

ORIGINAL

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-1180

TITLE G.R. DICKERSON, DIRECTOR, BUREAU OF ALCOHOL, TOBACCO
AND FIREARMS, Petitioner v. NEW BANNER INSTIUTE, INC.

PLACE Washington, D. C.

DATE November 29, 1982

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ALDERSON REPORTING

(202) 628-9300
440 FIRST STREET, N.W.
WASHINGTON, D.C. 20001

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 G. R. DICKERSON, DIRECTOR, :

4 BUREAU OF ALCOHOL, TOBACCO :

5 AND FIREARMS, :

6 Petitioner, :

7 v. : No. 81-1180

8 NEW BANNER INSTITUTE, INC. :

9 - - - - -x

10 Washington, D.C.

11 Monday, November 29, 1982

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 1:36 o'clock a.m.

15 APPEARANCES:

16 KENNETH S. GELLER, ESQ., Office of the Solicitor General,
17 Department of Justice, Washington, D.C.; on behalf of
18 the Petitioner.

19 LEWIS C. LANIER, ESQ., Columbia, South Carolina; on
20 behalf of the Respondent

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C O N T E N T S

ORAL ARGUMENT OF

PAGE

KENNETH S. GELLER, ESQ.,

on behalf of Petitioner

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LEWIS C. LANIER, ESQ.,

on behalf of Respondent

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KENNETH S. GELLER, ESQ.,

on behalf of Petitioner - rebuttal

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1 P R O C E E D I N G S

2 CHIEF JUSTICE BURGER: We will hear arguments
3 next in Dickerson against New Banner Institute.

4 I think you may proceed whenever you are
5 ready, Mr. Geller.

6 ORAL ARGUMENT OF KENNETH S. GELLER, ESQ.,
7 ON BEHALF OF THE PETITIONER

8 MR. GELLER: Thank you, Mr. Chief Justice, and
9 may it please the Court, the issue in this case is
10 whether a person who has been convicted of a felony in
11 state court and who therefore is disabled from dealing
12 in firearms under the Gun Control Act of 1968 is relieved
13 of these federal disabilities when his conviction is
14 subsequently expunged under state law.

15 QUESTION: Mr. Geller, is the question of
16 whether or not this particular respondent was convicted
17 before us?

18 MR. GELLER: Well, the Fourth Circuit held
19 that he was convicted, and therefore we have not raised
20 that question.

21 QUESTION: I suppose we will have to wait,
22 then, to hear respondent's argument --

23 MR. GELLER: But respondent has --

24 QUESTION: -- to see if he urges that as an
25 alternate ground for affirmance?

1 MR. GELLER: Yes, I think that the respondent
2 appears to.

3 QUESTION: Was that mooted in the court of
4 appeals?

5 MR. GELLER: The Fourth Circuit held that he
6 was convicted.

7 QUESTION: Well, I know, but was it an issue?

8 MR. GELLER: I am not sure whether the
9 respondents raised it. Since we had won on that issue
10 in the Fourth Circuit, we did not consider presenting it
11 here, and never inquired into whether it was briefed in
12 the Fourth Circuit. The Fourth Circuit seemed to assume
13 without too much difficulty that Kennison, the fellow at
14 issue here, had been convicted when he pleaded guilty in
15 Iowa state court, as I hope to get to in a minute, as I
16 briefly explain the statement of facts here.

17 David Kennison is the chairman of the board of
18 directors and a substantial stockholder of the
19 respondent, New Banner Institute. In 1974, he was
20 arrested and charged with kidnapping in Iowa, and
21 pursuant to a plea bargain, the kidnapping charge was
22 dismissed, but he pleaded guilty to the charge of
23 carrying a concealed weapon, which is a felony
24 punishable by five years' imprisonment in Iowa.

25 The trial judge in Iowa accepted the guilty

1 plea, deferred the entry of judgment, and sentenced
2 Kennison to probation. Kennison was then allowed to
3 leave Iowa and go home to South Carolina, where he
4 served his period of probation.

5 At the end of the probationary period, which
6 appears to have been one year, Kennison called up the
7 Iowa authorities, announced that he had successfully
8 completed the term of probation, and he had not been
9 arrested during that period. And then the Iowa court,
10 under the Iowa expunction statute, automatically
11 dismissed the -- released Kennison and did not enter
12 judgment, ordered his criminal record expunged.

13 Now, a few months later, New Banner Institute
14 applie for three licenses from the Secretary of the
15 Treasury in order to deal in firearms and manufacture
16 ammunition. New Banner did not list on the application
17 that one of its chief stockholders and officers had been
18 convicted of a felony, and these three licenses were
19 issued.

20 Shortly thereafter, the Bureau of Alcohol,
21 Tobacco, and Firearms learned of Kennison's Iowa
22 conviction, and served notice of its intent to revoke
23 the licenses. After a hearing before an Administrative
24 Law Judge, the director of the Bureau of Alcohol,
25 Tobacco, and Firearms found that Kennison had been

1 convicted of a disqualifying offense under state law,
2 and that Kennison had the power to direct the management
3 and policies of New Banner Institute.

4 Therefore, the Director ordered New Banner's
5 licenses revoked. The -- New Banner sought judicial
6 review, and the district court upheld the revocation
7 order, but the Fourth Circuit reversed.

8 The court of appeals agreed, as I said a
9 moment ago, that Kennison had been convicted when he
10 pleaded guilty in Iowa court to the felony, and
11 therefore the federal firearms disabilities had been
12 triggered at that point, but the Fourth Circuit believed
13 that since that offense had been expunged under state
14 law, it could no longer serve as a predicate for the
15 imposition of penalties or disabilities under the Gun
16 Control Act.

17 Therefore, the Fourth Circuit ordered the
18 director to issue the licenses, these three licenses, to
19 New Banner Institute under the federal statute.

20 Now, the Bureau revoked New Banner's licenses
21 in this case under the provisions of Section
22 923(d)(1)(B) of the statute, which prohibits the
23 issuance of a license to anyone who is disabled from
24 transporting, shipping, or receiving firearms or
25 ammunition under Sections 922(g) or (h) of the Act.

1 Sections 922(g) or (h) in turn make it unlawful for an
2 person, and I quote, "who has been convicted in any
3 court of a crime punishable by imprisonment for a term
4 exceeding one year to transport, ship, or receive a
5 firearm or ammunition."

6 Now, it's the government's position that
7 Kennison, by virtue of the undisputed finding that he
8 pleaded guilty to a felony in Iowa in 1974 is a person
9 who "has been convicted" within the meaning of this
10 section.

11 QUESTION: Well, your statement there really
12 subsumes the issue of conviction velno, doesn't it? The
13 statement you just made?

14 MR. GELLER: We believe that the Fourth
15 Circuit was correct in finding that the acceptance of
16 the guilty plea constitutes a conviction for purposes of
17 Sections 922(g) or (h). The question that we presented
18 in the petition is whether the subsequent expungement of
19 that conviction under state law for reasons having
20 nothing to do with innocence or legal error serves to
21 remove the federal disabilities.

