

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

- 1. The *Ross* case initially came before you after the Public Defender filed a motion on the defendant's behalf arguing he was not competent to waive further appeals because he suffered from "death row syndrome," even though he was found competent by the state trial courts, the Connecticut Supreme Court, and U.S. District Court Judge Christopher Droney. You granted the Public Defender standing because the defendant was "unable to litigate his own case due to mental incapacity," and stayed the execution pending another competency hearing. During this hearing you permitted the Public Defender to question the expert witness at length on direct examination, but you announced your ruling after only minutes of the State's cross-examination. When the State objected, you responded: "having listened to the witness, there is no doubt in my mind that we have a genuine issue here that needs to be fully explored."**

- a. Do you believe it was appropriate for you to issue your ruling before the State had finished its cross-examination?**

Response: Yes. At the time I made my ruling denying the State's motion to dismiss the petition, I had all the information I needed to determine that further proceedings in federal court were required. I did not think further cross-examination of Dr. Grassian was needed. Counsel for the State did not object.

- b. Do you understand why it may look to some like you had pre-judged the issue, even before the teleconference with Mr. Paulding?**

Response: Yes, although I understand that it may appear this way to some, I did not prejudge the issue. At the time I issued my ruling declining to dismiss the petition, I had all the information I thought was necessary.

- 2. The day after you granted the Public Defender's Motion to Stay the execution – and while that motion was still pending appellate review – you granted a Temporary Restraining Order to Stay the execution filed by the defendant's father. At this point, one of the prosecutors felt compelled to ask you in open court whether you had any personal objections to the death penalty, or whether there was any other reason that they should "question your partiality." Do you understand why one would find it difficult to believe that, even after the State's Attorney questioned your partiality, you still failed to remember your involvement in one of the most notorious death penalty cases in the State's history?**

Response: Yes, I understand that a person unfamiliar with the facts regarding my prior involvement might question my failure to recall it. But the truth is I did not recall it. Had I recalled it, I would have recused myself.

3. **After you had issued both rulings, you received a letter from an inmate questioning Mr. Ross's competence. After the State declined your invitation to voluntarily seek a stay based on the letter, you called another teleconference, which included the defendant's lawyer, Mr. Paulding. Initially, Mr. Paulding told you that he had read the letter from the inmate, discussed it with his client, and nonetheless had "somewhat a difference of opinion" from yours. It was after he resisted your efforts that your rhetoric grew more heated and you ultimately told him, "I'll have your law license." Only then did Mr. Paulding ask for "a little bit of time" to "process" what you had said. During your confirmation hearing, in response to a question from Senator Klobuchar regarding the competency hearing that was held the following week, you said: "As a result of the events that occurred during that week, the defendant's own counsel moved in the State court for a stay so that a full hearing could be held on the issue."**

- a. **Do you believe Mr. Paulding moved for a stay because of "the events that occurred during that week," or because of what you told him during that teleconference?**

Response: I do not know what Mr. Paulding was thinking at the time. In the motion itself, however, he set forth the "specific facts" he relied on to support a stay -- conversations he had with Dr. Norko and Martha Elliott after the telephone conference. See *State v. Ross*, Nos. CR 84 20300, 20355, 20356, Motion for Stay of Execution, Jan. 31, 2005 at 3-4. In an affidavit dated October 31, 2005 (copy on file with the Committee), he similarly stated that his "principal reasons" for filing the motion were the phone call he received from Dr. Norko on January 29, and the meetings he had with Dr. Norko and Ms. Elliott on January 30. See *id.* ¶ 35. I have no reason to question Mr. Paulding's statements.

- b. **In retrospect, is there any doubt in your mind that Mr. Paulding understood your statements to mean that if he did not heed your directive, his license to practice law would be in jeopardy?**

Response: I do not know what Mr. Paulding's understanding was at the time. My statements were intended to convey to him my firm belief that he had an ethical duty to act.

- c. **In your letter-submission to the Second Circuit, you maintained that your "warning to Attorney Paulding . . . should have been phrased in terms of the obligation I would have to refer him to the grievance authorities." Do you still maintain that your warning to Mr. Paulding was meant to convey nothing more than your duty to refer him to the grievance authorities?**

Response: Yes.

