

I COULDN'T WAIT TO ARGUE

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My first and, to date, only argument in the Supreme Court occurred in 1991 in *County of Riverside v. McLaughlin*.¹ The primary issue in the case concerned the time frame in which a person arrested without a warrant had to be taken in front of a magistrate for a determination of probable cause.

I was still an associate at my law firm when certiorari was granted, but I had spent almost all my time working on civil appeals. Even though I had been in practice only about seven years, I had already briefed and argued more than fifty cases in various state and federal appellate courts.

The first thing that struck me about oral argument at the Supreme Court was how fast it was scheduled. I had filed the cert petition at the end of the prior year's term, and the Court issued the order granting certiorari on the first Monday in October. When the clerk telephoned to advise me that certiorari had been granted, she also told me the case was tentatively set for oral argument in the first week of January 1991. In fact, oral argument ended up being scheduled immediately after New Years, only seven days after I had filed my reply brief on the merits.

It wasn't necessarily a sure thing that I would argue the case. I was, after all, still an associate, although I had briefed and argued the case all the way from the district court through the Ninth Circuit and had prepared the successful petition for certiorari. In a lot of law firms this wouldn't have made any difference, and the senior partner on the case would have argued in the Supreme Court. Or the client might have insisted on a partner arguing the case, or even brought in a Supreme Court

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1. 500 U.S. 44 (1991).

specialist from an outside firm, though that practice was less common twelve years ago than it is today. However, the partner I was working with and the client almost immediately told me that they thought that I should argue the case, precisely because I was an experienced appellate lawyer and was intimately acquainted with the record and the arguments.

I wasn't particularly apprehensive about appearing before the Supreme Court, but as with any court, I wanted to have some idea how they conducted oral argument before simply showing up in the courtroom. Because of the deadline for filing my opening brief and the various intervening holidays, I had only a small window of opportunity to see the Court prior to having to appear. As I recall, I realized on the Wednesday afternoon after I filed my brief that the only arguments scheduled before I would have to appear started the next Monday. I therefore had to arrange a hasty trip to Washington simply to observe oral argument. This ended up being the best preparation I could ever have for appearing in front of the Court.

The first thing that struck me about the courtroom was how close counsel would be to the bench when presenting oral argument. As a member of the Supreme Court bar, I was able even as an observer to sit down in the attorney well, just in front of the Court. Although the courtroom is large, the setting is fairly intimate for the attorneys arguing the case and the Court. I filed this important fact away in my mind.

It also helped to see what a broad range of advocates appeared in front of the Court. Some of the lawyers were outstanding, clearly highly experienced practitioners, if not in appeals, at least in the underlying subject matter that was before the Court. I recall one elderly admiralty lawyer who had complete command of his subject, but who, I was surprised to learn when I subsequently checked his background, had never previously appeared in front of the Court. I also saw a younger lawyer in another case do virtually everything wrong, from attempting to read his argument verbatim from three pages of single-spaced text to constantly equivocating in his position. I remember thinking that Justice Scalia appeared to be batting him back and forth the way a cat toys with a ball of yarn.

It may sound terrible, but watching that attorney melt down gave me plenty of confidence, because in the back of my mind I

thought I could never perform as horribly as he had. It also reminded me that however exciting it would be to stand in the shoes of the many famous attorneys who have argued before the Court—Daniel Webster, Thurgood Marshall, even Abraham Lincoln—the reality is that the Court selects cases based on the importance of the issues, not the quality of the advocate.

My general impression after observing oral argument was that this was simply another appellate court. The give and take of oral argument was pretty much identical to what I'd encountered in various state and federal courts. I couldn't wait to argue.²

I made it a point to get to Washington several days before oral argument in order to give myself sufficient time to prepare. Several organizations had offered to set up a moot court for me, but I had declined them all. I wasn't concerned about dealing with the dynamic of an appellate court, because I had already had a substantial number of appellate arguments. Instead, I wanted to focus on making sure that I understood every detail of the case and could answer virtually any hypothetical. To that end, the partner I was working with—who had been an appellate lawyer for over twenty years—spent the day before oral argument with me taking the case apart and putting it together again, turning the various issues over and coming at them from different directions. When we were done, I was confident that we had covered most of what the Court would probably raise at oral argument. We knew which portions of our case were strong and, more critically, which portions were weak.

