

July 2015

Sixth Amendment; Right to Counsel; Use of Prior Uncounseled Convictions; Lewis v. United States and Baldasar v. Illinois

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Recommended Citation

Marks, Rita (1981) "Sixth Amendment; Right to Counsel; Use of Prior Uncounseled Convictions; Lewis v. United States and Baldasar v. Illinois," *Akron Law Review*: Vol. 14 : Iss. 1 , Article 10.

Available at: <https://ideaexchange.uakron.edu/akronlawreview/vol14/iss1/10>

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CONSTITUTIONAL LAW

Sixth Amendent • Right to Counsel • Use of Prior Uncounseled Convictions

Lewis v. United States, 100 S. Ct. 915 (1980)

&

Baldasar v. Illinois, 100 S. Ct. 1585 (1980)

ONCE AGAIN the Supreme Court has spoken on the issue of the right to counsel. Within three months the Court rendered two decisions which appear to be inconsistent, not only with one another, but with prior decisions of the Court.

The Court in *Lewis v. United States*,¹ a six to three decision, held that a violation of section 1202(a)(1) of The Gun Control Act of 1968² can be predicated upon an invalid, uncounseled prior conviction. Section 1202 (a)(1) provides that any person who has been convicted of a felony and who receives, possesses, or transports in commerce any firearm shall be fined not more than \$10,000 or imprisoned for not more than two years, or both.³

In 1961 petitioner Lewis plead guilty to a charge of breaking and entering with the intent to commit a misdemeanor, a felony in the State of Florida.⁴ Petitioner was not represented by counsel at these proceedings.

Sixteen years later Lewis was arrested and indicted for possessing a firearm in violation of 1202(a)(1).⁵ At no time prior to being charged under 1202(a)(1) did the petitioner attack his prior felony conviction as invalid. Neither did the petitioner attempt to have the disability removed as provided for in section 1203(2)⁶ and section 925(c).⁷ Counsel for petitioner informed the court that petitioner had not been represented by counsel in the earlier Florida proceedings and alleged that this violated the holding of *Gideon v. Wainwright*.⁸ Counsel offered to provide evidence that would substantiate this fact and to introduce further evidence that the petitioner

¹ 100 S. Ct. 915 (1980).

² 18 U.S.C. app. § 1202(a)(1) (1976).

³ *Id.*

⁴ FLA. STAT. § 810.05 (repealed 1974).

⁵ 100 S. Ct. at 917.

⁶ 18 U.S.C. app. § 1203(2) (1976).

⁷ 18 U.S.C. § 925(c) (1976).

⁸ 372 U.S. 335 (1963).

had been entitled to appointed counsel at the time, since he was indigent.⁹ The court refused to admit this evidence on the ground that it was irrelevant to the question of whether petitioner had violated section 1202(a)(1). The court found the petitioner guilty and sentenced him to eighteen months imprisonment for the federal firearm violation.¹⁰

In a three to two decision the Fourth Circuit affirmed petitioner's conviction.¹¹ The majority held that Lewis could not defend against the gun possession charge by claiming for the first time that the prior conviction was invalid because he had been denied counsel. The majority felt that Congress intended to keep weapons out of the hands of the status class of convicted felons.¹² Further, the court rejected Lewis' argument that the prior uncounseled conviction was void for any purpose.¹³ The court stated:

We think that Congress is entitled to rely on a prior standing conviction as proof that there is probable cause to believe the convicted person has been involved in criminal activity and should not be able to buy a gun without first showing that he is no threat to public safety, even though the conviction may have been obtained in violation of *Gideon*.¹⁴

The court expressed a concern over the burden that would be placed upon trial courts if time-consuming collateral attacks of this nature were permitted. "[T]he government would have to demonstrate the constitutional validity of outstanding convictions—at whenever a defendant so insists. Yet, there is no evidence that Congress intended this type of procedure—a 'trial-within-a-trial'. . . ."¹⁵

In concluding the court acknowledged that other courts had reached contrary views, but they firmly believed that Congress had the constitutional power, in the interest of public safety, to prohibit any person subject to an outstanding facially valid felony conviction from possessing and receiving firearms.¹⁶

Judge Winter, writing in dissent, argued that section 1202(a)(1) did not place an affirmative burden on a defendant to have his invalid conviction overturned. He also argued that the denial of counsel in the prior proceeding was a violation of Lewis' constitutional rights.¹⁷ This invalid

⁹ 100 S. Ct. at 917.

