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Reaching the summit: Two solos who prevailed at the Supreme Court

On the surface, Steven Farber and David Mills have little in common. Farber has maintained his own one-man firm in Santa Fe, N.M., since 1978, handling personal-injury, white-collar criminal defense, civil rights and professional malpractice cases.

Mills began his solo career in Cleveland in 2008 with an appellate practice, following a four-year stint at a prestigious firm and two clerkships.

Yet both breathe rarified air, having argued significant cases before our nation's highest court — as sole practitioners against heavy odds — and won.

Expanding time limits for civil rights claims

Farber argued before the Supreme Court in 1985, in defense of his client's civil rights claim (under 42 U.S.C. Section 1983) for injuries inflicted by police. *Wilson v. Garcia*, 471 U.S. 261 (1985).

On interlocutory review, the court of appeals applied a three-year state limitations period applicable to personal injuries. The defendants petitioned for certiorari, arguing for two years under the state's tort claims act.

The Supreme Court granted certiorari and resolved a split of authority in favor of Farber's client. Application of each state's personal-injury limitations period to Section 1983 claims, the court held, promoted the statute's remedial purposes in accord with congressional intent. *Wilson* later was partially superseded by statute but remains a frequently applied decision and has been cited thousands of times.

Reality sunk in when Farber received the clerk's letter discussing procedures for oral argument in the high court and enclosing eight gallery tickets for friends and family.

Farber was opposed by a premier New Mexico firm with experienced appellate practitioners, and though Farber knew this was a David-and-Goliath situation, he vigorously prepared his case and expected success.

Farber memorized the rules and

customs of Supreme Court practice, studied early congressional debates on civil rights enactments going back to the 1870s and read every Section 1983-limitations case he could find.

He scoured opinions for the justices' discordant views on Section 1983 issues in other cases and formed arguments he hoped would lead to common ground. For final preparations, Farber had a moot court argument and observed other live arguments before the court.

No regrets either way

Farber is pleased he prevailed for his client — and secured an increased limitations period for Section 1983 litigants in the vast majority of states — but he knew the case could have ended differently.

"It was a daunting task," Farber conceded, "but I felt great about taking it on," adding that "I never had a moment's hesitation."

Because he laid it all on the line when preparing the case, he was able to "put on blinders," forge ahead with the argument and "not think about what happens if we lose." The transcript of his argument reflects that confidence.

Though Farber acknowledges the case took its toll — he worked nights and weekends, lost time with his family and sacrificed income from other cases — there are no regrets. His client needed an advocate, plain and simple. The case set a high standard for his work going forward and earned respect in the legal community.

Farber has an inherently independent spirit, he explained and as a sole practitioner, he could pursue this case passionately for his client, without pressure from partners or consideration of other external factors. Farber would not have it any other way.

Clarifying civil procedure for Section 1983 claims

David Mills ascended abruptly to the Supreme Court and never looked back.

In 2008, Mills was starting his practice from scratch and worked from an office inside his apartment with his mother's help as paralegal.

A woman called with an urgent

SOLE SPEAK



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request. She won a Section 1983 judgment arising from a sexual assault during incarceration but lost in the court of appeals based on a qualified immunity defense. It was the last hours of the final day to extend the cert petition deadline, and she was frantic.

Mills acted immediately. He gleaned the core facts, considered the prospects for Supreme Court review and filed his motion for extension within a few hours.

Though odds were long, Mills knew there was a chance and got to work. The court of appeals reversed the jury verdict in a split 2-1 opinion, ruling that the respondents were protected by qualified immunity.

Though the respondents failed to make a post-verdict motion, the court of appeals determined the immunity defense was preserved through the respondents' unsuccessful summary judgment motion.

Disagreements on the preservation issue existed in other circuits, and guidance from the Supreme Court was needed. Mills made a strong case for review. The court agreed to hear the matter. *Ortiz v. Jordan*, 562 U.S. 180 (2011)

To underscore the stakes involved — preservation of a qualified immunity defense — a friend-of-the-court brief supporting the respondents and the Ohio solicitor general was filed by 26 states, the District of Columbia and Puerto Rico. No pressure there.

Eat, drink and sleep the case
Mills was undeterred and left

nothing to chance in his preparations for the Nov. 1, 2010, argument. Adding to the burden, Mills started teaching a law school class in September, followed by two appellate arguments in October.

Nonetheless, with the assistance of two close colleagues, Mills etched out his arguments, researching and writing virtually every waking moment. He conducted multiple moot courts — exhausting efforts by themselves — each of which raised new questions to address.

The morning after the actual argument, Mills recalled, was the first time in a long while that he awoke without a pressing legal issue on his mind.

At oral argument, Mills uttered just one sentence before the justices started firing questions, and the grilling never stopped. Mills held his own, answering each query head-on.

The court ruled for his client, that respondents lost the qualified-immunity defense by failing to make a post-verdict motion under Federal Rule 50(b). The case has been studied and written about extensively since, by attorneys and academics alike.

Although Mills' star has risen dramatically — recently, he filed a friend-of-the-court brief for certain current and former members of Congress in a securities class action before the high court — Mills reveals a refreshing dedication to his sole practitioner roots.

Now consulting with lawyers across the country regarding lofty appellate issues, Mills still works from the original office within his apartment, assisted by his paralegal-mother. As a solo, Mills wants to create an elite work product that is affordable and, therefore, accessible to more litigants, even at the highest levels.

As shown by his work in *Ortiz v. Jordan*, Mills has more than met the mark.

Transcripts and recordings of Farber's and Mills' oral arguments are available at oyez.org. Their review is recommended for instructional use and as inspiration to fellow sole practitioners.