

**Responses of Andre M. Davis
Nominee to the U.S. Court of Appeals for the Fourth Circuit
to the Written Questions of Senator Jeff Sessions**

Suppression Motion Reversals

1. I am very troubled by the number of cases in which you have suppressed evidence and been overturned by the Fourth Circuit. During your hearing, Senator Coburn asked you whether, in your opinion, the Fourth Circuit got any of these reversals wrong. In response, you noted one case where the Fourth Circuit's decision was later overturned by the Supreme Court, but you did not specifically comment on any of the other cases where your opinion was reversed.

For each of the following appellate cases, please state for each whether you stand by your opinion or agree with the decision of the appellate court that the evidence should not have been suppressed, and please give reasoning as to the basis of your decision:

- a. United States v. Siegel, 536 F.3d 306 (4th Cir. 2008).
- b. United States v. Jamison, 509 F.3d 623 (4th Cir. 2007).
- c. United States v. Kimbrough, 477 F.3d 144 (4th Cir. 2007).
- d. United States v. McNeill, 484 F.3d 301 (4th Cir. 2007).
- e. United States v. Custis, 150 Fed. Appx. 265 (4th Cir. 2005).
- f. United States v. Dickey-Bey, 393 F.3d 449 (4th Cir. 2004).

Response: I fully accept the appellate court's rulings in these cases, in which the court rejected my assessment of the facts and/or concluded that I had misapplied the law to the evidentiary record before me.

Summary Judgment Reversals

2. While I am a supporter of summary judgment as a procedural device, I am concerned by the number of cases you listed in your questionnaire where the Fourth Circuit reversed, finding that there was a genuine issue of material fact where you found none.

For each of the following cases, please state whether you agree with your decision or the decision of the appellate court that reversed, and please give reasoning as to the basis of your decision:

- a. Nagy v. Baltimore Life Ins. Co., 49 F. Supp. 2d 822 (D. Md. 1999), aff'd in part and rev'd in part, 215 F.3d 1320 (4th Cir. 2000).
- b. Robinson v. New Line Cinema Corp., 42 F. Supp. 2d 578 (D. Md. 1999), rev'd, 211 F.3d 1265 (4th Cir. 2000).
- c. Prudential Real Estate Affiliates, Inc. v. Long & Foster Real Estate, Inc., 208 F.3d 210 (4th Cir. 2000).
- d. Kubicko v. Ogden Logistics Services, 181 F.3d 544 (4th Cir. 1999).
- e. Motor Club of America Ins. Co. v. Hanifi, 145 F.3d 170 (4th Cir. 1998).
- f. Harold v. Cendo, 131 F.3d 134 (4th Cir. 1997).

Response: I fully accept the appellate court's determination in these cases that the non-movant had projected sufficient evidence such that a genuine dispute of material fact precluded the entry of summary judgment.

The Eighth Amendment Standard

- 3. In the appellate review of your decision Rich v. Bruce, 129 F.3d 336 (4th Cir. 1997), the Fourth Circuit addressed a case in which you entered judgment in favor of the plaintiff on his Eighth Amendment claim. On appeal, the Fourth Circuit reversed, holding that you erred since you did not find that the defendant guard had actual knowledge of a specific risk to the plaintiff.
 - a. Please state whether you agree with your decision or the decision of the appellate court that reversed, and please give your reasoning as to the basis of your decision.

Response: I fully accept the appellate court's determination in this case that the plaintiff's evidence failed to satisfy the proof requirements for an Eighth Amendment claim.

