

ISSUES PENDING IN THE TENTH CIRCUIT

COMPILED BY THE KANSAS FEDERAL PUBLIC DEFENDER



Updated December 3, 2018

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.

Please direct all inquiries to Dan Hansmeier at daniel_hansmeier@fd.org or Paige Nichols at paige_nichols@fd.org.

Table of Contents

I. Appeals 1

II. Competence 1

III. Confessions 1

IV. Continuances 1

V. Discovery 1

VI. Double Jeopardy 1

VII. Eighth Amendment and Capital Issues 1

VIII. Ex Post Facto Issues 2

IX. First Amendment 2

X. Forfeiture 2

XI. Fourth Amendment Issues 2

 A. Arrest Warrant 2

 B. Attenuation (intervening circumstances) 2

 C. Consent 2

 D. Excessive Force 2

 E. Fruit of the Poisonous Tree 2

 F. Good Faith Exception 2

 G. Government Actor 3

 H. Hearing Issues 3

 I. Inventory Searches 3

 J. Knock and Talk 3

 K. Plain View Doctrine 3

 L. Protective Sweeps 3

 M. Scope of Warrantless Search 3

 N. Search Incident to Arrest 3

 O. Search Warrant Issues (including *Franks v. Delaware* issues) 3

 P. Standing (reasonable expectation of privacy) 3

 Q. *Terry* Stops: Initial Detention 3

 R. *Terry*: Frisk 3

 S. Traffic Stops 3

 T. Warrantless Arrests 4

 U. Warrantless Searches & Seizures 4

XII. Fourteenth Amendment: Due Process	4
XIII.Fifth Amendment: Due Process	4
XIV.Fifth Amendment: Confessions & <i>Miranda</i>	5
XV. Habeas Issues	5
A. 28 U.S.C. § 2241	5
B. 28 U.S.C. § 2254	5
C. 28 U.S.C. § 2255	7
D. Fed. R. Civ. P. 60(b).....	8
XVI.Immigration Issues	8
XVII. Indictment Issues	8
A. Amendments.....	8
B. Duplicity	8
C. Grand Jury Issues	8
D. Sufficiency of the Indictment (Sixth Amendment)	8
E. Variance	9
XVIII. Jurisdictional Issues.....	9
XIX.Motion Practice	9
XX. Offenses	9
A. 8 U.S.C. § 1253 (removal-related offenses)	9
B. 8 U.S.C. § 1326 (illegal reentry)	9
C. 16 U.S.C. § 3372, et al. (illegally taking fish and wildlife)	9
D. 18 U.S.C. § 2 (aiding and abetting)	9
E. 18 U.S.C. § 111 (assaulting, resisting, impeding an officer or employee).....	9
F. 18 U.S.C. § 242 (civil-rights violation).....	9
G. 18 U.S.C. § 287 (false claims against the government)	9
H. 18 U.S.C. § 371 (conspiracy).....	9
I. 18 U.S.C. § 666 (bribery)	9
J. 18 U.S.C. § 842 (unlawful distribution/possession of explosives).....	9
K. 18 U.S.C. § 843 (using a communication device)	9
L. 18 U.S.C. § 844 (arson).....	9
M. 18 U.S.C. § 875 (interstate communications)	9
N. 18 U.S.C. § 876 (mailing threatening communications)	9
O. 18 U.S.C. § 922(d) (disposal to a prohibited person)	9

P.	18 U.S.C. § 922(g) (prohibited person in possession)	9
Q.	18 U.S.C. § 924(c) (Possession/Use of Firearm during drug trafficking offense)	9
R.	18 U.S.C. § 1001 (false statements)	10
S.	18 U.S.C. § 1005 (false bank entries)	11
T.	18 U.S.C. § 1028 (identity-document fraud)	11
U.	18 U.S.C. § 1028A (identity theft)	11
V.	18 U.S.C. § 1041 (false statements to a bank)	11
W.	18 U.S.C. § 1201 (kidnapping)	11
X.	18 U.S.C. § 1341 (mail fraud)	11
Y.	18 U.S.C. § 1343 (wire fraud)	11
Z.	18 U.S.C. § 1344 (bank fraud)	11
AA.	18 U.S.C. § 1347 (health-care fraud)	11
BB.	18 U.S.C. § 1361 (degradation of government property)	11
CC.	18 U.S.C. § 1512 (witness tampering)	11
DD.	18 U.S.C. § 1513 (obstruction of justice)	11
EE.	18 U.S.C. § 1591 (sex trafficking of children)	11
FF.	18 U.S.C. § 1951 (Hobbs Act robbery)	11
GG.	18 U.S.C. § 1956 (money laundering)	11
HH.	18 U.S.C. §§ 2241-2245 (sexual abuse)	11
II.	18 U.S.C. § 2250 (SORNA: failure to register); 42 U.S.C. § 16911	11
JJ.	18 U.S.C. § 2251 (sexual exploitation/production of child pornography)	12
KK.	18 U.S.C. § 2422 (enticement to travel to engage in prostitution)	12
LL.	18 U.S.C. § 2423 (transportation of minors)	12
MM.	18 U.S.C. § 1591 (child sex trafficking)	12
NN.	18 U.S.C. § 2252A (receiving/distributing child pornography)	12
OO.	21 U.S.C. § 841 (drug trafficking)	12
PP.	21 U.S.C. § 846 (drug conspiracy)	12
QQ.	21 U.S.C. § 856 (drug-involved premises)	13
RR.	26 U.S.C. § 5861 (firearms offenses)	13
SS.	26 U.S.C. § 7201 (tax evasion)	13
TT.	26 U.S.C. § 7212	13
UU.	28 U.S.C. § 455 (recusal)	13
VV.	42 U.S.C. § 3631 (interfering with housing rights)	13

WW. 49 U.S.C. § 46504 (intimidating a flight attendant)	13
XXI. Pleas	13
A. Acceptance of Plea	13
B. Appeal Waiver	13
C. Breach	13
D. Rejection of Plea Agreement	14
E. Withdrawal of Plea	14
XXII. Restitution (18 U.S.C. § 3663, 3664, <i>et al.</i>)	14
XXIII. Rules of Criminal Procedure	14
A. Rule 8 (Joinder/Severance)	14
B. Rule 11 (pleas) (see main Pleas section)	14
C. Rule 12 (motions)	14
D. Rule 32 (sentencing procedures)	14
E. Rule 33 (new trial)	14
F. Rule 41 (search & seizure)	14
XXIV. Scope of Remand/Mandate Rule/Other Remand Issues	14
XXV. Second Amendment Issues	14
XXVI. Sentencing	14
A. Allocution	14
B. Apprendi	14
C. Armed Career Criminal Act (18 U.S.C. 924(e))	14
D. Burden of Proof	15
E. Capital Sentencing	15
F. Commitment in Lieu of Imprisonment (18 U.S.C. § 4244)	15
G. Departures and Variances	15
H. Fines & Assessments	15
I. Guidelines Sections	15
1. USSG § 1B1.2	16
2. USSG § 1B1.3 (relevant conduct)	16
3. USSG § 2A2.2	16
a) subsection (b)(2)(B) (use of dangerous weapon)	16
4. USSG § 2A3.5 (SORNA)	16
5. USSG § 2A4.1 (bodily injury)	16

6.	USSG § 2A6.1	16
a)	subsection (b)(2)(A) (more than 2 threats)	16
7.	USSG § 2B1.1.....	16
8.	USSG § 2B3.1 (robbery).....	17
9.	USSG § 2C1.1.....	17
10.	USSG § 2D1.1 (drugs).....	17
11.	USSG § 2G1.1 (sex trafficking)	17
12.	USSG § 2G2.2 (child pornography).....	17
13.	USSG § 2K2.1	17
14.	USSG § 2K2.2.....	18
15.	USSG § 2L1.2 (immigration offenses).....	18
16.	USSG § 2T1.1 (tax loss).....	18
17.	USSG § 2T1.4 (sophisticated means—tax offense).....	18
18.	USSG § 2Q2.1	18
19.	USSG § 3A1.1 (hate crime/vulnerable victim).....	18
20.	USSG § 3A1.3	18
21.	USSG § 3B1.1.....	18
22.	USSG § 3B1.2 (mitigating role).....	18
23.	USSG § 3B1.3 (abuse of trust).....	18
24.	USSG § 3C1.1 (obstruction).....	18
25.	USSG § 3C1.2 (reckless endangerment during flight)	19
26.	USSG § 3D1.2-1.5 (multiple counts)	19
27.	USSG § 3E1.1 (acceptance of responsibility)	19
28.	USSG § 4A1.1	19
29.	USSG § 4A1.2	19
30.	USSG § 4A1.3 (criminal-history departures)	19
31.	USSG §§ 4B1.1, 4B1.2 (crime of violence; controlled substance offense).....	19
32.	USSG § 4B1.5.....	20
33.	USSG § 5C1.2 (safety valve).....	20
34.	USSG § 5G1.3	20
35.	USSG § 5K1.1	21
36.	USSG § 5K2.14.....	21
37.	USSG § 5G1.2(d)	21

