

No. 20-256

In the Supreme Court of the United States

ZAVIAN MUNIZE JORDAN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was validly convicted on two separate counts of possessing a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c) (2012), where the evidence supported his possession of multiple firearms in separate places in furtherance of separate drug-trafficking offenses.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 952 F.3d 160. The order of the district court (Pet. App. 28a-33a) is not published in the Federal Supplement.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 2020. A petition for rehearing was denied on March 31, 2020 (Pet. App. 34a). On March 19, 2020, this Court extended the deadline to file a petition for a writ of certiorari to 150 days from the date of the lower court order denying a timely petition for rehearing. The petition for a writ of certiorari was filed on August 28, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of North Carolina, petitioner was convicted on one count of conspiring to distribute or possess with the intent to distribute heroin and cocaine, in violation of 21 U.S.C. 846; one count of possessing with the intent to distribute heroin, in violation of 21 U.S.C. 841(a)(1); one count of possessing with the intent to distribute cocaine, in violation of 21 U.S.C. 841(a)(1); two counts of possessing a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c) (2012); and one count of possessing a firearm after having been convicted of a felony, in violation of 18 U.S.C. 922(g)(1). Pet. App. 35a-37a. He was sentenced to 420 months of imprisonment, to be followed by four years of supervised release. *Id.* at 38a-40a. The court of appeals affirmed. *Id.* at 1a-27a.

1. In April 2016, law enforcement agents investigating the distribution of “China White” heroin in North Carolina arrested Ricky Grant after he sold heroin to a confidential source. Pet. App. 29a. Grant identified petitioner as his heroin supplier, and agreed to call petitioner while officers monitored and recorded the call. *Id.* at 3a-4a. Based on the call, the officers obtained warrants to track the location of petitioner’s phone and to place a tracking device on his truck. *Id.* at 4a.

On May 11, 2016, federal agents established surveillance at petitioner’s residence on Cullingford Lane near Charlotte, North Carolina. Pet. App. 29a, 73a. Around noon, petitioner traveled from his residence to a parking garage in downtown Charlotte, and then to a house on Lyles Court. *Id.* at 29a-30a. From there, petitioner traveled to another house on Ravencroft Drive, where he appeared to make an exchange by taking a white

plastic bag from the house and returning with a smaller item from his truck. *Id.* at 29a. Around 2 p.m., a police officer stopped petitioner's truck. *Ibid.* In the course of the traffic stop, the officer's drug-detecting dog "alerted, and [petitioner] admitted that he had cocaine in his possession." *Id.* at 5a. The officer found 12 grams of cocaine and \$2000 cash in petitioner's pockets. *Id.* at 5a, 29a-30a. A search of the truck uncovered a Taurus .45 caliber pistol, six phones, and \$26,000 in cash in a white bag. *Ibid.*

Petitioner was arrested. Pet. App. 5a. He agreed to talk to the police and gave a detailed statement "admitting that he was involved" in drug trafficking. *Ibid.* Petitioner told police that the Lyles Court house was his deceased grandmother's former residence, which he used to prepare and package drugs. *Ibid.* He further admitted that he regularly sold drugs at the Ravencroft Drive house, *id.* at 5a, 29a, and that, on the day of his arrest, he had packaged and prepared cocaine at the Lyles Court house before delivering it to the Ravencroft Drive house, *id.* at 30a; Trial Tr. 95. Later that evening, officers searched the Lyles Court house, the Ravencroft Drive house, and petitioner's residence on Cullingford Lane. Pet. App. 30a. At the Lyles Court house, the officers recovered 275 grams of heroin, drug-packaging materials, drug-purity testing kits, a respirator, digital scales, and a Glock .40 caliber pistol. *Ibid.* At the Ravencroft Drive house, officers recovered 753 grams of cocaine (as well as marijuana and methamphetamine), and a Springfield Armory handgun. *Ibid.* And at the Cullingford Lane residence, officers recovered an FN 5.7x28 mm caliber pistol, another .223 caliber pistol with a high-capacity magazine, bulletproof vests, and \$24,400 in cash. *Ibid.*

