No. 14-___

IN THE

Supreme Court of the United States

TAURUS D. HOYLE,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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AUGUST 11, 2014

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QUESTION PRESENTED

18 U.S.C. Chapter 44 concerns firearms. In particular, § 921 defines the various terms "used in the chapter"; § 922 prohibits certain unlawful acts; and § 924 delineates sentences for violations of § 922. Among other definitions, § 921(a)(20) specifies that "[a]ny conviction * * * for which a person * * * has had civil rights restored *shall not* be considered a conviction for purposes of this chapter" (emphasis added).

In contrast, under the Federal Sentencing Guidelines used to compute sentences for violations of § 922, convictions for which a person has had civil rights restored *are* counted to determine the person's offense level, which is one of two variables (the other is the person's criminal history category) that produce the applicable Guidelines sentencing range. *See* U.S. SENTENCING GUIDELINES MANUAL § 2K2.1 (2012). As a result, when, as here, a defendant has had civil rights restored following prior state law convictions, the relevant federal statute and the Guidelines are inconsistent.

Addressing this disconnect, the Ninth Circuit, applying *United States v. LaBonte*, 520 U.S. 751 (1997), held that the statute trumps the Guidelines. *See United States v. Palmer*, 183 F.3d 1014, 1018 (9th Cir. 1999). But the Tenth Circuit below, openly acknowledging and deepening an existing split with the Ninth, held that the Guidelines prevail.

The question presented is:

When the Sentencing Guidelines calculate a person's offense level based on prior convictions that are expressly excluded under the relevant federal statute, which controls: the statute or the Guidelines?

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The decision of the United States Court of Appeals for the Tenth Circuit (Pet. App. 1a-14a) is reported at 751 F.3d 1167. The oral sentencing decision of the United States District Court for the District of Kansas is unreported but reproduced at Pet. App. 15a-27a.

JURISDICTION

The Tenth Circuit issued its opinion affirming the district court's final judgment on May 13, 2014. Pet. App. 1a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant part of 18 U.S.C. § 921 ("Definitions") provides:

> (a) As used in this chapter—
>
> * * *
>
> (20) The term "crime punishable by imprisonment for a term exceeding one year" does not include—
>
> (A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or
>
> (B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.
>
> What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which

> the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

The relevant part of 18 U.S.C. § 922 ("Unlawful acts") provides:[1]

> (g) It shall be unlawful for any person—
>
> (1) who has been convicted of, [sic] a crime punishable by imprisonment for a term exceeding one year;
>
> * * *
>
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

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[1] The comma in § 922(g)(1)'s "who has been convicted in any court of, a crime punishable by imprisonment" appears to be a scrivener's error, left over after the statute was modified in 1986 to remove the underlined portion of the following pre-amended version: "who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year." *See* Firearms Owners' Protection Act, Pub. L. No. 99-308, § 102(6)(A) (amending 18 U.S.C. § 922(g)(1) by striking out "is under indictment for, or who"), 100 Stat. 449 (1986).

18 U.S.C. § 924(a)(2) ("Penalties") provides:

> Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

The relevant parts of U.S. SENTENCING GUIDELINES MANUAL ("U.S.S.G.") § 2K2.1 (2012) ("Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition") provide:[2]

> (a) Base Offense Level (Apply the Greatest):
>
> * * *
>
> (2) **24**, if the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;
>
> * * *
>
> Application Notes:
>
> * * *
>
> 10. Prior Felony Convictions.—For purposes of applying subsection (a)(1), (2), (3), or (4)(A), use only those felony convictions that receive criminal history points under §4A1.1(a), (b), or (c). In

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[2] Although this petition, as did the Tenth Circuit below, relies on the 2012 edition of the Guidelines in effect during petitioner's sentencing, Pet. App. 4a, the current, 2013 edition is in all material respects the same.

> addition, for purposes of applying subsection (a)(1) and (a)(2), use only those felony convictions that are counted separately under §4A1.1(a), (b), or (c). *See* §4A1.2(a)(2).
>
> Prior felony conviction(s) resulting in an increased base offense level under subsection (a)(1), (a)(2), (a)(3), (a)(4)(A), (a)(4)(B), or (a)(6) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).

U.S.S.G. § 4A1.2 cmt. n.10 ("Definitions and Instructions for Computing Criminal History") provides:

> Convictions Set Aside or Defendant Pardoned.—A number of jurisdictions have various procedures pursuant to which previous convictions may be set aside or the defendant may be pardoned for reasons unrelated to innocence or errors of law, *e.g.*, in order to restore civil rights or to remove the stigma associated with a criminal conviction. Sentences resulting from such convictions are to be counted. However, expunged convictions are not counted. § 4A1.2(j).

STATEMENT OF THE CASE

A. This case concerns an inconsistency between a federal firearms statute and a provision in the Federal Sentencing Guidelines. The statute is 18 U.S.C. Chapter 44, which makes unlawful various acts involving firearms and assigns penalties for violations. More specifically, § 922(g)(1) makes it unlawful for

anyone "who has been convicted in any court of, [sic] a crime punishable by imprisonment for a term exceeding one year" to "possess * * * any firearm." A person convicted of violating § 922(g)(1) is subject to fines or imprisonment up to ten years, or both. *See* § 924(a)(2). Significantly, in defining the phrase "a crime punishable by imprisonment for a term exceeding one year"—"[a]s used in this chapter," which includes §§ 922 and 924—the statute excludes "[a]ny conviction * * * for which a person * * * has had civil rights restored." § 921(a)(20).

The Sentencing Guidelines, on the other hand, direct that a person's sentence be calculated based on all relevant convictions—even those for which the person has had civil rights restored. The Guidelines accomplish this through a series of cross-references. The starting point for defendants convicted under 18 U.S.C. § 922(g)(1) is U.S.S.G. § 2K2.1(a)(2), which assigns a base offense level of 24 "if the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense." Application Note 10 to § 2K2.1 explains that prior felony convictions are those "that receive criminal history points under § 4A1.1." The Commentary to § 4A1.1, in turn, directs that the "definitions and instructions in § 4A1.2 govern the computation of the criminal history points." And lastly, Application Note 10 to § 4A1.2 explains that while "[a] number of jurisdictions have various procedures pursuant to which previous convictions may be set aside * * * to restore civil rights[,] * * * [s]entences resulting from such convictions are to be counted."

Thus, while the statute, Chapter 44, excludes convictions for which a person has had civil rights restored, such convictions are nonetheless used to calculate the same person's offense level under the Guidelines. The offense level then feeds directly into the final sentencing range under the Guidelines, which is based on the person's offense level and criminal history category, computed separately. *See* U.S.S.G. ch. 5, pt. A.

B. Petitioner was charged with a violation of 18 U.S.C. § 922(g)(1) (prohibiting a convicted felon from possessing a firearm). Pet. App. 2a. After the jury found him guilty, the federal district court sentenced petitioner under the enhanced sentencing provisions of the Armed Career Criminal Act, 18 U.S.C. § 924(e), based in part on petitioner's two prior Kansas convictions. *United States v. Hoyle*, 697 F.3d 1158, 1165-66 (10th Cir. 2012). Petitioner appealed to the Tenth Circuit, challenging his conviction and sentence. *Id.* at 1161. In its first decision in this case, the Tenth Circuit affirmed the § 922(g)(1) conviction, but remanded for resentencing. *Id.* The court held that the two prior Kansas convictions did not qualify for increasing petitioner's sentence under the Armed Career Criminal Act because his civil rights (including his right to own a firearm) had been restored under Kansas law. *Id.* at 1170.

C. On remand, in addition to arguments challenging his conviction (not relevant here), petitioner objected to the offense level calculation in his presentence investigation report ("PSR"). Pet. App. 3a-4a. The PSR calculated petitioner's total offense level of 28 and his criminal history category of VI, which yielded a sentencing range of 140 to 175 months.

