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STRETCHING VENUE BEYOND CONSTITUTIONAL RECOGNITION

United States v. Rodriguez-Moreno, 119 S. Ct. 1239 (1999)

I. INTRODUCTION

In *United States v. Rodriguez-Moreno*,¹ the United States Supreme Court held that venue for prosecution under 18 U.S.C. § 924(c)(1),² which makes it a separate crime to use or carry a firearm during a crime of violence, is proper in any federal jurisdictional district where the underlying crime of violence was committed, regardless of where the firearm was actually used.³

This Note examines the constitutional right to a proper venue for a criminal prosecution within the context of the constitutionally-accepted practice of enacting federal laws with broad venue provisions. This Note argues that the Supreme Court improperly interpreted 18 U.S.C. § 924(c)(1) by allowing the venue to be determined by the underlying violent crime rather than determining the venue by the nexus between the violent crime and the use of the firearm.⁴ In reaching this decision, this Note argues, the Court undermined the constitutional right of the accused and engaged in unwarranted judicial legislation. The latter criticism sparked Justice Scalia's pointed dissent, while the former most likely prompted Justice Stevens to join Justice Scalia in their uncommon alliance.

¹ 119 S. Ct. 1239 (1999) (Scalia, J., dissenting).

² 18 U.S.C. § 924(c)(1) (1999). Section 924(c)(1) was originally adopted by Congress as part of the Gun Control Act of 1968 and has been subject to subsequent amendments under the Comprehensive Crime Control Act of 1968 and the Firearm Owners' Protection Act of 1986. See *infra* notes 48-58 and accompanying text.

³ See *Rodriguez-Moreno*, 119 S. Ct. at 1244.

⁴ See *id.*

II. BACKGROUND

A. CONSTITUTIONAL RIGHT TO A VENUE WHERE THE CRIME OCCURS

1. Overview

The United States Constitution explicitly requires crimes to be tried where they are committed.⁵ Article III, Section 2 of the Constitution states that “[t]he Trial of all Crimes, except in Cases of Impeachment, shall be . . . held in the State where the said Crimes shall have been committed”⁶ The importance of this requirement is reinforced by the vicinage⁷ provision of the Sixth Amendment, which provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed”⁸ The Federal Rules of Criminal Procedure support this constitutional right by providing that “the prosecution shall be had in a district in which the offense was committed.”⁹

The Fifth Circuit Court of Appeals, echoing prior Supreme Court precedent, acknowledged that the constitutional venue provisions, bolstered by the Federal Rules of Criminal Proce-

⁵ U.S. CONST. art. III, § 2 cl. 3.

⁶ *Id.*

⁷ Professor Charles Alan Wright succinctly explained the relationship between venue and vicinage:

Strictly speaking the former constitutional provision [Art. III, Sec. 2, cl. 3] is a venue provision, since it fixes the place of trial, while the latter [Amendment 6] is a vicinage provision, since it deal with the place from which the jurors are to be selected. *This technical distinction has been of no importance.* Although in theory both constitutional provisions could be satisfied by trying a defendant in one district of a state though the offense was committed in another district, so long as the jurors were selected from the district of the crime, no such procedure has ever been attempted, and it has been considered that trial in the district of the offense is required.

CHARLES A. WRIGHT, *FEDERAL PRACTICE AND PROCEDURE* § 301, at 579 (1969) (footnotes omitted) (emphasis added). See also *United States v. Cabrales*, 118 S. Ct. 1772, 1774-75 (1998) (finding no distinction between the vicinage and venue provisions of the Constitution). Unless otherwise noted, this Note will refer to the separate venue and vicinage provisions as simply the “venue provisions.”

⁸ U.S. CONST. amend. VI. See also *United States v. Anderson*, 328 U.S. 699, 703 (1946) (Sixth Amendment’s specification “geographic,” prescribing trial in the district or districts within which offense committed).

⁹ FED. R. CRIM. P. 18.

ture, "reflect that in criminal cases the question of venue is not a legal technicality, instead it is a significant matter of public policy."¹⁰ Other United States Circuit Courts have concurred in this sentiment, emphasizing that the right to a proper venue is of "constitutional dimension" as opposed to a mere formal requirement.¹¹

The assertion that venue rights are of a "constitutional dimension" is supported by historical justifications. As tensions mounted between the colonies and Great Britain immediately prior to the American Revolution, colonial officials representing the Crown became increasingly concerned that American courts could not adequately protect royal interests, especially when American patriots were charged with a crime.¹² Thus, Parliament revived an ancient statute under which those on colonial soil (whether colonist or English soldier) could be taken to England or another colony for trial.¹³ This practice drew the ire of the colonists at a time when revolutionist nerves were particularly frayed, thus becoming a precipitating factor in the American Revolution.¹⁴ Thomas Jefferson made specific note of this perceived royal offense in the Declaration of Independence, criticizing King George III "for transporting us beyond Seas to be tried for pretended offenses."¹⁵

Following independence, with the British action still fresh in the memory of those organizing the new state governments, several states included state constitutional provisions limiting criminal prosecutions to the place where the crimes were committed.¹⁶ After many proposals and little debate, a similar provision was adopted in the United States Constitution.¹⁷ Because

¹⁰ *United States v. Pomranz*, 43 F.3d 156, 158 (5th Cir. 1995) (citing *United States v. Johnson*, 323 U.S. 273, 276 (1944)).

¹¹ *See United States v. Palma-Ruedas*, 121 F.3d 841, 848 (3d Cir. 1997); *see also United States v. Baxter*, 844 F.2d 734, 736 (3d Cir. 1989).

¹² *See Drew L. Kershen, Vicinage*, 29 OKLA. L. REV. 803, 805 (1976).

¹³ *See id.* at 805-06.

¹⁴ William Wirt Blume, *The Place of Trial of Criminal Cases: Constitutional Vicinage and Venue*, 43 MICH. L. REV. 59, 63-64 (1944).

¹⁵ THE DECLARATION OF INDEPENDENCE, para. 20 (U.S. 1776); *See also* Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 875 (1994).

¹⁶ *See* N.H. CONST. OF 1784, art. I, § 17; MD. CONST. OF 1776, DEC. OF RIGHTS, art. 18; MASS. CONST. OF 1780, PART 1, art. 13.

¹⁷ *See Kershen, supra* note 12, at 813.

the uniformity of acceptance left the historical record bare,¹⁸ one may never know the exact reasons for the Framers' enactment of the venue provisions. Justice Joseph Story, an early constitutional historian, did advance some possible and probable justifications of the venue provisions:

The object . . . is to secure the party accused from being dragged to a trial in some distant state, away from his friends, witnesses, and neighborhood; and thus subjected to the verdict of mere strangers, who may feel no common sympathy, or who may even cherish animosities, or prejudices against him. Besides this; a trial in a distant state or territory might subject a party to the most oppressive expenses, or perhaps even to the inability of procuring proper witnesses to establish his innocence.¹⁹

Such historically-accepted justifications prompted constitutional scholar Drew Kershen to conclude "that the draftsmen of Article III, Section 2, clause three intended limited venue to be of benefit primarily to the accused."²⁰

Just as likely, though, the Framers chose this provision to help prevent government abuses, for or against the accused.²¹ The Declaration of Independence charged the King with "protecting [troops] by a mock trial, from Punishment for any Murders which they should commit on the Inhabitants of these States,"²² allowing a leading commentator to conclude that the "circumvention of the judgment of the victimized community was attacked as a 'Mock Trial' system in the Declaration of Independence."²³ The Framers, with recent history of governmental abuse in mind, recognized that a venue provision would limit

¹⁸ See Kershen, *supra* note 12, at 813.

¹⁹ JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 925 (Carolina Academic Press reprint 1987), reprinted in *United States v. Palma Ruedas*, 121 F.3d 841, 862 (Alito, J., dissenting).

²⁰ Kershen, *supra* note 12, at 812-13. See also *United States v. Goldberg*, 830 F.2d 459, 465 (3d Cir. 1987) ("The venue provisions of the Constitution are important safeguards, protecting an accused from unfairness and hardship in defending against prosecution by the federal government.").

²¹ See *United States v. Palma-Ruedas*, 121 F.3d 841, 862 (3d Cir. 1997) (Alito, J., dissenting).

²² THE DECLARATION OF INDEPENDENCE, para. 16 (1776).

²³ AKIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 124 & n.163 (1997).

the possible abuse of power otherwise available if one could manipulate the geographical location of a trial.²⁴

Another compelling justification for the venue provisions, suggested by more recent scholarship, was that the provisions protected a community's right to stage the trial of local offenses.²⁵ States have traditionally held the balance of power within the federal system over shaping criminal statutes in a way that reflects local preferences.²⁶ As the federal government has increasingly encroached into this territory, the states, through the venue provision, have had the consolation of trying the accused with local juries, thus mirroring, to some extent, local values in a trial's outcome.²⁷ If the federal government has the power to choose venue, this consolation to the states is lost.²⁸

The constitutional venue provisions thus protect at least three policy interests. First, the venue provisions protect the rights of the accused.²⁹ The accused is more likely to stand trial in a familiar or procedurally sound venue: witnesses to the alleged crime most likely live in the area of the crime; tangible evidence of the crime is most often found at the place of the crime;³⁰ and the accused is also more likely to be tried at the accused's place of residence, allowing for comfort and support of family and friends and knowledge of local counsel.³¹ Second, federal governmental power against the individual is checked.³² Limiting venue can help prevent the federal government from gaining an advantage or leverage that can come with the power to choose venue in a more or less sympathetic state.³³ And, finally, federal governmental power against the individual states is curtailed.³⁴ The venue provisions allow each state the right to

²⁴ See *id.* at 243; *cf.* *Travis v. United States*, 364 U.S. 631, 634 (1961) (venue provisions should not be so freely construed as to give the government the choice of a favorable venue).

