
COMMENT

“I’M BEING PROSECUTED WHERE?”: VENUE UNDER 18 U.S.C. § 924(C)(1)*

TABLE OF CONTENTS

I.	INTRODUCTION	894
II.	COURTS INTERPRET VENUE UNDER 18 U.S.C. § 924(C)(1)...	896
	A. <i>Disagreement Among the Circuit Courts</i>	896
	1. <i>The Ninth Circuit and the “Verb Test.”</i>	896
	2. <i>The Fifth Circuit and the Public Policy</i> <i>Argument</i>	896
	3. <i>The Third Circuit Adopts the Ninth Circuit’s</i> <i>Reasoning</i>	897
	B. <i>The Supreme Court Reverses the Third Circuit</i>	899
III.	DETERMINING VENUE UNDER FEDERAL STATUTES	900
	A. <i>Determination of Proper Venue: A General Overview</i> ..	900
	B. <i>An Examination of Venue Provisions in Several</i> <i>Federal Statutes</i>	902
	1. <i>Venue in the Mail Fraud Statute</i>	902
	2. <i>Venue in the General Conspiracy Statute</i>	904
	3. <i>Venue in the Travel Act</i>	905
	C. <i>Distinguishing 18 U.S.C. § 924(c)(1)</i>	907
IV.	THE BACKGROUND AND OPERATION OF 18 U.S.C. § 924(C)(1)	909
	A. <i>The Legislative History and Intent of 18 U.S.C. §</i> <i>924(c)(1)</i>	909

* This paper was selected as the recipient of the 2000 Word for Word Reporting Award.

B.	<i>The Elements of 18 U.S.C. § 924(c)(1) and Interpretation in the Courts</i>	910
V.	VENUE FOR AN 18 U.S.C. § 924(C)(1) OFFENSE SHOULD COINCIDE WITH THE FIREARM'S USE.....	914
A.	<i>Where Is an 18 U.S.C. § 924(c)(1) Offense Committed?</i>	914
B.	<i>Penalty Enhancement Provision or Separate Offense?</i>	917
C.	<i>The Public Policy Argument Should Be Abandoned...</i>	919
VI.	CONCLUSION	920

I. INTRODUCTION

In a federal criminal trial, venue in the district in which a crime is committed is an important constitutional right of the defendant.¹ Congress has the power to expand the reach of venue by broadly defining the location where a crime is committed.² Although Congress has established some broad definitions,³ the courts must continue to closely examine the definition of where a crime is committed in order to guard the defendant's constitutional venue rights. In *United States v. Rodriguez-Moreno*,⁴ the Supreme Court held that venue for an 18 U.S.C. § 924(c)(1) (§ 924(c)(1))⁵ offense is proper in any

1. Refer to notes 67-70 *infra* and accompanying text (discussing venue rights afforded criminal defendants by Article III of the U.S. Constitution and the Federal Rules of Criminal Procedure).

2. Refer to notes 71-72 *infra* and accompanying text (explaining that Congress may define venue within constitutional limits).

3. See generally Michael A. Schlesinger, Note, *Venue in Constructive Contempt Prosecutions Under 18 U.S.C. § 1503: An Act-Oriented Approach*, 63 B.U. L. REV. 919, 925-26 (1983) (explaining that Congress can exercise its venue power explicitly in the statute or implicitly through language used in the statute).

4. 526 U.S. 275 (1999).

5. 18 U.S.C. § 924(c)(1)(A) (Supp. IV 1999) provides in pertinent part:

[A]ny person who, during and in relation to any crime of violence or drug trafficking crime . . . for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime . . . be sentenced to a term of imprisonment of not less than 5 years

Id.

Congress amended the current statute after the cases discussed in Part II were decided, but the amendment does not affect venue concerns. See *United States v. Rodriguez-Moreno*, 526 U.S. 275, 279 & n.3 (1999) ("The statute recently has been amended, see Pub. L. 105-386, 112 Stat. 3469, but it is not argued that the amendment is in any way relevant to our analysis in this case.").

district where the crime of violence was committed, even if the firearm was not used in that district.⁶ Considering the frequency of § 924(c)(1) prosecutions,⁷ this interpretation of § 924(c)(1) threatens a defendant's constitutional venue rights. The controversy turns on where a crime under § 924(c)(1) is committed. This Comment first examines the background of the controversy, then explores some methods and examples that courts use to determine proper venue for a criminal offense. This Comment then details the history and operation of § 924(c)(1). Finally, it examines § 924(c)(1) in light of the first three sections to determine if venue for such an offense can properly lie in a district where the defendant has not used, carried, or possessed a firearm.

Prosecutors wield tremendous power in the criminal system,⁸ and the government, with its seemingly endless resources, often overwhelms criminal defendants.⁹ The recent Supreme Court decision in *United States v. Rodriguez-Moreno* further empowers prosecutors by allowing them more liberal choices of venue in § 924(c)(1) offenses.¹⁰ The Court must ensure, however, that a defendant's constitutional rights are not cast aside in favor of advancing the government's interests.

6. See *Rodriguez-Moreno*, 526 U.S. at 276, 282.

7. See Tyler B. Robinson, Note, *A Question of Intent: Aiding and Abetting Law and the Rule of Accomplice Liability Under § 924(c)*, 96 MICH. L. REV. 783, 783 & n.1 (1997) ("A quick Westlaw search reveals more than 800 cases involving 18 U.S.C. § 924(c) in the federal courts during 1996 alone.").

8. See, e.g., *Young v. United States*, 481 U.S. 787, 814 (1987) (stating that "[the prosecutor] has the power to employ the full machinery of the state in scrutinizing any given individual"); Jennifer Gerarda Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique*, 43 EMORY L.J. 1247, 1304 n.221 (1994) ("Prosecutors have tremendous power and discretion in the criminal system."); Alfredo Garcia, *Toward an Integrated Vision of Criminal Procedural Rights: A Counter to Judicial and Academic Nihilism*, 77 MARQ. L. REV. 1, 8 (1993) (explaining that "the Sixth Amendment emerged as a counter to the tremendous power exercised by the public prosecutor").

9. See, e.g., Gary Goodpaster, *On the Theory of American Adversary Criminal Trial*, 78 J. CRIM. L. & CRIMINOLOGY 118, 134 (1987) ("Compared to the average citizen, the government has overwhelming resources"), Fred C. Zacharias, *Reconceptualizing Ethical Roles*, 65 GEO. WASH. L. REV. 169, 186 (1997) ("The criminal defense paradigm . . . posits an individual, relatively unsophisticated client facing overwhelming government resources.").

10. See *Rodriguez-Moreno*, 526 U.S. at 282 (holding that venue for a § 924(c)(1) offense is proper in any district in which the underlying crime was committed, thus affording prosecutors multiple venue choices).

II. COURTS INTERPRET VENUE UNDER 18 U.S.C. § 924(c)(1)

A. *Disagreement Among the Circuit Courts*

1. *The Ninth Circuit and the “Verb Test.”* In *United States v. Corona*,¹¹ the Ninth Circuit addressed the issue of venue related to a § 924(c)(1) offense.¹² Corona was involved in a drug trafficking conspiracy and was arrested in California.¹³ Corona was charged and convicted of a § 924(c)(1) offense, a drug distribution offense, and a conspiracy offense in the United States District Court for the District of Nevada.¹⁴ The Ninth Circuit held that Nevada was the proper venue for the conspiracy charge because “it was the site of the initial agreement and subsequent phone calls planning the drug transaction.”¹⁵

The court relied on the “verb test” to determine the place of commission of both the distribution and the § 924(c)(1) offenses.¹⁶ The verb test is based on the idea that all criminal statutes contain an essential verb that defines the crime.¹⁷ Under this test, a court examines the essential verb in a statute to determine where a crime was committed and, thus, where venue should lie.¹⁸ The Corona court concluded that the defendant committed the distribution and § 924(c)(1) offenses only in California,¹⁹ and, therefore, venue for those offenses was proper only in California.²⁰

2. *The Fifth Circuit and the Public Policy Argument.* In *United States v. Pomranz*,²¹ the Fifth Circuit declined to follow

11. 34 F.3d 876 (9th Cir. 1994).

12. *See id.* at 878-81.

13. *See id.* at 878.

14. *See id.* at 877-78.

15. *Id.* at 879. The court explained, “Venue for a conspiracy charge ‘is appropriate in any district where an overt act committed in the course of the conspiracy occurred. It is not necessary that [the defendant] himself have entered or otherwise committed an overt act within the district, as long as one of his coconspirators did.’” *Id.* (alteration in original) (quoting *United States v. Meyers*, 847 F.2d 1408, 1411 (9th Cir. 1988)).

16. *See id.* (stating that, for venue purposes, an examination of the statute’s key verbs is the proper way to determine where a crime is committed).

17. *See* Armistead M. Dobie, *Venue in Criminal Cases in the United States District Court*, 12 VA. L. REV. 287, 289 (1926) (relating the verb test and explaining that statutes often contain several such verbs that must be carefully examined to determine the statute’s meaning).

18. *See id.*

19. *See Corona*, 34 F.3d at 879-80.

20. *See id.* at 881.

21. 43 F.3d 156 (5th Cir. 1995).

