

CITIZENS FOR LAW AND ORDER

**REPORT ON THE JUDICIAL PHILOSOPHY OF
JUDGE CLARENCE THOMAS WITH RESPECT TO
CRIMINAL LAW AND CRIMINAL PROCEDURE**

**BY
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**Judge Clarence Thomas's Criminal
Law and Procedure Opinions**

Citizens for Law and Order ("CLO") commissioned this study of Judge Clarence Thomas's judicial philosophy as it relates to criminal law and procedure. A careful review of the legal opinions authored by Judge Thomas while a member of the United States Court of Appeals for the District of Columbia Circuit reflects a thoughtful jurist with a restrained judicial temperament and keen intellect. Judge Thomas has demonstrated strict adherence to the rule of law, even where his personal beliefs differ from a legal rule. His opinions and other writings demonstrate a fundamental understanding of the community's interest in deterring crime and meeting the needs of its victims. While Judge Thomas's opinions reflect an understanding that a judge is responsible for protecting the rights of those accused of crime, he also understands that a judge has a duty not to reshape the law according to his personal predilections.

Judge Thomas has participated in over 157 cases since joining the D.C. Circuit Court of Appeals. He has authored 17 majority opinions, 2 concurrences, and 2 dissents. Of those seventeen opinions, seven

were appeals from drug convictions. The criminal law opinions of Judge Thomas were reviewed with reference to his approach to controlling precedent, adherence to jurisprudential limitations on the power of the court, compliance with accepted principles of statutory construction, observance of settled rules concerning the standard of review, and faithfulness to prudential limitations on the scope of review and judicial decision-making.

Underlying Judge Thomas's approach to his obligation to decide criminal law cases is a common-sense approach to questions of criminal law and procedure, one that recognizes the practical problems faced by law enforcement officers combatting crime on the streets. When asked what should be done to solve the problems faced by America's inner cities, Judge Thomas remarked:

The first priority is to control the crime. The sections where the poorest people live aren't really liveable. If people can't go to school, or rear their families, or go to church without being mugged, how much progress can you expect in a community? Would you do business in a community that looks like an armed camp, where the only people who inhabit the streets after dark are the criminals?

Black America Under the Reagan Administration: A Symposium of Black Conservatives, The Heritage Foundation Policy Review (Fall 1985) at 37.

None of the speeches or statements made by Judge Thomas, however, explains how he will rule as a justice of the United States Supreme Court as clearly as his actual majority opinions. To borrow the words of L. Gordon Crovitz of the Wall Street Journal, "the best way to predict how Justice Clarence Thomas would rule is to review how Judge Clarence Thomas has ruled." Thus, a review of Judge Thomas's criminal law decisions follows.

United States v. Shabazz
United States v. McNeil
1991 U.S. App. LEXIS 10579 (May 28, 1991)

In the district court, the two defendants pleaded guilty to drug offenses involving dilaudid pills, the active ingredient of which is hydromorphone, a controlled substance. On appeal, the two defendants

alleged that the district court erred when it calculated their sentences under the Federal Sentencing Guidelines according to the gross weight of the dilaudid pills rather than the lesser net weight of the hydromorphone.

Judge Thomas's opinion for a unanimous panel of the Court of Appeals begins with an analysis of the applicable Sentencing Guidelines. Judge Thomas found that the Sentencing Guidelines require sentences to be calculated according to "the entire weight of any mixture or substance containing a detectable amount of the controlled substance." *Id* at *4 (citing to United States Sentencing Commission, Guidelines Manual § 2D1.1(c)n.* (Nov. 1990). Relying on analogous decisions from the other circuits, Judge Thomas found defendants' claim that the pills were not a "mixture or substance" to be without support.

In an alternative argument, the defendants urged that an interpretive note to the Sentencing Guidelines supported the position that sentencing should be based on the weight of the controlled substance when the weight of the substance with which it was combined is

unknown. Judge Thomas explained that the "interpretive notes" served to illustrate how the guidelines were to be applied but were not intended to be a substitute for the clear text of the Guidelines. Judge Thomas determined that, "by its terms," defendant's reading was "textually awkward and produces absurd results" and that "nothing in the text ... suggest[s] that limitation." *Id.* at *10.

