

LEAVEWORTHY

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The Newsletter of the NYSBA Committee
on Courts of Appellate Jurisdiction

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A reminder to our readers: your contributions regarding cases, articles, interesting events and the like will all be considered for publication in future issues. Submissions can be sent to appcourts@nysba.org.

Welcome

The Committee on Courts of Appellate Jurisdiction is sad to mark the retirement of Hon. Carmen Ciparick as Associate Judge of the New York Court of Appeals. We honored her at the Committee's annual dinner, with tributes from Chief Judge Jonathan Lippman and former Chief Judge Judith Kaye. This issue of *Leaveworthy* tries to capture who she is and the important role she played on the Court.

— Malvina Nathanson
Guest Editor



Retirement Interview with Court of Appeals Judge Carmen Ciparick

By Malvina Nathanson, Esq.

New York Court of Appeals Judge Carmen B. Ciparick retired on December 31, 2012. She began her legal career at The Legal Aid Society, representing poor individuals in civil matters at the Society's South Bronx office, where her Spanish-speaking abilities came in handy. She moved to the court system, gaining varied experience as assistant counsel to the Judicial Conference of the State of New York (predecessor of the Office of Court Administration), and in the Criminal Court as chief law assistant and as counsel to New York City's Chief Administrative Judge. Seeking a judicial position was a natural progression and her broad experience made her confident she could become a good judge. She began with an appointment to the Criminal Court bench in 1978, and was elected to the Supreme Court in 1983.

After many years as a trial court judge, Judge Ciparick felt it was time to move on. She sent in applications to panels for federal court, the Appellate Division and the Court of Appeals. Her first two attempts for the Court of Appeals were not successful, but the third time was the charm. In 1994 Governor Mario Cuomo appointed her to the Court of

Appeals, the first Hispanic and the second woman to serve on that Court.

Looking back on her 19 years on the Court of Appeals, Judge Ciparick will most miss her colleagues. Even where the judges disagreed in their conferences, they treated each other warmly during their nightly dinners in Albany. The disagreements were never personal, and the judges did not allow their disagreements to manifest themselves in their opinions, which were notably free of sarcasm or invective. She described the Court — all of its employees — as a family.

Her emphasis on personal relationships is longstanding. As a trial court judge, she preferred criminal cases to civil cases because they involved people rather than money. To her, the stakes were higher. Criminal cases also gave her an opportunity to preside over the jury voir dire. Judge Ciparick enjoyed developing a relationship with the potential jurors. Since her goal was to be fair and even-handed, she was particularly gratified that when she was once criticized in the press for being too liberal, she was defended and supported by prosecutors.

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She also enjoyed her experience as a member of the New York State Commission on Judicial Conduct. It taught her how important it was that judicial accountability accompany judicial independence. In her words, "... an independent judge is one who is accountable to the rule of law, and specifically to those fundamental precepts of due process that exist to ensure impartial decisionmaking and justice for all who come before the judge." Carmen Beauchamp Ciparick and Bradley T. King, "Judicial Independence: Is It Impaired or Bolstered by Judicial Accountability?" 84 ST. JOHN'S LAW REVIEW 1, p. 4 (2008). Unsurprisingly, her answer was an unequivocal endorsement of accountability.

Judge Ciparick regrets the constitutional provision that required her to retire at the end of 2012. As she pointed out, the provision was written when someone who reached 70 years was truly old. However, she can see a positive aspect of the limitation on service on the Court. Mandatory retirement gives the Court an opportunity to refresh itself as new people bring new perspectives.

Speaking of new perspectives, Judge Ciparick is delighted that more women have become judges on the Court. Women bring a different viewpoint, particularly in matrimonial and Family Court cases. They have also changed the tone. When four of the seven judges were women, the Court became a "kinder and gentler" place. Judge Ciparick

attributes this to former Chief Judge Judith Kaye, who emphatically encouraged a more civil tone on the Court. Judge Kaye, the first woman on the Court, had been there for 10 years when Judge Ciparick arrived. Judge Ciparick remembers that Judge Kaye greeted her with open arms and a bottle of champagne. Two women on the bench (the contingent after Judge Ciparick's retirement) are not enough. She expressed the hope that one of the next two appointments (replacements for Judge Theodore T. Jones and herself) would be a woman. (Editor's Note: On January 15, Governor Andrew Cuomo nominated Jenny Rivera for the seat that Judge Ciparick vacated, and on February 11, the State Senate confirmed her nomination.)

Judge Ciparick also admired the policy of Governor Mario Cuomo in appointing judges from different backgrounds and political parties, resulting in a court that was truly diverse.

