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Welcome and Introductions

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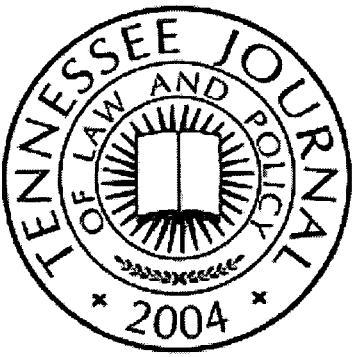

SUMMERS-WYATT SYMPOSIUM

"NAVIGATING THE COMPLEXITIES OF OUR MELTING POT: HOW IMMIGRATION AFFECTS LEGAL REPRESENTATION"[53]

FRIDAY, APRIL 12, 2013

THE UNIVERSITY OF TENNESSEE COLLEGE OF LAW

[53] EDITOR'S NOTE: Readers, please be aware that this transcript has been only lightly edited. The reasoning behind its light editing is so that the transcript reflects the actual words used by the presenters, as captured by the transcriptionists, and the actual punctuation marks chosen by the transcriptionists. Therefore, words have not been added in or taken out, except for filler words, such as "I mean," "like," "right," and "you know," and punctuation marks have largely been left unchanged, expect in limited circumstances. The editor's assumption is that all readers understand that this transcript reflects spoken words and thus will not follow the flow of written form and will mostly likely be able to piece together the statements of the presenters into coherent sentences where the transcriptionists may not have been able to be exact.

WELCOME AND INTRODUCTIONS

Douglas A. Blaze
Amy Williams

DOUGLAS A. BLAZE: It looks like it's going to be an exceptional program. The turnout continues to come in, and I'm sure it will get more full. I know that it was great because it was crummy weather it looked like when we started. I just looked out, it's actually going to be beautiful today. So when you have a chance, get out and enjoy the weather of Knoxville as well for those of you from out of town.

I want to welcome you to the College of Law. I think we are justifiably proud of our program, our faculty, and our staff. You'll see a little bit of that today. We're also very, very proud of our building, although we do have feelers out to try and find our maintenance guy so we can get it a little bit cooler in here. Hopefully, we can take care of that for you.

Thanks to all the presenters for coming in. We appreciate it very, very much. It makes a big difference. The *Journal of Law and Policy*; our newest journal, the *Journal of Race, Gender, and Social Justice*; and the Center for Advocacy and Dispute Resolution are all sponsoring, along with the College of Law, this program.

I want to thank a couple of people: John Craig Howell, who is now getting ready to sit down, from the *Journal of Race, Gender, and Social Justice*; the *Tennessee Journal of Law and Policy*, Amy Williams is the editor in chief. But in particular, the person who has really put this whole thing together is Katie Doran, and Katie, congratulations and thank you. It looks like it's going to be a great day. And then I just have to mention for the Center for Advocacy, the incomparable Penny White, who does so much for the law school, our profession, and our State.

The program looks impressive. We're already five minutes behind. And I need to make sure that I get my CLE credit since our rules have been changed in the State of Tennessee. At any rate, I look forward to the program and being with you off and on during the day. Thank you. And I turn it over to Amy Williams.

AMY WILLIAMS: Just for a second, I promise. Thank you. I'm Amy Williams, I'm editor in chief for about thirty-six more hours, I think, for the *Tennessee Journal of Law and Policy*. And on behalf of our journal and *Race, Gender, and Social Justice*, we just want to welcome you to the symposium. If you haven't figured it out already, the bathrooms are down the hall, as soon as you leave this room, you just take a right. And the bathrooms will be on your left not very far down the hallway. We've got, as I'm sure you saw, doughnuts and coffee outside. There's a commons area where there's also a little snack shop and vending machines. If you just keep going past the bathrooms and then turn left, you'll see it.

Also, those of us who have the volunteer tags on, there's several members of both journals here to help you, so if you need anything, just find somebody with one of these badges and we'll help you out. If we can't figure it out, we'll find somebody who can. And we want to thank you for coming.

