Myron H. Thompson
US District Court, Middle District, Alabama
(Selected Judicial Opinions and Commentary)

Preamble: Below is a representative sample of opinions written by Judge Myron Thompson that are part of the broad body of his work extending over a 40-year career. The topics addressed in these opinions include

- Policing practices and the use of deadly force
- Racial discrimination in the appointment of county polling officials
- Abusive prison systems and policies involving chain gangs, hitching posts, access to toilet facilities, visitation rights
- Separation of church and state and the application of the Establishment Clause
- Compassionate release of at-risk prisoners exposed to the emerging coronavirus
- Employment discrimination based on sexual orientation

In addition to these opinions (certain aspects of which I have summarized below), Judge Thompson presided over, and issued important opinions in, many other challenging cases in Alabama involving (1) abortion rights, (2) racial diversity of the Alabama state post-secondary education system, (3) redistricting in the City of Montgomery, (4) Alabama law barring gay and lesbian groups on college campuses from receiving public money or official support and (5) troubled conditions within the Alabama prison system.

Beyond the substance and technical legal aspects of all these opinions, the Judge's rulings reflect several obvious qualitative and character traits. They are thorough, well-written, and supported by extensive examination and analysis of relevant judicial precedents, and they reflect careful adherence to and respect for the applicable rulings of the Eleventh Circuit Court of Appeals, which are binding on the Federal District Court in Alabama. They are quite thoughtful in the sense that the matters in dispute (including collateral issues) are fully vetted and considered, with obvious sensitivities for the competing concerns of the litigants. And most importantly, they exemplify an even-handedness, an absence of judicial bias and a notable respect for the dignity of human beings.

In my view, you cannot have read through these opinions without concluding that Judge Thompson, armed with his knowledge and understanding of the U.S. Constitution, was swimming against the "tide" in Montgomery. For despite the efforts of many of our country's civil rights leaders (a number of whom, including John Lewis, were and are known to Judge Thompson), at the time of Judge Thompson's arrival on the bench in October of 1980 there remained within Alabama an enduring history of racial discrimination across the entire political, social and economic spectrum.

Over the years, the force of that discrimination has begun to diminish owing in no small measure to the integrity, humanity and uncommon courage of this man.

****

The summaries of these opinions follow. Other than textual material presented ***in italics,*** reflecting Judge Thompson's personal observations, the summaries and comments below are solely those of the author and not those of Judge Thompson.

1. **Eugene Ayler v. Joseph Hopper, Deputy Commissioner of Corrections for the State of Alabama,** 532 F. Supp. 198 (M.D. Ala. 1981) *(first court to hold that fleeing felon statute -- authorizing use of deadly force where use was unnecessary -- was unconstitutional). I attach it as a very early case. As you can see, I had been on the bench for only a very short period of time. It was daunting to realize that I could strike down a state law. And, of course, that I had no prior case on point made it all more challenging. And my own insecurity. And I was so very young. And there was the possible embarrassment of being reversed.*

   In a case brought against a state correction officer to recover damages arising out the use of deadly force to effect an arrest, Judge Thompson articulated the principle that to the extent a fleeing felon statute purports to allow the use of deadly force in situations not necessary to prevent imminent, or at least a substantial likelihood, of death or bodily harm – which the Alabama statute appeared to do – it is unconstitutional.

The plaintiff had requested that the Judge instruct the jury that the correction officer could not assert the defense of "good faith immunity" in reliance upon a statute that was unconstitutional. The Judge ruled that, because the constitutionality principle had not clearly been established at the time the defendant police officer used deadly force to effect the arrest, the principle could not be used to evaluate the defendant's claim of good faith immunity and accordingly refused to issue the jury instruction.

2. **Philip Paradise, Jr., et al. v. Bryon Prescott, Director of the Alabama Department of Public Safety,** 585 F. Supp. 72 (M.D. Ala. 1983) *(required that, in light of history of racial discrimination and continuing severe racial imbalances in upper ranks, 50% of all Alabama State Troopers promoted to corporal and above must be black). This one went all the way to the U.S. Supreme Court and was affirmed, 5 to 4. Drew national attention because it dealt with affirmative action. Also, it was very early in my career.*

   This was an affirmative action case that addressed the long history of racial imbalance among the ranks of Alabama state troopers, the latest ruling in litigation involving discrimination in hiring practices extending back to at least 1972. The plaintiffs had filed a motion to enforce the terms of two previously entered consent decrees intended to remedy the imbalance. Noting the repeated failures by the Alabama Department of Public Safety to make meaningful progress (for example, of the 66 corporals on the force, only 4 were black), Judge Thompson established procedures that the Department was required to implement in the promotion of troopers. Specifically, the Judge ruled that, for a specified period of time, (1) 50% of all those promoted to the rank of corporal and above must be black troopers as long as there were qualified black troopers available; (2) for each white trooper promoted to a higher rank, the Department was required to promote one black trooper to the same rank if there was a black trooper qualified for the promotion; and (3) this requirement was to remain in effect as to each rank above entry level until either 25% of the rank was black or the Department had developed and implemented promotion procedures meeting prior orders of the court.

