No. 18-8719

IN THE SUPREME COURT OF THE UNITED STATES

CIARAN PAUL REDMOND, 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

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

BRIAN A. BENCZKOWSKI
Assistant Attorney General

DANIEL N. LERMAN
Attorney

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

QUESTIONS PRESENTED

1. Whether the court of appeals erred in taking judicial notice that the United States Penitentiary in Victorville, California, is "within the special maritime and territorial jurisdiction of the United States," 18 U.S.C. 113(a).

2. Whether the district court permissibly imposed consecutive terms of imprisonment on petitioner's assault convictions under 18 U.S.C. 113(a)(1), (3), and (6), which were based on a single course of conduct.

IN THE SUPREME COURT OF THE UNITED STATES

No. 18-8719

CIARAN PAUL REDMOND, 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 memorandum of the court of appeals (Pet. App. 2-6) is not published in the Federal Reporter but is reprinted at 748 Fed. Appx. 760.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 2018. A petition for rehearing was denied on January 3, 2019 (Pet. App. 1). The petition for a writ of certiorari was filed on April 3, 2019. 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 assault with intent to commit murder, in violation of 18 U.S.C. 113(a)(1) (2006); assault with a dangerous weapon, in violation of 18 U.S.C. 113(a)(3) (2006); and assault resulting in serious bodily injury, in violation of 18 U.S.C. 113(a)(6). Judgment 1. He was sentenced to 360 months of imprisonment, to be followed by three years of supervised release. Ibid. The court of appeals affirmed. Pet. App. 2-6.

1. In May 2011, petitioner attacked another inmate in the United States Penitentiary (USP) in Victorville, California. Gov't C.A. Br. 5. After a co-assailant plunged a shank into the victim's spine, petitioner repeatedly stabbed the victim as he attempted to crawl away. Id. at 5-6. Before he was taken to solitary confinement, petitioner stated that the victim had "been paddy-wacked" and that someone should get him a "body bag." Id. at 7. The victim survived the attack, but suffered a slashed diaphragm, punctured liver, and stab wounds to his spinal cord. Ibid.

A federal grand jury charged petitioner with one count of assault with intent to commit murder within the special maritime and territorial jurisdiction of the United States, in violation of 18 U.S.C. 113(a)(1) (2006) (Count 1); one count of assault with a dangerous weapon within the special maritime and territorial

jurisdiction of the United States, in violation of 18 U.S.C. 113(a)(3) (2006) (Count 2); and one count of assault resulting in serious bodily injury within the special maritime and territorial jurisdiction of the United States, in violation of 18 U.S.C. 113(a)(6) (Count 3). Indictment 1-3.

At trial, the parties jointly proposed jury instructions stating that, for each count, the government must prove beyond a reasonable doubt that "the assault took place at the United States Penitentiary in Victorville, California." D. Ct. Doc. 134, at 5, 9, 13 (Sept. 26, 2016). The district court adopted the proposed instructions and read them to the jury verbatim. 10/6/2016 Tr. 163, 165, 167.

The jury found petitioner guilty on all three counts. Jury Verdict 1-2. Before his sentencing, petitioner contended that the three counts of conviction "merged" for purposes of sentencing, asserting that assault with a dangerous weapon and assault resulting in serious bodily injury (Counts 2 and 3) are lesser-included offenses of assault with intent to murder (Count 1) under Blockburger v. United States, 284 U.S. 299 (1932). D. Ct. Doc. 158, at 7 (Dec. 18, 2016). He argued that the Double Jeopardy Clause therefore prohibited the district court from imposing sentences on Counts 2 and 3 that would run consecutively to the sentence on Count 1. Id. at 7-8.

The district court rejected that argument, explaining that under Blockburger's "elements test," which looks to whether the

elements of one offense are a subset of the other, neither assault with a dangerous weapon nor assault resulting in serious bodily injury is a lesser-included offense of assault with intent to commit murder. D. Ct. Doc. 174, at 6-7 (Jan. 17, 2017). The court sentenced petitioner to a total term of 360 months of imprisonment: 240 months on his conviction for assault with intent to murder (Count 1), and 120 months on his convictions for assault with a dangerous weapon and assault resulting in serious bodily injury (Counts 2 and 3), to be served concurrently with each other but consecutively to the term imposed on his conviction for assault with intent to murder. Judgment 1.

