No. 20-6414

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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT IN REPLY

Petitioner seeks a writ of certiorari to address the Ninth Circuit's rule from *United States v. Read*, 918 F.3d 712 (9th Cir. 2019), which he contends conflicts with *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 relieves the Government from proving the jurisdictional element required to establish a violation of 18 U.S.C. § 113(a).

The Government opposes with two main arguments: that (1) the Ninth Circuit's rule neither conflicts with *Adams*, nor the Second and Tenth Circuits' rules following *Adams* (*Davis* and *Cassidy*), and (2) this case, in its opinion, provides an unsuitable vehicle for the Court to address the Ninth Circuit's rule as set forth in *Read*. But those arguments fail under scrutiny, and ultimately demonstrate why this Court should grant the writ, as set forth below.

Before getting there, Petitioner addresses the third argument the Government weaves into its opposition: that the Ninth Circuit, in a 2-1 split, unpublished decision, took judicial notice that Victorville prison falls within the special maritime and territorial jurisdiction of the United States, and that decision answers the question presented by Petitioner. Brief of United States in Opposition ("Opp.") at 7-13 citing *United States v. Redmond*, 748 Fed. App'x 760 (9th Cir. 2018), *cert. denied*, 140 S. Ct. 150 (2019). That argument should not detain the Court at all,

for three reasons. One, the existence of federal jurisdiction over the place in which the offense occurred is an element of the offenses defined at 18 U.S.C. § 113(a), which must be proved to the jury beyond a reasonable doubt. *See United States v. Gaudin*, 515 U.S. 506, 510, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995) citing *Estelle v. McGuire*, 502 U.S. 62, 69, 112 S.Ct. 475, 480, 116 L.Ed.2d 385 (1991); *Victor v. Nebraska*, 511 U.S. 1, 5, 114 S.Ct. 1239, 1242, 127 L.Ed.2d 583 (1994); *Patterson v. New York*, 432 U.S. 197, 210, 97 S.Ct. 2319, 2327, 53 L.Ed.2d 281 (1977). The fact that a panel of the court of appeals resolved the sufficiency of proof in another case, in an unpublished decision, does not address, much less affect, Petitioner's challenge to the Ninth Circuit's errant rule in *Read*.

Two, the Government's reliance on *Redmond* only provides further support to issue the writ of certiorari here: the Government's contention that a split decision in an unpublished ruling can erase an element in all section 113(a) prosecutions without ever submitting it to any jury on any occasion transgresses this Court's clear and consistent teachings. *Gaudin*, 515 U.S. at 515, citing *Sullivan v. Louisiana*, 508 U.S. 275, 277, 113 S.Ct. 2078, 2080 (1993) ("The right [to jury trial] includes, of course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of 'guilty' "); *Patterson, supra*, 432 U.S. at 204, 97 S.Ct. at 2324; *In re Winship*, 397 U.S. 358, 361, 363, 90 S.Ct. 1068, 1071, 1072 (1970).

And three, the Government never sought judicial notice of any materials in *this* case, neither before the court of appeals nor this Court, and the court of appeals resolved Petitioner's appeal by relying on the published opinion *Read*, not the unpublished memorandum *Redmond*. As a result, the Court should not be distracted by an issue the Government wished Petitioner presented. Instead, the Court should address the Ninth Circuit's errant rule in *Read*, a published opinion that binds the Ninth Circuit.[1]

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) and *Adams v. United States,* 319 U.S. 312 (1943).

The Government buries its discussion of *Adams* to the end of its brief, and then offers a solitary paragraph:

> 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,"

[1] Even if a court could take judicial notice of the purported legal aspect of the jurisdictional element, it must be done at the time of trial with an appropriate jury instruction under Fed. R. Evid. 201. *See United States v. Bello*, 194 F.3d 18, 22-24 (1st Cir. 1999). One leading commentator has described treating an element of a crime as a purported "legislative fact" 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).

> *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.

Opp. at 13-14.

Adams did more than that: it established that the prosecution's failure to prove at trial that that the federal government accepted jurisdiction over that land answered the jurisdictional question in favor of the defendants there. *Adams*, 319 U.S. at 312-13 (1943); *see also* 40 U.S.C. § 3112 (formerly codified at 40 U.S.C. §255). Along the way, the Court noted that the Government abandoned its prior interpretation on the jurisdictional question after the prosecution had ended, *Adams*, 319 U.S. at 314-15 ("[t]he Department of Justice has abandoned the view of jurisdiction which prompted the institution of this proceeding, and now advises us of its view that concurrent jurisdiction can be acquired only by the formal acceptance prescribed in the act"), making the resolution all the more apparent. Not only did *Adams* not turn on the Government's "consistent" vehemence that a different showing sufficed, as the Government presses here, the Government now tries to take back the concession it made, and upon which the Court acted and ruled, long ago. This approach, however, cannot undo this Court's precedent.

