

ISSUES PENDING IN THE TENTH CIRCUIT

COMPILED BY THE KANSAS FEDERAL PUBLIC DEFENDER



Updated September 9, 2019

PREFACE

In the fall of 2014, we (the Kansas Federal Public Defender) contacted the Tenth Circuit Court of Appeals about compiling a list of issues pending in the Court. To accomplish our goal, we needed the Tenth Circuit's assistance, and the Court came through (we are particularly indebted to Chief Deputy Clerk Chris Wolpert). Without the Tenth Circuit's assistance, this document would not exist.

We borrowed this idea from the Federal Public Defender for the Central District of Illinois. We thank them for allowing us to follow their lead.

A few words on the contents of this document. First, when an appeal is decided, the issue summary for that case will be removed from this document (as no longer pending).

Second, we have categorized issues in what we hope is a sensible approach. The categories are neither static nor exhaustive. We might add new ones, combine old ones, or make any other changes we see fit. Our goal is to make this as user-friendly as possible.

Third, the document is searchable. If you want to know if there are any *Terry* issues pending, just search for "*Terry*" or "frisk."

Fourth, there are bookmarks and the Table of Contents is hyperlinked to the body of the outline.

Fifth, at the end of the document, we have included a list of recently added cases (within the last month), with the issues in those cases parenthetically noted. We think this list will be a good resource for those who wish to use this document on a regular basis (and we thank former AFPD Jill Wichlens (Denver) for the suggestion).

Sixth, we do not mean to suggest an opinion on the merits of any case by our summaries. Our summaries are based on a very quick look at the briefs—we apologize if we bungle or omit any of your issues.

And finally, the document is available to anyone, for whatever use it might provide. We suggest the following uses: (1) when filing a brief in the Tenth Circuit or litigating an issue in the district court, to determine whether similar issues are currently pending, and, if so, to advise the Court and to review the briefs to assist in formulating arguments; (2) to assist attorneys in preserving issues in the district court (by providing notice of issues recently raised); and (3) to become better writers (by reading others' work and attempting to improve on it in our own work).

Our goal is to update this document weekly. If we fall behind, we apologize. If you are aware of an issue that we might have missed, please send the case name and number our way.

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I. Appeals/scope of remand

Did the district court abuse its discretion in refusing to conduct a de novo resentencing after an unlimited remand for resentencing, to correct an error in its loss calculation at the original sentencing? *United States v. Johnson*, No. 19-4000 (reply brief filed July 16, 2019).

This defendant died shortly after self-surrendering to BOP. Should the Tenth Circuit dismiss his appeal as moot, and remand the case with instructions for the district court to vacate his conviction and dismiss the indictment? *United States v. Coddington*, No. 18-1470 (brief filed July 8, 2019).

II. Competence

III. Confessions

IV. Continuances

Did the district court abuse its discretion when it refused to continue this defendant's sentencing hearing? *United States v. McClafin*, No. 18-1217 (OA May 9, 2019).

V. Discovery

VI. Double Jeopardy

Did this drug defendant's conspiracy prosecution in a Colorado federal court, after he pleaded guilty to the same conspiracy in a Texas federal court, violate the Double Jeopardy clause? *United States v. Mier-Garces*, No. 18-1085 (OA May 9, 2019).

VII. Eighth Amendment and Capital Issues

Does Oklahoma's "especially heinous, atrocious, or cruel" aggravator violate the Eighth Amendment, and is this state capital defendant entitled to 28 U.S.C. § 2254 relief? *Mitchell v. Royal*, No. 16-6258 (supplemental reply brief filed Nov. 9, 2018).

VIII. Ex Post Facto Issues

IX. First Amendment

X. Forfeiture

The Tenth Circuit remanded this fraud case for further proceedings regarding forfeiture. The district court refused to hold an evidentiary hearing on remand. Did the district court violate the mandate, or otherwise err in revising its forfeiture order? *United States v. Brandi Channon*, No. 19-2028 (brief filed July 29, 2019); *United States v. Matthew Channon*, No. 19-2029 (brief filed July 29, 2019).

XI. Fourth Amendment Issues

The district court originally granted this defendant's motion to suppress, and the government appealed. But the government then voluntarily dismissed its appeal, after which the district court

granted the government leave to dismiss the case without prejudice. Nine-plus months later, the government recharged the defendant and argued that *Workman* overruled the legal basis for the district court's original suppression order. Did the district court err in declining to find that the government was collaterally estopped from relitigating the suppression motion? *United States v. Arterbury*, No. 18-5085 (OA March 20, 2019).

- A. Arrest Warrant**
- B. Attenuation (intervening circumstances)**
- C. Consent**
- D. Excessive Force**
- E. Fruit of the Poisonous Tree**
- F. Good Faith Exception**

Did the district court err in holding that the good faith exception was an independent reason to deny the motion to suppression, even if the warrant was deficient? *United States v. Stein*, No. 19-3043 (brief filed August 12, 2019).

Did the government waive any good-faith argument on remand by insufficiently briefing it in this defendant's first appeal, and, if not, does good faith excuse the warrantless search of this defendant's email? *United States v. Ackerman*, No. 17-3238 (OA Nov. 16, 2018).

Does the good-faith exception apply to the execution of a flawed NIT warrant in this child-pornography case? Does it apply the execution of a flawed warrant to search this defendant's home? *United States v. Wagner*, No. 19-3068 (gov't brief filed August 26, 2019).

- G. Government Actor**
- H. Hearing Issues**
- I. Inventory Searches**
- J. Knock and Talk**
- K. Plain View Doctrine**
- L. Protective Sweeps**
- M. Scope of Warrantless Search**
- N. Search Incident to Arrest**
- O. Search Warrant Issues (including *Franks v. Delaware* issues)**

Did the district court err in denying the motion to suppress because the warrant lacked probable cause and particularity, or because it found there was no *Franks* violation? *United States v. Stein*, No. 19-3043 (brief filed August 12, 2019).

Did the district court err in holding that the good faith exception was an independent reasons to deny the motion to suppression, even if the warrant was deficient? *United States v. Stein*, No. 19-3043 (brief filed August 12, 2019).

Did the metropolitan judge who issued the search warrant in this case lack authority to do so, and was this search warrant otherwise illegal? *United States v. Sadlowski*, No. 19-2004 (reply brief filed August 19, 2019).

Did the district court err in denying this defendant's *Franks*-based motion to suppress the fruit of a search pursuant to a search warrant? *United States v. Ray*, No. 18-6227 (reply brief filed August 19, 2019).

Did the search warrant for this defendant's home lack probable cause? *United States v. Ross*, No. 19-7008 (gov't brief filed August 10, 2019).

Did the Virginia magistrate judge who issued this NIT warrant to search a Kansas computer lack authority to do so, and was the warrant otherwise illegal? *United States v. Wagner*, No. 19-3068 (gov't brief filed August 26, 2019).

Was the warrant issued to search this defendant's home for pornography unconstitutionally flawed? *United States v. Wagner*, No. 19-3068 (gov't brief filed August 26, 2019).

Did the search warrant affidavit in this case contain material omissions; did it establish probable cause; and was law enforcement's detention of this defendant during the execution of the search warrant reasonable under *Bailey v. United States*? *United States v. Jenkins*, No. 19-6014 (brief filed July 3, 2019).

P. Standing (reasonable expectation of privacy)

Did this defendant have standing to challenge the search of his email (before it was delivered to its intended recipient) under either a trespass theory or a privacy theory? *United States v. Ackerman*, No. 17-3238 (OA Nov. 16, 2018).

Q. Terry Stops: Initial Detention

Did the district court err in finding that an encounter between this defendant and Border Patrol agents was a seizure, as opposed to a consensual encounter? *United States v. Martinez*, No. 19-2010 (OA Sept. 26, 2019) (gov't appeal).

R. Terry: Frisk

S. Traffic Stops

Was there reasonable suspicion of criminal activity to justify detaining this defendant pending a dog sniff? *United States v. Orozco-Rivas*, No. 19-6074 (brief filed August 26, 2019).

Did law enforcement unreasonably extend the defendant's traffic stop by employing a time-consuming background check, and was there reasonable suspicion of impaired driving justifying the extension? *United States v. Mayville*, No. 19-4008 (brief filed August 23, 2019).

Did law enforcement unreasonably extend this defendant's detention during a traffic stop after the purpose of the stop was completed, and was there reasonable suspicion to support a dog sniff of this defendant's car? *United States v. Ahmed*, No. 18-4092 (reply brief filed March 18, 2019).

Did law enforcement have reasonable suspicion to detain this driver after completion of a traffic stop pending the arrival of a drug dog? *United States v. Berg*, No. 18-3250 (reply brief filed July 31, 2019).

Did law enforcement unreasonably extend the scope and duration of this traffic stop? *United States v. Cortez*, No. 19-2058; *United States v. Reyes-Moreno*, No. 19-2059 (joint brief filed June 20, 2019).

