United States of America
First Circuit Court of Appeals

NO. 08-2300

UNITED STATES OF AMERICA,

Appellee,

v.

CIRINO GONZALEZ,

Defendant/Appellant

BRIEF OF DEFENDANT - APPELLANT

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STATEMENT OF JURISDICTION

The First Circuit Court of Appeals has jurisdiction[1] of this appeal pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

Mr. Gonzalez was found guilty by a jury in the United States District Court for the District of New Hampshire, of conspiracy, contrary to 18 U.S.C. § 371, to impede federal officers, 18 U.S.C. § 111[2] and to accessory after the fact, 18 U.S.C. § 3 (Count II); and of accessory after the fact, contrary to 18 U.S.C. § 3 (Count III).

The court (*George Z. Singal,* J.) (sitting by designation), sentenced him to 60 months on Count II, and 36 months on Count III, stand committed, to be served consecutively.

A notice of appeal was filed on September 29, 2008.

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[1]This statement does not waive Mr. Gonzalez's claim that the federal government generally did not have territorial jurisdiction to prosecute, as detailed *infra*.

[2]Whether the jury found guilt on this object is a subject of dispute, see *infra*.

STATEMENT OF ISSUES

1. Did the court err in instructing the jury it could find guilt if there was intent to commit either of the objects in the dual-object conspiracy, when the indictment required an intent to commit both?

2. Did the court err in sentencing Mr. Gonzalez for a dual-object conspiracy when the special verdict found guilt on just one object?

3. Did the court err in convicting Mr. Gonzalez for accessory after the fact when the indictment was insufficient in that it failed to adequately specify the nature of the allegations against him?

4. Did the court err in convicting Mr. Gonzalez for accessory after the fact when the government failed to prove that Mr. Gonzalez knew the nature of the predicate offense?

5. Did the court dilute the government's burden of proof by giving the jury a reasonable doubt instruction that would require any doubt it might have to be substantial before it could acquit?

6. Did the court err in instructing the jury as a matter of law that the United States Marshals are employees of the government, when that is an element of the crime?

7. Did the court err in sentencing Mr. Gonzalez for a dual-object conspiracy when the jury found guilt on just one object?

8. Did the court err in sentencing Mr. Gonzalez for use of weapons when the jury refused to convict for that conduct, in violation of Mr. Gonzalez's right to trial by jury?

9. Did the court err in sentencing Mr. Gonzalez for felony conspiracy, when the underlying crime was merely a misdemeanor?

10. Did the court err in sentencing Mr. Gonzalez on the conspiracy count with regard to a supposed underlying offense of obstruction of justice, when obstruction was not charged, and other underlying offenses are intended by the indictment?

11. Did the court err in augmenting Mr. Gonzalez's sentence for obstruction of justice for informing the jury of its capacity for nullification, when nullification obviously is within the jury's capacity, and there is little likelihood of prejudice?

12. Did the court lack territorial jurisdiction to prosecute Mr. Gonzalez when both the place he was alleged to commit a crime and the courthouse in which he was tried had not been ceded by the State of New Hampshire to the federal government?

STATEMENT OF FACTS AND STATEMENT OF THE CASE

Edward and Elaine Brown are heroes among some for questioning the obligation to pay personal income tax. On the fourth day of their trial for "conspiracy and a number of federal tax crimes," the Browns failed to show up. They instead resorted to their well-defended remote home in Plainfield, New Hampshire. The situation attracted hundreds of supporters, many of whom were armed. *DE* 588 at 50, *DE* 591 at 68.[3] The Browns made clear to the world they would resist being arrested and would harm federal marshals and their families if authorities tried, *DE* 431 at 15-16, thus causing the United States Marshals to feel threatened and prevented from entering. *Id.* After 10 months the Marshals effected a peaceful resolution, largely through patience and trickery, and re-arrested the Browns.

Cirino Gonzalez was one of the visitors at the Browns, staying there for about two-and-a-half months. He was subsequently indicted on four charges:

Count I.	Conspiracy to prevent United States officers from discharging duties;
Count II.	**Conspiracy to commit offenses against the United States;**
Count III.	**Accessory after the fact**; and
Count V.	Using a firearm in connection with a crime of violence.

[3]Citations to the joint appendix are cited as *JointAppx.* Citations to the separate sealed appendix are cited as *SealedAppx.* Citations to the addendum are cited as *Add.* Citations to transcripts are cited by their docket entry as *DE*.

The two-week trial involved mostly munitions and explosives the Browns used to arm their home, which were unconnected to Mr. Gonzalez, and for which his co-defendants were found guilty. PSI *Table* ¶ 33, *SealedAppx.* at 13, *and generally* ¶¶ 24-36, *SealedAppx.* at 9-14; (weapons associated with co-defendants only). As to Mr. Gonzalez, the jury was unable to reach a verdict on counts I and V. JURY VERDICT FORM (Apr. 10, 2008) *JointAppx.* at 48. Mr. Gonzalez was found guilty, however, on counts II and III (indicated in bold type). Thus one of the conspiracies, and the allegations of firearms and crimes of violence, were dismissed. ENDORSED ORDER (June 6, 2008) (granting motion to dismiss without prejudice); JUDGMENT IN A CRIMINAL CASE (Oct. 3, 2008), *Add.* at 63.

SUMMARY OF ARGUMENT

Cirino Gonzalez first points out that the conspiracy count for which he was found guilty had two objects, connected by the conjunctive, "and," but that the court instructed the jury with the disjunctive, "or." He notes also that the jury issued a special verdict finding guilt on just one of the objects of the conspiracy, but that he was sentenced as though it found both. He argues that given the discrepancy between indictment and instructions, he is not guilty of any conspiracy, and distinguishes cases that deal with related issues.

Mr. Gonzalez then points out that the non-conspiracy accessory after the fact indictment was deficient in that it failed to specify the underlying offense, and argues, relatedly, that the government did not prove he knew of the underlying offense.

He then alleges that the court's instructions to the jury were inadequate because they diluted the government's burden of proof regarding the correct measure of reasonable doubt, and also because they directed an element that the jury was required to find to support a conviction.

Mr. Gonzalez argues that being sentenced pursuant to the court's pseudo-count analysis was improper because, at most, he was convicted of just one of the counts. He also argues that the court erred in sentencing him for having or using

weapons, when the jury did not convict for this conduct, and shows that the jury largely believed the testimony which the court, for sentencing, found was "perjurious."

Mr. Gonzalez then points out that he was sentenced for a felony conspiracy to battery, when he was guilty of, at most, misdemeanor conspiracy to assault.

He notes he was sentenced with regard to both the conspiracy and non-conspiracy accessory counts based on the wrong underlying offenses. He also argues that he should not have been penalized for telling the jury of its capacity for nullification when that capacity clearly exists and it was unlikely there was any prejudice, and even if he deserves some sanction, the court was unreasonable in its penalty.

Finally, Mr. Gonzalez argues that the government had no territorial jurisdiction to prosecute him for crimes in Plainfield, New Hampshire, nor to try him at the courthouse in Concord, when the state has not ceded either place to the federal government.

ARGUMENT

I. Mr. Gonzalez Was Convicted of Accessory and Conspiracy to Accessory, but not Conspiracy to Impede Officers

A. Indictment

Count III alleged a non-conspiracy violation of 18 U.S.C. §3, "accessory after the fact." It charged that Mr. Gonzalez:

> [K]nowing that offenses against the United States had been committed by Edward Brown and Elaine Brown, received, relieved, comforted and assisted Edward Brown and Elaine Brown in order to hinder and prevent their apprehension, trial and punishment.

THIRD SUPERSEDING INDICTMENT (Jan. 16, 2008) *JointAppx.* at 1.

Count II charged a dual-object conspiracy, 18 U.S.C. § 371, with the underlying violations specified as 18 U.S.C. § 111(a)(1) ("assaulting, resisting, or impeding certain officers or employees"), and the same 18 U.S.C. § 3 ("accessory after the fact") as was charged in Count III. It alleged that Mr. Gonzalez and others:

> [K]nowingly and willfully conspired and agreed with each other:
>
> "A. forcibly to assault, resist, oppose, impede, intimidate and interfere with federal law enforcement officers in the discharge of their duties, to wit: attempting to arrest Edward Brown and Elaine Brown …;
>
> and,
>
> B. knowing that offenses against the United States had been

> committed by Edward Brown and Elaine Brown, received, relieved, comforted and assisted Edward Brown and Elaine Brown in order to hinder and prevent their apprehension, trial and punishment…."

