No. _____

IN THE

Supreme Court of the United States

VERNON WHITE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

ELIZABETH RICHARDSON-ROYER*
Attorney-at-Law
3739 Balboa Street, Suite 1095
San Francisco, California 94121
(510) 679-1105
beth@richardsonroyer.com

Attorney for Petitioner
**Counsel of Record*

Appointed under the Criminal Justice Act, 18 U.S.C. § 3006A(d)(7)

QUESTION PRESENTED

Whether proof that a crime occurred at a federal prison is sufficient to establish the existence of "special maritime or territorial jurisdiction of the United States," 18 U.S.C. § 113(a), as the Ninth Circuit alone has held, or whether the existence of federal jurisdiction depends on whether the requirements of 40 U.S.C. § 3112(c) have been met, as this Court and other circuits have concluded.

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PETITION FOR A WRIT OF CERTIORARI

Vernon White petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

JUDGMENT BELOW

The judgment for which review is sought is *United States v. White*, No. 20-50323, 2022 WL 3278942 (9th Cir. Aug. 11, 2022) (Appendix ("App.") at 3-13.)

JURISDICTION

The Ninth Circuit issued its memorandum opinion affirming White's convictions on August 11, 2022. (App. 3-13.) A timely petition for rehearing en banc was denied on October 19, 2022. (App. 1-2.) This petition is being timely filed within 90 days of that denial. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment to the United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ; nor be deprived of life, liberty, or property, without due process of law . . . .

18 U.S.C. §§ 113(a)(3), (a)(6)

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

***

(3) Assault with a dangerous weapon, with intent to do bodily harm, by a fine under this title or imprisonment for not more than ten years, 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.

18 U.S.C. § 7(3)

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.

40 U.S.C. § 3112

(a) Exclusive jurisdiction not required.—It is not required that the Federal Government obtain exclusive jurisdiction in the United States over land or an interest in land it acquires.

(b) Acquisition and acceptance of jurisdiction.—When the head of a department, agency, or independent establishment of the Government, or other authorized officer of the

department, agency, or independent establishment, considers it desirable, that individual may accept or secure, from the State in which land or an interest in land that is under the immediate jurisdiction, custody, or control of the individual is situated, consent to, or cession of, any jurisdiction over the land or interest not previously obtained. The individual 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.

(c) **Presumption.**—It is conclusively presumed that jurisdiction has not been accepted until the Government accepts jurisdiction over land as provided in this section.

STATEMENT OF THE CASE

Vernon White was charged alongside codefendant Eric Banks with violations of 18 U.S.C. §§ 113(a)(3) and (a)(6) (assault with a dangerous weapon and assault resulting in serious bodily injury, both occurring within the special maritime and territorial jurisdiction of the United States). The defendants were jointly tried before a federal jury in the Central District of California.

At the close of evidence, White moved for a judgment of acquittal under Rule 29 of the Federal Rules of Criminal Procedure. (2-ER-60.)[1] The motion was denied. (*Id.*) He was convicted on both counts and sentenced to a custodial term of 68 months. (1-ER-2.)

[1] "ER" stands for the "Excerpts of Record" that were submitted alongside the opening brief before the Ninth Circuit. The citation convention is [Volume]-ER-[Page].

On appeal, White argued, relevant to this Petition, that the evidence was insufficient to prove that the charged offenses occurred within the "special maritime and territorial jurisdiction" of the United States, as 18 U.S.C. § 113(a) requires. The Ninth Circuit affirmed the judgment in an unpublished memorandum opinion. *United States v. White*, No. 20-50323, 2022 WL 3278942 (9th Cir. Aug. 11, 2022). The majority[2] held that White's claim was foreclosed by *United States v. Read*, 918 F.3d 712 (9th Cir. 2019), which held that uncontroverted testimony that an offense occurred within a federal prison was sufficient to prove § 113(a)'s jurisdictional element. (App. 6.)

