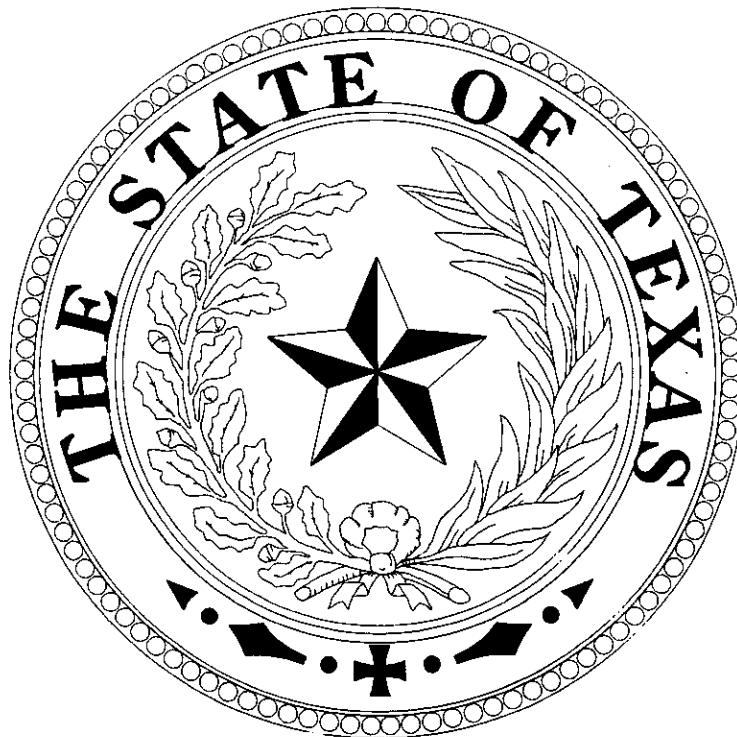


Examinee
Number

Exam
Date JULY 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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CRIMINAL PROCEDURE & EVIDENCE

Wilbur was the star of the basketball team at Regional High School (“RHS”). At age 18, Wilbur was 6’4” and weighed 225 pounds. On January 8, 2010, Wilbur was kicked off the team because a six-pack of beer was found in his locker. During the next five nights, someone spray painted “This School Stinks!” and other similar phrases on the outer brick walls of RHS. On one of these nights, Ms. Rosie, who lives near RHS, phoned the police and reported that a teenage male, about 5’10” tall and wearing a gray hooded sweatshirt, was lurking around RHS and carrying what appeared to be a small metal can.

Two weeks later, Police Officer (“Officer”) saw Wilbur walking away from RHS around dusk. Wilbur was wearing his red and blue RHS varsity basketball jacket. Because Officer recognized Wilbur and had followed the newspaper stories about his downfall from athletic stardom, he arrested Wilbur for spray painting RHS and handcuffed him. Officer took a cell phone from Wilbur’s pants pocket, viewed the digital pictures stored on it, and discovered that all of the pictures showed the spray painted walls of RHS.

Officer walked Wilbur to the front door of Ms. Rosie’s house. Ms. Rosie answered the door and saw Wilbur in handcuffs. Officer then asked her: “Isn’t this the guy you saw lurking around RHS with a can of spray paint?” Ms. Rosie responded: “I think so.”

Wilbur was charged by complaint with the state jail felony of graffiti and was booked into and detained in the county jail.

Six days have passed since Wilbur’s arrest and incarceration, and a magistrate has not yet determined whether probable cause exists to believe that Wilbur committed the offense of graffiti.

- 1. Within what amount of time should a magistrate decide whether probable cause exists to believe that a person committed a felony offense? What is the consequence if a magistrate fails to make a probable cause determination within this amount of time? Explain fully.**

A magistrate is considering releasing Wilbur on bond without sureties or other security, but she is concerned that Wilbur cannot be controlled by his parents and will roam the streets after dark.

2. What kind of bond is the magistrate considering? What conditions of bond, if any, can the magistrate impose to allay her concerns about releasing Wilbur on bond? Explain fully.

Wilbur is released on bond and visits his attorney (“Defense Counsel”). Wilbur asks Defense Counsel whether Officer was allowed to arrest and handcuff him as he was walking away from RHS.

3. Was Officer’s arrest of Wilbur valid? Explain fully.

Wilbur asks Defense Counsel whether he can waive his right to indictment to get his case moving more quickly.

4. Can a defendant waive his right to indictment? If so, what requirements must be met, and what charging document will be used instead of an indictment? Explain fully.

Wilbur decides not to waive his right to indictment. Because he believes he’s been misunderstood, he demands to have an opportunity to address the grand jury.

5. Does Wilbur have the right to address the grand jury? Explain fully.

The grand jury returns a five-count indictment based on the five consecutive nights that RHS was spray painted. Each count is based on a different night and charges Wilbur with having committed the state jail felony of graffiti by knowingly and intentionally making marks on a school with aerosol paint.

6. Was it permissible to charge the five offenses in the same indictment, or was a separate indictment required for each of the five offenses? Explain fully.

