HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

APPLICATION FOR SPECIAL LEAVE TO APPEAL FROM
THE COURT OF APPEAL OF THE SUPREME COURT OF SOUTH AUSTRALIA

No A17 of 2022

BETWEEN: MATTHEW BERNARD TENHOOPEN
Applicant

and

THE QUEEN
Respondent

APPLICANT'S SUBMISSIONS

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Issues

2. In order to establish extended joint criminal enterprise (**EJCE**) liability for common law murder, is it sufficient that the prosecution prove merely that the relevant accused contemplated that a co-venturer might do an act with the intent to cause grievous bodily harm or death, or must the prosecution also prove that the relevant accused contemplated that a co-venturer might, by such an act, actually cause the death of the deceased?

3. Are the principles of EJCE applicable at all in respect of the extended form of liability for murder created by s 12A of the CLCA?

4. If so, in order to establish EJCE liability for murder under s 12A of the CLCA, is it sufficient that the prosecution prove merely that the relevant accused contemplated that a co-venturer might commit an intentional act of violence in the course or furtherance of a major indictable offence punishable by imprisonment for ten years or more, or must the prosecution also prove that:

   (a) the relevant accused contemplated that a co-venturer might, by such an intentional act of violence, cause the death of the deceased;

   (b) the relevant accused contemplated that a co-venturer might commit an intentional act of violence of the same kind as was actually committed and which in fact caused

the death of the deceased; and/or

(c) the relevant accused contemplated that a co-venturer might commit an intentional act of violence of a kind that was likely to cause, or capable of causing, the death of the deceased?

Part III: Notice pursuant to s 78B of the *Judiciary Act 1903* (Cth)

5. The applicant has considered whether any notice should be given in compliance with s 78B of the *Judiciary Act 1903* (Cth). No such notice is required to be given.

Part IV: Citation of the judgment of the court below

6. The judgment of the Court of Appeal is reported as *Rigney v The Queen; Tenhoopen v The Queen; Carver v The Queen; Mitchell v The Queen* (2021) 290 A Crim R 384.

Part V: Facts

7. Tenhoopen was one of five men charged with the murder of Urim Gjabri (**the deceased**). Before Lovell J (**trial Judge**) and a jury, Tenhoopen was jointly tried with three of the other men – Alfred Claude Rigney (**Rigney**), Benjamin John Mitchell (**Mitchell**) and Aaron Donald Carver (**Carver**).[1] All were found guilty of murder.

8. The prosecution case was that Tenhoopen and four other men (Rigney, Mitchell and Carver, and Jason Paul Howell) were party to a joint criminal enterprise to break into a residence at Para Vista and steal cannabis plants. On 9 October 2018, four of the men, including Tenhoopen, travelled from Murray Bridge to Para Vista. In furtherance of the agreement, the five men approached the residence. CCTV from a nearby house appeared to show one of the men holding a long object, "a stick or possibly a bat".[2]

9. An unknown number of the men entered the residence and came across the occupant, the deceased. The prosecution case was that one of the men assaulted the deceased and caused his death. The evidence of a forensic pathologist established that the deceased's death was caused by a fracture to the skull inflicted with a blunt object. The deceased likely survived for some time before dying from his injuries. No weapon was located that might be consistent with the blow struck to Mr Gjabri's skull.[3]

10. The prosecution did not prove which of the five men inflicted the fatal injury, and did not allege that the joint enterprise itself extended to the commission of murder. The

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1 Core Appeal Book (**CAB**), pp 5-7.

2 Summing Up, pp 50 (CAB 57). The prosecution also sought to rely on the opportunity for the accused to have taken possession of bricks or parts of bricks as they walked past a building site (CAB 57, 90).

3 Summing Up, p 51 (CAB 58).

prosecution case of murder against each of Rigney, Mitchell, Carver and Tenhoopen was advanced on two alternative bases. Both depended upon the application of the principles of EJCE. The two pathways to conviction of murder for Tenhoopen that the trial Judge left to the jury were as follows.

11. The ***first*** pathway was "common law murder". The jury was directed that Tenhoopen and his co-accused would each be guilty of murder if he were a party to a joint criminal enterprise to "break and enter and steal the cannabis"[4] and contemplated that "in carrying out the joint enterprise … one or more of the accused, if they came across someone in the house, might inflict violence on that person … with the intention of either killing that person or causing really serious bodily harm".[5]

12. The ***second*** pathway was "constructive murder", pursuant to s 12A of the CLCA. The jury were directed that Tenhoopen would be guilty of murder if he contemplated that any co-venturer might commit any intentional act of violence in the course or furtherance of the joint criminal enterprise to break and enter and steal the cannabis.[6] The trial Judge told the jury that if the accused "contemplated that one of [the] participants in the joint enterprise might strike [the deceased] for example on the back of the leg, that would be a contemplation of an intentional act of violence" and "[t]hey do not have to have within their contemplation that someone would necessarily strike [the deceased] on the skull".[7]

13. Tenhoopen's appeal to the Court of Appeal was unanimously dismissed (along with those of his co-accused). Peek AJA (with whom Kelly P agreed) upheld the correctness of the trial Judge's directions with respect to both common law murder and s 12A of the CLCA. Doyle JA also agreed in a short concurring judgment.

