

UNITED STATES SENATE  
COMMITTEE ON THE JUDICIARY

QUESTIONNAIRE FOR JUDICIAL NOMINEES

PUBLIC

1. **Name**: State full name (include any former names used).

Eunice Cheryl Lee

2. **Position**: State the position for which you have been nominated.

United States Circuit Judge for the Second Circuit

3. **Address**: List current office address. If city and state of residence differs from your place of employment, please list the city and state where you currently reside.

Federal Defenders of New York, Inc.  
52 Duane Street, 10th Floor  
New York, New York 10007

4. **Birthplace**: State year and place of birth.

1970; Wiesbaden, Germany (U.S. Air Force base)

5. **Education**: List in reverse chronological order each college, law school, or any other institution of higher education attended and indicate for each the dates of attendance, whether a degree was received, and the date each degree was received.

1993 – 1996, Yale Law School; J.D., 1996  
Summer 1993, Oxford University/Ohio State University Pre-Law Program; no degree  
1989 – 1993, The Ohio State University; B.A. (*summa cum laude*), 1993

6. **Employment Record**: List in reverse chronological order all governmental agencies, business or professional corporations, companies, firms, or other enterprises, partnerships, institutions or organizations, non-profit or otherwise, with which you have been affiliated as an officer, director, partner, proprietor, or employee since graduation from college, whether or not you received payment for your services. Include the name and address of the employer and job title or description.

2019 – present  
Federal Defenders of New York, Inc.  
Appeals Bureau  
52 Duane Street, 10th Floor  
New York, New York 10007

Assistant Federal Defender

1998 – 2019

Office of the Appellate Defender  
11 Park Place, Suite 1601  
New York, New York 10007  
Supervising Attorney (2001 – 2019)  
Director of Recruitment (2003 – 2019)  
Staff Attorney (1998 – 2000)

2003 – 2019

New York University School of Law  
40 Washington Square South  
New York, New York 10012  
Adjunct Assistant Professor of Clinical Law,  
Criminal Appellate Defender Clinic

1997 – 1998

United States Court of Appeals for the Sixth Circuit  
Theodore Levin United States Courthouse  
231 West Lafayette Boulevard  
Detroit, Michigan 48226  
Law Clerk to the Honorable Eric L. Clay

1996 – 1997

United States District Court for the Southern District of Ohio  
Potter Stewart United States Courthouse  
100 East Fifth Street  
Cincinnati, Ohio 45202  
Law Clerk to the Honorable Susan J. Dlott

1995 – 1996

Connecticut Supreme Court  
231 Capitol Avenue, Suite 2  
Hartford, Connecticut 06106  
Research Assistant to Associate Justice Flemming L. Norcott, Jr.

Summer 1995

People for the American Way  
1101 15th Street, Northwest, Suite 600  
Washington, District of Columbia 20005  
Intern

Summer 1995

United States Department of Justice  
Civil Division

950 Pennsylvania Avenue, Northwest  
Washington, District of Columbia 20530  
Intern

Summer 1994  
Shearman & Sterling  
599 Lexington Avenue  
New York, New York 10022  
Summer Associate

Summer 1994  
NAACP Legal Defense and Educational Fund, Inc.  
40 Rector Street, 5th Floor  
New York, New York 10006  
Intern

7. **Military Service and Draft Status:** Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, serial number (if different from social security number) and type of discharge received, and whether you have registered for selective service.

I did not serve in the military. I was not required to register for the selective service.

8. **Honors and Awards:** List any scholarships, fellowships, honorary degrees, academic or professional honors, honorary society memberships, military awards, and any other special recognition for outstanding service or achievement.

Frederick Douglass Moot Court Competition (Northeast Regional), Best Brief Award  
(1994)

Shearman & Sterling NAACP LDF Scholarship (1993)  
The Ohio State University; *summa cum laude*, Dean's List (all quarters)  
Phi Beta Kappa (1993)  
OSU/Office of Minority Affairs Distinction Scholarship (1989 – 1993)  
OSU Distinguished Scholar Program (1991 – 1993)  
University Honors Scholarship (1989 – 1990)

9. **Bar Associations:** List all bar associations or legal or judicial-related committees, selection panels or conferences of which you are or have been a member, and give the titles and dates of any offices which you have held in such groups.

Association of the Bar of the City of New York, Committee on Professional  
Responsibility (2001 – 2003)  
Metropolitan Black Bar Association (2021)

10. **Bar and Court Admission:**

- a. List the date(s) you were admitted to the bar of any state and any lapses in membership. Please explain the reason for any lapse in membership.

New York, 1997

There have been no lapses in membership.

- b. List all courts in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse in membership. Give the same information for administrative bodies that require special admission to practice.

United States Court of Appeals for the Second Circuit, 2010

United States District Court for the Eastern District of New York, 2019

United States District Court for the Southern District of New York, 2002

There have been no lapses in membership.

**11. Memberships:**

- a. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in response to Questions 9 or 10 to which you belong, or to which you have belonged, since graduation from law school. Provide dates of membership or participation, and indicate any office you held. Include clubs, working groups, advisory or editorial boards, panels, committees, conferences, or publications.

Association of Legal Aid Attorneys (ALAA). Union representing Legal Aid and Federal Defenders attorneys, which is a subsidiary of the United Auto Workers (2019 – present)

New York State Office of Indigent Legal Services Working Group on Standards and Best Practices for Appellate and Post-Conviction Representation (July 2013 – 2014)

- b. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion, or national origin. Indicate whether any of these organizations listed in response to 11a above currently discriminate or formerly discriminated on the basis of race, sex, religion or national origin either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

To my knowledge, neither of the organizations listed above currently discriminates or formerly discriminated on the basis of race, sex, religion or



national origin, either through formal membership requirements or the practical implementation of membership policies.