Although Judge Ciparick had no appellate experience prior to her appointment, she was not in the least bit intimidated. She had broad experience in the trial courts in both civil and criminal matters and had written many opinions. Judge Kaye made her feel up to the task, assuring her that her vote counted just as much as anybody else's. She did have a problem at first with oral argument; the other judges were so quick with their questions, that Judge Ciparick was unable to get her questions out fast enough.

The deliberative process of the Court was somewhat new to her, although as a member of the Commission on Judicial Conduct she gained experience in reaching a decision after discussions among colleagues. She personally did not engage in lobbying other judges to win their support for an opinion, but occasionally agreed to modify an opinion to eliminate language others might perceive as offensive or to limit a holding in order to get additional votes. This happened with *Campaign for Fiscal Equity v. State of New York*, 86 N.Y.2d 307 (1995), in which plaintiffs claimed that funding disparities between different school districts violated the state and federal constitutions. The Court sustained causes of action pleaded by the nonschool board plaintiffs, and dismissed the claims of community school boards for lack of standing. While authoring the majority opinion, Judge Ciparick dissented from the dismissal of the community school boards' causes.

Judge Ciparick found some of the work on the court to be tedious, but the cases were exciting. Particularly notable was *Hernandez v. Robles*, 7 N.Y.3d 338 (2006), where the majority held that recognition of same-sex marriages was not constitutionally compelled. She proudly joined in Judge Kaye's dissent, and both got hate mail in reaction. She was also proud of her decisions holding the death penalty statute unconstitutional (e.g., *People v. Taylor*, 9 N.Y.3d 129 [2007]).

Her decision for the Court in *People v. Kent*, 19 N.Y.3d 290 (2012), also generated hate mail. In that case she held that the statutory language prohibiting possession of a sexual performance by a child did not authorize conviction where there was no evidence that defendant did anything

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CARMEN CIPARICK - A LIFE IN THE LAW

1/1/1942	Born in Washington Heights, New York City
1959-1963	Attended Hunter College (majoring in history and political science)
1963-1967	Attended St. John's University of Law (at night while working full-time)
1963-1967	Worked as a teacher, Harriet Beecher Stowe Junior High School, New York City (social studies and physical education)
1967	Admitted to practice in New York
1967-1969	Worked as a staff attorney in the Civil Division of The Legal Aid Society in its South Bronx office
1969-1972	Worked as Assistant Counsel to the Judicial Conference (now Office of Court Administration)
1972-1974	Worked as Chief Law Assistant, New York City Criminal Court
1974-1978	Worked as Counsel, New York City Administrative Judge
1978-1982	Appointed Judge, New York City Criminal Court
1983-1994	Elected Justice, Supreme Court, New York County
1985-1993	Served as member, New York State Commission on Judicial Conduct
1994-2012	Served as Associate Judge, Court of Appeals

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other than view images of child pornography. (The opinion affirmed the defendant's conviction of 132 counts of possession where there had been evidence that he downloaded the images but dismissed 2 counts where there was no such evidence.) However, the legislature quickly revised the statute to close the loophole identified in the decision. Her decision in *State of New York ex rel. Harkavy v. Consilvio*, 7 N.Y.3d 607 (2006), also prompted a legislative fix. *Harkavy* involved the attempt of the state to civilly commit sex offenders still in the custody of the correctional system but, as Judge Ciparick held, without the due process protections afforded by Correction Law § 402 and without other legislative authority. The legislature subsequently adopted Mental Hygiene Law Article 10, authorizing civil commitment proceedings against state prisoners.

Judge Ciparick was surprised by the results of one decision, *People v. Sparber*, 10 N.Y.3d 457 (2008), which held that the Department of Correctional Services (as it was then known) had no power to impose a term of post-release supervision on an inmate where the sentencing judge had failed to do so, even though such a term was statutorily mandated. This resulted in legislation as well, setting up a procedure whereby the State could initiate the resentencing of such defendants to the statutorily mandated sentences, but Judge Ciparick had not expected that the decision would "open the floodgates" to litigation as it did.

Judge Ciparick offered an interesting assessment of the cases interpreting Penal Law, § 125.25(2), the statute proscribing "depraved indifference" murder in the second degree ("[u]nder circumstances evincing a depraved indifference to human life, ... recklessly engag[ing] in conduct which creates a grave risk of death to another person and thereby causes the death of another person"). In a series of cases, the Court of Appeals

changed its view of the "depraved indifference" element from referring to the objective circumstances under which the defendant acted to referring to the defendant's *mens rea*. Judge Ciparick dissented from the final case in that line, *People v. Feingold*, 7 N.Y.3d 288 (2006), but has come to realize that the statute needed "fixing." Prosecutors were abusing the statute by charging both intentional murder and depraved indifference murder as alternatives as a matter of course, and jurors mistakenly thought they were extending mercy to a defendant by finding him guilty of depraved indifference rather than intentional murder.

