

# ISSUES PENDING IN THE TENTH CIRCUIT

COMPILED BY THE KANSAS FEDERAL PUBLIC DEFENDER



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# 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.

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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 reversibly err by refusing to allow a continuance of the final revocation hearing when the hearing unexpectedly became a contested one? *United States v. Royer*, No. 22-5010 (gov't brief filed May 24, 2022).

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 (OA April 1, 2022); *United States v. Sanchez*, No. 19-2141 (reply brief filed December 13, 2021); *United States v. Baca*, No. 19-2195 (reply brief filed December 13, 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).

## **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 (OA January 19, 2022).

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 (OA December 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**

### **D. Excessive Force**

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

### **F. Good Faith Exception**

Did the district court err by applying the good faith exception to a warrant that was void when it was issued because the issuing court lacked jurisdiction? *United States v. Bailey*, No. 21-5085 (brief filed May 27, 2022) (foreclosed issue).

Did the district court err when it applied the good faith exception to the exclusionary rule, in this case involving an overbroad warrant to search a home? *United States v. Suggs*, No. 22-1024 (brief filed April 28, 2022).

Did the district court err by applying the good faith exception to this search, where the law enforcement officer was acting outside his jurisdiction when conducting the investigation and search? *United States v. Patterson*, No. 21-7053 (gov't brief filed April 19, 2022).

### **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 (reply brief filed March 16, 2022).

### **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 (OA March 22, 2022).

### **L. Protective Sweeps**

### **M. Scope of Warrantless Search**

### **N. Search Incident to Arrest**

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

Did the affidavit supporting the search warrant in this case fail to establish probable cause that a firearm would be found at the defendant's house and contain material misrepresentations and omissions that invalidate it? *United States v. Alqabtani*, No. 22-2007 (brief filed May 5, 2022).

Did the district court err by failing to suppress the firearm found pursuant to a warrant that lacked probable cause, when information obtained from a deficient earlier seizure of a home is excised? *United States v. Sanchez*, No. 21-1328 (brief filed April 15, 2022).

Did the district court plainly err by failing to find a *Franks* violation in this case, where the trial testimony showed the office had made a reckless omission or misstatement in the affidavit authorizing the search warrant? *United States v. McKinney*, No. 21-5074 (gov't brief filed April 27, 2022).

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).

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

**Q. *Terry* Stops: Initial Detention**

Did the district court err by finding that officers had reasonable suspicion to stop this defendant based on an unidentified young woman reporting to an officer that the defendant was "bugging" her, and to frisk him based on supposed nervous behavior, his bulky clothing, and his repeated questions about the reason for the stop? *United States v. Anderson*, No. 21-2151 (brief filed April 21, 2022).

Did the district court by finding that the detention of this defendant in a hotel parking lot was not unreasonably prolonged, when it was based on suspicion of the presence of a discarded gun, but no gun was found after a diligent search? *United States v. Samilton*, No. 21-6149 (brief filed March 29, 2022).

Did the district court err when it found that officers had reasonable suspicion to detain this defendant and to continue the detention for 40 minutes, when they found information that he was a felon prohibited from possessing a firearm? *United States v. Young*, No. 21-2066 (reply brief filed May 5, 2022).

Did the district court err when it found that officers had reasonable suspicion to stop this defendant on his bicycle and then had justification to search his backpack? *United States v. Smith*, No. 21-5057 (gov't brief filed March 7, 2022).

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).

**R. *Terry*: Frisk**

Did the district court err by finding that officers had reasonable suspicion to stop this defendant based on an unidentified young woman reporting to an officer that the defendant was "bugging" her, and to frisk him based on supposed nervous behavior, his bulky clothing, and his repeated questions about the reason for the stop? *United States v. Anderson*, No. 21-2151 (brief filed April 21, 2022).

**S. Traffic Stops**

Did law enforcement lack reasonable suspicion that this defendant was engaged in drug trafficking at the time they stopped him, and did officers unlawfully extend the traffic stop to investigate drug trafficking? *United States v. Hayes*, No. 22-8010 (brief filed May 16, 2022).

Did law enforcement unlawfully prolong the traffic stop in this case by extensively questioning the defendant about things unrelated to the traffic violation; and is the subsequently obtained warrant invalid where it relied on the fruits of the extended stop? *United States v. Lara*, No. 21-8091 (brief filed May 16, 2022).

Did the district court err when it denied this defendant's motion to suppress because law enforcement impermissibly extended the stop to conduct a criminal investigation without reasonable suspicion? *United States v. Molina*, No. 21-8079 (gov't brief filed May 25, 2022).

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 (OA January 19, 2022).

