

ISSUES PENDING IN THE TENTH CIRCUIT

COMPILED BY THE KANSAS FEDERAL PUBLIC DEFENDER



Updated July 11, 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 3

 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) 4

 Q. *Terry* Stops: Initial Detention 4

 R. *Terry*: Frisk 4

 S. Traffic Stops 4

 T. Warrantless Arrests 4

 U. Warrantless Seizures 4

V. Warrantless Searches.....	5
XII. Fourteenth Amendment: Due Process.....	5
XIII.Fifth Amendment: Due Process.....	5
XIV.Fifth Amendment: Confessions & <i>Miranda</i>	5
XV. Habeas Issues.....	6
A. 28 U.S.C. § 2241.....	6
B. 28 U.S.C. § 2254.....	6
C. 28 U.S.C. § 2255.....	8
D. Fed. R. Civ. P. 60(b).....	9
XVI.Immigration Issues.....	9
XVII. Indictment Issues.....	9
A. Amendments.....	9
B. Duplicity.....	9
C. Grand Jury Issues.....	9
D. Sufficiency of the Indictment (Sixth Amendment).....	9
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).....	10
D. 18 U.S.C. § 2 (aiding and abetting).....	10
E. 18 U.S.C. § 111 (assaulting, resisting, impeding an officer or employee).....	10
F. 18 U.S.C. § 242 (civil-rights violation).....	10
G. 18 U.S.C. § 287 (false claims against the government).....	10
H. 18 U.S.C. § 371 (conspiracy).....	10
I. 18 U.S.C. § 666 (bribery).....	10
J. 18 U.S.C. § 842 (unlawful distribution/possession of explosives).....	10
K. 18 U.S.C. § 843 (using a communication device).....	10
L. 18 U.S.C. § 844 (arson).....	10
M. 18 U.S.C. § 875 (interstate communications).....	10
N. 18 U.S.C. § 876 (mailing threatening communications).....	10

O.	18 U.S.C. § 922(d) (disposal to a prohibited person)	10
P.	18 U.S.C. § 922(g) (prohibited person in possession)	10
Q.	18 U.S.C. § 924(c) (Possession/Use of Firearm during drug trafficking offense)	10
R.	18 U.S.C. § 1001 (false statements)	11
S.	18 U.S.C. § 1005 (false bank entries)	11
T.	18 U.S.C. § 1028 (identity-document fraud)	12
U.	18 U.S.C. § 1028A (identity theft)	12
V.	18 U.S.C. § 1041 (false statements to a bank)	12
W.	18 U.S.C. § 1201 (kidnapping)	12
X.	18 U.S.C. § 1341 (mail fraud)	12
Y.	18 U.S.C. § 1343 (wire fraud)	12
Z.	18 U.S.C. § 1344 (bank fraud)	12
AA.	18 U.S.C. § 1347 (health-care fraud)	12
BB.	18 U.S.C. § 1361 (depredation of government property)	12
CC.	18 U.S.C. § 1512 (witness tampering)	12
DD.	18 U.S.C. § 1513 (obstruction of justice)	12
EE.	18 U.S.C. § 1591 (sex trafficking of children)	12
FF.	18 U.S.C. § 1951 (Hobbs Act robbery)	12
GG.	18 U.S.C. § 1956 (money laundering)	12
HH.	18 U.S.C. §§ 2241-2245 (sexual abuse)	12
II.	18 U.S.C. § 2250 (SORNA: failure to register); 42 U.S.C. § 16911	12
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)	13
LL.	18 U.S.C. § 2423 (transportation of minors)	13
MM.	18 U.S.C. § 1591 (child sex trafficking)	13
NN.	18 U.S.C. § 2252A (receiving/distributing child pornography)	13
OO.	21 U.S.C. § 841 (drug trafficking)	13
PP.	21 U.S.C. § 846 (drug conspiracy)	13
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)	14
TT.	26 U.S.C. § 7212	14
UU.	28 U.S.C. § 455 (recusal)	14

VV.	49 U.S.C. § 46504 (intimidating a flight attendant)	14
XXI.	Pleas	14
	A. Acceptance of Plea	14
	B. Appeal Waiver	14
	C. Breach	14
	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)	15
	C. Rule 12 (motions)	15
	D. Rule 32 (sentencing procedures)	15
	E. Rule 33 (new trial)	15
	F. Rule 41 (search & seizure)	15
XXIV.	Scope of Remand/Mandate Rule/Other Remand Issues	15
XXV.	Second Amendment Issues	15
XXVI.	Sentencing	15
	A. Allocution	15
	B. Apprendi	15
	C. Armed Career Criminal Act (18 U.S.C. 924(e))	15
	D. Burden of Proof	17
	E. Capital Sentencing	17
	F. Commitment in Lieu of Imprisonment (18 U.S.C. § 4244)	17
	G. Departures and Variances	17
	H. Fines & Assessments	17
	I. Guidelines Sections	18
	1. USSG § 1B1.2	18
	2. USSG § 1B1.3 (relevant conduct)	18
	3. USSG § 2A2.2	18
	a) subsection (b)(2)(B) (use of dangerous weapon)	18
	4. USSG § 2A3.5 (SORNA)	18
	5. USSG § 2A4.1 (bodily injury)	18

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

2. Substantive.....	23
L. SORNA Sentencing Issues	24
M. Three Strikes (18 U.S.C. § 3559(c)).....	24
N. Resentencing Issues	24
O. Sentence Reductions under 18 U.S.C. § 3582(c)(2).....	24
P. Constitutional Issues.....	24
1. Fifth Amendment Due Process.....	24
2. Sixth Amendment and Hearsay	24
XXVII. Sixth Amendment	24
A. Right to Effective Assistance of Counsel.....	24
B. Substitution of Counsel/Conflicts of Interest/Counsel of Choice.....	25
C. Self-Incrimination.....	26
D. Self-Representation/Waiver of Counsel.....	26
E. Confrontation	26
F. Jury Verdict	26
G. Compulsory Process	27
XXVIII. Speedy Trial (statutory/constitutional) & Interstate Agreement on Detainers Act.....	27
XXIX. Standards of Review	27
A. Waiver.....	27
B. Forfeiture/Plain Error.....	27
C. De Novo Review.....	27
XXX. Statutes of Limitations.....	27
XXXI. Supervised Release	27
A. Revocation Issues.....	27
B. Sentencing Issues (either initially or after revocation).....	27
1. Substantive.....	27
2. Procedural.....	28
3. Unlawful Delegation of authority.....	28
4. Assimilative Crimes Act (ACA) sentences	28
C. Conditions of Supervised Release.....	28
XXXII. Trial Practice and Evidence Issues	29
A. Closing Argument	29
B. Confidential Informants.....	29

