

ISSUES PENDING IN THE TENTH CIRCUIT

COMPILED BY THE KANSAS FEDERAL PUBLIC DEFENDER



Updated July 3, 2017

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, with no resistance, 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. That office produces a similar document for issues pending in the Seventh Circuit (available here: <http://ilc.fd.org/General%20Documents/7IP.pdf>). 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*."

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 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).

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).

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 2

VIII. Ex Post Facto Issues 2

IX. First Amendment 2

X. Forfeiture 2

XI. Fourth Amendment Issues 3

 A. Arrest Warrant 3

 B. Consent 3

 C. Excessive Force 3

 D. Fruit of the Poisonous Tree 3

 E. Good Faith Exception 3

 F. Government Actor 3

 G. Hearing Issues 3

 H. Inventory Searches 3

 I. Knock and Talk 3

 J. Plain View Doctrine 3

 K. Protective Sweeps 3

 L. Scope of Warrantless Search 4

 M. Search Incident to Arrest 4

 N. Search Warrant Issues (including *Franks v. Delaware* issues) 4

 O. Standing (reasonable expectation of privacy) 5

 P. *Terry* Stops: Initial Detention 5

 Q. *Terry*: Frisk 5

 R. Traffic Stops 5

 S. Warrantless Arrests 6

 T. Warrantless Seizures 6

 U. Warrantless Searches 6

XII. Fourteenth Amendment: Due Process.....	6
XIII.Fifth Amendment: Due Process.....	6
XIV.Fifth Amendment: Confessions & <i>Miranda</i>	7
XV. Habeas Issues	7
A. 28 U.S.C. § 2241	7
B. 28 U.S.C. § 2254.....	8
C. 28 U.S.C. § 2255	9
D. Fed. R. Civ. P. 60(b).....	10
E. Procedural.....	10
XVI.Indictment Issues.....	10
A. Amendments.....	10
B. Duplicity	10
C. Grand Jury Issues	10
D. Sufficiency of the Indictment (Sixth Amendment).....	10
E. Variance.....	10
XVII. Jurisdictional Issues.....	11
XVIII. Motion Practice	11
XIX.Offenses	11
A. 8 U.S.C. § 1253 (removal-related offenses)	11
B. 8 U.S.C. § 1326 (illegal reentry)	11
C. 16 U.S.C. § 3372, et al. (illegally taking fish and wildlife)	11
D. 18 U.S.C. § 2 (aiding and abetting)	11
E. 18 U.S.C. § 111 (assaulting, resisting, impeding an officer or employee).....	11
F. 18 U.S.C. § 242 (civil-rights violation).....	11
G. 18 U.S.C. § 371 (conspiracy).....	11
H. 18 U.S.C. § 666 (bribery)	12
I. 18 U.S.C. § 842 (unlawful distribution/possession of explosives).....	12
J. 18 U.S.C. § 843 (using a communication device)	12
K. 18 U.S.C. § 844 (arson).....	12
L. 18 U.S.C. § 875 (interstate communications)	12
M. 18 U.S.C. § 876 (mailing threatening communications)	12
N. 18 U.S.C. § 922(d) (disposal to a prohibited person)	12
O. 18 U.S.C. § 922(g) (prohibited person in possession).....	12

P.	18 U.S.C. § 924(c) (Possession/Use of Firearm during drug trafficking offense)	12
Q.	18 U.S.C. § 1001 (false statements)	14
R.	18 U.S.C. § 1028 (identity-document fraud)	14
S.	18 U.S.C. § 1028A (identity theft)	14
T.	18 U.S.C. § 1041 (false statements to a bank)	14
U.	18 U.S.C. § 1201 (kidnapping)	14
V.	18 U.S.C. § 1341 (mail fraud)	14
W.	18 U.S.C. § 1343 (wire fraud)	14
X.	18 U.S.C. § 1344 (bank fraud)	14
Y.	18 U.S.C. § 1361 (degradation of government property)	14
Z.	18 U.S.C. § 1512 (witness tampering)	14
AA.	18 U.S.C. § 1513 (obstruction of justice)	14
BB.	18 U.S.C. § 1951 (Hobbs Act robbery)	14
CC.	18 U.S.C. § 1956 (money laundering)	14
DD.	18 U.S.C. § 2250 (SORNA: failure to register); 42 U.S.C. § 16911	15
EE.	18 U.S.C. § 2251 (sexual exploitation/production of child pornography)	15
FF.	18 U.S.C. § 2422 (enticement to travel to engage in prostitution)	15
GG.	18 U.S.C. § 2423 (transportation of minors)	15
HH.	18 U.S.C. § 1591 (child sex trafficking)	15
II.	18 U.S.C. § 2252A (receiving/distributing child pornography)	15
JJ.	21 U.S.C. § 841 (drug trafficking)	15
KK.	21 U.S.C. § 846 (drug conspiracy)	15
LL.	21 U.S.C. § 856 (drug-involved premises)	16
MM.	26 U.S.C. § 5861 (firearms offenses)	16
NN.	26 U.S.C. § 7201 (tax evasion)	16
OO.	26 U.S.C. § 7212	16
PP.	28 U.S.C. § 455 (recusal)	16
QQ.	49 U.S.C. § 46504 (intimidating a flight attendant)	16
XX.	Pleas	16
	A. Acceptance of Plea	16
	B. Appeal Waiver	16
	C. Breach	16
	D. Rejection of Plea Agreement	16

E. Withdrawal of Plea.....	17
XXI. Restitution (18 U.S.C. § 3663, 3664, <i>et al.</i>).....	17
XXII. Rules of Criminal Procedure	17
A. Rule 8 (Joinder/Severance).....	17
B. Rule 12 (motions).....	18
C. Rule 32 (sentencing procedures).....	18
D. Rule 33 (new trial)	18
E. Rule 41 (search & seizure).....	18
XXIII. Scope of Remand/Mandate Rule/Other Remand Issues	18
XXIV. Second Amendment Issues.....	18
XXV. Sentencing.....	18
A. Allocution	18
B. Apprendi.....	18
C. Armed Career Criminal Act (18 U.S.C. 924(e))	18
D. Burden of Proof	20
E. Capital Sentencing.....	20
F. Commitment in Lieu of Imprisonment (18 U.S.C. § 4244)	20
G. Departures and Variances	20
H. Fines & Assessments	20
I. Guidelines Sections	21
1. USSG § 1B1.2.....	21
2. USSG § 1B1.3 (relevant conduct).....	21
3. USSG § 2A2.2	22
a) subsection (b)(2)(B) (use of dangerous weapon)	22
4. USSG § 2A3.5 (SORNA).....	22
5. USSG § 2A4.1	22
a) subsection (b)(2)(A) (permanent or life-threatening bodily injury).....	22
6. USSG § 2A6.1	22
a) subsection (b)(2)(A) (more than 2 threats)	22
7. USSG § 2B1.1.....	22
a) subsection (b) (loss amount).....	22
b) subsection (b)(2) (victim enhancement).....	22
c) subsection (b)(10)(C) (sophisticated means).....	22

8. USSG § 2B3.1 (robbery).....	22
9. USSG § 2C1.1.....	22
10. USSG § 2D1.1.....	22
11. USSG § 2G2.2 (child pornography).....	23
12. USSG § 2K2.1.....	23
13. USSG § 2K2.2.....	23
14. USSG § 2L1.2 (immigration offenses).....	23
15. USSG § 2T1.1 (tax loss).....	23
16. USSG § 2T1.4 (sophisticated means—tax offense).....	24
17. SSG § 2Q2.1.....	24
18. USSG § 3B1.1.....	24
19. USSG § 3B1.2 (mitigating role).....	24
20. USSG § 3B1.3 (abuse of trust).....	24
21. USSG § 3C1.1 (obstruction).....	24
22. USSG § 3C1.2 (reckless endangerment during flight).....	24
23. USSG § 3D1.2 (grouping).....	24
24. USSG § 3E1.1.....	24
25. USSG § 4A1.1.....	25
26. USSG § 4A1.2.....	25
27. USSG § 4A1.3 (criminal-history departures).....	25
28. USSG §§ 4B1.1, 4B1.2 (crime of violence; controlled substance offense).....	25
29. USSG § 4B1.5.....	26
30. USSG § 5K1.1.....	26
31. USSG § 5K2.14.....	26
J. Mandatory Minimums and Maximums.....	26
K. Reasonableness.....	27
1. Procedural.....	27
2. Substantive.....	27
L. SORNA Sentencing Issues.....	28
M. Three Strikes (18 U.S.C. § 3559(c)).....	28
N. Resentencing Issues.....	29
O. Constitutional Issues.....	29
1. Fifth Amendment Due Process.....	29

2.	Sixth Amendment and Hearsay	29
XXVI.	Sixth Amendment	29
A.	Right to Effective Assistance of Counsel.....	29
B.	Substitution of Counsel/Conflicts of Interest/Counsel of Choice.....	31
C.	Self-Incrimination.....	31
D.	Self-Representation	31
E.	Confrontation	31
F.	Impartial Jury	32
G.	Compulsory Process	32
XXVII.	Speedy Trial (statutory and constitutional) & Interstate Agreement on Detainers Act ...	33
XXVIII.	Standards of Review	33
A.	Waiver.....	33
B.	Forfeiture/Plain Error.....	33
C.	De Novo Review.....	33
XXIX.	Supervised Release	33
A.	Revocation Issues.....	33
B.	Sentencing Issues (either initially or after revocation)	34
1.	Substantive.....	34
2.	Procedural.....	34
3.	Unlawful Delegation of authority.....	34
4.	Assimilative Crimes Act (ACA) sentences	34
C.	Conditions of Supervised Release.....	34
XXX.	Trial Practice and Evidence Issues	35
A.	Closing Argument	35
B.	Confidential Informants.....	35
C.	Cumulative Error.....	35
D.	Demonstrative Evidence.....	36
E.	Due Process	36
F.	Eyewitness Identification Testimony	36
G.	Jury Instructions	36
1.	Aiding and Abetting	36
2.	Burden of Proof.....	36
3.	Conspiracy.....	36

4. Constructive Possession	36
5. Deliberate Avoidance/Ignorance	36
6. Elements (see also statute under which defendant tried).....	36
7. Sentencing Elements	37
8. Flight.....	37
9. Guilt by Association/Guilt of Others	37
10. Investigative Techniques.....	37
11. Knowledge.....	37
12. Polygraphs.....	37
13. Proof.....	37
14. Spoliation	37
15. Theory of Defense/Affirmative Defense	37
16. Unanimity.....	37
17. Voluntary Intoxication	37
18. Witness Cautionary Instructions.....	37
H. Mistrial	37
I. Prior Convictions	37
J. Prosecutorial Misconduct.....	37
K. Right to be Present.....	39
L. Right to Present Defense	39
M. Rule 106 (rule of completeness).....	39
N. Rules 401, 402, 403 (relevance & undue prejudice)	39
O. Rule 404(b).....	40
P. Rules 412, 413 & 414 (Sexual Assault Evidence)	41
Q. Rules 701-706 (Opinions and Expert Testimony).....	41
R. Rules 801-807 (hearsay).....	42
S. Rule 901 (authentication)	42
T. Rule 1002 (Best Evidence Rule).....	42
U. Rule 1006 (Summaries).....	42
V. Surrebuttal	43
W. Voir Dire.....	43
XXXI. Void for Vagueness.....	43
XXXII. Wiretap Issues (18 U.S.C. § 2510-2522)	43

XXXIII. Miscellaneous.....43
A. Forum Shopping.....43
B. Disqualification of Government Counsel43

I. Appeals

Does the Tenth Circuit have jurisdiction to review the district court's dismissal of an indictment without prejudice, where the defendant claims that double jeopardy bars further prosecution? *United States v. Martinson*, No. 16-4017 (gov't brief filed May 11, 2016).

Should the Tenth Circuit remand this direct-appeal case for an evidentiary hearing on claims of ineffective assistance of counsel (rather than directing that those claims be brought later, in a collateral proceeding)? *United States v. Kearn*, No. 15-3121 (OA May 10, 2017).

May the Tenth Circuit hear an interlocutory appeal from the district court's denial of conflict-free § 2255 counsel, under the collateral-order doctrine? If not, should the Court treat this appeal as a petition for writ of mandamus? *United States v. Miller*, No. 16-1407 (gov't brief filed Nov. 17, 2016).

The Tenth Circuit has previously stated that when reviewing the denial of a motion to suppress, the Court "views the evidence in the light most favorable to the government." Should the Court revisit this standard? *United States v. Nelson*, No. 16-3292 (OA May 10, 2017); *United States v. Knox*, No. 16-3324 (reply brief filed May 24, 2017).

Should this case be remanded to a different judge for a third sentencing, where the original sentencing judge violated this Court's original resentencing remand order? *United States v. Zander*, No. 16-4162 (reply brief filed May 17, 2107).

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

V. Discovery

Did the district court err in denying any hearing or remedy for the defendant's allegations of government discovery violations? *United States v. Riddle*, No. 16-4143 (gov't brief filed May 19, 2017).

