

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DANIEL RAY,

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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QUESTION PRESENTED

In an 18 U.S.C. § 113 prosecution, does the Ninth Circuit’s rule that prison personnel testimony that they “work at a United States prison” contravene the requirements necessary to establish that the prison falls within the “special maritime and territorial jurisdiction of the United States” as required by 18 U.S.C. § 7(3) and *Adams v. United States*, 319 U.S. 312 (1943)?

TABLE OF CONTENTS

QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	1
STATEMENT OF THE CASE	3
ARGUMENT	6
A. The Ninth Circuit’s rule that all Bureau of Prison facilities fall within “the special maritime and territorial jurisdiction of the United States” conflicts with 18 U.S.C. § 7(3), <i>Adams v. United States</i> , 319 U.S. 312 (1943), <i>United States v. Davis</i> , 726 F.3d 357 (2d Cir. 2013), and <i>United States v. Cassidy</i> , 571 F.2d 534 (10th Cir. 1978), and this Court should grant review to resolve the conflict between the circuits regarding the application of <i>Adams</i> and enforcement of 18 U.S.C. § 7(3).	6
B. The Ninth Circuit’s rule is not only incorrect, it conflicts with the Second and Tenth Circuits’ interpretation of section 7(3), and the Court should grant this petition to resolve the circuit court conflict with respect to this regularly-applied statute.	11
CONCLUSION	16
APPENDIX	

United States v. Daniel Ray,
No. 18-50115, 811 Fed.Appx. 414 (9th Cir. April 28, 2020)

Order Denying Rehearing, August 14, 2020

TABLE OF AUTHORITIES

Cases

<i>Adams v. United States</i> , 319 U.S. 312 (1943).....	<i>passim</i>
<i>United States v. Cassidy</i> , 571 F.2d 534 (10th Cir. 1978)	6, 9, 12
<i>United States v. Davis</i> , 726 F.3d 357 (2d Cir. 2013).....	<i>passim</i>
<i>United States v. Hernandez-Fondura</i> , 58 F.3d 802 (2d Cir. 1995)	12, 14
<i>United States v. Ray</i> , 811 Fed. Appx. 414 (9th Cir. 2020)	1
<i>United States v. Read</i> , 918 F.3d 712 (9th Cir. 2019).....	5, 8
<i>United States v. Redmond</i> , 748 Fed. Appx. 760 (9th Cir. Oct. 24, 2018)....	5, 13, 14

Statutes

18 U.S.C. § 2	3
18 U.S.C. § 7	<i>passim</i>
18 U.S.C. § 113.....	<i>passim</i>
18 U.S.C. § 451	6
18 U.S.C. § 1792	10
18 U.S.C. § 1793	10
18 U.S.C. § 2241	10
18 U.S.C. § 2242	10
18 U.S.C. § 2243	10
18 U.S.C. § 2244	10
28 U.S.C. § 1254.....	1
40 U.S.C. § 255	6, 7, 9
40 U.S.C. § 3112	6, 9, 10

Constitutional Provisions

U.S. Const. amend. V.....	1
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OPINION BELOW

The Ninth Circuit's decision can be found at *United States v. Ray*, 811 Fed. Appx. 414 (9th Cir. 2020).

JURISDICTION

The court of appeals filed its decision on April 28, 2020, and denied rehearing and rehearing *en banc* on August 14, 2020. This Court has jurisdiction pursuant to 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.

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.

STATEMENT OF THE CASE

On July 28, 2017, a federal grand jury returned an indictment charging Patrick Bacon and Petitioner with one count each of assault with intent to do bodily harm with a dangerous weapon against inmate Anthony Grecco, in violation of 18 U.S.C. §§ 113(a)(3), 2(a), and assault against Grecco resulting in serious bodily injury, in violation of 18 U.S.C. §§ 113(a)(6), 2(a). The indictment further alleged that the assault occurred “within the special territorial jurisdiction of the United States, namely, the United States Penitentiary in Victorville, California[.]”

