No. 02-16478-AA

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RAMIRO RAMOS, JUAN RAMOS and
JOSE RAMOS,

Defendants-Appellants

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

BRIEF FOR THE UNITED STATES AS APPELLEE

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United States v. *Ramiro Ramos, Juan Ramos, Jose Ramos*
No. 02-16478-AA

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:

Ralph F. Boyd, Jr., 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

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SUBJECT MATTER AND APPELLATE JURISDICTION

This is an appeal from judgments of conviction and sentence under the laws of the United States. The district court had jurisdiction pursuant to 18 U.S.C. 3231. It sentenced defendants and entered final judgment on November 20, 2001. All three defendants filed a timely notice of appeal within ten days of judgment. This Court has jurisdiction pursuant to 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

1. Whether the prosecutor's opening remarks are error and warrant reversal.

2. Whether defendants are entitled to reversal of their convictions as a result of the government's alleged failure to provide timely notice of its intent to

introduce Rule 404(b) evidence (see Motion of the United States to Supplement the Record).

3. Whether the amount of the forfeiture, which primarily is proceeds derived from defendants' commission of their crimes and is significantly less than the fine authorized by law and the Federal Sentencing Guidelines, is excessive within the meaning of the Eighth Amendment.

STATEMENT OF CASE

A. Prior Proceedings

On May 24, 2001, a federal grand jury sitting in the Southern District of Florida returned a two-count indictment charging defendants and brothers, Juan and Ramiro Ramos, with harboring illegal aliens in violation of 8 U.S.C. 1324, and conspiracy to hold migrant workers in involuntary servitude in violation of 18 U.S.C. 241 (R. 16).[1] Subsequently, another grand jury returned a four-count superceding indictment charging defendants Juan and Ramiro Ramos and their cousin, Jose Ramos (R. 162). Count One charged all three defendants with conspiracy to achieve three unlawful purposes – to hold migrant workers in involuntary servitude, to engage in extortion to affect commerce, and to harbor illegal aliens for commercial and personal gain, in violation of 18 U.S.C. 371 (R.

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[1] "R." refers to the record number listed on the district court docket sheet. "Br." refers to the consolidated brief filed by all three defendants with this Court. "Tr.R. __ - pg. __" refers to the record number of the trial transcript and page number. Tr.R. 291 - pg. __ refers to the one transcript of defendants' sentencing dated November 20, 2002.

162 - pgs. 4-9). Count Two charged all three defendants with extortion in violation of the Hobbs Act, 18 U.S.C. 1951 (R. 162 - pgs. 10-11). Count Three charged all three defendants with using a firearm during the commission of a violent crime (extortion) (R. 162 - pgs. 11-12). Count Four charged defendants Juan and Ramiro Ramos with harboring illegal aliens in violation of 8 U.S.C. 1324(a) (R. 162 - pg. 12). The indictment also notified defendants Juan and Ramiro Ramos that the government, pursuant to 18 U.S.C. 982(a)(6)(A), would seek forfeiture of proceeds derived from, and properties, vehicles, and shares of stock used to facilitate, their commission of Counts One and Four (R. 162 - pgs. 12-23).

On Friday, May 31, 2002, three days prior to trial, the government faxed to defendants a Notice of Intent to Introduce Evidence Pursuant to Rule 404(b). See Motion of the United States to Supplement the Record. The Notice stated that the government intended to introduce evidence that Juan and Ramiro Ramos, for the tax year(s) 1997 and 1997-2001, respectively, received notices from the Social Security Administration (SSA) that more than 70% of their employees had Social Security numbers that did not match agency records. On May 31, and on June 1, the government also turned over to the defense three boxes of documents it had obtained "in the last few days" because "many of the entities that had received subpoenas did not comply with them in a timely fashion" (Tr.R. 322 - pg. 8). The government stated that it was disclosing the documents out of "an abundance of caution" even though it had "not necessarily gone through all of them" (Tr.R. 322

- pg. 8).

On Monday, June 3, defendants filed a Motion in Limine seeking to exclude the admission of the documents received on May 31 and June 1, on substantive grounds and because of untimely disclosure (R. 208). In both their motion and again in open court, defense counsel declined to seek a continuance and specifically stated that they did not want to delay the trial (R. 208 - pg. 2; Tr.R. 322 - pg. 3).

On June 3, a jury trial commenced (Tr.R. 322). Before selecting a jury, the district court denied defendants' Motion in Limine without prejudice (Tr.R. 322 - pgs. 5-6). The court explained that the motion to exclude evidence was premature since the government had not yet sought to introduce any of the challenged documents (Tr.R. 322 - pgs. 5-7). The court, however, invited defense counsel to object if the government sought their admission and they "feel like [they] are being prejudiced or [] need time to look at the documents or investigate them" (Tr.R. 322 - pg. 10).

On June 4, before the presentation of any evidence, the district court announced that it would not sit the week of June 10, as a result of official court business (Tr.R. 323 - pg. 3). In response, defense counsel stated that the recess would avoid "an unnecessary issue * * * created by the submission of all that late discovery" (Tr.R. 323 - pg. 4). The court also confirmed that consistent with prior arrangements it had made with counsel, it would not sit on Thursday, June 6 (Tr.R. 323 - pgs. 5-9). Consequently, defendants' trial was recessed on June 6, and for

ten days from Friday, June 7, until Monday, June 17 (Tr.R. 323 - pgs. 3, 6, 7).

On June 26, the jury returned its verdict (Tr.R. 262 - pg. 18). It found defendants Ramiro and Juan Ramos guilty on all counts (R. 229; R. 230). The jury found Jose Ramos guilty on Counts Two and Three (R. 231). As to Count One, the jury found him guilty of conspiracy with the intent to extort (Hobbs Act) and not guilty of conspiracy to hold persons in involuntary servitude and conspiracy to harbor illegal aliens (R. 231).

On June 27, the same jury heard evidence during forfeiture proceedings pursuant to 18 U.S.C. 982(a)(6)(A) (R. 232). On that day, the jury returned a special verdict finding that defendants Ramiro and Juan Ramos derived proceeds in the amount of $3,046,093.57 from Counts One and Four and identifying properties, vehicles, and shares of stock defendants used or intended to be used by them to facilitate those offenses (R. 233).

On July 1, 2002, the district court entered a preliminary forfeiture order that it amended on July 12, 2002 (R. 235; R. 242). Those orders, consistent with the jury's special verdict, directed defendants Juan and Ramiro Ramos to forfeit slightly over $3 million in proceeds acquired from the commission of Counts One and Four, as well as listed properties, vehicles, and shares of R&A Harvesting, Inc., used or intended to be used to facilitate those offenses (R. 235; R. 242).

On November 20, 2002, the district court sentenced defendants (R. 282; R. 284). It sentenced defendants Ramiro and Juan Ramos each to a total of 147 months imprisonment, 63 months on Counts One, Two, and Four to run

concurrently, and 84 months on Count Three to run consecutively (R. 282; R. 284). The district court also ordered each to forfeit the property set forth in its amended order of July 12, 2002, and to pay restitution in the amount of $675.00 (R. 282; R. 284; Tr.R. 291 - pgs. 23, 37). In addition, the court ordered Ramiro and Juan Ramos each to pay fines of $15,000 (R. 282; R. 284).