A federal grand jury in the Western District of North Carolina charged petitioner with one count of conspiring to distribute or possess with the intent to distribute heroin and cocaine, in violation of 21 U.S.C. 846 (Count 1); one count of possessing with the intent to distribute heroin, in violation of 21 U.S.C. 841(a)(1) (Count 5); one count of possessing with the intent to distribute cocaine, in violation of 21 U.S.C. 841(a)(1) (Count 6); one count of possessing a firearm in furtherance of the drug-trafficking conspiracy alleged in Count 1, in violation of 18 U.S.C. 924(c) (2012) (Count 8); one count of possessing a firearm in furtherance of the cocaine-distribution offense alleged in Count 6, in violation of 18 U.S.C. 924(c) (2012) (Count 9); and one count of possessing a firearm after having been convicted of a felony, in violation of 18 U.S.C. 922(g)(1) (Count 10). Pet. App. 50a-52a, 54a-57a. The felon-in-possession count alleged that, on May 11, 2016, petitioner possessed a Taurus .45 caliber semiautomatic pistol and ammunition; a Glock .40 caliber semiautomatic pistol and ammunition; and an FN 5.7x28 mm caliber semiautomatic pistol and ammunition. *Id.* at 57a. The indictment also charged various co-conspirators (in Count 1) with conspiring to distribute or possess with the intent to distribute heroin and cocaine, and other offenses not relevant here. *Id.* at 50a-62a.

The jury found petitioner guilty on all counts. Pet. App. 91a-93a.

2. Before sentencing, petitioner filed a motion to merge Counts 8 and 9—the two offenses under Section 924(c) for possessing a firearm in furtherance of a drug-trafficking crime—on the ground that “[n]othing in the jury verdict indicates that it found that [he] possessed different guns at different times.” Pet. App. 95a. The

district court denied the motion. *Id.* at 28a-33a. The court stated that a substantive drug-trafficking crime and conspiracy to commit drug-trafficking are separate offenses for purposes of the constitutional protection against double jeopardy, and “[a]s long as the underlying crimes are not identical under the [analysis of *Blockburger v. United States*, 284 U.S. 299 (1932)], then consecutive § 924(c) sentences are permissible” when they are based on two separate predicate offenses. Pet. App. 31a (quoting *United States v. Khan*, 461 F.3d 477, 494 (4th Cir. 2006)).

The district court additionally explained that the evidence, viewed “in [the] light most favorable to the government,” “amply supports the jury’s verdict” finding petitioner guilty of multiple Section 924(c) violations. Pet. App. 32a. The court observed that the jury had found in Count 8 that petitioner possessed a firearm in furtherance of the conspiracy to distribute cocaine and heroin alleged in Count 1 of the indictment. *Ibid.* And the court noted the evidence showing both that “a Glock pistol was found in proximity to over 275 grams of heroin and drug packaging materials at the Lyles Court residence where [petitioner] admitted processing the more than 753 grams of cocaine [that] he delivered to the Ravencroft residence,” and additionally that “two handguns, along with bullet proof vests and over \$24,000 currency, were found at [petitioner’s Cullingford Lane] residence.” *Ibid.* The court next observed that, in Count 9, the jury had found that petitioner possessed a firearm in furtherance of the separate drug-trafficking offense alleged in Count 6 of the indictment, namely, possessing with the intent to distribute cocaine. *Ibid.* And the court noted the evidence from the traffic

stop showing that petitioner possessed “a Taurus handgun underneath the center console of [his] truck when he possessed more than 7 grams of cocaine in his pocket.” *Ibid.*

The district court sentenced petitioner to five years of imprisonment for the drug-trafficking conspiracy offense (Count 1), five years for each of the substantive drug-trafficking offenses (Counts 5 and 6), and five years for the felon-in-possession offense (Count 10), all to run concurrently. Pet. App. 7a. The court also sentenced petitioner to a mandatory five-year consecutive term for the first Section 924(c) offense (Count 8), and a mandatory 25-year consecutive term for the second Section 924(c) offense (Count 9), for a total sentence of 420 months of imprisonment. *Ibid.*; see 18 U.S.C. 924(c)(1)(C)(i) (2012).¹

3. The court of appeals affirmed. Pet. App. 1a-27a. As relevant here, petitioner argued that multiple sentences under Section 924(c) are permissible only where each is supported by a distinct use of a firearm. *Id.* at 18a. Petitioner further argued that the jury’s verdict could have rested on a finding that he used a single gun on only one occasion, in furtherance of both the drug-trafficking conspiracy offense (the predicate offense for Count 8) and the substantive cocaine-distribution offense (the predicate offense for Count 9). *Ibid.*

The court of appeals rejected petitioner’s argument and affirmed his convictions and sentences. Pet. App.

