APPENDIX

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APPENDIX A

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UNITED STATES COURT OF APPEAL
FOR THE SIXTH CIRCUIT

No. 23-5427

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.

VICTOR EVERETTE SILVERS,
Defendant-Appellant.

Appeal from the United States District Court for the
Western District of Kentucky at Paducah.
No. 5:18-cr-00050-1—Benjamin J. Beaton,
District Judge.

Argued: December 10, 2024
Decided and Filed: February 20, 2025
Before:
MOORE, CLAY, and THAPAR, Circuit Judges.

* * *

OPINION

KAREN NELSON MOORE, Circuit Judge. Brittney Silvers, an active member of the United States

Army, was shot and killed while living on Fort Campbell, an Army base on the border of Kentucky and Tennessee. A jury found Brittney's estranged husband, Victor Silvers ("Silvers"), guilty of her premeditated murder. Following his conviction, the district court sentenced Silvers to life in prison.

On appeal, Silvers challenges his conviction and sentence on three grounds. First, he argues that the district court erred in taking judicial notice of the fact that Fort Campbell was within the United States' special maritime and territorial jurisdiction. Second, he argues that the district court abused its discretion in denying Silvers's motion to exclude a juror who wore a shirt supporting military veterans during the trial and who had served in the United States Navy, and in failing to ask a broader question during voir dire about prospective jurors' prior military service. Third, he challenges the constitutionality of his mandatory life sentence, arguing that it constitutes cruel and unusual punishment in violation of the Eighth Amendment.

Because the district court did not err in taking judicial notice of the fact of the United States' jurisdiction over Fort Campbell, nor did it abuse its discretion in denying Silvers relief based on Juror 5's alleged bias, we **AFFIRM** his conviction. And because Silvers's life sentence is constitutional under binding Supreme Court precedent, we also **AFFIRM** his sentence.

I. FACTUAL BACKGROUND

A. The Murder of Brittney Silvers

On the evening of October 14, 2018, neighbors found Brittney Silvers outside her apartment at 4217 Contreras Court, Fort Campbell, Kentucky with multiple gunshot wounds. R. 307 (PSR at ¶ 38) (Page ID #2168).

Despite neighbors' attempts to resuscitate her, Brittney Silvers was pronounced dead shortly after being transported by EMS to the Blanchfield Army Community Hospital. *Id.* Brittney Silvers's boyfriend, James Keating, was also found at the scene with a gunshot wound to his leg. *Id.*

Special Agents of the Military Police responded to the scene. *Id.* at ¶ 39 (Page ID #2169). When they arrived, they saw a man sitting in a car parked in Brittney Silvers's driveway who was being held at gunpoint by Military Police officers. *Id.* Agents noted that the man was shaking and mumbling "where is my wife, is my wife okay?" and removed him from the car and arrested him. *Id.* The man in the car was Victor Everette Silvers ("Silvers"), Brittney Silvers's estranged husband. *Id.* at ¶ 39, 41 (Page ID #2169).

Victor and Brittney Silvers were married in December 2011. R. 342 (Trial Tr. II at 14) (Page ID #2539). Brittney Silvers was a logistics specialist with the United States Army and was stationed at Fort Campbell, an Army installation located on the border of Kentucky and Tennessee. *Id.* at 14-15 (Page ID #2539-40). Although the two initially lived together on the base, at some point, they separated and Silvers moved to Clarksville, Tennessee. R. 349 (Trial Tr. V at 93-95) (Page ID #3157-59). Both began dating other people, and Brittney Silvers began a relationship with Keating. *Id.* at 94-95 (Page ID #3158-59).

In September 2018, Brittney Silvers sought and obtained an emergency protection order after Silvers called both Brittney Silvers and her mother and threatened Brittney Silvers's life and that of Keating. R. 342 (Trial Tr. II at 16-17, 78) (Page ID #2541-42, 2603); R. 343 (Trial Tr. III at 50) (Page ID #2739). A judge converted

that order into a domestic violence protection order on October 9, 2018 following a hearing that Silvers failed to attend. R. 342 (Trial Tr. II at 85-87) (Page ID #2610-12). The order restrained Silvers from having any physical contact with Brittney Silvers and forbade Silvers from possessing any firearms. *Id.* at 85-86 (Page ID #2610-11).

At trial, several eyewitnesses—including Keating—testified about the events of the night of October 14, 2018. All testified that Silvers was the person who had shot Brittney Silvers three times in the head and chest and who had shot Keating in the leg. *Id.* at 114 (Page ID #2639); R. 343 (Trial Tr. III at 54-55) (Page ID #2743-44). Although Silvers initially denied any involvement with the shootings, he later admitted to shooting Brittney Silvers and intending to kill Keating. R. 349 (Trial Tr. V at 105-06, 108) (Page ID #3169-70, 3172).

B. The Proceedings Below

A grand jury indicted Silvers on November 13, 2018 on counts of first-degree murder, attempted first-degree murder, domestic violence, violation of a protection order, possession of a firearm by a prohibited person, and the carry, use, and discharge of a firearm during a crime of violence. R. 14 (Indictment at 1-5) (Page ID #66-70). The government filed a second superseding indictment on November 8, 2022, that adjusted one count of the carry, use, and discharge of a firearm during a crime of violence to the carry, use, and discharge of a firearm during a crime of violence resulting in death. R. 239 (Second Super. Indictment at 1-5) (Page ID #1480-84).

1. Motion for Judicial Notice and Evidentiary Hearing

Four of the seven counts of the superseding indictment—Counts One (first-degree murder), Two (attempted murder), Three (domestic violence), and Four (violation of a protection order)—included as an element of the charge that the crime took place within the special maritime and territorial jurisdiction of the United States. 18 U.S.C. §§ 1111(b); 1113; 2261(a)(1); 2262(a)(1). In charging Silvers, the government alleged that the crime had occurred on Fort Campbell, a military base over which the federal government exercises jurisdiction. *See generally* R. 239 (Second Super. Indictment).

Prior to Silvers's trial, the government moved the district court to take judicial notice of the fact that Brittney Silvers's apartment at 4217 Contreras Court, Fort Campbell, Kentucky, and the immediate vicinity, was within the special maritime and territorial jurisdiction of the United States. R. 184 (Mot. for Jud. Not. at 1-11) (Page ID #999–1009). Silvers opposed the motion, arguing that the question should instead be presented to the jury. R. 209 (Opp. to Jud. Not. at 1-12) (Page ID #1119-30).

The district court held a hearing on the motion at which it reviewed the government's proffered evidence of the federal government's jurisdiction over Fort Campbell and heard arguments from both parties as to whether the question was suited for resolution by the judge or a jury. *See generally* R. 292 (Jud. Not. Hr'g Tr.). The government presented three witnesses, all members of the Army Corps of Engineers: the Corps's chief of the Military Branch in the Real Estate Division in the Louisville District, who testified that the United States had exclusive jurisdiction over Fort Campbell, *id.*

at 5 (Page ID #1837); a Corps surveyor, who identified the tract of land where Brittney Silvers lived as being within Fort Campbell, *id.* at 9-10 (Page ID #1841-42); and a Corps realty specialist, who, using historical documents, testified that the United States had accepted jurisdiction over the land that would become Fort Campbell, *id.* at 26, 30 (Page ID #1858, 1862). Specifically, the real-estate specialist showed (1) the 1942 final deed transferring the land to the United States; and (2) a series of letters between the Secretary of War and Kentucky's then-governors in which the Secretary of War accepted jurisdiction over the land that would become Fort Campbell. *Id.* at 23-26 (Page ID #1855-58); R. 355-5 (Deed at 1-4) (Page ID #3412-15), 355-6 (Apr. 28, 1945 Letter) (Page ID #3416), 355-7 (Aug. 3, 1945 Letter) (Page ID #3417), 355-11 (Mar. 29, 1943 Letter) (Page ID #3448), 355-12 (Jan. 3, 1944 Letter) (Page ID #3449). Silvers challenged the authenticity of all of the letters. R. 292 (Jud. Not. Hrg. Tr. at 26-27, 49-51) (Page ID #1858-59, 1881-83).

After considering the evidence and arguments from both parties on the motion, the district court summarily overruled Silvers's objection and granted the government's motion. *Id.* at 57 (Page ID #1889). At trial, the district court gave the following instruction to the jury as to the first-degree murder charge:

> The fourth element refers to the special maritime and territorial jurisdiction of the United States. 4217 Contreras Court is located within the special maritime and territorial jurisdiction of the United States. If you find beyond a reasonable doubt that the crime occurred at 4217 Contreras Court, that is sufficient to find that it occurred within the special maritime and territorial jurisdiction of the United States.

R. 350 (Trial Tr. VI at 27) (Page ID #3246). The district court further specified that this jurisdiction instruction applied to the attempted-murder charge, the domestic-violence charge, and the violation of a protection order charge. *Id.* at 30-32 (Page ID #3249-50). Following Silvers's trial, the district court issued a supplemental opinion and order setting forth its reasoning and reaffirming its decision to grant the government's motion to "take judicial notice that 4217 Contreras Court at Fort Campbell, Kentucky, is within the special maritime and territorial jurisdiction of the United States." R. 316 (Juris. Order at 1-11) (Page ID #2240-50).

2. Voir Dire and Questioning of Juror 5

Following the district court's resolution of both parties' pretrial motions, Silvers's case proceeded to trial. Both parties submitted proposed voir dire questions for the district court's consideration. R. 160-1 (Def. Juror Q. at 1-10) (Page ID #675-86); 225 (Govt. Voir Dire at 1-4) (Page ID #1272-75). Each proposed questionnaire suggested some version of the same question: whether any prospective juror, or someone close to them, had served in the United States military. R. 160-1 (Def. Juror Q. #14 at 5) (Page ID #679) ("Have you, an immediate family member or anyone close to you ever served in the U.S. military? If so, please describe the branch of service, rank, place of service, dates of service, and the type of discharge received … ."); R. 225 (Govt. Voir Dire Q. #9 at 2) (Page ID #1273) ("Have you or anyone close to you been a member of the United States Military? What branch?"). During voir dire, the district court asked a slightly different version of the question:

> Does anyone here, or anyone in your immediate family, work with the United States Justice

> Department, the U.S. Army, the FBI, the ATF, or the Christian County Sheriff's Office?

R. 341 (Trial Tr. I at 111) (Page ID #2451). Neither party objected to the district court's question, and a jury was seated and sworn.

Silvers's trial began on November 29, 2022. On the first day of trial, the defense brought to the district court's attention that one of the jurors, Juror 5, was wearing a shirt made by Til Valhalla Project ("TVP"), a company that donates its proceeds to honor fallen soldiers. R. 342 (Trial Tr. II at 99-100) (Page ID #2624-25). Silvers asked the district court to question Juror 5 as to whether the shirt had any significance to him and whether the subject matter of the trial affected his choice to wear it. *Id.* at 100 (Page ID #2625). At the end of the day, the district court asked Juror 5 to stay back and engaged him in the following line of questioning:

> [THE COURT]: You're Juror Number 5; correct?
>
> A JUROR: Yes, sir.
>
> THE COURT: Someone in the court noticed the TVP shirt that you're wearing today, and I think that may—do you know what the Valhalla Project is?
>
> A JUROR: Yeah, it's just the clothing line that's ran by veterans.
>
> THE COURT: Okay. And we've heard some testimony and discussion yesterday about military personnel and so forth. Out of curiosity, is there any connection between your wearing that shirt today and anything going on in the case?

> A JUROR: No. The only thing is I'm a veteran, that's all.
>
> THE COURT: Okay. And when did you serve? I think you told me yesterday, but I can't recall.
>
> A JUROR: No, the only questions you asked yesterday was Army. I'm with the Navy.
>
> THE COURT: I see. I see. Okay. And I apologize for misremembering.

Id. at 156 (Page ID #2681). When asked why he had chosen to wear that specific shirt to trial, Juror 5 responded that he worked in fields such that most of his clothes were dirty and that his "clean stuff is usually this." *Id.* at 157 (Page ID #2682). The district court then asked Juror 5 whether his past military experience had any bearing on his ability to be a fair and impartial juror in the case:

> THE COURT: If I had asked yesterday the question "Was anyone here—not just Army, but, you know, served in the military?" And you would have said yes and I followed up and asked you, "Is there anything about your service or folks you know that would affect your ability to serve as a fair and impartial juror in a case that involves the military—the Army context instead of another branch," would you—how would you have responded?
>
> A JUROR: I don't think it'll affect me whatsoever.

Id. The district court then excused Juror 5, and neither party raised an objection to Juror 5's continued service on the jury. *Id.* at 158 (Page ID #2683).

The next morning, however, Silvers moved to dismiss Juror 5 on the ground that he had been dishonest during voir dire by failing to disclose his time in the Navy. R. 343 (Trial Tr. III at 9) (Page ID #2698). Silvers's argument was that, even though the district court had asked potential jurors only about any connection to the Army, other potential jurors had volunteered their connections to other branches of the military, and Juror 5 should have done the same. *Id.* at 9-10 (Page ID #2698-99). In response to this argument, the district court went through each of the responses that potential jurors had given involving other branches of the military. *Id.* at 10-12 (Page ID #2699-701). The district court then stated,

> I disagree [that I was speaking of the military]. I think I was clearly speaking about the Army. That led to some answers that were broader, but I believe all the answers that we received were connected in one way or another to the fact—the items I mentioned specifically—Fort Campbell, law enforcement, Army.

Id. at 12 (Page ID #2701). The district court thus concluded that Juror 5 had not made any "tacit misrepresentation" by failing to answer the voir dire question and found Juror 5's explanation for having worn the TVP shirt credible. *Id.* The district court then denied Silvers's motion to strike the juror. *Id.*

Silvers's trial continued. Then, on the sixth and final day of trial, the jury returned a verdict of guilty as to all seven counts. R. 282 (Verdict at 1-7) (Page ID #1736-42).

3. Sentencing

Before Silvers's sentencing, the Probation Office submitted a Presentence Investigation Report ("PSR")

computing Silvers's total offense level as 43 and his criminal history category as II, with a resulting Guidelines range of life imprisonment. R. 307 (PSR at ¶ 76, 91, 121) (Page ID #2174, 2179, 2183). More important than the advisory Guidelines range in calculating that sentence, however, was the fact that Silvers's conviction for first-degree murder under 18 U.S.C. § 1111(b) carried a mandatory life sentence. *Id.* at ¶ 119 (Page ID #2183). Silvers's conviction for the carry, use, and discharge of a firearm during a crime of violence—the attempted murder of Keating—under 18 U.S.C. § 924(c)(1)(A)(iii) also carried a mandatory consecutive term of imprisonment of 120 months. *Id.* at ¶ 119-20; R. 239 (Second Super. Indictment at 5) (Page ID #1484).

At sentencing, Silvers argued that the mandatory life sentence accompanying his conviction under § 1111(b) was unconstitutional because it constituted cruel and unusual punishment in violation of the Eighth Amendment. R. 344 (Sent'g Tr. at 32-33) (Page ID #2823-24). The district court, recognizing that the life sentence was "extremely serious and severe," nevertheless concluded that it was "not unconstitutional in light of the precedent that the lawyers have discussed, and it's not disproportionate to the extremely serious crimes at issue here." *Id.* at 37 (Page ID #2828). The district court then imposed a sentence of life imprisonment for Brittney Silvers's murder plus a consecutive term of ten years of imprisonment for the discharge of a firearm during the attempted murder of Keating. *Id.* at 38 (Page ID #2829); R. 325 (Judgment of Sent. at 3) (Page ID #2297). The district court specified that this sentence was to run concurrently with a twenty-year sentence, a ten-year sentence, and a second sentence of life imprisonment on the other counts of conviction. R. 344 (Sent'g Tr. at 38)

(Page ID #2829). Silvers timely appealed. R. 326 (Notice of Appeal at 1) (Page ID #2303).

II. DISCUSSION

A. Judicial Notice of Jurisdiction

The first issue that Silvers raises on appeal is whether the district court erroneously determined that Fort Campbell, the Kentucky Army base where Brittney Silvers was killed, was within the special maritime and territorial jurisdiction of the United States and improperly instructed the jury to take judicial notice of that fact instead of submitting that question to the jury. Before analyzing this question of first impression in our Circuit, we pause to clarify what it means for a particular location to be within the federal government's special maritime and territorial jurisdiction.

1. Defining Special Maritime and Territorial Jurisdiction

Four of the seven counts of Silvers's conviction—his convictions under 18 U.S.C. § 1111(b) (murder), § 1113 (attempted murder), § 2261(a)(1) (domestic violence), and § 2262(a)(1) (violation of a protection order)—include as a necessary element that the crime took place "within the special maritime and territorial jurisdiction of the United States." So, to obtain a conviction under 18 U.S.C. §§ 1111(b), 1113, 2261(a)(1), or 2262(a)(1), the government must prove that the crime took place within the federal government's "special maritime and territorial jurisdiction." In relevant part, federal law defines "special maritime and territorial jurisdiction of the United States" as

> [a]ny 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).

As the district court observed, "[c]ounterintuitively, perhaps, the acquisition of land or exercise of control by the U.S. government does not create even a presumption that federal jurisdiction applies there." R. 316 (Juris. Order at 2) (Page ID #2241) (citing *United States v. Williams*, 17 M.J. 207, 211 (C.M.A. 1984) ("Although some may assume that a military installation automatically comes within Federal jurisdiction, that assumption is incorrect.")). Instead, pursuant to statute, to show that a particular location is within the special maritime and territorial jurisdiction of the United States, the government must prove that (1) the state in which the at-issue land is located has consented to transfer the land to the jurisdiction of the United States and (2) that the federal government has accepted that transfer of jurisdiction. 40 U.S.C. § 3112(b); *see Paul v. United States*, 371 U.S. 245, 264 (1963) ("Since 1940 Congress has required the United States to assent to the transfer of jurisdiction over the property, however it may be acquired.")

In Silvers's case, the district court determined, based upon evidence that the government presented at an in-depth pretrial evidentiary hearing, that Kentucky had agreed to transfer Fort Campbell to the federal government and that the federal government had

acquiesced to that transfer.[1] R. 316 (Juris. Order. at 8) (Page ID #2247). At trial, the district court told the jury that 4217 Contreras Court is within the United States' special maritime and territorial jurisdiction, thus directing the jury to find that the jurisdictional element of the charged crimes had been satisfied if the jury found beyond a reasonable doubt that the crime occurred at 4217 Contreras Court. R. 350 (Trial Tr. VI at 27) (Page ID #3246).

On appeal, Silvers argues that the district court erred in making this determination because whether the federal government accepted the transfer of jurisdiction was a question of fact that should be submitted to the jury, not a question of law for the court to decide. We turn to that question next.

2. Standard of Review

Silvers's challenge to his conviction is a constitutional one: whether, under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *United States v. Gaudin*, 515 U.S. 506 (1995), the Fifth and Sixth Amendments require that a jury, not a judge, determine beyond a reasonable doubt that a location is within the special maritime and territorial jurisdiction of the United States. We review constitutional questions de novo. *United States v. Blackwell*, 459 F.3d 739, 752 (6th Cir. 2006). We therefore review afresh whether the district court properly instructed the jury to take judicial notice of the jurisdictional status of

[1]Both below and on appeal, Silvers concedes that the government has proven that Kentucky consented to the transfer of jurisdiction over Fort Campbell to the United States. Appellant Br. at 28; R. 209 (Opp. to Jud. Not. at 3 n.2) (Page ID #1121). He contests only the government's accession.

Fort Campbell instead of submitting the question to the jury.

3. Permissibility of Taking Judicial Notice of Special Maritime or Territorial Jurisdiction

We first consider the constitutional backdrop underlying Silvers's claim. In *Gaudin*, the Supreme Court held that the Due Process Clause of the Fifth Amendment and the Sixth Amendment right to a jury trial "require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." 515 U.S. at 510. As a result, the Court held that, where materiality—a mixed question of law and fact—was an element of the charged offense, the defendant had "the right to have a jury determine … his guilt of every element of the crime with which he is charged," including the materiality of his allegedly false statements. *Id.* at 512, 522–23. Subsequently, in *Apprendi*, the Supreme Court cited *Gaudin* for the proposition that, "[t]aken together, [the Sixth and Fourteenth Amendments] indisputably entitle a criminal defendant" to a jury determination of guilt as to each element of the offense charged. 530 U.S. at 477. The Court thus determined that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490.

Silvers argues that *Gaudin* and *Apprendi* require us to hold that, because federal jurisdiction is a necessary element of several of the offenses with which Silvers was charged, the question of whether a particular location—in this case, Fort Campbell—is within the United States' territorial jurisdiction must be proven to the jury

beyond a reasonable doubt. Appellant Br. at 25, 29-34. The government disagrees, arguing that neither case addressed the issue of special maritime and territorial jurisdiction and thus they "do not apply to the question now before this [c]ourt." Appellee Br. at 25.

We disagree with the notion that *Gaudin* and *Apprendi* are inapplicable to the case at bar simply because the cases did not address the very same subject. Both cases, and their progeny in our circuit, stand for the important proposition that each essential element of a crime with which a criminal defendant is charged must be proven to a jury beyond a reasonable doubt. And the jurisdictional element of a number of federal crimes—four crimes charged here—is one such essential element.

Critically, however, the jurisdictional element of crimes such as § 1111 includes two separate inquiries: first, whether the parcel of land falls within the United States' special maritime and territorial jurisdiction; and second, whether the alleged offense occurred within that area. *See United States v. Gabrion*, 517 F.3d 839, 871 (6th Cir. 2008) (Moore, J., concurring). Silvers is correct that the second inquiry is a question of fact that, under *Gaudin* and *Apprendi*, must be submitted to the jury and proven beyond a reasonable doubt. But the first inquiry—the pure question of a location's jurisdictional character—is a legal question, one which turns on legislative, not adjudicative, fact.

We first distinguished between adjudicative and legislative facts in *Dayco Corp. v. Federal Trade Commission*, 362 F.2d 180 (6th Cir. 1966). There, we stated that "'legislative facts' involve generalized factual propositions which could form the basis for a legislative ruling which would have application to some class of situations, while 'adjudicative facts' relate to, and are

determinative of, one individual situation or course of conduct." *Id.* at 186. Several years later, in *Toth v. Grand Trunk Railroad*, we defined "adjudicative facts" as "the facts of the particular case" and "legislative facts" as "facts 'which have relevance to legal reasoning …, whether in the formulation of a legal principle or ruling by a judge … or in the enactment of a legislative body.'" 306 F.3d 335, 349 (6th Cir. 2002) (quoting Fed. R. Evid. 201, advisory committee's note (1972)); *see also Ohio v. Collins (In re Madeline Marie Nursing Homes)*, 694 F.2d 433, 445 n.13 (6th Cir. 1982) (similarly quoting the advisory committee note to Federal Rule of Evidence 201 for the proposition that there are "fundamental differences between adjudicative facts and legislative facts" in that adjudicative facts, but not legislative facts, relate to a particular case). Most recently, in *United States v. Miller*, we defined the terms again, referring to "legislative fact[s]" as those "[]to be decided uniformly[]" and "adjudicative fact[s]" as those "[]to be decided anew by hundreds of district judges[.]" 982 F.3d 412, 430 (6th Cir. 2020). The general principle that adjudicative facts relate to the particular facts of a specific case while legislative facts relate to universally established facts that do not change from case to case thus appears to be well settled in this court.

Whether something is an adjudicative or legislative fact has crucial implications; namely, under Federal Rule of Evidence 201—the rule that governs judicial notice—a district court must instruct a jury that it may disregard a judicially noticed *adjudicative* fact, but need not do the same for a judicially noticed *legislative* fact. Fed. R. Evid. 201(a) ("This rule governs judicial notice of an adjudicative fact only, not a legislative fact."); *id.* at (f) ("In a criminal case, the court must instruct the jury that it may or may not accept the noticed [adjudicative] fact as

conclusive."). The rule thus highlights the difference between these two categories of facts: one (adjudicative facts) concerns facts that must be proven to a jury beyond a reasonable doubt, and the other (legislative facts) concerns facts which a court may conclude exist as a matter of law.

The pertinent question before us, then, is whether the existence of special maritime or territorial jurisdiction of the United States is an adjudicative fact or a legislative fact. We conclude that it is the latter.

