ORIGINAL

In the

Supreme Court of the United States

GEORGE CALVIN LEWIS, JR.,

Petitioner,

--vs--

UNITED STATES,

Respondent.

Number: 78-1595

Washington, D. C.
January 7, 1980

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IN THE SUPREME COURT OF THE UNITED STATES

GEORGE CALVIN LEWIS, JR., Petitioner, v. UNITED STATES, Respondent.	No. 78-1595

Washington, D. C.,

Monday, January 7, 1980.

The above-entitled matter came on for oral argument at 2:12 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

ANDREW W. WOOD, ESQ., 300 West Main Street, Richmond, Virginia 23220; on behalf of the Petitioner

ANDREW J. LEVANDER, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C. 20530; on behalf of the Respondent

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 78-1595, Lewis v. United States.

Mr. Wood, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF ANDREW W. WOOD, ESQ.,

ON BEHALF OF THE PETITIONER

MR. WOOD: Mr. Chief Justice, and may it please the Court:

I represent the petitioner, George Calvin Lewis, Jr., and the facts of the case are as follows: Lewis was charged in a two-count indictment, one count of which is relevant to Your Honors' consideration. They charged him with the violation of section 1202 of 18 U.S.C. Appendix, that is the possession of a firearm, having previously been convicted of a felony.

The case came on before the United States District Court in Richmond with a jury. On the morning of trial, counsel in a motion, in the context of a motion for continuance pointed out to the court in a proffer that the conviction which formed the basis for the indictment had been obtained in counsel's judgment in violation a pure violation of Gideon v. Wainwright. Counsel told the court that he had called a lawyer in Florida who had been kind enough to check the records and that the records

of the Florida court, the records on the day of trial showed affirmatively that Lewis had no lawyer. Collaterally it was also represented to the court that the indictment possibly was defective although that issue was not pursued in view of the trial court's ruling on Gideon.

QUESTION: Mr. Wood, did it show affirmatively that he had no lawyer or did it just show or fail to show that he had one?

MR. WOOD: No, sir, this is not a silent record. I was told or counsel was told by the lawyer in Florida that it showed affirmatively that Lewis had no lawyer.

QUESTION: Is there anything in the record other than what counsel told?

MR. WOOD: No, sir. It was a proffer though and was accepted by the government for purposes of the court's ruling. I would submit that that settles the issue.

I might point out, sir, the actual record which was introduced were the orders on the day of sentencing, not the orders with respect to the finding of guilt. I believe that order -- and it is in the record -- recites that Lewis having previously or earlier been found guilty came on this date to be sentenced. That is a silent record.

QUESTION: What is your position here? If we

go along with you, is it your position that the conviction must be reversed?

MR. WOOD: No, sir. I am happy to accept the burden of proof, if Your Honor please.

QUESTION: Say that again.

MR. WOOD: I am happy to accept the burden of proof. Are you saying reversed and dismissed? I may have misunderstood you. I offered to prove, granted the continuance, that Lewis in fact had no lawyer. I also made a proffer of indigency, so that this is unlike some of the earlier cases and the dissenting opinions in which no burden of proof was even attempted.

QUESTION: Do you disagree with Judge Russell's statement in the opinion for the Fourth Circuit on the first page of the petition for writ of certiorari which has its APP. (1), where Judge Russell says, "The defendant does not deny on this appeal the receipt and possession of a firearm. Neither does he dispute his earlier conviction in Florida or that such conviction is facially valid."

MR. WOOD: Mr. Justice Rehnquist, I do dispute that. I have said things sometimes not knowing what I'm saying, but I don't recall ever conceding that. The judge might have pointed out in his dissent, but I do not understand the appellant Lewis to concede that it is

facially valid.

QUESTION: Did the dissenting judge make any issue of that?

MR. WOOD: Yes, sir, he pointed it out, Mr. Chief Justice, as I just said. He did not understand my position to be conceding facial validity.

I might add, if it is responsive, that I frankly see no difference between facial validity or invalidity, for that matter. The man either had a lawyer or he didn't and to me that is a technical nicety which has no place --

QUESTION: But if you go back twenty years, it may be very difficult to find out whether he had a lawyer or didn't.

MR. WOOD: Well, that question has been addressed by this Court with agony I am sure sometimes, but it is never too late to cure a wrong that was done, whether it was twenty years ago or fifty years ago. Certainly it is a problem. I might say practically, sir, that it would not have been a problem, I don't think in this case, in view of what I was told by this lawyer in Florida.

QUESTION: Well, wasn't there some other way to make that a little more clear and eliminated it as an issue in the case, the proof of whether there was or was

not counsel?

MR. WOOD: Well, as I say, Mr. Chief Justice, it came on on a proffer, I presume that had the judge agreed with me, I presume that he would have granted the continuance. It was a non-jury trial, it only took a couple of hours to try.

QUESTION: Mr. Wood, Judge Winter's dissenting opinion says that in arguing the correctness of the District Court's ruling that the government in effect concedes that for the present purposes the conviction was obtained in violation of defendant's Sixth Amendment rights. And I had understood that for the purposes of the case that the government made the same concession.

MR. WOOD: I had never --

QUESTION: It assumes at least that it accepts the same hypothesis.

MR. WOOD: Yes, sir. I had never understood their position to be any different.

QUESTION: And argues upon that hypothesis.

MR. WOOD: Absolutely, sir.

QUESTION: Is the final sentence or the final two sentences in his dissent to put a mild amount of question on that, because Judge Winter would remand in order to determine whether or not -- remand for a new trial, at which time it would be demonstrated unequivocally

one way or the other.

MR. WOOD: I think so, Mr. Chief Justice. I presume that would be a remand. I didn't take it as a stipulation so much as simply for the purpose of arguing for the purpose of my proffer.

