



# COURT OF APPEALS

*Some Updates  
&  
Some  
Reflections  
on a  
Great Tradition*

NYSBA CLE:  
August 20, 2019  
Vincent Martin Bonventre  
Albany Law School

# THE COURT OF APPEALS

*Some Updates*

&

*Some Reflections on a Great Tradition*

*NYSBA CLE August 20, 2019*

## Agenda

*Introduction/Overview*

*The DiFiore Court / The Judges*

*Some Updates*

*The Tradition*

*Great Judges & Their Decisions*

*Concluding Observations*



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# The DiFiore Court

*(Today--Since June 2017)*



Janet DiFiore

Jenny Rivera

Leslie Stein

Eugene Fahey

Michael Garcia

Rowan Wilson

Paul Feinman



# Chief Judge Janet M. DiFiore



- Appointed 2016, by Andrew Cuomo
- Replaced Jonathan Lippman (by David Paterson)
- From Westchester County
- Former Trial Judge, DA (Westchester County)
- Age: 64 (born Aug. 1955)
- Mandatory age retirement: 2025

# Senior Judge Jenny Rivera



- Appointed 2013, by Andrew Cuomo
- Replaced Carmen Ciparick (by Mario Cuomo)
- From New York City
- Former Law Professor, Law Clerk to then-Judge Sotomayor
- Age: 58 (born Dec. 1960)
- 14 year Term Ends: 2027



# Judge Leslie E. Stein



- Appointed 2015, by Andrew Cuomo
- Replaced Victoria Graffeo (by George Pataki)
- From Albany Area (born in New York City.)
- Former Practitioner, Trial and Appellate Judge, 3rd Dept.
- Age: 62 (born Dec. 1956)
- Mandatory age retirement: 2026

# Judge Eugene M. Fahey



- Appointed 2015, by Andrew Cuomo
- Replaced Robert Smith (by George Pataki)
- From Buffalo
- Former Practitioner, Trial and Appellate Judge, 4th Dept.
- Age: *almost* 68 (born Sept. 1951)
- Mandatory age retirement: 2021



# Judge Michael J. Garcia



- Appointed 2016, by Andrew Cuomo (only Republican nominated)
- Replaced Susan Read (by George Pataki)
- From Westchester County (born in Queens)
- Former Law Clerk to then-Judge Kaye, Practitioner, U.S. Attorney (SDNY)
- Age: 57 (born Oct. 1961)
- 14 year Term Ends: 2030

# Judge Rowan D. Wilson



- Appointed 2017,  
by Andrew Cuomo
- Replaced Eugene Pigott  
(by George Pataki)
- From Nassau County, L.I.  
(born in California)
- Partner, Cravath, Swaine  
& Moore
- Age: *almost* 59 (born Sept. 1960)
- Mandatory age retirement:  
2030



# Judge Paul G. Feinman



- Appointed 2017 by Andrew Cuomo
- To Fill Vacancy of Deceased Abdus-Salaam (by Andrew Cuomo)
- From New York City (born on Long Island)
- Former Trial and Appellate Judge, 1<sup>st</sup> Dept.
- Age: 59 (born Jan. 1960)
- Mandatory age retirement: 2030

# Today's DiFiore Court

## Diversity

- 1 African-American Judge  
(Judge Rowan Wilson)
- 2 Hispanic Judges (Judges Jenny Rivera and Michael Garcia)
- 3 Women (Chief Judge Janet DiFiore and Judges Rivera and Leslie Stein)
- 1 Openly Gay Judge (Judge Paul Feinman)



# Today's DiFiore Court

## Diversity

- 2 Upstaters (Judges Stein [the Capital Region] and Eugene Fahey [Buffalo])
- 2 From New York City (Judges Rivera and Feinman [Also, Judge Garcia was born in the City and Judge Wilson worked there.])
- 2 Who live just north of the City in Westchester County (Chief Judge DiFiore and Judge Garcia)
- 1 Who lives on Long Island (Judge Wilson [Also, Judge Feinman was born there.])

# Today's DiFiore Court

## Diversity

- 3 Who were appellate judges (Judges Stein, Fahey, and Feinman)
- 4 Who had been trial judges (Chief Judge DiFiore and Judges Stein, Fahey, and Feinman)
- 2 From private practice (Judges Garcia and Wilson [Also, Judge Stein had considerable private practice prior to judicial career.] )
- 2 Prosecutors who ran prosecutorial offices (Chief Judge DiFiore [Westchester Cnty DA] and Judge Garcia [U.S. Atty for the SDNY])

# Today's DiFiore Court

## Diversity

- 1 Academic (Judge Rivera)
- 6 Different law schools:
  - St. John's [DiFiore]
  - NYU [Rivera]
  - Albany [Stein and Garcia]
  - SUNY Buffalo [Fahey]
  - Harvard [Wilson]
  - Minnesota [Feinman]



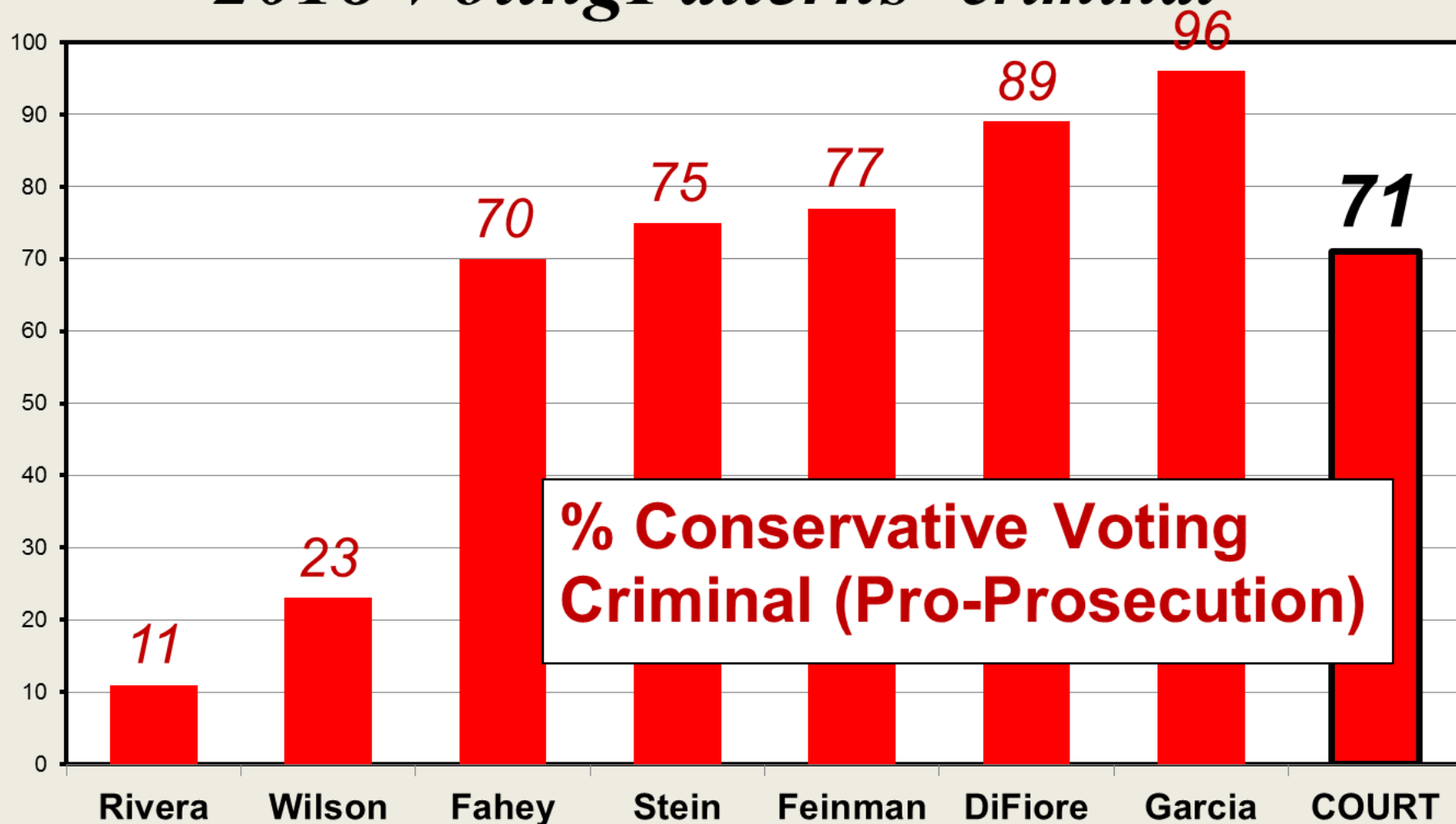
# Today's DiFiore Court

## Diversity

- 1 Italian-American (Chief Judge DiFiore)
- 1 Puerto Rican-American (Judge Rivera)
- 2 Jewish-Americans (Judge Stein and Feinman)  
*and*
- 1 “65 [now 67] Year Old White Guy” & Irish-American (Judge Fahey)  
*even*
- 1 Republican (Judge Garcia)  
[all the rest are Democrats]

