

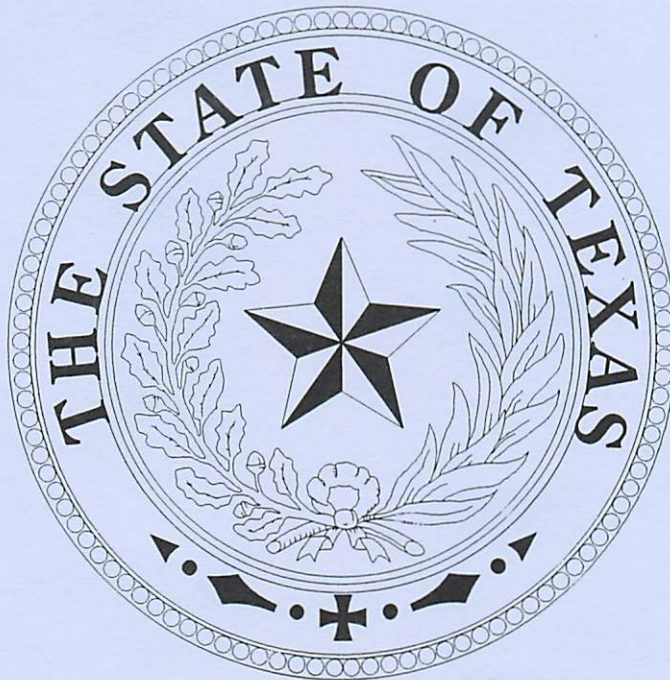
Examinee
Number

Attach Criminal P&E bar code sticker here

February 2012

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

COPYRIGHT © 2012 TEXAS BOARD OF LAW EXAMINERS
THIS MATERIAL, OR ANY PORTION HEREOF, MAY NOT BE REPRINTED WITHOUT THE ADVANCE WRITTEN PERMISSION
OF THE TEXAS BOARD OF LAW EXAMINERS.

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

Bubba Platt was an auto mechanic and one of nine employees at a gas station (“Station”), which was located in Midland, Texas, and owned by Gas Corporation. Station had a security camera that videotaped customers as they approached the cashier. On the night of December 11, 2011, while working alone, Bubba moved the security camera to Station’s bathroom and videotaped customers as they used the bathroom.

Two weeks later, Edgar West was surfing the Internet at his home in Midland when he opened a web site and was shocked to see a video recording of himself using the bathroom at Station. He immediately reported this to Midland Police Sergeant Law (“Sgt. Law”).

Sgt. Law drove to Station on a Sunday afternoon, saw that Bubba was the only employee there at the time, and arrested him. Without a warrant, Sgt. Law seized the security camera and the videotape within it from the bathroom. Sgt. Law then drove Bubba to the local jail, where he was detained.

Bubba has been charged by complaint with the state jail felony of improper visual recording. You have been appointed to represent him.

- 1. Was Sgt. Law’s arrest of Bubba valid? Explain fully.**

- 2. If Bubba is denied bail, what procedural step can you take to challenge that ruling, and what are two of the requisites of that procedural step? Explain fully.**

When you meet with Bubba, he tells you that he was unaware of what he was doing when he hid the security camera in the bathroom and put the video recordings on the Internet. Bubba states that he had a mental episode that caused him to lose all control of his brain and that he has had similar episodes throughout his life. He tells you that he is fine now and has no problem as long as he takes his medication.

3. Should you consider raising (a) incompetency, (b) insanity, or (c) both as a defense at Bubba's jury trial? Explain fully.

A grand jury indicts Bubba. The indictment alleges the following:

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF TEXAS:

THE GRAND JURY hereby charges that, on December 11, 2011, BUBBA PLATT did then and there intentionally and knowingly by videotape or other electronic means record, broadcast, and transmit a visual image of another, the Complainant, Edgar West, at a location that is a bathroom.

AGAINST THE PEACE AND DIGNITY OF THE STATE.

Matthew B. Brady
FOREPERSON OF THE GRAND JURY

4. Identify three defects in this indictment. Explain fully.

(DO NOT CONTINUE YOUR ANSWER IN THIS SPACE)

5. **What procedural step, if any, can you take to challenge the indictment based on these defects? If there is some procedural step you can take, by when must you take it?**

The case file of the prosecutor (“Prosecutor”) contains Sgt. Law’s notes of his discussions with Prosecutor about Bubba’s case. You file a motion for discovery of all notes that Sgt. Law has made about Bubba’s case.

6. **How should the Court rule on your motion for discovery of Sgt. Law’s notes? Explain fully.**

Prosecutor files a motion for discovery of the names and addresses of all witnesses that you intend to call at trial in Bubba’s defense.

