No. 04-11152

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

RAMIRO RAMOS,

Defendant-Appellant

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*
No. 04-11152-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

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Ramiro Ramos, Defendant

Juan Ramos, Co-Defendant

Jose Ramos, Co-Defendant

STATEMENT REGARDING ORAL ARGUMENT

The United States does not oppose oral argument.

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS (continued): **PAGE**

TABLE OF CITATIONS

CASES: **PAGE**

CASES (continued): **PAGE**

CASES (continued): **PAGE**

STATUTES:

RULES: **PAGE**

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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 See *United States* v. *Ramos*, No. 02-16478-AA (unpublished) (11th Cir. Sept. 26, 2003).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 March 1, 2004, the district court resentenced defendant and entered final judgment the following day. On March 4, 2004, defendant filed a timely notice of appeal. 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 intervening Supreme Court decision, it imposed a sentence 33 months longer than the erroneously calculated original sentence.

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 enhancements 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 put his 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, Ramiro Ramos, along with his brother and cousin, Juan and Jose Ramos (R.162).[1] Count

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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 _____. "R.E." refers to record excerpts filed with this Court by defendant under separate cover along with his brief. "Tr.R. __ - pg. __" refers to the record number listed on the district court docket sheet and the page number of the trial transcript. "R.280, Sent.I.Tr. - pg. __" refers to record number listed on the district court docket sheet and the page number of the sentencing transcript. "R.360, Sent.II.Tr. - pg. __" refers to the record number listed on the district court docket sheet and the page number of the transcript of defendant's resentencing. "PSR 8/22/02 - pg. __" refers to the Probation Department's initial Presentence Report for the first sentencing. "Rev.PSR 10/28/02 - pg. __" refers to the Probation Department's revised Presentence Report for the first sentencing. "PSR 1/16/04 - pg.__" refers to the Probation Department's initial Presentence Report for the resentencing. "Rev.PSR 2/4/04 - pg. __" refers to the Probation Department's revised Presentence Report for the resentencing. "U.S.R.E. - pg. __" refers to the Record Excerpts filed by the United States under seal and separate cover with this brief.

One charged that from January 1, 2000 through June 20, 2001, defendant, along with Juan 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 Juan 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 Juan 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 Juan 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 Juan Ramos harbored illegal aliens in violation of 8 U.S.C. 1324(a) (R.162 - pg. 12). On June 3, 2002, a jury trial commenced. On June 26, the jury returned its verdict and found defendant guilty on all counts (R.229).[2]

On November 20, 2002, the district court sentenced defendant to imprisonment for a term of 63 months on Counts One, Two, and Four, and 84

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[2] The jury also found Juan Ramos guilty on all counts (R. 230) and Jose Ramos guilty of Counts Two and Three and conspiracy to commit extortion (Count One) (R. 231).

months on Count Three, to run consecutively, or 147 months on all counts (R.282).[3]

Defendant, along with Juan and Jose Ramos, appealed their convictions and sentences. This Court rejected all their claims.

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 Juan and Jose Ramos, guilty of conspiracy to commit extortion, and remanded the case for defendant and Juan Ramos to be resentenced on the remaining counts of conviction, which it affirmed.

On March 1, 2004, the district court resentenced defendant, this time 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).[5]

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[3] The government has prepared a chart that summarizes the calculation of defendant's original sentence on November 20, 2002 and resentence on May 1, 2004 (U.S.R.E. - pg. 112).

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

[5] At both sentencings, the district court ordered defendant to pay a fine and

(continued...)

2. Facts

From January 1, 2000, until June 20, 2001, defendant Ramiro Ramos and his brother, Juan Ramos, together and through their company, R&A Harvesting, Inc., held, housed, and harbored hundreds of poverty stricken uneducated migrant workers, who could not speak English. As a result of harboring and forcing more than 750 such individuals to work, most of whom they knew to be illegal aliens (Tr.R. 325 - pg. 88, 109-110), defendant and his brother profited 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 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).

