No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

EDWARD RONALD STAMPER, Petitioner,

v.

UNITED STATES, Respondent.

On Petition for a Writ of Certiorari to the Ninth Circuit Court of Appeals

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The government convicted Edward Ronald Stamper of sexual abuse in violation of 18 U.S.C. § 2242(2)(B) based on a jury instruction which provided:

> In order for the Defendant to be found guilty of sexual abuse as charged in the Indictment, the government must prove each of the following elements beyond a reasonable doubt:
> First, the Defendant is an Indian person;
> Second, the Defendant knowingly engaged in a sexual act with [K.];
> Third, [K.] was physically incapable of declining participation in, or communicating unwillingness to engage in that sexual act; and
> Fourth, the crime occurred within the exterior boundaries of the Rocky Boy's Indian Reservation.

Was Stamper's conviction in contravention of multiple decisions of this Court, including *Rehaif v. United States*, 139 S. Ct. 2191 (2019) and *United States v. X-Citement Video*, 513 U.S. 64 (1994), since his jury was instructed that the element of knowingly applied only to the otherwise legal act of having sex, and it was not required to find, beyond a reasonable doubt, that he knew K. was "physically incapable of declining participation in or communicating unwillingness to engage in [a] sexual acts?"

PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the Ninth Circuit were petitioner Edward Ronald Stamper and respondent United States of America.

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v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
NINTH CIRCUIT COURT OF APPEALS

Edward Ronald Stamper respectfully petitions for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals in this case.

I. OPINIONS AND ORDERS BELOW

The opinion of the Ninth Circuit Court of Appeals is an unpublished memorandum entered in No. 18-35517. (Appendix (App.) A.)

II. JURISDICTION

The court of appeals entered judgment on November 18, 2019. The court denied a timely petition for rehearing on February 28, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

III. STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part, that "No person shall be . . . deprived of . . . property, without due process of law . . . ." U.S. Const. amend. V.

The Sixth Amendment to the United States Constitution provides, in pertinent part, that "In all criminal prosecutions the accused shall .... have the assistance of counsel for his defense." U.S. Const. amend. VI.

Stamper was convicted of violating 18 U.S.C. § 2242 (2)(B) which provides:

> Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly--
>
> (2) engages in a sexual act with another person if that other person is (A) incapable of appraising the nature of the conduct; or (B) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act;
>
> or attempts to do so, shall be fined under this title and imprisoned for any term of years or for life.

IV. STATEMENT OF THE CASE

I. Course of Proceedings in the Trial Court and Relevant Facts

On August 19, 2011, Edward Stamper was charged in a single count Indictment alleging a violation of 18 U.S.C. §§ 1153(a) and 2242(2)(B). It states:

> That on or about January 23, 2011, at Box Elder, in the State and District of Montana, and within the boundaries of the Rocky Boy's Indian Reservation, being Indian Country, the defendant EDWARD RONALD STAMPER, an Indian person, knowingly engaged in a sexual act with K.R., a person physically incapable of declining participation in and communicating unwillingness to engage in, that sexual act, in violation of 18 U.S.C. §§ 1153(a) and 2242(2)(B).

Stamper pled not guilty. He was tried to a jury on October 27 and 28, 2011. The jury returned a verdict of guilty.

Stamper's defense was that K. consented to sexual activity – or that he thought she consented – and he did not know that she was physically incapable of declining participation in,

or communicating unwillingness to engage in the sexual act.

The incident at issue at trial followed extended binge drinking at various locations, including Stamper's house, on January 22 and 23, 2011. In addition to K. and Stamper, Marlene Youpee and K.'s cousins R. and Ronnie Stump, Jr., were present at times. Stamper was older than everyone else, but age did not constitute an element of the crime. K. and the others knew Stamper through their families. The group eventually landed at Stamper's house. Ronnie and Marlene testified that K. passed out and that they had carried her down the hall and put her in a bed under a blanket. Ronnie and Marlene testified that K. did not wake up or respond in any way. (Ninth Circuit Case Number 18-35517, Docket Number 9, ER pp. 121, 123-124, 127, 211, 272-273 (hereinafter referenced ER)).

