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My first case in the Supreme Court was *Herrera v. Collins*,[1] a capital case out of Texas that raised the question of whether federal habeas corpus can be used to test the issue of actual innocence after an adverse final judgment in a state court.

Before taking *Herrera*, I had argued two capital cases on appeal—one in the Florida Supreme Court and one before an en banc panel of the Eleventh Circuit and, though I am not a criminal lawyer, much less an expert on federal post-conviction relief, I knew that the Supreme Court was sharply divided on issues relating to federal habeas and that it was particularly fractured on issues relating to the death penalty. I knew that the crime charged—the murder of a police officer—was a difficult context for the case, and I knew that the long period of time since the state court trial and appellate disposition, coupled with previously exhausted post-conviction efforts, were facts that cut very much against us.

Still, through some very skillful lawyering, those who handled the case below had been able to get the four votes necessary for certiorari. It was my job to hold those votes and find a fifth.

In all appellate work, I believe strongly in mock appellate arguments and, indeed, I believe that it is very useful to have several of these. Even before writing the brief, I find it helpful to have a mock argument before attorneys who are experts in the substantive field at issue, and then to use those sessions to guide the crafting of the brief.

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1. 506 U.S. 390 (1993).

In this instance, I had the great benefit of a co-counsel who was very knowledgeable about the law in capital cases, Mark Olive, and we decided that we needed intense feedback as we prepared for the argument. Luckily, the Florida State University College of Law (where I was then a faculty member) allowed us during the fall semester of 1992 to team-teach a role-playing class built around the *Herrera* case.

We enrolled students in the numbers required to have nine stand-ins for the members of the Supreme Court plus two students assigned to represent the state of Texas, and immersed them for the first part of the term in the law of habeas and capital post-conviction litigation. After lectures, they studied the Court's opinions on those topics, nine of them paying particular attention to the opinions of the justices whose roles they would play during the oral argument and in conference.

As the semester progressed, we came together for a formal argument, a follow-up conference, and opinion-writing by the students. I appeared before the student court and was, predictably, worked over very hard by the student playing the role of Justice Scalia. The other members of the mock court were also very vigorous in their questioning and, following argument, in their conference discussions, which Mark and I observed. It was instructive, if sobering, to watch the students debate the issues and to read their opinions. The outcome did not bolster my optimism about the case—the mock court ruled with Texas—but this intensive exercise was very useful in preparing for argument, especially as it helped me sharpen my planned responses to the questions we most expected the Court to raise. We supplemented this law-school exercise by engaging in a moot court conducted by habeas experts in Atlanta (I think the students were at least as tough), and then, just before argument, another before a panel of Supreme Court experts in Washington, D.C.

At the end of this preparation, the actual appearance before the Court was, in some respects, laden with less terror than might otherwise have been the case. The possibility that I might embarrass myself before my own students had prompted me to prepare carefully right from the start. I thought I was ready. Still, this was the United States Supreme Court and the case involved a death-row inmate. Those cases always carry an extra burden:

The sleepless nights and worry that inevitably dog the lawyer have only one benefit—it is a sure-fire way to lose weight, and I believe that I lost over ten pounds in the weeks leading up to the argument.

The normal tension in a Supreme Court argument, heightened on this occasion by both my first-appearance jitters and the gravity of the issues that I was set to argue, was further augmented by the certain knowledge that the case was likely to draw strong reaction from some of the justices, at least if they played their roles as well as the law students had. I suspected that those members of the Court who had been steadily cutting back on post-conviction relief would not enjoy facing the issue of actual innocence, and I had no doubt that this case would be met with a barrage of questions about the underlying facts.[2]

My preparation was not wasted, for the Court was extremely hot in its questioning. From the very first question, it was clear that the members of the Court who were hostile to the idea that federal habeas could accommodate a claim of innocence were attempting to push me into making a sweeping claim. I resisted their efforts, because I felt that I only needed to demonstrate that there was a sufficient factual basis in my case for a federal district judge to order an evidentiary hearing. Prevailing on that point would have been sufficient to get my client a second chance, and in a death case, a second chance for his client is often the best a lawyer can hope for.

Like those of most oral arguments I have conducted, my memories of this one are not a good source for a detailed summary of what transpired. I do remember several of the exchanges and, in some of these—but not all—my memory accords with the transcript. I do not remember being paralyzed or terrified, but I do recall that the pace of questioning was so intense that there were times that I did not have a chance to fully answer a question before another question was put to me. Still,

2. To better prepare myself on the facts, I spent a week in the South Texas counties where the case arose and visited with the people who had given affidavits in support of my client's claim of innocence, as well as others in the legal and political community there. I came during that trip to sense the strong local passion that surrounded this case, and I also came to admire the Reagan-appointed federal district judge who had ordered a hearing only to have that order promptly and abruptly displaced by a panel of the Fifth Circuit. *See Herrera v. Collins*, 954 F.2d 1029 (5th Cir. 1992).

thanks to the intensive preparation we had undertaken, I felt prepared and strangely comfortable.

The Court's eventual ruling did not leave me so comfortable. The majority held that the facts did not justify the trial court's order of an evidentiary hearing and, although a majority of the Court supported the use of habeas to demonstrate innocence in a case where there was a stronger factual basis,[3] my client was executed.

Since *Herrera*, I have been back to the Supreme Court and have had other appellate arguments, but I have never handled a more important case.

3. *See Herrera*, 506 U.S. at 404-05.