THIRD SUPERSEDING INDICTMENT (Jan. 16, 2008) *JointAppx.* at 1 (punctuation and capitalization altered).

Several things about the indictments are worth noting.

First, in various documents during these proceedings, the two conspiracy objects in Count II were referred to as Count 2A and Count 2B, and that convention is followed here.

Second, the crime charged in Count III is the same as the offense constituting the object of the conspiracy in Count 2B. The indictments reference the same statute, and are word-for-word identical. *See United States v. Felix*, 503 U.S. 378 (1992); *Pinkerton v. United States*, 328 U.S. 640 (1946).

Third, the word joining Counts 2A and 2B is "and" – the conjunctive. Thus, the indictment charges Mr. Gonzalez with conspiracy to further the objects "A … and B…."

Finally, the language of both conspiracy objects are taken directly from the statutes defining them. The language of the object forming Count 2A is nearly identical to 18 U.S.C. § 111(a)(1), which makes it a crime when one:

> forcibly assaults, resists, opposes, impedes, intimidates, or interferes with [federal law enforcement officers] while engaged in or on account of the performance of official duties.

18 U.S.C. § 111(a)(1). Likewise, the language of the object forming Count 2B is nearly identical to 18 U.S.C. § 3, which makes it a crime when one:

> knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment.

18 U.S.C. § 3. The indictment thus inescapably ties, as it must, each object of the conspiracy to a specific underlying offense.

B. Jury Instructions

After the evidence, the parties submitted proposed jury instructions. The government advocated changing the word between Counts 2A and 2B from "and" used in the indictment to "or" – from the conjunctive to the disjunctive. *See* GOVERNMENT'S PROPOSED JURY INSTRUCTIONS (Mar. 19, 2008), *DE* 332 at 8. The suggestion was taken, and the jury instructions fashioned by the court further highlighted this disjunctive by presaging "or" with "either," giving the instruction as a whole an "either A or B" cadence. Mr. Gonzalez objected. FED. R. CRIM. P. 30; *Henderson v. Kibbe*, 431 U.S. 145 (1977); *DE* 583 at 12-16.

As read to the jury by the judge, and also as taken into the jury room, *DE* 583 at 10, the instruction said:

> In count II all of the defendants are charged with conspiring … to *either* (A) assault, resist, or impede officers of the United States in the discharge of their duties, *or* (B) to receive, relieve, comfort or assist Edward and Elaine Brown in order to hinder and prevent their apprehension, trial, or punishment.

FINAL JURY INSTRUCTIONS (Apr. 7, 2008) *JointAppx.* at 19, 31; *DE* 596 at 15 (emphasis added).

C. Special Verdict

Although the record does not disclose why, the jury was given a special verdict form, drafted by either the court or the government. *See*, *United States v. Spock*, 416 F.2d 165 (1st Cir. 1969). Consequently the jury made specific findings.

On Count III: "We, the Jury, find the Defendant, Cirino Gonzalez, Guilty of accessory after the fact." JURY VERDICT FORM (Apr. 10, 2008) *JointAppx.* at 48 (underscore indicating jury's handwriting). This is a self-explanatory finding of guilt on the crime charged.

On Count II: "We, the Jury, find that the Defendant, Cirino Gonzalez, Guilty of conspiracy to hinder or prevent the United States Marshals in attempting to arrest Edward and Elaine Brown." *Id.* (underscore indicating jury's handwriting).

The finding on Count II warrants closer analysis.

The verdict does not overtly specify which object of the conspiracy on which the jury rested its finding, but the language of the verdict form is revealing. The jury found Mr. Gonzalez guilty of conspiracy "to hinder or prevent" the United States Marshals while "attempting to arrest" the Browns. As noted, § 3 narrowly makes it a crime to "hinder or prevent … apprehension." The language

of the verdict thus neatly tracks the language of the statute.

Section 111, however, does not contain the words "hinder" or "prevent," nor the phrase "hinder or prevent." Rather § 111 broadly makes it a crime when one "assaults, resists, opposes, impedes, intimidates, or interferes" with law enforcement during "performance of official duties." 18 U.S.C. § 111(a)(1). Moreover, section 111 provides that these things must be done "forcibly," a requirement absent from § 3.

Thus the Count II conspiracy verdict is not a general verdict. *See*, *United States v. Edelkind*, 467 F.3d 791 (1st Cir. 2006). It is a special finding of guilt on the Count 2B object only, and does not address Count 2A. Thus the jury found Mr. Gonzalez guilty of conspiracy to "accessory after the fact," but did not find him guilty of conspiracy to "assaulting, resisting, or impeding certain officers or employees."

And whatever the jury determined he did, it did *not* make a finding that Mr. Gonzalez did it "forcibly." This squares with the evidence. There was no showing that Mr. Gonzalez ever actually used force. The jury further recognized this by not reaching a verdict on Count I, which would have required a specific finding of "force, intimidation, or threat."

Thus, a plain reading of the verdict form regarding Count II shows Mr.

Gonzalez was found guilty of conspiracy 2B, but not conspiracy 2A. Combined with the verdict in Count III, he was, in summary, convicted of accessory and conspiracy to accessory.

D. Sentencing for Dual-Object Conspiracy

In its pre-sentence investigation report, the probation department called Count II "a dual object conspiracy," PSI ¶ 37, *SealedAppx.* at 15, such that Mr. Gonzalez should be sentenced "as if … convicted of a separate count of conspiracy for each offense that [he] conspired to commit." *Id.* It thus recommended a "pseudo count" analysis, and dubbed the objects of Count II as 2A and 2B. *Id.*

The sentencing court adopted this reasoning. FINDINGS AFFECTING SENTENCE (Sept. 26, 2008) doc. 534, *appx.* at 59. Mr. Gonzalez's sentence was thus augmented based on the conspiracy having two objects, even though the jury found only one. *DE* 621 at 36-37.

II. Mr. Gonzalez is Not Guilty of Count II Conspiracy

A. Government Did Not Prove All Elements of Conspiracy

Given the language of the indictment and the language of the verdict form, Mr. Gonzalez was not found guilty of conspiracy.

For a successful conspiracy prosecution, the Government must show two sets of intents. There first must be an intent to enter an agreement with co-conspirators. *Direct Sales Co v. United States*, 319 U.S. 703 (1943) ("[O]ne does not become a party to a conspiracy . . . unless he knows of the conspiracy."); *United States v. Falcone*, 311 U.S. 205, 207 (1940) ("Those having no knowledge of the conspiracy are not conspirators.")

Second, there must also be a specific intent to "effectuate the object of the conspiracy." *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 444 n. 20 (1978); *United States v. Piper*, 35 F.3d 611 (1st Cir. 1994); *see also United States v. Salameh*, 152 F.3d 88, 145 (2nd Cir. 1998) (subsequent history omitted) ("It is well settled that [among] the essential elements of the crime of conspiracy are … the defendant knowingly participated in the conspiracy with the specific intent to commit the offenses that were the objects of the conspiracy"); *United States v. Merriweather*, 78 F.3d 1070, 1078 (6th Cir. 1996) ("Conspiracy to distribute is a specific intent crime; that is, the government must prove that the defendant

conspired to distribute, with the intent to distribute, a controlled substance.");
United States v. Yefsky, 994 F.2d 885, 899 (1st Cir. 1993); *United States v. Rivera*, 6 F.3d 431, 443 (7th Cir. 1993); *United States v. Blair*, 54 F.3d 639, 642 (10th Cir. 1995) ("there can be no doubt ... that conspiracy is a specific intent crime"); *United States v. Childress*, 58 F.3d 693,707 (D.C. Cir. 1995) ("it is clear that conspiracy is a 'specific intent' crime"); *United States v. Ehrlichman*, 546 F.2d 910 (D.C. Cir. 1976); *United States v. Conlon*, 481 F.Supp. 654, 662 (D.C. D.C. 1979) ("because agreement is an inchoate concept, it is well established that the government must prove that the defendant entered into the agreement with the specific intent to carry the project to completion"); *State v. Gunnison*, 618 P.2d 604, 608 (Ariz. 1980) ("Conspiracy is a crime that requires a mens rea, or specific intent, even if the crime the conspirators are agreeing to commit does not in itself require such intent.").

