

Nos. 22-6587 and 22-6600

IN THE SUPREME COURT OF THE UNITED STATES

VERNON WHITE, PETITIONER

v.

UNITED STATES OF AMERICA

ERIC BANKS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly rejected petitioners' claim on appeal that they were entitled to relief from their 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. Reeves, No. 17-cr-103 (Aug. 16, 2018)

United States v. Britton, No. 17-cr-103 (Feb. 8, 2019)

United States v. Banks, No. 17-cr-103 (June 22, 2020)

United States v. White, No. 17-cr-103 (Oct. 29, 2020)

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

United States v. Banks, No. 20-50175 (Aug. 11, 2022)

United States v. White, No. 20-50323 (Aug. 11, 2022)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 3-13) is not published in the Federal Reporter but is available at 2022 WL 3278942.¹

¹ This brief refers to the petition appendix in No. 22-6587 as "Pet. App.," the petition in No. 22-6587 as "White Pet.," and the petition in No. 22-6600 as "Banks Pet."

JURISDICTION

The judgment of the court of appeals was entered on August 11, 2022. A petition for rehearing was denied on October 19, 2022 (Pet. App. 1-2). The petitions for writs of certiorari were filed on January 17, 2023. 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, petitioners were each convicted of assault with a dangerous weapon with intent to do bodily harm, in violation of 18 U.S.C. 113(a)(3), and assault resulting in serious bodily injury, in violation of 18 U.S.C. 113(a)(6). White Judgment 1; Banks Judgment 1. Petitioner White was sentenced to 68 months of imprisonment, to be followed by three years of supervised release. White Judgment 1. Petitioner Banks was sentenced to 74 months of imprisonment, to be followed by three years of supervised release. Banks Judgment 1. The court of appeals affirmed. Pet. App. 3-13.

1. On August 4, 2015, petitioners and two other inmates assaulted a fellow inmate, Quincy Alexander, at the United States Penitentiary (USP) in Victorville, California. See 20-50175 Gov't C.A. Br. 5. They attacked Alexander with homemade shanks on a soccer field, leaving him with multiple stab wounds on his back and right arm, as well as scalp lacerations. Id. at 5-6. An

investigation determined that the attack was likely gang-related. Id. at 5.

At the time of the assault, White was serving a 120-month sentence following his federal convictions in the Northern District of California for bank robbery and escape. 20-50323 Gov't C.A. Br. 4-5. Banks was serving a 205-month sentence following his federal convictions in the District of Nevada for Hobbs Act robbery and using a firearm during and in relation to a crime of violence. 20-50175 Gov't C.A. Br. 4-5.

2. A federal grand jury in the Central District of California returned an indictment charging both petitioners with 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 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 jury viewed surveillance video of the assault. See 06/18/19 Tr. 17-31. And the government called three correctional officers who testified that they worked for the Federal Bureau of Prisons (BOP) at USP Victorville and that the assault occurred on the soccer field at that facility. See id. at 13-18; 06/19/19 Tr. 6-8, 84-87. A physician assistant similarly

testified that he worked for BOP at USP Victorville and had treated Alexander there after the assault. 06/19/19 Tr. 74-76, 80.

At the close of the government's case-in-chief, petitioners moved for a judgment of acquittal. 06/20/19 Tr. 1, at 14. Petitioners declined the district court's invitation to make arguments in support of that motion, and the court denied it. Ibid. At the close of trial, the parties jointly proposed jury instructions stating that, for each count, the government must prove beyond a reasonable doubt that "the assault took place at the United States Penitentiary in Victorville, California," D. Ct. Doc. 153, at 41-42 (May 20, 2019), and the court instructed the jury accordingly, 06/20/19 Tr. 2, at 29-30, 33. After instructing the jury on the offenses charged in the indictment, the court instructed the jury that it could alternatively find petitioners guilty of the lesser-included offense of simple assault within the special maritime and territorial jurisdiction of the United States. Id. at 29-34; see 18 U.S.C. 113(a)(5).

During closing arguments, White's counsel urged conviction on that lesser-included offense. He stated that "White is guilty of simple assault" and invited the jury to "come together in unity to find that [he] is guilty of simple assault." 06/20/19 Tr. 2, at 53, 62. Banks's counsel likewise told the jury that his "client is * * * admitting that he committed a crime" but argued that

Banks was only "guilty of * * * the crime of assault." Id. at 64; see id. at 76.