Concurring in the judgment, Honorable Lucy H. Koh agreed that *Read* controlled, but she wrote separately because, in her view, *Read* was incorrectly decided. (App. 8-13.) She explained that "federal ownership of the land alone does not establish federal jurisdiction" (App. 9) and noted that "numerous courts across the country have concluded that mere evidence of a federal installation on federally owned land is insufficient to show federal jurisdiction" (App. 10). Judge Koh urged that *Read* should be reconsidered in an appropriate case. (App. 13.)

STATEMENT OF FACTS

Video surveillance captured White, codefendant Banks, and another inmate assaulting a fellow inmate at the United States Penitentiary at Victorville, California. Three handmade prison knives were recovered (2-ER-167-68), and the victim was treated

[2] Honorable Mark J. Bennett, Circuit Judge, and Honorable Gary S. Katzmann, Judge for the U.S. Court of International Trade, sitting by designation.

for lacerations to the scalp and forehead as well as stab wounds on his back and arm (2-ER-235-36).

Several officers testified that, at the time of the offense, they worked for the "Federal Bureau of Prisons" at the "Federal Corrections Complex in Victorville" or the "United States Penitentiary, Victorville." (2-ER-161-62, 3-ER-394.) Officers likewise testified that the assault occurred "on the soccer field." (2-ER-163, 200; 3-ER-399.) No witness testified about federal jurisdiction.

REASONS FOR GRANTING THE WRIT

A. The Opinion Below Conflicts with Decisions from this Court and Other Circuits Holding that Federal Ownership Alone Cannot Establish Federal Jurisdiction.

Title 18, United States Code, § 113(a) requires, as an element of the offense, that the assault must have occurred "within the special maritime and territorial jurisdiction of the United States." The term "special maritime and territorial jurisdiction of the United States" is defined, as relevant to this case, as follows:

> 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 likewise 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).

For lands acquired by the federal government from a state after 1940, the requirements for legally effectuating a jurisdictional transfer are set out in 40 U.S.C. § 3112. That statute provides that an authorized federal officer "may accept or secure" federal jurisdiction over land located within a state, and that officer "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." §§ 3112(b), (c). "It is conclusively presumed that jurisdiction has not been accepted until the [federal] government accepts jurisdiction over land as provided in this section." § 3112(c).

Thus, as Judge Koh explained in her concurrence in this case, "proving the existence of federal jurisdiction over land acquired from a state requires clearing two hurdles. First, the federal government must show that the state agreed to the transfer of jurisdiction, usually through consent or cession." (App. 9.) And "[s]econd, the federal government must show that it accepted the jurisdiction from the state." (*Id.*) Judge Koh explained that, "[f]or lands acquired prior to 1940, the federal government's acceptance of jurisdiction is presumed." (*Id.*) But "for lands acquired after 1940, there is a *conclusive* presumption *against* the federal government's acceptance of jurisdiction." (*Id.* (citing 40 U.S.C. § 3112(c)).) Thus, "federal ownership of land alone does not establish federal jurisdiction." (App. 9.)

Other courts have addressed the question of federal jurisdiction consistently with Judge Koh's concurrence in this case. In *United States v. Davis*, 726 F.3d 357 (2d Cir. 2013), for example, the Second Circuit explained that "the "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." *United States v. Davis*, 726

F.3d 357, 365 (2d Cir. 2013). This flatly conflicts with the majority's opinion in White's appeal.

Other courts, including this one, have likewise found federal jurisdiction lacking for federal military installations, post offices, and hospitals, even though they were on federal land. *See Adams v. United States*, 319 U.S. 312, 313-15 (1943) (federal military camp was not under federal jurisdiction because "government had not accepted jurisdiction in the manner required by the [1940] Act"); *United States ex rel. Greer v. Pate*, 393 F.2d 44, 45-47 (7th Cir. 1968) (post office not under federal jurisdiction where government never filed notice of acceptance with State of Illinois, as required post-1940); *DeKalb Cnty., Georgia v. Henry C. Beck Co.,* 382 F.2d 992, 994-96 (5th Cir. 1967) (VA hospital); *United States v. Williams*, 17 M.J. 207, 211, 215 (Ct. Mil. App. 1984) (federal military base). And this Court also applies the requirements of 40 U.S.C. § 3112 (formerly cited as 40 U.S.C. § 255) in determining that federal jurisdiction *does* exist. *See United States v. State Tax Comm'n of Miss.*, 412 U.S. 363, 371-72 (1973) ("True, the assent of the United States to the exercise of exclusive jurisdiction over the lands occupied by two [military] bases was a necessary final step in light of 40 U.S.C. § 255, but such assent was given through a series of letters from Government officials to the Governors of Mississippi between 1942 and 1950.").