The object of a conspiracy is an element of the offense. *United States v. Lindia*, 82 F.3d 1154, 1162 n. 7 (1st Cir. 1996) ("the general principle that the object of a conspiracy is an element of the offense and must be proven beyond a reasonable doubt"); *United States v. Bush*, 70 F.3d 557, 561 (10th Cir. 1995) (same).

Thus the specific intent to effectuate the underlying offense is also an

element of a conspiracy charge. *U.S. Gypsum Co.*, 438 U.S. at 443; *United States v. Lindia*, 82 F.3d 1154, 1162 n. 7 (1st Cir. 1996) ("the object of a conspiracy is an element of the offense and must be proven beyond a reasonable doubt"). Accordingly, because each object and each intent in a multi-object conspiracy are elements, the government must prove intent regarding each object. *See*, *Salameh*, 152 F.3d at 146 ("It is well settled that [among] the essential elements of the crime of conspiracy are … the defendant knowingly participated in the conspiracy with the specific intent to commit the offenses that were the objects of the conspiracy."); *United States v. Yefsky*, 994 F.2d 885, 899 (1st Cir. 1993) (instruction adequate where court told jury guilt requires finding of "specific intent to accomplish the unlawful purpose of the conspiracy"); *United States v. Haldeman*, 559 F.2d 31, 114 (C.A.D.C. 1976).

In its indictment, the government charged Mr. Gonzalez with two objects, and thus two intents – an intent to effectuate § 111, *and* an intent to effectuate § 3. In its instruction, the court allowed the jury to find *either* one *or* the other. In its verdict, the jury made clear that it found only the second.

The government set itself a high bar by indicting for two objects in the conjunctive – both "A … and B." To get a conspiracy conviction, it thus had to prove intents to effectuate both objects. But because both intents were not found by the jury, Mr. Gonzalez is not guilty of conspiracy.

B. Precedents Involving Conjunctive Indictments and Disjunctive Instructions Do Not Apply to Mr. Gonzalez's Case

Use of the conjunctive in indictments followed by use of the disjunctive in jury instructions is a well-canvassed area of the law. The cases arise in several contexts, none of which are instructive here.

Numerous dual-object conspiracy cases indicted in the conjunctive involve a general verdict. The law is clear that if one of the objects is unconstitutional or otherwise legally infirm, because there is a general verdict, it leaves unclear whether the jury found guilt based on the unlawful object. *See e.g.*, *Yates v. United States*, 354 U.S. 298 (1957); *Stromberg v. California*, 283 U.S. 359 (1931). Thus, a general verdict where neither of the objects are legally infirm presents no problem as long as the jury reaches unanimity on one of the objects. *Griffin v. United States*, 502 U.S. 46 (1991); *United States v. Coriaty*, 300 F.3d 244 (2nd Cir. 2002); *United States v. Beverly*, 913 F.2d 337 (7th Cir. 1990). These cases are not helpful here because they deal with the problem of a verdict potentially based on an unknown; that is, it cannot be discerned from a general verdict whether the object found by the jury was that which was permissible or impermissible. Here, however, there is a special verdict, no mystery regarding which object the jury found, and therefore a different issue.

Many cases involve a list of statutory ways a crime can be committed, where the statutes connect those ways with either an "and" or an "or." The cases typically arise where the indictment alleges them conjunctively, but the jury is instructed disjunctively. Courts have routinely approved these situations, because unlike conspiracy cases, the statutory list of ways in which the crime may be committed are not elements, but merely alternative ways in which the crime may be committed. *See e.g.*, *United States v. Miller*, 471 U.S. 130 (1985); *Turner v. United States*, 396 U.S. 398 (1970); *United States v. Cox*, 536 F.3d 723, 726 (7th Cir. 2008) ("where a statute defines two or more ways in which an offense may be committed, all may be alleged in the conjunctive in one count"); *United States v. Woodard*, 459 F.3d 1078 (11th Cir. 2006) (statute defined several ways to accomplish mail fraud); *United States v. Barrios-Perez*, 317 F.3d 777 (8th Cir. 2003) ("Because the challenged instruction did not alter the number or nature of the crimes for which [the defendant] could be convicted, no constructive amendment occurred."); *United States v. Bonanno*, 852 F.2d 434, 441 (9th Cir. 1988) ("Where a statute specifies two or more ways in which an offense may be committed, all may be alleged in the conjunctive in one count and proof of any one of those acts conjunctively charged may establish guilt."). No such single statutory list exists in this case. Mr. Gonzalez was charged with a conspiracy

under § 371, which necessarily requires reference to separate statutory offense objects. The "and" in Mr. Gonzalez's indictment does not simply connect a list of ways a single law may be broken, but connects separate offenses. Thus the non-conspiracy cases allowing conjunctive indictments and disjunctive instructions do not apply here.

A third group of inapposite cases involve variances between the indictment and the proof offered by the government. This error occurs when the trial court gives an instruction pertaining to the proof, but at odds with the indictment. These convictions are generally reversed if the indictment did not give the defendant fair notice of the charges actually proved. *See e.g.*, *LanFranco v. Murray*, 313 F.3d 112, 118 n. 1 (2nd Cir. 2002) (constitution prohibits 'constructive amendments' of an indictment when the government's evidence and the jury instructions 'modify essential elements of the offense charged to the point that there is a substantial likelihood that the defendant may have been convicted of an offense other than the one charged by the grand jury'"); *United States v. Santa-Manzano*, 842 F.2d 1 (1st Cir. 1988). Mr. Gonzalez's case does not involve a variance between the indictment and the evidence, and these sorts of cases thus do not control.

III. Count III Accessory after the Fact Indictment Failed to State an Element

The law requires that "an indictment charging one as an accessory after the fact must plead the underlying offense." *United States v. McLennan*, 672 F.2d 239, 243 (1st Cir. 1982). This is because an accessory crime "presupposes the completion of an underlying crime." *Id.*, quoting *United States v. Balano*, 618 F.2d 624 (10th Cir. 1979).

Count III of the indictment states merely that Mr. Gonzalez,

> *knowing that offenses against the United States had been committed* by Edward Brown and Elaine Brown, received, relieved, comforted and assisted Edward Brown and Elaine Brown in order to hinder and prevent their apprehension, trial and punishment.

THIRD SUPERSEDING INDICTMENT ¶ 14 (Jan. 16, 2008), *JointAppx.* at 1, 11 (emphasis added). It does not specify what offenses had been committed, and earlier factual allegations referenced in Count III only alleged the Browns had been convicted of "conspiracy and a number of federal tax crimes." *Id.* at ¶ 1.

Accordingly, the indictment is insufficient. Although this issue was not raised below, "an objection that an indictment fails to state an essential element of an offense 'shall be noticed by the court at any time during the pendency of the proceedings,'" and can be raised "for the first time on appeal" or by the court *sua sponte*. *United States v. Mojica-Baez*, 229 F.3d 292, 309 (1st Cir. 2000). This is

structural error because precedent requiring specification of the underlying charges existed long before the indictment here. *Mojica-Baez*, 229 F.3d at 310. Thus this court need not determine prejudice, and should vacate the conviction.

If the issue is nonetheless subject to plain error review, the error here is plain on the face of the indictment. It affected Mr. Gonzalez's substantial due process rights in that a vague reference to conspiracy and tax crimes is constitutionally inadequate notice. *United States v. Murphy*, 762 F.2d 1151, 1155 (1st Cir. 1985) (indictment defective for not adequately apprising defendants of the charges). The "accessory after the fact statute requires the government to establish that the defendant was aware of the facts that constitute the essential elements of the offender's crime." *United States v. Graves*, 143 F.3d 1185, 1190 (9th Cir. 1998); *United States v. Henning*, 77 F.3d 346, 350 (10th Cir. 1996) ("a defendant must have knowledge of the underlying offense in order to be convicted as an accessory after the fact").

Here where the predicate offense was unspecified, Mr. Gonzalez could not contest his knowledge of it, nor could the jury determine whether he had knowledge of it. Thus there is no assurance that the jury was unanimous with respect to which crime Mr. Gonzalez acted as an accessory.

