IN THE HIGH COURT OF AUSTRALIA **No P21 of 2012**

PERTH OFFICE OF THE REGISTRY

BETWEEN **GREGORY JOHN YATES**

Applicant

AND

THE QUEEN

Respondent

RESPONDENT'S SUBMISSIONS

PART I – Publication

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

PART II – Concise Statement of the Issues presented by this appeal

2. The respondent contends there are three issues which arise in this application for special leave, having regard to the delay in the bringing of the application, the applicant's ground of appeal and the posed special leave questions.

3. The first issue is whether an extension of time should be granted for the bringing of the application in circumstances in which, it is contended by the respondent:

   3.1. the delay has not been adequately explained; and

   3.2. the events that have transpired since the decision of the Court of Criminal Appeal demonstrate that the applicant has been assessed during the whole of that period to be a continuing danger to the community, such that his release on parole must depend on the availability of appropriate measures to manage that risk.

4. The second issue is whether the majority of the Court of Criminal Appeal had regard to an irrelevant consideration, namely the manipulation of the parole period, as a reason for imposing an indefinite sentence order as opposed to making an order for parole on a finite sentence.

5. The third issue is whether the majority of the Court of Criminal Appeal correctly determined that the material before the court justified the exceptional imposition of an indefinite sentence, in that the material established that the applicant constituted a danger to the community to the requisite standard.

Prepared on behalf of the Respondent by the Director of Public Prosecutions for Western Australia whose address for service is Level 1, 26 St Georges Terrace, Perth, WA 6000.
Reference No: DPP 86/11614 Telephone No: 9425 3901 Facsimile No: 9425 3614
Filed on: 11 January 2013

6. It is notable that the events occurred some twenty-five years ago. The legislation which applied to indeterminate sentences at the time of the applicant's sentencing in 1987 has since been repealed and replaced by another statutory provision, which does not exactly replicate s 662 of the *Criminal Code* (WA) (*Code*).[1] Accordingly, the questions which arise in this case are unlikely to arise again. Therefore, the grant of special leave must arise in this case from the establishment of an unjust and anomalous result in this particular case.[2]

7. The respondent respectfully submits that the issue identified as "a" in the Appellant's Submissions could not arise as a general proposition, as the relevance of an offender's intellectual disability to the decision whether to impose indefinite detention must depend on the specific facts of any case, in particular having regard to the nature of the offence, which may inform the extent of the danger the offender poses to society.

PART III – Notice under s 78B of the *Judiciary Act 1903* (Cth)

8. It is certified that this appeal does not involve a matter arising under the **Constitution** or involving its interpretation. Accordingly, the respondent has not given notice to the Attorneys General.

PART IV – Narrative Statement of Material Facts or Chronology

9. The respondent accepts that the applicant's narrative of facts as outlined in Part V of the Appellant's Submissions is accurate. Further, no material fact in the Appellant's Chronology is contested. However, the respondent considers the facts should be elaborated as follows.

10. The applicant was tried on an indictment dated 3 November 1986 alleging that on 7 August 1986 he unlawfully deprived a 7 year old girl of her personal liberty by detaining her against her will[3] and sexually penetrated the same child without her consent, in circumstances of aggravation, namely the child was under the age of 16 years and he did her bodily harm.[4]

11. The general facts of the offences are that the applicant, who was 25 years of age and intellectually impaired to an extent, was at a shopping centre on the Thursday evening. He was seen in the public toilets openly masturbating. He then left that shopping centre and went to another nearby shopping centre. At that centre, the 7 year old victim was spending the evening with her father, who worked at the service kiosk. At about 8.00pm she left her father to go to the female toilets. She went inside the toilet cubicle and then became aware of a person looking through the door at her. That person was the applicant. He subsequently entered her cubicle, with his penis already exposed, put his penis in her mouth and told her to suck on it and drink or swallow what came out. After he ejaculated he struck her on the head. She screamed and he fled. She ran back to her father in a distressed state. The applicant was spoken to by police that night.

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[1] See paragraphs 45 – 50 below.
[2] ***Radenkovic v The Queen*** (1990) 170 CLR 623, 635 (Mason CJ, McHugh J).
[3] Pursuant to s 333 of the *Criminal Code 1913* (WA) ("*Code*").
[4] Pursuant to s 324E read with s 324F of the *Code*, although it is noted that the margin note of the indictment incorrectly refers to s 324D of the *Code*.