R. also subsequently passed out on the couch in the living room. Stamper remained at the house while Ronnie and Marlene left to get more alcohol. When they returned, Ronnie went down the hall to check on K. Ronnie opened the door, turned on the light, and saw Stamper on top of K. having sex with her. Stamper was nude. K. was still wearing her shirt, but had no clothing from her waist down. Ronnie described K. as "dead limb" and "unconscious." (ER pp. 215-216, 272-275.)

Ronnie testified that Stamper's penis was in K's vagina. Ronnie went back to R., roused him, and returned to the bedroom with R. to confront Stamper. Ronnie testified that when he and R. "barged into the room," Stamper was shaking K., trying to wake her, and saying "something about 'she let me' or something," but K. "wasn't moving." (ER pp. 215-216, 219.)

Stamper retreated, pursued by Ronnie and R., both of whom landed enough blows to leave traces of Stamper's blood in the living room. Marlene testified she heard Ronnie cussing and heard

Stamper say, "I didn't do it. I didn't do it." Marlene entered the bedroom and helped K., who had awakened, to find her clothes so they could leave. The group left Stamper's house and took Stamper's car to a nearby relative's house. The group did not call the police. Stamper actually called the police to report Ronnie's and R.'s assault. (ER pp. 216-218, 263, 278-280.)

K. testified she had passed out and later awoke to find Stamper on top of her, penetrating her vagina with his penis. Contrary to Ronnie's trial testimony, K. also testified she pushed Stamper off of her and yelled for her cousins. (ER pp. 139-140.) She further testified in detail regarding what happened immediately after the alleged sexual assault. (ER pp. 141-143.) K. additionally testified that for some period of time, she was "going in and out of consciousness" and did not remember what she did when she was "passed out." (ER p. 155.)

Shortly after the group left Stamper's house, K. went to the hospital for a medical check. K. testified she "kept blacking out" at the hospital. (ER pp. 144-145.) However, neither the nurse nor the doctor who examined K. at the hospital, suggested that she had "passed out" or appeared to them to be unconscious at any time. (ER pp. 166-201.) Rather, Nurse Labaty described K. as "articulate," "attentive," "very, very serious," and able to provide "good detail." (ER pp. 171, 184.) Nurse Labaty testified that K. recalled specific facts about the alleged assault: "I asked her, specifically, whether there was any contact with her mouth or whether there was any – any contact with his mouth on her neck, where I needed to collect secretions. And she said that there was not." (ER p. 174.) K. told Nurse Labaty she "went to the back room" and gave no indication that she had been carried there and that she was yelling for help. (ER pp. 188, 190) Nurse Labaty never testified that K. was slurring her words or staggering. (ER pp. 166-201.)

FBI Agent McGrail testified regarding his interview with Stamper. Stamper explained K.

had invited him to have sex with her when her cousins left the house. K. asked him to "go to a back room" and told him to "[h]urry up before Ronnie and R. get back." Stamper also claimed he was "a little bit less intoxicated" than R. and K. On a scale of 1 to 10, where 10 was "extremely drunk," Stamper placed K. at "around an 8." Stamper did not claim K. had passed out.. Stamper did tell Agent McGrail that "[K.] never said no or stopped him." (ER pp. 299-301.)

Stamper did not testify. His defense rested on his statement to Agent McGrail. Defense counsel explained to the jury, through his closing argument, that Stamper contested only the third element of the pattern jury instruction: whether "K. . . . was physically incapable of declining participation in, or communicating unwillingness to engage in that sexual act." Counsel emphasized in his closing argument evidence showing that K. could have done exactly what Stamper said she had done—invited him to have sex and participated willingly—without remembering that she had done so. (ER pp. 380-383.) Counsel also argued K. was not as drunk as most witnesses had testified. (ER pp. 387-391.) Trial counsel explicitly argued:

> She told you that she did go in and out of consciousness, and she doesn't remember much. But that doesn't mean that my client was aware, subjectively, of what was going on in her mind. . . .[I]f she says: "come on in the back room," but she doesn't remember saying that but he does, then how could my client say: "Well, golly, you know, she may be in a blackout state, or she may be in this unconscious state." How would he know that? How could he know that?" (ER pp. 388-389.)

