IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY NO: S 99 of 2013

BETWEEN: **WILLIAM DAVID BUGMY**
Appellant

And **THE QUEEN**
Respondent

APPELLANT'S REPLY

Part I: This reply is certified to be in a form suitable for publication on the internet.

Part 2: 1. The appellant does not adopt the respondent's statement of two issues and the introduction of the language of s6(3) *Criminal Appeal Act* 1912 (NSW) pertaining to an applicant's appeal against sentence (by use of the words "warranted a lesser sentence"): Respondent's Submission "RS" [1]-[2]. The issues are those in the Appellant's Submissions ("AS"), Part II [2.1]-[2.5]. The facts are not contested. The matters at RS [4.3]-[4.5] were taken into account by the sentencing judge: AB 147.10-.16; AB148.10-.46.

2. On a Crown appeal, a finding of error of weight, essentially a particular of manifest inadequacy, does not amount on its own or in combination with other such errors necessarily to a finding that a sentence was unreasonable or plainly unjust. The CCA made no finding that the sentence imposed was markedly below other comparable sentences such that there must have been some misapplication of principle; nor was there comparison to the application of principle in other comparable cases or reference to results of such cases; nor was there a conclusion of manifest inadequacy: cf. RS[6.53], *Hili v The Queen* (2012) 242 CLR 520 at [49], [53]-[55],[58]-[60],[62]; *Dinsdale v R* (2000) 202 CLR 321 at [8]-[9]. Manifest inadequacy is not 'fundamentally intuitive": *Hili* at [60]. The CCA, having found it not necessary to consider whether the sentence was manifestly inadequate, erred in intervening under s5D in circumstances where no other ground pleaded error of principle. The pleaded grounds of the Crown appeal in this case may result in it being unnecessary to decide on this appeal whether, and in what circumstances, patent *House* error as opposed to fourth limb error would suffice to invoke s5D jurisdiction (cf.RS [6.51]-[6.61]). The formality of the notice of appeal in Crown appeals was affirmed in *R v JW* (2010) 77 NSWLR 7 at [27]-[30], see also *Carroll v The Queen* (2009) 83 ALJR 579 at [8].

3. The respondent's contention that once error is found, the CCA may intervene on a Crown appeal, promotes a construction of s5D that applies *House* without regard to the scope and purpose of s5D, namely the limiting purpose: *"It does not extend to the general correction of errors made by sentencing judges"* (*Green v R* (2011) 244 CLR 462 at 477 [36]). The respondent's submissions (RS[6.54]-[6.58]) are not supported by principle: *Griffiths v The Queen* (1977) 137 CLR 293 at 309-310, 326-7, 312, 329-331[1]. Reliance on *McGarry v The*

[1] See also *Malvaso v The Queen* (1989) 168 CLR 227 at 234, *Everett v The Queen* (1994) 181 CLR 295 at 299-300, 306; *Lowndes v The Queen* (1999) 195 CLR 665 at 678-679; *Dinsdale v The Queen* (2000) 202 CLR 321 at 340-341 [62]; *R v Osenkowski* (1982) 30 SASR 212 at 213; *R v Green* (2011) 244 CLR 462 at 465, 476-480; *R v Wall* (2002) 71 NSWLR 692 at 707-708; *R v Hernando* (2002) 136 A Crim R 451 at 456 [9], 458

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Queen (2001) 207 CLR 121 and *Strong v The Queen* (2005) 224 CLR 1 in relation to s5D is erroneous as *"Both McGarry and Strong involved a sentencing regime in which there was more than one element in the sentence. These cases have no relevant analogy to a Crown appeal": JW* at [145] [2] (cf. RS[6.54], footnote 46).

4. This Court should not now entertain "errors" not pleaded on the Crown appeal, including asserted errors of fact: see RS[6.58]-[6.60], [6.74], [6.79], [6.81]. The "errors" described in RS[6.58], [6.60], not found to be errors by the CCA, also misconstrue his Honour's findings. His Honour did not hold that the seriousness of the offence depended on the result of the offence alone, specifically and repeatedly noting the intention of the appellant to inflict grievous bodily harm in the context of considering the seriousness of the offence: AB 150.15, 150.28-45, CCA AB184 [18]. Contrary to RS [6.79], the offence under consideration in *R v Mitchell* (2007) 117 A Crim R 94 was an offence against s33. *R v McCullough* applied *Mitchell.* The finding of fact that the offence was committed in a 'fit of anger', on the 'spur of the moment', was not challenged on appeal, presumably in recognition that it would have been erroneous for the CCA to discard the facts as agreed and found by the sentencing judge in their consideration of last category *House* error: cf. *Carroll* at [9], [24]. The CCA noted the finding of the primary judge in this respect and agreed: AB184[19]; AB189[34].