Did the district court err in finding that two lane departures provided reasonable suspicion for a traffic stop? *United States v. Ockert*, No. 19-3049 (brief filed July 31, 2019).

T. Warrantless Arrests

Did the officer in this case lack probable cause to arrest this defendant—who momentarily balked and questioned the officer's order that he submit to a pat-down—for resisting an officer? *United States v. Romero, Jr.*, No. 18-2180 (OA July 19, 2019).

U. Warrantless Searches & Seizures

Did the warrantless seizure (by a border agent) and eventual search of this defendant's laptop violate the Fourth Amendment? *United States v. Williams*, No. 18-1299 (reply brief filed May 6, 2019) (EFF amicus brief filed Jan. 8, 2019).

Did law enforcement unlawfully enter this defendant's curtilage without a warrant to observe serial numbers on suspected stolen ATVs? *United States v. Ross*, No. 19-7008 (gov't brief filed August 10, 2019).

Does the "plain view" exception excuse these officers' warrantless search of this defendant's car? *United States v. Ockert*, No. 19-3049 (brief filed July 31, 2019).

XII. Fourteenth Amendment: Due Process

Did the state court violate this capital defendant's due process rights when it admitted a steady stream of prurient and irrelevant evidence about her sex life (purportedly to show her motive to kill her estranged husband)? *Andrew v. Aldridge*, No. 15-6190 (OA July 27, 2017) (abated pending en banc decision in *Pavatt v. Carpenter*, No. 14-6117 (en banc supplemental brief filed Jan. 9, 2019)).

XIII. Fifth Amendment: Due Process

Did the district court apply the wrong legal standard when it denied the motion to dismiss for preindictment delay? *United States v. Woodard*, No. 19-5009 (brief filed August 12, 2019).

Are this defendant's four child-pornography convictions under 18 U.S.C. § 2252(a)(5)(B) multiplicitous? *United States v. Elliott*, No. 18-2105 (OA July 19, 2019).

Did the government violate *Batson* when it used a peremptory challenge to excuse one of only two African American jurors in this defendant's venire, and proffered a pretextual reason for doing so? *United States v. Golden*, No. 18-6163 (gov't brief filed May 8, 2019).

Did the district court improperly rely on the defendant's silence at sentencing to make findings justifying sentencing enhancements? *United States v. Robertson*, No. 18-2165 (reply brief filed May 23, 2019).

Did outrageous conduct by government officials (distributing child pornography through the Playpen website) warrant dismissal of this defendant's indictment? *United States v. Wagner*, No. 19-3068 (gov't brief filed August 26, 2019).

XIV. Fifth Amendment: Confessions & *Miranda*

Did the state court err in this capital case when it admitted the defendant's un-*Mirandized* statements? *Andrew v. Aldridge*, No. 15-6190 (OA July 27, 2017) (abated pending en banc decision in *Pavatt v. Carpenter*, No. 14-6117 (en banc supplemental brief filed Jan. 9, 2019)).

Did the district court err in finding this defendant's confession voluntary? *United States v. Ravenell*, No. 18-2091 (OA March 20, 2019).

Did the district court err in concluding that admission of this defendant's un-*Mirandized* statements at her firearms trial was harmless? *United States v. O'Neal*, 18-1365 (reply brief filed July 5, 2019).

Should the district court have suppressed this defendant's statements to law enforcement, either as un-*Mirandized*, or as coerced? *United States v. Ray*, No. 18-6227 (reply brief filed August 19, 2019).

Did law enforcement unlawfully interrogate this defendant without a *Miranda* advisory? *United States v. Ross*, No. 19-7008 (gov't brief filed August 10, 2019).

Did law enforcement unlawfully interrogate this defendant in violation of *Miranda* and his due-process rights? *United States v. Wagner*, No. 19-3068 (gov't brief filed August 26, 2019).

Did law enforcement's false promise of leniency and other misrepresentations render this drug defendant's confession involuntary? *United States v. Young*, No. 18-6221 (gov't brief filed August 16, 2019).

Did law enforcement unlawfully interrogate these defendants during a traffic stop without a *Miranda* advisory? *United States v. Cortez*, No. 19-2058; *United States v. Reyes-Moreno*, No. 19-2059 (joint brief filed June 20, 2019).

Did the district court err in finding that the Border Patrol unlawfully subjected this defendant to custodial interrogation without *Miranda* warnings? *United States v. Martinez*, No. 19-2010 (OA Sept. 26, 2019) (gov't appeal).

XV. Habeas Issues

A. 28 U.S.C. § 2241

Is this state petitioner entitled to a certificate of appealability, and should the district court have granted his 28 U.S.C. § 2241 petition and ordered Oklahoma to reinstate his right to a jury trial on grounds that his waiver was not knowing, willing, or voluntary? *Win v. Cook*, No. 19-5013 (brief filed May 20, 2019).

B. 28 U.S.C. § 2254

Is that state drug defendant entitled to 28 U.S.C. § 2254 relief (or an evidentiary hearing) on his claims of ineffective assistance of counsel, prosecutorial misconduct, involuntary confession, double jeopardy, or insufficient evidence? *Urquiza v. Allbaugh*, No. 19-5066 (brief filed September 6, 2019).

Should the district court have granted this state capital defendant habeas relief based on individual or cumulative error, or at the very least have held an evidentiary hearing on her *Brady* and IAC claims? *Andrew v. Aldridge*, No. 15-6190 (OA July 27, 2017) (abated pending en banc decision in *Pavatt v. Carpenter*, No. 14-6117 (en banc supplemental brief filed Jan. 9, 2019)).

Should the district court have granted habeas relief on this state capital defendant's claims that (1) the exclusion of expert testimony relevant to the defendant's ability to form the necessary intent deprived him of due process; and (2) his *Miranda* waiver was neither knowing nor intelligent? *Coddington v. Carpenter*, No. 16-6295 (state's appeal) (OA Jan. 24, 2019).

Should the district court have granted federal habeas relief (or at least an evidentiary hearing) on this state capital defendant's claims of ineffective assistance of counsel, unconstitutional jury instructions, unconstitutional victim-impact testimony, and cumulative error? *Harris v. Carpenter*, No. 17-6109 (OA March 20, 2019).

Is this state child-abuse/murder defendant entitled to 28 U.S.C. § 2254 relief on grounds that his conviction was tainted by Sixth Amendment violations (the trial judge's denial of the right to present evidence that the state's forensic lab was unaccredited), the introduction of unduly prejudicial autopsy photographs, and cumulative error? *Weimer v. Allbaugh*, No. 18-6072 (state's brief filed Sept. 27, 2018).

Is this Oklahoma capital defendant entitled to 28 U.S.C. § 2254 relief on grounds of ineffective assistance of trial and appellate counsel? *Davis v. Carpenter*, No. 17-6225 (reply brief filed Jan. 11, 2019).

Is this Oklahoma molestation defendant entitled to a certificate of appealability and 28 U.S.C. § 2254 relief on his ineffective-assistance-of-counsel and state-misconduct claims? *Whitely v. Farris*, No. 18-6085 (OA March 21, 2019).

Is this Oklahoma murder defendant entitled to 28 U.S.C. § 2254 relief on his claims that he was denied his right to present a complete defense, that his trial counsel was ineffective, and that the evidence was insufficient to support his conviction? *Davis v. Allbaugh*, No. 18-6131 (OA March 21, 2019).

Is this Oklahoma sex-crimes defendant entitled to 28 U.S.C. § 2254 relief on his ineffective-assistance-of-counsel claims? *Crim v. Harvanke*, No. 18-7049 (brief filed Jan. 3, 2019).

Is this state sex offender entitled to a certificate of appealability and federal habeas relief (or at least an evidentiary hearing) on his actual innocence claim? *Burke v. Bigelow*, No. 18-4132 (brief filed March 5, 2019).

Is this Colorado defendant—convicted of attempted murder and other offenses committed when he was a juvenile—entitled to a certificate of appealability and § 2254 relief on his *Graham v. Florida* claims? *Rainer v. Hansen*, No. 18-1427 (reply brief filed July 16, 2019).

Whether the district court’s dismissal of this state habeas defendant’s 28 U.S.C. § 2254 petition on grounds that the basis for his claims could have been discovered earlier merits a certificate of appealability. *Barrientez v. Martin*, No. 19-6047 ((brief filed May 16, 2019).

Is this Utah murder defendant entitled to a certificate of appealability and 28 U.S.C. § 2254 relief on his claims of prosecutorial misconduct? *Pinder v. Crowther*, No. 19-4039 (brief filed July 12, 2019).

C. 28 U.S.C. § 2255

Is this defendant entitled to 28 U.S.C. § 2255 relief on the grounds that counsel misadvised him about the guidelines range that would apply under his plea agreement and failed to advise him of his right to appeal? *United States v. Orozco-Sanchez*, No. 19-2009 (brief filed September 6, 2019).

