No. 04-12923-EE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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UNITED STATES OF AMERICA,

Appellee

v.

JUAN RAMOS,

Defendant-Appellant

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

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# BRIEF FOR THE UNITED STATES AS APPELLEE

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*United States* v. *Juan Ramos*
No. 04-12923-EE

**CERTIFICATE OF INTERESTED PARTIES AND CORPORATE DISCLOSURE STATEMENT**

The undersigned counsel of record for the United States certifies that the following persons and parties have an interest in the outcome of this case:

R. Alexander Acosta, Esq., U.S. Department of Justice, Appellate Counsel for the Government

Andrew Huang, Esq., U.S. Department of Justice, Trial Counsel for the Government

The Honorable Michael Moore, U.S. District Court Judge

Alfredo Orta, Esq., Trial Counsel for Jose Ramos

Lorenzo J. Palomares, Esq., Appellate Counsel for defendants

Joaquin Perez, Esq., Trial and Appellate Counsel for Ramiro Ramos

Nelson Rodriguez-Varela, Esq., Appellate and Trial Counsel for Juan Ramos

Jessica Dunsay Silver, Esq., U.S. Department of Justice, Appellate Counsel for the Government

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Adrianna Vieco, Esq., U.S. Department of Justice, Trial Counsel for the Government

Ramiro Ramos, Co-defendant and Co-conspirator

Juan Ramos, Defendant

Jose Ramos, Co-defendant and Co-conspirator

## STATEMENT REGARDING ORAL ARGUMENT

The United States does not oppose oral argument.

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# BRIEF OF THE UNITED STATES AS APPELLEE

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## SUBJECT MATTER AND APPELLATE JURISDICTION

Defendant appeals his sentence imposed following an appeal to and remand by this Court. See *United States* v. *Ramos*, No. 02-16478-AA (unpublished) (11th Cir. Sept. 26, 2003). On May 3, 2004, the district court resentenced defendant and entered final judgment the following day (R.370, 371).[1] On June 4, 2004, defendant

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[1] "R." refers to the record number listed on the district court docket sheet. "Br." refers to defendant's brief filed with this Court on September 28, 2004. "R.R.Br." refers to the brief filed with this Court by codefendant Ramiro Ramos in appeal No. 04-11152-EE, which is currently pending. "R.R.U.S.Br." refers to the brief filed with this Court by the United States as Appellee in codefendant Ramiro Ramos' appeal, No. 04-11152-EE, which is currently pending with this Court. "Tr.R. __ - pg. __" refers to the record number listed on the district court docket sheet and the page number of the trial transcript. "R.285, Sent.I.Tr. - pg. __" refers to the record number listed on the district court docket sheet and the page

(continued...)

filed a notice of appeal (R.380). On July 2, 2004, this Court remanded defendant's appeal to the district court for a determination whether there was excusable neglect, or good cause to extend the time for defendant's filing a notice of appeal (R.382). On August 20, 2004, the district court granted defendant's motion for an extension of time in which to file his notice of appeal (R.384). This Court has jurisdiction pursuant to 28 U.S.C. 1291.

## STATEMENT OF THE ISSUES

1. Whether the district court vindictively sentenced defendant when, following an order to vacate and remand for resentencing predicated on an

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[1](...continued)
number of the hearing transcript of defendant and codefendant Ramiro Ramos' original sentencing. "R.370, Sent.II.Tr. - pg. __" refers to the record number listed on the district court docket sheet and the page number of the hearing transcript of defendant's resentencing. "R.360, R.R. Sent.II.Tr. - pg. __" refers to the record number listed on the district court docket sheet and the page number of the hearing transcript of codefendant Ramiro Ramos' resentencing. "PSR 8/23/02 - pg. __" refers to the Probation Department's initial Presentence Report prepared for defendant's first sentencing. "Rev.PSR 11/4/02 - pg. __" refers to the Probation Department's revised Presentence Report prepared for defendant's first sentencing. "FirstAdd. Rev.PSR 11/4/02" refers to the Probation Department's first Addendum to the Presentence Report prepared for defendant's first sentencing. "SecondAdd. Rev.PSR 11/15/02" refers to the Probation Department's Second Addendum to the Presentence Report prepared for defendant's first sentencing. "PSR 1/16/04 - pg.__" refers to the Probation Department's initial Presentence Report prepared for defendant's resentencing. "Add.PSR 2/4/04 - pg. __" refers to the Probation Department's Addendum to the Presentence Investigation report prepared for resentencing. "U.S.R.E. - pg. __" refers to the Record Excerpts filed by the United States under seal and separate cover with this brief. "R.R. U.S.R.E. - pg. __" refers to the Record Excerpts filed by the United States under seal and separate cover with its brief in codefendant Ramiro Ramos' appeal, No. 04-11152, which is currently pending with this Court. "Gov't Exh." refers to government exhibits admitted at trial.

intervening Supreme Court decision, it imposed a sentence 33 months longer than the original sentence it had erroneously calculated.

2. Whether the district court clearly erred in finding that a pistol-whipping incident committed "during" and "in furtherance" of the counts of conviction is "relevant conduct" that justifies adjustments within the meaning of Section 1B1.3 of the Sentencing Guidelines.

3. Whether the record supports the district court's finding that the victim of the pistol-whipping sustained "permanent or life-threatening injury" when defendant, along with his co-defendants/co-conspirators, put the victim's life at risk and caused injuries that left a prominent scar on his forehead.

## STATEMENT OF THE CASE

*1. Prior Proceedings*

On October 18, 2001, a federal grand jury sitting in the Southern District of Florida returned a four-count superseding indictment charging defendant, Juan Ramos, along with his brother and cousin, Ramiro and Jose Ramos (R.162). Count One charged that from January 1, 2000 through June 20, 2001, defendant, along with Ramiro and Jose Ramos, conspired to achieve three unlawful purposes: (1) to hold migrant workers in involuntary servitude; (2) to engage in extortion to affect commerce; and (3) to harbor illegal aliens for commercial and personal gain, in violation of 18 U.S.C. 371 (R.162 - pgs. 4-9). Count One specified that on May 27, 2000, as "part of the conspiracy," defendant, along with Ramiro and Jose Ramos, pistol-whipped the owner and operator of a van service "for the purpose of

inducing [him] * * * not to transport migrant farm laborers out of Lake Placid, Florida" (R.162 - pg. 5 ¶3; pg. 3 ¶11). Count Two charged defendant, along with Ramiro and Jose Ramos, with committing extortion in violation of the Hobbs Act, 18 U.S.C. 1951 (R.162 - pgs. 10-11). Count Three charged defendant, along with Ramiro and Jose Ramos, with using a firearm during a crime of violence (Count Two), in violation of 18 U.S.C. 924(c)(1)(a) (R.162 - pgs. 11-12). Count Four charged that from January 1, 2000 through June 20, 2001, defendant and Ramiro Ramos aided and abetted one another in harboring illegal aliens in violation of 8 U.S.C. 1324(a) and 18 U.S.C. 2 (R.162 - pg. 12).

On June 3, 2002, a jury trial commenced. On June 26, the jury returned its verdict and found defendant and co-defendant/co-conspirator, Ramiro Ramos, guilty on all counts (R.330, 229).[2]

On November 20, 2002, the district court sentenced defendant to a term of imprisonment of 63 months on Counts One, Two, and Four, and 84 months on Count Three, to run consecutively, or 147 months on all counts (R.284).[3] On that same date, the district court ordered co-defendant/co-conspirator, Ramiro Ramos, to serve the same sentence (R.282).

Defendant, along with Ramiro and Jose Ramos, appealed their convictions

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[2] The jury also found Jose Ramos guilty of Counts Two and Three and conspiracy to commit extortion (Count One) (R.231).

[3] The government has prepared a chart that summarizes the calculation of defendant's original sentence on November 20, 2002 and resentence on May 3, 2004 (U.S.R.E. - pg. 80).

and sentences. This Court rejected all their claims. *United States* v. *Ramos*, No. 02-16478-AA (unpublished) (11th Cir. Sept. 26, 2003).

On appeal, the government recommended *sua sponte* that all the Hobbs Act related counts be dismissed because they no longer alleged violations in light of *Scheidler* v. *NOW*, 537 U.S. 393, 401, 397, 123 S. Ct. 1057, 1064, 1061 (2003), a Supreme Court decision issued three weeks before defendants filed their briefs.[4] This Court agreed. As a result, this Court vacated the convictions as to Counts Two and Three, and that portion of Count One in which the jury found defendant, along with Ramiro and Jose Ramos, guilty of conspiracy to commit extortion. It also remanded the case for defendant and Ramiro Ramos to be resentenced on the remaining counts of conviction, which it affirmed.

On March 1, 2004, the district court resentenced co-defendant/co-conspirator Ramiro Ramos to a term of 60 months on Count One and 120 months on Count Four, to run consecutively, or 180 months on both counts (R.359). On May 3, 2004, the district court held a hearing and resentenced defendant to a term of 60 months on Count One and 120 months on Count Four, to run consecutively, or 180 months on both counts (R.371).[5]

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[4] The government also requested that defendant's cousin, Jose Ramos, be immediately released since he had been convicted only of Hobbs Act related counts. Defendant's cousin was subsequently released.