#### **T. Warrantless Arrests**

Did the district court err by denying this defendant's motion to suppress both evidence and statements procured after an illegal arrest without probable cause, and was his Miranda waiver involuntary because he was intoxicated? *United States v. Jones*, No. 22-1031 (brief filed June 6, 2022).

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 (OA March 22, 2022).

#### **U. Warrantless Searches & Seizures**

Did law enforcement's search of this defendant's backpack, after he had been handcuffed 10 feet away, and prior to any arrest, violate the Fourth Amendment? *United States v. O'Neil*, No. 22-2000 (brief filed April 13, 2022).

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. Canada*, No. 21-3202 (gov't brief filed May 12, 2022).

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).

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

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

Was the eyewitness field identification process in this case suggestive, unnecessary and unreliable? *United States v. O'Neil*, No. 22-2000 (brief filed April 13, 2022).

Do the government's Brady violations in this case warrant a new trial? *United States v. Herrera*, No. 19-2126 (OA April 1, 2022); *United States v. Sanchez*, No. 19-2141 (OA April 1, 2022); *United States v. Baca*, No. 19-2195 (OA April 1, 2022).

#### **XIV. Fifth Amendment: Right to Silence**

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

Did the district court err by denying this defendant's motion to suppress both evidence and statements procured after an illegal arrest without probable cause, and was his *Miranda* waiver involuntary because he was intoxicated? *United States v. Jones*, No. 22-1031 (brief filed June 6, 2022).

Did the district court err when it admitted this defendant's un-Mirandized statements at the jury trial and does the error warrant reversal? *United States v. Gonzales*, No. 21-2099 (gov't brief filed April 20, 2022).

Did the district court err by admitting derivative physical evidence from the unwarned statements? *United States v. Gonzales*, No. 21-2099 (gov't brief filed April 20, 2022) (foreclosed).

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 (OA March 22, 2022).

#### **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 (reply brief filed April 4, 2022).

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 defendant entitled to a COA and habeas relief on his claims of juror bias, and is that a claim a structural error? *Fairbourn v. Harlow*, No. 22-8005 (brief filed May 20, 2022).

Is this defendant entitled to a COA for his claims that Oklahoma lacks sovereign authority over Indian Country and did not have jurisdiction to prosecute him? *Smith v. Crow*, No. 22-7007 (brief filed April 27, 2022).

Did the district court err by finding this defendant's habeas claims to be untimely, either because he was entitled to equitable tolling or because a gateway claim of actual innocence supports a waiver of the one-year statute of limitations? *Hinojos v. Colorado*, No. 22-2001 (brief filed March 30, 2022).

Are this defendant's claims of actual innocence timely as an exception to statute-of-limitations rules, or because the limitations period reset after the Supreme Court decided *McGirt*? *Pacheco v. Habti*, No. 20-7002 (reply brief filed April 13, 2022).

Is this state defendant entitled to habeas relief on his claims of insufficient evidence, ineffective assistance of counsel, Brady violations, or other claims? *Hamilton v. Martin*, No. 21-5027 (brief filed January 10, 2022).

Is this state defendant entitled to habeas relief on his claims of ineffective assistance of counsel at the plea stage? *Clayton v. Crow*, No. 20-7015 (gov't brief filed December 14, 2021).

Did the district court err by granting habeas relief to this defendant on his claims of denial of the right to testify? *Lewallen v. Crow*, No. 21-5069 (reply brief filed January 24, 2022) (state appeal).

Is this state defendant entitled to habeas relief on his claims of prosecutorial misconduct, and do procedural default doctrines bar him from raising that claim? *Bryant v. Dowling*, No. 20-5100 (OA March 23, 2022).

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 (reply brief filed May 9, 2022).

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 (OA December 8, 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 (OA December 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 when it granted habeas relief to this defendant, finding that counsel provided ineffective assistance regarding a proposed plea prior to trial by failing to advise the client that he could admit the government could present sufficient evidence to support a conviction without supplying the factual basis himself? *United States v. Kearns*, No. 22-3068 (brief filed May 27, 2022) (gov't appeal).

Is this defendant entitled to a COA or § 2255 relief on his claims of government interference with the effective assistance of counsel, via government access of recorded attorney-client phone calls in a detention facility? *United States v. Hohn*, No. 22-3009 (brief filed May 19, 2022).

Is this defendant entitled to a COA or § 2255 relief on his claims of ineffective assistance of counsel relating to the failure to object to the admission of proffer statements at trial, or by counsel's failure to prepare for the proffer? *United States v. Brown*, No. 21-8083 (brief filed April 24, 2022).

Is this defendant entitled to equitable tolling of the statute of limitations because of incorrect attorney advice he was given about the deadline? *United States v. Vann*, No. 21-7057 (brief filed February 15, 2022).

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 (reply brief filed April 13, 2022).

