**The Week Before the Bar Exam: Cases to Be Aware Of**

It is the week before the bar exam! Here are a few last-minute cases that it does not hurt to be aware of. These fact patterns could show up on some state essay exams. (Some states, including Michigan, use relatively recent Supreme Court cases to formulate fact patterns.)

However, even if these exact cases do not show up, it is still a nice last-minute review of highly-tested law that can (and probably will) show up on the MBE, and may show up on state essay exams.

**I. 5th Amendment Miranda case: *Salinas v. Texas***

This one, *Salinas. V. Texas*, isn’t too recent (from 2013), which is exactly why it may be prime time to show up on some state essay exams or even the MBE. The holding is that **pre-*Miranda*, pre-arrest silence can be used against a defendant in court (post-*Miranda* silence may not be used against a defendant in court to prove guilt).**

The story? Police visited Mr. Salinas at his home in connection with a double homicide investigation. He voluntarily agreed to go to the police station. He answered most questions but was silent when asked about the murder weapon. At trial, the prosecution argued that the silence indicated guilt and the jury convicted Mr. Salinas. *Miranda* warnings were not needed since the interaction was voluntary. In a 5-4 decision, the Supreme court stated that the Fifth Amendment privilege extends to only those who **unambiguously invoke it**. A person does not invoke it by remaining silent. (Ironically, a defendant is required to speak…) Thus, the statements could be used against the defendant in court.

Want to read more? Here is an article about the case.

[**http://www.huffingtonpost.com/2013/06/17/supreme-court-silence\_n\_3453968.html**](http://www.huffingtonpost.com/2013/06/17/supreme-court-silence_n_3453968.html)

**6th Amendment Crawford Case: *Ohio v. Clark***

Two public school teachers asked a young boy what happened to his face after noticing bruises on his eyes and face. The boy responded “Dee Dee”(which was a nickname for the defendant, who was his mother’s boyfriend). The question was whether these statements made were testimonial. In a 9-0 opinion, the Supreme Court held that these statements were not testimonial because they were not made for the primary purpose of creating evidence for prosecution.

The defense had argued they were since teachers were “effectively law enforcement officers” since they were “mandatory reporters of child abuse.” The court was not convinced and said, “[m]andatory reporting obligations do not convert a conversation between a concerned teacher and her student into a law enforcement mission aimed at gathering evidence for prosecution.”The court instead said that the statements were asked in the context of an “ongoing emergency concerning child abuse.”

This is a good case to know because it was a 9-0 opinion which means there is one clear answer. It also tests the Confrontation Clause, which is popular on many state exams (including Michigan).

To read the case, click here: [**http://www.supremecourt.gov/opinions/14pdf/13-1352\_ed9l.pdf**](http://www.supremecourt.gov/opinions/14pdf/13-1352_ed9l.pdf)

**Search incident to arrest of a cell phone**

One of the main cases on this was *Riley v. California.* In that case, Riley was stopped for a traffic violation, which eventually led to his arrest on weapons charges for possession of concealed and loaded firearms. An officer searching Riley incident to the arrest seized a cell phone from Riley’s pants pocket. The officer accessed information on the phone and noticed the repeated use of a term associated with a street gang. The phone’s contents were examined later and Riley was charged based on evidence gathered from the phone. Riley moved to suppress all evidence that the police had obtained from his cell phone.

If you see this as an essay question, remember to discuss the Fourth Amendment guarantee against unreasonable searches and seizures and to state that there is generally a warrant requirement unless an exception applies. Here, the issue is whether the police can search the cell phone under the search incident to arrest exception.

The court concluded that a search of digital information on a cell phone implicates substantially greater individual privacy interests than a brief physical search. It stated:Digital data stored on a cell phone cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee’s escape. Officers may examine the phone’s physical aspects to ensure that it will not be used as a weapon, but the data on the phone can endanger no one. Cell phones differ in both a quantitative and a qualitative sense from other objects that might be carried on an arrestee’s person. Notably, modern cell phones have an immense storage capacity and implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse. (Further, the defendant won’t be able to destroy evidence if he is arrested so the police officers can get a warrant if there is probable cause.)