The district court sentenced defendant Jose Ramos to a total of 123 months imprisonment, 63 months on Counts One and Two to run concurrently, and 60 months on Count Three to run consecutively (R. 281). It also ordered him to pay a fine of $10,000 (R. 281). All three defendants filed timely notices of appeal (R. 286; R. 287; R. 288).

B. The Supreme Court's Decision in *Scheidler* v. *NOW*, 123 S. Ct. 1057 (2003).

On February 26, 2003, approximately three weeks before defendants filed their briefs with this Court, the Supreme Court decided *Scheidler* v. *NOW,* 123 S. Ct. 1057 (2003). In *Scheidler*, the Supreme Court held that abortion opponents, "who interfered with, and in some instances completely disrupted, the ability of the," *id.* at 1064, property owners to exercise their property rights "did not commit extortion [within the meaning of 18 U.S.C. 1951] because they did not 'obtain' property [from the victims] as required by the Hobbs Act," *id.* at 1063. In light of the decision in *Scheidler*, the government believes that defendants' convictions on Counts Two and Three should be reversed. Because defendant Jose Ramos was convicted only of Hobbs Act related offenses, the United States has filed a motion

along with this brief requesting his immediate release from custody. See Motion of the United States Seeking Release of Defendant Jose Ramos. Further, because the United States does not intend to retry any of the defendants on the Hobbs Act related counts, it will not address the issues (see the third and fourth issues of appellants' consolidated brief on pages 25-28) raised on appeal that pertain exclusively to those convictions.

C. Facts

Defendants Juan and Ramiro Ramos are brothers, who, together and through their business, R&A Harvesting, Inc., held, housed, and harbored hundreds of migrant workers, who were poverty stricken, uneducated, and unable to speak English.[2] As a result of defendants' hiring more than 750 workers, most of whom they knew were illegal aliens (Tr.R. 325 - pg. 88), from January 1, 2000, until June 30, 2001, the time frame of the charged conspiracy, they made enormous profits by providing inexpensive labor to citrus growers (Tr.R. 325 - pgs. 110-112).

Adalberto Martinez-Gonzales, Jesus Leon Morales, and Juan Castro testified about their experiences of coming from Mexico and working for defendants (Tr.R. 322 - pg. 54). In February 2001, they illegally crossed the border into the United States, hoping to find work that would allow them to send money to support their families who remained in Mexico (Tr.R. 323 - pgs. 161-165; Tr.R. 324 - pgs. 31-34; Tr.R. 325 - pgs. 173-176). After entering the United

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[2] Unless otherwise indicated, any mention of "defendants" refers to Juan and Ramiro Ramos.

States, they wandered in the Arizona desert and slept in a trailer, which belonged to a man whom they did not know, but referred to as El Chapparo (Tr.R. 323 - pgs. 177-178). Within a few days, El Chapparo drove them and 15 others halfway across the country to Lake Placid, Florida (Tr.R. 323 - pgs. 171, 177-180, 186; Tr.R. 324 - pgs. 111-112; Tr.R. 325 - pgs. 178-179). During the trip, none of the illegal aliens had any idea where they were being taken (Tr.R. 324 - pg. 162; Tr.R. 325 -pgs. 200-202).

When they arrived in Lake Placid, El Chapparo stopped at a roadside grocery store and ordered them to remain in the car (Tr.R. 323 - pgs. 180-181; Tr.R. 324 - pgs. 112, 117). After waiting for about an hour, defendants Ramiro and Juan Ramos, whom the illegal aliens came to know as El Diablo (the devil) and El Nino, appeared and asked if they were the ones who had come to work (Tr.R. 323 - pgs. 184-185; Tr.R. 324 - pgs. 118-120). Defendants said that since they had just paid El Chapparo $1,000 for transporting each of them from Arizona, each one of them would have to work hard picking oranges to pay off their debt (Tr.R. 323 - pgs. 181, 183, 185-186; Tr.R. 324 - pgs. 60-63, 119, 125, 195; Tr.R. 325 - pgs. 181-182, 210). The defendants also warned the workers that if any of them left or tried to escape, they would look for, find, kick, beat, and kill them (Tr.R. 323 - pg. 186; Tr.R. 324 - pgs. 64, 85, 119, 145-146, 185, 198; Tr.R. 325 - pgs. 188-191; Tr.R. 326 - pgs. 55-56). As a result, the illegal aliens were afraid and felt as if they had to work for defendants (Tr.R. 323 - pgs. 187, 203, 215; Tr.R. 324 - pgs. 68, 198; Tr.R. 325 - pgs. 23-25, 190, 194; Tr.R. 326 - pg. 55).

Defendants did not give the workers a choice of where to live (Tr.R. 324 - pg. 126; Tr.R. 325 - pgs. 8, 185). Rather, defendants housed them in dirty and poorly maintained facilities where as many as six workers lived together in a room, and deducted $30 a week from their earnings for the lodging (Tr.R. 232 - pgs. 199-200, 214; Tr.R. 324 - pgs. 126-127; Tr.R. 325 -pg. 186; Government Exh. 1). In addition, when Juan Castro asked Ramiro Ramos whether there was a television, he got angry and threatened to "fill [Juan Castro] with lead." Juan Castro understood Ramiro Ramos's threat to mean that defendant would shoot him (Tr.R. 324 - pgs. 128, 136, 167-168).

The day after the workers arrived, defendants made arrangements to have them pick oranges even though they had no identification or documentation authorizing them to be employed in the United States (Tr.R. 323 - pgs. 207-211; Tr.R. 325 - pg. 183). Without asking for any identification or papers, defendants gave the workers cards which had photographs that "kind of looked like [them]" in order to gain access and work at the orange groves (Tr.R. 323 - pgs. 207-208, 210; Tr.R. 324 - pgs. 127, 137; Tr.R. 325 - pgs. 9, 189-190).

Each morning the workers awoke around 5 a.m., and a man who worked for defendants and whom they knew as El Chivero, drove them to the groves, watched them, and gave them a token for each orange bin they filled (Tr.R. 323 - pgs. 209, 213; Tr.R. 324 - pgs. 22-23, 179; Tr.R. 325 - pgs. 9, 11, 184, 209). El Chivero also told one of the workers to hide when someone from the orange grove realized that he was not the person pictured on his identification card (Tr.R. 324 - pgs. 138-

140). The laborers worked a minimum of ten hours a day, never had a day off, and were paid based on the number of oranges bins they filled (Tr.R. 323 - pg. 204; Tr.R. 324 - pgs. 22-23; Tr.R. 325 - pgs. 9, 33-34, 36, 76, 98-99).

After working for defendants for approximately a month, four of the men who had arrived together from Mexico decided to escape because defendant Juan Ramos had threatened one of the workers and they were afraid (Tr.R. 323 - pgs. 215, 225-228; Tr.R. 324 - pgs. 146-147; Tr.R. 325 - pgs. 23-24, 190, 213). To avoid getting caught, the workers left on foot in the middle of the night without taking their belongings or getting fully dressed (Tr.R. 324 - pg. 148). Two of the workers were so afraid that defendants would kill them, they were shaking as they escaped (Tr.R. 325 - pg. 191). One of the laborers, Juan Castro, had called a number on a card he had been given by someone from a human rights coalition who said to call if he ever had problems (Tr.R. 323 - pgs. 231-232; Tr. R. 324 - pgs. 77-79, 147, 181-184). The person from the Coalition picked the workers up at a motel parking lot that night and drove them to the town of Immokalee, which was about an hour away (Tr.R. 323 - pg. 231; Tr.R. 324 - pg. 148; Tr.R. 325 - pg. 191).

