Responses of Michael C. Green
Nominee to be United States District Judge for the Western District of New York
to the Written Questions of Senator Chuck Grassley

1. **Given your work on the New York Commission, and considering your experience with criminal law, what is your familiarity with the Federal Sentencing Guidelines?**

   Response: I am familiar with the Federal Sentencing Guidelines from several different sources. First, as District Attorney I have worked with the United States Attorney's Office on a regular basis to determine whether cases can be prosecuted most effectively in state or federal court. This analysis included an examination of the applicable sentencing provisions in each jurisdiction, which in federal court required review of the Federal Sentencing Guidelines. Also, as a member of the New York Sentencing Commission, I studied the Federal Sentencing Guidelines as a reference in making recommendations for New York's sentencing scheme. Finally, I have been studying federal law, including the Federal Sentencing Guidelines, in preparation for my work as a federal district court judge, in the event I am confirmed by the United States Senate.

   a. **What was your position, while serving on the New York Commission, regarding mandatory minimum sentencing?**

      Response: As a member of the Commission I advocated for mandatory minimum sentences for those offenders convicted of crimes which threaten the safety of our communities.

   b. **If confirmed, under what circumstances would you depart from the Federal Sentencing Guidelines?**

      Response: Understanding that the Supreme Court in United States v. Booker, 543 US 220 (2005), held that the Federal Sentencing Guidelines are advisory, not mandatory, if confirmed as a district court judge, I would nevertheless give substantial deference to the applicable sentencing ranges calculated pursuant to the Guidelines. I would only consider departing from the Guidelines in an individual case when I felt a departure was warranted based upon the applicable statutory and decisional law. For example, I would consider a departure pursuant to 18 U.S.C. § 3553(e) when the government makes a motion for a departure based upon substantial cooperation by the defendant. In all cases, I would be strongly guided by the provisions of the Federal Sentencing Guidelines and any relevant decisions of the United States Supreme Court and Second Circuit Court of Appeals.

2. **Do you believe it is proper for a judge, consistent with governing precedent, to strike down an act of Congress that it deems unconstitutional? If so, under what circumstances, and applying what factors?**

   Response: Yes, I believe it is proper for a judge, consistent with governing precedent, to strike down an act of Congress. Such a decision would be proper when the judge

determines, after careful consideration, that such act exceeds Congressional authority as articulated in the Constitution and in relevant Supreme Court precedent.

3. **What is the most important attribute of a judge, and do you possess it?**

   Response: I believe the most important attribute of a judge is to be able to promptly decide cases on the narrow issues presented after making fair and impartial findings of facts, identifying and apply controlling statutory and case law, and applying that law to the facts of the particular case. I believe I possess this ability.

4. **Please explain your view of the appropriate temperament of a judge. What elements of judicial temperament do you consider the most important, and do you meet that standard?**

   Response: A judge should treat everyone with dignity and respect; should act in a manner that affords the federal courts and federal law the respect they deserve; and, should be firm in managing the docket, including ensuring that the décorum of the court is always maintained and that all decisions are prompt and just. I believe that I possess and have demonstrated that I possess the qualities that will ensure that I conduct myself in this manner should I have the honor of being confirmed as a federal district court judge.

5. **In general, Supreme Court precedents are binding on all lower federal courts and Circuit Court precedents are binding on the district courts within the particular circuit. Are you committed to following the precedents of higher courts faithfully and giving them full force and effect, even if you personally disagree with such precedents?**

   Response: Yes.

6. **At times, judges are faced with cases of first impression. If there were no controlling precedent that dispositively concluded an issue with which you were presented, to what sources would you turn for persuasive authority? What principles will guide you, or what methods will you employ, in deciding cases of first impression?**

   Response: I would start by finding the facts in a fair and objective manner. I would then turn to an analysis of the language of the statute or provision of the Constitution at issue, and if necessary and available, any legislative history that sheds light on the meaning of the statute. I would also look to the decisions of the United States Supreme Court, the Second Circuit Court of Appeals, and the other Circuit Courts in which these courts have decided similar cases, for further guidance in addressing a case of first impression. I would attempt to decide the issue as narrowly as possible consistent with the language of the Constitution or statute in question, considering any relevant precedent.

