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## Attorneys

### A Supreme Court First: Justices Call On Attorney, Again

The U.S. Supreme Court did something Feb. 27 that it's never done in its more than 225-year history.

The justices invited Adam K. Mortara of Bartlit Beck Herman Palenchar & Scott LLP, Chicago, "to brief and argue, as *amicus curiae*, in support of the judgment below," in a case about how federal courts should analyze habeas claims challenging state convictions, *Wilson v. Sellers*, 2017 BL 58994, U.S., No. 16-6855, granted 2/27/17.

The appointment isn't in and of itself particularly noteworthy. The Supreme Court extends such "invitations" about once per term.

The action was significant because the justices had already asked Mortara to brief and argue a criminal sentencing case that is pending before the justices, *Beckles v. United States*, U.S., No. 15-8544, argued 11/28/16.

"I'm not aware of any other advocate being invited to argue twice as an amicus," Kate Shaw, of the Benjamin N. Cardozo School of Law, New York, told Bloomberg BNA in a Feb. 27 email. Bloomberg BNA research confirmed the singularity of the justices' request.

"It's pretty remarkable, and it definitely suggests that he really impressed the justices with his last argument," Shaw, who wrote a 2016 essay on the court's appointment process, *Friends of the Court: Evaluating the Supreme Court's Amicus Invitations*, 101 Cornell L. Rev. 1533 (2016), said.

**'Ably Discharged.'** The court appoints individuals to argue in cases that it's agreed to review when neither party agrees with what the court below has done. The appointed attorney will argue in support of the judgment below.

That's what happened the last time the court called upon Mortara, an intellectual property litigator, to argue as an amicus in *Beckles v. United States*.

*Beckles* involves the application of another recent Supreme Court case which found a portion of the Armed Career Criminal Act unconstitutionally vague, *Johnson v. United States*, 83 U.S.L.W. 4576, 2015 BL 204915 (U.S. June 26, 2015).

The lower court in *Beckles* said that *Johnson* didn't apply to U.S. Sentencing Guidelines.

But the parties disagreed. Both the defendant and the federal government told the Supreme Court that *Johnson* did apply.

So the court asked Mortara to argue the other side.

Mortara "ably discharged that responsibility," Chief Justice John G. Roberts Jr. told him at the end of the *Beckles* argument. That's the language the Chief customarily uses to thank appointed attorneys.

**Who's Who.** We don't know yet if the justices agreed with Mortara in *Beckles*—the court hasn't issued its opinion.

But the fact that the justices appointed Mortara again suggests that the justices liked the job he did in that case and "saw fit to invite him back," Brian Goldman, of Orrick, Herrington & Sutcliffe LLP, San Francisco, told Bloomberg BNA in an email Feb. 27. Goldman also wrote about the Supreme Court appointment process in *Should the Supreme Court Stop Inviting Amici Curiae to Defend Abandoned Lower Court Decisions?*, 63 Stan. L. Rev. 907 (2011).

The court has appointed 61 attorneys to argue as an amicus, according to Shaw and research by Bloomberg BNA.

A shrinking Supreme Court docket and an increasingly specialized Supreme Court bar make these appointments coveted.

The list of appointed attorneys is a "who's who" of the Supreme Court bar, Supreme Court regular Jeffrey A. Lamken, of MoloLamken LLP, Washington, told Bloomberg BNA in 2015.

The list includes a former solicitor general, a now federal appellate court judge, and now-Chief Justice Roberts.

Many times the appointment will be the first time an individual argues before the Supreme Court, but that's not always the case, Goldman said.

But no appointee, however seasoned at the court, has been tapped twice to argue as an amicus.

**Repeat Players.** The court has tapped "repeat players" in other contexts, Shaw noted.

At least one person, Richard D. Bernstein of Willkie Farr & Gallagher LLP, Washington, has "received both an amicus invitation and an invitation to represent" an indigent party, she said.

Bernstein, former clerk to the late Justice Antonin Scalia, was invited by the justices to argue as an amicus in 2015, in *Montgomery v. Louisiana*, 84 U.S.L.W. 4063, 2016 BL 18591 (U.S. Jan. 26, 2016). Earlier Bernstein had been invited to represent a successful pro se petitioner in *Carmell v. Texas*, 529 U.S. 513 (2000).

"Also, when it comes to Special Masters, the Court has used many repeat players," Shaw said, referring to individuals appointed by the justices to hear evidence in its original jurisdiction cases.

There's "a law firm in Maine, Pierce Atwood, that has received a significant number of" these appointments, Shaw said.

**Unwritten Rules.** It's not clear why the court departed from its traditional process and appointed Mortara twice.

Like so many other established Supreme Court "rules," there isn't actually a written rule regarding high court appointments, Lamken said in 2015. So the process can be cloudy.

Mortara speculated that he may have snagged the second appointment because he argued the case in the

en banc Eleventh Circuit at the invitation of the court, he said in a Feb. 28 email.

"That appointment arose at the very last minute because the State changed its position after en banc rehearing had been granted," he said in a Feb. 28 email.

"I had been appointed twice before by the Eleventh Circuit and had the availability to brief and argue the case on an accelerated basis," Mortara said.

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