Did the district court err in denying this defendant's motion to dismiss as a remedy for the IRS's destruction of audit files that the agents admitted supported this tax-evasion defendant's defense? *United States v. Stegman*, No. 16-3321 (reply brief filed May 8, 2017).

VI. Double Jeopardy

Did the defendant's acquittal in a previous drug-conspiracy case bar his prosecution in this drug-conspiracy case? *United States v. Brown*, No. 16-6210 (reply brief filed April 12, 2017).

Were two of the charges in this false-documents case multiplicitous? *United States v. Etenyi*, No. 16-3364 (brief filed May 2, 2017).

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).

This defendant was just a few months over 18 when he allegedly committed a child-abuse murder. Does his mandatory life-without-parole sentence violate the 8th Amendment? (Arguing for an extension of *Miller v. Alabama*.) *United States v. Williston*, No. 15-7080 (gov't brief filed Sept. 28, 2016).

Did this Oklahoma state trial judge improperly admit victim-impact evidence during the sentencing phase of this capital trial, and did the state appellate court improperly find this error harmless? *Murphy v. Royal*, No. 15-7041, 7068 (OA March 22, 2017).

Did Oklahoma law wrongly cut off inquiry into this capital defendant's intellectual disability, which would render him ineligible for the death penalty? *Murphy v. Royal*, No. 15-7041, 7068 (OA March 22, 2017).

Was the evidence insufficient to support the heinous, atrocious, or cruel (HAC) aggravating factor in this capital case, and were the jury instructions on this factor unconstitutionally flawed? *Murphy v. Royal*, No. 15-7041, 7068 (OA March 22, 2017).

Should the jurors in this capital case have been instructed that "life without parole" means no possibility of parole, ever? *Murphy v. Royal*, No. 15-7041, 7068 (OA March 22, 2017).

Are Oklahoma's jury instructions defining mitigating circumstances unconstitutionally limiting? *Simpson v. Royal*, No. 16-6191 (brief filed May 31, 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 (brief filed May 31, 2017).

VIII. Ex Post Facto Issues

IX. First Amendment

Were this defendant's hyperbolic Internet posts in response to police shootings and corruption protected by the First Amendment, and should the district court have dismissed his charges of interstate communications with intent to injure (18 U.S.C. § 875(c))? *United States v. Stevens*, No. 17-5044 (brief filed June 9, 2017).

X. Forfeiture

Does the district court's joint-and-several \$16,985,250.00 forfeiture order, based on the entire drug conspiracy (and not just the defendant's role in it), violate the excessive fines clause or 21 U.S.C. § 853? *United States v. Pickel*, No. 16-3041 (OA May 10, 2017).

Was the evidence sufficient to support the court's money forfeiture order in this wire-fraud case? *United States v. Matthew Channon*, No. 16-2254 (gov't brief filed June 19, 2017); *United States v. Brandi Channon*, No. 16-2285 (gov't brief filed June 19, 2017).

XI. Fourth Amendment Issues

A. Arrest Warrant

B. 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 (brief filed June 13, 2017).

Did this driver voluntarily consent to a search of his car after the officer who stopped him for speeding asked his wife intrusive questions and unlawfully prolonged the stop? *United States v. Ramos*, No. 17-2013 (brief filed June 21, 2017).

C. Excessive Force

D. Fruit of the Poisonous Tree

E. Good Faith Exception

Did the district court err in finding that this search warrant—which the district court agreed lacked probable cause—was executed in good faith? *United States v. Dunn*, No. 15-1475 (reply brief filed Aug. 19, 2016).

Can *Leon* save the execution of a search warrant that was based on an invalid protective sweep? *United States v. Bagley*, No. 16-3305 (reply brief filed March 20, 2017).

Did the district court erroneously consider information outside of the warrant affidavit and warrant process when it found good faith? Was the district court's good-faith finding otherwise erroneous? *United States v. Knox*, No. 16-3324 (reply brief filed May 24, 2017).

Does *Leon* apply to a *Franks* violation when the errors in the warrant affidavit resulted from systemic or recurring police negligence? *United States v. Ewing*, No. 16-5179 (reply brief filed April 8, 2017).

F. Government Actor

G. Hearing Issues

H. Inventory Searches

Did this investigatory "inventory search" of a rental car violated the Fourth Amendment? *United States v. Sanchez*, No. 17-4000 (brief filed May 26, 2017).

I. Knock and Talk

J. Plain View Doctrine

K. Protective Sweeps

Did the district court err in holding that a warrantless search of a basement, including a bed in the basement, was a valid protective sweep after the defendant was arrested on a different floor of the home? *United States v. Nelson*, No. 16-3292 (OA May 10, 2017).

Did the district court err in finding that a protective sweep conducted inside a house, after the defendant was arrested (pursuant to an arrest warrant) at the front door of the house, was valid? *United States v. Bagley*, No. 16-3305 (reply brief filed March 20, 2017).

Was a warrantless search of a house and its attic—after the defendant was arrested outside—justified as a protective sweep? *United States v. Banks*, No. 16-6322 (brief filed April 8, 2017).

L. Scope of Warrantless Search

M. Search Incident to Arrest

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

Did the district court correctly find that allegations that a suspect in a stabbing and theft four miles away was present in the defendant’s home two days later did *not* establish probable cause that evidence of the stabbing would be found in the defendant’s home? *United States v. Dunn*, No. 15-1475 (reply brief filed Aug. 19, 2016).

Did a warrant to search for evidence of a stabbing and theft lack particularity when it purported to authorize a search for evidence including but not limited to mail, weapons, cell phones, computers, paperwork, and DNA? *United States v. Dunn*, No. 15-1475 (reply brief filed Aug. 19, 2016).

Did this search-warrant affidavit contain false statements and the fruit of a coerced interview, and, if so, should the fruit of the warrant have been suppressed? *United States v. McNeal*, No. 16-1054 (reply brief filed Oct. 13, 2016).

Whether the district court erred in granting blanket suppression for a *Franks* violation. *United States v. Gebrmann*, No. 16-1208 (OA March 23, 2017) (gov’t appeal).

Did this search-warrant affidavit contain a sufficient nexus to the property to be searched? *United States v. Ingram*, No. 16-6221 (reply brief filed March 21, 2017).

Did the district court err in denying a *Franks* hearing on the defendant’s claim that the search-warrant affidavit omitted material information that the defendant and his alleged associates were in prison during the time the affiant claimed they were involved in an ongoing drug conspiracy? *United States v. Ingram*, No. 16-6221 (reply brief filed March 21, 2017).

Should evidence seized from the defendant’s smartphone have been suppressed as the fruit of an unlawful search, where the search warrant for the phone was issued by a Kansas state judge, but executed in Missouri (beyond the Kansas judge’s jurisdiction)? *United States v. Pacheco*, No. 16-3294 (reply brief filed May 19, 2017).

Did officers exceed the scope of a search warrant for “records of narcotics transactions” when they seized the defendant’s electronic devices? *United States v. Pacheco*, No. 16-3294 (reply brief filed May 19, 2017).

Should the district court have suppressed the fruit of this warrant on *Franks* grounds that the affidavit contained knowing or reckless false statements and omissions? *United States v. Ewing*, No. 16-5179 (reply brief filed April 8, 2017).

O. Standing (reasonable expectation of privacy)

P. *Terry* Stops: Initial Detention

Was it reasonable for officers to conduct a “high risk” traffic stop to seize this defendant for a completed misdemeanor? *United States v. Windom*, No. 16-1027 (reply brief filed Oct. 11, 2016).

A police officer stopped this defendant in the street and asked him where he had just come from. Did the officer’s belief that the defendant’s answer might have been a lie provide reasonable suspicion to detain him? *United States v. Coca*, No. 16-2093 (OA April 27, 2017).

Q. *Terry*: Frisk

Did law-enforcement’s discovery during a traffic stop that a passenger (1) had recently been arrested for weapons possession; and (2) was listed in a gang database provide reasonable suspicion for a *Terry* pat-down? *United States v. Hammond*, No. 17-1102 (brief filed June 19, 2017).

R. Traffic Stops

Was it reasonable for officers to conduct a “high risk” traffic stop to seize this defendant for a completed misdemeanor? *United States v. Windom*, No. 16-1027 (reply brief filed Oct. 11, 2016).

Did an officer unreasonably prolong this traffic stop so that a drug dog could walk around the defendant’s truck? *United States v. Pickel*, No. 16-3041 (OA May 10, 2017).

Did the officer’s immediate questioning during this traffic stop for a burned out tag light (Have you been in trouble before? Have you been to prison?) exceed the alleged purpose of the stop? *United States v. Cone*, No. 16-5125 (submitted March 23, 2017).

Agents had probable cause to search this defendant’s trunk for a 40-inch-long rifle. Did a search of a small storage compartment in the passenger area of the car exceed the permissible scope of the search? *United States v. Mirabal*, No. 16-2188 (reply brief filed April 19, 2017).

Was the traffic stop of this defendant justified? *United States v. Brown*, No. 16-6210 (reply brief filed April 12, 2017).

Was an isolated incident of drifting left of center sufficient to justify this traffic stop? *United States v. Ingram*, No. 16-6220 (reply brief filed March 15, 2017).

Was this defendant’s continued detention after being ticketed justified by his nervousness and inconsistent stories? *United States v. Chow*, No. 16-8115 (gov’t brief filed April 8, 2017).

After an anonymous tip that a man was smoking marijuana in a car, officers blocked this defendant in with a police cruiser, lights on. Was this a detention, supported by reasonable suspicion? And did a search of credit cards in a bag in the car exceed the scope of any search for evidence of marijuana consumption? *United States v. Saulsberry*, No. 16-6306 (reply brief filed May 23, 2017).

Was this traffic stop for improper lane change under New Mexico law supported by reasonable suspicion? *United States v. Vance*, No. 17-2008 (brief filed May 11, 2017).

Was the district court's probable-cause finding in support of this traffic stop based on clearly erroneous factual findings? Was it based on a legally erroneous exercise of judicial notice? *United States v. Angeles*, No. 16-3354 (brief filed June 9, 2017).

Did an incidental lane breach give law enforcement a reasonable suspicion to support this traffic stop? *United States v. Angeles*, No. 16-3354 (brief filed June 9, 2017).

Was the district court's finding that the trooper reasonably believed that this defendant's brake light was out clearly erroneous? *United States v. Roberts*, No. 17-4021 (brief filed June 9, 2017).

Was a second VIN inspection beyond the scope of this traffic stop for speeding? *United States v. Ramos*, No. 17-2013 (brief filed June 21, 2017).

Did thirteen questions to a passenger, unrelated to this speeding stop, unlawfully prolong the stop? *United States v. Ramos*, No. 17-2013 (brief filed June 21, 2017).

S. Warrantless Arrests

Did this "high risk" traffic stop amount to an arrest without probable cause? *United States v. Windom*, No. 16-1027 (reply brief filed Oct. 11, 2016).

At what point did officers arrest this defendant: when they pulled into a parking lot where the defendant was sitting in his car, when they shined their "takedown lights" into his car, when they converged on the car (in such a way that he could not have left), shouting, with guns drawn, or when they forced the defendant out of the car? *United States v. Roberson*, No. 16-6136 (OA March 23, 2017).

Did this warrantless arrest of the defendant, who was "just standing" on the front porch of his home, simply because the defendant was wearing a baseball cap and grey shirt (described by a 911 caller as the clothing of a nearby burglary suspect), violate the Fourth Amendment? *United States v. Soza*, No. 16-2182 (OA March 21, 2017).

T. Warrantless Seizures

U. Warrantless Searches

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

Did the district court err in denying any evidentiary hearing on this defendant's selective-prosecution and vindictive-prosecution claims? *United States v. Portillos*, No. 16-1323 (reply brief filed April 11, 2017).

XIV. Fifth Amendment: Confessions & *Miranda*

Did the government’s bad advisory to the defendant before his grand-jury testimony (he was the target) violate his rights under the 5th and 6th Amendments, and should his grand-jury testimony have been suppressed? *United States v. Williston*, No. 15-7080 (gov’t brief filed Sept. 28, 2016).

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).

Whether this postal employee was “in custody” when postal investigators questioned him, and whether (1) he should have been given a full *Miranda* warning in addition to the *Garrity* warning the investigators gave him, and (2) his statements were voluntary. *United States v. Lemon*, No. 16-6213 (reply brief filed Feb. 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 the government violate *Braswell* during this tax-evasion trial when it attributed records of the corporation to the individual defendant? *United States v. Stegman*, No. 16-3321 (reply brief filed May 8, 2017).

Should this defendant be granted § 2254 relief on grounds that his custodial statement—given after his requests for counsel were ignored—should not have been admitted at trial? *Appleby v. Cline*, No. 17-3002 (brief filed April 5, 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 (brief filed June 13, 2017).