[5] At both the original sentencing and the resentencings, the district court ordered defendant and Ramiro Ramos to pay a fine and restitution and forfeit property consistent with a special jury verdict finding that defendant and his

(continued...)

*2. Facts*

From January 1, 2000, until June 20, 2001, defendant, Juan Ramos, and his brother, Ramiro Ramos, together held, housed, and harbored hundreds of poverty-stricken uneducated migrant workers, who could not speak English. As a result of jointly harboring and forcing hundreds of individuals to work, most of whom they knew to be illegal aliens (Tr.R. 325 - pgs. 88, 109-110), defendant and his brother profited by providing inexpensive labor to citrus growers (Tr.R. 325 - pgs. 110-112). Defendant and Ramiro Ramos operated, managed, and conducted their illegal activities through two companies, Juan Ramos Harvesting and R & A Harvesting, which they owned, respectively. Defendant is a registered agent of R & A Harvesting (Gov't Exh. 34).

Adalberto Martinez-Gonzales, Jesus Leon Morales, and Juan Castro testified about their experiences after they illegally entered the United States in February 2001 (Tr.R. 322 - pg. 54). A few days after they crossed the border from Mexico into the United States, a man, whom they did not know, but referred to as El Chaparro, transported them and 15 others halfway across the country to Lake Placid, Florida without their knowing where they were headed (Tr.R. 323 - pgs. 171, 177-180, 186; Tr.R. 324 - pgs. 111-112; Tr.R. 325 - pgs. 178-179).

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[5](...continued)
brother derived proceeds in the amount of $3,046,093.57 in properties, vehicles, and shares of stock from the commission of Counts One and Four (R.233, 282; R.285, Sent.I.Tr. - pg. 23; R.370, Sent.II.Tr. - pg. 36; R.360, RR. Sent.II.Tr. - pg. 61). The forfeiture, fine, and restitution are not at issue in this appeal.

Once in Lake Placid, El Chaparro stopped at a roadside grocery store and ordered the Mexicans to remain in the car (Tr.R. 323 - pgs. 180-181; Tr.R. 324 - pgs. 112, 117). After waiting for about an hour, defendant and his brother, Ramiro Ramos, whom the Mexicans came to know as El Nino and El Diablo (the devil) appeared (Tr.R. 323 - pgs. 184-185; Tr.R. 324 - pgs. 118-120). Defendant and Ramiro Ramos told the Mexicans that since they had just paid El Chapparo $1,000 for transporting each of them across the country, they all had to work picking oranges to pay off the debt (Tr.R. 323 - pgs. 185-187; Tr.R. 324 - pgs. 60-63, 119, 125, 195; Tr.R. 325 - pgs. 181-182, 210). They also warned the Mexicans that if any of them left, or tried to escape, they would find, kick, beat, or kill them (Tr.R. 323 - pg. 186; Tr.R. 324 - pgs. 63-64, 85, 119, 145-146, 185, 198; Tr.R. 325 - pgs. 188-191; Tr.R. 326 - pgs. 55-56). Consequently, the Mexicans were afraid and believed they had no choice but to work for defendant and Ramiro Ramos (Tr.R. 323 - pgs. 187, 203, 215; Tr.R. 324 - pgs. 67-68; Tr.R. 325 - pgs. 23-25, 190, 194; Tr.R. 326 - pg. 55).

Defendant divided the laborers into groups to work for either him or his brother, and told them where they would live (Tr.R. 323 - pg. 187; Tr.R. 324 - pg. 126; Tr.R. 325 - pgs. 8, 185). Defendant and Ramiro Ramos rented housing units, which were dirty and poorly maintained, assigned as many as six workers to live together, and then deducted $30 a week from each laborer's earnings to pay for the lodging (Tr.R. 323 - pgs. 199-200, 214; Tr.R. 324 - pgs. 126-127; Tr.R. 325 - pg. 186; Gov't Exh. 1).

Even though the Mexicans had no identification or documentation authorizing their employment in the United States, defendant and Ramiro Ramos arranged to have them work by picking oranges in growers' fields (Tr.R. 323 - pgs. 207-211; Tr.R. 325 - pgs. 73, 183). Without asking for any identification or papers, they gave the workers cards, which had photographs that "kind of looked like" them, so they would be admitted to work in the groves (Tr.R. 323 - pgs. 210, 207-208; Tr.R. 324 - pgs. 127, 137; Tr.R. 325 - pgs. 9, 189-190).

Each morning the laborers awoke around 5 a.m., and employees of defendant and Ramiro Ramos, who they referred to as Chiveros (goat drivers), transported them to the groves and then watched, supervised, and gave them a token for each filled bin, which held nine to ten large sacks of oranges weighing approximately 40 kilos (Tr.R. 323 - pgs. 30, 205-206, 209, 213; Tr.R. 324 - pgs. 22-23, 179; Tr.R. 325 - pgs. 9, 11, 184). The laborers worked approximately 12 hours a day, never had a day off, and received payment based on the number of tokens they had collected (Tr.R. 323 - pg. 204, 213; Tr.R. 324 - pgs. 22-23; Tr.R. 325 - pgs. 9, 33-34, 76, 98-99).

After the Mexicans had worked in the fields for approximately a month, defendant learned that certain workers had escaped (Tr.R. 325 - pgs. 188-189). Defendant approached some of the escapees' co-workers and told them that if they left, he "would come * * * look for * * * and kill" them (Tr.R. 325 - pg. 189).

That night, four of the men, who had arrived together from Mexico, decided to escape (Tr.R. 323 - pgs. 215; Tr.R. 324 - pgs. 146-147; Tr.R. 325 - pgs. 188-189,

213). To avoid getting caught, they left on foot without taking any belongings or getting fully dressed (Tr.R. 324 - pg. 148). Two of the workers were so afraid that defendant or Ramiro Ramos would catch and kill them, they shook as they escaped (Tr.R. 325 - pg. 191).

The government introduced evidence that for each worker they employ, labor contractors, like defendant and Ramiro Ramos, are required to sign and file an I-9 form with the Social Security Administration (SSA), certifying, under penalty of perjury, that the worker has presented the requisite documentation demonstrating that he or she is legally in the United States and may lawfully be employed (Tr.R. 323 - pgs. 17-19; Tr.R. 325 - pgs. 43-44, 58, 130; Tr.R. 258 - pgs. 8-9). An agent with SSA testified that based on the information contained on the I-9 forms submitted by defendant and Ramiro Ramos from January 1, 2000 through June 30, 2001, only 16 of their approximately 680 workers had valid Social Security numbers (Tr.R. 323 - pg. 121; Tr.R. 325 - pgs. 155, 160-161). A border patrol agent with the Immigration and Naturalization Service also testified that those same I-9 forms reflected that only ten of the workers had valid alien registration numbers, an eight digit number assigned to individuals lawfully admitted into the United States for permanent residence (Tr.R. 323 - pgs. 132-134).

In addition, the bookkeeper for defendant and Ramiro Ramos, who did their payroll and accounting, testified that at any particular time during a growing season, defendant and Ramiro Ramos had two crews of 40 to 60 workers and six or seven crews of 20 to 30 workers, respectively, and that it was “very common” to have a

complete turnover of workers once every month, or five times during one growing season (Tr.R. 325 - pgs. 118, 111-112, 109, 116-117). Consistent with a five-fold turnover rate, the bookkeeper reported that payroll records reflected that from November 2000 through June 2001, R & A Harvesting employed 724 laborers (Tr.R. 325 - pgs. 109-110, 116-117).

The government also introduced evidence regarding an incident that occurred on May 27, 2000, involving defendant, his brother, and his cousin. Around 10 p.m. that evening, three vans and a minivan, transporting primarily migrant workers out of the State of Florida, made its usual stop at the El Mercadito store to pick up additional passengers in Lake Placid (Tr.R. 326 - pgs. 61, 66, 131; Tr.R. 327 - pgs. 84-85, 87, 89). Defendant, along with Ramiro and Jose Ramos, all of whom had guns, approached Marcos Orozco, one of the van drivers (Tr.R. 326 - pgs. 78-79, 84-85; Tr.R. 327 - pgs. 19, 110; Tr.R. 328 - pg. 36). Ramiro Ramos demanded to see the owner, pointed his gun at Orozco, and threatened to kill him (Tr.R. 326 - pgs. 79, 84-86, 89; Tr.R. 327 - pgs. 68, 90-92; Tr.R. 328 - pg. 32). Defendant told several passengers "not to move," or "he would kill * * * and shoot" them (Tr.R. 326 - pg. 94; Tr.R. 327 - pg. 25). He "racked" and pointed his gun at Alejandro Benitez, one of the van drivers, and said "don't move" or you will be killed (Tr.R. 327 - pgs. 20-22, 19, 32, 68, 86-88; Tr.R. 326 - pgs. 79, 85-86).