In reaching this conclusion, we look first to the caselaw in this court, of which there is little. First, in *United States v. Harris*, a case in which the government had presented no evidence that Hamilton County, Ohio was within the Southern District of Ohio, we held that a "[d]istrict [c]ourt may take judicial notice of established geographical facts" without need for those facts to be proven to a jury beyond a reasonable doubt. 331 F.2d 600, 601 (6th Cir. 1964) (per curiam). Two subsequent opinions hinted that the same was true in the specific context of the fact of special maritime and territorial jurisdiction. *United States v. Blunt*, 558 F.2d 1245, 1247 (6th Cir. 1977) (per curiam) (stating, in dicta, that a "district court would have been correct in taking judicial notice under Rule 201, Federal Rules of Evidence, of the fact that the [Federal Correctional Institution in Lexington] was within the territorial jurisdiction of the United States"); *United States v. Booth*, No. 905748, 1991 WL 119530, at *5-6 (6th Cir. July 3, 1991) (table) (holding that "[w]hether a United States [Army base] is

within the special maritime and territorial jurisdiction of the United States is a legal issue, not a factual issue").[2]

Most recently, in *United States v. Gabrion*, we addressed a related issue: whether a district court erred in concluding, following an evidentiary hearing, that the United States had concurrent jurisdiction over a portion of the Manistee National Forest where the body of Gabrion's victim had been found. 517 F.3d at 845. We concluded that, as a matter of law, the federal government may exercise concurrent legislative jurisdiction over national forests. *Id.* at 848 (Batchelder, J.); 857 (Moore, J., concurring).[3] And in an opinion concurring in the judgment, we addressed the specific jurisdictional question raised here, stating that "in evaluating the [issue of special maritime or territorial jurisdiction] we must review both legal conclusions of the district court and factual conclusions of the jury." *Id.* at 870 (Moore, J., concurring). Although stating that "[w]hether the government proved that Gabrion murdered Timmerman on a parcel of national forest land over which the federal government has criminal jurisdiction is an element of the offense, which the government must prove to the jury beyond a reasonable doubt," the concurrence also noted that the jurisdictional element contains two separate inquiries: whether the parcel of land falls within the

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[2] *Booth*, although directly on point, is an unpublished opinion over thirty years old. It was also decided years before either *Gaudin* or *Apprendi*. So although persuasive to some degree, *Booth* does not decide this case.

[3] A majority of the panel also agreed that, for reasons that do not apply here, the location where Gabrion allegedly murdered the victim was within the special territorial and maritime jurisdiction of the United States. *Gabrion*, 517 F.3d at 856-57 (Batchelder, J.); 864 (Moore, J., concurring).

United States' special maritime and territorial jurisdiction, and whether the alleged offense happened within that parcel. *Id.* at 871 (citing *United States v. Prentiss*, 206 F.3d 960, 967 (10th Cir. 2000), *vacated on other grounds by United States v. Prentiss*, 256 F.3d 971, 981 (10th Cir. 2001) (en banc) ("While the court may determine, as a matter of law, the existence of federal jurisdiction over a geographic area, whether the locus of the offense is within that area is an essential element that must be resolved by the trier of fact.")). Our decision in *Gabrion*—which, notably, was decided after both *Gaudin* and *Apprendi*—thus seems to follow our prior intimation that we should treat the jurisdictional issue as a legal one.

The available out-of-circuit authority bolsters this conclusion. Two circuits have thus far directly decided this question in precedential opinions. First, in *United States v. Davis*, a case concerning the very same jurisdictional issue raised here, the Second Circuit held that

> to determine whether a crime took place within the special maritime and territorial jurisdiction of the United States requires two separate inquiries: one to determine the "locus of the crime" and one to determine the existence *vel non* of federal jurisdiction. *See* [*United States v. Hernandez-Fundora*, 58 F.3d 802, 810 (2d Cir. 1995)]. While the former is plainly a factual question for the jury to decide, the latter—turning on a fixed legal status that does not change from case to case and involving consideration of source materials (such as deeds, statutes, and treaties) that judges are better suited to evaluate than juries—has always been treated in this Circuit as a legal question that a court may decide on its own.

726 F.3d 357, 368 (2d Cir. 2013). Critically, the Second Circuit noted that "[n]othing in *Apprendi* or its progeny called this distinction into question, let alone suggested that questions of law must be submitted to the jury under the Sixth Amendment." *Id.* Accordingly, the Second Circuit held that "we may take judicial notice on appeal of whether a particular piece of land falls within the special maritime and territorial jurisdiction of the United States." *Id.*

Second, and most recently, in *United States v. Love*, the Eighth Circuit held 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, without violating a defendant's Sixth Amendment rights." 20 F.4th 407, 412 (8th Cir. 2021). In so holding, the Eighth Circuit determined that, based on that court's caselaw, "federal jurisdiction over a particular place is a question of law." *Id.* at 411. Next, the Eighth Circuit determined that "facts that resolve the special maritime and territorial jurisdiction question are legislative, not adjudicative" because "whether a particular facility is within federal jurisdiction is a universal truth." *Id.* at 411-12. Finally, the Eighth Circuit stated that "judicially noticed legislative facts need not be submitted to the jury." *Id.* at 412.[4]

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[4] Two other circuits have addressed this question in non-precedential opinions issued after *Gaudin* and *Apprendi*. In *United States v. Arroyo*, the Seventh Circuit held that, where a district court had taken "judicial notice, and instructed the jury to accept as fact, that Evansville is located in the Southern District of Indiana," the district court "did not invade the jury's province to decide … whether [Arroyo's] possession actually occurred in Evansville and thus within the district" because "the geographic boundaries of the judicial district encompassing Evansville … [is] not [an] element[]

Silvers argues that these cases are unpersuasive because they "simply fail to account for Gaudin." Appellant Br. at 30. As an initial matter, the Second Circuit's decision in *Davis* did address *Apprendi*, holding that the defendant had "cite[d] no authority for the proposition that *Apprendi* and its progeny cast into doubt decisions about whether, and when, a court may take judicial notice of a legislative fact, and … we have found no such authority ourselves." *Davis*, 726 F.3d at 367-68. More importantly, in each case, the court determined that the jurisdictional question was a legal one, thus removing the issue from the purview of *Gaudin* and *Apprendi*.

In the alternative, Silvers argues that we should look instead to the Ninth Circuit's decision in *United States v. Read*, 918 F.3d 712 (9th Cir. 2019), a case that, if read liberally, stands for the opposite conclusion than that reached by the Second and Eighth Circuits. In *Read*, the Ninth Circuit reviewed a defendant's challenge to the sufficiency of the evidence used to convict him under 18 U.S.C. § 113(a), "which prohibits an assault 'within the special maritime and territorial jurisdiction of the United States.'" *Id.* at 717 (quoting 18 U.S.C.

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of [the statute] or adjudicative fact[]"; but "legislative fact[] for the court to decide." 310 F. App'x 928, 929-30 (7th Cir. 2009).

Additionally, in *United States v. Styles*, the Fifth Circuit held the same as the Second and Eighth Circuits, writing that because "[a] district court may take judicial notice of the legislative fact that a federal installation is under federal jurisdiction[,] … [t]he district court did not err by taking notice that the VA Hospital in Styles's case was within the special territorial jurisdiction of the United States." 75 F. App'x 934, 935 (5th Cir. 2003) (per curiam). Importantly, however, pursuant to Fifth Circuit rules, *Styles* holds no precedential value. *Id.* at 935 n.*. Moreover, *Styles* appears to be in conflict with the Fifth Circuit's earlier, published opinion in *United States v. Perrien*, 274 F.3d 936 (5th Cir. 2001), discussed *infra*.

§ 113(a)). In reviewing Read's claim that the government had presented insufficient evidence that the assault took place within the federal government's jurisdiction, the Ninth Circuit held 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." *Id.* at 718 (citing *Gaudin*, 515 U.S. at 510). But the Ninth Circuit then held that, because "uncontradicted testimony from inmates or employees at a federal prison can establish" the required jurisdictional element, the government had, by eliciting testimony that the defendant was an inmate at the Phoenix federal prison at the time of the assault, adequately demonstrated that the federal prison "was under federal jurisdiction at the time Read allegedly committed the assault." *Id.*[5]

Unlike the Second and Eighth Circuits, the Ninth Circuit in *Read* made no distinction between the two inquiries included in the jurisdictional element: the existence of jurisdiction and the locus of the alleged crime. And unlike the case at bar, in *Read*, the government's jurisdictional evidence—which was in the form of testimony from the defendant and a correctional officer that Read "was an inmate of the Phoenix federal prison at the time of the assault"—was uncontested. *Id.* (internal quotation marks omitted). So the *Read* court did not, at least not clearly, decide the issue of whether a judge may determine the existence of special maritime or

[5] The Ninth Circuit also held that "the jury was properly instructed that the government had to prove the assaults took place in FCI-Phoenix," suggesting that the key issue for the jury to resolve was the physical location where the assaults took place. *See Read*, 918 F.3d at 719.

territorial jurisdiction and take judicial notice of that fact where the government's evidence of jurisdiction is contested.

Silvers also directs us to the D.C. Circuit's decision in *United States v. Khatallah*, 41 F.4th 608 (D.C. Cir. 2022) (per curiam), in support of his argument. There, the D.C. Circuit addressed the question of whether, on plain-error review, a defendant was entitled to a new trial because the district court did not instruct the jury about a jurisdictional element of the statute under which the defendant was charged. 41 F.4th at 627. The defendant was convicted under 18 U.S.C. § 1363, "which criminalizes the malicious destruction of buildings and property 'within the special maritime and territorial jurisdiction of the United States.'" *Id.* at 624 (quoting 18 U.S.C. § 1363). In bringing the charge, however, "the government relied only on the diplomatic premises definition of the special jurisdiction," which "applies to 'offenses committed by or against a national of the United States' on the premises of U.S. diplomatic facilities abroad." *Id.* (quoting 18 U.S.C. § 7(9)). But when both parties jointly proposed the jury instructions, neither party—nor the district court—recognized that the instructions omitted any mention of the requirement that the offense be committed "by or against a national of the United States." *Id.* at 627-28. So, when the district court, instructing the jury as to the statute's special jurisdictional element, "omit[ted] the preface that the crime in question must be committed 'by or against a national of the United States,'" the D.C. Circuit concluded that the district court had left out an essential element of the charge that the government was required to prove, and that the jury had to find, beyond a reasonable doubt. *Id.* at 628

(quoting 18 U.S.C. § 7(9)). The D.C. Circuit thus held that the district court's instructions were erroneous. *Id.*[6]

Although it addresses a similar issue to that raised in this case, *Khatallah* is distinguishable. Unlike this case, *Khatallah* involved the erroneous omission from the jury instructions of a statutory element of a charged crime. No party noticed that a required element of the charged crime was omitted from the jury instructions, nor was the error corrected at any point before the jury announced its verdict finding Khatallah guilty of Count 16. The question in *Khatallah* was therefore whether it was plain error for a district court to "omit[] a factual element that the jury had to find in order to convict Khatallah of violating" the statute, *id.* at 628—that is, whether the district court erred by failing to inform the jury that it must find that the government had proved that the offense was "committed by or against a national of the United States" in order to find Khatallah guilty. *See* 18 U.S.C. § 7(9). The D.C. Circuit answered that question in the affirmative. *Khatallah*, 41 F.4th at 628.

Here, the district court did not omit any factual element from the jury instructions. Put otherwise, the jury in this case was made aware that the statute under which Silvers had been charged required that the murder must have been committed at a location within the

[6] Despite concluding that the omission was in error and "assum[ing] for the purpose of [the] appeal that the error was plain," the D.C. Circuit nevertheless concluded that Khatallah failed to demonstrate that the error had affected his substantial rights because he failed to demonstrate "a 'reasonable probability' that the jury would have acquitted him of Count 16 if properly instructed." *Khatallah*, 41 F.4th at 628–30. The D.C. Circuit therefore found that Khatallah could not meet all four prongs of plain-error review and declined to vacate his conviction. *Id.* at 630.

special maritime and territorial jurisdiction of the United States. Having already determined in a pretrial ruling that Fort Campbell was within the special maritime and territorial jurisdiction of the United States, however, the district court instructed the jury that "4217 Contreras Court is located within the special maritime and territorial jurisdiction of the United States" and that, if the jury found beyond a reasonable doubt that Brittney Silvers's murder had occurred there, "that is sufficient to find that it occurred within the special maritime and territorial jurisdiction of the United States." R. 350 (Trial Tr. VI at 27) (Page ID #3246). Unlike the district court in *Khatallah*, then, the district court in this case did not neglect to inform the jury of any required factual element of the charged crime; instead, the district court, having concluding on its own that 4217 Contreras Court was within the special territorial and maritime jurisdiction of the United States, informed the jury of the element and instructed that the jury should find the element to have been satisfied if they found that the crime in fact occurred at 4217 Contreras Court. Had the district court, like the district court in *Khatallah*, neglected to inform the jury that the statute required the murder to have been committed within the special maritime and territorial jurisdiction of the United States, we would have concluded, like the *Khatallah* court, that such omission was in error. But because the facts of this case differ in this material way from those present in *Khatallah*, the cases are distinguishable.

Finally, Silvers points us to the Fifth Circuit's decision in *United States v. Perrien*, 274 F.3d 936 (5th Cir. 2001). In that case, decided shortly after *Apprendi*, the Fifth Circuit noted in a footnote that the holdings of *Gaudin* and *Apprendi* called into question that circuit's

prior caselaw holding that "the preponderance of the evidence standard applies to the jurisdictional elements" of certain statutes. *Id.* at 939 n.1. Concluding that "the requirement that [an] assault be committed 'within the special maritime and territorial jurisdiction of the United States' is unambiguously included in the offense-defining part of the statute," the Fifth Circuit "question[ed]" its precedent, stating that it "doubt[ed] that a mere preponderance of the evidence on this element could suffice to support a guilty verdict." *Id.*

As of now, however, the Fifth Circuit has yet to take up *Perrien's* invitation to overrule the circuit's precedent. And aside from one unpublished, and therefore nonprecedential, case, no panel of the Fifth Circuit has even discussed the *Perrien* footnote. *See United States v. Bailey*, 169 F. App'x 815, 821 (5th Cir. 2006) ("We share the *Perrien* court's concerns and likewise note the Supreme Court's discussions of the right to proof beyond a reasonable doubt afforded by the Due Process Clause and the Sixth Amendment."). So, while Fifth Circuit authority tilts in the direction of the outcome that Silvers urges, it does so with insufficient weight to persuade us to depart from the Second and Eighth Circuits.

The available authority in our circuit, as well as the modest weight of the on-point authority in other circuits, leads us to the ultimate conclusion that the question of the existence of special maritime or territorial jurisdiction is a legal question, turning on the immutable, universal fact of the jurisdictional character of a particular location. As a result, we conclude that a district court may determine the legal question of the existence *vel non* of federal jurisdiction and direct a jury to take judicial notice of the existence of that jurisdiction without violating the constitutional command set forth by *Gaudin* and *Apprendi*. We do not reach this conclusion

lightly; Silvers's argument, which urges us to consider carefully the constitutional implications of the removal of the jurisdictional question from the purview of the jury, is a fair and reasonable one. But our determination that the question of special maritime or territorial jurisdiction is a legal question vitiates Silvers's constitutional concern. We therefore affirm the district court's decision to take judicial notice that Brittney Silvers's apartment on Fort Campbell was within the United States's territorial jurisdiction.

B. Juror Bias

The next issue Silvers raises on appeal is whether the district court erred in denying Silvers's motion to dismiss Juror 5 when it was revealed, during trial, that Juror 5 had served in the Navy and by failing to ask potential jurors about prior military service during voir dire.

"[T]he right to a jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). "When a juror's impartiality is at issue, the relevant question is 'did a juror swear that he could set aside any opinion he might hold and decide the case on the evidence, and should the juror's protestation of impartiality have been believed.'" *United States v. Lanham*, 617 F.3d 873, 882 (6th Cir. 2010) (quoting *Dennis v. Mitchell*, 354 F.3d 511, 520 (6th Cir. 2003)).

Here, neither party disputes that Juror 5, when questioned, assured the court that he could "serve as a fair and impartial juror in a case that involves the military" despite having served in the Navy for five years. R. 342 (Trial Tr. II at 157) (Page ID #2682). But Silvers argues that the district court erred in accepting Juror 5's assurance of impartiality and should have instead

dismissed Juror 5 for bias against Silvers. Appellant Br. at 53. Silvers also argues that the district court erred in asking potential jurors during voir dire only whether they had served in the United States Army as opposed to asking a broader question about prior military service. *Id.* For the reasons set forth below, we conclude that the district court committed no reversible error on either count.

1. Standard of Review

We review a district court's decision to deny a motion for relief—in this case, a motion to dismiss a juror—because a juror failed fully to disclose information during voir dire for an abuse of discretion. *See Jones v. Kent County*, 115 F.4th 504, 517 (6th Cir. 2024). We apply the same abuse-of-discretion standard in reviewing a district court's voir dire of the jury venire. *United States v. Guzman*, 450 F.3d 627, 629 (6th Cir. 2006). "An abuse of discretion occurs when we are left with the definite and firm conviction that the [district] court … committed a clear error of judgment in the conclusion it reached … or where it improperly applies the law or uses an erroneous legal standard." *Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 504 (6th Cir. 2015) (quoting *United States v. Haywood*, 280 F.3d 715, 720 (6th Cir. 2002)). "Only in the case of manifest error will we overturn a finding of juror impartiality." *Guzman*, 450 F.3d at 629.

The government argues that Silvers failed to raise a challenge to the district court's question during voir dire, and that we should therefore consider the issue forfeited instead of reviewing the district court's decision for an abuse of discretion. Appellee Br. at 37. "When a party neglects to advance a particular issue in the lower court, we consider that issue forfeited on appeal." *Greer v. United States*, 938 F.3d 766, 770 (6th Cir. 2019). We

review forfeited claims under the plain-error standard of review. *United States v. Burrell*, 114 F.4th 537, 549 (6th Cir. 2024). We are inclined to agree with the government—during voir dire, no objection was lodged to the at-issue question by either party, nor did Silvers object when the district court concluded questioning on the Army service issue. R. 341 (Trial Tr. I at 111, 116) (Page ID #2451, 2456-58) (asking if "[a]nyone else" had Army connections to report). However, we need not decide the issue, because even under the more lenient abuse-of-discretion standard, Silvers's challenge fails.

2. The District Court's Impartiality Ruling

Although neither party explicitly frames it as such, the issue presented here is one of alleged juror nondisclosure. The legal framework under which we evaluate claims of juror nondisclosure comes from *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984). "Under *McDonough*, for a prospective juror's nondisclosure to warrant a new trial, a defendant must show that (1) the juror 'failed to answer honestly a material question on *voir dire*,' and (2) 'a correct response would have provided a valid basis for a challenge for cause.'" *English v. Berghuis*, 900 F.3d 804, 813 (6th Cir. 2018) (quoting *McDonough*, 464 U.S. at 556). Put differently, "the nondisclosure must have denied the defendant his Sixth Amendment right to an impartial jury." *Id.*

Silvers argues that the district court abused its discretion in finding that Juror 5 honestly answered the district court's question about military service during voir dire. Appellant Br. at 56, 61. In support of this argument, Silvers claims that, even though the district court's question during voir dire was whether any potential juror, or anyone in their immediate family, had "work[ed] with … the U.S. Army," R. 341 (Trial Tr. I at

111) (Page ID #2451), the court "had actually broadened the inquiry" by asking follow-up questions of other jurors that mentioned military service. Appellant Br. at 56. Specifically, the district court asked one juror who had served in the Army and worked for the Bureau of Prisons whether they had "had any other law enforcement or military-related job" since leaving the Bureau in 1990. R. 341 (Trial Tr. I at 112) (Page ID #2452). Another juror volunteered to the court that her husband was a retired marine, *id.* at 51 (Page ID #2391), and another juror volunteered to the court that he was a defense contractor supplying food service personnel at Fort Campbell and Fort Bragg, *id.* at 113 (Page ID #2453).

Silvers's argument that the district court implicitly "broadened the inquiry" into potential jurors' military service is unavailing. The district court, when confronting this argument below, went through each question and answer that defense counsel had proffered as having broadened the inquiry into military service writ large. R. 343 (Trial Tr. III at 10-12) (Page ID #2699-701). The district court then stated,

> I disagree [that I was speaking of the military]. I think I was clearly speaking about the Army. That led to some answers that were broader, but I believe all the answers that we received were connected in one way or another to the fact—the items I mentioned specifically—Fort Campbell, law enforcement, Army.

Id. at 12 (Page ID #2701). That the district court would ask only about service in the Army, and that potential jurors would understand the district court's question as asking only about service in the Army, relates to the

circumstance that the case involved a member of the Army who was killed while serving and living on an Army base.

In any event, we review for an abuse of discretion the district court's determination that Juror 5 had not "made any tacit misrepresentation by not speaking up in response to the question about the Army." *Id.*; *see Kent County*, 115 F.4th at 517. In finding that Juror 5—who had never worked for the Army, and therefore did not answer in the affirmative when asked if he had worked for the Army—answered the court's questions honestly, we are not convinced that the district court "committed a clear error of judgment in the conclusion it reached." *Rikos*, 799 F.3d at 504. The district court's determination that Juror 5 had answered its question honestly was within the court's discretion. And because we find no error in the district court's decision as to this first prong of the *McDonough* test, we need not proceed to the second. We therefore affirm the district court's denial of Silvers's motion to dismiss Juror 5 for bias.

3. The Voir Dire Question

Having found no error in the district court's bias determination, we next address Silvers's challenge to the district court's questioning during voir dire. Pursuant to Rule 24 of the Federal Rules of Criminal Procedure, the district court "may examine prospective jurors or may permit the attorneys for the parties to do so." Fed. R. Crim. P. 24(a)(1). If a trial judge decides to examine prospective jurors himself—which the district court elected to do here—the judge "must at the very least solicit questions from both parties' attorneys," but "is by no means *required* to ask these question[s] unless he deems them 'proper' or otherwise helpful to the voir dire process." *United States v. Sheldon*, 223 F. App'x 478,

481 (6th Cir. 2007) (citing *Rosales-Lopez v. United States*, 451 U.S. 182, 189 (1981) (plurality op.) (emphasis in original)).

"Because the obligation to empanel an impartial jury lies in the first instance with the trial judge, and because he must rely largely on his immediate perceptions, federal judges have been accorded ample discretion in determining how best to conduct the *voir dire*." *Rosales-Lopez*, 451 U.S. at 189. "In reviewing the district court's voir dire in this case," then, "we must determine whether the court 'abused the broad discretion vested in [it] … in [its] impaneling of [the] jury,' … remaining mindful of the fact that a district court 'retains great latitude in deciding what questions should be asked *on voir dire*.'" *United States v. Middleton*, 246 F.3d 825, 834 (6th Cir. 2001) (first quoting *United States v. Phibbs*, 999 F.2d 1053, 1071 (6th Cir. 1993); and then quoting *Mu'Min v. Virginia*, 500 U.S. 415, 424 (1991)).

Silvers argues that the district court abused this broad discretion by failing to "conduct[] an inquiry about panel members' potential bias for military victims and witnesses." Appellant Br. at 63. As a threshold matter, although Federal Rule of Criminal Procedure 24(a)(2) provides that a district court that elects to conduct voir dire must permit attorneys for both parties to ask or submit further questions of the venire, neither counsel for the defense nor counsel for the government asked or submitted any additional questions about any potential juror's prior military service after the district court conducted voir dire. And although defense counsel—or even the government—would likely have asked a different, broader question than asked by the district court, "[a] proffered *voir dire* question is not constitutionally required simply because it 'might be helpful in assessing whether a juror is impartial'; instead a question is

constitutionally compelled only where the 'failure to ask [that] question [] … render[s] the defendant's trial fundamentally unfair.'" *Beuke v. Houk*, 537 F.3d 618, 637 (6th Cir. 2008) (quoting *Mu'Min*, 500 U.S. at 425-26). Here, the district court asked a detailed, specific question—"Does anyone here, or anyone in your immediate family, work with the United States Justice Department, the U.S. Army, the FBI, the ATF, or the Christian County Sheriff's Office?", R. 341 (Trial Tr. I at 111) (Page ID #2451)—intended to evaluate whether any member of the venire had an impermissible bias in favor of the United States Army. The question was closely tailored to the facts of Silvers's case, which involved the murder of an active-duty member of the Army at an Army base. So, while Silvers's preferred question "might have helped to expose juror bias[es]" in favor of the military at large, "its omission [did] not result in a fundamentally unfair trial, and therefore it [was] not constitutionally compelled." *Beuke*, 537 F.3d at 637.

Silvers contends that our holding in *United States v. Laird*, 239 F. App'x 971 (6th Cir. 2007), counsels the opposite conclusion. *Laird* is an unpublished case in which we held that a district court abused its discretion in failing, in a drug trafficking case, to question prospective jurors about their attitudes towards narcotics-related crimes. *Id.* at 975. In *Laird*, we concluded that the district court's voir dire question—"[A]nybody have anything in their background or anything of that nature that would not allow them to sit on this kind of case? Anybody has been charged with such a crime [possession with intent to distribute cocaine and possessing a firearm in furtherance of a drug trafficking crime] themselves or anything of that nature[?]"—was "too general to elicit responses from the prospective jurors which would indicate a potential bias against individuals

charged with a drug offense." *Id.* at 973, 975. Determining that "the district court should have conducted a more probing inquiry into the prospective jurors[']' state of mind as it relates to drug-related offenses," we held that the district court had abused its discretion. *Id.* at 975.

