

All events related in this exam occurred in the State of Texas and you should assume that Texas law applies unless otherwise stated. This is an open book, essay exam containing five short essay questions. You may answer the questions in any order that you choose.

Statutes specifically referred to in the questions are photocopied as an appendix to this exam. This does not mean that all possible Texas statutes that might have a bearing on the issues raised are included in the appendix.

Read the exam in its entirety first. Because there are five questions, it is important to budget your time carefully. GOOD LUCK!!!

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Question One - 10 Points

Peter Prolific was convicted of bigamy under 25.01 Texas Penal Code. On appeal, Prolific argued that his conviction should be reversed because his indictment was fundamentally defective in that it omitted an essential element of the crime. The indictment tracked the language of 25.01(1)(A) alleging in part that: "Peter Prolific did . . . purport to marry one Victoria Vixen, a person other than Prolific's spouse, under circumstances that would but for the actor's prior marriage to Teresa Tedium Prolific, constitute a marriage."

Prolific argued that, to state an offense of bigamy under 25.01(1)(A), a culpable mental state must be alleged. The state argued that bigamy under Section (1)(A) of 25.01 Texas Penal Code is a strict liability offense and no mens rea need be alleged.

Assume that you are a member of the Texas Court of Criminal Appeals. How would you decide the issue? Explain your conclusion.

Question Two - (25 Points), Three (25 Points), and Four (20 Points)

Stanley Staid was a little worried about his daughter Cathy. Cathy had been an honor student and a cheerleader in high school but shortly after her 19th birthday she began dating Randy Rakish, a member of a motorcycle gang and a religious cult that Stanley considered to be "wierd." Cathy spent all of her time at Rakish's home much to the dismay of Stanley Staid. Stanley decided that he must somehow take his daughter away from the devious influence of Rakish.

Stanley was afraid to go near Rakish's hilltop home which was usually guarded by armed members of the motorcycle gang. Stanley asked his brother Les Staid for advice. Les was a police officer who was familiar with the notorious behavior of Rakish. When Stanley told Les that Cathy spent all of her time with Rakish, Les quickly concluded that Cathy must be forcibly removed from Rakish's home and "deprogrammed."

"You'll never be able to talk to her rationally" Les said,

"He's probably got her on drugs and she's been so brainwashed that she'll never listen to you."

"But what can I do?" pleaded Stanley.

"I've got an idea" responded Les. "I'll type up a search warrant to make it look official; I'll get you a police uniform and we'll go up there and get inside and take Cathy away. Then we can sit on her out at my place in the country for a few days until she comes to her senses."

Stanley was dubious, but after hours of discussion during which Les insisted that it was the only way, Stanley finally agreed. Les found an old police uniform for Stanley and began to give him training in basic self-defense techniques, including the use of the gun and nightstick that Les also provided.

Les began to regret his involvement in the scheme. Stanley was hopeless as a police officer. One night after Stanley accidentally discharged his gun nearly hitting his brother, Les decided to convince Stanley to give up the idea. "Cathy is just going through a phase" Les reasoned, "Now give me the gun back and go home and forget about it."

Stanley went home but he could not forget about the scheme. He still had the uniform and nightstick that his brother had given him. Impulsively, Stanley put the uniform on and drove to Rakish's home. To his surprise, there did not appear to be anyone guarding the home. Stanley knocked on the front door. Rakish opened the door a minute later.

"Police officer" squeaked Stanley, "I've got a warrant to search this place."

In fact, Stanley did not have even the phony warrant that he had planned to get through his brother. Rakish invited Stanley in however, saying "Don't worry about a warrant, you can come in. I've got nothing to hide."

Stanley eagerly accepted the invitation and began exploring the house. He discovered that the house apparently was empty. Discouraged, Stanley sat down and took off his hat. Rakish stared at Stanley intently. After a moment he said: "Don't I know you?" Stanley quickly put his hat back on but it was too late. "Yeah, you're Cathy's father aren't you - you S.O.B.!" Rakish advanced towards Stanley. "I'll teach you to meddle in our lives," Rakish said.