14. On 18 August 2022, orders were made by Keane and Edelman JJ, dispensing with the time limit imposed by rule 41.02.1 and referring Tenhoopen's application for special leave to appeal to the Full Court for argument as on an appeal, so that it might be heard together with the appeals in *Mitchell v The Queen* (A14 of 2022), *Rigney v The Queen* (A15 of 2022) and *Carver v The Queen* (A16 of 2022).[8]

15. The facts and evidence in relation to the events of 9 October 2018, key aspects of the trial Judge's summing up, and the reasons of the Court of Appeal are more fully set out

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4 Summing Up, p 39 (CAB 46).
5 Summing Up, p 42 (CAB 49).
6 Summing Up, pp 42-3, 53-62, 64-5, 266-70 (CAB 49-50, 60-69, 71-72, 273-277).
7 Summing Up, pp 54-5 (CAB 61-62).
8 CAB 419.

in the written submissions of Mitchell (at [6]-[22]), Rigney (at [7]-[31]) and Carver (at [11]-[21]). Tenhoopen accepts those descriptions as accurate.

Part VI: Argument

Proposed ground 1 – directions in relation to EJCE and common law murder

Overview of general principles and statements of authority in relation to EJCE liability

16. The doctrine of EJCE is of general application and is not limited to murder.[9] It is capable of application to criminal offences generally, including statutory offences – though it is, of course, always able to be excluded as a matter of statutory construction, either by express statutory words or by implication.

17. In its general form, the doctrine holds that, when offenders are party to a joint criminal enterprise to commit some offence (the **foundational offence**) and where, in the course of carrying out or furthering that enterprise, one of the co-venturers commits a different offence (the **incidental offence**), a secondary offender may be found guilty of the incidental offence if they *foresee* the possible *commission of the incidental offence*.[10]

18. In *Miller v The Queen*,[11] this Court confirmed the continuing applicability of the doctrine of EJCE. The basis for EJCE liability generally (ie, not specifically for murder) was described by French CJ, Kiefel, Bell, Nettle and Gordon JJ (**plurality**) as being that:[12]

> … a party to a joint criminal enterprise who foresees, but does not agree to, the commission of the incidental crime in the course of carrying out the agreement and who, with that awareness, continues to participate in the enterprise is liable for the incidental offence ("extended joint criminal enterprise" liability).

19. A person does not foresee "the commission" of an incidental crime unless they foresee the occurrence of all the elements of that crime – that is, the relevant act of the primary offender; any relevant state of mind of the primary offender that is necessary for the commission of the offence; and any relevant physical circumstance or result that is necessary for the offence to be committed

20. Elsewhere, the plurality made reference to "[p]roof of the accused's foresight of the

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9 *Miller v The Queen* (2016) 259 CLR 380 at [1] (French CJ, Kiefel, Bell, Nettle and Gordon JJ).
10 *Miller v The Queen* (2016) 259 CLR 380 at [4] (French CJ, Kiefel, Bell, Nettle and Gordon JJ).
11 (2016) 259 CLR 380.
12 (2016) 259 CLR 380 at [4]. (Emphasis added.) See also [132] (Keane J): "… if two people set out to commit an offence (crime A) and in the course of it one of them commits another offence (crime B), the second person is guilty as an accessory to crime B if he or she foresaw it [ie, crime B] as a possibility, but did not necessarily intend it". (Emphasis added.)

possibility of the commission of the incidental offence" and other equivalent expressions, as a description of what was required for EJCE liability, for murder as well as other offences.[13]

21. Gageler J, in his dissenting reasons in *Miller*, similarly described the requisite state of mind for EJCE liability as a member of a joint criminal enterprise "foresee[ing] the possibility of that other member committing that different offence".[14]

22. Hayne J's summary of the general principles of EJCE in *Gillard v The Queen* (also a murder case) likewise required foresight *of the commission of the incidental crime*, and not merely foresight of the infliction of violence with an intent to cause grievous bodily harm.[15] Gleeson CJ and Callinan J in the same case expressed the principle in similar terms and, moreover, seem to have regarded it as necessary for the prosecution to prove that an accused contemplated an act *causing death* in order to establish their guilt of manslaughter by way of EJCE liability.[16] It would be anomalous, to say the least, to require foresight of death for guilt of manslaughter but not for guilt of murder.

23. Keane J in *Miller* referred with evident approval to the statement of Hayne J in *Gillard*, that "the criminal culpability of a participant in a criminal joint venture for an 'incidental crime, when its commission is foreseen but not agreed … lies in the participation in the joint criminal enterprise with the necessary foresight'".[17] In justifying the continuing operation of EJCE principles as part of the common law of Australia, Keane J said:[18]

> … the Australian position recognises that deliberate participation in a joint criminal enterprise which carries a foreseen risk of an incidental crime itself has an important bearing upon the individual moral culpability of each participant for the incidental crime.

24. The same approach is further reflected in the statement of the House of Lords in *R v Powell*, in the context of murder, that "it is sufficient to found a conviction for murder for a secondary party to have realised that in the course of the joint enterprise the primary party might kill with intent to do so or with intent to cause grievous bodily harm".[19]

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13 (2016) 259 CLR 380 at [44]. (Emphasis added.) See also the use of similar expressions at [37], [38], [43].
14 (2016) 259 CLR 380 at [100]. (Emphasis added.) See also [108] ("with foresight of that crime"); but contrast [98].
15 (2003) 219 CLR 1 at [112], [118] (Gummow J agreeing). See also *R v Jones* (2006) 161 A Crim R 511 at [188(4)] (Duggan J; Bleby and Anderson JJ agreeing).
16 *Gillard v The Queen* (2003) 219 CLR 1 at [25] (Kirby J agreeing).
17 (2016) 259 CLR 380 at [135] (emphasis added), citing *Gillard v The Queen* (2003) 219 CLR 1 at [112].
18 (2016) 259 CLR 380 at [137]. (Emphasis added.)
19 [1999] 1 AC 1 at 27. (Emphasis added.)

