

No.

In The Supreme Court of the United States

OCTAVIO JIMENEZ-MARQUEZ, 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

The question presented is: Whether the phrase “in furtherance of” in 18 U.S.C. § 924(c) is unconstitutionally vague as applied to the Petitioner.

PARTIES TO THE PROCEEDING

Petitioner Octavio Jimenez-Marquez is currently serving the 248 month sentence imposed in this matter in FCI Lompoc II in Lompoc, California.

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

RELATED PROCEEDINGS

United States v. Jimenez-Marquez, 171 F.4th 1204 (10th Cir. 2026).

United States v. Jimenez-Marquez, No. 1:23-cr-00032-WJ-1 (D.N.M. Sept. 27, 2024).

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OPINION BELOW

The decision of the United States Court of Appeals for the Tenth Circuit is reported at 171 F.4th 1204 (10th Cir. 2026).

JURISDICTION

The court of appeals entered the judgment sought to be reviewed on April 3, 2026. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY
PROVISION INVOLVED

Section 924(c)(1)(A) of Title 18 of the United States Code provides:

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, 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 punishment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

18 U.S.C. § 942(c)(1)(A) (LexisNexis, LEXIS through Pub. L. No. 119-98).

CONSTITUTIONAL
PROVISION INVOLVED

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

STATEMENT OF THE CASE

Octavio Jimenez-Marquez was arrested when he was found standing in the bed of pickup truck unloading personal effects. A search of the truck revealed a bag of methamphetamine hidden under the driver's seat, and next to the bag was an unloaded revolver. An assault-style rifle was located in the front passenger area with an attached magazine but an empty chamber. A shaving kit was also discovered in the back seat area containing a varied assortment of ammunition, mixed together.

While the evidence was convincing that Mr. Jimenez was involved in the drug trafficking business, there was no evidence that he was involved in, or on his way to, a drug deal at the time of his arrest. The Government's theory was that Mr. Jimenez possessed the firearms to protect his drugs from robbery or for intimidation in connection with future drug deals.

A jury convicted Mr. Jimenez of, among other things, possession of a firearm *in furtherance of* a drug trafficking crime, contrary to 18 U.S.C. § 924(c)(1)(A).

The United States District Court for the District of New Mexico had jurisdiction over this matter pursuant to 18 U.S.C. § 3231.

Mr. Jimenez appealed to the Tenth Circuit Court of Appeals asserting that Section 924(c)(1)(A) is unconstitutionally vague. He argued that under *Bailey v. United States*, 515 U.S. 137 (1995)—and the law at the time

Congress amended Section 924(c) in response to Bailey—his possession was firmly and clearly “in relation to” the underlying offense, and not in possession at the “slightly higher” in-furtherance-of standard intended by Congress. In other words, that his possession was clearly “in relation to” the crime but that there was some unidentifiable something that made his possession also fit the “slightly higher standard” was impossibly vague as applied to him.

The Tenth Circuit rejected this assertion, explaining, in essence, that even if the difference between “in relation to” and “in furtherance of” is not definable, the factors for determining “in furtherance of” are not themselves vague, and that there is no space, or “safe harbor,” between the two wherein one can have possessed “in furtherance of” but not also “in relation to” the crime. (But Mr. Jimenez’s argument was the opposite: he possessed in relation to, but not in furtherance of, the crime.) Hence the statute was deemed not unconstitutionally vague as applied to Mr. Jimenez. *See United States v. Jimenez-Marquez*, 171 F.4th 1204, 1210 (10th Cir. 2026).

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.

The *Fifth Amendment* provides that “no person shall . . . be deprived of life, liberty, or property, without due process of law.” U.S. Const. amend. V. 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). “It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits.” *Id.* (quoting *Giaccio v. Pennsylvania*, 382 U.S. 299, 403-403 (1966)).

