Responses of Robert N. Chatigny
Nominee to be U.S. Circuit Judge for the Second Circuit
to the Written Questions of Senator Tom Coburn, M.D.

1. **What principles of constitutional interpretation would you look to in analyzing whether a particular statute infringes upon some individual right?**

   Response: In any given case, I look to relevant precedents of the Supreme Court and the Second Circuit to determine the principles of constitutional interpretation that should be applied.

2. **Please describe in your own words the criteria and legal methodology the Supreme Court employs to determine whether a right is a "fundamental right?"**

   Response: Generally speaking, the Supreme Court considers a right to be fundamental only if it is expressly guaranteed in the Constitution and deeply rooted in our history and legal tradition.

3. **In a 5-4 majority opinion, the U.S. Supreme Court recently held in *District of Columbia v. Heller*, 554 U.S. ___ (2008), that the Second Amendment of the United States Constitution "protects an individual right to possess a firearm unconnected to service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home." As Justice Scalia's opinion in *Heller* pointed out, Sir William Blackstone, the preeminent authority on English law for the Founders, cited the right to bear arms as one of the fundamental rights of Englishmen. Do you personally believe the right to bear arms is a fundamental right?**

   Response: This issue is currently pending before the Supreme Court in *McDonald v. City of Chicago* (No. 08-1521). Accordingly, I do not believe it would be appropriate for me to express a view at this time. In my work as a judge, I will faithfully follow the Supreme Court's decisions in *Heller* and *McDonald*.

   a. **Do you believe that explicitly guaranteed substantive rights, such as those guaranteed in the Bill of Rights, are also fundamental rights? Please explain why or why not.**

      Response: I look to Supreme Court precedent to determine which explicitly guaranteed substantive rights are fundamental. The Court has recognized that some but not all such rights are fundamental. If I were called upon to decide whether an explicitly guaranteed substantive right should be deemed to be fundamental, I would resolve the issue by faithfully and impartially applying relevant Supreme Court and Second Circuit precedent.

   b. **Is it your understanding of Supreme Court precedent that those provisions of the Bill of Rights that embody fundamental rights are deemed to apply against the States? Please explain why or why not.**

Response: Yes. If the Supreme Court decides that a right is fundamental, the right applies against the States.

c. ***Heller* further stated that "it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right." Do you believe that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right? Please explain why or why not.**

Response: Yes. *Heller* makes it clear that the Second Amendment codifies a preexisting right.

d. **Some have criticized the Supreme Court's decision in *Heller* saying it "discovered a constitutional right to own guns that the Court had not previously noticed in 220 years." Do you believe that *Heller* "discovered" a new right, or merely applied a fair reading of the plain text of the Second Amendment?**

Response: I believe the Court's decision is based on a fair reading of the plain text of the Second Amendment.

e. **During his State of the Union address, the President said the Supreme Court's decision in *Citizens United v. FEC*, 558 U.S. ___ (2010), "reversed a century of law" and others have stated that it abandoned "100 years of precedent." Do you agree that the Court reversed a century of law or 100 years of precedent in the *Citizens United* decision? Please explain why or why not.**

Response: In *Citizens United,* the Court stated that it was overruling its decision in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and part of its decision in *McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003). I have no reason to question the Court's statement.

4. **At your hearing when discussing the proper role of a judge, you testified that they would "avoid injecting their own policy preferences into the matter." Do you believe Judge Stephen Reinhart avoided injecting his own policy preferences in his March 11, 2010 dissent in *Newdow v. Rio Linda Union School District* (05-17257) when he ruled that including "Under God" in the pledge was unconstitutional? Please explain.**

Response**:** I have not had an opportunity to consider the opinions in *Newdow*. If a future case required me to decide an issue like the one presented there, I would give the majority opinion careful consideration as a precedent of a court of appeals, although it would not be binding on me.

a. **Do you believe Judge Diane Wood avoided injecting her own policy preferences in her decision in the case of *NOW v. Scheidler?* Please explain.**

Response: I have not had an opportunity to consider Judge Wood's opinion but it was reversed by the Supreme Court in *Scheidler v. National Organization for Women*, 547 U.S. 9 (2006) . I will follow the Supreme Court's decision in *Scheidler* in cases that come before me.

b. **Do you believe Judge Reinhart avoided injecting his own policy preferences in his decision in *Silveira v. Lockyer*, 312 F.3d 1052, which held that the right to bear arms is a collective right? Please explain.**

