No. 21-6212

IN THE SUPREME COURT OF THE UNITED STATES

ANTHONY DE LA TORRIENTE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record

KENNETH A. POLITE, JR.
Assistant Attorney General

ROSS B. GOLDMAN
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, sufficient evidence supported the jury's verdict that petitioner engaged in a sexual act with someone "physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act," in violation of 18 U.S.C. 2242(2)(B).

2. Whether the district court committed reversible error in instructing the jury on the "physically incapable" element of the offense.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (C.D. Cal.):

United States v. De La Torriente, No. 17-cr-608 (July 15, 2019)

United States Court of Appeals (9th Cir.):

United States v. De La Torriente, No. 19-50237 (May 5, 2021)

IN THE SUPREME COURT OF THE UNITED STATES

No. 21-6212

ANTHONY DE LA TORRIENTE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-5) is not published in the Federal Reporter but is reprinted at 846 Fed. Appx. 609.

JURISDICTION

The judgment of the court of appeals was entered on May 5, 2021. A petition for rehearing was denied on June 15, 2021 (Pet. App. 6). On March 19, 2020, the Court extended the time within which to file any petition for a writ of certiorari due on or after that date to 150 days from the date of the lower-court judgment, order denying discretionary review, or order denying a timely

petition for rehearing. The petition for a writ of certiorari was filed on November 3, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioner was convicted of sexual abuse within the special jurisdiction of the United States, in violation of 18 U.S.C. 2242(2)(B), 7(8), and abusive sexual contact within the special jurisdiction of the United States, in violation of 18 U.S.C. 2244(b), 7(8). Judgment 1. The district court sentenced petitioner to 78 months of imprisonment, to be followed by ten years of supervised release. Ibid.

1. On July 1, 2015, a group of cheerleading coaches, including petitioner and the victim in this case, "A.B.," offboarded a cruise ship to spend time in Mexico. Pet. App. 1; Gov't C.A. Br. 4. "A.B. drank heavily throughout the day and was extremely intoxicated by the time she re-boarded the ship." Pet. App. 2 (brackets, citation, and internal quotation marks omitted); see Gov't C.A. Br. 4-5. She was "unable to walk on her own to her cabin," "unable to change herself or to shower herself," and so intoxicated "that her friends induced vomiting to reduce her blood alcohol levels and propped her on her side in bed for fear that she would choke on her own vomit." Pet. App. 15. As her friends helped, A.B was "slurring her speech and getting emotional." Id. at 2 (citation and internal quotation marks omitted); see Gov't

C.A. Br. 5-9. A.B.'s friends "didn't really know what she was saying." C.A. E.R. 151.

When the other coaches left the room to get food, petitioner "volunteered to stay behind with A.B., who fell asleep." Pet. App. 2 (citation and internal quotation marks omitted). "A.B. woke up to [petitioner] pulling down her underwear before committing a sexual act without her consent." Ibid. (brackets, citation, and internal quotation marks omitted); see generally Gov't C.A. Br. 9 (detailing sexual acts petitioner committed, including "penetrat[ing] [A.B.] with his penis for a minute or two"). After a minute or two, petitioner "was interrupted by the sound of their friends returning." Pet. App. 2; see C.A. E.R. 776-777. Petitioner quickly pulled on A.B.'s underwear, wrapped her in a robe, and re-positioned her on the bed the way the others had left her. C.A. E.R. 777.

When the other coaches entered the room, the previously clean cabin was a "mess." C.A. E.R. 156. They started asking questions, but A.B. "was still intoxicated and unable to articulate her thoughts." Pet. App. 2 (citation and internal quotation marks omitted). A.B. eventually "started saying something quietly," but her friends "couldn't figure out what she was saying." C.A. E.R. 254. She "stumbled through her words several times before screaming that [petitioner] had hurt her." Pet. App. 2 (brackets and internal quotation marks omitted). Medical staff onboard "conducted a sexual assault exam on A.B., which recovered DNA

traces matching [petitioner's] profile." Ibid. Petitioner "denied that he had sex with A.B." Ibid.