We conclude that the district court's question in *Laird* materially differs from the voir dire question at issue in this case. Unlike the question in *Laird*, which we found "too vague to alert a potential juror, who is likely a legal novice, that the questioner is inquiring about their biases or prejudices," *id.* at 975, the question that the district court asked here was specific and clearly intended to inquire as to the prospective jurors' potential bias in favor of any of the listed institutions. In fact, Silvers's issue with the district court's question is that it was *too* specific— focusing only on the Army, the branch of the military implicated in this case, instead of the entire military—not too broad or vague. And Silvers cites no legal authority for the proposition that a district court abuses its discretion by asking a question on voir dire that is too closely tailored to the facts of a case.

Silvers is correct that an adequate voir dire is required to "ensur[e] 'a fair trial by a panel of impartial, "indifferent" jurors.'" *Guzman*, 450 F.3d at 630 (quoting *Irvin*, 366 U.S. at 722). But he is incorrect in asserting that the voir dire questioning in his case was constitutionally inadequate. The district court asked a detailed question about potential jurors' prior involvement with the Army in order to expose any impermissible bias in favor of the victim due to her status as an active-duty member of the Army. That the court's question focused on the particular branch of the military in which Brittney Silvers served was not an abuse of the district court's broad discretion in conducting voir dire. We therefore affirm the district court.

C. Constitutionality of Silvers's Mandatory Life Sentence

The final issue that Silvers raises on appeal is whether his mandatory life sentence under 18 U.S.C. § 1111(b) violated the Eighth Amendment's prohibition against cruel and unusual punishment. We review de novo constitutional challenges to sentences, including challenges to the constitutionality of a sentence under the Eighth Amendment. *United States v. Jones*, 569 F.3d 569, 573 (6th Cir. 2009).

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. "In reviewing Eighth Amendment challenges, this circuit has adhered to the 'narrow proportionality principle' articulated in *Harmelin v. Michigan*." *United States v. Hill*, 30 F.3d 48, 50 (6th Cir. 1994) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 996-97 (1991) (Kennedy, J., concurring)). That principle "requires a defendant to show that the term [of imprisonment] is grossly disproportionate to the crime." *United States v. Potter*, 927 F.3d 446, 454 (6th Cir. 2019) (citing *Ewing v. California*, 538 U.S. 11, 20, 23 (2003) (plurality op.)).

Here, Silvers argues that his mandatory life sentence for first degree murder is "cruel and disproportionate" as applied to the facts of his case. Appellant Br. at 67. But Silvers's argument faces "insurmountable obstacles before this court." *Potter*, 927 F.3d at 454. This is because, as Silver concedes, his argument is foreclosed by our decision in *Hill*. Appellant Br. at 64 ("Silvers acknowledges [*Harmelin*] and [*Hill*], which the Court may read to foreclose his challenge."). In *Hill*, we evaluated the defendant's argument that his mandatory life

sentence for a third felony drug conviction violated the Eighth Amendment. 30 F.3d at 50. Applying the "narrow proportionality principle" set forth in *Harmelin*, we compared the circumstances underlying Harmelin's conviction (first offense, simple possession) to those underlying the defendant's conviction (his third felony offense, for conspiracy to distribute, more than 25 times the amount of narcotics attributed to the defendant in *Harmelin* if applying a 100:1 crack to powder cocaine ratio) and determined that "the circumstances underlying [the defendant's] conviction and sentence are more egregious than those that justified the life sentence imposed in *Harmelin*." *Id.* at 50-51. On that basis, we concluded that the defendant's "mandatory life sentence did not violate the Eighth Amendment." *Id.* at 51.

Applying our reasoning in *Hill* to the case at bar, we conclude that the circumstances underlying Silvers's conviction and sentence—i.e., that Silvers was convicted of the premeditated murder of his estranged wife, as well as the attempted murder of Keaton, domestic violence, and violation of a protection order, among other related crimes—are certainly more egregious than those present in *Harmelin*. Additionally, although we have not specifically held that a mandatory life sentence for first-degree murder is constitutional, many of our sister circuits have. *See, e.g.*, *United States v. Sierra*, 933 F.3d 95, 98-99 (2d Cir. 2019); *United States v. Chavez*, 894 F.3d 593, 609 (4th Cir. 2018); *United States v. LaFleur*, 971 F.2d 200, 211 (9th Cir. 1991); *United States v. Forbes*, 282 F. App'x 324, 325 (5th Cir. 2008) (per curiam).

Silvers argues that we should nevertheless reconsider our holding in *Hill*. Appellant Br. at 64. But "[a] panel of this Court cannot overrule the decision of another panel. The prior decision remains controlling authority unless an inconsistent decision of the United

States Supreme Court requires modification of the same decision or this Court sitting en banc overrules the prior decision." *Salmi v. Sec'y of Health & Hum. Servs.*, 774 F.2d 685, 689 (6th Cir. 1985). *Hill* is a published opinion that neither the Supreme Court nor this court, sitting en banc, has called into question. *Hill* thus binds us here. We therefore affirm Silvers's sentence as constitutionally sound.

III. CONCLUSION

For the reasons set forth above, we **AFFIRM** Silvers's convictions and sentence.

CONCURRENCE

THAPAR, Circuit Judge, concurring in part and concurring in the judgment. Victor Silvers murdered his estranged wife on an Army base. After a jury convicted him, he was sentenced to life in prison without the possibility of parole. On appeal, he challenges three aspects of his conviction. The majority is right to reject them all. But because I would resolve some of the claims differently, I respectfully concur in part and concur in the judgment.

I.

On the night of October 14, 2018, Brittney Silvers was found lying outside her home dying of a gunshot wound. Brittney was a logistics specialist with the United States Army and lived on Fort Campbell, a military base straddling the border of Kentucky and Tennessee. Soon after she was shot, Military Police arrived on the scene. They found a man sitting in a parked car in Brittney's driveway, surrounded by neighbors with their guns drawn. That man was Victor Silvers ("Silvers"), Brittney's estranged husband.

A grand jury indicted Silvers for first-degree murder under 18 U.S.C. §§ 1111(a), (b).[1] Section 1111 requires the government to show that the crime occurred within the special maritime and territorial jurisdiction of the United States. 18 U.S.C. § 1111(b). Here, the government alleged that the murder occurred at Brittney's house on 4217 Contreras Court, which was located on the Fort Campbell military base. Thus, because the military

[1] Silvers also was indicted for attempted first degree murder (of Brittney's boyfriend), domestic violence, violation of a protective order, possession of a firearm by a prohibited person, and the carry, use, and discharge of a firearm during a crime of violence.

base fell within the special maritime and territorial jurisdiction of the United States, the government could prosecute Silvers.

Before trial, the United States asked the district court to take judicial notice that Brittney's address fell within the special maritime and territorial jurisdiction of the United States. Silvers opposed the motion, arguing that the Sixth Amendment required a jury to find this jurisdictional element. The court held an evidentiary hearing. There, the government introduced testimony from witnesses in the Army Corps of Engineers and government documents showing the transfer of the land from Kentucky to the United States in 1942. Silvers objected to the authenticity of these documents.

After hearing evidence and arguments from both sides, the court overruled Silvers' objections and found that Brittney's home fell within the special maritime and territorial jurisdiction of the United States. The court made clear that it was taking judicial notice only of the jurisdictional status of the land; it was leaving for the jury to determine whether the events in question actually occurred at 4217 Contreras Court.

Following a six-day trial, the jury found Silvers guilty on all seven counts. The court sentenced him to mandatory life in prison, as required by 18 U.S.C. § 1111(b).[2]

Silvers presses three arguments on appeal. First, that the jury must decide the jurisdictional status of the location where Silvers murdered Brittney. Second, that his mandatory life sentence was unconstitutional. And

[2] The court also added a mandatory 10-year consecutive term for Silvers' conviction for using a firearm during a crime of violence. *See* 18 U.S.C. § 924(c)(1)(A)(iii).

third, that the district court abused its discretion by refusing to dismiss a juror for bias and failing to inquire about his military service. I address each claim in turn.

II.

First, Silvers asks us to hold that the Sixth Amendment required a jury to determine that 4217 Contreras Court fell within the special maritime and territorial jurisdiction of the United States. His argument is simple: jurisdiction is an element of the crime for which he was charged, and the Sixth Amendment requires the jury to find all the elements of a crime.

Silvers is right that the Sixth Amendment requires the jury to find all the elements of a crime. *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). But the relevant element of the crime here is that the alleged murder occurred within the special maritime and territorial jurisdiction of the United States. *See* 18 U.S.C. §§ 1111(a), (b). It's a different question, however, whether the land on which the alleged murder occurred fell within special maritime and territorial jurisdiction. That's not a required element in the text of § 1111. Rather, it's a legal question that goes to the jurisdictional status of the land on which the crime allegedly occurred.

So, following the Supreme Court's instructions, I would look to history and tradition to determine who decides factual questions bearing on the jurisdictional status of land. And history makes clear that the court can make this finding. Thus, I agree with the majority that the district court could take judicial notice that 4217 Contreras Court fell within the special maritime and territorial jurisdiction of the United States.

A.

Silvers' challenge hinges on whether the judge or jury may decide the jurisdictional status of a given piece of land. Silvers says the jury; the government says the judge. As the majority properly recognizes, there's no Sixth Circuit precedent that resolves this dispute. Where, then, should a court turn?

The Supreme Court has told courts to look to historical evidence to determine the scope of the Sixth Amendment's right to a jury trial. In *United States v. Gaudin*, the Supreme Court emphasized that historical practice gives meaning to that right. 515 U.S. 506, 515 (1995). And *Gaudin* relied on this history to reiterate that the Sixth Amendment mandates that a jury must find all the elements of a crime to secure a conviction. *Id.* So too in *Apprendi v. New Jersey*. There, the Court invoked a "historical foundation" to support its interpretation of the Sixth Amendment. 530 U.S. at 477. Fast forward another twenty years, and the Supreme Court still uses historical practice to define the contours of the Sixth Amendment. *Erlinger v. United States*, 602 U.S. 821, 828-32 (2024); *see also id.* at 862-67 (Kavanaugh, J., dissenting).

For good reason, we usually focus on history when dealing with the Constitution. *See, e.g.*, *Vidal v. Elster*, 602 U.S. 286, 295-99 (2024) (looking to history to examine the interplay of the First Amendment and trademark rights); *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 24 (2022) (same, for the scope of the Second Amendment); *Town of Greece v. Galloway*, 572 U.S. 565, 575-77 (2014) (same, for the Establishment Clause); *Crawford v. Washington*, 541 U.S. 36, 42-50 (2004) (same, for the Confrontation Clause).

Following this consistent command, courts must look to history to determine who can find the jurisdictional status of a piece of land—judge or jury?

B.

History reveals that a judge can determine jurisdictional status without running afoul of a defendant's right to a jury trial.

i.

Both federal and state courts have long taken judicial notice of geographical facts giving rise to jurisdictional status—judicial notice that's akin to whether a particular location falls within special maritime or territorial jurisdiction. Cases demonstrating this principle fall into several categories: judicial notice that land falls within a given jurisdiction, judicial notice of admiralty jurisdiction, judicial notice of a navigable river, and judicial notice of Indian country.

a.

The best example of a court judicially noticing a fact giving rise to a jurisdictional element is *Jones v. United States*, 137 U.S. 202 (1890). In *Jones*, the federal government indicted the defendant for murder on the Caribbean Island of Navassa. How did the United States have the power to try someone for a crime on this piece of land? A law called the Guano Islands Act allowed the president to declare that the United States possessed any island with guano deposits. *See* 48 U.S.C. § 1411. (Guano is bird excrement used to make fertilizer and gunpowder.) The Act asserted federal criminal jurisdiction over all such islands. *Id.* § 1417. And, because there was guano on Navassa, and the President declared the United States possessed it, the government thought it had criminal jurisdiction.

The Supreme Court agreed. 137 U.S. at 211-12. In holding that the Act could confer jurisdiction, the Supreme Court reasoned that "[a]ll courts of justice are bound to take judicial notice of the territorial extent of the jurisdiction exercised by the government whose laws they administer." *Id.* at 214. And the Court described how judges can draw from diverse sources, including laws, treaties, and proclamations from outside the evidentiary record. *Id.* Thus, the *Jones* Court resolved the jurisdictional status itself through judicial notice, rather than leaving it to a jury. The Court looked at documents showing that the island of Navassa contained guano and actions by the President showing that the United States had claimed authority over Navassa. Based on those sources, the court found federal criminal jurisdiction over the case. *Id.* at 217, 224.

The Supreme Court also took judicial notice of facts giving rise to admiralty jurisdiction. *See Peyroux v. Howard*, 32 U.S. 324 (1833). In *Peyroux*, the question was whether a steamboat in New Orleans fell within the federal admiralty jurisdiction. The dispute boiled down to a factual question about geography: federal admiralty jurisdiction was proper if the water level of the Mississippi River in New Orleans rose and fell with the Gulf's changing tides. *Id.* at 342. The Supreme Court held that it could answer this question through judicial notice. *Id.* Even though the Court cautioned that it normally couldn't take judicial notice of factual questions, the Court explained that it was "bound to take notice of public facts and geographical positions." *Id.* Based on its study of a book called "Stoddard's Louisiana,"[3] the Court

[3] "Stoddard's Louisiana" refers to the 1812 book *Sketches, Historical and Descriptive, of Louisiana*, by Major Amos Stoddard. Born in Connecticut, Stoddard fought in the American Revolution. William Willis, *A History of the Law, the Courts, and the Lawyers*

satisfied itself that the river level in New Orleans ebbed and flowed with the Gulf's tide. *Id.* at 343. Thus, the Court confirmed that the case fell within the federal admiralty jurisdiction.

To be sure, *Peyroux* is a civil case—and because the court sat in admiralty jurisdiction, the defendant didn't have a right to a jury trial. *See Parsons v. Bedford, Breedlove & Robeson*, 3 Pet. 433, 446-47 (1830) (Story, J.). So, it doesn't speak directly to whether a judge may determine the jurisdictional status of land in a criminal case. Nevertheless, *Peyroux* teaches that federal courts have the authority to judicially notice geographical facts that form the basis of the court's jurisdiction. *See* 32 U.S. at 343.

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of Maine 180 (1863). He then clerked at the Supreme Court of Massachusetts in Boston before opening his own law practice in the town of Hallowell, Maine. *Id.* A man of "fine personal appearance," Stoddard had "more taste for military life than for the quiet pursuit of his profession in a remote country village." *Id.* He rejoined the military, where he distinguished himself as a "man of talents." *Id.* He was killed in 1813 at the Battle of Fort Meigs during the War of 1812. *Id.* Seeking to foster the American public's understanding of Louisiana's "climates, soils and productions, the magnitude and importance of its numerous rivers, and its commercial and other natural advantages," Stoddard published his *Sketches* in 1812. Amos Stoddard, *Sketches, Historical and Descriptive, of Louisiana* vi (1812). In the preface to his work, Stoddard worried that his long period of military service, during which he was "wholly secluded from the literary world," would not bode well for his "literary attempt." *Id.* at viii. He professed modest aims for his book: "I expect not the approbation of scientific men, though I hope to escape their censure. If they cannot think favorably of my genius or erudition, I trust they will at least commend my industry and motives." *Id.* They did. Stoddard would no doubt have been gratified to know that the Supreme Court of the United States treated "[t]he authority of Mr. Stoddard" as a basis for answering questions of federal law. *Peyroux*, 32 U.S. at 343.

What's more, judicial notice didn't end at the coastline. Courts have long taken judicial notice of what lands constituted "Indian country" in federal criminal prosecutions. Early federal statutes, such as the General Crimes Act of 1817, conferred federal jurisdiction over certain crimes that occurred in "Indian country." *See* 18 U.S.C. § 1152. But Congress didn't provide a clear definition of that term, so "the courts then proceeded to define Indian country judicially." David H. Getches et al., *Cases and Materials on Federal Indian Law* 349 (1979).

In *Donnelly v. United States*, for example, the Supreme Court determined that the United States had jurisdiction over a murder that occurred on an Indian reservation in northern California. 228 U.S. 243 (1913). The defendant had argued that the land on which the murder occurred wasn't Indian country. *Id.* at 268. But the Court held otherwise. *Id.* at 268-69. Thus, the jurisdictional status of the land wasn't a question for the jury. *See also United States v. Pelican*, 232 U.S. 442, 451-52 (1914) (reversing district court's determination that the land in question was not Indian country).

Other courts did the same. For example, in *Beebe v. United States*, the defendant was indicted for murder in Indian country. 11 N.W. 505 (Dakota 1882). The Supreme Court of the Territory of Dakota (an Article I court) declared its intention to "take judicial notice of Indian reservations, and of public leading proclamations affecting matters relative to its jurisdiction." *Id.* at 510. In doing so, the court relied on "authentic public documents." *Id.* Thus, the court did not submit the jurisdictional status of the land as a question to the jury.

So too in *United States v. Leathers*, 26 F. Cas. 897 (D. Nev. 1879) (No. 15,581). There, the jury found the defendant guilty of introducing liquor into Indian

country and trading without a license. *Id.* at 897. After the jury found a series of "[s]pecial issues of fact," the government moved for judgment from the court. *Id.* In so doing, the court had to determine that the land on which the jury found the crime to have occurred was Indian country and thus subject to federal jurisdiction. *Id.* The court concluded that it was. *Id.* at 900. This division of findings among court and jury matches the division in Silvers' case, albeit in reverse order: the jury first found that the crime occurred at a given place, and the court then determined that this place fell within Indian country.[4]

In sum, all these cases show that federal courts routinely determined the jurisdictional status of a piece of land.

b.

State cases paint a similar picture: courts consistently took judicial notice of facts giving rise to jurisdictional elements.[5]

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[4] This division continues to this day in the Indian country context. *See, e.g., United States v. Jackson*, 853 F.3d 436, 438 n.2 (8th Cir. 2017) ("The court determines whether a particular piece of land is in Indian country; the jury then decides whether the crime in fact occurred on that land."); *United States v. Roberts*, 185 F.3d 1125, 1139 (10th Cir. 1999) (same); *United States v. Stands*, 105 F.3d 1565, 1575 (8th Cir. 1997) (same).

[5] It's true that these state cases weren't interpreting the Sixth Amendment's right to jury trial, which the Supreme Court only incorporated against the states in 1968. *See Duncan v. Louisiana*, 391 U.S. 145 (1968). But early state practice can still be relevant as to the scope of the Sixth Amendment. The constitutions of the early states all required some form of jury trial. *Id.* at 153. And a jury trial was among the most precious rights in early America. *Id.* at 151. *See also Parsons*, 3 Pet. at 446 ("The trial by jury is justly dear to the American people" and "secured in every state constitution in

The best example of a state court taking jurisdictional notice of the status of land is *State v. Wagner*, 61 Me. 178 (1873). There, the state of Maine indicted a defendant for murder on an island called Smutty Nose. The defendant objected to the jurisdiction of the Maine state court, since he claimed the state hadn't shown that Smutty Nose was actually located in Maine. *Id.* at 181-82. Moreover, just as Silvers does here, the defendant argued that the jurisdictional status of a relevant piece of land was a jury question. *Id.* at 183. The Maine Supreme Court disagreed, holding that jurisdiction was a question for the judge. *Id.* at 184. The court observed that the "question of jurisdiction in this case turned entirely upon the construction of the ancient charters and grants," which was not "a matter for the jury to determine." *Id.* Instead, the construction of those documents was "purely a question of law for the court." *Id.* Why? Because "once settled," their meaning "must be deemed settled forever, and not subject to the varying verdicts of successive juries whenever a person charged with a crime sees fit to claim to throw in a denial of jurisdiction." *Id.* at 185. Unsurprisingly, the impracticability of leaving these inquiries to the jury mirrors the district court's reasoning here.

New York's highest court took a similar view. *See People v. Godfrey*, 17 Johns. 225 (N.Y. 1819). In *Godfrey*, a defendant argued that New York state courts lacked jurisdiction over his indictment for murder in Fort Niagara, which the defendant claimed fell within federal jurisdiction. The court combed through historical documents and treaties to conclude that New York had jurisdiction. *Id.* at 230-33. This wasn't a question

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the union.") (Story, J.). So, early state practices are still relevant to how the Sixth Amendment would have been understood.

for the jury to decide. Once the court was "perfectly satisfied" that the state had jurisdiction, "nothing remain[ed] but that judgment be passed" upon the defendant. *Id.* The court could take judicial notice of the land's status; the court didn't need to leave the question for the jury.

State courts likewise took judicial notice of facts relating to river navigability. In *Commonwealth v. King*, a defendant was indicted in Massachusetts for running a steamboat without a license on waters within the state's jurisdiction. 22 N.E. 905, 905 (Mass. 1889) (syllabus). But the state only had jurisdiction if the river—here, the Connecticut River—wasn't navigable where the defendant operated his steamboat. *Id.* at 906. If the river was navigable, by contrast, then it would fall within the federal admiralty jurisdiction—not Massachusetts' jurisdiction. The court held that the lower court might take judicial notice that the river wasn't navigable. *Id.* "It is well known," explained the court, that "the waters of the Connecticut river, at the place where it is alleged that the defendant's steam-boat was employed, can be used by vessels only for" intra-state transportation. *Id.* Those waters were thus "not within the maritime jurisdiction of the United States." *Id.* Nowhere did the court say that a jury would have to decide the question of navigability (and thus jurisdictional status). Rather, the Justices of the Massachusetts Supreme Judicial Court were free to make this determination for themselves, without violating the defendant's state constitutional right to a jury trial.

All told, courts throughout history have taken judicial notice of facts establishing the jurisdictional status of given geographical features. The Supreme Court long ago summarized this trend: "[C]ourts of the United States take judicial notice of the ports and waters of the

United States where the tide ebbs and flows, of the boundaries of the several States and judicial districts, and of the laws and jurisprudence of the several States in which they exercise jurisdiction." *Brown v. Piper*, 91 U.S. 37, 42 (1875). A leading 19th century evidence treatise agreed: "Courts also take notice of the territorial extent of the jurisdiction and sovereignty, exercised *de facto* by their own government." Simon Greenleaf, 1 A Treatise on the Law of Evidence ch. 2, § 6 (3d. ed. 1846). This mass of evidence confirms what the majority holds.

c.

Finally, there's one more 19th-century Supreme Court case that discusses judicial notice: *United States v. Jackalow*. 66 U.S. 484 (1861). While *Jackalow* teaches that the jury must find venue in a criminal case, it says nothing about the Sixth Amendment and the jurisdictional status of land.

In *Jackalow*, the defendant was charged in federal court in New Jersey with piracy on board a vessel in the Long Island Sound. *Id.* at 485. Why a New Jersey federal court? Under an 1820 act, any defendant who committed robbery on the "high seas" outside the boundaries of a state could be tried in the federal district court in which he was found (here, that was New Jersey). *See* "An act to protect the commerce of the United States, and punish the crime of piracy," Pub. L. 16-113, § 3, 3 Stat. 600 (1820). Thus, the key question was whether, at the time of the alleged offense, the ship's location was within the boundaries of a state. *Jackalow*, 66 U.S. at 486. The ship in question here was somewhere in the Long Island Sound, between New York and Connecticut. *Id.* at 487.

The Court held that the jury had to determine whether this location fell within a state. The Court

began by stating that "the boundary of a State, when a material fact in the determination of the extent of the jurisdiction of a court, is not a simple question of law." *Id.* Thus, a jury should find the relevant facts. As the Court put it: the "ascertainment" of the location's geographical status "belongs to the jury." *Id.* "All the testimony bearing upon this question, whether of maps, surveys, practical location, and the like, should be submitted to them under proper instructions to find the fact." *Id.* at 487-88.

Those few sentences appear to support Silvers' argument that a jury must determine the jurisdictional status of a piece of land. But *Jackalow* is about venue, not jurisdiction.

Remember that the relevant question in *Jackalow* was whether the defendant committed the crime outside the boundaries of a state. If so, Congress had prescribed that he could be tried in the state in which he was caught. What gave Congress authority to do so? The Venue Clause of the Constitution. This provision mandates that when a defendant commits an offense outside any state, "the trial shall be at such place or places as the Congress may by law have directed." U.S. Const. art. III, § 2, cl. 3. Thus, the *Jackalow* Court asked whether, "in view of this provision of the Constitution," the defendant committed his offense outside of any state. 66 U.S. at 486. That is, the key question was the proper *venue* for the trial. The Court held that the judge had to submit the issue of venue to the jury rather than determine it himself. *Id.* at 488.