Pet. App. 4a. However, because the statutory maximum was 120 months, 18 U.S.C. § 924(a)(2), that became the Guidelines sentence, U.S.S.G. § 5G1.1(a). Pet. App. 4a-5a. As relevant to this petition, the PSR calculated the total offense level of 28 starting with the base offense level of 24 under U.S.S.G. § 2K2.1(a)(2), justifying that starting point using petitioner's two prior Kansas convictions. Pet. App. 4a.

Petitioner challenged several calculations in his PSR, but the only challenge presented in this petition is to calculation of the base offense level. Specifically, petitioner argued that his base offense level should have been 14 instead of 24, U.S.S.G. § 2K2.1(a)(6), because the two Kansas felony convictions could not support the enhancement under § 2K2.1(a)(2) when petitioner's civil rights had been restored following those state convictions. Pet. App. 4a. Starting with a base offense level of 14 instead of 24, but applying all other calculations as set out in the PSR, would have produced a Guidelines sentencing range of 57 to 71 months, which is 49 to 63 months lower than the Guidelines sentence calculated with the base offense level of 24. *See* U.S.S.G. ch. 5, pt. A (recalculating the sentencing range as 57 to 71 months after the PSR's enhancement of the base offense level of 14 by 4 points—for the total offense level of 18—and applying the same criminal history category of VI).

The district court rejected petitioner's argument. The court acknowledged that there is "case law that supports defendant's argument," and "case law that goes the other way," on whether the statutory exclusion of convictions for which civil rights had been restored trumps the inclusion of such convictions under the Guidelines. Pet. App. 18a. The court concluded

that the Guidelines govern because the statutory exclusion "for purposes of this chapter" (which encompasses statutory sections dealing with both crime and punishment), 18 U.S.C. § 921(a)(20), does not conflict with the Guidelines, since the two "have very different purposes," Pet. App. 18a. The court did not explain what that difference was and why it resolved the issue as it did. The court then sentenced petitioner to 120 months. Pet. App. 4a-5a.

D. Petitioner again appealed to the Tenth Circuit, arguing, as relevant here, that his base offense level was predicated on state convictions that should have been excluded from the calculation. Pet. App. 7a-8a. The Tenth Circuit rejected that argument and affirmed the sentence. Pet. App. 2a.

The Tenth Circuit began by addressing whether 18 U.S.C. § 921(a)(20) "governs or controls the use of felony convictions under the sentencing guidelines." Pet. App. 8a. The court determined that, while the Guidelines must bend to "specific directives of Congress," the statutory prohibition on the use of convictions for which civil rights had been restored is not a specific directive. Pet. App. 8a. Instead, despite the broad phrase "for purposes of this chapter," according to the court, § 921(a)(20)'s exclusion of such convictions applies only to provisions of Chapter 44 that specifically mention the term "crime punishable by imprisonment for a term exceeding one year." Pet. App. 8a-9a. Thus, the court concluded that the exclusion goes no further than determining predicate offenses for the various crimes listed in § 922, setting out minimum sentences under § 924(e)(1), and exempting certain persons from criminal liability under § 925(b). Pet. App. 9a.

The court acknowledged that, in holding that convictions for which civil rights had been restored could be used to calculate offense levels under the Guidelines, it had reached "the opposite conclusion" from that of the Ninth Circuit in *United States v. Palmer*, 183 F.3d 1014 (9th Cir. 1999). Pet. App. 10a.

REASONS FOR GRANTING THE PETITION

The Court should grant this petition for a writ of certiorari, for four reasons. *First*, the Tenth Circuit's holding that a conviction excluded under 18 U.S.C. § 921(a)(20) because a person's civil rights had been restored may nonetheless be included to calculate the person's base offense level under the Guidelines widens a rift in the appellate courts on this issue. *Second*, the Tenth Circuit's decision runs contrary to the plain text of § 921(a)(20) and contradicts this Court's settled precedent that, when a federal statute and the Guidelines are inconsistent, the federal statute prevails. *Third*, the Tenth Circuit's decision raises a legal issue of critical importance to thousands of individuals. Petitioner's case is far from unique. *Fourth*, and finally, this case provides an ideal vehicle for reviewing the question presented, which is a pure question of law, free of any factual or procedural disputes.

I. THE TENTH CIRCUIT'S DECISION DEEPENS AN ACKNOWLEDGED CONFLICT IN THE FEDERAL COURTS

The Court should grant this petition to resolve an acknowledged and square conflict in the federal appellate courts' decisions.

A. Had petitioner's case arisen in the Ninth or Fourth Circuits, his Kansas convictions, for which his civil rights had since been restored, would not have

qualified to enhance his offense level under the Guidelines.

The Ninth Circuit in *Palmer* squarely held that convictions for which a person has had civil rights restored cannot be used to calculate the Guidelines base offense level. *See* 183 F.3d at 1017-18. Palmer, just as petitioner here, was convicted of possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1). *See id.* at 1016. During sentencing, his offense level was enhanced based on a prior conviction for which his civil rights had been restored. *See id.* Palmer appealed his sentence, arguing among other things that the district court erred in enhancing his offense level based on that conviction. *See id.*

The Ninth Circuit agreed. The court began by explaining that "the statute applicable to Palmer's current conviction," *id.* at 1017, is § 921(a)(20), and it specifically provides that "[a]ny conviction * * * for which a person * * * has had civil rights restored shall not be considered a conviction for purposes of this chapter." Because "this chapter"—Chapter 44—"includes both § 922 and § 924, which sets out maximum sentences for offenses under this chapter," the phrase "'for purposes of this chapter' clearly includes sentencing." *Palmer*, 183 F.3d at 1017. There is thus ultimately a conflict between the federal statute and the Guidelines' mandate "that for a firearms convictions, the district court must count a defendant's conviction for which his civil rights have been restored." *Id.* The court held that § 921(a)(20) trumps the Guidelines' offense level calculation because, "[w]here the Sentencing Guidelines and Congressional stat-

utes are inconsistent, the statutes control." *Palmer*, 183 F.3d at 1018 (citing *LaBonte*, 520 U.S. at 757).

The Ninth Circuit is not alone. The Fourth Circuit, on several occasions, has signaled that it generally agrees with *Palmer* and would probably follow its holding in an appropriate case raising the issue. *See United States v. Metheney*, 11 F. App'x 92, 94 (4th Cir. 2001) ("Metheney has not identified a conflict as clear as those at issue in *LaBonte* and *Palmer*."); *United States v. Hayes*, 68 F. App'x 432, 435-36 (4th Cir. 2003) (distinguishing *LaBonte* and *Palmer* in the absence of a similar conflict between the Guidelines and statutory law).

B. In the First, Third, Sixth, Eighth, and now Tenth Circuits, on the other hand, 18 U.S.C. § 921(a)(20)'s exclusion of convictions for which a person's civil rights had been restored does not apply to the person's base offense level calculations under the Guidelines.

In holding that petitioner's Kansas convictions for which his civil rights had been restored are properly counted to calculate his offense level under the Guidelines, the Tenth Circuit openly rejected the Ninth Circuit's contrary holding in *Palmer*. Pet. App. 10a-12a. According to the Tenth Circuit, "[i]t is a jump of logic to assume, as the *Palmer* court did, that because § 921(a)(20) 'sets out maximum sentences for offenses under this chapter,' it unquestionably controls the Commission's discretion to consider how prior convictions affect the appropriate sentence." Pet. App. 11a. Thus, the Tenth Circuit clearly announced its split with *Palmer*'s "opposite conclusion." Pet. App. 10a.

Before the Tenth Circuit's opinion here, other circuits had also parted ways with *Palmer*, or at least foreshadowed the split. In *United States v. Morris*, 139 F.3d 582, 584 (1998) (per curiam), the Eighth Circuit held that there was no conflict on the question presented in this petition: "18 U.S.C. § 921(a)(20) is controlling for purposes of defining the felon-in-possession offense, while U.S.S.G. § 2K2.1 is controlling for purposes of determining the resulting Guideline sentence absent a statutory conflict, which we do not see." *Palmer*, decided the year after *Morris*, created the circuit split that has since only grown deeper.

