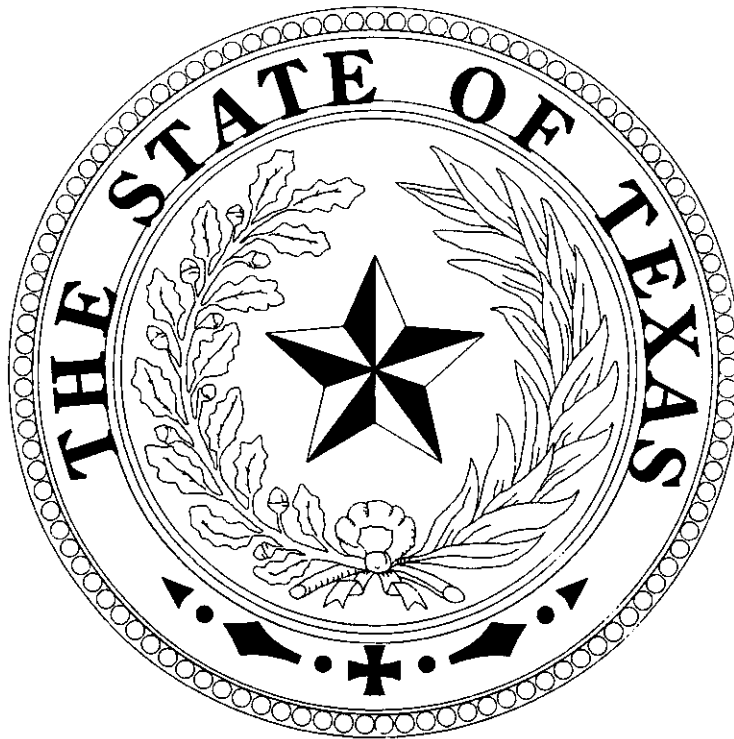


Examinee  
Number

Exam  
Date JULY 2008

# Criminal Procedure & Evidence

[This Criminal booklet is one part of the Procedure & Evidence session. Both the Civil and the Criminal booklets must be completed during the 90 minute Procedure & Evidence testing session.]



## TEXAS BAR EXAMINATION

COPYRIGHT © 2008 TEXAS BOARD OF LAW EXAMINERS  
THIS MATERIAL, OR ANY PORTION HEREOF, MAY NOT BE REPRINTED WITHOUT THE ADVANCE WRITTEN PERMISSION OF  
THE TEXAS BOARD OF LAW EXAMINERS.

**YOUR ANSWERS MUST BE LIMITED TO THE 5 LINES PROVIDED AFTER EACH QUESTION. ANYTHING MORE THAN 5 LINES WILL NOT BE GRADED.**

### **CRIMINAL PROCEDURE & EVIDENCE**

On February 4, 2008, a 19 year-old white female (“Defendant”) with blue eyes, who was 5'4" tall and 130 pounds, entered Pharmacy in Houston, Texas. As Defendant began stuffing boxes of Cold Medicine, which can be used to make methamphetamine, into her Designer purse, a store employee (“Clerk”) grabbed Defendant’s arm and accused her of shoplifting. Defendant grabbed a pair of scissors from the store’s counter, held them to Clerk’s throat, and yelled: “Let me go, or I’ll cut you bad!” Clerk released Defendant, and Defendant fled with numerous boxes of Cold Medicine.

Ten blocks from Pharmacy and just minutes later, Defendant ran in front of and was hit by a police car driven by a police officer (“Officer”). At the time Officer hit Defendant, Officer heard the following bulletin on his radio: “Robbery involving Cold Medicine at Pharmacy just reported by Clerk, who describes perpetrator as a white female with blue eyes, approximately 20 years old, 5'2" to 5'8" tall, weighing 110 to 150 pounds, and carrying a Designer purse.” Defendant tried to flee, but Officer arrested her for robbery because she fit the description in the radio bulletin and was carrying her Designer purse with three boxes of Cold Medicine sticking out of it. Defendant was treated for a broken right arm at a local hospital, taken to jail, and charged with the felony of aggravated robbery.

On February 5, 2008, the Court appointed Lawyer to represent Defendant. Lawyer, who was working on an appellate brief at the time, made no effort to contact Defendant until February 12, 2008, when he met with Defendant in jail. At Defendant’s examining trial that same day, the Court found probable cause and set bail at \$50,000. Four months later, Defendant, who could not afford the \$50,000 bail, was still sitting in jail, and nothing had happened in her case. On June 18, 2008, the Court replaced Lawyer with you as Defendant’s appointed counsel.

