

SIXTH AMENDMENT & ARTICLE III, § 2—THE RIGHT TO A JURY TRIAL IN CRIMINAL PROSECUTIONS—PROPER VENUE TO PROSECUTE CRIMINAL DEFENDANTS FOR USING OR CARRYING A FIREARM, DURING AND IN RELATION TO A CRIME OF VIOLENCE, EXTENDS TO ANY DISTRICT WHERE A CRIME OF VIOLENCE IS COMMITTED—*United States v. Rodriguez-Moreno*, 119 S. Ct. 1239 (1999).

The Supreme Court of the United States recently held that criminal defendants may be prosecuted under federal law for the use or possession of a firearm, in relation to or during a crime of violence by a district court sitting in any state where such violent crime is committed. *United States v. Rodriguez-Moreno*, 119 S. Ct. 1239, 1241 (1999). The Court reasoned that if a criminal defendant commits an underlying violent crime, while using or in possession of a firearm, and the violent crime begins in one state and continues into one or more other states, the Government's prosecution of the criminal defendant's use or possession of a firearm in connection with that violent crime is properly venued in any state where the criminal defendant commits the underlying violent crime. *See id.* Consequently, the Court validated Congressional efforts to reduce violent crime by holding that a prosecution for the use or possession of a firearm under federal law should transcend state geographical boundaries when a firearm is used during a crime of violence.

Respondent Rodriguez-Moreno and several other individuals were hired as bounty hunters by a Texas drug distributor after a New York drug dealer stole thirty kilograms of cocaine during a failed a drug transaction in Houston, Texas. *See id.* at 1241. Rodriguez-Moreno and his associates were instructed to capture the middleman in the drug transaction, Ephrain Avendano, and restrain him until the recalcitrant New York drug dealer could be located. *See id.* As directed, Rodriguez-Moreno and the other mercenaries apprehended Avendano, and subsequently drove with their prisoner from Texas to New Jersey, then to New York and Maryland, in an effort to find the coveted New York drug dealer. *See id.* Throughout their interstate odyssey in search of a drug dealer, the Rodriguez-Moreno crew steadfastly traveled with Avendano as their captive. *See id.*

When the kidnapers ultimately transported their hostage to Maryland, Rodriguez-Moreno evidently determined that a continued search for the New York drug dealer would be futile and unproductive. *See id.* at 1241-42. Respondent secured a .357 magnum revolver in Maryland and told the Texas drug distributor that he believed they should simply kill Avendano and abandon their search for the New York drug dealer. *See id.* In fact, on at least one occasion, Rodriguez-Moreno pointed the revolver at Avendano from point blank range, but respondent's associates dissuaded Rodriguez-Moreno from completing Avendano's execution. *See id.* at 1242. Thereafter, Avendano eluded his captors and notified the Maryland police. *See id.* Rodriguez-Moreno and

the other kidnapers were promptly arrested by Maryland police officers, who subsequently detected respondent's fingerprints on the confiscated revolver. *See id.*

Consequently, the Maryland police charged Rodriguez-Moreno and his henchmen with various crimes, including kidnapping Avendano, conspiracy to commit kidnapping and the use and possession of a firearm in connection with a kidnapping under 18 U.S.C. § 924(c)(1). *See id.* The Government commenced a joint prosecution against all co-defendants in the United States District Court for the District of New Jersey and, at the conclusion of the Government's case, respondent Rodriguez-Moreno moved to dismiss the § 924(c)(1) charge based on lack of venue. *See id.* Respondent argued that New Jersey was an improper venue due to the fact that, although the Government established that Rodriguez-Moreno used or possessed a firearm in connection with Avendano's kidnapping within the State of Maryland, the Government failed to prove that Rodriguez-Moreno committed such an act within the State of New Jersey. *See id.* In fact, respondent maintained that venue for the § 924(c)(1) charge was only proper in Maryland because the Government could only establish that Rodriguez-Moreno violated § 924(c)(1) by using a firearm during Avendano's kidnapping within the State of Maryland. *See id.*

