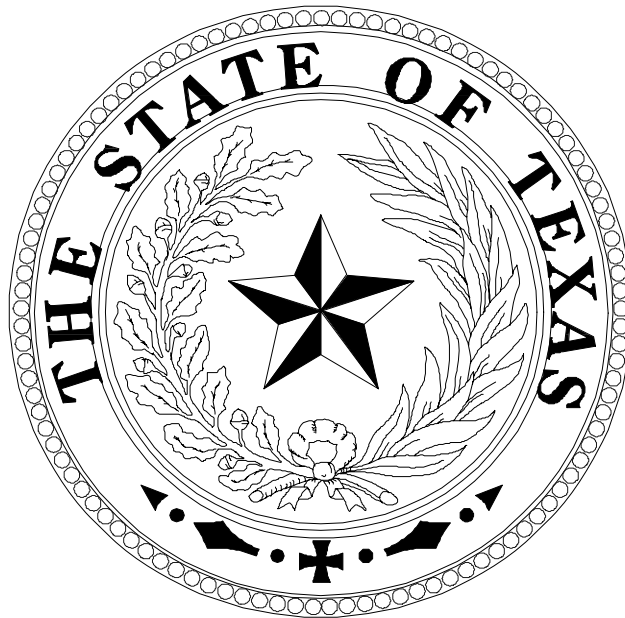


Examinee
Number

Exam
Date February 2009

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

On November 19, 2008, Troy drove his sport utility vehicle (“SUV”) to Roscoe’s house in Fort Bend County, Texas. When Troy entered Roscoe’s house, they talked about Roscoe’s sawed-off shotgun. Troy said that he was uncomfortable being around firearms and suggested they go for a ride. Without Troy’s knowledge, Roscoe put the sawed-off shotgun in the back of the SUV before they left.

Troy and Roscoe drove to Harris County, Texas. At a traffic light, a police officer (“Officer”) forced Troy to pull his SUV over to the side of the road because Officer saw a tattoo on Troy’s left arm and concluded that Troy “was up to no good.” As Officer approached the SUV on foot from the rear, he spotted the sawed-off shotgun and immediately arrested Troy and Roscoe for unlawfully possessing the weapon.

At the police station, Roscoe waived his rights and gave a written confession, admitting that he owned the sawed-off shotgun, but claiming that Troy had borrowed it and placed it in the SUV. Troy and Roscoe were charged with the felony of knowingly and intentionally possessing a short-barrel firearm. The court has appointed you as Troy’s lawyer.

At the examining trial, the court remarks that Troy’s bail should be set at \$25,000. When you argue to the court that Troy is poor, but that his family could pay if bail were set at \$10,000, the court responds: “If he has enough money to make bail, then he can afford to pay for his own lawyer.”

1. What are three rules that a court should follow when fixing the amount of bail?

2. Can the court consider whether Troy is capable of posting bail in determining whether Troy is indigent and is still entitled to appointed counsel? Explain fully.

- 3. If the court denies your request to reduce Troy’s bail to \$10,000, what procedural step, if any, can you take to seek a reduction in bail, and what argument, if any, can you make for such a reduction? Explain fully.**

Eager to get a great plea bargain, Roscoe meets with Officer and tells him that Troy has purchased many illegal weapons from him in the past and that they are locked in a closet in Troy’s apartment.

- 4. In order for a search warrant to be issued authorizing the search of Troy’s apartment for evidence, what facts must Officer allege and in what document must he do this? Explain fully.**

Subsequently, Troy is released on bond. A Harris County grand jury returns an indictment charging both Troy and Roscoe with the felony of intentionally and knowingly possessing a short-barrel firearm.

- 5. Is venue proper in Harris County, Texas? Explain fully.**

The court sets a pretrial hearing for 9:45 a.m. on December 17, 2008, and sets trial for January 5, 2009. You then learn that Roscoe's girlfriend saw Roscoe secretly place the sawed-off shotgun in the SUV, while Troy was not present. Unfortunately, Roscoe's girlfriend has gone on vacation, and you do not know how to contact her.

6. What procedural step, if any, can you take to obtain more time before the trial in order to find Roscoe's girlfriend; by what date must you take such a step, if any; and what must you show the court? Explain fully.

While preparing for trial, you realize that prohibiting the prosecutor from introducing the sawed-off shotgun into evidence will result in an acquittal of Troy.

7. What procedural step, if any, can you take to try to keep the sawed-off shotgun from being introduced into evidence, and what argument, if any, can you make in support of your position? Explain fully.

Against your advice, Troy decides to plead guilty. In court, the following occurs:

COURT:	How do you plead to the indictment?
TROY:	Your Honor, I plead guilty.
COURT:	Well, let me warn you about some things.
TROY:	Actually, Your Honor, I have changed my mind and want to take back my guilty plea and go to trial.

8. May Troy withdraw his guilty plea at this point in the proceeding? Explain fully.

Assume that Troy can and does withdraw his guilty plea.

9. Is Troy's guilty plea admissible at his trial as evidence of his guilt? Explain fully.

Before the December 17, 2008, pretrial hearing, you discover that Roscoe was convicted and sentenced in 2006 for unlawfully possessing a firearm silencer.

