

ISSUES PENDING IN THE TENTH CIRCUIT

COMPILED BY THE KANSAS FEDERAL PUBLIC DEFENDER



Updated January 30, 2017

PREFACE

In the fall of 2014, we (the Kansas Federal Public Defender) contacted the Tenth Circuit Court of Appeals about compiling a list of issues pending in the Court. To accomplish our goal, we needed the Tenth Circuit's assistance, and, with no resistance, the Court came through (we are particularly indebted to Chief Deputy Clerk Chris Wolpert). Without the Tenth Circuit's assistance, this document would not exist.

We borrowed this idea from the Federal Public Defender for the Central District of Illinois. That office produces a similar document for issues pending in the Seventh Circuit (available here: <http://ilc.fd.org/General%20Documents/7IP.pdf>). We thank them for allowing us to follow their lead.

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

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

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

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

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

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

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

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I. Appeals

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

Does the Tenth Circuit have jurisdiction to hear a government appeal from a post-verdict judgment of acquittal on one of multiple counts before the defendant is sentenced? *United States v. Drage*, No. 15-4190 (argued Nov. 15, 2016).

Should the Tenth Circuit remand this direct-appeal case for an evidentiary hearing on claims of ineffective assistance of counsel (rather than directing that those claims be brought later, in a collateral proceeding)? *United States v. Kearn*, No. 15-3121 (reply filed Jan. 23, 2017).

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

The Tenth Circuit has previously stated that when reviewing the denial of a motion to suppress, the Court "views the evidence in the light most favorable to the government." Should the Court revisit this standard? *United States v. Nelson*, No. 16-3292 (brief filed Dec. 20, 2016); *United States v. Knox*, No. 16-3324 (brief filed Jan. 27, 2017).

II. Competence

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

Was this capital defendant deprived of due process when he was allowed to waive counsel, tried for murder, and sentenced to death—all while incompetent? *Lay v. Royal*, No. 15-5111 (brief filed Dec. 9, 2016).

III. Confessions

IV. Continuances

V. Discovery

Did the defendant in this criminal contempt action have a right to discovery of the federal civil judge's referral of the case to the United States Attorney for prosecution? *United States v. Bowers*, No. 16-4008 (reply brief filed Oct. 3, 2016) (requesting appellate court to conduct in camera review of referral to answer this question).

Did the district court err in denying any hearing or remedy for the defendant's allegations of government discovery violations? *United States v. Riddle*, No. 16-4143 (brief filed Jan. 20, 2017).

VI. Double Jeopardy

Did the defendant's acquittal in a previous drug-conspiracy case bar his prosecution in this drug-conspiracy case? *United States v. Brown*, No. 16-6210 (brief filed Dec. 22, 2016).

VII. Eighth Amendment and Capital Issues

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

Whether there was sufficient evidence to support the HAC aggravator in a capital cases involving a shotgun death at close range. *Pavatt v. Trammell*, No. 14-6117 (argued March 8, 2016).

Whether the trial court's failure to provide an adequate instruction that the jury must find "conscious physical suffering" beyond a reasonable doubt before finding HAC violated the defendant's constitutional rights to fair trial, reliable sentencing, and due process. *Pavatt v. Trammell*, No. 14-6117 (argued March 8, 2016).

This defendant was convicted as an adult for non-homicide offenses committed when he was 16 years old. An Oklahoma state judge sentenced him to consecutive sentences totaling 131.75 years before he is eligible for parole. Does this sentence violate *Graham v. Florida's* requirement that juveniles convicted of non-homicide offenses have a meaningful and realistic opportunity for release? *Budder v. Addison*, No. 16-6088 (state's supplemental brief filed Dec. 19, 2016).

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

Did this Oklahoma state trial judge improperly admit victim-impact evidence during the sentencing phase of this capital trial, and did the state appellate court improperly find this error harmless? *Murphy v. Royal*, No. 15-7041, 7068 (reply brief filed Jan. 19, 2017).

Did Oklahoma law wrongly cut off inquiry into this capital defendant's intellectual disability, which would render him ineligible for the death penalty? *Murphy v. Royal*, No. 15-7041, 7068 (reply brief filed Jan. 19, 2017).

Was the evidence insufficient to support the heinous, atrocious, or cruel (HAC) aggravating factor in this capital case, and were the jury instructions on this factor unconstitutionally flawed? *Murphy v. Royal*, No. 15-7041, 7068 (reply brief filed Jan. 19, 2017).

Should the jurors in this capital case have been instructed that "life without parole" means no possibility of parole, ever? *Murphy v. Royal*, No. 15-7041, 7068 (reply brief filed Jan. 19, 2017).

Did the state court's failure to sever this capital defendant's trial from that of his son violate the Eighth Amendment? *Lay v. Royal*, No. 15-5111 (brief filed Dec. 9, 2016).

VIII. Ex Post Facto Issues

Whether retrospective application of USSG § 1B1.10(b)(2) (limiting the extent of an amended-guideline reduction) violates the *ex post facto* clause. *United States v. Green*, No. 15-6156 (brief filed October 26, 2015).

IX. Forfeiture

Did the district court err in entering a final forfeiture order absent any pre-sentencing preliminary order, as required by Fed. R. Crim. P. 32.2? *United States v. Dabda*, No. 15-3237 (reply brief filed May 31, 2016).

Does the district court's joint-and-several \$16,985,250.00 forfeiture order, based on the entire drug conspiracy (and not just the defendant's role in it), violate the excessive fines clause or 21 U.S.C. § 853? *United States v. Pickel*, No. 16-3041 (reply brief filed Nov. 30, 2016).

X. Fourth Amendment Issues

A. Arrest Warrant

B. Consent

C. Excessive Force

D. Fruit of the Poisonous Tree

E. Good Faith Exception

Whether the warrant affidavit was so lacking in probable cause as to rule out good faith. *United States v. Fuller*, No. 15-7036 (gov't brief filed December 23, 2015).

Whether the issuing judge wholly abandoned his judicial role. *United States v. Fuller*, No. 15-7036 (gov't brief filed December 23, 2015).

Can *Leon* save a search of cellphones and cellphone data, when neither were included in the search warrant? *United States v. Russian*, No. 15-3213 (reply brief filed June 20, 2016).

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

Can *Leon* save the execution of a search warrant that was based on an invalid protective sweep? *United States v. Bagley*, No. 16-3305 (brief filed Jan. 19, 2017).

Did the district court erroneously consider information outside of the warrant affidavit and warrant process when it found good faith? Was the district court's good-faith finding otherwise erroneous? *United States v. Knox*, No. 16-3324 (brief filed Jan. 27, 2017).

F. Government Actor

G. Hearing Issues

H. Inventory Searches

I. Knock and Talk

J. Plain View Doctrine

K. Protective Sweeps

Did the district court err in holding that a warrantless search of a basement, including a bed in the basement, was a valid protective sweep after the defendant was arrested on a different floor of the home? *United States v. Nelson*, No. 16-3292 (brief filed Dec. 20, 2016).

Did the district court err in finding that a protective sweep conducted inside a house, after the defendant was arrested (pursuant to an arrest warrant) at the front door of the house, was valid? *United States v. Bagley*, No. 16-3305 (brief filed Jan. 19, 2017).

L. Scope of Warrantless Search

M. Search Incident to Arrest

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

Whether the search warrant lacked probable cause absent sufficient detail and absent a showing that the CI was reliable. *United States v. Fuller*, No. 15-7036 (gov't brief filed December 23, 2015).

Is a search warrant fatally deficient on its face when it is not identified as a search warrant and does not purport to make any finding of probable cause? *United States v. Williamson*, No. 15-3147 (reply brief filed April 11, 2016).

Whether the seizure of cellphones and cellphone data—which the affidavit sought to include in a warrant, but the warrant did not include—violated the 4th Amendment. *United States v. Russian*, No. 15-3213 (reply brief filed June 20, 2016).

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

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

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

Whether the district court erred in granting blanket suppression for a *Franks* violation. *United States v. Gehrmann*, No. 16-1208 (gov't reply brief filed Dec. 2, 2016) (gov't appeal).

Did this search-warrant affidavit contain a sufficient nexus to the property to be searched? *United States v. Ingram*, No. 16-6221 (brief filed Nov. 22, 2016).

Did the district court err in denying a *Franks* hearing on the defendant's claim that the search-warrant affidavit omitted material information that the defendant and his alleged associates were in prison during the time the affiant claimed they were involved in an ongoing drug conspiracy? *United States v. Ingram*, No. 16-6221 (brief filed Nov. 22, 2016).

Should evidence seized from the defendant's smartphone have been suppressed as the fruit of an unlawful search, where the search warrant for the phone was issued by a Kansas state judge, but executed in Missouri (beyond the Kansas judge's jurisdiction)? *United States v. Pacheco*, No. 16-3294 (brief filed Jan. 20, 2017).

Did officers exceed the scope of a search warrant for "records of narcotics transactions" when they seized the defendant's electronic devices? *United States v. Pacheco*, No. 16-3294 (brief filed Jan. 20, 2017).

O. Standing (reasonable expectation of privacy)

P. *Terry* Stops: Initial Detention

Did officers exceed the scope of a *Terry* stop when they ordered the defendant to dismount his bicycle, took him to the ground, and tased him? *United States v. Morgan*, No. 16-5015 (gov't brief filed July 27, 2016).

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

A police officer stopped this defendant in the street and asked him where he had just come from. Did the officer's belief that the defendant's answer might have been a lie provide reasonable suspicion to detain him? *United States v. Coca*, No. 16-2093 (reply brief filed Nov. 14, 2016).

Q. *Terry*: Frisk

R. Traffic Stops

Whether officers had probable cause to conduct a second traffic stop on the defendant's vehicle 16 miles from the site of an initial stop and search that turned up no contraband, where officers learned nothing between the two stops to establish probable cause. *United States v. Pittman*, No. 15-7002 (brief filed May 6, 2015).

Whether an officer had reasonable suspicion to detain two women for 30 minutes until a drug dog arrived after they declined a request to search their car. The officer cited nervousness, imprecision about their final destination; an unreasonably short rental contract for the purported drive across country and back; and the defendant's jokingly telling the officer not to look in the back seat because it was "a mess." *United States v. Lopez*, No. 15-3130 (reply brief filed May 2, 2016); *United States v. Lopez*, No. 15-3134 (gov't brief filed March 21, 2016).

Were there sufficient facts in the record to support the district court's conclusion that the traffic stop in this case was supported by a reasonable suspicion that the defendant did not come to a complete stop at a stop sign? *United States v. Aleman*, No. 15-3321 (reply brief filed July 1, 2015).

In this case, a traffic stop may have been supported at its inception by the officer's inability to see the defendant's license plate. Once the car pulled over and the officer could see the plate, was any further stop unreasonable? *United States v. Aleman*, No. 15-3321 (reply brief filed July 1, 2015).

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

Did an officer unreasonably prolong this traffic stop so that a drug dog could walk around the defendant's truck? *United States v. Pickel*, No. 16-3041 (reply brief filed Nov. 30, 2016).

Did the officer's immediate questioning during this traffic stop for a burned out tag light (Have you been in trouble before? Have you been to prison?) exceed the alleged purpose of the stop? *United States v. Cone*, No. 16-5125 (reply brief filed Dec. 15, 2016).

Agents had probable cause to search this defendant's trunk for a 40-inch-long rifle. Did a search of a small storage compartment in the passenger area of the car exceed the permissible scope of the search? *United States v. Mirabal*, No. 16-2188 (brief filed Dec. 9, 2016).

Was the traffic stop of this defendant justified? *United States v. Brown*, No. 16-6210 (brief filed Dec. 22, 2016).

S. Warrantless Arrests

Officers responded to a 911 call that a woman was afraid of her "pimps." Was this information alone probable cause to arrest the men found with the woman for human trafficking? *United States v. Fykes*, No. 16-1034 (reply brief filed Aug. 25, 2016) (appeal from denial of motion to suppress evidence found in car during inventory search after arrest).

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

At what point did officers arrest this defendant: when they pulled into a parking lot where the defendant was sitting in his car, when they shined their "takedown lights" into his car, when they converged on the car (in such a way that he could not have left), shouting, with guns drawn, or when they forced the defendant out of the car? *United States v. Roberson*, No. 16-6136 (gov't brief filed Nov. 16, 2016).

Did this warrantless arrest of the defendant, who was "just standing" on the front porch of his home, simply because the defendant was wearing a baseball cap and grey shirt (described by a 911 caller as the clothing of a nearby burglary suspect), violate the Fourth Amendment? *United States v. Soza*, No. 16-2182 (reply brief filed Jan. 9, 2017).