This reading of *Jackalow*—as a venue rather than a jurisdiction case—coheres with subsequent caselaw. It's black-letter law that the government must prove venue to the jury by a preponderance of the evidence. *See, e.g.*,

United States v. Petlechkov, 922 F.3d 762, 770 (6th Cir. 2019); *see also* 2 Charles Alan Wright & Arthur Miller, *Federal Practice & Procedure* § 307 (4th ed. 2024). And courts have long understood *Jackalow* to be a case about venue, not jurisdiction. *See, e.g.*, *Smith v. United States*, 599 U.S. 236, 250 (2023) (calling *Jackalow* a case about "venue error"); *United States v. Perez*, 280 F.3d 318, 330 n.8 (3d Cir. 2002) (describing *Jackalow* as a case about whether "venue existed"); *United States v. Matos-Luchi*, 627 F.3d 1, 14 (1st Cir. 2010) (Lipez, J., dissenting) (same). Perhaps that's why, in the subsequent Guano Islands Act case, *Jones v. United States*, the Supreme Court felt free to disregard *Jackalow* when it held that "[a]ll courts of justice are bound to take judicial notice of the territorial extent" of legal boundaries. 137 U.S. at 214.

The distinction between jurisdictional status and venue also makes sense from first principles. The jurisdictional status of the land relates to the authority of a court to hear a particular case. 2 *Wharton's Criminal Procedure* § 10:1 (14th ed. 2023). That's a quintessential legal question: Does the law give the court authority? Venue, however, relates to the proper place for trial *within* a given jurisdiction. *Id.* In other words, among the courts that have legal authority over the defendant, the proper venue depends on the geographical location of the crime. *Id.* That's a factual question that depends on the site of the crime—and thus is a natural fit for the jury to determine. The legal issue of the jurisdictional status of the land, by contrast, is a better fit for the court to adjudicate.

In sum, *Jackalow* is a case about venue, not jurisdiction. It therefore has no bearing on whether courts have traditionally submitted the question of the jurisdictional status of land to the jury.

* * *

In conclusion, historical practice supports the majority's conclusion that the district court could take judicial notice that 4217 Contreras Court fell within the special maritime and territorial jurisdiction of the United States.

III.

Silvers also argues that the imposition of a mandatory life sentence is unconstitutional under the Eighth Amendment's prohibition on "cruel and unusual punishments." U.S. Const. amend. VIII. He claims that his punishment is "disproportionate and cruel." Appellant Br. at 64. He is wrong.

The Supreme Court has told us that the Eighth Amendment contains a "narrow proportionality principle" that prohibits a term of imprisonment from being "grossly disproportionate" to the crime. *United States v. Potter*, 927 F.3d 446, 454 (6th Cir. 2019) (citing *Ewing v. California*, 538 U.S. 11, 20 (2003) (plurality)). And, as Silvers acknowledged in his briefing, two relevant cases using the proportionality framework foreclose his challenge. In one of those cases, the Supreme Court upheld a mandatory life sentence for a defendant convicted of possessing 672 grams of cocaine. *Harmelin v. Michigan*, 501 U.S. 957, 961, 996 (1991). And in the other, *United States v. Hill*, our circuit upheld a mandatory life sentence for a third felony drug conviction. 30 F.3d 48, 50-51 (6th Cir. 1994). The present facts, which involve Silvers' premeditated murder of his estranged wife and attempted murder of her boyfriend, are far more egregious than the crimes in those cases. Thus, precedent makes clear that Silvers' sentence isn't grossly disproportionate to his heinous crime.

To be sure, as Justice Scalia has made clear, the "proportionality principle" has no basis in the text, history, or tradition of the Eighth Amendment. *See Harmelin*, 50 U.S. at 965 (opinion of Scalia, J.). And as judges, we're not authorized or equipped to weigh what sentence is proportionate to the severity of a given crime. *Cf. Nat'l Republican Senatorial Comm. v. FEC*, 117 F.4th 389, 400 (6th Cir. 2024) (en banc) (Thapar, J., concurring) (emphasizing that judicial balancing tests "sit[] in tension with the historically derived nature of our constitutional rights" and "strain[] courts' institutional competence"). Rather, the Eighth Amendment "leaves the unavoidably moral question of who 'deserves' a particular nonprohibited method of punishment to the judgment of the legislatures that authorize the penalty." *Miller v. Alabama*, 567 U.S. 460, 504 (2012) (Thomas, J., dissenting) (citation omitted). It's Congress's job—and not ours—to determine the appropriate length of the sentence for the murder Silvers committed. But the Supreme Court has interpreted the Eighth Amendment otherwise. And under that framework, I agree with the majority that Silvers' punishment isn't grossly disproportionate to his crime.

IV.

Finally, I agree with the majority's resolution of Silvers' jury bias claim. The juror at issue honestly answered the district court's questions during voir dire. And the district court did not abuse its discretion by failing to inquire about military service more generally.

* * *

I thus respectfully concur in the majority's analysis of the jury bias claim and concur in the judgment as to the remaining claims.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION

No. 5:18-cr-50

UNITED STATES OF AMERICA,
Plaintiff,

v.

VICTOR EVERETTE SILVERS,
Defendant.

Filed March 30, 2023

OPINION & ORDER

Is the U.S. Army base at Fort Campbell, Kentucky under federal jurisdiction? And in a federal criminal case, does the judge or the jury answer that question?

These two queries are raised by the United States' motion to take judicial notice that "4217 Contreras Court, Apartment F," where the conduct at issue in this case occurred, is "a place within the special maritime and territorial jurisdiction of the United States." Motion for Judicial Notice (DN 184) at 2 (quotation marks omitted).

The jurisdictional status of Fort Campbell is important to this Court, which hears all manner of cases arising from Fort Campbell.[1] That status is also

[1] Recent Fort Campbell cases litigated in the Western District of Kentucky address offenses such as the theft of federal property, *United States v. Morava*, No. 5:18-mj-1; possession of drug

important to this case, which concerns charges that Victor Silvers traveled to the base and committed several serious offenses on post. The federal murder, attempted-murder, firearm, and domestic-violence charges against him (Counts 1–5) all allege that these offenses occurred within the federal government's "special maritime and territorial jurisdiction." *See*, *e.g.*, 18 U.S.C. § 1111(b) (criminalizing murder committed within the special maritime and territorial jurisdiction of the United States); Second Superseding Indictment (DN 239) at 1–2 (charging that these five offenses occurred at Fort Campbell, a place within "the special maritime and territorial jurisdiction of the United States"). And 18 U.S.C. § 7(3) defines the "special maritime and territorial jurisdiction" to include "lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof."

The United States' trial proof included evidence that the alleged crimes "took place on the Fort Campbell, Kentucky military installation, at and in the immediate vicinity of 4217 Contreras Court, Apartment F, Fort Campbell, Kentucky." Motion at 2. The jury considered (among other things) whether the events took place at that street address. *See* Jury Instructions (DN 281) at 6. According to Silvers, however, the Sixth Amendment of the U.S. Constitution required the jury to also decide whether this portion of Fort Campbell is part of the designated federal jurisdictional territory. The Government, in contrast, urged the judge rather than jury to decide (or at least instruct) that 4217 Contreras Court is

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paraphernalia, *United States v. Sherman*, No. 5:18-mj-8; non-domestic assault, *United States v. Fanene*, 5:18-mj-21; and DUI, United *States v. Henrich*, 5:18-po-48.

part of the special maritime and territorial jurisdiction of the United States.

Before trial, the Court granted Silvers's request for an evidentiary hearing and then largely granted the Government's motion regarding Fort Campbell's jurisdictional status. The Court instructed the jury on the *legal* status of the locus of the crime: "4217 Contreras Court is located within the special maritime and territorial jurisdiction of the United States." *Id.* And the Court asked the jury to answer the factual question whether it found "beyond a reasonable doubt that the crime occurred at 4217 Contreras Court." *Id.* The jury answered yes and convicted Silvers on all seven counts.

The Court now offers this supplemental opinion to explain the basis for its ruling in greater detail.

A. Whose law applies? This motion and the defense's opposition don't raise the question whether state rather than federal criminal statutes apply to the alleged murder and attempted murder on post. At least not directly. On a day-to-day basis, no one doubts that federal (including Army) laws and regulations control. The defense offers no affirmative argument to call this state of affairs into question. Nor does it contend, as a factual matter, that the Contreras Court address falls outside the boundaries of Fort Campbell as a matter of geography. Hearing Transcript (DN 292) at 20:23–21:16.

But the defense maintains that the Government hasn't established (or couldn't establish) beyond a reasonable doubt the prerequisites of special maritime and territorial jurisdiction, which turn on legal documents and decisions made generations ago. The land that comprises Fort Campbell was not federally controlled before World War II—at least not as the collective territory we know today. During the war years, the United States

acquired various plots in Kentucky and Tennessee for use in the war, cobbling them together into what was once Camp Campbell and is now Fort Campbell. Hearing Tr. at 30:04–31:19; Gov't Exs. 2–3, 8.

Counterintuitively, perhaps, the acquisition of land or exercise of control by the U.S. government does not create even a presumption that federal jurisdiction applies there. "Although some may assume that a military installation automatically comes within Federal jurisdiction, that assumption is incorrect." *United States v. Williams*, 17 M.J. 207, 211 (C.M.A. 1984). Indeed, since 1940, federal law "presume[s] that jurisdiction has *not* been accepted." 40 U.S.C. § 3112 (formerly 40 U.S.C. § 255) (emphasis added).[2] So the United States doesn't exercise jurisdiction over all land it owns or controls within the several states; sometimes the feds have the status of mere landowners or proprietors. *See United States v. Davis*, 726 F.3d 357, 364 (2d Cir. 2013) (citing *Paul v. United States*, 371 U.S. 245, 264 (1963)).[3]

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[2] Section 3112(b) provides:

> 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.

[3] Silvers concedes the property in question "is situated on Fort Campbell" and owned by the United States. Opp. at 2 n.1. He also

Overcoming this presumption of state control and establishing federal jurisdiction depends on a two-step process: the state must agree to the transfer of jurisdiction and the federal government must accept jurisdiction. *See* § 3112(b); *Paul*, 371 U.S. at 264. The state must provide "consent to, or cession of, any jurisdiction." § 3112(b). And the head of a federal agency ("or other authorized officer…") indicates acceptance of jurisdiction by filing a notice with the Governor or following any other process set out in the State's laws. *Id.*

Establishing state relinquishment and federal acceptance is not always obvious. This determination "is often complex," and "federal courts can get the jurisdictional analysis wrong." *United States v. Banks*, No. 20-50175, 2022 WL 3278942, at *4 (9th Cir. Aug. 11, 2022) (Koh, J., concurring). Indeed, federal courts have on several occasions held that federal jurisdiction did *not* apply at federal institutions on federally owned land. *See Davis*, 726 F.3d at 364 (collecting cases). And courts of appeals have rejected jury instructions that merely ask, for example, whether the alleged offense "occurred in a federal prison on federal land." *Id.* at 361, 365. Such an instruction, as explained above, asks the wrong question. And as explained below, it also asks the wrong decisionmaker.

B. Who decides? The defense urges the Court to adopt an outlier position not supported by any precedent cited in these proceedings. No judge, it would appear, has tasked a jury with answering the question whether a particular plot is part of federal jurisdiction based on the legal sufficiency of state accession and federal

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accepts that Kentucky ceded jurisdiction over the property before 1954. *Id.* at 3 n.2.

acceptance under § 3112(b). Indeed, the pattern jury instructions of five circuits follow a different distinction that resonates with common-sense notions about the roles of judge and jury: lay jurors determine where acts occurred as a matter of fact while the judge decides the legal status (state or federal) of that location.[4] Under the two-prong test introduced above, the latter determination depends on the time and manner of the state's purported relinquishment and the United States' purported acceptance of the land in question.

A consistent body of caselaw mirrors these instructions. Although the Sixth Circuit lacks a pattern instruction for these special-jurisdictional offenses, three of its decisions have committed to the judge the question whether jurisdiction has transferred from a state to the federal government.

Most recently, in *United States v. Gabrion*, the court of appeals interpreted the word "jurisdiction" in 18 U.S.C. § 7 to refer to a sovereign's "legislative jurisdiction"—in other words, the federal government's "authority … to make its law applicable to persons or activities" at a particular spot. 517 F.3d 839, 845 n.5 (6th Cir. 2008). The court then held that the crime occurred within the federal government's territorial jurisdiction

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[4] Seventh Cir. Crim. Pattern Jury Instructions at 598; Eighth Cir. Crim. Pattern Jury Instructions at 351–52 (stating that "the issue of federal jurisdiction is a question of law to be determined by the court," but allowing that a judge may nevertheless include a jury instruction related to this point); Ninth Cir. Crim. Pattern Jury Instructions at 370–71 (*but see United States v. Read*, 918 F.3d 712, 718 (9th Cir. 2019) (describing existence of federal jurisdiction as element of § 113(a) to be proved to the jury)); Tenth Cir. Crim. Pattern Jury Instructions at 188–89; Eleventh Cir. Crim. Pattern Jury Instructions § O45.2 at 2.

based on the status of the national forest where the jury found the crime occurred. *Id.* at 848.

In *United States v. Booth*, a Sixth Circuit panel described as "a legal issue, not a factual issue," the question "whether [the] United States Naval Air Station" where the charged crime was committed was "within the special maritime and territorial jurisdiction of the United States." 936 F.2d 573, 1991 WL 119530, at *6 (6th Cir. 1991) (table). The court affirmed the district court's direct instruction to the jury that the Naval Air Station *was* within our special maritime and territorial jurisdiction. *Id.* at *5–6.

And in *United States v. Blunt*, the Sixth Circuit stated (without much explanation) that a "district court would have been correct in taking judicial notice under Rule 201, Federal Rules of Evidence, of the fact that the Federal Correctional Institution" in Lexington "was within the territorial jurisdiction of the United States." 558 F.2d 1245, 1247 (6th Cir. 1977). *See also United States v. Harris*, 331 F.2d 600, 601 (6th Cir. 1964) ("The District Court may take judicial notice of established geographical facts.").

Other circuits are in accord. Judges rather than juries have determined, for example, whether Fort Leavenworth or the Blue Ridge Parkway are part of the federal maritime and territorial jurisdiction. *See United States v. Miller*, 499 F.2d 736, 739 (10th Cir. 1974); *United States v. Lavender*, 602 F.2d 639, 641 (4th Cir. 1979). And whether the town of Cherokee, North Carolina, is found within the Cherokee Indian Reservation. *See United States v. Lossiah*, 537 F.2d 1250, 1251 (4th Cir. 1976); *see also United States v. Cook*, 922 F.2d 1026, 1031 (2d Cir. 1991) (cataloguing holdings that the question whether a crime occurred in Indian country is a

matter of law for the court). And whether the federal prisons in Brooklyn and Raybrook, New York are part of the special maritime and territorial jurisdiction. *Davis*, 726 F.3d at 366; *United States v. Hernandez-Fundora*, 58 F.3d 802, 812 (2d Cir. 1995). And whether the U.S. Medical Center for Federal Prisoners is within the special federal jurisdiction. *United States v. Love*, 20 F.4th 407, 412 (8th Cir. 2021).

It's easy enough to imagine a different rule, in which prosecutors and defense lawyers put on evidence of legal ownership and control for lay jurors to weigh. But the complexity and unfamiliarity of the "proof" offered during the pretrial hearing in this case illustrates the daunting task that would await jurors in the alternative universe proposed by the defense. Do aging legal documents—such as land titles and agency filings—establish whether a particular letter or deed or order (or combination thereof) was legally effective in transferring state jurisdiction to the federal government at a particular plot of land? As discussed below, that determination turns on repeated correspondence between the Secretary of War and Governor of Kentucky, circa 1942. For better or worse, precedent has consistently decided against tasking lay jurors with this fundamentally legal assignment. *See Getty Petroleum Marketing v. Capital Terminal Co.*, 391 F.3d 312, 331–32 (1st Cir. 2004) (Lipez, J., concurring) (discussing the impracticality of jury deliberations over legal questions otherwise subject to judicial notice); *cf. United States v. Durham*, No. 3:21-cr-12, 2023 WL 1926893, at *11–12 (W.D. Ky. Feb. 11, 2023) (discussing similar challenges in the Armed Career Criminal context). And these administrability concerns are compounded by the interest in consistent rulings on the jurisdictional status of federal property—a determination that should be uniform rather than case-specific

in order to avoid uncertainty and inconsistency regarding law-enforcement and prosecutorial actions. *See Love*, 20 F.4th at 412.

Rather than citing any specific judicial authority to the contrary, Silvers appeals generally to the *Apprendi* and *Gaudin* decisions assigning fact-finding duties to juries under the Sixth Amendment. Hearing Tr. 47:20–24; Opposition (DN 209) at 10. But *Apprendi* dealt with factual determinations about elements of criminal offenses, not legal questions about federal jurisdiction. 530 U.S. 466, 469 (2000). And *Gaudin* held only that in false-statement prosecutions the element of "materiality" is a mixed question of law and historical fact for the jury. 515 U.S. 506, 518–19 (1995). These decisions did not address judicial notice of "legislative facts," such as those relating to "geography and jurisdiction." *Davis*, 726 F.3d at 367 (quoting *Landell v. Sorrell*, 382 F.3d 91, 135 n.24 (2d Cir. 2002)); *see also United States v. Styles*, 75 F. App'x 934, 935 (5th Cir. 2003) (*Apprendi* "had no effect on whether the district court could take judicial notice" of the jurisdictional status of a federal hospital). Silvers asks the Court to treat these opinions, which address related but distinct questions, as tacitly overruling longstanding authority rejecting judicial notice of legislative facts.

C. Judicial Notice of Legislative Facts. The jurisdictional status of a particular location on federal property is just such a legislative fact: an "established truth, fact, or pronouncement that does not change from case to case but applies universally," rather than a fact "developed in a particular case." *Davis*, 726 F.3d at 366 (cleaned up). Legislative facts are ones of which a judge may take notice independent of a jury. Here, the Government asked the Court to take notice of the jurisdictional status of Fort Campbell and instruct the jury that

"the alleged crimes took place within the Special Maritime and Territorial Jurisdiction of the United States" if the jury found that the charged conduct took place at 4217 Contreras Court. Motion at 9. This is consistent with the Sixth Circuit's approval of judicial notice, since *Apprendi*, to establish that a crime occurred within the special maritime and territorial jurisdiction of the United States. *See Gabrion*, 517 F.3d at 848.

The best reading of the governing caselaw is that judicial notice of jurisdictional status is a question of legislative fact, not a so-called "adjudicative fact" that judges may notice, if at all, under Federal Rule of Evidence 201. *See Marshall v. Bramer*, 828 F.2d 355, 357 (6th Cir. 1987) ("Federal Rule of Evidence 201, which treats judicial notice, 'governs only judicial notice of adjudicative facts.'") (quoting FED. R. EVID. 201(a)). An adjudicative fact is one that addresses "the particular event which gave rise to the lawsuit and … help[s] explain who did what, when, where, how, and with what motive and intent." 2 MCCORMICK ON EVIDENCE § 328 (8th ed.). Because notice of adjudicative facts follows Rule 201, and notice of legislative facts does not, the procedures to take notice differ. *See, e.g.*, *Davis*, 726 F.3d at 367 ("[A] 'legislative fact' … may be judicially noticed without being subject to the strictures of Rule 201."). The most salient difference, at least for present purposes, is that in a federal criminal case the judge advises the jury that it *may* find an adjudicative fact established: "In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive." FED. R. EVID. 201(f).

"[W]hether a location falls within the 'special maritime and territorial jurisdiction of the United States' is a 'legislative fact' not controlled by Rule 201." WRIGHT & MILLER, 21B Fed. Prac. & Proc. Evid. § 5103 (2d ed.).

The circuits that have considered this issue have largely allowed judicial notice of jurisdictional status outside of Rule 201. *See*, *e.g.*, *Love*, 20 F.4th at 411–12 (jurisdictional status is a legislative fact not subject to Rule 201 requirements); *Davis*, 726 F.3d at 367–68 (same). Indeed, five circuits' pattern jury instructions allow for judicial determination of jurisdictional status. Seventh Cir. Crim. Pattern Jury Instructions at 598 (18 U.S.C. §§ 1111–12) (jurisdictional status determined by judicial notice); Eighth Cir. Crim. Pattern Jury Instructions, Committee Commentary, at 348, 352 (§ 7) (jurisdictional status is a matter of law determined by the court); Ninth Cir. Crim. Pattern Jury Instructions, Committee Commentary, at 370–71 (§ 1111) (same); Tenth Cir. Crim. Pattern Jury Instructions at 189 (§ 1111) (instructing that charged location is within jurisdiction); Eleventh Cir. Crim. Pattern Jury Instructions § O45.2 at 2 (same).[5]

Consistent with this treatment, courts have addressed unproven, or even *unraised*, legislative facts on appeal by judicial notice outside the bounds of Rule 201.

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[5] To be sure, some decisions go the other way, describing jurisdictional determination as one of "adjudicative fact" under Rule 201. *See*, *e.g.*, *United States v. Anderson*, 528 F.2d 590, 591–92 (5th Cir. 1976) (court could take judicial notice under Rule 201 that FCI-Tallahassee is within the special territorial jurisdiction of the United States). But these opinions tend not to confront the adjudicative/legislative distinction, perhaps grabbing Rule 201 off the rack as the only codified variety of judicial notice on offer. And other courts have called into question whether the jurisdictional status of rather more obscure locations is appropriate for judicial notice at all. *See United States v. Bello*, 194 F.3d 18, 22–23 (1st Cir. 1999) (expressing doubt that any "reasonable person" has ever heard of MDC-Guaynabo, let alone knows its jurisdictional status as within the special maritime and territorial jurisdiction of the United States).

See, e.g., *Davis*, 726 F.3d at 367–68; WRIGHT & MILLER § 5110.1.[6] Such questions often concern "non-evidence facts," such as those implicating venue, to which Rule 201 doesn't apply. WRIGHT & MILLER § 5103; *United States v. Robinson*, 858 Fed. App'x 627 (4th Cir. 2021) (no obligation under FED. R. EVID. 201(f) to charge jury with deciding whether to accept judicially noticed fact regarding venue). And whatever weight one gives to the Rule 201's advisory note, which in places reads more like a blurb for Professor Davis's law-review articles than a normal advisory comment, it also supports this approach: "Adjudicative facts are simply the facts of the particular case. Legislative facts, on the other hand, are those which have relevance to legal reasoning and the lawmaking process…." FED. R. EVID. 201 advisory committee's note (1972). If nothing else, this discussion underscores the distinction between legislative and adjudicative facts—only the latter of which is governed by Rule 201.

While the Sixth Circuit precedent is less than crystal clear, it supports taking notice of jurisdictional status without a submission to the jury. Two of the decisions cited above, *Gabrion* and *Booth*, reflected judicial notice of a location's jurisdictional status without submission to the jury—that is, as a matter of legislative rather than adjudicative fact. And the circuit has elsewhere noted that Rule 201 applies to adjudicative facts only, and has cautioned that judicial notice should generally not be used to establish the governing law in a case. *See Toth*

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[6] *See, e.g.*, *United States v. Johnson*, 738 Fed. App'x 798, 799 (4th Cir. 2018); *United States v. Tisdale*, 7 F.3d 228 (4th Cir. 1993) (table); *United States v. Gaither*, 83 F.3d 416 (4th Cir. 1993) (table); *United States v. Bowers*, 660 F.2d 527, 530–31 (5th Cir. 1981); *United States v. Styles*, 75 Fed. App'x 934, 935 (5th Cir. 2003).

v. Grand Trunk R.R., 306 F.3d 335, 349 (6th Cir. 2002). *Blunt*, described above, did invoke Rule 201—but merely held that the trial judge wouldn't have erred in taking judicial notice under that provision. 558 F.2d at 1247. This earlier opinion didn't address, much less reject, the longstanding custom of taking judicial notice of legislative facts such as these. This governing caselaw is therefore consistent with the out-of-circuit precedent noticing jurisdictional status as a matter of legislative fact.

D. Is Fort Campbell within the United States' Special Maritime and Territorial Jurisdiction?

As noted earlier, § 3112 requires the Government to show that the state agreed to transfer jurisdiction and the federal government accepted that transfer. Based on the Court's review of the arguments, record, and testimony offered in connection with this motion and at the pretrial hearing, the Government has satisfied § 3112's two prongs here. Its witness, James Phillips, explained that 4217 Contreras Court is located on a parcel acquired by the United States under the War Powers Condemnation Act in 1942. *See* Gov't Exs. 2–5; Hearing Tr. at 9:06–10:20. And the Government provided documentary evidence showing both state consent and federal acceptance.

The first prong is uncontested: Silvers didn't resist the Government's position that Kentucky consented to federal jurisdiction over the lands comprising the military base at Fort Campbell. Opp. at 3 n.2. And for good reason: Kentucky's consent is straightforward, statutory, and undisputed. K.R.S. § 3.010 states that the "Commonwealth of Kentucky consents to the acquisition by the United States of all lands and appurtenances in this state, by condemnation, gift or purchase, which are

needful to their constitutional purposes, but said acquisition shall not be deemed to result in a cession of jurisdiction by this Commonwealth." Courts—including the U.S. Supreme Court—have recognized that § 3.010 (and its predecessor, § 2376 of Carroll's Kentucky Statutes) is legally effective in supplying the Commonwealth's consent to federal jurisdiction. *See Howard v. Commissions of Sinking Fund of City of Louisville*, 344 U.S. 624, 625 (1953) (addressing the jurisdictional status of a naval ordnance plant in Louisville).