Is this defendant entitled to a certificate of appealability and 28 U.S.C. § 2255 relief on the grounds that Hobbs Act robbery is not a crime of violence under the only valid portion of 18 U.S.C. § 924(c)(3)(A)? *United States v. Myers*, No. 18-5109 (brief filed September 6, 2019).

Whether this petitioner is entitled to a certificate of appealability and 28 U.S.C. § 2255 relief despite the collateral-attack waiver in his plea agreement where his counsel ineffectively advised him during plea negotiations. *United States v. Henry*, No. 18-3023 (reply brief filed Dec. 18, 2018).

Is this petitioner entitled to 28 U.S.C. § 2255 relief (or at least an evidentiary hearing) on his claims of ineffective assistance of counsel and *Brady* violations? *United States v. Holloway*, No. 18-4083 (OA March 21, 2019).

Is this capital petitioner entitled to an evidentiary hearing on his 28 U.S.C. § 2255 claims that his counsel was ineffective in failing to present mitigating evidence, and failing to object to prosecutorial misconduct (the government’s invocation of religious authority)? *United States v. Fields*, No. 17-7031 (reply brief filed April 22, 2019).

Is this defendant entitled to 28 U.S.C. § 2255 relief on grounds that his counsel failed to argue at sentencing that Hobbs Act Robbery was not a crime of violence? *United States v. Cutbertson*, No. 18-1223 (reply brief filed August 9, 2019).

D. Fed. R. Civ. P. 60(b)

E. Coram Nobis

XVI. Immigration Issues

XVII. Indictment Issues

A. Amendments

Did the district court constructively amend this defendant’s enticement indictment through its jury instructions at trial? *United States v. Miller*, No. 18-7059 (gov’t brief filed June 27, 2019).

- B. Duplicity**
- C. Grand Jury Issues**
- D. Sufficiency of the Indictment (Sixth Amendment)**
- E. Variance**

XVIII. Jurisdictional Issues

Was there sufficient evidence that this second-degree-murder defendant's offense was committed within the territorial jurisdiction of the United States, and did the district court violate Rule 12 by delaying ruling on this defendant's jurisdictional challenge until after he was convicted? *United States v. Antonio*, No. 18-2118 (OA July 19, 2019).

XIX. Motion Practice

XX. Offenses

A. 8 U.S.C. § 1253 (removal-related offenses)

B. 8 U.S.C. §§ 1325/1326 (illegal entry/reentry)

Whether this Court must reverse the defendant's 8 USC § 1326(a) conviction because the underlying deportation order was void ab initio. *United States v. Lira-Ramirez*, No. 19-3057 (brief filed August 20, 2019).

Whether the district court erred in denying this unlawful-reentry defendant's *Pereira*-based motion to withdraw his guilty plea. *United States v. Herrera-Rivas*, No. 18-6192 (reply brief filed Feb. 22, 2019).

Does 8 U.S.C. § 1255(b)(1)(D) violate due process to the extent that it precludes review of removal orders in subsequent criminal prosecutions? Has this unlawful-reentry defendant shown that his underlying removal order was invalid? And should the district court have held a hearing to determine a fact relevant to the defendant's challenge to his underlying removal order? *United States v. Gonzales-Fierro*, No. 18-2168 (OA July 19, 2019).

Does improper "entry" for purposes of 8 U.S.C. § 1325 require freedom from official restraint, and, if so, does continuous surveillance from entry through arrest count as official restraint? *United States v. Gaspar-Miguel*, No. 19-2020 (reply brief filed August 6, 2019).

In a case charging illegal reentry after a prior removal under 18 U.S.C. § 1326, is a valid warrant of removal a necessary element, and was the evidence insufficient to prove that element in this case? *United States v. Caballero-Anaya*, No. 19-1034 (brief filed June 28, 2019).

Did the district court err in denying this illegal-reentry defendant's motion to dismiss on grounds that his underlying removal order was invalid? *United States v. Ferman*, No. 19-2078 (brief filed July 24, 2019).

C. 16 U.S.C. § 3372, et al. (illegally taking fish and wildlife)

D. 18 U.S.C. § 2 (aiding and abetting)

E. 18 U.S.C. § 111 (assaulting, resisting, impeding an officer or employee)

F. 18 U.S.C. § 242 (civil-rights violation)

G. 18 U.S.C. § 287 (false claims against the government)

In this sovereign citizen's false-claims prosecution under 18 U.S.C. § 287, did the district court err in (1) denying the defendant's First-Amendment-based motion to dismiss; (2) defining "claim" for the jury; and (3) not instructing the jury on specific intent? *United States v. Hutson*, No. 18-1206 (reply brief filed August 16, 2019).

H. 18 U.S.C. § 371 (conspiracy)

Was the evidence sufficient to sustain this defendant's conspiracy convictions? *United States v. Hammers*, No. 18-7051 (reply brief filed June 19, 2019).

Did the district court erroneously omit willfulness from the elements of conspiracy under 18 U.S.C. § 371? Was the evidence sufficient to support this defendant's conspiracy convictions? *United States v. Wyatt*, No. 18-1135 (reply brief filed July 25, 2019).

I. 18 U.S.C. § 666 (bribery)

J. 18 U.S.C. § 842 (unlawful distribution/possession of explosives)

K. 18 U.S.C. § 843 (using a communication device)

L. 18 U.S.C. § 844 (arson)

M. 18 U.S.C. § 875 (interstate communications)

N. 18 U.S.C. § 876 (mailing threatening communications)

O. 18 U.S.C. § 922(d) (disposal to a prohibited person)

P. 18 U.S.C. § 922(g) (prohibited person in possession)

Is this defendant's pre-*Rehaif* 18 U.S.C. § 922(g) guilty plea invalid? *United States v. Wilson*, No. 19-1055 (brief filed July 31, 2019).

Q. 18 U.S.C. § 924(c) (Possession/Use of Firearm during drug trafficking offense)

Is the residual clause of 18 U.S.C. § 924(c)(3)(B) void for vagueness; is federal kidnapping a crime of violence for purposes of § 924(c); and should this defendant have been granted § 2255 relief? *United States v. Ford*, No. 17-1122 (gov't brief filed August 16, 2019).

Whether arson under 18 U.S.C. § 844(i) is a crime of violence for purposes of § 924(c). *United States v. Lawless*, No. 17-1148 (OA Nov. 15, 2018).

Is federal arson a crime of violence for § 924(c) purposes, and is this defendant entitled to 28 U.S.C. § 2255 relief? *United States v. Moore*, No. 17-1224 (OA Oct. 24, 2018).

Is armed bank robbery under 18 U.S.C. § 2111 is a crime of violence for § 924(c) purposes, and is this defendant entitled to § 2255 relief? *United States v. Clark*, No. 18-2048 (briefs filed Nov. 13, 2018).

Are Hobbs Act robbery and VICAR-based Utah and Arizona aggravated assault crimes of violence for § 924(c) purposes, and is this defendant entitled to § 2255 relief? *United States v. Toki, et al.*, Nos. 17-4153, 17-4154, & 17-4155 (reply brief filed Nov. 8, 2018).

Is 18 U.S.C. § 2111 robbery a crime of violence for § 924(c) purposes, and is this defendant entitled to a COA and § 2255 relief? *United States v. Shirley*, No. 18-2071 (brief filed August 15, 2018).

Was the evidence sufficient in this § 924(c) case to establish the necessary nexus between the gun and the defendant's alleged drug trafficking? *United States v. Leffler*, No. 18-5087 (reply brief filed July 8, 2019).

Was evidence that this defendant kept a firearm in his bedroom and drugs in his kitchen sufficient to support his § 924(c) conviction? *United States v. Jones*, No. 19-5022 (gov't brief filed September 6, 2019).

R. 18 U.S.C. § 1001 (false statements)

S. 18 U.S.C. § 1005 (false bank entries)

T. 18 U.S.C. § 1028 (identity-document fraud)

U. 18 U.S.C. § 1028A (identity theft)

V. 18 U.S.C. § 1030 (computer fraud and related activity)

Was the evidence sufficient in this 18 U.S.C. § 1030 prosecution for intentionally damaging a protected computer? *United States v. Goodyear*, No. 18-6222 (reply brief filed August 19, 2019).

W. 18 U.S.C. § 1041 (false statements to a bank)

X. 18 U.S.C. § 1153 (offenses committed within Indian country)

Is the current definition of "Indian" for purposes of 18 U.S.C. § 1153 an unconstitutional racial classification? *United States v. Jim*, No. 18-2144 (reply brief filed August 29, 2019).