¹ After petitioner’s conviction and sentencing, Congress amended Section 924(c) to provide that the statutory minimum 25-year sentence applies “[i]n the case of a violation of this subsection that occurs after a prior conviction under this subsection has become final.” 18 U.S.C. 924(c)(1)(C). That statutory amendment does not apply to petitioner. See Pet. App. 21a-27a.

19a-21a. The court observed that, under its precedent, “there is no requirement that multiple and consecutive § 924(c) sentences rest on the use of different firearms or distinct uses of the same firearm,” so long as they were “predicated on different underlying offenses.” *Id.* at 19a; see *id.* at 18a-19a (citing *Khan*, 461 F.3d at 493-494). And while the court noted that other circuits require that multiple Section 924(c) convictions rest on separate incidents of using, carrying, or possessing a firearm, the court explained that “this is not the kind of case that has most troubled some courts, in which the evidence presented at trial makes clear that multiple § 924(c) convictions rest on a single use of a single gun.” *Id.* at 20a-21a.

The court of appeals emphasized that “the jury [here] was presented with ample evidence of different uses of different guns, all in furtherance of the predicate drug-trafficking offenses,” including “the handgun recovered from [petitioner’s] grandmother’s home, the two different handguns recovered from [petitioner’s] residence, and yet another handgun found in [petitioner’s] truck on the day he was arrested.” Pet. App. 20a. The court further observed that, “as the district court noted, had [petitioner] nonetheless been concerned that the jury might base its two § 924(c) convictions on a single use of a gun, he could have requested a jury instruction on the issue or a special verdict form that would have detailed the jury’s reasoning, but [he] did neither.” *Id.* at 20a-21a. “Accordingly,” the court of appeals determined, “the district court did not err in denying [petitioner’s] motion to sentence him on only one of his two § 924(c) convictions.” *Id.* at 21a.

ARGUMENT

Petitioner renews his contention (Pet. 9-22) that he should have been convicted of a single violation of 18 U.S.C. 924(c) (2012). The court of appeals correctly rejected that argument, and its decision does not implicate any circuit conflict that might warrant this Court's review. This Court has repeatedly denied other petitions for a writ of certiorari challenging the imposition of multiple convictions under Section 924(c).² The same result is warranted here.

1. The court of appeals correctly upheld petitioner's two separate Section 924(c) convictions.

Section 924(c) prescribes mandatory consecutive penalties for “any person who, during and in relation to any crime of violence or drug trafficking crime * * * uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm.” 18 U.S.C. 924(c)(1)(A); see 18 U.S.C. 924(c)(1)(C)(i) (2012); p. 6 n.1., *supra*. Here, the jury's verdict reflects—and petitioner does not dispute—that he committed two separate drug-trafficking offenses: conspiring to distribute or possess with the intent to distribute heroin and cocaine, and possessing with the intent to distribute cocaine. See p. 4, *supra*. Those offenses were the predicates for his two Section 924(c) convictions. *Ibid*.

As petitioner observes (Pet. 9-12), some courts of appeals (including the Fourth Circuit court below) have

² See, e.g., *Campbell v. United States*, 136 S. Ct. 76 (2015) (No. 14-9949); *Sessoms v. United States*, 571 U.S. 1023 (2013) (No. 12-8965); *Dire v. United States*, 568 U.S. 1145 (2013) (No. 12-6529); *Guess v. United States*, 568 U.S. 1093 (2013) (No. 12-6575); *Bernardez v. United States*, 565 U.S. 1160 (2012) (No. 11-6779); *Castro v. United States*, 565 U.S. 841 (2011) (No. 10-10620).