The government also established that labor contractors, like defendants, are required to file an I-9 form with the Social Security Administration (SSA) for each worker they hire in order to document that he is legally in the United States and entitled to be employed (Tr.R. 323 - pgs. 17-19; Tr.R. 258 - pg. 8-9). The top half of the form should be filled out by the worker and the bottom half by the

contractor, who certifies that the worker has presented the requisite documentation demonstrating that he may be lawfully employed (Tr.R. 323 - pg. 19; Tr.R. 325 - pgs. 43-44, 58, 130). By signing the form, the contractor verifies that the information on the I-9 form is accurate and that he has inspected the worker's documents (Tr.R. 325 - pgs. 43, 58, 130).

An agent with SSA, Dan Lynch, testified that based on the information contained on the I-9 forms submitted by defendants Juan and Ramiro Ramos from January 1, 2000 through June 30, 2001, the time frame of the alleged conspiracy, only 16 of their 680 workers had valid Social Security numbers (Tr.R. 325 - pgs. 160-161). An agent with the Immigration and Naturalization Service, border patrol agent Craig Fohl, also testified that the same I-9 forms reflected that only ten of defendants' 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). Bookkeeper Yolanda Celaya, whom defendants hired to do their payroll, also identified letters defendants had received from the SSA and given to her, stating that for the tax years 1997-2001, more than half of the employees of Juan Ramos and R&A Harvesting, Inc., had invalid Social Security numbers listed on their I-9 forms (Tr.R. 325 - pgs. 18-19, 60, 63-70, 89-92, 109-112; Government Exhs. 11-17). She also explained that the SSA sent defendants two such letters per year specifying the problem (Tr.R. 325 - pgs.129-131).

The government also introduced evidence regarding an incident involving

all three defendants, which occurred on May 27, 2000. 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 on Route 27 in Lake Placid to pick up additional passengers (Tr.R. 326 - pgs. 61, 66, 131; Tr.R. 327 - pgs. 84-85, 87, 89, 106). While most of the passengers were inside, the three defendants approached one of the drivers with guns drawn (Tr.R. 326 - pgs. 78-79, 84-85; Tr.R. 327 - pgs. 19, 110; Tr.R. 328 - pg. 36). Defendant Ramiro Ramos demanded to see the owner of the van service and then beat one of the drivers as Juan Ramos "racked" his gun and told other van employees and passengers he would shoot them if they moved (Tr.R. 326 - pgs. 79, 84-86, 89, 94; Tr.R. 327 - pgs. 19, 22, 68, 90-92; Tr.R. 328 - pg. 32). As Jose Cervantes-Martinez, Sr., the owner of the van service came outside, Ramiro Ramos, referring to the workers he employed, 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). Ramiro Ramos then pistol-whipped the owner of the van service as defendants Juan and Jose Ramiros kicked him (Tr.R. 326 - pgs. 90-93; Tr.R. 327 - pg. 72). The van owner went to the hospital, received stitches, and was released (Tr.R. 327 - pgs. 100-101; Tr.R. 328 - pg. 68; Tr.R. 256 - pg. 42). The defendants also shattered the windows of the vans with a pole and dismantled the steering column in one of the vans (Tr.R. 326 - pgs. 96-97; Tr.R. 327 - pgs. 24, 97, 99, 102). As a result of the incident, Cervantes-Martinez, the owner of the van service, stopped picking up passengers in Lake Placid (Tr.R. 327 - pgs. 103-104).

The police, who were telephoned by Alejandro Benitez, one of the van drivers not directly involved in the incident, arrived within a couple of minutes (Tr.R. 326 - pgs. 95-98). They arrested defendants as they were leaving the scene in Jose Ramos's pick-up truck and recovered a gun from under the front seat (Tr.R. 326 - pgs. 114-116, 120; Tr.R. 327 - pg. 28; Tr.R. 328 - pgs. 80-82, 92-93). Defendants pled *nolo-contendere* to battery in state court and were ordered to pay restitution of $7,343.42 for the damage they caused (Tr.R. 327 - pgs. 133-134).

The defense presented several witnesses. Defendant Jose Ramos testified at the trial (Tr.R. 330 - pg. 14). He explained that on the night of May 27, 2000, as he drove Juan and Ramiro home from a party, a friend called him on his cell phone and said that there were a lot of people and vans in a parking lot at the El Mercadito store on Route 27 (Tr.R. 330 - pgs. 27-28; Tr.R. 329 - pgs. 26-27). Defendants decided to stop at the location and as they arrived, defendants Juan and Ramiro Ramos immediately got out of his truck (Tr.R. 330 - pgs. 28-31, 96).

According to Jose Ramos, as he sat in his truck for seven or eight minutes, he heard glass breaking and saw a man and his son, whom he knew by name, repeatedly hit and kick the van owner (Tr.R. 330 - pgs. 31-35, 96). He also stated that when Ramiro Ramos, who now had a black eye and was bleeding, and Juan Ramos returned together to his truck, he started to drive away and was stopped by the police (Tr.R. 330 - pgs. 35-36, 103-104). In addition, he said he told a police officer, in response to questioning, that he had a gun inside a zippered pouch under his seat and had a permit authorizing him to carry it (Tr.R. 330 - pgs. 32-33,

37-38).

The defense also called Deputy Klemm, a deputy at the Highland Country Sheriff's Department, as a witness (Tr.R. 259 - pg. 128). He testified that he believed the gun he found in defendant's truck on the evening of May 20, 2000, was in a zippered pouch (Tr.R. 259 - pgs. 132, 136, 163). In addition, Deputy Klemm agreed that none of the witnesses he interviewed at the scene "put guns in the hands of anyone" (Tr.R. 259 - pg. 160).

Richard Hetherton, the Director of Human Resources for Lykes Brothers, a large company that owns several orange groves, also testified (Tr.R. 258 - pgs. 4-5). Hetherton explained the process for filling out I-9 forms and stated that once a worker presents the requisite documentation, a contractor is entitled to accept them at face value without inquiring as to their validity (Tr.R. 258 - pgs. 10-12, 43-44, 70-72). He also testified that his company gives all grove laborers photo identifications which enabled them to record their hours and ensure they receive minimum wage regardless of the number of oranges they pick (Tr.R. 258 - pgs. 12-13, 28, 56).

Joaquin Mendiburo, a safety and environmental compliance manager for Consolidated Citrus, another large grower, who hires labor from Juan and Ramiro Ramos, also testified. He stated that in May 2000, he conducted a random survey of defendants' workers to determine whether defendants treated them fairly (Tr.R. 258 - pgs. 78-84, 105). Mendiburo reported that because none of defendants' workers had any complaints, his company continued to use labor they provided

(Tr.R. 258 - pgs. 84-85). He also explained that due to the nature of the work, there is a high turnover of persons who work as fruit pickers (Tr.R. 258 - pgs. 93-94).

Harvey Largent, a maintenance worker and temporary tenet at the housing facility where workers were living in 2000 (Tr.R. 259 - pgs. 186-187, 206, 211), described the conditions as "nice," stated that each apartment had a stove, a refrigerator, shower, running water, sinks and restrooms, and explained that he too, like the workers, paid $30 a week for rent (Tr.R. 259 - pgs. 188, 187, 211). Largent also said that everyone who lived at the facilities had their own keys and could come and go as they pleased (Tr.R. 259 - pgs. 190, 195). In addition, he stated that he sometimes played soccer in the evening with the workers and they seemed to be "happy" (Tr.R. 259 - pg. 199).

