A Solo Argues Before SCOTUS

SCOTUSblog preview of the case Andy Simpson will be arguing in SCOTUS

Oddly, it doesn't discuss whether he'll be doing so in a Hawaiian shirt.

http://www.scotusblog.com/2018/01/argument-preview-consolidation-finality/

James S. Tyre, California

I actually tried to arrange time away to go see him in action, having never been to a SCOTUS trial before, or even in the building. Sadly, it could not be arranged.

BEST OF LUCK ANDY!!!! We are rooting for you!!!

Lyza L. Sandgren, (not an attorney)

Which other sezzers are going?

Carolyn Elefant, District of Columbia

Me

David Kaufman, Virginia

Is this going to be online, audio or visual?

Jonathan Stein, California

SCOTUS is still in the Stone Age, it doesn't do either audio or video live. The written transcript will be available later in the day, and the audio at the end of the week.

James S. Tyre

Between a TRO case in the VI, getting my reply brief in to SCOTUS, and then preparing for oral argument, I've been offline for a couple of weeks. I came up to DC on Monday night so that I could attend arguments on Tuesday and get a feel for how things are handled in the court (and to add familiarity to help quell any butterflies that might try to lodge in my stomach). I did attend two arguments on Tuesday, and then on Thursday had a moot court with the Georgetown University Law School Supreme Court Institute which was very tough, but fabulous. After my initial "opening statement" in the moot, I was 98% comfortable with all of the questions I was hit with. There were a few curve balls that I handled but felt I could have handled better. In the critique that followed, they identified a few weak spots (including my opening statement) and in one instance helped me refine an argument so that it is far more compelling. With respect to other weak spots, I spent the next 24 hours figuring out how to better address them and feel like I have a good way of responding to those questions.

In answer to Jim's initial question, no Hawaiian shirt, but I do have a cummerbund and bow tie in Hawaiian motif. Unfortunately, they are not silk and the bow tie is pre-tied. No way I would wear a pre-tied, non-silk bow tie to SCOTUS. I spent several hours on line trying to find a Hawaiian tie to wear but could only find them in polyester or cotton. (Again, out of the question for a SCOTUS argument.) I settled instead for a relatively (from SCOTUS's perspective) loud tie that comes close to Hawaiian. To that, I've added two pocket squares folded in different styles to make my garb slightly more bold than the norm. And, my suit, although a conservative blue, is lighter than the recommended navy blue.

As for the Hawaiian tie, I haven't given up. Yesterday, I found a silk Hawaiian tie at Nordstrom's Outlet, but it was grey and really wouldn't go with my blue suit nor be loud enough. I've still got 48 hours and if anyone in the DC area knows where I can find a true Hawaiian motif tie with dominant red or perhaps yellow colors, I'm prepared to venture out (into the cold) to buy it.

In other preparation notes, as those who have read my briefs know, one of my arguments is that you have a right of appeal from a final judgment and the judgment in this case was final -- it terminated the litigation and the district court had no other action to take or that it could take. Which to me brings to mind the Monty Python Dead Parrot Sketch. So, I'm thinking of setting up a Go-Fund my page and if the goal of $100,000 is met, I will argue that "The judgment in this case is final. The judgment has gone to meet its maker. It has joined the choir invisible." (After Chief Justice

Roberts invoked Ferris Bueller's Day Off in Tuesday's arguments, that no longer seems like much of a stretch goal.)

Hope to see some of you at the argument on Tuesday and I truly feel lifted by the support from this "steamed" (as Tyre would call it) group's support.

For those trying to attend, my case is first and the second case is even more of a "yawner" from the general public's perspective (it's about who can serve as a judge on some military panel) so there will not be long lines. By way of comparison, for the two Fourth Amendment cases this past Tuesday, the outside (non-lawyer) line was only about 20 people long at 8:30. Inside, the Bar Member's line was only about 15 people long at 8:40, and most of those lawyers had a specific interest in the case (e.g., they were from a firm where the lawyer was arguing). You are allowed to leave after the first case (as I will do) and I hope to have the opportunity to see you then, outside the courtroom, (if not before) to thank you for coming.