¹⁰ Petitioner's Brief App. at 11, 12.

¹¹ *United States v. Lewis*, 591 F.2d 978 (4th Cir. 1979).

¹² *Id.* at 979.

¹³ *Id.* at 980.

¹⁴ *Id.* at 981 (quoting *United States v. Allen*, 556 F.2d 720, 724 (4th Cir. 1977)).

¹⁵ *Id.* at 981 (quoting *United States v. Graves*, 554 F.2d 65, 83 (3rd Cir. 1977)).

¹⁶ *Id.*

¹⁷ *Id.* at 982.

conviction was a necessary predicate to a determination of guilt, a result not likely intended by Congress.¹⁸ Judge Winter found the majority holding in violation of the mandate of *Burgett v. Texas*,¹⁹ which forbids the use of a prior uncounseled conviction to enhance punishment under a recidivist statute.²⁰ He noted that *Burgett* does not require the defendant to seek post-conviction relief before collaterally attacking his conviction.²¹ Since the record clearly shows the denial of counsel, the burden on all the parties involved would be minimal.²² According to Judge Winter, "[N]either reason nor authority supports a rule that one previously convicted of a felony in violation of his sixth amendment right cannot assert the invalidity of that conviction as a defense to a prosecution under § 1202(a)."²³

This Fourth Circuit decision was the first to hold that an uncounseled conviction could be used as a basis for a conviction under section 1202 (a) (1). The Supreme Court granted certiorari to resolve the conflict among the circuits.

The Court, with Justice Blackmun writing for the majority, relies on two major premises: (1) the statutory language of 1202(a) (1) is plain and unambiguous, and (2) the classification created by the legislature bears a rational relationship to the purpose for which it was enacted.²⁴

"The statutory language is sweeping, and its plain meaning is that the fact of a felony conviction imposes a firearm disability until the conviction is vacated or the felon is relieved of his disability by some affirmative action"²⁵ The Court notes that section 1203 enumerates exceptions to 1202(a) (1), but there is no exception for one whose prior conviction is found to be invalid.²⁶

The majority finds further support in the legislative history of the Act. The legislation was enacted in response to the growing number of political assassinations and violent crimes involving the use of firearms.²⁷

¹⁸ *Id.* at 983.

¹⁹ 389 U.S. 109 (1967). Defendant was charged in a five-count indictment which was read to the jury. The first count charged him with assault. The remaining counts charged him with violation of the Texas recidivist statute, alleging prior felony convictions. Defendant was found guilty of assault and could have been sentenced to life imprisonment. Counsel objected to introduction of evidence of these convictions on the grounds that defendant had not been represented by counsel.

²⁰ *Id.* at 115.

²¹ 591 F.2d at 984.

²² *Id.* at 985.

²³ *Id.*

²⁴ 100 S. Ct. at 918-21.

²⁵ *Id.* at 918.

²⁶ 18 U.S.C. app. § 1203 (1976).

²⁷ 100 S. Ct. at 919.

Senator Russel Long, the sponsor of the bill, emphasized that a violation of section 1202(a)(1) is triggered by a conviction, and the disability remains in place until it has been removed through proper procedures.²⁸

The Court concludes that "section 1202(a) was a sweeping prophylaxis . . . , against misuse of firearms. There is no indication of any intent to require the Government to prove the validity of the predicate conviction."²⁹

Section 1203(2)³⁰ and section 925(c)³¹ provide two methods for removing the disability. The Court notes a third method: the petitioner could have challenged his prior conviction in state court.

