1998

Criminal Procedure -- Venue -- Third Circuit Finds Venue for Firearms Charge Improper in District Where Only Predicate Offense Occurred -- *United States v. Palma-Ruedas*

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CRIMINAL PROCEDURE — VENUE — THIRD CIRCUIT FINDS VENUE FOR FIREARMS CHARGE IMPROPER IN DISTRICT WHERE ONLY PREDICATE OFFENSE OCCURRED. — *United States v. Palma-Ruedas*, 121 F.3d 841 (3d Cir. 1997), *cert. denied*, 66 U.S.L.W. 3456 (U.S. Jan. 12, 1998) (No. 97-6888).

The assassinations of Senator Robert Kennedy, Dr. Martin Luther King, Jr., and President John F. Kennedy prompted Congress[1] to enact the Gun Control Act of 1968.[2] This legislation included 18 U.S.C. § 924(c)(1), which in its current form provides for an additional prison term of at least five years for anyone who "uses or carries a firearm" while engaged in a federal crime involving violence or drug trafficking.[3] Unfortunately, "[t]he hurried consideration"[4] of this provision and its amendments has resulted in interpretive disagreements that have reduced their effectiveness.[5]

The Third Circuit recently entered the dispute that exists among the circuit courts over the interpretation of § 924(c)(1). In *United States v. Palma-Ruedas*,[6] the Third Circuit followed the lead of the Ninth Circuit[7] and held that the government may not try a defendant under § 924(c)(1) in any venue where the defendant did not use or carry a firearm, even if the predicate crime may be tried there.[8] Because this holding is contrary to Congress's intent to deter the violence associated with the crimes enumerated in § 924(c)(1),[9] those circuits that have not yet addressed this issue should decline to follow the decisions of the Third and Ninth Circuits.

In *Palma-Ruedas*, six members of a cocaine distribution enterprise kidnapped Ephrain Avendano in Texas and drove him to New Jersey, New York, and finally Maryland.[10] The group used no weapons until it arrived in Maryland, where defendant "Moreno [put a] .357 magnum to the back of Avendano's neck, making it clear that he was going to kill him."[11] Avendano eventually escaped, and the defendants were

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1 *See, e.g.*, 114 CONG. REC. 22,244 (1968) (statement of Rep. Hunt); *id.* at 22,256 (statement of Rep. Kelly); *id.* at 22,263 (statement of Rep. Burton).

2 Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (1968).

3 18 U.S.C. § 924(c)(1) (1994). This section provides that "[w]hoever, during and in relation to any crime of violence or drug trafficking crime . . . for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime . . . be sentenced to imprisonment for five years . . . ." *Id.*

4 Christopher L. Robbins, Note, *Double-Barreled Prosecution: Linking Multiple Section 924(c) Violations to a Single Predicate Offense*, 49 VAND. L. REV. 1577, 1581 (1996).

5 *See id.* at 1578.

6 121 F.3d 841 (3d Cir. 1997), *cert. denied*, 66 U.S.L.W. 3456 (U.S. Jan. 12, 1998) (97-6888).

7 *See* United States v. Corona, 34 F.3d 876, 879–81 (9th Cir. 1994).

8 *See Palma-Ruedas*, 121 F.3d at 849–51.

9 *See* United States v. Pomranz, 43 F.3d 156, 161 (5th Cir. 1995).

10 *See Palma-Ruedas*, 121 F.3d at 846.

11 *Id.*

arrested.[12] All six defendants were indicted, jointly tried, and convicted in the United States District Court for the District of New Jersey on charges of kidnapping and conspiracy to kidnap.[13] Moreno was also convicted in the same proceeding for a § 924(c)(1) violation.[14]

At the close of the government's case, Moreno moved to dismiss the § 924(c)(1) count for lack of venue, arguing that because the gun was used and carried only inside Maryland, venue could properly lie only in that state.[15] The government countered that because New Jersey was a proper venue for the predicate kidnapping offense, it was also a proper venue for the § 924(c)(1) charge.[16] With no guidance from the Third Circuit and conflicting analyses by other circuits,[17] the district court chose to follow the Fifth Circuit's holding in *United States v. Pomranz*[18] and found New Jersey to be a proper venue for the § 924(c)(1) charge.[19]

The Third Circuit reversed Moreno's § 924(c)(1) conviction for lack of venue.[20] Writing for the court, Judge Lewis[21] noted that Article III, Section 2 of the Constitution[22] and Rule 18 of the Federal Rules of Criminal Procedure[23] require crimes to be tried in the place where they were committed.[24] The court explained that, consistent with these constraints, Congress can "define a crime broadly such that commission of that crime will likely cross state borders,"[25] or "explicitly provide a venue provision for any given offense, as long as the venue bears some relation to the offense."[26] However, where Congress

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12 *See id.* at 846–47.

