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Back to Article

Will Defense Lawyers Accept Help on High Court Criminal Cases?

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One by one, different segments of the bar have gotten the message in recent years: The Supreme Court is a scary place to be -- a place where novices, more often than not, should fear to tread.

That is, all segments but one: the criminal defense bar, where individuality and swagger persist, and where solo newbies hold to the romantic notion that if they can conquer a hometown jury, they can work the same charm on the nine justices of the nation's highest court.

That can be a mistake. The Supreme Court oral argument season that just ended saw an unusually high number of state criminal cases argued -- 22. Some were not argued or briefed well from the defense side, say observers in the criminal defense bar who are now looking for ways to upgrade criminal defense advocacy before the Supreme Court, in the same way that their adversaries have improved.

Their concern is that the rights of criminal defendants, already a tough sell before a Court typically unreceptive on that issue, will be further undermined by inadequate briefing and subpar oral advocacy.

But complex cultural and institutional obstacles stand in the way, ranging from the fierce tradition of independence held by criminal defense lawyers to the Supreme Court's long-standing resistance to allowing argument time for amicus curiae groups that might serve to strengthen the arguments made by the defendant's own lawyer.

"There is a lone-wolf quality to the culture" of criminal defense lawyers, says New York lawyer Joshua Dratel, co-chair of the amicus committee of the National Association of Criminal Defense Lawyers. "Perry Mason did not come from a big law firm. But if a lawyer feels overwhelmed at the prospect of arguing at the Supreme Court, I hope ego is not the reason for

not seeking help or giving up the case." But even as he says that, Dratel hastens to add, "NACDL will never try to take a case away from anybody."

Because of that unshakable policy, the NACDL's aid to lawyers about to argue before the Supreme Court has been more informal -- and less visible. But now, proposals are being debated to formalize the aid through more structured moot courts and assistance with brief writing, with the goal of making it easier and more respectable for defense lawyers to seek help.

Other ideas include asking the Supreme Court itself to offer to appoint experienced lawyers to assist first-time advocates, as is done in some lower appellate courts.

Jeffrey Fisher of Davis Wright Tremaine, one of the very few stars of criminal defense advocacy who currently practice before the Court, says he is sometimes rebuffed when he calls local lawyers who have just learned their criminal case has been granted Supreme Court review. And that's just with an offer to lend a hand, he says. Other firms often try to take over the case completely, including the oral argument, and are rejected even more vigorously.

Many of the local lawyers and their clients, Fisher says, "don't know that the Supreme Court is totally different from any other court, even any other appellate court." He adds, "A lot of the clients are not savvy; they're not like a United Airlines or some company that knows, when it finds itself in the Supreme Court, that it should pick up the phone and call Mayer Brown Rowe & Maw." Fisher is soon taking a faculty position at Stanford Law School, where he plans to use its Supreme Court clinic to help more criminal defense lawyers with their briefs and arguments. He will remain of counsel at Davis Wright Tremaine.

Fisher also says criminal defendants and their lawyers sometimes form a bond that leaves those lawyers less willing to step aside than attorneys in other types of cases might be. In a case heard last month, *United States v. Gonzalez-Lopez*, Fisher argued that that connection had a constitutional dimension -- namely, a Sixth Amendment right of the defendant to his or her counsel of choice. Fisher believes the client's wishes should be followed, but he hopes that lawyers will be straight with their clients and tell them that seeking help might be in their best interest.

And Fisher and others acknowledge there are times when the original lawyer, steeped in the case's previous twists and turns, is precisely the right attorney to argue. "A good lawyer stands to be very effective, especially if the case is fact-intensive."

But that is hard to predict. And when the wrong combination of factors gather at the case's final destination, the result can be defense lawyers who find themselves fully out-gunned.

"There is a pretty profound imbalance now," says Pamela Harris, of counsel at O'Melveny & Myers in Washington and, like Dratel and Fisher, a co-chair of the NACDL committee. "I'm not entirely sure the criminal defense community knows what it is up against."

A FAIR FIGHT?