22 QUESTION: Do you prefer to discuss the issue
23 of conviction velno now or in rebuttal?

24 MR. GELLER: I would be happy to discuss the
25 issue now, if you would like, Justice Rehnquist. We

1 believe that the Fourth Circuit was correct, and that
2 the question of what is a conviction is a federal
3 question. It doesn't depend on --

4 QUESTION: Well, that strikes me as a rather
5 strange proposition for the government to argue, unless
6 you simply mean that it is a federal question and
7 federal law refers to the laws of the several states.

8 MR. GELLER: No, we think it is a federal
9 question, that it is the intent of Congress that governs
10 as to what the meaning of the word "conviction" was.

11 QUESTION: No one would doubt that.

12 MR. GELLER: Yes.

13 QUESTION: It is a statute that Congress
14 passed.

15 MR. GELLER: Right.

16 QUESTION: But the question is, how did
17 Congress intend that the meaning of the word be sought?

18 MR. GELLER: Agreed, and what we think, the
19 only thing that makes sense in line with the purposes
20 that Congress intended to accomplish in the Gun Control
21 Act was that a conviction means there has been a formal
22 adjudication of guilt of a serious crime. I don't think
23 Congress meant to have that question depend on the
24 nuances or the niceties or the peculiarities of state
25 law, whether they call something a conviction or not.

1 QUESTION: But how do you tell whether it is a
2 formal adjudication?

3 QUESTION: Do you know, Mr. Geller, what the
4 situation would -- excuse me.

5 QUESTION: I'm sorry.

6 QUESTION: Do you know what the situation
7 would be under Iowa law?

8 MR. GELLER: Under Iowa law?

9 QUESTION: Iowa law.

10 MR. GELLER: Well, we have explained in our
11 reply brief that Iowa law is somewhat ambiguous as to
12 whether they would consider this a conviction. The Iowa
13 Supreme Court would consider this a conviction for
14 certain purposes, but perhaps not for others.

15 QUESTION: Do you know the case of Iowa
16 against Walton? It is not cited in your brief nor in
17 your opposition's brief. Let me read what the Iowa
18 court said. This is the Supreme Court of Iowa, not the
19 court of appeals, and this is Iowa law.

20 "A deferred judgment order cannot serve as
21 proof of a felony conviction in the prosecution of a
22 Section 724.26 charge." That's the Iowa comparable
23 provision. "The record necessarily has to disclose the
24 revocation of probation and the ultimate conviction."

25 MR. GELLER: Well, as we pointed out in our --

1 QUESTION: Just the opposite of your position
2 here under state law.

3 MR. GELLER: Well, it may well be that for
4 purposes of imposing punishment or granting of
5 forgiveness, that Iowa law would not consider this to be
6 a conviction for certain purposes, although I should
7 point out in our reply brief we pointed out that the
8 Supreme Court of Iowa has for other purposes considered
9 the procedure just like the one that Kennison underwent
10 a conviction for other purposes, such as --

11 QUESTION: Federal law certainly requires that
12 we look to the state law to determine whether or not it
13 is a felony, doesn't it?

14 MR. GELLER: It's a felony. That's correct.

15 QUESTION: And it is arguable that under that
16 Walton case it isn't a felony because there was no
17 conviction.

18 MR. GELLER: No, I think not, because it is
19 not a question of a felony. Congress defined the term
20 "conviction," and it has to be a conviction for an
21 offense that carries a maximum punishment of more than
22 one year. It is not a question of what the defendant is
23 actually sentenced to.

24 I think, Justice Blackmun, you might be right
25 that Congress wanted to see how the state courts

1 actually dealt with the defendant for purposes of
2 punishment if they had defined the word "conviction" to
3 mean what sentence did the state actually impose, but
4 they didn't do that. Congress defined the word
5 "conviction" by reference to what was the maximum
6 punishment that could have been imposed, and --

7 QUESTION: Let me give you the citation of the
8 Walton case, and if either of you have any comments, as
9 far as I am concerned, you could submit them after the
10 argument. I am surprised that your opposition hasn't
11 cited it. It is 311 Northwestern 113, and the jump cite
12 is -- I'm sorry. 311 Northwestern 2nd 110, and the jump
13 cite or page is 112. And it doesn't appear in the
14 headnotes, strangely enough.

15 MR. GELLER: Well, we -- we obviously didn't
16 make an exhaustive study of Iowa law, because in our
17 view Congress couldn't have wanted the disabilities of
18 the Act to turn upon such formalities as, for example,
19 whether a judgment was entered. We think what Congress
20 meant to do --

21 QUESTION: Or whether one state has deviated
22 greatly from another --

23 MR. GELLER: Yes.

24 QUESTION: -- so that a man could get a
25 federal license in one state --

1 MR. GELLER: Precisely.

2 QUESTION: -- and not in another, in the
3 adjoining state.

4 MR. GELLER: Precisely, precisely, Mr. Chief
5 Justice.

6 QUESTION: But the felony definition certainly
7 could embrace such deviations, and --

8 MR. GELLER: Well, it could, Justice
9 Rehnquist, but we don't think it's likely to. We think
10 that there is some common understanding of what are
11 serious crimes, and virtually every state deals with
12 those crimes by labeling them felonies.

13 QUESTION: In Arizona, it is a felony to steal
14 more than \$50 worth of citrus. Now, I dare say that
15 probably isn't a felony in most other states.

16 MR. GELLER: But there are failsafe mechanisms
17 in the statute to deal with that situation, and I hope
18 to get to them eventually. If you have a situation such
19 as that, Congress allowed the Secretary of the Treasury
20 to grant relief from the federal statute.

21 But what we think Congress meant to do was to
22 set a federal standard for what is a conviction for
23 purposes of imposing these federal, these important
24 federal disabilities. What that standard is is, has
25 there been an adjudication of guilt of a serious crime?

1 Have all the facts been found? Is all that remains to
2 do imposing some level of punishment?

3 Now, what level of punishment the state
4 decides to impose for its own purposes is really
5 irrelevant to the disabilities that Congress wanted to
6 impose in this situation? The fact that one state may
7 decide to sentence the person to five years'
8 imprisonment and another to expunge the conviction is
9 relevant only to state law enforcement purposes, not
10 federal law enforcement purposes.

11 The purpose of relying on the existence or, as
12 this Court said in Lewis, the fact of a conviction, is
13 that people who are convicted, who are found guilty of a
14 serious crime, Congress believed to be a member of a
15 class of presumptively risky people, people who should
16 not be allowed to deal in firearms, unless they get a
17 special dispensation from the Secretary of the Treasury.

18 Now, we think that that presumption of
19 riskiness attaches when there has been a formal
20 adjudication that the defendant committed a crime, and
21 not -- it doesn't depend on what happens thereafter --

22 QUESTION: Mr. Geller, you have used the word
23 "formal adjudication" I think three times. What does it
24 mean? What is a formal adjudication? What if he just
25 says, I am willing to enter a guilty plea?

1 MR. GELLER: I think that if the plea is
2 accepted, as it was here --

3 QUESTION: And the judge accepts and says, but
4 I won't enter judgment until the two years runs by. Is
5 it still a formal --

6 QUESTION: We don't think that Congress could
7 possibly have meant to have that matter. Let me, if I
8 could, give you a hypothetical.

9 QUESTION: Well, but your -- by adjudication,
10 you have sort of a special meaning to adjudication. You
11 don't mean entry of judgment.