The defense also recalled Jose Cervantes-Martinez, Sr., the owner of the van service. He admitted that he had no records of passengers he had transported in 2000, and that he had lied when he testified that he reported his income from the van service to the Internal Revenue Service (Tr.R. 259 - pgs. 232-233, 236-241).

Finally the defense recalled defendants' bookkeeper Yolanda Celaya. She testified that defendants' workers made minimum wage regardless of how many oranges they picked, that there was a high turnover of farm laborers, who were all basically from Mexico, and that one of the laborers, who testified at trial, had worked for defendants for only three weeks and another for only five weeks (Tr. R. 260 - pgs. 60, 63).

SUMMARY OF ARGUMENT

Defendants contend that their convictions should be reversed because the prosecutor's opening remarks were improper. Defendants' claim fails because the prosecutor's opening statement was not error and defendants were not prejudiced.

Defendants also contend (Br. 10) that the district court abused its discretion by permitting the government to provide "late disclosure of [its] intent to use 404(b) evidence." Defendants' claim is without merit because: (1) they were not entitled to pretrial notice pursuant to Rule 404(b); (2) they nonetheless received "reasonable" notice within the meaning of the Rule; and (3) their assertion is based on a mischaracterization of the record and an apparent misunderstanding of Rule 404(b). Assuming *arguendo* that the government failed to provide adequate notice and/or belatedly turned over certain documents, defendants are not entitled to relief because they refused the district court's invitation to seek a continuance, had adequate time to prepare their defense, and have not demonstrated actual prejudice.

Defendants also contend (Br.1 25) that the forfeiture is excessive and violates their Eighth Amendment rights because it is "grossly disproportional to the gravity of the[ir] offenses."[3] Defendants' claim is without merit. First, nearly 75% of the forfeiture is not subject to Eighth Amendment analysis because it

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[3] "Br.1" refers to the brief of defendants Juan and Ramiro Ramos filed with this court on March 19, 2003, which includes a claim (pp. 25-26) that the forfeiture is excessive in violation of the Eighth Amendment. This argument does not appear in defendants' consolidated brief.

constitutes proceeds derived from their offenses. Even so, the total amount of the forfeiture is not excessive because it is substantially less than the fine authorized by law and the Federal Sentencing Guidelines.

ARGUMENT

I.

THE PROSECUTOR'S OPENING STATEMENT WAS PROPER AND DOES NOT WARRANT REVERSAL

Defendants contend (Br. 15, 19-22) that their convictions should be reversed because the district court abused its discretion in failing to sustain their objections to the prosecutor's opening statement. The prosecutor's opening remarks were proper, and in any event, could not have prejudiced defendants since the jury was repeatedly instructed that arguments of counsel are not evidence and the evidence of defendants' guilt was overwhelming.

"To establish a claim of prosecutorial misconduct, a defendant must first prove that the prosecutor made an improper remark." *United States* v. *Chirinos*, 112 F.3d 1089, 1098 (11th Cir. 1997), cert. denied, 522 U.S. 1052 (1998). Even when a prosecutor's statements are improper, a defendant is not entitled to reversal unless they "permeate the entire atmosphere of the trial," *United States* v. *Elkins*, 885 F.2d 775, 786 (11th Cir. 1989), cert. denied, 494 U.S. 1005 (1990), "contribute to a miscarriage of justice," *United States* v. *Obregon*, 893 F.2d 1307, 1310 (11th Cir.), cert. denied, 494 U.S. 1090 (1990), and deny him "a fair trial," *Chirinos,* 112 F.3d at 1099. Defendants' claim fails on both counts.

Defendants contend (Br. 21) that the prosecutor in her opening statement "misstat[ed] the facts," "put[] into the minds of the jury things which were not true," and made "statements [that] were overly suggestive." The remarks referenced in their brief, however, do not reveal any error.

First, defendants argue (Br. 15) that the prosecutor "prejudic[ed] and biased * * * the jury" when she summarized the testimony of three laborers, who had come from Mexico and worked for defendants, stating (Br. 15, quoting Tr.R. 322 - pg. 51):

> I started in Mexico, and you will hear from three or four of these migrant workers. There are hundreds, but your will hear from three or four.

It is unclear why defendants believe this comment is prejudicial. Indeed, it accurately reflects the testimony of several witnesses, including Yolanda Celaya, defendants' bookkeeper, who agreed that no "American citizens work[] the fields" and acknowledged that defendant Ramiro Ramos hires hundreds of "migrant workers" (Tr.R. 325 - pgs. 88, 110; Tr.R. 260 - pg. 73).

Moreover, defendants have no basis to complain about the prosecutor's comment since counsel for both Juan and Ramiro Ramos made the same point in their opening statements. See *Chirinos,* 112 F.3d at 1098 (focusing on defense counsel's opening statement in assessing whether the prosecutor's opening statement was prejudicial). Defense counsel for Ramiro Ramos commented (Tr.R. 322 - pg. 65):

Ramiro Ramos had in excess of two hundred people working for him

> on any given week, and [] the record will show that he had in excess of a thousand people, Mexican Americans and Mexicans who have worked for him during the course of the last ten years * * *.

In addition, defense counsel for Juan Ramos stated, "the evidence will show * * * most of the people who do the picking are the Mexicans. That [sic] came here to the United States" (Tr.R. 322 - pg. 72). Accordingly, because the prosecutor's comment accurately summarizes the trial testimony and amounts to nothing more than what defense counsel said in their opening statements, it is not error.

Defendants also suggest (Br. 21-22) that the prosecutor committed reversible error when she stated that the fruit pickers "were forced to pay [defendants] 30 dollars a week" for facilities that were "filthy," "overcrowded," and not the type "you would * * * want to live [in] [] yourself" (Tr.R. 322 - pg. 54). Contrary to defendant's claim (Br. 21), this comment is not "overly suggestive," indicative of any "intent to cause jury bias," or a misstatement of the evidence.

Further, defendants again have no basis to complain since defense counsel for Juan Ramos made the identical point in virtually the same way during his opening statement. He explained that the housing for defendants' workers is "a very low cost place to live. No frills. Not nice. *Not a place where most people would want to stay"* (Tr.R. 322 - pg. 74). Thus, the prosecutor should not be faulted for her comment.

To the extent that defendants argue (Br. 22) that the prosecutor's opening statement is not "[t]he time and place * * * for detailing [the] evidence,"

"focus[ing] the jury's attention on the trial evidence," or "recit[ing] the anticipated testimony or other evidence at length and in detail," they misunderstand its function. The purpose of opening statements is to allow counsel to summarize the evidence that he or she anticipates will be presented. See *Eleventh Circuit Pattern Jury Instructions*, Comm. on Pattern Jury Instructions, District Judges Ass'n, Trial Instruction 1.1 at 416 (1997) (stating that opening statements are so "lawyers for each side * * * may explain the issues in the case and summarize the facts they expect the evidence will show"). Consequently, defendants have failed to meet their initial burden of establishing that the prosecutor's opening statement is improper.[4]

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[4] Even assuming error, defendants are not entitled to reversal of their convictions because the government's opening statement did not "undermine[] 'the fairness of the trial.'" *Obregon*, 893 F.2d 1310, quoting *United States* v. *Sawyer,* 799 F.2d 1494, 1507 (11th Cir. 1986), cert. denied, 479 U.S. 1069 (1987)). Given the overwhelming evidence of defendants' guilt, which includes testimonial and documentary evidence that defendants, by the use of threats, knowingly held, housed, and harbored hundreds of illegal aliens, for the purpose of reaping enormous financial profits, the prosecutor's comments could not have affected the outcome of the trial.