Oh, and if you want to be infuriated by the disdain shown for non-SCOTUS practitioners (to say nothing of solo/small firm lawyers), read this blog stating that I am going to get routed:

http://prawfsblawg.blogs.com/prawfsblawg/2018/01/argument-preview-hall-v-hall.html

So I'm going up against a heavy hitter, Obama's solicitor general, and maybe I missed the argument! (nice to see that two commenters realize that I did not miss the argument)

FWIW, as far as I can tell, the law professor author has never argued a case in either the Supreme Court or any of the federal courts of appeals.

By way of contrast, I've argued at least a dozen cases in the US Third Circuit as well as cases in the Federal and Fourth Circuits.

I'm not concerned by the professor's analysis. I think this is a case where my familiarity as a practitioner with the federal rules will come across in a way that will give the justices confidence in my arguments. By contrast, with all due respect to the past solicitor general, the lack of experience with how the sausage is made is not going to help him. So, hopefully, this case will show the benefit of NOT using SCOTUS counsel.

Could I lose the case? Of course. But I doubt it will be a rout.

Andy Simpson, U.S. Virgin Islands

I have jury duty on Tuesday (I kid you not) or I would attend. All the best. Break a leg. Don't freeze to death.

Elizabeth Pugliese, Maryland

You go, Andy, and find that tie! I tried my darnedest to work the schedules out to allow me to attend but I've got a paralegal on vacation and another out sick so I could not in good conscience leave everything to my only other paralegal. Wanted to attend VERY much but that's the way of it.

Break a leg, and win or lose the argument, YOU STILL DID IT IN FRONT OF SCOTUS!!! Beyond cool!

Lyza L. Sandgren

Good luck Andy. Still trying to figure if I can make it.

Roger Traversa, Pennsylvania

That blawg professor post is the most condescending thing I have ever seen.

If the moron had even read Andy's cert petition, he would have understood the complexity of the case and the quality of Andy's analysis. I will be doing a nice juicy post on this at some point....

Carolyn Elefant

Andy: On behalf of solos, lawyers that are in the trenches all day every day, you have already won !

Believe it or not, I may have something coming along that could end up where you are. I don’t know for sure just yet. If I do, I'll be calling you for advice.

Congratulations !

Joseph G. Bonanno, Massachusetts

I've just returned from Andy's argument at SCOTUS. Unfortunately, I arrived an hour before the argument but still too late to get a seat. The second case involved an appointments clause issue related to the military courts, which drew a huge crowd of military attorneys. I wound up sitting next to the counsel who heads the office where the military case originated and she told me that the Court also took up an issue presented by an amicus as to whether the military appeals court is actually an Article III court which I suppose gave the case some extra sex appeal. In any event, as a member of the SCOTUS bar, I was able to listen to the argument from the lawyers' lounge which, honestly, was preferable in some ways because I could focus only on the arguments - but problematic for writing a summary because I had some difficulty distinguishing between the male Justices based on voice (the women are pretty easy as they are very distinct).

1. So for background, here's the basic issue: whether a party in a case that was consolidated under FRCP 42 immediately file an appeal when a final judgment in entered just in his part of the case. In Andy's case, two cases with separate dockets were consolidated; eventually a judgment was entered in Andy's client's case docket, but the other case was still pending additional proceedings. Andy's client appealed her judgment to the Third Circuit which declined jurisdiction, finding that the case was not final for review in light of the pending case. Three years later, that pending case is still pending, meaning that Andy's client would still be waiting for relief.

2. With that brief background, here's the lede: Andy ROCKED it. No other way to describe it. He ably responded to the barrage of questions (starting slowly, then building momentum) and to explain all of the problems that the current system creates. He did not once lose his cool, had incredible command of the subject matter and foremost, was always respectful to both the Justices and his opposing counsel.

