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Qualifying Test paper:

00555: Recorder 2011
Crime Paper

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CANDIDATE BRIEF

Please read carefully before you start

You have 90 minutes to complete the entire test. The test is designed to assess your ability to work at speed and under pressure.

This test has been designed by judiciary from the Crown Court and will assess the following qualities and abilities:

Intellectual Capacity:

- High level of expertise in your chosen area or profession.
- Ability quickly to absorb and analyse information.
- Appropriate knowledge of the law and its underlying principles, or the ability to acquire this knowledge where necessary.

Authority and Communication Skills:

- Ability to explain the procedure and any decisions reached clearly and succinctly to all those involved.

Efficiency:

- Ability to work at speed and under pressure.
- Ability to organise time effectively and produce clear reasoned judgments expeditiously.

You should attempt to answer **every** question. You may answer the questions in any order, however please indicate clearly which question you are attempting.

Answers may be provided in bullet points where appropriate.

This test takes the form of three entirely separate case studies

PART A

Question 1 is worth a maximum of **9** marks

Question 2 is worth a maximum of **12** marks

Question 3 is worth a maximum of **12** marks

Question 4 is worth a maximum of **5** marks

Question 5 is worth a maximum of **10** marks

Question 6 is worth a maximum of **12** marks

PART B

Question 7 is worth a maximum of **6** marks

Question 8 is worth a maximum of **9** marks

Question 9 is worth a maximum of **11** marks

PART C

Question 10 is worth a maximum of **20** marks

Discretionary Marks

In some of the scenarios the answer flows from the candidates reasoning and may involve the exercise of judicial discretion. Discretionary marks may therefore be awarded where the candidate takes a different view from the examiner but provides very well reasoned arguments to support the exercise of that discretion. They may also be awarded for exceptional answers. A total of **up to 24** discretionary marks with **2 discretionary marks for each question, apart from question 10 which has up to 6 discretionary marks**, is available.

Part A is worth a maximum of 60 marks and up to 12 discretionary marks, **Part B** is worth a maximum of 26 marks and up to 6 discretionary marks, and **Part C** is worth a maximum of 20 marks and up to 6 discretionary marks.

Materials supplied

You have been supplied with a booklet containing all the supporting materials needed for this test.

The answers will be marked anonymously so please ensure you mark each page of your answer script with your candidate number only.

In providing your answers please **only** refer to the supporting materials provided. You will not receive marks for any reference to any other statute, procedural rules, relevant guidance or case law in your answers.

PART A (worth a maximum of 60 marks + up to 12 discretionary marks)

The Defendants are Roger Smith (17) and David Jones (21). Smith has previous convictions: assault occasioning actual bodily harm in 2007 and having a bladed instrument in a public place 2008. Jones has no previous convictions.

They face a two count indictment: Count 1 Wounding Nadine Rice with intent - Smith alone. Count 2 Assaulting John Stevenson thereby occasioning him actual bodily harm-both Defendants.

The prosecution case:

On the evening of 21st November 2009 Smith and Jones were at a party at the home of Rice. There was evidence of other partygoers that they had arrived together. Rice had previously been Smith's girlfriend. They were still friendly and they were seen to be affectionate during the party. Shortly before midnight Rice was talking to Stevenson in the hallway when Smith came out of the living room and started an argument with Rice. He suggested that Rice was being over friendly with Stevenson. This argument continued for several minutes during which Smith was seen to become angry and Rice was being placatory. Rice was then seen to enter the kitchen. Smith followed her into the kitchen. Nobody witnessed what happened between them in the kitchen.

Rice could not give a clear account of events in the kitchen save that Smith followed her into the kitchen and she could remember his having a knife in his possession but not when he had it or where it came from. She could not recall how she was injured. Her next memory was waking up in hospital.

After a few minutes Smith came out of the kitchen alone. He had blood on his hands and on the front of his trousers. At this point Stevenson came downstairs with Jones behind him. They both entered the kitchen followed by Smith. Stevenson saw Rice lying on the floor in a pool of blood apparently unconscious and asked Smith what had happened.

