NEW YORK COURT OF APPEALS

WHEN THE CHIEF WRITES: AN EXAMINATION OF CHIEF JUDGE JANET DIFIORE'S OPINIONS

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When Janet DiFiore took the Oath of Office at her formal investiture ceremony as Chief Judge of the New York Court of Appeals, she was wearing a particular robe.[1]

The date was February 8, 2016; the robe belonged to a former chief judge who had died only a month and a day earlier.[2]

Judge Judith S. Kaye, the first woman to serve as Chief Judge of the New York Court of Appeals, was remembered for her efforts toward unanimity on the Court, seeking mainstream consensus.[3] In contrast, the second woman to serve as Chief Judge had every part of a legacy left to shape, since she was only at the beginning of her time on the Court. Of her only female predecessor, DiFiore said: "Thanks to her single-minded determination and passion for justice, she was remarkably successful in pursuit of these worthy goals. She leaves behind a legacy of judicial leadership, reform, and public service that will inspire successors for generations to come."[4]

At the time of her nomination, Judge DiFiore's court was largely composed of new appointments.[5] Naturally, therefore, the two years

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[1] Janet DiFiore, *A Tribute to Chief Judge Judith S. Kaye*, 81 BROOK. L. REV. 1379, 1381 (2016).

[2] *Id.*; Sam Roberts, *Judith S. Kaye, First Woman to Serve as New York's Chief Judge, Dies at 77*, N.Y. TIMES (Jan. 7, 2016), https://www.nytimes.com/2016/01/08/nyregion/judith-s-kaye-first-woman-to-serve-as-new-yorks-chief-judge-dies-at-77.html.

[3] *See, e.g.*, Roberts, *supra* note 2.

[4] DiFiore, *supra* note 1, at 1381.

[5] *See* Jesse McKinley & James C. McKinley, Jr., *Janet DiFiore, Westchester Prosecutor, Is Nominated as New York's Chief Judge*, N.Y. TIMES (Dec. 1, 2015), https:// www.nytimes.com/ 2015/12/02/nyregion/westchester-district-attorney-nominated-for-chief-judge.html (noting that Governor Andrew Cuomo, at the time of Judge DiFiore's appointment, had selected four of the sitting judges and was shaping the bench to have a liberal majority). Since Chief Judge DiFiore's appointment, Governor Cuomo has seated two more judges: Rowan Wilson and Paul Feinman. *See* Patrick McGeehan, *Cuomo Nominates Rowan Wilson to New York's Highest*

of her tenure on the Court have provided the first cases with which to craft analysis of the perspectives of this fresh-faced court and of her jurisprudential leadership in particular.

Following a brief introduction regarding her rise to the role of Chief Judge, this article will examine Chief Judge DiFiore as a writer, with an especial focus on her criminal opinions. Between 2016 and 2017, the Chief Judge penned thirty-three opinions—thirty-one of which were for the majority.[6]

I. BEFORE THE COURT

DiFiore brought both judicial and prosecutorial experience to the Court. After graduating from St. John's University School of Law, she was an assistant district attorney in Westchester County, heading their narcotics bureau for a time.[7] Beginning in 1998, she served as a county court judge and later a State Supreme Court justice; she was also the chairwoman of Albany's primary ethics panel, the Joint Commission on Public Ethics.[8]

Arguably her most notable role was her stint as District Attorney for Westchester County.[9] She was elected in 2005 and has been praised for using her authority to crack down on wrongful convictions.[10] Perhaps the greatest example of this was her decision to cooperate with the Innocence Project in reinvestigating the conviction of Jeffrey Mark Deskovic, who served sixteen years in prison for a rape and murder he did not commit.[11] Deskovic himself,

Court, N.Y. TIMES (Jan. 16, 2017), https://www.nytimes.com/ 2017/01/16/ nyregion/cuomo-rowan-wilson-court-of-appeals.html; James C. McKinley, Jr., *First Openly Gay Judge Confirmed for New York's Highest Court*, N.Y. TIMES (June 21, 2017), https:// www.nytimes.com/2017/06/21/nyregion/paul-feinman-court-of-appeals-gay-judge.html.

[6] *See infra* notes 16–18 and accompanying text.

[7] McKinley & McKinley, *supra* note 5.

[8] *Id.*; *see* Vincent M. Bonventre, *Janet DiFiore, New York Chief Judge Nominee*, N.Y. CT. WATCHER (Jan. 18, 2016), http://www.newyorkcourtwatcher.com/2016/01/janet-difiore-new-york-chief-judge.html.

