IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY No. M127 of 2011

BETWEEN: KIEU THI BUI

Appellant

and

COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

APPELLANT'S SUBMISSIONS

Part 1: Certification

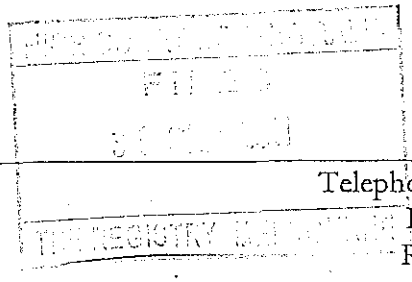
1. This submission is in a form suitable for publication on the internet.

Part II: Statement of Issue

2. This appeal raises the issue of whether the Victorian Court of Appeal (Criminal Division) erred in holding that sections 289(2) and 290(3) of the Criminal Procedure Act 2009(Vic) were picked up and applied pursuant to the Judiciary Act 1903(Cth) in a Crown Appeal against sentence instituted by the Commonwealth Director of Public Prosecutions.

3. This appeal presents the following issues for resolution;

3.1 The scope of and content of sections 289(2) and 290(3) of the Criminal Procedure Act 2009(Vic),



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3.2 Whether a discomformity exists between the operation of section 16A (1) or (2), in particular subsection (m) of the Crimes Act 1914(Cth) and sections 289(2) and 290(3) of the Criminal Procedure Act 2009(Vic) such that these provisions are not picked up and applied pursuant to the Judiciary Act 1903(Cth) where a State Court is exercising federal jurisdiction,

3.3 The scope and content of sections 16A (1) or (2), in particular subsection (m) of the Crimes Act 1914(Cth) and,

3.4 The capacity of either sections 68, 72, or 80 of the Judiciary Act 1903(Cth) to pick up and apply these provisions where a state court is exercising federal jurisdiction.

Part III: Section 78B Notice

4. Notices have been issued pursuant to section 78B of the Judiciary Act 1903(Cth)[1].

Part IV: Citation

5. The reasons for decision of Judge Wilmoth of the County Court of Victoria are unreported and are designated DPP v Bui , April, [2010] VCC[2]. These reasons are located in the Appeal Book. The reasons of the Court of Appeal (Criminal Division) Victoria are unreported and are designated DPP (Cth) v Kieu Thi Bui [2011] VSCA 61[3]. These reasons are located in the Appeal Book.

Part V: Narrative Statement of Facts

6. On 27 April 2010 the appellant pleaded guilty in the County Court at Melbourne before Judge Wilmoth to 1 count of importing a marketable quantity of a border controlled drug, namely heroin, contrary to s. 307.2 of the Criminal Code (Cth)[4]. The total pure weight of heroin was 197.3 grams. The appellant was sentenced to three years imprisonment, to be

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[1] Appeal Book ("A.B.")

[2] A.B.

[3] A.B.

[4] Indictment at A.B.

released forthwith upon giving security by recognizance of $5,000 and to be of good behaviour for three years. The sentence was imposed and commenced on 30 April 2010.

7. An Opening[5] was read into the transcript before Judge Wilmoth in the County Court and formed Exhibit A on the plea. Its contents are summarized at paragraph [12] of these submissions.

8. Viva voce evidence was lead on the plea from Ms Pamela Mathews[6], forensic psychologist, in her capacity as friend of the appellant. The content of this evidence is summarized at paragraph [14] of these submissions.

9. Viva voce evidence was also lead on the plea from Mr Bernard Healey[7], forensic psychologist, in his professional capacity and a report authored by Mr Healey dated 5 March 2010[8], formed Exhibit 2 on the plea. The content of this evidence is summarized at paragraph [15] of these submissions.

10. The Commonwealth Director of Public Prosecutions appealed against the appellant's sentence on the following grounds[9]:

- manifest inadequacy,
- material error in finding that 'exceptional circumstances" existed so far as the appellant's family circumstances were concerned or alternatively according too much weight to this; and
- material error in failing to separately quantify the discount for future co operation or alternatively according too much weight to this. The last of these grounds was not pursued.

11. New provisions of the Criminal Procedure Act 2009(Vic), applicable to Crown appeals against sentence were operative by the time of the hearing of the instant appeal. [10] These

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5 Opening at A.B.