MORNING KEYNOTE ADDRESS I: *PADILLA V. KENTUCKY*: HOW THE SUPREME COURT CHANGED THE RULE OF COMPETENCY IN LEGAL REPRESENTATION

William Robert Long, Jr.

KATIE DORAN: Good morning, everybody. It is my pleasure to introduce to you our first keynote speaker today, Mr. Robert Long. A brief introduction, Mr. Long is a graduate of Kentucky University of both undergrad and law school. He is currently the manager of the Capital Litigation Branch at the Kentucky Attorney General's Office. And as part of his job with the Kentucky Attorney General's Office, he is the attorney who argued the *Padilla v. Kentucky* case in front of the Supreme Court, and that is what he is here to talk to you about today. Mr. Long.

WILLIAM ROBERT LONG, JR.: I want to get started by first thanking the University of Tennessee and the different journals for inviting me. I was a little surprised by the invitation initially. It's been quite a while since I've been asked to speak about the *Padilla* case, and quite frankly, I'm a little bit intimidated by it. I'm used to having the crowd to my back and addressing my comments to judges and in a more conversational manner. And so this is a little different for me, but I think I'll manage.

Before I get started, I don't want to mislead anybody. I am in no way an expert or have any real working knowledge of immigration law. So probably you're asking, Why am I here? I kept asking myself that over and over, trying to figure out how to frame my comments for this event. And I figured the best thing I can offer is some background into how I got involved in the case and really the prosecution's take on it. And since I'm no longer having to be an advocate, perhaps provide a little more of a candid

inside look as to what the prosecutorial side or the State's side of the *Padilla* case really looked like and what we really thought of the case and what we fear and what we see the effect may be as the case has evolved.

So first of all, it was really odd for me to be involved with *Padilla* to begin with. As Katie mentioned, I'm the manager of the Capital Litigation Branch, which means I oversee all the death penalty cases in Kentucky. I had assumed that position just in September of 2008 and was taking over for the man who essentially had created that position who retired at the end of '08. I had never heard of Jose Padilla and never worked on any of his cases in the state court. And then I came back from the holiday break to find Jose Padilla's cert petition laying on my desk with a note from my predecessor saying, "This looks interesting. It has potential." And so I did not know anything about Mr. Padilla until I was attempting to draft a brief in opposition to his cert petition, which admittedly was extremely difficult to do because it did, in fact, have great potential, and this looked as if it might be my best and perhaps the only chance in my career to get to argue a case before the United States Supreme Court. And also, it was ultimately kind of daunting because, while the opportunity to argue was alluring, the position that I kind of was forced to take was not the greatest position in the world.

I guess we should start off basically by making sure everyone is a little bit basically aware of what *Padilla* was charged with, how he got to the United States Supreme Court, and explaining the law and how Kentucky's ruling departed from the general rule and thus justified the cert petition.

Padilla was traveling through Kentucky, and he was doing so on a semi-tractor/trailer and was found to be in possession of about half a ton, a little over a thousand pounds, of marijuana, a relatively large amount of marijuana. And from a prosecutor's side, these are great

facts. He waives his right voluntarily, he gives statements that seem incriminating, and he's in possession of the drugs. And so from a prosecutor's standpoint, this is a great case. However, he is appointed counsel, his appointed counsel allegedly tells him during the plea negotiation process that "if you accept this plea," "that I've looked into it, and that I really wouldn't worry about the chance of removal." You've been in the country for so long, and given your military service, I feel pretty good about it. Needless to say, that was not the best advice in the world. Now, it was good advice in the sense that Padilla was sympathetic. He had come to America, I believe, in the late '60s or early '70s as a young man, had served in the military in Vietnam, was honorably discharged, and he didn't have a long laundry list of criminal convictions. I'm only aware of one other prior conviction, I believe I recall, for receiving stolen property. Mr. Arnold comes next, he'll be filling you in on all the background.

