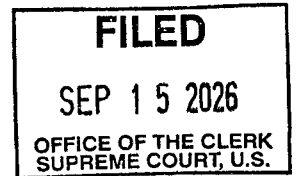


26 - 5923

ORIGINAL

IN THE

Supreme Court of the United States



No.

Gabriel Gigena,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari

to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner: **Gabriel Omar Gigena,**
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QUESTIONS PRESENTED

The questions presented are:

Whether a federal court of appeals may affirm a criminal conviction under 18 U.S.C. §§111 and 1114 by invoking an uncharged “person assisting” protected-person theory where the indictment charged assault on a federal officer, the jury was not instructed on the alternative theory, the government relied on generalized testimony that a local task-force officer was “special deputized,” and petitioner preserved a Rule 29 challenge to the absence of oath, deputation, MOU, renewal, expiration, United States Attorney approval, or other competent federal-status documentation, in conflict with *United States v. Washington*, 79 F.4th 320, 327–31 (3d Cir. 2023), and *United States v. Torres*, 862 F.2d 1025, 1030 (3d Cir. 1988)?

Whether affirming a conviction on an uncharged statutory theory violates the Fifth and Sixth Amendments, including *United States v. Gaudin*, 515 U.S. 506, 510–15 (1995), and *Stirone v. United States*, 361 U.S. 212, 217–19 (1960), where the substitute theory was never charged by the grand jury, never submitted to the petit jury, never found beyond a reasonable doubt, and disputed element facts were treated as established through counsel concessions, a warrant stipulation, or a Fed. R. Evid. 201 posture despite petitioner’s express pretrial objections?

Whether due process and 28 U.S.C. §455(a) permit a federal district judge who recused from a related civil rights action arising from the same operative facts

to later preside over the companion criminal prosecution where petitioner contends the prior civil recusal was not clearly disclosed in the criminal proceeding before trial, preventing a timely informed objection, and the judge thereafter entered trial-management rulings restricting federal-authority, excessive-force, and theory-of-defense evidence?

Whether a trial court violates the Fifth and Sixth Amendments by omitting theory-of-defense instructions on self-defense, excessive force, and honest mistake of fact, where plainclothes local officers executed a surprise rear-tackle on a defendant holding his minor children, key federal-authority and impeachment materials were withheld or excluded, and the trial record includes Juror No. 8's filed impressions showing that jurors initially favored acquittal but lacked a legal framework to consider fair opportunity to comply, excessive force, and honest mistake?

LIST OF PARTIES

The parties to this proceeding are petitioner **Gabriel Omar Gigena** and respondent **United States of America**. The judgment principally sought to be reviewed is the Tenth Circuit's Order and Judgment in *United States v. Gigena*, No. 25-4112, together with the order denying panel rehearing and rehearing en banc. Related proceedings, including petitioner's ancillary Supreme Court proceeding,

Gigena v. Nielson, et al., No. 26-5338, are identified below for context and preservation, but the United States is the respondent in this criminal certiorari petition.

CORPORATE DISCLOSURE STATEMENT

Petitioner is an individual proceeding pro se. No nongovernmental corporate party is identified in this petition, and no corporate disclosure statement is required.

STATEMENT OF PRIOR AND RELATED APPEALS AND CASES

Gigena v. Nielson, Jr., et al., Supreme Court No. 26-5338, is petitioner's ancillary Supreme Court proceeding arising from the related mandamus appeal concerning the handling and preservation of pretrial submissions. Petitioner has already submitted in that ancillary proceeding the opening brief, Rule 28(j) letter, and reply brief from *United States v. Gigena*, No. 25-4112. In this criminal petition, those appellate filings may be referenced as part of the related record and preservation history; they need not be duplicated in full in the appendix unless petitioner elects to include excerpts necessary for this petition's independent review.

Gigena v. Calaveras County of California, et al., No. 2:24-CV-00963 (D. Utah), is a related civil action originally filed December 30, 2024. Petitioner identifies that matter as related because it concerns connected factual and procedural issues,

because Judge Stewart recused from that civil action and, as petitioner contends the record reflects, later self-assigned to *United States v. Gigena*, and because petitioner contends the civil action remains pending without issuance of summons or an order for service of process under 28 U.S.C. §1915(d). Petitioner does not seek review of a merits ruling in that civil action in this petition.

Gabriel Gigena v. Ashly Roberts, __ U.S. __ (Petition for Review of Cal. S. Ct. submitted June 13, 2026, received June 22, 2026, review denied as untimely by 6 days where appellant contends notice of judgment was not delivered while he was incarcerated and appellant based the deadline upon the remittitur date); (*A.R. v. G.G.*, 24PA473343 (Calaveras Co. May 4, 2024) (de facto termination of parental rights without service of summons, without notice of hearing, without hearing from the parent first, and without a finding of unfitness or evidence to substantiate judgment), C101567 (Cal. Ct. App. 3d Dist. Dec. 2, 2025) (judgment affirmed based on presumption of correctness of the “judgment roll” with no findings, after the lower court allegedly refused to process the agreed statement for the record and the appellate court refused to augment the record with the agreed statement; in personam and subject-matter jurisdiction arguments ruled waived as incorporated from augment; ICWA ruled inapplicable though children were placed in foster care for two days and the court allegedly refused to give effect to an uncontested Tribal

Custody Decree), reh'g denied Dec. 19, 2025, S294767 (Cal. S. Ct. Mar. 11, 2026) (review denied); motion for equitable relief to set aside and reissue judgement submitted July 8, 2026, denied on the ground that the case was closed and unable to process).

TABLE OF CONTENTS

QUESTIONS PRESENTED	2
LIST OF PARTIES	3
CORPORATE DISCLOSURE.....	4
STATEMENT OF PRIOR AND RELATED CASES.....	4
I. JURISDICTIONAL STATEMENT	12
II. REASONS FOR GRANTING THE PETITION	13
III. STATEMENT OF THE CASE	27
IV. ARGUMENT	33
A. The Rule 29 Challenge Required Meaningful Review of the Charged Federal-Officer Element	34
B. The “Person Assisting” Fallback Constructively Amended the Indictment and Bypassed the Jury	38
C. The Omitted Defense Instructions Violated Petitioner’s Right to Present a Complete Defense	44
D. Juror No. 8’s Record Statement Demonstrates Prejudice and Vehicle Strength	48
E. The Recusal Issue Independently Warrants Review or Reinforces the Need for Vacatur	49
V. CONCLUSION AND PRAYER FOR RELIEF	52
CERTIFICATE OF COMPLIANCE	57
CERTIFICATE OF SERVICE.....	58
APPENDIXES.....	59

TABLE OF AUTHORITIES

Cases

<i>Alleyne v. United States</i> , 570 U.S. 99 (2013)	15, 39
<i>Allison v. Superior Court</i> , 99 Cal. App. 3d 993 (Cal. Ct. App. 1979)	35
<i>Apprendi v. New Jersey</i> , 530 U.S. 466 (2000).....	14, 39
<i>Barker v. Wingo</i> , 407 U.S. 514 (1972)	21
<i>Batson v. Kentucky</i> , 476 U.S. 79, 86–88 (1986).....	24, 47
<i>Berger v. United States</i> , 295 U.S. 78 (1935)	41
<i>Blackledge v. Perry</i> , 417 U.S. 21 (1974).....	24
<i>Blakely v. Washington</i> , 542 U.S. 296 (2004).....	39
<i>Bouie v. City of Columbia</i> , 378 U.S. 347 (1964).....	27
<i>Brady v. Maryland</i> , 373 U.S. 83 (1963)	43, 44
<i>Cargle v. Mullin</i> , 317 F.3d 1196 (10th Cir. 2003).....	42
<i>Caperton v. A.T. Massey Coal Co.</i> , 556 U.S. 868 (2009).....	16, 47
<i>Chiarella v. United States</i> , 445 U.S. 222, 236–37 (1980)	38
<i>Cline v. Superior Court</i> , 135 Cal. App. 3d 943 (1982)	28
<i>Cone v. Bell</i> , 556 U.S. 449 (2009)	44
<i>Crandell v. Bunnell</i> , 25 F.3d 754 (9th Cir. 1994).....	23, 50
<i>Cummings v. Missouri</i> , 71 U.S. 277 (1867).....	27
<i>Douglas v. Workman</i> , 560 F.3d 1156 (10th Cir. 2009)	42
<i>Foster v. Chatman</i> , 578 U.S. 488, 513–15 (2016).....	8, 24, 47
<i>Giglio v. United States</i> , 405 U.S. 150 (1972)	44
<i>Goodwin v. Superior Court</i> , 90 Cal. App. 4th 215 (2001)	35
<i>Hamling v. United States</i> , 418 U.S. 87 (1974)	39
<i>Heck v. Humphrey</i> , 512 U.S. 477 (1994).....	49
<i>In re Baby Boy M.</i> , 141 Cal. App. 4th 588 (Cal. Ct. App. 2006)	35
<i>In re Marriage of Leonard</i> , 122 Cal. App. 3d 443 (Cal. Ct. App. 1981)	35