12 MR. GELLER: That's exactly right. We think a
13 formal finding of guilt is what Congress meant by
14 conviction. All that remains is to enter some form of
15 punishment.

16 QUESTION: What if, instead of his accepting
17 the plea, the judge just said, file the plea with the
18 clerk, and come back in two years; in the meantime, you
19 know, the condition is --

20 MR. GELLER: That is precisely the situation
21 that I was going to address.

22 QUESTION: What would you -- Is that a formal
23 adjudication or not?

24 MR. GELLER: That is. That is, if all that
25 remains is to see how the defendant --

1 QUESTION: What if the judge says, we will
2 continue the case for two years?

3 MR. GELLER: Well, I would have to know a
4 little bit more.

5 QUESTION: You have to draw a line somewhere,
6 don't you?

7 MR. GELLER: You would have to find the point
8 where the judge has actually found the defendant
9 committed the elements of a crime, and that all he is
10 going to do thereafter is to determine the appropriate
11 punishment. Now, you could have two states, for
12 example, one in -- and in both states the defendant
13 commits the exact same crime, violating the exact same
14 statutory provisions, and in State One, the defendant,
15 as you say, enters a guilty plea. The judge --

16 QUESTION: His lawyer or he says, I am willing
17 to plead guilty --

18 MR. GELLER: Right, the judge --

19 QUESTION: -- if -- because it was just my
20 wife's gun --

21 MR. GELLER: Yes.

22 QUESTION: -- and it is not a serious thing,
23 and I am just willing to not do something for two
24 years. It depends on how he says that, doesn't it?

25 MR. GELLER: Well, no, it doesn't depend on

1 how the defendant says that. It depends upon what the
2 -- if the judge makes a formal finding of guilt, either
3 by accepting the guilty plea or by accepting the jury's
4 verdict or by, if it's a non-jury case, finding all of
5 the facts. At that point, we think there has been a
6 conviction.

7 Now, as I was saying, you could have a
8 situation where the judge accepts the guilty plea and
9 defers the entry of the judgment and says, I am going to
10 just watch your behavior over the next year before I
11 sentence you. You can have a second case, which is what
12 I think probably happened here in Iowa, in which the
13 judge accepts the guilty plea, enters a sentence -- here
14 it was a probationary sentence -- and at the end of the
15 year, based on the defendant's conduct, expunges the
16 sentence.

17 It seems to me the only differences between
18 those two situations is that in Case Number Two, the
19 judge has entered a formal document labeled Judgment,
20 but in either case there has been a factual finding that
21 the defendant committed a serious crime. Both
22 defendants would seem to fall into the presumptively
23 risky category that Congress had in mind in passing the
24 Gun Control Act, and we can't imagine why Congress would
25 have wanted to treat those two individuals differently

1 for the purpose of imposing federal disabilities.

2 QUESTION: But here is there a judgment or --

3 MR. GELLER: Here there -- here -- Yes. Here
4 the defendant was placed on probation. There was a
5 finding --

6 QUESTION: He couldn't place him on
7 probation --

8 MR. GELLER: That's exactly --

9 QUESTION: -- if he didn't enter a judgment,
10 could he?

11 MR. GELLER: Absolutely. The judge could not
12 have sentenced the defendant to even the probationary
13 term unless he had found that he had committed a crime.

14 QUESTION: Are you saying in response to the
15 Chief Justice's question that there was a judgment?

16 MR. GELLER: There was an order entered. It
17 wasn't labeled Judgment.

18 QUESTION: Well --

19 MR. GELLER: I am not sure that we should have
20 what Congress intended to accomplish in this important
21 federal statute turn --

22 QUESTION: Well, suppose the court had said, I
23 accept your plea of guilty and sentence you to five
24 years in the penitentiary?

25 MR. GELLER: Yes.

1 QUESTION: And he doesn't say, I find you
2 guilty, and he doesn't issue a judgment.

3 MR. GELLER: Well, I assume the sentence in
4 that situation would be the judgment.

5 QUESTION: The sentence would be the -- but he
6 didn't say judgment.

7 MR. GELLER: I don't -- that's exactly -- I
8 don't think that Congress's important purposes here turn
9 on how --

10 QUESTION: Well, the judge had to do something
11 to justify keeping him -- keeping the gentleman -- under
12 his control for a year.

13 MR. GELLER: Exactly. He had to find that he
14 had committed an offense under Iowa law, and that
15 offense under the Iowa statutes is punishable by five
16 years. We think that clearly constitutes a conviction
17 for the purposes of 922(g) or (h).

18 QUESTION: What would happen with a pardon?
19 The same thing?

20 MR. GELLER: A pardon?

21 QUESTION: The same thing.

22 MR. GELLER: It is interesting that you
23 mention a pardon, because Congress dealt with a pardon.

24 QUESTION: Yes, that's what I mean.

25 MR. GELLER: Congress dealt with a pardon in

1 Title VII, and it said that a pardon, if it
2 specifically announces that the defendant is still --
3 is to be allowed to engage in carrying of firearms,
4 serves to relieve disabilities, but Congress did not say
5 that in Title IV, which is the statute at issue here.
6 So presumably Congress did not want to allow
7 gubernatorial pardons to relieve defendants of the
8 disabilities imposed by federal law, yet the Fourth
9 Circuit has held that state expungements, which may be
10 less of an indication that the defendant is a
11 responsible person than a gubernatorial pardon, relieve
12 the defendant of those -- of those important federal
13 disabilities.

14 Now, I had hoped to get into a discussion of
15 some of the statutory provisions in order to show the
16 Court that the Fourth Circuit's decision is clearly
17 inconsistent with Congress's intent, and I am not going
18 to have time to discuss several of them, but I do want
19 to discuss what we believe perhaps is the most important
20 indication that the Fourth Circuit has incorrectly
21 construed the statute, and that is Section 925(c) of the
22 Act, which I alluded to earlier.

23 Congress realized that not everyone who was
24 convicted of a felony under state law is a risky
25 person. They also realized that it would be -- people,

1 even if they were initially risky, might rehabilitate
2 themselves, and it would be unduly harsh to subject
3 those people to lifetime or permanent disabilities.

4 But it is instructive to see what Congress did
5 in that situation. In Section 925(c), Congress
6 delegated to the Secretary --

7 QUESTION: What page is that on in your brief?

8 MR. GELLER: It's in the very back of the
9 brief, in the statutory appendix, Justice Rehnquist, on
10 Page --

11 QUESTION: Page 3-A, I think.

12 MR. GELLER: Yes, Page 3-A.

13 Let's look at what Congress did to deal with
14 that very serious problem. Congress empowered the
15 Secretary of the Treasury to grant relief from the
16 disabilities of the Act in selected cases, but at the
17 same time Congress restricted the Secretary's authority
18 in a number of significant ways.

19 First, relief under Section 925(c) can't be
20 granted to anyone convicted of a crime involving the use
21 of a firearm. Second, before relief can be granted
22 under Section 925(c), it has to be established to the
23 satisfaction of the Secretary that the circumstances
24 regarding the applicant's conviction and his record and
25 reputation are such that the applicant will not be

1 likely to act in a manner dangerous to the public
2 safety, and that the granting of relief, i.e., allowing
3 him to deal with firearms, would not be contrary to the
4 public interest.