But the state of the law at the time Padilla entered his guilty plea was such that — it was universally accepted that, in order to enter a voluntary guilty plea, knowingly, intelligently, and voluntarily entering a guilty plea, the defendant needed to understand the direct consequences of that plea and that generally a misunderstanding with regard to something that was collateral would not have any impact on the voluntary basis of the plea. And in fact, there was no duty for an appointed counsel or any criminal defense counsel, for that matter, to advise his client with regard to a collateral matter. Importantly, we need to identify the differences between a direct and a collateral matter. Direct matters are those things such as your right to trial by the jury, the right to confront witnesses, your right to appeal, all those kind of things you're going to waive as a result of your plea. Your attorney has the obligation to inform you of the offense, its potential punishments, any defenses that there may be, and to give you accurate advice so that you can

weigh the determinations of guilt and innocence and enter an intelligent plea.

But again, at the time Padilla entered his plea, it was well settled amongst all the circuits and in Kentucky that it did not need, there was no obligation for that counsel to go further and inquire about something that was collateral. And immigration consequences had always been deemed to be, in fact, collateral. Collateral not because they don't always apply but because they do not stem directly from the criminal convictions themselves. The state courts have no power over any of the immigration laws, they cannot deport anybody or remove anybody, and so it is something that happens collateral to and separate and apart from the conviction. Just like a citizen who loses his right to vote or loses his right to carry a weapon under the Second Amendment, those are also considered collateral consequences for which there is no obligation to advise.

However, that led to some negative results. Consequentially, criminal defendants are going to be concerned potentially about these collateral consequences. In Kentucky, one of the most collateral consequences that we see affected most often is parole eligibility. Parole eligibility does seem to be closely tied to the criminal proceeding, but it is enforced by the executive branch, not the judiciary. It is a gift of legislative grace that that's even available, and that is ultimately given to you at the discretion of the executive. So it has always been deemed to be collateral.

But you have a series of cases that would start coming up in Kentucky and throughout the circuits in which criminal defendants would ask their criminal attorneys, "Well, what about my parole eligibility, what about my immigration consequences," and they would ask about these collateral matters. If the attorney undertook — or attempted to answer those questions, a rule of law developed which we call in Kentucky, at least, the *Sparks* rule, it was the *Sparks*

case in the Sixth Circuit that said, if you mis-advise that defendant with regard to collateral consequences, even though you had no affirmative duty under the Sixth Amendment to even answer the question, if you chose to do it, you must be accurate. Failing to be, you gave mis-advice that would be — or you would risk being ineffective under *Strickland v. Washington.*

So now what we have here is Padilla alleging after entering his guilty plea that his counsel was ineffective for having failed to accurately tell him that he would be deported as a result of his conviction. After his conviction, a federal detainer or an immigration detainer was filed against him, and he was going to at least be put on track of being removed from the United States.

Initially, the state trial courts that reviewed that said, "No, it's a collateral matter, there's no ineffective assistance of counsel here," and affirmed the conviction. The Kentucky Court of Appeals said, well, no, under the *Sparks* rule, he's at least alleged mis-advice, he at least gets a full-blown hearing to determine whether or not this advice was really inaccurate and whether it impacted his decision. And if it was, then counsel was ineffective. All keeping with the precedent that existed throughout the nation. However, the Kentucky Supreme Court went kind of astray. And they did so for a logically consistent reason, but it left a bad taste, believe me, in just about everyone's mouth.

Essentially, the Kentucky Supreme Court reasoned, Well, if there is no affirmative duty to advise on a collateral matter and it's well settled that it is not a constitutional violation to not advise, to fail to advise on those matters, then really, what is the difference between failure to advise and mis-advice? And there is no real relevant distinction there. If you don't have a right to that advice, whether you got zero advice or bad advice, if they're equally as bad, which is very logically consistent, but essentially it boils down to the Kentucky Supreme Court saying, "We think it's

okay for criminal defense attorneys to give bad advice." When I ultimately was handed off the case, no matter how we tried to argue it or tried to come up with a way of defending the Kentucky Supreme Court's decision, you're still left with that what they're really practically saying is that bad advice is okay.

So it became a more and more daunting task, and I quickly realized just how daunting a task when I got summoned to Washington, D.C., by the Solicitor General's Office asking me to convince them not to file a brief on behalf of Padilla. Their initial inclination was to file a brief in support of Padilla saying Kentucky got it totally wrong, and I was left with my hat in hand at the Solicitor General's Office begging them not to, in fact, do that and trying to convince them that there was a rational basis for Kentucky's decision.