5. The prosecutor before the CCA submitted that the mental health of the appellant could not be taken into account absent a direct or indirect link to the commission of the offence, not that the judge had made an erroneous finding of fact (AB154-5, 191[43], 193[46]). The CCA should have held that the primary judge did not err in his consideration of the evidence of the mental health of the appellant: cf. AB193-4[45]-[47]. Dr Westmore had documented several "mental health issues" [3], including diagnosed mental illness in his first report (AB124-5, AB154) and noted in the second report confirmation of these upon review of the appellant's clinical notes[4]: AB 128-9. There was no 'automatic result' in relation to general deterrence (cf.RS[6.59]). His Honour considered both *Engert* and *Muldrock* (AB155), finding, contrary to the submission of the appellant for 'significant' moderation, that 'some moderation' would be allowed on account of the totality of the 'psycho-social evidence': cf RS[6.59]. The concession of the prosecutor before the primary judge that the appellant had established both mental illness and that *"he is in some ways not a great vehicle for general deterrence"* (AB36.25) was correctly made: cf. *R v Tsiaris* [1996] 1 VR 389 at 400; *DPP v De la Rosa* (2010) 79 NSWLR 1 at 43 [177]; *R v Verdins* (2007) 16 VR 269 at [5]; *R v Wright* (1997) 93 A Crim R 48 at [50]. In the appellant's case, such a finding, based on the totality of the medical and background evidence, was not erroneous, when balanced with the considerations of deterrence set out by his Honour by specific reference to *R v Schneidas* (1980) 4 A Crim R 96 at 100 and *R v Bryan* (unreported 31 October 1975): AB158. Nor, contrary to the findings of the CCA at AB189-190 [36]-[39] were considerations of deterrence to be confused with the 'objective seriousness' of the offence: cf. RS[6.82], see AS[6.35].

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[12], 460-463 [19]-[29]; *R v Reynolds* [2004] NSWCCA 51 at [23]-[26]; *R v Clarke* [1996] 2 VR 520; *DPP (Vic) v Bright* (2006) 163 A Crim R 538; *DPP (Vic) v Karazisis* (2010) 31 VR 634 at 652 [74].

[2] *JW* at [145], per Spigelman CJ, Allsop P, McClellan CJ at CL, Howie and Johnson JJ agreeing)

[3] Namely depression, auditory perception disturbance, antisocial personality disorder, multiple stressors associated with his numerous psychological and psychiatric social difficulties, resultant functioning in the lower range.

[4] Dr Westmore confirmed auditory hallucinations, depression, self-harming thoughts and behaviours and the probability of psychotic symptoms being of a primary psychotic origin with a high risk of self harm.

6. The respondent does not dispute the general principles stated in *Fernando, Gladue* and *Ipeelee* (RS[6.1]). The respondent appears to seek to distinguish the Canadian cases by arguing that the principles in each flowed from the statutory construction of s718(2)(e) *Criminal Code,* not found in NSW (RS [6.2], [6.9], [6.15], [6.16]). However the Canadian Supreme Court did not read s718(2)(e) in isolation from the purpose and principles of sentencing in ss718, 718.1 and 718.2, and stressed that this should not occur: *Gladue* p.705 [28]-[30], p.709 [39]-[40]. Read in the context of the wider purposes of sentencing and range of available penal sanctions[5] introduced at the same time as s718(2)(e), a comparison with ss3A, 5 and 21A *Crimes (SP) Act* 1999, *Fernando* and *Neal,* demonstrates broad equivalence (see AS [6.27]). The Canadian Supreme Court did not accept the contention that s718.2(e) was in fact an "affirmative action" provision under s15(2) *Canadian Charter of Rights and Freedoms*[6], noting that taking into account the unique circumstances of Aboriginal persons was *"not unfair to non-aboriginal people. Rather, the fundamental purpose of s718.2(e) is to treat aboriginal offenders fairly by taking into account their difference"* and did not require *"an automatic discount"*. The '*Gladue* principles' continue to be applied in Canada *"beyond the context of sentencing to... ensure the appropriate treatment for Aboriginal people as they interact with the justice system"*: *US v Leonard* 2012 ONCA 622 (CanLII) at [53], [85], see also *Law Society of Upper Canada v Terence John Robinson,* 2013 ONLSAP 18 (CanLII) at [69]-[74].