# DiFiore Court

## *2018 Voting Patterns--criminal*

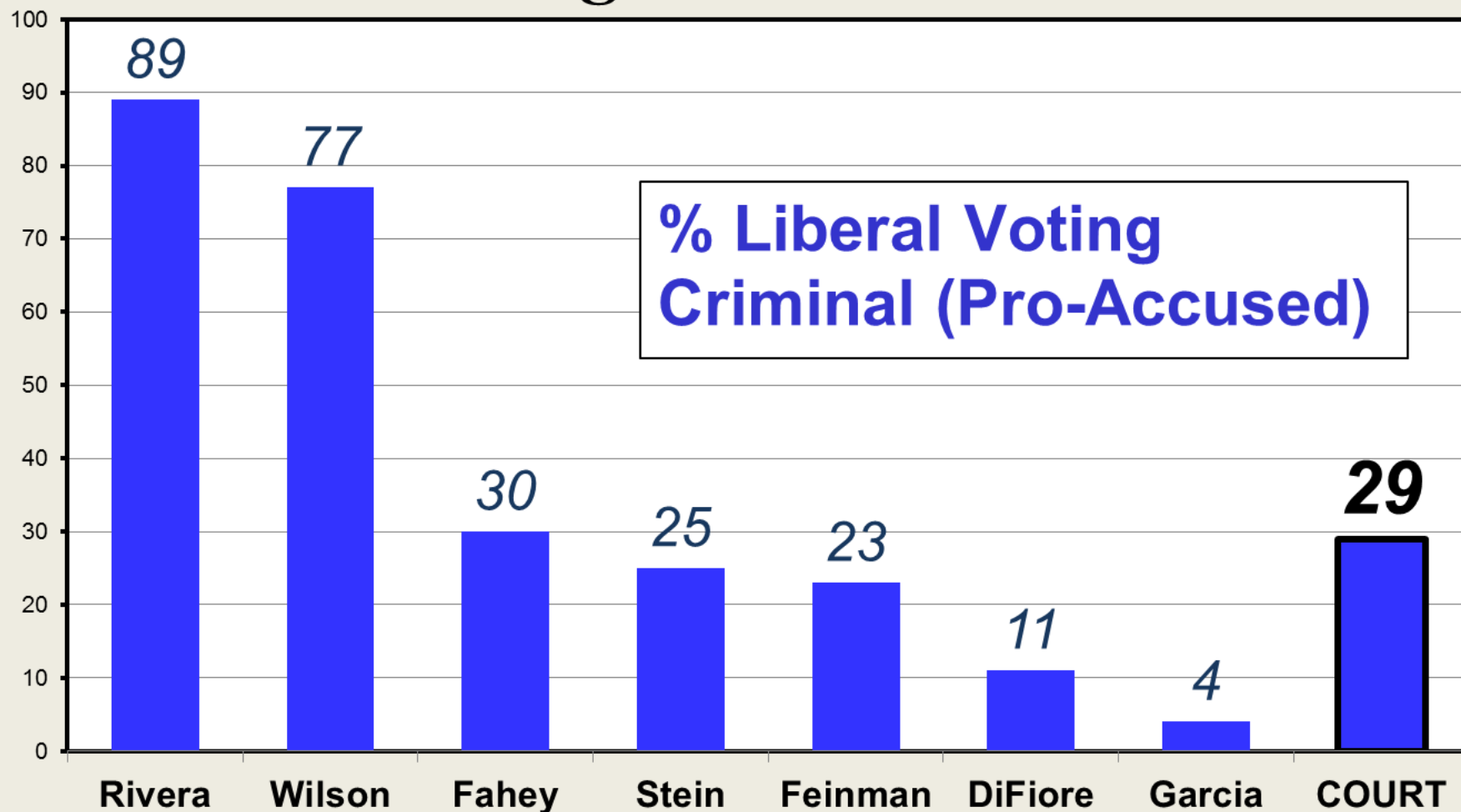


**Judges** (% Criminal Appeal Conservative Voting [28 Div. Decisions])

Source: Vincent M. Bonventre, Albany Law School 3/2019

# DiFiore Court

## *2018 Voting Patterns--criminal*



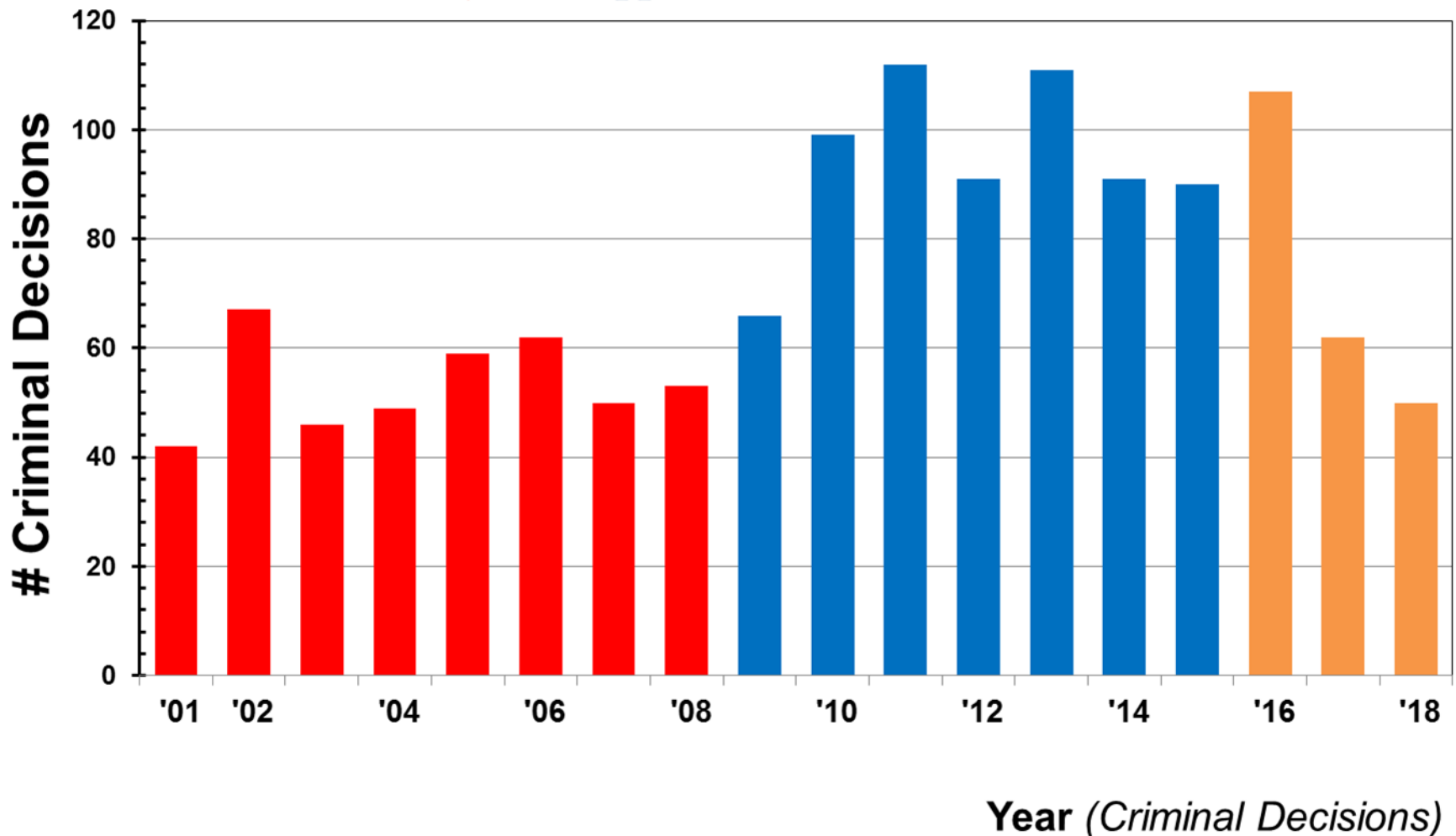
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# Court of Appeals Criminal Appeals Decided