**12. Published Writings and Public Statements:**

- a. List the titles, publishers, and dates of books, articles, reports, letters to the editor, editorial pieces, or other published material you have written or edited, including material published only on the Internet. Supply four (4) copies of all published material to the Committee.

“Second Circuit rejects application of the categorical approach for determining an ‘offense against property’ under the MVRA,” FDNY Second Circuit Blog (Jan. 8, 2021). Copy supplied.

“Second Circuit holds that district courts may grant compassionate release on expansive grounds and are not limited to the Sentencing Commission’s criteria,” FDNY Second Circuit Blog (Sept. 30, 2020). Copy supplied.

“Second Circuit grants suppression motion and holds that reasonable suspicion for stop was not established by defendant’s match to suspect’s race, even in combination with other factors, because a description based primarily on race is not particularized enough to guard against police overreach or harassment,” FDNY Second Circuit Blog (July 17, 2020). Copy supplied.

“Second Circuit defines ‘altered’ serial number on a firearm for purposes of the four-level enhancement under U.S.S.G. § 2K2.1(b)(4)(B) to mean that at least one serial number on the firearm is illegible to the naked eye,” FDNY Second Circuit Blog (May 27, 2020). Copy supplied.

“Second Circuit affirms grant of summary judgment dismissing claim of excessive force in handcuffing on grounds of qualified immunity, but notes that the right to raise such a claim is now ‘clearly established’ law,” FDNY Second Circuit Blog (Oct. 28, 2019). Copy supplied.

“Second Circuit affirms application of Sentencing Guidelines enhancement under § 2D1.1(b)(16)(E) for criminal conduct committed as part of a livelihood, addressing for the first time what constitutes ‘a substantial period of time’ in this context and what it means for criminal activity to be engaged in as a ‘primary occupation,’” FDNY Second Circuit Blog (Oct. 23, 2019). Copy supplied.

“Second Circuit holds that Fourth Amendment not violated by Suffolk County program that permits nonprofit organization to conduct home visits with individuals on the sex offender registry in order to confirm the accuracy of their registration address,” FDNY Second Circuit Blog (Sept. 6, 2019). Copy supplied.

“Second Circuit upholds prolonged traffic stop based on suspicion that car was

stolen, despite database check confirming that it was not stolen,” FDNY Second Circuit Blog (Sept. 6, 2019). Copy supplied.

Letter to the Editor, *Thomas’ change*, The Ohio State Lantern, Oct. 18, 1991. Copy supplied.

- b. Supply four (4) copies of any reports, memoranda or policy statements you prepared or contributed in the preparation of on behalf of any bar association, committee, conference, or organization of which you were or are a member. If you do not have a copy of a report, memorandum or policy statement, give the name and address of the organization that issued it, the date of the document, and a summary of its subject matter.

New York State Office of Indigent Legal Services, Appellate Standards and Best Practices (effective January 5, 2015). Copy supplied.

Statement of the Committee on Professional Responsibility of the Association of the Bar of the City of New York Regarding the United States Department of Justice Final Rule Allowing “Eavesdropping” on Lawyer/Client Conversations (April 8, 2002). Copy supplied.

- c. Supply four (4) copies of any testimony, official statements or other communications relating, in whole or in part, to matters of public policy or legal interpretation, that you have issued or provided or that others presented on your behalf to public bodies or public officials.

None.

- d. Supply four (4) copies, transcripts or recordings of all speeches or talks delivered by you including commencement speeches, remarks, lectures, panel discussions, conferences, political speeches, and question-and-answer sessions. Include the date and place where they were delivered, and readily available press reports about the speech or talk. If you do not have a copy of the speech or a transcript or recording of your remarks, give the name and address of the group before whom the speech was given, the date of the speech, and a summary of its subject matter. If you did not speak from a prepared text, furnish a copy of any outline or notes from which you spoke.

April 27, 2021: Guest Speaker, New York Law School, Professor Susan Abraham’s Advanced Appellate Advocacy Class, New York, New York (Virtual). I served as a judge for a moot court conducted as part of the class. The argument concerned a hypothetical case involving the dismissal of a diversity action based on lack of personal jurisdiction. I have no notes, transcript, or recording. New York Law School is located at 185 West Broadway, New York, New York, 10013.

January 25 – 29, 2021: Presenter and Facilitator, National Legal Aid and Defender Association, 2021 Appellate Defender Training Conference (Virtual). On January 27, 2021, I co-presented at a plenary session on “Writing a Persuasive Brief.” I also served as a facilitator at the daily small-group sessions, instructing practicing attorneys on brief writing as part of an intensive, five-day virtual training program. PowerPoint supplied.

November 16, 2020: Presenter, “Compassionate Release: Litigation and Strategy Updates,” Federal Defenders of New York, Inc., Virtual CLE Program. The program, which featured several presenters, focused on strategies for filing compassionate release motions, including discussion of the Second Circuit decision in *United States v. Brooker*, 976 F.3d 228 (2d Cir. 2020). I have no notes, transcript, or recording. The address for the Federal Defenders of New York, Inc. is 52 Duane Street, 10th Floor, New York, New York, 10007.

April 28, 2020: Guest Speaker, New York Law School, Professor Susan Abraham’s Advanced Appellate Advocacy Class, New York, New York (Virtual). I served as a judge for a moot court conducted as part of the class. The argument concerned a hypothetical case involving the dismissal of a diversity action based on lack of personal jurisdiction. I have no notes, transcript, or recording. New York Law School is located at 185 West Broadway, New York, New York, 10013.