Corona.²² Pomranz was charged and convicted of a § 924(c)(1) offense in the District Court for the Northern District of Texas.²³ Pomranz possessed a firearm at the time of his arrest in Oklahoma, but there was no evidence that Pomranz ever carried or used a firearm in Texas.²⁴ Nevertheless, the Fifth Circuit affirmed Pomranz's conviction under § 924(c)(1)²⁵ citing legislative intent²⁶ and public policy considerations in its decision.²⁷

The court premised its public policy argument on the "limited resources" available to the government in prosecuting a defendant.²⁸ The court explained that a separate prosecution for a § 924(c)(1) offense would force the government to choose between expending additional resources to obtain a conviction or forfeiting the § 924(c)(1) count.²⁹ Accordingly, the court concluded that prosecuting the defendant for the § 924(c)(1) offense in the same district as the predicate offense would not violate the defendant's right to venue and would satisfy the public policy concern of conserving limited government resources.³⁰

3. *The Third Circuit Adopts the Ninth Circuit's Reasoning.* In *United States v. Palma-Ruedas*,³¹ the Third Circuit addressed whether a defendant could be tried under § 924(c)(1) in a venue where "the defendant neither carried nor used the firearm."³²

22. See *id.* at 162.

23. See *id.* at 157.

24. See *id.* at 158.

25. See *id.*

26. See *id.* at 159. ("Congress enacted Section 924(c) . . . as part of a comprehensive response to the 'increasing rate of crime and lawlessness and the growing use of firearms in violent crime.'") (quoting H.R. REP. NO. 90-1577 (1968), reprinted in 1968 U.S.C.C.A.N. 4410, 4412).

27. See *Pomranz*, 43 F.3d at 161 (reasoning that a separate trial on the § 924(c)(1) count was contrary to public policy because it would tax resources and impede justice).

28. See *id.* (stating that the government would incur a burden if it was required to reestablish all the elements of a § 924(c)(1) offense in a second trial).

29. See *id.* (observing that if the court held that Oklahoma was the only proper venue for the § 924(c)(1) offense, the result "would impede the administration of justice because the government would be left with a difficult decision: expend its limited resources in prosecuting the felon a second time for this separate offense, or satisfy itself with the punishment previously imposed and forfeit a conviction on the weapons count").

30. See *id.* at 162 (explaining that the result does not violate the defendant's right to venue because venue is treated "with less deference than other constitutional rights").

31. 121 F.3d 841 (3d Cir. 1997), *rev'd sub nom.* *United States v. Rodriguez-Moreno*, 526 U.S. 275 (1999).

32. *Id.* at 848.

Palma-Ruedas was a consolidated appeal for six defendants convicted for drug conspiracy, kidnapping, and violating § 924(c)(1).³³ Jacinto Rodriguez-Moreno (“Moreno”) was convicted of a § 924(c)(1) offense.³⁴ The defendants kidnapped a victim in Texas following a failed drug deal.³⁵ They then drove the victim from Texas to New York, New Jersey, and Maryland.³⁶ In Maryland, Moreno took possession of a firearm and threatened the victim.³⁷ The victim escaped soon after Moreno’s threat, and the police captured all defendants in Maryland.³⁸ All defendants were indicted, tried, and convicted in the United States District Court for the District of New Jersey.³⁹

In a two-to-one decision, the *Palma-Ruedas* majority reversed Moreno’s § 924(c)(1) conviction.⁴⁰ The majority began its opinion by reciting authority supporting a defendant’s right to proper venue.⁴¹ The majority then examined the split between the Ninth Circuit in *Corona* and the Fifth Circuit in *Pomranz*.⁴² Following the Ninth Circuit’s analysis, the *Palma-Ruedas* court relied on the key verbs of the statute,⁴³ “uses or carries,” to conclude that “because the crime committed by Moreno—carrying or using a firearm in relation to a crime of violence—occurred only in Maryland, Moreno could only have been properly tried [for the § 924(c)(1) offense] in Maryland.”⁴⁴

In response to the public policy argument in *Pomranz*,⁴⁵ the *Palma-Ruedas* majority suggested that “[m]any constitutional guarantees for criminal defendants are inefficient and costly Nevertheless, these guarantees form the bedrock principles of our criminal justice system and should not be hastily balanced away.”⁴⁶ The majority declined to liberally construe the venue

33. See *id.* at 845.

34. See *id.*

35. See *id.* at 845-46.

36. See *id.* at 846.

37. See *id.*

38. See *id.* at 846-47.

39. See *id.* at 847.

40. See *id.* at 859.

41. See *id.* at 848 (discussing venue rights protected by the Constitution and the Federal Rules of Criminal Procedure).

42. See *id.* at 848-49.

43. See *id.* at 849 (stating that the use of the verb test is proper to determine where a crime is committed and, thus, where venue should lie).

44. *Id.* (emphasis omitted).

45. See *United States v. Pomranz*, 43 F.3d 156, 161 (5th Cir. 1995) (explaining that the public policy rationale of conserving government resources outweighed the defendant’s interest in a separate trial in another venue for the § 924(c)(1) offense).

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

requirement in § 924(c)(1); thus, venue for the § 924(c)(1) offense would only lie in Maryland.⁴⁷

The dissent, critical of the majority's strict reliance on the verb test,⁴⁸ argued that the verb test is not the only method by which to determine venue,⁴⁹ and that by utilizing the verb test, the majority "[made] syntax constitutionally determinative."⁵⁰ The dissent focused instead on the "during and *in relation to*" language in § 924(c)(1) to argue that venue was proper wherever the predicate crime of violence or drug trafficking occurred.⁵¹

B. *The Supreme Court Reverses the Third Circuit*

The Supreme Court granted certiorari after the Third Circuit reversed Moreno's § 924(c)(1) conviction.⁵² In *United States v. Rodriguez-Moreno*,⁵³ Justice Thomas delivered the opinion of the Court in a seven-to-two decision reversing the Third Circuit and affirming Moreno's 924(c)(1) conviction.⁵⁴ The Supreme Court held that "[w]here venue is appropriate for the underlying crime of violence, so too it is for the § 924(c)(1) offense."⁵⁵

The Court stated that venue should be determined by looking at the nature of the crime and the act or acts constituting it,⁵⁶ and that although the verb test has some value, it is not the sole determining factor used to establish venue.⁵⁷ The Court interpreted § 924(c)(1) as containing two distinct elements: (1) the usage and carrying of a firearm; and (2) the commission of a predicate violent crime.⁵⁸ Moreno's predicate violent crime, kidnapping, is a unitary crime.⁵⁹ Thus, venue for kidnapping is

47. See *id.* at 849-50.

48. See *id.* at 859 (Alito, J., concurring in part and dissenting in part). Refer to notes 17-18 *supra* and accompanying text (describing the verb test).

49. See *Palma-Ruedas*, 121 F.3d. at 860 (Alito, J., concurring in part and dissenting in part) (noting that the originator of the verb test had merely suggested that it was "usually" the best method, but not the only method).

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

51. See *id.* at 859-60 (Alito, J., concurring in part and dissenting in part) (showing how a simple rearrangement of the verbs in the statute would result in a different statutory interpretation).

52. See *United States v. Rodriguez-Moreno*, 524 U.S. 915, 915 (1998).

53. 526 U.S. 275 (1999).

54. See *id.* at 276, 282.

55. *Id.* at 282.

56. See *id.* at 279.

57. See *id.* at 280.

58. See *id.*

59. As used in this sense, a unitary crime is a crime that does not occur at a single point in time but is a continuing offense open to prosecution where it was begun, continued, or completed. See *id.* at 281-82.

proper in any district in which the kidnapping began, continued, or ended.⁶⁰ Because § 924(c)(1) offenses are not “point-in-time” offenses, proper venue is not limited to where the use of the firearm and the commission of the violent crime coincide.⁶¹ Thus Moreno’s use of the firearm in Maryland while committing the kidnapping satisfied the “during and in relation to” requirement of § 924(c)(1). Therefore, venue for the § 924(c)(1) offense was proper anywhere the predicate crime could be tried.⁶²

Justice Scalia, joined by Justice Stevens, wrote the dissenting opinion.⁶³ Justice Scalia disagreed with the majority over where the crime was committed.⁶⁴ Justice Scalia stated “[i]t 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.”⁶⁵ Justice Scalia focused on the “during and in relation to” phrase used in § 924(c)(1) to argue that the only proper venue for a § 924(c)(1) offense is where the firearm and the predicate crime occur simultaneously.⁶⁶

III. DETERMINING VENUE UNDER FEDERAL STATUTES

A. *Determination of Proper Venue: A General Overview*

The Constitution guarantees that venue in a criminal trial will lie in the state where the alleged crime is committed⁶⁷ and that a local jury shall hear the case.⁶⁸ This constitutional requirement is embodied in Federal Rule of Criminal Procedure

60. See *id.* The Court did not limit its reasoning to kidnapping, thus, presumably, other unitary crimes could be subject to the same treatment. See *id.* at 282.

61. See *id.* at 281.

62. See *id.* at 282.

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

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

65. *Id.* at 282-83 (Scalia, J., dissenting).

66. See *id.* (Scalia, J., dissenting) (analyzing the language of § 924(c)(1)).

67. See U.S. CONST. art. III, § 2, cl. 3 (“The Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed . . .”).

68. See U.S. CONST. amend. VI (“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 . . .”). Although the Sixth Amendment literally only defines the pool from which to draw jurors, it has often been interpreted as guaranteeing a criminal trial in the district where the crime was committed. See, e.g., *Rodriguez-Moreno*, 526 U.S. at 278 (recognizing that the Sixth Amendment reinforces the command of Article III, § 2); *Travis v. United States*, 364 U.S. 631, 634 (1961) (interpreting the Sixth Amendment as providing a requirement that reinforces Article III, § 2).

18, which states that “prosecution shall be had in a district in which the offense was committed.”⁶⁹ Although the Constitution establishes minimum requirements for venue,⁷⁰ Congress has the power to define *where* a crime is committed.⁷¹ Congress can exercise this venue power by including an explicit venue provision within a statute or by implying venue through the language used to define a crime.⁷² Several federal statutes contain explicit venue provisions.⁷³ Where Congress has not provided explicit venue provisions, and an unlawful act continues through multiple jurisdictions, Congress has enacted 18 U.S.C. § 3237 (“§ 3237”) to help determine venue.⁷⁴ Section 3237 is inapplicable, however, when a statute contains explicit venue provisions or when a court can interpret from the criminal acts described in the statute where the crime is committed.⁷⁵

69. FED. R. CRIM. P. 18.

70. See U.S. CONST. art. III, § 2, cl. 3; Norman Abrams, *Conspiracy and Multi-Venue in Federal Criminal Prosecutions: The Crime Committed Formula*, 9 UCLA L. REV. 751, 816 (1962) (“The constitutional venue requirement only fixes some undefined outer limits.”).

