No. 23-6724

IN THE SUPREME COURT OF THE UNITED STATES

TERRENCE MICHAEL TAYLOR,
AKA TERRANCE MICHAEL TAYLOR, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly rejected petitioner's challenge under the Double Jeopardy Clause to his three convictions for possessing a firearm or ammunition following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2) (2018), where petitioner pleaded guilty to three separate offenses.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A5) is reported at 86 F.4th 853.

JURISDICTION

The judgment of the court of appeals was entered on November 14, 2023. The petition for a writ of certiorari was filed on February 8, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Western District of Oklahoma, petitioner was convicted on two counts of possessing ammunition following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2) (2018); and one count of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2) (2018). Pet. App. A6. The district court sentenced him to 300 months of imprisonment, to be followed by three years of supervised release. Id. at A7-A8. The court of appeals affirmed. Id. at A1-A5.

1. On May 29, 2020, petitioner shot the tires of a victim's car because the victim refused to issue a refund after selling petitioner a car that had mechanical issues. Pet. App. A1. During the encounter at the victim's house, petitioner also pointed a firearm at the victim twice. Presentence Investigation Report (PSR) ¶ 13. Four 9mm shell casings were recovered near the victim's vehicle. Pet. App. A1; PSR ¶ 14.

On June 6, 2020, officers responded to a shots-fired call at a residence and discovered a different victim lying in her yard with several gunshot wounds to her legs and hands. Pet. App. A1; PSR ¶ 17. The victim told officers that she and petitioner had an argument over a used-car sale that ended when petitioner shot her, took her purse, and fled in his vehicle. Pet. App. A1; PSR ¶¶ 20, 22, 30. Officers recovered seven 9mm shell casings at the scene.

Pet. App. A1; PSR ¶ 19. Police located petitioner and arrested him. Pet. App. A1; PSR ¶ 18.

After the arrest, officers contacted petitioner's wife, who told them that she had never seen petitioner with a gun, but that her own 9mm firearm was missing. Pet. App. A1; PSR ¶ 18. On June 8, 2020, officers executed a search warrant for petitioner's residence. Pet. App. A1; PSR ¶ 25. They seized a Marlin .22 rifle from behind a bed and a 50-round box of 9mm ammunition from a safe. Ibid.

The next day, officers returned to the residence when petitioner's wife notified them that she had found a firearm. Pet. App. A2. Officers recovered a 9mm Kel-Tec pistol from behind a bookshelf and a box containing 21 rounds of 9mm ammunition. Ibid. The shell casings recovered from both shootings were fired from a 9mm Kel-Tec pistol. Ibid.; PSR ¶ 33.

2. A grand jury in the Western District of Oklahoma returned an indictment charging petitioner with two counts of possessing ammunition following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2) (2018); and one count of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2) (2018). Indictment 1-3. The first count alleged that petitioner possessed five pistol cartridges on or about May 29, 2020 (the day of the first shooting). Pet. App. A2; Indictment 1. The second count alleged that petitioner possessed

seven pistol cartridges on or about June 6, 2020 (the day of the second shooting). Pet. App. A2; Indictment 2. The third count alleged that petitioner possessed the 9mm Kel-Tec pistol and the Marlin .22 rifle between on or about June 6 and 10, 2020. Pet. App. A2; Indictment 2-3.

A week before the scheduled trial, the district court granted petitioner's motion to represent himself and have his previous counsel appointed as standby counsel. Pet. App. A2; D. Ct. Doc. 36 (Oct. 26, 2021). Petitioner then pleaded guilty to all three counts in the indictment. Pet. App. A2, A6; see D. Ct. Doc. 49 (Nov. 2, 2021). In his Petition to Enter a Plea of Guilty, petitioner admitted to possessing ammunition on or about May 29, 2020; possessing ammunition on or about June 6, 2020; and possessing a Kel-Tec 9mm handgun on or about June 6, 2020. D. Ct. Doc. 49, at 11. During the plea hearing, petitioner acknowledged that he possessed the Kel-Tec 9mm handgun "somewhere between June the 6th and the 10th of 2020." 11/2/21 Tr. 13-14. The district court found that the plea was voluntary and made with an understanding of the charges and the consequences of the plea. Pet. App. A2; 11/2/21 Tr. 14-15.

Following his guilty plea, petitioner submitted numerous letters and motions to the district court. Pet. App. A2; see, e.g., D. Ct. Doc. 67 (Feb. 16, 2022); D. Ct. Doc. 68 (Feb. 22, 2022); D. Ct. Doc. 70 (Feb. 28, 2022). Among other things,

petitioner moved to withdraw his plea. Pet. App. A2. The district court denied the motion, reaffirming that petitioner's plea had been knowing and voluntary. Ibid.; see D. Ct. Doc. 129, at 3-10 (July 14, 2022).

