

**Nomination of Rodney Smith to the U.S. District Court for the Southern District of Florida  
Questions for the Record  
Submitted October 24, 2018**

**QUESTIONS FROM SENATOR FEINSTEIN**

1. Please respond with your views on the proper application of precedent by judges.
- a. When, if ever, is it appropriate for lower courts to depart from Supreme Court precedent?**

It is never appropriate for lower courts to depart from Supreme Court precedent.

- b. Do you believe it is proper for a district court judge to question Supreme Court precedent in a concurring opinion? What about a dissent?**

It is not the appropriate role of a district court judge to question or criticize Supreme Court precedent. If the majority was not applying Supreme Court precedent correctly, or if a district court judge believed that a conflict of law existed that it was the purview of the Supreme Court to address, I believe it would be appropriate to note that in those limited circumstances.

- c. When, in your view, is it appropriate for the Supreme Court to overturn its own precedent?**

The Supreme Court has made clear that only it has the “prerogative ... to overrule one of its precedents.” *Bosse v. Oklahoma*, 1374 S. Ct. 1, 2 (2016); *see also State Oil Co. v. Khan*, 522 U.S. 3 (1997). Thus, it would be inappropriate for me as a lower court nominee to opine on when the Supreme Court should or should not overturn its own precedent, a prerogative that it alone holds.

2. When Chief Justice Roberts was before the Committee for his nomination, Senator Specter referred to the history and precedent of *Roe v. Wade* as “super-stare decisis.” A textbook on the law of judicial precedent, co-authored by Justice Neil Gorsuch, refers to *Roe v. Wade* as a “super-precedent” because it has survived more than three dozen attempts to overturn it. The book explains that “superprecedent” is “precedent that defines the law and its requirements so effectively that it prevents divergent holdings in later legal decisions on similar facts or induces disputants to settle their claims without litigation.” (The Law of Judicial Precedent, Thomas West, p. 802 (2016))

- a. Do you agree that *Roe v. Wade* is “super-stare decisis”? “superprecedent”?**

As a lower court nominee, all Supreme Court precedent is equally binding, and if confirmed, I will uphold and faithfully apply all such precedents.

- b. Is it settled law?**

Yes.

3. In *Obergefell v. Hodges*, the Supreme Court held that the Constitution guarantees same-sex couples the right to marry. **Is the holding in *Obergefell* settled law?**

Yes.

4. In Justice Stevens's dissent in *District of Columbia v. Heller* he wrote: "The Second Amendment was adopted to protect the right of the people of each of the several States to maintain a well-regulated militia. It was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable threat to the sovereignty of the several States. Neither the text of the Amendment nor the arguments advanced by its proponents evidenced the slightest interest in limiting any legislature's authority to regulate private civilian uses of firearms."

**c. Do you agree with Justice Stevens? Why or why not?**

As a lower court nominee and sitting state court judge, it would be inappropriate for me to provide personal opinions about particular Supreme Court decisions. That is particular true for matters that could come before me as a judge. *See* Canon 3(A)(6), Code of Conduct for United States Judges. *Heller* is controlling Supreme Court precedent, and if confirmed, I would uphold and faithfully apply all Supreme Court precedent.

**d. Did *Heller* leave room for common-sense gun regulation?**

The Supreme Court in *Heller* stated that "the right secured by the Second Amendment is not unlimited," adding, "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." *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008). The Court "also recognize[d] another important limitation on the right to keep and carry arms," namely, "that the sorts of weapons protected were those in common use at the time ... [and] the historical tradition of prohibiting the carrying of dangerous and unusual weapon." *Id.* at 627 (internal quotation marks omitted).

**e. Did *Heller*, in finding an individual right to bear arms, depart from decades of Supreme Court precedent?**

I have not studied the matter, and can only say that as a district court judge, I would be bound by and would faithfully apply *Heller* and all controlling Supreme Court precedent.

5. In *Citizens United v. FEC*, the Supreme Court held that corporations have free speech rights under the First Amendment and that any attempt to limit corporations' independent political expenditures is unconstitutional. This decision opened the floodgates to unprecedented sums of dark money in the political process.

