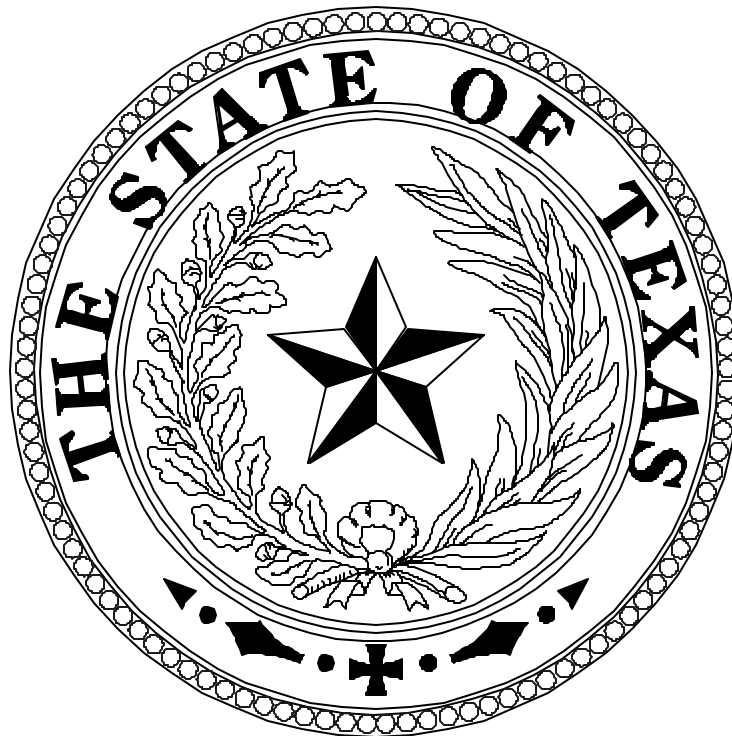


Examinee
Number

Exam
Date July 2005

Criminal Procedure & Evidence

[This booklet is only part of the Procedure & Evidence session. Both parts should be completed in one 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 AND EVIDENCE

You are appointed to represent Defendant, who is indigent. Defendant has been arrested for and charged with murder. The Nueces County grand jury will meet next week to consider an indictment against Defendant. You request an examining trial prior to the grand jury consideration of the case.

- 1. What court(s) have jurisdiction to hold examining trials? If Defendant desires to make a voluntary statement at an examining trial, when must he do so? Explain fully.**

The grand jury indicts Defendant. The indictment charges as follows:

IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS:
THE GRAND JURORS OF NUECES COUNTY, TEXAS, duly elected, tried, empaneled, sworn and charged to inquire of offenses committed in Nueces County, Texas, in the State of Texas, upon their oaths do present in and to the 28th District Court of said County that John Defendant, in the County of Nueces and State aforesaid, on or about the 1st day of March, 2005, did then and there cause the death of an individual, Mary Victim, by shooting her with a deadly weapon, to-wit: a firearm.

AGAINST THE PEACE AND DIGNITY OF THE STATE.

David Jones
DAVID JONES

2. Is this indictment sufficient to charge the offense of murder? Explain fully.

The grand jury sets Defendant's bail at \$500,000. Defendant cannot post a bond in that amount, and asks you to get the bail reduced.

3. List three factors the Court must consider in fixing the amount of Defendant's bail.

The Court reduces Defendant's bail to \$10,000. Defendant's grandfather informs you that although Defendant himself does not have the means to post bond, the grandfather will post the bail on Defendant's behalf. The Court tells you that if Defendant posts bail, the Court will no longer allow Defendant to have the services of appointed counsel.

- 4. Can the Court consider whether Defendant has posted or is capable of posting bail in determining whether Defendant is indigent? What, if any, exception is there to this rule? Explain fully.**

The district judge in whose Court Defendant's case is to be tried is a former assistant district attorney. Ten years ago, he prosecuted Defendant for a misdemeanor marijuana case in which Defendant received probation. Defendant asks you to take steps to have the judge removed from this murder case.

