UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF IOWA

CHAMBERS OF
ROBERT W. PRATT
CHIEF JUDGE
UNITED STATES DISTRICT COURTHOUSE
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July 16, 2008

Aaron V. Latham, Manager of Communications
University of Alabama School of Law
Box 870382
Tuscaloosa, AL 35487

Re: Morris Dees award nomination

Dear Mr. Latham:

I write in support of Professor Ronald Carlson's nomination of Judge Myron H. Bright for the 2008 Morris Dees award. I read the qualifications for such an award and believe that Judge Bright captures the essence of what the Morris Dees award is all about. I am certain you are familiar with his resume and his service in the federal judiciary for the last forty years. His career as a lawyer and as a Captain in the Air Force should also be considered as an important part of his commitment to advancing justice in the United States.

I believe the nomination criteria which best describe Judge Bright's career in the federal judiciary are "courage under fire - maintains a dedication to service with energy and compassion." I hope in some way my letter can tell you how Judge Bright exhibits these qualities and others that make him deserving of the Morris Dees Justice award. Certainly there can be no finer tribute to Morris Dees and the Southern Poverty Law Center than to have as a recipient of this award Judge Myron Bright.

I assume the committee making this award is familiar with Judge Bright's resume. Others who have written in support of Judge Bright may have set out his record, not only in service to the Eighth Circuit, but also detailing his service on other courts of appeal and district courts. I am a judge in a district court within the Eighth Circuit where Judge Bright served for forty years. I am, therefore, most familiar with his work on the Eighth Circuit. His other work, such as sitting on other courts, and visiting and lecturing at the many law schools should also be remembered. While his appellate work on the Eighth Circuit is truly outstanding, I know it is but a part of his work.

During the 25 years I practiced law before becoming a judge, I had the privilege of arguing four times in front of Judge Bright as the lawyer for the appellant. I found him to be well-prepared and his questions always succinct and to the point in terms of figuring out what the case was really about. His civility and decency to counsel always came through during oral submissions to him. I say this because the "process" of lawyering and judging has always

seemed to be important to Judge Bright. The manner and method of reaching decisions for Judge Bright are at least as important as the eventual result in the case and sometimes more important.

Judge Bright has been the author of many "high-profile" and headline grabbing cases. Perhaps the most noteworthy and one that became the "law of the land" was *Green v. McDonell Douglas*, 93 S. Ct. 1817 (1973). Early on, Judge Bright recognized the difficulty a plaintiff had in establishing discrimination. His opinion sanctioned the now well known "burden shifting" analysis that today permits many more cases to go forward and which allow for many more discrimination plaintiffs to truly have their day in court. I am certain that others more knowledgeable and scholarly than I will accurately describe those kinds of cases to you, and indeed, a computer review of Judge Bright's Eighth Circuit decisions will reveal many such examples. I would say, however, that where Judge Bright comes through as an advocate for the public interest is in those cases where no one, or at least very few people are listening or watching. Three areas where the federal judiciary is most involved with poor people are Social Security Disability or Supplemental Security Income appeals, sentencing in criminal cases and petitions challenging conditions of confinement within the prison setting where those incarcerated seek relief from conditions which violate their basic human rights. These three areas show, in the most fundamental way, why Judge Bright is deserving of the Morris Dees award. I want to just briefly touch upon three instances, one in each of these areas where Judge Bright's persistence and hard work have proven his "courage under fire and a dedication to serving the public interest and pursuing justice."

I will try to describe as best I can Judge Bright's work which merits this award. In doing so, I wish to "borrow" from the late Judge Richard S. Arnold's article about Justice Brennan. In describing the "judicial personality" Judge Arnold wrote:

> But as those who work on or are familiar with multi-judge courts know, separate opinions, either dissents or concurrences, reveal a great deal about *the judicial personality*. By contrast, an opinion of the Court is never an entirely personal work– even for a three judge panel of the court. It is institutional, not individual. If it is to succeed, it must be more than idiosyncratic. It is the voice not merely of the writer, but of the Court, that is to say, of the law itself. And, on a more practical and perhaps a more important level, it will be a failure unless it gets at least one other vote (or, in the case of the Supreme Court, four others). In writing for a court, one is always conscious of being restrained by the need to remain sensitive to the views of one's colleagues. A dissent or concurrence need not be so confined. It is nice if someone joins a dissent, but it is not essential. Dissents can be purely individual expressions, reined in only by self-restraint. They also have less of that quasi-political alloy that must leaven a piece of writing that is partly for others. For these reasons,

> they tend to be more fun to write. *So dissenting opinions are in some ways the best index to the judicial personality*.