**f. Do you believe that corporations have First Amendment rights that are equal to individuals' First Amendment rights?**

As a lower court nominee, it would be inappropriate for me to provide personal opinions about particular Supreme Court decisions. That is particular true for matters that could come before me as a judge. See Canon 3(A)(6), Code of Conduct for United States Judges. *Citizens United* is controlling Supreme Court precedent, and if confirmed, I would uphold and faithfully apply all Supreme Court precedent.

**g. Do individuals have a First Amendment interest in not having their individual speech drowned out by wealthy corporations?**

Please see my answer to Question 5.f.

**h. Do you believe corporations also have a right to freedom of religion under the First Amendment?**

Please see my answer to Question 5.f.

6. On February 22, 2018, when speaking to the Conservative Political Action Conference (CPAC), White House Counsel Don McGahn told the audience about the Administration's interview process for judicial nominees. He said: "On the judicial piece ... one of the things we interview on is their views on administrative law. And what you're seeing is the President nominating a number of people who have some experience, if not expertise, in dealing with the government, particularly the regulatory apparatus. This is different than judicial selection in past years..."

**a. Did anyone in this Administration, including at the White House or the Department of Justice, ever ask you about your views on any issue related to administrative law, including your "views on administrative law"? If so, by whom, what was asked, and what was your response?**

As indicated in my response to Question 26(a) on my Senate Judiciary Questionnaire, I interviewed with officials from the White House and Department of Justice on February 9, 2018. I do not recall everything discussed in the

interview. However, I do recall providing a general description of the Supreme Court's governing framework for deference to administrative interpretations, including the Supreme Court's controlling decisions in *Chevron, U.S.A., Inc. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) and *Michigan v. EPA*, 576 U.S. \_\_\_\_ (2015).

- b. Since 2016, has anyone with or affiliated with the Federalist Society, the Heritage Foundation, or any other group, asked you about your views on any issue related to administrative law, including your “views on administrative law”? If so, by whom, what was asked, and what was your response?**

No.

- c. What are your “views on administrative law”?**

As a lower court nominee, I will uphold and faithfully apply all Supreme Court and Eleventh Circuit precedents relating to administrative law.

7. On your Senate Questionnaire, you indicate that you have been a member of the Federalist Society since 2015. The Federalist Society's "About Us" webpage explains the purpose of the organization as follows: "Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society. While some members of the academic community have dissented from these views, by and large they are taught simultaneously with (and indeed as if they were) the law." It says that the Federalist Society seeks to "reorder[] priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law. It also requires restoring the recognition of the importance of these norms among lawyers, judges, law students and professors. In working to achieve these goals, the Society has created a conservative and libertarian intellectual network that extends to all levels of the legal community."

- a. Could you please elaborate on the “form of orthodox liberal ideology which advocates a centralized and uniform society” that the Federalist Society claims dominates law schools?**

The statements referenced above are not mine; thus, I am unable to speak or elaborate any further on what they reference.

- b. How exactly does the Federalist Society seek to “reorder priorities within the legal system”?**

Please see my answer to Question 7.a.

- c. What “traditional values” does the Federalist society seek to place a premium on?**

Please see my answer to Question 7.a.

8. When is it appropriate for judges to consider legislative history in construing a statute?

The Supreme Court has, on various occasions, made clear that courts may consider legislative history when statutory language and text is not clear and unambiguous.

9. At any point during the process that led to your nomination, did you have any discussions with anyone — including but not limited to individuals at the White House, at the Justice Department, or at outside groups — about loyalty to President Trump? If so, please elaborate.

No.

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

I received Questions for the Record from five Senators (which were transmitted to me by the Department of Justice) and drafted responses to each question. After drafting my responses, I solicited feedback regarding my answers from members of the Office of Legal Policy at the United States Department of Justice. I revised my answers in light of their feedback and made edits that I deemed appropriate, but the answers to each question are my own, and I authorized the submission of my responses.

**Nomination of Rodney Smith to be  
United States District Judge for the Southern District of Florida  
Questions for the Record  
October 24, 2018**

**QUESTIONS FROM SENATOR BLUMENTHAL**

I am concerned about public faith in the judiciary's impartiality and integrity. Please address the following question in light of our nation's constitution, laws, and code of conduct for the judiciary.

- 1. Do you believe that a sitting judge or justice who is shown to have committed perjury or substantially misled the Senate Judiciary Committee about the truth of a matter should continue to serve on the bench?**

A judge should not commit perjury or substantially mislead the Senate Judiciary Committee about the truth of a matter. Congress has the exclusive power to impeach and remove federal judges.