Confusion as to the "foresight" required for application of EJCE to common law murder

25. All of the passages quoted and referred to above indicate that, as a matter of principle, EJCE liability – both generally and in relation to murder in particular – rests on the proposition that the moral culpability of a person who, having agreed to the commission of a foundational offence, *foresees* the *commission of an incidental offence* by one of their co-venturers in the course of carrying out the foundational offence, is comparable to that of the person who personally commits the incidental offence. The further one drifts from that central principle, the less justification there is for attributing to the co-venturer the same criminal liability as the person who commits the incidental offence.

10 26. If this basic principle is simply applied to the case of common law murder, then the requisite foresight *must* include foresight of the possibility of the *death* of another. A person cannot, in any realistic sense, be said to have foreseen the possibility of *the commission of the offence of murder* unless they have contemplated the possibility of someone being killed.

27. The authorities are generally consistent in their statements of principle regarding the application of EJCE principles to *offences generally*: a co-venturer can be guilty of an offence if, but only if, they *foresee the commission of that particular offence*. On the other hand, there is significant confusion in the way courts have identified the state of mind necessary for a person to be found guilty of *murder* on the basis of EJCE.

20 28. For example, the plurality in *Miller* described the requisite state of mind in two different, and possibly inconsistent, ways. An important part of the reason for accepting the continued application of EJCE in the context of common law murder was expressed as follows in the judgment of the plurality:[20]

> … It is to be appreciated that in the paradigm case of murder, the secondary party's foresight is not that in executing the agreed criminal enterprise a person may die or suffer grievous bodily harm – it is that in executing the agreed criminal enterprise a party to it may commit murder. And with that knowledge, the secondary party must continue to participate in the agreed criminal enterprise.

29. Foresight that a "party … may commit murder" inescapably means foresight that a party
30 may do an act that in fact results in death; so this statement accords with principle. On the other hand, the plurality later said that, in its application to common law murder:[21]

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20 *Miller v The Queen* (2016) 259 CLR 380 at [45]. (Emphasis added.)

21 (2016) 259 CLR 380 at [1] (emphasis added), citing *McAuliffe v The Queen* (1995) 183 CLR 108; *Gillard v The Queen* (2003) 219 CLR 1; *Clayton v The Queen* (2006) 81 ALJR 439; *R v Taufahema* (2007) 228 CLR 232.

> … the doctrine holds that a person is guilty of murder where he or she is a party to an agreement to commit a crime and foresees that death or really serious bodily injury might be occasioned by a co-venturer acting with murderous intention and he or she, with that awareness, continues to participate in the agreed criminal enterprise.

30. This latter formulation is ambiguous. It could be understood as meaning that it would be sufficient for guilt of murder that the accused foresees *either* infliction of death *or* infliction of grievous bodily harm *alone*; or it could be understood as referring to the state of mind of a person who foresees the possible infliction of "death or really serious bodily injury" (ie, a person who foresees *both* death *and* grievous bodily harm, but as *alternative* possible results).

31. There are passages in the judgment of Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ in *Clayton v The Queen* that may appear more consistent with the latter view.[22] However, their Honours also expressed the relevant principle as being that "… the participants are liable for what they foresee as the possible results of that venture".[23] And it was specifically stated in that case that it was "neither necessary nor desirable to attempt to elaborate or explain [the principles of EJCE] in any way" and that "[n]othing that is said in these reasons should be understood as doing so".[24]

32. In *McAuliffe v The Queen*, the applicable *principle* was explained as being that "the prosecution must prove that the individual concerned foresaw *that the incidental crime might be committed* and cannot rely upon the existence of the common purpose as establishing that state of mind" and that "the criminal culpability lies in the participation in the joint criminal enterprise with the necessary foresight".[25] However, the actual direction approved in *McAuliffe* was that "an individual contemplation of the *intentional infliction of grievous bodily harm* as a possible incident of the venture would be a sufficient intention on the part of either of them for the purpose of murder".[26] The issue argued in *McAuliffe* was whether a co-venturer who contemplates the commission of an incidental crime, which was not itself the subject matter of the joint criminal enterprise, should be guilty of murder at all (ie, whether the doctrine of EJCE exists at all), rather than the exact nature of the foresight that should be required.[27] Given that the facts of *McAuliffe* involved a violent assault using a hammer, it may be that the distinction was

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22 (2006) 81 ALJR 439 at [16]-[17], [26].
23 (2006) 81 ALJR 439 at [20].
24 (2006) 81 ALJR 439 at [3].
25 (1995) 183 CLR 108 at 117-8. (Emphasis added.)
26 (1995) 183 CLR 108 at 118.
27 (1995) 183 CLR 108 at 113. It may well be that it was simply assumed that the requisite foresight for EJCE liability would be the same as that required for joint criminal enterprise liability.

not of great practical moment in that case: it is not easy to contemplate an assault with a hammer with intent to cause grievous bodily harm, without also foreseeing the possibility that the assault may cause death.

33. To the extent that it is necessary, Tenhoopen seeks leave to reopen and overrule *McAuliffe* in relation to this particular narrow aspect (ie, precisely what possibility must be foreseen).

34. If EJCE liability for common law murder applies to a person who contemplates the possible intentional infliction of grievous bodily harm – but who does not actually contemplate the possibility of death – this must be because the unique concept of "malice aforethought",[28] developed by the common law as the *mental element* for the crime of murder, is somehow to be imported into the EJCE analysis, but translated into the *result* foresight of which will suffice for liability of a secondary participant.

35. But, it is submitted, this involves an unjustifiable conflation of the necessary foresight in relation to the primary offender's *state of mind* and the necessary foresight as to the *consequence* of the primary offender's conduct.[29]

36. The only way this could be justified would be if EJCE liability were held to rest upon:

    (a) the *acts* of one co-venturer, including acts done in furtherance of the foundational offence but which were *not* within the contemplation of the joint venture, being *attributed* to all other co-venturers; and

    (b) mere *foresight* of the *possibility* of a co-venturer's act causing grievous bodily harm, without any intention or agreement that grievous bodily harm be inflicted, being treated as sufficient to amount to the *mens rea* for common law murder.

