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Differing Schools of Thought: Changing Perceptions of Oral Argument

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DIFFERING SCHOOLS OF THOUGHT: CHANGING PERCEPTIONS OF ORAL ARGUMENT

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INTRODUCTION

In the past few years, two events occurred that brought the process of oral argument into the news. On February 13, 2016, Justice Antonin Scalia died after having served on the United States Supreme Court for nearly thirty years. A hallmark of his time on the Court was his relentless and sharp questioning of the counsel that appeared before the Court. Before the ascension of Justice Scalia, many could argue that oral argument could be characterized as being a more genteel affair. With Justice Scalia setting the standard, others like Justices Sotomayor, Ginsburg, and Breyer have joined the fray to the point that the number of questions posed by the Justices increased significantly in recent times.[1]

The other event occurred on February 29, 2016, when Justice Clarence Thomas asked a number of questions at oral argument after over ten years of silence.[2] New York Times reporter Adam Liptak speculated that Justice Thomas's questions could have been prompted by Justice Scalia's death acting as "a sort of passing of the baton."[3] Through the years, Justice Thomas's silence had become a news story in and of itself. Thomas was quoted as lamenting the atmosphere of questioning that made the court "look like 'Family Feud.'"[4] Thomas said regarding oral

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1. *See* Q & A with Justice Antonin Scalia, CSPAN, (July 19, 2012) (quoting Justice Antonin Scalia "I was the first one who started asking a lot of questions I guess and that was probably my law school background, my law professor background. And then, when other law - former law professors came on the court they continued the same. Ruth Bader Ginsburg, of course, another law professor, Stephen Breyer, another former law professor").

2. *See* Adam Liptak, *Clarence Thomas Breaks 10 Years of Silence at Supreme Court*, N.Y. TIMES (Feb. 29, 2016), https://www.nytimes.com/2016/03/01/us/politics/supreme-court-clarence-thomas.html (noting that Justice Clarence Thomas began asking a government lawyer questions from the Supreme Court bench during oral arguments after years of silence possibly because he was the only member of the court "fully committed to the mode of constitutional interpretation" after Justice Scalia's death).

3. *Id.*

4. Adam Liptak, *No Argument: Thomas Keeps 5-Year Silence*, N.Y. TIMES, 2 (Feb. 12,

argument, "[i]f I invite you to argue your case, I should at least listen to you . . . ."[5] Although not as a prominent figure in this debate, Justice Alito also stated that "oral arguments aren't all that important, despite a popular belief to the contrary."[6]

The media and, understandably, the legal profession have become fascinated with the institution of oral argument. Whether it is the diametrically opposed views of oral argument as represented by the late Justice Scalia or those of Justice Thomas, now everyone seems to have an opinion on the merits of oral argument.[7] Typically, the opinions on the merits of oral argument have been examined through our experience with the United States Supreme Court.

Oral argument can be shorter or longer in duration, it can be engaging and perceived as being "hot," or it can be more routine and perceived as "cold." Requests for oral argument can be routinely granted when requested, or they can be screened vigorously by the judges to determine whether the request for oral argument should be granted. As a result, oral argument is often perceived as being a worthwhile activity, or conversely, as being of limited value. One thing is clear, that the decision to request or not request oral argument by the parties, or the decision to grant or deny the request for oral argument by the appellate panel, can become a very important decision during the pendency of the appeal. The decision to grant or deny oral argument is often the first substantive decision of the merits panel. Thus, a seminal question is how much significance appellate judges put into oral argument.

In this paper I will examine the changing perceptions of oral argument, as well as examine and review the data provided by the Office of

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2011), https://www.nytimes.com/2011/02/13/us/13thomas.html (reflecting on Justice Thomas's opinion of the atmosphere in the courtroom).

5. *Id.*

6. Debra Cassens Weiss, *Think Oral Arguments Are Important? Think Again, Justice Alito Says*, ABA JOURNAL, 1 (May 17, 2011, 11:15 AM), http://www.abajournal.com/news/article/think_oral_arguments_are_important_think_again_alito_says.

7. *See* Adam Liptak, *In Health Case, Appeals to a Justice's Idea of Liberty*, THE NEW YORK TIMES, 4 (Mar. 30, 2012), https://www.nytimes.com/2012/03/30/us/justice-anthony-m-kennedy-may-be-key-to-health-law-ruling.html (citing Adam Liptak, *Appealing to a Justice's Notion of Liberty*, THE NEW YORK TIMES, March 30, 2012, at A1); *see also* Adam Liptak, *When the Justices Ask Questions, Be Prepared to Lose the Case*, THE NEW YORK TIMES, 1–2 (May 25, 2009), https://www.nytimes.com/2009/05/26/us/26bar.html (discussing how there is now a theory that questions asked to the opposing party could indicate who will be the winning side. Chief Justice Roberts wrote that "the secret to successful advocacy is simply to get the Court to ask your opponent more questions.").