12. A trial before the Honourable Justice Wallace and a jury commenced on 11 February 1987 and the applicant was arraigned and entered pleas of not guilty.[5] The prosecution led its case, including evidence from the young victim. At the close of the prosecution case, the applicant elected to give evidence. During his examination in chief, the applicant gave evidence inconsistent with his instructions to counsel, which implicated him in the offending.[6] Following an adjournment, the applicant was again arraigned and entered pleas of guilty.[7] The jury then delivered verdicts of guilty on both counts on the indictment[8] and judgments of conviction were entered.[9]

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13. Some submissions were made as to sentence by the applicant's counsel as well as the prosecutor that day.[10] The matter was then adjourned.

14. On 13 March 1987 the applicant appeared before Wallace J for sentencing. A pre-sentence report had been prepared in the interim and further submissions were made by the applicant's counsel in relation to that report and the prosecution's submission that an order be made imposing indefinite imprisonment.[11] His Honour then proceeded to sentence the applicant. His Honour imposed a sentence of 7 years' imprisonment in respect of each count on the indictment, to be served concurrently, and made an order
20 pursuant to s 662 of the *Code* (as then enacted) that at the expiration of that term he was to be detained at the Governor's pleasure.

15. The Court of Criminal Appeal, comprised of Burt CJ, Brinsden and Smith JJ, heard an appeal against the sentences imposed and the s 662 order on 3 June 1987 and the reasons for judgment were delivered on 29 July 1987. The Court of Criminal Appeal unanimously allowed the appeal against the sentences imposed, to the extent that those sentences were reduced to 6 years and 3 months' imprisonment to reflect time served by the applicant on remand. The Court of Criminal Appeal upheld the s 662 order by majority, with Burt CJ dissenting.[12]

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PART V – Applicable Statutes and Regulations

16. The appellant's statement of applicable statutes and regulations is accepted.

PART VI – Succinct Statement of Argument

17. As set out above, the ground of appeal, the special leave questions posed and the delay in the bringing of the application for special leave raise three issues for consideration:

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[5] T 11.2.1987, 2.
[6] T 11.2, 1987, 110 - 111.
[7] T 11.2, 1987, 112.
[8] T 11.2, 1987, 113.
[9] T 11.2, 1987, 114.
[10] T 11.2.1987,
[11] T 13.3.1987, 123 – 124.
[12] ***Yates v The Queen***, unreported; CCA SCt of WA; Library No 6809; 29 July 1987.

17.1. The first relates to the question of whether an extension of time should be granted for the bringing of the application in the circumstances of this case.

17.2. The second relates to whether the majority of the court below had regard to an irrelevant consideration, namely the manipulation of the parole period, as a reason for imposing an indefinite sentence as opposed to making an order for parole on a finite sentence.

17.3. The third relates to the question of whether it was open, on the evidence before the sentencing judge and the court below, to make an order pursuant to s 662 of the *Code*, given the extraordinary nature of that order.

Extension of time for bringing the application

18. The application is brought approximately 25 years out of time. Very special circumstances would need to be shown before special leave would be granted after such a delay. In the first instance, the delay should be adequately explained.[13]

19. The lengthy delay in bringing the application since the decision of the Court of Criminal Appeal has not been explained. The affidavit of Karen Josephine Farley sworn on 19 June 2012, and the exhibits to that affidavit, explain only what has happened since early 2011 when the matter came to the attention of Legal Aid WA. The applicant had legal representation at the time of the appeal in the court below. There is no explanation why special leave was not sought at that time or for a period of nearly 24 years before early 2011.

20. The respondent submits that, in the circumstances, before granting an extension of time, the Court would need to be satisfied that an injustice has occurred that must be remedied. It is submitted that the Court would need to be satisfied not only that there had been an error of law, but that the determination of the sentencing judge and the majority of the Court of Criminal Appeal that the applicant was a danger to the community so as to require continued detention at the Governor's pleasure was wrong in fact.

21. The respondent submits that a proper determination of that issue requires consideration of the history of the applicant's incarceration since he completed the fixed term of his sentence and, in particular, the assessments that have been made of the danger he poses to the community.

