No.

IN THE SUPREME COURT OF THE UNITED STATES

CIARAN PAUL REDMOND,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED

1. A jury convicted petitioner of federal assault offenses under 18 U.S.C. § 113. Pursuant to Fed. R. Evid. 201, a divided panel of the Ninth Circuit took judicial notice of evidence submitted by the government for the first time on appeal in finding that the "special maritime and territorial jurisdiction" element of the offense had been established. This approach added to the confusion in the lower courts regarding the application of Rule 201, the distinction between "adjudicative facts" and "legislative facts," and the jury's role in determining a jurisdictional element. The first question presented is: Whether, after a jury trial, a federal court of appeals can take judicial notice of evidence submitted by the government for the first time on appeal to find that a jurisdictional element has been established, and, if it can, what are the applicable standards and did the evidence presented by the government on appeal satisfy those standards.

2. Petitioner was convicted on three § 113 counts for the same course of assault. Although the highest maximum sentence under the statute is 20 years, petitioner received 30 years based on consecutive sentences. The Ninth Circuit held the sentence did not violate the "merger" doctrine in conflict with the D.C. Circuit. The question presented is: Whether consecutive sentences are authorized for multiple counts of conviction under § 113 based on the same course of assault.

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OPINION BELOW

The Ninth Circuit issued an unpublished memorandum, with Judge Ikuta dissenting, that can be found at *United States v. Redmond*, 748 Fed. Appx. 760 (9th Cir. Oct. 24, 2018).

JURISDICTION

The court of appeals filed its memorandum on October 24, 2018 and denied a petition for rehearing and rehearing *en banc*, with Judge Ikuta voting to grant the petition, on January 3, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. Amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be

confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

18 U.S.C. § 7:

The term "special maritime and territorial jurisdiction of the United States," as used in this title, includes:

* * *

(3) Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building. . . .

18 U.S.C. § 113 (2011):

(a) Whoever, within the special maritime and territorial jurisdiction of the United States, is guilty of an assault shall be punished as follows:

(1) Assault with intent to commit murder, by imprisonment for not more than twenty years.

(2) Assault with intent to commit any felony, except murder or a felony under chapter 109A, by a fine under this title or imprisonment for not more than ten years, or both.

(3) Assault with a dangerous weapon, with intent to do bodily harm, and without just cause or excuse, by a fine under this title or imprisonment for not more than ten years, or both.

(4) Assault by striking, beating, or wounding, by a fine under this title or imprisonment for not more than six months, or both.

(5) Simple assault, by a fine under this title or imprisonment for not more than six months, or both, or if the victim of the assault is an individual who has not attained the age of 16 years, by fine under this title or imprisonment for not more than 1 year, or both.

(6) Assault resulting in serious bodily injury, by a fine under this title or imprisonment for not more than ten years, or both.

(7) Assault resulting in substantial bodily injury to an individual who has not attained the age of 16 years, by fine under this title or imprisonment for not more than 5 years, or both.

Fed. R. Evid. 201. Judicial Notice of Adjudicative Facts:

(a) Scope. This rule governs judicial notice of an adjudicative fact only, not a legislative fact.

(b) Kinds of Facts That May Be Judicially Noticed. The court may judicially notice a fact that is not subject to reasonable dispute because it:

(1) is generally known within the trial court's territorial jurisdiction; or

(2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

(c) Taking Notice. The court:

(1) may take judicial notice on its own; or

(2) must take judicial notice if a party requests it and the court is supplied with the necessary information.

(d) Timing. The court may take judicial notice at any stage of the proceeding.

(e) Opportunity to Be Heard. On timely request, a party is

> entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.
>
> **(f) Instructing the Jury.** In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.

STATEMENT OF THE CASE

On September 29, 2015, a federal grand jury in the Central District of California returned a three-count indictment against petitioner and codefendant Damion Eliah Johnson for an assault that occurred more than four years earlier, on May 6, 2011, at the United States Penitentiary ("USP") in Victorville, California. Count 1 alleged assault with the intent to commit murder in violation of 18 U.S.C. § 113(a)(1). Count 2 alleged assault with a dangerous weapon with intent to do bodily harm in violation of § 113(a)(3). Count 3 alleged assault resulting in serious bodily injury in violation of § 113(a)(6). Johnson pled guilty, and petitioner proceeded to a jury trial.