7. It is acknowledged by the respondent that the NSW Law Reform Commission ("NSWLRC") observed in *Report 96 Sentencing: Aboriginal Offenders (October 2000)* that the common law principles then applicable (as stated in *Fernando*) were sufficiently flexible to take account of the unique circumstances of Aboriginal offenders (RS[6.18]). The respondent also accepts that the *Gladue* principles are similar in broad terms to the *Fernando* principles (RS [6.18]-[6.21]). The NSWLRC Report noted the unique position of Indigenous Australians as relevant to the context in which they were sentenced (p.8-9 [1.13]-[1.17]) and that *"recognition of cultural difference and accommodation of diversity is not inconsistent with equality before, and equal protection under the law"* (p.9 [1.17]). Legislative prescription of the sentencing principles, such as the *Fernando* principles, *"would add nothing to the common law and is consequently*[7] *unnecessary"* (p.62 [2.47]). Nor should the statement of Toohey J in the 1988 paper[8] be taken out of context (RS[6.22]). Toohey J was careful to note that *"People do not lose their Aboriginality just because they live in a town or even a city"* (p.4), observing the complexities of frequent strong ties with Aborigines residing elsewhere, including family and clan groups (p.4) and acknowledging that when considering the circumstances of the offender, in order to impose a proportionate sentence, *"it may be the offender's Aboriginality that calls for particular attention"* (p.22-3). His Honour's opinions are not at odds with the application of the Gladue principles, or

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[5] The reforms referred to, akin to s3A and 21A *Crimes (Sentencing Procedure) Act* were analysed in *Gladue* at pp.710 [42]-711 [43]. The expansion of the range of available penal sanctions included the availability of a conditional sentence of imprisonment (Gladue p.709 [40]), equivalent to orders for suspended sentence, home detention or intensive corrections orders in NSW: ss 6,7,12 *Crimes (Sentencing Procedure) Act* 1999.

[6] Section 15 *Canadian Charter of Rights and Freedoms* provides under the heading of "Equality Rights":
15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[7] There appears to be a typographical error at RS [6.18]: *'completely'* should read *'consequently'*.

[8] Toohey J "The sentencing of Aboriginal offenders" , 2nd International Criminal Law Congress, 24 June 1988

Fernando (decided subsequently) which apply to all Aboriginals wherever they reside: *Gladue* at 738 [93.11], *Ipeelee* at 484[84]- 486[87].

8. The *"widespread consensus that imprisonment has not been successful"* in achieving some of the traditional sentencing goals of deterrence, denunciation and rehabilitation (*Gladue* at 718[57]) and that the overreliance on incarceration was of much greater concern in the sentencing of Aboriginal persons (*Gladue* at [58]), was echoed in the NSWLRC report (p30 [2.6], p.50 [2.41]) which noted *"the presumption that punishment is necessarily a deterrent to further offending may have little relevance for a person marginalized from the mainstream of society"*. The ineffectiveness of custodial sentences in breaking the cycle of recidivism and in rehabilitating Indigenous offenders was also considered (pp.50-51[2.42]). See also *R v Fernando* [2002] NSWCCA 28 at [64], *Ipeelee* at 472[66] and AS[6.23].

9. The appellant's submission particular to the applicant's circumstances (AS[6.23]) does not contend for a statement of principle that *"for such background factors to diminish the moral blameworthiness of a particular offence they must be 'integrally related' to the commission of that particular offence"* (cf. RS[6.13]). The submission of the respondent that a causal connection is necessary should be rejected for the reasons set out in *Ipeelee* at [82]-[83]. This Court should not adopt the errors that the Canadian Supreme Court sought to correct that had led to further over-representation of Aboriginal offenders in custody, *"thwarting"* the Gladue principles: *Ipeelee* at p.482 [80], pp.482-4 [81]-[83].

10. The respondent does not oppose this Court applying *Fernando, Gladue* and *Ipeelee,* requiring courts to take into account and give full weight to the known systemic and background factors affecting Indigenous offenders (RS[6.28], see AS[6.29]-[6.31]), which give context to the personal circumstances of individual Indigenous offenders. Further, the respondent accepts that if this Court adopts the construction placed on the judgment of the CCA (at AB194 [48]-196 [52]) by the appellant, the CCA has fallen into error (RS[6.27]-[6.28], [6.33], [6.34]) and such statements of principle are "plainly incorrect" (RS[6.31]). However the respondent argues that this would be a too literal interpretation of what is described as Hoeben JA's "comment" (RS[6.31) and that his Honour was not suggesting that the extent to which the *Fernando* considerations could be taken into account should be "diminished" or "given relatively little weight".

