

# TENTH CIRCUIT ORAL ARGUMENT CALENDAR

Thursday, January 7, 2021  
Denver, CO<sup>1</sup>  
Courtroom I

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9:00 A.M.

**Tymkovich, Murphy, Hartz**

**19-2182 NM United States v. Cotto**

1. Did the search warrant for this defendant's home allege a sufficient nexus between the house and criminal activity? Did the warrant sufficiently describe with particularity the items to be seized? And does the good faith exception or the inevitable discovery doctrine save the search?

for the government: Peter Eicker

for the defendant: Meredith Esser (Colorado FPD)

**19-2193 NM United States v. Platero**

1. Did the district court plainly err by increasing this defendant's base offense level based on the commentary to § 2A3.4, which defines sexual acts more expansively than the guideline's text?

for the government: Nicholas Marshall

for the defendant: Mallory Gagan (New Mexico FPD)

**19-2212 NM United States v. Trujillo (gov't appeal)**

1. Did the district court err when it granted this defendant's motion to suppress because it found that the impoundment and search of his car were not constitutional?

for the government: Paige Messec

for the defendant: Ryan Villa (Albuquerque, NM)

**19-4155 UT United States v. Crespín**

1. Did the district court impose an illegal sentence when it imposed a 14-month prison sentence for a supervised release violation when the defendant had already served the statutory maximum for the underlying offense?

for the government: Elizabethanne Stevens

for the defendant: Bretta Pirie (Utah FPD)

**20-5024 NOK United States v. Regalado (submitted on the briefs)**

1. In this trial for enticement of a minor and possession of a fraudulent document, did the district court plainly err by failing to instruct the jury to consider evidence of defendant's past child molestation only as it was relevant to one count, rather both counts?

for the government: Leena Alam

for the defendant: Barry Derryberry (Oklahoma FPD)

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<sup>1</sup> All November Session arguments will be held virtually via Zoom.

# TENTH CIRCUIT ORAL ARGUMENT CALENDAR

Monday, January 11, 2021  
Denver, CO  
Courtroom III

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9:00 A.M.

**Briscoe, Matheson & Carson**

**19-6174 WOK United States v. Yarclay**

1. Did the district court err when it applied enhancements for the number of victims and for the use of the means of identification of another person?

for the government: William Farrior

for the defendant: David Autry (Oklahoma City, OK)

**19-8051 WY United States v. Khan**

1. Was it error for the district court to give a good faith jury instruction for one codefendant, but not for another?
2. Was there sufficient evidence that this defendant knew that the doctor he worked with, also his brother, was prescribing drugs in violation of the Controlled Substance Act?
3. Did the search warrant for this defendant's out-of-state home provide a sufficient nexus between the crime and the residence? Should items that were seized but which were not listed in the warrant have been suppressed?

for the government: Stephanie Sprecher

for the defendant: Mark Baker (Albuquerque, NM)

**19-8054 WY United States v. Kahn**

1. Was this search warrant defective because it failed to establish probable cause that the patient files to be seized would be in the defendant's home, did the scope of the search exceed the warrant, and does the good faith exception apply?
2. Was a mistrial warranted by a government witness's reference to the defendant's custodial status during trial?
3. Did the court's instruction that the jury could find intent by what the defendant did or omitted to do impermissibly burden the defendant's right to silence?
4. Did the district court reversibly err by instructing the jury that the government can prove the knowledge required for drug trafficking if the defendant made an unreasonable but honest mistake. or by failing to instruct the jury that the defendant's actions were a but-for cause of the victim's death?

for the government: Stephanie Sprecher

for the defendant: Beau Brindley (Chicago, IL)

**20-5017 NOK United States v. Rodriguez**

1. In this child pornography production trial, was there insufficient evidence that the visual depictions at issue had been produced on material that had moved in interstate or foreign commerce?

for the government: Reagan Reininger

for the defendant: Gail Johnson (Boulder, CO)

**Tuesday, January 19, 2021**  
**Denver, CO**  
**Courtroom I**

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**9:00 A.M.**

**Tymkovich, Baldock & Bacharach**

**19-7052 & 19-7054 EOK United States v. Cushing & United States v. Hall**

1. Was there sufficient evidence to prove that these defendants entered a conspiracy to distribute methamphetamine, and not just a buyer-seller relationship, and that there was a single, interdependent conspiracy?
2. Did the district court reversibly err by refusing to give a requested instruction regarding the evidence of multiple conspiracies?
3. Did the district court reversibly err by admitting evidence of a phone call between the defendant and another person about an unidentified person “snitching.”
4. Was it error to admit the testimony of a law enforcement expert who had only information about the investigation?
5. Did multiple errors, including jury instructions, Rule 404(b) evidence, and improper expert testimony, amount to reversible cumulative error?

