

U.S. SUPREME COURT

Expert Analysis

Litigator Juggles Pro Bono Representation Of Inmate With Needs of Start-Up Practice

BY CHRISTINE SIMMONS

JUST AS New York litigator Christopher Paoella was hitting his stride in surmounting the challenges of starting his own firm he received a call in October from an old boss that threw his life into turmoil.

Paoella, 37, a partner of Reich & Paoella, the firm he founded with J. David Reich in 2011, learned that U.S. Supreme Court Justice Samuel Alito wanted to recommend him to represent a prison inmate whose handwritten petition, against very heavy odds, had persuaded the court to add his case to its docket as *Millbrook v. United States*, 11-10362.

Paoella, who had clerked for Alito on the U.S. Court of Appeals for the Third Circuit and then U.S. Supreme Court, said he knew he had the option not to take the case, but he also knew it was an offer “you can’t refuse.”

“It really is an honor to even have him think of my name in that context, and I didn’t want to say ‘no’ to something like that,” said Paoella. “Arguing in front of the court is something I’ve always dreamed about doing.”

Paoella was in Washington, D.C., yesterday to argue for Kim Millbrook, who alleges he was sexually assaulted by federal guards in a Lewisburg, Pa., prison and claims he can sue the federal government under the Federal Tort Claims Act.

Paoella noted that it is “very, very rare” for a pro se prisoner’s case to make it to the high court.



Christopher Paoella

For the past several months, Paoella has read and reread the briefs, researched the history of the case, brainstormed arguments with colleagues, and honed his presentation skills in moot courts. He has been “bouncing ideas around in my own head and running internal dialogues when I’m brushing my teeth in the morning and trying to poke holes in my own argument.”

“It’s hard not to over-prepare when the stakes are so high,” he said.

One of Paoella’s jobs as a Supreme Court clerk for Alito was reviewing petitions and making recommendations on whether there was an issue that was cert worthy.

“Just clerking on the court, you get to read a lot of really, really good briefs, and you also get to read a lot of really bad briefs, and you learn to tell the difference,” he said. “There’s stuff that’s not

intuitive that you kind of have to be there in order to know.”

In writing his brief for the Millbrook case, he said, “There are certain arguments and certain citations that I put in there with a particular reader in mind, like a specific justice on the court who I think may have a particular concern about XYZ topic,” he said.

To prepare for oral arguments, “you need to almost internalize the facts of the case and the law,” he said, adding that he has been going through the stacks of briefs, “pretty much just reading them cover to cover every day because I want to be at that point where everything in there is second nature to me.”

At a recent moot court session at the offices of Kramer Levin Naftalis & Frankel, five attorneys peppered Paoella with questions for more than an hour, said Arun Subramanian, a Susman Godfrey partner who participated.

“You really need to be comfortable standing up and answering rapid fire questions,” said Subramanian, a former clerk to Justice Ruth Bader Ginsburg, who noted the most important thing is to have a strong command of the facts and the law.

“It’s an art,” he said. “It’s not for everybody.”

Keeping the Lights On

As he wrote his Supreme Court brief and prepared for oral argument, Paoella kept his hand in a growing practice at his two-person firm. Paoella, who normally charges \$575 an hour but will receive nothing for represent-

ing Millbrook, estimated in an interview last week that he has spent at least 500 hours on the inmate's case.

"It's been a little crazy," he said. "We're a small firm so it's not like I can shift work off to an associate. We have to keep the lights on and keep the rent paid. You can't ignore your paying work during a time like this."

The court also appointed another former Third Circuit Alito clerk, Jeffrey Bucholtz, a King & Spalding partner in Washington, as amicus curiae to defend the lower court's rulings against Millbrook after the government switched sides and decided to back Millbrook's position. Bucholtz had the support of a nine-member appellate practice at his firm.

Just as Paoella was getting into the process, Hurricane Sandy hit.

His downtown Manhattan office was without power or heat for eight days and his home in Maplewood, N.J., was affected for seven days.