²⁵ See AMAR, *supra* note 23, at x.

²⁶ See *id.*

²⁷ See *id.*

²⁸ See *id.*

²⁹ See Kershen, *supra* note 12, at 810.

³⁰ See *id.* at 810-11.

³¹ See *id.* at 808-09.

³² See *United States v. Palma-Ruedas*, 121 F.3d 841, 848 (3d Cir. 1997) (Alito, J., dissenting).

³³ See *United States v. Goldberg*, 830 F.2d 459, 465 (3d Cir. 1987); see also *supra* notes 6-8 and accompanying text.

³⁴ See AMAR, *supra* note 23, at x; see also *supra* notes 24-27 and accompanying text.

try the person who actually committed the crime within the state's territory.³⁵ Judge Alito of the Third Circuit summed up the prevailing justifications for this constitutional mandate by stating that the "provisions were meant to put in place important substantive protections against government abuse."³⁶

2. *Constitutionality of Federal Legislation That Broadens Venue*

While Congress cannot altogether negate the constitutional venue guarantee, it can broadly define a crime so that the commission of the crime could likely cross district and state borders, thus providing a number of venue choices.³⁷ And Congress, without constitutional challenge, has explicitly provided broadened venue provisions for particular offenses, so long as the venue bears some relation to the offense.³⁸ Pushing the borders both constitutionally and geographically of congressional venue-stretching, courts have concluded that venue is proper in conspiracy cases in any district where an overt act which furthered the conspiracy happened or anywhere a conspiracy agreement was formed.³⁹ The Supreme Court approved this rule, permitting trials in districts where defendants have never stepped foot, despite "its dilutent effect upon venue rights."⁴⁰ The Court thus signaled its willingness to weaken venue rights in order to strengthen Congress's ability to deter crime.⁴¹ Therefore, in order for the judiciary to broadly interpret the criminal venue, Congress must establish a rational nexus between the crime and the venue within a venue provision,⁴² or a court must find from the words of the statute that

³⁵ See AMAR, *supra* note 23, at x.

³⁶ *Palma-Ruedas*, 121 F.3d at 861 (Alito, J., dissenting).

³⁷ See *United States v. Johnson*, 323 U.S. 273, 276 (1944) (reasoning that Congress can determine where one can commit a crime).

³⁸ See 18 U.S.C. § 3237(a) (1994) (continuing offense may be tried "in any district in which the offense was begun, continued, or completed. . . . And murder may be tried in any district where the injury was inflicted . . . without regard to the place where the death occurs.").

³⁹ See *United States v. Caldwell*, 16 F.3d 623, 624 (5th Cir. 1994); see also *United States v. Winship*, 724 F.2d 1116, 1125 (5th Cir. 1984).

⁴⁰ *United States v. Pomeranz*, 43 F.3d 156, 158 n. 2 (5th Cir. 1995) (citing *Winship*, 724 F.2d at 1125).

⁴¹ See generally *id.* at 159-60.

⁴² See, e.g., *supra* note 38.

the crime, at least in part, was committed within the court's jurisdictional area.⁴³

3. *18 U.S.C. § 924(c)(1) Does Not Have a Specific Venue Provision*

The Supreme Court has given Congress a green light to structure statutes in a way that defines venue broadly enough to reach criminals with only the slightest of ties to certain geographical areas.⁴⁴ Congress, however, has refrained from placing a venue provision on 18 U.S.C. § 924(c)(1), which would explicitly allow for the firearm crime to be properly tried in any venue where the predicate crime was committed.⁴⁵ At the time of Rodriguez-Moreno's offense, the substantive portion of § 924(c)(1) read: "whoever, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years . . ."⁴⁶

Although Congress could have, in a separate venue provision, specifically tied the gun offense with the proper venue of the underlying drug-trafficking crime,⁴⁷ Congress failed to do so. Furthermore, the congressional history of the statute provides sparse ground from which explanations for the omission of a venue provision can be cultivated.⁴⁸

Congress originally adopted § 924(c)(1) as part of the Gun Control Act of 1968.⁴⁹ This section of the Gun Control Act created a separate offense if a gun was either used in the commission of a felony or was carried unlawfully during the commission

⁴³ See *United States v. Johnson*, 323 U.S. 273, 276 (1944).

⁴⁴ See *id.*

⁴⁵ See *United States v. Palma-Ruedas*, 121 F.3d 841, 850 (3d Cir. 1997).

⁴⁶ The statute was amended during appeal, but the amendment is not relevant to the analysis of this case. See *United States v. Rodriguez-Moreno*, 119 S. Ct. at 1242 n.3 (citing Pub. L. No. 105-386, 112 Stat. 3469). The amended statute reads: "[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 . . . be sentenced to a term of imprisonment of not less than five years . . ." 18 U.S.C. § 924(c)(1)(A) (1999).

⁴⁷ See *Palma-Ruedas*, 121 F.3d at 850.

⁴⁸ See Brief for Respondent at 26-27, *United States v. Rodriguez-Moreno*, 119 S. Ct. 1239 (1999) (No. 97-1139).

⁴⁹ Gun Control Act, 82 Stat. 1213, 1224 (1968) (codified as amended at 18 U.S.C. § 924 (c)(1) (1999)).

of a felony.⁵⁰ Courts were given wide discretion in setting sentences for this offense (between one and ten years in prison), in addition to the penalty for the predicate offense.⁵¹

The public's increased dissatisfaction with judicial discretion in sentencing, which paralleled increasing national crime rates through the 1970s and 1980s, lead to the Comprehensive Crime Control Act of 1984, which instituted mandatory minimum sentencing guidelines.⁵² The Comprehensive Crime Control Act amended § 924(c)(1), creating a minimum prison sentence of five years for "[w]hoever uses or carries a firearm" during and in relation to any violent crime, in addition to the prison sentence for the predicate violent crime.⁵³

Soon after this amendment, courts encountered difficulty interpreting what constituted a "violent crime," especially in relation to the offense of drug-trafficking.⁵⁴ In the majority of cases, courts decided that drug-trafficking, in itself, was not a violent crime.⁵⁵ Congress expressed disagreement with the majority interpretation by amending § 924(c)(1) within the Firearm Owners' Protection Act of 1986 to include as a violent crime the predicate act of drug-trafficking.⁵⁶ Congress has since amended the statute to provide for harsher sentencing depending on the class of weapon used,⁵⁷ and most recently amended §

⁵⁰ See *id.* The text of the original § 924 (c) (1) states:

Whoever: (1) uses a firearm to commit any felony for which he may be prosecuted in a court of the United States, or; (2) carries a firearm unlawfully during the commission of a felony for which he may be prosecuted in a court of the United States, shall in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years. . . .

⁵¹ See *id.*

⁵² See Cindy Crane, Note, *L. Smith v. United States: Enhanced Penalties For Using Guns As Barter in Drug Deals*, 20 J. CONTEMP. L. 295, 299 (1994). But see Michael J. Riordan, *Using a Firearm During and in Relation to a Drug Trafficking Crime: Defining the Elements of the Mandatory Sentencing Provision of 18 U.S.C. § 924 (c)(1)*, 30 DUQ. L. REV. 39, 40 (1991) (discussing the failure of increased sentencing to reduce drug related crime).

⁵³ 18 U.S.C. § 924(c)(1)-(2) (1984).

⁵⁴ See Crane, *supra* note 52, at 299.

⁵⁵ See *id.*; see also *United States v. Bushey*, 617 F. Supp. 292 (D. Vt. 1985) (concluding that the combination of drug distribution and guns does not elevate distribution to the level of a violent crime).

⁵⁶ See 18 U.S.C. § 924(c)(1) (1994).

⁵⁷ See 18 U.S.C. § 924(c)(1) (1990), amended by 18 U.S.C. § 924(c)(1) (1994). If the firearm used in the predicate offense is a short-barreled rifle or shotgun, or a semiautomatic assault weapon, the minimum sentence is ten years; if the firearm is a ma-

924(c)(1) to make it a crime to “possess” a firearm in furtherance of any violent crime or drug-trafficking, in addition to simply “using” or “carrying” a firearm.⁵⁸ This amendment was made in response to the Supreme Court’s relatively narrow interpretation of the word “uses,”⁵⁹ and continues the congressional pattern of building a more inclusive, stiffer statute.

It is widely accepted, drawing from Congress’ amendment pattern of 18 U.S.C. § 924(c)(1), that the statute reflects congressional concern with high national rates of violent and narcotics-related crime.⁶⁰ While this is a logical inference, deterring violent crime was not the primary point of congressional debate when § 924(c)(1) was enacted as part of the Gun Control Act of 1968.⁶¹ What little is recorded of the congressional debate suggests that the focus was whether § 924(c)(1) would be constitutional if applied to state crimes and not on whether this statute would deter the predicate crimes.⁶² Thus, it can be logically inferred that Congress enacted § 924(c)(1) not simply to enhance punishment but with the intention to punish and deter the underlying crime, the illegal use of firearms.⁶³ Despite the legislative pattern of expanding the scope of 18 U.S.C. § 924(c)(1) through many amendments, Congress has yet to attach a separate venue provision.⁶⁴ Congress has not explicitly tied the firearm offense to any venue where the predicate crime takes place, though it has the power to do so.⁶⁵

B. CIRCUIT SPLIT

Before *Rodriguez-Moreno* was decided by the Supreme Court, the United States Circuit Courts were divided on whether venue was proper in any federal jurisdictional district where the under-

chine gun or destructive device, or if the firearm is equipped with a silencer or muffler, the sentence becomes thirty years. *See id.*

⁵⁸ *See* Pub. L. 105-386, 112 Stat. 3469 (1998).