Smith punched Stevenson several times to the face causing Stevenson to go to the ground. Then Smith and Jones both kicked Stevenson several times to the body as he lay on the ground. Then Smith and Jones left the property together. Stevenson made a 999 call from the property.

Rice had 4 superficial stab wounds to the front of her stomach and a 10 centimetre wound on the left side with substantial internal bleeding but no damage to any major organ. Stevenson had minor bruising to his lower back and minor abrasions to his left cheek.

Both Defendants were arrested the next day. Smith gave a prepared statement saying that Rice had grabbed a knife while they were in the kitchen and lashed out at him causing cuts to his stomach. In the course of a struggle he may well have forced the knife into her. He then left the kitchen once he had disarmed Rice. When Stevenson then went into the kitchen Smith followed him in order to show him the knife. Stevenson had tried to attack him but Jones had intervened to prevent him. Smith then left and was unaware how Stevenson sustained any injury or whether he had been assaulted.

Jones made no comment throughout his police interview.

During the preparation for the trial police took an additional witness statement from John Stevenson in which he made it clear that he did not wish to attend court to give evidence as he was aware that Smith had a reputation for fighting. He knew that Smith was a member of a local gang and that his family were notorious in the area as serious criminals. Although

being told of the court's power to require him to attend and to deal with any failure to give evidence once called Stevenson said he would rather go to prison than give evidence against Smith.

At the Plea and Case Management Hearing Jones provided a Defence Statement simply stating he did not assault Stevenson and that he did not cause Stevenson any injury. He gave no further details. At trial Jones gave evidence that Stevenson accused him and Smith of stabbing Rice and came at him with a knife. He punched him but did not kick him. He reacted in self defence using only sufficient force to prevent Stevenson from stabbing him. He said that he did not give this explanation during the interview because he was in a state of shock at being arrested and didn't know what to say.

Question 1 (9 marks)

The Prosecution apply to adduce evidence of the convictions of Roger Smith as follows:

- 2007 Assault occasioning actual bodily harm
 - 2008 Having a bladed article in a public place
- a. Under which 'gateway' or gateways of the Criminal Justice Act 2003 section 101 is this evidence admissible? (4 marks)
 - b. What would your ruling be? (Give reasons) (5 marks)

Question 2 (12 marks)

David Jones made no comment in his police interview.

- a. What inferences or conclusions can be drawn from his failure to mention facts which he later relied on in his defence and why? (3 marks)
- b. How would you advise the jury about whether they should draw any inferences or conclusions? (6 marks)
- c. Would your answer be different if David Jones said that he had made no comment because his solicitor told him to? (3 marks)

Question 3 (12 marks)

John Stevenson has indicated that he does not wish to give evidence due to fear. The prosecution apply to adduce as evidence his witness statement relying on the Criminal Justice Act 2003 section 116 (2) (e).

- a. What is the test to establish whether John Stevenson is afraid to give evidence? (1 mark)
- b. What procedure would you adopt and what enquiries would you make to enable you to make a decision as to whether the test was satisfied? (3 marks)
- c. What considerations would you take into account when deciding whether to allow the statement to be read? (4 marks)
- d. What is your ruling? (Please give reasons for your decision) (4 marks)

Question 4 (5 marks)

- a. Notwithstanding your answer in question 3, if you decided that John Stevenson must give oral evidence what other measures are available to help him give evidence? (3 marks)
- b. What order would you make? (2 marks)

Question 5 (10 marks)

David Jones did provide a Defence Statement but it consisted of a mere denial of the assault occasioning actual bodily harm with no further detail.

What points should he have included in the Defence Statement?

Question 6 (12 marks)

Instead of giving evidence, as the scenario above describes, at the close of the prosecution case, and in the presence of the jury, defence counsel informs you that David Jones has chosen not to give evidence at trial.