   Using strong language to describe the past history of racial discrimination in hiring and promotion, the Judge ruled that the promotional quotas imposed by

the court were necessary, failing which the intolerable racial disparities would not dissipate within the near future.

3. **Charles Harris and Mose Batie, et al. v. Charles Graddick, in his official capacity as Attorney General of Alabama,** 593 F. Supp. 128 (M.D. Ala. 1984); 615 F. Supp. 239 (M.D. Ala. 1985) *(required, under § 2 of Voting Rights Act, that defendant class of officials for all but one county in State of Alabama appoint more blacks as poll officials for primary, general, and special elections, and that failure to appoint blacks as poll officials in number proportionate to number of blacks in county constitutes prima-facie violation of court order). This is one of my favorites, primarily because the issue was: remedy. What to do about centuries of racial intimidation at the voting polls. It has been cited for its "imaginative" use of the Voting Rights Act.*

   The subject of this case is the long history of efforts by Alabama officials to suppress the black vote by not apportioning an appropriate percentage of blacks to serve as polling officials in counties across the State. Judge Thompson's opinion describes in detail the open and official racial discrimination manifested in practically every area of political, social and economic life. And even though, by 1984, blacks were legally entitled to expanded rights, they nevertheless continued to harbor strong fears of entering into public places. The simple act of registering and voting, especially when voting officials were all white, was an extremely intimidating experience. As a result, many blacks didn't register and didn't vote. In this context, the Judge found that, across the state, black people were grossly underrepresented. In at least 36 of Alabama's 67 counties, the percentage of black poll officials ranged from one-half to substantially less than one-half of the percentage of blacks in the county population.

   To mitigate these effects, Judge Thompson determined that the presence of black officials would significantly alleviate the situation and open up the political process to those suffering from fear. Issuing a preliminary injunction under section 2 of the Voting Rights Act (which bars racial discrimination in voting), the court ordered the appointing authorities for all counties (with one exception) to make polling appointments for all primary, general and special elections such that the total number of black persons appointed as poll officials would reasonably correspond to the percentage of black persons in

the population of the county. In a subsequent ruling, the court approved a settlement agreement that reflected the court's earlier findings and provided for ongoing record-keeping and the opportunity for further judicial review, if necessary.

4. **Michael Austin et al. v. Joe Hopper, Commissioner of the Alabama Department of Corrections,** 15 F. Supp. 2d 1210 (M.D. Ala. 1998) *(held that use of the "hitching post" in the Alabama prison system constituted cruel and unusual punishment in violation of the Eighth Amendment), supplemented, 28 F. Supp.2d 1231 (M.D. Ala. 1998). One of a number of run-ins with the Alabama penal system.*

   This case is based on a broad set of claims lodged by inmates of the Alabama prison system that challenged the constitutionality of specific prison systems and policies associated with chain gangs, "hitching posts," access to toilet facilities and denial of visitation rights. The case falls within the broader context of years of litigation and Federal judicial oversight regarding Alabama prison conditions, policies and practices.

   The Judge's opinion recounted, in great detail, the long, sordid history of chain gangs in Alabama. During Reconstruction, chain gangs provided an alternative to rebuilding the penal institutions that were destroyed during the Civil War and also served as a cheap form of labor. In the modern iteration of this penal practice (which affected 2,000 to 4,000 prisoners), inmates were shackled by leg-irons in groups of 5, separated with 8 feet of chain between them, and required to work on public highways or other hard labor projects. One or two corrections officers supervised 25 to 40 inmates, who remained shackled throughout the day, including at times when they had to relieve themselves and during mealtime. Chain gang assignments often ranged from 30 to 180 days (which could be extended by prison officials, based on behaviors). The majority of chain gang inmates, who died at enormously high rates due to brutal conditions, were blacks. After reviewing the serious physical and psychological harms inflicted by this practice, Judge Thompson approved a settlement agreement that barred the chaining of inmates together.