37. Neither of those propositions should be accepted.

38. In *IL v The Queen*, Kiefel CJ, Keane and Edelman JJ identified the distinction between primary and derivative liability, as follows:[30]

> Liability which is primary can involve attribution of the acts of another. But the liability remains personal to the accused. Liability which is derivative depends upon attribution to

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28 In the common law of Australia, "malice aforethought" is a state of mind consisting of an intention to cause grievous bodily harm or death, or knowledge that grievous bodily harm or death is the probable result: *Crabbe v The Queen* (1985) 156 CLR 464 at 470.

29 In *some* cases, this might not matter (because, for example, foresight of an act done with an *intention to kill* will invariably involve contemplation of the possibility of that intention being realised; and thus will involve contemplation of the possibility of death). But in most cases, this will be a very real distinction. Actual contemplation of the possibility of an act done with intent to inflict grievous bodily harm, but not death, is not tantamount to contemplation of the possibility that someone will be killed.

30 *IL v The Queen* (2017) 262 CLR 268 at [34].

> the accused of the liability of another. If the other is not liable then the accused cannot be liable.

39. In the same case, Gageler J said:[31]

> For completeness, I note that *Osland* concerned only the doctrine of joint criminal enterprise and not the doctrine of extended joint criminal enterprise recently affirmed by majority in *Miller v The Queen*[32]. This case too concerns only joint criminal enterprise. Whether criminal responsibility attributed by operation of the doctrine of extended joint criminal enterprise is primary or derivative and how, if at all, the doctrine of extended joint criminal enterprise might intersect with constructive murder are questions which do not now arise for consideration.

40. Joint criminal enterprise (not EJCE) involves primary, rather than derivative, liability.[33] In the case of joint criminal enterprise liability (but not EJCE), each party to the enterprise is liable for acts done by each other co-venturer which are contemplated by the agreement, because each such act is attributed, by law, to all of the parties to the agreement. Each party to the agreement is authorised, expressly or impliedly, by each other party to perform such acts as are within the scope of the agreement. The agreed-upon acts are *attributed* to each person who is a party to the agreement precisely because they are acts done pursuant to the agreement. And, because they have *agreed* to those acts being done (even if only contingently) each party to the joint criminal enterprise is taken to have intended them (even if only contingently). Thus, where the intentional commission of those acts amounts to an offence, each party to the joint enterprise has the *mens rea* necessary for the commission of the offence.[34] It is that combination of the attribution of the acts to the particular person, such that they are, in law, *the acts of that person*, coupled with the possession of the necessary *mens rea* by *that person*, which makes them directly liable under the doctrine of joint criminal enterprise.

41. In contrast, EJCE liability should *not* be regarded as primary; it is necessarily derivative. *Ex hypothesi*, the incidental offence committed by one party to the agreement was *not* itself the subject of the agreement, and thus was not authorised[35] by each of the persons

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31 *IL v The Queen* (2017) 262 CLR 268 at [107].

32 (2016) 259 CLR 380.

33 *Osland v The Queen* (1998) 197 CLR 316 at [72]-[73], [81] (McHugh J), [174] (Kirby J), [257] (Callinan J); *IL v The Queen* (2017) 262 CLR 268 at [30] (Kiefel CJ, Keane and Edelman JJ).

34 *Osland v The Queen* (1997) 197 CLR 316 at [93] (McHugh J).

35 In *Miller v The Queen* (2016) 259 CLR 380, only Keane J appears to have sought to justify EJCE liability as founded on "authorisation" (see at [136], [139], [143], [144]). But, with respect, mere foresight of a possibility of the commission of conduct is not the same as authorisation, and does not make it part of the agreed conduct; indeed, it is a state of mind that may exist alongside the *prohibition* of the conduct. As Dr Dyer has observed, the "agency justification" is "singularly inapt to explain EJCE liability": A Dyer, "The "Australian Position" Concerning Criminal Complicity: Principle, Policy or Politics?" (2018) 40 *Sydney Law Review* 290 at 301. See also A Dyer, "The *Osland* 'Wrong Turn' and the Problems that Fictions Produce" (2019) 42 *University of New South Wales Law Journal* 500 at 503.

who are parties to the agreement – had it been, we would be in the realm of joint criminal enterprise liability, not EJCE. A person is not liable under EJCE because the *acts* of their co-venturer are attributed to them. Rather, as stated in *Miller*, in EJCE the culpability of persons other than the primary offender arises because they have continued in the joint enterprise *with foresight of the commission, by the primary offender, of the incidental offence*.[36]

42. Moreover, once it is recognized that we are talking about an act that was not itself the subject of the accused's agreement, it is apparent that mere foresight of the possibility that such an act might be done by a co-venturer with an intention (on the part of that co-venturer) to cause grievous bodily harm does *not* amount to the *mens rea* for murder at common law. That is, EJCE cannot be satisfactorily explained as involving primary liability, because the participants "lack the mental element for the principal offence".[37]

The directions in the present case in relation to EJCE and common law murder

43. As a matter of principle, the only way Tenhoopen could properly be convicted of murder was if it were proved that he contemplated the possibility that a co-venturer might *commit that offence*[38] – that is, contemplated a co-venturer doing an act with intent to cause at least grievous bodily harm, *and* contemplated the possibility of such an act causing the death of a person – and continued to participate in the joint criminal enterprise despite that state of mind.

