

**Responses of Robert N. Chatigny
Nominee to be U.S. Circuit Judge for the Second Circuit
to the Written Questions of Senator Cornyn**

- 1. You departed from the minimum Sentencing Guidelines sentence in six child pornography prosecutions and in one case involving sex tourism. Despite the horrible nature of the crimes, you cut the sentences of the child pornography offenders to less than half of what the Sentencing Commission recommended. In the sex tourism case, you cut the recommended sentence by nearly 40 percent.**

- a. Do you believe the Sentencing Guidelines are too harsh on child sex crimes?**

Response: In my work as a district judge, I have faithfully applied the Guidelines in accordance with Supreme Court and Second Circuit precedent and will continue to do so.

- b. In the case involving sex tourism, you cut the recommended sentence from 57 months to 36 months. The maximum sentence was 30 years. The defendant in the case had taken a 15 year old girl across state lines overnight to have sexual contact with her. The primary reason you cited in cutting the sentence was: “Nature and circumstances of the offense/history of the defendant.”**

- i. What was it about the “nature and circumstances” of that offense that justified reducing the sentence?**

Response: This was the third sex tourism case to come before me for sentencing. In the previous cases, I gave one defendant the maximum guideline sentence (78 months) and the other defendant a sentence above the midpoint of the guideline range (34 months). In this instance, I concluded that a below-guideline sentence was sufficient based in part on the following facts concerning the nature and circumstances of the offense: 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 did not misrepresent his age to the victim or groom her to engage in sexual activity; the defendant informed the victim in writing the next day that he deeply regretted his wrongdoing; and the defendant subsequently discouraged the victim from having any further sexual contact with him.

- ii. Was there something about the “history of the defendant” that encouraged you to reduce his sentence? If so, do you frequently reduce the sentences of defendants with similar histories?**

Response: The defendant appeared to be truly remorseful and his offense conduct represented a marked deviation from an otherwise law-abiding life, which included service as a youth counselor without incident. I reduce a defendant’s sentence based on his or her history and characteristics to comport with the statutory requirement that a sentence be sufficient but not greater than necessary to fulfill the purposes set forth in 18 U.S.C. § 3553.

iii. In your opinion, does the “history of the defendant” matter more or less in child sex crimes?

Response: Under 18 U.S.C. § 3553, the history of the defendant must receive careful consideration in all cases.

c. What is the total number of child pornography cases in which you have sentenced a defendant? Please submit to the Committee a transcript of the sentencing phase for each of these cases.

Response: Review of available records shows that I have sentenced 12 defendants convicted of child pornography offenses. Transcripts are available in 2 of these cases: United States v. Salmon, No. 97-CR-77 (partial transcript) and United States v. Chappell, No. 09-CR-10. Copies of these transcripts were provided to the Committee on April 15, 2010 (along with copies of all other available transcripts of my sentencing hearings). As mentioned in the cover letter accompanying that submission to the Committee, the explanation for the small number of available transcripts is that transcripts typically are prepared only in the event of an appeal and none of these sentencings was the subject of an appeal.

2. A secondary reason you provided for reducing the sentence in the sex tourism case, as well as in many of the child pornography cases, was the “mental and emotional conditions” of the defendant. A defendant’s “mental and emotional conditions are not ordinarily relevant in determining whether a departure is warranted,” U.S.S.G. § 5H1.3, and thus a court may depart “only if the factor is present to an exceptional degree or in some other way makes the case different from the ordinary case,” *Koon v. United States*, 518 U.S. 51, 96 (1996). The Second Circuit has held that to be a proper basis for departure, a mental or emotional condition must “rise to the extraordinary level that it can be assumed to cause mental or emotional pathology.” *United States v. Rivera*, 192 F.3d 81, 86 (2d Cir. 1999). The Second Circuit also has ruled that in a child pornography case that a defendant does not warrant a downward departure for a “mental or emotional condition” where he “shows no evidence of psychosis,” “his sense of morality is significantly intact,” and “he appreciates both the societal and moral constraints of his behavior.” *United States v. Barton*, 76 F.3d 499, 502 (2d Cir. 1996).

a. What factors do you look for when considering whether a person convicted of a child sex crime has a mental or emotional condition that warrants a downward departure from his or her applicable Sentencing Guidelines range?

