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NYCOA: June 14 Hand Downs--Dissents, Disappointments, and Open Questions (Part 1: Actual Innocence)

As readers of New York Court Watcher are well aware, as are those who have attended my lectures or heard me on the air, I have the highest regard for the New York Court of Appeals as an institution and for the Judges who serve on it. Indeed, I've made clear my view--just as I did many years ago at the end of my Supreme Court Fellowship to an august audience that included Chief Justice Rehnquist--that I revere the Court of Appeals at least as much as I do the nation's high court.

But--and you knew that was coming--I have not hesitated to be candid in discussing Court of Appeals decisions, in analyzing the individual Judges' opinions and votes, or in being critical when I thought criticism was warranted. Well, the collection of decisions handed down by the Court last Thursday, June 14, cries out for some critique. (*The decision list and decisions themselves are accessible on the Court's website here: **http://www.nycourts.gov/ctapps/Decisions/2018/Jun18/Jun18.html**.*)

Dissents

The Court of Appeals issued eight decisions that day. Six of those eight drew dissenting opinions. (*I'm including those substantive concurring opinions that disagreed with the rule of law announced or how applied by the majority.*)

Now there is nothing necessarily wrong with so many dissents. Yes, there are those who prefer the Court to speak with one voice, to reach a consensus in order to avoid open division. But there are others, myself included, who welcome dissenting opinions. Those opinions usually improve the Court's decision by making arguments or raising questions that must then be addressed by the majority. The result is almost always a much sharper decision and a much clearer precedent for lower courts and lawyers to follow. (*And, admittedly, for law profs and commentators to critique.*)

Nevertheless, there is another side to the salutary aspects of dissenting opinions. It is the occasional disappointment or even dismay with the majority opinions that they oppose. These are the majority opinions and, thus, decisions of the Court that are either wrong on the law or, perhaps worse, simply but terribly unjust. At least one of the June 14 decisions seems to fall into that category.

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Disappointments

In *People v. Tiger*, over a two-Judge dissent, the majority held that actual innocence is not a basis for challenging a guilty plea conviction under New York law. It's not that the statute in question (CPL 440.10) actually says that. Or that the statute cannot be interpreted to allow an actual innocence challenge. No, the majority chose to adopt that interpretation. (*Usually, cases that get to high courts such as the NYCOA or the Supreme Court do have legitimate arguments for both sides--that's why those cases are there to be settled. Indeed, the two dissenters in this case certainly believed that the statute could and should be interpreted to allow actual innocence challenges.*)

So why did the Court choose to reject the availability of an actual innocence challenge? Strangely--and this is cause for at least as much concern as the Court's decision itself--the majority relied in large measure on Supreme Court precedents. Why is that strange? Consider that the Court of Appeals majority in this case relied on the ***federal*** Supreme Court's interpretations of ***federal*** protections to decide the ***New York*** high court's interpretation of a ***New York*** statute's totally independent protections. The Supreme Court's precedents were absolutely no authority for the ***New York*** law question before the ***New York*** Court of Appeals.

Beyond that, the federal Supreme Court decision most cited--five times between the majority and concurring opinions--was an unfortunate, if not a dreadful one. In that 1993 decision, *Herrera v Collins*, the majority of Supreme Court held that the *federal* Constitution did not *require* courts to consider actual innocence challenges to a conviction. And that Court's 6-3 majority was made possible only by the votes of Justices Scalia and Thomas who, in their own concurring opinion, insisted that ***the Constitution does not prohibit the conviction or even execution of an innocent person***, as long as proper procedures were otherwise followed.

That's right. That was the basis for two votes that made the majority possible in the Supreme Court's *Herrera* decision that the Court of Appeals majority relied on with approval. Indeed, the majority opinion itself in *Herrera*, authored by Chief Justice Rehnquist, declined to reject Scalia and Thomas's proposition.
(Instead, Rehnquist's opinion "assume[d]" the opposite "for the sake of argument," solely to assess the defendant's new evidence as unpersuasive. Three other members of the majority--Justices White, O'Connor, and Kennedy--did make clear in their concurring opinions that they believed it would be unconstitutional to execute an innocent person; but they were unpersuaded by the defendant's evidence that he was innocent.)

In the wake of *Herrera*, the Supreme Court has yet to rule that convicting and executing an innocent person is unconstitutional. Why would the New York Court of Appeals ever rely on that Court's case law on the actual innocence issue?

There's more. The Court of Appeals majority in *People v. Tiger* rejected the availability of an actual innocence challenge in a case in which the defendant might well have been actually innocent! The two dissenters--Judges Wilson and Rivera--in fact declare unequivocally that the defendant is innocent.

Moreover, the dissenters' assertion is corroborated by the result of a lawsuit instituted against the defendant. The civil jury in that lawsuit

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found that the defendant did *not* in fact commit the wrongdoing that was the basis for the guilty plea conviction. Consider that the civil jury, of course, only had to find by a preponderance of the evidence--not beyond a reasonable doubt--that the defendant was guilty of the wrongdoing. And still, that civil jury determined the defendant to be innocent.

So why then did the defendant plead guilty? As the dissenters, as well as countless studies and examinations of guilty pleas have found, there are many reasons why defendants plead guilty. Actual guilt is not necessarily one of them. In fact, innocent persons often plead guilty.

In this case, for example, as the dissenters point out, the defendant faced the possibility of seven years imprisonment if she went to trial. So "*she pleaded guilty after her lawyer told her she could not afford to hire an expert and a guilty plea could result in a suspended sentence*"--in fact, pleading guilty did result in a much lighter sentence than the possible seven years. And then, to repeat what has already been said, a civil jury found that the defendant was not guilty, even though that jury was aware of the defendant's own statements in the guilty plea proceedings.

Regardless of the admiration I have for the Court of Appeals and its members--and maybe because of that--I am struck by how flawed and unjust the decision is in *People v. Tiger*. This was not a fine Court's finest hour.

In the next part, we'll look at another significant aspect of that June 14 set of decisions.

Labels: Actual Innocence, Criminal Law, Judicial Decisionmaking, Judicial Federalism, NY Court of Appeals, Scalia and Thomas, SupCt

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