22. The respondent, accordingly, seeks leave to tender and rely on the affidavit of Lindsay Makinson Fox affirmed 10 January 2013 and the documents exhibited to that affidavit, being information and records from the Prisoners Review Board of Western Australia (the Board) concerning the assessment made by the Board in 2011 and 2012 of whether the applicant should be released on parole. It is submitted the material is relevant and admissible in determining the question of whether special leave should be granted.[14]

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[13] ***Van der Meer and Others v R*** 82 ALR 10 (Mason CJ at 22; Wilson, Dawson and Toohey JJ at 28-29; Deane J at 29); ***Wilde v The Queen*** (1987-1988) 164 CLR 365 (Brennan, Dawson and Toohey JJ at 374-375; Deane J at 378)

[14] ***Roads and Traffic Authority v Cremona*** [2002] HCA 38; 191 ALR 566 (Kirby J)

23. It is evident from those materials that the applicant has been assessed by psychiatrists and psychologists on a continuing basis, and that the authorities consider his release on parole to require stringent accommodation and supervision components if his risk to the community is to be managed adequately. Efforts have been made to meet those requirements.

24. The respondent submits that the history disclosed by the materials tends to support the conclusion reached by the sentencing judge and the majority of the Court of Criminal Appeal that the applicant posed such a danger to the community that he should be detained at the conclusion of his sentence until such time as it is determined that the danger has abated or can be managed adequately for the applicant to be released on parole. Therefore, in the context of an application brought 25 years out of time, no injustice has resulted.

25. If the appeal is allowed and the indefinite sentence is set aside, the applicant will have served his fixed term and would be entitled to be released without any supervision.

26. The fact that the applicant will have been imprisoned for longer than the maximum penalty for the most serious of the offences of which he was convicted (20 years)[15] does not manifest an injustice, given the protective nature of the provisions of s 662 of the *Code.*

27. In any event, for reasons set out below, the respondent submits the sentencing judge and the majority of the Court of Criminal Appeal did not make an error of law.

28. The considerations outlined in paragraphs 23 to 27 above apply to the determination of both –

    28.1. Whether the applicant should be granted an extension of time for the application for special leave; and

    28.2. Whether special leave should be granted.

Specific Error – Extraneous consideration

29. The applicant contends the majority of the court below made an express error by having regard to an irrelevant consideration, namely the manipulation of the parole period, when upholding the order for an indeterminate sentence.

30. At the time the applicant was sentenced the power to order indeterminate detention arose pursuant to s 662 of the *Code.*[16]. Section 663 of the *Code* provided at that time that the question whether the offender should or should not be detained in prison "shall be determined by the court on such evidence as the court may think fit to hear."

31. At the time the order was imposed and reviewed on appeal, the accepted test, as stated by Burt CJ in ***Tunaj v R***, was whether the circumstances were very exceptional and firmly indicated that the convicted person had shown himself "to constitute a danger to the public".[17] In ***Ciciora v R***, Burt CJ stated that this requires a conclusion that the person

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[15] Section 324E *Criminal Code* (WA)

[16] As then enacted.

[17] ***Tunaj v R*** [1984] WAR 48, 51 [45] – [50] (Burt CJ; Pidgeon & Rowland JJ agreeing).

sentenced "will, if released from custody, represent a positive danger to other members of the community".[18]

32. Subsequently, the High Court in ***Chester v The Queen***[19] articulated the test for the imposition of an order pursuant to s 662 as involving the exercise of an exceptional power, reserved for those cases in which the sentencing judge "is satisfied by acceptable evidence that the convicted person is, by reason of his antecedents, character, age, health or mental condition, the nature of the offence or any special circumstances, so likely to commit further crimes of violence (including sexual offences) that he constitutes a constant danger to the community".[20] The reference to 'constant' danger does not significantly alter the test as articulated by Burt CJ in ***Tunaj v R***.

33. While the terms of the statute itself do not specify a precise criteria according to which the power is to be exercised, in the light of the extraordinary nature of the punishment, considerations of the best mechanism for supervised release of the offender must be an irrelevant consideration.[21] To the extent that this consideration could be viewed as having regard to the welfare of the person whom it is proposed to release, in the sense of giving him a realistic prospect of contemplating a term of parole, it is contrary to the reasoning of Burt CJ in ***Tunaj v R***.[22]

34. Accordingly if, as asserted by the applicant, the sentencing Judge purported to impose the order, in part, by having regard to its ability to facilitate the authorities manipulating the length of the applicant's parole term[23], his Honour applied wrong principle in dealing with the making of the order pursuant to s 662 of the *Code*.