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, whom the Mexicans

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[5](...continued)
restitution and forfeit property consistent with a special jury verdict finding that defendant and his 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; Tr.R. 291 - pg. 23). The forfeiture, fine, and restitution are not at issue in this appeal.

came to know as El Diablo (the devil), appeared with his brother, Juan (Tr.R. 323 - pgs. 184-185; Tr.R. 324 - pgs. 118-120). Defendant told the Mexicans that since he 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. 185-186; Tr.R. 324 - pgs. 60-63, 119, 125, 195; Tr.R. 325 - pgs. 181-182, 210). Defendant also warned that if any of them left, or tried to escape, he or Juan would find, kick, beat, and 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 his brother (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 workers into groups and did not allow them to decide where they would live (Tr.R. 323 - pg. 187; Tr.R. 324 - pg. 126; Tr.R. 325 - pgs. 8, 185). He, along with his brother, housed the laborers in dirty and poorly maintained facilities where as many as six workers lived together, and deducted $30 a week from their earnings for the lodging (Tr.R. 323 - pgs. 199-200, 214; Tr.R. 324 - pgs. 126-127; Tr.R. 325 - pg. 186; Government Exh. 1). When one worker asked whether there was a television, defendant got angry and threatened to "fill [him] with lead" (Tr.R. 324 - pg. 128). The worker understood the threat to mean that defendant would shoot and kill him (Tr.R. 324 - pg. 136).

Defendant made arrangements to have the laborers work in fields picking oranges, even though they had no identification or documentation authorizing their

employment in the United States (Tr.R. 323 - pgs. 207-211; Tr.R. 325 - pg. 183). Without asking for any identification or papers, defendant gave the workers cards which had photographs that "kind of looked like [them]" so they would be admitted and could work in the orange groves (Tr.R. 323 - pgs. 210, 207-208; Tr.R. 324 - pgs. 127, 137; Tr.R. 325 - pgs. 9, 189-190).

Each morning the workers awoke around 5 a.m., and men, who worked for defendant and his brother, and who they referred to as Chiveros (goat drivers), transported them to the groves, watched and supervised them, and gave them a token for each full bin, which holds 9 to 10 large sacks of oranges each 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 from defendant based on the number of tokens they collected (Tr.R. 323 - pg. 204, 213; Tr.R. 324 - pgs. 22-23, Tr.R. 325 - pgs. 9, 33-34, 76, 98-99).

After working for approximately a month, 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. 189, 213). To avoid getting caught, the workers left on foot without taking any belongings or getting fully dressed (Tr.R. 324 - pg. 148). Two of the workers were so afraid of being caught and killed by defendant or his brother that they shook as they escaped (Tr.R. 325 - pg. 191).

The government introduced evidence that for each worker, labor contractors, like defendant and his brother, are required to sign and file an I-9 form with the

Social Security Administration (SSA), certifying that the worker has presented the requisite documentation and demonstrated that he or she is legally in the United States and may be lawfully 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 his brother from January 1, 2000 through June 30, 2001, only 16 of their 680 workers had valid Social Security numbers (Tr.R. 325 - pgs. 160-161). A border patrol agent with the Immigration and Naturalization Service also testified that the 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).

The government also introduced evidence regarding an incident that occurred on May 27, 2000, involving defendant, his brother, and 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 his brother and cousin, 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). Defendant 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). As Jose Cervantes-Martinez, Sr., the owner of the van service, approached, defendant, referring to his

own 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). Defendant then pistol-whipped the owner of the van service hitting him several times in the face with the butt of his gun, as Juan and Jose Ramos repeatedly punched him in the face (Tr.R. 326 - pgs. 90-93). Once the victim fell to the ground, defendant, who was wearing cowboy boots, along with Juan and Jose, 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 (U.S.R.E. - pgs. 1-24, PSR 8/22/02 - pgs. 1-24). 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. - pg. 23, PSR 8/22/02 - pg. 23 ¶89; U.S.R.E. - pg. 112, chart).

The Probation Department provided the Presentence Report to the parties

along with a cover letter specifying that all comments and objections had to be filed by October 28, 2002 (R.280, Sent.I.Tr. - pgs. 16-17). Both the government and defense complied with the deadline and submitted written objections by October 24, 2002 (U.S.R.E. - pgs. 51, 53, Rev.PSR 10/28/02 (Addendum) - pgs. 1, 3).[6]

The district court rejected all objections to the Presentence Report as untimely because the government and defense failed to comply with a local rule that required the objections to be filed within 14 days of receipt of the report (R.280, Sent.I.Tr. - pgs. 4-6, 16-18, 24). As a result, the district court did not consider the government's request to apply six levels of enhancements – two for obstruction of justice pursuant to Section 3C1.1 and four for defendant's aggravating role as a leader pursuant to Section 3B1.1(a) (U.S.R.E. - pg. 52, Rev.PSR 10/28/02 (Addendum) - pg. 2; R.280, Sent.I.Tr. -pg. 17). The district court also refused to consider a Revised Presentence Report, issued in response to the parties' objections, in which the Probation Department changed its recommendation to a total offense level of 30 and a guideline range of 97 to 121 months for Counts One, Two, and Four (U.S.R.E. - pg. 48, Rev.PSR 10/28/02 - pg. 24 ¶90; R.280, Sent.I.Tr. - pgs. 17-18). It retained the 84 months recommendation for Count Three. The