State Courts Administrator ("OSCA") for Florida's appellate courts. Their data summarized the dispositions of all appeals in Florida from 2011 to 2015. The dispositions are separated between those cases disposed by oral argument and those cases disposed without oral argument. From this research, we can observe whether this data comports with the changing perceptions of oral argument.

If there is a divergence in views, one may attempt to determine why. Is it rooted in the age old views as represented by Justice Thomas and the late Justice Scalia? Are some judges just perceiving it as a waste of time and a drain on the scarce resource of time, as opposed to the traditional view of oral argument as the ultimate legal proving ground? Finally, why should we care about the changing perceptions of oral argument? It matters to judges and practitioners because they need to know if the perceptions confirm or contradict their own perceptions of oral argument.

I. SCHOOLS OF THOUGHT

Through the years, there have been varying opinions on the value of oral argument. Often the scholarship was directly from the practitioner or the appellate judge. The perceptions can be divided into three categories: (1) Oral argument is a grand part of the appellate practice, which is a tradition that should be preserved and almost always utilized; (2) oral argument is generally valuable only for "close cases"; and (3) oral argument is generally considered a vestige from a distant past, since today we rely almost exclusively on the written briefs, and oral argument is a drain on the appellate judge's valuable time. Commentators often do not fit squarely in one camp and drift from one camp to another.

II. THE TRADITIONALIST VIEW OF ORAL ARGUMENT

The traditionalist view of oral argument advocates the virtue of oral argument as an institution. Oral argument can be valuable by having the parties respond to probing questions which in turn sharpen the answers from the parties, and as a result, narrow the issues to be resolved by the court. It serves as a method to bring the wide-ranging arguments to a more focused discussion, with the natural boundaries set by the inquiry and by the time set to discuss the pending issues. It serves as an opportunity for the parties to talk to the court, and through the questions and answers between the panel and the parties, as a way for the parties, often, to indirectly talk to each other. In order to determine if the value of oral argument is real, one has to consider the following questions: is the value

of oral argument "real," as highlighted by the traditionalists, in the sense that oral argument either changes minds or demonstrably sharpens the issues discussed? And if the answer is yes, can one realistically see that result in oral arguments that can be as short as ten minutes per side? To some commentators, "to understand the prevailing attitudes about oral argument and its importance to the appellate process, it is necessary to be familiar with the origins of oral proceedings in the legal process in England" and there is a reoccurring urge to return to the "English oral tradition."[8]

The English appellate courts proceedings "were almost exclusively oral and often continued for many hours."[9] "The essential fact is that English appellate proceedings were and are today entirely oral" and this is critical to understand the profound impact oral arguments have had on the American legal system.[10] Although the English tradition remains exclusively oral, through our history there has been a lessening of the importance of oral argument over the years. Starting with 1849, the United States Supreme Court limited each side to two hours of oral argument, and then cut the time of oral argument in 1858, 1870, and 1911.[11] Finally, the thirty minute, one attorney per side limit was set in 1984.[12]

In state courts, like Florida, the appellate rule states that "[e]ach side will be allowed 20 minutes for oral argument, except in capital cases in which each side will be allowed 30 minutes. On its own motion or that of a party, the court may require, limit, expand, or dispense with oral argument."[13] In the federal courts, the appellate rule states that all the parties will be advised of "the time allowed for each side" during the oral argument.[14] For example, in the Eleventh Circuit local rules, the "oral argument calendar will show the time the court has allotted for each argument."[15] The advisory committee notes for the federal rules point to the fact that the "majority of circuits now limit oral argument to thirty minutes for each side, with the provision that additional time may be made available upon request."[16]

8. Robert J. Martineau, *The Value of Appellate Oral Argument: A Challenge to the Conventional Wisdom*, 72 IOWA L. REV. 1, 5 (1986).
9. *Id.* at 7.
10. *Id.* at 7–8.
11. *See id.* at 10.
12. *See id.*
13. FLA. R. APP. P. 9.320.
14. FED. R. APP. P. 34(b).
15. 11TH CIR. R. 34–4, 138.
16. FED. R. APP. P. 34. advisory committee's note to 1967 adoption.

