

ORIGINAL

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: UNITED STATES, Petitioner v. JACINTO RODRIGUEZ-  
MORENO

CASE NO: 97-1139 *et al*

PLACE: Washington, D.C.

DATE: Monday, December 7, 1998

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 UNITED STATES, :  
4 Petitioner :  
5 v. : No. 97-1139  
6 JACINTO RODRIGUEZ-MORENO :

7 - - - - -X  
8 Washington, D.C.  
9 Monday, December 7, 1998

10 The above-entitled matter came on for oral  
11 argument before the Supreme Court of the United States at  
12 11:05 a.m.

13 APPEARANCES:

14 PAUL R. Q. WOLFSON, ESQ., Assistant to the Solicitor  
15 General, Department of Justice, Washington, D.C.; on  
16 behalf of the Petitioner.

17 JOHN P. McDONALD, ESQ., Somerville, New Jersey; on behalf  
18 of the Respondent.

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1 P R O C E E D I N G S

2 (11:05 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 next in Number 97-1139, United States v. Jacinto  
5 Rodriguez-Moreno.

6 Mr. Wolfson.

7 ORAL ARGUMENT OF PAUL R. Q. WOLFSON

8 ON BEHALF OF THE PETITIONER

9 MR. WOLFSON: Mr. Chief Justice, and may it  
10 please the Court:

11 Under the Constitution's venue provisions, a  
12 criminal trial shall be held in the State where the crime  
13 shall have been committed. The issue in this case is how  
14 that principle is to be applied in a case where the  
15 offense has more than one actus reus element and where one  
16 of those actus reus elements was carried out over several  
17 States.

18 QUESTION: What's the English meaning of actus  
19 reus?

20 MR. WOLFSON: The English -- it can be the -- it  
21 can be interpreted as the act of the crime, or the act of  
22 the thing, and it does not have a universal meaning, but  
23 generally speaking the courts have looked at -- have  
24 isolated actus reus as the conduct that must be performed  
25 by the defendant to make him punishable for a crime.

1           It is generally distinguishable from two other  
2 aspects of the crime, the mens rea, or the mental state,  
3 and other circumstances surrounding the crime. This is  
4 generally the approach that is taken by the Model Penal  
5 Code, which does not use the term, actus reus, but which  
6 uses the term -- but which distinguishes among conduct,  
7 mental state, and attendant circumstances, and that sort  
8 of -- that provision of the various aspects of the crime  
9 is also reflected in Justice Holmes' discussion of the  
10 common law.

11           QUESTION: Is conduct an equally satisfactory  
12 word, do you think, as actus reus?

13           MR. WOLFSON: I think conduct is not an equally  
14 satisfactory term, because actus reus refers specifically  
15 to conduct undertaken by the defendant which society has  
16 an interest in punishing.

17           QUESTION: You could translate it as the  
18 criminal, the criminal act.

19           MR. WOLFSON: The criminal act, or the criminal  
20 conduct. I use conduct because one has to take into  
21 account certain types of crimes that revolve on failure to  
22 perform a duty in which I think one would have to  
23 acknowledge that the criminal conduct was the failure to  
24 show up at the appointed time and place, as opposed to  
25 undertaking some overt act.

1 QUESTION: You're right. When you use a word  
2 like conduct it sort of sucks in surrounding circumstances  
3 more than -- you'd better stick with the Latin, I think.

4 (Laughter.)

5 MR. WOLFSON: Well, I'm -- I'll do my best,  
6 thank you.

7 But to return, our -- the rule that we propose  
8 and that is reflected in this Court's decisions is that in  
9 any State where any of the actus reus elements is carried  
10 out, that is an appropriate place for the defendant to be  
11 prosecuted.

12 In this case, that means that respondent was  
13 properly prosecuted in New Jersey, because one of the  
14 elements of the offense, defined by section 924(c), was  
15 the kidnapping, which in this case was a continuing,  
16 unitary, undivided crime that began in Texas, was  
17 continued into New Jersey, which was for some period of  
18 time the defendant's base of operations, and then was  
19 continued into Maryland.

20 QUESTION: Is that the criminal act that is  
21 being punished by this statute?

22 MR. WOLFSON: It is part of the criminal act  
23 that is being punished by this statute. The statute --  
24 where the court of appeals went wrong, I think, was to say  
25 that the statute punishes the use of the firearm only, and

1 they didn't look at the fact that --

2 QUESTION: No, the use during --

3 MR. WOLFSON: The use during, that's correct,  
4 but that is -- that is our point, which is that it's not  
5 just during, it is during and in relation to the  
6 underlying crime of violence for which this defendant may  
7 be prosecuted, and to obtain a conviction under section  
8 924(c), the Government must prove that the defendant did  
9 commit that underlying crime of violence, or was  
10 punishable for it under some principle such as Pinkerton  
11 liability, or aiding and abetting liability.

12 It is equally an element of the offense as the  
13 use of -- as the use or carrying of the firearm.

14 In its application, this statute essentially is  
15 no different from a statute that might define a crime of  
16 aggravated kidnapping.

17 I mean, suppose, for example -- kidnapping is  
18 defined in section 1201(a) of the United States Code, of  
19 title 18, as whoever kidnaps and holds for ransom any  
20 person shall be punishable by a term of years.

21 What 924(c) -- it's as if there were an added  
22 sentence to that section and says, and whoever, during and  
23 in relation to that kidnapping, uses or carries a gun,  
24 shall also be punished by an additional 5 years.

25 I think it would be odd in that situation if



1 someone were prosecuted for aggravated kidnapping to say  
2 that the only place he could be prosecuted would be where  
3 the aggravation took place, and not over the entirety  
4 of -- and not anywhere where the entirety of the  
5 kidnapping takes place.

