

July 2000

In February, 2000, Victim was walking to her car, which was parked at the Cowtown Shopping Mall, when she was suddenly confronted by a masked stranger, later identified as Defendant. Defendant told Victim that he had a knife in his pocket, that he wanted Victim's purse, and that he would "hurt her badly" if she did not comply. Victim immediately surrendered her purse, whereupon Defendant ran off without causing Victim any physical harm.

Victim reported this offense to a mall security guard, offering a description of her assailant's clothing. Ten minutes later the guard reported that he "had the perpetrator in custody." A second guard transported Victim to a nearby location in the parking lot, where she observed a man lying handcuffed on the ground. When Victim was asked whether she could identify the man as her assailant, Victim replied that while she could not positively identify the man, his clothes looked similar to those of the robber.

Upon hearing Victim's response, Defendant blurted out, "OK, I did it, but I'm sorry. You can have your money back -- please just let me go. My parole officer is going to be really, really mad at me." Fort Worth police soon arrived and took Defendant into custody, charging him with aggravated robbery.

Inasmuch as you have been a licensed attorney for almost an entire week now, the court has appointed you to represent Defendant.

After having announced his re-election bid earlier in the day, the trial judge sets Defendant's bail at \$500,000. That amount strikes you as excessive.

- 1. What procedures are available to you in an effort to effect a reduction in Defendant's bail and what arguments would you make in support of these procedures? Explain fully.**

Following the return of an aggravated robbery indictment against Defendant, you file a motion for an examining trial.

2. **Explain fully what an examining trial is, what its purpose is, and whether Defendant is entitled to an examining trial under the circumstances outlined above.**

The local newspaper gives extensive coverage to this case after it is revealed that Victim is the wife of the police chief. You begin to be concerned that because of these circumstances, it may be difficult for Defendant to get a fair trial in Fort Worth.

3. **What procedure is available to you to protect Defendant's right to a fair trial, what supporting documents must you file, and what evidence must you present in order to prevail? Explain fully.**

4. **At what stage of the case against Defendant must you undertake the procedure you have described in responding to the preceding question, and what are the consequences if you fail to undertake the procedure in a timely fashion? Explain fully.**

As you prepare your case, you begin to entertain doubts that Defendant is mentally competent to stand trial.

5. Is there a presumption regarding Defendant's competency, and, if so, what must you show in order to rebut that presumption? Explain fully.

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

Although you did not take criminal procedure in law school, you do remember from your civil procedure class that depositions are an essential tool of pre-trial discovery.

7. What procedure must you follow before you will be allowed to take Victim's pre-trial deposition, and would your answer be any different if you wished to depose the security guards who witnessed the events? Explain fully.

Name the defensive procedure you should employ to exclude the following items of evidence, explain what you must show in order to succeed, and state at what stage of the case against Defendant you must initiate the procedure.

8. Victim’s identification of Defendant at the time of his apprehension. Explain fully.

9. Defendant’s admission at the time of his apprehension. Explain fully.

You file a pre-trial discovery motion requesting a list of all State’s witnesses. The district attorney files a reciprocal motion requesting a list of all defense witnesses.

10. How should the court rule on the two motions? Explain fully.

- 11. Assume that you are not compelled by the court to provide the State with a list of all defense witnesses. Can you nonetheless ethically do so voluntarily? Under the Texas Rules of Evidence, can you do so voluntarily? Explain fully.**

Several weeks before trial, Defendant asks you whether his case will be tried to a jury or the judge.

- 12. What procedure is employed to express the choice whether to try the case to a jury or the judge, who has the right to make that decision, at what stage of the case must the decision be made, and must the choice be the same as to both the guilt and the punishment phases of the trial? Explain fully.**

As the jury voir dire commences, you are surprised to learn that the court reporter has taken the morning off and is absent from the courthouse.

- 13. What procedure must you have employed to ensure that the court reporter takes down the voir dire examination, at what stage of the case should you have initiated the procedure, and what are the consequences if you fail to do so? Explain fully.**

Of the 42 person jury panel summoned for trial, 8 are African-Americans. All 8 of these veniremen are acceptable to you. The prosecutor unsuccessfully challenges each of the 8 for cause. Following this unsuccessful effort, the prosecutor uses 8 of his 10 peremptory strikes on these veniremen.

14. Describe the procedure you should employ to contest the action by the prosecutor, at what stage of the proceedings must you employ it, and what remedy should you ask the judge to grant? Explain fully.

After the jury is seated and the indictment is read, the prosecutor makes his opening statement to the jury. At the conclusion of the State's opening statement, the following exchange occurs:

Court: Ms. Defense Counsel, do you wish to make an opening statement?

Defense Lawyer: I do, your Honor. However, I wish to do so after the State rests its case-in-chief.

Court: That request is denied counsel. Either make it now or you waive it. We're not going to drag this trial out.

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

A few minutes into the testimony of the State's first witness, you realize that you have neglected to ask that "the Rule" be invoked. You announce to the court that you now wish to do so.

- 16. Define “the Rule”, state whether, under the circumstances, it is too late for you to invoke the Rule, and name two possible sanctions that may be imposed if the court finds that the Rule has been violated. Explain fully.**

After the State’s first witness has testified on direct examination, the following exchange occurs:

Court: Counsel, you may proceed.

Defense Lawyer: Your Honor, the defense now moves for the production of the witness’ statement for use during cross-examination.

Prosecutor: We object. First, the request is untimely. Counsel should have asked for the statement at pre-trial. Secondly, this is our work-product. We refuse to produce the statement.

- 17. How should the court rule on each ground stated in the prosecutor’s objection, and what sanctions may the court impose if the prosecutor refuses to produce the statement? Explain fully.**

After the State rests its case, you present your first witness, Convict, who testifies as an alibi witness in behalf of Defendant. On cross-examination the following exchange occurs:

Prosecutor: It is true, is it not sir, that you were convicted of robbery in Harris County, Texas, in June of 1994?

Defense Lawyer: Your Honor, we object. That conviction is remote since it occurred 6 years ago.

Court: Overruled. The witness is directed to answer the question.

18. How should the court rule on your objection, and should the ruling be different if Convict's conviction is still on appeal? Explain fully.

After both sides have rested and closed, the court directs that any requested special charges and objections to the charge be heard. You decide to make your requests and objections orally.

19. List two of the three conditions that must be met in order for you to make your requests and objections orally, and state whether you must later reduce them to writing. Explain fully.

To no one's surprise but your own, Defendant is convicted of aggravated robbery. Naturally Defendant informs you that he wishes to appeal. You state orally, and in open court, that you hereby appeal the verdict and the grounds therefor. You fail to file anything in writing regarding the appeal and you also neglect to file a motion for new trial.

20. Have you adequately preserved an appeal, and may you still file a motion for a new trial? If you may still file a motion for new trial, within what time period must you file it, and may the court grant you an extension beyond that time? Explain fully.

Criminal Procedure & Evidence – July 2000

1. A failure to answer all parts of each question.
2. A failure to fully explain answers.
3. Confusing criminal and civil procedure by neglecting the differences between them. This is especially true with regard to discovery questions. This failure indicates a lack of familiarity with criminal procedure and evidence.
4. Discussing irrelevant matters. For example, when asked to discuss the available procedures to exclude evidence, applicants often discussed the admissibility of the evidence, which was not called for.
5. A failure to state answer clearly and concisely within the five-line maximum.
6. A lack of familiarity with timelines/deadlines applicable to various criminal procedures and motions. Again, applicants often confused civil and criminal rules.
7. When asked to do so by the question, a failure to identify how the trial court should rule on particular objections/motions.
8. Illegible handwriting. No credit will be given when an answer cannot be read.

February 2001

You are appointed to represent Defendant, who is indigent. Defendant has been arrested for and charged with murder. The Dallas County grand jury will meet next week to consider an indictment against Defendant. You decide to attend the grand jury session in order to present evidence and argue in behalf of Defendant.

- 1. Are there circumstances under which you can appear and present evidence before a grand jury in behalf of Defendant? Explain your answer.**

Your best efforts notwithstanding, the grand jury returns a true bill. The indictment charges as follows:

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

THE GRAND JURORS OF DALLAS COUNTY, TEXAS, duly elected, tried, empaneled, sworn and charged to inquire of offenses committed in Dallas County, Texas, in the State of Texas, upon their oaths do present in and to the 283rd District Court of said County that John Defendant, in the County of Dallas and State aforesaid, on or about the 10th day of December, 2000, did then and there cause the death of an individual, William Victim, by shooting him with a deadly weapon, to-wit: a firearm

AGAINST THE PEACE AND DIGNITY OF THE STATE.

DAVID JONES

You conclude that this indictment is fundamentally defective, but decide to forego your pre-trial objection and urge the issue on appeal.

- 2. Why is this indictment defective? What procedure is available to Defendant to challenge the indictment? At what stage of the proceedings must Defendant assert such a challenge? Explain your answer.**

Defendant files a pre-trial discovery motion requesting all exculpatory evidence in possession of the State. In its file, the State has two statements from Witness, who claims to have been present at the murder. Statement Number One, which is written and 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. However, since Statement Number Two is unsigned by Witness, the State decides it is not necessary to reveal its existence to Defendant.

- 3. 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 your answer.**

During a pre-trial conference, the Prosecutor tells you the State believes that 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 the State or the Court, reasoning that it is protected by the attorney-client privilege. Shortly thereafter, Defendant informs you that he wishes to file a sworn application for probation.

- 4. Under the circumstances outlined above, should you file a probation application for Defendant? Why or why not? If an application for probation is not filed, must you disclose Defendant’s criminal history to the State? Explain your answer.**

- 5. 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/jury punishment be filed?**

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

- 6. How should the Court rule on the State’s request? Explain your answer.**

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 plea bargain. Defendant disagrees and tells you that he wishes to persist in his plea of not guilty.

7. **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 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.

8. **What procedure, if any, should you employ 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 voir dire? Explain your answer.**

Of the 42 person jury panel summoned, 8 are African-Americans. Since Defendant is white and Victim was African-American, you exercise your peremptory challenges to strike all 8 of these venire persons.

9. **Can Prosecutor challenge your action? If so, what procedure will be employed in determining whether or not Prosecutor's challenge will prevail? Explain your answer.**

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 Parkland 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 COUNSEL: Objection, your honor. Improper predicate.

COURT: Sustained.

10. Is the Court's ruling correct? If so, what predicate must the State lay in order to properly admit State's Exhibit One? Explain your answer.

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

PROSECUTOR: Your honor, the State of Texas calls Defendant. Only he can tell us what really happened.

DEFENSE COUNSEL: Objection, your honor. Prosecutor knows full well that she cannot call Defendant to testify.

COURT: Ms. Prosecutor, I realize that was probably an oversight on your part. But unfortunately, I must sustain the objection.

DEFENSE COUNSEL: Thank you, Judge.

11. Is the Court's ruling correct? Even if the Court's ruling was correct, what, if anything, must you do further to preserve any issue of prejudice on appeal? Explain your answer.

Assume that the State has rested its case-in-chief. At that point, you do not believe the State has shown Defendant's guilt beyond a reasonable doubt.

12. What procedural steps, if any, should you take before beginning your presentation of Defendant's case, and should you do so within the hearing of the jury? Explain your answer.

You call Defendant as your last witness. During the State's cross-examination of your client, the following exchange occurs:

PROSECUTOR: You claim that Victim came at you with a knife; is that your story?

DEFENDANT: Yes, ma'am.

PROSECUTOR: And you told your lawyer this story, didn't you?

DEFENDANT: Yes, ma'am.

PROSECUTOR: And your lawyer certainly took notes while you were telling him this story, didn't he?

DEFENDANT: Yes, ma'am.

(Cross-examination script continues on the next page.)

PROSECUTOR: Your honor, we request that the defense turn over those notes to us for use during our cross-examination of Defendant. Our demand is based on *Gaskin* and is made in an effort to show prior inconsistent statements.

COURT: Yes, that's right. Mr. Defense Lawyer, turn over the notes.

13. Is the Court's ruling correct? Why or why not? Explain your answer.

After Defendant has testified, you rest. The State calls Officer as its first rebuttal witness. The following exchange occurs:

PROSECUTOR: Officer, this is not the first time you have dealt with Defendant is it?

OFFICER: Oh, no, ma'am.

PROSECUTOR: In fact, you have arrested Defendant for everything from driving while intoxicated to indecency with a child, right?

DEFENSE COUNSEL: Objection.

COURT: What do you mean "objection," Counselor? What is your basis?

14. What is the basis of your objection? How should the Court rule on the objection? Explain your answer.

15. Would your answer be the same if the question asked of Officer was whether, rather than having been arrested, Defendant had been convicted of prior felony offenses? Explain your answer.

16. Must the Court's charge be merely submitted to the jurors or must it be read to them? In state court, is the charge submitted/read before or after final jury arguments? What is the corresponding procedure in a federal criminal trial? Explain your answer.

In spite of your Herculean efforts, the jury finds Defendant guilty after only 8 minutes of deliberation. Although jury punishment has been elected, the swiftness of the verdict causes Defendant to reconsider that election. Defendant now decides that he wishes to have the judge assess punishment, but the Prosecutor objects.

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

During the punishment phase of Defendant's trial, the following exchange occurs:

PROSECUTOR: Detective, do you know the reputation that Defendant has in the community in which he resides for being a peaceful and law-abiding citizen?

DETECTIVE: Yes, ma'am, I do. His reputation is very, very bad.

PROSECUTOR: And since the Defendant has been found guilty by this jury, do you have an opinion as to what his prison sentence should be?

DETECTIVE: I certainly do. Defendant should receive

DEFENSE COUNSEL: Objection!

COURT: State your objection, Counsel.

18. What specific objection, if any, should you make? How should the Court rule? Explain your answer.

The Court's punishment charge includes an instruction that Defendant will not be eligible for parole until serving one-half of his sentence or 30 years, whichever is less. During her closing argument, Prosecutor argues as follows:

PROSECUTOR: Ladies and gentlemen, remember the Court's charge. Whatever sentence Defendant receives can be served in only one-half the time. Give Defendant double whatever you wish him actually to serve so he can't get out and harm another innocent victim.

19. Is this proper argument by Prosecutor? Why or why not? Explain your answer.

After two days of deliberations on the punishment issue, the jury announces that it is hopelessly deadlocked. The Court makes the following ruling on the record:

COURT: I am declaring a mistrial in this case. Since the jury has agreed on Defendant's guilt, that finding will be left undisturbed. A new jury panel will be summoned for tomorrow. At that time, we will commence a new hearing on punishment.

20. Is the Court's decision correct? Why or why not? Explain fully.

Criminal Procedure & Evidence – February 2001

Each paragraph number corresponds to the number of the criminal procedure and evidence question on the exam.

1. Most examinees stated general truths about grand jury proceedings, but failed to recognize the ability of the defense to participate with permission of the district attorney.
2. Most understood that the indictment could be challenged by a pretrial motion to quash, but few recognized that the indictment failed to allege a culpable mental state.
3. Many examinees did not know that the defendant need not request Brady material.
4. Many failed to recognize that a probation application may not be filed for a defendant with a prior felony conviction and that to file an application under these conditions would be committing or suborning perjury.
5. Many examinees were unfamiliar with the time lines for filing an application for probation and an application for judge or jury sentencing.
6. Most failed to recognize differences between the State's ability to discover the defense's list of expert witnesses and the defense's list of other witnesses. While experts are discoverable, other witnesses are not.
7. The majority of examinees knew that the defendant decides the plea to be entered, but many did not know the statutory admonishments that must be given when a defendant pleads guilty.
8. Most examinees seemed familiar with motions in limine and the need to object and to proceed to an adverse ruling to preserve error.
9. Most examinees correctly answered that the State could make a Batson claim, as well as the initial burden of proof on the State to make a prima facie case and on the defense to offer race-neutral explanations. However, the majority of examinees failed to state that the movant then had the ultimate burden to show racially motivated strikes.
10. Many examinees lacked familiarity with the business records exception to the hearsay rule and the predicate required for the admission of documents under this exception.
11. While many examinees recognized that the State could not call the defendant to testify, they failed to list each of the steps required to preserve a complaint.
12. Most examinees correctly stated that they would file a motion for instructed verdict after the State rests if the State failed to prove its case. However, many did not know that the motion is made outside the hearing of the jury.
13. Most examinees knew that defense counsel's notes of his interview with the defendant were not discoverable and that the notes were privileged. However, almost none knew that the Texas Rules of Evidence specifically exclude such notes from discovery.