Judge Ciparick served under two Chief Judges who had very different approaches to opinion-writing, each of which she found appropriate. Judge Kaye focused on unanimity; she thought it was important that the Court speak with one voice to give assurance to the bench and bar. Sometimes, however, getting unanimity required leaving some issues unresolved. Judge Lippman thinks all issues and opinions should be aired and sees great value in dissents. Although split decisions may inject an element of uncertainty, a dissenting opinion will sometimes prefigure the future path of the Court.

(Editors Note: On January 3, 2013, the New York Law Journal reported that Judge Ciparick would join Greenberg Traurig on January 14 as of counsel in the firm's New York City litigation and appellate practices. But don't expect her to disappear from public view. Judge Ciparick promises to continue to be active in public service.)

Malvina Nathanson, Esq. has handled civil and criminal appeals in the state and federal courts for over 45 years.

A Survey of Judge Carmen Ciparick's Criminal Law Jurisprudence

By Richard M. Greenberg, Esq.

Introduction

In her 19 years on the Court of Appeals, Judge Carmen Ciparick wrote approximately 125 opinions (including majority and dissenting opinions) in criminal cases. These cover a broad array of issues arising in criminal appeals, and include a number of high profile cases.

While no one would suggest that Judge Ciparick was anything but principled and fair, most criminal appellate practitioners would probably agree that Judge Ciparick has been on the more liberal wing of the Court, demonstrating solicitude for the rights of defendants in a variety of contexts. That said, a review of Judge Ciparick's opinions shows that, in general, she hewed closely to established principles, applying them with a view to safeguarding the rights of the accused, but rarely seeking to expand the rights of criminal defendants beyond their current contours. Her writings are clear, concise, well-reasoned, and logical, and occasionally exhibit a rhetorical flair.

Judge Ciparick's first written opinion in a criminal case came on February 17, 1994, just over a month after joining the Court. In *People v. Herring*, 83 N.Y.2d 780 (1994), a prosecution appeal, Judge Ciparick (joined by then-Chief Judge Judith S. Kaye) dissented from a memorandum decision of the Court rejecting the defendant's argument that the trial court erred in not charging the agency defense in a drug sale case. Applying the well-settled principle that, for this purpose, the evidence must be viewed in the light most favorable to the defense, Judge Ciparick had no difficulty concluding that whether the defendant was an agent of the buyer was properly a fact question for the jury.

In her final written opinion in a criminal case, *People v. Garcia*, 20 N.Y.3d 317 (2012), Judge Ciparick, writing for the Court, applied the familiar *DeBour* four-part test for police encounters to the setting of an automobile stop, concluding that an officer must have a "founded suspicion of criminality" before asking an occupant of the car whether he

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or she has any weapons. In reaching this conclusion, Judge Ciparick distinguished the right of the police to remove occupants from a lawfully-stopped automobile regardless of any suspicion.

In the 19 years between *Herring* and *Garcia*, Judge Ciparick wrote on a variety of criminal law issues. The following surveys some of her important opinions.

Notable and High Profile Cases

Among her most well-known opinions, Judge Ciparick wrote for the 4-3 majority in *People v. Taylor*, 9 N.Y.3d 129 (2007) – the final death penalty case in New York. Previously, in *People v. LaValle*, 3 N.Y.3d 88 (2004), the Court had held that the deadlock instruction required by statute was unconstitutionally coercive and, further, that some deadlock instruction is required. Thus, in a 4-3 ruling, the Court struck the death penalty in New York, leaving to the Legislature the option of repairing the statute. Judges Read and Graffeo joined Judge Robert Smith's dissent. In *Taylor*, the trial judge recognized the infirmity of the instruction and attempted to craft an instruction that would avoid its unconstitutionally coercive effects. At issue before the Court was whether the modified instruction, as given in this case, passed constitutional muster. Significantly, after *LaValle* was decided, but before *Taylor* came before the Court, Judge George Bundy Smith, *LaValle*'s author, was replaced on the Court by Judge Eugene F. Pigott, Jr. As it turned out, Judge Pigott voted with the dissenters to uphold the death sentence in *Taylor*. However, instead of ending up with a 4-3 decision in favor of the prosecution, Judge Robert Smith, adhering to principles of *stare decisis*, concurred with Judge Ciparick, creating a new 4-3 majority to strike the penalty. Judge Ciparick wrote a compelling opinion for the Court, laying out the legal imperative for reaffirming *LaValle*'s holdings, and concluded:

Like *LaValle*, our holding here is grounded in the irrevocable nature of capital punishment as well as "the concomitant need for greater certainty in the outcome of capital jury sentences" We do not agree that the Court erred in *LaValle*, or that our holdings were dicta, and thus we are ultimately left exactly where we were three years ago: the death penalty sentencing statute is unconstitutional on its face and it is not within our power to save the statute. *LaValle* is thus entitled to full precedential value. The Legislature, mindful of our State's due process protections, may reenact a sentencing statute that is free of coercion and cognizant of a jury's need to know the consequences of its choice.