3. The famed Neil Katyal, Andy's opposition was another matter entirely.

Though granted, like Andy, he too had strong command of the caselaw, he also made several gaffes that frankly, I would not expect from an experienced appellate practitioner who last year, argued roughly 10 percent of the cases heard at SCOTUS. For example, at one point, Katyal said something to the Justices along the lines of "none of the courts disagree on this point..." to which one Justice replied, "Well, if that were the case, we would not have granted cert."

In another instance, Katyal referred several times to an amicus brief filed by the district courts supposedly in favor of Katyal's policy argument that his approach to

the rules would afford district courts the control they need over their dockets while granting them the discretion to grant the relief that Andy's client was seeking. I think it was Chief Justice Roberts (but not sure) who said - wait a minute - that amicus brief was signed by 7 district court judges - how can you claim that it supports the view of the entire judiciary? To which Katayal responded (for realz!) "Well we would have gotten more if we'd had the time."

Finally, it seemed to me that Katyal must have underestimated Andy because Katyal lost his cool a few times. When Katyal responded to Andy during his argument, he referred to Andy a few times as "He" instead of "my friend" or "counsel" or Mr. Simpson. I know seems like a ridiculously minor thing, but in high level, appellate arguments, it's extremely disrespectful not to properly address opposing counsel. I know I'm being hard on Katyal - he is clearly talented and was of course, well-prepared - but he's not perfect, and it's not impossible for even a first-timer solo at SCOTUS to give Katyal a run for his money.

4. When I exited the court, I saw Mr. Katyal, his client (at least, I think it was his client) and an entourage of at least 7 other lawyers. I assume that this was not a pro bono case in exchange for experience since Katyal doesn't need it - but I cannot imagine what the client must have paid for the argument prep and the phalanx of lawyers. Plus, what's up with this calling federal district court judges and asking them to sign on to an amicus? How many ordinary people have that level of access?

I'm looking forward to reading the decision when it comes out. One way or another, it will be a decision of significant import to all lawyers handling consolidated cases under the federal rules.

CONGRATS ANDY!!!

Carolyn Elefant

Thanks Carolyn! The transcript of Andy's argument just went up. I won't have time to read it until later, but it's at

https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-1150_8n5a.pdf or http://bit.ly/2DkyJUB

James S. Tyre

That's great to hear! Good job holding your own, Andy!

I told my hubby that - one way or another - this case is sure to end up in a Civ Pro textbook.

Corrine Bielejeski, California

Congratulations Andy! It sounds like you in an impressive performance and one your client certainly can be proud of, especially noteworthy given the experience of your adversary. Keep us posted!

Thank you, Carolyn, for the report. It was nice to have a nearly contemporaneous play by play from someone who witnessed the action.

Kristin Haugen, Minnesota

Carolyn:

Your write up is, for me, an example of the amazing value of this list.

Rock on.

Peace,

Robert Link, California

And to Andy's credit, he did us proud. Well done Andy!

Craig McLaughlin, California

I just read the transcript.

He did rock it.

Well done, sir.

Danny E. Meek, Florida

You write, "Plus, what's up with this calling federal district court judges and asking them to sign on to an amicus? How many ordinary people have that level of access?"

Hopefully none, since that would be entirely improper. (Both the request and the participation.) These were _retired_ federal judges, not sitting ones.

David Nieporent, New York

I'm so proud to read this - and to know that this group can exhibit such great support.

Way to go, Andy!

Reta McKannan, Alabama

I guess I hadn't thought about whether they were sitting or not. But I don't know many solo/small firm lawyers with retired federal judges on speed dial.

Carolyn Elefant

And now, the SCOTUSblog analysis of the oral argument:

http://www.scotusblog.com/2018/01/argument-analysis-make-purpose-consolidation-like-marriage-debating-meaning-consolidation-effects-finality/ or http://www.scotusblog.com/?p=265934

Who knew that it gets physical in SCOTUS?