2. A grand jury returned a two-count indictment charging petitioner with sexually abusing A.B., in violation of 18 U.S.C. 2242(2)(B), 7(8); and abusive sexual contact with A.B., in violation of 18 U.S.C. 2244(b), 7(8). Judgment 1; see Indictment 1-4. As relevant to the first count, Section 2242(2)(B) makes it a crime to, in the special maritime jurisdiction of the United States, "engage[] in a sexual act with another person" when "that other person [wa]s * * * physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act." 18 U.S.C. 2242(2)(B).

At trial, the government presented eyewitness testimony from A.B. and several of the coaches on the cruise. The jury watched several videos documenting A.B.'s physical state that day, including A.B and petitioner taking tequila shots at the market, C.A. E.R. 108-109; A.B. urinating on the side of the road, id. at 204; and A.B. slumping on the shuttle bus next to petitioner with her eyes rolling back in her head, id. at 116. The government presented testimony from a forensic nurse, id. at 420; the doctor who examined A.B., id. at 480; and an FBI DNA expert, id. at 556. The government also introduced petitioner's handwritten statement to the ship's Chief Security Officer, id. at 1040-1041, and a recording of his FBI interview, id. at 667-689.

Petitioner ultimately did not dispute that a sexual encounter occurred or that it was "unwanted" from A.B.'s perspective; instead, he claimed that the government had failed to prove that A.B. was "physically incapable" of communication for purposes of the Section 2242 count, or the requisite mental state for either charged count. C.A. E.R. 886-916. At the close of the evidence, the district court instructed the jury on the elements of Section 2242(2)(B). The district court stated, over petitioner's objection but consistent with the Ninth Circuit's model instructions, that "[a] person need not be physically helpless to be physically incapable of declining participation in or communicating unwillingness to engage in a sexual act." Pet. App. 3 (citation omitted; brackets in original).

The jury found petitioner guilty on both counts. Pet. App. 1. Petitioner moved for a judgment of acquittal or a new trial. Id. at 14. The district court denied the motion, finding "ample evidence that A.B. was incapable of declining to participate or communicate her unwillingness to engage in sexual acts." Ibid. Observing that the testimony at trial provided an "overall picture" "of a woman who was extraordinarily inebriated and incapable of even the most simple tasks," the district court explained that "taking the evidence in the light most favorable to the government easily supports the jury's verdict." Id. at 15. The district court sentenced petitioner to 78 months of imprisonment, to be followed by ten years of supervised release. Judgment 1.

3. The court of appeals affirmed in a unanimous, unpublished decision. Pet. App. 1-5. Like the district court, the court of appeals rejected petitioner's contention that the evidence was insufficient to convict him of sexual abuse, in violation of Section 2242(2)(B). Id. at 3. The court of appeals explained that "[t]he 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 [petitioner] committed." Ibid. (quoting United States v. James, 810 F.3d 674, 681 (9th Cir.), cert. denied, 137 S. Ct. 219 (2016)) (first set of brackets in original).

The court of appeals likewise rejected petitioner's contention that the district court had erred in instructing the jury on the "physically incapable" language in 18 U.S.C. 2242(2)(B). Pet. App. 3-4. The court explained that the instruction was grounded in circuit precedent and was neither misleading nor inadequate. Ibid. The court further observed that although petitioner "objected to the instruction at trial, he did not propose an alternative that better explained the language he argue[d] was misleading"; instead, he "requested that the district court remove" the language "altogether and simply recite the statute." Id. at 4. And the court of appeals moreover found that

"any error that might have arisen from the jury instruction was harmless." Ibid.