Response: In *United States v. Silleg*, 311 F.3d 557, 563 (2d Cir. 2002), the Second Circuit held that “the diminished capacity of a defendant in a child pornography case may form the basis for a downward departure where the requirements of U.S.S.G. § 5K2.13 are satisfied.” Accordingly, I apply the standard of § 5K2.13 and consider

whether the defendant had a “significantly reduced mental capacity” that “contributed substantially to the commission of the offense.”

- b. Please describe in detail the relevant mental or emotional conditions of the child pornography crime defendants to whom you gave a lesser sentence on the basis of their “mental and emotional conditions.”**

Response: Review of available records discloses the following: United States v. Chappell, Case No. 09-CR-10: the defendant received a lesser sentence due to the effects of abuse and neglect he experienced as a child; United States v. Dole, Case No. 06-CR-262: the defendant’s capacity was reduced by a traumatic brain injury; United States v. Festa, Case No. 04-CR-233: the defendant received a lesser sentence due to the effects of abuse he experienced as a child; United States v. Chitty, Case No. 01-CR-231: the defendant’s capacity was reduced due to an impairment in functioning associated with a frontal lobe abnormality; United States v. Musacchio, Case No. 99-CR-120: the defendant received a lesser sentence due to the effects of a traumatic childhood.

- c. Did any of the child pornography defendants to whom you gave a lesser sentence on account of “mental and emotional conditions” show signs of psychosis, lack a sense of morality, or fail to appreciate “both the societal and moral constraints” of their behavior? If so, which ones and to what extent?**

Response: Based on available records, I believe the defendants had a reduced capacity to appreciate the wrongfulness of their conduct or control their conduct.

- d. In the federal sentencing statute, Congress specifically directed judges not to rely on anything as a mitigating factor in a child crimes case unless it has been “affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines.” 18 U.S.C. § 3553(b)(2)(A)(ii). Do you believe that your multiple downward departures in child sex crime cases adhered to the letter and spirit of Congress’s child sex crime laws?**

Response: Yes.

- 3. During the pendency of the Feeney Amendment to the PROTECT Act (2003-2005), which increased appellate and congressional scrutiny of sentencing departures and which you called “very controversial,” you did not depart from the Sentencing Guidelines in a single child pornography case. But immediately after the decision in *United States v. Booker*, 543 U.S. 220 (2005), which nullified the PROTECT Act guidelines and appellate standards, you began departing downward from the Sentencing Guidelines in child sex crime cases.**

- a. Before the *Booker* decision, did you have any child pornography cases in which you wanted to depart from the Sentencing Guidelines range but did not?**

Response: No.

- b. Under what circumstances would you consider a sentence within the appropriately calculated Guidelines range to be “substantively unreasonable”?**

Response: I can think of no circumstances where a sentence within a properly calculated guideline range, imposed in accordance with sound procedure, could be set aside as substantively unreasonable. In the Second Circuit, a sentence may be set aside as substantively unreasonable “only in exceptional cases where the trial court’s decision cannot be located within the range of permissible decisions.” *United States v. Cavera*, 550 F.3d 180, 189 (2d Cir. 2008)(en banc). As the Second Circuit has recognized, “in the overwhelming majority of cases, a Guidelines sentence will fall comfortably within the broad range of sentences that would be reasonable in the particular circumstances.” *United States v. Fernandez*, 443 F.3d 19, 27 (2d Cir. 2006).

- c. Would you, if confirmed as an appellate judge, ever think it appropriate to rule a within-Guidelines-sentence “substantively unreasonable” on the basis of a policy disagreement with Congress? If so, under what circumstances?**

Response: I cannot envision such a case.

- d. The Second Circuit has one of the most deferential standards for reviewing sentencing orders. See *United States v. Cavera*, 550 F.3d 180 (2d 2008) (stating the Second Circuit would set aside a sentencing order “only in exceptional cases”). What is your understanding of what constitutes an “exceptional case” for sentencing purposes? If confirmed, when would you set aside the sentencing order of a district judge?**

Response: In *Cavera*, the Second Circuit indicated that a case is “exceptional” if the sentencing judge relies on “invidious factors,” 550 F.3d at 191, or imposes a sentence outside the applicable range based on a factor that cannot “bear the weight assigned to it.” *Id.* If confirmed, I would set aside a sentence only when required to do so by Supreme Court or Second Circuit precedent.