In addition, immediately prior to opening statements and again at the conclusion of the trial, the district court instructed the jury that arguments of counsel are not evidence (Tr.R. 321 - pg. 52; R. 227 - pg. 5). Thus, defendants could not have been unfairly prejudiced by the prosecutor's opening statement. See, *e.g., Cargill* v. *Turpin*, 120 F.3d 1366, 1381 (11th Cir. 1997) (holding that court's instruction that argument was not evidence ensured that the prosecutor's three improper remarks during opening statement were not unduly prejudicial), cert. denied, 523 U.S. 1080 (1998).

To the extent that defendants now contend (Br. 22) that the district court should have taken additional curative measures, their claim is unwarranted and most certainly belated. In addition to the fact that such measures were

II.

DEFENDANTS ARE NOT ENTITLED TO REVERSAL OF THEIR CONVICTIONS AS A RESULT OF THE GOVERNMENT'S ALLEGED FAILURE TO PROVIDE TIMELY NOTICE OF ITS INTENT TO INTRODUCE 404(b) EVIDENCE

Defendants contend (Br. 10) that the district court abused its discretion by permitting the government to provide "late disclosure of [its] intent to use 404(b) evidence." Without identifying the specific 404(b) evidence introduced at trial to which they allegedly had inadequate notice or challenging its admissibility on substantive grounds, defendants claim they were wrongly convicted.

Defendants' claim is without merit. First, defendants were not entitled to pretrial notice pursuant to Rule 404(b). Second, although not required, the government provided defendants with "reasonable notice" in advance of trial within the meaning of Rule 404(b). Third, defendants' assertion is based on a mischaracterization of the record and an apparent misunderstanding of the Rule. Assuming *arguendo* that the government failed to provide adequate notice and/or belatedly turned over certain documents, defendants are not entitled to relief because they refused the district court's invitation to seek a continuance, had adequate time to prepare their defense, and have not demonstrated actual prejudice.

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unnecessary the defense, upon completion of the prosecutor's opening statement, never requested that the court direct the jury to disregard certain remarks, give a curative instruction, or grant a mistrial. Accordingly, defendants are not entitled to reversal of their convictions based on the prosecutor's opening statement.

At the outset, defendants' claim that the government failed to provide timely notice of its intent to introduce 404(b) evidence, must be evaluated under a plain error standard. That is because the defendants below refused to request a continuance, to accept the district court's invitation as the trial began, or to ask for additional time at any point during the trial to examine documents or other evidence for which they allegedly did not receive timely notice or disclosure. See *United States* v. *Bullard*, 37 F.3d 765, 768 (1st Cir. 1994) (evaluating claim that government violated its discovery obligation by failing to disclose substance of officer's testimony under plain error standard in part because defense never requested delay or continuance when officer testified), cert. denied, 514 U.S. 1089 (1995); *United States* v. *Garcia*, 917 F.2d 1370, 1374 (5th Cir. 1990) (explaining that defendant's failure to request a continuance to respond to material subject to disclosure during discovery weighs against defendant). As a result, defendants are entitled to reversal of their convictions only if the government's allegedly untimely notice "'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings,' and then only when a miscarriage of justice would result." *United States* v. *Brazel*, 102 F.3d 1120, 1151 n.21 (11th Cir.) (quoting *United States* v. *Williford*, 754 F.2d 1493, 1502 (11th Cir. 1985)), cert. denied, 522 U.S. 822 (1997).

Rule 404(b) sets forth the standard for the admission of "other crimes" evidence unrelated to the charged offenses. The district court has broad discretion in determining whether to admit 404(b) evidence and its determination will not be

disturbed on appeal unless there is a clear abuse of discretion. *United States* v. *Prosperi*, 201 F.3d 1335, 1348 (11th Cir.), cert. denied, 531 U.S. 956 (2000). See also *United States* v. *Powers,* 59 F.3d 1460, 1464 (4th Cir. 1995), cert. denied, 516 U.S. 1077 (1996).

"To reduce surprise" resulting from the presentation of "other crimes" evidence, the Rule requires the government, "upon request by the accused[,] * * * [to] provide reasonable notice in advance of trial, or during the trial" of "other crimes" evidence "it intends to introduce." Fed. R. Evid. 404(b), Advisory Comm. Notes, 1991 Amendments; Fed. R. Evid. 404(b).[5] The Rule does not define "reasonable," or impose any precise time limits for disclosure. *Ibid.* See Fed. R. Evid. 404(b), Advisory Committee Notes, 1991 Amendments. It does, however, recognize that notice in advance of trial will not always be possible and that timeliness will "depend largely on the circumstances of each case." *Ibid.*

Even when there is a specific request by the defense, the Rule and its notice provision apply only to the presentation of "other crimes" evidence unrelated to the charged offense. *United States* v. *Perez-Tosta*, 36 F.3d 1552, 1561 (11th Cir. 1994) (quoting Fed. R. Evid. 404(b), Advisory Committee Notes), cert. denied, 515 U.S. 1145 (1995). More specifically, the Rule does not cover or impose a

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[5] Defendants never made a pretrial request for 404(b) evidence. However, the magistrate issued a four page standing discovery order as to each defendant providing *inter alia,* that "the government shall advise the defendant(s) of its intention to introduce during its case in chief proof of evidence, pursuant to Rule 404(b), Federal Rules of Evidence" (R. 23 - pgs. 2-3; R. 27 - pgs. 2-3; R. 96 - pgs. 2-3).

notice requirement for evidence of criminal activity which: "(1) * * * ar[i]se[s] out of the same transaction or series of transactions as the charged offense, (2) [is] necessary to complete the story of the crime, or (3) [is] inextricably intertwined with evidence regarding the charged offense." *United States* v. *Jiminez*, 224 F.3d 1243, 1249 (11th Cir. 2000), cert. denied, 534 U.S. 1043 (2001); *United States* v. *McLean*, 138 F.3d 1398, 1403 (11th Cir.), cert. denied, 525 U.S. 896 (1998); *United States* v. *Ramsdale*, 61 F.3d 825, 829 (11th Cir. 1995). Indeed, the Advisory Committee Notes provide that the notice provision, which was adopted pursuant to a 1991 amendment, "does not extend to evidence of acts which are 'intrinsic' to the charged offense." Fed. R. Evid. 404(b), Advisory Comm. Notes, 1991 Amendments. Thus, the government is not obligated to provide defendants with *any* notice of bad acts or wrongs that substantially relate to the charged offenses. See, *e.g., United States* v. *Leavitt,* 878 F.2d 1329, 1339 (11th Cir.), cert. denied, 493 U.S. 968 (1989). This is so even when the government relies on Rule 404(b) to admit evidence that is not actually covered by the Rule. *McLean*, 138 F.3d at 1404-1405.

