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### Twice Grilled

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## TWICE GRILLED

J. Thomas Sullivan\*

I was fortunate enough to argue two cases before the Court in successive years, a circumstance that I suspect is quite rare for an unknown private practitioner. The experiences have blurred in my memory over time, likely due in no small part to the fact that I lost both cases, but I will try to separate the highlights here.

I do remember that any trip to the Court is indeed an awesome experience. My labor law professor, Charles J. Morris, had commented in class about the honor of arguing before the Court and then tossed out the suggestion that we, too, would be able to argue a case before the Court one day. His rather simplistic assurance on this point came back to me when I was notified that my first cert petition had been granted. I also remember the sleepless night before that argument; my premature attempts to awaken so that I would be sure to avoid being late; the back-up wake-up call my wife, Suzy, gave me that morning. How foolish she was to ask if I had slept well.

The concerns common to most counsel arguing before the Court were complicated before my first argument by a problem that I can say with some assurance is unique. Three days before my flight to Washington, I was playing with my then one-year-old daughter Molly. A toy she particularly liked had a suction cup on it, and I plopped it onto my forehead to make her laugh. She laughed enthusiastically, bouncing the toy in every which direction trying to pull it off while I steadfastly remained in control of the device for some matter of minutes. When I finally dislodged the thing, it had left a large, well-defined red circle in the middle of my forehead that looked exactly like a target. For the next two days, we tried everything to make the mark go

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away, but nothing seemed to work. I was worried that the Court might observe me as some kind of nut showing up pre-targeted for oral argument, but thankfully, it disappeared the day of my flight to Washington.

I remember that once I saw it, and then stepped inside it, the Court's impressive building gave me the feeling that this is a place where something very important happens. I think I would have had that feeling even if I had not been a lawyer, even if I had not been there to argue a case that morning. I realized again how much was at stake for my client, and imagining worst-case scenarios, I was quite relieved when I saw a sign indicating that the Supreme Court has a full-time tailor in residence. I put my fears about a ripped seam aside.

I still recall my first appearance at the Court as the worst oral argument I have ever delivered, and one of the worst experiences of my life. I should have won, because I was able to rely on *Brown v. Ohio*,<sup>1</sup> a decision favorable to my client that was almost directly on point. I was also sustained in my optimism by two other decisions, *Waller v. Florida*<sup>2</sup> and *Robinson v. Neil*,<sup>3</sup> written by Chief Justice Burger and then-Justice Rehnquist, respectively. Both supported my client's argument that his conviction for driving while intoxicated barred a later prosecution for vehicular manslaughter based on the same incident. Regrettably, Justice Powell, who had written the majority opinion in *Brown*, was ill on the day I argued, and I have always wondered whether his absence made a difference, because I lost on a split decision.<sup>4</sup>

Once the case was called, I found myself a total wreck. While my friend and co-counsel Henry Quintero<sup>5</sup> sat comfortably at counsel table after pocketing one of the quill pens, I drank most of the water available at the podium in a vain attempt to moisten my dry throat, and focused on willing my knees to hold me up. I was not in good shape, and I remember that Justice White didn't provide much help. Referring to *Illinois*

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1. 432 U.S. 161 (1977).

2. 397 U.S. 387 (1970).

3. 409 U.S. 505 (1973).

4. *Fugate v. N.M.*, 470 U.S. 904 (1985) (per curiam).

5. Henry Quintero has recently been appointed a district judge for the Sixth Judicial District of New Mexico.

*v. Vitale*,<sup>6</sup> another leading case that supported our position, I pronounced Vitale using two syllables, just as Dick Vitale, the omnipresent basketball commentator, pronounces his name. Justice White, after pointedly spearing me during my opening sentence to the Court,<sup>7</sup> used a three-syllable approach to Vitale when he mentioned the case. Things went downhill from there.

Justice Marshall, whom I shall always respect as a lawyer who not only served on the Court, but argued before it, pointed out that the accident victim had not died until after the resolution of the DUI case, and asked the understandable question: “How can you have a homicide if no one’s dead?”<sup>8</sup> I could only tell him that this was just the way the New Mexico legislature had written the vehicular homicide statute. It wasn’t a convincing response.