- 4. In 2003, you spoke at the inaugural meeting of the American Constitution Society chapter at the University of Connecticut School of Law. The topic of your speech was “judicial independence and accountability in sentencing.” You were highly critical of mandatory minimum sentences, calling them “dehumanizing” and noted that they were “at odds” with “our common law tradition.” You also remarked that, when sentencing a defendant, “[e]mpathy’ for individuals involved in [a] case inevitably comes into play, as it should.” And you said: “One person’s fairness may be another’s leniency, especially if the other . . . doesn’t have to explain the sentence to the defendant.”**

- a. **Please explain how you understand “our common law tradition” to influence your responsibilities when sentencing a defendant.**

Response: My sentencing decisions are based on applicable statutes and guidelines. Any policy views I have expressed on the subject of mandatory minimum sentences have not affected my sentencing decisions.

- b. **Do you still believe that minimum sentences are “dehumanizing”? Will you, if confirmed, have any reservations in enforcing mandatory minimum sentences set by Congress?**

Response: The sentencing process can be machinelike when a mandatory minimum sentence is imposed. I recognize, however, that mandatory minimum sentences are valid and have no reservations about enforcing the law set by Congress.

- c. **How does the responsibility of “explain[ing] the sentence to the defendant” affect your calculation of the defendant’s sentence?**

Response: It does not affect the calculation of the sentence.

- d. **Have you ever reduced the sentences of defendants to make the process of explaining their sentence to them less intense or difficult?**

Response: No.

- e. **At your confirmation hearing, you said that your “empathy” remark “referr[ed] to *not just the defendant*, but also the victims, as well as witnesses” How does your empathy for defendants influence your handling of criminal proceedings and sentencings? Please give an example of a case in which your empathy for a defendant, victim, or witness affected your ruling(s) in the case.**

Response: Empathy does not influence my sentencing decisions.

5. **You also stated in your 2003 American Constitution Society speech that “[u]nder the Constitution, a judge can’t be impeached for judicial acts.”**

- a. **Do you think that Congress can impeach a judge if he or she rules in unlawful ways or consistently defies the will of Congress as expressed in the laws of the United States?**

Response: A lawless act by a judge deliberately undertaken to defy the will of Congress would not be a “judicial act” as I used the phrase in my speech.

- b. **In your opinion, are the judicial acts of a judge never relevant to a determination of their “good Behavior”? U.S. Const., art. 3, sec. 1.**

Response: A “judicial act,” as I used the phrase in my speech, does not include unlawful acts that would properly subject a judge to a risk of impeachment.

- 6. You further noted in your 2003 American Constitution Society speech that “the Constitution does not entitle Congress to tell a judge how to apply the law on departures in a given case, and Congress should not attempt to intimidate judges into refusing to depart, or punish judges for departing.”**

- a. In what ways has Congress “intimidate[d] judges into refusing to depart, or punish[ed] judges for departing” from the Sentencing Guidelines?**

Response: Congress has not done so.

- b. Do you think that the Sentencing Guidelines improperly tell judges how to apply the law on departures in given cases?**

Response: No.

- 7. President Obama has stated: “[W]hile adherence to legal precedent and rules of statutory or constitutional construction will dispose of 95 percent of the cases that come before a court . . . what matters . . . is those 5 percent of cases that are truly difficult. In those cases, adherence to precedent and rules of construction and interpretation will only get you through the 25th mile of the marathon. That last mile can only be determined on the basis of one’s deepest values, one’s core concerns, one’s broader perspectives on how the world works, and the depth and breadth of one’s empathy. In those 5 percent of hard cases . . . the critical ingredient is supplied by what is in the judge’s heart.”**

- a. Do you agree with the President that legal precedent and rules of statutory or constitutional construction sometimes fail to provide an answer in hard cases? If so, what percentage of cases do you think constitute “hard cases”?**

Response: I agree that federal courts are sometimes called upon to decide difficult cases. In these instances, judges must be particularly careful to ensure that the case is decided in accordance with the law and evidence.

