

# ISSUES PENDING IN THE TENTH CIRCUIT

COMPILED BY THE KANSAS FEDERAL PUBLIC DEFENDER



Updated May 4, 2018

# PREFACE

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

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

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

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

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

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

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

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

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

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

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## **I. Appeals**

## **II. Competence**

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

## **III. Confessions**

## **IV. Continuances**

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

## **V. Discovery**

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

## **VI. Double Jeopardy**

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

## **VII. Eighth Amendment and Capital Issues**

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

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

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

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

## **VIII. Ex Post Facto Issues**

## **IX. First Amendment**

Were this defendant's letters to the USDA asking it to pay his private debts protected speech, and should the district court have dismissed this false-claims prosecution, or acquitted the defendant, or

instructed the jury on the defendant's First Amendment defense? *United States v. Glaub*, No. 17-1182 (OA March 22, 2018).

## **X. Forfeiture**

### **XI. Fourth Amendment Issues**

#### **A. Arrest Warrant**

#### **B. Consent**

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

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

Was this pilot's consent to a search of his plane the fruit of an illegal detention? *United States v. Latorre*, No. 17-8066 (OA May 16, 2018).

Did this defendant's mother freely and voluntarily consent to a search of the defendant's home in the face of her own physical frailty and an officer's threats to take her to jail? *United States v. Morris*, No. 17-6223 (brief filed Feb. 21, 2018).

#### **C. Excessive Force**

#### **D. Fruit of the Poisonous Tree**

Was this defendant's grand-jury testimony the fruit of an illegal detention? *United States v. Latorre*, No. 17-8066 (OA May 16, 2018).

#### **E. Good Faith Exception**

Was this search warrant so lacking in probable cause as to render its execution unreasonable? *United States v. Ejiqfor*, No. 17-6211 (gov't brief filed April 11, 2018).

Did the government waive any good-faith argument on remand by insufficiently briefing it in this defendant's first appeal, and, if not, does good faith excuse the warrantless search of this defendant's email? *United States v. Ackerman*, No. 17-3238 (brief filed April 6, 2018).

Can good faith excuse law enforcement's reliance on a warrant when the warrant affidavit contained information tainted by law enforcement's own Fourth Amendment violations? *United States v. Alderete*, No. 18-1032 (brief filed April 9, 2018).

**F. Government Actor**

**G. Hearing Issues**

**H. Inventory Searches**

**I. Knock and Talk**

**J. Plain View Doctrine**

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

**K. Protective Sweeps**

**L. Scope of Warrantless Search**

**M. Search Incident to Arrest**

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

Was this computer-fraud search warrant a pretext to search for child pornography; did the agents exceed the scope of the warrant (as the district court found) when they expanded their search after finding child pornography; did a second warrant purge the taint of the foregoing illegality; and did the district court err in denying suppression on good-faith grounds? *United States v. Loera*, No. 17-2180 (brief filed Feb. 7, 2018).

Did an affidavit alleging three vague and tangential connections to the actions of people involved in an online dating scheme supply probable cause for a warrant to search this defendant's home? *United States v. Ejiofor*, No. 17-6211 (gov't brief filed April 11, 2018).

Should the fruit of an unlawful entry and an unlawful car search be stricken from this search warrant affidavit, and does the warrant then lack probable cause? *United States v. Alderete*, No. 18-1032 (brief filed April 9, 2018).

**O. Standing (reasonable expectation of privacy)**

Did this defendant have standing to challenge the search of his email (before it was delivered to its intended recipient) under either a trespass theory or a privacy theory? *United States v. Ackerman*, No. 17-3238 (brief filed April 6, 2018).

**P. *Terry* Stops: Initial Detention**

**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 (OA Nov. 14, 2017).

Did law enforcement unlawfully retrieve and further inspect a small container of pills during a *Terry* frisk of this defendant? *United States v. Phommaseng*, No. 17-3225, 17-3226, 17-3227 (brief filed March 26, 2018).

## **R. Traffic Stops**

Was this traffic stop for improper lane change under New Mexico law supported by reasonable suspicion? *United States v. Vance*, No. 17-2008 (OA Nov. 16, 2017).

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

Were a state agent’s “stall tactics”—designed to keep this pilot on the ground until Homeland Security could arrive and follow up on another agent’s belief that this former drug-defendant pilot’s flight habits were suspicious—supported by reasonable suspicion (and does the collective-knowledge doctrine apply here)? *United States v. Latorre*, No. 17-8066 (OA May 16, 2018).

Was this traffic stop (in the defendant’s own driveway) unlawfully prolonged for purposes of a dog sniff? *United States v. Phommaseng*, No. 17-3225, 17-3226, 17-3227 (brief filed March 26, 2018).

Absent any surveillance suggesting that this defendant’s car had been used to transport contraband, did law enforcement have probable cause to stop and search the car? *United States v. Alderete*, No. 18-1032 (brief filed April 9, 2018).

## **S. Warrantless Arrests**

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

## **T. Warrantless Seizures**

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

## **U. Warrantless Searches**

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

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

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

Was a warrantless entry into this defendant’s home justified by exigent circumstances hours after an alleged shooting, and despite the fact that an officer testified that the officers did not rely on exigent circumstances? *United States v. Morris*, No. 17-6223 (brief filed Feb. 21, 2018).

Did a warrantless dog sniff of a car parked within the curtilage of the defendant’s home violate the Fourth Amendment? *United States v. Phommaseng*, No. 17-3225, 17-3226, 17-3227 (brief filed March 26, 2018).

Was law enforcement’s warrantless entry into this defendant’s mobile home—for “officer safety” and “preservation of any evidence”—unlawful; was a witness’s statement the fruit of this unlawful entry; and should that statement be stricken from a later warrant application? *United States v. Alderete*, No. 18-1032 (brief filed April 9, 2018).

## **XII. Fourteenth Amendment: Due Process**

Did the state court violate this capital defendant’s due process rights when it admitted a steady stream of prurient and irrelevant evidence about her sex life (purportedly to show her motive to kill her estranged husband)? *Andrew v. Aldridge*, No. 15-6190 (OA July 27, 2017).

