Nomination of Liles Clifton Burke to the
U.S. District Court for the Northern District of Alabama
Questions for the Record
Submitted October 11, 2017

QUESTIONS FROM SENATOR FEINSTEIN

1. Please respond with your views on the proper application of precedent by judges.

   a. **When, if ever, is it appropriate for a district court to depart from Supreme Court or the relevant circuit court's precedent?**

      It would never be appropriate for a district court to depart from United States Supreme Court precedent or precedent from the relevant circuit court.

   b. **When, if ever, is it appropriate for a district court judge to question Supreme Court or the relevant circuit court's precedent?**

      It would never be appropriate for a district court to question Supreme Court precedent or precedent from the relevant circuit court.

2. When Chief Justice Roberts was before the Committee for his nomination, Senator Specter referred to the history and precedent of *Roe v. Wade* as "super-stare decisis." A textbook on the law of judicial precedent, co-authored by Justice Neil Gorsuch, refers to *Roe v. Wade* as a "super-precedent" because it has survived more than three dozen attempts to overturn it. The book explains that "superprecedent" is "precedent that defines the law and its requirements so effectively that it prevents divergent holdings in later legal decisions on similar facts or induces disputants to settle their claims without litigation." (The Law of Judicial Precedent, Thomas West, p. 802 (2016))

   a. **Do you agree that *Roe v. Wade* is "super-stare decisis"? "superprecedent"?**

   Although I have heard the terms, "super-stare decisis" and "superprecedent," I have not had a chance to read the textbook quoted in the question. I certainly agree that *Roe v. Wade* is well-established law and is binding precedent on lower courts.

   b. **Is it settled law?**

   Yes. From the perspective of a district court, all Supreme Court precedent is settled law.

3. In *Obergefell v. Hodges*, the Supreme Court held that the Constitution guarantees same- sex couples the right to marry.

   a. **Is the holding in Obergefell settled law?**

Yes. From the perspective of a district court, all Supreme Court precedent is settled law.

b. On Friday, June 30, the Texas Supreme Court issued a decision in Pidgeon v. Turner which narrowly interpreted Obergefell and questioned whether states were required to treat same-sex couples equally to opposite-sex couples outside the context of marriage licenses. The Texas Supreme Court stated that "The Supreme Court held in Obergefell that the Constitution requires states to license and recognize same-sex marriages to the same extent that they license and recognize opposite-sex marriages, but it did not hold that states must provide the same publicly funded benefits to all married persons, and… it did not hold that the Texas DOMAs are unconstitutional." Is this your understanding of Obergefell?

I have not had the opportunity to study *Pidgeon v. Turner*. However, it is possible that a case raising similar issues could come before me if I am fortunate enough to be confirmed as a district judge. Therefore, I feel it would be inappropriate to discuss my thoughts on that particular issue. However, *Obergefell* is certainly binding U.S. Supreme Court precedent.

4. In Justice Stevens's dissent in *District of Columbia v. Heller* he wrote: "The Second Amendment was adopted to protect the right of the people of each of the several States to maintain a well-regulated militia. It was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable threat to the sovereignty of the several States. Neither the text of the Amendment nor the arguments advanced by its proponents evidenced the slightest interest in limiting any legislature's authority to regulate private civilian uses of firearms."

a. Do you agree with Justice Stevens? Why or why not?

I do not believe it is appropriate to express my personal views regarding Justice Stevens's dissent in *Heller* or on any other Constitutional issue. If confirmed, similar issues could potentially come before my court. Commenting on such issues could give litigants the impression that I would not be impartial as a judge. I recognize that *Heller* is binding U.S. Supreme Court precedent.

b. Did *Heller* leave room for common-sense gun regulation?

As stated in my response to Question 4(a), opining on such issues could give the appearance that I would not be impartial as a judge. Therefore, I do not believe it is appropriate to express my personal views on that issue.

c. Did *Heller*, in finding an individual right to bear arms, depart from decades of Supreme Court precedent?

As stated in my response to Question 4(a), opining on such issues could give the

appearance that I would not be impartial as a judge. Therefore, I do not believe it is appropriate to express my personal views on that issue.

