No. 21-6212

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

Reply Brief for Petitioner

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Introduction

Anthony De La Torriente seeks this Court's review to resolve a circuit split interpreting the federal sexual abuse statute. The Government disclaims the existence of any circuit split, and argues that, regardless, Mr. De La Torriente's case is a poor vehicle for the question presented. The Government is incorrect on both counts. First, the Government ignores the explicit holdings of the Eighth and Ninth Circuits, which created a circuit split. Second, the Government predicates its vehicle argument on the Ninth Circuit's erroneous interpretation of the statute, thereby demonstrating that the circuit split is outcome determinative in this case. Regardless, addressing the question presented will not require this Court to delve into the extensive trial record; at minimum, the Court should grant review to clarify the meaning of the statute and remand for the Ninth Circuit to apply the correct test to the facts of this case.

Argument

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

There is a longstanding circuit split interpreting the sexual abuse statute, specifically the element requiring proof that the victim was "physically incapable of declining participation in, or communicating unwillingness to engage in, th[e] sexual act." 18 U.S.C. § 2242(2)(B). The Government disclaims the existence of any circuit split, arguing that every

decision analyzing the statute involves a "nuanced, factbound analysis" that does not announce any broader rule. Opp. 13. But the Government ignores the fact that the circuit courts have explicitly announced divergent legal rules in interpreting the statute. Moreover, the circuit split is not superficial; the courts' divergent interpretations of the statute have led to conflicting outcomes on materially identical fact patterns. The issue is ripe for this Court's review.

1. The two sides of the circuit split explicitly announced divergent legal rules

Four circuit courts have explicitly announced divergent legal rules in interpreting the sexual abuse statute. The Eighth and Ninth Circuits explicitly interpret the statute "broadly," *United States v. James*, 810 F.3d 674, 676 (9th Cir. 2016), directing lower courts to sustain convictions as long as the evidence showed that a victim's ability to quickly decline consent was "hampered" by alcohol or drugs, *id.* at 681; *United States v. Carter*, 410 F.3d 1017, 1028 (8th Cir. 2005). Conversely, the Fourth and Seventh Circuits require evidence that a victim was physically unable to communicate a lack of consent; that is, that the victim 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). These conflicting decisions did not apply the same

test to a "factbound analysis" (*contra* Opp. 13). The courts have explicitly announced divergent interpretations of the statute.

i. Both the Eighth and Ninth Circuits explicitly hold that evidence that a victim was "hampered" or "hindered" by intoxication suffices to sustain a sexual abuse conviction. In *James*, the Ninth Circuit recognized that the plain terms of the statute apply only to the "infrequent scenario where the victim who is sexually assaulted . . . is incapable of communicating a refusal of unwanted intercourse." *James*, 810 F.3d at 676. But instead of limiting the statute's application to that "infrequent scenario," the Court decided to interpret the statute "broadly" so that it 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 (choosing "broader" interpretation "because it will allow more cases to be submitted to the good judgment of a jury"). Based on this "broad" interpretation of the statute, the Ninth Circuit concluded that a conviction can stand so long as evidence shows that a victim was "*hampered* due to sleep, intoxication, or drug use and thereby rendered physically incapable." *Id.* at 681 (emphasis added); App. 3 (quoting the same in affirming Mr. De La Torriente's conviction).

The Eighth Circuit has similarly held that the elements of sexual abuse are met where the "the lingering effects of the marijuana may have hindered [the victim's] ability to object straightaway to the abuse," even though the

victim was awake and could communicate at the time of the assault. *Carter*, 410 F.3d at 1028; *see also United States v. Demery*, 674 F.3d 776, 780 (8th Cir. 2011) (concluding there was sufficient evidence victim was "physically incapable" even though victim was "neither asleep nor intoxicated" when the sexual act commenced, because the sexual act occurred "very fast" after victim woke up).

The Government flatly ignores *James*'s explicit decision to interpret the statute "broadly" and argues that *James* simply applied the plain text of the statute. *See* Opp. 8. But ignoring the Ninth Circuit's holding does not change it; the Ninth Circuit explicitly broadened the application of the sexual abuse statute to situations where a victim is "hampered due to sleep, intoxication, or drug use." *See James*, 810 F.3d at 681. To allow a conviction where a victim was "hampered" creates a far lower bar than the statute's text, which requires proof that a victim was "physically incapable" of communicating a lack of consent; the first connotes mere impairment, whereas the latter requires an actual inability. *Compare Hamper,* Merriam-Webster.com[1] ("to interfere with the operation of"), *with Incapable*, Merriam-Webster.com[2] ("lacking capacity, ability, or qualification for the purpose or end in view"). Contrary to the Government's claim, the Ninth

[1] https://www.merriam-webster.com/dictionary/hamper (last visited Feb. 18, 2022).