The argument was supported by compelling evidence, such as K.'s interactions with the nurse and her detailed testimony about what occurred in the room after the alleged assault. (ER pp. 387-388.) Counsel's theory was although K. may have been blacked out, she was still verbal and able to consent. Thus although, technically, K. might have been incapable of consent, Stamper did not know it. Stamper's statement as testified to by Agent McGrail is consistent with this theory. (ER p. 388.)

Yet, despite the evidence and his closing argument, trial counsel did not request an instruction requiring that the government prove, beyond a reasonable doubt, that Stamper knew K. was "physically incapable of declining participation in or communicating unwillingness to engage in [a] sexual act." Rather, without objection, Stamper's jury was instructed:

> In order for the Defendant to be found guilty of sexual abuse as charged in the indictment, the government must prove each of the following elements beyond a reasonable doubt: First, the Defendant is an Indian person; second, the Defendant knowingly engaged in a sexual act with [K.].; third, [K.] was physically incapable of declining participation in or communicating unwillingness to engage in that sexual act; fourth, the crime occurred within the exterior boundaries of the Rocky Boy Indian Reservation.

(ER p. 370, (App. B)) It was also instructed: "The government is not required to prove that the Defendant knew that his acts or omissions were unlawful. And you may consider evidence of the Defendant's words, acts, or omissions, along with all the other evidence in deciding whether the Defendant acted knowingly." (ER p. 371.)

II. Direct appeal

Stamper's trial counsel was also appellate counsel. The issue on appeal was the sufficiency of the evidence. In the Opening Brief counsel argued:

> The only element which was contentious between the two parties was element number three (3). It reads as follows:
> That the victim was physically incapable of declining participation in or communicating unwillingness to engage in that sexual act.

U.S.A. v. Stamper, 9th Cir. case no. 12-30095, Doc. 4, p. 9. Yet, no argument was made that the jury should have been instructed that Stamper had to know K. was incapable of giving consent. The Ninth Circuit affirmed Stamper's conviction in an unpublished opinion. *United States v. Stamper*, 507 Fed. Appx. 723 (9th Cir. 2013).

III. Habeas proceedings in district court

On June 13, 2014, Stamper filed a Motion to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody. (Doc. 105.) Stamper raised numerous issues, including (as restated by the district court) that the "the jury was improperly instructed on the elements of the offense." (ER Doc. 129.) The court denied all but two of Stamper's claims. The district court required the Government to respond to the jury instruction issue as well as Stamper's claims regarding three witnesses who may have been able to testify about the complaining witness's behavior near the time of the incident. The district court remarked:

> Although the Ninth Circuit has not considered whether knowledge of the victim's incapacity is an element of the offense, the question is squarely presented on the facts of Stamper's trial. If a trial juror believed that K. appeared to the nurse and the doctor to be conscious and "attentive," even "articulate," when, by her own testimony, she was "blacked out" at least part of the time, or if a juror was otherwise not persuaded beyond reasonable doubt that Stamper knew K. was incapacitated, the elements instruction still permitted the juror to find Stamper guilty. (ER Doc. 129.)

During his deposition, trial counsel affirmed his trial strategy was to establish Stamper did not know K. was unable to consent and admitted he did not believe Stamper would receive a fair trial with the pattern instruction:

> Q. [R]egarding whether the defendant knew that the alleged victim was physically incapable of declining participation and/or communicating an unwillingness to engage in a sexual act, not requiring the defendant to know that, if that's just a matter of absolute liability, that puts a really high burden on the defendant, doesn't it?
> A. Well, I mean, it sucks, basically. When you have, you know, when you have a case like Eddie's case, yeah, it is not fair to Eddie, but—
> Q. Okay. Right. Okay.
> A. But we got to deal with what we are given us, and we got to do the best we can, it is just—
> Q. So, is it—but your whole theory here was that Eddie didn't know, right?
> A. Well, I mean, that Eddie thought it was, thought it was consensual.
> * * * * *
> Q: So, your argument was to apply that knowledge element or knowledge mental state

to that element?