QUESTION: But in Judge Winter's view that could not be accomplished except by granting a new trial, by making a new record.

MR. WOOD: Yes, sir, an inquiry into that, a factual inquiry.

QUESTION: That is what you tried to do, isn't it?

MR. WOOD: Yes, sir, absolutely.

QUESTION: And that is what you complained about, that you didn't have a right to do that.

MR. WOOD: Yes, sir.

QUESTION: I thought I understood you.

MR. WOOD: Yes, sir.

QUESTION: It would under 922(h).

MR. WOOD: Yes, sir.

QUESTION: It would be sufficient if your client were merely under indictment.

MR. WOOD: Yes, sir.

QUESTION: Does that square with your position as to convictions?

MR. WOOD: Oh, absolutely, sir. I think, Mr. Justice Blackmun, that the congressional intent in the indictment phase is obvious. Indictment, of course, is a temporary disability. One has his constitutional guarantees, for example, to a speedy trial which will remove it in a short time, and the use of the word "indictment" certainly is unequivocal.

May it please the Court, in constructing the statute I would urge you that it is not necessary to reach the consitutional issue. The government, I think the thrust of the government's argument has been and seems to be that if Congress had meant to exclude Lewis from the scope of the statute, that is to exclude people who had been convicted in violation of Gideon, that it would have spelled it out. I think the reverse really is true. I think that had Congress, with its awareness of Gideon, had it meant to include people like Lewis, I think it is just as logical to say that they would have spelled that out.

I am told that, for example, after this Court's decision in Miranda and some other cases that there was considerable congressional discussion about certain cases. Of course, I don't believe there has ever been any great congressional stir over the Court's ruling in Gideon. So certainly they were aware of Gideon. I believe Burgett

is a year prior to the enactment of the act in 1968 where Burgett -- so I think where the constitutional issue can be avoided simply on statutory construction.

Likewise, we are dealing with a penal statute. It must be strictly construed. I would suggest, if Your Honors please, that the statute is ambiguous for more than one reason. Obviously, if you took a literal reading of the statute, one who was convicted of a felony and won on appeal, for example, and had the thing dismissed, and later possesses a firearm -- well, if you read the statute literally this man has been convicted of a felony. I don't believe it excludes people --

QUESTION: Well, doesn't the reversal affirmatively vacate the conviction so that there is at that time no conviction extant?

MR. WOOD: Yes, sir.

QUESTION: It is quite like the situation you have here, isn't it?

MR. WOOD: That's right, and yet Lewis, even if he had filed his writ of corum novis or what have you and had the judgment vacated, Mr. Chief Justice, he still would have been convicted of a felony at some time prior.

So I think the statute is ambiguous. I think there is an ambiguity, a latent ambiguity in the word "felon" or "felony" or convicted of a felony. I think it

is arguable certainly and I think convincingly that that means validly convicted, certainly not void. I don't think there has been any question in this Court's rulings in Loper and Burgett, Tucker, that is void. They are not voidable. Convictions and violations get in.

As a matter of fact, I believe that in Loper v. Beto you framed the question in those words, made the petitioner attack a void judgment, a void conviction.

QUESTION: Well, do you think the language of Congress on its face is susceptible of including within its sweep the position of a person who has been convicted by a jury has appealed and the appellate court has reversed the judgment and directed a judgment of not guilty to be entered?

MR. WOOD: Yes, sir, I think so, but I think there is an important difference.

QUESTION: And you really see no difference between that and the question of a person who has been convicted and who after he is prosecuted under this statute who has never appealed, now says I didn't have a lawyer?

MR. WOOD: I do see a difference. I think the man that you mentioned first, the man who had his jury trial presumably had a fair trial, I think it might be more analogous to say what if he had a jury trial but no lawyer. We are talking about, Mr. Justice Rehnquist, the

most precious of all federal rights. This one though -- the rest of them are meaningless. I think there is a difference, at least that man has had it fair and square. If he argued --

QUESTION: Well, he was successful too --

MR. WOOD: Yes.

QUESTION: -- and got his conviction reversed. This person never bothered to take any action to get his conviction set aside until he was indicted for a new trial for another offense.

MR. WOOD: That's correct and it raises an interesting point that I have thought about, is if Lewis had come into my office -- and I hope I don't publicly confess malpractice or potential for it -- but if he had come in and said, look, I've been convicted in violation of Gideon v. Wainwright, I had absolutely no lawyer, what have I got to do -- I don's think it would be malpractice for a laywer to say nothing, that is do nothing. It is a void conviction and I think that that --

QUESTION: Unless you were planning on going out and buying a firearm.

MR. WOOD: That's right, sir. Obviously we take the precaution to --

QUESTION: If you were applying for a job and had to list any prior convictions, I suppose it might be

desirable to have his record clear, wouldn't it?

MR. WOOD: I think it would be to have his record clear.

QUESTION: Lots of times that would be a bar to employment.

MR. WOOD: Yes, sir.

QUESTION: Also I assume he would probably take some risk of retrial if he does that, too. If he sets aside whatever the conviction was and the statute hasn't run, he takes his chances on what will happen the next time around.

MR. WOOD: Yes, sir. Of course, Lewis I believe did four years, if I recall, three or four years. That was the time to do it. Why he didn't do it, of course, I don't know.

QUESTION: Mr. Wood, suppose instead of no lawyer he offered to prove and for the purpose of the decision the government accepted the fact that his conviction rested entirely on a conviction that was obtained from him by stringing him up over a door and beating him up or something like that, and therefore the conviction was void. What would you say about that kind of case?

MR. WOOD: Sir, I think, as the Harvard Law Review article points out, I think a line has to be drawn. Fortunately, I think I am at the right end of the line.