J. Mandatory Minimums and Maximums	21
K. Reasonableness	21
1. Procedural	21
2. Substantive	22
L. SORNA Sentencing Issues	23
M. Three Strikes (18 U.S.C. § 3559(c)).....	23
N. Resentencing Issues	23
O. Sentence Reductions under 18 U.S.C. § 3582(c)(2).....	23
P. Constitutional Issues	23
1. Fifth Amendment Due Process	23
2. Sixth Amendment and Hearsay	23
XXVII. Sixth Amendment	23
A. Right to Effective Assistance of Counsel	23
B. Substitution of Counsel/Conflicts of Interest/Counsel of Choice	24
C. Self-Incrimination.....	24
D. Self-Representation/Waiver of Counsel	24
E. Confrontation	24
F. Jury Verdict	24
G. Compulsory Process	24
XXVIII. Speedy Trial (statutory/constitutional) & Interstate Agreement on Detainers Act.....	25
XXIX. Standards of Review	25
A. Waiver	25
B. Forfeiture/Plain Error.....	25
C. De Novo Review.....	25
XXX. Statutes of Limitations.....	25
XXXI. Supervised Release	25
A. Revocation Issues.....	25
B. Sentencing Issues (either initially or after revocation)	25
1. Substantive.....	25
2. Procedural.....	26
3. Unlawful Delegation of authority.....	26
4. Assimilative Crimes Act (ACA) sentences	26
C. Conditions of Supervised Release.....	26

XXXII. Trial Practice and Evidence Issues	26
A. Closing Argument	26
B. Confidential Informants	26
C. Cumulative Error.....	26
D. Demonstrative Evidence.....	26
E. Due Process	26
F. Eyewitness Identification Testimony	26
G. Judicial misconduct	26
H. Jury Instructions	26
1. Aiding and Abetting	26
2. Burden of Proof.....	27
3. Conspiracy.....	27
4. Constructive Possession	27
5. Deliberate Avoidance/Ignorance	27
6. Elements (see also statute under which defendant tried).....	27
7. Sentencing Elements	27
8. Flight.....	27
9. Guilt by Association/Guilt of Others	27
10. Investigative Techniques.....	27
11. Knowledge	27
12. Polygraphs.....	27
13. Proof.....	27
14. Spoliation	27
15. Theory of Defense/Affirmative Defense	27
16. Unanimity.....	27
17. Voluntary Intoxication	27
18. Witness Cautionary Instructions.....	27
I. Jury Questions	27
J. Mistrial	27
K. Prior Convictions	28
L. Prosecutorial Misconduct.....	28
M. Right to be Present.....	28
N. Right to Present Defense	28

O. Rule 106 (rule of completeness).....	29
P. Rules 401, 402, 403 (relevance & undue prejudice)	29
Q. Rule 404(b)	30
R. Rules 412, 413 & 414 (Sexual Assault Evidence)	30
S. Rules 601-615 (Witnesses)	30
T. Rules 701-706 (Opinions and Expert Testimony).....	30
U. Rules 801-807 (hearsay).....	31
V. Rule 901 (authentication)	31
W. Rule 1002 (Best Evidence Rule).....	31
X. Rule 1006 (Summaries).....	31
Y. Surrebuttal	31
Z. Voir Dire.....	31
XXXIII. Vagueness.....	31
XXXIV. Wiretap Issues (18 U.S.C. § 2510-2522)	31

I. Appeals

Is this defendant's 28 U.S.C. § 2255 appeal moot, given the expiration of the defendant's prison sentence (though not his term of supervised release)? *United States v. Brigman*, No. 17-3176 (supplemental jurisdictional brief filed Oct. 31, 2018).

II. Competence

III. Confessions

IV. Continuances

Should the district court have continued this trial after it blocked the defendant's theory of defense by announcing, on the first day of trial, that it would not give an anticipated jury instruction? *United States v. Glaub*, No. 17-1182 (OA March 22, 2018).

Did the district court abuse its discretion when it refused to continue this defendant's sentencing hearing? *United States v. McClafin*, No. 18-1217 (brief filed Nov. 28, 2018).

V. Discovery

Did the magistrate err in this federal misdemeanor shoplifting case by precluding the defendant from presenting a mental-health expert at trial as a discovery-violation sanction? *United States v. Paup*, No. 18-1114 (gov't brief filed Nov. 27, 2018).

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 (gov't brief filed Nov. 29, 2018).

VII. Eighth Amendment and Capital Issues

Are Oklahoma's jury instructions defining mitigating circumstances unconstitutionally limiting? *Simpson v. Royal*, No. 16-6191 (OA Nov. 16, 2017).

Did the death sentence in this case rest on an unreasonable and unconstitutional determination that the murder was heinous, atrocious, and cruel? *Simpson v. Royal*, No. 16-6191 (OA Nov. 16, 2017).

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).

After the judge in this Oklahoma capital case—who was also serving as sentencer—excluded a jail snitch's testimony as inadmissible, did he violate the defendant's Eighth Amendment and Due Process rights by deliberately exposing himself to the details of the testimony (asking the state, *after* excluding the evidence, to make an offer of proof)? *Bush v. Royal*, No. 16-6318 (reply brief filed Sept. 12, 2018).

Did the judge in this Oklahoma capital case commit constitutional error by admitting victim-impact evidence in violation of Supreme Court precedent? *Bush v. Royal*, No. 16-6318 (reply brief filed Sept. 12, 2018).

Did cumulative error violate this Oklahoma capital defendant's Eighth Amendment and due-process rights? *Bush v. Royal*, No. 16-6318 (reply brief filed Sept. 12, 2018).

VIII. Ex Post Facto Issues

IX. First Amendment

Were this defendant's letters to the USDA asking it to pay his private debts protected speech, and should the district court have dismissed this false-claims prosecution, or acquitted the defendant, or instructed the jury on the defendant's First Amendment defense? *United States v. Glaub*, No. 17-1182 (OA March 22, 2018).

X. Forfeiture

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 (gov't brief filed Nov. 30, 2018).

A. Arrest Warrant

B. Attenuation (intervening circumstances)

Did the district court err in holding that the discovery of an arrest warrant for the defendant *after* law-enforcement's discovery of evidence was an "intervening circumstance" sufficient to purge the taint of the officer's unlawful conduct? *United States v. Gaines*, No. 17-3270 (OA Jan. 23, 2019).

C. Consent

D. Excessive Force

E. Fruit of the Poisonous Tree

F. Good Faith Exception

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).

Did the district court err when it refused, on good-faith grounds, to suppress the fruit of an unconstitutional search? *United States v. Cookson*, Nos. 18-3070, 18-3071 (brief filed Oct. 31, 2018).

G. Government Actor

H. Hearing Issues

I. Inventory Searches

J. Knock and Talk

K. Plain View Doctrine

Did the seizure of this defendant's cell phone fall within the plain-view doctrine under the facts of this case, and, if not, did the government establish inevitable discovery? *United States v. Blackburn*, No. 17-2141 (OA July 27, 2018).

L. Protective Sweeps

M. Scope of Warrantless Search

N. Search Incident to Arrest

Was law enforcement's search of this defendant's purse a proper search incident to arrest? *United States v. Knapp*, No. 18-8031 (OA Jan. 23, 2019).

O. Search Warrant Issues (including *Franks v. Delaware* issues)

Was this computer-fraud search warrant a pretext to search for child pornography; did the agents exceed the scope of the warrant (as the district court found) when they expanded their search after finding child pornography; did a second warrant purge the taint of the foregoing illegality; and did the district court err in denying suppression on good-faith grounds? *United States v. Loera*, No. 17-2180 (OA Sept. 25, 2018).

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 holding that the challenged law-enforcement encounter in this case was consensual, and not a seizure for Fourth Amendment purposes? *United States v. Gaines*, No. 17-3270 (OA Jan. 23, 2019).

Did the district court err when it granted this defendant's motion to suppress, taking race and other factors into account to find an unlawful seizure as opposed to a consensual encounter? *United States v. Easley*, No. 18-2020 (OA Nov. 16, 2018) (gov't appeal).

R. *Terry*: Frisk

Did law enforcement unlawfully retrieve and further inspect a small container of pills during a *Terry* frisk of this defendant? *United States v. Phommaseng*, No. 17-3225, 17-3226, 17-3227 (OA Sept. 27, 2018).

S. Traffic Stops

Was this traffic stop—not for any traffic violation, but to see if the occupants were the people sought in a bank robbery—supported by reasonable suspicion? *United States v. Martinez*, No. 17-4131 (OA May 16, 2018).

Was this traffic stop (in the defendant’s own driveway) unlawfully prolonged for purposes of a dog sniff? *United States v. Phommaseng*, No. 17-3225, 17-3226, 17-3227 (OA Sept. 27, 2018).

Was this traffic stop unlawfully prolonged, thereby tainting the driver’s consent to search the car? *United States v. Torres*, No. 18-2026 (OA Jan. 24, 2019).

Did the district court err in finding that this defendant/driver pulled over voluntarily in response to an officer’s emergency lights, and that his subsequent encounter with law enforcement was therefore consensual? And was there reasonable suspicion for this stop? *United States v. Milne*, No. 18-2037 (OA Nov. 16, 2018).

Did a bare report that this driver had marijuana in his car give law enforcement reasonable suspicion to stop the car? And did law enforcement thereafter credibly develop sufficient probable cause to search the car? *United States v. Bullcoming*, No. 18-6083 (reply brief filed Nov. 16, 2018).

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 (brief filed Nov. 30, 2018).

T. Warrantless Arrests

Did officers have probable cause to arrest this defendant—by all evidence unconscious on the stoop of a restaurant—for lurking with criminal intent? *United States v. McKnight*, No. 18-2143 (brief filed Nov. 26, 2018).

