

Appellate Lawyer of the Week: Christopher Paoella

TONY MAURO

The run-up to Christopher Paoella's appearance before the Supreme Court on Tuesday was anything but typical.

For one thing, until last October, Paoella had no idea he would be arguing at the high court at all. That was when Paoella arrived at the lower Manhattan office of his firm, Reich & Paoella, to find a voicemail message from Justice Samuel Alito Jr. asking him if he wanted to argue pro bono in the case of *Millbrook v. U.S.*

Paoella had clerked for Alito on the U.S. Court of Appeals for the Third Circuit and then again on the Supreme Court. The case, a Federal Tort Claims Act dispute brought to the court in a handwritten petition by indigent federal prisoner Kim Millbrook, arose from the Third Circuit. As the justice who handles such matters from that circuit, Alito got to pick a lawyer to handle the case, and he is exceptionally loyal to his clerks.

After checking with his partner, J. David Reich, Paoella said yes, even though it would be a major disruption for their fledgling two-person boutique litigation practice. Paoella said he couldn't drop everything. "We had to do right by our clients and keep the lights on."

He plunged into preparing the opening brief, due about a month hence—a job made trickier by the fact that Millbrook had no lawyer whatsoever to carefully frame or preserve arguments



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at earlier stages of the case. "I didn't have the benefit of prior work product," he said. As part of his preparation, Paoella traveled to the U.S. Penitentiary in Lewisburg, Pa., where Millbrook currently resides and where he asserts he was sexually assaulted by a guard—the basis of his tort claim.

In the midst of Paoella's research came Hurricane Sandy, which knocked out power at both his office in New York and his home in Maplewood, N.J., for about eight days. He kept working, but was able to get an extension of his brief-filing deadline until November 30.

Then came a switcheroo from his adversary, the United States. The government at first had opposed review of Millbrook's case, though it pointed out a circuit split on the issue he had raised. Once the court granted review, Solicitor General Donald Verrilli Jr. informed the court he no longer supported the Third Circuit decision dismissing Millbrook's appeal. Soon, Alito was on the phone again to another former clerk, and Jeffrey Bucholtz of King & Spalding was

named amicus curiae to defend the now orphaned Third Circuit decision.

During the argument Tuesday, both former Alito clerks acquitted themselves well, fielding complex questions of statutory interpretation with ease. Assistant to the solicitor general Anthony Yang also had argument time. It was difficult to predict the outcome, though it seemed possible that some of the knotty statutory issues could be kicked back to the lower courts.

Though Paoella beforehand had said "it wouldn't surprise me" if Alito, his former boss, grilled him with tough questions, it turned out that Alito asked no questions at all of his former clerks. As the argument concluded, Chief Justice John Roberts Jr. thanked Bucholtz for taking on the task of arguing an orphaned argument for the benefit of the court. Roberts did not say the same to Paoella, but it was not a slight. Recognizing appointed amicus curiae counsel is typical, but not so for those appointed to argue on behalf of indigent parties.

With the odd posture of the case, Paoella said that "procedurally this is one of the weirdest cases I've ever worked on." But he wouldn't have missed it for the world, no matter how it turns out. "It has been a joy to work on this case."

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