No. 97-1139

In the Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA, PETITIONER

v.

JACINTO RODRIGUEZ-MORENO

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether venue in a prosecution for using or carrying a firearm during and in relation to a crime of violence under 18 U.S.C. 924(c)(1) is proper in any district in which the defendant committed the underlying crime of violence, even if the defendant did not use or carry the firearm in that district.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-56a) is reported at 121 F.3d 841.

JURISDICTION

The judgment of the court of appeals was entered on July 30, 1997; an amended judgment was entered on September 3, 1997. See J.A. 2-4. A petition for rehearing was denied on September 26, 1997. Pet. App. 57a-58a. On December 16, 1997, Justice Souter extended the time in which to file a petition for a writ of certiorari to and including January 25, 1998. The petition for certiorari was filed on January 7, 1998, and was granted on June 8, 1998. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULE INVOLVED

1. Article III, Section 2, Clause 3, of the United States Constitution provides as follows:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

2. The Sixth Amendment to the United States Constitution provides in pertinent part as follows:

> In 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, which district shall have been previously ascertained by law[.]

3. Section 3237(a) of Title 18, United States Code, provides as follows:

> Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.
>
> Any offense involving the use of the mails, transportation in interstate or foreign commerce, or the importation of an object or person into the United States is a continuing offense and, except

> as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce, mail matter, or imported object or person moves.

4. Rule 18, Federal Rules of Criminal Procedure, provides as follows:

> Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed. The court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses and the prompt administration of justice.

5. Section 924(c)(1) of Title 18, United States Code, provides in pertinent part as follows:

> Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, 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[.] * * * Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed run concurrently with any other term of imprisonment including that im-

posed for the crime of violence or drug trafficking crime in which the firearm was used or carried.

STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, six defendants, including respondent, were convicted on one count of conspiracy to kidnap Ephrain Avendano and his wife Marbel Avendano, in violation of 18 U.S.C. 1201(c), and one count of kidnapping Ephrain Avendano, in violation of 18 U.S.C. 1201(a)(1). Five of the defendants, including respondent, were also convicted on one count of kidnapping Marbel Avendano, in violation of 18 U.S.C. 1201(a)(1). Three of the defendants, but not respondent, were convicted on one count of conspiracy to distribute cocaine and to possess cocaine with intent to distribute, in violation of 21 U.S.C. 846. Respondent was the only defendant convicted of using or carrying a firearm during and in relation to a crime of violence (the kidnapping of Ephrain Avendano), in violation of 18 U.S.C. 924(c)(1). See Pet. App. 2a.

1. This case arose out of a cocaine transaction between Omar Torres-Montalvo (Montalvo), a drug distributor operating out of Texas, and Fanol Ochoa, a New York drug dealer who made arrangements to purchase 30 kilograms of cocaine from Montalvo but absconded with the cocaine without paying for it. The transaction was arranged by Ephrain Avendano, acting as the middleman, who flew to Texas to help Ochoa make the arrangements with Montalvo. On December 11, 1994, Avendano and a colleague of Ochoa's, known as "Baldy," obtained 30 kilograms of cocaine from Montalvo and his colleague, Jorge Luis Pacheco. Baldy then drove away with the drugs,

presumably to give them to Ochoa. When Avendano paged Ochoa to secure payment for the drugs, Ochoa did not answer his pager. Pet. App. 3a-4a.

In response to Ochoa's failure to pay for the drugs, on December 12, 1994, Montalvo and Pacheco kidnapped Avendano and held him in various locations in Houston while they searched for Ochoa. Montalvo also hired defendant Jairo Pedroza-Ortiz, defendant Milton Palma-Ruedas, and respondent to look for Ochoa and to keep Avendano captive. After hearing that Ochoa had returned to New York, respondent, Pacheco, Montalvo, Ortiz, and Palma-Ruedas forcibly drove Avendano from Texas to Avendano's apartment in Middlesex, New Jersey. The defendants detained Avendano and his wife in their New Jersey apartment while they continued their search for Ochoa. Pet. App. 3a-5a.

On January 1, 1995, the kidnappers took Avendano to the house of defendant Randy Alvarez-Quinones in Newburgh, New York. After a police detective inquired about one of the cars at the Newburgh house, the kidnappers decided to drive Avendano to Maryland. Respondent, his five co-defendants, and Avendano arrived at a house in Maryland early on January 2, 1995. With the other defendants watching, respondent grabbed a .357 magnum revolver that was in the house, put it to Avendano's neck, and stated that he was ready to kill Avendano. Avendano eventually escaped from the house, ran to a neighbor's house a few blocks away, and called his wife in New Jersey. Mrs. Avendano contacted the police in New Jersey, and the neighbor called the police in Maryland. Pet. App. 6a-7a.

After obtaining a search warrant, Maryland police entered the house from which Avendano had escaped.

The police arrested respondent and his co-defendants and seized the .357 magnum, on which they found respondent's fingerprint. Pet. App. 7a.

2. The six defendants were tried jointly in the United States District Court for the District of New Jersey on charges of conspiring to distribute cocaine (J.A. 18), conspiring to kidnap Mr. and Mrs. Avendano (J.A. 12-16), kidnapping Mr. Avendano (J.A. 16), and kidnapping Mrs. Avendano (J.A. 17). Respondent was also initially charged in the same court with one count of violating 18 U.S.C. 924(c)(1), by using and carrying a firearm during and in relation to crimes of violence (the kidnappings of Mr. and Mrs. Avendano) and during and in relation to a drug trafficking crime (the drug conspiracy). J.A. 19.