[2] https://www.merriam-webster.com/dictionary/incapable (last visited Feb 18., 2022).

Circuit has improperly "construe[d] a statute in a way that negates its plain text." *Honeycutt v. United States*, 137 S. Ct. 1626, 1635 n.2 (2017).

The Government further argues that Mr. De La Torriente and the *James* dissent improperly rely on the rule of lenity even though the statute is not ambiguous. Opp. 11. But Mr. De La Torriente agrees that the statute is not ambiguous and invokes the rule of lenity only to underscore the unsoundness of the Ninth Circuit's reasoning. Pet. 22. As the dissent in *James* put it, the Ninth circuit's decision to interpret a criminal statute more "broadly" than its plain text permits amounts to a "rule of acerbity, *i.e.,* the rule of lenity stood on its head," which "is not how the criminal law is supposed to work." *James*, 810 F.3d at 684 (Kozinski, J., dissenting).

Finally, the Government attempts to muddle the circuit split by pointing to uncontroversial decisions affirming sexual abuse convictions where the victims were asleep or unconscious at the time of the sexual act and so obviously physically incapable of communicating a lack of consent. *See* Opp. 12-13 (citing *United States v. Fasthorse*, 639 F.3d 1182, 1184-85 (9th Cir. 2011) (affirming conviction because the victim was asleep when sexual act commenced); *United States v. Smith*, 606 F.3d 1270, 1281 (10th Cir. 2010) (same); *United States v. Meely*, 146 F.3d 867, at *1 (5th Cir. 1998) (per curiam) (unpublished) (same)). These clear-cut cases do not evince a "similar approach" across all of the circuit courts. *Contra* Opp. 13. Only the

Eighth and Ninth Circuits have held that a conviction may be affirmed where a victim is awake and capable of communication but is "hampered" by the effects of drugs or alcohol.

ii. In contrast, the Fourth and Seventh Circuits have applied the plain terms of the statute, holding that a sexual abuse conviction requires actual evidence that the victim could not physically communicate—neither verbally nor with physical gestures—at the time of the sexual act. In *Peters*, the Seventh Circuit reversed a sexual abuse conviction, holding that 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. *Peters,* 277 F.3d at 966 & 968.

Similarly, in *Williams*, the Fourth Circuit reversed a sexual abuse conviction despite the fact that the victim was intoxicated and had just been woken up at the time of the assault. *Williams,* 89 F.3d at 168. 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.* at 166 (quoting 18 U.S.C. § 2242(2)(B)). That is, regardless of whether the victim was physically hampered by sleep or intoxication, the evidence was insufficient if the victim could physically demonstrate a lack of consent.

2. The circuit split has been outcome determinative in multiple cases

The two sides of the circuit split have reached conflicting outcomes on materially identical fact patterns. These divergent outcomes further underscore the circuit split and the need for this Court's review.

Compare, for example, the Eighth Circuit's decision in *Carter* with the Fourth Circuit's decision in *Williams*. In both cases, the victims communicated a lack of consent during the assault. In *Carter*, the defendant argued that the victim "told Mr. Carter to stop while he was performing cunnilingus on her proves that she could . . . 'communicate unwillingness to engage in' cunnilingus." *Carter*, 410 F.3d at 1027 (quoting 18 U.S.C. § 2242(2)(B)) (alteration omitted). Similarly, in *Williams*, the victim demonstrated a lack of consent during the assault by pulling her underwear back on after the defendant tore them off, and by "attempt[ing] to close her legs after he forced them open." *Williams,* 89 F.3d at 168. In both cases, the victims were inebriated and had woken up immediately before the assaults. Nonetheless, the courts reached opposite conclusions. *Carter*, 410 F.3d at 1028 (concluding that elements of sexual abuse were met because "the lingering effects of the marijuana may have hindered [the victim's] ability to object straightaway to the abuse"); *Williams,* 89 F.3d at 168 (reversing conviction because victim's gestures demonstrated she was physically capable of declining consent). Contrary to the Government's

claim, these outcomes do not stem from "factbound" applications of the same legal rule. Opp. 13.