And really what that rational basis consisted of is that, under the existing precedent, it was logical to say that you have no right to be advising really does not impact waiver of your constitutional rights and the scope of representation under the Sixth Amendment need not extend into collateral matters, and we were able to basically present a kind of a parade-of-horrors type case. That if you start opening the door or requiring advice with regard to collateral matters, you make the criminal defense job extraordinarily difficult. You make criminal defense attorneys obligated to be expert in any number of areas of law where they don't have any expertise. The number of collateral consequences that affect someone that's been convicted of a felony is extraordinarily long. I think at some point, our list just in Kentucky was well over four hundred different types of consequences that are statutorily enforced in some way, and they go from losing your right to vote, to losing your right to bear arms, to immigration consequences, to being denied the ability to serve in the military, denied federal student loans for education. Chances are it's going to

affect your child custody situation. It's going to affect potentially everything because those felonies, especially in a state like Kentucky, exist on your record forever.

So the real fear of the Commonwealth was that if Padilla, who wasn't simply just asking, his was an alternative position that immigration be made kind of a special exception, but he was essentially asking that the *Sparks* rule was a bad rule, that there should be, in fact, an affirmative duty to inform criminal defendants about collateral consequences. I think to some degree they try to limit it to say, well, it was the duty of the attorney in a criminal defense situation to basically interview this client to try to determine specifically what was important to that client and then research and determine what collateral consequences were most likely to impact his decision to choose to go to trial or choose to accept a plea and then educate the client with regard to that. From a prosecutorial perspective, that was scary. The plea bargaining process is an extraordinarily useful tool to manage caseloads and to assure some sort of finality to convictions, and the main reason to engage in plea negotiations is to get that finality and to know that we have extinguished the case and we are not going to suffer years and years of further litigation. However, by introducing an obligation of counsel to advise on a collateral consequence, we open ourselves to a lot of uncertainty potentially. Kentucky has a three-year window in which you may raise collateral consequence claims or collateral claims relating to your criminal conviction. So for three years the criminal defendant, who may or may not or most likely is not going to be satisfied with his plea agreement and he's actually sitting in prison now, has three years and a lot of time to discern whether or not, what, "my attorney really should have advised me about one of these myriad of collateral consequences that is now particularly important to me" and bring it via a criminal rule 1142 claim for ineffective assistance of counsel. And if there is a duty

to advise, then we're stuck on the prosecutionary side some three, maybe four or five years later by the time the motion is filed, counsel is appointed, having to have a hearing to determine whether or not mis-advice or no advice was given on a collateral matter. And it creates this huge element of uncertainty in due process that scared the states to death.

And so we feared very much that if you open the door to — so our primary focus was trying to make the Court understand that kind of parade of horrors and suggest that adopting Padilla's position would be detrimental to the criminal justice system. It would, in fact, encourage prosecutors to avoid or, if you would, be reluctant to enter into the plea process. And people who deservedly so, perhaps, or could have benefited from the plea may lose out because of the uncertainty that would now be attached to those pleas.

And to some degree I believe we were successful. Ultimately, the United States Supreme Court chose once again not to weigh in on this direct collateral consequence component of the effective assistance of counsel. They made a point of saying that the fact that the prior rule, this rule that said you had to advise with regard to direct consequences, that no advice was mandated with regard to collateral consequences — they made a point to notice that that was not the United States Supreme Court's rule, it was a rule that persisted in the circuits, and that the Supreme Court had never really weighed in on that topic, and they once again had sidestepped it and did not choose to weigh in on it once again. Instead, opting to elevate immigration consequences or removal because of its kind of punitive, potentially punitive nature, and severity of that consequence, basically making a special exception. And from our perspective carving out a new right under the Sixth Amendment that didn't prior exist. And to some degree, we've been affirmed in that belief because now the United States Supreme Court in *Chaidez*, which I'm probably

mispronouncing it, just recently, I think in February, entered the opinion finding that the *Padilla* case was not retroactive, that it was, in fact, a new rule of law. So it only applied prospectively.