February 7, 2019: Co-Presenter, “Preservation Training for Trial Lawyers,” Neighborhood Defender Service of Harlem, CLE Program, New York, New York. PowerPoint supplied.

February 4, 2019: Co-Presenter, “Preservation Training for Trial Lawyers,” Office of the Appellate Defender, CLE Program, New York, New York. Handout and PowerPoint supplied.

January 17 – 20, 2019: Facilitator, National Legal Aid and Defender Association, 2019 Appellate Defender Training Conference, New Orleans, Louisiana. As part of the faculty, I instructed practicing attorneys in small-group workshops as part of an intensive, four-day training program. I have no notes, transcript, or recording. The address for the National Legal Aid and Defender Association is 1901 Pennsylvania Avenue, Northwest, Suite 500, Washington, District of Columbia 20006.

May 23, 2018: Co-Presenter, “Requirements for Preservation and Issues in Select Subject Areas,” The Legal Aid Society, CLE Program, New York, New York. PowerPoint supplied.

January 23, 2018: Co-Presenter, “Preservation Training for Trial Lawyers,” Office of the Appellate Defender, CLE Program, New York, New York. Handout and PowerPoint supplied.

June 14, 2013: Presenter and Panel Speaker, “Crafting a Persuasive Statement of Facts and Argument,” New York State Association of Criminal Defense Lawyers, CLE Program, Appellate Advocacy for the Criminal Defense Practitioner, Brooklyn, New York. Notes supplied. I have presented a lecture similar to this on other occasions using these same materials, but I do not recall the specific dates.

March 10 – 12, 2011: Facilitator, Dickinson School of Law and the Public Defender Association of Pennsylvania, Appellate Advocacy Training, Carlisle, Pennsylvania. As part of the faculty, I instructed practicing attorneys in small group and seminar settings during an intensive three-day appellate advocacy training program. I have no notes, transcript, or recording. The address for the Dickinson School of Law is 150 South College Street, Carlisle, Pennsylvania, 17013.

July 31, 2010: Panel Speaker, “From on High: Recent Supreme Court Litigation Affecting Our Practice,” Public Defender Advocacy, Hiring & Training Conference (PATH), Washington, District of Columbia. This panel discussion focused on giving an overview of recent cases from the United States Supreme Court of particular relevance to criminal defense practitioners. I have no notes, transcript, or recording. The address for the Public Defender Service for the District of Columbia is 633 Indiana Avenue, Northwest, Washington, District of Columbia 20004.

October 6 – 8, 2006: Facilitator, Georgia Public Defender Services Commission, Appellate Advocacy Training, Atlanta, Georgia. As part of the faculty, I instructed practicing attorneys in small-group and seminar settings during an intensive three-day appellate advocacy training program. I have no notes, transcript, or recording. The address for the Georgia Public Defender Standards Council is 104 Marietta Street Northwest, Suite 600, Atlanta, Georgia, 30303.

In approximately 2005, I was a panel speaker at an event sponsored by the career services office of Yale Law School. I do not recall the specifics, and I have no notes, transcript, or recording. Yale Law School is located at 127 Wall Street, New Haven, Connecticut, 06511.

Additionally, at some point in approximately 2010, I served as a judge in a moot court competition. I do not recall the sponsoring organization or the location of the event.

- e. List all interviews you have given to newspapers, magazines or other publications, or radio or television stations, providing the dates of these interviews and four (4) copies of the clips or transcripts of these interviews where they are available to you.

Ben Bedell, *Finding “Showup” Suggestive, Split Panel Upsets Convictions*,

N.Y.L.J., June 4, 2015. Copy supplied.

Ben Bedell, *False Testimony Not Enough to Toss Verdict, Panel Says*, N.Y.L.J., Apr. 2, 2015. Copy supplied.

Ben Bedell, *Citing 1878 Burglary Case, Panel Affirms Conviction*, N.Y.L.J., Jan. 14, 2015. Copy supplied.

13. **Judicial Office:** State (chronologically) any judicial offices you have held, including positions as an administrative law judge, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

I have not held judicial office.

- a. Approximately how many cases have you presided over that have gone to verdict or judgment? \_\_\_\_\_

- i. Of these cases, approximately what percent were:

jury trials: \_\_\_\_\_ %  
bench trials: \_\_\_\_\_ % [total 100%]

- ii. Of these cases, approximately what percent were:

civil proceedings: \_\_\_\_\_ %  
criminal proceedings: \_\_\_\_\_ % [total 100%]

- b. Provide citations for all opinions you have written, including concurrences and dissents.
- c. For each of the 10 most significant cases over which you presided, provide: (1) a capsule summary of the nature of the case; (2) the outcome of the case; (3) the name and contact information for counsel who had a significant role in the trial of the case; and (4) the citation of the case (if reported) or the docket number and a copy of the opinion or judgment (if not reported).
- d. For each of the 10 most significant opinions you have written, provide: (1) citations for those decisions that were published; (2) a copy of those decisions that were not published; and (3) the names and contact information for the attorneys who played a significant role in the case.
- e. Provide a list of all cases in which certiorari was requested or granted.
- f. Provide a brief summary of and citations for all of your opinions where your decisions were reversed by a reviewing court or where your judgment was affirmed with significant criticism of your substantive or procedural rulings. If

any of the opinions listed were not officially reported, provide copies of the opinions.

