FEDERAL COURTS
MR. BLUMOFF

MERCER LAW SCHOOL
FALL 1996

FINAL EXAMINATION
GENERAL INSTRUCTIONS

This exam has 4 questions. You will have until noon on December 19th to complete it. Organize well and get to the point.

YOU MUST LEAVE A ONE INCH MARGIN AROUND ALL FOUR SIDES OF EACH SHEET OF 81/2 x 11 INCH PAPER YOU USE. YOU MAY USE NO PRINT FONT SMALLER THAN TWELVE POINTS. USE NO MORE THAN TWELVE (12) PAGES. Double-spaced

Please put your blind grading number on each page, number your pages and indicate which question you are answering on each page. Please staple the pages together in the upper left hand corner and in order when you are finished.

This is obviously an open-book, open-note exam. You may use any material to which you made a substantial contribution; you are on your honor to forgo using any commercial outlines or student outlines to which you made no substantial contribution. You may no longer consult with one another in study groups or in any other forum about anything in the course once you have picked up your exam.

YOUR ANSWERS MUST BE TURNED IN TO MS. EVAN'S DESK ON THE THIRD FLOOR BY NOON, THURSDAY, DECEMBER 19TH. I WILL REDUCE YOUR FINAL GRADE BY ONE POINT FOR EACH MINUTE YOU ARE LATE.

GOOD LUCK!
HAVE A VERY HAPPY HOLIDAY SEASON!

I
(40%)

In the early morning hours of May 12, 1991, Todd Brown (Todd) and Mrs Brown (Susan) were traveling on a winding road from Grayson County, Texas, to their home in Bryan County, Oklahoma. After crossing into Oklahoma, Todd, who was driving, noticed a random police checkpoint. He decided to avoid the checkpoint and turned the car around and headed back to Texas, allegedly to spend the night at his mother's house. Although the testimony was disputed, Bryan County Deputy Sheriffs Morrison and Burns stated that they "chased" the Brown's car at a high rate of speed before successfully pulling them over. Todd testified that, because the road was winding, he was oblivious to the deputies behind him until both cars had traveled about 3 miles. By the time the deputies stopped the Browns, they were back in Grayson County, Texas, about four miles from the checkpoint.

Immediately after leaving the car, Morrison unholstered his sidearm, pointed it at the Brown's car, and ordered Todd and Susan to get out with their hands up. Burns, who was not authorized to have and did not carry a firearm, walked to Susan's side of the car and twice ordered her out. When she panicked and failed to move, Burns opened the car door, grabbed Susan by the arm at the wrist and elbow, yanked her out of the car and threw her to the ground. She hit the pavement with such impact that she suffered permanent damage to both knees. (After four efforts at surgical repair, her left knee required complete replacement.) At trial Susan testified that she had done nothing to provoke Burns. Burns had handcuffed Susan while he had her on the ground and kept her in cuffs for nearly an hour.

The Brown's filed suit against Burns and the County alleging several theories. Before trial, the Brown's attorney ran a record check and discovered that Deputy Burns had a lengthy criminal record, including nine traffic violations among them several DUIs and a charge of driving with a suspended license, several arrests for assault and battery, an arrest for possession of a false identification card, and a conviction for resisting arrest. By County Ordinance, the Sheriff makes hiring decisions pursuant to guidelines issued by the Oklahoma Attorney General, whose office rubber-stamps Sheriffs' decisions. Although the AG's office typically rubber-stamps the Sheriffs' decisions, it made no response when notified of the decision to hire Burns.

At trial, the County Sheriff who hired Burns testified as follows:

Q (Browns' Attorney). Did you a copy of Mr. Burns' rap sheet?

A.(Sheriff). I run his driving record, yes.

Q You can get that rap sheet immediately, can't you?

A It don't take long.

Q And did you not see on there where Mr. Burns had been arrested for assault and battery? Did you see that one on there?

A. I never noticed it, no.

Q. Did you notice on there he'd been arrested or charged with [driving with a suspended license] on several occasions?

A. I'm sure I did.

Q. All right. Did you notice on there that he'd been arrested and convicted for possession of false identification?

A. No, I never noticed that.

Q. Did you notice where he had been arrested for public drunkeness?

A. He had a long record.

Q. Did you notice on there where he had been arrested for resisting arrest?

A. No, I didn't.

Q. Did you make any inquiries after you got that information to determine exactly what the disposition of those charges were?