- a. What do you do? (4 marks)
- b. What inferences or conclusions, if any, may be drawn from his giving no evidence? (2 marks)
- c. How do you explain this to the jury? (6 marks)

PART B (worth a maximum of 26 marks + up to 6 discretionary marks)

Having just been appointed and having attended the Recorder Induction Course, today is your first day of sitting in the Crown Court. You have been appointed to a two-court centre and the judge in the other court is in the middle of a long fraud trial. You have to deal with the normal Monday list which has about 30 matters. Last week your home was burgled in the middle of the night while you were asleep upstairs. The burglars took a number of valuable personal possessions. You heard a noise and went down to confront two people, whom you cannot now recognise. They picked up the keys to your car and escaped in it. The possessions have not been recovered nor has anyone been arrested but your car has been found abandoned and completely trashed. The police have told you that there have been a lot of burglaries in your area and they suspect a number of youths who need money to supply their drug habits. Yesterday you were at a family gathering with, among others, your sister's long term partner, whom you know well and who is a lawyer employed by CPS. You discussed with him that you were about to start sitting as a Recorder and that you had been burgled recently. You realise that he may prosecute before you and, sure enough, when you arrive in court he is there as the CPS lawyer.

Question 7 (6 marks)

Do you have any concerns about someone whom you know so well with a familial connection prosecuting the list and if so how do you deal with them? What difference would it make to your judgement/action?

The first case for sentence is an 18 year old who has pleaded guilty to three counts of domestic burglary. The Pre Sentence Report indicates that he has a drug habit and he committed these offences while under the influence of drugs. It recommends a Community Order with a drug rehabilitation requirement. The defendant has voluntarily sought treatment and is doing well, but he is extremely stressed about this court appearance. The PSR suggests that if he is not sentenced today he may attempt self harm.

Question 8 (9 marks)

- a. Given your recent personal experience, are you content to deal with this case or would you recuse yourself? (1 mark)
- b. How do you deal with any concerns you have? (4 marks)
- c. What matters would you take into consideration when deciding whether or not to recuse yourself? (4 marks)

The next case is a Plea also in relation to a domestic burglary and assault occasioning actual bodily harm. You have read the victim's evidence. She is an 85 year old woman who says she opened the door to her house to let in the defendant who said he was from the Gas Board and wanted to read her meter. As soon as he was inside he punched her in the face so that she fell over. She suffered significant bruising around the eyes. He picked up and rifled through her handbag, taking £200 in cash and then ran off. Defence counsel indicates that his client has submitted a basis of plea which has been agreed by the prosecution and hands up a signed document entitled "Basis of Plea". It says that the defendant was passing the victim's house and saw the door open. He looked into the house and the victim came out of a room, screamed, stepped backwards and fell knocking her face on a piece of furniture. He walked in to check whether she was alright and saw a bundle of £200 in cash on a table. She started screaming again so he picked up the money in an opportunistic way and fled the

scene. He intends to plead guilty to burglary and common assault (on the basis that his entry into the house put the victim in fear of violence but that he did not punch her).

Question 9 (11 marks)

- a. Are you content to sentence on the agreed basis or do you have concerns about it? If so, what do you do about those concerns? (6 marks)
- b. What matters did you take into account when you came to your decision? (5 marks)

PART C (worth a maximum of 20 marks + up to 6 discretionary marks)

You are the judge in the trial of a defendant Andrew Bancroft charged with grievous bodily harm. The victim, a 16 year old girl called Charlotte Dorchester, was with her parents having a pub meal at their local public house, the Horse and Hounds. Five youths who had been drinking for some time were becoming increasingly rowdy and Mr Dorchester stood up and asked them if they would stop swearing and keep the noise down. There was a short confrontation between the five youths and Mr Dorchester which quickly escalated to some pushing and shoving. One of the youths then threw a beer glass at Mr Dorchester who ducked, but the glass hit Charlotte in the face, smashing on impact and causing a number of lacerations. The five youths all ran away and Charlotte was taken to the local Accident and Emergency department where she received a total of 32 sutures. As the youths ran out of the pub, one Andrew Bancroft tripped over and two other customers apprehended him. The other four escaped and have not subsequently been identified. Mr Dorchester could not describe any of the youths and was too concerned with his daughter to pay any attention to Andrew Bancroft when he was apprehended.

