

Questions for the Record for James David Cain, Jr.
From Senator Mazie K. Hirono

1. As part of my responsibility as a member of the Senate Judiciary Committee and to ensure the fitness of nominees, I am asking nominees to answer the following two questions:

a. Since you became a legal adult, have you ever made unwanted requests for sexual favors, or committed any verbal or physical harassment or assault of a sexual nature?

No.

b. Have you ever faced discipline, or entered into a settlement related to this kind of conduct?

No.

2. Only a small percentage of your legal work has taken place in federal courts. And, only one of the ten most significant litigated matters you identified on your Senate Judiciary Questionnaire was a federal district court case.

Please describe your experience(s) that you feel qualifies you to be a federal district court judge.

I have had an extensive litigation practice for the past 25 years in both federal and state courts. This practical, courtroom experience has trained me in both the substantive and procedural aspects of the law, while also affording me significant insights into the conduct of the judicial process from all aspects. I feel these experiences qualify me to undertake the role of federal district court judge.

In my Senate Judiciary Questionnaire, I tried to identify cases involving different areas of the law that illustrate the breadth of my litigation experience, regardless of venue. The federal court case you reference is the matter of *Whitten Foundation v. General Star Indemnity*, which was actually three separate lawsuits, with one filed in each of the Eastern, Middle and Western Districts of Louisiana. The following is a sampling of additional cases I have litigated in federal court:

(1) Michael Derek Farr and Sharon Farr Burt v. Tokai Rika Company, Limited, Goodyear Tire & Rubber Company, et al, Civil Action No. 3:99-cv-891WS, United States District Court, Southern District of Mississippi, Jackson Division.

I represented the plaintiff, Derek Farr, along with co-counsel, in a products liability suit as a result of a defective seatbelt manufactured by Tokai Rika. This case was tried before a jury to verdict.

- (2) Paul Johnson and Lisa Johnson v. Landstar Ranger, Liberty Mutual Fire Ins. Co., et al, Civil Action No. 2:00-CV-2222, United States District Court, Western District of Louisiana, Lake Charles Division

I represented Plaintiff, Paul Johnson, who was involved in an accident with an 18-wheeler owned and operated by Landstar Ranger. Mr. Johnson sustained serious personal injuries in the accident. This case was tried before a jury to verdict in favor of Mr. Johnson.

- (3) Aaron D. Isbell, Sr., et al v. NPC International, Inc., d/b/a Pizza Hut, United States District Court, Western District of Louisiana, Civil Action No. 2:00-CV-2498

I represented the plaintiffs in this products liability action against NPC International, Inc. This case was settled prior to trial.

- (4) Patricia Spicer v. Stapleton Corporation, United States District Court, Western District of Louisiana, Civil Action No. 2:04-CV-1297

I represented the plaintiff, Ms. Patricia Spicer, in a products liability case. This case was tried before a jury to verdict in favor of the defendant.

- (5) Vanguard Synfuels, LLC v. Lexington Insurance Company, Civil Action No. 1:12-CV-2056, United States District Court, Western District of Louisiana, Alexandria Division

I represented Vanguard Synfuels, LLC. Vanguard Synfuels, LLC, experienced a fire at its renewable energy facility in Central Louisiana and made a claim pursuant to its general liability policy of insurance with Lexington Insurance Company. Lexington Insurance Company denied the claim, and this action ensued. This case settled prior to trial.

3. In your Senate Judiciary Questionnaire, you described your pro bono work as including "represent[ing] indigent defendants in criminal matters when requested by the Courts." But you did not identify any specific pro bono matters on your Questionnaire.

Please describe the specific legal matters you have worked on a pro bono basis.

