

APPLICANT NO. _____

**ARKANSAS BAR EXAMINATION
FEBRUARY, 2003**

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TORTS

Alice, a resident of Hometown, Arkansas, is employed as a night bookkeeper at the Hometown State Bank. Her normal working hours are from 4:00 p.m. until midnight. At 4:10 p.m. on January 27, 2003, Alice was late for work when she rolled through a stop sign and was struck on the left side of her vehicle by a car driven by Betty.

Betty is a 17 year old high school senior at Hometown High. She is the daughter of Mr. and Mrs. Dan Citizen, also of Hometown. Earlier that afternoon, Betty heard on the local Hometown, Arkansas, radio station of a big beer sale at Cajun Charlie's, a liquor store and video poker parlor located in Louisiana just south of Hometown, Arkansas. The legal drinking age in Louisiana is 21. Betty used a fake ID to purchase a six-pack of beer at Cajun Charlie's. Betty did not open the first beer until she was back in Arkansas. By the time she collides with Alice, Betty has consumed enough beer to register a .10 blood alcohol level, which is above the legal limit in Arkansas. At the time of the collision, Betty has the right-of-way but is doing 40 mph in a 35 mph zone and talking on her cell phone. Other than the damage to her car, Alice is uninjured, even though the air bag on her car, a new 2003 Zephyr Roadster worth \$35,000, failed to deploy.

Alice has come to you, her family attorney, for guidance as to what her legal rights are. Discuss the various tort issues and discuss who, if anyone, she might compel to pay her damages. What courts are available to her?

ARKANSAS ESSAY
ANSWER
TORTS
February, 2003

I. Alice's Case Against Betty

Alice can sue Betty for the tort of negligence. Betty has a duty to drive her car under a standard of care that, because she is engaging in "adult-like" behavior (driving a car), is the same as the standard for adults - namely, the "person of ordinary prudence" standard. In the language of Judge Learned Hand, she will be liable if the burden in engaging in risk-preventing conduct is less than the probability that the conduct will cause injury. This duty was clearly breached: she was drunk, speeding, and talking on the phone. The first two were violations of law. Although Arkansas does not have a "negligence per se" rule, such violations are strong evidence of negligent conduct. Moreover, the breach of this duty was a cause-in-fact (but-for cause) and proximate (foreseeable) cause of the injury (or, at the very least, there is a fact question for the jury). Finally, Alice has sustained damages (property damage to the car). That Betty was complying with the law in the sense that she had the right-of-way may create a fact question as to her negligence, but in light of the drunkenness and speeding, a court would likely hold her liable.

II. Alice versus the Citizen Family

Alice can also recover against Betty's parents. Arkansas law provides that when persons under 18 negligently cause an accident, the person's parents are vicariously liable if they gave permission to drive or signed the driving permit (more evidence is needed on this point).

III. Alice's Case Against Cajun Charlie's

Alice may be able to recover from Cajun Charlie's. Under either state's law, the legal driving age is 21. Again, Arkansas does not have a negligence per se rule. And Cajun Charlie's might not have breached its duty of care if the fake ID was especially convincing. If not, the collision was perhaps a but-for cause of the injury (a fact question) and was surely a proximate (foreseeable) result of a drunk minor behind the wheel.

IV. Alice's Products Liability Suit

The air bag failed to work, and so Alice might consider a suit against the air bag supply company, the Zephyr Company, the Zephyr retailer - all commercial suppliers. The most likely theory is a product defect - the test being the "consumer expectations" test. A consumer would certainly not expect this kind of malfunction. She might also try to recover for breach of the implied warranty of merchantability, because the air bag was not fit for the ordinary purpose for which it is intended. Note that the latter theory sounds in contract, so pure economic loss is recoverable. As for the former theory, Arkansas has a special rule that one can recover without physical injury if one can show that a product was "unreasonably dangerous."

Even so, the defect was not a cause-in-fact or proximate cause of any damages. The only damages are damages to the car - damages that occurred prior to the failed deployment of the air bag. Therefore, no recovery is possible on these theories (and certainly not negligence against the

commercial sellers).