The parties proceeded to jury trial on January 16, 2018. The Government’s case centered on surveillance footage from four cameras capturing the events. Ex. 1 & 2.¹ The videos begin by showing inmates and guards inside the prison unit, going about their business. A guard inside the unit (later identified as Officer Melix) walks to a green door with a glass pane (between Cells 109 and 110), and looks through the glass. Officer Melix opens the door, and two inmates enter. Another prison guard (later identified as Officer Hamed) approaches Officer Melix and talks to him. Officer Melix then walks across the unit.

The video then shows two inmates—later identified as Bacon (in the white ball cap) and Petitioner—walk to Petitioner’s cell, Petitioner knocks on the door,

¹ The footage consists of four separate videos depicting the inside of the prison unit from four different angles; each exhibit contains two videos, which play simultaneously. *See generally* Ex. 1 & 2.

slightly opens it, doesn't enter, and then closes it. Petitioner turns around and stands near Bacon. Officers Melix and Hamed then approach them, and while they are talking, Petitioner slightly opens the door, reaches in, and it appears is given a book by his cellmate, Timothy Sylvia, before one of them closes the door. Petitioner and Bacon talk with the officers throughout. Petitioner never inspects the book in any manner.

The four individuals then disperse, and Petitioner and Bacon walk towards a table. Petitioner puts the book down on a table and walks away; Bacon sits at the table, and begins manipulating the book. Petitioner returns to the table and sits as Bacon gets up and walks away. The video then shows Bacon approach Grecco and attack him, with what witnesses later identified as a prison shank, for several seconds. The guards respond, and break up the fight in less than a minute.

The Government limited its trial proof for the jurisdictional element to perfunctory testimony from Agent Thomas Friend, who merely asserted that jurisdiction existed because he investigated crimes, as a federal agent, at the federal prison, and from prison personnel that testified they worked at the federal penitentiary. The jury convicted Petitioner on both counts following a two-day trial.

Petitioner challenged his convictions and sentence on appeal. As relevant here, he contended that the Government presented insufficient evidence that the

assault occurred in the “special maritime and territorial jurisdiction” of the United States. He relied heavily on a Judge Ikuta’s dissent in *United States v. Redmond*, 748 Fed. Appx. 760 (9th Cir. Oct. 24, 2018), which addressed the same question about the status of the penitentiary at Victorville.

In *Redmond*, Judge Ikuta dissented on the jurisdictional question, which the majority deemed had been satisfied. 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.” 748 Fed. Appx. at 762-63. 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.

On appeal, without addressing Petitioner’s material points of fact and law, the panel’s memorandum found the Government’s proof sufficient, citing circuit precedent:

Even if Ray preserved this claim, there is sufficient evidence, such as uncontested testimony by the prison guards, that the government proved this element. *See* *United States v. Read*, 918 F.3d 712, 718 (9th Cir. 2019)

(“[U]ncontradicted testimony from inmates or employees at a federal prison can establish the jurisdictional element of 18 U.S.C. § 113.”).

Pet. App. at 2.

ARGUMENT

A. The Ninth Circuit’s rule that all Bureau of Prison facilities fall within “the special maritime and territorial jurisdiction of the United States” conflicts with 18 U.S.C. § 7(3), *Adams v. United States*, 319 U.S. 312 (1943), *United States v. Davis*, 726 F.3d 357 (2d Cir. 2013), and *United States v. Cassidy*, 571 F.2d 534 (10th Cir. 1978), and this Court should grant review to resolve the conflict between the circuits regarding the application of *Adams* and enforcement of 18 U.S.C. § 7(3).

