

ISSUES PENDING IN THE TENTH CIRCUIT

COMPILED BY THE KANSAS FEDERAL PUBLIC DEFENDER



Updated September 22, 2022

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

III. Confessions

IV. Continuances

Did the district court reversibly err when it denied the defendant's continuance request during his revocation and hearing and sentencing? *United States v. Rivas*, No. 22-5007 (reply brief filed July 14, 2022).

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 (reply brief filed September 12, 2022); *United States v. Garcia*, No. 19-2152 (reply brief filed September 12, 2022).

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 (reply brief filed September 12, 2022).

VI. Double Jeopardy

VII. Eighth Amendment and Capital Issues

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 (reply brief filed July 14, 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**

Did the district court err when it found that the officers conducted a valid inventory search of this defendant's car, because it was a pretext to search for evidence? *United States v. Phillips*, No. 22-5053 (brief filed September 6, 2022).

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**
- L. Protective Sweeps**
- M. Scope of Warrantless Search**
- N. Search Incident to Arrest**
- O. Search Warrant Issues (including *Franks v. Delaware* issues)**

Should the district court have granted this motion to suppress the fruits of the search of this defendant's home, because the warrant lacked probable cause? *United States v. DeVargas*, No. 22-2064 (brief filed September 20, 2022).

Did the warrant to search this defendant's cell phone violate the probable cause and particularity requirements of the Fourth Amendment? If invalid, does the good faith exception apply? *United States v. Lucero*, No. 22-2018 (brief filed September 12, 2022).

Did the affidavit supporting a warrant for the search of the defendant's home rely on stale information or fail to establish a nexus between the alleged drug sale and the home? *United States v. Windom*, No. 22-1077/22-1119 (brief filed August 4, 2022).

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 (reply brief filed July 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 (reply brief filed September 2, 2022).

Did the district court plainly err by failing to find a *Franks* violation in this case, where the trial testimony showed the officer had made a reckless omission or misstatement in the affidavit authorizing the search warrant? *United States v. McKinney*, No. 21-5074 (reply brief filed June 15, 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 (reply brief filed August 24, 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 (gov't brief filed June 30, 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 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 (reply brief filed August 24, 2022).

S. Traffic Stops

Did law enforcement lack probable cause to stop and then search this defendant's car, because the officers' testimony that they observed traffic violations and smelled marijuana was not credible? *United States v. Phillips*, No. 22-5053 (brief filed September 6, 2022).

Did law enforcement lack reasonable suspicion that this defendant was engaged in alien smuggling at the time they stopped him? *United States v. Rodriguez*, No. 22-2038 (gov't brief filed September 6, 2022).

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 (reply brief filed August 5, 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 (reply brief filed September 1, 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 (reply brief filed June 24, 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 (gov't brief filed September 6, 2022).

U. Warrantless Searches & Seizures

Was the seizure of this defendant's cell phones by two different law enforcement agencies, one for 10 days and one for two months, unreasonable because there was no probable cause to believe the defendant was trafficking drugs, and because staffing problems at the agency is not a justification for the extended seizure? If invalid, does the good faith exception apply? *United States v. Lucero*, No. 22-2018 (brief filed September 12, 2022).

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 (gov’t brief filed July 17, 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 (reply brief filed June 16, 2022).

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 (gov’t brief filed July 17, 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*

Should the district court have suppressed this defendant’s statements to law enforcement during an interview, because the interview should have stopped after the defendant stated he was represented by a lawyer? *United States v. DeVargas*, No. 22-2064 (brief filed September 20, 2022).

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 (gov’t brief filed September 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 (reply brief filed June 8, 2022).

Did the district court err by admitting derivative physical evidence from the unwarned statements? *United States v. Gonzales*, No. 21-2099 (reply brief filed June 8, 2022) (foreclosed).

XVI. Habeas Issues

A. 28 U.S.C. § 2241

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

Did the prosecutor in this case violate Batson when four African American venire members were struck? *Cortez-Lazcano v. Whitten*, No. 22-5031 (brief filed July 21, 2022).

