

**TENTH CIRCUIT ORAL ARGUMENT CALENDAR**  
**Byron White Courthouse, Denver, Colorado**

**Tuesday, September 25, 2018**  
**Courtroom III**

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**9:00 A.M.**

**17-2146 NM United States v. Dalton**

1. Was this defendant deprived of his right to present a defense by way of a witness's exonerating statements when the government caused the witness to invoke the Fifth Amendment and refused to grant her immunity, and the district court excluded her recorded statement?
2. Was the video of this defendant's SWAT-team arrest irrelevant and unduly prejudicial to his trial on gun charges?
3. Should the district court have admitted the recording of an unavailable witness's exonerating statements under the catch-all provision of Federal Rule of Evidence 807?

for the government: Marisa Ong

for the defendant: Brock Benjamin (El Paso, TX)

**17-2161 NM United States v. Cook**

1. Should the district court have admitted a plea agreement incriminating this defendant's fiancé (whom she claimed was solely responsible for the drug trafficking underlying her charges) as an adopted admission by the government?
2. Did the district court violate this defendant's confrontation rights by refusing to allow her to cross-examine a police officer about his dishonesty in another case?
3. Did the district court violate Federal Rule of Evidence 608(b) when it refused to allow this defendant to cross-examine a police officer about his dishonesty in another case?

for the government: Alexander Uballez

for the defendant: Josh Lee (Colorado FPD)

**17-2173 NM United States v. Sedillo**

1. Is this drug defendant's 140-month guideline sentence procedurally unreasonable in light of the district court's failure to resolve disputed facts or explain its reason for rejecting the defendant's sentencing-manipulation-based variance argument?
2. Did the district court exceed its authority or jurisdiction when it sua sponte ordered this drug defendant to either marry the mother of his children or arrange child-support payments as a condition of supervised release (especially absent the existence of any state-issued child-support order)?

for the government: James Braun

for the defendant: Margaret Katze (New Mexico FPD)

**17-2180 NM United States v. Loera**

1. Was this computer-fraud search warrant a pretext to search for child pornography; did the agents exceed the scope of the warrant (as the district court found) when they expanded their search after finding child pornography; did a second warrant purge the taint of the foregoing illegality; and did the district court err in denying suppression on good-faith grounds?

for the government: Kristopher Houghton

for the defendant: Jerry Walz (Albuquerque, NM)

**17-2197 NM United States v. Jones**

1. Did this kidnapping victim's eye injury—resulting in sensitivity to bright light and necessitating sunglasses—qualify as a “serious bodily injury” for purposes of a two-level sentencing enhancement under USSG § 2A4.1(b)(2)(B)?
2. Did the district court erroneously add obstruction points under USSC § 3C1.1 for this defendant's prior alleged escapes?
3. Did the district court erroneously rely on this defendant's prior alleged escapes to deny any sentence reduction for acceptance of responsibility under USSG § 3E1.1?
4. Is this defendant's guideline sentence for kidnapping, in light of his background and the circumstances of his crime, substantively unreasonable?

for the government: Paul Mysliwicz

for the defendant: Kathleen McGarry (Glorieta, NM)

**17-2219 NM United States, Appellant v. Dutch**

1. Are this defendant's three prior bank robberies—committed on different days at different banks, but close in time and character—separate convictions for ACCA purposes?

for the government: George Kraehe

for the defendant: Brian Pori (New Mexico FPD)

Tuesday, September 25, 2018  
Courtroom IV

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9:00 A.M.

**17-6165 WOK United States v. Johnson (Cross-Appeal)**

**17-6195**

1. Is Oklahoma use of a vehicle to facilitate intentional discharge of a firearm a crime of violence (and was *Hammons* wrong about this)?
2. Is Oklahoma assault and battery on a police officer a violent felony for ACCA purposes?

for the government: Steven Creager

for the defendant: Kyle Wackenheim (Oklahoma FPD)

**17-1400 CO United States v. Murray**

1. Did the evidence and jury instructions in this assault case constructively amend the indictment? And if so, was this amendment structural error?

for the government: Karl Schock

for the defendant: Gail Johnson (Boulder, CO)

**17-6027 WOK Malone v. Carpenter (Death Penalty)**

1. Was this state capital defendant (1) deprived of his right to a fair trial and to present a defense by erroneous voluntary intoxication instructions, and (2) deprived of effective assistance of counsel, by counsel's failure to object to the instructions and failure to adequately prepare the expert witness in support of his voluntary intoxication defense; and should the district court have held an evidentiary hearing on these 28 U.S.C. § 2254 claims?