V. Alice Versus Hometown Radio

Hometown Radio is perhaps liable for discussing the beer sale. It may have been unreasonable conduct, because it could have foreseen underage persons (or any persons for that matter) going on a long drive to get alcohol (thus creating a high chance that drinking and driving would be mixed). The broadcast was likely a cause-in-fact and perhaps proximate cause of the injury (close fact questions). Even so, the degree of fault is attenuated at best in light of the intervening negligence of Alice (discussed infra). (Note, however, that intervening negligence, unlike intentional torts, usually does not cut off the causal chain.) Finally, one should note that commercial speech is protected by the First Amendment, and so tort liability might be limited (C.F. *NY Times v. Sullivan* in defamation context). In short, liability is unlikely.

VI. Alice's Comparative Fault

Alice also has a duty - a duty to herself to engage in reasonable conduct. She likely breached this duty when she ran the stop sign. Again, violation of statute is evidence of negligence. This was likely a but-for and proximate cause of the injuries,

Arkansas has a comparative fault scheme in which damages will be apportioned among all joined defendants, and Alice's recovery will be reduced by her own percentage fault. Also, she cannot recover if her fault was equal to (or greater than) 50% - a likely scenario.

Defendants are jointly and severally liable. If they pay too much, they can maintain contribution actions against one another.

VII. Bank's Liability

Probably not liable to Alice on respondeat superior because commuting to work is outside the scope of liability - even if the employee should be at work and is speeding because late.

VIII. Damages.

The only damages are to the car, and possibly missed work to get it fixed. Punitive damages are possible if the conduct was wanton misconduct.

IX. Which Court

Alice can sue in Arkansas state court. Even the Louisiana seller can be sued there, because the Arkansas long-arm statute extends to the reach of the Due Process Clause. Cajun Charlie's no doubt sold much liquor to Arkansas residents, and so is susceptible to specific and general jurisdiction in Arkansas.

Alternatively, Alice can sue in Louisiana state court. But that is not attractive because these courts likely do not have jurisdiction over other defendants. Note, also, that federal court is unavailable in Louisiana because (a) the amount in controversy is under \$75,000 and (b) all defendants are not diverse.

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3 Pages
PROPERTY

Part I.

Ed Black owned 25 acres of land in north Washington County. The warranty deed was properly recorded. His best friend was Sammy Jones. In 1995, Sammy purchased 15 acres of this land from Black. The property Sammy purchased consisted of 15 acres of unimproved land with a small lake which contained some fish. The sole access to the property, which was then approximately 5 miles from the city limits, was from Highway 3, then on a 10 foot wide dirt path through Black's remaining farm land. Sammy's warranty deed, which was properly recorded, did not mention the easement.

Sammy built a small house on the property in 1996. In the spring and fall, he fished in the lake and stayed in the small house. He put gravel on the 10 foot wide strip from Highway 3 to his land and maintained it in that condition beginning in 1996. He named it Camp Fun.

Black died in 1997. Sammy and his unmarried sister, Muffy, inherited the remaining property of Black, the 10 acres, called the Blue Moon Farm. The will did not provide any right of survivorship.

In 2000, Sammy sells Camp Fun to Bill White, a llama farmer. The warranty deed from Sammy said nothing about an easement. By this time the city limits abutted the property and property values had increased tremendously.

In January 2001, Sammy and Muffy decide to sell Blue Moon Farm which has increased substantially in value. They listed the property for sale with Andy Agent, who showed it to a

number

of commercial developers, including the officers of Big City Homes. The officers noted during the inspections that there was a ten-foot wide gravel road from Highway 3 through Blue Moon Farm and a gate up to the llama farm that said “Camp Fun.”

The land off of Highway 3 at the time was dotted with million dollar homes. Sammy and Muffy convey the property to Big City Homes for \$1 million. The warranty deed does not recite any easement.

- A. Discuss the type of ownership or tenancy that Sammy and Muffy had in Blue Moon Farm. Apply the law to the facts presented and explain your rationale. Discuss why the other types of ownership (tenancies) are not applicable and the rationale.
- B. Can Big City put a gate up at Highway 3, blocking access to Camp Fun? Explain, applying the facts of the case to your rationale.

Part II.

In 1970, Lucy and Red Smith, husband and wife, purchased a tract of land in Pulaski County. They put a small doublewide on the property and built two gardens. They had one child, Jimmy. Lucy and Red died in 1994 and Jimmy continued to reside in the doublewide and grow vegetables in the gardens.

Sylvester Green owns the land to west and to the south of Jimmy Smith. In December, 1995, he built a road on the land which cut through the edge of the Smith property.

In January, 2003, Smith decides to sell his property. The surveyor advised him that Green’s road is partially on his land.

