Granting Less

• The 12th Annual

Symposium:

NY's Court of

CENTER FOR JUDICIAL PROCESS: RECENT TITLES

The Chief Justices'

Marriage to Stare

· Judge Cooke: The

on the Law

An Advocate

•

Man and His Impact

Cuthbert W. Pound:

Trump

Decisis

Chief Judge Cooke

Reconsidering the Right to Die

Appeals in the Era of

#### **New York Court Watcher** Research & Commentary on the Supreme Court, the New York Court of Appeals, More About NYCW Author: Vin Bonventre @BonventreVin **Center for Judicial Process** Int'l Law Studies Alb L Rev Home State Const'l Comm & Cooke Symposia THE SEVEN: About the Court, By the Court - 2016 Cooke Symposium 2018 Cooke Symposium: Right to Die SEARCH NYCW THURSDAY, SEPTEMBER 6, 2018 Search NYCOA: (Part 2: Unsigned 4-3) [Back to] June 14 Hand Downs INDEX **Dissents**, **Disappointments**, and **Open** Questions • 1st Amendment (Reviewing the Supreme Court's past term and developments--yes, and 2nd Circuit enjoying the Saratoga meet -- monopolized my time for a while. Back to the New • 8th Amendment York Court.) VIN BONVENTRE • 9th Circuit Vincent Martin Judges who are proud of their opinions sign them. • Abdus-Bonventre is a frequent And when they don't? Salaam\_Sheila lecturer and widely · Abraham Henry J Let's return to that June 14 set of decisions quoted commentator on · Abrahamson\_Shirle courts, judges, and by New York's highest Court. To be sure, y public law. (More.) the Court of Appeals' entire past year Actual Innocence cannot be reduced to one day. But that day's Affirmative Action Follow on *Twitter*: particular collection of hand downs seems @BonventreVin; • Affordable Care quite reflective of the Court's recent LinkedIn Act behavior. Indeed, other Court watchers have noticed as well. · Alito Samuel NEW YORK COURT • Anti-terrorism WATCHER: RECENT In Part 1, we saw how the Court in People v. Tiger relied on a federal Supreme TITLES · Auto Searches Court decision -- a much criticized one, including a dreadful concurring • Bansal Preeta opinion--to determine a purely state statutory question. Moreover, in doing so, NYCOA: Criminal Appeals (Part 2)--• BBQ Trip it made credible claims of actual innocence much more difficult to raise. In Annual Totals fact, as the dissenters pointed out, the decision in Tiger was especially • Benjamin\_Liz Through the Years distressing because there was very good reason to believe that the defendant • Bharara Preet NYCOA: Criminal was in fact innocent -- as a subsequent civil trial found him. · Blackmun Harry Appeals--Who's Granting · Brandeis Louis & Who's

- Breitel Charles
- Brennan\_William
- Breyer\_Stephen
- Bruno Joe
- Burger Warren
- · Bus Sweeps
- California Chrome
- Campaign Finance
- Canine Sniffs
- Cardona\_Anthony
- · Cardozo Benjamin
- Charleston Massacre
- Church and State
- Ciparick\_Carmen
- Civil Liability
- CN SupCt

http://www.newyorkcourtwatcher.com/2018/09/nycoa-part-2-unsigned-4-3-back-to-june.html

1/6

Here's another highlight--unfortunately noteworthy because so puzzling and, like *Tiger*, disconcerting: *People v. Thibodeau*. This decision was rendered in an unsigned memorandum, despite the deeply divided 4 to 3 vote, and despite the comprehensive and persuasive dissenting opinion about the newly discovered evidence of innocence.

This case, like the previously discussed *Tiger*, dealt with a convicted defendant who has insisted that he's actually innocent and involves subsequent evidence which, if true, proves that he is. Also, like *Tiger*, a majority of the Court denied the defendant's request for relief.

But unlike *Tiger*, the majority opinion in *Thibodeau* was contained in a memorandum which the author chose not to sign. Yes, an unsigned memorandum decision, even though the closeness and importance of the case triggered a 30 page, rigorously detailed dissenting opinion, joined by 3 of the Court's 7 Judges: signed by Judge Rivera and joined by Judges Wilson and Feinman.

