

2018 Sixth Circuit En Banc Opinions

By Michael R. Williams

The United States Court of Appeals for the Sixth Circuit issued only two en banc opinions in 2018. One addresses a not-often-considered aspect of an oft-seen subject, the Sixth Amendment right to counsel. The other ventures into an area producing even fewer federal opinions, namely, the intersection between international law and child custody.

Right to counsel: *Turner v United States*

In an en banc opinion authored by Judge Alice Batchelder, the Sixth Circuit refused to extend the Sixth Amendment right to counsel to pre-indictment plea negotiations. The appellant could not then bring a claim for ineffective assistance of counsel based on his counsel's purported failure to communicate an exploding pre-indictment plea offer that expired upon indictment.¹

A Tennessee grand jury indicted appellant John Turner on multiple counts of aggravated robbery. Turner hired a lawyer who represented him in plea negotiations with the state. The same lawyer contacted the United States Attorney's Office, which confirmed that the United States also planned to bring charges and offered a pre-indictment plea of 15 years. Turner's attorney says he conveyed the plea offer to Turner, who refused; Turner disagrees. Regardless, the federal grand jury indicted Turner. After taking a less favorable plea, Turner filed a post-conviction motion alleging that his attorney rendered ineffective assistance of counsel in not conveying the pre-indictment plea offer. The district court denied the motion, holding that Turner's Sixth Amendment right had not yet attached at the time of the first federal plea offer. A panel of the Sixth Circuit affirmed.

Sitting en banc, the Sixth Circuit agreed,² recognizing that the Supreme Court had extended the Sixth Amendment right to counsel to plea negotiations in *Missouri v Frye*³ and *Lafler v Cooper*.⁴ But those cases concerned post-indictment plea negotiations. The Sixth Circuit concluded that the answer to the "distinct" attachment question was "crystal clear" in earlier Supreme Court decisions: "a person's Sixth Amendment right to counsel 'attaches only at or after the time that adversary judicial proceedings have been initiated against him.'"⁵

The Sixth Circuit also rejected Turner's argument that the indictment in state court triggered his Sixth Amendment right to counsel in federal court for offenses based on the same conduct. The Sixth Circuit, instead, adopted the majority view among circuit courts that "when a criminal defendant's conduct violates both state and federal law, that defendant commits two separate offenses, even when the state and federal offenses contain the same essential elements."⁶

This case also produced a rare appellate phenomenon: a *dubitante* opinion (that is, an opinion declaring doubt about a legal proposition without outright declaring it wrong). Judge John Bush, joined by Judge Raymond Kethledge, suggested that the Supreme Court "might wish to reconsider its right-to-counsel jurisprudence."⁷ In particular, those judges felt that "the greater weight of the Founding-era evidence" suggested Turner was an "accused" even before indictment and that the federal prosecutor's offer was part of a "criminal prosecution," as those terms were used in the Sixth Amendment.⁸ These judges observed that the Constitution refers to "accused" and "indicted" individuals separately, while a prosecutor's offer to *terminate* criminal proceedings seemed a part of "criminal prosecution" regardless of whether an indictment had yet

issued. A petition for writ of certiorari is still pending.⁹

Hague Abduction Convention: *Taglieri v Monasky*

Judge Jeffrey Sutton authored an en banc Sixth Circuit opinion that affirmed a district court's decision ordering a child's return to Italy.¹⁰ Though the decision grapples with some specialized questions related to the Hague Convention on the Civil Aspects of International Child Abduction, it rests on the daily bread of appellate courts: standard of review. In this case, as in many cases, "[w]ho wins turns on who decides."¹¹ Here, the decisive question was one of fact, and the appellate court had no basis to reverse the district court's well-reasoned factual findings.

The facts were hotly disputed. Domenic Taglieri and Michelle Monarsky met in the United States and later moved to Italy. The marriage had problems, which Monarsky says included physical abuse. Three years into the marriage, however, Monarsky became pregnant. After some separation, discussion of divorce, a brief reconciliation, and more instances of allegedly threatening behavior on Taglieri's part, Monarsky moved out of the house. In the meantime, their child was born. Monarsky eventually went back to America, taking her then eight-week-old child with her. Taglieri first filed a successful petition in an Italian court to terminate Monarsky's parental rights and then successfully petitioned the Northern District of Ohio under the Hague Convention. Monarsky returned to Italy with the child. A divided panel of the Sixth Circuit affirmed.

The Sixth Circuit, sitting en banc, explained that the Hague Abduction Convention contemplated that children abducted by

“one-half of an unhappy couple” would be returned to “the State of their habitual residence.”¹² The state of residence determines the underlying child custody claims. In an opinion issued after the district court’s decision in *Taglieri—Ahmed v Ahmed*—the Sixth Circuit laid out its test for determining a child’s state of habitual residence.¹³ The test looks principally to where a child is “acclimatized.” But where the child is too young or too disabled to be acclimatized, the court looks to shared parental intent.