"Kagan pushed Simpson ...." '-)

James S. Tyre

So proud of you, Andy!!! You are such a credit to the List! Congrats, win or lose!!!!

Lyza L. Sandgren

Thank you, Carolyn, for your detailed, thorough, and analytical report.

Andy, you got your case to the Supreme Court through superb advocacy. Congratulations! Your statement of the question presented is a model to which appellate advocates should aspire. (I copied Andy's statement of question below my signature block, between the double lines.) In my opinion, your statement of the question was an important--perhaps the most important--factor in the Supreme Court granting cert. (I thought that I had commended you about this before, but I just found the beginning of my unsent message in my Drafts folder.)

It surprises and disappoints me to learn of Katyal's poor performance. Perhaps he is trying to do too much.

Steven Finell, Californiaz

Thanks Carolyn, and to everyone who sent well wishes and congrats. It was indeed an amazing experience. First, a couple of shout-outs.

1. I had a couple of versions of my question presented and ran them by a few people. Carolyn was one and offered some good insight. The version of the question presented that I used reflected her thoughts.

2. David Kaufman came over to the VRBO where I was staying this past Saturday to be a sounding board on various ideas I was throwing out for possible responses to questions and to help me refine my opening statement. If you look at my opening statement in the transcript, when I describe Rule 42 as being for the "extraordinary case" that doesn't fit within the various rules in the FRCP that are designed to bring cases that should be tried as one case together, that was a David's suggestion.

3. The Supreme Court Institute of Georgetown Law School offers a free moot court (one side only) in every argued case before SCOTUS. I signed up for it and argued before 5 Supreme Court practitioners this past Thursday. (I posted a little about this earlier). What a fantastic service that helps to raise the bar of advocacy at the court.

Other observations:

4. Steve Finnell, thanks for the compliment on the Question Presented. That probably reflects a good 40 hours of work just for that one page in the brief. I agree with you that it is likely why they granted cert. All of the resources I found said that the QP is the most important part of the brief. I am amazed at some of the QPs I reviewed (literally at least 50) and how they seemed to be rote or pro forma. It's a real trick to not only come up with a compelling QP but also get it to fit on one page.

5. In many ways, the cert petition is much harder to write than the merits brief. First, because it is a different kind of advocacy -- you are not arguing the merits (well, maybe a little) but instead arguing for why your case fits into the cert criteria. Second, because once cert is granted, you know you have an interest that the court thinks is important; and, often, it is an indication that the court is inclined to rule in your favor. (I don't think that is necessarily true in my case -- with a 4-way split, it was hard to see how they could not leave the split unresolved.

With 4 alternatives, it's hard to say that they took the case with a view towards going with the version of the split that I wanted them to go with rather than just agreeing it needs to be cleaned up.

6. I was surprised that my hands were not shaking as argument started. Not because I was nervous. I actually wasn't and was very relaxed. But every time I've done something major for the first time in the past (arguing to the Third Circuit, speaking to a large audience, etc.) my hands have shook. I didn't sleep well the night before, but that was because I was like a kid waiting for Christmas to come, not because I was nervous. As were waiting in the courtroom for the argument to begin, I had a lot of nervous energy, but that was because I was anxious to begin rather than anxious that it was about to begin.

7. My biggest fear was that they wouldn't ask questions even after I made my opening statement. I had nothing practiced beyond that (although I had an outline of things I wanted to hit during the argument). That was an unfounded fear. I got through 2/3s of my opening (about 5 sentences), when Justice Sotomeyer asked the first question.