for the government: Jennifer Crabb

for the defendant: Robert Jackson (Oklahoma City, OK)

**Wednesday, September 26, 2018**  
**Courtroom III**

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**9:00 A.M.**

**17-5087 NOK United States v. Duran**

1. Whether this defendant is entitled to a certificate of appealability and 28 U.S.C. § 2255 relief from his ACCA sentence, based on Oklahoma robbery-by-fear convictions.

for the government: Leena Alam

for the defendant: Barry Derryberry (Oklahoma FPD)

**17-6119 WOK United States v. Harrison**

1. Is Oklahoma domestic abuse assault & battery a violent felony for ACCA purposes?

for the government: Steven Creager

for the defendant: Kathleen Shen (Colorado FPD)

**17-3194 KS United States v. Pullen**

1. Did the district court err when it dismissed this defendant's *Johnson*-based 28 U.S.C. § 2255 petition as impermissibly successive under 28 U.S.C. § 2255(h)(2) after this Court authorized the petition under that subsection (mandatory guidelines case)?

for the government: Jared Maag

for the defendant: Dan Hansmeier (Kansas FPD)

**Thursday, September 27, 2018**  
**Courtroom I**

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**8:30 A.M.**

**17-5118 NOK United States v. Murphy**

1. Was evidence that this defendant sometimes stored drugs at home sufficient to support a sentencing enhancement under USSG § 2D1.1(b)(12) for maintaining a drug premises?

for the government: Thomas Duncombe

for the defendant: Dean Sanderford (Colorado FPD)

**17-3122 KS United States v. Christy**

1. Did the district court err when it refused to instruct the jury that materiality is an essential element of making false bank entries?
2. Was the evidence insufficient as a matter of law to sustain this defendant's tax-evasion-based money-laundering convictions?
3. Was the district court's failure to ask this defendant personally if she wished to allocute plain sentencing error?
4. Did cumulative prosecutorial misconduct deny this defendant due process under plain-error review?

for the government: Jared Maag

for the defendant: Paige Nichols (Kansas FPD)

**17-3150 KS United States v. Jefferson**

1. Is robbery under 18 U.S.C. § 1951 a crime of violence for 18 U.S.C. § 924(c)(3)(A) purposes? And did the district court improperly direct a verdict when it so instructed the jury?
2. Did the district court err when it refused to instruct the jury that "force" means "violent force" in this 18 U.S.C. § 1951 case?
3. Was it misconduct for this prosecutor to argue that "possibilities do not equate to reasonable doubt"?

for the government: Carrie Capwell

for the defendant: Dan Hansmeier (Kansas FPD)

**18-5000 NOK United States v. Porter**

1. Did the district court plainly violate 18 U.S.C. § 3583(h)'s aggregation requirement when sentencing this defendant to 24 months' imprisonment after her second revocation?

for the government: Charles McLoughlin

for the defendant: Michael Reese (Cheyenne, WY)

**Thursday, September 27, 2018**  
**Courtroom II**

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**8:30 A.M.**

**17-2210 NM United States v. Ochoa-Olivas**

1. Is this defendant's revocation sentence substantively unreasonable?

for the government: John Balla

for the defendant: Margaret Katze (New Mexico FPD)

**17-4117 UT United States v. Trzaska**

1. Whether the district court abused its discretion by failing to weigh defendant's rights against the government's interest in maintaining the record of his arrest.
2. Whether the district court abused its discretion by failing to conduct an evidentiary hearing and make findings of fact when confronted with the allegations contained in defendant's motion.
3. Whether defendant is entitled to the requested relief when the correct legal standard is applied.

for the government: Elizabethanne Stevens

for the defendant: Jacob Rasch-Chabot (Colorado FPD)

**17-4159 UT United States v. Hansen**

1. Was this defendant's waiver of counsel knowing and intelligent? What was the district court required to do to ensure that the waiver was valid?

for the government: Gregory Knapp

for the defendant: Josh Lee (Colorado FPD)

**17-4187 UT United States v. Waldron**

1. Did the district court misstate the burden of proof in its instructions to the jury? Did it improperly tell the jury that the defendant did not anticipate calling any witnesses?
2. Was the *Brady* evidence at issue in this case material? Was an ex parte conversation between the district court and the government regarding the government's *Brady* obligation plain constitutional error?