There have been recent reports that the Heritage Foundation was planning to run a secret clerkship training program.<sup>1</sup> I am generally concerned about growing attempts by outside groups to buy influence in the judiciary.

- 1. Do you believe it is appropriate for sitting judges to participate in trainings designed to help law clerks with a particular ideological perspective advance their beliefs within the judiciary?**

I am not aware of any secret clerkship training program. If confirmed, I will not participate in any training designed to help law clerks with a particular ideological perspective advance their beliefs within the judiciary.

- 2. Please list all meetings, conferences or events affiliated with the Federalist Society in which you have participated.**

To the best of my knowledge, I have attended the Federalist Society Annual Florida Chapter Conference in February 2015 – 2018 in Orlando, Florida. I have attended the Miami Lawyers Chapter Holiday Reception in December 2017 and the Annual Supreme Court Roundup on October 23, 2018 in Miami, Florida.

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<sup>1</sup> Adam Liptak, *A Conservative Group's Closed-Door 'Training' of Judicial Clerks Draws Concern* N.Y. Times (Oct. 18 2018) <https://www.nytimes.com/2018/10/18/us/politics/heritage-foundation-clerks-judges-training.html>.

Questions for the Record for Rodney Smith  
From Senator Mazie K. Hirono

1. As part of my responsibility as a member of the Senate Judiciary Committee and to ensure the fitness of nominees, I am asking nominees to answer the following two questions:
  - a. Since you became a legal adult, have you ever made unwanted requests for sexual favors, or committed any verbal or physical harassment or assault of a sexual nature?  
  
No.
  - b. Have you ever faced discipline, or entered into a settlement related to this kind of conduct?  
  
No.

**Nomination of Rodney Smith**  
**United States District Court for the Southern District of Florida**  
**Questions for the Record**  
**Submitted October 24, 2018**

**QUESTIONS FROM SENATOR BOOKER**

1. As you no doubt noticed, one side of the dais at your October 17 hearing before the Senate Judiciary Committee was empty, and no Ranking Member was present. The Senate was on a month-long recess, and this hearing was held on that date over the objection of every member of the minority on this Committee.
  - a. Do you think it was appropriate for the Committee to hold a nominations hearing while the Senate was in recess before an election, and without the minority's consent—which the Committee has never done before?

As a sitting state court judge in Florida and federal judge nominee, I must refrain from injecting personal views or comments regarding the wisdom of a policy decision by the Committee. I cannot ethically opine on legislative policy judgments. *See* Canon 3(A)(6) & Canon 5, Code of Conduct for United States Judges.

- b. Do you think this unprecedented hearing was consistent with the Senate's constitutional duty under Article II, Section 2 to provide advice and consent on the President's nominees?

Please see my answer to Question 1.a.

- c. Did you indicate any objection to anyone in the Administration or on the majority side of the Committee about the timing of your confirmation hearing?

Please see my answer to Question 1.a.

2. According to a Brookings Institute study, African Americans and whites use drugs at similar rates, yet blacks are 3.6 times more likely to be arrested for selling drugs and 2.5 times more likely to be arrested for possessing drugs than their white peers.<sup>1</sup> Notably, the same study found that whites are actually *more likely* to sell drugs than blacks.<sup>2</sup> These shocking statistics are reflected in our nation's prisons and jails. Blacks are five times more likely than whites to be incarcerated in state prisons.<sup>3</sup> In my home state of New Jersey, the disparity between blacks and whites in the state prison system is greater than 10 to 1.<sup>4</sup>

- a. Do you believe there is implicit racial bias in our criminal justice system?

Yes. As co-chair of the Eleventh Judicial Circuit Fairness and Diversity Committee, as well as the Diversity Committee of the Florida Conference of Circuit Judges, I have worked to educate other judges on implicit bias. As an executive board member of the



Judicial Council of the National Bar Association, I have attended several seminars on implicit bias. Unfortunately, the statistics show that there is implicit racial bias in our criminal justice system.

- b. Do you believe people of color are disproportionately represented in our nation's jails and prisons?

Yes, the percentage of people of color in custody in our nation's jails and prisons exceeds the percentage of such persons in the national population.