At trial, the alleged victim, Garrett Rushing, testified that, in the beginning of 2011, he was an inmate at USP Victorville, and he attacked petitioner, who was also an inmate. A few months later, on May 6, 2011, Rushing testified that Johnson attacked him at the "chow hall," and petitioner then joined in the attack.

Rushing received approximately eleven stab wounds and serious injuries, including damage to his kidney and liver. The fight was captured on video.

Petitioner testified in his own defense. He stated that there was extraordinary and frequent violence at USP Victorville, which was nicknamed "victim-ville" and was a "campus of dudes carrying knives." He stated that Rushing had a reputation for violence and was "a master at the belt lock" and used ice picks as his favorite weapon. On January 4, 2011, while petitioner was recovering from a heart attack, Rushing attacked him with a "sucker punch." Rushing hit petitioner in the head and then bounced his head off the cement floor. Over the next few months, Rushing and his friends repeatedly approached petitioner as if to attack him, but petitioner's friends, including his cellmate Johnson, would come to his defense to make sure that he would not be "jumped."

On May 6, 2011, petitioner was informed that Rushing had been drinking and "was boisterous about how he's going to finish the job and he's going to have to come at me again." Petitioner and Johnson, his "wingman" who would "watch [his] back[,]" went to the chow hall. Another inmate told petitioner that Rushing was in the chow hall and had a weapon up his sleeve. Shortly thereafter, and in an encounter that occurred in seconds or "nanoseconds," petitioner saw Johnson and Rushing struggling, and he believed he saw Rushing pulling Johnson down over a

railing. Believing Rushing had a weapon, petitioner ran across the chow hall and went to Johnson's defense. Petitioner testified that he did not go to the chow hall with the intent to murder Rushing, stating: "No idiot is going to walk through the chow hall with the intention to commit murder in front of 300 witnesses and ten surveillance cameras. You'd have to be a moron to do that. And I'm not – I'm not exactly a genius, but I'm not an idiot."

The jury returned guilty verdicts on all three counts. The district court imposed a total sentence of 30 years on petitioner, which was comprised of a 20-year sentence on Count 1, and 10-year sentences on Counts 2 and 3 to run concurrently with each other but consecutively to the sentence on Count 1.

Petitioner challenged his convictions and sentence on appeal. He contended that the government presented insufficient evidence that the assault occurred in the "special maritime and territorial jurisdiction" of the United States. Petitioner also challenged his 30-year sentence based on consecutive sentences under the merger doctrine. In response to petitioner's opening brief, the government filed a motion to take judicial notice, which attached several documents regarding the land near USP Victorville. App. 7-30. Petitioner objected to the request for judicial notice and further argued that, in any event, the documents submitted by the government did not prove the jurisdictional element.

The Ninth Circuit issued a divided decision, with Judge Ikuta dissenting. App. 2-6. The majority held: "We do not need to address Redmond's sufficiency of the evidence claim . . . because we can and do take judicial notice that the United States Penitentiary USP at Victorville ('USP Victorville') is within the special maritime and territorial jurisdiction of the United States." App. 3. The majority explained: "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. In 1999, the United States retroceded the land to California, except for 933.89 acres, over which it specifically retained jurisdiction to build USP Victorville. Therefore, the United States has special maritime and territorial jurisdiction over USP Victorville as required by 18 U.S.C. § 7 and 40 U.S.C. § 3112." App. 3-4. The majority also rejected petitioner's sentencing claim, reasoning 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" under *Albernaz v. United States*, 450 U.S. 333 (1981). App. 4-5.

Judge Ikuta dissented on the jurisdictional question. She explained that the documents submitted by the government on appeal included a 1944 letter from the

United States War Department to the Governor of California accepting jurisdiction over land acquired for military purposes, but the "other documents presented by the United States . . . fail to establish that the land underlying USP Victorville was part of this general acceptance of jurisdiction." App. 6. She therefore concluded: "[W]e lack authority to take judicial notice that USP Victorville is within the special territorial and maritime jurisdiction of the United States. *See* Fed. R. Evid. 201(b)(2). Because the government has failed to satisfy the jurisdictional element of the offense of conviction, I would vacate the conviction." *Id.*

ARGUMENT

I. This Court should grant review to resolve the confusion in the lower courts regarding whether an appellate court can take judicial notice of facts on appeal to find the jurisdictional element of a criminal offense, and this case is an ideal vehicle to do so because a dissenting circuit judge correctly found that the government's appellate showing was deficient.

