No. 01-1340

In the Supreme Court of the United States

ARNOLD FRANK HOHN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether petitioner's motion pursuant to 28 U.S.C. 2255 to vacate his conviction and sentence under 18 U.S.C. 924(c) is moot because petitioner has completed serving his term of imprisonment and supervised release on that conviction.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 262 F.3d 811.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 2001. A petition for rehearing was denied on December 5, 2001 (Pet. App. 18a). The petition for a writ of certiorari was filed on March 5, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Nebraska, petitioner was

convicted of possession of methamphetamine with intent to distribute it within 1000 feet of a school, in violation of 21 U.S.C. 841 and 845a (recodified at 21 U.S.C. 860); being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g); and using or carrying a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1). He was sentenced to 90 months of imprisonment, to be followed by six years of supervised release, and he was ordered to pay $150 in special assessments. The court of appeals affirmed petitioner's convictions and sentence. The district court thereafter denied petitioner's motion for relief under 28 U.S.C. 2255, and the court of appeals rejected his request for a certificate of appealability. This Court granted certiorari, vacated the court of appeals' judgment, and remanded the case for further proceedings. On remand, the district court again denied petitioner's Section 2255 motion, and the court of appeals ordered the motion dismissed as moot.

1. In June 1990, the police searched petitioner's home after an informant told them that petitioner was selling methamphetamine. The police arrested petitioner, the only person present at the time of the search, in his living room. The police found methamphetamine, three firearms, and two holsters on petitioner's kitchen counter, and two more firearms in a box located in the kitchen. In petitioner's bedroom, they found more methamphetamine, as well as another firearm and a holster nearby. In a second bedroom, the police observed a wall-mounted gun case containing a collection of hunting rifles and shotguns. Pet. App. 2a.

2. A federal grand jury returned an indictment charging petitioner with: (1) possession of methamphetamine with intent to distribute it within 1000 feet of a school, in violation of 21 U.S.C. 841(a) and 845a

(recodified at Section 860); (2) being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g) and 924(a)(2); and (3) using or carrying a firearm during and in relation to a drug trafficking crime, in violation of Section 924(c)(1).[1] Pet. App. 2a. At trial, petitioner testified in his own behalf. He admitted possessing methamphetamine and firearms, but he claimed that he owned the weapons because he is an avid hunter and because his home had been burglarized and vandalized. *Ibid.* At the close of the trial, the district court provided the jury with the following instruction on the meaning of "use" and "carry" in Section 924(c)(1):

> The phrase 'used a firearm' means having a firearm available to aid in the commission of possession of Methamphetamine with intent to distribute. Similarly, the phrase 'carried a firearm' does not require proof of actual possession of a firearm or use of it in any affirmative manner, but does require proof beyond a reasonable doubt that the firearm was available to provide protection in connection with the possession of Methamphetamine with intent to distribute or to facilitate success.

Id. at 2a-3a. The court overruled petitioner's objection that the instruction "allows this jury to find that merely having a firearm available is sufficient" to establish "use" under Section 924(c)(1). *Id.* at 3a.

The jury found petitioner guilty on all counts, and the district court sentenced him to 90 months of imprison-

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[1] In 1998, Congress amended Section 924(c)(1) to proscribe possession of a firearm in furtherance of a drug trafficking crime, in addition to proscribing using or carrying a firearm during and in relation to a drug trafficking crime. Act of Nov. 13, 1998, Pub. L. No. 105-386, § 1(a), 112 Stat. 3469; 18 U.S.C. 924(c)(1) (2000). The petition involves only the pre-1998 statute.

ment, 60 months of which is attributable to the Section 924(c)(1) conviction. The court also imposed a six-year term of supervised release for the violation of Sections 841(a) and 845a, and concurrent three-year terms of supervised release for the remaining two counts. Pet. App. 3a. In addition, the district court imposed a special assessment of $50 on each of the three counts, see Judgment 5; Dist. Ct. Docket Entry 158, and defendant paid the special assessments as ordered. See Federal Bureau of Prisons, U.S. Dep't of Justice, *Progress Report for Arnold F. Hohn* (1995). On direct appeal, petitioner did not challenge his Section 924(c)(1) conviction or the jury instructions related to that offense. Pet. App. 3a. The court of appeals affirmed petitioner's convictions and sentence. *United States* v. *Hohn*, 8 F.3d 1301 (8th Cir. 1993).