## **XIII. Fifth Amendment: Due Process**

Were the two counts charged in this case under 18 U.S.C. §§ 2422(b) and 2251 (production of pornography and enticement to travel) multiplicitous? *United States v. Isabella*, No. 17-1197 (brief filed Feb. 12, 2018).

Did the evidence and jury instructions in this assault case constructively amend the indictment? And if so, was this amendment structural error? *United States v. Murray*, No. 17-1400 (brief filed April 23, 2018).

## **XIV. Fifth Amendment: Confessions & *Miranda***

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

Did the state court err in this capital case when it admitted the defendant’s un-*Mirandized* statements? *Andrew v. Aldridge*, No. 15-6190 (OA July 27, 2017).

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

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

## **XV. Habeas Issues**

### **A. 28 U.S.C. § 2241**

### **B. 28 U.S.C. § 2254**

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

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

Should the district court have granted this state capital defendant habeas relief based on individual or cumulative error, or at the very least have held an evidentiary hearing on her *Brady* and IAC claims? *Andrew v. Aldridge*, No. 15-6190 (OA July 27, 2017).

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

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

Whether the district court should have granted relief, or at least a hearing, on this defendant's claim that the Colorado Court of Appeals unreasonably held that he "impliedly" waived his right to trial counsel when he twice fired his lawyers shortly before trial. *Vreeland v. Zupan*, No. 16-1503 (OA May 17, 2017).

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

The federal district court vacated this defendant's state death sentence and directed that the defendant be appointed counsel and resentenced within 120 days. The state took no action by that deadline. Did the state waive its right to re-seek the death penalty in this case? *Eaton v. Wilson*, Nos. 15-8013, 16-8086 (state's brief filed April 16, 2018).

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

Should the district court have granted relief, or at least a hearing, on this state capital-defendant's ineffective-assistance-of-counsel, prosecutorial-misconduct, and capital-instructional-error claims? *Underwood v. Royal*, No. 16-6262 (OA March 22, 2018).

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

Should the district court have granted relief or at least an evidentiary hearing on this state prisoner's claims of juror misconduct (a sleeping juror) and ineffective assistance of counsel (for not alerting the court to the sleeping juror)? *Smith v. Aldridge*, No. 17-6149 (OA Feb. 15, 2018).



Should the district court have granted relief or at least an evidentiary hearing on this state capital defendant's claims of ineffective assistance of counsel and constitutionally flawed jury instructions? *Grissom v. Royal*, No. 16-6271 (state's brief filed Dec. 19, 2017).

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

Should the district court have granted habeas relief on this state capital defendant's claims that (1) the exclusion of expert testimony relevant to the defendant's ability to form the necessary intent deprived him of due process; and (2) his *Miranda* waiver was neither knowing nor intelligent? *Coddington v. Royal*, No. 16-6295 (state's brief filed Jan. 17, 2018).

Is this state defendant entitled to 28 U.S.C. § 2254 relief on grounds that the evidence admitted at his trial was insufficient as a matter of law to support his second-degree-murder conviction? *Thompson v. Allbaugh*, No. 17-6127 (reply brief filed May 3, 2018).

Should the district court have granted habeas relief on this state capital defendant's claims that his trial and appellate counsel were ineffective? *Johnson v. Royal*, No. 16-5165 (state's brief filed April 24, 2018).

Are this state defendant's IAC claims procedurally defaulted, and, if not, should the district court hold an evidentiary hearing to decide those claims? *Smith v. Allbaugh*, No. 17-5095 (brief filed March 19, 2018).

Was this state capital defendant (1) deprived of his right to a fair trial and to present a defense by erroneous voluntary intoxication instructions, and (2) deprived of effective assistance of counsel, by counsel's failure to object to the instructions and failure to adequately prepare the expert witness in support of his voluntary intoxication defense; and should the district court have held an evidentiary hearing on these 28 U.S.C. § 2254 claims? *Malone v. Royal*, No. 17-6027 (brief filed March 23, 2018).

Did the district court erroneously grant 28 U.S.C. § 2254 relief in this state first-degree assault and aggravated-robbery case based on ineffective assistance of counsel and a violation of the defendant's right to be present (with respect to a note from the jury), and did the district court further abuse its discretion by forever barring retrial after 90 days? *Hobdy v. Raemisch*, No. 18-1047 (brief filed March 28, 2018).

Are this defendant's ineffective-assistance-of-counsel claims procedurally defaulted, and did the district court otherwise erroneously deny a hearing and 28 U.S.C. § 2254 relief? *Duran v. Archuleta*, No. 17-1321 (state's brief filed March 29, 2018).

Did the district court err in denying this state murder defendant 28 U.S.C. § 2255 relief? *Ersland v. Bear*, No. 17-6255 (brief filed April 23, 2018).

Did the district court err when it granted this state capital murder defendant a stay and abeyance in his 28 U.S.C. § 2254 action? *Kell v. Benzón*, No. 17-4191 (brief filed April 25, 2018) (state's appeal).

### **C. 28 U.S.C. § 2255**

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 (OA Feb. 13, 2018).

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

Did this petitioner's claim that his attorney failed to consult with him about an appeal relate back to his original claim that counsel was ineffective in failing to file an appeal? *United States v. Smith*, No. 17-3075 (reply brief filed Jan. 5, 2018).

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

Did the district court err when it dismissed this defendant's *Johnson*-based 28 U.S.C. § 2255 petition as impermissibly successive under § 2255(h)(2) after this Court authorized the petition under that subsection? *United States v. Pullen*, No. 17-3194 (reply brief filed Jan. 10, 2018).

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

#### **XVI. Immigration Issues**

Did the district court have jurisdiction to order this defendant's removal as part of her criminal case? *Thoung v. United States*, No. 17-3220 (brief filed Dec. 27, 2017).

#### **XVII. 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 (OA Sept. 25, 2017).

##### **B. Duplicitous**

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 (OA Sept. 25, 2017).