At the conclusion of the government's case, the court dismissed the drug conspiracy charges against respondent, Palma-Ruedas, and Ortiz, pursuant to Federal Rule of Criminal Procedure 29(a). Pet. App. 7a-8a.[1] Respondent also moved to dismiss the Section 924(c)(1) charge against him for lack of venue in the District of New Jersey. Pet. App. 9a. The government acknowledged that the evidence at trial showed that respondent had used and carried the .357 magnum revolver only after the kidnappers arrived in Maryland. The government submitted, however, that venue for the Section 924(c) charge was proper in New Jersey, because respondent committed one of the

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[1] The district court accepted the argument made by those defendants, but contested by the government, that persons who agree with drug sellers to assist in the collection of money owed for drugs that have already been distributed do not thereby join a drug distribution conspiracy. See Tr. 11.6-11.9 (C.A. App. 468-471).

elements of the offense, the crime of violence (*i.e.*, the kidnapping), in part in New Jersey. J.A. 46-47. The district court agreed, and denied the motion to dismiss the Section 924(c)(1) count. J.A. 54.

The jury found respondent guilty on one count of conspiracy to kidnap Mr. and Mrs. Avendano, one count of kidnapping Mr. Avendano, one count of kidnapping Mrs. Avendano, and one count of using or carrying a firearm during and in relation to the kidnapping of Mr. Avendano. Pet. App. 2a, 7a-8a.[2] Respondent was sentenced to 87 months' imprisonment on the three kidnapping counts and to a mandatory consecutive 60-month prison term on the Section 924(c) count. *Id.* at 8a n.2.

3. a. The court of appeals affirmed the convictions of all six defendants, except for respondent's Section 924(c)(1) conviction, which the panel reversed by a 2-1 vote. Pet. App. 1a-40a. The majority concluded that venue for the Section 924(c) count was not proper in New Jersey because respondent did not use or carry the firearm there, even though the predicate kidnapping charge that formed the "crime of violence" element of the Section 924(c) charge was committed

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[2] Because the court had dismissed the drug conspiracy charge against respondent, the Section 924(c) count went to the jury only on the theory that he had used or carried the firearm during and in relation to one of the kidnapping offenses, *i.e.*, the kidnapping of either Mr. or Mrs. Avendano. See J.A. 61. Because the evidence showed that respondent had used the gun in Maryland to threaten and restrain Mr. Avendano, and did not show that the firearm was used in New Jersey in the kidnapping of Mrs. Avendano, the jury's verdict rests on respondent's use of the firearm in relation to the kidnapping of Mr. Avendano. See *Griffin* v. *United States*, 502 U.S. 46, 59-60 (1991).

in part in New Jersey. *Id.* at 9a-18a. The majority aligned itself with a decision of the Ninth Circuit, *United States* v. *Corona*, 34 F.3d 876 (1994), that had adopted a "key verb" or "active verb" test, that "examines the verbs in the statute that define the criminal conduct to determine where the offense was committed." Pet. App. 12a, 14a. The court rejected (*id.* at 15a) the "more pragmatic approach" of the Fifth Circuit in *United States* v. *Pomranz*, 43 F.3d 156, cert. denied, 516 U.S. 986 (1995), which had reasoned that "a violation of § 924(c)(1) is necessarily intertwined with the predicate act of drug trafficking or committing a violent crime." Pet. App. 12a-13a.

Under the "verb test," the majority stated,

> [Section] 924(c)(1) unambiguously designates the criminal conduct that is prohibited as "using" or "carrying" a firearm. It follows that one "commits" a violation of § 924(c)(1) in the district where one "uses" or "carries" a firearm. Accordingly, we conclude that because the crime committed by [respondent]—*carrying* or *using* a firearm in relation to a crime of violence—occurred only in Maryland, [respondent] could only have been properly tried in Maryland.

Id. at 15a. The court acknowledged that "Congress could have drafted [Section 924(c)(1)] to allow venue to lie in any district where the government could properly bring the related crime of violence or drug trafficking offense," but it concluded that the language actually chosen by Congress did not accomplish that result. *Id.* at 18a.

b. Judge Alito dissented from the reversal of respondent's Section 924(c)(1) conviction. Pet. App.

40a-56a. Following this Court's guidance that venue is dependent on "a realistic appraisal of the 'nature of the crime' defined by the statute," *id.* at 41a (quoting *United States* v. *Anderson*, 328 U.S. 699, 703 (1946)), he concluded "that the commission of the crime of violence or drug trafficking crime is a critical element of the [Section 924(c)(1)] offense and that permitting venue in a district in which the commission of this underlying crime occurred is consistent with the Constitution's venue provisions." *Ibid.*

Judge Alito observed that "while the 'verb test' may provide a useful first cut at determining venue," this Court "has never embraced the 'verb test,'" and "there are complicated crimes for which a rigid grammar-based test may not be appropriate." Pet. App. 48a. In the case of Section 924(c)(1), for example, "the defendant's commission of the underlying crime of violence or drug trafficking offense forms a vital part of the evil that Congress sought to punish and prevent." *Id.* at 49a. Indeed, "a central focus, if not *the* central focus, of the statute is the commission of the underlying crime." *Id.* at 49a-50a. Judge Alito therefore would have held that venue on the Section 924(c) charge was proper in the District of New Jersey because the crime of violence was committed there, and he would have affirmed respondent's Section 924(c)(1) conviction. *Id.* at 56a.

4. The government filed a petition for rehearing with a suggestion for rehearing en banc addressed solely to the venue question. On September 26, 1997, the Third Circuit voted 6-6 to deny that petition. Pet. App. 57a-58a.

SUMMARY OF ARGUMENT

Under the Constitution's venue provisions, a criminal defendant shall be tried in the State and district in which the offense "shall have been committed." It has long been recognized that a crime is "committed" in every district in which any *actus reus* element of the crime is carried out. Therefore, prosecution for a crime may be brought in a district in which an *actus reus* element of the crime was carried out by the defendant, even if other acts constituting elements of the crime were carried out in other districts. "Undoubtedly 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." *United States* v. *Lombardo*, 241 U.S. 73, 77 (1916).