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 (reply brief filed May 18, 2022).

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).

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 (gov't brief December 20, 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 (OA January 20, 2022).

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).

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 (OA January 19, 2022).

**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**

**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)**

**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 18 U.S.C. § 922(g) exceed Congress's commerce clause authority? *United States v. Gonzales*, No. 21-2099 (gov't brief filed April 20, 2022) (foreclosed).

Does an erroneous jury instruction on constructive possession of a gun warrant reversal in this case? *United States v. Johnson*, No. 21-3113 (gov't brief filed March 17, 2022).

Did the district err by accepting this defendant's guilty plea to constructively possessing a firearm because he did not admit he intended to exercise control over the firearm, but only that the firearms were in his vicinity? *United States v. Jackson*, No. 21-8054 (reply brief filed May 9, 2022).

**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)**

**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. § 1152/1153 (offenses committed within Indian country)**

Did the district court err in the jury instructions by omitting the element of the defendant's non-Indian status for a count under § 1152? *United States v. Ortner*, No. 21-5075 (brief filed March 30, 2022).

Did the district court err by finding that this defendant's tribal convictions for battery qualify as predicate convictions under 18 U.S.C. § 117(a), as referenced by the Major Crimes Act at § 1153? *United States v. Veneno*, No. 21-2101 (brief filed March 8, 2022).

Does Congress lack the constitutional authority to criminalize the conduct of Indians on tribal land? *United States v. Veneno*, No. 21-2101 (brief filed March 8, 2022) (foreclosed issue).

**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)**

**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 (degradation of government property)**

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

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

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

Was there sufficient evidence supporting this defendant's conviction for sex trafficking, because the evidence was incredible or impeached? *United States v. Coulter*, No. 21-6118 (brief filed May 3, 2022).

**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. § 1958 (use of interstate communication in murder for hire)**

Did the district court erroneously sentence this defendant to consecutive sentences on two multiplicitous counts of § 1958(a), because the two counts involved a common criminal objective and were part of the same course of conduct? *United States v. Maldonado-Passage*, No. 22-6025 (gov't brief filed May 13, 2022).

**SS. 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 (OA April 1, 2022); *United States v. Sanchez*, No. 19-2141 (OA April 1, 2022); *United States v. Baca*, No. 19-2195 (OA April 1, 2022); *United States v. Garcia*, No. 19-2148 (brief filed September 7, 2021); *United States v. Sanchez*, No. 19-2148 (brief filed September 7, 2021).

**TT. 18 U.S.C. § 2119 (carjacking)**

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

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).

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

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

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

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

In this trial for illegal transportation of a minor, did the district court plainly err by failing to instruct the jury that it needed to find the dominant purpose of the transportation was for someone to engage in a sexual act with the minor, in violation of a specific statute? *United States v. Ortner*, No. 21-5075 (brief filed March 30, 2022).

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

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

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

Was there sufficient evidence that this defendant participated in a drug conspiracy, including proof of agreement, participation, and interdependence? *United States v. Gunn*, No. 21-6168 (brief filed April 19, 2022).

Did the district court err by declining to give a multiple-conspiracy jury instruction? *United States v. Gunn*, No. 21-6168 (brief filed April 19, 2022).

**CCC. 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 (OA January 19, 2022).

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

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

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

**GGG. 26 U.S.C. § 7212**

**HHH. 28 U.S.C. § 455 (recusal)**

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

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

**KKK. 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).

**LLL. Regulatory and CFR Offenses**

**XXII. Pleas**

**A. Acceptance of Plea**

**B. Appeal Waiver**

Does the appeal waiver in this defendant's plea agreement bar this appeal of a condition imposed upon revocation of supervised release? *United States v. Ivory*, No. 21-3028 (reply brief filed April 22, 2022).

Does the appeal waiver in this defendant's plea agreement bar this appeal of the denial of motion to terminate probation? *United States v. Hartley*, No. 22-3010 (gov't brief filed March 29, 2022).

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 (reply brief filed April 13, 2022).

**C. Breach**

Did the government breach the plea agreement by failing to move for the additional one-level reduction under § 3E1.1 based on the defendant's objection to guidelines calculations? *United States v. Diaz-Menera*, No. 21-6127 (reply brief filed April 19, 2022).

Did the prosecutor's arguments at sentencing that the defendant's criminal history was underrepresented undermine the government's promise in the plea agreement to request a below-guideline sentence? *United States v. Lopez*, No. 21-3132 (reply brief filed April 18, 2022).

#### **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 (gov't brief filed February 2, 2022).

#### **F. Withdrawal of Plea**

Did the district court err by not allowing this defendant to withdraw his plea based on his claims of ineffective assistance of counsel and inapplicability of an appeal waiver? *United States v. Reed*, No. 21-2073 (reply brief filed April 8, 2022).