5. In *Citizens United v. FEC*, the Supreme Court held that corporations have free speech rights under the First Amendment and that any attempt to limit corporations' independent political expenditures is unconstitutional. This decision opened the floodgates to unprecedented sums of dark money in the political process.

   a. **Do you believe that corporations have First Amendment rights that are equal to individuals' First Amendment rights?**

   As stated in my response to Question 4(a), opining on such issues could give the appearance that I would not be impartial as a judge. Therefore, I do not believe it is appropriate to express my personal views on that issue. If confirmed, I certainly would be bound by *Citizens United* and all other Supreme Court and 11th Circuit precedent.

   b. **Do individuals have a First Amendment interest in not having their individual speech drowned out by wealthy corporations?**

   As stated in my response to Question 4(a), opining on such issues could give the appearance that I would not be impartial as a judge. Therefore, I do not believe it is appropriate to express my personal views on that issue. If confirmed, I certainly would be bound by *Citizens United* and all other Supreme Court and 11th Circuit precedent.

   c. **Do you believe corporations also have a right to freedom of religion under the First Amendment?**

   As stated in my response to Question 4(a), opining on such issues could give the appearance that I would not be impartial as a judge. Therefore, I do not believe it is appropriate to express my personal views on that issue. If confirmed, I certainly would be bound by *Citizens United* and all other Supreme Court and 11th Circuit precedent

6. In 2011, you wrote the majority opinion in *Ankrom v. State*, in which you upheld a conviction for chemical endangerment of a child for a woman who used cocaine while pregnant. Whether a viable fetus was covered under Alabama's child endangerment statute was a matter of first impression. You concluded that the term "child" in the statute was "unambiguous on its face" and there was no "rational basis for concluding that the plain and ordinary meaning of the term 'child' does not include a viable fetus." (152 So. 3d at 382, 384)

   In making your decision, you dismissed as unpersuasive cases from supreme courts in a number of other states that held various child endangerment statutes inapplicable to the conduct of pregnant women. Instead, you looked to Alabama's "public policy . . . to protect life, born and unborn." (152 So. 3d at 379) But public policy arguments were

raised on behalf of the woman defendant in this case as well—advocates noted that expanding the chemical endangerment law to include pregnant women would potentially discourage pregnant women with drug problems from carrying pregnancies to term, and also deter drug-dependent pregnant woman from seeking health care and sharing critical information with health professionals. **Why did your opinion not address any of these public policy reasons**?

Although the appellant in *Ankrom* put forth public-policy arguments in favor of her position, public-policy issues fall within the purview of the legislature, not the Alabama Court of Criminal Appeals. As noted, the Alabama Legislature had previously articulated the State's public policy on that issue and it would have been improper for the Court of Criminal Appeals to change it. Additionally, the Alabama Supreme Court had previously held that the term "child," under Alabama law, encompassed an unborn child in the context of the State's wrongful-death-of-a-minor statute. Additionally, Alabama's homicide statute applies to unborn children. As an intermediate appellate court bound by the decisions of the Alabama Supreme Court, it would have been improper to analyze supreme court cases from other states or the public policy of other states in that particular case.

7. In 2014, you wrote a unanimous opinion in *Floyd v. State* in which you upheld a conviction and capital sentence for felony murder against a challenge that prosecutors had violated *Batson v. Kentucky* by discriminating against African-American potential jurors. Prosecutors struck ten of the eleven African Americans in the jury pool, which resulted in an all-white jury with one African-American alternate juror. You agreed with the trial court that prosecutors had presented race-neutral grounds for all ten jury strikes — including one juror's prior traffic tickets and another's vacillation on her ability to impose the death penalty — even though prosecutors had not struck two white jurors who likewise had previous traffic violations and wavered on whether they could vote for a capital sentence. The United States Supreme Court later vacated your decision in light of its holding in another case, *Foster v. Chatman* (2016), in which it held that "[i]f a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack [panelist] who is permitted to serve, that is evidence tending to prove purposeful discrimination." (136 S. Ct. at 1754)

   a. **Given that in at least two instances the prosecutors' rationale for striking a juror applied equally to both white and African-American potential jurors, why did you believe it was appropriate for the prosecution to strike only the African-American would-be jurors?**