7. **What would you do if you believed the Supreme Court or the Court of Appeals had seriously erred in rendering a decision? Would you apply that decision or would you use your own judgment of the merits, or your best judgment of the merits?**

   Response: If I am confirmed as a district court judge, I would follow all controlling law regarding any issue that came before me as set forth by the United States Supreme Court and the Second Circuit Court of Appeals without regard for my personal opinions.

8. **As you know, the federal courts are facing enormous pressures as their caseload mounts. If confirmed, how do you intend to manage your caseload?**

   Response: As a judge I would set an example for all parties in terms of my work ethic and level of preparation. I would make sure criminal cases are handled according to the applicable speedy trial standards. I would utilize scheduling orders and be firm in holding parties to those orders to facilitate the prompt disposition of cases. I would use the resources available to me, including magistrate judges, and effective methods developed by other judges in my district, including mediation where appropriate, to help manage the caseload. I would conduct court proceedings in a fair but efficient manner and make decisions promptly.

9. **Do you believe that judges have a role in controlling the pace and conduct of litigation and, if confirmed, what specific steps would you take to control your docket?**

   Response: I believe judges play a significant role in controlling the pace and conduct of litigation; and, if confirmed, I would take the steps outlined in my response to question 8 to control my docket.

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

    Response: I received these questions from the Department of Justice via email on the evening of May 31, 2011. I prepared draft responses to the questions and then reviewed them with the Justice Department. I then finalized my answers and emailed them to the Justice Department for submission to the Judiciary Committee.

11. **Do these answers reflect your true and personal views?**

    Response: Yes.

Responses of Michael C. Green
Nominee to be United States District Judge for the Western District of New York
to the Written Questions of Senator Tom Coburn, M.D.

1. **Some people refer to the Constitution as a "living" document that is constantly evolving as society interprets it. Do you agree with this perspective of constitutional interpretation?**

   Response: No, I do not agree that the Constitution is constantly changing as society interprets it. While courts may be called on to apply the Constitution to new or different factual scenarios, the only way the Constitution itself changes is by a Constitutional Amendment.

2. **Justice William Brennan once said: "Our Constitution was not intended to preserve a preexisting society but to make a new one, to put in place new principles that the prior political community had not sufficiently recognized." Do you agree with him that constitutional interpretation today must take into account this supposed transformative purpose of the Constitution?**

   Response: No.

3. **Do you believe judicial doctrine rightly incorporates the evolving understandings of the Constitution forged through social movements, legislation, and historical practice?**

   Response: As a district court judge, I believe I would be bound by the text of the Constitution and the relevant United States Supreme Court and Second Circuit Court of Appeals cases interpreting the Constitution. I do not believe the Constitution changes through social movements, legislation, and historical practice.

4. **Is any transaction involving the exchange of money subject to Congress's Commerce Clause power?**

   Response: The United States Supreme Court has made it clear that Congressional power under the Commerce Clause is not absolute and is subject to limitation. As a district court judge I would follow and be bound by Supreme Court decisions such as United States v. Lopez, 514 U.S. 549 (1995) and United States v. Morrison, 529 U.S. 598 (2000) and the relevant decisions of the Second Circuit Court of Appeals in deciding cases involving challenges to Congress's power under the Commerce Clause.

5. **The U.S. Supreme Court held in *District of Columbia v. Heller*, 554 U.S. 570 (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. Leaving aside the *McDonald v.***

***Chicago* decision, do you personally believe the right to bear arms is a fundamental right?**

Response: The United States Supreme Court, in McDonald v. Chicago, 130 S. Ct. 3020, 3042 (2010), held that the right to bear arms is a fundamental right, and I have no personal opinions or beliefs that would interfere with my ability to follow the precedent of the Supreme Court on this issue.

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: The United States Supreme Court held in McDonald v. Chicago, 130 S. Ct. at 3036, that for purposes of determining if rights such as those guaranteed in the Bill of Rights apply against the states under the due process clause of the fourteenth amendment, most, but not all, of the rights contained in the first eight amendments are fundamental rights that apply against the States. I have no beliefs that would interfere with my ability to follow the precedent of the Supreme Court on this issue.