6 Now, what Congress has done in 924(c) is, it has  
7 essentially created sort of an off-the-shelf aggravation  
8 element which can be applied to a variety of crimes of  
9 violence or drug-trafficking crimes.

10 QUESTION: What do you think that those who  
11 revolted against King George would have thought if -- you  
12 know, one of their objections was that he would transport  
13 us across the seas to be tried for crimes.

14 What if King George had enacted a statute like  
15 this that made it unlawful to use a firearm in connection  
16 with a kidnapping offense, and the firearm was only used  
17 in Boston, and the kidnapping -- I'm sorry, the -- yes,  
18 the firearm was only used in Boston, and some of the  
19 kidnapping during which the firearm was used occurred in  
20 England.

21 Do you think they would have thought it was fair  
22 to try the defendant --

23 MR. WOLFSON: Well, if the --

24 QUESTION: -- in London for this firearm that he  
25 possessed in Boston?

1 MR. WOLFSON: If they assoc -- if the people who  
2 used the firearm associated themselves with a kidnapping  
3 that takes place in a variety of jurisdictions, the  
4 Constitution's venue provisions do recognize that it is  
5 proper to bring a defendant to trial in the place where he  
6 has committed a criminal activity.

7 The Constitution does not say that the proper  
8 venue for a crime shall be where the defendant, in the  
9 State of which a defendant is a citizen.

10 Now -- or where the defendant has resides. Now,  
11 it might have taken that approach if the only principle  
12 behind the Constitution's venue provisions was to allow  
13 the defendant to be tried in his home district, which one  
14 may assume is a more congenial district.

15 It balanced that with the other -- with another  
16 objective, which is that it is appropriate to bring the  
17 defendant to justice in the place where he has conducted  
18 his criminal activity, and if a defendant undertakes,  
19 voluntarily undertakes some purposeful activity that  
20 causes harm in a community through the commission of a  
21 criminal conduct, there's nothing in the venue provisions  
22 of the Constitution that say he can't -- now -- he can't  
23 be --

24 QUESTION: There's another statute that punishes  
25 kidnapping, isn't there? I mean, that's a separate

1 offense.

2 MR. WOLFSON: That is correct.

3 QUESTION: And this statute says, if during  
4 kidnapping you possess a firearm --

5 MR. WOLFSON: Use and carry.

6 QUESTION: -- you get an additional penalty,  
7 right?

8 MR. WOLFSON: If during that -- if during your  
9 kidnapping, the kidnapping which you carry out --

10 QUESTION: Uh-huh.

11 MR. WOLFSON: -- you use and possess a firearm,  
12 uses or -- use or carry a firearm, you get an additional  
13 penalty, but the penalty --

14 QUESTION: Let's assume he gets a penalty for  
15 the kidnapping, all right.

16 MR. WOLFSON: Correct.

17 QUESTION: He could still be tried for using a  
18 firearm during that kidnapping, right?

19 MR. WOLFSON: Yes.

20 QUESTION: Because that's a separate offense.  
21 There's an additional element involved.

22 MR. WOLFSON: The separate offense is using --  
23 is -- you must --

24 QUESTION: Using the firearm.

25 MR. WOLFSON: Right.

1           QUESTION: That's the only thing he's being  
2 punished additionally for, and you say even if he used  
3 that firearm only in one State, he could be tried in  
4 another State, where the kidnapping for which he's been  
5 separately punishing -- punished for, happened also to  
6 occur.

7           MR. WOLFSON: Let me say on that point that it  
8 is almost invariably the case that 924(c) charges are  
9 brought in conjunction with the charges for the, what one  
10 can call the underlying offense, and that is consistent  
11 with Congress' expectation that the two charges would be  
12 brought together, because it viewed 924(c) in the nature  
13 of an enhanced punishment for that underlying offense that  
14 was aggravated by the use or carrying of a firearm during  
15 and in relation to it.

16           In other words, Congress believed that when  
17 someone carries out this crime of violence or drug  
18 trafficking crime, that is more deserving of punishment  
19 because it was accompanied by use or carrying of a gun.

20           It is true that it is a separate offense. The  
21 element has to be proven beyond a reasonable doubt. There  
22 has to be trial by jury on that offense. It's not a  
23 sentencing factor, but nonetheless, it is so closely  
24 intertwined with the underlying offense that Congress  
25 really saw it as increased punishment for the nature of

1 that offense. It's -- for that particular offense.

2 QUESTION: Mr. Wolfson, you submitted the  
3 revision of 924(c), and I notice that in this respect  
4 there's no relevant change, and I wondered whether, in  
5 light of Cabrales last term, whether the Government had  
6 urged any clarification of this provision to avoid the  
7 problem we're dealing with.

8 MR. WOLFSON: I'm not aware of any discussion  
9 about Cabrales in this revision of 924(c), which I  
10 understand was more directed towards the Bailey issue  
11 about where the gun is possessed, rather than the more  
12 active type of uses as in use or carry.

13 It's not that uncommon for a -- for one of the  
14 underlying crimes which 924(c) is added onto to be carried  
15 out over a variety of States. I mean, one can imagine  
16 that inter -- one can imagine that that drug conspiracy, a  
17 drug distribution conspiracy, for example, that was based  
18 in Boston, and as part of that conspiracy someone might go  
19 to another city, Miami or Houston, to obtain the drugs and  
20 then bring them back to Boston.