**C. Grand Jury Issues**

**D. Sufficiency of the Indictment (Sixth Amendment)**

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

**E. Variance**

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

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

**XVIII. Jurisdictional Issues**

**XIX. Motion Practice**

**XX. Offenses**

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

**B. 8 U.S.C. § 1326 (illegal reentry)**

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

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

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

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

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

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

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

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

**H. 18 U.S.C. § 371 (conspiracy)**

**I. 18 U.S.C. § 666 (bribery)**

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

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

**L. 18 U.S.C. § 844 (arson)**

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

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

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

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

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

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

Should this defendant's § 922(g) conviction be reversed for insufficient evidence that the defendant knowingly possessed (actually or constructively) the firearms and ammunition specified in the indictment, on the date specified in the indictment? *United States v. Silva*, No. 17-2030 (OA March 20, 2018).

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

Is the residual clause of 18 U.S.C. § 924(c)(3)(B) void for vagueness, and is federal kidnapping a crime of violence for purposes of § 924(c)? *United States v. Jessie Hopper*, No. 15-2190 (OA Jan. 17, 2018); *United States v. Ford*, No. 17-1122 (gov't brief filed April 5, 2018) (and should this defendant have been granted § 2255 relief?).

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); *United States v. Lopez-Aguilar*, No. 17-2121 (supplemental brief filed Dec. 7, 2017); *United States v. Pacheco-Donelson*, No. 17-1180 (OA May 17, 2018).

Is armed bank robbery a crime of violence for purposes of § 924(c)? *United States v. Smith*, No. 17-3086 (submitted on briefs May 17, 2018).

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 (reply brief filed Aug. 16, 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 (supplemental brief filed April 25, 2018).

Whether arson under 18 U.S.C. § 844(i) is a crime of violence for purposes of § 924(c). *United States v. Lawless*, No. 17-1148 (reply brief filed Jan. 2, 2018).

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

Whether the residual clause of § 924(c) is unconstitutionally vague; whether *Autobee* and *Kundo* were wrongly decided; and whether the district court should have granted this defendant § 2255 relief. *United States v. Morgan*, No. 17-1172 (supplemental brief filed April 24, 2018).

Whether the residual clause of § 924(c) is unconstitutionally vague, and whether federal carjacking is a crime of violence. *United States v. Silva*, No. 17-2030 (OA March 20, 2018).

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

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

Is robbery under 18 U.S.C. § 1951 a crime of violence for 18 U.S.C. § 924(c)(3)(A) purposes? And did the district court improperly direct a verdict when it so instructed the jury? *United States v. Jefferson*, No. 17-3150 (reply brief filed April 17, 2018); *United States v. Rojas*, No. 17-2065 (reply brief filed March 2, 2018).

Did *Johnson* invalidate the residual clause of 18 U.S.C. § 924(c); is armed bank robbery under 18 U.S.C. § 2113(a) a crime of violence for § 924(c) purposes; and is this defendant entitled to § 2255 relief? *United States v. Neibart*, Nos. 17-2164, 17-2192 (brief filed Feb. 9, 2018).

Should this defendant's conviction (and life sentence) under 18 U.S.C. § 924(j) be vacated absent any triggering conviction under 18 U.S.C. § 924(c)? *United States v. Melgar-Cabrera*, No. 16-2018 (OA May 9, 2017).

Did *Johnson* invalidate the residual clause of 18 U.S.C. § 924(c) and is assault with a dangerous weapon under 18 U.S.C. § 113(a)(3) a crime of violence for § 924(c) purposes? *United States v. Concho*, No. 18-2015 (brief filed March 30, 2018).

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

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

Did the district court err when it refused to instruct the jury that materiality is an essential element of making false bank entries? *United States v. Christy*, No. 17-3122 (reply brief filed April 23, 2018).

- T. 18 U.S.C. § 1028 (identity-document fraud)**
- U. 18 U.S.C. § 1028A (identity theft)**
- V. 18 U.S.C. § 1041 (false statements to a bank)**
- W. 18 U.S.C. § 1201 (kidnapping)**
- X. 18 U.S.C. § 1341 (mail fraud)**
- Y. 18 U.S.C. § 1343 (wire fraud)**
- Z. 18 U.S.C. § 1344 (bank fraud)**
- AA. 18 U.S.C. § 1347 (health-care fraud)**

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

- BB. 18 U.S.C. § 1361 (deprivation of government property)**
- CC. 18 U.S.C. § 1512 (witness tampering)**
- DD. 18 U.S.C. § 1513 (obstruction of justice)**
- EE. 18 U.S.C. § 1591 (sex trafficking of children)**

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

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

Did the district court err when it refused to instruct the jury that “force” means “violent force” in this 18 U.S.C. § 1951 case? *United States v. Jefferson*, No. 17-3150 (reply brief filed April 17, 2018).

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

Was the evidence insufficient as a matter of law to sustain this defendant’s tax-evasion-based money-laundering convictions? *United States v. Christy*, No. 17-3122 (reply brief filed April 23, 2018).

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

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

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

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

Was the evidence sufficient in this case to establish violations of 18 U.S.C. §§ 2422(b) and 2251 (production of pornography and enticement to travel)? Were these two counts multiplicitous? *United States v. Isabella*, No. 17-1197 (brief filed Feb. 12, 2018).

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

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

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

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

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

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

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

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

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

**PP.21 U.S.C. § 846 (drug conspiracy)**

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

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

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

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

**SS. 26 U.S.C. § 7201 (tax evasion)**

**TT. 26 U.S.C. § 7212**

**UU. 28 U.S.C. § 455 (recusal)**

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

## **XXI. Pleas**

### **A. Acceptance of Plea**

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

### **B. Appeal Waiver**

### **C. Breach**

Whether the government's unenthusiastic sentencing recommendation breached its plea agreement with this drug defendant. *United States v. Lopez*, No. 17-1370 (reply brief filed April 10, 2018).

### **D. Rejection of Plea Agreement**

### **E. Withdrawal of Plea**

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

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

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

## **XXIII. Rules of Criminal Procedure**

### **A. Rule 8 (Joinder/Severance)**

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

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

### **C. Rule 12 (motions)**

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



**D. Rule 32 (sentencing procedures)**

**E. Rule 33 (new trial)**

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

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

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

After an unlimited remand for resentencing, the district court refused to rule on two of this defendant's variance arguments. Was this refusal either legal error or an abuse of discretion? *United States v. Godinez-Perez*, No. 17-3170 (OA May 17, 2018).

