Nomination of Wendy Berger to the U.S. District Court for the Middle 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 court judges 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?

   No.

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

   Only the Supreme Court may overturn its own precedent and the court has established factors that it considers when doing so. As a nominee to a lower federal court, it would be inappropriate for me to opine on when such a decision is properly exercised.

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"?

   I do not personally use those terms. As a lower court judge, I would be bound to follow all precedent.

   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 a 2012 case called *Miller v. Alabama*, the Supreme Court held that mandatory life imprisonment without possibility of parole for juvenile offenders is unconstitutional. In a 2015 case called *Garcia v. Florida*, you joined a per curiam opinion holding that *Miller* does not apply retroactively to defendants whose sentences were final before *Miller* was issued. In your response to the Senate Judiciary Committee questionnaire, you stated that "[a]t the time of Garcia's appeal, there was a conflict among the district courts on the question of retroactive application of *Miller*" and that your decision sided with the courts that found *Miller* did not apply retroactively.

   a. What was your rationale for arguing the case did not apply retroactively?

   We aligned ourselves with courts that determined *Miller* involved a procedural change in the law rather than a substantive one. Such changes did not warrant retroactive application pursuant to the test approved by the Florida Supreme Court in *Witt v. State,* 387 So.2d 922 (Fla.1980).

   b. Why did you not explain your reasoning in your decision?

   Our reasoning was explained through a citation opinion to our sister court's decision in *Falcon v. State*, 111 So. 3d 973 (Fla. 1st DCA 2013). Issuance of the citation opinion provided Garcia with the opportunity to seek review in the Florida Supreme Court.

   c. Your opinion in *Garcia* was issued on March 17, 2015. Two days later, on March 19, 2015, in a case called *Falcon v. Florida*, the Florida Supreme Court held that *Miller* applies retroactively. However, five days later, on March 24, 2015, you denied rehearing in the *Garcia* case. Why did you deny rehearing when the Florida Supreme Court had already disagreed with your holding?

   Garcia appealed the denial of his motion for postconviction relief on October 28, 2014. We issued a *per curiam* affirmance on February 3, 2015, along with an order staying the issuance of the mandate pending a decision by the Florida Supreme Court in *Falcon*. The following day, February 4, 2015, Garcia moved for rehearing and requested a revised opinion. The motion was denied on February 24, 2015, before the Florida Supreme Court issued its decision in *Falcon*, not March 24, 2015, as suggested in the question. In fact, on March 11, 2015, again, prior to the Supreme Court's decision in *Falcon*, we sua sponte withdrew our previously issued per curiam opinion and, on March 17, 2015, issued the citation opinion addressed in response to question 4b. As previously stated, the citation opinion provided Garcia with the opportunity to seek review in the Florida Supreme Court, an option that would not have otherwise been available to him.

5. You have a reputation as being extremely tough on criminal defendants and as issuing long prison sentences. In fact, at your investiture onto the bench of your current court, the chief judge remarked that few defense lawyers would be sad to see you leave the trial court. A friend of yours remarked that you were trying to get to a milestone of sentencing criminal defendants to a collective 1,000,000 years in prison. (Response to Senate Judiciary Committee Questionnaire, Attachments, pp. 473-488.)

a. Did you have a goal or milestone for sentencing defendants?

Absolutely not. Ms. Gennusa's comment was made in jest while "roasting" me at my investiture.

b. Why did you so often sentence defendants at the upper range of the guidelines range?

I did not routinely sentence criminal defendants to the upper range of the guidelines and reject any claims to the contrary.

It is worth noting that I was the only judge assigned to the felony division in St. Johns County, which meant that I presided over every felony criminal case brought by the State Attorney's Office. Those cases ranged in severity from nonviolent third degree felonies to first degree capital murder. The toughest sentences were reserved for violent offenders and those with lengthy criminal records. And as expected, those are the sentences that garnered the most publicity. However, most of the cases were resolved through plea negotiations and many defendants received a term of probation.

6. You have been a member of the National Rifle Association (NRA) since 2015. The NRA opposes common-sense gun regulations including expanding the background check system and cracking down on straw purchases. 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."

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

As a district court nominee, it would be improper for me to opine on majority or dissenting opinions of Supreme Court Justices. *See* Canon 3(A)(6), Code of Conduct for United States Judges.

b. 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," and "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 in the commercial sale of arms." *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008).

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

I am not familiar enough with the Supreme Court opinions that preceded *Heller* to comment. However, I would note that the Supreme Court in *Heller* indicated that "this case represents the Court's first in-depth examination of the Second Amendment." *Heller*, 554 U.S. at 635.

7. 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.

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

The Supreme Court has determined that "First Amendment protection extends to corporations." *See Citizens United v. FEC,* 558 U.S. 310, 342-43 (2010).

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

Please see my response to question 5a. I do not believe it would be appropriate to comment further on the matter.

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

In *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), the Supreme Court held that the term "person," within the meaning of RFRA's protection of a person's exercise of religion, includes for-profit and non-profit corporations.

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?

My interview with White House counsel took place in December 2017. During the interview we discussed a variety of legal topics. Although I may have been asked about my experience with administrative law, which is extremely limited, I do not recall any specific questions or answers on the topic.

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"?

I do not have any particular view on administrative law. If confirmed, I would faithfully apply all binding precedent on the matter.

7. On your Senate Questionnaire, you indicate that you have been a member of the Federalist Society since 2008. 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?

I have not previously reviewed this portion of the Federalist Society's website and therefore cannot comment on the views expressed therein.

b. How exactly does the Federalist Society seek to "reorder priorities within the legal system"?

According to its website, the Federalist Society "is founded on the principles that the state exists to preserve freedom, that the separation of governmental powers is central to our Constitution, and that it is emphatically the province and duty of the

judiciary to say what the law is, not what it should be. The Society seeks both to promote an awareness of these principles and to further their application through its activities." I cannot comment further on the matter.

c. What "traditional values" does the Federalist society seek to place a premium on?

Please refer to my response to question 7b.

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

The Supreme Court has determined that legislative history may be considered when the text of a statute is ambiguous. *See Exxon Mobile v. Allalattah Servs.*, 545 U.S. 546, 568 (2005).