QUESTION: That would be a void conviction, I suppose?

MR. WOOD: Sir?

QUESTION: That would be a void conviction, I guess.

MR. WOOD: I think so. It might be that a proper distinction to make is between a conviction that is void or one that is voidable if anybody can determine what that is.

QUESTION: But that is just as void as one where you don't have a lawyer.

MR. WOOD: I agree.

QUESTION: So that distinction would mean if you prevail here he should have the same right, wouldn't he, logically?

MR. WOOD: I think so, yes.

QUESTION: I'm not sure I heard your response clearly. Did you say that kind of conviction is voidable?

MR. WOOD: No, sir, I didn't mean that. I perhaps was over-responding, but I was suggesting that obviously a line has to be drawn. You can't come in and collaterally attack on any ground.

QUESTION: Did you say that he spent four years in prison under this conviction?

MR. WOOD: He spent some years in prison, Mr. Justice Burger, and --

QUESTION: So he didn't think his conviction was void during that period, did he, whether that makes any difference or not?

MR. WOOD: Well, he knew he was behind bars. No, sir, he never attacked --

QUESTION: He had no habeas corpus, no collateral attack of any kind on the conviction?

MR. WOOD: No, sir. You know, as you pointed out in the dissent, Mr. Chief Justice, when Lewis was convicted it was the law of the land. I believe he was convicted just prior to Gideon and put away in prison in Florida. I believe this is in the record, so I am not going outside it. When he got out of prison in Florida, he joined the Army and went to Vietnam and came out. So, no, he didn't think it was void.

I would like, if it please the Court, to touch on some more aspects of the constitutionality. As I said, I believe throughout the case in my brief, I think the issue before you boils down to an interpretation of three cases, chiefly Burgett, Loper and Tucker. Analyzing each of the three, I have come not only within the majority opinions but I believe that I am safe on the dissents as well. I know again, Mr. Chief Justice, that

some members of the Court were concerned because in Loper and in Tucker you were speaking not only of a prospective application of Gideon but you were talking about a retrospective application. That is, these trials where the evidence was introduced of the Gideon violations, these trials had taken place long before Gideon was ever decided and at the time they were introduced -- this is the case, I believe, in Loper -- the trial judge ruled correctly, it was the law of the land.

That is not the case here, of course. Lewis' trial in Richmond a couple of years ago, the law of the land was Gideon and he had been clearly convicted in violation of that, so I believe I have excluded that portion of the dissent.

I find it impossible or difficult, as Judge Winter did, to make any meaningful distinction between this case and Burgett v. Texas. I had thought that the Court had made clear that a conviction obtained in violation of Gideon was useless for any purpose, either to enhance punishment or to establish guilt, and both were done in this case. That is, he gets 18 months to serve by reason of this conviction, so he has got an enhanced punishment, and it was used as a predicate for the conviction itself, that is the whole basis for it was this conviction in violation of Gideon.

I would, Mr. Chief Justice, ask that the balance of my time be reserved for whatever rebuttal I would have. If I may add one thing -- I think I have made it clear but it is worth repeating, and that is the government and I apparently differ on the phraseology of the issue. I phrased it so in the petition that whether one convicted in violation of Gideon v. Wainwright could defend a fire-arms charge on that basis; the government has the most sweeping phraseology throughout their brief and referred to it as may one attack the constitutionality.

I come here today on the wings of Gideon, Loper, and Burgett and not any other basis.

QUESTION: When was this section passed under which your client was --

MR. WOOD: 1968, if Your Honor please.

QUESTION: '68. Is there a predecessor or not?

MR. WOOD: Judge, I don't know. I believe there may have been but I honestly don't know.

QUESTION: This was part of the Omnibus Crime Bill, wasn't it?

MR. WOOD: I'm sorry, Mr. Justice?

QUESTION: Wasn't this part of the Omnibus Crime Bill?

MR. WOOD: Yes, sir. Yes, sir.

MR. CHIEF JUSTICE BURGER: Mr. Levander.

ORAL ARGUMENT OF ANDREW J. LEVANDER, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. LEVANDER: Mr. Chief Justice, and may it please the Court:

First, in response to Mr. Justice Blackmun's and Mr. Justice Stewart's inquiries, I think that the government has conceded for the purposes of the proceedings here that the petitioner has alleged that his conviction was invalid under Gideon v. Wainwright. If the court accepts either petitioner's statutory or constitutional claim and rejects the government's arguments, then the appropriate remedy I think both petitioner and respondent agree would be a remand to the District Court for a determination of whether or not in fact the prior conviction was void under Gideon v. Wainwright.

As I understand his proffer, the record of the conviction does not affirmatively show that the petitioner did not have counsel at the time of his 1961 conviction. Rather, th -- I believe that the Florida lawyer indicated to Mr. Wood that the record, the transcript of the proceedings did indicate that he was without counsel.

QUESTION: Well, showed that he was uncounseled or did not show that he had counsel, which is it?

MR. LEVANDER: Well, I believe that he alleges that the Florida lawyer told him that the transcript

indicated affirmatively that petitioner was without counsel at the time of his prior conviction. We have never had an opportunity to explore that as a matter of proceedings because the District Court and the Court of Appeals correctly in our view said that whether or not he was without counsel at his 1961 conviction is irrelevant.

He was convicted in 1961 and he never overturned that conviction, he never obtained a pardon, and he never pursued his administrative remedies under the act.

QUESTION: Would that have been admissible, that proffer in the present trial? I mean it is double hearsay.

MR. LEVANDER: That's correct. I think what happened was that he asked for a continuance so he could find out more fully what the actual facts were, and the judge said, well, there is no need for a continuance because it is irrelevant, which is our point.

