

FEDERAL COURTS
Mr. Blumoff

MERCER LAW SCHOOL
December 18, 1997

FINAL EXAMINATION
GENERAL INSTRUCTIONS

This exam consists of 7 questions. You will have three hours and thirty minutes to complete it. Organize well and get to the point. Leave a usable margin on the left side of each sheet of paper you use and **write on one side of the page only**. 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 an open-book, open-note exam. You may use any material to which you made a substantial contribution; you may not use any commercial outlines or student outlines to which you made no substantial contribution.

Have a Wonderful Holiday Break!
I genuinely enjoyed the class.

1. (40 min.) In 1992, applicant, then serving time for rape and child abuse, was convicted in the Superior Court of Bibb County, Ga. of the second-degree murder of one of his fellow inmates at a state correctional institution. At trial, three witnesses for the state testified that they had seen all or part of the attack on the inmate and identified applicant as participating in the murder. Applicant produced three alibi witnesses of his own who testified that he was in bed at the time the stabbing occurred. At no point did applicant object to his in-court identification by the State's three eyewitnesses.

On direct appeal to the Georgia Court of Appeals, applicant claimed for the first time that the pretrial photographic identification employed by the state police violated the due process clause of the Fourteenth Amendment. The Georgia Court of Appeals refused to entertain the claim. The Georgia Supreme Court denied direct review in April, 1994.

On December 6, 1994, applicant filed his first federal habeas application in the appropriate court, alleging the same violation. The U. S. District Court dismissed the claim, citing adequate and independent state grounds of decision. Applicant did not appeal this decision. On September 21, 1996, after the effective date of the 1996 amendments, applicant filed his second federal habeas petition. He again alleged that the photo line-up constituted a denial of due process. He alleged as well that under a 1995 Eleventh Circuit opinion, his conviction required reversal. This time, the same District Court entertained the claims and, applying the newer standards, found the following:

the photographic identification was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. This conclusion is based on this Court's finding, among other things, that (1) the circumstances surrounding the witnesses' observations of the crime were such that there was a grave likelihood of misidentification; (2) the witnesses have failed to give sufficiently detailed descriptions of the assailant; and (3) both prison officials and prison factions have brought considerable pressure to bear on the state's witnesses.

Accordingly, the District Court ordered the applicant's release, but stayed the order pending the state's appeal to the Eleventh Circuit.

You are the clerk to one of the appellate court judges. Advise her on the issues raised and how they should be resolved.

2. (30 min.) Plaintiff, a resident of New Hampshire, filed a diversity action in the U.S. District Court in Nashua, N.H. on November 3, 1997. (She alleged damages in excess of the required amount-in-controversy.) The claim arose out of an automobile accident that occurred in New Hampshire with a vehicle driven by Massachusetts resident, Mr. John Smith, on December 12, 1995. Service was effected within New Hampshire's two year statute of limitations for negligence. It became clear when defendant's counsel entered his appearance on December 2, 1997, however, that the Federal Marshall who served process had served the wrong John Smith, and had done so despite the fact that the attorney for the right Smith had been attempting to negotiate a settlement with Plaintiff's attorney. Thereafter, plaintiff served the right John Smith on December 15, 1997.

After service, the right Smith's attorney filed a motion to dismiss for failure to serve process within the time prescribed by the New Hampshire statute. Smith's attorney accurately informed the court that New Hampshire has no relation back law (either by rule or common law) and no savings statute (i.e., a statute providing a grace period, often six months long, allowing plaintiff to re-file claims not decided on the merits outside the limitation period.) Plaintiff's counsel responded by citing the relation-back provisions in Fed. R. Civ. Proc. 15 (c)(3), which states the following in pertinent part:

An amendment of a pleading relates back to the date of the original pleading when . . . (3) the amendment changes the party . . . against whom a claim is asserted if the foregoing provision (2) is satisfied and, . . . the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

(Rule 15 (c)(2) requires that the claim asserted "arose out of the . . . conduct . . . or occurrence set forth . . . in the original pleading.")

Advise Judge I. Dunno how to resolve the motion.

3. (30 min.) An ordinance passed by the Macon City Council effective as of October 15, 1997 states the following:

Family planning clinics offering any abortion or contraception counseling

or services to a minor shall consult in person both parents of said minor before such services are rendered, unless such parent(s) is deceased; and if both parents are deceased such clinics shall consult in person with said minor's legal guardian(s). Failure to consult as required herein is punishable as a Class D felony, and, in addition, shall cause such clinics to forfeit their license for not less than one year.

Macon Ord. No. 111. (A Class D felony is punishable not in excess of one year, or \$5000, or both.)

Two individuals have filed suit in the United States District Court for the Middle District of Georgia seeking a declaration that the ordinance violates the Fourteenth Amendment. Plaintiffs include Ms. Penelope Gold, 22, who alleges that the Ordinance, by requiring parental consultation, will discourage minors from seeking its services and make it impossible for the Clinic to run profitably. Moreover, she has had and intends to have another abortion. The second plaintiff is Dr. James Silver, Director of Medical Service for the Clinic, who alleges that approximately 50% of the clinic's patients are minor women, just less than half of whom live without one parent (including about 10% who live with neither parent), and that the clinic does not dispense contraceptives. Who, if either, has standing and what, if any, claims can he or she or both raise?

4. (30 min.) Same facts as 3 but with this twist: On the same day process was served, November 4, 1997, the District Court entered a 10 day temporary restraining order and scheduled a hearing on plaintiffs' application for a preliminary injunction for November 14. Through no one's fault, that hearing was postponed until November 24. On November 15, the District Attorney for Bibb County filed an information against Dr. Silver, alleging that on November 3, 1997, he provided an abortion for a minor without appropriate notification. The DA moved to vacate the hearing setting, among other things. What issue or issues might these new facts give rise to and what information do you need for resolution? What options, if any, do plaintiff(s) have?

5. (25 min.) You are counsel to EMI, a company that holds the copyright on a tremendous amount of popular music. The company informs you that the Atlanta Public School District, pursuant to regulations promulgated by the Georgia Department of Education, is piping EMI music into all high school cafeterias in the district during non-classroom hours in an effort to curb vandalism. Neither the State nor the school district has sought permission or is paying royalties. The copyright statute permits copyright

holders to bring suit in federal district court against “any copyright violator” for statutory damages and other relief. Advise the company on whom it should sue and what relief it should seek.

6. (25 min.) A number of Persian Gulf veterans in Clarksville, Ga. began supporting a group called NORMAL, National Organization to Reform Marijuana Laws. The Vets were members of a small chapter within the larger group called the Veterans of Foreign Wars (“VFW”). When VFW Major General B. F. N. Joke found out about the group’s activities, he sent a report to the Department of the Army (“DOA”) recommending that it withdraw all financial aid DOA was then providing for the Clarksville chapter. DOA obliged. The group filed a diversity action against Joke alleging defamation in the report he sent to the DOA. Joke defended on a number of grounds including privilege. Explain whether this issue should be governed by federal common law or the state privilege law?

7. (15 min.) Explain the relationship between *Tarble’s Case* (Text at 459) and *Sheldon v. Sill* (Text at 354).