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, as explained in the answer to 5.a. above.

c. The *Heller* Court 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: I believe the United States Supreme Court, in Heller v. District of Columbia, 554 U.S. 570(2008), held that the Second Amendment, like the First and Fourth Amendments, codified pre-existing rights, and I have no beliefs that would interfere with my ability to follow the precedent of the Supreme Court on this issue.

6. 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 United States Supreme Court's decision in Heller was based on the text of the Second Amendment.

a. Similarly, 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: The United States Supreme Court, in Citizens United v. FEC, 130 S. Ct. 876 (2010), pointed out that it was faced with conflicting lines of precedent, namely cases predating Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990) which prohibited speech restrictions based on a speaker's corporate identity, and the post-Austin cases which recognized such restrictions as constitutional. In reconciling these conflicting lines of cases the Supreme Court overruled Austin.

7. What limitations remain on the individual Second Amendment right now that it has been incorporated against the States?

Response: The United States Supreme Court, in Heller v. District of Columbia, 554 U.S. 570 (2008) stated that "[a]lthough we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms". In McDonald v. Chicago, 130 S. Ct. 3020 (2010), the Supreme Court reaffirmed this concept.

a. In *McDonald v. Chicago*, the majority wrote: "We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons and the mentally ill,' 'laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.'"

What if a state passed a law imposing a $2,000 registration fee as a condition for the commercial sale of a firearm? Without stating how you would rule in such a case, please explain how you would conduct your analysis to determine whether the fee violated the Second Amendment right to keep arms?

Response: If confirmed as a district court judge and faced with an issue as described in this question, I would look to the applicable United States Supreme Court and Second Circuit case law interpreting the Second Amendment, including the holdings from Heller and McDonald referred to in the answer to question 7 above, and apply them to the facts of the case before me.

i. To what cases or authorities would you refer? Please be specific.

Response: Please see the response to Question 7.a. above.

b. If the New York legislature outlawed the carrying and possession of firearms on the grounds of hospitals that have psychiatric wards, regardless of whether the hospital was private, and someone challenged that law on constitutional grounds in a case that was before you, please explain how you would conduct your analysis to determine whether that regulation complied with the Second Amendment's guarantee of the right to bear arms without stating how you would rule in such a case. Please be specific as to which cases and authorities you would refer and what weight you would give them.

Response: If confirmed as a district court judge and faced with an issue as described in this question, I would look to the applicable United States Supreme Court and Second Circuit case law interpreting the Second Amendment, including the holdings from Heller and McDonald referred to in the answer to question 7 above, and apply them to the facts of the case before me.

i. Could a hospital qualify as a "sensitive place?" Why or why not?

Response: Please see the answer to question 7.b. above.

c. Is the Second Amendment limited only to possession of a handgun for self-defense in the home, since both *Heller* and *McDonald* involved cases of handgun possession for self-defense in the home?

Response: I do not believe the Supreme Court holdings in Heller or McDonald specifically limited the application of the Second Amendment to protect only possession of a handgun in a home for self-defense.

8. 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: If confirmed as a district court judge I would be bound by and would follow the holding of the United States Supreme Court in Roper v. Simmons regardless of any personal beliefs or opinions I may have on the issue.

a. Do you agree that the Constitution's prohibition on cruel and unusual punishment "embodies a principle whose application is appropriately informed by our society's understanding of cruelty and by what punishments have become unusual?"

Response: If confirmed as a district court judge and faced with such a challenge, I would apply the United States Supreme Court and Second Circuit Court of Appeals precedent when considering a claim of cruel and unusual punishment under the Eighth Amendment.

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

Response: Please see the answer to question 8.a. above.

c. Do you think that a judge could ever find that the "evolving standards of decency" dictated that the death penalty is unconstitutional in all cases?

Response: The Supreme Court has held that the death penalty is not unconstitutional in all cases and if confirmed as a district court judge I would have no difficulty following and applying this holding. I believe it would be improper for a district court judge to hold otherwise in the face of existing Supreme Court precedent.

d. What factors do you believe would be relevant to the judge's analysis?