U. Warrantless Searches & Seizures

Did a warrantless dog sniff of a car parked within the curtilage of the defendant’s home violate the Fourth Amendment? *United States v. Phommaseng*, No. 17-3225, 17-3226, 17-3227 (OA Sept. 27, 2018).

Did the district court err in relying on this defendant’s Colorado parole agreement to deny (without a hearing) his motion to suppress the fruit of a warrantless search by a federal agent of the defendant’s location via the Colorado Department of Corrections’ GPS database? *United States v. Mathews*, No. 18-1215 (brief filed Nov. 21, 2018).

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).

XIII. Fifth Amendment: Due Process

Were the two counts charged in this case under 18 U.S.C. §§ 2422(b) and 2251 (production of pornography and enticement to travel) multiplicitous? *United States v. Isabella*, No. 17-1197 (OA Nov. 16, 2018).

Did the evidence and jury instructions in this assault case constructively amend the indictment? And if so, was this amendment structural error? *United States v. Murray*, No. 17-1400 (OA Sept. 25, 2018).

Did the district court properly order this defendant to submit to involuntary medication to achieve competency? *United States v. Osborn*, No. 18-4009 (OA Sept. 27, 2018).

Did the district court erroneously admit identification testimony resulting from an unduly suggestive photo lineup? *United States v. Wofford*, No. 18-5029 (gov't brief filed Sept. 17, 2018).

Did this defendant waive his vindictive prosecution claim by failing to file a timely Rule 12 motion to dismiss, and should the district court have dismissed the indictment on vindictive-prosecution grounds? *United States v. Bowline*, No. 17-7080 (OA Nov. 14, 2018).

Are this defendant's tax-evasion and bankruptcy-fraud convictions multiplicitous? *United States v. Yurek*, No. 18-1134 (brief filed Oct. 5, 2018).

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).

Did this defendant knowingly and intelligently waive his *Miranda* rights? *United States v. Blackburn*, No. 17-2141 (OA July 27, 2018).

Did the district court err in finding this defendant's confession voluntary? *United States v. Ravenell*, No. 18-2091 (brief filed Oct. 5, 2018).

XV. Habeas Issues

A. 28 U.S.C. § 2241

B. 28 U.S.C. § 2254

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).

Habeas courts have broad discretion to order an adequate remedy for constitutional violations. Here the district court vacated this defendant's state death sentence. But the district court refused to consider the defendant's argument that the state should not be allowed to seek another death sentence, because at least 18 of this elderly defendant's mitigating witnesses had died since the original trial. Did the district court abuse its discretion? *Eaton v. Wilson*, Nos. 15-8013, 16-8086 (OA Sept. 27, 2018).

The federal district court vacated this defendant's state death sentence and directed that the defendant be appointed counsel and resentenced within 120 days. The state took no action by that

deadline. Did the state waive its right to re-seek the death penalty in this case? *Eaton v. Wilson*, Nos. 15-8013, 16-8086 (OA Sept. 27, 2018).

Should the district court have granted discovery and an evidentiary hearing on this capital defendant's *Brady* and IAC claims? *Goode v. Royal*, No. 16-5124 (OA March 20, 2018).

Should the district court have granted § 2254 relief to this state kidnapping defendant, who was convicted despite the fact that the district court's jury instructions omitted an essential element of the crime, an error to which trial counsel ineffectively failed to object? *Hagos v. Raemisch*, No. 17-1076 (brief filed July 17, 2017).

Should the district court have granted relief on this state capital defendant's claims of ineffective assistance of counsel and prosecutorial misconduct? *Cuesta-Rodriguez v. Royal*, No. 16-6315 (OA May 17, 2018).

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 habeas relief on this state capital defendant's claims that his trial and appellate counsel were ineffective? *Johnson v. Royal*, No. 16-5165 (OA Nov. 13, 2018).

Are this state defendant's IAC claims procedurally defaulted, and, if not, should the district court hold an evidentiary hearing to decide those claims? *Smith v. Allbaugh*, No. 17-5095 (OA Sept. 26, 2018).

Was this state capital defendant (1) deprived of his right to a fair trial and to present a defense by erroneous voluntary intoxication instructions, and (2) deprived of effective assistance of counsel, by counsel's failure to object to the instructions and failure to adequately prepare the expert witness in support of his voluntary intoxication defense; and should the district court have held an evidentiary hearing on these 28 U.S.C. § 2254 claims? *Malone v. Royal*, No. 17-6027 (OA Sept. 25).

Did the district court erroneously grant 28 U.S.C. § 2254 relief in this state first-degree assault and aggravated-robbery case based on ineffective assistance of counsel and a violation of the defendant's right to be present (with respect to a note from the jury), and did the district court further abuse its discretion by forever barring retrial after 90 days? *Hobdy v. Raemisch*, No. 18-1047 (state's appeal; OA Jan. 24, 2019).

Are this defendant's ineffective-assistance-of-counsel claims procedurally defaulted, and did the district court otherwise erroneously deny a hearing and 28 U.S.C. § 2254 relief? *Duran v. Archuleta*, No. 17-1321 (reply brief filed May 14, 2018).

Did the district court err when it granted this state capital murder defendant a stay and abeyance in his 28 U.S.C. § 2254 action? *Kell v. Benzion*, No. 17-4191 (reply brief filed July 5, 2018) (state's appeal).

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 (supplemental reply brief filed Nov. 13, 2018).

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 state second-degree-murder defendant entitled to a certificate of appealability and 28 U.S.C. § 2254 relief (or at least a hearing) on his ineffective-assistance-of-counsel claims (failure to impeach/present evidence; failure to request instruction on lesser offense)? *Nazario v. Allbaugh*, No. 18-6086 (reply brief filed Oct. 29, 2018).

Is this Oklahoma capital defendant entitled to 28 U.S.C. § 2254 relief on grounds of intellectual disability, ineffective assistance of counsel, and instructional error? *Smith v. Carpenter*, No. 17-6184 (state's brief filed Oct. 1, 2018).

Is this Colorado sexual-abuse defendant entitled to 28 U.S.C. § 2254 relief on his claim that he was convicted based on perjured testimony (by the teenage complaint, who recanted a year after trial)? *Farrar v. Raemisch*, No. 18-1005 (state's brief filed Nov. 13, 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 (state's brief filed Nov. 8, 2018).

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? *Whiteley v. Farris*, No. 18-6085 (brief filed Sept. 14, 2018).

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 (state's brief filed Nov. 20, 2018).

Whether this Oklahoma capital defendant is entitled to 28 U.S.C. § 2254 relief, or at least a hearing, on his claims of ineffective assistance of counsel, prosecutorial misconduct, and evidentiary error. *Harmon v. Carpenter*, No. 16-6360 (OA Nov. 14, 2018).

En Banc: Whether this Oklahoma capital defendant is entitled to 28 U.S.C. § 2254 relief based on his challenges to Oklahoma's "heinous, atrocious, or cruel" aggravating factor. *Pavatt v. Carpenter*, No. 14-6117 (state's en banc supplemental brief filed Nov. 16, 2018).

Is this Colorado defendant entitled to a certificate of appealability and 28 U.S.C. § 2254 relief on grounds that his lawyer failed to fully communicate a favorable plea offer and deadline for acceptance? *Baertschy v. Raemisch*, No. 18-1252 (brief filed Nov. 30, 2018).

C. 28 U.S.C. § 2255

Should the district court have held an evidentiary hearing on this defendant's ineffective-assistance-of-counsel claims? *United States v. Bong*, No. 16-3323 (OA Feb. 13, 2018).

Did the district court err when it sua sponte held that this defendant's *Brady* claim was time-barred? *United States v. Bong*, No. 16-3323 (OA Feb. 13, 2018).

Did the district court err when it dismissed this defendant's *Johnson*-based 28 U.S.C. § 2255 petition as impermissibly successive under § 2255(h)(2) after this Court authorized the petition under that subsection? *United States v. Pullen*, No. 17-3194 (OA Sept. 26, 2018).

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 (gov't brief filed Nov. 20, 2013).

Was this petitioner entitled to retroactive application of *Louis* in his 28 U.S.C. § 2255 proceeding? *United States v. Hopkins*, No. 18-2046 (reply brief filed Nov. 8, 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 (gov't brief filed Nov. 29, 2018).

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 (brief filed Sept. 10, 2018).

Is this defendant entitled to 28 U.S.C. § 2255 relief on grounds that his trial counsel failed to object to the district court's attribution of drug quantity to him for sentencing purposes, and failed to consult with him about an appeal, and did the district court apply the wrong law in denying his § 2255 petition? *United States v. Smith*, No. 17-3075 (OA Nov. 13, 2018).

Is this defendant's 28 U.S.C. § 2255 petition timely, on grounds that it was filed within a year after an impediment to filing (the defendant's residence-prison's failure to update its law library) was removed? *United States v. Wiseman*, No. 18-2143 (brief filed Nov. 26, 2018).

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

XVI. Immigration Issues

Did the district court have jurisdiction to order this defendant's removal as part of her criminal case? *Thoung v. United States*, No. 17-3220 (reply brief filed Sept. 5, 2018).

