UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 08-1154

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

RICHARD VILLAR,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE
HONORABLE PAUL J. BARBADORO, DISTRICT JUDGE

BRIEF OF RICHARD VILLAR
DEFENDANT-APPELLANT

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March 2009

TABLE OF CONTENTS

TABLE OF CASES

TABLE OF OTHER AUTHORITIES

STATEMENT OF JURISDICTION

1. Basis for Jurisdiction in the District Court:

This appeal is from the judgment and order in the case of Appellant, Richard Villar, in the United States District Court for the District of New Hampshire before the Honorable Paul J. Barbadoro. The District Court had subject matter jurisdiction under 18 U.S.C. § 3231. The judgment entered on January 23, 2008 (A. 1).

2. Basis for Jurisdiction in the Court of Appeals:

This Court has jurisdiction over appeals from final judgments of the District Court under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

3. The Judgment of Conviction is Appealable:

A judgment of conviction in a federal criminal case is a final order subject to appeal under 28 U.S.C. § 1291.

4. The Notice of Appeal was Timely Filed:

On January 23, 2008, the District Court entered its judgment. On January 23, 2008, the appellant filed a Notice of Appeal within the ten (10) day period of Rule 4(b) of the Federal Rules of Appellate Procedure.

5. Bail Status:

The appellant is in custody at The United States Penitentiary (USP) IN Terre Haute, Indiana under service of sentence in this case.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the District Court erred when it ruled that Rule of Evidence 606 (b) completely prohibited the District Court from conducting any inquiry into juror bias and prejudice, where the defendant is Hispanic and the juror's post-verdict email to defense counsel included an allegation that one of the jurors said, "I guess we're profiling but they cause all the trouble"?

2. Whether the defendant was denied Due Process and the right to an impartial and competent jury in violation of the Fifth, Sixth and Fourteenth Amendments to the Constitution, where the District Court refused to allow any questioning by either the Court or counsel of the juror who sent counsel the email regarding "profiling", or alternatively to set aside the verdict upon motion by defense counsel?

3. Whether the Trial Court erred when it ruled at sentencing that the defendant "otherwise used" the pellet gun and applied the four-level enhancement over the defendant's objection?

STATEMENT OF THE CASE

On April 26, 2006, a federal grand jury in the District Court for the District of New Hampshire returned a three (3) count indictment charging the defendant and co-defendants Joshua Gagnon and Dedra Scott regarding the robbery of the St. Mary's bank in Hudson, New Hampshire on April 18, 2006. Count One alleged that the defendant, Gagnon and Scott conspired together to commit the bank robbery in violation of and 18 U.S.C. §§ 371 and 2113(a). Count Two alleged that the defendant robbed the bank in violation of 18 U.S.C. § 2113(a). Count III of the indictment alleged that Gagnon committed the same bank robbery.

On January 11, 2007, the defendant was arraigned in the District Court, and he pleaded not guilty. On August 21, 2007, a jury was selected and the trial began (Tr. 1/2)[1]. The government presented sixteen witnesses (Tr. 3/116). At the conclusion of the government's case, the defendant moved under Rule 29 for dismissal or acquittal after the conclusion of the government's case (Tr. 3/121). The Trial Court denied the defendant's motion (Tr. 3/121).

The defendant then presented the testimony of three witnesses, Christopher Hunt (Tr. 3/124), Jennifer Villar

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[1] References to the transcripts of the four day jury trial are made herein as "(Tr. /)" followed by the volume (the day) and the particular page number. Transcripts of the two hearings regarding the juror issue are made here as "(Tr. Juror 1/) followed by the particular page number for the hearing held on August 27, 2007 and "(Tr. Juror 2/)" followed by the page number for the hearing held on August 28, 2007. References to the transcript of the sentencing hearing are made herein as "(Tr. Sent.) followed by the page

(Tr. 3/133), and Rene Villar (Tr. 3/140). On August 24, 2007, at 1:10 p.m. the jury found the defendant guilty on both Counts 1 and 2. The Court scheduled sentencing for November 27, 2007 (Tr. 4/2-3). Hours after the verdict was returned, a juror seated in the case contacted defendant's counsel via email (Tr. Juror 1/2). Defense counsel first saw the email at his office, and noticed that the subject line read "Juror No. 66" (Tr. Juror 2). The juror's email suggested that the jury's verdict may have been affected by racial or ethnic bias among the jurors. Defense counsel disclosed the email to the Court and the government early the following Monday morning. On August 27, 2007, the defendant filed a motion for court inquiry into the validity of the jury's verdict based on the juror's email. A special hearing was held on the issue (Tr. Juror 2/2-30) and the defendant filed a motion to set aside the verdict and memorandum of law pursuant to Rule of Criminal Procedure 33. The government filed a response to the defendant's motion to set aside the verdict on September 28, 2007. The District Court denied the motion on October 2, 2007.