Lewis contended that the statute should be construed so as to avoid a constitutional issue. The majority felt that the language and history of the statute are so clear that no alternative construction was possible.³²

The Court's second major rationale focuses on the relationship between the classification created — convicted felons — and the purpose of the legislation — to keep firearms out of the possession of those thought most likely to use them in the commission of crime. The Court concludes that Congress had a rational basis for the classification. Any felony conviction, even an allegedly invalid one is a sufficient basis on which to prohibit the possession of a firearm.³³

Conceding that an uncounseled conviction cannot be used for certain purposes, the Court summarily disposes of the argument that *Burgett* precludes the use of petitioner's uncounseled conviction to support the section 1202(a)(1) violation.³⁴ The majority notes that the focus of the federal gun laws is premised upon the "mere fact of conviction"; the disability attaches immediately upon conviction.³⁵ This is essentially a civil disability enforced through a criminal sanction. Petitioner is not precluded from seeking relief from an invalid conviction, but merely precluded from attacking it collaterally by way of a firearm prosecution.³⁶

The dissenters, led by Justice Brennan, disagree with the majority's characterization of the statute as plain and unambiguous.³⁷ They examined

²⁸ *Id.*

²⁹ *Id.* at 920.

³⁰ 18 U.S.C. app. § 1203(2) (1976).

³¹ 18 U.S.C. § 925(c) (1976).

³² 100 S. Ct. at 920.

³³ *Id.* at 921.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 922.

³⁷ *Id.* <https://ideaexchange.uakron.edu/akronlawreview/vol14/iss1/10>

the alternative constructions offered by the parties: "The first is the Government's — that § 1202(a)(1) may be read to permit only outstanding felony convictions to serve as a basis for prosecution. The second is petitioner's — that the predicate conviction must not only be outstanding, but also constitutionally valid."³⁸ Where one construction of the statute would result in a harsh penalty, the principle of lenity requires the statute be construed so as to avoid that result. Applying that principle in the instant case, the statute should apply only to those constitutionally convicted. The dissent finds nothing in the legislative history that would indicate a contrary congressional intent.³⁹

A second principle of statutory construction is that if there is a question of constitutionality, the Court should first determine whether there is a construction of the statute by which that issue may be avoided. Justice Brennan concludes that reading section 1202(a) so as to predicate criminal liability solely on the existence of a previous uncounseled felony conviction raises serious constitutional questions.⁴⁰ *Burgett* clearly controls in this case. Uncounseled felony convictions can never be used to support guilt or enhance punishment for another offense. Without the petitioner's prior conviction, there could be no conviction for a violation of section 1202(a)(1).⁴¹

The dissent finds that "it is simply irrelevant that petitioner could have challenged the validity of his prior conviction in appropriate proceedings in the state courts . . . neither *Burgett* nor *Loper* imposed any requirement that a defendant collaterally attack his uncounseled convictions before he faces prosecution under § 1202(a)(1). . . ."⁴²

For the first time since *Gideon v. Wainwright*,⁴³ the Court appears to have turned its back on the importance of the sixth amendment right to counsel. The continuous emphasis on the importance of this constitutional right has been subordinated to a construction of section 1202(a) that arguably renders the statute itself unconstitutional.

The Court dismisses in a preemptory manner petitioner's arguments based on the Court's own decisions in *Burgett*, *United States v. Tucker*,⁴⁴ and *Loper v. Beto*.⁴⁵ The paradoxical result of the Court's decision in *Lewis* is that if the petitioner had been charged and convicted of anything other

³⁸ *Id.* at 923.

³⁹ *Id.*

⁴⁰ *Id.* at 924.

⁴¹ *Id.*

⁴² *Id.* at 925.

⁴³ 372 U.S. at 335.

⁴⁴ 404 U.S. 443 (1972).

⁴⁵ 405 U.S. 473 (1972).

than a violation of a federal firearms statute, the prior uncounseled conviction could not have been used to enhance his punishment or impeach his testimony. Yet in this case, not only had Lewis been invalidly convicted in the first place, he would not have been in violation of section 1202(a)(1) but for that conviction. The Court's decision mandates this ironic and illogical result.