5 Congress wrote that right into the statute,
6 and the Secretary must make this precise finding after
7 an individualized inquiry every time he grants relief
8 from the disabilities of the Act, and under Section
9 925(c), whenever the Secretary grants relief, he has to
10 promptly publish notice of that fact in the Federal
11 Register.

12 QUESTION: Is it correct to think that under
13 925(c) the Secretary may not grant relief if the crime
14 in question is one -- is one involving the use of a
15 firearm or other weapon?

16 MR. GELLER: That's correct. The Secretary is
17 disabled from granting relief in that situation, but
18 look at the anomalies that would arise if the Fourth
19 Circuit were correct, because state officials would,
20 even though Congress carefully circumscribed the power
21 of the Secretary to grant relief from the firearms
22 disabilities imposed by the Act, state officials would
23 have unfettered discretion to accomplish even more than
24 Congress authorized the Secretary of the Treasury to
25 do.

1 State officials could grant, by granting
2 expungements, they could grant relief from the federal
3 Gun Control Act even for people who are convicted of a
4 firearms offense.

5 QUESTION: Well, but that might happen in any
6 number of ways, Mr. Geller, and certainly some of which
7 Congress couldn't prevent. What if you knew of a
8 particular metropolitan jurisdiction where the state
9 prosecuting attorney didn't happen to like the federal
10 firearms Act, and so every time he had somebody on a
11 felony that involved firearms, he would take a plea to a
12 misdemeanor in order to let the guy off?

13 MR. GELLER: Well, Congress obviously had to
14 bow to the -- to certain realities. There is nothing
15 Congress can do about that situation, but Congress can
16 do something about the situation in which defendants
17 were convicted of serious crimes. That's the issue in
18 this case.

19 Here, defendant was -- pleaded guilty to a
20 five-year felony --

21 QUESTION: You used the word "convicted."

22 MR. GELLER: Yes, I understand. Well, that is
23 our position, Justice Rehnquist, and it is the view also
24 of the Fourth Circuit.

25 QUESTION: Mr. Geller, assuming with you for a

1 moment there was a conviction, so we don't get off onto
2 that again, supposing that the man convicted appealed,
3 and the conviction was set aside, or there is a
4 collateral attack on the ground he didn't have counsel,
5 or he didn't plead knowingly. Is your view the same as
6 it was in the last case, that then -- you don't read the
7 statute literally as applied to that?

8 MR. GELLER: Well, we don't think that would
9 accomplish Congress's purpose. We agree with the
10 statement we made in the Lewis case.

11 QUESTION: In other words, if you have exactly
12 the same facts you have here --

13 MR. GELLER: Yes.

14 QUESTION: -- but instead of expunction, the
15 man comes in with a lawyer and files a coram nobis writ
16 or something like that and says, I want that conviction
17 set aside because it was really my wife's gun and not
18 mine, and I didn't realize that it had to be my gun, and
19 therefore set it aside. You have exactly the same facts
20 all the way through, but they set it aside instead of
21 expunging it. You would say he is eligible to be a
22 dealer.

23 MR. GELLER: Yes, but I think that -- I mean,
24 I think that is perfectly consistent with Congress's
25 purpose in selecting out people who have had convictions

1 entered against them.

2 QUESTION: It turns on the reason for the
3 state action --

4 MR. GELLER: Is relevant.

5 QUESTION: -- of vacating the judgment.

6 MR. GELLER: Yes. It is extremely relevant.
7 I mean, the purpose in fixing disabilities on people who
8 are convicted is that the fact of conviction, as the
9 Court said repeatedly in Lewis, is a reliable indicator
10 of whether that person is presumptively irresponsible or
11 too risky.

12 QUESTION: Yes, but it is equally reliable if
13 you reverse on the ground that the evidence was
14 improperly obtained with a search warrant, or something
15 like that.

16 MR. GELLER: Well, there may also be
17 constitutional problems in imposing disabilities on
18 someone who has had his conviction reversed, but we
19 don't have to reach that. We think simply as a matter
20 of Congressional intent, the fact of conviction is no
21 longer a reliable indicator of riskiness if in fact the
22 defendant has had his conviction reversed because of
23 some legal error or because of innocence.

24 At that point, there is no reason to assume
25 that he has committed a crime, but expunction is quite

1 different. Expunction assumes that the defendant has
2 committed a serious crime, and the state for its own law
3 enforcement purposes has decided to engage in an act of
4 partial or complete forgiveness.

5 The question is, would Congress have wanted
6 the states to forgive federal disabilities. We think
7 the answer to that on its face is probably wrong, but it
8 is certainly wrong when Congress has put in a specific
9 forgiveness provision in the federal statute, Section
10 925(c), which requires a cabinet level federal official
11 to make an individualized inquiry before granting relief
12 from the Gun Control Act, to see whether the defendant
13 is in fact a responsible, reliable person who should be
14 trusted with a firearm.

15 QUESTION: In other words, a conviction for
16 manslaughter by use of an automobile might be the kind
17 that the Secretary would have discretion to waive.

18 MR. GELLER: Absolutely. Absolutely. In
19 fact, the Secretary granted relief in 800 cases last
20 year in which he was satisfied that the person in
21 question was not risky or could be trusted to carry or
22 deal in firearms, but as I said, every time he did that,
23 he had to publish a notice of that fact in the Federal
24 Register, so that people would be aware of what the
25 legal status of this individual is.

1 QUESTION: Well, the Secretary can grant
2 relief, can't he, for a triple first degree murder
3 punishable by death if it was committed with a knife.

4 MR. GELLER: Yes, he could. He may not do it,
5 but Congress was willing to entrust that decision to a
6 cabinet level federal official applying uniform federal
7 standards. We don't think they were willing to entrust
8 that --

9 QUESTION: Do you think the Secretary of the
10 Treasury spends a lot of his waking hours passing on
11 these applications?

12 MR. GELLER: I would be surprised if he spends
13 very much time, but there are people in the Bureau of
14 Alcohol, Tobacco, and Firearms who do spend a great deal
15 of time studying these applications and making
16 individualized inquiries.

17 QUESTION: And if they got too casual about
18 the exercise of that discretion, they would probably
19 hear from Congress.

20 MR. GELLER: I think that's right. This is an
21 important federal statute. The Court has remarked on
22 that many times, and I needn't remind the Court of the
23 history that gave rise to Title IV and Title VII of the
24 Omnibus Crime Control Act. Congress was not cavalier
25 about allowing people who were convicted of felonies to

1 carry firearms. It imposed a disability on these
2 people, and it allowed the Secretary of the Treasury, a
3 cabinet level federal official, to remove that
4 disability.

5 It didn't, we think, mean to allow state
6 officials using unfettered discretion across the country
7 and not making any inquiry into whether the person could
8 be trusted to carry a firearm to relieve the
9 disabilities of the Gun Control Act.

10 Now, I just want to make one more point before
11 I reserve time for rebuttal, and that is that if the
12 Court agrees with the Fourth Circuit, if it says that
13 effect must be given to state expungements, then it is
14 going to have to confront the much more difficult
15 question of exactly what effect is to be given to these
16 various expungement statutes. Nearly half the states
17 have expungement statutes. They are a bewildering
18 array. They are -- They vary in almost every single
19 particular.