44. In relation to common law murder, the trial Judge directed the jury that Tenhoopen would be guilty of murder, in accordance with principles of EJCE, if they answered the following question in the affirmative:[39]

> Did the accused contemplate that in carrying out the joint enterprise to break into the house and steal the cannabis, that one or more of the accused, if they came across someone in the house, might inflict violence on that person and that violence inflicted be accompanied with the intention of either killing that person or causing really serious bodily harm?

45. The direction did not require that the jury find that Tenhoopen foresaw or contemplated as a possibility that, in carrying out the joint criminal enterprise, anyone might be killed. It did not require contemplation of *any* "result" of his co-venturer's act. If the rationale

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36 (2016) 259 CLR 380 at [4] (quoted at [18] above), [45] (quoted at [28] above).

37 A Dyer, "The Osland 'Wrong Turn' and the Problems that Fictions Produce" (2019) 42 *University of New South Wales Law Journal* 500 at 503.

38 *Miller v The Queen* (2016) 259 CLR 380 at [4], [37], [38], [43], [44] (French CJ, Kiefel, Bell, Nettle and Gordon JJ), [100], [108] (Gageler J), [132], [137] (Keane J); *Gillard v The Queen* (2003) 219 CLR 1 at [25] (Gleeson CJ and Callinan J), [112], [118] (Hayne J).

39 Summing Up, p 42 (CAB 49). Substantially the same direction was repeated again on the same page and on pp 49-50 (CAB 49, 56-57).

for the doctrine of EJCE is as was stated in *Miller*, it cannot be correct, as a matter of principle, for a trial Judge to direct a jury that a secondary offender is liable for an incidental offence committed by a co-venturer merely because they contemplate that a co-venturer might inflict violence on a person with the intention of causing them really serious bodily harm. What they must foresee is the possibility of *the commission of the offence of murder*, including the death of a person.

46. In the present case, the only agreement to which Tenhoopen was a party was an agreement to break and enter and steal cannabis. It was not alleged that the agreement extended to or encompassed the commission of any offence of violence, even on a contingent basis. Tenhoopen therefore could not be said to have agreed to or authorised (even contingently) the commission of the acts that killed the deceased. Those acts are not to be attributed to him as though they had been the subject of an agreement to which he was a party. And the minimum state of mind which the jury was instructed he would have to possess in order to be convicted of common law murder – contemplation of the possibility of a co-offender inflicting violence to which he had not agreed, with the intent to cause really serious bodily harm – did not amount to the *mens rea* for murder.

Proposed grounds 2 and 3 – directions in relation to EJCE and s 12A of the CLCA

Difficulties with the application of EJCE in conjunction with s 12A of the CLCA

47. Section 12A of the CLCA is entitled "Causing death by an intentional act of violence". It functions as a statutory (modified) replacement for "felony murder". Section 12A was enacted in 1994 and came into operation on 1 January 1995 – prior to this Court's decision in *McAuliffe*, which confirmed EJCE as part of the law of Australia. The acceptance of the doctrine had formerly been judicially resisted in South Australia.[40]

48. Tenhoopen respectfully submits that it is not critical whether s 12A is regarded as a distinct statutory offence or merely as a provision that deems certain instances of unlawful homicide to be murder.[41] What matters is that, in substance, s 12A creates a means by which persons may be criminally liable for a particular offence (murder); and the necessary elements for the attribution of such liability are established by statute. In practical terms, the significance of the statement that a person who commits the conduct identified in s 12A "is guilty of murder" is to attract statutory provisions that fix the

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40 See *R v Britten* (1988) 49 SASR 47 at 54 (King CJ).

41 Compare the Written Submissions of Carver at [28] ("does not create a separate statutory offence but … provides an alternative pathway to conviction of murder"); Written Submissions of Mitchell at [27] ("elements of the offence"); and Written Submissions of Rigney at [81] ("statutory offence").

mandatory head sentence, the usually-mandatory minimum 20-year non-parole period, and other principles applicable to sentencing and release on parole, which are applicable to offenders convicted of murder.[42]

49. Two critical "elements" of, or requirements for, s 12A liability are, *first*, that the (primary) offender must both intend and perform the particular act of violence that they do in fact commit, and *secondly*, that that act which the primary offender intends and performs must be the act that in fact causes the death of another (that requirement of a causal connection being the effect of the use of the word "thus").

50. The primary offender who *personally* commits an intentional act of violence that attracts the operation of s 12A will, necessarily, intend not just any act of violence but the *particular* act of violence that they do in fact commit. At the point when they commit the act of violence they will necessarily know the nature of the particular act that they intend, they will necessarily know the circumstances in which they commit the act, and they will thus be in a position to judge the risks associated with it, and the possible or foreseeable consequences that may result from it. The evident policy of s 12A is to attach to a person *in that position* liability for murder if they, in the course or furtherance of a serious criminal offence, decide to run the risk of intentionally committing *the particular intentional act of violence that they actually do commit*, and should the death of another person in fact turn out to be the result of that decision.

51. The application of the principles of EJCE to the (already extended) form of the offence of murder provided for in s 12A creates consequences which are extreme and which cannot be justified having regard to the rationale underlying either EJCE or s 12A.

52. If EJCE applies to s 12A in the manner identified in the directions given by the trial Judge, then a secondary offender may be liable for murder in circumstances where:

    (a) they foresee or contemplate the *possible* intentional commission by a co-venturer of *any* act of violence at all;

    (b) they need not foresee or contemplate the possible commission of the act of violence that is actually intentionally committed by the co-venturer, or any act of violence that is remotely comparable to the act actually intentionally committed;

    (c) they are (unlike the primary offender) not in a position to judge the risk associated with the particular (potentially uncontemplated) act of violence that the primary

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[42] See s 11 of the CLCA; ss 47(5)(b), 70(1)(b) and 95(2)(b) of the *Sentencing Act 2017* (SA); and s 67(6) and Division 4 of Part 6 of the *Correctional Services Act 1982* (SA).

offender does commit;

(d) they need not have foreseen or contemplated the possibility of the commission of any act of violence that is realistically capable of causing the death of a person; and

(e) they need not foresee or contemplate the possibility that the particular act of violence the possibility of which they *have* foreseen or contemplated, could cause death.