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 reviewed the questions, conducted research, and drafted answers. I asked for, and received feedback from the Department of Justice. All of the answers here are my own.

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QUESTIONS FROM SENATOR COONS

1. With respect to substantive due process, what factors do you look to when a case requires you to determine whether a right is fundamental and protected under the Fourteenth Amendment?

   I would look to decisions of the United States Supreme Court and the Eleventh Circuit to determine if either of those courts has determined that a particular right is fundamental and protected under the Fourteenth Amendment.

   a. Would you consider whether the right is expressly enumerated in the Constitution?

      Yes.

   b. Would you consider whether the right is deeply rooted in this nation's history and tradition? If so, what types of sources would you consult to determine whether a right is deeply rooted in this nation's history and tradition?

      Yes, as required by United States Supreme Court precedent.

   c. Would you consider whether the right has previously been recognized by Supreme Court or circuit precedent? What about the precedent of a court of appeals?

      Yes, if confirmed, I am bound to faithfully apply all relevant United States Supreme Court and Eleventh Circuit precedent. To the extent neither has opined, I would consider whether the right has been recognized by other circuit court precedent.

   d. Would you consider whether a similar right has previously been recognized by Supreme Court or circuit precedent? What about whether a similar right had been recognized by Supreme Court or circuit precedent?

      Yes.

   e. Would you consider whether the right is central to "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life"? *See Planned Parenthood v. Casey*, 505 U.S. 833, 581 (1992); *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Casey*).

      Inasmuch as *Casey* and *Lawrenc*e are binding precedent, I would consider and faithfully apply the holdings in those cases.

f. What other factors would you consider?

I would consider any other factor the United States Supreme Court and the Eleventh Circuit have deemed relevant.

2. Does the Fourteenth Amendment's promise of "equal protection" guarantee equality across race and gender, or does it only require racial equality?

The Fourteenth Amendment applies to both race and gender. *See United States v. Virginia*, 518 U.S. 515 (1996).

a. If you conclude that it does require gender equality under the law, how do you respond to the argument that the Fourteenth Amendment was passed to address certain forms of racial inequality during Reconstruction, and thus was not intended to create a new protection against gender discrimination?

This issue is moot in light of applicable United States Supreme Court precedent, which I am bound to faithfully apply regardless of any contrary arguments.

b. If you conclude that the Fourteenth Amendment has always required equal treatment of men and women, as some originalists contend, why was it not until 1996, in *United States v. Virginia*, 518 U.S. 515 (1996), that states were required to provide the same educational opportunities to men and women?

I have not studied the history of such litigation and cannot offer an informed opinion as to why the issue did not reach the United States Supreme Court until 1996.

c. Does the Fourteenth Amendment require that states treat gay and lesbian couples the same as heterosexual couples? Why or why not?

Yes. *See Obergefell v. Hodges*, 135 S.Ct. 2584 (2015). To the extent that discrimination based on sexual orientation in other contexts is impending in the courts, Canon 3(A)(6) of the Code of Conduct for United States Judges, precludes me from commenting further on the issue.

d. Does the Fourteenth Amendment require that states treat transgender people the same as those who are not transgender? Why or why not?

Inasmuch as this issue remains unsettled in the law, I am constrained from commenting as a judicial nominee. *See* Canon 3(A)(6) of the Code of Conduct for United States Judges.

3. Do you agree that there is a constitutional right to privacy that protects a woman's right to use contraceptives?

The United States Supreme Court recognized this right in *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Eisenstadt v. Baird*, 405 U.S. 438 (1972). If confirmed, I would faithfully follow those cases.

a. Do you agree that there is a constitutional right to privacy that protects a woman's right to obtain an abortion?

If confirmed, I would faithfully apply *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992); and *Whole Woman's Health v. Hellerstedt*, 136 S.Ct. 2292 (2016), as well as any other binding precedent of the United States Supreme Court and the Eleventh Circuit on this issue.

b. Do you agree that there is a constitutional right to privacy that protects intimate relations between two consenting adults, regardless of their sexes or genders?

If confirmed, I would faithfully apply all binding precedent of the United States Supreme Court and the Eleventh Circuit on this issue.

c. If you do not agree with any of the above, please explain whether these rights are protected or not and which constitutional rights or provisions encompass them.

Not applicable.

4. In *United States v. Virginia*, 518 U.S. 515, 536 (1996), the Court explained that in 1839, when the Virginia Military Institute was established, "[h]igher education at the time was considered dangerous for women," a view widely rejected today. In *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600-01 (2015), the Court reasoned, "As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. . . . Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser." This conclusion rejects arguments made by campaigns to prohibit same-sex marriage based on the purported negative impact of such marriages on children.

a. When is it appropriate to consider evidence that sheds light on our changing understanding of society?

If confirmed, I would faithfully follow all binding precedent of the United States Supreme Court and the Eleventh Circuit on the issue.

b. What is the role of sociology, scientific evidence, and data in judicial analysis?

Consideration of such evidence is justified if it is both reliable and relevant. *See* Rules 401 and 702, Fed. R. Evid.; *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

5. In the Supreme Court's *Obergefell* opinion, Justice Kennedy explained, "If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied. This Court has rejected that approach, both with respect to the right to marry and the rights of gays and lesbians."

a. Do you agree that after *Obergefell*, history and tradition should not limit the rights afforded to LGBT individuals?

I agree that *Obergefell* is settled law. If confirmed, I will faithfully apply it.

b. When is it appropriate to apply Justice Kennedy's formulation of substantive due process?

As a lower court judge, I am bound to and will faithfully follow all binding United States Supreme Court and Eleventh Circuit precedent on this issue.

6. You are a member of the Federalist Society, a group whose members often advocate an "originalist" interpretation of the Constitution.

a. In his opinion for the unanimous Court in *Brown v. Board of Education*, 347 U.S. 483 (1954), Chief Justice Warren wrote that although the "circumstances surrounding the adoption of the Fourteenth Amendment in 1868 . . . cast some light" on the amendment's original meaning, "it is not enough to resolve the problem with which we are faced. At best, they are inconclusive . . . . We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws." 347 U.S. at 489, 490-93. Do you consider *Brown* to be consistent with originalism even though the Court in *Brown* explicitly rejected the notion that the original meaning of the Fourteenth Amendment was dispositive or even conclusively supportive?