Smith comes to see you and asks you what you would advise him to do about the road and

his title.

- A. What type of action, if any, would you advise Smith to take? Explain your rationale.

- B. If Green did not know that he was on Jimmy's land when he built the road, would that alter your response? Explain why or why not, applying the rules to the recited facts.

- C. Assume that Jimmy was 13 when his parents died and that he was 22 when he comes to you for advice. Would that change your answer? Explain why or why not.

Part III.

The Browns, a married couple, built a home in 1995. They built the house by hiring various suppliers and other subcontractors. They sold that house and built a second home in 1998. As they had done with the first house, they hired the various suppliers and other subcontractors.

The Browns lived in the home for 2 years. The Greens, a married couple, through a real estate agent, approached them with an offer to buy the house in 2000. The Browns accept the offer which stated that the Greens would inspect the house themselves. The contract for sale was drafted by the Greens and stated that they had inspected the property and were accepting it "as is."

In 2001, the Greens noticed that the floors began to sag. They had the house inspected and learned that the floor and the underlying supports had to be totally replaced as a result of substantial old water and termite damage. They had the repairs done and the total cost was \$75,000. The repairs were finally completed in December, 2002.

The Greens come to you and ask you if they have any recourse against the Browns. What advice would you give them, applying the law to the facts.

ARKANSAS ESSAY
ANSWER
PROPERTY
February, 2003

A.

Sammy and Muffy took the property known as Blue Moon Farms as tenants in common. A conveyance to two or more persons in Arkansas is presumed to be a tenancy in common unless the presumption is rebutted. The presumption may be rebutted by the words "joint tenants with the right of survivorship." If such language had been present, then they would have been joint tenants. However, the will did not provide any right of survivorship.

Sammy and Muffy did not take as tenants by the entirety because they are not married. A conveyance to a husband and wife is presumed to be a tenancy by the entirety. However, since Sammy and Muffy were not married, they took as tenants in common.

Tenancies in common do not have a survivorship feature. Therefore, upon the death of either Sammy or Muffy while they owned the property, the half of the deceased would have been distributed to another under the intestacy statutes or as provided by will.

B.

Big City may not put up a gate at Highway 3 blocking access to Camp Fun. The easement on the property was passed to Sammy from Ed even though the deed was silent concerning the easement because Ed was the owner of both tracts of land before they were severed and Camp Fun was conveyed to Sammy. However, an easement is extinguished when the dominant and servient lands are united in the ownership. Assuming that this rule applies even if the servient parcel is owned by two persons when one of the persons also owns the dominant parcel, the easement was extinguished when Black died and Blue Moon Farm passed to Sammy and Muffy.

Despite this possibility of extinguishment of the easement, Bill White still has an easement over Blue Moon Farm by way of an easement by necessity. Easement by necessity arises when the only access to one's land is through an easement over another's property. The rationale behind an easement by necessity is that landlocked property left inaccessible renders the property valueless and of no use to the owner and society. Therefore, because the only access to Camp Fun is over Blue Moon Farm, Bill White has an easement over Blue Moon Farm by necessity.

Bill would have had an easement by prior use only if he had sold Blue Moon Farm to Big City.

Also, Arkansas law provides that a landowner may exercise a limited private right of condemnation and pay a landowner for the easement taken under this law. This might also provide Bill with an easement.

PART II

A.

It appears that Green has most likely acquired possession of a presumptive easement over Jimmy's land by way of adverse possession. In Arkansas, one can acquire property by adverse possession if he pays taxes on property contiguous to that being claimed by adverse possession, holds color of title to that contiguous property, exclusively occupies the property claimed, is uninterrupted in possession, visibly and openly occupies the property, actually physically possesses the property, possesses the property without the permission of its true owner and fulfills these requirements for seven years. Though the facts do not reveal whether all of these elements have been met, it appears they probably have been and the road has certainly been in existence for a little over 7 years. Smith should lose if a legal dispute over possession arises. Upon determining that the presumptive easement was in fact valid, I would recommend that Smith either try to get a quitclaim deed from Green for the easement or except it from the deed when he sells the land to prevent a later lawsuit from the purchaser.

B.

If Green did not know he was on Jimmy's land, then his possession would not be adverse and non-permissive. Therefore, Green would not have acquired title by adverse possession. Therefore, Jimmy can sell the land without concern of a later lawsuit from the purchaser.