XVII. Indictment Issues

A. Amendments

B. Duplicity

C. Grand Jury Issues

D. Sufficiency of the Indictment (Sixth Amendment)

E. Variance

Did the state court's refusal to instruct the jury consistent with the dates in the bill of particulars result in an unconstitutional variance? *Vreeland v. Zupan*, No. 16-1503 (OA May 17, 2017).

XVIII. Jurisdictional Issues

XIX. Motion Practice

XX. Offenses

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

B. 8 U.S.C. § 1326 (illegal reentry)

Should the district court have dismissed this illegal-reentry charge on grounds that the underlying administrative removal order was invalid? *United States v. Almanza-Vigil*, No. 17-2007 (OA Nov. 16, 2017).

Was this defendant's Colorado drug conviction an aggravated felony under 8 U.S.C. § 1101, thus properly triggering his removal? *United States v. Almanza-Vigil*, No. 17-2007 (OA Nov. 16, 2017).

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)

Was the jury instruction defining "claim" overbroad and inconsistent with Supreme Court precedent? *United States v. Glaub*, No. 17-1182 (OA March 22, 2018).

H. 18 U.S.C. § 371 (conspiracy)

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)

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 (reply brief filed May 21, 2018).

Does *Johnson* invalidate the residual clause of § 924(c), and is a Hobbs Act robbery a crime of violence for purposes of § 924(c)? *United States v. Lopez-Aguilar*, No. 17-2121 (OA Nov. 13, 2018).

Is § 924(c)(3)(B) unconstitutionally vague, and is retaliating against a witness under 18 U.S.C. § 1513 a crime of violence for § 924(c) purposes? *United States v. Bowen*, No. 17-1011 (OA Sept. 27, 2018).

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

Is robbery under 18 U.S.C. § 1951 a crime of violence for 18 U.S.C. § 924(c)(3)(A) purposes? And did the district court improperly direct a verdict when it so instructed the jury? *United States v. Jefferson*, No. 17-3150 (OA Sept. 27, 2018).

Whether forcibly assaulting a federal officer under 18 U.S.C. § 111(a)(1)(b) is a crime of violence for § 924(c) purposes (preserving issue notwithstanding *Kendall*), and whether this defendant is entitled to 28 U.S.C. § 2255 relief. *United States v. Montoya*, No. 17-8044 (brief filed May 7, 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).

Is Hobbs Act robbery a crime of violence for § 924(c) purposes (preserving issue notwithstanding *Melgar-Cabrera*), and is the Supreme Court's grant of a petition for certiorari in *Stokeling* reason to grant these defendants COAs on this question? *United States v. Johnson*, No. 17-3136 (brief filed July 24, 2018); *United States v. Bresbers*, No. 17-3137 (brief filed July 24, 2018); *United States v. Harris*, No. 17-3139 (brief filed July 24, 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).

Is this defendant entitled to 28 U.S.C. § 2255 relief from his 18 U.S.C. § 924(c) conviction on *Johnson* grounds? *United States v. Morgan*, No. 17-1172 (OA Nov. 13, 2018).

Is this defendant entitled to a certificate of appealability and 28 U.S.C. § 2255 relief from his 18 U.S.C. § 924(c) conviction under *Rosemond*? *United States v. Wiseman*, No. 18-2143 (brief filed Nov. 26, 2018).

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

Was the evidence sufficient in this 18 U.S.C. § 1001 false-statements case? *United States v. Williams*, No. 18-1080 (reply brief filed Nov. 15, 2018).

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

Did the district court err when it refused to instruct the jury that materiality is an essential element of making false bank entries? *United States v. Christy*, No. 17-3122 (OA Sept. 27, 2018).

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

U. 18 U.S.C. § 1028A (identity theft)

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

W. 18 U.S.C. § 1201 (kidnapping)

Was the evidence sufficient to support this defendant's kidnapping conviction under 18 U.S.C. § 1201(a)(1) and (2)? *United States v. Aguilar-Banuelos*, No. 18-1133 (gov't brief filed Oct. 23, 2018).

X. 18 U.S.C. § 1341 (mail fraud)

Y. 18 U.S.C. § 1343 (wire fraud)

Z. 18 U.S.C. § 1344 (bank fraud)

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

BB. 18 U.S.C. § 1361 (degradation of government property)

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

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

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

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

Did the district court err when it refused to instruct the jury that "force" means "violent force" in this 18 U.S.C. § 1951 case? *United States v. Jefferson*, No. 17-3150 (OA Sept. 27, 2018).

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

Was the evidence insufficient as a matter of law to sustain this defendant's tax-evasion-based money-laundering convictions? *United States v. Christy*, No. 17-3122 (OA Sept. 27, 2018).

Whether the district court had a sufficient factual basis to accept this defendant's guilty plea to money laundering. *United States v. Gonzales*, No. 18-8017 (OA Jan. 24, 2019).

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

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

Did Congress violate the non-delegation doctrine when it authorized the Attorney General to decide whether or not to apply SORNA retroactively (preserving issue pending *Gundy*)? *United States v. Williams*, No. 18-8053 (gov't brief filed Nov. 20, 2018).

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

Was the evidence sufficient in this case to establish violations of 18 U.S.C. §§ 2422(b) and 2251 (production of pornography and enticement to travel)? Were these two counts multiplicitous? *United States v. Isabella*, No. 17-1197 (OA Nov. 16, 2018).

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

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

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

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

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

Was the government's evidence sufficient to prove that this defendant—who appeared a single time at a drug-conspiracy headquarters and was videotaped counting cash—distributed or aided and abetted the distribution of heroin? *United States v. Arciniega-Zetin*, No. 16-4145 (OA Nov. 14, 2017).

Was the government's evidence of a series of discrete buy-sell agreements sufficient to support the jury's verdict that this defendant conspired to distribute more than 500 grams of methamphetamine? Did the district court properly instruct the jury for purposes of the verdict and sentencing under the statutory mandatory minimum? *United States v. Carter*, No. 18-8014 (gov't brief filed Nov. 9, 2018).

Was the evidence sufficient to sustain this defendant's drug convictions under 21 U.S.C. § 841? *United States v. Duran*, No. 18-1062 (gov't brief filed Nov. 29, 2018).

Was the evidence sufficient to prove quantity in this drug-conspiracy case? *United States v. Eichler*, No. 18-8015 (gov't brief filed Nov. 9, 2018).

Is this defendant's prior Wyoming drug conviction a "felony drug offense" for purposes of conviction and sentencing under 21 U.S.C. § 841(b)(1)(B), and does the categorical approach apply in answering this question? *United States v. Means-Goodman*, No. 18-8037 (brief filed Nov. 5, 2018).

PP.21 U.S.C. § 846 (drug conspiracy)

Was evidence that this defendant had a series of buyer-seller relationships sufficient to prove that he participated in a drug conspiracy? *United States v. Garrison*, No. 18-1053 (reply brief filed August 13, 2018).

Was counsel in this drug-conspiracy case ineffective in failing to request theory-of-defense instructions? *United States v. Garrison*, No. 18-1053 (reply brief filed August 13, 2018).

Was the evidence sufficient to prove both knowledge and quantity in this drug-conspiracy case? *United States v. Milne*, No. 18-2037 (OA Nov. 16, 2018).

Was the evidence sufficient to prove interdependence or a common purpose in this drug-conspiracy case? *United States v. Montijo-Dominguez*, No. 18-2008 (reply brief filed August 29, 2018).

Was the evidence sufficient to prove a shared distribution objective in this drug-conspiracy case? *United States v. Mendoza-Alarcon*, No. 18-2036 (brief filed Nov. 5, 2018).

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

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

Did the district court plainly err when it failed to instruct the jury that an essential element of 26 U.S.C. § 5861(d) is that the defendant knew the weapons at issue had the characteristics of machine guns? *United States v. Bishop*, No. 18-4088 (brief filed Nov. 9, 2018)

SS. 26 U.S.C. § 7201 (tax evasion)

Was the evidence sufficient to convict this tax protestor of tax *evasion* instead of simply failure to pay taxes, and should the district court have instructed the jury on the lesser offense? *United States v. Stubbs*, No. 17-1373 (gov't brief filed Nov. 28, 2018).

Was the evidence sufficient to convict this defendant-wife of committing tax evasion and bankruptcy fraud alongside her husband? *United States v. Yurek*, No. 18-1134 (brief filed Oct. 5, 2018).

Were the jury instructions in this tax-evasion case clearly erroneous? *United States v. Gorrell*, No. 18-5041 (brief filed Nov. 5, 2018).

TT. 26 U.S.C. § 7212

UU. 28 U.S.C. § 455 (recusal)

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

Was the government's evidence sufficient in this housing-rights case to show that this defendant attacked his victim on account of his victim's race (as opposed to his victim's son's race), and did the government's focus on the victim's son's race constructively amend the indictment? *United States v. Porter*, Nos. 18-4081, 18-4099 (gov't brief filed Nov. 26, 2018).

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

XXI. Pleas

Did the district court plainly violate Fed. R. Crim. P. 11(c)(1)(C) by sentencing this drug defendant based on an offense level contrary to that stipulated to by the parties? *United States v. Aragon*, No. 18-1121 (OA Jan. 23, 2019).

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. Garcia*, No. 18-2060 (OA Jan. 24, 2019); *United States v. Finney*, No. 18-3045 (OA Jan. 23, 2019).

B. Appeal Waiver

C. Breach

Did the government's negative comments about a guideline sentence (before formally recommending that same sentence) breach its plea agreement with this unlawful-reentry defendant? *United States v. Rodriguez-Barbosa*, No. 18-1119 (OA Oct. 24, 2018).