**XXV. Second Amendment Issues**

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

**XXVI. Sentencing**

**A. Allocution**

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

Was the district court's failure to ask this defendant personally if she wished to allocute plain sentencing error? *United States v. Christy*, No. 17-3122 (reply brief filed April 23, 2018).

**B. Apprendi**

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

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

Whether New Mexico attempted armed robbery and aggravated battery are violent felonies under the ACCA, and whether this defendant is entitled to § 2255 relief. *United States v. Dean*, No. 17-2113 (submitted March 20, 2018).

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

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

Whether Oklahoma robbery with firearms, second-degree burglary, and assault and battery with a deadly weapon are violent felonies for ACCA purposes, and whether this defendant is entitled to § 2255 relief. *United States v. Byers*, No. 17-6089 (brief filed July 26, 2017).

Whether Oklahoma second-degree burglary and pointing a weapon are ACCA predicates, and whether this defendant is entitled to § 2255 relief. *United States v. Washington*, No. 17-6079 (OA Feb. 15, 2018).

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

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

Whether this defendant is entitled to a certificate of appealability and § 2255 relief from his ACCA sentence, based on Oklahoma robbery-by-fear convictions. *United States v. Duran*, No. 17-5087 (reply brief filed April 3, 2018).

Whether this defendant is entitled to § 2255 relief from his ACCA sentence, based on Oklahoma burglary, deadly-conduct, and attempted-robbery-with-a-dangerous-weapon convictions. *United States v. Hernandez*, No. 17-6021 (gov't brief filed Jan. 26, 2018).

Is Oklahoma domestic abuse assault & battery a violent felony for ACCA purposes? *United States v. Harrison*, No. 17-6119 (reply brief filed April 11, 2018).

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

Whether aiding and abetting (18 U.S.C. § 2) and federal unarmed bank robbery (18 U.S.C. § 2113(a)) are violent felonies for ACCA purposes, and whether this defendant is entitled to § 2255 relief. *United States v. Deiter*, No. 17-2159 (reply brief filed March 1, 2018).

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

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

Is Oklahoma assault and battery on a police officer a violent felony for ACCA purposes? *United States v. Johnson*, No. 17-6165, 17-6195 (gov't reply filed April 20, 2018) (gov't cross-appeal).

Did the district court improperly deny this defendant 28 U.S.C. § 2255 relief from his 2008 ACCA sentence by finding that the sentence was *not* based on the now-invalidated residual clause? *United States v. Copeland*, No. 17-5125 (brief filed Feb. 7, 2018).

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

Whether Tennessee burglary, Oregon first-degree robbery, and Nevada attempted battery are violent felonies for ACCA purposes, and whether this defendant is entitled to 28 U.S.C. § 2255 relief. *United States v. Neely*, No. 17-8087 (gov't brief filed April 18, 2018).

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

Is the 1995 version of Oklahoma first-degree robbery a violent felony for ACCA purposes? *United States v. Harbert*, No. 17-6246 (brief filed March 26, 2018).

Are this defendant's three prior bank robberies—committed on different days at different banks, but close in time and character—separate convictions for ACCA purposes? *United States v. Dutch*, No. 17-2219 (response brief filed May 2, 2018) (gov't appeal).

Are the New Mexico crimes of armed robbery, aggravated assault, and aggravated battery violent felonies for ACCA purposes, and should the district court have granted this defendant 28 U.S.C. § 2255 relief? *United States v. Manzanares*, No. 18-2010 (brief filed April 13, 2018).

Are New Mexico burglary and aggravated assault violent felonies for ACCA purposes, and should the district court have granted this defendant 28 U.S.C. § 2255 relief? *United States v. Marquez*, No. 17-2221 (brief filed April 25, 2018).

#### **D. Burden of Proof**

#### **E. Capital Sentencing**

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

#### **G. Departures and Variances**

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

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

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

## H. Fines & Assessments

Did the district court err when it imposed a \$5,000.00 fine on an indigent defendant under 18 U.S.C. § 3014(a), which directs district courts to impose this fine “on any non-indigent person” convicted of a listed offense? *United States v. Bonilla*, No. 18-6016 (brief filed April 16, 2018).

### I. Guidelines Sections

#### 1. USSG § 1B1.2

#### 2. USSG § 1B1.3 (relevant conduct)

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

#### 3. USSG § 2A2.2

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

#### 4. USSG § 2A3.5 (SORNA)

#### 5. USSG § 2A4.1 (bodily injury)

Did this kidnapping victim’s eye injury—resulting in sensitivity to bright light and necessitating sunglasses—qualify as a “serious bodily injury” for purposes of a two-level sentencing enhancement under USSG § 2A4.1(b)(2)(B)? *United States v. Jones*, No. 17-2197 (reply brief filed April 26, 2018).

#### 6. USSG § 2A6.1

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

#### 7. USSG § 2B1.1

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

#### 8. USSG § 2B3.1 (robbery)

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

Did the district court erroneously conclude that the guidelines do not incorporate the statutory definition of “firearm” (or define “firearm” at all) for this enhancement? *United States v. Smith*, No. 17-8014 (brief filed July 17, 2017).

Did the district court erroneously enhance this defendant’s bank-robbery sentence for possession of a dangerous weapon under USSG § 2B3.1(b)(2)(E)? *United States v. Hall*, No. 18-2022 (brief filed April 30, 2018).

#### 9. USSG § 2C1.1

#### 10. USSG § 2D1.1

Was evidence that the defendant sometimes stored drugs at home sufficient to support a sentencing enhancement under USSG § 2D1.1(b)(12) for maintaining a drug premises? *United States v. Murphy*, No. 17-5118 (gov’t brief filed May 1, 2018).

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

**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 (OA Jan. 19, 2017).

**12. USSG § 2K2.1**

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 (OA Nov. 14, 2017).

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

Is Wyoming felony interference with a peace officer a crime of violence for purposes of USSG § 2K2.1(a)(4)(A)? *United States v. Winder*, No. 17-8075 (brief filed March 19, 2018).

