HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

No. A5 of 2022

BETWEEN: DARRYL MARTIN HORE

Appellant

and

THE QUEEN

Respondent

10

No. A6 of 2022

BETWEEN: JACOB ARTHUR WICHEN

Appellant

and

THE QUEEN

Respondent

APPELLANTS'

20 **OUTLINE OF ORAL SUBMISSIONS**

Part I: Certification

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

Part II: Outline of propositions the appellants intend to advance in oral argument

First issue of construction – the meaning of "willing" in s 59(1a)(a)

1. The first issue of construction (ground 1) concerns the meaning of the word "willing" in s 59(1a)(a) of the *Sentencing Act 2017* (SA).
2. The word "willing" is not defined, for the purposes of s 59 or at all. The definition of the word "unwilling" in s 57(1) is expressly limited by the words "in this section" and
30 is, in any event, a different expression from that used in s 59(1a)(a). The ordinary meaning of the expression "is … willing" requires a consideration of the *present* state of mind of the offender in connection with a future situation. In contrast, the definition of "unwilling" requires an objective assessment of the risk or likelihood of an offender

behaving in a particular way in a hypothetical future situation. **A [24]-[27], ARep [2]**

3. The Court of Appeal erred in holding that the word "willing" was to be construed as meaning "the converse of 'unwilling' in s 57". In particular:

   a. the Court erred in holding that ss 57 and 59 "can only provide a coherent regime for detention and … release on licence" if the word "willing" in s 59 is the converse of the word "unwilling" in s 57; **A [29], [40], ARep [4]-[6]**

   b. the Court erred in holding that it would be nonsensical for a person "to be detained under one test" and "immediately released" under another, when both initial detention and release are discretionary; **A [29], [38]-[39], [43]-[44]**

10 c. insofar as the Court of Appeal was referring to symmetry only in the "verbal tests" to be applied and not the legal and practical operation of the scheme, the point is textually weak because a finding that the person is "unwilling", although a practical restraint on ordering initial detention, is not expressed to be a precondition to the exercise of the power to detain in s 57. **A [37]**; **ARep fn 1**

4. The practical effect of the construction adopted by the Court of Appeal is that many persons who have been detained will be unable ever to satisfy the condition from within the prison environment, because existing risk factors cannot be further reduced. This is the "paradox" to which Kourakis CJ referred. **A [8], [18]-[19], [31], [54]**

5. The principle of legality is relevant in deciding between competing constructions of
20 s 59. The considerations relied upon by the respondent as supporting its construction do not satisfy the requirement for "irresistible clearness"; they concern symmetry in the "verbal tests" only. **A [31]-[35], [45], ARep [4]**

6. The second reading speech and Parliamentary Debates cannot be used to supplant the meaning of the text. In any case, insofar as the intended operation of s 59(1a) was described in the second reading speech, it largely repeated or paraphrased the terms of s 59(1a) itself. **A [51]**

Second issue of construction – can the effect of likely conditions be taken into account?

7. The second issue of construction (raised by ground 2) proceeds on the assumption that the word "willing" in s 59 means the converse of "unwilling" in s 57(1).

30 8. The Court of Appeal held that, in assessing whether "there is a significant risk that the person would, given an opportunity to commit a relevant offence, fail to exercise appropriate control of the person's sexual instincts" for the purposes of ss 58 and 59, an applicant for release on licence must satisfy the Court of his willingness and

capacity to control his sexual instincts "*without consideration of the effect of any conditions* that may be placed upon his release". **A [53]-[55], ARep [10]**

9. Assessment of the level of "risk" that a person would, given an "opportunity" to commit an offence, fail to exercise appropriate control over their sexual instincts, must depend upon the circumstances in which the posited "opportunity" arises. The hypothetical consideration should be anchored by reference to the likely circumstances of the person if released into the community. **A [56]-[57]**

10. On the Court of Appeal's construction, a person cannot be released even where the risk could be reduced by conditions such that it is no longer a "significant" risk. On
10 the appellant's construction, the risk assessment includes consideration of the likely effect of the conditions; though it does not require the Court to assume they will necessarily be complied with. **A [59], ARep [11]-[12]**

11. The requirement in s 59(4)(c)(ii), requires the Court to take into account a Parole Board report that identifies "the probable circumstances of the person if the person is released on licence" is a matter to be taken into account. That includes the conditions to be imposed in the event of release. It should be taken into account *both* at the threshold stage and in the exercise discretion. **A [60]**

12. The Court of Appeal's approach requires the Court to assess a risk in circumstances that *cannot arise*, because it must ignore any effect of conditions. This compels
20 detention not tailored to community protection, by requiring it to continue even if, by conditions, the risk could be reduced to less than a "significant risk". **A [59]-[60]**

Dated: 10 May 2022

Stephen McDonald