Comparing the Seventh Circuit's decision in *Peters* with Mr. De La Torriente's conviction in this case similarly reveals the depth of the circuit split. The evidence of incapacity here is far weaker than in *Peters*, 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 90-minute period during which the sexual act took place. *Peters*, 277 F.3d at 964.

The Government attempts to distinguish *Peters* because the victim had no memory of the 90-minute period during which the sexual act occurred, thus creating an evidentiary gap, whereas, here, A.B. recounted in detail her experiences "immediately before, during, and after the assault." Opp. 14. This argument makes little sense. In *Peters*, the evidentiary gap was created by the degree of the victim's incapacity; she passed out before the assault, had no memory of the sexual act, and multiple people had difficulty waking her afterward. *See Peters,* 277 F.3d at 964-66. Here, A.B. was awake during the entire sexual encounter, had a complete memory of it, recounted it in detail, and the Government did not adduce any testimony—let alone proof beyond a reasonable doubt—that A.B. was physically incapable of communicating a lack of consent. Pet. 26-30. Under the Seventh Circuit's

rule—requiring evidence that the victim could not communicate a lack of consent—the conviction here could not stand. But the Ninth Circuit affirmed Mr. De La Torriente's conviction based on its conclusion that evidence that A.B. was "physically hampered" sufficed to sustain the conviction. App. 3 (Ninth Circuit decision).

B. This case is an ideal vehicle for the question presented

The Government argues that this case is a poor vehicle for the question presented, but its arguments lack merit. First, the Ninth Circuit affirmed Mr. De La Torriente's conviction based on its erroneous interpretation of the statute; under the Fourth and Seventh Circuit's more restrictive test, the conviction would be reversed due to insufficient evidence. Pet. 25-30. Second, to the extent the sufficiency of the evidence is a record-intensive issue, that is not a reason to avoid the question presented; at minimum, the Court should clarify the meaning of the statute and remand for the lower courts to apply the correct test to the facts of this case. Finally, the question presented is also independently outcome-determinative with respect to the jury instruction issue.

1. The Government's sufficiency argument is predicated on the Ninth Circuit's erroneous interpretation of the statute

The Government argues that the evidence is sufficient to sustain Mr. De La Torriente's conviction regardless of the question presented, but the Government's sufficiency argument is predicated on the Ninth Circuit's

erroneous interpretation of the statute. Specifically, the Government argues that because the evidence showed that A.B. was "impaired" by alcohol, there was sufficient evidence to sustain the conviction. Opp. 8 (arguing that sufficient evidence proved "A.B. was verbally and physically impaired immediately before and after the assault"); Opp. 9 (arguing for sufficiency based on "multiple eyewitnesses documenting A.B.'s impairment"; Opp. 12 (same). But the question presented is whether, as the Eighth and Ninth Circuits have held, evidence showing only that a victim was impaired or hampered by drugs or alcohol is sufficient to sustain a conviction, or whether proof of an actual physical inability to decline consent is required. By basing its sufficiency argument on the Ninth Circuit's interpretation of the statute, the Government demonstrates that the question presented is outcome determinative in this case.

If the Court adopts the Fourth and Seventh Circuit's interpretation of the statute—requiring evidence that the victim was not merely "impaired" but actually could not communicate a lack of consent—then Mr. De La Torriente's conviction cannot stand. 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 her testimony contained no indication she lacked the ability to communicate a lack of consent by, for example, saying "no." Pet. 26-28.

Moreover, all the trial testimony confirmed that immediately before the sexual encounter and after it, A.B. was able to communicate extensively. The uncontested testimony established that A.B. dominated a conversation for 20-30 minutes immediately before the friends left the room and the sexual encounter occurred. *See* App. 2; ER 150, 211, 800. Then, immediately after the charged incident, A.B. was able to tell her friends about the unwanted sexual encounter. ER 157, 254-55; App. 2, 31, 33. Although A.B. testified that she was "not really" able to articulate herself well after the sexual encounter since she "was still intoxicated, and [ ] had just been woken up," App. 2, 31, there was no dispute that she described the sexual encounter to her friends immediately after it occurred. ER 157, 254-55; App. 2, 31, 33. While this evidence might have shown that A.B. was "impaired" by alcohol, there was insufficient evidence based upon which a rational jury could conclude beyond a reasonable doubt that she lacked the physical ability to say "no" or otherwise communicate a lack of consent.

