No. _____

IN THE

Supreme Court of the United States

JAVIER PEREZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Should application of the four-level sentencing enhancement for "permanent or life-threatening bodily injury" under U.S.S.G. § 2A2.1(b)(1)(A) require affirmative proof that the injury was permanent or life-threatening, or should lower courts continue to draw their own conclusions about the dangerousness of a particular injury, even if that practice results in wildly inconsistent applications of the enhancement?

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PETITION FOR A WRIT OF CERTIORARI

Javier Perez petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

JUDGMENT BELOW

The judgment for which review is sought is *United States v. Perez*, No. 23-1993 (9th Cir. Mar. 7, 2025). (Appendix ("App.") 2-15.)

JURISDICTION

The Ninth Circuit Court of Appeals issued its 2-1 memorandum opinion affirming Petitioner's sentence on March 7, 2025. (App. 2-15.) A petition for rehearing en banc was denied on May 20, 2025, and this petition is being timely filed within 90 days of that denial. (*See* App. 1.)

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

U.S. SENTENCING GUIDELINE INVOLVED

United States Sentencing Guidelines, Section 2A2.1(b)(1)(A)

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

STATEMENT OF THE CASE

A. Trial

The evidence presented at trial was described by the Ninth Circuit in its opinion in Petitioner's first appeal. The relevant portions of that description are as follows:

The Columbia Lil Cycos (CLCS) clique of the 18th Street gang controlled drug distribution, committed extortion, and engaged in other illegal activities in the Westlake neighborhood of Los Angeles from at least the mid-1990s. CLCS and allied gangs operate under the umbrella of the Mexican Mafia (the "Eme"), a prison-based gang whose members, once behind bars, continue to oversee the street gangs with which they were affiliated before their incarceration.

***

Francisco Clemente sold black-market goods at a street stand in CLCS territory. He got on the wrong side of CLCS leaders by acting disrespectfully and refusing to pay rent. In the summer of 2007, CLCS leader Pantoja tired of Clemente and chased him out of the neighborhood, telling rent-collector Juan Pablo Murillo to "take care of it" if Clemente returned. When Clemente did return, Murillo enlisted [Giovanni] Macedo—then 18 years old—to show Clemente what became of those who defied CLCS. Late at night on September 15, 2007, Macedo and Murillo made their way to Clemente's stand on Sixth Street, and Macedo fired several shots at him. Clemente was wounded but survived. 21-day-old Garcia was not so lucky—he was struck and killed by a stray bullet.

When he found out what had happened, Pantoja testified that he told Murillo the latter had "fucked up" by killing baby Garcia, violating the Eme's strict code against murdering infants and potentially triggering a gang-wide "green light" whereby all CLCS members would become targets for murder by other Eme-affiliated gangs. Pantoja told Murillo that Macedo "had to be dealt with." Murillo, a member of an allied 18th Street clique—South Central—enlisted the help of fellow South Central member Javier Perez. At around 10 p.m. on September 19, Murillo and Perez went to the home of another South Central member, Flor Aquino, and demanded the use of her Chevrolet Tahoe, purportedly to take Macedo to San Diego to hide out. Aquino reluctantly agreed, but decided she would do the driving. Murillo and another gang member went to Macedo's apartment, ordered him into the car, and drove away before informing him they were taking him to Mexico. They met up with Aquino and Perez at Aquino's home, and

> together Murillo, Perez, Aquino, and Macedo departed for Mexico.
>
> Across the border in Tijuana the next day, Aquino stayed with Macedo in the hotel while Murillo and Perez met up with Pantoja, who had gone to Tijuana, he said, to ensure Macedo was properly taken care of. Murillo assured Pantoja he and Perez would "handle it," and showed Pantoja a gun. Perez and Murillo returned to the hotel and took Macedo out drinking, then back to the hotel. Later that night, Perez, Murillo, Macedo, and Aquino drove toward Mexicali through the Sierra Juárez mountains on a cliffside highway, with Macedo in the front passenger seat. Perez and Murillo—seated in the back seat while Aquino drove—grabbed a rope, threw it around Macedo's neck, and began to strangle him. Murillo told Macedo he had messed up; Perez was less circumspect: he yelled, "Die motherfucker, die!"
>
> After strangling Macedo until he was bloodied, Perez and Murillo checked to see if Macedo was still alive. Believing him dead, Murillo and Perez dragged Macedo out of the car and threw him over the cliffside. But Macedo was alive: he woke up sliding down the cliff, grabbed a tree root to check his fall, climbed back up to the road, managed to hail a ride, and returned to the United States. He later testified against Perez at trial.

United States v. Perez, 962 F.3d 420, 432-33 (9th Cir. 2020).

The jury found Petitioner guilty of RICO conspiracy, VICAR murder conspiracy, VICAR kidnapping conspiracy, VICAR attempted murder, and conspiracy to kidnap. (2-ER-267-71.)[1] It acquitted him of VICAR kidnapping and kidnapping charges. (*Id.*)

Petitioner was sentenced to Life on Counts 1 and 20 and 120 months on Counts 16-18, to be served concurrently. (2-ER-94-99.)

[1] "ER" stands for the excerpts of record submitted to the Ninth Circuit alongside the opening brief at ECF No. 20.

B. First Appeal

In Petitioner's first appeal, the Ninth Circuit held that the district court erred in instructing the jury that the government did not need to prove that any part of the RICO or VICAR offenses took place within the United States. *United States v. Perez*, 962 F.3d 420, 440 (9th Cir. 2020). Although the error was harmless with respect to the VICAR murder conspiracy count, it was not harmless for the VICAR attempted murder count. *Id.* at 443-44. Accordingly, the Ninth Circuit reversed Petitioner's conviction on Count Eighteen. *Id.* at 444.

C. Resentencing

Following remand from the first appeal, the government elected not to retry Petitioner on Count Eighteen. That count was dismissed, and Petitioner was resentenced.

Relevant to this petition, the parties disagreed at resentencing about whether a four-level enhancement for permanent or life-threatening bodily injury was warranted under U.S.S.G. § 2A2.1(b)(1)(A).

At the resentencing hearing, the district court set forth several alternative methods of calculating the Guidelines range. Under any of these calculations—two of which included the disputed four-level enhancement—the district court explained, it would impose the same sentence. Petitioner was therefore sentenced to Life on Counts 1 and 20, plus 120 months on Counts 16 and 17, to be served concurrently. (1-ER-2, 38.)

D. Second Appeal

On March 7, 2025, the Ninth Circuit issued a 2-1 memorandum opinion affirming the sentence imposed at the resentencing. (App. 2-15.) Judges Tallman and R. Nelson were in the majority (App. 2-8), and Judge Berzon authored a dissent (App. 9-15).

Relevant to this petition, the majority held that the district court did not err in applying the four-level enhancement under § 2A2.1(b)(1)(A).[2] The majority explained:

> Here, the district court made several factual findings by a preponderance of the evidence supporting its conclusion that Macedo sustained injury that "involv[ed] a substantial risk of death." Relying on the evidence adduced in a two-month jury trial, the court found that Perez, who was hired to kill Macedo, strangled him with a rope to the point of a bloodied and scarred neck, causing Macedo to lose consciousness.[] The court also found that, once Perez and his co-conspirators believed Macedo dead, they threw his body off of a cliff in remote Mexico and fled the scene.
>
> ***
>
> In light of our rulings in [*United States v. Morgan*, 238 F.3d 1180 (9th Cir. 2001),] and [*United States v. Hinton*, 31 F.3d 817 (9th Cir. 1994)], the district court did not abuse its discretion in concluding that Macedo's injuries (asphyxiation to the point of unconsciousness, evidenced by a bloodied, scarred neck), alongside Perez's maltreatment of the victim (throwing an unconscious Macedo off of a cliff in remote Mexico and leaving him for dead) had a "substantial risk of death" and amounted to "life-threatening bodily injury."[] *See id.*; *Hinton*, 31 F.3d at 820, 826 ("Viewed in conjunction with [defendant's] contemporaneous threat to kill the victim, the forceful blows, the profuse blood loss and the subsequent

[2] Although Petitioner raised challenges to several of the alternative calculations on appeal, both the majority and the dissent reached only the issue of whether the § 2A2.1(b)(1)(A) enhancement was correctly applied. (*See* App. 3.)