Stanley turned to run but he tripped over an electrical cord, knocking an end table with a burning oil lamp to the floor. Stanley noticed that the lamp had started some magazines burning but he was preoccupied by the sight of Randy Rakish advancing towards him with his fist clenched.

Stanley closed his eyes and swung his nightstick. He heard a dull thud and opened his eyes, and to his astonishment, saw that Rakish had fallen to his knees, blood gushing from his head. Stanley struck another blow to the head of Rakish and then another. Stanley later told the police that he was in a great panic and that he probably struck Rakish "nine or ten times on the head."

As Rakish fell from his knees to the floor, Stanley noticed for the first time, that Rakish held a knife in his hand. As Stanley continued to strike Rakish, he fell forward onto the knife that he held in his hand. Stanley ran from the house. Before starting his car, Stanley noticed that the fire which had started from the falling oil lamp had spread and flames several feet high now flickered in the window of the room from which Stanley had just fled. Stanley felt numb, unable to move, he watched impassively as the fire spread until most of the house was engulfed by flames.

Finally, Stanley started the car and drove home. Stanley called his brother Les and told him what had happened. "I've been home alone all night, I'll just say you were with me all evening." Stanley thanked his brother, but after the conversation, Stanley decided to drive to the police station and confess.

Stanley told the police of his plans with his brother Les, but insisted that his brother was not to blame and that they had agreed to abandon their plans. Stanley said that he had made an independent decision to go to the home of Rakish, but only to try to talk to Cathy, not to forcibly remove her from the house as he had originally planned with his brother. Stanley said that he used the club because he feared for his safety because of Rakish's size and reputation for violence.

Rakish's body was found in the rubble that was once his house. Another body was found in an upstairs bedroom. Stanley had looked in the room but apparently did not see Rakish's friend because he was sleeping in a sleeping bag behind some furniture in the room. A pathologist examining the body of Rakish said that it was so badly burned that he could not verify whether Rakish had received blows to the head with a blunt object or a stab wound. The pathologist said that there was simply no way of knowing if Rakish was alive when his body was burned in the fire.

#### Question Two - 25 Points

As a noted expert on the crime of homicide, the District Attorney has asked you to write a brief memo outlining what possible homicide offense or offenses under Chapter 19 of the Texas Penal Code might be charged against Stanley Staid (but not his brother Les in this question). The D.A. has specified that he would like you to discuss potential problems for the state in obtaining a conviction for any of the possible convictions, the possibility of more than one homicide type conviction for Stanley and, also, which homicide offenses might be submitted to the jury as a lesser included offense of a higher grade of homicide offense. Limit your consideration in this question to offenses under Chapter 19 of the Texas Penal Code but you may consider offenses which may be used in combination with Chapter 19, such as the inchoate offenses in Chapter 15, if you think that they are applicable.

#### Question Three - 25 Points

The Grand Jury has returned indictments against Les Staid for Attempted Murder (15.01 & 19.02), Conspiracy to Kidnap (15.02 & 20.03), Solicitation of Burglary (15.03 & 30.02), Felony Murder (19.02(a)(3)), and Hindering Apprehension or Prosecution (38.05). Stanley Staid has been indicted for 2 counts of Felony Murder (19.02(a)(3)), Arson (28.02), Burglary (30.02), Aggravated Assault (22.02), and Impersonating a Public Servant (37.11). Assume that you have been appointed to represent both Stanley and Les Staid. Briefly outline your defense strategy. What defenses, justifications, procedural limitations for the state, or potential weaknesses in required proof by the state, etc. occur to you. Are there charges for which no valid defense attack appears from the information that you have been given. What potential punishment do your clients face?

Question Four - 20 Points

Assume that you are the presiding judge at the jury trial of Stanley and Les Staid and assume that the facts that you have been given were adduced by evidence at trial. The state has requested that attempted murder (15.01 and 19.02(A)(1)) be submitted as a lesser included offense for all felony murder charges (19.02(a)(3)), and that reckless damage or destruction (28.04) be instructed as a lesser included of the arson charge (28.02) against Stanley Staid. The defense attorney for Stanley Staid has asked that criminal trespass (30.05) be submitted as a lesser included offense of burglary (30.02). Would you grant any of these requests? Why or why not?