14. Most examinees knew that the evidence of the defendant's prior arrests was inadmissible as evidence of prior bad act/character/impeachment. Some spent the space stating that convictions would be admissible; however, this was not called for by the question.
15. Many examinees failed to recognize that prior convictions are admissible as impeachment. Some examinees responded incorrectly because they failed to carefully read the question, which stated that the defendant testified before the detective was called to discuss the defendant's prior convictions.
16. Most examinees correctly answered that the jury charge must be read to the jury, although some examinees did not know that it is read before final arguments in state court.
17. Most examinees did not recognize that the defendant could change his punishment election during trial if the district attorney consented.
18. Most examinees failed to respond that a detective's opinion about the sentence the defendant should receive was irrelevant and inadmissible because it would not assist the jury in determining the issue at hand. Most examinees incorrectly responded either (a) that all testimony would be admissible at the punishment phase or (b) that the testimony impermissibly dealt with an issue that only the jury could determine.
19. Most examinees knew that it was improper for the State in jury argument to discuss application of the parole laws to this particular defendant.
20. Most examinees knew that the judge's granting of a mistrial and summoning a new jury for punishment only was incorrect. However, many examinees did not recognize that a mistrial would require that the entire case to be retried. Many examinees erroneously stated that retrial would be barred by double jeopardy.

July 2001

You are hired to represent Defendant, who has been charged with Driving While Intoxicated - his Second (DWI-2) in Harris County, Texas. The State alleges that in 1995 Defendant was convicted of a DWI in Travis County, Texas, and received a two-year probated sentence.

Defendant's bail is set by the judge at \$25,000. Defendant cannot post a bond in that amount, and asks you to get the bond reduced.

- 1. List three of the factors the court must consider in fixing the amount of Defendant's bail.**

The district attorney informs you that since DWI-2 is a misdemeanor, Defendant's case will be prosecuted by an "information."

- 2. What is an "information"? Name one way in which an information differs from an indictment.**

You file a motion for discovery, seeking (1) a copy of the stationhouse videotape made of Defendant following his arrest, and (2) the names of the State's expert witnesses. The State refuses to provide these materials to you and tells you to "set the matter for hearing."

3. Is the State obligated to provide the two items requested? Explain fully.

On the post-arrest videotape of Defendant, a Houston police officer is heard asking Defendant whether he wishes to answer questions concerning the offense. Defendant answers, “No. I’m taking the Fifth. I want my lawyer and I want him right now.” The State tells you that it intends to play this videotape to the jury.

4. Should the jury be entitled to see and/or hear this portion of the videotape? Why or why not? What action, if any, should you take in an effort to prevent this videotape from going to the jury?

5. At a pre-trial hearing, Defendant gives testimony regarding the matter raised in question number 4, above. By doing so, has he waived his right to remain silent at his trial? Explain fully.

After the court sets this case for trial, you discover that a defense witness is absent. You decide to request a continuance.

- 6. List two factors you must allege in a first motion for continuance. State whether or not such a motion must be sworn.**

Defendant decides to go to trial, electing to try his case to a jury. During your voir dire examination of the panel, prospective juror #8 informs you that he has formed an opinion that Defendant is guilty.

- 7. What must you show to establish a challenge for cause to this prospective juror?**

- 8. How many challenges for cause is Defendant entitled to? How many peremptory challenges? Does the number of peremptory challenges differ depending on whether the trial takes place in county or district court?**

You subpoena Banker, who witnessed Defendant's arrest. Although properly served with the subpoena, Banker refuses to comply, telling your investigator, "I refuse to be a witness. Time is money and I don't intend to waste either."

9. What action, if any, is available to you to compel Banker’s attendance? Explain fully.

After the jury is seated, the prosecutor delivers her opening statement. In that statement, she tells the jury as follows:

PROSECUTOR: I also expect the evidence to show that Defendant knows full well that he is guilty of this offense. He knows that because he wanted to plead guilty in exchange for our plea bargain...

DEFENSE LAWYER: Objection!

COURT: What is your objection counsel? I’m not a mind-reader.

10. What is the proper objection to Prosecutor’s statement? How should the court rule? Explain fully.

The State calls Friend, a co-worker of Defendant. Friend testifies that Defendant sent her a letter (Letter #1) which contains potentially damaging admissions regarding the DWI. However, Defendant also sent Friend a second letter (Letter #2), which recants letter #1. The State offers only letter #1 into evidence.

11. Should you wish to do so, when and under what authority can you offer letter #2 before the jury? Explain fully.

The State's next witness is Officer, who arrested Defendant. You know that Officer is going to testify that, at the time of Defendant's arrest, a search of his car revealed an unlicensed handgun. You do not want the jury to hear testimony of this extraneous offense.

12. In sequential order, list the steps you should take to keep Officer's testimony out of evidence.

13. What objection(s) should you make in order to keep this testimony out of evidence? Explain fully.

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

14. 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.

Wife changes her mind and decides that she wants to testify about Defendant's conversation with her. Defendant however, objects to Wife's testimony.

15. Can Defendant claim a privilege and prevent Wife from testifying about the communication?

After the State rests, the following exchange occurs:

DEFENSE LAWYER: Your honor, the State has rested, and prior to calling my first witness, I now wish to make a brief opening statement to the jury.

COURT: Your request is denied as untimely, counsel. Now let's proceed.

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

Defendant calls as his first witness Expert, who has specialized knowledge about the rate of alcohol absorption into the human bloodstream. Expert intends to offer his opinion that Defendant was not intoxicated at the time of his arrest. The following exchange occurs:

PROSECUTOR: Your honor, we move to conduct a voir dire examination before the jury hears from this witness.

DEFENSE LAWYER: Your honor, I ...

COURT: Sit down counsel. The State's request is granted.

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

Defendant makes the decision to testify at the guilt/innocence stage of the trial. On cross-examination, the following exchange occurs:

PROSECUTOR: Mr. Defendant, isn't it true that you were convicted in 1995 in Travis County of misdemeanor DWI?

DEFENSE LAWYER: Objection your honor. This is an effort to impeach Defendant with evidence of an inadmissible conviction.

COURT: Sustained.

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

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 smelled of alcohol.

19. Can Defendant call the judge as a witness? Explain fully.

Following the reading of the court's charge and the argument of counsel, the jury begins its deliberations. Following two days of deliberations, the jury announces itself hopelessly deadlocked. You move for a mistrial, but the State opposes.

20. In order for the court to grant a mistrial, must the State join in your motion? Explain fully.

Criminal Procedure & Evidence – July 2001

Paragraph numbers correspond to the question number on the exam.

1. Most examinees identified one to three factors the court must consider in determining the amount of Defendant's bail.
2. Most examinees knew that an information differed from an indictment in that it does not require a grand jury or is signed by the prosecutor. Many examinees, however, failed to state that an information is the charging instrument for misdemeanors.
3. Many examinees did not know that the State is obligated to provide Defendant's videotaped confession and the State's list of expert witnesses, stating that either or both items constituted work product. Other examinees wrongly stated that one or both items would be discoverable only if they constituted *Brady* material or if the trial court determined that the materials should be disclosed.
4. Most examinees knew that the jury should not be entitled to see a videotape evidencing Defendant's post-arrest silence/invocation of the right to remain silent. A number of examinees stated that the attorney should file a motion in limine, rather than a motion to suppress or failed to state what action the defendant should take to exclude the tape.
5. Many examinees knew that Defendant would not waive his right to remain silent by testifying at a pretrial hearing.
6. Many examinees did not know that a motion for continuance needs to be sworn. Others stated factors for a continuance that would be irrelevant when the ground for the motion is an absent witness. For example, some stated grounds that the attorney is a member of the legislature, that the State announced a surprise witness, or that the attorney simply needs more time to prepare.
7. The majority of examinees knew that the venire member who established an opinion of Defendant's guilt is challengeable for cause due to bias or prejudice. Many examinees also indicated the need to demonstrate that the bias or prejudice would influence the verdict.
8. The majority of examinees recognized that Defendant is entitled to an unlimited number of challenges for cause. Many did not know that the number of peremptory challenges differs depending on whether the trial takes place in county or district court and stated that the number depended solely on the offense charged. Many examinees stated the number of peremptory challenges for capital and felony offenses, although the question clearly involves a misdemeanor offense. Finally, most examinees did not know that Defendant gets five peremptory challenges when tried in district court for a misdemeanor offense.
9. The majority of examinees failed to recognize that the attorney should compel Banker's attendance at trial through a writ of attachment, which allows an officer to take Banker into custody and deliver him to court. Most examinees stated that the attorney should seek to have Banker held in contempt. Others stated that the attorney should seek a subpoena, even though the question itself states that Banker was subpoenaed.

10. Nearly all examinees knew that plea negotiations/offers to compromise are inadmissible and that the trial court should sustain the attorney's objection. Most examinees who did not receive full credit neglected to state that the trial court should sustain the objection.
11. A number of examinees recognized that letter number two could be introduced into evidence under the rule of optional completeness. However, many examinees stated that the letter had to be turned over under *Brady* or *Gaskin*, that it could be used to refresh the witness' memory, or that it was a prior inconsistent statement. Further, most examinees did not know that letter number two could be introduced immediately, stating instead that the attorney must wait until cross-examination or the defense's case-in-chief.
12. Most examinees knew that the attorney should file a motion in limine, move to suppress, and object at trial. A number knew that the jury should be retired or that the attorneys should approach the bench. Most failed to state that a hearing should be held. Many examinees spent most of their allocated space discussing the grounds for each motion/objection, rather than concentrating on the steps that should be taken, which is what the question asked for.
13. The majority of examinees knew that the attorney could object on the grounds that the probative value of the evidence was substantially outweighed by its prejudicial effect. Fewer examinees knew that the evidence would constitute inadmissible character evidence. Many simply stated that the attorney should object on grounds of relevance or an illegal search and seizure, even though the question gives no indication that the search might be illegal. Also, some examinees ignored the call of the question, which asks for the objections the attorney should make, stating instead that the attorney should file a motion in limine, a motion to suppress, and/or object at trial.
14. The majority of examinees knew that Wife could not be compelled to testify for the State. However, the majority either thought that Wife could be called to the stand or failed to state whether Wife could refuse even to be called as a witness for the State.
15. While many examinees realized that Defendant could claim a privilege to prevent Wife from testifying, many others stated that only Wife could invoke a privilege. Further, the majority of examinees failed to state that both spouses could invoke the privilege.
16. Most examinees knew that Defendant was entitled to make an opening statement after the State rests its case-in-chief. Most examinees further noted that the defense has an option to make its opening statement immediately after the State's opening statement.
17. The majority of examinees knew that the State can conduct a voir dire examination of the defense's expert witness to determine his qualifications or the basis of his opinion. A small number stated that the State would have to wait until its cross-examination of the witness.
18. Many examinees knew that the court's ruling was correct because Defendant can be impeached only with felony convictions and misdemeanors involving moral turpitude. However, a significant number of examinees responded that Defendant had opened the door simply by testifying or that the conviction was admissible merely because it was less than ten years old.

19. The vast majority of examinees correctly stated that the presiding judge could not be called to testify at trial.
20. Most examinees knew that the State was not required to join in the defense's motion for mistrial due to a hung jury and that granting the mistrial was in the trial court's discretion. Several examinees gave unnecessary discussions of double jeopardy.

February 2002

You are appointed to represent Defendant, who has been charged with murder. You are informed that the Harris County, Texas grand jury will meet the next day to consider an indictment against him.

- 1. Can Prosecutor compel Defendant to testify before the grand jury? What rights does Defendant have regarding an appearance? Explain fully.**

Following Prosecutor's presentation, the Harris County grand jury returns the following indictment:

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

THE GRAND JURORS OF HARRIS COUNTY, TEXAS, duly elected, tried, empaneled, sworn and charged to inquire of offenses committed in the County of Harris in the State of Texas, upon their oaths do present in and to the 100th District Court of said County that George Defendant, in the County of Harris and State aforesaid, on or about the 10th day of January, 2002, did then and there cause the death of an individual, Sally Victim, by shooting her with a deadly weapon.

Terry Jones

TERRY JONES
Foreman, Grand Jury

2. Is this indictment defective? Why or why not? Explain fully.

On the day the indictment against Defendant is returned, the court orders that you file and present any pre-trial motions within the following three days.

3. Is this a proper order of the court? Explain fully.

During the course of its investigation into this offense, the Houston Police Department interviews an eye-witness who identifies Neighbor as the killer. The police, however, conclude that this identification was in error.

4. What is the State's obligation, if any, regarding this evidence and does the State's obligation depend on whether Defendant has formally requested the information? Explain fully.

As you prepare your case for trial, you learn that Defendant has a lengthy history of chronic psychiatric problems. You become concerned about Defendant's competency to stand trial.

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

6. List three ways in which incompetency differs from insanity under Texas law.

7. In preparation for trial, you file a written motion for discovery. Is Defendant entitled under the Texas Code of Criminal Procedure to the following: a) the names of the State's witnesses? b) statements of the State's witnesses? c) the autopsy report, including toxicological results? d) Defendant's confession? e) the Grand Jury transcription? Explain fully.

Defendant decides to plead guilty to the offense as charged.

- 8. List three admonishments that the court must give Defendant before accepting his felony plea of guilty.**

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

- 9. What are two ways in which deferred adjudication differs from probation? Explain fully.**

Defendant changes his mind and decides to try his case to a jury.

- 10. Who, as between judge and jury, sets punishment in a Texas criminal case, and does Texas procedure differ from federal procedure in the setting of punishment? Explain fully.**

When the jury panel of 42 venire members is assembled, you note that several police officers are among the first 15 venire persons. You conclude that these individuals may not be favorable defense jurors.

- 11. What action, if any, can you take to change the seating order of the venire persons, and at what stage of the proceeding should you take this action? Explain fully.**

Of the 42 person jury panel summoned for trial, 8 are African-Americans. Prosecutor uses 8 of his peremptory strikes on these venire members.

- 12. What procedure, if any, should you employ to contest this action by Prosecutor, at what stage of the proceedings should you employ it, and what is the consequence if your contest succeeds? Explain fully.**

After the jury is seated, Prosecutor informs the court that it will seek to introduce Defendant's post-arrest statement into evidence. You have previously filed a motion to suppress this confession. Defendant informs you that he wishes to testify at the suppression hearing.

13. If Defendant testifies at this hearing, 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 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. A couple of weeks before the killing they said they heard Defendant holler...

DEFENSE LAWYER: Objection and move to strike everything after "I sure did," your honor.

COURT: State the basis for your objection, counselor.

14. What is the evidentiary basis for your objection, and how should the court rule? Explain fully.

After the State's first witness has testified on direct examination, the following exchange occurs:

COURT: Counsel, you may proceed.

DEFENSE LAWYER: Your honor, the defense now moves for the production of the witness' statement for use during cross-examination.

PROSECUTOR: We object. The request is untimely. Counsel should have asked for the statement at pre-trial. We refuse to produce the statement.

15. How should the court rule on Prosecutor's objection, and what sanctions, if any, may the court impose if Prosecutor refuses to produce the statement? Explain fully.

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

COURT: Mr. Prosecutor, call your next witness.

PROSECUTOR: Your honor, the State of Texas calls Defendant.

DEFENSE LAWYER: Objection.

COURT: What do you mean "objection," counselor? What is your basis?

16. What are the bases for your objection, and how should the court rule on the objection? Explain fully.

After presenting all of its witnesses, the State rests. You note that Prosecutor has failed to prove that the offense occurred in Harris County.

17. What procedural steps should you take, and at what stage of the proceedings should you take them? Explain fully.

You offer 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 Texas Rule of Evidence 702.

COURT: Retire the jury.

18. List five factors the court should consider in determining the admissibility of this scientific evidence.

In a last-ditch effort to save himself, Defendant takes the stand in his own behalf. On cross-examination the following exchange occurs:

PROSECUTOR: Mr. Defendant, although you now deny that you are guilty of this offense, that's not what you told your lawyer's paralegal is it? Didn't you admit this whole sorry episode to her?

DEFENSE LAWYER: Objection, your honor.

19. On what grounds should you object to this question, and how should the court rule? Explain fully.

During his closing jury argument, Prosecutor makes the following statement:

PROSECUTOR: Ladies and gentlemen of the jury, the law-abiding citizens of Harris County are watching you. They demand a conviction in this case and they demand the harshest possible penalty.

