CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

LEVEL 6 - UNIT 18 - CRIMINAL LITIGATION

JUNE 2022

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 2022 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

It is clear that where candidates have properly prepared, in the sense that they have covered the syllabus diligently, and, in particular have read and understood the Case Study Materials and drew the necessary inferences from them This paper allowed them to demonstrate the breadth and depth of their knowledge, and the proportion of papers of merit standard or higher clearly demonstrates this.

One area of technique which this paper tested to a significant extent, was the ability to structure individual answers. This was particularly evident in Q2 (c) where the position of the two defendants need to be handled separately, and in Q3 (a) where issues relating to the two offences need to be dealt with separately. There were some candidates who failed to deploy the knowledge which they clearly possessed the best advantage.

Candidates also need to ensure that they are confining themselves to what is directly relevant and not wasting time and energy by providing additional information which does not actually address the question. For example in Q1 (b) the information given makes it clear that the client is at that stage pleading not guilty so there is no need to consider the implications of a guilty plea at Plea

before Venue, and in Q2 (b) the question specifically relates to a representation order so there is no need to discuss other forms of public funding such as duty solicitor schemes at the police station or at court.

Candidates are generally demonstrating that they have considered the Sentencing Guidelines applicable to the various offences and have made an effort to locate these offences within the various categories. This information is not always fully deployed. It is unfortunate that the minority still do not seem to undertake this elementary but essential preparatory work.

There was less evidence on this occasion of candidates preparing standard form answers and deploying them without contextualising them to the circumstances.

Some candidates still appear to believe that the answer to almost any issue which arises is to seek to exclude the relevant piece of evidence. This may very occasionally be the case, but the usual position will be that this evidence is admissible and ways must be found to minimise the weight given to it. In some cases the answer does not lie in the exclusion of evidence at all. In Q3 (c), once it has been established that the stop and search was unlawful because of non-compliance with s 2 (2) and/or (3) this takes the officer out of the execution of his duty and as a result an essential ingredient of the offence is not made out. This is a much more obvious approach than seeking to exclude evidence.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Question 1(a)

This was generally well answered. Weaker answers tended to be less detailed and precise. Some candidates failed to refer to the distinguishing features referred to in the materials. There is still a tendency on the part of some candidates to discuss the old-style identification parade unnecessarily. A suspect who has rejected a VIPER procedure is highly unlikely to consent to a parade.

(b)

This was again generally well answered. Some candidates included an inappropriate amount of detail on the procedure where Plea before Venue results in a guilty plea. Some candidates are still not demonstrating that they have considered where the charge fits in terms of the Sentencing Guidelines as they apply to allocation.

1(c)

This again was generally well answered, although some answers were slightly unstructured, and a few candidates incorporated additional facts which were not warranted by the materials, such as suggestions that the client had been subjected to abuse or coercive control by the co-accused.

Question 2(a)

A significant number of candidates failed to explain clearly and precisely enough the legal framework relating to bail in the circumstances. Some of the proposals for representations as to possible bail conditions were not as focused on the circumstances of the client as they should have been.

(b)

A very straightforward question and generally well answered. Some candidates failed to address the merits test. A small minority wasted time discussing funding for other stages of proceedings such as a duty solicitor advice at the police station or for the first appearance.

(c)

Answers to this question often lacked clarity. In relation to AK all that was required was to identify the arson offence as triable either way but with a sentencing guideline which made allocation to the Crown Court virtually inevitable. The other charges required separate consideration. Having regard to the antecedents possession of a bladed article was likely to justify allocation to the Crown Court. The summary s 89 offence would normally also be sent to the Crown Court. MG needed to be separately considered. Although formally a grave crime and a specified offence for the purposes of dangerousness, consideration of the sentencing guidelines with the appropriate discount for a juvenile should have led to the conclusion that the youth court was likely to retain jurisdiction, particularly with its power to commit the sentence. The initial appearance would however be likely to be in the adult magistrates court because of the joint charge, and the possibility of sending to the Crown Court. While there are a number of possible alternatives these should be presented in a logical fashion, and this was often not the case.

(d)

A minority of candidates failed to appreciate that this was a question specifically about the obligation not to mislead or be party to misleading the court. Some candidates were too quick to conclude that they were obliged to cease to act, when in truth, if the client accepts that the alibi witness cannot be used, there is no reason at all not to continue acting on the ordinary basis. The defence would not in this case be limited to simply putting the prosecution to prove, as any other positive evidence, for the defence could be deployed. A small, but disturbing, number of candidates suggested that there was an obligation to notify the police/prosecution about this evidence.