> denial of access to medical treatment endangered the victim's life and thus constituted a 'life-threatening bodily injury.'").

(App. 4, 7-8 (footnotes omitted).)

Judge Berzon dissented, finding that the majority misconstrued the plain language and obvious meaning of the Guideline it addressed. In Judge Berzon's view, "the enhancement applies only if the victim *actually sustained* an injury that was life-threatening." (App. 9 (emphasis in original).) And, Judge Berzon explained, the government failed to prove that either the victim's strangulation or his fall off the cliff caused life-threatening injuries. (*Id.*)

With respect to the strangulation, the dissent explained:

> In concluding that the strangulation resulted in a life-threatening injury, the district court relied on an erroneous factual finding, that Macedo "was found to have no heartbeat." On appeal the government repeated a version of this assertion, maintaining that Macedo had only "a faint pulse." There is no evidence in the record indicating that Macedo did not have a heartbeat or that his pulse was faint. The only evidence on this issue is Perez's co-conspirator's testimony that, when she checked while he was unconscious, Macedo had a pulse.
>
> "A district court may abuse its discretion . . . if it rests its decision on a clearly erroneous finding of material fact." *United States v. Rodriguez*, 921 F.3d 1149, 1156 (9th Cir. 2019) (citation omitted). The district court's finding that Macedo had no heartbeat is clearly erroneous, so its application of the life-threatening injury enhancement on this basis was an abuse of discretion.
>
> Macedo also sustained ligature marks around his neck. Although the majority discusses this injury, there is no serious argument that Macedo faced a substantial risk of death from his neck abrasions, nor does the government make one.

> The majority acknowledges the district court's erroneous factual finding regarding Macedo's pulse but contends that it is harmless, because Macedo sustained another injury resulting from the strangulation: unconsciousness. But it is not self-evident that Macedo faced "a substantial risk of death" from, or evidenced by, his unconsciousness. Although it may be that some feature of Macedo's unconsciousness made it deadly, the record is devoid of evidence so demonstrating, and so does not establish that Macedo faced "a substantial risk of death" because of, or evidenced by, his unconsciousness. U.S.S.G. § 1B1.1 cmt. 1(K).

(App. 10.)

With respect to the act of throwing the victim over an embankment, Judge Berzon explained: "The majority does not identify any injury—much less one that was life threatening—caused by Macedo's fall. The record indicates that Macedo was—although one might well have predicted otherwise—uninjured by the fall." (App. 12.)

She further explained:

> [T]he Guideline focuses on whether there *was* a life-threatening injury, not whether there could have been or whether the defendant believed there was one. Shooting at someone is surely maltreatment. If the victim is not hurt because the shooter misses him, he has not sustained a life-threatening injury, any more than a shooter who misses an intended victim is guilty of murder rather than attempted murder.

(App. 14-15.)

Accordingly, Judge Berzon would have held that the district court abused its discretion in applying the four-level enhancement. (App. 15.)

REASONS FOR GRANTING THE WRIT

A. There is substantial inconsistency in the way the lower courts interpret the terms "substantial bodily injury" and "permanent or life-threatening bodily injury" under Section 2A2.1(b)(1)(A).

There is a lack of consistency among the lower courts in applying U.S.S.G. § 2A2.1(b)(1)(A), with the inconsistency most apparent in the disparate ways the circuits treat similar injuries. In fact, the caselaw does not reveal any clear dividing line between "substantial bodily injury" and "permanent or life-threatening bodily injury," as those terms are applied to real-life injuries. The inconsistency in the caselaw leaves confusion concerning how to apply these enhancements and creates the risk that they will be arbitrarily and unfairly applied.

There is, for example, no principled way to reconcile the disparate outcomes in Petitioner's case and *United States v. Spinelli*, 352 F.3d 48 (2nd Cir. 2003). In *Spinelli*, the victim was shot at point-blank range. One bullet lodged in her neck and another ricocheted off her back. Remarkably, the victim sustained only minor injuries and was released from hospital within two days. The PSR recommended a four-level enhancement under § 2A2.1(b)(1), and the district court adopted that recommendation. On appeal, however, the Second Circuit held that the district court erred in relying on the circumstances of the crime rather than its effects. *Id.* at 57.

The Second Circuit explained its reasoning as follows:

> Since, for example, attempted murders are, by definition, life-threatening, to consider the defendant's conduct or the intended results of his actions could subject every attempted murder to the four level enhancement, regardless of the

> injuries suffered by the victim. But the Guidelines clearly contemplate various levels of enhancement for attempted murder—or indeed no enhancement at all. It follows that a focus on results is virtually compelled by the Guideline structure.

Spinelli, 352 F.3d at 57-58.

In Petitioner's case, the majority ignored *Spinelli* and focused explicitly on the *intended* results of the defendants' conduct. (*See* App. 4 fn.2.) The majority wrote, "Perez argues that the district court erred in adding the enhancement because 'it is not the actions of the defendants that can be life-threatening in order for the enhancement to apply; it is the injury.' But we have previously held that such 'acts' are not just 'circumstances in which the beatings took place'; they may constitute 'maltreatment to a life-threatening degree' 'whether or not the perpetrator also has inflicted other injuries.'" (App. 6 (quoting *United States v. Morgan*, 238 F.3d 1180, 1188 (9th Cir. 2001).)

Judge Berzon, in her dissent, criticized the majority's analysis on this point:

> Although there is testimony indicating that Macedo was unconscious, there is no evidence of the period of time he was out, and there is none that speaks to his need for immediate treatment. And unlike both cases where we have previously concluded there was or may have been a life-threatening injury under the Guideline, Macedo did not seek medical care after the incident. [Citations.] Although pursuing medical care is not an explicit requirement imposed by the Guideline, the fact that Macedo ultimately deemed no medical care necessary is probative of the dangerousness, or lack thereof, of his injury.

(App. 11-12.)

The lack of consistency in the way the lower courts treat the various enhancements under § 2A2.1(n)(1)(A)—and the need for guidance from this Court—is also apparent from a further review of the cases.

For example, in many cases in which a victim required immediate, life-saving medical attention—which the victim in Petitioner's case did not require—courts have found the four-level enhancement for "permanent or life-threatening bodily injury" warranted. *See, e.g.*, *United States v. Rios*, 830 F.3d 403, 442, 444 (6th Cir. 2016) (district court applied life-threatening injury enhancement where victim was airlifted to level-one trauma center after being beaten unconscious); *United States v. Sarratt*, 750 Fed. Appx. 213, 214 (4th Cir. 2019) (four-level enhancement applied where victim was shot in abdomen and treated in trauma bay reserved for high-risk injuries before being taken into surgery); *Jordan v. U.S. Parole Comm'n*, 552 Fed. Appx. 56, 58–59 (2d Cir. 2014) (holding that four-level enhancement was proper where stabbing caused abdominal arterial bleeding that would have been fatal but for surgical intervention); *United States v. Helton*, 32 Fed. Appx. 707, 716 (6th Cir. 2002) ("One who suffers a bullet wound that pierces ribs and diaphragm, collapses a lung and requires the transfusion of four units of blood has, we think, suffered an injury causing a substantial risk of death.").)

In other cases, however, courts have rejected the four-level enhancement in favor of a two- or three-level enhancement even where the victim was unconscious or where immediate medical care was necessary. *See United States v. Chambers*, 133 F.4th 812, 818 (8th Cir. 2025) (affirming imposition of three-level enhancement where victim was struck in head, shot in chest, required staples and surgery, and was hospitalized for a month);

United States v. Grant, 15 F.4th 452, 454, 456 (6th Cir. 2021) (district court applied two-level serious bodily injury enhancement even where the victim was punched in the head, shot in the chest, and underwent surgery); *United States v. Ellis*, 130 F.4th 442, 447 (4th Cir. 2025) (noting that district court rejected four-level permanent or life-threatening enhancement and instead imposed two-level serious bodily injury enhancement even where victim was shot in abdomen); *United States v. Taylor*, 973 F.3d 414, 416 (5th Cir. 2020) (noting that district court imposed serious bodily injury enhancement even where victim suffered multiple gunshot wounds).

