CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

JUNE 2021
LEVEL 6 – UNIT 18 - CRIMINAL LITIGATION

Note to Candidates and Learning Centre Tutors:

The purpose of the suggested points for responses is to provide candidates and learning centre tutors with guidance as to the key points candidates should have included in their answers to the June 2021 examinations. The suggested points for responses sets out a response that a good (merit/distinction) candidate would have provided. Candidates will have received credit, where applicable, for other points not addressed by the marking scheme.

Candidates and learning centre tutors should review the suggested points for responses in conjunction with the question papers and the Chief Examiners' **comments contained within this report,** which provide feedback on candidate performance in the examination.

CHIEF EXAMINER COMMENTS

This was a better profile than usual, with fewer very weak scripts and some very strong performances at the upper end. It is disappointing to see so many marginal fail scripts, but they failed to deal with issues in sufficient detail, generally failed to take the circumstances in the scenario into account and therefore lacked application.

Overall, we continue to see more candidates) doing relevant preparation, such as studying the relevant sentencing guidelines, although these are not always deployed precisely enough. In other respects, there is still too often a clear tendency to rote learn a standard response, and to deploy this without properly considering the context. Advice on how to approach an interview tendered to a client who fully accepts her part and is going to plead guilty does not need to go into detail about whether a written statement is consistent with the eventual defence but does need to focus on how best to make admissions to gain maximum credit on sentence. Similarly, an answer on bail which starts by referring at length to the presumption of bail but does not recognise that the client has been convicted and so the presumption does not apply demonstrates lack of attention to detail. PACE and the criminal justice system generally are designed to ensure that the Convention rights of suspects and defendants are respected, but it is not necessary to refer to these rights unless the facts suggest that they are being disregarded.

While irrelevant material is not penalised by deduction of marks, it earns none, and wastes valuable time. Moreover, when the examiner is assessing the extent to which a candidate has correctly analysed the fact pattern and shows the ability to explain and advise accurately and precisely, the presence of significant irrelevant material may indicate a lack of focus and precision.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Question 1(a)

Generally, well answered. Marks were lost for failure to explain the operation of VIPER fully and accurately (including the protections built in), and/or to explain the consequences of refusal to undertake VIPER – inferences at trial and possible use of covert video or other less favourable methods.

(b)

Nearly all candidates recognised that it was an ethical issue in relation to misleading the court. Too many assumed that they could not act, whereas it is possible to continue to act and put the prosecution to proof, but not advance a positive case which is untrue.

(c)(i)

Generally, well answered. Marks lost for imprecise description of procedure (a lot of points which indicated that candidates were considering allocation for trial, not committal for sentence after Plea before Venue) and failure to apply the sentencing guidelines.

(ii)

A lot of candidates failed to refer to a basis of plea and/or a Newton hearing. A number suggested a plea to a lesser charge – not appropriate because it is still theft in any event.

(iii)

Some candidates redeemed themselves by deploying the sentencing guidelines here and not in (i). Procedure on committal for sentence not fully explained.

Question 2(a)

Generally, well answered. Some irrelevant material on representation under duty solicitor schemes. Relatively few candidates identified loss of reputation as a key merits criterion.

2(b)

Most candidates were able to describe the procedure. Again, many did not deploy the sentencing guidelines properly. Coverage of election for trial and tactics tended to be generic. Very few addressed other issues such as bail and reporting restrictions.

(c)

Generally, well handled, although some candidates missed arraignment as a key purpose and there was at times lack of clarity over which aspects of disclosure occurred at/in connection with the PTPH.

Question 3(a)

Many candidates seemed unaware of the prescribed format. In relation to the alibi, coverage was often incomplete, as particulars of the alibi witness are required as well as particulars of the alibi itself. A lot of irrelevant narrative was included in many cases.