On the morning of oral argument I was surprised that I didn't feel nervous. People never believe this, but it's true. If anything, I was incredibly eager to argue.

We were the second or third case on the calendar in the morning session. One of the bits of procedure that struck me was that upon our arrival at the Court, the clerk took all of the

2. The only thing that gave me pause was the trivial matter of what to wear. The oral-argument notice pointed out that a morning coat was traditional, but that a dark suit, properly buttoned during argument, would do. Since the only attorney I had seen in a morning coat was from the Solicitor General's office, and since I didn't own one (Aside from the members of the royal family and the lawyers in the Solicitor General's office, who does?), I decided that I didn't want to argue in rented clothes likely to make me look like a refugee from a cheap road production of *My Fair Lady*. I chose a black suit and a colorful, but not too flashy, tie.

counsel who were to argue into his office, congratulated us on having gotten there, and briefed us on Court protocol. Most interesting was the fact that the Chief Justice liked to move the calendar along very, very quickly, and hence upon completion of one case, the next group of advocates were to immediately proceed to the counsel table. I had noticed this when I had come to observe oral argument as well, and I thought at the time that counsel for the case that had just been called seemed to race to the table and then to the podium in order to commence argument.

As I sat in the well waiting for my case to be called, it again struck me how close we would be to the Justices when arguing. This was Thurgood Marshall's last term at the Court, his health was not good, and in fact I was sitting so close that I could hear him wheezing with each breath.

When the case was called, I dutifully hurried up to the counsel table and then stepped up to the lectern, holding a single sheet of paper on which I had outlined my argument in about six lines. Although the case focused primarily on warrantless arrests, there was a standing issue on which the Court had also (to my surprise and my opponent's horror) granted certiorari, and thus as a practical matter, I started with that issue.³ I was almost immediately peppered with questions from Justices O'Connor and Souter, neither very hostile, but both certainly direct.

Justice Scalia then asked me whether it wasn't ridiculous to say that someone would file a suit for injunctive relief if they could not benefit from it, and I remember thinking that this was actually kind of a silly question. Probably every person whose action was dismissed for lack of standing thought that they could benefit from the litigation, but their subjective belief wasn't particularly relevant to the legal standards governing standing. However, I couched my response more carefully, although fairly firmly, reminding him that *Lyons* involved precisely that situation—Mr. Lyons, I pointed out, must have thought that he would benefit from the litigation, but the Court concluded that

3. The standing issue was whether the plaintiff could seek injunctive relief in the form of a probable-cause determination within a particular time frame, when it did not appear that he himself could ever benefit from any injunction, a line of argument arising from the Court's decision in *City of L.A. v. Lyons*, 461 U.S. 95 (1983).

he lacked standing. Justice Scalia smiled and then sat back in his chair. I had the feeling that he was just testing me a bit.

Years later, one of our associates was listening to the oral argument over the internet and remarked that he couldn't believe how I had shot back a response at Justice Scalia after he suggested in front of the whole chamber in the United State Supreme Court that a portion of my argument was ridiculous. I told him the truth: that I thought in some respects Justice Scalia's question was ridiculous, and that I was so involved in presenting the argument that I had pretty much forgotten where I was. This is really the strongest impression I have about my oral argument in the Supreme Court—it was just like appearing in front of any other appellate panel, save for a slightly greater number of questions. The Court was no better or worse prepared than many panels I had appeared in front of, but the Justices were certainly much more vigorous in their questioning.

Once I was in the courtroom, and especially when I was presenting argument, things felt comfortable because, in the end, it's simply another courtroom, and you're a lawyer presenting your case. I felt especially comfortable because I had presented many appellate arguments prior to appearing in front of the Court, and I was confident that I knew my case at least as well and probably better than they did. I realized that they might not agree with my position, but I knew that in light of the case law I certainly had fairly good arguments to present.

I enjoyed arguing in front of the Supreme Court. What experienced appellate lawyer wouldn't? If you find yourself with a case in the Supreme Court and haven't had a lot of appellate experience, well then, that's a different matter. It's not a good Court in which to have your first, second, or probably even your tenth oral argument.

My best advice is to come to Court with a fair amount of experience, try to observe an oral argument in advance and, of course, prepare until you're ready to drop. Re-read the briefs, the record, and all of the case law. Figure out your weakest points and anticipate the one question that you would *not* want to be asked. Then figure out an answer to that question.

And have fun. This is why you're an appellate lawyer.