71. See Abrams, *supra* note 70, at 816 (“Congress, by its definition of the elements of offenses . . . exercises an almost plenary power over venue.”).

72. See Schlesinger, *supra* note 3, at 925-26 (1983) (explaining that Congress can exercise its venue power explicitly in the statute or implicitly through language used in the statute).

73. See, e.g., 18 U.S.C. § 659 (1994 & Supp. IV 1999) (stating that venue for unlawfully taking goods in interstate commerce is proper where the violation first occurred and where the defendant received the goods); 18 U.S.C. § 1073 (1994 & Supp. IV 1999) (declaring that where a person moves in interstate or foreign commerce with intent to avoid prosecution, the giving of testimony, or service of summons, venue is proper only in the district in which the original crime was alleged to have been committed); 18 U.S.C. § 1512(h) (1994 & Supp. IV 1999) (stating that a person who tampers with a witness, victim, or informant in an official proceeding may be prosecuted where the proceeding was intended to be affected or where the alleged offense occurred); 18 U.S.C. § 3235 (1994) (stating that a trial for a capital offense should be in the county in which the offense was committed).

74. 18 U.S.C. § 3237 states in part, “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 (1994). See, e.g., *United States v. Muench*, 153 F.3d 1298, 1301 (11th Cir. 1998) (examining an Eighth Circuit holding that failure to pay child support, a violation of 18 U.S.C. § 228, was a continuing offense, and therefore venue was proper under § 3237 or where the child support recipients lived); *Clinton v. United States*, 293 F.2d 47, 47-48 (10th Cir. 1961) (deciding that the defendant, who was charged with transporting a kidnapping victim in interstate commerce, could be prosecuted, under § 3237, in any district through which the defendant transported the victim).

75. See generally *United States v. Brennan*, 183 F.3d 139, 147 (2d Cir. 1999) (stating that “[p]assage of the history and purpose of the Travel Act 3237(a) . . . did not alter the constitutional and policy concerns underlying the Court’s restrained view of venue”). The court went on to say that “[section] 3237(a) is best read as not applying to statutes . . . that specify that a crime [was] committed by the *particular* acts.” *Id.* (emphasis added). See also *United States v. Ross*, 205 F.2d 619, 621 (10th

When Congress has not explicitly defined where a crime is committed, courts look to the nature of the crime and the act or acts constituting the crime to determine its location for venue purposes.⁷⁶ The verb test is a common method that courts use to help determine where a crime is committed.⁷⁷ When Congress has defined a crime so that it can be found to have been committed in a broad area, courts, following § 3237, sometimes find venue in a district where the defendant has not been physically present, a result that seemingly goes against the spirit of constitutional guarantees of venue.⁷⁸ Because Congress has the power to define where a crime is committed, the textual requirements of the Constitution are met.⁷⁹ The following section examines how courts determine venue and how a defendant may be tried in a venue in which the defendant was not physically present during the crime's commission.

B. An Examination of Venue Provisions in Several Federal Statutes

1. *Venue in the Mail Fraud Statute.* The mail fraud statute has an extensive history in American law.⁸⁰ The modern mail fraud statute, 18 U.S.C. § 1341 (§ 1341), was enacted in 1872 to protect "the public against all . . . intentional efforts to despoil, and to prevent the post office from being used to carry [efforts to despoil] into effect."⁸¹ The Seventh Circuit, in 1975, stated that

Cir. 1953) (holding that the offense of depositing nonmailable matter in the mail system was completed upon deposit of the nonmailable matter in the mailing receptacle and thus was not a continuing act).

76. See *United States v. Rodriguez-Moreno*, 526 U.S. 275, 279 & n.1 (1999) (confirming that venue lies where the act or acts constituting the crime are committed); *United States v. Anderson*, 328 U.S. 699, 702-03 (1946) (discussing venue for a criminal prosecution under Section 11 of the Selective Training and Service Act; the Court stated that "[s]ince the statute does not indicate where Congress considered the place of committing the crime to be, . . . the *locus delicti* must be determined from the nature of the crime alleged and the location of the act or acts constituting it") (citations omitted).

77. Refer to notes 17-18 *supra* and accompanying text (describing the verb test and its use).

78. See, e.g., *United States v. Fagan*, 821 F.2d 1002, 1007-08 (5th Cir. 1987) (finding venue proper in the District Court for the Southern District of Texas for a mail fraud conviction although defendant was never physically present in Texas during the commission of the crime).

79. Refer to notes 71-72 *supra* and accompanying text (explaining that Congress may define venue within constitutional limits).

80. See generally Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771, 772-73 (1980) (examining the early legislative and judicial history of the mail fraud statute).

81. *Durland v. United States*, 161 U.S. 306, 314 (1896).

the modern mail fraud statute's purpose is to prevent the post office from being used as the vehicle for carrying out fraudulent schemes.⁸² The mail fraud statute is recognized as covering a broad range of behavior to protect society.⁸³

Determining proper venue for a mail fraud offense depends first on determining where the crime was committed.⁸⁴ Obviously, venue would be proper in the jurisdiction from which the defendant mailed a letter in furtherance of a fraudulent scheme.⁸⁵ Venue would also be proper in the jurisdiction in which the suspect letter was received, because the use of the mails to further a fraudulent scheme is the gravamen of the offense.⁸⁶ Therefore, venue under the mail fraud statute can involve a scenario in which a defendant is prosecuted in a jurisdiction that the defendant had not visited.⁸⁷

Because venue is proper both where a letter is sent and where it is received in furtherance of a fraud, some have argued that venue is proper in any district through which the suspect mailing passed. In *United States v. Brennan*,⁸⁸ the government argued that § 3237 applied to the mail fraud statute, and thus the defendant could be prosecuted in any district through which the mailings at issue had passed.⁸⁹ Rather, the *Brennan* court rejected the government's argument and found that § 3237 did not apply to the mail fraud statute.⁹⁰ The court also noted that if § 3237 applied, as the government argued, the mail fraud statute

82. See *United States v. Keane*, 522 F.2d 534, 544 (7th Cir. 1975).

83. See *id.*

84. Refer to notes 67-70 *supra* and accompanying text (discussing constitutional venue rights).

85. See *Kreuter v. United States*, 218 F.2d 532, 534 (5th Cir. 1955) (stating that a defendant could be tried for mail fraud where the defendant caused a letter to be mailed).

86. See *Salinger v. Loisel*, 265 U.S. 224, 234 (1924) (holding that a defendant could be tried for mail fraud where the letter was received); *Kreuter*, 218 F.2d at 534 (reasoning that "the gravamen of the offense is the use of the mails," and that a defendant "could be tried where he caused a letter to be either mailed or delivered in furtherance of the scheme").

87. See, e.g., *Hartzell v. United States*, 72 F.2d 569, 576 (8th Cir. 1934) (deciding that venue was proper in the United States District Court for the Northern District of Iowa, where the fraudulent letter was delivered, even though defendant was in London, England at the time of the commission of the crime).

88. 183 F.3d 139 (2d Cir. 1999).

89. See *id.* at 146. The defendants originated or received mailings in Manhattan in the Southern District of New York. See *id.* at 144. The defendants were prosecuted in the United States District Court for the Eastern District of New York based on testimony that all mail from the Southern District of New York passed through John F. Kennedy or LaGuardia airports, both of which are located in the Eastern District of New York. See *id.*

90. See *id.* at 146-47 (observing that Congress intended use of the mails "under" § 3237 to apply narrowly).

would be unconstitutional because “the locus of the crime of mail fraud does not include districts through which mailings merely passed en route to their destination.”⁹¹

2. *Venue in the General Conspiracy Statute.* Concerted criminal activity can potentially cause greater harm to the public than can crimes committed by individuals.⁹² To address this concern Congress has enacted a number of statutes that criminalize conspiracy to commit certain crimes.⁹³ The general conspiracy statute is codified at 18 U.S.C. § 371 (§ 371).⁹⁴ The Supreme Court recognized that the purpose of the conspiracy statute was to protect society from the dangers of concerted criminal activity and to identify and criminalize an agreement to engage in criminal activity that presents a threat to social order.⁹⁵

Under § 371, venue for a conspiracy offense is proper where the offense was committed.⁹⁶ A conspiracy offense consists of an agreement to commit an unlawful act and an act to further the object of the conspiracy.⁹⁷ Accordingly, determining what constitutes an agreement and an overt act will establish where the crime was committed and, therefore, where venue lies.⁹⁸ An overt act need not be an unlawful act, just one that advances the objective of the agreement.⁹⁹

91. *Id.* at 148.

92. *See Callanan v. United States*, 364 U.S. 587, 593 (1961) (observing that “collective criminal agreement—partnership in crime—presents a greater potential threat to the public than individual delicts”).

93. *See, e.g.*, 18 U.S.C. § 241 (1994 & Supp. IV 1999) (conspiracy against civil rights); 18 U.S.C. § 1201 (1994 & Supp. IV 1999) (conspiracy to kidnap); 18 U.S.C. § 2271 (1994) (conspiracy to cast away or destroy a vessel).

94. *See* 18 U.S.C. § 371 (1994). This statute states in part:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

Id.

95. *See United States v. Feola*, 420 U.S. 671, 693-94 (1975).

96. Refer to notes 67-70 *supra* and accompanying text (noting that the Constitution requires a trial where the crime was committed).

97. *See United States v. Falcone*, 311 U.S. 205, 210 (1940) (stating that conspiracy requires “agreement among the conspirators to commit an offense attended by an act of one or more of the conspirators to effect the object of the conspiracy”).

