

No. 23-

**In The
Supreme Court of the United States**

Joel Flores,
Petitioner,

v.

United States of America,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether 18 U.S.C. §924(c) provides fair warning of what constitutes possession of a firearm “in furtherance of” a drug offense as opposed to possession of a firearm “during and in relation to” a drug offense.

PARTIES TO THE PROCEEDING

Petitioner Joel Flores is currently serving the ten-year sentence imposed in this matter in FCI Jesup in Jesup, Georgia.

Respondent is the United States of America, acting through the United States Attorney's Office for the District of Colorado.

RELATED PROCEEDINGS

United States v. Flores, No. 22-1181, 2023 WL 5273770, at *(10th Cir. Aug. 16, 2023) (unpublished).

United States v. Flores, No. 19-cr-522-WJM (D. Colo. June 1, 2022).

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Tenth Circuit is reported at No. 22-1181, 2023 WL 5273770, at *(10th Cir. Aug. 16, 2023)

JURISDICTION

The court of appeals entered the judgment sought to be reviewed on August 16, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part: “No person shall be . . . deprived of life, liberty, or property, without due process of law.” U.S. Const. amend. V.

Title 18 U.S.C. § 924(c) provides in pertinent part:

[A]ny 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, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime (i) be sentenced to a term of imprisonment of not less than 5 years.

18 U.S.C. 924(c) (Westlaw through Pub. L. No. 118-19).

STATEMENT OF THE CASE

In the early morning of April 17, 2019, Mr. Flores was riding as a passenger in a Honda Civic driven by his friend. They passed by a police officer who noticed that the vehicle's license plate was not illuminated. The officer made a U-turn behind the Honda. Mr. Flores' friend noticed the police officer turn around, and he panicked. He sped up to about sixty-five miles an hour in a thirty-five mile an hour zone. He was unable to make a turn and ran the car onto a curb with such force as to deploy the airbags and shatter the rear window.

The pursuing officer observed the driver flee to the left along the front of a long liquor store and observed Mr. Flores duck to the right, around the liquor store. Apparently because he was watching Mr. Flores, the officer quickly lost sight of the driver before he had fled as far as the far end of the liquor store. The next structure was just over fifty yards across to the east, across an open parking lot.

Other officers arrived quickly to assist with the pursuit, which included searching the abandoned vehicle. The search revealed a firearm magazine and a spent shell casing. Because Mr. Flores' whereabouts were still unknown, the word was sent out that he may be armed.

Using a canine, Mr. Flores was eventually discovered hiding under a porch in a trailer park. The driver was not found.

After Mr. Flores was taken into custody, the canine was used to search the area between the vehicle and the area where Mr. Flores was discovered. The canine alerted to some juniper bushes in which a nine-millimeter firearm was discovered. Subsequent testing confirmed that the shell casing discovered in the vehicle had been used in the firearm found in the bushes.

After leaving the hospital, Mr. Flores was taken to the police station and, at Mr. Flores' request, was interviewed by investigators. During the interview, Mr. Flores admitted that the firearm belonged to him and that he intended to sell the methamphetamine found on him.

Mr. Flores was tried and convicted by a jury of being a felon in possession of a firearm; possession with intent to distribute five grams and more of methamphetamine; and, *possession* of a firearm *in furtherance* of a drug trafficking crime (i.e., the subject matter of this Petition).

Mr. Flores' drug distribution count carried a statutory minimum sentence of five years, and the firearm count required an additional five years incarceration. The court imposed the statutory minimum ten years.

Mr. Flores appealed, and the Tenth Circuit Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

SUMMARY OF THE ARGUMENT

When § 924(c) was amended in 1998, the law had already put ordinary people on notice that possession of a firearm with the intention that it be available for protection in connection with a drug trafficking crime was to possess it “*during and in relation to*” the crime.

As one example, the Tenth Circuit explained in *United States v. Nicholson* that “the government must prove that the use . . . of the weapon was ‘during and in relation to’ the drug trafficking crime. ‘To prove this necessary relation, the . . . evidence must support a finding that the defendant *intended* the weapon to be available for use during the drug transaction.’”). *United States v. Nicholson*, 983 F.2d 983, 990 (10th Cir. 1993) (alteration in original) (quoting *United States v. Matthews*, 942 F.2d 779, 783 (10th Cir. 1991)). With this clear understanding, ordinary people could govern their actions.

Congress then amended the section to require “in furtherance of” as a “slightly higher standard,” but could not begin to describe in what way it was a higher standard.

The [Judiciary] Committee recognize[d] that the distinction between “in furtherance of” and “during and in relation to” is a subtle one, and *may initially prove troublesome for prosecutors*. Nevertheless, the Committee believe[d] that “in furtherance of” is a slightly higher standard, and encompasses the “during and in relation to” language.