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*, 319 U.S. at 312-13 (1943). Courts have recognized this requirement in the specific context of federal prisons. *See Davis*, 726 F.3d at 364; *United States v. Cassidy*, 571 F.2d 534, 536-37 (10th Cir. 1978) (“As to lands acquired by the United States after 1940, it has been held that the United States does not acquire jurisdiction over lands acquired by it unless it gives notice of acceptance.”) (citing *Adams*).

In *Adams*, this Court addressed 40 U.S.C. § 255 and 18 U.S.C. § 451, the predecessors to 40 U.S.C. §§ 3112 and 18 U.S.C. § 7, respectively. 319 U.S. at 312-13. There, the defendants were soldiers who had been convicted of rape on

Camp Claiborne, a federal military camp in Louisiana. The federal government had acquired title to the property at the time of the crime but after 1940, and the Supreme Court addressed whether there existed federal criminal jurisdiction under the newly enacted section 255 because the federal government had *not* given notice of acceptance of jurisdiction, as required by the statutory scheme. *Id.* A unanimous Supreme Court held that there was no federal jurisdiction over the land because the Government had not accepted jurisdiction in the manner required by the Act. *Id.*

In derogation of *Adams*, the Ninth Circuit found proof of jurisdiction despite the fact that the Government presented no evidence that the land under Victorville had ever been acquired by the United States. Neither proof that an offense took place in a federal prison, nor a Government witness's assertion the United States had "exclusive jurisdiction" for "investigating criminal matters at [USP] Victorville[,"] is sufficient to establish this jurisdictional element.

Indeed, the Government's proof at trial was limited to the following perfunctory testimony by Agent Friend.

AUSA: As part of your assignment, do you have to be familiar with whether the United States has jurisdiction over the United States Penitentiary Victorville?

Friend: Yes. Jurisdiction is important to investigating crimes.

AUSA: What is the jurisdiction over the United States in terms of investigating criminal matters at United States Penitentiary Victorville?

Friend: Exclusive jurisdiction.

Friend merely asserted that jurisdiction existed in the context of his investigation, without actually providing evidence for the essential element: that the assault occurred “within the special maritime and territorial jurisdiction of the United States.”

The testimony relied on by the Ninth Circuit—testimony from BOP Technician Bouche, correctional officers Meliz, Hamed, and Valeriote, and the institution’s nurse—simply offered that these witnesses worked at USP Victorville or that the assault took place at USP Victorville, two points as uncontested as they are immaterial to the required jurisdictional showing. These witnesses offered nothing on the question of whether USP Victorville falls “within the special maritime and territorial jurisdiction of the United States.”

Rather than follow *Adams* and reverse, the Ninth Circuit relied on its circuit precedent: *Read*. Under *Read*, the Ninth Circuit does not require any proof of the Government’s acquisition of land, and instead permits section 113(a) prosecutions for *any* federal prison, irrespective of the requirements set forth in 18 U.S.C. § 7(3). *Read*, 918 F.3d at 718. This incorrect rule thus explains the Government’s

announced misunderstanding of the necessary proof of this element of the offense.

As the Government argued to the jury:

[T]here's a jurisdictional element for all of these crimes.
We have to prove that this matter occurred at [USP]
Victorville.

But the Government had to prove more than that and failed to do so. *See Davis*, 726 F.3d at 360 (the Government must prove “the assault took place within the special maritime and territorial jurisdiction of the United States”) (internal citations omitted); *Adams*, 319 U.S. at 312-13 (the Government must prove that the federal Government accepted jurisdiction over the parcel of land for an authorized purpose to establish jurisdiction under the Act of October 9, 1940, 40 U.S.C. § 255, now codified at 40 U.S.C. § 3112); *Cassidy*, 571 F.2d at 536 (The Government proved jurisdiction through evidence establishing “[t]hat in 1938 the United States purchased a piece of land in Jefferson County, Colorado; (2) that the Federal Correctional Institute is located on the land acquired by the United States in 1938 from Jefferson County, Colorado; (3) that the charged offenses occurred in the Federal Correctional Institute; and (4) that the State of Colorado consented to the acquisition of lands by the United States and ceded exclusive jurisdiction over land so acquired by the United States”).²