Response: I have not had an opportunity to consider Judge Reinhardt's opinion but the Supreme Court's decision in *Heller* makes it clear that the right to bear arms is an individual right. I will follow the Supreme Court's decision in *Heller* in cases that come before me.

c. **Do you believe Judge Reinhart avoided injecting his own policy preferences in his decision in *Gonzales v. Carhart*, 435 F.3d 1163, striking down the Partial Birth Abortion Ban? Please explain.**

Response: I have not had an opportunity to consider Judge Reinhardt's opinion but it was reversed by the Supreme Court in *Gonzales v. Carhart*, 550 U.S. 124 (2007) . I will follow the Supreme Court's decision in *Carhart* in cases that come before me.

5. **Please provide a summary of and citations for all the death penalty cases, other than the matters involving Michael Ross, in which you were involved as a lawyer.**

Response: I was not involved in any such cases as a lawyer.

6. **Please provide a summary of and citations for all the death penalty cases, other than the matters involving Michael Ross, in which you participated as a judge.**

Response: I was not involved in any such cases as a judge.

7. **Please list and provide citations for and a summary of all materials you have written that relate to the death penalty. If not publicly available, please provide copies.**

Response: The only materials I have written relating to the death penalty are the following opinions in the Ross litigation: *Ross ex rel. Smyth v. Lantz*, 392 F. Supp. 2d 236 (D. Conn. 2005), motion to vacate stay denied and appeal dismissed, 396 F.3d 512 (2d Cir. 2005), stay vacated, 543 U.S. 1134 (2005); and *Ross v. Rell*, Case No. 05-CV-130, 2005 WL 181883 (D. Conn. Jan. 26, 2005), order vacated, 398 F.3d 203 (2d Cir. 2005), stay vacated, 534 U.S. 1134 (2005).

8. **Please list and provide citations for and a summary of all statements, talks, and speeches you have made that relate to the death penalty. If not publicly available, please provide copies.**

   Response: I have given no talks or speeches relating to the death penalty. With regard to public statements relating to the death penalty, I have testified before this Committee that I would have no problems applying the death penalty or upholding capital punishment. During a telephone conference with counsel in the Ross litigation, I similarly stated that I have no moral or philosophical opposition to the death penalty per se, nor any beliefs that would stand in the way of implementing a death penalty in circumstances where the law called for it to be done. *Ross v. Rell*, Case No. 05-CV-130, 1/26/05 Transcript at 25-26. To the best of my recollection, I have made no other public statements relating to the death penalty.

9. **Please provide a summary of and citations for all the child pornography cases in which you were involved as a lawyer, including the sentencing range called for under the guidelines, the sentence for which you argued and the reasons therefore, and the sentence that was ultimately issued by the court.**

   Response: I was not involved in any such cases as a lawyer.

10. **Please provide a summary of and citations for all the child pornography cases, in which you participated as a judge, not limited to those in which you departed downward. Please include the sentencing range called for under the guidelines and the sentence that you issued.**

    Response:

    United States v. John Salmon, Case No. 97-CR-77. The defendant pleaded guilty to publishing a notice online seeking to exchange child pornography. The guideline range was 15 to 21 months. The defendant was sentenced to 9 months followed by supervised release for 2 years with a special condition requiring him to spend the first 6 months on home confinement with electronic monitoring. Substituting 6 months of home confinement with electronic monitoring for 6 months of imprisonment comported with the statutory requirement that the sentence be sufficient but not greater than necessary partly because of the impact of the case on the defendant (he had resigned from his position as a police officer, his wife had divorced him and he had been hospitalized as a protection against suicide). The Government did not appeal.

    United States v. Mark Clark, Case No. 99-CR-33. The defendant pleaded guilty to possession of child pornography. The guideline range was 15 to 21 months. The defendant was sentenced to 15 months followed by supervised release for 3 years.

    United States v. Paul Musacchio, Case No. 99-CR-120. The defendant pleaded guilty to possession of child pornography. The guideline range was 15 to 21 months. The defendant was placed on probation for two years with a special condition that he spend the first 4 months on home confinement with electronic monitoring. In addition, he was required to pay a fine of $4,000. A downward departure to a sentence of probation was recommended by the Probation Office based in part on the defendant's diminished capacity resulting from his extraordinarily traumatic upbringing. I do not believe the Government opposed the departure.