As a result, the Ninth Circuit's rule set forth in *Read* transgresses *Adams*. *Read* began its analysis correctly, and recognized that "[t]he existence of federal jurisdiction over the place in which the offense occurred is an element of the offenses defined at 18 U.S.C. § 113(a), which must be proved to the jury beyond a reasonable doubt. *See United States v. Gaudin*, 515 U.S. 506, 510, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995)." *Read*, 918 F.3d at 718. But *Read* then ignored *Adams*, and instead drew on bank robbery cases requiring proof of FDIC insurance to demonstrate jurisdiction to hold that proof of the federal government's acceptance of jurisdiction over the land on which the prison stood was *not* necessary. *Id.* Instead, the Ninth Circuit held that testimony that the assault took place at "the Phoenix federal prison" sufficed. *Id.*

This rule directly contravenes *Adams*. The fact that an assault took place at a federal facility does *not* address the required element: whether the assault occurred "within the special maritime and territorial jurisdiction of the United States." It simply assumes the answer, in derogation of *Adams* and *Gaudin*.

For this reason, the Government's *ipse dixit* denial that "the Ninth Circuit [rule] permits section 113(a) prosecutions for any federal prison, irrespective of the requirements set forth in that provision[,]" Opp. at 13 (internal quotations and citation omitted), cannot withstand scrutiny. That is precisely the Ninth Circuit's rule: testimony that an assault took place at a federal prison suffices to establish the

showing required by 18 U.S.C. § 7(3). *Read*, 918 F.3d at 718. Indeed, the prosecution argued just that to the jury: "there's a jurisdictional element for all of these crimes. We have to prove that this matter occurred at [USP] Victorville." Appellant's Ninth Circuit Excerpts of Record 156. And the Government maintains in this Court that section 7(3) is satisfied by the same showing: whether the Government proved "petitioner committed the assault at USP Victorville." Opp. at 10. But section 7(3) requires more, *viz.*, proof that the assault took place within the special maritime and territorial jurisdiction of the United States.[2]

For this reason alone, the Court should issue a writ of certiorari so it may hear this case, and correct the Ninth Circuit's errant rule.

B. The Ninth Circuit's rule 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.

The Government likewise buries the circuit split to the end of its opposition. Opp. at 14-16. As for the Second Circuit's rule in *Davis*—holding that testimony that a federal prison was located on "federal land" does not establish that "the special maritime and territorial jurisdiction" element of the offense, 726 F.3d at 364 ("the United States does not have jurisdiction over all lands owned by the

[2] The Government also incorrectly faults Petitioner for *its* misinterpretation of the statute and failure of evidence. Opp. at 12. Respectfully, the prosecution bears the burden of proving its case.

federal government within the states")—the Government asserts that the rule in *Davis* does not conflict with *Read*'s watered-down rule. Opp. at 14-15. But it doesn't explain why that is so, except as to say that in Petitioner's case, an FBI agent testified that "the federal government maintained exclusive jurisdiction over criminal investigations at USP Victorville." Opp. at 15. Respectfully, that non-sequitur provides no answer. Instead, it only confirms the conflict, and confirms *Read*'s deviation from this Court's decision in *Adams*.

So too, the Government relies on *United States v. Hernandez-Fondura*, 58 F.3d 802, 808-09 (1995), *cert. denied*, 515 U.S. 1127 (1995), *see* Opp. at 15, to suggest the *Davis* rule is in harmony with *Read*. But the Government omits discussion of a critical feature of *Hernandez-Fondura*: the failure (before *Davis*) to follow *Adams* and require proof of the federal government's acceptance of jurisdiction over the land on which a federal facility stands resulted in an unlawful conviction because the federal prison there *did not* "fall within the special maritime and territorial jurisdiction of the United States." *Hernandez-Fondura*, 58 F.3d. at 366.

Respecting the Tenth Circuit's decision in *Cassidy*, the Government confirms that it followed *Adams*,[3] and with respect to "land acquired by the United

[3] "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." *Cassidy*, 571 F.2d at 536-37 citing *Adams*.