for the government: Jennifer Williams

for the defendant: Sara Zalkin (Arcata, CA)

**18-4009 UT United States v. Osborn**

1. Did the district court properly order this defendant to submit to involuntary medication to achieve competency?

for the government: Syrena Hargrove

for the defendant: Amy Cleary (Nevada FPD)

**18-1032 CO United States v. Alderete**

1. Can good faith excuse law enforcement's reliance on a warrant when the warrant affidavit contained information tainted by law enforcement's own Fourth Amendment violations?
2. Should the fruit of an unlawful entry and an unlawful car search be stricken from this search warrant affidavit, and does the warrant then lack probable cause?
3. Absent any surveillance suggesting that this defendant's car had been used to transport contraband, did law enforcement have probable cause to stop and search the car?

4. Was law enforcement's warrantless entry into this defendant's mobile home—for "officer safety" and "preservation of any evidence"—unlawful; was a witness's statement the fruit of this unlawful entry; and should that statement be stricken from a later warrant application?

for the government: Marissa Miller

for the defendant: Deborah Roden (Cheyenne, WY)

**Thursday, September 27, 2018**  
**Courtroom III**

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**8:30 A.M.**

**17-1011 CO United States v. Bowen**

1. Is 18 U.S.C. § 924(c)(3)(B) unconstitutionally vague, and is retaliating against a witness under 18 U.S.C. § 1513 a crime of violence for 18 U.S.C. § 924(c) purposes?

for the government: Bishop Grewell

for the defendant: Meredith Esser (Colorado FPD)

**17-1370 CO United States v. Lopez**

1. Whether the government's unenthusiastic sentencing recommendation breached its plea agreement with this drug defendant.

for the government: Bishop Grewell

for the defendant: Jimmy Hopkins (Tahlequah, OK)

**17-6211 WOK United States v. Ejiofor**

1. Was this search warrant so lacking in probable cause as to render its execution unreasonable?
2. Did an affidavit alleging three vague and tangential connections to the actions of people involved in an online dating scheme supply probable cause for a warrant to search this defendant's home?

for the government: Timothy Ogilvie

for the defendant: Howard Pincus (Colorado FPD)

**17-6223 WOK United States v. Morris**

1. Was a warrantless entry into this defendant's home justified by exigent circumstances hours after an alleged shooting, and despite the fact that an officer testified that the officers did not rely on exigent circumstances?
2. Did this defendant's mother freely and voluntarily consent to a search of the defendant's home in the face of her own physical frailty and an officer's threats to take her to jail?

for the government: Travis Smith

for the defendant: Kyle Wackenheim (Oklahoma FPD)

**Thursday, September 27, 2018**  
**Courtroom IV**

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**8:30 A.M.**

**17-8075 WY United States v. Winder**

1. Is Wyoming felony interference with a peace officer a crime of violence for purposes of USSG § 2K2.1(a)(4)(A)?

for the government: Jason Conder

for the defendant: John Arceci (Colorado FPD)

**17-8084 WY United States v. Manning**

1. Did the district court plainly err in excluding a witness's statements that the defendant thought he would get life in prison if he had a gun—relevant to his intent not to possess a gun?
2. Did the district court err in excluding statements against penal interest, proffered under Fed. R. Evid. 804, that a third party made, admitting that the gun in this gun case was his?

for the government: Stephanie Hambrick

for the defendant: Bretta Pirie (Utah FPD)

**15-8013 WY Eaton v. Pacheco (Death Penalty)**

**16-8086**

1. Habeas courts have broad discretion to order an adequate remedy for constitutional violations. Here the district court vacated this defendant's state death sentence. But the district court refused to consider the defendant's argument that the state should not be allowed to seek another death sentence, because at least 18 of this elderly defendant's mitigating witnesses had died since the original trial. Did the district court abuse its discretion?
2. The federal district court vacated this defendant's state death sentence and directed that the defendant be appointed counsel and resentenced within 120 days. The state took no action by that deadline. Did the state waive its right to re-seek the death penalty in this case?
3. Did counsel's ineffectiveness in failing to investigate this state capital defendant's mental health result in the defendant being tried while incompetent?
4. Did the state prosecutor in this capital case violate *Brady* when it suppressed impeaching evidence related to a jailhouse informant?

for the government: Katherine Adams

for the defendant: Sean O'Brien (Kansas City, MO)