(b)

Most candidates identified some special measures, but not always the most relevant ones: ABE interview for evidence in chief, video/live link cross-examination, intermediary. Coverage of competence was patchy, particularly the position if it was put in issue. Many candidates treated the evidence as identification. It is not, it is a link in the chain connecting the defendant to the offence via the cricket stump.

(c)

This question achieved its objective of allowing the best candidates to achieve highly. 7 candidates who achieved distinction scored 9 or more. Most candidates picked up marks for identifying the burden and standard of proof and that the issue was over whether the defendant was involved, not whether an offence took place. The prosecution case is based on a concatenation of circumstances. The offenders are probably south Asian as is D (but he is never positively identified so no need to discuss Turnbull). One has a northeast accent, as does D (but there appears to have been no attempt to conduct a formal voice identification, which is possible but problematic, so again no positive ID). However, D remains within a, now much reduced, pool of potential culprits. The offenders refer to Farida Begum who in her statement does pick out the defendant as a relative with a motive. The children's evidence shows the presumed offenders (again no suggestion of positive identification) throwing objects over a wall. When these are recovered, the stump is linked to the offence and to D by DNA. There are also potential adverse inferences under s 34 and 36 CJPOA as outlined below.

There are three elements to the defence case. D is of good character, so is entitled to a full Vye direction. D has an alibi, but this is only watertight if he did get the bus back. If he was driven back, there is time for the return journey before committing the offence. Further evidence as to use of the bus could be sought. However, there is a problem in that D gave a no comment interview and adverse inferences can be drawn for failure to mention the alibi then. D claims to have an innocent explanation for the presence of his DNA (although this weakens but does

not destroy its probative value). If he was questioned about this in interview, his failure to give this explanation may again create adverse inferences. Furthermore, D has said he does not want to implicate others, and if he states that the cricket kit was kept at the home of Imtiaz Akbar, this appears to add another strand to the existing circumstantial evidence against him which is currently seen as inadequate (no accent, no DNA).

3(d)

As always, a minority of candidates failed to identify the correct procedure. There were too many references to sentencing and inadequate detail on the ground of appeal – that the conviction is unsafe, what constitutes 'unsafe' and what the consequences are.

Question 4(a)

The majority of candidates simply trotted out their standard response, with no, or minimal, recognition that this a guilty case, with no need to consider adverse inferences at trial and similar issues. D may well be advised to give a written statement but only so her admissions are clear and coherent. There is also an issue with whether the police have complied with their obligation to have D medically examined.

(b)

Failure to surrender is an offence (in contrast to breach of conditions). Most candidates did identify the need to surrender forthwith, as even if the panic attack can be verified and constitutes a reasonable excuse, the offence is committed if she fails to surrender once it is no longer relevant. The consequences for future remand were generally identified.

(c)

Very few candidates recognised that as this was post-conviction, the presumption of bail does not apply. Too few identified the likely non-custodial disposal as a key factor. More orthodox aspects were better covered.

(d)

Answers were often quite thin, indicating candidates had run out of steam. The full discount for early GP was not mentioned as often as expected. The need not to prejudice current progress was usually well and fully covered, together with suggestions for elements of a community sentence. The assault offence was not always seen as the most serious, requiring mitigation against custody.

SUGGESTED POINTS FOR RESPONSES LEVEL 6 – UNIT 18 - CRIMINAL LITIGATION
The purpose of this document is to provide candidates and learning centre tutors with guidance as to the key points candidates should have included in their answers to the June 2021 examinations. The Suggested Points for Responses do not for all questions set out all the points which candidates may have included in their responses to the questions. Candidates will have received credit, where applicable, for other points not addressed. Candidates and learning centre tutors should review this document in conjunction with the question papers and the Chief Examiners' reports which provide feedback on candidate's performance in the examination.