2. The court of appeals affirmed in an unpublished opinion. Pet. App. 2-6.

a. Petitioner contended, for the first time on appeal, that the government had presented insufficient evidence that the assaults occurred within the special maritime and territorial jurisdiction of the United States. Pet. C.A. Br. 10-12. He further argued that the court of appeals could not take judicial notice that USP Victorville was within the territorial jurisdiction of the United States because doing so would violate his Sixth Amendment right to a jury trial. Id. at 12-15.

The government responded that petitioner had forfeited and waived his challenge to the sufficiency of the evidence because he had not moved for a judgment of acquittal at the end of the government's case. Gov't C.A. Br. 22-35. The government added

that the court of appeals could in any event take judicial notice that USP Victorville was located within the special maritime and territorial jurisdiction of the United States. Id. at 35-40. In support, the government submitted documentary evidence showing that USP Victorville is within federal territorial jurisdiction. See Pet. App. 7-30.

The court of appeals found it unnecessary to address petitioner's sufficiency challenge "because we can and do take judicial notice that [USP Victorville] is within the special maritime and territorial jurisdiction of the United States." Pet. App. 3 (citing United States v. Smith, 282 F.3d 758, 767 (9th Cir. 2002); United States v. Gipe, 672 F.2d 777, 779 (9th Cir. 1982) (per curiam); and Fed. R. Evid. 201(b)(2) and (d)). The court observed that the "government provided evidence from sources whose accuracy cannot reasonably be questioned establishing that California conveyed and the United States accepted 1,912 acres of land in 1944," and that despite ceding some of that land back to California in 1999, the United States retained 933.89 acres "over which it specifically retained jurisdiction to build USP Victorville." Ibid. And the court therefore determined that "the United States has special maritime and territorial jurisdiction over USP Victorville." Id. at 3-4.

b. Petitioner also argued that, in imposing consecutive sentences, the "district court erroneously assessed the merger doctrine and failed to consider guiding principles of statutory

construction." Pet. C.A. Br. 23. According to petitioner, the district court erred in framing the issue as a "Double Jeopardy question requiring strict application of an elements test." Ibid.

The court of appeals rejected that argument. It explained that whether a court may impose consecutive sentences is governed by the test set forth in Albernaz v. United States, 450 U.S. 333 (1981). See Pet. App. 4-5. The court further explained that under that test, a court first determines whether each statutory "'provision requires proof of a fact which the other does not' under Blockburger, which creates a presumption that multiple punishments are permissible." Id. at 5 (citation omitted). The court next considers "whether legislative history evidences a meaning contrary to the Blockburger presumption" that multiple punishments are permissible. Ibid. Finally, if the statute remains ambiguous, the court "should apply the rules of statutory construction." Ibid.

Applying that test here, the court of appeals determined that "[a]ssault with intent to commit murder, assault with a deadly weapon, and assault resulting in serious bodily injury each require proof of a fact that the others do not, creating a presumption that consecutive sentences are permissible" for convictions on those three crimes. Pet. App. 5. The court further determined that Section 113 is not ambiguous, and it found "no evidence of a contrary meaning" in the legislative history. Ibid. The court therefore affirmed the district court's imposition of sentences on

Counts 2 and 3 that were consecutive to the sentence on Count 1. Ibid.

c. Judge Ikuta dissented. Pet. App. 6. She would have declined to take judicial notice of federal jurisdiction over USP Victorville because, in her view, the documents submitted by the government did not sufficiently establish such jurisdiction. Ibid.

ARGUMENT

Petitioner contends (Pet. 8-23) that the court of appeals erred in taking judicial notice that USP Victorville is within the special maritime and territorial jurisdiction of the United States. That contention lacks merit. The court of appeals correctly treated the scope of federal territorial jurisdiction as a legal question that it could resolve on appeal, given that the jury had determined as a factual matter that the offense occurred at a certain location. The court's decision is consistent with decisions of this Court, and no conflict exists among the courts of appeals on this issue that would warrant further review. Moreover, this would be a poor vehicle to address the question presented because petitioner forfeited the issue, leaving it reviewable only for plain error. This Court previously has denied certiorari to a petition presenting a similar question, see Davis v. United States, 135 S. Ct. 48 (2014) (No. 13-8993), and it should follow the same course here.