20 Now, when a state convicts someone of a crime,
21 it imposes on that defendant a bundle of disabilities.
22 It would be quite bizzare if by expunging only a portion
23 of those disabilities, federal courts were willing to
24 remove the disabilities imposed by Congress under the
25 Gun Control Act.

1 Therefore, it would seem that there would have
2 to be an individualized inquiry by the federal courts in
3 every single case to see whether what remains after the
4 expungement is still considered a conviction for federal
5 gun control purposes.

6 Now, this would be, we think, chaotic. It
7 would lead to massive confusion in enforcement of the
8 Act. No one would know what their legal status is if
9 they had an expunged conviction. The Fourth Circuit
10 here masked those difficulties by calling the Iowa
11 expungement statute absolute and unconditional, where we
12 think that is plainly incorrect for reasons we have
13 discussed in our reply brief, but even if it were true
14 in the case of the Iowa statute, there were dozens and
15 dozens of other expunction statutes out there, and if we
16 had to give effect to those expunction statutes under
17 federal law, the situation would be chaotic.

18 The Secretary of the Treasury would not know
19 whether he could grant a license to someone who had an
20 expunged conviction. The gun dealers would not know
21 whether they would be committing a crime by selling a
22 firearm to someone with an expunged conviction. Law
23 enforcement officers would not know whether someone with
24 an expunged conviction would be committing a crime by
25 carrying a firearm. And the defendant himself would not

1 know what his legal status is.

2 We think that Congress could not have intended
3 to allow such an ambiguous and confusing situation to
4 occur in the enforcement of an extremely important
5 federal statute. What we think Congress meant was that
6 when someone has been adjudicated guilty of a serious
7 crime, he falls within the disabilities of the federal
8 Act, and if he is to be relieved of those disabilities,
9 it is to be done by application to the Secretary of the
10 Treasury, followed by public notice of that fact, and
11 not in the helter-skelter fashion that the Fourth
12 Circuit seems to envision involving dozens and dozens of
13 state expungements by officers, giving no thought at all
14 to whether the person should continue to be disabled
15 under federal law.

16 I would like to reserve the balance of my
17 time.

18 CHIEF JUSTICE BURGER: Very well.

19 Mr. Lanier.

20 ORAL ARGUMENT OF LEWIS C. LANIER, ESQ.,

21 ON BEHALF OF THE RESPONDENT

22 MR. LANIER: Mr. Chief Justice, may it please
23 the Court, beginning with Justice Rehnquist's questions
24 concerning conviction, we have argued in the brief that
25 whatever happened in Iowa was not a conviction.

1 QUESTION: Did you present this to the court
2 of appeals?

3 MR. LANIER: No, Your Honor, we did not.

4 QUESTION: The court of appeals had no way of
5 passing on it then.

6 MR. LANIER: That's correct, Your Honor.

7 QUESTION: And you think that -- you are
8 suggesting affirmance on this ground.

9 MR. LANIER: Yes, Your Honor, on the basis
10 that in the Fourth Circuit's opinion, they do talk in
11 terms of a conviction, but in other portions of the
12 opinion they talk about a temporary disability running
13 because of the Iowa action.

14 QUESTION: My question is whether you -- you
15 must believe, then, that under our rules you are
16 entitled to present this issue.

17 MR. LANIER: No, Your Honor. We did not raise
18 that.

19 QUESTION: Well, I know, but --

20 MR. LANIER: But since it was argued, we feel
21 that we should have an opportunity to reply to the
22 conviction element of the case.

23 QUESTION: Are you suggesting that the court
24 of appeals uses the term "conviction" casually and
25 loosely, without regard to consequences of the use of

1 that term, having a statute before them where that was
2 very relevant?

3 MR. LANIER: Mr. Chief Justice, I believe the
4 Fourth Circuit did in their holding indicate -- go away
5 from the term "conviction." Granted, they did use the
6 term "conviction." They did tend to go away from the
7 term "conviction" in their holding that whatever
8 happened in Iowa was a temporary disability that was
9 relieved upon the expunction.

10 QUESTION: Relieved for all purposes, under
11 all circumstances?

12 MR. LANIER: That was the holding of the
13 Fourth Circuit, that the relief was unconditional and
14 absolute. Under that reasoning, I think it would be
15 relevant to go to the Iowa statute.

16 QUESTION: Are we or are we not bound to
17 accept the court of appeals' holding as a determination
18 that there was in law and fact a conviction in Iowa?

19 MR. LANIER: Mr. Chief Justice, I think you
20 are correct.

21 QUESTION: Well, Mr. Lanier, does that mean
22 you are retreating from the position you took in your
23 brief? This is your brief, the red one, isn't it?

24 MR. LANIER: Yes, Your Honor.

25 QUESTION: On Page 14, in your summary of

1 argument, where you say in the first short full
2 paragraph on the page, "The ruling of the Fourth Circuit
3 Court of Appeals should be affirmed because there never
4 was a conviction." Do you -- Is that a statement of
5 your position?

6 MR. LANIER: Justice Rehnquist, that is a
7 statement of our position on the brief.

8 QUESTION: Well, then, you do assert that,
9 quite apart from the Fourth Circuit's ruling on
10 expunction, there never was a conviction under the
11 statute in the first place. Is that correct?

12 MR. LANIER: That's correct.

13 QUESTION: Then we have to read the opinion
14 again and see whether when they used -- the three judges
15 used the term "conviction" they mean what lawyers and
16 judges usually mean by the term "conviction."

17 MR. LANIER: Which, Mr. Chief Justice, seems
18 to vary a great deal, adding to the ambiguity created by
19 the federal Act and the use of the term "has been
20 convicted."

21 QUESTION: But you never -- you didn't suggest
22 to the court of appeals what happened here shouldn't be
23 considered a conviction, did you?

24 You didn't make the argument in that court
25 that you are making here. Did you?

1 MR. LANIER: Your Honor, I believe there was
2 argument at the Fourth Circuit that it was not a
3 conviction.

4 QUESTION: What was expunged?

5 MR. LANIER: Mr. Justice Marshall, what was
6 expunged was the record of the Iowa deferred judgment
7 proceedings. We would resist the characterization that
8 the plea offered was accepted by the trial judge. The
9 Iowa statute has directed toward a state interest in not
10 evoking the criminal process.

11 Under the Iowa statute, the trial judge has
12 really three alternatives. He can go ahead and accept
13 the plea, sentence and fine, either/or, or he can use
14 the two elements under the Iowa code, Section 789-A.1.
15 He can suspend sentence and put the defendant under a
16 probationary period, and then, after the expiration of
17 the probationary period, the court may make a
18 recommendation to the chief executive of the state for
19 an expunction. Or, he can take the least punitive
20 element of that statute, and he can defer judgment on
21 the plea.