20. Assuming Prosecutor's argument is improper, what must you do to preserve error in such circumstance? Explain fully.

Criminal Procedure & Evidence – February 2002

1. Few examinees knew what rights a defendant has regarding the grand jury, particularly whether he may be compelled to testify.
2. Most examinees did well on this question.
3. The majority of examinees knew that the court's order was improper. However, most did not explain why.
4. Most examinees recognized the *Brady* issue in this question. Many examinees incorrectly believed that the State was under no affirmative duty to disclose.
5. Most examinees got at least one prong, if not both, of the competency test correct.
6. Few examinees exhibited an understanding of the differences between incompetence and insanity.
7. Too many examinees sought to avoid a direct answer by noting that discovery was discretionary with the court.
8. The majority of examinees did well on this question.
9. Many examinees demonstrated a basic misunderstanding of deferred adjudication. A common error was to confuse deferred adjudication with expunction.
10. It is difficult to generalize from the variety of difficulties examinees seem to have had on this question
11. Most examinees did well on this question.
12. Although most examinees knew of *Batson*, a surprisingly large number did not properly explain the procedure or the remedy for a violation.
13. While most examinees understood that the defendant did not waive his right to silence, many did not explain the limited scope of a *Jackson v. Denno* hearing.
14. Most examinees correctly identified the hearsay issue.
15. While many examinees answered this question correctly, many also wanted the court to impose civil sanctions against the prosecutor. Fines were often mentioned, as were contempt and jail.
16. Although most examinees knew that State could not call defendant as a witness, many neglected to explain why.
17. Many answers inappropriately suggested such civil remedies as "motion for summary judgment" or "motion to dismiss".

18. Many examinees seemed to have difficulty with this *Daubert* question even though the concept applies in both civil and criminal procedure and evidence.
19. Most examinees recognized the privilege issue and explained it well.
20. Few examinees listed all three steps necessary to preserve criminal error. Very few seemed to recognize the significance of proceeding to an adverse ruling.

July 2002

In December 2001, the San Antonio Police Department (located in San Antonio, Bexar County, Texas) received an anonymous telephone call that Defendant was selling cocaine out of his home. Based on that information, police officers prepared an affidavit and obtained a search warrant to search Defendant's house. Two days later the warrant was executed. When Defendant refused to open the door to his home, the police broke down the door and arrested Defendant. No controlled substances were found. However, a sawed-off shotgun was discovered in Defendant's car, which was parked in his next door neighbor's driveway.

Defendant is now charged with possession of a prohibited weapon. You are appointed by the court to represent him.

- 1. Under Texas law, did the police officers have the authority to break down Defendant's door in order to gain admittance to his home? Explain fully.**

Following his arrest, Defendant was placed in the Bexar County jail. Defendant, however, was not taken before a magistrate for one week, due to the Christmas holidays.

- 2. Under Texas law, when must Defendant be taken before a magistrate? What are the duties of the magistrate at such appearance?**

Prior to the district attorney presenting Defendant's case to the Bexar County grand jury, you request an examining trial.

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

You obtain a copy of the search warrant as you prepare Defendant's case for trial.

4. Identify two items which are required to be present in a Texas search warrant.

The first pre-trial motion that you file on behalf of Defendant is a motion to suppress the sawed-off shotgun seized during the search of his automobile.

5. Based on the facts set out above, explain two of the grounds you should urge in support of your motion to suppress.

The court schedules a pre-trial hearing on Defendant's motion to suppress evidence. Following that hearing, the court grants your motion to suppress the shotgun. The State immediately announces that it will "appeal the order all the way to the Texas Court of Criminal Appeals."

6. Is the State entitled to pursue an interlocutory appeal in this instance? What requirements, if any, must be met by the State to do so? Explain fully.

You file a pre-trial discovery motion requesting a list of all the State's witnesses. The district attorney files a reciprocal motion requesting a list of all defense witnesses.

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

Defendant elects a trial by jury and instructs you to file an application for probation on his behalf.

8. List two requirements of a proper application for felony probation.

Seven months after the grand jury indicts Defendant, the case is still not set for trial and no announcement has been made by the State.

9. What procedure should you employ to respond to this development? What general time limitations apply to such procedure in a: (1) felony case; and (2) misdemeanor case? Explain fully.

As the jury voir dire commences, you notice that the court reporter is not present. Upon inquiry, you learn that the reporter is absent from the courthouse.

10. What procedure should you have employed to ensure that the court reporter would take down the voir dire examination and what are the consequences for failing to do so? At what stage of the proceeding should you undertake this procedure? Explain fully.

During your voir dire of the jury panel, you conclude that several prospective jurors are legally unfit to serve on the jury. You challenge them for cause.

11. List five challenges for cause which may be made by either the State or the defense.

After the jury is impaneled, the State begins its case-in-chief, calling as its first witness the arresting officer. The following exchange occurs:

PROSECUTOR: After Defendant's arrest, did you speak with any of his neighbors about any problems over at Defendant's house?

WITNESS: You bet I did. They told me that they had heard Defendant bragging about the sawed-off shotgun he had just bought. They said that one time they heard him say....

DEFENSE LAWYER: Objection, your honor.

COURT: State the basis for your objection, counselor.

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

13. Would your answer to the preceding question be the same if a neighbor testified that he had heard Defendant making the statement? Explain fully.

The State next calls the police officer who signed the search warrant affidavit. The following exchange occurs:

PROSECUTOR: Officer, when you executed the search warrant at Defendant's home, what where you looking for?

WITNESS: Well, we had received reliable information about some cocaine....

DEFENSE LAWYER: Objection, your honor. We have a matter of law to take up with the Court and ask that the jury be retired.

COURT: Alright counselor. But I'm getting tired of your interruptions. Let the jury be retired.

14. What objection(s) should you make in order to keep this testimony out of evidence? Explain fully.

The State's third witness is Priest. The following exchange occurs:

PROSECUTOR: Do you know Defendant?

WITNESS: Yes I do. He is a member of our parish. He regularly attends confession on Saturday afternoon.

PROSECUTOR: On any of those occasions has he ever discussed with you the circumstances that led to his arrest?

DEFENSE LAWYER: Objection, judge.

COURT: What do you mean "objection" counselor? State the basis for your objection or sit down.

15. What is the proper objection, if any? How should the court rule? Explain fully.

After the State rests its case, you elect to present witnesses on Defendant's behalf. As your first witness, you call Defendant's three year-old son who lives with Defendant. However, before you can begin your questioning, the following occurs:

PROSECUTOR: Your honor, we object to any testimony from Child until his competency as a witness is first established.

COURT: Sustained.

16. Is the court's ruling correct? If so, what procedure should next occur? Explain fully.

After three days of trial, Defendant does not like the way things appear to be going. Defendant, who is on bond, fails to appear on the fourth day.

17. What is the general rule regarding the presence of the accused in a: (1) felony case; and (2) misdemeanor case? Can the trial proceed in Defendant's absence?

The jury finds Defendant guilty. Prior to trial, Defendant elected to have the jury assess punishment. At the punishment phase, the following occurs:

PROSECUTOR: Mr. Witness, do you know the reputation of Defendant in the community in which he resides for being a peaceful and law-abiding person?

WITNESS: I sure do.

PROSECUTOR: And is that reputation good or bad?

WITNESS: It's bad. In fact, bad doesn't begin to describe it.

DEFENSE LAWYER: Objection, your honor. Hearsay.

18. How should the court rule? Explain fully.

After both sides rest, the court informs counsel for the State and defense that they will each have 30 minutes for their final arguments. The following occurs:

DEFENSE LAWYER: Your honor, since the State was allowed to make the concluding address to the jury at the guilt stage, I believe it only fair that I get to conclude at this stage. Besides, I have the burden of proof as to punishment, so I should have the final word.

PROSECUTOR: We disagree.

COURT: Well, it seems fair to me. I will grant the request.

19. Is the court's ruling correct? 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 the jurors' home addresses and home telephone numbers.

20. Is there any procedure available to you to obtain the information? Explain fully.

Criminal Procedure & Evidence – July 2002

1. Many examinees stated that the officers had authority to break down the defendant's door because the officers were refused admittance after announcing; only a handful of examinees mentioned that the crime involved was a felony. Many examinees questioned the officers' authority based on a perceived lack of probable cause.
2. The majority of examinees knew that Defendant should be taken before a magistrate within 48 hours, but many did not know that this must occur "without unnecessary delay." The majority of examinees correctly stated that the magistrate's duties are to advise Defendant of the accusation and his rights.
3. Most examinees correctly stated that the purpose of an examining trial is to inquire into probable cause. However, only a handful of examinees stated the additional purpose of setting bail.
4. Most examinees correctly identified one or two items required to be present in a Texas search warrant. Many examinees discussed police affidavits to establish probable cause or that the search warrant must contain probable cause, neither of which is required to be contained in the search warrant itself.
5. Many examinees correctly stated at least one ground to support a motion to suppress under the facts presented. Many examinees simply stated the same ground in slightly different terms rather than stating two separate grounds for suppression. Other examinees stated grounds that were not based upon the fact situation presented in the exam question.
6. While many examinees knew that the State can pursue an interlocutory appeal after the granting of a motion to suppress, many others incorrectly stated that the State must go to trial without the evidence and appeal the decision after a final judgment or that the State must file a writ of mandamus. Almost no one stated that the State must appeal within 15 days and must certify that the appeal is not for purposes of delay. A majority of examinees who knew that the State could appeal discussed the types of things that the State would have to demonstrate in order to prevail on appeal (*e.g.*, show the trial court abused its discretion, show that the search was proper, etc.) rather than discussing the requirements to perfect the appeal.
7. Many examinees correctly answered that the State cannot discover a list of all defense witnesses, although many others incorrectly stated either that both parties are entitled to a list of witnesses or that it is a matter within the trial court's discretion. A number of examinees correctly indicated that there is no reciprocal discovery in Texas criminal cases, and a small number of examinees correctly noted that the State can discover the defendant's expert witnesses.
8. The majority of examinees correctly listed at least one requirement of a proper application for felony probation, *i.e.*, Defendant must not have any prior felony convictions and the application must be sworn and filed before trial. Many examinees simply stated that Defendant could not have any prior felonies (as opposed to felony *convictions*) or stated considerations that are not required to be contained within the actual probation application (*e.g.*, the sentence cannot be over ten years, Defendant must have strong ties to the community, Defendant cannot be charged with capital murder,

Defendant cannot have used a deadly weapon, Defendant cannot have committed certain types of offenses).

9. Some examinees correctly stated that Defendant should file a motion to set aside the indictment. However, many examinees stated that Defendant should have the court set a trial date or that the defendant should assert his right to a speedy trial. Some examinees simply stated that Defendant has a right to a speedy trial. Most examinees did not know the time limitations for such a procedure, *i.e.*, 180 days for a felony and 90 days for a misdemeanor. Instead, most examinees listed the statute of limitations period for felonies and misdemeanors or completely failed to discuss a time frame at all.
10. Most examinees recognized the need to object to the court reporter's absence or to request the court reporter's presence before voir dire begins in the event the reporter is absent, in spite of the appellate rule that requires his/her presence. The majority also correctly stated that failure to have voir dire recorded waives either the court reporter's presence or the ability to appeal voir dire error, but most examinees did not state that it waives both.
11. Most examinees correctly listed between three and five challenges for cause.
12. The vast majority of examinees correctly stated that the testimony at issue constitutes hearsay and that the objection should be sustained. Many failed to answer the question asking how the trial court should rule.
13. Many examinees correctly stated that, if the neighbor testified, the testimony about Defendant's statement would constitute an inadmissible statement against interest, which is a hearsay exception, or an admission by a party-opponent, which is not hearsay. Most of the remaining examinees incorrectly stated that the testimony still constituted hearsay because it was an out-of-court statement offered for its truth.
14. Some examinees correctly stated that the testimony was either hearsay, irrelevant, or nonresponsive and/or that the probative value of the evidence was substantially outweighed by the prejudicial effect. Some examinees simply stated that the testimony was prejudicial, which in and of itself is not grounds for exclusion since only unfair or undue prejudice results in inadmissibility. Even fewer examinees recognized that the testimony was inadmissible evidence of other bad acts to show character conformity. Many examinees focused on the trial court's ruling as being a comment on the weight of the evidence even though the question asks what objections should be made to keep the evidence out. Many other examinees stated that the search warrant was invalid because it was not based on probable cause or a reliable informant even though the question does not involve an attempt to introduce evidence seized pursuant to a search warrant.
15. Many examinees recognized that Defendant should object based on a privileged communication by a penitent to a clergy member. While some examinees further correctly stated that the objection should be sustained, others failed to answer the question about how the trial court should rule or incorrectly stated that the objection should be overruled. Others simply stated that there was no proper objection based on the privilege.

16. While many examinees recognized that the trial court's ruling was correct, many others stated that the ruling was incorrect because witnesses are presumed competent. Some examinees correctly stated that the trial court should question the witness and/or that the court should determine if the child has sufficient intellect to relate transactions. However, many examinees incorrectly stated that one of the parties must question the child and/or that the issue is whether the child understands the difference between the truth and a lie. Some examinees simply stated that a young child lacks competency to testify.
17. A large number of examinees did not know that Defendant must be present at all proceedings in felony cases and in misdemeanor cases when the punishment is imprisonment. Many examinees incorrectly answered that Defendant must be present to enter his plea, for the verdict, and for sentencing in felonies and misdemeanors. Many examinees recognized that the trial can proceed when Defendant is *voluntarily* absent.
18. Most examinees correctly said that the trial court should overrule defense counsel's objection because reputation testimony is relevant to punishment. However, most examinees stated that the testimony was not hearsay, and only a handful recognized that reputation testimony constitutes an exception to the hearsay rule.
19. Many examinees incorrectly stated that the ruling was correct because the trial court has discretion regarding the order of argument. Also, most examinees failed to recognize that Defendant has no burden of proof at punishment, and incorrectly stated that the State bears the burden of proof.
20. Many examinees stated that Defendant should file a motion to disclose. A large number stated that Defendant should either file a writ of mandamus, request a record, file a request for public records, or look in the phone book. Only a handful of examinees recognized that the jurors' personal information is confidential without a court order and that an attorney or the media can get the information for good cause.

February 2003

In January 2002, Child (age 9) tells her teacher that Defendant (Child's stepfather) had "touched her" and "hurt her down there." Teacher contacts the Austin Police Department (located in Austin, Travis County, Texas) to report the information. The police question Child, who maintains that she cannot remember where the offense occurred. The police immediately go to Defendant's workplace, where he is arrested without benefit of warrant.

After Defendant's arrest, he is warned of his rights by the police officers and then subjected to a custodial interrogation. Although Defendant refuses to give a written statement about the offense, he does make an oral admission that he has had sexual contact with Child. The police make note of Defendant's oral statement in their official offense report.

You are appointed by the Court to represent Defendant.

- 1. Under the circumstances noted above, is Defendant's oral statement admissible against him in a Texas criminal prosecution? Explain fully.**

Defendant's bail is originally set at \$100,000. You file a writ of habeas corpus, and, after the hearing, the Court reduces the bail to \$25,000. However, the Court also imposes a bond condition that Defendant not directly communicate with Child or go near the residence of Child. You argue that the Court lacks authority to impose such a condition, in that it would require Defendant to move out of the home he shares with Child and her mother.

2. Is this a proper condition of bond under Texas law? Explain fully.

The Travis County Grand Jury indicts Defendant for sexual assault of a child under the age of fourteen, alleging venue as Travis County, Texas.

3. Is Travis County a proper venue for this case? Explain fully.

In a pre-trial motion, you contend that the arrest of Defendant was improper inasmuch as the police did not have an arrest warrant.

4. Was Defendant's arrest improper? Explain fully.

As you prepare this case for trial, you discover that a defense witness is unavailable. You decide to file a first motion for continuance.

5. List three items that you must allege in your motion for continuance.

You also file a pre-trial motion to suppress Defendant's custodial oral statement. After conducting a *Jackson v. Denno* hearing on the motion, the Court finds that since the statement was given after a full and voluntary waiver of Defendant's rights and is corroborated by other facts, it will be admitted into evidence.

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

Defendant instructs you to approach Prosecutor in order to discuss the possibility of a plea bargain. You are reluctant to do so because you do not wish for any such negotiations to be taken as an admission of guilt by Defendant and used against him at trial.

7. Would such discussions, relating to a defendant's willingness to plead guilty, be admissible at trial? Explain fully.

One month prior to trial, you make a written request upon the State to provide you with any “404(b) crimes, wrongs, or acts,” which they intend to introduce. The State refuses your request.

