SUPREME COURT OF THE UNITED STATES

No. 97–1139

UNITED STATES, PETITIONER *v.* JACINTO RODRIGUEZ-MORENO

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

[March 30, 1999]

JUSTICE SCALIA, with whom JUSTICE STEVENS joins, dissenting.

I agree with the Court that in deciding where a crime was committed for purposes of the venue provision of Article III, §2, of the Constitution, and the vicinage provision of the Sixth Amendment, we must look at "the nature of the crime alleged and the location of the act or acts constituting it." *Ante*, at 3 (quoting *United States* v. *Cabrales*, 524 U. S. 1, 6–7 (1998), in turn quoting *United States* v. *Anderson*, 328 U. S. 699, 703 (1946)) (internal quotation marks omitted). I disagree with the Court, however, that the crime defined in 18 U. S. C. §924(c)(1) is "committed" either where the defendant commits the predicate offense or where he uses or carries the gun. It seems to me unmistakably clear from the text of the law that this crime can be committed only where the defendant *both* engages in the acts making up the predicate offense *and* uses or carries the gun.

At the time of respondent's alleged offense, §924(c)(1) read:

> "Whoever, during and in relation to any crime of violence or drug trafficking crime . . . 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."

This prohibits the act of using or carrying a firearm "during" (and in relation to) a predicate offense. The provisions of the United States Code defining the particular predicate offenses already punish all of the defendant's alleged criminal conduct except his use or carriage of a gun; §924(c)(1) itself criminalizes and punishes such use or carriage "during" the predicate crime, because that makes the crime more dangerous. Cf. *Muscarello* v. *United States*, 524 U. S. 125, 132 (1998). This is a simple concept, and it is embodied in a straightforward text. To answer the question before us we need only ask where the defendant's alleged act of using a firearm during (and in relation to) a kidnaping occurred. Since it occurred only in Maryland, venue will lie only there.

The Court, however, relies on *United States* v. *Lombardo*, 241 U. S. 73, 77 (1916), for the proposition 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.'" *Ante*, at 6–7. The fallacy in this reliance is that the crime before us does *not* consist of "distinct" parts that can occur in different localities. Its two parts are bound inseparably together by the word "during." Where the gun is being used, the predicate act must be occurring as well, and vice versa. The Court quite simply reads this requirement out of the statute– as though there were no difference between a statute making it a crime to steal a cookie and eat it (which could be prosecuted either in New Jersey, where the cookie was stolen, or in Maryland, where it was eaten) and a statute making it a crime to eat a cookie while robbing a bakery (which could be prosecuted only where the ingestive theft occurred).

The Court believes its holding is justified by the continuing nature of the kidnaping predicate offense, which invokes the statute providing that "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." 18 U. S. C. §3237(a). To disallow the New Jersey prosecution here, the Court suggests, is to convert §924(c)(1) from a continuing offense to a "point-in-time" offense. *Ante*, at 6. That is simply not so. I in no way contend that the kidnaping, or, for that matter, the use of the gun, can occur only at one point in time. Each can extend over a protracted period, and in many places. But §924(c)(1) is violated only so long as, *and where*, both continuing acts are being committed simultaneously. That is what the word "during" means. Thus, if the defendant here had used or carried the gun throughout the kidnaping, in Texas, New Jersey, New York, and Maryland, he could have been prosecuted in any of those States. As it was, however, he used a gun during a kidnaping only in Maryland.

Finally, the Government contends that focusing on the "use or carry" element of §924(c)(1) is "difficult to square" with the cases holding that there can be only one §924(c)(1) violation for each predicate offense. Reply Brief for United States 9 (citing *United States* v. *Palma-Ruedas*, 121 F. 3d 841, 862–863 (CA3 1997) (Alito, J., concurring in part and dissenting in part) (case below)). See, *e.g.*, *United States* v. *Anderson*, 59 F. 3d 1323, 1328–1334 (CADC) (en banc), cert. denied, 516 U. S. 999 (1995); *United States* v. *Taylor*, 13 F. 3d 986, 992–994 (CA6 1994); *United States* v. *Lindsay*, 985 F. 2d 666, 672–676 (CA2), cert. denied, 510 U. S. 832 (1993). This is an odd argument for the Government to make, since it has disagreed with those cases, see, *e.g.*, *Anderson*, *supra*, at 1328; *Lind-*

say, *supra*, at 674, and has succeeded in persuading two Circuits to the contrary, see *United States* v. *Camps*, 32 F. 3d 102, 106–109 (CA4 1994), cert. denied, 513 U. S. 1158 (1995); *United States* v. *Lucas*, 932 F. 2d 1210, 1222–1223 (CA8), cert. denied, 502 U. S. 869 (1991). But this dispute has nothing to do with the point before us here. I do not contend that using the firearm is "the entire essence of the offense." Reply Brief for United States 9. The predicate offense is assuredly an element of the crime—and if, for whatever reason, that element has the effect of limiting prosecution to one violation per predicate offense, it can do so just as effectively even if the "during" requirement is observed rather than ignored.

The short of the matter is that this defendant, who has a constitutional right to be tried in the State and district where his alleged crime was "committed," U. S. Const., Art. III, §2, cl. 3; Amdt. 6, has been prosecuted for using a gun during a kidnaping in a State and district where all agree he did not use a gun during a kidnaping. If 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.