**20.9 Sexual Abuse—Incapacity of Victim**

**(18 U.S.C. § 2242(2))**

The defendant is charged in [Count \_\_\_\_\_\_\_ of] the indictment with sexual abuse in violation of Section 2242(2) of Title 18 of the United States Code. For the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly engaged in a sexual act with [*name of victim*];

Second, [*name of victim*] was [incapable of appraising the nature of the conduct] [physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act]; and

Third, the offense was committed at [*specify place of federal jurisdiction*].

In this case, “sexual act” means [*specify statutory definition*].

[A person need not be physically helpless to be physically incapable of declining participation in or communicating unwillingness to engage in the sexual act.]

**Comment**

*See* Comment to Instruction 20.1 (Aggravated Sexual Abuse (18 U.S.C. § 2241(a))).

For purposes of a charge under § 2242(2)(B), establishing that a victim was physically incapable of declining participation in or communicating unwillingness to engage in the sexual act does not require proof that the victim was “physically helpless.” *United States v. James*, 810 F.3d 674, 679 (9th Cir. 2016).

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