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 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.*)**

### **XXIV. Rules of Criminal Procedure**

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

Did the district court err when it allowed sex offense counts and counts concerning possession of bald eagle parts to be joined in a single indictment? *United States v. Ortner*, No. 21-5075 (brief filed March 30, 2022).

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 (OA April 1, 2022); *United States v. Sanchez*, No. 19-2141 (OA April 1, 2022); *United States v. Baca*, No. 19-2195 (OA April 1, 2022); *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 17 (subpoenas)**

Did the district court err by refusing to issue or enforce subpoenas to: a prison official who would have testified about the difficulty of smuggling drugs in prison; a doctor who would have testified about the features of a schizoaffective disorder the defendant had been diagnosed with; and a doctor who would have testified about the defendant's overdose of drugs on a prior occasion? *United States v. Gunn*, No. 21-6168 (brief filed April 19, 2022).

**E. 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 (OA January 20, 2022); *United States v. Cervantez-Aguilar*, No. 20-3189 (OA January 20, 2022).

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

**G. Rule 32.1 (supervised release revocation and sentencing)**

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

**I. Rule 35 (modification of a sentence)**

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

**K. Rule 43 (presence)**

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

Did the district court procedurally err and violate the mandate of an earlier appeal by considering the absence of a plea agreement containing an appeal waiver as a basis for this defendant's sentence on remand? *United States v. Cozad*, No. 22-3050 (reply brief filed May 19, 2022).

**XXVI. Second Amendment Issues**

**XXVII. Sentencing**

**A. Allocution**

**B. Apprendi**

Must a finding of fact that is necessary to render a sentence substantively reasonable be found by a jury beyond a reasonable doubt? *United States v. Riker*, No. 21-2072 (gov't brief filed February 23, 2022) (foreclosed issue).

Did the district court err by increasing this defendant's sentence based on judge-found facts about acquitted conduct? *United States v. Bush*, No. 21-3071 (gov't brief filed May 25, 2022) (foreclosed issue).

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

Is a pre-2008 Oklahoma drug conviction, which could have been for distribution of hemp, an ACCA predicate? *United States v. Pitts-Green*, No. 21-6111 (gov't brief filed April 19, 2022).

Is Oklahoma aggravated assault and battery a violent felony under ACCA, and is the statute divisible? *United States v. Winrom*, No. 21-6069 (reply brief filed February 22, 2022).

Is Colorado first-degree arson a violent felony under ACCA? *United States v. Lynch*, No. 21-1178 (gov't brief filed December 17, 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 (OA December 8, 2021).

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

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

**H. Departures and Variances**

**I. Fines & Assessments**

Did the district court abuse its discretion when it ordered a \$100,000 fine after finding that the defendant lacked financial resources to pay a fine? *United States v. Ortner*, No. 21-5075 (brief filed March 30, 2022).

**J. First Step Act**

**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 plainly err by applying the criminal sexual abuse guideline to this defendant's conduct rather than the abusive sexual contact guideline? *United States v. McGirt*, No. 21-7048 (gov't brief filed May 25, 2022).

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)**

Did the district court err by applying the 4-point enhancement for unduly influencing a minor under § 2A3.2(b)(2)(B)(ii)? *United States v. Patterson*, No. 21-7053 (gov't brief filed April 19, 2022).

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**

Did the district court err by applying a 2-level enhancement because a substantial part of this mail fraud scheme was committed outside the United States because there was insufficient evidence that this was accurate? *United States v. Lutton*, No. 21-1285 (gov't brief filed March 28, 2022).

**10. USSG § 2B2.1 (burglary)**

**11. USSG § 2B3.1 (robbery)**

Did the district court err by applying a 2-level carjacking enhancement under § 2B3.1(b)(5) without finding that the defendant had the requisite intent? *United States v. Linares*, No. 21-3210 (brief filed April 18, 2022).

**12. USSG § 2C1.1**

**13. USSG § 2D1.1 (drugs)**

Did the district court err when it overruled this defendant's objections to multiple enhancements based on the amount of drugs involved in this conspiracy, the acts of violence engaged in, and the defendant's leadership role in the conspiracy? *United States v. Gunn*, No. 21-6168 (brief filed April 19, 2022).

Did the district court err when it applied the firearm enhancement at § 2D1.1(b)(1), because there was insufficient evidence that the defendant possessed the firearms that were discovered? *United States v. Martinez*, No. 21-7054 (brief filed April 1, 2022).

Did the district court err in finding the drug quantity attributable to this defendant because the hearsay statements on which the findings were based were unreliable? *United States v. Bush*, No. 21-3071 (gov't brief filed May 25, 2022).