XV. Habeas Issues

A. 28 U.S.C. § 2241

In this challenge to an Oklahoma prison disciplinary conviction, did the inmate’s procedural mistake in state court constitute procedural default for § 2241 purposes, when Oklahoma does not consistently apply its own rules? If so, does the Oklahoma court’s misleading communications with the inmate establish cause, and does the scant evidence in support of the inmate’s conviction establish prejudice to overcome that default? *Gordon v. Farris*, No. 15-6004 (reply brief filed January 6, 2016).

Whether ineffective assistance of counsel in a first 28 U.S.C. § 2255 proceeding can render § 2255 “inadequate or ineffective” such that a federal prisoner may resort to a 28 U.S.C. § 2241 petition to re-raise a previously denied § 2255 claim. *Ranes v. Warden*, No. 15-1485 (gov’t brief filed May 16, 2016).

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).

This Oklahoma prisoner filed a § 2254 petition to challenge, on due-process grounds, the state court's misapplication of newly-discovered-evidence rules in his state postconviction proceeding. Did the district court err in rejecting the petition on grounds of failure to state a claim and untimeliness? *Sullivan v. Rios*, No. 15-6179 (brief filed January 7, 2016).

Did the district court err in granting only sentencing-stage relief and not first-stage relief in this capital habeas case? *Jones v. Duckworth*, No. 15-6086, 15-6087 (OA Nov. 15, 2016).

Should the federal district court have stayed and abeyed this habeas petition so that the petitioner could finish exhausting his state court remedies? *Murphy v. Royal*, No. 15-7041, 7068 (OA March 22, 2017).

When did the federal habeas clock start ticking after this petitioner's Oklahoma state convictions? When the defendant's direct appeal was final? Or later, after his illegal sentence was corrected in light of a state court ruling that invalidated hundreds of sentences? *Burks v. Raemisch*, No. 16-1247 (brief filed Sept. 13, 2016).

Did the district court erroneously deny habeas relief by misapplying AEDPA standards to the prejudice prong of *Strickland*? *Nenmiller v. Raemisch*, No. 16-1396 (reply brief filed April 5, 2017).

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).

Did the Oklahoma Court of Criminal Appeals unreasonably apply *Chapman* when it held that the trial court's exclusion of a letter from the deceased complainant recanting his sex-abuse claims was harmless (and is a COA warranted here)? *Puckett v. Rios*, No. 16-6349 (state's brief filed June 19, 2017).

Should the district court have granted habeas relief on this defendant's *Brady* claim? *Lebere v. Trani*, No. 16-1499 (brief filed March 3, 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).

Having found three related constitutional violations, did the district court use the wrong test to determine whether this state murder defendant was entitled to federal habeas relief? *Acosta v. Raemisch*, No. 17-1131 (state's brief filed June 19, 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 (brief filed May 26, 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*, No. 15-8013 (brief filed June 19, 2017).

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*, No. 15-8013 (brief filed June 19, 2017).

C. 28 U.S.C. § 2255

Should the district court have granted this § 2255 petitioner an evidentiary hearing on his claims that (1) his 5th and 6th amendment rights were violated when his codefendants threatened him not to testify at trial; and (2) his *Brady* claim that the government suppressed BOP evidence of his codefendants' gang and other violent activities, and of one codefendant's extortion of him? *United States v. Shaw*, No. 15-1480 (revised brief filed February 22, 2016).

Should the district court have granted § 2255 relief on *Padilla* grounds where counsel did not advise his client that removal was a mandatory consequence of her plea? *United States v. Roman*, No. 15-1371 (brief filed March 8, 2016).

Whether the district court abused its discretion when, despite the defendant's approaching release date, it stayed this § 2255 proceeding pending *Beckles* (thereby almost certainly delaying relief until after the defendant is released); whether the 10th Circuit should issue a certificate of appealability with respect to the stay; and whether the 10th Circuit should grant a writ of mandamus and order the district court to lift the stay and decide the defendant's § 2255 petition. *United States v. Swartwood*, No. 16-8092 (brief filed Oct. 19, 2016).

Whether Wyoming and Nebraska burglary convictions are violent felonies for ACCA purposes after *Johnson*, and whether this claim is cognizable in a § 2255 proceeding. *United States v. Driscoll*, No. 16-8118 (reply brief filed March 17, 2017).

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 (brief filed May 24, 2016).

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 (brief filed May 24, 2016).

Is this defendant entitled to a certificate of appealability and § 2255 relief on his *Johnson*-related ACCA claim? *United States v. Rhodes*, No. 17-6096 (brief filed June 26, 2017).

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

This former § 2255 petitioner moved the district court under Rule 60(b) to correct its failure to consider his § 2255 claims of statutory sentencing error. The district court denied the motion, holding that it had indeed both considered and ruled on those claims. Was the district court wrong? *United States v. Goodwin*, No. 16-3285 (brief filed Oct. 28, 2016).

E. Procedural

Is a defendant “in custody” for purposes of § 2255 when she is detained in immigration custody as a result of her conviction? *United States v. Roman*, No. 15-1371 (brief filed March 8, 2016).

Did the district court err in finding this § 2255 motion time-barred despite the unavailability, until recently, of exculpatory evidence? *United States v. Roman*, No. 15-1371 (brief filed March 8, 2016).

Should the district court have granted an evidentiary hearing in this § 2255 proceeding? *United States v. Roman*, No. 15-1371 (brief filed March 8, 2016).

XVI. Indictment Issues

A. Amendments

Did the government’s evidence and argument on this false-statements count constructively and impermissibly broaden the indictment by allowing for a conviction based on an uncharged statement? *United States v. Miller*, No. 16-1231 (reply brief filed March 21, 2017).

Was the government’s amendment to the indictment during the second week of this tax-evasion trial permissible? *United States v. Stegman*, No. 16-3321 (reply brief filed May 8, 2017).

B. Duplicity

In this unlawful-prescriptions case, the government prosecuted the doctor-defendant on a “drug cocktail” theory, charging multiple controlled substances in a single count. Were these charges duplicitous? *United States v. Miller*, No. 16-1231 (reply brief filed March 21, 2017).

C. Grand Jury Issues

D. Sufficiency of the Indictment (Sixth Amendment)

E. Variance

Did the state court’s refusal to instruct the jury consistent with the dates in the bill of particulars result in an unconstitutional variance? *Vreeland v. Zupan*, No. 16-1503 (brief filed May 26, 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 (brief filed June 2, 2017).

XVII. Jurisdictional Issues

Did the State of Oklahoma have jurisdiction over these capital-murder charges, where the defendant and the victim were both Muscogee (Creek) Nation members, and the crime occurred on a restricted allotment within the Nation's reservation? *Murphy v. Royal*, No. 15-7041, 7068 (OA March 22, 2017).

XVIII. Motion Practice

XIX. Offenses

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

Was the evidence sufficient to sustain this 18 U.S.C. § 1253 conviction, and did the jury instructions fairly inform the jury of the charge? *United States v. Etenyi*, No. 16-3364 (brief filed May 2, 2017).

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 (brief filed May 5, 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 (brief filed May 5, 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)

Was the district court's failure to instruct the jury, consistent with *Wolfname*, on the essential assault element of 18 U.S.C. § 111 plain error? *United States v. Jereb*, No. 16-4127 (reply brief filed March 20, 2017).

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

G. 18 U.S.C. § 371 (conspiracy)

Was evidence of this defendant's interest in growing marijuana at home sufficient to establish his participation in a much larger cocaine and marijuana-import conspiracy? *United States v. Pickel*, No. 16-3041 (OA May 10, 2017).

Was there a prejudicial variance in this drug case between the charged, large conspiracy and the evidence of multiple separate conspiracies at trial? *United States v. Pickel*, No. 16-3041 (OA May 10, 2017).

Defendant Wells, a journalist, reported a pending land-use protest online. He was convicted of conspiring to trespass on public lands. Was the evidence sufficient to support his convictions, in light of his First Amendment defense? *United States v. Wells*, No. 16-4006 (reply brief filed Sept. 12, 2016).

H. 18 U.S.C. § 666 (bribery)

Was the evidence insufficient in this bribery case to establish the statutory value element, or is that element vague as applied in this case? *United States v. Hardin*, No. 16-1229 (OA May 8, 2017).

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

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

Was evidence of a single, ambiguous phone call sufficient to sustain this defendant's conviction of using a communication device? *United States v. Pickel*, No. 16-3041 (OA May 10, 2017).

K. 18 U.S.C. § 844 (arson)

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

Were this defendant's hyperbolic Internet posts in response to police shootings and corruption protected by the First Amendment, and should the district court have dismissed his charges of interstate communications with intent to injure (18 U.S.C. § 875(c))? *United States v. Stevens*, No. 17-5044 (brief filed June 9, 2017).

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

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

Should the fact of the recipient's "fleeting possession" be a defense to disposing of a firearm to a prohibited person, and should the trial court have so instructed the jury? *United States v. McNeal*, No. 16-1054 (reply brief filed Oct. 13, 2016).

Does this statute exceed Congress's power under the commerce clause (either generally, or as applied in this case)? *United States v. McNeal*, No. 16-1054 (reply brief filed Oct. 13, 2016).

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

Whether the evidence was insufficient to prove that the defendant knowingly possessed a gun found in his girlfriend's house. *United States v. Benford*, No. 15-6163 (supplemental briefs filed Oct. 28, 2016).

Was the evidence sufficient to support this defendant's convictions of felon in *knowing* possession (or constructive possession) of firearms and ammunition? *United States v. Nicholas*, No. 16-3043 (reply brief filed Sept. 23, 2016).

Was the evidence sufficient to support this defendant's gun conviction? *United States v. Banks*, No. 16-6322 (brief filed April 8, 2017).

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

Whether the evidence was sufficient to support the conviction where the government failed to establish that the defendant possessed 2.5 grams of powder cocaine with the intent to distribute it and was acting in furtherance of this crime in possessing the firearm. *United States v. Ellis*, No. 14-3165 & 14-3181 (OA Nov. 19, 2015).

Is the residual clause of 18 U.S.C. § 924(c)(3)(B) void for vagueness, and is federal kidnapping a crime of violence for purposes of § 924(c)? *United States v. Jessie Hopper*, No. 15-2190 (reply brief filed June 14, 2016).

Is a Hobbs Act robbery a crime of violence for purposes of 18 U.S.C. § 924(c)(3)(A)? *United States v. Melgar-Cabrera*, No. 16-2018 (OA May 9, 2017).

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. Dubarry*, No. 16-4067 (appeal from denial of § 2255 relief; brief filed Sept. 15, 2016); *United States v. Pasley*, No. 17-6033 (brief filed April 5, 2017).

Was the evidence sufficient in this case to prove that the defendant intentionally possessed a firearm *in furtherance* of drug crimes? *United States v. Gabourel*, No. 16-6227 (OA May 10, 2017).

Did *Johnson* invalidate the residual clause of § 924(c), and is carjacking—which can be based on mere “intimidation”—a crime of violence for § 924(c) purposes? *United States v. Kundo*, No. 16-4128 (brief filed Dec. 5, 2016).

Is armed bank robbery a crime of violence for purposes of § 924(c)? *United States v. Cravens*, No. 16-8111 (reply brief filed March 13, 2017); *United States v. Wade*, No. 16-1364 (gov’t brief filed June 20, 2017).

Is the residual clause of § 924(c) unconstitutionally vague; is armed bank robbery under 18 U.S.C. § 2113(a) and (d) a crime of violence; and should the district court have granted this defendant § 2255 relief? *United States v. Lloyd*, No. 16-2219 (brief filed Feb. 10, 2017).

Is the residual clause of § 924(c) unconstitutionally vague; is aggravated assault on a federal officer under 18 U.S.C. § 111(a) & (b) a crime of violence; and should the district court have granted § 2255 relief? *United States v. Wing*, No. 17-1007 (reply brief filed May 15, 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 (brief filed March 13, 2017).

Was the evidence at trial sufficient to convict the defendant of aiding and abetting § 924(c), when the defendant did not direct the informant to deliver a gun at the same time he delivered drugs to a customer? *United States v. Renteria*, No. 16-4204 (brief filed April 8, 2017).

Was the evidence sufficient to sustain this defendant’s § 924(c) conviction? *United States v. Banks*, No. 16-6322 (brief filed April 8, 2017).

Whether arson under 18 U.S.C. § 844(i) is a crime of violence for purposes of § 924(c). *United States v. Salas*, No. 16-2170 (reply brief filed May 22, 2017).

Whether the residual clause of § 924(c) is unconstitutionally vague; whether federal armed bank robbery is a crime of violence; and whether the district court should have granted this defendant § 2255 relief. *United States v. Salvador*, No. 17-1081 (brief filed May 24, 2017); *United States v. Autobee*, No. 17-1082 (brief filed June 5, 2017); *United States v. Higley*, No. 17-1111 (brief filed June 12, 2017) (18 U.S.C. § 924(c)).

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

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

Did the government prosecute this defendant under the wrong subsection of 18 U.S.C. § 1028, and was the evidence insufficient to prove the charge? *United States v. Etenyi*, No. 16-3364 (brief filed May 2, 2017).