As I started to say, the petitioner was convicted in 1961 in the Florida state courts of a felony. That conviction has never been overturned and he has never obtained a pardon and he has never pursued his administragive remedies under the act. Nonetheless, he claims that the act should be construed to permit him to attack the validity of his prior conviction for the first time in his federal gun law prosecution. Alternatively, he claims that if the act does not provide for such a

defense, that the Constitution requires it, at least where it is alleged that the prior conviction was obtained in violation of the right to counsel.

In our view, the language and structure of the act refutes petitioner's statutory claim. The act --

QUESTION: Mr. Levander, let me get back for a minute to this continuance question. I can fully understand the government's desire to resolve a case on a fairly broad basis, but after the continuance was denied, a trial took place?

MR. LEVANDER: That is correct.

QUESTION: And was any evidence adduced at trial to show that the prior conviction was uncounseled?

MR. LEVANDER: From the record I understand that at the conclusion of the government's case, Mr. Wood put the petitioner on the stand and that he said, now, judge, I want him to testify about the prior conviction and his lack of counsel, and the judge said, well, we have already gone through this, and he said, I agree, I just want to make my objection that he would testify and the judge said --

QUESTION: So the judge refused the proffer during the trial?

MR. LEVANDER: That's correct also. That is how I understand it. I think that the transcript, as far as

I know, is partially reprinted in the appendix and if the Court needed a fuller transcript we can obtain one.

As I started to say, the act unequivocally and broadly declares that any person who has been convicted of a felony may be receive, possess or transport a firearm. The plain meaning of that sweeping language is that any person who has an outstanding conviction, particularly ones such as the petitioner who served four years for that conviction, is barred from possessing a firearm. No exception appears in the language for a prior conviction that is invalid or a prior conviction that is invalid because of Gideon v. Wainwright or anything like that.

QUESTION: Is it what you are saying that if the man wants to purchase a firearm for whatever reason, assuming he is going to be a guard at a plant or a bank, that his first step is to go and take affirmative action by collateral attack on the conviction and have it set aside on that ground and then proceed to purchasethe firearm in which he could recite that there was no valid conviction outstanding against him or words to that effect? Is that what you are saying in effect?

MR. LEVANDER: That is absolutely correct, Mr. Chief Justice. I would point out a couple of things. First, of course, in this case the petitioner was not going to become a guard at an institution. He was arrested

for having a concealed weapon on his person as he was about to enter an illegal gambling casino. I would further point out that the act gives the defendant who has been convicted and either thinks he has been convicted unfairly or who thinks that his conviction is not indicative of his perpensity to misuse firearms three alternatives before going out and possessing the firearm.

First, he can collaterally attack his conviction in the appropriate court. Here he should have gone back to Florida state court where they are familiar with Florida law and Florida proceedings and Florida records and not raise it for the first time in a federal court after going out and possessing a firearm.

Second, he could obtain a qualifying pardon under section 1203 of the act. A pardon must state specifically not only that he is pardoned but that he is pardoned and can use firearms or can possess firearms.

Third, failing the ability to overturn the conviction for one reason or another or get a pardon, the convicted person has the alternative under section 923(c) of the act to petition the Secretary of the Treasury for a dispensation. This is not a meaningless procedure. In the year 1978, some 1,754 applications were made by convicted felons for a dispensation, and of those something like 574 were actually granted. So this is a

real procedure which is followed by many people who are apprehensive about their prior conviction.

Now, as I started to say, there is no exception in the act, no defense in the act regarding the validity of the prior conviction and such a defense would seemingly be irreconvilable with Congress' decision to impose a similar firearm disability on persons under indictment.

If the petitioner is correct about the statutory construction of the act, then he would attribute to Congress the following purpose: The person who was convicted albeit without counsel obviously has already been indicted; yet, even though he has been indicted and a jury or a judge has found him guilty beyond a reasonable doubt, albeit without counsel, he would be deemed more trustworthy than a person who is merely under indictment. Yet a person whose conviction is overturned for lack of counsel is not scott free, he is still under indictment. It is simply irreconcilable with the congressional language to construe the act to permit the validity of that defense.

We think the absence of --

QUESTION: In this case, there was no discussion about Congress or about anything.

MR. LEVANDER: Well, that is not exactly true, Your Honor. The legislative history --

QUESTION: It must have been about ten minutes.

MR. LEVANDER: Well, there is a lot more discussion about the parallel provisions in section 922 and those were enacted at the same time and use the same exact language, "has been convicted," and the legislative history as a whole shows a clear congressional purpose to broadly reach out, as this Court has recognized in Scarborough and Barrett and Huddleston and in Bass, a broad purpose of Congress to limit the flow of firearms to persons who might potentially be dangerous to society. And certainly the petitioner fits into that category.

It is particularly reflective of congressional intent that there is no specific validity defense because first of all there are exceptions and defenses contained within the act, express ones, but not the ones sought by petitioner.

Moreover, where Congress has thought it appropriate to allow defendants to challenge prior convictions, it has so provided. For example, in the Special Dangerous Offenders statute, which is found at 18 U.S.C. 3575(e), Congress has specifically provided the defense sought by the petitioner here. Interestingly, the Special Dangerous Offenders statute was enacted as Title X of the Organized Crime Control Act of 1970. Title XI of that very same act is an explosive control statute which in high verba adopts

the gun control provisions, and yet in that Title XI no special defense is made, the validity that is sought by the petitioner.

So it is therefore clear that Congress knows how to create such a defense or exception if they want to and that it purposely did not here, and that is quite understandable given the general thrust of the act, which is that persons who by their prior acts or characteristics have indicated they might be dangerous, should clear their name first before going out and possessing a firearm. It is a clear bright line rule.