Question Five - 20 Points

Larry Luck was divorced from his wife Sally in June of 1981. Sally was given custody of their two children (who were then age 1 and 2). Larry was ordered to pay \$200 per month in alimony and \$600 per month in child support. Larry made all alimony and child support payments for a year and a half but he suddenly stopped completely in January of 1983.

In December of 1982, Larry lost his job when the industry where he worked closed its Texas plant. In January of 1983, Larry became seriously ill and had to be hospitalized for 3 weeks. Larry's medical insurance through his job ended with the termination of his employment and he had not replaced it with private insurance before his illness. As a result Larry faced thousands of dollars in medical bills with no source of income.

Sally also did not work. She had no source of income other than Larry, no job training and she had 2 pre-school children to care for. When the child support and alimony payments stopped and Larry refused to sell his 1978 pickup truck and his few possessions to make the payments, she filed a civil suit against Larry. Not content with this action however, Sally persuaded the district attorney to file an information charging Larry with criminal nonsupport under 25.05 Texas Penal Code.

Larry presented evidence of his medical expenses and loss of employment at trial in September, 1983, claiming that he was not able to provide the support that he was legally obligated to provide. Larry also testified that he was unable to collect unemployment insurance for several months and when he began collecting it he had to pay his rent and other bills that had become several months past due. At trial in September, 1983, Sally presented evidence that it was undisputed that Larry had provided no child support at all since January of 1983.

At the close of the evidence, the trial court gave two instructions which Larry Luck challenges on appeal from his conviction. Pursuant to 25.05(f) the trial court instructed the jury that:

"The defendant has presented evidence that he could not provide the support that he was legally obligated to provide. If the defendant has persuaded you of this fact by a preponderance of the evidence then you should return a verdict of not guilty."

Pursuant to 25.05(b), the trial court instructed the jury that:

"Proof that the defendant has contributed no support or insufficient support to his children who are in needy circumstances, is prima facie evidence of the defendant's guilt of the charged offense. The state

must prove beyond a reasonable doubt that the defendant contributed insufficient or no support and the state must prove beyond a reasonable doubt that the defendant's children are in needy circumstances. If you have a reasonable doubt about either of these facts then the presumption fails and you shall not consider it for any purpose. If you are convinced of these facts beyond a reasonable doubt then you may find that the defendant intentionally or knowingly failed to provide support that he is legally obligated to provide for his children younger than 18 years, but you are not required to so find."

On appeal, Larry Luck argued that both instructions violated due process and that his conviction should be reversed. Assume you are an appellate court judge who must write a brief opinion on this issue. Do you agree with Luck? Why or why not?

**Sec. 15.01. Criminal Attempt.** (a) A person commits an offense if, with specific intent to commit an offense, he does an act amounting to more than mere preparation that tends but fails to effect the commission of the offense intended.

(b) If a person attempts an offense that may be aggravated, his conduct constitutes an attempt to commit the aggravated offense if an element that aggravates the offense accompanies the attempt.

(c) It is no defense to prosecution for criminal attempt that the offense attempted was actually committed.

(d) An offense under this section is one category lower than the offense attempted, and if the offense attempted is a felony of the third degree, the offense is a Class A misdemeanor.

**Sec. 15.02. Criminal Conspiracy.** (a) A person commits criminal conspiracy if, with intent that a felony be committed:

(1) he agrees with one or more persons that they or one or more of them engage in conduct that would constitute the offense; and

(2) he or one or more of them performs an overt act in pursuance of the agreement.

(b) An agreement constituting a conspiracy may be inferred from acts of the parties.

(c) It is no defense to prosecution for criminal conspiracy that:

(1) one or more of the coconspirators is not criminally responsible for the object offense;

(2) one or more of the coconspirators has been acquitted, so long as two or more coconspirators have not been acquitted;

(3) one or more of the coconspirators has not been prosecuted or convicted, has been convicted of a different offense, or is immune from prosecution.