8. What obligation, if any, does the State have to provide you such notice? Explain fully.

Prior to trial, you receive a certified letter from Prosecutor informing you that the State intends to offer what it terms an “outcry” statement of Child.

9. What are the threshold admissibility requirements for an outcry statement? Explain fully.

Seven members of the jury array are African-Americans. Although none of these venire persons are stricken for cause, Prosecutor peremptorily challenges all seven.

10. What procedure, if any, should you employ to contest this action by Prosecutor? Explain fully.

11. What remedy should you request, if Prosecutor's peremptory challenges are ruled improper? Explain fully.

12. Explain the difference between a challenge for cause and a peremptory challenge and list two examples of each.

The State subpoenas Defendant's wife as its first witness. Wife wishes to invoke her spousal privilege not to be called as a witness against Defendant.

13. Can Wife be called as a witness against Defendant? If so, can Wife be compelled to testify against Defendant? Explain fully.

The State's next witness is Custodian. The following exchange occurs:

PROSECUTOR: How are you employed?

CUSTODIAN: I am the records custodian for Brackenridge Hospital.

PROSECUTOR: In response to a subpoena, did you bring records with you today which relate to a physical examination of Child?

CUSTODIAN: 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: Overruled.

14. Is the Court's ruling correct? If not, describe the proper predicate necessary to admit State's Exhibit One?

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

PROSECUTOR: Your honor, the State of Texas calls Defendant. Only he can tell us what really happened.

DEFENSE LAWYER: Objection, your honor. Prosecutor knows full well that she cannot call Defendant to testify at this stage.

COURT: Ms. Prosecutor, unfortunately I must sustain the objection.

15. Is the Court's ruling correct? Would the ruling be any different at the penalty phase of Defendant's trial? Explain fully.

16. Would the Court's ruling be the same if Defendant had voluntarily testified in the pre-trial *Jackson v. Denno* hearing? Explain fully.

As its final case-in-chief witness, the State calls Doctor. The following exchange occurs:

PROSECUTOR: Doctor, do you know Defendant?

DOCTOR: Yes, I do. I am a psychiatrist. Defendant consulted me concerning the allegations against him.

PROSECUTOR: Okay. Let me ask you some questions about those consultations, and what Defendant told you.

DEFENSE LAWYER: Objection, your honor. Privilege.

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

After the State rests, you call Expert as your first witness. The following exchange occurs:

DEFENSE LAWYER: Doctor, please tell the jury what you do.

EXPERT: I am an expert in the topic of sexual offenses. I have made a study of the frequency of false reporting of such offenses by children. I think that in this case

PROSECUTOR: Objection. The State requests to test this witness' credentials before the jury hears his testimony.

18. Should the Court grant the State’s request? What procedure should be followed if the Court grants the request?

Your next witness is Friend, and without any objection from the State, you elicit testimony from him regarding Defendant’s character. During the State’s cross-examination, the following exchange occurs:

PROSECUTOR: Let me ask you some questions about Defendant’s criminal history. You know, don’t you, that Defendant has been arrested numerous times?

FRIEND: No, I don’t know that. This is the first time I’ve heard that.

PROSECUTOR: Well, let’s go over this lengthy list of arrests and see if that refreshes your memory.

DEFENSE LAWYER: Objection.

COURT: Why are you interrupting us again, Counsel? The jury is entitled to know about your client.

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

The jury finds Defendant guilty. Prior to trial, you filed a sworn application for probation on behalf of Defendant, alleging that Defendant has never before been convicted in this State, any other state, or any court of the United States.

20. Can the Court or the jury now consider a sentence of deferred adjudication as punishment for this offense? Explain fully.

Criminal Procedure & Evidence – February 2003

1. While many applicants correctly stated that oral confessions are generally inadmissible unless recorded, almost all applicants failed to recognize the other exceptions for admissibility when the statement leads to secreted/stolen property or leads to an instrumentality of the crime. However, many other applicants erroneously stated that oral confessions are admissible as long as the defendant is warned of and waives his rights or that the custodial statement would be a party admission.
2. The majority of applicants recognized that the stated bail conditions were proper, and a large number correctly noted that safety is an appropriate consideration and that the defendant could be ordered not to communicate with the child or go near certain locations. Fewer applicants noted that these conditions are appropriate when dealing with child sex offenders. A small number of applicants incorrectly believed that the conditions were inappropriate and that some type of protective order would be required.
3. Almost all applicants correctly stated that venue was proper in Travis County, and many further recognized that, when venue is not readily determinable, it is proper in the county where the defendant lives. Very few applicants mentioned that venue also could be proper under the circumstances in the county where the defendant was arrested or the county to which he was extradited. Many applicants simply stated that venue was proper because Travis County was where the crime occurred, even though the question makes clear that the child-victim could not state where the crime took place. Many applicants also incorrectly stated that venue would be proper in the county where the child-victim lived.
4. A large number of applicants failed to recognize that the defendant's arrest was proper. Very few applicants were aware that a peace officer can arrest a suspect without a warrant if there is probable cause to believe that the defendant assaulted a family member resulting in bodily injury. Many applicants who realized that the arrest was proper erroneously stated that such an arrest would be proper in sexual assault cases, for all felonies, for any offense committed against a family member, or because there were exigent circumstances based on a need to protect the child.
5. Most applicants correctly provided at least two of the items that must be included in a motion for continuance based on the unavailability of a witness.
6. The majority of applicants failed to respond that the trial court's ruling following the *Jackson v. Denno* hearing was incorrect because the defendant's oral confession did not comply with the code/law and that evidence in violation of federal or state constitutions or laws is inadmissible at trial. Most applicants stated that the ruling was correct either because: (1) the hearing was the appropriate method to review admissibility and that the defendant would be entitled to a jury instruction allowing the jury to decide voluntariness or (2) the oral confession was admissible since the defendant had been advised of and waived his rights.
7. Almost all applicants understood that plea negotiations are inadmissible at trial. No one correctly stated the very limited circumstances that would allow their admission.

8. While some applicants correctly stated that the State was required to provide notice of extraneous offenses when timely requested to do so, many incorrectly stated that the prosecution had no duty to provide notice or that only *Brady* materials would need to be disclosed. Very few applicants noted that *reasonable* notice is required, instead stating that notice must be given 10-30 days before trial, and almost no one stated that notice is required for case-in-chief evidence of extraneous offenses that do not arise out of the charged transaction.
9. The vast majority of applicants had no idea about the hearsay exception for outcry statements (*i.e.*, statements by a minor victim made to the first person over 18 regarding the offense). A large number of applicants equated outcry statements to excited utterances or testimony by the victim given via closed-circuit television. Some simply stated that the outcry statement would be admissible as long as the probative value was not substantially outweighed by the prejudicial effect or as long as the child was available to testify.
10. Most applicants stated at least a few of the steps to follow in raising a *Batson* challenge to the State's use of peremptory challenges based on race.
11. Most applicants correctly stated that the defendant should request that the trial court call a new array. No one noted that the trial court, in fact, cannot disallow the individual strikes; to the contrary, most applicants stated that disallowing the strikes was an alternative remedy.
12. Some applicants correctly identified the difference between challenges for cause and peremptory challenges, while many made no attempt to respond to this portion of the question. Most applicants who attempted to give two examples of challenges for cause and peremptory challenges did so correctly, although others either did not answer this portion of the question or failed to list two examples as requested by the question.
13. Many applicants generally recognized that the defendant's spouse could be called and compelled to testify because the privilege is inapplicable when the defendant is charged with a crime against a minor or a member of the household. Many of those who correctly answered the question often failed to directly answer each question asked, especially the question of whether the wife could be compelled to testify under the stated circumstances. Many other applicants incorrectly stated that privilege would prevent the spouse from being called and/or compelled to testify.
14. A large number of applicants correctly stated some or all of the things that must be shown to lay a predicate under the business records exception to the hearsay rule. However, several applicants did not pay attention to the court's ruling when answering the question as to whether the ruling was correct – in other words, applicants stated that the ruling was correct because the State had not laid the proper predicate when, in fact, the ruling was incorrect because the predicate had not been laid. Some applicants incorrectly stated that the ruling was correct because the State had marked the exhibit and shown it to defense counsel.
15. This is another question where applicants did not pay close attention to the trial court's ruling as stated in the factual scenario as they responded to the question concerning the correctness of the trial court's ruling at the guilt-innocence phase. Most applicants

correctly noted the defendant's right to remain silent, and many also correctly responded that the State cannot call the defendant to the stand. With regard to whether the answer would be different at punishment, many applicants realized that the answer would be the same, while many others incorrectly stated that the State would be allowed to call the defendant and compel him to testify at punishment.

16. Again, many applicants failed to carefully note the trial court's ruling when answering whether the ruling would be different if the defendant had testified at a *Jackson v. Denno* hearing. However, the majority of applicants correctly stated that testimony regarding preliminary matters does not waive a defendant's right not to testify at trial. Some applicants further correctly noted that the pretrial testimony could be used for impeachment if the defendant took the stand and testified differently at trial.
17. A large number of applicants failed to recognize that the trial court should overrule the defendant's privilege objection because the privilege regarding mental health information is available only in civil cases and therefore inapplicable in criminal cases.
18. The majority of applicants correctly responded that the trial court should allow the State to voir dire the defense expert outside the hearing of the jury. However, some simply stated that such voir dire would be appropriate without further stating that the questioning should be conducted without the jury present. A few applicants went on to note that the trial court would then determine admissibility of the testimony. A few applicants incorrectly thought that voir dire would be inappropriate because the State could cross-examine the expert when the time came.
19. A large number of applicants incorrectly stated that the trial court should overrule the objection because the defendant opened the door to such testimony. Some applicants correctly responded that the trial court should sustain the objection, although only a small number further recognized that the proposed testimony involved improper character/reputation evidence.
20. A small number of applicants correctly stated that deferred adjudication probation would be improper after a finding of guilt. Very few applicants noted that only the court, not the jury, could assess deferred adjudication probation. A large number of applicants confused regular probation and deferred adjudication probation. Many applicants stated that deferred adjudication probation cannot be imposed because the case involved sexual assault of a child.

July 2003

After responding to a 911 call from Neighbor, police arrest Defendant at the scene for the aggravated assault of his wife, Victim. Defendant is known to the arresting officers, inasmuch as Defendant served a 2-year misdemeanor DWI probation imposed in 1997. Defendant commits no offense in the presence of the officers.

The Court has appointed you to represent Defendant in Texas District Court.

1. Under Texas law, is the warrantless arrest of Defendant proper? Explain fully.

At his post-arrest interrogation Defendant asks to speak with a lawyer. Detective ignores the request, continues the custodial interrogation and eventually obtains a written inculpatory statement from Defendant.

2. What motion should you file regarding this statement? What basis should such motion allege? At what stage of the proceedings should you file the motion? Explain fully.

Prior to the grand jury considering the felony allegation against Defendant, you file a motion requesting an examining trial.

3. **What is an examining trial and what is its purpose? Is Defendant entitled to an examining trial under the circumstances outlined above? Explain fully.**

As you prepare your case, you become concerned that Defendant is mentally incompetent to stand trial.

4. **What is the legal presumption regarding Defendant's competency? Who has the burden of proof and what is the standard of proof regarding competency? Explain fully.**

Prosecutor advises you that, in addition to his written statement, Defendant gave a custodial oral statement concerning this offense. Prosecutor also informs you that she intends to offer Defendant's oral statement at trial.

5. **Identify 3 predicates which must be satisfied in order for Defendant's oral statement to be admissible in a criminal proceeding. Explain fully.**

As Prosecutor is preparing her case, she discovers that the State has two statements from Witness. In a written, signed Statement Number One, Witness says he saw Defendant assault Victim without provocation. In a subsequent, unsigned Statement Number Two, Witness recants Statement Number One and contends that Defendant struck Victim only after Victim had first attacked Defendant. Since the State does not intend to call Witness to testify, Prosecutor decides it is not necessary to reveal Statement Number Two to Defendant.

- 6. Is the State required to disclose Witness' name to Defendant? Is Prosecutor required to disclose Statement Number Two to Defendant? Would it matter whether Defendant had filed a pretrial motion requesting such evidence? Explain fully.**

After reviewing all of the evidence, you decide that it is in Defendant's best interest to plead guilty to the aggravated assault charge. Defendant refuses, accuses you of "selling him out", and instructs you that he wishes to persist in his plea of not guilty.

- 7. Who decides what plea will be entered? If Defendant changes his mind and agrees to enter a guilty plea, list 3 admonishments that the Court must give Defendant before accepting his felony plea of guilty.**

Plea negotiations are unsuccessful. Prior to trial, you learn that Prosecutor intends to introduce medical records describing Victim's injuries.

- 8. Lacking extrinsic evidence of admissibility, what procedure must Prosecutor follow to properly introduce such records at trial? Explain fully.**

When the jury panel of 42 veniremen is assembled, you note that several police officers and a former bar examiner are among the first 15 veniremen. You conclude that these individuals may not be favorable defense jurors.

- 9. What action, if any, can you take to change the seating order of the veniremen? At what stage of the proceeding should you take this action? Explain fully.**

During your voir dire examination of the jury panel, one of the prospective jurors reveals that she was a victim of spousal abuse and harbors a strong and unfavorable opinion about persons charged with that offense.

- 10. What must you show to establish a proper challenge for cause to this prospective juror?**

Of the 42 person jury panel summoned for trial, 8 are African-American. Prosecutor uses 8 of her peremptory strikes on these veniremen.

11. What procedure, if any, should you employ to contest this action by Prosecutor, and at what stage of the proceedings should you employ it? Explain fully.

Prosecutor announces before trial that she intends to call Victim as her first case-in-chief witness. Defendant objects, citing the husband-wife privilege.

12. Can Victim testify for the State over Defendant's objection? Can Victim refuse even to be called as a witness for the State? Explain fully.

After Victim testifies on direct examination in behalf of the State, you then move for the production of her written statement for use during your cross-examination. Prosecutor objects to your request for disclosure, citing the work-product privilege.

13. How should the Court rule on your request? What sanctions may the Court impose if Prosecutor refuses to produce Witness' statement? Explain fully.

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

PROSECUTOR: Your honor, the State of Texas calls Defendant. Only he can tell us what really happened.

DEFENSE: Objection, your honor. Prosecutor knows full well that she cannot call Defendant to testify.

COURT: Ms. Prosecutor, I realize that was probably an oversight on your part. But unfortunately, I must sustain Defendant's objection.

14. Is the Court's ruling correct? Even if the Court's ruling is correct, what, if anything, must you do to further preserve any issue of prejudice on appeal? Explain fully.

Defendant calls as his first witness, Expert, who claims to have specialized knowledge about "battered wife syndrome". Expert intends to offer his opinion that Victim has exaggerated her complaints about Defendant's behavior toward her. Prosecutor asks to take Expert on voir dire examination prior to the jury hearing the testimony.

15. Should the Court grant the State’s request? Explain fully.

During the guilt/innocence stage of trial, Defendant voluntarily takes the stand to testify in his own behalf. On cross-examination by the State the following exchange occurs:

PROSECUTOR: Mr. Defendant, isn’t it true that you were convicted of misdemeanor DWI in 1997 in Ector County, Texas?

DEFENSE: Objection your honor. This is an effort to impeach Defendant with evidence of an inadmissible conviction.

COURT: Sustained.

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

Continuing her cross-examination of Defendant, Prosecutor asks the following:

PROSECUTOR: Mr. Defendant, you have just told the jury that you are not guilty of this offense, is that correct?

DEFENDANT: Yes, and I’ll say it again -- I didn’t assault my wife. I love her!

PROSECUTOR: Can you then explain sir, why you offered to plead guilty in return for a 5-year probated sentence?

17. What objection(s), if any, should you make and how should the Court rule? Explain fully.

Although Defendant has elected to have the jury assess punishment, during the guilt/innocence deliberations Defendant now decides that he wishes to have the judge assess punishment if he is found guilty. Prosecutor objects to the change.

18. May Defendant change his election at this stage of the trial? Does Prosecutor's objection affect Defendant's right to change his election? Explain fully.

19. How many jurors are necessary to find Defendant guilty? How many jurors are necessary to find the Defendant not guilty? How many jurors must agree on the assessment of punishment, if Defendant is found guilty? What are the consequences of fewer than the required number of jurors as to each of these 3 outcomes?

Following his trial, Defendant asks you to explain the law regarding “ineffective assistance of counsel.” Although your feelings are hurt by the question, you do so.