As to the second, the Government's documents indicate that the Secretary of War repeatedly accepted federal jurisdiction over Camp Campbell and other federal areas acquired for military purposes before April 1945. Records show that the United States paid $26,233 to acquire approximately 325.10 acres on May 5, 1942 from Ella S. Ledford. *See* Deed to Tract 4C-16 (DN 184-5); 1942 Att'y Gen. Letter to Sec. of War (DN 184-1); War Dept. Distribution of Purchase Title Papers (DN 184-4). These "4C-16" documents show that the United States acquired the land at Contreras Court for military purposes.

And other documents show that the Secretary of War accepted jurisdiction over these and all other lands in Kentucky acquired for military purposes. Fort Campbell alone measures approximately 36,000 acres in Kentucky—in addition to considerably more in Tennessee. *See* Motion for Judicial Notice (DN 184) at 3 n.3. The Secretary of War and Governor didn't exchange correspondence in response to each individual acquisition, opting instead to state their positions categorically. Then-Secretary Henry Stimson sent a letter to Kentucky Governor Simeon Willis accepting "exclusive jurisdiction over all lands acquired by [the United States] for military purposes within the Commonwealth of

Kentucky, title to which has heretofore vested in the United States and over which exclusive jurisdiction has not heretofore been obtained." April 28, 1945 Stimson Letter (DN 184-6) (judicial acceptance letter maintained in Army Corps of Engineer files).

The Government also introduced an essentially identical letter, from August 3, 1945, communicating the same acceptance of exclusive jurisdiction over all federally acquired lands where jurisdiction hadn't already been specifically accepted. August 3, 1945 Stimson Letter (DN 184-7) (letter from Secretary of War Stimson to Governor Willis). Why two similar letters mere months apart? The records and testimony indicate this was a belt-and-suspenders approach by the War Department: similar letters accepting exclusive jurisdiction were sent by Stimson to Willis and his predecessor in March 1943, January 1944, and May 1944.[7] Contrary to Silvers's suggestion, these cumulative and consistent documents evincing broad acceptance of jurisdiction—extending from the 1940s to the 80s—support rather than undermine the Government's showing.

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[7] *See* Gov't Ex. 8 (Revised Jurisdiction Summary for Fort Campbell, Kentucky and Tennessee) (January 17, 1985), Ex. 9 (Revised Jurisdiction Summary, Fort Campbell, Kentucky and Tennessee) (December 5, 1975); Ex. 11 (Letters from Stimson to Willis dated April 28, 1945, August 3, 1945, and January 3, 1944 and to Governor Keen Johnson dated March 19, 1943); *see also* Exs. 13–14 (similar records maintained at Blue Grass Army Depot, rather than Fort Campbell, evincing federal intent in 1943 to accept federal jurisdiction over Kentucky lands acquired for military purposes). These letters formed the basis of a judicial finding in the Eastern District of Kentucky that the Blue Grass Army Depot was a federal enclave for purposes of federal question jurisdiction. *See Watkins v. Safety-Kleen Systems, Inc.*, No. 5:08-cv-224, 2008 WL 4073554, at *4–5 (E.D. Ky. 2008).

The only necessary logical step is a short one indeed. True, no letter states explicitly that the federal government accepts jurisdiction *specifically* over Plot 4C-16 in Christian County. Unsurprisingly, the United States instead speaks in the aggregate: accepting jurisdiction over *all* lands acquired for military purposes. And the other documents listed above show that the United States did in fact acquire Plot 4C-16 for military purposes. No argument or document presented to the Court suggests that shouldn't suffice under 40 U.S.C. § 3112.

In response, the defense argues that these documents showing transfer and acceptance are inadmissible because they are unauthenticated, inadmissible hearsay, and violate the best evidence rule. Opp. 5–7.[8] These evidentiary principles are likely inapplicable in this context because the ordinary rules of evidence do not apply to determinations of law or judicial notice of legislative facts. According to the Advisory Committee, "the judge is unrestricted in his investigation and conclusion" related to "judicial access to legislative facts …. render[ing] inappropriate any limitation in the form of indisputability … and any requirement of formal finding…." FED. R. EVID. 201 advisory committee (1972) (quotations omitted); *see also* 1 MUELLER & KIRKPATRICK, Fed. Evid. § 2:12 (4th ed.) ('[T]he Rules do not regulate … any aspect of noticing legislative facts"); *cf.* FED. R. EVID. 1101(d) (evidence rules "do not apply to … court's determination, under Rule 104(a), on a preliminary question of fact governing admissibility … and miscellaneous proceedings….").

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[8] The defense also indicated that it would raise a Confrontation Clause challenge, but did not set out any such argument in the response brief. *See* Opp. at 2. So this argument is abandoned. *See United States v. Watson*, 716 F. App'x 499, 502 (6th Cir. 2017).

In any case, Silvers's evidentiary objections fail on their merits.

As to hearsay, the Government's custodial witness—Charlie Effinger—demonstrated that the Army Corps of Engineers maintained these titles and letters as part of standard military recordkeeping practice. Hearing Tr. at 22:25–26:12, 28:21–23. And the various governmental entities created these documents at the time of the transfer as part of their regular course of record-keeping. Based on the documents and testimony considered at the jurisdictional hearing, these are commonplace files kept for decades in the ordinary course by the U.S. Army Corps. So these documents are excluded from the rule against hearsay under FED. R. EVID. 803(6). *See*, *e.g.*, *United States v. Pacheco*, 466 F. App'x 517, 523–24 (6th Cir. 2012) (admitting regularly-kept FDIC record under 803(6)).

As to the best-evidence rule, the only basis for such a challenge is that the original letters must be provided. FED. R. EVID. 1002; Opp. at 4–8. But the Government has presented photocopies of the original Stimson letters and sale documents. And "duplicate[s]" are "admissible to the same extent as the original unless a genuine question is raised about the original's authenticity." FED. R. EVID. 1003. Based on the Court's review of the testimony and objections, the defense has raised no serious doubts about the authenticity of these documents, which appear regular, official, and mutually reinforcing. The Court harbors no real doubts (and cannot imagine any explanation) that the documents are not what they purport to be.

As to authenticity, the Government has presented testimony from a custodian that these records come from a public office where official papers are kept.

Hearing Tr. at 22:25–26:12, 28:21–23 (testimony of Effinger); Reply at 2–3 (discussing source of records). So the records are presumed authentic. FED. R. EVID. 901(7) (evidence that public record is regularly kept supports authenticity); MCCORMICK ON EVID. § 226; *see also United States v. Lopez*, 762 F.3d 852, 862 (9th Cir. 2014) (testimony of custodial officer sufficient to certify authenticity of public record). The defense offers no compelling evidence to the contrary. Counsel pointed to differences between these letters (DNs 6 & 7) and others sent by Henry Stimson. *See* Hearing Tr. 42:07–18, 51:05–11 (parsing letterhead and signatures used in Stimson correspondence). But none show differences between these and other *acceptance* letters sent by Stimson as the Secretary of War. That these letters bear different letterhead than a small selection of other letters, or contain typed or traced rather than handwritten signatures, does not create any serious concern that they are forgeries or inauthentic in some other way. Opp. at 7–8 (comparing Defense Ex. 3). Some of these differences are slight or imperceptible, and arguably support rather than undermine the letters' authenticity. *See GE Franchise Commercial LLC v. Wormsby*, 2016 WL 4181192, at *4 (D. Ariz Aug. 8, 2016).[9]

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[9] At argument defense counsel cited neighboring Kentucky statutes, K.R.S. §§ 3.090 and 3.100, which purportedly cast doubt on the reliability of the Commonwealth's relinquishment and the United States' acceptance of jurisdiction. Hearing Tr. at 51:05–24. These statutes, nowhere mentioned in Silvers's papers, do not appear to have been passed until 1954—*after* state relinquishment and federal assumption of jurisdiction. *See* K.R.S. § 3.090 ("effective June 17, 1954"). Counsel nevertheless implied that the Governor may not have properly transmitted the United States' request to the next session of the General Assembly or published the Commonwealth's acceptance. This suspicion apparently rests on the absence of a section of the Kentucky Revised Statutes (3.010-.110) specifying

Other differences between various documents are similarly insignificant. Two exhibits—6 and 7—were substantively identical letters from Stimson to Willis, though they contained different dates and different modes of state acknowledgement. Silvers identifies nothing of import to be drawn from the difference between acceptance by seal versus signature. The upshot of each is identical: the Secretary of War accepted jurisdiction over all lands in Kentucky acquired for military purposes.[10]

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that Kentucky ceded jurisdiction over Fort Campbell. No material in the record, however, indicates that the Governor violated or then-existing state law created any such procedural requirement. Nor do these statutory citations, without more, call into question the accuracy or effectiveness of the 1940s records the Government relies on.

[10] Alternatively, Silvers argued that even if the jurisdictional element were susceptible to judicial notice, the Court should've declined because the Government has failed to show that the jurisdictional status of Fort Campbell "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Opp. at 1–2 (citing FED. R. EVID. 201(b)(2)). In response, the Court held a thorough pretrial hearing to allow the defense to air all its potential objections. As discussed below, however, Silvers didn't identify any countervailing evidence or flaws in the Government's submissions sufficient to call into question the accuracy and ascertainability of Fort Campbell's jurisdictional basis.

CONCLUSION

For these reasons and those discussed during the pretrial hearing, the Court granted the Government's motion that the Court take judicial notice that 4127 Contreras Court at Fort Campbell, Kentucky, is within the special maritime and territorial jurisdiction of the United States.

[Signature]
Benjamin Beaton, District Judge
United States District Court
March 30, 2023

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION

Case Number: 5:18-CR-50-1-BJB
US Marshal No: 19518-033

UNITED STATES OF AMERICA,

v.

VICTOR EVERETTE SILVERS

Filed May 4, 2023
Counsel for Defendant: Angela M. Rea
Counsel for the United States:
Seth A. Hancock (USA)
Court Reporter: Dena Legg
(For offenses committed on or
after November 1, 1987)

JUDGMENT IN A CRIMINAL CASE

THE DEFENDANT:

☐ Pursuant to plea agreement

☐ Pleaded guilty to count(s)

☐ Pleaded nolo contendere to count(s) which was accepted by the court.

☒ **Was found guilty by a jury on December 7, 2022 on Counts 1-7 of the Second Superseding Indictment after a plea of not guilty.**

ACCORDINGLY, the Court has adjudicated that the defendant is guilty of the following offense(s):

Title / Section and Nature of Offense	Date Offense Concluded	Count

FOR CONVICTION OFFENSE(S) DETAIL—SEE COUNTS OF CONVICTION ON PAGE 2

The defendant is sentenced as provided in pages 2 through **8** of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☐ Count(s) (Is) (are) dismissed on the motion of the United States.

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the Court and the United States Attorney of any material change in the defendant's economic circumstances.

3/30/2023	[Signature]
Dates of Imposition of Judgement	Benjamin Beaton, District Judge United States District Court

COUNTS OF CONVICTION

Title / Section and Nature of Offense	Date Offense Concluded	Count
18:1111(a) and (b) FIRST DEGREE MURDER (PREMEDITATED)	10/14/2018	1ss
18:1113 ATTEMPTED MURDER	10/14/2018	2ss
18:2261(a)(1) and (b)(1) DOMESTIC VIOLENCE	10/14/2018	3ss
18:2262(a)(1) and (b)(1) VIOLATION OF PROTECTION ORDER	10/14/2018	4ss
18:922(g)(8) and 924(a)(2) POSSESSION OF A FIREARM BY A PROHIBITED PERSON	10/14/2018	5ss
18:924(c)(1)(A)(iii) and 924(j)(1) USE/CARRY/DISCHARGE FIREARM DURING AND IN RELATION TO A CRIME OF VIOLENCE—RESULTING IN DEATH	10/14/2018	6ss
18:924(c)(1)(A)(iii) USE/CARRY/DISCHARGE FIREARM DURING AND IN RELATION TO A CRIME OF VIOLENCE	10/14/2018	7ss

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of **Life imprisonment on Counts 1, 3, 4, and 6 to run concurrently, 20 years on Count 2 to run concurrently, 10 years on Count 5 to run concurrently, and 10 years on Count 7 to run consecutively**.

☒ **The Court makes the following recommendations to the Bureau of Prisons: The Court recommends the Defendant is housed at a facility with educational programming. The Court also recommends the Defendant is housed in a facility as close as possible to Jacksonville, Florida.**

☒ **The defendant is remanded to the custody of the United States Marshal.**

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at A.M. / P.M. on

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ Before 2:00 p.m. on

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

☐ The defendant shall continue under the terms and conditions of his/her present bond pending surrender to the institution.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ To _____
_____ at _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: **3 years.**

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☒ **The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse.**

4. ☒ **You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. (check if applicable)**
5. ☒ **You must cooperate in the collection of DNA as directed by the probation officer.**
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense.

7. ☒ **You must participate in an approved program for domestic violence**.

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.

5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.

7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

8. You must not knowingly communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.

9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.

10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).

11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.

12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.

13. You must follow the instructions of the probation officer related to the conditions of supervision.

SPECIAL CONDITIONS OF SUPERVISION

14. The defendant shall participate in a domestic violence counseling program approved by the U.S. Probation Office and shall pay the costs of said program.

15. The defendant shall participate in a community-based mental health treatment program approved by the U.S. Probation Office. The defendant shall contribute to the Probation Office's cost of services rendered based upon his/her ability to pay as reflected in his/her monthly cash flow as it relates to the court-approved sliding fee scale.

16. The defendant shall submit his or her person, property, house, residence, vehicle, papers, computers [as defined in 18 U.S.C. § 1030(e)(1)], other electronic communications or data storage devices or media, or office to a search conducted by the United States Probation Officer. Failure to submit to a search may be grounds for revocation of release. The defendant shall warn any other occupants that the premises may be subject to searches pursuant to this condition. An officer may conduct a search pursuant to this condition only when reasonable suspicion exists that the defendant has violated a condition of their release and that the areas to be searched may contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.

17. The defendant shall have no contact with the victim, including correspondence, telephone contact to include text messaging, or communication through third party, except under circumstances approved in advance and in writing by the probation officer in consultation with the treatment provider.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see O*verview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Upon a finding of a violation of probation or supervised release, I understand that the Court may (1) revoke supervision, (2) extend the term of supervision and/or (3) modify the conditions of supervision.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

Defendant	Date
U.S. Probation Officer /Designated Witness	Date

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	$ 700.00		

☒ **The fine and the costs of investigation, prosecution, incarceration and supervision are waived due to the defendant's inability to pay.**

☒ **The determination of restitution is deferred. An Amended Judgment in a Criminal Case (AO 245C) will be entered after such determination.**

☐ Restitution is not an issue in this case.

☐ The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

Criminal debt may be paid by check or money order or may be paid online at www.kywd.uscourts.gov (See Online Payments for Criminal Debt). Your mail-in or online payment must include your case number in the exact format of DKYW518CR000050-001 to ensure proper application to your criminal monetary penalty. If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(I), all nonfederal victims must be paid in full prior to the United States receiving payment.

Name of Payee	**** Total Amount of Loss**	**Amount of Restitution Ordered**	**Priority Order Or Percentage Of Payment**

☐ If applicable, restitution amount ordered pursuant to plea agreement..... $

☐ The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. 3612(f). All of the payment options on Sheet 5, Part B may be Subject to penalties for default and delinquency pursuant to 18 U.S.C. 3612(g).

☒ **The court determined that the defendant does not have the ability to pay interest and it is ordered that:**

☒ **The interest requirement is waived for the** ☐ **Fine and/or** ☒ **Restitution**

☐ The interest requirement for the ☐ Fine and/or ☐ Restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A ☒ **Lump sum payment of $ 700 due immediately, balance due**

☐ not later than , or

☒ **in accordance with E, below.**

B ☐ Payment to begin immediately (may be combined with C, D, or E below); or

C ☐ Payment in (E.g. equal, weekly, monthly, quarterly) installments of $
Over a period of (E.g. months or years) year(s) to commence (E.g., 30 or 60 days) after The date of this judgment, or

D ☐ Payment in (E.g. equal, weekly, monthly, quarterly) installments of $
Over a period of (E.g. months or years) year(s) to commence (E.g., 30 or 60 days) after Release from imprisonment to a term of supervision; or

E ☒ **Special instructions regarding the payment of criminal monetary penalties:**

Any balance of criminal monetary penalties owed upon incarceration shall be paid in quarterly installments of at least $25 based on earnings from an institution job and/or community resources (other than Federal Prison Industries), or quarterly installments of at least $60 based on earnings from a job in Federal Prison Industries and/or community resources, during the period of

incarceration to commence upon arrival at the designated facility.

Upon commencement of the term of supervised release, the probation officer shall review your financial circumstances and recommend a payment schedule on any outstanding balance for approval by the court. Within the first 60 days of release, the probation officer shall submit a recommendation to the court for a payment schedule, for which the court shall retain final approval.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons Inmate Financial Responsibility Program, are to be made to the United States District Court, Gene Snyder Courthouse, 601 West Broadway, Suite 106, Louisville, KY 40202, unless otherwise directed by the Court, the Probation Officer, or the United States Attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☒ **The defendant shall forfeit the defendant's interest in the following property to the United States: The Court enters forfeiture against the Defendant, without objection, in accordance with the preliminary order filed by the United States, and will issue a final order of forfeiture in accordance with the Government's notice regarding forfeiture (DN 317) and FRCrP 32.2(c).**

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 23-5427

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.

VICTOR EVERETTE SILVERS,
Defendant-Appellant.

Filed March 25, 2025

ORDER

BEFORE: MOORE, CLAY, and THAPAR, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

[Signature]
Kelly L. Stephens, Clerk

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION

Case No. 5:18-CR-00050-BJB

UNITED STATES OF AMERICA,
Plaintiff,

v.

VICTOR EVERETTE SILVERS,
Defendant.

November 28, 2022

TRANSCRIPT OF EVIDENTIARY HEARING REGARDING GOVERNMENT'S MOTION FOR JUDICIAL NOTICE

BEFORE
HONORABLE BENJAMIN BEATON
UNITED STATES DISTRICT JUDGE

***

[3] (Begin proceedings in open court at 2:45 p.m.)

THE COURT: All right. Anything we need to talk about before you put on your witnesses?

MR. HANCOCK: Well, one little thing, Judge, if I can approach.

THE COURT: Fine.

MR. HANCOCK: Ms. Taylor with Corps of Engineers or one of their attorneys is present, and she can explain this, if need be, but this is the *Toohey* letter that limits the Corps of Engineers employees' testimony here. And I'm ready to proceed if the defense is.

THE COURT: All right. You may call your first witness.

MR. HANCOCK: Thank you, Judge.

(JACKIE PRESTON, called by the Government, sworn.)

DIRECT EXAMINATION

BY MR. HANCOCK:

Q. Ma'am, could you state your name for the record, please.

A. Jackie Preston.

Q. Can you spell your name for us, please.

A. Jackie, J-A-C-K-I-E, Preston, P-R-E-S-T-O-N.

Q. Thank you, ma'am. How are you employed?

A. With the Army Corps of Engineers.

Q. Okay. And what do you do for the Army Corps of Engineers?

A. I'm the chief of the Military Branch in the Real Estate **[4]** Division in the Louisville District.

Q. Okay. And tell us what you do in that position.

A. Well, basically, in the Military Branch, we oversee the real estate for all the military installations in the area of our responsibility—excuse me—and that entails disposals, acquisitions, use of the property by other entities, that type of thing.

Q. And what is the—I guess the overarching Army Corps of Engineers' responsibilities with regard to real estate that's owned by the government or the United States Army?

A. I don't know if I understand your question.

Q. I'll ask it a different way. Do you-all keep records? Does the Army Corps of Engineers keep records in relation to this real property that's owned?

A. Yes, we do.

Q. Why is that?

A. We are mandated by general orders from the Secretary of the Army to maintain—well, we have the real estate responsibility, the chief of engineers does, which is Corps of Engineers, for among other—construction, engineering, that type thing, but also for real estate. So it's our responsibility to keep the real estate records for acquisitions, disposals, use of other—by other entities, that type thing.

Q. Okay. And so is Fort Campbell, Kentucky, within the Louisville District?

[5] A. It is.

Q. Okay. And what is your understanding, if any, with regards to the jurisdictional status of Fort Campbell?

MS. STEVENS: Objection. Your Honor, that's for the court to decide.

THE COURT: Yes. I thought your position was it was for the jury to decide.

MS. STEVENS: Or the finder of fact, Your Honor.

THE COURT: There you go. Who owns Fort Campbell, is that—

MR. HANCOCK: I think that's part of it. I think that's part of it, Judge.

THE COURT: All right. Who has—who exercises jurisdiction over Fort Campbell? I don't think he's going to the ultimate question even if maybe the question was a little imprecise perhaps.

So let's just—I think we all will have a chance to talk about what I decide and what the jury decides and so forth. So go ahead, but what she answers to that question isn't gonna resolve anything. So go ahead.

BY MR. HANCOCK:

Q. Ms. Preston, what is your understanding as to the jurisdictional status of Fort Campbell, Kentucky?

A. We have exclusive jurisdiction.

Q. Okay. And how long have you been with the Army Corps of **[6]** Engineers?

A. Next month it will be 40 years.

Q. Okay. And have you been dealing with these real estate matters for the entirety of your career?

A. I have.

Q. Okay. I believe—

MR. HANCOCK: And, Ms. Crockett, you can tell me what exhibit number this is—in Docket Number 223—I believe this was filed as Exhibit 1 to that. I believe this is the General Order that Ms. Preston was referring to, yeah, the General Order. It's 223-1.

Q. Ms. Preston, I'll give you a chance to look at that and ask if you recognize it.

A. I do.

Q. What is it?

A. It's the General Order. I can see it.

MR. HANCOCK: All right. And, Ms. Crockett, could you take us to page—I believe it's 18 within the exhibit with particular note of paragraph 36(b)(5).

Q. And, Ms. Preston, in paragraph 36(b)(5) there, does that accurately summarize the Army Corps of Engineers' duty?

A. Yes, it does.

Q. All right. And that says that you're responsible for, quote, "Acquiring, managing the title, granting the use, and disposing of real property"?

[7] A. Uh-huh, yes.

MR. HANCOCK: I believe that's all the questions I have for Ms. Preston at this time.

THE COURT: Okay. Any cross?

CROSS-EXAMINATION

BY MS. STEVENS:

Q. Good afternoon, Ms. Preston.

A. Hi.

Q. So you've been in your position for the past 40 years; correct?

A. I have been in the Real Estate Division for the past 40 years, not this exact position.

Q. Was the Army Corps of Engineers in charge of this same position or a similar position back in the early 1940s?

A. I don't know.

Q. Docket Number 223, Exhibit 1, the General Order, what's the date on that General Order, ma'am?

A. I don't know.

MS. STEVENS: Mr. Hancock—

MR. HANCOCK: Can you pull that up.

MS. STEVENS: It was on page 1, Ms. Crockett, in the upper right.

A. 6 March 2020.

Q. Thank you, ma'am. Do you know whether such General Order existed back in the early 1940s?

[8] THE COURT: I do not know.

MS. STEVENS: That's all I have. Thank you, Your Honor.

THE COURT: Okay.

MR. HANCOCK: Thank you, Ms. Preston. That's all I have.

(JAMES CARTER PHILLIPS, called by the Government, sworn.)

DIRECT EXAMINATION

BY MR. HANCOCK:

Q. Sir, could you state your name for us.

A. My name's James Carter Phillips.

Q. All right. And could you spell your first and last names for the record.

A. J-A-M-E-S P-H-I-L-L-I-P-S.

Q. All right. And how are you employed, sir?

A. I'm a land surveyor with the U.S. Army Corps of Engineers.

Q. Okay. How long have you been a surveyor?

A. Been a licensed surveyor since September 2003.

Q. And how long have you worked for the Corps of Engineers?

A. Since May of 2018.

Q. What sort of professional licensures, certifications, training do you have to have to be a land surveyor?

A. You got to pass a test that's from the state, and in my case, I'm licensed in Tennessee.

Q. Okay. And what are your job duties as a surveyor for the **[9]** Corps of Engineers?

A. Well, mostly what I do is—we have these maps and land records, and a lot of stuff I do is land descriptions. But I basically help the—and support real estate and the fact that I identify things on the maps for real estate specialists.

Q. Okay. As a part of this case, were you asked to locate a particular address at Fort Campbell, Kentucky, on the greater sort of land acquisition maps?

