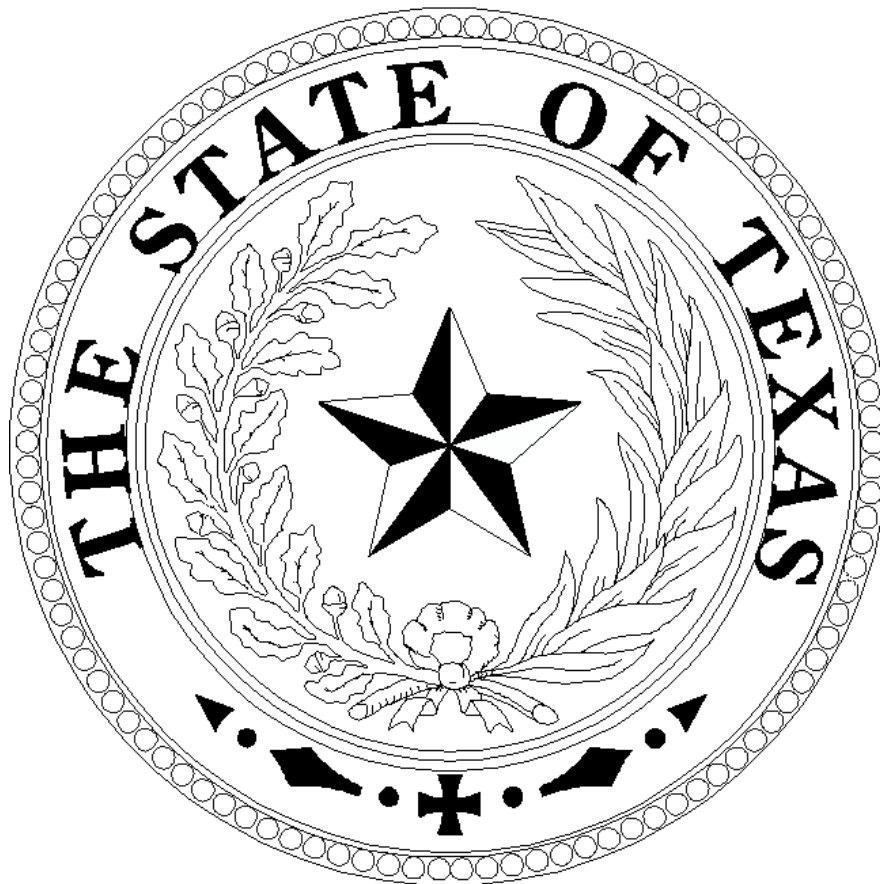


Examinee
Number

Exam
Date FEBRUARY 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

COPYRIGHT © 2007 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

You are appointed to represent Defendant, who is indigent and unable to hire counsel. Defendant has been arrested for and charged with murder. The Johnson County grand jury wishes to hear Defendant's side of the story.

- 1. Can the grand jury compel Defendant to appear and give testimony regarding his possible involvement in the homicide? Explain fully.**

The grand jury returns the following indictment:

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

The grand jurors of Johnson County, Texas, duly elected, tried, empaneled, sworn and charged to inquire of offenses committed in Johnson County, in the State of Texas, upon their oaths do present in and to the 100th District Court of said County, that James Defendant, in the County of Johnson and State aforesaid, on or about the 15th day of November, 2006, did then and there cause the death of an individual, Benjamin Victim, by shooting him with a deadly weapon, to-wit: a firearm.

AGAINST THE PEACE AND DIGNITY OF THE STATE.

David Smith

David Smith

Foreman, Grand Jury

2. Is this indictment fundamentally defective? Explain fully.

3. What procedure should Defendant employ to challenge the indictment? At what stage of the proceedings must Defendant assert such a challenge? Explain fully.

Defendant files a discovery motion requesting disclosure of all exculpatory evidence in the possession of the State. In its file, the State has two written statements from Witness, who claims to have been present at the homicide. Statement Number One, which is signed by Witness, states that Witness saw Defendant shoot Victim without provocation. Statement Number Two, given one month later, but unsigned by Witness, recants Statement Number One and claims that Defendant shot Victim only after Victim had first attacked Defendant with a hammer. However, since Statement Number Two is unsigned by Witness, the State decides it is not necessary to reveal its existence to Defendant.

- 4. Is the State required to disclose Statement Number Two to Defendant? Would your answer be the same regardless of whether Defendant had made a request for exculpatory evidence? Explain fully.**

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

- 5. Under the circumstances as outlined above, can you file a probation application for Defendant? If an application is not filed, are you obligated to disclose Defendant's criminal history to the State? Explain fully.**

Defendant informs you that he wishes to give testimony at a pre-trial hearing on the admissibility of a post-arrest statement purportedly given by him.