There is no clear line between the cases in which defendants receive the four-level enhancement and cases in which they receive something less. For example, in *United States v. Miner*, 345 F.3d 1004, 1006-07 (8th Cir. 2003), the defendant received a four-level enhancement where the victim had a scar from the removal of a bullet. But in *Grant*, the victim similarly underwent surgery to remove a bullet, and the defendant in that case only received a two-level enhancement. 15 F.4th at 456. In Petitioner's case, the victim required no medical intervention whatsoever, and yet Petitioner received the four-level enhancement.

Similarly, the defendant in *United States v. Egbert*, 562 F.3d 1092 (10th Cir. 2009), received an enhancement only for "serious bodily injury" where the victim was beaten unconscious, bleeding from the head, and believed by witnesses to be either seriously hurt or dead. *Id.* at 1101. Yet in Petitioner's case, the victim was also rendered unconscious and believed to be dead, yet Petitioner received the four-level enhancement. Likewise, in *Spinelli*, the court rejected the four-level enhancement despite the fact that

the victim was shot at close range and hospitalized for two days. 352 F.3d at 51, 60. Yet in Petitioner's case, the victim was never hospitalized—indeed, he walked away from the incident—yet Petitioner received the four-level enhancement. These types of inconsistent outcomes will continue until this Court provides much-needed clarification.

B. This case is an appropriate vehicle for the Court to resolve the inconsistency and clarify what is required for the four-level "permanent or life-threatening bodily injury" enhancement to apply.

This case is an appropriate vehicle through which the Court can resolve the inconsistency among the circuits and clarify what qualifies an injury as "permanent or life-threatening" for purposes of the four-point enhancement under U.S.S.G. § 2A2.1(b)(1)(A). The issue was litigated in the district court, which considered and discussed the issue at length during the resentencing hearing. (App. 23-32.) And it was subsequently raised on direct appeal and decided on the merits by the Court of Appeals in a split decision. (App. 2-15.)

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DATED: August 18, 2025

By: _____
ELIZABETH RICHARDSON-ROYER
Attorney-at-Law*

Attorney for Petitioner
**Counsel of Record*

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAY 20 2025

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JAVIER PEREZ,

Defendant-Appellant.

No. 23-1993

D.C. No. 2:07-cr-01172-DDP-32

ORDER DENYING PETITION FOR REHEARING EN BANC

Before: BERZON, TALLMAN, and R. NELSON, Circuit Judges,

Defendant-Appellant Javier Perez filed a petition for rehearing en banc (ECF. No. 52). Judge R. Nelson votes to deny the petition, and Judge Berzon and Judge Tallman so recommend. The full court has been advised of the petition and no judge of the Court has requested a vote on whether to rehear the case en banc. Fed. R. App. P. 40.

Defendant-Appellant's petition for rehearing en banc is DENIED.

IT IS SO ORDERED.

FILED

MAR 7 2025

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JAVIER PEREZ, Defendant-Appellant.	No. 23-1993 D.C. No. 2:07-cr-01172-DDP-32 MEMORANDUM*

On Appeal from the United States District Court
for the Central District of California
Hon. Dean D. Pregerson, Presiding

Argued and Submitted January 17, 2025
Pasadena, California

Before: BERZON, TALLMAN, and R. NELSON, Circuit Judges.
Dissent by Judge BERZON.

This case returns to us following a prior remand. *See United States v. Perez*, 962 F.3d 420, 446–47, 455 (9th Cir. 2020). Defendant-Appellant Javier Perez appeals his life sentence for RICO conspiracy, VICAR murder conspiracy, VICAR kidnapping conspiracy, and conspiracy to kidnap convictions based on a gang-

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

related kidnapping and attempted murder of a hitman who had previously murdered an innocent 21-day old bystander to another attempted murder.

The district court based the sentence primarily on the Probation Office's Sentencing Guidelines calculation that yields a recommended sentence of life imprisonment. The court alternatively adopted the Government's three additional guidelines calculations that each yield a recommended sentence ranging from 360 months to life imprisonment. All four calculations begin with kidnapping or murder conspiracy as the base level offense, which Perez agrees is correct. Perez also agrees that the Government's first and third alternative calculations correctly add other offense levels allowed under the base offense guidelines. The only issue Perez argues on appeal regarding the first and third alternative calculations is the inclusion of a four-level enhancement because his victim, Giovanni Macedo, "sustained permanent or life-threatening bodily injury." U.S. Sent'g Guidelines Manual § 2A2.1(b)(1)(A) (U.S. Sent'g Comm'n 2011). Perez's appeal thus turns on whether the district court erred in applying this enhancement. We find no such error.

We have jurisdiction to review the district court's sentence under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a). We review the court's application of facts to the guidelines "deferentially for abuse of discretion." *United States v. Gasca-Ruiz*, 852 F.3d 1167, 1171, 1174 (9th Cir. 2017) (en banc). "A district court abuses its discretion when it applies the wrong legal standard or when its findings of fact or its

application of law to fact are illogical, implausible, or without support in inferences that may be drawn from the record." *United States v. Chichande*, 113 F.4th 913, 919–20 (9th Cir. 2024) (internal quotation marks and citation omitted).

Application Note 1(J) to U.S.S.G. § 1B1.1 defines "life-threatening" in relevant part as "involving a substantial risk of death" and says nothing about the need for a threshold medical diagnosis or intervention to support that conclusion. *See also United States v. Hinton*, 31 F.3d 817, 825–26 (9th Cir. 1994) (dismissing defense argument that "no medical testimony was presented at trial, or at the sentencing hearing, which showed the victim faced a substantial risk of death because of the stab wounds" because the argument "fails to consider that the enhancement was premised not on infliction of a 'permanent' injury . . . but on that section's alternative, 'life-threatening' prong").

Here, the district court made several factual findings by a preponderance of the evidence supporting its conclusion that Macedo sustained injury that "involv[ed] a substantial risk of death." Relying on the evidence adduced in a two-month jury trial, the court found that Perez, who was hired to kill Macedo, strangled him with a rope to the point of a bloodied and scarred neck, causing Macedo to lose consciousness.[1] The court also found that, once Perez and his co-conspirators

[1] The dissent makes the perplexing statement that "it is not self-evident that Macedo faced a 'substantial risk of death' from, or evidenced by, his unconsciousness.

believed Macedo dead, they threw his body off of a cliff in remote Mexico and fled the scene.

Perez does not dispute those findings, which are supported by Macedo's own testimony, the testimony of the co-conspirator who drove them to the crime scene, photographs presented at trial of Macedo's neck taken approximately six weeks after strangulation, and the presence of his scars at trial nearly four and a half years later. Nothing compels us to conclude that these findings "are illogical, implausible, or without support in inferences that may be drawn from the record." *Chichande*, 113 F.4th at 919–20 (internal quotation marks and citation omitted); *see Hinton*, 31 F.3d at 820, 826 (agreeing that "[a]mple evidence of a life-threatening injury supported the sentencing court's factual findings on this issue," including, like here, witness testimony establishing the victim's injuries and maltreatment). Although the district court misstated a co-conspirator's testimony in finding that Macedo's heart had temporarily stopped at the time he was thrown off the cliff, that single erroneous factual finding was harmless. The undisputed facts cited above are enough to support the district court's enhancement.

Although it may be that some feature of Macedo's unconsciousness made it deadly, the record is devoid of evidence so demonstrating . . . ." We disagree. The record shows that two hired assassins strangled Macedo with a garrote while one yelled, "Die Motherfucker, die!" The assassins only ceased after one declared that Macedo was no longer breathing and that Macedo "couldn't be alive because he [] had just snapped his neck." These "feature[s]" of Macedo's unconsciousness presented a "substantial risk of death."