In some ways the State is somewhat pleased with the decision. It's not so much that we don't want immigrants or non-citizens to be informed of their negative consequences, we just wanted it limited in a manageable way not to open the door to every possible collateral consequence. And to that effect, prior to *Padilla* actually reaching the United States Supreme Court, Kentucky had already amended its standard plea form to include a statement indicating that, if you are a non-citizen and pleading guilty, you understand that you may be risking deportation or removal as a result of that guilty plea. Whether or not that waiver will truly carry the day waits to be seen. I've not yet had the case where someone signed that particular waiver form but then has alleged that their counsel was ineffective for giving them mis-advice with regard to immigration consequences. So that would be an interesting thing to happen when that does happen.

But what the Commonwealth does fear or does have a potential concern, and what we expressed at the United States Supreme Court, is that elevating immigration to this special place of being protected under the Sixth Amendment essentially grants citizens or non-citizens greater protections than citizens that we would likely see if they made that kind of choice in resolving this situation, we would likely see citizens making claims that will for me, my right to vote or my right to bear arms or whatever collateral consequence is particularly important to me, is just as important, is just as automatic, is just as crucial to my decision to plead guilty and thus should be also elevated and given special status just like immigration consequences. And while we have not seen that widespread throughout the nation, we have seen it quite a bit in Kentucky, and in fact, there is a Kentucky

decision right now that's not yet final, it's on a petition for rehearing, waiting to become final. But that says that, at least in Kentucky, Kentucky is going to use the *Padilla* logic or the logic employed by the United States Supreme Court to elevate the parole consequences. Which again, it's not that we're going to necessarily deny a criminal defendant his right to accurate information with regard to parole information or parole consequences to make it a constitutional right, and then to create further exceptions to this distinction between direct and collateral starts to whittle away again that certainty with regard to plea deals.

To some degree the State then advocated that what the United States Supreme Court should really do is criticize the court, criticize the Kentucky Supreme Court in its decision. But it ultimately acknowledged that it was a reasonable distinction and, under the existing body of law, that this is a collateral matter and that ultimately that this is a matter that should be addressed by the court rule-making, state legislatures, or even Congress, that, if this is a real problem that we want to protect, it can be addressed that way. In fact, at the time that we argued *Padilla*, I think there was somewhere between twenty-two and twenty-seven, I forget the exact number, states that had in some way or another addressed this problem with regard to immigration through changing their own court rules, adopting some sort of statutory scheme that required explanation of immigration consequences, and so forth.

That would have been kind of the perfect world for the Commonwealth because we're now not only elevating it to a constitutional issue, it is a statutory right that is specifically given to a specific situation. By elevating it to a constitutional right, again, we feared this onslaught of additional litigation and feared that courts will slowly but surely expand the number of collateral consequences in which there's an obligation to advise and that at some point the numbers become too unwieldy and too difficult for

criminal defendants and, again, that certainty will disappear. And in fact, it's already happened to some degree. I think our prosecutors, and to some degree our judges, are hesitant to really believe that the criminal defense bar with the fact that they do have too many clients, that they are over-worked, that they're not really prepared to give accurate immigration advice or advice on any number of collateral consequences — And I've seen prosecutors demand that, if you're going to take a plea, especially a non-citizen, that we do want to use our waiver form, that we want it to be put on the record. And we want the judge to instruct that, "I don't care what your attorney has told you," "I don't care what advice he's given you with regard to immigration consequences," "You understand that by pleading guilty you risk being deported, and if that's not a risk you're willing to accept, I won't accept the plea." And in effect, kind of get around *Padilla* and ensure that that plea will have some sort of absolute certainty.