13 *See id.* at 847.

14 *See id.*

15 *See id.*

16 *See id.*

17 *Compare* United States v. Corona, 34 F.3d 876, 879–81 (9th Cir. 1994) (holding that the district where the predicate offense took place is an improper venue for a § 924(c)(1) charge if a gun was not actually used or carried in that district), *with* United States v. Pomranz, 43 F.3d 156, 162 (5th Cir. 1995) (holding that the district where the predicate offense took place is a proper venue for a § 924(c)(1) charge), *and* United States v. Friedman, Nos. 95-CR-192, 96-CR-182, 1996 WL 612456, at *6 (E.D.N.Y. Aug. 13, 1996) (same).

18 43 F.3d 156 (5th Cir. 1995).

19 *See Palma-Ruedas*, 121 F.3d at 847–48.

20 *See id.* at 851. The court affirmed all of the defendants' other convictions. *See id.* at 859.

21 Judge Roth joined in Judge Lewis's opinion.

22 *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 . . . .").

23 *See* FED. R. CRIM. P. 18 ("Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed.").

24 *See Palma-Ruedas*, 121 F.3d at 848–49.

25 *Id.* at 850 (citing CHARLES A. WRIGHT, FEDERAL PRACTICE & PROCEDURE § 302, at 201 (2d ed. 1982)).

26 *Id.* (citing, as an example, 18 U.S.C. § 3237(a) (1994), which provides that "any offense against the United States begun in one district and completed in another, or committed in more than one district, may be . . . prosecuted in any district in which such offense was begun, continued, or completed").

does not explicitly indicate an intent to allow for multiple-venue actions, the court must look to the words of the statute[27] as well as the nature of the crime and the location of its commission to determine venue.[28] Having decided that Congress did not explicitly express an intent to allow for multiple venues, the court used the Ninth Circuit's "key verb" test to examine the verbs "uses" and "carries" in the statute and concluded that because those activities occurred only in Maryland, venue for the § 924(c)(1) charge could lie only in that state.[29]

Judge Alito wrote separately to reject the majority's reliance on the "key verb" test and to suggest that the court should instead "make a realistic appraisal of the 'nature of the crime' defined by the statute."[30] Judge Alito argued that "the crime of violence or drug-trafficking crime is a critical element of the [§ 924(c)(1)] offense"[31] and "is at the center of Congress's aim."[32] He reasoned that because the predicate crime in the case occurred in New Jersey, so too did a critical portion of the § 924(c)(1) offense.[33] Thus, Judge Alito would have held "that venue for a prosecution under this statute lies in any district in which the defendant committed the underlying crime."[34]

The *Palma-Ruedas* opinion rests on the soundness of three premises: that the legal question analyzed in the Ninth Circuit's *United States v. Corona*[35] opinion is analogous to that posed in *Palma-Ruedas*; that Congress must *explicitly* indicate an intent to allow for multiple venue actions; and that the legislative history shows no congressional intent to provide a single proceeding for the predicate offense and the § 924(c)(1) charge. None of these premises, however, finds support in the case law or the legislative history, and thus, neither does the court's holding in *Palma-Ruedas*.

The *Palma-Ruedas* court's decision to follow the Ninth Circuit's method of analysis in *Corona*[36] undermined the soundness of the *Palma-Ruedas* holding because *Corona* analyzed a different legal question. In *Corona*, the defendant was tried and convicted in the District of Nevada on four counts: conspiracy to possess with intent to distribute cocaine, two counts of distribution of cocaine, and a § 924(c)(1)

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27 *See id.* (citing United States v. Barsanti, 943 F.2d 428, 434 (4th Cir. 1991)).

28 *See id.* (citing United States v. Anderson, 328 U.S. 699, 703 (1946)).

29 *Id.* at 849–51.

30 *Id.* at 859 (Alito, J., concurring in part and dissenting in part) (citing *Anderson*, 328 U.S. at 703).

31 *Id.*

32 *Id.* at 863 (citing United States v. Pomranz, 43 F.3d 156, 160 (5th Cir. 1995); United States v. Taylor, 13 F.3d 986, 993–94 (6th Cir. 1994); and United States v. Correa-Ventura, 6 F.3d 1070, 1083 (5th Cir. 1993)).

33 *See id.* at 859.

34 *Id.* at 863.

35 34 F.3d 876 (9th Cir. 1994).