Petitioner also renews his contention (Pet. 24-27) that the district court was prohibited from imposing consecutive sentences for his separate assault convictions. But the court of appeals correctly applied the relevant precedents of this Court in affirming petitioner's consecutive sentences, and its decision does not conflict with the decision of any other court of appeals. Further review is unwarranted.

1. a. The court of appeals did not err in taking judicial notice (Pet. App. 3-4) that a particular place -- here, USP Victorville -- falls within the "the special maritime and territorial jurisdiction of the United States," 18 U.S.C. 113(a). Under the Fifth and Sixth Amendments, a criminal defendant is entitled to "a jury determination that he is guilty of every element of the crime with which he is charged, beyond a reasonable doubt," including "every fact necessary to constitute the crime." Apprendi v. New Jersey, 530 U.S. 466, 477 (2000) (brackets and citations omitted); see Alleyne v. United States, 570 U.S. 99, 111 (2013). That determination "includes application of the law to the facts," United States v. Gaudin, 515 U.S. 506, 513 (1995), but "on questions of law, it is the province of the court to decide," Georgia v. Brailsford, 3 U.S. (3 Dall.) 1, 3 (1794). Accordingly, "subject to the qualification that all acquittals are final, the law in criminal cases is to be determined by the court," not the jury. Sparf v. United States, 156 U.S. 51, 87 (1895) (citation and emphasis omitted); see Gaudin, 515 U.S. at 513 (explaining

that the court, not jury, determines "pure questions of law in a criminal case") (emphasis omitted). "Any other rule * * * would bring confusion and uncertainty in the administration of the criminal law." Sparf, 156 U.S. at 101.

The court of appeals correctly determined that USP Victorville is within the special maritime and territorial jurisdiction of the United States as a matter of law. Its legal determination on that issue aids in ensuring consistent treatment of all crimes at that location and accords with this Court's jurisprudence. The Court has explained that while the distinction between questions of fact and law sometimes can be "elusive," "the fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question." Miller v. Fenton, 474 U.S. 104, 113-114 (1985). Accordingly, although it might relate to an element of a crime, the scope of federal territorial or legislative jurisdiction is a question of law because it usually depends solely on construing statutes and other legal documents -- a task that courts are far "better positioned" than juries to perform. Id. at 114.

It is not uncommon for a court to decide a legal question that in turn determines whether a fact found by a jury satisfies the element of a crime. For example, "[t]here is no question that the Government in a Hobbs Act prosecution must prove beyond a reasonable doubt that the defendant engaged in conduct that

satisfies the Act's commerce element, but the meaning of that element is a question of law." Taylor v. United States, 136 S. Ct. 2074, 2080 (2016). As a result, although a defendant is entitled to have a jury find that his attempted robbery involved marijuana, it is for the court to determine as a matter of law that robberies involving marijuana "obstruct[], delay[], or affect[] commerce" within the meaning of the Hobbs Act, 18 U.S.C. 1951(a). See Taylor, 136 S. Ct. at 2080-2081. Similarly here, although the government here was required to -- and did -- prove to the jury beyond a reasonable doubt that petitioner's assault took place in USP Victorville, whether USP Victorville is in the special maritime or territorial jurisdiction of the United States is a question of law that the court of appeals had authority to answer. See also James v. United States, 550 U.S. 192, 214 (2007) (explaining that the court did not invade the province of the jury when it "avoided any inquiry into the underlying facts of [the] particular offense"), overruled on other grounds in Johnson v. United States, 135 S. Ct. 2551 (2015).

