

MEMORANDUM

To: The Senate Judiciary Committee:
John J. Bonacic, Chairman [District 42 - R, C, IP]
George A. Amedore, Jr. [District 46 - R, C, IP]
Tony Avilla [District 11 - D]
Phil Boyle [District 4 - R]
Neil D. Breslin [District 44 - D, IP, WF]
Leroy Comrie [District 14 - D]
Thomas D. Crocie [District 3 - R]
Ruben Diaz [District 32 - D]
Martin Malavé Dilan [District 18 - D]
Adriano Espaillat [District 31 - D, WF]
Kemp Hannon [District 6 - R, C, IP]
Ruth Hassell-Thompson [District 36 - D, WF]
Brad Holyman [District 27 - D, WF]
Andrew Lanza [District 24 - R]
Kenneth P. LaValle [District 1 - R]
Michael F. Nozzolio [District 54 - R, C, IP]
Thomas F. O'Mara [District 58 - R, C, IP]
Bill Perkins [District 30 - D, WF]
Michael H. Ranzanhofer [District 61 - R, C, IP]
Diane Savino [District 23 - D, WF, IP]
Sue Serino [District 41 - R, C, IP]
Toby Ann Savisky [District 16 - D]
Michael Venditto [District 8 - R, C, IP]

From: Samuel A. Abady, J.D., on Behalf of Jeffrey Mark Deskovic - Exoneree, Criminal Justice Reform Advocate and Director of the Jeffrey M. Deskovic Foundation for Justice, Inc.

Date: January 19, 2016

Re: Conformation Hearing for Janet DiFiore, Esq., Gov. Cuomo's Nominee for Chief Judge of the Court of Appeals

Jeffrey Mark Deskovic submits this Memorandum to members of the Senate Judiciary Committee and requests they question Ms. DiFiore about the matters identified herein in her forthcoming confirmation hearing scheduled for Wednesday, January 20th at 1:00 P.M.

Introduction

In the Timeline of major events in Janet DiFiore's professional life, the *Journal News* lists the following:

2006: Ordered the retesting of DNA evidence from the 1989 rape and murder of 15-year-old Angela Correa. The results led to the exoneration of Correa's classmate, Jeffrey Deskovic, who had served nearly 16 years in prison, and the conviction of Correa's killer, Stephen Cunningham.¹

Likewise, Albany Law School professor, Vincent Bonventre, declared Ms. DiFiore to be a "champion for the reduction and prevention of wrongful convictions," citing her actions in the Deskovic case, and the report she commissioned to identify factors that led to Mr. Deskovic's wrongful conviction and imprisonment.^{2, 3}

The University of Michigan Law School maintains The National Registry of Exonerations.⁴ To date, the total number of actually innocent defendants who have been

¹ <http://www.lohud.com/story/news/local/new-york/2015/12/01/cuomo-taps-difiore-chief-judge/76609496/>.

² http://www.nytimes.com/2015/12/02/nyregion/westchester-district-attorney-nominated-for-chief-judge.html?_r=0. Ms. DiFiore's predecessor and current Fox News television personality, Jeannine Pirro, vigorously opposed DNA testing of crime scene evidence.

³ <http://www.westchesterda.net/news-and-information/deskovic-report> (hereinafter as "Deskovic Report"). The authors stated "a broader understanding of his tragedy will help those who work in the criminal justice system take the steps necessary to protect others from his fate." The Innocence Project's comments about the report are found here: <http://www.innocenceproject.org/news-events-exonerations/press-releases/westchester-das-report-on-jeffrey-deskovics-wrongful-conviction>.