In *Read*, however, the Ninth Circuit took a different approach by holding that testimony that an assault occurred at a federal prison was sufficient to prove the element of "special maritime or territorial jurisdiction of the United States." The defendant in that case, charged with violating § 113(a) at a federal prison, argued that the

government's failure to submit historical documents establishing FCI Phoenix's jurisdictional status meant the evidence of jurisdiction was insufficient. *Read*, 918 F.3d at 718. The Ninth Circuit disagreed, explaining that "while historical documents can be sufficient to prove that land is subject to the 'special maritime and territorial jurisdiction of the United States,' they are not necessary." *Id.* Instead, it was sufficient for the assault victim to testify that he was an inmate "of the Phoenix federal prison" and an officer to testify that "he worked at the Federal Bureau of Prisons' male facility in Phoenix, and was employed by the United States Department of Justice, Federal Bureau of Prisons." *Id.* This evidence, the Ninth Circuit concluded, was such that "[a] reasonable juror could conclude . . . that FCI-Phoenix was under federal jurisdiction at the time Read allegedly committed assault." *Id.*

The Ninth Circuit's decision in *Read*, which that court applied in White's case, ignores completely the way federal jurisdiction must be obtained post-1940. And the question is not merely academic, as there exists real doubt about whether USP Victorville, where White was charged with committing assault, is under federal jurisdiction. In *United States v. Redmond*, 748 Fed. Appx. 760 (9th Cir. 2018) (*Redmond I*), the defendant raised a sufficiency challenge to his § 113(a) conviction, arguing that the government had failed to prove that the federal government had jurisdiction over USP Victorville. On appeal, the government presented documentary evidence that persuaded only two out of three judges to take judicial notice of the existence of federal jurisdiction. *Id.* at 761-62.

Judge Ikuta, dissenting, concluded that the government's documentary proof still fell short. *Id.* at 762 (Ikuta, J., dissenting). Although the government had presented a 1994 letter stating that the United States accepted exclusive jurisdiction over "all land acquired by it for military purposes within the State of California," Judge Ikuta found that "[t]he other documents presented by the United States . . . fail to establish that the land underlying USP Victorville was part of this general acceptance of jurisdiction." *Id.* In White's case, the government failed to produce even the documentary evidence of the purported jurisdiction, but there is reason to doubt that even that evidence fails to prove jurisdiction beyond a reasonable doubt.

B. This Case Presents an Appropriate Vehicle for this Court to Resolve the Circuit Split.

This case presents an appropriate vehicle by which the Court may resolve the circuit split and reaffirm that federal ownership, or the mere existence of a federal installation, does not establish "special maritime and territorial jurisdiction of the United States," as must be proven for certain federal crimes. *See* 18 U.S.C. §§ 7(3), 113(a).

White made a timely motion for judgment of acquittal under Rule 29 of the Federal Rules of Criminal Procedure, which fully preserved his challenges to the sufficiency of evidence for each element of the charged offenses. *See United States v. Nukida*, 8 F.3d 665, 672-73 (9th Cir. 1993) ("The proper way for a defendant to challenge the sufficiency of the government's evidence pertaining to [a] jurisdictional element . . . is a motion for acquittal under Rule 29, presented at the close of the government's case-in-chief."). Below, the government nonetheless argued that White waived his sufficiency

challenge when defense counsel argued during closing that White did not use a weapon and therefore was guilty, at most, of the lesser-included offense of simple assault. (*See* App. 7 n.2.) Unsurprisingly, the Ninth Circuit did not credit or even address the government's argument, which is unsupported by the law.

