IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY No. S309 of 2017

BETWEEN: **DL**
Appellant
and
The Queen
Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification for Publication

1. I certify that this submission is in a form suitable for publication on the internet.

Part II: Concise Statement of Issues

2. Does procedural fairness require that notice be given to an appellant that the Court is not proceeding on unchallenged findings of fact of the sentencing judge but rather is contemplating the determination of the s 6(3) *Criminal Appeal Act* 1912 question on the basis of particular 'aggravated' and adverse factual findings?

3. Following the decisions in *Kentwell v The Queen* (2014) 252 CLR 601 (***Kentwell***) and *Betts v The Queen* (2016) 258 CLR 420, (***Betts***) is it open to an intermediate court of appeal, when considering whether a lesser sentence is warranted in law under s 6(3) *Criminal Appeal Act* 1912 (NSW), to come to different and aggravated factual findings (such as in relation to an offender's intention, whether an offence was premeditated and whether the appellant was affected by a mental illness) than those reached by the sentencing judge? In particular, is this open in circumstances where the findings were accepted to be 'open' to the sentencing judge, the respondent has not challenged those findings, not lodged an appeal at any time and not submitted that the Court should find differently, with the parties conducting the proceedings on what is informally referred to as the 'usual basis', namely that such evidence was admissible in relation to progress towards rehabilitation and circumstances in custody since sentence?

Part III: Certification as to s 78B of the *Judiciary Act* 1903

Filed on behalf of the appellant on: 2 February 2018
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4. The appellant certifies that no notice is required under s 78B of the *Judiciary Act* 1903.

Part IV: Citation of the Reasons for judgment of the Primary and Intermediate Courts

5. The internet citation of the primary court reasons for judgment is *R v DL* [2008] NSWSC 1199 (**ROS**). The internet citation of the reasons for judgment of the Court of Criminal Appeal is *DL (No 2) v R* [2017] NSWCCA 58[1] (**CCA**).

Part V: Relevant Facts and Background

6. On 27 March 2007 the appellant was found guilty of the murder of the deceased on 19 July 2005. The deceased was 15 years of age. The appellant had just turned 16 years of age at the time of the offence. The maximum penalty for the offence was life imprisonment. At the time of sentence a standard non-parole period of 25 years applied to the sentencing of juvenile offenders in cases where the victim was a child under the age of 18 years: Part 4, Division 1A, *Crimes (Sentencing Procedure) Act* 1999 (as at 14 November 2008).

7. On 14 November 2008, the trial judge Justice Hulme sentenced the appellant to a term of imprisonment for 22 years with a non-parole period of 17 years. The sentence was backdated to commence on 19 July 2005. The appellant's earliest date of eligibility for parole is 19 July 2022. The sentence expires on 18 July 2027. The sentencing judge described the murder of the deceased in brief terms as follows:

> 'Shortly before 4.00pm on 19 July 2005 (the deceased), aged 15, alighted from a bus which had carried her part of the way home from school. Using a short cut, she commenced to walk through the car park of the Forresters Beach Resort with a view to walking to her home a little distance beyond. In the car park she was attacked by the Prisoner who with a knife which, although it has not been found, appears to have been short, stabbed her something in the order of 48 times': ROS [1]. CAB 42

8. Justice Hulme, having been supplied with evidence on the sentencing proceedings, including psychiatric reports and evidence from Dr Allnutt and Dr Nielssen and having also heard evidence from a treating psychiatrist Dr Kasinathan, made a number of findings on sentence:
   (1) There was scant evidence that might explain the killing: ROS [7]. CAB 43
   (2) The appellant was 16 years old at the time of the offence. He had no prior convictions and the primary judge accepted descriptions of him as 'shy, quiet, family oriented and someone who wouldn't hurt an ant'. ROS [8]. CAB 43

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[1] The names of the applicant, the deceased and a young witness are not to be published pursuant to s 15A of the *Children (Criminal Proceedings) Act 1987* (NSW).

(3) At the time of the attack the appellant must have been in a frenzy. There was much irrationality about what occurred: ROS [18]. Reasoning was almost non-existent: ROS [24]. CAB 46 CAB 47

(4) There was no persuasive evidence of any conceivably rational explanation for the attack: ROS [19]. CAB 46

(5) His Honour was not satisfied beyond reasonable doubt of premeditation: ROS [20]-[43]. CAB 46-52

(6) It was probable that the appellant was acting under the influence of some psychosis at the time of the murder: ROS [38]. CAB 51

(7) Because of the appellant's mental state, the primary judge could not be satisfied beyond reasonable doubt of an intention to kill: ROS [38]. CAB 51

(8) There was an intention to inflict grievous bodily harm: ROS [46]. CAB 53

(9) His Honour concluded that the offence was 'a little below the mid-range' of objective seriousness: ROS [49]. CAB 53

(10) The appellant was unlikely to reoffend however the sentencing judge could not find that his prospects of rehabilitation were good: ROS [44]. CAB 52

(11) The sentencing principles in relation to youth were applicable: ROS [50][2]. CAB 54

(12) Special circumstances were found: ROS [51]. CAB 54

9. On the appeal the respondent conceded error of principle, namely that the primary judge erred when sentencing the appellant by giving primary significance to the standard non-parole period (cf. *R v Way* (2004) 60 NSWLR 168), in a manner contrary to *Muldrock v The Queen* (2011) 244 CLR 120 ('*Muldrock error*'). This error was accepted unanimously by the CCA: [4], [41]-[50], [53], [132]. The second pleaded ground of manifest excess was not determined by the CCA: per Wilson J at [132] (Leeming JA agreeing at [1]), per Rothman J at [54]-[55] (although see [115]). CAB 61, 72-74 75, 95-96 CAB 95-96, 61 CAB 75, 92

10. There was agreement between the parties and acceptance by the CCA that when undertaking the exercise of the re-sentencing discretion in 2016, as opposed to sentencing in 2008, there was a significant difference in the task, as the standard non parole provisions no longer applied to the appellant: CCA [3], [5] (1), [47], [135]; s 54D (3) *Crimes (Sentencing* CAB 61, 62, 73, 96

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[2] *R v GDP* (1991) 53 A Crim R 112 at 116.

