

No. 20-6414

IN THE SUPREME COURT OF THE UNITED STATES

DANIEL RAY, 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

ELIZABETH B. PRELOGAR
Acting Solicitor General
Counsel of Record

NICHOLAS M. MCQUAID
Acting Assistant Attorney General

DAVID M. LIEBERMAN
Attorney

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

QUESTION PRESENTED

Whether the court of appeals correctly rejected petitioner's claim on appeal that he was entitled to relief from his assault convictions on the theory that the government had not established 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).

RELATED PROCEEDINGS

United States District Court (C.D. Cal.):

United States v. Ray, No. 17-cr-159 (Apr. 9, 2018)

United States Court of Appeals (9th Cir.):

United States v. Ray, No. 18-50115 (Apr. 28, 2020)

United States v. Ray, No. 18-50115 (Aug. 14, 2020)

IN THE SUPREME COURT OF THE UNITED STATES

No. 20-6414

DANIEL RAY, 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 opinion of the court of appeals (Pet. App. 1-3) is not published in the Federal Reporter but is reprinted at 811 Fed. Appx. 414.

JURISDICTION

The judgment of the court of appeals was entered on April 28, 2020. A petition for rehearing and rehearing en banc was denied on August 14, 2020 (Pet. App. 4). The petition for a writ of certiorari was filed on November 12, 2020. 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 aiding and abetting an assault with a dangerous weapon with intent to do bodily harm, in violation of 18 U.S.C. 113(a)(3) and 2(a), and aiding and abetting an assault resulting in serious bodily injury, in violation of 18 U.S.C. 113(a)(6) and 2(a). Judgment 1. The district court sentenced petitioner to 100 months of imprisonment, to be followed by three years of supervised release. Ibid. The court of appeals affirmed. Pet. App. 1-3.

1. On October 18, 2016, petitioner and another inmate, Patrick Bacon, coordinated an assault on a fellow inmate at the United States Penitentiary (USP) in Victorville, California. See Gov't C.A. Br. 1, 5-10. At the time, petitioner was serving a 144-month sentence following his federal convictions in the District of Nebraska for possession with intent to distribute methamphetamine and possession of a firearm in furtherance of a drug trafficking crime. See id. at 5. Bacon gained access to petitioner's housing unit by lying to prison guards and claiming that he had been transferred to that unit; while guards investigated that claim, petitioner joined Bacon and together they proceeded to petitioner's cell. Id. at 5-7.

Petitioner retrieved a book from his cell, and petitioner and Bacon walked to a table in the center of the housing unit. Gov't

C.A. Br. 7. Bacon sat down at the table, and petitioner placed the book in front of Bacon. Ibid. Bacon tore at the book's cover, attempting to extract something from it. Ibid. As Bacon struggled with the book, he looked toward petitioner, who had walked away from the table; petitioner immediately returned to Bacon's side. Ibid. Bacon ultimately ripped a nine-inch, sharpened, metal knife from the book's spine; stood up from the table; and intercepted another inmate, Anthony Grecco. Id. at 2, 7. Bacon stabbed Grecco repeatedly in the head, neck, and upper body; petitioner, meanwhile, sat down at the table and watched. Id. at 7-8.

Grecco, who suffered significant bleeding as a result of multiple stab wounds near major blood vessels, had to be transported to a local hospital for treatment. Gov't C.A. Br. 9-10. The entire assault was captured on the prison's surveillance video. Id. at 8.

2. A federal grand jury in the Central District of California returned an indictment charging petitioner with aiding and abetting an assault with a dangerous weapon with intent to do bodily harm within the special maritime and territorial jurisdiction of the United States, in violation of 18 U.S.C. 113(a)(3) and 2(a), and aiding and abetting an 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) and 2(a). Indictment 1-3.

At trial, the government called an FBI agent who testified that he "investigate[s] federal crimes"; that the United States has "[e]xclusive jurisdiction" over the investigation of criminal matters at USP Victorville; and that he was assigned to investigate the "serious assault" that petitioner committed at USP Victorville. See Gov't C.A. E.R. 17-18. The government also called a Bureau of Prisons (BOP) special investigator services support technician to authenticate surveillance videos of the assault. See id. at 61-66. During his testimony, the technician informed the jury that he worked for BOP, which is part of the United States Department of Justice, at the Federal Correctional Complex in Victorville, California, which includes USP Victorville. Id. at 62. Other witnesses -- officers and a registered nurse who worked at USP Victorville -- testified that they were working at USP Victorville when the assault occurred. See id. at 3, 67; Pet. C.A. E.R. 96-97, 179.