Judge Thomas rejected defendants' final claim that the method of sentencing articulated in the Sentencing Guidelines conflicted with a federal statute that requires sentencing based upon the gross weight of certain specified drugs. That statute did not refer to hydromorphine. Recognizing that the Sentencing Guidelines were promulgated "by the United States Sentencing Commission pursuant to an express grant of rulemaking authority," Judge Thomas held that the court may set aside the Guidelines "only if it contravenes an 'unambiguously expressed intent of Congress' or is unreasonable." *Id.* at *15 (citing to Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-45 (1984)). Judge Thomas relied on recent authority from the D.C. Circuit

in which the court had refused to accept "an argument that the negative implication of one provision unambiguously restricted a grant of authority that could otherwise be read into another provision." *Id.* at *18. Judge Thomas concluded that the court was "aware of no 'traditional tools of statutory construction,' that would compel [defendant's] proposed reading." *Id.* at *19 (citations omitted).

Two days after Judge Thomas issued the opinion in this case, the United States Supreme Court decided Chapman v. United States, 111 S. Ct. 1919 (1991). In Chapman, the Supreme Court reached the same conclusion based on the same rationale articulated by Judge Thomas in Shabazz. The Supreme Court held that a statute requiring the imposition of a mandatory minimum sentence for distribution of more than one gram of "a mixture or substance containing a detectable amount" should be determined by the weight of the mixture rather than the net weight of the controlled substance. *Id.* at 1925.

United States v. Harrison
United States v. Black
United States v. Butler
931 F.2d 65 (D.C. Cir. 1991)

Writing for a unanimous court, Judge Thomas affirmed the convictions of three defendants for possession with intent to distribute crack cocaine base and using or carrying a firearm during a drug trafficking offense. The three men were searched and subsequently arrested after police stopped a van in which they were traveling that carried a temporary license tag identified by the police as stolen. Harrison was carrying an unregistered handgun in a holster clipped to his belt and \$595 in cash. Black had 4.5 grams of cocaine base in his pants pocket and was also carrying an unregistered handgun. Butler was wearing a bullet-proof vest under his clothing. Other incriminating evidence found in the van included: 42 grams of diluted cocaine base, a temporary license tag with a different number than the one displayed on the outside of the van, a weapons magazine that contained pictures of the guns carried by defendants, and two fully loaded ammunition clips. Harrison sought to call Black to the stand.

At trial, Black refused to testify, invoking his Fifth Amendment privilege against self-incrimination. Harrison and Butler each moved unsuccessfully to sever their trials from Black's in order to obtain his testimony. Harrison appealed from the district court's refusal to sever his trial from that of his co-defendants. Black claimed that the act of calling him as a witness violated his Fifth Amendment privilege against self incrimination and Butler challenged the sufficiency of the evidence underlying his firearms conviction.

Judge Thomas examined the Federal Rules of Criminal Procedure governing severance of trials. The language of the rules allows the district court judge to determine whether to sever trials based upon a determination that a joinder of offenses or defendants would prejudice the defendant or the government. Supreme Court as well as D.C. Circuit Court precedent favors joinder of trials unless it is determined that the defendant "did not get a fair trial." The D.C. Circuit set forth its general standard in United States v. Ford, 870 F.2d 729, 731 (D.C. Cir. 1989), requiring that the defendant seeking a severance show: (1) a bona fide

need for the testimony; (2) the substance of the testimony and its exculpatory nature and effect; and (3) the likelihood that the defendant will testify if the cases are severed. Failure to demonstrate any one of these elements was fatal to severance. Id. at 732.

After an extensive review of the trial record, Judge Thomas concluded that Harrison had not identified Black's allegedly exculpatory testimony with sufficient specificity to establish that the district court's failure to sever deprived Harrison of a fair trial. In response to Harrison's argument that the court should be guided by analogous decisions from three other circuits, Judge Thomas distinguished those decisions based on controlling precedent of the D.C. Circuit.

Judge Thomas rejected Black's claim that his Fifth Amendment rights were violated when Harrison announced that he intended to call Black as a witness, reasoning that any error that may have occurred was not sufficiently prejudicial in light of the strong case against him to permit reversal under the "plain error" rule of criminal procedure applicable to

claims not properly preserved below.

