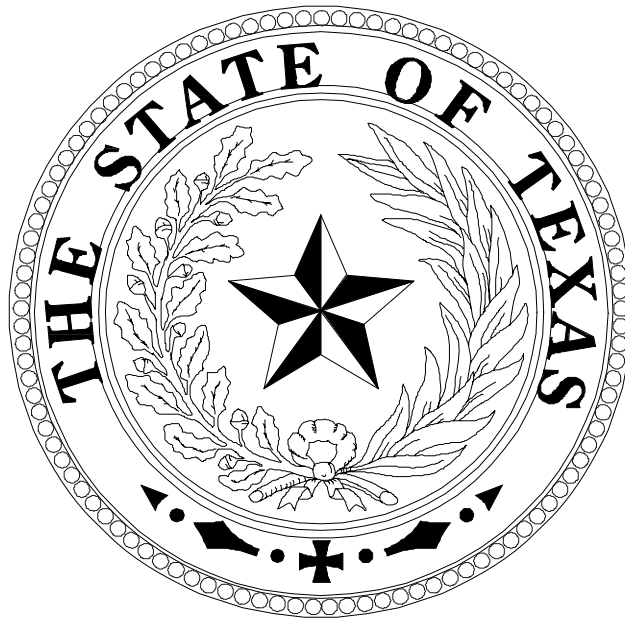


Examinee
Number

Exam
Date February 2009

Criminal Procedure & Evidence

[This Criminal booklet is one part of the Procedure & Evidence session. Both the Civil and the Criminal booklets must be completed during the 90 minute Procedure & Evidence testing session.]



TEXAS BAR EXAMINATION

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YOUR ANSWERS MUST BE LIMITED TO THE 5 LINES PROVIDED AFTER EACH QUESTION. ANYTHING MORE THAN 5 LINES WILL NOT BE GRADED.

CRIMINAL PROCEDURE & EVIDENCE

On November 19, 2008, Troy drove his sport utility vehicle (“SUV”) to Roscoe’s house in Fort Bend County, Texas. When Troy entered Roscoe’s house, they talked about Roscoe’s sawed-off shotgun. Troy said that he was uncomfortable being around firearms and suggested they go for a ride. Without Troy’s knowledge, Roscoe put the sawed-off shotgun in the back of the SUV before they left.

Troy and Roscoe drove to Harris County, Texas. At a traffic light, a police officer (“Officer”) forced Troy to pull his SUV over to the side of the road because Officer saw a tattoo on Troy’s left arm and concluded that Troy “was up to no good.” As Officer approached the SUV on foot from the rear, he spotted the sawed-off shotgun and immediately arrested Troy and Roscoe for unlawfully possessing the weapon.

At the police station, Roscoe waived his rights and gave a written confession, admitting that he owned the sawed-off shotgun, but claiming that Troy had borrowed it and placed it in the SUV. Troy and Roscoe were charged with the felony of knowingly and intentionally possessing a short-barrel firearm. The court has appointed you as Troy’s lawyer.

At the examining trial, the court remarks that Troy’s bail should be set at \$25,000. When you argue to the court that Troy is poor, but that his family could pay if bail were set at \$10,000, the court responds: “If he has enough money to make bail, then he can afford to pay for his own lawyer.”

1. What are three rules that a court should follow when fixing the amount of bail?

2. Can the court consider whether Troy is capable of posting bail in determining whether Troy is indigent and is still entitled to appointed counsel? Explain fully.

- 3. If the court denies your request to reduce Troy’s bail to \$10,000, what procedural step, if any, can you take to seek a reduction in bail, and what argument, if any, can you make for such a reduction? Explain fully.**

Eager to get a great plea bargain, Roscoe meets with Officer and tells him that Troy has purchased many illegal weapons from him in the past and that they are locked in a closet in Troy’s apartment.

- 4. In order for a search warrant to be issued authorizing the search of Troy’s apartment for evidence, what facts must Officer allege and in what document must he do this? Explain fully.**

Subsequently, Troy is released on bond. A Harris County grand jury returns an indictment charging both Troy and Roscoe with the felony of intentionally and knowingly possessing a short-barrel firearm.

- 5. Is venue proper in Harris County, Texas? Explain fully.**

The court sets a pretrial hearing for 9:45 a.m. on December 17, 2008, and sets trial for January 5, 2009. You then learn that Roscoe's girlfriend saw Roscoe secretly place the sawed-off shotgun in the SUV, while Troy was not present. Unfortunately, Roscoe's girlfriend has gone on vacation, and you do not know how to contact her.

6. What procedural step, if any, can you take to obtain more time before the trial in order to find Roscoe's girlfriend; by what date must you take such a step, if any; and what must you show the court? Explain fully.

While preparing for trial, you realize that prohibiting the prosecutor from introducing the sawed-off shotgun into evidence will result in an acquittal of Troy.