(4) the actor belongs to a class of persons that by definition of the object offense is legally incapable of committing the object offense in an individual capacity; or

(5) the object offense was actually committed.

(d) An offense under this section is one category lower than the most serious felony that is the object of the conspiracy, and if the most serious felony that is the object of the conspiracy is a felony of the third degree, the offense is a Class A misdemeanor.

**Sec. 15.03. Criminal Solicitation.** (a) A person commits an offense if, with intent that a capital felony or felony of the first degree be committed, he requests, commands, or attempts to induce another to engage in specific conduct that, under the circumstances surrounding his conduct as the actor believes them to be, would constitute the felony or make the other a party to its commission.

(b) A person may not be convicted under this section on the uncorroborated testimony of the person allegedly solicited and unless the solicitation is made under circumstances strongly corroborative of both the solicitation itself and the actor's intent that the other person act on the solicitation.

(c) It is no defense to prosecution under this section that:

(1) the person solicited is not criminally responsible for the felony solicited.

(2) the person solicited has been acquitted, has not been prosecuted or convicted, has been convicted of a different offense or of a different type or class of offense, or is immune from prosecution;

(3) the actor belongs to a class of persons that by definition of the felony solicited is legally incapable of committing the offense in an individual capacity; or

(4) the felony solicited was actually committed.

(d) An offense under this section is:

(1) a felony of the first degree if the offense solicited is a capital offense; or

(2) a felony of the second degree if the offense solicited is a felony of the first degree.

## CHAPTER 19. CRIMINAL HOMICIDE

**Sec. 19.01. Types of Criminal Homicide.** (a) A person commits criminal homicide if he intentionally, knowingly, recklessly, or with criminal negligence causes the death of an individual.

(b) Criminal homicide is murder, capital murder, voluntary manslaughter, involuntary manslaughter, or criminally negligent homicide.

**Sec. 19.02. Murder.** (a) A person commits an offense if he:

(1) intentionally or knowingly causes the death of an individual;

(2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual; or

(3) commits or attempts to commit a felony, other than voluntary or involuntary manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.

(b) An offense under this section is a felony of the first degree.

**Sec. 19.03. Capital Murder.** (a) A person commits an offense if he commits murder as defined under Section 19.02 (a)(1) of this code and:

(1) the person murders a peace officer or fireman who is acting in the lawful discharge of an official duty and who the person knows is a peace officer or fireman;

(2) the person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated rape, or arson;

(3) the person commits the murder for remuneration or the promise of remuneration or employs another to commit the murder for remuneration or the promise of remuneration;

(4) the person commits the murder while escaping or attempting to escape from a penal institution; or

(5) the person, while incarcerated in a penal institution, murders another who is employed in the operation of the penal institution.

(b) An offense under this section is a capital felony.

(c) If the jury does not find beyond a reasonable doubt that the defendant is guilty of an offense under this section, he may be convicted of murder or of any other lesser included offense.

**Sec. 19.04. Voluntary Manslaughter.** (a) A person commits an offense if he causes the death of an individual under circumstances that would constitute murder under Section 19.02 of this code, except that he caused the death under the immediate influence of sudden passion arising from an adequate cause.

(b) "Sudden passion" means passion directly caused by and arising out of provocation by the individual killed or another acting with the person killed which passion arises at the time of the offense and is not solely the result of former provocation.

(c) "Adequate cause" means cause that would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper, sufficient to render the mind incapable of cool reflection.

(d) An offense under this section is a felony of the second degree.

**Sec. 19.05. Involuntary Manslaughter.** (a) A person commits an offense if he:

(1) recklessly causes the death of an individual; or

(2) by accident or mistake when operating a motor vehicle while intoxicated and, by reason of such intoxication, causes the death of an individual.

(b) For purposes of this section, "intoxication" means that the actor does not have the normal use of his mental or physical faculties by reason of the voluntary introduction of any substance into his body.

(c) An offense under this section is a felony of the third degree.

