No. _____

In the

Supreme Court of the United States

ANTHONY DE LA TORRIENTE, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Petition for Writ of Certiorari to the

United States Court of Appeals

for the Ninth Circuit

Petition for Writ of Certiorari

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Question Presented

The federal sexual abuse statute, 18 U.S.C. § 2242(2)(B), criminalizes a "sexual act with another person if that other person is . . . physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act." Can evidence that a victim was intoxicated suffice to prove the "physically incapable" element of sexual abuse, or does a conviction require evidence showing an actual physical inability to communicate a lack of consent?

Statement of Related Proceedings

- *United States v. Anthony De La Torriente*,
  Case No. 2:17-cr-0608-DSF (C.D. Cal.)

- *United States v. Anthony De La Torriente*,
  Case No. 19-50237 (9th Cir.)

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Petition for Writ of Certiorari

Anthony De La Torriente petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in his case.

Opinions Below

The opinion of the Court of Appeals is unreported and is included in the Appendix at App. 1-5. The Court's denial of rehearing and rehearing en banc is included in the Appendix at App. 6. The relevant rulings of the District Court are also unreported and are included in the Appendix at App. 7-19.

Jurisdiction

The judgment of the Ninth Circuit Court of Appeals was entered on May 5, 2021. App. 1. The Court of Appeals denied a timely petition for rehearing and rehearing en banc on June 15, 2021. App. 6. This Court's miscellaneous orders dated March 19, 2020, and July 19, 2021, extended the deadline for this petition for a writ of certiorari to 150 days from the Court of Appeals' order denying the petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutory Provisions Involved

18 U.S.C. § 2242 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--
>
> > **(1)** causes another person to engage in a sexual act by threatening or placing that other person in fear (other than by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping); or
> > **(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.

Introduction

Five adult friends and co-workers were on a cruise together when they spent a day sightseeing and drinking heavily. That evening, they returned to one of the bedrooms on the ship and eventually left two of the friends—Anthony De La Torriente and "A.B"—alone, lying in a single bed together. Mr. De La Torriente and A.B. then had a sexual encounter for which Mr. De La Torriente was later convicted of the federal charges of sexual abuse (Count 1), and abusive sexual contact (Count 2).

Count 2 asked the jury the more familiar question of whether there was sexual contact without consent, and that count carried a maximum potential prison sentence of two years. *See* 18 U.S.C. § 2244(b). But Count 1—the sexual abuse charge—increased Mr. De La Torriente's sentencing exposure to a potential of life imprisonment, as that charge applies only where the victim was "physically incapable of declining participation in, or communicating unwillingness to engage in" sexual intercourse. 18 U.S.C. § 2242(2)(B). This petition focuses on the latter charge of sexual abuse.

There is a longstanding circuit split on the definition of the "physically incapable" element of the sexual abuse statute. Two Courts of Appeals—the Eighth and Ninth Circuits—interpret the statute "broadly" such that evidence that the victim "was physically hampered due to sleep, intoxication,

or drug use" suffices to prove the "physically incapable" element. *United States v. James*, 810 F.3d 674, 681 (9th Cir. 2016); *see also United States v. Carter*, 410 F.3d 1017, 1028 (8th Cir. 2005). In reaching this conclusion, the Ninth Circuit acknowledged that the plain terms of the statute apply only to the "infrequent scenario where the victim . . . is incapable of communicating a refusal of unwanted intercourse," but the Court chose to interpret the statute "broadly" so that it would be "more susceptible to application to various factual situations that can come before a jury." *James*, 810 F.3d at 676 & 681.

In contrast, two Courts of Appeals—the Fourth and Seventh Circuits—have held that evidence that a victim was severely intoxicated cannot alone prove that she was "physically incapable of declining participation in, or communicating unwillingness to engage in" sexual intercourse. *See United States v. Peters,* 277 F.3d 963, 968 (7th Cir. 2002); *United States v. Williams*, 89 F.3d 165, 168 (4th Cir. 1996). Instead, to sustain a conviction, these two courts require evidence that the victim actually lacked the physical ability to decline consent—that is, that the victim could not physically say "no," shake her head, or otherwise communicate a lack of consent at the time of the sexual act. Of course, under this interpretation, evidence might show that intoxication, drug use, or sleep led a victim to be physically incapable of

communicating a lack of consent, but the mere fact of intoxication cannot alone sustain a conviction.

This longstanding circuit split is ripe for this Court's review, and this case presents an ideal vehicle with which to resolve it. The victim here, A.B., testified about every moment of the charged sexual act, and nowhere in her testimony did she indicate that she lacked the physical ability to communicate a lack of consent. Moreover, the undisputed evidence showed that A.B. was able to carry on long conversations with her friends both before and after the sexual act. There was insufficient evidence based upon which a rational jury could conclude beyond a reasonable doubt that A.B. lacked the physical ability to say "no" or otherwise communicate a lack of consent. Nonetheless, the Ninth Circuit affirmed the conviction based entirely on the fact that A.B. was "extremely intoxicated" at the time of the sexual act and so was "physically hampered," which, under its broad interpretation of Section 2242(2)(B), sufficed to sustain a conviction. App. 2-3.