Question Number	Suggested points for responses	Max Marks
Q1 (a)	Larry Cuthbert is a known and available suspect. There is no dispute over his presence at the café, but he disputes being involved in any of the other offences under investigation or being the person caught on CCTV, so to the extent that there are identification witnesses this is disputed identification and the police should proceed to an identification procedure pursuant to Code D unless it is impractical or unnecessary. The preferred identification procedure is a video procedure using VIPER or equivalent technology. Larry Cuthbert need not consent to this, but he is advised to give consent as this is considered to be the most reliable procedure and least likely to give a false positive identification. Furthermore, any refusal will be recorded, and adverse inferences may be drawn at trial. In addition, the police might then proceed to less objective procedures, such as a group identification or the use of covert or other uncontrolled video footage. The prosecution must disclose the initial descriptions given by the potential eyewitnesses. The defence is entitled to scrutinise the materials used for a VIPER procedure, and a representative may attend when witnesses view the images. Standardised video images of Larry Cuthbert will be combined with similar images from eight comparators drawn from a large database and who should resemble Larry Cuthbert. The defence can object to the inclusion of particular comparator images. There is no mention of any distinguishing features, but these can be electronically replicated or eliminated if necessary.	7
(b)	It is ethically and technically possible to represent a client on a not guilty plea even though the client admits guilt. However, the representative is strictly limited to putting the prosecution to proof of its case. It is a breach of the Code of Conduct for Solicitors (section 1.4) to mislead the court or to be party to the client misleading the court. A representative cannot be party to presenting a case which he knows to be false, and this would certainly occur if the client were to put forward a positive case of innocence and give evidence in support	5

	of this. In practical terms, it may also be very difficult to put the prosecution to proof without making submissions or cross-examination points which would tend to mislead the court by asserting the innocence of the client. It is prudent to refuse to act on the basis suggested by the client.	
(c) (i)	Larry Cuthbert will appear in the magistrates court for Plea before Venue. If he indicates that he would enter a guilty plea, this will be treated as such and the court will consider whether to retain jurisdiction or commit the case to the Crown Court for sentence. In so doing the court will consider primarily the relevant sentencing guidelines, applied to the prosecution version of the facts and take into account aggravating circumstances such as Larry Cuthbert's previous record. On the prosecution version this case involves a number of thefts with high culpability (Band A) because of the organising role and relative sophistication of the operation and category 2 for harm based on the total value. The starting point for a 2A case is two years imprisonment with a range of one year to 3 years six months imprisonment. The court will take account of the available discount for a guilty plea but is highly likely to commit for sentence, even though it could impose a total of one years custody as there is more than one either way offence.	6
(ii)	It would be possible to put forward a basis of plea incorporating the more limited involvement, but it seems unlikely that the prosecution would accept this. If the defendant's version is correct, there is significantly less culpability, although probably only enough to reduce it to Band B, given the significant nature of planning. However, the sentencing guideline for a 2B case involves the starting point of one year and a range of 26 weeks to two years imprisonment, again subject to the same aggravating and mitigating factors. The defence could request a Newton hearing before the judge alone at which evidence would be led addressing the disputed issue of whether or not Larry Cuthbert was playing a leading role in the planning and execution of these offences. The prosecution bears the burden of proof to the criminal standard.	5
(iii)	If the Newton hearing is resolved in favour of the prosecution, not only will Larry Cuthbert fall to be sentenced in accordance with the guidelines for a 2A case, but he will lose the credit he would otherwise receive for his early guilty plea. If it is resolved in favour of the defence he will be sentenced according to the guidelines for a 2B case with the benefit of a full D1 discount, pursuant to s 73 of the Sentencing Code. This will be a discount of one third. Given that the offences are all of the same nature, the court should impose the full sentence on each count to be served concurrently.	5