98. *See* U.S. CONST. art. III, § 2, cl. 3 (stating that the trial for a crime should be held where the crime was committed).

99. *See Yates v. United States*, 354 U.S. 298, 334 (1957) (reasoning that, because the defendants were convicted of conspiracy to overthrow the government, speech not in and of itself illegal constituted an overt act toward the objective of the

Generally, an agreement is an understanding, implicit or otherwise, to commit an unlawful act.¹⁰⁰ A defendant can enter into an agreement without entering the locale where the unlawful acts are to take place.¹⁰¹ Venue is proper where the defendants entered into the conspiracy or where defendants committed any act to effectuate the conspiracy.¹⁰² Thus, as in mail fraud, situations can arise where defendants are subject to prosecution in a district in which they have not been physically present.¹⁰³

3. *Venue in the Travel Act.* In the early 1960s, Attorney General Robert Kennedy recognized the dilemma that organized crime presented to state authorities.¹⁰⁴ Often, local authorities lacked either the resources or the willingness to pursue organized criminals,¹⁰⁵ or they were powerless to act because the criminals committed the illegal activities across state lines.¹⁰⁶ In response, Congress passed the Interstate and Foreign Travel or Transportation in Aid of Racketeering Enterprises Act,¹⁰⁷ better

conspiracy).

100. See *Di Bonaventura v. United States*, 15 F.2d 494, 495 (4th Cir. 1926) (explaining that an unlawful agreement is the gist of a conspiracy offense, and holding that knowledge of a criminal act alone does not evidence an unlawful agreement).

101. See *Covelli v. United States*, 289 F. 791, 792-93 (2d Cir. 1923) (holding that venue was proper in the District Court of the United States for the Eastern District of New York even though defendant entered into the agreement by telephone from another district).

102. See *Hyde v. United States*, 225 U.S. 347, 365-67 (1912) (interpreting Section 5440 of the Revised Statutes, a predecessor of § 371, and holding that venue is proper where the defendants entered into the agreement or performed an action in furtherance of the conspiracy).

103. See, e.g., *Davis v. United States*, 148 F.2d 203, 204 (5th Cir. 1945) (stating that “[a] prosecution for conspiracy may be maintained in any federal district where an overt act is committed in furtherance thereof, even though some conspirators never entered that state or district”); *Chapman v. United States*, 10 F.2d 124, 125 (5th Cir. 1925) (stating that, although not all of the defendants in the conspiracy prosecution entered Texas, venue was proper because some of the co-conspirators committed overt acts within Texas).

104. See *United States v. Nardello*, 393 U.S. 286, 290 (1969) (“The Travel Act formed part of Attorney General Kennedy’s legislative proposals to combat organized crime.”); see also Randy J. Curato et al., Note, *Government Fraud, Waste, and Abuse: A Practical Guide to Fighting Official Corruption*, 58 NOTRE DAME L. REV. 1027, 1027-31 (1983) (discussing the history and purpose of the Travel Act and Attorney General Robert Kennedy’s efforts to combat organized crime).

105. See *United States v. Archer*, 486 F.2d 670, 685 (2d Cir. 1973) (observing that Congress intended the Travel Act to allow federal officers to act against organized criminals when local authorities were “unable or unwilling to do so”).

106. See *Nardello*, 393 U.S. at 290-91 (recognizing that one purpose of the Travel Act was to aid local officials in controlling criminal operations that were previously beyond local jurisdiction).

107. 18 U.S.C. § 1952 (1994).

known as the Travel Act, to aid local authorities in their efforts to combat organized criminals who operated across state lines.¹⁰⁸

The Travel Act makes interstate participation in a specific list of activities, often associated with organized crime, a federal crime.¹⁰⁹ Generally, the elements of a crime under the Travel Act are interstate travel or use of interstate facilities, intent to promote, direct, or manage illegal business, and an overt act.¹¹⁰ Use of interstate facilities includes the mail,¹¹¹ interstate banking channels,¹¹² and the telephone.¹¹³

As noted previously, venue for a crime is proper where the crime was committed.¹¹⁴ In *United States v. Erlenbaugh*,¹¹⁵ the Seventh Circuit stated that presence is not an element of the Travel Act and that “[b]eing the operator or proprietor of the betting establishment utilizing the interstate facility is sufficient

108. See Curato et al., *supra* note 104, at 1027, 1030 (explaining that the Travel Act was intended to enable federal authorities to combat interstate crime).

109. The Travel Act provides in part:

(a) Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to—(1) distribute the proceeds of any unlawful activity; or (2) commit any crime of violence to further any unlawful activity; or (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform—(A) an act described in paragraph (1) or (3) shall be fined under this title, imprisoned not more than 5 years, or both; or (B) an act described in paragraph (2) shall be fined under this title, imprisoned for not more than 20 years, or both, and if death results shall be imprisoned for any term of years or for life.

18 U.S.C. § 1952(a).

The Travel Act defines “unlawful activity” as any business enterprise involving gambling, liquor, narcotics or controlled substances, prostitution, extortion, bribery, or arson that are committed under certain circumstances. See *id.* § 1952(b).

110. See *United States v. Monu*, 782 F.2d 1209, 1211 (4th Cir. 1986) (describing the elements required to prove a violation of the Travel Act and noting that use of the mails constitutes use of interstate facilities); *Spinelli v. United States*, 382 F.2d 871, 893 (8th Cir. 1967) (listing the basic elements of a crime under the Travel Act), *rev’d on other grounds*, 393 U.S. 410 (1969).

111. See § 1952(a). See also *United States v. Heacock*, 31 F.3d 249, 254-55 (5th Cir. 1994) (holding that any use of the United States mail is sufficient to meet the Travel Act’s requirement of use of interstate facilities). *But see United States v. Barry*, 888 F.2d 1092, 1095 (6th Cir. 1989) (finding that only *interstate* mailing qualifies under the Travel Act as a use of interstate facilities).

112. See, e.g., *United States v. LeFaivre*, 507 F.2d 1288, 1290-91 (4th Cir. 1974) (holding that the defendant used interstate facilities when he deposited gambling proceeds in the form of out-of-state checks).

113. See, e.g., *United States v. Villano*, 529 F.2d 1046, 1052 (10th Cir. 1976) (finding that the receiving of interstate telephone calls, for a gambling scheme, constituted use of interstate facilities under the Travel Act).

114. Refer to notes 67-70 *supra* and accompanying text (noting constitutional venue requirements).

115. 452 F.2d 967 (7th Cir. 1971).

to result in a conviction under [the Travel Act] regardless of presence at any particular time.”¹¹⁶ In *United States v. Polizzi*,¹¹⁷ the Ninth Circuit noted that a violation of the Travel Act can be a continuing offense and that even aiding and abetting travel could constitute a Travel Act violation.¹¹⁸ Conceivably, the government could prosecute a defendant for a Travel Act violation in a venue in which the defendant has not been physically present, if the defendant used an interstate facility, intended to promote an unlawful business, and committed an overt act. For example, in *United States v. Nichols*,¹¹⁹ the defendant’s only interstate activity was a single visit to Kansas City, Missouri, in furtherance of a gambling operation in Kansas City, Kansas.¹²⁰ The *Nichols* court affirmed the defendant’s conviction in Missouri even though the defendant’s only gambling operation was in Kansas.¹²¹ Theoretically, if Nichols had not visited Missouri, but had only used an interstate facility, for example, mailing promotional materials to Missouri to promote his Kansas gambling operation, the government could still prosecute Nichols in Missouri under the Travel Act.

C. Distinguishing 18 U.S.C. § 924(c)(1)

In the above examples of mail fraud, conspiracy, and the Travel Act, a defendant can be prosecuted for a crime in a venue in which the defendant has not been physically present. The purpose and construction of these statutes sometimes require such a result. A violation of § 924(c)(1), however, does not share the same purpose as the above-referenced statutes and, on that ground, cannot support the prosecution of a defendant in a venue in which the defendant was not present.

The primary purpose of the mail fraud statute is to prevent the use of the post office to promote fraudulent schemes.¹²² With time, the statute has evolved into a jurisdictional method for the federal government to exert power at the state and local level.¹²³

116. *Id.* at 975.

117. 500 F.2d 856 (9th Cir. 1974).

118. *See id.* at 899 (proposing that “a defendant can be prosecuted for traveling in violation of § 1952, or for aiding and abetting such travel, in any district in which the travel occurred[.]” thus implying that the government could prosecute a defendant in a venue in which the defendant was never present).

119. 421 F.2d 570 (8th Cir. 1970).

120. *See id.* at 572.

121. *See id.* at 571, 575-76.

122. Refer to notes 81-83 *supra* and accompanying text (explaining the original purpose of the mail fraud statute).

123. *See* Peter J. Henning, *Maybe It Should Just Be Called Federal Fraud: The*

Because the use of the mails is the essential element of the offense, venue is proper wherever the defendant used the mails in furtherance of a fraud.¹²⁴ Thus, Congress defined the commission of mail fraud in a way that can result in the prosecution of a defendant in a venue where the defendant has not been physically present.¹²⁵

The purposes of the general conspiracy statute and the Travel Act are similar to that of the mail fraud statute. Both the conspiracy statute and the Travel Act were intended to criminalize efforts in furtherance of concerted criminal activity and to exert federal jurisdiction where local enforcement efforts were inadequate.¹²⁶ A defendant violates the conspiracy statute when the defendant enters into an agreement or performs an overt act in furtherance of the conspiracy.¹²⁷ Because the purpose of the conspiracy statute is to criminalize the conspiracy, venue is proper wherever the agreement or overt act furthering the conspiracy took place.¹²⁸ Similarly, the Travel Act criminalizes interstate travel or the use of interstate facilities in promotion of an illegal business.¹²⁹ Because the Travel Act criminalizes interstate travel or the use of interstate facilities, venue for the offense is proper where the interstate travel or the use of interstate facilities occurred.¹³⁰ As a result, defendants can sometimes violate the conspiracy statute or the Travel Act without having ever been physically present in the venue of prosecution.¹³¹

Changing Nature of the Mail Fraud Statute, 36 B.C. L. REV. 435, 436-37 (1995) (observing that court interpretations have recently expanded the scope of the mail fraud statute).