10. What procedural steps, if any, can you take to try to protect Troy from the prejudice he will suffer from the introduction of Roscoe's prior conviction if Troy and Roscoe are scheduled to be tried together? Explain fully.

During your investigation of Troy's defense, you locate Roscoe's girlfriend, Glenda, who lives in Harris County. She confirms that she saw Roscoe put the sawed-off shotgun in the back of Troy's SUV when Troy was not present.

11. What procedural steps, if any, can you take to ensure that Glenda appears at trial to testify as a witness? Explain fully.

At 9:15 a.m. on December 17, 2008, the court begins the pretrial hearing 30 minutes early, even though Troy has not arrived yet. You object to the court's beginning the hearing in Troy's absence, but the court overrules your objection.

12. Did the court correctly rule on your objection, and does a defendant have a right to be present at a pretrial proceeding? Explain fully.

At the joint trial of Troy and Roscoe on January 5, 2009, the jury panel is assembled and voir dire begins. During voir dire, one prospective juror states the opinion that "no person convicted of possessing an illegal firearm should ever get probation."

13. Can you properly make a challenge to this prospective juror, and, if so, what kind of challenge should you make and on what ground? Explain fully.

After the jury is selected, you notice that Officer and the State’s tattoo expert, who will be witnesses at trial, are conferring in the courtroom about Troy’s case.

14. What procedural step, if any, can you take to stop Officer and the expert from conferring about the case and from remaining in the courtroom during trial? Explain fully.

Prior to any testimony, the prosecutor asks for a bench conference and tells the court that she intends to introduce Roscoe’s confession to show that he owned the sawed-off shotgun and that Troy put the sawed-off shotgun in the SUV. You know from a conversation with Roscoe’s lawyer that Roscoe has chosen not to testify at trial.

15. What objections or requests, if any, should you make with regard to the admission of Roscoe’s confession into evidence? Explain fully.

During trial, Officer testifies on direct examination about how he pulled Troy’s SUV over and discovered the sawed-off shotgun. During your cross-examination of Officer, you request a copy of Officer’s report concerning these events, but the prosecutor objects, stating: “Police reports are work product and do not have to be produced as part of discovery.” The court denies your request for a copy of Officer’s report.

16. Is the court's ruling correct? Explain fully.

At a conference on the court's proposed jury charge, you object that, although the charge instructs that the jury must acquit unless it is satisfied beyond a reasonable doubt of the defendant's guilt, it does not define the phrase "reasonable doubt."

17. Must the court include a definition of "reasonable doubt" in the jury charge? Explain fully.

Troy decides not to testify in his own defense. During closing argument to the jury, the prosecutor makes the following statement:

PROSECUTOR: Ladies and gentlemen of the jury, if Troy really were not guilty, don't you think he would have gotten up on the witness stand and told you so!

18. Is the prosecutor's argument improper? If a prosecutor makes an improper closing argument to the jury, what procedural steps, if any, must defense counsel take to preserve error? Explain fully.

The jury finds both Troy and Roscoe guilty as charged in the indictment. Although you did not previously request that the jury determine Troy's sentence, you immediately file a written motion for the jury to assess punishment.

19. Is your request for jury sentencing timely at this stage of the proceedings? Explain fully.

The prosecutor gave you timely and proper notice that, at the sentencing phase of the trial, she would seek to introduce evidence that Troy committed a bank robbery on November 18, 2008, using Roscoe's sawed-off shotgun. Troy has not been charged with or convicted of the bank robbery.

20. Is evidence that Troy committed the bank robbery admissible against Troy in the sentencing phase of the trial? 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.

**WRITE THE PLEDGE ON THE BACK OF YOUR
CRIMINAL PROCEDURE AND EVIDENCE ANSWER
BOOK IN THE SPACE PROVIDED.**

February 2009 Criminal Procedure and Evidence Exam

1. This question called upon examinees to demonstrate knowledge of the rules for setting bail, which nearly all examinees did.
2. This question required examinees to demonstrate knowledge of the procedures for appointing counsel, which many examinees did by discussing the general rule barring consideration of a defendant's ability to post bail in determining whether he is indigent. A few examinees also mentioned the limited exception to the general rule.
3. This question called upon examinees to demonstrate knowledge of the procedures and grounds for reducing bail, which many examinees did by discussing an application for a writ of habeas corpus and contending that bail was excessive.
4. This question called upon examinees to demonstrate knowledge of the requirements for a search warrant for evidence of a crime. Many examinees knew that the police officer must allege facts in an affidavit establishing probable cause. A common problem for examinees was a lack of knowledge concerning the facts that must be alleged.
5. This question called upon examinees to demonstrate knowledge of the rules governing venue, which many examinees did by discussing where the offense was committed. A common problem was applying rules for jurisdiction in civil cases or relying on irrelevant factors.
6. This question required examinees to demonstrate knowledge of the requirements for a first motion for continuance when a witness is unavailable. Nearly all examinees knew that a defendant must file a motion for continuance, and many examinees correctly articulated two or three of the facts required to be established in the motion. A common problem was a lack of knowledge about the time frame in which to file the motion.
7. This question called upon examinees to demonstrate knowledge of the procedural steps and issues related to the illegal seizure of persons and evidence, which many examinees did by discussing the filing of a motion to suppress the shotgun as the fruit of an illegal stop. Some examinees further demonstrated knowledge of the minimum constitutional standard of reasonable suspicion. Common problems were discussing the wrong standard and discussing a motion in limine rather than a motion to suppress.
8. This question required examinees to demonstrate knowledge of the procedures applicable to guilty pleas. Most examinees knew that the defendant could withdraw his guilty plea. A common problem was a lack of knowledge of the time frame in which it is permissible for a defendant to do so.
9. This question called upon examinees to demonstrate knowledge of the inadmissibility of withdrawn guilty pleas, which most examinees did. The most common problem was the belief that a

withdrawn guilty plea is admissible in a criminal case as a statement by a party opponent or as a statement against interest.