- b. Assuming for the sake of argument that there is a “hard case” where the law is indeterminate, what factors and concerns would you, as a judge, consider in deciding the case?**

Response: If presented with such a case, I would bear in mind that my duty to decide the case should be discharged with due regard to the limits on my role in a federal system of separated powers and with appropriate sensitivity and deference to the responsibilities and prerogatives of the legislative and executive branches of government. As in any case, I would pay close attention to the presentations of the parties, study the applicable legal authorities, focus on the legally relevant facts

disclosed by the record, and issue a holding no broader than necessary to resolve the parties' dispute.

- c. **In your 2003 speech to the American Constitution Society chapter at the University of Connecticut School of Law, you said that, in sentencing a defendant, “[e]mpathy’ for individuals involved in [a] case inevitably comes into play, as it should.” How do you distinguish your appeal to judicial “empathy” from that of President Obama?**

Response: As a judge, I associate empathy with a desire and ability to approach each case with an open mind free of preconceptions, provide all people who come before the court with a respectful hearing for the purpose of understanding their positions, and render an unbiased decision reflecting impartial application of the law.

8. **During your January 28, 2005 conference call with T.R. Paulding, the attorney for the convicted serial murderer and rapist, Michael Ross, you made the remarkable statement that: “Ross never should have been convicted. Or if convicted, he never should have been sentenced to death because his sexual sadism, which was found by every single person who looked at him, is clearly a mitigating factor” You also remarked that “Michael Ross may be the least culpable, the least, of the people on death row.”**

At you confirmation hearing, you tried to explain these extraordinary remarks by saying: “I addressed [the issue of Ross’s sexual sadism] in connection with the issue of competence. The defendant had a long history of mental illness, several disorders These were relevant to the question of his competence to waive legal rights.”

- a. **In what way was your opinion about whether Ross should have been convicted and sentenced to death relevant to determining Ross’s competency? How was Ross’s culpability related to his competency?**

Response: As I explained at the confirmation hearing, I had no opinion about whether Ross should have been convicted or sentenced to death and regret very much my choice of words. My sole concern was his competence to waive legal rights. The Office of the Chief Public Defender, who had represented Ross for many years, proffered substantial evidence that his waiver was not voluntary but resulted from mental illness exacerbated by the conditions of his confinement. Dealing with this claim on short notice and in a tightly compressed time frame, I had to consider Ross’s history of mental illness as disclosed by the record before me.

- b. **Have you ever ruled that a defendant was not mentally competent to stand trial or waive his rights on account of “sexual sadism”? Are you aware of any other court that has ever found a defendant’s “sexual sadism” to render him mentally unfit to waive his appellate rights?**

Response: No.

- c. **Can you explain in detail Michael Ross’s “long history of mental illness” that you reviewed at the time you issued the stay of his execution? What mental illnesses relevant to his competency had Ross been diagnosed with at the time you reviewed his record? Who made these diagnoses and when?**

Response: It was undisputed that Ross was mentally ill. He had been diagnosed with various depressive, personality and anxiety disorders, as well as sexual sadism. He had made three suicide attempts since 1994, one of which almost succeeded. His statements and writings showed that he had vacillated about whether he wanted to pursue legal remedies or accept execution. I do not have the names of the doctors who evaluated him or the dates of their diagnoses.

9. **At your confirmation hearing, you stated that your initiation of, and comments during, the January 28, 2005 teleconference regarding the *Ross* case were driven by the production of “evidence on the subject of the defendant’s competence, including expert testimony, which had not been considered by the State court.” If this evidence was convincing, indeed if it was powerful enough to make you declare “I see this happening and I can’t live with it myself,” why didn’t you issue another stay of Ross’s execution on January 28, 2005?**

Response: At the time, I thought the best course of action was to urge Ross’s lawyer to speak with his expert witness, Dr. Norko, concerning the new evidence. I did not consider issuing another stay.