² Section 3112 is entitled “federal jurisdiction” and, with respect to property in the United States, requires the federal government to secure from the State “consent to, or cession of, any jurisdiction over the land or interest not previously

Contrary to the Ninth Circuit’s rule, 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 analogous 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. Thus, Congress knows how to make an offense punishable because it occurred in a federal prison; it also knows that the fact that an offense occurred in a federal prison does not mean it occurred in the special maritime and territorial jurisdiction of the United States.

obtained.” 40 U.S.C. § 3112(b). In addition, the federal government “*shall* indicate acceptance of jurisdiction on behalf of the Government by filing a notice of acceptance with the Governor of the State or in another manner prescribed by the laws of the State where the land is situated.” *Id.* (emphasis added). And further, “[i]t is *conclusively presumed* that jurisdiction has *not* been accepted until the Government accepts jurisdiction over land as provided in this section.” 40 U.S.C. § 3112(c) (emphases added).

B. The Ninth Circuit’s rule is not only incorrect, it conflicts with the Second and Tenth Circuits’ interpretation of section 7(3), and the Court should grant this petition to resolve the circuit court conflict with respect to this regularly-applied statute.

In *Davis*, the Second Circuit found the Government had presented insufficient evidence to sustain a section 113 conviction under facts similar to those here. There, the defendant committed an assault at “the Metropolitan Detention Center (‘MDC’)—a federal prison in Brooklyn, New York.” 726 F.3d at 360. A BOP employee testified that the MDC “is ‘a federal prison’ that is ‘on federal land.’” *Id.* at 361. The Second Circuit held this testimony was insufficient to establish the special maritime and territorial jurisdiction element of the offense, as defined by section 7(3).

After providing a detailed history of the federal acquisition of land, the Second Circuit explained, “[t]he upshot of all this is that the United States does not have jurisdiction over all lands owned by the federal government within the states.” *Id.* at 364. Thus, “courts have held in various cases that the federal government lacked jurisdiction over certain federal military installations, post offices, and hospitals, even though they are on federal land.” *Id.*

“[A]lthough some may assume that federal installations of these sorts ‘automatically come within Federal jurisdiction, that assumption[—the one applied by the Ninth Circuit in this case—] is incorrect.’” *Id.* (internal quotation marks and citations omitted). *Davis* noted that a prior conviction arising in the Second Circuit

had been vacated and the prosecution dismissed because Raybrook Federal Correctional Institution, although a federal prison on federal land, was not within the special maritime and territorial jurisdiction of the United States because the federal Government did not exercise jurisdiction over the land. *Id.* at 366 & n.5 (discussing *United States v. Hernandez-Fondura*, 58 F.3d 802 (2d Cir. 1995)).

The Second Circuit concluded: “[i]t follows that the evidence at trial in this case was not sufficient to satisfy the jurisdictional element of the offense of conviction. . . . Put simply, the mere fact that the assault took place in a federal prison on federal land—the full extent of the evidence that the Government presented on the jurisdictional question—does not mean that the federal government had jurisdiction over the location of the assault.” *Id.* at 364-65. No rational juror could have concluded otherwise. *See also Cassidy*, 571 F.2d at 536-37.

Here, none of the personnel’s testimony even addressed the jurisdictional question, and Agent Friend’s testimony that the United States had “exclusive” jurisdiction over USP Victorville was insufficient to establish beyond a reasonable doubt that USP Victorville constituted “[a]ny land[] reserved or acquired for 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). As an initial matter, this testimony was not only incorrect—USP Victorville does *not* actually fall “within the special maritime and territorial jurisdiction of the United States,” *see Redmond*, 748 Fed. App’x. at 762-63 (Ikuta, J., dissenting)—it was a non-sequitur: Friend testified about his jurisdiction to “*in terms of investigating criminal matters* at [USP] Victorville.” He neither mentioned nor testified about the “special and territorial jurisdiction of the United States” nor addressed how and when (or if) the United States acquired the land on which USP Victorville stands, or when (and if) the United States obtained the consent of California for the erection of USP Victorville.

