[Oral Argument Held on May 3, 2012]
No. 11-1257

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

*SALIM AHMED HAMDAN,*

*Petitioner,*

*v.*

*UNITED STATES OF AMERICA,*

*Respondent.*

**Appeal From The Court Of Military Commission Review**
**(Case No. CMCR-09-0002)**

# SUPPLEMENTAL BRIEF OF PETITIONER SALIM AHMED HAMDAN REGARDING MOOTNESS

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## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

The Certificate as to Parties, Rulings, and Related Cases is set forth in Petitioner-Appellant Salim Ahmed Hamdan's Principal Brief filed on November 15, 2011, and is hereby incorporated by reference.

DATED: June 4, 2012

By: /s/ *Adam Thurschwell*
One of the attorneys for Salim Ahmed Hamdan

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## SUMMARY OF ARGUMENT

Although Petitioner Salim Ahmed Hamdan and the Government strongly dispute the merits of the case, there is one point on which the parties agree: Hamdan's criminal conviction is presumed to have adverse collateral consequences, a presumption the Government acknowledges it cannot rebut, and therefore this direct appeal of that conviction presents a live controversy. Any inquiry into mootness is quickly resolved by Supreme Court precedent holding that the mere possibility of adverse future consequences, regardless of how remote or speculative, is sufficient to render an appeal of this sort justiciable. Accordingly, the Court should proceed to decide the merits of the case.

## ARGUMENT

### I. THE *SIBRON* PRESUMPTION APPLIES AND HAS NOT BEEN REBUTTED

#### A. On Direct Appeal of a Criminal Conviction, Collateral Consequences Are Presumed

The mootness question identified by the Court falls squarely within the rule announced by the Supreme Court in *Sibron v. New York*, 392 U.S. 40 (1968). In *Sibron*, the Court held that when the issue on appeal is a criminal conviction, courts must *presume* the existence of

collateral consequences sufficient to present a live controversy. *Id.* at 55. Acknowledging the "obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences," the Court explained that "[t]he mere 'possibility' that this will be the case is enough to preserve a criminal case from ending 'ignominiously in the limbo of mootness.'" *Id.* (quoting *Parker v. Ellis*, 362 U.S. 574, 577 (1960) (Warren, C.J., dissenting)).

In the context of a direct appeal of a criminal conviction, the "mere 'possibility'" test is easily – indeed, perhaps always – satisfied. *See id.* ("[T]he Court abandoned all inquiry into the actual existence of specific collateral consequences and in effect presumed that they existed.") (citing *Pollard v. United States*, 352 U.S. 354 (1957)). "Without pausing to canvass the possibilities in detail," the Court noted that the defendant's conviction "may be used to impeach his character should he choose to put it in issue at any future criminal trial," or may be considered by a trial judge in sentencing the defendant for some future crime. *Id.* at 55-56. In fact, in determining the case was not moot, the

Court found it sufficient that "[t]here are doubtless other collateral consequences" which were not enumerated. *Id.* at 56.

Subsequent Supreme Court cases have affirmed the *Sibron* presumption in the context of direct appeals from criminal convictions. In fact, the Court has continued to apply the presumption in circumstances in which the possibilities of collateral consequences have been not only remote, but entirely speculative. *See Spencer v. Kemna*, 523 U.S. 1, 10 (1998) (noting that since *Sibron*, the Court has "proceeded to accept the most generalized and hypothetical of consequences as sufficient to avoid mootness in challenges to conviction").

For instance, in *Benton v. Maryland*, 395 U.S. 784, 790 (1969), the Court considered whether a defendant's challenge to his larceny conviction was mooted by his longer concurrent sentence for burglary. The Court cited two possible collateral consequences to save the appeal from mootness. First, after noting that only "few States . . . consider all prior felony convictions for the purpose of enhancing sentence under habitual criminal statutes, even if the convictions actually constituted

