

Examinee
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February 2015

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

Wilma, a retired teacher, was babysitting three five-year-old children, Josh, Edna, and Oscar, at her home at 8:55 a.m. on January 17, 2014. Wilma was drunk at the time and left to go to Liquor Mart to buy more whiskey. Although logs were burning in the fireplace, Wilma felt comfortable leaving the children alone at her home because Ashley, a retired kindergarten teacher, was scheduled to arrive there at 9:00 a.m.

Wilma returned to her home at 9:25 a.m. and immediately realized that Ashley had not arrived. When Wilma entered the living room, she noticed that Josh, Edna, and Oscar were in pain and had burns on their hands.

Ashley arrived at Wilma’s house at 9:30 a.m. and called the police, telling the police dispatcher only, “We need assistance.” Sergeant First (“Sgt. First”) arrived and knocked on Wilma’s front door. Wilma responded by yelling through the door, “Just a minute.” Sgt. First waited for a few seconds, but then entered the house and went into the kitchen. He opened a kitchen drawer and, within it, saw a Liquor Mart receipt showing that Wilma had purchased a bottle of whiskey at 9:15 a.m. that morning. Sgt. First kept the receipt as evidence. After speaking with the children, Sgt. First arrested Wilma. Wilma was charged by a criminal complaint with the second-degree felony of injury to a child. You have been appointed as Wilma’s attorney.

Just before Wilma’s examining trial, the magistrate decides to wait to conduct the proceeding.

- 1. Within what amount of time must a magistrate make a probable cause determination following a warrantless arrest of a person for a felony? What consequences are there, if any, if a magistrate fails to make that determination within that amount of time?**

At Wilma's examining trial, you argue that she cannot afford to post bail in excess of \$10,000, but the magistrate sets Wilma's bail at \$25,000.

2. **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?**

Following her examining trial, Wilma asks you if there is a way in which she can resolve her case without being indicted by a grand jury.

3. **Can a defendant waive the right to be charged by indictment with a felony? If a defendant can waive that right, what is the procedural step by which a defendant may do so?**

A grand jury is convened, and Ashley is summoned as a witness to testify about the injuries to the three children. Ashley appears, but refuses to answer the grand jury's questions.

4. Can a Court compel Ashley to answer the grand jury's questions? If so, by what means?

The grand jury returns a three-count indictment charging in each count that, on or about January 17, 2014, at her home, Wilma committed the second degree felony of injury to a child. The three counts differ only in that each count charges that Wilma caused serious bodily injury to a different child: (1) to Josh in Count One; (2) to Edna in Count Two; and (3) to Oscar in Count Three.

5. Does the Texas Code of Criminal Procedure permit two or more offenses to be charged in one indictment? Explain your answer.

6. Does Wilma have the right to have an examining trial on the charges alleged in the indictment? Explain your answer.

The Court sets a date for a pretrial hearing. You decide to file a motion for discovery.

7. How many days before the pretrial hearing must you file your motion for discovery? What consequences are there, if any, if you fail to file the discovery motion by that time?

Contained within the case file of the prosecutor ("Prosecutor") is the written statement of Joe Wilson, who is Wilma's gardener. Mr. Wilson's statement describes the events he observed at Wilma's home between 9:00 a.m. and 10:00 a.m. on January 17, 2014, while cutting the lawn. You give a written request to Prosecutor to review Mr. Wilson's written statement.

8. Does the Texas Code of Criminal Procedure require Prosecutor to take any action in response to your request? Explain your answer.

Prior to trial, Prosecutor informs you that he will call Sgt. First as a witness to introduce into evidence and testify about the Liquor Mart receipt he found in Wilma's kitchen drawer.

9. What procedural step, if any, can you take to try to prohibit the introduction of the receipt into evidence and Sgt. First's testimony about it? If there is such a procedural step, what argument can you make in support of it?

You and Prosecutor reach a plea agreement that provides for a sentence of probation. When you present the plea agreement to Wilma, she asks you if probation is guaranteed.

10. What is your answer to Wilma's question?

Wilma asks you whether she can have a judge determine her guilt or innocence after a trial rather than having a jury do so.

- 11. Can a defendant charged with a felony waive the right to have a jury determine her guilt or innocence? If a defendant can waive that right, what procedural step, if any, must be taken by the defendant to do so?**

Wilma decides that she wants a jury trial. You decide that Wilma will be unfairly prejudiced if a single trial is held on all three counts involving injury to the three different children.

- 12. What procedural step, if any, can you take to try to obtain separate trials on each of the three counts in the indictment?**

13. What procedural step, if any, should you take to give a jury the option of imposing probation if it finds Wilma guilty?

You and Wilma appear for jury selection.

14. What is a challenge for cause? How many challenges for cause are you allowed to make on Wilma's behalf?

15. What is a peremptory challenge? How many peremptory challenges are you allowed to make on Wilma's behalf?

At trial, Prosecutor calls Josh as a witness. You make the following objection to any testimony by Josh: "Your Honor, I object because a five-year-old child cannot be a competent witness."

16. How should the Court rule on your objection? Explain your answer.

Prosecutor next calls Ashley as a witness. During your cross-examination of Ashley, you begin to question her about her felony conviction in 2013 for theft in order to make the jurors think they should not believe her. Prosecutor objects that Ashley's theft conviction is irrelevant.

17. How should the Court rule on Prosecutor's objection? Explain your answer.

Prosecutor calls the custodian of records of Liquor Mart to introduce a statement of Wilma's Liquor Mart account, which shows that Wilma purchased a bottle of whiskey there at 9:15 a.m. on January 17, 2014. You object that the statement of account is hearsay.

18. For the statement of account to be admissible under the Texas Rules of Evidence, what must the testimony of the custodian of records show?

To prove that the burns to the children resulted from Wilma's recklessness (which is an element of the charged offenses) and not as a result of a mere accident or mistake, Prosecutor calls the Director of Child Protective Services, Mr. Kidd, as a witness. Mr. Kidd testifies that Wilma's two seven-year-old sons were placed in foster care a year ago after she left them alone at home without food for three weeks. You object to this testimony on the ground that Wilma's abandonment of her sons did not result in a criminal conviction.

19. How should the Court rule on your objection?

The jury acquits Wilma of all three charges in the indictment. Prosecutor timely appeals on the ground that the evidence of Wilma's guilt was overwhelming. He then files an appellate brief which shows that no reasonable juror could have found Wilma not guilty based on the evidence introduced at trial and asks that the jury's verdict be reversed.

20. How should the Court of Appeals rule on Prosecutor's appeal?

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.**

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