<i>In re Martinez-Catala</i> , 129 F.3d 213 (1st Cir. 1997)	48
<i>Iowa v. Tovar</i> , 541 U.S. 77 (2004)	22, 49
<i>Kyles v. Whitley</i> , 514 U.S. 419 (1995)	44
<i>Neder v. United States</i> , 527 U.S. 1 (1999)	20, 37, 39
<i>Netsphere, Inc. v. Baron</i> , 703 F.3d 296 (5th Cir. 2012)	48
<i>Nichols v. Alley</i> , 71 F.3d 347 (10th Cir. 1995)	48
<i>Pazden v. Maurer</i> , 424 F.3d 303 (3d Cir. 2005)	23, 50
<i>People v. Carrillo</i> , 162 Cal. App. 3d 585 (Cal. Ct. App. 1984)	28
<i>People v. Johnson</i> , 151 Cal. App. 3d 1021 (Cal. Ct. App. 1984)	28, 35
<i>People v. Lortz</i> , 137 Cal. App. 3d 363 (1982)	36
<i>People v. Ramey</i> , 16 Cal. 3d 263, 545 P.2d 1333 (Cal. 1976)	26, 27, 28, 35
<i>Peugh v. United States</i> , 569 U.S. 530 (2013)	27
<i>Powers v. Ohio</i> , 499 U.S. 400, 411 (1991)	24, 47
<i>Smith v. Cain</i> , 565 U.S. 73 (2012)	44
<i>Snyder v. Louisiana</i> , 552 U.S. 472, 478–85 (2008)	25, 47
<i>Stirone v. United States</i> , 361 U.S. 212 (1960)	2, 19, 37, 39
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984)	20, 21
<i>Sullivan v. Louisiana</i> , 508 U.S. 275 (1993)	20, 37
<i>Taylor v. Illinois</i> , 484 U.S. 400 (1988)	18, 45
<i>United States v. Bagley</i> , 473 U.S. 667 (1985)	44
<i>United States v. Booker</i> , 543 U.S. 220 (2005)	39
<i>United States v. Cooley</i> , 1 F.3d 985 (10th Cir. 1993)	48
<i>United States v. Cronic</i> , 466 U.S. 648 (1984)	23
<i>United States v. Drapeau</i> , 644 F.3d 646 (8th Cir. 2011)	23, 43
<i>United States v. Farr</i> , 536 F.3d 1174 (10th Cir. 2008)	39
<i>United States v. Feola</i> , 420 U.S. 671 (1975)	15, 42

<i>United States v. Gigena</i> , No. 25-4112 (10th Cir. Aug. 13, 2026)	3, 4, 5, 12, 31
<i>United States v. Gonzalez-Lopez</i> , 548 U.S. 140 (2006).....	20, 22
<i>United States v. Goodwin</i> , 457 U.S. 368 (1982).....	24
<i>United States v. Hathaway</i> , 318 F.3d 1001 (10th Cir. 2003).....	39
<i>United States v. Morton</i> , 999 F.2d 435 (9th Cir. 1993).....	25, 43
<i>United States v. Ornelas</i> , 906 F.3d 1138 (9th Cir. 2018).....	25, 43
<i>United States v. Toombs</i> , 574 F.3d 1262 (10th Cir. 2009)	21
<i>United States v. Torres</i> , 862 F.2d 1025 (3d Cir. 1988)	2, 13, 33
<i>United States v. Silkwood</i> , 893 F.2d 245 (10th Cir. 1989)	23, 50
<i>United States v. Sorensen</i> , 801 F.3d 1217 (10th Cir. 2015)	42
<i>United States v. Span</i> , 970 F.2d 573 (9th Cir. 1992).....	25, 43
<i>United States v. Washington</i> , 79 F.4th 320 (3d Cir. 2023).....	2, 13, 33
<i>United States v. Young</i> , 470 U.S. 1 (1985)	42
<i>United States v. Zepeda</i> , 705 F.3d 1052 (9th Cir. 2013)	40
<i>Vasquez v. Hillery</i> , 474 U.S. 254, 263–64 (1986)	24
<i>Vermont v. Brillon</i> , 556 U.S. 81 (2009).....	21
<i>Washington v. Texas</i> , 388 U.S. 14 (1967)	18, 45

Constitutional Provisions

U.S. Const. amend. V.....	2, 3, 14
U.S. Const. amend. VI	2, 3, 14, 17, 20

U.S. Statutes

5 U.S.C. §3331	14, 30, 33
5 U.S.C. §3374.....	13
18 U.S.C. §111	2, 13, 25, 29, 32, 33, 34, 36, 38, 39, 42, 43
18 U.S.C. §1114.....	2, 13, 14, 19, 26, 29, 31, 32, 33
18 U.S.C. §§3161–3162.....	20

18 U.S.C. §3231	33
18 U.S.C. §3742(a)	12
28 U.S.C. §1254(1)	12
28 U.S.C. §1291	12
28 U.S.C. §1738A(e).....	28, 35
28 U.S.C. §1915(d)	5
28 U.S.C. §455(a)	2, 16, 48, 49

State Statutes

Cal. Fam. Code § 3402(q).....	34
Cal. Fam. Code § 3408	35
Cal. Fam. Code §3424(a).....	35
Cal. Penal Code §278.5.....	26, 28, 36
Cal. Penal Code §830.8.....	34
Utah Code § 77-30-13.....	36
Utah Code § 77-30-14.....	36

Rules

Fed. R. App. P. 28(j)	4, 12, 20, 22
Fed. R. Crim. P. 29.....	2, 13, 15, 20, 26, 30, 32
Fed. R. Crim. P. 12.....	20, 30
Fed. R. Evid. 201	2, 40, 41

Sentencing Guidelines

U.S.S.G. §2A2.4.....	39
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Other Authorities

USMS Policy Directives 8.18, 8.9, 2.11	17, 18, 23, 29, 43, 46
DOJ OIG Audit 24-116.....	33
ABA Model Rule 1.2(a).....	22, 49
ABA Model Rule 3.3	22, 49

I. JURISDICTIONAL STATEMENT

The judgment principally sought to be reviewed is the Order and Judgment of the United States Court of Appeals for the Tenth Circuit entered August 13, 2026, in *United States v. Gigena*, No. 25-4112, affirming petitioner's criminal conviction and sentence. The Tenth Circuit denied petitioner's petition for panel rehearing and rehearing en banc on August 31, 2026. A petition was sent on September 15, 2026. The Court's clerk issued a letter to correct on October 6, 2026, and this correction is timely measured from that letter. The court of appeals had jurisdiction under 28 U.S.C. §1291 and 18 U.S.C. §3742(a). This Court has jurisdiction under 28 U.S.C. §1254(1) to review the final judgment of a United States court of appeals by writ of certiorari. This criminal petition is related to petitioner's ancillary Supreme Court proceeding, *Gigena v. Nielson, et al.*, No. 26-5338, because that matter concerns the handling of pretrial submissions later treated as waived or untimely in the criminal appeal. Petitioner has already submitted the opening brief, Rule 28(j) letter, and reply brief from No. 25-4112 in the ancillary matter. This petition refers to those filings for preservation and context and will include only those excerpts, orders, or record materials necessary for independent review of the criminal judgment. The petition therefore presents a live controversy. Although petitioner has completed the custodial portion of the sentence, he remains subject to a term of supervised release, and the conviction continues to impose collateral and liberty consequences redressable by vacatur, reversal, a judgment of acquittal, or a new trial.

II. REASONS FOR GRANTING THE PETITION

This Court should grant review because the decision below presents recurring federal questions about §111/§1114 task-force prosecutions, the proof required before a local officer may be treated as a federally protected person, and whether an appellate court may affirm on an uncharged “person assisting” theory never found by the jury. The case is an unusually clean vehicle because petitioner preserved the federal-officer-status issue through Rule 29, the government expressly argued the fallback theory, the Tenth Circuit adopted it, and the filed juror record shows concrete prejudice from the omitted defense framework.

I. The Tenth Circuit’s Reliance on an Uncharged Statutory Fallback Theory to Salvage a Conviction Creates a Direct and Irreconcilable Conflict with the Third Circuit.