6 A.B.

7 A.B.

8 Report of Bernard Healey at A.B.

9 Notice of Appeal at A.B.

curtail the ability of the Court of Appeal upon a Crown Appeal against sentence to have regard to the "double jeopardy" principle.

12. Sufficient of the facts necessary to constitute a narrative statement of facts in this matter appear in the judgment of the Court of Appeal at paragraphs [4] to [11] concerning the circumstances of the appellant's offending. In summary, the appellant flew from Melbourne to Vietnam on 30 January 2009. The appellant had borrowed money from a man named "Ho" prior to her leaving for Vietnam. "Ho" had told the appellant that she could repay the debt she owed by bringing back heroin to Australia. "Ho" provided her with contact details for a person in Vietnam who would arrange for this to occur, as well as a contact number for the appellant to contact "Ho" when she returned to Australia. The appellant flew from Vietnam to Australia on 11 February 2010. On arrival at Melbourne the appellant was intercepted and then detained by members of the Australian Federal Police. The heroin was recovered and the appellant co operated with investigators, ultimately making a statement, signing an undertaking pursuant to s 21E[11] of the Crimes Act (Cth) and swearing to this at her plea in the County Court. The appellant gave evidence consistent with her undertaking at committal proceedings for co offenders after her plea in the County Court but prior to the hearing of her matter by the Court of Appeal.

13. Concerning the matters put by way of mitigation, the facts are summarised in the judgment of the Court of Appeal at paragraphs [12] to [15]. In particular the appellant had co operated with investigating authorities, pleaded guilty at an early stage, had given birth to twins prematurely, and was without prior conviction.

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[10] Part 6.3, Division 3 of the *Criminal Procedure Act* 2009(Vic), in particular ss. 289(2) and 290(3) of the *Criminal Procedure Act* 2009(Vic); The Act came into operation on the 1st of January 2010, Item 10 of Schedule 4 of The Act sets out the transitional provisions as they apply to appeals. So far as relevant they are:

.....

(4) Divisions 1, 2, and 3 of Part 6.3 apply to an appeal where the sentence is imposed on or after the commencement day.

[11] Undertaking pursuant to section 21E Crimes Act 1904 (Cth) at A. B.

14. Before Judge Wilmoth, Ms Mathews gave evidence to the effect that she met the appellant through the father of the appellant's twins, Mr Maddox, and had known the appellant socially since either late 2002, or early 2003. Ms Mathews stated that the appellant possesses many admirable qualities such as a commitment to hard work, a warm, generous and supportive nature and that she had raised her older daughter as a single mother. She gave evidence that the appellant is the primary carer of her infant children, and expressed concern for the well being of those children if they were separated from their mother. She stated that Mr Maddox would be unlikely to be in a position to provide full time care for these children.

15. Before Judge Wilmoth Mr. Healey deposed to the contents of his report, and opined that the appellant had a full scale IQ of 86, meaning that 82 per cent of the population around her age would perform better than her. He went on to state that:

- the appellant was in fear for her safety and that of family members as a result of her co operation with investigating and prosecuting authorities;
- the appellant was the primary carer for her children;
- the mother of the appellant is elderly and has suffered a stroke making it difficult for her to assist with care for the children of the appellant;
- the father of the appellant's children would have difficulty in looking after them;
- the management of such young children within the prison system would present difficulties; and
- any separation of the appellant from her infant children would be difficult, and raise the spectre of an attachment problem.

16. Before the Court of Appeal[12] it was submitted on behalf of the appellant:

> 16.1 That the sentence imposed did not disclose manifest inadequacy or material error having regard to the submissions made before Her Honour the learned sentencing judge.

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[12] *DPP(Cth) v Kieu Thi Bui* [2011] VSCA 61, A.B at …

16.2 That the meaning and content of the words "double jeopardy" in the new provisions ought to be confined to the meaning attributed to them in similar New South Wales legislation. [13] It was submitted that "double jeopardy" refers to the presumed distress and anxiety suffered by a respondent to a Crown Appeal, as distinct from any wider meaning that may have been accorded to "double jeopardy". This had been the subject of consideration by a 5 member bench in New South Wales in the matter of *JW*[14].