⁴ Most laymen assume wrongful convictions are aberrant, unpredictable, tragic events. To the contrary, legal scholars have demonstrated they arise from systemic defects in the criminal justice process, and sometimes, several of these defects are found in the same case. Major defects include:

- Prosecutorial Misconduct;
- Failure to Preserve Biological Evidence (such evidence is available only in 10-12% of all serious felony cases, and DNA is available in only about one fifth of all wrongful conviction cases due to lax or non-existent biological evidence preservation statutes);
- Police Interrogation Techniques ("Legal academics as well as many who have scrutinized the causes of wrongful convictions have long advocated the videotaping of police interrogations" *Deskovic Report* at 12);

(continued...)

exonerated is 1,662. Three of them were wrongfully convicted in Westchester County on Ms. DiFiore's watch, or while she was a member of the Westchester D.A.'s office:

- Jeffrey M. Deskovic
- Kian Khatibi
- Selwyn Days

A fourth case, that of NYPD officer Richard DiGuglielmo, led one County Court judge to issue a blistering 50-page opinion cataloguing egregious, pervasive and aggressive misconduct by Ms. DiFiore's prosecutors.

These matters are described below. The Committee should inquire about them.

Kian Khatibi

On January 11, 1998, Kayvan Khatibi and his friend, Eric Freud, got into an argument with Brian Duffy and William Boyar outside the Lock, Stock and Barrel, a college bar in the Village of Pleasantville. The altercation lasted some time. Kian walked by and avoided the group, and went to the Pleasantville police station. While Kian was at the police station, Kayvan stabbed Duffy and Boyar and with a small paring knife. Both victims were so drunk they "were not aware that they had been stabbed."⁵ Kayvan then fled the scene and threw his knife on the roof of the Mediterraneo Restaurant.

Kian Khatibi is sixteen months younger than his older brother, Kayvan, and much shorter. Kian was not involved in the fight or stabbing incident in any way.

His brother, the real perpetrator, later testified in Kian's successful Court of Claims wrongful imprisonment action that Pleasantville Detectives Stephen Bonura and Robert Mazzei came to his house looking to arrest Kian, but Kayvan told them that he, not Kian, stabbed Duffy and Boyar in self-defense. In response, the detectives threatened Kayvan should he give that

⁴(...continued)

- False Confessions, as happened in Mr. Deskovic's case (Police often contaminate confessions by feeding suspects non-public information about the crime. A 2010 groundbreaking study revealed "the problem of [police] contamination is epidemic, not episodic." Steven A. Drizin, *The Three Errors: Pathways to False Confessions and Wrongful Convictions*, <http://www.aidwyc.org/wp-content/uploads/2014/01/Professor-Steven-Drizin-The-Three-Errors-Pathways-to-False-Confessions-and-Wrongful-Convictions.pdf>
- Use of Incentivized or So-called "Snitch" Testimony; and
- Victim/Witness Misidentification.

⁵ *Khatibi v. State of New York*, 35 Misc.3d 1211(A), 951 N.Y.S.2d 86, 2012 N.Y. Slip Op. 50654(U) (Ct. of Claims, 2012).

exculpatory testimony at Kian's trial. Kayvan also testified Det. Mazzei stopped him on the street the night before he was scheduled to testify at Kian's trial, ordered him into an unmarked police car, drove around the block, and "reminded Kayvan of the threats that Mazzei and Bonura had made to Kayvan about confessing to the stabbing."⁶

On May 19, 1999, Kian was convicted of his brother's crimes,⁷ and despite having no prior criminal record, and having turned down a plea deal for 1-3 years because he was actually innocent, he was sentenced to 7-14 years in prison.

Kian pursued direct appeals and sought habeas corpus relief in federal court, but to no avail.⁸ He filed some 30-40 FOIL requests to unearth police reports and other evidence not produced at trial, again to no avail.⁹ Notably, he "refused to admit to the crimes" at a 2006 parole hearing seven years after his conviction, "despite his awareness that this would jeopardize his chances for parole because it would be considered a failure to show remorse."¹⁰

In May of 2003, he made a post trial motion under CPL § 440.10 to vacate his conviction because his trial counsel was ineffective by failing to obtain the Pleasantville police videotape which established his alibi. The matter was heard by Ms. DiFiore sitting as a Supreme Court judge in Westchester.

She found the fact that Kian "was in the local police station was not disputed," but refused to vacate his conviction on procedural grounds because "there is no allegation ... a demand was made for this information," even though it "would have established an alibi," and

⁶ *Khatibi v. State of New York*, 35 Misc.3d 1211(A), 951 N.Y.S.2d 86, 2012 N.Y. Slip Op. 50654(U) (Ct. of Claims, 2012). Not surprisingly, the detectives disputed Kayvan's testimony.