   The hitching post claims involved a special penal practice for those who refused to work on the chain gangs or disrupted work squads. These inmates,

with their hands handcuffed, were tied to a horizontal bar made of sturdy non-flexible material, located on the prison grounds. Some inmates were forced to stand with their arms above their heads while others were handcuffed such that they couldn't stand upright. Most were shackled with their two hands close together but some were handcuffed so that their arms were spread apart and their hands shackled independently. Inmates were not permitted to take breaks to flex or stretch and often had to stand for hours, on uneven surfaces, in an open-air setting, under the hot sun, without access to water or toilet facilities. As a result, they often suffered extreme pain, anguish, humiliation and mental suffering.

After reviewing prison regulations and numerous accounts of hitching post experiences (many of which involved malicious and sadistic treatment by corrections officers), and with the record showing that no other prison system, state or federal, utilized this practice, Judge Thompson determined that this penal policy, as currently practiced in Alabama prisons, violated the Eighth Amendment's cruel and unusual punishment constraints, which prohibit punishments that are incompatible with evolving standards of decency.

In his analysis of both chain gangs and hitching posts, Judge Thompson carefully considered the treatment of convicts as human beings who, within necessary limitations of prison life, are nevertheless entitled to be treated with decency. These considerations involve broad and idealistic concepts of dignity, civilized standards and humanity balanced against competing penological goals.

5. **Stephen Glassroth v. Roy Moore, Chief Justice of the Alabama Supreme Court,** 229 F. Supp. 2d 1290 (M.D. Ala. 2002) *(held that placement of monument engraved with the Ten Commandments in the lobby of the Alabama State Judicial Building violated the Establishment Clause of the First Amendment);* see also **Kelly McGinley v. Gorman Houston, Senior Associate Justice of the Alabama Supreme Court, et al.,** 282 F.Supp.2d 1304 (M.D. Ala. Sept. 4, 2003) *(removal of monument engraved with Ten Commandments in compliance with the court's order did not unconstitutionally establish the religion of "nontheistic beliefs"). The challenge here was not so much the law, but how to enforce my order without*

violence, in the face of defiance and thousands of people gathered in support of Moore. That issue is not in the opinion, or, really, written anywhere.

Several Alabama attorneys sued the Chief Justice of the Alabama Supreme Court, the politically popular Roy Moore, asserting that he had violated the Establishment Clause of the First Amendment by placing a 5,280-pound granite monument engraved with the Ten Commandments in the Alabama State Judicial Building. The Establishment Clause provides that "the government shall make no law respecting the establishment of religion."

Judge Moore, in the early 2000s, was a larger-than-life figure in the State of Alabama, having been involved in highly-publicized litigation with the American Civil Liberties Union and the State over his prior placement of a plaque of the Ten Commandments in his Gadsden, Alabama court room. He regularly invited the clergy to lead prayer in his courtroom before trials. Judge Moore's funding for these litigations came from Coral Ridge Ministries, an evangelical organization.

During his run for the office of Chief Justice, his campaign referred to him in all its materials as the "Ten Commandments Judge," and, on the evening of July 31, 2001, the newly-elected Chief Justice Moore quietly placed the monument in the large colonnaded rotunda in the Judicial Building. This was an act carried out without the approval or knowledge of the other eight Alabama Supreme Court Justices.

In a carefully worded, lengthy opinion, Judge Thompson described the monument ("the monument's sloping top and the religious air of the tablets unequivocally call to mind an open Bible resting on a lectern"), its positioning in the Building to achieve maximum effect and Justice Moore's own words at the time of the unveiling on August 1:

> The monument serves to remind the Appellate Courts and Judges of the Circuit and District Court of this State and members of the bar who appear before them of the truth that in order to establish justice we must invoke the favor and guidance of Almighty God.

On the basis of an extensive record, a week-long trial, and a personal visit to and inspection of the site, Judge Thompson concluded that the monument had

the primary effect of advancing and endorsing religion. In so finding, Judge Thompson rejected Justice Moore's assertion that, as a matter of law, the Judeo-Christian God must be recognized as sovereign over the State, addressing and countering, respectfully and thoroughly, each of Moore's arguments.