10. This question called upon examinees to demonstrate knowledge of procedural steps that a defendant might take to avoid prejudice from a codefendant's prior conviction, which some examinees did by discussing a motion for severance. Many examinees also discussed a motion in limine, and some of those examinees recognized the need to object thereafter at trial. A common problem was discussing procedural steps irrelevant to a defendant in this situation.

11. This question called upon examinees to demonstrate knowledge of procuring the attendance of a witness at trial, which most examinees did by discussing a subpoena and a writ of attachment. A common problem for other examinees was not discussing both of these steps.

12. This question required examinees to demonstrate knowledge of the rule governing a defendant's presence at pretrial proceedings, which many examinees did. A common problem for other examinees was confusing what the rule requires and what constitutes reversible error.

13. This question called upon examinees to demonstrate knowledge of challenges for cause based on bias or prejudice, which nearly all examinees did.

14. This question required examinees to demonstrate knowledge of "the rule," which most examinees did. Many examinees also discussed exceptions to "the rule."

15. This question required examinees to demonstrate knowledge of the constitutional and evidentiary problems raised by a codefendant's confession, which many examinees did by discussing objections based on hearsay and/or the Confrontation Clause. A common problem was not further mentioning the remedies of severance and redaction. Other common problems included incorporating facts not given and discussing inapplicable objections and measures.

16. This question called upon examinees to demonstrate knowledge of the rule governing the production and use of a prior statement of a witness for purposes of cross-examination, which many examinees did. Common mistakes were applying the work product doctrine, misunderstanding the discovery rules, and discussing the prosecutor's obligation to produce exculpatory evidence, even though the facts did not pose this issue.

17. This question required examinees to demonstrate knowledge of prevailing precedent on whether to include a definition of "reasonable doubt" in the jury charge. While some examinees demonstrated such knowledge, many did not.

18. This question required examinees to demonstrate knowledge of a defendant's right to silence and improper comment on it during closing argument, as well as the procedure for preserving error. Most examinees demonstrated such knowledge. Common problems for other examinees were ignoring the call of the question, neglecting to discuss each step required for error preservation, or failing to recognize the ground for objection.

19. This question required examinees to demonstrate knowledge of the procedure for electing jury sentencing, which some examinees did by discussing the need to make the election before the commencement of voir dire. Many examinees, however, did not demonstrate such knowledge.

20. This question required examinees to demonstrate knowledge of the admissibility of certain evidence during the punishment phase of trial. Although some examinees knew that evidence of prior bad acts could be admitted during the punishment phase, fewer mentioned the standard of proof that had to be met for the admission of a prior bad act. A common problem for most examinees was stating that only convictions are admissible during the punishment phase.

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CRIMINAL PROCEDURE & EVIDENCE – July 2009

On January 2, 2009, someone broke into Aaron’s home in Houston, Texas, and stole Aaron’s big screen TV. When Aaron discovered the crime, he phoned the Houston Police Department and reported the crime to Detective Don. Based on his investigation, Detective Don had probable cause to believe that Ike had committed the crime. Detective Don then hastily obtained a warrant authorizing the search of Ike’s apartment and the arrest of Ike. When Detective Don went to Ike’s apartment, knocked on the front door, and announced that he had a warrant to search the apartment and arrest Ike, Ike yelled: “Go away, I ain’t opening the door.” Detective Don broke down the door, arrested Ike, and found Aaron’s big screen TV in Ike’s apartment.

Ike was charged with the felony of burglary of a habitation, and the Court has appointed you to represent him. You interview Ike, and he swears that he is innocent and that his roommate, George, must have committed the crime. Ike also informs you that George has a prior felony conviction for burglary of a habitation for which he presently is on probation.

- 1. Was Detective Don required by law to obtain one warrant authorizing the search of Ike’s apartment and a separate warrant authorizing the arrest of Ike? Explain fully.**

- 2. Did Detective Don have the authority to break down Ike’s door in order to enter the apartment? Explain fully.**

At Ike's examining trial, the Court refuses to set bail for Ike. You decide to file an application for a writ of habeas corpus.

- 3. What is a writ of habeas corpus? To whom is it directed? By whom may it be granted? Explain fully.**

Prosecutor is considering whether to proceed with the prosecution of Ike for the felony of burglary of a habitation or instead to prosecute him for the misdemeanor of criminal trespass, which is punishable by confinement in jail for up to one year and a fine not to exceed \$4,000.