As Jose Cervantes-Martinez, Sr., the owner of the van service approached, Ramiro Ramos, referring to his migrant workers, said, "You are the son of a bitch who is going–taking away my people" (Tr.R. 327 - pg. 95; Tr.R. 326 - pg. 90). He

then pistol-whipped the owner of the van service, hitting him several times in the face with the butt of his gun, as defendant and Jose Ramos repeatedly punched him in the face (Tr.R. 326 - pgs. 90-93). Once the victim fell to the ground, defendant, along with Ramiro and Jose Ramos, repeatedly kicked him until his face and T-shirt were bloody and he lost consciousness (Tr.R. 326 - pgs. 93-95; Tr.R. 327 - pgs. 72, 106-107). An ambulance transported the van owner to the hospital, where he received stitches for two facial lacerations, one that extended "almost from the hairline down his forehead down to the bridge of his nose" and the other on his lip (Tr.R. 327 - pgs. 101, 99-100; Tr.R. 328 - pg. 68; Tr.R. 256 - pg. 42). The van owner suffered extreme pain all over his body and the lacerations left permanent scars on his face (Tr.R. 327 - pgs. 100-101).

*3. Defendant's First Sentencing*

Nearly three months prior to defendant's scheduled sentencing, the Probation Department completed defendant's Presentence Investigation Report (PSR) (U.S.R.E. - pgs. 1-22, PSR 8/23/02 - pgs. 1-22). Based on a total offense level of 26 and a criminal history category of I, the Probation Department recommended a guideline range of 63 to 78 months on Counts One, Two, and Four, which had been grouped together, and a minimum mandatory consecutive term of 84 months on Count Three (U.S.R.E. - pgs. 12, 21, PSR 8/23/02 - pg. 12 ¶49, pg. 21 ¶82; U.S.R.E. - pg. 80, chart).

The Probation Department provided the PSR to the parties along with a cover letter specifying that all comments and objections had to be filed by October

28, 2002 (R.285, Sent.I.Tr. - pgs. 16-17). The government complied with the Probation Department's deadline and on October 17, 2002, faxed a copy of its objections to defense counsel and the Probation Department. The objections included a request, *inter alia*, for a four-level enhancement pursuant to Section 3B1.1(a) of the Sentencing Guidelines, based on defendant's aggravated role as an organizer and leader of the criminal conspiracy (R.278 - pgs. 4-6).

On November 4, 2002, the Probation Department issued a revised PSR and an Addendum (U.S.R.E. - pgs. 23-45, Rev.PSR. 11/4/02 - pgs. 1-23; U.S.R.E. - pgs. 46-48, FirstAdd. Rev.PSR 11/4/02 - pgs. 1-3). On November 15, 2004, defendant submitted his objections and on that same date, the Probation Department issued a Second Addendum to the PSR (U.S.R.E. - pgs. 49-51, SecondAdd. Rev.PSR 11/15/02 - pgs. 1-3).[6]

On November 2, 2002, the district court held a hearing and sentenced defendant. The district court rejected all objections to the initial PSR as untimely because the government and defense counsel failed to comply with a local rule that required objections to be filed within 14 days of receipt of the report (R.285, Sent.I.Tr. - pg. 25; see also *id.* at 4-6, 16-18, 24). As a result, the district court did not consider the government's request to apply a four-level enhancement for defendant's aggravating role as a leader pursuant to Section 3B1.1(a) (R.285, Sent.I.Tr. - pg. 17; U.S.R.E. - pg. 47, FirstAdd. Rev.PSR 11/4/02 - pg. 2; R.R.

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[6] The district court did not receive defendant's objections to the PSR until November 18, 2002, or two days before his sentencing (R.285, Sent.I.Tr. - pg. 25).

U.S.R.E. - pg. 52). The district court also refused to consider the revised PSR, in which the Probation Department changed its recommendation from a total offense of 26 to a total offense level of 28 and to a corresponding guideline range of 78 to 97 months for Counts One, Two, and Four (U.S.R.E. - pg. 35, Rev.PSR 11/4/02 - pg. 13 ¶50; U.S.R.E. - pg. 43, Rev.PSR 11/4/02 - pg. 21 ¶83; R.285, Sent.I.Tr. - pg. 26). It retained the 84 months recommendation for Count Three. The district court, relying exclusively on the initial PSR, sentenced defendant to 63 months on Counts One, Two, and Four and 84 months on Count Three, to run consecutively, or 147 months on all counts (R.285, Sent.I.Tr. - pg. 35).[7]

*4. Defendant's Resentencing*

Following remand by this Court, the Probation Department issued a new PSR for defendant. Relying on essentially the same methodology it had used to prepare its prior reports, the Probation Department calculated a total offense level of 33 and recommended a guideline range of 135 to 168 months on Counts One and Four (U.S.R.E. - pg. 43, Rev.PSR 11/4/02 - pg. 21 ¶83; U.S.R.E. - pg. 73, PSR 1/16/04 - pg. 22 ¶86; U.S.R.E. - pg. 80, chart).

The Probation Department grouped Counts One and Four together and relied

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[7] At that same hearing, the district court sentenced co-defendant/co-conspirator Ramiro Ramos immediately before defendant, and imposed the same punishment (R.285, Sent.I.Tr. - pgs. 2-24). The district court rejected all objections to Ramiro Ramos' initial PSR as untimely, refused to consider the government's request to impose six levels of enhancements – two for obstruction of justice pursuant to Section 3C1.1 and four for his aggravating role as a leader pursuant to Section 3B1.1(a), and relied exclusively on the initial PSR to impose sentence (R.285, Sent.I.Tr. - pgs. 4-6, 16-18, 24; R.R.U.S.R.E. - pgs. 23 ¶89, 52).

on Section 2H4.1, the guideline for involuntary servitude, to calculate the total offense level because that is the offense guideline that yields the highest offense level pursuant to Section 3D1.3(a) (U.S.R.E. - pg. 63, PSR 1/16/04 - pg. 12 ¶40; U.S.R.E. - pg. 80, chart). Section 2H4.1(b)(4)(B) requires two levels to be added to the greater of the offense level for the involuntary servitude offense or "the offense level * * * [for] the other offense." Since defendant harbored illegal aliens, in violation of 8 U.S.C. 1324 (Count Four), "during * * * or in connection" with the conspiracy to commit involuntary servitude (Count One), the Probation Department used Section 2L1.1, the guideline for harboring, to compute the offense level (U.S.R.E. - pg. 63, PSR 1/16/04 - pg. 12 ¶44). The Probation Department started with a base offense level of 12, added nine levels pursuant to Section 2L1.1(b)(2)(C) because defendant harbored 100 or more aliens, four levels pursuant to Section 2L1.1(b)(4)(B) because defendant brandished a dangerous weapon, six levels pursuant to Section 2L1.1(b)(6)(3) because the victim of the pistol-whipping, Jose Martinez-Cervantes, sustained permanent or life-threatening bodily injury, and two levels pursuant to Section 2H4.1(b)(4)(B) (*Ibid.*; U.S.R.E. - pg. 80, chart). Thus, the Probation Department calculated a total offense level of 33 (U.S.R.E. - pg. 64, PSR 1/16/04 - pg. 13 ¶51). Both the government and defendant submitted timely objections to the PSR (R.351, 352).

On May 3, 2004, the district court held a hearing to resentence defendant (R.370). Defense counsel noted that the district court had "pretty much disposed of a lot of [his objections] already" when it previously resentenced co-defendant/co-

conspirator, Ramiro Ramos, on March 1, 2004 (R.370, Sent.II.Tr. - pg. 3).[8] The district court, seeking to avoid a "later claim on appeal" that it had "n[o]t consider[ed] defendant's specific claims, remarked, "if you have objections," "if there[] is something different that you want to argue, * * * this is the opportunity" (*Ibid.*).

The district court rejected defense counsel's argument that a four-level enhancement pursuant to Section 3B1.1(a) based on defendant's aggravated role as a leader of the conspiracy was unwarranted merely because defendant owned a separate, smaller company, had fewer workers, and supervised fewer Chiveros than his co-defendant/co-conspirator brother, Ramiro Ramos (R.370, Sent.II.Tr. - pgs. 5-7). Consistent with the jury's verdict that defendant was "linked together in a criminal conspiracy" with his brother, Ramiro Ramos, during which they jointly

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[8] At Ramiro Ramos' resentencing, the district court, consistent with the recommendation of the Probation Department, ruled that the pistol-whipping incident, in which defendant and codefendant/coconspirator Ramiro Ramos participated, was "relevant conduct" pursuant to Section 1B1.3 of the Sentencing Guidelines that could be relied upon to impose adjustments for brandishing a weapon and causing permanent or life-threatening bodily injury (R.360, R.R. Sent.II.Tr. - pgs. 8-10,12). See R.R.U.S. Br. 12-13 (discussion of the district court's rulings). The district court found that the pistol-whipping incident was relevant conduct because it occurred during the time frame and in furtherance of Counts One and Four, the conspiracy and harboring counts. (R.360, R.R. Sent.II.Tr. - pgs. 12, 10). It explained that the pistol whipping incident was "part and parcel of the overall conspiracy" since [t]he whole purpose of the assault [was] to intimidate [the workers] * * * so they wouldn't move on" and defendant and Ramiro Ramos could "maintain the involuntary servitude of the whole group" (*Id.* at 12, 9-10). The district court also concluded that the beating caused "permanent or life-threatening injury" within the meaning of Section 2L1.1(b)(6) because it "could very easily have resulted in death" and caused injuries that left permanent and prominent scars on the victim's face from his forehead to his nose and on his lip (*Id.* at 31, 29).

recruited, harbored, and sought to hold illegal aliens in involuntary servitude, the district court found that defendant's "involve[ment]" in "the criminal activity" "was * * * extensive" and supported the enhancement (*Id.* at 7).