* * *

In another controversial opinion, *People v. Kent*, 19 N.Y.3d 290 (2012), Judge Ciparick wrote for the Court in holding that, under the statute then in effect, the mere viewing of web images of child pornography does not constitute possession or procurement, and that evidence of images stored in computer cache files is proof that they were viewed at one time, but not proof that the viewer exercised sufficient control as to constitute possession or procurement. In contrast, proof that defendant downloaded and stored other images was sufficient to establish

criminal liability. As a result of this decision, the Legislature amended the statute to criminalize knowingly accessing images with intent to view them, thus legislatively overruling *Kent*.

* * *

Another of Judge Ciparick's notable opinions came in the high profile *People v. Koslowski*, 11 N.Y.3d 223 (2008), in which a unanimous Court upheld the larceny, conspiracy, and securities fraud convictions of the CEO and CFO of Tyco International Ltd. The Court rejected all of the defendants' arguments on appeal in concluding that they received a fair trial, leaving intact their significant prison terms.

* * *

In *People v. Jones*, 9 N.Y.3d 259 (2007), writing for a unanimous Court, Judge Ciparick considered the sufficiency of allegations in an information charging disorderly conduct. The information alleged that the officer

observed defendant along with a number of other individuals standing around at the above location, to wit a public sidewalk, not moving, and that as a result of defendants' [sic] behavior, numerous pedestrians in the area had to walk around defendants [sic]. . . .

Holding that the allegations were insufficient and the information was jurisdictionally defective, Judge Ciparick wrote that "[s]omething more than a mere inconvenience of pedestrians is required to support the charge. . . . Otherwise, any person who happens to stop on a sidewalk—whether to greet another, to seek directions or simply to regain one's bearings—would be subject to prosecution under this statute." Fears that tourists who stopped to take, or pose for, photos in Times Square would be subject to prosecution for disorderly conduct were thus allayed.

Fourth Amendment

As noted above, Judge Ciparick's final signed opinion in a criminal case, *People v. Garcia*, exemplified the Judge's manifest concern for protecting individuals' rights to be free from unreasonable searches and seizures. In almost all of her written opinions in this area, either for the Court or in dissent, Judge Ciparick wrote in favor of limiting police power or in favor of a robust exclusionary rule.

For example, in the context of automobile stops, Judge Ciparick wrote for the Court in holding that a general consent to search a vehicle does not permit the police to damage the vehicle by removing carpeting and using a crowbar to pry open sheet metal components of the car, *People v. Gomez*, 5 N.Y.3d 416 (2005); and (in a 4-3 decision) that the police exceeded their authority when they stopped defendant's car to seek information concerning a suspect whom they believed the defendant knew, *People v. Spencer*, 84 N.Y.2d 749 (1995).

Writing in dissent in car stop cases, Judge Ciparick would have found impermissible the search of a car lawfully stopped for a traffic infraction where, in her view, the occupants' movements did not rise to an actual and specific danger to the officers' safety, *People v. Mundo*, 99 N.Y.2d

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55 (2002); would have suppressed DMV information as the fruits of an unlawful traffic stop, *People v. Tolentino*, 14 N.Y.3d 382 (2010); and would have held that reasonable suspicion (and not merely a founded suspicion of criminality) is required under the State Constitution before the police may engage in a canine sniff of the exterior of a vehicle, *People v. Devone*, 15 N.Y.3d 106 (2010).

Judge Ciparick notably dissented in two other Fourth Amendment cases. In *People v. Rodriguez*, 19 N.Y.3d 166 (2012), Judge Ciparick dissented from the majority opinion requiring a showing of prejudice before wiretaps can be suppressed based on the state's failure to strictly comply with the wiretap statute's notice requirements. Citing the Court's prior decisions evincing a public policy to protect citizens from electronic surveillance and requiring scrupulous adherence to the statute's procedural requirements, the Judge would have suppressed without requiring a showing of prejudice. And, in *People v. Jones*, 2 N.Y.3d 235 (2004), Judge Ciparick would have suppressed a lineup identification as the unlawful fruit of a *Payton* violation (arrest in home without warrant). Judge Ciparick opined that this situation should not be treated differently from a statement taken from a defendant, which, under prior precedent, could be suppressed as the fruit of a *Payton* violation.