7. What procedural step can Defense Counsel take to obtain a separate trial for Wilbur on each count of the indictment? Could taking this procedural step ultimately affect Wilbur's sentence? Explain fully.

The Court notifies Defense Counsel that her deadline for filing any pleadings is five days after the date on which Wilbur was served with a copy of the indictment.

8. Did the Court give Defense Counsel the proper amount of time in which to file her pleadings? Explain fully.

Defense Counsel becomes concerned that the prosecutor (“Prosecutor”) will mention to the jury that Wilbur was kicked off the basketball team.

9. What procedural step should Defense Counsel take to prohibit Prosecutor from mentioning this fact? If Prosecutor mentions this fact at trial, what should Defense Counsel do to preserve the issue for appeal? Explain fully.

Defense Counsel learns that Prosecutor intends to introduce into evidence at trial the digital pictures of RHS found on the cell phone taken from Wilbur.

10. What procedural step, if any, can Defense Counsel take to try to keep the pictures from being introduced into evidence, and what arguments, if any, can Defense Counsel make in support of her position? Explain fully.

Defense Counsel discovers that Prosecutor intends to call Ms. Rosie as a witness in order to have her identify Wilbur as the person who was lurking around RHS with a can of spray paint.

11. **What procedural step, if any, can Defense Counsel take to try to stop Ms. Rosie from testifying about this, and what argument, if any, can Defense Counsel make in support of her position? Explain fully.**

Prosecutor believes that, regardless of the evidence introduced at trial, it will be virtually impossible to convict Wilbur in his hometown due to his widespread fame as a basketball player and the efforts that the media, businesses, and residents have jointly attempted to bring about the dismissal of the charges.

12. **What procedural step, if any, can Prosecutor take to seek relief from this problem? If there is some step that Prosecutor can take, what must Prosecutor show in order to obtain this relief? Explain fully.**

Wilbur insists that he is not guilty, and he tells Defense Counsel he wants a jury trial.

13. **What three questions must the court ask in testing the qualifications of a prospective juror? Explain fully.**

During jury selection, Prosecutor uses his peremptory challenges to strike all of the male prospective jurors.

- 14. What procedural step can Defense Counsel take to challenge Prosecutor's action? How may Prosecutor rebut this challenge? What must Defense Counsel show to succeed in her challenge? Explain fully.**

As his first witness at trial, Prosecutor calls a handwriting expert. The expert testifies that he compared the spray painted writing on RHS's walls to the known writing of Wilbur and concluded that they were written by the same person.

- 15. Can an expert's testimony of handwriting by comparison alone be sufficient to establish the handwriting of a person? Explain fully.**

Prosecutor calls Ms. Rosie as his next witness to testify about the male she saw lurking near RHS. In order to discredit Ms. Rosie, Defense Counsel begins to cross-examine her about her conviction eight years ago for the misdemeanor of driving while her license was suspended. Prosecutor objects to Defense Counsel's cross-examination on this topic.

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

After Prosecutor presents his case in chief, Defense Counsel begins to present the defense. As her first witness, Defense Counsel calls the minister from Wilbur's church, who testifies that Wilbur is a law abiding citizen who would never deface private or public property. During cross-examination, Prosecutor asks the minister: "Isn't it a fact that Wilbur has privately obtained spiritual advice from you regarding his urge to express himself by spray painting public buildings?"

17. On what basis can Defense Counsel object to Prosecutor's question? What should Prosecutor argue in response? Explain fully.

After the close of the evidence, Defense Counsel believes that Prosecutor has not presented any evidence to prove that the building that was spray painted was a school, as alleged in the indictment. Without that proof, Defense Counsel believes that Wilbur at most can be found guilty of the Class A misdemeanor of graffiti, which is a lesser included offense of the felonies charged in the indictment.

18. Does the Code of Criminal Procedure confine the jury to reaching a verdict only on the state jail felonies charged in the indictment, or does it provide for some other alternative? Explain fully.

During closing argument, Prosecutor makes the following comments:

Ladies and gentlemen of the jury, you heard Officer testify about his arrest of Wilbur. Ms. Rosie identified Wilbur as the person who was lurking around RHS. And, you saw the pictures on Wilbur's cell phone. We have met our burden of proof. The presumption of innocence is for the truly innocent only, and the presumption disappears once some evidence of defendant's guilt is offered. The burden of proof beyond a reasonable doubt is a shield for the innocent, not a barrier to conviction for the guilty.

19. On what grounds, if any, can Defense Counsel object to these remarks?

The jury convicts Wilbur, and sentence is imposed. After the trial is over, Wilbur complains to Defense Counsel that she failed to investigate his claims that: (1) he was in a town 100 miles away from RHS on the night that Ms. Rosie saw the male with a can of spray paint lurking around RHS; and (2) the cell phone in his pocket when he was arrested belonged to his girlfriend, and she took the pictures of RHS that were on the cell phone.

20. If Wilbur's claims are true, what legal ground does he have to attack his convictions? What legal standard must he meet to prevail?

DO NOT CONTINUE YOUR ANSWER IN THIS SPACE.

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MULTISTATE PERFORMANCE TEST and PROCEDURE & EVIDENCE

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