⁷ Assault in the first degree, Penal Law § 120.20(1), and criminal possession of a weapon in the fourth degree, Penal Law § 265.01(2).

⁸ *People v. Khatibi*, 289 A.D.2d 593, 736 N.Y.S.2d 238, 2001 N.Y. Slip Op. 11035 (2d Dept., 2001) (trial evidence deemed "legally sufficient to establish the defendant's guilt beyond a reasonable doubt" for assault in the first degree and criminal possession of a weapon in the fourth degree, as "verdict of guilt was not against the weight of the evidence"), *further app. den.*, 742 N.Y.S.2d 617, 97 N.Y.2d 756, 769 N.E.2d 363 (2002), and *Khatibi v. Tracy*, Case #: 7:04-cv-01509-SCR-GAY (S.D.N.Y.) (habeas writ denied by Hon. Stephen C. Robinson, March 28, 2005), *aff'd.*, *Khatibi v. Tracy*, Case Number 05-7025-PR (2d Cir., 2007) *cert denied*, 551 U.S. 1152, 127 S.Ct. 3020, 168 L.Ed.2d 740 (2007).

⁹ *Khatibi v. Weill*, 8 A.D.3d 485, 778 N.Y.S.2d 511, 2004 N.Y. Slip Op. 05245 (2d Dept., 2004) (rejecting mandamus to compel disclosure in response to FOIL request because "such documents were previously furnished to the petitioner's trial attorney").

¹⁰ *Khatibi v. State of New York*, 35 Misc.3d 1211(A), 951 N.Y.S.2d 86, 2012 N.Y. Slip Op. 50654(U) (Ct. of Claims, 2012) (Justice Ruderman noted that Kian "would rather spend his life in prison than admit to crimes he had not committed.")

because “there is no explanation offered why this was not raised at trial or on appeal.” She concluded, “that the Defendant was in the local police station” when his brother stabbed Duffy and Boyar, but said this “is not newly discovered evidence,” and likewise brushed aside that the video of Kian at the police station and contemporaneous audio tapes had been destroyed, “thereby preventing his use of them at trial” because Kian failed to show his lawyer made “a request ... for either of these recordings for trial.”¹¹ Yet, she somehow found Kian’s trial attorney provided him with effective representation.

Four and a half years later on November 17, 2007, Kian’s siblings were having an early Thanksgiving dinner with their father, George Khatibi, at his home in White Plains. He lamented Kian’s absence at the family event. Kayvan then “admitted that he was the one who had committed the stabbing.” Kian’s father was shocked and angry, as was Kian’s sister Sheila, and two other siblings left the table in disgust.¹²

Kian moved to vacate his conviction again, this time based on his brother’s confession as newly discovered evidence. The matter was heard by Justice Barbara Zambelli. She noted Kayvan admitted, “I’m the one who did the stabbing and Kian is in jail for nothing”; “Kian is in jail for something that he had not done”; and “he was responsible for Kian being in jail.”¹³ She ruled that Kayvan’s confession represented “a new theory ... in this is a purely circumstantial case where neither victim was able to state that they (sic) observed the actual stabbings ... and no witness was able to directly identify the defendant as the perpetrator.”¹⁴

Notably, Ms. DiFiore’s prosecutors opposed vacature of Kian’s conviction, and proffered an entirely new and patently risible theory of the case that “both Kian and Kayvan committed the assault.”¹⁵ Justice Zambelli gave short shrift to this argument and vacated Kian’s conviction. On September 23, 2008, which was Kian’s thirty-third birthday, she released Kian on his own recognizance after serving nearly ten years in prison, and ordered a new trial. Ms. DiFiore’s office then dismissed the indictment against him.

¹¹ *People v. Kian Daniel Khatibi*, Indictment 98-240, decision on CPL 440.10 motion dated May 19, 2003.

¹² *Khatibi v. State of New York*, 35 Misc.3d 1211(A), 951 N.Y.S.2d 86, 2012 N.Y. Slip Op. 50654(U) (Ct. of Claims, 2012).

