

ISSUES PENDING IN THE TENTH CIRCUIT

COMPILED BY THE KANSAS FEDERAL PUBLIC DEFENDER



Updated November 19, 2021

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." The easiest way to search is to use the keyboard shortcut CTRL + F (this launches a "find" function).

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

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

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

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

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

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

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I. Appeals/scope of remand

II. Competence

Did this defendant's inability to assist counsel render his trial a due process violation? *United States v. Ferguson*, No. 20-7045 (reply brief filed March 11, 2021).

III. Confessions

IV. Continuances

Did the district court err by refusing to grant a continuance when it was impossible for defense counsel to adequately prepare for trial? *United States v. Herrera*, No. 19-2126 (gov't brief filed August 2, 2021); *United States v. Sanchez*, No. 19-2141 (gov't brief filed August 2, 2021); *United States v. Baca*, No. 19-2195 (gov't brief filed August 2, 2021).

V. Discovery

Did the district court err by allowing a surprise witness to testify at the end of trial, when 18 U.S.C. § 3432 requires pretrial disclosure of witnesses? *United States v. Joe Gallegos*, No. 20-2058 (brief filed September 20, 2021); *United States v. Garcia*, No. 19-2152 (brief filed October 8, 2021).

Does 18 U.S.C § 3432, which requires disclosure of witnesses 3 days before trial for a capital offense, apply to an offense punishable by death, even if the government elects not to pursue the death penalty? *United States v. Garcia*, No. 19-2188 (brief filed June 28, 2021).

Did the district court err by permitting the government to introduce evidence that was disclosed late, in piecemeal fashion, and in violation of the court's discovery orders? *United States v. Topete-Madrueño*, No. 20-2180 (reply brief filed September 17, 2021).

Did the district court err by not imposing more severe sanctions for the government's discovery violations? *United States v. Jumaev*, No. 18-1296 (reply brief filed March 30, 2020).

VI. Double Jeopardy

VII. Eighth Amendment and Capital Issues

Does this defendant's life sentence for convictions related to fentanyl violate the Eighth Amendment? *United States v. Shamo*, No. 21-4116 (reply brief filed September 15, 2021).

Does this defendant's mandatory life sentence violate the Eighth Amendment's proportionality requirement? (foreclosed issue). *United States v. Burtrum*, No. 20-5091 (OA September 21, 2021).

Is this defendant entitled to a COA or § 2255 relief based on ineffective assistance of counsel during the guilt and penalty phases of his capital trial, evidentiary and due process claims, claims relating to uncharged aggravating factors, or his challenge to the reasonable-doubt instruction? *Menzies v. Powell*, No. 19-4042 (supplemental briefs filed March 8, 2021).

VIII. Ex Post Facto Issues

IX. First Amendment or Other Rights of Access

X. Forfeiture

XI. Fourth Amendment Issues

A. Arrest Warrant

B. Attenuation (intervening circumstances)

C. Consent

Did the district court err when it found that this defendant's consent to a law enforcement search of his luggage was voluntary? *United States v. Delgado-Salazar*, No. 21-2048 (reply brief filed November 10, 2021).

Did the district court err when it found that this defendant's consent to an encounter with law enforcement and to the search of a bag in his possession was voluntary? *United States v. Rodriguez*, No. 20-2173 (OA November 18, 2021).

Did the district court err when it found that this defendant's consent to search his pockets was voluntary? *United States v. Ballance*, No. 20-3141 (reply brief filed March 15, 2021).

D. Excessive Force

E. Fruit of the Poisonous Tree

F. Good Faith Exception

G. Government Actor

H. Hearing Issues

I. Inventory Searches

Was the seizure and search of this defendant's backpack unlawful because they were not justified as impoundment or inventory searches? *United States v. Braxton*, No. 21-1149 (brief filed October 27, 2021).

Was the search of this defendant's duffel bag, done well after booking and after the agent took the bag home, invalid? *United States v. Bullcoming*, No. 20-6125 (OA November 18, 2021).

J. Knock and Talk

K. Plain View Doctrine

Does the plain view exception apply to the searches law enforcement conducted of a luggage on a Greyhound bus? *United States v. Johnson*, No. 21-2058 (brief filed October 12, 2021).

L. Protective Sweeps

Did the district court err when it determined that a warrantless “protective” search of this defendant’s vehicle did not violate the Fourth Amendment? *United States v. Alexander*, No. 20-3238 (OA November 18, 2021).

M. Scope of Warrantless Search

N. Search Incident to Arrest

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

Did the district court err by finding that the warrant to search a home was still supported by probable cause at the time the search was executed? *United States v. Topete-Madrueno*, No. 20-2180 (reply brief filed September 17, 2021).

Did the district court err by denying this defendant’s request for a Franks hearing regarding alleged lies in the affidavit supporting the search warrant? *United States v. Velarde-Pavia*, No. 20-2135 (OA November 18, 2021).

Did the district court err by denying the motion to suppress evidence found on the defendant’s cell phone, because the warrant was insufficiently particular and overly broad? *United States v. Palms*, No. 20-5072 (OA September 21, 2021).

Did the district court err by not suppressing the fruits of extraterritorial search warrants in this terrorism case, issued by a Colorado judge for evidence in Philadelphia? *United States v. Jumaev*, No. 18-1296 (reply brief filed March 30, 2020).

P. Standing (reasonable expectation of privacy)

Did the district court err by holding that this defendant did not have standing to object to the search of a car because he was not the registered owner? *United States v. Topete-Madrueno*, No. 20-2180 (reply brief filed September 17, 2021).

Q. Terry Stops: Initial Detention

Did the district court err when it found that law enforcement’s request that the defendant get off the bus to speak with them was not a seizure? *United States v. Vazquez-Lopez*, No. 21-2033 (reply brief filed October 5, 2021).

Did the district court err when it found that officers had sufficient reasonable suspicion to stop this defendant based on a 911 call? *United States v. Ballance*, No. 20-3141 (reply brief filed March 15, 2021).

R. Terry: Frisk

Did law enforcement’s pat down of this defendant violate the Fourth Amendment, because there were no facts suggesting the defendant was armed and dangerous? *United States v. Caudle*, No. 21-7005 (reply brief filed September 16, 2021).

S. Traffic Stops

Did the district court err when it denied this defendant’s motion to suppress evidence found during a traffic stop because the defendant pulled onto private property prior to the stop, or does the plain

view exception or consent justify the subsequent search? *United States v. Parker*, No. 21-7035 (brief filed November 4, 2021).

Was this defendant seized when an officer attempted to make a traffic stop and followed the defendant, when no actual traffic violation had occurred? *United States v. Jeffers*, No. 21-6017 (gov't brief filed November 5, 2021).

Did the police officer in this case impermissibly extend the traffic stop without reasonable suspicion? *United States v. Frazier*, No. 20-4131 (OA November 17, 2021).

Did the district court err when it found this traffic stop valid, because it is not a violation of law to display a valid temporary permit and a state-issued license plate simultaneously? *United States v. Deluca*, No. 20-8075 (reply filed October 21, 2021).

Did the police officer impermissibly extend the traffic stop of this defendant until a drug dog arrived and alerted? *United States v. Butler*, No. 20-8037 (gov't brief filed June 21, 2021).

T. Warrantless Arrests

Did the district court err by finding officers had probable cause to arrest this defendant without a warrant on a Greyhound bus? *United States v. Johnson*, No. 21-2058 (brief filed October 12, 2021).

U. Warrantless Searches & Seizures

Did the district court err by denying this defendant's motion to suppress where the police ordered the defendant out of a car and to crawl onto the ground, at gunpoint, when he was asleep in a car with someone the police were arresting, who said that the defendant had a gun? *United States v. Bosman*, No. 21-1076 (gov't brief filed November 9, 2021).