The error affected substantial rights in sentencing as well. The statute

provides that an accessory "shall be imprisoned not more than one-half the maximum term of imprisonment … prescribed for the punishment of the principal." 18 U.S.C. § 3. Without a specified predicate statute, Mr. Gonzalez could not know at the outset what jeopardy he faced. *See United States v. Yefsky*, 994 F.2d 885, 893 (1st Cir. 1993); *Hamling v. United States*, 418 U.S. 87 (1974); *see Apprendi v. New Jersey*, 530 U.S. 466, 484 (2000) ("If a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened; it necessarily follows that the defendant should not – at the moment the State is put to proof of those circumstances – be deprived of protections that have, until that point, unquestionably attached."). The problem is illustrated by the difficulty, as noted *infra*, of determining which sentencing guideline applied to the charge.

The error seriously affected the fairness, integrity, and reputation of the proceedings, as demonstrated by the jury instructions. The jury was told the government was required to prove the Browns committed a felony and Mr. Gonzalez knew they committed a felony. FINAL JURY INSTRUCTIONS (Apr. 7, 2008) *JointAppx.* at 19, 32. No felony, however, was specified for the jury, because no felony was specified in the indictment. Consequently, each member of

the jury could have based the verdict on differing felonies, depending upon what each believed the Browns committed. This is particularly problematic here because, as discussed *infra*, there was no evidentiary proof of any specific predicate offense. Because there is no underlying offense specified, the maximum sentence is unknown and the sentencing range under the guidelines cannot be computed.

Whatever the standard of review, the indictment's failure to allege the crime to which Mr. Gonzalez was an accessory requires dismissal of Counts 2B and III.

IV. No Evidence to Prove Mr. Gonzalez Knew the Elements of the Browns' Crimes

The accessory after the fact statute provides:

> Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact.

18 U.S.C. § 3. As noted, "a defendant who is accused of being an accessory after the fact must be shown to have had actual knowledge of each element of the underlying offense." *United States v. Graves*, 143 F.3d 1185, 1189 (9th Cir 1998); *United States v. Henning*, 77 F.3d 346, 350 (10th Cir. 1996).

In *United States v. Cruz-Santiago*, 330 F.Supp.2d 26, 29 (D. P.R. 2004), the court held that even if the defendant knew the principal offender was "a fugitive that had committed a federal narcotics offense, it does not support a finding that [the defendant] knew the facts of each element of the specific underlying crime of conspiracy to possess with the intent to distribute controlled substances."

Although Mr. Gonzalez knew the Browns had been convicted of something regarding taxes, there was no proof that Mr. Gonzalez was aware of the facts and circumstances surrounding the Browns convictions, and certainly none showing he had knowledge of the elements of the Browns' crimes. Given that the indictment did not specify the Browns' underlying crime, discussed *supra*, this is not

surprising.

This Court reviews insufficiency of the evidence claims *de novo*, *United States v. Muñoz-Franco*, 487 F.3d 25, 41 (1st Cir. 2007), and should accordingly reverse Counts 2B and III.

V. Reasonable Doubt Instruction Diluted Government's Burden of Proof

The court's instruction to the jury regarding reasonable doubt was:

> A reasonable doubt does not mean a mere possibility that the defendant may be not guilty; nor does it mean a fanciful or imaginary doubt, nor one based on groundless conjecture. It means a doubt based upon reason.

DE 596 at 6. Mr. Gonzalez objected. *DE* 596 at 34, 49. The instruction is reviewed under an abuse-of-discretion standard, *United States v. Ranney*, 298 F.3d 74, 79 (1st Cir. 2002), to determine whether there is a reasonable likelihood that the jury understood the appropriate standard, *id.,* and is not subject to harmless error analysis. *Sullivan v. Louisiana*, 508 U.S. 275, 280 (1993).

By instructing the jury that a "mere possible doubt" was not a reasonable doubt, the trial court watered down the government's burden of proof.

In *Victor v. Nebraska*, 511 U.S. 1 (1994), the trial court instructed:

> "Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt."

Victor v. Nebraska, 511 U.S. at 17. The Court approved the language only because the term "possible" was equated to "imaginary." *Id.* at 17.

In contrast, the instruction here differentiates between a "mere possibility" and an "imaginary doubt." It suggests that small possible doubts were more than

imaginary but still not sufficient for a not guilty finding, and misleads the jury into thinking that small but reasonable doubts are no bar to conviction. *United States v. Oreto*, 37 F.3d 739, 753 (1st Cir. 1994) (defining "reasonable doubt" as "real doubt" not error because it means "more than speculative").

A definition of reasonable doubt is erroneous when it goes to the size of the doubt rather than the substance of the doubt. It is acceptable to tell the jury that the doubt may not be imaginary or speculative, but not permissible to inform the jury that the doubt must be substantial. The former defines the quality of the doubt; the latter defines its size. *Cage v. Louisiana*, 498 U.S. 39, 41 (1990) (terms "grave uncertainty" and "substantial doubt" are impermissible as they may suggest a higher degree of doubt is required) (overturned on other grounds).

In Mr. Gonzalez's case, there is a reasonable likelihood that the jury misunderstood the reasonable doubt standard. It is thus error, and this court should remand for a new trial.

VI. Court Erred in Directing Jury that Marshals Are Government Officers

Count 2A charged Mr. Gonzalez with conspiracy to resist or impede federal officers. The statute proscribes acts against certain persons defined as "any officer or employee of the United States or of any agency in any branch of the United States Government." 18 U.S.C. § 111, *referencing* 18 U.S.C. § 1114. Thus, to be guilty of the crime, the defendant's actions must be directed against an "officer or employee" of the United States government, and as a matter of statutory construction, proof that the person is an "officer or employee" is an element of the crime. *See United States v. Feola*, 420 U.S. 671 (1975).

During trial the government neglected to present evidence that the Marshals were officers of the United States. In an effort to rectify this, and over Mr. Gonzalez's objection, *DE* 596 at 35, 49, in its instructions the court told the jury "I instruct you that employees of the United States Marshals Service are in fact officers of the United States." FINAL JURY INSTRUCTIONS (Apr. 7, 2008) *JointAppx.* at 19, 30; *DE* 596 at 15. The court thus took an element away from the jury.

Courts have historically held that directing an element was structural error not subject to harmless error analysis. *United States v. Randazzo*, 80 F.3d 623, 631 (1st Cir. 1996); *United States v. DiRico*, 78 F.3d 732, 737 (1st Cir. 1996). But

in *Neder v. United States*, 527 U.S. 1, 9 (1999), the Supreme Court held that harmless error review was appropriate because "an instruction that omits an element of the offense does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence."

Recent sixth amendment jurisprudence, however, has cast doubt on that portion of *Neder*. The sixth amendment requires that in order to convict, a jury must unanimously find the government has proven each element of the offense beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (sixth amendment requires any fact leading to a sentence enhancement must be submitted to jury); *Ring v. Arizona*, 536 U.S. 584 (2002) (allowing judge to determine presence of aggravating factors for death penalty violates sixth amendment); *Blakely v. Washington*, 542 U.S. 296 (2004) (right to a jury trial extends to any facts that increase a defendant's sentencing range); *United States v. Booker*, 543 U.S. 220 (2005) (same). In *Shepard v. United States*, 544 U.S. 13, 26-28 (2005), Justice Thomas repudiated the narrow interpretation of the sixth amendment that he had joined in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), and it thus now appears that the sixth amendment cannot condone any finding of guilt where any element was directed by the court rather than found by the jury. *See e.g.*, *Freeze v. State*, 827 N.E.2d 600, 605 (Ind.App. 2005) ("The idea

that a deprivation of the Sixth Amendment right to a jury trial could ever be considered "harmless" is of recent and now-questionable vintage.").

The court's instruction directing that the Marshals are officers of the United States removed an element of the offense from the jury's consideration. It was structural error not subject to harmless error analysis, and Count 2A must be reversed.

VII. Dual-Object Conspiracy Analysis Resulted in Cirino Gonzalez Being Sentenced for a Crime for Which the Jury did not Find him Guilty

Even if Mr. Gonzalez is guilty of conspiracy, he was improperly sentenced for it. As noted, the jury's special verdict form made clear that it found guilt on the second object of the conspiracy (Count 2B), but not the first (Count 2A). Mr. Gonzalez was nonetheless sentenced for both.