A. That's correct, yes.

Q. Okay. And the address we're talking about here is 4217F Contreras Court, Fort Campbell, Kentucky; correct?

A. That's correct, yes.

Q. And were you able to locate that on the land acquisition maps?

A. Yes, I was.

MR. HANCOCK: Okay. And, Ms. Crockett, I'd ask if you would pull up Government's Exhibit 2, and I'm gonna ask Mr. Phillips if he can identify that for us.

A. Yeah, that's one of the land acquisition maps. There's, like, 20 some sheets total for Fort Campbell, but that's the one that I identified.

MR. HANCOCK: And if we can pull up Government's Exhibit 3, Ms. Crockett.

Q. Can you identify that, sir?

A. Yeah, that's the map I made to overlay the previous exhibit **[10]** with some imagery so that we could see what we was talking about.

Q. Okay. So if I'm looking at this map correctly, it appears that 4217 Contreras Court is this tract 4C-16 that's listed below this Ella S. Ledford.

A. That's correct.

Q. And have you also had occasion to see the land description in the deed for this?

A. Yes.

Q. All right.

A. That's part of the—on those maps, I think of them as a map that keeps track of title. And if you want to get into the details, you got to identify that tract number and pull the deed and then look at it for the details on the boundary.

Q. Okay. Anything about the deed description make you think that the land acquisition map and where you've located this is not accurate?

A. That is an accurate map.

MR. HANCOCK: Okay. That's all the questions I have for Mr. Phillips.

CROSS-EXAMINATION

BY MS. STEVENS:

Q. Good afternoon, Mr. Phillips.

A. Hello.

Q. Mr. Phillips, as a land surveyor licensed in Tennessee, are **[11]** you also, by virtue of your job with the Corps of Engineers, licensed to perform your duties across state lines?

A. Well, I'm in the Federal District. And as far as when you're a surveyor in—working for the government, you only have to be licensed in a state or the Washington District of Columbia to have this position.

Q. I imagine, in your position as a surveyor, you look at deeds as part of your duties.

A. That's correct.

Q. What was the date on the deed that you examined that was underlying Government's Exhibit 2?

A. I'd have to see that deed to refresh my memory, but if I remember correctly, they're in the '40s.

Q. The deed is in the 1940s?

A. I believe so, their acquisition deeds.

Q. Okay. And 4217 Contreras Court, the testimony you gave today, was that located in the Government's Exhibit 2 that you showed us in 2018?

A. If you're asking me was that specific address shown on that map, no. What I did was overlaid that map onto the imagery of—whatever the current image we had. I don't know the date of that imagery.

Q. You overlaid a map dated from when?

A. It would have been whatever imagery we had. As far as the software, we use Art Map.

[12] THE COURT: Can we just put it back on the screen?

MS. STEVENS: Yes, Your Honor.

BY MS. STEVENS:

Q. Okay. When you describe overlaying a map on the imagery, could you explain that for us?

A. I took this map you see right here, and we have software that's called Art Map in which we can go pull the latest imagery. Now, whatever that imagery that is—say, roughly 2020—and I'm not sure the exact date—and I took that map and overlaid it onto that site.

Q. And what imagery did you overlay onto the site? Where did you get that?

A. It's in our software.

Q. And what is the date for that imagery?

A. Approximately 2020. I don't know the exact date.

THE COURT: What's the date on this exhibit we're looking at now?

THE WITNESS: You'd have to look at it. It would be down here in the lower right, in that area. Maybe scroll around to our left. Actually, there's a date. It looks like maybe '47, but these get—as acquisitions get—if by chance something happens or they do get updated, that would have been the date at that time.

BY MS. STEVENS:

Q. Do you know whether this deed has been updated since that **[13]** time?

A. The deed's not, but this map—like, if you want to look over here in the lower left, there may be some other dates, and you would have to look at this, the lower left.

Q. And then when you described earlier overlaying imagery, is that—what exhibit is that that you created?

MR. HANCOCK: That's Exhibit 3, Cristy.

MS. STEVENS: Can you please pull up Exhibit—

THE COURT: Hold on. I have another question about this before we move on. Can you go back.

Can you tell from this exhibit which land is being acquired? Is the point of this map to show the acquisition of land by the United States?

THE WITNESS: It's a way we keep track of it, yes. It's a map—there's more sheets, but I would know by looking at that deed and I confirm it. By being a land surveyor using my skills, you pull that 4C-16 and then I pull the deed and then I read that land description to confirm what I'm seeing.

THE COURT: All right. And you see where that Ledford tract is shaded?

THE WITNESS: Correct.

THE COURT: What does that mean?

THE WITNESS: That shading right there—we would look in that legend. That was transferred from the U.S. Army's control to the Air Force, and I believe

that would be indicated **[14]** down in one of those symbols in the lower left.

THE COURT: And is that the acquisition that the right-hand column is referring to?

THE WITNESS: The acquisition is the deed itself, which would be tract 4C-16.

THE COURT: So are you talking about the whole thing or just that shaded area?

THE WITNESS: No, that whole tract, 4C-16. That's the deed of acquisition. The shaded area would have been the transfer from the U.S. Army to the U.S. Air Force.

THE COURT: So does this exhibit tell us that in December 31st, 1947, the United States owned this land, and it was transferred between the Army and the Air Force?

THE WITNESS: I would pull the deed to—you got to have both documents together. The date that you're looking for is on the deed.

THE COURT: But what does that date at the bottom mean?

THE WITNESS: That's 1947. That's when the map—these maps—there are archived maps that we use to keep track of the deeds.

THE COURT: I'm not trying to be contrary, but on the right side of that column, doesn't it say acquisition and—

THE WITNESS: Yeah, but those acquisitions—you know, it might take them five, ten years before they get **[15]** everything settled. Some of them go to court. You're talking about hundreds of tracts.

THE COURT: So in other words, that refers only to the map. It doesn't refer to the transfer.

THE WITNESS: It does not refer to the transfer of the deed, that is correct.

THE COURT: But it does memorialize that this shaded land was transferred; right? You're just saying that the—

THE WITNESS: Well, the shaded land, to know that transfer date, you would look in the lower left down here. That's probably a different date, and we'd have to match up that symbol.

It looks like—yeah, the last one down at the bottom says something 492. So many acres portions shown on this sheet is transferred to Department of Air Force, it looks like—I can't quite make that out—maybe 1949, retransferred to Department—oh, yeah, it's flipping back and forth even. It's staying within federal control, but it's going between departments.

THE COURT: So can you tell from this exhibit when that Ledford land was in federal control?

THE WITNESS: I would look for the deed for that. I used this document to find the deed, and you got to look at the land description that matches, and you'll find that deed and it'll have those tract numbers. That's the way the government **[16]** system works.

MS. STEVENS: Thank you, Your Honor.

BY MS. STEVENS:

Q. So going to Exhibit 3, can you explain to us where the imagery came from and what the date is for the imagery?

A. We have Art Map. It's a software we use in real estate. And, basically, it's just a generic imagery of the whole world. And so I put that in that software, and I know how to take that map—it's me that did this. I confirmed it with the land description. But, like, for example, you see that KY-117, I know where that road is. I've laid that road. I can see that—this other road going northeast/southwest, that matches here. It's just I'm using—as a surveyor using the landmarks to lay that map on there.

Q. So to clarify, Government's Exhibit 2 does not tell us the date that Fort Campbell was acquired by the United States Government. That's not the purpose in that exhibit; correct?

A. I created the map. So I would say no. It was me to communicate so you could see the overlay.

Q. Okay. And Government's Exhibit 3 does not purport to say the address of 4217 Contreras Court and where it lies as it would be depicted on October 14th, 2018, does it?

A. I'm sorry. Say that again.

Q. Sure. Since you can't date the imagery or you have not given us a date for the imagery, does Government's Exhibit 3 **[17]** purport to depict 4217 Contreras Court as it existed on October 14, 2018?

A. I want to say yes to that because I know where that road is. Now, granted you can't see that, but I zoomed in on that. I know where that street is. And I looked at those things, and I have landmarks that I verified that.

Q. Okay. But the imagery is not from 2018; correct?

A. No. It's an approximation. I do not know the exact date of the imagery.

MS. STEVENS: That's all I have. Thank you, Your Honor.

MR. HANCOCK: Ms. Crockett, can you pull up Government's Exhibit 5. It should be the deed.

REDIRECT EXAMINATION

BY MR. HANCOCK:

Q. Mr. Phillips, is this the deed that you reviewed?

A. That's correct.

Q. Okay. And, frankly, I got a little confused by Ms. Stevens' questioning there. So I don't know that I fully understand what she's driving at. We've got the land acquisition map which shows the parcels that have been made a part of Fort Campbell, so to speak. And some of those, am I correct, have been transferred or retransferred, and that's at least part of this Ledford tract but not the tract where 4217 Contreras Court is; correct?

[18] A. Say that again.

Q. So there are—that legend that's at the bottom left-hand corner of that land acquisition map shows that the various properties are within Fort Campbell, and the legend shows where some properties have been transferred or retransferred; correct?

A. That's correct, but that's not where that address is at.

Q. Okay. So 4217 Contreras Court was not transferred to the Air Force, and it was not retransferred back to the Army at any point; correct?

A. That's correct.

Q. Okay. So by looking at the deed, which is Government's Exhibit 5 here, and then looking at the

acquisition map, Government's Exhibit 2, and then you put everything together and made it Government's Exhibit 3, which is a satellite overlay; correct?

A. That's correct.

Q. Okay. You being a surveyor for Fort Campbell, do we think that the address of 4217 Contreras Court has, in the course of four years, shifted somehow on the land acquisition maps?

A. No. The land does not get up and walk.

Q. Okay. So, again, using the deed and its description and your familiarity with the landmarks, you're confident that 4217 Contreras Court is where you have it marked on Government's Exhibit 3; correct?

A. Yes. It's within the parameters of that tract indeed.

[19] Q. And that's tract 4C-16; correct?

A. That's correct.

MR. HANCOCK: Okay. That's all the questions I have for Mr. Phillips.

RECROSS-EXAMINATION

BY MS. STEVENS:

Q. But, Mr. Phillips, my question was can you tell us that the exhibit you created, Government's Exhibit 3, fairly and accurately depicts 4217 Contreras Court as it existed on October 14th, 2018, based on the imagery and the work that you put together?

A. I would use the deed. I can read that deed, and I know that that address and that property is well within that perimeter.

MS. STEVENS: Your Honor, we object to Government's Exhibit 3 as not a fair and accurate

representation of the land in 2018. It's a composite of what he's put together. He can say it illustrates where the property is, but I don't think he's been exact with respect to the dates of what he's using.

THE COURT: Why do you think it's not a fair and accurate representation as of 2018?

MS. STEVENS: Because he can't tell us when this software that he pulled the imagery down—what we're looking at. He can't tell us when that software was created. I would agree it's illustrative, but I don't think it defines it because we don't know when this imagery that is his software was created **[20]** or what he's using to overlay onto the map.

THE COURT: Well, what changed?

MS. STEVENS: I don't know, Your Honor.

THE COURT: Isn't this at least evidence that Contreras Court was within the parameters of Fort Campbell in 2018?

MS. STEVENS: It's illustrative evidence, Your Honor, but I don't think he's specific as to time and date.

THE COURT: Is there a requirement for greater specificity than what we've seen here?

MS. STEVENS: No, as long as we're not admitting Exhibit 3 to purport to depict exactly how that appeared on the date of the alleged murder. I think it's illustrative, Your Honor, but he hasn't laid a foundation for it being precise.

THE COURT: Okay.

MS. STEVENS: Thank you, Your Honor. No further questions.

THE COURT: All right. I think you can step down. MR. HANCOCK: Thank you, Mr. Phillips.

THE COURT: Let me ask you a question before you bring in your next witness.

MR. HANCOCK: Yes, sir.

THE COURT: All right. I honestly thought we were going to be talking about dates from the 1940s, not from the 2010s. I had written down in my notes "Defendant doesn't **[21]** dispute the lines, just the acceptance of the land by the United States."

And so now I hear you objecting to where things were in 2018, and I'm not sure what the evidence will be about when the United States accepted this on that relinquishment acceptance test that we discussed a little bit last time around. Maybe that evidence is coming, but I just wanted to make sure that I wasn't at sea for the wrong reason and for too long.

MR. HANCOCK: No, Judge—

THE COURT: Am I misunderstanding the defendant's position?

MS. STEVENS: You're not, Your Honor. That was my understanding as well, which is why the first cross-examination focused on the '40s. We really are talking about whether they properly ceded jurisdiction and the federal government accepted back at the time.

THE COURT: So why does the fair and accurate representation of 2018 matter?

MS. STEVENS: Well, then they tried to offer an exhibit without a proper foundation, that's all, Your Honor, but I agree with the Court that I don't think that's the dispute here.

THE COURT: All right. Are you gonna put on evidence of acceptance of this land?

MR. HANCOCK: Just any second now, Judge. That's the **[22]** next witness here.

THE COURT: All right. I just wanted to make sure we didn't lose our witnesses without getting to what I at least thought was the question at hand.

(CHARLIE EFFINGER, called by the Government, sworn.)

DIRECT EXAMINATION

BY MR. HANCOCK:

Q. Sir, could you please state your name.

A. Charlie Effinger.

Q. Can you spell your first and last names for the record, please.

A. It's C-H-A-R-L-I-E, last name Effinger, E-F-F-I-N-G-E-R.

Q. Okay. How are you employed, Mr. Effinger?

A. I am a realty specialist for the U.S. Army Corps of Engineers.

Q. Okay. How long have you been employed by the Corps of Engineers?

A. Been employed since 2009.

Q. And what do you do in your position?

A. So in real estate, I'm a realty specialist in our Military Branch. And so we manage real property—and that's kind of a diverse action—but for our military installations in our area of responsibility, and those states include Kentucky, Illinois, Indiana, Michigan, and Ohio.

Q. Okay. As a part of that, those duties, does the Corps of **[23]** Engineers and specifically your office maintain land records related to those parcels of real property?

A. Correct, yes.

Q. Okay. And how far back do those records go generally?

A. They'll go back to the original acquisitions of—I've had some installations that would be the late 1800s.

Q. Okay. And why would you keep such records? I say you. Why would the Army Corps of Engineers keep such records?

A. The Corps is directed to be the recordkeeper for the Army, for the United States.

Q. For these land records?

A. Correct, yeah.

Q. In the course of your job duties, we communicated and I asked you to research on this specific address, 4217 Contreras Court, Fort Campbell, Kentucky; correct?

A. Yes.

Q. Okay. What actions did you take to conduct that research?

A. Well, I had the two different pieces. One was the gentleman you were just speaking with James, our land surveyor, I asked him to confirm the deed and location of that address at Fort Campbell. And I—which I provided you that as well as pulled—we have—in our office we hold all the records, as you said, deeds and jurisdiction and all that information for Fort Campbell. So I went in the back, pulled the files out of our records.

[24] Q. And so you mentioned jurisdictional issues. Does that come up as a part of your job, these questions about jurisdiction?

A. It can.

Q. Okay. It looks like—and I don't think there's any qualm about this at this point, but tract 4C-16 was sort of a tracted issue that was identified by you and Mr. Phillips; correct?

A. Yes.

MR. HANCOCK: Okay. Ms. Crockett, could you pull up—and I'll say this first.

Q. Mr. Effinger, I'm gonna take you through some of the documents that you sent to me in regards to this tract, 4C-16, okay, and I'll ask that you identify these for us. Okay?

A. Uh-huh.

MR. HANCOCK: If you could pull up Exhibit 1 for us, which is the title opinion sheet. I think that says Government's Exhibit 4 on it. I'm a little confused as to what that is. It's the Exhibit 1 to my—sorry.

Q. Can you identify what this is?

A. Yeah, it's a letter from the—to the Secretary of War from the Attorney General's Office from one of the original ones back in the '40s.

Q. Okay. The letter dates June 9 of 1942; is that correct?

A. Correct.

Q. Okay. And in the body, that first paragraph is talking about this tract 4C-16; correct?

[25] A. Correct.

Q. And then it also talks about the Kentucky-Tennessee Armored Division Camp Project in Christian County, Kentucky; correct?

A. Correct.

Q. And I'll ask you to go over to what you had pulled up before, which I have marked down on my sheet as Government's Exhibit 4. Can you tell us what this is, sir?

A. It's kind of—I would say it looks like a final title—or, basically, final title describing basically the acquisition, which at that time would have been with Ella Ledford and regarding 4C-16 tract.

Q. Again, this looks like this is a War Department and then Office of the Chief of Engineers—

A. Correct.

Q. —document; correct?

A. Correct.

Q. Okay. And I note in here that there is language regarding condemnations proceeding under the War Powers Act; correct?

A. Yes.

Q. Okay. And Government's Exhibit 5 should be the deed. If you need us to flip through those pages so you can identify it, we can.

A. Yeah, that is the deed to the subject tract we're discussing.

Q. Okay. So that's the deed to this tract 4C-16 then?

[26] A. Yeah, the acquisition, correct.

Q. Okay. And so am I correct that this was transferred to the United States for Ms. Ledford in 1942?

A. Yes.

Q. Okay. I want to flip over to—or have Ms. Crockett flip over to Exhibit 6. What's this, sir?

A. That is a letter that goes from the Secretary of War at that time for the jurisdiction. It goes to the Governor of—in this case it would be the State of Kentucky and the—and then there's a spot on the bottom for them to accept the letter and acknowledge and—for that jurisdiction in which you would see at the—inside the body of the letter.

MS. STEVENS: Your Honor, we do object to Government's Exhibit 6. I don't know if the Court wishes to receive objections to each exhibit or to wait until they're offered in evidence, but we do object to this exhibit.

THE COURT: Well, I know—I know you do. Go ahead and ask him about it. And then you can question him on it and then you can tell me why you think this isn't good evidence of acceptance or what have you. Okay?

MS. STEVENS: Yes, Your Honor.

BY MR. HANCOCK:

Q. Sir, this type of jurisdictional acceptance letter, is this commonplace in the Corps of Engineers' files?

A. Yes.

[27] Q. Okay. So this is—this is not specific to tract 4C-16. This isn't an aberration. This is something that would be routine for any and all parcels of property; correct?

A. Yeah, yes.

Q. Okay. And if we could go to Exhibit 7.

MS. STEVENS: Same objection, Your Honor.

BY MR. HANCOCK:

Q. And see if you can identify this.

A. Yeah, it's just a different date, you know, time period. But, again, it's a letter from the Secretary of War to the Governor of Kentucky regarding jurisdiction at—in Kentucky.

Q. Okay. And so this letter, Exhibit 7, and Exhibit 6 that we just talked about, you sent both of those letters to me from your files; correct?

A. Correct.

Q. And both were contained in those files that relate to tract 4C-16?

A. Yes, and Fort Campbell as a whole, correct.

Q. And you had also sent Government's 8—

THE COURT: Well, hold on. Can I ask about 7?

MR. HANCOCK: Sure.

THE COURT: Is this the same letter as Exhibit 6? What's the difference?

THE WITNESS: This one was in 1945, and I believe the last one was '43—or, no, it was—or hold on. Excuse me.

[28] THE COURT: They're two different dates in '45, I agree.

THE WITNESS: Yeah, I noticed the dates were off is why I said that.

THE COURT: Are they otherwise the same letter? The body of it is what I mean. There's a different acceptance—

THE WITNESS: I would need to read.

THE COURT:—legend at the bottom.

MR. HANCOCK: Would you like me—Judge, this might make it a little easier. I've got a physical copy of these things, if that would be easier for the witness to review.

THE COURT: Sure.

MR. HANCOCK: If I could approach.

THE COURT: Do you have copies for me?

MR. HANCOCK: Just what I had attached to the – to my—that's just my response, I think. So I do have a copy, Judge.

THE COURT: Thank you.

THE WITNESS: The body would appear to be the same, but the dates are different.

THE COURT: And Mr. Hancock asked if these letters were common or routine in your recordkeeping system.

THE WITNESS: Yes.

THE COURT: Is it—what, if any, inference do you derive from two copies of substantively the same or quite **[29]** similar letter being found in this file?

THE WITNESS: I would look for the one with the—I'm gonna point to Exhibit 7, with that one with the signed acknowledgement from the Governor. You know, that shows it's been accepted from the state.

THE COURT: The signature and—are you pointing to the seal there?

THE WITNESS: Yes.

THE COURT: All right. And is that combination of seal and signature common on these acceptance letters that you see, or is there a different form of acceptance acknowledgement that you're used to seeing?

THE WITNESS: That's typical. I don't want to speak overall because they could be varied, but that's, I would say, typical, if that—

THE COURT: All right. Thanks.

Go ahead.

MR. HANCOCK: Thank you, Judge.

BY MR. HANCOCK:

Q. I think the judge asked about why there would be two letters. I want to talk about that a little bit and reference these jurisdictional summaries that you also provided. Government's 8—and this is a two-page. So we may have to go to the next page as well there. Is that that Jurisdictional Summary from 1985?

[30] A. Uh-huh, yes, sir.

Q. You have to say it out loud.

A. Yes. Sorry. I know. Sorry. Yes.

Q. You're fine. So I want to look down here. This shows that there was—if I'm reading this correctly, acreage was being acquired, it appears, over some period of time, and these letters of acceptance would have gone out and been applicable to what had been acquired since the last letter; is that accurate?

A. Correct.

Q. And then if we go over to the 1975 Jurisdictional Summary, which is Government's 9—and I think, similarly, this is a multipage document. It's four pages. And if you'll go to the top of page 2, is 4C-16 listed at the top of page 2?

A. Yes, sir.

Q. If you'll go back to page 1. And this summary indicates that exclusive jurisdiction vested in this. And it shows the date of the letter, 29 March 1943, and then April 7, 1943, is when that was accepted by the Governor at that point; correct?

A. Yes, sir.

Q. Okay. Now—

THE COURT: What is a Jurisdictions Summary?

MR. HANCOCK: Judge, this—what this appears to be, if you are asking me—

THE COURT: No, I was asking him.

MR. HANCOCK: Okay. I'm sorry.

[31] THE WITNESS: It is what we would pull in our files to review the history, you know, whether it be the deeds or what have you. It gives you the overall jurisdiction currently at that installation—in this case Fort Campbell—and it does give you an overview of the history as well, you know, a summary. And it will tell you exclusive jurisdiction, if there is, and then it would go through what is included with that so—as this is exclusive jurisdiction, and this tract in particular would be exclusive jurisdiction by reviewing our files, you know, with it stating exclusive jurisdiction in that last paragraph and going—it's in that first section of acres.

THE COURT: So, basically, in 1975, somebody went through and collected all the deeds that were cobbled together to represent the land that comprises Fort Campbell?

THE WITNESS: Correct, because it—in that letter, the 1943 letter, it would have—based off of this, it should show that, declaring Commonwealth of Kentucky exclusive jurisdiction for all of those acquired acreages, which is—but yes.

THE COURT: All right. Go ahead.

BY MR. HANCOCK:

Q. Based off this Jurisdictional Summary, really both of them, there were some letters that we didn't have copies of that weren't provided; correct?

A. Yes, sir.

[32] Q. Were you able to subsequently locate those?

A. Yes, and they were located in just another—in our files in another Kentucky installation location that would have had the same jurisdiction declared at that time.

Q. So was that the Blue Grass Army Depot?

A. Yes, sir.

MR. HANCOCK: Ms. Crockett, I'll have you pull up Government's Exhibit 13.

Q. Is this that 1943 letter?

A. Yes.

Q. Okay.

A. I believe so.

Q. And then Government's 14—

A. Yes.

Q. —from 1944?

A. 1944, correct.

Q. And so in your opinion, both of those apply with equal force not just to Blue Grass Army Depot but also to Fort Campbell?

A. Yes.

THE COURT: How do these relate to tract 4C-16 that we've been focusing on? Maybe you want to bring that out.

THE WITNESS: I guess if you go back to the Jurisdiction Summary—

MR. HANCOCK: Go back to Government's Exhibit 9, Ms. Crockett.

[33] THE WITNESS: So 4C-16 is in that 26,498 acres.

THE COURT: Right.

THE WITNESS: And letter-wise, it's a—the date letter accepted by the Secretary of War was 29 March 1943, 7 April '43 acknowledged by the Governor. And I—Mr. Hancock, I forgot which exhibit it is, but there should be an exhibit that matches—

MR. HANCOCK: That's the—

THE WITNESS:—to match the dates to that.

MR. HANCOCK: That's the Government's 13, I believe.

THE COURT: I guess, what connects this to 4C-16? That's what I'm confused by.

BY MR. HANCOCK:

Q. Mr. Effinger, the language of the letter in this instance that's signed by Governor Johnson and, of course, acknowledged—receipt of which is acknowledged by Governor Johnson but that was sent by Secretary of War Stimson, am I correct that it applies to all property which had been obtained for military purposes in the Commonwealth of Kentucky; correct?

A. Right. That's the point of it, correct.

Q. So it would not have 4C-16 written on it specifically. It would encompass, based off what your prior testimony was, that whole 26,000 acres that was listed on that revised Jurisdictional Summary from '75?