7. **How should the Court rule on Prosecutor’s motion to discover all witnesses that you intend to present at trial? Explain fully.**

Sgt. Law drafts a sworn affidavit for an evidentiary search warrant in order to search Bubba's home for all videotapes and video cameras present there. In his affidavit, Sgt. Law states that the videotapes and video cameras are located in Bubba's home, and he also states the home's correct address.

8. Is Sgt. Law's affidavit for the evidentiary search warrant sufficient? Explain fully.

You timely file a written pretrial motion requesting that the Court prohibit Prosecutor from introducing into evidence Station's security camera and the videotape within it, because Sgt. Law seized them without a warrant.

9. What argument, if any, can Prosecutor make in response to your motion? Explain fully.

Bubba is considering entering a guilty plea to the indictment.

10. If Bubba enters a guilty plea and receives the sentence provided for in his plea agreement, will he be barred from appealing a denial of your motion to prohibit Prosecutor from introducing the security camera and videotape into evidence? Explain fully.

During discovery, Prosecutor gives you the copies of the security camera's videotape. As you are viewing the videotape, you see that the trial judge in Bubba's case was recorded while using Station's bathroom.

11. **What procedural step, if any, can you take to ensure that Bubba has a fair and impartial judge presiding over his trial? What legal basis, if any, is there for taking a procedural step in these circumstances? Explain fully.**

You plan to call Bubba's psychiatrist to testify at trial about Bubba's mental affliction and its effect on his behavior and thoughts. Unfortunately, the psychiatrist is visiting a foreign country and will not return until after Bubba's trial date.

12. **What procedural step can you take to seek a postponement of the trial? What are two of the requisites you must satisfy as part of this procedural step? Explain fully?**

Bubba chooses to have a jury decide whether he is guilty, and the court holds a pretrial hearing to discuss the trial schedule. The trial will be held in Midland County, Texas.

During jury selection, three prospective jurors provide the following information: (1) Juror A is qualified to vote in Midland County, Texas, but has not registered to vote there; (2) Juror B has been convicted of misdemeanor theft; and (3) Juror C has been charged with, but not convicted of, misdemeanor theft. Prosecutor challenges all three of these jurors for cause, and you oppose Prosecutor's challenge.

13. How should the Court rule on Prosecutor's challenges for cause of Jurors A, B, and C? Explain fully.

The Court allows you and Prosecutor eight peremptory challenges each. You use your seventh and eighth peremptory challenges to strike two prospective jurors because they are wearing ugly plaid shirts. The Court asks you to justify your seventh and eighth peremptory challenges.

14. Did the Court allow you the correct number of peremptory challenges? Were you entitled to use your peremptory challenges to strike jurors based on their ugly plaid shirts, and must you justify your use of your peremptory challenges? Explain fully.

15. After a jury is impaneled, what are the first two steps in the order of proceeding in trial? If these two steps are skipped, can the error be fixed later in the trial? Explain fully.

Prosecutor calls Sgt. Law as his first witness at trial. Sgt. Law begins to testify about Bubba's oral confession at the jail on the day of his arrest. You object that such testimony is inadmissible because you were never informed about the confession in response to your request for discovery. Prosecutor hands you a tape recording of the confession and argues that Bubba's oral statement is admissible.

16. **By what deadline, if any, should Prosecutor have made the tape recording available to you, given his intent to introduce Bubba's oral statement at trial? Explain fully.**

During a break in the trial, you listen to the tape recording of Bubba's oral statement and hear him talking about the devil in response to most of Sgt. Law's questions. Bubba also says "yes, yes, yes, ha, ha, ha" in response to Sgt. Law's question: "You know you want you to waive your Miranda rights and that the devil wants that too, don't you?" Later in the recording you hear Bubba say, "I did it, I did it, I did it!" in response to Sgt. Law's question: "You know that the devil will get you if you do not admit that you placed the security camera in the bathroom, don't you?"

17. **Had Prosecutor given you the tape recording of Bubba's confession prior to trial, what procedural step would you have taken to obtain a ruling that the confession was inadmissible and on what legal basis would you have taken this step? Explain fully.**

Prosecutor informs you that his next witness will testify that Bubba assaulted him two years ago.

18. What objections, if any, should you make to the admissibility of this testimony? Explain fully.

19. You filed no pleading concerning the assessment of Bubba's punishment. Will the judge or the jury assess punishment in this case? Explain fully.

Bubba is convicted, sentenced, and sent to jail. Some of the people he videotaped using Station's bathroom were minors. He thus is charged in federal court with producing child pornography based on the same security camera and videotape that were used to obtain his Texas conviction for improper visual recording.

20. Does the federal prosecution for producing child pornography violate the Double Jeopardy Clause of the United States Constitution? Explain fully.

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