Similarly, the Government didn’t produce any evidence establishing when or how or if the Government obtained the land from California, or how (or if) it accepted jurisdiction from the State, *see Davis*, 726 F.3d at 361; it likewise failed to admit any evidence “establish[ing] that the land underlying USP Victorville was part of [any] general acceptance of jurisdiction” by the United States. *See also Redmond*, 748 Fed. App’x. at 762 (Ikuta, J., dissenting). Petitioner thus contends that, as a matter of historic fact, USP Victorville does not fall “within the special maritime and territorial jurisdiction of the United States” because no documents reflect that the land under it was part of the War Department’s 1944 acceptance of jurisdiction of nearby property.

Petitioner recognizes that *Hernandez-Fondura*, 58 F.3d at 808-09, turned down a jurisdictional challenge regarding a different facility. But the testimony elicited by the Government in *Hernandez-Fondura* was more robust than what the Government elicited here; there, the witness testified that “the Federal Government ha[d] a deed to the property” on which the prison was located. *Id.* at 808.³

This Court should also grant review of the pure question of law, as Petitioner’s case addressed the application of settled circuit precedent that conflicts with this Court’s jurisprudence and with the Second Circuit’s faithful application of it. Likewise, Petitioner’s case presents an excellent vehicle to resolve this conflict because the Government presented absolutely no evidence—documentary or otherwise—establishing that USP Victorville was “within the special maritime

³ *Davis* correctly observed that *Hernandez-Fondura* presents a “cautionary tale[,]” and further demonstrates the incorrectness of the Ninth Circuit’s “all Bureau of Prison facilities fall within the ‘special maritime and territorial jurisdiction of the United States’” rule. In *Hernandez-Fondura*, after the defendant’s conviction had been affirmed, but while the case was on remand for resentencing, the Government discovered that the federal prison in that case *did not* actually “fall within the special maritime and territorial jurisdiction of the United States[,]” which resulted in the vacatur of the defendant’s conviction. *Id.* at 366. This circumstance proves Petitioner’s challenge is substantial, and underscores the Government’s obligation to prove the jurisdictional element to a jury, beyond a reasonable doubt, with competent evidence. The undisputed reality is that not all federal prisons sit on federal land, and some are not subject to the United States’ special maritime and territorial jurisdiction. The Ninth Circuit’s rule that assumes jurisdiction for every federal prison is manifestly incorrect and should be corrected. At bottom, there is at least a genuine dispute as to whether the Government *could* even prove this element for USP Victorville. *See Redmond*, 748 Fed. App’x. at 762-63 (Ikuta, J., dissenting).

and territorial jurisdiction of the United States” at the time of the assault. The Government’s only attempt to meet that burden with proof beyond a reasonable doubt was so weak, the Ninth Circuit didn’t even mention it: S/A Friend’s testimony, submitted in the present tense and addressing jurisdiction to “investigat[e] criminal matters at [USP] Victorville,” and nothing more. This petition thus presents a pure question of law.

In sum, neither proof that an offense took place in a federal prison, nor a Government witness’s assertion the United States had “exclusive jurisdiction” for “investigating criminal matters at [USP] Victorville[,]” is sufficient to establish that “the assault took place within the special maritime and territorial jurisdiction of the United States.” The Ninth Circuit’s rule that all federal prison facilities meet this jurisdictional standard is clearly wrong, and there is no need for further percolation of an issue settled by this Court long ago in *Adams*, but which the Ninth Circuit declines to follow.

CONCLUSION

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

Respectfully submitted,

DATED: November 12, 2020

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