only separate counts in a single indictment tried on the same day," the Court found it sufficient that "Petitioner might some day in one of these States have both his larceny and burglary convictions counted against him." *Id.* at 790; *see also id.* at 790-91 ("Although this possibility may well be a remote one, it is enough to give this case an adversary cast and make it justiciable."). Second, the Court noted that the "convictions might some day be used to impeach his character if put in issue at a future trial." *Id.* at 791. The Court acknowledged that, even in the unlikely event of another trial on other charges in a different state coming to pass, the defendant might be able to mitigate the impeachment value of the larceny conviction by explaining that both convictions arose out of the same transaction. But, in finding the case was not moot, the Court reasoned that "a jury might not be able to appreciate this subtlety." *Id.* The Court's willingness to hypothesize situations to counter arguments against the collateral effect of the defendant's conviction demonstrates just how liberal the "mere 'possibility'" test is in practice.

In *Minnesota v. Dickerson*, 508 U.S. 366 (1993), the state's diversionary sentencing statute meant that, although the defendant was found guilty of drug possession, "no judgment of conviction was entered" and "the original charges were dismissed." *Id.* at 371 n.2. Despite the absence of convictions – or even charges – against the defendant at the time of his appeal, the Court found that the continuing possibility that the original drug charge could be used against him for (unspecified) "'future difficulties with the law,'" and that it might affect his criminal history category in the event of a federal conviction, were sufficient to make the case a justiciable controversy. *Id.* (quoting *State v. Goodrich*, 256 N.W.2d 506, 512 (Minn. 1977)).

Similarly, in *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), the *defendant* argued the case was moot and the Court was barred from reviewing a reversal of his conviction, but the Court firmly adhered to the *Sibron* principle:

> If the prospect of the State's visiting such collateral consequences on a criminal defendant who has served his sentence is a sufficient burden as to enable him to seek reversal of a decision affirming his conviction, the prospect of the State's inability to impose such a burden

> following a reversal of the conviction of a criminal defendant in its own courts must likewise be sufficient to enable the State to obtain review of its claims on the merits here.

*Id.* at 108 n.3. The Court held that the case was not moot because "[i]n any future state criminal proceedings against respondent, this conviction may be relevant to setting bail and length of sentence, and to the availability of probation." *Id.*; *see also id.* ("[W]e cannot say that such considerations are unduly speculative *even if a determination of mootness depended on a case-by-case analysis*.") (emphasis added). In short, nothing in subsequent Supreme Court case law has called into question *Sibron*'s core holding that collateral consequences of a conviction are to be presumed on direct appeal.

The present case is no exception to this well-established rule. Hamdan was tried and convicted of the crime of Military Support for Terrorism and now challenges that conviction on direct appeal. *See* Gov't Br. at 2 ("This Court has 'exclusive appellate jurisdiction' to 'determine the validity' of the final judgment rendered by Hamdan's military commission, as approved by the convening authority and the

CMCR, pursuant to Section 950g(a) of the 2009 MCA."). Accordingly, collateral consequences are presumed.

### B. The Government Has Not Tried to Rebut the Presumption of Collateral Consequences and in Any Event, It Cannot Be Rebutted Here

During oral argument in the present case, the Court raised the question whether the *Sibron* presumption is rebuttable. Transcript of Oral Argument at 3, *Hamdan v. United States*, No. 11-1257 (D.C. Cir. May 3, 2012) ("Tr."). In fact, there is language in *Sibron* suggesting that the presumption against mootness cannot be rebutted, as no one can definitively assert that no potential harm could arise in the future from a conviction, even if there are other factors that might tarnish a reputation or impose legal disabilities on the appellant. *See, e.g.*, 392 U.S. at 56 ("It is impossible for this Court to say at what point the number of convictions on a man's record renders his reputation irredeemable."). But, even if the presumption is deemed to be rebuttable, it is clear that it is rebuttable "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." *Id.* at 57. Thus, the

Government bears the burden to prove the absence of collateral consequences. *See, e.g.*, *Diaz v. Duckworth*, 143 F.3d 345, 346 (7th Cir. 1998); *United States v. Walgren*, 885 F.2d 1417, 1421 (9th Cir. 1989) ("'We have repeatedly reaffirmed the presumption that collateral consequences flow from any criminal conviction,' and the government carries the burden of disproving this presumption.") (quoting *Hirabayashi v. United States*, 828 F.2d 591, 606 (9th Cir. 1987)).