With these parameters in mind, I want to discuss Judge Bright's dissents or concurrences in each of the previously mentioned vital, but often overlooked areas of law. I feel these will give the Morris Dees Justice Award Committee insight into the "Judicial Personality" of Judge Myron H. Bright.

As I am certain your committee knows, the "Sentencing Reform Act of 1984" changed 300 years of American common and statutory law and mandated sentencing "ranges" based upon judges' fact finding regarding a defendant's conduct. This law became effective on November 1, 1987. As early as February 1990, in *U.S. v. O'Meara*, 895 F.2d 1216, 1221-22, (8th Cir. 1990), Judge Bright wrote in a concurring opinion about the impact of the Act on sentencing.

> This case opens the window on the sometimes bizarre and topsy-turvy world of sentencing under the Guidelines. The defendants in this case were convicted of the same crime by the same jury in front of the same judge. They conspired to obtain the same amount of drugs from the same DEA agent in the same county. They gave the same story to police upon arrest, used the same defense at trial and admitted the same relevant conduct to the same probation officer following conviction. Yet, in this case, the computed Guidelines sentencing range for Kost (57-71 months) was more than double that for O'Meara (27-33 months).

In analyzing these facts Judge Bright wrote:

> Whether the disparity in this case rests upon some inadvertent preference for personalities or because a more sophisticated offender successfully manipulated the system to his advantage, the end result is no less unsettling. Guideline sentencing "by the numbers" was supposed to eliminate such improper influences. As this case demonstrates, however, the Sentencing Guidelines do not reduce disparity and in my judgment have failed in that regard.
>
> The essential lie of the Sentencing Guidelines is that, by establishing neutral criteria which vastly restrict the district judge's discretionary powers, they will eliminate disparity in sentencing. In reality, the present guideline system merely replaces one system of subjective sentencing with another. Indeed, the Guidelines are an intricate and complex code of sentencing and, as such, require extensive construction. Needless to say, this construction is not conducted by

> computers-much less by gods. Instead, the implementation of the present guideline system is highly dependent on the judgment calls of fallible human actors, who are no less susceptible to errors in judgment and differences in interpretation than their pre-Guidelines predecessors. Hence, where sentencing judges once applied their legal knowledge and life experiences to the facts of a given case, we now call on them to evaluate the defendant's circumstances according to the dictates of a complex and cumbersome code.

Id. at 1222-23.

In concluding his opinion, Judge Bright wrote about the lack of judge input and discretion inherent in the guideline system:

> Guideline sentencing is perhaps most disturbing, however, not because it continues to require subjective decision-making, but because these still-subjective determinations are in large part no longer conducted by the federal judiciary. Rather, due to the difficulty of mastering this complicated and ever-evolving guideline system, it seems to me that district courts have come increasingly to rely on the recommendations of the probation officer who prepares the presentence report. Consequently, it is a sad but true fact of life under the Guidelines that many of the crucial judgment calls in sentencing are now made, not by the court, but by probation officers to whose technical knowledge overworked district judges understandably, but all too often, uncritically defer. I cannot help but feel that we have lost something in this substitution of technical proficiency for the thoughtful exercise of discretion by the federal judiciary.

Id. at 1223.

Thus began Judge Bright's 20 year, ultimately successful, campaign to restore judicial discretion to federal sentencing law. Judge Bright's lonely voice was eventually recognized and indeed vindicated by Justice Stevens' opinion in *Gall v. United States*, 128 S.Ct. 586 (2007). Judge Bright's voice was recognized by Justice Stevens in footnote 7, where the Supreme Court discussed the institutional advantage that district courts have in deciding sentencing matters. For a very long time, Judge Bright concurred and dissented when the easy path would have been to "go along to get along."

