Patricia Gilley and *Henderson v. United States*:

A Shreveport Small-Firm Lawyer's Path to Victory in the U.S. Supreme Court

By S. Christopher Slatten

Attorney Patricia A. (Pat) Gilley of Shreveport briefed and argued a case in the United States Supreme Court in 2012 — a rare event in itself for a Louisiana small-firm practitioner. In February of this year, she learned that she prevailed in that case, *Henderson v. U.S.*, 133 S.Ct. 1121 (2013). Her legal career and her solo effort before the high court were both along roads less traveled. During an interview at her family law firm, Gilley & Gilley in Shreveport, she discussed her personal history and the experience of presenting an argument to the Supreme Court. (She works with her husband, Harold C. Gilley, Jr., and their son, Tristan P. Gilley. All are referenced by their first names for the remainder of the article.)

Pat's interest in the law began at a young age as she grew up in small-town Streator, Ill., as the oldest of five children of a lawyer. She fondly recalls tagging along with her father for court appearances and being impressed when he walked through the bar and joined others with business before the court.

Pat considered another career path — a religious convent — but her life took a different turn when, in 1968, she sat beside young Harold Gilley in a class at the University of Illinois. It took Harold until the second semester to ask Pat out — to a Supremes concert — but Pat knew by the second date that she would marry him. They married in 1971.

Harold was committed to the Air Force after college, but he wanted to go to law school. Uncle Sam told him he was going to Thailand instead — unless he quickly confirmed admission to law school. Pat started working the phones. The couple had no ties with Louisiana, but she was able to persuade the chancellor of Louisiana State University Law School to admit them both. The Illinois natives drove to Baton Rouge in 1974 to begin their indoctrination in the civil law. After graduation, Harold was transferred to England Air Force Base in Alexandria, and Pat clerked for 3rd Circuit Judge William A. Culpepper.

The Air Force then decided that Harold was needed in Alaska, and the couple lived in Anchorage for five years. Pat worked for the Bureau of Land Management as a land-law examiner, where she found it thrilling to issue original patents from the United States to individuals who had staked out homesteads and claims in the wilderness. The couple had their first of three children in 1980, and Pat gave up her job to be a mother and homemaker for the next 10 years.

Shreveport attorney Patricia A. Gilley. *Photo provided by the Gilley Family.*

The Gilley family landed in the Shreveport area in 1986 after Harold was transferred to Barksdale Air Force Base. Pat soon persuaded Harold to retire after 20 years of service so the family could settle in the area. They both worked for a time for Support Enforcement, but Pat wanted to start a law firm.

The Gilleys took the risk and opened their firm, with their beginning civil practice supplemented with income Pat earned as a part-time conflicts attorney for the Caddo Parish Public Defender Board, where she saw her first courtroom work. The firm gained clients through the Shreveport Bar Association's attorney referral service and referrals from area attorneys. Among those referrals were civil rights cases from Shreveport attorney Henry C. Walker, which gave the Gilleys their first experiences in federal court.

Gilley & Gilley now has a broad general practice that handles everything from adoptions to successions. The Gilleys' son, Tristan P. Gilley, recently joined the firm. Pat says they love doing what they do, but her favorite cases are the federal criminal appointments she receives as a member of the Criminal Justice Act (CJA) panel. Her first jury trial was on a CJA appointment to represent a member of the Bottoms Boys gang in a lengthy multi-defendant trial in Shreveport in 1994. Almost 20 years later, her eyes still flash when she insists that her client never should have been charged as part of the conspiracy.

Pat's appellate experience has been primarily in CJA cases, and she has argued a few times before the 5th Circuit. The cases take a lot of preparation, but Pat says she finds the work rewarding and important. "Important" is a word Pat uses often to describe the causes of her clients. She knows it aggravates some courts when she "stirs them up" with motions and arguments that others might forego, but she says, "I'm going to do what I think is important."

One of these important clients was Armarcion Henderson, indicted for being a felon in possession of a firearm after the Haynesville chief of police stopped a truck in which Henderson was a passenger and found an SKS rifle and 20 rounds of ammunition beneath the passenger-side seat. Pat received a CJA appointment to represent Henderson. She filed a motion to suppress that was hotly contested, yet ultimately unsuccessful.