The Court did not necessarily have to go with the Sixth Amendment, elevating this to a Sixth Amendment claim, and could have gone through criticizing the court and encouraging courts to address it statutorily through the court rule-making procedure, it also could have looked at it through a due process angle. A due process angle means that it is ultimately the obligation of the State or of the judge to determine whether or not the person entering the plea is doing so knowingly, intelligently, and voluntarily. And put it upon the judge to make some sort of affirmative inquiry. I think ultimately they were hesitant to do that because, first of all, it was not the key issue of the case and it would have been departing from what the parties had argued. But it was also going to put additional obligations on judges, who are equally unprepared to advise someone on immigration consequences. What was a judge to do other than to just say, Well, you're always risking this, and you're really not entitled to this information? If the person is asking for — I

want to know my immigration consequences with regard before entering this plea — I think there is an impetus or a good reason to try to give them that information. In the long run, it aids the prosecution in making them have a better decision. But how you go about ensuring that that right is given to them is problematic.

And so ultimately, I think the State is ultimately satisfied with the result. We harbor still some sort of fear that this constitutional right under the Sixth Amendment will be further expanded and that we will have citizens claiming that they are somehow being treated differently than non-citizens, and to some degree they are. It's just the fact of the matter. Citizens possess a constitutional right to bear arms, a constitutional right to vote, and under the current state of the law, there is absolutely no obligation for a defense attorney to inform those citizens that a guilty plea will rob them of those rights. And for that matter, the *Sparks* rule that says if I give you mis-advice, if I misinformed you, thus making me now ineffective, it's essentially kind of out the window as well. While the United States Supreme Court chose to raise immigration, they ultimately agreed with the Kentucky Supreme Court that this distinction between no advice and mis-advice was really arbitrary, and they ultimately found that there was no relevant distinction between an act of commission versus an act of omission in the reviewing of the *Padilla* case. So I take a little pat on the back there that we actually managed to get the United States Supreme Court to agree with the logic of the Kentucky Supreme Court but ultimately could not get around the fact that, even applying that logic, you're still left with a decision that says it's okay to give bad advice to criminal defendants. And how is that ever going to be palatable? And so I think the Court was faced with this daunting task of trying to eliminate the risk of opening the door to the parade of horrors that I spoke of before and undermining the certainty of the plea process but at the same

time trying to protect a group of individuals who in many cases are not very well versed in their rights. In fact, some don't really have rights because they're not citizens, who are typically poor and are scared and are just trying to get through the process as quickly and as easily as they can and don't know exactly what to do.

That being said, to suggest that immigration consequences, something like removal, is always a terrible thing is a little bit of an overstatement too. It would obviously have been for Jose Padilla. Jose Padilla at the point of his conviction had been in the United States for more than half his life. He had established an entire life here. Just to ship him back to Honduras at that point would have been a real, true hardship. But the college student who is here to study who gets in trouble at a party on campus and is going to be sent back to London or to Paris or somewhere, it's not really a terrible hardship that they would be removed because of some behavior that he had. So immigration consequences are not necessarily harsh, but they can be extraordinarily harsh. And so it does make sense that the Court would want to address it, and it does make sense that the Court would ultimately want to get rid of this idea that bad advice is never okay.

But again, we've only done that with regard to immigration. If an attorney gives bad advice with regard to any of the other collateral consequences, until they've said something otherwise, they've eliminated that distinction between no advice and mis-advice, or at least called it into serious question with their comments at the end, and have made it now that, I think, if you want to be an effective advocate for your client, at least effective in the sense of the Sixth Amendment, you should restrain or absolutely refuse to ever answer questions with regard to collateral consequences. If you undertake — well, for that matter, I guess they've eliminated that too. You can feel free to do it and do it with impunity because they're collateral, there is no

right to have that advice, and whether you give bad advice or no advice doesn't matter, it won't impact the validity of the plea or at least arguably won't.

Well, I have not used quite all my time, but I think I pretty much hit the high points that I wanted to address. I know this is kind of an odd setting, but is there any kind of question you might have for me? Yes, ma'am.

UNIDENTIFIED SPEAKER: I have a question, not related to *Padilla* specifically, that might be interesting for students to hear about, but how did you prepare for your Supreme Court argument? And then tell us a little bit about the experience of actually arguing this case.