The district court also rejected defense counsel's contention that a nine-level adjustment pursuant to Section 2L1.1 (b)(2)(C) was unjustified because the government failed to establish that defendant harbored 100 or more illegal aliens (R.370, Sent.II.Tr. - pgs. 7-15). The district court, consistent with the recommendation of the Probation Department, concluded that because Count One charged defendant and his brother Ramiro Ramos with conspiracy to harbor illegal aliens and the evidence demonstrated that during the time frame of the illegal operation, 95% of the over 500 I-9 forms they submitted to the Social Security Administration for their workforce had fictitious social security and alien registration numbers, there is "sufficient * * * reliable evidence to conclude that [they harbored] * * * more than 100" illegal aliens (*Id*. at 14-15, 11-12; U.S.R.E. - pg. 79, Add.PSR 2/4/04 - pg. 4).

In addition, when defense counsel repeated arguments the court had already rejected at co-defendant/co-conspirator Ramiro Ramos' resentencing, it adhered to its prior rulings. For example, defense counsel stated that it would "rely on the previous arguments that were made [at] * * * the [resentencing] hearing * * * for Ramiro Ramos and rest on that" as to whether a pistol-whipping incident was "relevant conduct" that justified an adjustment for defendant's brandishing a weapon (R.370, Sent.II.Tr. - pg. 16). Defense counsel further noted that since the

district court had previously concluded that a six level adjustment pursuant to Section 2L1.1(b)(6)(3) was warranted because the victim of the pistol-whipping incident sustained permanent or life-threatening bodily injury and "a ruling concerning the nature of the injury * * * would not change from defendant to defendant[,] * * * [he would not] waste * * * time arguing whether * * * [the harm to the] victim constitute[s] * * * serious bodily injury or permanent injury" (*Id.* at 18). As a result, the district court noted and denied defendant's objections (*Id.* at 19).

After the district court addressed all of defendant's objections, the probation officer explained that even though the guideline range based on an offense level of 37 is 210 to 260 months, defendant's sentence could not exceed the statutory maximum as to both counts, or 180 months (R.370, Sent.II.Tr. - pgs. 24-25). As a result, the district court sentenced defendant to 60 months on Count One and 120 months on Count Four, to run consecutively, or 180 months on both counts (*Id.* at 36).

## SUMMARY OF ARGUMENT

The district court did not vindictively sentence defendant in violation of his due process rights. Following appeal, this Court vacated defendant's sentence and remanded for resentencing. On remand, the district court imposed a sentence that was 33 months longer than it had originally ordered. The circumstances of this case do not create an inference that the district court retaliated against defendant. The order to vacate and remand resulted from an intervening Supreme Court decision,

not from any error by the district court. Moreover, the record affirmatively demonstrates that the second sentence was longer because the district court corrected errors it had made in calculating defendant's original sentence.

The district court did not err in finding that the pistol-whipping incident was relevant conduct, within the meaning of Section 1B1.3(a), to the counts of conviction and thus justified adjustments for brandishing a weapon and causing permanent or life-threatening injury. The indictment, evidence, and jury verdict all support the district court's finding that defendant, along with his co-defendants/co-conspirators, Ramiro and Jose Ramos, committed the pistol-whipping "during" and "in furtherance" of the counts of conviction pursuant to Section 1B1.3(a).

The record supports the district court's finding that the victim of the pistol-whipping sustained "permanent or life-threatening bodily injury." The brutal pistol-whipping placed the victim in life-threatening circumstances and caused injuries that left a prominent and permanent scar on his forehead.

## ARGUMENT

### I

### THE DISTRICT COURT DID NOT VINDICTIVELY SENTENCE DEFENDANT WHEN FOLLOWING AN ORDER TO VACATE AND REMAND FOR RESENTENCING, PREDICATED ON AN INTERVENING SUPREME COURT DECISION, IT IMPOSED A LONGER SENTENCE THAN THE ERRONEOUSLY CALCULATED ORIGINAL SENTENCE

Lifting and relying on a major portion of the argument in co-defendant/ co-conspirator Ramiro Ramos' appellant brief (R.R. Br. 4-7), defendant argues (Br. 3-5) that the district court violated his due process rights by vindictively resentencing him to a term of imprisonment that was 33 months longer than originally ordered. Defendant's argument lacks merit because it is based on a mischaracterization of the record, the circumstances of this case do not create an inference of vindictiveness, and the record establishes that his second sentence is longer than his first because the district court corrected mistakes it made in calculating the original sentence.

A. In *North Carolina* v. *Pearce*, 395 U.S. 711, 723-724, 89 S. Ct. 2072, 2079-2080 (1969), the Supreme Court created a prophylactic rule to guard against "vindictiveness in the resentencing process." *Texas* v. *McCullough*, 475 U.S. 134, 138, 106 S. Ct. 976, 979 (1986). *Pearce*, however, "does not in any sense forbid enhanced sentences" at resentencing and "its presumption of vindictiveness 'do[es] not apply in every case where a convicted defendant receives a higher sentence on retrial.'" *Alabama* v. *Smith*, 490 U.S. 794, 799, 109 S. Ct. 2201, 2204 (1989) (quoting *McCullough*, 475 U.S. at 138, 106 S. Ct. at 978). Indeed, since *Pearce*, the

Supreme Court has repeatedly held that the presumption of vindictiveness should be invoked only in cases "in which there is a 'reasonable likelihood' that the increase in sentence is the product of actual vindictiveness on the part of the sentencing authority." *Smith*, 490 U.S. at 799, 109 S. Ct. at 2205 (quoting *United States* v. *Goodwin*, 457 U.S. 368, 373, 102 S. Ct. 2485, 2488 (1982)). See *Wasman* v. *United States*, 468 U.S. 559, 568, 104 S. Ct. 3217, 3222-3223 (1984); *Chaffin* v. *Stynchombe*, 412 U.S. 17, 24-28, 93 S. Ct. 1977, 1981-1983 (1973).

As a result, vindictiveness is not to be presumed when "the sentencing judge's motivation cannot be called fairly into question," or when there is no triggering event that reasonably links a longer sentence to an improper motivation. *United States* v. *Pimienta-Redondo*, 874 F.2d 9, 13 (lst Cir.), cert. denied, 493 U.S. 890, 110 S. Ct. 233 (1989). See, *e.g.*, *United States* v. *Warda*, 285 F.3d 573, 580 (7th Cir. 2002); *Fenner* v. *United States Parole Comm'n*, 251 F.3d 782, 788 (9th Cir. 2001); *United States* v. *Schmeltzer*, 20 F.3d 610, 613 n.3 (5th Cir.), cert. denied, 513 U.S. 1041, 115 S. Ct. 634 (1994). Consequently, in circumstances where a "remand [is] not the result of any error on the district court's part," *United States* v. *Cox*, 299 F.3d 143, 149 (2d Cir. 2002), and does not burden the district court with holding a new trial, the presumption should not be applied. See, *e.g.*, *Fenner* 251 F.3d at 787-788; *United States* v. *Volsteen*, 910 F.2d 187, 192 (5th Cir. 1990) (dicta), cert. denied, 498 U.S. 1074, 111 S. Ct. 801 (1991), adhered to on reh'g en banc, 950 F.2d 1086, cert. denied, 505 U.S. 1223, 112 S. Ct. 3039 (1992).

At the outset, this Court may review defendant's claim of vindictiveness only

for plain error since he raises it for the first time on appeal. *United States* v. *Fortier*, 242 F.3d 1224, 1228 (10th Cir.), cert. denied, 534 U.S. 979, 123 S. Ct. 409 (2001); *United States* v. *Scott*, 48 F.3d 1389, 1398 (5th Cir.), cert. denied, 516 U.S. 902, 116 S. Ct. 264 (1995). As a result, even if defendant were to demonstrate error that is plain and affects his substantial rights, this Court may reverse only if it "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *United States* v. *Simpson*, 228 F.3d 1294, 1301 (11th Cir. 2000) (quoting *Jones* v. *United States*, 527 U.S. 373, 389, 119 S. Ct. 2090, 2102 (1999)). In any event, the district court did not commit error.

Contrary to defendant's argument (Br. 4-5), the presumption of vindictiveness should not be invoked where, as here, the circumstances negate the possibility that the district court could have indulged in self-vindication. In this case, the district court could not have had any retaliatory motivation since the remand resulted not because any of the three defendants demonstrated error, but because of an intervening decision by the Supreme Court. The remand by this Court also did not require a new trial or other burdensome proceeding. In addition, defendant has not cited any evidence in the record to support his claim of vindictiveness. Accordingly, because there is no "reasonable likelihood" that the increased sentence resulted from "actual vindictiveness on the part of" the district judge, *Pearce*'s presumption of vindictiveness should not be invoked. *Smith*, 490 U.S. at 799, 109 S. Ct. at 220 (quoting *Goodwin*, 457 US. at 373, 102 S Ct. at 2488).

