

No. 19-55937

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

LEON THOMAS,

Plaintiff-Appellant,

v.

A.W. JURGENSEN, Associate Warden/Acting Warden, official
capacity,

Defendant-Appellee,

K. LOPEZ, ZUMKHER, JEFFREY ALLEN, FRANCISCO QUINTANA,

Defendants.

On Appeal from the United States District Court
for the Central District of California
No. 2:10-cv-02671-JGB-MRW
Hon. Jesus G. Bernal, *District Judge*

**BRIEF OF AMICI CURIAE FORMER PROSECUTORS AND
DEPARTMENT OF JUSTICE OFFICIALS IN SUPPORT OF PLAINTIFF-
APPELLANT AND REVERSAL**

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INTEREST OF AMICI CURIAE

Amici are former federal prosecutors and United States Department of Justice officials. Amici recognize that the development of constitutional principles through litigation provides critical guidance for the fair administration of the federal judicial system. Amici further have an interest in ensuring that all parties to constitutional litigation, including those representing the United States of America and the Department of Justice, hold themselves to the highest standards of professional and ethical conduct. As federal practitioners, amici appreciate that the public's confidence in the federal judicial system depends, in significant part, on the trust it has in the good faith and fair dealing of those privileged to represent the United States in court. Amici have a responsibility to raise their voices when the actions of government attorneys fail to meet this high bar.

Amici have obtained the consent of all parties in this appeal to the filing of this brief.

RULE 29(a)(4)(E) STATEMENT

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), amici certify that no party's counsel authored this brief in whole or in part, and that no person or entity other than amici and their counsel made a monetary contribution to the preparation and submission of this brief.

ARGUMENT

The qualities of a good prosecutor are as elusive and as impossible to define as those which make a gentleman. . . A sensitiveness to fair play and sportsmanship is perhaps the best protection against the abuse of power, and the citizens' safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility.

United States Attorney General Robert H. Jackson, April 1, 1940

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. . . He may prosecute with earnestness and vigor – indeed he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones.

Berger v. United States, 295 U.S. 78, 88 (1935)

For decades, these words have been the defining standards for generations of federal attorneys – ideals and principles to strive for starting the very first moment a brand new lawyer walks into the courthouse on his or her first day of work. But, as the instant case shows, unfortunately there are times when government lawyers fall short of these high expectations and act in such a way that one is left with the inescapable impression that justice has not been done – that the attorneys representing the United States failed in their duty to act fairly and justly.

In this brief, amici strongly support appellant Leon Thomas' position that the decision of the district court below should be reversed in no small part due to the indefensible actions of the government attorneys who waited for years to raise the argument that Mr. Thomas failed to properly exhaust his administrative remedies.

Amici write to express our sincere disappointment in the way government counsel conducted themselves at the tail end of this nearly ten-year old prisoner litigation.

I. Attorneys For The Department Of Justice Must Hold Themselves To The Highest Standards.

As amici, we can all personally attest that there was no greater professional honor than being able to stand up in a federal courtroom and proudly say that we represented the United States of America. In every instance, it was an awe-inspiring, and often chill-inducing, moment. But being privileged enough to serve as an Assistant United States Attorney (“AUSA”) also carries with it heavy and solemn responsibilities. As the lawyer entrusted with performing the “people’s work” in federal courts across the country, an AUSA must undertake these responsibilities with the highest level of professional excellence and ethical rigor. An AUSA has the duty to ensure, among other things, that justice is done (and not just win the case), that the rights of the opposing party (either in a criminal or civil case) are protected and allowed to be expressed, and that the ethical duties of candor to the Court are assiduously followed. Nothing less than the public’s faith in the justice system rests on the belief that AUSAs act honorably, fairly, and ethically.

To better frame the exacting professional and ethical obligations of an AUSA, amici would like to recount an experience many of us shared as new government attorneys. Shortly after joining the Department of Justice, new lawyers, both on the criminal and civil side, are sent to the Department’s National Advocacy Center

(“NAC”) in Columbia, South Carolina for a comprehensive trial advocacy program. During that program, as well as during other similar federal training sessions, the instructors stress that, as government lawyers, AUSAs have a duty to do justice and to make sure they act fairly and honestly. The common analogy used during these sessions is that, within the federal justice system, AUSAs are the ones who wear the “white hat.” Because AUSAs wear that white hat, they can do their jobs without fear that a negative result in a case will jeopardize their career. Rather, their sole, abiding mission is to ensure that justice is done.

II. In This Case, The AUSAs Failed To Act In A Way That Comported With The High Standards Expected Of Government Attorneys.

This case presents a stark contrast between what the public should expect from those representing their interests in federal court and what the AUSAs handling this case actually did. If the populace expects integrity and fair play from their government attorneys, then they should be woefully disappointed (as are we) with the way the AUSAs handled Mr. Thomas’ nearly ten-year old case. There is simply no excuse for the AUSAs on this case to wait until the eve of trial to file a dispositive motion on the basis of Mr. Thomas’ purported failure to exhaust his administrative remedies within the Bureau of Prisons. To the extent the government does have a valid exhaustion affirmative defense (for which, as amici, we support Mr. Thomas’ position in his brief that this defense was either waived/forfeited or precluded by the doctrines of laches or equitable estoppel), such a defense should have been raised

years earlier in the litigation. That would have been the fair thing to do as it would have both given Mr. Thomas an opportunity to correct the issue and it would not have so fundamentally wasted the district court's valuable time and resources.

But what is most distressing about the AUSAs' conduct in this case is the devastating impact it has had on Mr. Thomas' substantive complaints regarding the conditions of his incarceration. Because the AUSAs waited nine years to bring their summary judgment motion, the statute of limitations has now run on his Section 1983 claim and he no longer has any viable recourse to address his constitutional claims. Due to the government's bad-faith position on the exhaustion issue, the courthouse door is now closed to Mr. Thomas. Justice has been denied.

Above, we reminisced about how we were taught that, as young government lawyers, we wore the white hat. Unfortunately, the actions of the government attorneys in this case have left that white hat muddied.

CONCLUSION

For the reasons stated herein, amici request that the Court reverse and remand the district court's dismissal of Mr. Thomas' complaint.

Date: March 11, 2020

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 1904 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeal for the Ninth Circuit by using the appellate CM/ECF system on March 11, 2020.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: March 11, 2020

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