   In that case, the trial court held a hearing and made findings of fact regarding the prosecution's motives for striking the African-American jurors. Recognizing that such determinations largely turn on evaluations of credibility and that a trial court is in a better position than an appellate court to make such determinations, the Alabama Supreme Court has held that such decisions are to be given great deference and will only be reversed if they are clearly erroneous. Therefore, the Court of Criminal Appeals was not presented with the question of whether it would have necessarily made the same decision regarding whether the strikes in question were appropriate. Rather, the Court was called to decide whether the trial court's decision was clearly

erroneous. In *Floyd*, the record contained evidence supporting the trial court's decision and the Court of Criminal Appeals was not convinced that a mistake had been made. Accordingly, the Court affirmed the trial court's decision.

b. What race-neutral justification could a prosecutor have for striking African- American potential jurors on grounds that apply equally to white potential jurors?

I feel that it would be inappropriate to opine on such questions. If I am fortunate enough to be confirmed, *Batson* issues will no doubt come before my court. If I were to answer such questions, it could give rise to an appearance of impartiality. I certainly recognize that *Batson* and subsequent Supreme Court cases on this issue are binding precedent upon district courts.

8. In 2013, you wrote a 4-1 opinion in *Lane v. State* upholding the death penalty for a defendant whose IQ was 70. Extensive testimony from a neuropsychologist established that the defendant had deficits in nine areas of adaptive functioning, including communication and self-direction. On appeal, the United States Supreme Court vacated the judgment and remanded to your court in light of its decision in *Hall v. Florida* (2014), in which the Court overturned a Florida statute defining an intellectual disability as an IQ of 70 or less and emphasized that a defendant claiming such a disability must "have the opportunity to present evidence of his intellectual disability, including deficits in adaptive functioning over his lifetime." (134 S. Ct. at 2001)

   On remand, you once again upheld the death sentence for the defendant, concluding that the Supreme Court's decision in *Hall* was narrow and "centered only on the medical community's interpretation of the significance of an IQ test score." One of your colleagues on the Alabama Court of Criminal Appeals, Judge Welch, disagreed strongly with your interpretation, and wrote the following: "[T]he only reason the United States Supreme Court could have had for remanding this case is for additional consideration of the ample evidence of [the defendant's] adaptive deficiencies. Because the majority has found that consideration to be unnecessary, I believe that the majority has failed to follow the directions issued to this Court by the United States Supreme Court."

a. Why do you believe the Supreme Court remanded *Lane v. State* if not "for additional consideration of the ample evidence of [the defendant's] adaptive deficiencies"?

The United States Supreme Court's order remanding *Lane* was very specific. It instructed the Court of Criminal Appeals to reconsider *Lane* in light of *Hall v. Florida*. *Hall* was a narrow holding and centered on the question of whether it was appropriate to have a bright-line cutoff for IQ test scores when determining whether to hold a hearing in which a defendant would be allowed to present further evidence of adaptive deficiencies. The trial court gave Mr. Lane the opportunity to present further evidence of his alleged intellectual disabilities but determined that he did not meet his burden of proof. Remanding the case for a second evidentiary hearing or instructing

the trial court to reconsider the evidence presented at the first hearing would have been beyond the scope of the United States Supreme Court's order.

b. Do you believe it is appropriate to apply a bright-line test to determine whether a defendant has an "intellectual disability" that would preclude eligibility for capital punishment?

Hall v. Florida held that it was not appropriate to apply a bright-line test in that situation. I recognize that *Hall* is binding precedent from the U.S. Supreme Court.

9. In 2013, you retweeted a post with a quote attributed to the Roman senator and historian Tacitus: "Before, we had crimes that oppressed us; now, we have laws that oppress us."

a. What laws "oppress us"?

When I retweeted the post mentioned in the question, I was not referring to any current laws. Tacitus lived from 56 A.D. to 120 A.D. and his quote referred to laws as they existed in Rome at that time. As a student of history, I merely found the quote interesting. It was not intended as a commentary on modern laws.

10. In 2012, you retweeted a post that stated "I'm perfectly willing to throw people with sagging pants over the fiscal cliff."

a. What did you understand this quote to mean?