The probation department's pre-sentencing report in Mr. Gonzalez's case set forth the following analysis, which the court ratified. FINDINGS AFFECTING SENTENCE ¶ (Sept. 26, 2008) *JointAppx.* at 59.

The PSI considered count II "a dual object conspiracy," PSI ¶ 37, *SealedAppx.* at 15, and recommended a "pseudo count" analysis for Counts 2A and 2B, such that Mr. Gonzalez should be sentenced "as if … convicted of a separate count of conspiracy for each offense that [he] conspired to commit." *Id.* The sentencing court adopted this reasoning. FINDINGS AFFECTING SENTENCE ¶¶ 1-2, 4-5 (Sept. 26, 2008) *JointAppx.* at 59-60; *see* U.S.S.G. § 1B1.2 (d) ("A conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit."); *United States v. Carrozza*, 4 F.3d 70, 79 n. 6 (1st Cir. 1993) ("Each of the underlying

offenses, whether or not charged in substantive counts of conviction, are treated as if they were substantive counts of conviction, or 'pseudo counts.'").

Sentencing based on a pseudo count analysis resulted in Mr. Gonzalez being sentenced for essentially three crimes, rather than the two of which the jury actually convicted him. Although Mr. Gonzalez disputes some of the court's calculations, *infra*, the pseudo count analysis resulted in one extra offense level under the multiple-count guidelines. U.S.S.G. 3D1.4; PSI ¶ 68; FINDINGS AFFECTING SENTENCE ¶ 9 (Sept. 26, 2008) *JointAppx.* at 61.

The jury found Mr. Gonzalez guilty of Count 2B but not 2A, yet the court sentenced him for both. Being sentenced for a crime of which one has not been convicted is unconstitutional. U.S. CONST. amds 5 & 6. Mr. Gonzalez's case should thus be remanded for re-sentencing.

VIII. Cirino Gonzalez was Improperly Sentenced for Use of a Weapon, Which the Jury Rejected

By not finding Mr. Gonzalez guilty of Count V, the jury rejected the allegation of "carrying, using and possessing a firearm in connection with a crime of violence," 18 U.S.C. § 924. The court nonetheless sentenced him for the same conduct, thereby overruling the verdict.

Cirino Gonzalez grew up in Texas, where in 1993 when he was 15 years old and during his politically formative years, the federal government raided the Branch Dividian campus near Waco, Texas, to serve a warrant. Although the details of the raid are controversial, the government probably took rash action against a cult that, although heavily armed, was probably largely harmless. Seventy-six people died, including obvious innocents and law enforcement officers. A large majority of Americans believe the government acted badly. *See* Final Report to the Deputy Attorney General Concerning the 1993 Confrontation at the Mt.Carmel Complex, Waco, Texas, Pursuant to Order No. 2256-99 of the Attorney General, John C. Danforth, Special Counsel (Nov. 8, 2000), *available at* www.apologeticsindex.org/pdf/finalreport.pdf. As Mr. Gonzalez understood it, "In Waco, Texas a small organization with their own religious beliefs came together to study with David Koresh," but unneeded violence occurred which was

provoked by the U.S. Marshals. *DE* 404 at 44-45.

Growing up in south Texas, where a pickup truck with a gun rack is a familiar sight, *DE* 404 at 12, Mr. Gonzalez had constant contact with firearms of all types since he was a child. *DE* 404 at 11. He testified that his family owned more than ten guns, belonging to his father, his brother, and his sister. *DE* 404 at 66. Mr. Gonzalez told the jury that he was brought up since the age of five or six to be responsible and proficient with shooting. *DE* 404 at 12.

Mr. Gonzalez testified that when he was 17, he joined the Navy, and served aboard a destroyer during operations in Kosovo. As a gunner's mate, He attained some security clearances and became knowledgeable about weapons of all types. When naming the numerous guns and weapons on which he gained expertise, Mr. Gonzalez told the jury, "I know you guys don't know what I'm talking about. Every weapon onboard a ship I worked on." DE 404 at 17. "[B]asically at the end of my service onboard the ship, I was responsible for everything that went bang, boom, made smoke, made loud noises," *DE* 404 at 14, including missile systems. After four years at sea, and after steady advancements, he attained the rank of a non-commissioned officer. Mr. Gonzalez then transferred to Pearl Harbor for three additional years, where he continued working with large weapons systems. *DE* 404 at 16-18. He was honorably discharged in 2002. *DE* 404 at 19.

After his service, Mr. Gonzalez returned to Texas and worked in a variety of jobs involving security. DE 404 at 23-28. Unsatisfied and hoping to understand his nation's involvement in the Middle East, he signed on with a private military contractor in 2006 and went to Iraq as a weapons inspection expert. DE 404 at 30-32. The job paid well and Mr. Gonzalez enjoyed a pay bonus when he left.

With a new understanding of the war, and enough money to be self-supporting, Mr. Gonzalez returned home and joined the peace movement. DE 404 at 38. He traveled the country with some of the movement's luminaries, and visited "Camp Casey" outside President Bush's ranch in Texas. DE 404 at 39-41. Mr. Gonzalez began seeing the relationship between taxation and war spending, *DE* 414 at 8, and when he heard about the Browns anti-tax stand in Plainfield, New Hampshire, he came north.

Mr. Gonzalez stayed at the Browns' for two-and-a-half months – from Easter 2007 until mid-June. He testified that the reason he visited the Browns was to spread his anti-war message. The Browns' house was especially good for the purpose because hundreds of politically active citizens continually cycled through the place. Mr. Gonzalez testified: "It was a perfect spot[.] [I]t was like a hub of information and basically the supporters … traveled on their own. There was no point in me driving around to all of them, they could come to me." *DE* 414 at 77.

Mr. Gonzalez did not share the Browns' fight-taxes-to-the-death attitude, nor their apparent intent to provoke a confrontation with authorities. *DE* 404 at 45; *DE* 414 at 75, 82. Mr. Gonzalez said he was merely "[t]rying to hold the federal government accountable for their decisions that they were making with the war." *DE* 413 at 51. Mr. Gonzalez testified that Ed Brown's "fight was for the federal income tax and how basically it rates to being enslaved to the federal government and he used to bring up the truth, and I believed that was very important for people to understand that related to my causes." *DE* 413 at 51.

But Mr. Gonzalez's experience growing up near Waco also informed his actions. *DE* 414 at 23. He believed, as the Browns had publicly announced, that their standoff would be another Waco. Mr. Gonzalez did not trust the United States Marshals, *DE* 414 at 50, and believed they "don't usually ask questions" before shooting. *DE* 414 at 22. Upon hearing about the Browns on the news, Mr. Gonzalez testified, "I thought he's not going to go too long, they are going to go in and kill him." Thus, part of the message Mr. Gonzalez hoped to spread at the Browns' was that "the mentality of some of our federal government employees are in response to their efforts of speaking out." *DE* 404 at 44.

Mr. Gonzalez told the jury: "I was afraid that basically another Waco or Ruby Ridge would happen," *DE* 404 at 43, and that part of his purpose in coming

to New Hampshire was to prevent another Waco and to prevent the Marshals from killing the Browns. *DE* 414 at 9, 20-21.

The reason Mr. Gonzalez had his guns in New Hampshire was because after his time in the Navy, and given his childhood experience, it had become his habit to bring them everywhere, *DE* 414 at 81, and Plainfield, New Hampshire was where he was staying. *DE* 404 at 63. Mr. Gonzalez said he had no intent to use his firearms to threaten or intimidate the Marshals. *DE* 404 at 45, 63. Mr. Gonzalez was not interested in holding the government accountable through violence, because, he testified, "that would be too easy."

He told the jury his guns were with him in New Hampshire, as they were whenever he carried them, for self defense. *DE* 414 at 48-49. He did not bring them when he left the Browns' premises, because even though he could lawfully carry them, "it wasn't a good idea to take weapons into town." *DE* 414 at 38. He testified that he never pointed his guns at anyone, *DE* 404 at 63, 65-66, and was not there to provide security for the Browns. *DE* 414 at 35, 43.

Mr. Gonzalez testified that Ed Brown had requested that if the Marshals were to conduct a raid, everyone should leave the house. Mr. Gonzalez made plain to the jury that he would have complied with the request, but he would have left the residence without his guns. "I figured if I was going to be running out of

the house, probably be best not to have them with me." *DE* 414 at 31. Otherwise, Mr. Gonzalez testified, "they will shoot me." *DE* 414 at 11. Mr. Gonzalez had no interest in protecting others – just himself. "I wanted to protect myself, I can't protect everybody." *DE* 414 at 24. "Myself only. I'm a realist. I'm not a hero." *DE* 414 at 25.