Assuming that the defendant fraudulently persuaded an unwitting driver's license officer to produce a driver's license in his name, can he be convicted of "aiding and abetting" her production of the license under 18 U.S.C. § 1028? *United States v. Etenyi*, No. 16-3364 (brief filed May 2, 2017).

S. 18 U.S.C. § 1028A (identity theft)

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

Was the evidence insufficient to prove that any allegedly false statement was made to an FDIC-insured financial institution? *United States v. Riddle*, No. 16-4143 (gov't brief filed May 19, 2017).

U. 18 U.S.C. § 1201 (kidnapping)

V. 18 U.S.C. § 1341 (mail fraud)

W. 18 U.S.C. § 1343 (wire fraud)

X. 18 U.S.C. § 1344 (bank fraud)

This defendant attempted, incompetently, to apply for a loan using his father's name and identifying information. He was caught before completing the preliminary application. Bank employees later testified that the application never went to the underwriter (the loan decisionmaker), and the bank was never at a risk of financial loss. Absent materiality or any risk of loss, was the evidence sufficient to establish bank fraud? *United States v. Williams*, No. 16-3220 (OA May 10, 2017).

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

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

Was the evidence sufficient to sustain this defendant's witness-tampering conviction? *United States v. Banks*, No. 16-6322 (brief filed April 8, 2017).

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

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

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

Was the evidence sufficient to support this defendant's money-laundering conspiracy conviction? *United States v. Brown*, No. 16-6210 (reply brief filed April 12, 2017).

Was the evidence sufficient to sustain this defendant's money-laundering convictions? *United States v. Banks*, No. 16-6322 (brief filed April 8, 2017).

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

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

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

Was the evidence of this businessman’s connection to massage parlors sufficient to prove that he committed prostitution-related crimes? Alternatively, was the evidence sufficient to overcome his entrapment defense? *United States v. Tee*, No. 16-3243 (gov’t brief filed April 5, 2017).

GG. 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).

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

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

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

Was the government’s evidence sufficient to prove constructive possession of PCP under *Little* or otherwise? *United States v. Gabourel*, No. 16-6227 (OA May 10, 2017).

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 (gov’t brief filed April 6, 2017).

Was the evidence sufficient to sustain this defendant’s drug convictions? *United States v. Banks*, No. 16-6322 (brief filed April 8, 2017).

KK. 21 U.S.C. § 846 (drug conspiracy)

Whether the evidence was sufficient to support the jury’s verdict where the possession, distribution, or manufacture of either 280 grams of crack cocaine or 5 kilograms of powder cocaine was not reasonably foreseeable to the defendant. *United States v. Ellis*, No. 14-3165 & 14-3181 (OA Nov. 19, 2015).

Was the testimony of a drug-addicted gang member, absent other corroborating evidence, sufficient to sustain the defendant’s drug conspiracy conviction? *United States v. Gabourel*, No. 16-6227 (OA May 10, 2017).

Was this defendant’s mere presence among drug dealers sufficient to convict him of a drug conspiracy and other drug counts? *United States v. Grant*, No. 16-6228 (OA May 10, 2017).

Was the evidence sufficient to support this defendant’s drug-conspiracy conviction? *United States v. Brown*, No. 16-6210 (reply brief filed April 12, 2017).

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

Whether the evidence was sufficient to support the conviction where the defendant did not have the required connection to the alleged drug-involved premises. *United States v. Ellis*, No. 14-3165 & 14-3181 (OA Nov. 19, 2015).

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

NN. 26 U.S.C. § 7201 (tax evasion)

OO. 26 U.S.C. § 7212

PP.28 U.S.C. § 455 (recusal)

The defendants were convicted of conspiring to trespass on closed public lands as a land-use protest. The Southern Utah Wilderness Alliance urged the government to prosecute and helped the government collect evidence, and its legal director attended nearly every day of trial. This director was close personal friends with the trial judge. Should the judge have recused himself? *United States v. Wells*, No. 16-4006 (reply brief filed Sept. 12, 2016); *United States v. Lyman*, No. 16-4007 (reply brief filed Sept. 26, 2016).

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

Does 49 U.S.C. § 46504 require specific intent, and did the district court erroneously exclude intoxication evidence offered to disprove intent? *United States v. Lynch*, No. 16-1242 (reply brief filed Feb. 28, 2017).

Is the “intimidation” element of 49 U.S.C. § 46504 overbroad or unconstitutionally vague? *United States v. Lynch*, No. 16-1242 (reply brief filed Feb. 28, 2017).

XX. Pleas

A. Acceptance of Plea

B. Appeal Waiver

Whether this defendant’s agreement to an ACCA sentence and waiver of any collateral attack in his 11(c)(1)(C) plea agreement forecloses § 2255 relief based on *Johnson*. *United States v. Pam*, No. 16-2171 (OA May 9, 2017).

C. Breach

D. Rejection of Plea Agreement

Did the district court abuse its discretion when it rejected this defendant’s fast-track plea agreement, in part because the court believed that it could not impose supervised release as part of its sentence? *United States v. Sandoval-Enrique*, No. 16-2043 (reply brief filed July 6, 2016).

E. Withdrawal of Plea

Did the district court err in denying the defendant's motion to withdraw his guilty plea before sentencing in this drug case when the defendant claimed both innocence and that his attorney was ineffective in advising him? *United States v. Perez*, No. 15-2147 (gov't brief filed March 29, 2016).

Should the defendant be allowed to withdraw his plea because the district court inserted itself into the plea-bargaining process? *United States v. Sandoval-Enrique*, No. 16-2043 (reply brief filed July 6, 2016).

This defendant moved before sentencing to withdraw his plea, arguing that the negotiation process was rushed on the day of the plea, and that the plea documents were not fully translated or explained to him. Did the district court err in denying the motion? *United States v. Cano-Bahena*, No. 16, 3298 (gov't brief filed June 16, 2017).

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

Did the district court err in ordering restitution for repairs to public lands that were not directly attributable to the defendants in this land-use protest case? *United States v. Wells*, No. 16-4006 (reply brief filed Sept. 12, 2016); *United States v. Lyman*, No. 16-4007 (reply brief filed Sept. 26, 2016).

Did the district court exceed its statutory authority when it ordered restitution for losses sustained by individuals who were not "victims" of the offense? *United States v. Ballard*, No. 16-3274 (OA May 8, 2017).

Did the district court exceed its statutory authority when it ordered restitution for amounts that did not constitute "losses" sustained by a victim as a result of the offense? *United States v. Ballard*, No. 16-3274 (OA May 8, 2017).

Was there sufficient evidence to support the district court's restitution order? *United States v. Zander*, No. 16-4162 (reply brief filed May 17, 2017).

XXII. Rules of Criminal Procedure

A. Rule 8 (Joinder/Severance)

Should the district court have severed the defendants in this drug-conspiracy case due to antagonistic defenses and different degrees of culpability? *United States v. Brown*, No. 16-6210 (reply brief filed April 12, 2017).

Whether the district court erred in denying severance, given admission of codefendant's drug-smuggling in this case charging operation of an unregistered aircraft. *United States v. Wiles*, No. 16-8074 (reply brief filed April 17, 2017).

- B. Rule 12 (motions)**
- C. Rule 32 (sentencing procedures)**
- D. Rule 33 (new trial)**
- E. Rule 41 (search & seizure)**

Whether the district court erred in (1) holding that a Virginia magistrate lacked authority to issue an NIT (child-pornography) warrant to search a Colorado computer during the Playpen investigation; (2) holding that suppression was an appropriate remedy; and (3) rejecting the government’s good-faith argument. *United States v. Workman*, No. 16-1401 (gov’t appeal; reply filed March 27, 2017).

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

Where the district court violated Rule 11 by inserted itself into the plea-bargaining process, should a different judge be assigned for further proceedings? *United States v. Sandoval-Enrique*, No. 16-2043 (reply brief filed July 6, 2016).

XXIV. Second Amendment Issues

XXV. Sentencing

- A. Allocution**
- B. Apprendi**

Whether the district court erred when it imposed a mandatory minimum life sentence in a drug conspiracy case without a jury determination that the defendant reasonably foresaw that the charge conspiracy would involve the requisite drug quantity necessary to trigger the life sentence (also framed as a due-process violation). *United States v. Ellis*, No. 14-3165 & 14-3181 (OA Nov. 19, 2015).

This defendant’s child-pornography sentence was enhanced because he was found to have engaged in a “pattern of activity” under USSG § 4B1.5. The enhancement was based on allegations of conduct that was never charged, admitted, or proven to a jury. Did imposition of this enhancement based on judge-found facts violate the defendant’s due-process and sixth amendment rights? *United States v. Janatsch*, No. 16-6324 (reply brief filed March 24, 2017).

Did the district court’s imposition of a sentence five times the top of the guideline range based on judge-found facts about an incident unrelated to the crime of conviction violate the defendant’s fifth and sixth amendment rights? *United States v. Goossen*, No. 16-2252 (gov’t brief filed June 19, 2017).

Should this defendant be granted § 2254 relief on grounds that his Kansas hard-50 sentence violates *Apprendi*? *Appleby v. Cline*, No. 17-3002 (brief filed April 5, 2017).

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

Whether Oklahoma convictions for facilitating and attempting to facilitate the intentional discharge of a firearm are violent felonies for ACCA purposes. *United States v. Hammons*, No. 16-6024 (reply brief filed Aug. 15, 2016).

Whether Oklahoma convictions for aggravated attempt to elude a police officer, and assault and battery with a deadly weapon are violent felonies for ACCA purposes (appeal from denial of § 2255 relief). *United States v. Burtons*, No. 16-6091 (OA March 23, 2017).

Whether the following are violent felonies for ACCA purposes: Montana felony assault; Kansas robbery; and Kansas aggravated robbery. *United States v. Nicholas*, No. 16-3043 (reply brief filed Sept. 23, 2016).

Whether the New Mexico crime of shooting at or from a motor vehicle, which may be committed by mere reckless conduct, is a violent felony for ACCA purposes (also whether the defendant's agreement to the sentence and waiver of any collateral attack in his 11(c)(1)(C) plea agreement forecloses § 2255 relief). *United States v. Pam*, No. 16-2171 (OA May 9, 2017).

Whether this defendant is entitled to § 2255 relief from his ACCA sentence on grounds that his prior convictions for Texas aggravated assault (which required only recklessness) and Texas burglary (which did not require an entry contemporaneous with criminal intent) are not violent felonies. *United States v. Perry*, No. 16-8098 (reply brief filed May 15, 2017).

Whether a Kansas aggravated-battery conviction is a violent felony for ACCA purposes. *United States v. McMahan*, No. 16-3308 (brief filed Jan. 6, 2017).

Whether an Oregon arson conviction is a violent felony for ACCA purposes, and whether the district court should have granted this defendant § 2255 relief. *United States v. Buck*, No. 16-8103 (brief filed Jan. 13, 2017).

Whether this defendant is entitled to a certificate of appealability and § 2255 relief on his *Johnson* claim that his predicate burglaries no longer qualify as violent felonies. *United States v. Snyder*, No. 16-8117 (reply brief filed March 30, 2017); *United States v. Westover*, No. 17-8013 (reply brief filed April 14, 2017).

Whether New Mexico residential burglary is a violent felony for ACCA purposes, and whether the district court should have granted this defendant § 2255 relief. *United States v. Turrieta*, No. 16-2281 (brief filed Feb. 27, 2017).

Whether Oklahoma manslaughter in the first degree is a violent felony for ACCA purposes, and whether this defendant is entitled to a certificate of appealability and § 2255 relief. *United States v. Bouziden*, No. 17-6031 (reply brief filed June 9, 2017).

Should the Court grant this defendant a certificate of appealability and § 2255 relief on his claim that his prior burglary convictions are not ACCA predicates under today's law? *United States v. Couchman*, No. 17-6018 (brief filed April 4, 2017).

Whether Wyoming and Oregon burglaries are violent felonies for ACCA purposes, and whether the district court should have granted this defendant § 2255 relief. *United States v. Murphy*, No. 17-8010 (reply brief filed June 9, 2017).

Whether New Mexico third-degree robbery is a violent felony for ACCA purposes, and whether the district court should have granted this defendant § 2255 relief. *United States v. Garcia*, No. 17-2019 (brief filed April 26, 2017).

Is the ACCA unconstitutionally vague? *United States v. Brown*, No. 16-6373 (brief filed May 4, 2017).

Were this defendant's two drug deliveries to the same confidential informant fifteen days apart sufficiently related that they should not have counted as two predicate convictions for ACCA purposes? *United States v. Brown*, No. 16-6373 (brief filed May 4, 2017).

Whether Oklahoma assault and battery with a dangerous weapon is a violent felony for ACCA purposes. *United States v. Brown*, No. 16-6373 (brief filed May 4, 2017).

Whether Oklahoma assault and battery on a police officer is a violent felony for ACCA purposes. *United States v. Mason*, No. 17-7011 (brief filed May 4, 2017).