The offenses charged required the government to prove that the alleged assault occurred "within the special maritime and territorial jurisdiction of the United States . . . ." 18 U.S.C. § 113. The definition of the "special maritime and territorial jurisdiction of the United States" applicable in this case is "[a]ny lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall

be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building." 18 U.S.C. § 7(3). At trial, the government presented evidence that the alleged assault occurred at USP Victorville, but it presented no other evidence to establish the facts required by § 7.

Proof that an offense took place in a federal prison does not mean that it occurred in the "special maritime and territorial jurisdiction of the United States." Congress has recognized this principle, as it has defined a similar element in other federal assault statutes as: "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 . . . ." 18 U.S.C. §§ 2241, 2242, 2243, 2244 (emphasis added); *see also* 18 U.S.C. §§ 1792, 1793. To prove that land within the United States and conveyed to the federal government after 1940 is in the special maritime and territorial jurisdiction of the United States, the government must prove that the federal government accepted jurisdiction over that land, *see* 40 U.S.C. § 3112 (formerly codified at 40 U.S.C. § 255); *Adams v. United States*, 319 U.S. 312, 312-13 (1943), and courts have recognized this requirement in the specific context of federal prisons. *See United States v. Davis*, 726 F.3d 357, 364 (2d Cir. 2013); *United States v. Cassidy*, 571

F.2d 534, 536-37 (10th Cir. 1978). The question presented in this petition, which has generated significant confusion in the lower courts, is whether a federal court of appeals can take judicial notice of such facts when they were not presented to the jury at trial.

A. There is confusion in the lower courts

The lower courts have taken different approaches to the question presented. Here, the majority on the Ninth Circuit panel cited Fed. R. Evid. 201(b)(2) and (d) in holding that it could take judicial notice on appeal that the prison is within the special maritime and territorial jurisdiction of the United States. App. 3. Rule 201(b)(2) allows a court to take judicial notice of a fact that is not subject to reasonable dispute because it "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned[,]" and Rule 201(d) states that "[t]he court may take judicial notice at any stage of the proceeding." Fed. R. Evid. 201.[1]

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[1] The majority oddly stated in a footnote that it denied the government's motion to take judicial notice as moot, although it proceeded to consider and rely on the documents submitted by the government with its judicial notice motion. App. 3-4. The majority also stated that it did not need to consider petitioner's challenge to the sufficiency of the evidence, but it then found sufficient evidence based on its consideration of the documents submitted by the government on appeal. *Id.* As a final aside, the majority stated that petitioner did not challenge the jurisdictional element in the district court, but he made a general motion for a judgment of acquittal under Fed. R. Crim. P. 29 thereby preserving the issue, *see, e.g.*, *United States v.*

While the First Circuit agrees that a district court can take judicial notice of whether a location is within the special maritime and territorial jurisdiction at the time of *trial*, *see United States v. Bello*, 194 F.3d 18, 22-24 (1st Cir. 1999), it has emphasized that it is an "adjudicative fact," and Rule 201 requires a district court to "instruct the jury that it may or may not accept the noticed fact as conclusive." Fed. R. Evid. 201(f). Obviously, when the government only seeks judicial notice at the time of the appeal, the defendant is deprived of a finding by a jury properly instructed under Rule 201(f). *See United States v. Jones*, 580 F.2d 219, 224 (6th Cir. 1978) (finding insufficient evidence of jurisdictional element). The First Circuit explained that Rule 201(f) is designed to protect the Sixth Amendment right to trial by jury, *see Bello*, 194 F.3d at 25-26, but it also noted that it "remains unsettled whether 201[f]'s non-conclusive standard, permitting a jury to disregard judicial notice in a criminal case, is constitutionally compelled." *Id.* at 26 n.10.