D. Rejection of Plea Agreement

E. Withdrawal of Plea

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 (brief filed Oct. 12, 2018).

XXIII. Rules of Criminal Procedure

A. Rule 8 (Joinder/Severance)

Should the district court have severed this defendant's tax-evasion and bankruptcy-fraud trial from that of her husband-codefendant? *United States v. Yurek*, No. 18-1134 (brief filed Oct. 5, 2018).

B. Rule 11 (pleas) (see main Pleas section)

C. Rule 12 (motions)

Whether the district court abused its discretion in refusing to allow this defendant to file an untimely motion to suppress. *United States v. Garrison*, No. 18-1053 (reply brief filed August 13, 2018).

D. Rule 32 (sentencing procedures)

E. Rule 33 (new trial)

Was the district court's finding in this drug case that an AUSA impermissibly threatened a witness clearly erroneous, or did the district court abuse its discretion when it dismissed this indictment with prejudice? *United States v. Orozco*, No. 18-3003 (OA Nov. 14, 2018) (gov't appeal).

F. Rule 41 (search & seizure)

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

XXV. Second Amendment Issues

XXVI. Sentencing

Did the district court abuse its discretion when it denied this defendant's request to continue the sentencing hearing? *United States v. Rubio-Sepulveda*, No. 18-1055 (OA Jan. 23, 2019).

A. Allocution

Was the district court's failure to ask this defendant personally if she wished to allocute plain sentencing error? *United States v. Christy*, No. 17-3122 (OA Sept. 27, 2018).

B. Apprendi

C. Armed Career Criminal Act (18 U.S.C. 924(e))

Is Kansas robbery an ACCA predicate, and should the district court have granted this defendant § 2255 relief? *United States v. Bong*, No. 16-3323 (OA Feb. 13, 2018).

Whether Utah assault by a prisoner is an ACCA predicate, whether the district court misapplied the categorical approach, and whether this defendant is entitled to a certificate of appealability and § 2255 relief. *United States v. Pikyavit*, No. 17-4068 (reply brief filed March 9, 2018).

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

Whether making a false bomb threat under 18 U.S.C. § 844(e) is a violent felony or “involves the use of explosives” for ACCA purposes, and whether this defendant is entitled to § 2255 relief. *United States v. Wilfong*, No. 16-6342 (OA Jan. 16, 2018).

Is New Mexico robbery an ACCA predicate, and is this defendant entitled to a certificate of appealability and § 2255 relief? *United States v. Barela*, No. 17-2165 (brief filed Jan. 18, 2018).

Is Oklahoma assault and battery on a police officer a violent felony for ACCA purposes? *United States v. Johnson*, No. 17-6165, 17-6195 (OA Sept. 25, 2018) (gov’t cross-appeal).

Did the district court improperly deny this defendant 28 U.S.C. § 2255 relief from his 2008 ACCA sentence by finding that the sentence was *not* based on the now-invalidated residual clause? *United States v. Copeland*, No. 17-5125 (OA Jan. 23, 2019).

Whether Tennessee burglary, Oregon first-degree robbery, and Nevada attempted battery are violent felonies for ACCA purposes, and whether this defendant is entitled to 28 U.S.C. § 2255 relief. *United States v. Neely*, No. 17-8087 (OA Jan. 22, 2019).

Is the 1995 version of Oklahoma first-degree robbery a violent felony for ACCA purposes? *United States v. Harbert*, No. 17-6246 (brief filed March 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 (brief filed April 13, 2018).

D. Burden of Proof

E. Capital Sentencing

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

G. Departures and Variances

This defendant was resentenced after winning *Johnson* relief that dramatically reduced his total offense level. Was the district court’s upward variance at resentencing to double the guideline range excessive and unreasonable? *United States v. Richardson*, No. 16-6314 (gov’t brief filed Feb. 15, 2017).

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).

Was the government's testing of only 1 of 12 bundles of marijuana sufficient to establish quantity for relevant-conduct purposes in this drug-conspiracy case? *United States v. Milne*, No. 18-2037 (OA Nov. 16, 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).

Did the district court clearly err in its drug-quantity finding? *United States v. Aragon*, No. 18-1121 (OA Jan. 23, 2019).

3. USSG § 2A2.2

a) subsection (b)(2)(B) (use of dangerous weapon)

Did the district court clearly err when it declined to apply the aggravated-assault guideline at USSG § 2A2.2 based on this defendant's use of a taser to commit the charged crime of interfering with fair housing rights on account of race? *United States v. Porter*, Nos. 18-4081, 18-4099 (gov't brief filed Nov. 26, 2018) (government cross-appeal).

4. USSG § 2A3.5 (SORNA)

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 the fraud enhancement under USSG § 2B1.1(b)(9)(C) for violating a prior judicial or administrative order that was unrelated to this defendant's fraud? *United States v. Iley*, No. 17-1269 (OA March 20, 2018).

Is USSG § 2B1.1 (the fraud guideline) the right guideline for bankruptcy fraud, or is USSG § 2T1.1 (the tax-crimes guideline) the most analogous guideline? *United States v. Yurek*, No. 18-1134 (brief filed Oct. 5, 2018).

Should the district court have calculated loss in this bankruptcy-fraud case as the amount sought to be discharged, or rather the amount of assets concealed, and did the district court clearly err in determining the amount of loss for purposes of USSG § 2B1.1? *United States v. Wendy Yurek*, No. 18-1134 (brief filed Oct. 5, 2018); *United States v. Daryl Yurek*, No. 18-1129 (brief filed Nov. 9, 2018).

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 (brief filed Nov. 28, 2018).

8. USSG § 2B3.1 (robbery)

Did the district court err when it applied a 4-level enhancement for abduction because this bank-robbery defendant told the bank manager to give him access to the bank's vault, and then followed the manager and a teller to the vault? *United States v. Archuleta*, No. 16-1297 (OA May 9, 2017).

Did the district court erroneously enhance this defendant's bank-robbery sentence for possession of a dangerous weapon under USSG § 2B3.1(b)(2)(E)? *United States v. Hall*, No. 18-2022 (OA Nov. 16, 2018).

Did the district court err under USSG § 2B3.1 in applying the five-level enhancement for possessing a "firearm" instead of a three-level enhancement for a "dangerous weapon" given the evidence in this case? *United States v. Smith*, No. 18-8004 (OA Nov. 16, 2018).

9. USSG § 2C1.1

10. USSG § 2D1.1 (drugs)

Did the district court err in enhancing this drug defendant's sentence for maintaining a drug premises under USSG § 2D1.1(b)(12)? *United States v. Lozano*, No. 18-1031 (OA Nov. 14, 2018).

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-Garces*, No. 18-1085 (gov't brief filed Nov. 29, 2018).

Was there a sufficient nexus between the firearms and drugs in this case to support a gun enhancement under USSG § 2D1.1(b)(1)? *United States v. Dominguez-Perez*, No. 18-2063 (brief filed Sept. 24, 2018).

Was there sufficient evidence to support an enhancement for maintaining a drug premises under USSG § 2D1.1(b)(12)? *United States v. Dominguez-Perez*, No. 18-2063 (brief filed Sept. 24, 2018).

Did the district court err in imposing a criminal-livelihood enhancement under USSG § 2D1.1? *United States v. Cortes-Gomez*, No. 18-3052 (brief filed Sept. 26, 2018).

11. USSG § 2G1.1 (sex trafficking)

Did the district court abuse its discretion or plainly err when it imposed a 4-level enhancement for fraud or coercion in this sex-trafficking case under USSG § 2G1.1(b)(1)? *United States v. Sweargin*, No. 18-2111 (brief filed Oct. 29, 2018).

12. USSG § 2G2.2 (child pornography)

13. USSG § 2K2.1

Is Wyoming felony interference with a peace officer a crime of violence for purposes of USSG § 2K2.1(a)(4)(A)? *United States v. Winder*, No. 17-8075 (OA Sept. 27, 2018).

Did the district court erroneously enhance this defendant's sentence under USSG § 2K2.1(b)(6)(B) for using or possessing a firearm in connection with another felony offense based on the mere presence of unidentified laboratory components? *United States v. Morgan*, No. 18-7032 (gov't brief filed Nov. 13, 2018).

14. USSG § 2K2.2

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

16. USSG § 2T1.1 (tax loss)

Did the district court erroneously calculate the amount of income “from criminal activity” that this defendant failed to report under USSG § 2T1.1? *United States v. Stubbs*, No. 17-1373 (gov’t brief filed Nov. 28, 2018).

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

Did the district court erroneously enhance this tax defendant’s sentence for “sophisticated means” under USSG § 2T1.4? *United States v. Stubbs*, No. 17-1373 (gov’t brief filed Nov. 28, 2018).

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 § 3A1.3

21. USSG § 3B1.1

Did the district court err in subjecting this drug defendant to an aggravated-role enhancement under USSG 3B1.1(b)? *United States v. Lozano*, No. 18-1031 (OA Nov. 14, 2018).

Did the district court err in adding 4 levels to this defendant’s guideline calculation for “organizer-leader” instead of just two levels for “manager-supervisor,” under USSG § 3B1.1? *United States v. Rubio-Sepulveda*, No. 18-1055 (OA Jan. 23, 2019).