Question 3(a)

Again, this question requires candidates to structure their answer. Most candidates identified that there was a burden on the defence in relation to the possession of a bladed article in connection with establishing a good reason for its possession.

In relation to the arson, only a minority correctly identified that MG was now a competent and compatible witness for the prosecution and that his evidence would, on the face of it, be extremely damaging. There was far too much irrelevant reference to his confession. Candidates generally did not recognise the significance of the various circumstantial pieces of evidence which, while not

individually overwhelmingly preventive, were collectively highly significant when placed alongside the positive evidence of identification and the likely testimony of MG.

3(b)

Most candidates recognised that the outstanding offence was summary only and could therefore only be heard in the magistrates court. There was however considerable vagueness and ignorance about the precise mechanism. The Crown Court can only deal with a summary offence which has been sent in this way by way of a guilty plea. If the prosecution decides to pursue the matter, they must apply to the magistrates court to reinstate the case there as it will have been deemed to have stood adjourned pending the Crown court proceedings. The case will then proceed to a summary trial in the usual way.

(c)

Most candidates were able to give a reasonable account of ss 1 and 2 of PACE (although a significant number seemed to think it was sufficient to refer to the Code, rather than the legislation). Those candidates who discussed the point generally accepted that there were grounds to initiate a stop and search as the officer had actually seen an item being transferred to the suspect. Candidates generally recognised that the information required by s 2 had not been provided, at least in some respects. What was virtually always missing was a recognition of what this meant in terms of the allegation. Conducting an unlawful stop and search takes the officer out of the execution of his duty and so the offence is not made out. Most candidates suggested applying to exclude the relevant evidence. This is a much more complex and problematic approach.

Question 4(a)

Very few candidates identified that this was a terminating ruling (the actual phrase was only used once, and the concept described in other words only by another couple of candidates) a minority did recognise that the prosecution could seek to appeal, but there was very little evidence of knowledge of the procedural requirements, such as the requirement to give an undertaking to allow the charges to be dismissed if the appeal is unsuccessful. Some candidates did address the distinction between improper entrapment and creating a situation which allowed the defendant to commit a crime of his own volition in circumstances where detection was facilitated.

(b)

Most candidates recognised that this question required discussion of the Vye direction, but answers were generally very brief and thin, and sometimes focused on previous good character is relevant to sentencing rather than when considering guilt or innocence.

(c)

Most candidates identified that this was an appeal to the Court of Appeal (Criminal Division). A surprising number focused on appeal against conviction, although the question makes it clear that is an appeal against sentence only. Explanation of the procedure for appeal was usually stronger than consideration of the grounds. The focus should be on the disparity between this sentence and others imposed on the co-accused.

SUGGESTED POINTS FOR RESPONSE LEVEL 6 - UNIT 18 - CRIMINAL LITIGATION		
Question Number	**Suggested Points for Responses**	**Marks (Max)**
1 (a)	• DF is a known and available suspect who denies involvement. • An identification procedure should be used unless considered unnecessary. • Preferred procedure is VIPER video virtual identity parade. • This is under the supervision of an independent identification officer who ensures compliance with the requirements of the PACE Code. • Standardised moving images of DF will be shown to each witness separately together with eight similar video sequences selected from the national database so as to be reasonably comparable. • The cold sores and bruise can either be digitally removed from the images of DF or added to those of the comparators. • This is considered to be the most objective and fair procedure. • DF must consent, but if consent is not given adverse inferences may be drawn and alternative, less favourable, procedures may be adopted such as covert video or group identification. • The defence representative is entitled to see the initial descriptions given by witnesses, can make representations as to the suitability of comparators and generally ensure compliance with the procedures.	**7**
Question Number	**Suggested Points for Responses**	**Marks (Max)**
1(b)	• Theft is an either way offence so the first substantive appearance will be Plea before Venue followed by Mode of Trial/Allocation. • DF will be invited to enter a plea, as she enters a plea of not guilty the Court proceeds to consider which mode of trial is more appropriate. • The presumption is in favour of summary trial. • The prosecution will make representations as to the preferred mode of trial. CPS guidelines indicate that the prosecutor should indicate a firm preference. • The court must proceed on the basis that the case is at least as serious as represented by the prosecution. • Here there appear to be no procedural or other factors pointing towards trial on indictment. (see section 19 Magistrates Courts Act 1960 and Pt 9 CPR).	**10**