Those representing another view, the traditional view of oral argument, often harken back to the pre-1849 years of the Supreme Court to its value. They cite to the free-wheeling days of oral argument to wistfully point out the value of oral argument. Justice Rehnquist asked the reader "to travel back with me in time . . . to the Capitol Building . . . . It is February 4, 1824, and [the] argument is about to commence in Gibbons v. Ogden . . . . Five full Court days–four hours each day- were devoted to the argument of this important case."[17]

Citing to Judge Richard Posner, if the judge lacks familiarity in certain specific areas of the law, the judge may be "very badly in need of the advocates' help at oral argument."[18] Judges may gain insight into arguments not fully developed, or the judges may "gain a sense of attorneys' credibility based on the candid nature of oral argument."[19] In the United States Supreme Court, there is also the additional avenue that justices use oral argument to persuade one another. That would be a lesser factor in those courts where the judges are allowed to confer and discuss the pending case even before commencement of the oral argument.

Justice Robert Jackson often best represents this traditional view of oral argument, "I think the Justices would answer unanimously that now, as traditionally, they rely heavily on oral presentations."[20] Jackson represented the view that oral argument can be determinative to the judges and that should be of critical importance to the lawyers. "The bar must make its preparations for oral argument on the principle that it always is of the highest, and often of controlling, importance."[21]

Justice John Harlan realized that there was "some tendency at the trial bar . . . to regard the oral argument as little more than a traditionally tolerated part of the appellate process. The view is widespread that when a court comes to the hard business of decision, it is the briefs, and not the oral argument, which count."[22] Harlan concludes, reiterating the theme

17. William H. Rehnquist, *Oral Advocacy: A Disappearing Art*, 35 MERCER L. REV. 1015, 1016 (1984).

18. Michael Duvall, *When is Oral Argument Important? A Judicial Clerk's View of the Debate*, 9 J. APP. PRAC. & PROCESS, 121, 124 (2007).

19. *Id.* at 125.

20. Robert H. Jackson, *Advocacy Before the United States Supreme Court*, 37 CORNELL L. REV. 1, 2 (1951).

21. *Id.* at 2.

22. John M. Harlan, *What Part Does the Oral Argument Play in the Conduct of an Appeal?*, 41 CORNELL L. REV. 6, 6 (1955).

exposed by Jackson, that to "depreciate[]" the oral argument and "stake[]" all on the brief is to make a "great mistake."[23]

More recently, the late Chief Justice William Rehnquist extolled the virtues of oral argument and warned of the consequences of an appellate court system without oral argument. "The intangible value of oral argument is," to Rehnquist, "considerable. It is and should be valuable to counsel, to judges, and to the public."[24] Rehnquist expressed concern for an appellate judge becoming "isolated from all but a limited group of subordinates" without having the appellate judge participating in oral argument and having a "sense of immediacy and involvement" that emanates from being part of oral argument.[25]

Another example of the traditional view of oral argument are Judges Myron Bright and Richard Arnold of the Eighth Circuit Court of Appeals, who believed oral argument frequently changed minds. Judges Bright and Arnold, through a study they initiated, monitored the results of their own oral argument and kept count of their impressions of the following questions: "Was oral argument necessary?" "Was oral argument helpful?" And finally, "[d]id it change my mind?"[26]

Judge Bright determined that in 163 cases reviewed, oral argument was necessary in 85% of the cases, oral argument proved to be helpful in 82% of the cases, and finally, oral argument changed his mind in 31% of the cases.[27] "The importance of oral argument becomes even more apparent in view of the fact that Judge Bright found that oral argument changed his mind in . . . 37 percent of cases in which oral argument was 'necessary.'"[28] Judge Arnold determined that out of 157 cases, oral argument was necessary in 75% of the cases, oral argument was helpful in 80% of the cases, and finally, oral argument changed his mind in 17% of the cases.[29] Judge Arnold also changed his mind in 22% of the cases in which oral argument was "necessary."[30]

As one can see, the two judges perceived oral argument as being overwhelmingly helpful. This was illustrated, to them, by the fact that they

23. *Id.*
24. Rehnquist, *supra* note 17, at 1021.
25. *Id.* at 1022.
26. *See* Myron H. Bright & Richard S. Arnold, *Oral Argument? It May Be Crucial!*, 70 A.B.A. J. 68, 70 (1984).
27. *See id.*
28. *Id.*
29. *See id.*
30. *See id.*

changed their minds in a significant number of cases. Whether considering out of all cases, or out of a universe of cases where oral argument is considered helpful, oral argument, in this particular study, significantly changed the judges' minds. They based their confidence in oral argument, not just on the fact that oral argument changed minds as an institution, but also that it "serves . . . to strengthen a judge's initial impression of the case [and] that judge's strong view may be enough to persuade other judges to adopt the position."[31]