Mr. De La Torriente's conviction thus rests entirely on the Ninth Circuit's broad interpterion of Section 2242(2)(B); under the Fourth and Seventh Circuits' interpretation of the statute, his conviction could not stand. This case presents an opportunity to resolve this circuit split and clarify the elements of this weighty federal criminal charge.

Statement of the Case

A. The Trial Evidence

The jury heard that five friends and co-workers—including A.B. and Mr. De La Torriente—went on a cruise together. App. 1-2 (Ninth Circuit decision); ER 100-103.[1] A.B. was 20 years old at the time; Mr. De La Torriente was 26. ER 84, 379. Mr. De La Torriente and A.B. "flirted throughout the cruise." ER 171-72. They began holding hands on the first day of the trip, and they also kissed. ER 172, 721, 740, 760-61. A.B. had a boyfriend, but she told the group that he was abusive towards her, and the other friends encouraged A.B. to kindle a romantic relationship with Mr. De La Torriente. ER 165-66, 177.

On the third day, the ship docked in Mexico, and the group went to several tourist sites and drank alcohol at most of them. App. 1-2; ER 105-110. A.B. became "extremely intoxicated" as the day proceeded. App. 2; ER 111-13. While Mr. De La Torriente did not act as visibly drunk, he drank "the same amount as everyone else." ER 262.

When the friends returned to the ship, they all gathered in A.B.'s room and helped A.B. into her single bed, at which point Mr. De La Torriente lied

[1] Citations to "ER" refer to the Excerpts of Record filed in Mr. De La Torriente's appeal to the Ninth Circuit Court of Appeals, case number 19-50237.

down next to her. App. 2; ER 150, 210. A.B. then talked to the group of friends for approximately 20-30 minutes, with Mr. De La Torriente lying next to her. ER 150, 211; App. 25 (A.B.'s testimony). While there was evidence that A.B. was "slurring her speech" and "getting emotional" during this conversation, there was no dispute that she talked to her friends about a range of topics, including her dissatisfaction with her boyfriend, her relationship with her mother, and "her dog dying." App. 2; ER 800.

The friends left the room to get food, leaving A.B. and Mr. De La Torriente alone, lying in the bed together. App. 2; ER 152, 248. A.B. testified that she eventually fell asleep, and then awoke to Mr. De La Torriente "pulling down my underwear." App. 2, 26. A.B. testified that when she woke up, she felt intoxicated and "scared and confused, upset." App. 26. A.B. testified that Mr. De La Torriente eventually "committed a sexual act without her consent." App. 2, 28. After "a minute or two," the friends returned to the room. App. 2, 28-29. Although A.B. still felt "intoxicated" and so was not "able to articulate well at that point," she did tell her friends "what happened." App. 31-33 (A.B.'s testimony); *see also* ER 157, 254-55 (friends' testimony); App. 2 (Ninth Circuit decision).

B. Jury Instructions, Verdict, and Sentencing

The District Court first instructed the jury that the elements of sexual abuse are:

> First, defendant knowingly engaged in a sexual act with A.B.
>
> Second, defendant knew that A.B. was physically incapable of declining participation in or communicating unwillingness to engage in the sexual act; and,
>
> Third, the offense was committed within the special Maritime and territorial jurisdiction of the United States.

App. 11. The Court then twice provided the following Ninth Circuit Model Jury Instruction, over the defense' objection: "A person need not be physically helpless to be physically incapable of declining participation in or communicating unwillingness to engage in a sexual act." App. 11, 13. The instructions offered no further definition of the "physically incapable" element.

The jury returned guilty verdicts on both counts. App. 14. At sentencing, the District Court noted that Mr. De La Torriente "has never been in any kind of trouble before this," and his "conduct before and since this offense suggests this crime is out of character." ER 1423. The Court sentenced Mr. De La Torriente to 78 months' imprisonment, to be followed by 10 years of supervised-release. ER-22, 1420.

C. The Ninth Circuit's Decision

A panel of the Ninth Circuit Court of Appeals affirmed the conviction. The Ninth Circuit's decision briefly recited the facts as described above, noting that A.B. was "extremely intoxicated" when she returned to the ship, and that she talked to her friends both before and after the charged sexual act, although she was "slurring her speech" before the sexual act and she "stumbled through her words" afterwards. App. 2 (alterations omitted). As to the sufficiency of the evidence on Count 1, the Ninth Circuit concluded that there was sufficient evidence from which a rational jury could "conclude that A.B. was 'physically hampered due to sleep and intoxication and thereby rendered physically incapable' of declining participation in, or communicating unwillingness to engage in, the sex act that De La Torriente committed." App. 3 (quoting *United States v. James*, 810 F.3d 674, 681 (9th Cir. 2016)) (alteration omitted).