- 1. Did Lawyer make a timely effort to contact Defendant, and was the Court authorized to replace Lawyer based on his effort to contact Defendant? Explain fully.**

---

---

---

---

---

When you meet with Defendant on June 18, 2008, she asks you whether you can get her \$50,000 bail reduced. When you phone the prosecutor to discuss a reduction in bail, the prosecutor responds: “No way! I’m not ready for trial, and I don’t intend to let ‘Miss Scissorhands’ loose on the streets while I get ready for trial.”

**2. What legal basis is there, if any, for the Court to reduce Defendant's bail in these circumstances? Explain fully.**

---

---

---

---

---

Through your efforts, Defendant is released on bond. In a subsequent meeting with Defendant, she asks you whether Officer's arrest of her was valid since Officer did not see her commit any crime.

**3. Was Officer's arrest of Defendant valid? Explain fully.**

---

---

---

---

---

The prosecutor informs you that the Harris County grand jury will meet in a day or two to consider whether to indict Defendant.

**4. If Defendant is subpoenaed to appear before the grand jury, what warnings must she receive, if any? Explain fully.**

---

---

---

---

---

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

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

THE GRAND JURY OF HARRIS COUNTY, STATE OF TEXAS, duly elected, tried, empaneled, sworn, and organized as such at the January Term, A.D. 2008, upon their oaths do present in said term that Annie L. David on or about the 4<sup>th</sup> day of February, A.D. 2008, did then and there, while in the course of committing theft of property and with intent to obtain or maintain control of said property, intentionally and knowingly threaten Clerk with imminent bodily injury by use of a deadly weapon, to-wit: a pair of scissors, that in the manner of its use and intended use was capable of causing death and serious bodily injury.

AGAINST THE PEACE AND DIGNITY OF THE STATE.

Ambrose Burnside  
FOREPERSON OF THE GRAND JURY

5. What defects, if any, are there in this indictment? Explain fully.

---

---

---

---

---

---

When you and Defendant appear for Defendant's arraignment, the Court calls Defendant's name during the arraignment as "Annie L. David," exactly as it is shown in the indictment. Defendant's true name is Elizabeth K. Davis, not Annie L. David.

**DO NOT CONTINUE YOUR ANSWER IN THIS SPACE.**

6. **Can you wait until trial to challenge the error in the indictment concerning Defendant's name, and are there different consequences if you raise it now or if you wait until trial to raise it? Explain fully.**

---

---

---

---

---

Prior to trial, you decide that it would be a good idea to take the oral deposition of Clerk.

7. **What procedure must you follow before you will be allowed to take Clerk's oral pretrial deposition?**

---

---

---

---

---

Defendant decides to plead guilty to the offense as charged in the indictment. During the guilty plea hearing, the Court asks her to sign a document that contains a number of admonitions with regard to her guilty plea. When Defendant says that she cannot sign the document because she has a broken right arm, the Court refuses to let Defendant plead guilty and sets the case for trial in three weeks.

**DO NOT CONTINUE YOUR ANSWER IN THIS SPACE.**

**8. Does the Court have to make the guilty plea admonitions in writing and have Defendant sign them, or can Defendant plead guilty even if she cannot sign the written admonitions? Explain fully.**

---

---

---

---

---

Defendant tells you that, if she is convicted, all she really wants is a sentence of community supervision.

**9. Can the Court or a jury sentence Defendant to community supervision if she is convicted of aggravated robbery? Explain fully.**

---

---

---

---

---

In a search warrant affidavit, Officer makes the following statement, which he knows to be false in every respect: "I have learned from a reliable informant that, within the past twenty-four hours, the informant was in Defendant's apartment and observed Defendant manufacturing methamphetamine on the premises." Based on Officer's affidavit, a search warrant is issued authorizing a search of Defendant's apartment. Seven days after the warrant is issued, Officer executes the warrant and finds a pipe that is used for smoking crack cocaine in Defendant's apartment.