**Sec. 19.06. Evidence.** In all prosecutions for murder or voluntary manslaughter, the state or the defendant shall be permitted to offer testimony as to all relevant facts and circumstances surrounding the killing and the previous relationship existing between the accused and the deceased, together with all relevant facts and circumstances going

to show the condition of the mind of the accused at the time of the offense.

**Sec. 19.07. Criminally Negligent Homicide.** (a) A person commits an offense if he causes the death of an individual by criminal negligence.

(b) An offense under this section is a Class A misdemeanor.

**Sec. 22.01. Assault.** (a) A person commits an offense if he:

(1) intentionally, knowingly, or recklessly causes bodily injury to another, including his spouse; or

(2) intentionally or knowingly threatens another with imminent bodily injury, including his spouse; or

(3) intentionally or knowingly causes physical contact with another when he knows or should reasonably believe that the other will regard the contact as offensive or provocative.

**Sec. 22.02. Aggravated Assault.** (a) A person commits an offense if he commits assault as defined in Section 22.01 of this code and he:

(1) causes serious bodily injury to another, including his spouse;

(2) causes bodily injury to a peace officer in the lawful discharge of official duty when he knows or has been informed the person assaulted is a peace officer; or

(3) uses a deadly weapon.

\*\* (a) A person commits an offense if he commits assault as defined in Section 22.01 of this code and he:

(1) causes serious bodily injury to another;

(2) causes bodily injury to a peace officer when he knows or has been informed the person assaulted is a peace officer;

(A) while the peace officer is lawfully discharging an official duty;

or

(B) in retaliation for or on account of the peace officer's exercise of official power or performance of official duty as a peace officer; or

(3) cause bodily injury to a participant in a court proceeding when he knows or has been informed the person assaulted is a participant in a court proceeding;

(A) while the injured person is lawfully discharging an official duty; or

(B) in retaliation for or on account of the injured person's having exercised an official power or performed an official duty as a participant in a court proceeding; or

(4) uses a deadly weapon.

(b) The actor is presumed to have known the person assaulted was a peace officer if he was wearing a distinctive uniform indicating his employment as a peace officer.

(c) An offense under this section is a felony of the third degree.

**Sec. 25.01. Bigamy.** (a) An individual commits an offense if:

(1) he is legally married and he:

(A) purports to marry or does marry a person other than his spouse in this state, or any other state or foreign country, under circumstances that would, but for the actor's prior marriage, constitute a marriage; or

(B) lives with a person other than his spouse in this state under the appearance of being married; or

(2) he knows that a married person other than his spouse is married and he:

(A) purports to marry or does marry that person in this state, or any other state or foreign country, under circumstances that would, but for the person's prior marriage, constitute a marriage; or

(B) lives with that person in this state under the appearance of being married.

(b) For purposes of this section, "under the appearance of being married" means holding out that the parties are married with cohabitation, and an intent to be married by either party.

(c) It is a defense to prosecution under Subsection (a)(1) of this section that the actor reasonably believed that his marriage was void or had been dissolved by death, divorce, or annulment.

(d) For the purposes of this section, the lawful wife or husband of the actor may testify both for or against the actor concerning proof of the original marriage.

(e) An offense under this section is a felony of the third degree.

**Sec. 25.05. Criminal Nonsupport.** (a) An individual commits an offense if he intentionally or knowingly fails to provide support that he can provide and that he was legally obligated to provide for his children younger than 18 years, or for his spouse who is in needy circumstances.

(b) Proof that the actor has contributed no support or insufficient support to his child, or to his spouse who is in needy circumstances, is prima facie evidence of a violation of this section.

(c) For purposes of this section, "insufficient support" means support less than the support needed by a child or spouse to meet the minimal requirements of the child or spouse necessary for food, clothing, shelter, and medical care.

(d) For purposes of this section, "child" includes a child born out of wedlock whose paternity has been admitted by the actor or has been established in a civil suit.

(e) Under this section, a conviction may be had on the uncorroborated testimony of a party to the offense and a spouse shall be a competent witness.

(f) It is an affirmative defense to prosecution under this section that the actor could not provide the support that he was legally obligated to provide.