3. Subsequently, this Court rejected the broad interpretation of the word "use" that formed the basis for the jury instructions at petitioner's trial and held that "use" under Section 924(c)(1) requires "active employment of the firearm." *Bailey* v. *United States*, 516 U.S. 137, 144 (1995). Relying on *Bailey*, petitioner filed a pro se motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255. Pet. App. 4a. Petitioner argued that his conduct did not constitute a violation of Section 924(c)(1), as interpreted by *Bailey*, and that the district court's jury instructions improperly defined the phrase "used a firearm." The district court denied the motion, concluding that petitioner had waived the *Bailey* claim by failing to challenge his Section 924(c)(1) conviction or the corresponding jury instructions on direct appeal. *Ibid.* The court of appeals denied petitioner a certificate of appealability on the ground that his claim is statutory rather than constitutional and he thus had not made "a substantial

showing of the denial of a constitutional right." *Hohn* v. *United States*, 99 F.3d 892, 892-893 (8th Cir. 1996) (quoting 28 U.S.C. 2253(c)(2)), vacated, 524 U.S. 236 (1998).

4. This Court granted certiorari to determine whether it has jurisdiction to review decisions by the courts of appeals denying applications for certificates of appealability. 524 U.S. at 238-239. After answering that question in the affirmative, the Court vacated the court of appeals' decision because the United States conceded that petitioner's *Bailey* claim is constitutional in nature. *Id.* at 240, 253. The Court remanded the case to the court of appeals for further consideration. *Id.* at 253.

5. On remand, the court of appeals considered whether it could grant petitioner relief on his *Bailey* claim notwithstanding that he had procedurally defaulted the claim by failing to raise it on direct appeal. *Hohn* v. *United States*, 193 F.3d 921, 923-925 (8th Cir. 1999). Petitioner contended that his procedural default should be excused because he was actually innocent of the Section 924(c) offense. *Id.* at 923. The court of appeals held that petitioner was "actually innocent" of "using" a firearm under Section 924(c)(1). *Id.* at 924. Noting, however, that the jury found petitioner guilty of using *or* carrying a firearm, the court of appeals remanded to the district court "to engage in the fact-bound analysis of whether [petitioner] is factually innocent of carrying a firearm during or in relation to a drug trafficking offense, in order to open the gateway for the consideration of his defaulted *Bailey* claim." *Ibid.* See *Bousley* v. *United States*, 523 U.S. 614 (1998). After consideration of the supplemental briefs submitted on that question, the district court held that petitioner did not establish actual innocence of "carry-

ing" a firearm under Section 924(c)(1). Pet. App. 14a-17a. The court reasoned that

> the guns being open and obvious on the kitchen counter with such things as spare change next to holsters in which to carry them would indicate that they were carried. This evidence along with drugs being found in [petitioner's] home and on his person, could allow a reasonable juror to find that [petitioner] carried the firearm in relation to a drug trafficking crime. In addition, this Court notes that an informant stated that [petitioner] regularly carried a firearm.

Id. at 17a. The district court granted petitioner's request for a certificate of appealability. See *id.* at 5a.

6. Acting on its own motion, the court of appeals determined that it lacked jurisdiction to entertain petitioner's appeal, vacated the district court's judgment, and ordered petitioner's Section 2255 motion to be dismissed as moot. Pet. App. 1a-13a. After acknowledging that "this court and the Supreme Court have entertained [petitioner's] appeals since he was released from prison [in October of 1997]," the court observed that it was nevertheless obligated to satisfy itself of its own jurisdiction. *Id.* at 5a. The court asserted that, "[r]egardless of whether an Article III, [Section] 2 case existed in prior proceedings, [petitioner] must show the subsistence of a case or controversy in this court." *Id.* at 6a. Then, after observing that petitioner is no longer imprisoned and that the concurrent three-year term of supervised release imposed on the Section 924(c) conviction has expired, the court concluded that "[petitioner's] case is moot under the general mootness inquiry because a favorable decision could not redress any injury caused by a purportedly unconstitutional

conviction under [Section] 924(c)(1)." *Id.* at 6a-7a & n.2.[2]