A. No, I didn't.

Q. Did you not make any attempt to find out the status of Mr. Burns' criminal record at that time?

A. As far as him having a criminal record, I don't believe he had a criminal record. It was just all driving and -- most of it was, misdemeanors.

Q. Well, did you make any attempts to determine whether or not Mr. Burns was on probation at the time you placed him out there?

A. I didn't know he was on probation, no.

Q. Did you make any effort to find out?

A. I didn't have no idea he was on probation, no.

Q. Well, you saw on his rap sheet where he had been charged with [Driving Under the Influence], didn't you?

A. I heard it, but don't remember whether I seen it on the rap sheet or not.

Q. So you'd heard about it?

A. I don't remember whether I seen it on the rap sheet or heard of it.

* * * * * *

Questions:

A. The jury returned a verdict for the Browns against Deputy Burns for the unprovoked use of force, and against the County for the Sheriff's failure adequately to investigate Burns before hiring. The trial court also granted the Browns' request to enjoin the County to dismiss Burns from its employment. Moreover, the trial court denied Burns' qualified immunity motion, as did the jury. Burns and the County have filed timely appeals. Burns argued (1) that he was entitled to qualified immunity, and (2) that the court lacked authority to enjoin him. The County argued that the judge (1) improperly permitted municipal liability to go to the jury, and (2) erroneously held that the Sheriff was a final policy-maker. Draft a memorandum for the appellate court judge for whom you clerk assessing these arguments and any others raised by the facts and available to the court of appeals on its own motion.

To help you draft this memo, consider the following cases, which are precedent in the circuit in which the trial court sits, as well as any applicable Supreme Court precedent we studied.

1. *Hudson v. Macmillian,* 503 U.S. 1 (1992) : Whenever prison officials stand accused of using excessive physical force constituting "the unnecessary and wanton infliction of pain" violative of the Cruel and Unusual Punishments Clause, the core judicial inquiry is that set out in *Whitley v. Albers*, 475 U.S. 312, 320-321: whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm. Extending *Whitley's* application of the "unnecessary and wanton infliction of pain" standard to all allegations of force, whether the prison disturbance is a riot or a lesser disruption, works no innovation.

2. *Harper v. Harris County, Tex.*, 21 F.3d 597, 602 (1994). The circuit, on interlocutory appeal, upheld the trial court's denial of summary judgment under the following facts: Ms. Harper alleged that on October 29, 1990, Officer Denholm illegally arrested Harper as she was walking with her infant son, Jordan, to a bus stop. Harper contends that Denholm cut off her airway when he grabbed her around the throat, told her to drop her son, referred to her as a "bitch," and threw her to the ground. After transporting her to the jail, Denholm struck Harper on her right knee. Harper allegedly suffered a badly bruised knee and a sore throat.

The evidence revealed that a genuine issue of material fact remained regarding the use of excessive force and the objective reasonableness of using such force, so Denholm was not entitled to summary judgment. Denholm was permitted to assert qualified immunity at trial.

3. *Gonzalez v. Ysleta Indep. Sch. Dist.*, 996 F.2d 745 (1993). In *Gonzalez*, the Ysleta Independent School District (YISD) was sued for a single decision to transfer a teacher accused of sexually harassing a student, rather than removing the teacher from the classroom. The Board of Education Trustees approved the decision to transfer the teacher rather than remove him from the classroom. YISD argued that this ad hoc, isolated decision, even when made by policy-makers, did not constitute "policy" under *Monell*. YISD argued that this was especially true because the Board's decision was contrary to the district's own formal policy for handling such matters. This argument proved unpersuasive.

B. Assume, now, that after the trial court denied summary judgment on the

qualified immunity issue and after nearly all of discovery was concluded, the County filed misdemeanor resisting arrest charges against Mr. Brown in the appropriate state court. On the same day, the County moved to dismiss the Brown's civil suit on abstention grounds. The trial court refused, and the county has also preserved its appeal on this ground. Assess the issue on appeal.