8. At some point during the argument, it almost became like an out-of-body experience. As I was responding to questions, I mentally was looking down on the situation and thinking, "I've got this." I think that was at about the time that Justice Alito asked me what I would recommend to the Rules Committee if I were to recommend a rule to address the problem we were discussing. I had actually asked myself a similar question (my version was, "How would you revise the rules if you were on the Rules Committee?") that morning at about 4 a.m. and thought carefully about it. (That concept had not occurred to me in all my prep before then.) So when he asked that question, I crushed it. There was no doubt from the moment that the answer made contact with the question that the ball was going out of the park.

9. The whole thing was an incredible experience. I'm still on a high from it.

10. Like Carolyn, I was also surprised by Neal Katyal's argument. In many ways, he made what I felt were facile arguments. Some might call it good advocacy, but it was a

little bit too slick for my taste. For example, at the cert stage, his brief (he didn't sign it, but it was definitely ghost written by his team), never called the consolidation in my case an "all purposes" consolidation. It was a consolidation for pre-trial and trial only (and that does not necessarily mean for all purposes). At the merits stage, he made a strategic decision to recast the consolidation as an "all purposes" consolidation, partly for the purpose of claiming that the circuit split was much narrower and 12-1 in favor of his rule. That was a little too clever by half and I don't think he really fooled anyone -- especially Justice Gorsuch. (I called him on this in my rebuttal.) To buttress the claim, he then tried to argue that the court had united the two cases and that the final judgment in my case was therefore not final -- more like an order granting partial summary judgment to one defendant that can only be appealed under Rule 54(b) (or by waiting until the entire case is final). In my reply brief, I pointed out that the district judge had denied the respondents' motion for attorneys' fees because they had not filed their motion within 14 days of the entry of judgment (which is defined under the rules as a "final judgment"). He tried to argue that I had waived this argument because (a) I had never argued before that the consolidation was not for all purposes (not accurate and, in any event, that argument was introduced by him in his merits brief so I had a right to respond); and because I had not raised the attorney fee motion issue before. The Chief Justice quickly shut that down and I think it hurt his credibility.

11. I have to say that Katyal was very gracious during briefing, prior to argument, and afterwards. While we were waiting in the lawyers' lounge for arguments to begin, we spoke and I mentioned that I had done the Georgetown moot court. He said he had been disappointed that he had not been able to moot it with them (they only take one side and everyone is sworn to confidentiality) I made the comment, "Well, I definitely needed it more than you did." He responded, "I'm not so sure. I listened to your argument in the Third Circuit."

12. Katyal was definitely handling the case pro bono. There is fierce competition within the Supreme Court boutique bar, to handle as many cases as possible. It's a marketing cost for them. I had three or four separate firms offering to do it for me, including Josh Rosencranz, who is an incredible appellate lawyer.

13. In my preparation, I read an article written by another attorney who argued a case for the first time before the court who recommended thinking of the argument as a conversation between equals. It's a very intimate setting between the court and the podium. It's amazing how close you are to the bench. It was good advice. Although

some of the questioning was a little bit testy (for both sides), it really was a cordial conversation.

14. Can't remember if I posted on this before, but one thing you don't find much info on is how to reserve time if you are the petitioner. In the Third Circuit, at the start of the argument, you ask to reserve a set amount of time for rebuttal. That's taken off of your time in the main body of your argument. Not so in SCOTUS. If you want to reserve time, you have to ask for it at that time. And, if you are getting blistered with questions, you may not be able to get the request out. I blew that in the moot court. With SCOTUS, I had four minutes left and there was a lull. I quickly asked to reserve the balance of my time.

15. The attorney who wrote the amicus brief was also very gracious. She told me while we were waiting for the argument that she really liked the way I slammed her clients in my reply brief without being disrespectful.

That was for this paragraph:

It is ironic that the amici extol the virtue of judicial management and

> appellate gatekeeping by district courts in support of their

> interpretation of Rule 54(b). It cannot be doubted that in the

> traditional Rule 54(b) case (an appeal following the entry of a

> partial final judgment in a single case), district courts serve a valuable role as gatekeepers of appeals.