Did the district court err in applying a sentencing enhancement under USSG § 2K2.1(b)(6)(B) based on warning shots that this defendant reasonably (and lawfully, under Colorado law) fired into the air to ward off an attempted theft of property? *United States v. Vargas-Ortega*, No. 17-1433 (OA May 17, 2018).

**13. USSG § 2K2.2**

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

**15. USSG § 2T1.1 (tax loss)**

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

**17. USSG § 2Q2.1**

**18. USSG § 3A1.3**

**19. USSG § 3B1.1**

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

**20. USSG § 3B1.2 (mitigating role)**

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

**21. USSG § 3B1.3 (abuse of trust)**

**22. USSG § 3C1.1 (obstruction)**

Did the district court erroneously add obstruction points under USSC § 3C1.1 for this defendant’s prior alleged escapes? *United States v. Jones*, No. 17-2197 (reply brief filed April 26, 2018).

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

Where the defendant neither sped nor otherwise violated traffic laws during his flight from police, did the district court err in applying a reckless-endangerment enhancement? *United States v. Young*, No. 17-8059 (OA May 16, 2018).

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

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

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

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

Did the district court erroneously rely on this defendant's prior alleged escapes to deny any sentence reduction for acceptance of responsibility? *United States v. Jones*, No. 17-2197 (reply brief filed April 26, 2018).

**26. USSG § 4A1.1**

**27. USSG § 4A1.2**

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

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

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

Can the mandatory (pre-*Booker* guidelines) be challenged for vagueness, and should the district court have granted this defendant § 2255 relief under *Johnson*? *United States v. Zamora*, No. 17-2188 (brief filed Feb. 1, 2018).

Whether the mandatory guidelines are subject to vagueness challenges, and whether New Mexico robbery is a crime of violence. *United States v. Rhoads*, No. 17-2081 (OA March 20, 2018).

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

Is Oklahoma use of a vehicle to facilitate intentional discharge of a firearm a crime of violence (and was *Hammons* wrong about this)? *United States v. Johnson*, No. 17-6165, 17-6195 (reply brief filed April 4, 2018) (preserving claim while *Hammons* petition for certiorari pending).

Is federal bank robbery under 18 U.S.C. § 2113(a) a crime of violence for career-offender purposes? *United States v. Sheriff*, No. 17-8069 (submitted on briefs May 16, 2018).

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

Whether armed bank robbery under 18 U.S.C. § 21113 is a crime of violence for career-offender purposes, and whether this mandatory-guidelines defendant is entitled to § 2255 relief. *United States v. Holz*, No. 17-6118 (reply brief filed April 23, 2018).

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

Whether this defendant is entitled to § 2255 relief from his mandatory-guidelines career-offender sentence, which was based on an Oklahoma conviction for throwing or dropping an object from a vehicle. *United States v. Cranford*, No. 17-7054 (submitted on briefs May 16, 2018).

Are Kansas aggravated battery and second-degree murder crimes of violence for career-offender purposes (and is *Ontiveros* distinguishable, or was it wrongly decided)? *United States v. Love*, No. 17-3236 (brief filed Feb. 28, 2018).

Is Kansas reckless aggravated battery a crime of violence for career-offender purposes? *United States v. Ash*, Nos. 17-3233 & 17-3245 (brief filed March 1, 2018).

Was *Greer* wrongly decided, and is this defendant—who was sentenced as a career-offender under the mandatory guidelines—entitled to *Johnson*-based § 2255 relief? *United States v. Encinias*, No. 17-8070 (gov't brief filed March 21, 2018).

### **30. USSG § 4B1.5**

#### **31. USSG § 5C1.2 (safety valve)**

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

Is this defendant entitled to safety-valve relief, and did the district court err in concluding otherwise? *United States v. Gonzalez-Avalos*, No. 18-2003 (OA July 27, 2018).

### **32. USSG § 5K1.1**

#### **33. USSG § 5K2.14**

Did the district court improperly rely on USSG § 5K2.14 (public welfare significantly endangered) when it departed upwards in this explosives case, given that the applicable offense guidelines already take the danger to the public welfare into account? *United States v. Carey*, No. 17-7070 (gov't brief filed April 25, 2018).

### **34. USSG § 5G1.2(d)**

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

## **J. Mandatory Minimums and Maximums**

Did the government fail to prove that this defendant was previously convicted of a qualifying drug felony for 21 U.S.C. § 851 purposes when it relied solely on the previous case's docket entries, which did not specify the drug of conviction? *United States v. Hayes*, No. 17-4060 (reply brief filed Feb. 21, 2018).

Did the district court plainly err when it failed to conduct the colloquy required by 21 U.S.C. § 851(b)? *United States v. Hayes*, No. 17-4060 (reply brief filed Feb. 21, 2018).

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

## **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 (OA Sept. 25, 2017).

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

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

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

Did the district court commit procedural error because it failed to give an adequate explanation for the 25-year above-guidelines sentence it imposed in this bank robbery/924(c) case? *United States v. Smith*, No. 17-3086 (submitted on briefs May 17, 2018).

Did the district court procedurally err when it varied upwards without meaningfully considering this defendant's mitigating reasons for his reentries after removal? *United States v. Chavez-Morales*, No. 17-2124 (OA May 17, 2018).

Did the district court violate Fed. R. Crim. P. 32 by relying at sentencing on confidential codefendant and coconspirator PSRs without first disclosing this information to the defendant and allowing a reasonable opportunity for comment? *United States v. Bustamante-Conchas*, No. 17-2100 (reply brief filed Feb. 5, 2018).

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

Did the district court err when it concluded that the defendant's willingness to waive (and actual waiver of) his appellate rights was not an appropriate variance consideration? *United States v. Tena-Arana*, No. 17-1345 (OA May 16, 2018).

This defendant sought a downward variance, arguing that a guideline sentence would create an unwarranted disparity, because others in his position had received variances. The district court



denied the variance, declaring that it was the other courts that had created any disparity. Did the district court err? *United States v. Mandrell*, No. 17-7072 (brief filed March 7, 2018).

Did the district court commit legal error when it categorically refused to consider this defendant's family circumstances at sentencing? *United States v. Vargas-Ortega*, No. 17-1433 (OA May 17, 2018).