Not only has the Government failed to meet this demanding burden, *see* Tr. at 20 (Mr. De Pue: "[T]he ability to accomplish a rebuttal is a very high standard."), it has repeatedly and affirmatively asserted that it cannot. *See* Gov't Br. at 3 ("[T]he government does not believe that it can rebut the *Sibron* presumption in this case because Hamdan's conviction could be used against him in the event he returns to the conflict, is detained by the United States, and is tried for any new offenses. . . . Such a possibility is sufficient to render Hamdan's appeal of his conviction justiciable."); Tr. at 20 ("[W]e don't believe that we can rebut the presumption here . . . ."); *id.* at 21 ("This is a criminal conviction. The *Sibron* rule applies and we don't believe that we can

rebut the presumption, as I have said here."). In fact, the Government stated on the record that it could not find a single instance in which mootness was used to dismiss a case on direct review of a criminal conviction. Tr. at 21.

The Government's position is plainly correct. Even if Hamdan were required to prove up the "mere 'possibility'" of collateral consequences, there is no question that, like *Sibron*, "[t]his case certainly meets that test for survival." 392 U.S. at 55. For one, Hamdan's conviction makes entry into the United States impossible. *See* 8 U.S.C. § 1182(a)(3)(B)(i)(V). Numerous cases have held that a defendant's appeal is not mooted if his conviction precludes future entry into the country. *See, e.g.*, *United States v. Marsh*, 747 F.2d 7, 9 n.2 (1st Cir. 1984); *see also United States v. Hamdi*, 432 F.3d 115, 119 (2d Cir. 2005); *Tapia Garcia v. INS*, 237 F.3d 1216, 1218 (10th Cir. 2001).[1]

[1] Unlike *Gul v. Obama*, 652 F.3d 12 (D.C. Cir. 2011), *cert. denied*, 132 S. Ct. 1906 (2012), both *Marsh* and the present case involve a criminal conviction, not a status determination. A barrier to entry to the United States satisfies *Sibron*'s "mere 'possibility'" test, especially in light of the fact that here the Government, rather than Hamdan, bears the burden of disproving the existence of collateral consequences. *See also infra* Section II. Indeed, the collateral consequence regarding

Additionally, while there is no reason to believe that Hamdan would ever "return[] to the conflict," Gov't Br. at 3, it is not inconceivable that, rightly or wrongly, he could once again be detained by the United States and tried for new offenses. The United States is actively involved in security-related operations in Yemen, where Hamdan resides. No one can predict the future course of events in that politically unstable region. "There are doubtless other collateral consequences." *Sibron*, 392 U.S. at 56.

It matters not whether these prospects are likely, not likely, remote, speculative, or hypothetical. Under established case law, they demonstrate the "mere 'possibility'" of adverse collateral consequences sufficient to render this case a live controversy under the *Sibron* rule.

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Hamdan's inability to enter the United States is not speculative in this context. *Cf. In Re: People's Mojahedin Organization of Iran*, No. 12-1118 (D.C. Cir. June 1, 2012), slip op. at 3 (noting that designation as a Foreign Terrorist Organization "results in several 'dire consequences' for an organization, its members and other supporters," including the fact that "members are barred from entering the United States") (quoting *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 200 (D.C. Cir. 2001)) (citing 8 U.S.C. § 1182(a)(3)(B)(i)(IV), (V)).

## II. *SPENCER* AND ITS PROGENY DO NOT SUGGEST OTHERWISE

In *Spencer*, the Supreme Court considered whether "the presumption of collateral consequences which is applied to criminal convictions will be extended as well to revocations of parole." 523 U.S. at 8. The Court held that it should not. At the same time, however, it reaffirmed the basic holding of *Sibron* that criminal convictions carry the presumption:

> An incarcerated convict's (or a parolee's) challenge to the validity of his conviction always satisfies the case-or-controversy requirement . . . . In recent decades, we have been willing to presume that a wrongful criminal conviction has continuing collateral consequences (or, what is effectively the same, to count collateral consequences that are remote and unlikely to occur).
>
> The present petitioner, however, does not attack his convictions . . . ; he asserts only the wrongful termination of his parole status.