The Third Circuit picked up on the split in *United States v. Shelton*, 91 F. App'x 247, 249 (2004), and reasoned that, "[w]hile [§ 921(a)(20)] addresses only when an individual will be initially liable under Section 922(g)(1), once such initial liability is established the Guidelines consider the impact that a variety of factors (including prior felony convictions) will have on the defendant's eventual punishment." And so the Third Circuit held, "[t]hose different purposes persuade us that the texts are not in conflict but can rather coexist peacefully, each having a full operative effect in its own realm." *Id.* (citing *Morris* (8th Cir.) and *Palmer* (9th Cir.)—the former as support, and the latter to acknowledge the split).

More recently, the First Circuit concluded in *United States v. Damon*, 595 F.3d 395, 401 (2010), that there is no "indication in the language of U.S.S.G. § 2K2.1 that the Commission's definition of a 'controlled substance offense' as, inter alia, an offense involving 'imprisonment by a term exceeding one year' was meant to incorporate § 921(a)(20)(B)'s statutory

exceptions." And the Sixth Circuit in *United States v. Mosley*, 635 F.3d 859, 864 (2011), cited *Damon*, *Shelton*, and *Morris* as support for the proposition that "§ 921(a)(20)(B) applies only to the words 'as used in chapter 44 of Title 18,' * * * not to the guidelines in general or to § 2K2.1 in particular" (internal alterations & citation omitted).

* * *

The above conflict—between the Ninth and Fourth Circuits, on the one hand, and the First, Third, Sixth, Eighth, and Tenth, on the other—is unmistakable. But the Court need not take petitioner's word. The Tenth Circuit and the district court below confirmed that a square conflict exists on the question presented in this petition. Pet. App. 10a (the Tenth Circuit acknowledging the Ninth Circuit's "opposite conclusion"); Pet. App. 18a (the district court admitting that "[t]here is case law that supports defendant's argument," and "[t]here's also case law that goes the other way"). The Court should grant this petition and resolve this mature split in the federal courts of appeals.

II. THE TENTH CIRCUIT'S DECISION DEPARTS FROM THIS COURT'S PRECEDENT

Certiorari is also necessary because the Tenth Circuit's decision contradicts this Court's precedent and runs contrary to the plain text of a federal statute.

It is well established that the Guidelines "must bow to the specific directives of Congress," *LaBonte*, 520 U.S. at 757, and "commentary in the Guidelines Manual that interprets or explains a guideline is authoritative *unless* it violates * * * a federal statute," *Stinson v. United States*, 508 U.S. 36, 38 (1993) (em-

phasis added). The Tenth Circuit breaks with this black letter law.

Petitioner's conviction for violation of 18 U.S.C. § 922(g)(1) fell within the purview of § 921(a)(20), which states that "[a]ny conviction * * * for which a person * * * has had civil rights restored shall not be considered a conviction for purposes of this chapter." The "chapter" in question is Chapter 44 of 18 U.S.C., and thus the exclusion specified in § 921(a)(20) applies for the "purposes" of the *entire* chapter, including the section titled "Penalties," § 924. *See United States v. Traxel*, 914 F.2d 119, 122 (8th Cir. 1990) (§ 921(a)(20) "applies throughout the entire firearms chapter of the United States Code"). Thus, § 921(a)(20) commands that convictions for which civil rights have been restored shall not be counted when sentencing defendants for violations of § 922(g)(1) because one of the purposes of Chapter 44 is sentencing. Contrary to § 921(a)(20), however, the Guidelines specify that convictions for which civil rights have been restored nonetheless count to determine defendants' base offense level, one of the variables in computing a Guidelines sentencing range. *See* U.S.S.G § 2K2.1 cmt. n.10 (ultimately cross-referencing to 4A1.2 cmt. n.10).

Under this Court's decisions in *LaBonte* and *Stinson*, the proper resolution of this conflict between § 921(a)(20) and the Guidelines is clear. Section 921(a)(20) is a federal statute, and federal statutes trump the Guidelines. Applying the plain meaning of § 921(a)(20) to petitioner's case means that his prior Kansas convictions, for which his civil rights have been restored, should not be counted when calculating his base offense level under the Guidelines.

But that is not what the Tenth Circuit held. Instead, it concluded that there is no conflict between the statute and the Guidelines. The court so concluded, however, only after misapplying this Court's precedent and misconstruing the plain meaning of the word "purpose" in § 921(a)(20).

To begin, the Tenth Circuit misinterpreted *LaBonte*'s phrase "specific directive." In *LaBonte*, this Court held that Congress's "specific directive[]" concerning maximum sentencing requirements in 28 U.S.C. § 994 takes precedence over the Guidelines. 520 U.S. at 757. This context makes clear that the Court used the phrase "specific directive" to describe nothing more than a statute speaking to—and resolving—an issue that comes up in calculating a Guidelines sentencing range.

The Tenth Circuit purported to distinguish petitioner's case from *LaBonte* by arguing that petitioner did not point to "any specific directive within the statute" that prohibited the use of "pardoned convictions under the sentencing guidelines." Pet. App. 8a. But petitioner did point to a specific federal statute—§ 921(a)(20)—that excludes just such convictions, contrary to the Guidelines. The Tenth Circuit, therefore, must have meant that a "specific directive" is something other than the plain language of a federal statute. As an initial matter, that cannot be correct, because this Court frequently uses the term "specific directive" to refer to ordinary federal statutes. *See, e.g.*, *California v. United States*, 438 U.S. 645, 664 n.19 (1978) ("specific directive[]" refers to a federal statute); *Warden, Lewisburg Penitentiary v. Marrero*, 417 U.S. 653, 659 n.10 (1974) (same). Further, the Tenth Circuit accepted, as it had to, that 28 U.S.C.

§ 994 (at issue in *LaBonte*) "delineates what the [Sentencing] Commission 'shall' and 'shall not' do." Pet. App. 11a. But if so, then § 921(a)(20) likewise expressly states what the Guidelines shall not do—namely, that they shall not predicate base offense level calculations on a conviction for which civil rights have been restored. That this "specific directive" resides in § 921(a)(20) and not in the Sentencing Commission's authorizing statute, 28 U.S.C. § 994, is of no moment. Federal statutory law is federal statutory law, regardless where in the voluminous United States Code it is found.

The Tenth Circuit also misconstrued the plain language of the statute. The Tenth Circuit reasoned that "[t]he two provisions—§ 921(a)(20) and the sentencing guidelines—have different purposes. The statute addresses criminal liability under § 922; that established, the guidelines consider a number of factors (including prior convictions) pertaining to sentencing." Pet. App. 10a. That is a misreading of § 921(a)(20). Nowhere in the section does it limit the definition of "conviction" to criminal liability under § 922. Rather, the definition applies "for the purposes of this chapter," and the chapter includes § 924. All agree that "[i]n determining the scope of a statute, we look first to its language, giving the words used their ordinary meaning." *Moskal v. United States*, 498 U.S. 103, 108 (1990) (internal quotations & citations omitted). The word "purpose" means "[t]he reason why something is done or used." *Purpose Definition*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/purpose?show=0&t=1407512511 (last visited Aug. 8, 2014). Section 924, titled "Penalties," delineates appropriate sentences for violations of the chapter—

which is coextensive with the term "this chapter" in § 921(a)(20). Because sentencing is "the reason why [§ 924] is used," sentencing is § 924's purpose. And so, § 921(a)(20)'s limitation against the use of convictions for which civil rights had been restored applies to sentencing. The Guidelines, obviously aimed at sentencing, have the same purpose. As the two are in conflict, the statute must control. The Tenth Circuit erred in holding otherwise. *See LaBonte*, 520 U.S. at 757; *Stinson*, 508 U.S. at 38.