Is this defendant entitled to a COA and habeas relief on his claims of violation of ineffective assistance of counsel and improper admission of coconspirator testimony? *Rushing v. Harvenek*, No. 22-6072 (brief filed July 14, 2022).

Is this defendant entitled to a COA and habeas relief on her claims of violation of ineffective assistance of counsel and prosecutorial misconduct? *Nelson v. Williams*, No. 22-1085 (brief filed July 9, 2022).

Is this defendant entitled to a COA and habeas relief on his claims of violation of his confrontation rights or insufficiency of the evidence? *Redfearn v. Rankins*, No. 22-6061 (brief filed June 14, 2022).

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 (reply filed August 5, 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 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 by refusing to hold a hearing on this defendant's § 2255 petition where his allegations that he received incorrect legal advice was not rebutted? *United States v. Chavarin*, No. 21-4105 (brief filed September 12, 2022).

Is this defendant entitled to relief on his claim that Hobbs Act robbery is not a crime of violence under § 924(c), or his claim that he does not have three prior violent felonies under ACCA? *United States v. Perkins*, No. 22-2043 (brief filed August 18, 2022).

Was this defendant's § 2255 petition timely where it was a challenge to his mandatory § 3559 sentence, which includes a residual clause, and the petition was filed within a year of *United States v. Davis*, which struck down a similar residual clause as unconstitutionally vague? *United States v. Gurne*, No. 21-4151 (brief filed August 10, 2022).

Was this defendant's waiver of the right to counsel knowing and voluntary, and was appellate counsel ineffective for failing to raise the waiver issue on direct appeal? *United States v. Bishop*, No. 21-4085 (gov't brief filed August 15, 2022).

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 (reply brief filed August 1, 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 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).

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

E. Coram Nobis

XVII. Immigration Issues

XVIII. Indictment Issues

A. Amendments

Did the district court constructively amend the indictment charging aggravated sexual abuse, by touching under clothing, by instructing the jury on abusive sexual contact, which could be committed by touching over clothing? *United States v. Gibbs*, No. 22-5020 (brief filed September 21, 2022).

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)

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

Does § 1326 violate the equal protection clause because its passage was racially motivated? *United States v. Amador-Bonilla*, No. 22-6036 (brief filed July 27, 2022) (amicus briefs from history professor; nonprofit groups filed August 2, 2022).

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)

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)

Were this defendant's civil rights restored under state law after discharge of his suspended sentence, so that his prior conviction is not a disqualifying felony under § 922(g)? *United States v. DeVargas*, No. 22-2064 (brief filed September 20, 2022).

Does 18 U.S.C. § 922(g) exceed Congress's commerce clause authority? *United States v. Gonzales*, No. 21-2099 (reply brief filed June 8, 2022) (foreclosed).

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)

Is this defendant entitled to relief on his claim that Hobbs Act robbery is not a crime of violence under § 924(c), or his claim that he does not have three prior violent felonies under ACCA? *United States v. Perkins*, No. 22-2043 (brief filed August 18, 2022).

Whether federal second degree murder is not a crime of violence because it does not require the conscious and volitional use of force against another person. *United States v. Kepler*, No. 22-5006 (brief filed August 15, 2022).

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 (gov't brief filed July 13, 2022).

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 (gov't brief filed August 27, 2022).

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)

Was the evidence insufficient that this defendant used the means of identification of another when he only listed another person's name on a list of purported employees on a loan application? *United States v. Ojo*, No. 22-5041 (brief filed August 10, 2022).

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. § 1111 (murder)

Did the district court plainly err by failing to instruct the jury that second degree murder required the defendant to act without justification, excuse or mitigation? *United States v. Kepler*, No. 22-5006 (brief filed August 15, 2022); *United States v. Sago*, No. 22-5011 (brief filed August 30, 2022).

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

EE. 18 U.S.C. § 1151/1152/1153 (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 (reply brief filed August 18, 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 (reply brief filed July 17, 2022).

Does Congress lack the constitutional authority to criminalize the conduct of Indians on tribal land? *United States v. Veneno*, No. 21-2101 (reply brief filed July 17, 2022) (foreclosed issue).