As to the jury instruction on Count 1, the Ninth Circuit noted that the challenged model instruction—telling the jury that "A person need not be physically helpless to be physically incapable . . ."—was derived from the Court's decision in *James*, but the Ninth Circuit agreed that the "borrowing of this language in a jury instruction, where it lacked context and elaboration found in the opinion, may have been 'less than artful.'" App. 4 (citation

omitted). Nonetheless, the Ninth Circuit concluded that the model instruction was not so misleading as to warrant reversal and that, regardless, "any error that might have arisen from the jury instruction was harmless." App. 4. In reaching the conclusion that any instructional error was harmless, the Ninth Circuit was relying on its conclusion that evidence that the victim was "physically hampered due to sleep and intoxication" could suffice to prove the "physically incapable" element of sexual abuse. *See* App. 3-4 (alteration and citation omitted).

Mr. De La Torriente filed a timely petition for rehearing that the Ninth Circuit denied without offering analysis. App. 6.

Reasons for Granting the Writ

A. There is a longstanding circuit split on the question presented

Count 1 charged Mr. De La Torriente with sexual abuse under 18 U.S.C. § 2242(2)(B), which applies where a defendant "knowingly . . . engages in a sexual act with another person if that other person is . . . physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act." 18 U.S.C. § 2242(2)(B).[2] The statute does not criminalize all nonconsensual sex; instead, by its plain terms, Section 2242(2)(B) applies only to the "infrequent scenario where the victim . . . is incapable of communicating a refusal of unwanted intercourse." *United States v. James*, 810 F.3d 674, 676 (9th Cir. 2016). Demonstrating the severity of the offense, it carries a maximum potential sentence of life imprisonment. 18 U.S.C. § 2242.

There is a longstanding circuit split on the definition of the "physically incapable" element of the statute. Two Courts of Appeals—the Eighth and Ninth Circuits—have held that the statue should be interpreted "broadly" such that evidence that a victim was intoxicated at the time of the sexual act,

[2] As relevant here, the qualifying "sexual act" is "penetration, however slight," by the penis of the vulva, contact between the mouth and the vulva, or "penetration, however slight, of the anal or genital opening of another with a hand or a finger." 18 U.S.C. § 2246(2).

without more, is sufficient to sustain a conviction for sexual abuse on the theory that intoxication can "hamper" one's ability to decline consent. *James*, 810 F.3d at 679-81; *see also United States v. Carter*, 410 F.3d 1017, 1028 (8th Cir. 2005). On the other hand, two Courts of Appeals—the Fourth and Seventh Circuits—have held that to sustain a conviction, the Government cannot merely prove that the victim was intoxicated at the time of the sexual act. Instead, the Government must offer sufficient evidence that the victim lacked the physical ability to decline consent—that is, that she could not physically say "no," shake her head, or otherwise communicate a lack of consent. *See United States v. Peters,* 277 F.3d 963, 968 (7th Cir. 2002); *United States v. Williams*, 89 F.3d 165, 168 (4th Cir. 1996).

1. The Eighth and Ninth Circuits have interpreted the sexual abuse statute "broadly" such that evidence that a victim was "physically hampered" by intoxication suffices to sustain a conviction

The Eighth and Ninth Circuits have interpreted the sexual abuse statute to allow a conviction based on evidence showing only that the victim was intoxicated at the time of the sexual act. In *James*, the Ninth Circuit reversed the district court's decision entering a judgment of acquittal for sexual abuse. *James*, 810 F.3d at 680. The district court had concluded the evidence was insufficient to sustain a conviction by comparing the federal sexual abuse statute's "physically incapable" standard to certain state laws'

use of the term "physically helpless" in defining sexual assault laws. *Id.* In reversing, over a vigorous dissent, the Ninth Circuit stated that "'physically incapable' under § 2242(2)(B) should be *defined broadly* and not confused with the more narrow 'physically helpless' standard employed by the district court." *Id.* at 679 (emphasis added). Based on this broad interpterion of the statute, the Ninth Circuit further stated that "a defendant may be convicted under § 2242(2)(B) where the victim had some awareness of the situation and—while not completely physically helpless—was physically hampered due to sleep, intoxication, or drug use and thereby rendered physically incapable." *James*, 810 F.3d at 681.

In the instant case, the Ninth Circuit relied entirely on *James* in affirming Mr. De La Torriente's conviction, as the Court held: "The jury had ample evidence from which it could rationally conclude that A.B. was 'physically hampered due to sleep [and] intoxication and thereby rendered physically incapable' of declining participation in, or communicating unwillingness to engage in, the sex act that De La Torriente committed." App. 3 (quoting *James*). The District Court similarly relied exclusively on *James* in concluding that because A.B. was "extremely intoxicated at the time

of the alleged assault," the evidence was sufficient to sustain a conviction for sexual abuse. App. 15 (District Court order). Consequently, despite the evidence that A.B. *could* verbally communicate both before and immediately after the sexual act, and despite the lack of evidence that A.B. could not communicate when the sexual act commenced, the Ninth Circuit concluded that evidence of her severe intoxication sufficed to sustain the sexual abuse conviction. *See* App. 3.