C. Cumulative Error.....	29
D. Demonstrative Evidence.....	29
E. Due Process	29
F. Eyewitness Identification Testimony	29
G. Judicial misconduct	29
H. Jury Instructions	29
1. Aiding and Abetting	29
2. Burden of Proof.....	29
3. Conspiracy.....	29
4. Constructive Possession	29
5. Deliberate Avoidance/Ignorance.....	29
6. Elements (see also statute under which defendant tried).....	30
7. Sentencing Elements	30
8. Flight.....	30
9. Guilt by Association/Guilt of Others	30
10. Investigative Techniques.....	30
11. Knowledge	30
12. Polygraphs.....	30
13. Proof.....	30
14. Spoliation	30
15. Theory of Defense/Affirmative Defense	30
16. Unanimity.....	30
17. Voluntary Intoxication	30
18. Witness Cautionary Instructions.....	30
I. Jury Questions	30
J. Mistrial	30
K. Prior Convictions	30
L. Prosecutorial Misconduct.....	30
M. Right to be Present.....	32
N. Right to Present Defense	32
O. Rule 106 (rule of completeness).....	32
P. Rules 401, 402, 403 (relevance & undue prejudice)	32
Q. Rule 404(b)	33

R. Rules 412, 413 & 414 (Sexual Assault Evidence)	33
S. Rules 601-615 (Witnesses)	33
T. Rules 701-706 (Opinions and Expert Testimony).....	34
U. Rules 801-807 (hearsay).....	34
V. Rule 901 (authentication)	34
W. Rule 1002 (Best Evidence Rule).....	35
X. Rule 1006 (Summaries).....	35
Y. Surrebuttal	35
Z. Voir Dire.....	35
XXXIII. Vagueness.....	35
XXXIV. Wiretap Issues (18 U.S.C. § 2510-2522)	35

I. Appeals

II. Competence

Whether the state court erroneously allowed a capital trial to proceed despite evidence that the defendant had decompensated since being found competent. *Grant v. Trammell*, No. 14-6131 (OA Jan. 21, 2016).

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).

V. Discovery

Did the district court abuse its discretion by excluding expert testimony as a sanction for untimely disclosure of the expert as a witness? *United States v. Moya*, No. 17-2043 (OA March 22, 2018) (gov't appeal).

VI. Double Jeopardy

Did the double-jeopardy clause bar this defendant's federal murder and gun prosecution after the defendant was acquitted of the same murder in state court (preserving attack on dual-sovereignty doctrine for Supreme Court review)? *United States v. Roman*, No. 17-4084 (OA May 16, 2018).

VII. Eighth Amendment and Capital Issues

Whether capital-sentencing jury instructions, as exploited by the prosecutor, improperly limited the scope of relevant mitigating evidence. *Grant v. Trammell*, No. 14-6131 (OA Jan. 21, 2016).

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).

Did the admission of victim-impact evidence deprive this capital defendant of reliable sentencing? *Postelle v. Royal*, No. 16-6290 (OA March 20, 2018).

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 filed June 15, 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 (brief filed June 13, 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 (brief filed June 13, 2018).

Did cumulative error violate this Oklahoma capital defendant's Eighth Amendment and due-process rights? *Bush v. Royal*, No. 16-6318 (brief filed June 13, 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

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 (brief filed June 7, 2018).

C. Consent

Did agents' persistence and deception turn this "consensual" encounter (a knock-and-talk that morphed into an interrogation in the agents' car) into an involuntary seizure? *United States v. Dates*, No. 16-2267 (OA Jan. 17, 2018).

Whether the Tenth Circuit should remand this case to determine whether this defendant's "consent" was fruit of a preceding unconstitutional warrantless seizure of his home, and whether law enforcement's search exceeded the scope of any consent. *United States v. Shrum*, No. 17-3059 (OA Jan. 18, 2018).

Did this defendant's mother freely and voluntarily consent to a search of the defendant's home in the face of her own physical frailty and an officer's threats to take her to jail? *United States v. Morris*, No. 17-6223 (OA Sept. 27, 2018).

D. Excessive Force

E. Fruit of the Poisonous Tree

F. Good Faith Exception

Was this search warrant so lacking in probable cause as to render its execution unreasonable? *United States v. Ejiofor*, No. 17-6211 (OA Sept. 27, 2018).

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 (brief filed April 6, 2018).

Can good faith excuse law enforcement's reliance on a warrant when the warrant affidavit contained information tainted by law enforcement's own Fourth Amendment violations? *United States v. Alderete*, No. 18-1032 (OA Sept. 27, 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

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).

Did an affidavit alleging three vague and tangential connections to the actions of people involved in an online dating scheme supply probable cause for a warrant to search this defendant's home? *United States v. Ejiofor*, No. 17-6211 (OA Sept. 27, 2018).

Should the fruit of an unlawful entry and an unlawful car search be stricken from this search warrant affidavit, and does the warrant then lack probable cause? *United States v. Alderete*, No. 18-1032 (OA Sept. 27, 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 (brief filed April 6, 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 (brief filed June 7, 2018).

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).

Absent any surveillance suggesting that this defendant’s car had been used to transport contraband, did law enforcement have probable cause to stop and search the car? *United States v. Alderete*, No. 18-1032 (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 (brief filed May 31, 2018).

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 (brief filed May 30, 2018).

T. Warrantless Arrests

Was evidence that drugs were in a hotel room and that the defendant was seen walking toward the room with another person sufficient to establish probable cause to arrest the defendant? *United States v. Amador*, No. 17-3018 (OA March 22, 2018); *United States v. Mekaeil*, No. 17-3135 (OA March 22, 2018).

U. Warrantless Seizures

Was law enforcement’s warrantless seizure of this defendant’s home, when he was not suspected of any crime, unreasonable? *United States v. Shrum*, No. 17-3059 (OA Jan. 18, 2018).

V. Warrantless Searches

Should the Tenth Circuit remand this case for findings on whether a later search warrant was an independent source of evidence observed during a warrantless search of this defendant's home? *United States v. Shrum*, No. 17-3059 (OA Jan. 18, 2018).

Did the government fail to establish that a search of a hotel room pursuant to a warrant was an independent source of evidence discovered during a previous warrantless search? *United States v. Amador*, No. 17-3018 (OA March 22, 2018).

Did the district court properly conclude that a gun found during a warrantless search of this defendant's car would have been inevitably discovered by either plain view or a legal inventory search? *United States v. Metts*, No. 17-2111 (OA Jan. 16, 2018).

Was a warrantless entry into this defendant's home justified by exigent circumstances hours after an alleged shooting, and despite the fact that an officer testified that the officers did not rely on exigent circumstances? *United States v. Morris*, No. 17-6223 (OA Sept. 27, 2018).

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).

Was law enforcement's warrantless entry into this defendant's mobile home—for "officer safety" and "preservation of any evidence"—unlawful; was a witness's statement the fruit of this unlawful entry; and should that statement be stricken from a later warrant application? *United States v. Alderete*, No. 18-1032 (OA Sept. 27, 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 Sept. 27, 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).

XIV. Fifth Amendment: Confessions & *Miranda*

Should the district court have suppressed this murder defendant's statements on grounds that law enforcement continued to question him after he invoked his *Miranda* rights, in violation of *Edwards v. Arizona*? *United States v. Yepa*, No. 16-2060 (OA April 27, 2017).