Mr. Gonzalez left Plainfield on June 24, 2007, at the request of Ed Brown, over political or theological differences. Mr. Gonzalez testified that "Ed Brown never trusted me." *DE* 413 at 50. "It seemed like every week, every week and a half he'd sit, we would be talking, maybe eating, throughout the day, there was no particular routine to it, he would stop and look at me as if wondering why are you here?" *DE* 413 at 50-51.

When Mr. Gonzalez first arrived, the scene at the Browns was "very come and go, free, no problems whatsoever, barbecues, talks, picnics." *DE* 414 at 23; *DE* 591 at 22, 26, 71. But the situation changed over the summer. After he left, Mr. Gonzalez was not interested in going back because "it was a waste of time there." He "had already got a view of the situation," and felt he would not be able to advance his cause there. *DE* 413 at 53. A few weeks after he left, when friends were "pressing me to go to the second jamboree," Mr. Gonzalez refused to return because "I was feeling the situation that I was being told was getting out of hand."

DE 413 at 61; *see also DE* 591 at 58 (situation less peaceful later in summer).

Based on the crimes for which it convicted him and those for which it refused to convict, the jury apparently credited Mr. Gonzalez's testimony and his corroborating witnesses, regarding guns and violence. It did *not* find Mr. Gonzalez guilty of Count V of the indictment, which charged him with "carrying, using and possessing a firearm in connection with a crime of violence." 18 U.S.C. § 924(c)(1)(A)(I).

The jury's finding of no guilt was despite being instructed that, under *Pinkerton v. United States*, 328 U.S. 640 (1946), a conspirator may be held liable for the actions of conspirators (who, it found, *were* liable for guns and explosives). Thus the jury found Mr. Gonzalez not-responsible for not only his own guns, but also for the vast array of weapons and destructive devices possessed by others.

The sentencing court, however, made contrary findings. The court found that Mr. Gonzalez purchased a rifle "specifically to intimidate the marshals, prevent them from accomplishing their lawful duties and [it] would have been used against them if the marshals had attempted to enforce the warrant." *DE* 621 at 39. The court found Mr. Gonzalez's testimony – that his gun "'was not to threaten or intimidate the United States Marshals in any way,'" that "he never carried a weapon in furtherance of" the purpose to intimidate, and that "he didn't

intend to use those firearms to threaten anyone" – "perjurious." *DE* 621 at 40.

Over Mr. Gonzalez's objection, the court specifically used these findings to determine sentence. *DE* 621 at 42. In sentencing, the court ruled that Mr. Gonzalez "possessed a dangerous weapon and its use was threatened; therefore pursuant to [U.S.S.G.] § 2A2.4(b)(1)(B) the offense level is increased by 3." PSI ¶ 47, *SealedAppx.* at 18; FINDINGS AFFECTING SENTENCE ¶ 3 (Sept. 26, 2008) *JointAppx.* at 59.

The Supreme Court has held that the double jeopardy clause does not preclude a sentencing court from considering acquitted conduct, *United States v. Watts*, 519 US 148,157 (1997), but it has not reached the issue of whether reliance on the conduct violates the right to trial by jury. In *United States v. Booker*, 543 U.S. 220 (2005), the Court held that a sentence may not be increased based upon facts not found by the jury beyond a reasonable doubt. It follows that a sentencing court may not increase a sentence based on facts specifically rejected by the jury.

Because the jury heard the government's evidence regarding Mr. Gonzalez's guns, but did not find guilt, the presence of guns may not then be relied upon to enhance Mr. Gonzalez's sentence anyway. Consideration of it essentially overrules the jury's verdict. *See*, *United States v. O'Brien*, 542 F.3d 921 (1st Cir. 2008), *cert. granted*, 2009 WL 1787706 (U.S. Sept. 30, 2009) (No. 08-1569).

In cases where the presence of dangerous weapons have been used to augment a sentence under U.S.S.G. § 2A2.4(b)(1)(B), the weapons were *actually used* to harm or threaten. In *United States v. Steele*, 550 F.3d 693 (8th Cir. 2008), the defendant brandished a knife at and threatened to kill his girlfriend when she attempted to call the police, and on a different day he similarly used a set of brass knuckles. In *United States v. Beckner*, 983 F.2d 1380 (6th Cir. 1993), the defendant used her car, which the court determined was a dangerous weapon in the circumstances, to run down a postal inspector, and indiscriminately endanger children in a crowded neighborhood during an attempt to escape. *See also*, *United States v. Giacometti*, 28 F.3d 698 (7th Cir 1994) (similar). In *United States v. Rue*, 988 F.2d 94 (10th Cir. 1993), an inmate stabbed a prison guard with a hypodermic syringe.

In contrast, Mr. Gonzalez never used his guns to harm or threaten. His statements generally indicated a willingness to resist federal marshals and defend himself, but did not implicate Mr. Gonzalez's weapons, and were not a specific threat.

Mere possession of a gun does not implicitly create a threat. *See e.g.*, *United States v. Chapple*, 942 F.2d 439, 442 (7th Cir. 1991) ("the threat posed by simple possession of a weapon, without more, does not rise to the level of an act

that by its nature, presented a serious potential risk of physical injury to another.") (quotation omitted). Moreover, given the Browns' arsenal, that they had turned their house into a virtual armory, and the progressive circles of lethal protection they created around the house, Mr. Gonzalez's guns were negligible.

The court was in error in using Mr. Gonzalez's guns to augment his sentence. Accordingly, this Court should remand for re-sentencing without regard to Mr. Gonzalez's guns.

IX. Count 2A is a Misdemeanor, but Mr. Gonzalez was Sentenced as if it Were a Felony

Count 2A is a misdemeanor. Mr. Gonzalez was sentenced, however, as if it were a felony.

Federal law provides that the maximum sentence for conspiracy is five years.

> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. § 371.

As noted, the object of count 2A was "forcibly to assault, resist, oppose, impede, intimidate and interfere with federal law enforcement officers in the discharge of their duties" in violation of 18 U.S.C. § 111(a)(1). THIRD SUPERSEDING INDICTMENT (Jan. 16, 2008) *JointAppx.* at 1, 9. That statute provides that "whoever … forcibly assaults, resists, opposes, impedes, intimidates, or interferes with" a federal officer:

> shall, where the acts in violation of this section constitute only simple assault, be fined under this title or imprisoned not more than one year, or both, and in all other cases, be fined under this title or imprisoned not more than 8 years, or both.

18 U.S.C. § 111(a).[4] Thus, whether Mr. Gonzalez's maximum sentence is 1 year or 5 years turns on whether what he did "constitute[d] only simple assault" or something "other."

The statute is susceptible of several interpretations. *See*, *United States v. Gagnon*, 553 F.3d 1021 (6th Cir. 2009). The circuits agree that it states three different crimes – "simple assaults, other 'non-simple' assaults not involving a dangerous weapon or injury, and assaults that involve a dangerous weapon or cause injury." *United States v. McCulligan*, 256 F.3d 97, 102 (3rd Cir. 2001).

Because "assault" in the statute is undefined, the common law definition is used. *Moskal v. United States*, 498 U.S. 103 (1990); *United States v. Turley*, 352 U.S. 407 (1957). The common law definition of assault is an "attempt or offer to beat another, without touching him," 3 Blackstone, *Commentaries* at 120, or the "placing of another in reasonable apprehension of a battery." *United States v. Ramirez*, 233 F.3d 318, 321-22 (5th Cir. 2000). This is distinguished from the crime of "battery," which involves "[t]he least touching of another's person willfully, or in anger." 3 Blackstone, *Commentaries* at 120.

Thus, the three crimes stated in §111 are:

[4]The statute was amended as of January 8, 2008, after the events relevant here.

> (1) simple assault, which, in accord with the common-law definition, does not involve touching; (2) "all other cases," meaning assault that does involve contact but does not result in bodily injury or involve a weapon; and (3) assaults resulting in bodily injury or involving a weapon.