- g. Provide a description of the number and percentage of your decisions in which you issued an unpublished opinion and the manner in which those unpublished opinions are filed and/or stored.
  - h. Provide citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, provide copies of the opinions.
  - i. Provide citations to all cases in which you sat by designation on a federal court of appeals, including a brief summary of any opinions you authored, whether majority, dissenting, or concurring, and any dissenting opinions you joined.
14. **Recusal:** If you are or have been a judge, identify the basis by which you have assessed the necessity or propriety of recusal (If your court employs an "automatic" recusal system by which you may be recused without your knowledge, please include a general description of that system.) Provide a list of any cases, motions or matters that have come before you in which a litigant or party has requested that you recuse yourself due to an asserted conflict of interest or in which you have recused yourself sua sponte. Identify each such case, and for each provide the following information:

I have not held judicial office.

- a. whether your recusal was requested by a motion or other suggestion by a litigant or a party to the proceeding or by any other person or interested party; or if you recused yourself sua sponte;
- b. a brief description of the asserted conflict of interest or other ground for recusal;
- c. the procedure you followed in determining whether or not to recuse yourself;
- d. your reason for recusing or declining to recuse yourself, including any action taken to remove the real, apparent or asserted conflict of interest or to cure any other ground for recusal.

15. **Public Office, Political Activities and Affiliations:**

- a. List chronologically any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. If appointed, please include the name of the individual who appointed you. Also, state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.

None.

- b. List all memberships and offices held in and services rendered, whether compensated or not, to any political party or election committee. If you have ever held a position or played a role in a political campaign, identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

None.

16. **Legal Career:** Answer each part separately.

- a. Describe chronologically your law practice and legal experience after graduation from law school including:

- i. whether you served as clerk to a judge, and if so, the name of the judge, the court and the dates of the period you were a clerk;

I served as a law clerk to the following two judges:

The Honorable Susan J. Dlott  
United States District Court for the Southern District of Ohio  
1996 – 1997

The Honorable Eric L. Clay  
United States Court of Appeals for the Sixth Circuit  
1997 – 1998

- ii. whether you practiced alone, and if so, the addresses and dates;

I have not practiced alone.

- iii. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been affiliated, and the nature of your affiliation with each;

1998 – 2019  
Office of the Appellate Defender  
11 Park Place, Suite 1601  
New York, New York 10007  
Staff Attorney (1998 – 2001)  
Supervising Attorney (2001 – 2019)  
Director of Recruitment (2003 – 2019)

2003 – 2019  
New York University School of Law  
40 Washington Square South  
New York, New York 10012

Adjunct Assistant Professor of Clinical Law,  
Criminal Appellate Defender Clinic

2019 – present  
Federal Defenders of New York, Inc.  
Appeals Bureau  
52 Duane Street, 10th Floor  
New York, New York 10007  
Assistant Federal Defender

- iv. whether you served as a mediator or arbitrator in alternative dispute resolution proceedings and, if so, a description of the 10 most significant matters with which you were involved in that capacity.

I have never served as an arbitrator or a mediator.

b. Describe:

- i. the general character of your law practice and indicate by date when its character has changed over the years.

After completing my federal district and circuit court clerkships, I started practicing criminal law in 1998. From 1998 to 2019, I represented indigent clients on their appeals from various types of New York felony convictions. The representation consisted of direct appeals to the New York Appellate Division, First Department, and the New York Court of Appeals, as well as post-conviction motions in state trial court, and a limited number of federal habeas corpus petitions. While working at the Office of the Appellate Defender, my responsibilities also included training and supervising staff attorneys, as well as pro bono attorneys from law firms.

From 2003 to 2019, in conjunction with my position at the Office of the Appellate Defender, and as an adjunct assistant clinical professor at New York University School of Law, I co-taught law students and supervised their representation of clients in a criminal appellate defense clinic.

In May of 2019, I joined the Appeals Bureau at the Federal Defenders of New York, Inc. At that time, my practice changed to consist exclusively of criminal appellate defense of indigent clients in federal court. The majority of my practice is representation of clients on direct appeal in the Second Circuit, as well as in post-conviction proceedings in the Southern and Eastern Districts of New York. My practice also includes providing support to the attorneys in the Trial Division of the Federal Defenders.

- ii. your typical clients and the areas at each period of your legal career, if



any, in which you have specialized.

For the entirety of my legal career, my clients in both state and federal court have been poor and working-class people convicted of felony offenses. In state court, my cases included many theft, drug-related, and violent offenses. My federal practice likewise has included many theft and gun-related offenses. However, I have not specialized in any particular areas and have handled all different types of cases.

- c. Describe the percentage of your practice that has been in litigation and whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe such variance, providing dates.

When I was at the Office of the Appellate Defender from 1998 to 2019, 100% of my work was criminal appellate and post-conviction litigation. I argued the appeal in court in almost every case for which I filed a brief. I also appeared in trial court on various post-conviction matters. Since starting at the Federal Defenders in May of 2019, my work continues to be exclusively in criminal appellate and post-conviction litigation. I have argued most of the appeals that I have filed in the Second Circuit. I also have appeared in court in the Southern District of New York on a post-conviction matter.

- i. Indicate the percentage of your practice in:

- |                             |      |
|-----------------------------|------|
| 1. federal courts:          | 15 % |
| 2. state courts of record:  | 85 % |
| 3. other courts:            | 0 %  |
| 4. administrative agencies: | 0 %  |

- ii. Indicate the percentage of your practice in:

- |                          |       |
|--------------------------|-------|
| 1. civil proceedings:    | 0 %   |
| 2. criminal proceedings: | 100 % |

- d. State the number of cases in courts of record, including cases before administrative law judges, you tried to verdict, judgment or final decision (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

I have not tried any cases.