⁵⁹ *See* *Bailey v. United States*, 116 S. Ct. 501, 506 (1995).

⁶⁰ *See* Riordan, *supra* note 52, at 40; *see also* Alan M. Gilbert, Note, *Defining “Use” of a Firearm*, 87 J. CRIM. L. & CRIMINOLOGY 842, 843 (1997).

⁶¹ Pub. L. No. 90-618, 82 Stat. 1223-1224 (1968).

⁶² 114 CONG. REC. at 22229-30, 22234. Congress eventually decided to limit § 924(c)(1) to federal crimes. *See id.*

⁶³ Brief for Respondent at 26, *United States v. Rodriguez-Moreno*, 119 S. Ct. 1239 (1999) (No. 97-1139).

⁶⁴ *See* *United States v. Palma Ruedas*, 121 F.3d at 841, 850 (3d Cir. 1997).

⁶⁵ *See* *United States v. Rodriguez-Moreno*, 119 S. Ct. 1239, 1242 n.1 (1999).

lying crime of violence was committed in a § 924(c)(1) offense, regardless of where the firearm was actually used. The Third Circuit, in which *Rodriguez-Moreno* was tried, carefully examined two previous cases from sister circuits which provided opposing venue analyses to § 924(c)(1): *United States v. Corona*,⁶⁶ and *United States v. Pomranz*.⁶⁷

1. *United States v. Corona*

In *United States v. Corona*,⁶⁸ the defendant was tried in Nevada and convicted of both conspiracy to distribute cocaine and the substantive crimes associated with the conspiracy, which included the distribution of cocaine and the use of a firearm during the distribution.⁶⁹ Both the distribution of the cocaine and the use of the firearm occurred only in California, though overt acts of conspiracy happened in both California and Nevada.⁷⁰ On appeal the defendant argued that venue for the substantive offenses, including the § 924(c)(1) charge, was improper in Nevada.⁷¹

The Ninth Circuit conducted a separate venue analysis for the conspiracy and the substantive crimes, determining that venue was improper in Nevada for the substantive offenses.⁷² The court adopted the “verb test” and thus examined the verbs of the § 924(c)(1) offense to determine where Congress expected proper venue to lie.⁷³ Finding that one could only “use” or “carry” a gun in violation of § 924(c)(1) when in connection with the substantive predicate offense, the Ninth Circuit held that prosecution in a venue where the underlying conspiracy charge took place is not proper under § 924(c)(1) if the weapon was not used or carried in that venue.⁷⁴ The Ninth Circuit in *Corona* did not examine the government’s policy concerns, nor did it pay heed to any extrapolation of congressional

⁶⁶ 34 F.3d 876 (9th Cir. 1994).

⁶⁷ 43 F.3d 156 (5th Cir. 1995).

⁶⁸ 34 F.3d 876 (9th Cir. 1994).

⁶⁹ See *id.* at 877-78.

⁷⁰ See *id.*

⁷¹ See *id.*

⁷² See *id.* at 879.

⁷³ See *id.*

⁷⁴ See *id.*

intent, but, rather, the court conducted the venue analysis based on the statute as written by Congress.⁷⁵

Acknowledging the possible public policy difficulties inherent in its decision, the court stated "while [tying venue to the underlying offense] might make some sense from a policy standpoint, it runs counter to the venue principles established by the Constitution, the Federal Rules of Criminal Procedure, and the federal courts."⁷⁶ Furthermore, the court noted that the government "could have and should have" litigated all of the offenses in California.⁷⁷ The court concluded that because public policy concerns are insufficient to overrule constitutional principles,⁷⁸ a conviction under § 924(c)(1) could not be prosecuted where the conspiracy occurred if the firearm was not used or carried in that venue.⁷⁹

2. *United States v. Pomranz*

In *United States v. Pomranz*,⁸⁰ the defendant was charged with several counts relating to the distribution of marijuana, including the use of a gun in connection with the underlying crime of drug distribution.⁸¹ The drug trafficking occurred in North Texas, while the firearm was used in Oklahoma City.⁸² After being convicted on all counts in a North Texas trial, the defendant appealed.⁸³ Citing *Corona*, the defendant argued that the proper venue to try the § 924(c)(1) offense was Oklahoma City.⁸⁴

The Fifth Circuit disagreed.⁸⁵ The court explicitly rejected the Ninth Circuit's reasoning, and stated that the court's analysis would "effectively undermine the Congressional intent to curb the violence inherently associated with high-level drug deals."⁸⁶ The court observed the consistent increase in deter-

⁷⁵ See *id.* at 878-81.

⁷⁶ *Id.* at 879.

⁷⁷ *Id.* at 881.

⁷⁸ See *id.* at 879.

⁷⁹ See *id.* at 881.

⁸⁰ 43 F.3d 156 (5th Cir. 1995).

⁸¹ See *id.* at 157.

⁸² See *id.* at 158.

⁸³ See *id.* at 157.

⁸⁴ See *id.* at 159.

⁸⁵ See *id.* at 161.

⁸⁶ *Id.*

rence value throughout the § 924(c)(1) amendments,⁸⁷ and noted that the legislation's sponsor, United States Representative Richard Poff, explained that one of the statute's objectives was to "persuade a man who is tempted to commit a federal felony to leave his gun at home."⁸⁸ The Fifth Circuit therefore concluded that Congress intended § 924(c)(1) to provide "a *maximum* deterrence against using firearms" during the commission of other crimes.⁸⁹

The court did not analyze the words of the statute itself, but instead concluded that, unless venue is constructed broadly, the congressional intent of deterring violence "inherently associated with high-level drug deals" would be undermined.⁹⁰ Placing the goal of deterrence above all other considerations, the court acknowledged that policy concerns, particularly the possible additional costs the government might incur in prosecuting a convicted felon a second time, were paramount.⁹¹ To provide maximum deterrence at minimum prosecutorial cost, the court determined that a § 924(c)(1) violation is sufficiently intertwined with the predicate act of drug trafficking or committing a violent crime as to warrant trial in the same venue, regardless of where the firearm was actually used or carried.⁹² Cognizant of the constitutional concerns inherent in its decision, the court noted: "[W]e do not believe that our holding seriously infringes on the defendant's rights since this Court treats the right to venue with less deference than other constitutional rights."⁹³ While the court gave examples of when venue rights were treated with less deference than other constitutional rights in

⁸⁷ See *id.* at 160. The court noted that Congress first amended § 924(c) to make clear that the defendant was sentenced under both the predicate offense and the gun offense: "[T]he statute underwent further changes to increase the severity of punishment by: (1) requiring that the mandatory sentence run consecutively rather than concurrently with the predicate crime, (2) substantially increasing the mandatory penalty violations, and (3) denying parole or probation privileges during the § 924(c)(1) sentence." *Id.*

⁸⁸ *Id.* at 160 n.5 (quoting 114 CONG. REC. 22, 231 (1968)).

⁸⁹ *Id.* at 160.

⁹⁰ *Id.* at 161.

⁹¹ See *id.*

⁹² See *id.*

⁹³ *Id.* at 162.

the Fifth Circuit,⁹⁴ the court failed to give reasons for delegating venue to the bottom of its constitutional hierarchy.⁹⁵

The two opposing opinions from the Ninth and Fifth Circuits, set the stage for the Third Circuit's adjudication of Rodriguez-Moreno's appeal in the *Palma-Ruedas* case.⁹⁶

III. FACTS AND PROCEDURAL HISTORY

A. FACTS

In July 1994, Ephrain Avendano introduced the leader of a Texas cocaine distribution ring, Omar Torres-Montalvo, to Fanol Ochoa, a New York drug dealer, facilitating a relationship between the distributor and the dealer.⁹⁷ Avendano was to serve as middleman between Torres-Montalvo and Ochoa.⁹⁸

In October 1994, the first attempted transaction in this new business relationship was foiled when two of Torres-Montalvo's runners were arrested while en route to New York, and fourteen kilograms of cocaine were seized.⁹⁹ Torres-Montalvo expressed to Avendano that he was displeased with the seizure of the merchandise and with the legal fees of his employee.¹⁰⁰ He also expressed that he needed to make a new deal to compensate for his "big loss."¹⁰¹ Avendano relayed this information to Ochoa, who agreed to another deal with Torres-Montalvo, this time for thirty kilograms.¹⁰² Torres-Montalvo insisted that the deal would take place in Texas.¹⁰³ Avendano, acting as middleman, met with Ochoa and another man named "Baldy" at an airport in

⁹⁴ See *id.* The court explained that "the standard for finding a waiver of venue is much more relaxed than the rigorous standard for finding waivers of the right to trial by jury, the right to confront one's accusers or the privilege against compulsory self incrimination." *Id.* (quoting *United States v. Winship*, 724 F.2d 1116, 1124 (5th Cir. 1984)).

⁹⁵ See *id.*

⁹⁶ See *United States v. Palma-Ruedas*, 121 F.3d 841, 848 (3d Cir. 1997).

⁹⁷ See *id.* at 845.