That particular post was originally tweeted from a parody account called "@NotKennyRogers." I can't imagine that this tweet was meant to be taken seriously by its author, and it certainly wasn't taken seriously by me. At the time I retweeted it, the media was focusing heavily on the United States economy and frequently mentioned what was referred to as "the fiscal cliff." The actual Kenny Rogers is a 79-year-old country music singer. I found the tweet to be a humorous parody on the way that a member of the older generation, such as Kenny Rogers, might comment on the clothing trends of the younger generation.

b. Why did you retweet it?

As stated above, I found the tweet to be a humorous parody referencing the news that was being discussed at the time.

11. In 2015, you tweeted: "Did you know that Alabama gun permits are valid in 25 other states?" You also linked to an article about Alabama lawmakers, including then-Senator Jeff Sessions, pushing to make it easier for Alabama handgun owners to bring their guns into other states.

a. Why did you tweet this?

Like many Alabamians, I have a gun permit. When I read the article in question, I

was not aware that Alabama gun permits were valid in 25 other states. I found that to be an interesting fact and thought other people might find it interesting as well.

b. Why did you believe it was important to notify your Twitter followers that Alabama gun permits are valid in 25 other states?

I did not feel that it was important to notify my Twitter followers of that fact. As stated in the previous question, I merely found it to be interesting and thought others might as well.

c. As you are no doubt aware, different states have different approaches to gun control. Do you believe that principles of federalism ought to allow different states to decide for themselves which other state's gun permits to honor?

As stated in question 4(a), opining on such Constitutional issues could give the appearance that I would not be impartial as a judge. Therefore, I do not believe it is appropriate to express my personal views on that issue.

12. Do you intend to maintain your Twitter account if confirmed as a federal judge?

If I am fortunate enough to be confirmed, I would conform my social medial behavior to the Code of Conduct for United States Judges and refrain from any activity that would violate its canons.

13. Please explain your view of the appropriate temperament of a judge. Do you believe you have the appropriate temperament to be a federal judge?

I believe that appropriate judicial temperament includes treating litigants and attorneys with respect when they appear before you, always being well prepared prior to any hearing or trial, and faithfully following the Constitution and law wherever the evidence in a case may lead. I do believe that I have the appropriate temperament to be a federal judge.

14. District court judges often say that the most difficult aspect of their job is sentencing defendants. Judges also comment that one of the most complicated legal areas are decisions involving the United States Sentencing Guidelines. How do you plan to familiarize yourself with the Guidelines, and, more importantly, how do you plan to prepare yourself to sentence criminal defendants?

I plan to study the guidelines extensively in order to quickly bring myself up to speed on federal sentencing. I have almost 11 years of experience handling criminal cases both as a trial judge and as an appellate judge. I believe that experience has prepared me to sentence defendants who have been convicted of crimes.

15. Please describe with particularity the process by which these questions were answered.

I received these questions on Wednesday, October 11, 2017, with instructions to return my

answers to the Office of Legal Policy the following Friday. I read through each question and researched certain issues regarding opinions I had written and other applicable laws. Afterwards, I wrote answers to each of the questions and submitted them to the Office of Legal Policy on Thursday, October 12, 2017.

Nomination of Liles Burke to the
United States District Court for the
Northern District of Alabama
Questions for the Record Submitted
October 11, 2017

QUESTIONS FROM SENATOR WHITEHOUSE

1. During his confirmation hearing, Chief Justice Roberts likened the judicial role to that of a baseball umpire, saying "'[m]y job is to call balls and strikes and not to pitch or bat."

    a. Do you agree with Justice Roberts' metaphor? Why or why not?

       I have not had occasion to watch Chief Justice Roberts's confirmation hearing in its entirety and I am not familiar with that quote or the context in which he said it. However, I agree with the premise that a judge should not attempt to take on the role of the advocate or the legislature in discharging his duties. To the extent that Chief Justice Roberts's quote is based on that premise, I agree with it.

    b. What role, if any, should the practical consequences of a particular ruling play in a judge's rendering of a decision?

       A judge's decision should not be influenced by his personal opinion regarding the potential outcome. A judge's role is to faithfully apply the law to the case before him.

    c. Federal Rule of Civil Procedure 56 provides that a court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact" in a case. Do you agree that determining whether there is a "genuine dispute as to any material fact" in a case requires a judge to make a subjective determination?

       No. Subjective determinations regarding the facts of a case should be decided by a jury. In such cases, summary judgment would not be appropriate.