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 agents' persistence and deception turn this knock-and-talk that morphed into an interrogation in the agents' car into a custodial interrogation requiring *Miranda* warnings? *United States v. Dates*, No. 16-2267 (OA Jan. 17, 2018).

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

XV. Habeas Issues

A. 28 U.S.C. § 2241

B. 28 U.S.C. § 2254

Whether the state appellate court's IAC, jury-instruction, and *Batson* decisions in this capital case were unreasonable, and whether the federal district court therefore improperly deferred to the state appellate court in denying habeas relief. *Grant v. Trammell*, No. 14-6131 (OA Jan. 21, 2016).

Whether cumulative-error claims are cognizable in habeas proceedings, and whether this capital case presents reversible cumulative error. *Grant v. Trammell*, No. 14-6131 (OA Jan. 21, 2016).

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).

Should the district court have granted habeas relief on this defendant's *Brady* claim? *Lebere v. Trani*, No. 16-1499 (reply brief filed Dec. 13, 2017).

Should the district court have granted habeas relief on this defendant's IAC claim that his trial lawyer failed to challenge the admission of critical evidence at his murder trial? *Coones v. Shelton*, No. 16-3329 (brief filed March 8, 2017).

Whether the district court should have granted relief, or at least a hearing, on this defendant's claim that the Colorado Court of Appeals unreasonably held that he "impliedly" waived his right to trial counsel when he twice fired his lawyers shortly before trial. *Vreeland v. Zupan*, No. 16-1503 (OA May 17, 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 or at least an evidentiary hearing on this state prisoner's claims of juror misconduct (a sleeping juror) and ineffective assistance of counsel (for not alerting the court to the sleeping juror)? *Smith v. Aldridge*, No. 17-6149 (OA Feb. 15, 2018).

Should the district court have granted relief or at least an evidentiary hearing on this state capital defendant's claims of ineffective assistance of counsel and constitutionally flawed jury instructions? *Grissom v. Royal*, No. 16-6271 (state's brief filed Dec. 19, 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. Royal*, No. 16-6295 (state's brief filed Jan. 17, 2018).

Is this state defendant entitled to 28 U.S.C. § 2254 relief on grounds that the evidence admitted at his trial was insufficient as a matter of law to support his second-degree-murder conviction? *Thompson v. Allbaugh*, No. 17-6127 (OA Sept. 26, 2018).

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 (reply brief filed June 11, 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 (brief filed March 28, 2018).

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 in denying this state murder defendant 28 U.S.C. § 2255 relief? *Ersland v. Bear*, No. 17-6255 (brief filed April 23, 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. Benzón*, No. 17-4191 (reply brief filed July 5, 2018) (state's appeal).

Should the district court have granted federal habeas relief based on this state murder defendant's ineffective-assistance-of-counsel and new-evidence claims? *Ersland v. Bear*, No. 17-6255 (brief filed May 4, 2018).

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. Royal*, No. 17-6109 (brief filed July 2, 2018).

C. 28 U.S.C. § 2255

Should the district court have appointed counsel to represent this mentally impaired defendant on his § 2255 petition? *United States v. Jaramillo*, No. 16-1491 (brief filed May 16, 2017).

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 this petitioner's claim that his attorney failed to consult with him about an appeal relate back to his original claim that counsel was ineffective in failing to file an appeal? *United States v. Smith*, No. 17-3075 (gov't brief filed June 27, 2018).

Did the district court commit reversible error when it denied this defendant's § 2255 petition, raising IAC and competency claims, without a hearing? *United States v. Hale*, No. 17-4127 (gov't brief filed March 5, 2017).

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).

Did the district court err in denying this defendant's IAC-based 28 U.S.C. § 2255 motion without an evidentiary hearing? *United States v. Mascheroni*, No. 18-2017 (brief filed June 19, 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 (gov't brief filed May 8, 2018).

XVII. Indictment Issues

A. Amendments

B. Duplicity

C. Grand Jury Issues

D. Sufficiency of the Indictment (Sixth Amendment)

Did the district court err in dismissing this indictment for failure to allege a per se offense under the Sherman Act? *United States v. Kemp & Assoc., Inc., and Mannix* No. 17-4148 (OA May 16, 2018) (gov't appeal).

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).

Did the government's addition of overt acts to the indictment just before trial amount to an unconstitutional variance? *United States v. Ray*, No. 16-1306 (OA Jan. 18, 2018).

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)**

Whether this defendant’s Facebook posts were protected by the First Amendment, and whether the evidence was otherwise sufficient to convict him. *United States v. Tinoco*, No. 17-2059 (reply brief filed Dec. 22, 2017).

- 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)**

Was the evidence sufficient to establish this defendant’s constructive possession of firearms and ammunition? *United States v. Martinez*, No. 16-1393 (OA Jan. 18, 2018).

- 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. Pasley*, No. 17-6033 (brief filed April 5, 2017); *United States v. Lopez-Aguilar*, No. 17-2121 (supplemental brief filed Dec. 7, 2017).

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. Lawless*, No. 17-1148 (supplemental reply filed May 30, 2018).

Whether assault with a dangerous weapon under 18 U.S.C. § 113(a)(3) is a crime of violence for § 924(c) purposes and whether this defendant is entitled to § 2255 relief. *United States v. Muskett*, No. 17-2123 (brief filed Oct. 11, 2017).

Whether the residual clause of § 924(c) is unconstitutionally vague; whether *Autobee* and *Kundo* were wrongly decided; and whether the district court should have granted this defendant § 2255 relief. *United States v. Morgan*, No. 17-1172 (supplemental reply filed May 18, 2018).

Whether federal assault resulting in serious bodily injury (18 U.S.C. § 113(a)(6)) is a crime of violence for purposes of 18 U.S.C. § 924(c)(3). *United States v. Mann*, No. 17-2117 (gov't appeal) (OA May 17, 2018).

Was evidence that the defendant shared drugs with a friend during the same evening that they handled the defendant's rifle sufficient to sustain this defendant's § 924(c) conviction? *United States v. Roman*, No. 17-4084 (OA May 16, 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); *United States v. Rojas*, No. 17-2065 (reply brief filed March 2, 2018).

Did *Johnson* invalidate the residual clause of 18 U.S.C. § 924(c); is armed bank robbery under 18 U.S.C. § 2113(a) a crime of violence for § 924(c) purposes; and is this defendant entitled to § 2255 relief? *United States v. Neibart*, Nos. 17-2164, 17-2192 (brief filed Feb. 9, 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 (gov't brief filed June 19, 2018).

Is armed bank robbery under 18 U.S.C. § 2111 a crime of violence for § 924(c) purposes, and is this defendant entitled to § 2255 relief? *United States v. Clark*, No. 18-2048 (brief filed June 27, 2018).

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

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)**
- 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)**

Was the evidence sufficient to sustain this doctor’s health-care-fraud conviction? *United States v. Delia*, No. 17-7051 (OA May 16, 2018).