Is Kansas robbery an ACCA predicate, and should the district court have granted this defendant § 2255 relief? *United States v. Bong*, No. 16-3323 (brief filed May 24, 2016).

Did three of this defendant's prior convictions—all committed on the same day—qualify as separate convictions under the ACCA, and, if not, is this defendant entitled post-*Johnson* to § 2255 relief? *United States v. Brunken*, No. 17-6085 (brief filed June 19, 2017).

Is Oklahoma's general conspiracy statute divisible, and is this defendant entitled to § 2255 relief post-*Mathis*? *United States v. Trent*, No. 17-6041 (brief filed June 27, 2017).

D. Burden of Proof

E. Capital Sentencing

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

G. Departures and Variances

Did the district court erroneously conclude that it must “honor” the career-offender guideline and deny the defendant's motion for variance absent “extraordinary circumstances”? *United States v. Madkins*, No. 15-3299 (OA May 10, 2017).

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 (gov't brief filed June 13, 2017).

H. Fines & Assessments

Did the district court err when it imposed a \$5,000.00 special assessment under 18 U.S.C. § 3014(a) on this indigent defendant? *United States v. Janatsch*, No. 16-6324 (reply brief filed March 24, 2017).

I. Guidelines Sections

1. USSG § 1B1.2

Did the district court err when it relied on relevant conduct (rather than on the offense of conviction) to determine the offense guideline section and base offense level? *United States v. Jereb*, No. 16-4127 (reply brief filed March 20, 2017).

2. USSG § 1B1.3 (relevant conduct)

Whether there was sufficient evidence to support the district court's drug-quantity findings. *United States v. Niles*, No. 16-8048 (reply brief filed Oct. 31, 2016).

Did the district court commit plain error when it failed to make a particularized drug-quantity finding for guideline purposes (after having erroneously applied the statutory minimum)? *United States v. Ivory*, No. 15-3238 (submitted May 10, 2017).

Was the evidence sufficient in this contested conspiracy case to support the district court's summary adoption of the PSR's drug-quantity finding? *United States v. Banks*, No. 15-3324 (OA May 10, 2017).

Did the district court err in basing its drug-quantity finding on unreliable evidence and wiretap evidence that should have been suppressed? *United States v. Thompson*, No. 15-3313 (OA May 10, 2017).

Did the district court err in basing its drug-quantity finding on evidence of sales that were made before the defendant joined the conspiracy? *United States v. Johnson*, No. 16-3280 (reply brief filed April 26, 2017).

Did the district court clearly err in calculating this defendant's drug quantity based on an alleged coconspirator's contradictory testimony? *United States v. Pacheco*, No. 16-3294 (reply brief filed May 19, 2017).

Did the district court err in calculating drug quantity? *United States v. Banks*, No. 16-6322 (brief filed April 8, 2017).

Whether the district court erred when it attributed to this defendant for sentencing purposes prescription drug sales that were made outside the boundaries of the charged drug conspiracy? *United States v. Wilcox*, No. 16-4094 (brief filed April 18, 2017).

Did the evidence support the district court's finding that the defendant's involvement in the conspiracy began 8 months, rather than only 5 months, before the end date? *United States v. Valdez*, No. 16-3363 (brief filed June 5, 2017).

3. **USSG § 2A2.2**
 - a) **subsection (b)(2)(B) (use of dangerous weapon)**
4. **USSG § 2A3.5 (SORNA)**
5. **USSG § 2A4.1**
 - a) **subsection (b)(2)(A) (permanent or life-threatening bodily injury)**
6. **USSG § 2A6.1**
 - a) **subsection (b)(2)(A) (more than 2 threats)**
7. **USSG § 2B1.1**
 - a) **subsection (b) (loss amount)**

Did the district court err when it increased this wire-fraud defendant's offense level by 18 points for loss without sufficient evidence of causation and reasonable foreseeability? *United States v. Joseph*, No. 16-4109 (OA May 10, 2017).

Did the district court err when it applied a 2-point gross-receipts enhancement based on proceeds that went to business entities that this wire-fraud defendant only partially owned and in which he had no controlling interest? *United States v. Joseph*, No. 16-4109 (OA May 10, 2017).

Did the district court err when it calculated actual loss (1) despite the government's statement during a *Lafler/Frye* hearing that it would only pursue intended loss, (2) based on speculative, unsupported assumptions, and (3) based on either not-charged or acquitted conduct? *United States v. Johnson*, No. 16-4146 (reply brief filed June 30, 2017); *United States v. Riddle*, No. 16-4143 (gov't brief filed May 19, 2017).

Did the district court err in holding that consumer payments that merely pass through a bank are "receipts from a financial institution" for purposes of applying a "greater than \$1 million" enhancement? *United States v. Johnson*, No. 16-4146 reply brief filed June 30, 2017).

- b) **subsection (b)(2) (victim enhancement)**
- c) **subsection (b)(10)(C) (sophisticated means)**

Did the district court erroneously rely on acquitted conduct to apply a sophisticated-means enhancement? *United States v. Johnson*, No. 16-4146 (reply brief filed June 30, 2017).

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).

Does brandishing a firearm equal physical restraint under § 2B3.1(b)(4)(B), and should the Tenth Circuit reconsider *United States v. Fisher*, 132 F.3d 1327 (10th Cir. 1997)? *United States v. Wade*, No. 16-1364 (gov't brief filed June 20, 2017).

9. **USSG § 2C1.1**

10. **USSG § 2D1.1**

Whether the district court properly decided which prescribed drugs were legitimately prescribed and which weren't when calculating the drug quantity in this conspiracy case involving a pain-management clinic. *United States v. Schwartz*, No. 15-1162 (reply brief filed April 6, 2016).

Did the district court err in finding that this defendant knew that the methamphetamine he drove from Phoenix to Kansas City was from Mexico, and adding 2 levels for knowing importation under § 2D1.1(B)(5)? *United States v. Valdez*, No. 16-3363 (brief filed June 5, 2017).

11. USSG § 2G2.2 (child pornography)

Whether the district court erred in applying the 5-level “pattern of activity” enhancement where (1) the conduct did not qualify as “sexual abuse or exploitation,” and (2) the hearsay statements on which the enhancement was based were unreliable. *United States v. Pulham*, No. 16-8019 (reply brief filed Sept. 30, 2016).

Did the district court err in failing to address the defendant’s arguments that his unlikely recidivism and family circumstances justified a variance? *United States v. Soto*, No. 16-3276 (reply brief filed April 28, 2017).

12. USSG § 2K2.1

Was the evidence sufficient to support a finding that the firearms in this case—which were never recovered—were capable of accepting a large capacity magazine, such as to support a base-offense level 20, under § 2K2.1(a)(4)(B)? *United States v. Arevalo-Magana*, No. 16-5121 (gov’t brief filed Dec. 15, 2016).

Did the district court rely on the wrong standard (focusing on “accessibility”) for establishing either actual or constructive possession for purposes of a 2-level enhancement under § 2K2.1(b)(1)(A)? *United States v. Beierle*, No. 16-8040 (reply brief filed March 2, 2017).

Did the district court base its § 2K2.1(b)(6)(B) enhancement on a clearly erroneous factual finding? *United States v. Beierle*, No. 16-8040 (reply brief filed March 2, 2017).

Is Wyoming aggravated assault and battery (“threatening to use a drawn deadly weapon on another”) a crime of violence for purposes of § 2K2.1? *United States v. Devries*, No. 16-8113 (reply brief filed March 22, 2017).

Did the district court apply the wrong standard when it enhanced the defendant’s sentence under § 2K2.1(b)(5)? *United States v. Francis*, No. 16-1449 (gov’t brief filed June 29, 2017).

Whether Colorado lewd molestation is a crime of violence under § 2K2.1(a)(2), and whether the district court erred in applying a conduct-based inquiry to make it so. *United States v. Gieswein*, No. 16-6366 (brief filed May 26, 2017).

13. USSG § 2K2.2

Does this section disproportionately and unreasonably penalize reckless assaults more harshly than reckless killings? *United States v. Yazzie*, No. 16-2244 (reply brief filed May 24, 2017).

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

Whether the Oklahoma crime of concealing stolen property is an aggravated felony for purposes of § 2L1.2(b)(1)(C). *United States v. Lugo-Tovar*, No. 16-6259 (gov’t brief filed April 6, 2017).

15. USSG § 2T1.1 (tax loss)

Did the district court erroneously calculate this tax-evasion defendant’s tax loss by relying on acquitted conduct? *United States v. Stegman*, No. 16-3321 (reply brief filed May 8, 2017).

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

Did the district court erroneously apply a sophisticated-means enhancement to this tax-evasion defendant? *United States v. Stegman*, No. 16-3321 (reply brief filed May 8, 2017).

17. SSG § 2Q2.1

18. USSG § 3B1.1

Was the evidence sufficient to support the district court’s application of a 4-level leadership enhancement? *United States v. Banks*, No. 15-3324 (OA May 10, 2017). Similar issue raised by codefendant in consolidated case *United States v. Thompson*, No. 15-3313 (OA May 10, 2017).

19. USSG § 3B1.2 (mitigating role)

Did the district court err by comparing this defendant to “the universe of persons participating in similar crimes” in order to deny him a minor-role adjustment? *United States v. Orduno-Ramirez*, No. 17-3010 (gov’t brief filed June 27, 2017).

Should the district court have granted this defendant a minimal-participant reduction? *United States v. Valdez*, No. 16-3363 (brief filed June 5, 2017).

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 (brief filed June 27, 2017).

20. USSG § 3B1.3 (abuse of trust)

Whether the district court erred in applying a 2-level enhancement for abuse of trust when the defendant’s position was ministerial rather than managerial, and he did not use that position to facilitate his fraud. *United States v. Throne*, No. 16-1296 (submitted March 23, 2017).

21. USSG § 3C1.1 (obstruction)

Can an obstruction enhancement be applied to conduct obstructing the investigation of an offense of acquittal? *United States v. Stegman*, No. 16-3321 (reply brief filed May 8, 2017).

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

Must the defendant know he is being pursued to trigger this enhancement, and, if so, was the evidence here sufficient to support an enhancement for reckless endangerment during flight? *United States v. Cano-Bahena*, No. 16, 3298 (gov’t brief filed June 16, 2017).

23. USSG § 3D1.2 (grouping)

24. USSG § 3E1.1

May a sentencing court withhold a reduction for acceptance of responsibility based on conduct that does not qualify as offense conduct or relevant conduct under USSG § 1B1.3? *United States v. Kemp*, No. 15-3309 (OA Nov. 15, 2016).

In this case the defendant cooperated with the government, pleaded guilty, and expressed remorse. The government recommended both a 3-level reduction for acceptance and a § 5K1.1 departure. Did the district court err in denying acceptance points on grounds that pleading guilty is insufficient, and “[t]he adjustment requires some kind of steps to deal with the victims and what they have done. It requires, in many instances in drug cases, that there’s a demonstration of the time during the period of confinement that substantial and significant steps have been made to take a cure”? *United*

States v. Spaulding, No. 16-1122 (reply brief filed Oct. 26, 2016) (the government agrees that the district court erred).

Should this defendant have been granted a 2-level reduction for acceptance of responsibility where he admitted his conduct and went to trial solely to challenge the question of his intent? *United States v. Lynch*, No. 16-1242 (reply brief filed Feb. 28, 2017).

In this bank-robbery case, the district court denied the addict-defendant any reduction for acceptance of responsibility on grounds that he had tried to have drugs brought into the jail shortly after his guilty plea (which he entered less than three weeks after his arrest). Was this an abuse of discretion? *United States v. Downing*, No. 17-6058 (brief filed June 13, 2017).

25. USSG § 4A1.1

26. USSG § 4A1.2

Did the district court err when it assessed a criminal-history point for the defendant's juvenile-status offense—possessing less than an ounce of marijuana in Colorado, where such conduct is legal for an adult? *United States v. Archuleta*, No. 16-1297 (OA May 9, 2017).

Did the district court erroneously assess a criminal-history point for this defendant's previous conviction under a local ordinance, and does the categorical approach apply to determine whether a violation of a local ordinance is also a violation of state law? *United States v. Abeyta*, No. 17-1025 (reply brief filed June 29, 2017).

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

Did the district court plainly err by not departing on grounds that this reentry defendant's criminal history was overstated? *United States v. Garcia-Damian*, No. 16-2250 (reply brief filed March 13, 2017).

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

Whether a Kansas conviction for possession with intent to sell (defined to include possession with intent to *offer for sale*) is a controlled-substance offense for career-offender purposes. *United States v. Madkins*, No. 15-3299 (OA May 10, 2017).

Whether Wyoming convictions for aggravated assault are crimes of violence for career-offender purposes, and whether the district court erred in relying on guideline commentary to conclude that they are. *United States v. Jereb*, No. 16-4127 (reply brief filed March 20, 2017).