- i. What percentage of these trials were:

- |              |      |
|--------------|------|
| 1. jury:     | ___% |
| 2. non-jury: | ___% |

- e. Describe your practice, if any, before the Supreme Court of the United States. Supply four (4) copies of any briefs, amicus or otherwise, and, if applicable, any

oral argument transcripts before the Supreme Court in connection with your practice.

I have not appeared before the Supreme Court of the United States, but I have filed one petition for a writ of certiorari. *Cummings v. New York*, 565 U.S. 862 (2011) (petition for certiorari) (cert. denied). Copy supplied.

17. **Litigation:** Describe the ten (10) most significant litigated matters which you personally handled, whether or not you were the attorney of record. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

- a. the date of representation;
- b. the name of the court and the name of the judge or judges before whom the case was litigated; and
- c. the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

1. *United States v. Simmons*, Docket Nos. 08-cr-1280, 16-cv-2055 (S.D.N.Y), District Judge Valerie E. Caproni; 2019 – 2021

I began representing Mr. Simmons in approximately June 2019, but other attorneys from the Federal Defenders had been representing him for years prior to that time. I worked with co-counsel in preparing a motion to dismiss the indictment, and argued the motion in the district court in October 2019.

Mr. Simmons was charged in 2008 with one count of being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g), 924(e), and after being found guilty following a bench trial on stipulated facts, was sentenced in 2010 to a mandatory minimum term of 180 months. After the Supreme Court decision in *Johnson v. United States*, 576 U.S. 591 (2015), Mr. Simmons filed a motion under 28 U.S.C. § 2255 challenging his sentencing enhancement under 18 U.S.C. § 924(e). With the consent of the Government, the sentence was vacated, and the district court released Mr. Simmons from custody in 2016 pending resentencing. The resentencing was stayed between 2016 and early 2019, pending the development of relevant Second Circuit law. When Second Circuit case law confirmed the propriety of Mr. Simmons's original sentencing enhancement, the district judge lifted the stay in April 2019. Before resentencing could occur, however, the Supreme Court's decision in *Rehaif v. United States*, 139 S. Ct. 2191 (2019), necessitated additional briefing in Mr. Simmons's case as to a different issue. Co-counsel and I then filed a motion to dismiss the indictment pursuant to Federal Rule of Criminal Procedure 12(b)(3)(B)(v), which was denied by the district court on October 30, 2020. Co-counsel subsequently negotiated a disposition resulting in Mr. Simmons's

guilty plea to a superseding information in April 2021.

Opposing counsel

AUSA Peter John Davis  
United States Attorney's Office  
Southern District of New York  
1 St. Andrew's Plaza  
New York, NY 10007  
(212) 637-2468

Co-counsel

Peggy Cross-Goldenberg  
Federal Defenders of New York, Inc.  
52 Duane Street, 10th Floor  
New York, NY 10007  
(212) 417-8732

Edward S. Zas  
Federal Defenders of New York, Inc.  
52 Duane Street, 10th Floor  
New York, NY 10007  
(212) 417-8700

2. *United States v. Gargan*, Docket No. 18-cr-723 (S.D.N.Y), District Judge Paul G. Gardephe; 2020

In February 2020, I was assigned to handle Mr. Gargan's direct appeal in the Second Circuit. Other attorneys from the Federal Defenders had represented Mr. Gargan at trial. Mr. Gargan had been convicted on October 23, 2019, of one count of conspiracy to distribute narcotics, and was sentenced on December 16, 2019, to three years of imprisonment and three years of supervised release. As the coronavirus pandemic escalated and infections were beginning to spread in the federal prisons, I filed a motion (under seal) in the district court on April 15, 2020, seeking compassionate release for Mr. Gargan based on his heightened vulnerability to serious complications from COVID-19. I also submitted a reply to the Government's opposition. The district court granted Mr. Gargan's motion for compassionate release on May 5, 2020, and released him to home confinement. He subsequently withdrew his direct appeal from the Second Circuit.

Opposing counsel

AUSA Michael K. Krouse  
United States Attorney's Office  
Southern District of New York  
1 St. Andrew's Plaza  
New York, NY 10007  
(212) 637-2279

AUSA Sebastian Swett  
United States Attorney's Office  
Southern District of New York  
1 St. Andrew's Plaza  
New York, NY 10007  
(646) 832-8041

3. *People v. Coulibaly*, 172 A.D.3d 647 (1st Dep't 2019), New York Appellate Division, First Department (Sweeny, Justice Presiding, and Justices Renwick, Manzanet-Daniels, Tom, and Oing); 2017 – 2019

I represented Mr. Coulibaly from 2017 to 2019 while I was a supervising attorney at the Office of the Appellate Defender (OAD). I supervised the appellate representation, including reviewing all records and the trial transcript, collaborating with pro bono counsel Brenton T. Culpepper and Anna G. Dimon on issue selection and case strategy, and editing the opening brief and the reply brief. Because I left my employment with OAD after the briefing was complete, I was not involved in any of the subsequent representation, including the argument of the case in the Appellate Division.

Trial counsel for Mr. Coulibaly had filed a motion to dismiss the indictment based on a violation of Mr. Coulibaly's right to a speedy trial under New York Criminal Procedure Law § 30.30(1)(a). In arguing which periods of pre-trial delay should be charged to the prosecution, trial counsel made a dispositive mathematical error as to the number of days in an adjournment period that the prosecution had conceded was chargeable to it. Had the period been correctly calculated, the motion court would have found the speedy trial motion to be meritorious. On appeal, Mr. Coulibaly argued that this error by trial counsel constituted ineffective assistance of counsel. The Appellate Division agreed, reversing Mr. Coulibaly's conviction for second-degree assault and dismissing the indictment.