Finally, Judge Thomas held that there was sufficient evidence to permit a rational jury to find Butler guilty of the firearms offense on a "constructive possession" theory. Judge Thomas cited D.C. Circuit precedent for the proposition that a person is in "constructive possession" of a firearm if it is "within easy reach and available to protect [the user] during his ongoing [drug trafficking] offense." After a thorough review of recent circuit decisions on constructive possession, Judge Thomas determined that the jury reasonably could have inferred (by Butler's presence in a van containing two guns, while wearing a bulletproof vest) that Butler constructively possessed either or both of the guns.

United States v. Whole
925 F.2d 1481 (D.C. Cir. 1991)

A jury convicted the defendant of distributing crack cocaine and of using the telephone to facilitate his drug transactions. At trial, the

defendant claimed entrapment. The jury rejected that defense and convicted him on all nine counts. On appeal, Whoie argued for the first time that the district judge had erroneously instructed the jury on the elements of the entrapment defense. Judge Thomas examined the contention in light of the two elements of entrapment established by the Supreme Court: the government must have induced a defendant to commit a crime and it must be a crime that the defendant was not otherwise willing to commit. Whoie claimed that the district judge improperly allowed the jury to decide whether he had produced sufficient evidence of government inducement. Judge Thomas concluded that there was sufficient evidence of inducement to submit that issue to the jury.

Whoie also contended that the trial court failed to amend the model jury instructions to make explicit the government's burden to prove beyond a reasonable doubt that defendant was predisposed to commit the crimes. Judge Thomas relied on established D.C. Circuit precedent requiring that the court must "always consider the whole instruction -- not just the supposedly erroneous snippet.... In deciding whether jury

instructions are plainly erroneous, [the court will] consider as well the lawyers' arguments and the evidence." As a result, Judge Thomas concluded that the district judge's numerous explanations to the jury at trial of the defendant's presumed innocence properly evidenced that the government carried the burden of proof to show the defendant was "ready and willing" to commit the crime. Thus, the district court judge's use of the model jury instructions was not plain error.

United States v. Halliman
923 F.2d 873 (D.C. Cir. 1991)

Defendants were convicted of possession with the intent to distribute cocaine and crack cocaine base. The trial court rejected defendants motion to suppress evidence the police had obtained through searches.

After receiving a call from the manager of a hotel, the police conducted an investigation of a group of guests suspected of dealing

drugs. The police obtained search warrants to search the three rooms where the guests were staying. As they were leaving the station with the warrants, the police learned that one suspect had moved to another room. Rather than delay their search, the police decided to execute their warrants and attempt to interview the suspect in the newly rented room. When they knocked on the door of the newly rented room, a person inside asked them to wait "just a minute." The officers down the hall began to execute their searches on the other three rooms. Upon hearing a toilet flush inside the newly rented room and fearing that the person inside was destroying the evidence, the police officers forcibly entered the room. They found a bag of cocaine lying on the floor of the bathroom in plain view. They also executed a search that uncovered more cocaine in the room. The police subsequently obtained an emergency search warrant for this room and found certain drug paraphernalia. During the period of the initial search, the police executed a pat-down search of two other defendants as they returned to their hotel rooms. They discovered seventeen bags of crack cocaine and keys to the hotel rooms.

Judge Thomas, writing for a unanimous panel, affirmed the district court's denial of defendants' motion to suppress the evidence found during these searches. The court ruled that the warrantless search was justified by "exigent circumstances" doctrine. Judge Thomas relied on settled D.C. Circuit standards concerning exigent circumstances and found sufficient evidence in the trial record to satisfy that standard.

In Murray v. United States, 108 S. Ct. 2529 (1988), the Supreme Court had held that "evidence which is initially discovered during an illegal search, but is subsequently acquired through an independent and lawful source" is admissible at trial. Judge Thomas concluded that the emergency search warrant satisfied the requirement of an "independent source" and upheld the admission of the evidence.

The court also found that the police had probable cause to search the two men entering the hotel. The men had been under observation for over a week and when they entered the hotel and went to the rooms where the drugs were stored, the "totality of the

circumstances" provided probable cause to arrest the two defendants. The court also found that the district court did not abuse its discretion in denying the defendant's motion to sever the trials based upon the government's introduction of "independent and substantial evidence" in support of the defendant's individual charges.