*Kaye* vs. *Lippman* vs. *DiFiore* Eras

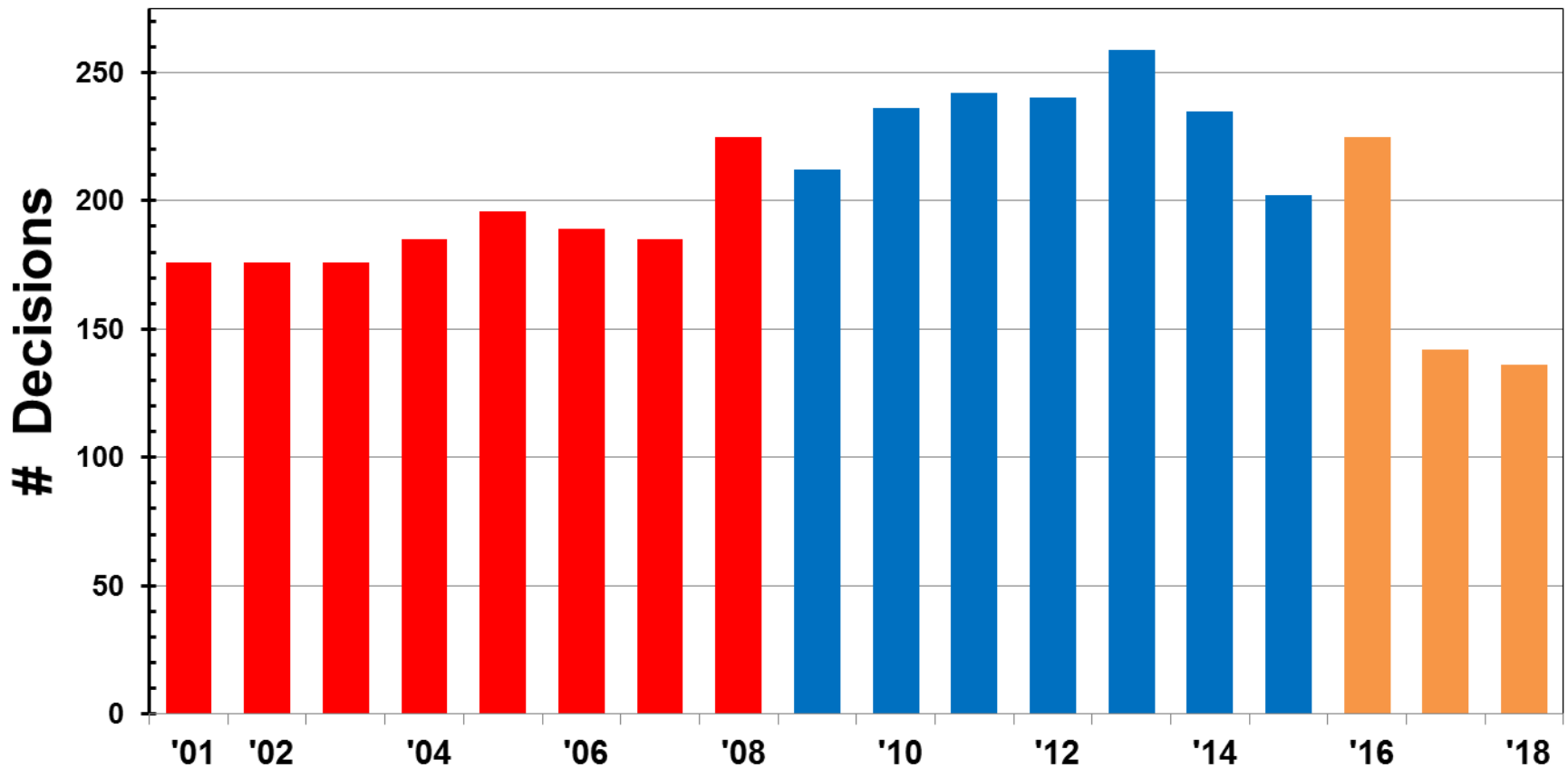


Source: Vincent M. Bonventre, Albany Law School updated 8/2019

# Court of Appeals

## Total Appeals Decided

*Kaye* vs. *Lippman* vs. *DiFiore* Eras

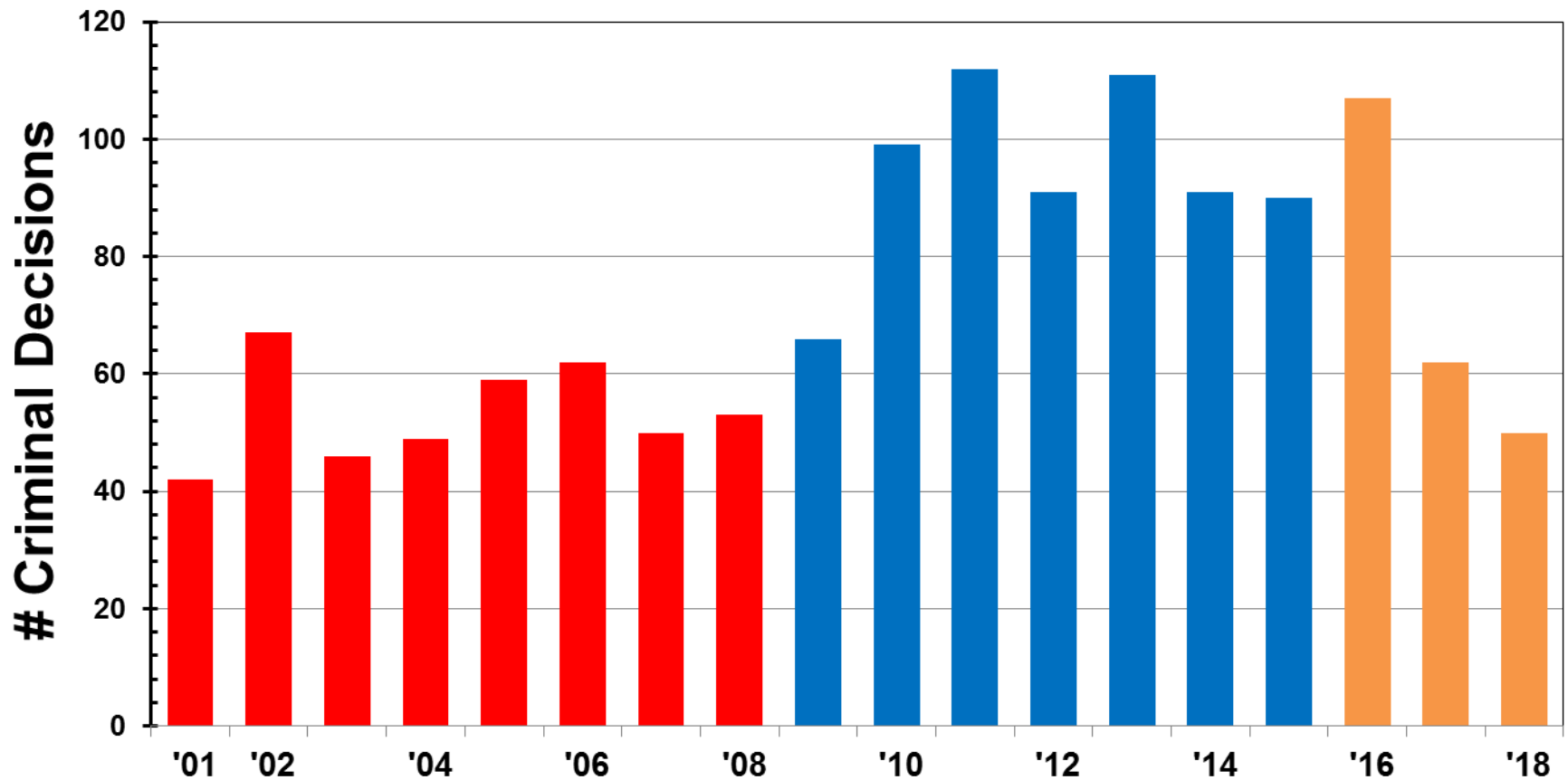


**Year (Annual Decisions)**

Source: Vincent M. Bonventre, Albany Law School updated 8/2019

# Court of Appeals Criminal Appeals Decided

*Kaye* vs. *Lippman* vs. *DiFiore* Eras



**Year (Criminal Decisions)**

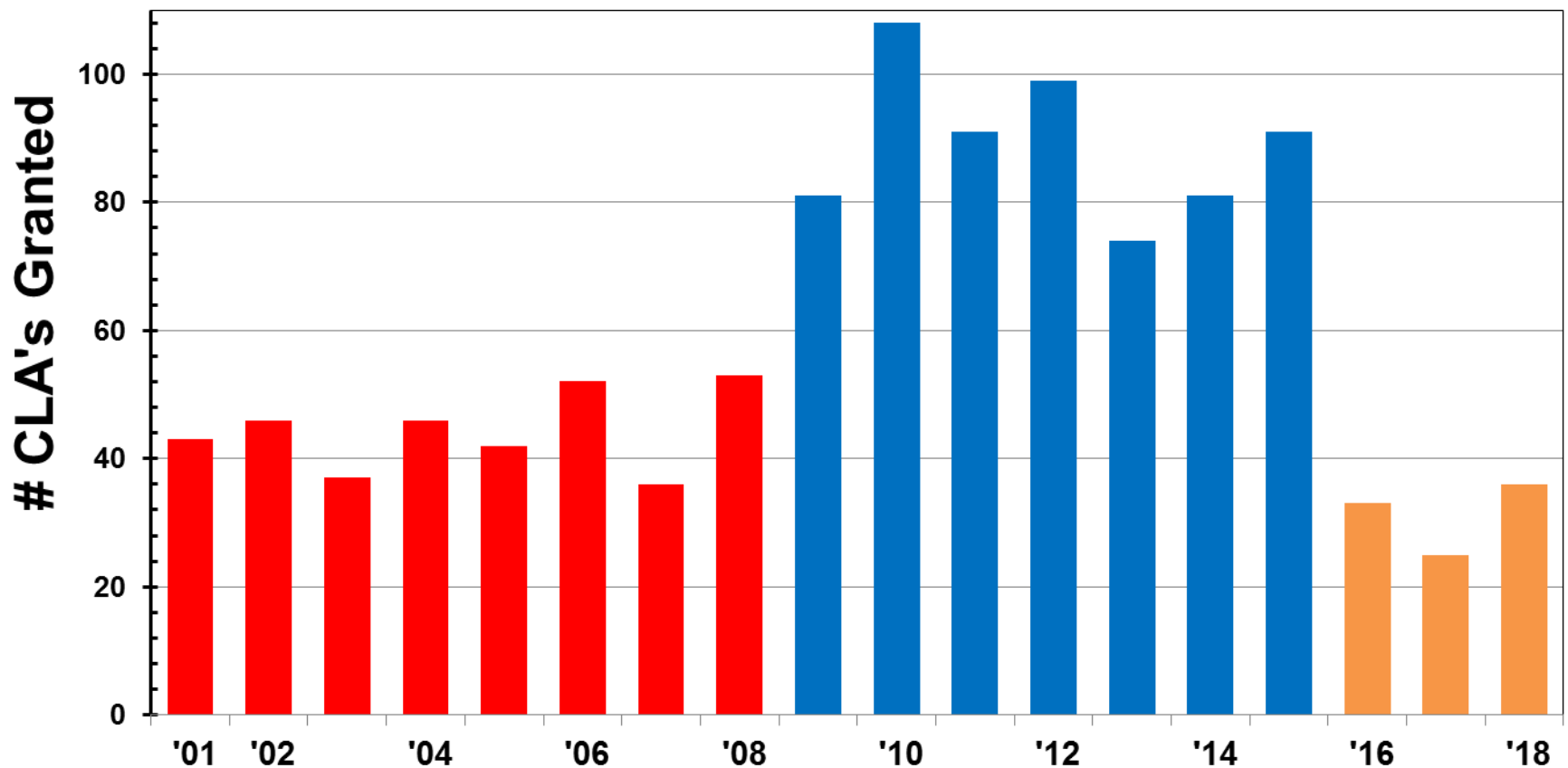
Source: Vincent M. Bonventre, Albany Law School updated 8/2019



# Court of Appeals

## Criminal Appeals Granted

*Kaye* vs. *Lippman* vs. *DiFiore* Eras

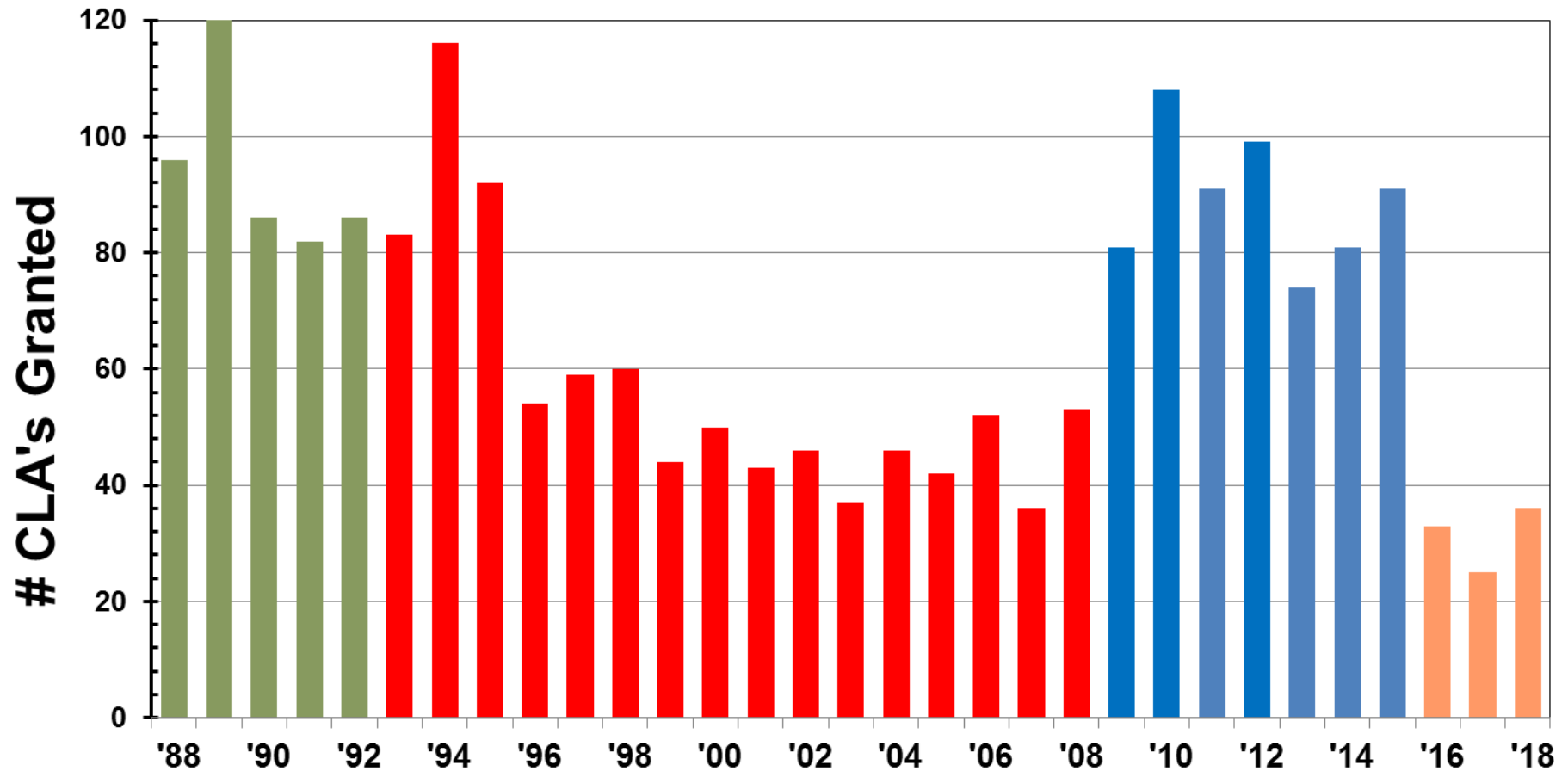


Year (*CLA's Granted*)