Opposing counsel

Assistant District Attorney Susan Axelrod  
Office of the District Attorney, New York County  
1 Hogan Place  
New York, NY 10013  
(212) 335-9253

Assistant District Attorney Amanda Katherine Regan  
Office of the District Attorney, New York County  
1 Hogan Place  
New York, NY 10013  
(212) 335-9729

Co-counsel

Brenton T. Culpepper  
Milbank, Tweed, Hadley & McCloy LLP  
28 Liberty Street

New York, NY 10005  
(212) 530-5626

Anna G. Dimon  
Milbank, Tweed, Hadley & McCloy LLP (at time of representation)  
Venable LLP (current)  
Rockefeller Center  
1270 Avenue of the Americas, 24th Floor  
New York, NY 10020  
(212) 503-0698

4. *People v. Joseph*, 28 N.Y.3d 1003 (2016), New York Court of Appeals (Chief Judge DiFiore, and Judges Pigott, Rivera, Abdus-Salaam, Fahey, Garcia, and Stein); 2014 – 2016

I represented Mr. Joseph from approximately 2014 to 2016. On appeal in the Appellate Division, First Department, *People v. Joseph*, 124 A.D.3d 437 (1st Dep't 2015), *aff'd as modified*, 28 N.Y.3d 1003 (2016), I supervised the representation, including editing the written work of pro bono counsel Matthew E.K. Howatt. On appeal to the New York Court of Appeals, I had exclusive responsibility for Mr. Joseph's representation, drafting all briefs and arguing the case.

Mr. Joseph was convicted of second-degree burglary of a "dwelling" under New York Penal Law § 140.25(2). His conviction was based on an unlawful entry into the basement of a deli through cellar doors that opened out onto a public sidewalk adjacent to the deli. His offense was deemed to be the burglary of a "dwelling," rather than third-degree burglary of a "building," based on the presence of residential apartments located on the floors above the deli. The New York Court of Appeals noted that the sidewalk entry to the basement was both entirely disconnected from the building and completely inaccessible to the residences in that building. Applying an exception to the general rule regarding the broad definition of a "dwelling," the court held that Mr. Joseph's entry should not be deemed burglary of a "dwelling." The court overturned the decision of the Appellate Division and vacated Mr. Joseph's conviction for second-degree burglary.

#### Opposing counsel

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5. *People v. Cruz (Marshall)*, 129 A.D.3d 119 (1st Dep't 2015), New York Appellate Division, First Department (Gonzalez, Presiding Justice, and Justices Tom, Renwick, Gische, and Kapnick); 2013 – 2016

I represented Mr. Marshall from 2013 to 2016. On appeal in the Appellate Division, First Department, 129 A.D.3d 119 (1st Dep't 2015), I supervised the appellate representation, including the written work of pro bono counsel Victorien Wu. After reversal on appeal, I represented Mr. Marshall with co-counsel from OAD at an independent source hearing in the trial court.

Mr. Marshall was one of three co-defendants convicted of robbery in the second degree, criminal possession of stolen property in the fourth degree, and resisting arrest, in connection with the theft of a woman's bag on the street. At a pre-trial suppression hearing, the defendants had moved to suppress a showup identification of them made by the complainant as the product of an unconstitutionally suggestive procedure. The Appellate Division agreed, vacating the convictions and remanding the case for retrial, to be preceded by an independent source hearing to determine if the identification of the complainant could be admitted at trial, notwithstanding the suggestive procedure. After the independent source hearing, the trial court ruled that the identification was admissible. Mr. Marshall then agreed to a guilty plea.

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6. *Cummings v. LaValley*, 582 F. App'x 49 (2d Cir. 2014) (Chief Judge Katzmann, and Circuit Judges Hall and Carney); 2008 – 2014

I represented Mr. Cummings from 2008 to 2014. I briefed and argued his appeal first in the New York Appellate Division, *People v. Cummings*, 66 A.D.3d 571 (1st Dep't 2009), and then the New York Court of Appeals, 16 N.Y.3d 784 (2011). I filed a cert petition to the United States Supreme Court, *Cummings v. New York*, 132 S. Ct. 203 (2011), which was denied, and then filed a federal habeas petition in the district court, *Cummings v. LaValley*, No. 12 Civ 7403, 2013 WL 5303763 (S.D.N.Y. Sept. 20, 2013). On appeal to the Second Circuit, pro bono counsel Caroline Lents assisted with the briefing, and I argued the appeal.

Mr. Cummings was convicted in New York state court of several offenses, including second-degree burglary of a "dwelling," based on his entry into a police precinct locker room and attempted theft of property. The police precinct was deemed a "dwelling" based on the presence in the precinct of a room with cots that officers occasionally used for overnight stays. While the trial attorney moved to dismiss this count of the indictment pre-trial, he did not renew this motion at trial. On appeal to the Appellate Division and the New York Court of Appeals, Mr. Cummings argued that he was denied the effective

assistance of counsel. In the habeas petition in the district court, and on appeal to the Second Circuit, he argued that the New York Court of Appeals erred in analyzing his claim under the New York standard for ineffective assistance of counsel rather than the federal standard. The Second Circuit held that the state court had implicitly applied the federal standard, and affirmed the conviction.

Opposing counsel in the Second Circuit

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(No longer practicing law)

7. *Torres v. Ercole*, 421 F. App'x 6 (2d Cir. 2011) (Circuit Judges Winter, Pooler, and Hall); 2002 – 2011

I represented Mr. Torres from 2002 to 2011. I supervised the work of pro bono counsel Stephen R. DiPrima in briefing and arguing Mr. Torres's appeal in the New York Appellate Division, *People v. Torres*, 2 A.D.3d 367 (1st Dep't 2003). I had exclusive responsibility for representation of Mr. Torres on the habeas petition in the district court, including drafting the briefs and conducting an evidentiary hearing. *Torres v. Ercole*, No. 06 Civ. 674, 2009 WL 4067281 (S.D.N.Y. Nov. 24, 2009). I then briefed and argued the appeal to the Second Circuit.



