New York Court Watcher

Research & Commentary on the Supreme Court, the New York Court of Appeals, More

THURSDAY, SEPTEMBER 6, 2018

NYCOA: (Part 2: Unsigned 4-3) [Back to] June 14 Hand Downs

Dissents, Disappointments, and Open Questions

(Reviewing the Supreme Court's past term and developments--yes, and enjoying the Saratoga meet--monopolized my time for a while. Back to the New York Court.)

Judges who are proud of their opinions sign them.
And when they don't?

Let's return to that June 14 set of decisions by New York's highest Court. To be sure, the Court of Appeals' entire past year cannot be reduced to one day. But that day's particular collection of hand downs seems quite reflective of the Court's recent behavior. Indeed, other Court watchers have noticed as well.

In **Part 1**, we saw how the Court in *People v. Tiger* relied on a ***federal*** Supreme Court decision--a much criticized one, including a dreadful concurring opinion--to determine a purely ***state*** statutory question. Moreover, in doing so, it made credible claims of actual innocence much more difficult to raise. In fact, as the dissenters pointed out, the decision in *Tiger* was especially distressing because there was very good reason to believe that the defendant was in fact innocent--as a subsequent civil trial found him.

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

- 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

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

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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.

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

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