The court of appeals recognized, however, the existence of an "exception" to the mootness doctrine when an injury other than imprisonment or supervised release—"some 'collateral consequence' of the conviction"—continues to exist. Pet. App. 10a (quoting *Spencer* v. *Kemna*, 523 U.S. 1, 7 (1998)). Relying on *Pollard* v. *United States*, 352 U.S. 354 (1957), the court began its "collateral consequences" analysis "by presuming that [petitioner's] [Section] 924(c)(1) conviction creates sufficient collateral consequences to render his appeal justiciable." Pet. App. 10a. The court also noted, however, that, in *Spencer*, this Court declined to

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[2] The court acknowledged that, under its decision in *Sesler* v. *Pitzer*, 110 F.3d 569 (8th Cir. 1997), this case would not be moot because, if petitioner prevailed in his challenge to his Section 924(c) conviction and had thus served sixty months' excess time in prison, the court could reduce his term of supervised release by that period. Pet. App. 7a-8a. (Petitioner is still serving the six-year term of supervised release for his violation of 21 U.S.C. 841 and 845a. Pet. App. 6a.) But the court recognized that *Sesler* conflicts with this Court's holding in *United States* v. *Johnson*, 529 U.S. 53 (2000), that a court may not automatically credit excess prison time against a term of supervised release. The court thus held that it "could not reduce [petitioner's] term of supervised release if we held his § 924(c)(1) conviction unconstitutional." Pet. App. 9a. In *Johnson*, the Court also noted that a district court has power to take into account "equitable considerations of great weight [that] exist when an individual is incarcerated beyond the proper expiration of his prison term," by granting early termination of supervised release under 18 U.S.C. 3583(e)(1) and (2). *Johnson*, 529 U.S. at 60. The court of appeals in this case did not address whether the district court's power to shorten petitioner's supervised release based in part on a successful challenge to his Section 924(c) conviction might create a live controversy over the validity of that conviction.

extend the presumption of collateral consequences from criminal convictions to parole revocations and, in so doing, criticized its precedent that had presumed collateral consequences from convictions. *Ibid.* The court of appeals therefore concluded that its analysis should reflect "the *Spencer* Court's distinct distaste for finding collateral consequences without a showing of a concrete statutory disability stemming from the challenged conviction." *Id.* at 10a-11a.

Relying on *Spencer*, the court of appeals then rejected the government's position that "the possibility that a court could use [petitioner's] [Section] 924(c)(1) conviction to enhance his sentence should a court convict [petitioner] of another crime in the future is a sufficient collateral consequence to render his appeal justiciable." Pet. App. 11a; see Gov't C.A. Br. 9 n.1. The court of appeals reasoned that this collateral consequence is too remote to preclude dismissal for mootness because it is "contingent upon [petitioner's] committing another crime, something that is within his power to prevent from occurring." Pet. App. 11a (citing *Spencer*, 523 U.S. at 15).

Next, the court of appeals concluded that petitioner would not suffer any "concrete" collateral consequences —*e.g.*, deprivation of the right to vote, to hold office, to serve on a jury, or to engage in certain businesses—as a result of his Section 924(c) conviction that would not independently result from his other, unchallenged convictions. Pet. App. 11a-12a. The court reasoned that its "inability to redress the purported constitutional infirmity in [petitioner's] [Section] 924(c)(1) conviction overcomes the presumption in favor of finding collateral consequences." *Id.* at 13a. The court therefore vacated

the district court's judgment on the merits and remanded the case for dismissal. *Ibid.*[3]

DISCUSSION

Petitioner argues (Pet. 8) that the court of appeals' decision "contravened decades of this Court's precedents by holding that the possibility that [petitioner's] Section 924(c) conviction would be used to enhance his sentence for future offenses was not a sufficient collateral consequence to make his case justiciable." He also contends that the courts of appeals are in conflict on how to apply the presumption of collateral consequences of a criminal conviction under this Court's cases. Although the government agrees that the Eighth Circuit's decision departs from this Court's cases, plenary review is not warranted because petitioner can show a concrete consequence of his conviction even under the court of appeals' test. The petition should therefore be granted, the judgment of the court of appeals vacated, and the case remanded for further consideration.