In his order, Judge Thompson ruled that placement of the monument was unconstitutional. Reflecting sound judgment, and undoubtedly being aware of the politically charged situation at the time of his ruling, Judge Thompson allowed Justice Moore 30 days to remove the monument, retaining jurisdiction to enter an injunction ordering removal, if that action became necessary. An injunction ultimately ensued, Chief Justice Moore failed to comply with it, but the other eight Associate Justices of the Alabama Supreme Court ordered removal of the monument, which was completed on August 27, 2003.

In a follow-up brief opinion, Judge Thompson denied legal arguments that forced removal of the monument constituted government endorsement of the religion of "non-theistic" beliefs in violation of the Establishment Clause.

6. **United States of American v. Martineza McCall,** 2020 WL 2992197 *(on emergency Motion for Compassionate Release, finding "extraordinary and compelling" reasons for prisoner McCall's supervised release from prison in light of his sickle-cell disease and exposure to Covid-19, which posed an urgent life-or-death situation that Bureau of Prisons was unable to address in the face of rampant outbreak among prison population).*

Prisoner McCall had already served two years of his 10-year sentence. Looking at his circumstances, Judge Thompson ruled that, in light of McCall's unique susceptibility to Covid-19, given his sickle-cell disease and rapidly worsening medical condition, coupled with the prison's inability properly to treat McCall's medical condition, there were extraordinary and compelling reasons for his release. In so ruling, the Judge considered not only the prisoner's medical condition but also his life history, his prior inability to secure disability benefits, his decision to sell drugs to pay bills, and his enduring PTSD symptoms stemming from the murders of his two brothers – one which occurred in his presence. The Judge also noted that McCall's 10-

year prison sentence consisted of a 5-year mandatory minimum sentence for his drug conviction plus another 5-year sentence in light of two prior felony drug convictions (the tack-on sentence would have been eliminated by the First Step Act of 2018, which became effective just 3 months after McCall's sentencing). The Judge's order permitting release required that the prisoner be place in home confinement with electronic monitoring for the next 3 years, followed by 5 years of supervised release.

Judge Thompson's opinion in *McCall* resonates with the body of work by Bryan Stevenson. Stevenson's 2014 book, ***Just Mercy | A Story of Justice and Redemption,*** provides a compelling narrative of the challenging legal work undertaken by Stevenson and others who were and are part of the Equal Justice Initiative. By virtue of their enduring efforts, many innocent people condemned to die secured their freedom and scores of others, including children convicted of non-homicide crimes who were sentenced to die in prison, have either been freed or given the opportunity of ultimate freedom.

A key message that emerges from the book, aside from the long history of unequal treatment of African-Americans, other minorities and poor people, is the transformative effect of the initiative undertaken by Stevenson and his colleagues to cause participants in the criminal justice system to give more meaningful consideration to the circumstances, including parental upbringing, psychological development, mental and physical disabilities and disruptive living conditions, that inform and provide context for aberrational and violent behaviors.

As Judge Thompson has made clear, these factors, often complex, are highly relevant in sentencing determinations.

7. **Roger Isaacs v. Felder Services, LLC,** 143 F.Supp.3d 1190 (M.D. Ala. Oct. 29, 2015) *(holding, as a matter of first impression, that claims of sexual discrimination – on the basis of an individual's sexual orientation – are cognizable under Title VII of the Civil Rights Act).*

Plaintiff Roger Isaacs, a gay man, alleged that his former employer, Felder Services, fired him on the basis of his sex, gender non-conformity and sexual orientation. While denying Isaac's claim (in view of his failure to present any

direct or circumstantial evidence of actual discrimination by his employer), Judge Thompson held that claims of sexual orientation-based discrimination are cognizable under Title VII of the Civil Rights Act of 1964. This issue is one that, at the time in 2015, had not been addressed by the Eleventh Circuit Court of Appeals.

Endorsing the position articulated by the Equal Employment Opportunity Commission, Judge Thompson held that Title VII prohibits employers from treating an employee or job applicant differently from other employees or applicants based on the fact that the individual is in a same-sex marriage or because the employee has or is interested in having a personal association with someone of a particular sex. Adverse action on that basis is, by definition, discrimination because of the employee's or applicant's sex.

Notably, almost five years later, in June 2020, in the case of **Bostock v. Clayton County, Georgia,** the U.S. Supreme Court resolved the disputes among several Circuit Courts of Appeals on the issue of sex-based employment discrimination, finding that an employer who fires an individual merely for being gay or transgender violates Title VII. In so holding, the Supreme Court reversed a 2018 ruling of the Eleventh Circuit to the effect that the law does not prohibit employers from firing employees for being gay.

****

Tom Igoe
July 2020