Procedure) Act 1999 (NSW), inserted by the *Crimes (Amendment (Sexual Offences) Act 2008 No 15, Schedule 2, s 4; MB v R* [2013] NSWCCA 254 at [17].

11. In the event of resentencing[3] the appellant read an affidavit from his solicitor detailing his progress in custody after sentence was imposed on 14 November 2008: T27.22 on 7.11.16, cf. *Betts* at [11]. The material was not tendered as fresh evidence. The affidavit summarised the appellant's case management file, Juvenile Justice records and Justice Health records from the date of sentence. There was no objection and no cross-examination. The affidavit detailed the appellant's disciplinary issues and punishments in the eight year period of custody since sentence. The primary focus was on the appellant's hardship in custody including assaults on him since sentence, incidents of self-harm, dismissal by a court of an accusation made by a juvenile justice officer that had resulted in him being transferred to adult custody sooner than recommended by the sentencing judge, scheduling of the appellant for a period of time while in adult custody and continued demonstrated immaturity. The appellant had participated in a Violent Offender's Program while in Juvenile Detention although maintaining innocence had not done so in adult custody: cf. CCA [170]. He had attained his HSC and completed various programs and courses: CCA [170]-[171]. CAB 102 CAB 102

12. Material about the appellant's mental health in this affidavit consisted of his solicitor's summary of case notes made by allied health staff that related solely to the ongoing management of the appellant in custody and annexed a Juvenile Justice Reclassification Report dated 11 November 2009 (Annexure A) and a report from Dr Chan, psychiatric registrar dated 11/9/2014 (Annexure D). The additional evidence said nothing about the primary psychiatric evidence. The appellant continued to be medicated after sentence. The annexed 2009 Juvenile Justice report (Annexure A) noted continuing depression and anxiety subsequent to sentence and also noted that the appellant was immature, unable to adjust to change and was 'exhibiting behavior consistent with early adolescence. These traits considerably impact on [DL]'s mental health and his inability to manage situations as they arise in detention'. A reduced classification was recommended[4]. There was no mention in this report of the primary psychiatric reports. AFM 124 AFM 135

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[3] On the appellant's behalf the affidavit of Carla Velasquez dated 2/11/2016 was relied on in the event of 'resentence': T27.22 on 7/11/2016. AFM 103 AFM 106

[4] Affidavit of Carla Velasquez 2/11/16 at paragraph [15], Annexure A at pages 7-8. AFM 130-131

13. The 2014 report (Annexure D) from Dr Chan, psychiatric registrar, recommended that the appellant be scheduled as mentally ill, requiring treatment in a hospital, under the *Mental Health (Forensic Provisions) Act 1990* (***MHFP Act***). It contained an extremely brief summary of the conclusions of the primary reports under the heading 'Psychiatric History' before addressing the appellant's reports of being subject to intimidation and assault while in adult custody (post-sentence), suicidal thoughts and medication. The report then gave a mental state observation for two days in Long Bay Hospital on 12 and 15 September 2014, concluding with the opinion that the appellant was thought to be suffering a psychotic illness by others and was mentally ill requiring further assessment, recommending that he be scheduled as an inpatient[5]. On 22 September 2014 the appellant was assessed as mentally ill and was required to remain in Long Bay Hospital by order under s 56 (2) of the *MHFP Act.* It was subsequently reported by Dr Chan that no psychotic symptoms were observed during the four weeks the appellant was in Long Bay Hospital in 2014. The appellant was described as concrete in thinking, preoccupied with his appeal, consistent with having 'Autistic Spectrum traits' and Adjustment Disorder[6]. He was discharged on 17 October 2014. Thereafter there were summarized regular notations in the files of suicidal ideation. AFM 135

14. The respondent filed two affidavits, one annexing records related to disciplinary infractions while in custody and the other extracting six limited observations from Justice Health notes on five days in 2014 and 2015 (two of those days while he was scheduled as mentally ill and another shortly after a self-harming incident) and annexing notes from those days[7].

15. Neither party suggested that the evidence relied on in the event of re-sentence was relevant to whether the appellant suffered psychosis at the time of the offence, intended to kill the deceased or engaged in premeditated conduct at the time. Nor did the evidence itself. Neither party commissioned additional reports from the forensic psychiatrists who had previously assessed the appellant and given evidence before Justice Hulme. Neither party had sought an opinion from any other appropriately qualified psychiatrist as to the relevance of the appellant's mental health over the period since he had been sentenced in 2008 to the question of whether he had been affected by a psychosis at the time of the offence.

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[5] Affidavit of Carla Velasquez 2/11/16 at paragraph [15], Annexure D. AFM 106
[6] Affidavit of Carla Velasquez at [120]. AFM 135
[7] The two affidavits read by the Crown were also received on the 'usual basis': T69.34 on 10/11/2016. AFM 120-12
AFM 191

16. Error having been found, the CCA was required to re-exercise the sentencing discretion in accordance with *Kentwell* at [40]-[43], *Markarian v The Queen* (2005) 228 CLR 357 and *Betts*. In written submissions, the respondent stated "when the victim's age is taken into account as a factor relevant to the assessment of objective seriousness, then the circumstances of this case place it in 'the high end of the range of objective seriousness of offences of its kind" [8]. This position later changed in oral submissions (see [20] below). AFM 192 Although there was comment by the respondent in oral submissions as to 'unduly favourable' findings of fact (10/11/16 T70.12), they were ultimately not challenged (see [20] below). It was ultimately conceded in oral argument by the respondent that the original sentence was such that there needed to be an adjustment to it (10/11/16 T70.37): AFM 192

> CROWN: We accept that the sentence, because of Muldrock, needs to be adjusted; but in taking into account the factors that I'm putting to your Honours now, that adjustment should be minimal, in our submission. We strongly oppose the submission that the circumstances of this case justify the imposition of a sentence that would make him eligible for parole immediately. The circumstances of this offence are far too serious to contemplate that, in our submission.