21 He might -- one of those coconspirators might  
22 use the gun while obtaining the drugs, and I think it  
23 would be strange to say that the -- that if Congress  
24 wanted the drug conspiracy and the 924(c) charge to be  
25 tried together, I think it would be odd to say that the

1 only place it could be tried was in the city where the  
2 drugs had been obtained, where the coconspirators had  
3 entered for just a moment, when the base of operations of  
4 the conspiracy was, say, in Boston.

5 It's that conspiracy, that distribution  
6 conspiracy that the use of the gun made worse, and that's  
7 I think how Congress really looked at the purpose of 9 --  
8 looked at the objective which -- of the 924(c) offense was  
9 to punish that aggravation.

10 QUESTION: Mr. Wolfson, help me out, because it  
11 bears some relevance as to how I view this case. I think  
12 I may have been wrong when I suggested earlier that you  
13 could have tried the kidnapping in one place and then  
14 later tried the gun offense. It would be double jeopardy,  
15 wouldn't it? Each offense has to contain an element that  
16 the other does not.

17 MR. WOLFSON: It would -- the -- if -- it is --  
18 it's not -- I have to say, under this Court's decisions,  
19 it's not clear, because it's true that they satisfy the  
20 Blockburger test that the kid -- the 924(c) offense  
21 contains all the elements of the kidnapping offense but  
22 the kidnapping offense doesn't contain any that the  
23 924(c) --

24 QUESTION: Right.

25 MR. WOLFSON: But there are cases of this Court

1 which have said that in certain kinds of complex type  
2 crimes like this, that the Blockburger test may not be  
3 fully applicable.

4 I'm not aware of any decided case law in the  
5 lower courts in this subject, but I believe Garrett v.  
6 United States, which is a decision of this court that  
7 talks about the continuing criminal enterprise statute,  
8 suggests that, which is sort of similar to this case in  
9 that there is an overall statute of carrying out a  
10 continuing criminal enterprise, and one might say that  
11 there are predicate acts of that that are the commission  
12 of other offenses, and there's discussion in that decision  
13 that says that the --

14 QUESTION: Garrett is the name of it?

15 MR. WOLFSON: I believe that's the case, yes.

16 One thing, Garrett is sort of -- actually, the  
17 CCE type crimes, and crimes like RICO, have been treated  
18 by the lower courts roughly similarly to the approach that  
19 we've suggested in this case, which is that -- take RICO,  
20 for example, where the defendant must manage the affairs  
21 of an enterprise through the conduct of racketeering  
22 activity.

23 The approach taken by the lower courts is that  
24 the defendant can be brought to trial wherever any of  
25 those predicate acts of racketeering activity take place,

1 and though -- now, though there may be situations where  
2 those racketeering acts are carried out in more than one  
3 State, and it's viewed as appropriate by the lower courts  
4 that the defendant may be tried on the overall RICO  
5 statute wherever any of those -- any of those racketeering  
6 acts were committed.

7 Similarly, there are other examples where --  
8 other examples of offenses with multiple elements.  
9 Another example is the Travel Act, which prohibits  
10 crossing State lines with an intent to carry out certain  
11 criminal activity and thereafter carrying it out or  
12 attempting to do so, and the courts have said -- the lower  
13 courts have said that the defendant may be prosecuted  
14 either where he leaves or where he arrives, or where he  
15 then carries out the criminal act.

16 QUESTION: What about the Hobbs Act?

17 MR. WOLFSON: The Hobbs Act? The Hobbs Act has  
18 been applied to allow prosecution wherever the obstructing  
19 act takes place.

20 QUESTION: Suppose that a person hijacks a truck  
21 in Maryland, and the contents of the truck were intended  
22 for distribution everywhere from Puerto Rico to Alaska,  
23 does that mean that he -- and it affects commerce in every  
24 State of the United States and the territories thereof.

25 All right, now can this person who hijacked the



1 truck in Maryland, since he's affected commerce  
2 everywhere, be tried anywhere?

3 MR. WOLFSON: The lower courts have said that a  
4 Hobbs Act prosecution may be brought where the commerce  
5 was affected. Now, the Government would have to prove --

6 QUESTION: So what's your -- your view is that  
7 under --

8 MR. WOLFSON: That's correct.

9 QUESTION: And there is no such thing as just a  
10 jurisdictional requirement?

11 MR. WOLFSON: There are -- no, there are  
12 jurisdictional requirements. For example, the possession  
13 offenses defined by 922(g) of title 18, which prohibit a  
14 certain number of -- certain classes of persons from  
15 possessing a gun if the gun has traveled in interstate  
16 commerce.

17 One can't prosecute him in any place simply  
18 because the gun was there. That is a -- an element that  
19 gives the Federal courts jurisdiction. It's not an actus  
20 reus type element of the offense on which venue can be  
21 predicated.

22 But the Hobbs Act requires that one obstruct --  
23 one commit an obstructive act and thereby affect commerce,  
24 and the courts have said -- the lower courts have said  
25 that the effect on commerce is part of the criminal

1 conduct undertaken by the defendant.

2 QUESTION: So there's nothing -- no contrary  
3 authority on that. You mean -- I'm surprised --

4 MR. WOLFSON: I -- I --

5 QUESTION: -- that you can't -- anywhere,  
6 Alaska -- I mean, most commerce, you know, affects --  
7 it's -- we're all interrelated, quite --

8 MR. WOLFSON: Well, one does have to prove -- I  
9 mean, the Government does have to prove in a Hobbs Act  
10 prosecution that the commerce was affected, and it's -- my  
11 understanding is that --

12 QUESTION: Oh, it's all labeled in the truck.

13 MR. WOLFSON: I'm not sure that the courts have  
14 gone so far as -- but my understanding is that the  
15 decisions all do say that the -- it may be -- the  
16 prosecution may be brought where the commerce was  
17 affected.