- c. Prior to your nomination, have you ever studied the issue of implicit racial bias in our criminal justice system? Please list what books, articles, or reports you have reviewed on this topic.

Yes. In addition to attending several seminars on implicit bias, I have also read reports and articles on implicit racial bias, including but not limited to:

<http://projects.heraldtribune.com/bias/sentencing/>.

3. According to a Pew Charitable Trusts fact sheet, in the 10 states with the largest declines in their incarceration rates, crime fell an average of 14.4 percent.<sup>5</sup> In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an 8.1 percent average.<sup>6</sup>

- a. Do you believe there is a direct link between increases of a state's incarcerated population and decreased crime rates in that state? If you believe there is a direct link, please explain your views.

I have not studied the statistics regarding the relationship between incarceration rates and crime rates, and I have not developed any well-formulated opinions on this issue.

- b. Do you believe there is a direct link between decreases of a state's incarcerated population and decreased crime rates in that state? If you do not believe there is a direct link, please explain your views.

Please see my answer to Question 2.a.

4. Do you believe it is an important goal for there to be demographic diversity in the judicial branch? If not, please explain your views.

Yes.

5. The color of a criminal defendant plays a significant role in capital punishment cases. For instance, people of color have accounted for 43 percent of total executions since 1976 and 55 percent of those currently awaiting the death penalty.<sup>7</sup>

- a. Do those statistics alarm you?

Yes.

- b. Do you believe it is cruel and unusual to disproportionately apply the death penalty on people of color? Why not?

As a sitting state court judge and federal judge nominee, ethically, it would be inappropriate for me to express my views on this question. *See* Canons 2 and 3, Code of Conduct for United States Judges. But I do agree that race should not play into sentencing decisions on whether to impose the death penalty.

- c. The color of the victim also plays an important role in determining whether the death penalty applies in a particular case. White victims account for about half of all murder victims, but 80 percent of all death penalty cases involve white victims. If you were a judge, and those statistics were playing out in your courtroom, what would you do?

Please see my answer to Question 5.b.

6. In *State v. Beckman*, you sentenced a juvenile to life in prison without the possibility of parole for committing murder.<sup>8</sup>

Four years later, in 2012, the Supreme Court ruled in *Miller v. Alabama* that mandatory life sentences for juveniles without the possibility of parole violate the Eighth Amendment's prohibition on "cruel and unusual punishments."<sup>9</sup> "Because juveniles have diminished culpability and greater prospects for reform," the Court explained, "they are less deserving of the most severe punishments."<sup>10</sup> The Court went on to say that "children have a 'lack of maturity and an underdeveloped sense of responsibility,' leading to recklessness, impulsivity, and heedless risk-taking."<sup>11</sup>

The Court had previously noted that a life sentence without the possibility of parole is "the second most severe [penalty] known to the law," after only the death penalty.<sup>12</sup> In *Miller*, the Court recognized the special import of life without parole for juvenile offenders. Life-without-parole sentences "share some characteristics with death sentences that are shared by no other sentences"—above all because "[i]mprisoning an offender until he dies alters the remainder of his life 'by a forfeiture that is irrevocable.'"<sup>13</sup> At a minimum, the Court reasoned, a sentencer should be able to "tak[e] account of an offender's age and the wealth of characteristics and circumstances attendant to it" in an individualized manner whenever "a juvenile confronts a sentence of life (and death) in prison."<sup>14</sup>

- a. Do you believe in some cases that juveniles should be held less criminally culpable than adults?

In response to Question 6, the trial court in *Beckman* sentenced the defendant to life with the right to judicial review after 25 years. Because this matter is pending before the U.S. Supreme Court (U.S. Oct. 2, 2018) (No. 18-6185) and as a sitting state court judge and federal judge nominee, ethically, it would be inappropriate for me to express my views on this question. *See* Canons 2 and 3, Code of Conduct

for United States Judges. If I am fortunate enough to be confirmed as a lower court judge, I would uphold and faithfully apply Supreme Court precedent in *Miller* and this arena of the law.

- b. The Supreme Court has recognized that a life-without-parole sentence shares a special characteristic with the death penalty: irrevocability.<sup>15</sup> Based on your understanding of the applicable law, why is the irrevocable nature of a life-without-parole sentence so significant for juvenile offenders?

Please see my answer to Question 6.a.