I couldn’t later explain to my client the four votes to affirm the New Mexico Supreme Court’s holding, which relied on a 1912 decision from the occupation of the Philippines that seemed to have been overruled by implication in the large body of far more recent double-jeopardy law. I can’t explain it now either, but I do know that *Fugate* remains a constitutional rule that may well apply only in New Mexico.

The following year, New Mexico’s Attorney General Paul Bardacke and I met in the Court again when we argued *New Mexico v. Earnest*.<sup>9</sup> General Bardacke, as Justice Rehnquist called him during questioning, had asked me some weeks before if I planned to use the reserved seats to which I was entitled. I had not even been aware that I had reserved seats, having overlooked that part of the instructions to counsel. When I indicated that I had no use for the tickets, he asked if I might cede them to him, and I agreed. Then he explained that Michael Douglas, who had been his roommate at Berkeley, wanted to attend the argument. If only I had been able to finish my script

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6. 447 U.S. 410 (1980).

7. I was stating the issue when he abruptly asked, “Isn’t that why we’re here?”

8. One of the recognized exceptions to the application of double jeopardy arises when a critical evidentiary fact—in this case, for example, the victim’s death—occurs after the initial prosecution on the lesser offense. Oddly, the New Mexico vehicular homicide statute provided when *Fugate* was decided that a defendant could be prosecuted for causing either death or serious bodily injury. Because the victim had been seriously injured in the accident, *Fugate* could have been prosecuted for manslaughter when the DUI was pending.

9. 477 U.S. 648 (1986).

by then! But instead of writing dialogue, I had been writing briefs. I even forgot to ask Paul if he would introduce me to Douglas.

My other clear memory of the events leading up to the argument in *Earnest* is of the pre-game that takes place in the Clerk's chambers, where the lawyers scheduled for the grill that day assemble, get some basic directions, and say their prayers. I know I said one. Then the fellow standing in line before me remarked that the only advice he had been given by the senior partners in his law firm was that the Chief Justice despised button-down collars. He frowned with mild dismay as he suddenly noticed the button-down collar on my brand-new white shirt, and said, "I guess I shouldn't have mentioned that."

Well, it didn't matter. I gave as good an appellate argument as I can, relying on Supreme Court authority indicating that a non-testifying co-defendant's confession could not be admitted as substantive evidence at trial in the absence of a meaningful opportunity for cross-examination. When asked if the New Mexico trial courts had applied the penal-interest exception to admit accomplice confessions in other cases, I looked over at my co-counsel and friend, Susan Gibbs. She shook her head no, allowing me to give a negative answer. She also took one of the quill pens, but this time I drank no water, and my knees held up.

I remember that I found it hard to sit quietly in my seat at counsel table during Bardacke's rebuttal. I almost always represent criminal defendants who have lost in the lower court, so I cherish rebuttal. Yet on the day when I delivered my best and most important argument, I was denied the opportunity for one last plea. I wish I had been given the chance, because the Court vacated the reversal I had won at the New Mexico Supreme Court, and I lost on remand.<sup>10</sup>

Unlike *Fugate*, in which no great issues of constitutional consequence were actually implicated in the argument, the *Earnest* litigation grew out of a longstanding question in Confrontation Clause analysis: Should the statements of accomplices be admitted into evidence when the defendant has

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10. *State v. Earnest*, 744 P.2d 539 (N.M. 1987), *cert. denied*, 484 U.S. 924 (1987). *Earnest* also lost on his Confrontation Clause claim when he raised it later in a federal habeas proceeding. *Earnest v. Dorsey*, 87 F.3d 1113 (10th Cir. 1996), *cert. denied*, 519 U.S. 1016 (1996).

had no opportunity to cross-examine those witnesses? Four members of the Court concluded later in *Lilly v. Virginia*<sup>11</sup> that accomplice statements cannot be admitted in the absence of cross-examination. And Justice Scalia, concurring, noted that he would not allow such statements to be admitted if made to the police.<sup>12</sup>

I was heartened by the result in *Lilly*, but also disappointed. It seems clear to me that Ralph Earnest would win if his case came to the Supreme Court today. He wouldn't be serving a life sentence. He would be free.



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11. 527 U.S. 116 (1999).

12. *Id.* at 143 (Scalia, J., concurring).