B. Further, not only can the district judge's motivation "not fairly be called

into question here," *Pimienta-Redondo*, 874 F.2d at 13, but the record also affirmatively establishes that defendant's second sentence was longer because the district court corrected mistakes it had made in calculating the initial sentence. It is well-settled that a longer sentence imposed to correct an erroneously calculated prior sentence is not considered vindictive. See, *e.g.*, *United States* v. *Garcia-Guitar*, 234 F.3d 483, 489 (9th Cir. 2000) (33-month increase as a result of a correction to presentence report), cert. denied, 532 U.S. 984, 121 S. Ct. 1629 (2001); *United States* v. *Edwards*, 225 F.3d 991 (8th Cir.) (increase from 650 months to mandatory life as result of two level increase to offense level), cert. denied, 531 U.S. 1100, 121 S. Ct. 834 (2000); *United States* v. *Duso*, 42 F.3d 365, 367 (6th Cir. 1994) (five-month increase as result of misapplication of firearms guideline that cross-referenced and required calculation of offense level in accordance with underlying narcotics offense). Nor is vindictiveness imputed when a harsher resentence is based on different information than the district court relied upon at the first sentencing. See, *e.g.*, *United States* v. *Warda*, 285 F.3d at 580 (37-month increase based on a "materially different record"); *Garcia-Guitar*, 234 F.3d at 489; *Duso*, 42 F.3d at 367; *Schmeltzer*, 20 F.3d at 613. This is so even when the information existed at the time the first sentence was imposed. See *ibid.* (imposition of four level increase that had "evidently [been] overlooked" at the first sentencing). See also *United States* v. *Atehortva*, 69 F.3d 679, 684 (2d Cir. 1995), cert. denied, 517 U.S. 1249, 116 S. Ct. 2510 (1996).

At the original hearing, when the district court sentenced defendant and co-

defendant/co-conspirator Ramiro Ramos, it refused to consider any objections to the initial PSRs, including the government's contention that the offense level should be increased four levels for each defendant pursuant to Section 3B1.1(a) for defendants' aggravating role as leaders. Had the district court considered and imposed that enhancement at the first sentencing hearing, defendant's sentence on Counts One, Two and Four, based on a total offense level of 30 and guideline range of 97 to 121 months, would have been at least 34 months longer than the sentence actually imposed. Thus, the record reflects that the 33 additional months in defendant's second sentence did not result from vindictiveness (See R.360, R.R. Sent.II.Tr. - pg. 53 (district court commenting at Ramiro Ramos' resentencing that it "appreciate[d] the [opportunity to] correct[]" the fact that it "did not consider" the government's request for enhancements for Ramiro and Juan Ramos' aggravating role as leaders because the parties "did not file * * * on time" since "there was abundant evidence that they were the organizers and leaders of five or more people")). See *United States* v. *Cochran*, 883 F.2d 1012, 1015 (11th Cir. 1989) (explaining "that the district court has the power, indeed the 'duty'" to correct an erroneous sentence).

To support his claim of vindictiveness, defendant – without citation – contends that:

> [a]t the original sentencing, the PSIR included a four level increase resulting from the Appellant's alleged leadership role in the offense and two level increase for obstruction of justice. At the initial sentencing the District Judge considered and later overruled those recommendations. At the re-sentencing the District Judge

> granted a U.S.S.G. 3C1.1 two level adjustment for Obstruction of Justice and held that the Appellant merited a U.S.S.G. 3B1.1(a) four level increase because he was an organizer and leader of five or more people.

(Br. 4). Defendant, however, mischaracterizes the PSR prepared for his initial sentencing, the district court's rulings at the initial hearing, and the district court's rulings at his resentencing.

Contrary to defendant's claim, the PSR prepared for his original sentencing did not include a recommendation for an enhancement based of his aggravated role as a leader (U.S.R.E. - pg. 12, PSR 8/23/02 - pg. 12 ¶44 (specifying no adjustment for defendant's Role in the Offense); U.S.R.E. - pg. 35, Rev.PSR 11/4/02 - pg. 13 ¶45 (same); U.S.R.E. - pg. 47, FirstAdd. PSR 11/4/02 - pg. 2 (probation officer refusing to recommend adjustment for defendant's aggravating role). Nor did the district court even consider the government's request to impose an enhancement for defendant's aggravated role at defendant's initial sentencing, since it ruled that all objections to the original PSR were untimely (R.285, Sent.I.Tr. - pgs. 24-26; See *id.* at pgs. 4-6, 16-18 (district court refusing to consider enhancement for Ramiro Ramos' aggravating role at the original sentencing); see also R.360, R.R. Sent.II.Tr. - pg. 51 (cocounsel explaining that the district court denied the objection because it was untimely)). Finally, contrary to defendant's assertion, the government never requested, the Probation Department never recommended, and the district court never imposed any enhancement for defendant's obstruction of justice (See U.S.R.E. - pg. 12, PSR 8/23/02 - pg. 12 ¶45 (specifying no adjustment for

Obstruction of Justice); U.S.R.E. - pg. 35, Rev.PSR 11/4/02 - pg. 13 ¶46 (same)). Rather, it is Ramiro Ramos, not defendant, who obstructed justice and was penalized for that conduct (R.360, R.R. Sent.II.Tr. - pgs. 35-48). Consequently, the record does not support defendant's claim of vindictiveness.

Defendant's second sentence is also longer because the Probation Department misapplied the Sentencing Guidelines when it originally calculated the offense level (before enhancements) for Counts One, Two, and Four. At the first sentencing, the Probation Department failed to rely on the offense guidelines that yield the highest offense level for those counts as required pursuant to Section 3D1.3(b). When it applied Section 2H4.1, the guideline for an involuntary servitude offense, and complied with Section 2H4.1(b)(4)'s requirement to calculate the total "offense level from the offense guideline applicable to [the] * * * offense" committed "in connection with the * * * involuntary servitude offense" (Count One), it cross-referenced to Section 2B3.2, the guideline applicable to Count Two (extortion), rather than Section 2L1.1, the guideline applicable to Count Four (harboring). As a result, at the first sentencing, the Probation Department wrongly calculated the total offense level (without enhancements) for Counts One, Two and Four to be 26 (Section 2B3.2, extortion – base offense level of 18, plus six for permanent or life-threatening injury, plus two because offense was committed in connection with the involuntary servitude offense) (U.S.R.E. - pg. 80, chart). Whereas, at the second sentencing, it calculated the total offense level without enhancements to be 33 (Section 2L1.1, harboring – base offense level of 12, plus

nine for harboring more than 100 aliens, plus six for permanent or life-threatening injury, plus four for brandishing a firearm, plus two because offense was committed in connection with involuntary servitude offense) (U.S.R.E. - pg. 80, chart).[9]

Accordingly, because the district court at the first sentencing miscalculated and underestimated the overall offense level for Counts One, Two, and Four by a total of seven levels – four for failing to impose a leadership role enhancement and three for cross-referencing to the wrong guideline – it did not violate defendant's due process rights in correcting the errors on resentencing.

C. Defendant was not entitled to a shorter sentence, as he suggests (Br. 5), on resentencing. It is well settled that a defendant is not entitled to a shorter sentence just because one or more counts of conviction are dismissed on appeal and he is resentenced on the remaining counts. See, *e.g.*, *Warda*, 285 F.3d at 580-581; *United States* v. *Murray*, 144 F.3d 270 (3d Cir.), cert. denied, 525 U.S. 911, 199 S. Ct. 254 (1998).[10] As the Supreme Court has explained, "the Double Jeopardy Clause does not provide the defendant with the right to know at any specific time

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[9] At the first sentencing, because the district court imposed a mandatory consecutive term of imprisonment for a violation of 18 U.S.C. 924(c) (Count Three), an adjustment for brandishing a weapon was not included in the calculation of the offense level for Counts One, Two and Four. See Sentencing Guidelines § 2K2.4, comment. (n.4).

[10] Arguments that relate to a defendant's expectation of punishment on resentencing generally are treated as claims of a violation of the Double Jeopardy Clause. See, *e.g.*, *United States* v. *Stinson*, 97 F.3d 466, 469 (11th Cir. 1996), cert. denied, 519 U.S. 1137, 117 S. Ct. 1007; *Cochran*, 883 F.2d at 1016.

what the exact limit of his punishment will be." *United States* v. *Di Francesco*, 449 U.S. 117, 101 S. Ct. 426, 427 (1980).