- 4. What courts have jurisdiction to conduct a trial of Ike for burglary of a habitation, and what courts have jurisdiction to conduct a trial of Ike for criminal trespass? Explain fully.**

Prosecutor decides to seek an indictment from the grand jury.

- 5. Who selects the people who will serve on the grand jury? Explain fully.**

The grand jury indicts Ike for the felony of burglary of a habitation. On January 23, 2009, the Court notifies you that it has set a pretrial hearing for February 16, 2009. You decide to file a motion for discovery.

- 6. By what date should you file your motion for discovery? What consequence, if any, is there if you do not file your motion for discovery by that date? Explain fully.**

You timely file your motion for discovery. Prosecutor has a report in his case file stating that Ike's roommate, George, confessed to Detective Don that he alone stole Aaron's big screen TV and that Ike had no knowledge of and took no part in the crime.

- 7. Is Prosecutor required to disclose to you the contents of this report? Does your answer depend on whether your discovery motion requested disclosure of any reports in Prosecutor's possession? Explain fully.**

Prosecutor files a motion requesting that you disclose the names and addresses of all lay and expert witnesses who will testify for the defense at trial.

8. Does the Code of Criminal Procedure provide any basis for Prosecutor’s request? Explain fully.

As part of the discovery process, Prosecutor gives you a copy of the search and arrest warrant obtained by Detective Don. The only description of the appearance, location, and address of Ike’s apartment that is contained in the warrant is the following: “The apartment is located in a white building in a residential neighborhood on a street on the west side of Houston, Texas.”

9. Is this description of Ike’s apartment legally sufficient? Assuming that description is not sufficient, what procedural step can you take to challenge the warrant, and what relief should you request? Explain fully.

Ike tells you that he is considering pleading guilty to the indictment, and asks you what will occur at the guilty plea proceeding.

10. List three admonitions that the Court must give Ike before accepting his felony plea of guilty.

Ike decides that he wants a jury trial, and he asks you if he will be eligible for probation if he is convicted by the jury.

11. List three prerequisites for Ike to be eligible for a sentence of probation.

During jury selection, Prospective Juror No. 8 makes the following statements in response to your question about the presumption of innocence: “Of course I believe Defendant Ike is guilty, and nothing you say will change my mind about it. Why else would a grand jury indict him?”

12. Do these statements provide you with any basis to challenge Prospective Juror No. 8? If so, what is the legal basis of your challenge, and what kind of challenge should you make? Explain fully.

After the jury is selected, Prosecutor makes an opening statement. When you tell the Court that you will make your opening statement after the State has presented its case in chief, the Court tells you that you must make your opening statement now or waive it.

13. Is the Court correct? Explain fully.

As Prosecutor's first witness, Detective Don testifies about his investigation of Ike. When you begin your cross-examination, you move the Court to order Prosecutor to produce any transcript of Detective Don's grand jury testimony about his investigation of Ike. Prosecutor responds that he has the transcript, but will not produce it because grand jury proceedings are secret.

14. How should the Court rule on your motion for production of the transcript? Explain fully.

As his second witness, Prosecutor calls Ike's roommate, George, who admits to burglarizing Aaron's apartment. George also testifies that, even though he previously tried to protect Ike from prosecution, the truth is that Ike helped him commit the burglary. When you begin to cross-examine George about the fact that George presently is on probation, the Court cuts you off and states: "Counsel, we're not going to go into that. It's got nothing to do with this case."

15. Is the Court's ruling correct, or are you entitled to cross-examine George about his probation? Explain fully.

At a bench conference, Prosecutor informs you and the Court that his next witness, Megan Watts, will testify as follows: "On December 27, 2008, I stopped Ike in the parking lot of my electronics store as he was loading one of my store's big screen TVs into his pickup truck. Ike had taken the TV out of the store without paying for it." Prosecutor states that he is offering this testimony because "Ike's theft of a big screen TV in the past shows that he stole Aaron's big screen TV in this case."

16. What objection should you make to this testimony, and how should the Court rule on it? Explain fully.

The jury charge prepared by the Court contains a number of legal definitions and statutes pertinent to the case. You object to the Court's jury charge and request in writing that the Court include a paragraph instructing the jury regarding the circumstances under which Ike can be convicted or acquitted. The Court denies your request, stating that it does not want to confuse the jury.

17. Is the Court's ruling correct? Explain fully.

During his closing argument, Prosecutor makes the following comments:

Ladies and Gentlemen of the jury, you now have heard all of the testimony, and it shows beyond a reasonable doubt that Ike is guilty. Do you think I would risk my career and put Detective Don on the witness stand if I didn't think he was telling the truth? I've never seen anyone who was more honest than Detective Don. And when he arrested Ike and read Ike his Miranda rights, Ike just kept his mouth shut and said nothing. That in itself shows Ike is guilty. Based on this evidence, you should return a verdict of guilty.

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

The jury convicts Ike of burglary of a habitation as charged in the indictment.

19. What standard of proof was the State required to meet to obtain a verdict of guilty? How many jurors had to concur in the verdict? What would have been the consequence if fewer than the minimum number of jurors voted for a verdict of guilty? Explain fully.

Ike ultimately receives a sentence of probation. Three days after Ike is sentenced, you learn that George bribed four of the jurors to convict Ike.