- 5. Is the judge disqualified from sitting in this case? Under what grounds is a judge disqualified in a criminal case? Explain fully.**

After the Court sets this case for trial, you learn that a witness you intend to call is unavailable. You decide to file a first motion for continuance.

6. Under these circumstances, list three things that your first motion for continuance must state.

7. Is the granting of your first motion for continuance a matter of right? Why or why not? Explain fully.

Defendant files a pre-trial discovery motion requesting all exculpatory evidence in the State's possession. The State has in its file two written statements from Witness, who claims to have been present at the killing. 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 states that Defendant shot Victim only after Victim had first attacked Defendant with a knife. Since Statement Number Two is unsigned by Witness, the State decides it is not necessary to reveal its existence to Defendant.

8. Is the State required to disclose Statement Number Two to Defendant? Why or why not? Would it matter whether Defendant had made a request for exculpatory evidence? Explain fully.

Defendant also petitions the Court to order the pre-trial disclosure of any transcription of testimony given before the grand jury which considered this case.

9. Is Defendant entitled to such transcriptions prior to trial? What, if any, conditions must Defendant meet to warrant disclosure? Explain fully.

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

10. What procedure, if any, should you employ to prevent this reference during voir dire by Prosecutor? What should you do to preserve the issue on appeal, in the event Prosecutor refers to those acts during voir dire? Explain fully.

Your investigation reveals that Defendant gave an inculpatory post-arrest written statement. You file a timely motion to suppress, alleging that the statement was involuntary. Defendant wishes to take the stand at the suppression hearing and testify regarding the circumstances of the taking of the statement.

11. Is the State's cross-examination of Defendant limited to the scope of this suppression hearing and if so, in what regard? If Defendant testifies at the suppression hearing, has he waived his right to remain silent at his trial? Explain fully.

Defendant tells you that he is considering pleading guilty to this charge, but only if the State is willing to offer him deferred adjudication in return for his plea.

12. List three statutory conditions of deferred adjudication.

The State laughs at your offer of deferred adjudication and tenders a counter-offer of 40 years. Defendant decides to go to trial and asks whether his case will be tried to a jury or a judge.

13. 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 the case to a jury. During the voir dire examination of the panel, prospective juror #10 reveals that his brother was murdered and if he finds Defendant guilty, he will not consider any punishment other than the maximum.

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

Inasmuch as Victim is an African-American and Defendant is white, you exercise peremptory challenges to strike every African-American on the panel.

15. Can Prosecutor challenge your action? If so, what should Prosecutor do, how must you respond, and how should the Court rule? 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 she was having with Defendant?

WITNESS: I sure did. They told me that they often heard screaming and noises that sounded like fighting coming from Victim's house. One time they said they heard Defendant holler...

DEFENSE LAWYER: Objection, your honor.

COURT: State the basis for your objection, Counselor.

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

DO NOT CONTINUE YOUR ANSWER IN THIS SPACE.

During the State's case-in-chief, the following exchange occurs:

PROSECUTOR: Tell the jury how you are employed.

WITNESS: I am the record custodian for General Hospital.

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

WITNESS: Yes, I did. They are marked as State's Exhibit One.

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

DEFENSE LAWYER: Objection, your honor. Improper predicate.

COURT: Sustained.

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

During a recess, the State informs you that its next witness is Defendant’s estranged wife. Prosecutor says it is her intention to ask whether Defendant admitted to Wife that he had been snorting cocaine prior to his arrest. Wife does not want to testify against her husband.

18. 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.

DO NOT CONTINUE YOUR ANSWER IN THIS SPACE.

After the State rests its case, you call as your first witness, Professor, who claims to be an expert concerning the unreliability of eyewitness identification testimony. The following exchange occurs:

PROSECUTOR: Your honor, we object to any testimony from this witness. The proffered testimony is neither relevant nor reliable under Rule 702. T.R.E.

COURT: Retire the jury.

19. List five factors which the Court should consider in determining the admissibility of this scientific evidence.

As Defendant's last witness, you call the presiding judge to give testimony that Defendant has always come to court on time and has never acted in a disruptive or violent manner.

20. Can Defendant call the judge as a witness? 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.