Did the district court err when it imposed an organizer/leader sentencing enhancement under USSG § 3B1.1(a)? *United States v. Cortes-Gomez*, No. 18-3052 (brief filed Sept. 26, 2018).

Did the district court plainly err when it enhanced this drug defendant’s guidelines calculation for playing a management role under USSG § 3B1.1(c)?

22. USSG § 3B1.2 (mitigating role)

Should the district court have adjusted this defendant’s sentence for her mitigating role under USSG § 3B1.2? *United States v. Yurek*, No. 18-1134 (brief filed Oct. 5, 2018).

23. USSG § 3B1.3 (abuse of trust)

24. USSG § 3C1.1 (obstruction)

Did the district court erroneously add obstruction points under USSG § 3C1.1 based on this defendant’s trial testimony, without specifying what parts of the defendant’s testimony it deemed perjurious? *United States v. Milne*, No. 18-2037 (OA Nov. 16, 2018).

Did the district court erroneously add obstruction points for perjury in this case under USSG § 3C1.1? *United States v. Dominguez-Perez*, No. 18-2063 (brief filed Sept. 24, 2018).

Did the district court erroneously add obstruction points for perjury under USSG § 3C1.1 absent evidence of perjury, and without making the required perjury findings? *United States v. Paup*, No. 18-1114 (gov’t brief filed Nov. 27, 2018).

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 (gov't brief filed Nov. 9, 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 (brief filed Oct. 22, 2018).

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 acceptance of responsibility in this case under USSG § 3E1.1? *United States v. Dominguez-Perez*, No. 18-2063 (brief filed Sept. 24, 2018).

28. USSG § 4A1.1

29. USSG § 4A1.2

Did the district court plainly err when it deemed a state sentence "actually served" for criminal history purposes, despite the fact that the defendant never spent time in state custody (having received credit at his state sentencing for time served in federal custody)? *United States v. Duz yurt*, No. 1039 (OA Jan. 24, 2019).

Did the district court plainly err in computing this defendant's criminal history under USSG § 4A1.2? *United States v. Griffin*, No. 18-7022 (gov't brief filed Nov. 13, 2018).

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

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

Whether Utah second-degree felony aggravated assault is categorically a crime of violence. *United States v. Bettcher*, No. 16-4165 (OA Sept. 28, 2017) (gov't appeal).

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 (brief filed Feb. 1, 2018).

Was this defendant's *Johnson*-based § 2255 timely filed, and is he entitled to § 2255 relief on grounds that New Mexico aggravated battery with a deadly weapon and voluntary manslaughter are not crimes of violence? *United States v. Torres*, No. 17-2128 (brief filed Nov. 1, 2017).

Is Oklahoma use of a vehicle to facilitate intentional discharge of a firearm a crime of violence (and was *Hammons* wrong about this)? *United States v. Johnson*, No. 17-6165, 17-6195 (OA Sept. 25) (preserving claim while *Hammons* petition for certiorari pending).

Whether armed bank robbery under 18 U.S.C. § 2113 is a crime of violence for career-offender purposes, and whether this mandatory-guidelines defendant is entitled to § 2255 relief. *United States v. Holz*, No. 17-6118 (reply brief filed April 23, 2018).

Are Kansas reckless aggravated battery and Missouri second-degree robbery crimes of violence for career-offender purposes? *United States v. Ash*, Nos. 17-3223 & 17-3245 (OA Nov. 13, 2018).

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. Encinias*, No. 17-8070 (gov’t brief filed March 21, 2018); *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); *United States v. Martinez*, No. 18-2113 (brief filed Nov. 21, 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).

Is this defendant entitled to a certificate of appealability; did the district court err in finding this defendant’s 28 U.S.C. § 2255 challenge to his mandatory-guidelines career-offender sentence untimely; and was *Greer* wrongly decided? *United States v. Brigman*, No. 17-3176 (supplemental jurisdictional brief filed Oct. 31, 2018).

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 (gov’t brief filed Nov. 13, 2018).

Is Colorado attempt broader than generic attempt, and is Colorado attempted robbery a crime of violence for career-offender purposes? *United States v. Mendez*, No. 18-1259 (brief filed Nov. 22, 2018).

32. USSG § 4B1.5

33. USSG § 5C1.2 (safety valve)

Did the district court clearly err in finding that the proximity of this drug defendant’s guns to drugs excluded him from safety-valve relief? *United States v. Hargrove*, No. 17-2102 (OA Feb. 13, 2018).

Is this defendant entitled to safety-valve relief, and did the district court err in concluding otherwise? *United States v. Molina-Villalobos*, No. 17-1411 (OA Nov. 14, 2018).

Is this defendant entitled to safety-valve relief, and did the district court err in concluding otherwise? *United States v. Montijo-Dominguez*, No. 18-2008 (reply brief filed August 29, 2018).

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. Finnesy*, No. 18-3045 (OA Jan. 23, 2019).

35. USSG § 5K1.1

36. USSG § 5K2.14

37. USSG § 5G1.2(d)

J. Mandatory Minimums and Maximums

This defendant's prior California drug felony conviction was retroactively designated a misdemeanor. Is he now entitled to a certificate of appealability and § 2255 relief from his federal mandatory life sentence (which was based on that felony conviction)? *United States v. McGee*, No. 18-5019 (reply brief filed August 29, 2018).

K. Reasonableness

1. Procedural

Did the district court plainly err when it used an incorrect sentence range as its starting point for this defendant's downward variant sentence? *United States v. Smith*, No. 18-1020 (OA Nov. 14, 2018).

Did the district court's failure to acknowledge this defendant's cognizable variance argument—or to explain why it rejected the argument—render its imposition of a guideline sentence procedurally unreasonable? *United States v. Garvia*, No. 18-2025 (reply brief filed August 2, 2018).

Did the district court procedurally err by refusing to consider varying downwards as a remedy for the government's apparently punitive refusal to recommend a third-level reduction for acceptance of responsibility? *United States v. Johnson*, No. 18-7012 (OA Nov. 14, 2018).

Did the district court plainly err in violation of 18 U.S.C. § 3582(a) and *Tapia* when it imposed consecutive sentences so that this defendant would have access to BOP programs? *United States v. Kelley*, No. 18-6056 (reply brief filed Sept. 27, 2018).

Did the district court abuse its discretion by sua sponte presenting its own evidence and arguments in support of a higher sentence for this drug defendant; and should a different judge be reassigned on remand? *United States v. Aragon*, No. 18-1121 (OA Jan. 23, 2019).

Did the district court plainly err when it rejected this defendant's *variance* request on grounds that it did not meet *departure* requirements? *United States v. Gallardo-Medina*, Nos. 18-1125, 18-1126 (gov't brief filed Oct. 29, 2018).

Did the district court's calculation errors render this defendant's sentence procedurally unreasonable? *United States v. Jones*, No. 18-2129 (reply brief filed Nov. 30, 2018).

Did the district court procedurally err when it denied this defendant's variance motion based on the plea agreement, which did not preclude a variance? *United States v. Parra*, No. 18-2040 (brief filed Oct. 22, 2018).

Does judicial factfinding that triples a defendant's guidelines range violate the due process, notice, and jury provisions of the Fifth and Sixth Amendments? *United States v. Clark*, No. 18-3132 (brief filed Nov. 5, 2018).

Did the district court plainly err when it sentenced this defendant on two grouped counts to time exceeding the statutory maximum for those counts? *United States v. Clark*, No. 18-3132 (brief filed Nov. 5, 2018).

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 (brief filed Nov. 28, 2018).

2. Substantive

The Tenth Circuit held that this repeat bank-robber's sentence of time-served (33 days) was substantively unreasonable, and remanded for resentencing. The district court held a new sentencing hearing, revisited its reasons in light of the Tenth Circuit's opinion, and imposed the same sentence. Is this sentence substantively unreasonable, and should this case be remanded to a different judge for resentencing? *United States v. Walker*, No. 17-4103 (OA May 17, 2018) (gov't appeal).

Is this drug/gun defendant's 120-month sentence substantively unreasonable? *United States v. Vasquez*, No. 17-2189 (OA July 27, 2018).

Is this 55-year-old assault defendant's 68-month upper-range guideline sentence for a prison stabbing substantively unreasonable? *United States v. Nanez-Rivera*, No. 17-1419 (OA Oct. 24, 2018).

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).

Is this defendant's guideline sentence substantively unreasonable? *United States v. Garcia*, No. 18-2025 (reply brief filed August 2, 2018).

Is this drug and money-laundering defendant's 235-month top-of-the-guideline sentence substantively unreasonable? *United States v. Rubio-Sepulveda*, No. 18-1055 (OA Jan. 23, 2019).

In light of his serious medical condition, is this defendant's 70-month drug-distribution and illegal-reentry sentence substantively unreasonable? *United States v. Soto*, No. 18-2034 (submitted Jan. 23, 2019).

Is this child-pornography defendant's five-year probationary sentence substantively unreasonable? *United States v. Cookson*, Nos. 18-3070, 18-3071 (response brief filed Oct. 31, 2018) (gov't appeal).

Is this drug defendant's 170-month mid-guidelines prison sentence substantively unreasonable? *United States v. Garcia*, No. 18-5012 (reply brief filed Nov. 6, 2018).

Is this marijuana defendant's 10-month above-guidelines prison sentence substantively unreasonable, especially given the district court's apparent consideration of an impermissible factor? *United States v. Bullcoming*, No. 18-6083 (reply brief filed Nov. 16, 2018).

