

**Senator Jeff Sessions
Questions for the Record**

**Mary McElroy
Nominee, U.S. District Judge for the District of Rhode Island**

- 1. You have written on several occasions that mandatory minimum sentences “can and do result in absurd results and leave sentencing decisions in the hands of the prosecutor making the charging decisions rather than the court.”**

- a. Please take this opportunity to expand on that statement.**

Response: As Public Defender for the State of Rhode Island, my responsibility is to advocate for the individual public defenders as well as the clients served by the office. These statements were made in that capacity. Mandatory minimum sentences are a legitimate expression of legislative intent in the area of appropriate punishment. What I meant by referring to the “hands of the prosecutor making the charging decisions” is that in the first instance the range of sentence, including mandatory minimums, is determined by the charging document. It is not uncommon that a given set of allegations fall within the embrace of several statutes and the prosecutor’s charging decision determines the range within which the court will have sentencing discretion.

- b. Do you believe that there are benefits to mandatory minimum sentences?**

Response: Please see responses to 1(a) above and 1(c) below.

- c. Do you agree that mandatory minimum sentences have been critical to reducing crime levels in the United States?**

Response: I do not know the empirical data with respect to whether mandatory minimum sentences have been critical to reducing crime levels in the United States. It seems reasonable to assume that where there is a deterrent effect of a statutory punishment, mandatory minimums would have an impact in reducing crime.

- 2. In 2013, you stated in a letter to the chairperson of the Rhode Island House Judiciary Committee that “[w]henever legislation infringes upon judicial discretion in the sentencing decision; absurd results are likely to occur.” Please take this opportunity to explain what you meant by that statement.**

Response: Please see my response to Question 1(a) above.

3. Under the Supreme Court's decision in *United States v. Booker*, the federal sentencing guidelines are now advisory, rather than mandatory.

a. If confirmed, how much deference will you afford the sentencing guidelines?

Response: If I am confirmed, I will apply precedent from the United States Supreme Court and the United States Court of Appeals for the First Circuit when determining how much deference to give the sentencing guidelines. "Although the Guidelines are no longer mandatory, 'district courts must still give respectful consideration to the now advisory Guidelines (and their accompanying policy statements).'" *United States v. Velez-Soto*, 804 F.3d 75, 78 (1st Cir. 2015) (quoting *United States v. Millan-Isaac*, 749 F.3d 57, 67 (1st Cir. 2009) and *Pepper v. United States*, 562 U.S. 476, 501 (2011)). The guidelines are both empirically based and the product of an independent commission and as such should be accorded significant deference.

b. Do you agree that the sentence a defendant receives for a particular crime should not depend on the judge he or she happens to draw?

Response: Yes.

c. Under what circumstances do you believe it appropriate for a district judge to depart downward from the sentencing guidelines?

Response: Although the sentencing guidelines are now advisory, they still remain the starting point for all sentencing decisions. Judges should select an appropriate sentence by reference to the appropriate guideline sentencing range, the guidance offered by the policy statements contained within the guidelines and the factors set forth in 18 U.S.C. §3553(a). This statute gives guidance to judges as to when it would be appropriate to depart downward (or upward) from an advisory guideline range. If confirmed, I would consider all of those factors in arriving at an appropriate sentence.

4. In 2013, you wrote to the Rhode Island legislature to express support for legislation "that would legalize marijuana and establish regulations associated with legalization."

a. Do you still adhere to this view?

Response: I supported the above noted legislation in my capacity as the Rhode Island Public Defender. This has been the position of the Rhode Island Public Defender since well before my appointment to the post. The agency position was not based on a moral or ethical view of marijuana use. Instead, it is consistent with agency advocacy for the inclusion of considerations of public safety and resources when legislating in the area of criminal justice policy. This is particularly so when proposed legislation would impact the clients we serve.

- b. In an August 29, 2013 Justice Department Memorandum, Deputy Attorney General Cole outlines the Department's policy of non-enforcement towards certain federal laws prohibiting interaction with marijuana. In your view, does this Memorandum outline an appropriate exercise of prosecutorial discretion?"**

Response: As a pending judicial nominee, it would be inappropriate for me to comment on the merits of a law enforcement decision made by the Department of Justice.

- 5. In 2014 and 2015, you wrote to the Rhode Island legislature to recommend the reclassification from misdemeanor to civil violation the crime of first offense shoplifting, referring to it as a "minor and in most cases victimless" crime.**

- a. Do you still adhere to the view that first offense shoplifting should be reclassified from misdemeanor to civil violation?**

Response: This is the position of the Rhode Island Public Defender's Office and continues to be the position of the agency. There are many instances in which shoplifting is not a victimless crime, and businesses can suffer significant monetary damage as a result of such unlawful acts.

- b. Do you still adhere to the view that first offense shoplifting is "in most cases victimless?"**

Response: Please see my response to Question 5(a) above.

- 6. In 2014, you wrote to the Rhode Island legislature to oppose legislation that would have required individuals convicted of any felony to submit a DNA sample. Recognizing that law enforcement relies on DNA databases to resolve outstanding investigations (including the occasional exoneration of an individual who was wrongly convicted), do you still oppose policies that would require all convicted felons to provide a DNA sample?**

Response: The proposed legislation that my agency opposed would have permitted DNA gathering, testing and inclusion in the database for all felony arrestees not simply for those convicted of any felony. The legislation would have permitted collection, testing and recording of DNA profiles even if no formal charge was ever brought. In part as a result of the advocacy of the Rhode Island Public Defender and others, the legislation as passed permits the gathering of DNA from arrestees but forbids testing and inclusion in the database unless formal charges are lodged.