22 We take the position that the plea was
23 offered, that the judge did not accept the plea --

24 QUESTION: All I -- I want to ask a very
25 simple question. What was expunged?

1 MR. LANIER: The record of the deferred
2 judgment proceedings in Iowa.

3 QUESTION: The entire proceeding?

4 MR. LANIER: That's correct, Your Honor.

5 QUESTION: Do you think Congress contemplated
6 that this national legislation should be subject to the
7 idiosyncracies of more than fifty different state
8 statutes, and twenty odd thousand judges' interpretation
9 of that statute in those states?

10 MR. LANIER: I think that Congress did
11 interpret that way by using the state definition of the
12 sentence, the maximum sentence, to trigger the
13 disabilities under the federal Act. I think Congress
14 definitely contemplated looking at the state law.

15 QUESTION: How does that help you?

16 MR. LANIER: Looking at --

17 QUESTION: Here is something for which the
18 punishment was more than one year, was it not?

19 MR. LANIER: That's correct. The Act also
20 looks to the state. If the state classifies an act as a
21 misdemeanor, state classification of misdemeanor, and it
22 is less than two years, then it is beyond the reach of
23 the federal gun control Act.

24 QUESTION: Well, if Congress meant what you
25 are suggesting, wouldn't it have been very simple to add

1 a few words, that is, unless such conviction is
2 expunged, or unless the record of such proceeding is
3 expunged?

4 MR. LANIER: Congress could have done that.
5 Some of the circuits have held that the express
6 exclusion of expungement is not binding in the
7 Arrington, Frier, and Ferguson decisions, in that they
8 said under the federal Youthful Offender Act, the
9 expungement portion of that provision will not toll the
10 disability.

11 Therefore, we hold that the -- it is our
12 position that when you look at those circuits' review of
13 the idea of expunction, they did intend it not to impose
14 a disability.

15 As to the question raised by the government in
16 the situation of whether or not there has been any
17 determination as to whether this Kennison is a
18 particularly risky person, the Iowa statute addresses
19 that also. Before the Iowa trial judge can impose or
20 elect to give the deferred judgment proceedings, he
21 makes a determination whether or not the nature and
22 seriousness of what is charged, the stability of the
23 person's employment, any prior record, and the state
24 interest in what will effect the maximum opportunity for
25 rehabilitation and the protection of the community at

1 large.

2 These decisions are by Iowa statute required
3 to be considered by the sentencing judge or the trial
4 judge.

5 QUESTION: Do you think a license could have
6 been issued -- would he have a right to have a license
7 the day after his guilty plea?

8 MR. LANIER: No, Your Honor. I think he would
9 be under a temporary disability, much like the federal
10 Act speaks in terms of being under a temporary
11 disability after indictment.

12 QUESTION: Well, if that is so, he must have
13 been convicted within the meaning of the statute.
14 During that period of probation, at least, he was
15 disqualified for a license. You agree with that,
16 apparently.

17 MR. LANIER: Yes, Your Honor.

18 QUESTION: Well, then, there had to be a
19 conviction, didn't there?

20 MR. LANIER: Your Honor, I find the Iowa
21 statute there a little bit unique in the criminal
22 concept --

23 QUESTION: Well, it may be unique, but you
24 have said that he was disqualified during the period of
25 his probation.

1 MR. LANIER: That's correct, Your Honor, but
2 he was still --

3 QUESTION: Within the meaning of this federal
4 statute.

5 MR. LANIER: Yes, he was disqualified during
6 that period of probation.

7 QUESTION: That had to mean that for a while,
8 anyway, there was a conviction.

9 MR. LANIER: Your Honor, we take the position
10 that the defendant in this case actually consented to
11 the probation under the terms of the Iowa statute, and
12 that Iowa has spoken in this term, and said, we don't
13 want the criminal law to come into effect in this
14 particular case. The legislature has authorized it, and
15 has given the judicial branch through the trial judge
16 the authority not to evoke the criminal process.

17 QUESTION: Of course, your other argument is
18 that even if there was a conviction, it was removed by
19 the expunction.

20 MR. LANIER: That's correct. And the --

21 QUESTION: Mr. Lanier, did you represent the
22 client before the court of appeals?

23 MR. LANIER: Yes, Your Honor.

24 QUESTION: And before the Administrative Law
25 Judge?

1 MR. LANIER: No, Justice O'Connor, my law
2 partner represented him before the Administrative Law
3 Judge, Judge Travis. Now -- and I was not at Fourth
4 Circuit and on the brief.

5 QUESTION: You did not make the oral
6 argument?

7 MR. LANIER: At Fourth Circuit?

8 QUESTION: Yes.

9 MR. LANIER: No, Your Honor. No, Ms. Justice
10 O'Connor.

11 QUESTION: Was the case orally argued to the
12 Fourth Circuit?

13 MR. LANIER: Yes, Mr. Justice.

14 QUESTION: But not by you?

15 MR. LANIER: That's correct.

16 QUESTION: Could you have made the same
17 argument if it hadn't been expunged?

18 MR. LANIER: Justice Marshall --

19 QUESTION: And I used "it" deliberately.
20 Could you?

21 MR. LANIER: No.

22 QUESTION: Why not?

23 MR. LANIER: Because the expunction was an
24 unconditional action.

25 QUESTION: No. Why not?

1 MR. LANIER: Why not -- I'm sorry, Mr. Justice.
2 QUESTION: Why not? What would prevent you
3 from arguing that?
4 MR. LANIER: Arguing that the expunction --
5 QUESTION: That you were entitled to a
6 license.
7 MR. LANIER: If it hadn't been expunged --
8 QUESTION: What hadn't been expunged?
9 MR. LANIER: The record of the deferred
10 judgment proceedings.
11 QUESTION: Your conviction, right?
12 MR. LANIER: No, Your Honor, we still resist
13 the fact that there was a conviction. Counsel for the
14 petitioners argue there was an adjudication in this
15 case. We find no adjudication there. There was a
16 decision to do nothing.
17 QUESTION: But the state is the one that
18 decides today he is and tomorrow he is not.
19 MR. LANIER: In conjunction with the
20 defendant. It is a consensual act in Iowa.
21 QUESTION: That's right. So the state decides
22 it. The day before the state expunged it, he couldn't
23 get it.
24 MR. LANIER: That's correct.
25 QUESTION: The day after it, he could get it.

1 MR. LANIER: Yes, Mr. Justice.

2 QUESTION: So the state is deciding a federal
3 statute.

4 QUESTION: You just said that the state, that
5 is, through the judge, had decided, and I think you used
6 the words "do nothing." Now, in Iowa, can you put
7 people on probation for a year or two years or three by
8 doing nothing? Just pluck them off the street?

9 MR. LANIER: The trial judge in conjunction
10 with the defendant elected a deferred judgment.

11 QUESTION: Well, there had to be a proceeding
12 first, did there not?

13 MR. LANIER: There was a proceeding.

14 QUESTION: Charging him with kidnapping, was
15 it, and armed conduct?

16 MR. LANIER: The kidnapping charges were
17 dismissed prior to --

18 QUESTION: Yes, I know, but the charge was --
19 that's how he got into the court, was it not?

20 MR. LANIER: That's correct. He was charged
21 with possession of a concealed weapon.

22 QUESTION: In connection with the kidnapping?

23 MR. LANIER: The result of a plea bargain.

24 QUESTION: Well, no, I'm talking about the
25 facts now. Forget the plea bargaining. He was charged

1 with using firearms in connection with the kidnapping?
2 That's the charge I am speaking of. That's the way I
3 read this record.