17. The respondent, relying on the additional evidence of the appellant's conduct and progress in custody since he was sentenced in 2008, submitted the Court would have serious reservations about the appellant's prospects of rehabilitation: T73.50. This submission AFM 195 invited no departure from the conclusion reached by the primary judge who had concluded he was unwilling to find that the appellant's prospects of rehabilitation were good: ROS [44]. There was at no point any challenge by either party to the conclusions of the primary judge as to risk of reoffending or special circumstances.

18. At the conclusion of the respondent's oral submissions and in response to specific questions from Justice Rothman, the Crown conceded that there was no challenge to the findings of fact of the sentencing judge and additionally conceded that there was no challenge to the conclusion as to the assessment of criminality of the sentencing judge (T74.11): AFM 196

> ROTHMAN J: But you don't take issue with the, what I'll call the substantive findings of his Honour below, that is, either the assessment of criminality, the findings of fact that his Honour made or anything of that kind?
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> CROWN: No, your Honour, except to say that in the circumstances, the applicant was well catered for in terms of those features that were taken into account to his considerable advantage.

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[8] Crown written submissions on the applicant's appeal against severity of sentence dated 27/10/16 at [22].

ROTHMAN J: Yes, that's why I asked the question.

CROWN: Yes, that's right, your Honour. In the absence of a Crown appeal, I don't think I could say anything else. Thank you, your Honours.

19. The appellant in reply acknowledged the concession of the respondent and the application of *Betts,* along with the necessity for the objective seriousness of the offence to be redetermined by the CCA in light of the *Muldrock* error (T74.26-74.45). Contrary to AFM 196
10 Leeming JA at CCA [10], this was not an invitation or an acknowledgement that the Court, CAB 64 when considering the issue of resentence, should determine for itself previous findings of fact made by the sentencing judge. Senior counsel for the appellant had submitted that in the context of resentencing from the outset there was a clear distinction between "objective seriousness as opposed to the facts that were found, and nobody has any dispute in relation to the facts that were found, we don't ask the Court to re-find the facts" (9/11/16 T38.26- AFM 184 .29)[9].

20. At no stage did the majority raise the possibility that it would visit afresh the undisputed findings of fact on intention to kill, psychosis at the time of the offence (or premeditation,
20 special circumstances or risk of reoffending), when deciding if a lesser sentence was warranted. Leeming JA and Wilson J dismissed the appellant's appeal against the severity of the sentence. Rothman J would have allowed the appeal and resentenced the appellant to serve 18 years imprisonment with a non-parole period of 12 years.

21. Leeming JA held: "The Court is not bound by any of the findings by the primary judge, especially given the materially different evidence now before it": [9]. He stated that the CAB 63 Court had the benefit of "expert psychiatric evidence as to DL's current and former states, which bear directly upon the objective seriousness of the crime": [5](3). His Honour stated CAB 62 that the appellant "has had ample opportunity to be heard on all aspects of his appeal against
30 sentence": [11]. Leeming JA had "formed a very different view of the objective seriousness CAB 64 of the offence. To be clear, none of what follows is intended to convey that the findings made by the primary judge were not open to his Honour": [19]. His Honour's different view CAB 66 was "With the benefit of the different evidence available to this Court...": [19]. Leeming JA CAB 66

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[9] See also 10/11/16 T74.37-.38, T74.41 and the reference to the "one exception" of objective seriousness.

did not conclude that the offence was premeditated: [35]. His Honour did not accept that the appellant was suffering from a psychiatric illness in 2005 as diagnosed by Dr Nielssen: [20]-[21], [36]. His Honour held that the appellant had intended to kill the deceased: [23]-[24], [30]-[37]. His Honour described the objective seriousness of the offence as "a very serious killing of a young defenceless 15 year old girl". His Honour accepted that the appellant was young, relatively immature and that the killing was seemingly irrational, with his youth and immaturity being highly relevant to an assessment of penalty: [38]. His Honour did not conclude that the appellant was unlikely to reoffend or that he had good prospects of rehabilitation: [36]. His Honour's assessment of the offence's objective seriousness was on the basis of substituted findings of intent to kill and absence of psychosis at the time, which was in turn material to his finding that no lesser sentence was warranted in law: [36], [37].

CAB 70
CAB 66, 70
CAB 67, 68-7
CAB 71
CAB 70-71
CAB 70-71,

22. Wilson J also made factual findings that differed from those of the sentencing judge. Her Honour was satisfied beyond reasonable doubt that the appellant was not psychotic at the time of the offence: [148]. Her Honour held: "The substantial reduction in the assessment of the appellant's moral culpability allowed by the sentencing judge in 2008, thus has no application. This heightens the gravity of the offence as compared to that made of the crime in 2008": [149]. Her Honour found the appellant had intended to kill the deceased. The presence of "some degree of premeditation" also heightened the gravity of the crime: [150]-[155]. Taking into account additionally to these matters the age of the victim, her Honour concluded that this was "an extremely serious example of murder". The principles of youth were limited as the offender had conducted himself as an adult: [159]-[160]. His suffering in custody was no greater than that of other prisoners and not attributable to "his illness": [169]. Her Honour did not conclude that there were good prospects for rehabilitation or that he was unlikely to re-offend, nor that there should be a finding of special circumstances: [175]-[176].