Y. 18 U.S.C. § 1201 (kidnapping)

Z. 18 U.S.C. § 1341 (mail fraud)

AA. 18 U.S.C. § 1343 (wire fraud)

BB. 18 U.S.C. § 1344 (bank fraud)

CC. 18 U.S.C. § 1347 (health-care fraud)

DD. 18 U.S.C. § 1361 (depredation of government property)

EE. 18 U.S.C. § 1512 (witness tampering)

Was the evidence sufficient to sustain this defendant's conviction for witness intimidation, based on a theory that a law enforcement officer was killed to prevent the discovery of the defendant's felon-in-possession offense? *United States v. Chatman*, No. 19-5038 (brief filed August 15, 2019).

FF. 18 U.S.C. § 1513 (obstruction of justice)

GG. 18 U.S.C. § 1591 (sex trafficking of children)

HH. 18 U.S.C. § 1791 (contraband in prison)

Was the evidence sufficient to sustain this defendant's conviction for manufacturing weapons in prison under 18 U.S.C. § 1791? *United States v. Golden*, No. 18-6163 (gov't brief filed May 8, 2019).

II. 18 U.S.C. § 1951 (Hobbs Act robbery)

JJ. 18 U.S.C. § 1956 (money laundering)

KK. 18 U.S.C. §§ 2241-2245 (sexual abuse)

LL. 18 U.S.C. § 2250 (SORNA: failure to register); 42 U.S.C. § 16911

MM. 18 U.S.C. § 2251 (sexual exploitation/production of child pornography)

NN. 18 U.S.C. § 2422 (enticement to travel to engage in prostitution)

OO. 18 U.S.C. § 2423 (transportation of minors)

PP. 18 U.S.C. § 1591 (child sex trafficking)

QQ. 18 U.S.C. § 2252A (receiving/distributing child pornography)

Was the evidence sufficient to sustain this defendant's child-pornography convictions? *United States v. Wagner*, No. 19-3068 (gov't brief filed August 26, 2019).

RR. 21 U.S.C. § 841 (drug trafficking)

Was the evidence sufficient to sustain this defendant's drug convictions under 21 U.S.C. § 841? *United States v. Duran*, No. 18-1062 (OA March 19, 2019).

Was the evidence sufficient to prove quantity in this drug-conspiracy case? *United States v. Eichler*, No. 18-8015 (reply brief filed Dec. 7, 2018).

Was the evidence sufficient to prove that this defendant knowingly possessed the methamphetamine found in his rental car with intent to distribute it? *United States v. Smith*, No. 18-4149 (brief filed April 15, 2019).

Was the evidence sufficient to prove that this defendant knowingly possessed the drugs found in the rental car he was driving? *United States v. Smith*, No. 18-4149 (brief filed May 22, 2019).

Whether the district court erred in refusing to instruct this drug-trafficking defendant's jury on the lesser included offense of simple possession. *United States v. Waugh*, No. 18-7062 (gov't brief filed August 12, 2019).

SS. 21 U.S.C. § 846 (drug conspiracy)

Was the evidence sufficient to prove a shared distribution objective in this drug-conspiracy case? *United States v. Mendoza-Alarcon*, No. 18-2036 (OA March 20, 2019).

TT. 21 U.S.C. § 856 (drug-involved premises)

UU. 26 U.S.C. § 5861 (firearms offenses)

VV. 26 U.S.C. § 7201 (tax evasion)

WW. 26 U.S.C. § 7212

XX. 28 U.S.C. § 455 (recusal)

Are this judge's rulings against this defendant reason to assign the case to a different judge on remand? *United States v. Hammers*, No. 18-7051 (reply brief filed June 19, 2019).

YY. 42 U.S.C. § 3631 (interfering with housing rights)

ZZ. 49 U.S.C. § 46504 (intimidating a flight attendant)

XXI. Pleas

A. Acceptance of Plea

Does a magistrate judge have jurisdiction (or authority) to accept a guilty plea, or only recommend that the district court do so? *United States v. Finnesy*, No. 18-3045 (OA Jan. 23, 2019).

B. Appeal Waiver

C. Breach

Did the district court err by denying a motion for sanctions in a § 2255 proceeding, where the defendant alleged that the government breached the plea agreement by asserting that he qualified for an ACCA enhancement? And if so, what is the remedy? *United States v. Wilfong*, No. 18-6219 (brief filed August 30, 2019).

Did the government breach its plea agreement with this cooperating defendant (and can the Tenth Circuit reach this question notwithstanding the defendant's appeal waiver)? *United States v. Rubbo*, No. 18-1342 (reply brief filed July 24, 2019).

D. Rejection of Plea Agreement

E. Withdrawal of Plea

Whether the district court erred in denying this unlawful-reentry defendant's *Pereira*-based motion to withdraw his guilty plea. *United States v. Herrera-Rivas*, No. 18-6192 (gov't brief filed Feb. 2, 2019).

Did the district court err in denying this child-abuse defendant's presentencing motion to withdraw her plea, based on the court's failure to ensure that the defendant understood the elements of the crime to which she was pleading? *United States v. Zayas*, No. 18-2154 (reply brief filed July 29, 2019).

XXII. Restitution (18 U.S.C. § 3663, 3664, et al.)

Did the district court err in ordering restitution for losses caused by someone other than the defendant? *United States v. Anthony*, No. 18-6047 (OA May 8, 2019).

Was the government's proof of loss sufficient to support the restitution award? *United States v. Goodyear*, No. 18-6222 (reply brief filed August 19, 2019).

Did the district court plainly err by ordering restitution for conduct that was not the basis for the offense of conviction? *United States v. Mendenhall*, No. 19-7006 (gov't brief filed July 3, 2019).

Does the Justice for All Reauthorization Act—allowing for the collection of restitution from a deceased defendant's estate, 18 U.S.C. § 3613(b)—apply to a defendant who dies while his direct appeal is still pending? *United States v. Coddington*, No. 18-1470 (brief filed July 8, 2019).

XXIII. Rules of Criminal Procedure

- A. Rule 8 (Joinder/Severance)**
- B. Rule 11 (pleas) (see main Pleas section)**
- C. Rule 12 (motions)**
- D. Rule 32 (sentencing procedures)**
- E. Rule 33 (new trial)**

Did the district court err when it denied the defendant's motion for new trial based on newly discovered evidence? *United States v. Gomez-Castro*, No. 18-4090 (brief filed August 12, 2019)

- F. Rule 41 (search & seizure)**

XXIV. Scope of Remand/Mandate Rule/Other Remand Issues

XXV. Second Amendment Issues

XXVI. Sentencing

- A. Allocution**
- B. Apprendi**
- C. Armed Career Criminal Act (18 U.S.C. 924(e))**

Whether Oklahoma controlled-substance distribution offenses count as predicate serious drug offenses under ACCA. *United States v. Cantu*, No. 19-6043 (brief filed August 23, 2019).

Whether New Mexico residential burglary and robbery count as predicate violent felonies under ACCA. *United States v. Martinez*, No. 19-2046 (brief filed August 21, 2019).

Is Oklahoma domestic abuse assault & battery a violent felony for ACCA purposes? *United States v. Harrison*, No. 17-6119 (OA Sept. 26, 2018).

Are the New Mexico crimes of armed robbery, aggravated assault, and aggravated battery violent felonies for ACCA purposes, and should the district court have granted this defendant 28 U.S.C. § 2255 relief? *United States v. Manzanares*, No. 18-2010 (reply brief filed May 31, 2018).

After *Stokeling*, is a 1993 Oklahoma first-degree robbery an ACCA predicate? *United States v. Godlock*, No. 17-6233 (reply brief filed April 24, 2019).

Is New Mexico robbery an ACCA predicate? *United States v. Velasquez*, No. 17-2150 (brief filed August 10, 2019) (gov't appeal).

D. Burden of Proof

E. Capital Sentencing

F. Commitment in Lieu of Imprisonment (18 U.S.C. § 4244)

G. Departures and Variances

Did the district court abuse its discretion by departing upwards in this gun case based on a discouraged factor and without making required findings? *United States v. Aaron*, No. 18-3232 (reply brief filed May 6, 2019).

H. Fines & Assessments

I. Guidelines Sections

1. USSG § 1B1.2

2. USSG § 1B1.3 (relevant conduct)

Did the district court err in relying on the presentence report to establish contested relevant conduct? *United States v. Padilla*, No. 18-5009 (OA Nov. 14, 2018).

Did the district court plainly err when it included this gun defendant's previous possession of a different gun a year earlier as relevant conduct? *United States v. Garcia*, No. 18-6033 (OA Nov. 14, 2018).

3. USSG § 2A2.2

Did the district court err in adding a 6-level enhancement to this assault defendant's sentence under USSG § 2A2.2? *United States v. James*, No. 18-3227 (reply brief filed September 3, 2019).

Did the district court err in adding a 2-level enhancement to this assault defendant's sentence for more than minimal planning under USSG § 2A2.2(b)(1)? *United States v. Coombs*, No. 19-8036 (brief filed August 2, 2019).