After losing the motion, Henderson pleaded guilty, subject to the right to appeal the suppression ruling, which made the case look just like scores of other felon-in-possession cases that pass through the federal court every year. There was certainly nothing about it that would make anyone predict it would reach the Supreme Court.

Then came the sentencing.

The sentencing guidelines suggested a range of 33 to 41 months of incarceration. There was evidence Henderson suffered from a substance abuse problem. The Bureau of Prisons has a highly regarded drug treatment program, but it is often unavailable to prisoners who are in for a short term. The district judge sentenced Henderson to 60 months in prison for the stated purpose that he could obtain drug rehabilitation.

Pat did not raise a procedural objection, but she later filed a motion to correct the sentence based on language in 18 U.S.C. § 3582(a). The statute says that certain fac-

tors are to be considered in determining a sentence, "recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation." The district court denied the motion as untimely and said the issue would be left to the appellate court.

Pat appealed. With the appeal pending, *Tapia v. U.S.*, 131 S.Ct. 2382 (2011), interpreted § 3582(a) and held 9-0 that it is error for a court to "impose or lengthen a prison sentence to enable an offender to complete a treatment program or otherwise to promote rehabilitation." The 5th Circuit Court of Appeals said Pat was correct that the district court erred, but the lack of a timely objection meant the appellate court could change the result only if it was "plain error" within the meaning of Federal Rule of Criminal Procedure 52(b).

The error had not been "plain" before *Tapia*, but it was "plain" afterward. The question was whether the error had to be plain when the district court imposed the sentence, or when the appellate court decided the appeal.

The 5th Circuit panel held that the error had to be plain at the time the district court imposed the sentence. Pat applied for en banc rehearing, but the court denied her petition by a 7-10 vote.

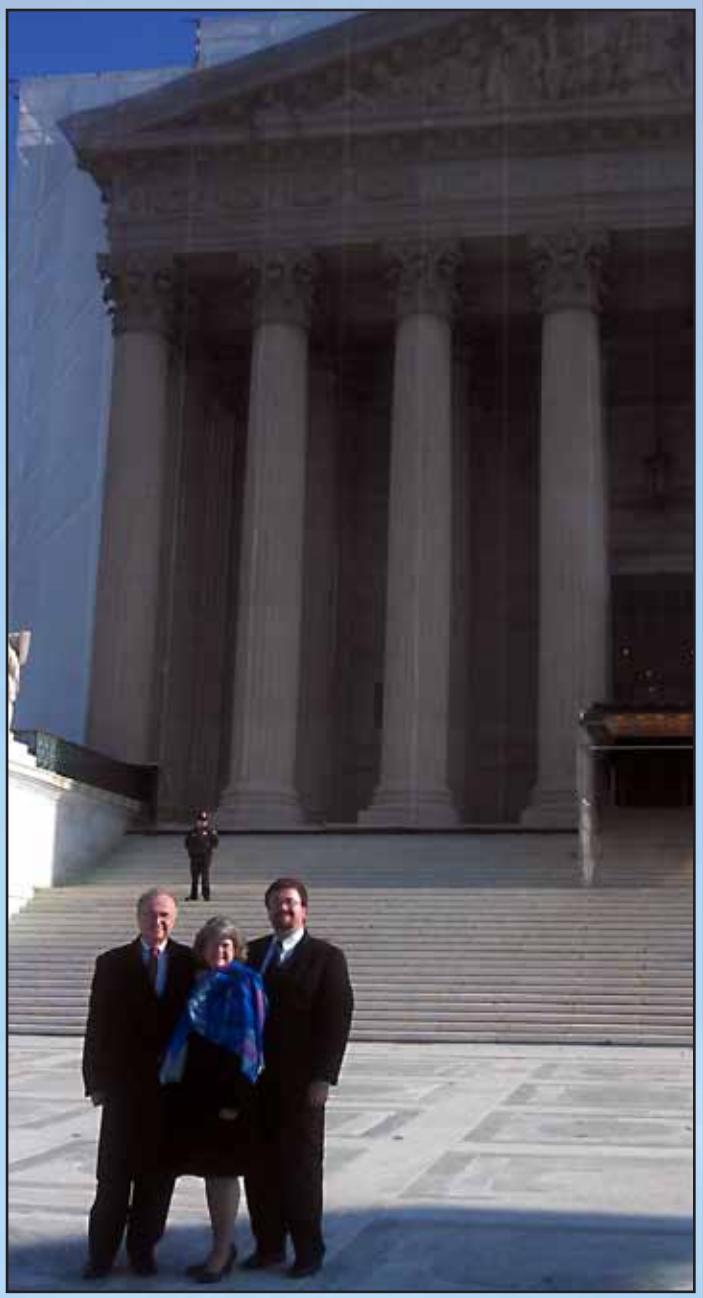
Many law school clinics and Supreme Court practitioners watch for likely candidates to make it to the high court. The federal circuits were split on the issue in *Henderson*, which made it a strong contender. Pat's phone began to ring and emails came pouring in immediately after the en banc denial. She was overwhelmed with offers from clinics and other specialists who wanted to take over the case and apply for certiorari. She received DVDs, brochures and other material touting the experience of various volunteers.