The District Court summarily denied respondent's motion to dismiss and a jury later convicted Rodriguez-Moreno on both the kidnapping counts and the § 924(c)(1) charge. *See id.* Respondent was accordingly sentenced to a mandatory sixty month prison term for the § 924(c)(1) offense and an additional eighty-seven months for the kidnapping convictions. *See id.* Rodriguez-Moreno then appealed to the United States Court of Appeals for the Third Circuit, and a divided Court of Appeals subsequently reversed respondent's conviction on the § 924(c)(1) charge. *See id.* A key factor in the Third Circuit's reversal of the conviction was a reliance on a method of statutory interpretation referred to as the "verb test." *See id.* Under the "verb test," the Third Circuit majority closely scrutinized the syntax and verb tense used by Congress in drafting the statute and determined that a defendant could only violate § 924(c)(1) in the state where a criminal defendant "carries" or "uses" a firearm during a crime of violence. *See id.* Therefore, the court held that New Jersey was an improper venue for the prosecution of a § 924(c)(1) charge because Maryland was the only state where Rodriguez-Moreno kidnapped Avendano while "carrying" or "using" a firearm. *See id.*

By contrast, a dissenting judge from the Third Circuit eschewed reliance on the "verb test" and argued that the majority's analysis was erroneously based upon "grammatical arcana." *Id.* Rather than focusing on statutory verbiage, the dissenting judge maintained that the court should have considered the "substance" of the challenged statute to determine where venue is proper. *See id.* The dissent reasoned that the "substance" of § 924(c)(1) embodies a Congressional mandate to criminalize certain specifically proscribed conduct (i.e. use

of a firearm during a kidnapping), and Congress intentionally incorporated a violent crime (i.e. kidnapping) as an essential element of the proscribed criminal conduct. *See id.* Thus, the dissent concluded that New Jersey venue for a criminal prosecution under § 924(c)(1) was proper because venue should lie “in any district in which the defendant committed the underlying crime of violence.” *Id.*

Thereafter, the Government contended that the reversal of respondent’s conviction by the Third Circuit was incongruous with a prior decision by the United States Court of Appeals for the Fifth Circuit, and the Government accordingly petitioned for *certiorari* with the Supreme Court of the United States. *See id.* The Court granted *certiorari* and subsequently reversed the Third Circuit’s decision by holding that venue for respondent’s trial was proper within the State of New Jersey. *See id.*

Writing for the majority, Justice Thomas initially assessed the well-established constitutional venue mandate under Article III, Section 2 of the United States Constitution, which proclaims that “the Trial of all Crimes . . . shall be held *in the State where the said Crimes shall have been committed.*” *Id.* (quoting U.S. CONST. art. III, § 2, cl. 3) (emphasis added). The Court also noted that the constitutional venue mandate is further supported by the criteria set forth under the Sixth Amendment, which declares 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.” *Id.* (quoting U.S. CONST. amend. VI) (emphasis added).

In accordance with the express constitutional venue mandate, Justice Thomas observed that a reviewing court must utilize a two-step venue inquiry to determine the *locus delicti*, the place in which a criminal offense was committed. A court must first discern the specific conduct that constitutes the substantive criminal offense, and a court must then pinpoint the location where such criminal conduct actually occurred. *See id.* at 1242-43 (citing *United States v. Cabrales*, 524 U.S. 1, 6-7 (1998)). After enunciating the Court’s two-step venue inquiry, Justice Thomas next turned to an analysis of the venue scrutiny employed by the Third Circuit in its evaluation of § 924(c)(1). *See id.* at 1243.

The majority first acknowledged that the Third Circuit relied upon the “verb test” and exclusively considered the verbs incorporated into the statutory text of § 924(c)(1) to define the substantive criminal offense. *See id.* While the Court recognized that the “verb test” may serve some practical purpose in the context of statutory interpretation, Justice Thomas nonetheless chided the Third Circuit for “rigidly” applying the “verb test” and ignoring the residual statutory language of § 924(c)(1). *See id.* The majority based its rejection of the Third Circuit’s stringent application of the “verb test” on the perception that the test inevitably and impermissibly narrows the type of conduct which could constitute a substantive criminal offense under the statute. *See id.* More

importantly, however, Justice Thomas cautioned that a strict application of the “verb test” would create a tangible risk that certain conduct, which Congress expressly intended to statutorily criminalize, could slip through the cracks of the criminal justice system and remain unprosecuted. *See id.*