Judge Bright, the traditionalist, reframes the question of whether oral argument is necessary in every case to the question of "whether oral argument is helpful in a substantial number of appeals."[32] Bright emphasizes the important part oral argument plays in "solidifying the collegial operation of an appellate court."[33] As he points out, often members of appellate courts are either physically spread out throughout a circuit, and reading is a "solitary" event, whereas oral argument is very much a "collegial function."[34]

The most important evidence of the import of the oral argument comes through the "testimonials of those persons in the best position to judge—the appellate judges. In a study of over two hundred statements made by appellate judges in various publications, presentations, and questionnaires, 80% of the judges said that oral arguments are very important to the resolution of cases."[35]

It should be noted that traditionalists do not diminish the value of written briefs as a way to elevate oral arguments. Traditionalists merely contest the diminishment of oral argument, and highlight the role oral arguments possess in assisting the written brief.

III. A MORE RECENT VIEW OF ORAL ARGUMENT: A DIMINISHING INSTITUTION

One view of oral argument is that oral argument no longer really matters anymore. In this view "the relative importance of oral argument has been greatly overestimated and that the appellate brief is and should be

31. *Id.* at 68.

32. Myron H. Bright, *The Power of the Spoken Word: In Defense of Oral Argument*, 72 IOWA L. REV. 35, 36 (1986).

33. *Id.* at 37.

34. *Id.*

35. *Id.* at 39.

the principal focus of the appellate process."[36] Further, one judge admitted in his own writing that:

> [t]he appellate brief is far more important than oral argument. To judge their relative importance, consider this: Oral argument in a federal appellate court may take fifteen minutes, with most of the time devoted to answering questions from the bench; analyzing a brief consumes hours, if not days, for the judge and his staff.[37]

Appellate judges and appellate lawyers recognize that oral argument has been restricted or eliminated in recent times.[38] One author states as proof of the lessening importance of oral argument that, at least according to Justice Thomas, oral argument is "not the real meat" of the work of the Supreme Court.[39] Further, "most judges will admit . . . an oral argument rarely wins an appellate case" stands as further proof of the lessening role of this institution.[40]

Even adherents to the traditionalist view acknowledge the costs associated with oral argument. Judge Bright, representative of the traditionalist school, also countered the argument of those who represent the school of thought that oral argument does not matter anymore and that, in fact, the "costs of oral argument far outstrip its value."[41] Costs such as time spent in oral argument for routine cases, where the disposition is obvious, instead of working on cases where the disposition is still in doubt. Those who diminish oral argument find the role of oral argument to be small, as reflected by the minutes spent in oral argument, as opposed to the hours spent in analyzing the written briefs.[42] This school, that oral arguments do not matter anymore, concludes that "[n]inety-five percent of appellate cases are won or lost on the basis of written briefs."[43]

IV. MIDDLE VIEW OF ORAL ARGUMENT: CLOSE CALLS

There is a third school of thought that rejects the "all-or-nothing proposition" that oral argument "matters in every case or does not matter in

36. Martineau, *supra* note 8, at 4.

37. Ruggero J. Aldisert, *The Appellate Bar: Professional Responsibility and Professional Competence–A View from the Jaundiced Eye of One Appellate Judge*, 11 CAP. U. L. REV. 445, 455 n.25 (1982).

38. *See* Martineau, *supra* note 8, at 3.

39. Duvall, *supra* note 18, at 122.

40. *Id.*

41. Bright, *supra* note 35, at 35.

42. *See id.* at 38.

43. *Id.*

any case."[44] Representatives of this school state that oral argument is important "in only a few close cases."[45] Finally, the view of "conventional wisdom . . . holds that oral argument is less important than in the past."[46]

With these views stated as a backdrop, then why does this school of thought even put any credence in the value of oral argument? This school postulates that "[o]ral argument significantly impacts the outcomes of only very close cases."[47] Thus, "[w]hen oral argument does matter– that is, when it is held in truly close cases– it really matters."[48]

The reasons for oral argument in close cases are varied. Ultimately, this view of oral argument stands somewhere between the idealized historical view of oral argument and the view that highlights the shortcomings of the institution. This view finds that "[o]ral argument can prompt the judges to 'zero in' on the precise turning point in an important case . . . [i]n a 'fifty/fifty,' 'fifty-one/forty-nine,' or even a 'sixty/forty' case, the importance of this impact cannot be overstated."[49]