20. Under Texas law, what is the standard for determining ineffective assistance of counsel?

Criminal Procedure & Evidence – July 2003

1. The majority of examinees correctly stated that the warrantless arrest was proper because police had probable cause to believe either that an assault on a family or household member had occurred or that a further assault would occur. Some examinees correctly recognized that both of these exceptions to the warrant requirement were present under the facts provided. A number of examinees incorrectly stated that the warrantless arrest was improper because the assault had not occurred in the officers' presence or because the arrest occurred at the defendant's house. Others who recognized that the arrest was proper provided scenarios that either do not constitute a recognized exception to the warrant requirement or an exception not present under the facts provided by the question. Some examinees correctly noted the general rule that an arrest requires a warrant unless an exception exists.
2. Almost all examinees knew that the defendant should file a motion to suppress before trial, although most examinees failed to further note that the defendant also could object at trial before testimony concerning the statement was admitted. A large number of examinees correctly stated that the motion should be based upon the denial of the defendant's right to counsel.
3. Most examinees knew that the purpose of an examining trial is to determine the existence of probable cause. Many examinees stated only one of the prerequisites for an examining trial, i.e., the alleged offense is a felony and an indictment has not been handed down. Some examinees incorrectly responded that the defendant would have to choose between an examining trial and a grand jury proceeding or that the examining trial is proper only after an indictment.
4. Almost all examinees recognized that a defendant is presumed competent. Many examinees correctly stated that the defendant has the burden of proof, although many others either incorrectly stated that the State has the burden or stated only that the movant has the burden without specifying the defendant. While many examinees knew that the standard of proof by a preponderance of the evidence, a large number of examinees incorrectly listed the standard as clear and convincing evidence or beyond a reasonable doubt. A number of examinees provided at least one of the criteria for incompetence, i.e., the defendant lacks sufficient present ability to consult with his attorney with a reasonable degree of rational understanding or lacks a rational as well as factual understanding of the proceedings against him.
5. Most examinees knew that the defendant's oral custodial statement had to be voluntarily given after being advised of and waiving his rights. Fewer examinees stated that the statement must be electronically recorded. A number of examinees incorrectly stated that the oral statement must be reduced to writing and signed by the defendant. Even fewer named one of the following requirements: a capable recording device, a competent operator, an unaltered recording, and identification of all voices.
6. Many examinees failed to recognize that, under the facts presented, the State must disclose the witness' name because it is exculpatory evidence. Rather, these examinees incorrectly stated either that the State is not required to disclose witness names or that the State is required to disclose the name only if the court orders it to do so. Most examinees realized that statement number 2 must be turned over without a request because it is

exculpatory, although some examinees said that statement number 2 must be turned over only if the trial court orders production.

7. The overwhelming majority of examinees knew that the defendant decides the plea, although a few examinees simply failed to answer this portion of the question. The majority of examinees were able to provide two to three of the admonishments that the trial court must give before accepting the defendant's guilty plea.
8. Many examinees listed at least two or three of the requirements for a business record affidavit. However, very few examinees further stated that the affidavit of authentication must be filed 14 days before trial. A number of examinees simply stated that the State would need to authenticate the documents or that the State would need to call the doctor or victim to testify that the records accurately described the victim's injuries. Some examinees stated the technical procedures for introducing evidence, e.g., have the exhibit marked, show it to defense counsel, and move for admission.
9. Most examinees knew that the defendant should request a jury shuffle, although a few stated that there was no procedure to rearrange the veniremembers or that the defendant must use peremptory strikes. While many examinees correctly stated that the shuffle must be requested before voir dire, others stated that the request should be made before the jury is empaneled. Some examinees further noted that only one shuffle is available per case, and only a few noted that either party could request a shuffle. A few examinees incorrectly stated that each party could request one shuffle per case.
10. Many examinees correctly stated that the prospective juror could be challenged for cause because her conclusions/experiences would influence her verdict. Other examinees incorrectly stated that the prospective juror can be challenged for cause simply because of her bias or prejudice without noting the requirement that her preconceptions influence her verdict. Very few examinees noted that the trial court must dismiss the prospective juror if she admits that her conclusion about guilt would influence her verdict. Almost no one noted that, if the prospective juror denied that her opinion would influence her verdict, the defense show how she formed her conclusion, the extent to which it affects her verdict, or whether she can render an impartial verdict.
11. A majority of examinees correctly stated that a hearing based upon race-based strikes must be requested before the jury is impaneled. Some examinees also noted that the remedy would be to dismiss the panel and begin voir dire anew. However, no one noted the requirement that the defendant be a member of a cognizable racial group.
12. Most examinees correctly recognized that the wife can testify over the defendant's objection. However, many examinees either did not know that the wife cannot refuse to be called, stated that she could be compelled to testify, or failed to respond to that portion of the question. A number of examinees recognized that an exception applies here because the defendant is charged with a crime against a household member.
13. Many examinees correctly stated that the court should grant the defendant's request for production. A large number of examinees stated that the court should overrule the objection even though the question asks how the trial court should rule on the request, not the objection. Many examinees gave inconsistent responses, stating that the court should overrule but then stating that the defendant was entitled to the statement. While a number

of examinees noted that the witness' statement must be produced upon request after the witness has testified, many examinees simply failed to note the timing for the request. Many examinees stated that sanctions for failure to produce included striking the testimony or granting a mistrial, but most examinees' answers did not include both. Most examinees incorrectly stated a number of other sanctions, such as contempt, fining the prosecutor, community service, or dismissing the case with prejudice.

14. The majority of examinees knew that the court's ruling is correct and that the defendant must request a curative instruction and a mistrial. The majority of examinees overlooked the requirement of an objection to preserve the complaint for appeal.
15. Most examinees knew that the prosecution should be allowed to voir dire the defendant's expert. Many examinees stated only one of the appropriate areas for examination (i.e., qualifications and basis for opinion), but not both. Almost no one noted that the trial court rules on the admissibility of the testimony.
16. Most examinees knew that the trial court's ruling is correct. Many examinees stated only one of the types of admissible convictions (felonies and crimes of moral turpitude), but not both. Even fewer examinees noted that the conviction must generally have occurred within the previous ten years.
17. Most examinees recognized that plea negotiations are inadmissible. Many examinees further stated correctly that the trial court should sustain the conviction, although some examinees incorrectly stated that the objection would be overruled because the State can use plea negotiations to impeach the defendant at trial. Only a handful of examinees noted that the Texas Rules of Evidence make such statements inadmissible, with the majority of examinees stating instead that the evidence is inadmissible under public policy or privilege.
18. Many examinees knew that the defendant can change his sentencing election at this stage of the trial, although many incorrectly stated that the decision cannot not be changed once trial begins. Many examinees knew that the requested change would require the prosecutor's consent, although many others incorrectly stated that the prosecutor's objection would have no effect because the defendant has the right to determine who assesses punishment.
19. Although a large number of examinees knew that a guilty verdict and assessment of punishment must be unanimous, many examinees did not know that a not guilty verdict also requires unanimity. A large number of examinees incorrectly believed that it takes only one dissenter for not guilty or that a majority can find the defendant not guilty. Likewise, some examinees incorrectly stated that less than unanimity is required for punishment. While a majority of examinees knew that less than unanimity requires a mistrial, some mistakenly thought that lack of unanimity for guilt requires acquittal.
20. Only a few examinees correctly stated the first prong for ineffective assistance of counsel, i.e., that considering the totality of representation the attorney failed to provide reasonably effective representation. A large number of examinees were aware that the second prong requires a showing that the defendant was prejudiced because but for the deficient performance, the outcome would have been different.

February 2004

In October 2003, Victim called the Lubbock, Texas police to report a burglary of his apartment. Numerous items of personal property were taken, including a TV and Victim's checkbook. The police had no suspects at the time of the report.

Four weeks later, Snitch was arrested while attempting to cash a check taken in the burglary. During his post-arrest interrogation, Snitch agreed to reveal the name of a person who Snitch claimed helped him commit the burglary. In return, Snitch asked for immunity from prosecution for the burglary. The police, with the concurrence of the Lubbock County District Attorney, agreed to the deal. Snitch then named Defendant, whom you represent.

Based on Snitch's information, the police went to Defendant's house to interview him about the burglary. Defendant denied any knowledge of the felony offense.

- 1. Under the circumstances set out above, can the police arrest Defendant without a warrant? Explain fully.**

- 2. What rights and obligations does Defendant have in regard to an appearance before the grand jury?**

3. What rights and obligations does Snitch have in regard to an appearance before the grand jury?

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 LUBBOCK COUNTY, TEXAS, duly elected, tried, empaneled, sworn and charged to inquire of offenses committed in Lubbock County, in the State of Texas, upon their oaths do present in and to the 364th District Court of said County, that John Defendant, in the County of Lubbock and State aforesaid, on or about the 1st day of October 2003, did then and there enter a building owned, occupied and used as a habitation by Sam Victim, without the effective consent of Sam Victim,

AGAINST THE PEACE AND DIGNITY OF THE STATE.

/s/ David Foreman
David Foreman
Foreman, Grand Jury

4. Is this indictment sufficient to charge the offense of burglary of a habitation? Explain fully.

5. Explain the purpose of an examining trial and whether, under the circumstances set out above, Defendant is entitled to an examining trial.

You file a pre-trial motion requesting that the State reveal the name of any informant from whom it has acquired information about this case. Although Prosecutor acknowledges that an informant has provided the State with information, she refuses to divulge his identity. You then file a motion to compel the State to reveal the identity of its informant.

6. Under the circumstances set out above, how should the Court rule? Explain fully.

You also file a request that the State provide you with notice of any extraneous “crimes, wrongs, or acts” which the State intends to introduce against Defendant at his trial.

7. What, if any, is the State’s obligation in response to this request? Explain fully.

Four weeks before trial, you issue notice of intent to take Victim's oral deposition.

8. What procedure must you follow before you will be allowed to take Victim's oral pre-trial deposition? Explain fully.

The State files a motion of its own, requesting a list of all defense witnesses you intend to call in Defendant's behalf, along with a summary of their anticipated testimony. After you refuse to comply with the request, the State files a motion to compel you to provide such information.

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

Two weeks prior to the date set for pre-trial hearings, Defendant asks you to decide whether his case will be tried to a jury or the judge.

10. Please explain the procedure that is employed to express this choice and how this choice is resolved. Must the choice be the same as to both the guilt and 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 #19 reveals that he has recently been burglarized 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?

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

12. Can Prosecutor challenge your action? If so, what should the prosecutor do, how must you respond, and how should the Court rule? Explain fully.

After the jury is seated, Prosecutor makes her opening statement to the jury. After she has concluded her statement, the Court asks you if you wish to make an opening statement. You tell the judge that you will make your statement after the State has rested its case-in-chief. The judge instructs you that if you wish to make a statement you must do so now or you waive your right.

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

The State calls Snitch as a witness in its case-in-chief. At the conclusion of his testimony, you request that the Court order Prosecutor to provide you a copy of any statement which Snitch has given. The State refuses to do so.

14. How should the Court rule? Explain fully.

You attempt to cross-examine Snitch on his immunity agreement with the State. Prosecutor objects that your line of questioning is irrelevant.

15. How should the Court rule on Prosecutor's objection? Explain fully.

After Prosecutor rests her case-in-chief, you realize that the State has failed to prove that the premises in question were entered without the effective consent of Victim, as alleged in the indictment.

16. What action should you take and when should you take it? Explain fully.

You subpoena Banker in order to introduce testimony regarding Victim's checking account. Although properly served with the subpoena, Banker refuses to comply, telling your investigator that "he is much too busy to testify on behalf of a criminal".

17. What action should you take in response to Banker's non-compliance with your subpoena? Explain fully.

You call Friend to testify as an alibi witness on behalf of Defendant. On cross-examination, Prosecutor asks Friend what Defendant has told him about his role in the offense. You object to any such statements as hearsay.

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

Defendant elects to take the stand during the guilt-innocence phase of his trial. During cross-examination, Prosecutor asks Defendant about his prior felony conviction which occurred nine years earlier. You object that the question is irrelevant inasmuch as the conviction is not alleged as an enhancement in Defendant's indictment. In addition, you object that the conviction is remote and therefore not admissible.

19. How should the Court rule? Explain fully.

The jury finds Defendant guilty and, following the sentencing phase of the trial, sentences him to 25 years in the penitentiary. Victim then asks to make a "victim's statement" in open court. The Court allows him to do so.

20. What procedures must the Court follow when allowing Victim to make such a statement? Explain fully.

Criminal Procedure & Evidence – February 2004

1. Many applicants indicated that the arrest was improper, but many others thought that the tip provided probable cause for a warrantless arrest. While many applicants also noted the exception for warrantless arrests when the offense is committed in the officer's presence/view, few stated the exception for when there is a representation of a credible person and the suspect is about to escape.
2. Many applicants correctly stated that the defendant had a right not to testify before the grand jury and the right to have counsel outside the room. Fewer applicants recognized that the defendant had the right to have counsel appointed, that he was entitled to warnings, and that he was required to appear.
3. Some applicants correctly stated that Snitch must appear and testify due to his immunity. Many applicants simply stated that Snitch had the same rights as the defendant in question 2. Almost none of the applicants noted that Snitch would face contempt (jail and/or a fine) if he refused to respond. Many applicants overlooked Snitch's immunity and incorrectly stated that he had the right to remain silent, while a number of others incorrectly responded as if Snitch had been a suspect witness facing indictment.
4. Most applicants correctly stated that the indictment was insufficient because it failed to include the intent element.
5. Most applicants correctly stated that an examining trial determines probable cause before an indictment. Many applicants correctly recognized that the defendant was not entitled to an examining trial under these circumstances. However, some applicants erroneously believed that the defendant was entitled to an examining trial because the indictment was defective, because he was arrested without a warrant, or because he was arrested based on a co-defendant's tip.
6. While a number of applicants stated that the trial court should overrule the request that the State reveal the informant's name at this time, almost no one recognized that the informant's identity was privileged and that the State likely would have to reveal the identity later if an exception applied. A number of applicants stated the other alternative, which is that the identity should be revealed in order to protect the defendant's right to confrontation.
7. While a number of applicants indicated that the State would be required to disclose the extraneous offenses or acts upon request, only a handful of applicants correctly stated the State's full obligation, which was to give reasonable notice upon timely request. A few applicants further noted that the material must be disclosed only if it would be used in the State's case-in-chief and that failure to disclose would result in exclusion of the evidence. Many applicants incorrectly responded that the State had no duty to disclose the material, with some stating that disclosure was not required because the material would be work product or that the defendant already knew the information. Others incorrectly responded as if the question involved exculpatory evidence under Brady.

8. Many applicants recognized that the defendant must apply to the court to take the deposition, and some further stated that the defendant must show good cause. Fewer applicants stated the requirement to give the State notice or noted that depositions are rare in criminal cases.
9. Many applicants correctly responded that the court should overrule the State's motion for a list of the defendant's witnesses because there is no reciprocal discovery in Texas. Only a handful of applicants noted that the defense would be required to disclose expert witnesses. A number of applicants incorrectly responded that the defense must disclose all witnesses to the State or that the trial court had discretion to decide whether to order disclosure.
10. Most applicants correctly stated that the defendant chooses whether to have a jury or bench trial, that the choice must be made pretrial, and that the choice can be different at the guilt and punishment phases. Some applicants further correctly noted that the decision cannot be changed without the State's consent, while fewer stated that the State must consent to a bench trial. No one stated that consent by the State is not necessary for jury punishment.
11. While many applicants stated that the defense must establish bias/prejudice, fewer applicants specified the type of bias or prejudice, e.g., bias/prejudice against the defendant or bias/prejudice against punishment law upon which the defendant is entitled to rely.
12. Most applicants knew that the State can assert a Batson challenge, that the prosecutor must complain/make a prima facie case, and that the defense then must show a race-neutral reason for the strikes. Some applicants further noted that, if the State showed purposeful discrimination, the trial court could call a new array or reinstate the venire members.
13. Most applicants recognized that the trial court's ruling was incorrect because the State can wait to make its argument until after the State rests its case-in-chief. Many applicants further noted that the defense can make its argument immediately following the State's argument. However, some applicants erroneously stated that the trial court's ruling was correct because the trial court had discretion to determine the order of the trial.
14. Most applicants correctly stated that the State must disclose the statement, and some correctly noted that the defense could have a reasonable time to review the statement. Fewer applicants further stated that the trial court could strike the testimony or declare a mistrial if the State refused to turn over the statement. A number of applicants incorrectly stated that disclosure was not required because the statement was work product.
15. Nearly all applicants correctly answered that the trial court should overrule the State's objection because the testimony was relevant to bias/prejudice/motive.
16. Many applicants correctly responded that the defendant should move for a directed/instructed verdict because the State failed to prove an essential element of its case. Only a few applicants noted that the motion should be made outside the jury's presence. A number of applicants incorrectly stated that the defendant should seek a summary judgment or a jnov, which are civil remedies.