Although the First Circuit noted that the constitutional issue remains "unsettled," the Sixth Circuit has held that a "trial court commits constitutional error when it takes judicial notice of facts constituting an essential element of the

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McCall, 553 F.3d 821, 830 (5th Cir. 2008); *United States v. Hammoude*, 51 F.3d 288, 291 (D.C. Cir. 1995), and, in any event, an attack on the jurisdictional element "can never be forfeited or waived." *United States v. Cotton*, 535 U.S. 625, 630 (2002); *see* Fed. R. Crim. P. 12(b)(2); *Government of Canal Zone v. Burjan*, 596 F.2d 690, 693 (5th Cir. 1979).

crime charged, but fails to instruct the jury according to Rule 201[f]." *United States v. Mentz*, 840 F.2d 315, 322 (6th Cir. 1988) (improper to instruct jury conclusively on jurisdictional element). Under this approach, it would be a constitutional error for an *appellate* court to take judicial notice of a fact that constitutes an element of the offense, as the Ninth Circuit did here, because it deprives a defendant of a jury determination of the element. At least one scholar agrees with the Sixth Circuit. *See* William M. Carter, Jr., *Trust Me, I'm a Judge: Why Binding Judicial Notice of Jurisdictional Facts Violates the Right to Jury Trial*, 68 Mo. L. Rev. 649 (2003).

The Second Circuit has taken a different view, holding that, while the factual element of the locus of the crime is for the jury to decide, whether that site is within the special maritime and territorial jurisdiction is a legal question comprised of a "legislative fact;" furthermore, because the question involves a "legislative fact," not an "adjudicative fact," Rule 201 does not apply. *See United States v. Hernandez-Fundora*, 58 F.3d 802, 809-12 (2d Cir. 1995). As a result, the Second Circuit has concluded that the jury need not be instructed under Rule 201(f), and thus an appellate court can take judicial notice of special maritime and territorial jurisdiction for the first time on appeal. *See United States v. Davis*, 726 F.3d 357, 366-67 (2d Cir. 2013). The Second Circuit also concluded that the Sixth

Amendment is not violated by taking judicial notice of this purported "legislative fact" for the first time on appeal, as it is a question "that judges are better suited to evaluate than juries" and it "has always been treated in this Circuit as a legal question that a court may decide on its own." *Id.* at 368. The Fifth Circuit also considers special maritime and territorial jurisdiction to be a "legislative fact," *see United States v. Bowers*, 660 F.2d 527, 531 (5th Cir. 1981), but a leading commentator has described this approach as a "questionable expedient[]" that "stretches the concept of 'legislative fact' well beyond the common understanding." Wright & Graham, *Federal Practice & Procedure: Evidence 2d* § 5103.1 (2005).

The conflict and confusion was recently demonstrated by the concurring and dissenting opinions in *United States v. Iverson*, 818 F.3d 1015 (10th Cir. 2016). Judge O'Brien concurred in *Iverson*, adopting the Second Circuit view and concluding that the jurisdictional element of FDIC status is a "legislative fact" for which judicial notice can be taken on appeal without violating the Sixth Amendment. *Id.* at 1028-33 (O'Brien, J., concurring). Judge O'Brien did agree, however, that an appellate court cannot take judicial notice of an *adjudicative* fact on appeal pursuant to Rule 201 to sustain a conviction. *Id.* at 1029 and n.6. Judge Phillips dissented in *Iverson*, finding that the jurisdictional element was an

adjudicative fact. *Id.* at 1037 n.6 (Phillips, J., dissenting).

In sum, there is a longstanding and deep division in the circuits on whether jurisdictional elements constitute "legislative facts," or instead "adjudicative facts" subject to Rule 201, and whether the Sixth Amendment prohibits them from being conclusively found by judges. As set forth below, this case is an excellent vehicle to resolve the confusion.

B. The approach taken by the Ninth Circuit majority is wrong

One reason to grant review in *this* case is that the majority of the Ninth Circuit panel adopted an approach that is inconsistent with all of the other circuits. The majority cited Rule 201 in support of taking judicial notice on appeal. App. 3. Rule 201, however, applies to "adjudicative facts," and, as set forth above, the other circuits generally agree that an appellate court cannot take judicial notice of "adjudicative facts" on appeal to sustain a jury conviction because it would violate a defendant's jury right under Rule 201(f), if not the Sixth Amendment. Accordingly, the Ninth Circuit's decision below is an outlier.