The district court sentenced petitioner to 300 months of imprisonment (120 months on each of the ammunition counts and 60 months on the firearms count, to run consecutively), to be followed by three years of supervised release. Pet. App. A7-A8.

3. The court of appeals affirmed. Pet. App. A1-A5.

Petitioner contended that his three Section 922(g)(1) convictions violated the Double Jeopardy Clause because they reflected "one continuous incident of possession." Pet. App. A2. The court of appeals determined, however, that petitioner had relinquished his double-jeopardy claim by pleading guilty. Ibid.

The court of appeals acknowledged that under United States v. Broce, 488 U.S. 563 (1989), and Class v. United States, 583 U.S. 174 (2018), a defendant who pleads guilty may nonetheless be entitled to raise a constitutional claim on appeal if the violation can be conclusively established "without any need to venture beyond [the] record." Pet. App. A2-A3 (quoting Broce, 488 U.S. at 574-575) (brackets in original). But the court explained that a guilty plea does relinquish a claim that would require further factual development, irrespective of whether such factual development

might be consistent with the facts admitted in the guilty plea. Id. at A3-A4.

The court of appeals then determined that petitioner would need additional factual development to succeed on a double-jeopardy claim. Pet. App. A4. It noted that under circuit precedent, the "simultaneous possession of multiple firearms generally constitutes only one offense unless there is evidence that the weapons were stored in different places or acquired at different times." Ibid. (quoting United States v. Hutching, 75 F.3d 1453, 1460 (10th Cir.), cert. denied, 517 U.S. 1246 (1996)). It further observed that petitioner had "concede[d]" that the government may demonstrate separate offenses by showing that the defendant possessed the same firearms on different dates, if his possession was interrupted at some point between those dates. Ibid. And it found that in this case, "the indictment is fully consistent with the possibility that [petitioner] acquired and stored the firearms separately and had multiple caches of ammunition that he accessed on different dates." Ibid. The court further observed that even resorting to the presentence and police reports, the record did not conclusively reflect a single continuous offense, but instead demonstrated that petitioner did not store his firearms and ammunition in a single place and shed no light on where the objects were in the days surrounding the shootings. Ibid.

ARGUMENT

Petitioner contends (Pet. 3-5, 8-11) that, notwithstanding his guilty plea to three unlawful-possession offenses in violation of 18 U.S.C. 922(g)(1) and 924(a)(2) (2018), he is entitled to challenge those convictions under the Double Jeopardy Clause on appeal. The court of appeals correctly determined that petitioner had relinquished that argument, and its decision does not conflict with any decision of this Court or another court of appeals. In any event, this case would be a poor vehicle for addressing the question presented. No further review is warranted.

1. a. This Court has held that "a valid guilty plea 'forgoes not only a fair trial, but also other accompanying constitutional guarantees.'" Class v. United States, 583 U.S. 174, 182 (2018) (citation omitted). For example, the plea "renders irrelevant -- and thereby prevents the defendant from appealing -- the constitutionality of case-related government conduct that takes place before the plea is entered." Ibid.; see Tollett v. Henderson, 411 U.S. 258, 267 (1973) ("[A] guilty plea represents a break in the chain of events which has preceded it in the criminal process."). In general, only a narrow category of claims, which assert that "on the face of the record the court had no power to enter the conviction or impose the sentence," remain available to a defendant who has knowingly and voluntarily entered an

unconditional guilty plea. United States v. Broce, 488 U.S. 563, 569 (1989).

In United States v. Broce, this Court applied those principles to reject a claim that multiple convictions were in fact for the same crime, in violation of the Double Jeopardy Clause. 488 U.S. at 569-576. There, two defendants pleaded guilty to two counts of conspiracy based on agreements to rig bids for highway contracts. Id. at 565-566. On collateral review, however, they challenged their convictions on double-jeopardy grounds, claiming "that the bid-rigging schemes alleged in their indictments were but a single conspiracy." Id. at 567. But while the lower courts had allowed them to submit new evidence in support of that claim, and granted relief based on that new evidence, see id. at 568-569, this Court held that the defendants had relinquished their double-jeopardy claim by pleading guilty "to two counts with facial allegations of distinct offenses." Id. at 570.