The Eighth Circuit has also interpreted the sexual abuse statute to broadly cover victims who are capable of communicating but whose ability to "object straightaway" is "hindered" by the effects of alcohol or drugs. *See United States v. Carter*, 410 F.3d 1017, 1028 (8th Cir. 2005). In *Carter*, the Eighth Circuit affirmed the district court's finding for purposes of sentencing that the defendant's assault on his granddaughter met the elements of sexual abuse under Section 2242(2)(B). *Id.* at 1027-28. At the time of the assault, the victim was under the influence of marijuana, but the defendant argued on appeal that the fact that she was awake when the sexual act commenced and that she "told Mr. Carter to stop while he was performing cunnilingus on her proves that she could . . . 'communicate unwillingness to engage in' cunnilingus." *Id.* at 1027 (quoting 18 U.S.C. § 2242(2)(B)) (alteration omitted). The Eighth Circuit rejected this

argument, concluding that "[e]ven though Mr. Carter's granddaughter was conscious during the sexual abuse and incest, the lingering effects of the marijuana may have hindered her ability to object straightaway to the abuse, and those effects provide a sufficient basis to" find that she was "physically incapable" of communicating a lack of consent under Section 2242(2)(B). *Id.* at 1028.

Thus, the Eighth Circuit, like the Ninth, interprets the sexual abuse statute to apply to a victim who *can* communicate a lack of consent, but whose ability to "object straightaway" may be hindered by the effects of drugs, alcohol, or drowsiness. *Id.*; *see also United States v. Demery*, 674 F.3d 776, 780 (8th Cir. 2011) (affirming Section 2242(2)(B) conviction even though victim was "neither asleep nor intoxicated" when the sexual act commenced, because the sexual act occurred "very fast" after victim woke up and so did not provide victim adequate opportunity to decline consent).

2. The Fourth and Seventh Circuits have applied the plain terms of the statute, requiring evidence that the victim could not physically communicate a lack of consent to sustain a conviction

In contrast, the Fourth and Seventh Circuits have held that evidence that a victim was intoxicated cannot, standing alone, prove that the victim was physically incapable of communicating a lack of consent under Section 2242(2)(B). In *Peters*, the Seventh Circuit reversed a sexual abuse conviction, holding that "it is not rational to conclude beyond a reasonable doubt that because [the victim] appeared intoxicated when her family arrived at 12:30 a.m., she was physically incapable of declining participation when the sexual act occurred." *Peters,* 277 F.3d at 966 & 968. The victim in *Peters* was severely intoxicated, so much so that she had no memory of the two-hour period during which the sexual act occurred. *Id.* at 965. Nonetheless, the Seventh Circuit held that the evidence of the victim's intoxication, even of severe intoxication, did not show beyond a reasonable doubt that she was physically incapable of communicating a lack of consent at the time of the sexual act. *Id.* at 966 & 968. Evidence showing she could not physically say "no" or otherwise decline consent was required to sustain a conviction. *See id.*

Similarly, in *Williams*, the Fourth Circuit reversed a Section 2242(2)(B) conviction, despite evidence that the victim was intoxicated and had just been

woken up at the time of the assault. *Williams,* 89 F.3d at 168. In *Williams*, the victim testified that she was intoxicated and fell asleep in her room on a ship, and she woke up after the defendant entered her room surreptitiously. *See id.* The defendant then "pulled off her underpants, forcibly opened her legs, and had sexual intercourse with her." *Id.* at 166. The Fourth Circuit reversed the conviction because the evidence showed that at the time of the sexual act of penetration, the victim could physically demonstrate her lack of consent. *See id.* at 168. Specifically, the victim testified that when the defendant first "tried to pull her underpants off, she pulled them back on," and she "attempted to close her legs after he forced them open." *Id.* The Court concluded that by pulling up her underwear and attempting to close her legs, the victim had physically demonstrated her lack of consent, and so there was insufficient evidence she was "physically incapable of declining participation in, or communicating unwillingness to engage in" a sexual act. *Id.* (quoting 18 U.S.C. § 2242(2)(B)).

In reaching this conclusion, the Fourth Circuit emphasized that Section 2242(2)(B) does not merely criminalize nonconsensual sex; it requires an inability to decline consent. As the Court explained: "The fact that [the victim] was unsuccessful in fending off Williams does not mean that she was

physically incapable of expressing her desire not to participate in sexual activity with him." *Id.*

3. This Court should resolve the circuit split on this important question of law

There is thus a longstanding circuit split on the definition of the "physically incapable" element of the sexual abuse statute. The Eighth and Ninth Circuits interpret the statute "broadly" such that evidence of a victim's intoxication suffices to prove that the victim was "physically incapable" of declining consent. On the other hand, the Fourth and Seventh Circuits have both held that evidence of intoxication cannot alone prove that a victim was "physically incapable"; instead, evidence proving that the victim was actually incapable of communicating a lack of consent is required to sustain a conviction.