FF. 18 U.S.C. § 1201 (kidnapping)

GG. 18 U.S.C. § 2113 (bank robbery)

HH. 18 U.S.C. § 1341 (mail fraud)

II. 18 U.S.C. § 1343 (wire fraud)

JJ. 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).

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

LL. 18 U.S.C. § 1361 (degradation of government property)

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

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

OO. 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 (reply brief filed August 25, 2022).

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

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

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

SS. 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).

TT. 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 reply brief filed September 12, 2022); *United States v. Joe Gallegos*, No. 20-2058 (reply brief filed September 12, 2022).

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 (reply brief filed September 12, 2022).

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 (reply brief filed September 12, 2022).

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 (reply brief filed September 12, 2022); *United States v. Sanchez*, No. 19-2148 (reply brief filed September 12, 2022).

UU. 18 U.S.C. § 2119 (carjacking)

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

Did the government present insufficient evidence supporting this defendant’s conviction of sexual abuse under 18 U.S.C. § 2242, because there was insufficient evidence that victim was incapacitated and that the defendant knew it? *United States v. Freeman*, No. 22-2039 (brief filed September 16, 2022).

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

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

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

ZZ. 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 (reply brief filed August 18, 2022).

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

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

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

Did the district court err by declining to give a multiple-conspiracy jury instruction? *United States v. Keith*, No. 21-6158 (reply brief filed September 21, 2022).

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 (reply brief filed July 12, 2022).

Did the district court err by declining to give a multiple-conspiracy jury instruction? *United States v. Gunn*, No. 21-6168 (reply brief filed July 12, 2022).

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

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

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

GGG. 26 U.S.C. § 7201 (tax evasion)

HHH. 26 U.S.C. § 7212

III. 28 U.S.C. § 455 (recusal)

Did the district court abuse its discretion by failing to recuse following evidence of threats against the court? *United States v. Martinez*, No. 22-2034 (brief filed August 22, 2022).

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

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

LLL. Assimilative Crimes Act (ACA)

In this ACA case, did the district court err when it concluded it could not consider a lower mandatory minimum that is part of state law? Or does that ACA permit district court adopt the state law that lowers mandatory minimum sentences if certain criteria are met? *United States v. Polk*, No. 22-5037 (brief filed September 20, 2022).

MMM. Regulatory and CFR Offenses

XXII. Pleas

A. Acceptance of Plea

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 (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).

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, where he raised questions about the voluntariness of his plea and disputed facts relevant to sentencing enhancements? *United States v. Sunrbodes*, No. 8070 (gov't brief filed June 7, 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 (reply brief filed August 18, 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 (reply brief filed September 12, 2022).

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 (reply brief filed September 12, 2022).

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 (reply brief filed September 12, 2022); *United States v. Sanchez*, No. 19-2148 (reply brief filed September 12, 2022).

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 (reply brief filed July 12, 2022).

E. Rule 29 (motion for judgment of acquittal)

F. Rule 32 (sentencing procedures)

G. Rule 32.1 (supervised release revocation and sentencing)

Were this defendant's due process rights violated at the revocation hearing because the judge constructively amended the violation petition or when a critical witness was not required to testify and be subject to cross examination? *United States v. Faunce*, No. 22-4019 (brief filed August 5, 2022).

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

XXVI. Second Amendment Issues

XXVII. Sentencing

A. Allocution

Did the district court plainly err by announcing it would give a life sentence prior to giving the defendant the opportunity to allocute? *United States v. Slinkard*, No. 22-5018 (brief filed August 22, 2022).

Did the district court plainly err by announcing it would not vary prior to giving the defendant the opportunity to allocute? *United States v. Benitez*, No. 22-5017 (gov't brief filed September 6, 2022).

B. Appendi

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 (reply brief filed July 27, 2022) (foreclosed issue).

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

Were this defendant's prior robbery offenses, which were committed over a 3-day period, committed on occasions different from one another, and is that a question requiring a jury finding? *United States v. Gallimore*, No. 22-6081 (brief filed September 8, 2022).

Is this defendant entitled to relief on his claim that Hobbs Act robbery is not a crime of violence under § 924(c), or his claim that he does not have three prior violent felonies under ACCA? *United States v. Perkins*, No. 22-2043 (brief filed August 18, 2022).