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[6] The record is contradictory as to the precise date the government first submitted its objections to the Probation Department. The Addendum to the Presentence Report discusses the government's objections and provides "[o]n October 24, 2002, the government filed [its] objections to the presentence report." (U.S.R.E. - pg. 51, Rev.PSR 10/28/02 (Addendum) - pg. 1). At the sentencing hearing, however, government counsel, consistent with transmittal sheets, explained that "she faxed [the government's objections] on * * * [October] 17th" to comply with the Probation Department's October 28 deadline (R. 280, Sent.I.Tr. - pg. 17).

district court, relying exclusively on the initial Presentence Report, imposed a sentence 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.280, Sent.I.Tr. - pg. 21).

4. Defendant's Resentencing

Following remand by this Court, the Probation Department issued a new Presentence Report. Relying on essentially the same methodology it had used to prepare its prior reports, the Probation Department calculated a total offense level of 35 and recommended a guideline range of 168 to 210 months on Counts One and Four (U.S.R.E. - pg. 78, PSR 1/16/04 - pg. 23 ¶92; U.S.R.E. - pg. 112, chart).

The Probation Department grouped Counts One and Four together and relied 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. 67, PSR 1/16/04 - pg. 12 ¶40; U.S.R.E. - pg. 112, 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. - pgs. 67-68, PSR 1/16/04 - pgs. 12-13 ¶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 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 2H4.1(b)(4)(B) (U.S.R.E. - pg. 112, chart). Thus, the Probation Department calculated a total offense level, without enhancements, of 33 (U.S.R.E. - pgs. 67-68, PSR 1/16/04 - pgs. 12-13 ¶44). The Probation Department then added two levels pursuant to Section 3C1.1 for obstruction of justice for a total offense level of 35 (U.S.R.E. - pg. 68, PSR 1/16/04 - pg. 13 ¶47). Both the government and defendant filed timely objections to the Presentence Report (R.351, 350).

On March 1, 2004, the district court held a sentencing hearing. The district court rejected defense counsel's argument that the offense level could not be increased for the pistol-whipping because that was unrelated to Counts One and Four, the conspiracy and harboring counts (R.360, Sent.II.Tr. - pgs. 9-10). The district court agreed with the Probation Department's conclusion that the pistol-whipping was "directly related" to the counts of conviction. It was committed during the time frame and in furtherance of those counts since defendant assaulted his victim because he was transporting migrant workers out of the area (U.S.R.E. - pg. 107, Rev.PSR 2/4/04 (Addendum) - pg. 2; R.360, Sent.II.Tr. - pg. 12). The district court found (R.360, Sent.II.Tr. - pg. 12) the pistol-whipping incident to be "part and parcel of the overall conspiracy" and explained (R.360, Sent.II.Tr - pgs. 8,

9, 10):

> The dates of the harboring charge were from on or about * * * January 1, 2000 and continuing through on or about June 20th, 2001. The incident involv[ing] * * * the assault on the drivers * * * occurred on May 27, 2000.
>
> * * * * *
>
> Well, I heard the evidence, first of all, * * * it was part of the object of the conspiracy to harbor them.
>
> * * * * *
>
> [T]he whole purpose of the assault [was] to intimidate [the workers]. * * * [T]he whole idea was to control them, to put them in fear so they wouldn't move on or * * * [to] maintain the involuntary servitude of the whole group, which was the purpose of the conspiracy.
>
> * * * It was proven beyond a reasonable doubt.

The district court also rejected defense counsel's argument that the offense level should be increased only two levels, rather than six levels, because the victim of the pistol-whipping suffered "bodily injury" not "permanent or life-threatening injury" within the meaning of Section 2L1.1(b)(6) (R.320, Sent.II.Tr. - pg. 24). The court explained that the beating, which caused permanent scars on the victim's face from his forehead to his nose and on his lip, "could very easily have resulted in death" (R.360, Sent.II.Tr. - pgs. 29, 31).