for the government: Linda Epperley

for Defendant Cushing: William Lunn (Tulsa, OK)

for Defendant Hall: Robert Wyatt (Oklahoma City, OK)

**20-3038 KS United States v. Carter**

**20-3039**

**20-3040**

**20-3042**

**20-3043**

1. Whether the district court, in response to motions filed in a criminal case for return of property under Federal Rule of Criminal Procedure 41(g), erred by conducting a wide-ranging investigation into the operations of the United States Attorney’s Office and by making erroneous legal and factual findings adverse to the government that the court has applied and will continue to apply in more than 100 pending motions under 28 U.S.C. § 2255.
2. Do the Objectors have a sufficient personal stake in the outcome of this case to establish appellate standing?
3. Did the district court commit reversible error by failing to adapt its judicial investigation and adjudication to afford the Objectors fair notice and an opportunity to be heard consistent with the constitutional mandates of due process?

for the government: William Glaser

for objector-appellants: Trevor Wohlford (Topeka, KS)

for movant-appellee: Melody Brannon (Kansas FPD)

**Tuesday, January 19, 2021**  
**Denver, CO**  
**Courtroom II**

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**9:00 A.M.**

**Phillips, Ebel & Carson**

**19-1389 CO United States v. Martinez**

1. Did the district court err by relying on the § 4B1.2 commentary to find that attempts and conspiracies to commit crimes of violence qualify as crimes of violence?
2. Does a condition of supervised release which allows the probation officer to require the defendant to notify third persons that he poses a risk to them, if the court approves it, mean that a hearing must be held regarding the approval?

for the government: Michael Johnson

for the defendant: Howard Pincus (Colorado FPD)

**19-1465 CO United States v. Kendall**

1. Did the district court err when it found that the inventory of this defendant's car was a legitimate exercise of the police community caretaking function, and that disassembling part of the interior did not exceed the scope of a valid inventory search?

for the government: Elizabeth Ford Milani

for the defendant: Michael Sheehan (Centennial, CO)

**20-1050 CO United States v. Rico**

1. Did the district court err by applying a cross-reference for attempted murder under USSG § 2K2.1 at this defendant's sentencing for firearm possession?

for the government: Elizabeth Ford Milani

for the defendant: Lance Hopkins (Tahlequah, OK)

**20-1083 CO United States v. Twitty**

1. Does the Assimilative Crimes Act confer jurisdiction in this case or is this stalking offense covered by other regulations? Is Colorado's stalking statute unconstitutional, such that it cannot be the basis for a conviction under the ACA, and did the district court improperly instruct the jury on stalking?

for the government: Karl Schock

for the defendant: Scott Reisch (Denver, CO)

**20-2006 NM United States v. Moya**

1. Did the district court err by improperly instructing the jury on the elements of a crime and the standard of causation for a crime under § 841 that causes a death? Was the evidence sufficient to support this defendant's conviction for that offense?
2. Did multiple errors, including improper expert testimony, excluded expert testimony, and improper instructions, cumulatively deprive this defendant of a fair trial?
3. Did the district court abuse its discretion by allowing the government to ask an expert hypothetical questions that addressed the ultimate issue in the case and were confusing? And did the district court err by denying the defendant's requests to present expert testimony?

for the government: James Braun

for the defendant: Lance Hopkins (Tahlequah, OK)

Wednesday, January 20, 2021  
Denver, CO  
Courtroom I

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9:00 A.M.

Hartz, Kelly & Phillips

20-6010 WOK United States v. Maldonado-Passage

1. Did the district err by refusing to group two counts under the guidelines, finding that the two counts were two separate plots to murder the same victim?
2. Did the district court err by allowing a witness to be present during the trial as a crime victim, when there was no evidence presented that she was harmed by the murder-for-hire scheme charged?

for the government: Steven Creager

for the defendant: Brandon Sample (Rutland, VT)

**Thursday, January 21, 2021**  
**Denver, CO**  
**Courtroom I**

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**9:00 A.M.**

**Briscoe, Bacharach & Eid**

**20-5004 NOK United States v. Woodard**

1. Was the impoundment of this defendant's car unconstitutional, because it exceeded the applicable local policy?
2. Did the district court plainly err when it classified this defendant as a career offender based on a prior Oklahoma controlled substance conviction?