III. THE QUESTION PRESENTED RAISES AN IMPORTANT ISSUE

The question presented transcends petitioner's case and affects potentially thousands of defendants in criminal proceedings around the country.

First, there is no question that petitioner's Guidelines sentence calculation would be different if the base offense level did not factor in the two Kansas convictions for which his civil rights had been restored. Instead of 120 months, his sentencing range would become 57 to 71 months. *See supra* at pp. 6-7. And the district judge has twice demonstrated his inclination to sentence petitioner at the lowest end of any Guidelines range. *See Hoyle*, 697 F.3d at 1166 (sentencing petitioner initially to 262 months' imprisonment, when the Guidelines range had been mistakenly calculated as 262 to 327 months); Pet. App. 4a-5a (resentencing on remand to 120 months, which was the Guidelines sentence due to the statutory maximum). But even sentencing at the highest range would reduce petitioner's sentence by 49 months from the current 120 months' sentence. Whatever arguments the government might wish to make for an upward departure beyond the corrected

Guidelines range would have to be presented to the district court. At this point, however, there is no doubt that petitioner's Guidelines sentencing range would be different under the approach that prevails in the Ninth and Fourth Circuits, from which the Tenth Circuit openly split.

Second, petitioner's situation is not unique. In fiscal year 2013 alone, Guidelines § 2K2.1(a)(2), which, as in petitioner's case, enhances the base offense level for firearms-related crimes if a defendant has "two [prior] felony convictions of either a crime of violence or a controlled substance offense," was applied to 1,170 defendants. United States Sentencing Commission, USE OF GUIDELINES AND SPECIFIC OFFENSE CHARACTERISTICS: GUIDELINE CALCULATION BASED FISCAL YEAR 2013 48 (2014). And a similar provision, § 2K2.1(a)(4)(A), which increases the base offense level for a firearms-related crime if a defendant has committed an offense after "one felony conviction of either a crime of violence or a controlled substance offense," was applied to 1,941 defendants. *See id.* Combined, that is over 3,000 defendants in 2013 alone.

Of course, the above numbers do not reveal how many out of this universe were convicted under 18 U.S.C. Chapter 44 after having had their civil rights restored for previous convictions. But it is telling that every jurisdiction in the United States provides for restoration of civil rights by some means. *See* National Association of Criminal Defense Lawyers, *Jurisdiction Profiles*, https://www.nacdl.org/ResourceCenter.aspx?id=25091&libID=25060#us (last visited Aug. 8, 2014). Against that backdrop, it is quite significant that over 3,000 defendants in

2013 alone were subject to sentencing enhancements for firearms-related offenses, with the result that the sentences may be unjustifiably prolonged under the erroneous result that now prevails in the First, Third, Sixth, Eighth, and Tenth Circuits.

There is pressing need for this Court to resolve a critical legal issue that potentially affects thousands of defendants every year.

IV. THIS CASE PRESENTS AN IDEAL VEHICLE TO RESOLVE THE QUESTION PRESENTED

The question presented raises a clean legal issue, making this case an ideal vehicle for resolving the question. *First*, there is no dispute that petitioner's civil rights have been restored following the two Kansas convictions. Pet. App. 3a. As a result, whether the two convictions may be used to calculate petitioner's base offense level depends entirely on whether 18 U.S.C. § 921(a)(20)'s limitation applies to base offense level calculations under the Guidelines. The circuits are split on this very issue.

Second, no factual dispute detracts from the question presented in this petition.

Finally, there are no issues of procedure or petitioner's standing, allowing the Court to resolve the question in an efficient manner without having to confront any threshold issues.

For these reasons, the Court could not ask for a better vehicle to resolve the important legal question presented, on which circuits are split.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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AUGUST 11, 2014

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

May 13, 2014, Filed

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. TAURUS D. HOYLE, Defendant - Appellant.	No. 13-3180

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS (D.C. No. 2:10-CR-20056-CM-1)

R. Bruce Kips, Shawnee, Kansas, for Defendant - Appellant.

James Brown, Assistant United States Attorney, (and Barry R. Grissom, United States Attorney, on the brief), Topeka, Kansas, for Plaintiff - Appellee.

Before **KELLY**, **BALDOCK**, and **HARTZ**, Circuit Judges.

KELLY, Circuit Judge.

Defendant-Appellant Taurus D. Hoyle appeals from the remand proceedings of his prior appeal. In *United States v. Hoyle (Hoyle I)*, 697 F.3d 1158 (10th Cir. 2012), this court affirmed Mr. Hoyle's conviction of 18 U.S.C. § 922(g)(1) but remanded for proper sentencing. Mr. Hoyle appeals again, this time challenging the district court's denial of his motion for a new trial on remand and consideration of prior state convictions at resentencing. Our jurisdiction arises under 28 U.S.C. § 1291, and we affirm.

Background

The facts underlying Mr. Hoyle's conviction are detailed in *Hoyle I*, 697 F.3d at 1161-63. Briefly, Mr. Hoyle was charged with violating 18 U.S.C. § 922(g)(1), which makes it unlawful for a convicted felon to "possess in or affecting commerce, any firearm or ammunition." *Id.* at 1162-63. The charge came after an incident where Mr. Hoyle pointed a gun at Tyda Hall and threatened to shoot. *Id.* at 1161. Ms. Hall called 911, and Mr. Hoyle fled. *Id.* During the 911 call, Ms. Hall described the gun as a silver revolver. *Id.* Officer Ruben Rodriguez located Mr. Hoyle and attempted to make contact. *Id.* at 1161-62. Mr. Hoyle fled, and Officer Rodriguez noticed that it looked like Mr. Hoyle was holding something. *Id.* at 1162. Officers eventually apprehended Mr. Hoyle, and Officer Rodriguez saw that Mr. Hoyle's hands were scratched and dotted

with blood. *Id.* No gun was found on Mr. Hoyle's person; however, Officer William Saunders searched the immediate area and found a silver revolver under an automobile. *Id.* Blood was found on the revolver—blood that a DNA test showed to be Mr. Hoyle's. *Id.*

Mr. Hoyle made several incriminating statements after arrest. First, in an interview with Detective Pat Greeno at Wyandotte County Jail, Mr. Hoyle asked whether he would be prosecuted by state or federal authorities; he wanted to know because he was a felon caught with a gun, and he should be in a federal holding facility. *Id.* Later, when Detective Greeno was transporting Mr. Hoyle to the United States Marshal's booking facility, Mr. Hoyle asked, "[C]an I plead guilty today?" *Id.* And when Detective Greeno was reading Mr. Hoyle the terms of a search warrant, Mr. Hoyle interrupted with, "I'm guilty of this, man. You don't need to go through all this." *Id.*

On this record, we rejected Mr. Hoyle's insufficient-evidence argument and affirmed his conviction. *Id.* at 1163, 1170. However, we held that his two prior Kansas convictions did "not qualify as predicate convictions for the [Armed Career Criminal Act's] enhanced sentencing provisions" because his civil rights had been restored under Kansas law. *Id.* at 1161, 1170. We therefore vacated his sentence and remanded "for resentencing consistent with this opinion." *Id.* at 1170.

On remand, Mr. Hoyle did not content himself with challenging his sentence; rather, he again challenged his conviction, this time arguing that the government suppressed evidence he could have used to impeach various witnesses. Aplt. Br. 4; Aplee. Br. 8. The

district court denied Mr. Hoyle's motion for a new trial and proceeded to resentencing. Aplt. Br. 4.

In preparation for resentencing, the probation office prepared a presentence investigation report (PSR) using the November 1, 2012 edition of the Sentencing Guidelines (U.S.S.G.). 3 R. 4-29. The PSR took into account Mr. Hoyle's two prior felony convictions—a 1994 Kansas conviction for aggravated assault and a 1994 Kansas conviction for aggravated escape from custody. *Id.* at 8, 11, 13. Given these prior felonies, the PSR arrived at a base offense level of 24 under U.S.S.G. § 2K2.1(a)(2) and assessed each conviction three criminal history points under § 4A1.1(a). *Id.* at 8, 16. This resulted in a criminal history category of VI. *Id.* at 16. The PSR also added four offense levels under § 2K2.1(b)(6)(B) because Mr. Hoyle "used or possessed the firearm" in connection with the Kansas felony of "criminal threat." *Id.* at 8.