Application of these principles to 18 U.S.C. 924(c)(1) leads to the conclusion that a defendant may be prosecuted for using or carrying a firearm during and in relation to a crime of violence in a district where the predicate crime of violence occurred, even if the gun was used or carried only in a different district. Section 924(c)(1) has two essential elements requiring proof of acts by the defendant (or acts for which he may be held accountable): (1) the commission of a federal crime of violence or drug trafficking crime, and (2) the defendant's use or carrying of a gun during and in relation to that crime. Because respondent's commission of a crime of violence was an *actus reus* element of the Section 924(c) charge against him, venue for this prosecution was proper in the District of New Jersey, where his crime of violence, kidnapping, was in part carried out.

The court of appeals erroneously concluded that venue was proper only in Maryland because that is

where respondent "used" or "carried" a firearm. The court found it controlling that the active verbs in Section 924(c) are "use" and "carry," and it therefore concluded that venue must lie only where the gun is "used" or "carried." This Court has never approved such a "verb test," however, and the test is inadequate for cases in which the statutory charge has multiple *actus reus* elements. Moreover, minor alterations in phrasing that would not change the substance of Section 924(c) would lead to a different result under the verb test. Rather than a rigid verb test, venue should turn on the actual nature of the crime and the "location of the act or acts constituting it." *United States* v. *Anderson*, 328 U.S. 699, 703 (1946). In this case, those acts include both use of a gun and commission of another crime, and venue is proper not only where the use of the gun took place but also where the predicate crime took place.

The Court's recent decision in *United States* v. *Cabrales*, 118 S. Ct. 1772 (1998), does not support the holding of the court of appeals. *Cabrales* held that venue for a prosecution for money laundering lies where the prohibited financial transactions took place, not where the crimes that generated the tainted money were committed. *Cabrales* emphasized that the acts constituting the defendant's money laundering included only the financial transactions at issue; she need not have committed, aided and abetted, or conspired to commit the underlying crimes that were the source of the laundered funds. A prosecution under Section 924(c)(1), by contrast, requires proof that the defendant committed, aided and abetted, or conspired to commit the predicate "crime of violence," during and in relation to which the gun was

used or carried; venue is therefore proper anywhere the defendant committed that crime of violence.

A rule permitting prosecution of Section 924(c) offenses wherever the predicate crimes of violence are committed is compatible with the interests of the defendant underlying the venue requirement. Consistent with Congress's intent that punishment for a Section 924(c) violation be in addition to punishment for the underlying predicate offense, the government typically joins a Section 924(c) charge with a separate charge for the underlying predicate violation. If the government were required to try the two offenses separately in different districts, the defendant would have to marshal the same evidence twice to defend himself in separate trials in different districts. If the government were forced to bring both cases only where the gun was "used," it would be difficult to bring an efficient prosecution in many multiple-object conspiracy cases where the object crimes are carried out in several states but a gun happens to be used only in one, and the place of trial may be distant from the main sources of evidence of the criminal conduct. The alternative of dropping the Section 924(c) offense would undermine Congress's intent that crimes of violence accompanied by use or carrying of firearms be subject to a mandatory five-year prison term.

ARGUMENT

VENUE FOR RESPONDENT'S OFFENSE OF USING OR CARRYING A FIREARM DURING AND IN RELATION TO A CRIME OF VIOLENCE WAS PROPER IN NEW JERSEY, EVEN THOUGH THE FIREARM WAS USED IN MARYLAND, BECAUSE THE CRIME OF VIOLENCE WAS COMMITTED IN PART IN NEW JERSEY

The question presented in this case is whether a defendant charged under 18 U.S.C. 924(c) with "us[ing] or carry[ing] a firearm" "during and in relation to a crime of violence" may be prosecuted in a district in which the "crime of violence" was committed, when the use of the firearm occurred elsewhere. The answer is supplied by the well-established rule that venue is proper for an offense in a district where the defendant commits (or is legally responsible for) an *actus reus* element of the offense, even if some other acts took place elsewhere. Accordingly, because the offense defined by Section 924(c) is "committed" in a district where the crime of violence takes place, venue for prosecution of a violation of Section 924(c) is proper where the crime of violence occurred, even if the gun was used or carried in a different district.

A. An Offense May Be Prosecuted In Any District In Which An *Actus Reus* Element Of The Offense Was Carried Out

The Constitution provides that a criminal defendant shall be tried in the State and district in which the offense "shall have been committed." U.S. Const. Art. III, § 2, Cl. 3; Amend. VI; see also Fed. R. Crim. P. 18 ("the prosecution shall be had in a district in

which the offense was committed").[3] Although, under the common law, a criminal offense was deemed to have only a single situs at which a prosecution might be brought, it has long been recognized that the Constitution does not mandate such a restrictive approach. As early as 1867, Congress provided that, in cases involving a criminal offense "begun in one judicial district of the United States and completed in another," the prosecution for such an offense might be brought "in either of the said districts, in the same manner as if it had been actually and wholly committed therein." Act of Mar. 2, 1867, ch. 169, § 30, 14 Stat. 484. Today that rule is embodied in 18 U.S.C. 3237(a), which permits prosecution in any district where an "offense was begun, continued, or completed."

This Court has likewise recognized that, where a criminal offense spans more than one district, the offense may be tried in any district in which an *actus reus* element of that offense was committed. As this Court has stated, "[u]ndoubtedly 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." *United States* v. *Lombardo*, 241 U.S. 73, 77 (1916). Indeed, this court has held venue proper in a variety of circumstances despite the absence of evidence that the defendant personally undertook any action, or indeed was ever physically

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[3] "Strictly speaking, [Article III, § 2, Cl. 3] is a venue provision, since it fixes the place of trial, while the [Sixth Amendment] is a vicinage provision, since it deals with the place from which the jurors are to be selected. This technical distinction has been of no importance." 2 C. Wright, *Federal Practice and Procedure* § 301, at 190 (2d ed. 1982) (footnotes omitted).

present, in the district in which the prosecution was brought.