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 (reply brief filed February 23, 2022).

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 when it applied a 4-level increase for possessing a weapon in connection with another offense based on an unsworn, undetailed, uncorroborated, and ultimately unreliable hearsay-within-hearsay statement made by an unobserved and incredible declarant? *United States v. Austin*, No. 22-3040 (brief filed June 6, 2022).

Did the district court err by classifying this defendant's prior Oklahoma drug conviction as a controlled substance offense, because it could have been a conviction involving hemp which was not a controlled substance? *United States v. Brown*, No. 21-6175 (brief filed May 11, 2022).

Did the district court err by applying the § 2K2.1(b)(6) enhancement for possession of a firearm in connection with a felony offense, based on an incident when the defendant shot a gun inside his room? *United States v. Leib*, No. 21-2136 (brief filed March 30, 2022).

Did the district court err by relying on an incorrect interpretation of constructive possession in applying the enhancement under § 2K2.1(b)(4)? *United States v. Trujillo*, 21-1323 (gov't brief filed May 25, 2022).

Did the district court by classifying this defendant's prior Wyoming drug conviction as a controlled substance offense? *United States v. Massmann*, No. 20-8057 (reply brief filed April 26, 2022).

Did the district court by classifying this defendant's prior Colorado drug conviction as a controlled substance offense? *United States v. Jackson*, No. 21-8054 (gov't brief filed March 21, 2022).

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 (OA March 23, 2022).

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 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 err by setting this defendant’s level under § 2S1.1(a)(1), because the proceeds were from drug sales, when it was undisputed that this defendant was not personally involved in drug distribution? *United States v. Diaz-Menera*, No. 21-6127 (reply brief filed April 19, 2022).

**24. USSG § 2X1.1 (attempt/solicitation/conspiracy)**

Did the district court err by declining to apply a 3-level attempt reduction in this case, where the defendant voluntarily gave up any attempt and was not close to completing any vehicle robbery? *United States v. Linares*, No. 21-3210 (brief filed April 18, 2022).

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

Did the district court err by applying the vulnerable victim enhancement, because the victim of the fraud crime was a young women with limited means and a lack of financial knowledge? *United States v. Mack*, No. 21-4100 (gov’t brief filed May 27, 2022).

**26. USSG § 3A1.2**

**27. USSG § 3A1.3**

**28. USSG § 3A1.4 (terrorism)**

**29. USSG § 3B1.1 (aggravating role)**

Did the district err by applying a § 3B1.1 enhancement to this defendant? *United States v. Bush*, No. 21-3071 (gov’t brief filed May 25, 2022).

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 (OA January 19, 2022).

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).

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

Did the district court err by refusing to apply a minor-role reduction in this case? *United States v. Luton*, No. 21-1285 (gov’t brief filed March 28, 2022).

**31. 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).

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

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

This defendant was convicted of fraud and firearms possession. Did the district court plainly err by not applying an enhancement for possession of a gun under USSG § 2B1.1(b)(16)(B) for the fraud count, and then grouping the fraud and firearms counts under § 3D1.2(c), which would have reduced his offense level? *United States v. Mack*, No. 21-4100 (gov't brief filed May 27, 2022).

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

Did the district court err by not giving a 2-level reduction for acceptance of responsibility, where the defendant conceded drug possession but contested only whether he intended to distribute? *United States v. Nevarez*, No. 21-1286 (reply brief filed May 20, 2022).

**35. USSG § 4A1.1**

**36. USSG § 4A1.2**

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

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

Does the phrase “controlled substance” in USSG § 4B1.2(b) include substances excluded from the Controlled Substances Act? (foreclosed issue) *United States v. Mask*, No. 21-6076 (gov't brief filed January 28, 2022).

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 (reply brief filed February 7, 2022).

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 (OA January 19, 2022).

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 (OA January 19, 2022).

**39. USSG § 4B1.5**

Did the district court err by applying a five-level enhancement for engaging in a pattern of activity involving prohibiting sexual conduct when there was only one prohibited sexual act with each minor victim? Is application of that enhancement along with a multiple-count enhancement impermissible double-counting? *United States v. Cifuentes-Lopez*, No. 21-6053 (gov't brief filed February 28, 2022).

**40. USSG § 5C1.2 (safety valve)**

Did the district court err by withholding a safety valve reduction based on insufficient evidence that the defendant possessed the firearms that were discovered? *United States v. Martinez*, No. 21-7054 (brief filed April 1, 2022).

**41. USSG § 5G1.3**

**42. USSG § 5K1.1**

**43. USSG § 5K2.7**

**44. USSG § 5K2.14**

**45. USSG § 5G1.2**

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

**L. Mandatory Minimums and Maximums**

Did the district court err in interpreting § 3553(f) in the conjunctive, to require all of the safety-valve criminal-history requirements to be met, rather than in the alternative, in order to sentence below the mandatory minimum? *United States v. Kolkman*, No. 22-8004 (brief filed May 6, 2022).