I consider *Brown* binding precedent. If confirmed, I will faithfully follow *Brown* and all other precedent of the United States Supreme Court and the Eleventh Circuit.

b. How do you respond to the criticism of originalism that terms like "'the freedom of speech,' 'equal protection,' and 'due process of law' are not precise or self-defining"? Robert Post & Reva Siegel, *Democratic Constitutionalism*, National Constitution Center, https://constitutioncenter.org/interactive-constitution/white-papers/democratic-constitutionalism (last visited Oct. 23, 2018).

I am not familiar with the white paper. However, it presents an interesting academic question. If confirmed, my analysis of these terms would faithfully follow the United States Supreme Court and Eleventh Circuit precedent when interpreting their meaning.

c. Should the public's understanding of a constitutional provision's meaning at the time of its adoption ever be dispositive when interpreting that constitutional provision today?

Yes, if the United States Supreme Court or the Eleventh Circuit say so.

d. Does the public's original understanding of the scope of a constitutional provision constrain its application decades later?

Yes, if the United States Supreme Court or the Eleventh Circuit say so.

e. What sources would you employ to discern the contours of a constitutional provision?

I would faithfully apply all relevant United States Supreme Court and Eleventh Circuit opinions. Should those sources not address the particular issue, I would consider persuasive opinions from other circuit courts, as well as the text and context of the relevant constitutional provisions along with historical sources relevant to original public meaning.

7. As a judge, you have presided over numerous criminal proceedings and have sentenced a range of defendants.

a. What is the purpose of sentencing?

The purpose of sentencing is fourfold: to punish the offender, to deter future criminal conduct, to protect the public, and to rehabilitate. *See* 18 U.S.C.A. §3553(a)(2).

b. You have spoken about presiding over the St. Johns County Adult Treatment Division. How has your experience with drug courts informed your views on sentencing and rehabilitation?

I do not know that it has necessarily informed my views on sentencing, but it has certainly cemented my view that rehabilitation efforts work when all parties involved are committed to the effort. This is particularly true as it relates to criminal defendants suffering from addiction.

c. I understand that you took part in a demonstration illustrating how individuals with schizophrenia experience the world. What lessons did you take from that demonstration?

I participated in this demonstration many years ago. What I recall from the experience is that people who suffer from schizophrenia see the world in a vastly different way from what many would consider "normal." Because they often suffer from paranoia, it is important to interact with people who suffer from this disorder in a calm and non-threatening way, particularly in a courtroom setting.

8. Your Senate Judiciary Committee Questionnaire provides a list of instances where your decisions have been reversed.

a. In *Wilbur v. State,* 64 So. 3d 756 (Fla. Dist. Ct. App. 2011), the court of appeals reversed a decision to allow the State to present evidence of prior drug sales to establish identity in a trial for selling cocaine. What is your understanding of the reasons for this reversal?

The Fifth District determined that "there was nothing unique or of special character" in the crime of sale of cocaine that would justify the introduction of similar fact evidence in the case.

b. In *Lee v. State,* 89 So. 3d 290 (Fla. Dist. Ct. App. 2012), the court of appeals determined

that it was not clear what standard was applied to the motion at issue, and in *McKinnon v. State,* 85 So.3d 1188 (Fla. Dist. Ct. App. 2012), and *Allen v. State,* 43 So.3d 874 (Fla. Dist. Ct. App. 2010), the written orders and the oral pronouncements did not conform to each other. What steps do you take to ensure that the clarity of your decisions facilitates appellate review?

While on the trial court, I tried to maintain the record in a manner that would help effectuate appellate review. I often offered detailed analysis in my orders, but in the case of *Lee v. State*, I failed to articulate the correct standard when I denied the motion for new trial. I did so on remand and was affirmed. Although the written orders in *Allen* and *McKinnon* did not conform to the oral pronouncement, it did not hinder appellate review, because the oral pronouncement controls. Nevertheless, if confirmed, I will do my best to ensure that the record is properly maintained and that my written orders articulate the reasons for my decision.

9. As a prosecutor, you served as co-counsel in *Hudson v. State*, 745 So. 2d 1014 (Fla. Dist. Ct. App. 1999). During the trial, the State introduced evidence of the defendant's prior abortions to secure a conviction for manslaughter. In your Senate Judiciary Committee Questionnaire, you wrote, "The case divided the community, involved complicated legal arguments, and controversial issues, such as when life begins." Please explain how the question of when life begins was relevant to the facts of the case and how you navigated the issues the case presented.

   The defendant denied killing her child and testified that her baby was stillborn. In order to sustain a conviction, we had to prove that the baby was born alive. We did this through medical testimony and scientific evidence. X-rays of the baby's lungs showed evidence of oxygenation, which indicated the child had taken a breath. Additionally, the presence of the nasal plug in the child's belly indicated that she had taken a breath before she died.

10. In one case before you, you instructed that duct tape be placed over the defendant's mouth when he refused to stop cursing in the courtroom. Did you consider other options to address the situation?

    Yes. All other options were considered.

    The case you are referencing is *The State of Florida v. Javall Harris*. If I recall correctly, Mr. Harris was on trial for possession of cocaine. To say he was disruptive would be an understatement. I made every attempt to get Mr. Harris to sit quietly, to no avail. After the State rested its case, Mr. Harris decided he wished to testify and had a number of documents he wanted to show the jury. I allowed defense counsel to proffer his testimony outside the presence of the jury. While placing Mr. Harris under oath, he refused to swear or affirm to tell the truth. As a result, I determined he was incompetent to testify and instructed him to return to his seat. He became loud and disruptive and, again, refused all attempts to calm him down. At that time, I warned Mr. Harris that if he did not comply with my orders, I would have the deputy place a piece of duct tape over his mouth. When this failed to deter him, I gave the order and the deputy complied. Mr. Harris became violent and had to be restrained by several officers. He was ultimately removed from the courtroom and returned to the St. Johns County Jail, where he was allowed to observe his trial through closed circuit

television. The entire incident took place outside the presence of the jury and after all other attempts to get Mr. Harris to comply with my orders were exhausted.