⁹⁸ See *id.*

⁹⁹ See *id.*

¹⁰⁰ See *id.*

¹⁰¹ *Id.*

¹⁰² See *id.*

¹⁰³ See *id.*

Houston.¹⁰⁴ For "reasons of security" Ochoa would not meet with Torres-Montalvo personally.¹⁰⁵ Instead, the plan was that Avendano and Baldy would meet Torres-Montalvo.¹⁰⁶ Baldy would then put the cocaine in his car, Avendano would call Ochoa, and Ochoa would then deliver the money.¹⁰⁷ The first part of this plan went smoothly. The cocaine was delivered to Baldy's car by Torres-Montalvo and Baldy drove away with the drugs.¹⁰⁸

The second part of the plan, though, did not fare as well for Torres-Montalvo: Ochoa never answered his pager.¹⁰⁹ Torres-Montalvo felt Avendano was responsible for the loss, and decided to hold Avendano physically until either the merchandise or the money was recovered.¹¹⁰

Hearing rumors that Ochoa was in New York bragging about his clever acquisition, Torres-Montalvo decided to use Avendano's New Jersey apartment as home base while searching for Ochoa in New York.¹¹¹ Torres-Montalvo hired four men, Pacheco, Ortiz, Palma-Ruedas, and Rodriguez-Morano, to find Ochoa and keep Avendano captive.¹¹² The four men drove to Avendano's place in New Jersey.¹¹³ After hearing that police had noticed their Texas license plates in Avendano's driveway, the group headed to Maryland and arrived at a house owned by Morillo, an acquaintance of Torres-Montalvo.¹¹⁴ While there, Morillo showed off his .357 magnum revolver to the group.¹¹⁵ In the meantime, Torres-Montalvo continued his search for Ochoa.¹¹⁶ As time passed, and Torres-Montalvo's search proved fruitless, tensions mounted between the kidnappers and their

¹⁰⁴ Brief for the United States at 4, *United States v. Rodriguez-Moreno*, 119 S. Ct. 1239 (1999) (No. 97-1139).

¹⁰⁵ *Palmas-Rudas*, 121 F.3d at 845.

¹⁰⁶ *See id.* at 846.

¹⁰⁷ *See id.* at 845-46.

¹⁰⁸ *See id.* at 846.

¹⁰⁹ *See id.*

¹¹⁰ *See id.*

¹¹¹ *See id.*

¹¹² *See id.*

¹¹³ *See id.*

¹¹⁴ *See id.*

¹¹⁵ *See id.*

¹¹⁶ *See id.*

captive.¹¹⁷ At one point Rodriguez-Moreno put Morillo's gun to the back of Avendano's neck, telling Torres-Montalvo that "they were just wasting time" and that they should "get it over with and just kill Avendano."¹¹⁸ After Torres-Montalvo and the others talked Rodriguez-Moreno out of this drastic action, Avendano managed to escape from the back of the house and contacted his wife, who contacted the police.¹¹⁹

The police secured a search warrant for the Maryland property, entered the house, and arrested Torres-Montalvo and his search party.¹²⁰ The police also seized the .357 magnum, which was covered with Rodriguez-Moreno's fingerprints.¹²¹

B. PROCEDURAL HISTORY

1. District Court

Rodriguez-Moreno and his co-defendants were tried in the United States District Court of New Jersey.¹²² All were charged with conspiring to kidnap Avendano.¹²³ Rodriguez-Moreno was also charged with using and carrying a firearm in relation to Avendano's kidnapping, in violation of 18 U.S.C. § 924(c)(1).¹²⁴ At the conclusion of the government's case, Rodriguez-Moreno moved to dismiss the § 924(c)(1) count for lack of venue, arguing venue was only proper in Maryland on the firearm count, as that was the only place where the government proved that he actually used a gun.¹²⁵ Because this was an issue of first impression in the Third Circuit, the District Court, in an unpublished opinion, looked to the two opposing analyses offered by the Ninth and Fifth Circuits.¹²⁶ Apparently persuaded by the Fifth Circuit's reasoning that a defendant is properly tried for unlawful use of a firearm in any district in which the venue is estab-

¹¹⁷ See *id.*

¹¹⁸ *Id.*

¹¹⁹ Brief for the United States at 5, *United States v. Rodriguez-Moreno*, 119 S. Ct. 1239 (1999) (No. 97-1139).

¹²⁰ See *id.* at 5-6.

¹²¹ See *id.* at 6.

¹²² See *Palma-Ruedas*, 121 F.3d at 847.

¹²³ See *id.*

¹²⁴ See *id.*

¹²⁵ See *id.*

¹²⁶ See *id.*; see also *supra* Part II.B.

lished for the underlying violent offense, the district court concluded that it was proper to try Rodriguez-Moreno in New Jersey.¹²⁷ Rodriguez-Moreno was sentenced to 87 months in prison for the kidnapping charges and to a mandatory consecutive term of 60 months in prison for the § 924(c)(1) offense.¹²⁸

2. *United States v. Palma-Ruedas*

All six defendants appealed from the decision of the district court, and the Third Circuit consolidated their appeals.¹²⁹ The court first examined Rodriguez-Moreno's contention that New Jersey was not the proper venue in which to prosecute him for the § 924(c)(1) offense.¹³⁰ In a two-to-one decision, the Third Circuit agreed with Rodriguez-Moreno and reversed the holding of the lower court.¹³¹ The Third Circuit sided with the statutory analysis provided by the Ninth Circuit in *Corona*, rather than with the Fifth Circuit's public policy analysis.¹³² In analyzing the proper venue under § 924(c)(1), the court first adopted the "verb test," also used by the *Corona* court, as an aid in determining where Congress intended venue to lie.¹³³ Applying the verb test to § 924(c)(1), the majority of the Third Circuit panel determined that violation of the statute is committed only where the defendant actually "uses" or "carries" a firearm.¹³⁴ The court then addressed the constitutional concerns involved when issues of venue arise.¹³⁵ Examining the history and historical justifications of the constitutional venue provisions, the court determined that this constitutional right deserved greater deference than the Fifth Circuit would have provided.¹³⁶ Finally,

¹²⁷ See *Palmas-Ruedas*, 121 F.3d at 847.

¹²⁸ See *United States v. Rodriguez-Moreno*, 119 S. Ct. 1239, 1242 (1999).

¹²⁹ See *Palma-Ruedas*, 121 F.3d at 846.

¹³⁰ See *id.* at 850-51.

¹³¹ See *id.*

¹³² See *id.* at 849.

¹³³ See *id.* See *supra* note 73 and accompanying text.

¹³⁴ *Palma-Ruedas*, 121 F.3d at 850.

¹³⁵ See *id.*

¹³⁶ See *id.* The court referred to the Fifth Circuit's finding that the Fifth Circuit treats venue provisions with less deference than other constitutional provisions, see *United States v. Pomranz*, 43 F.3d 156, 162 (1995), then later found that the Third Circuit has afforded the venue provisions the same weight as other constitutional guarantees for criminal defendants, acknowledging that "these guarantees form the bedrock principles of our criminal justice system and should not be hastily balanced away." *Palma-Ruedas*, 121 F.3d at 850.

the court looked to the congressional history of § 924(c)(1) and found that there was not enough evidence of congressional intent to broaden the venue in such cases to overcome the constitutional concerns.¹³⁷ The Third Circuit panel therefore concluded that because Rodriguez-Moreno only used the gun in Maryland, New Jersey was not the proper venue for the § 924(c)(1) count.¹³⁸

a. The Verb Test

The court began its analysis of proper venue by examining the verbs for clues as to where Congress intended venue to lie.¹³⁹ In applying the verb test, the Third Circuit found that § 924(c)(1) is unambiguous in designating the criminal conduct that is prohibited: "using" or "carrying" a firearm.¹⁴⁰ Thus, "one commits a violation of § 924(c)(1) in the district where one 'uses' or 'carries' a firearm."¹⁴¹ Because Rodriguez-Moreno only used a firearm in Maryland, the court concluded that he committed the § 924(c)(1) offense only in Maryland and should be tried for that particular offense in the proper Maryland venue.¹⁴²

The Third Circuit acknowledged that, when the verbs in statutes defining criminal conduct are ambiguous, the verb test might not always be appropriate.¹⁴³ But the court found the verbs defining the criminal conduct in § 924(c)(1) to be straightforward, and thus use of the verb test was considered proper.¹⁴⁴ The verb test has been adopted as an interpretive venue-determining tool in at least half of the federal circuits.¹⁴⁵

¹³⁷ See *id.*

¹³⁸ See *id.* at 850-51.

¹³⁹ See *id.* at 850. This verb test, introduced by Armistead M. Dobie in an influential article, *Venue in Criminal Cases in the United States District Court*, 12 VA. L. REV. 287, 289 (1926), suggests that "[a]ll federal crimes are statutory, and these crimes are often defined . . . in terms of a single verb. That essential verb usually contains the key to the solution of the question: in what district was the crime committed?" *Id.*

¹⁴⁰ *Palma-Ruedas*, 121 F. 3d at 849.

¹⁴¹ *Id.*

¹⁴² See *id.*

¹⁴³ See *id.* at 850 n.6.

¹⁴⁴ See *id.* at 850 & n.6.

