

## MY FIRST SUPREME COURT ARGUMENT . . . AND THEN WHAT HAPPENED

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My first Supreme Court argument was in *Puerto Rico v. Sánchez Valle*.<sup>1</sup> The case concerned the dual-sovereignty exception to the Double Jeopardy Clause. As every schoolkid learns, the Double Jeopardy Clause prevents criminal defendants from being tried twice for the same crime. As not every schoolkid learns, that rule does not apply when the successive prosecutions are by different sovereigns. The Supreme Court has held that states are different sovereigns from the federal government—which means that if a person’s conduct violates both federal and state law, he can be separately tried and sentenced in both federal and state court.<sup>2</sup> In *Sánchez Valle*, the question presented was whether Puerto Rico—a U.S. territory—was a different sovereign from the United States, such that successive prosecutions by the federal government and Puerto Rico for the same conduct did not violate the Double Jeopardy Clause.

I could not have asked for a better first Supreme Court case. *Sánchez Valle* presented a profound question of constitutional law: What constitutes a sovereign? It required a deep dive into history that included, for instance, comparing the creation of the Puerto Rico Constitution with the events surrounding the states’ entrance into the union. It was both symbolically important and of practical importance to the

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1. \_\_\_ U.S. \_\_\_, 136 S. Ct. 1863 (2016) (argued January 13, 2016).

2. *Sánchez Valle*, 136 S. Ct. at 1867, 1870 (explaining that “two prosecutions . . . are not for the same offense if brought by different sovereigns—even when those actions target the identical criminal conduct through equivalent criminal laws” because the defendant has “by one act . . . committed two offences” (citation omitted)).

administration of justice. And, of course, the case was of the greatest practical importance to my two clients, who faced years of additional imprisonment if Puerto Rico was permitted to prosecute them for crimes for which they had already served time. It was an incredible privilege to litigate the case in the Supreme Court.

Predictably, I prepared obsessively for the oral argument, doing three moot courts and spending most of my waking hours figuring out how I would respond to off-the-wall questions. The oral argument itself was a blur. I got out my first line—“Under the Constitution, states are sovereign, but territories are not”—which in retrospect might have been a bit trite. I got out a few more words and then the questions began. As in many a Supreme Court argument, my experience consisted of listening nervously to often lengthy questions that I wasn’t sure I understood; stammering out a few words in response; and then being interrupted with another lengthy question. My fifteen minutes went by very quickly, but I sat down thinking that I hadn’t affirmatively lost the case for my clients. In the end the Court went our way by a six-to-two vote.

I very much doubt that my oral argument made an impression on the Justices, but it certainly made an impression on me. Of course I wanted to go up there again. I began reading reported decisions to try to find one that might interest the Supreme Court, and I got lucky. Three lawyers agreed to let me file petitions for certiorari challenging adverse decisions. By a quirk of scheduling, the three petitions were scheduled for Conference in rapid succession, and then the Supreme Court granted all three. This meant that I would be arguing three Supreme Court cases in the span of a month. Uh-oh.

The next few months were busy. Preparing opening and reply briefs in three cases takes time. Of course, I had work for other clients that I couldn’t leave by the wayside. And all was not quiet on the home front, with two young kids who were not interested in my litigation calendar and our third child due two weeks after the third oral argument.

But as I prepared the briefs, I realized that I was even luckier than I thought. I had stumbled onto three cases in which the legal positions I would be taking were unusually compelling.

I have always found it unseemly for lawyers to take too much credit for Supreme Court wins. Supreme Court litigation is not a moot court competition. The Supreme Court rules for the better case, not the better lawyer. And for good reason—the whole premise of the certiorari process is that the Court takes cases that are important to the country, not just to the litigants. Indeed, it is customary for cert petitions to characterize cases as good vehicles for resolving broader issues that affect other litigants. So it would seem unfair to have those others lose their rights because someone else—the person who took the issue to the Supreme Court first—hired a bad lawyer. Of course having a good lawyer helps convince the Court about the strength of a case, but the Justices really do try their best to look past the quality of the lawyering and get to the right answer.