There is no reason to let the lower courts continue to struggle over the question presented; this is a case that "presents an important question of federal law that has divided the courts of appeal" and merits this Court's review. *See Brown v. United States*, 139 S. Ct. 14, 16 (2018) (Sotomayor, J., dissenting from denial of certiorari) (citing Sup. Ct. Rule 10).

B. The Ninth Circuit's interpretation of the statute is incorrect

The Ninth Circuit's interpretation of the sexual abuse statute contravenes its plain terms. Moreover, by explicitly interpreting the statute "broadly," the Ninth Circuit turns the rule of lenity "on its head"; this "is not how the criminal law is supposed to work." *James*, 810 F.3d at 684 (Kozinski, J., dissenting).

1. For improper policy reasons, the Ninth Circuit explicitly interprets the statute to create broader criminal liability than the plain text permits

"Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009) (internal quotation marks omitted). Section 2242(2)(B) speaks for itself: It criminalizes a sexual act with a person who is "physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act." 18 U.S.C. § 2242(2)(B).

There is no real dispute about the meaning of the statute's text. Indeed, in *James*, the Ninth Circuit repeatedly emphasized that the plain terms of the statute apply only to a victim who is physically unable to "verbally articulate her lack of consent" or "resist the sexual act." *James*, 810 F.3d at 682; *see also id.* at 676 (statute applies only to the "infrequent

scenario where the victim who is sexually assaulted . . . is incapable of communicating a refusal of unwanted intercourse"); *id.* at 683 (a victim who is physically incapable cannot "provide any verbal or non-verbal cues"). Thus, by its plain terms, a Section 2242(2)(B) conviction requires proof beyond a reasonable doubt that at the time of the sexual act, the victim was "physically incapable" of declining consent, either verbally or with physical gestures—that is, that the victim could not say "no," shake her head, or otherwise communicate a lack of consent.

Despite the clarity of the statute's text, the Ninth Circuit in *James* decided to interpret it "broadly" so that the statute would be "more susceptible to application to various factual situations that can come before a jury." *Id.* at 679 & 681; *see also id.* at 682 ("After surveying the dearth of case law, we find the cases more persuasive which punish conduct under the broader 'physically incapable' standard . . . because it will allow more cases to be submitted to the good judgment of a jury."). In so ruling, the Ninth Circuit lamented that the federal criminal code does not have a general "provision punishing non-consensual sexual intercourse."[3] *Id.* at 679. In

[3] While nonconsensual sexual intercourse is prosecutable under the federal code as abusive sexual contact, under 18 U.S.C. § 2244(b), there is no federal statute specifically targeting nonconsensual intercourse (as opposed to the broader category of "sexual contact"). The abusive sexual contact statute, charged here in Count 2, criminalizes "knowingly engag[ing] in

interpreting Section 2242(2)(B) "broadly," the Ninth Circuit attempted to fill this perceived gap. *See id.*

"[T]he Court cannot construe a statute in a way that negates its plain text." *Honeycutt v. United States*, 137 S. Ct. 1626, 1635 n.2 (2017). But that is precisely what the Ninth Circuit has done with the sexual abuse statute. Despite acknowledging that the plain terms of the statute apply to the "infrequent scenario" where a victim lacks the physical ability to communicate a refusal, the Court decided to interpret the statute "broadly" and allow juries to apply it to "various factual scenarios," including where the victim "was physically hampered due to sleep, intoxication, or drug use," regardless of whether the evidence proved she actually lacked the capacity to decline consent. *See James*, 810 F.3d at 676 & 679-82. By expanding the scope of a criminal statute for policy reasons—allowing sexual abuse convictions to stand even where the trial evidence does not prove the elements written into the statute—the Ninth Circuit has improperly usurped the role of the legislature. *See Liparota v. United States*, 471 U.S. 419, 424

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sexual contact with another person without that other person's permission." 18 U.S.C. § 2244(b). "Sexual contact" is defined as "the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person." *Id.* § 2246(3).

(1985) ("The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute.").

2. The Ninth Circuit's decision to interpret the statute "broadly" turns the rule of lenity "on its head"

To the extent the statute is ambiguous—which it is not—the Ninth Circuit's decision to interpret it "broadly" contravenes the fundamental precept that any "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Liparota*, 471 U.S. at 427 (citations omitted). As the dissent in *James* put it:

> The majority purports to find the statute crystal clear, but then decides it must pick between broader and narrower interpretations of the statutory language. It opts for the broader one because 'it will allow more cases to be submitted to the good judgment of a jury.' This rule of acerbity, *i.e.,* the rule of lenity stood on its head, is not how the criminal law is supposed to work. People must have fair notice of what is legal and what is illegal, which is why we apply the rule of lenity when confronted with an ambiguous criminal statute. The function of the jury is to find facts and determine guilt by applying known legal standards, not to make up the law as it goes along. The majority's 'let the jury decide

> what's illegal' approach is unwise and, most likely, unconstitutional.