11. The appellant's construction should be preferred for the following reasons: first, his Honour's four separate references to limitations on *Fernando* considerations, namely *"lost much of its force..."*, *"the extent to which social deprivation... can be taken into account must diminish"*, *"the extent to which his Honour could take them into account was limited"*, the reduction in weight to be given to general deterrence *"would be modest"* AB194,196; second, the respondent seeks to call in aid the 'errors' found by the CCA as supporting an enlivening of jurisdiction of the Court under s5D (RS[6.52], [6.53]); third, the CCA expressly referred to 'findings of error' in relation to 'the respondent's subjective case', indicative that the reference to 'weight' accorded to background factors was more than comment: AB196[55].

12. The statements of purported principle in the CCA judgment at AB 194[50], AB 196[52], *R v Ah-See, R v Drew,* and point 8 in *DPP v Terrick* (2009) 24 VR 415 at 469 [46.8] are erroneous. The prosecutor before the primary judge acknowledged that *R v McNaughton* (2006) 66 NSWLR 566 (which differs from the approach in *Terrick* to the use of prior

convictions[9]) was the correct approach to appellant's prior criminal record (AB35.48-36.25). The significant overrepresentation of Aboriginal men, women and children in custody in NSW, is further reason for this Court to correct the errors of principle at AB194-196 [50], [52] and to adopt the correct statement of principle, namely that sentencing judges should pay particular attention to the circumstances of Aboriginal persons standing before them for sentence, in the context of the general background matters set out at AS [6.29], regardless of passage of time or criminal history. The appellant submits that it is also appropriate to emphasise the pivotal role that s5 *Crimes (Sentencing Procedure) Act* has to play in the exercise of the sentencing discretion, both in the determination that no other penalty is appropriate and in determining the length of a custodial sentence, even when sentencing recidivist offenders.

13. The respondent is incorrect to say that there was no evidence that the appellant was in custody in the period from 1992-1995 (RS[6.43]). The appellant was in custody, sentenced to serve control orders in juvenile institutions on no less than four occasions in the noted period (aged 12-13: AB169 Items 3,5,6,7) and seven more occasions while a young person (aged 14-18 years: AB169 Items 8-9, 11-15)[10]. These sentences were in evidence in his criminal history as was his continuing high risk of self-harm (AB70-80, 129). It is also not correct to say that there was no evidence before the primary judge that the sentence was to be served in segregation (RS[6.66]), rather part of the sentence had already been served in segregation, namely 163[11] days (cf.RS[49]). While it is correct that 13 of these days spent in segregation were for an unrelated disciplinary infringement (AB155.40-156.25), the fact remained that he had spent 150 days in segregation for his offences against the Corrections Officers (Exhibit 4 AB132)[12]. These matters were relevant to the exercise of the discretion under s5D, as was the recommendation[13] for residential rehabilitation, which was not a 'limitation on his release' but an assurance that his rehabilitation in an appropriate facility would be given consideration by the State Parole Authority when the question of parole arose (cf. RS [6.66], [6.67]). The respondent having conceded that *"it is evident that the CCA did not refer to the discretion"* (RS [6.63]), it cannot be said that the Court referred to and dismissed relevant matters falling for consideration, the case not being one where the Court should obviously have declined to exercise the discretion: *cf. Malvaso* at 235-236. Strict compliance with such "procedures which authorize an increase in sentence by an appellate court should be insisted on": *Malvaso* at 233. The Crown appeal to the CCA should be dismissed.

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[9] See AS [6.14], [6.21], including footnote [19].
[10] Exhibit A "Custodial History" is a NSW Department of Corrective Services document and commences with the appellant's incarceration on 15 March 2000 in Junee Correction Centre (AB96), aged 18 years old. It is not a Juvenile Justice document and does not record his custodial movements when he was a juvenile.
[11] Exhibit 4 AB132, 10 Jan-9 June 2011. It appears that the author miscalculated the 135 day total.
[12] The appellant notes that the days in segregation appear to have been miscalculated in Exhibit 4, and in fact the appellant spent more than 135 days in segregation . AS [6.22] (o) should be corrected to read 150 days.
[13] As the appellant's sentence was greater than 3 years, the State Parole Authority has jurisdiction to determine whether and on what conditions the appellant should be released to parole: *Crimes (Administration of Sentences) Act* 1999, Part 6, Division 2, s135. The remarks on sentence are but one consideration as to whether the release of the appellant is in the interests of justice: *Crimes(AS)Act* 1999, s135(2)(d).