Did the district court err by finding reasonable suspicion to stop this defendant two separate times, and by finding the area of the stop to be a "high crime" area? *United States v. Gates*, No. 20-4106 (OA September 23, 2021).

Did the district court err when it found that exigent circumstances justified the officers' warrantless search of a crime victim's home when there was no evidence that anyone else was inside the home? If not, does the inevitable discovery doctrine save the search? *United States v. Logan*, No. 20-3202 (reply brief filed April 7, 2021).

Did the district court err by denying the motion to suppress evidence found when an agent lifted and felt the defendant's bag, which he had placed in an overhead compartment on a bus? *United States v. Fernandez*, No. 20-2106 (OA September 22, 2021).

XII. Fourteenth Amendment: Due Process

XIII. Fifth Amendment: Due Process

Did the district court err when it denied this defendant's motion to dismiss alleging selective enforcement based on discriminatory enforcement by ATF? *United States v. Casanova*, No. 20-2159 (gov't brief filed October 1, 2021).

Did the government engage in outrageous conduct that violates due process by using a paid informant who targeted this heroin-addicted defendant with diminished cognitive abilities? *United States v. Leal*, No. 21-2003 (reply brief filed November 17, 2021).

Did the district court's refusal to allow this defendant access to the trailer that was the crime scene violate his Fifth or Sixth Amendment rights? *United States v. Bullcoming*, No. 20-6125 (OA November 18, 2021).

Do the government's Brady violations in this case warrant a new trial? *United States v. Herrera*, No. 19-2126 (gov't brief filed August 2, 2021); *United States v. Sanchez*, No. 19-2141 (gov't brief filed August 2, 2021); *United States v. Baca*, No. 19-2195 (gov't brief filed August 2, 2021).

Was the government's involvement in this defendant's charged attempted use of explosives so outrageous that it should have been barred from prosecuting him? *United States v. Varnell*, No. 20-6040 (OA March 12, 2021).

XIV. Fifth Amendment: Right to Silence

XV. Fifth Amendment: Confessions & *Miranda*

Did the district court err when it denied the motion to suppress this defendant's statements, finding they were not coerced and that the defendant's waiver of his *Miranda* rights was valid? *United States v. Woody*, No. 21-2007 (reply brief filed October 12, 2021).

XVI. Habeas Issues

A. 28 U.S.C. § 2241

In this action challenging disciplinary sanctions, did the district court err by finding that the disciplinary hearing officer did not violate due process by admitting video evidence without reviewing it for relevance, and was the disciplinary hearing officer impartial? *Pittman v. Gomez*, No. 21-1114 (brief filed November 15, 2021).

Is this military defendant entitled to habeas relief on his claims that the military court failed to address the impact drug ingestion had on his mens rea and the introduction of misleading sentencing evidence? *Bales v. Commandant*, No. 20-3167 (OA September 20, 2021).

Is this military defendant entitled to habeas relief on his claims of defective jury instructions in his military proceeding? *Santucci v. Commandant*, No. 20-3149 (OA September 20, 2021).

B. 28 U.S.C. § 2254

Is this capital defendant entitled to habeas relief on his claims of ineffective assistance of counsel at trial and on appeal? *Frederick v. Farris*, No. 20-6131 (brief filed October 22, 2021).

Is this defendant entitled to a COA or habeas relief on his claims of actual innocence of an enhanced mandatory-minimum sentence? *Lee v. Schnurr*, No. 21-3098 (brief filed July 28, 2021).

Should this capital defendant's conviction be vacated based on claims of: ineffective assistance of guilt phase or penalty phase counsel; violation of his right to silence or confrontation rights via

admission of his prison file; Eighth or Fourteenth Amendment violations based on the court's reliance on unconstitutional aggravating factors? *Menzies v. Powell*, No. 19-4042 (brief filed March 24, 2021).

Did the district court err by granting this defendant habeas relief on his claim of ineffective assistance of counsel? *Sumpter v. Kansas*, No. 20-3186 (cross-appeal brief filed February 5, 2021) (state appeal) (OA November 18, 2021).

Is this defendant entitled to an evidentiary hearing on his habeas claims of actual innocence and flawed scientific evidence? *Nicholls v. Hansen*, No. 20-1159 (brief filed October 30, 2020).

Is this defendant entitled to a COA or habeas relief based on his claims of effective assistance of counsel during the guilt and penalty phases of his capital trial, evidentiary and due process claims, uncharged aggravating factors, or challenge to the reasonable-doubt instruction? *Menzies v. Powell*, No. 19-4042 (supplemental briefs filed March 8, 2021).

Is this state defendant entitled to habeas relief based on his claims of ineffective assistance of counsel? *Honie v. Powell*, No. 19-4158 (OA Jan. 22, 2021).

Is this state murder defendant entitled to § 2254 relief on his claims of insufficient evidence and ineffective assistance of counsel? *Meek v. Martin*, No. 20-7021 (reply brief filed April 2, 2021).

C. 28 U.S.C. § 2255

Did the district court err by holding that the reservation of rights in this appeal waiver in this defendant's plea agreement did not allow him to raise pre-plea government misconduct to challenge his conviction, or by holding that he was procedurally barred from doing so? *United States v. Spaeth*, No. 21-3096 (brief filed November 8, 2021).

Is this defendant entitled to a COA to appeal the district court's denial of his Sixth Amendment/prosecutorial misconduct claim as: (1) untimely under § 2255(f); and (2) futile under Article III's standing requirements? *United States v. Webb*, No. 21-3091 (brief filed November 8, 2021).

Is this defendant entitled to a COA or habeas relief on his claims of insufficient evidence and ineffective assistance of appellate counsel? *United States v. Strickland*, No. 21-6051 (brief filed September 16, 2021).

Is this defendant entitled to a COA and § 2255 relief because his prior convictions no longer qualify as ACCA predicates, rendering his sentence in violation of due process? *United States v. Thompson*, No. 21-6060 (brief filed July 15, 2021).

Did the district court err when it found that this defendant had not shown prejudice from a Rehaif error, when he had previously served probationary sentences? *United States v. Avitia*, No. 21-1028 (brief filed July 8, 2021).

Is this defendant entitled to § 2255 relief based on his claims of conflicted counsel or ineffective assistance of counsel? *United States v. Alcorta*, No. 20-3198 (reply brief filed September 22, 2021).

Does the savings clause of § 2255(e) allow for this defendant's claim that he is not an armed career criminal based on intervening case law? *Jackson v. Warden*, No. 21-3011 (brief filed June 8, 2021).

Does *United States v. Haymond* have retroactive effect, because it invalidated a portion of a federal statute? *United States v. Memmott*, No. 20-4119 (OA November 17, 2021).

Did this defendant's judgment become final only after the district court entered an amended judgment on remand, for purposes of the § 2255 statute of limitations? *United States v. Anthony*, No. 20-6134 (OA November 15, 2021).

Is this defendant entitled to an evidentiary hearing and § 2255 relief on his claim of ineffective assistance of counsel? *United States v. Lemon*, No. 20-6119 (brief filed January 13, 2021).

Is this defendant entitled to a COA or § 2255 relief on his claims of ineffective assistance of counsel, based on counsel's failure to object to sentencing enhancements? *United States v. Babcock*, No. 20-4003 (reply brief filed April 15, 2021).

Is this defendant entitled to a COA or § 2255 relief regarding claims of ineffective assistance of counsel, based on failure to investigate DNA evidence and omissions during plea negotiations? *Jenks v. United States*, No. 20-4023 (reply brief filed October 22, 2020).

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

E. Coram Nobis

XVII. Immigration Issues

XVIII. Indictment Issues

A. Amendments

B. Duplicity

C. Grand Jury Issues

D. Sufficiency of the Indictment (Sixth Amendment)

E. Variance

Was this indictment constructively amended by a jury instruction that included an additional element? *United States v. Segue*, No. 20-7034 (reply brief filed April 2, 2021); *United States v. Sutton*, No. 20-7028 (reply brief filed April 2, 2021).