held that a defendant's single course of conduct can support multiple convictions under Section 924(c), so long as each Section 924(c) conviction relates to a separate predicate offense. See *United States v. Hodge*, 870 F.3d 184, 196 (3d Cir. 2017); *United States v. Sandstrom*, 594 F.3d 634, 655-656 (8th Cir.), cert. denied, 562 U.S. 878, and 562 U.S. 881 (2010); *United States v. Khan*, 461 F.3d 477, 493-494 (4th Cir. 2006). Other courts of appeals have held (Pet. 12-16) that only one Section 924(c) conviction can arise from a defendant's single incidence of using, carrying, or possessing a firearm, even if the defendant's use, carrying, or possession gives rise to multiple distinct predicate offenses. See *United States v. Vichitvongsa*, 819 F.3d 260, 269 (6th Cir.), cert. denied, 137 S. Ct. 79 (2016); *United States v. Rentz*, 777 F.3d 1105, 1108-1111 (10th Cir. 2015) (en banc) (Gorsuch, J.); *United States v. Cureton*, 739 F.3d 1032, 1043 (7th Cir. 2014); *United States v. Phipps*, 319 F.3d 177, 189 (5th Cir. 2003); *United States v. Finley*, 245 F.3d 199, 206-208 (2d Cir. 2001), cert. denied, 534 U.S. 1144 (2002); *United States v. Wilson*, 160 F.3d 732, 749 (D.C. Cir. 1998), cert. denied, 528 U.S. 828 (1999). This case, however, does not implicate the division among the courts of appeals because no court doubts that a defendant can be convicted on separate Section 924(c) offenses when—like petitioner here—he possessed multiple firearms in different places in relation to distinct drug-trafficking crimes.

The court of appeals explained that “this is not the kind of case that has most troubled some courts, in which the evidence presented at trial makes clear that multiple § 924(c) convictions rest on a single use of a single gun.” Pet. App. 20a. Rather, “the jury was presented with ample evidence of different uses of different

guns, all in furtherance of the predicate drug-trafficking offenses,” including “the handgun recovered from [petitioner’s] grandmother’s home * * * and yet another handgun found in [petitioner’s] truck on the day he was arrested.” *Ibid.* The district court similarly linked the “Glock pistol * * * found in proximity to over 275 grams of heroin and drug packaging materials at the Lyles Court residence” to the Section 924(c) conviction on Count 8, whereas the court linked the “Taurus handgun underneath the center console of the defendant’s truck” to the Section 924(c) conviction on Count 9. *Id.* at 32a. Thus, both the court of appeals and the district court recognized that, as the government argued, the evidence showed that petitioner used separate firearms in furtherance of separate predicate crimes.

Petitioner does not directly dispute the lower courts’ determination that the record shows that he possessed at least two different guns, at two different times, in furtherance of two different drug-trafficking offenses. Petitioner instead asserts (Pet. 20) that he “had no opportunity to even *argue* that separate acts of possession were required but not proved or found.” But as the court of appeals explained, if petitioner had sought to preserve that objection and had “been concerned that the jury might base its two § 924(c) convictions on a single use of a gun, [then] he could have requested a jury instruction on the issue or a special verdict form that would have detailed the jury’s reasoning.” Pet. App. 20a-21a. Petitioner “did neither.” *Id.* at 21a.

To the extent petitioner argues that he was prejudiced by that omission—because the jury was “not required to find separate acts of possession” of a firearm, and so theoretically “could have rested its two convictions” under Section 924(c) on a single act of possessing

a single firearm, Pet. 19—the record does not support such an argument. With respect to the Section 924(c) offense charged in Count 9 (which had as a predicate petitioner’s cocaine-distribution offense), the government argued to the jury that “the gun” possessed in furtherance of the cocaine distribution was the Taurus .45 caliber pistol found “under the center console area” of petitioner’s truck when he was stopped by police. 4/5/2017 Trial Tr. 18. By contrast, with respect to the Section 924(c) offense charged in Count 8 (which had as a predicate petitioner’s cocaine- and heroin-trafficking conspiracy offense), the government argued that the “the gun” possessed in furtherance of the conspiracy was the Glock .40 caliber pistol found “at Lyles Court in [petitioner’s] Grandma’s residence, up on top of a cabinet by the drug scales.” *Id.* at 17. Moreover, in support of Count 10, which charged petitioner with being a felon in possession of a firearm, the government argued that petitioner had possessed the Taurus pistol found in the truck *and* the Glock pistol found at the Lyles Court house (as well as another firearm), and the jury convicted petitioner on that offense, too. See p. 4, *supra*.