T. Warrantless Seizures

U. Warrantless Searches

Law enforcement secretly installed a zoom- and freeze-frame capable video camera high on a utility pole 70 feet from the defendant's home, and watched the live feed for a month. Was this warrantless surveillance an unconstitutional search? *United States v. Cantu*, No. 16-2191 (gov't brief filed Dec. 9, 2016).

XI. Fourteenth Amendment: Due Process

Did the state court violate this capital defendant's due process rights when it admitted a steady stream of prurient and irrelevant evidence about her sex life (purportedly to show her motive to kill her estranged husband)? *Andrew v. Aldridge*, No. 15-6190 (brief filed Dec. 27, 2016).

XII. Fifth Amendment: Due Process

The government filed a 21 U.S.C. § 851 information after the defendant declined a proffer interview and elected to proceed to trial. Should the district court have dismissed the § 851 information on grounds of prosecutorial vindictiveness? (Distinguishing *Bordenkircher*.) *United States v. Creighton*, No. 15-8118 (reply brief filed Sept. 13, 2016).

Did the district court err in denying any evidentiary hearing on this defendant's selective-prosecution and vindictive-prosecution claims? *United States v. Portillos*, No. 16-1323 (brief filed Dec. 22, 2016).

XIII. Fifth Amendment: Confessions & *Miranda*

Was it plain error for the district court not to correct the prosecutor's *Doyle* misconduct when the court recognized the misconduct, but said nothing simply because defense counsel failed to object? *United States v. Sandoval*, No. 15-1311 (reply brief filed May 2, 2016).

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

Should the district court have suppressed this murder defendant's statements on grounds that law enforcement continued to question him after he invoked his *Miranda* rights, in violation of *Edwards v. Arizona*? *United States v. Yepa*, No. 16-2060 (reply brief filed Dec. 19, 2016).

Whether this postal employee was "in custody" when postal investigators questioned him, and whether (1) he should have been given a full *Miranda* warning in addition to the *Garrity* warning the investigators gave him, and (2) his statements were voluntary. *United States v. Lemon*, No. 16-3041 (brief filed Nov. 30, 2016).

Did the state court err in this capital case when it admitted the defendant's un-*Mirandized* statements? *Andrew v. Aldridge*, No. 15-6190 (brief filed Dec. 27, 2016).

XIV. Habeas Issues

A. 28 U.S.C. § 2241

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

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

Is *Alleyne* retroactive to cases on collateral review, and should the district court have granted *Alleyne* relief in this § 2241 action? *Hill v. Oliver*, No. 16-1165 (reply brief filed Jan. 10, 2017).

Whether this state prisoner's suspended-sentence revocation violated due process insofar as it was based on an allegation that the defendant violated a condition of *probation* while he was in *prison*. *Leatherwood v. Allbaugh*, No. 16-6251 (reply brief filed Dec. 8, 2016).

Whether the state judge who revoked this defendant's suspended sentence had an unconstitutional conflict of interest, specifically, a desire to acquiesce in the prosecutor's request for revocation given that the same prosecutor was at the same time investigating the judge for criminal offenses (and whether the federal district court should have granted a hearing on this claim). *Leatherwood v. Allbaugh*, No. 16-6251 (reply brief filed Dec. 8, 2016).

B. 28 U.S.C. § 2254

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

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

When do new facts presented at a § 2254 evidentiary hearing transform an original, exhausted claim into a new, unexhausted (and therefore prohibited) claim? *Milton v. Miller*, No. 15-6069 (brief filed October 9, 2015).

Whether this Oklahoma prisoner should have been afforded equitable tolling on grounds that his state appellate counsel never advised him that he had lost his state appeal. *White v. Patton*, No. 15-6174 (brief filed December 3, 2015).

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

Did the district court violate the AEDPA when it granted relief in this capital habeas case? *Jones v. Duckworth*, No. 15-6086, 15-6087 (cross-appellant's reply brief filed Sept. 2, 2016) (state's appeal from conditional grant of habeas corpus vacating Oklahoma death sentence).

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

Should the federal district court have stayed and abeyed this habeas petition so that the petitioner could finish exhausting his state court remedies? *Murphy v. Royal*, No. 15-7041, 7068 (reply brief filed Jan. 19, 2017).

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

Should the district court have temporarily stayed (and equitably tolled) this capital habeas proceeding upon undisputed evidence of the petitioner's schizophrenia, present incompetence, and likelihood of restoration to competency? *Lay v. Royal*, No. 15-5111 (brief filed Dec. 9, 2016).

Did the district court erroneously deny habeas relief by misapplying AEDPA standards to the prejudice prong of *Strickland*? *Nenmiller v. Raemisch*, No. 16-1396 (brief filed Dec. 22, 2016).

Should the district court have granted this state capital defendant habeas relief based on individual or cumulative error, or at the very least have held an evidentiary hearing on her *Brady* and IAC claims? *Andrew v. Aldridge*, No. 15-6190 (brief filed Dec. 27, 2016).

C. 28 U.S.C. § 2255

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

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

Johnson claim: Whether a challenge to the residual clause of the career offender guideline asserts a constitutional claim (for which a certificate of appeal from the denial of a § 2255 motion may be granted); and whether *Johnson* applies retroactively for purposes of collateral review under § 2255. *United States v. Rollins*, No. 15-1459 (brief filed May 27, 2016; amicus brief by FPD Colo. & Wyo. filed May 16, 2016).

Should the district court have held a hearing on this § 2255 petitioner's claim that his attorney was ineffective in failing to rebut the government's DNA expert's probability testimony? *United States v. Brooks*, No. 16-3064 (brief filed Aug. 8, 2016).

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

Johnson claim: Whether Wyoming and Nebraska burglary convictions are violent felonies for ACCA purposes after *Johnson*, and whether this claim is cognizable in a § 2255 proceeding. *United States v. Driscoll*, No. 16-8118 (brief filed Dec. 30, 2016).

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

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

E. Procedural

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

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

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

XV. Indictment Issues

A. Constructive Amendment

Did the government’s evidence and argument on this false-statements count constructively and impermissibly broaden the indictment by allowing for a conviction based on an uncharged statement? *United States v. Miller*, No. 16-1231 (brief filed Dec. 16, 2016).

B. Duplicitous

In this unlawful-prescriptions case, the government prosecuted the doctor-defendant on a “drug cocktail” theory, charging multiple controlled substances in a single count. Were these charges duplicitous? *United States v. Miller*, No. 16-1231 (brief filed Dec. 16, 2016).

C. Grand Jury Issues

D. Sufficiency of the Indictment (Sixth Amendment)

E. Variance

Was there a prejudicial variance in this drug case between the charged, large conspiracy and the evidence of multiple separate conspiracies at trial? *United States v. Dabda*, No. 15-3237 (reply brief filed May 31, 2016); *United States v. (Los Rovell) Dabda*, No. 15-3236 (reply brief filed Sept. 26, 2016).

XVI. Ineffective Assistance of Counsel

Was trial counsel ineffective in this federal arson and destructive-device case, and did the § 2255 court properly determine questions of strategy and prejudice? *United States v. Zajac*, No. 16-4020 (reply brief filed Sept. 6, 2016).

XVII. Jurisdictional Issues

Did the State of Oklahoma have jurisdiction over these capital-murder charges, where the defendant and the victim were both Muscogee (Creek) Nation members, and the crime occurred on a restricted allotment within the Nation's reservation? *Murphy v. Royal*, No. 15-7041, 7068 (reply brief filed Jan. 19, 2017).

XVIII. Motion Practice

XIX. Offenses

A. 8 USC § 1326 (illegal reentry)

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

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

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

Was the district court's failure to instruct the jury, consistent with *Wolfname*, on the essential assault element of 18 U.S.C. § 111 plain error? *United States v. Jereb*, No. 16-4127 (brief filed Nov. 18, 2016).

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

F. 18 U.S.C. § 371 (conspiracy)

Was the evidence in this case sufficient to prove the charged 43-defendant, multi-drug conspiracy? *United States v. Dabda*, No. 15-3237 (reply brief filed May 31, 2016).

Was evidence of this defendant's interest in growing marijuana at home sufficient to establish his participation in a much larger cocaine and marijuana-import conspiracy? *United States v. Pickel*, No. 16-3041 (reply brief filed Nov. 30, 2016).

Was there a prejudicial variance in this drug case between the charged, large conspiracy and the evidence of multiple separate conspiracies at trial? *United States v. Dabda*, No. 15-3237 (reply brief filed May 31, 2016). Similar variance argument raised in *United States v. Pickel*, No. 16-3041 (reply brief filed Nov. 30, 2016).

Did the district court err in granting the defendant's post-verdict motion for judgment of acquittal in this case charging a conspiracy to defraud the IRS (a "Klein conspiracy")? *United States v. Drage*, No. 15-4190 (argued Nov. 15, 2016).

Defendant Wells, a journalist, reported a pending land-use protest online. He was convicted of conspiring to trespass on public lands. Was the evidence sufficient to support his convictions, in

light of his First Amendment defense? *United States v. Wells*, No. 16-4006 (reply brief filed Sept. 12, 2016).

Was the evidence sufficient to prove that the defendant joined the broad alleged conspiracy rather than smaller, limited conspiracies? *United States v. (Los Rovell) Dabda*, No. 15-3236 (reply brief filed Sept. 26, 2016).

Was the evidence sufficient in this drug-conspiracy case to support the jury's quantity finding? Was it sufficient to support the jury's finding that the defendant conspired to commit a murder? *United States v. Sicairos*, No. 15-1422 (reply brief filed July 25, 2016).

G. 18 U.S.C. § 666 (bribery)

Was the evidence insufficient in this bribery case to establish the statutory value element, or is that element vague as applied in this case? *United States v. Hardin*, No. 16-1229 (brief filed Nov. 10, 2016).

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

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

Was evidence of a single, ambiguous phone call sufficient to sustain this defendant's conviction of using a communication device? *United States v. Pickel*, No. 16-3041 (reply brief filed Nov. 30, 2016).

J. 18 U.S.C. § 844 (arson)

This defendant was charged with arson of a building receiving federal funds, for starting a fire at a county attorney's office. That office had not received federal funds in over two years. Was the evidence sufficient of the "federal funds" element to sustain the conviction? Did the district court err in instructing the jury that it need only find that the office had "received"—rather than was currently "receiving"—federal funds? *United States v. Elliott*, No. 15-8138 (gov't brief filed June 24, 2016).

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

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

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

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

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

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

Does a municipal court conviction qualify as a "misdemeanor crime of domestic violence" as that phrase is defined under 18 U.S.C. § 921(a)(33)(A)(i)? *United States v. Pauler*, No. 16-3070 (reply brief filed Oct. 31, 2016).

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

N. 18 U.S.C. 922(n) (felon under indictment)

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

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

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

Was the evidence sufficient to prove that the defendant possessed a firearm in furtherance of a drug-trafficking crime when the government's main witness (the defendant's girlfriend) testified that the guns were merely present on a separate floor of the house, but were never carried, used, or discussed in connection with the defendant's marijuana growing operation? *United States v. Ransom*, No. 15-3293 (reply brief filed Sept. 6, 2016).

Johnson claim: Is a Hobbs Act robbery a crime of violence for purposes of 18 U.S.C. § 924(c)(3)(A)? *United States v. Melgar-Cabrera*, No. 16-2018 (reply brief filed Jan. 1, 2017).

Johnson claim: Does *Johnson* invalidate the residual clause of § 924(c), and is a Hobbs Act robbery a crime of violence for purposes of § 924(c)? *United States v. Dubarry*, No. 16-4067 (appeal from denial of § 2255 relief; brief filed Sept. 15, 2016).

Was the evidence sufficient in this case to prove that the defendant intentionally possessed a firearm *in furtherance* of drug crimes? *United States v. Gabourel*, No. 16-6227 (gov't brief filed Jan. 12, 2017).

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

Johnson claim: Is armed bank robbery a crime of violence for purposes of § 924(c)? *United States v. Cravens*, No. 16-8111 (brief filed Dec. 27, 2016).

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

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

R. 18 U.S.C. § 1028A (identity theft)

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

Was the evidence insufficient to prove that any allegedly false statement was made to an FDIC-insured financial institution? *United States v. Riddle*, No. 16-4143 (brief filed Jan. 20, 2017).

T. 18 U.S.C. § 1201 (kidnapping)

U. 18 U.S.C. § 1341 (mail fraud)

V. 18 U.S.C. § 1343 (wire fraud)

Was the evidence sufficient to support this wire-fraud defendant's conviction? *United States v. (Robert) Arnold*, No. 16-6089 (reply brief filed Jan. 25, 2017).