In *Thibodeau*, the defendant was convicted of kidnapping someone whose body was never found, but who was presumed to have been murdered. In prison since 1995, and always claiming to be innocent, the defendant was now seeking to undo his conviction based on new evidence which was not available

### 2/25/2019

- · Coglianese Adam
- Compelling Interest
- Confirmation hearings
- Constitutional Law
- Contraceptive
  Coverage
- Cooke Symposium
- Cooke\_Lawrence
- Criminal Law
- CrimLvApps (NYCOA)
- · Cruel and Unusual
- Crummey\_Peter
- Cuomo\_Andrew
- Cuomo\_Mario
- Death Penalty
- DeBour
- Dianne Renwick
- Dicker\_Fred
- DiFiore\_Janet
- Discrimination
- Dissents
- Diversity
- DNA
- DOMA
- Dominguez\_Ramon
- Double Jeopardy
- Durham\_Christine
- Employment Law
- Environmental Law
- Equal Protection
- Executive Order
- Exonerations
- Fahey\_Eugene
- · Father's Day
- FBI
- Federalism
- Feinman\_Paul
- FISA Court
- Free Exercise of Religion
- Free Speech
- Freedom of the Press
- Fuld\_Stanley
- Fundamental Rights
- Funeral Protests
- Garcia\_Michael
- Garland\_Merrick
- Gay Rights
- Gender Equality
- Gerrymandering
- Ginsburg\_Ruth
  Bader

# New York Court Watcher: NYCOA: (Part 2: Unsigned 4-3) [Back to] June 14 Hand Downs

at the time of his original prosecution. The legal question in his request for post-conviction relief was whether there was "a probability that had such evidence been received at trial the verdict would have been more favorable to the defendant." [That's the language of the governing provision in NY's Criminal Procedure Law (§ 440.10 [1] [g]).]

The new evidence consisted of statements, allegedly made by three men, admitting that they abducted the victim, killed her, and disposed of her body. Additionally, there was testimony by several witnesses to these incriminating statements. There also were some documents consistent with the guilt of the three men and the innocence of the defendant.

Beyond all that, as stressed in the dissenting opinion, the prosecution's

trial evidence was not overwhelming. No physical or testimonial evidence at trial placed defendant at the [scene] at the time the victim disappeared, and no forensic evidence was found...linking defendant to the victim.

Nevertheless, the unsigned, bare-majority memorandum disparaged the new evidence as "uncorroborated hearsay." It stated that the county court was "within its discretion" to reject the claim for post-conviction relief. In the view of the 3 dissenters, however,

It is difficult to imagine these statements [of the three men and the corroborating testimony] would not have 'added a little more doubt to the jury's view of the evidence,' such that there would have been enough uncertainty as to defendant's guilt." [Quoting a 2015 precedent of the Court.]

The specific point here is not about whether the majority or the dissenters got it right. Yes, it is certainly noteworthy that a majority of the Court, for the second time in this one decision day, saw fit to deny relief to a defendant whose claim of actual innocence had substantial support in the record. Many, including myself, find this dismaying. But that's a discussion for another time.

The particular point here is that the majority in *Thibodeau* saw fit to dismiss the strenuous protestations of their three dissenting colleagues--just one vote less than the majority--without the dignity of a signed opinion.

There is a "company line" about these memoranda decisions that has been repeatedly proffered over the years by former and current members of the Court. That semi-official explanation is that these unsigned writings are used in cases where the issues are already well-settled or readily resolved or otherwise insignificant.

Several years ago, my criticism of the frequency and typical inadequacy of such unsigned opinions at that time triggered a public rebuke, by a then-sitting member of the Court. Not surprisingly, that Judge insisted that these unsigned memorandum decisions were confined to cases involving nothing new or controversial or significant. Of course, as I responded then and repeat now, that excuse can hardly be taken seriously when unsigned opinions are used even where the Judges disagree about the resolution of the issue--especially when the division within the Court is deep and the issue intensely debated. A fortiori when the issue is a constitutional one or otherwise extremely consequential.