16.3 That the new Victorian provisions were not picked up and applied pursuant to the *Judiciary Act (Cth)* 1903[15], or alternatively were inconsistent with the provisions of s. 16A of the *Crimes Act (Cth)*.[16]

16.4 That whilst the new Victorian provisions may limit the Court of Appeal from considering the operation of "double jeopardy" in the resolution of a Crown Appeal against sentence, the fact that such appeals were to be brought in the public interest meant that Crown Appeals should only be brought having regard to the jurisprudence that had built up concerning the type of cases which were suitable for a Crown Appeal against sentence.

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[13] S. 68A *Crimes (Appeal and Review) Act* 2001(NSW)

[14] R *v JW* [2010] NSWCCA 49 ; (2010) 77 NSWLR 7, per Spiegelman CJ at [49] and [141]

[15] Reference was made to the minority decisions in *DPP (Cth) v De la Rosa* [2010] NSWCCA 194; (2010) 273 ALR 324; (2010) 243 FLR 28, per Allsop P at [48 – 54], and Baston JA at [100 - 110].

[16] Reference was made to *R v Talbot* [2009] TASSC 107, at [17 – 19], per Blow J (with whom Crawford CJ and Porter agreed) where the Court of Appeal found that the relevant Tasmanian legislation; *Criminal Code* (Tas) s402 (4A), limiting the operation of "double jeopardy' was inconsistent pursuant to S. 109 of the Constitution. The consideration of *Talbot* in the later decisions of R *v Baldock* [2010] WASCA 170; (2010) 269 ALR 674; 243 FLR 120, and *De La Rosa,* which resulted in neither the Court of Appeal of Western Australia or New South Wales following the reasoning of *Talbot*

17. Before the Court of Appeal the respondent submitted that:

17.1 The learned sentencing judge erred in finding exceptional circumstances existed with respect to the appellant's family circumstances, and the learned sentencing judge had imposed a sentence which was manifestly inadequate.

17.2 The respondent relied upon the Victorian Court of Appeal decision in *Markovic*[17] to demonstrate error in the learned sentencing judge purporting to rely upon an exercise of mercy in the alternative to finding exceptional circumstances so far as the appellant's family circumstances were concerned. Markovic was decided after the plea and sentence of the appellant before Her Honour Judge Wilmoth, but before the instant appeal was determined by the Court of Appeal.

17.3 The respondent did not oppose the meaning to be attributed to the words "double jeopardy" as contended by the appellant.

17.4 The respondent submitted that the jurisprudence which had developed to the effect that manifest inadequacy is insufficient on its own to justify intervention in a Crown Appeal, (as typified in the State of Victoria by the decision of *Bright*[18]), and that Crown Appeals ought be rare and exceptional, was no longer of any application.[19]

17.5 After hearing argument and reserving the instant Appeal, a bench of 5 heard argument and delivered judgment in the matter of Karazisis & Ors[20]. In that case the

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[17] *Markovic v R; Pantelic v R* [2010] VSCA 105

[18] *R v Clarke* [1996] VSCA 30; [1996] 2 VR 520; *DPP v Bright* [2006] VSCA 147; (2006) 163 A Crim R 538

[19] *Everett v R* [1994] HCA 49; (1994) 181 CLR 295; *R v Clarke* [1996] VSCA 30; [1996] 2 VR 520; *DPP v Bright* [2006] VSCA 147; (2006) 163 A Crim R 538

[20] *DPP v Karazisis; DPP v Bogstra; DPP v Kontoklotsis* [2010] VSCA 350

Court of Appeal[21] examined the new provisions operating in Victoria concerning the disposition of Crown Appeals.

18. In the Court of Appeal's reasons for decision in the instant case reference is made to the reasoning in Karazisis. In summary in Karazisis:

18.1 The Court of Appeal analysed the operation of "double jeopardy" in Crown appeals against sentence. [22]

18.2 All members of the Court of Appeal found that the effect of the new provisions was to eliminate double jeopardy when considering whether there had been sentencing error, as a discretionary consideration when the Court determines whether it is satisfied that a different sentence should be imposed, and when the Court has determined to intervene and impose a different sentence.

18.3 A majority[23] of the Court of Appeal found that the operation of the principle of "double jeopardy" should inform the Director's decision to institute a Crown Appeal and that the principle still had operation as a filter on the Director's discretion to institute a Crown Appeal.