35. In support of this contention, the applicant relies on a remark made by the sentencing judge during discourse at the sentencing hearing, namely:[24]

> I am inclined to agree with you there where the prisoner is viewed as a danger to the community, and the benefit that flows, which I think is largely misunderstood, is that instead of having the useless formality of a long term of parole to be served the authorities can fix at the appropriate time the proper period of parole.

36. The sentencing remarks of the sentencing judge are characterised by their brevity. The sentencing judge did not, with respect, provide adequate remarks that, by reference to the various medical reports, disclosed with sufficiency, the basis for the imposition of the indefinite sentence order.[25] Nevertheless, it is clear from his Honour's remarks that he was satisfied the applicant was a danger to the community. His Honour said:[26]

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[18] ***Ciciora v R***, (unreported, CCA (WA), February 1986, Lib No. 8691047), 5 (Burt CJ; Wallace & Franklyn JJ agreeing).
[19] ***Chester v The Queen*** (1988) 165 CLR 611.
[20] ***Chester v The Queen*** (1988) 165 CLR 611, 619 (Mason CJ, Brennan, Dean, Toohey and Gaudron JJ).
[21] ***Chester***, 619.
[22] ***Tunaj v R*** [1984] WAR 48, 51 [40] – [45].
[23] T 12.2.1987, page 119.
[24] T 12.2.1987, page 119.
[25] T 13.3.1987, page 124-125.
[26] T 13.3.87, page 125

> From a community point of view you appear unable to control your deviant sexual instincts. In my opinion you represent a danger to the community and in particular to young people.

37. What is notable is that the sentencing judge did not in his sentencing remarks expressly refer to the manipulation of the applicant's parole as the basis for imposing the indefinite sentence order.

38. The applicant, assuming that the sentencing judge did rely upon that reason as a factor in making the order, further contends that the majority of the court below erred in approving the sentencing Judge's approach. In support of that contention the applicant relies upon an observation of Brinsden J (with Smith J in agreement) at the conclusion of his reasons for decision that:[27]

> The provisions of s 662 coupled with the Offenders' Probation and Parole Act enable the Parole Board to fix a term of parole more readily suitable to his requirements than would be so if a minimum term had been fixed which could not have been less than three years.

39. That observation must be considered in light of the totality of his Honour's reasoning. Brinsden J correctly identified the appropriate principles for ordering an indefinite sentence and applied that test to the circumstances of the offending and matters personal to the applicant. His Honour determined that the "decision to utilize s. 662 was appropriate in this case as it is one that meets the requirements discussed in *Tunaj*."[28]

40. Burt CJ, in dissent, applied the same test as the majority and determined that the requirements in ***Tunaj*** were not satisfied and, therefore, would have set aside the order imposing the indefinite sentence.[29]

41. Burt CJ made the observation in his reasons for decision that "during the course of argument" it was suggested that s 662 may be used (in combination with s41(1)(c) and (3)(b) of the *Offenders Probation and Parole Act 1963* (WA)) to limit the period of any parole. Burt CJ observed that such an approach "has nothing to do with the policy underlying s 662 of the Criminal Code and the use of that section for that reason cannot be sustained".[30]

42. The majority did not engage in the impermissible reasoning identified by Burt CJ. Rather, the majority applied the same test as identified by Burt CJ in dissent and, on their assessment of the evidence, upheld the order imposing an indeterminate sentence. Accordingly, there is no basis to the Applicant's complaint that the majority had regard to an irrelevant consideration.

43. The difference between the majority and Burt CJ was in the application of the accepted principles to the facts of the case.

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[27] ***Yates v The Queen***, Library No. 6809, CCA; unreported; delivered 29 July 1987, 9 (Brinsden J).
[28] ***Yates v The Queen***, 9 (Brinsden J).
[29] ***Yates v The Queen***, 7 (Burt CJ).
[30] ***Yates***, 6 (Burt CJ).

44. As is discussed below, a significant factor relied upon by the majority was the nature of the offending for which the applicant was sentenced. The fact that he had not previously offended in a similar way was no barrier to the making of an order under s 662. Nothing in the judgment of Burt CJ can or should be construed as expressing a contrary view. It is evident from comments made by his Honour during the course of argument in the Court of Criminal Appeal that his Honour accepted a single offence, particularly of a violent sexual kind, could ground an order under s 662.[31] His Honour considered it absurd to suggest that an offender would have to rape a number of other people before the section would be applied.