Further, this Court has held that when a sentence is vacated on appeal, a defendant does not have a right to rely on it to create an expectation as to the sentence he will receive at resentencing. *United States* v. *Stinson*, 97 F.3d 466, 469 (11th Cir. 1996), cert. denied, 519 U.S. 1137, 117 S. Ct. 1007 (1997). See *Cochran*, 883 F.2d at 1016. As this Court has explained, because the initial sentence, once vacated, "becomes void in its entirety" and "any consequences that flow from it are totally wiped away," it creates neither a right nor a legitimate expectation as to future punishment. *Stinson*, 97 F.3d at 469; *Cochran*, 883 F.2d at 1016. Accordingly, once a defendant appeals, "any expectation of finality in a sentence is wholly absent." *Id.* at 1017. See *Warda*, 285 F.3d at 579-580; *Murray,* 144 F.3d at 275.

By appealing his conviction and sentence, defendant voluntarily sought nullification of his sentence. Having obtained that relief, he cannot now insist on the voided sentence.

## II

## THE DISTRICT COURT DID NOT CLEARLY ERR IN FINDING THAT A PISTOL-WHIPPING COMMITTED DURING AND IN FURTHERANCE OF THE COUNTS OF CONVICTION IS RELEVANT CONDUCT WITHIN THE MEANING OF SECTION 1B1.3 OF THE FEDERAL SENTENCING GUIDELINES

Making almost word-for-word the same argument as co-defendant/ co-conspirator Ramiro Ramos (R.R.Br. 7-13), defendant contends (Br. 5-12) the

district court erred in relying on a pistol-whipping incident to impose adjustments for brandishing a weapon and causing permanent or life-threatening injury. Because the district court clearly did not err in finding that defendant, along with his brother and cousin, Ramiro and Jose Ramos, committed the pistol whipping "during" and "in furtherance" of the counts of conviction pursuant to Section 1B1.3(a), it properly relied on "relevant conduct" to impose the challenged enhancements.

A. This Court reviews a district court's factual determination that conduct is relevant pursuant to Section 1B1.3 of the Sentencing Guidelines under the deferential clearly erroneous standard. *United States* v. *Coe*, 79 F.3d 126, 128 (11th Cir. 1996). "Under the sentencing guidelines, 'the offense' for which a defendant may be sentenced includes 'the offense of conviction and all relevant conduct.'" *United States* v. *Dunlap*, 279 F.3d 965, 966 (11th Cir. 2002) (quoting Sentencing Guidelines § 1B1.1, comment (n.1(k))). Relevant conduct includes "*all* acts * * * committed, aided [and] abetted * * * by the defendant," or "in the case of * * * jointly undertaken criminal activity * * * all reasonably foreseeable acts * * * of others *in furtherance of* the jointly undertaken criminal activity, that *occurred during* the commission of the offense[s] of conviction." Sentencing Guidelines § 1B1.3(a)(1)(A) & (a)(1)(B) (emphasis added). See *Dunlap*, 279 F.3d at 966; *Coe*, 79 F.3d at 127.

The district court, adopting the conclusion of the Probation Department, correctly found at co-conspirator/co-defendant Ramiro Ramos' resentencing that

the pistol-whipping incident is "relevant conduct" because it "occurred during the commission of the offense[s] of conviction." Sentencing Guidelines § 1B1.3; see R.360, R.R. Sent.II.Tr. - pg. 8; R.R. U.S.R.E. - pg. 107. Counts One and Four, respectively, charged that from January 1, 2000, continuing through June 20, 2001, defendant conspired to harbor illegal aliens and commit involuntary servitude in violation of 18 U.S.C. 371, and harbored illegal aliens in violation of 18 U.S.C. 1324(a) (R.162). The pistol-whipping incident occurred on May 27, 2000 (R.162 - pg. 11; R.360, R.R. Sent.II.Tr. - pg. 8). Because defendant, along with Ramiro and Jose Ramos, assaulted the van owner "during the commission" of Counts One and Four, that conduct is "relevant" and may be considered when calculating the offense level. *Dunlap*, 279 F.3d at 966; *Coe*, 79 F.3d at 128.

The district court also correctly found the pistol-whipping incident is relevant conduct because defendant, along with his brother and cousin, committed the offense "in furtherance of" the counts of conviction. Sentencing Guidelines § 1B1.3(a)(1)(B). Count One of the indictment specifies that the pistol-whipping "was part of the conspiracy" and the "manner and means" by which defendant, his brother and cousin accomplished its purposes (R.162 - pg. 5). It also provides that defendant, along with Ramiro and Jose Ramos, assaulted Jose Martinez Cervantes, Sr., the owner and operator of the van service "*for the purpose* of inducing [him] * * * not to transport migrant farm laborers out of Lake Placid, Florida" (R.162 - pg. 3 ¶11 (emphasis added); see R.162 - pg. 5 ¶3 (stating that Ramiro Ramos, Juan Ramos, and Jose Ramos pistol-whipped the owner of the van service "to

discourage [him] from operating a van service in Lake Placid, Florida, that transported farm workers away from Lake Placid, Florida")).

Consistent with the indictment, the trial evidence establishes that defendant, along with Ramiro and Jose Ramos, attacked the van owner because they believed that the victim's business posed a threat to their unlawful efforts to harbor and force illegal aliens to work. Ramiro Ramos, just moments before the beating, twice told the van owner the reason for the attack, stating, "[y]ou are the son of a bitch who is going – taking my people, and I'm going to kill you, you son of a bitch" (Tr.R.327 - pg. 95; see Tr.R.326 - pg. 90 (you are "the person that was taking [my] people away")). Thus, Ramiro Ramos' own words establish he, along with defendant and Jose Ramos, pistol-whipped the van owner to facilitate their crimes.

The jury's verdict likewise confirms that defendant assaulted the van owner to further his illegal endeavors. Since the jury convicted defendant of Count Two, it necessarily found that defendant assisted in pistol-whipping the victim "to obstruct [and] delay * * * his right to operate a van service transporting migrant farm workers within and outside the State of Florida" (R.162 - pgs. 10-11). Thus, the indictment, evidence, and jury verdict all support the district court's finding that defendant, along with Ramiro and Jose Ramos, committed the pistol-whipping "in furtherance" of the counts of conviction. Sentencing Guidelines § 1B1.3(a)(1)(B). Accordingly, the district court correctly relied on the offense to impose adjustments for brandishing a weapon and causing permanent or life-threatening injury.

Defendant nonetheless argues (Br. 7, 11) that the district court erred because

the owner of the van service is a "lawful legal resident[] of the United States," none of the passengers worked for him, and he did not use or brandish a firearm or cause any "'permanent bodily injury' to any * * * migrant worker[ ]" he harbored. The Sentencing Guidelines expressly provide that the victims of the relevant conduct and the offenses of conviction need not be one in the same when the offenses, as here, are part of a common scheme or plan. See Sentencing Guidelines § 1B1.3, comment. (n.9) (emphasis added) (explaining that offenses that are "part of a common scheme or plan * * * must be substantially connected

* * * *by at least one common factor* such as common victims, common accomplices, common purpose"). Consequently, the status of the van owner and his passengers has no bearing on whether the pistol-whipping is "relevant conduct" that justifies imposition of the enhancements.

To the extent that defendant contends (Br. 7) that the pistol-whipping erroneously "trigger[ed] the cross-reference" to Section 2L1.1, the guideline for harboring, he misconstrues the Guidelines and the district court's calculation of his sentence. The district court, consistent with the recommendation of the Probation Department, calculated the offense level pursuant to Section 2H4.1, the guideline for involuntary servitude. As previously noted, because defendant harbored illegal aliens "in connection with" his conspiring to commit involuntary servitude and Section 2H4.1(b)(4)(B) requires two levels to be added to the greater of the offense level for the involuntary servitude offense, or "the offense level

* * * [for] th[e] other offense," the Probation Department used Section 2L1.1, the

guideline for harboring, to compute the total offense level. Consequently, contrary to defendant's claim (Br. 8), defendant's commission of Counts One and Four together, and not the pistol whipping incident, "trigger[ed]" Section 2H41.1's "cross-reference provision."[11]

B. To the extent that defendant now argues (Br. 10-12) that the district court erred in imposing enhancements because the evidence fails to establish that he personally harbored 100 or more illegal aliens, or brandished a weapon pursuant to Sections 2L1.1(b)(2)(C) and 2L1.1(b)(4)(b), respectively, he misperceives both the law and the facts. In any event, the district court did not err in imposing the adjustments.

It is well-established that for purposes of sentencing, a defendant is responsible for all the reasonably foreseeable acts of his co-conspirators and accomplices taken in furtherance of his offenses of conviction. See Sentencing Guidelines § 1B1.3(B). See also *United States* v. *Lawrence*, 47 F.3d 1559, 1566 (11th Cir. 1995); *United States* v. *Garcia*, 13 F.3d 1464, 1470-1471 (11th Cir. 1994).

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[11] *United States* v. *Cross*, 121 F.3d 234 (6th Cir. 1997) and *United States* v. *Dawson*, 1 F.3d 457 (7th Cir. 1993), cited by defendant (Br. 7), are not on point and do not dictate a contrary conclusion. In *Cross*, 121 F.3d at 240-241, the Sixth Circuit "vacate[d] [a] four-level upward departure and remand[ed] * * * for further factual findings" as to whether conduct that occurred seven weeks *after* the "offense of conviction," was sufficiently related to be relevant conduct. In *Dawson*, the Seventh Circuit held that the district court erred in upwardly departing based on five bank robberies to which defendant confessed because Sentencing Guidelines § 3D1.4, a multiple-count grouping provision, applies only to conduct for which defendant has been convicted. Finally, because *United States* v. *Aguero*, cited by defendant (Br. 8) is an unpublished district court opinion that is not available on Westlaw, government counsel has been unable to review it.