124. Refer to notes 85-86 *supra* and accompanying text (explaining that venue for a mail fraud offense is proper where the letter was mailed or received).

125. Refer to note 87 *supra* (describing a case where the defendant was prosecuted in a district in which he was not physically present at the time the crime was committed).

126. Refer to notes 95, & 108-09 *supra* and accompanying text (stating the purposes of the conspiracy statute and the Travel Act, respectively).

127. See *United States v. Falcone*, 311 U.S. 205, 210 (1940) (articulating the elements of a conspiracy offense).

128. See *Hyde v. United States*, 225 U.S. 347, 367 (1912) (observing that venue for a conspiracy offense is proper where an agreement or an overt act took place).

129. Refer to note 109 *supra* and accompanying text (quoting selected text of the Travel Act).

130. See, e.g., *United States v. Polizzi*, 500 F.2d 856, 899 (9th Cir. 1974) (stating that venue for a Travel Act offense is proper wherever the travel took place).

131. See *Chapman v. United States*, 10 F.2d 124, 125 (5th Cir. 1925) (holding that, although some defendants in conspiracy prosecution did not enter Texas, venue was proper in Texas because co-conspirators committed overt acts within Texas). Refer to notes 119-21 *supra* and accompanying text (discussing *United States v. Nichols*, 421 F.2d 570 (8th Cir. 1970), and describing how use of interstate facilities

Section 924(c)(1) is distinguishable from the mail fraud statute, the conspiracy statute, and the Travel Act. The purpose of § 924(c)(1) was not to solve the jurisdictional dilemmas that precipitated the mail fraud statute, the conspiracy statute, or the Travel Act. Rather, the purpose of § 924(c)(1) was to address the increasingly common and dangerous combination of firearms and crime.¹³² The use, carrying, or possession of a firearm is the essential element of a § 924(c)(1) offense.¹³³ Following the courts' reasoning in mail fraud, conspiracy, and Travel Act cases, because the focus of § 924(c)(1) is the firearm, venue should only lie where the firearm is used, carried, or possessed. Therefore, given the purpose of § 924(c)(1), and basing venue determination on the construction of the statute, a defendant should not be prosecuted for a § 924(c)(1) offense in a venue in which the firearm has not been physically present.¹³⁴

IV. THE BACKGROUND AND OPERATION OF 18 U.S.C. § 924(c)(1)

A. *The Legislative History and Intent of 18 U.S.C. § 924(c)(1)*

Section 924(c)(1) stems from the Gun Control Act of 1968.¹³⁵ Representative Richard Poff characterized the intended goal of the statute as to “persuade the man who is tempted to commit a Federal felony to leave his gun at home.”¹³⁶ Other members of Congress also stressed the goal of deterring criminals from committing crimes with firearms.¹³⁷ Courts have echoed Representative Poff's statement by finding that the statute's purpose was “to prevent the carrying and use of firearms in the commission of federal felonies,”¹³⁸ and that the statute was enacted in an effort to combat the “dangerous combination” of

could theoretically violate the Travel Act and lead to prosecution of a defendant in a venue where the defendant was never present).

132. Refer to Part IV.A *infra* (discussing the legislative intent of § 924(c)(1)).

133. Refer to notes 136-39 *infra* and accompanying text (discussing the legislative intent of § 924(c)(1), which was to deter the use of a firearm in crimes).

134. *But see* Recent Cases, 111 HARV. L. REV. 1134, 1139 (1998) (arguing that venue for a § 924(c)(1) offense is proper “wherever the predicate substantive offense occurred”).

135. Pub. L. No. 90-618, 82 Stat. 1213 (1968).

136. 114 CONG. REC. 22,231 (daily ed. July 19, 1968) (statement of Rep. Poff).

137. *See id.* at 22,243-44 (statement of Rep. Hunt) (stating that the statute would apply to a person “who goes out taking a gun to commit a crime”); *id.* at 22,244 (statement of Rep. Randall) (arguing that the purpose of the statute “is to persuade the criminal to leave his gun at home”).

138. *United States v. Eagle*, 539 F.2d 1166, 1171 (8th Cir. 1976). *See also* *United States v. Rawlings*, 821 F.2d 1543, 1546 (11th Cir. 1987) (quoting *Eagle* as defining the purpose of § 924(c)(1)).

drugs and firearms.¹³⁹ The current version of § 924(c)(1) is the result of six amendments.¹⁴⁰ The latest amendment¹⁴¹ added a possession element, thereby perpetuating the original intent of the statute.¹⁴²

B. The Elements of 18 U.S.C. § 924(c)(1) and Interpretation in the Courts

In order to determine where a § 924(c)(1) offense is committed, it is essential to understand the elements of the offense and how those elements are interpreted. Courts have consistently upheld the validity of § 924(c)(1) when attacked on constitutional grounds,¹⁴³ finding that § 924(c)(1) is within Congress's power under the Commerce Clause¹⁴⁴ and does not violate due process, the Eighth Amendment,¹⁴⁵ or the equal protection clause.¹⁴⁶

A violation of § 924(c)(1) requires that the defendant (1) "use[] or carr[y] a firearm," (2) "during and in relation to any crime of violence or drug trafficking crime."¹⁴⁷ Courts have wrestled with the interpretation of at least four different elements of the crime: using a firearm during and in relation to any crime, carrying a firearm during and in relation to a crime, a crime of violence, and a drug trafficking crime.

139. See *Smith v. United States*, 508 U.S. 223, 240 (1993).

140. See Angela LaBuda Collins, Note, *The Latest Amendment to 18 U.S.C. § 924(c): Congressional Reaction to the Supreme Court's Interpretation of the Statute*, 48 CATH. U. L. REV. 1319, 1325-29 (1999) (discussing the effect of recent amendments to § 924(c)).

141. See Act of Nov. 13, 1998, Pub. L. No. 105-386, 112 Stat. 3469 (1998).

142. See 144 CONG. REC. H533 (daily ed. Feb. 24, 1998) (statement of Rep. McCollum) (stating that the amendment requires that the firearm be possessed in furtherance of the crime).

143. See, e.g., *United States v. King*, 532 F.2d 505, 510 (5th Cir. 1976) (stating that § 924(c) does not violate the Second or Fifth Amendments); *United States v. McMillian*, 535 F.2d 1035, 1037 n.1 (8th Cir. 1976) (finding unpersuasive the defendant's argument that § 924(c) exceeded Congress's power under the Commerce Clause).

144. See, e.g., *United States v. Brown*, 72 F.3d 96, 96-97 (8th Cir. 1995) (finding that § 924(c)(1) did not exceed Congress's power under the Commerce Clause and affirming defendant's conviction for using a gun in a drug trafficking crime).

145. See, e.g., *United States v. Wilkins*, 911 F.2d 337, 339-41 (9th Cir. 1990) (finding that mandatory sentencing under § 924(c) is not cruel and unusual punishment, and that due process is not violated because the legislature has the power to set mandatory sentences).

146. See, e.g., *United States v. Bregnard*, 951 F.2d 457, 461 (1st Cir. 1991) (asserting that § 924(c) does not violate equal protection even though defendant's crime would be classified as a misdemeanor in some states and, therefore, may not be considered a violent crime in those states).

147. See 18 U.S.C. § 924(c)(1)(A) (Supp. IV 1999).

Courts have had particular difficulty defining what constitutes using a firearm under § 924(c)(1).¹⁴⁸ Past interpretations varied from active employment of the firearm¹⁴⁹ to mere presence of the firearm on the premises.¹⁵⁰ In *Bailey v. United States*,¹⁵¹ the Supreme Court granted certiorari to resolve inconsistencies in the interpretation of the “use of a firearm” requirement of § 924(c)(1).¹⁵² The *Bailey* Court established “active employment” of a firearm as the applicable standard of “use” under § 924(c)(1).¹⁵³ The Court reasoned that although “the word ‘use’ poses some interpretational difficulties[,]” examination of the context of the statute shows that Congress intended that the crime involve more than mere possession.¹⁵⁴ A broad interpretation of “use” would tend to swallow the word “carry” and render “carry” meaningless.¹⁵⁵ The Court decided that the meanings of “use” and “carry” should not overlap.¹⁵⁶ The Court’s strict interpretation of “use” tended to support the proposition that there are no superfluous words in legislative language.¹⁵⁷ As

148. 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) (recognizing that this provision of § 924(c)(1) has been subject to varying interpretations by courts). See generally Francis M. Dougherty, J.D., Annotation, *What Constitutes “Use” of Firearm for Purposes of 18 USCS § 924(c)(1), Providing Penalty for Use of Firearm During Drug Trafficking Crime or Crime of Violence*, 125 A.L.R. FED. 545 (1995) (examining in detail different court interpretations of “use” under § 924(c)(1)).

149. See *United States v. Bailey*, 36 F.3d 106, 121-22 (D.C. Cir. 1994) (Williams, J., dissenting) (suggesting that the word “use” implies activity and that Congress had “active employment of a weapon in mind” when it passed § 924(c)), *rev’d*, 516 U.S. 137 (1995).

150. See, e.g., *United States v. Matra*, 841 F.2d 837, 843 (8th Cir. 1988) (deciding that the defendant used a machine gun under § 924(c)(1) when a post-arrest search of the house revealed a machine gun in a locked room beneath a waterbed frame because the defendant used the gun to ensure his success in a criminal venture).

151. 516 U.S. 137 (1995). *Bailey v. United States* was a consolidation of two § 924(c)(1) cases. See *id.* at 138. Bailey was arrested for possession of cocaine, and police found a loaded firearm in the trunk of his car. See *id.* at 139. Robinson was arrested for drug-related crimes, and police found an unloaded firearm locked in a trunk in his house. See *id.* at 140.