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Whether it was open to make an order under s 662?

Current State of the Law

45. The order for indefinite detention was made pursuant to s 662 of the *Code*. Section 662 of the *Criminal Code* was repealed by s 26 of the *Sentencing (Consequential Provisions) Act 1995* (WA). Since the commencement of s 26 of the *Sentencing (Consequential Provisions) Act 1995 (WA)*, any application for an order for indefinite imprisonment must be made pursuant to s 98 of the *Sentencing Act 1995* (WA). That section is not in
20 identical terms to the former s 662 of the *Code* and, therefore, authorities on that section are of limited assistance.

46. The present state of the law in relation to the imposition of an indefinite sentence is conveniently summarised by McKechnie J (Malcolm CJ and Anderson J agreeing) in ***Yarran v The Queen***,[32] by reference to principles distilled from a number of cases from the High Court and the Court of Appeal of Western Australia.[33] The principles highlight that, due to the extraordinary nature of indeterminate detention, the power is to be used sparingly and only in clear cases supported by cogent evidence. The authorities also require that the procedures observed should be regular and scrupulously thorough, usually
30 calling for a very large amount of relevant material.[34]

47. Whilst it remains possible for the State to seek an order pursuant to s 98 of the *Sentencing Act*, since the enactment of the *Dangerous Sexual Offenders Act 2006* (WA) (*DSO Act*), it has become the practice in Western Australia for offenders who might otherwise be the subject of such an application to instead be dealt with, prior to their release on a finite term, by way of an application pursuant to s 8(1) of the *DSO Act* that the offender be found to be a "serious danger to the community" and to be then subject either to indefinite detention or a supervision order pursuant to s 17(1) of the *DSO Act*.

40 48. Before the court can make an order under s 17(1) the court is required under s 7 of the *DSO Act* to be satisfied by acceptable and cogent evidence to a high degree of probability that the person is a serious danger to the community, having regard to materials set out in s 7(3) of the *DSO Act*.

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[31] T 3.6.87, page 30

[32] ***Yarran v The Queen*** [2003] WASCA 130; (2003) 27 WAR 427 [11]; NB: Special leave to appeal to the High Court from this decision was refused – ***Yarran v The Queen*** [2004] HCA Trans 417 (27 October 2004).

[33] ***Yarran v The Queen*** [12].

[34] ***Yarran v The Queen*** [11].

49. It is accepted by the respondent that the procedures and standards now required for an order pursuant to s 98 of the *Sentencing Act* or a finding under s 17 of the *DSO Act*, are proper and necessary given the extraordinary nature of the power to order detention for an indefinite period.

50. However, those requirements were not present in 1987 when the s 662 order was made, and upheld, in relation to the applicant. The respondent submits the applicant's complaint must be judged on the standards and procedural requirements as they applied at that time, and not by contemporary standards.[35] This is particularly so in the context of an application for special leave made well out of time, where there is evidence that the applicant has been and continues to be assessed as being a danger to the community, consistent with the finding of the court below that underpinned the indefinite sentence order.

Sufficiency of the Material

51. This issue requires consideration of the evidence that was relied upon by the sentencing judge (and the majority of the court below reviewing that decision) to be satisfied that the offender was, by reason of his antecedents, character, age, health or mental condition, the nature of the offence or any special circumstances, so likely to commit further crimes of violence (including sexual offences) that he constituted a danger[36] (or constant danger) to the community.[37]

52. In ***Chester***, it was observed that s 662 of the *Criminal Code* does not specify precise criteria according to which the power is to be exercised.[38] As noted above, s 663 required no more than that the court should consider such evidence as the court saw fit.[39]

53. The question is whether there was acceptable, cogent evidence[40] to satisfy the Court that the applicant did represent a constant danger to the community, without further particularisation as to the nature of that evidence. The requirement was merely that the information concerning "*the antecedents, character, age, health, or mental condition of the person convicted, the nature of the offence or any special circumstances of the case*"[41] established that the offender "is a constant and continuing danger to the community".[42]

54. It is difficult to determine with certainty the material that was before the sentencing judge, and the Court of Criminal Appeal. The materials now before the Court are those that the respondent has been able to obtain from other government departments, including the Prisoners Review Board, having determined that the Supreme Court of Western Australia does not have copies of the relevant reports that were before the Court of Criminal

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[35] The observations of Lord Woolf CJ at [98] in ***R v Hanratty*** [2002] 3 All ER 534, while made in a different context, are apposite. In essence the present application alleges a procedural irregularity, in that the sentencing judge acted on insufficient material in determining that the applicant was a danger to the community.