Andrew Bancroft was subsequently arrested by police and interviewed. He said he had gone alone to the public house where he had fallen into conversation with four other youths whom he did not know and whom he would not now recognise. When the altercation with Mr Dorchester started he was at the back of the crowd observing but when one of the other youths threw the glass he automatically ran away as well. One of his finger prints was found on a remnant of the smashed glass (among other unidentified prints) and he explained that he had earlier bought a round for the group and that must be how his print got onto the glass. Charlotte appeared to give evidence. She had two 5cm scars across her nose and cheek, which she said were permanent, and she was very emotional. In her statement and in examination in chief she said that Andrew Bancroft had thrown the glass, but in answer to questions in cross examination she accepted that she may only have identified him because she saw him being apprehended. Other eye witnesses could not identify who threw the glass.

At the end of the prosecution case defence counsel, Eric French, makes a submission that you should stop the case now and direct the jury to find his client not guilty. The prosecution counsel, George Howard, resists the application. Mr French refers you to R v Galbraith 73 Cr App R 124 and reads out the following passage:

“(1) If there is no evidence that the crime alleged has been committed by the defendant there is no difficulty – the judge will stop the case.

(2) The difficulty arises where there is some evidence but it is of a tenuous character, for example, because of inherent weakness or vagueness or because it is inconsistent with other evidence.

(a) Where the judge concludes that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty on a submission being made to stop the case.

(b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence on which the jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury."

Mr French submits that there is no evidence that links his client with the crime. Mr Howard submits that the matter should be left to the jury.

Question 10 (20 marks)

You must now rule on whether or not to stop the case.

Write down your ruling.



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Supporting Document Booklet

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Criminal Justice and Public Order Act 1994

- 34 (1) Where, in any proceedings against a person for an offence, evidence is given that the accused—
- (a) at any time before he was charged with the offence, on being questioned under caution by a constable trying to discover whether or by whom the offence had been committed, failed to mention any fact relied on in his defence in those proceedings; or
 - (b) on being charged with the offence or officially informed that he might be prosecuted for it, failed to mention any such fact,
- being a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned, charged or informed, as the case may be, subsection (2) below applies.
- (2) Where this subsection applies—
- (a) a magistrates' court inquiring into the offence as examining justices;
 - (b) a judge, in deciding whether to grant an application made by the accused under paragraph 2 of Schedule 3 to the Crime and Disorder Act 1998
 - (c) the court, in determining whether there is a case to answer
- and
- (d) the court or jury, in determining whether the accused is guilty of the offence charged,
- may draw such inferences from the failure as appear proper.
- 35 (1) At the trial of any person for an offence, subsections (2) and (3) below apply unless—
- (a) the accused's guilt is not in issue; or
 - (b) it appears to the court that the physical or mental condition of the accused makes it undesirable for him to give evidence;
- but subsection (2) below does not apply if, at the conclusion of the evidence for the prosecution, his legal representative informs the court that the accused will give evidence or, where he is unrepresented, the court ascertains from him that he will give evidence.
- (2) Where this subsection applies, the court shall, at the conclusion of the evidence for the prosecution, satisfy itself (in the case of proceedings on indictment with a jury, in the presence of the jury) that the accused is aware that the stage has been reached at which evidence can be given for the defence and that he can, if he wishes, give evidence and that, if he chooses not to give evidence, or having been sworn, without good cause refuses to answer any questions, it will be permissible for the court or the jury to draw such inferences as proper from his failure to give evidence or his refusal, without good cause, to answer any question.
- (3) Where this subsection applies, the court or jury, in determining whether the accused is guilty of the offence charged, may draw such inferences as appear proper from the failure of the accused to give evidence or his refusal, without good cause to answer any question.
- (4) This section does not render the accused compellable to give evidence on his own behalf, and he shall accordingly not be guilty of contempt of court by reason of a failure to do so.
- (5) For the purposes of this section a person who, having been sworn, refuses to answer any question shall be taken to do so without good cause unless—
- (a) he is entitled to refuse to answer the question by virtue of any enactment, whenever passed or made, or on the ground of privilege; or
 - (b) the court in the exercise of its general discretion excuses him from answering it.
- 38 (3) A person shall not have the proceedings against him transferred to the Crown Court for trial, have a case to answer or be convicted of an offence solely on an inference drawn from such a failure or refusal as is mentioned in section 34(2), 35(3), 36(2) or 37(2).