> Paradoxically, however, one of the main reasons that certain types of

> consolidated cases present appellate challenges is because district

> judges fail to enforce the compulsory counterclaim rule, Fed. R. Civ. P. 13(a)(1).

> The Gelboim court took note of such cases: "We need not decide

> whether or how Rule 54(b) applies to cases consolidated for all

> purposes involving closely related issues, actions that could have

> been brought under the umbrella of one complaint." Gelboim, 135 S.Ct. at 906 n.7.

>

16. I was blessed to have my 86-year-old father (a lawyer) (turns 87 on Thursday) and 84 year old mother present along with one of my brothers (also a lawyer and who sat at counsel table with me), my wife, my daughter (the infamous Rosei, who is now 16), one sister and her husband. That's in addition to Sezzers Carolyn and David and Paula Potoczak (Unfortunately did not get to meet Paula). I think Rosei finally appreciates what I do and I'm glad that she's going to have the memory of her father arguing in SCOTUS long after he has joined the choir invisible.

17. I did not work the Monty Python Parrot Sketch reference into the argument.

18. We took Rosie back to school in Litchfield CT after the argument and then Robin and I drove to Boston the same night so we could fly out today. Had not planned to drive the whole way last night after not sleeping well the night before but we had to beat the snow, which was supposed to start in the CT/Boston area at midnight. Pretty heavy snow this morning but flew out of BOS around noon. I'm glad to be back home where it is in the high seventies.

Andy Simpson

I'm speaking only for myself but I have so enjoyed learning by observing at a distance. Thank you for sharing your journey and congratulations on such a good experience.

I listened several years ago to the guys and girl who argued Miller v. Alabama and they were good - a juvenile case - but it wasn't as great as you.

Best wishes,

Reta McKannan

Congratulations Andy! Reading this post this early in the morning makes my day. How wonderful an opportunity and, more importantly, well done.

Kind Regards,

Aida Dismondy, Michigan

What a fabulous tale and to have so many people who mean so much to you present... BONUS!

I did notice you left out a very important detail .... and if it's in a previous message, apologies - but what tie did ya wear?? Of course feel free to link to any pix you may have <-of the tie and/or the entire day as it's so much easier to live vicariously through you with visuals #justsayin

Glad you're home safe n sound. {hugs}

-Andrea Cannavina, nope notta

I never did find a Hawaiian motif tie in silk. The tie I wore came close, but wasn't truly Hawaiian. The attorney for the amici commented that she liked my "Caribbean look" so I guess I achieved it.

Since I don't Facebook, I'll send you a photo privately. You can feel free to post it to someplace where others can see it. David Kaufman took the photo and it's about the only one that anyone took on the steps of the courthouse that came out good. (I had my jacket buttoned because it was so damn cold. In most of the pictures, I have my arms around other people, causing the jacket to bunch up so my jacket has the same look that Tricky Dick Nixon had when he would raise his arms and give the victory symbol. I can't believe that no one taking the pictures said, "Unbutton your jacket."

Andy Simpson

Just remembered I could post a photo on LinkedIn.

https://www.linkedin.com/feed/update/urn:li:activity:6359758254075056128

Andy Simpson

Nice tie, nice suit, nice look, but you also look like you are shivering your butt off in the cold.

Ron Jones, Florida

Hi Ronald:

Ronald Jones wrote,

"but you also look like you are shivering your butt off in the cold."

Give Andy a break. He lives in St. Croix, a tropical paradise, for crying out.

Joseph Hughes

Actually, at that point, I was too exhilarated to be cold. Andy

Andy Simpson

Audio of My SCOTUS Argument is Up!

Haven't had time to listen to it yet, but here it is:

https://www.supremecourt.gov/oral_arguments/audio/2017/16-1150

Andy Simpson

You handled it better than opposing counsel. Just from listening to the case, I agree with you. Your position makes more sense.

Mitchell P. Goldstein, Virginia