The Court explained that, in contrast to a claim that could be established "without any need to venture beyond [the] record," which might remain viable notwithstanding an unconditional guilty plea, the defendants could not "prove their [double-jeopardy] claim by relying on [the] indictments and the existing record." Broce, 488 U.S. at 575-576. The defendants "had the opportunity, instead of entering their guilty pleas, to challenge the theory of the indictments and to attempt to show the existence of only one

conspiracy in a trial-type proceeding." Id. at 571. But "[t]hey chose not to, and hence relinquished that entitlement." Ibid.

b. The court of appeals correctly applied the foregoing principles in rejecting petitioner's double-jeopardy claim here, because it cannot be proved based on the existing record.

The courts of appeals have taken the view that, in general, the simultaneous, undifferentiated possession or receipt of multiple firearms following a felony conviction constitutes only a single violation of Section 922(g)(1).[1] They have also taken the view that the simultaneous possession of a firearm and ammunition constitutes one offense rather than two.[2] But they have recognized that a defendant who possesses or receives multiple

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[1] See, e.g., United States v. Ankeny, 502 F.3d 829, 838 (9th Cir. 2007), cert. denied, 553 U.S. 1034 (2008); United States v. Verrecchia, 196 F.3d 294, 298 (1st Cir. 1999); United States v. Dunford, 148 F.3d 385, 390 (4th Cir. 1998); United States v. Cunningham, 145 F.3d 1385, 1398 (D.C. Cir.), cert. denied, 525 U.S. 1059 (1998), and 525 U.S. 1128 (1999); United States v. Hutching, 75 F.3d 1453, 1460 (10th Cir.), cert. denied, 517 U.S. 1246 (1996); see also United States v. Bonavia, 927 F.2d 565, 568-569 (11th Cir. 1991); United States v. Marino, 682 F.2d 449, 454 (3d Cir. 1982); United States v. McCrary, 643 F.2d 323, 325-328 (5th Cir. 1981); United States v. Powers, 572 F.2d 146, 150-152 (8th Cir. 1978); United States v. Rosenbarger, 536 F.2d 715, 720-721 (6th Cir. 1976), cert. denied, 431 U.S. 965 (1977); United States v. Calhoun, 510 F.2d 861, 869 (7th Cir.), cert. denied, 421 U.S. 950 (1975).

[2] See, e.g., United States v. Keen, 104 F.3d 1111, 1118-1120 (9th Cir. 1997); United States v. Berry, 977 F.2d 915, 918-919 (5th Cir. 1992); United States v. Throneburg, 921 F.2d 654, 656-657 (6th Cir. 1990); see also United States v. Pelusio, 725 F.2d 161, 168-169 (2d Cir. 1983); United States v. Oliver, 683 F.2d 224, 232-233 (7th Cir. 1982).

firearms at separate times or places has committed multiple offenses and may be convicted on each. See, e.g., United States v. Robinson, 855 F.3d 265, 270 (4th Cir. 2017); United States v. Kennedy, 682 F.3d 244, 255-256 (3d Cir. 2012); United States v. Cunningham, 145 F.3d 1385, 1398-1399 (D.C. Cir.), cert. denied, 525 U.S. 1059 (1998), and 525 U.S. 1128 (1999); United States v. Keen, 104 F.3d 1111, 1118 n.11 (9th Cir. 1997); United States v. Hutching, 75 F.3d 1453, 1460 (10th Cir.), cert. denied, 517 U.S. 1246 (1996); see also United States v. Gann, 732 F.2d 714, 720 (9th Cir.), cert. denied, 469 U.S. 1034 (1984).

In petitioner's case, the indictment, on its "face," Broce, 488 U.S. at 576, charged petitioner with three separate offenses. The first two counts alleged that petitioner possessed ammunition on or about two different dates, May 29 and June 6, 2020 -- the dates of the two shootings -- which were a week apart. Indictment 1-2. The third count alleged that defendant possessed two firearms, a Marlin .22 rifle and a Kel-Tec 9mm pistol, between on or about June 6 and 10, 2020. Indictment 2-3. And petitioner admitted to possessing the Kel-Tec 9mm pistol on or about those dates when he pleaded guilty to the offenses alleged in the indictment. D. Ct. Doc. 49, at 11; 11/2/21 Tr. 13-14.

This is not a case where the indictment charged "facially duplicative" offenses, Broce, 488 U.S. at 575. Petitioner does not and cannot claim that the possession of different items on

different dates, as alleged in the indictment, necessarily shows that he committed only one offense. His claim instead is that he did not in fact possess the items at distinct times or places. But petitioner relinquished any right to attempt to substantiate that claim when he entered a knowing and voluntary guilty plea that forwent a trial. Id. at 571.