ARGUMENT

Petitioner renews his contention (Pet. 11-30) that the evidence presented at trial was insufficient to prove that A.B. was "physically incapable," within the meaning of Section 2242(2)(B), of resisting or objecting to his unwanted sexual act. Petitioner also renews his contention (Pet. 31-36) that the district court erred in instructing the jury that "[a] person need not be physically helpless" in order to be "physically incapable" of consenting to a sexual act. The court of appeals correctly rejected those contentions, and its decision does not conflict with any decision of this Court or any other court of appeals. No further review is warranted.

1. a. Congress enacted Section 2242 in 1986 "as part of its effort to 'modernize and reform Federal rape statutes.'" United States v. James, 810 F.3d 674, 678 (9th Cir.) (quoting H.R. Rep. No. 594, 99th Cong., 2d Sess. 6 (1986)), cert. denied, 137 S. Ct. 219 (2016). Section 2242(2)(B) makes it a crime, in the special maritime and territorial jurisdiction of the United States, to "engag[e] 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).

In United States v. James, supra, the Ninth Circuit recognized 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." 810 F.3d at 681. That construction is consistent with the plain language of the statute, insofar as a victim may well be so intoxicated, disoriented, or semiconscious -- or so impaired by a combination of those or other conditions -- that she lacks capacity to "declin[e] participation in, or communicat[e] unwillingness to engage in," a sexual act. 18 U.S.C. 2242(2)(B).

Here, the evidence presented at trial readily supported the jury's finding that A.B. lacked such capacity. Multiple witnesses testified, and the video recordings confirmed, that A.B. was verbally and physically impaired immediately before and after the assault. See pp. 2-5, supra. For example, the jury heard that shortly before the assault, A.B. had to be carried "like a baby" and her friends "didn't really know what she was saying." C.A. E.R. 151, 241. And when A.B.'s friends walked in and interrupted the assault, petitioner was able to re-position A.B.'s body as he wished, while A.B. appeared so "out of it" that one friend thought she was still asleep. Id. at 254, 777. The jury also heard testimony that A.B. "wasn't answering" questions after the assault and, after she tried to speak, her friends "couldn't figure out what she was saying." Id. at 156, 254. In those circumstances,

a rational juror could readily find that a heavily intoxicated victim who "woke up to [petitioner] pulling down [her] underwear," id. at 774, lacked the capacity to express her unwillingness or resist petitioner's advances before penetration.

Petitioner contends that the evidence was insufficient to sustain his conviction because "A.B.'s testimony was the only evidence of the two-to-three minute sexual encounter," and "[w]hile there is no doubt her testimony described a disturbing experience, it failed to prove the 'physically incapable' element." Pet. 26-27. That factbound contention does not warrant this Court's review. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."). In any event, petitioner overlooks A.B.'s testimony that she was asleep when petitioner began removing her underwear, "confused" when petitioner penetrated her, and not "able to articulate well" afterward "that something had happened" because she "was still intoxicated, and [she] had just been woken up." C.A. E.R. 778-79; see id. at 774. That testimony, and A.B.'s overall incapacity, were also corroborated by video recordings and testimony overall from multiple eyewitnesses documenting A.B.'s impairment immediately before and after the assault. See pp. 2-5, supra.

At a minimum, the jury's verdict was not irrational -- especially when the evidence is construed, as it must be, in the

light most favorable to the verdict. See Jackson v. Virginia, 443 U.S. 307, 319 (1979)); see also, e.g., Pet. App. 3, 14-19. Petitioner asserts that other trial testimony "affirmatively showed" A.B.'s capacity, noting that A.B. spoke to her friends before they left to get food and that she eventually managed to say "'[m]y vagina hurts'" after the assault. Pet. 29-30 (citation omitted). But the jury heard that A.B.'s friends "didn't really know what she was saying" during the earlier conversation, C.A. E.R. 151; see id. at 245; that after the assault, A.B. at first "wasn't answering" questions, id. at 156; and that when trying to describe what petitioner had done, she "stumbl[ed] through her words" to such an extent that her friends "couldn't figure out what she was saying," id. at 254. The jury was entitled to credit that testimony and resolve any conflict in favor of the prosecution.