Because Counts One and Four charged defendant and his brother, Ramiro Ramos, with conspiracy to harbor illegal aliens and aiding and abetting each other in harboring illegal aliens, respectively, defendant may be punished for the reasonably foreseeable activities of his brother that furthered their harboring scheme. See Sentencing Guidelines § 1B1.3(B), comment. (nn. 2(b), 2(c)(2), 2(c)(4), 9(A), 9(B)). See, *e.g.*, *United States* v. *McCrimmon*, 362 F.3d 725, 731-732 (11th Cir. 2004) (defendant convicted of conspiracy to commit wire and securities fraud and money laundering, who recruited investors and used his independent company to further goals of the conspiracy, accountable for entire $51 million loss of investment scheme); *United States* v. *Pringle*, 350 F.3d 1172, 1175-1178 (11th Cir. 2003) (defendant convicted of Hobbs Act conspiracy correctly had his sentence enhanced for his co-conspirator's use of a firearm during robberies in which he did not participate); *United States* v. *Ryan*, 289 F.3d 1339, 1347-1348 (11th Cir.) (defendant convicted of conspiracy to distribute narcotics and substantive drug offenses accountable for drug quantity his conspirator agreed to purchase), cert. denied, 537 U.S. 927, 123 S. Ct. 324 (2002); *United States* v. *Alas*, 196 F.3d 1250, 1251 (11th Cir. 1999) (defendant convicted of conspiracy to possess and possession of stolen mail accountable for checks cashed by his co-defendant while defendant was incarcerated for an unrelated offense). Consequently, contrary to defendant's suggestion (Br. 11-12), the evidence need not demonstrate that defendant by himself harbored 100 or more illegal aliens for Section 2L1.1(b)(2)(C)'s enhancement to apply.

In the instant case, there is ample evidence to support the district court's imposition of an enhancement pursuant to Section 2L1.1(b)(2)(C) because defendant and Ramiro Ramos jointly harbored 100 or more illegal aliens. The record overwhelmingly establishes that defendant, together with his brother, actively recruited, supervised, and housed hundreds of undocumented migrant workers to aid, abet, and further their jointly undertaken criminal activities. As the district court and Probation Department both noted, defendant and his brother submitted in excess of 500 I-9 forms for their workforce to the Social Security Administration, more than 95% of which had fictitious social security and alien registration numbers, during the time frame of the conspiracy (R.370 Sent.II.Tr. - pg. 14; U.S.R.E. - pg. 79, Add.PSR 2/4/04 - pg. 4; R.360, R.R. Sent.II.Tr. - pg. 35; See Tr.R. 323 - pgs. 121, 132-134; Tr.R. 325 - pgs. 155, 160-161). Defendant and his brother's bookkeeper testified that from November 2000 through June 2001, one of the two growing seasons covered by the time frame of the conspiracy, R & A Harvesting, of which defendant is a registered agent, employed 724 migrant workers (Tr.R. 325 - pgs. 88, 109-110, 116-117, 160-161; Tr.R. 323- pgs. 132-134). Indeed, when interviewed by the Probation Department, Ramiro Ramos admitted R & A employed approximately 650 to 700 laborers a season to work in the citrus groves (R.R. U.S.R.E. - pg. 18 ¶74, pg. 73 ¶76).[12] Accordingly, the district court

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[12] *United States* v. *Lawrence,* 47 F.3d 1559 (11th Cir. 1995), cited by defendant (Br. 9-10) does not dictate a contrary conclusion. In *Lawrence,* three defendants pleaded guilty to three different substantive counts of distribution of cocaine that occurred on different dates in front of the same crack house. This

(continued...)

was justified in imposing an adjustment based on defendant and co-defendant/ co-conspirator Ramiro Ramos' harboring 100 or more illegal aliens.

Even when considered alone, defendant's activities establish that defendant by himself harbored 100 or more illegal aliens. After all, defendant's bookkeeper testified that at any particular time, defendant by himself maintained two crews of 40 to 60 laborers and that it was "very common" to have a complete turnover of workers once every month, or five times during a growing season (Tr.R. 325 - pgs. 118, 111-112, 116-117). Consequently, even with no turnover, defendant alone harbored more than 100 illegal aliens during the two growing seasons covered by the conspiracy.[13]

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[12](...continued)
Court held that where no evidence was presented regarding the quantity of drugs distributed, or defendant's individual involvement in the criminal activity, the district court erred in attributing over 550 grams of cocaine to each defendant based on computations in a presentence report, calculating the number of drug transactions that occurred at the location on a particular day, multiplying that number by the average weight of cocaine base involved in those transactions, and multiplying that number by the number of days it was assumed each defendant distributed cocaine. *Id.* at 1566-1568.

[13] Even though the evidence overwhelmingly establishes that defendant and Ramiro Ramos actually harbored at least 100 illegal aliens, defendant misreads *United States* v. *Cabrera*, 288 F.3d 163 (5th Cir. 2002) when he relies on that decision and argues (Br. 11) that the government "had to establish" that factual predicate to a "reasonable certainty" in order for Section 2L1.1(b)(2)'s enhancement to apply. Indeed, the Fifth Circuit held the contrary.

In *Cabrera*, the Fifth Circuit ruled that the preponderance of evidence standard governs a district court's findings as to the number of illegal aliens a defendant *actually* smuggles pursuant to Section 2L1.1(b)(2)(B). See 288 F.3d at 169, 172-173. It also held that the reasonable certainty standard of Section 2X1.1(a), which applies to a conspiracy not covered by a specific offense

(continued...)

Defendant has also waived any claim that the factual predicate is insufficient to support the enhancement for his brandishing a weapon. Defendant relied on the arguments made at Ramiro Ramos' resentencing to object to the brandishing enhancement, and his co-defendant never claimed that there was insufficient evidence to support it (R.360, R.R. Sent.II.Tr. - pg. 19 (detailing his objections as to the calculation of the offense level without mentioning the adjustment for brandishing a weapon)). In addition, since the PSRs reflect that the Probation Department recommended a brandishing enhancement for defendant based on pointing a gun at Alejandro Benitez and a brandishing enhancement for Ramiro Ramos based upon pointing a gun at Marcos Orozco, (U.S.R.E. - pg. 28, Rev.PSR 11/4/02 - pg. 6 ¶5; U.S.R.E. - pgs. 46-47, FirstAdd. Rev.PSR 11/4/02 - pgs. 1-2; U.S.R.E. - pgs. 57, 62, PSR 1/16/04 - pgs. 6 ¶7, 12 ¶44; U.S.R.E. - pgs. 76, 78, Add.PSR 2/4/04 - pgs. 1, 3; R.R. U.S.R.E. - pgs. 61 ¶7, 68 ¶44, 86 ¶7, 93 ¶44, 106; see R.370, Sent.II.Tr. - pg. 35), an objection by Ramiro Ramos that there is an inadequate factual predicate to justify the enhancement as to him, says nothing

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[13](...continued)
guideline and directs a court to apply "any adjustments * * * for any *intended* offense conduct that can be established with reasonable certainty" "governs findings of *intended* conduct *only*." 288 F.3d at 170 (emphasis added). Because Section 2L1.1(b)(2)(C)'s adjustment for harboring 100 or more illegal aliens was applied in the instant case based on what "ha[d] *occurred*" and not what defendant and Ramiro Ramos intended to do, it is justified so long as there is a preponderance of evidence to support it. 288 F.3d at 170 (quoting Sentencing Guidelines § 1B1.3(a)(1)).

about whether defendant brandished a weapon.[14]

In any event, the district court was justified in imposing an enhancement for defendant's brandishing a weapon. After all, as a co-conspirator and participant in the pistol-whipping, defendant is accountable for Ramiro Ramos' brandishing a weapon. In addition, the evidence clearly establishes that defendant and Ramiro Ramos brandished weapons at Alejandro Benitez and Marcos Orozco, respectively (Tr.R. 326 - pgs. 79, 84-86, 88-89; Tr.R. 327 - pgs. 19, 22, 32, 68, 86-88). Consequently, the district court did not commit plain error in imposing an enhancement for brandishing a weapon.