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[21] Warren CJ, Maxwell P, Ashley, Redlich and Weinberg JJA

[22] *Karazisis* at [32] – [45] where the following authorities were cited, *Peel v R* [1971] HCA 59; (1971) 125 CLR 447, per Barwick CJ at 452; *Whittaker v The King* [1928] HCA 28; (1928) 41 CLR 230, per Isaacs J at 248, cited with approval in *Tait* (1979) 24 ALR 473 , per Brennan, Deane and Gallop JJ at 476; *Everett* [1994] HCA 49; (1994) 181 CLR 295, per Brennan, Deane, Dawson and Gaudron at 299 JJ; R v Clarke [1996] VICSC 30; [1996] 2 VR 520; R v Allpass (1993) 72 A Crim R 561; *Lowndes v The Queen* [1999] HCA 29; (1999) 195 CLR 665, 671-2; *Dinsdale v The Queen* [2000] HCA 54; (2000) 202 CLR 321, at 339; *GAS v The Queen* [2004] HCA 22; (2004) 217 CLR 198; *R v Bright* [2006] VSCA 147; (2006) 163 A Crim R 538; *Griffiths v R* (1977) 137 CLR 293; *Malvaso v R* [1989] HCA 58; (1989) 168 CLR 227, per Deane and Mc Hugh JJ at 234.

[23] *Karazisis* at [120] , per Ashley, Redlich, and Weinberg JJA

18.4 The Court of Appeal refrained from determining the content of and meaning of "double jeopardy" as those words appear in the new Victorian provisions.[24]

18.5 The Court of Appeal determined that there are issues that only arise in Crown Appeals against sentence, and there is a residual discretion to refuse to intervene even if sentencing error has been shown. This residual discretion survived despite the removal of double jeopardy as one of the bases upon which it can be exercised.[25]

18.6 In reaching this conclusion the majority in Karazisis had regard to legislative amendment after the introduction of the Criminal Procedure Act 2009 (Vic)[26], and extrinsic materials[27].

19. In the instant case the Court of Appeal:

91.1 Held that there was no inconsistency between the new Victorian provisions and section 16A of the Crimes Act (Cth) so as to engage Section 109 of the Constitution, nor was there any impediment to these provisions being picked up and applied in a Commonwealth Crown Appeal against sentence.[28]

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[24] *Karazisis* at [99]

[25] *Karazisis* at [100]

[26] The *Criminal Procedure Amendment (Consequential and Transitional Provisions) Act 2009(Vic)* , which had the effect of amending section *289(2) of the Criminal Procedure Act 2009 (Vic)*, by substituting the words "whether an appeal should be allowed" for the words originally enacted , "whether there is error in the sentence imposed". See [54] of *Karazisis.*

[27] Explanatory Memorandum to *The Criminal Procedure Amendment (Consequential and Transitional Provisions) Bill 2009(Vic)* , Explanatory Memorandum, *Criminal Procedure Bill 2008 (Vic)* 107, and the Criminal Law – Justice Statement, *Criminal Procedure Act 2009 Legislative Guide (2010) 267,* Second Reading , "Criminal Procedure Bill" Attorney General 4th December 2008, Hansard p 4981 ff esp. p 4986.

[28] *Bui* at [62] – [71], [72] – [74]

19.2 Made reference to the Court of Appeal not having stated the meaning and content of "double jeopardy" in Karazisis & Ors, and at paragraphs [78] – [87] of the instant case the Court of Appeal indicated that the meaning and content of "double jeopardy" accords with that stated by Speigelman CJ in JW[29] at [144], that it is confined to the presumed distress and anxiety suffered by a respondent to a Crown Appeal.

19.3 That there had been error by Judge Wilmoth at first instance in finding that exceptional family hardship existed[30], and a manifestly inadequate sentence had been imposed upon the appellant at first instance[31]

19.4 Took into account the actual distress and anxiety which it found that the appellant suffered as a result of the instant Crown Appeal, both in terms of a consideration of the exercise of the Court's residual discretion, and when not moved to exercise that in favour of the appellant, in the re sentencing of the appellant.