7. What procedural step, if any, can you take to try to keep the sawed-off shotgun from being introduced into evidence, and what argument, if any, can you make in support of your position? Explain fully.

Against your advice, Troy decides to plead guilty. In court, the following occurs:

COURT:	How do you plead to the indictment?
TROY:	Your Honor, I plead guilty.
COURT:	Well, let me warn you about some things.
TROY:	Actually, Your Honor, I have changed my mind and want to take back my guilty plea and go to trial.

8. May Troy withdraw his guilty plea at this point in the proceeding? Explain fully.

Assume that Troy can and does withdraw his guilty plea.

9. Is Troy's guilty plea admissible at his trial as evidence of his guilt? Explain fully.

Before the December 17, 2008, pretrial hearing, you discover that Roscoe was convicted and sentenced in 2006 for unlawfully possessing a firearm silencer.

10. What procedural steps, if any, can you take to try to protect Troy from the prejudice he will suffer from the introduction of Roscoe's prior conviction if Troy and Roscoe are scheduled to be tried together? Explain fully.

During your investigation of Troy's defense, you locate Roscoe's girlfriend, Glenda, who lives in Harris County. She confirms that she saw Roscoe put the sawed-off shotgun in the back of Troy's SUV when Troy was not present.

- 11. What procedural steps, if any, can you take to ensure that Glenda appears at trial to testify as a witness? Explain fully.**

At 9:15 a.m. on December 17, 2008, the court begins the pretrial hearing 30 minutes early, even though Troy has not arrived yet. You object to the court's beginning the hearing in Troy's absence, but the court overrules your objection.

- 12. Did the court correctly rule on your objection, and does a defendant have a right to be present at a pretrial proceeding? Explain fully.**

At the joint trial of Troy and Roscoe on January 5, 2009, the jury panel is assembled and voir dire begins. During voir dire, one prospective juror states the opinion that "no person convicted of possessing an illegal firearm should ever get probation."

- 13. Can you properly make a challenge to this prospective juror, and, if so, what kind of challenge should you make and on what ground? Explain fully.**

After the jury is selected, you notice that Officer and the State’s tattoo expert, who will be witnesses at trial, are conferring in the courtroom about Troy’s case.

14. What procedural step, if any, can you take to stop Officer and the expert from conferring about the case and from remaining in the courtroom during trial? Explain fully.

Prior to any testimony, the prosecutor asks for a bench conference and tells the court that she intends to introduce Roscoe’s confession to show that he owned the sawed-off shotgun and that Troy put the sawed-off shotgun in the SUV. You know from a conversation with Roscoe’s lawyer that Roscoe has chosen not to testify at trial.

15. What objections or requests, if any, should you make with regard to the admission of Roscoe’s confession into evidence? Explain fully.

During trial, Officer testifies on direct examination about how he pulled Troy’s SUV over and discovered the sawed-off shotgun. During your cross-examination of Officer, you request a copy of Officer’s report concerning these events, but the prosecutor objects, stating: “Police reports are work product and do not have to be produced as part of discovery.” The court denies your request for a copy of Officer’s report.

16. Is the court's ruling correct? Explain fully.

At a conference on the court's proposed jury charge, you object that, although the charge instructs that the jury must acquit unless it is satisfied beyond a reasonable doubt of the defendant's guilt, it does not define the phrase "reasonable doubt."

17. Must the court include a definition of "reasonable doubt" in the jury charge? Explain fully.

Troy decides not to testify in his own defense. During closing argument to the jury, the prosecutor makes the following statement:

PROSECUTOR: Ladies and gentlemen of the jury, if Troy really were not guilty, don't you think he would have gotten up on the witness stand and told you so!

18. Is the prosecutor's argument improper? If a prosecutor makes an improper closing argument to the jury, what procedural steps, if any, must defense counsel take to preserve error? Explain fully.

The jury finds both Troy and Roscoe guilty as charged in the indictment. Although you did not previously request that the jury determine Troy's sentence, you immediately file a written motion for the jury to assess punishment.

19. Is your request for jury sentencing timely at this stage of the proceedings? Explain fully.

The prosecutor gave you timely and proper notice that, at the sentencing phase of the trial, she would seek to introduce evidence that Troy committed a bank robbery on November 18, 2008, using Roscoe's sawed-off shotgun. Troy has not been charged with or convicted of the bank robbery.

20. Is evidence that Troy committed the bank robbery admissible against Troy in the sentencing phase of the trial? Explain fully.

DO NOT CONTINUE YOUR ANSWER IN THIS SPACE.

THIS CONCLUDES THE CRIMINAL PROCEDURE AND EVIDENCE QUESTIONS. CIVIL PROCEDURE AND EVIDENCE QUESTIONS ARE CONTAINED IN A SEPARATE BOOKLET.

WRITE THE PLEDGE ON THE BACK OF YOUR CRIMINAL PROCEDURE AND EVIDENCE ANSWER BOOK IN THE SPACE PROVIDED.