A. Correct, as it—in that first paragraph, "exclusive **[34]** jurisdiction over lands within the Commonwealth by the United States military." And, yeah, for all of the Commonwealth at that time is what—

MR. HANCOCK: Does that answer your question, Judge?

THE COURT: Not really. I apologize for being dense. I don't understand why their acceptance letters are acknowledged by the Governor in '45 and in '43.

MR. HANCOCK: Because Fort Campbell was not acquired as a block all at one time. It was acquired over the course of time. And so as tracts were added, then you would have blocks that had—exclusive jurisdiction had already been accepted by these early letters.

But then, let's say, they add this tract or that tract on. Then the Secretary of War has to write a new letter to assert that exclusive jurisdiction, if that's his choice in that situation. And so there would be these subsequent letters that would also come in.

The terms of the letters also themselves, Judge, say that to the extent that it has not already occurred—you know, that exclusive jurisdiction hasn't already been asserted, I'm asserting exclusive jurisdiction over all these lands that have been obtained for military purposes within Kentucky.

And there's nothing on its face even that would limit it to just Fort Campbell. I mean, just historically speaking, you've got that Supreme Court case that talks about the naval ordnance **[35]** facility outside Louisville. You would have Camp Breckinridge. You would have had Blue Grass Army Depot. You would have had—

THE COURT: So '43, the Secretary is saying, "I accept everything you've given, and I'm not identifying specific plots, tracts." But then you have a letter from '45 that says, "I specifically accept 4C-16."

MR. HANCOCK: No, sir, no, sir. There's no letter that says any specific tract number. None of these letters say tract 4C-16. The Secretary of War says, "I accept exclusive jurisdiction over all lands that have been acquired for military purposes within the Commonwealth of Kentucky up to that point." And as new lands were acquired for various military purposes, there would be new letters that would be written that would then accept exclusive jurisdiction over those.

They also operate as a catch-all. There is a little quirk in the law, I think, from Kentucky's statute—and I talk about this in my—I think my motion originally. There was a little quirk where Kentucky put some language in that talked about condemnation proceedings, and that was in the first version of the Kentucky Revised Statutes. They later decided that that had been in error; and so they went back in and cleaned that up. I think there's also an issue there that they may have been

asserting jurisdiction multiple times because of the confusion over that.

THE COURT: So, in essence, the United States is **[36]** saying over and over again out of an abundance of caution, "Everything we've accepted in Kentucky we assert exclusive—we accept and assert exclusive jurisdiction over"?

MR. HANCOCK: Over all military because that's what Secretary of War Stimson has the authority to do. His authority would not extend, obviously, to Department of Agricultural ground or, you know, Department of Commerce, whatever it is.

THE COURT: And is it 4 and 5 which in your view tie the specific plot of land to a transfer to the U.S.A.?

MR. HANCOCK: 4 and 5? So we've got the title opinion cover page, which is Government's Exhibit 4, and then Government's Exhibit 5 would be the deed.

THE COURT: Right.

MR. HANCOCK: So I think the title opinion cover page is important for a couple of reasons. One, because it establishes that this was done under the War Powers Condemnation Act. And then also—it also describes this as being the Camp Campbell Kentucky-Tennessee Project, and that's similar to the title examination that we talked about early in Exhibit 1, which talks about this is part of the Kentucky-Tennessee Armored Division Camp Project. I think that establishes this was—this land was acquired for military purposes rather than some other purpose.

THE COURT: And it talks about the specific plot of land being acquired, not just all land in Kentucky acquired for **[37]** military purposes.

MR. HANCOCK: Correct. So those documents relate specifically to this tract 4C-16 and when it was acquired from Ms. Ledford in May of 1942.

THE COURT: Okay. All right. You can go ahead.

MR. HANCOCK: I think that's all the questions I have for Mr. Effinger at this time.

CROSS-EXAMINATION

BY MS. STEVENS:

Q. Good afternoon, Mr. Effinger.

A. Good afternoon.

Q. Is document—or Government's Exhibit 6 an original copy of a letter dated April 28, 1945? I shouldn't use the phrase "original copy." I'm sorry. Is it the original letter?

A. Can you pull it up? It was what was in our file.

Q. Sir, can you testify how that arrived in your file given that it's dated from April of 1945?

A. I cannot. It was before my time to give an accurate—

Q. Do you know whether this document, Government's Exhibit 6, is an actual copy of the original April 28, 1945, letter from the Secretary of War to the Governor of Kentucky?

A. I'm not sure.

Q. May we see Exhibit 7, please. Sir, I'm gonna have the same question for each document. I'm not trying to

be repetitive, but for Government's Exhibit 7, can you testify whether that is **[38]** an original letter dated August 3, 1945, from the Secretary of War?

A. I wouldn't know for sure the—I'm just pulling the documents, you know. If they're signed—some of them are copied. I don't think there's a way for me to give you a definitive answer.

Q. Because you can't tell us how they arrived in the Army's files to begin with, correct, to be fair?

A. Right, yes.

Q. Thank you. And can you tell us whether that is an actual copy of an original of a letter dated August 3, 1945? This is Government's Exhibit 7.

A. Well, again, I can't.

Q. And, sir, documents—Government's Exhibit 6 and 7, neither of them bear letterhead from the Secretary of War; is that correct?

A. It doesn't appear so.

Q. And if we could see Government's Exhibit 13, please. Thank you.

Same question here for Government's Exhibit 13. This document also does not bear letterhead from the Secretary of War; is that right?

A. There's things on the top. I don't know if that's worn out 'cause these papers are—they're what you—kind of onion paper, the rice—you know, the very fragile paper. So I don't **[39]** know if it's worn out, but you can't tell by looking at this.

Q. Thank you. And this document, Government's Exhibit 13, does not bear a signature below "sincerely yours," does it, sir?

A. There's—not from what I can tell. There's something there, but I can't tell what that is.

Q. And so this document too is not an original of a letter or that's not your testimony?

A. I'm not sure.

Q. Or a—can you tell us whether it's an actual copy of an original letter from the Secretary of War?

A. I'm not sure.

Q. And turning to Government's Exhibit 14, please.

THE COURT: Are your answers going to be the same for all these documents?

THE WITNESS: I'm not trying to do that.

THE COURT: If you don't know the answer to all of these questions, you can say so. We don't have to go through these one by one if your testimony is going to be the same, but maybe it will be different and maybe you want to look at them all. That's fine.

MS. STEVENS: This is the last one, Your Honor, Government's 14.

BY MS. STEVENS:

Q. This document too does not bear letterhead from the Secretary of War; is that correct?

[40] A. No, ma'am.

Q. And you cannot tell us whether it's an original or an actual copy of the original of such letter, can you, sir?

A. No, ma'am.

MS. STEVENS: Your Honor, the defense does object to Exhibit 6, 7, 13, and 14 under the best evidence

rule and the rules against hearsay and the Sixth Amendment.

Sir, thank you for your testimony.

THE COURT: Can I just ask the flip side of her question just to make sure we're clear. Does anything about these documents make you doubt that they are what they purport to be?

THE WITNESS: No, sir.

THE COURT: No? If copies came in in the '40s, is this how they would have been maintained over the years by the Army Corps?

THE WITNESS: Yes, sir.

MS. STEVENS: May I follow-up, Your Honor?

THE COURT: Sure.

BY MS. STEVENS:

Q. I'm gonna show you real quickly Defendant's—what I'll mark as Defendant's Exhibit 2, 3, and 4 and just ask you if in your files—this is a letter from the National Archives Catalog. Did you write to the National Archives to try to get letters in this case in response to Mr. Hancock's search for **[41]** these original documents?

A. I did not.

Q. Let's look at what's been marked as Defendant's Exhibit 2 from the National Archives Library, if we could have the Elmo projector, please.

Sir, do you see what appears to be letterhead on the top of this letter dated April 24th, 1945, from the War Department in Washington?

A. Yes.

Q. And there at the bottom—let's see if I can zoom in—do you see below "faithfully yours" the signature of Mr. Stimson, Secretary of War?

A. Yes.

Q. I'm showing you Defendant's Exhibit 3, also from the National Archives Repository of Letters. Do you see there, again, the letterhead from the War Department in Washington at the top of this letter dated November 12th, 1943?

A. Yes.

Q. And at the bottom, below "sincerely yours," the signature of the Secretary of War, Mr. Stimson?

A. Yes.

Q. And Defendant's Exhibit 4 from the New Hampshire Historical Society—and we have a cover letter addressed to Ms. Rea from the vice president certifying its authenticity. Here we have—do you see at the top and have you seen this in the course of **[42]** your duties letters from the Commonwealth of Kentucky Executive Chambers in Frankfort?

A. I have not.

Q. And to the left there, you see the name Simeon Willis, Governor—

A. Yes.

Q. —as part of the letterhead? And at the bottom, do you see the signature or what purports to be the signature of Simeon Willis, Governor?

A. Yes.

Q. And do these documents differ with respect to the letterhead and the signatures from documents at the same time, Government 6, 7, 13, and 14, in that regard?

A. I wouldn't be able to give you an accurate answer on that.

Q. I guess my question is just are they different with regard to the letterhead and the signature blocks?

A. Yeah, that was from the Governor, which we haven't looked at letters from the Governor yet.

Q. So those from the Secretary of War then specifically, do they differ from Government's 6, 7, 13, and 14?

A. Can you—I'm not sure.

Q. With regard to the letterhead from the Secretary of War in the National Archives documents, Defendant's 3 and 2, do those differ with regard to the letterhead being from the Secretary of War?

[43] A. From the ones I had no header, yes.

MS. STEVENS: Your Honor, if I may, the defense introduces Defendant's Exhibits 2, 3, and 4 as self-authenticating under Rule 902.5 from a government website publication.

THE COURT: Do the Government's documents self-authenticate as well?

MS. STEVENS: No because we have a question regarding their authenticity, and they don't come from a government-run website, which case law specifically covers even in Kentucky.

THE COURT: Are you introducing—even in Kentucky? Are you introducing any acceptance letters from the Secretary of War to highlight any purported differences between other land acceptance letters—

MS. STEVENS: No, no, Your Honor.

THE COURT:—or are these different types of letters you're introducing?

MS. STEVENS: These are just letters bearing the letterhead from the relevant time frame, that's all, Your Honor. That's all we have.

THE COURT: All right. Any objection to admitting these letters?

MR. HANCOCK: No, Judge.

MS. STEVENS: Thank you.

THE COURT: Okay.

[44] (Defendant Exhibits 2, 3, and 4 admitted in evidence.)

MS. STEVENS: Your Honor, that's all. Thank you.

MR. HANCOCK: Ms. Crockett, if you could pull up Government's 15.

REDIRECT EXAMINATION

BY MR. HANCOCK:

Q. I think we've got a series of four letters that I would like Mr. Effinger to look at. You need us to stop on any particular one or—

A. No, sir.

Q. Okay. Do you recognize those letters?

A. Yes, they look familiar.

Q. Okay. Are those better copies of the letters that you have in your file?

A. They appear so, yes.

Q. Okay. And what sort of marks or other indicia of reliability can you see on these documents that maybe is a bit indecipherable on the documents that are held by the Corps of Engineers?

A. It looks like dates—dates as well as seals, like, for the signature and, also, the signatures are clearer.

Q. And it also appears that they bear stamps, is that correct, the Coordination and Record Division of the Office of Secretary of War?

A. Yes, sir.

[45] Q. We've got—the letter from March of 1943 bears the stamp that says "Received, War Department Secretary's Office." And then it also has a stamp on it that's "Received April 10 by OCE." Would that be Office of the Chief of Engineers?

A. I believe so.

Q. And these are the identical letters to the letters that you located in your files related to these parcels of property or this parcel of property; correct?

A. It appears so.

Q. Is there any doubt in your mind that the letters that you have in your files are valid documents?

A. They would be what we would go off of if—for any type of jurisdiction question and be looked at as the documents.

Q. Okay. These are—again, I think you've testified to this, but these are records that the Corps of Engineers would be expected to hold and reference?

A. Yes, sir.

MR. HANCOCK: I think that's all the questions I have, Judge.

THE COURT: Anything else?

MS. STEVENS: Nothing further. Thank you.

THE COURT: All right. You can step down.

Do you have any other witnesses?

MR. HANCOCK: No additional witnesses, Judge.

THE COURT: All right. Ms. Stevens, you really think **[46]** this is the sort of question that should be put to a jury?

MS. STEVENS: Yes, Your Honor.

THE COURT: Do you have any example of any jury examining this sort of evidence in order to establish the legal fact of the jurisdiction of the United States over a plot of land as opposed to the factual occurrence of events on land over which the United States exercises exclusive or concurrent jurisdiction?

MS. STEVENS: Well, Your Honor, in the *Davis* decision in the Second Circuit, although the Sixth Circuit—or the Second Circuit talks about legislative judicial notice even in the Court of Appeals, the underlying facts were that a jury did determine such facts. I don't believe they examined deeds. I think in that case there was testimony from a prison official who said, "I work at the federal prison, and we have federal jurisdiction." And it turned out on appeal that was incorrect.

THE COURT: But doesn't that cut in the wrong direction because the judge in the Second Circuit, Judge Furman, I believe, said this shouldn't have been a question for the jury in the first place?

MS. STEVENS: I don't think it cuts in the wrong direction, Your Honor, because the Second Circuit—

THE COURT: Doesn't he say it's a legislative—a legislative fact, not adjudicative?

MS. STEVENS: They do. The Second Circuit says that, **[47]** and we disagree with that, Your Honor.

We cited that for the proposition that the United States does not have jurisdiction over all lands owned by the federal government. And had that question been properly put to the jury instead of the simple testimony "I work here and it's federal property"—that, in fact, proved to be wrong. But the difference is that *Apprendi v.*—or *Apprendi v. New Jersey*, the Sixth Amendment requires that all elements of a crime be tried to a jury. The defendant has the Sixth Amendment right to have all elements of a crime tried to a jury.

THE COURT: All factual elements; right? And won't the jury be asked to decide whether this crime happened at Contreras Court and isn't that consistent with the pattern instructions from all the circuits we examined that say it's for the jury to decide whether the events happened there and for the judge to decide the jurisdictional question?

MS. STEVENS: Your Honor, it's our position that it's a mixed question of fact and law, and for a mixed question of fact and law, it should and does go to the jury.

THE COURT: But are you asking me to disagree with the pattern instructions of all those circuits by putting this question to the jury?

MS. STEVENS: Yes, because of *Apprendi v. New Jersey* and *United States v. Gaudin*. And similar courts—

THE COURT: And has that *Apprendi* argument been put to **[48]** other courts before and have any courts agreed with your position?

MS. STEVENS: Yes, and we cited them in our briefs, Your Honor. The *Khatallah* case, for example, in Washington, D.C., sent this question in light of *Apprendi* to the jury. Now, I can't speak to the exact evidence that they proffered on the question, but they said because—and there is a string cite in our brief for other decisions too where the courts held that in light of *Apprendi*, you must submit the element to a jury.

And the legislative fact analysis that the Court directed us to in the docket entry, that 1972 Advisory Committee Note to Federal Rule of Evidence 201, which is where legislative facts were first discussed, long predates the decision in *Apprendi*.

If the Court were to turn to the Treatise 1, Federal Evidence, Section 2:12 in 2002, there they discuss legislative facts, and they define them as "realities that courts consider about the world that have critical factual content but also judgments about social values or policies." That's how it defines legislative facts. And they gave an example:

> The fact relied on by the Supreme Court in *Brown v. Board of Education* that legally mandated segregated education in public schools was damaging to Black Americans.

That's the type of fact.

THE COURT: But we're a bit far afield because there **[49]** is a body of case law and law in the form of pattern instructions that address this specific SMTJ question; right?

MS. STEVENS: Yes, Your Honor, and you are correct, we disagree with that in light of the Sixth Amendment and the decision in *Apprendi*—

THE COURT: All right.

MS. STEVENS:—and *United States v. Gaudin*.

Here's—

THE COURT: So you don't think it's a legislative fact or an adjudicative fact subject to judicial notice? You just think it's a mixed question of fact that has to go to the jury?

MS. STEVENS: Yes, Your Honor, that's our position.

THE COURT: Okay.

MS. STEVENS: And here the Government had the burden to prove three things: beyond a reasonable doubt, through authenticated and otherwise admissible records, that the specific property where the crime occurred was purchased or acquired by law to the United States. I believe that's what they're referencing in the Ledford deed.

From that deed, then they had to show, beyond a reasonable doubt, that Kentucky properly ceded jurisdiction of the property where the crimes occurred to the United States.

And, third, that an authorized officer of the department of the U. S. Government—and that's where Government's Exhibit 6, 7, 13, and 14 come in—they contend

that those are the letters **[50]** that indicate acceptance of jurisdiction, but it's unclear from those letters that they're authentic.

The testimony that we heard today is that this gentleman, while he relies on these documents, doesn't know where they came from, couldn't say whether they were original or copies or copies of an original, and because of that, they can't properly be authenticated.

THE COURT: But do they have to be authenticated in a preliminary hearing like this one? Do the Federal Rules of Evidence strictly apply here?

MS. STEVENS: Even Rule 201, Your Honor, describes that it must not be—you can't reasonably question the document because of two things: First, that it's generally known in the jurisdiction; or, second, it doesn't bear indicia of unreliability. Our position is they can reasonably be questioned because there are doubts about the authenticity of the letters, the signatures, the lack of letterhead, the writing on the side.

THE COURT: Do you think they're all fake?

MS. STEVENS: I don't think they're all fake. I think that perhaps what they are, Your Honor, is an attempt to reconstruct what happened, but we're not looking at the original. We're not looking at the copy. And so we don't know the dates that the—

THE COURT: The original doesn't matter as long as **[51]** there's no reason to doubt that an original did exist.

MS. STEVENS: Yes, and it's our position that the copy of the original would suffice if it didn't bear indicia of unreliability and these documents do.

THE COURT: What is the specific indicia of unreliability?

MS. STEVENS: The absence of letterhead, the absence of proper signatures. And, further, here's another piece of evidence: Kentucky Revised Statutes 3.090 require the Governor to transmit requests to the next session of the General Assembly for actions as it may deem proper.

Now, had that been done—I looked up the index, the Kentucky statute, Chapter—or Section 1, Chapter 3. 3.010 talks about acquisitions of lands, and they list the lands by which this has properly been done. And the list is the Federal Correctional Institute at Ashland, the Federal Correctional Institute at Fayette County, the Federal Constructional Institute at Manchester. They go on, Your Honor. The statutes list them, and they include Fort Knox but not Fort Campbell. Nowhere in the Kentucky legislature's list do we see Fort Campbell. And Fort Knox was established 1918 as Camp Knox and became a permanent military outpost in 1932. Fort Campbell established 1942, yet we don't see them in the properly ceded list.

THE COURT: So if you're right, what happens to the **[52]** convictions of all the folks tried on Fort Campbell for federal offenses? All invalid?

MS. STEVENS: I think the matter should be tried to a jury. We have the right to have this element of first degree murder tried and found beyond a reasonable doubt by a jury. It may or may not affect all juries the same way, but we would argue that the documents that have been demonstrated so far do bear indicia of unreliability.

THE COURT: Your effort is undoubtedly valiant. I'm not sure, however, it shows the lack of evidence of acceptance or that the differences in form of those acceptance documents would fall short of the Government's burden here.

I expect Mr. Hancock agrees, but you can make any response you'd like.

MS. STEVENS: Thank you, Your Honor.

MR. HANCOCK: I will not snatch defeat from the jaws of victory, Judge, if I'm reading the temperature of the room correctly here, but—

THE COURT: I mean, look, I'm not saying this is a good way to prove federal jurisdiction. This is the—this is an interesting mousetrap that our laws have built for folks in the position of all three sides of this room right now, but is there authority you can cite, Mr. Hancock, that the Federal Rules of Evidence wouldn't strictly apply to a determination such as this?

[53] MR. HANCOCK: I mean, this is one of these ancillary hearings.

THE COURT: Okay.

MR. HANCOCK: I don't have the specific rule cite. I just know the general rule. I think it was cited in my reply.

THE COURT: All right.

MR. HANCOCK: In any event, Judge, as the Court's talked about, it looks like there's five circuits that have pattern jury instructions that support this SMTJ question or the related Indian country question being presented to the jury in the manner that the United States requests.

I think ultimately, Judge, what we would request on the United States' part—and I think courts have done this in a couple of different ways. One, there's the judicial notice of the legislative fact that does not provide that caveat that the jury can ignore the instruction of law under—you know, that otherwise would be given for an adjudicative fact under Rule 201.

The other way that it's been done is the court just simply instructs the jury of the law. There's no mention of any sort of judicial notice in that. Either of those, I think, accomplishes what the law is here, which is that the court is performing its duty in instructing of the law. Again, ultimately the jury is gonna be asked to determine whether or not the crime occurred at 4217 Contreras Court.

[54] And then, if so, just like in those *Gabrion* instructions—and that *Gabrion* case has been reviewed with a fine-tooth comb at this point, especially over the subject matter jurisdiction issue, and I've not seen any discussion where the Sixth Circuit found fault with instructions in that case.

And in that case the court instructed that if the jury found that the—I think the body was located in Oxford Lake there on that national forest ground, and the jury was to find the locus but then the court instructed that that was within the SMTJ or some similar language.

THE COURT: To the extent *Gabrion* says this is a question of the court's own subject matter jurisdiction, which I'm not totally clear it does, but there's subsequent Sixth Circuit authority that seems to read it that way. To the extent this is a question of subject matter jurisdiction, that also militates in favor of it being a question of law for the court to decide before it even proceeds with a trial, wouldn't it?

MR. HANCOCK: That's correct, Judge, because subject matter jurisdiction could be raised at any time. And, in fact, in *Gabrion* and some of these other cases, it was not discussed at all in the trial court level. And, ultimately, we've got a number of cases where the appellate courts decide whether or not they can take judicial notice at that late date after a conviction has already been rendered.

THE COURT: Is the defendant's position that this is **[55]** not a question of subject matter jurisdiction?

MS. STEVENS: It would be our position that once the jury finds the element exists, clearly, the Court has subject matter jurisdiction.

THE COURT: But what about before then?

MS. STEVENS: Before then we'd have to wait for the jury to find that, Your Honor.

THE COURT: So we have quasi jurisdiction until that point?

MS. STEVENS: Yes.

THE COURT: All right. Anything else to say on this?

MR. HANCOCK: No, Judge.

THE COURT: Ms. Stevens, anything else to say?

MS. STEVENS: No. Thank you, Your Honor.

THE COURT: Let's take a break and come back and see what we can clean up before the end of the day. I know it's been a long day, and you guys have other stuff to do as well, but I do think it's worth talking about this DVO service/ personal jurisdiction question and then maybe the *Blockburger* point. And I don't know if

we will have any time left at all to talk about the Second Amendment, but those are all questions that await us. So let's take a quick break and then come back and keep going.

(Recess at 4:11 p.m. until 4:33 p.m.)

THE COURT: I'll end the last question of the day with **[56]** the same question we started with. Are you-all sure you want to go ahead with the trial tomorrow?

MS. STEVENS: Does that depend on the Second Amendment question, Your Honor, because we do have some points to make about that.

THE COURT: Well, I think—given the complexity of the Second Amendment question and the lateness of the motion, I don't think there's any way that I could do justice to a decision on that question before trial. So I think I would reserve ruling for good cause on the Second Amendment question.

And like Mr. Hancock said, we'd either have an acquittal, a conviction, or a decision that would be appealable and a conviction that could be reinstated if I agreed with you and was proven wrong. I think that's the long and short of it.

MS. STEVENS: Was the Court's question about the Second Amendment though or about could we use one more day in light of—

THE COURT: No, no, no. It's not about—so there won't be—one more day is not an option.

MS. STEVENS: Okay.

THE COURT: The question is to go forward tomorrow or to pause, let me write up all these many orders on all these many motions and then reconvene after

the first of the year for a different jury trial window. I'm not inclined to do that, but I want to—I asked you the question this morning, and I want **[57]** to make sure the answer is still the same.

MS. STEVENS: May I have a moment to confer with my co-counsel?

THE COURT: Yep. I can probably provide you with a little extra information, if it's helpful, which is to say for reasons that are hard to articulate in just one breath right now because of the many arguments and the facts we heard earlier, I'm not inclined to grant the suppression motions we heard today.

And as I indicated earlier—a moment ago, the jurisdictional status of this part of Fort Campbell is, I believe, consistent with the pattern instructions we discussed, one that is a decision for the court with respect to the jurisdictional status of this area, like we discussed today, the questions we discussed today, and then the jury question will be whether the events actually occurred at that spot.

So on the two—well, on the four motions and their subparts that required an evidentiary hearing, nothing would change other than the need for me to set out at a little greater length and specificity the reasons for my ruling. You guys are obviously litigating this case very hard, and no one begrudges you that. And I want to make sure that I set out my rulings in a way that make sense and is clear to the parties and anyone who reviews these decisions.