**M. Reasonableness**

**1. Procedural**

Did the district court plainly err by imposing a pre-determined sentence upon revocation of supervision based on statements it had made at the previous revocation sentencing, and failing to consider the sentencing factors? *United States v. Crews*, No. 21-1440 (brief filed May 27, 2022).

Is this defendant's sentence plainly procedurally unreasonable because the district court relied on criminal history to the exclusion of any other factor? *United States v. Bravo-Sosa*, No. 22-2015 (gov't brief filed June 3, 2022).

Was this defendant's sentence erroneously increased pursuant to a drug-weight calculation based on dismissed state charges and a police report that was not admitted, with no corroboration? *United States v. Anderson*, No. 21-2151 (brief filed April 21, 2022).

Did the district court procedurally err and violate the mandate of an earlier appeal by considering the absence of a plea agreement containing an appeal waiver as a basis for this defendant's sentence on remand? *United States v. Cozad*, No. 22-3050 (reply brief filed May 19, 2022).

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 (OA March 22, 2022).

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 (OA March 22, 2022).

Did the district court inadequately explain the sentence? *United States v. Astorga*, No. 21-2026 (OA January 19, 2022).

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 (OA January 19, 2022).

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).

## 2. Substantive

Is this defendant's within-guideline sentence for illegal reenter substantively unreasonable? *United States v. Bravo-Sosa*, No. 22-2015 (gov't brief filed June 3, 2022).

Is this defendant's life sentence for multiple counts of sexual abuse substantively unreasonable? *United States v. Whiteman*, No. 21-8095 (gov't brief filed June 6, 2022).

Is this mail fraud defendant's high-end guidelines sentence substantively unreasonable? *United States v. Luton*, No. 21-1285 (gov't brief filed March 28, 2022).

Is this defendant's upward-variance sentence to 240 months substantively unreasonable? *United States v. Livingston*, No. 21-2108 (reply brief filed April 29, 2022).

Is this illegal-reentry defendant's sentence substantively unreasonable because the district court gave undue weight to his criminal history and downplayed the mitigating facts? *United States v. Rangel-Rangel*, No. 21-1287 (reply brief filed May 24, 2022).

Is this embezzlement defendant's statutory-maximum sentence substantively unreasonable? *United States v. Harris*, No. 21-2102 (reply brief filed March 30, 2022).

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 (gov't brief filed January 7, 2022).

Is this defendant's above-guidelines sentence of 48 months for fentanyl distribution substantively unreasonable? *United States v. McCrary*, No. 21-6047 (OA March 22, 2022).

Is this defendant's 630-month sentence for production of child pornography substantively unreasonable? *United States v. Farley*, No. 21-8013 (OA January 19, 2022).

Is this defendant's life sentence for a sexual abuse case substantive unreasonable? *United States v. Woody*, No. 21-2007 (OA March 22, 2022).

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).

**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 finding no extraordinary and compelling reasons to warrant a sentence reduction or mis-weighting the sentencing factors? *United States v. Grist*, No. 21-7022 (OA January 20, 2022).

**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**

Did the district court err in concluding that the government’s purposeful sentencing-phase intrusion into a defendant’s confidential attorney-client communications is not a per se Sixth Amendment violation? *United States v. Orduno-Ramirez*, No. 22-3019 (brief filed May 27, 2022).

Is this defendant entitled to a COA or § 2255 relief on his claims of government interference with the effective assistance of counsel, via government access of recorded attorney-client phone calls in a detention facility? *United States v. Hohn*, No. 22-3009 (brief filed May 19, 2022).

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 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 a witness’s testimony that two women involved in prostitution had been killed, but that the witness did not know by whom, violate this defendant’s confrontation rights, right to an impartial jury, or the hearsay rules, in his trial for sex trafficking? *United States v. Coulter*, No. 21-6118 (brief filed May 3, 2022).

**F. Impartial Jury**

A juror in this case indicated that she was too emotional to continue deliberations. After the weekend and after questioning by the judge, the juror continued deliberating. Does the evidence show that the juror was coerced into reaching a final verdict? *United States v. Coulter*, No. 21-6118 (brief filed May 3, 2022).

**G. Jury Verdict**

**H. Public Trial**

Did the district court err by closing the courtroom to the public, except by video feed, during this defendant's trial, without making necessary findings supporting the closure? *United States v. Veneno*, No. 21-2101 (brief filed March 8, 2022).

