No. 24-_____

IN THE

SUPREME COURT OF THE UNITED STATES

Terrence Michael Taylor,

Petitioner,

v.

United States of America,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

VIRGINIA L. GRADY
Federal Public Defender

AMY W. SENIA
Assistant Federal Public Defender
Counsel of Record
Office of the Federal Public Defender
633 17th Street, Suite 1000
Denver, Colorado 80202
Tel: (303) 294-7002
Email: amy_senia@fd.org

Question Presented

In *Blackledge v. Perry*, 417 U.S. 21 (1974), and *Menna v. New York*, 423 U.S. 61 (1975), this Court held that a defendant who pleads guilty can still raise on appeal any constitutional claim that does not depend on challenging his "factual guilt." This Court reaffirmed that rule in *Class v. United States*, by holding that the defendant's guilty plea did not bar his constitutional claims on appeal because they did "not contradict the terms of the indictment or the written plea agreement" and could be "resolved without any need to venture beyond that record." 583 U.S. 174, 181 (2018).

Nonetheless, there is a five-circuit split regarding how these authorities apply in the context of a guilty plea to multiple counts charging violations of the same statutory provision, in particular, 18 U.S.C. § 922(g). The question presented is:

Does a defendant's guilty plea to an indictment charging multiple violations of 18 U.S.C. § 922(g), unlawful firearm possession, waive his Double Jeopardy claim on appeal when neither the indictment nor the plea colloquy sets forth the facts necessary to establish that each count is based on a separate unit of prosecution, *i.e.*, a separate and distinct act of possession?

Related Proceedings

- *United States v. Taylor*, No. 5:21-cr-00161, United States District Court for the Western District of Oklahoma (judgment entered July 7, 2022).

- *United States v. Taylor*, No. 22-6114, United States Court of Appeals for the Tenth Circuit (judgment entered November 14, 2023).

Table of Contents

Appendix

Table of Authorities

Page

Cases

Statutes

Constitutional Provisions

Petition for Writ of Certiorari

Opinion Below

The published decision of the United States Court of Appeals for the Tenth Circuit is reported at *United States v. Taylor*, 86 F.4th 853 (10th Cir. 2023), and can be found in the Appendix at A1.

Basis for Jurisdiction

The Tenth Circuit issued its opinion affirming the district court on November 14, 2023. (A1.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

U.S. Const., Amendment V

"No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb[.]"

18 U.S.C. § 922(g)(1)

"It shall be unlawful for any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year[] . . . to . . . possess in or affecting commerce, any firearm or ammunition[.]"

Statement

The government charged Mr. Taylor with three counts of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). The first count alleged that Mr. Taylor possessed five 9mm shell casings on or about May 29, 2020. The second count alleged that Mr. Taylor possessed seven 9mm shell casings on or about June 6, 2020. And the third count alleged that Mr. Taylor possessed a Kel-Tec 9mm handgun and a Marlin .22 caliber rifle between, on, or about June 6, 2020, and June 10, 2020.

Mr. Taylor subsequently entered a guilty plea to all three counts, and for the plea's factual basis, admitted only to possessing (i) 9mm shell casings on May 29, 2020, (ii) 9mm shell casings on June 6, 2020, and (iii) the Kel-Tec 9mm handgun on June 6, 2020—all in the Western District of Oklahoma. (A5.) The district court entered judgment on all three § 922(g)(1) counts and sentenced Mr. Taylor to 300 months' imprisonment. (A5, A6.)

On appeal, Mr. Taylor challenged his three § 922(g)(1) convictions and corresponding sentences as multiplicitous in violation of the Double Jeopardy Clause. He argued that the indictment did not allege, and the record (including the plea colloquy) did not establish, that each count was based on a separate unit of prosecution, *i.e.*, three separate incidents of possession.

The Tenth Circuit affirmed. Relying on this Court's decision in *United States v. Broce*, 488 U.S. 563 (1989), the Tenth Circuit held that Mr. Taylor waived review of his Double Jeopardy claim by pleading guilty. *United States v. Taylor*, 86 F.4th 853, 858 (10th Cir. 2023) ("The Supreme Court [in *Broce*] explained that '[j]ust as a

defendant who pleads guilty to a single count admits guilt to the specified offense, so too does a defendant who pleads guilty to two counts with facial allegations of distinct offenses concede that he has committed two separate crimes.'") (quoting *Broce*, 488 U.S. at 570). According to the Tenth Circuit, even though the indictment failed to allege expressly that the firearm and ammunition underlying the three counts were each separately possessed (*i.e.*, separately acquired, stored, or relinquished and then repossessed), Mr. Taylor's guilty plea nonetheless barred his Double Jeopardy claim because the indictment was "fully consistent with ***the possibility*** that Mr. Taylor acquired and stored the firearms separately and had multiple caches of ammunition that he accessed on different dates." *Id.* (emphasis added).