United States v. Philip Bunker, Case No. 00-CR-85. The defendant pleaded guilty to possession of child pornography. The guideline range was 15 to 21 months. The defendant was sentenced to 15 months followed by supervised release for 3 years and a fine of $4,000.

United States v. James Chitty, Case No. 01-CR-231. The defendant pleaded guilty to possession of child pornography. The applicable guideline range was 27 to 33 months. The defendant was sentenced to 21 months followed by supervised release for 3 years. The sentence was based on the defendant's reduced mental capacity. The Government did not appeal.

United States v. Stephen Festa, Case No. 04-CR-233. The defendant pleaded guilty to possession of child pornography. The guideline range was 21 to 27 months. The defendant sought a below-guideline sentence based on the effects of abuse he experienced as a child. I sentenced him to 18 months followed by supervised release for 3 years. The Government did not appeal

United States v. Wayne Coleman, Case No. 04-CR-289. The defendant pleaded guilty to possession of child pornography. The guideline range was 24 to 30 months. The defendant was sentenced to 24 months followed by supervised release for 3 years.

United States v. Matthew Dole, Case No. 06-CR-262. The defendant pleaded guilty to possession of child pornography. The guideline range was 33 to 41 months. The defendant was sentenced to one year and one day followed by supervised release for 10 years. A traumatic brain injury substantially reduced the defendant's ability to appreciate the wrongfulness of his offense conduct. The Government did not appeal.

United States v. Louis Graziani, Case No. 07-CR-281. The defendant pleaded guilty to possession of child pornography. The guideline range was 51 to 63 months. The defendant was sentenced to 24 months followed by supervised release for 10 years. The sentence was based on the defendant's extraordinary post-arrest rehabilitation from drug addiction and alcoholism and family circumstances. The Government did not appeal.

United States v. Dennis Hartigan, Case No. 08-CR-15. The defendant pleaded guilty to possession of child pornography. The guideline range was 60 to 71 months. The defendant was sentenced to 60 months followed by supervised release for 10 years.

United States v. Roger Chappell, Case No. 09-CR-10. The defendant pleaded guilty to possession of child pornography. The guideline range was 37 to 46 months. The defendant was sentenced to 14 months followed by supervised release for 5 years and a fine of $3,000. The sentence was based on the following combination of factors: the defendant committed the offense while suffering from a significantly reduced mental capacity stemming from sexual abuse and neglect he experienced as a child; his offense conduct was in marked contrast to his record of prior good works, which had resulted in significant benefit to the community; for 15 months prior to the sentencing, he had devoted himself to rehabilitation through intensive individual and group therapy; he was extraordinarily remorseful and appeared to pose no threat to the community; and he had a number of significant medical conditions. The Government did not appeal.

United States v. Christopher House, Case No. 09-CR-26. The defendant pleaded guilty to possession of child pornography. The guideline range was 37 to 46 months. The defendant was sentenced to one year and one day followed by supervised release for 10 years. The sentence was based on the following combination of factors: with one exception the images possessed by the defendant were of children in poses in contrast to pictures of children being sexually assaulted; the defendant, who was very remorseful, had been unusually cooperative with law enforcement; and, as a result of his offense conduct, the defendant had been discharged from the U.S. Navy, which was significant because he had planned on a military career. The Government did not appeal.

11. **Please provide a summary of and citations for all the sex tourism cases in which you were involved as a lawyer, including the sentencing range called for under the guidelines, the sentence for which you argued and the reasons therefore, and the sentence that was ultimately issued by the court.**

    Response: I was not involved in any such cases as a lawyer.

12. **Please provide a summary of and citations for all the sex tourism cases, in which you participated as a judge, not limited to those in which you departed downward. Please include the sentencing range called for under the guidelines and the sentence that you issued.**

    Response:

    United States v. Dennis Calheim, Case No. 01-CR-77. The defendant pleaded guilty to interstate travel for the purpose of engaging in illicit sexual conduct with a minor. The guideline range was 30 to 37 months. The defendant was sentenced to 34 months followed by supervised release for 3 years.

    United States v. Michael Albertson, Case No. 05-CR-10. The defendant pleaded guilty to interstate travel for the purpose of engaging in illicit sexual conduct with a minor. The guideline range was 63 to 78 months. The defendant was sentenced to 78 months followed by supervised release for 10 years and required to pay restitution in the amount of $8,600.