The decision below deepens a conflict concerning the government’s burden of proof under 18 U.S.C. §§111 and 1114 when local task-force officers operate without valid federal documentation. In *United States v. Washington*, 79 F.4th 320, 327–31 (3d Cir. 2023) (rejecting a §1114 conviction where the government failed to prove the charged protected-person theory), the Third Circuit addressed a failure of proof regarding the operative federal-officer status theory. Relying on *United States v. Torres*, 862 F.2d 1025, 1030 (3d Cir. 1988) (recognizing that local personnel assigned to a federal agency may qualify only with the required oath-and-assignment foundation), the court recognized that local personnel assigned to a federal agency under 5 U.S.C. §3374 may qualify for §1114 protection only where the necessary

federal oath-and-assignment foundation exists, including the oath required by 5 U.S.C. §3331. Where that foundation was absent, the Third Circuit rejected reliance on §1114's separate protection for "persons assisting" federal officers and treated the proof failure as requiring acquittal. The Tenth Circuit's ruling conflicts with that approach. The government relied on verbal trial testimony that Officer Piekarczyk was "special deputized," while petitioner challenged the absence of an oath of office, a valid Memorandum of Understanding, current deputation papers, renewal or expiration records, and United States Attorney approval. Rather than directing acquittal or requiring proof of the charged federal-officer theory, the panel added that, "in any event," §1114 also covers "any person assisting" a federal officer. That alternative protected-person theory was never charged in the indictment, never presented to the jury as a distinct basis for conviction, and never found beyond a reasonable doubt.

II. The Panel's Treatment of Omitted Jury Elements and Coerced Defense Concessions Violates Settled Precedent of this Court.

The decision below substantially departs from this Court's constitutional guardrails by treating contested elements as effectively directed by the court or waived by counsel despite petitioner's express objections. Under *United States v. Gaudin*, 515 U.S. 506, 510–15 (1995) (the jury must decide every essential element beyond a reasonable doubt), the Fifth and Sixth Amendments require the jury—not the judge—to decide every essential element of the charged offense. *Apprendi v. New*

Jersey, 530 U.S. 466, 490 (2000) (facts increasing criminal exposure must be submitted to the jury), and *Alleyne v. United States*, 570 U.S. 99, 103 (2013) (facts increasing mandatory punishment are elements for jury determination), reinforce that facts altering criminal exposure must be treated as jury questions. In *United States v. Feola*, 420 U.S. 671, 686 (1975) (honest mistake may negate mens rea where officers fail to identify themselves or use force reasonably perceived as unlawful), this Court recognized that even though a defendant need not know an officer's federal identity in every case, an honest mistake of fact induced by unannounced, aggressive force may negate mens rea and justify a defensive response. The trial court did not give instructions on self-defense, excessive force, or honest mistake of fact, despite record evidence that plainclothes local officers executed a surprise rear-tackle on petitioner while he was holding his three-year-old daughters. The Tenth Circuit insulated the omission by relying on counsel's trial posture and the statement that the case was "not about" officer status, even though petitioner had submitted written instructions and objections prohibiting stipulations to the federal-officer element. A defendant's right to jury determination of contested elements cannot be bartered away through counsel concessions over the defendant's active, documented objections.

Petitioner's Rule 29 motion independently placed the federal-officer-status element in dispute as a matter of evidentiary sufficiency. A Rule 29 challenge tests

whether the government introduced evidence from which a rational jury could find each essential element beyond a reasonable doubt. Once that challenge was preserved, the appellate court was required to determine whether the government proved the charged federal-officer element based on evidence admitted at trial—not based on counsel’s opening characterization, not on an involuntary or disputed concession, and not on a substitute statutory theory never submitted to the jury. Counsel’s remarks that the case was “not about” officer status could not relieve the government of its burden to prove that element, nor could they authorize the court of appeals to affirm on an uncharged “person assisting” theory the jury never found.

III. The Post-Recusal Assignment Posture Presents an Exceptional Constitutional Question.

This case presents a serious question concerning the appearance of impartiality required by due process and 28 U.S.C. §455(a). In *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009) (due process requires recusal when the probability of bias is constitutionally intolerable), this Court reaffirmed that due process requires recusal where the probability of bias is too high to be constitutionally tolerable. Petitioner preserved the question whether a federal district judge who recused from a related civil rights action arising from the same operative facts could thereafter preside over the companion criminal prosecution, where petitioner contends the assignment sequence and later trial-management rulings created an objective appearance of partiality. Petitioner contends that Judge Stewart entered an order of

recusal in the related civil action and then presided over the criminal prosecution arising from the same factual nucleus. Upon taking control of the criminal case, the court issued restrictive trial-management rulings affecting testimony, defense witnesses, USMS policy materials, and arrest-context evidence. This posture warrants review because public confidence in the judiciary depends on a clear rule that structurally related civil and criminal proceedings not be handled in a manner creating an objective appearance of partiality. Petitioner further contends that the prior civil recusal was not clearly disclosed in the criminal proceeding in a manner sufficient to permit a timely, informed objection before trial. That notice defect is central because the Tenth Circuit relied on the absence of a contemporaneous objection when rejecting the recusal claim, even though petitioner maintained that he discovered the full civil-recusal and criminal-assignment sequence only after trial. A waiver ruling cannot fairly rest on silence where the facts necessary to object were not clearly disclosed before the trial framework was set.

IV. The Lower Courts' Pretrial Suppression of Executive and Statutory Evidentiary Records Infringed Petitioner's Sixth Amendment Right to Present a Complete Defense.

This case presents an important question about the bounds of pretrial evidentiary restrictions that prevent a criminal defendant from introducing official government records to contest essential elements and defenses. Under the Sixth Amendment's Confrontation and Compulsory Process Clauses, a defendant must have a meaningful opportunity to present evidence that could influence the determination

of guilt. *Washington v. Texas*, 388 U.S. 14 (1967) (the accused has a constitutional right to present material witnesses), and *Taylor v. Illinois*, 484 U.S. 400 (1988) (the right to present witnesses is a fundamental element of due process), recognize that the right to call witnesses and present the defendant's version of the facts is a fundamental component of due process. Here, petitioner sought to present federal task-force and use-of-force materials, including USMS Policy Directives 8.18, 8.9, and 2.11, as well as agency materials bearing on whether the task force was lawfully authorized and whether body-worn-camera requirements applied. Petitioner contends those materials were necessary to contest federal-officer status, official duty, excessive force, self-defense, and honest mistake.

The record reflects that the court warned petitioner and counsel to take "special care" not to introduce testimony that would reopen excluded arrest-context issues. The government then requested and received substantial leeway in leading questions to avoid violating that order. Petitioner contends this combination allowed the prosecution to shape the evidentiary presentation while petitioner was prevented from presenting official records and defense context necessary to test the government's proof.

V. The documented juror record establishes that the omission of theory-of-defense instructions had an injurious and dispositive effect on the verdict.

The record contains an unusually concrete showing that the instructional omissions mattered. Juror No. 8 reported that most jurors initially favored a not-

guilty verdict, that jurors did not believe petitioner strictly assaulted the officer, and that they were troubled by the surprise tackle, lack of opportunity to surrender, and danger to petitioner's three-year-old daughters. The juror further explained that an instruction addressing whether petitioner had a fair opportunity to inquire or otherwise ascertain why he was being taken into custody would have given the not-guilty jurors "something concrete" to apply. That record demonstrates that the omitted self-defense, excessive-force, and honest-mistake instructions were not abstract; they likely affected the jury's path to conviction.

VI. The government's own appellate position confirms that the panel interposed a substitute liability theory.

The United States argued in the court of appeals that any technical defect in Officer Piekarczyk's deputation would make no difference because §1114 protects "any person assisting" a federal officer. The Tenth Circuit adopted that premise in its "in any event" reasoning. But the indictment charged petitioner with assaulting a federal officer, not an uncharged assisting theory; the jury was not instructed on a distinct assisting theory; and the verdict did not reflect any finding that petitioner assaulted a person assisting a separate federal officer in the performance of federal duties. By affirming on that fallback, the panel allowed petitioner to stand convicted on a theory neither charged nor found, contrary to *Stirone* (constructive amendment where conviction rests on a basis not charged), *Gaudin* (jury must find every

essential element), *Neder* (omitted-element error requires constitutional review), and *Sullivan* (structural error where instructional defect vitiates the verdict).