[9] *See* Vivian Yee, *After Delay, Janet DiFiore Is Confirmed as New York's Chief Judge*, N.Y. TIMES (Jan. 21, 2016), https://www.nytimes.com/2016/01/22/nyregion/after-delay-janet-difiore-is-confirmed-as-new-yorks-chief-judge.html.

[10] *See* McKinley & McKinley, *supra* note 5.

[11] *See id.*; Joshua A. Tepfer et al., *Convenient Scapegoats: Juvenile Confessions and Exculpatory DNA in Cook County, Illinois*, 18 CARDOZO J.L. & GENDER 631, 683 (2012) (discussing DiFiore's investigation as one example of law enforcement response to miscarriages of justice). In addition to revisiting the case, DiFiore "later commissioned a report that detailed the errors [leading to Deskovic's] conviction and recommended changes, including videotaping interrogations." McKinley & McKinley, *supra* note 5. Professor Vincent Bonventre of Albany Law School characterized these actions as being part and parcel of her reputation as "a champion for the reduction and prevention of wrongful convictions." *Id.*

however, did not support her nomination for chief judgeship; he believed that despite her efforts in his own case, she had failed to accomplish meaningful reforms overall.[12]

Intriguingly, DiFiore's political alignment is somewhat bipartisan: she was a Republican for much of her life, becoming a member of the Democrat party in the mid-2000s.[13] When Governor Andrew Cuomo, who had previously appointed her to gubernatorial commissions, nominated her for the position of Chief Judge, he spoke glowingly of DiFiore's character.[14] The Governor said that "[h]er commitment to the highest ethical standards makes her one of New York's finest public servants."[15]

II. THE FIRST TWO YEARS: A REPORT

Through 2016 and 2017, Judge DiFiore authored thirty-three opinions, seventeen of which were in criminal cases,[16] and sixteen of which were in civil cases.[17] Only two of the thirty-three saw DiFiore breaking from the majority, with one concurring opinion and one

[12] *See* Jon Campbell, *In Letter, Jeffrey Deskovic Opposes DiFiore's Nomination*, LOHUD (Jan. 21, 2016), http://www.lohud.com/story/news/politics/politics-on-the-hudson/2016/01/21/letter-jeffrey-deskovic-opposes-difiores-nomination/79110456/.

[13] *See* McKinley & McKinley, *supra* note 5.

[14] *See* Yee, *supra* note 9.

[15] *Id.*

[16] *See* People v. Austin, 86 N.E.3d 542, 543 (N.Y. 2017); People v. Bushey, 75 N.E.3d 1165, 1166 (N.Y. 2017); People v. Flanagan, 71 N.E.3d 541, 543 (N.Y. 2017); People v. Flores, 88 N.E.3d 361, 362 (N.Y. 2017); People v. Spencer, 78 N.E.3d 1178, 1179 (N.Y. 2017); People v. Valentin, 75 N.E.3d 1153, 1155 (N.Y. 2017); People v. Williams, 74 N.E.3d 649, 650 (N.Y. 2017); People v. Chery, 65 N.E.3d 684, 685 (N.Y. 2016); People v. Clarke, 63 N.E.3d 1144, 1145 (N.Y. 2016); People v. Davis, 66 N.E.3d 1076, 1078 (N.Y. 2016); People v. Henderson, 64 N.E.3d 284, 284 (N.Y. 2016); People v. Howard, 52 N.E.3d 1158, 1159 (N.Y. 2016); People v. John, 52 N.E.3d 1114, 1115 (N.Y. 2016); People v. Sincerbeaux, 57 N.E.3d 1076, 1077 (N.Y. 2016); People v. Smith, 57 N.E.3d 48, 49 (N.Y. 2016); People v. Smith, 66 N.E.3d 641, 655 (N.Y. 2016) (DiFiore, C.J., concurring); People v. Wright, 54 N.E.3d 1157, 1158 (N.Y. 2016).