Perez argues that the district court erred in adding the enhancement because "it is not the actions of the defendants that can be life-threatening in order for the enhancement to apply; it is the injury." But we have previously held that such "acts" are not just "circumstances in which the beatings took place"; they may constitute "maltreatment to a life-threatening degree" "whether or not the perpetrator also has inflicted other injuries." *United States v. Morgan*, 238 F.3d 1180, 1188 (9th Cir. 2001); *accord Hinton*, 31 F.3d at 820, 826. The facts and holding of *Morgan* are instructive. There, the victim was carjacked and kidnapped by two defendants at a truck stop. *Id.* at 1184. Defendants restrained the victim, locked him in the trunk in below-freezing temperatures, then later repeatedly stopped and beat him with a metal pipe, made several shallow cuts across his throat, and stabbed him in the shoulder. *Id.* Believing him dead, defendants drove to a remote location, removed the victim from the trunk, threw him down a hill, then drove away. *Id.* The victim, like Macedo, miraculously survived, climbed back up to the highway, and hailed a ride to safety. *Id.* He surprisingly required minimal medical care relative to his ordeal and was discharged from the hospital after only three days. *Id.*

At sentencing, the judge in *Morgan* added the lower enhancement of "serious bodily injury" rather than the Government's requested "permanent or life-threatening bodily injury." *Id.* at 1185. The district court reasoned, as Perez argues here, that the victim's "injuries themselves were not life-threatening, but that [the

victim's] situation was life-threatening." *Id.* at 1188. We rejected that reasoning and reversed and remanded, disagreeing that "[b]ecause the court found that [the victim's] 'circumstances' were more dire than his injuries, . . . it could not grant the enhancement for 'life-threatening injury.'" *Id.* at 1188. We ordered the district court to reconsider adding the enhancement based not only on "the beatings" but also the "deprivations themselves" to decide whether those constituted "maltreatment to a life-threatening degree . . . irrespective of the other injuries" the victim sustained. *Id.* (internal quotation marks omitted). On remand, the district court then found that the victim had indeed sustained "life-threatening bodily injury," which we affirmed. *United States v. Morgan*, 33 F. App'x 907, 907 (9th Cir. 2002).

In light of our rulings in *Morgan* and *Hinton*, the district court did not abuse its discretion in concluding that Macedo's injuries (asphyxiation to the point of unconsciousness, evidenced by a bloodied, scarred neck), alongside Perez's maltreatment of the victim (throwing an unconscious Macedo off of a cliff in remote Mexico and leaving him for dead) had a "substantial risk of death" and amounted to "life-threatening bodily injury."[2] *See id.*; *Hinton*, 31 F.3d at 820, 826 ("Viewed in

[2] This is a straightforward conclusion supported by the language of the guidelines and our case law. The dissent goes to great lengths to complicate it, reasoning that "[i]f the victim is not hurt because the shooter misses him, he has not sustained a life-threatening injury, any more than a shooter who misses an intended victim is guilty of murder rather than attempted murder." But that is not what happened here. Macedo did not dodge a bullet unscathed. He was strangled to the point of near

conjunction with [defendant's] contemporaneous threat to kill the victim, the forceful blows, the profuse blood loss and the subsequent denial of access to medical treatment endangered the victim's life and thus constituted a 'life-threatening bodily injury.'").

We hold that, applying a common sense analysis to the facts presented here, the sentencing judge properly found that there was a "substantial risk of death" to warrant the four-level "life-threatening bodily injury" enhancement. We affirm the district court's life sentence based on the Government's first and third alternative calculations that each yield a guidelines range of 360 months to life imprisonment. In light of our decision, we need not reach Perez's remaining issues challenging the Probation Office's guidelines calculation and the Government's second alternative guidelines calculation.

AFFIRMED.

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death. Then, the assassins threw Macedo's unconscious body off of a cliff in remote Mexico, all but guaranteeing he had no access to any lifesaving measures. Macedo is the opposite of an eggshell plaintiff—he survived what one would expect to be an unsurvivable assault. But the fact that he survived does not mean that his injury and maltreatment presented anything less than a "substantial risk of death." *See Morgan*, 33 F. App'x at 907; *Hinton*, 31 F.3d at 820, 826.

FILED

MAR 7 2025

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

BERZON, J., dissenting:

The majority misconstrues the meaning of the Sentencing Guideline it addresses.[1] Because I disagree with the application of the life-threatening bodily injury enhancement, I dissent.

The enhancement at issue applies "[i]f . . . the victim sustained permanent or life-threatening bodily injury." U.S.S.G. § 2A2.1(b)(1). The Guidelines commentary defines a "life-threatening bodily injury" as an "injury involving a substantial risk of death." U.S.S.G. § 1B1.1 cmt. 1(K). As the Guideline makes clear, the enhancement applies only if the victim *actually sustained* an injury that was life-threatening.

The district court concluded that "strangling someone to the point where they lose a heartbeat and throwing them off a cliff in Mexico unconscious is . . . an injury contemplated by the definition of life-threatening." The majority approves the district court's conclusion, reasoning that both Macedo's strangulation and his fall caused him to sustain life threatening injuries.

1. In concluding that the strangulation resulted in a life-threatening injury, the district court relied on an erroneous factual finding, that Macedo "was found to have no heartbeat." On appeal the government repeated a version of this assertion,

[1] Because the majority does not reach Perez's alternative arguments regarding what offenses may be cross-referenced under U.S.S.G. § 2A4.1(b)(7), I also do not address them.

maintaining that Macedo had only "a faint pulse." There is no evidence in the record indicating that Macedo did not have a heartbeat or that his pulse was faint. The only evidence on this issue is Perez's co-conspirator's testimony that, when she checked while he was unconscious, Macedo had a pulse.

"A district court may abuse its discretion . . . if it rests its decision on a clearly erroneous finding of material fact." *United States v. Rodriguez*, 921 F.3d 1149, 1156 (9th Cir. 2019) (citation omitted). The district court's finding that Macedo had no heartbeat is clearly erroneous, so its application of the life-threatening injury enhancement on this basis was an abuse of discretion.

Macedo also sustained ligature marks around his neck. Although the majority discusses this injury, there is no serious argument that Macedo faced a substantial risk of death from his neck abrasions, nor does the government make one.

The majority acknowledges the district court's erroneous factual finding regarding Macedo's pulse but contends that it is harmless, because Macedo sustained another injury resulting from the strangulation: unconsciousness. But it is not self-evident that Macedo faced "a substantial risk of death" from, or evidenced by, his unconsciousness. Although it may be that some feature of Macedo's unconsciousness made it deadly, the record is devoid of evidence so demonstrating, and so does not establish that Macedo faced "a substantial risk of death" because of, or evidenced by, his unconsciousness. U.S.S.G. § 1B1.1 cmt. 1(K).

United States v. Hinton provides an instructive example of the type of evidence that can prove an injury was life threatening. 31 F.3d 817 (9th Cir. 1994). There we affirmed the finding that the victim's "profuse blood loss" was life threatening. 31 F.3d 817, 826 (9th Cir. 1994). That case involved "[n]umerous witnesses" who "testified to the victim's considerable blood loss." *Id.* In particular, the ambulance medical technician who treated the victim testified that the victim had gone into shock and required immediate intervention to treat her bleeding. *Id.*

There is no comparable evidence here. Although there is testimony indicating that Macedo was unconscious, there is no evidence of the period of time he was out, and there is none that speaks to his need for immediate treatment. And unlike both cases where we have previously concluded there was or may have been a life-threatening injury under the Guideline, Macedo did not seek medical care after the incident. *See id.* at 820; *see also United States v. Morgan*, 238 F.3d 1180, 1184 (9th Cir. 2001). Although pursuing medical care is not an explicit requirement imposed by the Guideline, the fact that Macedo ultimately deemed no medical care necessary is probative of the dangerousness, or lack thereof, of his injury.

At base, there must be *some* evidence that the victim's injuries were so severe that they placed him in mortal peril. Here, there is no evidence demonstrating that Macedo's unconsciousness presented or was indicative of a substantial risk of death.

2. Next the majority contends that the act of throwing Macedo over an embankment on the side of the road merits the enhancement. The majority does not identify any injury—much less one that was life threatening—caused by Macedo's fall. The record indicates that Macedo was—although one might well have predicted otherwise—uninjured by the fall.