W. 18 U.S.C. § 1344 (bank fraud)

This defendant attempted, incompetently, to apply for a loan using his father's name and identifying information. He was caught before completing the preliminary application. Bank employees later testified that the application never went to the underwriter (the loan decisionmaker), and the bank was never at a risk of financial loss. Absent materiality or any risk of loss, was the evidence sufficient to establish bank fraud? *United States v. Williams*, No. 16-3220 (gov't brief filed Jan. 26, 2017).

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

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

1. subsection (a) (kills or attempts to kill)

In order to commit witness tampering, must the defendant kill another person with intent to prevent communications to a *federal* law enforcement officer, and should the district court have so instructed the jury? *United States v. Sicairos*, No. 15-1422 (reply brief filed July 25, 2016).

2. subsection (b) (uses physical force or threat)

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

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

Is merely shoving aside a cashier sufficient evidence of force to prove a Hobbs Act robbery? *United States v. Thomas*, No. 16-2044 (reply brief filed Oct. 7, 2016).

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

Was the evidence sufficient to support this defendant's money-laundering conspiracy conviction? *United States v. Brown*, No. 16-6210 (brief filed Dec. 22, 2016).

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

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

Section 2251 criminalizes *using* a minor to engage in sexually explicit activity. This language suggests active employment (i.e., a causal relationship between the defendant and the minor's conduct). Does secretly videotaping an unaware minor in the bathroom (and later editing the images) satisfy the "use" element of this crime? Should the district court have dismissed the indictment for failing to state a crime, or acquitted the defendant at his bench trial? *United States v. Theis*, No. 16-3058 (gov't brief filed Nov. 4, 2016).

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

Was the evidence of this businessman’s connection to massage parlors sufficient to prove that he committed prostitution-related crimes? Alternatively, was the evidence sufficient to overcome his entrapment defense? *United States v. Tee*, No. 16-3243 (brief filed Dec. 30, 2016).

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

Did Congress exceed its commerce power when it enacted 18 U.S.C. § 2423(c) (the “noncommercial prong”), and is this subsection unconstitutional either facially or as applied to this defendant? *United States v. Durham*, No. 16-6075 (gov’t brief filed Nov. 10, 2016).

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

In an indictment for child sex trafficking, is the government required to charge that the defendant knew or recklessly disregarded the fact that the victim was under 18? *United States v. Duong*, No. 16-6078 (gov’t appeal from dismissal of indictment) (reply brief filed Sept. 20, 2016).

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

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

Was the government’s evidence sufficient to prove constructive possession of PCP under *Little* or otherwise? *United States v. Gabourel*, No. 16-6227 (gov’t brief filed Jan. 12, 2017).

Was the government’s evidence sufficient to prove that this defendant—who appeared a single time at a drug-conspiracy headquarters and was videotaped counting cash—distributed or aided and abetted the distribution of heroin? *United States v. Arciniega-Zetin*, No. 16-4145 (brief filed Jan. 6, 2017).

JJ. 21 U.S.C. § 846 (drug conspiracy)

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

Whether evidence of recorded phone calls was sufficient to prove the defendant’s involvement in the charged drug conspiracy. *United States v. Alcorta*, No. 15-3129 (reply brief filed January 21, 2016).

Was the testimony of a drug-addicted gang member, absent other corroborating evidence, sufficient to sustain the defendant’s drug conspiracy conviction? *United States v. Gabourel*, No. 16-6227 (gov’t brief filed Jan. 12, 2017).

Was this defendant’s mere presence among drug dealers sufficient to convict him of a drug conspiracy and other drug counts? *United States v. Grant*, No. 16-6228 (brief filed Dec. 13, 2016).

Was the evidence sufficient to support this defendant’s drug-conspiracy conviction? *United States v. Brown*, No. 16-6210 (brief filed Dec. 22, 2016).

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

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

Did the district court err when it refused to instruct the jury that the defendant could not be convicted unless the government proved that drug-distribution was one of the principle or prime purposes for maintaining the premises? *United States v. (Los Rovell) Dahda*, No. 15-3236 (reply brief filed Sept. 26, 2016).

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

MM. 26 U.S.C. § 7201 (tax evasion)

NN. 26 U.S.C. § 7212

OO. 28 U.S.C. § 455 (recusal)

Whether, in this case involving a Facebook rant about an imaginary shooting in Littleton, Colorado, the district court's close personal connection to the Columbine shootings created an appearance of bias, and, thus, whether the district court erred when it failed to recuse itself (government also argues harmless error). *United States v. Jordan*, No. 14-1377 (argued Sept. 10, 2015).

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

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

Does 49 U.S.C. § 46504 require specific intent, and did the district court erroneously exclude intoxication evidence offered to disprove intent? *United States v. Lynch*, No. 16-1242 (brief filed Nov. 10, 2016).

Is the "intimidation" element of 49 U.S.C. § 46504 overbroad or unconstitutionally vague? *United States v. Lynch*, No. 16-1242 (brief filed Nov. 10, 2016).

XX. Pleas

A. Acceptance of Plea

Did the district court erroneously accept this conspiracy plea without an adequate factual basis with respect to the amount of drugs that would be attributed to the defendant at sentencing for mandatory-minimum purposes? *United States v. Carillo*, No. 15-2200 (reply brief filed July 5, 2016).

B. Appeal Waiver

Whether this defendant's agreement to an ACCA sentence and waiver of any collateral attack in his 11(c)(1)(C) plea agreement forecloses § 2255 relief based on *Johnson*. *United States v. Pam*, No. 16-2171 (brief filed Oct. 11, 2016).

Whether this defendant's plea waiver was knowing and voluntary. *United States v. Barron*, No. 16-7030 (reply brief filed Nov. 8, 2016).

Whether enforcing this defendant's collateral-attack waiver to dismiss his *Johnson*-based § 2255 action resulted in a miscarriage of justice. *United States v. Richards*, No. 16-6181, 16-6198 (reply brief filed Dec. 29, 2016); *United States v. Rabieh*, No. 16-6317 (brief filed Dec. 28, 2016).

C. Breach

D. Rejection of Plea Agreement

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

E. Withdrawal of Plea

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

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

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

Whether the restitution award in the written Judgment is erroneous because it is different than the amount ordered at the sentencing hearing. *United States v. Dickerson*, No. 14-2223 (argued Nov. 19, 2015).

Whether the district court erred in its restitution award because the government failed to meet its burden of proof on the issue because it did nothing other than rely on unsupported statements in the PSR. *United States v. Dickerson*, No. 14-2223 (argued Nov. 19, 2015).

Did the district court plainly err by including losses predating the temporal scope of the defendant's embezzlement plea in its restitution award? *United States v. Jones*, No. 15-3059 (reply brief filed December 30, 2015).

Was there sufficient evidence to support the district court's restitution order? *United States v. Pielsticker*, No. 15-5105 (reply brief filed April 13, 2016).

Did the district court plainly error by failing to reduce restitution in this bank fraud case by the proceeds of sold collateral? *United States v. Wright*, No. 15-5090 (reply brief filed April 28, 2016).

Is the district court’s restitution order—based on its novel view of loss in this real-estate investment fraud case—unlawful? *United States v. Evans*, No. 15-1461 (reply brief filed Aug. 8, 2016).

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

Did the government sufficiently establish that certain lenders were “victims” (rather than participants in the offense) for purposes of restitution in this wire-fraud case? *United States v. Arnold*, No. 16-6152 (reply brief filed Nov. 28, 2016).

Did the district court err by including noncompensable losses in its restitution order? *United States v. Arnold*, No. 16-6152 (reply brief filed Nov. 28, 2016).

Did the district court exceed its statutory authority when it ordered restitution for losses sustained by individuals who were not “victims” of the offense? *United States v. Ballard*, No. 16-3274 (brief filed Nov. 22, 2016).

Did the district court exceed its statutory authority when it ordered restitution for amounts that did not constitute “losses” sustained by a victim as a result of the offense? *United States v. Ballard*, No. 16-3274 (brief filed Nov. 22, 2016).

XXII. Rules of Criminal Procedure

A. Rule 8 (Joinder/Severance)

Should the district court have severed one of four Hobbs Act robbery counts when the first robbery predated the others by more than three years and did not involve the same *modus operandi*? *United States v. Thomas*, No. 16-2044 (reply brief filed Oct. 7, 2016).

Should the district court have severed the defendants in this drug-conspiracy case due to antagonistic defenses and different degrees of culpability? *United States v. Brown*, No. 16-6210 (brief filed Dec. 22, 2016).

B. Rule 12 (motions)

C. Rule 32 (sentencing procedures)

D. Rule 33 (new trial)

Did the district court err in ordering a new trial as an alternative remedy in this IRS “Klein conspiracy” case, in case its post-verdict acquittal of the defendant was reversed on appeal? *United States v. Drage*, No. 15-4190 (argued Nov. 15, 2016).

E. Rule 41 (search & seizure)

Whether the district court erred in (1) holding that a Virginia magistrate lacked authority to issue an NIT (child-pornography) warrant to search a Colorado computer during the Playpen investigation; (2) holding that suppression was an appropriate remedy; and (3) rejecting the government’s good-faith argument. *United States v. Workman*, No. 16-1401 (gov’t appeal; brief filed Dec. 28, 2016).

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

Where the sentencing judge took an unusually active role during a remand for resentencing and developed her own novel theory of loss in order to sentence the defendant harshly, should the case be assigned to a different judge if another resentencing is ordered after the defendant's second appeal? *United States v. Evans*, No. 15-1461 (argued Nov. 17, 2016).

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

XXIV. Second Amendment Issues

XXV. Sentencing

A. Allocation

Did the district court plainly err when it delayed allocation until after its lengthy announcement of a "tentative" sentence? *United States v. Theis*, No. 16-3058 (gov't brief filed Nov. 4, 2016).

Did the district court plainly err when it delayed allocation until after its lengthy announcement of a "tentative" sentence that morphed into a "decided" sentence before the defendant was invited to speak? *United States v. Valdez-Aguirre*, No. 15-3275 (reply brief filed Sept. 23, 2016).

Whether a district court's failure to offer the defendant allocation at sentencing is plain error; whether there might be exceptions to that rule; and whether a defendant must proffer a proposed allocation statement to establish plain error on appeal. *United States v. Bustamante-Conchas*, No. 15-2025 (reh. en banc; reply brief filed Dec. 16, 2016).

B. Apprendi

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

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

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

Johnson claim: Whether Oklahoma convictions for aggravated attempt to elude a police officer, and assault and battery with a deadly weapon are violent felonies for ACCA purposes (appeal from denial of § 2255 relief). *United States v. Burtons*, No. 16-6091 (reply brief filed Dec. 5, 2016).

Johnson claim: Whether an Oklahoma conviction for feloniously pointing a firearm is a violent felony for ACCA purposes (and whether the modified categorical approach applies here). *United States v. Tittle*, No. 15-6236 (reply brief filed Oct. 5, 2016).

Johnson claim: Whether the following are violent felonies for ACCA purposes: Utah attempted robbery; Utah assault by a prisoner; or assaulting, resisting, or impeding an officer under 18 U.S.C. § 111(a). *United States v. Ama*, No. 16-4039 (appeal from denial of § 2255 relief; reply brief filed Dec. 22, 2016).

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

Johnson claim: Whether California burglary and New Mexico burglary are violent felonies for ACCA purposes, and whether this issue is cognizable in a § 2255 proceeding (the district court dismissed the challenge as time-barred). *United States v. Velasquez-Contreras*, No. 16-2147 & 16-2209 (brief filed Sept. 30, 2016).

Johnson claim: Whether the New Mexico crime of shooting at or from a motor vehicle, which may be committed by mere reckless conduct, is a violent felony for ACCA purposes (also whether the defendant's agreement to the sentence and waiver of any collateral attack in his 11(c)(1)(C) plea agreement forecloses § 2255 relief). *United States v. Pam*, No. 16-2171 (brief filed Oct. 11, 2016).

Johnson claim: Whether Oklahoma convictions for assault with a dangerous weapon, assault and battery with a dangerous weapon, and felonious pointing a firearm are violent felonies for ACCA purposes. *United States v. Schubert*, No. 16-6216 (brief filed Oct. 28, 2016).

Whether the post-*Johnson* ACCA is unconstitutionally vague. *United States v. Schubert*, No. 16-6216 (brief filed Oct. 28, 2016).

