Keys To A 9-0 High Court Win: Practicality Over Perfection

By **Allon Kedem** (September 30, 2022)

With a new U.S. Supreme Court term underway — and amid a recent downturn in 9-0 opinions — advocates who have recently won unanimous rulings from the justices discuss their argument strategies, the tactics they think may help unify the court, and what other practitioners can learn from their experience.

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The hardest part about winning a U.S. Supreme Court argument, it is sometimes said, is having your case heard in the first place. The court only grants about 1% of the certiorari petitions filed each year;[1] but once it agrees to hear a case, it reverses the lower court more than three quarters of the time.[2]

So when the Supreme Court agreed to hear argument in our case, Wooden v. United States, we knew we stood a good chance of prevailing — though we didn't know it would end up being a unanimous victory. Our focus from the outset was on getting to a majority, and we believed we had two key factors working in our favor.

First and foremost, we had the stronger legal position.

At issue in our case was the Armed Career Criminal Act, a federal statute that imposes a harsh mandatory minimum sentence for illegal gun possession when the offender has three prior convictions that were "committed on occasions different from one another."

The government took the view that prior offenses should automatically be treated as occurring on different occasions whenever they were sequential in time rather than overlapping — even if the crimes were spaced only a few seconds apart.

Our view was that prior offenses were committed on the same occasion if they were part of a single criminal episode. Our focus on whether offenses arose from the same series of related events seemed to us like a far more natural reading of the statutory text than the government's time-based approach.

The factual background of our case was our second big advantage.

Our client, William Dale Wooden, had broken into a storage facility one night along with three other associates, and the group then tunneled through the drywall connecting 10 of the units. The episode resulted in 10 burglary charges for Wooden, one for each of the units.

Because the burglars had moved sequentially from unit to unit, the government treated those burglaries as having been committed on occasions different from one another. But the break-in was a single episode, and we believed the court would intuitively understand the 10 burglaries as having taken place on the same occasion.

Though the law and facts were on our side, we knew our position had a significant liability: The government's proposed test seemed clear-cut, while ours seemed more complicated and indeterminate.

The government was asking the Supreme Court to look only at a single factor — whether prior offenses were simultaneous or sequential in time. By contrast, figuring out whether past offenses were part of a single criminal episode, as we urged the court to do, involved an open-ended inquiry into all of the relevant circumstances.

This posed a particular risk for oral argument, where the justices come prepared with hypothetical questions designed to expose the holes and inconsistencies in advocates' positions. My argument time could easily be swallowed up by such hypotheticals, leaving me little opportunity to attack the government's position or otherwise advance my client's cause.

My team and I worked to neutralize this disadvantage.

My approach to oral argument typically involves a lot of so-called moots — practice arguments in which fellow lawyers play the judicial role of questioner — which I find are the best way to identify and address weaknesses in my position.

When I was an assistant in the Office of the Solicitor General at the U.S. Department of Justice, arguing on behalf of the government, we were limited to two moots per case. To prepare for Wooden, my first Supreme Court argument in private practice, I did a half-dozen.

These sessions, which involved colleagues both from inside and outside my firm who generously donated their time, were invaluable.

Another preparation strategy that I used is called a pre-mortem.

It works like this: My team and I started by imagining that we had lost the case. Then, we worked backward to figure out the most likely reason for our failure. I find the technique particularly useful for combating tunnel vision and overconfidence — two pitfalls especially likely to result in a disastrous oral presentation.

My preparation led me to make several important strategic decisions leading up to argument.

First, when faced with a hypothetical question about whether a series of events should count as a single criminal episode, I would give a direct "yes" or "no" answer each time, rather than suggest the outcome might depend on additional unstated facts.

The justices might not necessarily agree with my answer, but I would convey that the test we proposed was capable of definitive application, and the interaction would not invite an endless stream of follow-ups.

Second, I would pivot as often as possible to the favorable facts of our case.

Any hypothetical scenario posed to me would almost certainly be a far cry from Wooden's break-in, in which the 10 burglaries were committed in the course of just one evening, within a single structure, by the same group of perpetrators in an uninterrupted episode of criminal activity.

As I told the justices at argument,[3] though any legal standard can give rise to difficult line-drawing problems, the break-in was the "molten core" of a single episode; if crimes

committed sequentially could ever count as a single occasion, surely Wooden's burglaries should.