¹⁴⁵ See generally *United States v. Murphy*, 117 F.3d 137, 139 (4th Cir. 1997) ("Where . . . Congress has not provided an express venue provision in conjunction with a criminal statute, this circuit has looked to the verbs defining the criminal offense and the purpose underlying the criminal statute to determine proper venue."); *United States v. Crawford*, 115 F.3d 1397, 1405 (8th Cir. 1997) (applying the "key verb" test

b. Deference Toward Upholding the Constitution

The Third Circuit not only worried about the statutory interpretation of § 924(c)(1), but also expressed concern with the constitutional implications of judicially broadening venue.¹⁴⁶ While the government argued that a strict interpretation of venue would cause undue hardship, the Third Circuit noted that the government could have tried Rodriguez-Moreno on both the predicate crime and the separate firearm crime in a single trial in Maryland.¹⁴⁷ While acknowledging the potential administrative efficiency, and thus the policy persuasiveness, inherent in the government's argument, the court emphasized that many constitutional guarantees for criminal defendants are inefficient and costly, such as the right to counsel.¹⁴⁸ "Nevertheless, these guarantees form the bedrock principles of our criminal justice system and should not be hastily balanced away."¹⁴⁹ The Third Circuit thus affirmed that constitutional guarantees should trump administrative efficiency.¹⁵⁰

c. Congressional History Analysis of § 924(c)(1)

Recognizing that Congress does have the power to broaden venue in a constitutionally acceptable manner, the court examined the possibility that Congress intended for the venue of the firearm offense to be appropriate in any venue where the underlying crime is appropriate.¹⁵¹ Because Congress could have enacted a provision tying the venue of the gun crime to the

to the Child Support Recovery Act); *United States v. Corona*, 34 F.3d 876, 879-80 (9th Cir. 1994) (adopting verb test as an interpretive tool); *United States v. Cofield*, 11 F.3d 413, 416 (4th Cir. 1994) (remarking that "we have adopted the 'verb test' as an interpretive aid"); *United States v. Georgacarakos*, 988 F.2d 1289, 1293 (1st Cir. 1993) ("To determine venue, we examine the key verbs in the statute defining the criminal offense to find the scope of the relevant conduct.") (internal quotes omitted); *United States v. Ryan*, 894 F.2d 355, 360 (10th Cir. 1990) ("Courts usually examine the verbs employed in the statute to define the offense.").

¹⁴⁶ See *Palma-Ruedas*, 121 F.3d at 850.

¹⁴⁷ See *id.* at 849-50. The government argued that Rodriguez-Moreno could be tried only in New Jersey or New York on the charge of kidnapping Mr. Avendano, and this would not allow for a consolidated trial on all the charges in Maryland. The court unsympathetically replied that the "separate crime of kidnapping *Mr. Avendano* is not particularly relevant to our venue analysis." *Id.* at 850 n.5.

¹⁴⁸ See *id.* at 850.

¹⁴⁹ *Id.*

¹⁵⁰ See *id.*

¹⁵¹ See *id.*

predicate offense but did not, the court concluded the strict language of the statute and the constitutional concerns were controlling.¹⁵² The court reasoned that if the statute does not indicate location of the crime for determining venue, the verbs must be strictly construed to ensure that the defendant's Sixth Amendment rights are protected.¹⁵³

d. Dissent

Though conceding that the verb test may be one tool in determining where venue should lie, Judge Alito, in dissent, argued that this should not be the sole test.¹⁵⁴ Instead, the court should look to "the substance of the statutes in question," rather than relying on "grammatical arcana."¹⁵⁵ Judge Alito argued that one should first look to the nature of the crime as defined by the statute.¹⁵⁶ In this case, the nature of the crime was using a firearm in conjunction with the underlying crime of violence or drug trafficking.¹⁵⁷ Because the underlying crime is a critical element of the separate gun offense, Judge Alito argued, venue is constitutionally acceptable wherever the venue for the predicate offense is proper.¹⁵⁸

The dissent bolstered this analysis by arguing that defining venue broadly in this case is supported by the legislative history of § 924(c)(1).¹⁵⁹ Representative Poff, the statute's sponsor, stated that "the prosecution for the basic felony and the prosecution under my substitute would constitute one proceeding out of which two separate penalties would grow."¹⁶⁰ Thus, Con-

¹⁵² See *id.* (citing *United States v. Anderson*, 328 U.S. 699, 703 (1946), which held that when "nothing in either the statute or the legislative history . . . show[s] an intention on the part of Congress to depart from the Sixth Amendment's command," courts must determine venue by looking to the nature of the crime and where it was committed).

¹⁵³ See *id.* (citing *United States v. Johnson*, 323 U.S. 273, 276 (1944), which concluded that "[i]f an enactment of Congress equally permits the underlying spirit of the constitutional concern for trial in the vicinage to be respected rather than to be disregarded, construction should go in the direction of constitutional policy . . .").

¹⁵⁴ See *id.* at 859, 862 (Alito, J., concurring in part, dissenting in part).

¹⁵⁵ See *id.* at 865 (Alito, J., concurring in part, dissenting in part).

¹⁵⁶ See *id.* at 859 (Alito, J., concurring in part, dissenting in part).

¹⁵⁷ See *id.* (Alito, J., concurring in part, dissenting in part).

¹⁵⁸ See *id.* (Alito, J., concurring in part, dissenting in part).

¹⁵⁹ See *id.* at 863 (Alito, J., concurring in part, dissenting in part).

¹⁶⁰ See *id.* (Alito, J., concurring in part, dissenting in part) (citing 114 CONG. REC. 22,232 (1968)).

gress emphasized the importance of the underlying crime to the § 924(c)(1) offense, which, according to Judge Alito, helps establish the propriety of tying venue to the predicate offense.¹⁶¹ The dissenting judge argued further that the courts have acknowledged the intimacy with which the firearm offense and predicate offense have been congressionally wed by holding that only one gun crime can be appended to a single underlying crime.¹⁶²

Finally, Judge Alito insightfully noted that a defendant is just as likely to have significant ties to where she commits the underlying crime of violence or drug-trafficking, as she is to where the gun offense occurs,¹⁶³ thus effectively undermining the argument for separating venue based on the traditional justification of placing the trial in a familiar place for the accused.¹⁶⁴ Therefore, Judge Alito reasoned that it is not offensive to the Constitution to tie the venue to the predicate crime when charged with a § 924(c)(1) offense.¹⁶⁵

The government, noting that the Third Circuit's holding was in conflict with a Fifth Circuit decision,¹⁶⁶ petitioned for review.¹⁶⁷ The Supreme Court granted certiorari on June 8, 1998.¹⁶⁸

¹⁶¹ See *id.* (Alito, J., concurring in part, dissenting in part).

¹⁶² See *id.* at 862-63 (Alito, J., concurring in part, dissenting in part) (citing *United States v. Cappas*, 29 F.3d 1187, 1189 (7th Cir. 1994); *United States v. Lindsay*, 985 F.2d 666, 674 (2d Cir. 1993); *United States v. Sims*, 975 F.2d 1225, 1233 (6th Cir. 1992); *United States v. Moore*, 958 F.2d 310, 312 (10th Cir. 1992); *United States v. Hamilton*, 953 F.2d 1344, 1346 (11th Cir. 1992); *United States v. Privette*, 947 F.2d 1259, 1262-63 (5th Cir. 1991); *United States v. Fontanilla*, 849 F.2d 1257, 1258-59 (9th Cir. 1988); *but see United States v. Lucas*, 932 F.2d 1210, 1222-23 (8th Cir. 1991)).

¹⁶³ See *id.* at 863 (Alito, J., concurring in part, dissenting in part).

¹⁶⁴ See *id.* (Alito, J., concurring in part, dissenting in part).

¹⁶⁵ See *id.* (Alito, J., concurring in part, dissenting in part).

¹⁶⁶ See *United States v. Pomranz*, 43 F.3d 156 (5th Cir. 1995).

¹⁶⁷ *United States v. Rodriguez-Moreno*, 119 S. Ct. 1239, 1242 (1999).

¹⁶⁸ *United States v. Rodriguez-Moreno*, 118 S. Ct. 2296 (1999).

IV. THE SUPREME COURT OPINION

A. MAJORITY OPINION

Justice Thomas, writing for the majority,¹⁶⁹ concluded that venue was proper in a prosecution under § 924(c)(1) in any federal jurisdiction where the underlying crime was committed, and, therefore, venue in this case was proper in New Jersey.¹⁷⁰

Following recent precedent, Justice Thomas noted that the “*locus delicti* [of the charged offense] must be determined from the nature of the crime alleged and the location of the act or acts constituting it.”¹⁷¹ Thus, a court first must identify the criminal conduct and then “discern the location of the criminal acts.”¹⁷²

Though acknowledging that the Third Circuit’s verb test can be a useful tool in determining venue, the majority nonetheless submitted that the Court has “never before held . . . that the verbs are the sole consideration in identifying the conduct that constitutes an offense.”¹⁷³ In this case, the Court expressed concern that because “the crime of violence element of the statute is embedded in a prepositional phrase and not expressed in verbs,” the Third Circuit overlooked the essential conduct element of the statute.¹⁷⁴ Thus, the majority found that the verb test, applied rigidly, unduly limits the inquiry about the nature of the offense, which creates a concern that statutorily prohibited conduct may be missed.¹⁷⁵

Justice Thomas explained that § 924(c)(1) contains two distinct conduct elements: “using and carrying” a gun and the commission of the violent crime.¹⁷⁶ Therefore, the government had only to prove that a firearm was used “during and in relation to” the acts constituting kidnapping in the course of a drug

¹⁶⁹ Rehnquist, C.J., and O’Connor, Kennedy, Souter, Ginsberg, and Breyer, JJ., joined in this opinion. *Rodriguez-Moreno*, 119 S. Ct. at 1241.

¹⁷⁰ *See id.* at 1244.