Interference with Defendant Plea Bargaining

- 4. I am very troubled by your role in the case described by the Fourth Circuit in United States v. Bradley, 455 F.3d 453 (4th Cir. 2006). According to the Fourth Circuit's opinion, you became heavily involved in trying to get the defendants to work out a plea deal with the prosecution. The Fourth Circuit's review of your actions demonstrates that you took an active role in trying to influence the defendants to take a plea: "Judicial encouragement to plead guilty was so clear that one defendant . . . complained

of it to the district court: ‘You keep telling us to cop out, like we are already guilty.’” (Id. at 464). In vacating the defendants’ convictions and remanding to a different judge, the Fourth Circuit concluded:

“We have not found a single case in which the extent of judicial involvement in plea negotiations equalled (sic) that in the case at hand. The district court repeatedly appeared to be an advocate for the pleas rather than as a neutral arbiter, and any fair reading of the record reveals the substantial risk of coerced guilty pleas. . . . We can only conclude that the district court’s role as advocate for the Defendant’s guilty pleas affected the fairness, integrity, and public reputation of judicial proceedings.” (Id. at 464-65).

- a. Please explain your conduct in this case and why you considered it to be appropriate.**

Response: I believe with the benefit of hindsight that my involvement in facilitating the guilty pleas in this case was inappropriate and that the Fourth Circuit was correct to say so. I became involved in, but I did not interfere with, the plea process, at the invitation and encouragement of defense counsel. Nevertheless, I should not have gotten involved in that process at all. I should have permitted the case to proceed to verdict without any involvement whatsoever on my part in discussing with counsel a possible change of plea by any defendant.

- b. At your hearing, you testified that a good judge is one who “appreciate[s] the importance of a fair hearing and a fair and impartial judgment in every case.” Do you believe the litigants received a fair and impartial hearing in this case?**

Response: Yes.

The Second Amendment

- 5. The Second Amendment states: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”**

- a. Do you believe that the Second Amendment is an individual right or a collective right? Please explain.**

Response: The Supreme Court held in *District of Columbia v. Heller* that it is an individual right. That is the controlling law of the land.

- b. Do you believe an individual Second Amendment right exists outside the context of military service or hunting? If so, please explain.**

Response: The Supreme Court in *District of Columbia v. Heller* did not limit the right to the context of military service or hunting.

- c. What restrictions, if any, do you believe would be constitutional against an individual's Second Amendment rights?**

Response: Any proposed restrictions that come before me as a judge would need to be justified by the guidelines set in *District of Columbia v. Heller*.

- d. What standard of scrutiny do you believe is appropriate in a Second Amendment challenge against a Federal or State gun law?**

Response: The Supreme Court in *District of Columbia v. Heller* did not establish a standard of scrutiny. As this question may come before me in a case if I am confirmed, I believe that to maintain both the appearance of impartiality as well as the actuality of impartiality, I must decline to express my views on these legal issues.

- e. Do you believe that the Second Amendment should be incorporated against the States?**

Response: As this question may come before me in a case if I am confirmed, I believe that to maintain both the appearance of impartiality as well as the actuality of impartiality, I must decline to express my views on these legal issues.

Judicial Philosophy

- 6. During his campaign, President Obama announced: "We need somebody who's got the heart, the empathy, to recognize what it's like to be a young teenage mom, the empathy to understand what it's like to be poor or African-American or gay or disabled or old- and that's the criterion by which I'll be selecting my judges."**

- a. Which, if any, of these categories do you believe best describes your judicial philosophy as laid out by the President?**

Response: I do not believe the above quote describes a judicial philosophy. My approach in every case that comes before me is to apply the law to the facts.

- b. During your hearing, you stated that a good judge is "one who appreciates the burdens, the challenges that the litigants before him or her has met." What weight should judges give to these considerations and how do they balance them against a neutral application of the law?**

Response: The above quote was a part of my response to Senator Coburn when he asked me about the concept of empathy. I believe that empathy is an attribute of character that provides a judge with insight and understanding of the human condition of the litigants whose cases the judge exercises authority to decide. Empathy is not a rule of decision or a basis for the decision in any legal matter. The sole task of the judge is to insure the neutral application of the law to the facts of the case and nothing is to be “balanced” against that task.