Mr. Torres was convicted of robbery in the second-degree and grand larceny in the fourth degree, and sentenced, as a persistent felony offender, to 20 years to life imprisonment. He argued in the state court and before the Second Circuit, that he was denied the effective assistance of counsel by his trial counsel's failure to impeach the arresting officer with a statement from the first trial, which could have been used to obtain suppression of an inculpatory statement at the second trial. The Second Circuit affirmed the district court's finding that Mr. Torres received effective representation.

Opposing counsel in the Southern District of New York and the Second Circuit

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8. *People v. Steward*, 17 N.Y.3d 104 (2011), New York Court of Appeals (Chief Judge Lippman, and Judges Ciparick, Pigott, Jones, Graffeo, Smith, and Read); 2009 – 2011

I represented Mr. Steward from 2009 to 2011. On appeal to the Appellate Division, First Department, *People v. Steward*, 72 A.D.2d 524 (1st Dep't 2010), *rev'd*, 17 N.Y.3d 104 (2011), I supervised the representation, including reviewing all records and the trial transcript, collaborating with pro bono counsel Christina M. McGill on issue selection and case strategy, and editing the written work on the appellate briefs and on the subsequent application for leave to appeal to the New York Court of Appeals. I argued the leave application at a leave conference. When leave was granted, I recruited a more junior attorney from OAD who had not previously had the opportunity to argue in the Court of Appeals, and I asked her to take on a primary role. I supervised her written work, and she argued the case in the Court of Appeals.

Mr. Steward was convicted of first-degree and second-degree robbery in a case in which the complainant was a prominent local radio personality. During jury selection, defense

counsel objected to the court's imposition of a five-minute limitation on counsel for the questioning of jurors during each round of voir dire. The Appellate Division concluded that the restriction was allowable, but the Court of Appeals held that it was an abuse of discretion for the trial court to adhere to the restriction in the face of counsel's objection. The court reversed Mr. Steward's conviction, and the prosecution ultimately decided not to retry him.

Opposing counsel

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9. *People v. Gonzalez*, Ind. 560/05, New York State Supreme Court, New York County, Part 44 (Justice Marcy L. Kahn); 2007 – 2009

I represented Mr. Gonzalez from 2007 to 2009. Mr. Gonzalez and a co-defendant had been convicted at trial of third-degree criminal sale of a controlled substance based on an allegation of a \$20 sale of drugs. Mr. Gonzalez was sentenced to a term of 1 to 3 years in prison, which was the statutory minimum. I supervised an OAD staff attorney in preparing the opening brief for Mr. Gonzalez's appeal, and I then drafted the reply brief and argued the case to the Appellate Division, which affirmed the conviction, *People v. Gonzalez*, 50 A.D.3d 527 (1st Dep't 2008). The trial court had permitted Mr. Gonzalez to remain out on bail during the trial and throughout the duration of the appeal. Following the affirmance in the Appellate Division, I submitted a motion to the trial court to either dismiss or reduce his conviction in the interest of justice, or to vacate his sentence as illegally imposed or invalid, based on it being "cruel and unusual" punishment under the specific circumstances of the case. The court granted the motion on the constitutional claim and reduced Mr. Gonzalez's sentence to time served, with a concurrent sentence of

5 years' probation.

Opposing counsel on the motion in the trial court

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10. *People v. Gil*, 285 A.D.2d 7 (1st Dep't 2001) New York Appellate Division, First Department (Sullivan, Presiding Justice, and Justices Mazzarelli, Ellerin, Lerner, and Buckley); 1999 – 2001

I represented Mr. Gil on appeal from 1999 to 2001. Mr. Gil was convicted after trial of criminal impersonation, burglary, kidnapping, and robbery, and was sentenced to 50 ½ to 103 years in prison. I first filed a post-conviction motion to vacate his conviction, and then a direct appeal, arguing in both that Mr. Gil's trial counsel was ineffective for proceeding to trial on the date of Mr. Gil's arraignment on a multicount felony indictment without any prior investigation and after waiving all pre-trial motions and discovery. The Appellate Division agreed that counsel's actions could not be justified as reasonable strategy, and vacated Mr. Gil's conviction on direct appeal, remanding the case for further proceedings, at which Mr. Gil was represented by other counsel.

Opposing counsel

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18. **Legal Activities:** Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe fully the nature of your participation in these activities. List any client(s) or organization(s) for whom you performed lobbying activities and describe the lobbying activities you performed on behalf of such client(s) or organizations(s). (Note: As to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

I have engaged in advocacy for clients that did not relate to their criminal appeals. Because my legal representation of clients generally begins after they have been convicted, most of my clients are incarcerated. When I practiced in state court, I frequently wrote letters in support of clients who were appearing before the parole board. Even since leaving state court practice, I have written such a letter for a former client. I also have assisted incarcerated clients with regard to conditions surrounding their confinement, including access to mental health and other treatment programs, through non-litigation advocacy and outreach to correctional facilities on their behalf.

19. **Teaching:** What courses have you taught? For each course, state the title, the institution at which you taught the course, the years in which you taught the course, and describe briefly the subject matter of the course and the major topics taught. If you have a syllabus of each course, provide four (4) copies to the committee.