At the close of the government's case, petitioner moved for a judgment of acquittal on the ground that the government had failed to present sufficient evidence that he had knowledge of the knife hidden in the book's spine or that he intended that the knife be used. Pet. C.A. E.R. 52. The district court denied petitioner's motion. Ibid.

The parties jointly proposed jury instructions stating that, for each count, the government must prove beyond a reasonable doubt

that "the assault took place on the grounds of United States Penitentiary Victorville," D. Ct. Doc. No. 121, at 36-37 (Jan. 10, 2018), and the district court instructed the jury accordingly, see Pet. C.A. E.R. 81-82. The jury found petitioner guilty on both counts. Jury Verdict 1-2.

Petitioner moved for a judgment of acquittal notwithstanding the verdict on the ground that "a rational juror could not conclude beyond a reasonable doubt that [petitioner] acted with the intent to facilitate" the assault because "[n]o evidence showed [that] he knew [that] the book contained a shank" or that he knew of Bacon's plan. Pet. C.A. E.R. at 33; see id. at 30-36. The district court denied petitioner's motion. Id. at 29. The court sentenced petitioner to 100 months of imprisonment, to be followed by three years of supervised release. Judgment 1.

3. The court of appeals affirmed in an unpublished memorandum opinion. Pet. App. 1-3.

For the first time on appeal, petitioner contended that the government had presented insufficient evidence that the assault occurred within the special maritime and territorial jurisdiction of the United States. Pet. C.A. Br. 22-30. He also argued that the court of appeals could not take judicial notice that USP Victorville was within the special maritime and territorial jurisdiction of the United States. Id. at 30-38.

The government responded that petitioner had waived any such challenge, because he had not identified it in moving for a judgment of acquittal. Gov't C.A. Br. 26-28. The government further maintained that, even if this argument was properly before the court of appeals, the evidence established the jurisdictional element of petitioner's offenses, citing trial testimony from the FBI agent, BOP technician, and other BOP employees. See id. at 28-33; see also p. 4, supra. The government also maintained that the court of appeals could take judicial notice that USP Victorville was located within the special maritime and territorial jurisdiction of the United States. Gov't C.A. Br. 33-37. In a separate case in that court, United States v. Redmond, 748 Fed. Appx. 760 (9th Cir. 2018), cert. denied, 140 S. Ct. 150 (2019), the government had introduced records on appeal demonstrating that USP Victorville was within the special maritime and territorial jurisdiction of the United States, and the court had found that it "c[ould] * * * take judicial notice" of such a fact and concluded that USP Victorville fell within that jurisdiction. Id. at 761. The government cited the Redmond decision to the court of appeals in this case and contended that the court could take judicial notice of the records submitted in Redmond to find that the jurisdictional element necessary for a conviction under 18 U.S.C. 113(a) was satisfied. Gov't C.A. Br. 33-37.

The court of appeals rejected petitioner's challenge. Pet. App. 2. The court found that "[e]ven if [petitioner] preserved this claim, there is sufficient evidence, such as uncontroverted testimony by the prison guards, that the government proved this element." Ibid. The court cited an earlier court of appeals decision stating that "[u]ncontradicted testimony from inmates or employees at a federal prison can establish the jurisdictional element of 18 U.S.C. § 113." Ibid. (quoting United States v. Read, 918 F.3d 712, 718 (9th Cir. 2019)).

ARGUMENT

Petitioner renews his appellate claim (Pet. 6-15) that he is entitled to relief from his conviction on the theory that the government failed to establish that his assault of Grecco occurred "within the special maritime and territorial jurisdiction of the United States" for purposes of 18 U.S.C. 113(a). The court of appeals correctly rejected that argument, and its factbound resolution of petitioner's claim does not conflict with any decision of this Court or another court of appeals. Moreover, this case would be a poor vehicle to address the question presented because petitioner forfeited the claim, leaving it reviewable only for plain error. This Court previously has denied petitions for writs of certiorari presenting similar questions, see Redmond v. United States, 140 S. Ct. 150 (2019) (No. 18-8719); Davis v. United

States, 574 U.S. 828 (2014) (No. 13-8993), and it should follow the same course here.