On November 27, 2007, the District Court sentenced the defendant to prison for 60 months on Count 1 and 188 months on Count 2, with both sentences to run concurrently. The defendant was also sentenced to three years of supervised

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number.

release (Tr. Sent. 35). On January 23, 2007, the defendant timely filed his notice of appeal. This is an appeal from the judgment of conviction by the District Court.

STATEMENT OF FACTS

A. The Facts at Trial. At trial, the government presented sixteen witnesses, whose testimony can be summarized as follows:

On April 18, 2006, shortly after 2:00 p.m., Hudson, New Hampshire Police Sergeant Charles Dyac was on duty he heard a radio dispatch that the St. Mary's Bank on Winnhaven Drive in Hudson had just been robbed (Tr. 1/35). After hearing the transmission, Sergeant Dyac and Detective Solari drove to the bank (Tr. 1/35) where they were joined by other Hudson police personnel (Tr. 1/36). Upon arrival at the bank, Sergeant Dyac made contact with bank employees (Tr. 1/36). He identified himself with his badge and identification through the window and the bank employees unlocked the door and let him in (Tr. 1/36).

Sergeant Dyac spoke with the tellers (Tr. 1/47) and reviewed the bank's surveillance video (Tr. 1/43) in an effort to get a description of the suspects as quickly as possible. At trial the Government introduced both the surveillance video and numerous photographs which depicted two suspects, one of whom was wearing a ski mask and holding what appeared to be a weapon (Tr. 1/44-45).

Once the officers obtained a description of the suspects, that information was immediately relayed to all units in that area (Tr. 1/47). The description provided was of a white male with freckles, approximately five foot eight, with a sharp, pointy nose, light brown colored eyes, thin build, wearing a faded brown pullover sweatshirt with writing on it (Tr. 1/51). The second man was described as wearing dark clothing, a ski mask that covered his entire face, and that he spoke with a thick Spanish accent (Tr. 1/52).

Sergeant Dyac left the bank in order to investigate the surrounding area (Tr. 1/50). Hudson detectives Connors and Dubuque arrived at the bank at about 3:00 o'clock (Tr. 2/28). Detective Connors was ordered to obtain any surveillance footage from the surrounding Citizen's Bank and Brook's Pharmacy located on that same road (Tr. 2/29). As Connors left to seek out the surveillance video, he observed a witness named Todd Lyons conversing with Detective Lamarche (Tr. 2/29). Mr. Lyons informed the detectives that he was a resident who lived nearby and he had observed a mask at the corner of Winnhaven and Birch (Tr. 2/29).

Detective Connors drove to the corner and secured the location (Tr. 2/31). Connor informed Dyac about the mask (Tr. 1/50), after which Dyac searched a nearby wooded area where he discovered a pellet gun (Tr. 1/52). Sergeant Dyac

noticed some footprints as he walked up Winnhaven drive (Tr. 1/56). No shoes were ever recovered that could have been compared with the footprints found during the course of this investigation (Tr. 1/59).

Hudson Police Sergeant Briggs was asked to process what the police determined to be the getaway vehicle, a light blue Mercury minivan (Tr. 2/79). The minivan's interior was messy and in disarray, with trash, clothing and two pairs of shoes littered the back seat (Tr. 2/79). The officers compared the tread on the bottom of both pairs of shoes found inside the minivan to the treads left at the bank and discovered they did not match (Tr. 2/82-83).

Inside the minivan the officers located a woman's purse that contained a small cellophane packaging with an object that appeared to be a hardened piece of cotton that had a light brown tinge to it (Tr. 2/85). A telephone bill belonging to Dedra Scott was also discovered inside the minivan (Tr. 2/85).

Donna Paquette, the mother of Dedra Scott, contacted the Hudson Police and agreed to cooperate with the police by contacting her daughter (Tr. 1/62). Thereafter, Dedra Scott contacted the Hudson Police and advised them of her intention to turn herself in (Tr. 1/63). Eventually Dedra Scott turned herself in ten days after the robbery on April 28, 2006 (Tr. 1/65). After Scott's arrest, the police began

looking for the defendant in Nashua to no avail (Tr. 1/63).