152. See *id.* at 142 (explaining that the circuit courts use conflicting standards and often reach conflicting results).

153. See *id.* at 143 (defining “active employment” as a “use that makes the firearm an operative factor in relation to the predicate offense”).

154. See *id.*

155. See *id.* at 145 (reasoning that if “‘use’ includes even the action of a defendant who puts a gun into place to protect drugs or to embolden himself” then “no role remains for ‘carry’”).

156. See *id.* at 146 (“Nothing here indicates that Congress, when it provided these two terms, [use and carry,] intended that they be understood to be redundant.”).

157. See *id.*

a result, the *Bailey* Court found that the defendants had not actively used a firearm and overturned both convictions.¹⁵⁸

Some members of Congress were displeased with the *Bailey* Court's narrow interpretation of "use."¹⁵⁹ Congress, in response, amended § 924(c)(1) in 1998 by adding a possession element to the statute.¹⁶⁰ The amended statute includes simple possession of a firearm in furtherance of a crime of violence or drug trafficking crime,¹⁶¹ expanding the reach of § 924(c)(1) to cases in which a defendant may not have used the firearm under the narrow *Bailey* interpretation.

The second issue is defining what actions constitute the carrying of a firearm during and in relation to a crime. Until *Muscarello v. United States*,¹⁶² the circuit courts differed in their interpretation of what constituted carrying a firearm.¹⁶³ In *Muscarello*, the Supreme Court held that "carrying" under § 924(c)(1) was not limited to carrying on the body.¹⁶⁴ The Court examined the history of § 924(c)(1) and found that "carrying" applies to the "person who knowingly possesses and conveys firearms in a vehicle, including in the locked glove compartment or trunk of a car, which the person accompanies."¹⁶⁵ The Court declined to limit "carrying" to situations where the firearm is "immediately accessible."¹⁶⁶ The *Muscarello* dissent favored the *Bailey* Court's approach to the interpretation of "carry," a narrow and more lenient definition that would "indicate not merely keeping arms on one's premises or in one's vehicle, but bearing them in such manner as to be ready for use as a weapon."¹⁶⁷ Subsequently, the *Muscarello* Court's decision to interpret

158. See *id.* at 150-51. The *Bailey* Court offered the examples of "brandishing, displaying, bartering, striking with, and . . . firing or attempting to fire a firearm" as acts that would constitute active use. *Id.* at 148.

159. See 142 CONG. REC. S1976 (daily ed. Mar. 13, 1996) (statement of Sen. Helms) (referring to the narrow interpretation of use as "an unfortunate and unwise Supreme Court decision"); 142 CONG. REC. S7764-65 (daily ed. July 11, 1996) (statement of Sen. DeWine) (proposing a change to § 924(c)(1) that would stress the "close proximity" of a firearm and not the firearm's use).

160. See Act of Nov. 13, 1998, Pub. L. No. 105-386, 112 Stat. 3469 (1998).

161. See *id.*

162. 524 U.S. 125 (1998).

163. See Lynn Marsella, Note, *Something About "Carry": Supreme Court Broadens the Scope of 18 U.S.C. § 924(c)*, 89 J. CRIM. L. & CRIMINOLOGY 973, 979-82 (1999) (describing the circuit court's various different interpretations of "carry" under § 924(c)(1)).

164. See *Muscarello*, 524 U.S. at 126.

165. *Id.* at 126-27.

166. See *id.* at 138 (explaining that when a firearm is carried in a glove compartment, for example, it is irrelevant whether or not the glove compartment is locked).

167. *Id.* at 140 (Ginsburg, J., dissenting).

“carrying a firearm” broadly was reinforced when Congress added the possession provision to the statute.¹⁶⁸

The third element of the crime is that the accused must have committed a crime of violence. Determining what constitutes a crime of violence is a question of law for the judge because it does not involve evidence, but only an examination of the statutory elements of an offense.¹⁶⁹ Section § 924(c)(3) defines a crime of violence,¹⁷⁰ and courts have established a “substantial risk” test following the statutory language.¹⁷¹ Courts’ interpretations of crimes of violence include bank robbery,¹⁷² involuntary manslaughter,¹⁷³ kidnapping,¹⁷⁴ and even witness tampering.¹⁷⁵

If the defendant has not committed a violent crime, the statute can still apply if the defendant committed a drug trafficking crime.¹⁷⁶ Section 924(c)(2) defines a drug trafficking crime as any felony that is “punishable under the Controlled Substances Act, the Controlled Substances Import and Export Act, or the Maritime Drug Law Enforcement Act.”¹⁷⁷ But regardless of whether the predicate crime is one of violence or drug trafficking, there must be a nexus between the firearm and

168. See Act of Nov. 13, 1998, Pub. L. No. 105-386, 112 Stat. 3469 (1998).

169. See *United States v. Vidaure*, 861 F.2d 1337, 1340 (5th Cir. 1988) (stating that under § 924(c)(1), “[t]he answer to [whether an offense is a crime of violence] does not depend upon the probative value of any extrinsic evidence and should be determined by the judge”).

170. § 924(c)(3) provides:

[T]he term “crime of violence” means an offense that is a felony and—(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 924(c)(3) (1994 & Supp. IV 1999).

171. See, e.g., *United States v. Moore*, 38 F.3d 977, 981 (8th Cir. 1994) (affirming the district court’s decision that involuntary manslaughter is a violent crime under the “substantial risk” test in § 924(c)).

172. See, e.g., *United States v. Johnson*, 962 F.2d 1308, 1312 (8th Cir. 1992) (finding that bank robbery is a crime of violence and that conspiracy to commit a crime of violence makes the conspiracy itself a crime of violence).

173. See, e.g., *Moore*, 38 F.3d at 981 (finding that involuntary manslaughter involves a substantial risk that physical force will be used in its commission and is a crime of violence).

174. See *United States v. Rodriguez-Moreno*, 526 U.S. 275, 278 (1999) (affirming a defendant’s conviction under § 924(c)(1) where the predicate crime was kidnapping).

175. See, e.g., *United States v. Weston*, 960 F.2d 212, 214 n.1, 217 (1st Cir. 1992) (agreeing that defendant’s acts of retaliation and tampering with a witness were crimes of violence).

176. See 18 U.S.C. § 924(c)(1)(A) (Supp. IV 1999) (“[A]ny person who, during and in relation to any crime of violence or drug trafficking crime . . . shall . . . be sentenced to a term of imprisonment of not less than five years.”) (emphasis added).

177. 18 U.S.C. § 924(c)(2) (1994) (citations omitted).

the predicate crime.¹⁷⁸ Determining whether a sufficient nexus exists is often difficult when the defendant commits a drug trafficking crime.¹⁷⁹ Although the government is not required to convict or even charge the defendant with the predicate drug trafficking offense arising at the time the firearm is found,¹⁸⁰ the offense must be proved beyond a reasonable doubt.¹⁸¹

V. VENUE FOR AN 18 U.S.C. § 924(C)(1) OFFENSE
SHOULD COINCIDE WITH THE FIREARM'S USE

A. *Where Is an 18 U.S.C. § 924(c)(1) Offense Committed?*

Following the constitutional requirements that determine where venue is proper, a court must first determine where the § 924(c)(1) offense was committed.¹⁸² The verb test¹⁸³ and an examination of the nature of the crime¹⁸⁴ both indicate that a § 924(c)(1) offense is committed where the firearm and the predicate crime coincide.

From the language of § 924(c)(1), “commission of the crime” is where the defendant uses, carries, or possesses a firearm

178. See *United States v. Lasanta*, 978 F.2d 1300, 1308-09 (2d Cir. 1992) (reversing the defendant's conviction under § 924(c)(1) because the “gun-drug nexus” was insufficient where a firearm was found in the defendant's car four months before the defendant was arrested for a drug offense).

179. See *id.* (describing how the nexus requirement has been evaluated in other cases involving drug trafficking crimes).

180. See *United States v. Cox*, 934 F.2d 1114, 1122-23 (10th Cir. 1991) (affirming the defendant's conviction under § 924(c)(1) where the defendant was not charged with an offense relating to the specific drugs found with the firearms, but did admit to possession of drugs found elsewhere).

181. See, e.g., *United States v. Jenkins*, 90 F.3d 814, 821 (3d Cir. 1996) (“Commission of a drug trafficking offense is an element of the crime described in § 924(c)(1), and must be proved beyond a reasonable doubt.”).

182. Refer to notes 67-70 *supra* and accompanying text (describing the constitutional requirement that a criminal defendant be tried where the crime was committed).

183. Refer to notes 17-18 *supra* and accompanying text (explaining the origins and use of the verb test). See also *United States v. Palma-Ruedas*, 121 F.3d 841, 849 (3d Cir. 1997) (applying the verb test and concluding that “one ‘commits’ a violation of § 924(c)(1) in the district where one ‘uses’ or ‘carries’ a firearm”), *rev'd sub nom.* *United States v. Rodriguez-Moreno*, 526 U.S. 275 (1999).

184. See *United States v. Anderson*, 328 U.S. 699, 703 (1946) (asserting that venue for a criminal prosecution “must be determined from the nature of the crime alleged and the location of the act or acts constituting it”). Although the predicate crime is an element of a § 924(c)(1) offense, the legislative intent points out that the firearm is the essential element of the offense. Refer to notes 136-39 *supra* and accompanying text (explaining that the legislature intended to criminalize the combination of firearms and a violent or drug trafficking crime). See also *Jenkins*, 90 F.3d at 821 (recognizing that a predicate crime is an element of a § 924(c)(1) offense).

during, in relation to, or in furtherance of a crime.¹⁸⁵ On its face, this suggests that there must be a sufficient nexus between the firearm and the crime.¹⁸⁶ The purpose of § 924(c)(1) is to deter the use, carrying or possession of a firearm in combination with a crime.¹⁸⁷ In order to violate § 924(c)(1), a defendant must both commit a predicate crime and either use, carry, or possess a firearm. Accordingly, the purpose of the statute, as expressed by Congress, also supports the requirement of a nexus between the firearm and the crime.

