

Examinee  
Number

Exam  
Date FEBRUARY 2008

# 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**

In January of 2008, an anonymous person phones a Travis County Sheriff's Deputy ("Deputy") and states that a man in a ball cap will be picking up drugs at Shopping Mall in Austin, Texas, and delivering them to a person named "Top Dog." Deputy rushes to Shopping Mall and spots a green backpack in front of an army surplus store. Five minutes later, a 20-year-old white male ("Defendant") wearing a ball cap walks out of the army surplus store and grabs the green backpack. Deputy arrests Defendant, handcuffs him, and warns him of his right to remain silent. Defendant responds: "I ain't sayin' nothin'." Deputy opens the backpack and finds cocaine. In the patrol car, Deputy lectures Defendant for twenty minutes on the evils of drugs and then says: "I can convince the District Attorney to help you if you cooperate now." Defendant breaks into tears and says: "I only got involved to get tuition money."

Defendant is charged with possession with intent to deliver cocaine in an amount between one and four grams. You have been appointed to represent Defendant.

Defendant is released on bond on the condition that he not go near any residence or school where children under the age of 12 are present. Defendant asks you to challenge that condition so that he can visit his young nephews and their friends during weekends.

**1. What valid basis, if any, is there for challenging this condition of release? Explain fully.**

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You request an examining trial. Defendant wants to make a statement at the examining trial, but refuses to be placed under oath.

2. Under what conditions, if any, is Defendant permitted to make an unsworn statement at the examining trial? Explain fully.

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During Prosecutor's direct examination at the examining trial, Deputy testifies that she cannot recall whether Defendant was wearing a ball cap when he came out of the army surplus store and grabbed the green backpack. Prior to trial, Deputy retires from service and moves to Florida.

3. Under what conditions, if any, can you introduce Deputy's examining trial testimony into evidence at Defendant's jury trial? Explain fully.

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After the examining trial, you learn that a grand jury will be impaneled in 5 days and that it has been hand-picked by Deputy's father, who is a jury commissioner, to include only Deputy's close family members.

4. When and on what grounds should you challenge the composition of the grand jury? Explain fully.

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**DO NOT CONTINUE YOUR ANSWER IN THIS SPACE.**

The grand jury returns an indictment charging Defendant with possession with intent to deliver cocaine in an amount between one and four grams. You file a motion for discovery and inspection of all police reports written by Deputy that are material to Defendant's prosecution. Prosecutor files a response opposing your motion.

**5. How should the Court rule on your motion? Explain fully.**

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When you watch the 6 o'clock news on television, you see that the lead news story shows Defendant's mug shot while discussing the Travis County Sheriff's Department's new "Punish the Pushers, Put 'em in Prison" county-wide, anti-drug campaign.

**6. What procedural step, if any, should you take to protect Defendant's right to a fair trial? What documents must you file in support of your position? What must the evidence show in order for you to prevail? Explain fully.**

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You decide that, in order to have any chance of winning at trial, you must ask the Court to exclude from evidence: (a) Defendant's post-arrest statement that he got involved for tuition money; and (b) the cocaine found in the green backpack.

**7. On what grounds, if any, can you seek to exclude Defendant's post-arrest statement from evidence? Explain fully.**

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**8. On what grounds, if any, can you seek to exclude the cocaine from evidence? Explain fully.**

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At a pretrial hearing on whether to exclude Defendant's post-arrest statement, Deputy testifies that she was silent in her patrol car and that Defendant spontaneously blurted out: "I only got involved to get tuition money." Defendant testifies that Deputy's drug lecture and promise to convince the District Attorney to help Defendant if he cooperated coerced him into making his statement. At the end of the hearing, the Court refuses to exclude Defendant's post-arrest statement from evidence at trial.

**9. What procedural step, if any, can you take to have the jury at Defendant's trial consider whether Defendant's post-arrest statement was voluntarily made? What evidence must you present, if any, to get the Court to allow the jury to consider the voluntariness issue? Explain fully.**

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**DO NOT CONTINUE YOUR ANSWER IN THIS SPACE.**

At the same pretrial hearing, the Court refuses to exclude from evidence the cocaine found in the green backpack.

10. **Can a jury at Defendant's trial still consider whether the cocaine in the green backpack was obtained in violation of federal or state law? What procedural step, if any, should you take to have the jury consider this issue? Explain fully.**

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Defendant decides to accept the Prosecutor's plea bargain and plead guilty to the offense as charged.

11. **List 3 admonishments that the Court must give Defendant before accepting his felony plea of guilty.**

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Defendant reconsiders his decision to plead guilty and decides to go to trial instead. Defendant tells you he wants a jury to decide his punishment if he is convicted.