	[Note that there is likely to be some overlap in answers between points addressed in (ii) and (iii) particularly and cross credit should be given.]	
	Total	**28 marks**
Question Number	**Suggested points for responses**	**Max Marks**
Q2 (a)	An application should be made electronically to the Legal Aid Agency, using the LAA Online Portal. Shahid Masud will need to satisfy both the means and merits test. So far as means are concerned, applying the initial means test, the total gross income of £11,500 is less than the qualifying amount of £12,475 so he will be funded if the case proceeds in the magistrates court and funded with no contribution if it proceeds in the Crown Court. There are no adjustments to be made for dependents or capital. As the application appears to be made before allocation has been determined the merits test is that of the interests of justice. In this case, as Shahid Masud is of previous good character, he is at risk of losing that good character. The nature of the offence, involving greater culpability through the use of a weapon but lesser harm as the injuries do not seem particularly serious in the context of ABH, is category two with an entry point of 26 weeks imprisonment, so there is clearly also a risk of a custodial sentence involving loss of liberty.	5
(b)	The initial appearance, as IDPC appears to have been provided, will start with Plea before Venue as this is an offence triable either way. When Shahid Masud indicates a plea of not guilty the court will proceed to Mode of Trial or allocation. The court will hear representations from the prosecution as to the nature of the offence and any recommendation as to venue. The defence can make representations as to venue, but the court is required to treat the cases being at least as serious as the prosecution version. The court will take into account the factors required under s 19 Magistrates Court Act 1980. In practice the primary consideration is whether the court will have adequate sentencing powers. There is a presumption that either way cases will be tried summarily unless there is good reason to the contrary. The court will have regard to the mode of trial guidelines in the Criminal Procedure Rules and to the relevant sentencing guidelines issued by the Sentencing Council. The fact that Shahid Masud has a previous good character will also be taken into account. Although there clearly appears to be some kind of cultural animus, arising from the suspected relationship between the complainant and Farida Begum, this does not fit into any statutory or other aggravating factors as such. The use of weapons clearly indicates higher culpability, as does attacking two against one. However, the harm is relatively lower, as the injuries, while unpleasant, are not particularly serious. As the starting point for an offence in category 2 is 26 weeks custody, and	10

	there are no obvious aggravating factors, the court is likely to accept jurisdiction. Shahid Masud should be advised that the court has accepted jurisdiction but that it could still opt to commit him to the Crown Court for sentence having heard the case in full. He should also be advised that he has the right to elect trial at the Crown Court. When exercising that election he should consider that the Crown Court has greater powers of sentence, and that proceedings there are more likely to be reported. However, at least anecdotally, acquittal rates are higher. While the Crown Court has better procedures for dealing with disputed issues of law or evidence, there is no suggestion of any such here.	
(c)	This hearing is the Plea and Trial Preparation Hearing (PTPH). In relation to matters which are going to proceed to trial this is the principal case management hearing based on the PTPH form which is normally completed electronically. This enables the judge to manage the case because the prosecution must identify the evidential issues in the case, the defence must indicate what the real issues are and any outstanding issues of disclosure should be identified. The future timetable for outstanding disclosure and the trial itself can be established. If there is to be a guilty plea, the defendant can be arraigned.	5
	Total	**20 marks**

Question Number	**Suggested points for responses**	**Max Marks**
Q3 (a)	Part 1: Plea I confirm that I intend to plead not guilty to the charge against me. Part 2: Nature of the defence (a) the defence is mistaken identity and alibi; (b) the facts on which I take issue are that I was the person who assaulted the complainant Robert McNamara with a cricket stump on the basis that I was not present and did not participate in the offence; (c) the facts on which I propose to rely are that (1) on the day in question I was assisting a friend, Faisal Mohammed, to demolish a garden shed at his home in Newport Pagnell which is 10 miles distant from the scene of the crime. I left Newport Pagnell at approximately 7.45 p.m. and returned to Bedford by public transport arriving at approximately 8.30 pm. (2) the cricket	5

