

**Responses of James A. Wynn, Jr.
Nominee to the U.S. Court of Appeals for the Fourth Circuit
to the Written Questions of Senator Jeff Sessions**

- 1. In a 2004 law review article entitled, “Judicial Diversity: Where Independence and Accountability Meet,” published in the *Albany Law Review*, you stated:**

“The representative function of the judiciary is not limited to fact-finding and case outcomes. Even when a litigant is unsuccessful, a judge’s ability to empathize with his or her diverse perception and circumstance is essential to the litigant’s respect for the court’s adverse action. . . . [J]udges must engage in the diverse and disaffected life stories of these groups.”

As you may know, President Obama has described the types of judges that he will nominate to the federal bench as follows:

“We need somebody who’s got the heart, the empathy, to recognize what it’s like to be a young teenage mom. The empathy to understand what it’s like to be poor, or African-American, or gay, or disabled, or old. And that’s the criteria by which I’m going to be selecting my judges.”

- a. Do you believe that you fit President Obama’s criteria for federal judges, as described in his quote?**

Response: I do not know, and cannot comment as to, President Obama’s criteria for selecting federal judges. I assume, because he nominated me, that President Obama believes that my record demonstrates that I am qualified to serve as a federal judge.

- b. During her confirmation hearing, Justice Sotomayor rejected this so-called “empathy standard” stating, “We apply the law to facts. We don’t apply feelings to facts.” Do you agree with Justice Sotomayor?**

Response: Yes, I agree with her statement.

- c. What role do you believe that empathy should play in a judge’s consideration of a case?**

Response: Empathy should not play any role in a judge’s applying the law to the facts. The judge’s job is to apply the law to the facts of the particular case in front of him.

- d. Do you think that it is proper for judges to consider their own subjective sense of empathy in determining what the law means?**

Response: No.

i. If so, under what circumstances?

Response: Not applicable.

ii. Please provide an example of a case in which you have considered your own subjective sense of empathy in determining what the law means.

Response: None. In each case in which I participate, I provide the parties with a neutral and impartial decision. I base my decisions on the law, not empathy.

iii. Please provide an example of a case where you have set aside your own subjective sense of empathy and ruled based solely on the law.

Response: None. In each case in which I participate, I provide the parties with a neutral and impartial decision. Empathy plays no role in that.

e. Do your above-quoted statements reflect your judicial philosophy?

Response: No. The quotes from our article are not statements about judicial philosophy. Rather, they are simply observations about the representative function of judges in a democracy.

f. Do your above-quoted statements reflect your view of the role of a judge? If not, please explain your view of the role of a judge.

Response: No. The role of a judge is to apply the pertinent law to the facts in a neutral and impartial manner. The above-quoted statements are an abbreviated excerpt from our article about the role of diversity in achieving an impartial and representative judiciary. The very next sentence after the above-noted quotations plainly states that “[t]o be sure, the absence of diversity in the judiciary does not necessarily mean that nondiverse judges are unable to adjudicate matters fairly and impartially.”

2. In your article, you stated that “lack of diversity has direct and deleterious impacts on the success of minority litigants, the representative function of the elected judiciary, and most importantly, the quality of judicial decisionmaking.”

a. Do you believe that a judge’s racial or ethnic background affects the quality of his or her decision-making? Please explain your answer.

Response: No. Decisions should be the product of a neutral and impartial application of the pertinent law to the facts of a case. That process should not be affected by the judge’s race or ethnic background.

- b. Please explain how “lack of diversity” impacts “the quality of judicial decisionmaking.”**

Response: My co-author and I wrote that diversity in the judiciary broadens the variety of experiences informing the deliberative process. This is a view expressed by other judges. For example, in his testimony to the Senate Judiciary Committee during his confirmation hearings on January 11, 2006, Justice Alito eloquently spoke of the impact of his immigrant background on his judicial decisionmaking, stating:

When I get a case about discrimination, I have to think about people in my own family who suffered discrimination because of their ethnic background or because of religion or because of gender. And I do take that into account.