Right to Counsel

Judge Ciparick was vigilant in upholding the right to counsel, including the right to the effective assistance of counsel. In her final dissenting opinion in a criminal case, *People v. Townsley*, 20 N.Y.3d 294 (2012), the Judge took issue with the majority decision finding that appellate counsel was not ineffective for failing to raise on appeal the claim that trial counsel was conflicted where the prosecutor accused counsel of trying to fabricate a defense. Writing that "conflict-free representation is nothing short of fundamental," Judge Ciparick would have found appellate counsel ineffective for not raising this issue on appeal, despite performing an otherwise admirable job.

In another ringing dissent, in *People v. Wardlaw*, 6 N.Y.3d 556 (2006), Judge Ciparick disagreed that the denial of the right to counsel at a pre-trial suppression hearing could ever be found to be harmless error, writing: "It is a sad day when the Court of Appeals deviates from its heretofore robust protection of the right to counsel as conceived under the State's Constitution solely because of the proof of guilt and the heinousness of the crimes alleged."

Foreshadowing the U.S. Supreme Court's ground-breaking decision in *Padilla v. Kentucky*, 130 S.Ct. 1473 (2009), Judge Ciparick wrote for the Court in *People v. McDonald*, 1 N.Y.3d 109 (2003), that counsel provides deficient representation, for purposes of ineffective assistance of counsel analysis, where he misinforms his client that his guilty plea will not subject him to deportation.

Sentencing

In addition to her opinion in *Taylor*, Judge Ciparick wrote in several important sentencing cases. In the ground-breaking companion cases,

People v. Sparber, 10 N.Y.3d 457 (2008), and *Matter of Garner v. NYS Dep't of Corr. Servs.*, 10 N.Y.3d 358 (2008), Judge Ciparick wrote for a unanimous Court, holding that a term of post-release supervision (PRS) was required to be imposed as part of all determinate sentences, and that such PRS term could only be imposed by the court. Thus, where the court neglected to pronounce the PRS term on the record at sentencing, and the State Department of Correctional Services (DOCS) added the term as part of its sentence computation responsibility, the DOCS-imposed term was unlawful and a nullity (*Garner*). However, rejecting the defendants' claims in *Sparber*, the Court held that the court's failure to impose PRS at sentencing could be corrected by remanding for a resentencing proceeding. These decisions resulted in thousands of state prisoners being brought back to court to be resentenced to add a term of PRS to their prison terms. The Court apparently believed that the burden on the state in resentencing thousands of prisoners was a lesser evil than the prospect of allowing thousands of individuals convicted of violent felonies to be released without any community supervision.

In later litigation spawned by these PRS resentencing proceedings, Judge Ciparick dissented in *People v. Lingle*, 16 N.Y.3d 621 (2011). *Lingle* raised several questions concerning PRS resentencing proceedings, the most important of which was at what point double jeopardy principles would bar resentencing a defendant to add a term of PRS. The majority held that double jeopardy would bar resentence only after the individual served his entire initial sentence (including any conditional release time after release), whereas Judge Ciparick would have held that once the individual was released from the prison portion of his sentence (usually 6/7 of the term), double jeopardy should bar resentence, for at that point, the individual has a reasonable expectation in finality. In addition, contrary to the majority, Judge Ciparick would have held that the Appellate Division has the power to reduce the sentence in the interest of justice after a PRS resentencing proceeding.

In *People v. Rivera*, 5 N.Y.3d 61 (2005), Judge Ciparick dissented from the majority ruling upholding New York's discretionary persistent felony offender statute in the face of an *Apprendi* claim. This contentious issue, still undetermined by the U.S. Supreme Court, has been before the Court of Appeals at least three times, as well as in the federal courts in habeas corpus proceedings. Most recently, a three-judge panel of the U.S. Court of Appeals for the Second Circuit found the law to be unconstitutional under *Apprendi*, in *Besser v. Walsh*, 601 F.3d 163 (2010), only to be overruled by an *en banc* Second Circuit in *Portalatin v. Graham*, 624 F.3d 69 (2010). It remains to be seen whether Judge Ciparick's view will ultimately be vindicated, as efforts to obtain U.S. Supreme Court review of this statute continue.

In other sentencing opinions, Judge Ciparick found consecutive sentences unlawful in *People v. Rosas*, 8 N.Y.3d 493 (2007), and *People v. Wright*, 19 N.Y.3d 359 (2012), and found the defendant entitled to jail time credit in *People v. Zephrin*, 14 N.Y.3d 296 (2010). In each

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of these cases, Judge Ciparick's decisions worked to the advantage of the defendant (although in *Rosas*, the Court's holding that defendant's two sentences of life without parole should run concurrently and not consecutively was a "victory" unlikely to help Mr. Rosas).

