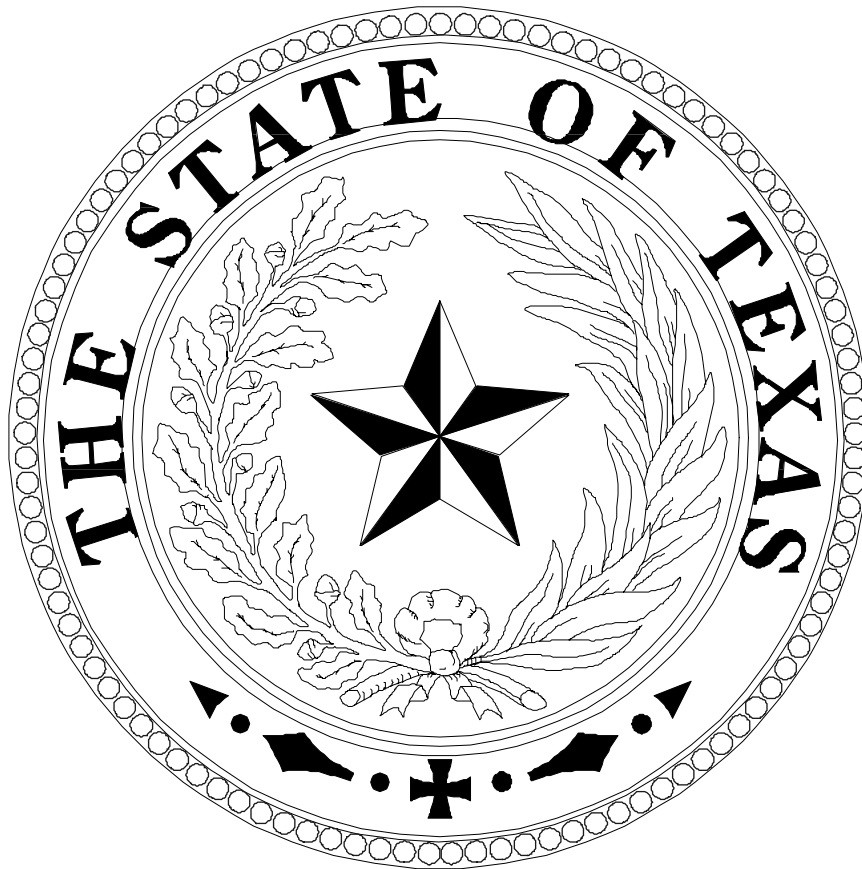


Examinee
Number

Exam
Date JULY 2007

Criminal Procedure & Evidence

[This Civil 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 May of 2007, Victim and her five-year-old child, Son, were approaching Victim's automobile, which had been left idling in front of a Houston, Harris County, Texas, restaurant by a valet parking attendant. Victim and Son were suddenly confronted by an armed man, later identified as Defendant. Defendant brandished a handgun and demanded Victim's purse and automobile, claiming that he would "hurt them badly" if Victim did not comply. Victim surrendered her purse and she and Son stepped away from the vehicle, whereupon Defendant sped off without causing Victim or Son any physical harm.

Victim reported this offense to the restaurant manager and offered a description of the assailant. The restaurant manager immediately summoned police and questioned the valet staff pending arrival of the police. Victim and Son returned to wait at their table inside the restaurant, where Victim discovered that she had left her prescription eyeglasses on the table.

Shortly before the police arrived, the manager rushed in to report that a valet "had the perpetrator in custody." The police soon arrived and took charge, transporting Victim and Son to a nearby location, where a man was lying on the ground being handcuffed by a police officer. Victim was asked whether she could identify the man on the ground as her assailant. Victim replied that, while she was not wearing her glasses at the time of the incident and therefore could not be sure enough of his features to positively identify the man, she could say for sure that this man's size, hair color and clothing looked similar to those of her assailant.

Upon hearing Victim's response to police, Defendant blurted out, "I did it, but I'm really sorry. You can have your purse and all your money back. Please let me go back to the hospital. I have given your car to Elvis Presley, who needed a ride to Graceland. If we hurry, I bet we can catch up with Elvis and your car. My parole officer and my psychiatrist are going to be so mad at me."

Police took Defendant into custody and charged him with aggravated robbery. You are appointed by the Court to represent Defendant. Prior to Prosecutor presenting Defendant's case to the Harris County grand jury, you request an examining trial.

1. What is the purpose of an examining trial under Texas law? Explain fully.

As you prepare your case for trial, you learn that Defendant has a history of chronic psychiatric problems. You begin to entertain serious doubts that Defendant is mentally competent to stand trial.

2. What facts must you establish in order to rebut the legal presumption that Defendant is competent to stand trial? Explain fully.

3. Which party has the burden of proof to establish that Defendant is incompetent to stand trial, what standard of proof applies, and what are the consequences if Defendant is found incompetent to stand trial? Explain fully.

4. List three (3) ways in which incompetency differs from insanity under Texas law.

Defendant refuses to be evaluated by a psychiatrist and decides to plead guilty to the offense as charged.