VII. The lower courts' waiver analysis transformed court- and counsel-caused omissions into personal waiver.

The government and the panel repeatedly relied on trial counsel's omissions: counsel did not contest officer status, did not request self-defense or excessive-force instructions, did not present certain federal-authority materials, and agreed to continuances. But petitioner's filings showed that he objected to concessions, sought discovery to prove or disprove task-force status, preserved Rule 29 and Rule 12 challenges, and later notified the court of appeals through a Rule 28(j) letter of an alleged counsel-of-choice structural defect. *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006) (wrongful deprivation of retained counsel of choice is structural error), recognizes that wrongful deprivation of retained counsel of choice is structural and is not measured by substitute counsel's performance under *Strickland v. Washington*, 466 U.S. 668 (1984) (ordinary ineffective-assistance claims require deficient performance and prejudice). The lower courts' approach converted these court- and counsel-caused omissions into petitioner's personal waiver and insulated core jury, indictment, and mens rea issues from meaningful review. That waiver trap independently supports certiorari.

Petitioner also preserved Speedy Trial and Speedy Trial Act objections under the Sixth Amendment and 18 U.S.C. §§3161–3162. The continuances were justified

as necessary to prepare and investigate the defense, including self-defense, excessive force, honest mistake, and related arrest-context defenses, yet counsel omitted those defenses and instructions days before trial. The record included audio-recorded counsel communications acknowledging the need to prepare those defenses and related witness and expert proof. [Record: Supp.ROA-Vol.III (Doc.46, 25-4112 Folder, Files: “Call with Justin Public Defender part1.amr,” “Call with Justin Public Defender part2.amr,” “justinOct25th_out.m4a,” “001_nov25_2024,” “002_nov25_2024,” and “may8_2025Jon William”); Supp.ROA-Vol.II (Doc.46, pp.29L.13–30L.19).] Those circumstances further demonstrate how counsel-caused delay and omission were treated as petitioner’s personal waiver rather than as a breakdown chargeable to the government. See *Barker v. Wingo*, 407 U.S. 514, 530 (1972) (setting out the four-factor constitutional speedy-trial analysis); *Vermont v. Brillon*, 556 U.S. 81, 92 (2009) (delay from a systemic breakdown in appointed defense may be charged to the State); *United States v. Toombs*, 574 F.3d 1262, 1271–72 (10th Cir. 2009) (conclusory ends-of-justice findings are insufficient under the Speedy Trial Act).

Nor was the counsel issue undeveloped in the sense relevant here. Petitioner did not rely on counsel’s conduct solely as an ordinary collateral claim under *Strickland v. Washington*, 466 U.S. 668, 687–96 (1984) (ordinary ineffective-assistance claims require deficient performance and prejudice). He invoked

counsel's conduct to show that the lower courts could not fairly convert counsel's omissions into petitioner's personal waiver of preserved structural and elemental objections. The appellate record included petitioner's written objections to stipulations, instructions to counsel regarding defense objectives, requests for discovery to establish or disprove task-force-officer status, pre and post-trial pro se motions, recorded communications concerning omitted defenses, and the Rule 28(j) letter asserting counsel-of-choice interference under *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148–50 (2006) (wrongful deprivation of retained counsel of choice is structural error). In that posture, the court of appeals should have addressed the effect of the developed counsel record on waiver, preservation, federal-officer status, jury instructions, and indictment defects rather than deferring the entire issue to collateral review.

That record also implicated counsel's duty to follow the client's objectives and the unconstitutional-choice doctrine. ABA Model Rule 1.2(a) recognizes that counsel must abide by a client's decisions concerning the objectives of representation, while ABA Model Rule 3.3 imposes duties of candor toward the tribunal. Petitioner argued that counsel disregarded express objectives, conceded disputed elements, failed to pursue requested defenses, and left petitioner with the constitutionally offensive choice between proceeding with allegedly ineffective or unprepared counsel and proceeding pro se only after conviction. *Iowa v. Tovar*, 541

U.S. 77, 88 (2004) (waiver of counsel must be voluntary); *United States v. Silkwood*, 893 F.2d 245, 248–49 (10th Cir. 1989) (impermissible choice between unprepared counsel and self-representation); *Crandell v. Bunnell*, 25 F.3d 754, 755 (9th Cir. 1994) (unconstitutional choice between constitutional rights); *Pazden v. Maurer*, 424 F.3d 303, 316, 318 (3d Cir. 2005) (waiver cannot rest on a constitutionally offensive choice). At minimum, that developed record prevented the panel from using counsel’s omissions as affirmative waiver while refusing to consider petitioner’s evidence that those omissions were contested, involuntary, and structurally consequential.

The developed record also showed a non-adversarial testing problem. Petitioner argued that counsel did not merely make strategic choices; counsel allegedly failed to test the government’s proof on federal-officer status, official duty, warrant authority, use of force, body-worn-camera policy, favorable discovery, and requested defense instructions. That posture implicated *United States v. Cronin*, 466 U.S. 648, 659 (1984) (prejudice may be presumed where counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing), and reinforced why the court of appeals could not fairly treat counsel’s omissions as petitioner’s personal waiver of preserved structural, elemental, and defense objections.

Petitioner also preserved a vindictive-prosecution concern based on the timing of federal charges after his sister filed a U.S. Marshals complaint and on sentencing

statements referencing petitioner's own filings and litigation conduct. Those facts supported an inference that protected complaints and court access were treated as aggravating circumstances. *Blackledge v. Perry*, 417 U.S. 21, 28–29 (1974) (due process prohibits prosecutorial action that penalizes a defendant for exercising legal rights); *United States v. Goodwin*, 457 U.S. 368, 372–84 (1982) (recognizing the presumption-of-vindictiveness doctrine where there is a realistic likelihood of prosecutorial retaliation).

Petitioner also preserved a jury-selection structural-error issue. The record reflected that the only Native American juror was allegedly selected and then crossed out or replaced after selection, with counsel later explaining that the notes did not reflect what had occurred. Petitioner argued that this was not a routine peremptory-strike dispute, but a post-selection alteration of the jury panel under race-linked circumstances that implicated equal protection, the integrity of jury selection, and structural-error principles. *Batson v. Kentucky*, 476 U.S. 79, 86–88 (1986) (equal protection prohibits excluding jurors on account of race); *Powers v. Ohio*, 499 U.S. 400, 411 (1991) (racial discrimination in jury selection harms the excluded juror and public confidence in justice); *Vasquez v. Hillery*, 474 U.S. 254, 263–64 (1986) (racial discrimination in jury selection is structural and not subject to harmless-error review); *Foster v. Chatman*, 578 U.S. 488, 513–15 (2016) (jury-selection notes may

reveal race-based pretext); *Snyder v. Louisiana*, 552 U.S. 472, 478–85 (2008) (pretext is evaluated from the totality of the circumstances).

The doctrinal conflict is not limited to federal-officer status. The Ninth and Eighth Circuits recognize that §111 prosecutions may require self-defense, honest-mistake, or excessive-force instructions where a defendant reacts to plainclothes or aggressive law-enforcement force. *United States v. Morton*, 999 F.2d 435, 438–40 (9th Cir. 1993) (plainclothes officer’s conduct may create a jury question on mistaken belief and self-defense); *United States v. Span*, 970 F.2d 573, 577 (9th Cir. 1992) (recognizing a defense where officers use excessive force during arrest); *United States v. Ornelas*, 906 F.3d 1138, 1147 (9th Cir. 2018) (excessive-force theory may be addressed through a self-defense instruction in a §111 case); *United States v. Drapeau*, 644 F.3d 646, 654 (8th Cir. 2011) (recognizing an excessive-force defense in the §111 context). The decision below allowed the jury to convict without that defense framework, despite a record showing a surprise rear-tackle by plainclothes local officers while petitioner held his children.

These errors are cumulative, not discrete. Each flowed from the same structural defect: petitioner was convicted after the charged federal-officer, official-duty, warrant-authority, mens rea, and defense issues were either removed from the jury, supplied by disputed concessions, restricted through evidentiary rulings, or replaced on appeal by an uncharged statutory theory. This case is not a request for

ordinary error correction. It presents recurring institutional questions about federal task-force prosecutions, the evidentiary foundation required before local officers may be treated as protected federal officers under §1114, appellate substitution of uncharged “person assisting” theories, and the extent to which lower courts may treat counsel-caused omissions as a defendant’s personal waiver of indictment, jury-trial, and complete-defense rights. It is also a clean vehicle: the government argued the fallback theory, the Tenth Circuit adopted it, petitioner preserved federal-officer status through Rule 29, and Juror No. 8’s filed impressions provide concrete prejudice evidence while petitioner remains subject to supervised release.

III. STATEMENT OF THE CASE

I. Factual Background: Tribal Sovereignty and the Pre-Planned Arrest Posture.

Petitioner Gabriel Omar Gigena is a Tribal Chief of the Chiricahua Apache Tribe – 33rd Dynasty of the Kingdom of Hayah Hawah. On April 28, 2024, the Tribal Council issued a child-custody decree granting full legal and physical custody of petitioner’s twin minor children to him. Petitioner contends that, under principles of tribal sovereignty, that decree displaced competing state assertions of authority and was entitled to full faith and credit.

