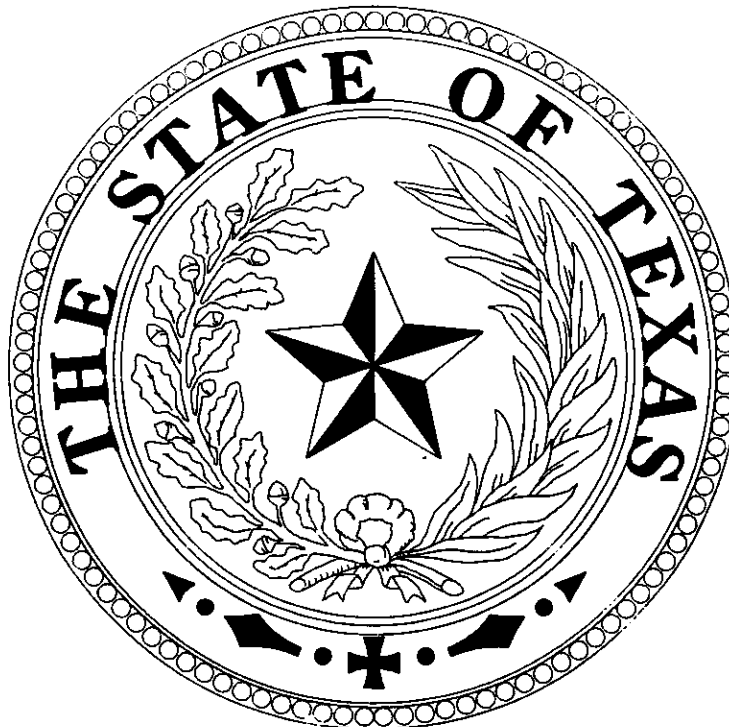


Examinee
Number

Exam
Date FEBRUARY 2010

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

George purchased a new sport utility vehicle ("SUV"). Two years later, he lost his job and was unable to make the insurance and loan payments on the SUV. One night, the SUV caught on fire. By the time firemen and Police Officer ("Officer") arrived at the scene, the SUV was totally destroyed. Officer discovered a cigarette lighter and a can of gas in the bushes near the SUV.

Two years and one month after the SUV was destroyed by fire, George's best friend, Lenny, was charged with the felony of arson. Officer arrested Lenny, handcuffed him, and took Lenny to the police station. After Officer advised Lenny of all of his rights, Lenny waived his rights. Officer questioned Lenny about the SUV. Lenny told Officer that he set the SUV on fire because George had promised to give him \$500 in cash from the insurance proceeds.

You have been appointed to represent Lenny in the arson prosecution, and bail has been set at \$20,000.

- 1. Is the prosecution barred because the State waited too long to file this felony charge against Lenny? Explain fully.**

When you first speak with Lenny, he seems slightly confused. You briefly wonder about Lenny's competence to stand trial.

- 2. What would you need to establish to prove that Lenny is incompetent to stand trial, and what burden of proof would you need to meet? Explain fully.**

After a minute or two, Lenny snaps out of his confusion and is perfectly fine. During your conversation with him, he asks you to explain what bail is and what he has to do to get released from jail.

3. **What is bail? What is a bail bond? In what major way does a personal bond differ from a bail bond? Explain fully.**

A few days later, Lenny posts bail and is released from jail. The prosecutor phones you and asks you whether Lenny would be willing to resolve the case quickly by waiving his right to indictment and pleading guilty to an information in return for the State's recommendation of a lenient sentence.

4. **What is an indictment? Discuss two ways in which an indictment and an information differ? Explain fully.**

While considering the State's plea offer, Lenny asks you what will happen if he pleads guilty but the Court does not agree with the plea agreement.

5. **Will Lenny be allowed to withdraw his guilty plea if the court rejects the plea agreement? Explain fully.**

Lenny tells you that he thinks it would be better for him to enter a plea of nolo contendere rather than a plea of guilty. He believes that a nolo contendere plea does not have the same legal effect as a guilty plea.

6. Is Lenny's belief correct? Explain fully.

Lenny decides to reject the prosecutor's offer. The grand jury subsequently returns an indictment that appears to charge Lenny with the felony of arson for setting the SUV on fire. However, you believe that the indictment fails to charge two of the elements of arson and thus fails to charge Lenny with that crime.

7. What procedural step, if any, can you take to challenge the indictment? Assuming that you can take some procedural step, when should that step be taken? Explain fully.

Prior to trial, your arson expert asks you for a copy of Officer's police report. You file a motion for discovery that requests a copy of Officer's police report.

