

No. _____

IN THE
Supreme Court of the United States

RAMELL MARKUS,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Like other Sentencing Guidelines provisions involving violence, the Guidelines for kidnapping offenses (USSG §2A4.1) enhance a defendant's sentence where the victim sustained "serious bodily injury," a finding that can be based on, *inter alia*, the victim's experiencing "extreme physical pain." USSG §1B1.1, comment. (n. 1(M)).

In the instant matter, notwithstanding the victim's testimony that his injuries were only "painful," the district court enhanced petitioner's sentence based on its conclusion that objectively such injuries must have resulted in extreme physical pain. While at least one other circuit court has upheld a sentence based on such objective inferences, the decision below departs from the view of at least three other appellate courts that impose a subjective test.

This petition raises the following question about with the circuit courts are divided:

Is a determination of "serious bodily injury" based on "extreme physical pain" a subjective test based on the victim's level of pain tolerance or an objective test based on the nature of the bodily injury inflicted?

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OPINIONS BELOW

The summary order of the United States Court of Appeals for the Second Circuit affirming petitioner's judgment of conviction is reported as *United States v. Crumble*, 2022 WL 364002 (2d Cir. 2022), a copy of which is annexed hereto as Appendix A.

The unreported order of the United States Court of Appeals for the Second Circuit, dated April 26, 2022, denying petitioner's rehearing petition is annexed hereto as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals sought to be reviewed was entered on February 8, 2022, and the order of that court denying petitioner's rehearing petition was entered on April 26, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT

Petitioner Ramell Markus was convicted along with a co-defendant (Crumble) with various offenses relating to their participation in the alleged kidnapping of a drug-dealer that petitioner knew. A jury acquitted both defendants of the §924(c) charge but convicted them of kidnapping, kidnapping conspiracy and violence in aid of an extortion. The district court sentenced petitioner to a 180-month term of imprisonment.

At sentencing, petitioner objected to a 2-level enhancement for causing the victim (Nieves) “serious bodily injury” arguing that the government failed to establish that the victim experienced “extreme physical pain” within the meaning of USSG §1B1.1, comment (note 1M). Doc#146 at 9-10.¹ Indeed, Nieves testified at petitioner’s trial only that his injuries were “painful.” A552. Moreover, Nieves never sought medical treatment for his injuries. Instead, his fiancée put “like a Band-Aid [with] ointment” on his arms for two weeks. A444.

¹ References to “Doc#__” are to docket entries in the United States District Court for the Eastern District of New York for Case No. 1:18-cr-32 (ARR); “A__” refers to page numbers in the Appendix filed by Petitioner in the United States Court of Appeals for the Second Circuit in Case No. 19-1419.

Nor was Nieves's conduct during the offense consistent with one who was experiencing "extreme physical pain." For example, after petitioner allegedly pistol-whipped Nieves, Nieves's "reaction" was just that he was "pretty shocked," asking petitioner whom he knew "why is he doing this." A102.² Likewise, after one of the co-conspirators (Burch) put an hot iron on Nieves's arms, Nieves testified that he and Burch passed the time "talking about Las Vegas, you know, casinos." A113.

Nevertheless, applying the clear error standard, the Panel concluded that because Nieves testified that "he was pistol whipped, struck over the head by a glass that shattered, and burned on both arms with an iron, combined with the photos of Nieves's injuries and scars present many months later in court," the district court was within its rights to find that objectively Nieves necessarily experienced "extreme physical pain." 2022 WL 364002 at *2.

REASONS FOR GRANTING THE WRIT

The kidnapping Guidelines provide for an enhancement based on the level of injury to the victim. Thus, USSG §2A4.1 provides for enhancements

² Whether the jury credited this testimony is itself debatable since the jury acquitted petitioner of the 924(c) charge.

(A) If the victim sustained permanent or life-threatening bodily injury, increase by 4 levels; (B) if the victim sustained serious bodily injury, increase by 2 levels; or (C) if the degree of injury is between that specified in subdivisions (A) and (B), increase by 3 levels.

See U.S.S.G. §2A4.1(b)(2).

“Serious bodily injury” the enhancement imposed here, is in turn defined, as relevant here, to mean an “injury involving *extreme physical pain* or the protracted impairment of a function of a bodily member, organ, or mental faculty; or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation.” USSG §1B1.1, comment. (n. 1(M)) (emphasis added). Numerous other Guideline provisions provide for a similar enhancement based on “serious bodily injury.” *See, e.g.*, USSG §§2A2.1(b)(1)(B) (assault); 2B3.1(b)(3)(B) (robbery); 2B3.2(b)(4)(B) (extortion); §2N2.1(b), comment. n.3(A) (food and drug offenses); §2Q1.6(a)(3) (Hazardous Devices on Federal Lands). And a number of criminal offenses make the infliction of “serious bodily injury” upon the victim an element of the offense. *See, e.g.*, 18 U.S.C. §113(6) and (7) (assault); 18 U.S.C. § 1365(a)(3) (tampering with consumer products); 18 U.S.C. §§ 2241(a)(2), 2246(4) (aggravated sexual abuse).