A: Bolster, to bolster, yeah. I used that because I don't have an instruction on it, you know, I don't have an element that the government has to prove whether he knew or not.

* * * * *

Q: So, would an instruction that he had to – that a specific instruction from the judge that he had to know that she was not capable of giving consent, would that be, would that have been helpful to you in this case?

A: Yes.

(ER pp. 473-476.) Counsel conceded that jury instructions can be critical in the outcome of a case, yet he did no research on the critical issue in this case and only looked at the pattern jury instructions and followed them without any analysis. (ER pp. 477-479.)

Trial counsel was asked if there was any reason not to request an instruction which required the jury to find that Stamper had to know that K. was physically incapable of declining participation in or communicating unwillingness to engage in that sexual act. He responded, in essence, he would never challenge the model instructions. (ER pp. 488-489.) He admitted that he never even thought about, much less researched, requesting a jury instruction that was consistent with the evidence and his theory of the case – even though the jury instruction that was given only required Stamper to know that he had sex with K.

Q: No. To argue that based on the construction of the statute, particularly in conjunction with the statutes on either side of it.

A: Oh, I see.

Q: That the knowingly element had to apply to her state?

A: Well, I wouldn't have thought of that. I mean no I wouldn't have thought of that. Yeah.

Q: Did you think about it? Did you do any research into that at all?

A: No. No.

(ER p. 490.)

After the parties deposed trial counsel, the Government and Stamper simultaneously filed pleadings on April 21, 2017. On May 23, 2018, the District Court entered its Order denying

Stampers' Motion to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody. (ER p. 43 (App. C).) Although the Court denied Stamper's claim regarding the jury instruction, the court did grant a certificate of appealability on this issue. The district court explained:

> The Court recognizes, however, that Stamper presents a colorable claim for relief on an issue that has resulted in opinions by two separate courts of appeals that have reached a contrary result. *See United States v. Peters*, 277 F.3d 963, 967 (7th Cir. 2002); *United States v. Bruguier*, 735 F.3d 754, 765-773 (8th Cir. 2013). These decisions and their apparent conflict with the Ninth Circuit's most recent pronouncement on the issue in *United States v. James*, 810 F. 3d 674 (9th Cir. 2016), highlight the need for careful consideration of the question of whether § 2242(2) requires the government to prove that the defendant knew of the victim's inability to consent to sexual contact. ..... (App. C.)

Stamper filed a timely Notice of Appeal on June 19, 2018. (ER Vol. III, 502, Doc. 181). The Ninth Circuit issued an unpublished Memorandum which denied Stamper relief. The Court did not address the faultiness of the jury instructions given by the trial court. Rather, the Court found, "there is no reasonable probability that Stamper would have been found not guilty even with an additional instruction." (App. A.) Stamper filed a petition for rehearing, which was summarily denied.

V. REASONS FOR GRANTING THE WRIT

A. The Government should have been required to prove Mr. Stamper knew K was incapable of consent.

1. Precedent from this Court supports a requirement that the element of knowingly applies to whether a defendant knows the alleged victim is incapable of consent.

Stamper was convicted of Sexual Abuse pursuant to 18 U.S.C. § 2242 (2)(B) which provides in pertinent part:

> Whoever, in the special maritime and territorial jurisdiction of the United States . . . . knowingly--
> (2) engages in a sexual act with another person if that other person is-
> * * * * *

(B) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act;
or attempts to do so, shall be fined under this title and imprisoned for any term of years or Afor life. (Emphasis supplied).