4. USSG § 2A3.2 (sexual abuse of a minor)

Did the district court err in adding a 4-level enhancement under USSG § 2A3.2(b)(1) to this sexual-abuse defendant's sentence for abusing a 15-year-old minor without adequate facts to find that she was in his care, custody, or supervisory control? *United States v. Blackbird*, No. 19-7007 (reply brief filed August 12, 2019).

5. USSG § 2A4.1 (bodily injury)

6. USSG § 2A6.1

a) subsection (b)(2)(A) (more than 2 threats)

7. USSG § 2B1.1

Did the district court err in applying a 6-level substantial-financial-hardship enhancement under USSG § 2B1.1(b)(2)(C) where the government conceded that, at the time the parties entered their plea agreement, the government did not have evidence to support the enhancement, and it did not

thereafter attempt to prove the enhancement? *United States v. McClafin*, No. 18-1217 (OA May 9, 2019).

Did the district court erroneously hold this fraud defendant responsible at sentencing for a victim's "substantial financial hardship" under USSG § 2B1.1(b)(2)(A), when the hardship was not sufficiently attributable to this defendant (as opposed to his codefendant)? *United States v. Brevington*, No. 18-1357 (supplemental brief filed August 28, 2019).

8. USSG § 2B3.1 (robbery)

9. USSG § 2C1.1

10. USSG § 2D1.1 (drugs)

Were photos of this drug defendant's messy house sufficient to support an enhancement of his sentence for maintaining a drug premises under USSG § 2D1.1(b)(12)? *United States v. Mier-Garves*, No. 18-1085 (OA May 9, 2019).

Did the district court err under USSG § 2D1.1 in refusing to consider the impact of inert plant material on the potency of this defendant's synthetic marijuana? *United States v. Abdeljawad*, No. 18-2121 (reply brief filed May 17, 2019).

11. USSG § 2G1.1 (sex trafficking)

12. USSG § 2G2.2 (child pornography)

13. USSG § 2K2.1

Did the district court erroneously apply a cross-reference in USSG § 2K2.1(c) without sufficient reliable evidence to increase this defendant's base offense level? *United States v. Carter*, No. 18-8069 (gov't brief filed March 27, 2019).

Did the district court make proper findings under the right standard to find that this defendant assaulted a police officer, in order to enhance his sentence 4 levels under USSG § 2K2.1(b)(6)? *United States v. Robertson*, No. 18-2165 (reply brief filed May 23, 2019).

Is Oklahoma endeavoring to manufacture a controlled dangerous substance a controlled-substance offense for purposes of § 2K2.1(a)(4)(A)? *United States v. Faulkner*, No. 18-7066 (reply brief filed August 15, 2019).

Did the district court erroneously rely on impeached hearsay testimony in order to add 4 levels to this firearm defendant's sentence under USSG § 2K2.1(b)(6)(B)?

Did the district court err by increasing this firearm defendant's sentence absent sufficient evidence under USSG § 2K2.1(b)(6)(B)? *United States v. Ross*, No. 19-7008 (gov't brief filed August 10, 2019).

Is Colorado attempted second degree assault a crime of violence for USSG § 2K2.1 purposes? *United States v. Lovato*, No. 18-1468 (reply brief filed July 2, 2019).

Did the district court err in applying a four-level enhancement for possessing a firearm in connection with a felony under USSG § 2K2.1(b)(6)(B)? *United States v. Hall*, No. 18-6226 (gov't brief filed July 10, 2019).

Did the district court err in applying a three-level enhancement for possession of certain firearms, where the government and its confidential informant manipulated the types of firearms involved in the case? *United States v. Krueger*, No. 19-2052 (gov't brief filed August 23, 2019).

Did the district court properly apply a 2-level enhancement under USSG § 2K2.1 for prior firearms possession in this alien-in-possession case? *United States v. Guillen*, No. 19-2042 (gov't brief filed August 5, 2019).

Did the district court plainly err in applying a USSG § 2K2.1(a)(1) enhancement where one of the “prior” convictions relied on to trigger the enhancement post-dated the defendant’s offense of conviction? *United States v. Trujillo*, No. 19-2057 (brief filed August 6, 2019).

14. USSG § 2K2.2

15. USSG § 2L1.2 (immigration offenses)

16. USSG § 2T1.1 (tax loss)

17. USSG § 2T1.4 (sophisticated means—tax offense)

18. USSG § 2Q2.1

19. USSG § 3A1.1 (hate crime/vulnerable victim)

Where both the victim and the defendant suffered physical disabilities, did the district court err in enhancing the defendant’s voluntary manslaughter sentence on vulnerable-victim grounds under USSG § 3A1.1? *United States v. Joe*, No. 18-2072 (OA Jan. 24, 2019).

20. USSG § 3A1.2

Did the district court make proper findings under the right standard to find that this defendant assaulted an official victim, in order to enhance his sentence 6 levels under USSG § 3A1.2(c)(1)? *United States v. Robertson*, No. 18-2165 (reply brief filed May 23, 2019).

Did the district court err when it denied this defendant’s request for a mitigating role reduction under USSG § 3B1.2, without comparing her culpability to that of her coconspirators? Was the district court’s factfinding underlying its denial of this reduction clearly erroneous? *United States v. Nkome*, No. 18-3261 (government brief filed August 29, 2019).

21. USSG § 3A1.3

22. USSG § 3B1.1 (aggravating role)

Did the district court err when it applied a 2-level aggravating-role enhancement under § 3B1.1, because there was insufficient evidence that the defendant was a manager in this tax-fraud conspiracy? *United States v. Gebrmann*, No. 19-1145 (brief filed August 27, 2019).

23. USSG § 3B1.2 (mitigating role)

Did the district court err by focusing on the “essential” nature of the defendant’s role to deny a mitigating-role adjustment under § 3B1.2? *United States v. Madrid*, No. 19-2060 (brief filed August 27, 2019).

24. USSG § 3C1.1 (obstruction)

Did the district court err when it applied the § 3C1.1 enhancement for obstruction of justice because it was not supported by adequate findings by the court or sufficient proof by the government? *United States v. Gomez-Castro*, No. 18-4090 (brief filed August 12, 2019).

Did the district court erroneously enhance this defendant's sentence on obstruction grounds for perjury under USSG § 3C1.1 without making the requisite findings? *United States v. Eichler*, No. 18-8015 (reply brief filed Dec. 7, 2018).

Did the district court err when it enhanced this defendant's sentence for obstruction of justice under USSG § 3C1.1 without making findings about what part of his trial testimony was willfully, materially false? *United States v. Chavarin*, No. 18-4011 (OA March 20, 2019).

Did the district court erroneously rely on testimony that—even if false—was immaterial to enhance this defendant's sentence on obstruction grounds under USSG § 3C1.1? *United States v. Fernandez-Barron*, No. 18-1254 (reply brief filed May 14, 2019).

Did the district court erroneously enhance this conspiracy defendant's sentence for obstruction of justice under USSG § 3C1.1 after finding that he committed perjury at trial, despite the fact that the jury acquitted him on all substantive counts? *United States v. Hammers*, No. 18-7051 (reply brief filed June 19, 2019).

Did the district court erroneously add obstruction points for failure to appear under USSG § 3C1.1 absent any evidence that this defendant did, in fact, ever fail to appear? *United States v. Simeus*, No. 18-3262 (brief filed May 28, 2019).

25. USSG § 3C1.2 (reckless endangerment during flight)

26. USSG § 3D1.2-1.5 (multiple counts)

27. USSG § 3E1.1 (acceptance of responsibility)

Did the district court erroneously deny an acceptance-of-responsibility reduction under USSG § 3E1.1(a) solely because the government refused to recommend the reduction? *United States v. Finney*, No. 18-3045 (OA Jan. 23, 2019).

Did the district court erroneously deny an acceptance-of-responsibility reduction for this defendant, who went to trial on stipulated facts in order to preserve his suppression issue? *United States v. Ross*, No. 19-7008 (reply brief filed August 29, 2019).

28. USSG § 4A1.1

29. USSG § 4A1.2

Did the district court plainly err by assessing criminal history points for a local ordinance violation that was not also a state crime, contrary to USSG § 4A1.2(c)(2)? *United States v. Gomez-Lopez*, No. 18-1456 (gov't brief filed July 22, 2019).

Did the district court plainly err under USSG § 4A1.2 in assessing three criminal history points for a prior sentence that was suspended? *United States v. Trillo-Gonzalez*, No. 19-2018 (gov't brief filed September 5, 2019).

30. USSG § 4A1.3 (criminal-history departures)

31. USSG §§ 4B1.1, 4B1.2 (crime of violence; controlled substance offense)

Whether Utah robbery qualifies as a predicate “crime of violence” under the career-offender guideline. *United States v. Platt*, No. 19-6061 (brief filed August 29, 2019).