United States v. Mackey, 265 F.3d 457, 461 (6th Cir. 2001) (emphasis added) (quoting H.R.Rep. No. 105-344, 1997 WL 66839, at *11-12 (1997)). Well, if the distinction may be troublesome for prosecutors,

it certainly will be troublesome for ordinary people who must have fair warning¹ of when their conduct crosses that line. The “void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement” *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

Nevertheless, the amendment assured prospective defendants that possession of a firearm “during and in relation” to drug trafficking *is not a crime*.

¹ The main issue before the Tenth Circuit was whether the evidence was sufficient to support Mr. Flores’ conviction for firearm possession in furtherance of a drug trafficking crime. *See United States v. Flores*, No. 22-1181, 2023 WL 5273770, at *(10th Cir. Aug. 16, 2023). Mr. Flores argued that the evidence was insufficient precisely because the “something more” than “during and in relation to” could not be defined. Mr. Flores appealed based on the insufficiency of the evidence because lack of fair warning was not argued at the district court level. Nevertheless, Mr. Flores did argue to the court of appeals for application of the rule of lenity because of the vagueness of the statute, arguing expressly that the statute failed to give him “fair notice” of what conduct over and above “during and in relation to” constituted a violation. Accordingly, the court of appeals had the opportunity to address this issue, even though it elected not to mention the lenity argument in its opinion. Thus, the issue is preserved.

Under the Fifth Amendment, the federal government may not deprive individuals of “life, liberty, or property, without due process of law.”” *See Wooden v. United States*, 595 U.S. 360, 389 (2022) (Gorsuch, J. concurring) (quoting U.S. CONST. amend. V). “Generally, that guarantee requires governments seeking to take a person's freedom or possessions to adhere to ‘those settled usages and modes of proceeding’ found in the common law. *Id.* (quoting *Murray's Lessee v. Hoboken Land & Improvement Co.*, 15 L.Ed. 372 (1856)). “And among those ‘settled usages’ is the ancient rule that the law must afford ordinary people fair notice of its demands. *Id.* (citing *Sessions v. Dimaya*, 138 S.Ct. 1204, 1224-1225 (2018) (Gorsuch, J., concurring in part and concurring in judgment)); *see also United States v. Paz-Alvarez*, 799 F.3d 12, 28 (1st Cir. 2015) (quoting *Marks v. United States*, 430 U.S. 188, 191 (1977)) (“[T]he Fifth Amendment Due Process Clause gives [the defendant] a ‘right to fair warning of that which will give rise to criminal penalties.’”).

“The vagueness doctrine bars enforcement of ‘a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning

and differ as to its application.” *United States v. Lanier*, 520 U.S. 259, 266 (1997) (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)); *see also United States v. Richter*, 796 F.3d 1173, 1188 (10th Cir. 2015) (“To comport with the Due Process Clause of the U.S. Constitution, a law must ‘give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute.’”). “[D]ue process requires citizens be given fair notice of what conduct is criminal. A criminal statute cannot be so vague that “ordinary people” are uncertain of its meaning.” *United States v. Apollo Energies, Inc.*, 611 F.3d 679, 687 (10th Cir. 2010).

The prohibition of vagueness in criminal statutes . . . is an “essential” of due process, required by both “ordinary notions of fair play and the settled rules of law.” The void-for-vagueness doctrine, as we have called it, guarantees that ordinary people have “fair notice” of the conduct a statute proscribes. And the doctrine guards against arbitrary or discriminatory law enforcement by insisting that a statute provide standards to govern the actions of police officers, prosecutors, juries, and judges. In that sense, the doctrine is a corollary of the separation of powers—*requiring that Congress, rather than the executive or judicial branch*, define what conduct is sanctionable and what is not.

Sessions v. Dimaya, 138 S. Ct. 1204, 1212 (2018) (emphasis added) (citations omitted).

Some may argue that “in furtherance of,” standing alone, is perfectly clear. However, the “in furtherance of” standard is vague specifically in how it is different, and “slightly higher,” than the “during and in relation to” standard. This is not some immaterial cloudiness, this is the line where one’s conduct crosses from lawful to criminal.

REASON FOR GRANTING THE PETITION

The court of appeals decided an important question of federal law that has not been, but should be, settled by this Court.

This Court has not addressed whether 18 U.S.C. § 924(c) provides a clear demarcation between constructive possession of a firearm which is “during and in relation to” a predicate crime and such possession “in furtherance of” the crime. It has not decided whether the statute gives fair warning conduct violates the “in furtherance of” standard over and above what would violate the “during and in relation to” standard.

By adding the phrase “in furtherance of” and setting “possession” apart from the “during and in relation to” standard, Congress clearly intended to draw a line before imposing an additional five years to a sentence. However, the line is indecipherable.

Criminal defendants are routinely prosecuted in the federal courts for possession a firearm in furtherance of a drug trafficking crime. A conviction carries a mandatory minimum sentence of five years “*in addition to* the punishment for such . . . drug trafficking crime.”§ 924(c)(1)(A).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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