b. Petitioner argues that the Ninth Circuit has improperly interpreted Section 2242(2)(B) "to create broader criminal liability than the plain text permits." Pet. 19 (emphasis omitted). But that argument rests on the mistaken premise that the Ninth Circuit allows sexual-abuse convictions to stand so long as the victim was intoxicated, "regardless of whether the evidence showed an actual inability to decline consent." Pet. 24. In fact, the Ninth Circuit has simply recognized that Section 2242(2)(B) properly applies whenever a victim lacks capacity to "declin[e] participation in, or communicat[e] unwillingness to engage in,"

the sexual act -- whether because of intoxication, sleep, or anything else. 18 U.S.C. 2242(2)(B); see James, 810 F.3d at 681 (examining trial evidence to determine whether the jury could rationally conclude that the victim was in fact "physically incapable"); Pet. App. 3 (same). As petitioner appears to acknowledge (Pet. 23-24), intoxication -- particularly in combination with other conditions -- may sometimes result in a physical inability to decline an unwanted sexual act. But the Ninth Circuit has not held that it invariably does.

Petitioner's invocation (Pet. 22-23) of the rule of lenity is unsound. That rule "applies only when a criminal statute contains a grievous ambiguity or uncertainty, and only if, after seizing everything from which aid can be derived, the Court can make no more than a guess as to what Congress intended." Ocasio v. United States, 578 U.S. 282, 295 n.8 (2016) (citation and internal quotation marks omitted). Section 2242(2)(B) is not grievously ambiguous, and petitioner has pointed to no court that has deemed it to be. Although individual cases may be close, a dispute about the proper inference to draw from particular facts is well within a jury's competence. See United States v. Williams, 553 U.S. 285, 306 (2008) ("Close cases can be imagined under virtually any statute. The problem that poses is addressed, not by the doctrine of vagueness, but by the requirement of proof beyond a reasonable doubt.").

c. Petitioner contends (Pet. 11-12) that review is warranted to resolve a conflict in the courts of appeals about whether "evidence that a victim was intoxicated at the time of the sexual act, without more, is sufficient to sustain a conviction for sexual abuse." See Pet i, 11-18. But this case would be an unsuitable vehicle to address the circumstances in which intoxication alone permits an inference that a victim was "physically incapable" under Section 2242(2)(B) because the court of appeals did not sustain petitioner's conviction based on A.B.'s intoxication alone. Rather, the court of appeals rested its decision on the full sweep of the trial evidence. Pet. App. 1-3. As the decision below explains, substantial additional evidence supported the jury's incapacity finding, including A.B.'s disorientation from sleep and demonstrated verbal and physical impairment. Id. at 2-3; see pp. 2-5, 8-10, supra.

In any event, no conflict exists. Contrary to petitioner's contention (Pet. 12-15), neither the Eighth nor Ninth Circuit has adopted a categorical rule that intoxication suffices to sustain a Section 2242(2)(B) conviction. Rather, in both decisions petitioner cites, the court of appeals conducted a fact-specific inquiry, examining all the circumstances to determine whether incapacity had been established. See United States v. Carter, 410 F.3d 1017, 1027-1028 (8th Cir. 2005) (incapacity finding not clearly erroneous where sexual abuse occurred shortly after victim regained consciousness from "black[ing] out" and "lingering

effects of the marijuana may have hindered [victim's] ability to object straightaway to the abuse"); James, 810 F.3d at 682 (considering incapacity in the context of cerebral palsy and surveying all the evidence presented at trial). Other circuits take a similar approach. See, e.g., United States v. Smith, 606 F.3d 1270, 1280-1281 (10th Cir. 2010) (surveying evidence that victim was "heavily intoxicated" and "asleep" when defendant engaged in sexual act in determining that victim "could not communicate unwillingness to engage in the sexual act"); United States v. Meely, 146 F.3d 867, at *1 (5th Cir. 1998) (per curiam) (unpublished) (rejecting unpreserved sufficiency challenge to Section 2242(2)(B) conviction where defendant committed sexual acts against victim who was "passed out drunk").