Are Arkansas marijuana convictions qualifying priors under ACCA? *United States v. Williams*, No. 22-6021 (brief filed July 25, 2022).

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 (reply brief filed June 7, 2022).

Is Oklahoma aggravated assault and battery a violent felony under ACCA, and is the statute divisible? *United States v. Winrow*, 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

Did the district court err when it gave this defendant an upward variance, based on findings that the defendant had not been attacked as he claimed during an incident when he drew a gun, and based on the inapplicability of a crime-of-violence enhancement? *United States v. Foley*, No. 22-1020 (gov't brief filed September 21, 2022).

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 (reply brief filed August 18, 2022).

J. First Step Act

Is this defendant's conviction for a RICO violation, where the racketeering predicates were distribution of crack cocaine under §§ 846 and 841, a covered offense under § 404 of the First Step Act? *United States v. Hutchinson*, No. 21-1162 (OA June 2022).

K. Guidelines Sections

- 1. USSG § 1B1.2**
- 2. USSG § 1B1.3 (relevant conduct)**
- 3. USSG § 2A2.1 (murder)**

Did the district court err by holding that a cross-reference to § 2A2.1 for attempted murder does not require a finding of a specific intent to kill, but only a finding of malice aforethought, which is only a general intent standard that can be satisfied by extreme recklessness? *United States v. Brooks*, No. 21-6059 (brief filed July 25, 2022).

Did the district court err by applying a cross reference to the murder guideline, because the government failed to prove that the defendant tried to kill, rather than just intimidate, when he fired a gun at officers during a foot chase? *United States v. Oloa*, No. 22-6046 (reply brief filed September 7, 2022).

- 4. USSG § 2A2.2**
- 5. 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 (reply brief filed July 5, 2022).

- 6. 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).

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

Did the district court err by applying a 4-level enhancement for "otherwise using" a firearm instead of the 3-level enhancement for "brandishing" a firearm, where the defendant pointed a BB gun at

someone and demanded their car keys? *United States v. Ortiz*, No. 22-2061 (gov't brief filed September 6, 2022).

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 (reply brief filed July 29, 2022).

13. USSG § 2C1.1

14. 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 (reply brief filed July 12, 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 (reply brief filed August 5, 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 (reply brief filed July 27, 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).

15. USSG § 2G1.1 (sex trafficking)

16. USSG § 2G2.2 (child pornography)

17. USSG § 2K1.4 (arson)

18. USSG § 2K2.1

Did the district court err by imposing a 4-level enhancement for possessing ammunition in connection with another felony, either because the felony of assault did not apply because the defendant acted in self defense, or because the other felony was being a felon in possession under state law does not qualify? *United States v. Eddington*, No. 22-1076 (brief filed August 26, 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. Uhegnu*, No. 22-6093 (brief filed August 23, 2022).

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 (reply brief filed August 18, 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 (reply brief filed August 15, 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 (reply brief filed July 10, 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 (reply brief filed June 27, 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 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 (gov't brief filed June 17, 2022).

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).

19. USSG § 2K2.2

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

21. USSG § 2T1.1 (tax loss)

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

23. USSG § 2Q2.1

24. 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).

25. 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 (reply brief filed July 29, 2022).

26. 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 (reply brief filed July 15, 2022).

- 27. USSG § 3A1.2
- 28. USSG § 3A1.3
- 29. USSG § 3A1.4 (terrorism)

30. USSG § 3B1.1 (aggravating role)

Did the district court clearly err by applying a manager/supervisor enhancement, when there was insufficient evidence that the defendant controlled any subordinate? *United States v. Hunsaker*, No. 22-7016 (brief filed August 16, 2022).

Did the district err by applying a § 3B1.1 enhancement to this defendant? *United States v. Bush*, No. 21-3071 (reply brief filed July 27, 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).

31. USSG § 3B1.2 (mitigating role)

32. USSG § 3C1.1 (obstruction)

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).

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

34. 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 (reply brief filed July 15, 2022).

35. 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).