20. What procedural step can you take to bring this information to the attention of the trial court and to attack Ike's conviction? How long do you have to take this procedural step? Explain fully.

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July 2009 Criminal Procedure and Evidence Exam

1. This question called upon examinees to demonstrate knowledge of the availability of a combined search and arrest warrant. Most examinees knew that Detective Don was not required to obtain two separate warrants to search and arrest in these circumstances. However, the majority of those examinees overlooked that Detective Don already had obtained a search warrant additionally authorizing Ike's arrest and answered the question as if the detective had made a warrantless arrest of Ike while executing the search warrant. Other examinees erroneously responded that a search warrant and a separate arrest warrant were required.
2. This question required examinees to demonstrate knowledge of the authorized means of effecting an arrest in a felony case. Many examinees knew that an officer is authorized to break down the door if he is refused admittance, but did not expressly mention the purpose of making an arrest in a case that involves a felony. Most examinees assumed or discussed facts not included in the question, such as destruction of evidence or flight, and then answered a question different from the one asked.
3. This question called upon examinees to demonstrate knowledge of the writ of habeas corpus, which some examinees did. Many examinees did not correctly state what such a writ is, which courts can grant the writ, and/or to whom it is directed.
4. This question called upon examinees to demonstrate knowledge of the jurisdiction of district courts and county courts. Many examinees demonstrated such knowledge. The most common problem was a lack of knowledge concerning the jurisdiction of county courts and of what courts have jurisdiction over certain types of misdemeanor cases.
5. This question called upon examinees to demonstrate knowledge of the methods used to select grand jurors. Most examinees did not know who selects the people who will serve on the grand jury, and the most common error was naming persons who are not authorized to make the selection. Other examinees focused on the qualifications of grand jurors and their terms of service, although the question does not call for such information.
6. This question required examinees to demonstrate knowledge of the deadline for filing motions when a pretrial hearing has been set and of the consequence of missing the deadline. Although many examinees knew the deadline, fewer examinees were able to state the consequences of missing it.
7. This question called upon examinees to demonstrate knowledge of the prosecution's duty to disclose exculpatory information, and most examinees demonstrated such knowledge. The most common mistake among other examinees was responding that the information in the police report constituted protected work product in these circumstances.
8. This question required examinees to demonstrate knowledge of the parameters of discovery available to the State and particularly with regard to disclosure of the identity of defense witnesses. Many examinees knew that the rules authorize disclosure of expert witnesses, but mistakenly thought that they require disclosure of lay witnesses.
9. This question called upon examinees to demonstrate knowledge of the requisites of a valid search warrant, including the sufficiency of the description of the place to be searched and the procedural step to challenge any inadequacy in that regard. Most examinees demonstrated such knowledge.
10. This question called upon examinees to demonstrate knowledge of guilty pleas and particularly of the admonishments required before the trial court accepts a guilty plea. Most examinees correctly named two or three of the required admonishments.

11. This question called upon examinees to demonstrate knowledge of the prerequisites for community supervision. Most examinees correctly named one or two prerequisites. The most common mistake was discussing matters that the jury might consider in determining whether to recommend community supervision rather than focusing on the statutory prerequisites for eligibility.

12. This question required examinees to demonstrate knowledge of challenges for cause, which nearly all examinees did.

13. This question called upon examinees to demonstrate knowledge of the order of proceeding in trial and specifically of the appropriate time for the defense to make its opening statement, which nearly all examinees did. Some examinees erroneously responded by discussing the trial court's discretion.

14. This question required examinees to demonstrate knowledge of the rule governing the production of statements of witnesses in a criminal case. Many examinees were unfamiliar with the rule and superimposed their own requirements for production of the grand jury transcript.

15. This question required examinees to demonstrate knowledge of impeachment to show a witness's bias or interest, which some examinees did. Many examinees focused on impeachment using the prior criminal conviction and did not discuss using probation to show a bias in favor of the State, even though the question specifically focused on the use of probation in cross-examination.

16. This question called upon examinees to demonstrate knowledge of the evidentiary rule barring the admission of character evidence to prove an act in conformity therewith, which many examinees did. Many examinees who stated the correct ground for objecting then erroneously concluded that the trial court should overrule the objection based on facts not stated in the question.

17. This question required examinees to demonstrate knowledge of the application paragraph in a jury charge. Many examinees knew that the trial court erred in denying the requested instruction, but discussed matters not stated in the question or raised by the facts. Other examinees erroneously discussed global rules concerning the trial court's discretion or lack of discretion.

18. This question required examinees to demonstrate knowledge of the appropriate areas for jury argument, which many examinees did. The most common mistake was recognizing only one of the improper arguments presented by the facts.

19. This question required examinees to demonstrate knowledge of the requirements for conviction in a criminal case and of the failure to meet those requirements. Most examinees demonstrated such knowledge. The most common errors were not knowing whether a unanimous verdict is required and the result of a less than unanimous verdict.