2. During Justice Sotomayor's confirmation proceedings, President Obama expressed his view that a judge benefits from having a sense of empathy, for instance "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."

    a. What role, if any, should empathy play in a judge's decision-making process?

       While empathy certainly plays a role in how a judge should treat those who come before him, it should not factor in to the decision-making process. A judge's decision-making process should be based on the law and the precedent set out by the United States Supreme Court and the 11th Circuit.

b. What role, if any, should a judge's personal life experience play in his or her decision-making process?

   Please see question 2(a) above.

c. Do you believe you can empathize with "a young teenage mom," or understand what it is like to be "poor or African-American or gay or disabled or old"? If so, which life experiences lead you to that sense of empathy? Will you bring those life experiences to bear in exercising your judicial role?

   Yes, I do. Growing up in a small county in Alabama and attending public schools, I had the opportunity to spend time with people from many different backgrounds and family situations. As a state district court judge, especially in my work with the Marshall County Drug Court and the Marshall County Family Violence Court, I interacted with people from nearly all walks of life. Additionally, I have had the privilege of leading the Marshall County United Way fund drive. I believe those experiences, as well as the things I encounter in my daily life, have given me the ability to empathize with a diverse range of people. As to whether those life experiences will influence my role as a judge, please see my responses to questions 2(a) and 2(b) above.

3. While serving in the University of Alabama's Student Government Association, you defended a resolution which asked for the University's denial of recognition of a Gay/Lesbian Alliance. How can you assure members of the LGBTQ community and other vulnerable groups that you will protect and defend their constitutional rights given these prior stances?

   Respectfully, the resolution referenced in the question did not ask The University to deny recognition to the Gay/Lesbian Alliance. The only thing that the resolution sought was a legal opinion from the State Attorney General regarding whether the organization could be legally funded by a state institution under Alabama law at that time. At the time the opinion was sought in 1992, several colleges and universities were considering this issue. Additionally, there were many in the legislature and elsewhere who asserted that such funding was not legal under then existing Alabama law. If confirmed, I pledge to apply all binding precedent and to protect the Constitutional rights of every person who comes before my court. As an example of my commitment to protect such rights, I would point to my concurrence in *Williams v. State*, 184 So. 3d 1064 (Ala. Crim. App. 2015), an opinion in which the Alabama Court of Criminal Appeals held that a statute criminalizing consensual homosexual conduct was unconstitutional under *Lawrence v. Texas*, 539 U.S. 558 (2003), as applied to the defendant's conduct in that particular case.

4. Can you explain your reasoning in *Ankrom v. State*, in which you upheld a chemical endangerment of a child conviction for a pregnant woman who used cocaine? Why did you reject the conclusion of many other state supreme courts that had held child endangerment statutes inapplicable to fetuses? Do you think your conclusion that the

term "child" includes the more specific term "fetus" is consistent with a textualist or Originalist philosophy?

In *Ankrom*, the Court of Criminal Appeals was called upon to determine whether the term "child" in the state's chemical endangerment statute encompassed an unborn child. The Alabama Supreme Court had previously held that the term "child" encompassed an unborn child in the context of the State's wrongful-death-of-a-minor statute. Similarly, Alabama's homicide statute applies to unborn children. As an intermediate appellate court bound by the decisions of the Alabama Supreme Court, it would have been improper to analyze supreme court cases from other states that reached different conclusions in defining a term that had already been defined by the Alabama Supreme Court. The Court of Criminal Appeals' conclusion that the term "child" encompassed an unborn child, in the context of *Ankrom*, is consistent with a judicial philosophy committed to following precedent of higher courts. The Court's decision in *Ankrom* was subsequently affirmed by the Alabama Supreme Court.

5. Given Alabama's partisan election of judges and your close involvement with the Republican Party, how can you ensure the American people that you will be impartial as a district judge? Do you believe that your tweets on political issues, or your public endorsement of Republican candidates, violated Alabama's Canons of judicial ethics, which instruct judges to "avoid impropriety and the appearance of impropriety" and "regulate extra-judicial activities to minimize the risk of conflict with [their] judicial duties"? Why or why not? Do you believe you would need to change your social media presence as a judge on the District Court? Why or why not?