53. A major source of difficulty in the approach that was reflected in the trial Judge's directions (and approved as correct by the Court of Appeal) is the real potential for significant, or indeed complete, disconnect between the intentional act of violence the possibility of the commission of which is foreseen, and the intentional act of violence that is actually performed and that causes death. A secondary offender may foresee the possibility of a co-venturer intentionally committing *some* act of violence, but that foreseen act might well bear no resemblance to the act of violence actually committed in the circumstances that actually unfold. It is hard to see why foresight of a possibility of some essentially irrelevant hypothetical act of violence – where nothing like it ever was actually committed by anyone – should dictate a co-venturer's guilt of murder.

54. The range of potential intentional "acts of violence" is enormous. Continuation in an enterprise with foresight of the possibility of *some* kind of intentional act of violence need not be in any real sense morally equivalent to foresight of the intentional act of violence that is actually committed. And, importantly, foresight of the commission of *some* kind of intentional act of violence in hypothetical circumstances, and continuation in the enterprise with *that* awareness, may be morally far removed from the moral culpability of the primary offender who decides, in particular known circumstances, to commit a very different kind of intentional act of violence. There is a vast difference in the moral culpability of a person running the very remote risk of (unforeseen) death arising from a very minor contemplated intentional act of violence committed by a co-venturer, of a kind that is not at all likely to cause death, and that of a person running a high risk of death resulting from a wholly different kind of intentional act of violence, where death is a foreseeable and realistic outcome which actually results.

55. Yet, on the approach reflected in the trial Judge's directions and accepted by the Court of Appeal, a person is liable for murder if they merely foresee the possibility of a co-offender committing *any* intentional act of violence: recall that the trial Judge used the

example of a contemplated possibility of a "strike" or "smack" to the back of the leg.[43]

56. A concrete, though hypothetical, example starkly illustrates the sorts of capricious results that would follow from the application of EJCE principles to s 12A in the manner contemplated by the trial Judge's directions. Suppose that two men devise a plan to bribe a public official.[44] The first man contemplates that, in the event that the official refuses the offered bribe, his co-venturer might speak abusively to the official and give them a shove (an intentional act of violence) in an attempt to bully the official into accepting the bribe. What actually happens, though, is that, upon the refusal of the bribe by the official, the second co-venturer holds a loaded gun to the official's temple and threatens to pull the trigger (quite a different intentional act of violence). The gun accidentally discharges, and the official is killed. On the trial Judge's directions, the first co-venturer would be guilty of murder, even though they did not contemplate even the possibility of an act of violence of a kind anything like the act that was actually committed, did not contemplate even the possibility of commission of any act of violence that carried any appreciable risk of causing death, and did not contemplate even the possibility of the official being killed.

57. In light of the difficulties identified above, Tenhoopen advances four alternative submissions about the proper approach to s 12A. If any of these contentions were accepted, it would follow that special leave should be granted and the appeal allowed.

First submission: EJCE has no application to s 12A of the CLCA

58. As a matter of statutory construction, the Parliament, in enacting s 12A, should not be understood to have intended that the doctrine of EJCE should apply in combination with s 12A. Considerations of text, context and purpose support that conclusion.

59. Section 12A operates to expand liability for murder to a wider category of cases than those to which it would otherwise apply. The question of statutory construction that arises concerns the nature and *extent* of that expansion of liability.[45] That question must be resolved by reference to the text, understood in the context of general constructional principles and the purpose or mischief underlying its enactment.

60. Having regard to the text of s 12A, the operation of the provision is explicitly addressed

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43 Summing Up, pp 54-5, 61, 270 (CAB 61-62, 68, 277).

44 A major indictable offence against s 249 of the CLCA that carries a maximum penalty of imprisonment for ten years.

45 Cf *Construction Forestry Mining and Energy Union v Mammoet Australia Pty Ltd* (2013) 248 CLR 619 at [40], quoting *Carr v Western Australia* (2007) 232 CLR 138 at [5]-[7]; *Minister for Employment and Workplace Relations v Gribbles Radiology Pty Ltd* (2005) 222 CLR 194 at [21].

only to – and thus is limited to – a *person* who *commits* an *intentional act of violence*. Those words, properly construed, mark the limit of the extent of the expansion of liability which s 12A effects.

61. The first inquiry necessitated by the text of s 12A is whether the person in question *committed* an "intentional act of violence". The paradigm case of a person committing an "intentional act of violence" is where that person, themselves, personally carries out the act of violence. It is in that paradigm case that one can most readily discern the policy behind the expansion of liability for murder which s 12A effects (see [50] above).

62. Even if not limited only to that paradigm case, s 12A is, in terms, limited in its application to a person who *commits* an intentional act of violence. A person may "commit" an *act* either by doing it personally or in circumstances where another person's acts are *attributed* to that person.[46] As submitted at [38]-[41] above, the better analysis of EJCE is that, unlike joint criminal enterprise liability, EJCE liability does not rest upon the *attribution* of the *acts* of the primary offender to the secondary offender; rather, in EJCE, *liability* is attributed or imposed to reflect the culpability of a person who contemplates the possible commission of the incidental crime and yet, with that knowledge, continues to participate in the joint enterprise.