The district court also imposed a four level enhancement pursuant to Section 3B1.1 based on defendant's aggravated role as a leader. The court explained that even though it had not considered the enhancement at defendant's first sentencing because of the untimeliness of the government's request, it "appreciate[d] [the opportunity] for correction" since "there was abundant evidence that * * * [defendant's criminal] activity was extensive and that [he] [was] the organizer[] and

leader[] of five or more people" * * * on both counts" (R.360, Sent.II.Tr. - pg. 53).[7]

The probation officer then explained that even though the guideline range based on an offense level of 39 is 262 to 327 months, defendant's sentence could not exceed the statutory maximum as to both counts, or 180 months (R.360, Sent.II.Tr. - pg. 56). 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 (R.360, Sent.II.Tr. - pgs. 60-61).

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 that 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.

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[7] After denying his various objections and prior to the district court's imposing sentence, defense counsel commented that "it probably would have been better if the Court of Appeals had never remanded the case * * * [because] before [defendants] got 12 years and now [the district court would be] * * * giv[ing] them 15 years" (R.360, Sent.II.Tr. - pg. 53).

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 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." Defendant's 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

Relying upon *North Carolina* v. *Pearce*, 395 U.S. 711, 89 S. Ct. 2072 (1969), defendant appears to argue (Br. 4) 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 the circumstances of this case do not create an inference of vindictiveness and the

record establishes that the second sentence is longer than the first because the district court corrected mistakes it made in calculating the original sentence.

A. In *North Carolina* v. *Pearce*, 395 U.S. at 723-724, 89 S. Ct. at 2079-2080, 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 *Texas* v. *McCullough*, 457 U.S. at 138. 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 (1989), 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; *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).

Applying these principles, the presumption of vindictiveness should not be applied here. In this case, 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).[8] 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

[8] Defense counsel's single remark at the resentencing hearing, uttered once the district court denied all his objections and he recognized that the total offense level was 39 – that "the sentence now will exceed the" term originally imposed – cannot fairly be construed to constitute an objection that the district court vindictively sentenced defendant. (R.360, Sent.II.Tr. - pg. 54). The comment fails to mention vindictiveness, claim a constitutional violation, or even allege that a harsher sentence is error. Even after the district court imposed sentence, defense counsel did not argue that it was vindictive.

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), 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 defendant demonstrated that it had erred, but because of an intervening decision by the Supreme Court. Furthermore, the remand by this Court did not require a new trial by the same district judge, but only a resentencing hearing. In fact, the evidence shows that, rather than being vengeful at the need to hold a re-sentencing hearing, the district court noted that it "appreciate[d] [the opportunity] * * * to correct[]" errors it had made at the original sentencing (R.360, Sent.II.Tr. - pg. 53).

Indeed, the defendant has not cited any evidence in the record to support his claim of vindictiveness. The transcript of defendant's second sentencing reflects that the district court carefully considered each of defendant's objections, detailed the basis for its calculations, and explained the reason the new sentence was longer than the first.

Consequently, there is no "reasonable likelihood" that the increased sentence "resulted from actual vindictiveness on the part of" the district judge and *Pearce*'s presumption of vindictiveness should not be invoked.

B. Moreover, 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 *id.* at 613 (imposition of four level increase that had "evidently [been] overlooked" at the first sentencing). See also *United States* v. *Atehortva*, 69 F.3d at 679, 684 (2d Cir. 1995), cert. denied, 517 U.S. 1249, 116 S. Ct. 2510 (1996).

At the first sentencing, the district court refused to consider any objections to the initial Presentence Report, including the government's contention that the offense level should be increased six levels – two pursuant to Section 3C1.1 for obstruction of justice and four pursuant to Section 3B1.1(a) for defendant's aggravating role as a leader. Had the district court considered and imposed those enhancements at the first sentencing hearing, defendant's sentence on Counts One, Two and Four, based on a total offense level of 32 and guideline range of 121 to 151 months, would have been at least 58 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, Sent.II.Tr. - pg. 53 (district court commenting at the second sentencing hearing that it "appreciate[d] the [opportunity to] correct[]" the fact that it "did not consider [the enhancements] because they were untimely"). 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).

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 (2H4.1, 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. 112, 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. 112, 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 nine levels – six for failing to impose obstruction of justice and leadership role enhancements and three for cross-referencing to the wrong guideline, it did not

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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).

violate the defendant's due process rights to correct the errors on resentencing.

C. Nor was defendant entitled to a shorter sentence, as he suggests (Br. 6), 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 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

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[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); *United States* v. *Cochran*, 883 F.2d at 1016.

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

Defendant contends (Br. 7-13) 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 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.