18 QUESTION: Can we put it just a different way?  
19 If you win this case, would it not mean that in the Hobbs  
20 Act case that Justice Breyer posits, the prosecution could  
21 be brought anywhere that the goods might have been  
22 destined?

23 MR. WOLFSON: I think that's probably correct,  
24 yes.

25 The court of appeals, instead of -- instead of

1 looking at the actual nature of the offense laid great  
2 emphasis on the fact that Congress had only used the  
3 active verbs, uses and carries, in defining section  
4 924(c), and that approach, what's been called the key verb  
5 test, or the active verb test, is defective because it  
6 makes venue turn on aspects of the statute that are really  
7 immaterial, do not go to the -- they don't capture the  
8 offense that Congress actually defined when it passed  
9 924(c).

10 And on that point, as Judge Alito pointed out in  
11 the dissent below, Congress could have easily restated the  
12 offense by using slightly different language, but if to  
13 have reached an exactly identical result.

14 Congress could have said, whoever commits a  
15 crime of violence, or -- commits a crime of violence or is  
16 punishable -- and is punishable therefor, and during and  
17 in relation to that crime of violence uses or carries a  
18 firearm, may be punished, and the majority in the court of  
19 appeals agreed that the defendant, if Congress had stated  
20 the statute that way that the defendant could be  
21 prosecuted in New Jersey, and it seems odd to say that the  
22 venue decision should turn on just certain grammatical  
23 aspects --

24 QUESTION: Why does it? I mean, why does it  
25 seem strange that what -- that effects should hinge upon

1 what you say?

2 MR. WOLFSON: No, I --

3 QUESTION: I mean --

4 MR. WOLFSON: The point is not that the language  
5 that Congress chose is irrelevant. I mean, clearly, if  
6 Congress chooses one verb rather than another it may be  
7 getting at a different point. I mean, there are cases,  
8 for example, that have said, if Congress defines an  
9 offense as depositing in the mails rather than using the  
10 mails, that it may have -- it may have been aiming at a  
11 particular --

12 QUESTION: Right.

13 MR. WOLFSON: -- a substantive difference.

14 The point is, where everybody agrees what the  
15 offenses are -- excuse me, what the actus reus elements  
16 are of the offense, there's not really any disagreement on  
17 that, I don't think, it -- then the fact that Congress  
18 captured it with one active verb and a prepositional  
19 phrase, whereas it could have just as easily been restated  
20 using two active verbs, should not affect the venue  
21 outcome.

22 QUESTION: What about whoever -- suppose they  
23 say, whoever, knowing that a gun will be used in a crime  
24 of violence, carries a gun. Whoever knowing. See, it  
25 says knowing, rather than in relation to, and of course he

1 carries the gun in Maryland and he knows that the crime  
2 will be committed in California.

3 MR. WOLFSON: Whoever --

4 QUESTION: So knowing, the reason I picked  
5 knowing is because I'm thinking of the laundering, the  
6 money laundering.

7 MR. WOLFSON: Right.

8 QUESTION: Whoever knowing that this came from a  
9 crime of violence, this money, deposits it. Well, we know  
10 that the fact that the crime is in -- you know, that the  
11 crime of violence, or the underlying crime was in some  
12 other State, you can't try it there.

13 MR. WOLFSON: Well, in that case it would -- in  
14 that case, if I understand the hypothetical correctly,  
15 there's no requirement that the crime -- that the crime  
16 actually be used in the crime of violence.

17 It's simply carrying a gun, you know, knowing --  
18 having some evil intent, it would seem that the crime is  
19 committed where the gun is carried and the knowledge is  
20 had. If it's not required that the Government also prove  
21 that the gun therefore be actually used by the defendant  
22 in the commission of a crime, so I think it would be  
23 distinguishable on that, on that point, that --

24 QUESTION: In the present case, the only  
25 difference it would have made is, how many months in

1 the -- I mean, if you could have brought the whole  
2 prosecution where the gun was used -- I forget what the  
3 different States were. Where was it, New Jersey that the  
4 gun was used?

5 MR. WOLFSON: The gun was used -- the use  
6 element was satis -- was carried out in Maryland.

7 QUESTION: In Maryland.

8 MR. WOLFSON: The kidnapping began in Texas,  
9 continued into New Jersey, and was completed in Maryland.

10 QUESTION: It's clear you could have prosecuted  
11 the whole case in Maryland.

12 MR. WOLFSON: Not the whole case.

13 QUESTION: Why?

14 MR. WOLFSON: We couldn't have prosecuted the  
15 kidnapping of Mrs. Avendano in Maryland --

16 QUESTION: I see.

17 MR. WOLFSON: -- because she -- and that's --  
18 that is -- and she was not -- she was left behind in New  
19 Jersey --

20 QUESTION: I see. I see.

21 MR. WOLFSON: -- when the kidnapers went on,  
22 and that is a -- there is an independent interest that the  
23 Government has in punishing that offense.

24 QUESTION: Okay, but that's -- but that's just  
25 sort of accidental in this case. I mean, let's assume the

1 kidnapping of just one person and the use of the gun,  
2 never mind the other kidnapping. It was a separate  
3 kidnapping.

4 This kidnapping could have been prosecuted, plus  
5 the use of the gun, the separate offense for use of the  
6 gun, in Maryland, or you could have prosecuted just the  
7 kidnapping in either New Jersey or Texas, I assume.

8 MR. WOLFSON: Correct.

9 QUESTION: And had you prosecuted it there, you  
10 would have gotten a sentencing enhancement for the use of  
11 the gun.