The "legislative fact" approach taken by the Second and Fifth Circuits (and Judge O'Brien in *Iverson*) is also wrong. As an initial matter, to label a fact a "legislative fact" so as to circumvent the need to instruct the jury under Rule 201(f) is inconsistent with the Advisory Committee Notes. The Committee

explained that it was "of the view that mandatory instruction to a jury in a criminal case to accept as conclusive *any* fact judicially noticed is inappropriate because contrary to the spirit of the Sixth Amendment right to a jury trial . . . ." Fed. R. Evid. 201, 1974 Advisory Committee Notes (emphasis added). Thus, it is improper under the Federal Rules of Evidence for a court to determine a fact conclusively in a criminal case, whether at trial or on appeal, by labeling it a "legislative fact."

Furthermore, when Congress wants to remove the determination of a jurisdictional element from the jury, it specifically says so. *See, e.g.*, 46 U.S.C. § 70504(a) ("Jurisdiction of the United States with respect to a vessel subject to this chapter is not an element of an offense. Jurisdictional issues arising under this chapter are preliminary questions of law to be determined solely by the trial judge."). The fact that Congress included no such language in § 113 or in § 7 demonstrates the invalidity of the "legislative fact" approach.

The "legislative fact" approach has little historical basis and is inconsistent with the Sixth Amendment. In other words, "formalistic labeling of jurisdictional facts as 'legislative' or 'adjudicative' begs the Sixth Amendment question." Carter, *supra*, at 663. The term "legislative fact" was first coined in a 1942 law review article on evidentiary problems in the *administrative* process. *See* Fed. R.

Evid. 201, 1972 Advisory Committee Notes. Thus, the concept has little applicability to a criminal case, and the fact that this terminology is a relatively recent development establishes that there is no historical basis to conclude that a "legislative fact" rationale is consistent with the Sixth Amendment. The statutory scheme and the Federal Rules of Evidence should be construed to avoid constitutionally doubtful constructions, and the "legislative fact" approach is constitutionally doubtful under the Sixth Amendment. *See, e.g.*, *Clark v. Martinez*, 543 U.S. 371, 381-82 (2005).

While this Court can avoid the question through the principles of statutory construction articulated above, if the constitutional question must be decided, this Court should conclude that the "legislative fact" approach is inconsistent with its Sixth Amendment jurisprudence, particularly *United States v. Gaudin*, 515 U.S. 506 (1995). The Second Circuit's "legislative fact" approach is based on its 1995 opinion in *Hernandez-Fundora*, which was originally decided before *Gaudin*, *see Hernandez-Fundora*, 58 F.3d at 802, and its later opinion in *Davis* failed to cite *Gaudin* in conducting its constitutional analysis. *See Davis*, 726 F.3d at 367-68.[2]

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[2] Ironically, the Second Circuit was forced to acknowledge that the subsequent history in *Hernandez-Fundora* demonstrates the problem with the "legislative fact" approach. After determining that a "legislative fact" was at issue and therefore it was permissible for the trial court to remove the jurisdictional issue from the jury by way of a conclusive instruction, *see Hernandez-Fundora*, 58 F.3d

This Court has stated that even jurisdictional elements "must be proved to a jury beyond a reasonable doubt[,]" *Torres v. Lynch*, 136 S. Ct. 1619, 1630 (2016), and characterizing a jurisdictional element as a hybrid issue of law and fact does not allow removing the purported legal part from the jury. *See Gaudin*, 515 U.S. at 511-14. A "mixed question of law and fact" is "typically . . . resolved by juries." *Id.* at 512. "Juries at the time of the framing could not be forced to produce mere 'factual findings,' but were entitled to deliver a general verdict pronouncing the defendant's guilt or innocence." *Id.* at 513. This Court's decisions "in no way undermined the historical and constitutionally guaranteed right of criminal defendants to demand that the jury decide guilt or innocence on every issue, which includes application of the law to the facts." *Id.* To the contrary, this Court's precedent "confirms that the jury's constitutional responsibility is not merely to determine the facts, but to apply the law to those facts and draw the ultimate conclusion of guilt or innocence." *Id.* at 514.