The jury rejected petitioners' argument that they should be convicted only of simple assault, instead finding them each guilty of assault with a dangerous weapon with intent to do bodily harm, in violation of 18 U.S.C. 113(a)(3), and assault resulting in serious bodily injury, in violation of 18 U.S.C. 113(a)(6).

3. The court of appeals affirmed in an unpublished memorandum opinion. Pet. App. 3-13.

On appeal, petitioners contended for the first time that the government had presented insufficient evidence that the assault occurred within the special maritime and territorial jurisdiction of the United States. 20-50175 Pet. C.A. Br. 51-53; 20-50323 Pet. C.A. Br. 24-27. And they further contended 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. 20-50175 Pet. C.A. Br. 53-56; 20-50323 Pet. C.A. Br. 27-30.

The government responded that petitioners had waived any such challenge because they had conceded guilt in closing argument on the lesser crime of simple assault within the special maritime and territorial jurisdiction of the United States, which has the same jurisdictional requirement. 20-50175 Gov't C.A. Br. 54-56. The government also maintained that, in any event, if petitioners'

argument were properly before the court of appeals, the evidence established the jurisdictional component of petitioners' offenses, citing the trial testimony of the BOP employees. See id. at 56-59; see also pp. 3-4, supra.

The government additionally observed 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. 20-50175 Gov't C.A. Br. 59-63. 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 court had explained that it "c[ould] * * * take judicial notice" of records on appeal demonstrating that USP Victorville was within the special maritime and territorial jurisdiction of the United States. Id. at 761. The government accordingly noted that the court could in this case likewise take judicial notice of the records submitted in Redmond to recognize that the jurisdictional requirement was satisfied. 20-50175 Gov't C.A. Br. 59-60.

The court of appeals rejected petitioners' challenge. Pet. App. 6-7. The court referenced the testimony of the correctional officers, who told the jury that they worked for BOP at USP Victorville at the time of the attack and that the attack had occurred within that facility. Ibid. And the court cited its earlier decision in United States v. Read, 918 F.3d 712 (9th Cir. 2019), which found that "th[is] type of uncontroverted testimony"

was sufficient to establish that a correctional facility was within the special maritime and territorial jurisdiction of the United States. Pet. App. 6. The court therefore found it “unnecessary” to “reach whether [petitioners] waived their sufficiency of the evidence challenge by arguing during closing that they were guilty of the lesser included offense of simple assault.” Id. at 7 n.2.

Judge Koh concurred, agreeing that Read foreclosed petitioners’ claim but asserting “that Read was incorrectly decided” and “encourag[ing]” the court of appeals “to reconsider Read in an appropriate case.” Pet. App. 8, 13; see id. at 8-13.

ARGUMENT

Petitioners renew their appellate claim (White Pet. 5-9; Banks Pet. 12-13) that they are entitled to relief from their convictions on the theory that the government failed to establish that they stabbed Alexander “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 petitioners’ 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 petitioners conceded the jurisdictional requirement at trial, and also forfeited their claim regarding it by raising it only on appeal, where it would at best be reviewable only for plain error. This Court has repeatedly

and recently denied petitions for writs of certiorari presenting similar questions, see Ray v. United States, 141 S. Ct. 1503 (2021) (No. 20-6414); 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. Petitioners contend (White Pet. 5-9; Banks Pet. 12-13) that the government presented insufficient evidence that their assault on Alexander at USP Victorville occurred within the special maritime and territorial jurisdiction of the United States. That contention lacks merit.

a. As petitioners acknowledge, the government presented ample evidence to the jury that petitioners committed the assault at USP Victorville. See pp. 3-4, supra; White Pet. 4 ("Video surveillance captured [petitioner] White [and others] assaulting a fellow inmate at the United States Penitentiary at Victorville."); Banks Pet. 1 ("[T]he government introduced evidence that the charged assault occurred in a federal prison."). And 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).² Although the government was required to prove to the jury that the assault

² We have served petitioners 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.