- c. The Supreme Court has also recognized the fundamental implications of a life-without-parole sentence: it “means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days.”<sup>16</sup> Based on your understanding of the applicable law, how is the threshold for imposing a sentence of life without parole different for juvenile offenders, as opposed to adult offenders?

Please see my answer to Question 6.a.

- d. Was it your opinion at the time you sentenced the juvenile defendant in *Beckman* that he was irredeemable?

Please see my answer to Question 6.a.

- e. Bryan Stevenson in *Just Mercy* noted that former Senator Alan Simpson (R-WY), a staunch conservative, had “been adjudicated a juvenile delinquent when he was seventeen for multiple convictions for arson, theft, aggravated assault, gun violence, and, finally, assaulting a police officer. He later confessed: ‘I was a monster.’”<sup>17</sup> Would you have guessed that a juvenile delinquent who was convicted of arson, theft, aggravated assault, gun violence, and assaulting a police officer would eventually become a United States Senator?

Please see my answer to Question 6.a.

- f. In 2016, you issued an amended sentencing order that said, “[T]he constitutionality of Florida’s juvenile sentencing scheme for capital offenses remained unsettled; however, this much is clear: ‘under *Miller*, a sentence of life without parole remains a constitutionally permissible sentencing option.’”<sup>18</sup> Do you believe your amended sentencing order adhered to the spirit of *Miller*?

Please see my answer to Question 6.a.

- g. How did your amended sentencing order account for some of the age-related sentencing considerations delineated in *Miller*, as relevant, including:  
(1) “hallmark features” of youth such as “immaturity, impetuosity, and failure to

appreciate risks and consequences”; (2) “the family and home environment that surrounds” the juvenile offender; (3) “the circumstances of the homicide offense”; (4) whether the juvenile offender “might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys”; and (5) “the possibility of rehabilitation”?<sup>19</sup>

Please see my response to Question 6.a.

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<sup>1</sup> JONATHAN ROTHWELL, HOW THE WAR ON DRUGS DAMAGES BLACK SOCIAL MOBILITY, BROOKINGS INSTITUTE (Sept. 30, 2014), available at <https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility/>.

<sup>2</sup> *Id.*

<sup>3</sup> ASHLEY NELLIS, PH.D., THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS, THE SENTENCING PROJECT 14 (June 14, 2016), available at <http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/>.

<sup>4</sup> *Id.* at 8.

<sup>5</sup> THE PEW CHARITABLE TRUSTS, NATIONAL IMPRISONMENT AND CRIME RATES CONTINUE TO FALL 1 (Dec. 2016), available at [http://www.pewtrusts.org/~media/assets/2016/12/national\\_imprisonment\\_and\\_crime\\_rates\\_continue\\_to\\_fall\\_web.pdf](http://www.pewtrusts.org/~media/assets/2016/12/national_imprisonment_and_crime_rates_continue_to_fall_web.pdf).

<sup>6</sup> *Id.*

<sup>7</sup> *Race and the Death Penalty*, AM. CIVIL LIBERTIES UNION, <https://www.aclu.org/other/race-and-death-penalty> (last visited June 13, 2018).

<sup>8</sup> No. F09-14217, *aff'd*, 230 So. 3d 77 (Fla. Dist. Ct. App. 2017), *reh'g denied* (Oct. 19, 2017), *review denied*, No. SC17-2060, 2018 WL 3213795 (Fla. July 2, 2018), *petition for cert. filed* (U.S. Oct. 2, 2018) (No. 18-6185).

<sup>9</sup> *Miller v. Alabama*, 567 U.S. 460, 465 (2012) (citing U.S. CONST. amend. VIII).

<sup>10</sup> *Id.* at 471 (quoting *Graham v. Florida*, 560 U.S. 48, 68 (2010)).

<sup>11</sup> *Id.* (quoting *Roper v. Simmons* 543 U.S. 551, 569 (2005)).

<sup>12</sup> *Harmelin v. Michigan*, 501 U.S. 957, 996 (1991).

<sup>13</sup> *Miller*, 567 U.S. at 474-75 (quoting *Graham*, 560 U.S. at 69).

<sup>14</sup> *Id.* at 477.

<sup>15</sup> *Id.* at 474-75.

<sup>16</sup> *Graham*, 560 U.S. at 70 (alteration in original) (quoting *Naovarath v. State*, 779 P.2d 944 (Nev. 1989)).