Source: Vincent M. Bonventre, Albany Law School updated 8/2019

# Court of Appeals Criminal Appeals Granted

*Wachtler* vs. *Kaye* vs. *Lippman* vs. *Early DiFiore* Eras



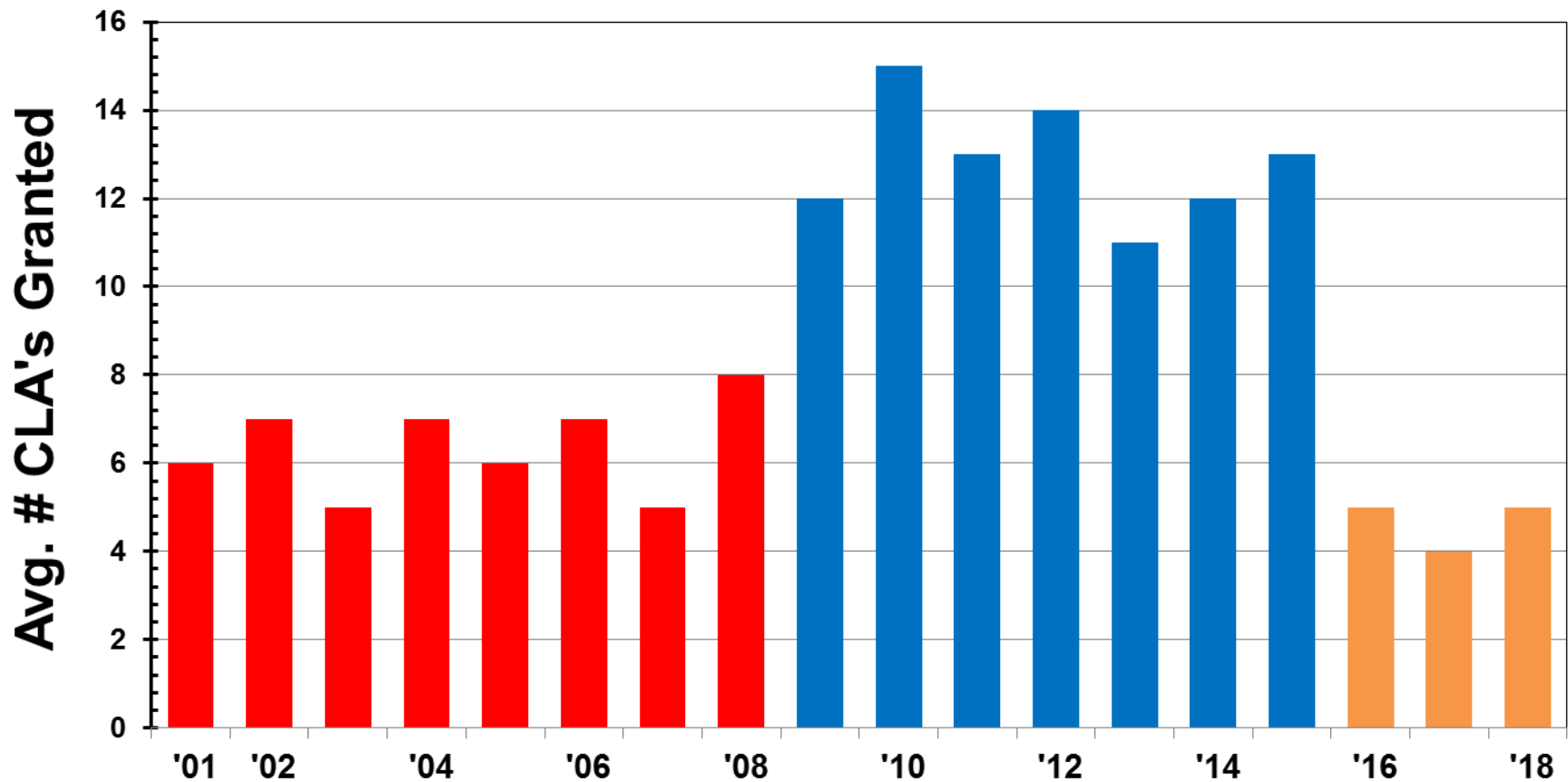
**Year** (*Annual CLA's granted*)

Source: Vincent M. Bonventre, Albany Law School updated 2/2019

# Court of Appeals

## Average CLA's Granted Per Judge

*Kaye* vs. *Lippman* vs. *DiFiore* Eras



Year (Avg. CLA's Granted)

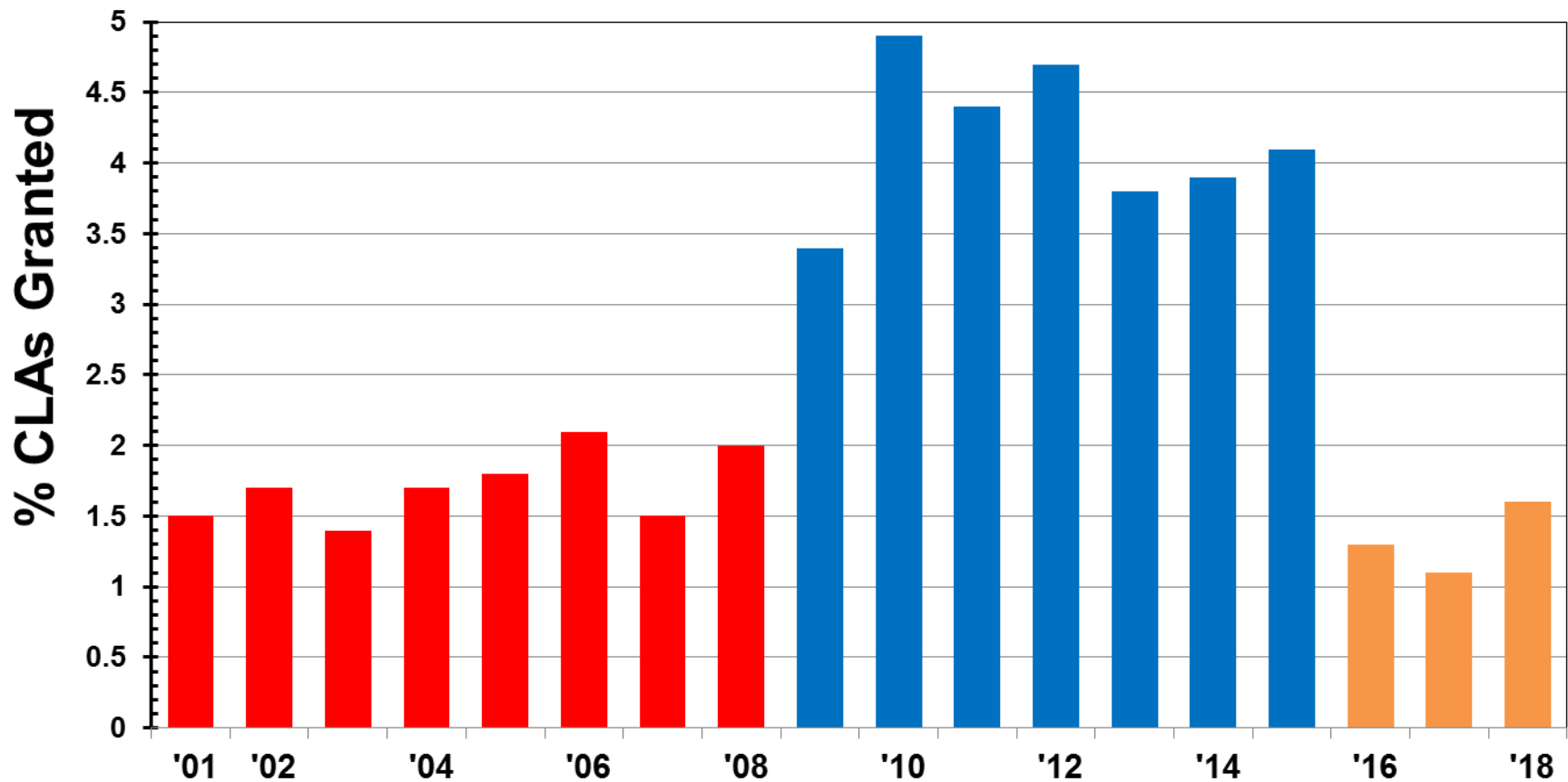
Source: Vincent M. Bonventre, Albany Law School updated 8/2019