36. USSG § 4A1.1

37. USSG § 4A1.2

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

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

Did the district court plainly err by not applying the generic definition of “conspiracy” as it existed when the guidelines were promulgated, which required a bilateral agreement? Or did the district court err by allowing the commentary to expand the guideline definition of a crime of violence? *United States v. Maloid*, No. 21-1422 (brief filed July 7, 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).

40. USSG § 4B1.5

41. USSG § 5C1.2 (safety valve)

Did the district court err by withholding a safety valve reduction based on findings that the defendant was not truthful about various things? *United States v. Zhong*, No. 22-1034 (gov't brief filed September 12, 2022).

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 (reply brief filed August 5, 2022).

42. USSG § 5G1.3

Did the district court plainly err by failing to consider § 5G1.3 and failing to impose reasons for its decision to impose a sentence consecutive to two state sentences that has been suspended but were set to be imposed due to the conduct in the instant offense? *United States v. Lester*, No. 22-6077 (brief filed September 6, 2022).

Did the district court err by failing to give an adjustment § 5G1.3 before determining whether to impose a variance from the guidelines sentence, when defense counsel argued it was clear that BOP would not give credit for the time the defendant served on a related state sentence? *United States v. Lee*, No. 21-6167 (brief filed August 1, 2022).

43. USSG § 5K1.1

44. USSG § 5K2.7

45. USSG § 5K2.14

46. USSG § 5G1.2

47. 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 (reply brief filed August 26, 2022).

M. Reasonableness

1. Procedural

Did the district court imposed an unreasonable sentence because it failed to adequately consider the need to avoid sentencing disparities? *United States v. Eddington*, No. 22-1076 (brief filed August 26, 2022).

Should this defendant's sentence be vacated because the judge improperly considered rehabilitative concerns and the need for treatment when imposing the sentence? *United States v. Johns*, No. 22-2008 (brief filed August 8, 2022).

Is this defendant's sentence procedurally unreasonable because the district court did not explain its decision not to grant a downward variance? *United States v. Ortiz*, No. 22-2061 (gov't brief filed September 6, 2022).

In this illegal reentry case, did the district court err by denying the request for a variance or impose a substantively unreasonable sentence because this defendant's criminal history was overrepresented? *United States v. Villa-Chavez*, No. 22-2065 (reply brief filed July 28, 2022).

Did the district court err when it gave this defendant an upward variance, based on findings that the defendant had not been attacked as he claimed during an incident when he drew a gun, and based on the inapplicability of a crime-of-violence enhancement? *United States v. Foley*, No. 22-1020 (gov't brief filed September 21, 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 (reply brief filed August 24, 2022).

Did the district court inadequately explain the sentence? *United States v. Astorga*, No. 21-2026 (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 1,320 sentence for child pornography possession, receipt and distribution substantively unreasonable because the guideline is not rationally based and because the district court discounting mitigating factors in the case? *United States v. Adams*, No. 22-2071 (brief filed August 17, 2022).

Is this defendant's sentence substantively unreasonable because the district court did not give adequate weight to mitigating factors? *United States v. Ortiz*, No. 22-2061 (gov't brief filed September 6, 2022).

Is this defendant's sentence substantively unreasonable because he committed the offense of second degree murder largely because of untreated mental illness, and because of threats by his abusive father, who was the victim? *United States v. Krafft*, No. 22-5023 (brief filed August 4, 2022).

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 (reply brief filed June 20, 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 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).

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. Attachment of the Right to Counsel

Did the district court err by denying this defendant's motion to suppress statements made during a custodial interview after his federal arrest, when his right to counsel had attached because state charges had been deferred in the aftermath of McGirt? *United States v. Warrington*, No. 22-7003 (brief filed September 7, 2022).

B. 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).

C. 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).

D. Self-Incrimination

Should the district court have granted a mistrial because a law enforcement officer witness implied that the fact that the defendant wanted to speak with an attorney indicated his guilt? *United States v. Phillips*, No. 22-5053 (brief filed September 6, 2022).

E. Self-Representation/Waiver of Counsel

Was this defendant's waiver of the right to counsel knowing and voluntary, and was appellate counsel ineffective for failing to raise the waiver issue on direct appeal? *United States v. Bishop*, No. 21-4085 (gov't brief filed August 15, 2022).