36 *See Palma-Ruedas*, 121 F.3d at 849.

violation.[37] On appeal, the defendant argued that Nevada was an improper venue for the cocaine distribution and § 924(c)(1) charges because these substantive offenses took place entirely within California.[38] The predicate crime that took place in Nevada, therefore, was not a substantive "crime of violence or drug trafficking crime,"[39] but rather the preparatory crime of *conspiracy* to traffic drugs.

Indeed, the *Corona* court analyzed a question different from that posed in *Palma-Ruedas*, and asked whether "venue [exists] over a substantive crime committed in furtherance of a *conspiracy* in any district where venue is proper for the conspiracy charge."[40] The court analyzed the cocaine distribution and § 924(c)(1) venue issues as though they posed a single question of law.[41] Applying this framework, the *Corona* court cited decisions questioning whether a state in which a conspiracy takes place has venue over a substantive offense if the conspiracy and substantive offense occur in different states.[42] The *Corona* court noted that cases addressing this question highlighted "the legal distinction between preparation for a crime and commission of the crime itself."[43] The court explained that "[a]ctions which are merely preparatory or prior to the crime are not probative in determining venue."[44]

Although this analysis may be sound when a substantive crime (such as cocaine distribution) is tried in the venue in which the *conspiracy* to commit that crime was formed, it is inapplicable to a § 924(c)(1) charge that is tried in the venue in which the predicate substantive offense occurred. Whereas conspiracy to commit an offense and the act of committing that offense are independent crimes, an underlying substantive offense and a § 924(c)(1) offense are not independently chargeable. Thus, although one could be charged for conspiracy to commit a crime if one did not actually commit the substantive crime, one cannot be charged with a § 924(c)(1) offense if one did not commit the underlying substantive offense. In this sense, the underlying substantive offense is an actual element of the § 924(c)(1) offense.[45] "Since the indispensable predicate offense is as important or essential to the completed offense as the carrying or using of the fire-

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[37] *See Corona*, 34 F.3d at 878.

[38] *See id.*

[39] 18 U.S.C. § 924(c)(1) (1994).

[40] *Corona*, 34 F.3d at 879 (emphasis added).

[41] *See id.* at 879–81.

[42] *See id.* (citing United States v. Georgacarakos, 988 F.2d 1289, 1293 (1st Cir. 1993); United States v. Beech-Nut Nutrition Corp., 871 F.2d 1181, 1188 (2d Cir. 1989); United States v. Walden, 464 F.2d 1015, 1018, 1020 (4th Cir. 1972); and United States v. Jordan, 846 F. Supp. 895, 898 (D. Nev. 1994)).

[43] *Id.* at 880 (quoting *Walden*, 464 F.2d at 1018).

[44] *Id.* at 879–80 (quoting *Georgacarakos*, 988 F.2d at 1293).

[45] *See Palma-Ruedas*, 121 F.3d at 859 (Alito, J., concurring in part and dissenting in part).

arm[,] . . . it only follows that venue should be allowed where the violent crime or drug offense occurred."[46]

This conclusion is supported by *Corona* itself, which states that "[c]ontinuing offenses may be prosecuted 'in any district in which such offense was begun, continued, or completed.'"[47] Because the substantive offense is a necessary element of the § 924(c)(1) charge, it follows that the venue in which the substantive offense occurs is the place where the § 924(c)(1) offense is "begun."

The soundness of *Palma-Ruedas* is undermined not only by the case law upon which the court relied but also by the legislative history of § 924(c)(1), which reveals a congressional intent to avoid trying the predicate offense and the § 924(c)(1) charge in separate proceedings. The *Palma-Ruedas* majority cited *United States v. Anderson*[48] for the proposition that when "Congress has not explicitly indicated an intention to allow multiple venue actions, [the court] remain[s] guided by the strict language of the Constitution."[49] But *Anderson* does not actually require an *explicit* statement of congressional intent to allow multiple venues; it holds only that when "[t]here is nothing in either the statute or the legislative history to show [such] an intention on the part of Congress[,] . . . the *locus delicti* must be determined from the nature of the crime alleged and the location of the act or acts constituting it."[50] Thus, in determining whether Congress intended to allow multiple venues, one can look to statements in the legislative history that *imply* such intent.

The contentious congressional debates surrounding the scope of § 924(c)(1)[51] strongly suggest congressional support for multiple venues. Section 924(c)(1) was first proposed as an amendment to the Gun Control Act of 1968. The initial proposal would have covered state as well as federal crimes,[52] but the substitute amendment ultimately adopted by Congress limited § 924(c)(1) to federal crimes.[53] Congress did not want § 924(c)(1) to cover state crimes because it wanted neither to vest state courts with the authority to hear the § 924(c)(1) charge in tandem with the predicate state offense,[54] nor to allow a state trial for

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46 United States v. Pomranz, 43 F.3d 156, 162 (5th Cir. 1995).