for the government: Victor Regal

for the defendant: Shira Kieval (Colorado FPD)

**Thursday, January 21, 2021**  
**Denver, CO**  
**Courtroom III**

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**9:00 A.M.**

**Tymkovich, Baldock & Carson**

**19-5111 NOK United States v. Xiong**

1. Did the district court plainly err by instructing the jury that it could convict this defendant of constructively possessing a firearm, without instructing them that they had to find that he intended to control it?

for the government: Leena Alam

for the defendant: Dean Sanderford (Colorado FPD)

**20-2004 NM United States v. Guillen**

1. Did the district court err when it found this defendant voluntarily consented to police officers' entry into his home, or by concluding that the defendant's father had apparent authority to consent to a search of the defendant's bedroom?
2. Should some or all of this defendant's statements be suppressed because agents deliberately interrogated him without informing him of his *Miranda* rights before obtaining his statements again after a waiver, and/or because his waiver was not voluntary?

for the government: Tiffany Walters

for the defendant: Melissa Morris (New Mexico FPD)

Friday, January 22, 2021  
Denver, CO  
Courtroom II

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9:00 A.M.

McHugh, Kelly & Eid

19-6161 WOK United States v. Foust

1. Did the district court abuse its discretion when it admitted handwriting expert testimony?

for the government: Jessica Perry

for the defendant: Howard Pincus (Colorado FPD)

19-6189 WOK United States v. Craine (submitted on the briefs)

1. Did the district court err when it denied this defendant's motion to withdraw his guilty plea after *Rehaif v. United States*?
2. Did the district court err by applying a cross-reference for first-degree murder under USSG § 2K2.1 at this defendant's sentencing for firearm possession?
3. Is this defendant's statutory-maximum 120-month sentence for firearm possession substantively unreasonable?

for the government: Julia Barry

for the defendant: Kyle Wackenheim (Oklahoma FPD)

20-6005 WOK United States v. Outley

1. Was this defendant's mid-trial waiver of the right to counsel knowing and intelligent?
2. Did the district court err when it denied the defendant's request to present evidence about a February 2020 traffic stop, based on its prior ruling that the government could not present the evidence under Rule 404(b)?

for the government: David McCrary

for the defendant: Shira Kieval (Colorado FPD)

20-6017 WOK United States v. Jones

1. Is this defendant's 15-month sentence for indecent exposure while in BOP transit, to run consecutive to the sentence he is already serving, substantively unreasonable?

for the government: Steven Creager

for the defendant: Susan Otto (Oklahoma FPD)

20-6023 WOK United States v. Benton

1. Is the government required to prove that a defendant knew that a prior conviction precluded him from possessing a firearm?

for the government: Wilson McGarry

for the defendant: Timothy Kingston (Foley, AL)

**Friday, January 22, 2021**  
**Denver, CO**  
**Courtroom IV**

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**9:00 A.M.**

**Lucero, Holmes & Phillips**

**19-3256 KS United States v. Starks**

1. Did the district court plainly err by admitting out-of-court statements by non-testifying officers suggesting that this defendant had trafficked drugs during the investigation, in violation of the Sixth Amendment?
2. Did multiple instances of prosecutorial misconduct deprive this defendant of a fair trial?
3. Did the district court abuse its discretion when it admitted expert testimony from a law enforcement witness absent either notice from the government or any Rule 702 finding?
4. Did the district court abuse its discretion by admitting hearsay evidence that this defendant and an alleged coconspirator crossed the U.S.-Mexico border together?
5. Did multiple errors, including improper expert testimony, hearsay evidence, evidence admitted in violation of the defendant's confrontation rights, and prosecutorial misconduct, cumulatively deprive this defendant of a fair trial?

for the government: James Brown

for the defendant: Paige Nichols (Kansas FPD)

**20-3029 KS United States v. Wasson**

1. Did the government prove beyond a reasonable doubt that this defendant transported child pornography?

for the government: Jason Hart

for the defendant: Paige Nichols (Kansas FPD)

**19-4158 UT Honie v. Powell (death penalty)**

1. Is this state defendant entitled to habeas relief based on his claims of ineffective assistance of counsel?

for the government: Melissa Holyoak

for the defendant: Eric Zuckerman (Utah FPD)