	• Primary consideration is sentencing powers, having regard to the Sentencing Guidelines in Magistrates Courts. • The guideline for this category of theft suggests that DF falls into culpability category B as playing a significant role in group activity. The case falls between harm category 2 and 3. The value of the property stolen is at the lower end of medium value, but the loss of a significant amount of work product could constitute significant additional harm to the victim. • The starting point for B2 is one year's imprisonment with a range of 26 weeks to 2 years and for B3 is a high-level community order with a range of a low-level community order to 36 weeks. • DF has some relevant previous convictions which are an aggravating factor. • If the court concludes that its sentencing powers are inadequate it will allocate the case to the Crown Court. • If it concludes they are adequate it must offer DF and election for trial on indictment. DF would then have to consider that the magistrates would not normally commit for sentence after accepting jurisdiction while she runs a risk of a higher sentence in the Crown Court. She should also consider that the prospects of acquittal are anecdotally higher in the Crown Court. The Crown Court carries greater stress, publicity and potentially higher costs. There is no real indication that the superior procedures of the Crown Court for dealing with legal and evidential issues will be relevant.	
Question Number	**Suggested Points for Responses**	**Marks (Max)**
1(c)	• DF has entered a guilty plea, albeit at a late stage, and is entitled to an appropriate discount (10%). • The guilty plea indicates, as confirmed in the PSR, that DF has accepted responsibility for the offence. • DF is the sole carer for two small children and an immediate custodial sentence would have a disproportionate impact on them. • The PSR makes clear that an unpaid work requirement could be imposed as a punitive element of a community order. • There are indications that the DF is starting to address the consequences of her drug abuse, and a drug rehabilitation requirement will facilitate this. It is submitted that the custody threshold has not been crossed, but if the court is not of that opinion, it is submitted that any custodial sentence should be suspended and a suspended sentence order including a drug rehabilitation requirement and possibly an unpaid work requirement should be imposed.	**7**
		Question 1 Total:24 marks

Question Number	Suggested Points for Responses	Marks (Max)
2(a)	• AK is prima facie entitled to bail: s 4 Bail Act (BA) 1976. • Bail may be withheld, or conditions imposed pursuant to Schedule 1 BA. • Here, AK has allegedly committed the offence of arson while on bail for the other offences and within a matter of days. • An exception to the right to bail exists where there are substantial grounds to believe that AK would commit an offence while on bail: para 2 (1) (b) Sch 1 BA. None of the other exceptions appear to apply on the basis of the material available. • Most of the considerations listed in para 9 Sch 1 BA do not appear relevant (except seriousness of the offence and possibly antecedents and associations of the client). However, the court may consider the likely method of disposal if convicted of all offences is likely to be custodial. • Defence representations will focus on the fact that AK denies any involvement in the arson offence and has an alibi. There is no other basis for alleging a likelihood of further offences, and AK is now on notice that he must conduct himself properly pending trial.	**6**
Question Number	**Suggested Points for Responses**	**Marks (Max)**
2(b)	• The application must be made electronically to the Legal Aid Agency. The application must satisfy the means and merits test. • AK will satisfy the means test. His gross income is less than the £12,400 below which no means assessment is required in the magistrates court. He will also satisfy the means test for the Crown Court. • The merits test is automatically satisfied in cases sent to the Crown Court. Even if the cases were retained in the magistrates court, AK is clearly at risk of loss of liberty as the sentencing guidelines for arson and possession of a bladed article suggest this.	**5**

Question Number	Suggested Points for Responses	Marks (Max)
2(c)	• MG is a juvenile and would normally appear and be tried and sentenced in the Youth Court which has special procedures and facilities. He may be committed for sentence to the Crown Court as arson carries a life sentence in the case of an adult, provided that the Youth Court is of opinion that a sentence in excess of the 24-month Detention and Training Order which it can impose is necessary: s 16 Sentencing Code. However, this is unlikely as the offence appears to fall within category A2; culpability is high because of the use of an accelerant and the apparent revenge motive. Harm is intermediate. The starting point for an adult is two years custody and there will be a significant reduction in this for a juvenile. • If he is considered to be dangerous, he may also be so committed under s 17 as arson is a specified offence for the purposes of s 306. • As MG is jointly charged with AK, an adult, he could be sent for trial in the Crown Court, if AK is so sent and it is in the interests of justice: s 51 (7) Crime and Disorder Act 1998 (CDA). • If convicted before the Crown Court after being sent for trial, MG's case should normally be remitted to the Youth Court for sentence: s 25. • In relation to AK, the offence of arson and possession of a bladed article in public are either way offences. • As noted above in the case of AK the arson offence falls within category A2 with a starting point of two years custody. It is almost inevitable that this case will be sent to the Crown Court. • The other offences must be considered separately, as they do not arise out of the same circumstances. • The possession of a bladed article offence falls within category A2. There is high culpability because it is a bladed article, namely a knife. Harm does not fall within any of the higher category factors. The starting point is six months custody with a range of three months to one year's custody. There is some aggravation based on AK's criminal record including affray. The magistrates court is likely to decline jurisdiction. • The police obstruction case is summary only, but is capable of being sent to the Crown Court as it is imprisonable and arises out of the same circumstances as the principal case: s 51 (3) CDA. The Crown Court can only deal with this case on a guilty plea. • The police obstruction case is deemed to stand adjourned in the magistrates court: s 51 (10) CDA.	**6**