Johnson claim: Whether this defendant is entitled to § 2255 relief from his ACCA sentence on grounds that his prior convictions for Texas aggravated assault (which required only recklessness) and Texas burglary (which did not require an entry contemporaneous with criminal intent) are not violent felonies. *United States v. Perry*, No. 16-8098 (brief filed Nov. 2, 2016).

Johnson claim: Whether a Florida conviction for obstructing or opposing an officer with violence is a violent felony for ACCA purposes (§ 2255 appeal on district court's grant of certificate of appealability). *United States v. Lee*, No. 16-6288 (brief filed Nov. 28, 2016).

Johnson claim: Whether Wyoming and Nebraska burglary convictions are violent felonies for ACCA purposes after *Johnson*, and whether this claim is cognizable in a § 2255 proceeding. *United States v. Driscoll*, No. 16-8118 (brief filed Dec. 30, 2016).

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

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

Johnson claim: Whether this defendant is entitled to a certificate of appealability and § 2255 relief on his *Johnson* claim that his predicate burglaries no longer qualify as violent felonies. *United States v. Snyder*, No. 16-8117 (brief filed Jan. 18, 2017).

D. Burden of Proof

E. Capital Sentencing

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

G. Departures and Variances

Did the district court erroneously conclude that it must “honor” the career-offender guideline and deny the defendant’s motion for variance absent “extraordinary circumstances”? *United States v. Madkins*, No. 15-3299 (gov’t brief filed Jan. 20, 2017).

This defendant was resentenced after winning *Johnson* relief that dramatically reduced his total offense level. Was the district court’s upward variance at resentencing to double the guideline range excessive and unreasonable? *United States v. Richardson*, No. 16-6314 (brief filed Jan. 17, 2017).

H. Fines

Did the district court improperly impose a fine, despite the defendant’s inability to pay, as a substitute for forfeiture? *United States v. (Los Rovell) Dabda*, No. 15-3236 (reply brief filed Sept. 26, 2016).

I. Guidelines Sections

1. USSG § 1B1.2

Did the district court err when it relied on relevant conduct (rather than on the offense of conviction) to determine the offense guideline section and base offense level? *United States v. Jereb*, No. 16-4127 (brief filed Nov. 18, 2016).

2. USSG § 1B1.3 (relevant conduct)

Whether the district court clearly erred in finding that this defendant entered the charged bank and tax-fraud conspiracies at their outset for purposes of determining relevant conduct. *United States v. Pielsticker*, No. 15-5105 (reply brief filed April 13, 2016).

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

Did the district court commit plain error when it failed to make a particularized drug-quantity finding for guideline purposes (after having erroneously applied the statutory minimum)? *United States v. Ivory*, No. 15-3238 (gov’t brief filed Jan. 20, 2017).

Was the evidence sufficient in this contested conspiracy case to support the district court’s summary adoption of the PSR’s drug-quantify finding? *United States v. Banks*, No. 15-3324 (gov’t brief filed Jan. 20, 2017).

Did the district court err in basing its drug-quantity finding on unreliable evidence and wiretap evidence that should have been suppressed? *United States v. Thompson*, No. 15-3313 (gov’t brief filed Jan. 20, 2017).

Did the district court err in basing its drug-quantity finding on evidence of sales that were made before the defendant joined the conspiracy? *United States v. Johnson*, No. 16-3280 (brief filed Jan. 18, 2017).

Did the district court clearly err in calculating this defendant's drug quantity based on an alleged coconspirator's contradictory testimony? *United States v. Pacheco*, No. 16-3294 (brief filed Jan. 20, 2017).

3. USSG § 2A2.2

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

4. USSG § 2A3.5 (SORNA)

5. USSG § 2A4.1

a) subsection (b)(2)(A) (permanent or life-threatening bodily injury)

6. USSG § 2A6.1

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

Whether the district court erred when it determined that the defendant's multiple Facebook comments constituted multiple threats because: (1) the subsequent comments were not directed at a particular individual or group and, therefore, were not true threats; and (2) the district court failed to determine whether the defendant made the comments with a subjective intent to threaten (the defendant concedes plain error review on the last point). *United States v. Jordan*, No. 14-1377 (argued Sept. 10, 2015).

7. USSG § 2B1.1

a) subsection (b) (loss amount)

Whether the district court erroneously put the burden on the defendant to disprove the claimed loss amount in this embezzlement case. *United States v. Jones*, No. 15-3059 (reply brief filed December 30, 2015).

Did the district court abuse its discretion in refusing to apply anticipated amendments to § 2B1.1? *United States v. Pielsticker*, No. 15-5105 (reply brief filed April 13, 2016).

Did sufficient evidence support the district court's loss calculation, and did the district court articulate a reasonable loss-calculation methodology? *United States v. Pielsticker*, No. 15-5105 (reply brief filed April 13, 2016).

Did the district court commit plain error when it failed to reduce the loss amount in this bank fraud case by the proceeds of sold collateral? *United States v. Wright*, No. 15-5090 (reply brief filed April 28, 2016).

Was the district court's novel "loss of equity" approach in this real-estate investment fraud case legally erroneous and unsupported by the evidence? *United States v. Evans*, No. 15-1461 (reply brief filed Aug. 8, 2016).

Did the district court err when it increased this wire-fraud defendant's offense level by 18 points for loss without sufficient evidence of causation and reasonable foreseeability? *United States v. Joseph*, No. 16-4109 (brief filed Dec. 7, 2016).

Did the district court err when it applied a 2-point gross-receipts enhancement based on proceeds that went to business entities that this wire-fraud defendant only partially owned and in which he had no controlling interest? *United States v. Joseph*, No. 16-4109 (brief filed Dec. 7, 2016).

Did the district court err when it calculated actual loss (1) despite the government’s statement during a *Lafler/Frye* hearing that it would only pursue intended loss, (2) based on speculative, unsupported assumptions, and (3) based on either not-charged or acquitted conduct? *United States v. Johnson*, No. 16-4146 (brief filed Jan. 12, 2017); *United States v. Riddle*, No. 16-4143 (brief filed Jan. 20, 2017).

Did the district court err in holding that consumer payments that merely pass through a bank are “receipts from a financial institution” for purposes of applying a “greater than \$1 million” enhancement? *United States v. Johnson*, No. 16-4146 (brief filed Jan. 12, 2017).

b) subsection (b)(2) (victim enhancement)

Did the district court’s erroneous loss calculation also render erroneous application of the victim enhancement? *United States v. Evans*, No. 15-1461 (reply brief filed Aug. 8, 2016).

c) subsection (b)(10)(C) (sophisticated means)

Did the district court erroneously rely on acquitted conduct to apply a sophisticated-means enhancement? *United States v. Johnson*, No. 16-4146 (brief filed Jan. 12, 2017).

8. USSG § 2B3.1 (robbery)

a) subsection (b)(2)(E) (dangerous weapon brandished or possessed)

Whether the district court erred in applying this enhancement based solely on police reports that the defendant used a Taser during the robbery. *United States v. Dickerson*, No. 14-2223 (argued Nov. 19, 2015).

b) subsection (b)(3)(A) (bodily injury)

Whether the district court erred in applying a bodily-injury enhancement based on information in the PSR, without any medical evidence or testimony from the victims, and where the injuries suffered (“red marks”) were not significant enough to trigger the enhancement. *United States v. Dickerson*, No. 14-2223 (argued Nov. 19, 2015).

c) subsection(b)(4)(A) (abduction)

Did the district court err when it applied a 4-level enhancement for abduction because this bank-robbery defendant told the bank manager to give him access to the bank’s vault, and then followed the manager and a teller to the vault? *United States v. Archuleta*, No. 16-1297 (reply brief filed Jan. 19, 2017).

d) subsection (b)(4)(B) (physical restraint)

Whether the district court erred in applying a physical-restraint enhancement based solely on the probation officer’s restatement of an arrest report’s narrative of the video of the incident. *United States v. Dickerson*, No. 14-2223 (argued Nov. 19, 2015).

e) subsection (b)(7)

Whether the district court erred in calculating loss amount to include stolen checks and money orders that did not result in *actual* loss to the financial institution. *United States v. Dickerson*, No. 14-2223 (argued Nov. 19, 2015).

9. USSG § 2C1.1

10. USSG § 2D1.1

a) subsection (b)(1) (possession of a firearm)

b) subsection (b)(5) (importation of meth)

c) subsection (c) (drug quantity)

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

d) subsection (d)(1) (murder cross-reference)

11. USSG § 2G2.2 (child pornography)

Did the district court err in failing to address the defendant's critique of the child-pornography guideline when it denied the defendant's request for a variance? *United States v. Wireman*, No. 15-3291 (reply brief filed June 20, 2016).

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

Did the district court err in failing to address the defendant's arguments that his unlikely recidivism and family circumstances justified a variance? *United States v. Soto*, No. 16-3276 (brief filed Jan. 3, 2017).

12. USSG § 2K2.1

Did the district court plainly err when it relied on a prior conviction that was too old to score as criminal history to increase the defendant's sentence under § 2K2.1(a)(4)? *United States v. Russian*, No. 15-3213 (reply brief filed June 20, 2016).

In this case, the defendant committed an assault, and then drove several miles home and got a gun, apparently intending to harm himself. Was this gun possession sufficiently connected with the assault to enhance the defendant's sentence under 2K2.1(b)(6)(B)? Was it connected with a felony flight? *United States v. Harrison*, No. 15-8116 (brief filed March 25, 2016).

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

Did the district court rely on the wrong standard (focusing on "accessibility") for establishing either actual or constructive possession for purposes of a 2-level enhancement under § 2K2.1(b)(1)(A)? *United States v. Beierle*, No. 16-8040 (brief filed Oct. 28, 2016).

Did the district court base its § 2K2.1(b)(6)(B) enhancement on a clearly erroneous factual finding? *United States v. Beierle*, No. 16-8040 (brief filed Oct. 28, 2016).

Johnson claim: Is pre-1997 Idaho voluntary manslaughter a crime of violence for purposes of § 2K2.1 (under the commentary to § 4B1.2 or otherwise), and if not, should the defendant have qualified for the sporting exception in the firearms guideline? *United States v. Snyder*, No. 16-8108 (brief filed Dec. 19, 2016).

Johnson claim: Is Wyoming aggravated assault and battery (“threatening to use a drawn deadly weapon on another”) a crime of violence for purposes of § 2K2.1? *United States v. Devries*, No. 16-8113 (brief filed Dec. 28, 2016).

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

Johnson claim: Whether a conviction under California’s Health and Safety Code § 11352(a)—which includes both trafficking and non-trafficking offenses—is a drug-trafficking offense for purposes of § 2L1.2, and whether the district court improperly applied the modified categorical approach. *United States v. Hernandez-Banega*, No. 16-1061 (reply brief filed Nov. 7, 2016).

14. USSG § 2T1.1 (tax loss)

15. USSG § 2Q2.1

16. USSG § 3B1.1

Was there sufficient evidence that others were criminally responsible “participants” to support a manager/supervisor enhancement? *United States v. Pielsticker*, No. 15-5105 (reply brief filed April 13, 2016).

Was the evidence sufficient to support the district court’s application of a 4-level leadership enhancement? *United States v. Banks*, No. 15-3324 (gov’t brief filed Jan. 20, 2017). Similar issue raised by codefendant in consolidated case *United States v. Thompson*, No. 15-3313 (gov’t brief filed Jan. 20, 2017).

17. USSG § 3B1.2 (mitigating role)

Did the district court err by failing to conduct an intra-case analysis before denying the defendant a mitigating role adjustment under § 3B1.2? *United States v. Moreno*, No. 15-3051 (reply brief filed November 9, 2015).

Did the district court err by comparing the defendant to, not an average participant, but a least-culpable participant, in denying the defendant a mitigating role adjustment under § 3B1.2? *United States v. Moreno*, No. 15-3051 (reply brief filed November 9, 2015).

Did the district court abuse its discretion in denying the defendant a mitigating role adjustment under § 3B1.2, despite a preponderance of evidence supporting the adjustment? *United States v. Moreno*, No. 15-3051 (reply brief filed November 9, 2015).

Whether the district court erred in denying the defendant-couriers minor-role reductions under § 3B1.2. *United States v. Lopez*, No. 15-3130 (reply brief filed May 2, 2016); *United States v. Lopez*, No. 15-3134 (gov’t brief filed March 21, 2016).

18. USSG § 3B1.3 (abuse of trust)

Whether the district court erred in applying a 2-level enhancement for abuse of trust when the defendant’s position was ministerial rather than managerial, and he did not use that position to facilitate his fraud. *United States v. Throne*, No. 16-1296 (reply brief filed Dec. 27, 2016).