The statements in our article are narrower than those given by Justice Alito. Our article addresses the fact that elected judiciaries are generally less diverse than their appointed federal counterparts. Our article concludes that where there is a lack of diversity in the elected system, there is a general lack of a variety of experiences informing the deliberative process.

- 3. You also argued that “each judge brings to the bench a sum of life experience [of race and gender]” and that experience influences perception, which in turn influences judicial decisionmaking. You concluded that “a lack of diversity in the judiciary creates a structural bias – a partiality – which is biased against [minorities].”**

- a. Do you agree that every judge has an obligation render justice impartially, without respect to persons?**

Response: Yes.

- b. How do you reconcile the above statements with the judicial oath, which requires judges to faithfully and impartially “administer justice without respect to persons, and do equal right to the poor and the rich . . . under the Constitution and the laws of the United States”?**

Response: The statements do not conflict with the judicial oath. Indeed, I believe that diversity on the bench helps to prevent the public’s perception of a structural bias and enhances a judge’s ability to “administer justice without respect to persons, and do equal right to the poor and the rich.”

- c. Please explain your statement that a lack of diversity creates a structural bias against minorities.**

Response: In this section of our article, my co-author and I looked at the potential value of diversity within the judicial system. In this context, for example, we looked at laws regarding diversity in the jury system. We cited *Taylor v. Louisiana*, 419 U.S. 522, 42 L. Ed. 2d 690 (1975), as an example that “the Supreme Court has endorsed the view that the Fourteenth Amendment and Sixth Amendment require structural impartiality in a jury venire.” The Supreme Court there held that the systematic exclusion of women from the jury panel violated the Sixth Amendment’s fair-cross-section requirement, and that “[t]he broad representative character of the jury . . . [is an] assurance of a diffused impartiality.” *Id.* At 530, 42 L. Ed. 2d at 698.

Diversity itself will not change the outcome of a case. In fact, as Justice Scalia says in *Republican Party v. White*, 536 U.S. 765, 153 L. Ed. 2d 694 (2002), “it is virtually impossible to find a judge who does not have preconceptions about the law Indeed, even if it were possible to select judges who did not have preconceived views on legal issues, it would hardly be desirable to do so.” *Id.* at 777-78, 153 L. Ed. 2d at 706. Justice Scalia explained that the fundamental guarantee of impartiality is that every person coming before a court will have the law applied to him or her equally because a judge is “willing to consider views that oppose his preconceptions and remain open to persuasion.” *Id.* at 778, 153 L. Ed. 2d at 707.

Our article’s point is that “judicial ‘diversity promotes impartiality by ensuring that no one viewpoint, perspective, or set of values can persistently dominate legal decisionmaking.’” Therefore, the converse is that a lack of diversity and the dominance of one perspective might, under certain circumstances, result in a structural bias as opposed to an individual bias.

4. In your article, you also argued that “[i]n the absence of diversity, the goals of obtaining an impartial and representative judiciary are credibly challenged.”

a. Do you believe that it is necessary to have a diverse court in order to have a fair and functioning court? If so, what kind of diversity?

Response: No, it is not necessary to have a diverse court in order to have a fair and functioning court. As our article states, “[t]o be sure, the absence of diversity in the judiciary does not necessarily mean that nondiverse judges are unable to adjudicate matters fairly and impartially.”

b. Do you believe that if a court does not have the proper level of diversity with respect to race and gender, minorities and women will not receive justice?

Response: No.

5. In *State v. McClendon*, 130 N.C. App. 368 (N.C. Ct. App. 1998), you argued in dissent that it violated the Fourth Amendment to detain an individual who was stopped for speeding, appeared nervous, gave inconsistent and vague answers regarding his destination, and could not produce a registration card for the vehicle. A search yielded over 50 pounds of marijuana. The North Carolina Supreme Court affirmed the majority’s conclusion that “based on the totality of the circumstances . . . the detention of the defendant beyond the issuance of the warning ticket was justified and . . . no violation of defendant’s constitutional rights occurred.”

a. Please explain your reasoning in this case.