# Court of Appeals

## % Criminal Appeals Granted

*Kaye* vs. *Lippman* vs. *DiFiore* Eras



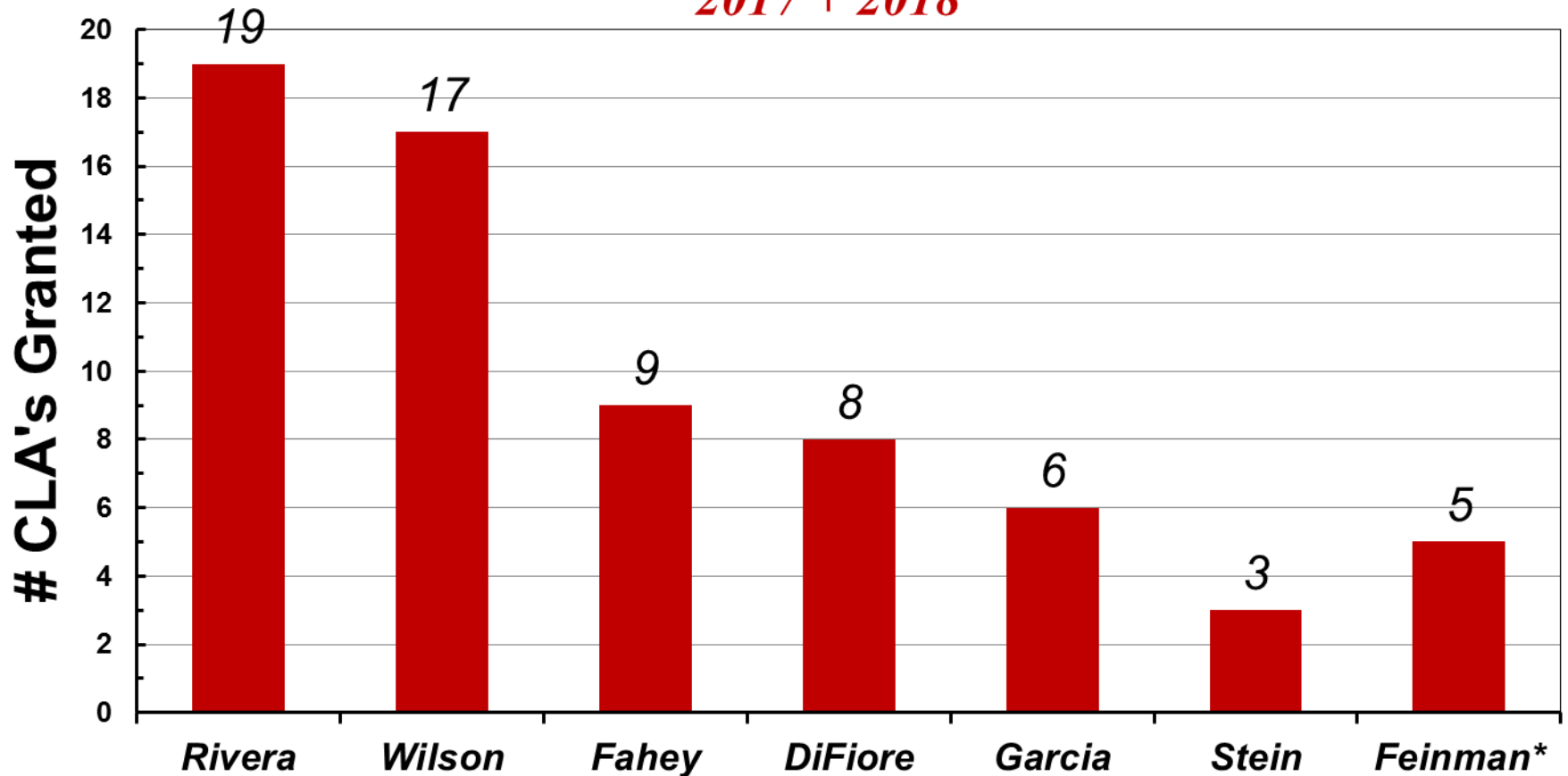
**Year (% CLAs Granted)**

Source: Vincent M. Bonventre, Albany Law School updated 8/2019

# DiFiore Court

## # CLA's Granted by Judge

*2017 + 2018*



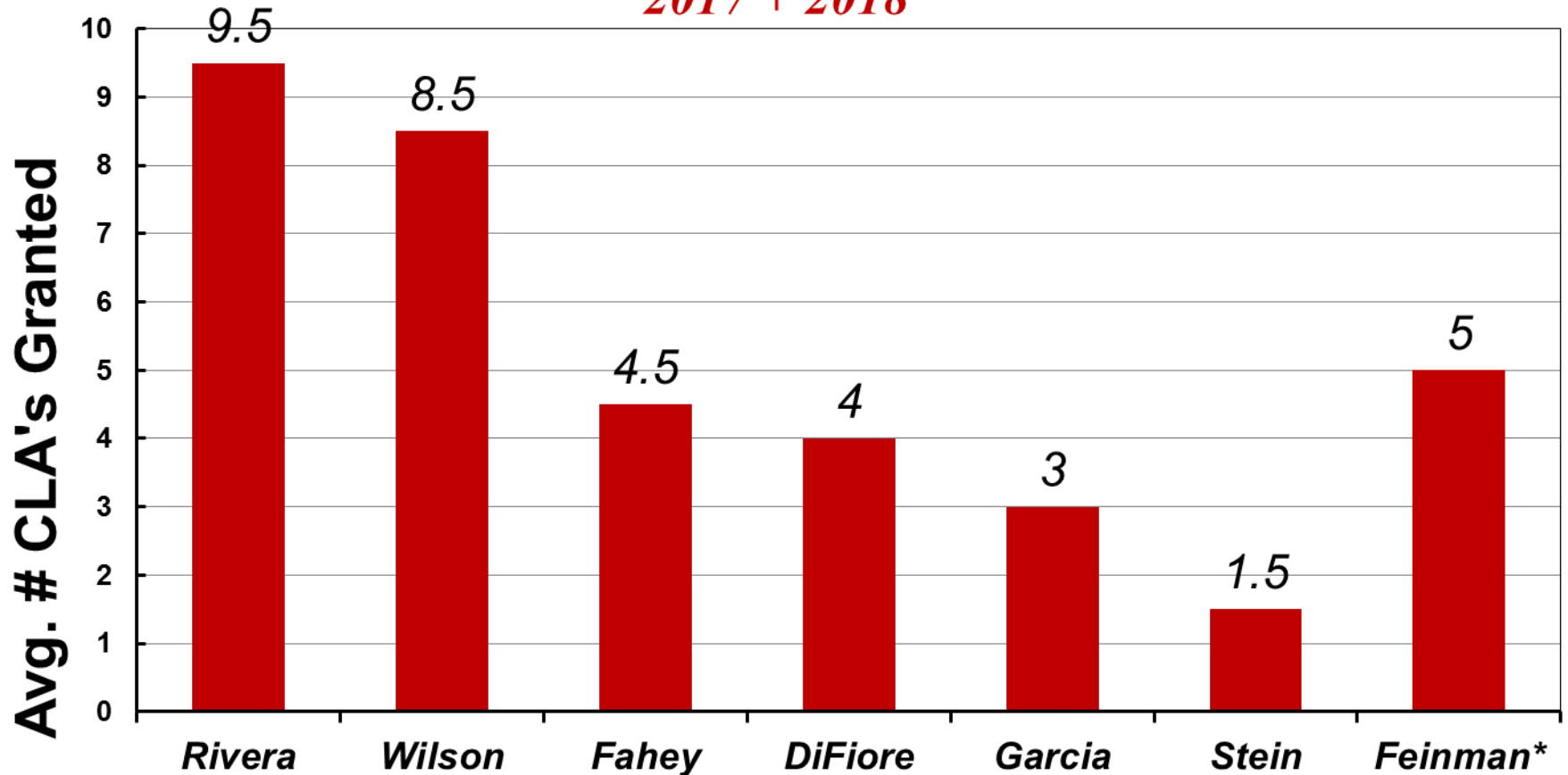
**Judge** (# CLA's Granted)

Source: Vincent M. Bonventre, Albany Law School 8/2019

# DiFiore Court

## Average CLA's Granted by Judge

*2017 + 2018*



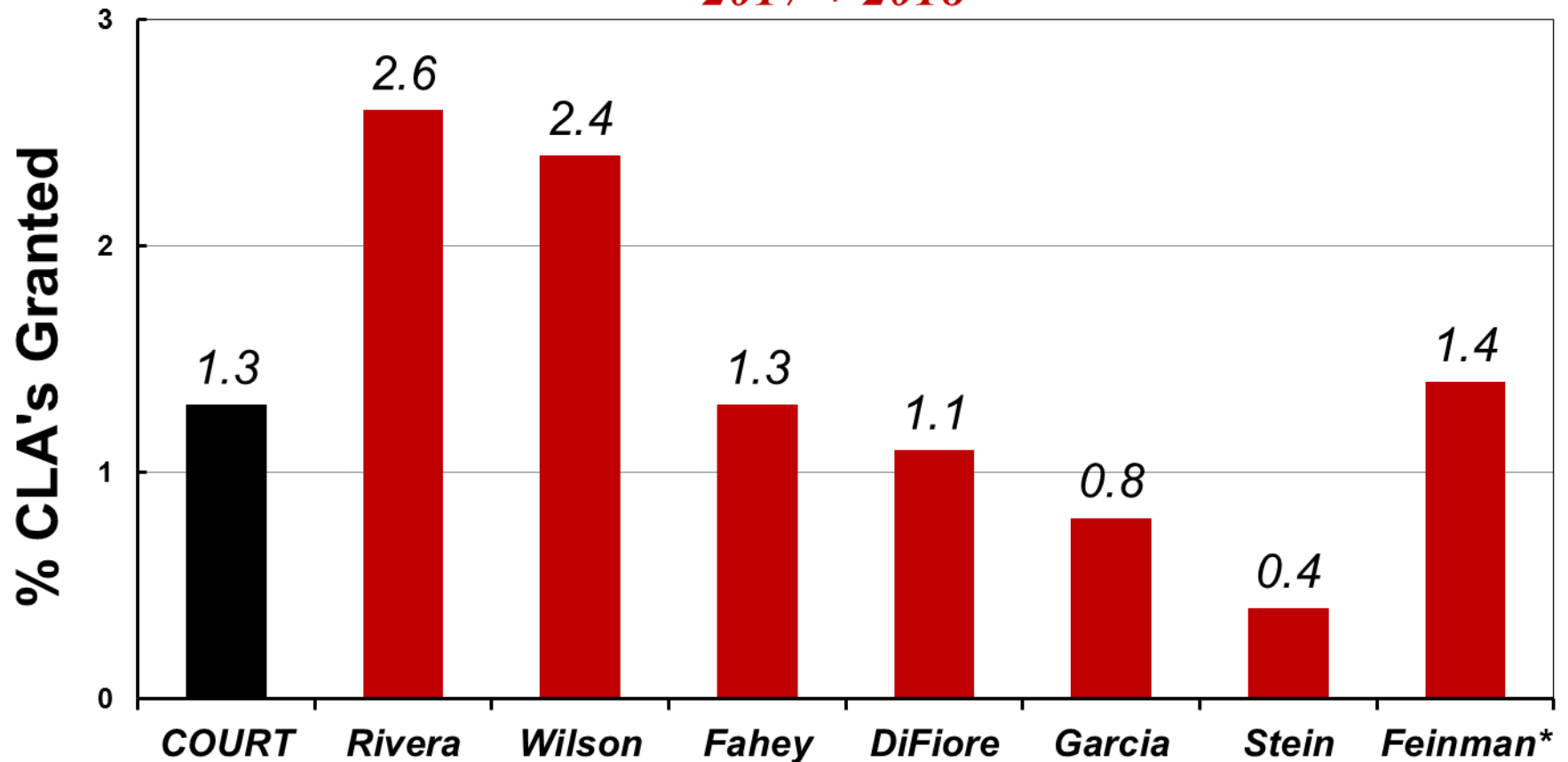
**Judge** (Avg. # CLA's Granted)