Instead, the majority relies on a provision in the Guidelines commentary stating that "[i]n the case of a kidnapping, for example, maltreatment to a life-threatening degree (*e.g.*, by denial of food or medical care) would constitute life-threatening bodily injury." U.S.S.G. § 1B1.1. cmt. 1(K). In accordance with this provision, we have held that "during a kidnapping, deprivation of the essentials of life or similar 'maltreatment' may by itself be a 'life-threatening bodily injury.'" *United States v. Morgan*, 238 F.3d 1180, 1188 (9th Cir. 2001). In *Morgan*, we remanded for the district court to consider whether the victim's lack of "fresh air, food, water, medical care, and heat" was sufficiently life threatening to qualify for the enhancement. *Id.* at 1188-89. The logic of such a rule is that, although not caused by physical violence, conditions such as starvation, dehydration, hypothermia, or heat stroke, caused by lack of food, water, or appropriate temperature conditions, can be considered "injuries" for the purposes of the enhancement, and can trigger the enhancement—but only *if* the condition becomes life-threatening.

Seeking to justify the application of the life-threatening bodily injury enhancement even though Macedo was not injured at all by the fall, the majority maintains that throwing Macedo over an embankment is analogous to denying kidnapping victims food or water or exposing them to extreme temperatures, because it is also "maltreatment." This reading is unsupported by *Morgan*, which addressed maltreatment of a specific type—the "deprivation of the essentials of life"—and then remanded to determine whether the maltreatment was life-threatening. *Morgan*, 238 F.3d at 1188. With that sort of maltreatment, any internal impact on life-sustaining bodily functions is gradual, and it makes sense to ask retrospectively whether at some point the harm caused by the maltreatment became life-threatening. In contrast, where the "maltreatment" takes the form of placing an individual in danger of sustaining a physical injury—shooting at someone, for example, or, as here, throwing someone over an embankment—either an injury occurred or it did not. If, as here, *no* injury occurred, there could not have been a life-threatening injury; if an injury did occur, *then* the second question arises, whether it was life-threatening.

The majority's reading disregards the two-step analysis *Morgan* presupposes and thereby conflicts with the language of the Guideline itself. Once again, the Guideline is clear that the enhancement applies only if the victim actually "*sustained*" a "life-threatening bodily injury." U.S.S.G. § 2A2.1(b)(1)(A) (emphasis added). Expanding the commentary concerning "maltreatment" to encompass acts

beyond the gradual internal injuries that can be caused by the deprivation of life essentials means that virtually every act of violence would warrant the enhancement, regardless of whether the victim sustained *any* injury.

That exact situation is present here. It is uncontroverted that Macedo was entirely uninjured from his fall. Yet the majority would apply the life-threatening bodily injury enhancement because throwing him off the cliff was maltreatment and *could* have caused him to sustain a life-threatening injury.[2] But the Guideline focuses on whether there *was* a life-threatening injury, not whether there could have been or whether the defendant believed there was one. Shooting at someone is surely maltreatment. If the victim is not hurt because the shooter misses him, he has not

[2] To be sure, Perez's statements during the incident show that there was a clear intent to kill Macedo, as well as an erroneous belief that he had succeeded in doing so. Contrary to the majority's reasoning, however, being in a situation where there is an intent to kill is not the same as "sustain[ing]" a "life-threatening bodily injury." U.S.S.G. § 2A2.1(b)(1)(A). Because "attempted murders are, by definition, life-threatening, to consider . . . the intended result of [the defendant's] actions could subject every attempted murder to the four-level enhancement, regardless of the injuries actually suffered by the victim." *United States v. Spinelli*, 352 F.3d 48, 57 (2d Cir. 2003). "But the Guidelines clearly contemplate various levels of enhancement for attempted murder-or indeed no enhancement at all" depending on the actual severity of the victim's injuries. *Id.* The majority's application of the enhancement based on indications that Perez intended Macedo's death and erroneously believed that he had fatally injured him is inconsistent with the structure of the Guideline, which indicates that the enhancement should not apply in every instance of attempted murder, and the text of the enhancement. The text, once again, requires the victim to have *actually* sustained a life-threatening injury.

sustained a life-threatening injury, any more than a shooter who misses an intended victim is guilty of murder rather than attempted murder.

Because there is insufficient evidence that Macedo sustained an injury that posed a substantial risk of death, I would hold that the district court abused its discretion in applying the life-threatening bodily injury enhancement. I therefore respectfully dissent.

United States District Court
Central District of California

RE-SENTENCING

UNITED STATES OF AMERICA vs. **Docket No.** CR 07-01172-DDP-32

Defendant Javier Perez **Social Security No.** 7 7 0 5

akas: Ranger (Last 4 digits)

In the presence of the attorney for the government, the defendant appeared in person on this date.

MONTH	DAY	YEAR
8	14	2023

COUNSEL **Paul Blake, CJA**
(Name of Counsel)

PLEA ☐ **GUILTY,** and the court being satisfied that there is a factual basis for the plea. ☐ **NOLO CONTENDERE** ☐ **NOT GUILTY**

FINDING There being a finding/verdict of **GUILTY,** defendant has been convicted as charged of the offense(s) of:
Count 1: Racteteer Influenced and Corrupt Organizations Conspiracy 18 U.S.C. § 1962(d)
Counts 16, 17; Violent Crime in Aid of Racketeering Activity (18 U.S.C. § 1959 (a)(5):
Count 20: Conspiracy to Commit Kidnapping (18 U.S.C. § 1201c)

JUDGMENT AND PROB/ COMM ORDER The Court asked whether there was any reason why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the Court, the Court adjudged the defendant guilty as charged and convicted and ordered that: Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of:

It is ordered that the defendant shall pay to the United States a special assessment of $400, which is due immediately. Any unpaid balance shall be due during the period of imprisonment, at the rate of not less than $25 per quarter, and pursuant to the Bureau of Prisons' Inmate Financial Responsibility Program.

Pursuant to Guideline § 5E1.2(a), all fines are waived as the Court finds that the defendant has established that he is unable to pay and is not likely to become able to pay any fine.

Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant, Javier Perez, is hereby committed on Count 1, 16, 17 and 20 of the Fourth Superseding Indictment to the custody of the Bureau of Prisons for a term of life. This term consists of life on each of Counts 1 and 20 of the Fourth Superseding Indictment and 120 months on counts 16 and 17, all to be served concurrently.

The Court recommends that the Bureau of Prisons conduct a mental health evaluation of the defendant and provide all necessary treatment.

In the event of release from imprisonment, the defendant shall be placed on supervised release for a term of five years. This term consists of five years on each of Counts 1 and 20 and three years on each of Counts 16 and 17 of the Fourth Superseding Indictment, all such terms to run concurrently under the following terms and conditions:

1. The defendant shall comply with the rules and regulations of the United States Probation & Pretrial Services Office and Second Amended General Order 20-04.

2. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from custody and at least two periodic drug tests thereafter,

not to exceed eight tests per month, as directed by the Probation Officer.

3. The defendant shall cooperate in the collection of a DNA sample from the defendant.

4. During the period of community supervision, the defendant shall pay the special assessment in accordance with this judgment's orders pertaining to such payment.

5. The defendant shall reside for a period of 6 months in a residential reentry center community corrections component, as directed by the Probation Officer, and shall observe the rules of that facility.

6. When not employed or excused by the Probation Officer for schooling, training, or other acceptable reasons, the defendant shall perform 20 hours of community service per week as directed by the Probation & Pretrial Services Office.

7. The defendant shall not associate with anyone known to the defendant to be a member of the Lil' Cycos Gang and others known to the defendant to be participants in the Lil' Cycos Gang's criminal activities, with the exception of the defendant's family members. The defendant may not wear, display, use or possess any gang insignias, emblems, badges, buttons, caps, hats, jackets, shoes, or any other clothing that defendant knows evidence affiliation with the Lil' Cycos Gang, and may not display any signs or gestures that defendant knows evidence affiliation with the Lil' Cycos Gang.