12 MR. WOLFSON: That is correct.

13 QUESTION: So what difference are we talking  
14 about between getting the additional sentence for use of  
15 the gun, convicting of a separate crime, and simply  
16 getting the sentencing enhancement for kidnapping with the  
17 use of --

18 MR. WOLFSON: It could be about 40 months'  
19 difference. It could be from 12 to 40 months' difference,  
20 depending on where the district court chose to sentence  
21 the person in -- within the guidelines range. That's in  
22 this case.

23 I do also want to say, though, that this  
24 defendant -- this respondent had a criminal history III.  
25 For defendants the difference grows as you get lower down

1 in the criminal history, so that for someone with less  
2 criminal history, the disparity becomes greater, but in  
3 this case it's between 12 and 40 --

4 QUESTION: You could generalize as to the  
5 relative --

6 MR. WOLFSON: Right.

7 QUESTION: -- insignificance of the difference  
8 in this case, you say.

9 MR. WOLFSON: Right. Right. There is a  
10 difference. It's 12 to, I believe it's 39 -- 12 would be  
11 12 -- he got a sentence of 147 months, and under the  
12 situation that Justice Scalia posits it would be 108 to  
13 135 months, but the disparity grows as I explained, and so  
14 there is -- I mean, there is a substantial difference, and  
15 that reflects the fact that Congress imposed what is a  
16 rather strict penalty. It's a -- in 924(c). It's a 5-  
17 year mandatory add-on.

18 It can't be -- it has to be consecutive. It  
19 can't be paroled. It doesn't matter whether -- you know,  
20 it applies even whether the defendant -- whether the  
21 offense contains its own enhancement statutory element for  
22 use of a dangerous weapon, or use of a firearm, but it  
23 is -- Congress did view it as a very serious matter when  
24 an offense is aggravated through the use of a firearm.

25 QUESTION: Mr. Wolfson, you said that the



1 majority in the Third Circuit agreed that if the statute  
2 had been reworded as Judge Alito proposed, there wouldn't  
3 be any question about proper venue here. Was that  
4 implicit in his decision? I didn't see an expressed --

5 MR. WOLFSON: Right.

6 QUESTION: -- agreement to that effect.

7 MR. WOLFSON: On page 18a of the petition  
8 appendix the Court said, in the specific context of  
9 section 924(c), Congress could have drafted -- I'm sorry.

10 QUESTION: -- the page you're reading?

11 MR. WOLFSON: I'm sorry. It's at the very top  
12 of the page.

13 QUESTION: Okay.

14 MR. WOLFSON: 18a of the petition appendix.

15 Congress could have drafted the statute to allow  
16 venue to lie in any district where the Government could  
17 properly bring the related crime of violence or drug-  
18 trafficking offense, and then there's a footnote, footnote  
19 80(d), the defense artfully suggests how such a statute  
20 might be written, and then the Court goes on to say,  
21 Congress did not do so.

22 I'd like to reserve the remainder of my time for  
23 rebuttal.

24 QUESTION: Very well, Mr. Wolfson.

25 Mr. McDonald, we'll hear from you.

1 ORAL ARGUMENT OF JOHN P. MCDONALD

2 ON BEHALF OF THE RESPONDENT

3 MR. MCDONALD: Mr. Chief Justice, and may it  
4 please the Court:

5 There is no escape from the logic that a  
6 924(c)(1) violation is not committed unless and until a  
7 firearm is used or carried. When or where the underlying  
8 predicate offense began is simply unimportant.

9 QUESTION: It's not committed either until  
10 there's been a kidnapping.

11 MR. MCDONALD: That's correct, Your Honor. You  
12 have to have -- 924(c) is a point-in-time offense. It is  
13 not necessarily a continuing offense. It occurs only when  
14 and only where the weapon is used during and in relation  
15 to the underlying crime of violence. Venue, in our  
16 opinion, can never relate back to the anterior or  
17 predicate offense.

18 QUESTION: What about a kidnapping that, as in  
19 this case, simply continued from one State to another?

20 MR. MCDONALD: Had Mr. Moreno used a weapon at  
21 the inception of the kidnapping, and had he kept it with  
22 him, then he would -- 924(c) under those circumstances  
23 would be a continuing offense, and he could simply be  
24 prosecuted --

25 QUESTION: What's your authority for saying that

1 this is not a continuing offense? The kidnapping surely  
2 is a continuing offense.

3 MR. MCDONALD: The underlying crime of  
4 kidnapping is a continuing offense.

5 This Court's analysis of the statute in Bailey  
6 said, and these other cases in Busic and Simpson a number  
7 of years ago, clearly said that this not a sentencing  
8 enhancement. 924(c) is a separate and distinct crime, and  
9 the --

10 QUESTION: You don't deny it could be a  
11 continuing offense. You just say it only continues as  
12 long as the firearm is being used during the other crime.

13 MR. MCDONALD: That's correct.

14 QUESTION: And if you continue to use the  
15 firearm during the entire kidnapping, it's a continuing  
16 offense.

17 MR. MCDONALD: Under those set of facts that is  
18 correct, Your Honor.

19 QUESTION: Your position is that the duration of  
20 the continuity is limited by the use of the firearm.

21 MR. MCDONALD: It is limited by the time and  
22 place that they are together as one.

23 QUESTION: As the statute says, whoever uses a  
24 firearm during, and there's only one point in time here  
25 that the firearm was used during the kidnapping.

1 MR. MCDONALD: That's correct, Your Honor.  
2 Under the facts of this case, the 924(c) violation  
3 probably occurred in about 1 minute. Mr. Moreno, out of a  
4 sense of desperation, threatened a -- the -- Mr. Avendano  
5 with the gun. Shortly thereafter, at the same time --

6 QUESTION: What do you mean, out of a sense of  
7 desperation? You'd think it was Mr. Avendano who'd be  
8 desperate.

9 (Laughter.)