Response: My dissent in *McClendon* did not address the Fourth Amendment and, in fact, did not even mention the Fourth Amendment. Rather, the dissent relied on two binding North Carolina precedents. (States may provide greater protection than is required by the federal constitution.) As I wrote in the *McClendon* dissent:

Because our Supreme Court in *State v. Pearson*, 348 N.C. 272, 498 S.E.2d 599 (1998), and this Court most recently in *State v. Falana*, 129 N.C. App. 813, 501 S.E.2d 358, found that evidence similar to that in the case at hand was insufficient to support a conclusion that the officers were justified in detaining the drivers in those cases, I dissent from the majority's decision in this case.

State v. McClendon, 130 N.C. App. 368, 379, 502 S.E.2d 902, 909 (1998). Significantly, in its decision in *McClendon*, the Supreme Court of North Carolina “recognize[d] that *Pearson* could be so construed,” as in my dissent. *State v. McClendon*, 350 N.C. 630, 637, 517 S.E.2d 128, 133 (1999). The Supreme Court “revisit[ed] *Pearson* . . . in order to clarify its meaning and to illustrate how the totality of the circumstances are distinguishable from those in the case.” *Id.*

b. Do you accept the Supreme Court’s decision?

Response: Yes, I accept the Supreme Court’s decision as binding North Carolina law and have faithfully followed it as such. I relied on and cited the Supreme Court’s decision, for example, in *State v. Hernandez*, 170 N.C. App. 299, 612 S.E.2d 420 (2005), to uphold an officer’s detention of a suspect.

6. In *State v. Brooks*, 111 N.C. App. 558 (N.C. Ct. App. 1993), rev’d, 337 N.C. 132 (N.C. 1994), you held that approaching a parked car and talking with the driver constituted an investigatory stop requiring reasonable suspicion for purposes of the Fourth Amendment. There, a State Bureau of Investigation Agent was executing a search warrant on a business where the car was parked when he noticed the defendant in a parked car. When he walked over to the car and engaged the driver

in conversation, he noticed an empty gun holster next to the driver. When he asked where the gun was located, the defendant told the agent that he was sitting on it. After seizing the gun, the agent obtained consent to search the car and found drugs. The North Carolina Supreme Court unanimously reversed your decision.

a. Please explain your reasoning in this case.

Response: Sixteen years ago, when the *Brooks* opinion was issued, the law in this area was less clear than it is today. In *Brooks*, the case in state court arose after a federal judge had dismissed similar charges arising from the same facts. The federal judge who reviewed the case reached the same conclusion that we did. In reaching our decision, we looked to then-recent and binding state law precedent, *State v. Fleming*, 106 N.C. App. 165, 415 S.E.2d 782 (1992), indicating that generalized suspicion was insufficient to comport with the Fourth Amendment. Our panel, which included a concurring judge who authored *Fleming*, found the *Brooks* facts similar to those in *Fleming*.

On discretionary review, the Supreme Court of North Carolina provided clarity in this area by addressing, for the first time, a then-recent United States Supreme Court opinion, *Florida v. Bostick*, 501 U.S. 429, 115 L. Ed. 2d 389 (1991).

In the fifteen years since the Supreme Court of North Carolina's decision in *Brooks*, I have relied on and cited it. For example, in *State v. Wilson*, No. COA08-1536, 2009 WL 2177694 (N.C. App. July 21, 2009), I cited *Brooks* and wrote for a panel that no seizure had occurred and that the defendant's motion to suppress was therefore properly denied.

b. The North Carolina Supreme Court concluded that “upon seeing the empty holster, the officer was not required to give Miranda warnings prior to asking the defendant, ‘where is your gun?’ [and] that upon being told by the defendant that the weapon was under the defendant’s thigh, the officer had probable cause to arrest him.” Do you disagree with this analysis? Please explain your answer.