8. As directed by the Probation Officer, the defendant shall not be present in any area known to the defendant to be a location where members of the Lil' Cycos Gang meet or assemble.

9. The defendant shall submit the defendant's person, property, house, residence, vehicle, papers, computers, cell phones, other electronic communications or data storage devices or media, email accounts, social media accounts, cloud storage accounts, or other areas under the defendant's control, to a search conducted by a United States Probation Officer or law enforcement officer. Failure to submit to a search may be grounds for revocation. The defendant shall warn any other occupants that the premises may be subject to searches pursuant to this condition. Any search pursuant to this condition will be conducted at a reasonable time and in a reasonable manner upon reasonable suspicion that the defendant has violated a condition of his supervision and that the areas to be searched contain evidence of this violation.

Defendant informed of his right to appeal.

USA vs. Javier Perez Docket No.: CR 07-01172-DDP-32

In addition to the special conditions of supervision imposed above, it is hereby ordered that the Standard Conditions of Probation and Supervised Release within this judgment be imposed. The Court may change the conditions of supervision, reduce or extend the period of supervision, and at any time during the supervision period or within the maximum period permitted by law, may issue a warrant and revoke supervision for a violation occurring during the supervision period.

August 18, 2023
Date

U. S. District Judge

It is ordered that the Clerk deliver a copy of this Judgment and Probation/Commitment Order to the U.S. Marshal or other qualified officer.

Clerk, U.S. District Court

August 18, 2023
Filed Date

By Patricia Gomez
Deputy Clerk

The defendant must comply with the standard conditions that have been adopted by this court (set forth below).

STANDARD CONDITIONS OF PROBATION AND SUPERVISED RELEASE

While the defendant is on probation or supervised release pursuant to this judgment:

USA vs. Javier Perez Docket No.: CR 07-01172-DDP-32

1. The defendant must not commit another federal, state, or local crime;
2. The defendant must report to the probation office in the federal judicial district of residence within 72 hours of imposition of a sentence of probation or release from imprisonment, unless otherwise directed by the probation officer;
3. The defendant must report to the probation office as instructed by the court or probation officer;
4. The defendant must not knowingly leave the judicial district without first receiving the permission of the court or probation officer;
5. The defendant must answer truthfully the inquiries of the probation officer, unless legitimately asserting his or her Fifth Amendment right against self-incrimination as to new criminal conduct;
6. The defendant must reside at a location approved by the probation officer and must notify the probation officer at least 10 days before any anticipated change or within 72 hours of an unanticipated change in residence or persons living in defendant's residence;
7. The defendant must permit the probation officer to contact him or her at any time at home or elsewhere and must permit confiscation of any contraband prohibited by law or the terms of supervision and observed in plain view by the probation officer;
8. The defendant must work at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons and must notify the probation officer at least ten days before any change in employment or within 72 hours of an unanticipated change;
9. The defendant must not knowingly associate with any persons engaged in criminal activity and must not knowingly associate with any person convicted of a felony unless granted permission to do so by the probation officer. This condition will not apply to intimate family members, unless the court has completed an individualized review and has determined that the restriction is necessary for protection of the community or rehabilitation;
10. The defendant must refrain from excessive use of alcohol and must not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
11. The defendant must notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer;
12. For felony cases, the defendant must not possess a firearm, ammunition, destructive device, or any other dangerous weapon;
13. The defendant must not act or enter into any agreement with a law enforcement agency to act as an informant or source without the permission of the court;
14. The defendant must follow the instructions of the probation officer to implement the orders of the court, afford adequate deterrence from criminal conduct, protect the public from further crimes of the defendant; and provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

☐ The defendant must also comply with the following special conditions (set forth below).

STATUTORY PROVISIONS PERTAINING TO PAYMENT AND COLLECTION OF FINANCIAL SANCTIONS

The defendant must pay interest on a fine or restitution of more than $2,500, unless the court waives interest or unless the fine or restitution is paid in full before the fifteenth (15th) day after the date of the judgment under 18 U.S.C. § 3612(f)(1). Payments may be subject to penalties for default and delinquency under 18 U.S.C. § 3612(g). Interest and penalties pertaining to restitution, however, are not applicable for offenses completed before April 24, 1996. Assessments, restitution, fines, penalties, and costs must be paid by certified check or money order made payable to "Clerk, U.S. District Court." Each certified check or money order must include the case name and number. Payments must be delivered to:

United States District Court, Central District of California
Attn: Fiscal Department
255 East Temple Street, Room 1178
Los Angeles, CA 90012

or such other address as the Court may in future direct.

If all or any portion of a fine or restitution ordered remains unpaid after the termination of supervision, the defendant must pay the balance as directed by the United States Attorney's Office. 18 U.S.C. § 3613.

The defendant must notify the United States Attorney within thirty (30) days of any change in the defendant's mailing address or residence address until all fines, restitution, costs, and special assessments are paid in full. 18 U.S.C. § 3612(b)(l)(F).

The defendant must notify the Court (through the Probation Office) and the United States Attorney of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay a fine or restitution, as required by 18 U.S.C. § 3664(k). The Court may also accept such notification from the government or the victim, and may, on its own motion or that of a party or the victim, adjust the manner of payment of a fine or restitution under 18 U.S.C. § 3664(k). See also 18 U.S.C. § 3572(d)(3) and for probation 18 U.S.C. § 3563(a)(7).

Payments will be applied in the following order:

1. Special assessments under 18 U.S.C. § 3013;
2. Restitution, in this sequence (under 18 U.S.C. § 3664(i), all non-federal victims must be paid before the United States is paid):
   Non-federal victims (individual and corporate),
   Providers of compensation to non-federal victims,
   The United States as victim;
3. Fine;
4. Community restitution, under 18 U.S.C. § 3663(c); and
5. Other penalties and costs.

CONDITIONS OF PROBATION AND SUPERVISED RELEASE PERTAINING TO FINANCIAL SANCTIONS

As directed by the Probation Officer, the defendant must provide to the Probation Officer: (1) a signed release authorizing credit report inquiries; (2) federal and state income tax returns or a signed release authorizing their disclosure and (3) an accurate financial statement, with supporting documentation as to all assets, income and expenses of the defendant. In addition, the defendant must not apply for any loan or open any line of credit without prior approval of the Probation Officer.

When supervision begins, and at any time thereafter upon request of the Probation Officer, the defendant must produce to the Probation and Pretrial Services Office records of all bank or investments accounts to which the defendant has access, including any business or trust accounts. Thereafter, for the term of supervision, the defendant must notify and receive approval of the Probation Office in advance of opening a new account or modifying or closing an existing one, including adding or deleting signatories; changing the account number or name, address, or other identifying information affiliated with the account; or any other modification. If the Probation Office approves the new account, modification or closing, the defendant must give the Probation Officer all related account records within 10 days of opening, modifying or closing the account. The defendant must not direct or ask anyone else to open or maintain any account on the defendant's behalf.

The defendant must not transfer, sell, give away, or otherwise convey any asset with a fair market value in excess of $500 without approval of the Probation Officer until all financial obligations imposed by the Court have been satisfied in full.

These conditions are in addition to any other conditions imposed by this judgment.

USA vs. Javier Perez Docket No.: CR 07-01172-DDP-32

RETURN

I have executed the within Judgment and Commitment as follows:

Defendant delivered on _____ to _____

Defendant noted on appeal on _____

Defendant released on _____

Mandate issued on _____

Defendant's appeal determined on _____

Defendant delivered on _____ to _____

at _____

the institution designated by the Bureau of Prisons, with a certified copy of the within Judgment and Commitment.

United States Marshal

_____ By _____

Date Deputy Marshal

CERTIFICATE

I hereby attest and certify this date that the foregoing document is a full, true and correct copy of the original on file in my office, and in my legal custody.