[17] *See In re* Avella v. City of N.Y., 80 N.E.3d 982, 991 (N.Y. 2017) (DiFiore, C.J., dissenting); B.F. v. Reprod. Med. Ass'n. of N.Y., LLP, Nos. 126, 127, 2017 N.Y. LEXIS 3724, at *1–2 (Dec. 14, 2017); D&R Global Selections, S.L. v. Bodega Olegario Falcon Pineiro, 78 N.E.3d 1172, 1174 (N.Y. 2017); Gevorkyan v. Judelson, 80 N.E.3d 999, 1000 (N.Y. 2017); Griffin v. Sirva, Inc., 76 N.E.3d 1063, 1064 (N.Y. 2017); Kimmel v. State of New York, 80 N.E.3d 370, 372 (N.Y. 2017); Marin v. Const. Realty, LLC, 71 N.E.3d 530, 531 (N.Y. 2017); *In re* Mestecky v. City of N.Y., 88 N.E.3d 365, 366 (N.Y. 2017); O'Brien v. Port Auth. of N.Y. & N.J., 74 N.E.3d 307, 308 (N.Y. 2017); Tara N.P. v. W. Suffolk Bd. of Coop. Educ. Servs., 71 N.E.3d 950, 952 (N.Y. 2017); *In re* Highbridge Broadway, LLC v. Assessor of the City of Schenectady, 54 N.E.3d 50, 51 (N.Y. 2016); Justinian Capital SPC v. WestLB AG, N.Y. Branch, 65 N.E.3d 1253, 1254 (N.Y. 2016); *In re* Kent v. Lefkowitz, 54 N.E.3d 1149, 1150 (N.Y. 2016); *In re* Newcomb v. Middle Country Cent. Sch. Dist., 68 N.E.3d 714, 716 (N.Y. 2016); Plotch v. Citibank, N.A., 54 N.E.3d 66, 67 (N.Y. 2016); *In re* Springer v. Bd. of Educ. of the City Sch. Dist. of the City of N.Y., 49 N.E.3d 1189, 1190 (N.Y. 2016).

dissent.[18]

Before reporting on the substance of any of these decisions, it is important to note the random method by which cases are assigned to the Court of Appeals' judges. Decades ago, former New York Governor Mario Cuomo described the process as a "quaint but efficient one," in which the judges "draw[]" cases in a random numerical order: this order then passes cases to judges according to seniority.[19] Since the random nature of this process remains largely in place today,[20] not even New York's Chief Judge has a free choice of what cases she will or will not author. However, a cross-section of opinions can still provide insight into a judge's priorities and overall jurisprudence.

A. Majority Opinions

1. Criminal

In twelve out of the sixteen criminal opinions which Chief Judge DiFiore wrote for the Court, she voted against the defendant.[21] In ten of those twelve cases, she led the Court in affirming Appellate Division findings that there had been no violation of a defendant's rights, or that there had been no abuse of discretion at the trial court level.[22]

The remaining cases were slightly more complicated. For example, in *People v. Davis*, a 2016 case involving murder convictions stemming from a home invasion, the Court modified the order of the Appellate Division, Fourth Department, reinstating the murder convictions that had accompanied convictions for robbery and burglary.[23] The Fourth Department had partially reversed a jury

[18] *See In re Avella*, 80 N.E.3d at 991 (DiFiore, C.J., dissenting); *Smith*, 66 N.E. 3d at 655 (DiFiore, C.J., concurring).

[19] Mario M. Cuomo, *The New York Court of Appeals: A Practical Perspective*, 34 ST. JOHN'S L. REV. 197, 207 (1960).

[20] *See* Symposium, *The New York Court of Appeals: The Untold Secrets of Eagle Street*, 76 ALB. L. REV. 1897, 1923–24 (2013).

[21] *See Bushey*, 75 N.E.3d at 1169; *Flanagan*, 71 N.E.3d at 555 (citation omitted); *Flores*, 88 N.E.3d at 365; *Valentin*, 75 N.E.3d at 1159; *Williams*, 74 N.E.3d at 652–53 (citations omitted); *Chery*, 65 N.E.3d at 688 (citation omitted); *Davis*, 66 N.E.3d at 1082; *Henderson*, 64 N.E.3d at 285–86 (citation omitted); *Howard*, 52 N.E.3d at 1166; *Sincerbeaux*, 57 N.E.3d at 1081; *Smith*, 57 N.E.3d at 52–53 (citation omitted); *Wright*, 54 N.E.3d at 1162.

[22] *See Bushey*, 75 N.E.3d at 1169; *Flanagan*, 71 N.E.3d at 555; *Valentin*, 75 N.E.3d at 1159; *Williams*, 74 N.E.3d at 653; *Chery*, 65 N.E.3d at 688; *Clarke*, 63 N.E.3d at 1148; *Henderson*, 64 N.E.3d at 286; *Howard*, 52 N.E.3d at 1166; *Sincerbeaux*, 57 N.E.3d at 1081; *Wright*, 54 N.E.3d at 1162.