<sup>17</sup> BRYAN STEVENSON, JUST MERCY 271 (2014).

<sup>18</sup> *Florida v. Beckman*, Amended Sentencing Order (Florida Circuit Court, Eleventh Judicial Circuit (Feb. 22, 2016)).

<sup>19</sup> *Miller*, 567 U.S. at 477-78.

**Questions for the Record from Senator Kamala D. Harris  
Submitted October 24, 2018  
For the Nomination of**

**Rodney Smith, to the U.S. District Court for the Southern District of Florida**

1. In 2008, in *State v. Beckman*, you sentenced a minor to life in prison without the possibility of parole. You stood by that decision in 2016, even after the U.S. Supreme Court in *Miller v. Alabama* held that mandatory life sentences without the chance for parole were unconstitutional for juvenile offenders.

- a. **Do you stand by that sentencing decision today?**

In response to Question 1, the trial court in *Beckman* sentenced the defendant to life with the right to judicial review after 25 years. Because this matter is pending before the U.S. Supreme Court (U.S. Oct. 2, 2018) (No. 18-6185), and as a sitting state court judge and federal judge nominee, ethically, it would be inappropriate for me to express my views on this question. See Canons 2 and 3, Code of Conduct for United States Judges. If I am fortunate enough to be confirmed as a lower court judge, I would uphold and faithfully apply Supreme Court precedent in *Miller* and this arena of the law

- b. **In making the decision, did you have any concerns about sentencing a child to prison for life?**

Please see my answer to Question 1.a.

2. District court judges have great discretion when it comes to sentencing defendants. In considering your nomination, it is important that we understand your views on sentencing, while appreciating that each case must be evaluated on its specific facts and circumstances.

- a. **What is the process you would follow before you sentenced a defendant?**

As a state county and circuit court judge in Florida for over ten years, I have sentenced numerous criminal defendants. Thus, I can attest that sentencing a criminal defendant is one of the most important and difficult responsibilities of a judge. Unequivocally, I would carefully evaluate each case fairly and impartially on its specific facts and circumstances. If confirmed, I would begin by ensuring that the applicable advisory sentencing guidelines range for the offense conduct is correctly calculated. I would then proceed to consider any applicable statutes, the presentence report, the allocution of the defendant, the arguments of counsel, any statements by the defendant's family and friends, and any victim impact statements. I would be consistently mindful of Congress' direction that the imposition of any sentence should be "sufficient, but not greater than necessary, to comply" with the congressionally designated purposes of federal sentencing:

“the need for the sentence imposed...to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; [] to afford adequate deterrence to criminal conduct; [] to protect the public from further crimes of the defendant; and [] to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.” 18 U.S.C. § 3553.

**b. As a new federal judge, how do you plan to determine what constitutes a fair and proportional sentence?**

In addition to my response to Question 2.a. above, I would, if confirmed, discuss the issue of sentencing extensively with my colleagues within the Southern District of Florida. Furthermore, I would continue to read and study all publications issued by the United States Sentencing Commission, as well as all sentencing decisions rendered by the U.S. Supreme Court and the Eleventh Circuit Court of Appeals.

**c. When is it appropriate to depart from the Sentencing Guidelines?**

Pursuant to Supreme Court and Eleventh Circuit precedent, the U.S. Sentencing Guidelines are not binding on trial judges; they are merely advisory. *See, e.g., Booker v. United States*, 543 U.S. 220 (2005). However, they provide valuable guidance on when a departure sentence is appropriate. The factors listed in 18 U.S.C. § 3553(a) may call for varying from the Guidelines range—so long as the ultimate sentence is reasonable. Part K of Section 5 of the Sentencing Guidelines lists the specific circumstances under which a trial judge may depart from the advisory Guidelines range.