The Court exhibits an unusual deference to the Congress by permitting a reading of the statute that effectively denies the petitioner his sixth and fourteenth amendment rights. The dissent also avoids what should be the central issue of this case, the plight of the petitioner as a result of the violation of his sixth and fourteenth amendment rights. Instead, both the majority and the dissent focus on the statutory language. The petitioner's rights were violated once in 1961. That violation is compounded by the majority's broad reading of section 1202(a). This reading includes within the statute's reach anyone convicted, validly or invalidly, of a felony. It is neither illogical nor unreasonable to assume that Congress intended to include only those validly convicted. Clearly it would be unconstitutional for Congress to have specifically included within the statutory language those who have been subject to invalid convictions by reason of denial of counsel. Yet the Court writes into case law what Congress could not constitutionally accomplish.

It is interesting to note the way in which the petitioner, the government, and the Court phrased the issue in this case. Petitioner phrased the question as follows:

Whether a conviction in violation of *Gideon v. Wainwright* . . . may be used to support a subsequent conviction under 18 U.S.C. § 1202 (a)(1).⁴⁶

The government chose a much broader phrasing of the issue:

Whether a defendant who is a previously convicted felon may challenge the constitutionality of his prior conviction as a defense to a prosecution for unlawful possession of a firearm.⁴⁷

The Court presented the question in the following manner:

[W]hether a defendant's extant prior conviction, flawed because he was without counsel, as required by *Gideon v. Wainwright* . . . may constitute the predicate for a subsequent conviction under § 1202 (a)(1). . . .⁴⁸

The Court chose to phrase the issue in the narrow form. By so doing

⁴⁶ Petitioner's Brief at 2.

⁴⁷ Respondent's Brief at 2.

they could have easily limited their decision so as to include only a serious violation of a defendant's rights, one that rises to constitutional magnitude, such as denial of right to counsel. The Court's ruling, however, is not directed to questioning a conviction obtained in violation of defendant's sixth and fourteenth amendment rights, but to gleaning the Congressional intent and to establishing the existence of a rational basis for the legislation. The Court chose to ignore its many rulings on the right to counsel and has established a special standard by which the government can constitutionally deny a defendant the right to counsel. It is difficult to reconcile this decision with the Court's own precedent. The Court ignored these inconsistencies and adopted the government's position. An analysis of this case raises many questions, but provides few answers.

Two months later, the Court further confused the issue in *Baldasar v. Illinois*.⁴⁹ In a per curiam decision the Court held that an uncounseled misdemeanor conviction cannot be used under an enhanced penalty statute to convert a subsequent misdemeanor into a felony carrying a prison term.⁵⁰ The decision appears to be consistent with the Court's holdings in *Argersinger v. Hamlin*⁵¹ and *Scott v. Illinois*⁵² and inconsistent with the Court's holding in *Lewis*.

In 1975 the petitioner was charged with petty theft, a misdemeanor. He was not represented by counsel. Petitioner was fined and sentenced to one year's probation. Six months later, the petitioner was again arrested and charged with another petty theft. Over the objection of counsel, evidence was introduced at trial that petitioner had a prior misdemeanor conviction.⁵³ The prosecution successfully argued that petitioner be punished under the Illinois enhancement statute⁵⁴ which converts a second misdemeanor theft conviction into a felony. Petitioner was sentenced to a term of imprisonment of one to three years under the enhancement statute.

The Illinois Appellate Court upheld appellant Baldasar's conviction. Justice Nash, writing for the majority, relied upon *Argersinger* and concluded that there was nothing in the language of that case "suggesting a prospective application or readjudication of a defendant's right to counsel should he be convicted in the future of the commission of another offense and be then subject to another sentence."⁵⁵

⁴⁹ 100 S. Ct. 1585 (1980).

⁵⁰ *Id.*

⁵¹ 407 U.S. 25 (1972).

⁵² 440 U.S. 367 (1979).

⁵³ 100 S. Ct. at 1586.

⁵⁴ ILL. REV. STAT., ch. 38, § 16-1(e)(1) (1973).

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⁵⁵ *People v. Baldasar*, 52 Ill. App. 3d 305, 307, 367 N.E. 2d 459, 461-62 (1977).