The most recent amendment to § 924(c)(1) added a possession element to the statute.¹⁸⁸ The phrase “in furtherance of” limits that possession element.¹⁸⁹ The “in furtherance of” language is a higher level of nexus than the “during or in relation to” language.¹⁹⁰ Congress was concerned that adding a possession standard would extend the reach of § 924(c)(1) to persons whose firearm possession was unrelated to the crime.¹⁹¹ Therefore, Congress added the “in furtherance of” standard to assure that there would be a sufficient relationship or nexus between the firearm and the crime.¹⁹²

The *Rodriguez-Moreno* Court failed to consider fully this nexus requirement. The Court summarily decided that the defendant could be prosecuted under § 924(c)(1) in any venue appropriate for prosecution of the kidnapping offense if the defendant used a firearm at any time during the offense because kidnapping is a unitary offense.¹⁹³ If, however, § 924(c)(1) is intended primarily to prevent the use, carrying, or possession of a firearm, the nexus requirement cannot be satisfied in a venue where the firearm was never present.

185. See 18 U.S.C. § 924(c)(1) (Supp. IV 1999).

186. See *United States v. Lasanta*, 978 F.2d 1300, 1308-09 (2d Cir. 1992) (describing the necessity of proving a “gun-drug nexus” for a conviction under § 924(c)(1)).

187. Refer to notes 136-39 *supra* and accompanying text (discussing the legislative intent of § 924(c)(1)).

188. See Act of Nov. 13, 1998, Pub. L. No. 105-386, 112 Stat. 3469 (1998).

189. See 18 U.S.C. § 924(c)(1)(A) (Supp. IV 1999) (“[A]ny person who . . . in furtherance of any [violent or drug trafficking] crime, possesses a firearm, shall . . . be sentenced to a term of imprisonment of not less than 5 years.”).

190. See H.R. REP. NO. 105-344, at 12 (1997) (describing the differences in the level of proof between the “during and in relation to” and the “in furtherance of” standards).

191. See 144 CONG. REC. H533 (daily ed. Feb. 24, 1998) (statement of Rep. Waters) (expressing concern that, if the possession standard were not limited, a hunter who possessed a firearm and a small amount of drugs could be prosecuted under § 924(c)(1)).

192. See 144 CONG. REC. S12,671 (daily ed. Oct. 16, 1998) (statement of Sen. DeWine) (arguing that the possession standard under § 924(c)(1) would not apply when “an insufficient nexus between the crime and the gun” exists).

193. See *United States v. Rodriguez-Moreno*, 526 U.S. 275, 281-82 (1999).

Suppose, for example, that a defendant stays exclusively in Texas and carries a firearm in Texas during a drug conspiracy while co-conspirators perform overt acts in New York. Under the general conspiracy statute, the government can prosecute the Texas defendant for conspiracy in New York, even though the defendant never visited New York.¹⁹⁴ Under § 924(c)(1), the defendant has also carried a firearm during and in relation to a drug trafficking crime. Because the commission of a § 924(c)(1) offense requires a nexus between the firearm and the crime, the Texas defendant can only rightly be found to have committed the § 924(c)(1) offense in Texas. Should courts be willing to extend venue for the § 924(c)(1) offense to a district the defendant has never visited? Prosecution of the defendant in New York would seem to clearly violate the nexus requirement of § 924(c)(1), as well as the constitutional guarantee of a trial where the crime is committed.¹⁹⁵

The majority in *Rodriguez-Moreno* rejected the argument that § 924(c)(1) is a “point-in-time” offense committed only where the predicate crime and the firearm coincide.¹⁹⁶ The majority first analyzed the predicate crime and found that kidnapping is a continuing offense committed where the “offense was begun, continued, or completed.”¹⁹⁷ Ample precedent supports this position.¹⁹⁸ The majority then concluded that the “during and in relation to” phrase is sufficient to link the use of the firearm in Maryland to the commission of the kidnapping in any district through which the kidnapping continued.¹⁹⁹ Such a construction, however, directly conflicts with the text and history of § 924(c)(1). The legislative history of § 924(c)(1) clearly demonstrates an intent to punish the combination of the *predicate crime and the firearm*.²⁰⁰ A § 924(c)(1) offense is committed only where the defendant *both* commits the predicate crime and uses, carries, or possesses a firearm.²⁰¹ Under this construction, § 924(c)(1) does

194. See *Davis v. United States*, 148 F.2d 203, 204 (5th Cir. 1945) (holding that prosecution for conspiracy is proper “in any federal district where an overt act is committed in furtherance” of the conspiracy).

195. *But see United States v. Pomranz*, 43 F.3d 156, 158, 162 (5th Cir. 1995) (holding that venue was proper in Texas for a § 924(c)(1) offense even when there was no evidence that defendant used or carried a firearm in Texas).

196. See *Rodriguez-Moreno*, 526 U.S. at 281.

197. See *id.* at 282 (quoting § 3237(a)).

198. See *id.* at 281 (citing four circuit court cases that determined that kidnapping is a unitary crime).

199. See *id.*

200. Refer to notes 136-39 *supra* and accompanying text (discussing the legislative intent of § 924(c)(1)).

201. See, e.g., *United States v. Anderson*, 59 F.3d 1323, 1328 (D.C. Cir. 1995)

not necessarily become a “point-in-time” offense.²⁰² Had Moreno used a firearm throughout the entire kidnapping, prosecution for the § 924(c)(1) offense would be proper in any district where the kidnapping could be prosecuted, but Moreno only used the firearm in Maryland. Thus, both elements of the § 924(c)(1) offense coincided only in Maryland.²⁰³ The predicate crime is a necessary element of the § 924(c)(1) offense,²⁰⁴ but the § 924(c)(1) offense materializes only at the nexus of the firearm and the predicate crime.

B. Penalty Enhancement Provision or Separate Offense?

Another way to analyze § 924(c)(1) is to determine whether it constitutes a separate offense or is only a penalty-enhancement provision. If § 924(c)(1) creates a separate offense, venue may be proper only where the firearm and the predicate offense coincide because that is where the § 924(c)(1) offense was committed. Regarding § 924(c)(1) as a penalty-enhancement provision, however, lends more weight to the argument that venue is proper where the predicate crime was committed.²⁰⁵

Although some courts have categorized § 924(c)(1) as a penalty-enhancement provision,²⁰⁶ the majority of courts view § 924(c)(1) as a separate offense.²⁰⁷ The statute’s sponsor,

(explaining that “the complete § 924(c)(1) crime is committed . . . when the defendant brings the gun (carries it) or uses it in relation to an underlying drug trafficking or violent crime”).

202. See *Rodriguez-Moreno*, 526 U.S. at 284 (Scalia, J., dissenting) (observing that the § 924(c)(1) and kidnapping offenses “can extend over a protracted period, and in many places”).

203. See *id.* at 281 (acknowledging that Moreno used a firearm only in Maryland).

204. See *id.* (stating that a § 924(c)(1) offense contains the elements of using and carrying a firearm and the commission of a predicate crime).

205. Refer to notes 218-20 *infra* and accompanying text (analyzing § 924(c)(1) as a possible penalty-enhancement provision).

206. See, e.g., *United States v. Correa-Ventura*, 6 F.3d 1070, 1083 (5th Cir. 1993) (stating that § 924(c)(1) is similar to a penalty-enhancement statute); *United States v. Stewart*, 779 F.2d 538, 540 (9th Cir. 1985) (observing that the intent of § 924(c)(1) “was to impose more severe sanctions where firearms facilitated” the felony).

207. See Christopher L. Robbins, Note, *Double-Barreled Prosecution: Linking Multiple Section 924(c) Violations to a Single Predicate Offense*, 49 VAND. L. REV. 1577, 1589-91 (1996) (concluding from case law and legislative history that § 924(c) is a “criminal offense distinct from the underlying felony”). See, e.g., *United States v. Anderson*, 59 F.3d 1323, 1326 (D.C. Cir. 1995) (holding that, although a predicate crime is an element of a § 924(c)(1) conviction, “a § 924(c)(1) conviction stands on its own even if the defendant is acquitted of the underlying offense or the underlying offense is not charged”); *United States v. Lucas*, 932 F.2d 1210, 1223 (8th Cir. 1991) (deciding that each separate use of a firearm can lead to a separate conviction under § 924(c)(1), even for the same predicate offense).

Representative Poff, stated that the proposed statute was intended to create “a separate Federal crime . . . and invoke[] separate and supplemental penalties.”²⁰⁸ In addition, § 924(c)(1) provides for harsher sentences for “a second or subsequent conviction” under the statute.²⁰⁹ A defendant can be convicted of a § 924(c)(1) offense without being convicted, or even charged, with the predicate crime.²¹⁰

It is apparent that a § 924(c)(1) offense is a separate crime because the predicate crime is but an element of a § 924(c)(1) offense. The Third Circuit, in *United States v. Palma-Ruedas*,²¹¹ and the Ninth Circuit, in *United States v. Corona*,²¹² decided congruently that, as a separate offense, venue for a § 924(c)(1) violation is proper only where the firearm and the predicate crime coincided.²¹³ If a § 924(c)(1) offense is a separate offense from the predicate crime, which it appears to be, then the commission of a § 924(c)(1) offense must be at the nexus of the predicate crime and the firearm. Thus, venue should be proper only where both the firearm and the predicate crime coincide.

Despite evidence to the contrary, some courts have held that a § 924(c)(1) offense is merely a penalty-enhancement provision.²¹⁴ In *Muscarello v. United States*,²¹⁵ Justice Ginsburg

208. 114 CONG. REC. 22,231 (daily ed. July 19, 1968) (statement of Rep. Poff).