States prior to 1940, the presumption that jurisdiction was accepted" is sufficient where "the Government's evidence established" that the federal government purchased the land at issue, and both the State and federal government "consented to the acquisition of lands by the United States and ceded exclusive jurisdiction over land so acquired by the United States." *Cassidy*, 571 F.2d at 536-37; *cf.* Opp. at 16. Obviously, the Ninth Circuit's rule in *Read* requires nothing of the sort. But rather than address the Ninth Circuit's errant rule, and its conflict with *Cassidy*, the Government dodges the issue to suggest that the Ninth Circuit resolved this issue for all jury trials arising from assaults at Victorville by taking judicial notice of documents neither offered nor submitted at Petitioner's trial, and *not* submitted at any trial, in an *unpublished* split decision. Opp. at 16 citing, *Redmond*, 748 Fed. App'x at 761-762.

Putting aside that the Government's response does not overcome Petitioner's showing of a circuit split, the thrust of the Government's response supports issuance of the writ all the more: the notion that an element to be decided by jury in all prosecutions for section 113(a) offenses at Victorville has been resolved, for all time, and not by *any* jury in *any* case, but by judicial notice in a split decision in an unpublished memorandum violates *Gaudin*. While the Government may be content to have an element of section 113(a) prosecutions erased from the statute by unpublished judicial fiat, this Court's decisions do not permit that approach.

C. Petitioner's case is a suitable vehicle to address the Ninth Circuit's rule in *Read.*

In this case, the court of appeals applied settled Ninth Circuit precedent to hold that the Government need only introduce evidence that an assault occurred at a federal facility to sustain the jurisdictional element in section 113(a) prosecutions. Considering the clarity of *Adams*, and the fidelity to that rule as followed by the Second and Tenth Circuits, Petitioner's assignment of error to the Ninth Circuit on this pure question of law makes this case suitable to address the Ninth Circuit's errant rule.[4]

So too, the Government's emphasis on plain error review, *see* Opp. at 17, is not as strong as the Government contends. Before Petitioner presented his Rule 29 motion to the district court, his co-defendant Bacon moved for acquittal on *all elements* of the offenses, *see* District Court Record Docket Entry 233 at 374-75 & 399-400, and thus alerted the district court to review the jurisdictional element for sufficiency of the evidence. As a result, any further Rule 29 objection by Petitioner on the jurisdictional element point would have been futile. *See United States v. Kyle*, 734 F.3d 956, 962 (9th Cir. 2013) (plain error review inapplicable

[4] The Government's attempt to convert Petitioner's challenge to the Ninth Circuit's errant rule in *Read* to a mere error-correction claim pursuant to Rule 29, should be unavailing. While that approach perhaps bespeaks tacit concession that the Ninth Circuit's rule strays from *Adams*, Petitioner urges the Court to address the correctness of *Read*, and its effect on this case and the many others that will follow.

where objection would be futile), as the district court was apprised of the jurisdictional challenge to the trial court proceedings. For this reason, the Court should review this pure error of law *de novo*. But even if the Court ultimately reviews this claim under the plain error standard, there is essentially no functional difference between the *Jackson*[5] standard on *de novo* or plain error review, *see United States v. Cruz*, 554 F.3d 840, 844 (9th Cir. 2009), and this Court should address the Ninth Circuit's errant rule which continues to apply to *all* section 113(a) prosecutions in nine states and two territories.[6]

[5] *Jackson v. Virginia*, 443 U.S. 307 (1979)

[6] And even on plain error review, the facts are not nearly as strong as the Government contends. In brief, the record does not demonstrate that Petitioner—who merely was handed a book by his cellmate and then passed it to co-defendant Bacon—had foreknowledge that the book contained a shank *or* that Bacon would attack Grecco, two findings necessary to sustain conviction pursuant to *Rosemond v. United States*, 572 U.S. 65 (2014) (the Government must prove that the aider and abettor in the criminal venture acted "with full awareness of its scope[,]" *and* with "advance knowledge" of the crime to be committed). Even as recited by the Government, the record supports the conclusion that Petitioner escorted Bacon to his cellmate and passed a book, and then showed curiosity to what Bacon would do with the book, as opposed to knowing about his cellmate's and Bacon's intent to assault Grecco. *See* Ninth Circuit Docket Entry 18 at 16-21.

CONCLUSION

For the reasons presented, this Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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