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 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 observed 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 recognition that USP Victorville is within the special maritime and territorial jurisdiction of the United States is a 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 to the documents in the Redmond appeal as demonstrating that the assault committed by petitioners at USP Victorville occurred within the special maritime and

territorial jurisdiction of the United States. See 20-50175 Gov't C.A. Br. 59-60.

Although the court of appeals' unpublished decision here did not discuss petitioners' forfeited claim on that issue at length, see Pet. App. 6-7, its disposition of the claim is correct. The jury heard "uncontroverted testimony," id. at 6, on the requisite component of the jurisdictional requirement -- that petitioners committed the assault at USP Victorville. See pp. 3-4, supra. Indeed, petitioners agreed to a jury instruction that required only proof that "the assault took place at the United States Penitentiary in Victorville, California." D. Ct. Doc. 153, at 41-42. And when the issue was raised on appeal, the documents presented in Redmond and the decision in that case illustrated that USP Victorville is within the special maritime and territorial jurisdiction of the United States. The jurisdictional component of Section 113(a) was therefore fully satisfied.

b. Petitioners nevertheless contend (White Pet. 7-9; Banks Pet. 1-2, 11-12) that their convictions are infirm because the government did not specifically introduce evidence at their trial that the federal government accepted jurisdiction over the land occupied by USP Victorville. But as explained above, such testimony was not necessary. 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 761-762, 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 while the government's witnesses did not specifically discuss whether the federal government had formally accepted jurisdiction over the land occupied by USP Victorville, that is explained by petitioners' failure to contest the issue at trial. 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 did not err in rejecting petitioners' appellate claim. Pet. App. 6-7.

Petitioners also assert (White Pet. 8-9; Banks Pet. 8-11) 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.³ But that factbound dispute, regarding the status of

³ Banks incorrectly asserts (Pet. 2) that the court of appeals' subsequent decision in Redmond's post-conviction proceedings "acknowledged that the evidence" previously "submitted by the government * * * to establish jurisdiction was insufficient." But Banks cites a withdrawn panel opinion that, moreover, did not even go as far as he asserts. See Redmond v. United States, No. 21-55142, 2022 WL 1658445, at *2 (9th Cir.) (noting only "that there could well be merit to the claim that the transfer of jurisdiction * * * was not legally effectuated") (emphasis added), withdrawn and superseded on denial of reh'g en banc, No. 21-55142, 2022 WL 4461379 (9th Cir. 2022), cert. denied, No. 22-6984 (Apr. 3, 2023). And the superseding opinion simply noted the evidence relied on by the panel that took judicial notice

a single parcel of federal land that lies within the boundaries of a single federal circuit court, does not warrant further review. Indeed, this Court denied the petition for a writ of certiorari in Redmond, supra (No. 18-8719), and it likewise denied the petition for a writ of certiorari in Ray, supra (No. 20-6414), which also presented the question whether USP Victorville is within the special maritime and territorial jurisdiction of the United States. The same result is warranted here.

Petitioners also fault the court of appeals for relying on its previous decision in United States v. Read, 918 F.3d 712 (2019), and assert that the Ninth Circuit “ignores completely the way federal jurisdiction must be obtained post-1940.” White Pet. 8; see Banks Pet. 12. But Read made no such error. Read instead addressed the types of evidence that can be used to prove the jurisdictional requirement, recognizing 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. Petitioners assert (White Pet. 7; Banks Pet. 6-7) that the decision below conflicts with this Court’s decisions in Adams v. United States, 319 U.S. 312 (1943), and United States v. State

of USP Victorville’s jurisdictional status in Redmond’s direct appeal. See Redmond v. United States, No. 21-55142, 2022 WL 4461379, at *2 n.1 (9th Cir. 2022).

Tax Commission, 412 U.S. 363 (1973), and implicates a division in the courts of appeals. Those assertions lack merit.

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. 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 requirement that USP Victorville be within the special maritime and territorial jurisdiction of the United States, relying on evidence specific to that institution. And in State Tax Commission, this Court relied on letters and other historical sources in concluding that an Air Force base did fall within federal jurisdiction under the same statute that was at issue in Adams. See 412 U.S. at 371-373. That approach is identical to the approach that the court of appeals took in Redmond. See 748 Fed. Appx. at 761-762.