A defense lawyer's strategic decision to focus on the shortcomings in one area of proof does not constitute a waiver of a sufficiency challenge otherwise properly preserved. *See United States v. Chance*, 306 F.3d 356, 371 (6th Cir. 2002) (finding that Rule 29 motion preserved challenge as to each element of offense even where counsel's argument was largely focused on one element); *United States v. James*, 987 F.2d 648, 651 (9th Cir. 1993) (holding that defense counsel's argument that only one disputed issue existed did not represent concession as to other issues or elements). Here, defense counsel's trial argument for conviction on a lesser-included offense was not an explicit concession that the evidence of jurisdiction was sufficient, and it therefore has no effect on White's properly preserved sufficiency challenge to all elements of the charged offenses through his general Rule 29 motion. There is no impediment to this Court's review.

This case—with a preserved Rule 29 sufficiency challenge applicable to each element of the charged offenses—is an appropriate vehicle for this Court to decide the question of whether evidence that a crime occurred on federally owned land is insufficient to establish federal jurisdiction as defined in 18 U.S.C. § 7(3).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DATED: January 17, 2023

By: _____
ELIZABETH RICHARDSON-ROYER
Attorney-at-Law*

Attorney for Petitioner
**Counsel of Record*

APPENDIX

FILED

OCT 19 2022

MOLLY C. DWYER, CLERK
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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ERIC BANKS, AKA Daniel Ulices Acevedo, AKA Eric Perry, AKA Lamar Sterling Perry, AKA Perry Lamar Sterling, AKA Latrell White, Defendant-Appellant.	No. 20-50175 D.C. Nos. 5:17-cr-00103-DMG-2 5:17-cr-00103-DMG Central District of California, Riverside ORDER

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. VERNON WHITE, AKA Marquette Adams, AKA Billy Edwards, AKA Slim, AKA Jamir Williams, Defendant-Appellant.	No. 20-50323 D.C. Nos. 5:17-cr-00103-DMG-1 5:17-cr-00103-DMG

Before: BENNETT and KOH, Circuit Judges, and KATZMANN,* Judge.

Defendants-Appellants have filed a petition for panel rehearing and a

* The Honorable Gary S. Katzmann, Judge for the United States Court of International Trade, sitting by designation.

petition for rehearing en banc. [Dkt. 64] The panel has voted to deny the petition for panel rehearing. Judges Bennett and Koh vote to deny the petition for rehearing en banc, and Judge Katzmann so recommends. The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on en banc rehearing. *See* Fed. R. App. P. 35.

The petition for panel rehearing and rehearing en banc is **DENIED**.

NOT FOR PUBLICATION

FILED

AUG 11 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ERIC BANKS, AKA Daniel Ulices Acevedo, AKA Eric Perry, AKA Lamar Sterling Perry, AKA Perry Lamar Sterling, AKA Latrell White, Defendant-Appellant.	No. 20-50175 D.C. Nos. 5:17-cr-00103-DMG-2 5:17-cr-00103-DMG MEMORANDUM*

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. VERNON WHITE, AKA Marquette Adams, AKA Billy Edwards, AKA Slim, AKA Jamir Williams, Defendant-Appellant.	No. 20-50323 D.C. Nos. 5:17-cr-00103-DMG-1 5:17-cr-00103-DMG

Appeal from the United States District Court
for the Central District of California
Dolly M. Gee, District Judge, Presiding

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Argued and Submitted July 14, 2022
Pasadena, California

Before: BENNETT and KOH, Circuit Judges, and KATZMANN,** Judge.
Concurrence by Judge KOH

Defendants-Appellants Eric Banks and Vernon White, inmates at the United States Penitentiary in Victorville, California (USPV), raise several arguments challenging their convictions under 18 U.S.C. § 113(a)(3) and (a)(6) for assaulting another inmate. We have jurisdiction under 28 U.S.C. § 1291 and affirm.