**d. Judge Danny Reeves of the Eastern District of Kentucky—who also serves on the U.S. Sentencing Commission—has stated that he believes mandatory minimum sentences are more likely to deter certain types of crime than discretionary or indeterminate sentencing.<sup>1</sup>**

**i. Do you agree with Judge Reeves?**

I have never studied whether mandatory minimum sentences are likely to deter certain types of crime, and I am unfamiliar with Judge Reeves’ position on that issue. Because the establishment of mandatory minimum sentences is a policy matter subject to legislative judgment, the Florida Legislature has adopted mandatory minimum sentences for certain categories of crimes, and as a sitting state court judge, I have applied those laws as required. In either case, the question of which kind of sentencing regime better deters crime is one for the political branches. If confirmed, I

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<sup>1</sup> Judge Danny C. Reeves, Responses to Senators’ Questions for the Record, <https://www.judiciary.senate.gov/imo/media/doc/Reeves%20Responses%20to%20QFRs1.pdf>.

would apply sentencing laws as enacted, without regard to any personal views as to the efficacy of the required sentences.

ii. **Do you believe that mandatory minimum sentences have provided for a more equitable criminal justice system?**

Respectfully, the equity of mandatory minimum sentences is a political question that is reserved for the judgment of Congress. As a United States district judge nominee and a sitting state court circuit judge in Florida, I cannot ethically opine on legislative policy judgments. *See* Canon 3(A)(6) & Canon 5, Code of Conduct for United States Judges.

iii. **Please identify instances where you thought a mandatory minimum sentence was unjustly applied to a defendant.**

Please see my answer to Question 2.d.ii.

iv. Former-Judge John Gleeson has criticized mandatory minimums in various opinions he has authored, and he has taken proactive efforts to remedy unjust sentences that result from mandatory minimums.<sup>2</sup> **If confirmed, and you are required to impose an unjust and disproportionate sentence, would you commit to taking proactive efforts to address the injustice, including:**

1. **Describing the injustice in your opinions?**

If confirmed, I would apply mandatory minimum sentencing statutes to the extent such statutes are constitutional. Thus, I do believe it may be appropriate for a judge to state for the record that he or she would not have sentenced a particular defendant to a particular sentence if not compelled by a statute. Judges should provide detailed opinions explaining the facts and circumstances of the crime and the law that required the sentence imposed, but must refrain from injecting their personal views or criticism of a policy decision by Congress to impose a mandatory minimum sentence.

2. **Reaching out to the U.S. Attorney and other federal prosecutors to discuss their charging policies?**

The question of what crime to charge is one that our Constitution reserves to the Executive Branch. However, I would raise charging decisions with federal prosecutors if I were concerned about ethical impropriety, lack of professionalism, or prosecutorial

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<sup>2</sup> *See, e.g.*, Stephanie Clifford, *Citing Fairness, U.S. Judge Acts to Undo a Sentence He Was Forced to Impose*, N.Y. Times (July 28, 2014), <https://www.nytimes.com/2014/07/29/nyregion/brooklyn-judge-acts-to-undo-long-sentence-for-francois-holloway-he-had-to-impose.html>.

misconduct, and would address such issues consistent with the Code of Judicial Conduct and other ethical obligations.

**3. Reaching out to the U.S. Attorney and other federal prosecutors to discuss considerations of clemency?**

The clemency power is reserved to the Executive Branch. However, as explained above, I do believe that a judge may, in an appropriate case, state on the record that he or she would not have imposed a certain sentence but for a statutory requirement so that Executive Branch officials are aware of the judge's views for the purposes of considering clemency.

- e. 28 U.S.C. § 994(j) directs that alternatives to incarceration are “generally appropriate for first offenders not convicted of a violent or otherwise serious offense.” **If confirmed as a judge, would you commit to taking into account alternatives to incarceration?**

Yes.

3. Judges are one of the cornerstones of our justice system. If confirmed, you will be in a position to decide whether individuals receive fairness, justice, and due process.

- a. **Does a judge have a role in ensuring that our justice system is a fair and equitable one?**

Yes.

- b. **Do you believe that there are racial disparities in our criminal justice system? If so, please provide specific examples. If not, please explain why not.**

Yes. It is my understanding that there are racial disparities in our criminal justice system. For example, racial minorities are statistically more likely to be arrested and incarcerated than whites, and racial minorities comprise a greater percentage of the incarcerated population than they do of the overall population. See: <http://projects.heraldtribune.com/bias/sentencing/>

4. If confirmed as a federal judge, you will be in a position to hire staff and law clerks.

- a. **Do you believe that it is important to have a diverse staff and law clerks?**

Yes.

- b. **Would you commit to executing a plan to ensure that qualified minorities and women are given serious consideration for positions of power and/or**



**supervisory positions?**

Yes.