In the early- to mid-2000's, I was appointed on multiple occasions by the 14th Judicial District Court, Calcasieu Parish, Louisiana, to represent indigent criminal defendants. I never refused such an assignment. I have not been able to locate the actual files. I contacted the Calcasieu Parish Clerk of Court's Office in an effort to obtain the records of any such matters. As a result of an intervening software conversion by the Clerk of Court, that office was unable to conduct a search for those records. To the best of my recollection, these cases involved charges of simple burglary, theft, possession of stolen things greater than \$500.00, and assault.

Nomination of James David Cain, Jr.
United States District Court for the Western District of
Louisiana Questions for the Record
Submitted November 20, 2018

QUESTIONS FROM SENATOR

BOOKER

1. In your Questionnaire responses, you noted that your practice at your firm since 2007 “has included litigation for Lake Charles City Police Department and Calcasieu Parish Sheriff’s Department in excessive force cases.”¹ One such case was *Deshotels v. Norsworthy*, in which you represented the City of Lake Charles in a lawsuit filed against police officers arising from the death of Dr. Sheldon J. Deshotels, Jr., who suffocated on his own vomit and died after a struggle with police officers during his arrest.²

- a. How did you become involved in this representation?

This case was originally filed by the Deshotels family in September 2008. I enrolled in the case in March 2009 at the request of the Mayor of the City of Lake Charles and the Lake Charles City Attorney. Because of my litigation experience, including in federal court, I was asked to advise and to assist the in-house Assistant City Attorney, who was primarily responsible for the case.

- b. What was the extent of your role in this case?

I served as co-counsel for the City of Lake Charles with the in-house Assistant City Attorney for the City of Lake Charles.

- c. Did you have any personal concerns about policies or practices that were in place regarding the use of force at this or any other police department you represented?

My understanding of the Code of Conduct for United States Judges prohibits me, as a federal judicial nominee, from expressing a view on matters that might come before me if I am confirmed. I believe the subject matter of this question falls within that prohibition. Moreover, the rules of ethics pertaining to the attorney/client privilege prohibit me from commenting upon my advice to, or discussions had with, my client. I believe the subject matter of this question falls within that prohibition.

- d. In the course of your legal practice representing police departments in excessive-force cases, have you ever made any recommendations regarding changes to improve departmental policies involving the use of force?

The rules of ethics pertaining to the attorney/client privilege prohibit me from

¹ SJQ at 10.

² See *Deshotels v. Norsworthy*, No. 08-1378, 2010 WL 785664 (W.D. La. Mar.8, 2010).

commenting upon my advice to, or discussions had with, my client. I believe the subject matter of this question falls within that prohibition.

- e. In its final report in 2015, the President's Task Force on 21st-Century Policing made the following recommendation: "Paramount among the policies of law enforcement organizations are those controlling use of force. Not only should there be policies for deadly and nondeadly uses of force but a clearly stated 'sanctity of life' philosophy must also be in the forefront of every officer's mind. This way of thinking should be accompanied by rigorous practical ongoing training in an atmosphere of nonjudgmental and safe sharing of views with fellow officers about how they behaved in use of force situations."³ Based on your work in your legal practice, as well as any other relevant experiences, do you agree?

Yes.

2. In your Questionnaire responses, you stated that you "have represented indigent defendants in criminal matters when requested by the Courts."⁴ Can you describe one or more of these pro bono representations of indigent defendants?

In the early- to mid-2000's, I was appointed on multiple occasions by the 14th Judicial District Court, Calcasieu Parish, Louisiana, to represent indigent criminal defendants. I never refused such an assignment. I have not been able to locate the actual files. I contacted the Calcasieu Parish Clerk of Court's Office in an effort to obtain the records of any such matters. As a result of an intervening software conversion by the Clerk of Court, that office was unable to conduct a search for those records. To the best of my recollection, these cases involved charges of simple burglary, theft, possession of stolen things greater than \$500.00, and assault.