XIX. Jurisdictional Issues

XX. Motion Practice

XXI. Offenses

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

B. 8 U.S.C. § 1324 (encouraging/transporting illegal immigration)

Did the district court err when it held that the prohibition on encouraging or inducing illegal immigration was facially unconstitutional under the First Amendment? *United States v. Hernandez-Calvillo*, No. 19-3210 (OA March 15, 2021) (gov't appeal); *United States v. Papalotzi*, No. 19-3211 (OA March 15, 2021) (gov't appeal).

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

Was there insufficient evidence that this defendant entered the country without inspection, where the evidence showed that she was under surveillance at all times? *United States v. Alvarado-Diaz*, No. 19-2134 (OA September 22, 2021).

Was there insufficient evidence that this defendant entered the country without inspection, where the evidence showed that he was under surveillance at all times and did not show he actually evaded inspection? *United States v. Bracamonte-Gasparini*, No. 19-2133 (OA September 22, 2021).

D. 18 U.S.C. § 78 (securities fraud)

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

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

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

H. 18 U.S.C. § 113 (assaults within maritime and territorial jurisdiction)

Did the district court err by entering judgment against this defendant under § 113(a)(1), because two counts were multiplicitous, or because the jury instruction failed to instruct the jury to find proof of all the elements? *United States v. Wells*, No. 20-1228 (OA May 14, 2021).

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

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

K. 18 U.S.C. § 371 (conspiracy)

L. 18 U.S.C. § 666 (bribery)

M. 18 U.S.C. § 669 (theft from health care program)

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

Did the district court plainly err by imposing a 15-year sentence, when the statutory maximum sentence is 10 years? *United States v. Salas*, No. 20-2158 (reply brief filed November 10, 2021).

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

P. 18 U.S.C. § 844 (arson)

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

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

S. 18 U.S.C. § 922(a) (false statement during firearm purchase)

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

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

Does a jury instruction that failed to require the jury to find that this defendant knew of the status that made him a prohibited person warrant reversal? *United States v. Casanova*, No. 20-2159 (gov't brief filed October 1, 2021).

Under the Kansas sentencing guidelines, was this defendant's Kansas burglary conviction "a crime punishable by imprisonment for a term exceeding one year" under § 922(g)(1)? *United States v. Hilleland*, No. 21-3063 (submitted on the briefs November 17, 2021).

Was there sufficient evidence that this defendant actually possessed a firearm? *United States v. Nichols*, No. 20-6198 (reply brief filed August 25, 2021).

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

Should this defendant's § 924(c) convictions be vacated because Hobbs Act robbery is not categorically a crime of violence, either because it criminalizes future conduct or because it includes threats to intangible property? *United States v. Garcia*, No. 21-2009 (brief filed June 25, 2021).

Should this defendant's § 924(c) convictions be vacated because Hobbs Act robbery is not categorically a crime of violence under the force clause, and the § 924(c) convictions were based on the unconstitutional residual clause? *United States v. Eccleston*, No. 20-2119 (brief filed April 26, 2021).

Should this defendant's § 924(c) convictions be vacated because Hobbs Act robbery is not categorically a crime of violence under the force clause, and the § 924(c) convictions were based on the unconstitutional residual clause? *United States v. Brooks*, No. 20-5115 (brief filed March 24, 2021).

Must this defendant's § 924(c) convictions be vacated because Hobbs Act robbery are not categorically crimes of violence under the force clause, because it can be committed by a threat to harm property? *United States v. Baker*, No. 20-3062 (OA May 12, 2021).

Did the district court err in holding that Hobbs Act robbery and attempted Hobbs Act robbery qualify as crimes of violence under § 924(c)? *United States v. Wilson*, No. 20-5077 (gov't brief filed December 21, 2020).

Is this defendant entitled to § 2255 relief based on his claim that Hobbs Act robbery is not categorically a crime of violence under § 924(c)? *United States v. Wilson*, No. 20-5077 (gov't brief filed December 21, 2020).

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

Was there insufficient evidence that this defendant conspired to make false statements to obtain immigration benefits, where there was proof of multiple conspiracies and not one single conspiracy? *United States v. Murry*, No. 20-1214 (OA September 21, 2021); *United States v. Rajesh Ramcharan*, No.

20-1241(OA September 21, 2021); *United States v. Diann Ramcharan*, No. 20-1243 (OA September 21, 2021); *United States v. Harvell*, No. 20-1245 (OA September 21, 2021)

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

Should the convictions for false entries in bank records be vacated because there was insufficient evidence that the entries were false, actually constituted entries, or were made with intent to deceive the victim banks? *United States v. Gregory*, No. 20-3232 (OA November 18, 2021).

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

Z. 18 U.S.C. § 1028A (identity theft)

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

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

CC. 18 U.S.C. § 1112 (involuntary manslaughter)

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

EE. 18 U.S.C. § 1201 (kidnapping)

Did the district court plainly err when it instructed the jury that the defendant bore the burden to prove that the victim was no longer held against her will before the statute of limitations expired on a kidnapping charge? *United States v. Piette*, No. 20-7008 (OA September 21, 2021).

FF. 18 U.S.C. § 2113 (bank robbery)

Did the district court err by finding that this defendant's actions, forcing a victim to withdraw money from an ATM, did not constitute attempted bank robbery? *United States v. Chavez*, No. 20-2083 (OA March 9, 2021) (gov't appeal).

GG. 18 U.S.C. § 1341 (mail fraud)

HH. 18 U.S.C. § 1343 (wire fraud)

II. 18 U.S.C. § 1344 (bank fraud)

Should the convictions for bank fraud be vacated, because the evidence was insufficient to show that the defendant intentionally provided materially false documents or information to the victim banks? *United States v. Gregory*, No. 20-3232 (OA November 18, 2021).

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

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

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

Should this conviction under § 1512 be vacated or reversed because the jury was not instructed on the definition of "official proceeding," or because there was insufficient evidence to prove intimidation, threats or persuasion? *United States v. Segue*, No. 20-7034 (OA August 3, 2021) (OA August 3, 2021); *United States v. Sutton*, No. 20-7028 (OA August 3, 2021).

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

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

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

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

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

RR. 18 U.S.C. § 1959 (racketeering)

Was there insufficient evidence to sustain this defendant's convictions for murder for the purpose of racketeering or conspiracy? *United States v. Andrew Gallegos*, No. 20-2056 (brief filed July 28, 2021); *United States v. Joe Gallegos*, No. 20-2058 (brief filed September 20, 2021).

Did the district court err by instructing the jury it could predicate convictions under § 1959 based on a state offense—second-degree murder—whose statute of limitations had expired? *United States v. Garcia*, No. 19-2188 (brief filed June 28, 2021).

In defining predicate racketeering offenses under § 1959, did the district court err by relying on a state-law definition rather than a federal generic definition? *United States v. Garcia*, No. 19-2188 (brief filed June 28, 2021).

Does the “position” clause of 18 U.S.C. § 1959(a) exceed Congress's commerce clause authority? *United States v. Herrera*, No. 19-2126 (gov't brief filed August 2, 2021); *United States v. Sanchez*, No. 19-2141 (gov't brief filed August 2, 2021); *United States v. Baca*, No. 19-2195 (gov't brief filed August 2, 2021); *United States v. Garcia*, No. 19-2148 (brief filed September 7, 2021); *United States v. Sanchez*, No. 19-2148 (brief filed September 7, 2021).

SS. 18 U.S.C. § 2119 (carjacking)

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

Was there sufficient evidence to support this defendant's conviction for aggravated sexual abuse because there was no evidence of direct skin-to-skin contact between the defendant and the victim, rather than touching through clothing? *United States v. Burtrum*, No. 20-5091 (OA September 21, 2021).