Reasons for Granting the Petition

The Tenth Circuit's decision in this case amounts to a ruling that a guilty plea inherently waives a defendant's right to challenge his convictions as multiplicitous in violation of the Double Jeopardy Clause, even when the indictment fails to allege, and the plea colloquy fails to establish, that the admitted conduct amounts to multiple violations of the same statute. That ruling violates decades of established precedent in this Court and creates a five-circuit split as applied to § 922(g) in particular.

The Double Jeopardy Clause protects criminal defendants against multiplicitous convictions and sentences, that is, "multiple punishments for the same offense imposed in a single proceeding." *Jones v. Thomas*, 491 U.S. 376, 381 (1989). This "constitutional guarantee" assures that "the court does not exceed its legislative authorization by imposing multiple punishments for the same offense." *Brown v. Ohio*,

432 U.S. 161, 165 (1977). In the context of an indictment that charges multiple violations of a single statutory provision, the Double Jeopardy question asks what act the legislature intended as the statute's "unit of prosecution," that is, the minimum amount of activity a defendant must undertake to commit each new and independent violation of the same criminal statute. *Callanan v. United States*, 364 U.S. 587, 597 (1961). If a defendant's proven or admitted conduct constitutes only one unit of prosecution under the statute, but he has been convicted of and sentenced for multiple violations of that statute, then the Double Jeopardy Clause has been violated.

With respect to § 922(g) specifically, all circuit courts agree that the unit of prosecution is a single incident of possession, regardless of whether a defendant possessed more than one firearm, possessed a firearm and ammunition, or possessed multiple rounds of ammunition, and regardless of how long he possessed them. *See United States v. Richardson*, 439 F.3d 421 (8th Cir. 2006) (listing cases from all circuits). The majority of circuit courts also agree that, where the prosecution seeks more than one charge under § 922(g) in the same indictment, separate acquisition or separate storage of multiple weapons, or interrupted and reacquired possession of the same weapon, becomes an element of the crimes charged. *See United States v. Meza*, 701 F.3d 411, 433 (5th Cir. 2012); *United States v. Jones*, 533 F.2d 1387, 1389-92 (6th Cir. 1976); *United States v. Conley*, 291 F.3d 464, 471 (7th Cir. 2002); *United States v. Gilliam*, 934 F.3d 854, 859 (8th Cir. 2019); *United States v. Ankeny*, 502 F.3d 829, 838 (9th Cir. 2007); *United States v. Valentine*, 706 F.2d 282, 294 (10th Cir. 1983); *United States v. Cunningham*, 145 F.3d 1385, 1398 (D.C. Cir. 1998). As a result, in

the majority of circuits, it violates the Double Jeopardy Clause to convict a defendant of and sentence him for multiple violations of § 922(g) when the government fails to prove that his conduct amounted to multiple, separate acts of possession. *See id.*

Where the courts diverge, however, is as to whether a defendant's guilty plea waives a Double Jeopardy claim on appeal when the indictment charged multiple violations of § 922(g), but the indictment did not allege, and the plea colloquy did not establish, that the defendant separately stored or separately acquired the charged weapons (*i.e.*, engaged in two distinct acts of possession). The Court should use this case to resolve that split.

I. The circuits are divided about whether a guilty plea to multiple counts of § 922(g) waives a defendant's Double Jeopardy challenge

At least four federal circuit courts stand on one side of the split, ruling that pleading guilty to multiple § 922 counts does not waive a defendant's right to raise a Double Jeopardy challenge on appeal where the indictment did not expressly allege, and the plea colloquy did not establish, that each count is based on a separate unit of prosecution. On plain error review, the Third Circuit in *United States v. Tann* held that the defendant's two convictions under § 922(g) violated the Double Jeopardy Clause, notwithstanding the defendant's guilty plea to both counts. 577 F.3d 533, 534-37 (3d Cir. 2009). The Third Circuit relied on the fact that the government had made no showing that the defendant separately stored or separately acquired the firearm underlying one count and the ammunition underlying the other count. *Id.*