Echoing the tenets expressed by the Third Circuit dissent, Justice Thomas next examined the statutory text of § 924(c)(1) and concluded that, due to its reliance on the “verb test,” the lower court failed to recognize a conduct element under the statute. *See id.* Notwithstanding the fact that Congress interposed a “violent crime” element to the criminal conduct (i.e. kidnapping) within a prepositional phrase—opposed to conjugated with a verb—Justice Thomas nonetheless concluded that § 924(c)(1) contained two separate, but intertwined, essential conduct elements: (1) the “using and carrying” of a firearm; and (2) the commission of a crime of violence. *See id.* The majority also distinguished these “essential” conduct elements under § 924(c)(1) from conduct that could be considered a mere “circumstance” of the underlying criminal activity. *See id.* at 1243, n.4 (citing *Cabrales*, 524 U.S. at 7). Consequently, the Court flatly rejected the Third Circuit’s contention that § 924(c)(1) contained one conduct element, thus determining that the Government must establish both essential conduct elements under the statute to sustain respondent’s prosecution. *See id.* at 1243. Therefore, the Government must show that Rodriguez-Moreno used and carried a firearm, committed a kidnapping as a crime of violence, and that the firearm was used “during and in relation to” the crime of violence. *See id.*

Moreover, respondent attempted to argue that § 924(c)(1) should be considered a “point-in-time” statute, whereby the Government could only establish a violation of the statute in which both the kidnapping and the weapon possession occur simultaneously. *See id.* Justice Thomas found respondent’s “point-in-time” argument entirely unpersuasive. *See id.* The majority noted that several circuit courts have concluded that kidnapping is a “unitary crime” which begins when a victim is apprehended, continues until a victim is liberated, and may transcend geographic boundaries. *See id.* at 1243-44. Thus, the majority ultimately rejected respondent’s argument by observing that it would be imprudent for the Court to consider the conduct proscribed under § 924(c)(1) as a “point-in-time” offense when the Government relies upon a continuing criminal act (i.e. kidnapping) to satisfy the “crime of violence” element under the statute. *See id.* at 1244.

In conclusion, Justice Thomas referred to a prior holding in which the Court resolved that if a criminal offense consists of more than one element, and those elements occur in more than one locality, the Government may prosecute the entire criminal act “where any part can be proved to have been done.” *Id.* (citing *United States v. Lombarbo*, 241 U.S. 73, 77 (1916)). Therefore, because the Government’s prosecution of Rodriguez-Moreno was properly venued in any state where the underlying kidnapping occurred, the majority re-

versed the Third Circuit's decision and concluded that venue was proper for respondent's trial on both the kidnapping charge and the pendant § 924(c)(1) offense, within the State of New Jersey. *See id.*

A strong dissent authored by Justice Scalia and joined by Justice Stevens, sharply criticized the majority for its determination that the Government could prosecute the respondent on criminal charges in any state where a portion of statutorily-prohibited conduct occurs. *See id.* at 1244 (Scalia, J., dissenting). On the contrary, Justice Scalia maintained that the plain statutory language of § 924(c)(1) clearly illustrates that prosecutors may only permissibly raise criminal charges in the state where a defendant *both* engages in the prohibited conduct *and* uses or possesses a firearm in connection with such conduct. *See id.* (emphasis added).

As support for the dissent's position, Justice Scalia first noted that every element of Rodriguez-Moreno's criminal conduct, except the use or carriage of a firearm, is punishable under other provisions of federal law. *See id.* Further, the dissent distinguished § 924(c)(1) from other federal statutes by positing that Congress must specifically intend to punish the act of "using or carrying" a firearm during the commission of a crime because the presence of a weapon makes that criminal conduct "more dangerous." *Id.* Under such a premise, Justice Scalia maintained that venue could only properly lie in Maryland because Maryland was the only state in which Rodriguez-Moreno both kidnapped Avendano and used a firearm in connection with Avendano's kidnapping. *See id.* at 1245 (Scalia, J., dissenting).