Despite the government's efforts, no fingerprints were lifted or raised from the pellet gun (Tr. 2/83-96). At trial the government presented the testimony of Timothy Jackson, a government expert in the field of fingerprint comparison (Tr. 3/85) and footwear impressions (Tr. 3/96-97). Mr. Jackson was unable to obtain any latent prints or footprints in order to make any comparisons (Tr. 3/96).

Ms. Shirley Bhutto was employed a security specialist at St. Mary's Bank (Tr. 2/16). On April 18, 2006, Ms. Bhutto responded to the scene of the robbery in order to examine the surveillance video (Tr. 2/17-18). She testified that the bank was missing a total of about $17,429.00 (Tr. 2/19). Bank tellers Jennifer Manning and Katherine Willette testified. Ms. Manning testified that one of the robbers, who was masked, had a Hispanic accent (Tr. 2/8). The prosecutor showed Ms. Manning a surveillance photo of the robbery and asked Ms. Manning if she could identify the man in the photo as the man who robber her; she could not identify the robber (Tr. 2/10).

Shawna Harrington testified that she is a 21-year-old mother of a two and a half year old child whom she lost custody of due to her abuse of heroin and cocaine (Tr. 3/32-33). The child's father is Joshua Gagnon, a co-conspirator in the bank robbery (Tr. 3/36). Ms. Harrington admitted to

being addicted to heroin for two and a half years and was in rehab at the time of her testimony (Tr. 3/33). Ms. Harrington testified that on April 23, 2006, the day Joshua Gagnon was arrested, she was interviewed by law enforcement officials and lied to them because she did not want to get in trouble (Tr. 3/37). In order to fuel her heroin addiction, she has lied, stolen from her mother and step-father and worked as a prostitute (Tr. 3/37-38).

Ms. Harrington testified that on the date of the robbery, she and her two year old daughter were living with Richard Villar, Dedra Scott and Joshua Gagnon in an apartment on East Hollis Street in Nashua (Tr. 3/38). She testified that she and the defendant used heroin every day while they were living together (Tr. 3/39). According to Harrington, a few days before the robbery, Villar, Scott, Gagnon and Harrington were all getting high and Mr. Villar made mention about the possibility of robbing a bank to buy more heroin and cocaine (Tr. 3/41-42). Harrington claimed she was not interested in the bank robbery but that Scott and Gagnon were (Tr. 3/42).

Rino Giordano testified that he lives in the area of Winnhaven Drive (Tr. 3/3) and usually arrives home from work around noon or 12:30 p.m. (Tr. 3/4). At approximately 1:30 p.m. on April 18, 2006, Giordano took his dog for a walk on Winnhaven Drive, where he saw two men walking towards him

(Tr. 3/7). Mr. Giordano described one of the men as a Caucasian male with light hair, about six feet tall, and the other as a shorter Hispanic-looking male with short hair (Tr. 3/7). Giordano saw a blue minivan stop and pick up the two men (Tr. 3/11).

Melissa Nichols testified she is a stay-at-home mom and lived near St. Mary's Bank. As she was folding laundry and looking out her picture window, she noticed a light blue van pull up (Tr. 3/16). She noticed two men get out of the van and head towards the bank (Tr. 3/17). Both men appeared to be Hispanic (Tr. 3/18).

Michael Febonio testified that he is employed as a salesman and was leaving for work at approximately 1:30 p.m. on April 18, 2006 when he noticed two men walking down the street (Tr. 3/25). He described one man as being shorter, thicker and having darker skin than the other (Tr. 3/26); and the other as leaner with lighter skin (Tr. 3/26). He further testified that there was something similar about their dress and that seemed odd to him (Tr. 3/26) and that it was too far to observe any facial features (Tr. 3/28).

B. The Verdict and the Email. On August 24, 2007, at 1:10 p.m. the jury found the defendant guilty on both Counts 1 and 2. The Court scheduled sentencing for November 27, 2007 (Tr. 4/2-3). Hours after the verdict was returned, a juror seated in the case contacted defendant's counsel via

email (Tr. Juror 1/2). Defense counsel first saw the email at his office, and noticed that the subject line read "Juror No. 66" (Tr. Juror 2). The juror's email intimated that the jury's verdict may have been affected by racial or ethnic bias among the jurors. Defense counsel disclosed the email to the Court and the government early the following Monday morning. The email read:

> I feel compelled to send this to you. I don't know if I should even be doing this but I don't care. I know it's late but I want you to know that there were at least 3 people on that jury who actually listened to the testimony with an open mind. We tried to make the rest pay attention. We made them go through every piece of evidence and every witness. Between us we pointed out every disc[prency]. They made up some story to explain it away. I want you to know that I will go to jail before I ever serve on another jury. It was awful. I'm sorry we couldn't do anything. We finally decided to not prolong that man's hope any longer. We could have stayed there for another week. Their minds were made up from the first day. Here's one example, [A] man said "I guess we're profiling but they cause all the trouble." Well I won't keep you any longer. Again I'm sorry we couldn't do more. You know if I thought we would have gotten a different kind of jury the next time I think [I] would have kept them there. These people

> are the salt of the earth and there is no gray in their lives. I really hope they never get into the scales of justice because she isn't.
> God Bless you and Mary keep you safe."

(District Court Docket Entry 104, United States' Response to Defendant's Motion to Set Aside Verdict, at p. 2-3). On August 27, 2007, the defendant filed a motion requesting that the District Court inquire into the validity of the jury's verdict based on the juror's email. A special hearing was held on the issue (Tr. Juror 2/2-30) and the defendant filed a motion to set aside the verdict and memorandum of law pursuant to Rule of Criminal Procedure 33. The government filed a response to the defendant's motion to set aside the verdict on September 28, 2007. The District Court denied the motion on October 2, 2007.

SUMMARY OF THE ARGUMENT

The Trial Court erred when it ruled that the Rule 606 (b) was a complete bar to any inquiry into the juror bias that the juror's email asserted. Racial or ethnic bias or prejudice is an extrinsic influence not subject to Rule 606 (b), because the racial bias of a juror or jurors is unrelated to any specific factual issue that a juror in a criminal case may be called upon to determine and is thereby extraneous prejudicial information.

Even if the District Court was correct in ruling that

Rule 606 (b) prevented it from inquiry into juror bias and prejudice against the defendant because of his ethnicity, the defendant's Constitutional rights must trump the rule of evidence because Constitutional rights cannot be left open to the vagaries of the rules of evidence.

The Trial Court in adjusting the defendant's sentence upward four levels based upon its ruling that the defendant "otherwise used" the pellet gun, rather than "brandishing the pellet gun, which would have resulted in a three level upward adjustment, where there was insufficient evidence to warrant the ruling that the defendant "otherwise used" the pellet gun.

ARGUMENT

I. THE DISTRICT COURT ERRED WHEN IT RULED THAT RULE OF EVIDENCE 606(b) PROHIBITED CONDUCTING ANY INQUIRY INTO JUROR PREJUDICE BEYOND CONFIRMING THAT THE JUROR SENT THE EMAIL TO DEFENSE COUNSEL, WHERE THE EMAIL INDICATED A LIKELIHOOD OF ETHNIC BIAS AND DISCRIMINATORY ANIMUS TOWARD THE DEFENDANT, WHO IS HISPANIC, BY MEMBERS OF THE JURY DURING DELIBERATIONS

A. The Standard of Review

The district court declined to hold such a post-verdict inquiry with the juror who sent the email to trial counsel or the other jurors or to grant a new trial based on the email. The abuse of discretion standard governs this issue. *United States v. Connolly*, 341 F. 3d 16, 45 (1st Cir. 2003), citing *United States v. Boylan*, 698 F. Supp. 376

(D. Mass. 1976).

B. The District Court erred when it ruled that Rule of Evidence 606 (b) prohibited any inquiry into ethnic or racial bias by the jury, after reviewing the email and finding that the email was "… strongly suggestive of ethnic bias" (Tr. Juror 1/10). Rule of Evidence 606 (b) states as follows:

> "Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes."

Rule of Evidence 606 (b).

The government's interest in the finality of verdicts and the privacy of the jury's deliberations is significant. Restrictions on post-verdict contact and the limitations on juror testimony about deliberations, Rule of Evidence 606 (b), exist to protect important interests in the finality of the verdict and the privacy of the deliberations. *Tanner v. United States*, 483 U.S. 107, 120 (1987). However, the defendant here possesses a weighty Sixth Amendment right to a fair and impartial jury and to the fundamental fair play required by the Due Process guaranteed by the Fourteenth Amendment. *United States v. Heller*, 785 F. 2d 1524 (11th Cir. 1986).

Racial or ethnic bias though is an "extraneous influence" which falls outside the prohibitions of Rule 606 (b) and the firmly established common law addressed in *Tanner*, 483 U.S. at 117, citing *Mattox v. United States*, 146 U.S. 140 (1892). Upon the District Court's reading of the juror's email, it opined as follows: "[O]ne thing that causes me the most concern is the suggestion that there may be an ethnic bias at work on the part of one or more of the jurors in their decision making.", and "[S]he'll have to explain her thinking on that… What I see is a possible reference to ethnic bias that needs further explanation if it, in fact a statement that was made." (Tr. Juror 1/7).