19.5 Resentenced the appellant to a sentence of 4 years imprisonment with a non parole period of 2 years.

20. Had the new Victorian provisions not applied, "double jeopardy" would have had potential operation at the finding of error stage, the exercise of discretion whether or not to re sentence, and if there were to be a resentence such an exercise would have produced a sentence that was toward the lower end of the range available.[32]

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[29] R *v JW* [2010] NSWCCA 49; (2010) 77 NSWLR 7. Which considered the operation of 68A *Crimes (Appeal and Review) Act* 2001(NSW)

[30] *Bui* at para [23] – [29].

[31] *Bui* at paras [31] – [46]

[32] *Dinsdale v* R [2000] HCA 54; 202 CLR 321, per Kirby at [62]

Part VI: Argument

21. Since 1970 in the State of Victoria, the Crown has had a right of appeal against a sentence imposed at first instance. By the combined operation of S 567A Crimes Act 1958(Vic) , S 68(2) Judiciary Act 1903 (Cth), and S 9(7) Director of Public Prosecutions Act 1983 (Cth) this right of appeal has been available to the Commonwealth Director of Public Prosecutions, and before that office was established the Commonwealth Attorney General[33].

22. Since the 1 January 2010 new provisions have governed the hearing and determination of Crown appeals against sentence in Victoria[34]. Now the Commonwealth Director's right of appeal is by the combined working of sections 287 of the Criminal Procedure Act 2009(Vic) , S 68(2) Judiciary Act 1903 (Cth), and S 9(7) Director of Public Prosecutions Act 1983 (Cth).

Interstate Authorities

23. Other jurisdictions within Australia have also imposed statutory modifications to the hearing of Crown Appeals against sentence. [35]

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[33] *Rhode v Director of Public Prosecutions* [1986] HCA 50; (1986) 161 CLR 119

[34] Part 6.3, Division 3 of the *Criminal Procedure Act* 1989(Vic)

[35] *Criminal Code* (Tas) , s402(4A); *Criminal Appeal Act* 2004 (WA), s41(4); *Crimes (Appeal and Review) Act* 2001 (NSW), s68A; *Criminal Procedure Act* 2009 (Vic), s289, 290, *Criminal Law Consolidation Act* 1935 (SA), Ss 335, and 340; New subsection *(1A)* inserted into *s. 414 Criminal Code (N.T.)* , by the *Criminal Law Amendment (Sentencing Appeals) Act* 2011(N.T.). So far as interpreting these provisions is concerned see R *v JW per* Spiegelman CJ at *[*49], and [141]. *The State of Western Australia v Wallam* [2008] WASCA 117, (2008) 185 A Crim R 116, per McLure JA [29] , and per Miller JA [56]; *The State of Western Australia v Cunningham* [2008] WASCA 240, per Miller JA at [21] - [22], (Steytler P and Buss JA agreeing); *Director of Public Prosecutions v Blyth* [2010] TASCCA 10; R *v Abdulla* [2011] SASCFC 20, at [19 – 25]

24. The question of resolving any discomformity between the various provisions of the states which curtail "double jeopardy" as a sentencing consideration in a Commonwealth Crown Appeal against sentence and the provisions of s. 16A Crimes Act 1914 (Cth) has produced different and conflicting authority at a state Appellate Court level.

25. The Tasmanian, Western Australian, and New South Wales Courts of Appeal[36] have each examined this issue.

26. In Tasmania an inconsistency pursuant to section 109 of the Constitution was found to exist.

27. In Western Australia neither inconsistency nor any disconformity with the provisions of the Judiciary Act was found to exist. In *Baldock* the Court had drawn to its attention the decision of Talbot and declined to follow it. In *Baldock* the Court did not have argument concerning the effect of section 16A (2) (m) Crimes Act (Cth).

28. In New South Wales a minority of two[37] found that a disconformity existed between that State's legislation and section 16A(2)(m) Crimes Act (Cth). The effect of that disconformity would be to prevent the application of that State's provisions which curtail "double jeopardy" as a sentencing consideration in a Commonwealth Crown Appeal against sentence.