In the 19th century, argument before the Supreme Court was dominated by a handful of attorneys such as Daniel Webster and Frances Scott Key, some of whom argued hundreds of cases. A strong Supreme Court specialist bar has returned in recent years. Richard J. Lazarus, "Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar," 96 *Georgetown Law Journal* 1487 (2008).

These specialists, moreover, appear to be winning. A review of merits cases from 2004-10 showed that specialists, including law school clinics, won a significantly greater percentage of their cases than nonspecialists. Criminal defendants, civil plaintiffs and immigrants represented by specialists prevailed in 67 percent of the cases in which they were petitioners and 32 percent as respondents. Such litigants represented by nonspecialists won only 48 percent of cases as petitioners and 14.5 percent as respondents. Within the ranks of the specialists, law school clinics performed well. Their clients won 70 percent as petitioners and 35 percent as respondents. *See,* Jeffrey L. Fisher, "A Clinic's Place in the Supreme Court Bar," 65 *Stanford Law Review* 137 (2013).

Pat first declined the many offers to take over the case, but then she received an offer from Professor Michael F. Sturley, a former Justice Powell law clerk who directs a Supreme Court clinic at the University of Texas (UT). He offered to have his students help but allow Pat to remain as lead counsel. She accepted. The students, along with attorneys in Houston, Texas, and Washington, D.C., went to work on the petition for certiorari.

The Supreme Court receives about 10,000 petitions for certiorari each year. Around 80 to 100 — less than 1 percent — have been granted in recent terms.



Shreveport attorneys, from left, Harold C. Gilley, Jr., Patricia A. Gilley and Tristan P. Gilley on the steps of the U.S. Supreme Court in Washington D.C. *Photo provided by the Gilley Family.*

The Supreme Court granted Henderson's petition in June 2012. By that time, the law students who helped earlier had graduated or gone home for the summer, but there were still volunteers who wanted to help review the merits brief, and they put pressure on Pat to issue an early draft. She gathered multiple binders of research materials, practically lived at the office, stopped taking new clients, and devoted herself to the brief, but she still could not produce one to her satisfaction under the time demands

of her volunteers. She eventually parted ways with them and, again taking a road less traveled, wrote the brief on her own. She read, about two weeks before the brief was due, a comment from Justice Antonin Scalia indicating that the justices cringe when ordinary trial lawyers come before the Court. That did little to calm her nerves.

The briefing process did have its pleasantness. The Solicitor General represents the United States before the Supreme Court, and Assistant Solicitor General Jeffrey B. Wall was assigned to *Henderson*. Pat and Wall talked on the phone often and got along well with regard to various extensions and preparing the joint appendix. The briefing process was also different because the Court requires briefs be printed, much like a paperback book. (If you find yourself before the Supreme Court, Cockle Law Brief Printing will find you and offer its services if you ever have a case before the Court. They will check your citations and proofread the brief, but the service is not cheap. Pat's printing bill was $2,800.)

William K. Suter, a retired Army major general and Tulane Law School graduate, has been the clerk of the Supreme Court for more than 20 years. Pat says the members of his staff could not be nicer, although the members of her firm did call one deputy clerk "the drill instructor" because she often called and told them exactly what to do, and when to do it, so as to keep the case on track.