Response: I agree with the Supreme Court of North Carolina's analysis. Significantly, my colleagues and I on the Court of Appeals panel did not reach the issue of whether the officer was required to Mirandize the defendant.

- 7. In *State v. Smith*, 123 N.C. App., 162 (1996), *rev'd*, 346 N.C. 794 (1997), an unpublished opinion, you affirmed a lower court's decision that police violated the defendant's Fourth Amendment rights when they employed a technique called “knock and talk.” Even though police suspected that drugs were present in the defendant's home, and although they obtained permission to enter and search the home, you affirmed the trial court's decision that the search violated the Fourth**

Amendment. The North Carolina Supreme Court unanimously reversed your decision. Citing the U.S. Supreme Court’s decision in *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), the North Carolina Supreme Court noted that while searches of a home without a warrant are presumptively unreasonable, “[c]onsent . . . has long been recognized as a special situation excepted from the warrant requirement, and a search is not unreasonable within the meaning of the Fourth Amendment when lawful consent to the search is given.”

- a. Did you consider the Supreme Court’s decision in *Bustamonte* in affirming the trial court’s decision? If so, please explain how the decision figured into your reasoning.**

Response: Thirteen years ago, our opinion in *Smith* cited *Bustamonte*. We did not, however, hold that the “knock and talk” procedure was unconstitutional. Rather, we affirmed the trial court’s holding on the basis that, under the totality of the circumstances, the consent to search was invalid. We cited *Bustamonte* as support for the principle that, although a valid consent is a recognized exception to the Fourth Amendment’s warrant requirement, the prosecution must prove and the court must find that the consent was valid, voluntary, and untainted by illegality in any form.

On discretionary review, the Supreme Court of North Carolina addressed the “knock and talk” procedure. However, regarding the consent issue addressed in our Court of Appeals opinion, the Supreme Court concluded that “the trial court did not make a specific finding” regarding whether the consent was voluntary, and that “the evidence on this point is conflicting.” *Smith*, 346 N.C. at 801, 488 S.E.2d at 214. Accordingly, the Supreme Court remanded the matter to the trial court “for reconsideration of, and further findings on, defendant’s motion to suppress in light of this opinion.” *Id.*

No appeal followed from the trial court’s ruling upon remand by the Supreme Court. Records in the county of origin indicate that the case was dismissed.

- b. Do you believe that the police technique of conducting a “knock and talk” is unconstitutional? Please explain your answer and whether this was part of your reasoning in this case.**

Response: The Supreme Court of the United States and the Supreme Court of North Carolina have held that the “knock and talk” technique is constitutional. I have faithfully followed that precedent without any reservation. As stated above, the constitutionality of a “knock and talk” was not addressed by our Court of Appeals opinion in *Smith*.

- c. Considering the potential impact of the decision, why was this opinion unpublished?**

Response: In 1996, the North Carolina Court of Appeals consisted of twelve judges who wrote over 1200 opinions each year. To expedite the adjudication of the high number of appeals before the court, the Court of Appeals employed a “fast-track” calendar by which the Chief Judge determined that certain cases could be decided quickly. Since one of the three judges on the *Smith* panel was a special emergency judge, it appears that *Smith* was a fast-track case. As with nearly every case placed on the fast-track calendar, it was not published.

Because the decision was unpublished, under North Carolina’s Rules of Appellate Procedure, it had no precedential value. Additionally, in 1996, it could not have been cited even as “guidance.” Thus, it would have had no “potential impact” on North Carolina jurisprudence.

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

Response: I reread the relevant materials and cases, conducted research on the issues raised by the questions presented, and drafted responses to each of the questions. The Department of Justice reviewed my responses and discussed them with me, and I made some revisions thereafter. These answers are my own.

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

Response: Yes.