1. The United States agrees that the court of appeals' decision conflicts with decisions of this Court finding challenges to criminal convictions, the sentence for which was fully served, not to be moot. *E.g.*, *Pollard* v. *United States*, 352 U.S. 354, 358 (1957); *Sibron* v. *New York*, 392 U.S. 40, 55-56 (1968); *Evitts* v. *Lucey*, 469 U.S. 387, 391 n.4 (1985). At least since its decision in *Pollard*, the Court has viewed "[t]he

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[3] Petitioner sought rehearing and rehearing en banc. In response, the United States agreed with the panel that the case is moot because petitioner has served his full terms of imprisonment and supervised release on the Section 924(c) count. U.S. Resp. to Appellant's Pet. for Rehearing With Suggestion of Rehearing En Banc 9.

possibility of consequences collateral to the imposition of sentence [as] sufficiently substantial to justify * * * dealing with the merits" of a defendant's request for collateral relief. 352 U.S. at 358. In *Sibron*, the Court stated that it had "abandoned all inquiry into the actual existence of specific collateral consequences and in effect presumed that they existed." 392 U.S. at 55. Thereafter, the Court has "accept[ed] the most generalized and hypothetical of consequences as sufficient to avoid mootness in challenges to conviction." *Spencer* v. *Kemna*, 523 U.S. 1, 10 (1998) (citing *Evitts*, 469 U.S. at 391 n.4; *Benton* v. *Maryland*, 395 U.S. 784, 790-791 (1969); *Pennsylvania* v. *Mimms*, 434 U.S. 106, 108 n.3 (1977) (per curiam); *Minnesota* v. *Dickerson*, 508 U.S. 366 (1993)). Notably, the Court has consistently relied on the possibility that the conviction might be used to enhance the defendant's sentence for a future conviction as a basis for finding that a controversy over the conviction's validity is not moot. See, *e.g.*, *Dickerson*, 508 U.S. at 371 n.2; *Evitts*, 469 U.S. at 391 n.4; *Mimms*, 434 U.S. at 108 n.3; *Benton*, 395 U.S. at 790; *Sibron*, 392 U.S. at 55-56.

The court of appeals began its analysis by citing *Pollard* and "presuming that [petitioner's] § 924(c)(1) conviction creates sufficient collateral consequences to render his appeal justiciable." Pet. App. 10a. But it then went on to analyze whether the presumption was overcome in light of the "*Spencer* Court's distinct distaste for finding collateral consequences without a showing of a concrete statutory disability stemming from the challenged conviction." *Id.* at 10a-11a. *Spencer*, however, did not involve a challenge to a conviction, and it did not alter the presumption, repeatedly applied by this Court, that "a wrongful criminal conviction has continuing collateral consequences."

Spencer, 523 U.S. at 8. Although some language in *Spencer* is critical of that presumption, see *id.* at 10-11, the Court did not abrogate the practice. See *id.* at 12. Instead, the Court declined to extend the presumption of collateral consequences to challenges to revocation of parole, a context in which the Court had not historically applied the presumption. See *id.* at 12-13 (citing *Lane* v. *Williams*, 455 U.S. 624 (1982)). In fact, the Court noted that the presumption of collateral consequences "is likely to comport with reality" in the context of criminal convictions, because "it is an obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences." *Id.* at 12 (quoting *Sibron*, 392 U.S. at 55).

The presumption of collateral consequences in challenges to convictions thus survives *Spencer*. *Spencer* and other cases are not entirely clear on whether the presumption is effectively conclusive or, rather, whether it is rebuttable on a case-by-case basis. But the Court's cases *are* clear that the possibility of a recidivist enhancement for a future sentence is sufficient to preclude a finding of mootness in a challenge to a conviction. See *Dickerson*, *Evitts*, *Mimms*, *Benton*, and *Sibron*, *supra*. The court of appeals' rejection of that approach cannot be reconciled with those cases. And the court was not justified in departing from this Court's holdings based on a belief that their reasoning had been undermined by later decisions. See *Agostini* v. *Felton*, 521 U.S. 203, 237 (1997); *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477 (1989).