Source: Vincent M. Bonventre, Albany Law School 8/2019

# DiFiore Court

## % CLA's Granted by Judge

*2017 + 2018*



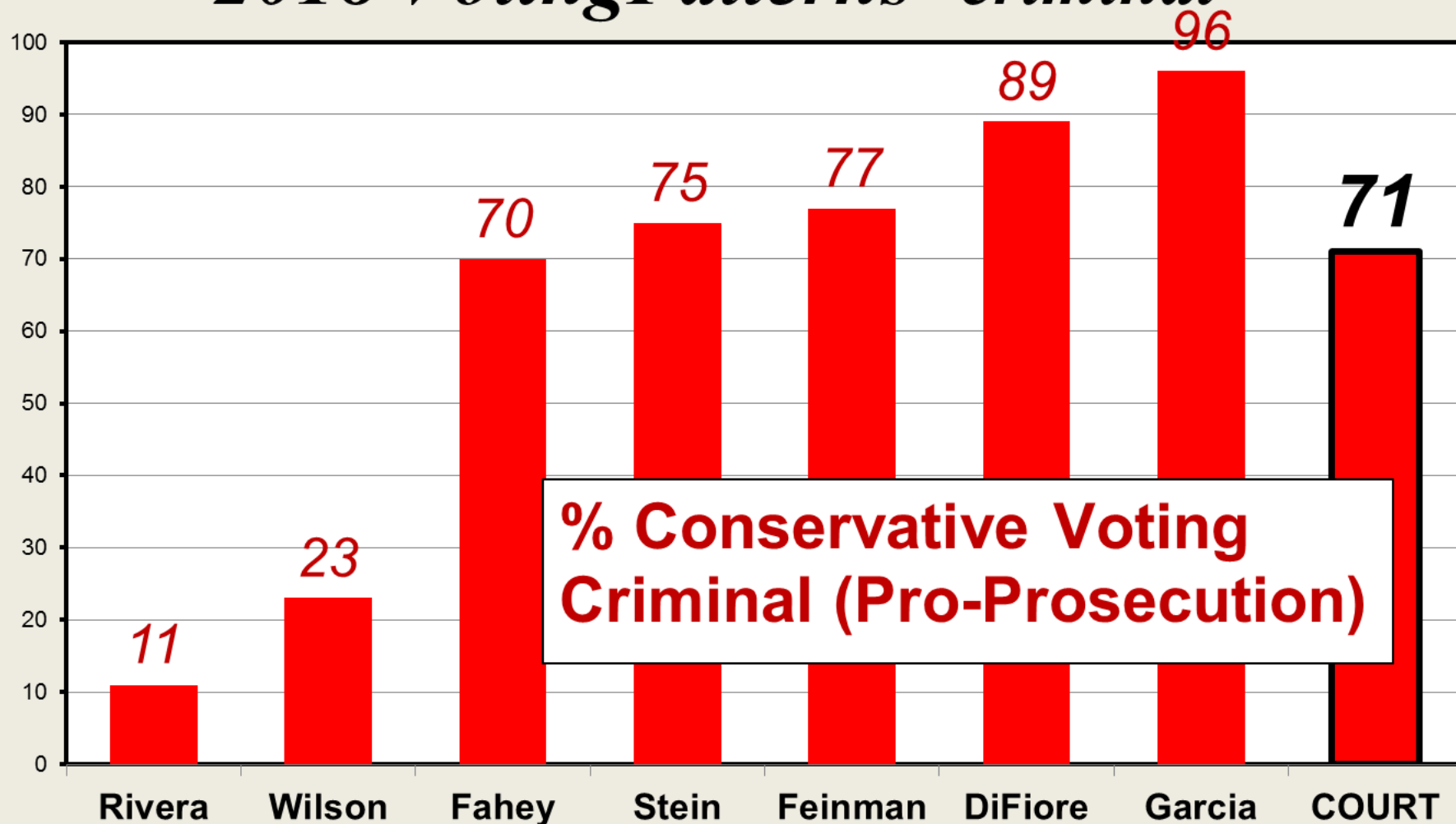
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# DiFiore Court

## *2018 Voting Patterns--criminal*

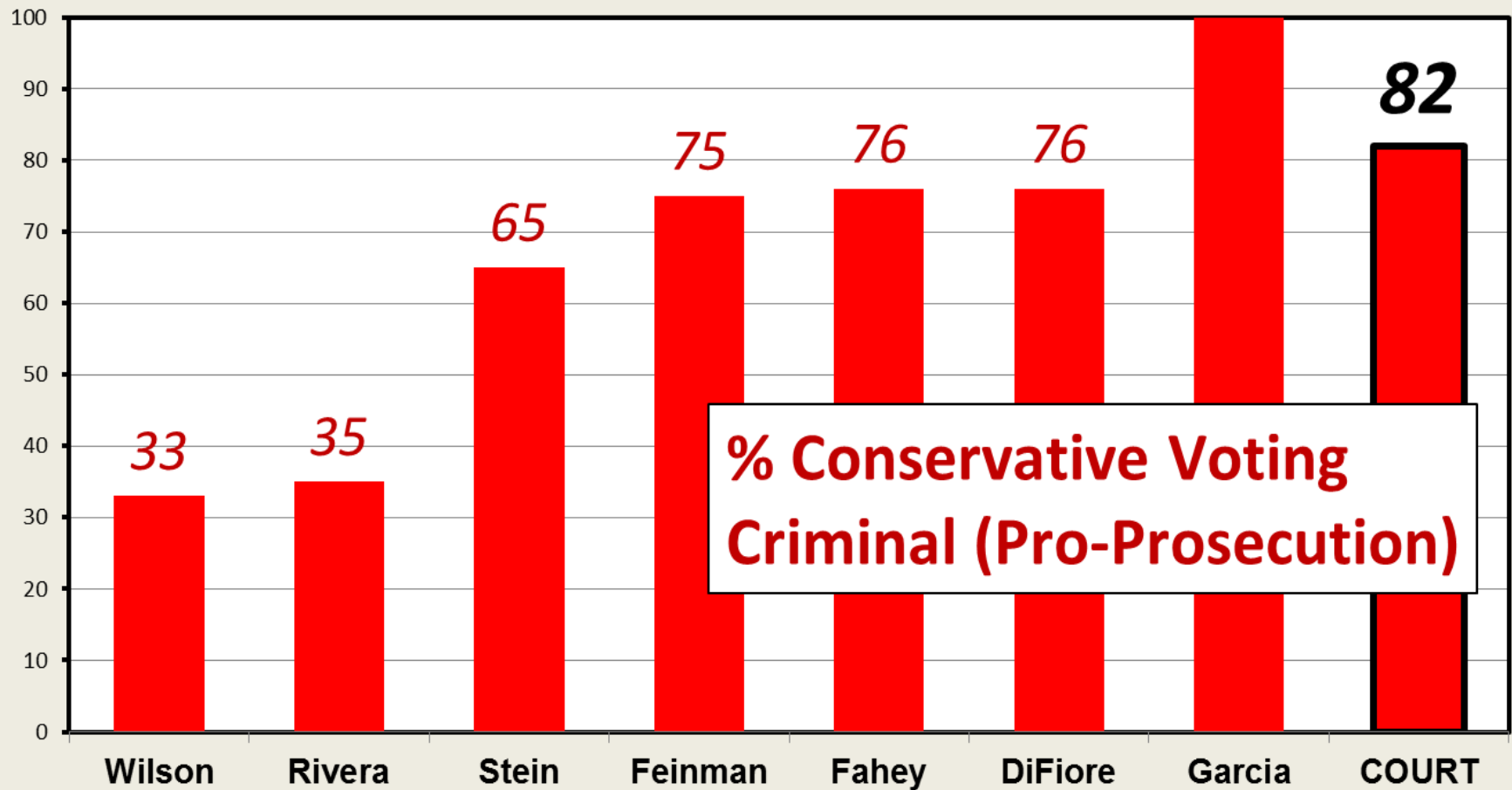


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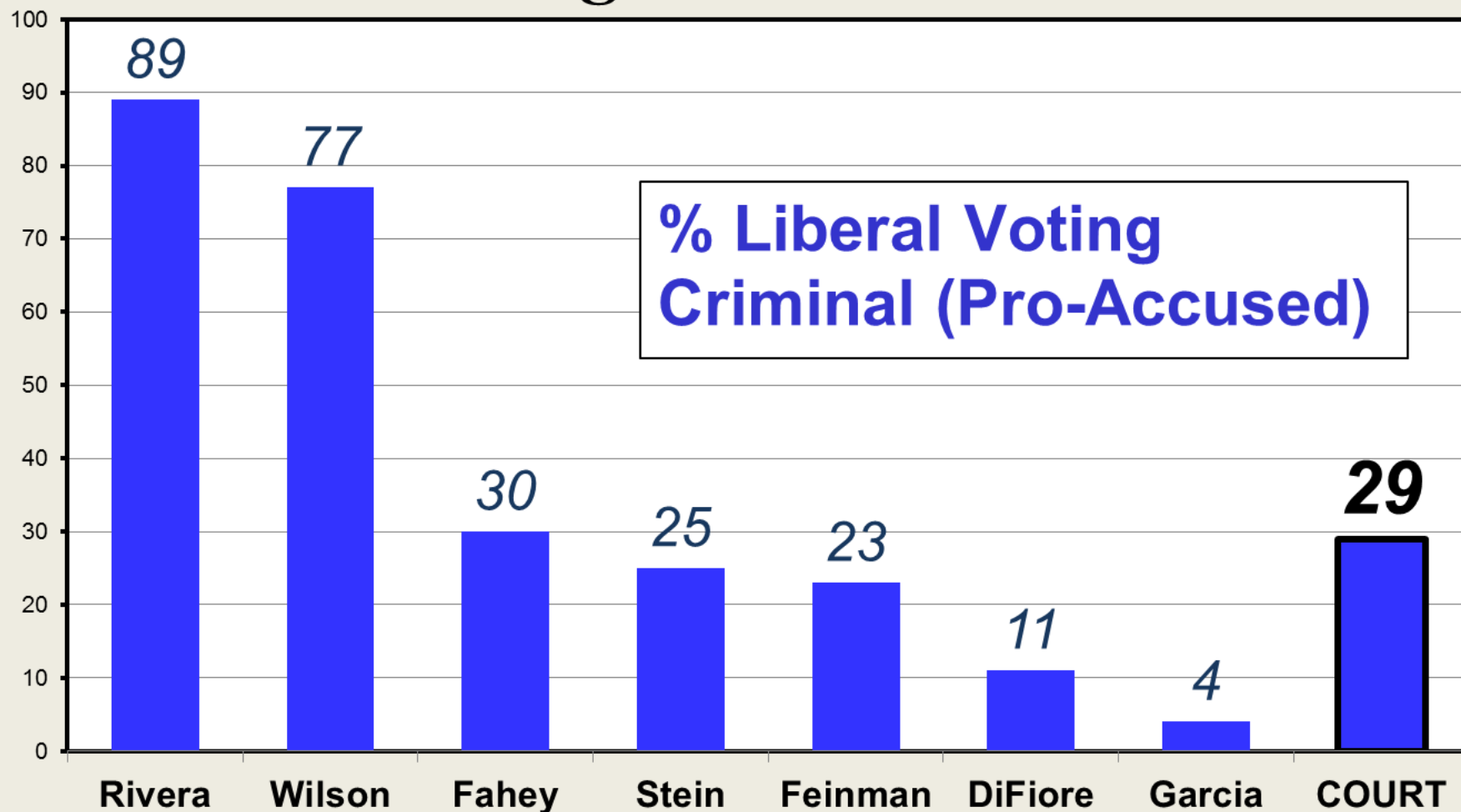