	• The magistrates court could commit for sentence following conviction if it considered its sentencing powers were inadequate.	
Question Number	**Suggested Points for Responses**	**Marks (Max)**
2(d)	• A lawyer cannot mislead the court: s 1.4 SRA Code of Conduct. This includes being party to the court being misled by others. • Here it would be misleading the court to put forward the evidence of Jas Patel as evidence of truth. • At this stage nothing has happened which requires you to withdraw from the case. • If AK accepts your advice that the evidence of Jas Patel cannot be put before the court, you may continue to act. • If AK persists in requiring the evidence of Jas Patel to be put before the court, you would be professionally embarrassed. • In this situation you would withdraw from the case but would not disclose the reasons for this in order to maintain client confidentiality.	**5**
	Question 2 Total:27 marks	
Question Number	**Suggested Points for Responses**	**Marks (Max)**
3(a)	• The legal and evidential burden is on the prosecution to establish the case against AK to the criminal standard. • The defence would make representations that the two charges should not be joined in the same indictment and should not be heard together. There is no link between them other than the person of the defendant. • In relation to the charge of arson there is no doubt that the offence was committed. The issue between the prosecution and the defence is whether or not AK was one of the perpetrators. • The prosecution evidence is: 1. The eyewitness identification evidence of Roy Strong. The defence will require the judge to give a Turnbull direction to the effect that an honest witness may be a mistaken witness and that the capacity of humans to identify each other is limited. The direction should address the circumstances of the observation. It is the observation of a stranger over a relatively short period of time, at a time when the witness had no particular reason to note the person observed. The light conditions are likely to have been reasonable. There is no evidence as to any physical weakness of the witness. The jury should be directed that they should not rely solely on eyewitness evidence that they do not regard as strong,	**16**

but weak eyewitness evidence can be used to support other evidence.

2. The evidence of MG. He is a competent and compellable witness for the prosecution. It will be necessary to cross examine him on the basis that he is lying and is implicating AK in order to deflect attention from his brother. Attacking the character of a witness in this way will expose the character of AK. This is however unlikely to be a major consideration.
3. The prosecution can seek to admit the previous convictions of AK to demonstrate his bad character and in particular a propensity to commit offences in the context of gang membership.
4. The mobile phone data places AK in the general area. The text from MG to AK establishes some link between the two, but this is merely circumstantial.
5. The evidence of Jade Macdonald is also circumstantial in relation to AK. Her sighting of two cyclists is consistent with the evidence of Roy Strong and the CCTV evidence from the crime scene. The bag and its contents are direct evidence against MG, but insofar as there is a link between AK and MG, this evidence reinforces it. Jade McDonald is in principle a competent and compellable witness, although she will give un-sworn evidence. This is subject to any challenge to her competence. She will be entitled to special measures, which will probably involve evidence in chief by an ABE recording and any cross examination by video link.

- The defence cannot put forward a positive alibi unless AK has provided an alternative witness. If AK does not give evidence adverse inferences may be drawn: s 35 PACE. If, in giving evidence, AK does put forward a positive case which he could reasonably have advanced in interview, adverse inferences may be drawn: s 34 PACE. These inferences may only be used to support a prosecution case which has other elements. If AK gives evidence and simply maintains a bare denial, it is unlikely that inferences could be drawn.
- The overall defence strategy will be to cast doubt on elements of the prosecution case so that the jury cannot be satisfied so they are sure that AK is guilty.
- In relation to the possession of a bladed article, there is no doubt that AK was in possession of such an article.
- Whether or not there were irregularities in the actions of the police leading up to his arrest and detention, the prosecution will be able to rely on the real evidence of the knife.
- Once the prosecution prove that AK was in possession of a bladed article the burden of proof shifts to AK on the balance of probabilities to demonstrate that he had a good reason for