This Court has not ever definitively classified

whether racial bias against a defendant expressed by one or more jurors in the presence of other jurors is either an extrinsic influence or an intrinsic influence. One decision of this Court that that would tend to indicate that this is an extrinsic influence, and not barred per se from inquiry under Rule 606 (b), is *United States v. Connolly*, 341 U.S. 16, 34 (1st Cir. 2003). In *Connolly*, the Court stated that a "...court should only conduct such an inquiry when reasonable grounds for investigation exist' i.e. there is clear, strong, substantial and incontrovertible evidence that a specific, non-speculative impropriety had occurred which would have prejudiced the trial of a defendant". *Id,* citing *United States v. Moon*, 718 F. 2d 1210, 1234 (2d Cir. 1983).

In *Heller*, the allegation was anti-Semitic bias, and here it is ethnic bias toward a Hispanic defendant. *Heller*, 785 F. 2d at 1524. The foreperson's note to the judge in *Heller* included the line, "[D]uring the course of this trial, there were comments in the jury room about various testimony. Also, some ethnic slurs were made." *Heller*, 785 F. 2d at 1525. Here, the juror's email included the comment that during deliberations, "A man said 'I guess we're profiling but they cause all the trouble". See *United States v. McClinton*, 135 F. 3d 1178 (7th Cir. 1998).

Another Circuit Court has held that racial bias is the

type of extrinsic evidence exempt from Rule 606 (b)'s prohibitions. *United States v. Henley*, 238 F. 3d 1111 (9th Cir. 2001). In *Henley*, a juror was alleged to have made racial remarks while car pooling to and from the trial that "all niggers are guilty." *Id.*, at 1113-1114. The Ninth Circuit stated in *Henley* that "a powerful case can be made that Rule 606 (b) is wholly inapplicable to racial bias" because the racial bias of a juror is unrelated to any specific factual issue that a juror in a criminal case may be called upon to determine and is thereby extraneous prejudicial information. *Id.*, at 1120. The statement related by the juror's email in this case was a racially biased statement similar to the one in *Henley*.

The District Court erred in ruling that Rule 606 (b) barred any inquiry into ethnic bias in this case, even though the juror's email clearly set out a "non-frivolous suggestion", *United States v. Ortiz-Arrigoitia*, 996 F. 2d 436, 442 (1st Cir. 1993), that the jury was racially or ethnically biased against the defendant because he was Hispanic. Comparing the burden upon the Court to inquire of the juror or jurors on the one hand, see *Tavares v. Holbrook*, 779 F. 2d 1 (1st Cir. 1985), with the alarming concern that racial bias may have led to the guilty verdict on the other, weighs heavily in favor of the District Court conducting an inquiry into the latter possibility.

II. IF THE DISTRICT COURT WAS CORRECT IN RULING THAT RULE 606 (b) PREVENTED IT FROM INQUIRY INTO RACIAL OR ETHNIC BIAS OR PREJUDICE, THEN THE DEFENDANT'S CONSTITUTIONAL RIGHTS TO A FAIR TRIAL AS GUARANTEED BY THE SIXTH AMENDMENT AND HIS DUE PROCESS RIGHTS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS MUST TRUMP THE EVIDENTIARY RULE

A. The Standard of Review

Defense counsel made a timely motion requesting that the District Court make inquiry of the juror who sent the email to defense counsel (Tr. Juror 1/3). The issue of whether the constitutional ramifications of juror prejudice or bias trump a rigid application of this rule of evidence would be an issue of first impression and would therefore necessarily be reviewed de novo.

B. The defendant's Constitutional rights must trump a rigid application of a rule of evidence, particularly in light of the plain implications set forth in the juror's email.

The cost of making inquiry of this juror, and/or the other jurors, would be slight compared with the risk of not inquiring into the racial or ethnic bias that the email illuminates. See *Turner v. Murray*, 476 U.S. 28, 45 (1986)(Opinion of J. Marshall, concurring in part and dissenting in part). Here there is a "reasonable possibility that racial or ethnic prejudice might have influenced the jury." *Rosales-Lopez v. United States*, 451 U.S. 182 (1981)(dealing with requested juror voir dire). If even one of the jurors had an ethnic or racial bias against

the defendant because the defendant is Hispanic, the defendant's right to a trial by an impartial jury was impaired.