Direct and Collateral Consequences of Guilty Pleas

In two significant cases, Judge Ciparick dissented from rulings that held certain consequences of a conviction to be collateral. In *People v. Gravino*, 14 N.Y.3d 546 (2010), the Court held that mandatory registration under the Sex Offender Registration Act (SORA) is a collateral consequence of the conviction, and thus, a guilty plea to a sex offense is not involuntary where the court fails to inform the accused of such requirements. And, in *People v. Harnett*, 16 N.Y.3d 200 (2011), the Court reached the same conclusion with respect to the defendant's potential civil commitment under the Sex Offender Management and Treatment Act. Judge Ciparick dissented in both cases, concluding in *Gravino* that the mandatory nature of SORA rendered it a direct consequence of the plea. And, in *Harnett*, the Judge wrote that civil commitment, while only a possibility, "is so grave a deprivation of liberty that a plea should not be considered knowing and voluntary unless the defendant is aware of it."

However, in *People v. Smith*, 15 N.Y.3d 669 (2010), Judge Ciparick wrote for a unanimous Court in ruling that the requirements of GORA – New York City's Gun Offender Registration Act – are not part of the sentence and judgment of conviction and, thus, are not reviewable on direct appeal. According to the Court, "pursuant to the terms of GORA, the registration of a gun offender is an administrative matter between the City of New York, the NYPD, and the offender, not a component of a gun offender's sentence to be imposed by the sentencing court."

Depraved Indifference Murder

In this highly complex and long-evolving area of criminal jurisprudence, Judge Ciparick has weighed in with her own opinions. First, she dissented in *People v. Sanchez*, 98 N.Y.2d 373 (2002), in which the Court upheld a depraved indifference murder conviction in the face of evidence establishing an intentional killing. Judge Ciparick, as did other dissenting judges on the Court, concluded that depraved indifference murder was too often conflated with, and used as a substitute for, intentional homicides. However, she parted company with some of those same colleagues regarding the proper way to distinguish depraved indifference from mere recklessness. Thus, Judge Ciparick dissented in *People v. Feingold*, 7 N.Y.3d 288 (2006), the culminating case that overruled *People v. Register*, 60 N.Y.2d 270 (1983), and held for the first time that "depraved indifference to human life," as defined in the murder statute, referred to a *mens rea*, or state of mind of the defendant, rather than the objective circumstances surrounding the defendant's recklessness, as was the law under *Register*. Judge Ciparick's dissent espoused the view that, while the *Register* standard was problematic, the Court's more recent decision in *People v. Suarez*, 6 N.Y.3d 202 (2005), clarified *Register* and made it more workable.

The Judge believed the Court went too far in overruling *Register* and holding "depraved indifference" to be a culpable mental state.

Nevertheless, in the recent case of *People v. Matos*, 19 N.Y.3d 470 (2012), Judge Ciparick, writing for the Court, applied *Feingold* to conclude that the evidence was legally insufficient to convict defendant of depraved indifference murder, and could only support a conviction, if at all, for the lesser crime of reckless manslaughter.

Other Significant Opinions

Judge Ciparick authored many other significant opinions concerning a wide variety of criminal law issues. For example, she wrote the Court's opinion in its recent and expansive *Batson* case, *People v. Hecker*, 15 N.Y.3d 625 (2010), in which the Court, in four consolidated appeals, clarified the three-step process in determining whether a party engaged in impermissible discrimination in jury selection. In *People v. Finley*, 10 N.Y.3d 647 (2008), Judge Ciparick wrote the majority opinion holding that small amounts of marijuana possessed by prison inmates were not "dangerous contraband" under the statute sufficient to elevate the crime of second degree promoting prison contraband to the first degree felony. Applying the U.S. Supreme Court's most recent case on the right to a public trial, *Pressley v. Georgia*, 130 S.Ct. 721 (2010), Judge Ciparick wrote for the Court in *People v. Martin*, 16 N.Y.3d 607 (2011), holding that the defendant was denied his public trial rights.

Of course, Judge Ciparick did not hesitate to uphold convictions where she believed the defendant received a fair trial. For example, in *People v. Wrotten*, 14 N.Y.3d 33 (2009), Judge Ciparick, writing for the Court, refused to find that defendant was denied her right to confrontation or that the trial court exceeded its authority, where the complainant was permitted to testify remotely via two-way video. In *People v. Calabria*, 3 N.Y.3d 80 (2004), Judge Ciparick, writing for the majority, upheld a conviction based solely on one eyewitness identification, rejecting defendant's legal sufficiency claim. In *People v. Davis*, 14 N.Y.3d 20 (2009), Judge Ciparick wrote for the majority in ruling that criminal possession of a controlled substance is not a lesser included offense of third degree sale, even where the defense of agency is asserted. And, in another case called *People v. Davis*, 13 N.Y.3d 17 (2009), Judge Ciparick wrote for the Court in upholding the constitutionality of the consensual adjudication of class B misdemeanors before Judicial Hearing Officers.