Another important but often over looked area of federal law concerns the "conditions of confinement" cases which involve claims by incarcerated prisoners that their civil rights have been violated. In *Goff v. Nix,* 803 F.2d 358 (8th Cir. 1986), Judge Bright dissented from an

Eighth Circuit panel opinion that reversed the district court which had held that visual "body cavity" searches violated prisoners fourth amendment rights. In his dissent, Judge Bright reminded us that the important role federal courts should play in protecting everyone's civil rights: "I am concerned about this court's apparent willingness to substitute the rhetoric of judicial deference for meaningful scrutiny of constitutional claims in the prison setting." *Id.* at 375. Later in the opinion Judge Bright reminded us of the universality of human rights when he wrote, "In its concluding paragraph, the majority implies that this case concerns only an amorphous set of 'basic human rights' beyond the protection of the federal courts. This case is certainly about human rights; and if it is true, as has often been said, that the manner in which a society treats its prisoners is evidence of the essential character of that society, then this case may have broad connotations." *Id*.

Who is more despised in our country that convicted prisoners? Who needs the protections of our constitution more than people confined by the power of the state? Judge Bright knows the history of prisons in our circuit (Arkansas comes readily to mind) and has not forgotten the Eighth Circuit and the Supreme Court's holdings regarding conditions of confinement. In *Hutto v. Finney*, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978), the state prison administrators did not dispute the District Court's conclusion that the conditions in two Arkansas prisons constituted cruel and unusual punishment.

With respect to Social Security Disability and Supplemental Security Income claims for disability benefits, the Eighth Circuit, throughout the late seventies and eighties, was a bulwark in standing up to executive branch decisions that came about by virtue of the government's policy of "non-acquiescence." By the mid to late nineties, however, the Eighth Circuit was less receptive to the claims of citizens denied benefits by administrative law judges who served in the Social Security Administration. Judge Bright remained constant in his dedication to protecting a claimant's right to plenary judicial review in the federal court. Again, dissenting in *Spradling v. Chater*, 126 F.3d 1072, 1075 (8th Cir. 1997), Judge Bright wrote, "I dissent. The record is abundantly clear that the claimant suffers a severe, long-term disability to his back." After reciting many of the medical facts before the administrative law judge, Judge Bright forcefully summarized relevant Eighth Circuit law by writing:

> In this case, the rejection of back pain is not a matter of credibility but an inability by the ALJ and Social Security Administration to comprehend that disabling back pain does not bar some limited life activities. The ALJ seems to have rejected the painful back condition because Spradling can do some things and is not a complete invalid. The Social Security Administration has failed to recognize that a claimant such as Spradling is not required to prove he is bedridden or completely helpless to be found disabled.

In *Spradling,* the majority, in denying the claim, had relied upon the rationale of the ALJ that since Spradling no longer regularly saw a physician in rural Arkansas, he clearly was not disabled. In response to that argument Judge Bright wrote at 1077:

> The majority and ALJ also rely upon the fact that Spradling saw health care providers for his back pain only twice in two years and failed to have his pain medication adjusted when it caused him stomach irritation. At oral argument, Spradling argued that he had no means of securing health care in this time period. Again, considering the type of disability, it may not be unreasonable for someone who is told by medical experts that nothing can be done for his back pain to not continue to seek further options. He continued to take pain and depression medications during these two years.

By examining the "judicial personality" of Judge Bright it is clear that his view of judging captures the essence of the role of the federal judiciary. In fact if a person examines the actual oath of office that all federal judges take, one can see that Judge Bright throughout his forty years on the federal bench has remained faithful to the words of that oath he took on June 7, 1968. 28 U.S.C. 453 reads as follows:

> Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: "I, _____ _____, do solemnly swear (or affirm) that I will administer justice without respect to persons, and **do equal right to the poor** and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as _____ under the Constitution and laws of the United States. So help me God.

Judge Bright's career has brought enlightenment to the law. His warmth as a person and his generosity of spirit make him instantly likeable. It is, however, his constancy in striving to bring justice to others that makes him deserving of this award. Thank you for your consideration of my remarks.

Sincerely,

Robert W. Pratt