**Judges** (% Criminal Appeal Conservative Voting)

Source: Vincent M. Bonventre, Albany Law School 3/2018

# DiFiore Court

## *2018 Voting Patterns--criminal*

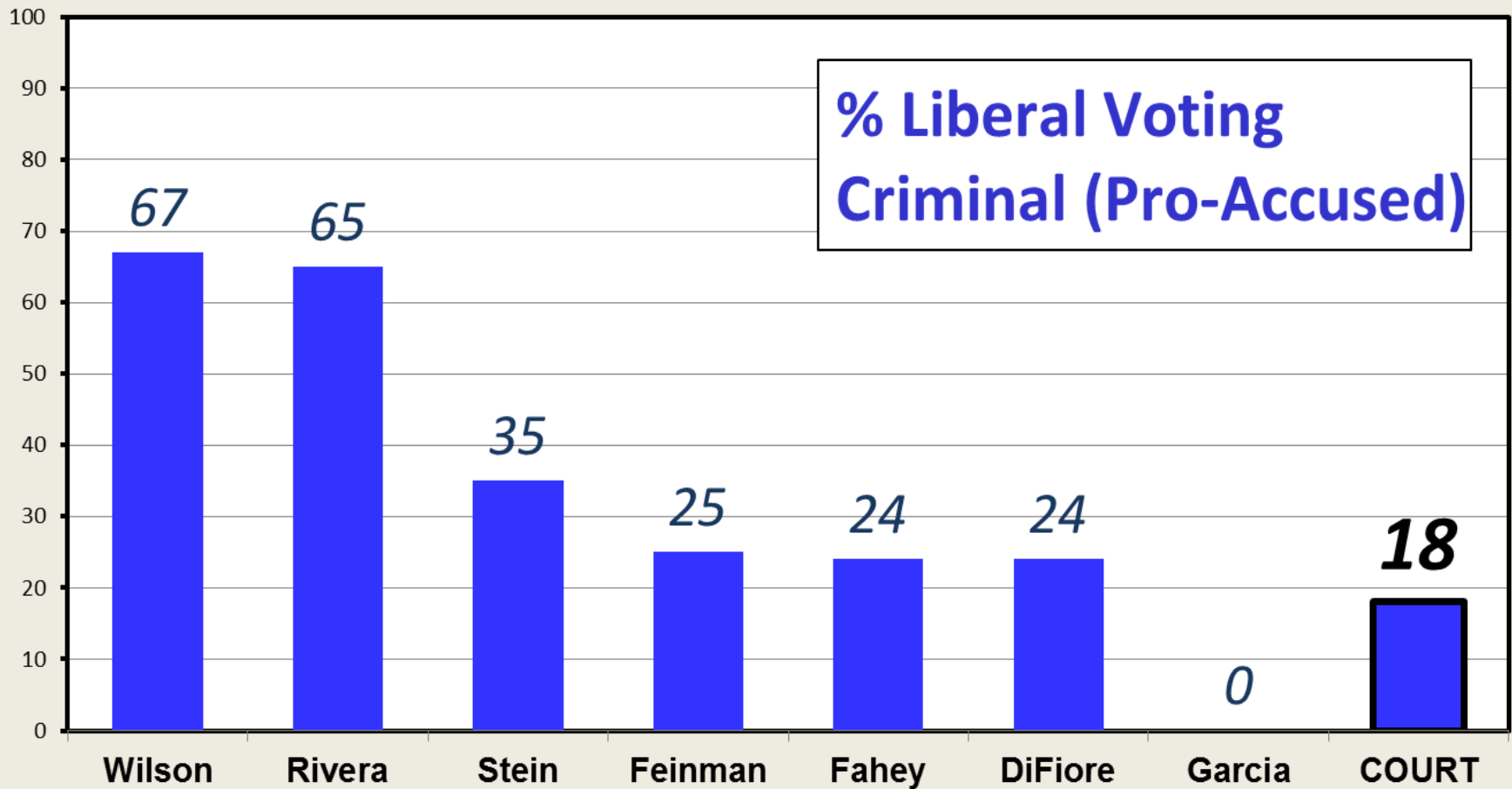


**Judges** (% Criminal Appeal Liberal Voting [28 div. decisions])

Source: Vincent M. Bonventre, Albany Law School 3/2019

# DiFiore Court

## *2017 Voting Patterns--criminal*



**Judges** (% Criminal Appeal Liberal Voting)

Source: Vincent M. Bonventre, Albany Law School 3/2018

# The Main Issue

“ $\Sigma_n$ -free and  $G$ -contractible” only says that, for  $\Gamma \leq G \times \Sigma_n$ ,

$$\mathcal{O}(n)^\Gamma \simeq \begin{cases} * & \Gamma = H \leq G \\ \emptyset & \Gamma \cap \Sigma_n \neq \{e\} \end{cases}$$

Doesn't say what happens if  $\Gamma \cap \Sigma_n = \{e\}$  unless  $\Gamma = H$ .



# CRIM DiFiore Ct 2018

Date/Case	Ct	PiF	R	S	Fa	G	W	Fe
2/13 <sup>dangerous knife</sup> Edward/ McCain	Mem C 6-1	C	C	(entry) (C)	C	C	(entry) L	C
2/15 <sup>conspir/gang</sup> Reyes	Mem L 5-2	L	L	L	L	C	L	C
<sup>speedy trial</sup> Wiggins	L 4-3	C	L	L	(L)	C	L	C
3/22 <sup>no justification charge</sup> Sanchez	Mem C 5-2	C	L	C	C	C	L	C
3/27 <sup>no lesser incl ok</sup> Boyd	Mem C 5-2	C	L	C	C	C	L	C
<sup>P no DeBour viol</sup> Perez	Mem C 5-2	C	L	C	C	C	L	C
4/3 <sup>pro se denied</sup> Silburn	C 5-2	(C)	L	C	C	C	L	C
4/26 <sup>pro se denied</sup> Britton	Mem C 6-1	C	L	C	C	C	C	C
5/1 <sup>DeBour</sup> Gates	Mem L 6-1	L	L	L	L	C	L	L

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## *The Tradition of a Great Court*

NYSBA CLE

August 20, 2019

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*Introduction/Overview*

*First: The DiFiore Court / The Judges*

*Some Recent Observations*

*Then: The Tradition*

*Great Judges*

*Their Decisions and Opinions*

*Concluding Observations*



# Hiram Denio

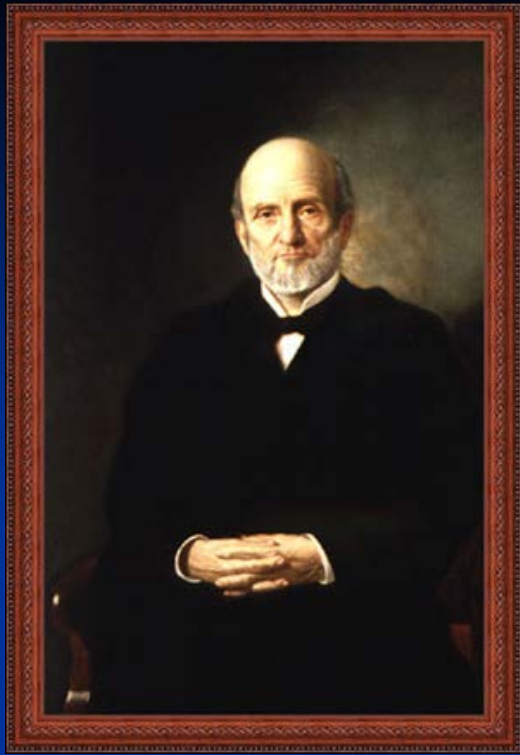
Born: Rome, NY

Court of Appeals 1853-1865

Chief Judge 1856-57, 1862-65

*Lemmon v. People* (1860)

*[S]laves introduced into the territory of this State  
[are] free.*



# Robert Earl

Born: Herkimer, NY

Court of Appeals 1870, 1870-75\*, 1875-94

Chief Judge 1870, 1892

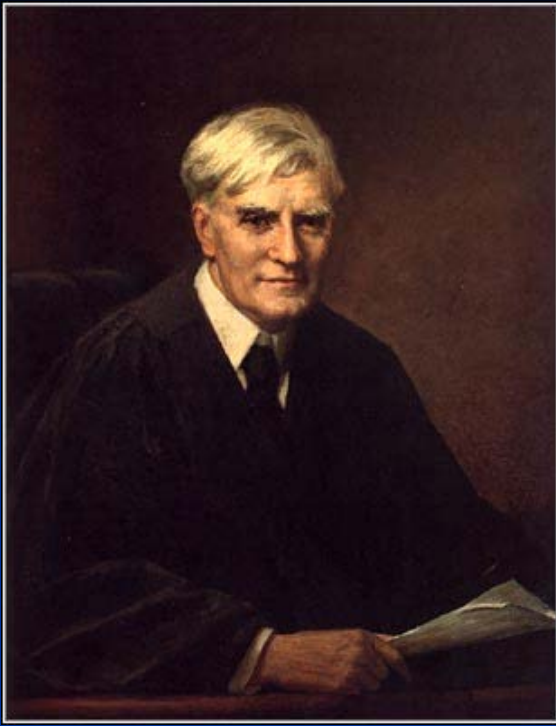
## *Matter of Jacobs* (1885)

*[O]ne may be deprived of his liberty and his constitutional rights thereto violated without the actual imprisonment or restraint of his person.*

## *Riggs v. Palmer* (1889)

*No one shall be permitted to profit by his own fraud.*





# Benjamin N. Cardozo

Born: New York City, NY

Court of Appeals 1914-32

Chief Judge 1927-32

*The Nature of the Judicial Process* (1921)

*There is in each of us a stream of tendency...Judges cannot escape that current any more than other mortals.*

*[T]he duty of a judge...must balance all his ingredients...as wisely as he can.*





# Cuthbert W. Pound

Born: Lockport, NY

Court of Appeals 1915-34

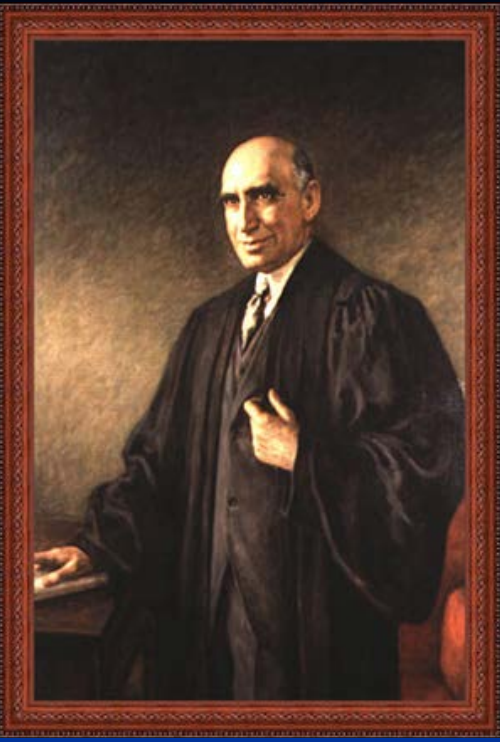
Chief Judge 1932-34

*People v. Gitlow* (1922) [Dissent]

*[T]he rights of the best of men are secure only as the rights of the vilest and most abhorrent are protected.*

*People v. Nebbia* (1933)