II
(30 %)

John Doe, a black man, was convicted of killing a white man in Georgia. The State alleged that the victim owed Doe a substantial amount of money for the sale of drugs. At trial, two prosecution witnesses identify Doe as the man they saw arguing with the victim immediately before the crime. They also testified that after the argument, they saw Doe pull out a handgun, shoot the victim in the head at point blank range and, before fleeing, extract the victim's wallet from his pocket. The state trial court judge, without objection from Doe's court-appointed attorney, introduced highly questionable sound spectrography evidence for the purpose of determining whether Doe's voice matched a voice recorded by a local police wiretap as part of an on-going drug investigation. Doe presented an alibi defense; his sister testified that Doe was at her house at the time of the murder.

The jury convicted Doe of first degree murder after only ninety minutes of deliberation. In the penalty phase, the jury recommended the death penalty which, because of the financial gain element of the crime, was an appropriate aggravating factor for the jury to consider in support of the death penalty. Because Doe continued to insist on his innocence, the only evidence his counsel introduced was a character witness who testified that Doe had always been an easy-going guy who was never in trouble at work. The judge sentenced Doe to the electric chair.

Doe has exhausted his postconviction remedies in the State system and filed a federal habeas petition. He had not, however, raised the issue of ineffective assistance of counsel. The district court denied Doe's motion. Eighteen months later, Doe submits his second petition, which is the subject of this question. He attached to the petition the affidavits of two of his sister's neighbors who state that at the time the crime occurred and for that entire afternoon they were working outside in their front yard. They swear that they saw Doe enter his sister's house at least thirty minutes before the crime and never saw him depart. Doe also attaches

an affidavit stating that the two witnesses who testified against him at trial were members of the Ku Klux Klan; that the prosecution knew this, but did not inform him--a *Brady* violation. He also points out that within the past year the Supreme Court, after suggesting that voice spectrography evidence was inherently unreliable, held for the first time that the police could not seize a custodial detainee's voice after he has asked for counsel. (Thus, the Court did not reach the issue of voice spectrography admissibility.)

Doe claims that he told his appointed trial counsel about the two neighbors but that the attorney never even interviewed them. The new alibi witnesses, he alleges, establish his actual innocence. He also attaches bank and employment records from the time the crime occurred, establishing that he had a good job and was financially secure; thus, even if the jury could find him guilty, this new evidence would tend to undermine the aggravating circumstance that was necessary to support the death penalty. He claims that his trial counsel should have discovered this information and presented it at trial. Moreover, he claims that he did not know that his counsel had to object to either the admissibility of voice spectrography evidence or the fact that it was impermissible for the state to take a voice exemplar without his knowledge.

Describe the potential procedural barriers Doe faces in his effort to get a new evidentiary hearing.

III
(15 %)

The habitat of two rare fish properly placed on the U.S. Fish & Wildlife Service's Endangered Species list lies at the center of two reservoirs that provide irrigation water from the Klamath Project in Klamath, Oregon. The Bureau of Reclamation, which runs the Klamath Project, adopted the USF & W's recommendation and cut back on the amount of water available for irrigation.

Two ranchers who used water from Klamath and an agronomist from Oregon State University who had recently received a grant from the National Science Foundation to research irrigation alternatives during the Summer 1997, sued the federal government under the provision of the Endangered Species Act that permits suit by "any citizen." (This is the same provision that the Court struck down--at

least as applied--in *Lujan v. Defenders of Wildlife* in 1992.) The federal government filed two motions to dismiss for lack of standing. The first motion (Motion A) against the ranchers argued that the ranchers failed to satisfy the "zone of interest" test, an argument that prevailed in the one Circuit Court that has heard a similar claim. The second motion (Motion B) against the agronomist argued that he failed to allege a cognizable injury-in-fact. Evaluate the two arguments.

IV
(15 %)

Consider note 6 on page 381 of you text. To avoid a ripeness challenge, the actual Plaintiff's in *Duke Power* alleged that the storage of nuclear fuel at the construction site caused environmental harm. The Supreme Court agreed.

A. Is this result consistent with either *Flast v. Cohen* or *Lujan*?

B. In the last paragraph on the page, your authors' pose a "hypothetical reconstruction": Under *Mottley* and *Skelly*, could this hypothetical suit be brought in federal court? Assess the arguments for and against?