It is clear, for example, that a federal crime may be "committed," for purposes of constitutional and statutory venue provisions, in any district in which acts constituting an element of the offense for which the defendant is accountable are carried out, even if performed by someone other than the defendant. In *Hyde* v. *United States*, 225 U.S. 347 (1912), the defendants were convicted of conspiracy to defraud the United States out of public lands located in Oregon and California. See *id.* at 349-351. The prosecution was brought in the District of Columbia, based on a co-conspirator's performance in that district of overt acts in furtherance of the conspiracy. Although it was not alleged either that the defendants had entered the District of Columbia or that the conspiracy had been formed there, the Court held that venue in that district was proper, based on the performance of overt acts there by the defendants' co-conspirator. *Id.* at 356-367.

The courts of appeals have also uniformly concluded that venue in a conspiracy prosecution brought under 18 U.S.C. 371 is proper in any district in which an overt act in furtherance of the conspiracy was committed by any of the conspirators.[4] Indeed, they have held that venue in conspiracy cases is proper wherever an overt act was carried out, even if

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[4] See, *e.g.*, *United States* v. *Bascope-Zurita*, 68 F.3d 1057, 1062 (8th Cir. 1995), cert. denied, 516 U.S. 1062 (1996); *United States* v. *Smith*, 918 F.2d 1551, 1557 (11th Cir. 1990); *United States* v. *Uribe*, 890 F.2d 554, 558 (1st Cir. 1989); *United States* v. *Meyers*, 847 F.2d 1408, 1411 (9th Cir. 1988).

proof of an overt act is not necessary to a conviction.[5] The courts have similarly held that one accused under 18 U.S.C. 2(a) of aiding or abetting the commission of a substantive crime may be prosecuted not only where the defendant committed his acts, but also where the principal committed the substantive crime.[6] Thus, when a defendant's criminal acts are performed in concert with other wrongdoers, the defendant is subject to prosecution in the districts where his confederates' criminal conduct was carried out, whether or not he was present in that district.

Venue may also be based on the effects of a defendant's conduct in another district. An offense involving the use of the mails, for example, may constitutionally be prosecuted "in any district from, through, or into which" the materials passed in transit, even if the defendant never possessed the materials in each such district. 18 U.S.C. 3237(a); see

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[5] *United States* v. *Mayo*, 721 F.2d 1084, 1088-1091 (7th Cir. 1983); *Kott* v. *United States*, 163 F.2d 984, 986 (5th Cir. 1947), cert. denied, 333 U.S. 837 (1948); see *United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 402-404 (1927) (apparently endorsing this view).

[6] *United States* v. *Romero*, No. 97-2983, 1998 WL 407103, at *6 (8th Cir. July 22, 1998); accord *United States* v. *Mendoza*, 108 F.3d 1155, 1156 (9th Cir.), cert. denied, 118 S. Ct. 351 (1997); *United States* v. *Griffin*, 814 F.2d 806, 810 (1st Cir. 1987); *United States* v. *Brantley*, 733 F.2d 1429, 1434 (11th Cir. 1984), cert. denied, 470 U.S. 1006 (1985); *United States* v. *Kibler*, 667 F.2d 452, 455 (4th Cir.), cert. denied, 456 U.S. 961 (1982); *United States* v. *Gillette*, 189 F.2d 449, 451-452 (2d Cir.), cert. denied, 342 U.S. 827 (1951); see also *United States* v. *Chestnut*, 553 F.2d 40, 47 (2d Cir. 1976) (prosecution for causing another to accept and receive illegal campaign contributions may be brought where contribution was received, as well as made).

In re Palliser, 136 U.S. 257, 266 (1890) (holding, under predecessor version of general venue statute, that an offense committed through the use of the mails could be prosecuted in the district where the letter is received); *United States* v. *Johnson*, 323 U.S. 273, 275 (1944) (consistent with the Constitution, "an illegal use of the mails or of other instruments of commerce may subject the user to prosecution in the district where he sent the goods, or in the district of their arrival, or in any intervening district"). A prosecution for illegally accepting transportation of goods from a common carrier at rates less than the carrier's published rates may be brought in any district through which the goods were transported, even if the defendant's only interaction with the carrier was entering into an agreement, in a district other than the one in which the prosecution is brought. See *Armour Packing Co.* v. *United States*, 209 U.S. 56, 73-77 (1908). Similarly, the lower courts have held that a prosecution for obstruction of justice may constitutionally be brought in the district where the obstructed judicial proceedings occurred, even if the defendant's obstructive acts took place at another location.[7] And prosecutions under the Hobbs Act for

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[7] See, *e.g.*, *United States* v. *Cofield*, 11 F.3d 413, 415-419 (4th Cir. 1993), cert. denied, 510 U.S. 1140 (1994); *United States* v. *Frederick*, 835 F.2d 1211, 1212-1215 (7th Cir. 1987), cert. denied, 486 U.S. 1013 (1988); *United States* v. *Reed*, 773 F.2d 477, 484-486 (2d Cir. 1985); *United States* v. *Barham*, 666 F.2d 521, 523-524 (11th Cir.), cert. denied, 456 U.S. 947 (1982); *United States* v. *Tedesco*, 635 F.2d 902, 904-906 (1st Cir. 1980), cert. denied, 452 U.S. 962 (1981). But see *United States* v. *White*, 887 F.2d 267, 272 & n.3 (D.C. Cir. 1989) (R.B. Ginsburg, J.) (holding that, under prior circuit precedent, prosecution for bribery or obstruction of justice can be brought only in the

obstructing, delaying, or affecting interstate commerce by means of robbery or extortion, 18 U.S.C. 1951(a), may be brought in the district where the requisite effect on interstate commerce was felt, as well as in the district where the robbery or extortion took place.[8]

B. Venue In A Prosecution Under 18 U.S.C. 924(c)(1) Is Proper Where The Predicate Crime Took Place, Because That Crime Is One Of The Acts Constituting The Offense

Because venue for prosecution of a federal crime is proper in any district in which an element of the offense for which the defendant is accountable was "committed," even if not committed by the defendant personally in that district, it is *a fortiori* proper in any district in which acts constituting an element of a multiple-element offense were committed by the defendant in that district. That proposition leads to the conclusion that venue in this case was proper in the District of New Jersey, for, as we now explain, respondent committed one of the elements of his Section 924(c) offense—the commission of a federal crime of violence—in New Jersey.