**DO NOT CONTINUE YOUR ANSWER IN THIS SPACE.**

**10. What procedural step should you take to challenge the issuance of the search warrant, what must you show in support of your position, and what relief should you request? Explain fully.**

---

---

---

---

---

**11. Is there any basis on which to challenge the execution of the search warrant? What procedural step, if any, can you take to challenge the execution of the search warrant? Explain fully.**

---

---

---

---

---

Assume that you did not and will not raise any challenges to the issuance and execution of the search warrant. Prosecutor tells you that he intends to discuss, during his opening statement at trial, the crack pipe found in Defendant's apartment.

**12. What procedure should you employ in an effort to prevent this action by Prosecutor? What should you do to preserve the issue for appeal in the event Prosecutor refers to the crack pipe during his opening statement? Explain fully.**

---

---

---

---

---

Prior to trial, you learn that no one from the hospital where Defendant was treated for her broken arm will be available to testify for Defendant at trial. You would like to introduce the hospital's records into evidence because they show that Cold Medicine was not among Defendant's belongings when she was admitted for treatment.

- 13. What must you do before trial in order to ensure that the hospital's records are admissible into evidence at trial without the presence of any witness from the hospital?**

---

---

---

---

---

On the day of Defendant's trial, you and Defendant show up in court for jury selection. You notice that 15 out of the first 20 venire persons have lapel pins bearing the following logo: "IPWU: International Pharmacy Workers Union." Since Clerk will be testifying at trial, the lapel pins make you feel a bit uncomfortable.

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

---

---

---

---

---

Later during jury selection, you question a woman who is wearing one of the IPWU lapel pins. She states that pharmacies are easy targets for "robbers and thugs" and that she would "absolutely and without a doubt" believe the testimony of a pharmacy employee no matter what.

**DO NOT CONTINUE YOUR ANSWER IN THIS SPACE.**

**15. What action, if any, can you take to strike this woman from the jury, and on what legal ground?**

---

---

---

---

---

During trial, the physician who interviewed Defendant when she was treated at the hospital for a broken arm on the day of the robbery, testifies as follows:

PROSECUTOR: Now, doctor, in addition to being a physician, are you an ordained minister?

PHYSICIAN: Yes, I am.

PROSECUTOR: Did you counsel Defendant spiritually?

PHYSICIAN: No, not at all. I just asked her how she broke her arm, and she told me that she ran in front of a car as she was fleeing a robbery.

DEFENSE COUNSEL: I object, your Honor! This information is inadmissible and confidential under the physician-patient privilege and as a statement to a clergyman.

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

---

---

---

---

---

The prosecution calls Clerk as its next witness, and Clerk testifies about the facts of the robbery. During your cross-examination of Clerk the following occurs:

DEFENSE COUNSEL: Clerk, isn't it true that you were convicted of the felony of kidnapping 8 years ago and that, during the kidnapping, you kicked the victim in the shins?

CLERK: Well, I was convicted, but...

PROSECUTOR: Your Honor, I object to Defense Counsel's question!

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

---

---

---

---

---

As its next witness, the prosecution calls Customer, who was in Pharmacy on February 4, 2008, and observed the robbery. Customer testifies that she never saw Defendant pick up, hold, or use a pair of scissors or any other dangerous weapon. If the jury believes Customer, it could decide to convict Defendant of robbery rather than aggravated robbery.

**18. What procedural step can you take to give the jury the option of convicting Defendant of robbery rather than aggravated robbery? When and how should you take that step?**

---

---

---

---

---

Before closing argument, you ask the Court to permit you to argue last to the jury. Prosecutor objects and asks that the Court allow him to argue last.

**19. How should the Court rule, and how are the order and number of arguments regulated in Texas criminal cases? Explain fully.**

---

---

---

---

---

The jury finds Defendant guilty of aggravated robbery, and Defendant is sentenced to prison. Because Defendant punched Officer when he arrested her on February 4, 2008, the grand jury indicts Defendant for resisting arrest on February 4, 2008, by “intentionally and knowingly preventing and obstructing a person she knew to be a peace officer from effecting an arrest by using force against the peace officer.”

20. Does it violate the Double Jeopardy Clause for the grand jury to indict Defendant for resisting arrest during her flight from Pharmacy now that she had been convicted of aggravated robbery at Pharmacy? Explain fully.

---

---

---

---

---

**DO NOT CONTINUE YOUR ANSWER IN THIS SPACE.**

**THIS CONCLUDES THE CRIMINAL PROCEDURE AND EVIDENCE QUESTIONS. CIVIL PROCEDURE AND EVIDENCE QUESTIONS ARE CONTAINED IN A SEPARATE BOOKLET.**