63. Importantly, that limited operation of s 12A is reinforced by the use of the word "intentional". It signals that s 12A applies to a person who commits (whether personally or in circumstances where the *act* of a primary offender is *attributed* to them) an act of violence with an *actual intention* to do so. So understood, the text of s 12A imposes liability for murder only upon persons who actually have an *intention* to commit an act of violence – and not mere *foresight* or *contemplation* of a possibility that an act of violence may be committed by another co-venturer. That the extended form of liability for murder should be limited to persons who intend personally to do an act of violence including those who, by entering an agreement with others, *agree* to the commission of an act of violence in pursuit of their criminal purpose (and thus relevantly "intend" it) is unsurprising, and accords with the natural meaning of s 12A.

64. As a statutory replacement for the common law felony murder rule, s 12A produces a form of "constructive" murder: particular conduct that would not otherwise qualify as murder is, in effect, *deemed* to be murder. In *Wilson v The Queen*, it was accepted that

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[46] For example, joint criminal enterprise (not EJCE), where the act in question is within the scope of the parties' mutual agreement. See generally *IL v The Queen* (2017) 262 CLR 268 at [26]-[40].

"the scope of constructive crime 'should be confined to what is truly unavoidable'".[47] This is consistent with the more general principle of statutory construction applicable to deeming provisions, namely that they should be construed strictly and only for the purpose for which resort is had to them.[48]

65. There is nothing to suggest that the purpose or mischief to which the enactment of s 12A was directed extended to rendering a person liable for murder on the basis of nothing more than mere foresight or contemplation of a possibility that another participant, in the course of or in furtherance of a joint criminal enterprise, might commit an intentional act of violence which the first person had not agreed to. Indeed, both its terms and the timing of its enactment strongly suggest that no such operation was intended.

66. Having regard to the rationales underlying each of s 12A and EJCE, and the peculiar and unacceptable consequences of applying s 12A and EJCE cumulatively, it is to be concluded that principles of EJCE do not apply cumulatively upon s 12A.

67. The remaining contentions proceed on the basis (contrary to the above submission) that the doctrine of EJCE *is* capable of applying to the offence created by s 12A of the CLCA.

Second submission: must contemplate co-venturer "committing murder", including death

68. For the reasons already advanced at [16]-[42] above, it is submitted that a principled approach to the doctrine of EJCE, when applied to an incidental offence of murder, requires that a secondary offender only be held guilty of murder if they contemplate that a co-venturer *might commit murder* – that is, if they contemplate *all of the essential elements* for a co-venturer to be guilty of murder, including that the co-venturer might do an act *that results in the death of another person*.

69. If that contention were accepted then it would follow that, for a secondary offender to commit murder by EJCE, applied to s 12A of the CLCA, they must contemplate not merely that a co-offender might commit an intentional act of violence in furtherance of the joint criminal enterprise, but must also foresee the possibility that the contemplated intentional act of violence might result in the death of another person. If that is correct, the trial Judge's directions regarding constructive murder omitted an essential element, namely contemplation that the co-venturer's intentional act of violence might cause the death of another.

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47 (1992) 174 CLR 313 at 327 (Mason CJ, Toohey, Gaudron and McHugh JJ).

48 *Onody v Return to Work Corporation (SA)* (2019) 133 SASR 109 at [76]; *Federal Commissioner of Taxation v Comber* (1986) 10 FCR 88 at 96; *Ex parte Walton; Re Levy* (1881) 17 Ch D 746 at 756.

70. Even if, contrary to the submissions at [16]-[42] above, the Court were to accept that a person can be convicted of *common law murder* if they contemplate merely that a co-venturer might *intentionally inflict grievous bodily harm* (ie, without the need to contemplate the possibility of the co-venturer doing an act that *might result in death*), it should be accepted that that is a conclusion that applies peculiarly to EJCE liability in its application to common law murder. As suggested at [34] above, if EJCE liability for common law murder extends to a person with that limited foresight, it must somehow be because the anomalous mental element of "malice aforethought" that applies to the common law offence of murder is translated into the operation of EJCE in relation to that offence. Even if that position were to be maintained in relation to the application of the doctrine of EJCE to the *sui generis* case of common law murder (though for the reasons already advanced above, it should not be), there is no reason in principle to extend it further so that it applies more broadly to statutory forms of liability.

71. As explained at [16]-[23] above, the wider *general principle* on which EJCE liability is based – as repeatedly articulated by this Court[49] – is that a person should be liable for an incidental offence that is committed by a co-venturer if, but only if, the person contemplated or foresaw the possible *commission of that offence* – meaning that they foresaw all the elements of the offence. When applied to statutory offences (or statutory criminal liability that depends on establishing particular elements), EJCE should be held to require proof of foresight of *every* element of the offence – including those elements which are concerned with a particular outcome, consequence or *result*.

72. That general principle, when applied to the conduct prescribed by s 12A of the CLCA, leads to the conclusion that (whatever might be the position with respect to EJCE liability for murder at common law), a person can only be liable for murder under s 12A on the basis of EJCE if they foresee the possibility of all of the statutory elements necessary for the operation of s 12A – including the death of a person.

Third submission: must contemplate an act of violence of the kind actually committed

73. If (contrary to the submissions just advanced) EJCE principles:

    (a) *are* to be applied to s 12A of the CLCA; and

    (b) do not require that a person contemplate or foresee the possibility of an intentional

[49] *Miller v The Queen* (2016) 259 CLR 380 at [4], [37], [38], [43], [44] (French CJ, Kiefel, Bell, Nettle and Gordon JJ), [100], [108] (Gageler J), [132], [137] (Keane J); *Gillard v The Queen* (2003) 219 CLR 1 at [25] (Gleeson CJ and Callinan J), [112], [118] (Hayne J).

act of violence by a co-venturer that *causes death*,

then the EJCE requirement that a secondary offender, in order to be guilty of murder, must foresee or contemplate the possibility that a co-venturer might "commit the incidental offence" should be understood, in the context of s 12A, as requiring that the secondary offender contemplate the possibility that a co-venturer may intentionally commit an act of violence *of the same kind* as the *particular intentional act of violence that the co-venturer did in fact commit and which did in fact cause the death*.[50] Put slightly differently, the requirement of foresight is not merely foresight of the possibility of *any* act of violence; it is foresight of an act of the kind that constituted the *actus reus* of the s 12A offence that was *actually committed* by the primary offender.