12. **What procedural step should you take to have the jury assess punishment, and when should you take that step? If Defendant is convicted by the jury, can Defendant then change his mind and have the Court decide punishment? Explain fully.**

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The jury panel is assembled and voir dire examination begins. As the questioning progresses, you notice that a prospective juror keeps staring at you.

13. **Can you exercise either (a) a challenge for cause or (b) a peremptory challenge to exclude the prospective juror on the basis of the juror's stare alone? Explain fully.**

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Prosecutor exercises peremptory challenges to strike every African-American on the panel.

14. **In light of the fact that Defendant is a 20-year-old white male, can you challenge Prosecutor's action? If so, what should you do; how should Prosecutor respond; and how should the Court rule? Explain fully.**

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**DO NOT CONTINUE YOUR ANSWER IN THIS SPACE.**

Prosecutor's first witness in the State's case in chief is Top Dog, who testifies: "I told Defendant that I would give him some tuition money if he would go to Shopping Mall and pick up the cocaine in the green backpack for me. Defendant agreed to do it. I followed him to Shopping Mall and saw him pick up the cocaine." Prosecutor is so pleased with Top Dog's testimony that he considers resting on that evidence without introducing Defendant's post-arrest statement, the cocaine, or any other evidence.

**15. Can Prosecutor secure a valid conviction of Defendant on the basis of Top Dog's testimony alone? Explain fully.**

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Prosecutor decides to call more witnesses to testify. Prosecutor's second witness is Defendant's drug treatment counselor. During the drug counselor's testimony, the following exchange occurs:

PROSECUTOR: Do you know Defendant?

WITNESS: Yes. Defendant voluntarily came to Drug Rehabilitation Center in Austin, Texas, during December of 2007, to kick his drug habit. I was his licensed drug treatment counselor.

PROSECUTOR: Did Defendant ever tell you that he planned to pick up drugs for a man named Top Dog?

WITNESS: Yes. In fact, he said that –

DEFENSE LAWYER: Objection, Your Honor! What Defendant told this witness is inadmissible.

**16. What is the evidentiary basis for your objection, and how should the Court rule? Explain fully.**

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**DO NOT CONTINUE YOUR ANSWER IN THIS SPACE.**



Prosecutor's third witness is a police officer who found and interviewed the anonymous person who had reported by phone that drugs would be picked up at Shopping Mall. During the police officer's testimony, the following exchange occurs:

PROSECUTOR: What happened when you tracked down this anonymous caller and interviewed him?  
WITNESS: Well, he told me his friend, Ruby, had to break their lunch date because she had to take Defendant to a mall to pick up some drugs for Top Dog.  
DEFENSE LAWYER: Objection, Your Honor!  
COURT: State the basis for your objection, Counselor.

**17. What grounds, if any, are there for your objection, and how should the Court rule? Explain fully.**

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During the State's final argument in the guilt-innocence phase of Defendant's trial, Prosecutor makes the following concluding remarks:

PROSECUTOR: We all know the problems that drugs cause in our community, and the community has given you, ladies and gentlemen of the jury, the opportunity to do something about it here today. Don't let your fellow citizens down; find Defendant guilty as charged. And, don't be fooled by the tricks of defense counsel. Counsel is just trying to blind you to the truth with a big smoke screen and some fun house mirrors. Thank you.

**18. On what grounds, if any, can you object to these remarks? Explain fully.**

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**DO NOT CONTINUE YOUR ANSWER IN THIS SPACE.**

The jury finds Defendant guilty after a day of deliberations. Due to Defendant's election, the jury will assess punishment. During a bench conference, Prosecutor informs you and the Court that he intends to introduce as evidence Defendant's 2004 Texas felony conviction for possession of cocaine. The following exchange occurs at the bench:

DEFENSE LAWYER: I object, Your Honor. This is the first time I am hearing about this conviction. The State had a duty to give me notice of it.

PROSECUTOR: You never requested any notice, counselor.

DEFENSE LAWYER: I don't have to. It's your duty to give me notice!

19. **Under what circumstances, if any, is the State required to give notice of its intent to introduce Defendant's prior conviction into evidence at sentencing. How should the Court rule on your objection? Explain fully.**

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After three days of deliberations on the punishment issue, the jury announces that it is hopelessly deadlocked. You move for a mistrial and request that the Court hold a new trial on Defendant's guilt and on punishment. The Court states that the jury's guilty verdict will not be disturbed. The Court grants a mistrial as to the punishment phase of the trial, however, and states that it will impanel a new jury the next day to begin the punishment phase anew.

20. **Is the Court's ruling correct? Does double jeopardy bar the retrial of the punishment phase of Defendant's trial? Explain fully.**

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**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.**