- d. **The District of Connecticut’s local rules make clear that federal judges have “inherent authority” to enforce “the standards of professional conduct.” In fact, in an article criticizing your conduct in the *Ross* case, the co-chairman of the Connecticut Bar Association’s federal practice section was quoted as saying: “All judges have the inherent authority to discipline the attorneys who appear before them.” Given that you personally possessed the inherent authority to discipline Mr. Paulding, do you agree that Mr. Paulding likely saw your threat as even that much more viable?**

Response: I do not know what was in Mr. Paulding’s mind at the time. I tried to make it clear to him that if he failed to act and a subsequent investigation determined that his client had been executed in violation of constitutional rights, I would refer the matter to the grievance committee.

4. **During you hearing, you testified that “At the emergency hearing on the application for the Stay, the plaintiffs proffered evidence on the subject of the defendant’s competence, including expert testimony, which had not been considered by the State court.” In fact, the Connecticut Supreme Court had considered and rejected Dr. Grassian’s testimony:**

“We also conclude that Grassian’s proposed testimony on the effect of segregated confinement on the defendant’s ability to make a rational and voluntary choice is speculative. Grassian has neither examined the defendant nor inspected the conditions of the defendant’s confinement. . . . Moreover, Grassian’s proposed testimony that Norko had failed to recognize that the defendant’s intelligence would allow him to conceal a “hidden agenda” is not supported by the record. . . . Finally, we conclude that much of the proposed testimony by many of the witnesses is conclusory in that it suggests that the defendant’s decision to take control of his fate by forgoing further legal challenges to his death sentences and his ambivalent feelings over the consequences of that decision are, in and of themselves, evidence of his incompetence. We see no basis for that proposition in logic, experience or the law.” *State v. Ross*, 272 Conn. 577, 592 (Jan. 14, 2005).

- a. **Given that the Connecticut Supreme Court considered and rejected Dr. Grassian’s testimony, do you still contend that Dr. Grassian’s testimony was new evidence not considered by the courts at the state level?**

Response: In my testimony at the confirmation hearing, I was referring to the competency proceeding conducted by Judge Clifford. I apologize for any misunderstanding in this regard.

- b. **Aside from Dr. Grassian, did any other witnesses testify at the initial hearing?**

Response: No other live testimony was presented.

- c. **Not including Dr. Grassian and his testimony, was there any other evidence offered at the initial hearing that was not considered by the state courts?**

Response: Not to my knowledge.

- d. **Had Dr. Grassian ever examined Mr. Ross?**

Response: No.

- e. **Did you examine Mr. Ross, as U.S. District Judge Droney had?**

Response: No.

5. **Approximately three hours before the scheduled execution, you directed the clerk of your court to call the execution command center and request the phone number of Judge Patrick Clifford, the state court trial judge in the *Ross* case. The Assistant State's Attorney told the clerk that he could not provide Judge Clifford's phone number because of a standing order of the Chief Justice of the State Supreme Court. Thirty-five minutes later, your clerk called back and asked whether the State could call Judge Clifford and give him your phone number. At your hearing, you testified:**

"I wanted the judge to know that I was available in case he wanted to speak with me. I thought there was a chance he might hear from Mr. Paulding and he might want to seek clarification from me."

Senator Kyl also asked you whether "tr[ied] to contact the Chief Justice of the Supreme Court, Justice Sullivan." You testified: "No." Did the clerk of your court call the clerk of the Connecticut Supreme Court to obtain Justice Clifford's phone number?

Response: Not to my knowledge.

6. **On January 10, 2005, two weeks before your involvement in the case, U.S. District Judge Droney made an inquiry into Mr. Ross's competence. Judge Droney held the hearing in a state facility so that he could see and speak with Mr. Ross directly via closed circuit television. Judge Droney "made an independent finding that [Ross was] competent to proceed on his own behalf." After speaking with Mr. Ross extensively, Judge Droney found that, "[g]iven Michael Ross' amply demonstrated competence before this Court and other courts, there is no basis for ordering a full evidentiary hearing on the issue of his competency." Like the motions before you, the issue arose before Judge Droney in the context of whether certain parties had standing to litigate on Ross's behalf as "next friends." Did you believe you gave Judge Droney's decision proper consideration, especially given that he had personally examined Mr. Ross, when you rendered your own?**

Response: Yes.