That approach reflects longstanding differences in the handling of adjudicative and legislative facts. Adjudicative facts are "the facts of the particular case," Fed. R. Evid. 201 advisory committee's note (1972), which "relate to the parties, their activities, their properties, their businesses," United States v. Gould, 536 F.2d 216, 219 (8th Cir. 1976) (quoting 2 Kenneth Culp Davis, Administrative Law Treatise § 15.03, at 353

(1958)). Legislative facts, by contrast, include those that "have relevance to legal reasoning," that are used "in the formulation of a legal principle or ruling by a judge or court," Fed. R. Evid. 201 advisory committee note, and that "do not change from case to case." United States v. Hernandez-Fundora, 58 F.3d 802, 812 (2d Cir.) (quoting Gould, 536 F.2d at 220), cert. denied, 515 U.S. 1127 (1995) (No. 94-9164).

Although adjudicative facts traditionally are the province of the jury, legislative facts are not. See 2 Kenneth Culp Davis & Richard J. Pierce, Jr., Administrative Law Treatise § 10.6, at 153, 155 (3d ed. 1994). A "jury's role is only to resolve issues of adjudicative fact -- those involving the immediate parties." Id. at 153. Thus, for example, the question "[w]hether 123 C Street is inside or outside the city" is "not an adjudicative fact" for a jury to answer because it "is a question about 123 C Street, not about a party." Id. at 155; cf. Fed. R. Evid. 201(a), (f) (requiring that the jury be permitted to disregard judicial notice of adjudicative facts, while specifying that rule does not constrain notice of legislative facts). Here, the question whether USP Victorville is within the special maritime and territorial jurisdiction of the United States is a question about USP Victorville, not about petitioner or his assault. The court of appeals thus correctly took judicial notice of the existence of federal territorial jurisdiction here. Indeed, "courts of justice are bound to take judicial notice of the territorial extent of the

jurisdiction exercised by the government whose laws they administer." Jones v. United States, 137 U.S. 202, 214 (1890).

In arguing for a contrary conclusion, petitioner contends (Pet. 16-19) that the court of appeals erred because it took "conclusive judicial notice of an element in a criminal case," in violation of Gaudin. But the court did not take "conclusive judicial notice" that petitioner committed his crime within the special maritime and territorial jurisdiction of the United States -- the geographic element of his assault conviction. Rather, the jury determined beyond a reasonable doubt that petitioner committed his crimes at a specific location -- USP Victorville -- and the court of appeals simply determined that, as a matter of law, "the special maritime and territorial jurisdiction of the United States" encompassed that specific location. Pet. App. 3. The court's analysis therefore comports with Gaudin's requirement that a jury find each element of an offense. Indeed, Gaudin itself recognized that courts are entitled to give binding instructions to jurors on purely legal questions, see 515 U.S. at 513, and Taylor makes clear that questions of federal legislative jurisdiction that are incorporated into elements of crimes are legal in nature, see 136 S. Ct. at 2079-2081.

b. Contrary to petitioner's contention (Pet. 10-14), this case does not implicate any circuit conflict that would warrant this Court's review of the first question presented in the petition. No appellate court has declined a request that it take

judicial notice of jurisdictional boundaries under circumstances like those presented here. Instead, like the court of appeals here, most courts to address the question have found that a court may take judicial notice of the scope of federal territorial jurisdiction on appeal. See, e.g., United States v. Davis, 726 F.3d 357 (2d Cir. 2013), cert. denied, 135 S. Ct. 48 (2014) (No. 13-8993); United States v. Lavender, 602 F.2d 639, 641 (4th Cir. 1979); United States v. Bowers, 660 F.2d 527, 531 (5th Cir. 1981) (per curiam); United States v. Rummell, 642 F.2d 213, 216 (7th Cir. 1981).

For example, in Davis, the Second Circuit took judicial notice that a federal prison in Brooklyn was within the special maritime and territorial jurisdiction of the United States. 726 F.3d at 367-368. The court explained that "to determine whether a crime took place within the special maritime and territorial jurisdiction of the United States requires two separate inquiries: one to determine the 'loc[ation] of the crime,' and one to determine the existence vel non of federal jurisdiction." Id. at 368 (citation omitted). "While the former is plainly a factual question for the jury to decide, the latter -- turning on a fixed legal status that does not change from case to case and involving consideration of source materials (such as deeds, statutes, and treaties) that judges are better suited to evaluate than juries" -- is a "legal question that a court may decide on its own." Ibid.