3. According to a Brookings Institution study, African Americans and whites use drugs at similar rates, yet blacks are 3.6 times more likely to be arrested for selling drugs and 2.5 times more likely to be arrested for possessing drugs than their white peers.⁵ Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.⁶ These shocking statistics are reflected in our nation's prisons and jails. Blacks are five times more likely than whites to be incarcerated in state prisons.⁷ In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.⁸

- a. Do you believe there is implicit racial bias in our criminal justice system?

³ FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST-CENTURY POLICING 19 (2015), https://cops.usdoj.gov/pdf/taskforce/TaskForce_FinalReport.pdf.

⁴ SJQ at 20.

⁵ Jonathan Rothwell, *How the War on Drugs Damages Black Social Mobility*, BROOKINGS INST. (Sept. 30, 2014), <https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility>.

⁶ *Id.*

⁷ Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, SENTENCING PROJECT (June 14, 2016), <http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons>.

⁸ *Id.*

Yes.

- b. Do you believe people of color are disproportionately represented in our nation's jails and prisons?

Yes.

- c. Prior to your nomination, have you ever studied the issue of implicit racial bias in our criminal justice system? Please list what books, articles, or reports you have reviewed on this topic.

I have not studied the issue of implicit racial bias in the criminal justice system.

4. According to a Pew Charitable Trusts fact sheet, in the 10 states with the largest declines in their incarceration rates, crime fell by an average of 14.4 percent.⁹ In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.¹⁰

- a. Do you believe there is a direct link between increases in a state's incarcerated population and decreased crime rates in that state? If you believe there is a direct link, please explain your views.

I have not studied whether a direct link exists between increases in a state's incarcerated population and decreased crime rates in that state, and so I am unable to offer any informed comments on this issue.

- b. Do you believe there is a direct link between decreases in a state's incarcerated population and decreased crime rates in that state? If you do not believe there is a direct link, please explain your views.

See my answer to Question 4(a.).

5. Do you believe it is an important goal for there to be demographic diversity in the judicial branch? If not, please explain your views.

Yes.

6. Do you believe that *Brown v. Board of Education*¹¹ was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

I believe racism and/or segregation in any form is reprehensible and wrong. I will

⁹ Fact Sheet, *National Imprisonment and Crime Rates Continue To Fall*, PEW CHARITABLE TRUSTS (Dec. 29, 2016), <http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2016/12/national-imprisonment-and-crime-rates-continue-to-fall>.

¹⁰ *Id.*

¹¹ 347 U.S. 483 (1954).

faithfully apply and follow the Supreme Court's decision in *Brown v. Board of Education*, as well as all binding precedent decisions of the Supreme Court and the U.S. Fifth Circuit Court of Appeals. It is my understanding that Canon 3(A)(6) and Canon 2(A) of the Code of Conduct for United States Judges, as well as ABA Rule 2.10(B), generally address this issue.

7. Do you believe that *Plessy v. Ferguson*¹² was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

The United States Supreme Court found that *Plessy v. Ferguson* was wrongly decided. *Brown v. Board of Education* overturned *Plessy*, and if I am fortunate enough to be confirmed, I will faithfully and without hesitation apply *Brown*.

8. Has any official from the White House or the Department of Justice, or anyone else involved in your nomination or confirmation process, instructed or suggested that you not opine on whether any past Supreme Court decisions were correctly decided?

Prior to my hearing on November 13, 2008, I met with individuals from the Department of Justice. My responses, both during the hearing and to all of the questions submitted to me since the hearing, are my own.

9. President Trump has stated on Twitter: "We cannot allow all of these people to invade our Country. When somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came."¹³ Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

My understanding of the Code of Conduct for United States Judges prohibits me, as a federal judicial nominee, from expressing a view on matters that might come before me if I am confirmed. I believe the subject matter of this question falls within that prohibition. Nevertheless, I believe every litigant is entitled to be treated with dignity and fairness in the Courts. If I am fortunate enough to be confirmed to the U.S. District Court, I will apply all binding precedent decisions of the United States Supreme Court and U.S. Fifth Circuit Court of Appeals in any immigration cases that come before me.