Response: In light of the answer to question 8.c. above, I do not believe any such analysis would be appropriate for a district court judge.

e. When determining what the "evolving standards of decency" are, justices have looked to different standards. Some justices have justified their decision by looking to the laws of various American states,[1] in addition to foreign law, and in other cases have looked solely to the laws and traditions of foreign countries.[2] Do you believe either standard has merit when interpreting the text of the Constitution?

Response: If confirmed as a district court judge, I would interpret the text of the Constitution based on a reading of the text and any United States Supreme Court or Second Circuit Court of Appeals cases on point. I would not consider the laws of the states or foreign laws unless I was specifically required to do so by the law as established by the above-mentioned courts.

i. If so, do you believe one standard more meritorious than the other? Please explain why or why not.

Response: Please see the answer to question 8.e. above. I would only consider these sources to the extent required and in the manner required by Supreme Court and Second Circuit precedent.

9. In your view, is it ever proper for judges to rely on foreign or international laws or decisions in determining the meaning of the Constitution?

Response: If confirmed as a district court judge it would not be proper for me to look to foreign or international law in interpreting the Constitution or laws of the United States unless required by Supreme Court and Second Circuit precedent, and if so, only to the extent required.

[1] *Roper v. Simmons*, 543 U.S. 551, 564-65.
[2] *Graham v. Florida*, 130 S.Ct. 2011, 2033-34.

a. Is it appropriate for judges to look for foreign countries for "wise solutions" and "good ideas" to legal and constitutional problems?

Response: Please see the answer to question 9 above.

b. If so, under what circumstances would you consider foreign law when interpreting the Constitution?

Response: Please see the answer to question 9 above.

c. Do you believe foreign nations have ideas and solutions to legal problems that could contribute to the proper interpretation of our laws?

Response: Please see the answer to question 9 above. I believe the laws of the United States should be interpreted by reference to legal sources within the United States.

d. Would you consider foreign law when interpreting the Eighth Amendment? Other amendments?

Response: Please see the answer to question 9 above.

10. You noted in your hearing testimony that you not only prosecute cases, you also have to "seek justice" and there are "many" occasions when doing justice requires you to dismiss a case or make a decision not to bring charges because "that's just." Please explain in detail what specific factors you consider when deciding to dismiss a case or not bring charges.

Response: While every case is different and must be considered individually, the analysis involves an examination of the facts of the case in light of the applicable law.

a. Please provide some examples of cases where you decided not to bring charges or dropped the case and include details about the potential charges and factors you considered when making your decision.

Response: The three cases that come to mind immediately are People v. Douglas Warney, People v. Frank Sterling, and People v. Freddie Peacock. In each of the cases the defendant was convicted by a jury, Warney and Sterling of murder, and Peacock of rape. I was not District Attorney, nor was I involved in the original prosecution of any of the cases. However, during my term as District Attorney my office uncovered and/or was provided with evidence, including DNA evidence in all three cases, which after extensive investigation, established that each defendant was wrongfully convicted. In all three cases I moved, jointly with the defense, to have the convictions set aside and to have the indictments dismissed.

b. Did your decision involve empathy towards the perpetrator?

Response: No.

c. What role do you believe empathy should play when judges are deciding cases?

Response: While I believe it is important for a judge to strive to understand the perspective of all parties in the fact finding part of the process, I believe a judge's ultimate decision must be based on an impartial application of the controlling law to the facts of a case. Sympathy or other feelings for or against a party must play no part in judicial decision making.

d. Do you believe empathy is an essential ingredient for arriving at just decisions and outcomes and should play a role in a judge's consideration of a case?

Response: Please see the response to 10.c. above.

11. In your testimony, you stated that you often recommended drug treatment rather than jail time for certain drug-related arrests. Please provide statistics for the number of drug felony cases in your office disposed of by plea, trial, or other disposition, since you took over as District Attorney in 2004. Please list each separately and include the national and statewide averages for each category of offense as well.