2. Even if the analysis in *Spencer* were thought to justify revisiting the presumption that criminal convictions have collateral consequences, this case is not an appropriate one for undertaking that reconsideration.

That is because the decision of the court of appeals is incorrect even under that court's understanding of the law.

Even assuming that the law required a defendant who is no longer in custody or under supervised release for the conviction that he seeks to challenge to show a concrete consequence caused by the challenged conviction, there is a concrete consequence here. Pursuant to 18 U.S.C. 3013(a)(2)(A) (1988), the district court imposed a special assessment of $50 for petitioner's Section 924(c) conviction, see Judgment 5; Dist. Ct. Docket Entry 158, and petitioner paid the special assessment as ordered. See Federal Bureau of Prisons, U.S. Dep't of Justice, *Progress Report for Arnold F. Hohn* (1995). Petitioner's liability for the assessment depends on the validity of his Section 924(c) conviction, and it does not depend in any way on his other convictions. Cf. *Ray* v. *United States*, 481 U.S. 736 (1987) (per curiam) (sentence not concurrent when special assessment imposed on each count); see, *e.g.*, *United States* v. *Hughey*, 147 F.3d 423, 433 n.5 (5th Cir.) (ordering refund of assessment on vacated conviction), cert. denied, 525 U.S. 1030 (1998); *United States* v. *Rosario*, 111 F.3d 293, 300 (2d Cir.) (same), cert. denied, 522 U.S. 923, 522 U.S. 969 (1997). Thus, petitioner's challenge to his conviction would not be moot even if there were no presumption of collateral consequences, and, in particular, even if the possibility of a future recidivist enhancement did not suffice to establish a live controversy. Cf. *Glickman* v. *Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 463 n.5 (1997) (challenge to terminated regulation not moot in light of plaintiffs' prayer for refund of assessments paid before termination).

Neither party called the special assessment on the Section 924(c) count to the attention of the court of

appeals. That court thus has not had the opportunity to consider the effect of the assessment on its analysis of the mootness issue. If, on remand, the court of appeals agrees that petitioner's motion is not moot because of the special assessment, then the court of appeals may choose not to address the general mootness question discussed in its initial opinion in this case. The court could instead proceed to determine whether the district court correctly denied petitioner's Section 2255 motion because he cannot excuse his procedural default of his *Bailey* claim. Likewise, plenary review to address this Court's mootness doctrine with respect to challenges to convictions for which the sentence has been fully served is not warranted here because the special assessment makes it unnecessary to determine any broad legal question. Cf. *Ray* v. *United States*, 481 U.S. 736, 737 (1987) (declining to determine the role of the concurrent sentence doctrine in the federal courts because the special assessment made the sentences not concurrent).

3. For similar reasons, plenary review is not warranted to resolve any disagreement among the courts of appeals on how to apply the presumption that criminal convictions have collateral consequences. As petitioner observes (Pet. 17, 18-19), the courts of appeals have expressed different views about whether the presumption is rebuttable. The Ninth Circuit has held that the presumption is irrebuttable because "[o]nce convicted, one remains forever subject to the prospect of harsher punishment for a subsequent offense as a result of federal and state [repeat offender] laws." *Chacon* v. *Wood*, 36 F.3d 1459, 1463 (9th Cir. 1994), superseded on other grounds, 28 U.S.C. 2253(c). Accordingly, that court has concluded that "there is simply no way ever [for the government] to meet the *Sibron* mootness requirement: that there be 'no possibility' of collateral

legal consequences." *Chacon*, 36 F.3d at 1463. No other circuit, however, has ruled out the possibility that the presumption may be rebutted in a particular case.

Nevertheless, that inconsistency between the Ninth Circuit's approach and the decisions of the other circuits does not warrant this Court's review. As the Ninth Circuit has observed, both the federal Sentencing Guidelines and the sentencing schemes of many States rely on prior convictions as a basis for penalty enhancements. See *Chacon*, 36 F.3d at 1463. Thus, even in those circuits that hold open the theoretical possibility of rebuttal, the prospect of future enhancements based on a felony or misdemeanor conviction can seldom, if ever, be ruled out.