Is this illegal-reentry defendant's top-of-the-guideline 24-month prison sentence substantively unreasonable? *United States v. Guardado-Panuco*, No. 18-1210 (gov't brief filed Oct. 15, 2018).

Is this first-time offender's 180-month sentence on drug and gun convictions substantively unreasonable? *United States v. Dominguez-Perez*, No. 18-2063 (brief filed Sept. 24, 2018).

Whether the district court's calculation errors rendered this defendant's sentence substantively unreasonable. *United States v. Jones*, No. 18-2129 (reply brief filed Nov. 30, 2018).

Whether this defendant's above-guideline felon-in-possession sentence is substantively unreasonable. *United States v. Cade*, No. 18-6110 (brief filed Oct. 30, 2018).

Whether this unlawful-reentry defendant's 26-month within-guidelines sentence is substantively unreasonable. *United States v. Ramirez-Plata*, No. 18-1211 (gov't brief filed Nov. 28, 2018).

Whether this child-pornography defendant's 10-year within-guidelines prison sentence is substantively unreasonable. *United States v. Blair*, No. 18-1220 (brief filed Nov. 5, 2018).

Is this ICE defendant's within-guidelines sentence substantively unreasonable? *United States v. Clark*, No. 18-3132 (brief filed Nov. 5, 2018).

Whether this illegal-reentry defendant's top-of-the guideline 21-month prison sentence is substantively unreasonable on grounds that his criminal history was overstated. *United States v. Martinez-Martinez*, No. 18-5072 (brief filed Nov. 21, 2018).

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. 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).

Was capital counsel ineffective in this state case for failing to (1) investigate, prepare, and present lay witnesses; (2) request a second-degree-murder instruction; (3) object to prosecutorial misconduct; (4) object to erroneous HAC instructions; and (5) objection to an instruction that limited consideration of mitigation? *Simpson v. Royal*, No. 16-6191 (OA Nov. 16, 2017).

Did counsel's ineffectiveness in failing to investigate this state capital defendant's mental health result in the defendant being tried while incompetent? *Eaton v. Wilson*, Nos. 15-8013, 16-8086 (OA Sept. 27, 2018).

Was trial counsel ineffective in failing to investigate and call alibi witnesses in this kidnapping/robbery case? *United States v. Ford*, No. 17-1122 (reply brief filed May 21, 2018).

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 trial counsel in this Oklahoma capital case ineffective in failing to object to unconstitutional victim-impact evidence? *Bush v. Royal*, No. 16-6318 (reply brief filed Sept. 12, 2018).

Was appellate counsel in this Oklahoma capital case ineffective in failing to challenge the constitutionality of Oklahoma law barring capital defendants who plead guilty from receiving a jury sentencing hearing? *Bush v. Royal*, No. 16-6318 (reply brief filed Sept. 12, 2018).

Was counsel in this drug-conspiracy case ineffective in failing to request theory-of-defense instructions? *United States v. Garrison*, No. 18-1053 (reply brief filed August 13, 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 (brief filed Oct. 12, 2018).

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

C. Self-Incrimination

D. Self-Representation/Waiver of Counsel

Was this defendant's waiver of counsel knowing and intelligent? What was the district court required to do to ensure that the waiver was valid? *United States v. Hansen*, No. 17-4159 (OA Sept. 27, 2018).

Did the district court abuse its discretion when it denied this defendant hybrid representation on the mistaken assumption that such representation is not allowed? *United States v. Couch*, No. 18-3032 (OA Jan. 24, 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).

Did the district court violate this defendant's confrontation rights by refusing to allow her to cross-examine a police officer about his dishonesty in another case? *United States v. Cook*, No. 17-2161 (OA Sept. 25, 2018).

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

Did the government violate this defendant's Sixth Amendment right to compulsory process by deporting a witness? *United States v. Garcia*, No. 18-5012 (reply brief filed Nov. 6, 2018).

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

Did the district court err in denying this defendant's motion to dismiss on Sixth Amendment speedy-trial grounds? *United States v. Medina*, No. 17-1455 (OA Nov. 16, 2018).

Did the government violate this defendant's Sixth Amendment speedy-trial rights when it delayed prosecution of his case for more than a year after the indictment was returned? *United States v. Nixon*, No. 18-1154 (OA Jan. 24, 2019).

Did the district court err in denying this defendant's motion to dismiss on Sixth Amendment and statutory speedy-trial grounds? *United States v. Cortes-Gomez*, No. 18-3052 (brief filed Sept. 26, 2018).

XXIX. Standards of Review

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

XXX. Statutes of Limitations

XXXI. Supervised Release

A. Revocation Issues

Was the evidence sufficient to prove that this defendant violated a mandatory condition of supervision? *United States v. Rogers*, No. 18-5008 (gov't brief filed Sept. 19, 2018).

Was the district court's reliance on hearsay to revoke this defendant's supervised release reversible error? *United States v. Murphy*, No. 18-5052 (reply brief filed Nov. 27, 2018).

B. Sentencing Issues (either initially or after revocation)

1. Substantive

Is this defendant's revocation sentence substantively unreasonable? *United States v. Rhea*, No. 17-7071 (gov't brief filed March 23, 2018).

Is this defendant's 24-month revocation sentence substantively unreasonable? *United States v. Yazzie*, No. 18-2039 (OA Nov. 16, 2018).

Is this defendant's revocation sentence substantively unreasonable? *United States v. Rogers*, No. 18-5008 (gov't brief filed Sept. 19, 2018).

Is this defendant's revocation sentence substantively unreasonable? *United States v. Rosales-Trujillo*, Nos. 18-8023 & 18-8032 (brief filed Sept. 13, 2018).

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).

3. Unlawful Delegation of authority

4. Assimilative Crimes Act (ACA) sentences

C. Conditions of Supervised Release

Did the district court err when it imposed a special condition of supervised release (take all prescribed mental-health medications) without making the required particularized findings? *United States v. Yazzie*, No. 18-2039 (OA Nov. 16, 2018).

Did the district court's imposition of substance-abuse and gang conditions of supervised release unconstitutionally delegate a judicial function to the probation office? *United States v. Lopez*, No. 17-4180 (OA Jan. 24, 2019).

Did the district court err in imposing conditions of supervised release without making necessary findings? *United States v. Lopez*, No. 17-4180 (OA Jan. 24, 2019).

In this child-pornography case, does a special condition of release prohibiting the defendant from using any computer or device with internet access without his probation officer's permission involve a greater deprivation of liberty than necessary? *United States v. Blair*, No. 18-1220 (brief filed Nov. 5, 2018).

Is the standard condition of release obligating the defendant to notify others that he or she poses a risk, should the probation officer so demand, unconstitutionally vague, and does it improperly delegate judicial authority to the probation office (distinguishing *Hull*)? *United States v. Cabral*, No. 18-1263 (brief filed Nov. 23, 2018).

XXXII. Trial Practice and Evidence Issues

A. Closing Argument

B. Confidential Informants

C. Cumulative Error

D. Demonstrative Evidence

E. Due Process

F. Eyewitness Identification Testimony

G. Judicial misconduct

H. Jury Instructions

1. Aiding and Abetting

Whether the district court's aiding-and-abetting instruction was inconsistent with *Rosemond v. United States*. *United States v. Arciniega-Zetin*, No. 16-4145 (OA Nov. 14, 2017).

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 (brief filed Nov. 5, 2018).

4. Constructive Possession

Whether the district court plainly erred when it failed to instruct the jury that it must determine that the defendant intended to possess the charged drugs (as is now required per *Little*). *United States v. Arciniega-Zetin*, No. 16-4145 (OA Nov. 14, 2017); *United States v. Campbell*, No. 18-2033 (OA Jan. 23, 2019).

5. Deliberate Avoidance/Ignorance

Whether the district court erroneously gave a deliberate-ignorance instruction in this heroin-distribution case. *United States v. Arciniega-Zetin*, No. 16-4145 (OA Nov. 14, 2017).

6. Elements (see also statute under which defendant tried)

Whether the district court erroneously instructed the jury that “concrete involvement” was sufficient to prove distribution of heroin. *United States v. Arciniega-Zetin*, No. 16-4145 (OA Nov. 14, 2017).

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 denying this unlawful-reentry defendant his request to assert a duress defense at trial? *United States v. Arias-Quijada*, No. 18-6130 (gov’t brief filed Oct. 17, 2018).

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 (gov’t brief filed Nov. 9, 2018).

16. Unanimity

17. Voluntary Intoxication

18. Witness Cautionary Instructions

Did the district court err in refusing to give a cautionary instruction regarding accomplice testimony? *United States v. Cortes-Gomez*, No. 18-3052 (brief filed Sept. 26, 2018).

I. Jury Questions

J. Mistrial

Should the district court have granted a mistrial in this drug case after the government elicited law-enforcement testimony that the defendant’s gun was stolen—in direct violation of an in limine order excluding this fact? *United States v. Hargrove*, No. 17-2102 (OA Feb. 15, 2018).

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).

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).

Did the state prosecutor in this capital case violate *Brady* by suppressing evidence that would have impeached a jailhouse informant? *Simpson v. Royal*, No. 16-6191 (OA Nov. 16, 2017).

Did the state prosecutor in this capital case violate due process when he denigrated the defendant’s mitigation evidence and made other improper arguments? *Simpson v. Royal*, No. 16-6191 (OA Nov. 16, 2017).