Mr. Hoyle objected. He argued that, because his civil rights had been restored, his two state felony convictions could not be used to either enhance his base offense level under § 2K2.1(a)(2) or assess criminal history points under § 4A1.1(a). *Id.* at 26, 28. He also objected to the four-level increase for committing "criminal threat," arguing that Ms. Hall, who testified at trial that Mr. Hoyle pointed his revolver at her and threatened to shoot, was not a credible witness. *Id.* at 27-28.

The district court overruled Mr. Hoyle's objections. 2 R. 41-44. The court adopted the PSR's total offense level of 28 and criminal history category VI, and noted that the guidelines range was 140 to 175 months. *Id.* at 44. However, because the statutory maximum sentence was 120 months, *id.* at 44-45, the

court sentenced Mr. Hoyle to 120 months' imprisonment followed by three years' supervised release, 1 R. 78-79.

Discussion

In this appeal, Mr. Hoyle argues that, on remand of *Hoyle I*, the district court erred by (1) denying him a new trial based on violations of *Brady v. Maryland*, 373 U.S. 83 (1963); (2) using his two state convictions—to which his civil rights had been restored—to (a) enhance his base offense level under U.S.S.G. § 2K2.1 and (b) assess criminal history points under § 4A1.1; and (3) finding that he used or possessed the revolver in connection with the Kansas felony "criminal threat." Aplt. Br. ii, 23.

1. New Trial for Brady Violations

We review a *Brady* claim asserted in a Rule 33 motion for a new trial de novo, reviewing any factual findings for clear error. *United States v. Torres*, 569 F.3d 1277, 1281 (10th Cir. 2009). Mr. Hoyle alleges that, after our remand in *Hoyle I*, his counsel discovered three *Brady* violations that occurred during his trial. Aplt. Br. 6. First, he argues the government failed to disclose a disciplinary letter received by Officer Saunders, and this impeachment evidence creates "a reasonable probability that the jury might not have believed [Officer Saunders's] testimony that he found the firearm underneath an automobile in the area where [Mr. Hoyle] was arrested." *Id.* at 6, 11. Second, Mr. Hoyle alleges that the government failed to disclose a disciplinary letter received by Officer Palmerin—whom the government did not call as a witness—and with this evidence he "could have called Palmerin as a witness and questioned his credibility" regarding a police

report. *Id.* at 6, 12. Finally, he alleges the government failed to disclose that Tyda Hall had a Kansas City, Kansas conviction of misdemeanor theft. *Id.* at 6. Although there is no reason to believe that the government knew about Ms. Hall's conviction before trial, he argues that "the Government should or could have learned about" it before then. *Id.* at 13.

We reject Mr. Hoyle's arguments that the government suppressed material impeachment evidence at his trial.[1] First, the district court reviewed Officer Saunders's disciplinary letter *in camera* and found that the letter did not relate to "truthfulness" or "honesty." 1 R. 56. Mr. Hoyle does not challenge this finding as clearly erroneous, *see* Aplt. Br. 10-12, so the issue is waived, *Silverton Snowmobile Club v. United States Forest Serv.*, 433 F.3d 772, 783 (10th Cir. 2006). Second, Mr. Hoyle neither presented the content of Officer Palmerin's

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[1] The government raises the possibility that the district court lacked jurisdiction to consider Mr. Hoyle's motion for a new trial given our limited remand for "resentencing" only. Aplee. Br. 1 n.1. The "mandate rule" "requir[es] trial court conformity with the appellate court's terms of remand." *United States v. West*, 646 F.3d 745, 748 (10th Cir. 2011). "[T]he scope of the mandate on remand in the Tenth Circuit is carved out by exclusion: unless the district court's discretion is specifically cabined, it may exercise discretion on what may be heard." *Id.* at 749. In addition to a mandate from this court, however, Rule 33 provides a district court with an independent jurisdictional basis to consider post-remand motions for a new trial. *See United States v. Ross*, 372 F.3d 1097, 1105 (9th Cir. 2004). Because Mr. Hoyle's motion was based on newly discovered evidence and filed within three years after his guilty verdict, *see* Fed. R. Crim. P. 33(b)(1), the district court had jurisdiction to consider it on remand, and it is properly before this court.

disciplinary letter to the district court, 1 R. 55, nor placed it in the appellate record. Mr. Hoyle has thus failed to meet his burden of establishing the existence of favorable, material evidence rather than hinting at its suspected existence. *See United States v. Erickson*, 561 F.3d 1150, 1163 (10th Cir. 2009). Finally, the district court found that the government did not suppress knowledge of Tyda Hall's conviction because the government did not know of that conviction. 1 R. 54-55. This finding is not clearly erroneous. Moreover, Mr. Hoyle's suggestion that the government "should or could have" learned of this conviction highlights that this evidence was not in the "possession or control of the government," *Erickson*, 561 F.3d at 1163, and Mr. Hoyle does not allege that the government kept itself intentionally ignorant of Ms. Hall's conviction, *see* Aplt. Br. 13-14. The district court properly denied Mr. Hoyle's motion for a new trial.

2. Prior State Convictions under Sentencing Guidelines

We review the district court's interpretation of the sentencing guidelines de novo. *United States v. Hodge*, 721 F.3d 1279, 1280 (10th Cir. 2013). In this appeal, Mr. Hoyle argues that the sentencing guidelines' use of the term "imprisonment for a term exceeding one year" conflicts with the use of that term in statutes. Aplt. Br. 14, 18. Specifically, he argues U.S.S.G. § 2K2.1(a)(2)'s definition of "felony conviction" (i.e., a conviction "punishable by death or imprisonment for a term exceeding one year"), and § 4A1.1(a)'s definition of "prior sentence of imprisonment exceeding one year and one month," conflict with 18 U.S.C. § 921(a)(20)'s definition of

"crime punishable by imprisonment for a term exceeding one year." *Id.* The latter statute expressly excludes from that definition "[a]ny conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored." 18 U.S.C. § 921(a)(20). Because the sentencing guidelines nonetheless take such convictions into consideration, Mr. Hoyle argues the sentencing guidelines impermissibly deviate from the statute.

We must first determine whether § 921(a)(20) governs or controls the use of felony convictions under the sentencing guidelines as Mr. Hoyle contends. Aplt. Br. 16-17. Of course, Congress delegated to the Sentencing Commission significant discretion in formulating federal sentencing guidelines. *United States v. LaBonte*, 520 U.S. 751, 757 (1997). That discretion is not unbounded, however, and the guidelines must follow the "specific directives of Congress." *Id.* Congress "imposed upon the Commission a variety of specific requirements." *Id.* at 753 (citing 28 U.S.C. §§ 994(b)-(n)). To determine whether a statute constitutes a specific directive or requirement that limits the Commission's discretion, we must turn to the statutory language. *See id.* at 757. If the guidelines conflict with a specific directive of Congress, then the guidelines must give way. *Id.*

Mr. Hoyle argues that § 921(a)(20) is a "statutory prohibition" on the use of pardoned convictions under the sentencing guidelines. Aplt. Br. 17. He does not point out, however, any specific directive within the statute to this effect. Section 921 sets forth various definitions "used in this chapter," and subsection (a)(20) defines "crime punishable by imprisonment

for a term exceeding one year . . . for purposes of this chapter." 18 U.S.C. § 921(a), (a)(20). "This chapter" refers to Chapter 44 ("Firearms") of Title 18 of the United States Code. In Chapter 44, "crime punishable by imprisonment for a term exceeding one year" is used in § 922(d)(1), (g)(1), and (n), which make it unlawful to provide a firearm to a known felon, possess a firearm as a felon, or ship or transport a firearm while under a felony indictment; § 924(e)(2)(B), which defines "violent felony"; and § 925(b), which exempts certain licensed persons from criminal liability. Thus, § 921(a)(20)'s definition of "crime punishable by imprisonment for a term exceeding one year"—and its exclusion of pardoned convictions—is limited to determining what offenses count as predicate offenses for § 922, determining who gets a greater minimum sentence under § 924(e)(1), and exempting certain persons from criminal liability altogether (§ 925(b)). The statutory definition does not illuminate what convictions the Commission can use to determine an appropriate sentence under the guidelines.