	stump on which my DNA was found was one which was in regular use among a group of friends for informal cricket games and which I would have handled numerous occasions together with others; (d) there is no point of law on which I propose to rely; and (e) if your defence statement includes an alibi (i.e. an assertion that you were in a place, at a time, inconsistent with you having committed the offence), give particulars, including – I was at 14 Chichely Street Newport Pagnell until 7.45 p.m. on the date in question. The witness who can confirm this is: Faisal Mohammed, 14 Chichely Street Newport Pagnell, DoB 21/02/1990	
(b) (i)	S 53 Youth Justice and Criminal Evidence Act 1999 provides that all persons, regardless of age are competent witnesses provided that they are capable of understanding questions put to them and giving comprehensible answers. In the case of very young children the court must carry out an initial assessment, and may need to reconsider matters once the evidence has been given, if admitting the evidence would be unfair by excluding it under s 78 PACE: R v B (2010). The evidence will be unsworn as the children are under 14: s 55 YJCEA.	4
(ii)	The Achieving Best Evidence guidance will be appropriate, and the evidence in chief of these children is likely to be given as an ABE video recording. Child witnesses are entitled to special measures pursuant to s 16 YJCEA, such as removal of wigs and gowns, screens, use of a Registered Intermediary, and a video cross examination as well as the ABE interview. These measures should be addressed at the PTPH.	4
(c)	The legal and evidential burden is always on the prosecution to prove the case beyond reasonable doubt. In this case, there is no doubt that an assault took place upon Robert McNamara. The issue is whether Shahid Masud was one of the assailants. Shahid Masud is under an evidential burden in relation to the alibi, but not otherwise, although tactically it is appropriate to adduce evidence with a view to persuading the jury that there is at least a doubt as to the prosecution case. The key element in the prosecution case is the DNA on the cricket stump. This clearly associates Shahid Masud with the stump, and therefore with the attack because of the presence of DNA from Robert McCartney, but is not unequivocal as there is DNA from at least two males unaccounted for. The prosecution case is essentially circumstantial. There are a number of links in the chain, starting with the relationship between Robert McCartney and Farida Begum. The evidence of Farida Begum, if	12

	believed, establishes a motive. It is unlikely that Robert McNamara would be allowed to identify Shahid Masud by voice, as voice recognition, as such, is regarded as problematic except when based on expert analysis of sonograms, but it is part of the chain of circumstance. The evidence of the children as to where the stump was disposed of and the use of a red car reinforces the potential connection with Imtiaz Akhtar who also has a motive. The alibi is not watertight. Feisal Mohammed appears to be somewhat vague about exactly when Shahid Masud left him. A journey of 10 miles by car is very feasible in 30 minutes and not unfeasible in 15. By giving a no comment interview but now putting forward a positive defence of alibi and an explanation for his DNA on the cricket stump Shahid Masud exposes himself to an application by the prosecution for a direction in relation to adverse inferences from silence pursuant to s 34 CJPOA on the basis that these are matters which it was reasonable for him to mention at the time of the interview. As he is of good character, Shahid Masud is entitled to a full Vye direction as to both credibility and propensity.	
(d)	Appeal against conviction lies to the Court of Appeal (Criminal Division) pursuant to the Criminal Appeals Act 1968. The sole ground of appeal is that the conviction is unsafe. An application for leave to appeal must be made within 28 days of conviction or sentence if later. If leave is refused by the single judge the application can be renewed before the full court. Misdirection of the jury by the trial judge is a legitimate basis for arguing that the conviction is unsafe. The Court of Appeal will consider whether the direction was so defective as to lead the jury to potentially approach matters on a false basis. However, even if the Court of Appeal finds that there has been a misdirection it can nevertheless declare that the verdict was safe and reject the appeal if it is satisfied that the misdirection was immaterial. If the appeal is allowed, the Court of Appeal may nevertheless direct a retrial, on the basis that a jury properly directed could properly have convicted. Only if the Court of Appeal is satisfied that there is no basis on which a jury properly directed could have convicted will the appeal be fully allowed and the conviction quashed.	5
	Total	**30 marks**