The cases that have adopted a "legislative fact" approach have not

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at 809-12, it was later discovered on remand for resentencing that "the federal government did not in fact have jurisdiction, concurrent or otherwise, over" the federal prison where the assault occurred, thereby requiring the conviction to be vacated. *Davis*, 726 F.3d at 366-67 and n.5. This is precisely why juries, not judges, should decide the element with all of the constitutional guarantees that are afforded at a trial.

established a convincing and consistent historical practice of removing jurisdictional elements from the jury's consideration so as to permit an "extraordinary" exception to the Sixth Amendment right. *Id.* at 515. As mentioned, the earliest authority to support the "legislative fact" approach appears to be a 1942 article on administrative law. *See, e.g.*, *Hernandez-Fundora*, 58 F.3d at 811. This is hardly the convincing and consistent showing needed to establish such an extraordinary exception to the Sixth Amendment. *See Gaudin*, 515 U.S. at 515-19. As this Court stated in *Gaudin*: "Since that proposition [of removing the purported "legal" aspect of an element] is contrary to the uniform general understanding (and we think the only understanding consistent with principle) that the Fifth and Sixth Amendments require conviction by a jury of *all* elements of the crime, we must reject those cases that have embraced it. Though uniform postratification practice can shed light upon the meaning of an ambiguous constitutional provision, the practice here is not uniform, and the core meaning of the constitutional guarantee is unambiguous." *Id.* at 518-19.

In sum, this case is a good vehicle to review the question presented because the approach taken by the majority below, which relied on Rule 201 to take judicial notice of the element for the first time on appeal, is wrong. Rule 201 does not allow a court, whether trial or appellate, to take conclusive judicial notice of

an element in a criminal case, and the Sixth Amendment similarly forbids such a practice.

C. Even if judicial notice were permissible, review is warranted

There is another reason why review is warranted in *this* case. Even if this Court were to conclude that judges can take conclusive judicial notice of a jurisdictional element, it should clarify the standards and procedures that apply to that judicial determination, and this case is an excellent vehicle to do so because the three judges below could not agree on whether the government made a sufficient showing to establish the jurisdictional element.

A threshold question concerns the standard of proof. If a judge is allowed to find a jurisdictional element of a criminal offense by way of conclusive judicial notice, he or she should at least have to do so under the reasonable doubt standard. *See Torres*, 136 S. Ct. at 1630 (jurisdictional elements are subject to the reasonable doubt standard). Indeed, the whole premise of a judicially noticeable fact is that it is not subject to reasonable doubt. *See* Fed. R. Evid. 201(b)(2). The majority below did not explain what standard of proof it was applying to the jurisdictional element, App. 3-4, nor did the Second Circuit explicitly do so in *Davis*. Similarly, the majority below did not explain what evidentiary and constitutional rules it was applying when considering the admissibility of the

documents submitted by the government on appeal. For example, petitioner was not afforded Confrontation Clause rights that would normally apply at a criminal trial, or even permitted an evidentiary hearing, and, as set forth below, the documents submitted by the government were not properly authenticated, were incomplete and even doctored, and otherwise failed to establish the jurisdictional element. App. 7-30.

As Judge Ikuta explained, the government's appellate submission did not prove the jurisdictional element beyond a reasonable doubt (or even under a lesser standard of proof). App. 6. With its judicial notice request, the government submitted two letters from the War Department. The first letter, dated August 16, 1944, was quoted by Judge Ikuta and stated that the United States accepted exclusive jurisdiction over land acquired by it for military purposes in California. App. 30. The second letter, dated September 29, 1944, listed "military reservations in the State of California acquired either in whole or in part by the United States from February 1, 1940, to August 16, 1944, inclusive." App. 23. Handwritten into the list is "George A.F. Base see Victorville." App. 25. This appears to be the only handwritten addition to the list, and the government offered no evidence as to who added those words and when the handwriting was added. Later in the list appears "Victorville Army Air Field" and "Victorville Military

Fields 1 and 3." App. 29. Handwritten next to those entries are the words, "now George A.F. Base" in the same handwriting that appeared earlier. *Id.* Thus, by using the word "now," it is clear that whoever wrote in the "George A.F. Base" language did so at some later time after the documents were created by the War Department.