Seeking a peaceful environment, petitioner relocated with his children to Utah. Petitioner contends that out-of-state personnel in Calaveras County, California, acting without territorial jurisdiction, manufactured a defective Ramey arrest warrant under California Penal Code §278.5. Although petitioner challenged

the warrant as unsupported by a viable affidavit of probable cause and infected by false criminal-history information, California authorities transmitted a USM-560 Delegation of Apprehension Responsibility or case referral to a localized task force in Utah.

The United States itself acknowledged in sentencing materials that petitioner “took his two daughters” in the family car from California to Utah and that this conduct was “not illegal,” yet petitioner contends the later temporary emergency order and Ramey warrant were used to frame that already-completed lawful conduct as criminal. Petitioner argued that this retroactive use of a later emergency order to criminalize completed lawful conduct violated ex post facto and due-process fair-notice principles. *Cummings v. Missouri*, 71 U.S. 277, 325–26 (1867) (ex post facto principles prohibit retroactive punishment for conduct not punishable when done); *Bouie v. City of Columbia*, 378 U.S. 347, 353–54 (1964) (due process bars unforeseeable judicial enlargement of criminal liability applied retroactively); *Peugh v. United States*, 569 U.S. 530, 538–39 (2013) (the Ex Post Facto Clause embodies fair-notice principles against retroactive punishment). [Record: ROA-Vol. I (Dkt.16-1, p.178).]

Petitioner further argued that the custody-related charging theory could not lawfully arise without a prior issued and served custody or visitation order giving notice that the conduct was prohibited. California authorities cited by petitioner

recognize that, absent an operative custody order or decree affecting custody, a parent with custody rights could not violate California Penal Code §278.5 merely by taking exclusive possession of the children or leaving the state. *People v. Carrillo*, 162 Cal. App. 3d 585, 589–90, 208 Cal. Rptr. 684 (Cal. Ct. App. 1984) (parent with custody rights does not violate statute absent custody order); *Cline v. Superior Court*, 135 Cal. App. 3d 943, 947, 185 Cal. Rptr. 787 (1982) (presumed father did not violate statute absent operative custody order); *People v. Johnson*, 151 Cal. App. 3d 1021, 1027–28, 199 Cal. Rptr. 231 (Cal. Ct. App. 1984) (filing without service does not confer jurisdiction and custody rights are not displaced without due process). Federal custody-recognition law likewise requires notice and an opportunity to be heard before a custody determination is made. 28 U.S.C. §1738A(e). Those authorities reinforced petitioner’s position that a later, unserved temporary emergency order could not retroactively create criminality, lawful federal task-force authority, or negate petitioner’s fair-notice and mens rea defenses. Those facts matter here because the same later emergency order and Ramey warrant supplied the asserted basis for the Utah task-force arrest, the claimed official-duty nexus, and the prosecution’s attempt to negate petitioner’s honest-mistake and fair-opportunity defenses.

On May 4, 2024, while petitioner was at a public playground in Park City, Utah, with his three-year-old daughters, local Sandy City police personnel—acting

on their day off and, petitioner contends, without explicit written approval from the United States Attorney's Office—executed a surprise rear-tackle on petitioner while he held the children. The executing officers wore no body-worn cameras, despite petitioner's reliance on agency directives requiring their use. Petitioner contends that, caught in an unannounced surprise assault by plainclothes men, he instinctively held the officer in a brief protective grip lasting fewer than thirty seconds—and, depending on the government witness, as briefly as five to ten seconds—to isolate his children from an unknown threat. Petitioner was subsequently indicted under 18 U.S.C. §§111(a)(1) and 1114. [Record: Tribal custody decree, Supp.ROA Vol. V, Doc. 54-2, pp. 689–699; USM-560/case referral and investigative materials, Supp.ROA Vol. VIII, Doc. 64; officer deputation testimony, Supp.ROA Vol. I, Doc. 40, pp. 107–08, 155, 214; EOUSA final agency action, Supp.ROA Vol. V, Doc. 54-2, pp. 179–184; USMS policies, Supp.ROA Vol. IV, Doc. 54-1, pp. 664–685.]

II. District Court Proceedings: The Concealment of Sovereign Elements.

Before trial, petitioner repeatedly attempted to submit pro se documents to the district court to preserve challenges to the sufficiency of the indictment, the lack of territorial jurisdiction, federal-officer status, task-force authority, and vindictive prosecution. The district court lodged those documents but refused to adjudicate them because petitioner was represented by appointed counsel. Petitioner contends that, over his express written instructions and objections, trial counsel failed to

contest the victim's federal status and did not request theory-of-defense instructions on excessive force, self-defense, or honest mistake of fact.

Before trial, petitioner expressly instructed defense counsel by email, with the instruction submitted to or copied to the court's chambers, not to stipulate that the alleged victim was a federal officer engaged in official duties. Petitioner stated that the issue "must be proven" and was "non negotiable." Counsel's later opening-statement concession and the court's treatment of related warrant facts as conclusively proven therefore could not fairly be treated as petitioner's personal waiver of the federal-officer, official-duty, or warrant-related issues.

Crucially, petitioner contends that the prosecution failed to produce foundational federal paperwork at trial to establish actual federal status, including a task-force Memorandum of Understanding, an oath of office under 5 U.S.C. §3331, valid deputation renewals, expiration records, or United States Attorney approval. The government relied on trial testimony that the officer was "special deputized." Only after the jury returned a conviction did the court allow petitioner to proceed pro se. In post-trial motions, petitioner demanded adjudication of the missing elements and targeted the failure of proof under Federal Rule of Criminal Procedure 29. The district court denied relief. [Record: Rule 29 preservation, Supp.ROA Vol. I, Doc. 40, pp. 276–280; Rule 12 and pretrial preservation materials, ROA Vol. I, Doc. 16-1, pp. 38–64; emergency discovery/TFO bona fide request, ROA Vol. I,

Doc. 16-1, pp. 100–175, 182–184; no-stipulation email, Supp.ROA Vol. V, Doc. 54-1, p. 527; district court post-trial order, ROA Vol. I, pp. 86–99.]

III. Appellate Posture: Affirmance via an Uncharged Statutory Theory.

On direct appeal, the Tenth Circuit issued an unpublished Order and Judgment affirming the conviction. The panel treated the district court’s failure to consider petitioner’s pretrial pro se submissions as waived or abandoned because those submissions were filed while petitioner was represented by counsel. The panel also rejected several post-trial issues through plain-error or waiver analysis, even though petitioner argued that counsel-caused omissions and court restrictions prevented those issues from being presented at trial.

Regarding the preserved challenge to the federal-officer element, the panel held that trial testimony was sufficient to show that Officer Piekarczyk was deputized by the U.S. Marshals Service as a task-force officer. But the panel also declared that, “in any event,” 18 U.S.C. §1114 covers “any person assisting” a federal officer. This alternative theory was not charged in the indictment, was not separately requested in the jury instructions, and was not found by the jury at trial. Petitioner timely sought panel rehearing and rehearing en banc, which the Tenth Circuit denied by per curiam order on August 31, 2026. [Record: Tenth Circuit Order and Judgment, *United States v. Gigena*, No. 25-4112, Doc. 85-1, Aug. 13, 2026, pp. 11–13; order denying panel rehearing and rehearing en banc, Aug. 31, 2026; panel language relying on trial testimony and “in any event” §1114 assisting clause.]

IV. Non-Mootness and Ongoing Liberty Restrictions.

Although petitioner has completed the 15-month custodial portion of his sentence, this case remains a live, non-moot controversy under Article III. Petitioner remains subject to a three-year term of supervised release administered through the District of Utah, which constitutes an ongoing restraint on liberty. The conviction also carries continuing collateral consequences that may be redressed by vacatur of the judgment, reversal, judgment of acquittal, or a new trial.

IV. ARGUMENT

The decision below was wrong because it treated counsel's concessions, a disputed warrant stipulation, and an appellate fallback theory as substitutes for the government's burden to prove the charged elements beyond a reasonable doubt. The jury was never permitted to decide the federal-status, official-duty, warrant-authority, assisting-theory, bodily-injury, self-defense, excessive-force, and honest-mistake issues under the correct legal framework.

A. The Rule 29 challenge required meaningful review of the charged federal-officer element.

The government bore the burden to prove every element of 18 U.S.C. §§111 and 1114 beyond a reasonable doubt. Petitioner's Rule 29 challenge placed the federal-officer-status and official-duty elements in dispute. The Tenth Circuit therefore had to decide whether the evidence admitted at trial permitted a rational jury to find that Officer Piekarczyk held valid federal status or was lawfully acting within federal duties on May 4, 2024.