Criminal Procedure and Investigations Act 1996

6A (1) For the purposes of this Part a defence statement is a written statement—

- (a) setting out the nature of the accused's defence, including any particular defences on which he intends to rely,
- (b) indicating the matters of fact on which he takes issue with the prosecution,
- (c) setting out, in the case of each such matter, why he takes issue with the prosecution, and
- (d) indicating any point of law (including any point as to the admissibility of evidence or an abuse of process) which he wishes to take, and any authority on which he intends to rely for that purpose.

(2) A defence statement that discloses an alibi must give particulars of it, including—

- (a) the name, address and date of birth of any witness the accused believes is able to give evidence in support of the alibi, or as many of those details as are known to the accused when the statement is given;
- (b) any information in the accused's possession which might be of material assistance in identifying or finding any such witness in whose case any of the details mentioned in paragraph (a) are not known to the accused when the statement is given.

(3) For the purposes of this section evidence in support of an alibi is evidence tending to show that by reason of the presence of the accused at a particular place or in a particular area at a particular time he was not, or was unlikely to have been, at the place where the offence is alleged to have been committed at the time of its alleged commission.

Youth Justice and Criminal Evidence Act 1999

- 23 (1) A special measures direction may provide for the witness, while giving testimony or being sworn in court, to be prevented by means of a screen or other arrangement from seeing the accused.
- (2) But the screen or other arrangement must not prevent the witness from being able to see, and to be seen by —
- (a) the judge or justices (or both) and the jury (if there is one);
 - (b) legal representatives acting in the proceedings; and
 - (c) any interpreter or other person appointed (in pursuance of the direction or otherwise) to assist the witness.
- (3) Where two or more legal representatives are acting for a party to the proceedings, subsection (2)(b) is to be regarded as satisfied in relation to those representatives if the witness is able at all material times to see and be seen by at least one of them.

Criminal Justice Act 2003

- 101 (1) In criminal proceedings evidence of the defendant's bad character is admissible if, but only if—
- (a) all parties to the proceedings agree to the evidence being admissible,
 - (b) the evidence is adduced by the defendant himself or is given in answer to a question asked by him in cross-examination and intended to elicit it,
 - (c) it is important explanatory evidence,
 - (d) it is relevant to an important matter in issue between the defendant and the prosecution,
 - (e) it has substantial probative value in relation to an important matter in issue between the defendant and a co-defendant,
 - (f) it is evidence to correct a false impression given by the defendant, or
 - (g) the defendant has made an attack on another person's character.
- (2) Sections 102 to 106 contain provision supplementing subsection (1).
- (3) The court must not admit evidence under subsection (1)(d) or (g) if, on an application by the defendant to exclude it, it appears to the court that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.
- (4) On an application to exclude evidence under subsection (3) the court must have regard, in particular, to the length of time between the matters to which that evidence relates and the matters which form the subject of the offence charged
- 116 (1) In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if—
- (a) oral evidence given in the proceedings by the person who made the statement would be admissible as evidence of that matter,
 - (b) the person who made the statement (the relevant person) is identified to the court's satisfaction, and
 - (c) any of the five conditions mentioned in subsection (2) is satisfied.
- (2) The conditions are—
- (a) that the relevant person is dead;
 - (b) that the relevant person is unfit to be a witness because of his bodily or mental condition;
 - (c) that the relevant person is outside the United Kingdom and it is not reasonably practicable to secure his attendance;