74. The application of common law EJCE principles to s 12A must pay sufficient regard to the expression "and *thus causes* the death of another" as it appears in s 12A. Under s 12A, it is not *any* intentional act of violence that must be committed for a primary offender to be guilty, but an act of violence that in fact causes death. It is *that* intentional act of violence – the act that has in fact resulted in death – which a co-venturer must have foreseen. While naturally a co-venturer need not foresee every detail of the precise circumstances in which such an act of violence is in fact committed, it must still be possible, if EJCE liability is to arise by reference to s 12A, to say that the secondary offender contemplated an intentional act of violence of the same kind that caused death.

75. This would, appropriately, require a degree of culpability of the secondary offender that is more consonant with the rationale for both s 12A and EJCE liability, and better aligns the attribution of liability and moral culpability. The rationale for EJCE liability is that a secondary offender should be liable for an incidental offence the possible commission of which they have foreseen. Even if that is understood (contrary to the submissions above) to mean only contemplation of the *acts and state of mind* of the primary offender, and not the *consequences* of the primary offender's act, what it means to contemplate or foresee the possible commission of an offence must be understood in a realistic sense.

76. Just as a primary offender will only be guilty of murder in accordance with s 12A for the consequences that occur as the result of the particular act of violence that they *actually intend to commit* and *do in fact commit*, a secondary offender will be guilty of murder only for the consequences that occur as the result of an act of violence of a kind that they *actually contemplate* a co-venturer both *intending to commit*, and in fact

[50] A similar contention was advanced in the Court of Appeal but rejected by Peek AJA at CA [125]ff.

committing.

77. Precisely what a jury should be directed would amount to an act of violence "of the same kind" in the relevant sense must of course depend upon the facts and circumstances of each particular case. But (if this submission is accepted) in the circumstances of the present case, the trial Judge ought to have directed the jury that Tenhoopen could only be convicted of murder if the prosecution had proved that he contemplated as a possibility, at least, the intentional commission, by another co-venturer, of an assault involving the use of significant force to the head with a blunt object or weapon.

Fourth submission: must contemplate an act of violence capable of causing death

78. If each of the above submissions is not accepted, the final submission of Tenhoopen is that a secondary participant in a joint criminal enterprise, in order to be guilty of murder, must foresee or contemplate at least an intentional act of violence that would be likely to cause death, or that is at least realistically capable of causing death.

79. This conclusion might be arrived at in either of two ways. *First*, the reference in s 12A of the CLCA itself to an "intentional act of violence" can appropriately be construed as referring to an act of violence that would be realistically capable of causing death. Tenhoopen adopts the submissions advanced by Carver in this respect.[51]

80. *Secondly*, as submitted at [74] above, the word "thus" in s 12A is important, and must be given effect in the way EJCE liability applies to s 12A. Before a secondary offender can be convicted of murder by reason of s 12A through principles of EJCE, they must foresee – if not the actual act of violence committed by the primary offender or an act of violence of that kind (as per the third submission above) – at least an act of violence that is of a kind that would be likely to, or reasonably capable of, causing death. Otherwise, the liability of the secondary offender becomes completely disconnected from the moral culpability associated with the "act of violence" that they foresee.

81. Again, this fourth submission tends more appropriately to align the degree of moral culpability of the secondary offender with their exposure to liability for murder.

82. The trial Judge's directions in this case (including the example of a strike to the back of the leg) made it clear that foresight of the possibility, by a secondary participant, of *any* intentional act of violence by a co-venturer – even one not realistically capable of causing death – would suffice for guilt of murder. That means that, applying EJCE, a

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51 Written Submissions of Carver at [45]-[80].

person who merely contemplates an act of violence of a kind that could not realistically result in death is treated as having culpability comparable to a person who has done the particular act of violence which *did* cause the death of the deceased and which was thus, necessarily, capable of doing so, and which that person intentionally committed in the face of the precise risks of that particular act.

Part VII: Orders sought

83. Tenhoopen seeks the following orders:

    1. Special leave to appeal granted.

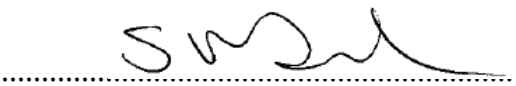
    2. Appeal allowed.

    3. Set aside the order of the Court of Appeal of the Supreme Court of South Australia made on 10 August 2021 dismissing the appellant's appeal against conviction and, in its place, order that the appeal to the Court of Appeal be allowed and that there be a new trial.

Part VIII: Estimate of time required

84. Tenhoopen estimates that he will require up to forty five minutes for the presentation of his oral argument.

Dated: 7 September 2022



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Name: S A McDonald

Telephone: 08 8212 6022

Email: mcdonald@hansonchambers.com.au

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Name: G P G Mead

Telephone: 08 8111 5614

Email: greg.mead@lsc.sa.gov.au

ANNEXURE: LIST OF RELEVANT STATUTORY PROVISIONS

1. *Criminal Law Consolidation Act 1935* (SA), ss 11, 12A (as in force on 9 October 2018)

2. *Sentencing Act 2017* (SA), s 47(5)(b) (as in force on 9 October 2018)