- BB. 18 U.S.C. § 1361 (deprivation 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)**

Was the complainant’s conclusory testimony that she was solicited to commit “sex acts” sufficient to prove the “sex act” element of 18 U.S.C. § 1591, and did the district court plainly err in failing to define “sex act” for the jury? *United States v. Lacy*, No. 17-3119 (OA March 20, 2018).

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).

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

Did the district court overbroadly define “sexual abuse” in its instructions to this jury? *United States v. Magnan*, No. 17-8026 (OA Jan. 18, 2018).

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

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 Sept. 27, 2018).

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

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

Did Congress exceed its commerce power when it enacted 18 U.S.C. § 2423(c) (the “noncommercial prong”), and is this subsection unconstitutional either facially or as applied to this defendant? *United States v. Durham*, No. 16-6075 (OA March 23, 2017).

Was the evidence of knowledge and intent sufficient to support this defendant’s conviction? *United States v. Lacy*, No. 17-3119 (OA March 20, 2018).

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 evidence of this defendant’s presence as a passenger in a truck in which drugs were concealed sufficient to sustain his drug trafficking and conspiracy convictions? *United States v. Rodriguez-Flores*, No. 17-2039 (OA March 20, 2018).

PP.21 U.S.C. § 846 (drug conspiracy)

Was the evidence sufficient to prove the defendant’s participation in the conspiracy as charged? *United States v. Marquez*, No. 17-2028 (OA Jan. 17, 2018).

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 (brief filed June 11, 2018).

Was counsel in this drug-conspiracy case ineffective in failing to request theory-of-defense instructions? *United States v. Garrison*, No. 18-1053 (brief filed June 11, 2018).

Was the evidence sufficient to prove both knowledge and quantity in this drug-conspiracy case? *United States v. Milne*, No. 18-2037 (brief filed May 30, 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 (brief filed July 2, 2018).

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

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

Is the National Firearms Act, as applied to silencers and short-barreled rifles that are made, possessed, and transferred within the borders of Kansas, a valid exercise of Congressional power? *United States v. Cox*, No. 17-3034 (OA Jan. 16, 2018); *United States v. Kettler*, No. 17-3035 (OA Jan. 16, 2018).

SS. 26 U.S.C. § 7201 (tax evasion)

TT. 26 U.S.C. § 7212

UU. 28 U.S.C. § 455 (recusal)

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

XXI. Pleas

A. Acceptance of Plea

Did this 4-minute impersonal mass illegal-reentry plea proceeding (involving a general advisory given to a large group followed by generic questioning of a group of four) violate either Rule 11 or the defendant's due-process rights? *United States v. Mejia-Rios*, No. 17-2096 (OA May 17, 2018).

B. Appeal Waiver

Did the district court properly dismiss this defendant's *Johnson*-based § 2255 petition on grounds that he waived any collateral challenges in his plea agreement? *United States v. Brumley*, No. 17-7081 (brief filed May 24, 2018).

C. Breach

Whether the government's unenthusiastic sentencing recommendation breached its plea agreement with this drug defendant. *United States v. Lopez*, No. 17-1370 (OA Sept. 27, 2018).

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 (brief filed June 28, 2018).

D. Rejection of Plea Agreement

E. Withdrawal of Plea

Should the district court have granted this defendant's pre-sentencing motion to withdraw his plea? *United States v. Qualls*, No. 17-2046 (OA Jan. 17, 2018).

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

Was the evidence sufficient to support the district court's restitution order, and did the district court err in ordering restitution to the Paiute Tribe without explicit statutory authority to do so? *United States v. Zander*, No. 17-4156 (reply brief filed March 28, 2018).

XXIII. Rules of Criminal Procedure

A. Rule 8 (Joinder/Severance)

Whether the district court should have severed this defendant's charges on assaults alleged to have happened in different years and in different prisons, especially where the defendant wished to testify about one count but not another. *United States v. Thomas*, No. 17-1278 (gov't brief filed June 20, 2018).

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

C. Rule 12 (motions)

Whether the district court erred in holding that whether a person has been adjudicated or committed for 18 U.S.C. § 924(g)(4) purposes is an issue of fact rather than an issue of law subject to Rule 12(b)(3)(B)(v) dismissal. *United States v. McLinn*, No. 17-3083 (OA March 20, 2018).

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 (brief filed June 11, 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 (brief filed June 11, 2018) (gov't appeal).

F. Rule 41 (search & seizure)

Did the district court err in denying this defendant's post-conviction motion for return of property under Fed. R. Crim. P. 41(g)? *United States v. Bacon*, No. 16-4106 (OA Jan. 18, 2018).

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

XXV. Second Amendment Issues

Does the National Firearms Act as applied to making, possessing, and transferring silencers and short-barreled rifles violate the Second Amendment? *United States v. Cox*, No. 17-3034 (OA Jan. 16, 2018); *United States v. Kettler*, No. 17-3035 (OA Jan. 16, 2018).

XXVI. Sentencing

A. Allocution

Did the district court commit plain error by not inviting this pro se defendant to allocute at resentencing (after inviting him to give legal arguments)? *United States v. Zander*, No. 17-4156 (reply brief filed March 28, 2018).

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 Oklahoma second-degree rape, maiming, and burglary are violent felonies under the ACCA, and whether this defendant is entitled to § 2255 relief. *United States v. Galbreath*, No. 17-6122 (reply brief filed Nov. 6, 2017).

Did the district court erroneously find that it likely relied on the unconstitutional residual clause in granting this defendant § 2255 relief after *Johnson*? *United States v. Britto*, No. 17-5033 (OA Jan. 16, 2018) (gov't appeal).

Whether New Mexico residential burglary is an ACCA predicate. *United States v. Aires*, No. 17-2076 (brief filed Sept. 5, 2017).

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).

Whether this defendant is entitled to a certificate of appealability and § 2255 relief from his ACCA sentence, based on Oklahoma robbery-by-fear convictions. *United States v. Duran*, No. 17-5087 (OA Sept. 26, 2018).

Whether this defendant is entitled to § 2255 relief from his ACCA sentence, based on Oklahoma burglary, deadly-conduct, and attempted-robbery-with-a-dangerous-weapon convictions. *United States v. Hernandez*, No. 17-6021 (gov't brief filed Jan. 26, 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).

Whether this defendant is entitled to § 2255 relief from his burglary-based ACCA sentence. *United States v. Carson*, No. 17-8064 (brief filed Dec. 20, 2017).

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) (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 (brief filed Feb. 7, 2018).

Whether New Mexico armed robbery and aggravated battery with a deadly weapon are violent felonies for ACCA purposes, and whether this defendant is entitled to 28 U.S.C. § 2255 relief. *United States v. Baker*, No. 17-2174 (brief filed Feb. 23, 2018).

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 (reply brief filed June 4, 2018).

Whether New Mexico (1) aggravated assault with a deadly weapon, (2) third-degree robbery, and (3) aggravated battery with a deadly weapon are violent felonies for ACCA purposes, and whether this defendant is entitled to a certificate of appealability and 28 U.S.C. § 2255 relief. *United States v. Sanchez*, No. 17-2200 (brief filed Feb. 28, 2018).