29. The West Australian and New South Wales decisions involved consideration of whether the proper course is to first address any issue of inconsistency by applying section 109 of the Constitution, or go to the Judiciary Act. The Tasmanian Court of Appeal found an inconsistency pursuant to section 109 of the Constitution. However, the West Australian and New South Wales Courts of Appeal have determined that the proper approach is to go to the Judiciary Act to ascertain whether the internal exclusions operating within those provisions prevent the relevant state provisions being picked up and applied. In particular

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[36] R *v Talbot* [2009] TASSC 107, R *v Baldock* [2010] WASCA 170, 243 FLR 120; (2010) 269 ALR 674, and *De La Rosa*

[37] *De La Rosa*, per Allsop P at [48 – 54]; and Basten JA at [100 – 110]

the Courts looked to section 80 of the Judiciary Act[38]. This involves a determination that the particular state law does not operate in federal jurisdiction by its own force.[39]

Error Asserted

30. So far as the instant case is concerned, it is submitted that in determining that ss. 289(2) and 290(3) of the Criminal Procedure Act 1989(Vic) were picked up and applied by the Judiciary Act, the Court of Appeal erred. It is submitted that a discomformity exists between the operation of ss 289(2) and 290(3) of the Criminal Procedure Act 1989(Vic) and s. 16A of the Crimes Act (Cth).

Legislative history of s. 16A Crimes Act 1914 (Cth)

31. Section 16A of Part 1B of the Crimes Act 1914 (Cth) was introduced by the Crimes Legislation Amendment Act (No 2) 1989 (Cth)[40]. The amendments introduced by this legislation came into effect on the 17 July 1990 and have applied to any sentence imposed

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[38] *De La Rosa*, where all judges were of the opinion that it was necessary to first examine whether or not the relevant New South Wales provision was picked up and applied by the provisions of the Judiciary Act [28 – 56], [79], [162], [273], [314]; *Baldock* , where the joint judgments of Pullin JA and Martin J dealt with inconsistency pursuant to S. 109 Constitution at [57 – 64], and Buss JA examined whether or not the provision was picked up and applied pursuant to the Judiciary Act provisions [87 – 119]. See also *Northern Territory v GPAO* [1999] HCA 8; (1999) 196 CLR 553, *Putland v R* [2004] HCA 8; (2004) 218 CLR 174, *Agtrack (NT) Pty Ltd v Hatfield* [2005] HCA 38; (2005) 223 CLR 251, *R v LK* [2010] HCA 17, (2010) 266 ALR 399, at [25] footnote no 59

[39] *Solomons v District Court of New South Wales* [2002] HCA 47; 211 CLR 119, at [9], and [21] per Gleeson CJ, Gaudron, Gummow, Hayne, and Callinan JJ, at [37] per McHugh J, and [74] – [76] per Kirby J

[40] Act no 4 of 1990

after that date. This legislation had the effect of repealing the pre existing Commonwealth Prisoners Act 1967(Cth) and replaced it with Part 1B of the Crimes Act 1914 (Cth).

32. Prior to its enactment there had been 2 Reports of the Australian Law Reform Commission on Federal Sentencing. [41]

33. Neither the Explanatory Memorandum[42] nor the Second Reading Speech[43] assist with discerning the scope of and content of Section 16A(1).

Analysis of Section 16A Crimes Act 1914 (Cth)

34. The factors listed in section 16A(2) relate to a combination of matters; those personal to the offender[44], general sentencing principles[45], factors concerned with the circumstances of the offence[46], the commission of other offences, the victim, the effect of sentence upon the prisoner's family or dependents, and with the conduct of the accused after commission of the offence. There is no neat dichotomy to be drawn within section 16A with

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[41] "Sentencing of Federal Offenders" ALRC No 15 Interim Report (1980), and "Sentencing" ALRC No 44 Report (1988). It has been said that the "*relevant terms of Part 1B cannot be traced to these recommendations…*", per The Court in *DPP(Cth) v El Kaharni* (1990) 21 NSWLR 370, at 375; see also Basten JA at [117] – [120] of *De la Rosa*

[42] Explanatory Memorandum to Crimes Legislation Amendment Act (No 2) 1989 (Cth)

[43] Minister's second reading speech; House of Representatives on 30 October 1989; Senate on 19 December 1989

[44] Section 16A(2) (f), (g), (h),(j), (m)

[45] Section 16A(2) (k), (n)

[46] Section 16A(2) (a), (c), (e)

circumstances of the offence being solely the province of section 16A (1) and matters of a different character being the province of section 16A(2).

35. To rigidly limit section 16A(1) to the imposition of a sentence appropriate in all the circumstances of "the offence", and exclude from it the personal circumstances of the offender, would make the combined operation of sections 16A(1) and (2) unworkable as there would on the face of it be inconsistency between what each subsection requires.