¹³ *People v. Kian Daniel Khatibi*, Indictment 98-240, decision on CPL 440.10 motion dated September 9, 2008.

¹⁴ *Id.*

¹⁵ *Id.*

As noted above, Kian won his Court of Claims action.¹⁶ Justice Ruderman found Kian “forthright and credible” and found his “conduct of going to the police station shortly after witnessing the fight was consistent with his innocence and his lack of awareness that his brother was involved in the fight.”¹⁷

Surely, if claimant had in fact just stabbed two people or knew that his brother had done so, it would be highly unlikely that claimant would proceed into the nearby police station seeking a ride from a police officer. Further, claimant’s physical appearance at the police station was not consistent with the appearance of someone who had just been in a physical altercation with two, very large, intoxicated men who were bleeding in several places.¹⁸

All this was known to Ms. DiFiore’s office for many years. In 2010, Kian filed a multi-million dollar civil rights action against Pleasantville and its police department in federal court.¹⁹ That action likely will be tried this year.

Members of the Committee are urged to press Ms. DiFiore about her conduct in this case. Specifically, she should asked the following:

- whether she regrets her judicial decision which cost Kian another four and a half years in prison, and would have cost him another decade in prison had his brother not finally confessed in 2007;
- if not, how she rationalizes her decision as just;
- why she did not move to vacate Kian’s conviction after her office learned his brother confessed;

¹⁶ As Justice Ruderman noted, under Court of Claims Act § 8–b, a claimant must prove by clear and convincing evidence that: (i) he was convicted of one or more felonies or misdemeanors, sentenced to a term of imprisonment, and served all or part of that sentence; (ii) the judgment was reversed or vacated under a statutorily enumerated ground; (iii) he did not commit the crimes charged; and (iv) did not by his own conduct cause or bring about his conviction. These statutory requirements are strictly construed, *Torres v. State of New York*, 228 A.D.2d 579, 644 N.Y.S.2d 748 (2d Dept., 1996) and “the linchpin’ of the statute is innocence.” *Ivey v. State of New York*, 80 N.Y.2d 474, 479, 606 N.E.2d 1360, 591 N.Y.S.2d 969, 479 (1992).

¹⁷ *Khatibi v. State of New York*, 35 Misc.3d 1211(A), 951 N.Y.S.2d 86, 2012 N.Y. Slip Op. 50654(U) (Ct. of Claims, 2012).

¹⁸ *Id.*

¹⁹ *Kian Khatibi v. Stephen Bonura, Robert Mazzei, The Village off Pleasantville, and The Village of Pleasantville Police Department*, #1:10-cv-01168-ER-PED (S.D.N.Y.)

- why instead she directed her deputies to oppose Kian’s motion to vacate his conviction after his brother confessed;
- whether she believes it was appropriate for her office to argue Kian and his brother together stabbed Duffy and Boyar, when they clearly did not believe it, given that they dismissed the indictment shortly afterward rather than re-try Kian.

Her answers to these questions will reveal a great deal about whether Ms. DiFiore is qualified to be New York’s most important and powerful judge.

Selwyn Days

Selwyn Days is a mentally retarded man with a long history of taking “antipsychotic medication used to treat schizophrenia and acute psychosis.”²⁰ He was charged with a double murder. “Shortly after noon on November 21, 1996, the bodies of 79 year-old Archie Harris and 35 year-old Betty Ramcharan were discovered inside of Harris’ Eastchester home. Harris had been beaten, bludgeoned and stabbed to death, while Ramcharan had been strangled and suffocated and her throat had been slit. A bloody kitchen knife was found lying near Ramcharan.”²¹

More than five years later, Days was arrested on February 16, 2001, and interrogated on and off for seven hours during fourteen hours in police custody. Only the last seventy-five minutes during which he supposedly confessed was recorded. “Shortly after the killings, investigators learned that Harris had made Ramcharan the major beneficiary of his \$1.6 million estate. But because she died with him, the estate went to his grown children.”²² Those with a motive to commit the murders were never pursued.