1. To decide where venue is permissible for a prosecution under 18 U.S.C. 924(c), it is necessary to determine the elements of that offense. This Court "adheres to the general guide" that "'the *locus delicti*

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district where the bribe or obstructive act took place). In 1988, Congress specifically provided that venue is proper in the district where the proceeding that was the object of the obstruction took place. 18 U.S.C. 1512(h); see Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7029(a), 102 Stat. 4397-4398.

[8] See *United States* v. *Stephenson*, 895 F.2d 867, 875 (2d Cir. 1990); *United States* v. *Lewis*, 797 F.2d 358, 367 (7th Cir. 1986), cert. denied, 479 U.S. 1093 (1987).

must be determined from the nature of the crime alleged and the location of the act or acts constituting it.'" *United States* v. *Cabrales*, 118 S. Ct. 1772, 1776 (1998) (quoting *United States* v. *Anderson*, 328 U.S. 699, 703 (1946)) (brackets omitted); see *Travis* v. *United States*, 364 U.S. 631, 635 (1961); *United States* v. *Cores*, 356 U.S. 405, 408 (1958). The "acts constituting" a violation of Section 924(c)(1) are two: the defendant must use or carry a firearm, and he must commit a crime of violence (or a drug trafficking crime), during and in relation to which the gun was used or carried. "The mere carrying or use of a firearm is not the criminal *actus reus* proscribed"; instead, the offense requires "that a criminal defendant used a firearm in committing another federal crime." *United States* v. *Correa-Ventura*, 6 F.3d 1070, 1083 (5th Cir. 1993). The firearm's use is "inextricably intertwined with the underlying offense." *Id.* at 1084. Moreover, "the gun at least must facilitate, or have the potential of facilitating, the [underlying] offense," *Smith* v. *United States*, 508 U.S. 223, 238 (1993) (internal brackets and quotation marks omitted), for "[t]he relation between the firearm and the underlying offense is an essential element of the crime." *United States* v. *Stewart*, 779 F.2d 538, 540 (9th Cir. 1985) (Kennedy, J.), cert. denied, 484 U.S. 867 (1987).

Thus, Section 924(c) defines an offense that has "distinct parts"—the use of the gun and the commission of the crime of violence—and may be prosecuted in any district where either of those parts "can be proved to have been done." *Lombardo*, 241 U.S. at 77. In the present case, respondent and his co-defendants were prosecuted and convicted in the District of New Jersey for a federal crime of violence (kidnapping

Mr. Avendano), during and in relation to which respondent used a gun in Maryland. Respondent does not contend that venue in New Jersey was improper on the kidnapping charge. Nor does respondent contend that the kidnapping does not satisfy the "crime of violence" element of the Section 924(c) count, or that he did not use or carry a firearm "during and in relation to" the kidnapping offense. Indeed, the court of appeals acknowledged that respondent's use of the revolver in Maryland was "related to the kidnapping of Mr. Avendano." Pet. App. 15a n.5 (emphasis omitted). Because the act of kidnapping occurred in part in New Jersey, venue for the Section 924(c) properly lay in the District of New Jersey.

The offense defined by Section 924(c) is similar, in pertinent respects, to other complex federal crimes with multiple *actus reus* elements, one of which is the commission of (or attempt to commit) another crime. In those situations, the courts have held that venue is proper in any district in which any of the *actus reus* elements was performed, including the predicate or underlying crime. For example, to prove a substantive violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, the government must show "(1) the conduct (2) of an enterprise (3) through a pattern of racketeering activity." *Salinas* v. *United States*, 118 S. Ct. 469, 476 (1997); see 18 U.S.C. 1962(c). A RICO prosecution may be brought in any district where the racketeering activity has taken place, whether or not the defendant personally undertook any action there. See *United States* v. *Persico*, 621 F. Supp. 842, 858 (S.D.N.Y. 1985). Similarly, the continuing criminal enterprise statute, 21 U.S.C. 848, requires proof of a continuing series of violations of federal narcotics law,

undertaken by an organizer, supervisor, or manager in concert with five or more persons, from which the defendant obtains substantial income. 21 U.S.C. 848(c). "It is enough, to confer venue on a district, that one of the 'continuing series' of criminal acts constituting the enterprise occur there," even if the defendant never physically entered that district or actively organized, supervised, or managed anything there. *United States* v. *Fry*, 413 F. Supp. 1269, 1272 (E.D. Mich. 1976), aff'd, 559 F.2d 1221 (6th Cir. 1977), cert. denied, 434 U.S. 1062 (1978). And a prosecution under the Travel Act, 18 U.S.C. 1952, which prohibits traveling in interstate commerce with the intent to promote unlawful activity, and thereafter committing or attempting to commit such unlawful activity, may be brought in any district where the travel occurred, including the district from which the travel commenced and the district in which the unlawful activity was promoted or carried out. See *United States* v. *Burns*, 990 F.2d 1426, 1436-1437 (4th Cir.), cert. denied, 508 U.S. 967 (1993); *United States* v. *Blitstein*, 626 F.2d 774, 783-784 (10th Cir. 1980), cert. denied, 449 U.S. 1102 (1981); *United States* v. *Polizzi*, 500 F.2d 856, 899 (9th Cir. 1974), cert. denied, 419 U.S. 1120 (1975).