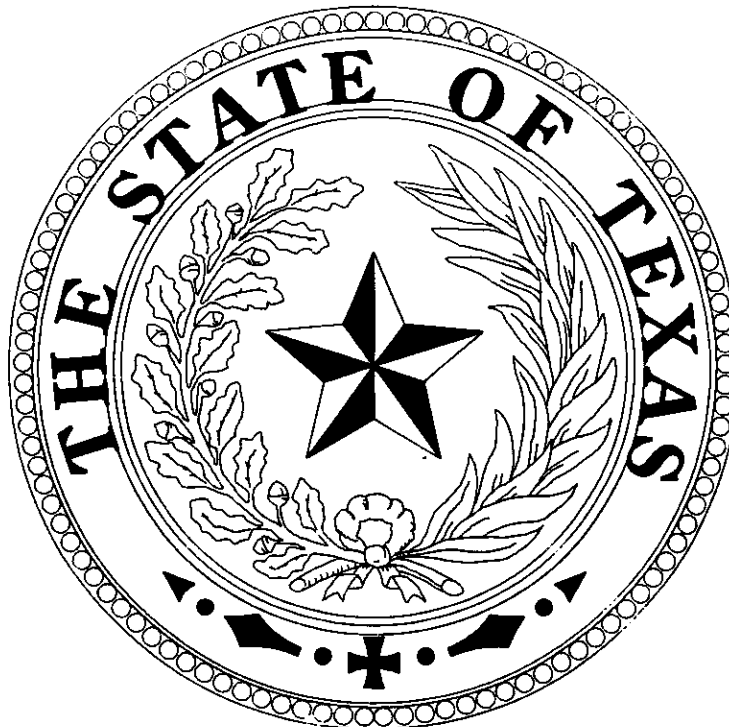
20. This question required examinees to demonstrate knowledge of post-trial challenges to a conviction. Most examinees correctly discussed a motion for new trial and the deadline for filing such a motion. The most common mistakes were failing to recognize the correct statutory basis for the motion and discussing the wrong procedural step to take post-trial.

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Date FEBRUARY 2010

Criminal Procedure & Evidence

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CRIMINAL PROCEDURE & EVIDENCE

George purchased a new sport utility vehicle ("SUV"). Two years later, he lost his job and was unable to make the insurance and loan payments on the SUV. One night, the SUV caught on fire. By the time firemen and Police Officer ("Officer") arrived at the scene, the SUV was totally destroyed. Officer discovered a cigarette lighter and a can of gas in the bushes near the SUV.

Two years and one month after the SUV was destroyed by fire, George's best friend, Lenny, was charged with the felony of arson. Officer arrested Lenny, handcuffed him, and took Lenny to the police station. After Officer advised Lenny of all of his rights, Lenny waived his rights. Officer questioned Lenny about the SUV. Lenny told Officer that he set the SUV on fire because George had promised to give him \$500 in cash from the insurance proceeds.

You have been appointed to represent Lenny in the arson prosecution, and bail has been set at \$20,000.

1. **Is the prosecution barred because the State waited too long to file this felony charge against Lenny? Explain fully.**

When you first speak with Lenny, he seems slightly confused. You briefly wonder about Lenny's competence to stand trial.

2. **What would you need to establish to prove that Lenny is incompetent to stand trial, and what burden of proof would you need to meet? Explain fully.**

After a minute or two, Lenny snaps out of his confusion and is perfectly fine. During your conversation with him, he asks you to explain what bail is and what he has to do to get released from jail.

3. **What is bail? What is a bail bond? In what major way does a personal bond differ from a bail bond? Explain fully.**

A few days later, Lenny posts bail and is released from jail. The prosecutor phones you and asks you whether Lenny would be willing to resolve the case quickly by waiving his right to indictment and pleading guilty to an information in return for the State's recommendation of a lenient sentence.

4. **What is an indictment? Discuss two ways in which an indictment and an information differ? Explain fully.**

While considering the State's plea offer, Lenny asks you what will happen if he pleads guilty but the Court does not agree with the plea agreement.

5. **Will Lenny be allowed to withdraw his guilty plea if the court rejects the plea agreement? Explain fully.**

Lenny tells you that he thinks it would be better for him to enter a plea of nolo contendere rather than a plea of guilty. He believes that a nolo contendere plea does not have the same legal effect as a guilty plea.

6. Is Lenny's belief correct? Explain fully.

Lenny decides to reject the prosecutor's offer. The grand jury subsequently returns an indictment that appears to charge Lenny with the felony of arson for setting the SUV on fire. However, you believe that the indictment fails to charge two of the elements of arson and thus fails to charge Lenny with that crime.

7. What procedural step, if any, can you take to challenge the indictment? Assuming that you can take some procedural step, when should that step be taken? Explain fully.

Prior to trial, your arson expert asks you for a copy of Officer's police report. You file a motion for discovery that requests a copy of Officer's police report.

8. Must the prosecutor produce a copy of Officer's police report to you as part of discovery before trial? Explain fully.

Lenny is eligible for community supervision, and you believe that a jury might be sympathetic and recommend community supervision.

9. **What procedural steps can you take to obtain jury sentencing and to allow a jury to recommend community supervision? When should you take these steps? Explain fully.**

You timely take the proper procedural steps to obtain jury sentencing and to allow a jury to recommend community supervision. Prior to trial, Lenny tells you that he used to play with matches and that he set his grandfather's barn on fire six years ago. You worry that the prosecutor might try to introduce evidence of this previous event at trial.