Between 2003 and 2019, I co-taught the Criminal Appellate Defender Clinic, as an adjunct assistant clinical professor at New York University School of Law, and in conjunction with the Office of the Appellate Defender (OAD). I taught during the following semesters:

Fall 2003

Spring 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011

Fall 2011

Spring 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019

Students in the clinic represented OAD clients appealing their convictions to the New York Supreme Court, Appellate Division, First Department. Under the supervision of an OAD supervising attorney, students read the trial record, researched issues, and prepared the opening appellate brief.

The clinic also consisted of weekly seminars covering three broad areas: (1) the lawyering and counseling skills necessary to represent indigent clients appealing their convictions; (2) substantive elements of criminal appellate advocacy, including standards of review, the preservation doctrine, harmless error analysis, and remedies; and (3) brief-writing skills, including analysis of a record, issue selection, and developing a theory of the case. The seminar sessions also dealt with oral advocacy, challenging a conviction by means of a post-verdict motion in trial court, and other types of advocacy appellate attorneys can engage in on behalf of their clients, such as parole advocacy, addressing prison-related problems, and social work assistance.

Copies of all syllabi supplied, except for Spring 2006, which I am unable to locate.

20. **Deferred Income/ Future Benefits**: List the sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients or customers. Describe the arrangements you have made to be compensated in the future for any financial or business interest.

None.

21. **Outside Commitments During Court Service**: Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

I have no such plans, commitments, or arrangements.

22. **Sources of Income**: List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, licensing fees, honoraria, and other items exceeding \$500 or more (if you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here).

My Financial Disclosure Report is being filed with the Administrative Office of U.S. Courts and I will supplement this Questionnaire with a copy of that Report.

23. **Statement of Net Worth**: Please complete the attached financial net worth statement in detail (add schedules as called for).

See attached Net Worth Statement.

24. **Potential Conflicts of Interest**:

- a. Identify the family members or other persons, parties, categories of litigation, and financial arrangements that are likely to present potential conflicts-of-interest when you first assume the position to which you have been nominated. Explain

how you would address any such conflict if it were to arise.

As a general matter, I would handle any matters involving actual or potential conflicts of interest in conformity with the Code of Conduct for United States Judges and any other relevant statutes, ethical canons, and rules.

I would recuse myself from any criminal case that I worked on while at the Federal Defenders of New York, as well as any case of a Federal Defender colleague of which I have personal knowledge. With respect to any other case involving a client of the Federal Defenders, I would look for guidance to the Code of Conduct for United States Judges and any other relevant statutes, ethical canons, and rules. I am not aware of any other persons, parties, categories of litigation, or financial interests that are likely to present any conflict-of-interest concerns.

- b. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

I will adhere to the Code of Conduct for United States Judges in identifying and handling all matters involving any actual or potential conflict of interest. Further, should I learn of a situation that any party or observer might conceivably identify as a potential conflict of interest, I would alert the parties to the issue in question and offer them the opportunity to express their views. As appropriate, I would also consult with my judicial colleagues on these issues.

25. **Pro Bono Work:** An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

The entirety of my legal practice has been dedicated to public service and representing the disadvantaged, first with the Office of the Appellate Defender, and then with the Federal Defenders of New York. I have represented only indigent clients throughout my career. In addition to legal representation, I have assisted my indigent clients with non-legal matters, including parole advocacy and non-litigation advocacy on their behalf with correctional facilities.

I also have tried to give back to the legal profession by fostering the development of other attorneys. As an adjunct clinical professor at New York University School of Law, I instructed numerous law students in appellate advocacy and representation of indigent clients. I have mentored law students both within the clinic and outside of the clinic, including offering career guidance.

Through my work as a supervising attorney at the Office of the Appellate Defender, I conducted numerous in-house training programs with new staff attorneys at the office.

This training included instruction on substantive legal topics as well as the practical skills necessary for effective appellate representation. I have mentored many staff attorneys over the years, both formally and informally, and served as a reference for many of these attorneys. As the director of recruitment at the Office of the Appellate Defender, I had the opportunity to interview and offer guidance to a large number of attorneys and law students seeking a career in public interest.

In addition, I have trained and supervised attorneys from private law firms in their pro bono representation of indigent clients on appeal, and I have volunteered my time to participate in various multi-day appellate training programs for public defenders from across the country.

**26. Selection Process:**

- a. Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and the interviews in which you participated). Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, please include that process in your description, as well as whether the commission recommended your nomination. List the dates of all interviews or communications you had with the White House staff or the Justice Department regarding this nomination. Do not include any contacts with Federal Bureau of Investigation personnel concerning your nomination.

On January 29, 2021, I spoke with a member of Senator Charles E. Schumer's Judicial Screening Committee regarding the application process. On February 10, 2021, I submitted a judicial questionnaire to the Screening Committee regarding a potential opening on the Second Circuit Court of Appeals. I spoke by telephone with a member of Senator Schumer's staff on March 1, 2021. On March 3, 2021, I submitted a Judicial Position Interest Questionnaire to Senator Kirsten Gillibrand. On March 9, 2021, I spoke by telephone with a member of Senator Schumer's Screening Committee. On March 13, 2021, I interviewed with Senator Schumer. On March 19, 2021, I spoke by telephone with a member of Senator Gillibrand's staff. On March 22, 2021, I interviewed with attorneys from the White House Counsel's Office. Since that date, I have been in contact with officials from the Office of Legal Policy at the Department of Justice. On May 11, 2021, I interviewed with President Biden and White House Counsel Dana Remus. On May 12, 2021, my nomination was submitted to the Senate.

- b. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any currently pending or specific case, legal issue or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question? If so, explain fully.

No.