[36] ***Tunaj v R***, 51 [45] – [50] (Burt CJ; Pidgeon & Rowland JJ agreeing).

[37] ***Chester***, 618 – 619.

[38] ***Chester***, 617.

[39] S 663 of the *Code* (as then enacted).

[40] ***Chester***, 619.

[41] Section 662 of the *Code*.

[42] ***Chester***, 619.

Appeal. The reports that have been obtained would appear to be the sum of the materials before the primary judge and the court below. During the sentencing proceedings the applicant's counsel submitted that it might be beneficial for a report to be ordered from the Authority for the Intellectually Handicapped,[43] but it does not appear that such an order was made.

55. It is apparent from the judgments of the majority in the Court of Criminal Appeal that, having examined all reports and other material, they were satisfied that, applying the proper test, there was sufficient evidence to conclude that the applicant constituted a constant danger to the community.

56. In his judgment, Brinsden J referred to the relevant features as the character and mental condition of the applicant, as well as the nature of the offence.[44] Agreeing with the reasons of Brinsden J generally, Smith J also referred to the circumstances of the offence and the reports.[45]

57. Section 662 of the *Criminal Code* expressly provided that the "mental condition" of the person convicted as a relevant factor to which the Court may have regard in determining whether such an order should be made.

58. The court below considered the reports demonstrated that the applicant had a significant mental condition. The applicant was diagnosed as "hyperactive with minimal brain damage" from the age of three years,[46] and had been provided with support and services by the Division for the Intellectually Handicapped from that time.[47]

59. The report of the Visiting Consultant Psychiatrist Booth who assessed the applicant on 1 December 1986, but had treated him on several occasions between September and October 1986, concluded that Dr Booth was unable to make any medical recommendation for treatment of his condition.[48] That determination removed the applicant from the scope of a justice's order under the *Mental Health Act 1962* (WA), as there were no prospects for treatment.[49]

60. The nature of the offence itself, which was also a relevant factor under s 662 of the *Code* and, given the disjunctive wording, could be a sufficient basis under that provision, supported that conclusion. The applicant entered the female toilets and forced his way into the cubicle of a young girl, detained her against her will, then defiled her by committing an act of sexual penetration against her, including ejaculation, and also used physical violence.[50]

61. The prior criminal history of the applicant, whilst admittedly of limited scope, contained convictions that were consistent with this reported history, including convictions for gross

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[43] T 12.2.87, 117.
[44] See ***Yates v The Queen***, 8 - 9 (Brinsden J).
[45] See ***Yates v The Queen***, 2 (Smith J).
[46] Psychological Report - Mary McHugh dated 3.12.1986.
[47] Psychological Report – S K Robertson dated 27.10.1982, 1.
[48] Psychiatric Report – J Booth dated 9.12.1986, 2.
[49] Section 29(1) *Mental Health Act 1962* (WA); ***Chester***, 618.
[50] See ***Yates v The Queen***, 4 - 5 (Brinsden J) for a detailed outline of the circumstances of the offending.

indecency, for which he was on probation at the time he committed the present offences, as well as convictions for evil designs and wilful exposure for which he was fined.

62. In addition, s 662 of the *Code* referred immediately after 'antecedents' to another relevant consideration, being the 'character' of the person convicted. It must follow that "character" encompassed more than the offender's prior criminal convictions. In that regard, the Psychological Report of S.K.Robertson referred to the expressed concern of the applicant's parents in 1982 as to the applicant's "sexual associations with young children since 1976" and reports to the police relating to incidents in 1976, 1977, 1978 and 1981,[51] although only two charges were laid against him at that time, when he was still a juvenile, and both were dismissed pursuant to s 26 of the *Child Welfare Act 1947* (WA).