The appellate court did not identify an oath of office under 5 U.S.C. §3331, a current special deputation, valid renewal records, a Memorandum of Understanding, United States Attorney approval, or other documentary proof establishing federal status and lawful official duty. Instead, it relied on testimony that the local officer was “special deputized.” Under *Washington* and *Torres*, that is not enough where the charged protected-person theory depends on a lawful oath-and-assignment foundation for local personnel operating under federal authority. The appellate court ignored the officer’s own testimony that his special deputation began in April 2021: “In April of 2021, I was special deputized with the United States Marshals Service as a task force officer.” It also ignored DOJ OIG materials explaining that USMS special deputations are time-limited to 1-3 years and that a lapse may create “legal risks” in criminal prosecutions by allowing defense counsel to challenge the TFO’s jurisdiction to conduct USMS-authorized operations. [Record: Supp.ROA-Vol.I (Dkt.40, p.107L.23–24); ROA-Vol.I (Doc.16-1, pp.120, 124).]

Petitioner also preserved this issue as a lack-of-standing and failure-of-proof problem. The point was not merely that the district court lacked general criminal jurisdiction under 18 U.S.C. §3231; it was that the United States could not sustain the charged §1111/§1114 prosecution without proving the protected-person status and lawful official-duty nexus alleged in the indictment. If the alleged victim was neither a bona fide federal officer nor lawfully assisting a separately identified federal

officer in the performance of federal duties, the government lacked the evidentiary foundation necessary to proceed on the charged theory.

Petitioner further contends that the California warrant had no self-executing jurisdictional effect in Utah absent lawful Utah or federal authority to execute it. That issue mattered not because a defective warrant automatically defeats §111 liability, but because the asserted warrant authority was used to establish official duty, justify the surprise takedown, and negate petitioner's honest-mistake and excessive-force defenses. If the executing officers lacked lawful authority to execute the California warrant in Utah, the jury should have been permitted to consider that fact in deciding official duty, mens rea, fair opportunity to comply, and the reasonableness of petitioner's brief defensive reaction.

Petitioner's warrant-authority position was grounded in the record and in the procedural limits cited below. California Penal Code §830.8 limits peace-officer authority for specified non-California or special officers and does not itself make a California warrant self-executing in Utah. The California instrument functioned as a child-physical-custody warrant, not ordinary proof that petitioner was subject to a criminal arrest warrant enforceable in Utah without separate lawful authority. Cal. Fam. Code §3402(q) ("Warrant" means an order authorizing law enforcement officers to take physical custody of a child).

A Ramey warrant is a pre-complaint California arrest warrant that must rest on a valid probable-cause foundation and lawful judicial authority; it is not a substitute for charges, service, notice, or territorial execution authority. *People v. Ramey*, 16 Cal. 3d 263, 276, 545 P.2d 1333 (Cal. 1976) (pre-complaint arrest warrant requires probable cause); *Goodwin v. Superior Court*, 90 Cal. App. 4th 215, 225 (2001) (pre-complaint judicial authority depends on a lawful jurisdictional foundation).

The custody materials likewise mattered because temporary emergency custody jurisdiction depends on the child's presence in the state, and custody determinations require notice and opportunity to be heard. Cal. Fam. Code §3424(a); 28 U.S.C. §1738A(e); *In re Baby Boy M.*, 141 Cal. App. 4th 588, 600–01, 46 Cal. Rptr. 3d 196 (Cal. Ct. App. 2006) (unsubstantiated allegations are insufficient to invoke emergency jurisdiction, and temporary emergency jurisdiction cannot be invoked without proof of the child's whereabouts); Cal. Fam. Code §3408 (notice to persons outside the state); *In re Marriage of Leonard*, 122 Cal. App. 3d 443, 449–50, 175 Cal. Rptr. 903 (Cal. Ct. App. 1981) (due process in custody proceedings requires notice and opportunity to be heard in the prescribed manner); *Allison v. Superior Court*, 99 Cal. App. 3d 993, 999–1000, 160 Cal. Rptr. 309 (Cal. Ct. App. 1979) (departure from statutory notice requirements for out-of-state parties undermines jurisdiction); *People v. Johnson*, 151 Cal. App. 3d 1021, 1027–28

(1984) (service and jurisdiction affect custody rights); *People v. Lortz*, 137 Cal. App. 3d 363, 369, 187 Cal. Rptr. 89, 95 (1982) (holding that it is not necessary first to obtain a judicial finding by the family-law court that an operative or pre-existing visitation order was violated before a criminal charge may be filed; the purpose of §278.5 is to provide criminal sanctions for violations of operative or pre-existing custody and visitation orders).

These authorities supported petitioner's position that §278.5 presupposes an operative or pre-existing custody or visitation order, not retroactive punishment for conduct completed before notice or service of any such order. Those warrant and jurisdiction defects also explain why petitioner emphasized that he was held for 18 days and extradited without state charges being filed. They were relevant to whether the task-force operation was a lawful federal duty and whether petitioner had a fair opportunity to understand, comply, or form criminal intent before the surprise tackle. Thus, the California order and warrant defects were not collateral family-law disputes; they were directly relevant to whether the officers were engaged in lawful federal duty and whether petitioner could form the mens rea required for §111 before the surprise tackle.

Utah law independently reinforced petitioner's warrant-authority objection. Petitioner contended that Utah Code §§77-30-13 and 77-30-14 did not authorize a Utah arrest or extradition based on the California child-custody order or related

custody warrant absent compliance with Utah procedures and a lawful Utah or federal execution basis. Petitioner further argued that the U.S. Marshals-led operation proceeded without participation by the lead local jurisdictional agency, the Summit County Sheriff's Office, after an administrative decision not to participate. Those facts bore directly on whether the officers were engaged in lawful federal duty, whether the asserted warrant authority was valid in Utah, and whether petitioner had fair notice or opportunity to comply before the surprise tackle.

B. The “person assisting” fallback constructively amended the indictment and bypassed the jury.

The indictment charged assault on a federal officer. The trial proceeded on that theory. The jury was not instructed that it could convict on a distinct theory that the local officer was merely assisting a separate federal officer. The Tenth Circuit's “in any event” reliance on the assisting clause therefore altered the basis for affirmance after trial.

A constructive amendment occurs when the prosecution or court changes the charging theory so the defendant may be convicted on a basis not returned by the grand jury. *Stirone v. United States*, 361 U.S. 212, 217–19 (1960) (reversing where the proof permitted conviction on an uncharged basis). Relatedly, *Gaudin* requires jury findings on every essential element, *Neder v. United States*, 527 U.S. 1, 8–15 (1999) (omitted-element errors require constitutional harmless-error review), confirms that omitted-element errors require constitutional review, and *Sullivan v.*

Louisiana, 508 U.S. 275, 281–82 (1993), protects the structural role of the jury where an instructional defect vitiates the verdict. The fallback theory here was not charged, not tried, and not found.

The fallback theory also functioned as an abandonment of the charged theory. The indictment alleged that petitioner assaulted a federal officer, and the government was therefore required to prove the charged protected-person status and official-duty nexus. But when petitioner challenged the absence of oath, deputation, MOU, renewal, expiration, and United States Attorney approval evidence, the government shifted to the separate statutory phrase “any person assisting” a federal officer. The Tenth Circuit then affirmed on that fallback. That sequence did not merely supplement the charged theory; it substituted a different protected-person theory after trial. A conviction cannot be sustained where the government effectively abandons the charged theory and the appellate court supplies a different uncharged basis for liability. See also *Chiarella v. United States*, 445 U.S. 222, 236–37 (1980) (declining to affirm a criminal conviction on a theory not submitted to the jury).

The indictment and verdict form compound that constitutional defect. The indictment charged the physical-contact form of §111(a)(1), but it did not charge a §111(b) bodily-injury offense, did not charge a distinct “person assisting” theory, and did not identify a separate federal officer being assisted. The verdict form contained no special finding on bodily injury, no finding on an assisting theory, and

no finding that petitioner caused injury through unlawful conduct rather than through the officers' initial tackle. These omissions matter because an indictment must fairly inform the accused of the charge and protect against double jeopardy. *Hamling v. United States*, 418 U.S. 87, 117–18 (1974) (indictment must contain the elements of the offense and fairly inform the defendant of the charge). They also mirror the §111 charging concerns recognized in *United States v. Hathaway*, 318 F.3d 1001, 1009–10 (10th Cir. 2003) (recognizing that §111 contains distinct offense levels depending on whether the conduct is simple assault, physical-contact assault, or assault involving bodily injury or other aggravating facts, and holding that the charging document must distinguish the charged offense level), and the constructive-amendment rule applied in *United States v. Farr*, 536 F.3d 1174, 1180–88 (10th Cir. 2008) (constructive amendment occurs when the theory of conviction differs from the theory charged). Yet the courts relied on an uncharged assisting theory to sustain the conviction and on disputed bodily-injury facts to calculate the advisory guideline range, see U.S.S.G. §2A2.4. Although advisory-guideline factfinding is ordinarily treated differently after *United States v. Booker*, 543 U.S. 220, 244–45 (2005), the bodily-injury enhancement here reinforces the same constitutional concern identified in *Stirone*, *Gaudin*, *Neder*, *Apprendi*, *Blakely v. Washington*, 542 U.S. 296, 303–04 (2004), *Booker*, and *Alleyne*: petitioner's conviction and punishment

were influenced by facts and theories not charged by the grand jury, not submitted to the jury, and not resolved by the verdict.