United States v. Chestaro, 197 F.3d 600 (2nd Cir. 1999). This circuits' common law definition of assault for § 111 is in accord with the general federal assault statute, which distinguishes between "[s]imple assault," 18 U.S.C. § 113(a)(4), and "[a]ssault by striking, beating, or wounding." 18 U.S.C. § 113(a)(5); *see e.g., United States v. Estrada-Fernandez*, 150 F.3d 491 (5th Cir. 1998); *United States v. Juvenile Male*, 930 F.2d 727 (9th Cir. 1991).

Nothing in the record suggests Mr. Gonzalez had any physical contact with any government official, or even got close to one. The only way the government knew he was at the Brown's house, for example, was from aerial surveillance, witness reports, and an internet video interview. At most Mr. Gonzalez's actions state the classic definition of assault – an "offer to beat" the Marshals, but "without touching."

Thus the object of the conspiracy in Count 2A was nothing more than a misdemeanor. But Mr. Gonzalez was sentenced for more than a year. The jury did not make any finding regarding physical contact, thus preventing the court from sentencing in excess of a year. *Apprendi v. New Jersey*, 530 U.S. 466, 490

(2000) ("any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt"). This Court must accordingly remand for re-sentencing.

X. Guideline Calculations for Count 2B and Count III Based on Wrong Underlying Offense

The pre-sentence report established base offense levels for Count 2B and Count III, which the court adopted. PSI ¶¶ 38-39, *SealedAppx.* at 15-16; FINDINGS AFFECTING SENTENCE ¶¶ 5-7 (Sept. 26, 2008) *JointAppx.* at 60-61. For both counts, the court used the wrong underlying offense to calculate Mr. Gonzalez's sentence.

Conspiracy is sentenced in accord with the "substantive offense." U.S.S.G. § 2X1.1(a). The "substantive offense" "means the offense that the defendant was *convicted* of soliciting, attempting, or conspiring to commit." U.S.S.G. § 2X1.1, *application note 2* (emphasis added).

In Count 2B Mr. Gonzalez was convicted of conspiracy to commit accessory after the fact, and in Count III he was convicted of accessory.

Accessory is sentenced in accord with the "underlying offense." U.S.S.G. § 2X3.1. The "underlying offense" "means the offense as to which the defendant is *convicted* of being an accessory." U.S.S.G. § 2X3.1, *application note 1* (emphasis added).

This case presents the difficulty of a twice-removed offense. Both the conspiracy and the accessory allegation contain a reference, thus making a

reference within a reference. *See Rita v. United States*, 551 U.S. 338, 343 (2007).

The question here is what is the substantive or underlying offense to which Mr. Gonzalez was an accessory. The guidelines provide that the court should "apply the most analogous offense guideline." U.S.S.G. § 2X5.1. Starting with the correct guideline is "essential," *United States v. Orsburn*, 525 F.3d 543, 547 (7th Cir. 2008), and is an issue for this Court to determine. *United States v. Brady*, 168 F.3d 574, 577 (1st Cir. 1999).

Without any explanation, for both counts the court used as the underlying offense, "obstruction of justice." PSI ¶¶ 38-39, *SealedAppx.* at 15-16; FINDINGS AFFECTING SENTENCE ¶¶ 5, 7 (Sept. 26, 2008) *JointAppx.* at 60-61. It thus applied U.S.S.G. § 2J1.2, which carries a base offense level of 14. But Mr. Gonzalez was not charged or convicted of obstruction, nor conspiracy to it. Had the grand jury intended to allege obstruction, it would have issued an indictment charging it.

The conduct addressed by Count 2A on the one hand, and 2B and Count III on the other, although not identical, is similar. The indictments for all three charges broadly allege that Mr. Gonzalez helped the Browns avoid arrest. Because count 2A alleges conspiracy to resist and impede officers under 18 U.S.C. § 111, the court properly applied the guideline for that crime, U.S.S.G. § 2A2.4, which is addressed toward "obstructing or impeding officers," and carries a base

offense level of 10.

For count 2B and for Count III, however, rather than obstruction, the analogous crime should be the same as 2A. The court should therefore have applied the same U.S.S.G. § 2A2.4 to both of them.

By sentencing under the obstruction guideline, the court imposed sentences for crimes for which the grand jury did not indict, and imposed a penalty on Mr. Gonzalez that is not authorized by the indictments. *United States v. McCulligan*, 256 F.3d 97, 107 (3rd Cir. 2001) ("a defendant cannot be convicted of one crime yet sentenced under the Guidelines as though he or she were convicted of some other crime"); U.S. CONST. amds 5 & 6. This court should thus remand for re-sentencing.

XI. Mr. Gonzalez Should Not Have Been Penalized for Obstruction of Justice Based on Jury Nullification Statement

The jury issued its verdicts as to Mr. Gonzalez's co-defendants, and then sent a message to the court:

> We are deadlocked on two counts for the third defendant [Mr. Gonzalez]. We have reviewed the evidence in the matter for approximately twelve hours, and our votes have not changed significantly. What do we do? Please advise.

DE 593 at 2.

While "the jury was on their way out" of the courtroom, *DE* 593 at 25, Mr. Gonzalez stated: "Jury nullification is your right. The Judge and the prosecution doesn't want you to know what that right is." *DE* 593 at 24; *see* PSI ¶ 42, *SealedAppx.* at 16.

The PSI says that Mr. Gonzalez "yelled to members of the jury." PSI ¶ 42, *SealedAppx.* at 16. Nothing in the record indicates, however, that Mr. Gonzalez's point of information was conducted in an agitated manner or with an increased volume.

For this, the court imposed a two-point addition to its sentence calculation. It imposed the addition three times – once each for counts 2A, 2B, and III. PSI ¶¶ 50, 56, 62, *SealedAppx.* at 18-19; FINDINGS AFFECTING SENTENCE ¶¶ 4, 6, 8 (Sept. 26, 2008) *JointAppx.* at 59.

Defendants do not have a right to a nullification instruction, and their attorneys do not have a right to make an end-run around the court's refusal to issue one. *United States v. Manning*, 79 F.3d 212, 219 (1st Cir. 1996); *United States v. Sepulveda*, 15 F.3d 1161, 1190 (1st Cir. 1993).

Nonetheless, nullification has a long history. It is recognized as an inescapable by-product of American trial-by-jury. *Sparf v. United States*, 156 U.S. 51, 65 (1895); *Manning*, 79 F.3d at 212; *Sepulveda*, 15 F.3d at 1161; *United States v. Boardman*, 419 F.2d 110 (1st Cir. 1969); *United States v. Kzyske*, 836 F.2d 1013 (6th Cir. 1988) (dissenting opinion); *United States v. Trujillo*, 714 F.2d 102, 105-06 (11th Cir. 1983); *Washington v. Watkins*, 655 F.2d 1346 (5th Cir. 1981); *United States v. Wilson*, 629 F.2d 439 (6th Cir. 1980) ("In criminal cases, a jury is entitled to acquit the defendant because it has no sympathy for the government's position."); *United States v. Wiley*, 503 F.2d 106 (8th Cir. 1974); *United States v. Dougherty*, 473 F.2d 1113, 1136-37 (D.C.Cir.1972); *United States v. Dellinger*, 472 F.2d 340 (7th Cir. 1972). It may be rooted in both mentions of the trial-by-jury in the federal constitution, constitutional separation of powers, jurors' own rights, various rights of the defendant, historical precedent, or the impracticalities of policing the jury room. *See* Nancy J. King, *Silencing Nullification Advocacy Inside the Jury Room and Outside the Courtroom*, 65 U.CHI.L.REV. 433 (1998);

William M. Kunstler, *Jury Nullification in Conscience Cases*, 10 VA.J.INT'L.L. 71 (1969).

No known court or commentator has suggested, however, that nullification does not exist. *Horning v. District of Columbia*, 254 U.S. 135, 138 (1920) ("the jury has the power to bring in a verdict in the teeth of both law and facts").

Whether Mr. Gonzalez had a right to a jury nullification instruction is not the issue. *See*, *United States v. Dougherty*, 473 F.2d at 1113. Here the question is whether Mr. Gonzalez should be punished for his attempt to educate the jury on its ability, if not its right, to nullify.

First, "nullification" – the word Mr. Gonzalez used – is a term-of-art, which neither Mr. Gonzalez nor the court defined. It is thus probable that many of the jurors did not understand Mr. Gonzalez's communiqué.