(g) During the pendency of a prosecution under this section, the court, after notice and a hearing, may enter temporary orders providing for support and enforce such orders by contempt proceedings.

(h) Except as provided in Subsection (i) of this section, an offense under this section is a Class A misdemeanor.

(i) An offense under this section is a felony of the third degree if the actor:

- (1) has been convicted one or more times under this section; or
- (2) commits the offense while residing in another state.

**Sec. 28.02. Arson.** (a) A person commits an offense if he starts a fire or causes an explosion with intent to destroy or damage any building, habitation, or vehicle:

- (1) knowing that it is within the limits of an incorporated city or town;
- (2) knowing that it is insured against damage or destruction;
- (3) knowing that it is subject to a mortgage or other security interest;
- (4) knowing that it is located on property belonging to another;
- (5) knowing that it has located within it property belonging to another; or

(6) when he is reckless about whether the burning or explosion will endanger the life of some individual or the safety of the property of another.

(b) It is a defense to prosecution under Subsection (a)(1) of this section that prior to starting the fire or causing the explosion, the actor obtained a permit or other written authorization granted in accordance with a city ordinance, if any, regulating fires and explosions.

(c) An offense under this section is a felony of the second degree, unless bodily injury or death is suffered by any person by reason of the commission of the offense, in which event it is a felony of the first degree.

**Sec. 28.04. Reckless Damage or Destruction.** (a) A person commits an offense if, without the effective consent of the owner, he recklessly damages or destroys property of the owner.

(b) An offense under this section is a Class C misdemeanor.

**Sec. 30.05. Criminal Trespass.** (a) A person commits an offense if he enters or remains on property or in a building of another without effect consent and he:

- (1) had notice that the entry was forbidden; or
- (2) received notice to depart but failed to do so.

(b) For purposes of this section:

- (1) "entry" means the intrusion of the entire body; and
- (2) "notice" means:

(A) oral or written communication by the owner or someone with parent authority to act for the owner;

(B) fencing or other enclosure obviously designed to exclude intruders or to contain livestock; or

(C) a sign or signs posted on the property or at the entrance to a building, reasonably likely to come to the attention of intruders, indicating that entry is forbidden.

(c) An offense under this section is a Class B misdemeanor unless it is committed in a habitation or the actor carries a deadly weapon on or about a person during the commission of the offense, in which event it is a Class A misdemeanor.

**Sec. 37.11. Impersonating Public Servant.** (a) A person commits an offense if he impersonates a public servant with intent to induce another to submit to his pretended official authority or to rely on pretended official acts.

(b) An offense under this section is a Class A misdemeanor unless the person impersonated a peace officer, in which event it is a felony of the third degree.

**Sec. 38.05. Hindering Apprehension or Prosecution.** (a) A person commits an offense if, with intent to hinder the arrest, prosecution, conviction, or punishment of another for an offense, he:

(1) harbors or conceals the other;

(2) provides or aids in providing the other with any means of avoiding arrest or effecting escape; or

(3) warns the other of impending discovery or apprehension.

(b) It is a defense to prosecution under Subsection (a)(3) of this section that the warning was given in connection with an effort to bring another into compliance with the law.

(c) An offense under this section is a Class A misdemeanor.

**Sec. 30.02. Burglary.** (a) A person commits an offense if, without the effective consent of the owner, he:

(1) enters a habitation, or a building (or any portion of a building not then open to the public, with intent to commit a felony or theft);

(2) remains concealed, with intent to commit a felony or theft, a building or habitation; or

(3) enters a building or habitation and commits or attempts to commit a felony or theft.

(b) For purposes of this section, "enter" means to intrude:

(1) any part of the body; or

(2) any physical object connected with the body.

(c) Except as provided in Subsection (d) of this section, an offense under this section is a felony of the second degree.

(d) An offense under this section is a felony of the first degree:

(1) the premises are a habitation; or

(2) any party to the offense is armed with explosives or a deadly weapon; or

(3) any party to the offense injures or attempts to injure anyone in effecting entry or while in the building or in immediate flight from the building.