The government is aware of only two published court of appeals' decisions holding that a collateral attack on a criminal conviction was moot because there was no possibility of collateral consequences from the conviction, and neither of those decisions has significant continuing precedential value. In *Malloy* v. *Purvis*, 681 F.2d 736 (11th Cir. 1982), the court of appeals found that a defendant's collateral attack on a forgery conviction was moot. But the defendant in that case had, following the forgery conviction, been sentenced to life imprisonment without parole, and the forgery conviction was not one of the prior offenses relied upon by the sentencing court in imposing that sentence. See *id.* at 739 n.2; *id.* at 739 (Wisdom, J., specially concurring). Moreover, the Eleventh Circuit has questioned the vitality of *Malloy* in light of subsequent cases, *Minor* v. *Dugger*, 864 F.2d 124, 126, 127 (1989), and has made clear that, notwithstanding *Malloy*, a challenge to a criminal conviction is not moot "where the conviction *could* be used for enhancement purposes." *Id.* at 126.

In *Broughton* v. *North Carolina*, 717 F.2d 147, 148-149 (4th Cir. 1983) (per curiam), cert. denied, 466 U.S. 940 (1984), the Fourth Circuit dismissed as moot a habeas attack on a misdemeanor contempt-of-court conviction for which the petitioner had served 30 days in jail, because the court concluded that the conviction did not create any risk of a future sentence enhancement under the state sentencing law then in effect. *Id.* at 149 (citing N.C. Gen. Stat. §15A-1340.4 (1981)). Like *Malloy*, however, *Broughton* does not appear to be of continuing significance. The conviction at issue in *Broughton* now could result in a sentence enhancement under the United States Sentencing Guidelines. See Guidelines §§ 4A1.1(c), 4A1.2(c)(1) (directing sentencing court to increase criminal history score based on prior sentences of 30 or more days imposed on misdemeanor convictions, including contempt convictions). Moreover, a later Fourth Circuit decision has narrowed *Broughton*'s impact. See *Nakell* v. *Attorney General of North Carolina*, 15 F.3d 319, 322-323 (4th Cir.) (attorney's habeas challenge to criminal contempt conviction not moot under *Broughton* because of possible refund of fine and prospect of disciplinary action by bar), cert. denied, 513 U.S. 866 (1994).

There is also not any significant disagreement among the courts of appeals about who has the burden of demonstrating the presence or absence of collateral consequences from a criminal conviction. Those courts of appeals that have addressed the issue require the party asserting mootness to overcome the presumption that collateral consequences result from a challenged criminal conviction. See, *e.g.*, *Minor*, 864 F.2d at 125; *Bryan* v. *Duckworth*, 88 F.3d 431, 433 (7th Cir. 1996). The government is not aware of any court of appeals that has held to the contrary. None of the decisions

cited by petitioner as placing the burden of proof on the criminal defendant (Pet. 19-20 & n.9) actually discussed the issue of which party has the burden of proving or disproving that a criminal conviction has sufficient collateral consequences to preclude mootness. Moreover, two of the decisions did not even involve habeas petitions or motions under 28 U.S.C. 2255 challenging prior convictions. The Third Circuit's decision in *Steele* v. *Blackman*, 236 F.3d 130 (2001), involved a challenge to an alien exclusion order based on the classification of a prior offense as an "aggravated felony," and the First Circuit's decision in *Arnold* v. *Panora*, 593 F.2d 161 (1979), involved a civil suit. Thus, there is no reason for this Court to grant review to address the burden of proof issue.

In any event, this case does not provide an appropriate vehicle for review of any disagreement among the courts of appeals on the questions whether the presumption of collateral consequences is rebuttable, and, if it is, who bears the burden of proof. Petitioner himself asserts (Pet. 18-20) that his Section 2255 motion would be justiciable in all but the Eighth Circuit. See Pet. 15 n.7. As discussed above, petitioner suffers from a concrete consequence of the challenged Section 924(c) conviction—his liability for the $50 special assessment imposed by the district court at sentencing. Accordingly, his case is not moot regardless of whether the presumption of collateral consequences is rebuttable and of who bears the burden of proof.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded for further consideration.

Respectfully submitted.

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