Although the language in the substantive criminal statute and sentencing guidelines may be similar, we have noted "that the inquiry under the statute is separate from and independent of the one under the sentencing guidelines, unless indicated otherwise. Thus, the statutory definition is controlling for the actual offense, but the commentary to the guideline controls for purposes of determining the sentence." *United States v. Plakio*, 433 F.3d 692, 696 (10th Cir. 2005). In *Plakio*, the fact that the defendant's conviction qualified as a "crime punishable by imprisonment for a term exceeding one year" under § 922(g)(1) did not also determine whether that

conviction qualified as an offense "punishable by imprisonment for a term exceeding one year" under U.S.S.G. § 2K2.1. *Id.*; *see also United States v. Morris*, 139 F.3d 582, 584 (8th Cir. 1998) (Section 921(a)(20) is controlling for purposes of defining felon-in-possession offense, while U.S.S.G. § 2K2.1 is controlling for purposes of determining resulting sentence).

Unless Congress has specifically directed otherwise, there is no conflict between exempting certain conduct from criminal liability under a statute and not exempting that same conduct from sentencing consideration. The two provisions—§ 921(a)(20) and the sentencing guidelines—have different purposes. The statute addresses criminal liability under § 922; that established, the guidelines consider a number of factors (including prior convictions) pertaining to sentencing. That Congress sought to avoid felon-in-possession liability for persons who had their felonies negated by restoration of civil rights, *see* 18 U.S.C. § 921(a)(20), does not mean that Congress sought to avoid enhanced punishment for persons who were nonetheless guilty of § 922 and two previous, albeit negated, felonies, *see* U.S.S.G. § 2K2.1(a)(2). The statute simply does not address how restoration of civil rights affects sentencing. That determination is within the sound discretion of the Sentencing Commission.

The one appellate decision reaching the opposite conclusion is unpersuasive. In *United States v. Palmer*, the Ninth Circuit held that, because the "governing statute [(§ 921(a)(20))] specifically precluded the use of a conviction for which civil rights have been restored, the district court erred in

counting" the defendant's prior felony conviction towards his base offense level under U.S.S.G. § 2K2.1. 183 F.3d 1014, 1017 (9th Cir. 1999). Section 921(a)(20) governs sentencing, the court concluded, because "Chapter 44 includes both § 922 and § 924, which sets out maximum sentences for offenses under this chapter. Accordingly, 'for purposes of this chapter' clearly includes sentencing." *Id.*

Palmer's holding that § 921(a)(20) is a "governing statute" cabining the Commission's discretion in enacting sentencing guidelines is flawed for two reasons. First, in *LaBonte*, upon which *Palmer* purported to rely, 183 F.3d at 1018, the Supreme Court struck down sentencing guidelines where they conflicted with "specific requirements" or "specific directives" of Congress, 520 U.S. at 753, 757. Unless a statute constitutes a "specific" limitation on the Commission's broad discretion, *see* 520 U.S. at 757, the Commission has discretion to act. The Supreme Court found such specific limitations within 28 U.S.C. § 994, *id.* at 753, a statute that delineates what the Commission "shall" and "shall not" do, *see*, *e.g.*, 28 U.S.C. § 994(b)(1), (t). It is a jump of logic to assume, as the *Palmer* court did, that because § 921(a)(20) "sets out maximum sentences for offenses under this chapter," it unquestionably controls the Commission's discretion to consider how prior convictions affect the appropriate sentence.[2]

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[2] This is not to say that the sentencing guidelines can never be in conflict with a statute defining a substantive offense or setting out a maximum sentence. If the guidelines sought to criminalize conduct that is lawful under statute, or sought to impose a sentence notwithstanding a statutory maximum

Second, *Palmer*'s lack of analysis undermines the soundness of its holding. After holding that pardoned convictions could not be used to establish a defendant's "base offense level," the Ninth Circuit went on to hold that the use of such convictions to compute a defendant's "criminal history category" did not conflict with the "statutory prohibition" of § 921(a)(20) because "criminal history category" was not addressed in Chapter 44. *Palmer*, 183 F.3d at 1018. However, this cannot be squared with the court's earlier holding that Chapter 44 "clearly includes sentencing." *Id.* at 1017. A defendant's criminal history category is as much a part of his "sentencing" as his base offense level, *see Koon v. United States,* 518 U.S. 81, 88 (1996), and neither are mentioned in Chapter 44.

For these reasons, the district court properly overruled Mr. Hoyle's objection to counting his prior Kansas convictions towards his base offense level (U.S.S.G. § 2K2.1) and criminal history category (§ 4A1.1).

3. Sufficient Evidence for Criminal Threat

While we review the district court's interpretation of the sentencing guidelines de novo, we review its factual findings for clear error. *United States v. Kitchell*, 653 F.3d 1206, 1226 (10th Cir. 2011). Under this standard of review, we will not disturb the

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sentence, the guidelines would conflict with a specific directive of Congress. But that is not the case here. As mentioned above, U.S.S.G. § 2K2.1 does not create criminal liability where none exists otherwise. It imposes a sentence for conduct made unlawful by statute (e.g., § 922(g)) and also takes into account the defendant's susceptibility to recidivism, something that § 921(a)(20) does not specifically prohibit.

district court's factual findings unless they have no basis in the record, and we view the evidence and inferences therefrom in the light most favorable to the district court's determination. *Id.*

Mr. Hoyle argues that the district court erred by increasing his offense level by four levels because there was insufficient evidence to find that he committed the Kansas felony "criminal threat" while possessing the silver revolver. Aplt. Br. 21-23. This is so, he contends, because the district court failed to consider Ms. Hall's "lack of credibility" as exhibited by her misdemeanor theft conviction. *Id.* at 21-22. He also contends the evidence is insufficient because Ms. Hall never told the 911 operator that Mr. Hoyle was pointing a gun "at her or anyone else," and other witnesses never stated that Mr. Hoyle pointed a gun at Ms. Hall. *Id.* at 22-23.

The guidelines provide for a four-level increase if the defendant "used or possessed any firearm or ammunition in connection with another felony offense." U.S.S.G. § 2K2.1(b)(6)(B). At the time of Mr. Hoyle's actions, the Kansas "criminal threat" statute made a felony of "any threat to . . . [c]ommit violence communicated with intent to terrorize another." Kan. Stat. Ann. § 21-3419(a)(1) (2007).[3] The district court found by a preponderance of the evidence that Mr. Hoyle committed this felony while possessing the silver revolver, 2 R. 44, in part because Ms. Hall testified that Mr. Hoyle pointed his gun at her and threatened to shoot, 2 Supp. R. 57-58. The court determined that Ms. Hall's prior conviction

[3] This statute was repealed effective July 1, 2011. 2010 Kan. Sess. Laws ch. 136, § 307.

for theft did not undermine her credibility. 2 R. 21-22, 44.

"The credibility of a witness at sentencing is for the sentencing court, who is the trier of fact, to analyze." *United States v. Deninno*, 29 F.3d 572, 578 (10th Cir. 1994). A determination of witness credibility is reviewed for clear error, and "[w]e will not hold that testimony is, as a matter of law, incredible unless it is unbelievable on its face, i.e., testimony as to facts that the witness physically could not have possibly observed or events that could not have occurred under the laws of nature." *United States v. Virgen-Chavarin*, 350 F.3d 1122, 1134 (10th Cir. 2003) (quoting *United States v. Mendez-Zamora*, 296 F.3d 1013, 1018 (10th Cir. 2002)). In this regard, the district court's credibility determination is "virtually unreviewable on appeal." *Id.* (internal quotation marks omitted).