The Supreme Court has made abundantly clear that when a Constitutional right is at issue, that the Constitutional right cannot be left to the "vagaries of the rules of evidence." *Crawford v. Washington*, 542 U.S. 36, 61 (2004). Here, the defendant's right to a fair trial by a panel of impartial indifferent jurors, *Irvin v. Dowd*, 366 U.S. 717, 721-722 (1961) must be weighed against a wooden application of a rule of evidence. A fair trial in a fair tribunal is a basic requirement of Due Process. *In re Murchison*, 349 U.S. 133 (1955). The failure to accord an accused a fair hearing violates even the minimal standards of due process. *Irvin*, 366 U.S. at 722.

The paramount importance placed upon the impartiality of jurors can be traced at least as far back as the trial or Aaron Burr. In 1 Burr's Trial 416 (1807), Chief Justice Marshall described the importance of impartial jurors as follows:

> [Light] impressions which may fairly be supposed to yield to the testimony that may be offered; which may leave the mind open to a fair consideration of that testimony, constitute no sufficient objection to a juror; but

> that those strong and deep impressions, which will close the mind against the testimony that may be offered in opposition to them; which will combat that testimony and resist its force, do constitute a sufficient objection to him."

Irvin v. Dowd, 366 U.S. at 722, citing 1 Burr's Trial 416 (1807).

Here, "profiling" of the defendant by the jurors because of his ethnic background or race compromised the integrity of the jury's verdict. The defendant's Constitutional rights to a fair trial by an impartial jury, and his right to Due Process, require that the verdict be set aside or at least that an inquiry be made by the District Court regarding prejudice or bias that may have affected the verdict.

III. THE TRIAL COURT ERRED IN RULING THAT THE DEFENDANT "OTHERWISE USED" THE PELLET GUN AND INCORRECTLY APPLIED THE FOUR LEVEL ENHANCEMENT FOR "OTHERWISE USED" WHERE IT SHOULD HAVE APPLIED A "BRANDISHING" ENHANCEMENT

A. The Standard of Review

Defense counsel made a timely objection to the four level enhancement for "otherwise used", rather than a three-level enhancement for "brandishing", the pellet gun (Tr. Sent. 2-12). This Court will review *de novo* the

interpretation by the District Court of the language and meaning of words used in the Sentencing Guidelines. *United States v. LaFortune*, 192 F. 3d 157 (1st Cir. 1999). The Court reviews the District Court's finding of fact for clear error. *Id.*

B. The Trial Court should have applied the three-level enhancement for brandishing. The defendant objected to the four level enhancement for "otherwise using" the pellet gun (Tr. Sent. 9). Bank teller Jenny Manning testified that she felt something stuck into her side that she later determined to be a weapon. There was no reference to the gun by the robbers or threats to shoot it. U.S.S.G. §1B1.1 Commentary Note C defines what brandishing means: "that all or part of the weapon was otherwise made known to another person, in order to intimidate the person, regardless of whether the weapon was visible to that person."

"Otherwise used" is defined as conduct that does not amount to discharge of the weapon but it is something more than brandishing, displaying or possessing the weapon. U.S.S.G. §1B1.1 Commentary Note I. As the defendant argued in the District Court (Tr. Sent. 10), the offense conduct here was brandishing, where the teller did not even know it was a gun when she felt something in her side (Tr. Sent. 10), and there was no more than a display of the weapon than

that described in U.S.S.G. §1B1.1 Commentary Note C.

The facts here are distinguishable from *United States v. LaFortune*, 192 F. 3d 157 (1st Cir. 1999), in which this Court was faced for the first time with distinguishing between "brandishing" and "otherwise using" a weapon. In *LaFortune*, the defendant held the gun at a person's head and cocked it. The Court ruled that "specifically leveling a cocked firearm at the head or body of a teller is a cessation of 'brandishing' and the commencement of 'otherwise used.'" *LaFortune*, 192 F. 3d at 161-162.

In this case, though, the conduct was more analogous to using the weapon " … to 'advise' those concerned that he possesses the general ability to do violence, and that violence is imminently and immediately available. *LaFortune*, 192 F. 3d at 161-162. The conduct here "constitute[d] the generalized warning that these weapons may be, in the future, used and not merely brandished." *Id.* at 161-162. The District Court erred in applying the four level adjustment for "otherwise used" regarding the pellet gun.