Oral argument was scheduled for the Wednesday after Thanksgiving. Pat's preparation included a practice argument at Louisiana State University Paul M. Hebert Law Center. Two weeks before the argument, she traveled to the University of Texas, where students portrayed the justices and grilled her about the issues. The next week, she traveled to Georgetown Law School for a well-known moot court program offered to attorneys with cases before the Supreme Court. Two professors and three experienced criminal law attorneys put Pat through her paces.

Pat, Harold, Tristan and six other family members traveled to Washington, D.C. for the oral argument. The three lawyers in the family were able to view an argument the day before. Pat, who said she used to get sick when she gave a presentation in school, admits to being only a little nervous when her big day arrived. She said her lack of nerves was due to months of preparation and her confidence that she would win because her position was "so right."

Patricia and Harold Gilley, right, with William K. Suter, clerk of the U.S. Supreme Court. Suter, a Tulane Law School graduate who was admitted to the Louisiana State Bar in 1962, retired from the clerk's position on Aug. 31, 2013, after 22 years of service. *Photo provided by the Gilley Family.*

Pat and Harold were both able to sit at the counsel table, with the rest of the family in the viewing gallery. Two quill pens, a Court tradition, were on the desk for them and can now be seen in their Shreveport offices. Wall arrived in the formal morning coat that members of the Solicitor General's office traditionally wear when before the Court. Pat stood to shake his hand on meeting him for the first time, but he gave her a big hug and some advice: "Have fun."

Pat approached the lectern. Professor Paul R. Baier, constitutional law professor at LSU Law Center and a Judicial Fellow at the Court in 1975-76, had advised Pat to show that she knew what she was doing by reaching for the hand crank on the side of the lectern and adjusting the height. Fortunately, Pat had mentioned this to General Suter during a visit, and he quickly begged her not to touch the ancient and delicate mechanism. Mistake avoided.

Pat barely got started before the questions flew. Chief Justice John G. Roberts, Jr. and Justices Antonin Scalia, Ruth Bader Ginsburg, Anthony M. Kennedy, Samuel A. Alito, Jr., Stephen G. Breyer and Sonia Sotomayor all had questions or comments during Pat's argument. Justice Elena Kagan weighed in during Wall's argument. Justice Clarence Thomas was not moved to break his famous silence. The attorneys stand close to the long bench. Pat said she felt like her head was on a swivel, searching for the face of the justice who asked the last question.

Thirty minutes is allowed for each side to argue. A white light comes on after 25 minutes, and an attorney may reserve some of the remaining time for rebuttal. A red light comes on after 30 minutes, which usually signals the last word. Pat says she was so in the moment that neither she nor Harold saw either light come on. Professor Baier told her she managed to get an extra 17 seconds, which is quite rare, before the Chief Justice ended it with, "Thank you, counsel."

Pat returned from D.C. and moved on to other clients and cases. Pat said she never checked on the resolution of the case because she knew she would win. When she arrived at work on Feb. 20, 2013, her 42nd wedding anniversary, her email inbox was filled with messages of congratulation. She wondered how the people at UT and lawyers scattered around the country knew it was her anniversary, but when she opened the first message she saw that she had won Henderson's case by a 6-3 vote.

Pat's legal career, with a decade passing between her clerkship and her next job as a lawyer, has taken an unusual path. She has now marked that career with a special distinction and she achieved it in her own way. Pat would agree that she often seeks the road less traveled, not only in law but also in life. Whatever path she takes, Pat fights for the causes which she believes are "important," but, even more significantly, she enjoys every minute of it.

S. Christopher (Chris) Slatten, a 1990 graduate of Louisiana State University Paul M. Hebert Law Center, serves as law clerk to Magistrate Judge Mark L. Hornsby, U.S. District Court, Western District of Louisiana, in Shreveport. He is a member of the Louisiana Supreme Court's Committee on Bar Admissions. He is co-chair of the Editorial Board of The Bar Review, *published by the Shreveport Bar Association. A version of this article first appeared in the April 2013 issue of that publication. (U.S. District Court, Ste. 1148, 300 Fannin St., Shreveport, LA 71101-3122)*