    United States v. Jason Palmeira, Case No. 07-CR-116. The defendant pleaded guilty to interstate travel for the purpose of engaging in illicit sexual conduct with a minor. The guideline range was 57 to 71 months. The defendant was sentenced to 36 months followed by supervised release for 10 years. The sentence was based on the following combination of factors: the defendant did not misrepresent his age to the 15-year old victim or groom her to engage in sexual activity; there was no sexual intercourse; the illicit sexual conduct took place in the course of one night without significant planning on the part of the defendant; the defendant informed the victim in writing the next day that he deeply regretted his wrongdoing; the defendant subsequently discouraged the victim from having any further sexual contact with him; and the defendant's offense conduct represented a marked deviation from an otherwise law-abiding life, which included service as a youth counselor without incident. The Government did not appeal.

13. Please provide a summary of and citations for all the sex crime cases not previously requested above in which you were involved as a lawyer, including the sentencing range called for under the guidelines, the sentence for which you argued and the reasons you provided, and the sentence that was ultimately issued by the court.

Response: I was involved in one such case as a lawyer. In that case, my firm represented a defendant who pleaded guilty in state court to a misdemeanor involving sexual conduct with a minor. There were no sentencing guidelines. We urged the state court to impose a sentence of probation on the grounds that the defendant had a record of providing valuable service to the community, he was truly remorseful for his wrongful conduct, the victim misled him concerning her age and he did not realize the victim was a minor. A sentence of probation was imposed.

14. Please provide a summary of and citations for all the sex crime cases not previously mentioned in which you participated as a judge, including the sentencing range called for under the guidelines and the sentence that you issued.

Response:

<u>United States v. William Guilmette</u>, Case No. 04-CR-259. The defendant pleaded guilty to one count of using a facility of interstate commerce to attempt to entice an individual under 18 to engage in sexual activity and one count of attempted transfer of obscene material to a minor. The guideline range was 51 to 63 months. The defendant was sentenced to 63 months followed by supervised release for life.

<u>United States v. Thomas Donaldson</u>, Case No. 04-CR-234. The defendant pleaded guilty to using an interstate facility to attempt to persuade a minor to engage in sexual activity. The defendant was sentenced to a mandatory minimum 60 months (which exceeded the otherwise applicable guideline range of 33 to 41 months) followed by supervised release for 5 years.

<u>United States v. Scott Lape</u>, Case No. 08-CR-55. The defendant pleaded guilty to using an interstate facility to contact a minor with the intent to entice the minor to engage in sexual activity. The guideline range was 46 to 57 months. The defendant was sentenced to 60 months followed by supervised release for 15 years.

<u>United States v. Anthony Lowenstein</u>, Case. No. 09-CR-99. The defendant, a Connecticut resident, was convicted in the U.S. District Court for the District of Arizona of interstate travel with intent to engage in illicit sexual conduct with a juvenile and

possession of child pornography. He was sentenced to prison for 60 months followed by lifetime supervised release. Following his release from prison, he was supervised by the U.S. Probation Office in Connecticut. In July 2009, he admitted violating conditions of his supervised release prohibiting him from having contact with minors and possessing pornographic materials and requiring him to provide truthful information to the Probation Office and abstain from drinking alcohol. The revocation table in the guidelines suggested a sanction of 3 to 9 months in prison. I revoked his supervise release, sentenced him to 6 months in prison, reinstated the lifetime supervised release term and required him to spend the first three months of his supervised release in a halfway house. In April 2010, he admitted violating the condition requiring him to reside in the halfway house. The revocation table suggested a sanction of 3 to 9 months in prison. I revoked his supervised release and sentenced him to 5 months in prison followed by lifetime supervised release.

15. **You testified at your hearing that you were "contacted by a friend who asked [you] if [you] would file, on behalf of the Connecticut Criminal Defense Lawyers Association, a motion in the State Supreme Court for leave to file an *amicus* brief on an evidentiary issue." Did the Connecticut Criminal Defense Lawyers Association ever ask you to file any other *amicus* briefs?**

    Response**:** No.

    a. **If so, please describe the nature of the litigation and a summary of the issues you briefed.**

       Response: n/a

    b. **Did any other organization ever ask you to file an *amicus* brief in a case?**

       Response: Not that I recall.

       i. **If so, please describe the nature of the litigation and a summary of the issues you briefed.**