Clerk, U.S. District Court

_____ By _____

Filed Date Deputy Clerk

FOR U.S. PROBATION OFFICE USE ONLY

Upon a finding of violation of probation or supervised release, I understand that the court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

(Signed) _____ _____

Defendant Date

_____ _____

U. S. Probation Officer/Designated Witness Date

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

- - -

HONORABLE DEAN D. PREGERSON, DISTRICT JUDGE PRESIDING

UNITED STATES OF AMERICA,	)	
	)	
Plaintiffs,	)	
	)	
	)	
	)	
vs.	)	**No. CR 07-01172-DDP-32**
	)	
	)	
	)	
JAVIER PEREZ,	)	
	)	
Defendant.	)	
	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

RESENTENCING HEARING [3363]

LOS ANGELES, CALIFORNIA

MONDAY, AUGUST 14, 2023

MARIA R. BUSTILLOS
OFFICIAL COURT REPORTER
C.S.R. 12254
UNITED STATES COURTHOUSE
350 WEST 1ST STREET
SUITE 4455
LOS ANGELES, CALIFORNIA 90012
(213) 894-2739

possible calculations, there's no floor below a 37-6 that seems credible to the Court.

MR. NELSON: I would concur with that, Your Honor. I think we're between a 37-6 and a 43-6.

THE COURT: Exactly.

MR. NELSON: And there's -- the only other then issue that to -- to bring up to the Court that could change some of this is, you know, if we're applying the conditions of permanent bodily injury, those definitions come out of the commentary, which after the Ninth Circuit's decision in Castillo creates an issue of how we approach terms in the commentary. And that unfortunately, only struck me this morning. I did some very quick research. I did find a Sixth Circuit case on this, where the Sixth Circuit had said that this Guideline is not so ambiguous that you would need to -- the terms "serious bodily injury," "life threatening bodily injury" or "permanent bodily injury" are not so ambiguous that you would need to resort to the definitions in the commentary. And that case is *United States v. Medlin*. It can be found at 65 F.4th -- I'm sorry -- I just lost the page cite there. But I think under any kind of commonsense understanding of life threatening injury, that is the injury that we have here.

THE COURT: Right. But just to revisit the initial 37 offense level calculation that I went through, that does not require a consideration of any of those other factors.

MR. NELSON: No, Your Honor.

THE COURT: And there has been argument that the victim recovered in the sense that, you know, he was found to have no heartbeat. He was pushed over a cliff after he had been strangled, and that somehow miraculously, he didn't fall all the way down the cliff, and he was able to regain consciousness. He remained with noticeable ligature abrasions on his neck even several years after the incident. So walk me through why you think the law under the circumstances where he seems to have made a physical recovery but for the -- you know, the scars that that's still -- that a plus four is still appropriate.

MR. NELSON: So to get there, it's a permanent injury or a life threatening injury. It's "or." That's a disjunctive, not a conjunctive. So the -- the scarring is still being there years later. It appears to be a permanent injury, and I think would get us there through that path. But the life-threatening injury is what Your Honor just described, which is being choked to the point of passing out, not having a perceptible

heartbeat, loss of consciousness, that that is a life-threatening -- being in that condition with those injuries, that is a life-threatening state. And the injuries that put you there are life-threatening injuries.

THE COURT: Being strangled is a life-threatening injury in a nutshell.

MR. NELSON: Being strangled to the point that you actually lose consciousness. So just --

THE COURT: Yes, I meant under the facts of this case.

MR. NELSON: Yes, under the -- a mere strangling of somebody, you know, grabbing them, shaking them, and somewhat harming them, but they, you know, get away and are short of breath. I would not argue that that is a life-threatening injury; but being strangled to the point that you lose consciousness and have no perceptible heartbeat, that is --

THE COURT: And then have no access to medical care because you're thrown off a cliff.

MR. NELSON: Yes. And I believe I reference these in the cases where being kidnapped and being so deprived of care of food, care, medical attention of that sort could be a life-threatening injury scenario. If that can qualify, then I think what Your Honor and I

have just described would certainly qualify.

THE COURT: Okay. And did you want to continue with -- so you've articulated your theory for the 43-6.

MR. NELSON: Yeah. And there's really two ways we get there -- or 43-6, yes, we get there through (b)(7)(A). We can get to a 41 through (b)(7)(B), which is the four, plus the offense level from the Guideline applicable to that other offense. Your -- which is what Your Honor did in reaching a 37. The Government would reach a 41 by including four more for the life-threatening injury.

THE COURT: Right. And I'm trying to find the reference, but I believe in footnote 18, you also referenced that even though the conduct or conviction that was reversed because of the -- the -- the legal determination that the statute was not extraterritorial, you also in one of your footnotes -- and I'm trying to put my finger on it -- indicated that the conduct itself would still qualify as conspiracy to commit murder in a foreign country --

MR. NELSON: Yes.

THE COURT: -- which would also yield -- I don't know if you've looked at that in terms of a Guideline calculation, but that would be an alternative

theory that would directly deal with the conduct for the offense that was reversed because of the legal finding of no extraterritorial application.

MR. NELSON: Yes, Your Honor, yes. It is footnote four on page 13.

THE COURT: Footnote four, okay. And what would the Guideline calculation be under that?

MR. NELSON: So there, I believe we would go to -- that should take us to the murder Guideline, because that would be the murder of a U.S. citizen outside of the U.S. And that would also get us under 2A1.1, a 43.

THE COURT: Right. And it still requires the finding that the nature of the injury was life-threatening, et cetera.

MR. NELSON: So if we -- an actual murder would just get us to the third -- to the 43.

THE COURT: Correct.

MR. NELSON: For the conspiracy to commit this extraterritorial murder, yes, that would start at a 33, and would require the four-level finding for life-threatening or permanent injury.

THE COURT: Very well.

MR. NELSON: That would be under 2A1.5.

THE COURT: Okay. And, Mr. Blake, did you want

to address the life-threatening or permanent injury component or any of the other Guideline issues that the Government has addressed -- well, let me just keep the record straight ... Mr. Nelson, have you gone through the important Guideline calculations and said everything you want to say in that regard?

MR. NELSON: Yeah, I believe either was -- is set forth in my brief, which you've clearly read and what I've just said here. Those are the Guideline positions that the -- or the Guideline calculations that the Government posits to the Court.

THE COURT: Okay. Thank you. And, Mr. Blake, other than what you've already argued, do you want to add anything more in response?

MR. BLAKE: Simply, Your Honor, that we believe the Government's calculations are in error, that the -- that the ones specifically, that they're relying on with respect to -- if I may just have a moment -- 2A4.1(b)(7)(A), and of course, 2A 1.1 are problematic in the sense that as I earlier addressed. We don't have that situation. I understand that clearly, there could have been a much different outcome; but from what we understand, this gentleman regained consciousness fairly quickly. He was able to go and get help. And he has not -- within the confines of those particular

enhancements or applications, this still does not qualify under that view, and we respectfully take and disagree with that, that the proper offense level should be a 33.

THE COURT: Okay. So you specifically don't believe that they were life-threatening injuries.

MR. BLAKE: They -- there was certainly the potentiality for that, but that's not, in fact, what happened. And I think we are governed by the actual facts as it was determined. And, of course, I wasn't at the trial, but I do believe that this gentleman was not impacted in the way that it could have happened. So I think that is -- is controlling here.

THE COURT: Okay. And I just -- I'm going to disagree with you as a matter of law on that, and find that the four-level, if that calculation is -- is the one that would apply to the calculations and it is the one that would apply, except for the initial what I would call the conservative approach that I started with, that results in the 37-6, I think that the law does not require that you remain having a life-threatening injury. You just have to have had a life-threatening injury. And I think it's hard to dispute that strangling someone to the point where they lose a heartbeat and throwing them off a cliff in Mexico

unconscious is not an injury contemplated by the definition of life-threatening. So that objection is overruled.

So what the Court is going to do is just indicate for the record that it does agree with the Government's Guideline calculations in its brief, and incorporates that analysis into its findings.

The Court also makes the conceded finding by the Defense, which the Court sees no alternative argument, that -- that a minimum 37 offense level and a six, the Court finds is unassailable. The other arguments about the 43-6 and the various ways you can get to that, the Government's arguments seem to be the most credible. So the Court adopts those. So just to be clear, the Court finds that there are solid bases for each of those paths, adopts all of them in the alternative in the event that one or more was found later on appeal to not be appropriate, the Court still wants the record to reflect that it adopts all of those calculations and specifically, the calculation that results in the offense level of 37, based on the conspiracy to kidnap analysis that I started off my comments with.