V. A BRIEF VIEW OF QUANTITATIVE STUDIES

There are statements and testimonials by judges about how they perceive oral argument, but here is what we know from quantitative studies. A recent empirical study seems to back the "traditional" school of thought. That study reviewed "a unique set of data," that being the "notes taken by former Supreme Court Justice Harry Blackmun as he sat on the bench during oral argument[]."[50] Blackmun's oral argument notes included "a grade for each attorney's oral presentation before the Court," as well comments raised by other Justices.[51] The importance of this study is that the grades given for the quality of each oral argument related to the Justices' final votes on the merits, thus demonstrating that a superior performance in oral argument was a leading indicator of success on the merits.

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44. Duvall, *supra* note 18, at 121.
45. *Id.*
46. *Id.* at 122.
47. *Id.* at 123.
48. *Id.* at 124.
49. *Id.* at 125.
50. Timothy R. Johnson, James F. Spriggs II & Paul J. Wahlbeck, *Oral Advocacy Before the United States Supreme Court: Does It Affect the Justices' Decisions?*, 85 WASH. U. L. REV. 3, 460 (2007).
51. *Id.* at 461.

According to this study, the Justices found oral arguments helped clarify their own thinking as well as "perhaps that of their colleagues."[52] This study also wanted to confirm that the "ideological proclivity" of Justice Blackmun did not influence the grades given by the Justice for the attorneys' performance during oral argument.[53] They concluded that "Blackmun's evaluations of attorneys are not greatly influenced by his own ideological leanings" and that the findings regarding the quality of oral argument are "not overly tainted by Blackmun's ideology, and thus [they] may [] be used to explain the other Justices' final votes on the merits."[54] The study concluded that the quality and experience of litigating before the court often translated into better grades for oral argument.

Thus, "[e]ven when controlling for the most compelling alternate explanation– a Justice's ideology– and accounting for other factors affecting Court outcomes, the oral argument grades correlate highly with the Justices' final votes on the merits."[55] One example given is "when the appellant's attorney is manifestly better than the appellee's attorney, there is an 81.4% chance that a Justice will vote for the petitioner, while this likelihood decreases to 32.9% when the appellee's attorney is clearly better."[56] Thus, this study presents data which demonstrate that "the probability of a Justice voting for a litigant rises substantially if the litigant's attorney presented better oral arguments, even after controlling for other likely explanations of a Justice's vote. Indeed, even Justices who ideologically disagreed with the point of view being advocated by an attorney were more likely to vote for her client if she made the stronger arguments."[57]

Another quantitative study was conducted testing the hypothesis that a lawyer who was asked more questions during oral argument by the justices of the United States Supreme Court was more likely to lose. The study found evidence that the number of questions asked, and the number of words spoken, was "negatively correlated with a party's likelihood of winning."[58] The survey concluded through empirical analysis that "Supreme Court justices are more prone to ask questions at oral argument

52. *Id.* at 464.
53. *Id.* at 467.
54. *Id.* at 484.
55. *Id.* at 495.
56. Johnson, *supra* note 50, at 496.
57. *Id.* at 524.
58. Lee Epstein, William M. Landes & Richard A. Posner, *Inferring the Winning Party in the Supreme Court from the Pattern of Questioning at Oral Argument*, 39 J. LEGAL STUD. 433, 433 (2010).

of the lawyers for the parties against whom they will vote."[59] This study gives us another angle from a quantitative study to see the effects of oral argument on judicial decision-making.

In a report delivered by the Fifth Circuit Court of Appeals back in 1973, "screening procedures" operated "to assure that the more difficult cases are orally argued."[60] Further during 1973, those cases decided during the summary calendar resulted in reversals in 7.3% of the cases, whereas those heard during oral argument had a reversal rate of 26.0%.[61] Years later in a separate survey, a federal court survey acknowledged that "[a]ppeals decided without oral argument usually are affirmed, and are affirmed at a greater rate than argued cases. As indicated . . . the Third Circuit has the highest rate of affirmance of non[-]argued appeals (91 percent) and the greatest difference between affirmance rates in argued and non[-]argued cases (61 percent versus 91 percent)."[62] The federal study concluded that "[t]he difference between the rate of affirmance in argued cases and the rate in non[-]argued cases suggests that the likelihood of affirmance is an influential factor in determining that an appeal can be resolved without argument."[63] The data from these two federal studies over two decades seem to align with the state data examined in this study. There is a higher rate of affirmance in the state study, like the two prior federal studies, in non-argued cases than in argued cases, or stated conversely, a higher rate of reversal for those cases decided after oral argument. These quantitative studies demonstrate that oral argument can be a leading indicator of success on the merits. That could increase the value of oral argument to the litigants.