*[C]onstitutional law is a progressive science.*



# Irving Lehman

Born: New York City, NY

Court of Appeals 1924-45

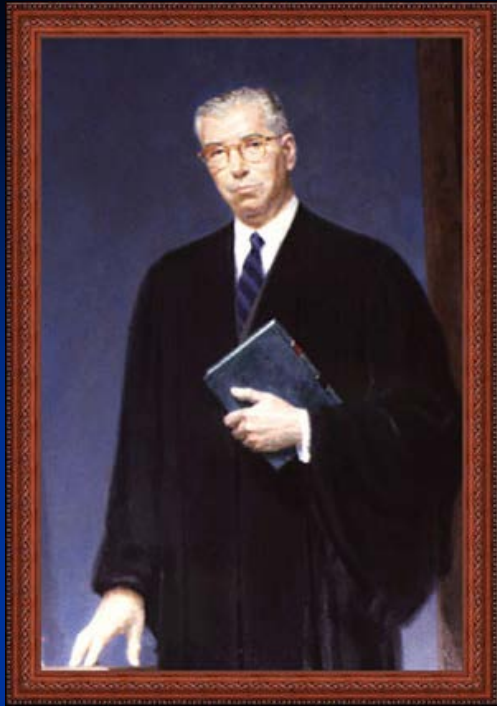
Chief Judge 1940-45

## *Addresses on the Judicial Process*

*The thoughtful judge learns soon ...that exact justice cannot be done in all cases through the application of general rules.*

***People v. Barber** (1943)*

*This Court is bound to exercise independent judgment.*



# Stanley H. Fuld

Born: New York City, NY

Court of Appeals 1946-73

Chief Judge 1967-73

## *People v. Donovan* (1963)

*[W]e find it unnecessary to consider whether or not the Supreme Court would regard [it] a violation.*

## *Dorsey v. Stuyvesant Town Corp.* (1949)

[Dissent]

*The equal protection clause of the Constitution of New York State is at least as broad in coverage as its Federal counterpart.*



# Lawrence H. Cooke

Born: Monticello, NY

Court of Appeals 1975-84

Chief Judge 1979-84

## *People v. Isaacson* (1978)

*[T]his court would be paying mere lip service to due process if it sanctioned a prosecution [despite] 'reprehensible' police action.*

## *People v. Rogers* (1979)

*[O]nce an attorney has entered the proceeding...a defendant in custody may not be further interrogated in the absence of counsel.*



# Judith S. Kaye

Born: Monticello, NY

Court of Appeals 1983-2008

Chief Judge 1993-2008

*People v. Scott* (1992) [Concurrence]

*[H]owever much we might consider ourselves dispensing justice strictly according to formula, at some point the decisions we make must come down to judgments.*

*Hernandez v. Robles* (2006) [Dissent]

*[F]undamental rights are fundamental rights. They are not defined in terms of who is entitled to exercise them.*





# Jonathan Lippman

Born: New York City, NY

Court of Appeals 2009-15

Chief Judge 2009-15

## *People v. Weaver* (2009)

*One need only consider what the police may learn, practically effortlessly, from planting a single [GPS] device.*

## *People v. Thomas* (2012)

*[N]ot all deception of a suspect is coercive, but in extreme forms it may be.*



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# Concluding Observations

## The DiFiore Court





# SARATOGA

## Remember

### Travers Stakes, This Saturday



The  
End

*Thank You!*

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No More



# Early DiFiore Court

## Some Notable Decisions

### DiFiore Opinions:



#### ■ People v. Sean John

4[DiFiore]- 3[Pigott, Abdus-Salaam, Garcia]

- *Right to confront DNA testing analyst*

#### ■ O'Brien v. Port Authority

4[DiFiore]- 3[Rivera, Fahey, Wilson]

- *Rev'd summary judgement for injured worker under Scaffold Law*

#### ■ Kimmel v. State      4[DiFiore]- 2[Garcia, Stein]

- *Atty Fees allowed vs State under EAJA*

#### ■ People v. Wiggins      4[Fahey]- 3[**DiFiore**, Garcia, Feinman]

- *Rev'd AD finding of good faith for 6 year pre-trial detention delay*



# Early DiFiore Court

## Some Notable Decisions

### Rivera Opinions:



- **M/O Jamal S.**  
4[Pigott]- 3[Rivera, DiFiore, Stein]
  - *Precinct search of juvenile stopped for bicycle infraction was justified*
- **People v. McCullough**  
4[Mem] - 3[Rivera, Abdus-Salaam, Fahey]
  - *Disallowing expert on ID evidence not abuse of discretion*
- **People v. Siverston** 4[Mem] -2[Rivera, Stein]
  - *Exigency for warrantless entry and search*
- **Myers v. Schneiderman** 5[Per Curiam]/ (4 -1[Rivera])
  - *No right to aid-in-dying/ assisted suicide*

# Early DiFiore Court

## Some Notable Decisions

### Stein Opinions:



- **Aoki v. Aoki**, 5[Pigott] - 2[Rivera, Stein]
  - *Partial releases of testamentary powers of appointment upheld [?]*
- **Highbridge Brdwy v. Schenectady** 6[DiFiore] - 1[Stein]
  - *Annual petitions unnecessary during pendency of initial petition for ten-year business investment exemption [?]*
- **Hain v. Jamison**, 7[Stein] – 0
  - *Proximate cause resulting from loose calf*
- **People v. Valentin** 4[Abdus-Salaam] – 3[Rivera, Stein, Wilson]
  - *Initial aggressor instruction okay*
- **People v. Hardee** 4[Mem] – 3[Rivera, Stein, Wilson]
  - *Reasonableness of protective auto search is mixed question by AD*

# Early DiFiore Court

## Some Notable Decisions



### Fahey Opinions:

#### ■ **People v. Anthony Badalamenti**

4[Fahey] – 3[Rivera, Abdus-Salaam, Stein]

- *Vicarious consent to eavesdrop for abused child*

#### ■ **Yaniveth R. v. LTD Realty, 6[Pigott] - 1[Fahey]**

- *Child does not “reside” with grandparent for protection of lead abatement legislation*

#### ■ **Kent v. Lefkowitz, 5[DiFiore] - 1[Fahey]**

- *PERB dismissal of improper practice charge upheld*

#### ■ **People v. Boone, 5[Fahey] - 2[Stein, Garcia]**

- *Cross-racial ID charge mandatory if requested*

# Early DiFiore Court

## Some Notable Decisions



### Garcia Opinions:

#### ■ People v. Sean John

4[DiFiore] - 3[Pigott, Abdus-Salaam, Garcia]

- *Right to confront DNA testing analyst*

#### ■ People v. Elliott Parrilla, 7[Garcia] – 0

- *Strict liability for criminal possession of “gravity” knife [!]*

#### ■ Obey v. NYC, NYCTA, 6[Mem/Entry] - 1[Garcia]

- *Sufficient evidence of NYCTA negligence to uphold verdict*

#### ■ Kimmel v. State, 4[DiFiore]- 2[Garcia, Stein]

- *Atty Fees allowed vs State under EAJA*

#### ■ B.F. v. Reproductive Medicine, 5[DiFiore]- 1[Garcia]

- *SOL runs from “wrongful birth” not act of medical negligence*



# Early DiFiore Court

## Some Notable Decisions



### Wilson Opinions:

- **People v. Charles Smith**, 6[Fahey] - 1[Wilson]
  - *“Display” firearm for aggravated robbery*
- **Facebook v. NY Cnty. DA**, 5[Stein] - 1[Wilson]
  - *Denial to quash warrants not appealable under fed or state law*
- **NYC v. NYS Nurses Assn.**, 5[Wilson] - 1[Garcia]
  - *City required to provide Assn. w/ info on nurse discipline*
- **People v. Viruet**, 4[Garcia] - 2[Stein, Wilson]
  - *Denial of adverse inference charge harmless error*
- **Chauca v. Abraham**, 6[Garcia] - 1[Wilson]
  - *C-L punitive standard/ not automatic under NYC Hum. Rts. Law*

# Early DiFiore Court

## Some Notable Decisions

### Feinman Opinions:



- **Rodriguez v. NYC**, 4[Feinman] - 3[DiFiore, Stein, Garcia]
  - *Partial summary judgement permitted for personal injury plaintiff*
  
- **Congel v. Maltifano**, 5[Fahey] - 2[DiFiore, Feinman]
  - *“minority discount” applies to evaluate wrongfully dissolving partner’s interest*  
[?]

# Early DiFiore Court

## Some Notable Decisions

### Pigott Opinions:



#### ■ Wally v. NYC HHC

4[Pigott]- 3[Rivera, Abdus-Salaam, Fahey]

■ *Late notice of claim disallowed*

#### ■ Matter of Brooke S.B.

5[Abdus-Salaam] - 1[Pigott] - 0

■ *Partner of biological mother, has standing for custody or visitation*

#### ■ Turturro v. NYC

6[Fahey]- 1[Pigott]

■ *Municipal liability where speeding auto hit 12 year old on bicycle*



# Early DiFiore Court

## Some Notable Decisions



### Abdus-Salaam

#### ■ Wally v. NYC HHC

4[Pigott] – 3[Abdus-Salaam, Rivera, Fahey]

■ *Late notice of claim disallowed*

#### ■ Matter of Brooke S.B.

5[Abdus-Salaam] - 1[Pigott] - 0

■ *Partner of biological mother, has standing for custody or visitation*

#### ■ People v. Bridgeforth

6[Abdus-Salaam] - 1[Garcia] - 0

■ *Skin color is a Batson classification under NY Law*

# Early DiFiore Court

## Some Notable Decisions

### Unsigned Majority Opinions:



#### ■ Sherman v. NY Thruway Authority

4[Mem] - 3[Rivera, Abdus-Salaam, Fahey]

■ *Storm still-in-progress defeats slip & fall*

#### ■ People v. McCullough

4[Mem] - 3[Rivera, Abdus-Salaam, Fahey]

■ *App Div erred in reversing on uncorroborated challenged ID evidence*

#### ■ PM/O Yoga Vida v. Comm'r of Labor

4[Mem] - 2[Fahey, Rivera]

■ *Non-staff instructors not employees for unemployment contribution*

# Early DiFiore Court

## Some Notable Decisions



## Unsigned Majority Opinions:

### ■ Pullman v. Silvermann

4[Mem] - 3[Stein, Rivera, Abdus-Salaam]

- *Rev'd App Div summary judgement for physician in med. mal. suit*

### ■ Obey v. NYC, NYC Transit Auth.

6[Mem/Entry] - 1[Garcia]

- *Sufficient evidence of NYCTA negligence to uphold verdict*

### ■ People v. Siverston (twice argued)

4[Mem] - 2[Rivera, Stein]

- *Exigency for warrantless entry and search*

### ■ People v. Hardee 4[Mem] – 3[Rivera, Stein, Wilson]

- *Reasonableness of protective auto search is mixed question by AD*

# Early DiFiore Court



## Some Notable Decisions Unsigned & Cryptic:

### ■ People v. Maldonado

5[Mem] - 1[Rivera (entry)] - 0

■ *Rev'd App Div & ordered new trial, on ineffective counsel*

*We hold that counsel's overall performance fell below the "meaningful representation" standard and defendant is entitled to a new trial (see People v Berroa, 99 NY3d 134 [2002]; see also People v Baldi, 54 NY2d 134, 147 [1981]).* ???

*Judge Rivera concurs in the result.* ???