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 this defendant's three prior bank robberies—committed on different days at different banks, but close in time and character—separate convictions for ACCA purposes? *United States v. Dutch*, No. 17-2219 (OA Sept. 25, 2018) (gov't appeal).

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).

The district court varied upward in this 924(c) case to impose the guideline sentence that the district court believed would have applied to the defendant's dismissed robbery count. But the district court was wrong about what that guideline sentence would have been. Was the resulting variant sentence the result of plain procedural error? *United States v. Ross*, No. 16-3335 (OA Oct. 26, 2017).

Did the district court err in departing upwards in this checkpoint evasion case without sufficient notice or explanation? *United States v. Joseph*, No. 18-2023 (brief filed April 30, 2018).

H. Fines & Assessments

Did the district court err when it imposed a \$5,000.00 fine on an indigent defendant under 18 U.S.C. § 3014(a), which directs district courts to impose this fine "on any non-indigent person" convicted of a listed offense? *United States v. Bonilla*, No. 18-6016 (gov't brief filed June 15, 2018).

I. Guidelines Sections

1. USSG § 1B1.2

2. USSG § 1B1.3 (relevant conduct)

Was there sufficient evidence of the defendant's knowledge and agreement to attribute five kilograms of cocaine to him? *United States v. Solis*, No. 17-2027 (gov't cross-appeal No. 17-2035) (OA July 27, 2018).

Did the district court err in relying on the presentence report to establish contested relevant conduct? *United States v. Padilla*, No. 18-5009 (brief filed May 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 (brief filed May 30, 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 (brief filed May 29, 2018).

3. USSG § 2A2.2

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

4. USSG § 2A3.5 (SORNA)

5. USSG § 2A4.1 (bodily injury)

Did this kidnapping victim's eye injury—resulting in sensitivity to bright light and necessitating sunglasses—qualify as a “serious bodily injury” for purposes of a two-level sentencing enhancement under USSG § 2A4.1(b)(2)(B)? *United States v. Jones*, No. 17-2197 (OA Sept. 25, 2018).

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).

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 conclude that the guidelines do not incorporate the statutory definition of “firearm” (or define “firearm” at all) for this enhancement? *United States v. Smith*, No. 17-8014 (brief filed July 17, 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 (gov't brief filed June 29, 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 (brief filed May 11, 2018).

9. USSG § 2C1.1

10. USSG § 2D1.1

Was evidence that this defendant sometimes stored drugs at home sufficient to support a sentencing enhancement under USSG § 2D1.1(b)(12) for maintaining a drug premises? *United States v. Murphy*, No. 17-5118 (OA Sept. 27, 2018).

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 (gov’t brief filed July 2, 2018).

11. USSG § 2G2.2 (child pornography)

12. USSG § 2K2.1

Was the evidence of “close proximity” insufficient to support a 4-level increase under § 2K2.1(b)(6)(B)? *United States v. Templeton*, No. 17-2091 (OA Jan. 17, 2018).

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).

Is a jury finding with respect to the nature of a firearm necessary before the district court may increase a defendant’s base offense level on that ground under USSG § 2K2.1? *United States v. Martinež*, No. 17-8097 (brief filed June 21, 2018).

13. USSG § 2K2.2

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

15. USSG § 2T1.1 (tax loss)

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

17. USSG § 2Q2.1

18. USSG § 3A1.3

19. 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 (gov’t brief filed July 2, 2018).

20. USSG § 3B1.2 (mitigating role)

Did the district court err in denying this defendant a minor or minimal-role reduction on grounds that she provided necessary services and a car to her bank-robber boyfriend? *United States v. Morris*, No. 17-3074 (reply brief filed Aug. 2, 2017).

21. USSG § 3B1.3 (abuse of trust)

22. USSG § 3C1.1 (obstruction)

Did the district court erroneously add obstruction points under USSC § 3C1.1 for this defendant’s prior alleged escapes? *United States v. Jones*, No. 17-2197 (OA Sept. 25, 2018).

Did the district court erroneously add obstruction points under USSC § 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 (brief filed May 30, 2018).

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

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

Did the district court plainly err by failing to follow the guidelines' grouping rules? *United States v. Lymon*, No. 17-2077 (OA March 20, 2018).

Did the district court plainly err by misapplying the grouping rules in § 3D1.2 and § 3D1.4? *United States v. Rafal*, No. 17-4107 (OA May 16, 2018).

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

Did the district court erroneously rely on this defendant's prior alleged escapes to deny any sentence reduction for acceptance of responsibility? *United States v. Jones*, No. 17-2197 (OA Sept. 25, 2018).

26. USSG § 4A1.1

27. USSG § 4A1.2

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

29. 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).

Whether the mandatory guidelines are subject to vagueness challenges, and whether New Mexico robbery is a crime of violence. *United States v. Rhoads*, No. 17-2081 (OA March 20, 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).

Was this defendant's mandatory-guideline career-offender sentence based on the residual clause, are federal second-degree murder, federal assault with a dangerous weapon, and New Mexico voluntary manslaughter crimes of violence, and is this defendant entitled to § 2255 relief? *United States v. Sarracino*, No. 17-2168 (brief filed Dec. 7, 2017).

Whether armed bank robbery under 18 U.S.C. § 21113 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).

Whether this defendant’s career-offender sentence—based on Kansas possession with intent to sell—is plain error under *Madkins*. *United States v. Reyes*, No. 17-3026 (brief filed Dec. 21, 2017).

Is Kansas aggravated battery a crime of violence for career-offender purposes (and is *Ontiveros* distinguishable, or was it wrongly decided)? *United States v. Love*, No. 17-3236 (OA Sept. 27, 2018).

Are Kansas reckless aggravated battery and Missouri second-degree robbery crimes of violence for career-offender purposes? *United States v. Ash*, Nos. 17-3233 & 17-3245 (gov’t brief and cross-appeal filed June 1, 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).

Is Colorado distribution of an imitation controlled substance offense a “controlled substance offense” for career-offender purposes? *United States v. Thomas*, No. 17-1405 (brief filed May 25, 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 (brief filed June 20, 2018).

Is Colorado second-degree assault a crime of violence for career-offender purposes? (Preserving issue notwithstanding *Ontiveros*). *United States v. Underwood*, No. 18-1017 (brief filed July 9, 2017).

30. USSG § 4B1.5

31. 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. Gonzalez-Avalos*, No. 18-2003 (OA July 27, 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 (reply brief filed June 18, 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 (brief filed July 2, 2018).

32. USSG § 5K1.1

33. USSG § 5K2.14

Did the district court improperly rely on USSG § 5K2.14 (public welfare significantly endangered) when it departed upwards in this explosives case, given that the applicable offense guidelines already

take the danger to the public welfare into account? *United States v. Carey*, No. 17-7070 (reply brief filed May 9, 2018).

34. USSG § 5G1.2(d)

Did the district court clearly err when it imposed consecutive sentences without proper grouping? *United States v. Lymon*, No. 17-2077 (OA March 20, 2018).