**I. Compulsory Process**

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

Did the district court err by denying this defendant's motion to dismiss based on speedy trial violations, when multiple delays were based on COVID-related issues? *United States v. Gunn*, No. 21-6168 (brief filed April 19, 2022).

Did the district court err by denying this defendant's motion to dismiss for speedy trial violations, when delays were based on multiple COVID-related orders? *United States v. Nevarez*, No. 21-1286 (reply brief filed May 20, 2022).

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).

**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**

Did the district court err when it found there was sufficient evidence that this defendant intended to inflict injury on a federal officer under 18 U.S.C. § 111, and revoked his supervision on that basis? *United States v. Young*, No. 22-3029 (brief filed June 3, 2022).

Should this defendant's revocation be vacated because the underlying condition was impermissibly imposed via a general order affecting all persons on supervision? *United States v. Nielsen*, No. 21-8087 (reply brief filed May 13, 2022).

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

#### **1. Statutory Maximum**

Did the district court err at revocation by imposing an additional term of supervised release that exceeds the statutory maximum permitted by the statute? *United States v. Massmann*, No. 20-8056 (gov't brief filed March 21, 2022).

#### **2. Mandatory Minimum**

#### **3. Substantive**

Is the term of supervised release imposed on this defendant upon revocation substantively unreasonable because the violations were minor ones? *United States v. Royer*, No. 22-5010 (gov't brief filed May 24, 2022).

Is this defendant's 5-month sentence upon revocation substantively reasonable given his physical and mental health issues? *United States v. Oakes*, No. 21-6147 (gov't brief filed April 29, 2022).

Is this defendant's five-year term of supervised release substantively unreasonable, in light of the facts of the revocation conduct? *United States v. Dobosu*, No. 21-1236 (reply brief filed May 24, 2022).

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).

#### **4. Procedural**

Did the district court plainly err by considering the need for retribution when sentencing this defendant on revocation of supervised release? *United States v. Booker*, No. 22-7000 (gov't brief filed May 9, 2022).

#### **5. Unlawful Delegation of authority**

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

Did the district court plainly err by imposing a supervised release condition that prohibits the possession of adult pornography and prohibiting the defendant from going any place where such

material is available, without particularized findings? *United States v. Bailey*, No. 21-5085 (brief filed May 27, 2022).

Did the district court err by imposing a condition prohibiting the possession of sexual materials without making particularized findings justifying the condition, after this defendant had already completed sex offender treatment? *United States v. Soule*, No. 22-8001 (brief filed May 31, 2022).

Did the district court make sufficient findings to justify imposition of a condition requiring this defendant to take prescribed medications? *United States v. Ivory*, No. 21-3028 (reply brief filed April 22, 2022).

Did the district court err by imposing a condition requiring outpatient drug treatment when there is no evidence of recent drug abuse? *United States v. Ortiz*, No. 21-2106 (brief filed January 3, 2022).

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 (gov't brief December 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 (OA January 19, 2022).

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).

#### **D. Early Termination of Supervised Release or Probation**

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

#### **A. Closing Argument**

#### **B. Confidential Informants**

#### **C. Cumulative Error**

Do multiple errors, including evidentiary errors, confrontation errors, and vouching, warrant a new trial in this case? *United States v. Coulter*, No. 21-6118 (brief filed May 3, 2022).

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 (OA April 1, 2022); *United States v. Sanchez*, No. 19-2141 (OA April 1, 2022); *United States v. Baca*, No. 19-2195 (OA April 1, 2022).

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).

#### **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**

Did the district court err by failing to instruct the jury about the acceptable level of doubt when rendering a verdict basely only on circumstantial evidence? *United States v. Martinez*, No. 21-2100 (reply brief filed April 14, 2022).

**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 (reply brief filed February 1, 2022)

**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 (OA January 20, 2022); *United States v. Cervantez-Aguilar*, No. 20-3189 (OA January 20, 2022).

**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**

Did the district court err by failing to give a promised limiting instruction regarding vouching prior to the prosecution’s expert testimony and giving a different instruction in such a way that bolstered the expert’s testimony? *United States v. Whiteman*, No. 21-8095 (gov’t brief filed June 6, 2022).

**I. Jury Questions**

**J. Jury Selection**

Did the prosecutor in this case violate Batson when he used half his strikes to strike all three Hispanic venire members, and there is evidence the strikes were pretextual? *United States v. Smalley*, No. 21-1167 (reply brief filed April 26, 2022).

**K. Mistrial**

**L. Prior Convictions**

**M. Privileges**

**N. Prosecutorial Misconduct**

Did an attorney appointed as guardian ad litem for an alleged trafficking victim improperly vouch for the credibility of that victim by openly encouraging her while she testified in the presence of the jury? *United States v. Coulter*, No. 21-6118 (brief filed May 3, 2022).