Other significant dissents authored by Judge Ciparick include *People v. Gajadher*, 9 N.Y.3d 438 (2007), in which the majority upheld the defendant's conviction by a jury of 11, where the defendant consented to proceed to a verdict with 11 jurors. Judge Ciparick would have held that a jury of 12 may not be waived by a defendant. In *People v. Muhammad*, 17 N.Y.3d 532 (2011), a 4-3 decision, Judge Ciparick wrote a vigorous dissent from the majority's decision upholding two convictions over claims that the verdicts were repugnant. Finally, in *People v. Kalin*, 12 N.Y.3d 225 (2009), Judge Ciparick dissented from

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a ruling upholding a misdemeanor drug information premised on an officer's identification of the illicit substances based on his experience and training, but without a laboratory report or field test. Concluding that such conclusory allegations are jurisdictionally deficient, Judge Ciparick lamented that "the majority brushes aside the protections that must be afforded to misdemeanor defendants to ensure that such prosecutions do not become routinized or treated as insignificant or unimportant."

* * *

While it is not possible, in this survey, to fully analyze all of Judge Ciparick's criminal law opinions spanning 19 years on the Court of Appeals, it is clear that Judge Ciparick has been a staunch defender of the constitutional rights of the accused, an ardent protector of the Fourth Amendment and the rights of individuals to be free from

unreasonable searches and seizures, and a consistent guardian of the accused's right to the effective assistance of counsel. Perhaps fittingly, Judge Ciparick's departure from the Court coincides with preparations to celebrate the upcoming 50th anniversary of the Supreme Court's seminal decision in *Gideon v. Wainwright* establishing an indigent defendant's right to appointed counsel. Looking back at her body of work over 19 years on the Court, Judge Ciparick can be proud of her role in protecting that right and the many rights that flow from it.

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Judge Ciparick's Civil Law Jurisprudence

By Alan J. Pierce, Esq.

Above all else Judge Ciparick's majority and dissenting opinions in civil cases at the Court of Appeals demonstrate that she is fair to all parties and principled in her decisions. Like her criminal jurisprudence, however, it is fair to say that her writings and decisions reflect a judge who believes that the judiciary has a responsibility to protect individual civil rights and liberties, as well as government-provided assistance or protections, in the face of infringement by the executive and legislative branches of government and other sources of power.

There is no way for this brief article to adequately reflect Judge Ciparick's many opinions in civil cases at the Court from 1994 through 2012. But we will try to give a fair sample to demonstrate Judge Ciparick's unwavering fairness to the litigants and parties who came before her and her significant contributions to New York's civil jurisprudence.

Court And Majority Opinions

In the first of three Court rulings in a lengthy battle over the disparities in education funding between school districts, Judge Ciparick wrote the majority opinion for the Court in *Campaign for Fiscal Equity v. State*, 86 N.Y.2d 307 (1995), holding that opponents of the State school funding system had a valid cause of action under the Education Article of the State Constitution, which mandates that children are entitled to a taxpayer-funded "sound, basic education." She defined this as a high school-level education that prepares students to become good workers and citizens. This ultimately led to more than \$2 billion in additional funding for New York City schools in subsequent *CFE* decisions by the Court. See 100 N.Y.2d 893 (2003); 8 N.Y.3d 14 (2006).

In *Matter of Jacob*, 86 N.Y.2d 651 (1995), Judge Ciparick's opinion enabled two unmarried partners of biological mothers – one heterosexual and one homosexual – to adopt the children they had been helping to raise.

Judge Ciparick's unanimous opinion for the Court in *Grumet v. Cuomo*, 90 N.Y.2d 57 (1997), held that a 1994 law tailored by the Legislature to funnel school aid to the Hasidic community of Kiryas Joel of Orange County was an impermissible governmental endorsement of a religious community that violated the Establishment Clause of the U.S. Constitution.

In *Adirondack League Club v. Sierra Club*, 92 N.Y.2d 591 (1998), Judge Ciparick harkened back to an 1865 Court of Appeals precedent in writing the majority ruling that "navigability" still guides the question of whether waterways are "public highways" open to all travelers in this dispute over whether recreational boaters should have free use of the Moose River in the Adirondacks.

Judge Ciparick's opinion in *Levin v. Yeshiva Univ.*, 96 N.Y.2d 484 (2001), reinstated a discrimination suit based on sexual orientation brought by two female students who claimed that married heterosexual students unfairly got preference for student housing over unmarried or homosexual partners.