J. Mandatory Minimums and Maximums

Absent a special quantity verdict by the jury in this drug case, was the district court obligated (or even authorized, per *Apprendi*) to sentence the defendant to the statutory mandatory minimum? *United States v. Solis*, No. 17-2027 (gov't cross-appeal No. 17-2035) (OA July 27, 2018).

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 (brief filed June 29, 2018).

K. Reasonableness

1. Procedural

The district court varied upward in this 924(c) case to impose the guideline sentence that the district court believed would have applied to the defendant's dismissed robbery count. But the district court was wrong about what that guideline sentence would have been. Was the resulting variant sentence the result of plain procedural error? *United States v. Ross*, No. 16-3335 (OA Oct. 26, 2017).

Must district courts find *clear and convincing* evidence before imposing an upward variance of more than double the defendant's guideline sentence? *United States v. Scott*, No. 16-1474 (OA March 22, 2018).

Did the district court err in relying on double hearsay, inconsistent statements, and uncorroborated unreliable witnesses when it imposed an upward variance of more than double this defendant's guideline sentence? *United States v. Scott*, No. 16-1474 (OA March 22, 2018).

Did the district court procedurally err when it departed upwards and imposed consecutive sentences on grounds that this involuntary-manslaughter defendant would have received a longer sentence in New Mexico state court? *United States v. Beaver*, No. 17-2151 (OA July 27, 2018).

Is this fraud defendant's 60-month sentence—an upward variance twice her high-end guideline sentence—procedurally unreasonable on grounds that the district court failed to adequately address the defendant's arguments and explain the sentence? *United States v. Hoaks*, No. 17-6250 (gov't brief filed May 1, 2018).

Did the district court plainly err in imposing partially consecutive sentences without stating any reason for doing so? *United States v. Martinez-Romero*, No. 17-2220 (brief filed June 12, 2018).

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 (gov't brief filed July 2, 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 (brief filed June 14, 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 (brief filed June 18, 2018).

2. Substantive

Is this child-abuse defendant's 480-month sentence substantively unreasonable? *United States v. Durham*, No. 16-6075 (OA March 23, 2017).

Whether a 200-month sentence for this defendant, convicted of helping her boyfriend rob a bank (plus a 924(c) count), is substantively unreasonable. *United States v. Morris*, No. 17-3074 (reply brief filed Aug. 2, 2017).

Whether this mail and wire fraud defendant's 5-year probationary sentence (with an advisory guideline range of 78-97 months) is substantively unreasonable. *United States v. Sample*, No. 17-2086 (OA March 20, 2018) (gov't appeal).

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).

Did the district court impose a substantively unreasonable sentence when it departed upwards and imposed consecutive sentences on grounds that this involuntary-manslaughter defendant would have received a longer sentence in New Mexico state court? *United States v. Beaver*, No. 17-2151 (OA July 27, 2018).

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

Are this defendant's illegal reentry and supervised-release-revocation sentences substantively unreasonable? *United States v. Meraz-Martinez*, Nos. 17-2143 & 17-2144 (OA July 27, 2018).

Is this defendant's 24-month prison sentence on an illegal-reentry conviction substantively unreasonable? *United States v. Salinas-Cadena*, Nos. 17-2169 & 17-2170 (gov't brief filed March 30, 2018).

Is this defendant's guideline sentence for kidnapping, in light of his background and the circumstances of his crime, substantively unreasonable? *United States v. Jones*, No. 17-2197 (OA Sept. 25, 2018).

Is this fraud defendant's 60-month sentence—an upward variance twice her high-end guideline sentence—substantively unreasonable? *United States v. Hoaks*, No. 17-6250 (gov't brief filed May 1, 2018).

Is this 55-year-old assault defendant's 68-month upper-range guideline sentence for a prison stabbing substantively unreasonable? *United States v. Narez-Rivera*, No. 17-1419 (gov't brief filed July 2, 2018).

Is this defendant's 15-year mid-range guideline sentence for drug distribution substantively unreasonable? *United States v. Quintana-Torres*, No. 17-3256 (gov't brief filed July 3, 2018).

Was the district court's above-guidelines sentence in this gun case substantively unreasonable? *United States v. Garcia*, No. 18-6033 (brief filed May 29, 2018).

Is this defendant's guideline sentence substantively unreasonable? *United States v. Garcia*, No. 18-2025 (brief filed June 14, 2018).

Is this gun defendant's guideline sentence substantively unreasonable? *United States v. Underwood*, No. 18-1017 (brief filed July 9, 2017).

L. SORNA Sentencing Issues

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

Is Oklahoma first-degree manslaughter a predicate offense for three-strikes purposes, and did the district court err in relying on a minute entry in an appearance docket to so find here? *United States v. Leaverton*, No. 17-5001 (OA Nov. 16, 2017).

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

Whether trial counsel's failure to investigate this capital defendant's complex mental condition and capacity constituted ineffective assistance of counsel. *Grant v. Trammell*, No. 14-6131 (OA Jan. 21, 2016).

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).

Should the district court have granted habeas relief on this defendant's IAC claim that his trial lawyer failed to challenge the admission of critical evidence at his murder trial? *Coones v. Shelton*, No. 16-3329 (brief filed March 8, 2017).

Whether the Colorado Court of Appeals unreasonably concluded that this defendant "impliedly" waived his right to trial counsel when he twice fired attorneys shortly before trial. *Vreeland v. Zupan*, No. 16-1503 (OA May 17, 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).

Were trial and appellate counsel ineffective in not addressing the Flynn Effect as mitigating evidence? *Postelle v. Royal*, No. 16-6290 (OA March 20, 2018).

Was trial counsel ineffective in (1) failing to object to the district court's use of conspiracy-wide drug quantity at sentencing; (2) failing to consult with the defendant about an appeal? *United States v. Smith*, No. 17-3075 (gov't brief filed June 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 trial counsel ineffective in introducing the defendant's prior conviction at trial in this state child-enticement case? *Sandoval v. Raemisch*, No. 17-1161 (reply brief filed Jan. 16, 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 (brief filed June 13, 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 (brief filed June 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 (brief filed June 11, 2018).

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

Whether appellate counsel was ineffective in failing to raise IAC claims with respect to trial counsel, and in failing to challenge the trial court's exclusion of a defense expert witness in this state capital trial. *Wood v. Royal*, No. 16-6001 (OA Nov. 14, 2017).

Whether trial counsel were ineffective in failing to investigate and present mitigating evidence in this capital case. *Wood v. Royal*, No. 16-6001 (OA Nov. 14, 2017).

C. Self-Incrimination

D. Self-Representation/Waiver of Counsel

Did the district court violate this defendant's Sixth Amendment right to represent himself at trial? *United States v. Delia*, No. 17-7051 (OA May 16, 2018).

Was this defendant's waiver of counsel knowing and intelligent? *United States v. Quintana-Torres*, No. 17-3256 (gov't brief filed July 3, 2018).

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).