*Id.* at 7-8 (citations omitted). The *Spencer* Court refused to extend the *Sibron* presumption beyond direct appeals of criminal convictions, and therefore held that the petitioner bore the burden of asserting concrete

injuries-in-fact sufficient to satisfy Article III's case-or-controversy requirement. *Id.* at 14.

*Spencer* relied heavily upon *Lane v. Williams*, 455 U.S. 624 (1982), in which the Court also refused to extend the *Sibron* rule. In that case, habeas petitioners alleged that trial courts had failed to advise them of the mandatory parole requirement before accepting their guilty pleas, in violation of their due process rights. They did not, however, challenge their convictions on that ground; rather, they sought only release from custody. *Id.* at 627-28. When their sentences expired, they essentially received all the relief they requested. *Id.* In drawing a distinction between appeals of sentences and appeals of convictions, the Court reaffirmed the *Sibron* presumption of collateral consequences in cases challenging convictions:

> If respondents had sought the opportunity to plead anew, this case would not be moot. . . .
>
> . . . .
>
> Since respondents elected only to attack their sentences, and since those sentences expired during the course of these proceedings, this case is moot. "Nullification of a conviction may have important benefits for a defendant . . .

> but urging in a habeas corpus proceeding the correction of a sentence already served is another matter."

*Id.* at 630-31 (quoting *North Carolina v. Rice*, 404 U.S. 244, 248 (1971)).

Similarly, in *United States v. Juvenile Male*, 131 S. Ct. 2860, 2864 (2011), the respondent appealed a condition of his supervision rather than his underlying conviction. The Court refused to extend the *Sibron* presumption beyond its original scope:

> When the defendant challenges his underlying *conviction*, this Court's cases have long presumed the existence of collateral consequences. But when a defendant challenges only an expired *sentence*, no such presumption applies, and the defendant must bear the burden of identifying some ongoing "collateral consequenc[e]" that is "traceable" to the challenged portion of the sentence and "likely to be redressed by a favorable judicial decision."

*Id.* (quoting *Spencer*, 523 U.S. at 7).

Consistent with the *Spencer* principle, this Court refused to extend the *Sibron* rule to Guantanamo *habeas* petitions. *Gul*, 652 F.3d 12. In that case, the appellants brought habeas challenges to their detentions and their "enemy combatant" designations while in U.S. custody at Guantanamo Bay. The Government argued that, once they

were transferred to the custody of foreign nations, they should be "foreclosed from arguing [their] petition[s] [are] not moot, because habeas is at its 'core' about remedying unlawful detention." *Id.* at 16. Although the Court "[a]ssum[ed] without deciding the collateral consequences doctrine applies to a habeas petition filed by a detainee," *id.*, it did not apply the *Sibron* presumption of collateral consequences. Instead, it held that "[a] former detainee, like an individual challenging his parole, must instead make an actual showing his prior detention or continued designation burdens him with 'concrete injuries.'" *Id.* at 17 (quoting *Spencer*, 523 U.S. at 14).

Nothing in the Court's discussion, however, suggests that it intended to veer from longstanding precedent applying the *Sibron* presumption to cases, like the present one, in which a criminal defendant challenges his conviction on direct appeal. The habeas petitioners in *Gul* did not have criminal convictions on their record. In fact, the Government itself cites *Gul* in articulating the *Sibron* presumption and conceding its application in this case. Gov't Br. at 2.

Hamdan's status as a former Guantanamo detainee has no bearing on the straightforward application of *Sibron* in the present case.

The case law, thus, has drawn a bright line between cases involving direct appeals of criminal convictions, in which collateral consequences will be presumed so as to preserve a case on appeal even after a defendant has been released from custody, and other situations. Hamdan's appeal falls squarely in the former category.

## CONCLUSION

For the foregoing reasons and for those stated during oral argument, the Court should hold that this case is not moot and proceed to consideration of the merits.

Respectfully submitted,

DATED: June 4, 2012

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DATED: June 4, 2012

By: /s/ *Adam Thurschwell*
One of the attorneys for Salim Ahmed Hamdan

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