Justice Scalia next considered the Court's statutory interpretation of § 924(c)(1) and its reliance on the *United States v. Lombarbo* decision. *See id.* The dissent initially disagreed with the majority's assessment that § 924(c)(1) criminalizes conduct that could potentially occur in more than one locality. *See id.* Justice Scalia argued, on the other hand, that where one criminal act occurs, the other criminal act must also necessarily occur because the two conduct elements in the statute are conjoined by the word "during." *See id.* The dissenting Justice scolded the majority for its statutory construction, and reasserted that a proper interpretation of § 924(c)(1) would mean that the only state where the Government could establish that Rodriguez-Moreno used or carried a firearm "during" Avendano's kidnapping was Maryland. *See id.*

Additionally, Justice Scalia maintained that the majority's characterization of kidnapping as a "continuing" offense was inconsequential to the issue of whether Rodriguez-Moreno could be prosecuted in New Jersey under § 924(c)(1). *See id.* The dissent surmised that if Rodriguez-Moreno actually used or carried a firearm during Avendano's kidnapping, which "continued" through four states, the Government could have prosecuted respondent under § 924(c)(1) in any one of the four states. *See id.* Nonetheless, the Justice observed that the undisputed facts before the Court illustrate that Rodriguez-Moreno used or carried a firearm only during Avendano's kidnapping in

Maryland. *See id.* The dissent concluded by acknowledging Rodriguez-Moreno's constitutional right to a trial in the state where a crime was allegedly committed, and declared that the decision by the *Rodriguez-Moreno* majority represents a movement away from statutory interpretation designed to protect against oppressive governmental action and serves to transgress the rights guaranteed to all citizens under the Constitution. *See id.* at 1245-46 (Scalia, J., dissenting).

ANALYSIS

The decision in *United States v. Rodriguez-Moreno* represents a strong message from the Supreme Court that rising levels of violence in our society cannot be tolerated under any circumstance, and persons who commit violent crimes with a firearm will face strictly-enforced, federal criminal penalties for their actions. As nightly television news reports incessantly bombard viewers with stories focusing on senseless acts of violence (e.g. school shootings, church burnings, and terrorist attacks), the *United States v. Rodriguez-Moreno* decision suggests that the Court acknowledged the existence of pervasive criminal violence, and tacitly approved efforts by Congress to hedge this burgeoning societal problem.

Notwithstanding the *Rodriguez-Moreno* majority's endorsement of Congressional measures designed to counterbalance rising levels of violent crime, the Court cannot defy its role as the ultimate interpreter of the Constitution by allowing a trend in the anti-crime movement to interfere with the rights afforded under the Constitution. In fact, throughout the framing of the Constitution, our Founding Fathers maintained that the independence of the judicial branch of the federal government would allow the Supreme Court to become the guardian of the Constitution and the guarantor of individual rights against oppressive conduct by the other governmental branches. The Framers clearly intended that, on the one hand, the Court would follow the letter of the law, and on the other hand, Congress would remain sensitive to the political and ideological will of the people of the United States.

While Article III, Section 2 of the United States Constitution guarantees the right to a trial held in the state where a defendant commits a crime, the Court in *Rodriguez-Moreno* nonetheless declined to follow the letter of the law and failed to recognize that the only state where respondent "committed" a violation of § 924(c)(1)—by using a firearm during Avendano's kidnapping—was the State of Maryland. Instead, the Court improperly responded to a ground swell of public opinion against violent crime and endorsed a dramatic expansion of federal prosecutorial authority over violent criminals by curtailing the venue rights guaranteed under Article III, Section 2 of the Constitution.

Although law enforcement officials, government prosecutors, and politicians trying to create a "tough on crime" image will likely praise the *Rodri-*

quez-Moreno holding, the majority's decision signifies a clear deviation by the Court from its practice of following the letter of the law, as well as a regression from its position once envisioned by the Framers: guardian of the Constitution. Furthermore, Justice Scalia cautioned that where the Court declines to follow the letter of the law, "the law departs 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." *See id.* at 1246 (Scalia, J., dissenting). In the future, the Court should understand its function as an independent interpreter of the Constitution, resist political and sociological influences that affect Congressional policy, and avoid reaching decisions that may be "politically correct" but actually serve to compromise the Constitutional rights of all citizens.

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