I pledge to the committee and the American people that my involvement with the Republican Party will not affect my decision making if I am fortunate enough to be confirmed as a district judge. Furthermore, I would point to my record as a state district court judge and as a state appellate judge as evidence that, despite being required to run for office in a partisan election, I have always ruled in an impartial manner.

I do not believe that any of my tweets violated Alabama's Canons of Judicial Ethics. Alabama's Canons and opinions interpreting them by the Judicial Inquiry Commission certainly take into account the fact that judges are required to run in partisan elections and, therefore, will be required to engage in certain political activity. In my years on the bench, I have never had a lawyer in one of my cases raise an objection regarding anything I have posted on social media. I would never post anything that could cause a litigant to believe that I would treat his or her case in anything but a fair and evenhanded manner.

If I am fortunate enough to be confirmed, I would conform my social media behavior to the Code of Conduct for United States judges and refrain from any activity that would violate its canons.

Nomination of Liles Clifton Burke, to be United States District Judge for the Northern District of Alabama
Questions for the Record
Submitted October 11, 2017

QUESTIONS FROM SENATOR COONS

1. With respect to substantive due process, what factors do you look to when a case requires you to determine whether a right is fundamental and protected under the Fourteenth Amendment?

   If confirmed as a district court judge, I would be bound to follow precedent from the United States Supreme Court and the 11th Circuit. If a case required me to make such a determination, I would consider the facts of the case and the arguments of the parties in light of the factors set out by the United States Supreme Court and the 11th Circuit.

   a. Would you consider whether the right is expressly enumerated in the Constitution?

      Please see my response to question number 1 above.

   b. Would you consider whether the right is deeply rooted in this nation's history and tradition? If so, what types of sources would you consult to determine whether a right is deeply rooted in this nation's history and tradition?

      Please see my response to question number 1 above.

   c. Would you consider whether the right has previously been recognized by Supreme Court or circuit precedent? What about the precedent of a court of appeals outside your circuit?

      Please see my response to question number 1 above.

   d. Would you consider whether a similar right has previously been recognized by Supreme Court or circuit precedent? What about whether a similar right has previously been recognized by a court of appeals outside your circuit?

      Please see my response to question number 1 above.

   e. Would you consider whether the right is central to "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life"? *See Planned Parenthood v. Casey*, 505 U.S. 833, 581 (1992); *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Casey*).

      Please see my response to question number 1 above.

   f. What other factors would you consider?

Please see my response to question number 1 above.

2. Does the Fourteenth Amendment's promise of "equal protection" guarantee equality across race and gender, or does it only require racial equality?

   The United States Supreme Court has extended the Equal Protection Clause of the Fourteenth Amendment to cover gender in many instances. I recognize that those decisions are binding precedent on district courts.

   a. If you conclude that it does require gender equality under the law, how do you respond to the argument that the Fourteenth Amendment was passed to address certain forms of racial inequality during Reconstruction, and thus was not intended to create a new protection against gender discrimination?

      I believe it would be inappropriate to opine on such issues because questions involving the scope of the Equal Protection Clause could come before me as a district judge. Commenting on such issues could give litigants the impression that I would not be impartial as a judge.

   b. If you conclude that the Fourteenth Amendment has always required equal treatment of men and women, as some originalists contend, why was it not until 1996, in *United States v. Virginia*, 518 U.S. 515 (1996), that states were required to provide the same educational opportunities to men and women?

      Please see my response to question 2(a) above.

   c. Does the Fourteenth Amendment require that states treat gay and lesbian couples the same as heterosexual couples? Why or why not?

      Please see my response to question 2(a) above.

   d. Does the Fourteenth Amendment require that states treat transgender people the same as those who are not transgender? Why or why not?

      Please see my response to question 2(a) above.

3. The Supreme Court has decided several key cases addressing the scope of the right to privacy under the Constitution.

   a. Do you agree that there is a constitutional right to privacy that protects a woman's right to use contraceptives?

      The United States Supreme Court has held that such a right exists and that holding is binding precedent upon the district courts.

b. Do you agree that there is a constitutional right to privacy that protects a woman's right to obtain an abortion?

The United States Supreme Court has held that there is a constitutional right to privacy that protects a woman's right to obtain an abortion. As with all Supreme Court precedent, it is binding upon the district courts.

c. Do you agree that there is a constitutional right to privacy that protects intimate relations between two consenting adults, regardless of their sexes or genders?