In *United States v. Mills*, 830 Fed.Appx. 256 (10th Cir. October 15, 2020), the defendant was convicted of engaging in various sexual abuse offenses committed on Indian Lands. At sentencing and over objection, the district court applied a two-level enhancement pursuant to USSG §2A3.1(b)(4)(B) because the victim suffered “serious bodily injury.” In making this finding, the district court relied on “credible testimony of the victim that she experienced extreme physical pain, 10 on a scale of 1 to 10, caused by [Mr. Mills'] repeated anal penetration.” 830 Fed.Appx. at 257. The defendant appealed arguing that the district court’s finding was clearly erroneous because it was based only on the victim’s “subjective assessment of her pain caused by the anal penetration and in the absence of any physical injury found by [the examining nurse] and in the absence of any contemporaneous complaints of extreme pain.” *Id.* at 258. The Tenth Circuit rejected this argument because “as the government points out, pain is subjective” and the victim “testified that she experienced extreme pain.” *Id.* at 259.

Similarly, in *United States v. Newman*, 931 F.2d 57, 1991 WL 63625 (6th Cir. Apr. 23, 1991), the defendants pled guilty to kidnapping a 74-year-old woman who they then raped. At sentencing the district court

enhanced their sentence for causing “serious bodily injury” a finding the defendant’s challenged on appeal. In affirming the conviction, the Sixth Circuit agreed that despite the “extreme trauma” caused by the rape the evidence was insufficient to establish that it was anything more than “painful” but nevertheless upheld the enhancement based on the other tests contained within the definition (i.e., “impairment of a mental faculty”). *See also United States v. Rivera*, 83 F.3d 542, 547 (1st Cir. 1996) (vacated determination that carjacking defendant caused “serious bodily injury” based on his rape of the victim. While the rape may have been “degrading, heinous, cruel and brutal,” “there is no record evidence that [the victim] suffered either ‘extreme physical pain’ or any of the other listed injuries.”).

Likewise, in *United States v. Desormeaux*, 4 F.3d 628, 630 (8th Cir.1993), the Eighth Circuit vacated a sentence based on its finding that the district court erred when it failed to enhance the defendant’s sentence where the victim described the pain she suffered from a knife wound that lacerated her kidney as “a lot worse than giving birth to a child.” By contrast, in *United States v. Guy*, 282 F.3d 991, 997 (8th Cir. 2002) the Eighth Circuit vacated an enhancement for “serious bodily injury”

because the fact that the rape victim was “jammed against the car door (the government says her head was banged against it),” and that she told the defendant he “was hurting her,” as well as the fact that she “cried during the rape” and was “ble[eding],” was insufficient to establish “extreme physical pain.”

What emerges from the foregoing cases is that because pain is subjective, a court will only uphold the enhancement when there is testimony from the victim establishing that the pain experienced by the victim was atypical, and in excess of the pain normally associated with bodily injury. Where such evidence is not in the record, even if the defendant’s action is consistent with something that may be extremely painful (i.e., a forcible rape), the enhancement will not apply.³

In contrast to these cases, the Court of Appeal here eschewed a subjective test, instead upholding the district court’s imposition of a “serious bodily injury” enhancement based on its reasoning that the wounds inflicted upon Nieves (*e.g.*, a hot iron to his bare arms) must have

³ The Sentencing Guidelines define “Bodily Injury” to mean “any significant injury; *e.g.*, *an injury that is painful and obvious*, or is of a type for which medical attention ordinarily would be sought.” USSG 1B1.1, comment. n(1(B)).

been extremely painful. This was notwithstanding the fact that there was no record evidence that *this* particular victim experienced anything more than ordinary pain.

The Fifth Circuit has taken a similar approach. Thus, in *United States v. Garza-Robles*, 627 F.3d 161, 169-170 (5th Cir. 2010) the Fifth Circuit upheld a finding of “serious bodily injury” based simply on testimony that the victim had been “assaulted repeatedly resulting in a broken rib, bruised buttocks, and cuts behind the ears” finding that such testimony made it objectively “plausible” for the district court to conclude these injuries involved “extreme pain.”

The position of the Second and Fifth Circuits is unreasonable and unworkable. “Pain is an inherently subjective experience, knowable only to the sufferer.” Ahluwalia SC, et al, “Sometimes you wonder, is this really true?": Clinician assessment of patients’ subjective experience of pain” 26 J Eval Clin Pract. 1048-1053 (June 2020) (“Ahluwalia”). While objectivity plays a role in making clinical assessments based on the level of such pain (*id.*),⁴ it is not, and should not be, a relevant determinant in

⁴ “[W]hen an individual seeks medical attention for their pain, their self-reported experience must be translated into an objective clinical assessment, quantifying the experience in a manner that lends itself to available interventions. Important decision such as whether to use prescription opioids to treat pain rely on the

deciding the degree of pain necessary to satisfy the enhancement under the Guidelines. And even if such an objective test were to be used, it should certainly not be accepted without a medical assessment evaluating that pain, evidence that was never presented here.

This Court should grant certiorari to resolve the conflict among the circuit courts.

CONCLUSION

Because the decision of the Second Circuit conflicts with decisions of at least three other appellate courts, petitioner respectfully requests that the Petition for Writ of Certiorari be granted to resolve the Circuit split.

RESPECTFULLY SUBMITTED

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clinician's ability to make relatively objection sense of subjective patient experiences.” Ahluwalia at 1048.