The Rule 201 posture further compounds the jury-finding defect. At trial, the court advised the jury that the parties had stipulated to the existence of an arrest warrant and that the jury must treat that fact as conclusively proven; the court then clarified that the warrant was a California state warrant, not a federal warrant. Petitioner had expressly instructed counsel not to stipulate to matters bearing on the warrant, federal-officer status, or official-duty elements. In a criminal case, judicially noticed adjudicative facts may not be treated as conclusively binding on the jury. Fed. R. Evid. 201(f). Nor may a disputed or unauthorized stipulation relieve the government of its burden to prove every element beyond a reasonable doubt. *United States v. Zepeda*, 705 F.3d 1052, 1064 (9th Cir. 2013) (judicially noticed facts in criminal cases are insufficient to satisfy the government's burden unless accepted by the jury). The warrant stipulation therefore illustrates the same constitutional problem: facts central to official duty, intent, and the lawfulness of the arrest posture were removed from the jury's independent consideration despite petitioner's objections.

That instruction was not merely private or after-the-fact; petitioner sent it before trial to defense counsel and to the court's chambers. The record therefore showed that petitioner did not personally waive the federal-officer, official-duty, or

warrant-related issues that counsel later allowed the jury to treat as established. The warrant stipulation was also connected to trial-management discussions concerning redactions, witness limitations, and the court's effort to avoid reopening arrest-context evidence. Petitioner contends those discussions included knowingly false or misleading statements that allowed disputed warrant, official-duty, and mens rea facts to be removed from adversarial testing before the jury, while the prosecution was permitted to guide its witnesses through the narrowed evidentiary presentation. [Record: Supp.ROA-Vol.I (Dkt.40, p.14L.1–p.18L.16, p.274L.19–p.276L.5).]

The prejudice was magnified when the prosecutor characterized counsel's opening statement in closing argument as a purported "confession" that the federal-officer element was not contested. Opening statements are not evidence, and counsel's characterization could not substitute for proof beyond a reasonable doubt of an essential element. Nor could a disputed stipulation or judicial-notice posture convert a contested fact into a conclusively established fact in a criminal case. Fed. R. Evid. 201(f). By urging the jury to treat counsel's statement as petitioner's confession on officer status, the prosecution transformed an unauthorized concession into substantive proof of an element petitioner had expressly instructed counsel not to concede. That use of counsel's statement implicated settled limits on prosecutorial argument. *Berger v. United States*, 295 U.S. 78, 88 (1935) (prosecutor may prosecute earnestly but may not use improper methods calculated to produce a wrongful

conviction); *United States v. Young*, 470 U.S. 1, 11–12, 16–20 (1985) (improper argument must be evaluated in context and may undermine trial fairness); *Douglas v. Workman*, 560 F.3d 1156, 1179 (10th Cir. 2009) (improper vouching occurs when a prosecutor implies personal knowledge of witness credibility); *Cargle v. Mullin*, 317 F.3d 1196, 1218 (10th Cir. 2003) (cumulative prosecutorial misconduct may deny due process); *United States v. Sorensen*, 801 F.3d 1217, 1242–43 (10th Cir. 2015) (misconduct warrants reversal where there is reason to believe it influenced the verdict). [Record: warrant stipulation and correction, Supp.ROA-Vol.I (Dkt.40, p.274L.19–p.276L.5); no-stipulation email, Supp.ROA-Vol.V (Doc.54-1, p.527); prosecutor’s closing argument using counsel’s opening statement as a “confession,” Supp.ROA-Vol.I (Dkt.40, p.375L.6–11); prosecutor credibility/vouching statements, Supp.ROA-Vol.I (Dkt.40, p.371L.3–4, p.371L.19–p.372L.15).]

C. The omitted defense instructions violated petitioner’s right to present a complete defense.

This Court recognized in *United States v. Feola*, 420 U.S. 671, 686 (1975), that a defendant’s state of knowledge may matter under §111 where an officer fails to identify himself or uses force that could reasonably be interpreted as unlawful. The record here supported instructions on self-defense, excessive force, and honest mistake of fact because the arrest began with a surprise tackle while petitioner was holding his children. Lower federal courts recognize that excessive force or apparent unlawful force can require defensive-instruction guidance in §111 prosecutions.

United States v. Morton, 999 F.2d 435, 438–40 (9th Cir. 1993) (plainclothes officer’s conduct may create a jury question on mistaken belief and self-defense); *United States v. Span*, 970 F.2d 573, 577 (9th Cir. 1992) (recognizing a defense where officers use excessive force during arrest); *United States v. Drapeau*, 644 F.3d 646, 654 (8th Cir. 2011) (recognizing excessive-force defense in §111 context); *United States v. Ornelas*, 906 F.3d 1138, 1147 (9th Cir. 2018) (excessive-force theory may be addressed through a self-defense instruction in a §111 case). The jury here received no such framework, even though the government acknowledged that excessive force can be relevant to self-defense and Juror No. 8 later confirmed that such language would have given initially not-guilty jurors “something concrete” to apply.

The complete-defense problem was compounded by the government’s failure to disclose or preserve materials bearing directly on federal authority, officer credibility, and petitioner’s defense theories. Petitioner identified records and evidence concerning task-force authorization, United States Attorney approval, MOU/deputation/oath status, body-worn-camera policy, officer reports, video/audio evidence, and impeachment material. Those materials were favorable because they bore on federal-officer status, official duty, excessive force, self-defense, honest mistake, and witness credibility. *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (government has a constitutional duty to disclose favorable evidence); *United States*

v. Bagley, 473 U.S. 667, 676, 682 (1985) (favorable evidence includes exculpatory and impeachment evidence and materiality is not limited to requested evidence); *Giglio v. United States*, 405 U.S. 150, 154–55 (1972) (undisclosed credibility evidence violates due process under *Brady*); *Kyles v. Whitley*, 514 U.S. 419, 435–36, 454 (1995) (suppressed evidence is assessed cumulatively and may undermine confidence in the verdict); *Smith v. Cain*, 565 U.S. 73, 75–76 (2012) (material impeachment evidence undermines confidence where the witness’s testimony is central); *Cone v. Bell*, 556 U.S. 449, 469–70 (2009) (evidence is material when there is a reasonable probability it would have altered at least one juror’s assessment). Because the omitted materials went to the government’s proof of the charged element and to the defense theories the jury never received, their suppression reinforced the denial of petitioner’s right to present a complete defense. The materiality showing is not speculative: Juror No. 8’s filed impressions show that evidence and instructions bearing on fair opportunity to comply, excessive force, federal authority, and honest mistake would have given the initially not-guilty jurors “something concrete” to apply. That record satisfies the prejudice logic of *Cone* and *Kyles*, because the withheld or excluded evidence reasonably could have altered at least one juror’s assessment and undermines confidence in the verdict.

The developed record also included a served subpoena for petitioner’s sister, Leilani Gigena, whose favorable testimony was omitted despite petitioner’s

contention that she was a key defense witness. That omission further showed that counsel's posture did not merely reflect strategy, but deprived the jury of material defense evidence bearing on petitioner's custody posture, fair notice, arrest context, and mens rea. *Washington v. Texas*, 388 U.S. 14, 19 (1967) (defendant has the right to present material witnesses in his defense); *Taylor v. Illinois*, 484 U.S. 400, 408–09 (1988) (right to offer witness testimony is a fundamental element of due process). [Record: Supp.ROA Vol.VII (Doc.63, pp.24–77, 78–79).]

The same record also showed restrictions affecting witness statements, leading-question leeway for government witnesses, heavy redactions, and petitioner's preserved right to testify. Petitioner contends those restrictions rested in part on knowingly false or misleading representations, further supporting his complete-defense claim because they prevented the jury from hearing the full factual context for custody, warrant authority, officer conduct, excessive force, honest mistake, and petitioner's reaction during the arrest. [Record: Supp.ROA-Vol.I (Dkt.40, p.14L.1–p.18L.16, p.320L.1–p.321L.25, p.341L.15–p.342L.25).]