The petitioner's construction of the act would encourage defendants and people who have been convicted to simply guess whether or not they think that their prior conviction is valid. That would certainly narrow the ambit of the act and it would also tend to defeat the purpose of Congress which was to make sure that people who are running around with firearms or getting firearms are to be trusted.

QUESTION: Well, is it a question of whether they can be trusted or whether they are the kind of people who fit into the category that Congress said should not be permitted to have firearms?

MR. LEVANDER: That's right, Congress has sweepingly created these categories of persons and a

convicted person has various options to show that he doesn't belong in that category. One of them is simply not to go out and buy a firearm and ignore the fact that he has a conviction.

QUESTION: What if he had been indicted and the indictment had never been pressed and he had never been tried and was out on bail for three years, four years, would the statute apply?

MR. LEVANDER: Well, the under indictment part would apply. Presumably he would go into court and simply have it dismissed for failure to prosecute under the Speedy Trial Act or something of that nature or the speedy trial clause of the Constitution. He has got nothing.

QUESTION: I am assuming three or four years and he has done nothing and he is still under indictment and then in the same posture as this fellow going into an illegal establishment packing a gun.

MR. LEVANDER: He would have violated the act 922(g) or 922(h) if the receipt or transportation could be shown under the statutory language. Under indictment is under indictment; convicted means convicted.

We think basically that the thrust of petitioner's argument is his constitutional claims based on a Burgett line of cases. Before turning to that though,

I think that in our view this is really a due process case and the question is whether or not Congress has the power to keep firearms out of the hands of persons that they think have exhibited characteristics which might suggest that they might misuse the firearms until such time as they clear their name.

QUESTION: Well, that is not really the issue in this case, is it? I mean, I haven't heard the petitioner question, for example, the power of Congress to keep firearms out of the hands of people who have been indicted for something.

MR. LEVANDER: Well, if that --

QUESTION: That is not the issue in this case, is it? It is not due process.

MR. LEVANDER: Well, let me try to explain.

QUESTION: All right.

MR. LEVANDER: If Congress could pass now, if Congress is constitutionally empowered to say people under indictment may not possess a firearm and that is valid --

QUESTION: Yes?

MR. LEVANDER: -- then it cannot be or it would be completely illogical for the Sixth Amendment to require that persons who have not only been indicted but have been convicted and have not done something about

that conviction cannot possess a firearm and ignore the fact of their conviction.

QUESTION: I did not understand Mr. Wood's basic argument to be that Congress would not have had the power to do this but that in fact Congress did not, that it is a matter basically of statutory construction.

MR. LEVANDER: I think that --

QUESTION: Maybe I misapprehended.

MR. LEVANDER: Yes, I think he makes both arguments. I think that, as I tried to demonstrate in the last two minutes, that all the indicia of congressional intent, the sweeping language, the legislative history, the policy and the express exceptions and other acts show what Congress intended to do. He not only claims that Congress did not --

QUESTION: Did not do it but also that he could not.

MR. LEVANDER: That's right, and as to that point --

QUESTION: For that argument that you are now addressing.

MR. LEVANDER: Right.

QUESTION: And under your reasoning you could make Burgett into a due process case.

MR. LEVANDER: Well, I think probably that

the Court might have decided under due process principles. I mean the use of so many collateral and perhaps prejudicial convictions was simply a violation of due process as opposed to the Sixth Amendment.

QUESTION: Mr. Levander, you say that if a prior conviction has been set aside that he still is subject to section --

MR. LEVANDER: No, that once the prior --

QUESTION: Well, he has been convicted.

MR. LEVANDER: Well, I think that would be a -- first of all, as a --

QUESTION: Well, he has been, hasn't he?

MR. LEVANDER: Well, the Chief Justice --

QUESTION: That is what the statute says, he has--

MR. LEVANDER: Well, as the Chief Justice pointed out, once a person's conviction has been overturned, the judgment of conviction is vacated and so therefore he is no longer a convicted felon.

QUESTION: That isn't what the statute says. It says anyone who has been convicted.

MR. LEVANDER: Well, I think that would be an overly literal interpretation of the language which the court --

QUESTION: Well, that is the argument your

colleague uses. Why don't you just say valid conviction?

MR. LEVANDER: Well, we say someone who has an outstanding conviction. The language that --

QUESTION: You would add that word rather than the other?

MR. LEVANDER: The other language would be more appropriate if Congress said who has ever been convicted regardless of whether or not --

QUESTION: It might be, but it says who has been convicted and that literally would cover my case.

MR. LEVANDER: Well, literally --

QUESTION: And you say no, you should construe that out of the statute and your colleague says if you are going to do that, if you would ask Congress, surely they wouldn't have intended to include an invalid conviction in this prohibition.

MR. LEVANDER: Well, the existence in the statute of a pardon procedure and administrative procedure for people who had outstanding convictions strongly suggests that Congress intended that convicted meant an outstanding conviction. The person who has had their conviction overturned certainly doesn't need a pardon. And if you went to a governor of the state of Florida and said I had my conviction overturned but I want a pardon, he would say, you know, you're crazy. That would not be a

normal procedure, I don't think. And I think that the normal plain meaning of the language has been convicted of a felony is someonw who has an outstanding conviction.

QUESTION: Do you mean either he has served his sentence -- especially if he had served his sentence, his conviction is still you say a valid conviction.

MR. LEVANDER: Well, it is presumptively valid under Johnson v. Zerbst until such time as it has been overturned and certainly a petitioner who has served four years for his crime in Florida in 1961 knew that he had been convicted.

I started to say that if the general classification of the statute is a rational one and it is a limited civil disability regarding firearms that has been imposed by Congress valid as to all people who had outstanding convictions, then it follows that Congress could impose a criminal penalty on someone who ignored the fact of that conviction and failed to pursue administrative or judicial remedies to overturn that conviction prior to possessing a firearm.