Did the district court violate this defendant's due process rights by relieving the government of its obligation to prove the requisite mens rea under § 2241? *United States v. Wells*, 20-1228 (OA May 14, 2021).

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

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

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

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

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

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

Was there sufficient evidence that this defendant participated in a methamphetamine conspiracy? *United States v. Leal*, No. 21-2003 (reply brief filed November 17, 2021).

Was there sufficient evidence that this defendant possessed methamphetamine with an intent to distribute, based only on circumstantial evidence? *United States v. Fernandez*, No. 20-2106 (OA September 22, 2021).

AAA. 21 U.S.C. § 846 (drug conspiracy)

BBB. 21 U.S.C. § 848 (continuing criminal enterprise)

Was there sufficient evidence that this defendant distributed a substance that is prohibited under § 848, and that he willfully committed the crime? *United States v. Shamo*, No. 21-4116 (reply brief filed September 15, 2021).

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

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

EEE. 26 U.S.C. § 7201 (tax evasion)

FFF. 26 U.S.C. § 7212

GGG. 28 U.S.C. § 455 (recusal)

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

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

JJJ. Assimilative Crimes Act (ACA)

Did the district court err by denying the motion to dismiss because this defendant could not have been charged under the state law, which served as the basis for his prosecution under the ACA? *United States v. Harris*, No. 20-8032 (OA May 12, 2021).

KKK. Regulatory and CFR Offenses

XXII. Pleas

A. Acceptance of Plea

Did the district court err by accepting a plea to possession of a firearm in relation to a drug trafficking offense, when there was no evidence of that nexus? *United States v. Clifford*, No. 21-8004 (OA November 18, 2021).

B. Appeal Waiver

Did this defendant's appeal waiver bar his post-conviction challenge to his conviction, or only his sentence? *United States v. Chatwin*, No. 21-4003 (brief filed November 1, 2021).

C. Breach

Did the government breach the plea agreement in this case by failing to provide the defendant with a reasonable opportunity to cooperate, and failing to inform the court of the defendant's willingness to cooperate? *United States v. Terry*, No. 20-7053 (OA August 3, 2021).

D. Rejection of Plea Agreement

E. Voluntariness of Plea

Was this defendant's conditional plea involuntary where it was premised on a misunderstanding of what rights were preserved for appeal? *United States v. Brochu*, No. 21-8024 (brief filed November 1, 2021).

Was this defendant's plea involuntary, where he told the court he had been denied necessary medication, changed his mind four times, and was pressed by the prosecutor and court to plead? *United States v. McIntosh*, No. 20-5089 (OA September 21, 2021).

F. Withdrawal of Plea

Did the district court err by not allowing this defendant to withdraw his plea, where he raised questions about the voluntariness of his plea and disputed facts relevant to sentencing enhancements? *United States v. Sunrhodes*, No. 8070 (gov't brief filed June 7, 2021).

Did the district court err by not allowing this defendant to withdraw his plea, where there were questions about the voluntariness of his plea? *United States v. McIntosh*, No. 20-5089 (OA September 21, 2021).

Did the district court err by denying the motion to withdraw the guilty plea, because the denial was based on a clearly erroneous factual finding regarding the defendant's admissions? *United States v. Wilcox*, No. 20-7047 (OA May 12, 2021).

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

Did the district court err when it denied restitution by applying the wrong standard of causation or erroneously assessing the evidence? *United States v. Anthony*, No. 21-6015 (reply brief filed June 30, 2021) (gov't appeal).

Did the district court err by awarding restitution to a victim of a dismissed count, rather than the count of conviction? *United States v. Benally*, No. 20-2157 (OA November 18, 2021).

Did the district court err by awarding restitution because its award was not supported by reasonable certainty of the cost of the victim's future medical needs? *United States v. Burtrum*, No. 20-5091 (OA September 21, 2021).

Did the district court plainly err by ordering restitution in excess of its statutory authority, specifically by ordering restitution for the expenses of the deceased victim's adult son and his family's travel expenses? *United States v. Casados*, No. 20-1006/1216 (OA May 20, 2021).

XXIV. Rules of Criminal Procedure

A. Rule 8 (Joinder/Severance)

Did the district court err when it denied a motion to sever this defendant's trial from codefendants, based on an erroneous belief that evidence of all the crimes would be admissible against all the defendants even if they were severed? *United States v. Garcia*, No. 19-2152 (brief filed October 8, 2021).

Did the district court err by refusing to sever this defendant's trial or certain charges from the rest of the trial? *United States v. Andrew Gallegos*, No. 20-2056 (brief filed July 28, 2021).

Did the district court err by refusing to sever the trial for one defendant's murder count from the other defendants' assassination conspiracy count? *United States v. Herrera*, No. 19-2126 (gov't brief filed August 2, 2021); *United States v. Sanchez*, No. 19-2141 (gov't brief filed August 2, 2021); *United States v. Baca*, No. 19-2195 (gov't brief filed August 2, 2021); *United States v. Garcia*, No. 19-2148 (brief filed September 7, 2021); *United States v. Sanchez*, No. 19-2148 (brief filed September 7, 2021).

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

C. Rule 12 (motions)

D. Rule 29 (motion for judgment of acquittal)

Did the district court err when it sua sponte convicted this defendant of lesser-included offenses despite the government's waiver of that result? *United States v. Cortez-Nieto*, No. 20-3184 (reply brief filed September 27, 2021); *United States v. Cervantez-Aguilar*, No. 20-3189 (reply brief filed September 27, 2021).

E. Rule 32 (sentencing procedures)

Did the district court plainly err by under Rule 32 by restricting this defendant's allocution at sentencing? *United States v. Zajac*, No. 20-4123 (reply brief filed September 7, 2021).

F. Rule 32.1 (supervised release revocation and sentencing)

G. Rule 33 (new trial)

Did the district court err by denying this defendant's two motions for a new trial based on new evidence that effectively negated an element of the crime and based on the government's violations of its disclosure obligations? *United States v. Cordova*, No. 20-2007 (OA November 18, 2021).

H. Rule 35 (modification of a sentence)

I. Rule 41 (search & seizure)

J. Rule 43 (presence)

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

XXVI. Second Amendment Issues

XXVII. Sentencing

A. Allocution

B. Apprendi

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

Is Oklahoma aggravated assault and battery a violent felony under ACCA, and is the statute divisible? *United States v. Winrow*, No. 21-6069 (brief filed October 18, 2021).

Is Colorado first-degree arson a violent felony under ACCA? *United States v. Lynch*, No. 21-1178 (brief filed October 7, 2021).

Is New Mexico aggravated battery a violent felony under ACCA? *United States v. Gonzales*, No. 21-2022 (gov't brief filed July 21, 2021).

D. Burden of Proof

E. Capital Sentencing

Is this defendant entitled to a COA or § 2255 relief based on his claims of effective assistance of counsel during the guilt and penalty phases of his capital trial, evidentiary and due process claims, uncharged aggravating factors, or challenge to the reasonable-doubt instruction? *Menzies v. Powell*, No. 19-4042 (supplemental briefs filed March 8, 2021).

F. Consecutive Sentences (18 U.S.C. § 3584)

Did the district court plainly err in imposing a consecutive sentence based on a misunderstanding of statutory requirements? *United States v. Zajac*, No. 20-4123 (reply brief filed September 7, 2021).

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

H. Departures and Variances

I. Fines & Assessments

Did the district court err by concluding this defendant had the ability to pay a \$500 immediately? *United States v. Gardner*, No. 20-8060 (OA November 18, 2021).

J. First Step Act

In addressing a motion under the First Step Act, did the district court err when it found the defendant had been convicted of one “covered offense” but found it lacked jurisdiction to consider arguments about a different, concurrent sentence? *United States v. Carillo*, No. 21-1153 (OA November 18, 2021).