7. According to Mr. O'Hare, your conduct during the teleconference

“created an immediate conflict of interest between Attorney Paulding and his client. Attorney Paulding had to either do Judge Chatigny’s bidding or face being disbarred. . . . Consequently, the State . . . was faced with executing Ross when counsel was encumbered by a potentially insoluble conflict.”

During your hearing, you testified:

“I believe Mr. Paulding has stated that he did not feel threatened and that he sought the Stay based mainly on his conversation with Dr. Norko and his duty to the courts to bring to their attention new information or evidence bearing on the issue of his client’s competence.”

I recognize that, according to the Second Circuit’s opinion, Mr. Paulding stated that he reversed course “in part” because of your statements to him. But the fact is that your statements placed Mr. Paulding in a very difficult position ethically.

- a. After Mr. Paulding reversed course, he had to explain why he did so, and why that reversal was consistent with his prior statements. Do you agree that if Mr. Paulding had taken the position that he had reversed course solely because of your statements, that it would have operated as an admission that he was acting to protect his own interests, at the expense of his own?**

Response: No. My remarks to Mr. Paulding called upon him to take action consistent with his ethical obligations to his client and his prior statements to the state courts that he would immediately notify them if information or evidence came to his attention casting doubt on his client’s competence.

- b. In first instance, do you agree that your actions created an “insoluble conflict” for Mr. Paulding?**

Response: No.

8. Following Mr. Ross’s eventual execution, seven Assistant State’s Attorneys filed an ethics complaint against. Only after they had filed their initial complaint did they learn that you had been involved in the case while in private practice. At your confirmation hearing, you testified that you reviewed a motion on behalf of the Connecticut Criminal Defense Lawyers Association for leave to file an amicus brief on “an evidentiary issue.” You testified that you reviewed the motion that someone else had prepared and “and that was the end of my involvement in the case.” Later in your testimony, you admitted that you had exchanged letters with Ross.

- a. At what point did you recall that you had been involved in the case? Please specify whether it was before or after the initial ethics complaint.**

Response: I recalled my prior involvement only after one of the complainants amended his initial complaint to include a claim based on my prior involvement. Until then, I had no recollection of it.

- b. At what point did you recall that you had also corresponded with the defendant?**

Response: After the complainant amended his complaint to include this claim, my former partner retrieved a file from storage and found that it contained copies of this correspondence. Until then, I had no recollection of it.

- c. Did you continue to receive all the orders issued in the case because your appearance remained in the Supreme Court file?**

Response: Because my name was not removed from the appearance list, orders were received by my former firm after my involvement ended. I do not know which orders were received. The only order I recall seeing was the order granting the application to file an amicus brief. Once the decision was made that no amicus brief would be filed, I had no interest in the matter.

- d. Were you served with a copy of the state's 300-page brief and accompanying appendix totaling several hundred pages?**

Response: I do not know whether it was served. To my knowledge, I did not receive it.

- e. Were you served with a copy of the defendant's 300-page brief and multiple volume appendices?**

Response: I do not know whether it was served. To my knowledge, I did not receive it.

- 9. During the January 28th teleconference, while discussing Ross' mental state, you stated, "his sexual sadism, which was found by every single person who looked at him, is clearly a mitigating factor." At your hearing, you testified that the history of the Ross case is replete with psychiatric issues informing your concern about Mr. Ross's competency. But your statements during the teleconference and your testimony during your hearing seem to ignore the very important distinction between insanity and competency. Mr. Ross's sexual sadism went to the former and was presented at trial and sentencing as a mitigating factor. Prior to approximately 2004 when Mr. Ross decided not to pursue any further appeals, had any expert or any motion ever suggested that Mr. Ross was not competent?**

Response: Not to my knowledge.