17. Many applicants recognized that the defendant should move for a writ of attachment, and others stated that the defendant should file some other type of motion (e.g., a motion to compel). Some applicants correctly noted that an attachment would authorize the witness to be brought into court. Very few applicants stated that the defendant would be entitled to the attachment immediately.
18. Many applicants correctly stated that the trial court should overrule the objection either because the statement was an admission by a party-opponent, which is non-hearsay, or because it was a statement against interest, which is a hearsay exception. Some applicants incorrectly stated that the objection should be sustained because the question exceeded the scope of direct examination or constituted improper impeachment.
19. Many applicants correctly stated that the trial court should overrule the objection and that the conviction within the past 10 years was not too remote. Fewer applicants noted that the felony conviction was relevant for impeachment. Many applicants incorrectly responded that the objection should be sustained because the danger of unfair prejudice outweighed the probative value.
20. Very few applicants understood any of the procedures for a victim statement. The incorrect answers varied widely. A number of applicants answered the question as if the defendant would be making the statement. Others incorrectly stated that the statement must be recorded, whereas the correct answer is that the statement is not transcribed. A handful of applicants correctly stated that the content of the victim's statement could include the victim's views on the offense, the defendant, or the effect of the offense. Many applicants incorrectly stated that the statement was untimely because it was not made during the punishment phase. Others said that the statement could be used against the victim on appeal or could subject the victim to perjury.

July 2004

In March 2004, Parent places a 911 call to the Bexar County Sheriff's Office. She reports that her seven-year old daughter, Child, has not come home from school. When the deputies arrive at Parent's home, they talk with Witness, a seven-year old classmate of Child. Witness tells the investigators that she saw Child being forced into a car as she was walking home. Witness provides a partial description of the car and driver. Based on that description, an "Amber Alert" is issued.

At 3:30 a.m. the next day a patrol officer in Comal County, which is adjacent to Bexar County, sees a car that matches the description given in the Amber Alert. The driver's description also matches. Defendant, who is the driver and the only person in the car, appears nervous after the stop. Officer takes Defendant into custody. During a post-arrest search of the automobile at the scene of the arrest, Officer finds some children's school books in the trunk. Child's name is written in the books.

The next morning Child is found in Comal County, not far from where Defendant was arrested. Child is unharmed.

Defendant is charged with kidnapping. You are appointed to represent him.

- 1. Under the circumstances set out above, what is the proper venue in this case? Explain fully.**

- 2. What procedure, if any, is available to you to seek a reduction in bail and what arguments would you make in support of any such procedure? Explain fully.**

After conferring with you, Defendant decides that he wishes to waive his right to be accused by indictment.

- 3. What requirements must be met in order for a person to waive indictment? What, if any, exception is there to a person's right to make such a waiver?**

During a pre-trial conference with Prosecutor, you learn that the State believes that Defendant has no criminal record. However, Defendant reveals to you that in fact he does have a record, having been convicted of a felony in Arkansas under a different name. You decide not to reveal this information to either the State or the Court, reasoning that it is protected by the attorney-client privilege. Shortly thereafter, Defendant informs you that he wishes to file a sworn application for probation.

- 4. Under the circumstances outlined above, should you file a probation application for Defendant? Why or why not? If an application for probation is not filed, must you disclose Defendant’s criminal history to the State? Explain fully.**

As you prepare for Defendant’s trial, you attempt to speak with the Bexar County Deputy Sheriff who responded to Parent’s 911 call. The deputy refuses to speak with you. In light of his unwillingness to cooperate, you decide to take his deposition.

- 5. What procedures must you follow to take Deputy’s deposition? Explain fully.**

The State serves you with a motion seeking disclosure of the name and address of all fact and expert witnesses which you may use at trial. You object to the motion, citing attorney-client privilege.

6. How should the Court rule on the State’s motion? Explain fully.

After reviewing the facts of Defendant’s case, you prepare and file a motion to suppress Defendant’s warrantless arrest.

7. Under the circumstances set out in this case, was the warrantless arrest of Defendant proper? Explain fully.

You decide to contest the post-arrest search of Defendant’s car that led to discovery of the school books.

8. What is the appropriate motion to file and what arguments could you make regarding the books? Explain fully.

As the trial date looms, you apply for various subpoenas to be issued for witnesses. One of your subpoenaed witnesses lives in Amarillo, some 494 miles away from the trial location. Although properly served, the witness refuses to honor the subpoena, claiming that she is exempt by virtue of the fact that she resides more than 150 miles from the county of prosecution.

9. Is the summoned witness obligated to honor the subpoena and appear as directed? Explain fully.

10. What recourse, if any, do you have if the witness refuses to obey the subpoena? Explain fully.

Several days prior to the beginning of jury selection you receive what is captioned “State’s Motion in Limine.”

11. What is a motion in limine? Explain fully.

Defendant asks you to explain his rights regarding trial by jury versus trial to the court.

12. Who elects whether to try the case to the court or to a jury? When must the election be made? Must the election be the same for both phases of a bifurcated trial? Explain fully.

A jury trial is elected. After the prospective jurors have been sworn and before the voir dire examination begins, the court tests the legal qualifications of the jurors by asking three questions.

13. What three matters must the court determine regarding a prospective juror's legal qualifications to serve? Explain fully.

After the jury is seated and the indictment is read, Prosecutor makes his opening statement to the jury. At the conclusion of the State's opening statement, the following exchange occurs:

COURT: Ms. Defense Counsel, do you wish to make an opening statement?

DEFENSE LAWYER: I do, Your Honor. However, I wish to do so after the State rests its case-in-chief.

COURT: That request is denied. Either make it now or you waive it. We're not going to drag this trial out.

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

After the State's first witness has testified on direct examination, the following exchange occurs:

COURT: Counsel, you may proceed.

DEFENSE LAWYER: Your Honor, the defense now moves for the production of the witness' statement for use during cross-examination.

PROSECUTOR: We object. First, the request is untimely. Counsel should have asked for the statement at pre-trial. Secondly, this is our work-product. We refuse to produce the statement.

15. How should the Court rule on each ground stated in Prosecutor's objection, and what sanctions may the Court impose if Prosecutor refuses to produce the statement? Explain fully.

During the presentation of the State's case, Prosecutor offers into evidence part of a letter written by Defendant. You believe that the omitted portion of the letter is favorable to Defendant.

16. Is the remainder of the letter admissible? Why or why not? Explain fully.

After the State rests its case, you call your first witness, Convict, who testifies in behalf of Defendant. On cross-examination the following exchange occurs:

PROSECUTOR: It is true, is it not sir, that you were convicted of robbery in Harris County, Texas, in June of 1998?

DEFENSE LAWYER: Your Honor, we object. That conviction is remote since it occurred some 6 years ago.

COURT: Overruled. The witness is directed to answer the question.

17. Is the Court's ruling correct? Should the ruling be different if Convict's conviction is still on appeal? Explain fully.

After both sides rest and close their evidence at the guilt-innocence stage of the trial, the Court's charge is read to the jury and the attorneys are instructed to make their final arguments.

18. How is the order of argument and number of arguments regulated in Texas criminal cases? Explain fully.

The jury finds Defendant guilty. At the punishment stage, you call a psychiatrist, Dr. Shrink, in an effort to show that Defendant does not pose a continuing threat to society. However, before your examination begins, the following exchange occurs:

PROSECUTOR: Your Honor, we move to conduct a voir dire examination of Dr. Shrink before the jury hears from him.

DEFENSE LAWYER: Your Honor, I...

COURT: Sit down counsel. The State's request is granted.

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

The State now wishes to offer punishment rebuttal evidence from the officer who arrested Defendant. The officer will testify that as he approached Defendant’s car on the night of his arrest, the Defendant screamed “You've got me, I did it. Arrest me before I strike again!” Before the jury hears the testimony, the following exchange occurs:

DEFENSE LAWYER: Your Honor, we object. This oral statement does not meet the requirements of the Code of Criminal Procedure since it was not recorded and did not lead to the fruits of the crime. Besides, it’s hearsay.

COURT: Overruled. Mr. Prosecutor, you may proceed with your witness.

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

Criminal Procedure and Evidence – July 2004

Paragraph numbers correspond to the question number on the exam.

1. Most examinees correctly named either Bexar County or Comal County as the proper venue, although fewer examinees recognized that both counties are appropriate. Only a handful of examinees further noted that venue is proper in any county through which the child was taken.
2. Many examinees knew that the defendant should file an application for writ of habeas corpus or a motion to reduce bail, although many other examinees made no attempt to name the procedure. The majority of examinees correctly named one, but not both, arguments to support a bail reduction, i.e., bail is excessive/unreasonable and bail is designed to secure the defendant's appearance and protect the community, not just incarcerate him.
3. Most examinees named one or more requirements for waiving an indictment, i.e., knowing, voluntary, and intelligent waiver; legal counsel; and in open court or in writing. The majority of examinees knew that an indictment cannot be waived for capital murder.
4. Many examinees knew that the attorney cannot file the probation application, and some specified that the felony conviction precludes probation. Many examinees correctly responded that they must not disclose the defendant's criminal history, although a number of examinees mistakenly believed that Texas has reciprocal discovery in criminal cases.
5. Most examinees knew that the defendant should file an application showing good cause. Fewer knew that the State must be notified, and almost no one noted that the court would hold a hearing and grant or deny the application.
6. Many examinees knew that the State can discover expert witnesses. However, many did not state that the motion should be denied in part as to fact witnesses because the defense is not required to reveal confidential information, and others incorrectly stated that fact witnesses must be disclosed. On this question in particular, many examinees gave conflicting answers – for example, examinees would state that the motion for disclosure should be overruled because the State is entitled to disclosure of experts or that the court should grant disclosure because the State was not entitled to disclosure of witnesses.
7. The majority of examinees responded that the defendant's arrest is proper. However, only a few examinees further explained that the arrest is appropriate because the defendant was in a suspicious place under circumstances reasonably showing that he was guilty of a felony.
8. Nearly all examinees stated that the defendant should file a motion to suppress. Fewer articulated the defendant's potential argument that the books are the fruit of the poisonous tree because an illegal arrest renders a search illegal.

9. Few examinees knew that the summoned witness must appear, and even fewer knew that subpoenas in criminal cases are valid statewide. The majority of examinees incorrectly stated that the witness is not required to appear because she lives more than 150 miles from the trial location or that she must attend only if she works or is served within 150 miles of the trial location.
10. Most examinees stated that a writ of attachment would be appropriate to command law enforcement to take the witness into custody and bring her to court.
11. Most examinees correctly stated at least some of the components of a motion in limine. Many examinees recognized that a motion in limine does not preserve error for appeal.
12. Nearly all examinees correctly stated that the defendant elects pretrial whether to have the case tried to the court (with the concurrence of the State) or to a jury and that the election need not be the same for both phases of the trial.
13. While many examinees knew that a potential juror must not be convicted of a felony, fewer knew the remaining legal qualifications, i.e., that he not be convicted of a theft, that he be a qualified voter (many erroneously stated that he must be registered), and that he not be under indictment or legal accusation for a felony or theft. Many examinees erroneously stated matters that are grounds for challenges for cause.
14. Nearly all examinees correctly responded that the trial court's ruling is incorrect and that the defendant can make an opening statement either following the State's opening or after the State rests.
15. Many examinees knew that both the timeliness and work product objections should be overruled and named at least one appropriate sanction, i.e., strike the testimony/instruct the jury to disregard and declare a mistrial.
16. Most examinees recognized that the remainder of the letter is admissible, and many named the applicable theory as the rule of optional completeness. Fewer examinees explained that when part of the letter is introduced by one party, the remainder may be offered by the other party.
17. The majority of examinees correctly responded that the ruling is correct, noted that the rule of remoteness is ten years, and recognized that the ruling would be different if the conviction is on appeal. However, when responding to whether the court's ruling is correct, a number of examinees gave conflicting answers that could not be reconciled, e.g., they incorrectly stated that the court's ruling was incorrect because the conviction is not admissible or that the ruling is correct because the conviction is admissible.
18. Many examinees correctly noted that the State always argues last. Fewer correctly stated the order of arguments as State-defense-State. Only two examinees knew that the court cannot limit arguments to less than two per side. Some examinees incorrectly stated that the order of arguments would depend on whether the State or the defense has the burden of proof at trial (even though the State always has the burden of proof as to all elements of the offense).

19. Most examinees knew that the trial court's ruling is correct, although some examinees erroneously stated that voir dire is inappropriate at the punishment phase, that the State should conduct voir dire pretrial, that voir dire would be appropriate only if the State had not previously disclosed the expert, or that voir dire is the method of selecting a jury. The majority of examinees stated that the State can voir dire the expert about his qualifications or the basis of his opinion, but most did not list both areas of inquiry. Only a few examinees noted that the trial court rules on the admissibility of the testimony.
20. Most examinees correctly responded that the defendant's statement is admissible and listed at least one of the following bases of admissibility: excited utterance, statement against interest, admission by a party-opponent, and non-custodial statement.

You are appointed to represent Defendant, who has been charged with possession of a controlled substance. Defendant is in jail, with bail set at \$750,000. Defendant cannot post a bond in that amount, and asks you to get his bail reduced.

- 1. List three of the factors the court must consider in fixing the amount of Defendant's bail.**

The Harris County grand jury indicts Defendant. Following the return of the indictment, you request an examining trial.

- 2. What is the purpose of an examining trial? Is Defendant entitled to an examining trial? Explain fully.**

You decide that you need the assistance of a forensic criminalist to help you evaluate the physical evidence in the case. However, neither you nor Defendant can afford to hire an expert.

3. What pleading should you file to obtain the assistance of such an expert? Explain fully.

As you prepare this case for trial, you learn that Defendant has a lengthy history of chronic psychiatric problems. You become concerned about Defendant's competency to stand trial.

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

5. Under Texas law, list three ways in which incompetency differs from insanity.

Defendant considers the possibility of pleading guilty to the offense for which he is indicted. He asks you to explain the mechanics of a guilty plea.

- 6. List three admonishments that the court must give Defendant before it can accept his felony plea of guilty.**

Defendant decides not to plead guilty, electing instead to go to trial. Although he has previously served time in the penitentiary, Defendant asks you to prepare and file an application for probation.

- 7. Is Defendant entitled to file an application for probation under Texas law? Explain fully.**

When the jury panel is assembled, you have a premonition that the first 20 veniremen are not sympathetic to Defendant.

- 8. What action, if any, can you take to change the seating order of the veniremen? At what stage of the proceedings must you take such action? Explain fully.**

9. How many peremptory challenges does Defendant have in a single-defendant felony trial? How many does the State have? How many challenges for cause does each side have? How many jurors are seated?

10. Following the seating of the jury, what is the order of proceeding in a Texas felony trial? Explain fully.

After the jury is seated, Prosecutor delivers her opening statement. In that statement, she tells the jury as follows:

PROSECUTOR: I also expect the evidence to show that Defendant knows full well that he is guilty of this offense. He knows that because he wanted to plead guilty in exchange for our plea bargain...

DEFENSE LAWYER: Objection!

COURT: What is your objection counsel?

11. What is the proper objection to Prosecutor’s statement? How should the Court rule? Explain fully.

Assume that you had filed a pre-trial motion in limine asking the court to disallow Prosecutor’s mention of any plea negotiations. The Court granted that motion.

12. Would you still be obligated to object to Prosecutor’s opening statement? Explain fully.

The State’s first witness is Officer, who arrested Defendant. You know that Officer is going to testify that at the time of Defendant’s arrest, a search of his car revealed an unlicensed handgun. You do not want the jury to hear testimony about this extraneous offense.

13. In sequential order, list the steps you should take to attempt to keep Officer’s testimony on this issue out of evidence. Explain fully.

The State calls Priest as a witness. The following exchange occurs:

PROSECUTOR: Do you know Defendant?

PRIEST: Yes I do. He is a member of our parish. I regularly hear his confession in the county jail on Saturday afternoon.

PROSECUTOR: On any of those occasions has he ever discussed with you the circumstances that led to his arrest?

DEFENSE LAWYER: Objection, judge.

COURT: What do you mean “objection” counselor? State the basis for your objection.