1. Petitioner contends (Pet. 6-10) that the government presented insufficient evidence that his assault on Grecco at USP Victorville occurred within the special maritime and territorial jurisdiction of the United States. That contention lacks merit.

a. The government presented ample evidence to the jury that petitioner committed the assault at USP Victorville, see p. 4, supra, and petitioner admits that this fact is “uncontested,” Pet. 8. For the reasons set forth in the government’s brief in opposition to the petition for a writ of certiorari in Redmond v. United States, that is all that the jury was required to find here. See Br. in Opp. at 8-17, Redmond, supra, No. 18-8719.¹ Although the government was required to prove to the jury that the assault took place at USP Victorville, whether USP Victorville is within 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 ibid.; see also Jones v. United States, 137 U.S. 202, 214 (1890) (“All courts of justice are bound to take judicial notice of the territorial extent of the jurisdiction exercised by the government whose laws they administer * * * as appearing from the public acts of the legislature and executive, although

¹ We have served petitioner with a copy of the government’s brief in opposition in Redmond, supra (No. 18-8719). That brief is also available on the Court’s electronic docket.

those acts are not formally put in evidence, nor in accord with the pleadings.").

The "special maritime and territorial jurisdiction of the United States" includes "[a]ny lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof." 18 U.S.C. 7(3); see 40 U.S.C. 3112(b) (requiring, in certain circumstances involving the "[a]cquisition and acceptance of jurisdiction," that the government "fil[e] 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") (capitalization altered); United States v. Cassidy, 571 F.2d 534, 536 (10th Cir.) ("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."), cert. denied, 436 U.S. 951 (1978).

In United States v. Redmond, 748 Fed. Appx. 760 (9th Cir. 2018), cert. denied, 140 S. Ct. 150 (2019), a decision of the court of appeals that predates the decision below, the court correctly recognized that "USP Victorville[] is within the special maritime and territorial jurisdiction of the United States." Id. at 761 (internal quotation marks omitted). The court found that it could properly take "judicial notice" of evidence that

[t]he government provided * * * 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.

Id. at 761-762. Redmond's determination that USP Victorville is within the special maritime and territorial jurisdiction of the United States is a finding of legislative fact that is as true in this case as it was in Redmond. See United States v. Hernandez-Fundora, 58 F.3d 802, 812 (2d Cir.) (explaining that "[l]egislative facts are established truths, facts or pronouncements that do not change from case to case but apply universally") (quoting United States v. Gould, 536 F.2d 216, 220 (8th Cir. 1976)), cert. denied, 515 U.S. 1127 (1995). Indeed, in its briefing in this case, the government referred the court of appeals to the evidence that it had introduced during the Redmond appeal and asserted that this evidence showed that the assaults committed by petitioner at USP Victorville occurred within the special maritime and territorial jurisdiction of the United States. See Gov't C.A. Br. 32-37.

Although the court of appeals' unpublished decision did not discuss petitioner's forfeited claim on this issue at length, see Pet. App. 2, its disposition of the claim is correct. It is uncontested "that the government proved," ibid., the requisite component of the jurisdictional element to the jury -- that petitioner committed the assault at USP Victorville. See p. 8, supra. And, by relying on the documents presented in Redmond and

the decision in that case, the government provided ample basis for the court of appeals to conclude that USP Victorville is within the special maritime and territorial jurisdiction of the United States. What is more, at trial the government elicited uncontested testimony from an FBI agent that the federal government had "[e]xclusive jurisdiction" over the investigation of offenses at USP Victorville, Pet. C.A. E.R. 113, which included the "serious assault" in this case, id. at 114. Petitioner did not challenge the agent's testimony during cross-examination, id. at 124-142, or in either of the two motions that he made for a judgment of acquittal, see id. at 30-36, 52. Petitioner also agreed to a jury instruction that required only proof that the assault in fact occurred at USP Victorville. D. Ct. Doc. 121, at 36-37. The government thus provided a sufficient basis for the court of appeals' conclusion that the jurisdictional element in 18 U.S.C. 113(a) was satisfied.