Petitioner's contention (Pet. 16-18) that the Fourth and Seventh Circuits have adopted a categorical rule that evidence of intoxication can never sustain a Section 2242(2)(B) conviction is similarly mistaken. Those circuits also conduct a nuanced, factbound analysis to determine whether the government established the victim's incapacity at trial. In United States v. Peters, 277 F.3d 963 (2002), the Seventh Circuit found the evidence insufficient where the government had failed to introduce evidence establishing the victim's physical state during the 90-minute window in which the assault occurred. See id. at 967-968; United States v. Fasthorse, 639 F.3d 1182, 1184 (9th Cir.) (describing Peters as "holding that evidence was insufficient where the record

was silent with respect to the hour-and-a-half period in which the sexual act occurred"), cert. denied, 565 U.S. 893 (2011). The Seventh Circuit did not suggest that evidence of the effects of intoxication could never satisfy Section 2242(2)(B), and the decision in Peters does not indicate that petitioner's case -- which included ample evidence of A.B.'s incapacity immediately before, during, and after the assault -- would have come out differently in the Seventh Circuit.

The Fourth Circuit's decision in United States v. Williams, 89 F.3d 165 (1996), is likewise unhelpful to petitioner. There, the victim "awoke to find [the defendant] in her room," and when he "tried to pull her underpants off, she pulled them back on." Id. at 168. And the Fourth Circuit found the evidence insufficient because, according to the victim's own testimony, the sexual act took place "after [the victim] had communicated her desire not to have sexual intercourse with [the defendant]." Ibid.; see ibid. ("Even if at some point before this assault [the victim] would have been physically incapable of declining participation because she was either intoxicated or asleep, penetration -- which is the sine qua non of a sexual act as defined under the federal scheme -- did not occur until after she had communicated her desire not to have sexual intercourse with [the defendant]."). No similar resistance occurred here.

2. Petitioner briefly contends (Pet. 31-35) that the district court erred in instructing the jury that a "person need not be

physically helpless to be physically incapable of declining participation in or communicating unwillingness to engage in [a] sexual act." Pet. 31 (citation omitted). In petitioner's view, the terms "physically helpless" and "physically incapable" are "essentially synonymous," and the jury instruction "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." Pet. 32. But as the court of appeals has explained, "[t]he federal statute itself does not use the term 'physically helpless,'" which ordinarily means "'totally physically incapacitated.'" James, 810 F.3d at 680-681 (citation omitted). Rather, the statute asks only whether the victim is "physically incapable" of specific activities -- namely, declining participation or communicating unwillingness to engage in the sexual act. 18 U.S.C. 2242(2)(B). "A victim could have a physical incapacity to decline participation or be incapable of communicating unwillingness to engage in a sexual act and still not be physically helpless." James, 810 F.3d at 681. The jury instruction conveyed that common-sense distinction.

In any event, petitioner does not identify any conflict in the courts of appeals or conflict with this Court's decisions on the proper jury instruction. A jury instruction must accurately describe the law, but a district court retains discretion as to the precise wording to use. See United States v. Park, 421 U.S. 658, 675 (1975) (reviewing a jury instruction formulation for abuse

of discretion). Even assuming the district court's use of this language in its instruction "may have been 'less than artful,'" the instruction was neither "'misleading'" nor "'inadequate.'" Pet. App. 4 (citations omitted). And moreover, given the overwhelming evidence that A.B. was physically incapable of resisting or declining to participate, any error in the jury instruction was harmless, as the court of appeals held. Ibid.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

KENNETH A. POLITE, JR.
Assistant Attorney General

ROSS B. GOLDMAN
Attorney

FEBRUARY 2022