The Sixth Circuit's 2016 En Banc Opinions

By John A. Ferroli

The Court of Appeals for the Sixth Circuit handed down only three en banc decisions in 2016, but all make for interesting reading as they address the rights of individuals in various contexts.

Privacy

In *Detroit Free Press Inc v United States Department of Justice*,[1] the court overruled a prior decision regarding a criminal defendant's privacy interest in his or her booking photo. In a 1996 case—also brought by the *Free Press*—the court had held that a criminal defendant lacked any privacy interest in a booking photo.[2] In 2012, after the Tenth and Eleventh Circuits handed down decisions disagreeing with the Sixth Circuit, the U.S. Marshal Service refused to honor Freedom of Information Act requests for booking photos anywhere in the U.S.—even requests made in Sixth Circuit jurisdictions—citing the exemption to the act that allows an agency to refuse a request for a law enforcement record if releasing that record "could reasonably be expected to constitute an unwarranted invasion of personal privacy."[3] Thus, when the *Free Press* requested the booking photos of Michigan police officers charged with bribery and drug conspiracy, the request was denied. Citing the *Free Press* opinion from 1996, the district court and the three-judge appeal panel ordered disclosure of the photos.

Reexamining its 1996 opinion as applied to the act's privacy invasion exemption, the court held that the personal privacy interest addressed by the exemption includes "embarrassing and humiliating facts—particularly those connecting an individual to criminality…" and that booking photos "fit squarely within this realm of embarrassing and humiliating information."[4] Indeed, the court held, "viewers so uniformly associate booking photos with guilt and criminality that we strongly disfavor showing such photos to criminal juries."[5]

In addition to Tenth and Eleventh Circuit decisions, the court's overruling of its 1996 opinion was motivated by the effect of modern information technology on the consequences of disclosure. The court opined that because booking photos are now capable of long-term storage and use, disclosure of such photos "casts a long, damaging shadow over the depicted individual."[6] The court found the privacy implications of "mug-shot websites" especially troubling:

> Today, an idle internet search reveals the same booking photo that once would have required a trip to the local library's microfiche collection. In fact, mug-shot websites collect and display booking photos from decades-old arrests: BustedMugshots and JustMugshots, to name a couple. Potential employers and other acquaintances may easily access booking photos on these websites, hampering the depicted individual's professional and personal prospects. Desperate to scrub evidence of past arrests from their online footprint, individuals pay such sites to remove their pictures. Indeed, an online-reputation-management industry now exists, promising to banish unsavory information—a booking photo, a viral tweet—to the third or fourth page of internet search results, where few persist in clicking. The steps many take to squelch publicity of booking photos reinforce a statutory privacy interest.[7]

When it wrote its earlier opinion, the court said, it "could not have known or expected that a booking photo could haunt the depicted individual for decades. Experience has taught us otherwise."[8] Reversing the disclosure order, the court then determined that the necessary balancing of the public interest against the privacy interest must be done on a case-by-case basis, so it remanded the case to the district court to conduct such a balancing analysis on the facts before it.

Second Amendment

In *Tyler v Hillsdale County Sheriff's Department*,[9] a divided Sixth Circuit reversed a trial court's dismissal of a suit by Clifford Tyler seeking a declaration that his 30-year-old involuntary commitment to a mental institution rendered him ineligible to possess a firearm under 18 USC 922(g)(4), which prohibits anyone "who has been adjudicated as a mental defective or who has been committed to a mental institution" from possessing a firearm. Tyler had been involuntarily committed in 1985 because of a depressive episode, but since then had no further bouts of mental illness or issues with drug or alcohol abuse. In 2011, he unsuccessfully attempted to purchase a gun after the county sheriff determined that he was ineligible given his previous commitment to a mental institution. When the Bureau of Alcohol, Tobacco and Firearms declined to review his petition for restoration of his right to own a firearm, he sued, contending that, as applied to him, the statutory bar was unconstitutional.

In its lead opinion, the *Tyler* court noted that in *District of Columbia v Heller*,[10] the United States Supreme Court had determined that while the right to own firearms was protected by the Second Amendment, longstanding prohibitions against the ownership of firearms by felons and the mentally

ill were presumptively lawful.[11] However, the *Tyler* court found that the *Heller* presumption did not foreclose the statutory bar from constitutional scrutiny:

> To rely solely on *Heller*'s presumption here would amount to a judicial endorsement of Congress's power to declare, "Once mentally ill, always so." This we will not do. *Heller*'s presumption of lawfulness should not be used to enshrine a permanent stigma on anyone who has ever been committed to a mental institution for whatever reason.[12]

Conducting a two-step analysis previously adopted by the court to resolve Second Amendment challenges, the court in its lead opinion held that the mere fact that a person has been involuntarily committed does not mean he or she is "categorically unprotected by the Second Amendment."[13] The court further held that the government had not carried its burden to establish a reasonable fit between the important goals of reducing crime and suicides and § 922(g)(4)'s permanent disarmament of all persons with a prior commitment:

> There is no indication of the *continued* risk presented by people who were involuntarily committed many years ago and who have no history of intervening mental illness, criminal activity, or substance abuse. Indeed, Congress's evidence seems to focus solely on the risk posed by those presently mentally ill and who have been recently committed….
>
> Thus, we conclude that Tyler has a viable claim under the Second Amendment and that the government has not justified a lifetime ban on gun possession by anyone who has been "adjudicated as a mental defective" or "committed to a mental institution," 18 U.S.C. § 922(g)(4).[14]

The court remanded the claim to the district court to determine, applying intermediate scrutiny, the statute's constitutionality as applied to *Tyler*.