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

## 2. Substantive

Is this child-abuse defendant's 480-month sentence substantively unreasonable? *United States v. Durham*, No. 16-6075 (OA March 23, 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; OA Nov. 14, 2017).

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

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

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

Is this gun defendant's upward variant sentence of 60 months (2X his mid-range guideline sentence) substantively unreasonable? *United States v. Mosley*, No. 17-1232 (OA May 17, 2018).

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

Was the district court's imposition of a guideline sentence—driven by a guideline that was based on a since-repudiated criminal statute (regarding semi-automatic weapons)—substantively unreasonable? *United States v. Ibanez*, No. 17-1337 (submitted on briefs May 16, 2018).

Is this gun defendant's 54-month below-guideline sentence (6-months higher than the variance he sought) substantively unreasonable? *United States v. Howard*, No. 17-8060 (gov't brief filed April 23, 2018).

Is this illegal-reentry defendant’s 45-month above-guideline sentence substantively unreasonable? *United States v. Cruz-Artiaga*, No. 17-1399 (gov’t brief filed Feb. 21, 2018).

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

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

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

Is this defendant’s guideline sentence for kidnapping, in light of his background and the circumstances of his crime, substantively unreasonable? *United States v. Jones*, No. 17-2197 (reply brief filed April 26, 2018).

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

Is this 55-year-old assault defendant’s 68-month upper-range guideline sentence for a prison stabbing substantively unreasonable? *United States v. Nanez-Rivera*, No. 17-1419 (brief filed April 20, 2018).

Is this defendant’s 15-year mid-range guideline sentence for drug distribution substantively unreasonable? *United States v. Quintana-Torres*, No. 17-3256 (brief filed April 23, 2018).

#### **L. SORNA Sentencing Issues**

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

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

#### **N. Resentencing Issues**

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

#### **P. Constitutional Issues**

##### **1. Fifth Amendment Due Process**

##### **2. Sixth Amendment and Hearsay**

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. Pulbam*, No. 16-8019 (OA Jan. 19, 2017).

## **XXVII. Sixth Amendment**

### **A. Right to Effective Assistance of Counsel**

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

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

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

Whether the Colorado Court of Appeals unreasonably concluded that this defendant "impliedly" waived his right to trial counsel when he twice fired attorneys shortly before trial. *Vreeland v. Zupan*, No. 16-1503 (OA May 17, 2017).

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

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

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

Was trial counsel ineffective in (1) failing to object to the district court's use of conspiracy-wide drug quantity at sentencing; (2) failing to consult with the defendant about an appeal? *United States v. Smith*, No. 17-3075 (reply brief filed Jan. 5, 2018).

Was trial counsel ineffective in failing to investigate and call alibi witnesses in this kidnapping/robbery case? *United States v. Ford*, No. 17-1122 (gov't brief filed April 5, 2018).

Was trial counsel ineffective in introducing the defendant's prior conviction at trial in this state child-enticement case? *Sandoval v. Raemisch*, No. 17-1161 (reply brief filed Jan. 16, 2018).

Did the district court err in denying this defendant's motion to release seized assets for his defense? *United States v. Kahn*, No. 17-8035 (OA Jan. 18, 2018).

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

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

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

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

## **C. Self-Incrimination**

### **D. Self-Representation/Waiver of Counsel**

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

Was this defendant's waiver of counsel knowing and intelligent? *United States v. Quintana-Torres*, No. 17-3256 (brief filed April 23, 2018).

## **E. Confrontation**

Did the state court violate this capital defendant's Sixth Amendment right to confrontation when it admitted police reports containing testimonial statements by the deceased several weeks before his death accusing the defendant of trying to kill him? *Andrew v. Aldridge*, No. 15-6190 (OA July 27, 2017).

Did the district court violate this assault defendant's confrontation rights by limiting her cross-examination of the complainant with respect to the defendant's self-defense defense? *United States v. Tapaha*, No. 17-2104 (OA March 22, 2018).

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

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

Is this state defendant entitled to 28 U.S.C. § 2254 relief on grounds that the state court violated his due-process and confrontation rights by admitting a non-testifying codefendant's inculpatory statements through the state's impeachment of another witness? *Thompson v. Allbaugh*, No. 17-6127 (reply brief filed May 3, 2018).

Did the district court violate this defendant's confrontation rights by refusing to allow him to cross-examine a police officer about his dishonesty in another case? *United States v. Cook*, No. 17-2161 (brief filed Feb. 23, 2018).

## **F. Impartial Jury**

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

## **G. Compulsory Process**

### **XXVIII. Speedy Trial (statutory and constitutional) & IADA**

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

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

Did a nine-month delay between this defendant's state sentencing and her federal arrest (on a 2-year-old indictment) violate her constitutional speedy-trial rights? *United States v. Frias*, No. 17-1242 (OA May 17, 2018).

### **XXIX. Standards of Review**

#### **A. Waiver**

#### **B. Forfeiture/Plain Error**

#### **C. De Novo Review**

### **XXX. Statutes of Limitations**

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

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

### **XXXI. Supervised Release**

#### **A. Revocation Issues**

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

## **B. Sentencing Issues (either initially or after revocation)**

### **1. Substantive**

Is this defendant's revocation sentence—which is longer than his initial sentence—substantively unreasonable? *United States v. Ulibarri*, No. 17-2179 (OA May 17, 2018).

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

Is this defendant's revocation sentence substantively unreasonable? *United States v. Ochoa-Oliva*, No. 17-2210 (brief filed April 2, 2018).

### **2. Procedural**

Did the district court plainly err when it imposed the maximum term of supervised release without explaining why, and without mentioning USSG § 5D1.1(c) (recommending against supervision when deportation likely)? *United States v. Chavez-Morales*, No. 17-2124 (reply brief filed Jan. 16, 2018).

Is this drug defendant's 140-month guideline sentence procedurally unreasonable in light of the district court's failure to resolve disputed facts or explain its reason for rejecting the defendant's sentencing-manipulation-based variance argument? *United States v. Sedillo*, No. 17-2173 (gov't brief filed April 9, 2018).