1. Although the government provided the defense with pretrial Notice of Intent to Introduce Evidence Under Rule 404(b), it was not required to do so because the evidence identified in its notice was not "other crimes" evidence within the meaning of the Rule. On May 31, 2001, three days prior to trial, the government provided defendants with written notice that the government intended to introduce evidence that defendants Juan and Ramiros Ramos had knowledge

that, for the tax year(s) 1997 and 1997-2001, respectively, more than 70% of their employees had Social Security numbers that did not match records of the Social Security Administration (SSA).

Evidence that defendants had knowledge that a large percentage of their workforce over a period of years had invalid Social Security numbers is *not* "other crimes" evidence within the meaning of Rule 404(b) because it demonstrates a continuing pattern of illegal activity that is inextricably intertwined with the charged offenses. In addition, since the government had to demonstrate that defendants were aware that their workforce consisted primarily of illegal aliens to establish guilt as to Counts One and Four, evidence establishing that they knew that a substantial percentage of their workers had invalid Social Security numbers and thus were not authorized to work is intrinsic and relevant to the charged offenses. Thus, the government was not required pursuant to Rule 404(b) to provide notice to the defense that it intended to introduce evidence relating to the Social Security numbers of their workers as to the years preceding 2000, or the dates of the charged conspiracy.[6]

2. Although not required, the government nonetheless provided defendants with "reasonable notice" in advance of trial that it intended to introduce evidence

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[6] Evidence pertaining to the Social Security numbers of defendants' workforce from January 1, 2000, until June 30, 2001, the time frame of the charged conspiracy, is clearly not "other crimes" evidence since it is direct evidence as to defendants' state of mind during the commission of the charged offenses.

that defendants had knowledge that a substantial percentage of their workforce consistently and repeatedly had invalid Social Security numbers. In assessing the sufficiency of 404(b) notice, this Court has focused on three factors: (1) "the motivations and circumstances of the party presenting the evidence"; (2) "the prejudice suffered by the defendant"; and (3) "the importance of the evidence to the proponent's case." *Perez-Tosta*, 36 F.3d at 1561-1562. Courts have recognized notice provided immediately prior to or in the midst of trial to be "reasonable" and timely. See *e.g., id.* at 1560 (disclosure a few minutes before jury selection); *United States* v. *Lopez-Gutierrez,* 83 F.3d 1235, 1240-1241 (10th Cir. 1996) (disclosure in the midst of trial); *United States* v. *Sutton,* 41 F.3d 1257, 1258-1259 (8th Cir. 1994) (disclosure two days prior to the start of trial).

a. The government was diligent in both providing pretrial notice of and disclosing the evidence it introduced at trial to establish that defendants knew that their workers repeatedly had invalid Social Security numbers. First, on May 31, *three days prior to trial*, the government, pursuant to Rule 404(b), provided defendants with written notice that it intended to introduce evidence that defendants, over the years, had received letters from the SSA stating that more than 70% of their workforce had Social Security numbers that did not match agency records. See Motion of the United States to Supplement the Record.

Moreover, nearly eight months before the trial, the government turned over most of the evidence it introduced into evidence pertaining to the letters from SSA. More specifically, on October 12, 2001, after receiving business records

subpoenaed from Yolanda Celaya, defendants' bookkeeper, the government promptly turned over letters from the SSA to Juan Ramos, Ramiro Ramos, and/or R&A Harvesting, Inc. indicating that 70% of the names and Social Security numbers of defendants' workforce from 1996-2002 did not match SSA's records.[7] Accordingly, the government's disclosure of certain documents well in advance of trial along with its pretrial written notice constitutes reasonable pretrial notice of its intent to introduce evidence pertaining to the Social Security numbers of defendants' workforce. See *e.g., United States* v. *Holmes*, 111 F.3d 463, 468 (6th Cir. 1997) (reasonable 404(b) notice provided when government mentioned witness during jury voir dire and provided defense with a copy of a government agent's interview of him a few weeks prior to trial); *United States* v. *Valenti*, 60 F.3d 941, 945 (2d Cir. 1995) (reasonable 404(b) notice given when the government, four days prior to trial, provided documents to defense on the day it received them); *Sutton*, 41 F.3d at 1258 (reasonable 404(b) notice of defendant's drug use provided when the government, rather than complying with court order to provide notice four days prior to trial, gave only two days notice and a month before trial, provided defendant with a witness statement specifying that defendant

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[7] The government introduced some of the letters into evidence as exhibits 11-15 (Tr.R. 325 - pgs. 18-19, 63, 65-68). The government also introduced into evidence, as exhibits 16 and 17, letters from SSA to R&A Harvesting, Inc., indicating the same irregularity with Social Security numbers for the tax years 2000 and 2001 (Tr.R. 325 - pg. 70). The government turned over these letters on May 30, four days prior trial, the same day it received them by fax from SSA agent David Lynch.

was involved in a drug buy); *Perez-Tosta*, 36 F.3d at 1561-1562 (reasonable 404(b) notice provided when case agent and prosecutor learned of evidence a week before trial and informed defendants a few minutes before jury selection).

b. The government's pretrial notice and disclosure of documents was also reasonable since defendants suffered no prejudice. Because the government provided written pretrial notice and much of the evidence relating to it eight months prior to trial, defendants had ample time in the months and weeks prior to the trial to prepare their case, including any response relating to the irregularity in their workers' Social Security numbers.

Moreover, the trial schedule ensured that defendants had ample time in the middle of trial to respond to the government's evidence relating to the subject of the pretrial notice. First, the defense did not begin its case until 20 days *after* its receipt of the government's May 31 pretrial notice (Tr.R. 330 - pg. 14). More significantly, on June 4, prior to the presentation of *any* evidence, the district court informed the parties that the trial would be recessed the entire week of June 10 (Tr. R. 323 - p. 3). As a result, defense counsel for defendant Ramiros Ramos commented that the court's recess avoids "an unnecessary issue * * * created by the submission of all that late discovery. * * * I think that will take care of some of the issues that have to do with the late submission of discovery" (Tr.R. 323 - p. 4). See, *e.g., Holmes,* 111 F.3d at 468 (concluding that "postpon[ing] [witness's] testimony for five days * * * [gave] defense time to prepare, and remov[ed] any possibility of unwarranted prejudice"); *Perez-Tosta,* 36 F.3d at 1562

(government's notice immediately before jury voir dire that provided defendant's investigator with six days during the trial to check out witness's account was sufficient to avoid prejudice).

Further, defendants never sought a continuance once the government provided its 404(b) pretrial notice and turned over certain documents a few days before the trial began (see Motion of the United States to Supplement the Record). In addition, the defense did not accept the court's invitation to request additional time to prepare its defense when the government introduced any evidence during the trial (Tr.R. 322 - p. 10). Accordingly, defendants are hardly in a position to argue (Br. 25) that the government's untimely notice or disclosure of documents caused them prejudice or resulted in insufficient time to "verify * * * information," "contact" witnesses, or "meaningful[ly] cross-examine * * * prosecution witnesses." See, *e.g., United States* v. *Beras,* 183 F.3d 22, 26 (1st Cir. 1999) (explaining that "where defense counsel does not seek a continuance upon belated receipt of discoverable information, a court * * * can assume that counsel did not need more time to incorporate the information into the defense's game plan") (quoting *United States* v. *Sepulveda*, 15 F.3d 1161, 1173 (1st Cir. 1993), cert. denied, 512 U.S. 1223 (1994)); *Valenti*, 60 F.3d at 945 (explaining that "[i]t is not without significance that [defense] failed to seek a continuance or other postponement to study documents," in holding that government's disclosure of 404(b) documents four days prior to trial was reasonable); *United States* v. *French*, 974 F.2d 687, 695 & n.11 (6th Cir. 1992) (rejecting defendant's claim of

prejudice resulting from inadequate 404(b) notice in part because "there was no motion to continue"), cert. denied, 506 U.S. 1066 (1993). Further, to date, nearly a year after their trial, the defense still has not come forward with a single witness they would have presented had they had more time to investigate. *United States* v. *Green*, 258 F.3d 683, 694 (7th Cir. 2001) (explaining that without a demonstration that inadequate or untimely notice resulted in actual prejudice or affected trial preparation, defendant is not entitled to reversal under plain error standard). See also *United States* v. *Kuenstler*, 2003 WL1873308 *6 (8th Cir. Apr. 15, 2003) (holding that defendant is not entitled to reversal based on alleged discovery violation because he neither requested a continuance nor demonstrated actual prejudice) (same). Accordingly, defendants are not entitled to relief because they have not established prejudice. See *Valenti*, 60 F.3d at 945. See also *French*, 974 F.2d at 695.