**1. THE VAGUENESS OF SECTION 924(c) LEADS THE
FEDERAL COURTS TO IMPOSE MANDATORY
CONSECUTIVE FIVE YEAR SENTENCES UNDER
CIRCUMSTANCES NOT INTENDED BY CONGRESS.**

Section 924(c) was amended in 1998. At the time of the amendment, the section had put people of ordinary intelligence 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 “*in relation to*” the crime.

As one example,¹ 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” and that “[t]o 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

¹ See also *United States v. Matthews*, 942 F.2d 779, 783 (10th Cir. 1991) (holding that to prove “during and in relation to” the government had to have evidence that “the defendant *intended* the weapon be available for use during the drug transaction.”); *United States v. Payero*, 888 F.2d 928, 929 (1st Cir. 1989) (“available for possible use during or immediately following the transaction”); *United States v. Feliz-Cordero*, 859 F.2d 250, 254 (2d Cir. 1988) (quoting S.Rep. No. 225, 98th Cong., 2d Sess. 1, 314 n.10 (1983), *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 8492 n.10) (with respect to meaning of “during and in relation to,” explaining that “[t]he necessary relation or connection between the possession of a firearm and the underlying crime is established “if from the circumstances or otherwise it could be found that the defendant *intended to use the gun* if a contingency arose or to make his escape.”); *United States v. Acosta-Cazares*, 878 F.2d 945 (6th Cir. 1989) (alteration in original) (finding that a handgun found in an apartment along with drugs were used “during and in relation” to a drug trafficking crime for purposes of Section 924(c)); *United States v. Wilson*, 938 F.2d 785, 792 (7th Cir. 1991) (finding that “during and in relation to” “clearly established” when “defendant’s gun was strategically placed on top of the bag containing cocaine”); *United States v. Jones*, 990 F.2d 1047, 1049 (8th Cir. 1993) (finding that a gun kept “in the same room as[,] and in close proximity to[,] the contraband” was possession “during and in relation to” the crime). The list goes on.

clear understanding, people of ordinary intelligence could govern their actions.

In *Bailey v. United States*, 516 U.S. 137 (1995), the Supreme Court addressed the meaning of the terms “use” and “carry” in Section 924(c). The *Bailey* Court observed that the courts were making virtually every “possession for protection”² a “use” within the meaning of Section 924(c) and that this did not draw the line Congress intended before imposing an additional five year minimum sentence.³

In response to *Bailey*, Congress amended the section. However, rather than simply adding “possession,” it set possession off with its own standard, i.e., possession “in furtherance of” the underlying crime. As previously noted, “in relation to was already firmly established to include the possession of a firearm for protection.

The House Judiciary Committee explained that it

believe[d] that the evidence presented by the government in [*Bailey*] may not have been sufficient to sustain a conviction for possession of a firearm “in furtherance of” the commission of a drug trafficking offense. In that case, a prosecution expert testified at Mr. Bailey’s trial that drug dealers frequently carry a firearm to protect themselves, as well as their drugs and money. Standing on its own, this evidence may be insufficient to meet with “in furtherance of” test.

³ See *Bailey*, 516 U.S. at 144 (The Court of Appeals “proximity and accessibility standard provides almost no limitation on the kind of possession that would be criminalized; in practice, nearly every possession of a firearm by a person engaged in drug trafficking would satisfy the standard, thereby erasing the line that the statutes, and the courts, have tried to draw. . . . Congress knew how to draft a statute to reach a firearm that was ‘intended to be used.’”).

H.R. Rep. No. 105-344, at 12 (1997).

The “evidence presented” in *Bailey* was very similar to the evidence in Mr. Jimenez’s case. In *Bailey*, “the officers saw Bailey push something between the seat and the front console” and a subsequent “search of the passenger compartment found one round of ammunition” and cocaine. A search of the trunk yielded “a large amount of cash and a bag containing a loaded 9-mm pistol.” *Bailey*, 516 U.S. at 139. The Committee explained that “one way to clearly satisfy the ‘in furtherance of test would be additional witness testimony connecting Mr. Bailey with the firearm.” H.R. Rep. No. 105-344, at 12.