Extradition

In *Martinez v United States*,[15] the court held that Avelino Cruz Martinez's extradition would not violate Article 7 of the extradition treaty between the United States and Mexico and upheld the district court's denial of his petition for habeas corpus. Martinez, now a citizen of the United States, had attended a party in Mexico in 2006 during which two murders occurred. After the murders, Martinez returned to his home in the United States. Within two months after the murders, a Mexican court issued a warrant for his arrest, and Martinez admitted "there is probable cause to believe that he was the assailant."[16] Six years later under the extradition treaty, Mexico asked the United States to return Martinez to be tried for murder. Martinez filed a habeas corpus petition, claiming that his extradition would violate Article 7 of the treaty, which prohibits extradition when prosecution or enforcement of the penalty for the charged offense "has become barred by lapse of time according to the laws of the requesting or requested Party."[17] In particular, he argued that his extradition would violate the relevant statute of limitations and his Sixth Amendment right to a speedy trial.

Sitting en banc, the Sixth Circuit rejected Martinez's arguments. First, the court found that even if the U.S. statute of limitations relied on by Martinez were applicable,[18] it had not expired. The court held that the fact that the Mexican court had not indicted or instituted an information against Martinez was not dispositive; rather, because under Mexican law the issuance of an arrest warrant marks the beginning of the prosecution, the issuance of an arrest warrant for Martinez would stop the running of the U.S. statute of limitations. Because the Mexican court issued an arrest warrant within two months of Martinez's alleged offense, the five-year limitations period did not bar his prosecution.[19]

The court next addressed Martinez's argument that the "barred by lapse of time" language in the treaty incorporated the right to a speedy and public trial under the Sixth Amendment to the U. S. Constitution. Martinez argued that a "non-speedy trial is one that takes too long to start and to finish, which creates a lapse-of-time defect in the prosecution."[20] The court rejected this argument on multiple levels. For example, the court opined that if "lapse of time" incorporates the constitutional speedy-trial guarantee, it might also incorporate the mandate of the Speedy Trial Act that a trial begin within 70 days of the indictment, information, or the defendant's appearance before the court, whichever occurs later:[21]

> These [Speedy Trial Act] provisions would leave foreign nations with just seventy days to issue any extradition request after the Act's clock starts ticking if they want to avoid debates about whether any delay was excusable….What will happen next is the kudzu-like spreading of Speedy Trial Act claims and the choking out of statute-of-limitations claims—and thus the choking out of the one claim that all agree is covered by the phrase "barred by lapse of time." In case after case, extradition requests that violate no statute of limitations will be denied for Speedy Trial Act violations.[22]

The court also squarely addressed Martinez's underlying fairness argument—that extradition was not sought until six years after the Mexican court issued the arrest warrant. While holding that Martinez had no recourse for this delay in the courts, the court suggested that he might have recourse in diplomatic channels:

> That leaves what may be Cruz Martinez's ultimate worry: that rejecting his interpretation of the treaty would allow Mexico to seek extradition of an American citizen years after a valid Mexican arrest warrant has issued. Just such a prospect exists here, he says, given his claim that he never tried to hide his address from American or Mexican authorities. But it is not this court's "province" to limit the treaty's scope in search of a seemingly "desirable result." Otherwise, the treaty would mean one thing for some fact patterns and something else for other fact patterns. Treaty interpretation, as opposed to executive branch discretion, does not turn on shifting fact patterns. Cruz Martinez's arguments on this score are most productively (and, we would add, quietly fairly) directed to the Secretary of State, who retains "sole discretion to determine whether or not [an individual] should

actually be extradited." That discretion would prevent any untoward extradition from going forward, potentially including this one—which is why Cruz Martinez's requests for relief are better directed to our diplomats than to our judges.[23] ■

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ENDNOTES

1. *Detroit Free Press Inc v US Dep't of Justice*, 829 F3d 478 (CA 6, 2016).
2. *Detroit Free Press Inc v Dep't of Justice*, 73 F3d 93 (CA 6, 1996).
3. *Detroit Free Press*, 829 F3d at 480, quoting 5 USC 552(b)(7)(C).
4. *Id.* at 481–482.
5. *Id.* at 482 (citations omitted).
6. *Id.*
7. *Id.* at 482–483 (citations and footnote omitted).
8. *Id.* at 485 (citation omitted).
9. *Tyler v Hillsdale Co Sheriff's Dep't*, 837 F3d 678 (CA 6, 2016).
10. *District of Columbia v Heller*, 554 US 570; 128 S Ct 2783; 171 L Ed 2d 637 (2008).
11. *Tyler*, 837 F3d at 681, citing *Heller*, 554 US at 595, 626–627, n 26.
12. *Id.* at 688.
13. *Id.* at 690.
14. *Id.* at 699.
15. *Martinez v United States*, 828 F3d 451 (CA 6, 2016).
16. *Id.* at 454.
17. *Id.* (citation omitted).
18. The statute provides that no person shall be prosecuted, tried, or punished for any non-capital offense "unless the indictment is found or the information is instituted within five years next after such offense shall have been committed." 18 USC 3282(a).
19. *Martinez*, 828 F3d at 456–457.
20. *Id.* at 457.
21. *Id.* at 467–468.
22. *Id.* at 468 (citations omitted).
23. *Id.* at 469–470 (citations omitted).