2. It is particularly appropriate for violations of Section 924(c)(1) to be prosecuted wherever the incorporated crime of violence may be prosecuted, for Congress's intent in enacting Section 924(c)(1) was not to punish the use or carrying of a gun *per se*, but rather to prevent other federal offenses from becoming more dangerous through the use of firearms. And while Section 924(c)(1) is undoubtedly an independent offense, and not merely a sentence-enhancement provision, its purpose and effect are to provide a

mandatory imprisonment term for other federal offenses made more dangerous through the use or carrying of firearms, in addition to any punishment imposed for those offenses themelves. Indeed, Section 924(c)(1) charges are almost always brought in tandem with other charges (usually several others), and are almost never brought alone.[9]

The legislative development of Section 924(c) shows that Congress intended the penalty imposed by that Section to provide a stricter punishment for other federal offenses made more dangerous through the use or carrying of firearms. The original version of Section 924(c) was enacted as part of the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1223-1224. The predecessor to what took shape as Section 924(c) was introduced as an amendment to pending gun control legislation on the floor of the House of Representatives by Representative Poff, who stated that the purpose of the mandatory minimum sentence effected by his amendment was "to persuade the man who is tempted to commit a Federal felony to leave his gun at home." 114 Cong. Rec. 22,231 (1968); see *Muscarello* v. *United States*, 118 S. Ct. 1911, 1916 (1998) (noting that Court had found those comments by Rep. Poff to be "crucial material" in interpreting Section 924(c)); *Busic* v. *United States*, 446 U.S. 398, 405 (1980) (similar); *Simpson* v. *United States*, 435 U.S. 6,

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[9] Records compiled by the Bureau of Justice Statistics indicate that, in Fiscal Year 1997, the government charged 2136 defendants with violating 18 U.S.C. 924(c). Only 20 defendants, or fewer than 1% of the total, were charged solely under that statute. Of the remaining 1936 defendants, 546 were charged with one other offense, 588 were charged with two other offenses, 341 were charged with three other offenses, and 641 were charged with four or more other offenses.

13-14 (1978) (similar). Representative Poff suggested that his amendment was superior to an amendment proposed by Representative Casey because the Casey amendment would have reached the use of guns in state offenses, if the gun had moved in interstate commerce. Representative Poff opposed the Casey proposal because of its potential for increased burdens on the federal courts, and in response to a colloquy about prosecutions under his amendment, he stated that an advantage of his proposal was that "it would be expected 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. at 22,232.

Section 924(c) was revised as part of the Comprehensive Crime Control Act of 1984, Pub. L. No. 99-473, ch. X, pt. D, § 1005, 98 Stat. 2138-2139. The 1984 revisions restricted the scope of Section 924(c) to firearm use or carrying "during and in relation to" federal crimes of violence (rather than all federal felonies, as was the case before 1984), and overturned the effect of the decisions of this Court restricting the use of Section 924(c) in prosecutions in which the defendant was also charged with a federal offense containing its own sentence-enhancement provision. See S. Rep. No. 225, 98th Cong., 1st Sess. 312-313 (1983) (discussing *Simpson*, *supra*, and *Busic*, *supra*). As before, however, "the evident purpose of the statute was to impose more severe sanctions where firearms facilitated, or had the potential of facilitating, the commission of [another federal] felony." *Stewart*, 779 F.2d at 540.

Section 924(c) was revised again in 1986, when Congress extended it to reach using or carrying firearms during and in relation to drug trafficking

crimes, as well as crimes of violence. See Firearms Owners' Protection Act, Pub. L. No. 99-308, § 104, 100 Stat. 456-457. That amendment, reflecting Congress's concern about the "dangerous combination of drugs and guns," *Muscarello*, 118 S. Ct. at 1916 (internal quotation marks omitted), added new penalties for drug violations involving use or carrying of firearms.

This legislative background underscores that the offense stated in Section 924(c) is not merely the "use" or "carry[ing]" of a firearm. The commission of a "crime of violence" or "drug trafficking crime" by the defendant (or for which the defendant is legally accountable) is equally an essential element of the offense. As such, venue for prosecutions under Section 924(c) is governed by the familiar and well-established rule that an offense is "committed," and therefore a prosecution may be brought, in any district in which any *actus reus* element of the offense was carried out—including the element of the commission of a federal crime of violence.

C. The Court Of Appeals' "Key Verb" Test Should Be Rejected In This Case

Although the court of appeals did not disagree with the government's point that "a violation of § 924(c)(1) is dependent on the predicate offense," which was committed in both New Jersey and Maryland (Pet. App. 14a), it nonetheless concluded that venue would be proper in this case only in Maryland because it was there that respondent "used" his firearm (*id.* at 15a). It reached that conclusion by applying a "key verb" or "active verb" test. Under that test, the crime is deemed to have been "committed" where the conduct described by the active verb in the offense-defining provision took place. *Id.* at 14a-15a. In this case, the

court reasoned that, because the verbs defining the prohibited conduct under Section 924(c)(1) are "uses" and "carries," courts should look only to the place where the firearm was "used" or "carried" to determine the proper venue. *Id.* at 15a.