Did the district court err by denying this defendant’s motion to reconsider the denial of his First Step Act motion to reduce his crack cocaine sentence because of new circumstances or because of errors in the original order? *United States v. Warren*, 20-1436 (OA September 9, 2021).

Does § 403 of the First Step Act, which eliminated mandatory stacking of two § 924(c) convictions, apply to defendant’s whose cases were pending on direct appeal at the time of the Act’s passage? *United States v. Jefferson*, No. 17-3150 (supplemental briefs filed December 28, 2020).

K. Guidelines Sections

1. **USSG § 1B1.2**
2. **USSG § 1B1.3 (relevant conduct)**
3. **USSG § 2A2.2**
4. **USSG § 2A3.1 (criminal sexual abuse)**

Did the district court err by applying an enhancement for “abduction,” as well as one for the use of force, because it was impermissible double-counting? *United States v. Wells*, No. 20-1228 (OA May 14, 2021).

5. **USSG § 2A3.2 (sexual abuse of a minor)**
6. **USSG § 2A3.4 (abusive sexual contact)**
7. **USSG § 2A4.1 (bodily injury)**
8. **USSG § 2A6.1**
 - a) **subsection (b)(2)(A) (more than 2 threats)**
9. **USSG § 2B1.1**
10. **USSG § 2B2.1 (burglary)**
11. **USSG § 2B3.1 (robbery)**
12. **USSG § 2C1.1**
13. **USSG § 2D1.1 (drugs)**

Did the district court err by assessing a base offense level of 36, when there was insufficient record evidence supporting the drug weight necessary for that offense level? *United States v. Williams*, No. 21-6061 (brief filed November 3, 2021).

Did the district court err by assessing a 2-level enhancement for gun possession because the gun was not possessed close in time to the drug possession offense? *United States v. Portillo-Uranga*, No. 20-3191 (OA November 17, 2021).

Did the district court err in its calculations of drug quantity or in applying an enhancement for the use of violence, because those findings were not factually supported? *United States v. McDonald*, No. 20-7052 (OA September 21, 2021).

14. **USSG § 2G1.1 (sex trafficking)**
15. **USSG § 2G2.2 (child pornography)**
16. **USSG § 2K1.4 (arson)**
17. **USSG § 2K2.1**

Did the district court err by classifying this defendant’s prior California conviction for possession of methamphetamine for sale as a controlled substance offense under § 4B1.2? *United States v. Blattel*, No. 21-8018 (gov’t brief filed November 18, 2021).

Did the district court err by imposing an enhancement for possessing a firearm in connection with another felony offense? *United States v. McCowan*, No. 21-8035 (gov’t brief filed November 4, 2021).

Did the district court err by imposing an enhancement for possessing a firearm in connection with another felony offense without sufficient evidence? *United States v. Southard*, No. 21-6035 (reply brief filed October 21, 2021).

Did the district court err by imposing an enhancement for possessing a firearm in connection with another felony offense, when the facts supported mere possession of a firearm? *United States v. Sanchez*, No. 21-2010 (OA November 18, 2021).

Did the district court err in applying enhancements for using or possessing the charged firearm in connection with attempted murder or any other felony? *United States v. Alexander*, No. 20-6154 (OA September 21, 2021).

Did the district court err when it enhanced this defendant's sentence under § 2K2.1 based on a prior Oklahoma controlled substance conviction, or by applying the enhancement for possessing a firearm in connection with another felony? *United States v. Nichols*, No. 20-6198 (reply brief filed August 25, 2021).

Did the district court err by relying exclusively on statements in the PSR to establish allegations supporting an enhancement for possessing a high capacity magazine? *United States v. Bramlett*, No. 21-8005/8008 (brief filed May 4, 2021).

Did the district court err when it enhanced this defendant's sentence under § 2K2.1 based on a prior Oklahoma controlled substance conviction? *United States v. Smith*, No. 21-6012 (brief filed April 28, 2021).

Did the district court err when it applied enhancements for a stolen firearm and possessing a gun in connection with another felony offense, when the evidence did not support them? *United States v. Gross*, No. 20-6175 (OA November 18, 2021).

Is Colorado third degree assault a crime of violence for USSG § 2K2.1 purposes? *United States v. Moon*, No. 20-1333 (gov't brief filed April 7, 2021).

18. USSG § 2K2.2

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

20. USSG § 2T1.1 (tax loss)

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

22. USSG § 2Q2.1

23. USSG § 2S1.1 (money laundering)

Did the district court plainly err by applying an aggravating-role enhancement based on this defendant's role in a drug trafficking organization, rather than focusing on the money-laundering conduct? *United States v. Arellanes-Portillo*, No. 20-3165 (OA September 21, 2021).

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

25. USSG § 3A1.2

26. USSG § 3A1.3

27. USSG § 3A1.4 (terrorism)

Did the district court err by apply a terrorism enhancement under USSG § 3A1.4 because of the government’s extensive involvement in the crime? *United States v. Varnell*, No. 20-6040 (OA March 12, 2021).

28. USSG § 3B1.1 (aggravating role)

Did the district court err by applying a manager/supervisor enhancement where there was insufficient evidence that the defendant had control or responsibility for the actions of the other participants? Was any error in application of a sentencing enhancement harmless where the sentencing court stated it would impose the same sentence without the challenged enhancement? *United States v. Escarsiga*, No. 21-6043 (reply brief filed November 1, 2021).

Did the district court err by applying a manager/supervisor enhancement because this defendant was not a “supervisor” in the criminal activity? *United States v. Astorga*, No. 21-2026 (reply brief filed October 19, 2021).

Did the district court err by applying an aggravating-role enhancement without a sufficient factual basis? *United States v. McDonald*, No. 20-7052 (OA September 21, 2021).

29. USSG § 3B1.2 (mitigating role)

Did the district court err by rejecting the PSR’s recommendation that this defendant receive a minor role reduction? *United States v. Zavala-Cervantes*, No. 21-5039 (brief filed November 5, 2021).

30. USSG § 3C1.1 (obstruction)

Did the district court err by applying an enhancement for obstruction of justice based on ambiguous conversations? *United States v. McDonald*, No. 20-7052 (OA September 21, 2021).

Did the district court err by applying the § 3C1.1 enhancement on the basis of disputed facts, when the defendant was facing a criminal charge for the same conduct? *United States v. Wells*, No. 20-1228 (OA May 14, 2021).

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

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

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

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

Did the district court err by denying this defendant an adjustment for acceptance of responsibility because he went to trial? *United States v. Casanova*, No. 20-2159 (gov’t brief filed October 1, 2021).

34. USSG § 4A1.1

35. USSG § 4A1.2

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

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

Did the district court plainly err by classifying this defendant as a career offender, because his Wyoming drug conviction does not qualify as a controlled substance offense? *United States v. Harbin*, No. 21-8038 (brief filed November 12, 2021).

Did the district court err when it determined that a Kansas reckless aggravated battery conviction qualifies as a crime of violence under USSG § 4B1.2(a)(1), because the offense does not require force against the person of another, or because the offense is premised on causation of injury? *United States v. Adams*, No. 21-3043 (reply brief filed November 15, 2021).

Did the district court plainly err when it determined that a Kansas reckless aggravated battery conviction qualifies as a crime of violence under USSG § 4B1.2(a)(1)? *United States v. Alexander*, No. 20-3238 (OA November 18, 2021).

Is this defendant's Utah drug offense broader than a "controlled substance offense" under § 4B1.2 because it can be committed by an offer to sell? *United States v. Babcock*, No. 20-4003 (reply brief filed April 15, 2021).

38. USSG § 4B1.5

Did the district court err by applying an enhancement for coercing victims to perform commercial sex acts on multiple occasions? *United States v. Morgan*, No. 21-5053 (gov't brief filed November 10, 2021).