10. **What procedural step, if any, can you take to ensure that the prosecutor will disclose before trial whether he intends to introduce in the State's case at trial evidence of this previous event? Explain fully.**

During discovery, you learn about Lenny's confession to Officer at the police station. You also learn that the prosecutor intends to have Officer testify at trial about his recollection of Lenny's confession at the police station.

11. **What procedural step, if any, can you take to have the Court exclude Officer's testimony about this confession from evidence? On what basis, if any, can you take this step? Explain fully.**

In one of your discussions with Lenny, he tells you that he went to the police station one year after he set the SUV on fire and told the receptionist on duty the following: "I am feeling guilty about something I did. Is Officer here? I really need to talk to him about a fire and about getting my friend's lighter back." Lenny also tells you that he left the police station when the receptionist went to find Officer because he became scared. You have no doubt that the prosecutor will have the receptionist testify at trial about what Lenny told him at the police station.

12. **What procedural step, if any, can you take to have the Court exclude the receptionist's testimony from evidence? On what basis, if any, can you take this step? Explain fully.**

On the day of trial, the jury panel is assembled and voir dire begins. When questioned, one prospective juror states that he retired from the fire department in Shawnee, Kansas, about ten years ago. He also states that he would be able to follow the court's instructions and reach a fair and impartial verdict based on the evidence.

13. **Can you exercise a challenge to exclude this person from the jury? If so, what kind of challenge can you use, and to how many such challenges are you entitled? Explain fully.**

After the jury is selected and sworn and opening statements are given, one of the jurors suddenly has a massive heart attack and is taken to the hospital. The prosecutor requests a mistrial on the ground that, under the laws of Texas, no less than twelve jurors can return a verdict in a trial of a felony.

14. Must the Court grant a mistrial? Explain fully.

As his first witness, the prosecutor calls an arson expert to testify that the SUV was set on fire with George's cigarette lighter. Your expert has told you that this arson expert's opinion is nonsense. You ask the Court to allow you to question the prosecution's arson expert about his qualifications and the basis of his opinion outside of the jury's presence. The Court denies your request.

15. Is the Court's ruling correct? Explain fully.

The prosecutor tells you that he intends to call Lenny's wife, Kate, as his second witness to testify that she saw Lenny holding George's cigarette lighter two hours before the SUV burned. Outside of the jury's presence, however, Kate tells the Court that she does not want to testify against Lenny.

16. Does Kate have any right to refuse to testify against Lenny? Does Lenny have any right to prohibit the prosecutor from calling Kate as a witness? Explain fully.

A few minutes before trial begins on the second day, Lenny calls you on your cell phone and tells you that he does not like the way things are going and that he “might not make it to court due to other plans.” Lenny does not come to court.

17. Does a defendant have the right to be personally present at trial? May the trial proceed in Lenny’s absence? Explain fully.

At the end of trial, you ask the Court to instruct the jury as follows: “You are not bound by the State’s arson expert’s opinion that George’s cigarette lighter was used to set the SUV on fire. You are the ultimate arbiters of the credibility and reliability of that opinion and should consider it with great skepticism because the expert is paid by the State.” The prosecutor objects to your proposed instruction, and the Court decides not to give it to the jury.

18. Is the Court’s ruling correct? Explain fully.

The jury convicts Lenny of arson. The jury also assesses Lenny’s punishment at five years’ incarceration, but recommends to the Court that it suspend the imposition of the sentence and place Lenny on community supervision.

19. **May the Court ignore the jury's recommendation of community supervision and impose a sentence of five years' incarceration only? Explain fully.**

You decide not to file a motion for new trial in Lenny's case. Lenny tells you that he wants to appeal.

20. **What procedural step must you take to perfect Lenny's appeal, and how long do you have to take that step?**

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Examinee # _____

February 2010 Criminal Procedure and Evidence Comments

1. This question called upon examinees to demonstrate knowledge of the statute of limitations. Most examinees knew that the prosecution was not barred. Some examinees also knew the applicable limitations period.
2. This question required examinees to demonstrate knowledge of the procedure to prove a defendant's incompetence to stand trial. Most examinees knew what was required to demonstrate a defendant's incompetence. The most common problem was a lack of knowledge about the correct burden of proof. A few examinees appeared to confuse incompetence to stand trial with insanity.
3. This question called upon examinees to demonstrate knowledge of bail, bail bonds, and personal bonds, which many examinees did not fully do.
4. This question required examinees to demonstrate knowledge of charging instruments. Most examinees knew what an indictment is and identified at least one difference between an indictment and an information. The most common problem was not identifying two ways in which an indictment differs from an information.
5. This question called upon examinees to demonstrate knowledge of the defendant's options if the court does not accept the plea agreement, which many examinees did. A common mistake was responding as if the question was about the admonishments required at a guilty plea proceeding or about the court taking a guilty plea under advisement.
6. This question required examinees to demonstrate knowledge of the legal effect of a plea of nolo contendere and a plea of guilty, which most examinees did.
7. This question called upon examinees to demonstrate knowledge of how to challenge an indictment that fails to state all elements of the charged offense. Although many examinees did not know the correct type of motion to file, most knew the correct time frame in which to make the challenge.
8. This question required examinees to demonstrate knowledge of discovery and the work product doctrine, which many examinees did. The most common mistake was stating that the report contained exculpatory information, even though that fact was not part of the question, and concluding that the report was discoverable based on that incorrectly presumed fact.
9. This question called upon examinees to demonstrate knowledge of the procedures used to request jury sentencing and to allow the jury to consider community supervision. Although many examinees knew the time frame for filing an election for jury sentencing and a motion for community supervision, most examinees neglected to state the required content and form of a motion for community supervision. A common problem was not responding to all parts of the question or not knowing the time frame for filing such requests.