Likewise, in *Ankeny*, the Ninth Circuit held that the defendant properly preserved his Double Jeopardy challenge for appeal by raising it after pleading guilty to

four § 922(g) counts but before sentencing. 502 F.3d at 838. The *Ankeny* court emphasized that the defendant's "written plea and plea colloquy made no reference to separate acquisition or possession" of the four weapons underlying the four § 922(g) counts, and the government "presented no evidence of separate acquisition or possession." *Id.* As a result, the Ninth Circuit explained, the defendant "lodged his objection at the appropriate time, after the government had missed that opportunity." *Id.*

Similarly, the First Circuit held that a defendant does not waive a Double Jeopardy challenge on appeal by merely pleading guilty to multiple § 922(g) counts; he waives the claim only where he has pleaded guilty to an indictment and facts that expressly establish he committed multiple, separate acts of possession (*i.e.*, that the weapons underlying each count were stored separately). *United States v. Grant*, 114 F.3d 323, 328-29 (1st Cir. 1997) (citing *Broce*, 488 U.S. at 576; *Menna*, 423 U.S. at 63 n.2; and *Blackledge*, 417 U.S. 21)).

Finally, the Seventh Circuit has rejected the idea that pleading guilty to a multi-count indictment waives a defendant's right to challenge his convictions as multiplicitous where the indictment fails to allege facts showing that more than one offense occurred. *See McFarland v. Pickett*, 469 F.2d 1277, 1279 (7th Cir. 1972). In *McFarland*, the defendant pleaded guilty to two counts of § 922(j) for possessing two different stolen firearms. When he subsequently challenged his convictions as multiplicitous, the government argued that he had waived his right to contest the validity of separate convictions by pleading guilty, which, in the government's view, was an implicit admission that he committed two separate offenses. *Id.* The Seventh Circuit

rejected this argument, explaining that because the indictment alleged only that the defendant possessed two different weapons, and not that the weapons were separately acquired or stored, the defendant's guilty plea "could not, therefore, constitute an admission of guilt of two offenses when only one was alleged to have occurred." *Id.*

On the other side of the split, the Tenth Circuit here held that Mr. Taylor's guilty plea waived his Double Jeopardy challenge because the indictment was "fully consistent with ***the possibility*** that Mr. Taylor acquired and stored the firearms separately[.]" *Taylor*, 86 F.4th at 858 (emphasis added). This ruling directly conflicts with the above-mentioned circuit authorities. So too in *Tann*, *Ankeny*, and *McFarland*, the indictment was "fully consistent with the possibility" that the charged firearms were acquired and stored separately. Nonetheless, the courts in those cases treated the defendant's multiplicity challenge as reviewable because the indictment did not allege—and thus the defendant's guilty plea did not admit—facts expressly establishing the separateness of possessions underlying each count.

In sum, in at least the First, Third, Seventh, and Ninth Circuits, a defendant's guilty plea to multiple counts of § 922 does not waive a subsequent Double Jeopardy challenge where neither the indictment nor the plea colloquy expressly establishes facts showing that each count is based on a separate unit of prosecution, *i.e.*, a separate possession. In contrast, a defendant in the Tenth Circuit waives his right to raise a Double Jeopardy claim simply by pleading guilty to multiple § 922(g) counts, even when the government has never alleged, and the defendant has never admitted, that his conduct constituted multiple, separate incidents of possession.

Certiorari is accordingly warranted to resolve the division among the courts of appeal on this important and recurring question.

II. The Tenth Circuit's approach misinterprets *Broce* and its progeny

The Tenth Circuit held that, under this Court's decision in *Broce*, Mr. Taylor's guilty plea waived his Double Jeopardy claim. The Tenth Circuit reasoned that, although the indictment did not expressly allege the separateness of possessions, the indictment was nonetheless "consistent with ***the possibility***" that Mr. Taylor committed three separate offenses. *Taylor*, 86 F.4th at 858 (emphasis added). The Tenth Circuit's reliance on and interpretation of *Broce* is flatly incorrect. *Broce* does not stand for the proposition that pleading guilty constitutes an implicit admission of elements not alleged in the indictment and not included in the plea's factual basis.