39. USSG § 5C1.2 (safety valve)

40. USSG § 5G1.3

41. USSG § 5K1.1

42. USSG § 5K2.7

43. USSG § 5K2.14

44. USSG § 5G1.2

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

L. Mandatory Minimums and Maximums

M. Reasonableness

1. Procedural

Is this defendant's sentence procedurally unreasonable because the court failed to consider his mitigating arguments about addiction? *United States v. Shepherd*, No. 20-6192 (brief filed November 2, 2021).

Is this defendant's sentence procedurally unreasonable because the court relied on clearly erroneous facts? *United States v. Morgan*, No. 21-5053 (gov't brief filed November 10, 2021).

Did the district court plainly err by refusing to consider this defendant's family circumstances at sentencing or by misinterpreting § 3553(a)(6) to require the judge to sentence this defendant similarly with other defendants without the same family issues? *United States v. Littlejohn*, No. 21-1224 (gov't brief filed November 12, 2021).

Did the district court err when it failed to rule on all the objections to the PSR, or because the court relied on clearly erroneous facts or failed to explain the sentence? *United States v. McCrary*, No. 21-6047 (gov't brief filed November 12, 2021).

Did the district court err when it denied this defendant's motion for a downward variance, because of age of the defendant's criminal history? *United States v. Nunez-Rosa*, No. 21-2031 (reply brief filed October 1, 2021).

Is this defendant's sentence procedurally unreasonable because the district court refused to rule on the central guideline dispute in the case? *United States v. Colbert*, No. 21-1041 (reply brief filed September 20, 2021).

Did the district court inadequately explain the sentence? *United States v. Astorga*, No. 21-2026 (reply brief filed October 19, 2021).

Did the district court procedurally err when it imposed this sentence because it misunderstood applicable statutes and guidelines? *United States v. Farley*, No. 21-8013 (reply brief filed November 4, 2021).

Did the district court err by relying on improper factors to select the sentence, including the defendant's association with "dangerous people," which included his own brother, or by computing the sentence by beginning at the statutory maximum and working downward? *United States v. Southard*, No. 21-6035 (reply brief filed October 21, 2021).

Did the district court plainly err in relying on the possibility that others who worked in a mall could have been injured by arson, when the record contains no evidence that anyone else was present at the mall at the time? *United States v. Salas*, No. 20-2158 (reply brief filed November 10, 2021).

Did the district court impose a procedurally or substantively unreasonable sentence in light of the defendant's history? *United States v. Velasco-Mares*, No. 20-2179 (reply brief filed August 2, 2021).

Is this defendant's term of supervised release procedurally or substantively unreasonable, because the district court failed to consider that the defendant had overserved the statutory maximum imprisonment sentence, and failed to consider the time the defendant had already served during the COVID-19 pandemic? *United States v. Mobley*, No. 21-3004 (OA November 17, 2021).

Did the district court procedurally err by increasing this defendant's sentence because she pleaded guilty without a plea agreement? *United States v. Cozad*, No. 20-3233 (OA September 21, 2021).

2. Substantive

Is this defendant's 300-month sentence for drug distribution substantively unreasonable? *United States v. Shepherd*, No. 20-6192 (brief filed November 2, 2021).

Is this defendant's statutory-maximum sentence of 120 months for firearm possession by a convicted felon substantively unreasonable? *United States v. Carpenter*, No. 21-6070 (brief filed October 13, 2021).

Is this defendant's above-guidelines sentence of 48 months for fentanyl distribution substantively unreasonable? *United States v. McCrary*, No. 21-6047 (gov't brief filed November 12, 2021).

Is this defendant's within-guidelines sentence substantively unreasonable, in light of the age of the defendant's criminal history? *United States v. Nunez-Rosa*, No. 21-2031 (reply brief filed October 1, 2021).

Is this defendant's sentence above-guidelines sentence substantively unreasonable? *United States v. Colbert*, No. 21-1041 (reply brief filed September 20, 2021).

Is this defendant's term of supervised release substantively unreasonable, because the district court failed to give effect to the mitigating circumstances in this case and does not account for the possibility that the defendant could be revoked and resentenced indefinitely? *United States v. Stan*, No. 21-1065 (reply brief filed November 4, 2021).

Is this defendant's 630-month sentence for production of child pornography substantively unreasonable? *United States v. Farley*, No. 21-8013 (reply brief filed November 4, 2021).

Is this defendant's life sentence for a sexual abuse case substantive unreasonable? *United States v. Woody*, No. 21-2007 (reply brief filed October 12, 2021).

Is this defendant's statutory-maximum 120-month sentence substantively unreasonable, in light of the defendant's possession of a single gun that had to be manually loaded and the lack of any violence? *United States v. Nichols*, No. 20-6198 (reply brief filed August 25, 2021).

Did the district court impose a procedurally or substantively unreasonable sentence in light of the defendant's history? *United States v. Velasco-Mares*, No. 20-2179 (reply brief filed August 2, 2021).

Is this defendant's 46-month sentence substantive unreasonable, in light of his family and mental-health history? *United States v. Sunrbodes*, No. 8070 (gov't brief filed June 7, 2021).

Is this defendant's above-guideline statutory-maximum sentence for weapons possession by a convicted felon substantively unreasonable? *United States v. Gross*, No. 20-6175 (OA November 18, 2021).

Is this defendant's term of supervised release procedurally or substantively unreasonable, because the district court failed to consider that the defendant had overserved the statutory maximum imprisonment sentence, and failed to consider the time the defendant had already served during the COVID-19 pandemic? *United States v. Mobley*, No. 21-3004 (OA November 17, 2021).

The government's delay in bringing this defendant to court on the indictment led to the use of a much higher guideline range, and resulted in a unwarranted disparities. Is that sentence substantive unreasonable? *United States v. Diaz*, No. 20-1269 (OA November 18, 2021).

N. SORNA Sentencing Issues

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

P. Resentencing Issues

Q. Compassionate Release under 18 U.S.C. § 3582(c)(1)

Did the district court abuse its discretion in denying this defendant's motion to reduce sentence under 18 U.S.C. § 3582(c)(1)(A) by conditioning relief on proof of citizenship and relying on unsupported fact? *United States v. Parada*, No. 20-3244 (OA September 21, 2021).

Did the district court abuse its discretion when it denied this defendant's motion for compassionate release based on findings that his medical conditions were not new or were not extraordinary and compelling reasons for a reduction, or based on findings that the defendant posed a danger to the public? *United States v. Krowner*, No. 21-2175 (OA September 21, 2021).

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

S. Constitutional Issues

1. **Fifth Amendment Due Process**
2. **Sixth Amendment and Hearsay**

XXVIII. Sixth Amendment

A. Right to Effective Assistance of Counsel

Was this defendant's mid-trial waiver of the right to counsel knowing and intelligent? *United States v. Outley*, No. 20-6005 (OA January 22, 2021).

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

Did the district court err when it ruled that this defendant's trial attorney did not work under a conflict of interest, or render ineffective assistance? *United States v. Casanova*, No. 20-2159 (gov't brief filed October 1, 2021).

Did the district court err by refusing to hold a hearing on this defendant's motion to substitute counsel? *United States v. Segue*, No. 20-7034 (reply brief filed April 2, 2021).

C. Self-Incrimination

D. Self-Representation/Waiver of Counsel

Did the district court err when it denied this defendant the right to represent himself at sentencing? *United States v. Piette*, No. 20-7008 (OA September 21, 2021).

E. Confrontation

Did the district court err by admitting the recording of a 911 call because there was an insufficient foundation or because admission of the call violated the defendant's confrontation rights? *United States v. Draine*, No. 20-6118 (reply brief filed October 1, 2021).

F. Impartial Jury

G. Jury Verdict

H. Compulsory Process

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

Did the district court err by refusing to dismiss charges or grant a motion for some lesser sanction for speedy trial violations when there was a 15-year pre-indictment delay? *United States v. Garcia*, No. 19-2152 (brief filed October 8, 2021).