Third, and relatedly, I would keep focus on the flaws in the government's position.

In our view, the government's test was not as clear-cut as it appeared: The precise sequence and timing of related crimes is often difficult to discern, particularly from the vantage point of a sentencing proceeding conducted years after the fact.

The government's position also reflected a tortured reading of the statutory text, and was a poor fit with the Armed Career Criminal Act's history and function. I pointed out these limitations at every opportunity.

For Wooden to win, I did not have to convince the court to adopt our proposed test in all its particulars; I only had to convince the court that the government's sole focus on the timing of past offenses was flawed.

The government itself facilitated my approach by articulating a version of its test at oral argument that, in my view, differed appreciably from the position it had advanced in its brief. Several justices reacted skeptically, and I knew there was an opening to unify the court in rejecting the government's new test.

I used my entire rebuttal time to hammer the government's shift in position and point out reasons to be wary of it. I spoke uninterrupted for five minutes; no justice asked me a question. But I could tell that they were absorbing my criticisms, and that I had given them enough reasons not to endorse an untested approach that had only emerged post-briefing.

Following argument, I felt good about our chances of prevailing, though I didn't know whether the outcome would be unanimous. When the decision came out, the majority had embraced our single-criminal-episode approach over the government's time-based approach — without even mentioning the new test the government had introduced at oral argument.

Although two of the justices did not fully accept the majority's reasoning, they agreed with the result: The court was unanimous that Wooden's burglaries should be treated for purposes of sentencing as having been committed on the same occasion, not on occasions different from one another.

The 9-0 outcome suggests that our strategy worked. My decisive answers to the justices' hypothetical questions enabled me to pivot to our affirmative arguments; my focus on the favorable facts of Wooden's case, and the flaws in the government's position, were reflected in the court's minimalist decision.

The majority acknowledged that our test might pose hard questions at the margins, but added that "surely, this one does not." And the concurrence agreed that any reasonable doubt should be resolved in Wooden's favor. This was not a wholesale endorsement of our position, so much as a rejection of the government's aggressive approach — especially as it applied to Wooden.

Each Supreme Court case ultimately turns on its own circumstances, with victory more often a function of the relative strength of the parties' legal positions than the skill of their oral advocates. Yet oral argument can make a difference, even — or perhaps especially — when the justices are favorably disposed toward one side but undecided on the precise rationale.

Without attempting a comprehensive theory, I'd suggest a few lessons to be drawn from my experience in Wooden's case.

Preparation is key, but so is the right kind of preparation. Make sure to reach outside your inner circle, exposing yourself to an array of perspectives and avoiding confirmation bias. When participating in moots and pre-mortems, remember that the fault lines in Supreme Court cases are not always along the left-right axis; other cleavages, such as pragmatism versus formalism, can be just as important.

Experienced Supreme Court practitioners are helpful sounding boards for honing an oral presentation, but so are less-experienced attorneys and even nonlawyers: Unless I can explain my case in plain English to friends and family members in a way they can understand, I know I'm not ready yet to discuss it with the justices.

Above all, know your case's limitations as well as its strengths. Given our position on behalf of Wooden, I knew that my answers to the justices' hypothetical questions would not leave all of them — or perhaps even any of them — completely satisfied. But I was not looking for perfection, just the best response available.

When speaking to audiences about his judicial philosophy, Justice Antonin Scalia used to tell the old joke about the two hunters who happen across a grizzly bear in the woods. When the first hunter bends down to tie his laces, the other one expresses disbelief. "Don't be silly — you can't outrun a bear!" The first hunter responds, "I don't have to outrun the bear."

The point is: Your position does not have to be perfect; it just has to be better than the alternative.

Allon Kedem is a partner at Arnold & Porter. He previously served as an assistant in the Office of the Solicitor General at the DOJ. He argued for the petitioner in Wooden v. U.S. on Oct. 4, 2021.

[1] https://www.citizen.org/wp-content/uploads/gettingyourfootinthedoor.pdf.

[2] https://ballotpedia.org/SCOTUS_case_reversal_rates_(2007_-_Present)#:~:text=The%20Supreme%20Court%20of%20the,since%202007%20(71.4%20percent).

[3] https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/20-5279_h315.pdf.