Stamper's defense was that he did not know that K. was physically incapable of declining participation in, or communicating unwillingness to engage in the sexual act. However, without objection, Stamper's jury was instructed:

> "In order for the Defendant to be found guilty of sexual abuse as charged in the indictment, the government must prove each of the following elements beyond a reasonable doubt: First, the Defendant is an Indian person; second, the Defendant knowingly engaged in a sexual act with [K.].; third, [K.] was physically incapable of declining participation in or communicating unwillingness to engage in that sexual act; fourth, the crime occurred within the exterior boundaries of the Rocky Boy Indian Reservation."

(App. B.) Thus, his jury was instructed that the element of knowingly applied only to the otherwise legal act of having sex. It was not required to find, beyond a reasonable doubt, that he knew K. was "physically incapable of declining participation in or communicating unwillingness to engage in [a] sexual act" – the element that made the act illegal and punishable by up to a life sentence. This eliminated the only contested element of the offense from the jury's consideration and is in contravention of multiple decisions by this Court.

At the time of Stamper's trial, several controlling cases from this Court addressed the issue of how a jury must be instructed regarding which elements the mental state applies to. *Flores-Figueroa v. United States*, 556 U.S. 646, 652 (2009) held that where a criminal statute introduces the elements of a crime with the word "knowingly" that word is applied to each element. Previously, this Court decided *Staples v. United States*, 511 U.S. 600, 618-19 (1994), holding "where, as here, dispensing with mens rea would require the defendant to have knowledge only of traditionally lawful conduct, a severe penalty is a further factor tending to

suggest that Congress did not intend to eliminate the mens rea requirement."

The 1994 case of *United States v. X-Citement Video*, 513 U.S. 64 (1994) presented a question similar to the one presented here. There, this Court analyzed 18 U.S.C. § 2252 which provides:

> (a) Any person who--
> (1) knowingly transports or ships using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means including by computer or mails, any visual depiction, if--
> (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
> (B) such visual depiction is of such conduct;
> (2) knowingly receives, or distributes, any visual depiction using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or through the mails, if--
> (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
> (B) such visual depiction is of such conduct;

The critical determination in *X-Citement Video* was whether the term "knowingly" in subsections (1) and (2) modified the phrase "the use of a minor" in subsections (1)(A) and 2(A). The Court noted "[t]he most natural grammatical reading, adopted by the Ninth Circuit, suggests that the term "knowingly" modifies only the surrounding verbs: transports, ships, receives, distributes, or reproduces." Under this construction, the word "knowingly would not modify the elements of the minority of the performers or the sexually explicit nature of the material, because they are set forth in independent clauses separated by interruptive punctuation." *Id.* at 69. However, because this interpretation would sweep within the ambit of the statute actors who had no idea that they were dealing with sexually explicit material, the Court determined that it would not

assume that Congress intended such a result. It cited a number of cases where it had interpreted criminal statutes to impose a mental state element on acts that distinguished innocent from criminal conduct and stated. *Id.* at 72 (*citing Morrissette v. United States*, 342 U.S. 246 (1952) and *Staples*.)

Additionally, this Court noted the canons of statutory construction supported the determination that the term "knowingly" applied to the age of the performers because imposing criminal responsibility without some element of scienter would raise serious doubts about the constitutionality of the statute. *X-Citement Video*, 513 U.S. at 78. Thus, it concluded that the mental state element applied to both the sexually explicit nature of the material and the age of the performers.

On June 21, 2019, in *Rehaif v. United States*, ---U.S.---, 139 S. Ct. 2191 (2019), this Court again reinforced the presumption that Congress intends to require a defendant to possess a culpable mental state regarding each of the statutory elements that criminalize otherwise innocent conduct. *Rehaif* was convicted of being an illegal alien in possession of a firearm in violation of 18 U.S.C. § 922(g). The question was whether the government had to prove he not only "knowingly" possessed a firearm but also knew he was an unlawful alien. In its holding, this Court referenced the "longstanding presumption, traceable to common law, that Congress intends to require a defendant to possess a culpable mental state regarding 'each of the statutory elements that criminalize otherwise innocent conduct.'" *Id.* at 2195 (citation omitted.) This Court stated, "[T]he understanding that an injury is criminal only if inflicted knowingly 'is as universal and persistent in mature systems of law as belief in freedom of the human will. ... " and noted "the cases in which we have emphasized scienter's importance in separating wrongful

from innocent acts are legion." *Id.* at 2196. It additionally noted that 18 U.S.C. 922(g) carried a potential penalty of ten years and that any exception to a scienter requirement does not apply in the face of such harsh penalties. *Id.* at 2197.