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 the Sixth Amendment by restricting this defendant's cross-examination of his codefendant with respect to her potential sentence and other matters affecting her credibility? *United States v. Roach*, No. 17-2085 (OA May 17, 2018).

Did the district court erroneously conclude that the Sixth Amendment confrontation clause prohibited expert testimony based on data that the testifying expert did not produce? *United States v. Moya*, No. 17-2043 (OA March 22, 2018) (gov't appeal).

Is this state defendant entitled to 28 U.S.C. § 2254 relief on grounds that the state court violated his due-process and confrontation rights by admitting a non-testifying codefendant's inculpatory statements through the state's impeachment of another witness? *Thompson v. Allbaugh*, No. 17-6127 (OA Sept. 26, 2018).

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

Should the district court have granted a mistrial in this firearms case after a juror improperly asked her husband about a core trial issue and reported his answer to the other jurors? *United States v. Daniels*, No. 17-1380 (brief filed March 26, 2018).

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 filed June 15, 2018).

G. Compulsory Process

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

Did the government violate the Interstate Agreement on Detainers Act when it arrested this defendant while he was in state custody and shuttled him back and forth before trying him on federal charges? *United States v. Ray*, No. 16-1306 (OA Jan. 18, 2018).

Did the district court erroneously deny this defendant's motion to dismiss for statutory speedy-trial violations? *United States v. Ray*, No. 16-1306 (OA Jan. 18, 2018).

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 (brief filed June 8, 2018).

XXIX. Standards of Review

A. Waiver

B. Forfeiture/Plain Error

C. De Novo Review

XXX. Statutes of Limitations

The general statute of limitations (18 U.S.C. § 3282) passed before the indictment in this health-care-fraud case was filed. Did the Wartime Suspension of Limitations Act (18 U.S.C. § 3287) apply, notwithstanding the fact that the alleged victim was a state agency, not a federal agency? *United States v. Delia*, No. 17-7051 (OA May 16, 2018).

Did the duration of this conspiracy delay the start of the statute of limitations? *United States v. Kemp & Assoc., Inc., and Mannix* No. 17-4148 (OA May 16) (gov't appeal).

XXXI. Supervised Release

A. Revocation Issues

Did evidence that this defendant's boyfriend spanked her son with a belt support the district court's finding that she participated in child abuse, and its revocation of her supervised release? *United States v. Romero*, No. 17-2172 (OA May 17, 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 revocation sentence substantively unreasonable? *United States v. Ochoa-Oliva*, No. 17-2210 (OA Sept. 27, 2018).

Is this defendant's revocation sentence—at the top of the guidelines—substantively unreasonable? *United States v. Plancarte*, No. 17-1457 (brief filed June 8, 2018).

Is this defendant's 24-month revocation sentence substantively unreasonable? *United States v. Yazzie*, No. 18-2039 (gov't brief filed July 10, 2018).

Is this defendant's statutory maximum revocation sentence (double the high guideline sentence) substantively unreasonable? *United States v. Moorad*, No. 18-6002 (brief filed July 6, 2018).

2. Procedural

Is this drug defendant's 140-month guideline sentence procedurally unreasonable in light of the district court's failure to resolve disputed facts or explain its reason for rejecting the defendant's sentencing-manipulation-based variance argument? *United States v. Sedillo*, No. 17-2173 (OA Sept. 25, 2018).

Did the district court plainly violate 18 U.S.C. § 3583(h)'s aggregation requirement when sentencing this defendant to 24 months' imprisonment after her second revocation? *United States v. Porter*, No. 18-5000 (brief filed May 14, 2018).

3. Unlawful Delegation of authority

4. Assimilative Crimes Act (ACA) sentences

C. Conditions of Supervised Release

Did the district court exceed its authority or jurisdiction when it sua sponte ordered this drug defendant to either marry the mother of his children or arrange child-support payments as a condition of supervised release (especially absent the existence of any state-issued child-support order)? *United States v. Sedillo*, No. 17-2173 (OA Sept. 25, 2018).

Did the district court plainly err by imposing occupational restrictions as a condition of supervised release without making adequate findings? *United States v. Quintana-Torres*, No. 17-3256 (gov't brief filed July 3, 2018).

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 (gov't brief filed July 10, 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 (brief filed June 21, 2018).

Did the district court err in imposing conditions of supervised release without making necessary findings? *United States v. Lopez*, No. 17-4180 (brief filed June 21, 2018).

XXXII. Trial Practice and Evidence Issues

A. Closing Argument

B. Confidential Informants

C. Cumulative Error

Whether instructional error and prosecutorial misconduct cumulatively denied this defendant a fair trial. *United States v. Giannukos*, No. 17-3067 (OA March 22, 2018).

Whether improper expert testimony, prior bad acts, and hearsay evidence cumulatively deprived this defendant of a fair trial. *United States v. Martinez*, No. 16-1393 (OA Jan. 18, 2018).

D. Demonstrative Evidence

E. Due Process

F. Eyewitness Identification Testimony

G. Judicial misconduct

Did the district court improperly ask a DEA agent, who was interpreting phone calls between alleged drug conspirators, whether the conversation might have involved pounds instead of just ounces? *United States v. Marquez*, No. 17-2028 (OA Jan. 17, 2018).

H. Jury Instructions

Did the trial court properly respond to this jury's questions asking (1) what evidence was related to a particular count; and (2) whether the count referenced the wrong drug-buy date? *United States v. Olea-Monarez*, No. 16-3330 (OA Jan. 18, 2018).

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

Did the district court misstate the burden of proof in its instructions to the jury? Did it improperly tell the jury that the defendant did not anticipate calling any witnesses? *United States v. Waldron*, No. 17-4187 (OA Sept. 27, 2018).

3. Conspiracy

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. Scott*, No. 16-1474 (OA March 22, 2018); *United States v. Giannukos*, No. 17-3067 (OA March 22, 2018); *United States v. Martinez*, No. 16-1393 (OA Jan. 18, 2018).

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 refusing to instruct the jury that the defendant’s good-faith reliance on the Kansas Second Amendment Protection Act was a complete defense to his federal gun charges? *United States v. Cox*, No. 17-3034 (OA Jan. 16, 2018); *United States v. Kettler*, No. 17-3035 (OA Jan. 16, 2018).

Did the district court err in refusing to give a self-defense instruction in this prison assault case? *United States v. Thomas*, No. 17-1278 (gov’t brief filed June 20, 2018).

16. Unanimity

17. Voluntary Intoxication

18. Witness Cautionary Instructions

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 government know that its medical expert’s testimony was based on faulty and outdated science, and did the government’s failure to disclose this at trial amount to a *Brady* violation? *United States v. Durham*, No. 16-6075 (OA March 23, 2017).

Did the government commit misconduct by implying during closing argument that homosexuals are unsafe around children in this child sexual assault case? *United States v. Durham*, No. 16-6075 (OA March 23, 2017).

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).

Should the district court have granted habeas relief on this defendant’s *Brady* claim? *Lebere v. Trani*, No. 16-1499 (reply brief filed Dec. 13, 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 government’s destruction of IRS records violate this tax-fraud defendant’s due process rights under *Youngblood*? *United States v. Ray*, No. 16-1306 (OA Jan. 18, 2018).