To read the case, Riley v. California, click here: **http://www.supremecourt.gov/opinions/13pdf/13-132\_8l9c.pdf**

**Electronic Discovery update:**

There several amendments to the Federal Rules of Civil Procedure that took place in December 2015 (but don’t worry, they won’t show up on the MBE for February – In July, it is fair game as that is when the NCBE will start testing amendments to the rules!)

**Effective in 2015,** there is a new rule directed to electronically stored information (ESI). It says if electronically stored information that should have been preserved is lost because a party failed to take **reasonable steps** (\*not “perfect steps”) to preserve it, and it cannot be restored or replaced through additional discovery, the court:

* (1) May order measures no greater than necessary to cure the prejudice; or
* (2) Only upon finding that the party acted with intent to deprive another party of the information’s use in the litigation may:

presume that the lost information was unfavorable to the party;

instruct the jury that it may or must presume the information was unfavorable to the party; or

dismiss the action or enter a default judgment.

\*Note: This does not include a requirement that the court find prejudice to the other party. The fact that evidence is destroyed infers there is prejudice.

Examples

Examples of curative measures (under 1, above) include:

Forbidding the party that failed to preserve ESI from putting on certain evidence;

Permitting the parties to present evidence and argument to the jury regarding the loss of ESI; or

Giving the jury instructions to assist in its evaluation of such evidence or argument.

Examples of measures (under 2, above) include:

Presuming the lost information was unfavorable and instructing the jury that it may or must presume the information was unfavorable; or

Dismissing the action or entering a default judgment.

This would be a quite rude of a state to test this because the rules just became effective a couple months ago. Nonetheless, if that is your state’s style, it does not hurt to be aware of this case.

**Gay Marriage**

Gay marriage is now legal! (To put it in legal language, The Fourteenth Amendment requires a state to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state.) If you did *not* know this, you have been studying too much. So given the fact that everyone knows the outcome, and it is quite a hot-button issue, it is not good material for an essay question, in our humble opinion. However, we had to include it since it was one of the seminal cases of 2015 that decided a very heated fundamental rights question.

**For Michigan Bar Exam Takers:**

If you are in Michigan, here are a few additional cases to be aware of:

* **Premises-liability cases are still as defendant-friendly as ever.** Plunkett Cooney wrote an article about two cases that the Michigan Supreme Court recently reversed. In one case (*Compau v. Pioneer Res Co., LLC*) the Supreme Court granted summary disposition against a plaintiff who had tripped and fallen over a tie on defendant’s property. The Supreme Court that the plaintiff failed to state a claim of ordinary negligence and that her premises liability claims were dismissed under the open and obvious doctrine. In the other case (*Stimpson v. GFI Management Services, Inc.*) the Supreme Court granted summary disposition against a plaintiff who slipped and fell in the icy parking lot in her apartment complex while walking to her truck. While the Michigan Court of Appeals had said that the dangers posed by the ice met the “effectively unavoidable” special aspects exception to the open and obvious doctrine, the Supreme Court found that the ice was not inescapable because the plaintiff decided where to park her truck, chose to use the truck even though she had a vehicle parked under the carport, and didn’t attempt to use the salt provided by the landlord. **The defendant usually wins in premises liability cases on the Michigan bar exam, and these cases signal the strong defendant-friendly sentiment still exists.**
* If you feel like a reading a few opinions to see some highly-tested law in the context of a court opinion, please see *Spriggs v. Shanlian* for an “exigent circumstances” analysis (where a member of the BLE, Honorable Farah presided over the initial case). Please see this *Moir v. Moir* case, for an amazing fact pattern as well as a child custody, property division, and child support analysis.

Good luck this last week before the bar exam! Congratulations on almost being done!

Ms. Ashley Heidemann scored over a 180 on the Michigan Bar Exam in February of 2011. She (as well as a team of bar exam tutors!) offers [private one-on-one tutoring](http://www.excellenceinlawschool.com/bar-exam/private-tutoring/) for bar exam students nationwide as well as [Michigan bar exam courses](http://www.excellenceinlawschool.com/bar-exam/michigan-bar-exam-course/) and [seminars](http://www.excellenceinlawschool.com/bar-exam/michigan-bar-exam-seminar/) . For any questions about her bar exam services, please [click here](http://www.excellenceinlawschool.com/contact/) to contact us. We are happy to assist you in any way we can.