63. In 1978, following his first charge as a juvenile, the applicant was placed in a residential facility where he received weekly individual sexual counselling from the hostel psychologist, and later participated in Human Relationship/Sex Induction Programmes in 1981 and 1982.[52] Despite the counselling sessions and his participation in those programmes, in late October 1982, some three to four years before the present offences, the psychologist concluded that "more aversive procedures may have to be utilized to teach [the Applicant] the consequences of his illegal sexual behaviour in the community".[53]

64. The respondent submits the majority did not err in their decision that the order for indefinite imprisonment was properly made. The combination of the nature of the offending and the applicant's mental state, which did not augur well for rehabilitation, provided a sufficient basis for the order of an indefinite sentence.

65. Whilst the procedures by which the evidence was obtained were not, judged by today's standards, as rigorous as would be expected, that does not undermine the validity of the majority's conclusion based upon the standards and procedures applicable at the relevant time.

Comparison with Other Cases

66. The present case is different to the circumstances in ***Chester***. In ***Chester***, the Court was at pains to point out that the object of s 662 was ostensibly to protect the public from persons with a propensity to commit violent crime; that is, to protect the community from physical harm.[54] In ***Chester*** the imposition of the order was set aside as the applicant's conduct and record did not establish that he posed a constant danger of violent injury to the community. There was an alternative provision under s 661 of the *Code*, as then enacted, which was applicable to habitual criminals generally.

67. In the present case, s 662 was properly engaged on the basis that the applicant posed a constant danger of violent injury to the community. In that way, the applicant's case was more akin to ***Ciciora v The Queen***, albeit the breadth of offending was greater in the case of ***Ciciora***. The respondent submits the latter distinction does not preclude the cases

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[51] Psychological Report – S K Robertson dated 27.10.1982, 2.
[52] Psychological Report – S K Robertson dated 27.10.1982, 3.
[53] Psychological Report – S K Robertson dated 27.10.1982, 3.
[54] ***Chester***, 618.

being regarded as of the same kind. The language of s 662 did not require multiple offending before an order could be made for indefinite detention; indeed, it specifically provided such an order could be made "whether such person has been previously convicted of any indictable offence or not". The fact that one offender has had a greater opportunity to inflict harm on the community than another, before being detained indefinitely, would no doubt more readily demonstrate the danger posed by the first offender, but would not preclude a finding that the second offender was a constant danger to the community, if there was cogent evidence establishing that danger. As noted by Burt CJ in ***Ciciora***,[55]

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> "Courts from time to time in, happily, quite rare cases, owe a positive duty to take positive steps to protect the community from criminal conduct ..."

68. If, to the benefit of the community, a person who poses a constant risk to the personal safety of the community can be identified at an early stage, the provisions of s 662 could be properly engaged consistently with the court's duty to take the positive steps necessary to protect the community. As discussed in paragraph 44 above, Burt CJ in the present case acknowledged during argument that it would be absurd to require an offender to have sexually assaulted a number of people before the section could be utilised.

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***Veen, Veen (No 2)* and the principles of proportionality**

69. At the time the applicant was sentenced and the sentence was reviewed by the Court of Criminal Appeal, the decision of this Court in ***Veen v The Queen***[56] had been decided[57] but not ***Veen (No 2)***.[58] In a later judgment of the Western Australian Court of Criminal Appeal considering an order made pursuant to s 662, ***Gooch v The Queen***[59], the relevance of the principles enunciated in ***Veen (No 2)*** to such applications was considered.[60] Malcolm CJ noted that in a case which falls under s 662, preventative detention is permissible.[61]

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70. The principle of proportionality in sentencing cannot arise where there is a proper foundation for an indeterminate sentence.[62] As noted by Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ in ***McGarry v The Queen*** in relation to s 98 of the *Sentencing Act 1995* (WA), the evident purpose of the provision "is to provide for detention of an offender beyond the time that would result from the imposition of a sentence proportionate to the offender's criminality."[63] Similarly, once the criteria for an order pursuant to s 662 were found to have been met in the case of the applicant, the result of the order would be to detain the application for a period beyond the length of time proportionality might require.