This Court has long held that "a guilty plea does not bar a claim on appeal 'where on the face of the record the court had no power to enter the conviction or impose the sentence.'" *Class v. United States*, 583 U.S. 174 , 181 (2018) (quoting *Broce*, 488 U.S. at 569). This longstanding rule originates from *Menna v. New York*, wherein this Court held that a post-plea Double Jeopardy claim is not waived where the claim leaves "the issue of factual guilt," as established by the factual basis of the defendant's guilty plea, undisturbed. 423 U.S. 61, 62 n.2 (1975) (per curiam). Because the defendant's argument in *Menna* challenged the power of the trial court to punish him twice for the same conduct—regardless of "how validly his factual guilt [was] established" by his guilty plea—his Double Jeopardy claim was not waived by pleading guilty. *Id.*

Over a decade later, the Supreme Court applied this same rule in *Broce*, holding that the defendants' Double Jeopardy claims were foreclosed because, unlike in *Menna*, their claims could not be resolved without contradicting the explicit terms of their guilty pleas or "seek[ing] further proceedings at which to expand the record with new evidence." 488 U.S. at 575.

The defendants in *Broce* attempted to collaterally attack their convictions on Double Jeopardy grounds after pleading guilty to two separate indictments charging two separate conspiracies. 488 U.S. at 567-68. Pointing to evidence outside of the record, the defendants sought a factual determination that the two charged conspiracies were actually smaller parts of one overarching conspiracy. *Id.* at 567-70. In holding that this argument was waived, the *Broce* Court explained: "[w]hen respondents pleaded guilty to two charges of conspiracy on the ***explicit premise of two agreements*** which started at different times and embraced separate objectives, they conceded guilt to two separate offenses." *Broce*, 488 U.S. at 571 (emphasis added).

Importantly, as the Court in *Broce* noted, the unit of prosecution for conspiracy is based on the number of agreements; "[a] single agreement to commit several crimes constitutes one conspiracy" and "multiple agreements to commit separate crimes constitute multiple conspiracies." *Id.* at 570-71. The *Broce* defendants' Double Jeopardy challenge was thus doomed not because they pled guilty to two counts and thus implicitly admitted to committing two separate crimes, but because their plea colloquies explicitly admitted the very facts alleged in the indictment that were necessary to

establish that the two counts were each supported by their own separate unit of prosecution—*i.e.*, the existence of two separate agreements—and they required an evidentiary hearing to disprove those already-admitted facts. 488 U.S. at 571.

No such issue exists here. Mr. Taylor's claim would be barred by *Broce* if he had admitted that the firearm and ammunition were each separately acquired, separately stored, or relinquished and repossessed, and were attempting to backpedal that admission on appeal. But he has attempted no such thing. Instead, there is no *Broce* problem here because the factual basis underlying Mr. Taylor's guilty plea did not include the specific facts necessary for the government to establish three units of prosecution (*i.e.*, separate storage, acquisition, or dispossession and repossession of the three items). Indeed, in counts two and three, Mr. Taylor admitted only to possessing ammunition and a firearm, both in the Western District of Oklahoma, and both on June 6, 2020. Nothing about those admissions establishes that Mr. Taylor separately acquired or separately stored that firearm and ammunition.

As the First, Third, Seventh, and Ninth Circuits correctly acknowledge, a defendant has not implicitly and irrevocably admitted to committing multiple offenses when his guilty plea's factual basis does not include the elements necessary to establish that his conduct does, in fact, amount to multiple violations of the same statutory provision. *See Class*, 583 U.S. at 181 (defendant's guilty plea did not waive claims that did "not contradict the terms of the indictment or the written plea agreement" and could be "resolved without any need to venture beyond that record"). If Mr. Taylor had been federally prosecuted in the First, Third, Seventh, or Ninth Circuits, he

would have had the right to appeal his multiple convictions under § 922(g) as violating the Double Jeopardy Clause, asserting that the government failed to elicit a guilty plea sufficient to establish that Mr. Taylor committed three different crimes under § 922(g)(1). Not so in the Tenth.

This split has created and will continue to create disparities among defendants around the country. Certiorari is therefore warranted to ensure that defendants in all federal circuits receive the same constitutional protections when charged with multiple violations of the same statutory provision, be it § 922(g) or any other statute.

Conclusion

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

VIRGINIA L. GRADY
Federal Public Defender

/s/ Amy W. Senia
AMY W. SENIA
Assistant Federal Public Defender
Counsel of Record
633 17th Street, Suite 1000
Denver, Colorado 80202
Tel: (303) 294-7002
Email: amy_senia@fd.org

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