Nomination of Wendy Williams Berger to be
United States District Judge for the Middle District of Florida
Questions for the Record
October 24, 2018

QUESTIONS FROM SENATOR BLUMENTHAL

While you worked as an Assistant State Attorney, you prosecuted a case involving concealed birth infanticide. At trial, the prosecution introduced evidence that the defendant had previously had two abortions. The District Court of Appeal subsequently ruled that this evidence was "irrelevant and highly prejudicial" and, as a result, reversed and remanded the case for a new trial.[1] You have informed the Senate Judiciary Committee that you "handled most of the expert medical testimony and evidence" for this trial.[2]

1. **Were you responsible for the decision to introduce this evidence at trial? If not, did you agree with the decision to introduce this evidence at trial?**

   I agreed with the decision to seek the admission of one prior abortion for the reasons argued by co-counsel during the hearing on the motion in limine and also because I believed it would cast doubt on the defendant's assertion that she was not aware she was pregnant until it was too late to obtain an abortion. In my view, the evidence was relevant to show that the defendant, having been pregnant at least once before, knew the symptoms of pregnancy despite her claim of ignorance. However, I worried about the admission of the second prior abortion and expressed my concerns to co-counsel at the time.

2. **I believe that a good judge can see both sides of the issue. In light of the arguments at trial and the District Court of Appeal's decision in this case, can you please explain why a judge might believe that the evidence of the two previous abortion was "highly prejudicial" in this case?**

   Based on the defendant's testimony and theory of defense, the trial judge believed that the probative value of the abortion evidence outweighed any prejudice to the defendant. I agree, at least as to one of the prior abortions, but based on additional reasons not adequately outlined in the record; namely that the defendant did not know she was pregnant until it was too late to obtain an abortion. Nevertheless, given the controversial topic of abortion, and the fact that the jury heard additional evidence that the defendant attempted to abort the baby she was ultimately convicted of killing, I can see where other judges may have a differing opinion.

In December 2016, Florida's Supreme Court Judicial Nominating Committee was reported to have suggested you for a potential nomination to your state's highest court.[3] News reports from that time period raise three questions I would like you to address:

1. **Your candidacy for the Supreme Court was said to have been "heavily promoted by members of the Florida chapter of the Federalist Society."[4] Please list all members**

of the Florida chapter of the Federalist Society you spoke with about your candidacy. Please include alongside each individual you name a summary of the content of your discussions with them, including their stated reasons for supporting your candidacy, if any.

I did not specifically seek out the endorsement of the Florida chapter of the Federalist Society, nor did I speak to any member formally about my candidacy. With that said, I have a number of friends, both attorneys and judges, who are fellow members of the Federalist Society and we talked generally about how the process was going. While I am grateful for their support of my nomination, I am confident it was based on our personal and professional relationships, rather than affiliation with any particular group.

2. **Did you ever indicate to anyone that you would rule a particular way on an issue during the course of your being considered for a nomination to Florida's Supreme Court? If so, please provide a detailed description of the issue, how you indicated you would rule, and to whom you made this indication.**

No.

3. **You were quoted as telling the Supreme Court Judicial Nominating Committee that "[t]here's a time when you can throw stare decisis aside if it's wrong."[5] Can a United States District Court Judge ever throw stare decisis aside if it's wrong? If yes, please describe how you determine when stare decisis is "wrong."**

A United States District Court Judge is bound by precedent and may not throw stare decisis aside, even if the judge disagrees with the decision and believes that it is wrong.

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[1] *Hudson v. State*, 745 So.2d 1014, 1015-16 (Fla. 5th DCA 1999).
[2] Senate Judicial Questionnaire, 51.
[3] Mary Ellen Klas, *Conservatives Line Up To Be Rick Scott's Pick on High Court*, Bradenton Herald (Nov. 29, 2016), https://www.bradenton.com/news/politics-government/state-politics/article117655173.html
[4] *Id.*
[5] *Id.*

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?**

   Individuals convicted of perjury should not serve in the judiciary.

There have been recent reports that the Heritage Foundation was planning to run a secret clerkship training program.[6] 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?**

   While I believe it is appropriate for judges to participate in trainings designed to assist law clerks, in the context of your question, I do not believe it would be appropriate for a judge to participate in a program designed to advance a particular political or ideological belief.

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

   a. Florida Federalist Society Statewide Conference (Orlando, Florida)
      - February 2015: Moderator, "Perspectives on the Florida Judicial Selection Process"
      - February 2016, 2017, 2018: Attendee

   b. Federalist Society National Lawyers Conference (Washington, DC) 2016, 2017

   c. Federalist Society Reception, Florida Bar Annual Conference (regularly attend)

   d. Florida Federalist Society, Jacksonville Chapter
      - January 16, 2018: Scalia Speaks: Reflections on Law, Faith, and Life Well Lived, presented by co-author, Ed Whelan

[6] 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 Wendy Berger
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.

2. In 2008, Ereck Plancher, a student-athlete at the University of Central Florida (UCF), collapsed and died following football practice. His family sued UCF for wrongful death. At trial, one of Plancher's teammates testified that the head football coach had ordered all water and athletic trainers out of the practice facility prior to the start of conditioning drills. He further testified that the coach yelled obscenities at Plancher and told him to get up after Plancher fell during an obstacle course drill. Following trial, the jury awarded Plancher's family $10 million.

   You served on the panel hearing UCF's appeal. In a dissenting opinion, you took the position that UCF was not liable for Plancher's death because he had released the university from all liability when he signed a standard Medical Examination and Authorization Waiver. In relevant part, that waiver stated:

   > "In consideration of the University of Central Florida Athletic Association, Inc. permitting me to participate in intercollegiate athletics and to engage in all activities and travel related to my sport, I hereby voluntarily assume all risks associated with participation and agree to exonerate, save harmless and release the University of Central Florida Athletic Association, Inc., its agents, servants, trustees, and employees from any and all liability, any medical expenses not covered by the University of Central Florida Athletic Association's athletics medical insurance coverage, and all claims, causes of action or demands of any kind and nature whatsoever which may arise by or in connection with my participation in any activities related to intercollegiate athletics."