This Court has never adopted or applied such a "key verb" test that focuses solely on one part of speech in a statutory sentence. Rather, the Court has consistently applied a more realistic approach to the offense in question, emphasizing the "nature of the crime alleged and the location of the act or acts constituting it." *E.g.*, *Cabrales*, 118 S. Ct. at 1776. And whatever might be the merits of the "key verb" test in other, simpler contexts, it is inadequate in cases like this one, involving an offense with more than one *actus reus* element. As Professor Abrams suggested, identification of the key verb cannot be dispositive of "the proper venue of an offense with multi-district contacts," and one must draw a distinction between "two general types" of crimes, "those involving an offense interpreted to consist of at least two separate act-elements; and those involving one treated by the courts as composed of a single act-element." N. Abrams, *Conspiracy and Multi-Venue in Federal Criminal Prosecutions: The Crime Committed Formula*, 9 UCLA L. Rev. 751, 777 (1962).

Contrary to the court of appeals' assertion (Pet. App. 15a), Section 924(c)(1) does *not* "designate[] the criminal conduct that is prohibited as 'using' or 'carrying' a firearm." Rather, the conduct prohibited by Section 924(c)(1) is using or carrying a firearm during and in relation to another crime also committed by that defendant. The defendant must commit another federal crime (here, a crime of violence) *and*

use or carry a gun in relation to that crime. Thus, Section 924(c)(1) incorporates all of the elements of the "crime of violence" or the "drug trafficking crime," and the government is required to prove that the defendant committed all those elements.[10]

Rather that rest on the actual nature of the crime, the court of appeals' verb test would make the venue for the prosecution dependent on immaterial aspects of the statutory language. As Judge Alito pointed out (Pet. App. 43a-44a) and the majority acknowledged (*id.* at 18a), Congress might have used minimally different statutory language to describe the crime stated in Section 924(c)(1) and employed active verbs rather than prepositional phrases to describe the predicate-crime element. Thus, Congress might have re-phrased the offense in Section 924(c) to punish anyone who "commits a federal crime of violence and uses or carries a firearm during and in relation to that crime." Had Congress used such language, those insignificant differences, under the majority's test, would have led to a different outcome in this case. Yet there is little sense in a venue test that depends on nothing of substance in the offense defined by the criminal statute.

Moreover, an "active verb" test would do little to resolve questions of venue for offenses that are defined through subordinate clauses or past participles combined with infinitive phrases, see Pet. App. 53a-

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[10] In establishing those elements, the usual means for showing a defendant's liability, such as abetting and abetting and liability under the *Pinkerton* doctrine of conspiracy law, may be invoked. See, *e.g.*, *Bazemore* v. *United States*, 138 F.3d 947, 949 (11th Cir. 1998); *Woodruff* v. *United States*, 131 F.3d 1238, 1243 (7th Cir. 1997).

55a (Judge Alito's dissent, discussing 18 U.S.C. 922(g)), or offenses that punish one who "fails" or "refuses" to perform some duty. In *Johnston* v. *United States*, 351 U.S. 215 (1956), for example, the government prosecuted several conscientious objectors who had refused to report for their assignments for civilian work in lieu of military induction. The applicable statute punished anyone who "knowingly fail[ed] or neglect[ed] or refuse[d] to perform any duty required of him under or in execution of this title [involving the military draft]." *Id.* at 221. Over the objection of the dissent that "when the registrant is adamant in his refusal to budge from his home town and stays at home defying the local authorities, the crime he has committed has been committed at home," *id.* at 223 (Douglas, J., dissenting), the Court concluded that the crime was committed where the duty "to report" was to have been performed, for that was "where the failure occurred," *id.* at 222-223. The Court did not give controlling weight to the active verbs in the statute—"fail or neglect or refuse"—but rather examined the entire statute, including the infinitive phrase "to perform any duty," to determine the nature of the offense and its locus. So too here, a single-minded focus on the active verbs "use" and "carry" does not capture the essence of Section 924(c)(1) and is therefore an inaccurate method to determine where the crime was committed.[11]

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[11] It is also difficult to square the "key verb" test with decisions holding that venue for conspiracy prosecutions is proper wherever an overt act in furtherance of the conspiracy is carried out, even if the agreement was not formed in the district of prosecution. See pp. 15-16, *supra*. Because, as the courts have held, such venue is proper even when proof of an overt act is not necessary for proof of the conspiracy (*ibid.*), it

D. This Court's Decision In *United States* v. *Cabrales* Does Not Suggest That The Only Proper Venue For A Section 924(c)(1) Offense Is Where The "Use" Or "Carrying" Occurred

In *United States* v. *Cabrales*, 118 S. Ct. 1772 (1998), this Court held that venue for a charge of money laundering, in violation of 18 U.S.C. 1956(a)(1)(B)(ii) and 18 U.S.C. 1957, was not proper in the district where the laundered proceeds were unlawfully generated, when the prohibited financial transactions occurred in another district. *Id.* at 1775-1777. The Court observed that the crimes described by the money laundering statutes "interdict only the financial transactions [and] * * * not the anterior criminal conduct that yielded the funds allegedly laundered." *Id.* at 1776. Thus, the Court ruled that the charged offenses, *i.e.*, conducting financial transactions to avoid a reporting requirement (§ 1956) and in criminally derived property (§ 1957), were committed "wholly within Florida," where the transactions occurred. *Ibid.*

The analysis in *Cabrales* depended on the fact that the money laundering statutes at issue there did not require the defendant's involvement in or accountabil-

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would be difficult to rationalize those cases on the basis that the defendants had undertaken the action defined by the "key verb" in the statute—"to conspire"—in the district of prosecution. It is possible to resort to the "fictional theory that each [overt] act 'renews' the conspiracy wherever it occurs," Abrams, *supra*, 9 UCLA L. Rev. at 763, and thus to conclude that the conspirators all "conspire" anew whenever any of them commits an over act. The more realistic analysis, however, is that venue in a conspiracy case is proper where an overt act is performed because a conspiracy has effects, and therefore may be prosecuted, wherever acts in furtherance of it are carried out.

ity for the unlawful activity that generated the laundered funds. As the Court explained, the defendant in *Cabrales* was "charged in the money-laundering counts with criminal activity 'after the fact' of an offense begun and completed by others." 118 S. Ct. at 1776. Respondent, however, was not charged with a crime that occurred "after the fact" of another person's offense. To the contrary, the charged violation of Section 924(c)(1) required proof that respondent used or carried a firearm during and in relation to another crime that he committed. While Cabrales' money laundering offenses did not require proof that she was in any way involved with the unlawful activity that generated the laundered funds, respondent's offense required proof that he had kidnapped Mr. Avendano, and used a firearm during and in relation to that kidnapping. Thus, respondent, unlike Cabrales, committed acts constituting an element of the offense in the district in which he was tried. As we have explained, committing a crime of violence in relation to the use of a firearm is an essential element of a Section 924(c)(1) offense, and respondent committed such a crime of violence in New Jersey.