The photographic exhibits reinforced the same defense and materiality points. Petitioner submitted photographs showing the children's size, petitioner's injuries, records or photographs concerning the children's injuries after the tackle, and photographs showing no visible neck injury to the officer. Those exhibits bore

directly on excessive force, honest mistake, injury causation, and impeachment of the government's "choking and strangling" theory.

The video/audio exhibit issue further reinforced the complete-defense problem because the trial record reflected that audio was removed from exhibits before they went to the jury, depriving jurors of potentially favorable context bearing on force, timing, officer conduct, and impeachment. [Record: Supp.ROA-Vol.I (Dkt.40, p.395L.18–22).]; [Record: EOUSA final agency action, Supp.ROA Vol. V, Doc. 54-2, pp. 179–184; USMS Policy Directives 8.18, 8.9, and 2.11, Supp.ROA Vol. IV, Doc. 54-1, pp. 664–685; body-worn-camera/MOU testimony, Supp.ROA Vol. I, Doc. 40, p. 114L.2–23; officer reports and video/audio materials, Supp.ROA Vol. VIII, Doc. 64; Juror No. 8 impressions, Supp.ROA Vol. VI, Doc. 54-3, pp. 114–127; photographic exhibits, Supp.ROA Vol. IV, Doc. 54-1, pp. 152–54, 156–58, 605–09; Trial Exhibits Doc. 67, pp. 1–2.]

D. Juror No. 8's record statement demonstrates prejudice and makes this case an exceptional vehicle.

The juror record confirms that the omitted instructions were outcome-significant.

The statement reports that most jurors initially favored acquittal, that jurors did not believe petitioner strictly assaulted the officer, and that the lack of legal instruction on fair opportunity to understand, comply, or defend prevented the jury from grounding its not-guilty view in law. That record defeats any suggestion that the omitted defenses were harmless or merely theoretical.

The jury-selection record further reinforces why this case is an exceptional vehicle. Petitioner preserved an objection that the only Native American juror was allegedly selected and then crossed out or replaced after selection, with the explanation that counsel's notes did not reflect what occurred. If credited, that irregularity was not ordinary jury-selection error; it was a structural defect in the formation of the tribunal under race-linked circumstances. The same juror-integrity principles recognized in *Batson*, *Powers*, *Vasquez*, *Foster*, and *Snyder* support review because the integrity of the jury's composition bears directly on public confidence and cannot be treated as harmless factual background. [Record: Supp.ROA-Vol.I (Dkt.40, p.42L.23–p.43L.1, p.89L.5–13, p.96L.6–12); Supp.ROA-Vol.VI (Dkt.54-3, pp.22–25); Supp.ROA-Vol.V (Dkt.54-2, pp.85–86, 110–114).]

E. The recusal issue independently warrants review or, at minimum, reinforces the need for vacatur.

Petitioner preserved a due process challenge based on the relationship between the criminal prosecution and the related civil rights action from which Judge Stewart recused. The Tenth Circuit rejected the issue as undeveloped and procedurally deficient, but the record posture presents a broader institutional question: whether a judge's recusal from a related civil action arising from the same operative facts permits later control of the companion criminal prosecution where the judge's trial-management rulings affected evidence, witnesses, federal-authority proof, and defense instructions. Under *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 883–

87 (2009), 28 U.S.C. §455(a), *Nichols v. Alley*, 71 F.3d 347, 352 (10th Cir. 1995), and *United States v. Cooley*, 1 F.3d 985, 993–94 (10th Cir. 1993), the appearance of impartiality is itself a structural concern.

The alleged nondisclosure also bears directly on waiver. A party cannot knowingly waive an appearance-of-impartiality objection without timely notice of the facts giving rise to the objection. If the relationship between the civil recusal and criminal assignment was not clearly disclosed in the criminal case before trial, the lower courts erred by treating petitioner’s later objection as untimely or inadequately preserved. The narrower preservation question is therefore straightforward: nondisclosure prevented informed objection, and the absence of objection was then used against petitioner.

The recusal posture also had to be assessed under the proper legal-sufficiency standard. Petitioner argued that, at the threshold, recusal allegations must be accepted as true for purposes of determining whether they are legally sufficient. *In re Martinez-Catala*, 129 F.3d 213, 218 (1st Cir. 1997) (recusal allegations are accepted as true for legal-sufficiency review); *Netsphere, Inc. v. Baron*, 703 F.3d 296, 315 (5th Cir. 2012) (court examines legal sufficiency without passing on the truth of the asserted facts). And under *Nichols v. Alley*, 71 F.3d 347, 352 (10th Cir. 1995) (close questions under §455(a) should be resolved in favor of recusal), close appearance-of-impartiality questions favor recusal. The panel’s contrary treatment

allowed the issue to be disposed of through waiver and underdevelopment rather than through the objective inquiry required by §455(a) and due process.

The civil-criminal sequence also matters because the related civil rights action arose from the same operative facts later used to obtain and affirm the criminal conviction. Petitioner contends that allowing the criminal prosecution to proceed under the same disputed factual framework created the practical effect of forcing the civil claims into a future *Heck v. Humphrey*, 512 U.S. 477, 486–87 (1994), bar, because success on those claims could later be characterized as necessarily implying the invalidity of the conviction. That consequence reinforces why the recusal and disclosure issues were not merely administrative; they affected the structure of both the criminal case and the related civil rights litigation.

The same waiver problem was compounded by counsel's professional obligations and petitioner's developed objections. ABA Model Rule 1.2(a) recognizes that counsel must abide by a client's decisions concerning the objectives of representation, and ABA Model Rule 3.3 imposes duties of candor toward the tribunal. Petitioner argued that counsel disregarded express objectives, conceded disputed elements, and failed to present the defense posture necessary to preserve the recusal, federal-officer, and instruction issues. Because waiver of counsel and related trial rights must be voluntary, *Iowa v. Tovar*, 541 U.S. 77, 88 (2004), and because courts have rejected constitutionally offensive choices between unprepared

counsel and self-representation, *United States v. Silkwood*, 893 F.2d 245, 248–49 (10th Cir. 1989); *Crandell v. Bunnell*, 25 F.3d 754, 755 (9th Cir. 1994); *Pazden v. Maurer*, 424 F.3d 303, 316, 318 (3d Cir. 2005), the court of appeals should not have treated counsel’s omissions as petitioner’s personal waiver while refusing to address the developed record showing those omissions were contested.

The same waiver problem affected petitioner’s preserved Speedy Trial and Speedy Trial Act objections. Petitioner contended that counsel’s continuance requests contradicted his instructions, were justified as necessary to prepare self-defense, excessive-force, honest-mistake, witness, and expert proof, and then culminated in counsel omitting those defenses and instructions days before trial. That posture reinforced petitioner’s argument that the delay and resulting waiver should not have been charged personally to him.

V. CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, petitioner **Gabriel Omar Gigena** respectfully requests that this Court grant the Petition for a Writ of Certiorari, review the August 13, 2026 Order and Judgment of the United States Court of Appeals for the Tenth Circuit and the August 31, 2026 order denying panel rehearing and rehearing en banc, and reverse or vacate the judgment below. The federal-officer element, the protected-person theory, the warrant posture, and the defense instructions all turned on facts the jury was never permitted to decide under the proper legal framework. That structural defect—combined with the post-trial appellate substitution of an

uncharged theory—warrants this Court’s review. Petitioner respectfully asks this Court to vindicate his God-given rights as secured by the Constitution, including the right to indictment by the charged theory, trial by jury on every essential element, due process, an impartial tribunal, and a meaningful opportunity to present a complete defense. Petitioner further requests such relief as justice requires, including entry of judgment of acquittal on the preserved sufficiency issue or, in the alternative, vacatur and remand for a new trial before a different judge with proper jury findings on federal-officer status, official duty, any alleged “person assisting” theory, and petitioner’s theory-of-defense instructions.

Respectfully submitted.

I declare on Revered Divine Grace, Holiness, and under penalty of perjury under the law of The United States and in equilibrium with The Great Constitution of the Kingdom of Hayah Hawah that the foregoing is true and correct, and if called upon to testify to the matters herein, I could and would testify competently thereto.

Executed: October 15, 2026

Revered and Divinely Upheld,

THE SILVER DRAGON OF THE GOLDEN DAWN

/S/ **Gabriel Gigena**

**Office of Chief Cornerstone
Gabriel Omar Gigena,
Chief Wót’ááh Atsá,**



Respectable Pro Per,

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