10. **You noted at your confirmation hearing that the Connecticut courts’ consideration and rejections of Michael Ross’s mental competency were not binding on your review of his competency to waive further appeals to his execution “[b]ecause the procedure that was followed was limited and I was presented with evidence raising a substantial issue on a matter of life and death.” Section 2254(d) of the Antiterrorism and Effective Death Penalty Act (“AEDPA”), however, states that “[a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication . . . was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, or . . . resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” Moreover, § 2254(e) of AEDPA states that in considering the habeas petition of a state prisoner “a determination of a factual issue made by a State court shall be presumed to be correct.” And the Second Circuit has explained:**

The standard of review set forth in AEDPA is not conditional. It is stated in mandatory terms—habeas relief “*shall not* be granted with respect to *any claim* that was adjudicated on the merits in State court proceedings Accordingly, a habeas claim, even if subject to a federal evidentiary hearing, is still a “claim that was adjudicated on

the merits in State court proceedings,” and is subject to the highly deferential standard of review established therein. . . . And new evidence uncovered in the federal proceeding is relevant only insofar as it assists the habeas court in determining whether the state court reached an unreasonable application of law.

***Wilson v. Mazzuca*, 570 F.3d 490, 499-500 (2d Cir. 2009) (internal citations omitted).**

- a. In light of the relevant AEDPA provisions and rulings of the Second Circuit, please explain more fully why the Connecticut courts’ determinations of Michael Ross’s competency were not binding on your review of his competency.**

Response: In the Ross case, the State argued that the Connecticut courts’ determination of competency required summary dismissal of the habeas petition for lack of standing. I concluded that a hearing on the issue of Ross’s volitional capacity was necessary, and therefore denied the State’s motion to dismiss, primarily because the issue of Ross’s volitional capacity had not been adequately addressed by the state courts and no particularized finding had been made concerning his volitional capacity as required by *Rees v. Payton*, 384 U.S. 312 (1966).

- b. In your review of the Ross case, did you determine that the Connecticut courts’ adjudication of Ross’s competency “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined the Supreme Court of the United States, or . . . resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding”?**

Response: I concluded that a hearing was required to determine whether Ross lacked volitional capacity under *Rees*, an issue that had not been adequately addressed in the state courts. In reaching this conclusion, I reviewed the Connecticut Supreme Court’s determination that the evidence proffered to it by the Office of the Chief Public Defender was not “meaningful evidence” under *Demosthenes v. Bard*, 495 U.S. 731 (1990). Based on the record before me, I concluded that the Connecticut Supreme Court’s determination reflected an unreasonable application of *Demosthenes*.

- c. How exactly did the new evidence that you reviewed call into question whether the Connecticut courts reached an unreasonable application of clearly established Federal law?**

Response: The evidence presented to me cast doubt on Ross’s volitional capacity, a critical factor under *Rees*, which had not been adequately addressed in the state courts.

- 11. In your teleconference with the parties in the Ross case on January 28, 2005, you said: “I believe that as a result of Ross’s transfer to [Northern Correctional**

Institute] . . . his life changed very dramatically for the worse . . . [and] a fair amount of literature which I have read . . . 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.”

- a. **What was the “literature” that you referred to in this statement? Please provide citations to the Committee for any articles or books that you were referencing.**

Response: I referred to this “literature,” not 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 to Mr. Paulding. I recall reading the following materials 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).

- b. **Do you think that it is appropriate for a judge to research, reference, and rely upon empirical sources not cited or presented by the parties when deciding a case?**

Response: As a rule, no.

12. You lamented at your hearing that “the Ross case gets in the way of the record of my work day-to-day in all kinds of cases over the course of 15 years.” You said, “[i]t is not a reliable indication of my character as a judge or my work as a judge.” Would you please provide five cases that you think are indicative of your character and work as a judge?

Response: Summaries of the following cases appear in my responses to the Committee’s Questionnaire: *Emily J. v. Rowland*, Case No. 93-CV-1944; *United States v. Bryce*, Case Nos. 97-CR-249, 99-CR-238; *United States v. Richards*, Case No. 99-CR-266; *Cowan v. Breen*, Case No. 00-CV-52; *United States v. Harris*, Case No. 04-CR-360.

- 13. To what extent is foreign law or practices relevant to the interpretation and application of the laws and Constitution of the United States? Have you ever relied on foreign law or practices to decide a case?**

Response: A judge should not rely on foreign law to decide a case except when the law of the United States requires him or her to do so, for example, to adjudicate a case involving a treaty. I have not relied on foreign law to decide a case.