### **3. Unlawful Delegation of authority**

### **4. Assimilative Crimes Act (ACA) sentences**

## **C. Conditions of Supervised Release**

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 (OA Nov. 14, 2017).

A standard condition of release provides that the probation officer may, in the officer's discretion, require the defendant to notify another person that the defendant poses a risk to that person. Is this condition impermissibly vague, and does it unlawfully delegate judicial authority to the probation officer and constitute an unlawful occupational restriction? *United States v. Hull*, No. 17-1086 (OA March 22, 2018).

The district court ordered this bank-fraud defendant to participate in drug testing and/or treatment and refrain from using alcohol while on supervised release. Was this condition supported by the evidence, and did it unlawfully delegate discretion to the probation officer? *United States v. Wright*, No. 17-1191 (reply brief filed April 23, 2018).

The district court ordered this defendant not to associate with gang members while on supervised release, and refused—without a proper inquiry or particularized findings—to make an exception for the defendant's close foster brothers. Was this an abuse of discretion? *United States v. Pacheco-Donelson*, No. 17-1180 (OA May 17, 2018).

Is it plain error for a district court to impose a special condition of supervised release “in all cases” without making the statutorily required defendant-specific findings? *United States v. Michaelis*, No. 17-3179 (OA May 17, 2018).

Did the district court plainly err by failing to make particularized findings before imposing a condition of supervised release requiring the defendant to take all prescribed mental-health medications? *United States v. Ulibarri*, No. 17-2179 (OA May 17, 2018).

Did the district court unconstitutionally delegate power to the probation officer to decide whether to place this defendant in residential drug treatment as a condition of supervised release? *United States v. Russian*, No. 17-3157 (OA May 17, 2018).

Should this defendant's judgment be amended to conform to the oral sentence pronounced with respect to a condition of supervised release? *United States v. Russian*, No. 17-3157 (OA May 17, 2018).

Did the district court exceed its authority or jurisdiction when it sua sponte ordered this drug defendant to either marry the mother of his children or arrange child-support payments as a condition of supervised release (especially absent the existence of any state-issued child-support order)? *United States v. Sedillo*, No. 17-2173 (gov't brief filed April 9, 2018).

Did the district court plainly err by imposing occupational restrictions as a condition of supervised release without making adequate findings? *United States v. Quintana-Torres*, No. 17-3256 (brief filed April 23, 2018).

## **XXXII. Trial Practice and Evidence Issues**

### **A. Closing Argument**

### **B. Confidential Informants**

### **C. Cumulative Error**

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

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

### **D. Demonstrative Evidence**

### **E. Due Process**

### **F. Eyewitness Identification Testimony**

### **G. Judicial misconduct**

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

### **H. Jury Instructions**

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

### **1. Aiding and Abetting**

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

### **2. Burden of Proof**

Did the district court misstate the burden of proof in its instructions to the jury? Did it improperly tell the jury that the defendant did not anticipate calling any witnesses? *United States v. Waldron*, No. 17-4187 (reply brief filed May 2, 2018).

### **3. Conspiracy**

#### **4. Constructive Possession**

Whether the district court plainly erred when it failed to instruct the jury that it must determine that the defendant intended to possess the charged drugs (as is now required per *Little*). *United States v. Arciniega-Zetin*, No. 16-4145 (OA Nov. 14, 2017); *United States v. Scott*, No. 16-1474 (OA March 22, 2018); *United States v. Giannukos*, No. 17-3067 (OA March 22, 2018); *United States v. Martinez*, No. 16-1393 (OA Jan. 18, 2018).

#### **5. Deliberate Avoidance/Ignorance**

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

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

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

#### **7. Sentencing Elements**

#### **8. Flight**

#### **9. Guilt by Association/Guilt of Others**

#### **10. Investigative Techniques**

#### **11. Knowledge**

#### **12. Polygraphs**

#### **13. Proof**

#### **14. Spoliation**

#### **15. Theory of Defense/Affirmative Defense**

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

Did the district court err in refusing to give a self-defense instruction in this prison assault case? *United States v. Thomas*, No. 17-1278 (brief filed April 20, 2018).



**16. Unanimity**

**17. Voluntary Intoxication**

**18. Witness Cautionary Instructions**

**I. Jury Questions**

Did the district court abuse its discretion by failing to respond to a jury question with “concrete accuracy”? *United States v. Frias*, No. 17-1242 (OA May 17, 2018).

**J. Mistrial**

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

**K. Prior Convictions**

**L. Prosecutorial Misconduct**

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

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

Did the prosecutors in this state capital trial violate *Brady* when they concealed a sentencing benefit they engineered for a witness who claimed that the defendant had confessed to the crime while in jail? *Andrew v. Aldridge*, No. 15-6190 (OA July 27, 2017).

Did the prosecutors in this state capital trial violate the defendant’s right to fundamental fairness when they falsely suggested in closing that her daughter’s emotional breakdown during her penalty-phase testimony was evidence that she was not opposed to her mother’s execution? *Andrew v. Aldridge*, No. 15-6190 (OA July 27, 2017).

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

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

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

Did the government’s destruction of IRS records violate this tax-fraud defendant’s due process rights under *Youngblood*? *United States v. Ray*, No. 16-1306 (OA Jan. 18, 2018).

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

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

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

Did the prosecutor commit misconduct by commenting on matters not in evidence? *United States v. Magnan*, No. 17-8026 (OA Jan. 18, 2018).

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

Did cumulative prosecutorial misconduct deny this defendant due process under plain-error review? *United States v. Christy*, No. 17-3122 (reply brief filed April 23, 2018).

Was the *Brady* evidence at issue in this case material? Was an ex parte conversation between the district court and the government regarding the government’s *Brady* obligation plain constitutional error? *United States v. Waldron*, No. 17-4187 (reply brief filed May 2, 2018).

Did the prosecutor commit prejudicial misconduct in relation to this defendant’s heat-of-passion defense? *United States v. Currie*, No. 17-3242 (brief filed May 3, 2018).

### **M. Right to be Present**

### **N. Right to Present Defense**

Did the state court deny this capital defendant’s right to present a defense when it excluded several defense witnesses as a sanction for perceived discovery infractions? *Andrew v. Aldridge*, No. 15-6190 (OA July 27, 2017).