James, 810 F.3d at 684 (Kozinski, J., dissenting) (citations omitted).

3. Appropriately applying the plain terms of the statute would not render it unworkable

Applying the plain terms of the statute would also not render it unworkable or unclear. A defendant could be convicted of Section 2242(2)(B) where the Government proves beyond a reasonable doubt that at the time of the sexual act, the victim actually lacked the physical ability to decline consent. Considering that the statute carries a potential sentence of life imprisonment, applying the statute's plain terms would appropriately limit its application to the cases to which Congress intended it to apply. *See United States v. Price*, 980 F.3d 1211, 1223 n.3 (9th Cir. 2019) (noting that Section 2242(2)(B) has "has a severe maximum penalty of life imprisonment" and has therefore been interpreted to carry a strict mens rea requirement).

There are plenty of cases appropriately applying Section 2242(2)(B) to criminal conduct that actually met the text's "physically incapable" element. In the context of victims rendered "physically incapable" due to alcohol or drug use, most sexual abuse convictions involve victims who were either asleep, "passed out," or nearly unconscious at the time of the sexual act, and

so actually physically incapable of communicating a lack of consent. *See, e.g.*, *United States v. Fasthorse*, 639 F.3d 1182, 1184-85 (9th Cir. 2011) (evidence sufficient because, where "the victim testifies that she woke up while the sexual act was ongoing, this provides sufficient evidence for the jury to conclude that penetration occurred while she was asleep" (quotation marks and citation omitted)); *United States v. Smith*, 606 F.3d 1270, 1281 (10th Cir. 2010) (the victim "woke up to find Smith on top of her and engaged in sex."); *United States v. Wilcox*, 487 F.3d 1163, 1169 (8th Cir. 2007) (same); *United States v. Morgan*, 164 F.3d 1235, 1238 (9th Cir. 1999) (victim was in-and-out of consciousness); *United States v. Barrett*, 937 F.2d 1346, 1348 (8th Cir. 1991) (victim was only partially conscious before the sexual act and was only "fully awake" when "she felt [defendant's] penis inside her vagina").

These cases show that alcohol or drug use might lead some victims to become "physically incapable" of declining consent under Section 2242(2)(B). But the problem with the Ninth Circuit's interpretation of the statute is that it permits a conviction to stand where the evidence shows only that the victim was "physically hampered" by intoxication, regardless of whether the evidence showed an actual inability to decline consent. *See James*, 810 F.3d at 681; App. 3. Likewise, the Eighth Circuit's interpretation of the statute covers victims who are capable of communicating but whose ability to "object

straightaway" is "hindered" by the effects of alcohol or drugs. *Carter*, 410 F.3d at 1028. The Ninth Circuit's interpretation of the statute—along with the Eighth's—is incorrect.

C. This case presents an ideal vehicle for the question presented

This case squarely raises the question presented in two independent ways; the Ninth Circuit's decision rejecting Mr. De La Torriente's challenge to both the sufficiency of the evidence and the jury instructions hinged on the Court's broad interpretation of Section 2242(2)(B). If this Court were to adopt a narrower interpretation of the statute—the one adopted by the Fourth and Seventh Circuits—then Mr. De La Torriente's conviction would be reversed on insufficiency grounds, or, at the least, a new trial would be necessary due to instructional error.

1. The Ninth Circuit's conclusion that the evidence was sufficient to sustain a conviction was based entirely on its broad interpretation of the sexual abuse statute

The facts of this case were not materially in dispute. A.B. testified that she woke up before the sexual act began, she had a clear memory of every moment once she woke up, and she was able to carry on long, if slurred, conversations both before and after the sexual act. There was insufficient evidence based upon which a rational jury could conclude beyond a reasonable doubt that A.B. lacked the physical ability to say "no" or otherwise communicate a lack of consent. Nonetheless, the Ninth Circuit affirmed the conviction based on the fact that A.B. was "extremely intoxicated" at the time of the sexual act and so was "physically hampered," which, under its broad interpretation of Section 2242(2)(B), sufficed to sustain a conviction. (App. 2-3.) But under the Fourth and Seventh Circuit's interpretation of the statute—requiring actual evidence that the victim could not physically communicate a lack of consent—there can be no doubt that the evidence would be insufficient to sustain Mr. De La Torriente's conviction.

i. A.B.'s testimony was the only evidence of the two-to-three minute sexual encounter. A.B. recounted every detail of the charged incident, and yet her testimony lacked any indication she was incapable of communicating—either verbally or with physical gestures—at the time of the

statutorily defined "sexual act" (i.e., penetration). While there is no doubt her testimony described a disturbing experience, it failed to prove the "physically incapable" element of the sexual abuse charge.