Can attempt offenses qualify as predicate controlled substance offenses under the career-offender guideline, and even if so, is Colorado attempt broader than generic attempt? *United States v. Lovelace*, No. 19-1100 (gov’t brief filed September 5, 2019).

Can the mandatory (pre-*Booker* guidelines) be challenged for vagueness, and should the district court have granted this defendant § 2255 relief under *Johnson*? *United States v. Zamora*, No. 17-2188 (reply brief filed Jan. 11, 2019).

Was *Greer* wrongly decided, and is this defendant—who was sentenced as a career-offender under the mandatory guidelines—entitled to *Johnson*-based § 2255 relief? *United States v. Ellis*, No. 17-4097 (brief filed May 25, 2018); *United States v. Miller*, No. 17-4136 (brief filed May 25, 2018); *United States v. Cesspooch*, No. 17-4160 (brief filed June 5, 2018); *United States v. Rith*, No. 17-4149 (brief filed August 3, 2018).

Is Colorado distribution of an imitation controlled substance a “controlled substance offense” for career-offender purposes? *United States v. Thomas*, No. 17-1405 (OA Nov. 16, 2018).

On panel rehearing: Are the mandatory guidelines unconstitutionally vague under *Johnson*, and was *Greer* wrong about this in light of *Dimaya*? *United States v. Ward*, No. 17-3182 (reply brief filed Dec. 14, 2018).

Did the district court plainly err by relying on this defendant’s 21 U.S.C. § 846 conspiracy conviction to designate him a career offender under USSG §§ 4B1.1 and 4B1.2? *United States v. Wilson*, No. 18-7045 (gov’t brief filed March 25, 2019).

Is Utah third-degree reckless aggravated assault a crime of violence for career-offender purposes? *United States v. Fagatele*, No. 18-4004 (reply brief filed May 29, 2019).

Is Illinois manufacture or delivery of cocaine a controlled substance offense for career-offender purposes? *United States v. Wilks*, No. 19-3040 (gov’t brief filed June 27, 2019).

32. USSG § 4B1.5

33. USSG § 5C1.2 (safety valve)

Did the district court err in reconsidering this defendant’s safety-valve eligibility? *United States v. Garibaldi-Bravo*, No. 19-2036 (brief filed July 16, 2019).

34. USSG § 5G1.3

Did the district court err by ignoring USSG § 5G1.3 when deciding whether to run this defendant’s sentence concurrently or consecutively with an undischarged state sentence? *United States v. Finney*, No. 18-3045 (OA Jan. 23, 2019).

35. USSG § 5K1.1

36. USSG § 5K2.7

Did the district court erroneously increase this conspiracy defendant's sentence for disrupting a governmental function, under USSG § 5K2.7? *United States v. Hammers*, No. 18-7051 (reply brief filed June 19, 2019).

37. USSG § 5K2.14

38. USSG § 5G1.2(d)

39. USSG § 7B1.3 (revocation of probation or supervised release).

Did the district court err in treating the consecutive-sentencing provision within USSG § 7B1.3 as mandatory, or in imposing consecutive sentences because of a personal bias against concurrent sentences? *United States v. Flores-Martinez*, No. 19-2074 (gov't brief filed September 4, 2019).

J. Mandatory Minimums and Maximums

K. Reasonableness

1. Procedural

Did the district court procedurally err at this defendant's sentencing in refusing to hear statements from a character witness, announcing its tentative sentence before hearing arguments or allocution, and failing to consider all sentencing factors? *United States v. McClafflin*, No. 18-1217 (OA May 9, 2019).

Are the child pornography guidelines so inherently flawed as to render any sentence under them procedurally and substantively unreasonable? *United States v. Elliott*, No. 18-2105 (OA July 19, 2019).

Did the district court violate this defendant's due-process rights by making sentencing findings that more than doubled his guidelines range by the preponderance-of-evidence standard, rather by the clear-and-convincing-evidence standard? *United States v. Robertson*, No. 18-2165 (reply brief filed May 23, 2019).

Did the district court procedurally err when it refused to consider the sentence this "Indian" defendant (convicted under the Major Crimes Act) would have faced under state law for the same conduct, when considering the 18 U.S.C. § 3553(a) sentencing factors? *United States v. Begay*, No. 19-2022 (reply brief filed August 9, 2019).

Did the district court erroneously vary upward in this gun case on the basis of unreliable evidence, and an improper belief that an uncontested administrative forfeiture was evidence of wrongdoing? *United States v. Simeus*, No. 18-3262 (brief filed May 28, 2019).

Did the district court impose a procedurally erroneous upward departure based on improper factors and without the required notice? Is this defendant's above-guideline sentence procedurally erroneous even if it was a variance rather than a departure? *United States v. Hamilton*, No. 18-5124 (reply brief filed July 15, 2019).

Is this illegal reentry defendant's above-guideline sentence—three times the guideline high end, with insufficient explanation—substantively or procedurally unreasonable? *United States v. Castandeda-Ruiz*, No. 19-3037 (reply brief filed August 13, 2019).

Did the district court’s mistaken view of how the law might have applied in a hypothetical version of this case render this defendant’s sentence procedurally unreasonable? *United States v. Pena*, No. 19-2050 (government brief filed August 29, 2019).

Did the district court procedurally err by failing to recognize its discretion to vary downward? *United States v. Purvis*, No. 19-3003 (brief filed August 2, 2019).

2. Substantive

Was the district court’s within-guidelines sentence substantively unreasonable, because it is twice as long as a coconspirator’s sentence? *United States v. Madrid*, No. 19-2060 (brief filed August 27, 2019).

Was the district court’s above-guidelines sentence in this gun case substantively unreasonable? *United States v. Garcia*, No. 18-6033 (OA Nov. 14, 2018).

Are the child pornography guidelines so inherently flawed as to render any sentence under them procedurally and substantively unreasonable? *United States v. Elliott*, No. 18-2105 (OA July 19, 2019).

Is this defendant’s sentence substantively unreasonable? *United States v. Carter*, No. 18-8069 (gov’t brief filed March 27, 2019).

Is this defendant’s within-guidelines life sentence substantively unreasonable? *United States v. Jim*, No. 18-2144 (reply brief filed August 29, 2019).

Is this assault defendant’s above-guidelines sentence substantively unreasonable? *United States v. James*, No. 18-3227 (gov’t brief filed July 29, 2019).

Is this defendant’s above-guidelines felon-in-possession sentence substantively unreasonable? *United States v. Silas*, No. 18-1448 (reply brief filed July 10, 2019).

Is this defendant’s within-guidelines sentence for recklessly committed aggravated assault substantively unreasonable? *United States v. Sandoval*, No. 19-2041 (gov’t brief filed August 21, 2019).

Is this gun defendant’s within-guidelines sentence substantively unreasonable? *United States v. Richards*, Nos. 18-6223, 18-6224 (gov’t brief filed June 28, 2019).

Is this fraud defendant’s above-guideline sentence substantively unreasonable? *United States v. Hamilton*, No. 18-5124 (reply brief filed July 15, 2019).

Is this gun defendant’s within-guideline sentence substantively unreasonable? *United States v. Krueger*, No. 19-2052 (brief filed June 24, 2019).

Is this illegal reentry defendant’s above-guideline sentence—three times the guideline high end, with insufficient explanation—substantively or procedurally unreasonable? *United States v. Castandeda-Ruiz*, No. 19-3037 (reply brief filed August 13, 2019).

Is this illegal reentry defendant’s above-guideline sentence—more than twice the high end of the guidelines range—substantively unreasonable? *United States v. Caballero-Anaya*, No. 19-1034 (brief filed June 28, 2019).

Is this carjacking defendant's above-guideline sentence (360 months, despite a guideline range of 123-138 months) substantively unreasonable? *United States v. Pena*, No. 19-2050 (government brief filed August 29, 2019).

Is this drug defendant's within-guideline sentence substantively unreasonable? *United States v. Jones*, No. 19-5022 (gov't brief filed September 6, 2019).

Is this assault defendant's within-guideline sentence substantively unreasonable? *United States v. Coombs*, No. 19-8036 (brief filed August 2, 2019).

Whether this defendant's above guideline sentence of the statutory maximum was substantively unreasonable because the district court failed to adequately consider the circumstances of the defendant's background. *United States v. Holland*, No. 19-6045 (gov't brief filed September 9, 2019).

L. SORNA Sentencing Issues

M. Three Strikes (18 U.S.C. § 3559(c))

N. Resentencing Issues

O. Sentence Reductions under 18 U.S.C. § 3582(c)(2)

P. Motions under the First Step Act

Did the district court err when it held a defendant ineligible for relief under the First Step Act solely because his guidelines range remains unchanged? And if so, can a district court deny relief under the Act because the guidelines range has not changed, without considering anything else? *United States v. McKinney*, No. 19-3105 (brief filed August 28, 2019).