- (d) that the relevant person cannot be found although such steps as it is reasonably practicable to take to find him have been taken;
 - (e) that through fear the relevant person does not give (or does not continue to give) oral evidence in the proceedings, either at all or in connection with the subject matter of the statement, and the court gives leave for the statement to be given in evidence.
- (3) For the purposes of subsection (2)(e) “fear” is to be widely construed and (for example) includes fear of the death or injury of another person or of financial loss.
- (4) Leave may be given under subsection (2) (e) only if the court considers that the statement ought to be admitted in the interests of justice, having regard—
- (a) to the statement’s contents,
 - (b) to any risk that its admission or exclusion will result in unfairness to any party to the proceedings (and in particular to how difficult it will be to challenge the statement if the relevant person does not give oral evidence),
 - (c) in appropriate cases, to the fact that a direction under section 19 of the Youth Justice and Criminal Evidence Act 1999 (c. 23) (special measures for the giving of evidence by fearful witnesses etc) could be made in relation to the relevant person, and
 - (d) to any other relevant circumstances.
- (5) A condition set out in any paragraph of subsection (2) which is in fact satisfied is to be treated as not satisfied if it is shown that the circumstances described in that paragraph are caused—
- (a) by the person in support of whose case it is sought to give the statement in evidence, or
 - (b) by a person acting on his behalf,
- in order to prevent the relevant person giving oral evidence in the proceedings (whether at all or in connection with the subject matter of the statement).



THE CONSOLIDATED CRIMINAL PRACTICE DIRECTION

IV.45.10 The prosecution may reach an agreement with the defendant as to the factual basis on which the defendant will plead guilty, often known as an 'agreed basis of plea'. It is always subject to the approval of the court, which will consider whether it is fair and in the interests of justice.

IV.45.11 *R v Underwood* [2004] EWCA Crim 2256; [2005] 1 Cr App R (S) 90 outlines the principles to be applied where the defendant admits that he or she is guilty, but disputes the basis of offending alleged by the prosecution:

- a. The prosecution may accept and agree the defendant's account of the disputed facts or reject it in its entirety. If the prosecution accepts the defendant's basis of plea, it must ensure that the basis of plea is factually accurate and enables the sentencing judge to impose a sentence appropriate to reflect the justice of the case;
- b. In resolving any disputed factual matters, the prosecution must consider its primary duty to the court and must not agree with or acquiesce in an agreement which contains material factual disputes;
- c. If the prosecution does accept the defendant's basis of plea, it must be reduced to writing, be signed by advocates for both sides, and made available to the judge prior to the prosecution's opening;
- d. An agreed basis of plea that has been reached between the parties must not contain any matters which are in dispute;
- e. On occasion the prosecution may lack the evidence positively to dispute the defendant's account, for example, where the defendant asserts a matter outside the knowledge of the prosecution. Simply because the prosecution does not have evidence to contradict the defendant's assertions does not mean those assertions should be agreed. In such a case, the prosecution should test the defendant's evidence and submissions by requesting a *Newton* hearing (*R v Newton* (1982) 4 Cr App R (S) 388, (1982) 77 Cr App R 13), following the procedure set out in paragraph IV.45.13, below.
- f. If it is not possible for the parties to resolve a factual dispute when attempting to reach a plea agreement under this part, it is the responsibility of the prosecution to consider whether the matter should proceed to trial, or to invite the court to hold a *Newton* hearing as necessary.
- g. Subject to paragraph IV.45.12, where the prosecution has not invited the court to hold a *Newton* hearing, and where the factual dispute between the prosecution and the defence is likely to have a material impact on the sentence, if the defence does not invite the court to hold a *Newton* hearing the court is entitled to reach its own conclusion of the facts on the evidence before it.

IV.45.12 *R v Underwood* emphasises that whether or not pleas have been 'agreed' the judge is not bound by any such agreement and is entitled of his or her own motion to insist that any evidence relevant to the facts in dispute (or upon which the judge requires further evidence for whatever reason) should be called. Any view formed by the prosecution on a proposed basis of plea is deemed to be conditional on the judge's acceptance of the basis of plea.