A.B. testified that she woke up before the statutorily defined "sexual act" (i.e., penetration). App. 26. The Government asked A.B. several questions about her capacity between the time she awoke and the sexual act—missing from this testimony is any indication that she lacked the capacity to communicate:

> Q. Did you feel intoxicated?
>
> A. Yes.
>
> Q. And how did you feel at that point in general?
>
> A. Scared and confused, upset.

App. 26.

A.B. testified that Mr. De La Torriente then attempted to engage in sexual intercourse with her. App. 26-27. The Government then again asked questions of A.B. that could theoretically have produced evidence of incapacity. Instead, the following exchange occurred:

> Q. What were you feeling at that point?
>
> A. Scared and confused. I didn't know why it was happening.

App. 28. A.B. testified that De La Torriente then had sexual intercourse with her for "maybe a minute or two" before the other friends returned to the room. App. 28-29.

A.B. thus testified that she was awake before the sexual act occurred and she had a complete memory of the charged incident. The Government had ample opportunity to elicit any evidence A.B. was "physically incapable" when the sexual act commenced. But the Government failed to produce any such evidence. For example, A.B. did not say that she could not say "no"; that she was frozen in place; or that she lacked the capacity to shake her head or gesture with her arms. Feeling "intoxicated" and "[s]cared and confused, upset," do not prove the requisite physical inability to communicate a lack of consent.[4]

A.B.'s only testimony about her physical abilities during the charged incident was her statement that at some point, "I turned my head and I saw [Mr. De La Torriente's] face." App. 27. This was affirmative evidence that A.B. *could* move sufficiently to, for example, shake her head and thereby

[4] Count 1 charged a violation of Section 2242(2)(B), the "physically incapable" provision. The Government did not charge Section 2242(2)(A), which applies where the victims is "incapable of appraising the nature of the conduct." 18 U.S.C. § 2242(2)(A). While evidence of confusion may have some relevance under Section 2242(2)(A), it does not prove a physical inability to communicate. *See James*, 810 F.3d at 678 (explaining different provisions).

"declin[e] participation in" the sexual act. *See Williams*, 89 F.3d at 168 (reversing conviction because when the defendant first "tried to pull [victim's] underpants off, she pulled them back on," thus demonstrating she was physically capable of "declining participation"). A.B.'s testimony painted a complete picture of the charged incident, and nowhere in her testimony was there proof beyond a reasonable doubt that she was "physically incapable" of saying "no" or otherwise verbally or physically declining consent.

ii. All the testimony regarding the moments before and after the sexual act affirmatively showed that A.B. had the ability to communicate. The uncontested testimony established that A.B. dominated a conversation for 20-30 minutes before the friends left the room. *See* App. 2; ER 150, 211, 800. While there was evidence that A.B. was "slurring her speech" and "getting emotional" during this conversation, there was no dispute that she talked to her friends about a range of topics, including her dissatisfaction with her boyfriend, her relationship with her mother, and "her dog dying." App. 2; ER 150, 211, 800.

After the friends returned, A.B. again was able to communicate. While A.B. testified that she was "not really" able to articulate herself well at that point since she "was still intoxicated, and [ ] had just been woken up," App. 2, 31, she was able to tell her friends that "[m]y vagina hurts," and then

repeat "Yeah, he hurt me. My vagina hurts," ER 157, 254-55; App. 2, 31. A.B. also stood up on her own accord. ER 158. A.B. then left the room with Harris and, as she testified, was able to "tell him what had happened." App. 33.

iii. Th Ninth Circuit affirmed the conviction because under its broad interpretation of the statute, evidence that A.B. was "physically hampered" due to drowsiness and intoxication sufficed to prove the "physically incapable" element of Section 2242(2)(B). App. 3 (quoting *James*). But under the Fourth and Seventh Circuits' interpretations—applying the plain terms of the statute—the dearth of any evidence showing A.B. could not physically communicate a lack of consent would render the evidence insufficient. Indeed, the facts here actually demonstrate a far higher level of capacity than in *Peters*, 277 F.3d at 964, where the Seventh Circuit held the evidence insufficient, despite the fact that the victim was so intoxicated that she had "passed out" on the floor before the sexual act and had no memory of the two-hour period during which the sexual act took place. *Id.* at 965. The question presented is thus squarely presented by this case.