Petitioners also err (White Pet. 6-7; Banks Pet. 5-7, 12) 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 Section 113(a) in the district court, ibid., 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," id. 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 in Davis does not conflict with the affirmance here because the government here observed that the court of appeals could, if necessary, take judicial notice, as it had in Redmond, that USP Victorville is within the special maritime and territorial jurisdiction of the United States -- and thereby follow the same approach that the Second Circuit did in Davis. Even if the extent

to which the court of appeals here considered the record in Redmond is unclear, that does not suggest any conflict between the Second and Ninth Circuits.

Banks likewise errs (Pet. 3, 7, 12) in suggesting that the affirmance in this case conflicts with the Eighth Circuit's decision in United States v. Love, 20 F.4th 407 (2021). In Love, the Eighth Circuit agreed that a "district court may take judicial notice that a place is within the special maritime and territorial jurisdiction of the United States and not submit that issue to the jury." Id. at 412. It then took judicial notice of a 1931 deed conveying the disputed land where the assault occurred (a BOP medical facility) to the United States. Ibid. Because that analysis mirrors the approach undertaken by the court of appeals in Redmond with respect to USP Victorville, no disagreement exists between the Eighth and Ninth Circuits.

Petitioners' remaining references (White Pet. 7; Banks Pet. 6) to decisions discussing the status of other parcels of land are misplaced for the simple reason that there was no indication in those cases that the United States accepted jurisdiction over the disputed property. See United States ex rel. Greer v. Pate, 393 F.2d 44, 46 (7th Cir.) (citing the "uncontroverted" fact that "no notice of acceptance of jurisdiction * * * was ever filed with the State of Illinois" for the property and holding that a habeas petitioner had properly been tried in state court), cert. denied,

393 U.S. 890 (1968); DeKalb County, Georgia v. Henry C. Beck Co., 382 F.2d 992, 995 (5th Cir. 1967) (“[T]he United States has taken no affirmative action to accept jurisdiction over the land.”); United States v. Williams, 17 M.J. 207, 214 (C.M.A. 1984) (noting that “the record * * * contains a number of maps and other exhibits which show various areas of Fort Hood and portray the jurisdictional status of those areas,” including certain areas that “have never been subject to any Federal jurisdiction”). Here, in contrast, the government has provided evidence that it accepted jurisdiction over USP Victorville. See Redmond, 748 Fed. Appx. at 761. And to the extent that petitioners are challenging the court of appeals’ acceptance of that evidence in Redmond, that specific determination about an institution located entirely in the Ninth Circuit does not conflict with the decisions petitioners identify, and that issue is exceedingly unlikely ever to arise in any other circuit.

3. At all events, this case would be a poor vehicle to address the question presented. Petitioners never contested the government’s jurisdictional evidence in the district court. While petitioners summarily moved for a judgment of acquittal, see 06/20/19 Tr. 1, at 14, they did not assert that insufficient evidence supported the jurisdictional requirement of the Section 113(a) offenses. And in their closing arguments, petitioners repeatedly conceded that they were guilty of the lesser-included

offense of simple assault within the special maritime and territorial jurisdiction of the United States, in violation of Section 113(a)(5). See pp. 4-5, supra. Those statements reflect a "binding concession" of all the elements supporting the simple-assault charge -- including a concession that the assault occurred within the special maritime and territorial jurisdiction of the United States. United States v. Bentson, 947 F.2d 1353, 1356 (9th Cir. 1991), cert. denied, 504 U.S. 958 (1992); see United States v. Houser, 754 F.3d 1335, 1352 (11th Cir. 2014) (similar).

Even if petitioners had not affirmatively conceded the jurisdictional element at closing argument, their failure to raise an objection at trial means they could obtain relief only by satisfying the requirements of plain-error review. See Fed. R. Crim. P. 52(b); Greer v. United States, 141 S. Ct. 2090, 2096 (2021). And petitioners have not suggested that they could demonstrate that (1) the district court committed an "error"; (2) the error was "clear" or "obvious"; (3) the error affected their "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 petitioners could demonstrate that they meet the first two plain-error requirements, they would be unable to establish that the allegedly deficient trial testimony addressing the jurisdictional element affected

their 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 761-762, which is a legislative fact that is equally true in this case.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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