IV.45.13 Where the defendant pleads guilty, but disputes the basis of offending alleged by the prosecution, the following procedure should be followed:

- a. The defendant's basis of plea must be set out in writing, identifying what is in dispute;
- b. The court may invite the parties to make representations about whether the dispute is material to sentence; and
- c. If the court decides that it is a material dispute, the court will invite such further representations or evidence as it may require and decide the dispute in accordance with the principles set out in *R v Newton*.

IV.45.14 Where the disputed issue arises from facts which are within the exclusive knowledge of the defendant and the defendant is willing to give evidence in support of his case, the defence advocate should be prepared to call the defendant. If the defendant is not willing to testify, and subject to any explanation which may be given, the judge may draw such inferences as appear appropriate. Paragraphs 6 to 10 of *Underwood* provide additional guidance regarding the *Newton* hearing procedure.

IV.45.15 The Attorney General has issued guidance for prosecutors regarding their duties when accepting pleas and during the sentencing exercise titled *Attorney General's Guidelines on the Acceptance of Pleas and the Prosecutor's Role in the Sentencing Exercise*.

**Practice Direction (Criminal Proceedings: Consolidation), para. IV.44
[2002] 1 W.L.R. 2870**

Defendant's right to give or not to give evidence

IV.44.1 At the conclusion of the evidence for the prosecution, section 35(2) of the *Criminal Justice and Public Order Act 1994* requires the court to satisfy itself that the accused is aware that the stage has been reached at which evidence can be given for the defence and that he can, if he wishes, give evidence and that, if he chooses not to give evidence, or having been sworn, without good cause refuses to answer any question, it will be permissible for the jury to draw such inferences as appear proper from his failure to give evidence or his refusal, without good cause, to answer any question.

If the accused is legally represented

IV.44.2 Section 35(1) provides that section 35(2) does not apply if at the conclusion of the evidence for the prosecution the accused's legal representative informs the court that the accused will give evidence. This should be done in the presence of the jury. If the representative indicates that the accused will give evidence the case should proceed in the usual way.

IV.44.3 If the court is not so informed, or if the court is informed that the accused does not intend to give evidence, the judge should in the presence of the jury inquire of the representative in these terms:

“Have you advised your client that the stage has now been reached at which he may give evidence and, if he chooses not to do so or, having been sworn, without good cause refuses to answer any question, the jury may draw such inferences as appear proper from his failure to do so?”

IV.44.4 If the representative replies to the judge that the accused has been so advised, then the case shall proceed. If counsel replies that the accused has not been so advised, then the judge shall direct the representative to advise his client of the consequences set out in paragraph 44.3 and should adjourn briefly for his purpose before proceeding further.

If the accused is not legally represented

IV.44.5 If the accused is not represented, the judge shall at the conclusion of the evidence for the prosecution and in the presence of the jury say to the accused:

“You have heard the evidence against you. Now is the time for you to make your defence. You may give evidence on oath, and be cross-examined like any other witness. If you do not give evidence or, having been sworn, without good cause refuse to answer any question the jury may draw such inferences as appear proper. That means they may hold it against you. You may also call any witness or witnesses whom you have arranged to attend court. Afterwards you may also, if you wish, address the jury by arguing your case from the dock. But you cannot at that stage give evidence. Do you now intend to give evidence?”

It is not a breach of professional privilege to require a defence advocate to provide information in accordance with paragraph IV.44.3 of this practice direction: *R. v Cowan*; *R. v Gayle*; *R. v Ricciardi* [1996] 1 Cr.App.R. 1, CA. Furthermore, the words of that paragraph should not be replaced by a simple inquiry of the defence advocate as to whether the defendant has been made aware of the provisions of section 35 of the Act: *ibid*.

A failure to give the defendant the warning required by subsection (2) is of no consequence where no adverse inference is the fact drawn: *Radford v Kent County Council*, 162 J.P. 697, DC.