Second, the jury was leaving the courtroom, presumably with the ordinary shuffling, and there is nothing in the record showing whether members even heard Mr. Gonzalez's statement.

Third, Mr. Gonzalez's statement was made after the jury returned two verdicts against him, and after it explained to the court that after 12 hours of deliberation it was "deadlocked" on the other counts. After an *Allen* charge, the outcome did not change. Thus Mr. Gonzalez's attempt at educating the jury, if

anything, bore no fruit.

Fourth, because nullification is an inescapable part of the American system of justice, education about it cannot be an obstruction of justice.

Fifth, the court imposed the 2-level increase three times – once for each count. Although the effect of triple-counting is mitigated somewhat by the multi-count calculations, *supra*, Mr. Gonzalez made just one statement – not three.

Finally, even if some punishment is due Mr. Gonzalez for talking out of turn, a thrice 2-point increase is unreasonably severe.

Accordingly, this court should remand for re-sentencing.

XII. Federal Government Had no Territorial Jurisdiction in Plainfield, New Hampshire, nor at the Courthouse in Concord

The federal constitution provides that among the powers of Congress are:

> *To exercise exclusive Legislation in all Cases whatsoever*, over such District … as may … become the Seat of the Government of the United States, *and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be*, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.

U.S. CONST., art. I, § 8, cl. 17 (emphasis added). To exercise these powers, the federal government must acquire the place from the state.

> The question is not an open one. It long has been settled that, where lands for such a purpose are purchased by the United States with the consent of the state Legislature, the jurisdiction theretofore residing in the state passes, in virtue of the constitutional provision, to the United States, thereby making the jurisdiction of the latter the sole jurisdiction.

Surplus Trading Co., 281 U.S. at 652. The federal jurisdictional statute recognizes the constitutional limitation. The "territorial jurisdiction of the United States" includes:

> Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

18 U.S.C. § 7(3). "Needful building" includes courthouses. *Sharon v. Hill*, 24 F.

726 (C.C.Cal. 1885).

If territory has been purchased by the United States without the consent of the state, the constitutional clause has no application. In that situation the power of the federal government is "simply that of an ordinary proprietor." *Paul v. United States*, 371 U.S. 245, 264 (1963); *Palmer v. Barrett*, 162 U.S. 399 (1896); *United States v. San Francisco Bridge Co.*, 88 F. 891 (N.D.Cal. 1898) (state retains complete and exclusive jurisdiction if land purchased without consent of the state). Consent of the state can be effectuated by "a cession of legislative authority and political jurisdiction," *Ft. Leavenworth R. Co. v. Lowe*, 114 U.S. 525, 541 (1885), or by condemnation by the federal government. *United States v. State Tax Commission of Miss.*, 412 U.S. 363 (1973).

"Exclusive legislation" and "like Authority" here means "exclusive jurisdiction." *James v. Dravo Contracting Co.*, 302 U.S. 134, 141 (1937), citing *Surplus Trading Co. v. Cook*, 281 U.S. 647, 652 (1930). Thus, Congress does not have jurisdiction over places that are not acquired in accord with the constitution.

> Generally speaking, within any state of this Union the preservation of the peace and the protection of person and property are the functions of the state government, and are no part of the primary duty, at least, of the nation. The laws of congress in respect to those matters do not extend into the territorial limits of the states, but have force only in the District of Columbia, and other places that are within the exclusive jurisdiction of the national government.

Caha v. United States, 152 U.S. 211, 215 (1894). For this reasons, states have enacted statutes ceding certain jurisdiction. *Id.* (citing Kansas cession statute). States may condition their cession and thus retain whatever authority they wish. *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518 (1938) (retention of state taxing authority); *Silas Mason Co. v. Tax Com'n of State of Washington*, 302 U.S. 186 (1937) (retention of authority over "reclamation of arid or semiarid lands").

In a criminal prosecution, territorial jurisdiction must be proven. Thus, for example, in *United States v. Bateman*, 34 F. 86 (C.C.Cal. 1888), the court held that federal authorities could not prosecute a murder that occurred at the Presidio military reservation because it was in the city and county of San Francisco and it had not been ceded to the federal government. It therefore held that the murder was "not an offense against the United States." *Bateman*. 34 F. at 88. The situation was rectified by a cession statute shortly thereafter. Thus when another murder occurred at the Presidio, the United States had jurisdiction to prosecute it because a "retrocession of jurisdiction from the state of California to the United States has been made." *United States v. Watkins*, 22 F.2d 437 (D.C.Cal. 1927) (distinguishing *Bateman*).

To address such situations many states in that era enacted cession statutes, including New Hampshire in 1883. It provides:

> Jurisdiction is ceded to the United States of America over all lands within this state now or hereafter exclusively owned by the United States, and used as sites for post offices, custom-houses, military air bases, military installations or other public buildings: *provided, that an accurate description and plan of the lands so owned and occupied, verified by the oath of some officer of the United States having knowledge of the facts, shall be filed with the secretary of this state*; and, provided, further, that this cession is upon the express condition that the state of New Hampshire shall retain concurrent jurisdiction with the United States in and over all such lands, so far that all civil and criminal process issuing under the authority of this state may be executed on the said lands and in any building now or hereafter erected thereon, in the same way and with the same effect as if this statute had not been enacted; and that exclusive jurisdiction shall revert to and revest in this state whenever the lands shall cease to be the property of the United States.

N.H. REV. STAT. ANN. § 123:1 (emphasis added). The New Hampshire statute cedes power to the federal government, and retains concurrent state jurisdiction. The cession, however, is conditioned upon the filing with the New Hampshire Secretary of State an "accurate description" of the "lands so owned and occupied" by the federal government.

During the pendency of this case, the defendants sought proof that the requisite filings had been made with the New Hampshire Secretary of State. *See* MOTION FOR ORDER TO SHOW CAUSE (Jan. 8, 2008) ¶ 11, DE 137-3. The Secretary of State issued a certificates confirming that they had not. *Id.*

Accordingly, the federal government has no authority over the Brown's land

in Plainfield, New Hampshire, and the government made no effort to prove jurisdiction there. It thus had no power to attempt the arrest of the Browns in Plainfield, nor prosecute Mr. Gonzalez for his actions there.

If, for instance, a person were alleged to have murdered a federal officer, whether the federal government has authority to prosecute would turn on territorial concerns, and would essentially present the Presidio scenario. Mr. Gonzalez's case is no different. Although federal officers may have a legitimate interest in executing a warrant against the Browns, any actions taken against the officers on non-federal, or non-ceded, property, is prosecuted by local authorities.

For the same reason, the court had no jurisdiction when it sat in Concord, as the territory the court occupies also has not been ceded.

Courts have before rejected this argument, citing 18 U.S.C. § 3231 which provides that "[t]he district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States." *See*, *e.g.*, *United States v. Collins*, 920 F.2d 619, 629 (10th Cir 1990). The point is misplaced because constitution trumps statute.

Courts have also rejected this argument on the grounds that the constitution enables Congress to make acts criminal "irrespective of where they are committed." *Id.* While that is no doubt true, the power of the legislature to make

criminal laws does not necessarily imply the power to enforce them outside constitutional boundaries.

This court should accordingly reverse Mr. Gonzalez's convictions for want of jurisdiction.

CONCLUSION

Based on the foregoing, Mr. Gonzalez respectfully requests this Court reverse all convictions, or in the alternative, remand for re-sentencing.

Mr. Gonzalez hereby joins such other portions of his co-defendants' briefs as may be applicable to him.

Mr. Gonzalez requests that his attorney be allowed to present oral argument.

Respectfully submitted,

Cirino Gonzalez
By his Attorney,

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Dated: October 16, 2009

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I hereby certify that on October 16, 2009, a copy of the foregoing will be forwarded to Arnold H. Huftalen, Esq., AUSA; Paul Glickman, Esq., for co-defendant Jason Gerhard; and Sven Wiberg, Esq., for co-defendant Daniel Riley.

Dated: October 16, 2009

Joshua L. Gordon, Esq.

I hereby certify that this brief complies with the type-volume limitations contained in F.R.A.P. 32(a)(7)(B), that it was prepared using WordPerfect version X4, and that it contains no more than 11,800 words, exclusive of those portions of the brief which are exempted.

Dated: October 16, 2009

Joshua L. Gordon, Esq.

ADDENDUM