209. See § 924(c)(1)(C) (Supp. IV 1999) (emphasis added).

210. See, e.g., *Anderson*, 59 F.3d at 1326 (finding that a § 924(c)(1) conviction can stand even if the defendant is acquitted of or not charged with the predicate crime); *United States v. Pomranz*, 43 F.3d 156, 161 (5th Cir. 1995) (explaining that a hypothetical second trial of a defendant for a § 924(c)(1) offense would require the government to prove the predicate crime, but, impliedly, would not require a conviction or charge of the predicate crime); *United States v. Wilson*, 884 F.2d 174, 176 n.2 (5th Cir. 1989) (noting that a state court conviction for a federal drug trafficking offense was insufficient to establish the elements of the § 924(c)(1) offense in federal district court, thus requiring the government to present additional evidence for the predicate offense).

211. 121 F.3d 841 (3d Cir. 1997), *rev'd sub nom.* *United States v. Rodriguez-Moreno*, 526 U.S. 275 (1999).

212. 34 F.3d 876 (9th Cir. 1994).

213. See *Palma-Ruedas*, 121 F.3d at 849 (holding that venue for a § 924(c)(1) offense was proper only in Maryland because, although defendant engaged in the predicate crime in several states, he only used the firearm in Maryland); *Corona*, 34 F.3d at 881 (deciding that venue for a § 924(c)(1) offense was proper only in California even though the underlying conspiracy offense could be prosecuted in Nevada). *But see* *United States v. Rodriguez-Moreno*, 526 U.S. 275, 282 (1999) (reversing *Palma-Ruedas* and holding that venue for a § 924(c)(1) offense is proper wherever the predicate crime was committed); *United States v. Pomranz*, 43 F.3d 156, 157-58 (5th Cir. 1995) (affirming conviction in Texas of the defendant for a § 924(c)(1) offense even though there was no evidence that the defendant ever possessed a firearm in Texas).

214. See, e.g., *United States v. Campbell*, 42 F.3d 1199, 1206 (9th Cir. 1994) (referring to § 924(c)(1) as a “penalty enhancement for carrying or using a firearm during the commission of a felony”).

stated in dissent, “Section 924(c)(1) of Title 18, United States Code, is a punishment-enhancing provision.”²¹⁶ To date, the Supreme Court has not expressly ruled on whether § 924(c)(1) is a separate offense or a penalty-enhancement provision. In *United States v. Rodriguez-Moreno*,²¹⁷ the Court left undefined the nature of § 924(c)(1).

If § 924(c)(1) is simply a penalty-enhancement provision, then venue may be proper where the predicate crime is committed.²¹⁸ Such an interpretation, however, would be contrary to the original intent behind § 924(c)(1).²¹⁹ But even if § 924(c)(1) is nothing more than a penalty-enhancement provision, the penalty-enhancement is still based upon the use, carrying, or possession of a firearm.²²⁰ Thus, regarding § 924(c)(1) as a penalty-enhancement provision, and honoring the original legislative intent of the statute, may still require that venue lie only where a nexus between the firearm and predicate crime exists. Therefore, to best preserve constitutional guarantees, penalty-enhancement should only be available in a venue where the firearm and the predicate crime coincide.

C. *The Public Policy Argument Should Be Abandoned*

In *United States v. Pomranz*,²²¹ the court upheld the defendant’s conviction in Texas for a § 924(c)(1) offense even though there was no evidence that the defendant used or carried the firearm in Texas.²²² One of the court’s arguments was based on public policy considerations. Concerned with the expense of trial and the government’s limited resources, the *Pomranz* court stated that to require a second trial in Oklahoma on defendant’s § 924(c)(1) offense would “impede the administration of justice.”²²³

215. 524 U.S. 125 (1998).

216. *Id.* at 139 (Ginsburg, J., dissenting).

217. 526 U.S. 275 (1999).

218. *See* *United States v. Lombardo*, 241 U.S. 73, 77 (1916) (recognizing that when a crime consists of distinct parts, the entire crime can be tried where any one part of the crime occurred).

219. *See* 114 CONG. REC. 22,231 (daily ed. July 19, 1968) (statement of Rep. Poff) (stating that the proposed statute was intended to create “a separate Federal crime . . . and invoke[] separate and supplemental penalties”).

220. *See* 18 U.S.C. § 924(c)(1)(A) (Supp. IV 1999).

221. 43 F.3d 156 (5th Cir. 1995).

222. Refer to Part II.A.2 *supra* (discussing the *Pomranz* facts and the court’s holding).

223. *See Pomranz*, 43 F.3d at 161. The court also commented that “we 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.” *Id.* at 162.

In *United States v. Palma-Ruedas*, the government urged the court to consider the cost of requiring multiple trials to obtain a § 924(c)(1) conviction.²²⁴ The court responded: “Many constitutional guarantees for criminal defendants are inefficient and costly Nevertheless, these guarantees form the bedrock principles of our criminal justice system and should not be hastily balanced away.”²²⁵

Generally, courts do not give much weight to public policy arguments.²²⁶ When public policy arguments contradict constitutional rights, courts favor protecting constitutional rights.²²⁷ The government’s having limited resources does not justify a public policy argument for compromising a defendant’s constitutional right to a trial in the district where the crime is committed.²²⁸ In *United States v. Rodriguez-Moreno*, the government could have prosecuted all of the defendants in a single trial in Maryland, in which venue was proper for all the charged offenses.²²⁹ This would have conserved government resources and avoided controversy over whether venue was proper.

VI. CONCLUSION

The language and intent of § 924(c)(1) reveals that the statute’s purpose is to deter the combining of violent crimes or drug crimes with the use of firearms.²³⁰ Because the purpose of § 924(c)(1) is to deter this combination, it follows that a § 924(c)(1) offense is only committed where both the predicate crime and the

224. See *United States v. Palma-Ruedas*, 121 F.3d 841, 849 (3d Cir. 1997), *rev’d sub nom.* *United States v. Rodriguez-Moreno*, 526 U.S. 275 (1999).

225. *Id.* at 850.

226. See, e.g., James E. Meason, *Environmental Audits, Privileges from Disclosure, and Small Business Penalty Policies*, 18 N. ILL. U. L. REV. 497, 513 (1998) (“[P]ublic policy traditionally has been seen as a weak argument in the eyes of the courts.”).

227. See, e.g., *United States v. Johnson*, 323 U.S. 273, 276 (1944) (“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 . . .”).

228. See, e.g., Schlesinger, *supra* note 3, at 943-44 n.162 (arguing that in determining venue in a criminal trial, it is improper “to weigh the additional burden on the federal judiciary”).

229. The defendants were charged with conspiring to kidnap, kidnapping, and a § 924(c)(1) offense, all of which had a direct connection to Maryland. See *United States v. Rodriguez-Moreno*, 526 U.S. 275, 276-77 (1999) (relating that the police apprehended the defendants in Maryland, where the kidnapping and use of the firearm both coincided).

230. Refer to Part IV.A *supra* (discussing the legislative intent of § 924(c)(1)).

firearm coincide.²³¹ Courts examine the nature of a crime and use the verb test to determine where that crime was committed.²³² Both methods point to the locale where the firearm and predicate crime coincide as the proper venue.²³³

Another important issue in the § 924(c)(1) venue controversy is whether a § 924(c)(1) offense is a separate offense or simply a penalty-enhancement provision. The bulk of the evidence indicates that § 924(c)(1) is a separate offense that stands independent of the predicate crime.²³⁴ If § 924(c)(1) is a separate offense, then it offends the Constitution when courts allow a defendant to be prosecuted in a venue where a firearm—the key element of a § 924(c)(1) offense—was not used.²³⁵ The Supreme Court failed to address this issue in *United States v. Rodriguez-Moreno*. Clearly, a Supreme Court decision on whether § 924(c)(1) is a separate offense would settle much of the venue controversy that has recently split the circuit courts.

The Supreme Court should expressly reject the public policy argument advanced in *United States v. Pomranz*. Considering that the government's resources almost always dwarf the defendant's resources,²³⁶ a defendant's constitutional rights should not be compromised in favor of government convenience.²³⁷ These public policy arguments should also fail because they advocate extending the reach of § 924(c)(1) beyond its intended scope of the nexus between a firearm and a predicate crime.

In *United States v. Rodriguez-Moreno*,²³⁸ the Supreme Court declined an opportunity to strengthen and enforce the constitutional guarantees of venue afforded to defendants. In the

231. See 144 CONG. REC. S12,671 (daily ed. Oct. 16, 1998) (statement of Sen. DeWine) (arguing that § 924(c)(1) would not apply when there exists "an insufficient nexus between the crime and the gun").

232. Refer to notes 76-77 *supra* and accompanying text (noting that courts often look to the nature of the statute and use the verb test to help determine where a crime was committed).

233. Refer to notes 183-84 *supra* and accompanying text (stating that the nature of the crime and the verb test both indicate the intention that a § 924(c)(1) offense occurs only where the firearm and predicate crime coincide).

234. Refer to notes 207-13 *supra* and accompanying text (discussing whether a violation of § 924(c)(1) is a separate crime).

235. Refer to Part V.B *supra* (examining § 924(c)(1) as a penalty-enhancement provision or a separate offense).

236. See, e.g., Goodpaster, *supra* note 9, at 134 ("Compared to the average citizen, the government has overwhelming resources . . ."); Zacharias, *supra* note 9, at 186 ("The criminal defense paradigm . . . posits an individual, relatively unsophisticated client facing overwhelming government resources.").

237. See *United States v. Johnson*, 323 U.S. 273, 276 (1944) (arguing that a defendant's constitutional right to vicinage should outweigh the government's inconvenience).

238. 526 U.S. 275 (1999).

future, the Court should address this concern and strike a more equitable balance between a defendant's constitutional rights and the government's economic interests.

Christopher W. Pratt