The court held that *Argersinger* was limited in scope, prohibiting imprisonment only for the specific uncounseled misdemeanor; an uncounseled conviction might properly be used if the petitioner were convicted in a future proceeding based upon subsequent conduct.⁵⁶

The dissent did not dispute the validity of petitioner's conviction under the *Argersinger* rationale. However, Justice Rechenmacher disagreed with the majority's limiting *Argersinger* to a conviction and the sentence imposed for that conviction. He noted that as a consequence of appellant's prior conviction, the potential result was two extra years of imprisonment.⁵⁷ He distinguished this result from one in which a prior uncounseled conviction was used for the purpose of impeachment:

[W]here the misdemeanor was introduced for impeachment purposes, the link between the prior conviction and the defendant's imprisonment was quite remote, or even speculative . . . Clearly, in the instant case, imprisonment is a far more direct consequence of the use of the earlier conviction. . . .⁵⁸

When the case reached the Supreme Court, Justice Stewart, joined by Justices Brennan and Stevens, filed a concurring opinion holding that under *Scott* "no indigent criminal defendant [may] be sentenced to a term of imprisonment unless the state afforded him the right to assistance of appointed counsel in his defense."⁵⁹ Petitioner's sentence violated this rule.

Justice Marshall, joined by Justices Brennan and Stevens, wrote a concurring opinion supporting a reversal of petitioner's conviction based upon the Court's holding in *Gideon*.⁶⁰ He noted that while *Argersinger* limited the constitutional right to counsel where the offense charged was a misdemeanor, and *Scott* further defined those limits, in the instant case the petitioner's prior uncounseled misdemeanor conviction had been used collaterally to impose a term of imprisonment.⁶¹ It is clear that had it not been for the petitioner's prior conviction, his sentence could have been for no more than one year.⁶²

The Court agreed that petitioner's prior conviction was valid for some purposes, but not for the purpose of increasing his imprisonment under a repeat offender statute.⁶³

⁵⁶ *Id.* at 310.

⁵⁷ *Id.* at 312.

⁵⁸ *Id.* at 313.

⁵⁹ 100 S. Ct. at 1586 (quoting *Scott*, 440 U.S. at 373-74).

⁶⁰ *Id.* at 1587.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 1588.

In yet another concurring opinion, Justice Blackmun reiterated his "bright line" approach of *Scott*: an indigent would have counsel appointed whenever the petty offense was punishable by more than six month's imprisonment.⁶⁴ Problems such as Baldasar's would never arise under such an approach.

The dissent, led by Justice Powell, distinguished *Scott* from the instant case by emphasizing that the petitioner's prior conviction was constitutionally valid and that the majority's holding now makes that conviction invalid if used as the predicate for enhancing petitioner's sentence.⁶⁵

Trial courts will now be subjected to the additional burden of predicting whether a defendant will repeat his offense. The increased cost, delay, and confusion that will result will frustrate state policies of deterring repeat criminal offenders. The dissent laments not only this confusion, but the lack of effective guidelines by which courts may administer justice in misdemeanor cases.⁶⁶

Justice Powell writes in a footnote that the decision in *Baldasar* is all the more puzzling in view of the Court's decision in *Lewis*. Justice Powell finds that "The conflict between the holdings could scarcely be more violent."⁶⁷

It is interesting to note that the majority in *Baldasar*, with the exception of Justice Stewart, made up the dissent in *Scott*. Clearly, this majority has not adopted the rationale of *Scott*, but bound by precedent, held that *Baldasar* follows in a logical progression a line of cases that protect a defendant's sixth and fourteenth amendment right to counsel.

Justice Powell, writing in dissent, expressed his concern that this decision will incite further litigation and interfere with the administration of justice.⁶⁸ It would appear that his fears are justified. The prosecution, in order to preserve its options, will ask that the court appoint counsel in most, if not all, misdemeanor cases. The dissent in *Scott* will become the rule that trial courts will necessarily follow, a defendant will be entitled to appointed counsel in all cases where any imprisonment is authorized. Justice Powell suggests that uncounseled misdemeanor convictions cannot be used for impeachment or for later sentencing determinations.⁶⁹

⁶⁴ *Id.* at 1589.

⁶⁵ *Id.* at 1590.

⁶⁶ *Id.* at 1590-91.