¹² 163 U.S. 537 (1896).

¹³ Donald J. Trump (@realDonaldTrump), TWITTER (June 24, 2018, 8:02 A.M.), <https://twitter.com/realDonaldTrump/status/1010900865602019329>.

**Questions for the Record from Senator Kamala D. Harris
Submitted November 20, 2018
For the Nomination of**

James D. Cain, to the U.S. District Court for the Western District of Louisiana

1. In 2008, as a partner at Loftin, Cain & LeBlanc, you defended the City of Lake Charles, Louisiana in *Deshotels v. Norsworthy*, a case involving police excessive use of force. After police officers deployed a taser on Mr. Deshotels, he was unable to stand, his face turned purple, and he was unable to breathe. The officers allegedly failed to seek help, and Mr. Deshotels later suffocated and died.

- a. **Do you believe the police officers acted appropriately in this case?**

This case was originally filed by the Deshotels family in September 2008. I enrolled in the case in March 2009 at the request of the Mayor of the City of Lake Charles and the Lake Charles City Attorney. Because of my litigation experience, including in federal court, I was asked to advise and to assist the in-house Assistant City Attorney, who was primarily responsible for the case. The rules of ethics pertaining to the attorney/client privilege prohibit me from commenting upon my advice to, or discussions had with, my client, the City of Lake Charles, or my co-counsel.

- b. **Do you believe it was appropriate for the City of Lake Charles to settle the wrongful death claims, rather than litigate them in court?**

Yes.

- c. **Did you submit any filings on behalf of the City of Lake Charles in *Deshotels*?**

Yes. The only pleading prepared and submitted by me in this matter was a motion to enroll as co-counsel for the City of Lake Charles.

- i. **If the answer is “yes,” can you make those filings available to the Senate Judiciary Committee?**

Yes. I will gladly provide a copy of the motion to enroll as co-counsel prepared and submitted by me in this matter if the Senate Judiciary Committee so requests.

2. District court judges have great discretion when it comes to sentencing defendants. It is important that we understand your views on sentencing, with the appreciation that each case would be evaluated on its specific facts and circumstances.

- a. **What is the process you would follow before you sentenced a defendant?**

If I am fortunate enough to be confirmed to the United States District Court, I will faithfully apply the laws of the United States pertaining to sentencing of criminal defendants, including the Federal Rules of Criminal Procedure and the provisions of 18 U.S.C. § 3551, et seq. In doing so, I would always carefully review and consider the pre-sentencing investigation report and any associated written materials, the evidence presented at trial, the post-trial sentencing memoranda submitted by the parties, any victim statements, any statements of the defendant, and arguments of counsel. I would evaluate all of this information in light of applicable sentencing options and guidelines, including the factors outlined in 18 U.S.C. § 3553(a) and departure factors discussed in the sentencing guidelines, together with case law interpreting and applying the pertinent laws, guidelines and factors. At the end of this process, I would impose a sentence intended to achieve the sentencing purposes established by Congress.

b. As a new judge, how do you plan to determine what constitutes a fair and proportional sentence?

I would follow the steps outlined in my answer to Question 2(a.)

c. When is it appropriate to depart from the Sentencing Guidelines?

Following the Supreme Court decision, *United States v. Booker*, 543 U.S. 220 (2005), sentencing guidelines are advisory and not binding on district court judges. The guidelines include appropriate grounds to depart from sentencing guideline ranges. The factors enumerated in 18 U.S.C. § 3553(a) also may warrant departure from sentencing guideline ranges.

d. Judge Danny Reeves of the Eastern District of Kentucky—who also serves on the U.S. Sentencing Commission—has stated that he believes mandatory minimum sentences are more likely to deter certain types of crime than discretionary or indeterminate sentencing.¹

i. Do you agree with Judge Reeves?