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

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

Did the district court violate this assault defendant’s constitutional right to present a defense by limiting testimony relevant to self-defense? *United States v. Tapaba*, No. 17-2104 (OA March 22, 2018).

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

Was this defendant deprived of his right to present a defense by way of a witness's exonerating statements when the government caused the witness to invoke the Fifth Amendment and refused to grant her immunity, and the district court excluded her recorded statement? *United States v. Dalton*, No. 17-2146 (brief filed Feb. 5, 2018).

**O. Rule 106 (rule of completeness)**

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

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

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

Did the district court violate Rule 403 and *Old Chief* in denying this gun-defendant's request to instruct the jury that he was a "prohibited person" rather than a "convicted felon"? *United States v. Silva*, No. 17-2030 (OA March 20, 2018).

Was the video of this defendant's SWAT-team arrest irrelevant and unduly prejudicial to his trial on gun charges? *United States v. Dalton*, No. 17-2146 (brief filed Feb. 5, 2018).

Was evidence of non-criminal (but nonetheless inflammatory) pictures and communications irrelevant and unduly prejudicial in this pornography/enticement case? *United States v. Isabella*, No. 17-1197 (brief filed Feb. 12, 2018).

Did the district court abuse its discretion when it excluded as irrelevant evidence incriminating this defendant's fiancé (whom she claimed was solely responsible for the drug trafficking underlying her charges)? *United States v. Cook*, No. 17-2161 (brief filed Feb. 23, 2018).

Did the district court plainly err in excluding a witness's statements that the defendant thought he would get life in prison if he had a gun—relevant to his intent not to possess a gun? *United States v. Manning*, No. 17-8084 (brief filed April 25, 2018).

**Q. Rule 404(b)**

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

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

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

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

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

**S. Rules 601-615 (Witnesses)**

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

Did the district court violate F.R.E. 608(b) when it refused to allow this defendant to cross-examine a police officer about his dishonesty in another case? *United States v. Cook*, No. 17-2161 (brief filed Feb. 23, 2018).

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

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 (OA Sept. 25, 2017).

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

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

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

Was it error to allow a government expert to testify in a child sexual-abuse case that 96-98% of child sexual-abuse complainants are telling the truth? *United States v. Magnan*, No. 17-8026 (OA Jan. 18, 2018).

Did the district court plainly err by admitting unreliable expert DNA testimony? *United States v. Silva*, No. 17-2030 (OA March 20, 2018).

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

**U. Rules 801-807 (hearsay)**

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

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

Should the district court have admitted the recording of an unavailable witness's exonerating statements under the catch-all provision of Federal Rule of Evidence 807? *United States v. Dalton*, No. 17-2146 (brief filed Feb. 5, 2018).

Should the district court have admitted a plea agreement incriminating this defendant's fiancé (whom she claimed was solely responsible for the drug trafficking underlying her charges) as an adopted admission by the government? *United States v. Cook*, No. 17-2161 (brief filed Feb. 23, 2018).

Did the district court err in excluding statements against penal interest, proffered under Fed. R. Evid. 804, that a third party made, admitting that the gun in this gun case was his? *United States v. Manning*, No. 17-8084 (brief filed April 25, 2018).

**V. Rule 901 (authentication)**

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

**W. Rule 1002 (Best Evidence Rule)**

Did the district court's admission of redacted court records violate the best-evidence rule? *United States v. Francis*, No. 16-1449 (OA Nov. 14, 2017).

**X. Rule 1006 (Summaries)**

**Y. Surrebuttal**

**Z. Voir Dire**

**XXXIII. Vagueness**

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

## Recently Added Cases

(most recent to least recent)

*United States v. Currie*, No. 17-3242 (brief filed May 3, 2018) (trial practice: prosecutorial misconduct).

*United States v. Rodríguez-Arroyo*, No. 18-6028 (brief filed May 2, 2018) (Sixth Amendment: right to effective assistance of counsel).

*United States v. Lozano*, No. 18-1031 (brief filed May 1, 2018) (USSG §§ 2D1.1(b)(12); 3B1.1(b)).

*United States v. Joseph*, No. 18-2023 (brief filed April 30, 2018) (departures & variances).

*United States v. Hall*, No. 18-2022 (brief filed April 30, 2018) (USSG § 2B3.1).

*United States v. Manning*, No. 17-8084 (brief filed April 25, 2018) (hearsay; relevance).

*Kell v. Benzón*, No. 17-4191 (brief filed April 25, 2018) (28 U.S.C. § 2254) (state's appeal).

*United States v. Marquez*, No. 17-2221 (brief filed April 25, 2018) (ACCA).

*Ersland v. Bear*, No. 17-6255 (brief filed April 23, 2018) (28 U.S.C. § 2254).

*United States v. Hansen*, No. 17-4159 (brief filed April 23, 2018) (Sixth Amendment: waiver of counsel; supervised release: conditions).

*United States v. Quintana-Torres*, No. 17-3256 (brief filed April 23, 2018) (sentencing: substantive unreasonableness).

*United States v. Murray*, No. 17-1400 (brief filed April 23, 2018) (Fifth Amendment: constructive amendment of indictment).

*United States v. Nanez-Rivera*, No. 17-1419 (brief filed April 20, 2018) (sentencing: substantive unreasonableness).

*United States v. Thomas*, No. 17-1278 (brief filed April 20, 2018) (jury instructions: self-defense; severance of charges).

*United States v. Waldron*, No. 17-4187 (reply brief filed May 2, 2018) (*Brady*; jury instructions).

*United States v. Bonilla*, No. 18-6016 (brief filed April 16, 2018) (fines & assessments).

*United States v. Manzanares*, No. 18-2010 (brief filed April 13, 2018) (ACCA).

*United States v. Alderete*, No. 18-1032 (brief filed April 9, 2018) (Fourth Amendment: warrantless searches; traffic stops; search warrant issues; good-faith).

*United States v. Ackerman*, No. 17-3238 (brief filed April 6, 2018) (Fourth Amendment: standing, good faith).

*United States v. Hoaks*, No. 17-6250 (gov't brief filed May 1, 2018) (sentencing: substantive & procedural reasonableness).