2. Alternatively, Mr. De La Torriente's challenge to the Ninth Circuit's Model Jury Instruction is also a good vehicle for the question presented

The question presented is independently outcome determinative with respect to Mr. De La Torriente's challenge to the Ninth Circuit's Model Jury Instruction. The instruction—telling the jury that "A person need not be physically helpless to be physically incapable of declining participation in or communicating unwillingness to engage in the sexual act" (App. 11, 13)—erroneously allowed the jury to reach a guilty verdict based on a finding that A.B. met some lesser, unspecified threshold of incapacity. This instruction was based on the Ninth Circuit's decision to interpret Section 2242(2)(B) to extend "broadly" to situations in which the victim may not have actually been "physically incapable" of communicating a lack of consent.

i. The District Court first correctly instructed the jury that a conviction required proof that "defendant knew that A.B. was physically incapable of declining participation in or communicating unwillingness to engage in the sexual act." App. 11. But the Court twice followed this instruction with the following: "A person need not be physically helpless to be physically incapable of declining participation in or communicating unwillingness to engage in a sexual act." App. 11, 13. This follow-up instruction comes from the Ninth Circuit's Model Jury Instructions.

See Model Crim. Jury Instr. 9th Cir. 8.172. The Model Instructions cite to *James*, 810 F.3d at 679, where the Ninth Circuit stated that "'physically incapable' under § 2242(2)(B) should be defined broadly and not confused with the more narrow 'physically helpless' standard employed by the district court." *Id*.

The model instruction erroneously allowed the jury to reach a guilty verdict based on a lesser, unspecified threshold of incapacity. In colloquial English, there is no material distinction between the terms "physically helpless" and "physically incapable." Indeed, *Webster's Third New International Dictionary* 1053 (1986 ed.) defines "helpless" as "incapable of action." Since the two terms are essentially synonymous, the instruction—telling the jury that "A person need not be physically helpless to be physically incapable"—erroneously allowed the jury to reach a guilty verdict based on a finding that A.B. was not actually physically incapable of communicating a lack of consent.

ii. In rejecting Mr. De La Torriente's challenge to the jury instructions, the Ninth Circuit agreed that the "borrowing of this language in a jury instruction, where it lacked context and elaboration found in the opinion, may have been less than artful." App. 4 (quotation marks and citation omitted). Nonetheless, the Ninth Circuit concluded that the model

instruction was not so misleading to warrant reversal and that, regardless, "any error that might have arisen from the jury instruction was harmless." App. 4. Of course, this ruling was premised on the Ninth Circuit's interpretation of Section 2242(B)(2), holding that the "physically incapable" element of sexual abuse includes situations where a victim is merely "physically hampered due to sleep and intoxication." *See* App. 3-4 (alteration and citation omitted).

If this Court adopts the Fourth and Seventh Circuit's interpretation of the statute—which would have required the jury to decide whether A.B. actually lacked the ability to communicate a lack of consent—then the Ninth Circuit's decision finding the instructional error harmless cannot stand. "An error in describing an element of the offense in a jury instruction is harmless only if it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" *United States v. Munguia*, 704 F.3d 596, 603-604 (9th Cir. 2012) (quoting *Neder v. United States*, 527 U.S. 1, 18 (1999)); *see* App. 4 (citing *Munguia*). If a sexual abuse charge required the jury to determine whether A.B. was actually physically incapable of declining consent at the time of the sexual act, then the erroneous instruction could not be harmless beyond a reasonable doubt.

First, the erroneous instruction misled the jury as to the primary disputed element in the trial. The Defense did not seriously contest most of the elements of the sexual abuse charge, such as the sexual act or the jurisdictional element. *See* ER 886-916 (Defense closing). The primary issue in the trial, as the Government told the jury, was: "Did the defendant know [A.B.] was physically incapable of giving consent?" ER 870.

Second, as discussed above with respect to the sufficiency of the evidence, the evidence of A.B.'s incapacity, and Mr. De La Torriente's knowledge of her incapacity, were at least close questions; there was no direct evidence that A.B. lacked the physical ability to communicate a lack of consent. The question for the jury was whether evidence of A.B.'s intoxication could substantiate an inference, beyond a reasonable doubt, that A.B. could not physically communicate a lack of consent. This was at least a close question, especially in light of the direct evidence that she could communicate both immediately before and after the sexual act occurred. The erroneous charge was not harmless beyond a reasonable doubt since it lowered the Government's burden as to this closely contested issue.

Finally, in its rebuttal closing, the Government focused on the erroneous jury instruction to counter the Defense's arguments about A.B.'s incapacity. The Government argued: "The defense argued that [A.B] was not

physically incapable of consenting, but look at the instruction the Court gave you. A person need not be physically helpless to be physically incapable of declining participation in or communicating an unwillingness to engage in a sexual act." ER 918. While the Government made this argument, it also visually projected the text of the erroneous instruction to the jury. ER 1352 (Government's PowerPoint presentation). The Government thus emphasized the erroneous jury instruction in its rebuttal closing—both orally and visually—as a central argument going to the primary disputed issue in the trial.

The question presented is thus squarely presented by this case; if the Court rejects the Ninth Circuit's broad interpretation of Section 2242(B)(2), then the conviction must be reversed on insufficiency grounds, or, at the least, a new trial is required to correct the instructional error.

Conclusion

For the foregoing reasons, Mr. De La Torriente respectfully requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

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