47 *Corona*, 34 F.3d at 879 (quoting 18 U.S.C. § 3237(a) (1994)).

48 328 U.S. 699 (1946).

49 *Palma-Ruedas*, 121 F.3d at 850 (citing *Anderson*, 328 U.S. at 703).

50 *Anderson*, 328 U.S. at 703.

51 *See generally* 114 CONG. REC. 22,229–45, 22,789–93 (1968) (recording a debate in Congress over the scope of § 924(c)(1)).

52 *See id.* at 22,229–30 (statement of Rep. Casey).

53 *See id.* at 22,231 (statement of Rep. Poff).

54 *See, e.g.*, *id.* at 22,240 (statement of Rep. Celler) (expressing concern that under such a scheme, "State judges and State courts would be interpreting Federal criminal statutes all over the country. At the present time those interpretations are limited to Federal judges, who are schooled in the art of interpretations of the Federal statutes"); *id.* at 22,790 (statement of Rep. Poff) (ex-

the predicate offense and a subsequent federal trial for the § 924(c)(1) charge.[55] Indeed, both opponents and proponents of including state predicate crimes within the scope of § 924(c)(1) wanted to avoid having two separate trials.[56] Moreover, the author of the amendment that Congress ultimately adopted emphasized that "it would be expected that the prosecution [of] the basic felony and the prosecution [of the § 924(c)(1) offense] . . . would constitute *one proceeding* out of which two separate penalties may grow."[57] Thus, although Congress did not expressly provide for the situation in which the predicate offense and the § 924(c)(1) offense occur in different venues, the legislative history indicates that members of Congress opposed the possibility that the predicate offense and the § 924(c)(1) offense would be tried in separate proceedings or in separate courts.

The *Palma-Ruedas* court's misplaced reliance on the *Corona* court's analysis, its misapplication of the *Anderson* test, and its failure to examine the legislative history will force federal prosecutors to make a difficult choice in many § 924(c)(1) cases: expending limited resources prosecuting the defendant a second time or forfeiting a conviction on the weapons charge altogether.[58] The court should have eliminated this dilemma and reinforced the clear intent of Congress by finding proper venue for § 924(c)(1) offenses wherever the predicate substantive offense occurred.

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plaining that "as a matter of policy this is unwise, principally because it fractures the Federal system spiritually and functionally").

[55] *See, e.g., id.* at 22,238 (statement of Rep. Pepper) ("Some Members, I observe, are concerned about having two offenses — one tried in the State court . . . and another one tried in the Federal court for the use of a weapon.").

[56] *Compare, e.g., id.* at 22,232 (statement of Rep. Ichord) (opposing the inclusion of state predicate crimes and asking Rep. Poff whether his amendment "contemplate[d a] second criminal proceeding or [whether the defendant would] be tried in the original proceeding where he was first tried"), *with id.* at 22,240 (statement of Rep. Pepper) (supporting the inclusion of state predicate crimes and stating that his amendment "merely solves a dilemma which we have been concerned about, as to trying a case for robbery in a State court, and then having to go into a Federal court and have an entirely new trial").

[57] *Id.* at 22,232 (statement of Rep. Poff) (emphasis added).

[58] *See* United States v. Pomranz, 43 F.3d 156, 161 (5th Cir. 1995). Both the *Palma-Ruedas* and *Corona* courts rejected this argument, noting that the government has the option of trying the cases in a single trial if it wants to, and that the government is limited only in its ability to shop for a favorable forum. *See Palma-Ruedas*, 121 F.3d at 850 ("[H]ad the government wanted to try Moreno on all counts in a single trial, it certainly could have done so in Maryland. . . . Essentially, the government wants to have the *option* of venue."); United States v. Corona, 34 F.3d 876, 881 (9th Cir. 1994) ("If the government desired to litigate all these offenses in a single trial, it could have and should have done so in California."). Although this may be true in these two cases, it does not hold for all fact patterns. Suppose that Defendants A and B both kidnap Victim V in Texas, then A withdraws from the criminal enterprise, and B drives V to Maryland, where he threatens V with a gun. Under *Palma-Ruedas*, the government would be required to hold a separate trial in each state rather than consolidate all of the charges in one state. Moreover, there is nothing in the legislative history to indicate that Congress was concerned with the possibility of forum shopping by the government.