36. Section 16A Crimes Act (Cth) has been interpreted as incorporating:

General deterrence[47];

Proportionality[48];

Totality and Avoidance of double punishment[49];

Sentencing principles[50] identified in cases such as *Power, Deakin*, and *Bugmy*[51] relevant to the fixing of non parole periods.

37. The interaction between sections 16A (1) and (2) was described by the Court in El Kaharni as follows:

> *"section 16A (2) provides a catalogue of matters to be considered in determining the "severity appropriate in all the circumstances of the offence…"*[52]

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[47] *DPP (Cth) v El Kaharni* (1990) 21 NSWLR 370, at 378

[48] *Wong v R* (2001) 207 CLR 584, at [71] – [72], and [31].

[49] *Johnson v R* [2004] HCA 15, 205 ALR 346, 78 ALJR 616, at [15], and [25] – [34]

[50] *Hili v R* [2010] HCA 45, (2010) 272 ALR 465; (2010) 85 ALJR 195; (2010) 78 ATR 11, at [40]

[51] *Power v R* (1974) 131 CLR 623,[1974] HCA 26, *Deakin v R* (1984) 58 ALJR 367, 54 ALR 765, [1984] HCA 31, *Bugmy v R* (1990) 169 CLR 525, [1990] HCA 18

38. In Johnson the interaction was described in the following terms:

> *"..general common law sentencing principles are applicable by virtue of the use of the words "... of a severity appropriate in all the circumstances of the offence..." in section 16A (1) and the introductory words "in addition to any other matters ...." to section 16A (2)*[53]

39. Section 16A applies to a Court that is "determining the sentence to be passed, or the order to be made in respect of any person for a federal offence....", and thus applies to an appeal court considering a Crown Appeal.

Submission

40. It is submitted that either singly or in combination, the following have the effect of incorporating into section 16A a requirement to have regard to "double jeopardy" in a Commonwealth Crown Appeal against sentence:

40.1 The words appearing in section 16A (1) ".... a severity appropriate in all the circumstances of the offence ..." are apt to cover "double jeopardy". Section 16A(1) is sufficiently broad to encompass "double jeopardy", the application of the principle arising as it does from the imposition at first instance of a sentence relating to the circumstances of the offence, it is inextricably linked to " ... all the circumstances of the offence"

40.2 The words appearing in section 16A (2) "In addition to any other matters ...." are sufficiently broad to encompass "double jeopardy". It is known to an appeal court that standing for sentence a second time occasions distress and anxiety.

40.3 The combined effect of the above.

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[52] *El Kaharni* , at 378

[53] *Johnson* at [15], per Gummow, Callinan, and Heydon JJ

40.4 The operation of section 16A (2) (m) requiring regard be had to the "...mental condition of the person". It is known to the Court of Appeal hearing a Crown Appeal against sentence that it is presumed to occasion distress and anxiety to the respondent to such an appeal[54].

41. So far as section 16A (2) (m) is concerned it is submitted that "...mental condition" refers simply to the mental state of the prisoner. It is apparent that the non exhaustive list of matters found within section 16A (2) are identified for the purpose of their being taken into account to enable the imposition of a just and appropriate sentence. To narrowly construe these would potentially frustrate this purpose.

42. The words "mental condition" are apt to a broad meaning; they are not limited by reference to mental disorder, illness, or some such other narrower descriptor[55].

43. Other later provisions within Part 1B of the Crimes Act (Cth) deal with fitness to be tried, acquittal due to mental illness, and summary disposition of persons suffering from mental illness or intellectual disability. In these later provisions the words "mental condition", "mental illness", and "intellectual disability" are used. They appear, however, not in general sentencing provisions but in provisions whose purpose is to deal with particular matters such as fitness for trial, and release.

44. The meaning to be attributed to "double jeopardy" as those words appear in sections 289(2) and 290(3) of the Criminal Procedure Act 2009 (Vic), should be limited to the presumed distress and anxiety of the respondent to a Crown appeal having to stand for

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[54] *De La Rosa*, see Allsop P at [52], and Basten JA at [104] – [106]

[55] In Australian Law Reform Commission Report No 103, "Same Crime, Same Time – Sentencing of Federal Offenders " (2006) , at Chapter 28, the report appears to assume that 'mental condition' within section 16A(2)(m) doesn't include "mental illness" nor "intellectual disability"

sentence on a subsequent occasion. The respondent took no issue with this interpretation of these provisions in the Victorian Court of Appeal, and the respondent ought not now be allowed to depart from this stance.