VI. STATEWIDE DISPOSITIONS AND DO THEY COMPORT WITH PERCEPTIONS OF ORAL ARGUMENT

With the background of the differing schools of thought about the value of oral argument, I reviewed five years of data from the State of Florida Office of State Courts Administrator ("OSCA"). The data retrieved for this paper includes the dispositions for years 2011, 2012, 2013, 2014 and 2015. The information is broken down by year and individual district

59. *Id.* at 466.

60. BERNARD D. REAMS, JR. & CHARLES R. HAWORTH, 6A CONGRESS AND THE COURTS, 520 (1978).

61. *See id.* at 518.

62. JOE S. CECIL & DONNA STIENSTRA, FED. JUDICIAL CTR., DECIDING CASES WITHOUT ARGUMENT: AN EXAMINATION OF FOUR COURTS OF APPEALS, at 30 (1987).

63. *Id.* at 30–31.

court of appeal. First, the data is divided between cases disposed of with oral argument and those cases disposed of without oral argument. The data is further broken down by the type of disposition, such as authored opinion, per curiam affirmed ("PCA"), citation opinion, etc. Finally, the disposition is further broken down by a description of the disposition, such as affirmed, affirmed in part and reversed in part, reversed, etc.

After reviewing the data, we can see if the data, in fact, comports with the judges' perceptions or challenges the judges' views. We also understand that significant amount of cases, whether set on the oral argument calendar or not, will be dismissed on procedural grounds, leaving a lesser number to be decided on the merits.

Statewide, throughout the five years of data, the difference in dispositions between cases resolved with oral argument and those cases without oral argument, is significant. In 2011, 26% of all cases disposed of with oral argument had a disposition of reversal or reversal in part. This compares to 5.4% reversal and reversal in part of cases without oral argument. The reversal and reversal in part rates for cases with oral argument was 29% in 2012, 27% in 2013, 25.3% in 2014 and 29.8% in 2015. These rates compare to the reversal and reversal in part rates for cases without oral argument, 5.4% in 2012, 4.8% in 2013, 4.4% in 2014 and 5.0% in 2015. Facially there appears to be a geometric difference between cases resolved by oral argument from those disposed of without oral arguments.[64]

Could this mean that one's chances of getting a reversal or reversal in part is potentially five or to six times greater when oral argument is granted? This would clearly indicate that, at least facially, one should hesitate before waiving oral argument. On the other hand, the reason that oral argument was granted could be because the cases are "close" where reversal was more likely. It is not clear if there is a causal effect between the fact that there was an oral argument, and the possible reversal. Stated another way, did the oral argument cause the reversal or did the possible reversal in the record highly influence the granting of the oral argument,

64. ST. CTS. ADMR., ST. OF FLA. OFF., ORAL ARGUMENT AND NON ORAL ARGUMENT DISPOSITIONS BY YEAR AND DISTRICT, CALENDAR YEAR 2011 TO 2015 (providing the data from OSCA demonstrates that in 2015, 6,937 of the 21,767 statewide cases disposed of on the non-oral argument calendar were dismissed. Dismissal could be for a variety of reasons such as lack of jurisdiction, non-appealable orders, etc. In 2014, 7,091 of 22,435 cases disposed of on the non-oral argument calendar were also dismissed. The amounts of dismissal for 2011 to 2013, were similar: 6,707, 6,215, and 7,125 cases out of 22,538, 23,664 and 22,802 total non-oral argument cases). *See also* Appendix.

and the resulting reversal? It is not clear in what direction the causal "arrow" is pointing.

We can make several observations as a result of these statistics compiled and provided by OSCA. We can observe, over five consecutive years of statewide data for oral argument cases that the rate of reversal, in full or in part, fluctuated from 25.3% to 29.8%.

Thus, the exercise of oral argument seems, at least facially, not to be "just a day in court," but rather an exercise that may on occasion result in changed results. Would those same cases have ended in the same reversal rate, even without oral argument, one cannot say. But one can say that the statewide rate of reversal, in full or in part, for non-oral argument cases also fluctuated from 4.4% to 5.4% over the same period of time. One cannot say that the lower reversal rate is due to the fact these cases were considered without the benefit of oral argument. All we can say is that the disparity in the rate of reversal exists.

