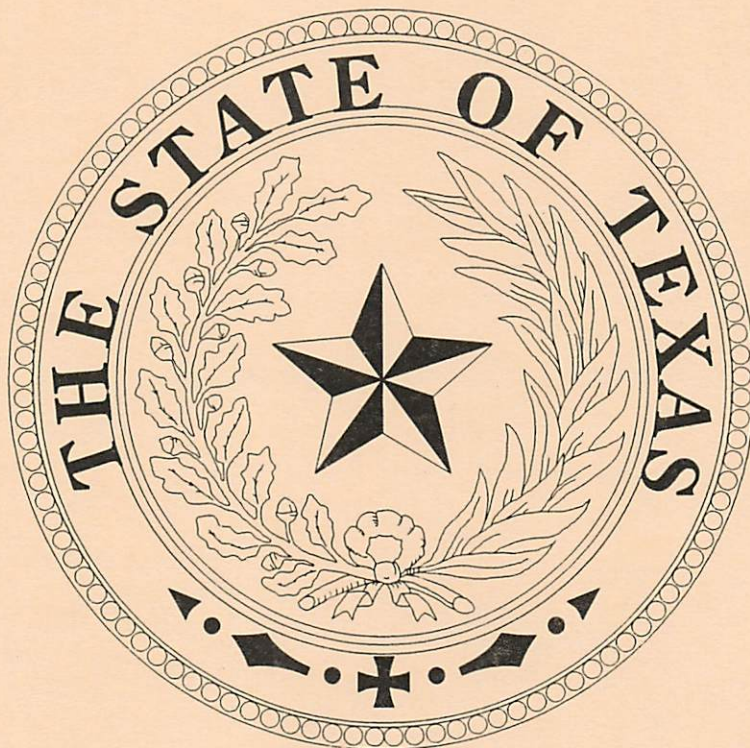


Examinee
Number

Exam
Date JULY 2011

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

Wendy was a waitress at a restaurant ("Restaurant") in Texas. Her friend, Sally, offered to pay her to swipe Restaurant's customers' credit cards through a miniature credit card reader to obtain their credit card information. Wendy agreed and began swiping customers' credit cards through Sally's credit card reader, as well as through Restaurant's cash register. Once per week, Sally retrieved the credit card reader from Wendy and gave her a new one.

One month later, Restaurant's best customer, Emmett, noticed a \$300 charge at a store in Illinois on his credit card bill. Because Emmett had never been to Illinois, he called the police. To investigate Emmett's complaint, Police Detective Loss ("Det. Loss") went to Restaurant, ordered a meal, and gave Wendy his credit card to pay for it. He saw Wendy swipe his credit card through Sally's credit card reader as well as through Restaurant's cash register. Det. Loss arrested Wendy and confiscated Sally's credit card reader. Wendy told Det. Loss that Sally had given her the credit card reader and had agreed to pay her for swiping the cards. Det. Loss then arrested Sally.

Sally has been charged by a complaint with the second degree felony of fraudulently obtaining, possessing, and using the identifying information of another. She has been brought before a magistrate.

- 1. Name three of the rights about which the magistrate should advise Sally.**

You are appointed to represent Sally, who is being held in jail without bail.

- 2. Within what time period should you contact Sally? What may the Court do if you fail to meet this deadline? Explain fully.**

3. **What facts, if any, in Sally’s prior criminal record would allow a district judge to deny Sally bail? Explain fully.**

When you meet with Sally in jail, she claims she was merely gathering information for a survey of consumers’ food preferences. She also asks you whether a judge can “throw out” the charges against her.

4. **At this early stage of the prosecution of Sally, is she entitled to a proceeding in which the truth of the accusation made against her will be considered? If there is such a proceeding, what is it, and what determination will be made? Explain fully.**

Det. Loss is considering obtaining a search warrant for Sally’s apartment.

5. **What are the requisites for a search warrant to be sufficient under the Texas Code of Criminal Procedure? Explain fully.**

Due to your efforts, bail is set for Sally, and she is released from jail. Sally subsequently disappears, and no one is able to locate her. Thereafter, a grand jury indicts her for the second degree felony of fraudulently obtaining, possessing, and using the identifying information of another.

6. How many jurors serve on a grand jury, how many must concur for a person to be indicted, and who drafts the indictment? Explain fully.