Was the government’s filing of a superseding indictment in this case—after the defendant had filed substantive motions and retained new counsel—vindictive, in violation of due-process? *United States v. Ray*, No. 16-1306 (OA Jan. 18, 2018).

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).

Did the prosecutor commit misconduct when it argued that the jury should rely on hearsay evidence as direct evidence when it was only admitted for impeachment purposes? *United States v. Giannukos*, No. 17-3067 (OA March 22, 2018).

Did the prosecutor commit misconduct by commenting on matters not in evidence? *United States v. Magnan*, No. 17-8026 (OA Jan. 18, 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).

Was the *Brady* evidence at issue in this case material? Was an ex parte conversation between the district court and the government regarding the government’s *Brady* obligation plain constitutional error? *United States v. Waldron*, No. 17-4187 (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 (brief filed May 3, 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).

Did the district court violate this defendant's constitutional right to present a defense by disallowing any evidence or instructions on her duress defense? *United States v. Dixon*, No. 17-7010 (OA Nov. 16, 2017).

Was this defendant's acquittal in state court of the same murder charge he faced in federal court admissible to establish his theory of defense that the acquittal motivated the manufacture of evidence presented at his federal trial? *United States v. Roman*, No. 17-4084 (OA May 16, 2018).

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 (brief filed May 21, 2018).

O. Rule 106 (rule of completeness)

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

Should evidence of the defendant's struggles with homosexuality and child pornography have been suppressed as unduly prejudicial in this child sexual abuse case? *United States v. Durham*, No. 16-6075 (OA March 23, 2017).

Should evidence of the defendant's confessions been excluded as more prejudicial than probative? *United States v. Durham*, No. 16-6075 (OA March 23, 2017).

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 Sept. 27, 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 (brief filed May 30, 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 (brief filed May 30, 2018).

Q. Rule 404(b)

Was the defendant's struggles with homosexuality and child pornography improper 404(b) evidence that should have been suppressed in this child sexual abuse case? *United States v. Durham*, No. 16-6075 (OA March 23, 2017).

Did the district court erroneously admit (1) the defendant's prior felon-in-possession conviction; (2) a girlfriend's testimony that she had seen the defendant with a gun; and (3) evidence that the defendant had stolen a gun from an ex-girlfriend in the past, as 404(b) evidence in this felon-in-possession case? *United States v. Scott*, No. 16-1474 (OA March 22, 2018).

Did the district court allow evidence of this drug & gun defendant's prior drug sales for an improper purpose? *United States v. Martinez*, No. 16-1393 (OA Jan. 18, 2018).

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

Did the district court improperly instruct the jury that it could consider evidence of prior sexual abuse as propensity evidence? *United States v. Magnan*, No. 17-8026 (OA Jan. 18, 2018).

S. Rules 601-615 (Witnesses)

Did the district court plainly err by admitting a complainant's prior consistent statements through two police officers as substantive evidence, and despite the government's failure to ask the complainant to explain or deny the statements (F.R.E. 613)? *United States v. Lacy*, No. 17-3119 (OA March 20, 2018).

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 (brief filed May 21, 2018).

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

Did the district court commit plain error in this drug case by admitting expert testimony that denials of knowledge that a vehicle contains drugs are generally not credible? *United States v. Rodriguez-Flores*, No. 17-2039 (OA March 20, 2018).

Did the district court err in allowing DEA agents to interpret recorded phone calls in this drug conspiracy case? *United States v. Marquez*, No. 17-2028 (OA Jan. 17, 2018).

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).

Was it error to allow a government expert to testify in a child sexual-abuse case that 96-98% of child sexual-abuse complainants are telling the truth? *United States v. Magnan*, No. 17-8026 (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).

U. Rules 801-807 (hearsay)

Did the district court err in admitting unauthenticated medical records containing double hearsay? *United States v. Durham*, No. 16-6075 (OA March 23, 2017).

Was admission of multiple prior consistent statements in this child-sexual abuse trial improper? *United States v. Magnan*, No. 17-8026 (OA Jan. 18, 2018).

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)

Did the district court err in admitting video evidence of the defendant's confessions (recorded on a cellphone) without proper authentication, given the possibility that the recordings had been altered? *United States v. Durham*, No. 16-6075 (OA March 23, 2017).

W. Rule 1002 (Best Evidence Rule)

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. Underwood, No. 18-1017 (brief filed July 9, 2017) (sentencing: substantive reasonableness; USSG §§ 4B1.1, 4B1.2).

United States v. Moorad, No. 18-6002 (brief filed July 6, 2018) (supervised-release-revocation sentencing: substantive reasonableness).

United States v. Montijo-Dominguez, No. 18-2008 (brief filed July 2, 2018) (USSG § 5C1.2; 21 U.S.C. § 846).

Harris v. Royal, No. 17-6109 (brief filed July 2, 2018) (capital case: 28 U.S.C. § 2254).

United States v. McGee, No. 18-5019 (brief filed June 29, 2018) (sentencing: mandatory minimums).

United States v. Rodriguez-Barbosa, No. 18-1119 (brief filed June 28, 2018) (pleas: breach).

United States v. Clark, No. 18-2048 (brief filed June 27, 2018) (18 U.S.C. § 924(c)).

United States v. Osborn, No. 18-4009 (OA Sept. 27, 2018) (Fifth Amendment due process: involuntary medication to achieve competency).

United States v. Martinez, No. 17-8097 (brief filed June 21, 2018) (USSG § 2K.1(a)).

United States v. Lopez, No. 17-4180 (brief filed June 21, 2018) (supervised release: conditions).

United States v. Brigman, No. 17-3176 (brief filed June 20, 2018) (USSC §§ 4B1.1, 4B1.2).

United States v. Mascheroni, No. 18-2017 (brief filed June 19, 2018) (28 U.S.C. § 2255).

United States v. Johnson, No. 18-7012 (brief filed June 18, 2018) (sentencing: procedural reasonableness).

United States v. Hansen, No. 17-4159 (OA Sept. 27, 2018) (Sixth Amendment: right to counsel).

United States v. Garcia, No. 18-2025 (brief filed June 14, 2018) (sentencing: procedural & substantive reasonableness).

Bush v. Royal, No. 16-6318 (brief filed June 13, 2018) (capital case: Eighth Amendment, Due Process, Sixth Amendment, victim impact, IAC, guilty pleas, cumulative error).

United States v. Martinez-Romero, No. 17-2220 (brief filed June 12, 2018) (sentencing: procedural reasonableness).

United States v. Garrison, No. 18-1053 (brief filed June 11, 2018) (Fed. R. Crim. P. 12; 21 U.S.C. § 846; Sixth Amendment: IAC).

United States v. Orozco, No. 18-3003 (brief filed June 11, 2018) (Fed. R. Crim. P. 33).

United States v. Medina, No. 17-1455 (brief filed June 8, 2018) (speedy trial).