So unless there's something further from either party on the Guideline calculations, I think I've --

I -- I articulated where I am.

Mr. Nelson ...

MR. NELSON: Nothing from the Government, Your Honor.

THE COURT: Mr. Blake, anything further?

MR. BLAKE: I just want for point of clarification -- and certainly, it does appear that one of the concerns from reasoning was that -- as to whether or not, there was a procedural error in finding that 2A4.1(b)(7) was applicable. And I just want to make sure that the Court had taken that into consideration.

THE COURT: Do you understand that argument?

MR. NELSON: No, I --

THE COURT: Can you be more specific.

MR. BLAKE: Well, it dovetails. And I just want to make sure I had understood the Court's finding. It appears to me that there was at least a concern or a finding by the appellate court that there was -- there was either an insufficient factual and legal basis to support the sentencing enhancement that deployed Section 2A4.1(b)(7) of the United States Sentencing Guidelines.

THE COURT: Based upon what?

MR. BLAKE: Based I think on the potential error that we've been talking about here with respect to

the application of whether or not that was appropriate to what actually happened to this victim. And I think I may have overstated it, but I -- I think that was the concern I wanted to raise for point of clarification that the Court has considered that and the application note that we were talking about earlier.

THE COURT: Yes, I have considered that, but -- and I disagree with that argument.

MR. BLAKE: Okay.

THE COURT: Is there anything in that regard, Mr. Nelson?

MR. NELSON: No, Your Honor.

THE COURT: Okay. Very well. Then we've concluded the Guideline calculation and the Court has stated its alternative paths to either a 43-6 which the Court adopts or alternatively a 37-6 if there should be some flaw in the other analyses, and that would include the analyses under the footnote that was referenced in the Government's brief, as well.

So in terms of the 3553(a) factors, I'd like to hear from the Government.

MR. NELSON: Yes, Your Honor. The 3553(a) factors remain the same today as they did when Your Honor originally sentenced the defendant. And I realize that like Mr. Blake, both of us are -- joined

Q Did Midget return to the car?
A Yes.
Q And did Face sit as well?
A Yes, he went --
Q Where did he sit?
A Where I was sitting at.
Q Was Midget still in the front -- in the driver's seat?
A Yes.
Q What happened next?
A Got to the front seat, and I'm feeling better but not -- not good. And so I just tilted my seat a little bit to an angle so I could just relax, and stayed for about a minute; then just seen a rope coming over my head with the corner -- with the left side of my eye -- the corner of my left eye. I seen throwing a rope over me and tried to grabbed it -- to grab it, but grabbed it too late, and they just -- that's when Trooper pulled the rope too.
Q Okay. You just said that you tried to grab the rope. How -- were you able to touch any part of the rope?
A Yes.
Q Could you please demonstrate to the jury how you grabbed the rope?
A The tip of my fingers.
Q With the tip of your fingers -- with your palms facing out?

A Yes, tried to pull it out.
Q And what happened after you tried to grab the rope?
A That's when I felt somebody else just grabbing on the rope too and pulling hard on me.
Q And a moment ago, you said that Trooper was pulling on the rope as well?
A Yes.
Q Was Face pulling on the rope?
A Yes. He's the first one that threw it over my head.
Q Did you hear anyone say anything as the rope was being pulled around your neck?
A Yes.
Q What did you hear?
A That I fucked up; "die mother fucker."
Q That you had fucked up; die mother fucker?
A Yeah -- yes.
Q Do you know who said that to you -- or those phrases to you?
A Yes.
Q Who said them?
A Trooper.
Q What happened after they pulled the rope around your neck, if you know?
A I blacked out.
Q What was the next thing you remember after you blacked

out?
A Waking up, sliding down the mountain.
Q Waking up, sliding down a mountain?
A Yeah.
Q Was it dark out when you woke up?
A I was already -- it was already daytime. The sun was up.
Q Did you know where you were?
A No.
Q Did you have any memory of what had happened?
A Not at first. Because I was -- I was awake, but my -- I wasn't in -- the memory of what happened hadn't kicked in. After a few seconds after I was awake, that's when everything just came back, like fools tried to kill me. And that's when I knew I was falling down. I was falling down, and I grabbed onto something -- there was a dry root stick sticking out of the floor. So I just grabbed it and I just stayed there.
Q I believe you said you grabbed some dry root that was sticking out and grabbed onto it?
A Yeah.
Q Did you subsequently make your way back up that cliff?
A Yes.
Q Did you later make that -- made it up that cliff; yes?
Did you see anything that reminded you of what had happened?

A Yes.
Q What did you see?
A My shirt.
Q What was it about your shirt that reminded you of what had happened the night before?
A I was full of blood and my neck was messed up.
Q And your shirt was full of blood and your neck was messed up. What do you mean your neck was messed up?
A It looked like if I was -- I mean, it was real messed up. Somebody tried to strangle me.
Q Did it have pain -- did you feel pain?
A Yes, I couldn't move my neck.
Q You couldn't move your head?
A My neck.
Q "My neck" -- your neck.

What happened after you made your way up the cliff?

A Tried to stop cars and -- and eventually a big trailer stopped and told me what happened. He had thought I got in a car crash or something. I told him nah. "I need some help. I almost got killed. I need to call my family. Can you help me?" And he goes, "I'll take you all the way to Mexicali, and then I'll drop you off so you could call your people from the other side." And he had a bucket of water; that's -- I washed up my Face and everything. He gave me a collar shirt with a collar on it.

Q And did he, in fact, drive you to Mexicali?
A Yes.
Q What happened next?
A He dropped me off in a gas station and gave me like ten pesos, and that's when I called my girlfriend.
Q What happened after you called your girlfriend?
A I told her they had tried to kill me; -- that Face tried to kill me, and she was like -- she just said, "that mother fucker," because she told me that she -- she kept calling him.

MR. LITMAN: Objection; hearsay as to what his girlfriend told him.

THE COURT: Sustained.

BY MS. MOGHADDAM:
Q Mr. Macedo, after you called your girlfriend, what happened?
A I told her where I was at, what happened. And I just told her to pick me up.
Q And did she, in fact, pick you up?
A Yes.
Q Did anyone else come with her?
A Yes.
Q Who came with her?
A My mom, my sister, my brother and her sister.
Q And what happened after they picked you up at Mexicali?

A We -- we left to -- we left back to -- came back to the states, and we checked in to a motel room.
Q You checked into a motel room?
A Yes.
Q Where was the motel room located approximately -- I mean, the city?
A Lancaster.
Q Why didn't you go back to Los Angeles?
A Because I knew that what I had done, the shooting the vendor. So we're like, The cops are going to go looking for me. That's the first place they're going to go. So I don't want to go over there.
Q Did you also have concerns about your safety?
A Yes.

MR. LITMAN: Objection; move to strike.

THE COURT: It's leading. Sustained.

The jury will disregard the answer.

BY MS. MOGHADDAM:
Q Other than concerns about the cops finding you, were there other reasons that motivated you not to return to your girlfriend's house in Los Angeles?
A Yes.
Q What were those reasons?
A They think I'm dead. I'm just -- they tried to kill me. They think I'm dead; I'm gone. I ain't coming back.

Mr. Macedo, what is depicted in Exhibit 1653?
A The back of my neck.
Q And again, in one of photographs taken by your girlfriend?
A Yes.
Q And if we could now look at Exhibit 1654...
Is this another photograph of the injury to your neck?
A Yes.
Q Mr. Macedo, could you point on your body to -- on your neck, specifically, to the area where the ropes fell as depicted in Exhibit 1652 to Exhibit 1654 to show the jury.
A Right here.
(Whereupon the witness is indicating.)
BY MS. MOGHADDAM:
Q Is the scar there today?
A Barely.
Q Barely?
A Yeah, barely.
Q Mr. Macedo, while you were living in Utah with your girlfriend, did LAPD make contact with you at some point?
A I did.
Q You made contact with LAPD?
A Yes.
Q How did you make contact with them? Did you speak by