *Sibron*, 392 U.S. at 55.

the direct appeal process, causing the conviction to stand. Finally, this issue evades review, because the appellate court could just as well reverse the conviction on separate grounds that have nothing to do with a jury trial (such as e.g. improper breaching of the attorney-client privilege, which was a significant issue at trial), without even reaching the jury trial issue. In that case, Defendant would be back in front of the same judge, who will again deny him a jury trial, and he will be forced into the same useless pipeline in order to try to obtain a jury before trial. The Court will be ensuring that this issue never reaches it for review, because a Petition for Mandamus simply cannot reach the Supreme Court in time due to Speedy Trial Act requirements. The Court of Appeals will have *de facto* unfettered discretion to deny petitions for mandamus to ensure a trial by jury, making a mockery of its supposed role as a “jealous” protector of the right.

The Government’s BIO does not substantially address the merits, but to the extent that it does, Defendant hereby responds: the Government misleadingly suggests that the Ninth Circuit has recognized some kind of distinction between a “constitutional” and a “statutory” right to a jury trial in granting mandamus, which it never has. No Circuit has recognized any distinction between having a “constitutional” and a “statutory” right to a jury trial with respect to mandamus; and the only Circuit to even

mention this issue found, as the Government begrudges in a footnote, that “the lower court would be equally unlawful...in denying either a constitutional or a statutory right to a jury trial, at least insofar as it would influence a decision to grant mandamus.” *In re Union Nacional De Trabajadores*, 502 F.2d 113, 116 (1st Cir. 1974)(internal citations omitted). Nor is this distinction suggested by any of the numerous cases reinforcing the right to review by mandamus of the wrongful deprivation of a jury trial, both in this Court and in the Circuit courts.

Finally, if this Petition does not become otherwise moot through an acquittal (as addressed above), it presents the perfect vehicle for resolving the long-standing issue of the right to mandamus relief. This is a criminal case in which the defendant’s right to a jury trial is crystal-clear. The Government fails to even present an intelligible argument against it. After the first Ninth Circuit Motions Panel requested a response from the Government and the district court judge, the second Ninth Circuit Motions Panel (Judge Reinhardt presiding) failed to even address the merits and denied the Petition solely on the grounds that Defendant was not entitled to mandamus at this stage of the proceedings, which is telling. This Petition presents the perfect opportunity for the Court to remind Circuit Motions Panels that “someone is watching.”

CONCLUSION

For the foregoing reasons, if the Defendant is not acquitted (or the district court has not ruled by this Court's September conference), then the Petition should be granted.

If the Defendant is acquitted, then Defendant expects to file to withdraw the Petition. In any event, Petitioner expects to notify this Court of the final disposition of the case.

Respectfully submitted,

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