After reviewing the record, we hold that the district court did not clearly err in crediting Ms. Hall's version of events, nor did it clearly err in finding by a preponderance of the evidence that Mr. Hoyle committed the Kansas felony of "criminal threat" while possessing the silver revolver.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

UNITED STATES OF AMERICA, Plaintiff, v. TAURUS D HOYLE, Defendant.	Docket No. 10-20056-CM Kansas City, Kansas Date: 6/28/13

TRANSCRIPT OF
SENTENCING HEARING
BEFORE THE HONORABLE CARLOS MURGUIA,
UNITED STATES DISTRICT JUDGE.

APPEARANCES:

For the Plaintiff:	Terra Morehead Asst. US Attorney 360 US Courthouse 500 State Avenue Kansas City, KS 66101
For the Defendant:	R Bruce Kips Attorney at Law 6333 Long Suite 380 Shawnee, KS 66216
Court Reporter:	Nancy Moroney Wiss, CSR, RMR, FCRR Official Court Reporter 558 US Courthouse

500 State Avenue
Kansas City, KS 66101

Proceedings recorded by machine shorthand, transcript produced by computer-aided transcription.

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THE COURT: Court next calls Case Number 10-20056. It's a case entitled United States of America versus Taurus D Hoyle. The parties please enter their appearance.

MS. MOREHEAD: May it please the court, Terra Morehead, Assistant United States Attorney, appearing on behalf of the government.

MR. KIPS: May it please the court, Mr. Hoyle appears in person, by and through counsel Bruce Kips.

THE COURT: We'll go ahead and start our sentencing hearing with counsel and Mr. Hoyle, you staying at your table, but I am going to ask, Mr. Hoyle, if you would please stand and raise your right hand.

(Defendant sworn.)

THE DEFENDANT: Yes, I do.

THE COURT: Thank you. Please have a seat.

MR. KIPS: Your Honor?

THE COURT: Yes.

MR. KIPS: I do have one short witness I want to call with regard to issue three in my amended sentencing memorandum.

THE COURT: All right. Thank you. Let me go ahead and put some things on the record regarding

our sentencing hearing today. Mr. Hoyle, if you recall,

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THE COURT: We're back on the record. Court did take a recess to go over counsel's arguments, and

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there was evidence offered at our hearing. There was testimony of Mr. Adams, as well as references to other previously admitted evidence that—at Mr. Hoyle's trial. Again, the court believed even prior to our hearing that the parties had fully briefed the objections. There were some additional arguments made, referenced another case. Court is prepared to rule now after having considered all of the arguments and evidence presented. First, defendant objects to his base offense level. The presentence investigation report calculates a base offense level of 24 under United States Sentencing Guideline Section 2 K 2.1 A 2, because defendant had two prior state felony convictions for crimes of violence. Application note one explains that, quote, crime of violence has the meaning given that term in Section 4 B 1.2 A and application note one of that section. Relevant to defendant's objection, Section 4 B 1.2 defines, quote, crime of violence, end quote, as an offense, quote, punishable by imprisonment for a term exceeding one year, end quote. Defendant contends that the phrase, quote, punishable by imprisonment for a term exceeding one year, end quote, should have a definition provided in 18 United States Code Section

921 A 20. The definition in this section applies, quote, for purposes of this chapter, end quote,

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and excludes convictions for which a person had his civil rights restored. The relevant chapter is Chapter 44 which sets out maximum sentences for offenses. Based on the inclusion of maximum sentences in Chapter 44, defendant contends that, quote, for purposes of this chapter, end quote, clearly includes sentencing. Therefore, the defendant argues that this definition must apply to the sentencing guidelines, because otherwise, the sentencing guidelines and the statute would directly conflict. If defendant is correct, then his base offense level drops to 14 because he would not have two prior felony convictions for crimes of violence, he—because all of his civil rights were restored. There is case law that supports defendant's argument. In United States versus Palmer, 183 Fed 3rd 1014 from 1999, the Ninth Circuit did not count Palmer's prior offense in calculating his base offense level because the state had restored Palmer's rights with respect to that conviction. There's also case law that goes the other way. In United States versus Shelton, 91 Federal Appendix 247 from 2004, the Third Circuit addressed a similar argument with respect to the definition of, quote, felony conviction, end quote. In rejecting Shelton's argument, the panel explained that the definitions in Section 921 and the sentencing

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guidelines have very different purposes, and that the different purposes, quote, persuade us that the texts are not in conflict, end quote. The Eighth Circuit reached a similar conclusion in United States versus

Morris at 139 Fed 3rd 582, from 1998. In addition, court also reviewed the Sixth Circuit's opinion in United States versus Mosley at 635 Fed 3rd 859 from 2011 and the First Circuit's opinion in United States versus Damon at 595 Fed 3rd at 395, a 2010 case. After carefully reviewing the case law, the statute, and the guidelines, the court concludes that the definition in Section 921 A 20 does not control the definition of, quote, crime of violence, end quote, the Sentencing Guideline Section 2 K 2.1. As a policy concern, to accept defendant's position would mean that anytime a defendant is guilty of a statutory offense that carries a maximum or a minimum sentence, and the statute has a definition section that applies, quote, for purposes of this chapter, end quote, the probation officer and court would have to consider whether any applicable provision of the sentencing guideline conflicts with the statutory definition. Court finds this would be cumbersome and remove clarity. Defendant's first objection is overruled. Second, similar to the above, defendant argues that his two state convictions for which his

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civil rights were restored should not be counted in his criminal history calculations. Defendant focuses on Sentencing Guideline Section 4 A 1.2 and application note 10, and makes a similar argument to that discussed above. As discussed above, the court does not think that—that the, quote, for purposes of this chapter, end quote, language in 18 United States Code Section 921 A 20 creates a conflict with the sentencing guidelines. The court overrules this objection. Third, defendant objects to the four level enhancement for using or possessing the firearm in

connection with the Kansas felony offense of criminal threat. This enhancement is based on defendant pointing a gun at Tyda Hall and threatening to shoot her. Defendant contends that Miss Hall is not credible because she has a 2009 misdemeanor theft conviction, and she did not disclose this conviction when asked whether she had any truth or veracity convictions. Defendant also called Mr. Adams who testified that he never saw Mr. Hoyle threaten anyone with a gun on that day. The court observed both Mr. Adams and Miss Hall testify. Mr. Adams' testimony contradicts not only the testimony of Miss Hall but also it contradicts portions of Miss Stacey Bradley's testimony about the events of that day. Having observed the demeanor of both individuals and all the evidence

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presented at trial, and in that regard, court did have the opportunity during this time-frame which we had our sentencing—our remand hearings continued to review once again the transcripts of the testimony that was provided—offered at Mr. Hoyle's trial including Defendant's Exhibit Number 401. The court would make a couple of just observations. I'm not questioning motivations, because I don't have all that information before the court. I would note, Mr. Adams' testimony and the timing of that testimony was that it occurred today at this sentencing on remand. It didn't happen during the trial. I know he was asked in regards to why he didn't testify at trial. I believe his testimony was that he didn't have a ride. Also, Mr. Adams was asked the same—or a question regarding prior convictions. I believe Miss Hall was as well through trial. In regards to the questions

from the government's attorney today, he's asked if he had any prior convictions involving truth—quote, truth or veracity, end quote. His response to that is what—what does that mean? I mention that only because possibly on that, again, not knowing what was going through Miss Hall's mind, the government's attorney did set out some of the history of what she was involved in regarding that misdemeanor conviction at the time of the trial, but it's possible

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that that phrase of truth or veracity is not as clear as it may appear to be to either the court or counsel or people with a legal background as it may be to people without that background. Again, upon review, again, in regards to the court weighing the testimony that was offered not only today but during trial, considering all the evidence presented at trial as well as today, the court finds that Miss Hall's testimony to be more credible and more consistent with the other evidence. The court does make this finding despite the two events identified by defendant. Court finds that neither of these events sufficiently undermines Miss Hall's credibility. The court determines that the four level enhancement for criminal threat is justified by a preponderance of the evidence. The court overrules this objection. Based on the court's rulings now on the defendant's objections, court is first going to find that the presentence investigation report be sealed, be made part of the record, be made available for purposes of appeal, if any, in the future. The court would also find that under the sentencing guidelines, the total offense level should be a total offense level of 28, and with a criminal history

category of six, that under the guidelines, the range of imprisonment would be 140 to 175 months. However, because the statutory maximum

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sentence is 120 months, the guideline range becomes 120 months. Any objections to those findings at this time by the government?