14. What is the proper objection, if any? How should the Court rule? Explain fully.

Prosecutor calls as its next witness Wife, who has been married to Defendant for 15 years. Prosecutor says it is her intention to inquire whether following his arrest Defendant admitted to Wife that he has a chemical dependency problem. Wife not only wants to testify against Defendant, she is anxious to do so.

15. Can Defendant claim a privilege and prevent Wife from testifying about the communication? Explain fully.

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

COURT: Mr. Prosecutor, call your next witness.

PROSECUTOR: Your honor, the State of Texas calls Defendant.

DEFENSE LAWYER: Objection.

16. What are the bases for your objection, and how should the Court rule on the objection? Explain fully.

After presenting all of its witnesses, the State rests. You note that Prosecutor has failed to prove that the offense occurred in Harris County.

17. What steps should you take to advise the Court of this failure, and at what stage of the proceedings should you take them? Explain fully.

Defendant calls as his first witness Expert, who has specialized knowledge about the drugs that Defendant is charged with possessing. Expert intends to offer his opinion that the State failed to analyze the drugs pursuant to reliable scientific technique.

PROSECUTOR: Your honor, we move to conduct a voir dire examination before the jury hears from this witness.

DEFENSE LAWYER: Your honor, I ...

COURT: Sit down counsel. The State's request is granted.

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

As Defendant's last witness, you call the presiding judge to give testimony that Defendant has always been polite and well-behaved when in court.

19. Can you call the judge as a witness? Explain fully.

Following the reading of the Court's charge and the argument of counsel, the jury begins its deliberations. After two days of deliberations, the jury announces that it is hopelessly deadlocked. You move for a mistrial, but the State opposes.

20. In order for the court to grant a mistrial, must the State join in your motion? Explain fully.

Criminal Procedure and Evidence – February 2005

The paragraph numbers correspond to the question number on the exam.

1. Nearly all examinees correctly identified two to three factors for the court to consider in setting bail.
2. Most examinees knew that the purpose of an examining trial is for the State to show probable cause. Many examinees further correctly stated that the defendant was not entitled to an examining trial because the grand jury already had indicted him. However, some examinees incorrectly believed that a defendant is always entitled to an examining trial in a felony case, failing to recognize that the examining trial must occur before indictment.
3. Most examinees correctly stated in general terms that the defendant should file a motion in order to obtain an expert, but fewer categorized the pleading as a motion for the court to authorize reimbursement for reasonable and necessary expenses. Many examinees further noted that the defendant must allege indigency. Only a handful of examinees went on to state that the defendant had a due process right to the assistance of an expert.
4. Some examinees correctly stated at least one of the two criteria for incompetency, i.e., the defendant lacks sufficient present ability to consult with his attorney with a reasonable degree of rational understanding or he lacks a rational and factual understanding of the proceedings. Additionally, some examinees correctly noted at least one of the following regarding incompetency: the defendant is presumed competent, bears the burden of proof, and must prove his incompetency by a preponderance of the evidence.
5. When asked to compare incompetency and insanity, many examinees discussed only one or the other or simply listed facts (which were not stated in the question) that might prove incompetency or insanity. Some examinees were able to make one comparison, while fewer were able to make two or more. The most common comparisons which examinees correctly noted were that: incompetency is judged at the present time, while insanity is judged at the time of the offense; incompetency is a separate issue, while insanity is an affirmative defense; and insanity requires an acquittal, while incompetency does not lead to an acquittal. Many examinees who attempted to compare the standards of proof correctly stated that competency is by a preponderance of the evidence, but incorrectly stated that insanity is by clear and convincing evidence rather than by a preponderance of the evidence.
6. The majority of examinees listed two or three of the admonishments that the trial court must give before accepting a guilty plea.
7. Many examinees gave a wide variety of incorrect answers regarding the defendant's eligibility for probation. These incorrect responses included statements that the defendant was eligible for probation if he had not already been convicted of two prior offenses, if he had not used a deadly weapon in the previous or current offenses, if he had completed serving his sentence in the prior case, or if the trial judge decided to allow probation. Under the facts of the question, the defendant cannot request probation. An application for probation must be filed pretrial, be sworn, and state that the defendant has never been

convicted of a felony anywhere. Here, the defendant has a prior felony conviction that makes him ineligible for probation.

8. The majority of examinees correctly stated that the defendant should request a jury shuffle before voir dire begins, that only one shuffle is allowed per trial (not per side), and/or that a shuffle would re-order the veniremembers (not call a new panel). Only a couple of examinees noted it would be reversible error for the court to deny an appropriately requested shuffle. Some examinees incorrectly stated that the defendant should assert a Batson challenge or use his peremptory challenges.
9. Most examinees knew that each side has unlimited challenges for cause and that twelve jurors would be seated. However, a large majority of examinees did not know that under the facts of this case, both the defendant and the State have ten peremptory challenges.
10. Most examinees correctly listed the order in which the case would proceed after jury selection. However, some examinees' responses consisted almost entirely of discussing voir dire, even though the question asked for the order of proceedings following the seating of the jury.
11. The majority of examinees correctly stated that under TRE 410 the trial court should sustain the objection because statements made in negotiations which do not result in a plea are inadmissible. Many examinees further noted that the defendant should request an instruction to disregard. Some examinees incorrectly stated that the objection should be that withdrawn guilty pleas are inadmissible or that the State cannot comment on the defendant's plea, even though under the facts stated there was no indication that the defendant had withdrawn a previous guilty plea.
12. Most examinees knew that the defendant must still object and correctly indicated in some manner that motions in limine, standing alone, do not preserve error for appeal. However, a few examinees incorrectly believed that an objection would be unnecessary because the motion in limine preserves error.
13. Most examinees did not recognize that the defendant was required to object to the admission of the extraneous character conformity evidence under Tex. R. Evid. 404(b) and, if the objection was overruled, to then seek a Rule 403 balancing of the probative value versus the prejudicial effect. No one noted that the burden would be on the proponent under rule 404(b) and on the opponent under rule 403. Many examinees simply discussed general objections, motions in limine, motions to suppress, appeals, or habeas petitions.
14. While the majority of examinees correctly stated that the objection should be based on privileged communication to a member of the clergy, most did not further note that the communication must be confidential/not intended for disclosure. Many examinees knew that the objection should be sustained. However, many examinees who correctly identified privilege as the basis for the objection went on to incorrectly state that the objection should be overruled because Texas does not recognize a clergy privilege. Additionally, a number of examinees discussed hearsay, even though the call of the question clearly sought a response based upon privilege pursuant to TRE 505.

15. While many examinees correctly stated that under TRE 504 the defendant could claim a privilege to prevent the wife from revealing confidential marital communications, many others incorrectly stated that waiver of the privilege was a decision for the wife alone. Only a few examinees correctly distinguished the testimonial privilege, which would allow wife to decide whether to testify to matters other than marital communications.
16. Most examinees correctly stated that the objection should be sustained because it would violate the United States Constitution (Fifth Amendment) for the State to call the defendant to testify. Many examinees further noted that the defendant should request an instruction to disregard and/or a mistrial. Only a few examinees recognized that the State's action violated the Texas Constitution and the Texas Code of Criminal Procedure. Some examinees incorrectly responded that the State can call the defendant to testify if he is on the State's witness list.
17. Many examinees correctly stated that the defendant should move for an instructed verdict before presenting any defense evidence. Only a handful of examinees further noted that the request should be made outside the jury's presence. Many examinees incorrectly identified remedies that do not exist in criminal cases, e.g., a summary judgment or a jnov.
18. The majority of examinees correctly stated that under TRE 705(b) the State is entitled to voir dire the defense's expert regarding the facts and data underlying his opinion. Fewer examinees further noted that the voir dire must take place outside the jury's presence. A few examinees incorrectly stated that the State could voir dire the expert only if it did not have prior notice that the expert would testify, that only the defendant can voir dire experts, that the State's questions must wait for cross-examination, or that voir dire must occur pretrial.
19. The majority of examinees correctly responded that the presiding judge cannot testify in this trial. Almost no one noted that, under Rule 605, an objection is not required in order to preserve error.
20. The majority of examinees knew that the State was not required to join in the motion for mistrial. While many examinees went on to correctly state that granting a mistrial is within the trial court's discretion if a verdict cannot be reached, only a few examinees further noted that the trial court can grant a mistrial if both parties agree.

July 2005

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.

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.

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.

Criminal Procedure and Evidence – July 2005

1. Many examinees did not correctly answer either portion of this question, while others answered only one question correctly. Examinees should have responded that any magistrate has jurisdiction to conduct an examining trial and that Defendant can make a voluntary statement after warnings but before anyone else testifies.
2. Most examinees knew that the indictment was insufficient because it lacked the intent element and/or did not reflect that it was signed by the grand jury foreman.
3. Most examinees correctly named two or three of the factors considered in fixing bail. Appropriate considerations include: the safety of the community/victim, the ability to make bail, the nature/circumstances of the offense, assuring compliance, and avoiding oppression.
4. Most examinees did not correctly answer both portions of the question, stating either the general rule or the exception. Many examinees incorrectly stated the exception as the general rule. The correct response was that the court cannot consider whether Defendant has posted or is capable of posting bail in determining indigence, except as it reflects his financial circumstances per statutory considerations.
5. Some examinees knew that the judge was not disqualified under the facts presented, although many incorrectly stated that the judge was disqualified due to his past prosecution of Defendant in an unrelated case. While some examinees knew that the judge would be disqualified if he were the injured party, fewer knew that he would be disqualified if he previously prosecuted this case before becoming a judge or if he was related to the victim.
6. Most examinees correctly named two or three allegations that must be included in a first motion for continuance. These include: the witness' name and address, a description of diligence, the material facts to be proved, the absence is not Defendant's fault, there is no reasonable expectation of attendance, and the continuance is not for delay.
7. Many examinees knew that granting a first motion for continuance is not a matter of right and that granting the motion is within the discretion of the trial court.
8. The majority of examinees correctly responded that the State was required to disclose Statement Number Two without a request from the defense because it was Brady/exculpatory material. A few examinees incorrectly responded that disclosure was not required because the statement was the State's work product, because it was unsigned, or because it would be inadmissible at trial.
9. Many examinees knew that Defendant was not generally entitled to grand jury transcripts pretrial and/or that Defendant must show particularized need to warrant disclosure. Very few examinees noted the need to maintain secrecy of grand jury proceedings.
10. Most examinees correctly responded that Defendant should file a motion in limine and object during voir dire if the State mentioned the extraneous acts. Fewer examinees stated that Defendant must obtain an adverse ruling or noted that a motion in limine does not preserve error.

11. Most examinees knew that the State's cross-examination of Defendant would be limited to the taking of the statement without examination of the merits of the case and that he did not waive his right to remain silent at trial by testifying at his suppression hearing.
12. Many people correctly identified at least one statutory condition of deferred adjudication. Statutory conditions of deferred adjudication include: no adjudication of guilt, no conviction, cannot be given by a jury or post-conviction, Defendant is subject to the maximum sentence if revoked, and the case is dismissed on completion of probation.
13. Most examinees knew that Defendant must choose whether to be tried by a jury or a judge and that he may elect differently for the guilt-innocence and punishment phases. Fewer examinees knew that the decision must be filed pretrial, and only a handful noted that the State must agree to a jury waiver at the guilt-innocence phase.
14. Many examinees stated that Defendant must show bias or prejudice without specifying the type of bias or prejudice. Examinees should have stated that the basis for the challenge for cause was bias or prejudice against Defendant and bias or prejudice against the law upon which Defendant is entitled to rely.
15. Most examinees knew that the prosecutor could make a Batson challenge to complain of race-based strikes, shifting the burden to Defendant to give race-neutral explanations for the strikes. Fewer examinees knew that the trial court could order a new array if the State proved discrimination.
16. Most examinees correctly identified hearsay as the basis for the objection, although not as many knew that the trial court would sustain the objection. A small number of examinees noted that the testimony was inadmissible because it related a statement by someone other than the declarant. Some examinees incorrectly stated that the testimony would come in as a party admission, overlooking that the witness had not heard Defendant's statement, but was testifying about what someone told him Defendant said.
17. Some examinees knew that the court's ruling was correct, while others did not answer this question or erroneously stated that the ruling was incorrect. However, many examinees named most or all of the elements of the predicate, i.e., recorded at or near the time, from information from a person with knowledge, the activity was in the regular course of business, and the memo was in the regular course of business.
18. Most examinees knew that Wife had a privilege not to testify for the State against her husband. A few examinees also knew that Wife could refuse to be called as a witness for the State, but many examinees either failed to answer this portion of the question or answered it incorrectly.
19. Most examinees correctly listed two or more factors to be considered in determining the admissibility of scientific evidence. These factors include: the extent the theory has been tested, the extent it relies on subjective determination, whether it has been subjected to peer review, whether it has been accepted in the scientific community, non-judicial uses of the technique, the expert's experience, the existence of scientific literature, clarity of the presentation, the availability of other experts, and the rate of error.

20. Almost all examinees knew that Defendant cannot call the presiding judge as a witness. A few examinees noted that the Texas Rules of Evidence prohibit calling the judge.

February 2006

Defendant is arrested after a valid law enforcement search of his apartment resulted in the seizure of a firearm equipped with a silencer.

Following his arrest, Defendant remained in custody for one week with no charges filed and no bail set. At the conclusion of the week, Defendant hires you to represent him in this action.

You decide to file an application for a writ of habeas corpus.

- 1. What is a writ of habeas corpus? To whom is a writ directed? What remedy does a writ seek? Explain fully.**

Defendant is eventually charged with, and indicted for, possession of a prohibited weapon, a third-degree felony. He posts a \$10,000 bond. You learn that while Defendant was in jail, as a result of custodial interrogation, Defendant signed a written statement regarding this matter.

You ask Prosecutor to give you a copy of Defendant's statement. Prosecutor refuses, citing the "investigator's work product" exception.

- 2. What action, if any, should you take in response to Prosecutor’s refusal? How should the Court rule? Explain fully.**

After investigating the circumstances, you conclude that Defendant’s written statement was not voluntary.

- 3. What warnings must this statement show on its face in order to be admissible?**

- 4. In addition to the warnings referred to in the preceding question, what must the face of the statement further show?**

After the court sets the case for trial, you learn that a witness crucial to the defense is unavailable. You decide to file a first motion for continuance based on that circumstance.

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

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

6. How should the Court rule on Prosecutor's request? Explain your answer.

After reviewing all of the evidence, you decide that it is in Defendant's best interest to accept the States plea bargain offer and plead guilty to the prohibited weapon charge. Defendant disagrees and tells you that he wishes to persist in his plea of not guilty.

- 7. 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.**

You decide that certain business records from a gun dealer are relevant to your defense. However, the custodian of those records will be unavailable at trial.

- 8. How can you introduce those records without live testimony? What must you show?**

The jury panel is assembled and voir dire examination begins. As the questioning progresses, it becomes obvious that you should exercise challenges for cause and peremptory challenges.

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

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

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

11. Can you challenge Prosecutor's action? If so, what should you do, how must Prosecutor respond, and how should the Court rule? Explain fully.

During the State's case-in-chief, the following testimonial exchange occurs between Prosecutor and Officer witness:

PROSECUTOR: Did you speak with any of Defendant's neighbors about any problems that they were having with Defendant?

OFFICER: I sure did. They told me that they often heard Defendant talking about his love of guns. One time they claim they heard Defendant say...

DEFENSE LAWYER: Objection, your honor.

COURT: State the basis for your objection, Counselor.

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

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

PROSECUTOR: Doctor, have you treated Defendant as a patient?

DOCTOR: Yes, for a few months in the year 2005.

PROSECUTOR: During that time, did Defendant discuss with you his desire to obtain various types of exotic firearms and related equipment, including a silencer?

DEFENSE LAWYER: Objection. Physician-patient privilege. Those communications are confidential.

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

After the State rests, you put on Expert, who is a firearms expert. Expert is of the opinion that the silencer in question is not a prohibited weapon under the Texas statute. Prosecutor objects to the testimony and the Court sustains the objection. You believe that the Court's ruling is erroneous.

14. What must you do in order to preserve that issue for appeal? Explain fully.

Your next witness is Friend, a long time associate of Defendant. Much to your surprise, Friend’s testimony differs significantly from what he had told you in an earlier interview.

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

Defendant elects not to testify and you rest. The State calls Detective as its first rebuttal witness. The following exchange occurs:

PROSECUTOR: Detective, is this the first time you have dealt with Defendant?

DETECTIVE: Oh, no, ma’am.

PROSECUTOR: In fact, you have arrested Defendant for everything under the sun, from driving while intoxicated to indecency with a child, right?