F. 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 (reply brief filed August 25, 2022).

G. 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 (reply brief filed August 25, 2022).

H. Jury Verdict

I. 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 (reply brief filed July 17, 2022).

J. Compulsory Process

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

Should this defendant's felon-in-possession conviction be vacated for speedy trial violations, where the order declaring the case complex was entered after the speedy trial clock expired? *United States v. Martinez*, No. 22-2034 (brief filed August 22, 2022).

This defendant was named in two counts of a 97-count indictment against 55 individuals. The case was designated complex and trial did not occur for two years. Did the lengthy delay in this case violate the Speedy Trial Act or the Sixth Amendment? *United States v. Keith*, No. 21-6158 (reply brief filed September 21, 2022).

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 (reply brief filed July 12, 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 (reply brief filed September 12, 2022).

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

XXXII. Supervised Release

A. Revocation Issues

Were this defendant’s due process rights violated at the revocation hearing because the judge constructively amended the violation petition or when a critical witness was not required to testify and be subject to cross examination? *United States v. Faunce*, No. 22-4019 (brief filed August 5, 2022).

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 (reply brief filed September 6, 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 Reasonableness

Is this defendant’s 24-month consecutive sentence for supervised release violations substantively unreasonable? *United States v. Rivera*, No. 22-6087 (brief filed September 12, 2022).

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 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 Reasonableness

Did the district court plainly err by basing this defendant's revocation sentence on rehabilitative purposes? *United States v. Willow*, No. 22-8037 (brief filed September 14, 2022).

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 (reply brief filed June 15, 2022).

5. Unlawful Delegation of authority

C. Conditions of Supervised Release

Should conditions of supervised release requiring residence at a halfway house and community service be vacated because the court improperly considered retribution when imposing them? *United States v. Johns*, No. 22-2008 (brief filed August 8, 2022).

Did the district court err by requiring outpatient substance abuse treatment as a condition of supervised release? *United States v. Ortiz*, No. 22-2026 (reply brief filed August 15, 2022).

Did the district court err in imposing three special conditions of supervised release, including lifetime prohibitions on access to sexually explicit material, limiting access to the internet, and limiting access to cameras and recording equipment? *United States v. Prestel*, No. 22-7009 (gov't brief filed August 24, 2022).

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 (gov't brief filed August 1, 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 (reply brief filed August 15, 2022).

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 instructional error and prosecutorial misconduct, warrant a new trial in this case? *United States v. Kepler*, No. 22-5006 (brief filed August 15, 2022).

Do multiple errors, including evidentiary errors, confrontation errors, and vouching, warrant a new trial in this case? *United States v. Coulter*, No. 21-6118 (reply brief filed August 25, 2022).

Do multiple errors, including a surprise witness and declining to bifurcate the trial, cumulatively require reversal? *United States v. Garcia*, No. 19-2188 (reply brief filed September 12, 2022).

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).

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 A 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 (reply brief filed September 12, 2022).

F. Eyewitness Identification Testimony

G. Judicial misconduct

H. Jury Instructions

1. **Aiding and Abetting**
2. **Burden of Proof**
3. **Conspiracy**
4. **Constructive Possession**
5. **Deliberate Avoidance/Ignorance**

6. Drug Use

Did the district court err by refusing to give the circuit pattern instruction about a drug addicted witness, when there was evidence that the witness was a drug user? *United States v. Abeyta*, No. 22-2010 (brief filed July 25, 2022).

7. Elements (see statute under which defendant tried)

8. Sentencing Elements

9. Flight

10. Guilt by Association/Guilt of Others

11. Investigative Techniques

12. Knowledge

13. Polygraphs

14. Proof

15. Spoliation

16. Theory of Defense/Affirmative Defense

17. Unanimity

18. Voluntary Intoxication

19. 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 (reply brief filed June 20, 2022).

I. Jury Questions

J. Jury Selection

Did the prosecutor in this case violate Batson when four African American venire members were struck? *Cortez-Lazcano v. Whitten*, No. 22-5031 (brief filed July 21, 2022).

