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POLITICS

Criminal Defendants Sometimes 'Left Behind' at Supreme Court, Study Shows

Sidebar

By ADAM LIPTAK AUG. 8, 2016

WASHINGTON — The quality of advocacy at the Supreme Court these days is quite high. “We have an extraordinary group of lawyers who appear very regularly before us,” Justice Elena Kagan said in 2014 at a Justice Department event.

But there was, she said, one exception. “Case in and case out,” she said, “the category of litigant who is not getting great representation at the Supreme Court are criminal defendants.”

That impression, widely shared by people who frequently attend Supreme Court arguments, has now been confirmed by a comprehensive look at a decade of data.

“Criminal defendants are almost never represented by expert counsel in arguments before the Supreme Court,” Andrew Manuel Crespo, a law professor at Harvard, wrote in the new study, which was published in *The Minnesota Law Review*.

In the 10 years ending in June 2015, he found, as many as two-thirds of the arguments on behalf of criminal defendants were presented by lawyers making their first Supreme Court appearances.

“The justices have come to expect a level of expertise,” Professor Crespo said in an interview. “One important constituency that has been left behind by that explosion of expertise is criminal defendants.”

Professor Crespo, drawing on earlier studies, treated lawyers as experts beginning with their fifth arguments before the justices. About half of the arguments in civil cases were made by such expert lawyers, compared with fewer than a quarter for criminal defendants.

State and local prosecutors who argued in the Supreme Court were often quite green, too. But also aligned against criminal defendants in many cases are experienced lawyers with the United States solicitor general’s office. Lawyers from that office handled or participated in 72 percent of arguments in criminal cases, siding against criminal defendants 96 percent of the time.

“When it comes to questions of criminal justice, the solicitor general’s office is in fact a prosecutorial office,” said Professor Crespo, a former law clerk to Justice Kagan and Justice Stephen G. Breyer.

When lawyers with the solicitor general’s office approached the Supreme Court lectern, they had on average about 25 previous arguments. The comparable number for criminal defense lawyers was 5.3.

“It means that you’re getting some of the best lawyering in the country, but only on the side of one half of the question,” Professor Crespo said.

“A court that’s going to decide these important questions will benefit from hearing quality lawyering on both sides of the issue.”

Why are there so few expert lawyers arguing on behalf of criminal defendants? Justice Sonia Sotomayor has said that the main factor is vanity: Many criminal defense lawyers are too reluctant to cede the glamour of Supreme Court arguments to specialists.

“I think it’s malpractice for any lawyer who thinks, ‘This is my one shot before the Supreme Court, and I have to take it,’” Justice Sotomayor told Reuters in 2014.

The cream of the Supreme Court bar does occasionally handle cases for criminal defendants, often without charge. But there is only one expert Supreme Court advocate whose practice is largely devoted to criminal defense: Jeffrey L. Fisher of Stanford Law School.

“It seems safe to say,” Professor Crespo wrote, “that Professor Fisher is the expert Supreme Court criminal defense bar — if only one person a bar could make.”

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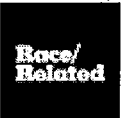
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A second factor tilts the playing field against criminal defendants: The Supreme Court itself is dominated by former prosecutors.

Six of the eight members of the current court have worked in prosecutors' offices. Four of them served in the Justice Department; Justice Clarence Thomas was an assistant attorney general of Missouri; and Justice Sotomayor was an assistant district attorney in Manhattan.

Should the Senate confirm President Obama's Supreme Court nominee, Judge Merrick B. Garland, the court would gain a former Justice Department official who supervised the prosecutions of the 1995 Oklahoma City bombing and of Theodore J. Kaczynski, the Unabomber.

With Judge Garland on the court, the justices would have a total of 36 years of prosecutorial experience, the most in at least four decades.

The court could use some diversity in this area, Justice Sotomayor said in April at Brooklyn Law School. "There is no criminal defense lawyer on the court," she said.

In fact, since Justice Thurgood Marshall retired in 1991, the Supreme Court has been without a single member who had spent any significant time working as a criminal defense lawyer before ascending to the bench.

These days, Professor Crespo wrote, "constitutional criminal adjudication before the U.S. Supreme Court consists largely of arguments by expert prosecutors, offered to former expert prosecutors."

He offered an intriguing proposal to provide some balance, urging the justices to appoint expert lawyers to argue as friends of the court alongside the defendants' own lawyers. That would start to level the playing field, as the court routinely lets lawyers from the solicitor general's office share argument time with state and local prosecutors.

There is precedent for this. In 1961, the court allowed a lawyer for the American Civil Liberties Union to argue as a friend of the court in what would turn out to be a groundbreaking case, *Mapp v. Ohio*.

The A.C.L.U.'s lawyer was alone in pressing the view that evidence obtained in violation of the Constitution must be suppressed in state courts. The court accepted that position, revolutionizing criminal justice.

Routinely allowing experts to argue on both sides of criminal cases seems only fair, Professor Crespo said.

"It is important to have a balance of perspectives on these issues," he said. "Right now the court is strikingly lopsided."

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