Did the district court err by dismissing the indictment for violation of this defendant's constitutional speedy trial rights, where the government waited to prosecute him until after his state prosecution was completed? *United States v. Garcia*, No. 20-1386 (OA November 18, 2021) (gov't appeal).

Did the district court erred when it denied this defendant's motion to dismiss the indictment under the Speedy Trial Act, because the clock started when the case was transferred and he was arraigned in a different district? *United States v. Black*, No. 20-3199 (OA September 21, 2021).

Did a six-year delay in this terrorism case violate the defendant's constitutional speedy trial right? *United States v. Muhtorov*, No. 18-1366 (reply brief filed April 7, 2020).

Should the district court have dismissed the indictment for providing material support to a terrorist organization because of constitutional speedy-trial violations resulting from a six-year delay? *United States v. Jumaev*, No. 18-1296 (supplemental brief filed June 1, 2021).

XXX. Standards of Review

A. Waiver

B. Forfeiture/Plain Error

C. De Novo Review

XXXI. Statutes of Limitations

The statute of limitations for traveling to have sex with a minor under 18 U.S.C. § 2423 began to run when the victim turned 16, and therefore expired before this defendant was indicted. In the interim, two statutes were passed that extended the statute of limitations. Should this defendant's conviction be reversed or did those statutes validly extend the statute of limitations? *United States v. Piette*, No. 20-7008 (OA September 21, 2021).

XXXII. Supervised Release

A. Revocation Issues

B. Sentencing Issues (either initially or after revocation)

1. Statutory Maximum

2. Mandatory Minimum

Did the district court err in applying the mandatory revocation and minimum sentence provisions of § 3583(k) which had previously been found unconstitutional both by the Tenth Circuit and the Supreme Court? *United States v. Shakespeare*, No. 21-8010 (reply brief filed September 2, 2021).

3. Substantive

Is this defendant's above-guideline probation-revocation sentence procedurally or substantively unreasonable, where the sentence constituted enforcement of a sentencing bargain the court had previously offered the defendant? *United States v. Moore*, No. 20-3171 (OA September 21, 2021).

4. Procedural

Is this defendant's above-guideline probation-revocation sentence procedurally or substantively unreasonable, where the sentence constituted enforcement of a sentencing bargain the court had previously offered the defendant? *United States v. Moore*, No. 20-3171 (OA September 21, 2021).

5. Unlawful Delegation of authority

6. Assimilative Crimes Act (ACA) sentences

C. Conditions of Supervised Release

Did the district court err by imposing a condition prohibiting this defendant from possessing certain items that are related to his pagan religious practice? *United States v. Holzer*, No. 21-1080 (brief filed November 8, 2021).

Did the district court err by imposing a condition prohibiting possession of sexual materials, or by imposing a condition requiring the defendant to submit to a psychosexual evaluation? *United States v. Englehart*, No. 21-8007 (OA November 18, 2021)

Did the district court plainly err by imposing a special condition of supervised release that prohibited this defendant from possessing pornography depicting sexually explicit conduct? *United States v. Holuby*, No. 21-6071 (brief filed September 20, 2021).

Did the district court err by restricting this defendant's right to associate with his spouse as a condition of supervised release? *United States v. Astorga*, No. 21-2026 (reply brief filed October 19, 2021).

Did the district court err by imposing conditions of supervised release that are overly burdensome? *United States v. Mobley*, No. 21-3004 (OA November 17, 2021).

Did the district court plainly err by requiring this defendant to take any prescribed medication on supervised release because it failed to justify the condition with particularized findings and compelling circumstances? *United States v. Fonville*, No. 20-7033 (OA May 12, 2021).

XXXIII. Trial Practice and Evidence Issues

A. Closing Argument

B. Confidential Informants

Did the district court abuse its discretion by denying this defendant's motion to produce the confidential information and for information about the informant? *United States v. Velarde-Pavia*, No. 20-2135 (OA November 18, 2021).

C. Cumulative Error

Do multiple errors, including a surprise witness and declining to bifurcate the trial, cumulatively require reversal? *United States v. Garcia*, No. 19-2188 (brief filed June 28, 2021).

Do multiple errors, including refusing to grant a continuance, refusing to sever counts, Brady violations, warrant a new trial? *United States v. Herrera*, No. 19-2126 (gov't brief filed August 2, 2021); *United States v. Sanchez*, No. 19-2141 (gov't brief filed August 2, 2021); *United States v. Baca*, No. 19-2195 (gov't brief filed August 2, 2021).

Do multiple errors, including incompetency, Rule 403, and prosecutorial misconduct, require reversal in this case? *United States v. Ferguson*, No. 20-7045 (reply brief filed March 11, 2021).

Do multiple instructional and evidentiary errors require reversal in this case? *United States v. Segue*, No. 20-7034 (reply brief filed April 2, 2021); *United States v. Sutton*, No. 20-7028 (reply brief filed April 2, 2021).

D. Demonstrative Evidence

E. Due Process

Did the district court err by refusing to bifurcate the trial of multiple defendants accused of multiple murders, to separate the most grisly murder from the other charges, when the surrounding circumstances were different than the other counts, and the spillover effect would be prejudicial on the other charges? *United States v. Garcia*, No. 19-2188 (brief filed June 28, 2021).

F. Eyewitness Identification Testimony

G. Judicial misconduct

H. Jury Instructions

- 1. Aiding and Abetting**
- 2. Burden of Proof**
- 3. Conspiracy**
- 4. Constructive Possession**

Did the district court plainly erred by instructing the jury it could convicted this defendant of constructively possessing a firearm, without instructing them that they had to find that he intended to control it? *United States v. Neff*, No. 21-3013 (brief filed August 23, 2021)

- 5. Deliberate Avoidance/Ignorance**
- 6. Elements (see statute under which defendant tried)**
- 7. Sentencing Elements**
- 8. Flight**
- 9. Guilt by Association/Guilt of Others**

Did the district court err by instructing the jury that “the possible guilt of others should not enter your thinking,” and refusing to clarify that the jurors could consider the possible guilt of testifying witnesses when evaluating their credibility? *United States v. Cortez-Nieto*, No. 20-3184 (reply brief filed September 27, 2021); *United States v. Cervantez-Aguilar*, No. 20-3189 (reply brief filed September 27, 2021).

- 10. Investigative Techniques
- 11. Knowledge
- 12. Polygraphs
- 13. Proof
- 14. Spoliation
- 15. Theory of Defense/Affirmative Defense
- 16. Unanimity
- 17. Voluntary Intoxication
- 18. Witness Cautionary Instructions

I. Jury Questions

J. Jury Selection

K. Mistrial

L. Prior Convictions

M. Privileges

Did the district court err when it enforced the privileges invoked by the government and ended questioning about a DEA informant? *United States v. Fernandez*, No. 20-2106 (OA September 22, 2021).

N. Prosecutorial Misconduct

Did the prosecutor misstate the law when she told the jurors that “the possible guilt of others should not enter your thinking”—and therefore they should not consider the cooperators’ motive to testify falsely? *United States v. Cortez-Nieto*, No. 20-3184 (reply brief filed September 27, 2021); *United States v. Cervantez-Aguilar*, No. 20-3189 (reply brief filed September 27, 2021).

Did the prosecutor’s closing argument based on facts not in evidence warrant a new trial? *United States v. Gregory*, No. 20-3232 (OA November 18, 2021).

Did the government’s mid-trial change of position regarding the relevance of certain images constitute prosecutorial misconduct warranting a mistrial? *United States v. Ferguson*, No. 20-7045 (reply brief filed March 11, 2021).

O. Right to be Present

P. Right to Present Defense

Did the district court abuse its discretion and violate this defendant’s constitutional right to present a defense by excluding evidence of the victim’s assaults on third parties, when the defense was self-defense? *United States v. Armajo*, No. 21-8021 (gov’t brief filed November 18, 2021).