Florida Trend, a monthly business magazine, noted that you "cemented [your]self as someone conservatives trust in 2013 when [you] wrote a partially dissenting opinion" in that case.

   a. Do you consider denying a student-athlete access to water and athletic trainers during conditioning drills and berating a student-athlete in distress to be either inherent to or a foreseeable risk of participating in collegiate athletics?

      The Planchers filed an action in negligence. As described in my dissent, I

believe the release signed by Eric Plancher was clear and unambiguous and enforceable against him and his heirs on this claim. As for my thoughts on the egregious nature of the case, I would refer you to footnote 21 of the opinion, which states:

> *My opinion regarding the enforceability of the release should not be interpreted to condone the egregious conduct of the UCFAA coaching staff. Indeed, as it appears and as the jury found, it was both the coaching staff's actions and inactions that led to the tragic death of Ereck Plancher. It is difficult to comprehend how one human being can ignore another in obvious distress or prevent someone else from offering aid to one in distress, but, inexplicably, that is what happened here. In that regard, I would note that exculpatory clauses are unenforceable to the extent they attempt to release liability for intentional torts. See Loewe v. Seagate Homes, Inc., 987 So.2d 758 (Fla. 5th DCA 2008).*

UCF Athletics Ass'n Inc., v. Plancher, 121 So. 3d 1097, n. 21 (Fla. 5th DCA 2013).

b. Can an individual entering into a contract waive rights that were not foreseeable at the time the contract was entered?

Generally, yes. *See Sanislo v. Give Kids the World, Inc.*, 157 So. 3d 256 (Fla. 2015).

c. Why do you think Florida Trend described you as "someone conservatives trust" after you wrote your opinion in the UCF case?

I cannot speak to why Florida Trend described me in a particular way. However, I believe I am a judge everyone can trust to follow the law.

3. During a November 28, 2016 interview with the Florida Supreme Court Judicial Nominating Commission, you stated that you preferred appellate work and were not interested in becoming a federal district court judge. This is consistent with an interview you gave to the St. Augustine Record in November 2012. In that interview, you expressed a preference for being an appellate judge and described the work of a trial judge as "emotionally and physically draining."

   What changed between November 2016 and now? Why do you now want to be a federal district court judge?

   I acknowledge making those statements at the time and continue to enjoy my work on the appellate court. After the Florida Supreme Court appointment process concluded, a number of people asked that I reconsider my position on becoming a federal district court judge. Included among those is my friend and former colleague, U.S. District Judge Carlos Mendoza, who was nominated by President Obama and unanimously confirmed by the Senate. Judge Mendoza discussed with me his experience as a federal district court judge and how it differed from state trial court work. He believed that I would find

the work interesting and intellectually challenging. After prayerful consideration and discussion with my husband, I decided to submit my name for consideration. During the nomination process, three seats opened up on the Florida Supreme Court. Although I was lobbied pretty hard to do so, I chose not to apply for one of those seats. I am absolutely committed to serving as a United States District Court Judge.

Nomination of Wendy Berger
United States District Court for the Middle 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?

    The nominations hearing was scheduled by the Chair and Ranking member of the Judiciary Committee. The timing of the hearing was not up to me. Whether it was appropriate to conduct the hearing during recess is a political question best left to the individual members of the committee. Accordingly, pursuant to Canons 1, 2, and 5 of the Code of Conduct for United States Judges and Canons 1, 2, and 7 of the Florida Code of Judicial Conduct, I do not believe it would be proper for me to comment further on the matter.

    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?

    I believe the nominations hearing process is consistent with the Senate's constitutional duty to provide advice and consent on the President's nominees.

    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?

    No.

2. As Assistant General Counsel to Florida Governor Jeb Bush from 2001 to 2005, you advised him on issues relating to criminal justice, clemency, and the death penalty.

    a. How did that experience inform your approach to criminal cases once you became a state judge?

    As the Governor's death penalty attorney, I was responsible for making the decision to recommend the Governor sign a death warrant on eleven separate occasions. The decision required careful and deliberate consideration of the facts and procedural history with due regard for the wishes of the victim's family, the rights of the inmate, and the interests of the community. I also wanted to be certain that the condemned

inmate had committed the crime before approaching the Governor with a warrant. To that end, I thoroughly researched every case. I did not take my responsibility lightly and found it to be a sobering experience.

I appreciate and support the multi-layered postconviction appellate process in place in our country. The process safeguards the rights of the defendant while ensuring confidence in the verdict.

b. How would that experience inform your approach to criminal cases if you are confirmed as a federal district judge?

I believe the experiences would inform my approach as a federal district court judge in the in the same manner as it did as a state court judge.

3. You appear to have developed a reputation for imposing especially harsh sentences on criminal defendants. A February 2016 news article stated that as a trial judge you "buil[t] a reputation as a judge who was extremely tough on criminal defendants."[1] A November 2012 article described you as follows: "Anyone who's been through or worked in the justice system in St. Johns County has an opinion of Judge Wendy Berger. Some see her as the ultimate defender of victims, making sure dangerous people get long prison sentences—or worse. Others find her too harsh and unyielding. It's no secret defendants were all too happy to avoid her court when possible."[2] Another article, also from November 2012, stated: "Nearly everyone mentioned Berger's reputation for issuing long prison sentences. [Friend and local attorney Anne Marie] Gennusa said the rumor that Berger was trying to get to a milestone of sentencing St. Johns County criminals to a collective 100,000 years in prison was untrue. 'She reached that years ago,' Gennusa said. 'The milestone is a million.'"[3]

a. Do you dispute the reputation described in these articles for being exceptionally tough on criminal defendants and imposing harsh sentences? If so, please explain how.

I disagree with any assertion that I indiscriminately applied extremely harsh sentences to criminal defendants or that I was attempting to reach a sentencing "milestone," which was a comment made in jest by a friend while "roasting" me at my investiture.

I was the only judge assigned to the felony division in St. Johns County, which meant that I presided over every felony criminal case brought by the State Attorney's Office. Those cases ranged in severity from nonviolent third degree felonies to first degree capital murder. The toughest sentences were reserved for violent offenders and those with lengthy criminal records. And as expected, those are the sentences that garnered the most publicity.