[23] *Davis*, 66 N.E.3d at 1078.

conviction on the grounds "that the People failed to prove beyond a reasonable doubt that it was reasonably foreseeable that defendant's actions, i.e., unlawfully entering the victim's apartment and assaulting him, would cause the victim's death."[24] Writing for the Court, DiFiore disagreed, finding that the victim's underlying heart condition, combined with the violent nature of the defendant's actions in commission of the robbery and burglary (specifically, breaking the victim's jaw, and leaving the victim lying in a blood-spattered room) served as sufficient evidence of the foreseeability of the victim's death.[25]

The Court combined *People v. Smith* and *People v. Ramsey* in a single opinion.[26] Although the Court affirmed in *Ramsey* and reversed in *Smith*, both holdings were against defendants, since the Court concluded in both cases that the defendants had failed to meet the procedural requirements for taking an appeal.[27] Similarly, in *People v. Flores*, the Court denied jurisdiction to the Appellate Division because of a procedural failure on defendant's part, even though, in that case, the Court expressly dictated that the (county) court retained discretion to grant an extension that would allow the defendant to correct her error in filing an appeal.[28]

Regarding the four cases in which she (and the Court) ruled for the defendant, all but one involved what DiFiore described as the violation of defendants' Sixth Amendment rights[29] (under the federal constitution)—specifically, the right to confrontation of adverse witnesses[30] and the right to a fair trial.[31] Interestingly, all three of

[24] People v. Davis, 6 N.Y.S.3d 365, 367 (App. Div. 2015).

[25] *Davis*, 66 N.E.3d at 1081 (citations omitted).

[26] *See Smith*, 57 N.E.3d at 49–50.

[27] *Id.* at 49, 53 ("[A]n affidavit of errors is a jurisdictional prerequisite for the taking of an appeal from a local criminal court where there is no court stenographer.").

[28] People v. Flores, 88 N.E.3d 361, 362, 365 (N.Y. 2017) ("County Court granted defendant an extension of time to obtain the transcripts, but did not address defendant's alternative motion to file a late affidavit of errors. Given the unusual circumstances presented here, we remit to County Court to permit that court's exercise of discretion in connection with defendant's motion to file a late affidavit of errors.").

[29] U.S. CONST. amend. VI.

[30] *See* People v. Austin, 86 N.E.3d 542, 543 (N.Y. 2017) ("We conclude that the introduction of this hearsay evidence through surrogate testimony in order to prove an essential fact for a finding of guilt — that defendant was the perpetrator of the burglaries at issue — violated defendant's right to confront the witnesses against him."); People v. John, 52 N.E.3d 1114, 1115 (N.Y. 2016) ("[We conclude that defendant's Sixth Amendment rights to confrontation were violated] when the People introduced DNA reports into evidence, asserting that defendant's DNA profile was found on the gun that was the subject of the charged possessory weapon offense, without producing a single witness who conducted, witnessed or supervised the laboratory's generation of the DNA profile from the gun or defendant's exemplar.").

[31] *See* People v. Spencer, 78 N.E.3d 1178, 1179 (N.Y. 2017) (citation omitted).

these cases predicate trial rights on the basis of federal, rather than state-centric, protections and case law.[32]

The sole outlier, *People v. Clarke*, addressed the issue of a speedy trial but predicated the issue—whether the government was responsible for a delay in DNA testing—on state precedents.[33] DiFiore and the rest of the Court held that the Appellate Division had rightly charged the government with failure to exercise due diligence.[34]

i. Patterns of Judgment

The body of these cases, regardless of outcome, have reflected Chief Judge DiFiore's combined experience and expertise as both a prosecutor and a trial judge. Her writing demonstrates respect for judicial discretion and close attention to legal *loopholes*—the majority of which were exploited, at least in this collection of cases, by the State.

