



HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

B11 of 2024

BETWEEN:

RODNEY MICHAEL CHERRY

Plaintiff

and

STATE OF QUEENSLAND

Defendant

**OUTLINE OF ORAL ARGUMENT FOR THE ATTORNEY GENERAL FOR
WESTERN AUSTRALIA (INTERVENING)**

PART I: INTERNET PUBLICATION

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

PART II: PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

2. The plaintiff's case cannot be distinguished in any relevant respect from the legislation held to be valid in each of *Crump v New South Wales* (2012) 247 CLR 1 (**JBA Vol 3 Tab 18**), *Knight v Victoria* (2017) 261 CLR 306 (**JBA Vol 4 Tab 28**) and *Minogue v Victoria* (2019) 268 CLR 1 (**JBA Vol 5 Tab 34**).
3. In those cases, this Court rejected challenges which contended that the relevant legislation:
 - (a) deprived the court's sentencing decision of its substantive determination by depriving the prisoner of any real prospect of release: *Crump*, 3-4 (**JBA Vol 3 Tab 18, 608-609**);
 - (b) was *ad hominem* and targeted only the prisoner: *Knight*, 308 (**JBA Vol 4 Tab 28, 1253**); and
 - (c) in substance and effect extended the prisoner's non-parole period or imposed an additional period of ineligibility for parole, thereby increasing the punishment imposed on the prisoner: *Minogue*, 4 (**JBA Vol 5 Tab 34, 1510-1511**).
4. In rejecting those arguments, the Court emphasised the distinction between the exercise of judicial power in sentencing an offender and the exercise of executive power in determining whether to release a prisoner on parole. Once sentenced, the future of the prisoner is subject to that executive power: *Minogue* [14] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ), [32] (Gageler J) (**JBA Vol 5 Tab 34, 1522-3, 1528**); *Crump*, [28] (French CJ) (**JBA Vol 3 Tab 18, 616-7**); *Knight*, [28]-[29] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ) (**JBA Vol 4 Tab 28, 1263-4**); See **WA**, [14].
5. That executive power can be broadened *or* constrained *or* abolished by a state legislature (*Crump* [36] (French CJ) (**JBA Vol 3 Tab 18, 619-20**), cited with approval in *Minogue* [17] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ) (**JBA Vol 5 Tab 34, 1529**): **WA**, [15].

6. Altering the circumstances in which the executive might extend a mercy by granting parole does not extend or make heavier the sentence, because it does not affect the sentence at all (see *Baker v The Queen* (2004) 223 CLR 513, [29] (McHugh, Gummow, Hayne and Heydon JJ) (**JBA Vol 3 Tab 15, 463**); *Crump*, [41] (Gummow, Hayne, Crennan, Kiefel and Bell JJ)) (**JBA Vol 3 Tab 18, 620-1**); *Minogue*, [21] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ), [32] (Gageler J) (**JBA Vol 5 Tab 34, 1525, 1528**)); **WA, [22]-[23]**.
7. In this case the plaintiff seeks to reagitate the arguments rejected in *Crump*, *Knight* and *Minogue*, on the basis that the impugned provisions here are different from the legislation upheld in those cases in two respects:
 - (a) unlike the impugned provisions, the legislation in each of those cases preserved the prisoner's entitlement to apply for parole: **PS, [5]-[6], [38]-[39]; Reply, [12]-[16]**;
 - (b) the impugned provisions are punitive: **PS [6], [45]-[48]**.
8. That the prisoner in *Crump*, *Knight* and *Minogue* could make a futile application for parole, while the plaintiff in this case cannot apply for parole for so long as a declaration is in force, has no constitutional significance. It is immaterial whether the constraint on access to parole is imposed by way of the jurisdictional facts which must be satisfied:
 - (a) for a prisoner's parole application to be granted; or
 - (b) for a prisoner to be able to apply for parole: **WA [15]-[22]**.
9. Like the prisoner in *Crump*, *Knight* and *Minogue*, the plaintiff cannot satisfy the jurisdictional facts which would make parole accessible to him at this time. He may do so at a later time.
10. As to the plaintiff's contention that the impugned legislation is punitive, it is not for the reasons advanced by the defendant: **DS, [41]-[49], [57]-[59]; WA, [4]**.

There is no occasion to determine application of the *Kable* principle

11. Accordingly, since the impugned legislation has *no effect* on the judicial determination of the plaintiff's sentence, his contention that State legislation which does affect a State Court's judicial determination of a prisoner's sentence infringes

the *Kable* principle, does not need to, and should not, be determined by the Court:
DS, [10]; WA, [4].

Dated: 4 February 2025

A handwritten signature in black ink, appearing to read 'C. Bydder', with a long horizontal stroke extending to the right.

Craig Bydder SC

Duska Van Nellestijn