b. Petitioner nevertheless contends (Pet. 6-10) that his convictions are infirm because the government did not specifically introduce evidence at the trial in this case that the federal government accepted jurisdiction over the land occupied by USP Victorville. But as explained above, such testimony was not necessary in this case. USP Victorville's inclusion within the special maritime and territorial jurisdiction of the United States is a legislative fact that the court of appeals has previously

taken judicial notice of, Redmond, 748 Fed. Appx. at 761, and any federal court involved in this case could and can do the same -- including this Court, see Jones, 137 U.S. at 214; cf. Br. in Opp. at 8-12, Redmond, supra (No. 18-8719). And in any event, on the facts here the FBI agent's testimony was sufficient to support the conclusion that the government met its burden in establishing the jurisdictional element in 18 U.S.C. 113(a). While the agent did not specifically discuss whether the federal government had formally accepted jurisdiction over the land occupied by USP Victorville, this omission is explained by petitioner's failure to contest the agent's principal assertion: that the government maintained "[e]xclusive jurisdiction" over the investigation of criminal matters at USP Victorville. Pet. C.A. E.R. 113. In the absence of such a challenge and given the evidence provided to and relied on by the court of appeals in Redmond, the court of appeals here did not err in concluding that the government proved the jurisdictional element. Pet. App. 2.

To the extent that petitioner suggests (Pet. 5, 13) that Redmond erred in concluding that USP Victorville is within the special maritime and territorial jurisdiction of the United States -- and that the dissent had the better of the argument in that case -- that factbound dispute regarding the status of a single parcel of federal land does not merit further review. Indeed,

this Court denied the petition for a writ of certiorari in Redmond, supra (No. 18-8719), and the same result is warranted here.

Petitioner also faults the court of appeals for relying on its previous decision in United States v. Read, 918 F.3d 712 (9th Cir. 2019), and asserts that the Ninth Circuit “permits section 113(a) prosecutions for any federal prison, irrespective of the requirements set forth” in that provision. Pet. 8. But Read adopted no such rule. Read instead addressed the types of evidence that can be used to prove the jurisdictional element, concluding that “while historical documents can be sufficient * * * they are not necessary” and that “uncontradicted testimony from inmates or employees at a federal prison can establish the jurisdictional element of 18 U.S.C. § 113.” 918 F.3d at 718.

2. Petitioner asserts (Pet. 6-7, 11-15) that the decision below conflicts with this Court’s decision in Adams v. United States, 319 U.S. 312 (1943), and implicates a division in the courts of appeals. Those assertions lack merit, and in any event this case would not be a suitable vehicle for further review.

In Adams, this Court concluded that “Camp Claiborne, Louisiana, a government military camp” was not “within the federal criminal jurisdiction” under a predecessor to the current statute addressing federal jurisdiction over land (40 U.S.C. 3112). 319 U.S. at 312-313. It was uncontested in this Court that the federal government had not in fact “given notice of acceptance of

jurisdiction" over Camp Claiborne "at the time of the alleged offense," id. at 313, and the Court determined that the statute did not allow for the United States to obtain a conviction without having done so, id. at 313-315. In contrast, the government in this case has consistently maintained that it has satisfied the statutory requirements for USP Victorville to be within the special maritime and territorial jurisdiction of the United States, relying on evidence specific to that institution.

Petitioner also errs (Pet. 11-15) in contending that the court of appeals' decision in this case conflicts with the Second Circuit's decision in United States v. Davis, 726 F.3d 357 (2013), cert. denied, 574 U.S. 828 (2014). In Davis, a BOP employee testified at trial that the Metropolitan Detention Center in Brooklyn, New York was "a federal prison" "on federal land." Id. at 360-361 (citation omitted). On cross-examination, the employee stated that he did not know when the land was obtained from the State of New York and did not know "how the federal government accepted jurisdiction." Id. at 361 (citation omitted). The defendant in Davis challenged the sufficiency of the government's evidence that the Center fell within federal jurisdiction under 18 U.S.C. 113(a) in the district court, and, after that court rejected his challenge, renewed his argument in the Second Circuit. The Second Circuit found that the evidence proffered at trial -- which consisted solely of the "fact that the

assault took place in a federal prison on federal land," Davis, 726 F.3d at 365 -- was insufficient, id. at 362-367, but took judicial notice of documents confirming that the Center was within the special maritime and territorial jurisdiction of the United States and affirmed the defendant's conviction, id. at 367-371. That affirmance does not conflict with the affirmance here.