For example, the 2016 case *People v. Chery* involved the narrow exception that allows conspicuous omissions of exculpatory facts to be used for impeachment (whereas, generally, a defendant's pretrial silence may not be admitted).[35] DiFiore wrote for the Court in affirming the conviction, stating: "[The] defendant elected to provide some explanation of what happened at the scene, and it was unnatural to have omitted the significantly more favorable version of events to which he testified at trial—[specifically,] that complainant had assaulted him."[36]

In a 2017 case, *People v. Bushey*, DiFiore's analysis tracked two of her telltale trends in criminal cases: emphasizing a carve-out that avoided any breach of the defendant's rights, and relying on the tenets of federal constitutional law to do so.[37] In her opinion for the Court, DiFiore determined that running a license plate through a police database for "any outstanding violations or suspensions on the registration of the vehicle" did not constitute a search under the Fourth Amendment of the U.S. Constitution.[38] As in her analyses

[32] *See, e.g.*, *id.*

[33] *See* People v. Clarke, 63 N.E.3d 1144, 1145, 1146 (N.Y. 2016) (citations omitted).

[34] *Id.* at 1145, 1148.

[35] People v. Chery, 65 N.E.3d 684, 687 (N.Y. 2016) (quoting People v. Williams, 31 N.E.3d 103, 106 (N.Y. 2015)).

[36] *Chery*, 65 N.E.3d at 687.

[37] People v. Bushey, 75 N.E.3d 1165, 1168 (N.Y. 2017).

[38] *Id.* at 1166; U.S. CONST. amend. IV.

addressing trial rights,[39] she turned to U.S. Supreme Court jurisprudence: here, the *Katz*[40] doctrine that determines whether government action intrudes of an individual's legitimate expectation of privacy.[41] License plates, to DiFiore's view, fell outside this protective parameter:

> Because the purpose of a license plate is to readily facilitate the identification of the registered owner of the vehicle for the administration of public safety, a person has no reasonable expectation of privacy in the information acquired by the State for this purpose and contained in a law enforcement or DMV database.[42]

Both of these examples are consistent with DiFiore's record of opinions in favor of upholding, rather than overturning, convictions—except, as noted, in a posse of cases involving Sixth Amendment rights.

2. Civil

Between 2016 and 2017, Chief Judge DiFiore authored sixteen civil opinions, fifteen of which were for the majority.[43] Substantively, DiFiore's civil opinions do not lend themselves to such ready categorization as her criminal opinions. They cover wide-ranging areas of law—from issues of establishing personal jurisdiction over a

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[39] *See, e.g.*, People v. Austin, 86 N.E.3d 542, 543 (N.Y. 2017); People v. Spencer, 78 N.E.3d 1178, 1179 (N.Y. 2017) (citation omitted); People v. John, 52 N.E.3d 1114, 1115 (N.Y. 2016).

[40] Katz v. United States, 389 U.S. 347 (1967), *superseded by statute*, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510–22 (2012).

[41] *Bushey*, 75 N.E.3d at 1167 (quoting People v. Weaver, 909 N.E.2d 1195, 1198 (N.Y. 2009); citing *Katz*, 389 U.S. at 361 (Harlan J., concurring)) ("We start with the premise that '[s]ince *Katz*, the existence of a privacy interest within the Fourth Amendment's protective ambit has been understood to depend upon whether the individual asserting the interest has demonstrated a subjective expectation of privacy and whether that expectation would be accepted as reasonable by society.'").

[42] *Bushey*, 75 N.E.3d at 1168.

[43] *See* B.F. v. Reprod. Med. Ass'n. of N.Y., LLP, Nos. 126, 127, 2017 N.Y. LEXIS 3724, at *1 (N.Y. Dec. 14, 2017); D&R Global Selections, S.L. v. Bodega Olegario Falcon Pineiro, 78 N.E.3d 1172, 1174 (N.Y. 2017); Gevorkyan v. Judelson, 80 N.E.3d 999, 1000 (N.Y. 2017); Griffin v. Sirva, Inc., 76 N.E.3d 1063, 1064 (N.Y. 2017); Kimmel v. State of N.Y., 80 N.E.3d 370, 372 (N.Y. 2017); Marin v. Const. Realty, LLC, 71 N.E.3d 530, 531 (N.Y. 2017); *In re* Mestecky v. City of N.Y., 88 N.E.3d 365, 366 (N.Y. 2017); O'Brien v. Port Auth. of N.Y. & N.J., 74 N.E.3d 307, 308 (N.Y. 2017); Tara N.P. v. W. Suffolk Bd. of Coop. Educ. Servs., 71 N.E.3d 950, 952 (N.Y. 2017); *In re* Highbridge Broadway, LLC v. Assessor of the City of Schenectady, 54 N.E.3d 50, 51 (N.Y. 2016); Justinian Capital SPC v. WestLB AG, N.Y. Branch, 65 N.E.3d 1253, 1254 (N.Y. 2016); *In re* Kent v. Lefkowitz, 54 N.E.3d 1149, 1150 (N.Y. 2016); *In re* Newcomb v. Middle Country Cent. Sch. Dist., 68 N.E.3d 714, 716 (N.Y. 2016); Plotch v. Citibank, N.A., 54 N.E.3d 66, 67 (N.Y. 2016); *In re* Springer v. Bd. of Educ. of the City Sch. Dist. of the City of N.Y., 49 N.E.3d 1189, 1190 (N.Y. 2016).