          Response: n/a

16. **You testified at your hearing that your prior involvement in the Ross case "didn't extend beyond essentially acting as local counsel for my friend for the purpose of filing an application to file a motion" and "some very limited research." However, you also admitted that Ross sent you a letter and you responded by writing him a letter stating you were no longer involved in the litigation, which was in July 1992. Did your appearance remain on the Connecticut Supreme Court's file?**

    Response: Yes. Though my involvement in the litigation was limited to filing the amicus application on behalf of the CCDLA, no withdrawal of my appearance was filed.

a. **Did you receive any orders following your filing an application to file a motion? If so, how many and for how many years?**

Response: Yes. Soon after the amicus application was filed, I received an order granting the application. I do not recall receiving any other orders. However, my former firm's file relating to the amicus application, when retrieved from storage by my former partner in 2005, contained service copies of various documents filed in the case in 1992, 1993 and 1994. I do not recall seeing any such documents at any time and do not believe I did see them.

b. **Did you receive the state's 300 page brief and appendix in the *Ross* case?**

Response: Not to my knowledge.

c. **Did you receive the defendant's 300 page brief and appendix in the *Ross* case?**

Response: Not to my knowledge.

17. **At your hearing, Senator Klobuchar mentioned the Supreme Court case of *Atkins v. Virginia*, and stated that "the death penalty is, of course, the ultimate punishment. We have to be very careful when it's applied." Was the case of *Atkins v. Virginia* relevant to the matters before you in the *Ross* case? Please explain.**

Response: In *Atkins v. Virginia*, 536 U.S. 304 (2002), the Supreme Court held that the Eighth Amendment prohibits the execution of mentally retarded defendants. The Court's holding in *Atkins* did not govern the issue presented to me in the Ross litigation, which was whether a mentally ill defendant was competent to waive legal challenges to his death sentence.

a. **Was *Atkins v. Virginia* relevant to the lower courts' inquiry in the *Ross* case? Please explain.**

Response: Please see my response above.

b. **In *Atkins v. Virginia*, the Supreme Court ruled that the imposition of the death penalty on mentally retarded defendants constituted cruel and unusual punishment. In its majority opinion, Justice Stevens stated that the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures," and that the majority first reviewed "the judgment of legislatures that have addressed the suitability of imposing the death penalty on the mentally retarded." The majority cited the fact that 18 States, less than half of the 38 States that permitted capital punishment, had recently enacted legislation barring execution of the mentally retarded as evidence that a "national consensus" existed about the propriety of executing the mentally retarded. Do you believe that the legislative acts of 47% of the country equates to a national consensus?**

Response: The Supreme Court's decision in *Atkins* is binding on me and I do not believe it would be appropriate for me to comment on the correctness of the Court's reasoning.

c. **Do you believe Justice Stevens avoided injecting the policy preferences of the Court in this case? Please explain.**

Response: Please see my response above.

d. **In its majority opinion, the Court stated: "Moreover, within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved. Brief for The European Union as *Amicus Curiae* in *McCarver* v. *North Carolina*, O. T. 2001, No. 00—8727, p. 4." Do you personally believe it was appropriate for the Court to consider the opinion of the "world community" when interpreting the Eighth Amendment?**

Response: Please see my response above.

18. **In *Roper v. Simmons*, 543 U.S. 551 (2005), Justice Kennedy relied in part on the "evolving standards of decency" to hold that capital punishment for any murderer under age 18 was unconstitutional. I understand that the Supreme Court has ruled on this matter, but do you agree with Justice Kennedy's analysis?**

Response: I am bound by the Supreme Court's decision in *Roper* and do not believe it would be appropriate for me to comment on the correctness of the Court's reasoning.

a. **How would you determine what the evolving standards of decency are?**

Response: I would review legislative enactments to determine if there is objective evidence of consensus.