In addition, during my tenure on the trial court, I served as the presiding judge of the St. Johns County Adult Drug Court. As I described in my SJQ, the program offers

nonviolent felony offenders an intensive treatment-based alternative to incarceration. Instead of a jail or prison term, participants are ordered to go through a strict multi-phased program of court appearances, group therapy, counseling and random drug testing. The goal of our drug court program was to help these offenders overcome their dependence on drugs by integrating drug treatment with strict and intensive judicial monitoring, in an effort to reduce the crimes associated with addiction and, ultimately, benefit the community as a whole. Without a doubt, I am most proud of my work with drug court. Nothing is more professionally rewarding than being blessed with the opportunity to take part in a life transformed.

b. What specific assurances can you provide to demonstrate that, if confirmed as a federal district judge, you would impose fair, just, and reasonable sentences on criminal defendants consistent with federal law?

I would carefully and thoughtfully work to ensure that every sentence I impose is "sufficient, but not greater than necessary" to achieve the sentencing purposes set forth by Congress. 18 U.S.C. § 3553(a)(2). In order to achieve this goal, I would consider arguments of counsel, any statement the defendant wished to make, statements of victims and other witnesses, the presentence report, recommendations of probation, the governing statutes, the Sentencing Guidelines, evidence offered in mitigation, and precedent of the Eleventh Circuit.

c. If you are confirmed, how would the federal sentencing guidelines affect your preexisting views on and approach to sentencing criminal defendants?

I would consult the advisory federal sentencing guidelines, as required, in formulating a sentence that is sufficient, but not greater than necessary, to achieve the sentencing goals set forth in 18 U.S.C. § 3553.

4. In a December 2016 interview relating to a vacancy on the Florida Supreme Court, you stated that you would "offer a consistent and conservative judicial philosophy."[4]

a. What do you understand "a consistent and conservative judicial philosophy" to mean?

Having a conservative judicial philosophy should not be confused with having a conservative political philosophy because the two are not interchangeable. In my view, a conservative judicial philosophy is one that respects the legislative process, understands the distinct roles of the three branches of government, and employs judicial restraint. In that regard, I believe it is my duty as a judge to say what the law is and not what I believe it to be. This is true whether I agree with the law or not.

b. Do you believe that imposing "a consistent and conservative judicial philosophy" is consistent with what your duties would be as a federal district judge?

Yes. Judges at all levels are bound to follow the law. If confirmed as a federal district court judge, I will consistently apply the facts to the law and faithfully follow the decisions of the United States Supreme Court and Eleventh Circuit

Court of Appeals.

5. According to a Brookings Institution 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.[5] Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.[6] 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.[7] In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.[8]

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

      I have not specifically studied the issue so I am reluctant to make such a judgment.

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

      Yes.

   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.

      Not specifically. However, I believe the topic was discussed during mandatory diversity training for judges. And although I cannot cite to them specifically, I have also read some newspaper articles on the topic.

6. According to a Pew Charitable Trusts fact sheet, in the 10 states with the largest declines in their incarceration rates, crime fell by an average of 14.4 percent.[9] In the 10 states that saw the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.[10]

   a. Do you believe there is a direct link between increases in 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 issue. Therefore, I do not have enough information on the topic to know whether there is a direct link between increases in a state's incarcerated population and decreased crime rates in that state.

   b. Do you believe there is a direct link between decreases in 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.

      I have not studied the issue. Therefore, I do not have enough information on the topic to know whether there is a direct link between decreases in a state's

incarcerated population and decreased crime rates in that state.

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

   I believe diversity of all kinds is important.

8. Do you believe that *Brown v. Board of Education*[11] was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

   Brown v. Board of Education is decided law. It is not up to me to determine whether a Supreme Court case is correctly decided. As a lower court judge, I must assume that it is and follow it without hesitation.

9. Do you believe that *Plessy v. Ferguson*[12] was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

   Lower court judges should not opine on whether a particular Supreme Court case was correctly decided. I would note, however, that the Supreme Court exercised it authority to recede from *Plessy* more than 60 years ago in *Brown v. Board of Education,* 347 U.S. 483 (1954). Accordingly, the doctrine of "separate-but-equal" no longer has a place in our law.

10. Has any official from the White House or the Department of Justice, or anyone else involved in your nomination or confirmation process, instructed or suggested that you not opine on whether any past Supreme Court decisions were correctly decided?

    No. I was instructed to answer all questions truthfully and to be mindful of the Judicial Cannons when doing so.

11. President Trump has stated on Twitter: "We cannot allow all of these people to invade our Country. When somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came."[13] Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

    Every litigant is entitled to due process and a fair adjudication of their claims.

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[1] SJQ Attachments to Question 12(a) at 473.
[2] *Id.* at 482.
[3] *Id.* at 485.
[4] Dara Kam, *Florida High Court Hopefuls Pitch Conservative Credentials*, WJCT (Nov. 23, 2016), http://news.wjct.org /post/florida-high-court-hopefuls-pitch-conservative-credentials
[5] Jonathan Rothwell, *How the War on Drugs Damages Black Social Mobility*, BROOKINGS INST. (Sept. 30, 2014), https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility.
[6] *Id.*
[7] Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, SENTENCING PROJECT (June 14, 2016), http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons.
[8] *Id.*[9] Fact Sheet, *National Imprisonment and Crime Rates Continue To Fall*, PEW CHARITABLE TRUSTS (Dec. 29,

2016), http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2016/12/national-imprisonment-and-crime-rates-continue-to-fall.
[10] *Id.*
[11] 347 U.S. 483 (1954).
[12] 163 U.S. 537 (1896).
[13] Donald J. Trump (@realDonaldTrump), TWITTER (June 24, 2018, 8:02 A.M.), https://twitter.com/realDonaldTrump/status/1010900865602019329.

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

Wendy Berger, to the U.S. District Court for the Middle District of Florida

1. At your hearing, you said that you had not "thought about" whether, under extant U.S. Supreme Court case law, race can be considered by educational institutions in their admissions decisions.

   a. **What did the Court hold in *Bakke, Gratz*, *Grutter*, *Fisher I*, and *Fisher II*?**

   In *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), a white male applicant to the University of California at Davis Medical School, who was denied admission brought an action challenging the legality of the school's special admissions program under which 16 of the 100 positions in the class were reserved for "disadvantaged" minority students. The Supreme Court concluded that "the goal of achieving a diverse student body is sufficiently compelling to justify consideration of race in admissions decisions under some circumstances," but that the University's "special admissions program, which foreclose[d] consideration to persons like [Bakke], [were] unnecessary to the achievement of this compelling goal and therefore invalid under the Equal Protection Clause."