10. Your decision during the initial hearing relied heavily on the testimony of Dr. Grassian, who testified that the defendant understood his legal position and available options, but that he was not able to “make[] a rational choice to forego further legal proceedings.” You also stated during the January 28th teleconference that “death row syndrome” is a well-recognized phenomenon.

a. Do you still believe that “death row syndrome” is a well-recognized phenomenon?

Response: I do not know how this “syndrome” is currently viewed.

b. You have been nominated to the Second Circuit, where you will hear appeals from, among other districts, the Southern District of New York. As of today, the Department of Justice still intends to try 9-11 mastermind Khalid Sheikh Mohammed (KSM) in the Southern District of New York. While he was being held at GITMO, KSM reportedly requested to be executed. If he is convicted in New York and waives his appeals and again requests to be executed, do you believe he would be competent to make that decision, or would he be incompetent based on “death row syndrome”?

Response: As a sitting district judge and nominee to the Second Circuit, I do not believe it would be appropriate for me to comment on a hypothetical question based on a pending case.

11. In unanimously reversing your decision in *Doe v. Lee*, the Supreme Court stated,

“Sex offenders are a serious threat in this nation....The victims of sex assault are most often juveniles and when convicted sex offenders reenter society, they are much more likely than any other type of offender to be re-arrested for a new rape or sex assault.”

a. Are you uncomfortable, generally, with the constitutionality of a Megan’s law?

Response: No.

i. If so, why?

Response: n/a

- ii. Are you worried that such a law may violate the rights of a convicted sex offender?**

Response: No.

- iii. Are you uncomfortable with the idea of requiring convicted sex offenders to register with the police?**

Response: No.

- 12. In *Walczyk v. Rio*, a plaintiff who was charged with criminal threatening filed a §1983 action against police officers who arrested the plaintiff and searched his home for firearms. You denied the officers' motion for summary judgment despite the plaintiff's long history of using firearms to threaten others and his potential threat to an officer when he stated "the police aren't taking the action necessary to avoid a bloodbath." The Second Circuit reversed your decision holding that the magistrate "certainly had a substantial basis" to conclude probable cause existed.**

- a. Can you explain your ruling and whether you agree with the Second Circuit's decision reversing your decision?**

Response: My ruling denying the officers' motion for summary judgment on the unlawful arrest and search claims (the ruling granted their motion on other claims) was based primarily on a prior ruling by the Connecticut Appellate Court (on the direct appeal in the underlying criminal case) that the warrant affidavit fell well short of establishing probable cause. *See Walczyk v. Rio*, 339 F. Supp. 2d 385, 390 (D. Conn. 2004). The Connecticut Appellate Court reasoned that "[a] statement to a police officer that *the police* needed to act to avoid a 'bloodbath' cannot be the basis of probable cause to believe that the defendant, at the time or in the immediate future, would engage in threatening behavior." *See State v. Walczyk*, 76 Conn. App. 169, 180-82 (2003)(emphasis in original). I thought the Connecticut Appellate Court's determination was incorrect but reluctantly concluded that it required me to deny summary judgment. The Second Circuit disagreed with the Connecticut Appellate Court's determination, noted it was not binding, and reversed. *Walczyk v. Rio*, 496 F.3d 139, 159-60 (2d Cir. 2007).

- b. One of the factors you considered when rejecting the officers' assertion of qualified immunity was that they had failed to inform the magistrate that they had not spoken directly with the officer who filed the report about the "bloodbath" remark. In reversing your decision, the Second Circuit stated:**

"we observe that the law permitting one law enforcement officer to rely on the report of another in applying for a warrant nowhere requires direct consultation to ensure that the officer reviewing the report ascribes no more weight to the described facts than the report intended..."

Why did you not consider this factor when the Second Circuit found that the law does not require direct consultation?

Response: I do not believe the officers relied on this factor when the case was before me.

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

Response: I drafted the answers, sent them to the Office of the White House Counsel, received comments, then put my answers in final form.

14. Do these answers reflect your true and personal views?

Response: Yes.