The Sixth Circuit held that the district court’s determinations on shared parental intent addressed factual questions, and factual questions were limited to only clear-error review. Here, the district court was “[f]aced with a two-sided record” and therefore had the authority to rule in either direction.¹⁴ The Sixth Circuit also had no qualms about the fact that the district court’s deci-

sion came before the Sixth Circuit shaped its preferred test in *Ahmed*. The district court’s inquiry “respect[ed] *Ahmed*, which applied the same standard.”¹⁵ Lastly, the Sixth Circuit rejected the suggestion that it create a presumption against finding any habitual residence for infants. The district court was accordingly affirmed.¹⁶ ■



Michael R. Williams is the managing partner of the Kalamazoo office of Bush Seyferth & Paige PLLC where he focuses on complex litigation. A member of the SBM U.S. Courts Committee, he previously clerked for Judge G. Steven Agee of the U.S. Court of Appeals for the Fourth Circuit and for Chief Judge Deborah K. Chasanow of the U.S. District Court for the District of Maryland.

ENDNOTES

1. *Turner v United States*, 885 F3d 949 (CA 6, 2018).
2. *Id.* at 951.
3. *Missouri v Frye*, 566 US 134, 144; 132 S Ct 1399; 182 L Ed 2d 379 (2012).
4. *Laffler v Cooper*, 566 US 156, 162; 132 S Ct 1376; 182 L Ed 2d 398 (2012).
5. *Turner*, 885 F3d at 953 (quoting *United States v Gouveia*, 467 US 180, 187; 104 S Ct 2292; 81 L Ed 2d 146 [1984]).
6. *Id.* at 955.
7. *Id.* at 956 (Bush, J., concurring dubitante).
8. *Id.*
9. *Turner v United States*, 885 F3d 949 (CA 6, 2018), petition for cert filed, ___ USLW ___ (US July 20, 1028) [No. 18-106].
10. *Taglieri v Monasky*, 907 F3d 404 (CA 6, 2018).
11. *Id.* at 405.
12. *Id.* at 407.
13. *Ahmed v Ahmed*, 867 F3d 682 (CA 6, 2017).
14. *Taglieri*, 907 F3d at 409 (citations omitted).
15. *Id.* at 410.
16. *Id.* at 411.

SBM IN MEMORIAM

Jack T. Arnold, P10260, of Gold Canyon, Arizona died December 8, 2018. He was born in 1937, graduated from the Detroit College of Law, and was admitted to the Bar in 1952.

Jan P. Benedict, P23303, of Emory, Texas died February 14, 2019. He was born in 1944 and was admitted to the Bar in 1973.

Johannes A. Buiteweg, P11367, of Rochester Hills died February 17, 2019. He was born in 1926, graduated from the University of Detroit School of Law, and was admitted to the Bar in 1961.

DJ Culkar, P46740, of Dallas, Texas died February 26, 2019. He was born in 1963, graduated from the University of Detroit Mercy School of Law, and was admitted to the Bar in 1996.

Albert Nelson Deaner, P27625, of Filer City died February 23, 2019. He was born in 1949, graduated from the Thomas M. Cooley Law School, and was admitted to the Bar in 1977.

Geoffrey L. Gifford, P13965, of Chicago, Illinois died February 9, 2019. He was born in 1946, graduated from the University of Michigan Law School, and was admitted to the Bar in 1972.

Ernest Otto Hornung, P15128, of Clinton Township died February 16, 2019. He was born in 1945, graduated from the Detroit College of Law, and was admitted to the Bar in 1970.

Frederick S. Krupp, P25781, of Lake City died February 21, 2019. He was born in 1943, graduated from the Wayne State University Law School, and was admitted to the Bar in 1975.

Dennis J. Kuirsy, P23442, of Waterford died February 23, 2019. He was born in 1945, graduated from the University of Detroit School of Law, and was admitted to the Bar in 1973.

Diane M. Lepsig, P28612, of Kingston, Tennessee died November 18, 2018. She was born in 1943, graduated from the Detroit College of Law, and was admitted to the Bar in 1978.

V. Robert Payant, P18731, of Reno, Nevada died September 4, 2018. He was born in 1932 and was admitted to the Bar in 1957.

Russell E. Price, P19096, of Fremont died December 21, 2018. He was born in 1931, graduated from the Wayne State University Law School, and was admitted to the Bar in 1958.

Hon. Maureen Pulte Reilly, P19327, of Venice, Florida died January 7, 2019. She was born in 1934, graduated from the University of Detroit School of Law, and was admitted to the Bar in 1958.

Randal L. Schmidt, P65901, of Plymouth died September 18, 2018. He was born in 1971, graduated from the Thomas M. Cooley Law School, and was admitted to the Bar in 2003.

Charles W. Simon Jr., P20494, of Edmore died February 18, 2019. He was born in 1932, graduated from the University of Michigan Law School, and was admitted to the Bar in 1961.

Marlon S. Simon, P51493, of Long Beach, California died February 9, 2019. He was born in 1968, graduated from the University of Michigan Law School, and was admitted to the Bar in 1994.

Gail E. Steinhauer, P31339, of Bloomfield Hills died February 6, 2019. She was born in 1950, graduated from the Detroit College of Law, and was admitted to the Bar in 1980.

Norman W. Stern, P20990, of Southfield died February 19, 2019. He was born in 1924, graduated from the Detroit College of Law, and was admitted to the Bar in 1949.

Alfred B. Thomas, P21366, of Grosse Pointe Park died September 25, 2018. He was born in 1933 and was admitted to the Bar in 1969.

In Memoriam information is published as soon as possible after it is received.