¹⁷¹ *Id.* at 1243 (quoting *United States v. Cabrales*, 524 U.S. 1, 6-7 (1998) (quoting *United States v. Anderson*, 328 U.S. 699, 703 (1946))).

¹⁷² *Id.*

¹⁷³ *Id.* at 1242.

¹⁷⁴ *Id.*

¹⁷⁵ *See id.*

¹⁷⁶ *See id.* at 1243.

transaction.¹⁷⁷ Rodriguez-Moreno contended that the firearm crime was not relevant to the New Jersey kidnapping crime because he never used the firearm in New Jersey.¹⁷⁸ The Court responded first that § 924(c)(1) does not define a "point-in-time" offense, as the crime may cover several districts.¹⁷⁹ A kidnapping, the predicate crime, once begun, ends only when the victim is free, thus it makes no sense to think of the crime in geographic fragments.¹⁸⁰ Because § 924(c)(1) makes it a crime to use a firearm "during and in relation to" the predicate offense, if the gun was used "during and in relation" to the kidnapping, the § 924(c)(1) crime carries throughout the kidnapping.¹⁸¹

Second, the Court addressed its holding in *United States v. Lombardo*,¹⁸² and agreed that "where a crime consists of distinct parts which have different localities the whole may be tried where any part can be proved to have been done."¹⁸³ Justice Thomas implied by citing *Lombardo* that § 924(c)(1) may be tried wherever it is proper to try either of the two distinct parts: the firearm offense and the violent crime offense.¹⁸⁴ Furthermore, § 924(c)(1) creates a unitary continuing crime of distinct parts.¹⁸⁵ Congress has provided that any continuing offenses can be prosecuted "in any district in which such offense was begun, continued, or completed."¹⁸⁶ Therefore, the majority concluded, it is proper to prosecute the defendant in any district where the underlying crime was committed, so long as the gun offense was committed "during and in relation to" the underlying offense.¹⁸⁷ The Supreme Court held that, because it was

¹⁷⁷ See *id.*

¹⁷⁸ See Respondent's Brief at 12, *Rodriguez-Moreno* (No. 97-1139).

¹⁷⁹ See *Rodriguez-Moreno*, 119 S. Ct. at 1243-44 (noting that several Circuits have determined kidnapping to be a unitary crime, including *United States v. Seals*, 130 F.3d 451, 461-62 (D.C. Cir. 1997); *United States v. Denny-Shaffer*, 2 F.3d 999, 1018-19 (10th Cir. 1993); *United States v. Godinez*, 998 F.2d 471, 473 (7th Cir. 1993); and *United States v. Garcia*, 854 F.2d 340, 343-44 (9th Cir. 1988)).

¹⁸⁰ See *id.* at 1244.

¹⁸¹ See *id.*

¹⁸² *United States v. Lombardo*, 241 U.S. 73 (1916).

¹⁸³ See *Rodriguez-Moreno*, 119 S. Ct. at 1243-44 (citing *Lombardo*, 241 U.S. at 77).

¹⁸⁴ See *id.*

¹⁸⁵ See *id.*

¹⁸⁶ 18 U.S.C. § 3237(a) (1994).

¹⁸⁷ *Rodriguez-Moreno*, 119 S. Ct. at 1243.

proper to try the kidnapping in New Jersey, the § 924(c)(1) offense could be tried there as well.¹⁸⁸

The majority opinion acknowledged the venue provisions within the Constitution,¹⁸⁹ but did not examine the case in light of constitutional analysis,¹⁹⁰ despite the substantial constitutional examination conducted by the Third, Fifth, and Ninth Circuits.¹⁹¹ The Court also failed to discuss any implications that may stem from this opinion when lower courts analyze venue provisions in the future.¹⁹²

B. DISSENT

Justice Scalia¹⁹³ agreed with the majority that one must look at “the nature of the crime alleged and the location of the act or acts constituting it.”¹⁹⁴ He disagreed, though, that the § 924(c)(1) crime is committed “either where the defendant commits the predicate offense or where he uses or carries the gun.”¹⁹⁵ The crime can be committed, Scalia contended, only where the “defendant *both* engages in the acts making up the predicate offense *and* uses or carries the gun.”¹⁹⁶

The majority, according to the dissent, mistakenly relied on *Lombardo*, which held that if a crime has distinct parts which have been committed in different localities, the crime may be tried in any locality where any one part can be proved to have been done.¹⁹⁷ Justice Scalia said the reliance on *Lombardo* is unwarranted here because Rodriguez-Moreno’s alleged crime did not consist of “distinct” parts that occurred in two separate places.¹⁹⁸ Rather, Justice Scalia noted “[i]ts two parts are bound inseparably together by the word ‘during.’”¹⁹⁹

¹⁸⁸ See *id.* at 1244.

¹⁸⁹ See *id.* at 1242.

¹⁹⁰ See *id.* at 1242-44.

¹⁹¹ See *United States v. Palma-Ruedas*, 121 F.3d 841, 849-50 (3d Cir. 1997); *United States v. Pomranz*, 43 F.3d 156, 158-61 (5th Cir. 1995); *United States v. Corona*, 34 F.3d 876, 878-79 (9th Cir. 1994).

¹⁹² See *Rodriguez-Moreno*, 119 S. Ct. at 1242-44.

¹⁹³ Justice Stevens joined Justice Scalia’s dissent. *Id.* at 1244.

¹⁹⁴ *Id.* (Scalia, J., dissenting).

¹⁹⁵ *Id.* (Scalia, J., dissenting).

¹⁹⁶ *Id.* (Scalia, J., dissenting).

¹⁹⁷ See *id.* at 1245 (Scalia, J., dissenting).

¹⁹⁸ See *id.* (Scalia, J., dissenting).

¹⁹⁹ *Id.* (Scalia, J., dissenting).

The dissent agreed with the majority that both the kidnapping and the use of the gun are not in themselves "point-in-time" offenses, as they both can extend over a protracted period of time and to several places.²⁰⁰ Section 924(c)(1), though, can be violated only where both acts happen simultaneously, argued Justice Scalia, who pointedly proclaimed that "[t]his is what the word 'during' means."²⁰¹ In other words, § 924(c)(1), like the crime of kidnapping, has the potential to cross venue borders, but only if the gun is actually used during the crossing.²⁰²

Thus, Scalia wrote, the defendant "who has a constitutional right to be tried in the State and district where his alleged crime was 'committed,' . . . has been prosecuted for using a gun during a kidnapping in a State and district where all agree he did not use a gun during a kidnapping."²⁰³ The dissent closed by implying that this should have been a simple case if the analysis was based on the text, commenting that "[i]f to state this case is not to decide it, the law has departed further from the meaning of language than is appropriate for a government that is supposed to rule (and to be restrained) through the written word."²⁰⁴

Justice Scalia, like the majority, refrained from analyzing the constitutional aspects of this case.²⁰⁵ It is unclear whether the dissent believed the case simply could be decided on statutory interpretation, or if it believed constitutional analysis to be unwarranted.

V. ANALYSIS

The dissent correctly concluded that the majority failed to properly interpret the language of the statute.²⁰⁶ But the dissent, by declining to place the interpretation of the statute within the context of constitutional venue analysis,²⁰⁷ faltered before reaching a fully satisfying critique of the majority's questionable decision. This analysis seeks to bolster the dissent's conclusion, first by explaining why the dissent's statutory inter-

²⁰⁰ See *id.* (Scalia, J., dissenting).

²⁰¹ *Id.* (Scalia, J., dissenting).

²⁰² See *id.* (Scalia, J., dissenting).

²⁰³ *Id.* at 1245-46 (Scalia, J., dissenting).

²⁰⁴ *Id.* at 1246 (Scalia, J., dissenting).

²⁰⁵ See *id.* at 1244-46 (Scalia, J., dissenting).

²⁰⁶ See *id.* (Scalia, J., dissenting).

²⁰⁷ See *id.* (Scalia, J., dissenting).

pretation of § 924(c)(1) is more sound than that of the majority, second by addressing the proper context for use of legislative history and the verb test in interpreting § 924(c)(1), and third by answering the constitutional question of why the Court should have, within the context of § 924(c)(1), boldly guarded the now vulnerable venue provisions.

A. STATUTORY ANALYSIS

1. *The Court Mistakenly Concluded that § 924(c)(1) Has "Distinct Parts"*

Although the majority opinion claims otherwise,²⁰⁸ § 924(c)(1) does not embody two distinct criminal elements, either of which, when violated, could provide a choice of venue in which the government could properly prosecute.²⁰⁹ The majority started the statutory interpretation correctly.²¹⁰ First, the Court "identif[ied] the conduct constituting the offense" and then "discern[ed] the location of the commission of the criminal acts."²¹¹ But the majority then proceeded to misidentify "the conduct constituting the offense"²¹² by implicating two distinct conduct elements within § 924(c)(1): the commission of the violent crime of kidnapping and "the using and carrying" of a gun.²¹³ But the language of the statute speaks only of one element of the crime: "Whoever, during and in relation to any crime of violence . . . uses or carries a firearm, shall . . . be sentenced to imprisonment for five years"²¹⁴ Justice Scalia, with a keen eye for the linguistically obvious, correctly argued that the gun violation can be committed only if the gun is used *during* the offense.²¹⁵ Thus, § 924(c)(1) has only one conduct element: using or carrying the gun while committing a violent crime.²¹⁶ If either part is performed separately, the § 924(c)(1)

²⁰⁸ See *id.* at 1244.

²⁰⁹ See *id.* at 1245. (Scalia, J., dissenting).

²¹⁰ See *id.* at 1242.