CONCLUSION

For the reasons set forth in the defendant's argument, and for such other reasons as may be advanced on oral argument, the defendant moves that the Court reverse the District Court's order on the defendant's motion to set aside the verdict, or alternatively to reverse the District Court's order on the defendant's motion that the District Court make an inquiry into the validity of the verdict because Rule 606 (b) did not prohibit it from doing so. In the alternative the defendant moves that the Court reverse the District Court's ruling on his objection to the four level adjustment for "otherwise using" a weapon.

Respectfully submitted,
Richard Villar
By his attorney,

Dated: March 4, 2009

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE AND LENGTH LIMITATIONS

1. This brief has been prepared using 10 ½ characters per inch mono-spaced typeface. The specific software name and version, typeface name, and characters per inch are:

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Mark Stevens, Esquire

CERTIFICATE OF SERVICE

I, Mark Stevens, Attorney for Defendant-Appellant Richard Villar, certify that two copies of the within brief were mailed by first class mail, postage prepaid to United States Attorney Aixa Maldonado-Quinones, Esquire, United States Attorney's Office, United States Attorney's Office District of New Hampshire, 53 Pleasant Street, Concord, NH 03301-2904, on January 28, 2009.

Mark Stevens, Esquire

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 08-1154

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

RICHARD VILLAR,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE
HONORABLE PAUL J. BARBADORO, DISTRICT JUDGE

ADDENDUM TO BRIEF OF RICHARD VILLAR
DEFENDANT-APPELLANT

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AO 245B (Rev. 06/05) Judgment in a Criminal Case - Sheet 1

United States District Court
District of New Hampshire

U.S. DISTRICT COURT
DISTRICT OF N.H.
FILED
2008 JAN 23 P 2:44

UNITED STATES OF AMERICA
v.
RICHARD VILLAR

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: **06-cr-85-01-PB**

Michael Iacopino, Esq.
Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s): _.
[ ] pleaded nolo contendere to count(s) _ which was accepted by the court.
[x] was found guilty on count(s) **1 and 2 of the Indictment** after a plea of not guilty.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18: USC 371 and 2113(a)	Conspiracy to commit bank robbery	04/18/2006	1
18: USC 2113(a)	Bank Robbery	4/18/2006	2

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _ and is discharged as to such count(s).

[ ] Count(s) dismissed on motion of the United States: _.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

1/22/2008
Date of Imposition of Judgment

Signature of Judicial Officer

PAUL BARBADORO
United States District Judge
Name & Title of Judicial Officer

1-23-08
Date

A.1

CASE NUMBER: **06-cr-85-01-PB**
DEFENDANT: **RICHARD VILLAR**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **188 months**.

60 months on Count 1 and 188 months on Count 2, to be served concurrently

[x] The court makes the following recommendations to the Bureau of Prisons:

that the defendant participate in the intensive drug education and treatment program

[x] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district.
[ ] at _ on _.
[ ] as notified by the United States Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
[ ] before _ on _.
[ ] as notified by the United States Marshal.
[ ] as notified by the Probation or Pretrial Services Officer.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

A.2

CASE NUMBER: **06-cr-85-01-PB**
DEFENDANT: **RICHARD VILLAR**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **3 years**.

on each count, to run concurrently

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

Pursuant to Public law 108-405, Revised DNA Collection Requirements Under the Justice for All Act of 2004, the defendant shall submit to DNA collection while incarcerated in the Bureau of Prisons, or at the direction of the U.S. Probation Office.

For offenses committed on or after September 13,1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, not to exceed 72 drug tests per year of supervision.

[ ] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check if applicable.)

[x] The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

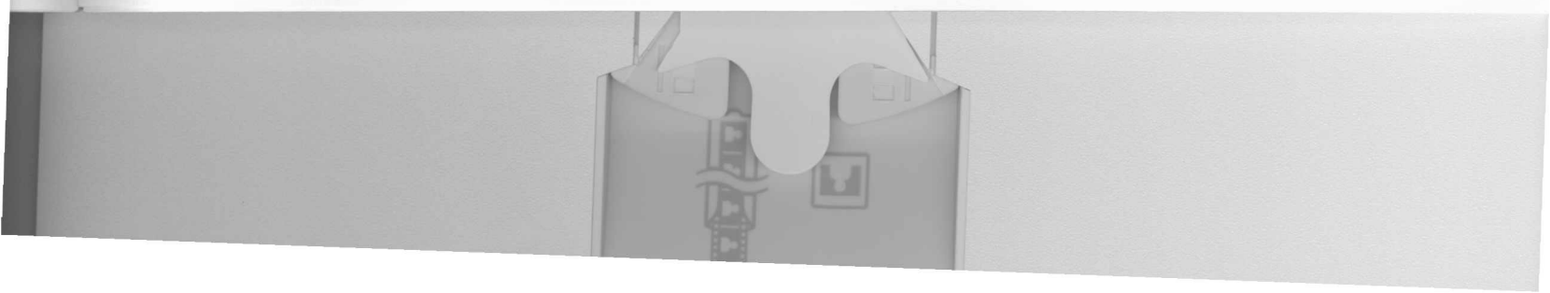
If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow instructions of the probation officer;
4) the defendant shall support his or her dependants and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