19. USSG § 3C1.1 (obstruction)

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

21. USSG § 3D1.2 (grouping)

22. USSG § 3E1.1

May a sentencing court withhold a reduction for acceptance of responsibility based on conduct that does not qualify as offense conduct or relevant conduct under USSG § 1B1.3? *United States v. Kemp*, No. 15-3309 (reply brief filed July 8, 2016).

In this case the defendant cooperated with the government, pleaded guilty, and expressed remorse. The government recommended both a 3-level reduction for acceptance and a § 5K1.1 departure. Did the district court err in denying acceptance points on grounds that pleading guilty is insufficient, and “[t]he adjustment requires some kind of steps to deal with the victims and what they have done. It requires, in many instances in drug cases, that there’s a demonstration of the time during the period of confinement that substantial and significant steps have been made to take a cure”? *United States v. Spaulding*, No. 16-1122 (reply brief filed Oct. 26, 2016) (the government agrees that the district court erred).

Should this defendant have been granted a 2-level reduction for acceptance of responsibility where he admitted his conduct and went to trial solely to challenge the question of his intent? *United States v. Lynch*, No. 16-1242 (brief filed Nov. 10, 2016).

23. USSG § 4A1.1

24. USSG § 4A1.2

Did the district court err when it assessed a criminal-history point for the defendant’s juvenile-status offense—possessing less than an ounce of marijuana in Colorado, where such conduct is legal for an adult? *United States v. Archuleta*, No. 16-1297 (reply brief filed Jan. 19, 2017).

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

Did the district court plainly err by not departing on grounds that this reentry defendant’s criminal history was overstated? *United States v. Garcia-Damian*, No. 16-2250 (brief filed Dec. 27, 2016).

26. USSG § 4B1.2 (crime of violence; controlled substance offense)

Johnson claim: Whether a challenge to the residual clause of the career offender guideline asserts a constitutional claim (for which a certificate of appeal from the denial of a § 2255 motion may be granted); and whether *Johnson* applies retroactively for purposes of collateral review under § 2255. *United States v. Rollins*, No. 15-1459 (brief filed May 27, 2016; amicus brief by FPD Colo. & Wyo. filed May 16, 2016; abated pending *Beckles*).

Johnson claim: Whether a Colorado conviction for attempted aggravated robbery is a crime of violence for career-offender purposes, and what role the commentary plays in this analysis. *United States v. Evans*, No. 16-1171 (appeal from denial of § 2255 relief; reply brief filed Sept. 8, 2016).

Johnson claim: Whether a Colorado conviction for aggravated robbery is a crime of violence for career-offender purposes, and whether it can be so labeled based solely on the guideline commentary. *United States v. Jones*, No. 16-1223 (brief filed Sept. 7, 2016).

Johnson claim: Whether a Colorado conviction for assault on a peace officer is a crime of violence for career-offender purposes. *Greer v. United States*, No. 16-1282 (appeal from denial of § 2255 relief; amended reply brief filed Dec. 22, 2016).

Johnson claim: Whether a Kansas conviction for possession with intent to sell (defined to include possession with intent to *offer for sale*) is a controlled-substance offense for career-offender purposes. *United States v. Madkins*, No. 15-3299 (gov't brief filed Jan. 20, 2017).

Johnson claim: Whether Colorado convictions for robbery and second-degree assault are crimes of violence for career-offender purposes. *Taylor v. United States*, No. 16-1350 (appeal from denial of § 2255 relief; reply brief filed Dec. 8, 2016).

Johnson claim: Whether *Johnson* is retroactive to career-offender cases on collateral review, and whether (notwithstanding *Molinez-Martinez*) the defendant was required to prove that his sentence would have been lower absent application of the career-offender guideline. *Taylor v. United States*, No. 16-1350 (appeal from denial of § 2255 relief; reply brief filed Dec. 8, 2016).

Johnson claim: Whether Wyoming convictions for aggravated assault are crimes of violence for career-offender purposes, and whether the district court erred in relying on guideline commentary to conclude that they are. *United States v. Jereb*, No. 16-4127 (brief filed Nov. 18, 2016).

Johnson claim: Whether *Johnson* is retroactive to career-offender cases on collateral review. *United States v. Miller*, No. 16-2229 (brief filed Dec. 6, 2016); *see also House v. United States*, No. 16-1413 (brief filed Dec. 9, 2016) (same).

Johnson claim: Whether Oklahoma convictions for pointing a firearm at another and assault with a dangerous weapon are crimes of violence for career-offender purposes. *United States v. Kutcz*, No. 16-6266 (brief filed Dec. 19, 2015).

Johnson claim: Whether Colorado second-degree assault is a crime of violence for career-offender purposes. *United States v. Ontiveros*, No. 16-1362 (brief filed Jan. 4, 2017).

Whether the district court wrongly denied § 2255 relief on this defendant's *Johnson* claim because the court had originally varied upward from the career-offender guideline. *United States v. Kaimana*, No. 16-1328 (gov't brief filed Jan. 26, 2017).

Johnson claim: Whether Colorado robbery is a crime of violence (and whether *Harris* was wrong). *United States v. Porter*, No. 16-1289 (brief filed Jan. 17, 2017).

Johnson claim: Whether Utah second-degree felony aggravated assault is categorically a crime of violence. *United States v. Bettcher*, No. 16-4165 (brief filed Jan. 18, 2017) (gov't appeal).

Whether Colorado conspiracy to commit felony menacing is a crime of violence, and whether this defendant's 11(c)(1)(C) agreement precluded him from any *Johnson* relief. *United States v. Rodriguez*, No. 16-1384 (brief filed Jan. 26, 2017).

Whether a Hobbs Act robbery (18 U.S.C. § 1951) is a crime of violence under the 2016 guidelines. *United States v O'Connor*, No. 16-3300 (brief filed Jan. 27, 2017).

27. USSG § 4B1.5

28. USSG § 5K1.1

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

29. USSG § 5K2.14

J. Statutory Mandatory Minimums and Maximums

Under the *Biglow* cases, was the district court required to sentence the defendant within the default statutory range absent a jury verdict form that included a particular quantity finding (even if the jury was instructed that a particular quantity was an element of the conspiracy)? *United States v. Dabda*, No. 15-3237 (reply brief filed May 31, 2016).

Did the district court plainly err by imposing a sentence above the statutory maximum? *United States v. Russian*, No. 15-3213 (reply brief filed June 20, 2016).

Did the district court violate the defendant’s Sixth Amendment rights by imposing a sentence under § 841(b)(1)(C) (0-20 years) rather than under § 841(b)(1)(D) (max 5 years) absent a specific quantity finding by the jury? *United States v. (Los Rovell) Dabda*, No. 15-3236 (reply brief filed Sept. 26, 2016).

Must a jury decide whether the prior convictions triggering a mandatory life sentence were *final* at the time the defendant committed the instant offense? *United States v. Sicairos*, No. 15-1422 (reply brief filed July 25, 2016).

Did the district court plainly err when it imposed the statutory minimum under § 841(b)(1)(A) absent necessary jury findings? *United States v. Ivory*, No. 15-3238 (gov’t brief filed Jan. 20, 2017).

Did the district court erroneously sentence this conspiracy defendant to twice the statutory maximum? *United States v. Archuleta*, No. 16-1297 (reply brief filed Jan. 19, 2017).

Should the district court have granted this defendant § 2255 relief from his mandatory life sentence after California reduced his prior felony drug convictions to misdemeanors? *United States v. Bell*, No. 16-6332 (brief filed Jan. 11, 2017).

Did the district court violate *Alleyne* by imposing a statutory mandatory minimum 10-year sentence when the jury was not instructed that quantity was an element of the offense to be found beyond a reasonable doubt? *United States v. Johnson*, No. 16-3280 (brief filed Jan. 18, 2017).

K. Reasonableness

1. Procedural

Whether the district court committed plain procedural error when it failed to “properly weigh” the advisory Guidelines range in this illegal reentry case (because it both disavowed and considered the Guideline) (government invokes waiver). *United States v. Lopez-Montez & Gonzalez-Lopez*, No. 1506, 1507 (gov’t brief filed May 18, 2015).

Whether the district court committed procedural error in imposing Guidelines enhancements and ordering restitution without making the requisite factual findings or addressing the defendant's objections. *United States v. Dickerson*, No. 14-2223 (argued Nov. 19, 2015).

Whether the district court procedurally erred because it mistakenly believed it was required to sentence this mentally ill reentry-after-removal defendant to a higher sentence than that imposed for the defendant's removal conviction. *United States v. Corchado-Aguirre*, No. 15-2115 (reply brief filed October 7, 2015).

Did the district court clearly err in its attribution of drug quantities to this conspiracy defendant? *United States v. Dabda*, No. 15-3237 (reply brief filed May 31, 2016).

Did the district court err in failing to address the defendant's critique of the child-pornography guideline when it denied the defendant's request for a variance? *United States v. Wireman*, No. 15-3291 (argued Nov. 15, 2016).

Did the district court procedurally err when it imposed an above-guideline sentence without explanation? *United States v. Carillo*, No. 15-2200 (reply brief filed July 5, 2016).

Whether the district court's above-guideline sentence was a plainly erroneous departure sentence imposed without adequate notice or opportunity to argue against departure. *United States v. Fykes*, No. 16-1034 (reply brief filed Aug. 25, 2016).

Whether the district court's above-guideline sentence was a plainly erroneous variance imposed without adequate explanation. *United States v. Fykes*, No. 16-1034 (reply brief filed Aug. 25, 2016).

Whether this drug-conspiracy defendant's sentence was impermissibly disparate from the sentences of his codefendants as well as drug sentences nationwide. *United States v. Sicairos*, No. 15-1422 (reply brief filed July 25, 2016).

Whether the consecutive sentences imposed in this unlawful-prescriptions and false-statement case were procedurally unreasonable. *United States v. Miller*, No. 16-1231 (brief filed Dec. 16, 2016).

Whether the district court procedurally erred by presuming the guidelines were reasonable and not adequately explaining the sentence. *United States v. Garcia-Damian*, No. 16-2250 (brief filed Dec. 27, 2016).

2. Substantive

Whether the 121-month bottom-of-the-range Guidelines sentence was substantively unreasonable: (1) in light of the various Guidelines miscalculations and other procedural errors committed by the district court; and (2) because the sentence was based on judge-found facts that more than doubled his Guidelines range. *United States v. Dickerson*, No. 14-2223 (argued Nov. 19, 2015).

Was the district court's upward variance in this drug-conspiracy case—in reliance on the government's poorly supported claim that the defendant had manipulated a codefendant into losing her safety-valve eligibility—substantively unreasonable? *United States v. Dabda*, No. 15-3237 (reply brief filed May 31, 2016).

Did the district court abuse its discretion in refusing a variance for this defendant with serious heart problems? *United States v. Pielsticker*, No. 15-5105 (reply brief filed April 13, 2016).

Did the district court's failure to explain its above-guideline sentence in this case render the sentence substantively unreasonable? *United States v. Carillo*, No. 15-2200 (reply brief filed July 5, 2016).

Was a 70-day time-served sentence substantively unreasonable for this defendant convicted of kidnapping his ex-girlfriend? *United States v. Derusse*, No. 15-3302 (gov't appeal: response brief filed June 20, 2016).

Whether the district court's assignment of criminal-history points to a 1992 drug sentence (which would have been much shorter today), and refusal to find this criminal-history overstated, rendered the defendant's current sentence substantively unreasonable. *United States v. Fykes*, No. 16-1034 (reply brief filed Aug. 25, 2016).

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

Was the upward variance imposed here after revocation of release—300% above the top of the guideline range—substantively unreasonable? *United States v. Jones*, No. 16-5036 (reply brief filed Oct. 5, 2016).

Is this child-abuse defendant's 480-month sentence substantively unreasonable? *United States v. Durham*, No. 16-6075 (reply brief filed Dec. 12, 2016).

Is this defendant's top-of-the-guideline sentence substantively unreasonable in light of his mitigating circumstances and history? *United States v. McCulley*, No. 16-1149 (reply brief filed Dec. 16, 2016).

Was the district court's decision to run this defendant's sentence consecutively to another related federal sentence substantively unreasonable? *United States v. Jones*, No. 16-1337 (reply brief filed Dec. 13, 2016).

Is this first-time offender's 60-year sentence for producing child pornography substantively unreasonable, especially in light of expert testimony that he poses a low risk of recidivism? *United States v. Gallegos*, No. 16-1269 (gov't brief filed Dec. 30, 2016).