45. If a meaning were to be attributed to "double jeopardy' beyond presumed distress and anxiety, it would potentially raise a greater discomformity with the provisions of section 16A Crimes Act (Cth). It would also raise the potential for challenge on the basis of it representing an attack on the institutional integrity of a Court exercising power pursuant to Chapter III of the Constitution, representing an impermissible interference with the exercise of judicial power.[56]

46. Should the Court be of the view that section 16A operates to include "double jeopardy" then it is submitted that the internal limitations[57] in sections 68[58], 79, and 80 of the Judiciary

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[56] R *v Carroll* [2010] NSWCCA 55; (2010) 77 NSWLR 45; (2010) 267 ALR 57; (2010) 239 FLR 11; at [31] – [36]. *Kable v Director of Public Prosecutions* [1996] HCA 24; 189 CLR 51

[57] In Kelly v Saadat – Talab [2008] NSW 213; 72 NSWLR 305, at 307 – 309 [3] – [9] consideration was given to the jurisprudence concerning the internal limitations found within sections 68(1) and 79(1) of the Judiciary Act , and the existence of contrariety between the state law to be picked up and the federal law, cited were *Putland* at 179 [7] per Gleeson CJ, and 189 [41] per Gummow, and Heydon JJ, *Northern Territory v GPAO* [1999] HCA 8; 196 CLR 553 at 576 [38] and 586 [76]; *Agtrack (NT) Pty Limited v Hatfield* [2005] HCA 38; 223 CLR 251 at 587-588 [79]-[80] Gleeson CJ and Gummow J (with whom Gaudron J and Hayne J agreed in this respect: see 606 [135] and 650 [254]); *Austral Pacific Group Limited (In liquidation) v Airservices Australia* [2000] HCA 39; 203 CLR 136 at 144 [17], Gleeson CJ and Gummow and Hayne JJ; *Butler v Attorney-General of Victoria* [1961] HCA 32; 106 CLR 268 at 275 and *Dossett v TKJ Nominees Pty Ltd* [2003] HCA 69; 218 CLR 1 at 7 [14] and 13-14 [43].*South Australia v Tanner* [1989] HCA 3; 166 CLR 161 at 171 (per Wilson, Dawson, Toohey and Gaudron JJ); *Saraswati v The Queen* [1991] HCA 21; 172 CLR 1 at 17 (per Gaudron J); *Kartinyeri v Commonwealth* [1998] HCA 52; 195 CLR 337 at 375 (per Gummow and Hayne JJ); and *Shergold v Tanner* [2002] HCA 19; 209 CLR 126 at 136-137 (per Gleeson CJ and McHugh, Gummow, Kirby and Hayne JJ, citing Gaudron J in *Saraswati* at 17).

Act would prevent the Victorian provisions in question from being picked up and applied as surrogate Federal Law.

Part VII: Applicable Provisions

47. The applicable provisions, and acts at the time of the sentence before Judge Wilmoth and at the time of the Court of Appeal's decision are set out and a statement of whether or not they remain in force unchanged , along with a copy of any amending or repealing provisions or acts are attached as an annexure.

Part VIII: Orders

48. The orders sought by the appellant are;

1 That the appeal be allowed and,

2. That the order of the Court of Appeal of the Supreme Court of Victoria made on the 9 of March 2011 be set aside and, in its place, order that the appeal to that Court be dismissed.

3. In the alternative, the matter be remitted to the Court of Appeal of the Supreme Court of Victoria for its proper consideration.

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[58] The reference to "procedure" in sections 68(1) and (1) (c) of the Judiciary Act 1903 (Cth) was held to include powers conferred under sentencing laws *Putland,* at 188 [34] per Gummow and Heydon JJ, at 215 [121] Callinan J agreed. Presumably "procedure" in the context of section 68(1) (d) would be the same. As to the reach of such powers and whether or not they are limited to procedural sentencing matters the issue remains open. See *R v ONA* [2009] VSCA 146, per Neave JA at [112 – 113]

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29 September 2011.