2. Petitioner’s assertion of a circuit conflict (Pet. 9-19) does not warrant further review in this case. The court of appeals expressly and correctly distinguished this case from the decisions on which petitioner relies, “in which the evidence presented at trial ma[de] clear that multiple § 924(c) convictions rest[ed] on a single use of a single gun.” Pet. App. 20a. See *Vichitvongsa*, 819 F.3d at 266 (defendant “us[ed] the same firearm *one* time”); *Rentz*, 777 F.3d at 1108 (“[T]he question presented by this appeal is whether * * * § 924(c)(1)(A) authorizes multiple charges when everyone admits there’s only a single use, carry, or possession.”);

Cureton, 739 F.3d at 1043 (defendant’s predicate offenses involved a “single use of a single gun”); *Phipps*, 319 F.3d at 189 (defendants “used a single firearm a single time”); *Finley*, 245 F.3d at 206 (“a single gun continually possessed”); *Wilson*, 160 F.3d at 749 (“only one firearm and one use”). Here, in contrast, the evidence showed that petitioner’s two Section 924(c)(1) convictions were based on his possession of at least two different firearms—one in his truck and another at his grandmother’s residence—which he used to carry out his drug-trafficking operations. See pp. 9-11, *supra*.

In addition, the decisions on which petitioner relies involved circumstances in which the multiple predicate offenses “consisted of virtually the same conduct.” *Finley*, 245 F.3d at 207. In *United States v. Rentz*, *supra*, for example, the defendant was charged with murder and assault for “firing a single shot” that killed one victim and wounded another. 777 F.3d at 1107; see *United States v. Wallace*, 447 F.3d 184, 189 (2d Cir.) (defendant’s predicate offenses “consist[ed] of the same shooting”), cert. denied, 549 U.S. 1011 (2006); *Wilson*, 160 F.3d at 748-750 (defendant was charged with both murder and killing a witness for shooting the same person). Similarly, the defendant in *United States v. Cureton*, *supra*, was charged with attempted extortion and interstate communication of a ransom request based on “the exact same conduct.” 739 F.3d at 1040. See also *Vichitvongsa*, 819 F.3d at 266 (defendant used a firearm one time “to simultaneously further *two* different conspiracies”); *United States v. Walters*, 351 F.3d 159, 171 (5th Cir. 2003) (defendant’s predicate offenses occurred “simultaneously with the single explosion of a single bomb”); *Phipps*, 319 F.3d at 188-189 (defendants bran-

dished a firearm a single time to both carjack and kidnap a victim, then “immediately” relinquished the gun); *Finley*, 245 F.3d at 206-208 (defendant was charged with drug possession and drug distribution based on two phases of a single drug sale).

This case is different. Petitioner’s predicate offenses were not simultaneous, and they did not consist of the same conduct. The government proved in Count 6 that, on May 11, 2016, petitioner possessed cocaine with the intent to distribute it. Pet. App. 54a-55a. In support of Count 1, the government proved that, from 2013 until January 2017, petitioner and his conspirators conspired to possess with the intent to distribute both cocaine and heroin. *Id.* at 51a-52a. The predicate offenses therefore differed with respect to their conduct, their time frame, and their drugs involved. The outcome here accordingly did not depend on the unit of prosecution under Section 924(c).

Nor does petitioner provide any substantial basis for concluding that the question presented will often be outcome-determinative. As this case illustrates, even if a particular circuit might theoretically permit a single possession or use of a gun to support multiple convictions under Section 924(c), that does not mean that such convictions will in fact be sought or obtained. Indeed, guidance to federal prosecutors that postdates the trial in this case instructs them, when possible, to treat the use or possession of the firearm as the unit of prosecution. And if cases implicating the unit-of-prosecution rule nonetheless arise with sufficient frequency as to potentially warrant this Court’s review, this Court can consider granting certiorari in a case—unlike this one—where resolution of the question presented is likely to make a difference.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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