Was this defendant deprived of his right to present a complete defense when the court refused to allow him to introduce his own previous statements denying his involvement in a murder, when the

government introduced his inculpatory statements? *United States v. Herrera*, No. 19-2126 (gov't brief filed August 2, 2021).

Q. Rule 201 (judicial notice)

Did the district err by refusing to take judicial notice of an army document that listed the defendant's primary job, which was relevant to the immigration fraud case against him? *United States v. Murry*, No. 20-1214 (OA September 21, 2021); *United States v. Rajesh Ramcharan*, No. 20-1241 (OA September 21, 2021); *United States v. Diann Ramcharan*, No. 20-1243 (OA September 21, 2021); *United States v. Harvell*, No. 20-1245 (OA September 21, 2021).

R. Rule 106 (rule of completeness)

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

Did the district court err by permitting testimony about gang relationships among witnesses? *United States v. Andrew Gallegos*, No. 20-2056 (brief filed July 28, 2021).

Did the district court err by admitting an unintelligible recorded conversation and testimony about the alleged statements on it? *United States v. Cordova*, No. 20-2007 (OA November 18, 2021).

Did the district court err by allowing the introduction of images of child pornography, when the defense did not dispute that issue? *United States v. Ferguson*, No. 20-7045 (reply brief filed March 11, 2021).

Did the district court err by allowing the admission of evidence about a victim's risk of death, when there was no evidence she suffered an injury that risked death? *United States v. Wells*, No. 20-1228 (OA May 14, 2021).

T. Rule 404(b)

In this VICAR trial, did the district court err by admitting testimony that the defendant committed other gang-related assaults nine years earlier? *United States v. Sanchez*, No. 19-2141 (brief filed February 2, 2021); *United States v. Baca*, No. 19-2195 (brief filed February 1, 2021).

In this case involving charges of kidnapping and traveling to engage in sex with a minor, did the district court err in this by admitting evidence that the defendant molested other children? *United States v. Piette*, No. 20-7008 (OA September 21, 2021).

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

Did the district court err by excluding evidence of a victim's prior sexual behavior, where the evidence was relevant and excluding it violated the defendant's confrontation and due process rights? *United States v. Palms*, No. 20-5072 (OA September 21, 2021).

V. Rules 601-615 (Witnesses)

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

Did the district court err by allowing a lay witness to offer expert opinion testimony about the significance of drug quantities and characteristics of drug distribution, or by allowing expert

witnesses to testify to the defendant's mental state of intent to distribute drugs? *United States v. Draine*, No. 20-6118 (reply brief filed October 1, 2021).

Did the district court plainly err by allowing a lay witness to provide expert testimony on "prison culture?" *United States v. Segue*, No. 20-7034 (reply brief filed April 2, 2021); *United States v. Sutton*, No. 20-7028 (reply brief filed April 2, 2021).

X. Rules 801-807 (hearsay)

Did the district court err by admitting a victim's statements made to a doctor during a medical examination related to sexual assault? *United States v. Woody*, No. 21-2007 (reply brief filed October 12, 2021).

Did the district court err by admitting photos from a website because they were hearsay and insufficiently authenticated? *United States v. Shamo*, No. 21-4116 (reply brief filed September 15, 2021).

Did the district court err by admitting witness statements under the coconspirator exception, because there was not a sufficient basis that the witness was part of the drug conspiracy? *United States v. Butler*, No. 20-8037 (reply brief filed July 26, 2021).

Y. Rule 901 (authentication)

Z. Rule 1002 (Best Evidence Rule)

AA. Rule 1006 (Summaries)

BB. Surrebuttal

CC. Voir Dire

Did the district court err by refusing to allow counsel to conduct voir dire on racial or ethnic bias in this immigration-fraud case? *United States v. Murry*, No. 20-1214 (OA September 21, 2021); *United States v. Rajesh Ramcharan*, No. 20-1241(OA September 21, 2021); *United States v. Diann Ramcharan*, No. 20-1243 (OA September 21, 2021); *United States v. Harvell*, No. 20-1245 (OA September 21, 2021).

XXXIV. Vagueness

XXXV. Wiretap Issues (18 U.S.C. § 2510-2522 or FISA Section 702)

Did the district court err in denying this defendant's motion to suppress because the affidavit did not establish probable cause for the wiretap, and subsequent tapping orders were tainted? *United States v. Sauzameda*, No. 20-2151 (OA November 18, 2021).

Did the district court err by denying the motion to suppress wiretap recordings because the "necessity" finding was not established, and because many intercepted calls originated outside the district and were placed to phones outside the district? *United States v. Portillo-Uranga*, No. 20-3191 (OA November 17, 2021).

Was the government's warrantless surveillance of this terrorism defendant under the Foreign Intelligence Surveillance Act unconstitutional? And/or was disclosure of the FISA materials required for litigation of this suppression issue? Was the defendant entitled to notice of other surveillance tools used by the government? *United States v. Muhtorov*, No. 18-1366 (reply brief filed April 7, 2020) (multiple amicus briefs filed by The Brennan Center, NACDL, former Church Committee staff, and cybersecurity experts)

Recently Added Cases

(most recent to least recent)

- Pittman v. Gomez*, No. 21-1114 (brief filed November 15, 2021) (28 U.S.C. § 2241).
- United States v. Harbin*, No. 21-8038 (brief filed November 12, 2021) (USSG § 4B1.2).
- United States v. Spaeth*, No. 21-3096 (brief filed November 8, 2021) (28 U.S.C. § 2255, appeal waiver).
- United States v. Webb*, No. 21-3091 (brief filed November 8, 2021) (28 U.S.C. § 2255).
- United States v. Holzner*, No. 21-1080 (brief filed November 8, 2021) (conditions of supervised release).
- United States v. Zavala-Cervantes*, No. 21-5039 (brief filed November 5, 2021) (USSG § 3B1.2).
- United States v. Parker*, No. 21-7035 (brief filed November 4, 2021) (traffic stops).
- United States v. Williams*, No. 21-6061 (brief filed November 3, 2021) (USSG § 2D1.1).
- United States v. Shepherd*, No. 20-6192 (brief filed November 2, 2021) (procedural and substantive reasonableness).
- United States v. Brochu*, No. 21-8024 (brief filed November 1, 2021) (voluntariness of plea).
- United States v. Chatwin*, No. 21-4003 (brief filed November 1, 2021) (appeal waiver).
- United States v. Braxton*, No. 21-1149 (brief filed October 27, 2021) (inventory search).
- Frederick v. Farris*, No. 20-6131 (brief filed October 22, 2021) (28 U.S.C. § 2254).
- United States v. Winrow*, No. 21-6069 (brief filed October 18, 2021) (18 U.S.C. § 924(e)).
- United States v. Carpenter*, No. 21-6070 (brief filed October 13, 2021) (substantive unreasonableness).
- United States v. Morgan*, No. 21-5053 (brief filed October 12, 2021) (procedural reasonableness; USSG § 4B1.5).
- United States v. Johnson*, No. 21-2058 (brief filed October 12, 2021) (warrantless arrest, plain view).
- United States v. Garcia*, No. 19-2152 (brief filed October 8, 2021) (speedy trial; severance; 18 U.S.C. § 1959; discovery).
- United States v. Lynch*, No. 21-1178 (brief filed October 7, 2021) (18 U.S.C. § 924(e)).
- United States v. Littlejohn*, No. 21-1224 (brief filed October 1, 2021) (procedural reasonableness).
- United States v. Casanova*, No. 20-2159 (gov't brief filed October 1, 2021) (due process, conflict of interest, 18 U.S.C. § 922(g), USSG § 3E1.1).
- United States v. Holuby*, No. 21-6071 (brief filed September 20, 2021) (conditions of supervised release).
- United States v. Joe Gallegos*, No. 20-2058 (brief filed September 20, 2021) (18 U.S.C. § 1959; discovery).