United States v. Rogers
918 F.2d 207 (D.C. Cir. 1990)

The defendant was convicted of possessing more than 50 grams of crack cocaine with the intent to distribute within 1,000 feet of a school.

Police officers observed a group of men gathered on a street known to be frequented by drug dealers. Upon seeing the officers, the defendant grabbed a gym bag and ran. When the police pursued him, the defendant threw the gym bag into a sewer. The defendant was arrested and when searched, police found a telephone beeper. When the officers

retrieved the gym bag, it contained fifty-five grams of 82% pure crack cocaine.

Defendant took the stand and testified that he had been on his way to visit a girlfriend who lived on the street. The defendant further testified that the gym bag was not his bag but belonged to a friend. The district court then allowed the prosecution to question the defendant about his prior arrests as a juvenile -- that he had once before distributed crack cocaine on the same street and thrown the crack away in the same manner when he had seen the police. The district court also allowed testimony that he had once owned a beeper.

The jury convicted the defendant and he appealed. Judge Thomas, writing for a unanimous panel, rejected defendant's argument that the Federal Rules of Evidence prohibited admission of his prior conduct. He stated that the "Federal Rules of Evidence are creatures of statute" and thus should be interpreted by beginning with the language of the rules themselves using "'traditional tools'" of statutory

construction. After a review of the language, supported by Advisory Committee notes and decisions from other circuits, Judge Thomas upheld admission of the evidence. The testimony was not offered to prove character and the district court did not abuse its discretion in allowing the evidence.

Finally, Judge Thomas rejected defendant's argument that the district court should have granted his motion for acquittal or a new trial. Based upon Supreme Court standards, Judge Thomas found that "[a]mple and convincing evidence supported the jury's verdict under the reading of the statute even more favorable to [defendant]." *Id.* at 214.

United States v. Long
United States v. Mayfield
905 F.2d 1572 (D.C. Cir.),
cert. denied, 111 S. Ct. 365 (1990)

Two defendants were convicted of possession of cocaine with intent to distribute and of using a firearm in a drug trafficking crime. The

defendants were arrested in an apartment where cocaine and other drug paraphernalia was found. The police also found an unloaded handgun between the sofa cushions.

One of the defendants filed her notice of appeal one day later than the Federal Rules of Appellate Procedure permits. Judge Thomas rejected the appeal stressing that the time limit is "mandatory and jurisdictional," citing the Supreme Court's decision in United States v. Robinson, 361 U.S. 220 (1960). The court rejected defendant's argument that the court's docketing of her untimely notice of appeal should have been construed as an implicit extension of time. Judge Thomas declined to equate the ministerial act of docketing an appeal with an implicit grant of an extension of time finding that "the unambiguous language of the rule forecloses this shortcut." 905 F.2d at 1574. Although Judge Thomas's interpretation was required by precedent of the D.C. Circuit, he also distinguished other circuit decisions that allowed untimely appeals. He emphasized that the specified time limits "serve vital interests of efficiency and finality in the administration of justice."

Id. at 1575. The court remanded the case for a determination whether the defendant should be granted a discretionary thirty day extension permitted in the rules based upon a showing of excusable neglect.

As to the other defendant, the court (with Judge Sentelle concurring separately) reversed the firearm conviction and affirmed the drug conviction. Noting that the appellate court owes "tremendous deference to a jury verdict" in the face of a challenge to the sufficiency of the evidence, Judge Thomas nonetheless, found that the government failed to produce any evidence that the defendant had "use[d] or carri[e]d a firearm" within the meaning of the statute. Judge Thomas rejected the government's argument that the defendant "used" the gun by committing a drug offense facilitated by a gun. He stated that such an interpretation would obliterate any remaining limits on the meaning and application of the word "use," a prospect particularly troubling when construing a criminal statute. Judge Thomas rejected "the notion that a loose, transitive relationship of this type is sufficient to show that a person 'used' a gun." Based upon a comprehensive review of D.C. as well as

other circuit court precedents, Judge Thomas explained that the government must establish some nexus whereby the defendant actually or constructively possessed the particular firearm in order to prove that he "used" it.