As this Court stated in Yakis v. United States -- I am quoting from page 444 of Volume 321 -- there is "no principle of law or provision of the Constitution which precludes Congress from making criminal the violation of an administrative regulation by one who has failed

to avail himself of an adequate separate procedure for the adjudication of its validity."

Therefore, if the classification is valid, and we submit that it it, submit that it is valid for several reasons, then the imposition of a criminal penalty by one who ignores the fact of his conviction and fails to avail himself of the adequate procedures that have been supplied by Congress, will -- then there is no question as to the constitutionality of the act.

QUESTION: What about one who has been convicted but he has appealed his case and the case is pending?

MR. LEVANDER: Well, in United States v. Liles, in the Ninth Circuit, they held that both the act applies to someone who has a conviction on appeal and there is no constitutional impediment to convicting him.

QUESTION: And you agree with that?

MR. LEVANDER: I agree with that, yes.

QUESTION: What happens to the poor man that didn't have a lawyer when he was convicted and didn't have a lawyer during the four years when he was serving his time and he hasn't got a lawyer yet, he is just in bad shape, isn't he?

MR. LEVANDER: No, sir --

QUESTION: If he happened to buy a gun, he is in awful shape.

MR. LEVANDER: If he has been convicted, it is Congress' judgment that he should clear his name first. He could simply send a letter to the Secretary of the Treasury saying, gee, I --

QUESTION: Well, who would tell him that?

MR. LEVANDER: Well, 1,800 --

QUESTION: He didn't have sense enough to get a lawyer the first time.

MR. LEVANDER: Well, 1,800 --

QUESTION: This is sort of a non-lw yer man but he is still a citizen of the United States.

MR. LEVANDER: He certainly is, sir.

QUESTION: He just hasn't had the benefit of a lawyer.

MR. LEVANDER: But 1,800 felons knew last year and sent applications to the Secretary of the Treasury.

QUESTION: I thought constitutional rights were individual.

MR. LEVANDER: They certainly are.

QUESTION: Linited by 1,800 or --

MR. LEVANDER: That is absolutely correct. We think that Congress, knowing that there was a tremendous and precipitous rise in violence and particularly that violence is connected to gun possession by people with criminal records or characteristics, that it was entitled

to broadly provide that anyone who has been convicted, whether or not the conviction may be subject to collateral attack, cannot possess a firearm until such time as they clear their name.

It is particularly constitutional and meets equal protection analysis challenges because 925(c) makes sure that the statute is individually tailored. Someone who thinks that their conviction is not indicative of their perpensity to misuse firearms can go in and apply to the Secretary for dispensation.

Moreover, even by focusing on the sub-class of persons whose convictions are possibly subject to collateral attack,that the statute is still rational. Certainly a person who has been convicted even without counsel has been both indicted and found guilty beyond a reasonable doubt, and those facts differentiate him from the populace at large.

QUESTION: How about the case where the possession of a firearm takes place before a conviction has been overturned but it is overturned prior to indictment?

MR. LEVANDER: He still violates the statute.

QUESTION: So the crucial date is when he possesses the firearm.

MR. LEVANDER: The crucial determination is

that he must clear his name before possessing the firearm and --

QUESTION: And if he has cleared it in habeas corpus and that is on appeal by the state --

MR. LEVANDER: If he has cleared his name -- once he clears his name either in --

QUESTION: It isn't clear, the state is appealing it.

MR. LEVANDER: Say that again.

QUESTION: A habeas corpus proceeding, he has won it in the trial in the Federal District Court.

MR. LEVANDER: Then once he has overturned his conviction --

QUESTION: But the state has appealed it.

MR. LEVANDER: -- and the state is appealing, then he still is under indictment under section 922.

QUESTION: So what difference does that make?

MR. LEVANDER: Then he can't go out and receive or transport a firearm if he is still --

QUESTION: He is still under indictment, but how about -- let's say he possesses a firearm --

QUESTION: He is as bad off as the man who didn't have a lawyer.

QUESTION: Well, go ahead.

MR. LEVANDER: Thank you. The main reliance of

petitioner is on the Burgett line of cases and we think those cases are distinguishable for several reasons. First of all, in Burgett and in Loper and in Tucker, the reliability of the individual conviction was at issue which is to say that a sentence was enhanced or credibility destroyed by reference to an uncounseled conviction. That is not the case under the federal gun laws. The reliability of the individual conviction as an indicator of the individual defendant's propensity to use firearms is simply not at issue in the federal gun law.

QUESTION: Just before you proceed, Mr. Levander, I didn't understand -- I don't think I got your answer to my brother White's question.

MR. LEVANDER: I'm not sure I got Mr. Justice White's question.

QUESTION: As I understood it, a person is convicted, he then collaterally attacks his conviction successfully and has that conviction set aside and the state appeals, and at that time may he be indicted for violation of Title 18 --

MR. LEVANDER: After he overturns his conviction he received a firearm?

QUESTION: And it is pending on appeal by the state.

MR. LEVANDER: Then he is violating section

922(g) or 922(h) -- excuse me -- which refers to the receipt of a firearm by anyone under indictment for a felony.

QUESTION: I'm talking about 1202(a)(1) which is what --

MR. LEVANDER: There is no provision under 1202(a)(1) for persons under indictment and if --

QUESTION: But that is the statute that is involved here.

MR. LEVANDER: That's right.

QUESTION: All right. So we are talking about that statute.

MR. LEVANDER: After his conviction is overturned --

QUESTION: Yes.