DEFENSE LAWYER: Objection.

COURT: What do you mean “objection,” Counselor? What is your basis?

16. What is the basis of your objection? How should the Court rule on the objection? Explain fully.

17. Assume that the Court sustains the foregoing objection. What steps must you then take to preserve the issue for appeal? Explain fully.

The State's next rebuttal witness is Clerk. Prosecutor seeks to elicit testimony from Clerk that court records reveal that Defendant was convicted of a felony in 1980. You object to the testimony.

18. What objection should you make? How should the Court rule? Explain fully.

As you review the Court's proposed guilt/innocence charge, you notice that the Court does not instruct the jury regarding Defendant's failure to testify.

19. Are you entitled to such an instruction? If so, what instruction should be given? Explain fully.

The jury finds Defendant guilty and assesses his punishment at 8 years in the penitentiary. You decide to have your investigator interview the jurors regarding possible juror misconduct as a ground in a motion for new trial. However, the district clerk refuses to give you the jurors' home addresses and home telephone numbers.

20. Is there any procedure available to you to obtain the information? Explain fully.

Criminal Procedure and Evidence – February 2006

1. While many examinees knew that a writ of habeas corpus is the remedy for someone restrained of his liberty, fewer knew that the remedy sought by a writ is to produce the detainee and show why he is in custody. Most examinees did not know that the writ is directed to the one having custody, stating instead that the writ is directed to a court.
2. Most examinees knew that the defendant should file a motion for discovery and that the trial court should grant the motion. Only a few examinees noted that production is specifically required by statute.
3. Many examinees did not respond to the call of the question, which asked what warnings the defendant's written statement must contain. Other examinees simply answered that the statement must contain "Miranda warnings." Some examinees correctly listed two or three of the required warnings. These warnings are that the defendant has the right to remain silent, that any statement can be used against him, that he has the right to have a lawyer present during questioning, that a lawyer can be appointed if he cannot afford one, and that he can terminate the interview at any time.
4. Few examinees correctly responded that the defendant's written statement must further show that he knowingly, intelligently, and voluntarily waived his rights. As with question 3, many examinees did not respond to the call of the question.
5. Most examinees correctly listed two or three of the allegations required to be stated in the motion for continuance. Specifically, the defendant's motion for continuance must allege the witness' name and address, diligence in trying to locate the witness, the facts to be proven, the witness' absence is not due to the defendant, the continuance is not sought for purposes of delay, and there is no expectation that delay to another day of the term will help.
6. A complete answer to this question must state that the trial court should grant the prosecutor's request for expert witnesses and should deny the request for all other witnesses. Many examinees responded either that the trial court should grant or should deny the prosecutor's request for defense witnesses and did not differentiate between expert and other witnesses. Very few examinees stated that there is virtually no reciprocal discovery in Texas criminal cases.
7. Nearly all examinees knew that the defendant decides what plea to enter. Most examinees correctly listed two or three admonishments that the court must give before accepting a felony plea of guilty. The required admonishments are the range of punishment, the district attorney's recommendation is not binding, no appeal may be had if the recommendation is not exceeded, non-citizens may be subject to deportation, the defendant must be competent, and the plea must be free and voluntary.
8. Many examinees knew that the records could be introduced through an affidavit from the custodian stating that the records were created by a person with knowledge or from information transmitted by a person with first-hand knowledge, that the records were made in the regular course of business, that it was regular practice to keep the records, and that the records were made at or near the time of the events.

9. Nearly all examinees knew that each side has an unlimited number of challenges for cause. However, most examinees failed to state that a challenge for cause is an objection to a particular veniremember alleging some fact that would render him incapable or unfit to serve. Instead, most examinees listed facts that would constitute disqualifications.
10. Most examinees knew that a peremptory challenge is a challenge to a juror without assigning any reason. Many examinees knew that each side is allotted ten peremptory challenges in a noncapital, single-defendant felony case.
11. The majority of examinees knew that the defendant can challenge the prosecutor's action with a *Batson* challenge. Many examinees also correctly responded that the trial court would call a new array or disallow the strikes if the prosecutor did not show that the strikes were racially neutral. A few examinees stated that the defendant should request a hearing and that race-based strikes are disallowed.
12. Most examinees knew that the defendant should make a hearsay objection and many knew that the trial court would sustain the objection. A few examinees recognized that the testimony constituted hearsay because it was a statement by someone other than the declarant offered to prove the truth of the matter asserted. A number of examinees erroneously stated that the testimony would be admissible as a statement by a party-opponent.
13. Most examinees knew that the trial court should overrule the objection. Many knew that there is no physician-patient privilege in Texas criminal cases, although many did not and instead discussed why the defendant's statement would fall outside such a privilege.
14. Many examinees knew that the defendant must make an offer of proof to preserve error in the exclusion of the expert's opinion. However, many other examinees erroneously stated that nothing needed to be done because the sustained objection on the record would be sufficient. Almost no one stated that the defendant must make the offer of proof as soon as possible but before the charge is read to the jury.
15. Almost all examinees correctly responded that the defendant can impeach the credibility of his own witness. Many knew that the defendant would do so using the witness' prior inconsistent statement.
16. Most examinees knew that the trial court should sustain the defendant's objection, but many examinees failed to recognize that the objection would be to relevancy. Many examinees knew that the evidence was inadmissible because it was not a final conviction or because it was extraneous.
17. While a number of examinees stated that the defendant must request an instruction to disregard and move for a mistrial, many examinees' answers included only one or the other. Many examinees incorrectly stated that the defendant did not have to do anything because his objection was sustained and he would have nothing to appeal. Only a few examinees recognized that the defendant would have to pursue an adverse ruling.
18. Most examinees knew that the defendant's 1980 felony conviction was inadmissible based on remoteness because it was more than ten year old.

19. Most examinees knew that the defendant would be entitled to a jury instruction that the jury may not draw any inference from the defendant's invocation of his privilege against self-incrimination.
20. While many examinees knew that a defendant could obtain the jurors' information, fewer knew that the correct procedure would be a motion for disclosure. Even fewer examinees noted that jurors' personal information is confidential without a court order and that the attorney or the media could get the information for good cause. Many examinees erroneously stated that the only procedure available would be a jury poll immediately after the verdict.

July 2006

Defendant was arrested following the execution of a search warrant at his business. A search of a safe at the business revealed what appeared to be illegal controlled substances, \$95,000 in cash, and a switchblade knife. All of those items were seized and Defendant has been charged with possession with intent to deliver Methamphetamine in an amount between 4 and 200 grams and possession of a prohibited weapon.

You are appointed to represent Defendant.

Prosecutor informs you that the Smith County grand jury will meet next week to consider indictments against Defendant.

- 1. Can Prosecutor compel Defendant to testify before the grand jury? What rights does Defendant have regarding an appearance before the grand jury? Explain fully.**

On the day the indictment against Defendant is returned, the Court notifies you that you must file and present any pre-trial motions within the following three days.

- 2. Can the Court compel you to file and present your pre-trial motions under the circumstances outlined above? Explain fully.**

As you prepare your case for trial, you review the affidavit for the search warrant.

3. What three facts must the affidavit set forth to establish probable cause?

You conclude that the search warrant is defective.

4. What motion should you file to contest the validity of the search? What must the motion allege and what remedy should you seek? Explain fully.

The Court conducts a pre-trial hearing on your motion. Following that hearing, the Court grants the relief you requested. Prosecutor immediately announces that she will appeal the Court's order.

5. Is the State entitled to pursue an interlocutory appeal in this instance? If so, what requirements must be met by the State in order to do so? Explain fully.

You also learn that Defendant gave police a post-arrest written, signed statement denying his involvement in this offense. You request that Prosecutor provide you a copy of the statement. Prosecutor refuses your request, claiming work product privilege.

6. Is Prosecutor required to provide you a copy of Defendant's statement? Explain fully.

You file a pre-trial discovery motion requesting a list of all of the State's witnesses. Prosecutor files a reciprocal motion requesting a list of all defense witnesses.

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

Defendant elects to have a jury trial and instructs you to file an application for probation on his behalf.

8. List three requirements of a proper application for felony probation.

Defendant decides to plead guilty to the lesser included offense of possession of Methamphetamine 4-200 grams.

- 9. List three admonishments that the Court must give Defendant before accepting his felony plea of guilty.**

Defendant changes his mind and elects to try both stages of his case to a jury.

When the jury panel of 42 is assembled, you note that several police officers and a former bar examiner are among the first 15 venire persons. You believe that these individuals may not be favorable defense jurors.

- 10. What action, if any, can you take to change the seating order of the venire persons? At what stage of the proceeding should you take this action? Explain fully.**

During your voir dire of the jury panel, you conclude that several prospective jurors are legally unfit to serve on the jury. You challenge them for cause.

11. List five challenges for cause which may be made by either the State or the defense.

After the jury is seated, Prosecutor delivers her opening statement. In that statement, she tells the jury as follows:

PROSECUTOR: I also expect the evidence to show that Defendant knows full well that he is guilty of this offense. He knows that because he wanted to plead guilty in exchange for our plea bargain...

DEFENSE LAWYER: Objection!

COURT: What is your objection counsel?

12. What is the proper objection to Prosecutor's statement? How should the Court rule? Explain fully.

The State's first witness is Officer, who executed the search warrant. After he has testified on direct examination, the following exchange occurs:

COURT: Counsel, you may proceed.

DEFENSE LAWYER: Your Honor, the defense now moves for the production of Officer's report for use during cross-examination.

PROSECUTOR: We object. The request is untimely. Counsel should have asked for the report at pre-trial. We refuse to produce the report.

13. How should the Court rule on Prosecutor’s objection? What sanctions may the Court impose if Prosecutor refuses to produce the statement? Explain fully.

The State’s next witness is Convict, who intends to testify that he has previously been involved with Defendant in several illegal drug transactions. You request that the Court consider the admissibility of Convict’s testimony in a hearing conducted outside the presence of the jury.

14. What ground, or grounds, should you raise in your effort to exclude Convict’s testimony? Explain fully.

On your cross-examination of Convict, the following exchange occurs:

DEFENSE LAWYER: It is true, is it not sir, that you were convicted of robbery in Harris County, Texas, in June of 2000?

PROSECUTOR: Your Honor, we object. That conviction is remote since it occurred 6 years ago.

COURT: Overruled. The witness is directed to answer the question.

15. How should the Court rule on Prosecutor’s objection? Would the ruling be different if Convict’s conviction is still on appeal? Explain fully.

The State’s next witness is Expert, who intends to testify regarding his opinion that the substance seized during the search is indeed Methamphetamine. The following exchange occurs:

PROSECUTOR: Your Honor, the State next calls Expert, a forensic chemist.

DEFENSE LAWYER: We request that the jury be retired in order to conduct a voir dire examination of this witness.

COURT: Denied. You can examine him in the presence of the jury. You have wasted enough time.

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

As its last witness, the State calls Defendant. The following exchange occurs:

PROSECUTOR: Your Honor, the State of Texas calls Defendant. Only he can tell us what really happened.

DEFENSE LAWYER: Objection, your honor. Prosecutor knows full well that she cannot call Defendant to testify.

COURT: Objections sustained.

17. Is the Court's ruling correct? Even if the Court's ruling is correct, what, if anything, must you do further to preserve any issue of prejudice on appeal? Explain fully.

After the State rests, the following exchange occurs:

DEFENSE LAWYER: Your Honor, the State has rested, and prior to calling my first witness, I now wish to make a brief opening statement to the jury.

COURT: Your request is denied as untimely. Let's proceed.

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

As your first witness you intend to call Associate, who was Defendant's business partner at the time of the offense. Although properly subpoenaed, Associate refuses to appear, saying "he doesn't want to get involved."

19. What action should you take in response to Associate’s non-compliance with your subpoena? Explain fully.

In a desperate last-ditch effort to save himself, Defendant takes the stand in his own behalf. On cross-examination, the following exchange occurs:

PROSECUTOR: Mr. Defendant, although you now deny that you are guilty of this offense, that’s not what you told your lawyer’s paralegal is it? Didn’t you admit this whole sorry episode to her?

DEFENSE LAWYER: Objection, your Honor.

20. On what grounds should you object to this question? How should the Court rule? Explain fully.

Criminal Procedure and Evidence – July 2006

The paragraph numbers correspond to the question number on the exam.

1. Most examinees knew that Defendant has a Fifth Amendment right against being compelled to testify and that Defendant can consult with an attorney outside the courtroom. Many examinees knew that Defendant can be compelled to appear. Fewer examinees noted that Defendant can waive his rights and that his answers can be used against him.
2. While many examinees correctly responded that the Court cannot compel Defendant to file and present his pretrial motions within three days after the indictment is returned, fewer stated that Defendant is entitled to ten days. Very few examinees noted that the ten days can be waived with Defendant's consent.
3. Many examinees knew that an evidentiary search-warrant affidavit must specify that the property sought is evidence of the offense and/or that the property is located at the place to be searched.
4. Many examinees correctly responded that Defendant should file a motion to suppress seeking to exclude the fruits of the search. Many examinees also stated that the motion should allege that the affidavit's contents are insufficient under the Texas Code of Criminal Procedure or that the affidavit did not establish probable cause, although most examinees failed to include both grounds in their responses.
5. About half of the examinees explained that the State is entitled to pursue an interlocutory appeal following the granting of a motion to suppress, although many erroneously responded that the State must seek a writ of mandamus. Some examinees knew that the State must file its notice of appeal within fifteen days, although very few knew that the State must certify that the appeal is not for delay.
6. Many examinees correctly stated that Prosecutor is required to turn over a copy of Defendant's statement because it is exculpatory. Only a few examinees further stated that disclosure is mandatory under the Texas Code of Criminal Procedure.
7. Many examinees correctly responded that the Court must deny the State's global motion requesting all defense witnesses and that the Court should order discovery of experts. Only a few examinees noted that Texas has no reciprocal criminal discovery. Some examinees discussed only Defendant's motion even though the question asks how the Court should rule on the State's motion.
8. Most examinees knew that a proper application for felony probation must state that Defendant has no previous felony convictions in any jurisdiction. Many examinees also stated that the application must be sworn, although fewer examinees stated that the application must be filed pretrial.
9. Nearly all examinees correctly named three admonishments that the Court must give Defendant before accepting his felony plea of guilty.

10. Nearly all examinees knew that Defendant may request a jury shuffle to change the seating order of the venire members, that the shuffle should be requested before voir dire, and that only one shuffle is allowed per case. Only a few examinees further noted that a shuffle does not mean a new venire panel or that denial of a shuffle request is reversible error.
11. Nearly all examinees correctly identified two or three challenges for cause that can be made by either the State or the defense.
12. Nearly all examinees correctly stated that the trial court should sustain Defendant's objection because an offer to compromise is inadmissible.
13. Most examinees knew that the Court should overrule Prosecutor's objection and that sanctions for failure to produce the report include striking the evidence or instructing the jury to disregard. Many examinees further responded that the Court could sanction Prosecutor by granting a mistrial. Only a few examinees noted that Defendant would be entitled to a reasonable time to inspect the report.
14. Most examinees knew that Defendant should object on the grounds that the evidence constitutes irrelevant extraneous acts offered to show character conformity and that the probative value of the evidence is substantially outweighed by the danger of unfair prejudice.
15. Nearly all examinees correctly stated that the Court should overrule Prosecutor's objection because the conviction is less than ten years old. Many examinees knew that the conviction would be inadmissible if it were still on appeal and hence non-final.
16. Many examinees knew that the Court erred in denying Defendant's request to voir dire the expert outside the jury's presence. Very few examinees further stated that such voir dire is conducted prior to the expert giving his opinion or disclosing the underlying facts and data. A number of examinees erroneously stated that the Court's ruling is correct because Defendant must voir dire the expert in the jury's presence.
17. Nearly all examinees knew that the Court ruled correctly on Defendant's objection to being called by Prosecutor to testify. Most examinees further stated that Defendant should proceed to an adverse ruling, including a request for a curative instruction and a mistrial in order to preserve any issue of prejudice on appeal.
18. Nearly all examinees correctly stated that the Court's ruling is incorrect because Defendant can make his opening statement either immediately following the State's opening or after the State rests its case-in-chief.
19. Most examinees knew that Defendant should seek a writ of attachment to have the witness brought to court. Some examinees further noted that Defendant is entitled to an attachment forthwith.
20. Many examinees correctly responded that the Court should sustain Defendant's objection based on the attorney-client privilege, which extends to agents of the attorney.