Response: From January 1, 2004, to present 4,135 (73%) drug felony cases prosecuted by my office have been disposed of by plea, 107 (2%) by trial, and there have been 1,480 (25%) other dispositions. New York State data shows 86% of drug felonies are disposed of by plea, 1% by trial and 13% by other disposition. National data shows 65% of drug felony cases are disposed by plea, 2% by trial, and 33% by other disposition. Please note that these comparisons are approximate and are based on different data sources and different time frames.

12. Please provide a brief summary of and citation for each case in which you asked for a sentence for a defendant which was below what was called for by the U.S. Sentencing Guidelines. Please include the sentencing range called for under the guidelines, the sentence you requested, and the sentence issued by the judge.

Response: I have personally prosecuted and made sentence recommendations on thousands of cases in my twenty-four years as a prosecutor. Because all these cases involved defendants convicted of violating New York State's criminal statutes, and New York State crimes have different elements than federal criminal offenses, it is not possible to accurately compare my sentence recommendations to the Federal Sentencing Guidelines. New York State has its own sentencing guidelines (*See* NY Penal Law Articles 60 and 70). I have never recommended a sentence below the sentencing range authorized by New York law; and to the best of my knowledge, a judge has never imposed a sentence below the range authorized by New York law on any of the cases I prosecuted.

13. You also noted in your hearing testimony that you were the "person designated to get up to speed on capital prosecutions, lead the office, and in fact wound up teaching attorneys around the State how to prosecute capital cases" after New York State enacted a capital penalty statute in 1995. Can you please explain in detail what information you provided attorneys around the State about how to prosecute capital cases?

Response: In January, 1998, I served as a member of a panel discussing "Emerging Legal Issues" at a Statewide Conference on Capital Prosecution organized by the New York Prosecutors Training Institute (NYPTI). In August, 1999, I gave a lecture entitled "Arguing for Death" at a Statewide Conference on Capital Prosecutions – Demonstrations and Discussions organized by NYPTI. In August, 2001, as part of a Capital Prosecution Survey Course organized by NYPTI, I gave a presentation entitled "A View From the Box" regarding jurors in capital cases. In February, 2002, as part of a conference hosted by NYPTI entitled "Terrorism and Emerging Legal Issues in Murder Prosecutions," I gave a presentation entitled "Handling a Death Penalty Case." The above presentations were listed in response to question 12.d. on my United States Senate, Committee on the Judiciary, Questionnaire for Judicial Nominees and if outlines exist, they were provided with the Questionnaire.

In addition to these formal presentations I served as part of a panel of prosecutors from across New York who were available to and did provide advice to other New York prosecutors on issues related to the prosecution of capital cases. This was generally done by way of telephone conferences. I do not have notes of specific cases or issues discussed during these conferences. Additionally, on at least one occasion that I can recall, prosecutors from another county in New York came to my office and I spent two days assisting them in preparing for a capital trial in their county.

a. How many capital cases have you prosecuted in your career?

Response: I was lead prosecutor on three cases where a notice of intent to seek the death penalty was actually filed.

b. Please provide a brief summary of and citations for each death penalty case in which you participated, and, to the extent available, copies of opinions issued in those cases.

Response: Please see the summaries below:

<u>People v. Foued Abdallah aka Tom Cruise</u> (New York State Supreme Court, Monroe County, Indictment #53, 1996)

Abdallah was charged with Murder in the First Degree for breaking into his ex-girlfriend's home while she was out, waiting for her, and then stabbing her to death with her seven year old son in the house. The district attorney, Howard R.

Relin, filed a notice of intent to seek the death penalty. The defendant pled guilty before trial, with the consent of the district attorney, to Murder in the First Degree with a sentence of life without parole. The defendant appealed and his conviction and sentence were affirmed (People v. Foued Abdallah, 23 AD3d 1116 [4th Dept, 2005], *leave denied* 6 NY3d 845 [2006]). Abdallah also filed a petition for a writ of habeas corpus in the Western District of New York. Habeas relief was denied and the petition was dismissed by decision and order of Hon. Michael A. Telesca, on April 26, 2010 (Cruise v. Conway, *unreported*, 2010 WL 1707924 (WDNY 2010). I was lead trial counsel during the prosecution of Abdallah.