1. Banks argues that we should dismiss the indictment because his Speedy Trial Act rights were violated.[1] But the "[f]ailure of the defendant to move for dismissal prior to trial . . . shall constitute a waiver of the right to dismissal under [the Speedy Trial Act]." 18 U.S.C. § 3162(a)(2). Banks never moved to dismiss before trial, and he therefore waived any right to dismissal under the Speedy Trial Act. Banks's argument that a defendant's mere assertion of his speedy trial rights is sufficient to preserve a Speedy Trial Act claim is foreclosed by our precedent. *See United States v. Tanh Huu Lam*, 251 F.3d 852, 858 n.9, 860–61 (9th Cir. 2001) (holding that, even though the defendant had repeatedly

** The Honorable Gary S. Katzmann, Judge for the United States Court of International Trade, sitting by designation.

[1] We grant Banks's unopposed motion to take judicial notice of district court dockets and filings in two other cases, which support his Speedy Trial Act claim. Dkt. No. 15.

asserted a desire for a speedy trial, he waived his Speedy Trial Act claim because he failed to file a motion to dismiss until after his trial).

2. White argues that the district court erred by precluding him from presenting a duress defense. "We review the district court's decision to exclude the duress defense de novo." *United States v. Chi Tong Kuok*, 671 F.3d 931, 947 (9th Cir. 2012). The district court did not err because White failed to make a prima facie showing of an immediate, specific threat, which is a necessary element of duress. *See id.* at 947–48; *United States v. Vasquez-Landaver*, 527 F.3d 798, 802 (9th Cir. 2008). White presented no evidence of any specific threats. He offered only generic, undetailed evidence that gangs usually assault those who refuse to carry out orders. Such evidence is insufficient. *See Chi Tong Kuok*, 671 F.3d at 948 ("[V]ague and undetailed threats will not suffice.").

3. Banks argues that the district court abused its discretion in conducting voir dire by failing to adequately test for bias against prisoners. We disagree because the record shows that the voir dire as a whole was reasonably sufficient to test for bias against prisoners. *See United States v. Powell*, 932 F.2d 1337, 1340–41 (9th Cir. 1991); *Darbin v. Nourse*, 664 F.2d 1109, 1113 (9th Cir. 1981). Indeed, defense counsel for White asked several questions that were specifically aimed at eliciting bias against prisoners.

4. For the first time on appeal White challenges the jury instruction on

the jurisdictional element of the charged offenses. Both charged offenses required the government to prove that the assault occurred "within the special maritime and territorial jurisdiction of the United States." 18 U.S.C. § 113(a)(3), (a)(6). White waived his challenge because (1) he and the government jointly proposed the instruction he now challenges; (2) the basis for his challenge—the plain statutory text of the charged offenses—existed before he submitted the proposed instruction; and (3) he was aware of the statutory text because the indictment referenced the charged offenses and recited the statutory text that White now claims was improperly omitted. *See United States v. Cain*, 130 F.3d 381, 383–84 (9th Cir. 1997). Even if White did not waive his challenge, it would fail because the instruction on the jurisdictional element was proper under *United States v. Read*, 918 F.3d 712 (9th Cir. 2019). *See United States v. Hong*, 938 F.3d 1040, 1046 (9th Cir. 2019).

5. Defendants argue that the evidence was insufficient to establish that USPV was within the special maritime and territorial jurisdiction of the United States. *See* 18 U.S.C. § 113(a); *id.* § 7. *Read* forecloses Defendants' challenge because the government here offered precisely the type of uncontroverted testimony that the *Read* court held was sufficient. *See Read*, 918 F.3d at 718. Two officers who responded to the attack testified that they worked for the Federal Bureau of Prisons at USPV. Another officer testified that he worked for the

Bureau of Prisons at USPV at the time of the attack. All three officers testified that the attack occurred on the field at USPV. Defendants' reliance on *United States v. Redmond*, 748 F. App'x 760 (9th Cir. 2018), is unconvincing because they rely on the *dissent* in the *unpublished* disposition. Finally, as a three-judge panel bound by *Read*, we are compelled to reject Defendants' arguments that *Read* was wrongly decided and that we should follow *United States v. Davis*, 726 F.3d 357 (2d Cir. 2013). *See Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003) (en banc).[2]

6. Banks claims he was tried and punished in violation of the Double Jeopardy Clause because he had already been adjudicated and punished for the same conduct in a Bureau of Prisons proceeding. But as Banks correctly concedes, his argument is foreclosed by *United States v. Brown*, 59 F.3d 102, 103 (9th Cir. 1995) (per curiam).