10 MR. MCDONALD: Out of a sense of frustration, he  
11 pulled the weapon and used it, Your Honor.

12 Immediately thereafter, one of his codefendants  
13 said, don't do it, this is not the way we're conducting  
14 ourselves, words to that effect which are on page 27 of  
15 the joint appendix.

16 QUESTION: I think everybody understands that  
17 this -- where the kidnapping took place and where the gun  
18 took place. The real question for me anywhere -- anyway,  
19 is, under this statute is the kidnapping part of the  
20 offense?

21 I know it wasn't completed till he had the gun,  
22 but is the kidnapping part of it?

23 MR. MCDONALD: It --

24 QUESTION: And you cite a bunch of cases, and  
25 what the, I take it the Solicitor General has said is, I

1 can look far and wide for a case. I may find one that has  
2 a clear jurisdictional element where they said that isn't  
3 part.

4 But aside from those cases, all the other cases  
5 are against you, so I want to know which is the example  
6 that you would pick out and say, no, no, here is a  
7 statute, it refers to several separate things, one of them  
8 is a big one, the others seem minor, all are elements, and  
9 a court has held that one or more of those elements, not  
10 jurisdictional, is not, for purposes of venue, part of the  
11 offense.

12 MR. MCDONALD: There is a case on point.

13 QUESTION: Which one?

14 MR. MCDONALD: Midstate Horticultural. It's  
15 this Court's opinion in 1939, and if I may, it was an  
16 Elkins Act prosecution.

17 The Elkins Act prohibited the illegal payments  
18 of rebates in interstate rail shipping. It was a very  
19 broad venue provision under that statute, and it said, in  
20 essence, that the crime could be charged anywhere where  
21 either the payment was made or received, or anywhere where  
22 the shipment took place in any State, similar to this  
23 case.

24 When the court of -- when this Court had the  
25 case in 1939, it was a unique set of facts. The facts

1 were, Your Honor, that the shipment had been made in 1932  
2 and 1933 from California to New Jersey, but the payment  
3 was only made in 1935 in the City of New York, and the  
4 case was tried in Philadelphia, and this Court said no,  
5 you can't do that.

6 They said that you must look at the acts of the  
7 accused, where they were committed, and that is where  
8 venue was laid.

9 QUESTION: Well, that was a case involving the  
10 granting or the receiving of rebates. Were there other  
11 elements of the crime?

12 MR. MCDONALD: There were -- yes. The --

13 QUESTION: And those other elements had occurred  
14 other places?

15 MR. MCDONALD: That's correct. The elements --  
16 the other element of the crime was the interstate  
17 shipment, and in that case, that part of the crime  
18 occurred from California to New Jersey, and in every  
19 State, and as this case found in Armour Packing, 30 years  
20 before that in 1909, that had the payment been made  
21 before, and the shipping continued, it could be tried in  
22 any case through which the shipments proceeded.

23 QUESTION: It seems to me in the Cabrales case  
24 the Court was actually rather careful not to say that the  
25 only place for the venue is where all of the elements of

1 the crimes have occurred, all of the active conduct  
2 necessary to commit the crimes have -- it seems to me  
3 Cabrales is very important for what it did not say in that  
4 respect, as we look at this case.

5 MR. MCDONALD: Well, Your Honor, I believe that  
6 Cabrales supports our position. What Cabrales said was,  
7 in Cabrales the money laundering had to be the result of  
8 an illegal crime. That was part of the statute, that it  
9 had to be -- at least for the 957, that there had to be  
10 shown that the money was illegally obtained.

11 QUESTION: But it didn't have to be illegally  
12 obtained by that particular defendant.

13 MR. MCDONALD: That's correct, Your Honor, but  
14 what this Court said was, look at Cabrales and what she  
15 did, and where she did it, and what happened before is not  
16 important. It is not necessary for the conviction of  
17 the --

18 QUESTION: But that was an after-the-fact crime.  
19 In Cabrales the opinion repeatedly says, this is -- you  
20 have to type this case. It's in the after-the-fact  
21 category.

22 Here we have a during situation. That's quite  
23 different.

24 MR. MCDONALD: Well, it was, in fact, an after-  
25 the-fact crime. That was set forth in the opinion.

1           Here, if the Government's theory on where venue  
2 can be laid under -- where either the kidnapping took  
3 place or either the gun was used, and takes out the during  
4 and in relation to argument, then venue could be laid in  
5 any number of States all over the country, and is not  
6 limited by the words, during and in relation to.

7           QUESTION: No, but isn't the response to that  
8 argument -- I mean, that's a fair argument, but isn't the  
9 response to that argument a very practical one, that we're  
10 getting at a problem of practical unfairness when we  
11 devise venue rules and Congress passes them.

12           There isn't any practical unfairness here, for  
13 the simple reason that in -- on the Government's theory in  
14 a case like this, your client can be prosecuted in any one  
15 of those other jurisdictions anyway, so that your client  
16 is not being, as it were, transported across the seas in  
17 the sort of Declaration of Independence sense, and isn't  
18 that sort of argument for fairness the response to the  
19 argument that you have just made?

20           MR. MCDONALD: No, Your Honor. Venue must be  
21 determined on each count in the indictment separately, and  
22 just merely because three or four counts in the indictment  
23 confer venue in one place and one does not, there's no  
24 practical application that permits the Court to try them  
25 all in one place. That is simply what the Constitution



1 does not permit.