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[14] Lifting a sentence directly from Ramiro Ramos' brief (R.R.Br. 12-13), defendant referring to the PSRs wrongly claims (Br. 11) that the "only incident where a firearm was even mentioned is listed in paragraph 43 * * * where a two level enhancement was provided for the 'threatened use of a firearm Section 2H4.1(b)(2)(B)' which was directly related to harboring charge" (See U.S.R.E. - pg. 57, PSR 1/16/04 - pg. 6 ¶7 (during the pistol-whipping "Ramiro Ramos pointed a gun and threatened to shoot and kill Marcos Orozco, a van driver working for Jose Martinez, and Juan Ramos pointed a gun and threatened to shoot and kill Alejandro Benitez, another van driver")); U.S.R.E. - pg. 63, PSR 1/16/04 - pg. 12 ¶44 (explaining "four level increase pursuant to Section 2L1.1(b)(4)(B) because a firearm was brandished against Alejandro Benitez"); U.S.R.E. - pg. 76, Add.PSR 2/4/04 - pg. 1 (noting that "[p]aragraph 7 includes the specific information regarding the defendant pointing a gun and threatening to kill Alejandro Benitez, and the codefendants pointing guns at other persons'); U.S.R.E. - pg. 78, Add.PSR 2/4/04 - pg. 3 (noting "[a]s outlined in paragraph 7, during the van incident that occurred on May 27, 2000, the defendant pointed a gun and threatened to shoot and kill Alejandro Benitez); (See also U.S.R.E. - pg. 28, Rev.PSR 11/4/02 - pg. 6 ¶5 (same statement as in PSR 1/16/04 - pg. 6 ¶7); U.S.R.E. - pg. 46, FirstAdd.PSR 11/4/02 - pg. 1 (referring to "testimony from Alejandro Benitez that the defendant pointed a gun at him and said he would kill him"); U.S.R.E. - pg. 47, FirstAdd.PSR 11/4/02 - pg. 2 (referring to "trial transcript in which Alejandro Benitez testified that the defendant pointed a gun at him and said he would kill him")).

## III

## THE RECORD SUPPORTS THE DISTRICT COURT'S FINDING THAT THE VICTIM OF THE PISTOL-WHIPPING SUSTAINED "PERMANENT OR LIFE-THREATENING INJURY" SINCE DEFENDANT PLACED HIS VICTIM'S LIFE AT RISK AND CAUSED THE PERMANENT SCARS ON HIS FACE

Lifting almost verbatin Section II C of his co-defendant's brief (R.R.Br. 13-16) defendant contends (Br. 12-14) that the record does not support the district court's finding that the victim of the pistol-whipping sustained "permanent or life-threatening bodily injury."[15] Defendant's argument is without merit.

This Court reviews a district court's factual determination that a victim sustained "permanent or life-threatening bodily injury" for clear error and must "give due deference to the district court's application of the guidelines to the facts." 18 U.S.C. 3742(e). Section 1B1.1, Application Note 1(g) defines "permanent or life-threatening bodily injury" as:

> injury involving a substantial risk of death; loss or substantial impairment of the function of a body member, organ, or mental faculty that is likely to be permanent; or an obvious disfigurement that is likely to be permanent. In the case of kidnaping, for example, maltreatment to a life-threatening degree (*e.g.*, by denial of food or medical care) would constitute life-threatening bodily injury.

Because the Application Note is phrased in the disjunctive, a finding of either

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[15] The district court found that the victim of the pistol-whipping incident sustained permanent or life-threatening injury at Ramiro Ramos' resentencing (See R.360, R.R. Sent.II.Tr. - pgs. 29, 31). At defendant's resentencing, defense counsel stated, the court "made a ruling concerning the nature of the injury [at Ramiro Ramos' resentencing] that would not change from defendant to defendant * * * and thus will just rest on the argument that was previously made in that regard" (R.370, Sent.II.Tr. - pgs. 18, 19).

"permanent" or "life-threatening" injury is sufficient to invoke this enhancement.

The Note also identifies "maltreatment to a life-threatening degree" as one example of life-threatening injury. As a result, "life-threatening" injury occurs when a defendant places his victim in "circumstances [that are] themselves * * * life-threatening, irrespective of any other injury the victim might have suffered." *United States* v. *Morgan*, 238 F.3d 1180, 1188 (9th Cir.), cert. denied, 534 U.S. 863, 122 S. Ct. 146 (2001). See *United States* v. *Torrealba*, 339 F.3d 1238, 1247 n.12 (11th Cir. 2003) (refusing to decide whether "situation" warranted adjustment since the Court found victim's injuries justified increase), cert. denied, 124 S. Ct. 1481 (2004); *United States* v. *Williams*, 258 F.3d 669, 674 (7th Cir.) (holding "life threatening *risk*" sufficient to warrant adjustment) (emphasis added), cert. denied, 534 U.S. 981, 122 S. Ct. 414 (2001). Thus, the Seventh Circuit has explained that "it is hard to see how * * * maltreatment such as being beaten over the head repeatedly with a metal object" would not pose a life-threatening risk sufficient to warrant a six level increase for "permanent or life-threatening injury." *Williams*, 258 F.3d at 674.

Applying this precedent, the record clearly supports the district court's finding of "permanent or life-threatening injury." The evidence reflects that Ramiro Ramos repeatedly smacked the victim in the face with the butt of a gun, as defendant and his cousin repeatedly punched him in the face (Tr.R.326 - pgs. 90-93). Once on the ground, all three defendants repeatedly kicked the victim until he lost consciousness (Tr.R.326 - pgs. 93-95; Tr.R.327 - pgs. 106-107). Since it hardly

can be disputed that a pistol-whipping to the face and head that causes a victim to lose consciousness poses a risk of death, the district court clearly did not err in finding that the conduct "could very easily have resulted in death" (R.360, R.R. Sent.II.Tr. - pg. 29)). See *Williams*, 258 F.3d at 674; *Morgan*, 238 F.3d 1180.

The nature of the victim's injuries also justifies the enhancement. As this Court has explained, "[t]he plain language of application note 1 [(g)] encompasses injuries that may not be terribly severe but are permanent." *Torrealba*, 339 F.3d at 1246 (quoting *United States* v. *Price*, 149 F.3d 352, 354 (5th Cir. 1998)). Consistent with the Application Note, a cut on the face that requires stitches and leaves a noticeable permanent scar is "obvious disfigurement" that constitutes "permanent injury" pursuant to Sentencing Guidelines § 1B1.1. See *United States* v. *Phillips*, 239 F.3d 829, 835 (7th Cir.) (a permanent mark on the cheek and above the eye), cert. denied, 534 U.S. 884, 122 S. Ct. 191 (2001); *United States* v. *Chee*, 173 F.3d 864 (10th Cir. 1999) (unpublished) (permanent scar on the lip); *United States* v. *Cree*, 166 F.3d 1270, 1272 (8th Cir. 1999) (a cut on the face requiring 17 stitches that left a scar). See *United States* v. *Miner*, 345 F.3d 1004, 1006 (8th Cir. 2003) (permanent scar on victim's neck from removal of bullet and presence of a bullet inside his body), cert. denied, 124 S. Ct. 1700 (2004). See also *United States* v. *Jacobs*, 167 F.3d 792, 797-798 (3d Cir. 1999) (facial scar with other injuries). This Court recently affirmed a district court finding that a victim with facial nerve damage and scarring suffered "permanent or life threatening injury," citing *Phillips*, *Chee*, and *Jacobs*. *Torrealba*, 339 F.3d at 1246-1247.

In the instant case, the record reflects that the brutal pistol-whipping resulted in permanent scarring to the victim's face. As a result of the beating, the victim received two lacerations to his face, one that extended "almost from the hairline down his forehead down to the bridge of his nose" and the other on his "upper lip on the right side," both of which required sutures and left scars (Tr.R.327 - pgs. 101, 100). During the trial, the victim displayed the scar on his forehead and at sentencing the Probation Department relied on an affidavit by the victim's treating physician that described the injuries as "permanent disfigurement." (U.S.R.E - pg. 49, SecondAdd. Rev.PSR 11/15/02 - pg. 1; U.S.R.E. - pg. 78, Add.PSR 2/4/04 - pg. 3). Because the record establishes that the victim has a prominent, permanent scar on his face that the district court had an opportunity to observe, this Court cannot conclude that the district court clearly erred in finding the victim suffered "permanent bodily injury."

Defendant, relying (Br. 13-14) on several cases in which a court found "permanent or life-threatening" injury based on injuries more severe than the victim's, argues that the district court misclassified the victim's injuries. As both the Third and Seventh Circuits explained in rejecting an identical argument, "[t]he fact that there are cases that have found other arguably more severe injuries as permanent or life-threatening bodily injuries * * * is of no moment" since the question to be decided is whether in the instant case there is evidence to support the district court's findings. *United States* v. *Jacobs*, 167 F.3d 792, 798 (3d Cir. 1999). See *Phillips*, 239 F.3d at 838. Because the record, here, establishes that the victim

has a prominent permanent scar on his face as a result of the pistol-whipping incident in which defendant participated, the district court's finding is not clearly erroneous.

## CONCLUSION

WHEREFORE, defendant's sentence should be affirmed.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

As required by Federal Rule of Appellate Procedure 32(a)(7)(B), I, Lisa J. Stark, counsel for appellee United States, certify that this brief is proportionally spaced Times New Roman, 14 point font, and contains 11,361 words.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

_____
LISA J. STARK
Attorney

Date: October 29, 2004

## CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2004, two copies of the BRIEF FOR THE UNITED STATES AS APPELLEE were served by first class mail, postage prepaid, to the following counsel of record:

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