Whether the mandatory guidelines are subject to vagueness challenges post-*Beckles*. *United States v. Miller*, No. 16-2229 (supplemental brief filed May 19, 2017).

Whether Colorado second-degree assault is a crime of violence for career-offender purposes. *United States v. Ontiveros*, No. 16-1362 (gov't brief filed March 6, 2017).

Whether Colorado robbery is a crime of violence (and whether *Harris* was wrong). *United States v. Thomas*, No. 16-1321 (gov't brief filed Feb. 28, 2017).

Whether Utah second-degree felony aggravated assault is categorically a crime of violence. *United States v. Bettcher*, No. 16-4165 (gov't reply brief filed June 2, 2017) (gov't appeal).

Whether a Hobbs Act robbery (18 U.S.C. § 1951) is a crime of violence under the 2016 guidelines. *United States v O'Connor*, No. 16-3300 (reply brief filed May 15, 2017).

Whether the following are crimes of violence for career-offender purposes under the 2016 guidelines: 18 U.S.C. § 111(a)(1) and (b) (assaulting, resisting, impeding, intimidating, and interfering with a correctional officer with infliction of bodily injury), and a DC conviction for assault on a police officer. *United States v. Kendall*, No. 16-6344 (reply brief filed June 2, 2017).

Whether a Colorado conviction for assault on a peace officer is a crime of violence for career-offender purposes, and whether this defendant—sentenced under the mandatory guidelines (pre-*Booker*)—is entitled to *Johnson* relief under § 2255 notwithstanding *Beckles*. *United States v. Greer*, No. 16-1282 (supplemental reply brief filed June 2, 2017).

Whether Kansas aggravated assault is a crime of violence for career-offender purposes. *United States v. Benton*, No. 16-3332 (reply brief filed May 2, 2017).

Whether this defendant's § 924(c) conviction, predicated on a Hobbs Act robbery, is a crime of violence for career-offender purposes. *United States v. Murphy*, No. 16-3255 (brief filed April 17, 2017).

Whether aggravated assault under 18 U.S.C. § 111(b) is a crime of violence for career-offender purposes. *United States v. Murphy*, No. 16-3255 (brief filed April 17, 2017).

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. Mulay*, No. 17-3031 (brief filed May 12, 2017).

Is Oklahoma feloniously pointing a firearm a crime of violence for career-offender purposes? *United States v. Cary*, No. 17-7006 (gov't brief conceding issue filed June 19, 2017).

Whether Colorado distribution is a controlled-substance offense for career-offender purposes. *United States v. McKibbin*, No. 16-1493 (brief filed May 26, 2017).

29. USSG § 4B1.5

30. USSG § 5K1.1

Did the district court err by “granting” the government's § 5K1.1 departure motion (recommending 77 months), but then imposing a sentence at the high-end of the original guideline range (137 months)? *United States v. Spaulding*, No. 16-1122 (reply brief filed Oct. 26, 2016) (the government agrees that the district court erred).

31. USSG § 5K2.14

J. Mandatory Minimums and Maximums

Did the district court plainly err when it imposed the statutory minimum under § 841(b)(1)(A) absent necessary jury findings? *United States v. Ivory*, No. 15-3238 (submitted May 10, 2017).

Did the district court erroneously sentence this conspiracy defendant to twice the statutory maximum? *United States v. Archuleta*, No. 16-1297 (OA May 9, 2017).

Did the district court violate *Alleyne* by imposing a statutory mandatory minimum 10-year sentence when the jury was not instructed that quantity was an element of the offense to be found beyond a reasonable doubt? *United States v. Johnson*, No. 16-3280 (reply brief filed April 26, 2017).

K. Reasonableness

1. Procedural

Whether the consecutive sentences imposed in this unlawful-prescriptions and false-statement case were procedurally unreasonable. *United States v. Miller*, No. 16-1231 (reply brief filed March 21, 2017).

Whether the district court procedurally erred by presuming the guidelines were reasonable and not adequately explaining the sentence. *United States v. Garcia-Damian*, No. 16-2250 (reply brief filed March 13, 2017).

Did the district court procedurally err when it denied the defendant's disparity-based motion for downward variance on grounds that the defendant failed to offer an "identical" comparison case? *United States v. Allen*, No. 16-1450 (reply brief filed May 16, 2017).

Did the district court's rejection of the defendant's arguments for leniency without explanation render his upward-variant sentence procedurally unreasonable? *United States v. Goossen*, No. 16-2252 (gov't brief filed June 19, 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 (gov't brief filed June 13, 2017).

Was the district court's reliance on information outside the record at sentencing, without prior notice to the defendant, plain procedural error? *United States v. Huntsman*, No. 17-4031 (brief filed June 14, 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 (brief filed June 26, 2017).

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 (brief filed June 26, 2017).

2. Substantive

Was this defendant's guideline sentence of 24 months for a supervised release violation, with 12 months ordered to run consecutively to his other state and federal sentences, substantively unreasonable? *United States v. Rocha-Rodriguez*, No. 16-1045 (gov't brief filed June 6, 2016).

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

Is this drug-conspiracy defendant's life sentence substantively unreasonable? *United States v. Lopez-Garcia*, No. 16-3174 (gov't brief filed March 6, 2017).

Whether this reentry defendant's guideline sentence was substantively unreasonable. *United States v. Garcia-Damian*, No. 16-2250 (reply brief filed March 13, 2017).

Was a 78-month sentence substantively unreasonable for this felon-in-possession defendant? *United States v. Lopez*, No. 16-1324 (reply brief filed April 3, 2017).

Was this defendant's statutory-maximum child-pornography sentence substantively unreasonable? *United States v. Janatsch*, No. 16-6324 (reply brief filed March 24, 2017).

Was this defendant's 27-month illegal-reentry sentence substantively unreasonable? *United States v. Tovilla-Martinez*, No. 16-1331 (reply brief filed March 14, 2017).

Was this drug defendant's sentence—compared with the sentences of his codefendants—substantively unreasonable? *United States v. Cano-Babena*, No. 16, 3298 (gov't brief filed June 16, 2017); *United States v. Valdez*, No. 16-3363 (brief filed June 5, 2017).

Was the 25-month upward variance in this fraud case substantively unreasonable? *United States v. Patton*, No. 16-6359 (gov't brief filed May 5, 2017).

Was the upward variance in this drug case—to five times the top of the guideline range—substantively unreasonable? *United States v. Goossen*, No. 16-2252 (gov't brief filed June 19, 2017).

Are these jailer-defendants' 12- and 24-month respective downward-variant sentences for civil-rights offenses substantively unreasonable? *United States v. Brown*, No. 17-7016; *United States v. Barnes*, No. 17-7017 (consolidated government appeals; gov't brief filed May 10, 2017).

Whether this sixty-year-old non-violent bank-robbery defendant's 60-month sentence is substantively unreasonable. *United States v. Keith*, No. 16-6374 (brief filed May 26, 2017).

Whether this methamphetamine addict's 30-year above-guideline sentence for bank robbery is substantively unreasonable. *United States v. Jordan*, No. 16-3370 (brief filed June 2, 2017).

Whether this drug addict's high-end 240-month sentence for an out-of-character, non-violent, weaponless bank robbery is substantively unreasonable. *United States v. Downing*, No. 17-6058 (brief filed June 13, 2017).

Whether a 200-month sentence for this defendant, who helped her boyfriend rob a bank, is substantively unreasonable. *United States v. Morris*, No. 17-3074 (brief filed June 27, 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 (brief filed May 8, 2017).

N. Resentencing Issues

Did the district court violate Rules 32, 35, and 43, and the right to be present at sentencing by “resentencing” the defendant via videoconference, and amending the judgment rather than conducting a full resentencing as required by the remand? *United States v. Zander*, No. 16-4162 (reply brief filed May 17, 2107).

O. Constitutional Issues

1. Fifth Amendment Due Process

Did the trial court’s repeated denial of evidentiary hearings violate this defendant’s due-process rights? *United States v. Johnson*, No. 16-4146 (reply brief filed June 30, 2017); *United States v. Riddle*, No. 16-4143 (gov’t brief filed May 19, 2017).

Should the district court have disqualified the prosecutor in this case? *United States v. Riddle*, No. 16-4143 (gov’t brief filed May 19, 2017).

2. Sixth Amendment and Hearsay

Did the district court err in admitting double-hearsay at this sentencing hearing without first determining whether the second-level statements bore a minimal indicia of reliability? *United States v. Anderson*, No. 15-1393 (gov’t brief filed June 3, 2016).

Whether the district court erred in applying the 5-level “pattern of activity” enhancement in this child-pornography case where the hearsay statements on which the enhancement was based were unreliable. *United States v. Pulham*, No. 16-8019 (reply brief filed Sept. 30, 2016).

XXVI. 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).

Whether counsel was ineffective in this capital case by failing to introduce organic-brain-damage evidence. *Littlejohn v. Trammell*, No. 14-6177 (OA Jan. 20, 2016).

Did the trial court’s initial appointment of counsel over the defendant’s protest, and later revocation of that appointment, result in the defendant receiving ineffective assistance of counsel? *United States v. Lyman*, No. 16-4007 (reply brief filed Sept. 26, 2016).

Was counsel ineffective in the sentencing phase of this capital case by failing to investigate and present mitigating evidence? *Murphy v. Royal*, No. 15-7041, 7068 (OA March 22, 2017).

Should the Tenth Circuit remand this direct-appeal case for an evidentiary hearing on claims of ineffective assistance of counsel (rather than directing that those claims be brought later, in a collateral proceeding)? *United States v. Kearn*, No. 15-3121 (OA May 10, 2017).

Should the federal habeas court have granted a hearing on this state capital defendant's claim that her trial lawyer's presentation of inaccurate, incriminating DNA evidence, was ineffective assistance of counsel? *Andrew v. Aldridge*, No. 15-6190 (OA July 27, 2017).

Was this defendant denied his right to conflict-free counsel when the district court (1) appointed CJA counsel who had previously represented two witnesses, and (2) excluded the defendant from proceedings in which it concluded that counsel was not conflicted? *United States v. Johnson*, No. 16-4146 (reply brief filed June 30, 2017).

Did a search warrant for email accounts that included attorney-client communications, but that did not impose any filtering requirements, violate the Sixth Amendment (especially given the deficiency of the government's self-directed filter)? *United States v. Johnson*, No. 16-4146 (reply brief filed June 30, 2017).

Was trial counsel ineffective in (1) giving inaccurate advise and failing to correct the district court's inaccurate advise with respect to whether and how the defendant's prior convictions might be used to impeach him if he testified; and (2) failing to listen to jail audio recordings that were admitted against the defendant at trial? *United States v. Prieto*, No. 16-1333 (reply brief filed May 8, 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).

Should the district court have granted habeas relief on this defendant's IAC claims that his trial lawyers (1) failed to move to suppress the fruit of an arrest warrant that was untimely served and lacked territorial jurisdiction; and (2) failed to present expert testimony and argue at trial that the defendant lacked the requisite intent due to a mental disease or defect? *Appleby v. Cline*, No. 17-3002 (brief filed April 5, 2017).

After this murder defendant's state public defenders suddenly withdrew four days before trial, he was without counsel for several days, during which key events occurred that changed the course of trial. Was this deprivation of counsel structural error and per se reversible error? *Acosta v. Raemisch*, No. 17-1131 (state's brief filed June 19, 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 (brief field May 26, 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 (brief filed May 31, 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*, No. 15-8013 (brief filed June 19, 2017).

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

Whether the district court violated the defendant's right to counsel by: (1) refusing to appoint new counsel after prior counsel moved to withdraw based on a strained relationship and an inability to file any non-frivolous arguments; and (3) failing to inform the defendant that he could receive a mandatory minimum term of imprisonment of life on the drug conspiracy count. *United States v. Ellis*, No. 14-3165 & 14-3181 (OA Nov. 19, 2015).

Did the government's bad advisory to the defendant before his grand-jury testimony (he was the target) violate his rights under the 5th and 6th Amendments, and should his grand-jury testimony have been suppressed? *United States v. Williston*, No. 15-7080 (gov't brief filed Sept. 28, 2016).

In this § 2255 case, the government argued that the defendant procedurally defaulted his *Johnson* claim by not raising it on direct appeal. The defendant's direct-appeal counsel worked at the same FPD office as the defendant's § 2255 counsel. In this circumstance, should the district court have granted § 2255 counsel's motion to appoint other, conflict-free counsel to argue the FPD's ineffectiveness as cause for the procedural default? *United States v. Miller*, No. 16-1407 (gov't brief filed Nov. 17, 2016) (sixth amendment: conflicts of interest).

Did the district court's refusal, on the first day of trial, to grant a continuance and allow appointed counsel to withdraw so that retained counsel could represent the defendant violate the defendant's right to counsel of choice? *United States v. Lemon*, No. 16-6213 (reply brief filed Feb. 27, 2017).

Did the trial court err when it failed to ask the defendant personally about motions of unclear provenance that were filed seeking new counsel and to withdraw the defendant's guilty plea? *United States v. Soto*, No. 16-3276 (reply brief filed April 28, 2017).