2 QUESTION: Mr. McDonald, on your theory, what  
3 would be the result under Judge Alito's suggested revision  
4 of this statute, whoever commits any crime of violence or  
5 drug trafficking crime for which he may be prosecuted in a  
6 court of the United States and during and in relation to  
7 that crime uses or carries a firearm.

8 Would that be a different result under your  
9 theory as to venue?

10 MR. MCDONALD: I believe it is. That is nothing  
11 more than a sentencing enhancement at that point. It is  
12 no longer a separate and distinct crime.

13 Your Honor, it seems that everybody wants to  
14 rewrite this statute. The dissent wanted to rewrite it,  
15 the Government wants to rewrite it, and Congress has, in  
16 fact, in the last month rewritten the statute, but that's  
17 not the statute under which Mr. Moreno was tried and  
18 convicted.

19 QUESTION: Well, but if under the dissent's  
20 rewriting the venue would have been proper even under your  
21 view, it is just strictly, then, a matter almost of  
22 grammar to decide where venue can be.

23 MR. MCDONALD: No, Your Honor, because --

24 QUESTION: Maybe that's the way it should be,  
25 but it's what it boils down to.

1 MR. MCDONALD: I don't believe so, Your Honor,  
2 because no matter how you rewrite the statute, you -- I  
3 don't believe that you can escape the clear language that  
4 the gun must be used during and in relation to an  
5 underlying crime of violence.

6 QUESTION: Well, but that's -- that would be the  
7 language in the rewritten version that I read you, and  
8 during and in relation to that crime uses or carries a  
9 firearm.

10 MR. MCDONALD: Well, Your Honor, it would be our  
11 position that that would -- trial would still have to be  
12 held in the place where the gun was used during and in  
13 relation to the underlying felony.

14 QUESTION: Well then, that isn't the same  
15 answer, though, you gave me a couple of minutes ago.

16 MR. MCDONALD: Is it an easier case for the  
17 Government under the statute the way it is -- would be  
18 rewritten? Yes. I think that the -- you could argue --

19 QUESTION: Would the Government still lose?

20 MR. MCDONALD: I believe they would, Your Honor.

21 QUESTION: Yes, but your first answer was,  
22 because under that statute it becomes a sentencing factor  
23 rather than a different crime.

24 MR. MCDONALD: That is part of it.

25 QUESTION: What we've got before us is two

1 separate crimes.

2 MR. MCDONALD: That is right, Your Honor.

3 Mr. Moreno was tried and convicted and punished  
4 for kidnapping. That was a continuing offense, and it  
5 could have been tried in any number of districts in this  
6 United States.

7 It is only when it comes together with the gun,  
8 when he begins to use the weapon, as this Court said in  
9 Bailey, when he torques up the stakes, when he makes it  
10 more dangerous, when he commits another offense, that is  
11 when 924(c)(1) begins, and not a moment before.

12 We believe that the Cabrales decision warrants  
13 rejection of the Government's position in this case. The  
14 Government's petition for certiorari in this case  
15 recognizes the Cabrales decision would be dispositive of  
16 this case, and they ask that the petition for writ of  
17 certiorari be held pending the Court's disposition in U.S.  
18 v. Cabrales, and disposed of as appropriate in light of  
19 the resolution of that case.

20 Now, at that time the decision had not been  
21 written, and I understand that, but Cabrales simply said,  
22 it reaffirmed this Court's rulings for the last 90 years,  
23 particularly that cite -- the standard cited in Anderson,  
24 and it said, you must look to where the acts of the  
25 accused, what acts were committed and violated the statute

1 in question.

2 QUESTION: I'd like you to go back to what you  
3 said just before. It seems to me that this case was held  
4 for Cabrales because if Cabrales had come out the other  
5 way --

6 QUESTION: It would have been cert denied.

7 QUESTION: Yes.

8 MR. MCDONALD: If Cabrales had --

9 QUESTION: Suppose Cabrales had come out the  
10 other way.

11 MR. MCDONALD: In favor of the Government.

12 QUESTION: Right.

13 MR. MCDONALD: Then I imagine that they were  
14 asking that it be remanded to the Third Circuit Court of  
15 Appeals in -- for determination and resolution in  
16 recognition of that holding, because we prevailed in the  
17 Third Circuit.

18 QUESTION: Yes.

19 MR. MCDONALD: And had the Court just simply  
20 denied cert, we would still prevail.

21 Am I answering your question, Your Honor?

22 QUESTION: Yes. Yes.

23 QUESTION: Mr. McDonald, are you defending what  
24 is called the active verb theory? I haven't heard you  
25 really put much emphasis on that. Is --

1 MR. MCDONALD: The active --

2 QUESTION: Do you find that a useful mode of  
3 analysis?

4 MR. MCDONALD: I think the active verb test has  
5 best been described by the courts of appeals and the  
6 authorities as a very good first cut at understanding the  
7 statute.

8 Most of the courts of appeals have not held that  
9 it is an exclusive analysis of any criminal case, but they  
10 have held that it is something that they utilize in their  
11 examination of the statute as to where venue should lie.

12 If this Court adopted the active verb test, and  
13 the active verbs in this case are use and carry, we would  
14 prevail without much further discussion.

15 It dawned on us that there are a number of  
16 circuits that have adopted this test, but this Court --  
17 that test, but this Court has not. If this Court adopts  
18 that test, I believe that we would prevail under that  
19 test. It is a straightforward test.

20 QUESTION: I've looked at the case you cited,  
21 the United States v. Midstate Co., and there the Court was  
22 very careful to say that the transport of the goods  
23 through Pennsylvania was a lawful act, and that Congress  
24 did not intend that subsequent conduct or events should  
25 stamp criminality upon an act that was lawful, and so

1 there's no continuing event.