corporate defendant,[44] to a slip-and-fall tort claim against the State,[45] to a claim dismissed on the basis of the near-ancient doctrine of champerty.[46]

Because of this dearth of easily classifiable cases, perhaps the best focus for a report on a selection of these cases is a study of how the Chief Judge represents the Court's authority as a whole. In criminal cases, as previously established, she tends to rely on federal rather than state law. Here, it will be shown that her approach differs with regard to the civil arena. The dichotomy between criminal and civil matters in this regard is particularly represented in the cases where the Court answers questions that have been certified for review, generally by other courts. Three of DiFiore's civil opinions between 2016 and 2017 addressed certified questions[47]—two of which came from the United States Court of Appeals for the Second Circuit.[48]

Relying ultimately on state law, the Court does not only answer the questions themselves; it is empowered to reformulate them to match the needed legal framework. An example of both these aspects is present in *Griffin v. Sirva, Inc.*, where Chief Judge DiFiore led the Court in answering one question directly and reformulating the other two.[49] *Griffin* involved two sections of New York's Human Rights Law concerning the rights of persons terminated from employment because of prior criminal convictions.[50] In an opinion joined by five out of six other justices, Chief Judge DiFiore answered the first question affirmatively, determining that liability for violations of this section of law was limited to *employers*.[51] However, she narrowed the focus of the second question, which had previously appeared to open the door in defining the role to which liability might attach, stating: "[w]e therefore reformulate this question . . . '[i]f Section 296 (15) is limited [to an *employer*,] how should courts determine whether an entity is the aggrieved party's "employer" for the purposes of a

[44] *D&R Global Selections, S.L.*, 78 N.E.3d at 1174.

[45] *O'Brien*, 74 N.E.3d at 308.

[46] *Justinian Capital SPC*, 65 N.E.3d at 1254. The doctrine of champerty prohibits financial capitalization and commercialization of lawsuits. *Id.* (citation omitted).

[47] *See B.F.*, 2017 N.Y. LEXIS 3724, at *1; *Gevorkyan*, 80 N.E.3d at 1000; *Griffin*, 76 N.E.3d at 1064.

[48] *See B.F.*, 2017 N.Y. LEXIS 3724, at *1 (citation omitted); *Gevorkyan*, 80 N.E.3d at 1000. The remaining question was a response to multiple appeals mirroring the push for a new cause of action, as in *Becker v. Schwartz*. *See B.F.*, 2017 N.Y. LEXIS 3724, at *1–2 (citing Becker v. Schwartz, 386 N.E.2d 807, 811 (N.Y. 1978)).

[49] *Griffin*, 76 N.E.3d at 1070.

[50] *Id.* at 1064 ("Two questions concern *section 296 (15),* which prohibits discrimination against individuals with prior criminal convictions. A third question concerns *section 296 (6)*, which prohibits aiding and abetting discriminatory conduct.").

[51] *Id.* at 1063, 1065 (citation omitted).

claim under Section 296 (15)?'"[52] Similarly, she freely characterized the last question as not being directed at specific facts of the case, but at a "clarification" of the scope of liability, and reformulated it accordingly.[53] This science of reinterpretation is indicative not only of how the Court of Appeals—and its Chief—have the power to shape New York law, but also of the fact that they need *not* answer to a higher power when it comes to the confines of state matters.