MR. LEVANDER: -- then he is not subject to the limitations of section 1202 --

QUESTION: Even though it is on appeal -- even though he is literally within the terms of the statute because he has been convicted by a court of --

MR. LEVANDER: But some court has vacated the order of conviction, I take it.

QUESTION: He has been convicted.

MR. LEVANDER: Right. It doesn't mean who has ever been convicted.

QUESTION: Well, that is what it says.

MR. LEVANDER: The statute as we construe it --

QUESTION: The statute says has been convicted and that would make it illegal for such a person to possess a firearm even though his conviction had been set aside on direct appeal.

QUESTION: Isn't that the same point Mr. Justice White made before?

QUESTION: Yes.

MR. LEVANDER: Yes, and I suggested that that might literally be what that statute says --

QUESTION: That is what that statute says literally and you are relying on the literal terms of the statute, I assume, are't you?

MR. LEVANDER: Well, certainly if that is the literal reading of the statute, which we don't have to decide that here, because here we have a --

QUESTION: Well, it is what the statute says.

MR. LEVANDER: Well, the --

QUESTION: In literal terms, that is what the statute says.

MR. LEVANDER: But when you think of someone who has been convicted of a felony, you don't think of someone who has overturned that conviction because the order of conviction has been vacated.

QUESTION: Maybe you don't think of somebody

as such, but the Congress made this statute applicable, made it a criminal offense for anybody who has been convicted, regardless of the ultimate fate of that conviction.

MR. LEVANDER: Well, for the purposes --

QUESTION: Can't he be indicted and convicted for having violated the statute by obtaining a gun while there is an outstanding indictment against him?

MR. LEVANDER: Yes, he could.

QUESTION: Because the habeas corpus judgment doesn't nullify the indictment, it nullifies only the conviction.

MR. LEVANDER: That's right.

QUESTION: But he can't be under 1202(a)(1), can he?

MR. LEVANDER: Not in our view, Your Honor.

QUESTION: That is the statute involved here, isn't it?

MR. LEVANDER: That's right. If the man has had his conviction overturned, he is no longer someone who has been convicted.

QUESTION: How come?

MR. LEVANDER: Because the word "convicted" as used by Congress in our view means that someone who has a conviction outstanding.

QUESTION: In other words, you are telling us

the statute doesn't mean what it says.

MR. LEVANDER: Well, the Court need not decide that question here, since in any event your broader reading of the words "has been convicted" certainly applies to petitioner who has never overturned his conviction.

QUESTION: Well, I was wondering just what your argument was.

MR. LEVANDER: We are saying --

QUESTION: You are relying on the words of the statute.

MR. LEVANDER: Well, we are. We are only saying that the plain meaning of that statute is not the broader definition or limited definition that you are pressing upon me but rather a position in between what petitioner --

QUESTION: Somewhere in between with what it says and what it doesn't say?

(Laughter)

QUESTION: Mr. Levander, isn't it just like the First Amendment, Congress shall make no law means Congress may make some law?

MR. LEVANDER: Thank you, Mr. Justice Blackmun.

At any rate, I am aware of no federal prosecution of someone who has possessed or received a firearm after the time that their conviction was overturned, and

that is the policy that the government follows with regard to this act.

I started to try to distinguish Burgett and that line of cases and the first distinction is a distinction that this Court drew in Loper itself. In a footnote in the majority opinion in that case, the Court distinguished between two things: First of all, there is a -- what was not good in that case was the use of an uncounseled conviction to impeach a defendant's testimony generally. Howefer, the Court suggested that a different result would be reached if on direct testimony the defendant got up and said, "I have never been convicted," simply ignoring the fact of his prior conviction, albeit uncounseled.

In that case he would just be ignoring the historical fact of his conviction as opposed to the general impeachment where the reliability of the conviction is critical to its impeachment value. And here we say the same thing. The reliability of the individual conviction with regard to the defendan't propensity to misuse a firearm is only relevant in two respects: First, in the administrative proceeding before the Secretary of the Treasury and also that the general group of persons who have been convicted are more likely to misuse firearms than the populace at large.

However, in the criminal trial itself, it is only the historical fact of conviction which is at issue.

The second distinction I would draw between the Burgett line of cases and this case is that Congress has simply provided a timing differential. The defendant, the person who has been convicted must go out and clear his name prior to obtaining the firearm, and the civil disability which is imposed by the statute attaches immediately upon conviction. The criminal penalty is imposed when he simply ignores the civil disability and ignores the administrative procedures set up by Congress or judicial procedures.

In Burgett and in Loper and in Tucker, the first time that the prior conviction, allegedly uncounseled convictions in those cases became relevant was at the criminal proceeding itself, not immediately upon the conviction, and therefore it was appropriate to allow the defendants in those cases to challenge the validity of their prior convictions at the criminal trial.

Here the petitioner eschewed his right to challenge his prior conviction at an earlier stage which Congress directed him to do so and for failing to do that Congress has imposed a penalty.

If counsel's interpretation of the Burgett line of cases and the Sixth Amendment is correct, it would lead

to the conclusion that a person who is convicted, albeit without counsel, and is in jail could escape from jail without any kind of penalty being attached, he can simply ignore the fact of his conviction and walk out tomorrow because under his theory it is as if there is no such thing as the conviction, and I don't think that is what Congress or this Court meant in those cases.

QUESTION: Mr. Wood tells us in his reply brief that Virginia has held just that.

MR. LEVANDER: Well, Mr. Wood suggests that the Court didn't -- correct me, but that the Court didn't reach that issue, it didn't have to, and the court in Virginia has never said that and there are other courts that have suggested quite the opposite, that a person can't simply ignore the fact of his conviction and escape.

QUESTION: Why do you think that conclusion inevitably follows from his argument anyway?