This makes Supreme Court litigation particularly rewarding when you are lucky enough to stumble across a winning case. And I was lucky, cubed. I had stumbled across three winning cases.

The first case, *Howell v. Howell*,<sup>3</sup> was a military divorce dispute in which I represented a veteran against his ex-wife. Federal law provides that a veteran can get a pension or disability pay, but not both; if a veteran starts receiving disability pay, he waives a corresponding portion of his pension. Federal law also provides that a divorce court can divide a veteran's pension, but not disability pay. A divorce court had divided Mr. Howell's pension, and he later waived a portion of his pension to receive disability pay. The divorce court then ordered him to pay his ex-wife an amount that would ensure that she was getting the same monthly amount that she had received when he was paying her solely out of his pension. When you work through the math, you realize that this order is dollar-for-dollar identical to an order dividing Mr. Howell's disability pay, which is prohibited under federal law. Yet the Supreme Court of Arizona nonetheless held that the order did not violate federal law. This just couldn't be right.

The second case, *Honeycutt v. United States*,<sup>4</sup> concerned whether co-conspirators are jointly and severally liable for forfeiture orders when only one conspirator actually got the

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3. \_\_\_ U.S. \_\_\_, 137 S. Ct. 1400 (2017) (argued March 20, 2017).

4. \_\_\_ U.S. \_\_\_, 137 S. Ct. 1626 (2017) (argued March 29, 2017).

money. Nothing in the federal statute at issue provided for joint and several liability. Indeed, the statute was clearly directed at ensuring the forfeiture of tainted property directly implicated in crime—which is inconsistent with imposing forfeiture orders on co-conspirators who never received tainted property.

The third case, *Kokesh v. SEC*,<sup>5</sup> concerned whether there was a statute of limitations for the SEC's implied disgorgement remedy. Disgorgement is an implied remedy, so, not surprisingly, there is no express statute of limitations. An old statute provided a general five-year statute of limitations that applied in actions for penalties or forfeitures, so the question was whether disgorgement fell into either category. The SEC took the position that disgorgement was neither a penalty nor a forfeiture, so there was no statute of limitations whatsoever. Of course, the reason Congress hadn't enacted a statute of limitations was that disgorgement was an implied remedy. So the SEC's position boiled down to the theory that not only could the government create implied remedies, but it could ensure that those remedies were subject to no limitations period precisely because they are implied. I did not think the Supreme Court would go for that.

So I felt good about my cases. Well, not *that* good. I was up against the government in all three cases—in *Honeywell* and *Kokesh*, the government was the opposing party—and in *Howell*, the government had filed an amicus brief on the ex-spouse's side. In all three cases, not only the courts below, but also most other courts, had ruled against my position. In *Honeycutt*, the one case in which I truly felt certain that the government's position was wrong, there was actually a nine-to-one circuit split in the government's favor. I was worried that my assessment of our positions reflected unconscious hubris. (Consciously, at least, I was extremely nervous.) I was also aware that lawyers routinely insist publicly, and believe privately, that they're going to win, only to be shocked by the outrageous decisions against them. I didn't want to be one of those lawyers.

But it worked out. The oral arguments were a bit anticlimactic, which was a good thing. In *Howell* I sat down with something like thirteen minutes left, having gotten only a

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5. \_\_\_ U.S. \_\_\_, 137 S. Ct. 1635 (2017) (argued April 18, 2017).

few polite questions from the bench. In *Honeycutt* I don't think I got a single hostile question, and sat down fifteen minutes early. My primary regret in both cases is that I droned on too long in rebuttal. The bench was more active in *Kokesh*, but the Justices were much harder on my opponent. In the end, the Court ruled for my clients in all three cases without dissent.

I definitely didn't win the cases because of my oral arguments. My clients won the cases because, on the law, they deserved to win. I just went along for the ride, but it was a great ride.