B. Concurrence & Dissent

The only time that DiFiore deviated from the majority opinion in a criminal case was to write a concurrence was in 2016, in the combined cases of *People v. Smith* and *People v. Fagan*.[54] Judge Eugene Pigott delivered the opinion of the Court.[55] The case addressed a tangle of confusion surrounding post-release supervision ("PRS") as part of a defendant's sentence.[56] Initially, courts had glossed over whether defendants must be informed of this component; the Court settled the matter in *People v. Catu*,[57] requiring that defendants be made aware of this "direct consequence of a criminal conviction" so that they can "knowingly, voluntarily and intelligently choose among alternative course of action[.]"[58] In *Smith* and *Fagan*, the Court concluded that, although defendants were not informed of the PRS consequences of their convictions in accordance with *Catu*, their convictions were properly obtained because *Catu* did not apply retroactively to sentences enacted prior to its ruling.[59]

Chief Judge DiFiore concurred in the result, writing in a separate opinion to emphasize why, to her view, defendants had foreclosed their ability to contest the constitutionality of their PRS sentences.[60] With regard to defendant Smith, she concluded that, though he had

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[52] *Id.* at 1068 (emphasis added) (quoting Griffin v. Sirva Inc., 835 F.3d 283, 285 (2d Cir. 2016)).

[53] *Griffin*, 76 N.E.3d at 1069.

[54] People v. Smith, 66 N.E.3d 641, 655 (N.Y. 2016) (DiFiore, C.J., concurring).

[55] *Id.* at 643.

[56] *Id.*

[57] *See* People v. Catu, 825 N.E.2d 1081, 1082 (N.Y. 2005).

[58] *Id.* at 1082.

[59] *Smith*, 66 N.E.3d at 644.

[60] *Id.* at 658 (DiFiore, C.J., concurring) ("Here, the constitutional infirmity that both defendants argue rendered their respective original convictions 'unconstitutionally obtained' within the meaning of CPL 400.15 (7) (b) is the failure of the trial courts to impose PRS as part of their original judgment or otherwise advise defendants in their original proceeding that the sentence included a mandatory period of PRS. Defendants' essential argument is that this is a *Catu* error that infected their guilty pleas and requires disqualification of those convictions as predicate convictions.").

not initially been sentenced to PRS, a term of PRS was administratively imposed following his release—and that he bargained for the minimum PRS term, thus vitiating any later argument he could have as to its invalidity.[61] "[H]aving chosen not to seek the remedy of vacatur of the guilty plea and the opportunity to be restored to a preplea status," DiFiore stated, "[he] cannot now claim his original conviction was unconstitutionally obtained."[62] She conducted her analysis of defendant Fagan's circumstances in much the same way.[63]

DiFiore's sole written dissent came in a civil case, *In re Avella v. City of New York*, where the majority (led by Judge Rowan Wilson) ruled to enjoin development of a designated park area in Queens, N.Y.[64] DiFiore dissented because she believed that the development of the park had been expressly authorized by the State Legislature, thus removing the protections of the public trust doctrine.[65] In reaching this conclusion, DiFiore urged a restrained, textualist approach to decision-making: "To resolve this issue, we rely first and foremost on the plain language of the statute and canons of statutory interpretation."[66]

III. CONCLUSION

The first two years of DiFiore's tenure as Chief Judge have painted a complex picture of her approach to judicial, analytical leadership. With regard to criminal cases, her experience as prosecutor and trial judge comes to the fore—sometimes to the detriment of defendants, as in *Smith* and *Fagan*, where her insistence on binding them to previous "bargains," despite the possibility of a power (and information) imbalance that may well have driven these defendants to an undesirable agreement.[67] However, this degree of prior experience also displays itself powerfully in her canny, direct analysis, often threading out narrow yet crucial distinctions.

On the civil side, she relies more heavily (and, arguably, more appropriately) on state law and state power, while still revealing

[61] *Id.* at 659.

[62] *Id.*

[63] *Id.* at 660 ("[D]efendant received the precise sentence for which he bargained, undermining any argument that his guilty plea was not knowingly, voluntarily and intelligently entered. Therefore, nothing barred the use of the 2000 conviction as a predicate felony conviction in connection with defendant's sentence for his 2010 conviction.").

[64] *See In re* Avella v. City of N.Y., 80 N.E.3d 982, 983 (N.Y. 2017).

[65] *Id.* at 991–92 (DiFiore, C.J., dissenting) (citations omitted).

[66] *Id.* at 992.

[67] *See Smith*, 66 N.E.3d at 655, 659, 660 (DiFiore, C.J., concurring).

attention to detail and sometimes austere adherence to the letter of the law.

Two years is still too soon to track the shaping of a legacy, but given her distinct and varied experience prior to achieving this highest honor and duty, Chief Judge DiFiore has already shown her mettle on both sides of the bench.