5. **List three (3) admonishments that the Court must give Defendant before accepting his felony plea of guilty.**

In exchange for his plea of guilty, Prosecutor offers Defendant deferred adjudication. Defendant asks you to explain the differences between deferred adjudication and probation.

6. **What are two (2) ways in which deferred adjudication differs from probation? Explain fully.**

Defendant's estranged Wife visits him and convinces Defendant to try his case to a jury. You thus begin to focus on trial strategy.

7. **What procedural steps, if any, should you employ to exclude victim's identification of Defendant at the time of his arrest, including what you must demonstrate in order to succeed, and at what stage of the case you must initiate the procedure? Explain fully.**

DO NOT CONTINUE YOUR ANSWER IN THIS SPACE.

8. What procedural steps, if any, should you employ to exclude Defendant’s statement at the time of his arrest, including what you must demonstrate in order to succeed, and at what stage of the case you must initiate the procedure? Explain fully.

Assume Defendant informs you that he wishes to testify at any hearing concerning his statements given at the time of his arrest.

9. If Defendant testifies at a hearing to determine admissibility of his statements, what issues may Prosecutor inquire into on cross-examination, and does Defendant waive his right to remain silent at the remainder of his trial? Explain fully.

During a pre-trial conference, Prosecutor tells you he believes Defendant has no criminal record. However, Defendant has revealed to you that he has been convicted of a felony under a different name. You decide not to disclose this fact to either Prosecutor or the Court, reasoning that it is protected by the attorney-client privilege. Soon thereafter, Defendant informs you that he wishes to file a sworn application for probation.

10. Under the present circumstances, should you file a probation application for Defendant? If an application for probation is not filed, must you disclose Defendant’s complete criminal history to the State? Explain fully.

11. If Defendant elects to file an application for probation, at what stage of the proceedings must it be filed? At what stage of the proceedings must an election for judge or jury punishment be filed? Explain fully.

During the State’s case-in chief, Son, age 5, is called as an eyewitness against Defendant. The following exchange occurs:

DEFENSE ATTORNEY: Your Honor, I object. This witness is obviously not competent and is therefore disqualified.
PROSECUTOR: Judge, I have interviewed this child. The boy is unusually bright and I have no doubt that he will make a credible eyewitness.
COURT: Ladies and gentlemen, please retire to the jury room.

12. What inquiry must the Court make to ensure that Son is competent, and should the inquiry occur on or off the record? Explain fully.

The trial continues with Prosecutor calling Defendant's Wife to testify. The following exchange occurs:

DEFENSE ATTORNEY: Your Honor, the prosecutor knows that the Texas Rules of Evidence disqualify this witness. We object.

13. How should the Court rule on Defendant's objection? Explain fully.

After presenting all of its witnesses, the State rests its case. You believe that Prosecutor has failed to prove that the offense occurred in Harris County, Texas, as charged.

14. What procedural steps should you take to challenge that omission of proof and at what stage of the proceedings should they be performed? Explain fully.

You offer as your first witness Professor, who claims to be an expert concerning inherent unreliability of eyewitness identification testimony given by any child under the age of ten years, pursuant to a study he has conducted. The following exchange occurs:

PROSECUTOR: Your Honor, I object. The proffered testimony is neither relevant nor reliable under Texas Rule of Evidence 702.

15. List five (5) factors the Court should consider in determining the admissibility of this scientific evidence.

Your second witness, Defendant's Friend, testifies without objection as to Defendant's character. The following occurs during the State's cross-examination of Friend:

PROSECUTOR: Friend, let me ask you about Defendant's criminal record. Did you know that Defendant has been arrested previously for a violent crime?
FRIEND: That's the first I've heard about that.
PROSECUTOR: Well, let's go down Defendant's rap sheet together and see if it refreshes your memory.
DEFENSE ATTORNEY: Objection, your Honor.

16. What is the proper objection to Prosecutor’s question and how should the Court rule? Explain fully.

Despite your efforts, the jury finds Defendant guilty after less than 20 minutes of deliberation. Although jury punishment had previously been elected, the swiftness of the verdict causes Defendant to reconsider that election. Defendant now decides that he prefers to have the judge assess punishment, but Prosecutor objects.

17. May Defendant change his election at this stage of the trial? Explain fully.

18. What standard of proof must the State have satisfied in order to have obtained a verdict of guilty? How many jurors must have concurred in the guilty verdict? What is the consequence if fewer than the minimum requisite number of jurors voted guilty? Explain fully.

After the verdict, you decide to have your investigator interview the jurors regarding possible juror misconduct as a ground for your motion for new trial. However, the district clerk refuses to give you jurors’ home addresses and home telephone numbers.

19. What procedure, if any, is available to you to obtain the juror contact information? Explain fully.

Soon after the trial is over, you learn that Defendant is seeking to challenge his judgment and sentence, claiming that you provided ineffective assistance of counsel.

20. What are the grounds for such a claim, and what must Defendant demonstrate to prevail? 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.