Did the district court have jurisdiction to rule on a motion under the First Step Act, when the defendant was convicted of a powder cocaine offense but he was held responsible for crack cocaine as relevant conduct? And if so, did the court err by applying § 3582(c)(2) and using drug amounts from the PSR to determine eligibility for relief under the Act? *United States v. Ulloa*, No. 19-6080 (brief filed August 28, 2019).

Did the district court impose a procedurally and substantively unreasonable sentence by refusing to grant the defendant's motion for relief under the First Step Act and refusing to hold a resentencing hearing? *United States v. Mannie*, No. 19-6102 (brief filed August 26, 2019).

Q. Constitutional Issues

1. Fifth Amendment Due Process

2. Sixth Amendment and Hearsay

XXVII. Sixth Amendment

A. Right to Effective Assistance of Counsel

Should the federal habeas court have granted a hearing on this state capital defendant's claim that her trial lawyer's presentation of inaccurate, incriminating DNA evidence, was ineffective assistance

of counsel? *Andrew v. Aldridge*, No. 15-6190 (OA July 27, 2017) (abated pending en banc decision in *Pavatt v. Carpenter*, No. 14-6117 (en banc supplemental brief filed Jan. 9, 2019)).

Was trial counsel ineffective in failing to investigate and call alibi witnesses in this kidnapping/robbery case? *United States v. Ford*, No. 17-1122 (gov't brief filed August 16, 2019).

Was defense counsel ineffective in failing to object to the district court's finding, in 2015, that Oklahoma second-degree burglary qualified as a crime of violence for purposes of a sentencing enhancement under USSG § 2L1.2(b)(1)(A)? *United States v. Rodriguez-Arroyo*, No. 18-6028 (brief filed May 2, 2018).

Was counsel ineffective in failing to object at sentencing that Hobbs Act robbery is not a career-offender predicate, and is this defendant (who the government now concedes is not a career offender) entitled to 28 U.S.C. § 2255 relief for this or other due-process reasons? *United States v. Cuthbertson*, No. 18-1223 (reply brief filed August 9, 2019).

Did law enforcement unlawfully interrogate this defendant without counsel, despite knowing that he was represented at the time? *United States v. Ross*, No. 19-7008 (gov't brief filed August 10, 2019).

B. Substitution of Counsel/Conflicts of Interest/Counsel of Choice

Did the district court insufficiently inquire into a possible breakdown of this defendant's relationship with counsel when the district court refused to conduct a private inquiry, outside the presence of the prosecutor? *United States v. Milhouse*, No. 18-3245 (brief filed May 17, 2019).

C. Self-Incrimination

D. Self-Representation/Waiver of Counsel

Did the district court reversibly err in denying this defendant's invocation of his right to represent himself on a limited remand to reconsider a condition of supervised release that the district court chose not to impose? *United States v. Russian*, No. 18-3173 (reply brief filed May 13, 2019).

Was this state defendant improperly compelled to choose between self-representation and a conflicted counsel? Was his waiver of counsel voluntary? Was it unreasonable for the state trial judge to prohibit him from withdrawing his waiver only a week later? *Wellmon v. CDOC*, No. 19-1002 (reply brief filed August 1, 2019).

E. Confrontation

Did the state court violate this capital defendant's Sixth Amendment right to confrontation when it admitted police reports containing testimonial statements by the deceased several weeks before his death accusing the defendant of trying to kill him? *Andrew v. Aldridge*, No. 15-6190 (OA July 27, 2017) (abated pending en banc decision in *Pavatt v. Carpenter*, No. 14-6117 (en banc supplemental brief filed Jan. 9, 2019)).

F. Jury Verdict

Does Oklahoma's death-penalty law violate the Sixth Amendment, and is this state capital defendant entitled to 28 U.S.C. § 2254 relief? *Mitchell v. Royal*, No. 16-6258 (supplemental reply brief filed Nov. 9, 2018).

G. Compulsory Process

XXVIII. Speedy Trial (statutory/constitutional) & Interstate Agreement on Detainers Act

XXIX. Standards of Review

- A. Waiver**
- B. Forfeiture/Plain Error**
- C. De Novo Review**

XXX. Statutes of Limitations

XXXI. Supervised Release

A. Revocation Issues

Did the district court abuse its discretion when it found that this misdemeanor defendant—who indisputably did not receive the statutorily required notice that the district court had imposed a new condition of release—knowingly violated that condition? *United States v. Pleviak*, No. 18-3236 (reply brief filed Jan. 29, 2019).

Did the district court erroneously revoke this defendant’s supervised release without first considering required statutory and guideline provisions? *United States v. Campbell*, No. 19-3019 (reply brief filed August 27, 2019).

B. Sentencing Issues (either initially or after revocation)

1. Substantive

Is this defendant’s mid-guideline revocation sentence substantively unreasonable? *United States v. Abeita*, No. 19-2051 (gov’t brief filed August 19, 2019).

2. Procedural

Whether the district court erred, plainly or otherwise, under 18 U.S.C. § 3583(h)’s sentencing limits, when sentencing this defendant for a supervised-release violation. *United States v. Branch*, No. 18-3069 (gov’t brief filed August 27, 2018).

Did the district court abuse its discretion by not considering the statutory sentencing factors at this defendant’s sentencing hearing? *United States v. Ward*, No. 18-4111 (brief filed Dec. 19, 2018).

Did the district court erroneously impose a supervised-release-revocation sentence, and a subsequent supervision term, exceeding the statutory maximums? *United States v. Campbell*, No. 19-3019 (reply brief filed August 27, 2019).

Did the district court procedurally err by imposing a mid-guideline revocation sentence without sufficient explanation? *United States v. Abeita*, No. 19-2051 (brief filed June 25, 2019).

Did the district court procedural err in considering a state recidivism enhancement (prohibited under USSG § 7B1.1) to conclude that this defendant's revocation conduct was a Grade B rather than a Grade C violation? *United States v. Rodriguez*, No. 18-1449 (reply brief filed July 26, 2019).

3. Unlawful Delegation of authority

4. Assimilative Crimes Act (ACA) sentences

C. Conditions of Supervised Release

Did the district court plainly err when it imposed a special condition of release obligating this defendant to take any medication prescribed to him, without making required findings? *United States v. Malone*, No. 18-3213 (OA May 9, 2019); *United States v. Lovato*, No. 18-1468 (reply brief filed July 2, 2019).

Must the district court strike from its written judgment a condition of supervised release that was not orally adopted at sentencing? *United States v. Jim*, No. 18-2144 (reply brief filed August 29, 2019).

Was this judge's imposition of a broad probation-officer-triggered risk-notification provision as a condition of supervised release an unlawful delegation of judicial power, as in *Cabra*? *United States v. Harris*, No. 18-1492 (brief filed July 22, 2019).

XXXII. Trial Practice and Evidence Issues

A. Closing Argument

B. Confidential Informants

C. Cumulative Error

If not individually reversible, did the district court's multiple instructional errors amount to cumulative error requiring reversal? *United States v. Gomez-Castro*, No. 18-4090 (brief filed August 12, 2019).

D. Demonstrative Evidence

E. Due Process

F. Eyewitness Identification Testimony

G. Judicial misconduct

H. Jury Instructions

1. Aiding and Abetting

Did the district court commit plain error when it (1) repeatedly instructed the jurors, including the alternate juror, that they could talk about the evidence in the case before the end of the trial, (2) inadequately instructed the jury on aider and abettor liability, and (3) failed to instruct the jury that constructive possession requires an intent to control the item(s) possessed? *United States v. Gomez-Castro*, No. 18-4090 (brief filed August 12, 2019).

2. Burden of Proof

3. Conspiracy

Did the district court plainly err in this drug-conspiracy case when it failed to instruct the jury, in response to a jury question, that an agreement with an undercover government agent is insufficient to support a conspiracy conviction? *United States v. Mendoza-Alarcon*, No. 18-2036 (OA March 20, 2019).

4. Constructive Possession

Did the district court commit plain error when it (1) repeatedly instructed the jurors, including the alternate juror, that they could talk about the evidence in the case before the end of the trial, (2) inadequately instructed the jury on aider and abettor liability, and (3) failed to instruct the jury that constructive possession requires an intent to control the item(s) possessed? *United States v. Gomez-Castro*, No. 18-4090 (brief filed August 12, 2019).

5. Deliberate Avoidance/Ignorance

6. Elements (see statute under which defendant tried)

7. Sentencing Elements

8. Flight

9. Guilt by Association/Guilt of Others

10. Investigative Techniques

11. Knowledge

12. Polygraphs

13. Proof

14. Spoliation

15. Theory of Defense/Affirmative Defense

Did the district court err in refusing to instruct the jury in this drug-conspiracy case that mere proof of a buyer-seller relationship is not enough to establish a conspiracy? *United States v. Eichler*, No. 18-8015 (reply brief filed Dec. 7, 2018).