Judge Ciparick wrote for a unanimous Court in *Narducci v. Manhasset Bay Assoc.*, 96 N.Y.2d 259 (2001), that the plaintiffs in these two companion cases could not avail themselves of the strict liability imposed by Labor Law § 240(1) for worksite injuries involving falling workers or falling objects, which had previously been liberally applied.

In upholding the constitutionality of a tax against a facial challenge in *Matter of Moran Towing v. Urbach*, 99 N.Y.2d 443 (2003), Judge Ciparick set forth a four-part test for determining whether a tax violates the Commerce Clause of the State Constitution, which has frequently been employed in determining the application of taxes on Internet sales.

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In *Dalton v. Pataki*, 5 N.Y.3d 243 (2005), Ciparick wrote the majority opinion finding legal under the State Constitution the revenue-raising measures the State took in the wake of the 9/11 terror attacks, including authorizing up to six Indian-run casinos, New York's entry into multi-state lotteries, and the introduction of slot machine-like video lottery terminals in existing horse racing tracks.

In *Ehrenfeld v. Bin Mahfouz*, 9 N.Y.3d 501 (2007), Judge Ciparick wrote that New York's long-arm statute did not give New York courts personal jurisdiction over an author's action to invalidate a British judgment in favor of a Saudi businessman who contended the author libelously accused him of helping bankroll al Qaida terrorists.

In a case over entitlement to the "service charges" imposed on customers' bills for banquets on luxury craft in New York Harbor, Ciparick wrote for the Court in *Samiento v. World Yacht*, 10 N.Y.3d 70 (2008), that "reasonable patrons" would believe that the money was being paid for remittance to the wait staff on the cruises and should not be retained by the boats' operators.

In *Matter of H.M. v E.T.*, 14 N.Y.3d 521 (2010), she wrote the majority opinion holding that Family Court has subject matter jurisdiction to adjudicate a support petition by a biological parent seeking child support from her former same-sex partner.

Judge Ciparick's opinion in *Warney v. State*, 16 N.Y.3d 428 (2011), held that a man who served nine years in prison for murder before being exonerated through DNA evidence should get the chance to sue for his years of incarceration despite making statements to police following his arrest that seemed to constitute a confession.

Judge Ciparick wrote the majority opinion in *Matter of New York County Lawyers' Assn. v. Bloomberg*, 19 N.Y.3d 712 (2012), holding that Mayor Bloomberg's plan to contract out the representation of indigent criminal defendants in conflict cases to institutional providers was permissible under the plan for indigent representation adopted by New York City pursuant to County Law Title 18 under the mandate of *Gideon v. Wainwright*, 372 U.S. 335 (1963).

Dissenting Opinions

Judge Ciparick dissented from the Court's decision in *In re Obot*, 89 N.Y.2d 883 (1996), confirming an arbitration award against a dis-

charged prison employee who failed to preserve his argument in the arbitration that his discharge was retaliatory. Because of the strong public policy decrying retaliatory discharges expressed in Civil Service Law § 75-b(2), she would have recognized an exception to the finality of arbitral awards procured at the expense of the employee's right to fair representation.

In *Garcia v. Bratton*, 90 N.Y.2d 991 (1997), Judge Ciparick dissented from the majority's opinion that a probationary officer who was placed on modified duty after the original probationary period and was then terminated was not entitled to a hearing, opining that a hearing was required because the ambiguous statutes should be interpreted in favor of the officer.

Although she did not write the dissent in *Hernandez v. Robles*, 7 N.Y.3d 338 (2006), Judge Ciparick joined Chief Judge's Kaye's dissent that the denial of marriage licenses to same-sex couples violates the Due Process and Equal Protection clauses of the New York Constitution. The Legislature changed the law consistent with the dissent five years later.

In *Lee v. Astoria Generating Company*, 13 N.Y.3d 382 (2009), Judge Ciparick dissented from the majority decision that the state law claim of a land-based maritime worker injured while working on a barge was preempted by the federal government's exclusive maritime jurisdiction, even though his injury did not constitute a maritime tort. She wrote that "[i]f there is no remedy provided [within a federal statute, then] there is no 'exclusive remedy' that preempts state law actions."

In three separate dissents in *Cubas v. Martinez*, 8 N.Y.3d 611 (2007), *Ramroop v. Flexo-craft Printing, Inc.*, 11 N.Y.3d 160 (2008), and *Khrapunskiy v. Doar*, 12 N.Y.3d 478 (2009), Judge Ciparick voted to extend constitutional rights to "undocumented immigrants" and specifically used that term instead of "illegal immigrants." (Note: In *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009), newly appointed Supreme Court Justice Sonia Sotomayor also used the term "undocumented immigrant" in lieu of "illegal immigrant," the first time this term appeared in a Supreme Court decision.)

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