4 MR. LANIER: Mr. Chief Justice, I believe the
5 charge of kidnapping was dropped, and then the
6 possession --

7 QUESTION: Yes, I know it was dropped, but the
8 initial charge was a charge of kidnapping using a
9 firearm. Is that not correct?

10 MR. LANIER: That's not correct.

11 QUESTION: Well, then, tell me what is the
12 charge.

13 MR. LANIER: He was initially charged with the
14 only charge of kidnapping.

15 QUESTION: Yes.

16 QUESTION: Kidnapping whom?

17 MR. LANIER: His wife, a South Carolina
18 citizen in Iowa. They dropped the kidnapping charge,
19 and then charged, not as a lesser included under the
20 kidnapping charge, but then charged with possession of a
21 concealed weapon.

22 QUESTION: A new charge.

23 MR. LANIER: A new charge, which was -- which
24 was the subject of the negotiated or the conditional
25 plea in Iowa.

1 QUESTION: So his plea then was an admission
2 that whatever he did, whether you call it kidnapping or
3 whatever, whatever the offense was, it was accomplished
4 by him by the use of a firearm. Is that correct?

5 MR. LANIER: Mr. Chief Justice, I say that is
6 not correct, either, because there may be a difference
7 in terms between use and possession. He was charged
8 with possession. He was never charged with using it,
9 just the fact, the simple fact of possession.

10 QUESTION: Whose gun was it?

11 MR. LANIER: It was his wife's gun also. He
12 was offered a deferred judgment, not a suspended
13 sentence. The judge would have sentenced him at that
14 time. We take the position that Boykin went a little
15 bit further than saying that a plea of guilty is in
16 itself a conviction. It said, all that remains is a
17 judgment of guilt and a sentence thereon.

18 We submit that those two other elements of
19 judgment of guilt and sentence thereon are absent in
20 this case, and they are absent because Iowa intended
21 them to be absent, because Iowa intended not to evoke
22 the state criminal law in this situation.

23 QUESTION: But are we entitled to assume on
24 this record that whatever he did that led to the charge
25 of kidnapping, he did it at a time when he had a firearm

1 on his person or in his possession?

2 MR. LANIER: Yes. In the car that he was
3 using at the time.

4 In this case, it appears that the government
5 is using the petitioner in this case, the Linity in
6 reverse. They are saying, we admit that we have to
7 trigger the federal firearms statute through the state
8 criminal statute, and we will only invoke it or we will
9 invoke it to impose disabilities.

10 They have said that there is a proceeding
11 under the Act, the federal firearms Act, where the
12 Secretary can remove the disability. In Iowa, there was
13 a state judge determination that this man was not a
14 risky person. He made that determination and elected
15 not to evoke the criminal law of the state of Iowa. He
16 did that because the statute in itself says he has to
17 consider these things and in fact put on the record why
18 he elected --

19 QUESTION: Was an order issued at the end of
20 his trial?

21 MR. LANIER: Some type of order was issued
22 that was not a judgment.

23 QUESTION: Is it in the record any place?

24 MR. LANIER: Your Honor, I don't think that
25 order is in the record.

1 QUESTION: Well, isn't it rather important as
2 to what happened?

3 MR. LANIER: I am sorry, Justice Marshall.

4 QUESTION: Isn't it rather important? Suppose
5 the judge says, I find you guilty and sentence you.
6 Wouldn't that be a different case from what you have
7 been arguing?

8 MR. LANIER: Absolutely.

9 QUESTION: And I don't know what he said, do
10 I? And you don't, either.

11 MR. LANIER: That's correct, Your Honor.

12 QUESTION: Thank you.

13 QUESTION: May I ask if under the Iowa
14 expungement procedure they physically destroy the
15 records of the proceeding?

16 MR. LANIER: The only record -- the record of
17 the -- the Iowa statute compels the expunction, it does
18 not specify the destruction, of the deferred judgment
19 proceedings. There is a record, called an
20 administrative record, that is kept in the office of the
21 clerk. That administrative record is kept in order to
22 advise the court if there is -- Under the Iowa statute,
23 you can have two deferred judgments for a misdemeanor,
24 and only one for a felony. So we take the position that
25 the record housed in the clerk's office is just to

1 determine whether or not he is eligible for a deferred
2 judgment.

3 QUESTION: What are the contents of the
4 administrative record after the expungement proceeding
5 is terminated? What is retained? Do you know? Does
6 the statute tell us?

7 MR. LANIER: The statute does not tell us what
8 it contains. In this case, there appears to be an
9 analogy that can be made that people that are confronted
10 with the Iowa statute come in and go out of a disability
11 status. The Fourth Circuit has held that from the time
12 of the granting or the -- the granting of the
13 probationary period, that Kennison is disabled, that at
14 the end of the probationary period, under the deferred
15 judgment statute, that that probation is ended, and his
16 record of the conditional plea of a deferred judgment is
17 expunged.

18 If the only thing there is is offer to plea
19 under the deferred judgment statute, and those
20 proceedings are expunged, we submit there is nothing
21 left of a conviction, and that administrative record
22 retained by the clerk of court is nothing more than
23 something -- the equivalent of an arrest record, which
24 we would submit evokes no disabilities under the federal
25 Act.

1 The state statute involved, when the trial
2 judge elects to use the deferred judgment as opposed to
3 the suspended sentence, works automatically.
4 Petitioner's brief indicates that the disabilities are
5 not automatic, they are not unconditional, and they are
6 not absolute on the theory that nothing -- no
7 recommendation was made by the trial judge to restore
8 the disabilities imposed or to restore civil rights in
9 Kennison's case.

10 However, that is not necessary under the
11 deferred judgment portion. The statute specifically
12 states that under the deferred judgment statute, upon
13 discharge from probation, if the judgment has been
14 deferred under 789-A.1, the court's criminal record with
15 reference to the deferred judgment shall be expunged,
16 and that is the conclusion of the case.

17 We submit that the -- whatever happened in
18 Iowa was not a conviction, and in any event, upon the
19 successful completion of the probationary period
20 involved in the case, that the expungement lifted the
21 disabilities under the federal firearms Act.

22 QUESTION: Excuse me. Do we have any
23 appendices besides that in the petition? I don't mean
24 these -- these are copies of brief before court of
25 appeals. I mean of --

1 MR. LANIER: The appendix from Fourth Circuit
2 was adopted. It is in a blue binding, black --

3 QUESTION: Blue binding? Well, where is it?

4 MR. LANIER: I believe that the appendix from
5 the Fourth Circuit was submitted by the petitioner.

6 QUESTION: Nine copies? I just don't have
7 any. That's all I'm complaining about.

8 QUESTION: Well, I thought there was a motion
9 to dispense with printing the Joint Appendix, and that
10 was granted.

11 MR. LANIER: That's correct, and that was
12 granted.

13 QUESTION: So it has just been -- it has been
14 filed here, like a record.

15 QUESTION: The original record.

16 MR. LANIER: That's correct.

17 QUESTION: Ask the clerk over there.

18 QUESTION: Could I see it?

19 QUESTION: I understand there is nothing up
20 here now. That is all I want to find out. Has a record
21 been lodged with the Court?