Was this defendant's high-end 11-month guideline sentence, plus 2 years of additional supervision (with 6 months of home confinement) for a supervised-release violation substantively unreasonable? *United States v. Murphy*, No. 16-5118 (brief filed Nov. 23, 2016).

Is this drug-conspiracy defendant's life sentence substantively unreasonable? *United States v. Lopez-Garcia*, No. 16-3174 (brief filed Dec. 2, 2016).

Was the district court's upward variance/departure sentence for this mentally ill, suicidal defendant substantively unreasonable in this involuntary (DUI) manslaughter case? *United States v. Rentz*, No. 16-2211 (brief filed Dec. 14, 2016).

Did the district court's uneven weighing of § 3553(a) factors—focusing on the defendant's adolescence and decade-old convictions rather than on his mental-health and efforts to improve—

render this defendant's upward-variance sentence substantively unreasonable? *United States v. Mays*, No. 16-1366 (gov't brief filed Jan. 23, 2017).

Whether this reentry defendant's guideline sentence was substantively unreasonable. *United States v. Garcia-Damian*, No. 16-2250 (brief filed Dec. 27, 2016).

Was a 78-month sentence substantively unreasonable for this felon-in-possession defendant? *United States v. Lopez*, No. 16-1324 (brief filed Jan. 17, 2017).

Was this defendant's 18-month illegal-reentry sentence substantively unreasonable? *United States v. Tellez-Castrejon*, No. 16-1353 (brief filed Jan. 26, 2017).

L. SORNA Sentencing Issues

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

Whether the district court erred in denying the defendant's Amendment 782 motion for reduction of sentence on grounds that the defendant was previously sentenced below the amended range. *United States v. Green*, No. 15-6156 (brief filed October 26, 2015).

Whether the district court erred in denying the defendant's Amendment 782 motion for reduction in light of the sentencing factors in 18 U.S.C. § 3553. *United States v. Green*, No. 15-6156 (brief filed October 26, 2015).

Whether retrospective application of USSG § 1B1.10(b)(2) (limiting the extent of an amended-guideline reduction) violates the *ex post facto* clause. *United States v. Green*, No. 15-6156 (brief filed October 26, 2015).

N. Resentencing Issues

O. Constitutional Issues

1. Fifth Amendment Due Process

Did the trial court's repeated denial of evidentiary hearings violate this defendant's due-process rights? *United States v. Johnson*, No. 16-4146 (brief filed Jan. 12, 2017); *United States v. Riddle*, No. 16-4143 (brief filed Jan. 20, 2017).

Should the district court have disqualified the prosecutor in this case? *United States v. Riddle*, No. 16-4143 (brief filed Jan. 20, 2017).

a) Judge-found Facts at Sentencing

b) Juror Issues

Whether the district court abused its discretion when it failed to conduct a full inquiry concerning the safety concerns of all jurors after one juror expressed concern over her safety. *United States v. Cisneros*, No. 14-1440 (argued March 10, 2016).

c) Presentation of False Testimony (*Napue* violation)

2. Sixth Amendment and Hearsay

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

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

XXVI. Sixth Amendment

A. Right to Effective Assistance of Counsel

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

Did the district court wrongly reject this state prisoner’s § 2254 claim that trial counsel’s failure to relay crucial information about a favorable plea offer constituted ineffective assistance of counsel? *Milton v. Miller*, No. 15-6069 (brief filed October 9, 2015).

Whether counsel was ineffective in this capital case by (1) failing to prevent the presentation of pervasive victim-impact evidence, and (2) failing to investigate and present a compelling mitigation case. *Pavatt v. Trammell*, No. 14-6117 (argued March 8, 2016).

Whether postconviction counsel was ineffective in this capital case by failing to raise trial counsel’s ineffectiveness on in the defendant’s initial postconviction proceeding. *Pavatt v. Trammell*, No. 14-6117 (argued March 8, 2016).

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

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

Was counsel ineffective in the sentencing phase of this capital case by failing to investigate and present mitigating evidence? *Murphy v. Royal*, No. 15-7041, 7068 (reply brief filed Jan. 19, 2017).

Should the district court have held a hearing on this § 2255 petitioner’s claim that his attorney was ineffective in failing to rebut the government’s DNA expert’s probability testimony? *United States v. Brooks*, No. 16-3064 (brief filed Aug. 8, 2016).

Should the Tenth Circuit remand this direct-appeal case for an evidentiary hearing on claims of ineffective assistance of counsel (rather than directing that those claims be brought later, in a collateral proceeding)? *United States v. Kearn*, No. 15-3121 (reply filed Jan. 23, 2017).

Was trial counsel ineffective in this state felony-murder case for (1) failing to adequately advise the defendant with respect to his right to testify; (2) failing to investigate and pursue a mental-state

defense; or (3) failing to pursue a proximate-cause defense? *Becker v. Cline*, No. 16-3262 (brief filed Nov. 9, 2016).

Was appellate counsel ineffective in this state capital-murder case, for failing to raise the issues of competency, confrontation, IAC, and instructional error on direct appeal? *Lay v. Royal*, No. 15-5111 (brief filed Dec. 9, 2016).

Was trial counsel ineffective for (1) coercing the defendant to plead guilty by incorrectly telling him minutes before jury selection that he would receive a “guaranteed” life sentence if the case went to trial and he lost; (2) coercing the defendant to proceed before a magistrate judge; (3) failing to timely seek withdrawal of the defendant’s plea at the defendant’s request; or (4) failing to challenge the magistrate’s authority to issue a final ruling on the defendant’s motion to withdraw his plea? *United States v. Gilchrist*, No. 16-3200 (brief filed Dec. 15, 2016).

Should the federal habeas court have granted a hearing on this state capital defendant’s claim that her trial lawyer’s presentation of inaccurate, incriminating DNA evidence, was ineffective assistance of counsel? *Andrew v. Aldridge*, No. 15-6190 (brief filed Dec. 27, 2016).

Was this defendant denied his right to conflict-free counsel when the district court (1) appointed CJA counsel who had previously represented two witnesses, and (2) excluded the defendant from proceedings in which it concluded that counsel was not conflicted? *United States v. Johnson*, No. 16-4146 (brief filed Jan. 12, 2017).

Did a search warrant for email accounts that included attorney-client communications, but that did not impose any filtering requirements, violate the Sixth Amendment (especially given the deficiency of the government’s self-directed filter)? *United States v. Johnson*, No. 16-4146 (brief filed Jan. 12, 2017).

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

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

Whether the district court’s failure to inquire into a known conflict—defense counsel’s former marriage to and continued shared parenting with the prosecutor—was reversible error. *United States v. Williamson*, No. 15-3147 (reply brief filed April 11, 2016).

Whether the defendant’s collateral complaints against defense counsel, which counsel asserted had affected his ability to represent the defendant, created a conflict necessitating substitution of counsel. *United States v. Williamson*, No. 15-3147 (reply brief filed April 11, 2016).

Did a complete breakdown of communications between the defendant and his counsel necessitate substitution of counsel? *United States v. Williamson*, No. 15-3147 (reply brief filed April 11, 2016).

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

Did the district court's refusal to grant a continuance amount to a denial of counsel of choice? *United States v. Maley*, No. 16-2016 (gov't brief filed Oct. 6, 2016).

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

Did the district court's refusal, on the first day of trial, to grant a continuance and allow appointed counsel to withdraw so that retained counsel could represent the defendant violate the defendant's right to counsel of choice? *United States v. Lemon*, No. 16-3041 (brief filed Nov. 30, 2016).

Did the trial court err when it failed to ask the defendant personally about motions of unclear provenance that were filed seeking new counsel and to withdraw the defendant's guilty plea? *United States v. Soto*, No. 16-3276 (brief filed Jan. 3, 2017).

Did the district court deny this defendant counsel of choice when it denied him access to seized funds—not traced to any crime charged—to fund his defense, in violation of *United States v. Louis*? *United States v. Johnson*, No. 16-4146 (brief filed Jan. 12, 2017).

C. Self-Incrimination

D. Self-Representation

Was the defendant's waiver of counsel knowing and voluntary in light of competency questions and the district court's refusal to appoint substitute counsel? *United States v. Williamson*, No. 15-3147 (reply brief filed April 11, 2016).

Was the district court's failure to advise this pro se defendant about his right to counsel at *sentencing* reversible sentencing error? *United States v. Williamson*, No. 15-3147 (reply brief filed April 11, 2016).

This defendant represented herself during proceedings leading up to a 2011 criminal trial. When she did not show up for trial, the district court revoked her right to represent herself. Four years later, she was arrested and charged with failure to appear. When she moved to represent herself, the district court denied the motion, based on the order issued four years earlier. Was this error? *United States v. Burton*, No. 16-4108 (gov't brief filed Jan. 23, 2017).

Was this capital defendant denied his right to counsel when he was allowed to waive counsel and proceed pro se in his capital murder trial despite evidence of his incompetency? *Lay v. Royal*, No. 15-5111 (brief filed Dec. 9, 2016).

E. Confrontation

After a state court dismissed murder charges against the defendant, who allegedly committed the murder while on supervised release for a federal crack-cocaine conviction, the federal district court relied on extensive hearsay reports of the murder and other alleged violations to revoke the defendant's supervised release. What reliability test must the court perform before accepting such hearsay in lieu of live testimony? Did the district court's reliance on this hearsay violate the defendant's rights to due process and confrontation under the 5th and 6th Amendments? *United States v. Jones*, No. 15-6119 (reply brief filed January 7, 2016).

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

Did the district court commit plain error when it allowed the government to elicit the out-of-court statements of a non-testifying expert? *United States v. Kearn*, No. 15-3121 (reply filed Jan. 23, 2017).

Did the state court's failure to sever this capital defendant's trial from that of his son violate the defendant's Sixth Amendment right to confront his son, whose incriminating statements against his father were admitted, and whose mitigation case blamed his father? *Lay v. Royal*, No. 15-5111 (brief filed Dec. 9, 2016).

Did exclusion of a testifying coconspirator's plea agreement and sentencing exposure violate this defendant's confrontation rights? *United States v. Mirabal*, No. 16-2188 (brief filed Dec. 9, 2016).

Did the state court violate this capital defendant's Sixth Amendment right to confrontation when it admitted police reports containing testimonial statements by the deceased several weeks before his death accusing the defendant of trying to kill him? *Andrew v. Aldridge*, No. 15-6190 (brief filed Dec. 27, 2016).

Did the district court improperly exclude defense evidence offered to counter government evidence admitted in violation of in limine orders (on grounds that the defendants did not object when the government's evidence came in)? *United States v. Johnson*, No. 16-4146 (brief filed Jan. 12, 2017); *United States v. Riddle*, No. 16-4143 (brief filed Jan. 20, 2017).

F. Impartial Jury

When several jurors expressed concern after seeing a Hispanic man sitting in a truck in the jurors' parking lot, and one juror even followed the man and took his picture, fearing "intimidation or repercussions to members of the jury," did the district court err in refusing to declare a mistrial, or in failing to ask the jurors more probing questions before denying a mistrial? *United States v. Rios-Morales*, No. 16-3233 (brief filed Nov. 23, 2016).

G. Compulsory Process

Whether in this state DUI case the defendant should have been allowed to subpoena the state toxicologist's educational records showing that she had lied about her credentials (and whether this

issue should have been reached in defendant's § 2254 proceeding). *Morehead v. Douglas County, CO, et al.*, No. 15-1481 (brief filed February 29, 2016).

XXVII. Speedy Trial (statutory and constitutional)

Did 80 days of non-excludable time elapse between first appearance and trial, and should the district court have granted the defendant's pretrial motion to dismiss on statutory speedy-trial grounds? *United States v. Ransom*, No. 15-3293 (reply brief filed Sept. 6, 2016).

Did the district court violate the Speedy Trial Act when it relied on a flawed "ends of justice" continuance to deny the defendant's motion to dismiss? *United States v. Madkins*, No. 15-3299 (gov't brief filed Jan. 20, 2017).

Here the district court dismissed consolidated felony and misdemeanor charges without prejudice under the Speedy Trial Act. The court considered the seriousness of the felony charges, as required by the Act, but did not consider the seriousness (or lack thereof) of the misdemeanor charge. Should the district court have dismissed that charge with prejudice? *United States v. Joseph*, No. 16-4109 (brief filed Dec. 7, 2016).

Did the district court err when it held that the defendant's motion to dismiss on speedy-trial grounds, filed during jury selection (three days before the jury was empaneled), was untimely? *United States v. Riddle*, No. 16-4143 (brief filed Jan. 20, 2017).