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[55] ***Ciciora***, 6 (Burt CJ).
[56] ***Veen v The Queen*** (1979) 143 CLR 458.
[57] And was referred to by Burt CJ in his dissenting judgment.
[58] ***Veen (No 2)*** (1988) 164 CLR 465; 33 A Crim R 230.
[59] ***Gooch v The Queen*** (1989) 43 A Crim R 382.
[60] ***Gooch***, 385 – 387 (Malcolm CJ).
[61] ***Gooch***, 387 (Malcolm CJ).
[62] The distinction was recognised in ***Veen (No 2)*** (Wilson J, at 486; Deane J, at 495; Gaudron J, at 496).
[63] ***McGarry v The Queen*** (2001) 207 CLR 121 [24].

71. If however, as was found in ***Gooch***, there was not a finding that the offender was a constant danger to the community, so that the offender was not appropriately subject to an order pursuant to s 662, in sentencing the offender to a finite term the principle of proportionality would permit the court to have regard to the protection of society among the factors relevant to the exercise of the sentencing discretion.[64]

Parole and the Prisoners Review Board

72. The applicant's first sentence review date occurred on 13 May 1991 and he has remained eligible for release on parole from that date at the Governor's pleasure. The applicant's release on parole is presently governed by s 27 of the *Sentence Administration Act 2003* (WA) which provides that the Governor may release the prisoner on a date set by the Governor, for a parole period of 6 months to 5 years, once a report is received from the Prisoners Review Board. Unless requested by a Minister or where special circumstances arise, such a report is prepared by the Board and provided at least yearly.[65]

73. The Prisoners Review Board has advised that the applicant was most recently reviewed by the Board in May 2012.

74. As discussed in paragraph 24 above, the decision of the sentencing judge and the majority of the Court of Criminal Appeal that the applicant posed a constant danger to the community would appear to have been justified, given the applicant's history since the expiration of the finite term, by the continuing assessment of the parole authority from time to time that he indeed poses a danger to the community.

75. It is the correctness of the assessment by the authorities over that period that should be the subject of scrutiny at this point in time, and the respondent respectfully submits this application is not the proper mechanism to achieve that. There is scope for judicial review of the executive decision by way of an application for a writ of certiorari to the Supreme Court of Western Australia. While the bases for review are narrow, the respondent submits that is the proper mechanism for reviewing the applicant's circumstances at this point in time, rather than an application to displace an order of a court made 25 years ago relying on purported error based on the more stringent evidentiary standards that apply now.[66]

Conclusion

76. The applicant has not adequately explained the inordinate delay in bringing the application for special leave. An extension of time should not be granted because it has not been demonstrated that the decision of the court below has resulted in an injustice.

77. In any event, special leave should not be granted as the questions that arise in this case are unlikely to arise again and, having regard to all the circumstances, it has not been demonstrated that the decision of the court below has resulted in an unjust and anomalous

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[64] ***Gooch***, 387 (Malcolm CJ) citing ***Veen (No 2)***, 473; 235 (Mason CJ, Brennan, Dawson and Toohey JJ).

[65] Section 12(2)(c) of the *Sentence Administration Act 2003* (WA).

[66] See for example ***Kirby v The Prisoners Review Board*** [2011] WASCA 149; ***Littlefair v The Prisoners Review Board*** [2011] WASCA 150; ***Miketic v The Prisoners Review Board*** [2011] WASC 176.

result. An anomaly would arise if the indefinite detention order were set aside, in that an offender who has been assessed by the responsible authorities to be a continuing danger to the community and in need of structured supervision and support upon his conditional release on parole, would be entitled to release without any such strictures.

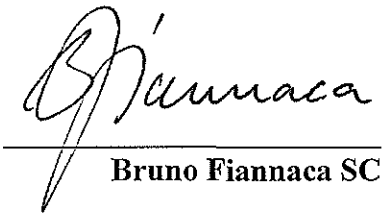
78. If special leave is granted, the appeal should not be allowed, as the decision of the majority of the court below was not wrong in law, having regard to the requirements of s 662 of the *Code* as it applied at that time.

79. The incarceration of the applicant for a period in excess of the maximum term for the most serious of the offences of which he was convicted, having regard to his personal circumstances, is a matter that understandably causes disquiet. However, it does not follow that the decision of the court below was wrong, or that the applicant's continued detention for the protection of the community is not warranted until measures can be put in place to adequately manage his risk upon release on parole. There are appropriate mechanisms for review of parole assessments.

PART VI – Estimate of length of oral argument

80. The respondent estimates it will require two hours for the presentation of the respondent's oral argument.

DATED this 11th day of January 2013



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