WILLIAM ROBERT LONG, JR.: Well, it was an amazing experience, to be honest. It dominated the better part of my life for 2009. It was very unique. Answering the phone to have the solicitor generals on the other line say, "We need you to come to Washington, like tomorrow," and trying to get that arranged, again, provided all sorts of weird opportunities that I never would have expected. But the preparation is basically the National Association of Attorney Generals operates in Washington, and they have a great contact person named Dan Switzer, who provides some support to the Attorney Generals' offices. And so I contacted him to give me kind of the basic playbook of how this process works. He offered his services to review our brief and to offer suggestions, and then ultimately they set up a moot court in Washington the week before oral arguments.

But in preparation back in Kentucky, I just wrote and wrote and rewrote and rewrote. It was much different than the normal process. In most of the cases I handled — you're expected to handle a numerous number of cases, so you write it, if you're lucky, you get a chance to really edit it and re-read it multiple times. And you're trying to get it out

and filed just to meet your deadline. But with this case, everything kind of got put off on the side. I think we went through at least seven drafts of the brief before we finally settled on something we liked. It was a new experience for me. In every other instance that I've ever had with the United States Supreme Court trying to create these cute, little booklets, Kentucky is such a penny-pincher, that unless cert is actually granted, we attempted to create these things in-house. And my past experience has been that we don't always get it right. And I got some really bad versions of this from our print shop and was stuck in one instance literally in a brief in opposition in the *Padilla* case hand-cutting the paper to make it fit.

I did one in-house moot with the Attorney General's Office. It did not prove particularly helpful. A bunch of like-minded people trying to convince me that I had a reasonable case and despite the fact knowing that I have a position that's going to ultimately be not very palatable to most people. I contacted the University of Kentucky and got a panel of three — I think it was four law professors — that would agree to sit in judgment over me and allowed me to have a moot court there. They found a three and zero to argue Padilla's position, and we went through a full kind of moot court there. It proved more helpful but also disconcerting. As you might imagine, the faculty and staff there was also very skeptical of the State's position, proved to be much more so than even the United States Supreme Court itself, and they beat up on me quite well for about an hour or so. And then finally I had a video-taped moot court at the National Association of Attorneys General, and Dan Switzer had arranged to have several Washington attorneys who had all had some level of Supreme Court experience come read the materials and put me through a moot. And they were actually paid participants. They got some sort of stipend pay, and so they were well prepared. There were no time limits, and they drilled me for about an hour and forty-

five minutes. Interestingly, that grilling also included Michael Dreeben, the deputy solicitor general that ultimately argued the case. I had this really weird relationship with the Solicitor General's Office. Because they took a hybrid position, they said ultimately Kentucky was wrong and the mis-advice rule was good but that Padilla could never prove prejudice under the second prong of *Strickland*, they nevertheless supported the State. They demanded, and I somehow was intimidated and relented, in allowing them to participate in my moot, but I was forbidden from participating in their moot. It didn't seem quite fair. But ultimately Mr. Dreeben, at the time I think he had argued something like seventy cases before the United States Supreme Court, was extraordinarily gracious and perhaps the most helpful person as far as preparing me for oral argument of anyone in the room. The other hired members of the panel seemed somewhat just outright dismissive and could not understand why the Court could not really comprehend the concerns of the State or why the Court would even grant cert. Michael Dreeben seemed to get it. He seemed to kind of change the mood in the room. Before he got there, the paid participants were really kind of rude to me, to be honest. And then when Michael Dreeben came in, they all said, Well, what's he doing here? He's not arguing this case. This can't possibly be important enough for him to be involved in. And the fact that he believed it to be of some import kind of changed the mood and made the experience of that moot more beneficial.

And then the United States Supreme Court itself, what can I say? It is a neat place. The place is filled. You get to walk in the side door, you walk into the attorneys' bench down in the basement, and all the attorneys are lined up trying to get their tickets to just come and watch. And you walk up to the counter and say, "I'm arguing counsel," and then things suddenly change. And you are whisked away to the attorneys' lounge, you are escorted by a marshal

through the building, through the crowds. There's much less security required. They make it a big point to say that you can't take cell phones or anything else. And I said, Well, do I need to run down to the locker? No, you leave them at the clerk's office on the counter. I'm just supposed to leave my cell phone? You're at the United States Supreme Court for God's sakes. You just leave all your stuff just laying there. I would have never in my life dreamed of doing it, but I did.