People v. Mateo (Monroe County Court, Indictment #914, 1996)

Mateo was charged with Murder in the First Degree, Attempted Murder in the First Degree, kidnapping and other crimes for his role in three separate but related incidents. He was charged with a second count of first degree murder for the commission of four murders in a similar fashion. The first degree murder charges were under a recently enacted capital murder statute. The trial judge dismissed one first degree murder charge on the ground that the murders were not sufficiently similar (People v. Mateo, 175 Misc.2d 192, 218 [Monroe County Ct, 1997]). The People appealed and the trial court's decision was affirmed by the Appellate Division and the Court of Appeals (People v. Mateo, 249 AD2d 894 [4th Dept 1998]; *affirmed* 93 NY2d 327 [1999]). The trial court also declared a provision of the statute dealing with pleas unconstitutional. The Appellate Division granted a declaratory judgment in favor of the District Attorney (Relin v. Connell, 251 AD2d 1041 [4th Dept, 1998]). The Court of Appeals later reversed the Appellate Division and affirmed the trial court's ruling (Hynes v. Tomei, 92 NY2d 613 [1998]). The United States Supreme Court denied certiorari (Hynes v. Tomei, 527 U.S. 1015 [1999]).

The District Attorney sought the death penalty and Mateo was tried and convicted of Murder in the First Degree as well as other crimes. The defendant was sentenced to death. The convictions were affirmed on appeal, but the death sentence was set aside due to a ruling that a portion of the state statute was unconstitutional (People v. Mateo, 2 NY3d 383 [2004]). The matter was remitted for resentencing and the defendant was sentenced to life without parole. The defendant filed a petition for a writ of habeas corpus in the Western District of New York. On October 9, 2009, Hon. Michael A. Telesca, denied habeas relief and dismissed the petition. Mateo v. Artus, *unreported*, 2009 WL 3273878 (WDNY 2009).

Mateo's three additional murder charges were tried separately and the defendant was convicted of the murders. The convictions were affirmed (People v. Mateo, 11 AD3d 984 [4th Dept, 2004], *leave denied* 3 NY3d 758). I was the lead prosecutor for all of the Mateo litigation.

People v. Owens (New York State Supreme Court, Monroe County, Indictment #414 and #547, 1999)

John Owens, a five-time felon, was charged with two counts of Murder in the First Degree and additional crimes for the rape and murder of two women. He was also charged with two counts of Rape in the First Degree and related crimes for the forcible rapes of two additional women. The District Attorney sought the death penalty. The two first degree murder charges and one of the rape charges were tried before a jury. The defendant was convicted of all three charges after a trial that spanned nine months. The jury deadlocked on whether to sentence the defendant to death or life without parole on one count, and on the other count, they agreed to a sentence of life without parole. The defendant was sentenced to life without parole, 25 years to life on the second (deadlocked) murder, and 25 years on the rape. This conviction was affirmed on appeal (People v. Owens, 51 AD3d 1369 [4th Dept 2008]; *leave denied* 11 NY3d 740).

At a separate trial, the defendant was convicted of the remaining rape and sentenced to an additional 25 years. This conviction was affirmed on appeal (People v. Owens, 50 AD3d 1579 [4th Dept 2008]; *leave denied* 10 NY3d 938). I was lead counsel for all of the Owens litigation.

Copies of all published opinions I am aware of from these cases are attached.

c. How is prosecuting a capital case different from prosecuting a life sentence?

Response: Under the New York State death penalty provisions there are many differences. The New York Legislature, in reinstating the death penalty, enacted special protections for capital defendants, including, specially trained and appointed counsel, additional time for pretrial motions, individual *voir dire* of prospective jurors, and a direct appeal, as a matter of right, to the New York Court of Appeals. Under New York's death penalty sentencing scheme, a convicted defendant has a right to a separate sentencing proceeding before a jury and the right to presentation of mitigating factors by way of testimony. The United States Supreme Court has recognized the differences between cases where a defendant faces the death penalty and when life imprisonment is the maximum penalty. "[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long.... Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280, 305 (1976).