Other courts of appeals likewise have taken judicial notice of similar issues of territorial jurisdiction. In Lavender, the Fourth Circuit took judicial notice that a parkway was within the territorial jurisdiction of the United States. 602 F.2d at 641. In Bowers, the Fifth Circuit determined that "[t]he fact that Fort Benning is under federal jurisdiction is a well established fact appropriate for judicial notice" because, as a legislative fact, it "does not change from case to case but, instead, remains fixed." 660 F.2d at 531. And the Seventh Circuit has taken the same approach to judicial notice of the boundaries of judicial districts for purposes of venue. See Rummell, 642 F.2d at 216; see also United States v. Arroyo, 310 Fed. Appx. 928, 929 (7th Cir. 2009) (unpublished). Relatedly, courts of appeals are in agreement that a dispute about whether a particular location is in "Indian country" is a question of law for judicial determination. See United States v. Roberts, 185 F.3d 1125, 1140 (10th Cir. 1999), cert. denied, 529 U.S. 1108 (2000) (No. 99-1174); United States v. Stands, 105 F.3d 1565, 1575 (8th Cir.), cert. denied, 522 U.S. 841 (1997) (No. 96-9420); United States v. Cook, 922 F.2d 1026, 1031 (2d Cir.), cert. denied, 500 U.S. 941 (1991) (No. 90-1386); United States v. Sohappy, 770 F.2d 816, 822 n.6 (9th Cir. 1985), cert. denied, 477 U.S. 906 (1986).

Petitioner errs in contending (Pet. 11-12) that review is warranted on the ground that the decision below conflicts with those of the First and Sixth Circuits. In United States v. Bello,

194 F.3d 18 (1999), the First Circuit disapproved of courts' taking binding judicial notice of territorial boundaries, but it did so without adversary briefing and in a manner that does not conflict with the result here. In Bello, at the request of prosecutors, the district court took judicial notice that a prison fell within the special maritime and territorial jurisdiction of the United States using the procedures in Rule 201 governing notice of adjudicative facts, including instructing the jury that the judicial notice was not binding. Id. at 23-24. The court of appeals rejected the defendant's claims that the district court took judicial notice in a manner that violated Rule 201 or the Constitution, and it affirmed the conviction. Ibid. Although it stated that it agreed with the parties' assumption that "[w]here the prison sits is * * * unquestionably an adjudicative fact" that could be noticed only in the non-binding manner authorized under Rule 201, id. at 23, that statement was made without the benefit of adversarial briefing -- the parties in Bello "assumed" that Rule 201 applied, and simply disputed whether the district court had complied with the rule, id. at 22 -- and was unnecessary to the judgment. The court also expressly noted that it "remain[ed] unsettled" whether Rule 201(g)'s procedures for non-binding notice were constitutionally required. Id. at 26 n.10. Bello's affirmance of the conviction in that case would not preclude a future First Circuit panel from affirming a conviction in a case like this, where petitioner made no effort to submit the

territorial-jurisdiction question to the jury and the court finds the issue clear on appeal.

Petitioner's reliance on the Sixth Circuit's decision in United States v. Mentz, 840 F.2d 315 (1988), is misplaced as well. The defendant in Mentz challenged his conviction on the ground that the government had failed to prove that the banks he robbed were insured by the Federal Deposit Insurance Corporation (FDIC), as required to sustain his convictions under 18 U.S.C. 2113(a). 840 F.2d at 318. On appeal, the government argued that the district court had in fact taken judicial notice of the banks' insured status. Id. at 321-322. The Sixth Circuit rejected that argument because "[a]fter reviewing the record, [it was] unable to find any evidence that the district court judicially noticed the FDIC insurance coverage of the banks in this case." Id. at 322. The Sixth Circuit went on to state that even if the district court had taken such judicial notice, the government's argument still would fail because a bank's insured status is an adjudicative fact, and so the district court's taking notice without having "inform[ed] the jury that it could disregard the facts noticed" would have violated Rule 201(g). Id. at 323.