Did the state prosecutor in this capital case violate *Brady* when it suppressed impeaching evidence related to a jailhouse informant? *Eaton v. Wilson*, Nos. 15-8013, 16-8086 (OA Sept. 27, 2018).

Was it misconduct for this prosecutor to argue that “possibilities do not equate to reasonable doubt”? *United States v. Jefferson*, No. 17-3150 (OA Sept. 27, 2018).

Did cumulative prosecutorial misconduct deny this defendant due process under plain-error review? *United States v. Christy*, No. 17-3122 (OA Sept. 27, 2018).

Did the prosecutor commit prejudicial misconduct in relation to this defendant’s heat-of-passion defense? *United States v. Currie*, No. 17-3242 (OA Nov. 13, 2018).

Did the prosecutor in this case commit reversible misconduct during rebuttal closing argument? *United States v. Loya-Ramirez*, No. 18-1100 (brief filed Nov. 2, 2018).

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).

Did the state court’s refusal to allow evidence of this capital defendant’s PTSD during the guilt phase violate his right to present a complete defense? *Simpson v. Royal*, No. 16-6191 (OA Nov. 16, 2017).

Was this defendant deprived of his right to present a defense by way of a witness's exonerating statements when the government caused the witness to invoke the Fifth Amendment and refused to grant her immunity, and the district court excluded her recorded statement? *United States v. Dalton*, No. 17-2146 (OA Sept. 25, 2018).

Did the district court deprive this defendant of his due process and statutory rights (under 18 U.S.C. § 3006A(e)(1)) by denying funds for a mental-health expert and excluding evidence at trial of his mental-health history? *United States v. Martinez*, No. 18-8007 (OA Nov. 16, 2018).

Did the district court deprive this false-statements defendant of his constitutional right to present a defense by excluding two defense expert witnesses? *United States v. Williams*, No. 18-1080 (reply brief filed Nov. 15, 2018).

Did the district court violate this pro-se gun defendant's Fifth and Sixth Amendment rights to testify and present a defense when it limited his testimony about how the weapon he designed worked, and why he didn't think it was a federally-covered machine gun, on grounds that it was improper (un-noticed) expert testimony? *United States v. Bishop*, No. 18-4088 (brief filed Nov. 9, 2018).

O. Rule 106 (rule of completeness)

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

Was the video of this defendant's SWAT-team arrest irrelevant and unduly prejudicial to his trial on gun charges? *United States v. Dalton*, No. 17-2146 (OA Sept. 25, 2018).

Was evidence of non-criminal (but nonetheless inflammatory) pictures and communications irrelevant and unduly prejudicial in this pornography/enticement case? *United States v. Isabella*, No. 17-1197 (OA Nov. 16, 2018).

Did the district court abuse its discretion when it excluded as irrelevant evidence incriminating this defendant's fiancé (whom she claimed was solely responsible for the drug trafficking underlying her charges)? *United States v. Cook*, No. 17-2161 (OA Sept. 25, 2018).

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).

The question in this defendant's drug-conspiracy trial was whether he knew that the burlap bags he was transporting contained marijuana. The bags were sealed and odor-free in the car. Did the district court abuse its discretion when it allowed the government to display the marijuana unsealed and strong-smelling to the jury? *United States v. Milne*, No. 18-2037 (OA Nov. 16, 2018).

Did the district court abuse its discretion in allowing a codefendant's lawyer to elicit testimony that this defendant had a tiny amount of (uncharged) heroin in his pocket, in violation of Federal Rules of Evidence 402, 403, and 404(b)? *United States v. Milne*, No. 18-2037 (OA Nov. 16, 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 (gov't brief filed Nov. 29, 2018).

Q. Rule 404(b)

Did the district court err in admitting F.R.E. 404(b) evidence as res gestae? *United States v. Williams*, No. 18-1080 (reply brief filed Nov. 15, 2018).

Did the district court err when it failed to rule on this defendant's F.R.E. 404(b) objection? *United States v. Stubbs*, No. 17-1373 (gov't brief filed Nov. 28, 2018).

Did the district court violate FRE 403 or 404(b) by admitting evidence that this robbery/gun defendant previously shot a person with the gun he was charged with unlawfully possessing? *United States v. Duncan*, No. 18-6009 (gov't brief filed Nov. 14, 2018).

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 (gov't brief filed Nov. 9, 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 (brief filed Oct. 12, 2018).

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

S. Rules 601-615 (Witnesses)

Did the district court violate F.R.E. 608(b) when it refused to allow this defendant to cross-examine a police officer about his dishonesty in another case? *United States v. Cook*, No. 17-2161 (OA Sept. 25, 2018).

Did the district court abuse its discretion under F.R.E. 608(a) by preventing this defendant—whose credibility the government attacked during cross-examination—from presenting evidence of his truthful character? *United States v. Martinez*, No. 18-8007 (OA Nov. 16, 2018).

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

Did the district court err in allowing a narcotics detective to give unhelpful opinions that did nothing more than summarize the government's evidence? *United States v. Martinez*, No. 16-1393 (OA Jan. 18, 2018).

Whether the admission of a DEA agent's expert testimony that drug suspects' post-arrest statements are generally not true was plain error. *United States v. Guzman-Dominguez*, No. 17-2136 (OA March 20, 2018).

Did the district court erroneously exclude defense eyewitness-expert testimony under FRE 702 and *Daubert*? *United States v. Wofford*, No. 18-5029 (OA Jan. 24, 2019).

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 (gov't brief filed Nov. 29, 2018).

Did the district court plainly err in admitting lay hearsay and expert testimony that the weapons at issue in this unregistered-machine-guns case were in fact machine guns? *United States v. Bishop*, No. 18-4088 (brief filed Nov. 9, 2018).

Did the district court violate *Daubert* and FRE 702 by denying a hearing on this defendant's motion to exclude expert GPS testimony? *United States v. Mathews*, No. 18-1215 (brief filed Nov. 21, 2018).

U. Rules 801-807 (hearsay)

Should the district court have admitted the recording of an unavailable witness's exonerating statements under the catch-all provision of Federal Rule of Evidence 807? *United States v. Dalton*, No. 17-2146 (OA Sept. 25, 2018).

Should the district court have admitted a plea agreement incriminating this defendant's fiancé (whom she claimed was solely responsible for the drug trafficking underlying her charges) as an adopted admission by the government? *United States v. Cook*, No. 17-2161 (OA Sept. 25, 2018).

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).

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 (brief filed Sept. 7, 2018).

X. Rule 1006 (Summaries)

Y. Surrebuttal

Z. Voir Dire

XXXIII. Vagueness

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

Recently Added Cases

(most recent to least recent)

United States v. Ahmed, No. 18-4092 (brief filed Nov. 30, 2018) (Fourth Amendment: traffic stops).

Baertschy v. Raemisch, No. 18-1252 (brief filed Nov. 30, 2018) (28 U.S.C. § 2254).

United States v. McClafin, No. 18-1217 (brief filed Nov. 28, 2018) (continuances; USSG § 2B1.1; sentencing: procedural reasonableness).

United States v. McKnight, No. 18-2143 (brief filed Nov. 26, 2018) (Fourth Amendment: warrantless arrests).

United States v. Wiseman, No. 18-2143 (brief filed Nov. 26, 2018) (28 U.S.C. § 2255; 18 U.S.C. § 924(c)).

United States v. Cabral, No. 18-1263 (brief filed Nov. 23, 2018) (supervised release: conditions).

United States v. Mendez, No. 18-1259 (brief filed Nov. 22, 2018) (USSG §§ 4B1.1, 4B1.2).

United States v. Martinez-Martinez, No. 18-5072 (brief filed Nov. 21, 2018) (sentencing: substantive unreasonableness).

United States v. Martinez, No. 18-2113 (brief filed Nov. 21, 2018) (USSG §§ 4B1.1, 4B1.2).

United States v. Mathews, No. 18-1215 (brief filed Nov. 21, 2018) (Fourth Amendment: warrantless searches; FRE 701-706).

Pavatt v. Carpenter, No. 14-6117 (state's en banc supplemental brief filed Nov. 16, 2018) (28 U.S.C. § 2254).

United States v. Bishop, No. 18-4088 (brief filed Nov. 9, 2018) (Fifth Amendment; Sixth Amendment; trial: right to present a defense; 26 U.S.C. § 5861; FRE 701, 702, 704, 801).

United States v. Yurek, No. 18-1129 (brief filed Nov. 9, 2018) (USSG § 2B1.1).

United States v. Means-Goodman, No. 18-8037 (brief filed Nov. 5, 2018) (USSG § 3B1.1; 21 U.S.C. § 841(b)).

United States v. Gorrell, No. 18-5041 (brief filed Nov. 5, 2018) (26 U.S.C. § 7201).

United States v. Clark, No. 18-3132 (brief filed Nov. 5, 2018) (sentencing: substantive unreasonableness, procedural unreasonableness).

United States v. Mendoza-Alarcon, No. 18-2036 (brief filed Nov. 5, 2018) (jury instructions: conspiracy; 21 U.S.C. § 846).

United States v. Blair, No. 18-1220 (brief filed Nov. 5, 2018) (supervised release conditions; sentencing: substantive unreasonableness).

United States v. Williams, No. 18-8053 (gov't brief filed Nov. 20, 2018) (SORNA).