   Gratz v. Bollinger, 539 U.S. 244 (2003), involved a class action lawsuit filed by rejected Caucasian in-state applicants for admission to the University of Michigan's College of Literature, Science and the Arts. The complaint alleged that the Board of Regents' use of racial preferences in undergraduate admissions violated the Equal Protection Clause, Title VI, and § 1981. While the Supreme Court rejected any contention that diversity could not constitute a compelling state interest, it concluded that University's policy, which automatically distributed 20 points, or one-fifth of the points needed to guarantee admission, to every single "underrepresented minority" applicant solely because of race, was not narrowly tailored to achieve educational diversity.

   In *Grutter v. Bollinger*, 539 U.S. 306 (2003), law school applicants who were denied admission challenged the race conscious admissions policy at the University of Michigan Law School. In its decision upholding the policy, the Supreme Court held that the law school's "narrowly tailored use of race in its admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body is not prohibited by the Equal Protection Clause, Title VI, or § 1981."

   In *Fisher v. University of Texas Austin*, 570 U.S. 297 (2013) (Fisher I), a white applicant who was denied admission to the university brought suit alleging that the university's consideration of race in its admissions process violated her right to equal protection. The appellate court's order affirming the trial court's order

granting summary judgment in favor of the university was vacated by the Supreme Court because the appellate court failed to apply strict scrutiny when reviewing the case.

The United States Supreme Court ultimately held in *Fisher II,* that the university's undergraduate admissions system, which, as required by the State's Top Ten Percent Law, offered admission to any students who graduate from a Texas high school in the top 10% of their class, and then filled the remainder of its incoming freshman class by combining an applicant's "Academic Index," consisting of the student's SAT score and high school academic performance with the applicant's "Personal Achievement Index," which involves a holistic review containing numerous factors, including race, survived a strict scrutiny analysis and was therefore lawful under the equal protection clause. *See Fisher v. University of Texas Austin*, 136 S. Ct. 2198 (2016).

b. **Is racial diversity important in educational settings?**

The Supreme Court of the United States has held that diversity furthers a compelling government interest.

c. **As a practical matter, do you believe that educational institutions are likely to be able to achieve meaningful racial diversity without recognizing and taking account of race?**

I have not been confronted with this precise issue. However, to the extent the issue may come before me, it would be inappropriate for me to offer an opinion on the subject. *See* Canon 3(A)(6), of the Code of Conduct for United States Judges and Canon 3(B)(9), of the Florida Code of Judicial Conduct. With that said, I will faithfully follow all United States Supreme Court and Eleventh Circuit precedent addressing the matter.

d. **Does the U.S. Constitution allow an educational institution to consider race if it eliminates race-based considerations and thereafter experiences a reduction in minority enrollment?**

I have not been confronted with this precise issue. However, to the extent the issue may come before me, it would be inappropriate for me to offer an opinion on the subject. *See* Canon 3(A)(6), of the Code of Conduct for United States Judges and Canon 3(B)(9), of the Florida Code of Judicial Conduct. With that said, I will faithfully follow all United States Supreme Court and Eleventh Circuit precedent addressing the matter.

2. In 2013, you joined a per curiam order in *Falcon v. State*, which declined to retroactively apply the U.S. Supreme Court's decision in *Miller v. Alabama*, which held that mandatory life imprisonment without parole for those under 18 years of age violates the

8th Amendment. The opinion you joined affirmed the sentence of a 15-year-old girl to life without parole for a murder conviction.

a. **Do you stand by that decision?**

Falcon v. State was decided by the First District Court of Appeal. Since I am not a member of that court, I did not join the per curiam opinion. However, in a case named *Garcia v. State*, 159 So. 3d 973 (Fla. 5th DCA 2015), my court aligned itself with the First District in *Falcon*. At the time of Garcia's appeal, there was a conflict among the districts over whether *Miller* should be applied retroactively. Because we agreed with our sister courts that *Miller* involved a procedural change in the law rather than a substantive one, pursuant to the test approved by the Florida Supreme Court in *Witt v. State,* 387 So.2d 922 (Fla.1980), we concluded retroactive application was not warranted. However, because the law was unsettled, we stayed issuance of the mandate in our case pending the Florida Supreme Court's decision in *Falcon*.

The Florida Supreme Court has since determined that *Miller* applies retroactively. Accordingly, we vacated our decision in *Garcia* and remanded the case for resentencing. I stand by the decision to remand the case for resentencing.

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

The decision to affirm Garcia's conviction was based on the law in the State of Florida at the time.

c. **Do you believe that harsh sentencing practices improve public safety? If yes, please provide citations.**

I have not studied the issue. Accordingly, I do not believe I can offer an informed answer on the subject.

d. There is a substantial body of scientific evidence concerning the brain development of juveniles and its impact on behavior and decision-making.[1]

i. **In light of this evidence, do you agree that leniency is appropriate when sentencing a juvenile defendant?**

I believe in some circumstances leniency may be appropriate. In other circumstances, it may not. It depends on the individual juvenile defendant and the particular nature and circumstances of the case.

[1] *See, e.g.,* Carl Zimmer, *You're an Adult. Your Brain, Not So Much*, N.Y. Times (Dec. 21, 2016), https://www.nytimes.com/2016/12/21/science/youre-an-adult-your-brain-not-so-much html.

ii. **In light of this evidence, do you agree that the possibility of parole is particularly important in juvenile sentencing?**

The United States Supreme Court addressed this issue in *Graham v. Florida*, 560 U.S. 48 (2010) and *Miller v. Alabama,* 567 U.S. 460 (2012), when it held that mandatory life sentences without the possibility of parole for those under the age of 18 at the time of their crimes violated the Eighth Amendment's prohibition on cruel and unusual punishments. Although the Eighth Amendment does not require that a juvenile offender be released during his or her natural life, it does require "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *See Graham*, 560 U.S. at 75.