CAB 98
CAB 49
CAB 99-100
CAB 100
CAB 102
CAB 103

23. Rothman J in his dissenting judgment recognised that there had been no challenge to the sentencing judge's findings of fact: [73]. His Honour did not depart from the findings of the trial judge on intent to kill, premeditation or psychosis, holding that to make a contrary finding "necessarily involves the proposition that the sentencing judge's conclusions of fact were not open to him. These matters must be proved beyond reasonable doubt to be held against the appellant": [74]. His Honour nevertheless examined the evidence on these issues and concurred with the conclusions of the trial judge: [82]-[83], [85], [94]-[95]. His Honour

CAB 81
CAB 81
CAB 83-85, 85, 87

held: "There is no evidence in these proceedings that the early treatment of prodromal changes may prevent the onset of symptoms. However, there is no evidence to the contrary. The appellant was treated after the attack...Further, Dr Allnutt accepted there could be only one psychotic attack and that he may have had such an attack": [82]. His Honour also held CAB 83 that the fact that full psychotic symptoms had not been displayed "does not require or indicate that the attack was not the manifestation of prodromal schizophrenia": [83]. His CAB 85 Honour had regard, amongst other matters, to the appellant's youth and immaturity, the age of the victim and those matters that had occurred since sentence in determining whether a lesser sentence was warranted in law. Rothman J would have allowed the appeal and imposed a sentence seeing the appellant currently eligible for parole.

Part VI: Argument

Procedural Fairness

24. The purpose of an offender's appeal under s 6(3) *Criminal Appeal Act* is the correction of error and the sentencing of the appellant in accordance with law. Principles of procedural fairness condition the exercise of the power to determine an offender's appeal. Lord Fraser of Tulleybelton explained in *In re Hamilton; In re Forrest* [1981] AC 1038 at 1045:

> 'One of the principles of natural justice is that a person is entitled to adequate notice and opportunity to be heard before any judicial order is pronounced against him, so that he, or someone acting on his behalf, may make such representations, if any, as he sees fit. That is the rule of *audi alteram partem* which applies to all judicial proceedings unless its application to a particular class of proceedings has been excluded by Parliament expressly or by necessary implication'.

25. This basic principle of procedural fairness includes that a person should have an opportunity to put his or her case and to meet the case that is put against him or her: *cf. Re Minister for Immigration and Multicultural Affairs and Another ex parte Miah* (2001) 206 CLR 57 (***Miah***) at 86 [99], [140]. In sentencing proceedings it includes that "judges should make known to counsel particular matters which concern them and which may in their minds weigh in favour of a more severe sentence": *Chow v DPP* (1992) 28 NSWLR 593 (***Chow***) at 613 per Sheller JA (agreeing with Kirby P at 606C-E). The principles are "applicable to sentencing as it is to any other judicial proceeding": per Keane JA *R v Cunningham* [2005] QCA 321 at p.5 (***Cunningham***)[10].

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[10] See also *Parker v Director of Public Prosecutions* (1992) 28 NSWLR 282, 293-296 (***Parker***) per Kirby P; *R v Uzabeaga* (2000) 119 A Crim R 542 [34] per Bell J; *Suleiman v The State of Western Australia* [2017] WASCA 26 (***Suleiman***) at [37] per Buss P; *R v Downie and Dandy* [1998] 2 VR 517 per Callaway JA (Phillips CJ and Batt JA agreeing); *Davey v The Queen* [2010] VSCA 346 at [29] per Redlich JA; *Lennon v The Queen* [2017]

26. This court has affirmed that an appeal against severity of sentence requires procedural fairness to an appellant: *Neal v The Queen* (1982) 149 CLR 305 (***Neal***) at 307, 308, 311, *R H McL v The Queen* (2000) 203 CLR 452 (***McL***) at [44], [77], [123]-[124], *Pantorno v The Queen* (1989) 166 CLR 466 (***Pantorno***) at 473, *Kentwell* at [41]. The recognition that procedural fairness attends a severity appeal in *Kentwell* (at [43], footnote 81) was not expressed as being limited to only those very rare cases involving the 'redundant' power referred to in *Neal* at 308, 310-311, 322. An aspect of procedural fairness to the offender includes providing an opportunity to be heard, in order that "the court might be persuaded that the aggravating feature is not present or for some reason it should not be taken into account in the peculiar circumstances of the particular case": *Tadrosse v R* (2005) 65 NSWLR 740 at [19]. A judicial officer should give notice of his or her intention to consider whether evidence could support an adverse finding on sentence in circumstances where no such finding is sought by the Crown: *Stokes v R* (2006) 185 A Crim R 74 at [10]-[15]; *Govindaraju v R* [2011] NSWCCA 255 at [52]-[57], [62]; *Ng v R* (2011) 214 A Crim R 191 at [43]-[50]; *Cunningham* at p.5; *R v Kitson* [2008] QCA 86 at [20]-[24].

27. There was a denial of procedural fairness in significant respects in the appellant's case when having upheld error of law, without warning to the parties in the exercise of the s 6(3) determination as to re-sentence: (a) the majority found that the appellant intended to kill, not to inflict grievous bodily harm (CCA [22]-[24], [36], [150]); (b) the majority found that the appellant was not suffering psychosis at the time of the offence (CCA [36], [141], [148]); (c) the majority rejected the uncontested positive finding that he was unlikely to re-offend (ROS 44, CCA [36], [175]); (d) Wilson J found premeditation (CCA [152]-[154]); and (e) Wilson J also found an absence of special circumstances (CCA [176]).