And then the courtroom was a unique courtroom. In all the other courtrooms that I've ever argued in, in the appellate court, the justices sit up high, kind of pushed back away from you, and you're kind of at a podium. And it has some distance, and they kind of lord over you. At the United States Supreme Court, it's a curved bench, your podium is pushed right up in between them to some degree, and I really almost felt as though I could reach across the bench and shake Chief Justice Roberts's hand if I wanted to. There was a little more distance than that, but it doesn't really feel that way. The room being so tall and so wide and the way you're kind of pushed up — they also have the acoustics so that the sound behind you kind of melts away, and they do have a speaker system set up that tries to pinpoint the sound to the podium. Another odd setup is that that podium, attached to it are counsel desks. In every other situation, counsel desks are several feet away, these big tables here, it's a relatively small table that's literally attached to it. So as my opponent Stephen Kinnaird or Michael Dreeben are arguing, I'm literally right here, and there's the podium. I'm literally standing right beside them while they argue. And from the bench, it appears that the Court can actually look down and see any of my notes that I'm taking. And that's kind of a scary thought. I'm not just on display or performing when I'm actually at the podium, but I'm on display and performing the entire time that I'm standing there.

The way it ended up being set up, because the solicitor general had taken this odd position, we agreed that Padilla's counsel would go first, solicitor general — who at the end his brief would typically go last — would actually go in the middle, and then I would respond to both because I was going to take issue with some of the solicitor general's positions.

Once they called it to order, I was good, I was fine through Mr. Kinnaird's arguments. I felt good, I felt like I had confidence. And then Mr. Dreeben got started. And in the last five minutes of Mr. Dreeben's arguments, I probably did not hear a word he said. It became suddenly very real to me that I was about to stand up, and I got really scared, to be honest. Yes, sir.

UNIDENTIFIED SPEAKER: Do you know what happened to Padilla personally? Did he plead out later, or did you go to trial –

WILLIAM ROBERT LONG, JR.: Well, I can give you a little bit of an insight to that. I'll limit my comments a little bit because Mr. Arnold, who represents Padilla, and he'll be speaking next. But ultimately it came back to state court. He was given a hearing to determine whether or not this mis-advice was really given, whether it really did affect his decision. The trial court ultimately said, he could not prove the prejudice prong, he appealed to the Kentucky Court of Appeals, who said that he could. We chose not to take that any further. And he's currently back in the circuit court. It's still not quite resolved. And I'll let Mr. Arnold explain further.

One last comment, just because it was so unique and I still remember. As nervous as I was, when I stood up to the podium and said, may it please the Court and that, and Mr. Chief Justice — it's bizarre, but the look or the comment that — I don't even remember exactly what he

said — but that Chief Justice Roberts said, he just looked like he was very encouraging. And suddenly I calmed down quickly. And I found the Court as a whole, even though Justice Stevens and Justice Sotomayor — and it was her first week on the bench, by the way — gave me a little bit of grief, for the most part, they were a much more friendly court than, say, the Sixth Circuit, all right. I've had the Sixth Circuit not be very kind to me at all. They've been extraordinarily mean to me at times, in fact. Ultimately having done it, I felt more comfortable there.

And then from that point, the biggest impact on my practice is it changed things a lot. Seven or eight days later I had an oral argument before the Kentucky Supreme Court, and that felt like nothing. I mean no offense to the Kentucky State Supreme Court, but it was a wonderful feeling to walk into that courtroom now with an immense amount of confidence and absolutely no fear. Now, some of that has dissipated, but for the most part, I'm much more comfortable now with the courts having done it because I can always remind myself having done that, I've done something unique. And if I can get through that without passing out, I can get through about anything.

Unless there's other questions, I'll wrap up. Thank you.

KATIE DORAN: Thank you, Mr. Long, for speaking, and as a token of our appreciation, we want to give you this.