VII. ONE JUDGE'S VIEW OF ORAL ARGUMENT

In conclusion, through a review of historical perspectives, we find a varying and changing view of oral argument. This is confirmed and represented by the differing view of oral arguments. In many cases, these differing and varied views can be shaped, and perhaps explained, by their different perceptions to this institution. Often their views can be understood by how they grant or deny oral argument and their screening criteria, if any.

From one judge's perspective, oral argument is very helpful and clarifies the issues, and consequently changes minds. It serves many roles from giving the litigants their "day in court" to having the attorneys answer questions from the panel that is decisive to the resolution of the case. It is, of course, true that each of the schools of thought can claim that their perspective is the correct view of oral argument. Perhaps on any given day they are all right (and conversely all wrong). In many cases, the traditionalist view is correct. The oral argument is a worthwhile endeavor. It clarifies and strengthens the judge's decision-making. In other cases the middle view of oral argument prevails, where the oral argument is especially decisive in the determination of "close call" cases. Finally, the third school representing oral argument as a diminishing institution can be correct. It is undeniable that, on occasion, oral argument does not elucidate the issues. The law is clear and the facts speak for themselves. The granting of oral argument at times only causes the parties to spend more

money on legal fees in the preparation and time spent in oral argument. Thus, while acknowledging that each school of thought has merit to its position, I believe that oral argument is and remains a worthwhile institution.*

APPENDIX:

Statewide	2011	2012	2013	2014	2015
OA: Reversed, Reversed in part	461 26.0%	526 29.0%	435 27.0%	390 25.3%	488 29.8%
OA: Total Cases	1656	1808	1604	1536	1634
Non-OA: Reversed, Reversed in part	1239 5.4%	1158 4.8%	1016 4.4%	1113 4.9%	1095 5.8%
Non-OA: Total Cases	22,538	23,664	22,802	22,435	21,767

* Editor's Footnote:
See Adam Liptak, *No Argument: Thomas Keeps Five Year Silence*, N.Y. TIMES (Feb. 12, 2011), http://www.nytimes.com/2011/02/13/us/thomas.html; *see also* Adam Liptak, *Appealing To a Justice's Notion of Liberty*, N.Y. TIMES, March 30, 2012, at A1; Adam Liptak, *Clarence Thomas Breaks Ten Years of Silence at Supreme Court*, N.Y. TIMES (Feb. 29, 2016), https://www.nytimes.com/2016/03/01/us/politics/supreme-court-clarence-thomas.html; Bernard D. Reams, Jr. & Charles R. Haworth, 6A CONGRESS AND THE COURTS (1978); Bert I. Hwang, *Lightened Scrutiny*, 124 HARVARD L. REV. 1109 (2011); Celia Ampel, *Lawyers Secure Rare Reversal Without Oral Argument in Federal Trade Secrets Case*, DAILY BUSINESS REVIEW (Nov. 23, 2016), http://www.dailybusinessreview.com/id=1202773137773; Charles R. Haworth, *Circuit Splitting and the "New" National Court of Appeals: Can the Mouse Roar?*, 30 SW. L.J. 839 (1976); Daniel Bussel, *Opinions First-Argument Afterwards,* 61 UCLA L. REV. 1194 (2014); Debra Cassens Weiss, *Think Oral Arguments Are Important? Think Again, Justice Alito Says*, ABA JOURNAL (May 17, 2011 6:15 AM),