If I am fortunate enough to be confirmed to the United States District Court, I will be required to follow the law pertaining to mandatory minimum sentences, regardless of my personal views. I have not studied whether mandatory minimum sentences serve to deter any specific type(s) of crime, thus I am not in a position to comment on this issue.

ii. Do you believe that mandatory minimum sentences have provided for a more equitable criminal justice system?

¹ <https://www.judiciary.senate.gov/imo/media/doc/Reeves%20Responses%20to%20QFRs1.pdf>

Mandatory minimum sentences were established by the United States Congress. I believe the appropriateness of such legislation is a political issue, and, therefore, pursuant to Canon 5 of the Code of Conduct for United States Judges, it would be inappropriate for me to publically state an opinion on this issue.

iii. **Please identify instances where you thought a mandatory minimum sentence was unjustly applied to a defendant.**

Please see my answer to Question 2(d)(ii.).

iv. Former-Judge John Gleeson has criticized mandatory minimums in various opinions he has authored, and has taken proactive efforts to remedy unjust sentences that result from mandatory minimums.² **If confirmed, and you are required to impose an unjust and disproportionate sentence, would you commit to taking proactive efforts to address the injustice, including:**

1. **Describing the injustice in your opinions?**

The power to enact legislation pertaining to the imposition of mandatory minimum sentences is exclusively within the power of the United States Congress. Charging defendants under such legislation and requesting imposition of mandatory minimum sentences is exclusively within the power of the Executive Branch. I believe in the event I was required to impose a sentence that would result in extreme injustice, I would consider commenting in my opinion.

2. **Reaching out to the U.S. Attorney and other federal prosecutors to discuss their charging policies?**

Generally, decisions regarding how defendants are to be charged falls within the discretion of the federal prosecutor, and principles of separation of powers suggest federal judges should be careful not to encroach upon that discretion.

3. **Reaching out to the U.S. Attorney and other federal prosecutors to discuss considerations of clemency?**

Federal clemency is exclusively a function of the Executive Branch. Judges should respect this authority. See *Harbison v. Bell*, 556 U.S. 180 (2009).

² See, e.g., “Citing Fairness, U.S. Judge Acts to Undo a Sentence He Was Forced to Impose,” NY Times, July 28, 2014, <https://www.nytimes.com/2014/07/29/nyregion/brooklyn-judge-acts-to-undo-long-sentence-for-francois-holloway-he-had-to-impose.html>

- e. 28 U.S.C. Section 994(j) directs that alternatives to incarceration are “generally appropriate for first offenders not convicted of a violent or otherwise serious offense.” **If confirmed as a judge, would you commit to taking into account alternatives to incarceration?**

Yes. If confirmed as a United States District Court Judge, I would assess the prudence of alternatives to incarceration in appropriate cases where permitted by applicable law and justified by the facts of the case.

- 3. Judges are one of the cornerstones of our justice system. If confirmed, you will be in a position to decide whether individuals receive fairness, justice, and due process.

- a. **Does a judge have a role in ensuring that our justice system is a fair and equitable one?**

Yes.

- b. **Do you believe there are racial disparities in our criminal justice system? If so, please provide specific examples. If not, please explain why not.**

Yes. I have not studied this issue in depth, however, and so I cannot provide specific examples. If I am fortunate enough to be confirmed to the United States District Court, I pledge that all people who appear before me will be treated respectfully and fairly.

- 4. If confirmed as a federal judge, you will be in a position to hire staff and law clerks.

- a. **Do you believe it is important to have a diverse staff and law clerks?**

Yes.

- b. **Would you commit to executing a plan to ensure that qualified minorities and women are given serious consideration for positions of power and/or supervisory positions?**

If I am fortunate enough to be confirmed to the United States District Court, I will seek applicants from a wide variety of backgrounds and give consideration to all applicants regardless of their age, gender, sexual orientation, race, color, national origin, or religion.