So with respect to those four motions, I would be ruling **[58]** against the defense and setting out my reasons in greater clarity in separate written orders.

That leaves the Second Amendment question, which for an additional reason beyond the one that I'm—that I mentioned earlier, I do think, to the extent there are factual aspects of the challenge here in addition to the pure legal ones, you know, that may be another reason to defer a decision until after we've heard the proof on this point.

You've now raised questions about sort of the way in which service was effected and some of the factual aftermath of the issuance of the initial order, which I think could potentially be relevant. And this was a question I wanted to hear from both of you-all on, whether this is actually just a facial challenge or whether the court's decision is more appropriately addressed to the Second Amendment right of someone in Mr. Silvers' particular situation. So that's another reason that I think cuts in favor of proceeding with trial and issuing a written decision after a verdict, you know, assuming no acquittal, which would obviously eliminate the need to rule on that.

That leaves the sort of *Blockburger* due process issue that I'm—I think that one pretty clearly goes against the defense based on the timing of the second superseding indictment and the different elements of the murder charge and the—I forget which the second—

MS. DYCUS: Interstate domestic violence.

[59] THE COURT:—yes, thank you—the domestic violence charge. I think you-all will confirm here in a moment that those each involve different elements and that there wasn't specific prejudice to the defense or any violation from including that modification in the second superseding indictment. Again, that's something I want to set out in a written order but, I think, will not change the—will not affect our ability to proceed tomorrow.

What does that leave? Oh, the personal jurisdiction service point, which the Government says they have an oral response to the motion filed yesterday. Maybe I should hear from Mr. Hancock, or whoever on that side, on that point now before going further.

And as I run through the many issues that we've covered and at least touched on today, I probably talked myself into the view that we have gotten this far down the aisle that probably, given the age of this case and the availability of witnesses coming from places like Africa, that we should probably charge ahead tomorrow. But, Mr. Hancock, why don't you tell me first in just broad strokes the Government's response to the most recently filed motion to dismiss.

MR. HANCOCK: Yes, Judge, hit some high points here. I had had conversation with Ms. Leslie when we took a break. As I understand the defendant's argument, the arguable lack of personal jurisdiction of the underlying court would be based off **[60]** the location of service of the defendant with that EPO.

We expect that the testimony of Shannon DeArmand, who is a—I believe she's a deputy with the Christian County Sheriff's Office. She's an office employee. Her testimony is gonna be that Mr. Silvers came to the Christian County Sheriff's Office and was served.

That's consistent with the defendant's recorded statement. I believe that's part 1 of the FBI interview where he tells Special Agent Laferte that he went and picked up that order. So that dovetails together.

I'll note, to the extent that we've been accused of a *Brady* violation, the disclosure of the handwritten petition by Brittney Silvers is not a *Brady* violation for a couple of reasons. One, we weren't previously in

possession of that document. We received it the day we disclosed it or maybe the day before we disclosed it.

I asked Ms. Crockett to contact the Christian County Clerk's Office to obtain that to see whether or not we had all of Ms. Silvers' handwritten, you know, petition documents, and they sent that. That's a publicly available document. *Brady* wouldn't extend to something we didn't have in our possession to begin with, but it also doesn't extend to documents that are publicly available so that the defense can obtain them.

To the extent that there's any issue about Ms. Silvers' claim that the assault occurred in Montgomery County, Tennessee, **[61]** that wasn't the only place that was made mention of. If you watch the recording of the family court DVO hearing, she states on the record there that she was assaulted in Montgomery County, Tennessee, which is consistent with what she handwrote on there on that petition. That DVO hearing—I think that's been in the possession of the defense since November of 2019 or thereabouts. So they've had it for a great long while at this point.

Additionally, I'll say that there appears to be a significant body of law which prohibits this court from examining the underlying validity of a protective order. There's a Northern District of Ohio case, *United States v. Thomas*. There's a Westlaw cite, 2022 WL 1803339, and that was filed June 2nd of 2022. And I'll additionally refer the Court to *United States v. Baker*, which is 197 F.3d 211, and specific 216 to 217. That's a Sixth Circuit opinion from 1999.

And that *Baker* case relied in large measure on *Lewis v. United States*, which is 445 U.S. 55, 66 through 68, which is a 1980 Supreme Court case. In that case, the underlying validity of a felony conviction was not

susceptible to collateral attack when the issue before the trial court was a 922(g) case. Basically, they said that the fact that there may not have been certain protections afforded to the defendant in that situation was of no consequence when it came to whether or not he had been convicted of a felony for 922(g)(1) purposes.

[62] MS. LESLIE: Your Honor, two quick responses. For the record, Kristina Leslie on behalf of Victor Silvers. Essentially—

THE COURT: May I ask one question of Mr. Hancock.

MS. LESLIE: Yes, Your Honor.

MR. HANCOCK: Sure.

THE COURT: Did you examine the Kentucky state court decisions that appear to address personal jurisdiction challenges to Kentucky court orders/protective orders based on domestic violence acts allegedly considered—committed out of state?

MR. HANCOCK: I did not, Judge.

THE COURT: All right. I think it appears there's at least some Kentucky authority that may directly or indirectly address some of the concerns, assuming there is a role for a subsequent federal court to come in and examine the validity of a state court order. Spencer against Spencer, 191 S.W.3d 14, which I believe addresses the validity of orders directed against nonresidents, and Dunbar against Vidal, 2022 WL 3568840.

I think that, again, defeats the personal jurisdiction challenge, though, you know, we're within the state court system. I'm not talking about federal review of a state court order. And I don't want to speak with undo confidence here because it's like others—like everyone,

I think, we just became aware of this issue very, very recently, but those were **[63]** two things that appear like they may at least be relevant. So I wanted to share them and ask if either side had considered that question.

So, Ms. Leslie, you can respond to that or anything else Mr. Hancock said.

MS. LESLIE: Thank you, Your Honor. In response to the additional cases the Court provided, no I was—did not have the time to look into those but certainly will.

And in response to the Government, essentially, our challenge here is with respect to the EPO summons, which was attached as Exhibit 10 to the Government's, I believe, response, Docket Number 255, to our *Bruen* motion. And what drew the defense's attention was with respect to the proof of service.

I can try to use this device so the Court can see what I'm seeing. Do you—

THE COURT: Dena, can you turn on the Elmo?

MS. LESLIE: Oh, thank you, Ms. Legg.

Okay. Your Honor, so at the bottom of that document—can you see—so I'd just like to direct the Court's attention to the Proof of Service box where it has an "X" indicating that Victor Silvers was served by the delivery of true copies.

Where our inquiry begins is that, of course, in the Commonwealth of Kentucky, there are two ways that service can essentially be executed, either within the State of Kentucky or for nonresidents there are a set of procedures. And it's our **[64]** understanding that at that time Mr. Silvers was a resident of Tennessee. He lived

at 3365 Wiser Drive, which is located in Clarksville, Tennessee, Montgomery County. He had—

THE COURT: So is your position that if an order is physically served on a non-Kentucky resident, that's no good? That physical service is—doesn't work for a nonresident?

MS. LESLIE: It works if it's served within the confines of the Commonwealth of Kentucky. What I'm saying is the Christian County Sheriff's Office cannot, of course, go to Montgomery—across state lines to Montgomery County to serve Mr. Silvers at his home, for example.

THE COURT: All right. Do you have any reason to doubt the anticipated testimony that service happened in the Christian County Sheriff's Office?

MS. LESLIE: Your Honor, and with full candor to the Court, when Mr. Hancock and I spoke a moment ago, that's when I learned that that would be the anticipated evidence. And so I think our position is that the summons on its face doesn't represent that fact, and it sounds like that would be a trial issue to be litigated before a jury.

THE COURT: And I think he agrees with you there because that's—he's gonna put in testimony to that effect. What decision says that personal service outside the state is no good for a nonresident?

MS. LESLIE: What decision says that personally—

[65] THE COURT: What decision says that personally serving a non-Kentucky resident with a court order outside the Commonwealth doesn't work to effect personal jurisdiction?

MS. LESLIE: Got it. I don't have a case on point, but I have statutes, Commonwealth of Kentucky statutes that direct the process procedures for out-of-state individuals. KRS Section 403.730—and I can provide the—

THE COURT: No, I read it in your motion. Go ahead.

MS. LESLIE: Okay. That code section handles domestic relations proceedings such as the emergency protective order that Ms. Silvers sought on September 26. And within that section, Section (1)(b) prescribes that Rule of Civil Procedure 45.03 will govern service.

And so when we move to Civil Procedure Rule 45.03, it prescribes there service within the state, and if it's not to be conducted within the state, then that triggers Kentucky's Long Arm Statute, which is I believe 454.210. And that prescribes procedures where, essentially, the Secretary of State for Kentucky has to mail two certified copies to the complainant or the recipient that's intended for—to receive process and the—

THE COURT: How does that make any sense in the context of an emergency protective order, that it's not valid until an out-of-stater receives a Secretary of State copy? I understand why it's important that someone subject to a **[66]** protective order actually know about it, but why would Kentucky law care about that person finding out through two letters from the Secretary of State?

MS. LESLIE: Right. So I should clarify. That's not the only means. The other way that I've actually seen it done, usually more frequently, is the Christian County court will contact the court in Montgomery County and ask that department to serve—provide

service on someone who's in their jurisdiction, but there's no indication that that occurred here either based off of the summons that was issued in this case. It just has the name Victor Silvers, true copies were served and doesn't indicate where or how.

THE COURT: So we have a summons that says this was served on Mr. Silvers, and we anticipate testimony that says that service happened in the Christian County Sheriff's Office. And we apparently have, according to the Government, a recorded statement from the defendant that has testimony consistent with that. Why would we throw out this charge based on the possibility that maybe these three pieces of evidence didn't add up to effective service, as opposed to waiting and see—waiting and seeing what the record actually turned up?

MS. LESLIE: Sure, Your Honor. So I think—and, again, when I spoke with Mr. Hancock a moment ago and learned about what the Government's anticipated testimony would be, I was unaware of that fact.

[67] So kind of for academic purposes, if there's no evidence provided that Mr. Silvers, an out-of-state Kentucky—or Tennessee, excuse me, resident was not provided with out-of-state service, then it draws the question as to how he was served. I phrased that terribly. Let me restart, Your Honor.

THE COURT: But you were—you're aware of the recorded statement he's referring to?

MS. LESLIE: That we also have objections to as to the credibility and the reliability of that statement. And before learning about this proposed employee of the sheriff's department that's gonna testify, if Mr. Silvers was the sole source as to how service was provided—

I cannot think of a case on point. It escapes my mind right now, but I don't think that that would be sufficient to establish that fact, if he is the only source of that information, given the circumstances surrounding that interrogation. But I do apologize for not having that case available.

THE COURT: All right. And what's your authority that says the right—assuming you're true—assuming everything that you say is true about the proper way to do this, what's the authority that says "and therefore dismiss the count"?

MS. LESLIE: Your Honor, so because it's a motion to dismiss the count, we are raising it pretrial pursuant to 12(b)(3), of course, and we think it falls within the Court's **[68]** discretion of good cause to impose, you know, a potential remedy. Our first suggestion would be to dismiss the count. If the Court's not inclined to do that, we would move for some sort of motion in limine.

THE COURT: All right. Has the Government raised a timeliness objection to this motion?

MR. HANCOCK: Yes, yes, Judge. To the extent that it was implied before, it's now expressed.

THE COURT: And the nature of your objection is that there's no reason this motion to dismiss couldn't have been raised before the court's deadline for pretrial motions?

MR. HANCOCK: Correct.

THE COURT: All right. And what's the defense's response to that?

MS. LESLIE: Well, Your Honor, the defense's response to that is, when we were provided discovery in this case that included the protective order, it was

redacted. And so, for example, we were confused about the location of this alleged September 23rd incident that Ms. Silvers goes to the court to request a petition on.

Today we heard the Government say that that September 23rd incident happened in Montgomery County and that they have made those sort of representations the entire time, but that actually has not been the case.

At the second detention hearing, it was represented—and I **[69]** think we cite this in our brief—that the September 23rd incident happened on base at Fort Campbell. And then even at the pretrial conference, I believe that same representation was made. So I don't—

THE COURT: The base could be in Montgomery County or Christian County; right?

MS. LESLIE: I'm sorry?

THE COURT: A domestic violence incident that happened on base is consistent with that happening in Montgomery County, Tennessee, or in Christian County, Kentucky; right? So it doesn't mean that's not—

MS. LESLIE: Except they said that it happened—

THE COURT: Did they say it happened in Kentucky and they changed their story?

MS. LESLIE: They said Fort Campbell, Kentucky, in Christian County repeatedly, which is why we never looked at it because we just accepted the representations. But we were confused because when we had redacted discovery, we didn't actually know of the location. Once we figured that out, we then took a closer look

at the proof of service, which is why this was filed last night or—

THE COURT: What changed? Why did you get an unredacted copy late in the game? You got it in response to your *Bruen* motion?

MS. LESLIE: No, Your Honor. So throughout the course **[70]** of this case, we have been engaged in conversations with the Government about discovery. And at that moment, they provided us unredacted discovery in response to our—I don't know—second or third request for it.

THE COURT: All right. Did the Government change its tune regarding whether this happened in Tennessee or Kentucky?

MR. HANCOCK: Judge, this request may seem a little irregular, but I'm gonna ask that we be allowed to address the Court ex parte for a minute in regards to a matter that has already been before the Court and, I believe, was referred over to Judge King. And I think now at this point might—I'm uncomfortable not bringing this to the Court's attention at this point, given the tenor of the arguments that are being presented.

THE COURT: All right. Do you have any objection to me discussing this with the Government ex parte?

MS. LESLIE: Absolutely not. Would you like for us to step out, Your Honor?

THE COURT: Up to you. You want to use headphones or they can step out.

MR. HANCOCK: It'd probably be easier if they were to step out.

THE COURT: All right. Take a little break.

MS. LESLIE: Thank you, Your Honor.

THE COURT: And then while we're moving, there's an ex **[71]** parte matter that I'll take up with the defense after this ex parte matter is handled. And so they can have a little break, and we'll talk to you-all separately in a moment. Okay?

MS. STEVENS: Yes, Your Honor.

(Ex parte proceedings filed under seal.)

THE COURT: All right. Thank you everyone for your flexibility. I need to noodle on the motion to dismiss from last night; and so I'll revisit that with you-all, I expect, tomorrow. And if there's anything that changes or anything else you-all need to flag, by all means, you can do so in the morning or, I suppose, through an ECF filing or an email to chambers copying both sides if it's just flagging some legal source or something like that.

All right. Can we move on to the *Blockburger* due process question the defense has raised?

MS. STEVENS: Your Honor, we primarily rest on the brief, which was not very long, but with regard to *Blockburger* in Count 1 and 3, the closest case we could find was the Fifth Circuit decision in *United States v. Agofsky* where they had different words in the elements—premeditated, first degree murder, and another count for murder by a federal prisoner. And while the federal prisoner status is different, the court held that it would not be proper to have cumulative punishment absent clear legislative intent of an intent to punish separately, and that's the most analogous case we could find on point here.

[72] It would be Mr. Silvers' alleged status as a spouse and the victim's status as a spouse which would then subject him to the cumulative punishment for both first degree murder when murder is the predicate crime for count—is it 5? I'm sorry—Count 1 or 3, and that is our most analogous case. We don't have a Sixth Circuit case on point there.

THE COURT: Isn't this a pretty common—I don't want to say fact pattern but common scenario with these crime of violence enhancers for use of a firearm in connection with some other underlying offense that directly involves that firearm?

MS. STEVENS: It can be, Your Honor, but if we look for the firearm count, specifically 924 counts, the legislative history there does show a clear intent of Congress to punish in addition for the carrying of the firearm. So that's why I say that *Agofsky* was the closest case we could find in a similar situation not involving the addition of the gun count.

THE COURT: Anything to say about that?

MS. DYCUS: No, Your Honor. We would stand on our brief. We think that they are separate elements.

THE COURT: And is there—I don't think your papers address the prejudice question on the due process.

MS. STEVENS: Oh, yes, Your Honor.

THE COURT: Do they?

MS. STEVENS: The prejudice—oh, are we on Count 6? I'm sorry. Ms. Dycus, did I interrupt you?

[73] MS. DYCUS: Go ahead. I'm looking for my brief right now. My server just disconnected.

THE COURT: I was just asking the defense about what, if any, prejudice they identified in connection with that due process question.

MS. STEVENS: The addition of the 924(j) allegation increased the penalty from ten years to up to life. In the prior recitations of the indictment, at the end of the indictment, they list the potential punishment. And it's ten years and then that said "up to life," but until they added 924(j), that was actually incorrect. What they had charged him with prior to the second superseding indictment subjected him at most to ten years but now is subjected to ten years to life. So that would be the prejudice.

THE COURT: I thought the prior indictment set out a minimum—charged with a minimum sentence of ten years.

MS. STEVENS: We looked up—

THE COURT: Not a maximum.

MS. STEVENS: We looked up 924—is it (c)?—924(c), and it was actually a maximum of ten years.

THE COURT: (c)(1)(A), is that what was originally charged?

MS. STEVENS: I was just corrected by cocounsel. It was a minimum of ten, Your Honor. I'm sorry.

THE COURT: All right.

[74] MS. STEVENS: Yes.

THE COURT: All right. So at least on that basis, the possibility of the life—concurrent life sentence already existed; right?

MS. STEVENS: Yeah.

THE COURT: All right. Anything to add on that?

MS. DYCUS: No, sir.

THE COURT: All right. Can I ask just one question about the Second Amendment motion?

MS. STEVENS: Yes, Your Honor.

THE COURT: Why do you say this is—why did you say this is only a facial challenge, and is your position different now that you've called into question the facts of the underlying protective order?

MS. STEVENS: It would be, wouldn't it, Your Honor? When we filed this, it was before we called into question the personal service issue. And so I do think it would be difficult for the Court to answer it hypothetically.

That being said, we are certainly willing to accept the Government's proffer of what their evidence would show and assume for purposes of the Second Amendment motion that they will tie that up or be able to tie that up with testimony. We don't dispute their proffer; and so it would be sort of a conditional proffer.

And then for the Second Amendment motion, assuming for **[75]** purposes of the motion that he has been properly accused of a misdemeanor domestic violence issue, then the *Bruen* question applies in full force.

And the prejudice to not deciding it prior to trial would be that he's now standing trial in front of a jury, assume that he violated a protective order when he left home with a pistol and that is a criminal action, that if the statute is unconstitutional, it's not. And in the eyes of the jury, it could prejudice them.

THE COURT: Is there any authority that says a court's decision to wait to decide a constitutional question until after a jury verdict is inherently prejudicial?

MS. STEVENS: No, Your Honor, I've not seen that.

THE COURT: Okay. And even assuming there is some prejudice, wouldn't that be at least somewhat mitigated by the fact that the motion came so late in the proceedings?

MS. STEVENS: Well, Your Honor, with regard to the timing of the motion, it really was in response to the second superseding indictment.

Prior to that what they had alleged when—before they added the *Rehaif* elements, Count 5 was deficient on its face, and they didn't supersede or change it after the *Rehaif* decision in 2019. And we're in the position of, if we had decided to challenge it for being deficient on its face, they would have superseded and added the *Rehaif* elements, and we would have **[76]** caused that to happen.

THE COURT: So it was justifiable sandbagging because you could have gotten rid of that Count 5 almost.

MS. STEVENS: It wasn't sandbagging, though, Your Honor. It would have been ineffective on our part to subject him to a charge that they had not properly indicted him for, but they did properly indict for it now, and that prompted the filing of the Second Amendment brief.

THE COURT: But there was a *Bruen* issue all along even if a count was susceptible to dismissal on some other grounds; right?

MS. STEVENS: Perhaps, but it would have been for a deficient count, a count that was already void on its face.

THE COURT: Right, but you can all argue in the alternative.

MS. STEVENS: We could have but, again, Your Honor, that would have been us subjecting our client to indictment for Count 5. The Government did that on their own, which is proper.

THE COURT: Why would it have—why couldn't you have said, in a timely manner, "This count is no good because of the Second Amendment" and then in a Rule 29 motion, or whenever, said, "You know, get the heck out. This is facially inconsistent or facially unlawful anyway."

MS. STEVENS: Arguably we could have, but it was our tactical decision not to challenge Count 5 because we viewed it **[77]** as invalid on its face unless and until they fixed it, which they did do.

THE COURT: All right. Well, whatever—even assuming there is prejudice in this circumstance—and we don't have an authority saying it is—I think the lateness of the motion and its complexity, regardless of the factors that led to that timing decision, would amply justify reserving decision here until after trial.

Of course, pretrial motions ought to be decided before trial under Rule 12, but that contains an exception if there's good cause to defer a ruling. And I believe the timing of the motion, the complexity of the issues, the lateness of full briefing, and frankly, the possibility that based on other motions and based on the nature of the facial versus as applied challenge, there are simply factual—may be factual issues bound up in this, but there's

ample cause to defer a ruling on this motion without any prejudice to Silvers' ability to defend himself at trial and without any prejudice to either side's ability to appeal an adverse ruling.

Anything else to say about deferring on the Second Amendment motion?

MR. HANCOCK: No, Judge.

THE COURT: Anything else to say on that?

MS. STEVENS: No, Your Honor. The briefing stands though, correct, Your Honor? We don't need to refile or **[78]** anything during the litigation? It's before the Court?

THE COURT: It is before the court.

MS. STEVENS: Thank you, Your Honor.

THE COURT: All right. You guys sick of me yet?

Do you have other things to do before we reconvene in a few hours? Is there anything else we ought to discuss before we break for the day?

MR. HANCOCK: We don't have anything else, Judge. Do you want us—what's your timing tomorrow, ideas on what time you want us to get together and then how you think tomorrow will proceed as far as whether you think we'll get to openings or first witnesses or what have you?

THE COURT: Well, I sure hope—I have no reason to think we won't get to openings. And do you-all have at least some flexibility for a witness or two if we are making good progress?

MR. HANCOCK: I think we have one witness that will be available tomorrow.

THE COURT: Who would take a non de minimis amount of time?

MR. HANCOCK: Probably 20, 30 minutes.

THE COURT: Okay. I think that probably puts us in good shape for tomorrow.

MS. STEVENS: Your Honor, we do have one request. We neglected in our proposed jury questionnaire to include a **[79]** question about the jurors' experience with firearms. That is a part of this case, and we would request that the Court ask the jurors about their experience with or handling firearms.

THE COURT: Can you be more specific?

MS. STEVENS: Yes.

THE COURT: Ladies and gentlemen, do any of you own guns? Have any of you ever fired guns? What sort of a question am I posing in that circumstance?

MS. STEVENS: Both of those are good questions, Your Honor, and if they say yes, you could ask, "Do you have strong feelings about guns if you were to hear testimony related to that that would impact your ability to serve as a juror?"

THE COURT: Well, my suspicion is that most everyone has strong feelings about guns, and I'm not sure that those feelings would in most cases bear on someone's qualifications to serve as a juror, but I will think about whether there's a more targeted question to ask that would not involve us sort of polling all 70 jurors, or however many, about their thoughts on guns.

MS. STEVENS: The first question, Your Honor, if the Court could inquire do they have experience handling firearms would be a request.

THE COURT: And is there an answer to that question that would result—and I'm not saying this is the only reason you would ask it—but is there an answer to that question that **[80]** might result in someone being disqualified to serve as a fair and impartial juror in this case?

MS. STEVENS: Oh, no, Your Honor, that would not be the only reason in asking it. We really would want to know about their experience or if they have any, but the second question that I posed was to assist the Court in determining whether it's in any way disqualifying for that for a particular juror, but the first question is one we would like to know.

THE COURT: Just for your peremptories?

MS. STEVENS: Yes, Your Honor.

THE COURT: All right. The Government have anything to add about voir dire?

MR. HANCOCK: No, Judge.

THE COURT: All right. I think I know where we're going on the shackling question, but I'll have a ruling for you in the morning.

I'm gonna, like I said, deny the motions to suppress with a written opinion to follow, and we'll talk more about the jurisdictional element in connection with the jury questions—I'm sorry—the jury instructions. Is there anything else we ought to discuss today?

MR. HANCOCK: Not for the United States, Judge.

MS. STEVENS: No, Your Honor. Thank you.

THE COURT: Time? I suspect the jurors will be ready to go around 9:30. So maybe we're ready to go

around 8:45. Is **[81]** that reasonable? I'm sure we will have some things to discuss—

MS. STEVENS: Yes, Your Honor.

THE COURT: —before we begin. Is that okay?

MR. HANCOCK: That's fine, Judge. You want to meet here in the courtroom, or do you have a preference elsewhere?

THE COURT: Let's just be right here at 8:45.

All right. Thanks everyone for your patience today, and we'll see you in the morning.

(Proceedings concluded at 5:39 p.m.)

C E R T I F I C A T E

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

s/ Dena Legg
Certified Court Reporter
No. 20042A157
Official Court Reporter

January 25, 2023
Date

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