c. Finally, the evidence regarding the pattern of employing workers with invalid Social Security numbers was significant to the government's case. Counts One and Four required the government to establish that defendants had knowledge that their workers were illegal aliens. See *Perez-Tosta,* 36 F.3d at 1562, (explaining that because "rule 404(b) is a rule of inclusion, [] 404(b) evidence, like other relevant evidence, should not lightly be excluded when it is central to the prosecution's case"). The fact that defendants received official notification from the SSA each and every year for six years that 70% of their workforce had invalid Social Security numbers was important evidence in

establishing defendants' intent with regard to Counts One and Four. Thus, the government provided reasonable notice pursuant to Rule 404(b) and defendants are not entitled to reversal of their convictions.

3. Defendants also misconstrue both the record and Rule 404(b) when they claim (Br. 23) that the government "ambush[ed]" them by providing "over 3000 pages of 404(b) material after the jury had been selected."

First, the government did not provide defendants with a significant amount of discovery *after* the jury was selected. Jury selection was on Monday, June 3, and on May 31 and June 1, the government turned over three boxes of documents, which in substantial part included records previously disclosed to the defense and Jencks material (Tr.R. 322 - pg. 8).[8]

Moreover, to the extent that defendants now complain that the government failed to disclose each piece of 404(b) evidence it introduced at trial, their claim fails. First, defendants have not identified a single piece of 404(b) evidence that was introduced at trial for which they had inadequate pretrial notice. In addition, Rule 404(b) does not mandate the disclosure of documents or evidence. Rather, it

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[8] After the trial began, the government provided the defense with some additional discovery that was not 404(b) evidence. On June 3, the government provided the defense with Jencks material for two witnesses it had just decided it would call, handwritten notes made in the past two days by a government agent who was to be a witness, and two I-9 forms for two workers. On June 7, the government also provided defendants a spreadsheet it had received from a Social Security agent the day before, identifying defendants' workers, who during the pendency of the conspiracy, had invalid Social Security numbers (Tr.R. 325 - pgs. 154, 157-162).

requires the government to provide *notice* of its intent to introduce evidence so that defense counsel are aware "of the general nature of the * * * extrinsic acts." Fed. R. Evid. 404(b), Advisory Comm. Notes, 1991 Amendments. See, *e.g.,* *United States* v. *Robinson*, 110 F.3d 1320, 1326 (8th Cir.) (404(b) notice reasonable even though it did not include details regarding the entire substance of witness' testimony), cert. denied, 522 U.S. 975 (1997); *United States* v. *Lampley*, 68 F.3d 1296, 1300 n.4 (6th Cir. 1995) (404(b) notice reasonable even though it is not entirely consistent with witness's testimony). Accordingly, defendants' claim that the government violated Rule 404(b) when it belatedly turned over certain documents is without merit.[9]

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[9] To the extent that defendants' claim (Br. 23) of "ambush" implies that the government was lax in turning over discoverable documents and/or withheld certain information to gain a tactical advantage, the record does not support their claim. First, the government, in the court below, explained that the three boxes of documents turned over to the defense on May 31 and June 1 were records it had received "in the last few days" because "many of the entities that had received subpoenas did not comply with them in a timely fashion" (Tr.R. 322 - pg. 8). In fact, the government was so intent on providing documents expeditiously upon receipt, that on May 31, and June 1, it turned over the documents before fully reviewing them and in the months leading up to the trial, the government promptly and repeatedly provided the defense with tens of thousands of documents as they became available from various sources.

Moreover, contrary to the inference of their brief, it was defense counsel, not the government, who failed to provide discovery as required. For example, on November 13, 2001, and January 28, 2002, respectively, the government filed and the district court granted, a motion to compel defendants to comply with a grand jury subpoena *duces tecum* (R. 109; R. 124).

Even assuming *arguendo* that the government somehow failed to comply with its discovery obligations, defendants are not entitled to relief. It is well established that a defendant is entitled to reversal of his conviction for a discovery

III.

FORFEITURE THAT IS PRIMARILY PROCEEDS OF DEFENDANTS' CRIMES AND CONSTITUTES AN AMOUNT SUBSTANTIALLY LESS THAN THE FINE AUTHORIZED BY LAW AND THE SENTENCING GUIDELINES IS NOT EXCESSIVE WITHIN THE MEANING OF THE EIGHTH AMENDMENT

Defendants contend (Br.1 25) that the forfeiture is excessive in violation of their Eighth Amendment rights because it is "grossly disproportional to the gravity of [their] offenses." Defendants' claim is without merit.

The Eighth Amendment bars the imposition of excessive fines. *United States* v. *Bajakajian*, 524 U.S. 321, 327 (1998). It has no bearing, however, on the forfeiture of money or property that are the proceeds of a defendant's criminal activity. *Smith* v. *United States,* 76 F.3d 879, 882 (7th Cir. 1996); *United States* v. *Wild,* 47 F.3d 669, 674 n.11, 676 (4th Cir.), cert. denied, 516 U.S. 842 (1995); *United States* v. *Alexander*, 32 F.3d 1231, 1236 (8th Cir. 1994); *S.E.C.* v. *Bilzerian*, 29 F.3d 689, 696 (D.C. Cir. 1994). See *Austin* v. *United States*, 509 U.S. 602, 622 n.14 (1993) (explaining that "a fine that serves purely remedial purposes cannot be considered 'excessive' in any event"). Since a defendant has no lawful right or entitlement to gains derived from illegal activity, an order requiring forfeiture of the proceeds or fruits of his criminal activity is not a fine,

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violation only if it affects his substantial rights so as to preclude him from actually presenting a defense. *United States* v. *Tinoco*, 304 F.3d 1088, 1119 (11th Cir. 2002), cert. denied, 123 S. Ct. 1484 (2003); *United States* v. *Chastain*, 198 F.2d 1338, 1348 (11th Cir. 1999), cert. denied, 532 U.S. 996 (2001). Here, because defendants, as discussed, have suffered no prejudice, their convictions should stand.

but a guarantee that he does not unfairly derive economic benefit from his unlawful conduct. See *Alexander,* 32 F.3d at 1236. See also *United States* v. *Tilley*, 18 F.3d 295, 300 (5th Cir.), cert. denied, 513 U.S. 1015 (1994).