The narcotics charges were affirmed despite defendant's objections that evidence of a telephone call received by the police officer at the defendant's house should not be admissible. The statements made by the caller were not excluded as hearsay since they were not offered as assertions that the defendant was involved in drug dealing. Instead, the evidence was received as a series of nonassertive questions falling outside the scope of the hearsay rule.

Judge Thomas upheld the district court's denial of defendant's motion to sever his trial finding that the evidence against the defendants failed to rise to the "gross disparity of evidence" standard as dictated by the Supreme Court. Noting that there is a "strong and legitimate interest in efficient and expeditious proceedings," Judge Thomas added that "this

interest must never be allowed to eclipse a defendant's right to a fair trial." In holding that the district court did not abuse its discretion in denying the motion to sever, Judge Thomas found that an abundance of evidence implicating both defendants was presented to the court.

United States v. Poston
902 F.2d 90 (D.C. Cir. 1990)

Knowing that his friend was carrying PCP and intended to distribute it, the defendant drove him to the site of the drug sale. The defendant dropped off his friend and drove around the block to the next corner while the sale was being consummated. He was arrested while waiting in his truck. The jury found the defendant guilty of aiding and abetting the possession of PCP with intent to distribute but acquitted him of the charge of aiding and abetting the distribution. On appeal, the defendant argued that (1) there was insufficient evidence to convict; (2) the district court abused its discretion in denying his motion for a continuance on the day before trial; (3) he was denied effective

assistance of counsel because the lawyer he hired only had one day before trial to prepare; and (4) he was denied due process when the prosecution refused to request a downward departure from the federal Sentencing Guidelines.

Writing for a unanimous panel, Judge Thomas affirmed defendant's conviction. On the aiding and abetting charge, Judge Thomas was guided by the limited review the Supreme Court permits for assessing the sufficiency of evidence on appeal. Judge Thomas declined to construe the statute to require that the defendant must himself have actually possessed the illegal drug or assisted in obtaining possession of it. This "cramped" interpretation of the statute was rejected because of the court's well-established, broad standards that require only that the defendant have aided and abetted in the crime of possession of the drug.

The court also rejected the defendant's contention that it was an abuse of discretion to deny his motion for continuance on ground that it was the defendant's delay in deciding to select new counsel that

prompted the motion for continuance at the "eleventh hour." Judge Thomas noted the public's "strong interest in the prompt, effective, and efficient administration of justice," emphasizing defendant's lack of evidence to demonstrate that the trial judge abused his discretion to deny the continuance.

Defendant's claim that he received ineffective assistance of counsel was found to be without merit and unsupported by Supreme Court precedent. Defendant failed to point to any error made by his counsel or to show that it resulted in any prejudice to his defense. His ineffective assistance of counsel defense was therefore inadequate as a matter of law.

Finally, defendant argued that he was denied due process by the failure of the prosecution to request that his sentence be reduced below the statutory minimum mandated under the Sentencing Guidelines. This allegation arose from statements made by the arresting officers concerning the defendant's cooperation. Since the police did make this

cooperation known, Judge Thomas held that the commitment to the defendant to do so could not be construed to obligate the prosecution to file a motion to depart from the sentencing guidelines.

Conclusion

Judge Thomas's criminal law opinions evidence his belief in judicial restraint, his commitment to established rules of law and thoughtful attention to the issues before the court in a particular case. His opinions show scholarship and keen attention to detail with a scrupulous regard for the rights of defendants and a concurrent concern for victims. As shown by this analysis, Judge Thomas's observance of controlling precedent, particularly in cases such as Whoie, Poston and Harrison, provided the consistency and predictability we demand of criminal laws. In Long and Halliman, Judge Thomas refused to expand the jurisdiction of the court or to answer questions not properly before the court. Judge Thomas's observance of "traditional tools" of statutory construction in cases such as Rogers and Long, compelled the court to construe the applicable statutes as intended by the legislature rather than

in accordance with the judge's own predilections. Finally, in Rogers, Long, and Halliman for example, Judge Thomas rejected arguments that evidence must be excluded when there is a justifiable basis for admission. This study of Judge Thomas's criminal law and procedure majority opinions highlights his proven judicial qualifications and suggests that he would be an extremely able and valued member of the Supreme Court.