Moreover, in *Cabrales*, the substantive money laundering offense, as charged in the indictment, alleged no factual link between the defendant and the Western District of Missouri, the district of indictment and trial. See 118 S. Ct. at 1777 ("The counts before us portray [Cabrales] and the money she deposited and withdrew as moving inside Florida only."). Here, in contrast, the count of the indictment charging a violation of Section 924(c) unmistakably linked respondent with the District of New Jersey. J.A. 15-16, 19-20. Respondent was an integral participant in the kidnapping of Mr. Avendano; he helped to

hold him hostage in Texas, he transported him to New Jersey, and he subsequently moved him to New York and Maryland. He therefore was alleged and shown to have committed the predicate crime of kidnapping in part in the district of trial. The holding of *Cabrales* therefore has no application here, where respondent himself committed the predicate crime and is factually linked in that action to the district in which he was tried.

E. Prosecution Of Respondent's Section 924(c) Offense In New Jersey Is Consistent With The Purposes Of The Constitutional And Statutory Venue Provisions

A rule requiring prosecution of violations of Section 924(c)(1) only in the district in which the gun was actually "used" or "carried," and not also permitting such prosecutions in a district in which the crime of violence was committed, would do little to advance defendants' interests secured by the constitutional and statutory venue prosecutions. At the same time, it would undercut the effective administration of the criminal law.

If the government could not prosecute respondent in New Jersey for both kidnapping Mr. Avendano and using a gun during that kidnapping, there would be three other potential avenues of prosecution available to it. First, the government could prosecute the kidnapping offense in New Jersey and prosecute the Section 924(c) offense in Maryland. That approach, however, would do little to benefit respondent. Because the government is required to show that respondent committed the underlying kidnapping offense in order to prove that he used a gun "during and in relation to" that offense, the government would, in effect, be required to prove the kidnapping

offense twice. Respondent would also be required to marshal the same evidence twice in defense to the charges. Two prosecutions involving the same evidence would hardly benefit the defendant, and such sequential prosecutions would also burden the judicial system.

Second, the government could prosecute both the kidnapping offense and the Section 924(c) offense in Maryland. That approach would also entail considerable costs, for both respondent and the government. It would require the government to bring, and respondent to defend, a prosecution for the kidnapping of Mr. Avendano separately from a prosecution for the kidnapping of Mrs. Avendano, even though both kidnappings were committed by the same defendants during overlapping time periods and after the same botched drug transaction, and both were charged as overt acts committed in furtherance of the same conspiracy (which encompassed both kidnappings). See J.A. 13-16. It would also shift much of the weight of the case away from New Jersey—a result that conflicts with the purpose of the venue requirement to try cases where crimes are committed and evidence is likely to be (here, New Jersey, where the two kidnappings mostly took place and the victims resided), and with another of its purposes, to protect "a community's right to have trials of local offenses occur in the community." Pet. App. 47a (Alito, J., dissenting); A. Amar, *The Constitution and Criminal Procedure—First Principles* 124 (1997).

To avoid those problems, the government could, as a third alternative, pursue the kidnapping offenses in New Jersey and drop the Section 924(c) prosecution altogether. That alternative, however, is inconsistent with Congress's clearly expressed intent that

federal crimes of violence accompanied by the use of a firearm be punished in addition to the punishment for the underlying offense and be subject to the mandatory five-year prison term imposed by Section 924(c)(1). As we have explained (p. 23, *supra*), Congress amended Section 924(c) in 1984 to overturn the effect of this Court's decisions in *Simpson* and *Busic* and to make plain that all such crimes of violence should be punished by an additional, mandatory prison term, consecutive to any sentence imposed for the underlying offense. While the Sentencing Guidelines do provide for an offender's offense level to be increased by two levels based on his use of a dangerous weapon (including a firearm) during a kidnapping (see Guidelines § 2A4.1(b)(3); cf. Guidelines § 2D1.1(b)(1) (drug trafficking offenses)), the effect of that increase does not nearly match the additional five-year prison term required by Section 924(c)(1).[12] The significant difference in sentencing also distinguishes this case from *Cabrales*, where there was likely to be a "negligible" effect on

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[12] For example, an offender in criminal history category I who was convicted of kidnapping and whose offense involved no increases in offense levels or adjustments would be sentenced to 51-63 months' imprisonment. See Guidelines § 2A4.1(a) (offense level 24), Ch. 5, Pt. A (sentencing table). If the same offender used a firearm during the kidnapping, his offense level would be increased to 26, and his sentence would be 63-78 months' imprisonment. *Ibid.* If he were prosecuted under Section 924(c) as well, his effective Guidelines range would be 111-123 months' imprisonment (51-63 months, plus 5-year mandatory term). Currently, when a defendant is sentenced under Section 924(c)(1), his offense level for the underlying crime of violence or drug trafficking offense is not also increased for use of the firearm. See Guidelines § 2K2.4, Application Note 2.

sentencing from abandoning the money laundering charge in Florida. 117 S. Ct. at 1777. The difference would not be negligible here, and nothing in the Constitution's venue provisions justifies such a windfall for the defendant.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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