CAB 67, 70-71, 99
CAB 70-71, 97, 98
CAB 52-53, 70-71, 103, 99-100
CAB 103

28. Where those matters the subject of 'aggravated' factual findings were not matters in issue on the appeal or there is a concession by the respondent that the appeal should be allowed and decided on the basis of the facts as found by a sentencing judge and an appellate court gives no indication that there is contemplation of re-determining integral findings of fact in a manner adverse to an appellant, the character of the denial of procedural fairness is error of law in the nature of jurisdictional error. All of these circumstances pertained in the appellant's case. As Bathurst CJ held in *Lehn* at [65]:

VSCA 85 (***Lennon***) at [23]-[24] per Weinberg and Santamaria JJA and Kidd AJA; *Police v Lymberopoulos (2007) 98 SASR 433; James v Turner (2006) 15 Tas R 375; Shea v Cox [2014] ACTSC 7*

> 'A denial of procedural fairness has been held to be an error of law which can be classified as jurisdictional: *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82; [2000] HCA 57 (***Aala***) at [41], [169]; *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 27; [2001] HCA 22 at [26] [213]. In the context of court proceedings, such a denial of procedural fairness will entitle the aggrieved party to a rehearing, unless a particular breach would not have affected the outcome: *Aala* at [104]; *Stead v State Government Insurance Commission* (1986) 161 CLR 141; [1986] HCA 54 (***Stead***) at 145. Put another way, where there has been a denial of procedural fairness, a miscarriage of justice has occurred in respect of which the person affected is entitled to relief'.

29. In *Lehn*, there was such a denial in circumstances where during the sentencing hearing the Crown did not contend anything less than a 25% "discount" for the guilty plea should be afforded to an offender and the sentencing judge gave no indication that he contemplated giving any lesser "discount" but ultimately awarded a "discount" of only 20%: *Lehn* at [61], [65]. The obligation to afford procedural fairness also extends to putting an offender on notice where unchallenged matters that may be found in mitigation of an offender are not to be accepted: *Beevers v The Queen* [2016] VSCA 271 at [36]-[38]; *Lennon v The Queen* [2017] VSCA 85 at [23]-[24], [28]-[31]; *Wang v R* [2013] NSWCCA 2 at [71].

30. The statement of Leeming JA at CCA [11] that the appellant had "ample opportunity to be heard on all aspects of his appeal against sentence" is wrong. It was not joined in by Rothman or Wilson JJ and should not be accepted by this Court. Rothman J affirmed: "The sentencing judge's findings of fact are not the subject of challenge": CCA [73]. The appeal was conducted on this basis. The transcript reveals the respondent ultimately additionally did not challenge the criminality of the appellant as being "a little below the mid-range" of objective seriousness and accepted that the appeal should be allowed and the appellant re-sentenced. There was no suggestion from the bench that consideration of substituted aggravated factual findings of intent to kill, absence of psychosis or premeditation were in contemplation. Nor was there any indication that the unchallenged mitigating findings not in issue before the CCA of no risk of re-offending and special circumstances were also under consideration for review. CAB 64 CAB 81

31. There was express reference by the majority in the appellant's case to the significant impact on the outcome of the appeal as a result of the aggravated findings as to lack of mental illness, intent to kill and in the findings of Wilson J, additionally premeditation (CCA [149]-[152], [173]-[176]). There was also detrimental impact in the determination of the appeal on CAB 99, 103

the basis of the rejection of the uncontested positive findings of risk of re-offending and special circumstances without notice to the appellant. Rothman J, who made no such aggravated findings and confirmed the sentencing judge's finding of special circumstances (CCA [116]), would have allowed the appeal and reduced the head sentence by 4 years and CAB 92
the non-parole period by 5 years: CCA [117]. His Honour held that anything above the head CAB 92-93
sentence he proposed was "outside the range for this offence by an offender with these subjective circumstances": CCA [115]. It cannot be said that the breach 'could not have CAB 92
possibly have produced a different result': *cf. Stead* at 147. The appellant was deprived of the possibility of a successful outcome on his appeal: *cf. Stead* at 145; *Aala* at 109 [58]-[60].

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32. There was a further aspect to the denial of fairness in the exercise of the appellate jurisdiction under s 6(3). At the time of the appeal, this Court had recently affirmed the limited basis of receipt of evidence tendered in the event of re-sentence as pertaining to an offender's "progress towards rehabilitation": *Betts* at [11]. This "restraint" was affirmed unanimously by this Court as "an aspect of the principled administration of adversarial criminal justice": *Betts* at [12]. The evidence on re-sentence was not tendered or to be used as fresh evidence to cast doubt on the findings as to mental state, intention to inflict grievous bodily harm or premeditation. There was no notice to the parties that the evidence tendered on the limited basis on the appellant's appeal against severity of sentence would be used in a
20 manner other than with the principled restraint affirmed in *Betts.* The proceedings were conducted on the ordinary basis, with specific reliance on *Betts* by the appellant: T74.26 on AMF 196
10/11/16. No party argued nor did the majority suggest on the hearing that *Betts* did not apply or that the ordinary restraint on offender's appeals would be abandoned.

33. Finally, the failure of the majority to raise that they intended to reject the evidence of the psychiatrist(s) who gave evidence on the original sentence proceedings without any fresh evidence in the form of an updated psychiatric report addressing the issues of concern and proceeding to do so was a denial of procedural fairness: cf. *Suleiman v The State of Western Australia* [2017] WASCA 26 at [48]-[50].

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34. The duty to afford procedural fairness is "a fetter upon the lawful exercise of power": *Aala* at [169]. The authority to decide the appellant's case was to be exercised only if procedural fairness had been extended in accordance with law: *cf. Aala* at [169], *Miah* at [26], *Chow* at 606. It is submitted that there was a denial of procedural fairness to the appellant by the

majority of the CCA on his appeal. The appropriate order is that the matter be remitted for consideration of the appeal in accordance with law.