7. Banks argues for reversal based on the cumulative effect of the alleged errors. But because he has identified no error, there was no cumulative error. *See United States v. Martinez-Martinez*, 369 F.3d 1076, 1090 (9th Cir. 2004).

AFFIRMED.

[2] Because it is unnecessary, we do not reach whether Defendants waived their sufficiency of the evidence challenge by arguing during closing that they were guilty of the lesser included offense of simple assault or whether we may take judicial notice that USPV is within the special maritime and territorial jurisdiction of the United States.

FILED

AUG 11 2022

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U.S. COURT OF APPEALS

United States v. Banks, 20-50175; *United States v. White*, 20-50323

KOH, Circuit Judge, concurring:

I join the memorandum disposition because I agree that *United States v. Read*, 918 F.3d 712 (9th Cir. 2019), controls. *See Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003) (en banc) (a three-judge panel cannot overrule Ninth Circuit precedent in the absence of an intervening Supreme Court decision). I write separately because I believe that *Read* was incorrectly decided and that we should reconsider *Read* in a future case.

The Enclave Clause of the United States Constitution imposes limits on federal jurisdiction over federally owned land acquired from a state. *See* U.S. Const., art. I, § 8, cl. 17. Here, defendants were convicted of assaulting another inmate in federal prison, in violation of 18 U.S.C. § 113(a). Section 113(a) contains a jurisdictional element, which requires that the government prove the offense occurred "within the special maritime and territorial jurisdiction of the United States." 18 U.S.C. § 113(a).

Consistent with the Enclave Clause, 18 U.S.C. § 7(3) defines the "special maritime and territorial jurisdiction of the United States" as:

> 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.

Id. § 7(3).

Accordingly, proving the existence of federal jurisdiction over land acquired from a state requires clearing two hurdles. First, the federal government must show that the state agreed to the transfer of jurisdiction, usually through consent or cession.[1] *See, e.g.*, *Kleppe v. New Mexico*, 426 U.S. 529, 542-43 (1976) ("Absent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory . . . .").

Second, the federal government must show that it accepted the jurisdiction from the state. *See Atkinson v. Tax Comm'n*, 303 U.S. 20, 23 (1938). For lands acquired prior to 1940, the federal government's acceptance of jurisdiction is presumed. *Id.* However, for lands acquired after 1940, there is a *conclusive* presumption *against* the federal government's acceptance of jurisdiction. *See* 40 U.S.C. § 3112(c); *see also Adams v. United States*, 319 U.S. 312, 313-15 (1943).

The upshot here is that federal ownership of land alone does not establish federal jurisdiction. As such, "one cannot simply assume that a federal installation

[1] Cession occurs when the state cedes jurisdiction over territory to the federal government through legislation and usually arises when the federal government has not purchased the land or the transfer of jurisdiction occurred after the purchase. *See, e.g.*, *Fort Leavenworth Railway Co. v. Lowe*, 114 U.S. 525, 526 (1885) (finding the federal government had jurisdiction over Fort Leavenworth despite not purchasing the underlying land).

on federal land automatically comes within Federal jurisdiction." *United States v. Davis*, 726 F.3d 357, 366-67 (2d Cir. 2013) (cleaned up).

Indeed, numerous courts across the country have concluded that mere evidence of a federal installation on federally owned land is insufficient to show federal jurisdiction. *See, e.g.*, *United States ex rel. Greer v. Pate*, 393 F.2d 44, 45-47 (7th Cir. 1968) (post office); *DeKalb Cnty., Georgia v. Henry C. Beck Co.*, 382 F.2d 992, 994-96 (5th Cir. 1967) (Veterans Administration hospital); *United States v. Williams*, 17 M.J. 207, 211, 215 (Ct. Mil. App. 1984) (federal military base).