Another document submitted by the government purports to be a "Calendar Item" dated September 3, 1999 for the California State Lands Commission. App. 21-22. The document states that the "United States exercises partial legislative jurisdiction over 1912 acres more or less of George Air Force Base," the "remainder of the facility is under proprietary jurisdiction[,]" and the United States had requested to retrocede all but 933.89 acres of the land back to California, the remainder to be retained for the Federal Bureau of Prisons. App. 21. The majority below relied on this document, which appears to be missing at least one page, *see* App. 21-22, to conclude that USP Victorville is within the special maritime and territorial jurisdiction of the United States. App. 3-4.

The California State Lands Commission cannot establish whether the *federal* government accepted jurisdiction over land. Only the federal government can do so, *see Adams*, 319 U.S. at 315, and the only federal documents submitted by the government stated that the federal government accepted *exclusive*

jurisdiction, *not* "partial legislative jurisdiction," App. 21, over "Victorville Army Air Field" and "Victorville Military Fields 1 and 3." App. 29. The government submitted no competent evidence that the federal government accepted the requisite jurisdiction over George Air Force Base. The fact that some unknown person at some unknown time wrote in "George A.F. Base" next to the Victorville entries is not competent evidence.

Moreover, the document relied upon by the Ninth Circuit majority actually creates more doubt, further demonstrating that the government failed to establish that the federal government accepted the requisite jurisdiction over the specific land where USP Victorville is located. The document relied upon by the majority states that "more or less" 1,912 acres of George Air Force Base was under "partial legislative jurisdiction" and that the remainder of the facility was "under proprietary jurisdiction." App. 21. Proprietary jurisdiction is not sufficient to establish special maritime and territorial jurisdiction. *See United States v. Bohn*, 622 F.3d 1129, 1133 (9th Cir. 2010) (distinguishing between proprietary jurisdiction and exclusive or concurrent jurisdiction). Thus, even assuming that the federal government accepted "partial legislative jurisdiction" over some of George Air Force Base (something that the federal government never stated it was doing), other parts of the base were only under "proprietary jurisdiction." The

government has not established that the prison is on the area of George Air Force Base for which "partial legislative jurisdiction" was accepted, as opposed to the area under "proprietary jurisdiction." The bottom line is that, as Judge Ikuta found, the "documents presented by the United States . . . fail to establish that the land underlying USP Victorville was part of [a] general acceptance of jurisdiction" by the federal government. App. 6. The government did not prove the element, and therefore it was also inappropriate to take judicial notice of the element.

The dispute below and the defects in the government's submission demonstrate why an appellate court should not be allowed to take judicial notice of a jurisdictional element for the first time on appeal. But even if an appellate court can do so, this Court should hold that a reasonable doubt standard applies and that the government failed to satisfy this standard, requiring entry of a judgment of acquittal. At the very least, because the majority below did not articulate what standard of proof it was utilizing, this Court should remand for consideration of the jurisdictional element under the reasonable doubt standard. Furthermore, if conclusive judicial notice is somehow appropriate, this Court should clarify that the appropriate procedure is for an appellate court to remand to the district court for a hearing, where a defendant will be afforded the opportunity to cross-examine the government's witnesses and otherwise dispute its evidence.

II. The Ninth Circuit's determination that petitioner could receive consecutive sentences totaling beyond the highest statutory maximum under 18 U.S.C. § 113 for the same course of assault created a conflict with the D.C. Circuit, and this Court should grant review to clarify the "merger" doctrine.

A. The Ninth Circuit's decision conflicts with the D.C. Circuit

The assault with intent to commit murder charge carried a statutory maximum of 20 years. 18 U.S.C. § 113(a)(1). The assault with a dangerous weapon charge carried a statutory maximum of 10 years. 18 U.S.C. § 113(a)(3). The assault resulting in serious bodily injury charge also carried a statutory maximum of 10 years. 18 U.S.C. § 113(a)(6). Petitioner contended that, under the "merger" doctrine, he could not receive consecutive sentences, and therefore the statutory maximum was 20 years. The district court, however, imposed consecutive sentences totaling 30 years, and the Ninth Circuit affirmed. App. 4-5.