Aggravated findings on re-sentence

35. There was no fresh psychiatric evidence on the appellant's sentence appeal as to his mental state at the time of the offence or psychiatric evidence as to his current psychiatric state, as opposed to summaries of his treatment in custody and case notes since sentence. Leeming JA was wrong to consider that the evidence tendered in the event of re-sentencing was: (a) expert psychiatric evidence as to the appellant's current mental state (cf. CCA [5](3)); (b) CAB 62
10 'materially different' to the evidence before the sentencing judge as to psychiatric state at the time of the offence (cf. CCA [9]); (c) admissible on the appeal for the purpose of re- CAB 63 assessing intention, psychosis or premeditation (cf. *Betts* at [16], [59]); (d) admissible on the appeal as evidence bearing "directly upon the objective seriousness of the crime" (cf. *Betts* at [16], [59]; CCA [5](3)). Justice Wilson's observation that the appellant had not been CAB 62 diagnosed with schizophrenia "either before he was sentenced in 2008, or since that time" was not evidence of a material change in circumstances: cf. CCA [148]. CAB 98

36. Despite the limitations of the further material regarding the appellant's mental health, Leeming JA and Wilson J both concluded beyond reasonable doubt that the appellant had
20 not been psychotic at the time of the offence: CCA [20], [148]. Neither Judge referred to the CAB66, 98 evidence of Dr Nielssen (12/09/08 at T56.10-.17) and Dr Allnutt (1/08/08 at T28.47-29.05) AFM 50 in the primary proceedings that it was possible the appellant had experienced "a brief period AFM 24-25 of psychosis that flared up and then resolved". Leeming J relied upon his conclusion that the appellant had not been suffering from a psychosis to also conclude that the appellant had intended to kill the deceased: CCA [23]-[24]. Wilson J relied on the same conclusion to find CAB 67 the appellant intended to kill the deceased (CCA [150], and there had been "some degree of CAB 99 premeditation": CCA [152]. As set out above, these findings were said to "[heighten] the CAB 99 gravity of the offence": CCA [149], [151], [155], see also [36]. CAB 99, 99, 100, 70-71

30 37. Justice Rothman's reasoning supports the conclusion that the unchallenged findings of the trial judge in relation to psychosis, the nature of the attack and the lack of satisfaction beyond reasonable doubt of intent to kill were, with respect, correct: CCA [82]-[83], [85], CAB 33-35, 85, 87 [94]-[95]. That evidence of schizophrenia had not emerged in the eight years of custody since sentence did not alter the psychiatric evidence before the sentencing judge. As

Rothman J held, there was no evidence to exclude that the early treatment of prodromal changes may prevent the onset of symptoms and the appellant was treated after the attack: CCA [82]. Further Dr Allnutt had accepted that there may be only one psychotic attack and CAB 83-85 that the appellant may have had such an attack: CCA [82]. The evidence did not "require or CAB 83-85 indicate that the attack was not a manifestation of prodromal schizophrenia": CCA [83]. CAB 85

38. The circumstances of the appellant's severity appeal did not provide any proper basis for the CCA to reevaluate and decide afresh every conclusion reached by the sentencing judge. That is not to say that the re-exercise of the discretion as outlined in *Kentwell* is only in respect of the discrete component of the sentence infected by error, nor is there merely an adjustment of sentence: *Lehn* at [60], [68]. The text of s 6(3) "does not provide that if a discrete error is found, the sentence can be adjusted to take account of that error...the section requires the court to form its own view of the appropriate sentence, although, as pointed out in *Kentwell* at [43], not necessarily to resentence": *Lehn* at [69]. To do otherwise is contrary to the instinctive approach as explained in *Markarian.* As Bathurst CJ held in *Lehn* at [69], the purpose of the section is "to ensure that a person whose sentence is affected by error is sentenced according to law". This accords with the observation of French CJ, Crennan and Kiefel JJ in *Green v The Queen* (2011) 244 CLR 462 at [1] that the purpose of an appellant's appeal against severity of a sentence is 'the correction of judicial error in particular cases' and to be distinguished from the purpose of a Crown appeal.

39. As Spigelman CJ said in *Baxter* at [10] and [19] (affirmed in *Kentwell* at [42]):

> '[10] When the Court of Criminal Appeal turns its mind to forming the opinion which s 6(3) requires, it must do so by reference to the facts as they exist at that time, *insofar as the Court permits evidence of those facts to be placed before the Court*" (emphasis added).
>
> '[19] Section 6(3) is directed to ensuring that the Court of Criminal Appeal...re-exercises the sentencing discretion taking into account all statutory requirements and sentencing principles *with a view to formulating the positive opinion* for which the subsection provides.' (emphasis added)

40. As noted by this Court (French CJ, Kiefel, Bell, Gageler and Gordon JJ) in *Betts* at [59]:

> '...there is no principled reason for holding that a finding that was not open to challenge on the appeal is susceptible to challenge on new evidence in the event the appellate court comes to consider re-sentencing'.

41. The principled administration of an adversarial criminal justice system will rarely require reevaluation of such factual conclusions at the point of the appeal when consideration is given to whether a lesser sentence is warranted in law: *Betts* at [12] and [16]. In many resentencing cases there will be additional evidence of events postdating the original sentence hearing, such as progress made towards rehabilitation, changes in an offender's health, unexpected hardship in custody, further re-offending, assistance to authorities and ongoing hardship to third parties that will be potentially relevant to whether a lesser sentence is warranted in law: *Betts* at [2]. The further material in this case did require the Court to consider issues of hardship in custody, prospects of rehabilitation and the like afresh, in accordance with "the usual basis" of the tender of that material. It was open to the Court to arrive at conclusions on those issues that differed from those made at first instance in 2008.

42. The majority did not apply recognised or appropriate restraints on consideration of the appellant's appeal. As recognised in *Thammavongsa v R* (2015) 251 A Crim R 342 at [21(2)], [23], the independent assessment required by s 6(3) is in the context of submissions before the appellate court as "Many issues in the court below may no longer be issues in this Court. Findings of fact made by the sentencing judge may not be challenged and for that reason may be accepted by this Court without the need for further assessment".