10. This question called upon examinees to demonstrate knowledge of the procedure by which to request notice of the State's intent to introduce evidence of other crimes or acts. Most examinees did not know the correct procedural step to obtain such notice. The most common mistake was naming procedures aimed at excluding evidence at trial, rather than obtaining notice pretrial.
11. This question called upon examinees to demonstrate knowledge of Texas procedure concerning confessions. Most examinees knew to file a motion to suppress. Fewer examinees demonstrated knowledge of the procedural rules concerning oral statements that are not electronically recorded or written. The most common mistake was stating grounds for exclusion that were not raised by, or were contrary to, the facts stated in the question.
12. This question called upon examinees to demonstrate knowledge of the requirement of custodial interrogation for the suppression of a defendant's statements, which most examinees did not do. The most common mistake was responding that Lenny's remarks were inadmissible for evidentiary reasons.
13. This question called upon examinees to demonstrate knowledge about the use of peremptory challenges, which most examinees did. However, many examinees did not know the number of peremptory challenges to which each party is entitled.
14. This question required examinees to demonstrate knowledge about the number of jurors required to return a verdict in a trial of a felony. Although most examinees knew that a mistrial was not required, only some examinees knew whether the trial could proceed with eleven jurors. Very few examinees demonstrated knowledge of the required form of the verdict in these circumstances. The most common mistake was stating that a mistrial was required.
15. This question called upon examinees to demonstrate knowledge of the procedure to challenge an expert outside of the jury's presence, which most examinees did. The most common mistakes involved discussing challenging an expert during cross-examination or a deposition.
16. This question required examinees to demonstrate knowledge of the spousal privilege, which most examinees did. Some examinees incorrectly applied the marital communication privilege even though the facts did not raise it.
17. This question called upon examinees to demonstrate knowledge of the defendant's right to be present at his trial. Many examinees knew that a defendant has the right to be personally present at trial. Fewer examinees knew when a trial can proceed in the defendant's absence, and this was one of the most common mistakes. Another common mistake was not answering both questions.
18. This question required examinees to demonstrate knowledge of the proper content of jury instructions. Many examinees knew that the court's ruling was correct, but fewer knew the

correct reason for that answer. Common mistakes were stating that all or part of the instruction was correct or treating the instruction as a jury argument by counsel rather than an instruction by the trial court.

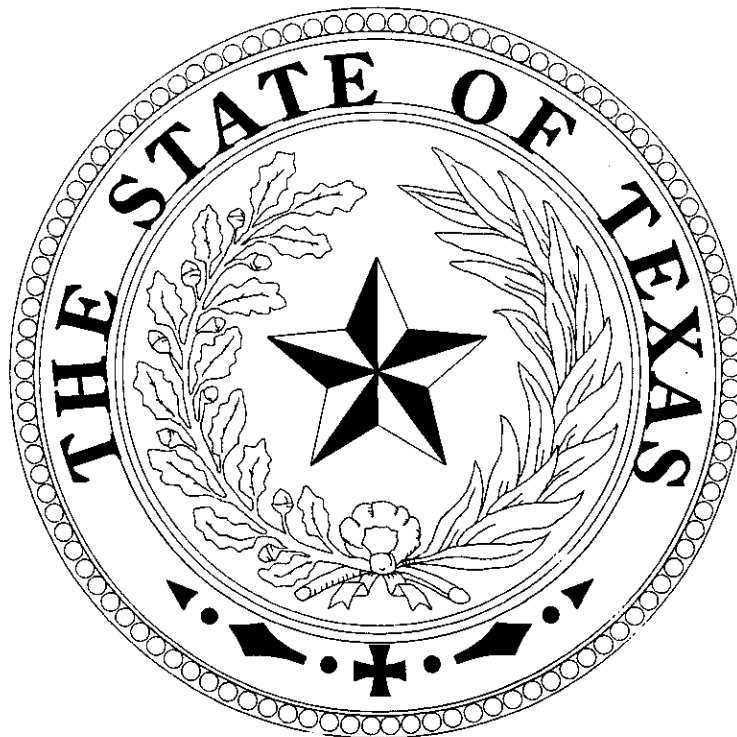
19. This question called upon examinees to demonstrate knowledge about the roles of the judge and jury when the jury recommends community supervision. Some examinees fully understood the jury's role and the effect of its recommendation of community supervision. The most common mistake, which many examinees made, was minimizing the jury's role and effect of its recommendation and maximizing the discretion of the judge to impose sentence in these circumstances.
20. This question required examinees to demonstrate knowledge of how to perfect an appeal. Most examinees knew the time limit within which to appeal, but did not know the document that had to be filed.

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.]



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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?

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