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*

actions "committed by" the defendant "*in furtherance of* * * * jointly undertaken criminal activity" *or* "*occur[ing] during* the commission of the offense[s] of conviction." Sentencing Guidelines § 1B1.3(a)(1)(A) & 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 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 U.S.R.E. - pg. 107, Rev.PSR 2/4/04 (Addendum) - pg. 2; R.360, Sent.II.Tr. - pg. 8). 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, Sent.II.Tr. - pg. 8). Because defendant 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 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 accomplished its purposes (R.162 - pg. 5). It also provides that defendant 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 defendant 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 attacked the van owner because he believed that the victim's business posed a threat to his unlawful efforts to harbor and force illegal aliens to work. Defendant, 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, defendant's own words establish that he pistol-whipped the van owner to facilitate his 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 pistol-whipped his 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 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. 9, 12) 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. 8) 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]

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

Defendant contends 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." Defendant's argument is without merit.

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[11] Three of the four cases defendant cites (Br. 8, 9, 10), *United States* v. *Lawrence*, 47 F.3d 1559, 1566 (11th Cir. 1995), *United States* v. *Cross*, 121 F.3d 234 (6th Cir. 1997), *United States* v. *Dawson*, 1 F.3d 457 (7th Cir. 1993), do not dictate a contrary conclusion since none is on point. In *Lawrence*, this Court held that the district court erred in setting a base offense level premised on the quantity of drugs attributable to each of three defendants since its findings and the evidence did not support its conclusion that each defendant distributed 500 grams of cocaine. In *Cross*, 143 F.3d at 243, 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. *Gold*, is an unpublished district court opinion that is not available on Westlaw, government counsel has been unable to review it.

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 "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.) (emphasis added) (holding "life threatening *risk*" sufficient to warrant adjustment), 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 defendant repeatedly smacked the victim in the face with the butt of a gun, as his brother and cousin repeatedly punched him in the face (Tr.R.326 - pgs. 90-93). Once on the ground, the victim was repeatedly kicked 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 defendant's conduct "could very easily have resulted in death." (R.360, 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 defendant's 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. 111; See U.S.R.E. pg. 54, Rev.PSR. 10/28/02 (Addendum) - pg. 4; U.S.R.E. pg. 108, Rev.PSR 2/4/04 (Addendum) - 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. 13-16) 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 defendant's conduct, the district court's finding is not clearly erroneous.

Finally, even if the district court erred in finding the victim sustained "permanent or life-threatening injury," the error is harmless since a four level enhancement for "serious bodily injury," which the victim unquestionably sustained, would nonetheless yield a guideline range of 210 to 262 months, exceeding the statutory maximum penalty of 180 months.

The Guidelines define "serious bodily injury" as injury involving "extreme physical pain * * * or requiring medical intervention." Sentencing Guidelines § 1B1.1, comment. (n.1(i)). It is beyond dispute that the victim suffered "extreme physical pain" and required medical treatment since the brutal beating necessitated his transport to the hospital by ambulance for medical treatment and suturing. See,

e.g., *United States* v. *Segien*, 114 F.3d 1014, 1018 (10th Cir. 1997) ("serious bodily injury" when victim whose knee "gave out" was taken to hospital, used crutches for two weeks, and received physical therapy), cert. denied, 523 U.S. 1024, 118 S. Ct. 1310 (1998); *United States* v. *Moore*, 997 F.2d 30, 36 (5th Cir.) ("serious bodily injury" for gunshot to the leg that required two-hour emergency room visit and no hospitalization or surgery), cert. denied, 510 U.S. 1029, 114 S. Ct. 647 (1993); *United States* v. *Corbin*, 972 F.2d 271, 272 (9th Cir. 1992) ("seriously bodily injury" for cut "on the head with a metal object resembling a gun, causing a laceration which required a two-layer closure using more than 25 sutures"). See also *United States* v. *Ashley*, 141 F.3d 63, 69 (2d Cir.) (conduct posing "substantial risk of serious bodily injury" based on defendant's resisting arrest and causing five officers to be taken to the hospital one of whom suffered a sprained wrist), cert. denied, 525 U.S. 888, 119 S. Ct. 203 (1998). Accordingly, because the victim clearly sustained "serious bodily injury," which would yield the same maximum sentence, any error in applying the "permanent or life-threatening" enhancement would have been harmless.

CONCLUSION

WHEREFORE, defendant's sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(7)(B)

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 8,683 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

CERTIFICATE OF SERVICE

I hereby certify that on September 22, 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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