43. Second, there may be direct concessions as to findings of fact and conclusions in the matter on the appeal itself. Criminal proceedings (including those involving disputed facts and sentencing) are both accusatorial and adversarial, with restraint by judicial officers an important aspect because of the interests at stake: *Chow* at 605C-606B. Additionally, subject to well-defined exceptions, "parties are bound by the conduct of their counsel, who exercise a wide discretion in deciding what issues to contest, what witnesses to call, what evidence to lead or seek to have excluded and what lines of argument to pursue": *Nudd v The Queen* (2006) 80 ALJR 614 at [9]. Where a concession is made by the Crown on an appeal, such concessions may well be informed by considerations of fairness, whether such matters were the subject of notified issue between the parties and whether such matters were or could ever be the subject of a Crown appeal. Where concessions are made by a prosecutor, a court should be slow to reject such a concession, let alone characterise it as a 'slip' (cf. CCA [9]), a mistake, or a matter in which a judge's "experience" should prevail (cf. *Chow* at 606G-607A). It is submitted that a judge "assuming the role of adversary" (cf. *Neal* at 311) where CAB 64

the Crown has conceded on an offender's appeal that a lesser sentence is warranted in law (in the context of concessions as to available findings), in order to determine no lesser sentence is warranted is incongruous with the purpose of the appeal provision itself.

44. Third, where a finding is not open to challenge on an appellant's appeal and the evidence on the sentence appeal is tendered on 'the usual basis', there is 'no principled reason' for that finding to be susceptible to challenge on the appeal: cf *Betts* at [11], [59]. The position of the Crown on the appellant's appeal that there was no challenge to the factual findings of the sentencing judge was a principled approach on the appeal and was not 'a slip': cf. CCA [9]. CAB 64

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45. Fourth, where parties have not been afforded the opportunity before the appeal court to make submissions on aggravated factual findings or otherwise adverse findings, there will be a jurisdictional issue based in a lack of procedural fairness should the process proceed other than on the uncontested primary findings, as outlined in the ground above.

46. Fifth, where there is contemplation of disturbing the factual findings of the sentencing judge on matters not related to rehabilitation or hardship in custody and the like that have not been challenged by a ground of appeal, the intermediate court of appeal should be slow to interfere. In a criminal case where *Olbrich v The Queen* 199 CLR 270 applies to factual

20 findings[11], "aggravated" factual findings are to be made beyond reasonable doubt, which as Rothman J observed in the appellant's case, necessarily involves an appellate court concluding that the non-aggravated factual finding was "not open" on the basis of the material before the Court: CCA [75]. As stated above, it also involves consideration of the CAB 81-82 purpose of an offender's appeal, the issues between the parties as informed by the grounds of appeal and the limitations pertaining to the tender of evidence discussed in *Betts.*

47. Sixth, where sentencing is taking place after a trial, it is the primary judge who has seen and heard the evidence. Seventh, where oral evidence is given in the proceedings on sentence, it is the trial judge who has seen and heard that evidence: *Skinner v The Queen* (1913) 16 CLR

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[11] Cf. Section 132C *Evidence Act* 1977 (Qld) which applies to 'any sentencing procedure in a criminal proceeding', permitting a sentencing judge to act on any allegation of fact that is admitted or not challenged and to apply a test of satisfaction on the balance of probabilities to those matters that are not admitted or are challenged.

336. Eighth, the judge at first instance has a significantly greater opportunity to engage with counsel in the course of submissions: cf. *Mundine v R* [2017] NSWCCA 97 at [20]-[23].

48. As the primary judge's findings as to intention, psychosis, premeditation, risk of reoffending and special circumstances were not the subject of challenge by either party in the appellant's appeal, there were no issues on these matters requiring resolution by the Court. The Crown made express concessions, accepted that the Crown had chosen not to take issue with those findings, accepted that the Crown had not lodged a Notice of Appeal in the eight years since sentence or contended on the appeal either in writing or ultimately orally that the findings were not open. No party challenged the operation of *Betts,* which was specifically relied on by the appellant in the proceedings (T74.28). The trial judge had heard and seen the evidence at trial and all three psychiatrists on the sentence proceedings, at which time there had been no emergence of psychosis some three years after the offence. Leeming JA confirmed that none of his substituted findings "is intended to convey that the findings made by the primary judge were not open to his Honour." (CCA [19]) CAB 196 CAB 66

49. Neither *Kentwell* nor *Lehn* qualified any of the above outlined restraints on an offender's appeal. Underpinning the new aggravated conclusions was the willingness of Leeming JA and Wilson J to revisit the question of the appellant's psychiatric state at the time of the offence. To approach re-sentencing in appellate proceedings with the view that "This Court is not bound by any of the findings of the sentencing judge..." (cf. Leeming JA at [9]), CAB 63 without regard to *Betts* or the pleaded issues on the appeal, as occurred in this case, would lead to a radical change in approach to the conduct of offenders appeals. All offenders' appeals would have to be approached on a de novo type basis with an assumption that all factual findings may be revisited in the event that an offender establishes error. However *Betts* denies that this is the basis for the conduct of offenders' appeals. *Lehn* did not qualify *Betts* for good reason.