At the time of the murders, Days was 500 miles away at his home in Goldsboro, North Carolina, as established by four witnesses from Goldsboro, including a North Carolina magistrate.²³ No crime scene DNA evidence matched Days, but DNA on the knife and rope matched others. Ms. DiFiore’s prosecutors claimed this evidence was “inconclusive and

²⁰ *People v. Days*, 131 A.D.3d 972, 980, 15 N.Y.S.3d 823, 831 (2d Dept., 2015) (“there was little evidence to corroborate the defendant’s confession in this case, and his conviction turned almost entirely on his videotaped confession (citation omitted). There was no DNA or other physical evidence linking the defendant to the crime, and there was no eyewitness testimony.”)

²¹ *People v. Days*, 26 Misc.3d 1205(A), 906 N.Y.S.2d 782 (West. Cnty., 2009).

²² <http://truthinjustice.org/selwyn-days.htm>

²³ *People v. Days*, 26 Misc.3d 1205(A), 906 N.Y.S.2d 782 (West. Cnty., 2009).

speculative.”²⁴

The first trial in 2003 ended in a hung jury. Days was convicted on April 16, 2004, following his second trial and “sentenced to two consecutive terms of 25 years to life imprisonment,” and that conviction was upheld on appeal.²⁵ Thereafter, The Exoneration Initiative together with the Manhattan firm of Paul, Weiss, Rifkin, Wharton & Garrison took over as defense counsel, and proved Days’s trial lawyer failed to pursue his alibi defense and DNA evidence. As a result, the conviction was thrown out.²⁶

The third trial ended with a hung jury in 2011, but Days was found guilty in his fourth trial. That conviction was thrown out because the trial judge barred expert testimony on the issue of false confessions. Police “repeatedly employed suggestive and leading questions, fed the defendant specific details related to the crime scene, and used rapport-building techniques,” to exploit Days’s feeble intelligence and mental illness. The appellate court found “significant concerns” that only the supposed confession during the last seventy-five minutes of the seven-hour interrogation was videotaped.²⁷

In addition, “The indictment and the initial bill of particulars alleged that the victims were killed between November 19, 1996, and November 21, 1996,” but for the third trial, Ms. DiFiore's prosecutors amended the bill of particulars ten years after the murders and now claimed “these murders occurred two or three days prior to the discovery of the two bodies, including and encompassing the evening hours of November 18, 1996.” The Second Department rejected this shameless tactic because prosecutors knew “defendant's alibi witnesses previously indicated that the defendant was present in North Carolina beginning on November 19, 1996.”²⁸

His case is now headed to a fifth trial.

Ms. DiFiore should be asked why she continues to pursue Selwyn Days. She should be pressed to explain her reasoning in detail, both from the perspective of a prosecutor’s duty to do justice, and the cost-benefit analysis of spending millions in public resources to pursue this mentally ill, feeble minded man with a strong alibi, instead of pursuing those with 1.6 million reasons to murder the victims.

²⁴ http://www.nytimes.com/2011/02/08/nyregion/08retrial.html?_r=0

²⁵ *People v. Days*, 31 A.D.3d 574, 817 N.Y.S.2d 535 (2d Dept., 2006), *aff'd*, 7 N.Y.3d 811, 855 N.E.2d 802, 822 N.Y.S.2d 486 (2006).

²⁶ *People v. Days*, 26 Misc.3d 1205(A), 906 N.Y.S.2d 782 (West. Cnty., 2009).

²⁷ *People v. Days*, 131 A.D.3d 972, 15 N.Y.S.3d 823 (2d Dept., 2015)

²⁸ *Id.*, 131 A.D.3d at 982, 15 N.Y.S.3d at 833.

In the last appeal, the Second Department noted “False confessions that precipitate a wrongful conviction manifestly harm the defendant, the crime victim, society and the criminal justice system,” citing the Court of Appeals.²⁹ The Committee also should ask Ms. DiFiore whether she accepts or rejects admission of expert testimony to demonstrate some confessions may be false and therefore worthless.