Did the district court deny this defendant counsel of choice when it denied him access to seized funds—not traced to any crime charged—to fund his defense, in violation of *United States v. Louis*? *United States v. Johnson*, No. 16-4146 (reply brief filed June 30, 2017).

Whether appellate counsel was ineffective 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 (state's brief filed June 30, 2017).

Whether trial counsel were ineffective in failing to investigate and present mitigating evidence in this capital case. *Wood v. Royal*, No. 16-6001 (state's brief filed June 30, 2017).

C. Self-Incrimination

D. Self-Representation

E. Confrontation

After a state court dismissed murder charges against the defendant, who allegedly committed the murder while on supervised release for a federal crack-cocaine conviction, the federal district court relied on extensive hearsay reports of the murder and other alleged violations to revoke the defendant's supervised release. What reliability test must the court perform before accepting such hearsay in lieu of live testimony? Did the district court's reliance on this hearsay violate the

defendant's rights to due process and confrontation under the 5th and 6th Amendments? *United States v. Jones*, No. 15-6119 (reply brief filed January 7, 2016).

Did admission of only part of a recorded FBI interview of the defendant violate the defendant's right to confront the agent who conducted the interview? *United States v. Williston*, No. 15-7080 (gov't brief filed Sept. 28, 2016).

Did the district court commit plain error when it allowed the government to elicit the out-of-court statements of a non-testifying expert? *United States v. Kearn*, No. 15-3121 (OA May 10, 2017).

Did exclusion of a testifying coconspirator's plea agreement and sentencing exposure violate this defendant's confrontation rights? *United States v. Mirabal*, No. 16-2188 (reply brief filed April 19, 2017).

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 improperly exclude defense evidence offered to counter government evidence admitted in violation of in limine orders (on grounds that the defendants did not object when the government's evidence came in)? *United States v. Johnson*, No. 16-4146 (reply brief filed June 30, 2017); *United States v. Riddle*, No. 16-4143 (gov't brief filed May 19, 2017).

Did the district court violate this tax-evasion defendant's confrontation rights by admitting testimonial statements and documents that his deceased tax preparer provided the government during its investigation of the case? *United States v. Stegman*, No. 16-3321 (reply brief filed May 8, 2017).

F. Impartial Jury

When several jurors expressed concern after seeing a Hispanic man sitting in a truck in the jurors' parking lot, and one juror even followed the man and took his picture, fearing "intimidation or repercussions to members of the jury," did the district court err in refusing to declare a mistrial, or in failing to ask the jurors more probing questions before denying a mistrial? *United States v. Rios-Morales*, No. 16-3233 (reply brief filed April 6, 2017).

G. Compulsory Process

Whether in this state DUI case the defendant should have been allowed to subpoena the state toxicologist's educational records showing that she had lied about her credentials (and whether this issue should have been reached in defendant's § 2254 proceeding). *Morehead v. Douglas County, CO, et al.*, No. 15-1481 (brief filed February 29, 2016).

XXVII. Speedy Trial (statutory and constitutional) & Interstate Agreement on Detainers Act

Did the district court violate the Speedy Trial Act when it relied on a flawed “ends of justice” continuance to deny the defendant’s motion to dismiss? *United States v. Madkins*, No. 15-3299 (OA May 10, 2017).

Here the district court dismissed consolidated felony and misdemeanor charges without prejudice under the Speedy Trial Act. The court considered the seriousness of the felony charges, as required by the Act, but did not consider the seriousness (or lack thereof) of the misdemeanor charge. Should the district court have dismissed that charge with prejudice? *United States v. Joseph*, No. 16-4109 (OA May 10, 2017).

Did the district court err when it held that the defendant’s motion to dismiss on speedy-trial grounds, filed during jury selection (three days before the jury was empaneled), was untimely? *United States v. Riddle*, No. 16-4143 (gov’t brief filed May 19, 2017).

This defendant was detained in state custody nearly 10 months before his federal indictment. Were the state proceedings merely a ruse to bypass the charging time limits in the federal Speedy Trial Act, and should the district court have dismissed this indictment? *United States v. Asfour*, No. 16-6231 (reply brief filed May 16, 2017).

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 (brief filed June 2, 2017).

Did the district court erroneously deny this defendant’s motion to dismiss for statutory speedy-trial violations? *United States v. Ray*, No. 16-1306 (brief filed June 2, 2017).

XXVIII. Standards of Review

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

XXIX. Supervised Release

A. Revocation Issues

Was evidence of pornography on this defendant’s smartphone in caches inaccessible to him sufficient to establish, by a preponderance of evidence, that he violated a condition of release? *United States v. Haymond*, No. 16-5156 (OA May 10, 2017).

Did the district court plainly err by revoking supervised release based on violations of conditions that had never been imposed? *United States v. Billy*, No. 16-7071 (gov’t brief filed March 6, 2017).

Did the district court err in finding that the defendant's false statements to his probation officer constituted a new crime (under 18 U.S.C. § 1001) absent evidence or an admission of materiality? *United States v. Olden*, No. 17-5008 (gov't brief filed May 15, 2017).

B. Sentencing Issues (either initially or after revocation)

1. Substantive

Whether the district court's upward variance/departure after revoking the defendant's supervised release was substantively unreasonable. *United States v. Hatanaka*, No. 17-2012 (gov't brief filed June 19, 2017).

2. Procedural

Did the district court plainly err when it imposed an above-guideline sentence for a supervised-release violation without any explanation? *United States v. Barona*, No. 15-4143 (brief filed February 18, 2016).

Does the mandatory minimum sentence in 18 U.S.C. 3583(k) for certain release violations found by a judge on a preponderance of evidence violate due process, *Apprendi*, *Blakeley*, *Booker*, and *Alleyne*? *United States v. Haymond*, No. 16-5156 (OA May 10, 2017).

Whether the district court plainly erred when it imposed an upward variant/departure sentence without an adequate explanation, and in reliance on extra-statutory factors. *United States v. Hatanaka*, No. 17-2012 (brief filed May 4, 2017).

3. Unlawful Delegation of authority

4. Assimilative Crimes Act (ACA) sentences

C. Conditions of Supervised Release

Does the district court have authority to impose a warrantless search condition on a non-sex offender? *United States v. Kemp*, No. 15-3309 (reply brief filed July 8, 2016).

Where the district court orally imposed the "standard conditions" of release, but the written judgment listed conditions inconsistent with the standard conditions, should the written judgment be modified to conform to the oral pronouncement of sentence? *United States v. Kemp*, No. 15-3309 (reply brief filed July 8, 2016).

Did the district court abuse its discretion when it imposed, as a condition of supervised release, a no-contact provision prohibiting this child-pornography defendant from contact with his daughter (the victim), who would be an adult by the time of the defendant's release? *United States v. Kearn*, No. 15-3121 (OA May 10, 2017).

This defendant was on supervised release following his conviction and sentence for failure to register. He had previously completed sex-offender treatment, and his original sex crime was 12 years old. His violations of release did not involve sexual misconduct. Did the district court abuse its discretion when it imposed special conditions of a new term of supervised release requiring sex-offender treatment, and prohibiting unsupervised contact with the defendant's own children? *United States v. Garcia*, No. 16-1011 (submitted May 9, 2017).

Did the district court unconstitutionally delegate sentencing authority to a private treatment contractor when it imposed a condition of supervised release obligating the defendant to “successfully complete” treatment with a private contractor, placing no limits on that contractor’s discretion to decide what constitutes “successful completion” of treatment? *United States v. Garcia*, No. 16-1011 (submitted May 9, 2017).

Did the district court abuse its discretion when it imposed a special supervised-release condition of mental-health treatment based only on the court’s speculation that the defendant had gone “off the rail at times”? *United States v. Jereb*, No. 16-4127 (reply brief filed March 20, 2017).

Did the district court plainly err by prohibiting the defendant from accessing any computer or device connected to the internet absent sufficient findings? *United States v. Billy*, No. 16-7071 (gov’t brief filed March 6, 2017).

Should the district court’s sixth amended judgment, filed sua sponte to add special conditions of release nine months after the district court’s fifth amended judgment, be vacated under the law-of-the-case doctrine, as unauthorized by Fed. R. Crim. P. 36, or as unsupported and invalid? *United States v. Kieffer*, No. 16-1457 (OA May 10, 2017).

Do the occupational and associational restrictions here—including requiring probation approval for any employment—improperly delegate a judicial function to the probation office? *United States v. Jenks*, No. 16-4119 (reply brief filed June 8, 2017).

Did the district court err when it imposed an occupational condition without making necessary findings? *United States v. Jenks*, No. 16-4119 (reply brief filed June 8, 2017).

Did the district court err when it ordered this firearms defendant to submit to sex-offender treatment as a special condition of supervised release without explaining why? *United States v. Francis*, No. 16-1449 (gov’t brief filed June 29, 2017).

Did the district court make sufficient findings to limit this defendant’s contact with his own daughter while on supervised release? *United States v. Cobee*, No. 17-3099 (brief filed June 27, 2017).

XXX. Trial Practice and Evidence Issues

A. Closing Argument

B. Confidential Informants

C. Cumulative Error

Whether cumulative sentencing-phase error warrants relief in this capital habeas case. *Littlejohn v. Trammell*, No. 14-6177 (OA Jan. 20, 2016).

Whether trial errors, including admission of hearsay, 404(b) evidence, improper opinions, and other errors, cumulatively denied the defendant a fair trial. *United States v. Kearn*, No. 15-3121 (OA May 10, 2017).

Whether trial error, including admission of 404(b) evidence, prosecutorial misconduct, and the district court's failure to probe potential juror bias, cumulatively denied the defendant a fair trial. *United States v. Rios-Morales*, No. 16-3233 (reply brief filed April 6, 2017).

D. Demonstrative Evidence

E. Due Process

F. Eyewitness Identification Testimony

G. Jury Instructions

This defendant's theory of defense included an attack on law enforcement's investigative techniques. The district court instructed the jury that the evidence was collected pursuant to a lawful search, and that the government was not obligated to use any particular investigation method. The court refused an instruction that if investigative methods left jurors with a reasonable doubt, they must acquit. Did this imbalanced instruction shift the burden of proof or deprive the defendant of his right to present his theory of defense? *United States v. Jenks*, No. 16-4119 (reply brief filed June 8, 2017).

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 (brief filed May 15, 2017).

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 (reply brief filed May 8, 2017).

2. Burden of Proof

Did the district court commit plain error when instructing the jury on reasonable doubt (for the same reasons detailed in *Petty*)? *United States v. Kearns*, No. 15-3121 (OA May 10, 2017); also raised in *United States v. Ivory*, No. 15-3238 (submitted May 10, 2017), and consolidated cases.

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. De Rangel*, No. 16-5126 (gov't brief filed Jan. 26, 2017); *United States v. Arciniega-Zetin*, No. 16-4145 (reply brief filed May 8, 2017); *United States v. Scott*, No. 16-1474 (brief filed June 26, 2017).

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 (reply brief filed May 8, 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 (reply brief filed May 8, 2017).

7. Sentencing Elements

Whether the district court violated *Biglow I* and *II* and *Alleyne* when it instructed the jury that it was not required to find that the defendant-courier knew the amount of drugs that she possessed. *United States v. Lopez*, No. 15-3134 (gov't brief filed March 21, 2016).

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 deny the defendant's constitutional right to present a defense when it refused to instruct the jury that a reasonable doubt as to the person who committed the offense necessitated an acquittal? *United States v. Meisel*, No. 15-3182 (reply brief filed April 4, 2016).

This defendant testified that he was not a drug dealer and did not give anyone methamphetamine on or around the date charged. Should the district court have given the defendant's requested instruction on the lesser-included offense of simple possession? *United States v. Pacheco*, No. 16-3294 (reply brief filed May 19, 2017).

Did the district court err in excluding the defendant's proffered evidence of immateriality in the false-statements-to-a-bank case? *United States v. Riddle*, No. 16-4143 (gov't brief filed May 19, 2017).

16. Unanimity

17. Voluntary Intoxication

18. Witness Cautionary Instructions

Did the district court commit plain error by omitting the 10th Circuit's addicted-witness cautionary instruction (pattern instruction 1.16)? *United States v. Gabourel*, No. 16-6227 OA May 10, 2017).

H. Mistrial

I. Prior Convictions

Did the district court err when it permitted the government, under Rule 609(a)(1), to impeach the defendant with his 2007 state conviction for failure to register in this SORNA prosecution? *United States v. Hartwell*, No. 15-1457 (OA May 10, 2017).

J. Prosecutorial Misconduct

Did the prosecutor violate *Brady* by withholding information about testifying informants? *United States v. Garcia-Martinez*, No. 15-1432 (reply brief filed Sept. 1, 2016).

In this case charging conspiracy to trespass on public lands, did the government violate *Brady* by not disclosing Bureau of Land Management files conflicting with the government's theory that certain roads were closed to off-highway vehicles? *United States v. Wells*, No. 16-4006 (reply brief filed Sept. 12, 2016).