19. **During the January 28, 2005, teleconference, you stated: "There is abundant literature, some of which I've read, . . . that gives great weight to the notion that a person who is in that setting can lose his ability to make a knowing, intelligent and voluntary choice. In fact, most European countries -- I want to be careful to be as accurate as I can -- I believe most European countries have recognized that to the point where their courts will not permit extradition of people from their countries to this country if the person's going to wind up in that setting." And, in response to a question from Senator Kyl, you stated that you cited European extradition experience because "they relied upon empirical evidence regarding the effect of long-term solitary confinement on inmates." Please list and provide copies of the literature or studies you read or consulted, including the empirical evidence you noted in your testimony.**

Response: I did not refer to this "literature" as a basis for a ruling of any kind, but simply to provide context for my remarks to Mr. Paulding. Prior to my involvement in the Ross litigation, I had occasion to read about the potential effects of long-term solitary confinement on inmates in supermax prisons. These are the writings I referred to when I spoke with Mr. Paulding. I recall reading the following articles prior to the Ross case: McCord, *Imagining a Retributivist Alternative to Capital Punishment*, 50 Fla. L. Rev. 1 (1998); Romano, *If the SHU Fits: Cruel and Unusual Punishment at California's Pelican Bay State Prison,* 45 Emory L.J. 1089 (1996); Lillich, *The Soering Case*, 85 Am. J. Int'l L. 128 (1991); *Soering v. The United Kingdom,* 161 Eur. Ct. H.R. (1989); Grassian, *Psychopathological Effects of Solitary Confinement,* 140 Am. J. Psychiatry 1450 (1983).

a. **Did any of the books and literature you consulted in the *Ross* case involve mitigating factors, sexual sadism, or other mental or emotional disorders?**

   Response: The materials indicate that long-term solitary confinement can lead to various mental and emotional disorders.

20. At your hearing, I asked you why Michael Ross testified before the state court in his last competency hearing that the only reason he was participating in the competency hearing was to protect Paulding's law license. After first denying that Ross made that statement, you then corrected the record and acknowledged that he gave that testimony in the subsequent state court proceeding. According to a news report, Ross testified: "I will participate in any competency hearing that this Court orders to protect [Paulding's] license, and that's the only reason I am doing it."[1] Why do you think Ross made that statement?

Response: I do not know why Ross made the statement. At the confirmation hearing, I was initially asked why he made the statement "in front of [me]." In response to that question, I testified that he did not make the statement in the proceeding before me. I later clarified that he did make the statement in state court. I never denied that he made the statement. I apologize for any misunderstanding in this regard.

a. **Do you agree that it implies that Paulding believed his law license had been threatened?**

   Response: I do not know what Ross meant to imply his statement. In my opinion, the statement most likely reflects a desire on his part to have others understand that he was cooperating only because of concern for Mr. Paulding.

b. **Do you agree that it certainly implies that Paulding told Ross that you had threatened his law license if Ross did not agree to file a motion to reopen the competency issue?**

[1] U.S. States News, "State of Connecticut v. Michael Ross: State Objects to Motion for Appointment as Special Counsel," (May 2, 2005).

Response: Please see my response above.

21. You testified at your hearing that "the evidence that concerned [you] at the very beginning was this evidence proffered at the emergency hearing, including expert psychiatric evidence, which had not been part of the competency hearing in the State court." Was this expert Dr. Stuart Grassian?

Response: The proffered evidence included expert testimony by Dr. Grassian and another psychiatrist, Dr. Eric Goldsmith. Dr. Grassian testified at the hearing, based on his review of an extensive record, including psychiatric evaluations of Ross and Ross's own statements and writings, that Ross's decision to drop his appeals was not the product of a voluntary decision process but instead an attempt to end pain that had become increasingly unbearable. Dr. Grassian also criticized the opinion of the psychiatrist who had testified in the state competency proceeding, Dr. Michael Norko, because Dr. Norko's opinion did not focus on the issue of Ross's volitional capacity, among other things. Dr. Goldsmith did not testify at the hearing but a written proffer of his proposed testimony showed that he was prepared to testify that Dr. Norko had failed to adequately explore the voluntariness of Ross's decision to accept execution and that the voluntariness of Ross's waiver of further appeals was open to serious question. In addition to this psychiatric testimony, the petitioner proffered numerous affidavits of persons who had known Ross for years and whose interactions with him caused them to believe he was not competent.

a. If not, to whom were you referring?

Response: Please see my response above.

b. Had Mr. Grassian examined Ross prior to you first seeing the evidence he presented on death row syndrome?

Response: No.

c. Had the Connecticut Supreme Court ever considered Dr. Grassian's testimony previously? If so, what was their analysis of his assertion?

Response: The Connecticut Supreme Court reviewed a written offer of proof that included a summary of Dr. Grassian's proposed testimony. The Court found that his proposed testimony was "speculative and not supported by the record" and did not constitute "meaningful evidence" of incompetence required to establish next friend standing under *Demosthenes v. Baal*, 495 U.S. 731, 732 (1990). See *State v. Ross*, 272 Conn. 577, 611 (2005).

d. Did you interrupt the prosecution's cross examination of Dr. Grassian and state you were ready to issue your ruling?