8. Must the prosecutor produce a copy of Officer's police report to you as part of discovery before trial? Explain fully.

Lenny is eligible for community supervision, and you believe that a jury might be sympathetic and recommend community supervision.

9. What procedural steps can you take to obtain jury sentencing and to allow a jury to recommend community supervision? When should you take these steps? Explain fully.

You timely take the proper procedural steps to obtain jury sentencing and to allow a jury to recommend community supervision. Prior to trial, Lenny tells you that he used to play with matches and that he set his grandfather's barn on fire six years ago. You worry that the prosecutor might try to introduce evidence of this previous event at trial.

10. What procedural step, if any, can you take to ensure that the prosecutor will disclose before trial whether he intends to introduce in the State's case at trial evidence of this previous event? Explain fully.

During discovery, you learn about Lenny's confession to Officer at the police station. You also learn that the prosecutor intends to have Officer testify at trial about his recollection of Lenny's confession at the police station.

11. **What procedural step, if any, can you take to have the Court exclude Officer's testimony about this confession from evidence? On what basis, if any, can you take this step? Explain fully.**

In one of your discussions with Lenny, he tells you that he went to the police station one year after he set the SUV on fire and told the receptionist on duty the following: "I am feeling guilty about something I did. Is Officer here? I really need to talk to him about a fire and about getting my friend's lighter back." Lenny also tells you that he left the police station when the receptionist went to find Officer because he became scared. You have no doubt that the prosecutor will have the receptionist testify at trial about what Lenny told him at the police station.

12. **What procedural step, if any, can you take to have the Court exclude the receptionist's testimony from evidence? On what basis, if any, can you take this step? Explain fully.**

On the day of trial, the jury panel is assembled and voir dire begins. When questioned, one prospective juror states that he retired from the fire department in Shawnee, Kansas, about ten years ago. He also states that he would be able to follow the court's instructions and reach a fair and impartial verdict based on the evidence.

13. **Can you exercise a challenge to exclude this person from the jury? If so, what kind of challenge can you use, and to how many such challenges are you entitled? Explain fully.**

After the jury is selected and sworn and opening statements are given, one of the jurors suddenly has a massive heart attack and is taken to the hospital. The prosecutor requests a mistrial on the ground that, under the laws of Texas, no less than twelve jurors can return a verdict in a trial of a felony.

14. Must the Court grant a mistrial? Explain fully.

As his first witness, the prosecutor calls an arson expert to testify that the SUV was set on fire with George's cigarette lighter. Your expert has told you that this arson expert's opinion is nonsense. You ask the Court to allow you to question the prosecution's arson expert about his qualifications and the basis of his opinion outside of the jury's presence. The Court denies your request.

15. Is the Court's ruling correct? Explain fully.

The prosecutor tells you that he intends to call Lenny's wife, Kate, as his second witness to testify that she saw Lenny holding George's cigarette lighter two hours before the SUV burned. Outside of the jury's presence, however, Kate tells the Court that she does not want to testify against Lenny.

16. Does Kate have any right to refuse to testify against Lenny? Does Lenny have any right to prohibit the prosecutor from calling Kate as a witness? Explain fully.

A few minutes before trial begins on the second day, Lenny calls you on your cell phone and tells you that he does not like the way things are going and that he “might not make it to court due to other plans.” Lenny does not come to court.

17. Does a defendant have the right to be personally present at trial? May the trial proceed in Lenny’s absence? Explain fully.

At the end of trial, you ask the Court to instruct the jury as follows: “You are not bound by the State’s arson expert’s opinion that George’s cigarette lighter was used to set the SUV on fire. You are the ultimate arbiters of the credibility and reliability of that opinion and should consider it with great skepticism because the expert is paid by the State.” The prosecutor objects to your proposed instruction, and the Court decides not to give it to the jury.

18. Is the Court’s ruling correct? Explain fully.

The jury convicts Lenny of arson. The jury also assesses Lenny’s punishment at five years’ incarceration, but recommends to the Court that it suspend the imposition of the sentence and place Lenny on community supervision.

19. **May the Court ignore the jury's recommendation of community supervision and impose a sentence of five years' incarceration only? Explain fully.**

You decide not to file a motion for new trial in Lenny's case. Lenny tells you that he wants to appeal.

20. **What procedural step must you take to perfect Lenny's appeal, and how long do you have to take that step?**

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THIS CONCLUDES THE CRIMINAL PROCEDURE AND EVIDENCE QUESTIONS. CIVIL
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MULTISTATE PERFORMANCE TEST and PROCEDURE & EVIDENCE

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