Indeed, it is especially hard to take that company line about unsigned memorandum decisions seriously when, as in *Thibodeau*, a substantial claim of actual innocence is at stake, where the Court is divided 4 to 3, and where the dissenters presented their position in a comprehensive, passionate, 30 page opinion. Surely, such a dissent deserved a fuller and signed elaboration of the majority's reasons why the dissenters were wrong.

In the month of June alone, there were 7 such unsigned memorandum opinions in non-unanimous decisions--i.e., where at least 1 of the Judges disagreed with the majority strongly enough and viewed the issue as significant enough to author a dissent. And lest there be any misconception, these unsigned writings Through Dissent and Debate

- Scrooge v. Robin Hood: A Tale of Two Justices
- The Boomer Decision and Court Calculations

### INTERNATIONAL LAW STUDIES

- The Trial of Saddam Hussein
- International Law Studies (ILS) Staff, 2017-2018
- The Asian Infrastructure Investment Bank
- Animal Law: Evolution and the Need for International Protection
- Supervised Release and Illegal Immigration: An Empty Gesture?

- Goats
- Gorsuch\_Neil
- GPS
- Graffeo\_Victoria
- Great Women\_Great Chiefs
- Guest Post
- Guns
- Hancock\_Stewart
- Holmes\_Oliver W
- Honest Services
  Law
- IA SupCt
- Immigration
- International Law
- Internet Commerce
- Interrogations
- Interstate
  Commerce Power
- Intro to NYCW
- Jackson Robert
- Jefferson Thomas
- Jerkens H. Allen
- Jewish Seat (NY COA)
- Jones\_Theodore
- Journalist Privilege
- Joyce\_Sister
  Maureen
- Judicial Activism
- Judicial Decisionmaking
- Judicial Experience
- Judicial Federalism
- Judicial Output
- Judicial Restraint
- Judicial Review
- Judicial Selection
- Juvenile Justice
- Kagan\_Elena
- Kavanaugh\_Brett
- Kaye\_Judith
- Kennedy\_Anthony
- Korematsu decision
- Lehman\_Irving
- Lethal Injection
- Levine\_Howard
- Lippman\_Jonathan
- Literalism
- Madison\_James
- Malone\_Bernard
- Marshall\_Margaret
- Marshall\_Thurgood
- Martin\_Trayvon
- Mayberger\_Robert

## New York Court Watcher: NYCOA: (Part 2: Unsigned 4-3) [Back to] June 14 Hand Downs

are not the handiwork of just one side of the Court's ideological aisle. They are not always pro-prosecution.

For example, in *People v. Morrison*, decided the same month (June 28), the 4-3 majority, in an unsigned memorandum, reversed a rape conviction on the basis of a trial error which, the majority ruled, did not require any showing of any actual prejudice to the defendant. That triggered a concise dissent by Chief Judge DiFiore. She was joined by Judge Garcia who penned his own forceful 30 page dissenting opinion, which was joined in turn by Judge Feinman. Five conclusory, unsigned paragraphs by the majority hardly seems to have been adequate.

With few exceptions, cases that reach the Court of Appeals are sufficiently significant and close that their resolution deserves the fullest justification and explanation. These unsigned memoranda opinions rarely provide that. This is especially unfortunate when a dissenting opinion raises important questions. Indeed, it's often no wonder why the author of the unsigned majority opinion would choose not to take credit.

Others who follow the Court of Appeals are noticing as well. Among them, the eminent litigator Paul Shechtman recently commented that, "30 decisions [in criminal appeals over the past year] were decided by memorandum opinion; no judge signed his or her name to the decision." (*Criminal Cases Faced an Often Divided Court This Term*, NYLJ, Aug. 18, 2018.)

To put it plainly, the prolific use of these unsigned memorandum opinions is unworthy of a fine Court.

### ≻€

Newer Post

Labels: Actual Innocence, Criminal Law, Judicial Decisionmaking, NY Court of Appeals, Unsigned Memoranda

Home

Older Post

ivewei i ost	TIOME