Richard DiGuglielmo

Perhaps no Westchester case is more notorious than that of NYPD officer Richard DiGuglielmo who shot and killed Charles Campbell outside the deli owned by DiGuglielmo’s father.³⁰ The merits or demerits of his conviction and appellate claims are not at issue. Rather, the Committee should press Ms. DiFiore on the findings of then-County Court Justice Rory Bellantoni who vacated DiGuglielmo’s conviction, but was overturned on appeal on grounds essentially unrelated to his factual findings.³¹

Justice Bellantoni presided over a lengthy post-conviction trial about Ms. DiFiore’s office and the Dobbs Ferry police. He issued a blistering 50-page opinion in which he condemned Ms. DiFiore’s prosecutors for their flagrant misconduct in suborning perjury, muscling a key prosecution witness to change his story and then hiding that fact from the defense, and tainting the transcript of the proceedings.³²

Justice Bellantoni was unsparing in his condemnation of Ms. DiFiore’s chief lieutenant: “When a Government lawyer, with enormous resources at ... her disposal abuses power and ignores ethical standards, ... she not only undermines public trust, but inflicts damage beyond

²⁹ *People v. Days*, 131 A.D.3d at 979, 15 N.Y.S.3d at 830.

³⁰ See, e.g., Samuel A. Abady, *Reversal of Fortune - The Deeply Troubling Case of Richard DiGuglielmo*, Westchester Guardian (July 1, 2010).

³¹ DiGuglielmo told the jury he did not intend to kill Charles Campbell, but instead, shot to protect his father because Campbell had hit his father twice with a baseball bat and was poised to strike his father in the head, possibly killing him. The jury acquitted DiGuglielmo of assault and intentional murder, but convicted on depraved indifference murder. Justice Bellantoni exhaustively reviewed the trial record and concluded Campbell “took a batter’s stance and was about to strike the elder Diguglielmo who was trying to regain his balance when Officer Diguglielmo shot,” and held a defendant can be guilty of intentional murder or depraved indifference murder, but not both. Thus, DiGuglielmo “should never have been charged with, or convicted of, depraved indifference murder.” The Second Department reversed. It acknowledged the law of depraved indifference murder had changed, but DiGuglielmo could not benefit from it because the change in the law was not retroactive. Viewing that same record, the appellate judges in Brooklyn also found “the circumstances did not support an objectively reasonable inference that a deadly strike with the bat was imminent.” The lynchpin of that court’s decision was “defendant’s ... background and training as a police officer” who knows he can “use deadly force only as a last resort.” *People v. DiGuglielmo*, 75 A.D.3d 206, 902 N.Y.S.2d 131 (2d Dept., 2010), *aff’d*, 17 N.Y.3d 771, 952 N.E.2d 1068, 929 N.Y.S.2d 74 (2011).

³² *People v. DiGuglielmo*, 21 Misc.3d 1103(A), 873 N.Y.S.2d 236, 2008 WL 4355431 (Westchester Cnty, 2008).

calculation to the system of justice.”³³

Among his many findings, Justice Bellantoni condemned Ms. DiFiore’s prosecutors for:

- their “scorched earth policy of attempting to vilify” the eyewitnesses at the hearing because they would “not go along with their program”;
- their deceit in arguing a witness named White was “so biased and so perjurious that his odious presence in the courtroom made a mockery of the proceedings,” when Justice Bellantoni found to the contrary, “White’s testimony, as the People are well-aware, was truthful and accurate”;
- their “win at all costs” approach to the case, ethics be damned;
- one prosecutor, A.D.A. Ward, sat alone with the court stenographer, Betsy Watson, to “proofread” the hearing transcript, and then lied to Justice Bellantoni about having done so, which “damaged the integrity of the transcript, if not the proceeding itself”; and
- another seasoned prosecutor close to Ms. DiFiore, A.D.A. Murphy, “was intimately involved” in directing the Dobbs Ferry Police to illegally coerce an eye witnesses “every step of the way” because his testimony was favorable to DiGuglielmo.³⁴

Ms. DiFiore manages an office which employs some 230 people.³⁵ The above represents an extraordinary judicial condemnation of a sitting District Attorney.