The United States Supreme Court has held that such a right exists. Accordingly, that is binding precedent upon the district courts.

d. If you do not agree with any of the above, please explain whether these rights are protected or not and which constitutional rights or provisions encompass them.

Please see my answers to questions 3(a)-3(c) above.

4. In *United States v. Virginia*, 518 U.S. 515, 536 (1996), the Court explained that in 1839, when the Virginia Military Institute was established, "Higher education at the time was considered dangerous for women," a view widely rejected today. In *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600-01 (2013), the Court reasoned, "As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. . . . Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser." This conclusion rejects arguments made by campaigns to prohibit same-sex marriage based on the purported negative impact of such marriages on children.

a. When is it appropriate to consider evidence that sheds light on our changing understanding of society?

As a district court judge, I would be bound by precedent from the United States Supreme Court and the 11th Circuit. Unless either of those courts specifically directed a district court to consider such evidence, it would not be appropriate to consider such evidence.

b. What is the role of sociology, scientific evidence, and data in judicial analysis?

If confirmed, I would follow precedent from the United States Supreme Court and the 11th Circuit regarding those issues. I would also follow the Federal Rules of Evidence as they relate to the admission of such evidence.

5. In *Lane v. State*, 169 So. 3d 1076 (Ala. Crim. App. 2013), you authored an opinion upholding the death penalty for a defendant who asserted that he had mental deficiencies that made him ineligible to receive the death penalty. The Supreme Court subsequently decided

Hall v. Florida, 134 S. Ct. 1986 (2014), striking down Florida's bright-line rule defining an intellectual disability as an IQ of 70 or below, and ruling instead that a defendant must have the opportunity to present evidence of a disability. On remand, you again authored an opinion in *Lane*, upholding the death sentence without any further presentation of evidence. Why did you find further consideration of evidence to be unnecessary?

Before *Hall v. Florida*, courts in Florida used a bright-line rule when deciding whether a capital defendant would be allowed to present further evidence of an intellectual disability. Specifically, Florida courts refused to consider further evidence of intellectual disabilities if a defendant scored 70 or higher on an IQ test. *Hall* ruled that bright-line cutoff to be improper and held that courts must consider the fact that scores on IQ tests can fluctuate within a "standard error of measurement." *Hall* held that defendants whose IQ fell within the range of the "standard error of measurement" should be allowed to present further evidence of intellectual disabilities at an evidentiary hearing. In *Lane*, the defendant had an IQ of 70, therefore, his IQ was within the "standard error of measurement." The trial court held an evidentiary hearing and allowed Mr. Lane to call witnesses, including an expert witness, to present evidence of his alleged disability. That was all that *Hall* required. Remanding the case for a second evidentiary hearing or instructing the trial court to reconsider the evidence presented at the first hearing would have been outside the scope of the United States Supreme Court's order.

6. Last year, you authored an opinion rejecting a challenge to Alabama's sexual deviance law in *Gilbert v. State*, 220 So. 3d 1099 (Ala. Crim. App. 2016). The defendant argued that the law was unconstitutional in light of *Lawrence v. Texas*, 539 U.S. 558 (2003). However, you asserted that the defendant did not have standing to bring a challenge under *Lawrence* because his conduct did not fall within the conduct envisioned in *Lawrence*. Why, in your view, did the defendant's conduct not fall within the scope of the conduct envisioned in *Lawrence*?

   In that case, the defendant pleaded guilty to the charged offense. However, the defendant did not place any evidence in the record in the form of sworn testimony, admitted evidence, or stipulated facts which would tend to indicate whether the defendant's conduct was consensual or not. Therefore, the Court of Criminal Appeals had no way to determine whether the defendant's conduct was protected by *Lawrence*. I also would note my concurrence in *Williams v. State*, 184 So. 3d 1064 (Ala. Crim. App. 2015), an opinion in which the Alabama Court of Criminal Appeals held that a statute criminalizing consensual homosexual conduct was unconstitutional under *Lawrence v. Texas*, 539 U.S. 558 (2003), as applied to the defendant's conduct in that particular case. In that case, there was evidence in the record which indicated that the conduct was consensual.