MR. LEVANDER: Well, I think he says that --

QUESTION: We are dealing with an act of Congress and it is really -- at least one of his points is that it is a matter of construing that act of Congress, and maybe the act of Congress makes it a penal offense to escape from the jail or prison, then there would be a question of construing that act of Congress, quite a different statute.

MR. LEVANDER: I am now referring to his

constitutional argument and not his statutory argument, and as to that the logic of his position, at least the conclusion of the Sixth Amendment would justify such an escape as the defendant could simply ignore the fact of his conviction and walk out the jail door.

Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Wood?

ORAL ARGUMENT OF ANDREW W. WOOD, ESQ.,

ON BEHALF OF THE PETITIONER -- REBUTTAL

MR. WOOD: Mr. Chief Justice, and may it please the Court: Just a few comments if I may.

The joint appendix, if Your Honor please, beginning at pages 2, 3, and so on show merely that the point I believe was preserved. The appendix will show that after the government had rested its case in chief and I believe called Mr. Lewis to the stand to testify on other matters, we made the proffer again and that is we told the judge that in view of his earlier ruling that the evidence of the Gideon violation would not be received, that we would not go into that matter. Of course, it is conceivable that we could have gone forward even without any records and had the man testify and he may have been believed. But in view of the judge's earlier ruling, he held that that would not be necessary to

present such proof.

I would only have a few more comments at this time and that is the government has stressed that Lewis and people like Lewis should have their convictions ex= punged and file petitions for writs of corum novis. Real life just is not that way. Lewis is not an educated man, as are many people who are in his fix, and it just doesn't happen that way, and I think this Court knows it. To me, it is unthinkable that the Constitution would permit some kind of penalty for his failure to have done that. He is already in trouble, as Mr. Justice Marshall has said --

QUESTION: I suppose you would say he could be convicted even if he didn't know anything about the gun law.

MR. WOOD: No, sir. I am talking about a deprivation of the constitutional right.

QUESTION: I know, but even if he knew nothing whatsoever about 1202 and got the gun, I suppose he could be convicted, no matter how innocent he thought he was.

MR. WOOD: Certainly, sir. There is a differ- ence between saying ignorance is no excuse or no defense and saying that we've got to place an obligation on the man --

QUESTION: You mean it would be different if

he were told, if he had been told prior to his possession of the gun, remember, don't pick up any guns because you have been convicted and you haven't had it set aside?

MR. WOOD: No, sir, it would not be --

QUESTION: Then what relevance is it whether he is uneducated or not?

MR. WOOD: Well, I think that the government I think makes a fallacious argument on this score. The Loper decision I submit is controlling. The real holding in that case is that it simply can't be used affirmatively by the prosecution, and that is the essence of it and the gist of it.

QUESTION: Mr. Wood, to the extent of just confining it to a constitutional inquiry, supposing as some cities do they have this regulation that you can't be a cab driver if you have been convicted of a felon and they have a form that you fill out and one of the questions is have you ever been convicted of a felony and if his answer is false you can be indicted for perjury.

MR. WOOD: Yes, sir.

QUESTION: He just ignores it because it is totally void. Can he be indicted for perjury as a matter of constitutional law?

MR. WOOD: Judge, I have thought about that a good deal this morning, about the perjury aspect of it.

I think it is an interesting analogy. I think -- I can't remember the leading case that this Court decided not too long ago on perjury, but I remember reading it some time back, and I would think that you would have a difficult time convicting him of perjury. I think there is enough ambiguity in the word "felon." I think it means validly convicted felon and they could certainly exclude the man who is convicted of a so-called felony in the absence of flagrant denial of a Sixth Amendment right.

QUESTION: I suppose then you are saying that in the 1202 prosecution you can litigate the validity of your prior conviction on any ground you wanted?

MR. WOOD: No, sir.

QUESTION: Why? Do you mean facial validity or --

MR. WOOD: No, sir, I make no distinction.

QUESTION: Well, what if he just says my conviction is invalid because they introduced tainted evidence.

MR. WOOD: I don't --

QUESTION: Does the 1202 court hear that kind of an attack on --

MR. WOOD: No, sir.

QUESTION: Why not?

MR. WOOD: Well, I think the line can be drawn

with the case that you have before you today as a Gideon violation.

QUESTION: I know, but this is a Fourth Amendment violation.

MR. WOOD: Yes, sir.

QUESTION: Assume that he claims that he was convicted on the basis of evidence illegally seized without a search warrant, in violation of the Fourth Amendment, and the government says, well, so what, let's assume that it was, you would say -- would that kind of a claim have to be heard in your case, in the 1202 case?

MR. WOOD: I'm sorry, Your Honor, I may have misunderstood you.

QUESTION: In the 1202 case, would the court have to entertain that kind of a defense?

MR. WOOD: Your Honor, I don't think so. I don't think the court can draw a line --

QUESTION: Between what, between one constitutional --

MR. WOOD: Between those that are, for example, obviously void and those voidable, whatever that is. I confess not to be able to articulate the distinction very well, but I think mine is an obviously void case.

QUESTION: A number of states have a provision that a person incarcerated in prison under a life sentence

and commits a homicide in an effort to escape, for example, and the death penalty is mandatory.

MR. WOOD: Yes, sir.

QUESTION: Now, suppose you have a man who is in prison under an uncounseled conviction for murder, he has entered a guilty plea without counsel and he is in for life and commits the homicide.

MR. WOOD: Yes, sir.

QUESTION: You would have to say, I suppose, that he could not be under that statute because he is in custody under an uncounseled and therefore unconstitutional conviction?

MR. WOOD: Judge, I would have to say that, yes, sir.

I think my time is up. Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 3:02 o'clock p.m., the case in the above entitled matter was submitted.)

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