Forfeiture for violations of Counts One and Four are governed by 18 U.S.C. 982(a)(6)(A), which permits forfeiture of the proceeds derived from illegal activity, as well as conveyances and property used in, or to facilitate the offenses. As the jury found in its special verdict, nearly 75% of the total amount forfeited, or $3,046,093.57, constitutes proceeds derived from defendants' unlawful conduct for which the jury had found them guilty of Counts One and Four. Accordingly, that portion of the forfeiture is not an excessive fine barred by the Eighth Amendment.

Moreover, the forfeiture of the various properties, vehicles, and shares of stock of R&A Harvesting, Inc., which defendants value at more than $700,000, were found by the jury to facilitate their crime and are not an excessive fine within the meaning of the Eighth Amendment.[10] A punitive forfeiture is constitutionally excessive only "if it is grossly disproportional to the gravity of [] defendant[]s[']s offense." *United States* v. *10380 S.W. 28th Street*, 214 F.3d 1291, 1295 (11th Cir.) (quoting *Bajakajian*, 524 U.S. at 334), cert. denied, 531 U.S. 969 (2000). Because "[j]udgments about the appropriate punishment for an offense belong in

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[10] Because the value ascribed by defendants to the properties, vehicles, and shares of stock is well below the maximum fine prescribed by law and the Sentencing Guidelines, it is not necessary for the government in this appeal to address the question of whether they have correctly valued those items.

the first instance to the legislature," this Court "look[s] to the maximum fine for [d]efendant's offenses, as prescribed by Congress and the United States Sentencing Commission (USSC), in determining whether the [] forfeiture is excessive." *United States* v. *Dicter*, 198 F.3d 1284, 1292 (11th Cir. 1999) (quoting *Bajakajian*, 524 U.S. at 336), cert. denied, 531 U.S. 828 (2000). "If the value of forfeited property is within the range of fines prescribed by Congress, a strong presumption arises that the forfeiture is constitutional * * * [and] almost certainly is not excessive." *10380 S.W. 28th Street*, 214 F.3d at 1295 (quoting *United States* v. *817 N.E. 29th Drive*, 175 F.3d 1304, 1309-1310 (11th Cir. 1999), cert. denied, 528 U.S. 1083 (2000)). See *Dicter*, 198 F.3d at 1292.

The defendants' forfeiture of properties, vehicles, and shares of stock is not excessive because it is substantially less than the maximum fine authorized both by law and the Federal Sentencing Guidelines. The government sought forfeiture pursuant to Counts One and Four, which charged defendants with conspiracy in violation of 18 U.S.C. 371, and harboring illegal aliens in violation of 8 U.S.C. 1324(a). The latter statute states that in a case "in which the offense was done for the purpose of commercial advantage or private financial gain, [a defendant shall] be fined under Title 18." 8 U.S.C. 1324(a)(1)(B)(i).

Title 18 has a special fine provision when individuals, like defendants, commit an offense for financial gain. More specifically, 18 U.S.C. 3571(d), entitled "Alternative fine based on gain or loss," specifies:

> If any person derives pecuniary gain from the offense,

> * * * the defendant may be fined not more than the greater of twice the gross gain * * * unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.

Accordingly, a fine up to twice the gross gain derived by a defendant from the offenses is permissible under the law.

Consistent with Title 18, the Federal Sentencing Guidelines also allow defendants who commit offenses that result in pecuniary gain to be fined "at least twice the amount of gain * * * resulting from the offense." U.S.S.G. § 5E1.2, Commentary, Application Note 4. More specifically, "the guidelines do not limit the maximum fines in * * * cases" where "the defendant is convicted under a statute authorizing [] a maximum fine greater than $250,000." U.S.S.G. § 5E1.2, Commentary, Application Note 5; U.S.S.G. § 5E1.2(4). Accordingly, a defendant convicted of a violation of 8 U.S.C. 1324, which authorizes a fine pursuant to 18 U.S.C. 3571(d), may be fined up to twice the gross gain derived from their offenses under the Sentencing Guidelines. See, *e.g., 817 N.E. 29th Drive,* 175 F.3d at 1310 (relying on U.S.S.G. § 5E1.2(c)(4) of the Sentencing Guidelines in holding that forfeiture that was less than statutory maximum fine of $1 million was proportional and did not violate the Eighth Amendment).

In the instant case, the maximum fine permissible pursuant to 18 U.S.C. 3571(d) and the Sentencing Guidelines is twice defendants' gain of $3,046,093.57, or $6,092,197.14. Because the total amount of the forfeiture, even including proceeds that are not subject to Eighth Amendment analysis, is significantly less

than (and only slightly more than half) the fine authorized by law, it is not excessive within the meaning of the Eighth Amendment. See, *e.g., United States* v. *Garrison,* 133 F.3d 831, 851 n.36 (11th Cir. 1998) (applying 18 U.S.C. 3571(d) and holding that fine of $2.5 million is not unreasonable and is consistent with the Sentencing Guidelines even though offense for which defendant was convicted imposed a maximum fine of $250,000); *United States* v. *Wilder*, 15 F.3d 1292, 1300 (5th Cir. 1994) (holding that fine of $4 million is proper pursuant to Sentencing Guidelines and 18 U.S.C. 3571(d)).

Even if the forfeiture in this case were somehow outside the range prescribed by statute, it nonetheless would be constitutional since it is not "grossly disproportional to the gravity of [] defendant[s]'[] offense." *Bajakajian*, 524 U.S. at 334. First, the mere fact that a forfeiture within the range authorized by law is presumptively constitutional, does not mean that a forfeiture in excess of it is necessarily unconstitutional. *817 N.E. 29th Drive,* 175 F.3d at 1309 n.9. Moreover, while a proportionality standard requires that "the core * * * comparison * * * [be] the severity of the fine with the seriousness of the underlying offense," this Court has recognized that all "relevant factors" should be considered. *United States* v. *427 and 429 Hall Street*, 74 F.3d 1165, 1172 (11th Cir. 1996). See *e.g., Dicter*, 198 F.3d at 1292 n.11 (rejecting defendant's contention that forfeiture of his medical license, which "represents his entire livelihood" was excessive in light of the statutory penalty, defendant's repeated unlawful conduct, and the large quantities of drugs involved). Accordingly, here,

in light of all relevant factors, including the statutory penalty, defendants' pervasive and continuing pattern of unlawful conduct, the seriousness of defendants' crimes, the number and vulnerability of the defendants' victims, the fact that defendants' offenses do not constitute a single isolated criminal act, and the substantial connection between the properties and items forfeited and defendants' illegal conduct, the forfeiture is not "grossly disproportionate to the gravity of his crimes." *Id.* at 1292. Accordingly, the forfeiture does not violate defendants' Eighth Amendment rights.

CONCLUSION

For the reasons articulated in this brief, the judgment of conviction and forfeiture of Juan and Ramiro Ramos as to Counts One and Four should be affirmed, the judgment of conviction and sentence as to Counts Two and Three should be reversed, and their cases remanded for resentencing.

As to Jose Ramiros, his judgment and sentence as to all counts should be reversed and he should be immediately released from custody.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to Fed. R. App. P. 29(d) and Eleventh Circuit Rule 29-2, the attached brief was prepared using WordPerfect 9 and contains 10,225 words of proportionally spaced 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on May 5, 2003, two copies of the foregoing Brief For The United States As Appellee and one copy of the attached motions were served by first-class mail, postage prepaid, on the following counsel of record:

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