50. The making of aggravated factual findings where there has been no challenge to those findings (by ground of appeal or otherwise) and where those findings were open to the sentencing judge, would also lead to anomalies on offenders' appeals. In cases of conceded latent error/manifest excess, such an approach would mean that the court could dismiss an appeal on the basis of substituted aggravated factual findings (on matters not even in issue between the parties) rather than exercising the discretion on the basis of the facts as found

by the sentencing judge and those additional matters relevant to rehabilitation and the like based on the evidence filed addressing events since sentence. However, it has never been doubted that the s 6(3) question, on a pleaded ground of manifest excess (or manifest inadequacy under s 5D), is answered other than on the basis of the facts as found by the primary judge, along with additional matters relevant to rehabilitation since sentence, not substituted aggravated factual findings: cf. *Carroll v The Queen* (2009) 83 ALJR 579 at [24]; *House v The King* (1938) 55 CLR 499 at 505; *R v Carroll; Carroll v R* (2010) 77 NSWLR 45. In the appellant's case, the ground of appeal pleading manifest excess was not determined by the majority who held that it "[fell] away" as the ground of patent error had been upheld: CCA [132], [1]. Rothman J agreed with this (CCA [55]), however in determining an appropriate sentence found that anything beyond the head sentence he proposed was "outside the range for this offence by an offender with these subjective circumstances": CCA [115]. CAB 95-96, 61, 75 CAB 92

51. Further, in cases where there has been no pleaded challenge to the factual findings at the stage of the determination of *House* error, but error of law upheld, in consideration of whether a lesser sentence is warranted, it is contrary to the purpose of a severity appeal and *Betts* to then substitute (unheralded) aggravated factual findings in order to dismiss the appeal. So too, it would be incongruous, that where an appellant has challenged but failed to have upheld a pleaded factual error, but succeeded in establishing error of a different nature, for the unsuccessfully challenged fact to then be substituted with an aggravated finding in the exercise of the re-sentencing discretion. *Kentwell* at [43] does not suggest such a process or that such aggravated conclusions may be reached by an appellate court on the question of whether a lesser sentence is warranted in law. It may be that evidence of events that have occurred since the sentence hearing will lead to the conclusion that no lesser sentence is warranted. Examples of such circumstances include where the evidence since sentence discloses that a prisoner has served his sentence in a normal prison environment, whereas the offender was given the benefit of a finding by the sentencing judge that his sentence would be served in isolation or where the prisoner's conduct post sentence undermines previously favourable conclusions about prospects of rehabilitation or remorse. The rare power to impose a greater sentence has only been used in New South Wales (to the knowledge of the appellant) in circumstances where having established error, the greater sentence was sought by the appellant in order to effect a practical amelioration of his sentence and only after steps were taken by the CCA to ensure procedural fairness was

accorded, including by staying the orders on the appeal to allow consideration of them: *R v Schodde* (2003) 142 A Crim R 307 at [31].

52. There are further reasons why in fairness, the concessions of the respondent below were correctly made and it is a correct application of principle that aggravated factual findings should not ordinarily be made in the exercise of a sentence appeal. Consideration of the s 6(3) question cannot be divorced from the context of its operation as an aspect of the correction of identified error, the offender first having been erroneously sentenced by the primary court. The role of intermediate courts of appeal in determining whether a lesser sentence in law is warranted with a view to forming the positive opinion is a different and distinct role to that of a sentencing judge finding the facts for the first time, including a judge who is given agreed facts but has material before him or her that may call into question those agreed facts. It is also different and distinct from a judge re-sentencing an offender after a second trial, the conviction on the first having been quashed on appeal: cf *Gilmore* (1979) 1 A Crim R 416 at 419-42. Considerations of public policy, articulated in *McL* at [23] and [72], albeit in a different context, are also significant. The risk that an appellate court, of its own motion may arrive at different and adverse findings of fact, may be perceived by the public and an appellant as "containing a retributive element" because an appellant has identified error on the appeal: *McL* at [72]. Lastly, a repeated attempt by a respondent to argue for matters of aggravation in the event of established error, on issues previously rejected by the primary sentencing judge, is adverse to the purpose of an offender's appeal (the correction of error). It involves the State having a repeated opportunity to argue for more severe findings only because of the offender's successful demonstration of error (on an altogether different basis). The respondent was, with respect, correct to concede below that the findings of the sentencing judge on those matters with which this appeal is concerned were not challenged.

53. In the appellant's case he had been erroneously sentenced at first instance with primary weight being given to a 25 year standard non-parole period and at the time of the exercise of the re-sentencing discretion there was no standard non-parole period applying. The concessions of the respondent on the appeal that a lesser sentence is warranted in law and the absence of challenge to the sentencing judge's assessment of the appellant's criminality were, with respect correctly made. In consideration of the s 6(3) determination the appellant's age and immaturity could assume its proper relevance in the process, the age of

the victim could be accounted for in the finding of objective seriousness, the matters of rehabilitation and hardship in custody since sentence could be taken into account and the range of comparable cases of juveniles sentenced for murder where there was no standard non parole period could assume an appropriate role in the proceedings, along with the unchallenged findings of the sentencing judge. The evidence relied on in the appellant's sentence appeal warranted the lesser sentence proposed by Justice Rothman. It was not such as to warrant dismissal of his appeal, or when synthesised in the intuitive sentencing exercise within the restraints of the appellate process, to warrant other than a substantial reduction of the sentence.

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Part VII: Applicable Statutory Provisions

54. Section 6(3) of the *Criminal Appeal Act* 1912 (NSW) as in effect at the time and as still in force provides:

> 'On an appeal under section 5 (1) against a sentence, the court, if it is of opinion that some other sentence, whether more or less severe is warranted in law and should have been passed, shall quash the sentence and pass such other sentence in substitution therefor, and in any other case shall dismiss the appeal'.

Part VIII: Orders

20 55. The following orders are sought:

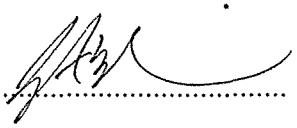
(1) The appeal is upheld.

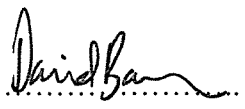
(2) The matter is remitted to the Court of Criminal Appeal (NSW) to be dealt with in accordance with law.

Part IX: Time estimate

The appellant estimates that one hour is required for the appellant's oral argument.

Dated: 2 February 2018





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