But Mentz made clear that it "confine[d] [its] remarks to 'adjudicative facts,'" 840 F.2d at 322 n.13, and it had no occasion to consider -- much less hold -- that whether a particular location is within the special maritime and territorial jurisdiction is an adjudicative fact, rather than a question for the court.

Accordingly, Mentz does not present a conflict with the decision below that warrants this Court's review.

The Tenth Circuit's decision in United States v. Iverson, 818 F.3d 1015, cert. denied, 137 S. Ct. 217 (2016) (No. 16-5298), likewise suggests no reason for further review. Iverson stated only that the evidence there was sufficient to sustain the jury's verdict that the victim banks were FDIC insured. Id. at 1024. Judge O'Brien concurred separately "to suggest an alternative basis for affirming," namely, that the court "can and should take judicial notice of the banks' federally insured status." Id. at 1028. But nothing in that concurrence could or does conflict with the decision below. Nor is this Court's review warranted to "clarify the standards and procedures that apply to" the judicial determination whether a particular location falls within the special maritime and territorial jurisdiction of the United States. Pet. 19. Even assuming that some fixed standard applied to that legal question, the court of appeals' determination that "the government provided evidence from sources whose accuracy cannot reasonably be questioned" would satisfy it. Pet. App. 3. And to the extent that petitioner challenges (Pet. 20-23) that determination, his factbound claim does not warrant this Court's review.

c. In any event, this case would be a poor vehicle to address the first question presented in the petition. Petitioner affirmatively requested a jury instruction on each of his assault

counts that read: "In order for [petitioner] to be found guilty of th[e] charge, the government must prove each of the following elements beyond a reasonable doubt: * * * Third, the assault took place at the United States Penitentiary in Victorville, California." D. Ct. Doc. 134, at 9, 17; accord id. at 13 (listing that requirement as the "Fourth" element). The district court gave those instructions verbatim to the jury. 10/6/2016 Tr. 163, 165, 167; see D. Ct. Doc. 145, at 12, 14, 16 (Oct. 7, 2016). To the extent petitioner now claims that the jury should have been instructed differently on the jurisdictional element, that challenge has not been adequately preserved. Moreover, the court of appeals found that any sufficiency-of-the-evidence claim would be subject to plain-error review, Pet. App. 3, and petitioner has not suggested that he could demonstrate that (1) the district court committed an "error"; (2) the error was "clear" or "obvious"; (3) the error affected his "substantial rights"; and (4) the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." United States v. Olano, 507 U.S. 725, 732-736 (1993) (citations omitted).

2. The second question presented also does not warrant this Court's review.

a. The court of appeals correctly determined (Pet. App. 4-5) that the district court did not impermissibly impose consecutive sentences on petitioner's multiple assault convictions. This Court addressed the permissibility of imposing consecutive

sentences on multiple convictions stemming from the same course of conduct in Albernaz v. United States, 450 U.S. 333 (1981), explaining that "the 'rule of statutory construction' stated in Blockburger [v. United States, 284 U.S. 299 (1932)] is to be used 'to determine whether Congress has in a given situation provided that two statutory offenses may be punished cumulatively.'" Albernaz, 450 U.S. at 337 (citation omitted). The Blockburger rule treats two provisions as defining separate offenses when "each provision requires proof of a fact which the other does not." Ibid. (citation omitted). If that test is satisfied, it provides "'conclusive'" evidence that Congress intended to authorize consecutive punishments, absent "a clear indication of contrary legislative intent." Id. at 336, 340 (citation omitted).

The court of appeals properly applied Albernaz here. The court determined that "[a]ssault with intent to commit murder, assault with a deadly weapon, and assault resulting in serious bodily injury each require[s] proof of a fact that the others do not, creating a presumption that consecutive sentences are permissible." Pet. App. 5. That determination was correct: a defendant's "intent to commit murder," 18 U.S.C. 113(a)(1) (2006); his use of "a dangerous weapon," 18 U.S.C. 113(a)(3) (2006); and the victim's suffering "serious bodily injury," 18 U.S.C. 113(a)(6), each are different facts requiring different proof. The court further found "no evidence of a contrary meaning" in the statutory text or legislative history. Pet. App. 5. That, too,

is correct, and petitioner does not identify any language in the statute or legislative history that suggests a contrary legislative intent.