Petitioner errs in contending (Pet. 5) that convictions for multiple Section 922(g) offenses are multiplicitous unless the indictment explicitly alleges, or the plea colloquy specifically establishes, that the defendant separately stored or separately acquired the charged weapons or ammunition. By pleading guilty, petitioner admitted that he is legally guilty -- that is, that "he committed the crime charged against him." Broce, 488 U.S. at 570 (quoting North Carolina v. Alford, 400 U.S. 25, 32 (1970)). As in Broce, the fact that petitioner may be able to establish multiplicity by "draw[ing] upon factual evidence outside the original record," id. at 568, cannot overcome his knowing and voluntary decision to plead guilty.

Petitioner attempts to distinguish (Pet. 9) Broce by arguing that the defendants there had pleaded "guilty to two separate indictments charging two separate conspiracies." But, in fact, the indictments in Broce "did not explicitly state that the conspiracies were separate." Broce, 488 U.S. at 570 (emphasis added). The Court nevertheless found that the defendants had

relinquished their double-jeopardy claim, and it follows that petitioner has relinquished his.

2. Petitioner asserts (Pet. 5-8) that the court of appeals' decision in this case conflicts with decisions of the First, Third, Seventh, and Ninth Circuits. According to petitioner (Pet. 5), those circuits have held that a defendant does not waive his double-jeopardy claim by pleading guilty unless the indictment or the plea colloquy expressly establishes that each count in the indictment is based on a separate unit of prosecution. He is incorrect.

In United States v. Tann, 577 F.3d 533 (3d Cir. 2009), the defendant pleaded guilty to one count of possessing ammunition following a felony conviction and one count of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g). Id. at 535. The court of appeals determined that the district court had plainly erred by entering separate convictions and sentences for the simultaneous possession of a firearm and ammunition. Id. at 535-538. But the court never cited Broce or otherwise addressed the question presented here of whether the defendant had waived his multiplicity argument by pleading guilty. And unlike in this case, it was apparent from the materials in the record that the two charges were based on a single incident. Compare id. at 534-535, with Pet. App. A4.

In United States v. Ankeny, 502 F.3d 829 (9th Cir. 2007), cert. denied, 553 U.S. 1034 (2008), the defendant pleaded guilty to four counts of possessing a firearm following a felony conviction, in violation of Section 922(g)(1). Id. at 834. The court of appeals determined that the district court had erred by not dismissing three of the Section 922(g)(1) counts, since the record did not reflect that the firearms were acquired or possessed on separate occasions. Id. at 838-839. But as in Tann, the court did not cite Broce or discuss the body of caselaw governing relinquishment based on a guilty plea. And unlike this case, the four items in Ankeny were all seized simultaneously from a single location, and the indictment charged the defendant with possessing all of the firearms on a single date. Id. at 833-834, 838; see Pet. App. A4.

The decision in United States v. Grant, 114 F.3d 323 (1st Cir. 1997), fully supports the decision below. In Grant, the defendant pleaded guilty to four counts of possessing firearms following a felony conviction, but then raised a double-jeopardy challenge on appeal. Id. at 325, 328. Citing Broce, the First Circuit explained that a defendant "must show that the indictment was facially multiplicitous to prevail on his Double Jeopardy challenge." Id. at 329. And it found that the defendant there could not make the requisite showing, since "the facial allegations of the four counts consisted of distinct offenses, charging [the

defendant] with the possession of eleven different weapons in two separate cities on three different dates." Ibid. Thus, given the defendant's guilty plea, the court determined that he "cannot now argue that a factual issue remains regarding the location or time of his possession of these different firearms." Id. at 330. That analysis and result are fully in accord with the analysis and result here. See Pet. App. A4.

Lastly, in McFarland v. Pickett, 469 F.2d 1277 (7th Cir. 1972) (per curiam), the defendant pleaded guilty to two counts of concealing and storing stolen firearms, in violation of 18 U.S.C. 922(j). 469 F.2d at 1278. The court of appeals rejected the government's argument that the defendant had waived his multiplicity challenge by pleading guilty, reasoning that "[t]here is no indication * * * that proof of all allegations in the government information would have required proof that two weapons were acquired at different times and concealed in different locations." Id. at 1279. But McFarland substantially predated Broce; its reasoning is at odds with Broce's, see 488 U.S. at 574-575; and there is no basis for concluding that the Seventh Circuit would follow McFarland's superseded reasoning now, if it were presented with a case like petitioner's.

3. In any event, this case would be a poor vehicle for resolving the question presented given the government's argument below that, even apart from his guilty plea, petitioner waived or

forfeited his multiplicity objection by failing to raise it properly before the district court. See Gov't C.A. Br. 18-24. In light of its determination that petitioner waived his challenge by pleading guilty, the court of appeals declined to address that alternative argument. Pet. App. A4. But the presence of an alternative basis for affirmance would complicate the Court's ability to determine the proper remedy were it to rule in petitioner's favor on the question presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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