Again, pursuant to *United States v. Nicholson*, 983 F.2d 983, 990 (10th Cir. 1993), and like cases, it was well-established that Mr. Jimenez’s possession constituted “during and in relation to” the drug trafficking offense. The Committee explained that it “*intend[ed] to leave undisturbed the body of case law which ha[d] interpreted the phrase ‘during and in relation to’* in the context of prosecutions for violations of Sec. 924(c).” H.R. Rep. No. 105-344, at 12 (emphasis added). Hence, Mr. Jimenez’s possession-for-protection was “during and in relation to” the underlying crime. The Committee then explained that the “‘in furtherance of’ standard is a slightly higher standard, and *encompasses* the ‘during and in relation to’ language.” *Id.* at 11 (emphasis added). It “recogniz[ed] that the distinction between ‘in furtherance of’ and ‘during and in relation to’ is a subtle one, and may initially prove troublesome for prosecutors” but nevertheless “believe[d] it to be a slightly higher standard.” *Id.* The consequence of this

subtle distinction, or better-put, “vagueness,” is that courts simply have found *all* possession for protection cases to be “in furtherance of” the underlying crime.

Mr. Jimenez’s point is that he was on fair notice that his possession of a firearm for protection was *only* “during and in relation to” his drug trafficking and that something more was required to establish “in furtherance of” the crime and that there is no definition of what that something else is. The “subtle distinction” between the two standards is a line that is not defined and is not definable. The courts ignore this explicitly-intended distinction and apply the lower “during and in relation to” standard and simply call it “in furtherance of.” Hence, the statute is ambiguous and failed to give Mr. Jimenez the fair notice required by Due Process.

2. THIS CASE IS A GOOD VEHICLE FOR RESOLVING THIS IMPORTANT FEDERAL QUESTION

Because Section 924(c) adds five years consecutive to any other sentence, the question presented has weighty implications for federal prisoners.

A. The ambiguity in the meaning of “in furtherance of” has lead to inconsistent and arbitrary application. In fiscal year 2025 alone, 1,258 federal prisoners were sentenced for drug trafficking coupled with a least one Section 924(c) count. New Mexico, a border state, had 60 of these convictions,⁴ more than

⁴ Sentencing Data Analyzer, Sentencing Resource Council; <https://src.fd.org/resources/dashboards/208-sentencing-data-analyzer> (last visited June 25, 2026).

California, Arizona, and the border districts of Texas, *combined*.⁵

B. This case is a good vehicle for addressing whether the phrase “in furtherance of” in Section 924(c) is ambiguous, i.e., whether it gives fair notice of the line, if any, between possession of a firearm “during and in relation to” a drug trafficking crime, as that phrase was understood at the time the section was amended, and possession “in furtherance of” the crime. The question was preserved in the district court (Dist. Ct. R. vol. 1 at 175-84, 196-201; vol. 3 at 452-55) and on appeal (Def. C.A. Br. at 7-24). The Tenth Circuit’s answer was outcome-determinative for Mr. Jimenez’s conviction under Section 924(c). *See* App. 7(a), 9(a). Moreover, because a sentence imposed under Section 924(c) must run consecutively to any other sentence, *see* 18 U.S.C. § 924(c)(1)(D)(ii), reversing Mr. Jimenez’s conviction on that court will have a significant effect on his overall term of imprisonment. *See* App. 13(a) (district court imposed a 60 month sentence that “shall run consecutively” for his conviction under Section 924(c)).

CONCLUSION

The petition for writ of certiorari should be granted.

⁵ Eastern District of California (9); Northern District of California (1); Central District of California (6); Southern District of California (10); Western District of Texas (25); and Southern District of Texas (7).

Respectfully submitted,

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