Petitioner attempts to distinguish Albernaz (Pet. 26-27) on the ground that it "dealt with two different statutes 'contained in distinct Subchapters.'" Pet. 27 (citation omitted). But Albernaz's determination that Congress authorized cumulative punishments did not depend on the fact that the offenses there were contained in different subchapters instead of in different subsections or subparagraphs. Rather, it depended on the Court's determination that the provisions at issue "clearly satisf[ied] the rule announced in Blockburger" because it was "beyond peradventure that 'each provision requires proof of a fact that the other does not.'" Albernaz, 450 U.S. at 339 (brackets and citation omitted). That is precisely the rule that the court of appeals applied here, and petitioner does not dispute that his offenses of conviction satisfy the Blockburger test.

To the extent that petitioner suggests (Pet. 25) that the court of appeals should have gone beyond Blockburger to apply a "merger doctrine," which he describes as a "principle of statutory construction and policy," he overlooks the court of appeals' recognition -- consistent with Albernaz -- that clear evidence of contrary legislative intent could overcome "the Blockburger presumption," Pet. App. 5; see Albernaz, 450 U.S. at 340. The court simply found no such clear contrary evidence here. See Pet.

App. 5. And to the extent petitioner suggests (Pet. 26) that the rule of lenity applies, that suggestion is without merit. This Court has made clear that "the rule of lenity simply has no application" when, as here, a court is "not confronted with any statutory ambiguity" about whether Congress intended to impose multiple punishments. Albernaz, 450 U.S. at 343.

b. Petitioner's contention (Pet. 24-25) that the decision below conflicts with the D.C. Circuit's decisions in United States v. McLaughlin, 164 F.3d 1 (1998), cert. denied, 526 U.S. 1079 (1999) (No. 98-8598), and Ingram v. United States, 353 F.2d 872 (1965), is incorrect. Ingram, which predates Albernaz, acknowledged the general rule that "since there are two offenses, one requiring proof of a factor the other does not, two punishments are permissible," 353 F.2d at 874, but nevertheless determined that the local D.C. assault statute at issue contained "objective manifestations of Congressional intent" that rebutted the presumption of multiple punishments, id. at 875. That analysis is consistent with the framework that the court of appeals applied here, and any inconsistency would not survive this Court's post-Ingram decision in Albernaz.

Similarly, McLaughlin expressly acknowledged that "where a federal and District offense satisfy Blockburger," multiple punishments are appropriate unless "whatever manifestations of congressional intent are present * * * seriously call into doubt whether" the legislature in fact intended multiple punishments.

164 F.3d at 12. Applying that framework to the statutory scheme before it, the court in McLaughlin found itself "skeptical as to whether Congress intended a single assault to lead to convictions for both assault with intent to kill while armed and aggravated assault" under D.C. Code §§ 22-501 and 22-502 (1995), respectively. 164 F.3d at 16. That determination does not conflict with the court of appeals' determination here that, based on the statutory scheme, Congress did intend a single assault to lead to multiple punishments for separate violations of the various provisions of 18 U.S.C. 113. Indeed, the other circuit courts to have addressed the issue have treated Congress as having defined separate crimes in each of the subsections of Section 113. See United States v. Good Bird, 197 F.3d 1203, 1204-1205 (8th Cir. 1999); United States v. Guilbert, 692 F.2d 1340, 1345 (11th Cir. 1982), cert. denied, 460 U.S. 1016 (1983) (per curiam); see also United States v. Battle, 174 Fed. Appx. 179, 181 (4th Cir. 2006) (per curiam); United States v. Del Castillo, 212 Fed. Appx. 818, 822 (11th Cir. 2006) (per curiam); cf. United States v. Pego, 567 Fed. Appx. 323, 328 (6th Cir. 2014).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

BRIAN A. BENCZKOWSKI
Assistant Attorney General

DANIEL N. LERMAN
Attorney

JUNE 2019