After Sally is indicted, the clerk, at the direction of the judge of the Court having jurisdiction of Sally's case, issues a *capias*.

7. What is a *capias*? Explain fully.

The Court sets a pretrial hearing in Sally's case. Due to the popularity of Restaurant, you decide to file a motion for change of venue.

8. When must you file your motion? What consequence, if any, is there if you do not file your motion by that date? Explain fully.

After Sally is located, you meet with her. She states that she would be willing to plead guilty, but that she wants a jury to assess the punishment in her case.

9. Does the Texas Code of Criminal Procedure allow a jury to assess punishment when a defendant enters a guilty plea? Explain fully.

You phone the prosecutor (“Prosecutor”) in Sally’s case and request to inspect the credit card reader that was confiscated from Wendy so that you can prepare for trial. Prosecutor refuses to allow you to inspect the credit card reader.

10. What procedural step, if any, can you take to try to get access to the credit card reader? If there is such a procedural step, what must you show to get access to the credit card reader? Explain fully.

You propose a plea bargain to Prosecutor that would allow Sally to plead guilty to a misdemeanor that is a lesser included offense of the offense charged in the indictment.

11. Does the district court have jurisdiction over such a lesser included offense? Explain fully.

Sally tells you that she wants a jury trial as to her guilt and her punishment. She also tells you that: (a) if she is found guilty, she wants probation; and (b) she has no prior convictions in Texas, but has a prior felony conviction in Idaho.

12. Is Sally eligible for probation? If a defendant is eligible for probation, what procedural step should defense counsel take to allow a jury to recommend it, and when should defense counsel take this step? Explain fully.

You and Sally appear in court for jury selection. About an hour after the beginning of jury selection, and after numerous prospective jurors have been questioned regarding their ability to be fair in Sally's case, Sally tells you that she thinks 18 out of the first 20 prospective jurors are customers of Restaurant.

13. What action, if any, can you take to change the seating of the prospective jurors? Explain fully.

During jury selection, Prosecutor asks the prospective jurors the following question: "If the evidence, in a hypothetical case, showed that a person gave a credit card reader to a waitress, asked her to swipe customers' credit cards through it, and then retrieved it on a weekly basis, is there anyone who could not convict that person based on that evidence?" You object to the question.

14. How should the Court rule on your objection? Explain fully.

After the jury is selected, Prosecutor informs you that he intends to introduce into evidence Wendy's statement to Det. Loss when she was arrested because Wendy is asserting her right to remain silent.

15. What objections or requests, if any, should you make with regard to the admission of Wendy's statement? Explain fully.

Prosecutor makes a deal with Wendy that he will not prosecute her if she testifies against Sally. Wendy testifies at trial and incriminates Sally. On cross-examination, you ask Wendy: "Isn't it true that you made a deal with Prosecutor and that is why you aren't being prosecuted?" Prosecutor objects that the status of Wendy's prosecution is irrelevant to Sally's guilt.

16. How should the Court rule on Prosecutor's objection? Explain fully.

Prosecutor calls Emmett as a witness, and he testifies that: (1) there was an erroneous charge on his credit card for a purchase in Illinois; (2) he has no idea whether his credit card information was stolen at Restaurant; and (3) he never noticed any unusual behavior by Wendy. Prosecutor then asks Emmett: "Do you have any opinion about whether Sally knowingly and intentionally committed the crime charged in the indictment?"

17. On what grounds, if any, can you object to Prosecutor's question? Explain fully.

During your cross examination of Emmett, you try to attack his credibility by asking him:
"Didn't you lie on Tuesday about having an affair with your boss?"

Prosecutor objects to your question.

18. How should the Court rule? Explain fully.

After closing argument and about an hour into jury deliberations, the jurors disagree about whether Emmett testified that the erroneous credit card charge resulted from a purchase made in Illinois or a purchase made in Texas.

19. What can the jury do, if anything, to find out what Emmett actually testified to? Explain fully.

Sally is convicted and the sentence is imposed. She appeals challenging the legal sufficiency of the evidence to support her conviction.

20. What is the standard of review for the legal sufficiency of the evidence? 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.

MULTISTATE PERFORMANCE TEST and PROCEDURE & EVIDENCE

**TEXAS BAR EXAM
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