http://www.abajournal.com/news/article/think_oral_arguments_are_important_think_again_alito_says.html; Donald Songer, Danna Smith & Reginald Sheehan, *Nonpublication in the Eleventh Circuit: An Empirical Analysis*, 16 FLA. St. U. L. Rev. 963 (1989); Edward Becker, Michael Boudin & Pierre Laval, *The Appellate Judges Speak*, 74 FORDHAM L. REV. 1 (2005); Gary Sasso, *Appellate Oral Argument*, 20 LITIGATION 27 (1994); Gino DiVito, *Surviving the Death of Oral Argument*, 99 ILL. B.J. 188 (Apr. 2011); Jamal Greene, *Does Clarence Thomas's Silence Matter?*, N.Y. TIMES, (Feb. 17, 2011), http://www.nytimes.com/roomfordebate/2011/02/16/does-clarence-thomass-silence-matter.html; James C. Phillips & Edward L. Carter, *Oral Argument in the Early Roberts Court: A Qualitative and Quantitative Analysis of Individual Justice Behavior*, 11 J. APP. PRAC. & PROCESS 325 (2010); JOE S. CECIL & DONNA STIENSTRA, FED. JUDICIAL CTR., DECIDING CASES WITHOUT ARGUMENT: AN EXAMINATION OF FOUR COURTS OF APPEALS (1987); John M. Harlan, *What Part Does the Oral Argument Play in the Conduct of an Appeal?*, 41 CORNELL L. REV. 6 (1955); Joseph T. Thai & Andrew M. Coats, *The Case for Oral Argument in the Supreme Court of Oklahoma*, 61 OKLA. L. REV. 695 (2008); Joseph W. Hatchett & Robert J. Telfer, III, *The Importance of Appellate Oral Argument*, 33 STETSON L. REV. 139 (2003); Lauren K. Robel, *Caseload and Judging: Judicial Adaptions to Caseload*, 1990 B.Y.U. L. REV. 3 (1990); Lee Epstein, William M. Landes & Richard A. Posner, *Inferring the Winning Party in the Supreme Court from the Pattern of Questioning at Oral Argument*, 39 J. LEGAL STUD. 433 (2010); J. Mark White, *"Request for Oral Argument Denied:" The Death of Oral Argument in Alabama's Appellate Courts*, ALA. LAW., Mar. 2008, at 123; Masua Sagiv, *Cultural Bias in Judicial Decision Making*, 35 B.C. J. L. & SOC. JUST. 229 (2015); Michael Duvall, *When is Oral Argument Important? A Judicial Clerk's View of the Debate*, 9 J. APP. PRAC. & PROCESS 121 (2007); Myron H. Bright & Richard S. Arnold, *Oral Argument? It May be Crucial!*, 70 A.B.A. J. 68 (1984); Myron H. Bright, *The Power of the Spoken Word: In Defense of Oral Argument*, 72 IOWA L. REV. 35 (1986); OFF. PROGRAM POL'Y ANALYSIS GOV'T ACCOUNTABILITY, A REVIEW OF THE FLORIDA DISTRICT COURTS OF APPEAL BOUNDARIES AND WORKLOAD (2017); Paul D. Carrington, *The Function of the Civil Appeal: A Late-Century View*, 38 S.C. L. REV. 411 (1987); Patricia M. Wald, *19 Tips From 19 Years On the Appellate Bench,* 1 J. APP. PRAC. & PROCESS 7 (1999); Q. and A: Antonin Scalia (CSPAN television broadcast, July 29, 2012); Richard A. Posner & Albert H. Yoon, *What Judges Think of the Quality of Legal Representation*, 63 STAN. L. REV. 317 (2011); Richard A. Posner, *From the Bench: Convincing a Federal Court of Appeals*, 25 LITIGATION 3 (1999); Robert Holmes & Andy Douglas, *Practice Before the Ohio Supreme Court: Appellate Briefing*, 58 OHIO ST. B. ASS'N REP.1015 (1985); Robert Jackson, *Advocacy Before the United States Supreme Court*, 37 CORNELL L.Q. 1 (1951); Robert J. Martineau, *The Value of Appellate Oral Argument: A Challenge to the Conventional Wisdom*, 72 IOWA L. REV. 1 (1986); Ruggero J. Aldisert, *The Appellate Bar: Professional Responsibility and Professional Competence- A View from the Jaundiced Eye of One Appellate*

Judge, 11 CAP. U. L. REV. 445 (1982); Stephen L. Wasby, Steven Peterson, James Schubert & Glendon Schubert, *The Supreme Court's Use of Per Curiam Dispositions: The Connection to Oral Argument*, 13 N. ILL. U. L. REV. 1 (1992); Susan L. Kelsey, *Improving Appellate Oral Arguments Through Tentative Opinions and Focus Orders*, 88 FLA. B.J. 10 (2014); Thomas Baker, *A Compendium of Proposals to Reform the United States Courts of Appeals*, 37 U. Fla. L. Rev. 225 (1985); Timothy R. Johnson, James F. Spriggs II & Paul J. Wahlbeck, *Oral Advocacy Before the United States Supreme Court: Does It Affect the Justices' Decision?*, 85 WASH. U. L. REV. 3 (2007); Warren D. Wolfson, *Oral Argument: Does It Matter?*, 35 IND. L. REV. 451 (2002); William Rehnquist, *Oral Advocacy: A Disappearing Art*, 35 MERCER L. REV. 1015 (1984);William M. Richman & William L. Reynolds, INJUSTICE ON APPEAL, THE UNITED STATES COURTS OF APPEALS IN CRISIS (2013).