XXVIII. Standards of Review

A. Waiver

Whether, under the invited error doctrine, the defendant waived his claim that the district court failed to consider the applicable Guideline because the defendant asked the district court not to consider the Guideline. *United States v. Lopez-Montez & Gonzalez-Lopez*, No. 1506, 1507 (gov't brief filed May 18, 2015).

B. Forfeiture/Plain Error

C. De Novo Review

XXIX. Supervised Release

A. Revocation Issues

Was evidence of pornography on this defendant's smartphone in caches inaccessible to him sufficient to establish, by a preponderance of evidence, that he violated a condition of release? *United States v. Haymond*, No. 16-5156 (gov't brief filed Jan. 27, 2017).

Did the district court plainly err by revoking supervised release based on violations of conditions that had never been imposed? *United States v. Billy*, No. 16-7071 (brief filed Jan. 5, 2017).

B. Sentencing Issues (either initially or after revocation)

1. Substantive

2. Procedural

Whether the district court committed plain procedural error when it failed to state on the record its reasons for imposing a sentence consecutive to the underlying illegal reentry conviction. *United States v. Lopez-Montez & Gonzalez-Lopez*, No. 1506, 1507 (gov't brief filed May 18, 2015).

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

Whether the district court erred when it imposed a one-year term of supervised release to follow a statutory maximum prison sentence for a supervised-release violation, under a former version of § 3583(h) that did not authorize any further supervision after a maximum sentence. *United States v. Prince*, No. 16-3051 (brief filed June 27, 2016).

Does the mandatory minimum sentence in 18 U.S.C. 3583(k) for certain release violations found by a judge on a preponderance of evidence violate due process, *Apprendi*, *Blakely*, *Booker*, and *Alleyne*? *United States v. Haymond*, No. 16-5156 (gov't brief filed Jan. 27, 2017).

3. Unlawful Delegation of authority

4. Assimilative Crimes Act (ACA) sentences

C. Conditions of Supervised Release

Whether the district court plainly erred when it imposed conditions of supervised release without offering any explanation for them. The district court adopted the PSR, which recommended the conditions, but the PSR likewise offered no explanation for them. *United States v. Lopez*, No. 15-3130 (reply brief filed May 2, 2016).

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

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

Here the defendant was convicted of two counts of criminal contempt for conduct in relation to a civil proceeding in which he was not a defendant and no civil judgment was entered against him. Did the district court abuse its discretion when it ordered the defendant to pay money toward that civil judgment as a condition of supervised release? *United States v. Bowers*, No. 16-4008 (reply brief filed Oct. 3, 2016).

Did the district court abuse its discretion when it imposed, as a condition of supervised release, a no-contact provision prohibiting this child-pornography defendant from contact with his daughter (the victim), who would be an adult by the time of the defendant's release? *United States v. Kearn*, No. 15-3121 (reply filed Jan. 23, 2017).

This defendant was on supervised release following his conviction and sentence for failure to register. He had previously completed sex-offender treatment, and his original sex crime was 12 years old. His violations of release did not involve sexual misconduct. Did the district court abuse its discretion when it imposed special conditions of a new term of supervised release requiring sex-offender treatment, and prohibiting unsupervised contact with the defendant's own children? *United States v. Garcia*, No. 16-1011 (reply brief filed Jan. 6, 2017).

Did the district court unconstitutionally delegate sentencing authority to a private treatment contractor when it imposed a condition of supervised release obligating the defendant to "successfully complete" treatment with a private contractor, placing no limits on that contractor's discretion to decide what constitutes "successful completion" of treatment? *United States v. Garcia*, No. 16-1011 (reply brief filed Jan. 6, 2017).

Did the district court abuse its discretion when it imposed a special supervised-release condition of mental-health treatment based only on the court's speculation that the defendant had gone "off the rail at times"? *United States v. Jereb*, No. 16-4127 (brief filed Nov. 18, 2016).

Did the district court plainly err by prohibiting the defendant from accessing any computer or device connected to the internet absent sufficient findings? *United States v. Billy*, No. 16-7071 (brief filed Jan. 5, 2017).

Should the district court's sixth amended judgment, filed sua sponte to add special conditions of release nine months after the district court's fifth amended judgment, be vacated under the law-of-the-case doctrine, as unauthorized by Fed. R. Crim. P. 36, or as unsupported and invalid? *United States v. Kieffer*, No. 16-1457 (brief filed Jan. 17, 2017).

XXX. Trial Practice and Evidence Issues

A. Closing Argument

B. Confidential Informants

C. Cumulative Error

Whether the trial errors, including the admission of irrelevant evidence of an unrelated murder and prosecutorial misconduct related to that evidence, cumulatively denied the defendant a fair trial. *United States v. Cisneros*, No. 14-1440 (argued March 10, 2016).

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

Whether trial errors, including admission of hearsay, 404(b) evidence, improper opinions, and other errors, cumulatively denied the defendant a fair trial. *United States v. Kearn*, No. 15-3121 (reply filed Jan. 23, 2017).

Whether trial error, including admission of 404(b) evidence, prosecutorial misconduct, and the district court's failure to probe potential juror bias, cumulatively denied the defendant a fair trial. *United States v. Rios-Morales*, No. 16-3233 (brief filed Nov. 23, 2016).

D. Demonstrative Evidence

E. Due Process

F. Eyewitness Identification Testimony

Was the prosecutor's request that the victim identify her Hobbs Act robber in court unduly suggestive, when she had not previously been asked to identify anyone, it had been 19 months since the robbery, and the defendant was the only African American at the defense table? *United States v. Thomas*, No. 16-2044 (reply brief filed Oct. 7, 2016).

G. Jury Instructions

1. Aiding and Abetting

Whether the district court's aiding-and-abetting instruction was inconsistent with *Rosemond v. United States*. *United States v. Arciniega-Zetin*, No. 16-4145 (brief filed Jan. 6, 2017).

2. Burden of Proof

Does the Tenth Circuit pattern burden-of-proof instruction withstand constitutional scrutiny? This appeal challenges the "firmly convinced" language as lowering the government's burden; the absence of language cautioning that the burden is strict and heavy; the phrase "only required" as minimizing the burden; and the failure of the instruction to inform the jury that reasonable doubt may arise not just from the evidence, but also from the *lack* of evidence. *United States v. Petty*, No. 15-1421 (reply brief filed Oct. 11, 2016) (amicus brief filed by NACDL and Colorado Criminal Defense Bar June 10, 2016).

Did the district court commit plain error when instructing the jury on reasonable doubt (for the same reasons detailed in *Petty*)? *United States v. Kearm*, No. 15-3121 (reply filed Jan. 23, 2017); also raised in *United States v. Ivory*, No. 15-3238 (gov't brief filed Jan. 20, 2017), and consolidated cases.

3. Conspiracy

In this conspiracy case, the jurors were given a *Pinkerton* instruction with respect to several substantive counts. The jurors asked whether they had to find the defendant guilty of the conspiracy in order to find him guilty of the substantive counts. The district court answered "no." Was this plain error? *United States v. Wright*, No. 15-5090 (reply brief filed April 28, 2016).

4. Constructive Possession

Whether the district court plainly erred when it failed to instruct the jury that it must determine the defendant intended to possess a gun (as is now required per *Little*), not just that the defendant had knowledge of the gun. *United States v. Fikes*, No. 16-1034 (reply brief filed Aug. 25, 2016); *United States v. Benford*, No. 15-6163 (supplemental briefs filed Oct. 28, 2016).

Whether the district court plainly erred when it failed to instruct the jury that it must determine that the defendant intended to possess the charged drugs (as is now required per *Little*). *United States v. De Rangel*, No. 16-5126 (gov't brief filed Jan. 26, 2017); *United States v. Arciniega-Zetin*, No. 16-4145 (brief filed Jan. 6, 2017).

5. Deliberate Avoidance/Ignorance

Whether the district court erroneously gave a deliberate-ignorance instruction in this heroin-distribution case. *United States v. Arciniega-Zetin*, No. 16-4145 (brief filed Jan. 6, 2017).

6. Elements

Whether omission of the intent-to-defraud element from the jury instructions in this bank-fraud conspiracy case was plain error. *United States v. Wright*, No. 15-5090 (argued Sept. 22, 2016).

Whether the district court erroneously instructed the jury that “concrete involvement” was sufficient to prove distribution of heroin. *United States v. Arciniega-Zetin*, No. 16-4145 (brief filed Jan. 6, 2017).

7. Sentencing Elements

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

Must a jury decide whether the prior convictions triggering a mandatory life sentence were *final* at the time the defendant committed the instant offense? *United States v. Sicairos*, No. 15-1422 (reply brief filed July 25, 2016).

8. Flight

9. Guilt by Association/Guilt of Others

10. Investigative Techniques

11. Knowledge

12. Polygraphs

13. Proof

14. Spoliation

15. Theory of Defense/Affirmative Defense

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

This defendant testified that he was not a drug dealer and did not give anyone methamphetamine on or around the date charged. Should the district court have given the defendant’s requested instruction on the lesser-included offense of simple possession? *United States v. Pacheco*, No. 16-3294 (brief filed Jan. 20, 2017).

Did the district court err in excluding the defendant’s proffered evidence of immateriality in the false-statements-to-a-bank case? *United States v. Riddle*, No. 16-4143 (brief filed Jan. 20, 2017).

16. Unanimity

Did this state court violate the defendant’s right to a unanimous jury decision when it failed to give a specific unanimity instruction and verdict form as to the multiple acts alleged as predicates for the defendant’s felony-murder conviction? *Becker v. Cline*, No. 16-3262 (brief filed Nov. 9, 2016).

17. Voluntary Intoxication

18. Witness Cautionary Instructions

Did the district court commit plain error by omitting the 10th Circuit’s addicted-witness cautionary instruction (pattern instruction 1.16)? *United States v. Gabourel*, No. 16-6227 (gov’t brief filed Jan. 12, 2017).

H. Mistrial

I. Prior Convictions

Did the district court err when it permitted the government, under Rule 609(a)(1), to impeach the defendant with his 2007 state conviction for failure to register in this SORNA prosecution? *United States v. Hartwell*, No. 15-1457 (reply brief filed Sept. 23, 2016).

J. Prosecutorial Misconduct

Whether the government committed misconduct during trial when it repeatedly referenced an unrelated murder, despite an exclusion order, and remarked on the safety of the community in reference to the defendant’s guilt. *United States v. Cisneros*, No. 14-1440 (argued March 10, 2016).

Did the prosecutor violate *Brady* by withholding impeachment evidence, thereby necessitating a new trial? *United States v. Wright*, No. 15-5090 (reply brief filed April 28, 2016).

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

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

Did the government violate *Brady* in this drug-conspiracy witness-tampering-by-murder case by failing to disclose evidence that the government’s star witness—who the defendant contended committed the charged murder—had previously tried to cover up his involvement in another drug-related murder? *United States v. Sicairos*, No. 15-1422 (reply brief filed July 25, 2016).

Should the district court have suppressed the defendant’s statements that were the fruit of the government’s misconduct—specifically, the government’s violation of a state ethics rule prohibiting lawyers from communicating about the subject of the representation with a represented person? *United States v. Elliott*, No. 15-8138 (gov’t brief filed June 24, 2016).

Did the government know that its medical expert’s testimony was based on faulty and outdated science, and did the government’s failure to disclose this at trial amount to a *Brady* violation? *United States v. Durham*, No. 16-6075 (reply brief filed Dec. 12, 2016).

Did the government commit misconduct by implying during closing argument that homosexuals are unsafe around children in this child sexual assault case? *United States v. Durham*, No. 16-6075 (reply brief filed Dec. 12, 2016).

Did the prosecutor commit misconduct in this drug-conspiracy case by using 404(b) evidence for an improper (propensity) purpose, arguing facts not in evidence during closing, misstating the evidence, improperly bolstering the credibility of witnesses, appealing to class prejudice, making appeals to the emotions of the jury, and improperly commenting on the civic duty of the jury (“I now ask that you bring justice to us”)? *United States v. Rios-Morales*, No. 16-3233 (brief filed Nov. 23, 2016).

Did the prosecutors in this state capital trial violate *Brady* when they concealed a sentencing benefit they engineered for a witness who claimed that the defendant had confessed to the crime while in jail? *Andrew v. Aldridge*, No. 15-6190 (brief filed Dec. 27, 2016).

Did the prosecutors in this state capital trial violate the defendant’s right to fundamental fairness when they falsely suggested in closing that her daughter’s emotional breakdown during her penalty-phase testimony was evidence that she was not opposed to her mother’s execution? *Andrew v. Aldridge*, No. 15-6190 (brief filed Dec. 27, 2016).