2. Support exists amongst the circuit courts regarding the knowing element of the 18 U.S.C. § 2242 (2)(B).

Stamper's conviction is contrary to several circuits courts which have considered the issue and have found either explicitly or implicitly that the jury must find that a defendant knew that the alleged victim was "physically incapable of declining participation in the sexual act." Prior to Stamper's trial, the Seventh Circuit decided *Peters* and found insufficient evidence to sustain the verdict. There, the complaining witness had consumed a large quantity of alcohol and she and Peters engaged in a sexual act. *Peters*, 277 F. 3d at 967. Shortly thereafter, another person found her in the bedroom. She did not remember how she got to the bedroom and testified she never would have consented to sex with Peters. *Id.* at 967. Significantly, the jury had been instructed that the Government had to prove beyond a reasonable doubt that "the Defendant, Michael Peters, knew that Barbie House was physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act." *Id.* at 966-967.

Subsequently, in *Bruguier*, the Eighth Circuit specifically held that the jury instructions erroneously omitted a mens rea element and reversed the defendant's sexual abuse conviction under section 18 U.S.C. §2242(2). *Bruguier*, 735 F. 3d at 756. In *Bruguier*, strikingly similar to Stamper's case, after a night of heavy drinking, witnesses walked into a bedroom and encountered Bruguier engaged in sexual intercourse with the alleged victim. The witnesses testified the alleged victim was "laying like she was knocked out" and "in a daze. *Id.* at 756. Bruguier testified that the alleged victim kept asking him to dance after he arrived at her house,

and they kissed and had consensual sex. *Id.* at 756-757.

Bruguier proposed a jury instruction that would have required the jury to find not only that he knowingly engaged in a sexual act with the alleged victim and she was incapable of consenting, but also "that James Bruguier knew that Crystal Stricker was physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act." *Bruguier*, 735 F. 3d at 758. The district court rejected Bruguier's proposed instruction and instead imposed an instruction almost identical to the one submitted to Stamper's jury. *Id.* at 758. On appeal, the Court analyzed the statutory construction and prior case law from this Court, and concluded "knowingly" in 18 U.S.C. § 2242(2) applies to each element of the offense. *Id.* at 760.

The Eight Circuit again examined this issue in *United States v. Fast Horse*, 747 F.3d 1040, 1041-1042 (8th Cir. 2014) and found plain error in a case similar to this one. In *Fast Horse*, after a night of drinking the alleged victim woke up to find Fast Horse having sex with her. *Fast Horse*, 747 F. 3d at 1041. The Court examined whether the trial court properly required the jury to find beyond a reasonable doubt both that Fast Horse knowingly committed the sexual act and that he knew Quintina Little Elk was incapable of appraising the nature of the conduct or was physically incapable of declining participation in, or communicating her unwillingness to engage in, that sexual act. *Id.* at 1043. The Court found it plain error when the district court failed to instruct the jury on the mens rea requirement of each element. *Id.* at 1043. The Court held, "where a defendant has been denied 'his Sixth Amendment right to a jury determination of an important element of the crime, the integrity of the judicial proceeding is jeopardized.'" *Id.* at 1043 (citation omitted.)

Stamper's defense was that K. encouraged him to come back to the bedroom and the two engaged in consensual sex. The argument was supported by evidence that, although K. may have been blacked out, she was still verbal and apparently able to consent. Although K. might have been incapable of consent because of her intoxicated state, Stamper did not know it. As in *Bruguier* and *Fast Horse,* the knowledge element of whether K. was incapable of consent was integral to the jury's deliberation. The failure of the district court and Stamper's counsel to ensure the jury was properly instructed prejudiced Stamper and prevented him from receiving a fair trial.