In doing so, the Ninth Circuit created a conflict with the D.C. Circuit, which has held that, under a statutory merger analysis, Congress did not intend for consecutive sentences for a single course of assault. *See United States v. McLaughlin*, 164 F.3d 1, 16 (D.C. Cir. 1998). The D. C. Circuit "concluded that 'although the various sections may define 'separate and distinct offenses,' it is unlikely that Congress intended a single act to be punished cumulatively as both a more and a less serious form of aggravated assault." *Id.* It had also previously reached a similar conclusion in *Ingram v. United States*, 353 F.2d 872 (D.C. Cir.

1965), which held that there was no intent to "pyramid" sentences for an assault with an intent to murder and an assault with a dangerous weapon. In "instances [of] merger, lack of explicit intent and a policy of lenity have been held in varying combinations to preclude consecutive sentences." *Id.* at 874. Thus, review is warranted because the decision below conflicts with the D.C. Circuit's precedent.

B. This Court should clarify its "merger" precedent

Unlike the pure "elements test" of the Double Jeopardy Clause, *see Blockburger v. United States*, 284 U.S. 299, 304 (1932), the merger doctrine is a principle of statutory construction and policy, and this Court has made clear that such a non-constitutional inquiry is the threshold question when assessing a federal statute in this context. *See Busic v. United States*, 446 U.S. 398 (1980). The merger principle applies when there is a substantial overlap between offenses that drives a statutory maximum sentence higher than what Congress appears to have contemplated for the conduct. *See United States v. Santos*, 553 U.S. 507, 515-17 (2008). Concurring in *Santos*, Justice Stevens emphasized that the merger doctrine is an important limitation "[w]hen a defendant has a significant criminal history or Guidelines enhancements apply," as was the situation in petitioner's case. *Id.* at 527. Dissenting in *Santos*, Justice Breyer recognized that the merger doctrine is designed to restrict the government's "punishment-transforming

power" to manipulate statutory maximum sentences through charging decisions. *Id.* at 529-30. As he stated, "the 'merger' problem is essentially a problem of fairness in sentencing . . . ." *Id.* at 530.

In reaching its conclusion that consecutive sentences were prohibited in *Ingram*, the D.C. Circuit relied on *Prince v. United States*, 352 U.S. 322 (1957), where this Court held that consecutive sentences under 18 U.S.C. § 2113 for bank robbery and entering a bank with the intent to commit a felony were impermissible under a statutory merger theory. *Id.* at 324 (stating the question as whether the offenses "merged"). This Court explained that "there was no indication that Congress intended to pyramid the penalties[,]" *id.* at 327, the language later repeated in *Ingram*. Relying on a Rule of Lenity approach, this Court justified its holding that consecutive sentences were not allowed by concluding: "While reasonable minds might differ on this conclusion, we think it is consistent with our policy of not attributing to Congress, in the enactment of criminal statutes, an intention to punish more severely than the language of its laws clearly imports in the light of pertinent legislative history." *Id.* at 329.

In affirming below, the Ninth Circuit relied on *Albernaz v. United States*, 450 U.S. 333, 339-43 (1981) to assert that there is a *presumption* in favor of consecutive sentences if offenses have separate elements. App. 5. But *Albernaz*

dealt with two *different* statutes "contained in distinct Subchapters[,]" thereby demonstrating Congress's intent that consecutive punishments were permissible. *Albernaz*, 450 U.S. at 336. In distinguishing *Braverman v. United States*, 317 U.S. 49 (1942), *Albernaz* explained that at issue in *Braverman* were multiple violations of "a single statute." *Albernaz*, 450 U.S. at 339. Here, like *Prince*, the penalty provisions are within the same statute, creating ambiguity and triggering the merger doctrine. This Court should grant this petition to resolve the confusion that has resulted due to any potential tension between *Prince* and *Albernaz*.

CONCLUSION

This Court should grant this petition for a writ of *certiorari*.

Respectfully submitted,

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