In its vehicle argument, the Government relies heavily on A.B.'s level of intoxication earlier in the day, hours before the charged incident. *E.g.*, Opp. 9 (relying on testimony and video evidence regarding A.B.'s level on intoxication on bus ride back to the ship). But the uncontroverted testimony showed that by the time the group of friends returned to the ship and left A.B. and Mr. De La Torriente alone, lying in bed together, A.B. was "much

better than she was when we got on the ship." ER 263 (testimony of Government witness). The Government's reliance on evidence regarding A.B.'s physical abilities hours earlier is thus a red herring.

This case is an ideal vehicle for the question presented. 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 (Ninth Circuit decision). But under the Fourth and Seventh Circuits' interpretation of the statute—requiring actual evidence that the victim could not physically communicate a lack of consent—the evidence would be insufficient to sustain Mr. De La Torriente's conviction.

2. This Court can address the question presented and remand for the Ninth Circuit to apply the correct test to the facts of this case

As addressed above, the Government muddles the record in arguing that sufficient evidence supported Mr. De La Torriente's conviction. But the Court need not delve into the extensive trial record to determine whether this case merits review; at minimum, the Court should grant review to clarify the meaning of the statute and remand for the lower courts to apply the correct test to the facts of this case. *See Wilson v. Seiter*, 501 U.S. 294, 306 (1991) (remanding for "reconsideration under the appropriate standard" even though "any error on the point may have been harmless"); *Hicks v. United*

States, 137 S. Ct. 2000, 2000 (2017) (mem.) (Gorsuch, J., concurring) ("When this Court identifies a legal error, it routinely remands the case so the court of appeals may resolve whether the error was harmless in light of other proof in the case.").

The question presented is whether the Eighth and Ninth Circuits' broad interpretation of the sexual abuse statute is correct or whether the federal courts must apply the stricter test dictated by the plain terms of the statute. The Ninth Circuit explicitly affirmed Mr. De La Torriente's conviction based on its broad interpretation of the statute, reasoning that because A.B. was "physically hampered" by intoxication, sufficient evidence supported the conviction. App. 2-3 (quoting *James*, 810 F.3d at 681). The Ninth Circuit did not decide whether ethe evidence would be sufficient under a stricter reading of the statute—that is, whether there was sufficient evidence that A.B. could not physically communicate a lack of consent by, for example, saying "no." This Court need not reach that issue in the first instance; it should, at minimum, address the question presented and remand for the Ninth Circuit to decide whether sufficient evidence supported the conviction under the correct legal standard.

3. The question presented is independently outcome determinative with respect to the Ninth Circuit's instructional error

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 Government argues that the instruction is not related to the circuit split; that it is not erroneous; and that any instructional error was harmless. Opp. 14-16. The Government is wrong on all counts.

First, the model 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)—derives from the Ninth Circuit's broad interpretation of the statute. *See* Model Crim. Jury Instr. 9th Cir. 8.172 (citing *James*, 810 F.3d at 679). If this Court decides that the Ninth Circuit has interpreted the statute incorrectly, then the model instruction cannot stand.

Second, the instruction erroneously allowed the jury to reach a guilty verdict based on a finding that A.B. met some lesser, unspecified threshold of incapacity. The jury instruction offered only one definition of the term "physically incapable," and that definition told the jury that it could reach a guilty verdict if it found A.B. was not "physically helpless." But the jury had no basis upon which to parse a distinction between the terms "physically incapable" and "physically helpless." The Government's hyper-technical distinction between the two phrases—even assuming that it is technically

correct—shows that there is barely any daylight between them. *Contra* Opp. 15. At minimum, the instruction was confusing, equivocal, and ambiguous—lowering the required level of incapacity in an opaque manner—and so very likely "could have been misunderstood by the jury." *United States v. Hernandez*, 859 F.3d 817, 823 (9th Cir. 2017).

Third, it is not "clear beyond a reasonable doubt" that the instructional error was harmless. Pet. 33-35. This Court should grant review to clarify the meaning of the statute and remand for the Ninth Circuit to conduct the harmless-error analysis in light of the correct interpretation of the statute.

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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