Did the prosecutor improperly inflame the passions of the jury by referring to two women’s deaths, which occurred long before trial, during the closing argument in this sex trafficking trial? *United States v. Coulter*, No. 21-6118 (brief filed May 3, 2022).

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 (OA January 20, 2022); *United States v. Cervantez-Aguilar*, No. 20-3189 (OA January 20, 2022).

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 (OA March 23, 2022).

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 (OA April 1, 2022).

**Q. Rule 201 (judicial notice)**

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

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

Did the district court err by allowing testimony that the defendant did not display remorse a month after a murder, because it was irrelevant to proof of guilt? *United States v. Ree*, No. 21-7068 (brief filed May 6, 2022).

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 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)**

Should this defendant's conviction be reversed based on the erroneous admission of Rule 404(b) evidence? *United States v. Veneno*, No. 21-2101 (brief filed March 8, 2022).

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)**

### **V. Rules 601-615 (Witnesses)**

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

Did the district court err by failing to perform its gatekeeper function and allowing the testimony of two medical experts? *United States v. Pehrson*, No. 21-4133 (gov't brief filed May 16, 2022).

Did the district court violate Rule 702 and the jury's role by allowing experts to testify that they believed the accusations against the defendant? *United States v. Jones*, No. 21-5079 (reply brief filed April 26, 2022).

Did the district court err by allowing expert testimony about firearm toolmark evidence under the *Daubert* standard? *United States v. Hunt*, No. 21-6046 (reply brief filed April 8, 2022).

### **X. Rules 801-807 (hearsay)**

Did the district court err by not admitting prior inconsistent statements for the truth of the matter asserted? *United States v. McGirt*, No. 21-7048 (gov't brief filed May 25, 2022).

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 (OA March 22, 2022).

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 (OA January 19, 2022).

**Y. Rule 901 (authentication)**

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

**AA. Rule 1006 (Summaries)**

**BB. Surrebuttal**

**CC. Voir Dire**

**XXXIV. Vagueness**

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

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).

## Recently Added Cases

(most recent to least recent)

*United States v. Young*, No. 22-3029 (brief filed June 3, 2022) (revocation).

*United States v. Austin*, No. 22-3040 (brief filed June 6, 2022) (USSG § 2K2.1).

*United States v. Jones*, No. 22-1031 (brief filed June 6, 2022) (warrantless arrest, Miranda).

*United States v. Soule*, No. 22-8001 (brief filed May 31, 2022) (conditions of supervised release).

*United States v. Crews*, No. 21-1440 (brief filed May 27, 2022) (procedural reasonableness).

*United States v. Bailey*, No. 21-5085 (brief filed May 27, 2022) (conditions of supervised release, good faith).

*United States v. Orduno-Ramirez*, No. 22-3019 (brief filed May 27, 2022) (Sixth Amendment).

*United States v. Kearn*, No. 22-3068 (brief filed May 27, 2022) (28 U.S.C. § 2255).

*Fairbourn v. Harlow*, No. 22-8005 (brief filed May 20, 2022) (28 U.S.C. § 2254).

*United States v. Hohn*, No. 22-3009 (brief filed May 19, 2022) (effective assistance of counsel, 28 U.S.C. § 2255).

*United States v. Hayes*, No. 22-8010 (brief filed May 16, 2022) (traffic stops).

*United States v. Lara*, No. 21-8091 (brief filed May 16, 2022) (traffic stops).

*United States v. Brown*, No. 21-6175 (brief filed May 11, 2022) (USSG § 2K2.1).

*United States v. Ree*, No. 21-7068 (brief filed May 6, 2022) (FRE 401).

*United States v. Kolkman*, No. 22-8004 (brief filed May 6, 2022) (safety valve/mandatory minimum).

*United States v. Alqahtani*, No. 22-2007 (brief filed May 5, 2022) (search warrant issues).

*United States v. Bravo-Sosa*, No. 22-2015 (brief filed May 4, 2022) (procedural and substantive reasonableness).

*United States v. Coulter*, No. 21-6118 (brief filed May 3, 2022) (confrontation, 18 U.S.C. § 1591, impartial jury, prosecutorial misconduct, cumulative error).

*United States v. Suggs*, No. 22-1024 (brief filed April 28, 2022) (good faith).

*United States v. Royer*, No. 22-5010 (brief filed April 26, 2022) (continuances, revocation sentence).

*Smith v. Crow*, No. 22-7007 (brief filed April 27, 2022) (28 U.S.C. § 2254).

*United States v. Brown*, No. 21-8083 (brief filed April 24, 2022) (28 U.S.C. § 2255).

*United States v. Anderson*, No. 21-2151 (brief filed April 21, 2022) (Terry stop and frisk, procedural reasonableness).