²¹¹ See *id.* (applying the test first announced in *United States v. Anderson*, 328 U.S. 699, 703 (1946), and most recently affirmed in *United States v. Cabrales*, 524 U.S. 1, 6-7 (1998)).

²¹² See *id.*

²¹³ See *id.* at 1243.

²¹⁴ 18 U.S.C. § 924(c)(1) (1994).

²¹⁵ See *Rodriguez-Moreno*, 119 S. Ct. at 1244 (Scalia, J., dissenting).

²¹⁶ See *id.* at 1245 (Scalia, J., dissenting).

offense is never committed.²¹⁷ Justice Scalia properly concluded that “[w]here the gun is being used, the predicate act must be occurring as well, and vice-versa.”²¹⁸ The statute cannot logically be read another way as the violent offense and the gun possession have to coincide before a § 924(c)(1) offense is committed.²¹⁹

To avoid the problem of explaining the illogical, the majority simply never addressed the problem posed by the word “during.”²²⁰ Instead, in explaining how the statute has “distinct parts,” as required by the *Lombardo* analysis, the Court conclusively noted the two *elements* of the crime.²²¹ By interpreting § 924(c)(1)’s “conduct element” as having two distinct parts, the majority, in effect, wrote the word “during” out of the statute.²²² This is troubling, as Congress is the more appropriate institution to make such an important statutory revision.²²³

Because § 924(c)(1) does not have distinct parts (the crime can only be committed where the underlying act of violence is accompanied by a firearm), the Court’s reliance on *Lombardo* for the proposition that, if a crime consists of distinct parts, the venue may lie where any part can be proved²²⁴ is therefore mistaken. Section 924(c)(1) is not violated until both the use of the gun and the predicate crime coincide, an unhappy coincidence which apparently only happened in Maryland.²²⁵

2. *Congressional Intent Does Not Justify the Court’s Conclusion that Venue was Proper in New Jersey*

The majority declined to justify a relaxed construction of § 924(c)(1) based on congressional intent, although it was vigorously argued by the government.²²⁶ There are two possible reasons for this omission. First, Justice Thomas prefers to rely on

²¹⁷ See *id.* (Scalia, J., dissenting).

²¹⁸ *Id.* (Scalia, J., dissenting).

²¹⁹ See *id.* (Scalia, J., dissenting).

²²⁰ See *id.* at 1243.

²²¹ See *id.* at 1244.

²²² *Id.* at 1244 (Scalia, J., dissenting).

²²³ See *id.* at 1246 (Scalia, J., dissenting).

²²⁴ *Id.* at 1247.

²²⁵ See *United States v. Palma-Ruedas*, 121 F.3d 841, 846 (3d Cir. 1997).

²²⁶ See *United States’ Brief* at 21-22, *Rodriguez-Moreno* (No. 97-1139).

statutory language.²²⁷ Second, the government's congressional intent argument was weak, and therefore would not advance the majority's opinion.²²⁸ The government argued that, because Congress was concerned about the proliferation of violence when it first enacted § 924(c)(1) and as it passed subsequent amendments to that section, Congress must have meant for both the underlying crime and the use of a firearm to be distinct elements.²²⁹ This argument echoes a proposition in the *Palma-Ruedas* dissent, which stated that "a central focus, if not the central focus, of the statute is the commission of the underlying crime."²³⁰

Congress, though, enacted § 924(c)(1) as part of the Gun Control Act of 1968,²³¹ creating a more logical inference that Congress enacted § 924(c)(1) with the intention of punishing the illegal use of firearms and not simply to enhance punishment for the underlying crime.²³² What little is recorded of the congressional debate focuses on whether § 924(c)(1) would be constitutional if applied to state crimes and not on whether this statute would deter the predicate crimes.²³³ While Representative Poff, the statute's sponsor, made statements that would lead one to reasonably infer the statute was enacted for reasons of deterrence,²³⁴ it would be unreasonable to further infer that Congress intended the predicate offense and firearm offense to be distinct elements.²³⁵

²²⁷ Cf. *City of Edmonds v. Oxford House, Inc.*, 115 S. Ct. 1776, 1783-87 (1995) (Thomas, J., dissenting) (expressing concern that the majority was willing to intrude upon statutory plain meaning without a clear statement of Congress's intentions while asserting that his reading of the statute allowed him to avoid considering whether legislative history was "either authoritative or persuasive").

²²⁸ See United States' Brief at 21-25, *Rodriguez-Moreno* (No. 97-1139).

²²⁹ See *id.* at 21-22.

²³⁰ *Palma-Ruedas*, 121 F.3d at 862.

²³¹ Pub. L. No. 90-618, 82 Stat. 1223-1224. (1968).

²³² Respondent's Brief at 26-27, *Rodriguez-Moreno* (No. 97-1139).

²³³ See 114 CONG. REC. 22,229-22,234 (1968). Congress eventually decided to limit § 924(c)(1) to federal crimes. See 18 U.S.C. § 924 (1999).

²³⁴ See 114 CONG. REC. 22,231 (1968) (explaining that the provision was meant to persuade those seeking to commit certain crimes "to leave [their] gun[s] at home").

²³⁵ Representative Poff did say that "the prosecution for the basic felony and the prosecution under my substitute would constitute one proceeding out of which two separate penalties may grow." 114 CONG. REC. 22,232 (1968). While at first blush one might interpret this statement as implicating a venue preference, it actually merely shows that Representative Poff correctly expected that most § 924(c)(1) offenses would occur in the same venue as the predicate crime. And the fact that the

Congress has amended 18 U.S.C. § 924(c)(1) periodically since its enactment, with a major revision in 1983.²³⁶ In 1983 Congress adopted the Supreme Court's decision in *Simpson v. United States*,²³⁷ which held that § 924(c)(1) sets out an offense distinct from the underlying felony and is not simply a penalty provision.²³⁸ The majority's decision, by reading the word "during" out of § 924(c)(1) creates nothing more than a simple penalty provision, thus frustrating congressional intent.²³⁹

3. *The Verb Test in this Case was an Appropriate Interpretive Tool*

Justice Thomas accused the Third Circuit of applying the verb test "rigidly."²⁴⁰ While acknowledging that such a test works as a useful interpretive tool, Justice Thomas found that the verb test, when applied to § 924(c)(1) "unduly limits the inquiry into the nature of the offense."²⁴¹ Justice Thomas, however, failed to explain how the nature of the offense affects the geographical positioning of the offense.²⁴² In this case, the correct inquiry is where the gun was used in relation to the kidnapping, an inquiry the verb test answers with precision.²⁴³ The Third Circuit succinctly and appropriately responded to a similar accusation from their dissent: "Although there may be statutes in which the verbs defining the statute are ambiguous, 18 U.S.C. § 924 is not such a statute."²⁴⁴ The Third Circuit did not rely solely upon the verb test to reach its conclusion, but used the test merely as an interpretive tool,²⁴⁵ a tool the Supreme Court conceded to be appropriate.²⁴⁶

sponsor expected two separate penalties illustrates the intent of § 924(c)(1) to not simply be a penalty enhancing provision. See Respondent's Brief at 26, *Rodriguez-Moreno* (No. 97-1139).

²³⁶ S. REP. NO. 98-225, at 313 (1983). See *supra* notes 49-65 and accompanying text.

²³⁷ 435 U.S. 6 (1978).

²³⁸ *Id.* at 12.

²³⁹ See *id.* at 10 (holding that Congress did not mean for § 924(c)(1) to be a sentencing enhancement); S. REP. NO. 98-225, at 313 (1983).

²⁴⁰ *Rodriguez-Moreno*, 119 S. Ct. at 1243.

²⁴¹ *Id.*

²⁴² See *id.*

²⁴³ See *United States v. Palma-Ruedas*, 121 F.3d 841, 849 (3d Cir. 1997).

²⁴⁴ *Id.* at 850 n.6.

²⁴⁵ See *id.*

²⁴⁶ See *Rodriguez-Moreno*, 119 S. Ct. at 1242.

B. THE FRAMERS INTENDED TO LIMIT GOVERNMENTAL POWER
THROUGH THE VENUE CLAUSE

Strikingly, neither the majority nor the dissent in this case acknowledged the constitutional concerns implicit in the Court's ruling,²⁴⁷ despite the constitutional boundaries set by the venue provisions through which the Court navigated.²⁴⁸ Actually, though, this case provided a tempting opportunity to ignore the constitutional ramifications. First, Rodriguez-Moreno and his fellow kidnappers/drug pushers are unsympathetic characters, as painted by the Third Circuit.²⁴⁹ Second, Maryland is presumably just as foreign as New Jersey to this band of Texas outlaws, undermining a traditional venue concession of allowing the accused to go through a trial in familiar surroundings.²⁵⁰ Finally, because the victim, Avendano, was neither a sympathetic character nor a resident of Maryland, the citizens of Maryland would presumably hardly feel slighted by having Rodriguez-Moreno tried outside of their borders.²⁵¹ Despite these drawbacks, the history of the venue provision begs that it not be ignored.²⁵²

Though the Framers of the Constitution did not debate either the venue or the vicinage provisions of the Constitution, the Framers most likely included the provisions as a way to limit federal power.²⁵³ The Declaration of Independence provides clues leading to the logical determination that those provisions, among other possible justifications meant to protect the accused, would be a limiting force upon the power of the federal government.²⁵⁴ The Declaration of Independence expressed

²⁴⁷ See *id.* at 1241-46.

²⁴⁸ See *supra* notes 5-11 and accompanying text.

²⁴⁹ See *Palma-Ruedas*, 121 F.3d at 845-47.