"I was kind of a refugee, moving from house to house like trying to find a wireless connection where I can plug in my computer and write this brief," he said.

Paoella's practice involves commercial litigation, including contract disputes, and also white-collar crime and investigations, and a growing appellate practice.

Taking on a pro bono project for several months in the first few years of a practice comes with financial considerations. The court pays only for printing briefs and his trip to Washington.

"It has been tough. This is not the kind of thing I think we could do on a regular basis, at least at the size we're at now," Paoella said.

But he and his partner realized this was a "great opportunity for me professionally" and "a really good opportunity for the firm... If you do well in a case like this, it's something that people take notice of," Paoella said.

He shifted much of his work to the weekends and evenings.

"My first job out of law school was working at Cravath [Swaine & Moore], so I'm not a stranger to working a 14-hour day," he said. "It's a little bit of a flashback to being a young associate."

Reich also covered for him on firm matters, he said, and helped on research for the *Millbrook* case. His partner was an "invaluable editor" and a sounding board, he said.

Paoella, a graduate of Harvard Law School, joined Winston & Strawn after clerking for Alito during the justice's first full term on the U.S. Supreme Court, from 2006 to 2007.

He practiced as of counsel for Winston & Strawn, where he met Reich, formerly a Winston partner. The two founded their boutique in 2011 and, as in any start-up, the principals had to address every issue.

"If the Internet goes off in our office, I need to fix that. I can't call someone in IT to do that," he said. "There's this whole list of things that are necessary to practice law but aren't actually practicing law. We're over the start-up phase of it, but there's always some part of that that continues."

Paoella said the firm has attracted a steady stream of cases, and he and Reich are hiring part-time associates. Paoella said he would be happy if his firm has 20 lawyers in five years but he doesn't want to return to a large-firm environment.

Paoella and Reich were attracted to the flexibility that a small firm offered and the idea of working in a small team.

"Winston was a great experience," he said, but with about 200 lawyers in New York and hundreds more across the country, "There were partners at the firm I wouldn't recognize if I was in the same room with them."

He said he also looked forward to fewer conflicts.

"At all the big firms I used to work at, conflicts check was a grueling, grueling process," he said.

Before the Court

Millbrook, Paoella's client, was convicted in 2007 of drug and firearm offenses as well as witness tampering and witness retaliation.

Millbrook was pro se until Paoella was appointed. The nonprofit Lewisburg Prison Project, which submitted an amicus brief in the Supreme Court case, had previously provided some legal advice to Millbrook, said Paoella, who travelled to Lewisburg to meet his client.

"He got over a pretty big hurdle at this point, and you don't do that without having

some fundamental idea of the issues that are at stake in the case," Paoella said about this client, noting that the court receives about 10,000 petitions for a writ of certiorari each year, many "written by really, really good lawyers." The court grants and hears oral argument in about only 75 to 80 cases.

After the Third Circuit dismissed his case, the Supreme Court granted Millbrook's petition, taking an interest in an issue causing a split in lower courts. The issue is whether the Federal Tort Claims Act waives sovereign immunity of the government for abuses by law enforcement officers when their conduct takes place outside the context of an arrest, search or seizure.

Paoella has argued the plain language of the law requires no arrest, search or seizure requirement.

If the Supreme Court sides with Paoella's argument, the case could get sent back to a Pennsylvania district court, Paoella said.

"It's a fairly discrete issue," he said. "I don't think it's going to be a sea change in the law...but it's an issue of extreme importance for the people who are affected by it," in particular inmates in federal prisons.

Paoella said that many court rulings and statutes in the last 20 years have tended to close the courtroom door to prisoners, and the Federal Tort Claims Act is "one of the few avenues they have left for vindication of rights and I actually think it will have a serious impact on prisoners' interest."

Reached after the oral argument yesterday, Paoella said he felt he did well, "but it's always difficult to predict how the court is going to go."

"They certainly pushed hard on a couple of questions," he said.

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