

Part Two. Essay Question. 50 Points

PART II. Essay Questions

You have 90 minutes to answer this portion of the exam, which consists of three essay questions worth a total of 50 points (a thirty point question and two ten point questions). Please write your answer in the bluebook(s) that will be provided to you with the exam question. Please write your answer with a blue or black ink pen or type your answer. For Part II of the exam only, you may use your textbook, notes, or any other material that you have prepared, borrowed, or purchased. Good luck!

Question One (30 Points)

Sam Suspect broke into the "Quick Loan Pawnshop" in San Antonio, Texas on April 1, 1994. Sam put some watches into a bag and was looking around for other merchandise when Otto Owner surprised him by coming out of the back room of the store with a shotgun. Sam was unarmed but he managed to wrestle the gun away from Otto and flee. Otto had triggered a silent alarm and police officers responding to it drove into the parking lot of the pawnshop as Sam ran through the lot with a pillow case containing the stolen watches and the shotgun that he had taken from Otto.

Otto ran out into the parking lot and yelled to the officers that the man fleeing through the parking lot had just burglarized his store and taken a shotgun like the one Otto was holding in his hand. Otto had obtained a second shotgun from his gun rack which was identical to the shotgun that had been taken by Suspect. The guns were a matched set that Otto always kept loaded with the same ammunition since his store had been the frequent target of burglars.

Without waiting for a response from the officers, Otto gave chase after Suspect, firing his weapon several times. Otto failed to heed the officers' warnings to put the gun down. Two officers set out on foot after Otto Owner and Sam Suspect as they ran through the back alleys of the commercial district which was nearly deserted in the early hours of the morning when the incident occurred.

After Suspect had been fired upon several times by both Otto and the two police officers, he climbed up a stairway to a balcony and fired a "warning shot" in the hope that his pursuers would stop or at least slow down. Suspect's shot drew a barrage of responsive fire from the officers and particularly Otto, who

fired his gun as fast as he could empty the chambers and re-load. Suspect cowered behind a small protective wall on the balcony, where he had become trapped. Suspect did not fire the gun again, perhaps because he would have had no more ammunition for the gun if he had fired all of the shells in the shotgun. During a brief pause in the gun fire, while Otto re-loaded, Suspect yelled out to stop firing and that he would surrender. An officer yelled for Suspect to throw down his weapon and Suspect did so. Complying with orders from a police officer, Suspect walked down from the balcony with his hands up and was arrested.

Otto and the several officers walked out from behind the various barricades that each had sought after Suspect fired his single shot. One of the officers was unaccounted for until a search of alley revealed the body of one of the police officers who had been killed by a single bullet that matched the ammunition used by Otto as well as the one bullet fired by Suspect. An autopsy later reported that the fatal bullet had come from above, but because both Suspect and Otto Owner fired their weapons from perches above the slain officers, it could not be determined which individual had fired the fatal shot.

As an Assistant District Attorney, you have been asked to draft a memo discussing what offense or offenses with which to charge Suspect. Your boss, the D.A. has specified that she would like you to discuss the possibility of obtaining a capital murder conviction, but also, to address potential problems with a capital charge and any lesser included offenses that might be appropriately be considered. Your instructions include a directive to discuss the question of whether and under what circumstances multiple convictions might be obtained and whether Otto Owner should be charged and could be charged successfully with any criminal offense. (Although Chapter 19, the homicide chapter, is included in the appendix of statutes, you should not necessarily limit your discussion to chapter 19 offenses).

Question Two (10 Points)

Billy Broke was ordered to pay child support for his son William Jr. to his former wife Betty, who was awarded custody of Will Jr. in a divorce proceeding. For two years, Billy made timely support payments in the amount stipulated in the court order. However, after Billy was laid off from his job in the oil fields, he stopped making payments, but he did nothing to notify the court of his changed economic circumstances.

Billy was arrested and charged with a violation of section 25.05 Texas Penal Code, Criminal Nonsupport. At trial, Billy's lawyer argues that Billy's non-payment was solely the result of indigency. Billy's attorney argues that a proposed jury instruction that tracks the statutory language of 25.05(d) is unconstitutional because it violates the due process requirement

of proof beyond a reasonable doubt in criminal cases. The statute and the proposed jury instruction provide: "It is an affirmative defense to prosecution under this section that the actor could not provide support for his child."

As the trial judge, write a brief memo discussing the merits of the defense claim and how you will handle this defensive matter.

Question Three (10 Points)

Use the same facts and statute as in the previous question, except assume for the purposes of this question only that the legislature amended 25.05(d) prior to the events and the trial described in the previous question to read:

"It is presumed that one who fails to make court-ordered child support payments does so intentionally or knowingly."

How would you rule on defense objections that the amended statute also violates due process. Would you instruct the jury about this statutory presumption and, if so, how would you word the instruction?