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

Do multiple instances of prosecutorial misconduct, including a soliloquy in the voice of the victim, mischaracterization of expert testimony, questions asking the defendant to comment on the credibility of other witnesses, and statements about the state of the defendant's home, warrant a new trial? *United States v. Kepler*, No. 22-5006 (brief filed August 15, 2022).

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 (reply brief filed August 25, 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 (reply brief filed August 25, 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).

O. Right to be Present

P. Right to Present Defense

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 evidence about alleged murders by a gang, even though the defendant conceded that enterprise evidence? *United States v. Martinez*, No. 22-2034 (brief filed August 22, 2022).

Did the district court err by admitting audio on officer's body camera video of the aftermath of a shooting in this ammunition possession case, because that audio was cumulative, emotional and prejudicial? *United States v. Williams*, No. 22-1072 (brief filed August 17, 2022).

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 (reply brief filed July 21, 2022).

Did the district court err by permitting testimony about gang relationships among witnesses? *United States v. Andrew Gallegos*, No. 20-2056 (reply brief filed September 12, 2022).

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 (reply brief filed July 17, 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 plainly err by allowing two law enforcement officers to provide expert opinion that the defendant's version of events was not credible? *United States v. Griffith*, No. 22-7005 (gov't brief filed September 19, 2022).

Did the district court err by failing to perform its gatekeeper function and allowing the testimony of two medical experts? *United States v. Pebrson*, No. 21-4133 (reply brief filed June 21, 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).

Y. Rule 901 (authentication)

Did the district court abuse its discretion by admitting into evidence a list of serial numbers of bills purportedly stolen from a credit union, without reliable authentication? *United States v. Quintana*, No. 22-2069 (brief filed September 11, 2022).

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. Polk*, No. 22-5037 (brief filed September 20, 2022) (18 U.S.C. § 13).
- United States v. DeVargas*, No. 22-2064 (brief filed September 20, 2022) (18 U.S.C. § 922(g), search warrant issues, Miranda).
- United States v. Freeman*, No. 22-2039 (brief filed September 16, 2022) (18 U.S.C. § 2242).
- United States v. Willow*, No. 22-8037 (brief filed September 14, 2022) (revocation sentence reasonableness).
- United States v. Rivera*, No. 22-6087 (brief filed September 12, 2022) (revocation sentence reasonableness).
- United States v. Lucero*, No. 22-2018 (brief filed September 12, 2022) (warrantless seizure, search warrant issues).
- United States v. Chavarin*, No. 21-4105 (brief filed September 12, 2022) (§ 2255).
- United States v. Quintana*, No. 22-2069 (brief filed September 11, 2022) (FRE 901).
- United States v. Gallimore*, No. 22-6081 (brief filed September 8, 2022) (ACCA).
- United States v. Warrington*, No. 22-7003 (brief filed September 7, 2022) (Sixth Amendment right to counsel).
- United States v. Lester*, No. 22-6077 (brief filed September 6, 2022) (USSG § 5G1.3).
- United States v. Phillips*, No. 22-5053 (brief filed September 6, 2022) (traffic stops, inventory searches, Fifth Amendment self incrimination).
- United States v. Eddington*, No. 22-1076 (brief filed August 26, 2022) (USSG § 2K2.1, procedural reasonableness).
- United States v. Uhegwu*, No. 22-6093 (brief filed August 23, 2022) (USSG § 2K2.1).
- United States v. Slinkard*, No. 22-5018 (brief filed August 22, 2022) (allocution).
- United States v. Martinez*, No. 22-2034 (brief filed August 22, 2022) (speedy trial, FRE 403, recusal).
- United States v. Griffith*, No. 22-7005 (brief filed August 19, 2022) (expert opinions).
- United States v. Perkins*, No. 22-2043 (brief filed August 18, 2022) (28 U.S.C. § 2255, § 924(c), ACCA).
- United States v. Adams*, No. 22-2071 (brief filed August 17, 2022) (substantive reasonableness).
- United States v. Williams*, No. 22-1072 (brief filed August 17, 2022) (FRE 403).
- United States v. Hunsaker*, No. 22-7016 (brief filed August 16, 2022) (USSG § 3B1.1).