Did the prosecutor violate this Chinese defendant’s rights to equal protection, due process, and a fair trial when he singled out the sole Asian-American juror during voir dire and asked other jurors if they felt “okay” serving with him? *United States v. Tee*, No. 16-3243 (brief filed Dec. 30, 2016).

K. Right to be Present

L. Right to Present Defense

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

Did the district court erroneously conclude that a state court’s refusal to admit evidence of (1) the victims’ drug use; and (2) a defense witness (who was excluded as a discovery sanction) in this capital case was constitutional error? *Jones v. Duckworth*, No. 15-6086, 15-6087 (cross-appellant’s reply brief filed Sept. 2, 2016) (state’s appeal from conditional grant of habeas corpus vacating Oklahoma death sentence).

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

Did the district court deny this defendant’s right to present a defense when it excluded as hearsay evidence that he repudiated his “confession” within a day after making it? *United States v. Lemon*, No. 16-3041 (brief filed Nov. 30, 2016).

Did the district court deny this defendant’s right to present a defense when it quashed a defense subpoena? *United States v. Portillos*, No. 16-1323 (brief filed Dec. 22, 2016).

Did the state court deny this capital defendant’s right to present a defense when it excluded several defense witnesses as a sanction for perceived discovery infractions? *Andrew v. Aldridge*, No. 15-6190 (brief filed Dec. 27, 2016).

Did the district court deprive the defendant of his right to present a defense when it granted the government's untimely motion to exclude a defense expert witness? *United States v. Johnson*, No. 16-4146 (brief filed Jan. 12, 2017).

Did the district court wrongly exclude evidence of immateriality in this false-statements case? *United States v. Johnson*, No. 16-4146 (brief filed Jan. 12, 2017).

M. Rule 106 (rule of completeness)

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

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

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

Whether confusing evidence about this postal employee's gambling was relevant to show his motive for stealing from the mails. *United States v. Lemon*, No. 16-3041 (brief filed Nov. 30, 2016).

Whether the district court erred in permitting the introduction of evidence of a murder unrelated to the charged offense. *United States v. Cisneros*, No. 14-1440 (argued March 10, 2016).

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

Should evidence of the defendant's struggles with homosexuality and child pornography have been suppressed as unduly prejudicial in this child sexual abuse case? *United States v. Durham*, No. 16-6075 (reply brief filed Dec. 12, 2016).

Should evidence of the defendant's confessions been excluded as more prejudicial than probative? *United States v. Durham*, No. 16-6075 (reply brief filed Dec. 12, 2016).

Should evidence that the defendant purchased drugs months before the charged conspiracy have been excluded as unduly prejudicial? *United States v. Cox*, No. 16-8066 (gov't brief filed Dec. 7, 2016).

Whether confusing evidence about this postal employee's gambling was unduly prejudicial in his theft-of-mail prosecution. *United States v. Lemon*, No. 16-3041 (brief filed Nov. 30, 2016).

Was admission of the defendant's prior drug convictions and gang affiliation unduly prejudicial in this drug-conspiracy case? *United States v. Grant*, No. 16-6228 (brief filed Dec. 13, 2016).

Was admission of this defendant's gang affiliation unduly prejudicial character evidence? *United States v. Brown*, No. 16-6210 (brief filed Dec. 22, 2016).

Was admission of provocative online massage ads unduly prejudicial in this prostitution-related case? *United States v. Tee*, No. 16-3243 (brief filed Dec. 30, 2016).

This defendant was on trial for mailing threatening communications that made reference to firearms and ammunition. Did the district court abuse its discretion by admitting irrelevant and unduly

prejudicial testimony about and pictures of the firearms and ammunition? *United States v. Twitty*, No. 16-1322 (brief filed Jan. 27, 2017).

O. Rule 404(b)

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

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

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

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

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

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

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

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

Was the defendant's struggles with homosexuality and child pornography improper 404(b) evidence that should have been suppressed in this child sexual abuse case? *United States v. Durham*, No. 16-6075 (reply brief filed Dec. 12, 2016).

Did the district court commit plain error in this child pornography case when it admitted evidence of multiple images under 404(b) without defining the reason for the evidence or giving a special

unanimity instruction with respect to the evidence? *United States v. Kearn*, No. 15-3121 (reply filed Jan. 23, 2017).

Did the district court abuse its discretion by admitting evidence of a separately charged conspiracy in this drug-conspiracy case? And was admission of this evidence unduly prejudicial insofar as discovery had not been completed in the separate case? *United States v. Rios-Morales*, No. 16-3233 (brief filed Nov. 23, 2016).

Did the district court abuse its discretion in this drug-conspiracy case by admitting the defendant's prior drug convictions and gang affiliation? *United States v. Grant*, No. 16-6228 (brief filed Dec. 13, 2016).

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

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

Whether allowing law-enforcement witnesses to offer expert opinions in the guise of lay opinions violated Rules 701 and 702. *United States v. Sandoval*, No. 15-1311 (reply brief filed May 2, 2016).

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

Did the district court violate Rules 701, 702, and 704 when it admitted opinions through witnesses and exhibits that the images at issue in this case were child pornography, and that the defendant was the person who distributed them? *United States v. Kearn*, No. 15-3121 (reply filed Jan. 23, 2017).

Whether the government's medical expert's testimony in this unlawful-prescriptions case was standardless and inadmissible under Rule 702. *United States v. Miller*, No. 16-1231 (brief filed Dec. 16, 2016).

R. Rules 801-807 (hearsay)

Whether the district court erred in admitting jailhouse telephone recordings under the coconspirator exception when the calls did not further the conspiracy. *United States v. Alcorta*, No. 15-3129 (reply brief filed January 21, 2016).

Whether the district court erred in admitting jailhouse telephone recordings under the coconspirator exception when the calls were made after the defendants were arrested (and the conspiracy was over). *United States v. Lopez*, No. 15-3130 (reply brief filed May 2, 2016); *United States v. Lopez*, No. 15-3134 (gov't brief filed March 21, 2016).

Did the district court err in admitting unauthenticated medical records containing double hearsay? *United States v. Durham*, No. 16-6075 (reply brief filed Dec. 12, 2016).

Did the district court commit plain error when it allowed the government to elicit the out-of-court statements of a non-testifying expert? *United States v. Kearn*, No. 15-3121 (reply filed Jan. 23, 2017).

Were the deceased's statements to medical personnel in this murder case admissible as excited utterances, statements for a medical diagnosis, or dying declarations? *United States v. Magnan*, No. 16-7043 (reply brief filed Jan. 11, 2017).

Was the defendant’s prior acquittal relevant and admissible under the residual hearsay exception? *United States v. Brown*, No. 16-6210 (brief filed Dec. 22, 2016).

Did the trial court erroneously admit online ads without a proper business-records foundation? *United States v. Tee*, No. 16-3243 (brief filed Dec. 30, 2016).

This defendant was on trial for mailing threatening communications in connection with another criminal case. Did the district court abuse its discretion by admitting orders from that case—which contained damaging judicial findings and conclusions (i.e., inadmissible hearsay)? *United States v. Twitty*, No. 16-1322 (brief filed Jan. 27, 2017).

S. Rule 901 (authentication)

Did the district court err in admitting video evidence of the defendant’s confessions (recorded on a cellphone) without proper authentication, given the possibility that the recordings had been altered? *United States v. Durham*, No. 16-6075 (reply brief filed Dec. 12, 2016).

Did the district court erroneously admit unauthenticated text messages and an unauthenticated “web-generated” document? *United States v. (Robert) Arnold*, No. 16-6089 (reply brief filed Jan. 25, 2017).

T. Rule 1002 (Best Evidence Rule)

U. Surrebuttal

V. Voir Dire

XXXI. Void for Vagueness

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

Should the fruit of these wiretap orders have been suppressed on grounds that the orders authorized law enforcement to intercept calls outside the authorizing court’s territorial jurisdiction? *United States v. Dabda*, No. 15-3237 (reply brief filed May 31, 2016); *United States v. (Los Rovell) Dabda*, No. 15-3236 (reply brief filed Sept. 26, 2016).

Should the district court have required the government to prove by clear and convincing evidence (rather than by merely a preponderance of evidence) that the wiretapped calls in this case were intercepted within the issuing state judge’s territorial jurisdiction? Was the evidence sufficient to prove location of interception under either standard? *United States v. Thompson*, No. 15-3313 (gov’t brief filed Jan. 20, 2017); *United States v. Johnson*, No. 16-3280 (brief filed Jan. 18, 2017).

Is a search warrant required by Title III or the Fourth Amendment to access cell site location information? *United States v. Thompson*, No. 15-3313 (gov’t brief filed Jan. 20, 2017).

XXXIII. Miscellaneous

A. Forum Shopping

B. Disqualification of Government Counsel

Cases Added in January 2017

United States v. Arciniega-Zetin, No. 16-4145 (brief filed Jan. 6, 2017) (18 U.S.C. § 841: jury instructions, sufficiency of evidence).

United States v. Bagley, No. 16-3305 (brief filed Jan. 19, 2017) (fourth amendment: protective sweeps, good faith).

United States v. Bell, No. 16-6332 (brief filed Jan. 11, 2017) (sentencing: statutory mandatory minimums).

United States v. Bettcher, No. 16-4165 (brief filed Jan. 18, 2017) (§ 4B1.2: *Johnson* claim).

United States v. Billy, No. 16-7071 (brief filed Jan. 5, 2017) (supervised release: revocation & conditions).

United States v. Buck, No. 16-8103 (brief filed Jan. 13, 2017) (ACCA: *Johnson* claim).

United States v. Driscoll, No. 16-8118 (brief filed Dec. 30, 2016) (28 U.S.C. § 2255; ACCA: *Johnson* claim).

United States v. Johnson, No. 16-4146 (brief filed Jan. 12, 2017) (18 U.S.C. § 1014; sixth amendment: right to counsel; right to present a defense; sixth amendment: confrontation; due process: judicial misconduct; § 2B1.1; § 2B1.1(b)(10)(C); § 2B1.1(b)(16)(A)).

United States v. Johnson, No. 16-3280 (brief filed Jan. 18, 2017) (sentencing: mandatory minimum, relevant conduct; wiretap).

United States v. Kaimana, No. 16-1328 (gov't brief filed Jan. 26, 2017) (§ 4B1.2: *Johnson* claim).

United States v. Kieffer, No. 16-1457 (brief filed Jan. 17, 2017) (supervised release: conditions).

United States v. Knox, No. 16-3324 (brief filed Jan. 27, 2017) (fourth amendment: good faith).

United States v. Lopez, No. 16-1324 (brief filed Jan. 17, 2017) (sentencing: substantive unreasonableness).

United States v. McMahan, No. 16-3308 (brief filed Jan. 6, 2017) (ACCA: *Johnson* claim).

United States v O'Connor, No. 16-3300 (brief filed Jan. 27, 2017) (§ 4B1.2: *Johnson* claim).

United States v. Ontiveros, No. 16-1362 (brief filed Jan. 4, 2017) (§ 4B1.2: *Johnson* claim).

United States v. Pacheco, No. 16-3294 (brief filed Jan. 20, 2017) (fourth amendment: search-warrant issues; trial practice: jury instructions: theory of defense; §1B1.3).

United States v. Porter, No. 16-1289 (brief filed Jan. 17, 2017) (§ 4B1.2: *Johnson* claim).

United States v. Richardson, No. 16-6314 (brief filed Jan. 17, 2017) (sentencing: departures & variances).

United States v. Riddle, No. 16-4143 (brief filed Jan. 20, 2017) (18 U.S.C. § 1014; speedy trial; discovery; fifth amendment: confrontation; due process: judicial misconduct; § 2B1.1).

United States v. Rodriguez, No. 16-1384 (brief filed Jan. 26, 2017) (§ 4B1.2: *Johnson* claim).

United States v. Snyder, No. 16-8117 (brief filed Jan. 18, 2017) (ACCA: *Johnson* claim).

United States v. Soto, No. 16-3276 (brief filed Jan. 3, 2017) (sixth amendment: substitution of counsel; sentencing: procedural reasonableness).

United States v. Tee, No. 16-3243 (brief filed Dec. 30, 2016) (18 U.S.C. § 2422; entrapment; prosecutorial misconduct; FRE 403; FRE 803).

United States v. Tellez-Castrejon, No. 16-1353 (brief filed Jan. 26, 2017) (sentencing: substantive unreasonableness).

United States v. Twitty, No. 16-1322 (brief filed Jan. 27, 2017) (Fed. R. Evid. 401, 403, 802).