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 prosecutor commit misconduct in this drug-conspiracy case by using 404(b) evidence for an improper (propensity) purpose, arguing facts not in evidence during closing, misstating the evidence, improperly bolstering the credibility of witnesses, appealing to class prejudice, making appeals to the emotions of the jury, and improperly commenting on the civic duty of the jury ("I now ask that you bring justice to us")? *United States v. Rios-Morales*, No. 16-3233 (reply brief filed April 6, 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).

Did the prosecutor violate this Chinese defendant's rights to equal protection, due process, and a fair trial when he singled out the sole Asian-American juror during voir dire and asked other jurors if they felt "okay" serving with him? *United States v. Tee*, No. 16-3243 (gov't brief filed April 5, 2017).

Should the district court have granted habeas relief on this defendant's *Brady* claim? *Lebere v. Trani*, No. 16-1499 (brief filed March 3, 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 (brief filed May 31, 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 (brief filed May 31, 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 (brief filed June 2, 2017).

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 (brief filed June 2, 2017).

Did the state prosecutor in this capital case violate *Brady* when it suppressed impeaching evidence related to a jailhouse informant? *Eaton v. Wilson*, No. 15-8013 (brief filed June 19, 2017).

K. Right to be Present

L. Right to Present Defense

Did the district court deny the defendant's constitutional right to present a defense when it prohibited counsel from arguing that third parties with access to the defendant's computer might be responsible for the child pornography found on the computer, and it refused to instruct the jury that a reasonable doubt as to the person who committed the offense necessitated an acquittal? *United States v. Meisel*, No. 15-3182 (reply brief filed April 4, 2016).

In this case charging conspiracy to trespass on closed public lands, did the district court deny the defendant's right to present a defense when it prohibited evidence that the land at issue was not closed? *United States v. Lyman*, No. 16-4007 (reply brief filed Sept. 26, 2016).

Did the district court deny this defendant's right to present a defense when it excluded as hearsay evidence that he repudiated his "confession" within a day after making it? *United States v. Lemon*, No. 16-6213 (reply brief filed Feb. 27, 2017).

Did the district court deny this defendant's right to present a defense when it quashed a defense subpoena? *United States v. Portillos*, No. 16-1323 (reply brief filed April 11, 2017).

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 district court deprive the defendant of his right to present a defense when it granted the government's untimely motion to exclude a defense expert witness? *United States v. Johnson*, No. 16-4146 (reply brief filed June 30, 2017).

Did the district court wrongly exclude evidence of immateriality in this false-statements case? *United States v. Johnson*, No. 16-4146 (reply brief filed June 30, 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 (brief filed May 31, 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 (brief filed June 14, 2017).

M. Rule 106 (rule of completeness)

Did admission of only part of a recorded FBI interview of the defendant violate the rule of completeness? *United States v. Williston*, No. 15-7080 (gov't brief filed Sept. 28, 2016).

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

Whether patient deaths not directly attributable to the defendant's pain-management clinic were erroneously admitted as *res gestae* in this drug-conspiracy case. *United States v. Schwartz*, No. 15-1162 (reply brief filed April 6, 2016).

Whether confusing evidence about this postal employee's gambling was relevant to show his motive for stealing from the mails. *United States v. Lemon*, No. 16-6213 (reply brief filed Feb. 27, 2017).

Whether patient deaths not directly attributable to the defendant's pain-management clinic were erroneously admitted as *res gestae* in this drug-conspiracy case. *United States v. Schwartz*, No. 15-1162 (reply brief filed April 6, 2016).

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).

Whether confusing evidence about this postal employee's gambling was unduly prejudicial in his theft-of-mail prosecution. *United States v. Lemon*, No. 16-6213 (reply brief filed Feb. 27, 2017).

Was admission of the defendant's prior drug convictions and gang affiliation unduly prejudicial in this drug-conspiracy case? *United States v. Grant*, No. 16-6228 (OA May 10, 2017).

Was admission of this defendant's gang affiliation unduly prejudicial character evidence? *United States v. Brown*, No. 16-6210 (reply brief filed April 12, 2017).

Was admission of provocative online massage ads unduly prejudicial in this prostitution-related case? *United States v. Tee*, No. 16-3243 (gov't brief filed April 5, 2017).

Was admission of officer summary testimony in this drug/gang case unduly prejudicial? *United States v. Banks*, No. 16-6322 (brief filed April 8, 2017).

O. Rule 404(b)

Whether text messages about trading car parts for guns exchanged months before the defendant's alleged illegal possession of a gun were erroneously admitted at trial. *United States v. Benford*, No. 15-6163 (supplemental briefs filed Oct. 28, 2016).

Whether the trial court erroneously admitted evidence that the defendant brandished a gun at someone weeks before the defendant's alleged illegal possession of a different gun. *United States v. Benford*, No. 15-6163 (supplemental briefs filed Oct. 28, 2016).

In this drug-conspiracy case involving a pain-management clinic, should the trial court have declared a mistrial after mistakenly including a 404(b) instruction (referencing the defendant's "other crimes wrong or acts") in its pretrial preliminary instructions to the jury? *United States v. Schwartz*, No. 15-1162 (reply brief filed April 6, 2016).

Whether patient deaths not directly attributable to the defendant's pain-management clinic were erroneously admitted as *res gestae* in this drug-conspiracy case. *United States v. Schwartz*, No. 15-1162 (reply brief filed April 6, 2016).

Whether evidence of the alleged coconspirators' previous marijuana cultivation was admissible in this drug-conspiracy case involving a pain-management clinic that did not sell marijuana. *United States v. Schwartz*, No. 15-1162 (reply brief filed April 6, 2016).

Did defense counsel's direct examination of the defendant's wife about the defendant's efforts to maintain a good business reputation open the door to the defendant's prior alleged commissions of theft, insurance fraud, bankruptcy fraud, and marijuana distribution? *United States v. Schwartz*, No. 15-1162 (reply brief filed April 6, 2016).

In this case, the defendant's wife died after falling off a cliff in a national park. The government charged the defendant with murder, theorizing that he had pushed his wife. Did the district court err under either Rule 403 or 404(b) when it relied on the "doctrine of chances" to admit evidence that (1) the defendant's wife had previously suffered an accident while alone with the defendant, when he dropped a piece of wood on her neck; and (2) the defendant's first wife had suffered fatal injuries while alone with the defendant, when their jeep rolled and crushed her while they were changing a tire by the side of the road? *United States v. Hentborn*, No. 15-1490 (reply brief filed Nov. 2, 2016).

Did admission of the defendant's previous rough conduct toward the child in this child-abuse murder case violate either Rule 403 or 404(b)? *United States v. Williston*, No. 15-7080 (gov't brief filed Sept. 28, 2016).

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 commit plain error in this child pornography case when it admitted evidence of multiple images under 404(b) without defining the reason for the evidence or giving a special unanimity instruction with respect to the evidence? *United States v. Kearn*, No. 15-3121 (OA May 10, 2017).

Did the district court abuse its discretion by admitting evidence of a separately charged conspiracy in this drug-conspiracy case? And was admission of this evidence unduly prejudicial insofar as discovery had not been completed in the separate case? *United States v. Rios-Morales*, No. 16-3233 (reply brief filed April 6, 2017).

Did the district court abuse its discretion in this drug-conspiracy case by admitting the defendant's prior drug convictions and gang affiliation? *United States v. Grant*, No. 16-6228 (OA May 10, 2017).

Did the district court abuse its discretion when it admitted, in this drug case, the defendant's multiple prior drug convictions? *United States v. Banks*, No. 16-6322 (brief filed April 8, 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 (brief filed June 26, 2017).

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

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

Did the trial court violate Rule 704 when it admitted a DEA agent's expert opinion that the defendant was not an "unwitting" participant in the charged drug conspiracy? *United States v. Garcia-Martinez*, No. 15-1432 (reply brief filed Aug. 19, 2016).

Did the district court violate Rules 701, 702, and 704 when it admitted opinions through witnesses and exhibits that the images at issue in this case were child pornography, and that the defendant was the person who distributed them? *United States v. Kearn*, No. 15-3121 (OA May 10, 2017).

Whether the government's medical expert's testimony in this unlawful-prescriptions case was standardless and inadmissible under Rule 702. *United States v. Miller*, No. 16-1231 (reply brief filed March 21, 2017).

R. 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).

Did the district court commit plain error when it allowed the government to elicit the out-of-court statements of a non-testifying expert? *United States v. Kearn*, No. 15-3121 (OA May 10, 2017).

Were the deceased's statements to medical personnel in this murder case admissible as excited utterances, statements for a medical diagnosis, or dying declarations? *United States v. Magnan*, No. 16-7043 (OA March 21, 2017).

Was the defendant's prior acquittal relevant and admissible under the residual hearsay exception? *United States v. Brown*, No. 16-6210 (reply brief filed April 12, 2017).

Did the trial court erroneously admit online ads without a proper business-records foundation? *United States v. Tee*, No. 16-3243 (gov't brief filed April 5, 2017).

S. 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).

T. Rule 1002 (Best Evidence Rule)

Did the district court's admission of redacted court records violate the best-evidence rule? *United States v. Francis*, No. 16-1449 (gov't brief filed June 29, 2017).

U. Rule 1006 (Summaries)

Did the district court erroneously admit summary charts, created from a third party's spreadsheets, the original data for which was never made available to the defense? *United States v. Matthew Channon*, No. 16-2254 (gov't brief filed June 19, 2017); *United States v. Brandi Channon*, No. 16-2285 (gov't brief filed June 19, 2017).

V. Surrebuttal

W. Voir Dire

XXXI. Void for Vagueness

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

Should the district court have required the government to prove by clear and convincing evidence (rather than by merely a preponderance of evidence) that the wiretapped calls in this case were intercepted within the issuing state judge's territorial jurisdiction? Was the evidence sufficient to prove location of interception under either standard? *United States v. Thompson*, No. 15-3313 (OA May 10, 2017); *United States v. Johnson*, No. 16-3280 (reply brief filed April 26, 2017).

Is a search warrant required by Title III or the Fourth Amendment to access cell site location information? *United States v. Thompson*, No. 15-3313 (OA May 10, 2017).

XXXIII. Miscellaneous

A. Forum Shopping

B. Disqualification of Government Counsel

Recently Added Cases

Eaton v. Wilson, No. 15-8013 (brief filed June 19, 2017) (28 U.S.C. § 2254; IAC; competence; *Brady*).

United States v. Angeles, No. 16-3354 (brief filed June 9, 2017) (Fourth Amendment: traffic stop).

United States v. Autobee, No. 17-1082 (brief filed June 5, 2017) (18 U.S.C. § 924(c)).

United States v. Brunken, No. 17-6085 (brief filed June 19, 2017) (ACCA).

United States v. Cobee, No. 17-3099 (brief filed June 27, 2017) (supervised-release conditions).

United States v. Dates, No. 16-2267 (brief filed June 13, 2017) (Fourth Amendment; Fifth Amendment; *Miranda*).

United States v. Dixon, No. 17-7010 (brief filed June 14, 2017) (right to present a defense).

United States v. Downing, No. 17-6058 (brief filed June 13, 2017) (USSG § 3E1.1; sentencing: substantive unreasonableness).

United States v. Hammond, No. 17-1102 (brief filed June 19, 2017) (Fourth Amendment: *Terry*).

United States v. Higley, No. 17-1111 (brief filed June 12, 2017) (18 U.S.C. § 924(c)).

United States v. Huntsman, No. 17-4031 (brief filed June 14, 2017) (sentencing: procedural unreasonableness).

United States v. Jordan, No. 16-3370 (brief filed June 2, 2017) (sentencing: substantive unreasonableness).

United States v. Morris, No. 17-3074 (brief filed June 27, 2017) (USSG § 3B1.2(b); sentencing: substantive unreasonableness).

United States v. Ramos, No. 17-2013 (brief filed June 21, 2017) (Fourth Amendment: traffic stop, consent).

United States v. Ray, No. 16-1306 (brief filed June 2, 2017) (Interstate Agreement on Detainers; superseding indictments; speedy trial; *Youngblood*; variance).

United States v. Rhodes, No. 17-6096 (brief filed June 26, 2017) (ACCA; 28 U.S.C. § 2255).

United States v. Roberts, No. 17-4021 (brief filed June 9, 2017) (Fourth Amendment: traffic stop).

United States v. Scott, No. 16-1474 (brief filed June 26, 2017) (Rule 404(b); jury instructions: constructive possession; sentencing: procedural error).

United States v. Stevens, No. 17-5044 (brief filed June 9, 2017) (First Amendment; 18 U.S.C. § 875).

United States v. Trent, No. 17-6041 (brief filed June 27, 2017) (ACCA; 28 U.S.C. § 2255).

United States v. Valdez, No. 16-3363 (brief filed June 5, 2017) (USSG §§ 2D1.1, 3B1.2, 1B1.3; sentencing disparity).