⁶⁷ *Id.* at 1592 n.3.

⁶⁸ *Id.* at 1590.

⁶⁹ *Id.* at 1592.

A situation more likely to give the Court problems is that of the uncounseled defendant who is given probation and who then violates some provision of that probation such as associating with known criminals or failing to report to a probation officer. A reading of *Baldasar* indicates that a trial court is precluded from revoking the defendant's probation and imposing a prison sentence. Unquestionably, the Court will have to face this issue in the future.

There seems to be no reasonable way in which to reconcile the Court's holdings in *Lewis* and *Baldasar*. *Lewis* involved an invalid conviction. That conviction, according to the Court's prior decisions, could not be used to impeach the defendant's testimony, enhance his punishment under a recidivist statute, or affect his sentence. No one has suggested that the defendant in *Lewis* either had counsel or that he knowingly and intelligently waived his right to counsel. Further, no one has suggested that the defendant was not entitled to counsel under the sixth and fourteenth amendments. Yet the Supreme Court, by focusing on statutory language and construction, held that this undisputedly invalid conviction, could be used as a predicate to a conviction under a federal gun control law that resulted in a prison sentence of eighteen months.⁷⁰

Compare this to *Baldasar* which involved a valid misdemeanor conviction. No one will disagree as to the validity of the defendant's conviction under the rationale of *Argersinger* and *Scott*. Even the defendant did not question the validity of his conviction nor argue that he was entitled to appointed counsel. Yet the Court finds that this valid conviction is invalid for the purpose of imposing an increased term of imprisonment for a second offense under a repeat offender statute.

In both cases the Court speaks of burdens on the trial courts in making the necessary determinations. Yet the facts of the two cases would indicate that the Court could easily have arrived at different results. In *Lewis* it is clear from the record that the defendant had been entitled to counsel under *Gideon*. Administratively, there would be little or no burden in terms of cost or delay in making this determination.

As a result of the holding in *Baldasar*, the trial court is now required prior to trial, not only to make a determination as to whether or not a prison sentence will be imposed for a misdemeanor, but also whether or not they believe that this particular defendant is likely to commit a second misdemeanor for which an enhanced prison term may be imposed. It would appear that the Court requires judges to bring their crystal balls to the bench whenever a defendant is charged with a misdemeanor which

⁷⁰100 S. Ct. at 923-24.
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if repeated will convert that misdemeanor into a felony and additional imprisonment. The time, cost, and confusion involved will be immeasurable.

In *Lewis*, both the majority and the dissent concentrate their reasoning on the language and construction of the statute under which the petitioner was convicted. Few words are expended on behalf of the defendant's sixth and fourteenth amendment rights, rights clearly violated by his prior uncounseled conviction. By contrast the focus in *Baldasar* is squarely upon the right to counsel where a term of imprisonment is imposed. The choice of focus seems to have predetermined the Court's result in each of these cases.

One could more easily understand the reverse results in the two cases. Petitioner Baldasar had a trial without counsel on a misdemeanor charge. He received a fine and probation. A prison term was imposed only after he had repeated the misdemeanor offense. One can make the assumption that the court, upon granting probation, made clear to the defendant that a subsequent offense and conviction would subject him to a prison term. Petitioner Lewis, on the other hand, pleaded guilty. When that is the case:

Counsel is needed so that the accused may know precisely what he is doing, so that he is fully aware of the prospect of going to jail or prison, and so that he is treated fairly by the prosecution.⁷¹

Since reliable convictions and fundamental fairness in the trial process are basic to our criminal justice system the Court should have reversed *Lewis* and, at the very least, granted a new trial with counsel. Such a decision would have been consistent with *Baldasar* and would have maintained the Court's previously unflinching adherence to the importance of the right to counsel in felony cases.

The message the Court has sent to trial courts, defendants, and prosecutors is unclear. The issue of right to counsel and its many ramifications will continue to be argued for the foreseeable future. The Court will continue to struggle with the collateral effects of uncounseled convictions. At some point, the Court will be forced to reconcile the conflicting holdings of *Baldasar* and *Lewis*. The resolution of that confrontation will have an important impact on the administration of criminal justice.

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