Response: Following a recess in the hearing, before cross-examination of Dr. Grassian resumed, I stated that I thought we needed to clarify the procedural posture of the case. I pointed out that the State's motion for summary dismissal of the petition based on lack of standing had been denied prior to the recess and that a stay of the execution pending further proceedings appeared to be inevitable. Based on subsequent comments by counsel for the State, I understood that the State did not want to cross-examine Dr. Grassian further at that time.

22. **In *Boumediene v. Bush*, the Supreme Court held that the detainees at the U.S. Naval Base at Guantanamo Bay, Cuba, "are entitled to the privilege of habeas corpus to challenge the legality of their detention." Slip Op. at 42. The Court based its holding on Article I, Section 9, Clause 2, of the Constitution (the Suspension Clause), which allows for suspension of habeas corpus rights only in cases of rebellion or invasion. Do you personally believe that the Supreme Court's decision in *Boumediene* was correctly decided? Please explain.**

    Response: The Court's decision is binding on me and I will follow it in any cases that come before me. I do not believe it would be appropriate for me to comment on the correctness of the Court's reasoning.

    a. **In contrast, the Solicitor General's office under the Obama Administration recently argued against habeas jurisdiction at the Bagram internment facility in Afghanistan. What constitutional distinctions do you see between those enemy combatants held at Guantanamo and those at Bagram? Please explain.**

        Response: I have not had occasion to study the matter. Moreover, because a future case may require me to decide a similar issue, I do not believe it would be appropriate for me to express an opinion at this time.

23. **In *Washington v. Glucksberg,* 521 U.S. 702 (1997), in which the Supreme Court held that a right to assistance in committing suicide was not protected by the Due Process Clause, the Court reasoned: "we have always been reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this unchartered area are scarce and open-ended. By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore 'exercise the utmost care whenever we are asked to break new ground in this field,' lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of this Court."**

    a. **Do you agree with the Court's assessment of the importance of public debate and legislative action?**

        Response: The decision of the Court is binding on me and I will follow it in cases that come before me. I do not believe it would be appropriate for me to comment on the correctness of the Court's reasoning.

24. Do you believe the President has the constitutional authority as commander-in-chief to override laws enacted by Congress and to immunize people under his command from prosecution if they violate these laws passed by Congress?

Response: I have not had occasion to study the matter. Moreover, because a future case may require me to decide a similar issue, I do not believe it would be appropriate for me to express an opinion at this time.

a. Do you believe the President has the authority to circumvent the Foreign Intelligence Surveillance Act (FISA), and bypass the FISA court to conduct warrantless electronic surveillance that may include spying on Americans?

Response: Please see my response above.

25. How would you determine Congressional intent in cases of statutory interpretation?

Response: I look first to the plain meaning of the statute itself, which provides the clearest evidence of legislative intent. When statutory text is ambiguous, I apply rules of statutory construction to resolve the ambiguity. If the meaning of the text remains uncertain, I examine the statute's legislative history for reliable evidence of legislative intent.

a. Should presidential signing statements be considered by a court in construing Congressional intent?

Response: By its nature, a signing statement would not be expected to provide evidence of legislative intent.

26. Do you believe the President has the constitutional authority to preventively detain noncitizen terrorist suspects?

Response: I have not had occasion to study the matter. Moreover, because a future case may require me to decide the issue, I do not believe it would be appropriate for me to express an opinion at this time.

a. Must such detentions occur in the United States?

Response: Please see my response above.

b. Does the United States have no authority to detain except after Article III court determinations?

Response: Please see my response above.

i. **What in your view constitutes the minimum of due process that should be required for tribunals that authorize or affirm detentions?**

Response: Please see my response above.

ii. **Would detainees before those tribunals enjoy a presumption of innocence or of guilt?**

Response: Please see my response above.

iii. **What evidentiary threshold would have to be met in those tribunals that review such cases? A preponderance of the evidence? Clear and convincing evidence? Beyond a reasonable doubt?**

Response: Please see my response above.

iv. **Should evidence be admission in such tribunals that is not admissible in civilian courts?**

Response: Please see my response above.

v. **Would detainees have to be either released *or* brought to the United States? If not, please describe the other options.**

Response: Please see my response above.