C.

My answer would not change as one has only 3 years after a disability such as minority is removed to interrupt adverse possession. Because Jimmy is now 22, more than 3 years have passed since he turned 18 and the disability was removed.

PART III

The Greens have no recourse against the Browns because Arkansas law adheres to the rule of caveat emptor. The law in Arkansas is that a buyer taking "as is" without any express warranties from the seller takes the property as he receives it and cannot sue his seller. The exception to this rule is if a buyer purchases from a builder/vendor. Though the Browns built the home, they are not vendors of homes as the facts do not reveal such a status. Because they do not build and sell homes regularly, they are not subject to liability as builder/vendors. A reasonable inspection of the property should have revealed the termite and water damage. The Greens inspected the property and buyer beware is the law in Arkansas.

However, the Greens can sue the builder of the property for breach of the implied warranty of habitability as privity between the plaintiff and builder is not required and the 5-year statute of limitations on the claim has not expired.

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1 Page
WILLS, ESTATES AND TRUSTS

Father has been married for thirty years. He has three adult children: Amy, Bart, and Carl. Amy has one son Dean. Bart has no children. Carl has twin daughters, Edie and Evelyn. Father makes the following will which is properly executed and witnessed and which you may assume is valid:

I, Father, being of sound mind and body, leave my entire estate consisting of \$900,000 to my children, Amy and Carl, per capita.

Carl dies before Father. When Father dies, all remaining potential beneficiaries are alive.

Questions:

1. Identify all potential beneficiaries and discuss whether they can inherit under this will.
2. Explain how the \$900,000 estate will be divided.

ARKANSAS ESSAY
ANSWER
WILLS, ESTATES, AND TRUSTS
February, 2003

Question 1. Who can inherit?

1. Wife. Although Wife is not provided for in the will, she is entitled to receive the following:

a) Dower. Since there are descendants of Father, Wife's dower rights consist of 1/3 life estate in any real property, and 1/2 absolute in any personal property. This right of dower is exempt from any creditor's claims.

b) Homestead. Wife is entitled to retain the family home (80 acres if rural, 1/4 acre if urban) for life. (Also, any minor children would be entitled to remain in the home until they reach 21.)

c) Family Allowances. Wife could also receive family allowance, which would include \$2,000 against creditors or \$1,000 as against beneficiaries, the household furnishings, \$500/month for 2 months as living expenses, and the right of quarantine (the right to reside in the home for a reasonable time).

2. Bart

Bart is a pretermitted child (a child not mentioned in the will). As such, he is entitled to take the share he would have taken had Father died intestate.

3. Edde and Evelyn

Edie and Evelyn do not take under the will. Since Father left his estate to Amy and Carl; "per capita," and Carl is dead, Amy takes it all, and Edie and Evelyn get nothing. Had the will read "per stirpes," Edie and Evelyn would have divided Carl's share.

4. Amy

Since the estate was left to Amy and Carl, per capita, and Carl is deceased, Amy gets all the heritable estate.

5. Dean

Dean does not take, since Amy is alive. Amy could, of course, disclaim her inheritance, in which case it would pass to Dean, as though Amy were dead. However, according to the fact presented, Dean gets nothing.

Question 2. How is the estate divided

1. Wife's dower, homestead and family allowances come off the top. What is left after that is the heritable estate.

2. If Bart so elects, he can receive $\frac{1}{3}$ of the heritable estate. This is so because, even though the will says "per capita," Bart is taking what he would have received if Father died intestate. Arkansas's rule for intestate succession of descendants is per capita with representation. To determine who takes, you go to the first generation that has surviving descendants, in this case Father's children. Count the number of living descendants (2) and the number of deceased descendants with surviving descendants of their own (1). The estate is split in 3 equal shares, so Bart receives $\frac{1}{3}$.

3. Amy receives the rest of Father's estate.

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**ARKANSAS BAR EXAMINATION
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**3 Pages
EQUITY AND DOMESTIC RELATIONS**

Husband and Wife married in 1995. It was the first marriage for Husband and the second marriage for Wife. At that time Husband was 50 years of age, was worth FIFTY THOUSAND DOLLARS (\$50,000), and earned ONE HUNDRED THOUSAND DOLLARS (\$100,000) per year as a certified public accountant but had a hard time saving his earnings. Wife was 35 years of age and was worth FIVE MILLION DOLLARS (\$5,000,000) which she had inherited at the death of her first husband. These assets provided her an income of approximately TWO HUNDRED AND FIFTY THOUSAND DOLLARS (\$250,000) per year. She was a high school graduate with some college hours but not sophisticated in the business world and did not work outside the home. Husband was in love and Wife was happy to have a father for her three young children. Husband had recovered from a serious illness a few months before their marriage.