As a threshold matter, at trial in this case the government did more than merely demonstrate that the assault took place in a federal prison on federal land; instead, the government elicited uncontested testimony that the federal government maintained exclusive jurisdiction over criminal investigations at USP Victorville. There is thus no conflict with Davis. Indeed, in a different case the Second Circuit agreed that evidence similar to that presented by the government here can suffice. In United States v. Hernandez-Fundora, 58 F.3d 802, cert. denied, 515 U.S. 1127 (1995), the Second Circuit rejected a challenge to the sufficiency of the government's jurisdictional evidence based on an FBI agent's "uncontradicted testimony that concurrent federal jurisdiction existed" over the correctional institution. Id. at 809. In any event, the government here urged the court of appeals to, if necessary, take judicial notice that USP Victorville is within the special maritime and territorial jurisdiction of the United States -- and follow the same approach that the Second Circuit did in Davis. Even if the extent to which the court of

appeals considered this jurisdictional evidence is unclear, that does not suggest any conflict between the Second and Ninth Circuits.

Petitioner also errs (Pet. 6, 9, 12) in suggesting that the affirmance in this case conflicts with the Tenth Circuit's affirmance of a conviction in United States v. Cassidy, supra. In Cassidy, the Tenth Circuit affirmed the finding that crimes that occurred at a federal prison on land that was acquired by the United States in 1938 were committed within the special maritime and territorial jurisdiction of the United States. 571 F.2d at 536-537. Cassidy, which itself involved the acquisition of lands before 1940, noted that for lands acquired after 1940, "unless and until the United States has by affirmative action accepted jurisdiction over lands hereinafter acquired by the United States," it is "to be conclusively presumed that no such jurisdiction has been accepted." Id. at 536 (emphasis omitted). But although USP Victorville is on land acquired after 1940, neither the memorandum disposition here nor the one in Redmond holds otherwise. And to the extent that petitioner is challenging the court of appeals' determination in Redmond that the government in fact accepted jurisdiction, see 748 Fed. Appx. at 761-762, that specific finding about an institution located in the Ninth Circuit could not conflict with Cassidy or any other out-of-circuit decision.

3. In any event, this case would be a poor vehicle to address the question presented. Petitioner never contested the government's jurisdictional evidence in the district court. While petitioner twice moved for a judgment of acquittal based on purported deficiencies in the government's evidence regarding his intent to commit the offense, he did not move for a judgment of acquittal on the separate theory that insufficient evidence supported the jurisdictional element of his crimes. Indeed, petitioner affirmatively requested jury instructions that, as to the jurisdictional element, only required the government to prove beyond a reasonable doubt that "the assault took place on the grounds of United States Penitentiary Victorville." D. Ct. Doc. 121, at 36-37.

Petitioner's sufficiency-of-the-evidence claim thus would at most be subject to plain-error review. See Fed. R. Crim. P. 52(b); United States v. Eriksen, 639 F.3d 1138, 1148 (9th Cir. 2011), as amended on denial of reh'g (May 23, 2011) ("Because Defendants' Rule 29 motion regarding Counts 17 and 18 was limited to an argument about mens rea, our review is for plain error."); cf. United States v. Graf, 610 F.3d 1148, 1166 (9th Cir. 2010) ("[W]hen a Rule 29 motion is made on a specific ground, other grounds not raised are waived. We may review a waived ground for acquittal only to prevent a manifest miscarriage of justice.") (citations and internal quotation marks omitted).

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). Indeed, even assuming that petitioner could demonstrate that he meets the first two plain-error requirements, he would be unable to establish that the allegedly deficient trial testimony addressing the jurisdictional element affected his substantial rights or seriously affected the fairness, integrity, or public reputation of the proceeding -- because the court of appeals has already concluded that USP Victorville is within the special maritime and territorial jurisdiction of the United States, Redmond, 748 Fed. Appx. at 761, which is a finding of legislative fact that remains true in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Acting Solicitor General

NICHOLAS M. MCQUAID
Acting Assistant Attorney General

DAVID M. LIEBERMAN
Attorney

JANUARY 2021