22 MR. LANIER: Yes, the record has been filed.

23 QUESTION: Where is it?

24 MR. LANIER: The fact of the expunction has
25 been addressed, as I stated previously, under Ferguson,

1 Frier, and Arrington, and in those circuit courts the
2 court has held that the federal expunction under the
3 Youthful Offender Act effectively lifts the disabilities
4 imposed upon the federal Gun Control Act. We would rely
5 also on those decisions in those circuits.

6 Thank you.

7 CHIEF JUSTICE BURGER: Very well.

8 Do you have anything further, Mr. Geller?

9 ORAL ARGUMENT OF KENNETH S. GELLER, ESQ.,
10 ON BEHALF OF THE PETITIONER - REBUTTAL

11 MR. GELLER: One or two things, Mr. Chief
12 Justice.

13 First, in answer to Justice Stevens' question,
14 Iowa doesn't in fact destroy the record.

15 QUESTION: Does not?

16 MR. GELLER: Does not. In fact, the Bureau of
17 ATF found out about Kennison's conviction in this case
18 from the Iowa authorities.

19 QUESTION: Mr. Geller, supposing you had
20 exactly the same procedure you had here in Iowa, and 30
21 days after the guilty plea was accepted and there was a
22 conviction entered, the defendant came in by his
23 attorney and moved for leave to withdraw his guilty
24 plea, and said he had misunderstood, just, whatever
25 charges. The judge just said -- And then the prosecutor

1 came in and said, we do not oppose the motion, and the
2 judge said, leave to withdraw plea granted.

3 MR. GELLER: I would -- My position would be,
4 I think the government's position would be that there
5 would not be a conviction in that case. The plea has
6 been legally set aside, vacated. There has been no
7 finding that the defendant committed the crime.

8 QUESTION: But the same finding -- I want to
9 have the same finding that you got here.

10 MR. GELLER: Yes, but an expunction is not a
11 finding that the defendant did not commit the crime.
12 That is crucial.

13 QUESTION: Well, but in my hypothetical, the
14 same thing.

15 MR. GELLER: Yes. I don't agree, Justice
16 Stevens. If the --

17 QUESTION: Supposing two years later, then,
18 just instead of expunging, he came in and said, I move
19 to withdraw my guilty plea, and the judge said, motion
20 granted.

21 MR. GELLER: Well, I think I would have to
22 know more about the state procedure to see whether this
23 is --

24 QUESTION: Same state procedure you have got
25 here.

1 MR. GELLER: If there is no -- if it is just
2 an expunction, if there is no finding that the --

3 QUESTION: It just gives the judge the
4 authority to allow the defendant at the end of the
5 probation period to withdraw his guilty plea.

6 MR. GELLER: I would think that if the basis
7 for the relief, it has nothing to do with the fact that
8 the defendant did not commit the crime --

9 QUESTION: He just says in his motion, I want
10 to withdraw it, and the prosecutor doesn't oppose it.

11 QUESTION: Do we have that kind of a statute
12 here?

13 MR. GELLER: We don't. In fact, if I could
14 just turn for a second to the case we have before us
15 before my time runs out, because there is in fact an
16 order entered in this case by the trial judge. It is
17 Government's Exhibit 13, which I think the Court will
18 find in the record, and it begins by saying that the
19 defendant has entered a plea of guilty. It has not just
20 been offered. The judge has accepted it.

21 And under cases of this Court like Boykin, I
22 think that a guilty plea is a conviction for these
23 purposes. There is no question here that the plea --

24 QUESTION: Well, do you think Boykin was
25 attempting to categorize guilty pleas in a strictly

1 technical sense?

2 MR. GELLER: No, of course -- of course not,
3 but we are trying to categorize what Congress meant by
4 -- what it meant when it used the word "conviction." We
5 think it was using it in the same sense that the Court
6 has frequently used it, such as in Kercheval and Boykin,
7 a formal finding of guilt.

8 Now, the sorts of questions that, Justice
9 Stevens, you were asking about what is left after the
10 expungement, and Justice Blackmun was asking about how
11 does state law deal with this expunction, that is --
12 those are the sorts of questions that federal courts
13 would have to wrestle with, and federal administrative
14 officials would have to wrestle with day after day in
15 enforcing this important federal statute if the Court
16 holds that state expunction provisions, which vary
17 wildly from state to state, and are very ambiguous as to
18 what has been expunged, what is the basis for the
19 expunction, if the Court were to hold that that finding
20 in itself wipes out the important disabilities imposed
21 by the Gun Control Act, we don't think Congress could
22 ever have intended that, especially in light of Section
23 925(c).

24 QUESTION: I don't mean to be too repetitious,
25 Mr. Geller, but I am not sure I understand your answer

1 to my question.

2 MR. GELLER: Yes.

3 QUESTION: And it really would be helpful to
4 me.

5 MR. GELLER: Yes.

6 QUESTION: Take my hypothetical. Precisely
7 the same kind of judgment that we have here. And a year
8 later, a lawyer comes in and files a motion asking leave
9 to withdraw the plea, and on the ground that the
10 prosecutor does not oppose it, and the prosecutor says,
11 that is right, the judge says, we had a finding, you
12 start out the same way you did there, but the leave is
13 hereby withdrawn, and the judgment is vacated. What is
14 the government's position as to whether he would be
15 disabled or not?

16 MR. GELLER: Well, if I may, I would like to
17 give a somewhat more extended answer than one word. On
18 one pole, we have the Lewis situation.

19 QUESTION: I understand that.

20 MR. GELLER: On the other pole, it seems to me
21 we have the Kennison situation, where there is no
22 question that the conviction was expunged for reasons
23 wholly unrelated to guilt. Now, Justice Stevens, you
24 have just presented a hypothetical which is in between
25 those two. It seems to me that you have to make a

1 further inquiry. I would have to have facts that are
2 not included in your --

3 QUESTION: Are you able to answer my
4 hypothetical?

5 MR. GELLER: I think the answer is that if the
6 judge has not made a finding that the defendant did not
7 commit the crime, then there has been a conviction. He
8 has been convicted under Section 922(c).

9 QUESTION: Your answer is, under my
10 hypothetical, he would be disabled. I just want you to
11 answer it.

12 MR. GELLER: I think that's my answer, but I'd
13 like to know more of the facts before I commit the
14 government to that position.

15 QUESTION: But those facts and the
16 hypothesized statute aren't present in this case.

17 MR. GELLER: Are not what the Court has before
18 us here by any means.

19 Thank you.

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

22 (Whereupon, at 2:30 p.m., the case in the
23 above-entitled matter was submitted.)

24

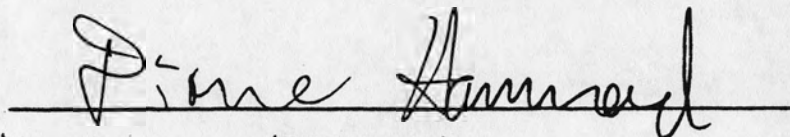
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of: G.R. DICKERSON, DIRECTOR, BUREAU OF ALCOHOL AND FOREARMS, v. NEW BANNER INSTITUTE, INC. #81-1180

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