B. Mr. Stamper's counsel was ineffective when he failed to ensure the jury was properly instructed.

A criminal defendant is denied effective assistance of counsel if: (1) his counsel's conduct falls short of the range reasonably demanded in light of the Sixth Amendment to the United States Constitution; and (2) counsel's failure is prejudicial. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). The right to the effective assistance of counsel is guaranteed not only during trial and sentencing, but also on a first appeal as of right. *Douglas v. California*, 372 U.S. 353, 357 (1963).

The failure to obtain an accurate instruction on a critical element of the charged crime, thereby lessening the government's burden of proof, constitutes ineffective assistance of counsel. This is particularly true if the error results from a misunderstanding of the law and the element is integral to the defendant's defense theory. *United States v. Alferahin*, 433 F.3d 1148, 1161-1162 (9th Cir. 2006); *United States v. Span*, 75 F.3d 1383 (9th Cir. 1996).

The only issue in this case was whether Stamper knew that K was "physically incapable of declining participation in, or communicating unwillingness to engage in, [a] sexual act." However, his jury was instructed that he was guilty if she was incapable of declining participation

– whether she appeared to be or not or whether he knew it or not – so long as he knew that he was having sex with her which is not in itself illegal. Moreover, his jury also was instructed that the government was not required to prove that he knew that his acts were unlawful. Under these instructions, the jury was obligated to convict. The verdict was directed against him although he had a legitimate defense.

Trial counsel, who was also appellate counsel, admitted his trial strategy was to establish Stamper did not know K. was physically incapable of declining participation in or communicating unwillingness to engage in a sexual act. He acknowledged Stamper could not get a fair trial with the instructions given. Yet, he never considered requesting a different instruction, failed to analyze the statute, conduct any research, apply basic tenets of statutory construction, or even brainstorm the case with colleagues. Rather, he relied solely on the pattern jury instructions. In doing so he failed to head the admonitions contained in the introduction to the pattern instructions that: "They are not mandatory, and must be reviewed carefully before use in a particular case. They are not a substitute for the individual research and drafting that may be required in a particular case, nor are they intended to discourage judges from using their own forms and techniques for instructing juries."

If counsel had requested the appropriate instructions, a reasonable probability exists the result of the trial would have been different. The evidence supported a determination that, despite K.'s drunken state, Stamper did not know she "was "physically incapable of declining participation in or communicating unwillingness to engage in [a] sexual act." Yet, Stamper's jury was not given that option. It was instructed that if it found that Stamper knew he engaged in a sexual act and also found that K. was "blacked out," it must convict – even if Stamper did not know she was

"blacked out." (App. B.) There is at least a reasonable probability that the result of his trial would have been different if the jury had been properly instructed. The government was relieved of its burden of proof on this issue, and Stamper was prejudiced.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

RESPECTFULLY SUBMITTED,

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May 26, 2020

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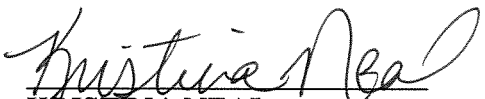
UNITED STATES OF AMERICA, Respondent.

CERTIFICATE OF SERVICE

I, Kristina Neal, a member of the Bar of this Court, hereby certify that on MAY 26, 2020, a copy of the Petition of Writ of Certiorari and Motion to Proceed in Forma Pauperis in the above-entitled case were mailed, first class postage prepaid to: Jessica Betley, Assistant United States Attorney, United States Attorney's Office – Great Falls, P. O. Box 3447, 119 1st Avenue North, Suite 300, Great Falls, Montana 59403-3447 and Solicitor General of the United States, Room 5616, Department of Justice, 950 Pennsylvania Ave., N.W., Washington D.C. 20530-0001, counsel for all the respondents herein. I further certify that all parties required to be served have been served.



KRISTINA NEAL
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DATED: May 26, 2020