2 That's quite different from kidnapping, which  
3 was unlawful at all times.

4 MR. MCDONALD: In that respect, it is --

5 QUESTION: I think the case is just not so  
6 helpful for your position.

7 MR. MCDONALD: Well, if you consider the  
8 essential elements, it is true that in Midstate  
9 Horticultural the underlying essential element was not  
10 criminal in and of itself, but it was still an essential  
11 element of the offense.

12 Here, the kidnapping is an essential element of  
13 the offense. It happens to be criminal.

14 QUESTION: That wasn't the distinction the Court  
15 made. The Court said, if you have a continuous offense,  
16 then it must be an offense in the State which is -- where  
17 the case is being tried, and it found that that was just  
18 not that -- not true.

19 MR. MCDONALD: Well, under the Elkins Act, most  
20 of those offenses -- and as this Court has said time and  
21 again in venue cases, they are fact-sensitive and we must  
22 look closely at the facts of the case.

23 In almost all the Elkins Act prosecutions it was  
24 a continuing offense. It was an offense that started with  
25 the payment or receipt of an illegal gratuity, or a kick-

1 back, and then that offense occurred each and every placed  
2 that the goods were shipped, so for that -- for the  
3 reasons of that statute, it would be a continuing offense.

4 Here --

5 QUESTION: That's not what -- I just got that to  
6 look at it. I just agree with Justice Kennedy. It seemed  
7 as if the statute said it's an illegal offense to give or  
8 receive a rebate, and what it seemed to say -- I just  
9 looked at it quickly -- is that in Pennsylvania the  
10 transportation continued, it went through Pennsylvania,  
11 but it wasn't given in Pennsylvania, the rebate, nor was  
12 it received in Pennsylvania. What happened is, the goods  
13 passed through Pennsylvania.

14 So it sounds as if the Court's saying,  
15 Pennsylvania had nothing to do with this under the  
16 statute.

17 MR. MCDONALD: Well, under the Armour --

18 QUESTION: In connection with is a preposition,  
19 just like during. I mean, it's the same structure --

20 QUESTION: It sounds like it.

21 QUESTION: -- that you have in front of us here.

22 MR. MCDONALD: Well, Your Honor, if you read the  
23 Armour Packing case, the Armour Packing case said that  
24 under the Elkins Act the -- it could well be a  
25 continuing -- it is a continuing offense, under -- through

1 each and every State that the transportation occurred, and  
2 that was by statute. The venue provisions there were  
3 very, very broad.

4 QUESTION: Well, is there a case where I could  
5 look at it and find the following, any case in any court.

6 What I'd look at is, there'd be a statute, and  
7 the statute would have several elements, and I'd leave out  
8 of the picture any element that the defendant -- that does  
9 not involve the defendant's doing something, or being  
10 personally involved.

11 For example, if an element is at night, the  
12 defendant doesn't create night, so leave that out of it.

13 Also leave out of it any jurisdictional part,  
14 pure jurisdiction, like the gun statute.

15 All right, now are you thinking of a set of  
16 elements? Give me a case which said that venue is  
17 improper in any one of those elements.

18 MR. MCDONALD: I don't believe that there is a  
19 case one way or the other for a point-in-time case.

20 QUESTION: Or any -- anything. See, what  
21 they're saying is that, despite perhaps the appeal of your  
22 argument, they have a clear test, and moreover it's one  
23 that the courts have never -- never, never, never departed  
24 from.

25 I think that's putting their argument as



1 strongly as I can, perhaps too strongly in their favor,  
2 but the -- a clear answer that would be, look, here are  
3 three cases which have said that there are five elements  
4 to this crime, and four of those elements involve the  
5 defendant, and as to number 4, you can't put it there.  
6 It's just peripheral. It's too irrelevant, too far away.

7 MR. MCDONALD: Well, there are no cases that I  
8 know of that have held that, but what the cases have said  
9 is that you must look at the acts of the accused, and they  
10 are fact-specific, and I don't know of -- I'm trying to  
11 think of cases where the defendant where it'd be as fact-  
12 specific as this, where the gun and the kidnapping came  
13 together only in one place and only at one time.

14 QUESTION: Okay. Suppose, then, we said, you're  
15 right. This is going to be a clear case. This is a clear  
16 case, and so now you're trying to write the words that  
17 create a workable precedent for lower courts.

18 We will be faced with statutes of several  
19 elements. The defendant will be involved in all of them.  
20 Some of those elements, venue is proper. Others, they're  
21 not. The test that distinguishes the one from the other,  
22 in your opinion, is?

23 MR. MCDONALD: That if -- if the elements all  
24 must come together under that particular statute, and that  
25 is what the statute says, that they must come together at

1 some point in time, then it is only in that place where  
2 they came together at a point in time where venue is  
3 proper. That would be the ruling that I would suggest.

4 If there are no further questions --

5 QUESTION: Very well, Mr. McDonald.

6 MR. MCDONALD: Thank you.

7 QUESTION: Thank you.

8 Mr. Wolfson, you have 6 minutes remaining.

9 MR. WOLFSON: Unless there are any questions, I  
10 have nothing further. Thank you.

11 CHIEF JUSTICE REHNQUIST: Very well.

12 The case is submitted.

13 (Whereupon, at 11:48 a.m., the case in the  
14 above-entitled matter was submitted.)

## CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of

The United States in the Matter of:

UNITED STATES, Petitioner v. JACINTO RODRIGUEZ-MORENO  
CASE NO: 97-1139

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Don Mari Fedilo

(REPORTER)