16. Unanimity

17. Voluntary Intoxication

18. Witness Cautionary Instructions

I. Jury Questions

J. Mistrial

K. Prior Convictions

L. Prosecutorial Misconduct

Did the prosecutors in this state capital trial violate *Brady* when they concealed a sentencing benefit they engineered for a witness who claimed that the defendant had confessed to the crime while in jail? *Andrew v. Aldridge*, No. 15-6190 (OA July 27, 2017) (abated pending en banc decision in *Pavatt v. Carpenter*, No. 14-6117 (en banc supplemental brief filed Jan. 9, 2019)).

Did the prosecutors in this state capital trial violate the defendant’s right to fundamental fairness when they falsely suggested in closing that her daughter’s emotional breakdown during her penalty-phase testimony was evidence that she was not opposed to her mother’s execution? *Andrew v. Aldridge*, No. 15-6190 (OA July 27, 2017) (abated pending en banc decision in *Pavatt v. Carpenter*, No. 14-6117 (en banc supplemental brief filed Jan. 9, 2019)).

Did the prosecutor in this case commit reversible misconduct by misstating the evidence? *United States v. Hammers*, No. 18-7051 (reply brief filed June 19, 2019).

Did the prosecutor commit reversible misconduct while cross-examining this defendant? *United States v. Wyatt*, No. 18-1135 (reply brief filed July 25, 2019).

M. Right to be Present

N. Right to Present Defense

Did the state court deny this capital defendant’s right to present a defense when it excluded several defense witnesses as a sanction for perceived discovery infractions? *Andrew v. Aldridge*, No. 15-6190 (OA July 27, 2017) (abated pending en banc decision in *Pavatt v. Carpenter*, No. 14-6117 (en banc supplemental brief filed Jan. 9, 2019)).

O. Rule 106 (rule of completeness)

P. Rules 401, 402, 403 (relevance & undue prejudice)

Did the district court plainly err in excluding a witness’s statements that the defendant thought he would get life in prison if he had a gun—relevant to his intent not to possess a gun? *United States v. Manning*, No. 17-8084 (OA Sept. 27, 2018).

Did the district court erroneously admit irrelevant, prejudicial, hearsay evidence of drug sales that predated this defendant’s alleged involvement in the charged drug conspiracy, in violation of FRE 401, 402, 403, 602, and 801? *United States v. Duran*, No. 18-1062 (OA March 19, 2019).

Did the district court erroneously exclude as irrelevant evidence proffered by this fraud defendant in support of his mistake defense? *United States v. Brewington*, No. 18-1357 (supplemental brief filed August 28, 2019).

Q. Rule 404(b)

Did the district court erroneously admit FRE 404(b) evidence of cannabis sales and use in this methamphetamine-conspiracy case, especially absent a limiting instruction? *United States v. Eichler*, No. 18-8015 (reply brief filed Dec. 7, 2018).

Did the district court abuse its discretion in this DUI-second-degree-murder case by admitting 404(b) evidence that portrayed the defendant as a person with a propensity for callousness and driving drunk? *United States v. Merritt*, No. 18-1146 (OA May 9, 2019).

Did the district court err in this murder/self-defense case when it excluded evidence that the decedent was under the influence of methamphetamine at the time of the killing? *United States v. Tony*, No. 18-2182 (reply brief filed September 3, 2019).

R. Rules 412, 413 & 414 (Sexual Assault Evidence)

Did the district court abuse its discretion by excluding evidence proffered in this sexual assault case under FRE 412 relevant to show an alternate source for the complainant's injuries? *United States v. Russell*, No. 18-2174 (gov't brief filed July 1, 2019).

S. Rules 601-615 (Witnesses)

T. Rules 701-706 (Opinions and Expert Testimony)

Did the district court abuse its discretion in this drug case by admitting a case agent's subjective belief in the defendant's guilt, and "expert" testimony translating recorded phone calls, in violation of FRE 701 and 702? *United States v. Duran*, No. 18-1062 (OA March 19, 2019).

Did the district court plainly err when it admitted "expert" testimony in this drug case purporting to interpret language used in texts and recorded telephone calls? *United States v. Smith*, No. 18-4149 (brief filed April 15, 2019).

Did the district court plainly err under FRE 702 when it admitted expert testimony from a lay witness interpreting text messages between this drug defendant and another party? *United States v. Smith*, No. 18-4149 (brief filed May 22, 2019).

U. Rules 801-807 (hearsay)

Did the district court err in excluding statements against penal interest, proffered under Fed. R. Evid. 804, that a third party made, admitting that the gun in this gun case was his? *United States v. Manning*, No. 17-8084 (OA Sept. 27, 2018).

Did the district court erroneously exclude as hearsay evidence proffered by this defendant for a non-hearsay purpose? *United States v. Brewington*, No. 18-1357 (supplemental brief filed August 28, 2019).

Did the district court erroneously exclude as hearsay this defendant's alleged coconspirator's suicide note, in which the coconspirator took sole responsibility for the crimes, thereby exonerating the defendant? *United States v. Hammers*, No. 18-7051 (reply brief filed June 19, 2019).

Did the district court erroneously exclude as hearsay cross-examination about statements that had already been admitted into evidence? *United States v. Wagner*, No. 19-3068 (gov't brief filed August 26, 2019).

Did the district court erroneously admit an entire 911 call at trial as a present sense impression? *United States v. Lovato*, No. 18-1468 (reply brief filed July 2, 2019).

V. Rule 901 (authentication)

W. Rule 1002 (Best Evidence Rule)

Did the district court violate the best-evidence rule (FRE 1002) by admitting (partial) transcripts of Spanish language audiotapes without admitting the tapes themselves; and did the district court plainly err when it instructed the jury that the translations (which attributed certain statements to the defendant) were accurate and not to be rejected? *United States v. Chavez*, No. 17-8096 (OA March 20, 2019).

X. Rule 1006 (Summaries)

Y. Surrebuttal

Z. Voir Dire

Did the district court err when it informed the jury pool during voir dire in this murder case that the death penalty was not on the table? *United States v. Tony*, No. 18-2182 (reply brief filed September 3, 2019).

XXXIII. Vagueness

XXXIV. Wiretap Issues (18 U.S.C. § 2510-2522)

Recently Added Cases

(most recent to least recent)

- Urquiva v. Allbaugh*, No. 19-5066 (brief filed September 6, 2019) (28 U.S.C. § 2254).
- United States v. Orozco-Sanchez*, No. 19-2009 (brief filed September 6, 2019) (28 U.S.C. § 2255).
- United States v. Myers*, No. 18-5109 (brief filed September 6, 2019) (28 U.S.C. § 2255).
- United States v. McKinney*, No. 19-3105 (brief filed August 28, 2019) (First Step Act).
- United States v. Ulloa*, No. 19-6080 (brief filed August 28, 2019) (First Step Act).
- United States v. Mannie*, No. 19-6102 (brief filed August 26, 2019) (First Step Act).
- United States v. Wilfong*, No. 18-6219 (brief filed August 30, 2019) (pleas: breach).
- United States v. Platt*, No. 19-6061 (brief filed August 28, 2019) (USSG 4B1.1 and 4B1.2)
- United States v. Madrid*, No. 19-2060 (brief filed August 27, 2019) (USSG § 3B1.2, sentencing: substantive reasonableness).
- United States v. Gebrmann*, No. 19-1145 (brief filed August 27, 2019) (USSG § 3B1.1)
- United States v. Orozco-Rivas*, No. 19-6074 (brief filed August 26, 2019) (Fourth Amendment: traffic stops).
- United States v. Lovelace*, No. 19-1100 (brief filed August 26, 2019) (USSG §§ 4B1.1 and 4B1.2).
- United States v. Cantu*, No. 19-6043 (brief filed August 23, 2019) (sentencing: ACCA, 18 U.S.C. 924(e)).
- United States v. Mayville*, No. 19-4008 (brief filed August 23, 2019) (Fourth Amendment: traffic stops).
- United States v. Martinez*, No. 19-2046 (brief filed August 21, 2019) (sentencing: ACCA, 18 U.S.C. 924(e)).
- United States v. Lira-Ramirez*, No. 19-3057 (brief filed August 20, 2019) (8 U.S.C. § 1326).
- United States v. Chatman*, No. 19-5038 (brief filed August 15, 2019) (18 U.S.C. § 1512).
- United States v. Woodard*, No. 19-5009 (brief filed August 12, 2019) (Fifth Amendment: due process).
- United States v. Stein*, No. 19-3043 (brief filed August 12, 2019) (search warrant issues; good faith exception).
- United States v. Gomez-Castro*, No. 18-4090 (brief filed August 12, 2019) (jury instructions: aiding and abetting, constructive possession; cumulative error; Rule 33 (new trial); USSG § 3C1.1).
- United States v. Velasquez*, No. 17-2150 (brief filed August 10, 2019) (sentencing: ACCA, 18 U.S.C. 924(e)).