6. If Defendant voluntarily gives such testimony, has he waived his right to remain silent at his trial? Explain fully.

At a pre-trial hearing, the State moves that you provide a list of all defense witnesses, including experts that you intend to call at trial. You respond that such information is protected by the attorney-client privilege and refuse to comply.

7. How should the Court rule on the State's motion? Explain fully.

After reviewing all of the evidence, you decide that it is in Defendant's best interest to plead guilty to the murder charge pursuant to a proffered plea bargain. Defendant disagrees and tells you that he wishes to persist in his plea of not guilty.

8. Who decides what plea will be entered? If Defendant changes his mind and agrees to enter a guilty plea, list three admonishments that the Court must give before accepting a felony plea of guilty.

Prior to trial, Prosecutor informs you that she will seek to introduce evidence of Defendants' alleged extraneous acts of misconduct. You are concerned that Prosecutor will refer to these acts during her voir dire examination of the prospective jurors.

9. What procedure should you employ in an effort to prevent this action by Prosecutor? What should you do to preserve the issue on appeal in the event Prosecutor refers to those acts during her voir dire? Explain fully.

Defendant makes a final decision to go to trial and asks you whether his case will be tried to a judge or a jury.

10. Who makes the choice? When must the choice be made? Must the choice be the same as to both the guilt/innocence and the punishment phases of the trial? Explain fully.

The decision is made to try Defendant's case to a jury. During the voir dire examination of the panel, a prospective juror reveals that his sister was murdered and, if he finds Defendant guilty, he will not consider any punishment other than the maximum.

11. What must you show to establish a challenge for cause to this prospective juror? Explain fully.

As the voir dire examination continues, it becomes obvious that you should exercise challenges for cause, as well as peremptory challenges.

12. What is a challenge for cause? How many such challenges is each side allotted? Explain fully.

DO NOT CONTINUE YOUR ANSWER IN THIS SPACE.

13. What is the peremptory challenge? How many such challenges is each side allotted in a non-capital, single defendant felony case? Explain fully.

The victim in this case is African-American. You decide that you should exercise peremptory challenges to strike every African-American on the panel.

14. Can Prosecutor challenge your action? If so, what should Prosecutor do, how must you respond and what relief should Prosecutor seek? Explain fully.

During the State's case-in-chief, the following exchange occurs between Prosecutor and a police officer witness:

PROSECUTOR: Did you speak with any of Victim's neighbors about any problems that he had with Defendant?

OFFICER: Yes. They told me that they often heard loud disagreements between Victim and someone they believed to be Defendant. One time they said they heard.....

DEFENSE LAWYER: Objection, your honor.

COURT: State the basis of your objection, counselor.

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

Later, during the State’s case-in-chief, the following exchange occurs:

PROSECUTOR: Tell the jury how you are employed.

WITNESS: I am the records custodian for General Hospital.

PROSECUTOR: Did you bring records with you today which relate to the medical treatment of Victim?

WITNESS: Yes. They have been marked as State’s Exhibit One.

PROSECUTOR: Your honor, we offer State’s Exhibit One.

DEFENSE LAWYER: Objection. Improper predicate.

COURT: Sustained.

16. Is the Court’s ruling correct? If so, what predicate must the State lay in order to properly offer State’s Exhibit One? Explain fully.

During a recess, the State informs you that its next witness is Defendant’s estranged wife. Prosecutor says that it is her intention to ask whether Defendant admitted to Wife that he had killed Victim over a narcotics dispute. Wife does not want to testify against her husband.

17. If called as a witness, can Wife be compelled, over her objection, to testify for the State? Can Wife refuse even to be called as a witness for the State? Explain fully.

Prosecutor calls Doctor as a witness in its case-in-chief. The following exchange occurs:

PROSECUTOR: Doctor, you have treated Defendant as a patient, haven't you?

DOCTOR: Yes, for a period of several months in the year 2006.

PROSECUTOR: During the treatment, did you and Defendant discuss his inability to control his violent temper?

DEFENSE LAWYER: Objection. Physician-patient privilege. Defendant's communications with Doctor are confidential.

18. How should the Court rule on your objection? Explain fully.

After the State rests, you call Friend, a long-time associate of Defendant, as an alibi witness. You are surprised when Friend's testimony differs in significant respects from what he has told you in an earlier interview.

19. Can you impeach the credibility of your own witness? If you can do so, describe the means of impeachment. Explain fully.

After almost five days of trial, Defendant, who is on bond, fails to appear. You request a continuance until Defendant can be located.

20. What are the rules regarding the presence of the Defendant in a felony case? 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.