MS. MOREHEAD: No, Your Honor.

THE COURT: Other than those previously made, Mr. Kips, any other objections to those findings at this time by defendant?

MR. KIPS: No, Judge.

THE COURT: The court is ready to announce its proposed findings of fact and tentative sentence. At this time, Mr. Kips, in regards to that, are there any statements or arguments you care to make on behalf of Mr. Hoyle's sentence?

MR. KIPS: Just one moment, Judge. Judge, we have nothing else.

THE COURT: I'll—I heard what Mr. Kips said, Mr. Hoyle, but I do need to ask you this for the record. I asked Mr. Kips first if there was anything that he wanted to say on your behalf. He said that there is nothing else that we have. But I need to ask you, Mr. Hoyle, is there anything that you wanted to say on your behalf, or is there any evidence that you want to offer in mitigation, which means in lessening of your sentence?

THE DEFENDANT: No, sir.

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THE COURT: Anything from the government?

MS. MOREHEAD: Nothing, Judge.

THE COURT: At this time the court is ready to announce its proposed findings of fact and tentative sentence. Court is required pursuant to 18 United States Code Section 3553 A to impose a sentence that is sufficient but not greater than necessary to comply with the purposes of sentencing identified in 18 United States Code Section 3553 A 2. In determining the particular sentence to be imposed, the court has considered the United States Sentencing Guidelines which promote uniformity in sentencing and assist the court in determining an appropriate sentence by weighing the basic nature of the offense as well as aggravating and mitigating factors. The court has considered the statements of the parties and the presentence investigation report. In accordance with provisions set forth at 18 United States Code Section 3553 A, the court has considered the nature and circumstances of the offense and the history and characteristics of the defendant. Specifically, the court has considered the defendant's extensive criminal history, four felony convictions and eight misdemeanor convictions, and the violent nature of several of those convictions. In connection with defendant's prior aggravated assault

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case, the transcript of the plea colloquy reflects that, quote, Taurus Hoyle leaned out of the passenger window and fired a shot at the victim, end quote. In connection with defendant's aggravated escape case, the facts reflect defendant fled from a deputy who was escorting defendant to a court hearing. Defendant's record further includes three misdemeanor convictions for obstruction, one misdemeanor conviction for assault, one

misdemeanor conviction for battery of a law enforcement officer, and one misdemeanor conviction for resisting an officer. In the assault case, the complaint charges defendant punched a female victim in the face. In the battery of a law enforcement officer case, the information charges defendant punched a female Kansas City police officer in the face. In one of the obstruction cases, defendant ran from an officer. Similarly, defendant ran from officers in the instant case. Defendant has numerous arrests for failure to appear, and his supervision was revoked in all three of his felony cases; specifically, three times in his most recent federal case. It would appear to the court that defendant has been afforded opportunities to change his ways, yet by his actions, he has continued to demonstrate a longstanding disrespect for the law and safety of the community. After considering the

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previously referenced factors, the court intends to sentence defendant to a term of 120 months imprisonment to be followed by a three-year term of supervised release. The court believes that such a sentence is sufficient but not greater than necessary to reflect the seriousness of the offense, to promote respect for the law, and provide just punishment for the offense as set forth at 18 United States Code Section 3553 A 2 A. Further, the sentence should afford adequate deterrence to criminal conduct and protect the public from further crimes of the defendant in accordance with provisions of 18 United States Code Section 3553 A 2 B and C. In light of defendant's inability to pay a fine, the court does not intend to impose a fine. A $100 special assessment is

required pursuant to 18 United States Code Section 3013. The court is going to mention this again for the record, just to make sure our record is complete. There were forfeiture allegations made in the indictment. At the first sentencing hearing on August 17th, 2011, the court ordered the forfeiture of defendant's interest in a 38-caliber Smith & Wesson revolver, Model 64-3, Serial Number 7 D 36792 that was used in the offense. On March 29th, 2012, the court granted the government's motion for a preliminary order of forfeiture in the referenced firearm. Court at this

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time does make that for purposes of this sentencing hearing a final order of forfeiture. Court does intend to impose each of the mandatory and special conditions of supervision as set forth in Part D of the presentence report. Defendant is prohibited by federal law from possessing or purchasing a firearm or ammunition as a result of this conviction. Prohibition against possessing or purchasing a destructive device or other dangerous weapon is warranted based upon the nature of the instant offense of conviction and defendant's criminal history. Mandatory conditions for drug testing and DNA collection are imposed pursuant to 18 United States Code Section 3583 D. Substance abuse treatment and alcohol prohibition conditions are deemed warranted in light of defendant's substance abuse history. A special condition allowing for searches based upon reasonable suspicion is believed to be warranted due to the nature of the instant offense of conviction and defendant's criminal history. Any

objections to the court's proposed findings of fact and tentative sentence from the government?

MS. MOREHEAD: No, Your Honor.

THE COURT: From defendant?

MR. KIPS: No, Judge.

THE COURT: Mr. Kips, I am going to ask at

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this point if you and Mr. Hoyle will please stand up. Mr. Kips, again, other than the objections previously put on the record, do you know of any other reason why the court should not impose a sentence at this time?

MR. KIPS: No, Your Honor.

THE COURT: Mr. Hoyle, the court determines that the presentence investigation report and the previously stated findings are accurate, and orders those findings to be incorporated in the following sentence. Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the court, defendant Taurus D Hoyle is hereby committed to the custody of bureau of prisons to be imprisoned for a term of 120 months. Upon release from confinement, defendant shall be placed on supervised release for a term of three years. Within 72 hours of release from the custody of bureau of prisons, defendant shall report in person to the probation office in the district to which defendant is released. While on supervised release, defendant should not commit another federal, state or local crime, shall comply with the standard conditions that have been adopted by this court, as well as the mandatory and special conditions of supervision previously stated by the court. Defendant is ordered to pay United States a

special assessment of $100 to the clerk, US District Court.

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Payments on the assessment are to begin immediately and may be paid while in the bureau of prisons custody. The court does not impose a fine in this case based on defendant's inability to pay. The court does order the forfeiture of the defendant's interest in the firearm previously put on the record and seized by the Kansas City, Kansas police on March 30th, 2010, makes this a final order of forfeiture. Both the government and defendant are advised of their respective rights to appeal this sentence and conviction. An appeal taken from this sentence is subject to 18 United States Code Section 3742. Defendant is advised of your right to appeal the conviction and sentence. You also can lose your right to appeal if you do not timely file a notice of appeal in the district court. Rule 4 B of the Federal Rules of Appellate Procedure gives you 14 days after the entry of judgment to file a notice of appeal. If you so request, the clerk of the court shall immediately prepare and file a notice of appeal on your behalf. If you're unable to pay the costs of an appeal, you have the right to apply for leave to appeal in forma pauperis, which means without having to pay a filing fee. You are remanded to the custody of the US marshal service pending designation by the federal bureau of prisons. If there's nothing else, this hearing's adjourned. Thank you.

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