²⁵⁰ See *supra* notes 29-36 and accompanying text. The justification for upholding the venue provision based on convenience of the accused has been criticized as outmoded in today's highly mobile society. See Norman Abrams, *Conspiracy and Multi-Venue in Federal Criminal Prosecutions*, 9 UCLA L. REV. 751 (1962). Abrams argues that the venue provision "does not take into account the residence of the accused" and thus bears "no necessary connection to the location of the victim, witness, documents or other similar factors." *Id.* at 817.

²⁵¹ See *supra* note 26 and accompanying text.

²⁵² See *supra* notes 12-36 and accompanying text.

²⁵³ See *supra* notes 21-36 and accompanying text.

²⁵⁴ See THE DECLARATION OF INDEPENDENCE para. 16 (U.S. 1776). See also *supra* notes 21-28 and accompanying text.

dismay that colonists could be forced to go to England for trial, and that English soldiers did not have to be tried for their alleged crimes within the colonies.²⁵⁵ The royal government, it was perceived, could determine a likely outcome through the choice of venue.²⁵⁶ To the colonists, this was unacceptable.²⁵⁷ Thus, the limitation of vicinage and venue to the place where the crime was committed became an important right protected by many of the independent colonies, and later by the United States Constitution.²⁵⁸

Further, the right to have a jury from the district where the crime was committed (the vicinage provision), which has historically been indistinguishable from the right to a proper venue,²⁵⁹ was placed in the Sixth Amendment, surrounded by other rights which limits governmental power, including the right to a speedy trial, the right to be informed of the government's accusation, and the right to counsel.²⁶⁰ The Supreme Court in *United States v. Johnson*²⁶¹ accepted the logical conclusion that the Framers meant to limit federal power through the venue and vicinage provisions, finding that compromising the venue provision of the Constitution could lead to "the appearance of abuses, if not abuses, in the selection of what may be deemed a tribunal favorable to the prosecution."²⁶² This reasoning was later confirmed in *Travis v. United States*,²⁶³ where the Court held that "venue provisions in Acts of Congress should not be so freely construed as to give the Government the choice of a 'tribunal favorable' to it."²⁶⁴

The Supreme Court's decision in this case is constitutionally dangerous on three levels. First, it allows administrative convenience, even without legislative branch approval, to trump a constitutional right.²⁶⁵ Allowing the government to choose the most

²⁵⁵ THE DECLARATION OF INDEPENDENCE para. 16 (U.S. 1776).

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ See Kershen, *supra* note 12, at 813.

²⁵⁹ See WRIGHT, *supra* note 7, at 579.

²⁶⁰ U.S. CONST. amend. VI.

²⁶¹ *United States v. Johnson*, 323 U.S. 273 (1944).

²⁶² *Id.* at 275.

²⁶³ 364 U.S. 631 (1961).

²⁶⁴ *Id.* at 634 (quoting *Johnson*, 323 U.S. at 275).

²⁶⁵ Cf. *United States v. Palma-Ruedas*, 121 F.3d 841, 850 (3d Cir. 1997) (noting that constitutional principles should not easily give way to administrative convenience).

favorable tribunal for the prosecution places the government in an inherently better position from which to try the case.²⁶⁶ Conversely, the accused will be forced to expend more resources as evidence and witnesses, which are more likely to be found where the offense took place, are left behind.²⁶⁷ While this is appealing from a public policy position, as taxpayers have a monetary incentive in allowing federal prosecutors to work as efficiently as possible, the provisions of the Constitution protecting the rights of the accused "should not be hastily balanced away."²⁶⁸ Giving the government an inherent advantage over the accused in tribunal choice cuts against the spirit of the venue guarantees within the Constitution.²⁶⁹

Second, this decision provides a precedent that invites governmental abuse, as the government in similar factual situations can actively choose the most favorable venue in which to try the case.²⁷⁰ By allowing the government to try Rodriguez-Moreno in a jurisdiction of questionable constitutionality, the Court has implicitly stretched the boundaries within which government prosecutors work.²⁷¹ The Supreme Court essentially allowed the government in this case to choose, anywhere along the path from Texas to New York, the forum in which to try the § 924(c)(1) offense.²⁷² While the prosecutors ostensibly (and most likely) tried the case simply in the most convenient forum,²⁷³ nothing prohibits the government now from choosing a forum in a similar case for purely strategic reasons.²⁷⁴ In *Corona*, one can imagine that the government felt more comfortable try-

²⁶⁶ *Cf. id.* ("Essentially the government wants to have the option of venue . . . it does not want to be restricted to trying these cases in the venue where the § 924 violation occurred.").

²⁶⁷ Kershen, *supra* note 12, at 810-11.

²⁶⁸ *Palma-Ruedas*, 121 F.3d at 850.

²⁶⁹ *See Johnson*, 323 U.S. at 276.

²⁷⁰ *Cf. id.* (expressing concern that broadening venue could lead to the appearance of abuse, if not outright abuse).

²⁷¹ *See* Brief Amicus Curiae of the National Association of Criminal Defense Lawyers at 1-2, *United States v. Rodriguez-Moreno*, 119 S. Ct. 1239 (1999) (No. 97-1139) (noting that this case "represents an unprecedented and unwarranted expansion of [the government's] power" to choose venue).

²⁷² *See Rodriguez-Moreno*, 119 S. Ct. at 1244.

²⁷³ *See Palma-Ruedas*, 121 F.3d at 850 n.5.

²⁷⁴ *See* STORY, *supra* note 19, § 925 (stating that a purpose of the venue provision was to guard against being subjected to a jury who may "cherish animosities, or prejudices" against the accused).

ing the substantive drug-trafficking charges in the more conservative Nevada, rather than relatively liberal California.²⁷⁵ This is not conceptually different from the time the royal government, as perceived by the colonists, could determine a probable outcome through the choice of venue.²⁷⁶ The venue provisions were likely enacted to protect against even the appearance of such abuse.²⁷⁷

Finally, the Court's decision takes power away from localities by not protecting a community's right to stage the trial of local offenses.²⁷⁸ States have traditionally held the balance of power within the federal system over shaping criminal statutes in a way that reflects local preferences.²⁷⁹ As the federal government has increasingly encroached into this territory, the states, through the venue provisions, have at least had the consolation of trying the accused with local juries, thus mirroring, to some extent, local values in a trial's outcome.²⁸⁰ Because the federal government was given the power to choose the venue for Rodriguez-Moreno's § 924(c)(1) offense, this consolation to Maryland, however small, was lost.²⁸¹

Realizing the important historical background and compelling justifications within the venue provisions, the Supreme Court has previously noted that, in criminal cases, the question of venue is not a legal technicality, but a significant matter of public policy.²⁸² Thus, "if an enactment of Congress equally permits the underlying spirit of the constitutional concern for trial in the vicinage to be respected rather than to be disrespected, construction should go in the direction of constitutional policy."²⁸³ The Supreme Court would have done well to adhere to its own advice.²⁸⁴

In this case, the constitutional concern for proper venue was not respected by the very court charged with providing such

²⁷⁵ See *supra* notes 68-79 and accompanying text.

²⁷⁶ See *supra* notes 12-24 and accompanying text.

²⁷⁷ See *United States v. Johnson*, 323 U.S. 273, 275-76 (1944).

²⁷⁸ See AMAR, *supra* note 23, at 124 & n.163.

²⁷⁹ See *id.* See also *supra* notes 25-28 and accompanying text.

²⁸⁰ See *supra* notes 25-36 and accompanying text.

²⁸¹ See *supra* notes 29-36 and accompanying text.

²⁸² *Johnson*, 323 U.S. at 276 (1944).

²⁸³ *Id.*

²⁸⁴ See *United States v. Palma-Ruedas*, 121 F.3d 841, 850 (3d Cir. 1997).

constitutional protections.²⁸⁵ Thus, where Congress does not explicitly enact a constitutionally acceptable venue provision, constitutional concerns should persuade the Court to err on the side of strict venue interpretation.²⁸⁶

VI. CONCLUSION

The Supreme Court in *United States v. Rodriguez-Moreno* held that venue was proper in a prosecution under § 924(c)(1) in any federal jurisdiction where the underlying crime was committed.²⁸⁷ Because § 924(c)(1) defines a unitary crime with two distinct elements, according to the majority, it is proper to prosecute the defendant in any district where the underlying crime was committed, so long as the gun offense was committed “during and in relation to” the underlying offense.²⁸⁸ The majority, though, errs by reading the word “during” out of the statute, leading to the mistaken conclusion that § 924(c)(1) presents two separate offenses.²⁸⁹ Further, the congressional history does not support the Court’s relaxed reading of the statute and choice of the verb test as the appropriate interpretive tool.²⁹⁰ Finally, the venue provisions of the Constitution require deference when the Court adjudicates close cases.²⁹¹

Because the Supreme Court improperly interpreted § 924(c)(1), and ignored the Constitutional implications of defining the venue in this case broadly, *United States v. Rodriguez-Moreno* was improperly decided.

Todd Lloyd

²⁸⁵ See *id.*

²⁸⁶ See *id.*

²⁸⁷ See *United States v. Rodriguez-Moreno*, 119 S. Ct. 1239, 1244 (1999).

²⁸⁸ See *id.*

²⁸⁹ See *id.* at 1245 (Scalia, J., dissenting).

²⁹⁰ See *supra* notes 226-46 and accompanying text.

²⁹¹ See *United States v. Johnson*, 323 U.S. 273, 276 (1944). See also *supra* notes 282-86 and accompanying text.