Wife was smart enough to hire an attorney to prepare a premarital agreement. The agreement was presented to Husband forty eight (48) hours before the 1995 wedding. This request to sign a premarital agreement surprised Husband. Because of his embarrassment concerning the disparity of their net worth; and because as a CPA he was certain that he knew more law than the Wife's lawyer; and because of his illness and their difference in age, he assumed that he would die first; the Husband, without reading it carefully, signed the agreement immediately while in Wife's attorney's office. Wife also verbally assured Husband that she would take care of him for the rest of his life. Wife properly executed the agreement at the same time.

The premarital agreement provided: it was not executed in contemplation of divorce, but if a divorce occurred, each spouse relinquished all interest in the other spouse's property; neither party was to pay the other any support of any kind; each party accepted the provisions of the agreement in lieu of all rights which either would otherwise acquire by reason of the marriage; and, each party would keep the assets they brought into the marriage.

Also, the agreement provided: upon the death of either party, the surviving spouse would receive from the decedent's estate the sum of FIFTY THOUSAND DOLLARS (\$50,000); the surviving spouse relinquished all interest in the deceased spouse's property except as provided for in the premarital agreement; and, the surviving party accepted the provisions of the agreement in lieu of all rights which the surviving spouse would otherwise acquire by reason of the marriage.

Before signing, and while in the attorney's office, both parties attached an Asset Disclosure Statement to the agreement purporting to state completely and accurately their individual assets and income. Wife forgot about her jewelry which had been given to her by her first husband. It was in a bank lock box and had a value of TWO HUNDRED THOUSAND DOLLARS (\$200,000). Wife also failed to list paintings and other antiques displayed in her home which had a value of THREE HUNDRED THOUSAND DOLLARS (\$300,000). Husband had visited in her home many times prior to their marriage. Husband, having few assets, was able to correctly state his assets and income.

After the marriage, Husband and Wife lived together for approximately seven years. Their assets were not commingled and have stayed approximately the same as at their marriage. During

the marriage, Husband determined the existence and value of his wife's jewelry when she began to wear it on numerous occasions. In December of 2002, Husband discovered Wife had a boyfriend and was committing adultery.

Husband has also been told that his illness has reoccurred and it probably will prevent him from being able to work.

Husband comes to you as his divorce lawyer and seeks your advice concerning the premarital agreement.

Write a memorandum to your client advising him on the law with applicable facts and probable outcome of a challenge to the validity of the premarital agreement.

ARKANSAS ESSAY
ANSWER
EQUITY AND DOMESTIC RELATIONS
February, 2003

Requirements:

ARKANSAS P. A. A.	v.	UPAA
1) voluntary		1) voluntary
2) full & fair (presumed if you have independent counsel)		2) not unconscionable (requires disclosure)
3) fair & reasonable provisions at the time it was entered into		

First, H was capable of entering into the PA (premarital agreement/prenuptial agreement) because he was of sufficient age (18) and sound mind. There is no additional consideration needed besides the marriage itself. Under these circumstances, H signed voluntarily as there was no coercion, fraud *(discussed later), duress, force or other extenuating circumstances regarding the execution itself. (Surprise is not enough), especially since he had 48 hours to think about it, had he chosen not to sign it immediately.

As for the second element, f & f disclosure, this is where the husband has the most successful chance to challenge the P.A. The fact that W “forgot” to (or “failed” to) list approximately \$500,000 worth of assets doesn’t necessarily invalidate the P.A. Full & fair disclosure is presumed if you have independent legal counsel. In this case, while H had the opportunity to consult with an attorney on his own (as he had 48 hours before the wedding, which gave him ample time) he nevertheless chose to sign it anyway without reading it fully. This fault on his part will not be attributed to W. But, there is still the issue of the disclosure. If she can show that there was an unintentional mistake in omitting (no fraudulent intent) the jewelry and paintings, and that the husband was aware of those assets anyway prior to their entering into the P.A., and that such an omission has no bearing on the ultimate outcome of the P.A. or its other provisions, then the court will probably find that the P.A. is still valid.