3. 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?**

If confirmed, I would approach each sentencing with the understanding that every case is different. Accordingly, my decision will be guided by the specific facts and circumstances of the case. Additionally, I will carefully consider all applicable statutes, the advisory sentencing guidelines, any other pertinent legal authorities, any presentence report, any arguments from the parties, and any statements from the defendant, victim or other witnesses. I will also be mindful of Congress's direction that 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?**

Please see my response to question 3a.

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

The advisory federal sentencing guidelines and other authorities provide guidance on when a departure sentence would be appropriate. If confirmed, I would carefully consider these authorities, the factors articulated in 18 U.S.C. § 3553, and the positions of the parties before deciding whether a departure sentence was

appropriate.

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.[2]

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

As a district court nominee, it would not be appropriate for me to express any view with respect to the matter because those issues involve political questions and policy choices within the purview of Congress. *See* Code of Conduct for United States Judges, Canons 2.A., 5. With that said, I am bound by and will faithfully follow the law on the subject regardless of my personal views.

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

Please see my answer to Question 3.d.i.

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

Please see my answer to Question 3.d.i.

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.[3] 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:**

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

I do not believe it would be appropriate for me to make such a commitment. If confirmed, I would be obligated to comply with any mandatory sentencing statutes, provided they were constitutional.

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

[2] Judge Danny C. Reeves, Responses to Senators' Questions for the Record, https://www.judiciary.senate.gov/imo/media/doc/Reeves%20Responses%20to%20QFRs1.pdf.
[3] *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.

Charging decisions are solely within the purview of the Executive Branch.

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

Clemency considerations are best left to Executive Branch.

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.

4. 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. Although I have not studied the issue in depth, it is my understanding that racial minorities comprise a greater percentage of the incarcerated population.

5. 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?**

Qualified women and minorities will be given serious consideration for positions my office and any other position over which I have control and input.

6. You reported being a member of the National Rifle Association since 2015.

We recently held hearings for Judge Kavanaugh's nomination to the U.S. Supreme Court. Judge Kavanaugh's interpretation of the Supreme Court's 2008 decision in *Heller* is that public safety is not a factor that a court can consider when evaluating gun safety laws.

a. Do you agree with this interpretation of *Heller*?

I do not believe it would be appropriate for me to comment on the matter because the issue may come before me. *See* Canon 3(A)(6), of the Code of Conduct for United States Judges and Canon 3(B)(9), of the Florida Code of Judicial Conduct. Additionally, I do not know the precise context in which the comment was made.

Judge Kavanaugh also interprets *Heller* to say that a weapon cannot be banned if: (a) the weapon has not traditionally been banned; and (b) the weapon is now commonly used by law-abiding citizens. He used this reasoning to argue that the D.C. assault weapons ban should be struck down.

b. Do you agree with this interpretation of *Heller*?

Please see my response to Question 6a.

c. If not, what do you believe the test should be when deciding whether a gun safety law can be upheld?

As a lower court judge, I am bound and will faithfully follow all United States Supreme Court and Eleventh Circuit precedent on the issue.

7. In 2010, you wrote a dissent in the case *Burton v. State* while sitting by designation on an appellate court in Florida. At issue was an order compelling a pregnant woman suffering from complications in her pregnancy to remain hospitalized against her will. The order further compelled the pregnant woman to undergo "any medical treatment deemed necessary by the attending obstetrician, including detention in the hospital of bed rest, administration of intra-venous medications, and anticipated surgical delivery." A majority of the appellate panel reversed and held the trial court had applied the wrong legal standard. Specifically, the trial court applied case law concerning the welfare of the child instead of considering, as required by prior precedent, "whether the state's … interest [in fetal life] is sufficient to override the pregnant woman's constitutional right to the control of her person." In your dissent, you agreed that the trial judge applied the wrong legal standard, but wrote that you would dismiss the appeal as moot.

a. **Is a fetus a person entitled to protection under the U.S. Constitution?**

In *Roe v. Wade*, 410 U.S. 113, 158 (1973), the United States Supreme Court concluded that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." As a district judge, I would fully and faithfully apply *Roe* as well as all other binding precedent from the Supreme Court and the Eleventh Circuit.

8. In *Whole Woman's Health* in 2016, the U.S. Supreme Court invalidated two provisions of Texas law that imposed new restrictions on health care facilities that provide abortions. After the law passed, the number of those facilities in Texas dropped in half, severely limiting access to health care for the women of Texas.

    a. **Was *Whole Woman's Health* correctly decided?**

    It is not up to me to determine whether a Supreme Court case is correctly decided. As a lower court judge, I must assume that it is and follow it without hesitation. With that said, I am bound by and will faithfully follow all United States Supreme Court precedent, including *Whole Woman's Health.*

    b. **Did the Court in *Whole Woman's Health* change or clarify the "undue burden" test used to evaluate laws restricting access to abortion? If so, how?**

    The Supreme Court in *Whole Woman's Health* concluded that the record provided adequate support for the district court's finding that the challenged law placed an undue burden on a woman's right to seek an abortion.

9. In December 2016, you were nominated by the Florida Judicial Nominating Commission to fill a vacancy on the Florida Supreme Court. In an interview regarding your nomination, you said that you would, among other things, "offer a consistent and conservative judicial philosophy."

    a. **What did you mean by "conservative judicial philosophy"?**

    Having a conservative judicial philosophy should not be confused with having a conservative political philosophy because the two are not interchangeable. In my view, a conservative judicial philosophy is one that respects the legislative process, understands the distinct roles of the three branches of government, and employs judicial restraint. In that regard, I believe it is my duty as a judge to say what the law is and not what I believe it to be. This is true whether I agree with the law or not.

    b. **Does this mean that, if confirmed, your desired legal outcomes will dictate the decisions you make as a judge?**

    No, quite the contrary as discussed in my response to Question 9a.

    c. **Do you consider yourself an originalist?**

    Yes.

    d. **Do you consider yourself a textualist?**

Yes.

e. **In analyzing the meaning of a statute, would you ever consider legislative history?**

The meaning of a statute should be derived solely from its text, unless the text is ambiguous, in which case I would consider legislative history in the form of prior enacted statutes.