A.3



SPECIAL CONDITIONS OF SUPERVISION

In addition, the defendant shall comply with the following special conditions:

The defendant shall provide the probation officer with access to any requested financial information.

The defendant shall apply all monies received from income tax refunds, lottery winnings, judgments, and/or any other anticipated or unexpected financial gains to the outstanding court-ordered financial obligation.

The defendant shall not incur new credit charges or open additional lines of credit without the approval of the probation officer unless he is in compliance with the installment payment schedule.

The defendant shall participate in a program approved by the United States Probation Office for treatment of narcotic addiction or drug or alcohol dependency which will include testing for the detection of substance use or abuse. The defendant shall also abstain from the use of alcoholic beverages and/or all other intoxicants during and after the course of treatment. The defendant shall pay for the cost of treatment to the extent he is able as determined by the probation officer.

The defendant shall submit his person, residence, office, or vehicle to a search conducted by a U.S. probation officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion that contraband or evidence of a violation of a condition of release may exist; failure to submit to a search may be grounds for revocation; the defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.

Upon a finding of a violation of probation or supervised release, I understand that the court may: (1) revoke supervision; (2) extend the term of supervision; and/or (3) modify the conditions of supervision.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

(Signed)

_____ _____
Defendant Date

_____ _____
U.S. Probation Officer/ Designated Witness Date

A.4

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	**$200.00**		**$15,929.00**

[ ] The determination of restitution is deferred until . An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

[x] The defendant shall make restitution (including community restitution) to the following payees in the amount listed.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all non-federal victims must be paid in full prior to the United States receiving payment.

Name of Payee	**Total Amount of Loss	Amount of Restitution Ordered	Priority Order or % of Pymnt
St. Mary's Bank		**$3,500.00**	
St Paul Fire and Marine Insurance Co.		**$12,429.00**	
	TOTALS:	**$15,929.00**	

[ ] If applicable, restitution amount ordered pursuant to plea agreement. $_____

[ ] The defendant shall pay interest on any fine or restitution of more than $2500, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. §3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. §3612(g).

[x] The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

[x] The interest requirement is waived for the [ ] fine [x] restitution.

[ ] The interest requirement for the [ ] fine and/or [ ] restitution is modified as follows:

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994 but before April 23, 1996.

A. 5

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A [ ] Lump sum payment of $_ due immediately, balance due

[ ] not later than _, or
[ ] in accordance with **C**, **D**, or **E** below; or

B [x] Payment to begin immediately (may be combined with **C**, **D**, or [x] **E** below); or

C [ ] Payment in _ installments of $_ over a period of _, to commence _ days after the date of this judgment; or

D [ ] Payment in _ installments of $_ over a period of _ , to commence _ days after release from imprisonment to a term of supervision; or

E [x] Special instructions regarding the payment of criminal monetary penalties:

Upon commencement of the term of supervised release, the probation officer will review the defendant's financial circumstances and recommend to the Court a schedule of payments on any remaining balance not paid during the defendant's period of incarceration.

Criminal monetary payments are to be made to Clerk, U.S. District Court, 55 Pleasant Street, Room 110, Concord, NH 03301. Payments shall be in cash or in a bank check or money order made payable to Clerk, U.S. District Court. Personal checks are not accepted.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are to be made payable to the clerk of the court, unless otherwise directed by the court, the probation officer, or the United States attorney.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

[x] Joint and Several

Defendant Name, Case Number, and Joint and Several Amount:
Joshua Gagnon 06-cr-85-02-PB, and Dedra Scott 06-cr-85-03-PB, $15,929.00 to be paid, except that no further payment shall be required after the sum of the amounts actually paid by all the defendants has fully covered all of the compensable injuries. Any payment made by the defendant shall be divided among the victims named in proportion to their compensable injuries.

[ ] The defendant shall pay the cost of prosecution.

[ ] The defendant shall pay the following court cost(s):

[ ] The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3)restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs.

A. 6