Fair & Reasonable Provisions:

Parties can contract for the disposition of their property, support to be paid (or not to be paid to each other), the effect of life insurance, etc. Basically, the only thing that they cannot contract on is support for the benefit of children (child support). I got the impression from the facts that the kids were her’s from her prior marriage, and I didn’t see any attempt in the P.A. to improperly do so. The subjects covered in the P.A. were all valid.

Basically, my review of the terms of the P.A. is that it does make fair, reasonable & adequate provisions for the support of the other (\$50,000 to each other upon death).

As for her jewelry, \$200,000 is a “drop in the bucket” compared to her total estate, and so even had husband known of her

As for the antiques/paintings, he was aware of them and had seen them many times before. These also appear to have been hers before the marriage. Thus, the forgotten \$500,000 is relatively small compared 5 million dollars net worth that he voluntarily relinquished his rights to.

The facts show that he has a sufficient income and ability to support himself in the event of her death or divorce, and that he won't become a "public charge." His education and training should be taken into account in determining "fair and reasonable" provisions. In light of these factors, and his age, there is no reason to find that he wasn't fairly provided for in the P.A., at the time it was executed, notwithstanding his recent change in health.

Also, to be considered is her lack of education/training/experience/age and that she is responsible for her 3 young children, (who will inherit solely from their mother now). It is entirely equitable that new husband not be entitled to share in their future inheritance from their deceased father, especially in light of the fact that she has the expenses associated with raising these kids and a very little potential for other income.

It is also important to note that the parties never co-mingled their funds and otherwise evidenced an intent to abide by the terms of the P.A. during their 7 year marriage and that husband presumably benefitted from her wealth while married to her. I think the P.A. will be enforceable.

The fact that W had an affair is neither here nor there with respect to the fairness or enforceability of the P.A. However, this fact will become important when determining whether or not there are grounds for divorce or any defense to a divorce.

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**1 Page
CRIMINAL LAW AND PROCEDURE**

Angry Merciful was released from prison after serving time for rape, incest and kidnapping. Ninety (90) days later, he shot and killed Charity Precious in the course of burglarizing her home at Peaceful Corner, Arkansas. Merciful was charged with capital murder, burglary and theft of property. Upon conviction by a jury of 11, the circuit judge decided to set the sentence himself and thereby send a message to all residents of Peaceful Corner to let them know that murder in Peaceful Corner would carry a death sentence. The evidence was clear and convincing. Merciful's lawyer did not object to the judge sentencing Merciful because he felt the jury would be tougher than the judge. The judge then sentenced Merciful to death by lethal injection on the capital murder charge and forty years on the burglary and theft charges.

Merciful's trial lawyer also handled his appeal. The only issue raised by his appeal was whether there was sufficient evidence to sustain a finding of guilty on the three charges. His convictions were affirmed. Merciful then filed a Petition For Post Conviction Relief. The foregoing is a statement of the facts for the purpose of the Rule 37 Petition For Post Conviction Relief under the Arkansas Rules of Criminal Procedure.

You are Merciful's attorney on his Rule 37 Petition For Post Conviction Relief. Please identify all the issues suggested by the facts which should be included in a Rule 37 Petition For Post Conviction Relief. You are then to make a decision sitting as the judge.

ARKANSAS ESSAY
ANSWER
CRIMINAL LAW AND PROCEDURE
February, 2003

There are 4 issues that Merciful should raise in his Petition for Post Conviction Relief. He should prevail on at least 3 of the issues and could possibly prevail on a 4th issue.

First, a jury of 11 convicted Merciful of capital murder, burglary and theft. The jury was required to consist of 12 people. Merciful should receive relief for this error.

Second, the evidence presented was only clear and convincing. The prosecution must prove each element of the crime beyond a reasonable doubt to obtain a criminal conviction. The prosecution did not reach this standard, therefore, Merciful should receive relief on this issue.

Third, the judge set the sentence himself. In a capital case the jury is required to set the sentence. Since the judge set the sentence Merciful should receive relief on this issue as well.

Finally, it appears that Merciful's lawyer was ineffective counsel. He did not object to the judge setting sentence in this case. He apparently did not object to the standard of evidence used to convict his client. A jury could not have sentenced Merciful any more harshly than the judge did.

As judge deciding all of these issues, I would rule in favor of Merciful on all of the issues. Merciful should receive a new trial based on the errors in this court.