	possession of the knife. S 139 (5) Criminal Justice Act 1988 provides some examples of good reason including possession for the purposes of work. By analogy possession for the purposes of a college course could amount to good reason.	
Question Number	**Suggested Points for Responses**	**Marks (Max)**
3(b)	• The Crown Court cannot deal with this matter either by a trial or by remitting it to the magistrates court. • If the prosecution considers it is in the public interest to proceed with the outstanding charge it must apply to the magistrates court to relist it. • This has the effect of reinstating the case pursuant to s 51 (10) CDA.	**5**
Question Number	**Suggested Points for Responses**	**Marks (Max)**
(c)	• PACE provides for a general stop and search power in relation to prohibited items. Offensive weapons (including bladed articles) are prohibited items: s 1 (7) PACE. • The power is exercisable in a public place and Town Hall Square Luton is a public place. • Pursuant to PACE and the Code the power should be exercised on the basis of information or intelligence. Here DC Berkowitz observed the apparent transfer of a bladed article to AK. • There are procedural requirements imposed by s 2 PACE, in particular that a constable not in uniform should provide documentary evidence of his status, and that any constable should provide his name and police station, the object of the search and his grounds for making it. • If the evidence of AK and of the mobile phone video is accepted, it is clear that DC Berkowitz did not fully comply with these requirements. • Failure to comply with the requirements of PACE has the consequence that the officer in question is not acting in the execution of his duty. The subject of the search is therefore entitled to refuse compliance and to use reasonable force so to do: Osman; Fennelly. AK appears to have a defence to the charge for these reasons.	**8**
		Question 3 Total:29 marks

Question Number	Suggested Points for Responses	Marks (Max)
4(a)	• Pursuant to Part 9 of the Criminal Justice Act 2003 and specifically s 58, the prosecution can, with the leave of the trial judge or the Court of Appeal, appeal to the Court of Appeal against a ruling which has the effect of terminating the proceedings. • In this case, by excluding the only admissible evidence against the defendant, the trial judge has made such a ruling. • An appeal must be made forthwith, or following an adjournment to allow consideration. The prosecution must confirm that if leave to appeal is not granted or the appeal is abandoned the defendant should be acquitted. • Pursuant to s 61, the Court of Appeal may confirm, reverse or vary the ruling. • Where appropriate the proceedings in the Crown Court may be resumed or a new trial may take place. • The Court of Appeal will only reverse or vary the ruling if it is satisfied that the ruling was wrong in law, involved an error of law or principle, or was a ruling that it was not reasonable for the judge to have made: s 67. • Here the Court of Appeal will need to consider whether the actions of the police amount to entrapment, namely inciting the commission of an offence which would not otherwise have occurred: Loosely, as opposed to providing an opportunity for the defendant to commit an offence which he was entirely willing to undertake: Nottingham City Council v Amin.	**7**
Question Number	**Suggested Points for Responses**	**Marks (Max)**
(b)	• Being of previous good character does not merely mean that the bad character of the defendant cannot be put before the court through one of the gateways created by s 101 CJA 2003. • A defendant who is of previous good character is entitled to a good character direction pursuant to Vye. There are two limbs to this direction. • The first limb is that a defendant of good character is more likely to be a credible witness as there is nothing to impugn his honesty and reliability. • The second limb is that such a defendant does not have an existing propensity to commit offences. LW is entitled to a full direction as above.	**7**

Question Number	Suggested Points for Responses	Marks (Max)
4(c)	• There is a right of appeal against sentence to the Court of Appeal (Criminal Division): s 9 Criminal Appeal Act 1968 (CAA). • Leave of the trial judge or of the Court of Appeal is required for such an appeal: s 11 CAA. • The appeal must be lodged within 28 days of sentence together with grounds of appeal. Trial counsel is obliged to advise on the merits of an appeal and to draft grounds of appeal where the advice is positive. • The Court of Appeal cannot increase the sentence imposed by the Crown Court but can make a loss of time order if it is satisfied that the appeal is without merit. The effect of this is that time spent in custody from the commencement of the appeal to its disposal will not count towards the sentence. • The appeal will be allowed if the sentence is wrong in law, wrong in principle or manifestly excessive. • In this case the principal argument would appear to be the lack of compatibility between the sentence imposed on LW and those imposed on others with a greater degree of culpability. • Inconsistency of sentencing between co-accused has been successfully argued. • The discrepancy must be significant, and incapable of being explained by legitimate distinctions between the defendants on the basis of their relative culpability and personal mitigation.	**6**
		Question 4 Total:20 marks