Yet that is precisely what we did in *Read*. Notwithstanding a conclusive presumption against federal acceptance of jurisdiction over land acquired after 1940,[2] in *Read* we relied solely on the trial testimony of government witnesses. Specifically, we held that mere prisoner testimony that "he was an inmate 'of the Phoenix federal prison' at the time of the assault," in conjunction with prison guard testimony that "he worked at the Federal Bureau of Prison's male facility in Phoenix, and was employed by the United States Department of Justice, Federal Bureau of Prisons," was sufficient to prove *beyond a reasonable doubt* that the federal prison was under federal jurisdiction, *Read*, 918 F.3d at 718.

[2] The government conceded in their brief that the presumption applied. *See United States v. Read*, No. 17-10439, ECF No. 32 (9th Cir. Aug. 23, 2018).

Recall that the government must prove, whether to the judge or the jury,[3] that the state agreed to, and the federal government accepted, the transfer of jurisdiction. A prisoner or employee's testimony about the location of the assault fails to prove either state agreement to transfer, or federal government acceptance of, jurisdiction *beyond a reasonable doubt*. *See Davis*, 726 F.3d at 364 (employee testimony that assault took place in a federal prison insufficient to prove that the federal government had jurisdiction over the prison). Indeed, *Read* fails to explain why such testimony is sufficient to rebut the conclusive presumption against federal government acceptance of jurisdiction for federal lands acquired after 1940.

My concern is not hypothetical. Because proving state agreement and federal acceptance is often complex, federal courts can get the jurisdictional analysis wrong. For example, in *United States v. Hernandez-Fundora*, 58 F.3d 802 (2d Cir. 1995), the defendant was convicted of § 113 assault in Raybrook federal prison. *Id.* at 804. The Second Circuit rejected the defendant's jurisdictional challenge

[3] *Read*'s holding 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," appears to implicitly overrule prior Ninth Circuit decisions holding that the existence of federal jurisdiction is a legal question determined by the district court. *See, e.g.*, *United States v. Warren*, 984 F.2d 325, 327 (9th Cir. 1993) (explaining that the "existence of federal jurisdiction over the geographic area" is a question of law and "the locus of the offense within the area" is a question of fact); *see also United States v. Mujahid*, 799 F.3d 1228, 1237 (9th Cir. 2015). I do not address this issue here because, in either circumstance, the government still bears the burden to prove its case.

because an FBI agent testified at trial that the federal government had jurisdiction over the prison. *Id.* at 808-10. However, after the Second Circuit vacated the conviction on other grounds, the government discovered on remand that the prison was not subject to federal jurisdiction because the underlying land was acquired after 1940, and New York withheld consent. *Davis*, 726 F.3d at 366 n.5.

Moreover, our Court has expressed differing views about the jurisdictional status of United States Prison Victorville, the prison in the instant case. Judges Wardlaw and Bybee previously concluded the government had federal jurisdiction over Victorville. *See United States v. Redmond*, 748 F. App'x 760, 761-62 (9th Cir. 2018). However, Judges Berzon, Bea, Ikuta, and Ngyuen have expressed doubt. *Id.* at 762-63 (Ikuta, J., dissenting); *United States v. Redmond*, No. 21-55142, 2022 WL 1658445, at *2 (9th Cir. May 25, 2022).

At bottom, the Constitution requires that the government "prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged." *United States v. Perlaza*, 439 F.3d 1149, 1171 n.24 (9th Cir. 2006) (quoting *Patterson v. New York*, 432 U.S. 197, 210 (1977)); *see also United States v. Gaudin*, 515 U.S. 506, 510 (1995). Our decision in *Read* acknowledges the government's burden to prove "[t]he existence of federal jurisdiction over the place in which the offense occurred . . . to the jury beyond a

reasonable doubt," 916 F.3d at 718, but excuses the government from being held to its proper burden.

I would therefore encourage the Court to reconsider *Read* in an appropriate case.