Question Number	Suggested points for responses	Max Marks
Q4 (a)	The disclosure provided by the police clearly establishes the *actus reus* of theft by shoplifting and your client admits the *mens rea.* So far as the theft is concerned it is clearly appropriate to advise her to make admissions, in order to obtain the maximum credit for cooperation and to pave the way for an early guilty plea. So far as the spitting incident is concerned, the position is less clear-cut, but Jane Parker will benefit from admitting the spitting itself and putting forward her mitigation that she believed she was too far away for it to actually impact on the security guard. The prevalence of such incidents where the perpetrator has referred to Covid 19 is such that her apparent inability to remember whether this was mentioned is unlikely to be seen as credible. Jane Parker could be advised to answer questions in interview by making admissions. There appears to be relatively little scope for her to say anything damaging to her interests in terms of aggravating the circumstances of the offences. However, if she is concerned about whether she can put forward her version of matters in a coherent way, she could give a no comment interview but provide a written statement containing full admissions on her own terms. Any other approach should be advised against, as it is likely not to be in her interests, but ultimately the choice is hers.	6
(b)	Failing to surrender to custody without reasonable excuse is an offence: s 6 Bail Act 1976. The panic attack will not be regarded as a reasonable excuse, except possibly for the short period that it actually lasted: s 6 (2) BA. The warrant renders Jane Parker liable to arrest, and once arrested she will be detained in custody and produced before the magistrates court on the next available occasion. In the circumstances, Jane Parker should attend at a police station to allow herself to be arrested at the earliest opportunity as this will indicate a desire to cooperate. If you are aware of the timing it will facilitate you representing her when she is brought before the court.	5
(c)	Following conviction the prima facie right to bail no longer applies: s 4 (2) BA. However, bail may be granted unconditionally or subject to conditions pursuant to s 3 BA. The purpose of imposing conditions so far as relevant to Jane Parker would be to secure that she surrenders to custody and does not commit offences: s 3 (6) BA. The court is also entitled to take into account whether a custodial sentence is likely to be imposed: Sched 1 para 1A BA. The two theft offences are unlikely to attract a custodial sentence, falling within category 2C and 3C, even allowing for the previous record. The failure to surrender to bail is likewise unlikely attract a custodial sentence, falling within category 3B or 3C. The assault appears to fall within category 2. There is higher	6

	harm with the potential infliction of a Covid 19 infection but lower culpability. This again does not attract a custodial sentence according to the guideline, unless spitting in the context of the Covid pandemic is seen as a particular aggravating feature. The primary submission would be that bail should be granted because there is no realistic prospect of a custodial sentence. Secondary submissions would be that bail should be granted with conditions in order to secure attendance and prevent further offending. This could include a condition of residence at the accommodations currently provided, and also a condition not to enter commercial premises.	
(d)	The primary objective of a plea in mitigation in this case is to avoid a custodial sentence. The reasons why a custodial sentence might be imposed are that (1) a persistent shoplifter has reoffended, including committing an offence whilst on bail. While the offences themselves do not appear to warrant custodial sentences, the context may affect the outcome, and (2) spitting at or on the security guard could be regarded as a particularly of noxious offence given the prevalence of Covid 19 and the potential for transmission by spitting. Given the underlying problems with substance abuse and the apparent progress being made, it should be argued that this should not be undermined by what would inevitably be a short custodial sentence which would destabilise Jane Parker and undo the progress that had been made. Jane Parker is of course entitled to a full D1 one third discount for her early guilty pleas to all charges. This also indicates her acceptance of responsibility. As a benefit recipient, it is unlikely that Jane Parker will be in a position to pay any substantial fine without impacting on her ability to meet the costs of everyday life. A community order would appear to be appropriate. This is likely to include probation supervision and may include community payback, subject to the availability of this. There may also be specific activities designed to address aspects of Jane Parker's situation, although it does not appear that drug rehabilitation, alcohol treatment or mental health treatment are currently required, given the stage of rehabilitation already achieved.	5
	Total	**22 marks**