What defense lawyers face at the high court is vastly different from decades ago. It used to be that many of their opponents were substandard advocates themselves. State attorneys general, eager to impress voters back home, would argue before the Court. Some would embarrass themselves by using fulsome rhetoric and humorous asides that might work at a campaign rally but not before the justices.

Now, however, 31 states have solicitors general who bring a high level of skill to the Court. R. Ted Cruz of Texas, Caitlin Halligan of New York, Kevin Newsom of Alabama, and Gary Feinerman of Illinois are former Supreme Court law clerks.

And then there is the U.S. solicitor general's office, which often comes in on the side of the state in criminal cases and almost always secures argument time. That office was involved in 16 of the 22 state criminal cases this term. And when Deputy Solicitor General Michael Dreeben, the criminal law specialist, is the one who rises before the Court, a mismatch is in the offing.

"When he argues and then the defense lawyer gets up, it reminds me of those old carnivals where you go up against

a professional boxer, and if you last in the ring for one minute you win a prize," says Jeffrey Green, whose law firm, Sidley Austin, quietly and on a pro bono basis has helped criminal defense lawyers with briefing and moot court sessions for nearly a decade.

"It's not a case of defense lawyers getting worse, it's just that the states' side is getting so much better," says Georgetown University Law Center professor Richard Lazarus, whose Supreme Court Institute also puts on moot court sessions.

Though the high court routinely gives the solicitor general argument time as an amicus party, it seldom says yes to the NACDL, even when it is clear from the briefing that the defendant's case may not be well presented. The Court may not want to open the door to other amicus groups seeking argument time, but some advocates say it should make an exception for criminal defendants.

"There is a real injustice," says Roy Englert Jr. of Robbins, Russell, Englert, Orseck & Untereiner, a veteran advocate before the Court. "There are often two experienced oral advocates on the prosecution side and one oral advocate -- usually not an appellate specialist, and usually presenting his or her first Supreme Court argument -- on the defense side."

Englert, like others, thinks this contrast hurts the Court itself, not just the defense side. "There should be a more organized effort to persuade the Court to do this, and it would be in the Court's interest, not just ours," says Jonathan Hacker, a colleague of Harris' at O'Melveny. Dan Schweitzer, Supreme Court counsel for the National Association of Attorneys General, says, "I don't think it benefits the state when the other side writes a poor brief or makes a poor oral argument."

A CASE IN POINT

One recent case that caused concern among the defense bar was *Brigham City v. Stuart*, in which three residents of Brigham City, Utah, challenged a police search on Fourth Amendment grounds. Responding to a late-night noise complaint, police entered a home without knocking, after they saw a fight under way inside. Their original lawyer won before the Utah Supreme Court, but he ended his representation at that point.

So when Utah appealed the case to the U.S. Supreme Court, the defendants went to the Internet and hired Michael Studebaker of Ogden, Utah, who has been a lawyer for four years and whose only appellate experience was arguing once before a Kentucky appeals court as a legal aid lawyer. He filed an opposition to certiorari that ran only six pages long.

The high court granted review, and Studebaker, 37, filed a merits brief that raised eyebrows. It was 13 pages long, far short of the 50-page maximum that most other lawyers exploit. O'Melveny's Hacker filed an amicus brief for the NACDL that read like a merits brief, complete with a review of the facts.

Concern in the defense lawyer community mounted as Studebaker struggled through two difficult moot courts in Washington. But Studebaker improved, and when he finally argued, on April 24, his performance was not as bad as some had feared. Still, he seemed at a loss when asked several key questions, and at one point his answer to a justice's question was, "Personally, yes; legally, no." The case is still pending.

In an interview last week, Studebaker defended his briefs and his advocacy: "I think we covered the issues pretty well. I honestly didn't believe the Court would grant cert." When it did, he said, "I got a million calls from people wanting to take the case over."

Studebaker acknowledged: "I wanted the case, but I wanted to do right by the client. I would have had no problem stepping aside." But when he talked to his clients, he said, "They asked me to stay on." He added, "When the clients want you to step up to the plate, that's what you do, and we did as good a job as we could."