Prosecutorial misconduct is not an outlier in criminal justice. To the contrary, as noted by Alex Kozinski, one of the nation’s leading federal appellate judges, “violations have reached epidemic proportions in recent years” and such misconduct “erodes the public’s trust in our justice system, and chips away at the foundational premises of the rule of law.”³⁶ Justice Bellantoni attributed this to the win-at-all-costs mentality of Ms. DiFiore’s office. A 2003 report from The Center for Public Integrity found prosecutorial misconduct nationwide was rampant: “Local prosecutors in many of the 2,341 jurisdictions across the nation have stretched, bent or

³³ *Id.*

³⁴ *Id.*

³⁵ Joseph De Avila, *Westchester D.A. Is Nominated to Be State’s Top Judge*, Wall Street Journal (December 1, 2015).

³⁶ *U.S. v. Olsen*, 737 F.3d 625 (9th Cir., 2013).

broken rules while convicting defendants.³⁷

The Committee should question Ms. DiFiore about the office culture she fostered, and ask her to respond to Justice Bellantoni's findings about the flagrant misconduct of her subordinates. The Committee should explore her views generally about prosecutorial misconduct. Her answers will shed light on her fitness to be New York's top judge.

Conclusion - Atmospherics Versus Substance

Political atmospherics unavoidably surround nomination to the state's most important judicial position. For example, Ms. DiFiore was endorsed by Manhattan D.A., Cyrus R. Vance Jr., who proclaimed she has "dedicated her career to ensuring public safety and fairness," and by outgoing Chief Judge Jonathan Lippman who hailed her "intellect, integrity and collegiality."³⁸

In contrast, the New York State Bar Association deemed Ms. DiFiore merely "qualified," not "well qualified," which generated the headline, "DiFiore not among top qualified candidates for chief judge, Bar Association says."³⁹ The New York State Trial Lawyers Association deemed her to be "highly qualified and highly recommended," while the New York City Bar Association deemed her "well qualified," but the New York State Academy of Trial Lawyers deemed her merely "recommended," but not "most highly recommended," much less "highly recommended."⁴⁰

Media pundits have focused on Ms. DiFiore's close ties to Gov. Cuomo and questioned whether, as Chief Judge, she will be sufficiently independent when presiding over cases challenging the Governor's exercise of Executive authority. Mr. Deskovic believes that issue is presented in any nomination because governors do not nominate their political enemies to serve as the state's top judge.

To date, no media have focused on the serious issues set forth herein. Yet, these are matters that vitally affect the delivery of fair and impartial justice, the birthright of every New Yorker and every American.

Accordingly, Mr. Deskovic submits confirmation or rejection of Ms. DiFiore's

³⁷ Steve Weinburg, "Breaking the rules: Who suffers when a prosecutor is cited for misconduct?", <http://www.publicintegrity.org/2003/06/26/5517/breaking-rules>.

³⁸ *Id* at footnote 1.

³⁹

<http://www.democratandchronicle.com/story/news/politics/blogs/vote-up/2015/11/10/difiore-not-among-top-qualified-candidates-for-chief-judge-bar-association-says/75524600/>

⁴⁰ *Id*.

nomination should be based on the merits and her fitness for the state's highest judicial office, not atmospheric, and specifically, her commitment to address issues pertaining to wrongful conviction described above.

New York's Chief Judge, perhaps more than any other public official, is instrumental in moving the Legislature to adopt remedial legislation. Mr. Deskovic remains grateful to Ms. DiFiore for changing course from her predecessor, as it led to his exoneration. Nonetheless, substance is what counts, and to merit the Committee's confirmation, Ms. DiFiore should be questioned searchingly about the cases summarized above. Her answers should demonstrate two things:

(i) that she has learned from mistakes made in the wrongful conviction cases on her watch; and

(ii) that she is determined, as Chief Judge, to champion remedial legislation to avoid wrongful convictions in the future.

If her answers fulfill these criteria, then she should be confirmed, per New York State Constitution, Art. VI, § 2(e).⁴¹ If, on the other hand, her answers leave members unconvinced, then she should not be confirmed and her nomination must be rejected.

⁴¹ "The governor shall appoint, with the advice and consent of the senate, from among those recommended by the judicial nominating commission, a person to fill the office of chief judge ... whenever a vacancy occurs in the court of appeals."